USEFUL POINTS OF FEDERAL LAW

Introduction

I hope you'll find this a convenient way to find relevant caselaw. Most of the entries come from the 11th Circuit and the United States Supreme Court. There are some from other jurisdictions. What I've included represents points of law I might be able to use to defend a client, that addresses an issue I need to know, or states an established principle for which I might someday need a citation.

It's not as up to date as it could be. I let it go for a number of years, but as of the end of 2022, I've started adding new cases. It remains a good starting point, and the vast majority of caselaw remains valid. Be forewarned, 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.

Throughout the Table of Contents, you'll find links to the different topics. Not every topic or subtopic has one, but I've sprinkled the links throughout, and they'll get you within range of those topics without links. Many entries cite the reporter, but many just have the case number and date. For the latter, you should be able to find the opinion with Google or whatever legal research program you have.

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

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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 is not arbitrary, capricious, or clearly contrary to the law.
Cook v. Wiley, No. 98-6273 (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 § 2422(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 § 2422(b).
U.S. v. Hornaday, 392 F.3d 1306 (11th Cir. 12/13/04)

APPEALS

Harmless Error

Appeals: Harmless Error - Direct Appeal as Compared to Habeas

The test for whether a federal constitutional error 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 (1967). 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 Asubstantial 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, 167 F.3d 1350 (11th Cir. 1999); United States v. Pon, 963 F.3d 1207, 1227 (11th Cir. 2020); U.S. v. Duldulao, No. 20-13973 (11th Cir. 11/29/23)*
Appeal: Harmless Error - Structural Error
See: McIntyre v. Williams, 216 F.3d 1255 (11th Cir. 2000)

Independent State Ground

The defendant lost his post-conviction motion in state court because it was a subsequent post-conviction claim and, in the view of the Arizona Supreme Court, the summary reversal in *Lynch v. Arizona*, 578 U.S. 613 (2016), did not qualify as "significant change in the law" as defined by the state rule. The United States Supreme Court granted his motion for certiorari review and vacated his death sentence. It did so because the case was one of the rare exceptional cases where a state-court judgment rested on a novel and unforeseeable state-court procedural decision lacking fair or substantial support in prior state law. Accordingly, the state decision was not adequate to preclude review of a federal question.
Cruz v. Arizona, 143 S. Ct. 650 (2023)

Invited Error

Appeals: Invited Error – Exception for Jury Instruction Based on Existing Precedent
There is an exception to the rule where the "error" invited by a party was based on settled law that changed while the case was on appeal.
U.S. v. Duldulao, No. 20-13973 (11th Cir. 11/29/23)
Appeals: Invited Error - Construed Narrowly
The court has traditionally construed invited errors narrowly, so as to preserve the opportunity for appellate review.
U.S. v. Burnette, No. 21-13990 (11th Cir. 4/11/23)

Jurisdiction

Appeals: Jurisdiction - 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: Jurisdiction - 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: Jurisdiction - 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: Jurisdiction - 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 Cir. 4/28/17)

Appeals: Jurisdiction - 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)

Miscellaneous

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 - 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: 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 - 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); U.S. v. One Parcel of Real Estate, 214 F.3d 1291 (11th Cir. 2000)
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 - 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 - Jurisdictional Issues Must Be Resolved Before the Merits
U.S. v. Phillips, 225 F.3d 1198 (11th Cir. 8/30/2000)
Appeals: 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)
Appeals: 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)
Appeals: 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)

Notice of Appeal

Appeals: 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: Notice of Appeal - 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 an 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)

Precedent

Appeals: Precedent – Historical Precedent
See Justice Barnett's concurring opinion in Samia v. U.S., 143 S. Ct. 2004 (2023), where s he wrote: "While history is often important and sometimes dipositive, we should be discriminating

in its use. Otherwise, we risk undermining the force of historical arguments when they matter most.

Appeals: Precedent - Inconsistent Precedent

Where there are two or more inconsistent circuit decisions, the court must follow the earliest one.
U.S. v. Puentes-Hurtado, 794 F.3d 1278 (11th Cir. 2015)

Appeals: Precedent - 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)

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Arizona v. Gant, Case No. 07-542 (S. Ct. 4/21/09)

Appeals: Precedent - 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)

Appeals: Precedent - 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 retroactive effect in all cases still open on direct review.
Jones v. U.S., 224 F.3d 1251 (11th Cir. 8/29/00)

Appeals: Precedent - 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)

Appeals: Precedent - Reconciliation of Intra-circuit Conflict (First Opinion Controls)

When there is no method for reconciling an intra-circuit 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)

Appeals: Precedent - 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)

Appeals: Precedent - 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)

Prior Precedent Rule

Appeals: Prior Precedent Rule - Arguments Not Considered Don't Fall Under the Rule

U.S. v. Johnson, Case No. 07-13497 (11th Cir. 5/30/08); U.S. v. Jackson, No. 13963 (11th Cir. 12/13/22); U.S. v. Penn, No. 21-12420 (11th Cir. 3/24/23)

Appeals: Prior Precedent Rule – Prior Precedent Must Be Followed Unless Overruled
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: Prior Precedent Rule – Questions Not Brought to Attention of Court
Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.
U.S. v. Jackson, No. 21-13963 (12/13/22)
Appeals: Prior Precedent Rule - 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: Prior Precedent Rule - Dicta
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-Banner 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); Rudolph v. U.S. No. 21-1282 & 22-10135 (11th Cir. 2/12/24)
Appeals: 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)

Plain Error

Appeals: Plain Error – Erroneous Jury Instruction
The erroneous jury instruction amounted to plain error because if affected the outcome of the proceeding.
U.S. v. Gladden, No. 21-11621 (11th Cir. 8/17/23)
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 F.3d 1167 (11th Cir. 2016); U.S. v. Gonzalez, 834 F.3d 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)
Appeals: 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: Plain Error – Possibility of 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)

Record

Appeals: Record - 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: Record - 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: Record - 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, n. 9 (11th Cir. 9/14/00)
Appeal: Record - 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)
Appeals: Record - Reference to Polls in Appellate Brief
See: Ramdass v. Angelone, 530 U.S. 156, 120 S. Ct. 2113 (6/12/00)

Remand

Appeals: Remand - Reassignment of Case to a New Trial Judge
See: U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Appeals: Remand - 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: Remand – Court of Appeals Discretion to Remand to a Different Judge
RU.S. v. Hunter, Case No. 15-12640 (11th Cir. 8/26/16)

Review

Appeals: Review - Differing Reasonable Interpretations of Evidence
If evidence is capable of different reasonable interpretations, findings based on one of them are not clearly erroneous.
Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997)
Appeals: Review - 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: Review - 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 not revisit the question unless it is incredible as a matter of law.
U.S. v. Feliciano, 747 F.3d 1284 (11th Cir. 2012)
Appeals: Review - Party Presentation Principle
The failure to present an argument on appeal does not always prevent the court from considering the issue. There are circumstances in which a modest initiating role for a court is appropriate.
United States v. Campbell, Case No. 16-10128 (11th Cir. Feb. 16, 2022) (en banc)
Appeals: Review - 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 the challenged action is in its duration too short to be fully litigated and there is a reasonable expectation the 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: Review - 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: Review - 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: Review - 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: Review - Statute Establishes What the Defendant can Appeal
18 USC § 3742
See: U.S. v. Ruiz, Case No. 01-595 (6/24/02)
Appeals: Review - 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)
Appeals: Review - Appellate Court Can't Revisit Issues of Credibility
U.S. v. Chastain, 128 F.3d 1338 (11th Cir. 12/30/99)
Appeals: Review - 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)
Appeals: Review - 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: Review - 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)

Standard of Review

Appeal: Standard of Review – Statutory Construction
Questions of statutory construction are legal determinations so are reviewed de novo.
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)
Appeal: Standard of Review – Mixed Questions of Law and Fact
De Novo
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)
Appeal: Standard of Review – Constitutional Issues
De Novo.
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)
Appeal: Standard of Review - 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, 159 F.3d 1328 (11th Cir. 1998); Tarver v. Hopper, No. 97-6998 (11th Cir. 3/11/99); McDaniel v. Brown, Case No. 08-559 (S. Ct. 1/11/10)

Appeals: Standard of Review - 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: Standard of Review - 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 findings of fact that are clearly erroneous.
U.S. v. Siegelman, Case No. 12-14373 (11th Cir. 5/20/15); U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)

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 F.3d 1160, 1189 (11th Cir. 2010); U.S. v. Burnette, No. 21-13990 (11th Cir. 4/11/23)

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)

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); U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)

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 reviewed 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, 159 F.3d 1328 (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)

Time Limits

Appeals: Time Limits - 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: Time Limits - Out of Time
When the district courts conclude that an 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)

Appeals: 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)

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 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 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 - Even Decisions Based on New Law are Waived if Not Raised in Initial Brief
Although Blakely decision had not yet issued 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)

Appeals: Waiver - Appeal of Sentence
An appeal of sentence waiver provision is enforceable if the waiver is made knowingly and voluntarily.
U.S. v. Weaver, No. 00-15142 (11th Cir. 11/13/01)

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 the 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 of no remuneration.
U.S. v. Campbell, 317 F.3d 597 (6th Cir. 2003)
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: 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: Stacking
United States v. Smith, 240 F.3d 927 (11th Cir. 2001)
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)

ARMED CAREER CRIMINAL ACT

Categorical Approach

ACCA: Categorical Approach – Conspiracies
When a defendant has been convicted of a conspiring to commit a crime, the categorical approach requires the court to determine whether the staute defining the underllying crime is divisible if it would othewise be overbroad.
U.S. v. Lopez, No. 21-12709 (11th Cir. 8/7/23)
ACCA: Categorical Approach - Description
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); United States v. Jackson, No. 21-13963 (11th Cir. 12/13/22); U.S. v. Penn, No. 21-12420 (11th Cir. 3/24/23); U.S. v. Lopez, No. 21-12709 (11th Cir. 8/7/23)
ACCA: Categorical Approach - *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); U.S. v. Penn, No. 21-12420 (11th Cir. 3/24/23); U.S. v. Laines, No. 20-12907 (11th Cir. 6/6/23); U.S. v. Lopez, No. 21-12709 (11th Cir. 8/7/23)

Different Occasions

ACCA: Different Occasions - Wooden
Defendant's ten burglary offenses from a single criminal episode did on different "occasions" and counted as only one conviction under the Career Criminal Act. Case lends support to argument that government must allege and prove offenses occurred on different occasions.
Wooden v. United States, No. 20-5279 (S. Ct. 3/7/22)
ACCA: Different Occasions - Meaningful Opportunity to Desist
McCarthan v. Warden FCC Coleman, 811 F.3d 1237 (11th Cir. 2016)
ACCA: Different Occasions – Shepard Documents
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)
ACCA: Different Occasions - 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)
ACCA: Different Occasions -Application of Shepard Restrictions to Determination of Whether Prior Offenses Were Temporally Distinct
U.S. v. Proch, 637 F.3d 1262 (11th Cir. 2011)
ACCA: Different Occasions - 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)

Divisibility

ACCA: Divisibility - 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: Divisibility - Listing of Multiple Ways to Commit Offense in the Indictment
Indicates the offense is indivisible.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18)
ACCA: Divisibility - 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: 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., 136 S. Ct. 2243 (2016)
ACCA: Divisibility – Florida Drug Statute is Divisible
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); Cintron v. U.S. Atty. Gen, Case No. 15-12344 (11th Cir. 2/20/18); U.S. v. Penn, No. 21-12430 (11th Cir. 3/24/23)

Florida Convictions

ACCA: Florida Convictions: Possession of a Listed Chemical With Reason to Believe It Will Be Used to Manufacture a Controlled Substance
Florida Statute § 893.149(1), possession a listed chemical with reasonable cause to believe it will be used to manufacture a controlled substance, doesn't qualify as a "serious drug offense" under the ACCA. Long discussion of the meaning of "manufacture" and grumbling about the categorical method.
U.S. v. Miles, No. 21-12609 (11th Cir. 7/31/23)
ACCA: Florida Convictions: Cocaine Convictions Might Not Qualify
See Judge Rosenbaum's dissent in: U.S. v. Laines, No. 20-12907 (11th Cir. 6/6/23)
ACCA: Florida Convictions: Aggravated Assault
Because reckless conduct will not support a conviction of Florida's aggravated assault statute, Fla. Stat. § 784.021, the offense is a violent felony.
Somers v. U.S., No. 19-11484 (11th Cir. 4/25/23)
ACCA: Florida Convictions: Distribution Includes Attempted Distribution
The ACCA states that a "serious drug offense" includes, among other things, "distributing" a controlled substance. Section 893.13(1)(a) of the Florida Statutes prohibits the delivery of a

controlled substance but includes in the definition of "delivery," the "attempted transfer" of a controlled substance, so the defendant argued the Florida Statute included conduct not prohibited by the ACCA. The 11th Circuit disagreed, concluding that "distributing" includes an attempt to distribute.
U.S. v. Penn, No. 21-12430 (11th Cir. 3/24/23)

ACCA: Florida Convictions: Cocaine

As of September 2015, Schedule II (18 U.S.C. § 1308.12) excluded an isomer of cocaine, ioflupane. Florida excluded ioflupane as of July 1, 2017. Nonetheless, holding that the federal statute incorporates the definition of "serious drug offense" at the time the drug offense was committed, Florida convictions that occurred prior to July 1, 2017, still count as predicate offenses. Reasoning in cases from other districts in Sentencing Guideline cases is in conflict: see U.S. v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021); U.S. v. Bautista, 989 F.3d 698, 701, 703 (9th Cir. 2021); and U.S. v. Clark, 46 F.4th 404, 406 (6th Cir. 20220: U.S. v. Gibson, No. 20-3049 (2d Cir. 12/6/22)
United States v. Jackson, No. 21-1363 (11th Cir. 12/13/22), *reversing the panel's earlier decision*

ACCA: Florida Convictions – 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); United States v. Jackson, No. 21-1363 (11th Cir. 12/13/22); U.S. v. Penn, No. 21-12420 (11th Cir. 3/24/23)

ACCA: Florida Convictions - Battery of a Law Enforcement Officer

Court still hasn't decided whether the statute is divisible three ways: touching/striking/infliction of bodily harm, though the Government has usually conceded it is divisible only two ways.
Santos v. U.S., 982 F.3d 1303 (11th Cir. 2020)

ACCA: Florida Convictions - Florida Robbery is a Violent Felony

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

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

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

ACCA: Florida Convictions - 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 Convictions - 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: Florida Convictions – Drug Offenses

Neither the Armed Career Criminal Act's serious drug offense, nor the Guideline'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)

ACCA: Florida Convictions - 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)

ACCA: Florida Convictions - 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)

ACCA: Florida Convictions - 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)

ACCA: Florida Convictions - 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)

ACCA: Florida Convictions - 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)

Miscellaneous

ACCA: Miscellaneous – Serious Drug Offense – Federal Drug Schedule at the Time of Prior Offense or at the Time of the Federal Firearm Offense

The ACCA defines "serious drug offense" as an offense under state law involving sale, etc. of a controlled substance defined by the Federal Controlled Substances Act (21 U.S.C. § 802). While four circuits have held it is the drug schedule in effect at the time of the federal firearm offense that matters, the 11th Circuit has held to the contrary relying on the schedule in effect at the time of the defendant's prior state drug offense. The Supreme Court has granted certiorari review to resolve the conflict.

Jackson v. U.S., No. 22-6640.

ACCA: Miscellaneous - 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 because other defendants at other times may have been convicted or future defendants could be convicted, of violating the same statute without violence. Curiouser and curiouser 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: Miscellaneous - 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 imposition of an ACCA enhancement is justified on the basis of an ACCA-qualifying conviction that the 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: Miscellaneous - PSR and Court Should Identify Predicate Convictions

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

ACCA: Miscellaneous - 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)
ACCA: Miscellaneous - 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)
ACCA: Miscellaneous -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)
ACCA: Miscellaneous - 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)
ACCA: Miscellaneous - No Time Limit on Predicate Convictions
U.S. v. Lujan, 9 F.3d 890 (10th Cir. 1993)
ACCA: Miscellaneous - 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)
ACCA: Miscellaneous - Subsequent Vacation of Predicate Offense
Where subsequent to the defendant's 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, No. 98-9244 (11th Cir. 12/17/99)
ACCA: Miscellaneous - Predicate Offense Must Occur Prior to Gun Offense
In the situation here, where both the predicate offense crime and conviction occurred prior to the resentencing 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, No. 97-6418 (11th Cir. 2/11/99)

Modified Categorical Approach

ACCA: Modified Categorical Approach - Definition

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: 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)

Out-of-State Convictions

ACCA: Out-of-State-Convictions - 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: Out-of-State-Convictions - 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: Out-of-State-Convictions - 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: Out-of-State-Convictions - South Carolina Burglary Statute is Non-Generic and Indivisible

U.S. v. Lockett, Case No. 14-15084 (11th Cir. 1/21/16)

ACCA: Out-of-State-Convictions - 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)

ACCA: Out-of-State-Convictions - 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)

ACCA: Out-of-State-Convictions - 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 cannot serve as predicate offenses for the Armed Career Criminal Act.
U.S. v. Owens, Case No. 09-13118 (11th Cir. 2/27/12)
ACCA: Out-of-State-Convictions - 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)
ACCA: Out-of-State-Convictions - 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), overruled in part by U.S. v. Howard, 742 F.3d 1334 (11th Cir. 2014)
ACCA: Out-of-State-Convictions – New Jersey Walk-Away Escape Not a Violent Felony
U.S. v. Lee, Case No. 08-14724 (11th Cir. 10/26/09)
ACCA: Out-of-State-Convictions – Illinois Failure to Report Not a Violent Felony
Chambers v. United States, Case No. 06-11206 (S. Ct. 1/13/09)
ACCA: Out-of-State-Convictions - 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)

Residual Clause

ACCA: Residual Clause - Unconstitutionally Vague
Johnson v. United States, Case No. 13-7120 (S. Ct. 11/5/14)
ACCA: Residual Clause - Johnson Plain Error
See: United States v. Hornyak, Case No. 14-50299 (5th Cir. 10/3015)

Shepard Documents

ACCA: Shepard Documents – Plea Colloquy (Prosecutor's Recitation of Facts)
Over the dissenting opinion of Judge Newsom, the court held the state prosecutor's recitation of facts in support of a guilty 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: Shepard Documents - Description
Good succinct description.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18)
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: Shepard Documents - 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)

ACCA: Shepard Documents - 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)

ACCA: Shepard Documents - 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 Aburglary 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)

ACCA: Shepard Documents - 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)

Violent Conduct Defined

ACCA: Violent Conduct Defined - 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: Violent Conduct Defined

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

ACCA: Violent Conduct Defined - Is 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: Violent Conduct Defined - 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)

ACCA: Violent Conduct Defined - 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)

ACCA: Violent Felony Defined - DUI Not a Violent Felony

Begay v. U.S., 533 U.S. 137 (2008)

ARREST

Burden of Proof

Search & Seizure: Arrest - Burden of Proof (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)

Lawfulness

Arrest: Lawfulness - 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: Lawfulness - 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: Lawfulness - 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: Lawfulness - 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: Lawfulness - 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: Lawfulness - 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)
Arrests: Lawfulness - 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)

Probable Cause

Arrest: Probable Cause
A deficient inquiry and willful ignorance do not establish probable cause.
Cozzi v. City of Birmingham, 892 F.3d 1288, 1294 (11th Cir. 2018); Carter v. Butts Cnty., 821 F.3d 1310, 1321 (11th Cir. 2016)
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); Washington v. Howard, 25 F.4th 891, 898-99 (11th Cir. 2022)
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: Probable Cause – Necessary to Support Arrest
U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03)
Arrest: Probable Cause - 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 driver's license had another address, and she had unpacked suitcases.
Holmes v. Kucynda, Case No. 02-11408 (11th Cir. 2/13/03)

Test

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)

Warrant

Arrest: Warrant – Entry to Arrest (Cert Petition: Reason to Believe Subject is Home)
Question of whether "reason to believe" subject in in the home is the equivalent of probable cause is before the Supreme Court in Pennington v. West Virginia.

Arrest: Warrant - Entry to Execute Arrest Warrant (Officers Need Not Be Certain Suspect is Present)
Officers need not be "absolutely certain" that suspect is home before entering to execute an arrest warrant.
U.S. v. Grushko, No. 10438 (11th Cir.9/23/22)

Arrest: Warrant - Execution of Arrest Warrant – Seizure of Contraband
Upon lawfully entering to execute an arrest warrant, officers may seize any contraband in plain view.
U.S. v. Grushko, No. 10438 (11th Cir.9/23/22)

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, 99-12086 (11th Cir. 12/28/2000)

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.
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)

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

Conflict

Attorney-Client: Conflict - 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 - Conflict of One Lawyer in the Firm Disqualifies Entire Firm

U.S. v. Campbell, Case No. 06-13548 (11th Cir. 7/13/07)

Denial of Right to Counsel

Attorney-Client: Denial of Right to Counsel - 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 of 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. Gonzalez-Lopez, Case No. 05-352 (S. Ct. 6/26/06)

Miscellaneous

Attorney-Client: Miscellaneous - 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 make 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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)

Responsibility

Attorney/Client: Responsibility - 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: Responsibility - 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: Responsibility - 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: Responsibility - 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)

Right to New Counsel

Attorney-Client: Right to New Counsel – Must be Good Cause

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: Right to New Counsel – Disagreement Over Strategy

Does not justify appointment of new counsel. See Judge Martin's concurring opinion in Howell v. Secretary, Fla. Dept. of Corrections, Case No. 13-10766 (11th Cir. 9/13/13)

Self-Representation

Attorney-Client: Self-Representation - Faretta Inquiry

See U.S. v. Kimball, 291 F.3d 726 (11th Cir. 2002); U.S. v. Stanley, Case No. 12-11126 (11th Cir. 1/6/14)

Attorney-Client: Self-Representation - Timely Request

Court may deny request if the jury is already impaneled.
U.S. v. Young, 287 F.3d 1352 (11th Cir. 2002)

Attorney-Client: Self-Representation - 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 to 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)

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, 1198 F.3d 1293 (11th Cir. 12/28/99)

Attorney's Fees: Prevailing Fee

In 2002, the prevailing market rate for attorneys 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 prosecutor's 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, Northern District Court of Florida Case No. 3:91cr03052/RV (2/11/03)

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, No. 98-6273 (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, No. 98-6273 (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, No. 98-6273 (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)
Bureau of Prisons - 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)

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, No. 99-4094 (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, No. 99-4094 (11th Cir. 8/23/01)

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, No. 97-42 (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, No. 97-4 (11th Cir. 6/22/99)

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, 532 U.S. 774 (S. Ct. 2001)

CITATION FORM

Citation Form (internal citations and quotation marks omitted)
Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000)

CLOSING ARGUMENTS

Closing Arguments: Pecuniary Interests of Jury as Taxpayers
It is improper for a prosecutor to invoke the individual pecuniary interests of 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 Ademarcating 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, No. 98-5458 (11th Cir. 5/3/02); U.S. v. Bernal-Beniez, Case No. 08-10308 (11th Cir. 1/25/10)

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, No. 97-2669 (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 nothing more than what was already in evidence to be improper.
U.S. v. Hands, No. 97-6718 (11th Circuit 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, No. 97-6718 (11th Circuit 8/18/99)

Closing Arguments: 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)

Closing Arguments: Summary of Evidence by Prosecutor Isn't Evidence

See: U.S. v. Trainor, 376 F.3d 1325 (11th Cir. 2005)

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, 761 So.2d 1027 (Fla. 2000)

COMPASIONATE RELEASE

Compassionate Release: Bryant

The only circumstances that can rise to the level of extraordinary and compelling reasons for compassionate release are those described in §1B1.3 of the Sentencing Guidelines.
Bryant v. United States, 996 F.3d 1243 (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 frighteningly 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 exceed 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 officer's 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, 287 F.3d 1315 (11th Cir. 2002)

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 with Subpoena Doesn't Confer Immunity
See: U.S. v. Vangates, 287 F.3d 1315 (11th Cir. 2002)

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, 530 U.S. 27 (S. Ct. 2000)

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, 530 U.S. 27 (S. Ct. 2000)

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); 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); U.S. v. McDowell, 250 F.3d 1354 (11th Cir. 2001); Howes v. Fields, 132 S. Ct. 1181 (S. Ct. 2012)
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 - 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 form 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: 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, 530 U.S. 428 (2000)

Confessions: Miranda - 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)

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: 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 - 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 - 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 - 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, 523 U.S. 782 (2001)

Right to Counsel

Confessions: Right to Counsel - 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: Right to Counsel - 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: 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: 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, 532 U.S. 162 (2001)

Confessions: Right to Counsel - 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: Right to Counsel - 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., No. 14-11857 (11th Cir. 2/27/15)

Testimonial

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

Confessions: Testimonial - 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 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 authenticity 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, 530 U.S. 27 (2000)

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 was 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

Elements

Conspiracy: Elements - 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 F.3d 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: Elements - 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: Elements - 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: Elements - 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 the 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)

Conspiracy: Elements - 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, No. 98-5822 (11th Cir. 3/3/2000)

Conspiracy: Elements - 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, No. 92-2061 (11th Cir. 10/26/98)

Conspiracy: Elements

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 least 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, No. 92-2872 (11th Cir. 10/26/98); U.S. v. Calderon, 169 F.3d 718 (11th Cir. 1999); U.S. v. Charles, Case No. 01-12498 (11th Cir. 12/3/02)

Jury Instructions

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: Jury Instructions - 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)

Miscellaneous

Conspiracy: Miscellaneous – Pinkerton

Limits a defendant's liability for substantive offenses committed by co-conspirators to include only those acts that were done in furtherance of the conspiracy, fell within the scope of the unlawful project, and were part of the ramifications of the plan which could be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.
U.S. v. Collazo, 984 F.3d 1308 (9th Cir. 2021) [11th Circuit Pattern Instruction O13.5]

Conspiracy: Miscellaneous - 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: 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous – Looseness of Doctrine
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, No. 92-2872 (11th Cir. 10/26/98)
Conspiracy: Miscellaneous - Wheel
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)

Overt Acts

Conspiracy: Overt Acts - 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: Overt Acts 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: Overt Acts 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: 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, No. 98-2519 (11th Cir. 6/3/99)

Sufficiency of Evidence

Conspiracy: Sufficiency of Evidence – Prudent Smuggler Doctrine

Court relied on the "prudent smuggler doctrine," the idea that a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders, to find the evidence was sufficient to support the conspiracy conviction.
U.S. v. Morel, No. 20-14315 (11th Cir. 3/23/23)

Conspiracy: Sufficiency of Evidence - 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, 485 F.3d 1291 (11th Cir. 2007)

Conspiracy: Sufficiency of Evidence - 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 of Evidence - 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: Sufficiency of Evidence - 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: Sufficiency of Evidence - Proof of Defendant's Involvement (Presence Where Drugs Found)

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: Sufficiency of Evidence - 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: Sufficiency of Evidence - 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: Sufficiency of Evidence - 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, No. 92-2872 (11th Cir. 10/26/98)

Conspiracy: Sufficiency of Evidence - 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, No. 92-2872 (11th Cir. 10/26/98)

Conspiracy: Sufficiency of Evidence - 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: Sufficiency of Evidence - Proof of Participation May Be Established by Facts of Crime

U.S. v. Alvarez, 837 F.2d 1024 (11th Cir. 1988); Duren v. Hopper, 161 F.3d 655 (11th Cir. 1998); U.S. v. Bain, 736 F.2d 1480 (11th Cir. 1984)

Withdrawal

Conspiracy: Withdrawal - 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: 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)

CONSTITUTIONAL LAW

Commerce Clause

Constitutional Law: Commerce Clause – Jurisdictional Act Need Not Link Directly to the Crime

The jurisdictional element of interstate commerce need not link directly to the criminalized act itself as long as the object of the criminal act is sufficiently connected to interstate commerce.
U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)

Constitutional Law: Commerce Clause - Hobbs Act Robbery

Robbery of drug dealer met satisfied Hobbs Act'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, Case 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., No. 01-13191 (11th Circuit 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, No. 96-3621 (11th Cir. 8/31/98); U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)

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 – No Exception to Correct Misleading Impression

Court rejected state prosecutor's argument that the state was entitled to introduce plea colloquy of absent witness to correct a misleading impression created by defense evidence.
Hempill v. New York, No. 20-637 (S. Ct. 1/20/22)

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 - Primary Purpose

A statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. Where 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 - 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 - 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 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 – Crawford Isn't Retroactive
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)
Cruel and Unusual
Constitutional Law: Cruel and Unusual - Mandatory Life Sentences for Juveniles
Violate the 8th Amendment.
Miller v. Alabama, Case No. 10-9647 (S. Ct. 6/25/12)
Constitutional Law: Cruel and Unusual - 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: Cruel and Unusual - Confinement of Juvenile for Life for a Non-Homicide 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: Cruel and Unusual - 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: Cruel and Unusual - 8th Amendment Excessive Fines Clause and Forfeiture
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)
Constitutional Law: Cruel and Unusual - 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: 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, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003)
Constitutional Law: Cruel and Unusual - 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)

Double Jeopardy

Constitutional Law: Double Jeopardy – Repugnant Verdicts Preclude Retrial?
The Georgia Supreme Court held that a jury's verdict of acquittal on one criminal charge and its verdict of guilty on another arising from the same facts were logically and legally impossible to reconcile, so it vacated the conviction. The Supreme Court has granted certiorari review to determine whether the Double Jeopardy Clause prohibits a retrial of the offense of which the defendant was acquitted.
McElrath v. Georgia, No. 22-721
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 make that showing.
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, No. 03-8661 (S. Ct. 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, 151 F.3d 1215 (11th Cir 10/29/98)

Due Process

Indigents

Constitutional Law: Due Process – Indigents (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 – Indigents (Indigent's Right to Retain Expert Witnesses)

At least according to the Eleventh Circuit, Ait is unclear whether the Sixth Amendment guarantees a defendant the right to a no-psychiatric expert who is crucial to prove his only defense: self-defense.
In re: Conklin, Case No. 05-13817 (11th Cir. 7/12/05) n. 2.

Miscellaneous

Constitutional Law: Due Process – 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)

Clark v. Crosby, 335 F.3d 1303 (11th Cir. 2003)

Procedural Rights

Constitutional Law: Due Process – Procedural Rights (Hearing)

N.Y. moratorium on evictions based on Covid-19.

Chrysafis v. Marks, No. 21A8, 2021 U.S. LEXIS 3635 (S. Ct. Aug. 12, 2021)

Constitutional Law: Due Process – Procedural Rights (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 – Procedural Rights (Liberty Interest)

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 – Procedural Rights (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 – Procedural Rights (Defendant's Right to Present Evidence)

See: U.S. v. Hurn, Case No. 03-13366 (11th Cir. 5/7/04)

Constitutional Law: Due Process – Procedural Rights (Right to Present a Defense)

U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)

Constitutional Law: Due Process – Procedural Rights (Deprivation of Property)

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., 534 U.S. 161 (2002); City of Los Angeles v. David, Case No. 02-1212 (S. Ct. 5/19/03)

Prosecutorial Misconduct

Constitutional Law: Due Process – Prosecutorial Misconduct (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 – Prosecutorial Misconduct (Deportation of Defense Witnesses)
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 – Prosecutorial Misconduct (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 – Prosecutorial Misconduct (Use of Conflicting Theories)
There are 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, No. 98-5829 (11th Cir. 4/16/01)
Constitutional Law: Due Process – Prosecutorial Misconduct (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, No. 98-5829 (11th Cir. 4/16/01); Ventura v. Attorney General, Case No. 04-14564 (11th Cir. 8/9/05)
Constitutional Law: Due Process – Prosecutorial Misconduct (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 - 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)

Rational Basis Test

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 - 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 F.3d 1020 (11th Cir. 2001); Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)

Substantive Due Process

Constitutional Law: Due Process – Proof Beyond a Reasonable Doubt
The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.
In re Winship, 397 U.S. 358 (1970)
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 - Substantive Due Process (Compared to 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 Aheightened 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 - 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 - Substantive (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 - Substantive (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 - Substantive
See Judge Scalia' dissent in 527 U.S. 41 (1999)
Constitutional Law: Due Process – Substantive (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)

Vagueness

Constitutional Law: Due Process – Vagueness – Claim By One to Whom the Statute Constitutionally Applies
A facial vagueness challenge cannot be maintained by one to whom a statute may be constitutionally applied.
U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)

Constitutional Law: Due Process – Vagueness (Worthy Intentions Not Enough)
Doubtless, Congress had high and worth intentions when it enacted § 1346. But it must do more than invoke an aspirational phrase and leave it to prosecutors and judges to make things up as they go along.
Percoco v. U.S., 143 S. Ct. 1130 (2023) (Gorsuch, J. concurring)

Constitutional Law: Due Process – Vagueness (Overbreadth)
The overbreadth doctrine represents an exception to the rule regarding facial challenges to a statute. It instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute may be lawfully applied.
U.S. v. Hansen, No. 22-179 (S. Ct. 6/23/23)

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 – Vagueness (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 – Vagueness (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 – Vagueness (Facial Validity of a Statute)
The Court declared the Chicago gang loitering statute unconstitutional.
Chicago v. Morales, 527 U.S. 41 (1999)

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, 195 F.3d 645 (11th Cir. 1999); 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 the court the governmental entity enforced the statute against those engaged in unprotected activities.
U.S. v. Acheson, 195 F.3d 645 (11th Cir. 1999)

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, 216 F.3d 1307 (11th Cir. 2000)
Constitutional Law: Ex Post Facto: Unforeseeable State Court Construction of a Statute
Unforeseeable state court construction of a criminal statute applied retroactively can violate the Due Process Clause.
Metheny v. Hammonds, 216 F.3d 1307 (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, 216 F.3d 1307 (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, 592 U.S. 513 (2000)
Constitutional Law: 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, 532 U.S. 451 (2001)
Constitutional Law: 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: 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, 529 U.S. 694 (2000)
Constitutional Law: Ex Post Facto - 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, No. 97-5502 (11th Cir. 12/15/99)
Constitutional Law: Ex Post Facto – Sentencing Guidelines
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)

Guns

Constitutional Law: Guns - Second Amendment Applicable to States

McDonald v. City of Chicago, Case No. 08-1521 (S. Ct. 6/28/10)
Constitutional Law: Guns - 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: Guns - 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)

Miscellaneous

Constitutional Law: 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) **Constitutional Law: Miscellaneous - 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 jurisdiction.
Loughrin v. U.S., Case No. 13-316 (6/23/15)
Constitutional Law: Miscellaneous - 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: Miscellaneous - 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 - 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 - 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 - Separation of Powers (Congress and the Courts)
See Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999)
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, 529 U.S. 694 (2000)

Retroactivity

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 - 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 - Teague
For a concise summary of Teague, see:
Danforth v. Minnesota, Case No. 06-8273 (S. Ct. 2/20/08)
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 Ait 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 Awatershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is Afundamental in some abstract sense is not enough; the rule must be one Awithout 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 two to three 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 - 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)

Constitutional law: Retroactivity - Career Offender Predicate

Court rejected claim based on Johnson v. U.S., 130 S. Ct. 1265 (2010), 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)

Constitutional Law: Retroactivity – Right to Effective Assistance of Counsel in Plea Negotiations

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)

Constitutional Law: Retroactivity - 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)

Constitutional Law: Retroactivity – Graham v. Florida

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 – Parole Board Rules

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, 216 F.3d 1307 (11th Cir. 2000)

Right to Remain Silent

Constitutional Law: 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, 532 U.S. 17 (2001)

Constitutional Law: Right to Remain Silent - 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, 532 U.S. 17 (2001)

Constitutional Law: Right to Remain Silent - 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)

Constitutional Law: Right to Remain Silent - 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, 530 U.S. 27 (2000)

Constitutional Law: Right to Remain Silent - 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 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)

Constitutional Law: Right to Remain Silent - 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)

Constitutional Law: Right to Remain Silent - 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: Right to Remain Silent - 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, No. 4-10, NO. 12-13131 (11th Cir. 2/7/13)

Constitutional Law: Right to Remain Silent -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 Athe 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: Right to Remain Silent - 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, 536 U.S. 24 (2002)

Right to Trial

Constitutional Law: Right to Trial - 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: Right to Trial - 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: Right to Trial - 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)

Speech

Constitutional Law: Speech – Content-Based Restriction

To determine whether a regulation is a content-based restriction of speech, courts first consider whether the regulation on its face draws a distinction based on the message a speaker conveys. If the provision is facially content neutral, courts consider whether it cannot be justified without reference to the content of the regulated speech or was adopted by government because of disagreement with the message the speech conveys.
U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)

Constitutional Law: Speech – First Amendment Overbreadth Challenge to Statute

To prevail on a First Amendment overbreadth challenge, the plaintiff must establish from the text of the challenged provision and from actual fact that a substantial number of instances exist to which the provision cannot be applied constitutionally.
U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)

Constitutional Law: Speech – True Threats

To fall within the true threat exception, the government must prove that the defendant had some understanding of his statements' threatening character, though this subjective standard is met by a showing of recklessness. Court draws a distinction between the standard for true threats and incitement with the latter requiring purpose or knowledge.
Counterman v. Colorado, No. 22-138 (S. Ct. 6/27/23)

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, a court 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 form 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 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 promoting a depicting of minors was found to be unconstitutionally overbroad.
Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002)

Constitutional Law: Speech - 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)

Statutory Challenges

Constitutional Law: Statutory Challenges - Facial

Generally, a plaintiff bringing a facial challenge must establish no set of circumstances exists under which the law would be vaild or show that the law lacks a plainly legitimate sweep. And for all arguments but First Amendment ones, the act that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid because federal courts have not recognized an over-breadth doctrine outside the limited context of the First Amendment.
U.S. v. Pugh, No. 21-13136 (11th Cir. 1/18/24)
Constitutional Law: Statutory Challenges - Alabama Ban on Sale of Sexual Devices Upheld.
Bailey v. Pryor, 240 F.3d 944 (11th Cir. 2000)
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 inmate's constitutional interests.
Bailey v. Pryor, 240 F.3d 944 (11th Cir. 2001)
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 constitutional.
Bailey v. Pryor, 240 F.3d 944 (11th Cir. 2001)
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, 240 F.3d 944 (11th Cir. 2001)
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., 529 U.S. 848 (2000)
Constitutional Law: Statutory Challenges - 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: Statutory Challenges - 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, 531 U.S. 250 (2001)
Constitutional Law: Statutory Challenges - 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. Salerno, 481 U.S. 739, 745 (1987)

Constitutional Law: Statutory Challenges - 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, J, concurring); Richardson v. U.S., No. 97-8629 (S. Ct. 6/1/99)

CONTEMPT

Contempt: Appeal

If it is to satisfy the final judgment rule and be the subject of an appeal, a contempt citation must include a finding of contempt and a non-contingent order of sanctions.

In re Grand Jury Subpoena, No. 21-13651 (11th Cir. 1/31/23)

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)

CONTINUING CRIMINAL ENTERPRISE

Continuing Criminal Enterprise: Jury Must be Unanimous

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 has 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, No. 98-5546 (11th Cir. 1/11/00)

COURT OPINIONS

Court Opinions: Dicta
Even if not strictly necessary, language may still prove to be a holding.
U.S. v. Files, No. 21-12859 (11th Cir. 3/24/23)
Court Opinions: Interpreting Fragmented 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);
Court Opinions: Dicta - Decision Can Hold Nothing Beyond the Facts of the Case
See: U.S. v. Birge, 830 F.3d 1229 (11th Cir. 2016)
Court Opinions: Distinguishing Cases - No One Questions
In a prior case the court addressed the need for Miranda warnings and stated that no one questions that Shatzer was in custody for Miranda purposes. In this case, the Court noted that the statement meant only that the issue of custody was not contested.
Howes v. Fields, Case No. 10-680 (S. Ct. 2/21/12)
Court Opinions: Unpublished Opinions Are Not Precedential
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10) n. 34
Court Opinions: 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)
Court Opinions: 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 (11th Cir. 6/16/04)
Court Opinions: 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)
Court Opinions: Decisions of One Circuit Not Binding on Another
Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1208 (11th Cir. 1981)

COURT REPORTERS

Court Reporters: Should Transcribe Audio Tapes Played During Trial
AOptimally, the transcribed testimony of the 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 by 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, 237 F.3d 1279 (11th Cir. 2001)
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)
Courts: Court's Obligation to Appoint an Interpreter
See: U.S. v. Edouard, Case No. 05-15808 (11th Cir. 5/11/07)
Courts: Sealing Documents
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, a court 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)
Courts: 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 raise, 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)

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., 527 U.S. 373 (1999)

Death Penalty: Aggravating Circumstances - Overbroad If ....

An aggravating circumstance is overly broad if the sentencing jury could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty.

Arave v. Creech, 507 U.S. 463, 474 (1993); Jones v. U.S., 527 U.S. 373 (1999)

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, No. 97-9027 (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 - HAC (Defendant Intended the Abuse)

U.S. v. Hall, 152 F.3d 381, 415 (5th Cir. 1998)

Death Penalty: Aggravating Circumstances - Instruction for HAC

Not unduly vague.

U.S. v. Hall, 152 F.3d 381, 414 (5th Cir. 1998)

Death Penalty: Aggravating Circumstances - HAC Not Too Vague

U. S. v. Webster, 162 F.3d 308 (5th Cir. 1998)

Evidence

Death Penalty: Evidence - Rules 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)

Ineffective Assistance of Counsel

Death Penalty: 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: Ineffective Assistance of Counsel
A fairly rare example of someone winning a new sentencing hearing because of ineffective assistance of counsel.
Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999)
Death Penalty: Ineffective Assistance – Compilation of Cases
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Death Penalty: Ineffective Assistance - Obligation to Perform Mitigation Investigation
Williams v. Taylor, 529 U.S. 362 (2000)
Death Penalty: 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 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., 218 F.3d 1305 (11th Cir. 2000); Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Death Penalty: Ineffective Assistance - Investigation of Mitigation
See: Williams v. Head, No. 97-8983 (11th Cir. 8/26/99); Fortenberry v. Haley, Case No. 01-12553 (11th Cir. 7/17/02)
Death Penalty: 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)
Death Penalty: Ineffective Assistance - 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)

Intellectual Disability

Death Penalty: Intellectual Disability – Nexus to Crime Not Required
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)
Death Penalty: Intellectual Disability - 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: Intellectual Disability - 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: Intellectual Disability - 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: Intellectual Disability - 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)

Jury & Jury Instructions

Death Penalty: Jury & Jury Instructions - 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 & Jury Instructions - 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 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 & Jury Instructions – 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 & Jury Instructions - Death Qualification and Bifurcated Jury
Court rejected argument.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)
Death Penalty: Jury & Jury Instructions - 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 sentenced to some other lesser sentence. Only options are life or death.
Jones v. U.S., 527 U.S. 373 (1999)
Death Penalty: Jury & Jury Instructions: No Need to Instruct Jury on Consequences of a Hung Penalty Phase Jury
Jones v. U.S., 527 U.S. 373 (1999)
Death Penalty: Jury & Jury Instructions 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

Because the defendant was prosecuted under the continuing criminal enterprise statute there was, in theory, a 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 government 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, 530 U.S. 156 (2000)

Death Penalty: Jury & Jury Instructions - 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)

Lethal Injection

Death Penalty: Lethal Injection – Alternative Not Limited to Those Methods Authorized

An inmate seeking to identify an alternate method of execution is not limited to choosing among those presently authorized by a particular State's law.

Nance v. Commissioner, Ga. Dept. of Corrections, No. 20-11393 (11th Cir. 1/30/23)

Death Penalty: Lethal Injection – Requirement for Raising Claim

Th challenge a lethal injection protocol under the Eighth Amendment, a prisoner must show (1) the lethal injection protocol in question creates a substantial risk of serious harm, and (2) there are known and available alternatives that are feasible, readily implemented, and that will in fact significantly reduce the substantial risk of severe pain.

Nance v. Commissioner, Ga. Dept. of Corrections, No. 20-11393 (11th Cir. 1/30/23)

Death Penalty: Lethal Injection - § 1983 Proper Method in Challenge Proposing Alternate Method of Execution

Section 1983 is a proper vehicle for a method-of-execution challenge that proposes an alternate method of execution not permitted by state law.

Nance v. Commissioner, Ga. Dept. of Corrections, No. 20-11393 (11th Cir. 1/30/23)

Death Penalty: Lethal Injection – Failure to Identify Alternative Method of Execution

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: 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: 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 that 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: Lethal Injection - § 1983 and Statute of Limitations

Like all § 1983 claims a challenge to the method of execution is subject to the statute 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)

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)

Miscellaneous

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 - 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 of 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 - 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 - 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, 275 F.3d 1032 (11th Cir. 2001)

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 - 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, 161 F.3d 655 (11th Cir. 1998); 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: Justification

To prevail on a justification defense, the defendant must show: (1) he was under unlawful and present, imminent and impending threat of death or serious bodily injury; (2) he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative to violating the law; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.
U.S. v. Moore, No. 21-12291 (11th Cir. 8/11/23)

Defenses: Affirmative Defense – Burden of Persuasion

Whether the defendant has the burden of persuasion depends upon whether the affirmative defense negates an element of the offense, typically the defendant's state of mind. If it does, the burden of persuasion rests with the government.
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)

Defenses: Whether an Affirmative Defense Depends Upon Whether the Exception is an Element

If the exception is an element, the government must plead and prove the existence of it. But if it is an affirmative defense, the defendant has the burden of going forward with sufficient evidence to raise the exception as an issue.
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)

Defenses: Determination of Whether It Is an Affirmative Defense

There is a three-part process courts use to determine whether a particular defense is an affirmative one. It requires courts to look at the language and structure of the statute, examine the legislative history, and decide whether the defendant or the government is better situated to present evidence tending to prove or disprove the applicability of the exception.
U.S. v. Shamsid-Deen, No. 20-11877 (11th Cir. 3/6/23)

Defenses: Entrapment-by-Estoppel

In contrast to a public authority 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)

Defenses: Impossibility

All courts are in agreement that what is usually referred to as Afactual impossibility is no defense to a charge of attempt.
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)

Defenses: 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)

Defenses: Reliance on Defendant's Understanding of the Law

Defendant's view isn't of much significance.
Ramdass v. Angelone, 530 U.S. 156 (2000) (Stevens, J. dissenting opinion)

DETENTION

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: 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, 399 F.3d 1297 (11th Cir. 2005); 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)
Discovery: 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, 634 F.3d 1198 (11th Cir. 2011)
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 (11th 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, 221 F.3d 1177 (11th Cir. 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, 527 U.S. 263 (1999)
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, 527 U.S. 263 (1999); Mincey v. Head, No. 97-9078 (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, NO. 97-6998 (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, No. 97-6998 (11th Cir. 3/11/99)
Discovery: Brady - In General
Kyles v. Whitley 115 S. Ct. 1535 (1995); Strickler v. Greene, 527 U.S. 263 (1999); Mincey v. Head, , No. 97-9078 (11th Cir. 3/16/00); Carr v. Schofield, Case No. 02-11488 (11th Cir. 3/31/04); Davis v. Terry, Case No. 04-13371 (11th 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, No. 96-4225 (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, No. 96-4225 (11th Cir. 2/25/99)
Discovery: Brady and Giglio - 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)

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); U.S. v. Merrill, 685 F.3d 1002 (11th Cir. 2012)
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 - 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 (11th 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 Identity 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 complained 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 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, 764 So.2d 633 (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 Applicable to Sentencing Hearings?
Yes, at least according to:
U.S. v. Randall, Case No. 2:18cr3030, 2020 WL 4194003 (D. Nev. July 20, 2020); but see U.S. v. Cordero-Perez, Case No. 6:14cr177, 2015 WL 403231 (M.D. Fla. Jan. 28, 2015)
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 Apossession, 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, 316 F.3d 1215, 1249 (11th Cir. 2003)

DRUGS & NARCOTICS

§ 851 Notice

Drugs & Narcotics: § 851 Notice – 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: § 851 Notice – Sufficiency
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: § 851 Notice - 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: § 851 Notice – Failure to File Precludes Enhancement
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, No. 96-4520 (11th Cir. 5/13/99); U.S. v. Gonzalez, No. 96-5303 (11th Cir. 8/13/99)
Drugs & Narcotics: § 851 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)
Drugs & Narcotics: § 851 Notice – Failure to File Precludes Enhancement
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, No. 96-5303 (11th Cir. 8/13/99)

Conspiracy

Drugs & Narcotics: 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 & Narcotics – Conspiracy (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

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 Acrack 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 (11th Cir. 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., No. 97-8958 (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 old cocaine. May be other forms.
U.S. v. Adams, 125 F.3d 586 (7th Cir. 1997)
Drugs & Narcotics: Drugs - 11th Cir. Says Guidelines Definition of Cocaine Base Isn't Vague
The guidelines definition of Acrack 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, No. 96-4520 (11th Cir. 5/13/99)
Drugs & Narcotics: Drugs - 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)

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: 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 Acontrolled 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.Supp.2d 417 (E.D. N.Y. 10/9/13) (Gleeson)
Drugs & Narcotics: Miscellaneous - Enhanced Penalty for Death
18 U.S.C. § 841(b)(1)(C) requires only that death resulted from 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 death.
U.S. v. Webb, Case No. 10-10574 (11th Cir. 9/12/11)
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 - 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, 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.
U.S. v. Cofield, 108 F.Supp.2d 1374 (S.D. Fla. 2000)

Physicians & Pharmacists

Drugs & Narcotics: Physicians & Pharmacists – Jury Instructions
On remand from the Supreme Court, the court vacated convictions for distributing controlled substances not for a legitimate medical purpose and outside the usual course of professional practice. In accord with the, then, existing 11th Circuit precedent the trial court instructed the jury that the test for whether a physician acted outside the usual course of professional practice was an objective one. But as subsequently recognized by the Supreme Court, the test is subjective—the physician knew he or she was acting outside the usual course of professional practice.
U.S. v. Duldulao, No. 20-13973 (11th Cir. 11/29/23)
Drugs & Narcotics: Physicians & Pharmacists - Jury Instructions ("outside the usual course of professional practice or for no legitimate medical purpose")
Court rejected the defendant physician's argument that the government was required to prove the dispensing of oxycodone was "outside the usual course of professional practice" <u>and</u> "for no legitimate medical purpose." The correct conjunction is "or."
U.S. v. Heaton, No. 20-12568 (11th Cir. 2/14/23)
Drugs & Narcotics: Physicians & Pharmacists - "Except as Authorized"
Section 841(a) of Title 28 prohibits the "knowing[] or intentional[] dispensing of controlled substances except as authorized." In this case, involving two physicians, the relevant drugs were only "authorized" to be dispensed pursuant to a prescription, and an effective prescription must be made for a "legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). The trial court, erroneously

concluding an objective test to be appropriate, erred in denying the defendant's request for an instruction that good faith was a defense to the allegation the defendants acted outside the "usual course of professional practice." To obtain a conviction the government must prove beyond a reasonable doubt that a defendant "1) knowingly or intentionally dispensed a controlled; and (2) *knowingly or intentionally* did so in an unauthorized manner.
U.S. v. Ruan, No. 17-12653 (11th Cir. 1/5/23) *on remand from the United States Supreme Court;* U.S. v. Heaton, No. 20-12568 (11th Cir. 2/14/23)

Drugs & Narcotics: Physicians & Pharmacists - 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, No. 94-3139 (11th Cir.

Possession

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.

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 the 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 - Inspection Isn't Possession

U.S. v. Edwards, No. 97-4896 (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

Mandatory Minimum

Drugs & Narcotics: Sentencing - Mandatory Minimum (Scope of the Agreement)

Is 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); United States v. Bacon, 598 F.3d 772 (11th Cir. 2010); U.S. v. Collazo, 984 F.3d 1308 (9th Cir. 2021)

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 – Mandatory Minimum (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 – Mandatory Minimum (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 – Mandatory Minimum (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 – Mandatory Minimum (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 – Mandatory Minimum (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 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 - 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)

Miscellaneous

Drugs & Narcotics: Sentencing – Miscellaneous (Fair Sentencing Act Applies to Resentencings)

The Fair 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 – Miscellaneous (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)

Sufficiency of Evidence

Drugs & Narcotics: Sufficiency of Evidences - 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 the 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: Sufficiency of Evidence - 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 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)
6/25/99)
Drugs & Narcotics: Sufficiency of Evidences - 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: Sufficiency of Evidence - 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: Sufficiency of Evidence - 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, No. 96-4520 (11th Cir. 5/13/99)
Drugs & Narcotics: Sufficiency of Evidence - 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., No. 97-8629 (S. Ct. 6/1/99)
Drugs & Narcotics: Sufficiency of Evidence - 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)
U.S. v. Cochran, Case No. 11-11923 (11th Cir. 6/14/12)

Drugs & Narcotics: Sufficiency of Evidence - 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: Sufficiency of Evidence - 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 the defendant's conviction.
U.S. v. Wilson, 183 F.3d 1291 (11th Cir. 8/12/99)

Drugs & Narcotics: Sufficiency of Evidence - 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, 183 F.3d 1291 (11th Cir. 1999); U.S. v. Diaz-Boyzo, Case No. 04-15629 (11th Cir. 12/14/05)

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 had 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 to 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: 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. 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 ignorance 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, 179 F.3d 1328 (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)

ESTOPPEL

Estoppel: 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 TO prevail in another phase.
Zedner v. U.S., Case No. 05-5992 (U.S. 6/5/06)
Estoppel: 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 for 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)
Estoppel: 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)

EVIDENCE

Authentication

Evidence: 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 Aappearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
U.S. v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000)

Character

Evidence: Character - 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 - 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 - 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 - 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 truthfulness 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 - 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 - Truthful Character
Pointing out inconsistencies in a witness' testimony and arguing the witness's testimony is not credible isn't the same thing as attacking the witness's 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 - 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)
Evidence: Character - 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, 168 F.3d 1234 (11th Cir. 1999); U.S. v. Burnette, No. 21-13990 (11th Cir. 4/11/23)

Evidence: Character – Cross-X 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. 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 – Criticism of Reliance on "Inextricably Intertwined"

See U.S. v. Green, 617 F.3d 233 (3d Cir. 2010)

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 operandi. Such evidence is admissible as intrinsic evidence outside the scope of the Rule if it is linked in time and circumstance 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); U.S. v. Brown, 765 F.3d 278 (3d Cir. 2014); U.S. v. Caldwell, 760 F.3d 267 (3d Cir. 2014); U.S. v. Gomez, 763 F.3d 845 (7th Cir. 2014); U.S. v. Hall, 858 F.3d 254 (4th Cir. 2017); U.S. v. Repak, 852 F.3d 230 (3d Cir. 22017); U.S. v. Rodriguez, 880 F.3d 1151 (9th Cir. 1151)

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 ensure 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 - 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, 248 F.3d 1036 (11th Cir. 2001)

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, 173 F.3d 1312 (11th Cir. 1999)

Confrontation

Evidence: Confrontation – Confrontation Clause Prohibits Only Impermissible Hearsay

U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)

Evidence: Confrontation – Bruton Effectively Overruled (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: 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: Confrontation – 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: Confrontation - Bruton (Example of Favorable Outcome)

See: U.S. v. Doherty, No. 98-3562 (11th Cir. 10/27/00); U.S. v. Turner, Case No. 05-14388 (11th Cir. 1/11/07)

Evidence: Confrontation - Testimonial Definition

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: Confrontation - Testimonial Evidence (Witness Unavailable and Opportunity for Cross Examination)

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: 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 deportee 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 is not-testimonial and therefore is not subject to confrontation.

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

Evidence: Confrontation – Bruton (Redaction Adequate)

U.S. v. Taylor, No. 96-4991 (11th Cir. 8/31/99)

Evidence - Confrontation - Bruton (Redaction Inadequate)

U.S. v. Gonzalez, 185 F.3d 1315 (11th Cir. 1999). See also: Gray v. Maryland, 118 S. Ct. 1151 (1998)

Evidence: Confrontation - 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, 197 F.3d 1059 (11th Cir. 1999)

Evidence: Confrontation - Testimony About 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: 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)

Evidence: 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. Neither 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)

Evidence: 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)

Evidence: Confrontation - Autopsy Reports

In this North Florida case, the court of appeals concluded 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)

Evidence: 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)

Evidence: 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 Ain shambles and that courts will have to conduct Aopen-ended balancing tests' and amorphous, if not entirely subjective,' inquiries into the totality of the circumstances bearing on reliability, whenever Athe prosecution cries emergency.
Michigan v. Perry, Case No. 09-150 (S. Ct. 2/8/11)

Evidence: 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)
Evidence: 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)
Evidence: 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)
Evidence: Confrontation - Testimonial (Business and Public Records)
While there is some dispute over the issue, the Second Circuit held that business and public records are, by 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)
Evidence: 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: 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)
Evidence: 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. Infrastructure, Inc., Case No. 07-14648 (11th Cir. 7/29/09)
Evidence: 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: 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 deportee 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 is not-testimonial and therefore is not subject to confrontation.
U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)
Evidence: 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)

Evidence: Confrontation - Crawford (Expectation of Declarant)
The key to answering the question of whether an out-of-court statement qualifies is 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)
Evidence: 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)

Credibility

Evidence: Credibility - 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 officer's 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)
Evidence: Credibility - 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)
Evidence: Credibility - Courts Have Recognized Credibility Questions Re: Informants
This Court has long recognized the serious questions of credibility informers pose.
Banks v. Dretke, Case No. 02-8286 (S. Ct. 2/24/04)

Hearsay

Definition

Evidence: Hearsay – Definition (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 – Definition (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 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 aren't capable of being true and false and are not hearsay.
U.S. v. Rivera, Case No. 13-13125 (11th Cir. 3/12/15)
Evidence: Hearsay – Definition (Only Conceivable Explanation Would Be Statement of Others)
Statements can be hearsay even though they do not explicitly paraphrase the words of others if 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 – Definition (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); U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)
Evidence: Hearsay – Definition (Statements of Lawyer to Third Party not Admissible)
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 – Definition (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)

Coconspirator Statements

Evidence: Hearsay – Coconspirator Statements (Must Be Made in Course of Conspiracy)
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 – Coconspirator Statements (In General)
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 coconspirator's proffered statement as well as independent external evidence.
U.S. v. Dickerson, No. 98-5829; U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11) (on remand from Supreme Court)

Exceptions

Evidence: Hearsay – Exceptions (Irrelevant Non-Hearsay Purpose)
A party cannot launder hearsay into a trial by offering it for an irrelevant non-hearsay purpose.
U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)
Evidence: Hearsay – Exceptions (Residual Exception -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 - 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, 682 F.3d 974 (11th Cir. 2012)
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 – Exceptions (Business Records - Summary Prepared for Litigation)
The Court held the government's typed summary of handwritten business records was inadmissible 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 - 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 are 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 – Exceptions (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 officer's 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; U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)
Evidence: Hearsay – Exceptions (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,

Evidence: Hearsay – Exceptions (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 testifies 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 rebut 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, No. 98-5169 (11th Cir. 11/6/2000); U.S. v. Vance, Case No. 06-13035 (11th Cir. 8/3/07)

Evidence: Hearsay – Exceptions (Residual Exception)

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 and 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, No. 99-4098 (11th Cir. 7/14/00)

Evidence: Exceptions - 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, 194 F.3d 1186 (11th Cir. 1999); U.S. v. Willis, 759 F.2d 1486 (11th Cir. 1985)

Evidence: Hearsay – Exceptions (Admissibility of Co-Defendant'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, 527 U.S. 116 (1999)

Miscellaneous

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

If a hearsay statement is to be admitted on the basis of the defendant's misconduct that led to the unavailability of a witness, the standard of proof is that of a preponderance of the evidence.
U.S. v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001)

Rule of Completion

Evidence: Hearsay – Rule of Completion

The rule of completeness codified in Rule 106 renders additional portions of a complete document or recording relevant when the opposing party distorts the meaning of the document or recording by introducing misleading excerpts into evidence.
U.S. v. Lopez, 4 F.4th 706 (9th Cir. 2021)

Evidence: Hearsay – Rule of Completion (Exculpatory Portion of Hearsay Statement)

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, NO. 96-9250 (11th Cir 2/2/99)

Evidence: Rule of Completeness (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 Afor the ascertainment of truth.
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)

Evidence: Hearsay - 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, No. 96-9250 (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 a way 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, No. 96-9250 (11th Cir 2/2/99)

Impeachment

Evidence: Impeachment – Convictions Older Than 10 Years

There is a strong presumption against the using a conviction to impeach a witness if the conviction is more than 10 years old from the date the defendant was last released from custody.
U.S. v. Moore, No. 21-12291 (11th Cir. 8/11/23)

Evidence: Impeachment – Defendant's Prior Convictions (Balancing Test)

For a favorable analysis of Rule 609's requirement that the "probative value of the evidence outweigh[] its prejudicial effect."
U.S. v. Caldwell, 760 F.3d 267 (3d Cir. 2014)

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, No. 98-2701 (11th Cir. 5/19/00)

Evidence: Impeachment - Can't Ask Witness if Another Witness is Lying

While Rule 608(a) witness to testify about a witness's general character for truthfulness or untruthfulness, 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: Impeachment - 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 (11th Cir. 5/23/05); U.S. v. Burnette, No. 21-13990 (11th Cir. 4/11/23)

Evidence: Impeachment - 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: Impeachment - 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)

Miscellaneous

Evidence: Miscellaneous - Statements of Counsel Not Evidence

U.S. v. Kendrick, 682 F.3d 974 (11th Cir. 2012)

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 identification is the linchpin of the evaluation. Where the indicators of a witness' ability to make an accurate identification are outweighed by the corrupting effect of law enforcement 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: 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); U.S. v. Daniels, No. 22-10408 (11th Cir. 1/24/24)

Evidence: Miscellaneous - Testimony from Pretrial Services Officer

Information obtained in the 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 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 - Transcripts of Tape Recordings
See: U.S. v. Holton, 116 F.3d 1536 (D.C. Cir. 1997)
Evidence: Miscellaneous - Reputation Testimony vs. Opinion Testimony
See: United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1982)
Evidence: Miscellaneous - Testimony Derived from Substantial Assistance Agreements
It's admissible.
U.S. v. Lowrey, 166 F.3d 1119 (11th Cir. 2/3/99)

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 - 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)

Opinion and Expert Testimony

Evidence: Opinion and Expert Testimony – Lay Opinion (Willfulness)
Rule 701 restricts a law witness to testimony rationally based on the witnesses' perception. Here, officer's lay opinion that he had never seen such willfulness was improper because it purported to tell the jury about the defendant's state of mind—something to which neither he nor any other witness could testify based on his rationally-based perception.
U.S. v. Sotis, No. 22-10256 (11th Cir. 12/20/23)
Evidence: Opinion and Expert Testimony – Defendant's Knowledge
In a case where the defendant was caught transporting drugs across the border and the question was whether he knew the concealed drugs were in his truck, the trial court erred in allowing a DEA agent to give an opinion that those who hire individuals to transport drugs look for people

who are involved with unlawful drug distribution and who charge a price. The court of appeals questioned whether the testimony was really "expert opinion" and described it as "a simple generalization: In most drug cases, the person hired to transport the drugs knows the drugs are in the vehicle."
United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir. 2002); see also the cert petition in Dellilah Diaz v. U.S., Docket No. 23-14 pending in the Supreme Court as of November 2023.

Evidence: Opinion and Expert Testimony – Daubert Hearing Not Required for Fingerprint Evidence

The 11th Circuit affirmed the trial court's decision denying the defendant's request for a Daubert hearing regarding fingerprint evidence.
U.S. v. Ware, No. 21-10539 (11th Cir. 6/1/23)

Evidence: Opinion and Expert Testimony – Insanity

Rule 704(b) of the Federal Rules of Evidence prohibits an expert in a criminal case from giving an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Here, the Bureau of Prisons psychologist ran afoul of the rule when, in addressing the defendant's insanity defense, she testified he was able to appreciate the nature and quality or the wrongfulness of his acts.
U.S. v. Turner, Case No. 20-12364 (11th Cir. 3/1/23)

Evidence: Opinion and Expert Testimony – Law Enforcement

Trial court erred in admitting testimony of ICE officer who had, relying on his experience, testified the likelihood was "nil" that a drug cartel would entrust a large quantity of drugs with someone who had been threatened to comply. The court, concluding the determination of reliability was most important when the relied upon his or her experience, found the record lacked the requisite showing of reliability.
United States v. Valencia-Lopez, 971 F.3d 891 (9th Cir. 2020)

Evidence: Opinion and Expert Testimony – Reliance on Experience

While in some cases an admissible expert will need rigorous scientific or statistical analysis, less formal methods are also permitted when the expert testifies primarily based on experience.
U.S. v. Esformes, No. 19-13838 (11th Cir. 1/6/23)

Evidence: Opinion and Expert Testimony – Daubert Ruling after Testimony Presented to Jury

With the exception of hearings on the admissibility of confessions, neither the Rules of Evidence nor caselaw categorically require the district court to prevent the jury from hearing evidence that has not yet been admitted. Here, the court found no error when the district court allowed the jury to hear the expert's testimony before it concluded the testimony was admissible.
U.S. v. Esformes, No. 19-13838 (11th Cir. 1/6/23)

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 whether the witness 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 - 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 analyst's 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 is Inadmissible 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 probability 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, 304 F.3d 1088 (11th Cir. 2002)
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 testified that an unusual marking was a code. The court held the officer's testimony 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, No. 98-5458 (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, No. 01-13947 (2/13/2002)
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); U.S. v. Ware, No. 21-10539 (11th Cir. 6/1/23); but see: U.S. v. Daniels, No. 22-10408 (11th Cir. 1/24/24) (requiring some basis for concluding the witness is more likely to correctly identify the defendant than is the jury).

Evidence: Opinion Testimony - Daubert Applies to Everything!

Analysis applied in this instance to a financial analyst.
U.S. v. Majors, No. 97-2803 (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. Frazier, 387 F.3d 1244 (11th Cir. 2004)

Evidence: Opinion Testimony - Daubert Applies to All Expert Testimony

U.S. v. Paul, 175 F.3d 906 (11th Cir. 1999)

Evidence: Opinion 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: Opinion Testimony - Court, not Witnesses, Should Explain the 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

Prejudice – Rule 403

Evidence: Prejudice – Limiting Instruction May be Inadequate

Sometimes the risk of admitting relevant testimony is so great that no limiting instruction can adequately eliminate it.
U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)

Evidence: Prejudice – Definition of Unfair Prejudice
When the court speaks of "unfair prejudice" it means an undue tendency to suggest decision on an improper basis.
U.S. v. Kent, No. 22-13068 (11th Cir. 2/26/24)
Evidence: Prejudice -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: Prejudice - 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)

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., 260 F.3d 1295 (11th Cir. 2001)
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 inadmissible 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 of 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) was 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 - 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 the 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, 184 F.3d 1300 (11th Cir. 1999)
Evidence: Scientific - Profiling of Child Molesters
Met Daubert test.
U.S. v. Romero 98-2358 (7th Cir. 8/31/1999)
Evidence: Scientific - Handwriting
See: U.S. v. Paul, 175 F.3d 906 (11th Cir. 1999)
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, 526 U.S. 137 (1999); U.S. v. Paul, 175 F.3d 906 (11th Cir. 1999)
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, 526 U.S. 137 (1999)

Summary

Evidence: Summary – Three Kinds of Summary Evidence
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: 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, 233 F.3d 1285 (11th Cir. 2000); 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)

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, 418 F.3d 1159 (11th Cir. 2005)

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, 286 F.3d 1223 (11th Cir. 2002)

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, 286 F.3d 1223 (11th Cir. 2002)

FIREARMS

924(c)

Crime of Violence

Firearms: 924(c) – Crime of Violence (Armed Bank Robbery is a Crime of Violence)

In re: Hines, Case No. 16-12454 (11th Cir. 6/8/16)

Firearms: 924(c) – Crime of Violence (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) – Crime of Violence (Carjacking is a Crime of Violence)

In re: Smith, Case No. 16-13661 (11th Cir. 7/18/16)

Firearms: 924(c) – Crime of Violence (Manslaughter Isn't Crime of Violence) U.S. v. Benally, No. 14-10452 (9th Cir. Aug. 1, 2016)

Miscellaneous

Firearms: 924(c) – Miscellaneous (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., 572 U.S. 65 (2014)

Firearms: 924(c) – Miscellaneous (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) – Miscellaneous (Firearm Need Not be Introduced into Evidence)

U.S. v. Wilson, 183 F.3d 1291 (11th Cir. 8/12/99)

Sentencing

Firearms: 924(c) – Sentencing (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) – Sentencing (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) – Sentencing (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) – Sentencing (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 applies 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. 526 U.S. 8 (2010)

Firearms: 924(c) – Sentencing (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: 924(c) – Sentencing (Stacking - Resentencing After 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)

Sufficiency of Evidence

Firearms: 924(c) – Sufficiency of Evidence (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) – Sufficiency of Evidence (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)
(2010)
Firearms: 924(c) – Sufficiency of Evidence (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) – Sufficiency of Evidence (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) – Sufficiency of Evidence (Gun's Presence by Coincidence)
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, No. 00-15795 (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) – Sufficiency of Evidence (Gun in Car)
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) – Sufficiency of Evidence (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 Acarrying 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 (11th Cir. 1999)
Firearms: 924(c) – Sufficiency of Evidence (Active Employment)

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) – Sufficiency of Evidence (Transportation)

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)

Miscellaneous

Firearms: Miscellaneous – 18 U.S.C. § 924(j) Sentence Can Be Imposed Concurrently

18 U.S.C. § 924(j) penalizes "a person, who in the course of a violation of [18 U.S.C. § 924(c)] causes the death of a person through the use of a firearm" with different penalties depending on whether the killing is a murder or manslaughter. The sentence for the offense need not run consecutively to the underlying drug offense or crime of violence.
Lora v. United States, No. 22-49 (June 16, 2023)

Firearms: Miscellaneous – Second Amendment (Law Prohibiting Minors from Purchasing a Firearm)

Florida statute § 790.065(13) prohibiting minors from purchasing firearms does not violate the Second Amendment.
National Rifle Association v. Bondi, No. 21-12314 (11th Cir. 3/9/23)
Firearms: Miscellaneous – Second Amendment
When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the second Amendment's unqualified command.
New York Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022),
Firearms: Miscellaneous - Proof that What Defendant Possessed was a Firearm
Lay testimony that what the defendant possessed was a firearm is sufficient. 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: Miscellaneous - 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: 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)
Firearms: Miscellaneous - 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. v. Ressam, Case No. 07-455 (S. Ct. 5/19/08)
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 - Definition of Business of Dealing as Used in 18 USC § 924(a)(1)(D)
Three transactions 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)
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)

Possession By Prohibited Person

Convicted Felon

Firearms: Possession by a Convicted Felon – Maybe Violates Bruen
U.S. v. Jessie Bullock, No. 3:18-CR-165 (S.D. Miss. 6/28/23) (Reeves, J.)
Firearms: Possession by Prohibited Person – Convicted Felon (Doesn't Violate 2nd Amendment)
Even after *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the statute prohibiting possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1), remains constitutional.
Range v. Attorney General, No. 21-2835 (3d Cir. 9/19/22); U.S. v. Dubois, No. 22-10829 (11th Cir. 3/5/24)

Domestic Violence Conviction

Firearms: Possession by Prohibited Person – Domestic Violence Injunction
The Supreme Court has granted certiorari review in U.S. v. Rahimi, 22-915.
Firearms: Possession by Prohibited Person – Domestic Violence Conviction (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: Possession by a Prohibited Person – 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: Possession by Prohibited Person – Domestic Violence Conviction (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: Possession by Prohibited Person – Domestic Violence Conviction (Based on Reckless Conduct)
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: Possession by Prohibited Person – Domestic Violence (Mother of Child)
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: Possession by Prohibited Person – Domestic Violence Conviction (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: Possession by Prohibited Person - Domestic Violence Conviction (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: Possession by Prohibited Person – Domestic Violence Conviction (Georgia Battery Statute Qualified)
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)

Drug User

Firearms: Possession by Prohibited Person – Statute Unconstitutional as Applied
Though the court found the defendant was an "unlawful user," the government presented no evidence he was intoxicated at the time of arrest and no evidence as to when he had last used marijuana. The court went on to say that "our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. It concluded 18 U.S.C. § 922(g)(3) violated the Second Amendment as applied to the defendant.
U.S. v. Daniels, No. 22-60596 (5th Cir. 8/9/23)
Firearms: Possession by Prohibited Person – Drug User (Statute is Unconstitutional)
At least according to a district court in Oklahoma, 18 U.S.C. § 922(g)(3), which prohibits the possession of a firearm by users of controlled substances, is unconstitutionally vague, in violation of the Due Process Clause and unconstitutionally infringes upon the fundamental right to possess a firearm in violation of the Second Amendment.
U.S. v. Harrison, No. CR-22-00328-PRW (W.D. Okla. 2/3/23)
Firearms: Possession by a Prohibited Person – Drug User (Contemporaneous and Continuous Use of Drug Required)
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)

Indictment

Firearms: Possession by Prohibited Person – Indictment (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: Possession by Prohibited Person – Indictment (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)

Miscellaneous

Firearms: Possession by Prohibited Person – Miscellaneous (Restraining Order)

At least according to the Fifth Circuit, 18 U.S.C. § 922(g)(8), which prohibits individuals from possessing a firearm if under a domestic violence restraining order, violates the Second Amendment.
U.S. v. Rahimi, No. 21-11001 (5th Cir. 2/2/23)

Firearms: Possession by Prohibited Person – Miscellaneous (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: Possession by Prohibited Person – Miscellaneous (Stipulation re Prior Conviction)

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: Possession by Prohibited Person – Miscellaneous (Transfer of Firearms)

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: Possession by a Prohibited Person – Miscellaneous (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: Possession by Prohibited Person – Miscellaneous (No Second Amendment Defense)

U.S. v. Rozier, Case No. 08-17061 (11th Cir. 3/4/10)

Firearms: Possession by Prohibited Person – Miscellaneous (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 it was an essential element of the offense.
U.S. v. Amante, Case No. 05-3067 (2d Cir. 8/9/05)

Firearms: Possession by Prohibited Person – Miscellaneous (Similarity of Names Insufficient)
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: Possession by Prohibited Person – Miscellaneous (Example of Case Involving Only Ammunition)
U.S. v. Floyd, 281 F3d 1346 (11th Cir. 2002)
Firearms: Possession by Prohibited Person – Miscellaneous (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, 205 F.3d 1292 (11th Cir. 2000); U.S. v. Bell, 214 F.3d 1299 (11th Cir. 2000); U.S. v. Rice, 214 F.3d 1295 (11th Cir. 2000)

Prior Conviction

Firearms: Possession by Prohibited Person – Prior Conviction (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: Possession by Prohibited Person – Prior Conviction (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: Possession by Prohibited Person – Prior Conviction (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)

Proof of Possession

Firearms: Possession by Prohibited Person – Proof of Possession (Constructive Possession – Intentionality Requirement)
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: Possession by Prohibited Person – Proof of Possession (Elements)
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: Possession by Prohibited Person – Proof of Possession (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)

Rehaif

Firearms: Possession by Prohibited Person – 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 court must determine whether the defendant has carried the burden of showing a reasonable probability that the 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 Prohibited Person - Rehaif (Domestic Violence Conviction)

Govt had to prove defendant knew he had been convicted of a misdemeanor under state law; that to be convicted of it, he 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 and the failure to include it in the stipulated facts was plain, but, under the circumstances, did not affect the defendant's substantial rights. Opinion includes 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)

Restoration of Rights

Firearms: Possession by a Prohibited Person – Restoration of Rights (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: Possession by Prohibited Person – Restoration of Rights (Can't Happen)

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: Possession by Prohibited Person – Restoration of Rights (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, 202 F.3d 1320 (11th Cir. 2000)

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 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, 253 F.3d 607 (11th Cir. 2001)

Firearms: Prohibited Firearms - Silencer (Knowledge)
Although the court is obligated to instruct the jury that the defendant knew what he possessed was a silencer, the government is not required to prove that the defendant knew the silencer had no serial number.
U.S. v. Ruiz, No. 98-5821 (11th Cir. 6/8/01); U.S. v. Moore, No. 00-12587 (11th Cir. 6/6/01)

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, 175 F.3d 870 (11th Cir. 1999)

FIRST STEP ACT

First Step Act: Court Need Not Recalculate the guideline range
Though in some instances it may be the better practice to calculate the new sentencing range before deciding whether to grant or deny a First Step Act motion, the trial court is not required to do so.
U.S. v. Gonzalez, No. 19-14381 (11th Cir. 6/21/23)

First Step Act: Court Must Adequately Explain Decision
A district court must adequately explain its decision under the First Step Act, and that usually requires providing a reasoned basis for the exercise of discretion.
U.S. v. Gonzalez, No. 19-14381 (11th Cir. 6/21/23)

First Step Act: Trial Court Can Only Reduce Sentences on "Covered Offenses"
U.S. v. Files, No. 21-12859 (11th Cir. 3/24/23)

First Step Act: First Step Act Doesn't Require Court to Vacate Sentence in Excess of Maximum
The trial court sentenced Williams in 2010 after the enactment of the Fair Sentencing Act as he committed his offense prior to Act's enactment. Subsequently, in Dorsey v. United States, 567 U.S. 260 (2012), the Court held those in Williams's circumstances—who had committed the offense prior to the Act but were sentenced after its enactment—were to benefit from the Act's reduced sentences. For Williams, it meant his life sentence exceeded the new maximum penalty of life. The trial court, however, denied Williams's First Step Act motion and denied his request to reduce the life sentence. The 11th Circuit upheld the trial court finding that the First Step Act did not require trial courts to reduce unlawful sentences.

U.S. v. Williams, No. 21-12877 (11th Cir. 3/23/23)

First Step Act: Pre-Apprendi Cases – Drug Quantity

In cases decided prior to Apprendi, the determination of the drug quantity used for sentencing is the quantity for determining eligibility under the First Step Act.

U.S. v. Clowers, No. 20-13074 (11th Cir. 3/14/23)

First Step Act: Concepcion Doesn't Alter Jones

At least according to the 11th Circuit, the decision in Concepcion v. United States, 142 S. Ct. 2389 (2022), doesn't alter the holding in United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), that, for purposes of the First Step Act, the drug quantity in pre-Apprendi cases is that determined at the initial sentencing hearing.

United States v. Jackson, 58 F.4th 1331 (11th Cir. 2023); U.S. v. McCoy, No. 21-13838 (11th Cir. 12/14/23)

First Step Act: Intervening Judicial Decisions

The First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.

United States v. Concepcion, No. 20-1650 (S. Ct. June 27, 2020)

First Step Act: Stacked 924(c) Sentences - Resentencing
eligible for a reduced sentence

Where the court was resentencing the defendant who had originally been sentenced to stacked 924(c) sentences even though the offenses were alleged in the same indictment, the district court correctly applied the First Step Act and imposed two five-year sentences.

United States v. Jackson, 830 Fed. Appx. 772 (7th Cir. 2020)

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); U.S. v. Gonzalez, No. 19-14381 (11th Cir. 6/21/23)

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); U.S. v. Gonzalez, No. 19-14381 (11th Cir. June 21, 2023)

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., , 141 S. Ct. 1858 (2021)

First Step Act: Five Kilograms or More of Powder Cocaine

Those defendants with a single count conspiracy involving the same threshold amounts are eligible for a reduced sentence under the First Step Act.

U.S. v. Taylor, 982 F.3d 1295 (11th Cir. 2020)

FORFEITURE

Eighth Amendment

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: Eighth Amendment - 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)

Funds for Legal Representation

Forfeiture: Funds for Legal Representation - Seizure of Assets

Though18 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)

Judgment & Preliminary Order

Forfeiture: Judgment & Preliminary Order - 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.

Forfeiture: Judgment & Preliminary – Preliminary Order 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 preliminary order 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 preliminary order and the Court vacated the forfeiture order.

U.S. v. Petrie, 302 F.3d 1280 (11th Cir. 2002)

S. v. Pease, Case No. 00-13237 (11th Cir. 5/22/03)

Miscellaneous

Forfeiture: Miscellaneous – Jury Determines Only Whether Property is Forfeitable

Under Federal Rule of Criminal Procedure 32, the jury only determined whether specific property is forfeitable. A party is not entitled to a jury finding regarding a money judgment.

U.S. v. Esformes, No. 19-13838 (11th Cir. 1/6/23)

Forfeiture: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - Dog Alert on Cash

The probative value of dog alerts to the smell 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - Criminal vs. Civil

United States v. Kennedy, 201 F.3d 1324 (11th Cir. 2000)

Forfeiture: Miscellaneous - 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, No. 96-9448 (11th Cir. 12/23/99)

Forfeiture: Miscellaneous – 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 determining 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, No. 96-4035 (11th Cir. 5/21/99)

Relationship to Restitution

Forfeiture: Relationship to Restitution - 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)

Rights of Third Parties

Forfeiture: Rights of Third Parties – Standing

A third party must establish that he or she has standing by asserting a legal interest in the property. If he or she succeeds, the party must establish the order of forfeiture is invalid under one of the two provisions of 21 U.S.C. § 853(n)(6). To establish standing the party must demonstrate by a preponderance of the evidence that he or she has "primary dominion or control" over the property. Title to the property won't establish property if the

Forfeiture: Rights of Third Parties - Comingled Funds
See Rothstein v. U.S., Case No. 11-10676 (6/11/13 11th Cir.)
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: Rights of Third Parties – Two Avenues of Relief
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: Rights of Third Parties - 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: Rights of Third Parties - 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)

Seizure of Assets

Forfeiture: Seizure of Assets - 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: Seizure of Assets - Right to Pretrial Hearing Re: Pretrial Seizure of Assets
See: U.S. v. Kaley, Case No. 07-13010 (11th Cir. 8/18/09)
Forfeiture: Seizure of Assets - 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, No. 96-2599 (11th Circuit 7/29/99)

FRAUD & THEFT

Bank Fraud

Fraud & Theft: Bank Fraud - Includes Effort to Defraud Bank Depositor
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, 237 F.3d 1295 (11th Cir. 2001)
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, 135 F.3d 1363 (11th Cir. 1998)
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, 135 F.3d 1363 (11th Cir. 1998)
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 must prove (1) that the defendant participated in the scheme by means of materially 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)

Health Care Fraud

Fraud & Theft: Health Care Fraud – Elements

The elements of healthcare fraud under 18 U.S.C. § 1347 are (1) that the defendant knowingly and willfully executed a scheme or artifice (a) to defraud a health care benefit program as defined in 18 U.S.C. § 24(b) or (b) to obtain money or property owned by or under the custody and control of a health care benefit program by means of false or fraudulent pretenses, representations, or promises; (2) that the health care benefit program affected interstate commerce; (3) that the false pretenses, representations, or promised related to a material fact; (4) that the defendant acted willfully and with intent to defraud; and (5) that the defendant acted in connection with the delivery of payments for healthcare benefits, items or services.

U.S. v. Scott, No. 21-11467 (11th Cir. 1/20/23)

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, 285 F.3d 1345 (11th Cir. 2002)

Honest Services Fraud

Fraud & Theft: Honest Services Fraud – Private Individuals

Though concluding the statute could apply to private individuals that are "actual agents of the government," the court concluded the jury instruction that the statute applied to those private citizens that "dominated and controlled" government business and that those working in government "actually relied on" was too broad.

Percoco v. U.S., 143 S. Ct. 1130 (2023)

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. To implicate the statute, a public official must either engage or agree to engage in (1) a sufficiently serious act—casting a vote being the quintessential example—(2) concerning a sufficiently serious and concrete matter.

McDonnell v. U.S., Case No. 15-474 (S. Ct. 4/27/16); U.S. v. Burnette, No. 21-13990 (11th Cir. 4/11/21)

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); Percoco v. U.S., 143 S. Ct. 1130 (2023)

Fraud & Theft: Honest Services Fraud – Broad Statute

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: Honest Services Fraud - 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 a private sector defendant must contravene by inherently harming the purpose of parties' relationship.
U.S. v. Devegter, 198 F.3d 1324 (11th Cir. 1999)

Mail Fraud and Wire Fraud

Fraud & Theft: Mail & Wire Fraud – Language of Both Statutes Construed the Same

Ciminelli v. U.S., 143 S. Ct. 1121 (2023)

Fraud & Theft: Mail & Wire Fraud – Reaches Only Traditional Property Interests

The wire fraud statute reaches only traditional property interests. Here, it meant the statute did not reach a conviction based on the deprivation of the right to valuable economic information needed to make discretionary economic decisions.
Ciminelli v. U.S., 143 S. Ct. 1121 (2023)

Fraud & Theft: Mail & 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 what they paid for.
U.S. v. Takhalov, 827 F.3d 1307 (11th Cir. 2016)

Fraud & Theft: Mail & Wire Fraud - Use of Internet Doesn't by Itself Establish Nexus

Depends where the origin and host servers are located.
United States v. Biyiklioglu, No. 14-31003 (5th Cir. 6/15/16)

Fraud & Theft: Mail & Wire 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: Mail & 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: Mail & 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: Mail & Wire Fraud: Each Wire Transmission a Separate Offense
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Fraud & Theft: Mail & Wire Fraud - Each Letter a Separate Offense
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Fraud & Theft: Mail & Wire 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 says nothing about deceiving persons of ordinary prudence or comprehension.
U.S. v. Svete, Case No. 05-13809 (11th Cir. 3/26/08)
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 the 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: Mail & 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 it 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: Mail & 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: Mail & 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: Mail Fraud & Wire 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, 135 F.3d 1363 (11th Cir. 1998)
Fraud & Theft: Mail Fraud & Wire 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 claim the defendant would have reasonably known that it would be mailed from her place of work to the Dept. of Labor in another city.
U.S. v. Rhodes, No. 97-6853 (11th Cir 6/4/99)

Fraud & Theft: Mail Fraud & Wire 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 & Wire Fraud - Jury Instructions (Defining Related Offenses)

Before someone may be convicted of money laundering, the jury must find the laundered funds were proceeds of 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 & Wire Fraud - Sufficiency (Nature of Scheme)

To prove the crime of mail fraud the Government must establish the defendant intended to create a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension. It must show 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: Mail & 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 & Wire Fraud - Misrepresentation Must Be Material but Need Not Be Believable

A mail fraud conviction does require 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 & Wire 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 & Wire 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, 531 U.S. 12 (2000); U.S. v. Peter, Case No. 01-16982 (11th Cir. 10/28/02)

Fraud & Theft: Mail & Wire 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 & Wire Fraud - More Than Puffing and Failed Business Efforts
U.S. v. Majors, 169 F.3d 718 (11th Cir. 1999)

Miscellaneous

Fraud & Theft: Miscellaneous - 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: Miscellaneous - Puffing and Sellers Talk 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 - 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 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 Amount to a 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: 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., No. 92-2929 (11th Cir. 2/23/99)

Theft From U.S.

Fraud and Theft: Theft from U.S. - 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, NO. 00-15142 (11th Cir. 12/18/01)
Fraud: Theft from U.S. - 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 occurs more than six years from the date which the tax is due.
U.S. v. Hunerlach, 197 F.3d 1059 (11th Cir. 1999)
Fraud and Theft: Theft from U.S. - 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: Theft from the U.S. - 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: Theft from the U.S. - 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: Theft from the U.S. - 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 act to be criminal under Section 666. But there is no requirement it 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: Theft from the U.S. - Misapplication of Funds
The court vacated the 18 U.S.C. § 666 conviction of a director for the Hillsborough County Head Start Program, holding his judgment of acquittal should have 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: Theft from U.S. - 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 for her salary were not salary payments from the federal government to Brooks County.
U.S. v. Chafin, Case No. 14-10160 (11th Cir. 10/28/15)

Fraud & Theft: Theft from U.S. - 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: 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., 529 U.S. 667 (2000)

Fraud: Theft from U.S. - Bribery of Public Officials (Can Include Those Working for Private Organization)

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)

Unauthorized use of Access Devices

Fraud and Theft: 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: 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: 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)

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 witness' 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, from 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 the court has grave doubt the decision to indict was free from the substantial influence of the prosecutor's misconduct.
U.S. v. Cavallo, Case No. 12-15660 (11th Cir. 6/22/15)

GUIDELINES

Acquitted Conduct

Guidelines: Acquitted Conduct – Supreme Court Review Pending

McClinton v. U.S; Luczak v. U.S.; Shaw v. U.S.; Kar v. U.S.; Bullock v. U.S.
As of 1/19/23

Guidelines: Acquitted Conduct

Nothing prohibits the sentencing judge from considering acquitted conduct.
U.S. v. Faust, 456 F.3d 1342 (11th Cir. 2006)

Guidelines: Acquitted Conduct (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)

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 every 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, No. 01-10955 (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, No. 99-11570 (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, No. 99-11570 (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 additional 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, No. 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)

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 Affidavit)
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, No. 01-11398 (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, 277 F.3de 1311 (11th 2002)
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, No. 98-4023 (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, No. 98-3741 (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, 190 F.3d 1208 (11th Cir. 1999)
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, 183 F.3d 1315 (11th Cir. 1999)

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 of Organizers and Leaders)
U.S. v. Figueroa, 682 F.3d 694 (7th Cir. 2012)
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, No. 97-2873 (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, No. 98-5063(11th Cir. 8/29/00)
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. DeVaron, 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, 168 F.3d 1234 (11th Cir. 1999)

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, 168 F.3d 1234 (11th Cir. 1999)

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 states that the court may depart upward for one who manages the assets.
U.S. v. Harness, 180 F.3d 1232 (1999)

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, 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 3§A1.1(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, 287 F.3d 1053 (11th Cir. 2002)

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, 287 F.3d 1053 (11th Cir. 2002)

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 knowing cab drivers must respond to all dispatches and thus are particularly vulnerable to carjackings.

U.S. v. Frank, 247 F.3d 1257 (11th Cir. 2001)

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, 183 F.3d 1315 (11th Cir. 1999)

Appeals

Guidelines: Appeals – "Significant Procedural Error"

A trial court commits a significant procedural error if it calculates the guidelines incorrectly, fails to consider, the § 3553(a) factors, bases the sentence on clearly erroneous facts, or fails to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.

U.S. v. Steiger, No. 22-10742 (11th Cir. 10/3/23), opinion vacated. Ct granted request for en banc hearing (11/27/23)

Guidelines: Appeals – Standard of Review (Whether Court Stated A Specific Reason for a Sentence Outside the Guideline Range)
Even in the absence of an objection, the court reviews de novo whether the district court gave a specific reason for imposing a sentence outside the guideline range.
U.S. v. Steiger, No. 22-10742 (11th Cir. 10/3/23), opinion vacated. Ct granted request for en banc hearing (11/27/23)
Guidelines: Appeals – Preservation of Objections to Sentence
Judge Newsome argues objections to procedural error require a specific objection while a claim that the sentence is greater than necessary suffices for substantive error.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals - No Such Thing as Procedural Reasonableness
Despite decisions to the contrary, there are only two types of challenges to guideline sentencing decisions: (1) procedural *error* and (2) substantive reasonableness. There is no such thing as procedural reasonableness. The district court must determine whether a sentence is sufficient, but not greater than necessary. If the district court makes a procedural error then the resulting sentence no longer bears the reliability that would support a presumption of reasonableness on review.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals – Sorry State of Sentencing Caselaw
Judge Newsom refers to "the sorry state of our sentencing caselaw" in describing the record of inconsistent decisions regarding substantive versus procedural error and the rules for preserving objections.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals - Standard of Review for Error
The standard of review for preserved error is abuse of discretion. It is plain error for unpreserved error.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals - Inconsistent Standard Used to Determine if Defense has Preserved Sentencing Challenges
Based on existing precedent, a party can argue—and a panel might well conclude—pretty much whatever it wants concerning whether a sentence-related challenge was properly preserved for appellate review. There are conflicting opinions as to whether a general, blanket objective suffices to preserve a substantive-reasonableness objection. Same is true for a claim the sentence is procedurally unreasonable.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals - Harmless Error (Substantive v. Procedural Error)
A substantive error is harmless whenever the record as a whole shows the error did not substantially affect the sentence. The burden of showing it affected the sentence falls to the defendant. If the error is procedural, the burden of proving harmlessness falls to the government. It is a standard difficult to satisfy, and it requires more than uncertainty or ambiguity. It is as difficult as it is for a defendant to meet the third-prong prejudice standard for plain error-review. It requires the government to affirmatively show the error did not affect the sentence or had but very slight effect.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)
Guidelines: Appeals - Consideration of an Improper Factor

Consideration of an improper factor, placing undue emphasis on a single § 3553(a) factor, or failure to afford consideration to relevant factors are substantive error, though Judge Newsom contends it should be a procedural error.
U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)

Guidelines: Appeals - Objection for Substantively Unreasonable Sentence

A defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is greater than necessary has informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence.
U.S. v. Rodriguez, No. 20-12534 (11th Cir. 8/1/23)

Guidelines: Appeals – Court's Announcement It Would Have Imposed Same Sentence Anyway

Where the district states that it would have imposed the same 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); U.S. v. Keene, 470 F.3d 1347, 1349-50 (11th Cir. 2006)

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 by 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); U.S. v. Curtin, No. 22-10509 (11th Cir. 8/28/23) (Newsom, J. concurring)

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 the sentence in question.
U.S. v. Gonzalez, Case No. 08-10008 (12/12/08); United States v. King, No. 21-12963 (11th Cir. 1/23/23)
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, No. 98-6157, 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)
Guidelines: Appeals - Deference to Sentencing Decisions Made by Trial Court
U.S. v. Bruno, Case No. 12-15089 (11th Cir. 6/19/15)
Guidelines: Appeals - 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: 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: Appeals - 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: Appeals - 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, No. 00-14025 (11th Cir. 1/18/02); but see U.S. v. Washington, Case No. 11-14177 (11th Cir. 4/26/13)

Calculations

Guidelines: Calculations – Current Role of the Guidelines

U.S. v. Henry, No. 18-15251 (11th Cir. 6/21/21)

Guidelines: Calculations - 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: Calculations - 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 imposes appropriately different sentences for criminal conduct of different severity.
Molina-Martinez, Case No. 14-8913 (S. Ct. 1/12/16)

Guidelines: Calculations - 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 or underlying data, could not support the guideline calculations.
U.S. v. Rodriguez, Case No. 11-15911 (11th Cir. 10/16/13)

Guidelines: Calculations - 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: Calculations - 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, even 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: Calculations - 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: Calculations - 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: Calculations - 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: Calculations - 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: Calculations - 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: Calculations - Cross Referencing
The government, in this 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 Aaggravating non-monetary objective.
U.S. v. Genao, 343 F.3d 578 (2d Cir. 2003)
Guidelines: Calculations - 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: Calculations - 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, No. 01-10396 (11th Cir. 12/21/01), U.S. v. Webb, Case No. 10-14743 (11th Cir. 1/5/12)
Guidelines: Calculations - 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); U.S. v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995), U.S. v. Washington, 714 F.3d 1358 (11th Cir. 2012).

Guidelines: Calculations - Racketeering (Ambiguous Determination by Jury)

Where the jury in its verdict did not clearly spell out which predicate acts had been proven, the court, for sentencing purposes, should determine which acts were proven.
U.S. v. Digiorgio, 193 F.3d 1175 (11th Cir. 8/23/99)

Guidelines: Calculations - 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 a stipulation, and could not be used to justify the use of 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: Calculations - 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, No. 98-4741; 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: Calculations - 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: Calculations - Credit for Undischarged 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 defendant is not entitled to credit.
United States v. Henry, No. 18-15251 (11th Cir. August 7, 2021)

Career Offender

Calculations

Guidelines: Career Offender - Calculations (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 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: Career Offender - Calculations (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: Career Offender – Calculations (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: Career Offender – Calculations (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)

Miscellaneous

Guidelines: Career Offender - Miscellaneous (Inchoate Controlled Substance Offenses)
Though the commentary includes inchoate offenses, the guideline itself does not. As the commentary is inconsistent with the plain language of the guideline, the guideline is controlling, and inchoate controlled substance offenses don't qualify for career offender sentencing. Here, the court vacated the defendant's career offender sentence for conspiring to distribute heroin and cocaine.
U.S. v. Dupree, No. 19-13776 (11th Cir. 1/18/23) e*n banc*
Guidelines: Career Offender – Miscellaneous (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: Career Offender - Miscellaneous (Differences in Violent Crime Definition Between Career Offender Guideline and ACC)
The guidelines enhance 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, the general words should be limited to persons or things similar to those specifically enumerated. It 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 not 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: Career Offender - Miscellaneous (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: Career Offender - Miscellaneous (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: Career Offender - Miscellaneous (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 supersede 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: Career Offender - Miscellaneous (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)

Predicate Offenses

Guidelines: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (Fla. Battery By Strangulation)
Is a crime of violence.
U.S. v. Dixon, Case No. 17-10503 (11th Cir. 10/23/17)
Guidelines: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (Possession of a Sawed-Off Shotgun is a Crime of Violence)
Possession of an unregistered 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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses: 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: Career Offender - Predicate Offenses (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 is a crime of violence and holds that there 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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (Carrying a Concealed Firearm Not a Qualifying Offense)
U.S. v. Archer, Case No.07-11488 (11th Cir. 6/26/08)
Guidelines: - Predicate Offenses (Battery on 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 the 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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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: Career Offender - Predicate Offenses (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)

Proof of Prior Convictions

Guidelines: Career Offender - Proof of Prior Convictions (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 facts 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: Career Offender - Proof of Prior Convictions (NCIC Printout)
Government attempted to prove a prior conviction without judicial records, relying instead upon records from the Department of Corrections and the NCIC printout. While holding that the government did not necessarily have to rely on judicial records, the court held 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: Career Offender - Proof of Prior Convictions (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 agent 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 two-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: Career Offender - Proof of Prior Convictions (Facts Prior Offenses)
[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, 172 F.3d 775 (11th Cir. 1999)

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 Guidelines 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 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 statute 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 after 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 - 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 Guideline Commentary was controlling. Because there was commentary to the effect that foreseeability 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 foreseeability 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, No. 98-2010 (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

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 Adischarged 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)
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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)

Conspiracies

Guidelines: - Conspiracies (Scope of Agreement)

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 foreseeability. 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: Conspiracies - 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: Conspiracies - 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: Conspiracies - Dividing a Count into Separate Groups

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)

Criminal History

Guidelines: Criminal History - 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 - 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 - 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 - 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 - 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 scoresheet, 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 - 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 - 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 - 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 - 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 - 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 - 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 free man, 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. Buter, No. 98-5686 (11th Cir. 10/6/00)

Guidelines: Criminal History - 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 - Uncounseled Conviction
"This Court does not allow a defendant to collaterally attack the constitutionality of a conviction for the first time in 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, No. 98-2123 (11th Cir. 2/14/00)
Guidelines: Criminal History - 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, 186 F.3d 37 (1st Cir. 1999)
Guidelines: Criminal History - 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 - 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 - 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 - least 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)

CRITICISM

Guidelines: Criticism – Production of Child Pornography (USSG §2G2.1)
The guideline for production of child pornography is not the product of empirical research.
U.S. v. Huffstatler, 561 F.3d 694, 696 (7th Cir. 2009), vacated on other grounds at 571 F.3d 620 (7th Cir. 2009)
Guidelines: Criticism – Not All Guidelines are the Product of Empirical Evidence
Gall v. U.S., 552 U.S. 38, 46 (2007)
Guidelines: Criticism – Those Guidelines that are Not the Product of Empirical Evidence are Due Closer Review
Kimbrough v. U.S., 552 U.S. 85, 89 (2008); U.S. v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010)
Guidelines: Criticism – Not Appropriate to Defer to Guidelines in Some Cases
U.S. v. Lozano, 490 F.3d 1317 (11th Cir. 2007)
Guidelines: Criticism – Child Pornography (USSG §2G2.2)

The guideline applicable to child pornography offenses is "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."
U.S. v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010); U.S. v. R.V, 156 F.Supp.3d 207, 267 (E.D. N.Y. 2016); U.S. v. Childs, 976 F.Supp.2d 981 (S.D. Ohio 2013)

Guidelines: Criticism – Child Pornography (USSG §2G2.2) – Judge Rodgers Statement Before Sentencing Commission

"The cumulative effect over time from Congress' directives, direct amendments, and the enactment of mandatory minimum for receipt, coupled with the Commission's efforts to comply with those directives, has resulted in ever increasing sentences . . . that ferries the ordinary offender to the high end of the statutory sentencing range."
http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Rodgers.pdf, at 7

Guidelines: Criticism – Child Pornography (USSG §2G2.2) – Use of a Computer

Increasing the offense level for use of a computer is "like penalizing speeding, but then adding an extra penalty if a car is involved."
U.S. v. Kelly, 868 F.Supp.2d 1202, 1209 (D. N.M. 2012)

Guidelines: Criticism – Methamphetamine (Longer Sentences that Other Drug Offenses)

U.S. v. Nawana, 321 F.Supp.3d 943, 953 (N.D. Iowa 2018)

Guidelines: Criticism – Methamphetamine (Ice Guideline Does Not Comport with Reality)

The distinction between ice and a mixture of meth "does not comport with the reality of how methamphetamine is created, trafficked, and sold, and creates an arbitrary distinction between defendants that runs contrary to the § 3553(a) factors."
U.S. v. Rodriguez, 382 F.Supp.3d 892, 895 (D. Alaska 2019); U.S. v. Ibarra-Sandoval, 265 F.Supp.3d 1249, 1255 (N. N.M. 2017); U.S. v. Johnson, 379 F.Supp.3d 1213, 1224 (M.D. Ala. 2019); U.S. v. Bean, 371 F.Supp.3d 46, 51 (D. N.H. 2019); U.S. v. Pereda, No. 18-cr-228, 2019 WL 463027, *4 (D. Colo. Feb 6, 2019); U.S. v. Hoover, No. 4:17cr327, 2018 WL 5924500, *3 (D. Idaho Nov. 13, 2018); U.S. v. Ferguson, No. 17-204, 2018 WL 3682509, *4 (D. Minn. Aug. 2, 2018); U.S. v. Harry, 313 F.Supp.3d 969, 974 (N.D. Iowa 2018); U.S. v. Saldana, No. 2:117cr271-1, 2018 U.S. Dist LEXIS 110790, *12 (W.D. Mich. July 3, 2018); U.S. v. Carrillo, 440 F.Supp.3d 1148, 1154-55 (E.D. Cal. 2020)

Guidelines: Criticism - Career Offender

The career offender guideline "has the strong potential to lead to . . . unwarranted sentencing uniformity.
U.S. v. Newhouse, 919 F.Supp.2d 955, 977-978 (N.D. Iowa 2013); U.S. v. Dixon, No. 2:16cr16, 2016 WL 4492843, *3 (M.D. Ala. Aug. 5, 2016)

Guidelines: Criticism – Fraud Guideline

See Judge Underwood's concurring opinion in U.S. v. Corsey, 2013 WL 3796393 (2nd Cir. 7/24/13)

Guidelines: Criticism - Not Clear 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)

GROUPING

Guidelines: Grouping – Sexual Activity with Minor

Multiple acts 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 counts 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 a single 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 with an enhancement used for the obstruction of justice. In this case the court erred by imposing consecutive sentences.
U.S. v. Magluta, 198 F.3d 1265 (11th Cir. 1999); *opinion modified* 203 F.3d 1304 (11th Cir. 2000)
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 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, No. 99-13259 (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, No. 99-10037 (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, 195 F.3d 598 (11th Cir. 1999); U.S. v. Harper, 972 F.2d 321, 322 (11th Cir. 1995)

Interpretation (General Rules)

Guidelines: Interpretation – "Controlled Substance Offense"
In determining whether a conviction qualifies as a controlled substance offense, courts rely only on whether the offense violated state law at the time it was committed.
U.S. v. Dubois, No. 22-10829 (11th Cir. 3/5/24)
Guidelines: Interpretation – Ordinary Rules of Statutory Construction Apply
U.S. v. Dubois, No. 22-10829 (11th Cir. 3/5/24)
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, No. 97-8424 (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 is intentional 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, 366 F.3d 1178 (11th Cir. 2004)
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, 275 F.3d 1020 (11th Cir. 2001)

Guidelines: Interpretation – Text Trumps Commentary

U.S. v. Tejas, Case No. 16-16336 (11th Cir. 8/23/17)

Miscellaneous

Guidelines: Miscellaneous – Deference Due Commentary

Guidelines commentary is due the same level of deference given to an agency's interpretation of its own rules, deference first described in Bowles v. Seminole Rock & Sand Co.
U.S. v. Dupree, No. 19-13776 (11th Cir. 1/18/23) *En Banc*

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 as 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 - 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 - 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 - 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 - 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 in the fashioning of a just sentence.
U.S. v. Merritt, 988 F.2d 1298, 1307 (2d Cir. 1993)

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 - 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)

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, No. 00-12340 (11th Cir. 7/27/01)

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, No. 00-11123 (11th Cir. 7/11/01); U.S. v. Dupree, No. 19-13776 (11th Cir. 1/18/23) *En Banc*

Offense Conduct

Drugs & Narcotics

Calculations

Guidelines: Offense Conduct – Drugs & Narcotics (Calculations: Mixture)

"Mixture or Substance" does not include materials that must 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 (Calculations: 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 (Calculations: Value of Vehicle Represented Drug Proceeds)

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 (Calculations: Quantity of 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 (Calculations: 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 (Calculations: 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 (Calculations: 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 (Calculations: 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 (Calculations: Weight of Pills Includes Everything)

The court must use the total weight of the pills distributed by 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, No. 94-3139 (11th Cir. 6/25/99)

Guidelines: Offense Conduct - Drugs & Narcotics (Calculations: 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 (Calculations: 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 (Calculations: 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, No. 98-6749 (11th Cir. 9/29/00)

Connection to Firearms

Guidelines: Offense Conduct – Drugs & Narcotics (Connection to Firearms: 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, 872 F.3d 1197 (11th Cir. 2017)

Guidelines: Offense Conduct - Drugs & Narcotics (Connection to Firearms: 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 (Connection to Firearms: Enhancement for Co-Conspirator Possession)

For a §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 the conspiracy at the time of possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.

U.S. v. Gallo, 195 F.3d 1278 (11th Cir. 1999); 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 (Connection to 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, No. 97-2669 (11th Cir. 10/15/99); U.S. v. Hall, 46 F.3d 62, 63 (11th Cir. 1995)

Guidelines: Offense Conduct - Drugs & Narcotics (Connection to 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, No. 97-6903 (11th Cir. 4/20/99)

Methamphetamine

Guidelines: Offense Conduct - Drugs & Narcotics (Meth: 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: 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, 249 F.3d 1298 (11th Cir. 2001); [100% theoretical yield to the relevant precursor]

Guidelines: Offense Conduct - Drugs & Narcotics (Meth: Calculation of D-methamphetamine: Phenylacetic Acid)
Court upheld a conversion ratio of 1:1.
U.S. V. Ramsdale, 179 F.3d 1320 (11th Cir. 1999)

Miscellaneous

Guidelines: Offense Conduct – Drugs & Narcotics (Miscellaneous: Maintained 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 controlled substance.
U.S. v. George, 872 F.3d 1197 (11th Cir. 2017)

Guidelines: Offense Conduct - Drugs & Narcotics (Miscellaneous: - Reliance on Hearsay is OK)
U.S. v. Jackson, No. 98-6487 (10th Cir. 6/2/00)

Guidelines: Offense Conduct - Drugs & Narcotics (Miscellaneous: Deaths - Foreseeability)
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)

Escape

Guidelines: Offense Conduct – 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)
Guidelines: Offense Conduct - 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

Firearms

Controlled Substance Offense

Guidelines: Offense Conduct – Controlled Substance Offense (Georgia Marijuana Conviction)
Though at the time of the defendant's conviction, his 2013 Georgia conviction for possession to distribute marijuana as well as the federal definition of marijuana, included hemp, the offense still counted as a "controlled substance offense" for the purpose of increasing his base offense level from 14 to 20. The court held that state law at the time of conviction determined whether the offense qualified.
U.S. v. Dubois, No. 22-10829 (11th Cir. 3/5/24)

Crime of Violence

Guidelines: Offense Conduct – Firearm (Crime of Violence: Georgia Robbery)
Court concluded Georgia's robbery statute was divisible and one of the alternatives, robbery by intimidation, was a crime of violence.
U.S. v. Harrison, No. 21-14514 (11th Cir. 1/10/23)
Guidelines: Offense Conduct – Firearms (Crime of Violence: 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 (Crime of Violence: Statutory Rape)
U.S. v. Ivory, Case No. 06-10895 (11th Cir. 1/17/07)
Guidelines: Offense Conduct - Firearms (Crime of Violence: Possession of an Unregistered Firearm)
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 (Crime of Violence: Fleeing and Eluding)
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, No. 03-1855 (6th Cir. 7/29/04)
Guidelines: Offense Conduct - Firearms (Crime of Violence: Possession of a Machine Gun)
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 (Crime of Violence: Withhold of Adjudication)
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, No. 99-14955 (11th Cir. 12/11/2000)
Guidelines: Offense Conduct - Firearms (Crime of Violence: Post Commission of Offense 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, 167 F.3d 1364 (11th Cir. 1999)
Cross Reference
Guidelines: Offense Conduct - Firearms (Cross Reference: Any Firearm)
The cross-reference provision (§2K2.1(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 (Cross Reference: Different Gun)
Defendant was convicted of being a felon in possession of a firearm. There was evidence that, though 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), 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 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)
Firearms: Offense Conduct - Firearms (Cross Reference: Conviction Isn't Necessary)
Section 2X1.1, when cross-referenced 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)
"In Connection With"
Guidelines: Offense Conduct – Firearms ("In Connection With": 2006 Amendment)
In 2006, the Sentencing Commission amended the Commentary to 2K2.1, requiring the firearm facilitate the other offense and not be possessed coincidentally to the other offense. In doing so, it rejected the holdings in the cases of U.S. v. Rhind, 289 F.3d 690 (11th Cir. 2002); U.S. v. Matos-Rodriguez, 188 F.3d 1300 (11th Cir. 1999); and U.S. v. Young, 115 F.3d 834 (11th Cir. 1997).
U.S. v. Gibbs, 753 Fed. App'x 771, 774 n. 8 (11th Cir. 2018)
Guidelines: Offense Conduct – Firearms ("In Connection With": Proximity Assumption Rebuttable)

Court held the Commentary, supplementing the "in connection with" enhancement, that seemingly allows for the enhancement if the firearm is in "close proximity to drugs," is rebuttable. The judge authoring the concurring opinion contended the commentary conflicts with the language of the guideline and should be rejected under Auer.
United States v. Perez, 5 F.4th 390 (3d Cir. 2021)
Guidelines: Offense Conduct – Firearms ("In Connection With": 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 ("In Connection With": 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 ("In Connection With": 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, 1 F.4th 940 (11th Cir. 2021)
Guidelines: Offense Conduct – Firearms ("In Connection With": 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 ("In Connection With": Sale of Firearm Does Not Amount to 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 ("In Connection With": Coconspirator's Possession)
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 the defendant would foresee the firearm possession.
U.S. v. Fields, Case No. 04-12486 (11th Cir. 5/16/05)
Guidelines: Offense Conduct - Firearms ("In Connection With": 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 ("In Connection With": 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 ("In Connection With": 924(c) Conviction)
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 ("In Connection With: 924(c) Conviction)
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 ("In Connection With": Based on Assumption)
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 the defendant armed himself with a preconceived plan to use the gun, however, is a consideration.
U.S. v. Jackson, 276 F3d 1236 (11th Circuit 2001)
Guidelines: Offense Conduct - Firearms ("In Connection With": 924(c) and 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, 198 F.3d 1338 (11th Cir. 1999)
Guidelines: Offense Conduct - Firearms ("In Connection With": Theft of Firearms)
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)
Miscellaneous
Guidelines: Offense Conduct – Firearms (Miscellaneous: Possession of Stolen Firearms – Govt. Need Not Prove Defendant Knew the Firearm was Stolen)
Court rejected defense arguments that (1) due process required the government to prove the defendant knew the gun was stolen and (2) that application of the enhancement relied on Commentary which impermissibly expanded the application of the guideline beyond its plain meaning.
U.S. v. Dubois, No. 22-10829 (11th Cir. 3/5/24)
Guidelines: Offense Conduct - Firearms (Miscellaneous: Possession of Stolen Firearms)

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 (Miscellaneous: 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 in 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 F.3d 1181 (11th Cir. 1999)

Guidelines: Offense Conduct - Firearms (Miscellaneous: PSR Admission to Drug Use)

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 (Miscellaneous: Number of Firearms - Can Count Firearms That Did Not Travel in Interstate Commerce)

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 firearms 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)

Sporting Purposes

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 (Sporting Purposes: 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)

Trafficking

Guidelines: Offense Conduct - Firearms (Trafficking: Identity of Individual Receiving Firearm)

Though the Government failed to establish failed 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)

Fraud & Theft

Calculations

Guidelines: Offense Conduct - Fraud and Theft - (Calculations: Does 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 (Calculations: 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 (Calculations: Causing 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 (Offense Calculations: 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 (Calculations: Organized Scheme to Steal 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 (Calculations: 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 counterfeit.
U.S. v. Rodriguez-Cisneros, 916 F.Supp.2d 932 (D. Neb. 2013)

Guidelines: Offense Conduct - Fraud & Theft (Calculations: Number of Victims includes Unauthorized Recipients of Goods)
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 (Calculations: 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 (Calculations: 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 (Calculations: 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 opportunistic.
U.S. v. Crawford, Case No. 03-15136 (11th Cir. 5/2/05)
Guidelines: Offense Conduct - Fraud and Theft (Calculations: 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 (Calculations: 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 (Calculations: 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, 267 F.3d 1113 (11th Cir. 2001)
Guidelines: Offense Conduct - Fraud & Theft (Calculations: Disruption of Government Function)
Fifteen-million-dollar scheme involving Medicare benefits merited a four-level enhancement for disruption of a government function, USSG 5K2.7.
U.S. v. Regueiro, 240 F.3d 1321 (11th Cir. 2001)
Loss
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)
The defendant's sentence can only be enhanced by those reasonably foreseeable losses, caused by co-conspirators acting in furtherance of the part 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: 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 under - or overestimates the seriousness of the offense, then the court may grant an upward or downward departure as needed.
U. S. v. Campbell, No. 12-11952 (11th Cir. 9/3/14)
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 (Loss: Bribery)
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, the 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 (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 (Loss: Reasonable Estimate of 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 (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, and 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 (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 (Loss: Opportunity Cost)
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 & Theft (Loss: 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 (5th Cir. 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 (Loss: Greater of Intended or Actual)

It is the greater of either the actual loss or the intended loss.

U.S. v. Hedges, No. 97-4711 (11th Cir. 5/21/99); U.S. v. Grant, Case No. 04-12268 (11th Cir. 11/29/05)

Guidelines: Offense Conduct - Fraud & Theft (Loss: 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 (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, No. 98-4432 (11th Cir. 4/19/99)

Miscellaneous

Guidelines: Offense Conduct - Fraud & Theft (Miscellaneous - 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, 195 F.3d 598 (11th Cir. 1999); U.S. v. Harper, 972 F.2d 321, 322 (11th Cir. 1995)

Immigration Cases

Aggravated Felony

Guidelines: Offense Conduct - Immigration Cases (Aggravated Felony: Florida's Drug Statute)

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 (Aggravated Felony: 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 (Aggravated Felony: Offense Characteristics: 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, 216 F.3d 1019 (11th Cir. 2000)
Guidelines: Offense Conduct - Immigration (Aggravated Felony: 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, No. 99-11190 (11th Cir. 6/26/00)
Guidelines: Offense Conduct - Immigration (Aggravated Felony: 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)
Guidelines: Offense Conduct – 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)
Guidelines: Offense Conduct – 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)
Guidelines: Offense Conduct – Immigration (Aggravated Felony: Generic Aggravated Assault)
A generic aggravated assault amounts to a criminal assault accompanied by the 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)
Guidelines: Offense Conduct – 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)
Guidelines: Offense Conduct – Immigration (Aggravated Felony: Withhold of Adjudication Qualifies)
U.S. v. Anderson, 328 F.3d 1326 (11th Cir. 2003)
Guidelines: Offense Conduct – 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, 247 F.3d 1158 (11th Cir. 2001); U.S. v. Cortes-Salazar, Case No. 11-11428 (11th Cir. 5/30/12)

Guidelines: Offense Conduct - 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)

Guidelines: Offense Conduct – 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, No. 00-10899 (11th Cir. 1/22/01)

Guidelines: Offense Conduct - Immigration (Aggravated Felony: 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, No. 02-50211 (5th Cir. 2/18/03)

Crime of Violence

Guidelines: Offense Conduct – Immigration Cases (Crime of Violence: Fla. Felony Battery)

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 statute 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 (Crime of Violence: 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 (Crime of Violence: Fla. Offense of Throwing a Deadly Missile into Occupied Vehicle)

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); U.S. v. Estrada, Case No. 14-10230 (11th Cir. 2/6/15)

Guidelines: Offense Conduct - Immigration Cases (Crime of Violence: 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 (Crime of Violence: Aggravated Felony = ACCA Violent Felony)

Any crime that is an ACCA 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 (Crime of Violence: 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 (Crime of Violence: 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 (Crime of Violence: 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 (Crime of Violence: 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 - Immigration (Crime of Violence: California Residential Burglary)
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 (Crime of Violence: Battery on Pregnant Woman)
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 (Crimes of Violence: No Time Limit)
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 (Crimes of Violence: Statutory Rape a Crime of Violence)
U.S. v. Chavarriya-Mejia, Case No. 03-10753 (11th Cir. 4/29/04)
Offense Characteristics
Guidelines: Offense Conduct - Alien Smuggling (Offense Characteristics: 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 - Immigration (Offense Characteristics: 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. ½/08)
Guidelines: Offense Conduct – Immigration (Offense Characteristics: 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 (Offense Characteristics: 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 was consistent with personal consumption.
U.S. v. Aguilar-Ortiz, Case No. 05-12591 (11th Cir. 5/31/06)
Guidelines: Offense Conduct - Immigration (Offense Characteristics: Possession of Documents Relating to Naturalization)
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: Immigration - Enhancements Based on Prior Convictions (Offense Characteristics: 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)

Miscellaneous

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 (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 (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 (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 known 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 (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)
Guidelines: Offense Conduct – 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 false and where the correctly documented wildlife or plants were part and parcel of a charged conspiracy to illegally smuggle into the United States wildlife and plants protected by the Convention on International Trade in the Endangered Species Act.
U.S. v. Norris, Case No. 04-15487 (11th Cir. 6/23/06)

Money Laundering

Guidelines: Offense Conduct - Money Laundering (Loss: Appreciated Value)
Under §2S1.1, where one of the money laundering schemes was an investment in the stock of a privately-held company and its 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, No. 05-13422 (11th Cir. 3/15/06)
Money Laundering: Offense Conduct – 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, 292 F.3d 703 (11th Cir. 2002)

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 implicit 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); United States v. Ware, No. 21-10539 (11th Cir. 6/1/23)
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 known, 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)
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 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, 198 F.3d 1338 (11th Cir. 1999)
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 guard 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, 198 F.3d 1338 (11th Cir. 1999)
Guidelines: Offense Conduct - Robbery (Enhancement for Kidnaping)
Moving the victim 50 or 60 feet within a parking lot qualified under §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 §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)
Robbery: Offense Conduct - 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, 206 F.3d 1051 (11th Cir. 2000)
Robbery: Offense Conduct - 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: Offense Conduct - 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, No. 96-6133(11th Cir. 6/20/97)
Robbery: Offense Conduct – Enhancement for Abduction
Moving the victim 50 or 60 feet within a parking lot qualified for a four-level enhancement under §2B3.1(b)(4)(A)
U.S. v. Hawkins, 87 F.3d 722 (5th Cir. 1996)

Sex Offenses

Calculations

Guidelines: Offense Conduct – Sex Offenses (Minor in Custody or Control of Defendant)
Trial court properly applied the two-level enhancement in §2G1.3(b)(1)(B) for a minor being "in the custody, care, or supervisory control of the defendant" where the 41-year-old defendant was the pimp of his 17-year-old girlfriend who, at least temporarily, lived with him. There is conflict with a Ninth Circuit opinion.
U.S. v. Gatlin, No. 19-14969 (11th Cir. 1/5/24)

Guidelines: Offense Conduct – Sex Offenses (Calculations: Solicitation – Relevant Conduct)
In solicitation case, the trial court erred in counting the solicitation of a second child as relevant conduct. Section 1B1.3(a)(2) didn't apply because the offense of exploitation of minors is excluded from §3D1.2(d)'s multiple count grouping. Section 1B1.3(a)(1) didn't apply because it didn't occur during the solicitation of the first victim.
U.S. v. Schock, 862 F.3d 563 (6th Cir. 2017)
Guidelines: Offense Conduct – Sex Offenses (Calculations: 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 (Calculations: 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 (Calculations: 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 (Calculations: 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 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 (Calculations: 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 or 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 (Calculations: 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 (Calculations: 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 (Calculations: 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 now 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 (Calculations: 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). 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 (Calculations: Influencing a Minor to Engage in Sexual Act)
Where the defendant was communicating with a 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 (Calculations: 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 stating 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 (Calculations: Allowing Others to Access Child Porn Files Through Kazaa Is Distribution)
Defendant's 2-level increase in his offense level pursuant to §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 (Calculations: 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)
Guidelines: Offense Conduct - Sex Offenses (Calculations: 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 an 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 (Calculations: 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 (Calculations: 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 (Calculations: Sexual Abuse of Minor - 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 (Calculations: 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 victim, when he held the victim down by her arms and hair and pinned her beneath him during intercourse.
Us. v. Long Turkey, 342 F.3d 856 (8th Cir. 2003)
Guidelines: Offense Conduct - Sex Offenses (Calculations: Child Pornography - Sadistic)
Under 2G2.2(b)(3) a photograph qualifies as sadistic if it depicts a young child in 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 (Calculations: 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, No. 99-14561 (11th Cir. 7/20/2000)

Guidelines: Offense Conduct - Sex Offenses (Calculations: 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, 214 F.3d 1285 (11th Cir. 2000)**;** U.S. v. Bender, 290 F.3d 1279 (11th Cir. 2002)
Offense Conduct - Sex Offenses (Calculations: Cross Reference - 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-reference 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 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 rendezvous.
U.S. v. Bohannon, Case No. 05-16492 (11th Cir. 2/1/07))

Grouping

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, No. 99-13259 (11th Cir. 6/29/00)
Guidelines: Offense Conduct - Sex Offenses (Grouping: Depiction of Minors - Victims Are Those in Photo)
Defendant entered guilty pleas to three counts of transporting a depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1). He had, on three occasions, transmitted photos of minors engaged in sexually explicit to an undercover agent posing as a fourteen-year-old girl. 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 photos and upheld the trial court's decision to score each of the offenses separately.
U.S. v. Tillmon, No. 99-10037 (11th Cir. 11/10/99)
Guidelines: Offense Conduct - Sex Offenses (Grouping: Transporting a Minor for Sexual Activity – psychological force)
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)

Miscellaneous

Guidelines: Offense Conduct - Sex Offenses (Miscellaneous: Harm Caused to Victims)
Mozie v. U.S., Case No. 12-12538 (11th Cir. 5/22/14)
Guidelines: Offense Conduct - Sex Offenses (Miscellaneous: Sentencing Commission'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)

Pattern of Activity

Guidelines: Offense Conduct – Sex Offenses (Pattern of Activity - Can Include Instant Offense
U.S. v. Fox, 926 F.3d 1275 (11th Cir. 2019)

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 (Pattern of Activity: Not Limited to Relevant Conduct)
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 (Pattern of Activity: Undercover Agent)
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 (Pattern of Activity: 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)

Relevant Conduct

Guidelines: Relevant Conduct – Solicitation of Minor
In solicitation case, the trial court erred in counting the solicitation of a second child as relevant conduct. Section 1B1.3(a)(2) didn't apply because the offense of exploitation of minors is excluded from §3D1.2(d)'s multiple count grouping. Section 1B1.3(a)(1) didn't apply because it didn't occur during the solicitation 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. 12-14373, 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, courts 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 than 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 - 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 known, 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 led to his conviction.
U.S. v. Dunlap, No. 00-14025 (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, 179 F.3d 1320 (11th Cir. 1999); 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 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, No. 98-6749 (11th Cir. 9/29/00)

Guidelines: Relevant Conduct (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)

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 Criminal Act)

Amendment 706 lowered the penalties for crack cocaine. In those cases where the applicable offense level from the Armed Career Criminal Act was 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 - § 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., 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 court, 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)

Role of Guidelines

Guidelines: Role - 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., 550 U.S. 350 (2009)
Guidelines: Role - Guidelines are Starting Point but Only One Factor
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)
Guidelines: Role - 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)
Guidelines: Role – No Thumb on Scale for 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)
Guidelines: Role - Case-By-Case Determination of Weight to Give 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)

Guidelines: Role - 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.Supp.2d 961, 963 (D. Wis. 2006); contra: U.S. v. Hankton, Case No. 03-2345 (7th Cir. 9/7/06)

Guidelines: Role - Guidelines Range 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)

Guidelines: Role - Guidelines Are the 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); Molina-Martinez v. U.S., Case No. 14-8913 (S. Ct. 1/12/16)

Safety Valve

Guidelines: Safety Valve – Defendant Disqualified Only if All Three of Criminal History Provisions Apply

Assuming the defendant meets the provision's other requirements, he is disqualified only if all three of the criminal history subsections in 18 U.S.C. § 3553(f)(1) apply. There is a circuit split. U.S. v. Garcon, No. 19-14650 (11th Cir. 12/6/22), but the Supreme Court has granted certiorari review in Pulsifer v. U.S., No. 22-340.

Guidelines: Safety Valve - Applies to Only Five Offenses

21 U.S.C. §§841, 844, 846, 960, 963.
U.S. v. Pertuz-Pertuz, No. 10-15800 (11th Cir. 5/11/2012)

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 - 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, No. 98-2106 (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, that 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 requirement.
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 is 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 §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, 176 F.3d 1309 (11th Cir. 1999)
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 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).

Substantial Assistance (§5K1.1)

Guidelines: Substantial Assistance - Methodology
Because §5K1.1 is silent as to the methodology to be 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: 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: 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: Substantial Assistance - Must be Reasonable
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)
Guidelines: 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: 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); United States v. Head, No. 98-8491 (11th Cir. 6/25/99)
Guidelines: 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 (11th Cir. 5/23/00)
Guidelines: 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: 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, No. 98-4416 (4th Cir. 9/13/99)

Guidelines: 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: Substantial Assistance – Govt Decisions Not to File Motion Violated Due Process

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: Substantial Assistance – Court Review of Government Decision Not to File Motion

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: 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: Substantial Assistance – Defendant's Exercised Right to 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: Substantial Assistance – Government 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: 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: Substantial Assistance - 5K1.1 Up Until Sentencing; 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, No. 95-3269 (11th Cir. 6/20/97)
Guidelines: Substantial Assistance- Assistance to 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: 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, 160 F.3d 1309 (11th Cir. 1998)
Guidelines: 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)

Variance

Advanced Age

Guidelines: Variance – Advanced Age
U.S v. Phinney, 599 F.Supp.2d 1037, 1044 (E.D. Wisc. 2009); U.S. v. Lights, 2017 WL 4082311, *4 (S.D. N.Y. Sept. 14, 2017); U.S. v. Miller, 2014 WL 2207921, *3 (M.D. Tenn. May 27, 2014); U.S. v. Sanchez, 2012 WL 843548, *2 (D. N.M. Feb. 22, 2012)
Guidelines: Variance – Advanced Age (Reduced Risk of Recidivism Because of Defendant's Age)
U.S. v. Payton, Case No. 13-1242 (6th Cir. 6/12/14)
Guidelines: Variance – Advanced Age
Recidivism decreases with age
U.S. v. Early, Case No. 10-15537 (11th Cir. 7/11/12), n. 3 (Martin, J. concurring)

Career Offender

Guidelines: Variance – Career Offender

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)

Guidelines: Variance – Career Offender

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.
U.S. v. Williams, 435 F.3d 1350 (11th Cir. 2006)

Child Pornography

Guidelines: Variance – Child Pornography (Production)

U.S. v. Price, Case No. 12-1630 (7th Cir. 12/5/14)

Guidelines: Variance – Child Pornography

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)

Guidelines: Variance – Child Pornography

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)

Guidelines: Variance – Child 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 him 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)

Disadvantaged Background

Guidelines: Variance – Disadvantaged Background

"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."
California v. Brown, 479 U.S. 538, 545 (1987); Porter v. McCollum, 130 S. Ct. 447, 454 (2009)' Perry v. Lynaugh, 492 U.S. 302, 319 (1989); Landrigan v. Schriro, 441 F.3d 638, 648 (9th Cir. 2006)

Guidelines: Variance – Disadvantaged Background (Long Opinion That Discusses Everything)

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)

Guidelines: Variance - 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)
Guidelines: Variance – Disadvantaged Less Culpable
[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)

Disparity

Guidelines: Variance – Disparity (Between Codefendants)
May support a below guidelines sentence.
U.S. v. Castaing-Sosa, Case No. 07-15490 (11th Cir. 6/19/08)
Guidelines: Variance - Disparity (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)
Guidelines: Variance - Disparity (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
Guidelines: Variance – Disparity (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)
Guidelines: Variance – Disparity (District's 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 the national median for such offenses is acceptable, the goals of federal sentencing purportedly include imposition of sentences that are sufficient, but not greater 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.)
Guidelines: Variance – Disparity (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)
Guidelines: Variance – Disparity (3553(a) - Concerned Only with Unwarranted Disparities)
U.S. v. Owens, 464 F.3d 1252, 1256 (11th Cir. 2006)

Drug Addiction

Guidelines: Variance – Drug Addiction

U.S. v. Hendrickson, 25 F.Supp.3d 1166 (N.D. Iowa 2014); U.S. v. Mack, 331 F. App'x 157, 158 (3d Cir. 2009); U.S. v. Sanders, No. 09-1454, 2009 U.S. App. LEXIS 25672, *2 (7th Cir. No. 23, 2009)

Drug Courier

Guidelines: Variance – 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: AIf 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)

Family Circumstances

Guidelines: Variance – 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)

Guidelines: Variance – Family Circumstances (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)

Good Works

Guidelines: Variance – 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)

Intellectual Disability

Guidelines: Variance – Intellectual Disability

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)

Guidelines: Variance – Intellectual Disability

Intellectual disability is a condition, not a number.

Hall v. Florida, 572 U.S. 701 (2014)

Guidelines: Variance – Intellectual Disability

"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, 572 U.S. 701 (2014)

Guidelines: Variance – Intellectual Disability

Today our society views mentally retarded offenders as categorically less culpable than the average criminal.
Atkins v. Virginia, 536 U.S. 304, 316 (2002)

Justification

Guidelines: Variance – Court Must Give a Specific Reason

Section 3553(a) provides that if the district court imposes a sentence outside the guidelines range, it must state in open court the specific reason for imposing it. The other circuits apply a harmless error analysis in the absence of an objection, the 11th Circuit requires a remand in the absence of an objection.
U.S. v. Steiger, No. 22-10742 (11th Cir. 10/3/23)

Guidelines: Variance – Justification (Degree of the Variance)

The justification for variance must be sufficiently compelling to support the degree of the variance.
U.S. v. Irey, 612 F.3d 1160, 1187 (11th Cir. 2010)

Guidelines: Variance – Justification (Discretionary Call)

Whether the applicable § 3553(a) factors justify a variance is a discretionary call.
United States v. King, No. 21-12963 (11th Cir. 1/23/23)

Guidelines: Variance – Justification (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 judge's 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)

Guidelines: Variance – Justification (Factors That Could Not Justify a Departure May Justify a Variance)

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

Guidelines: Variance – Justification (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); U.S. v. Oudomsine, No. 22-10924 (11th Cir. 1/18/23)

Guidelines: Variance – Justification (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)

Lack of Criminal History

Guidelines: Variance – Lack of Criminal History

Lack of criminal history, though already taken into account, can justify a variance.
U.S. v. Chase, 560 F.3d 828 (8th Cir. 2009)

Guidelines: Variance - 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)

Loss Overstates Culpability

Guidelines: Variance - Loss Calculation Overstated Culpability
U.S. v. Prosperi, No. 10-1739 (1st Cir. 7/13/12)

Low Risk of Recidivism

Guidelines: Variance – 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)

Mental Illness

Guidelines: Variance – 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 departure.
United States v. Ferguson, Case No. 2:12cr187 -MHT, 2013 WL 627145 (M.D. Ala. Feb. 20, 2013).

Miscellaneous

Guidelines: Variance – Miscellaneous (Notice)
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: Variance – Miscellaneous (General Description of Variance Procedure
Peugh v. U.S., 569 U.S. 530 (2013)
Guidelines: Variance – 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 Aabsent 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)
Guidelines: Variance – Miscellaneous (Deterrence an Especially Important Consideration in White Collar Crime)
U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Guidelines: Variance – Miscellaneous (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)

Guidelines: Variance – Miscellaneous (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)
Guidelines: Variance – Miscellaneous (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)
Guidelines: Variance – 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 Deterrence 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)

Poor Health

Guidelines: Variance – Poor Health
U.S. v. Curry, No. 5:02-CR-50088, 2019 WL 6826528, *4 (W.D. La. Dec. 13, 2019); U.S. v. Martin, No. 1:05CR21, 2019 WL 4862055, *3 (N.D. W.Va. October 2, 2019); U.S. v. Troutman, No. CCB-04-144, 2020 WL 65084 (D. Md. Jan. 7, 2020)

Rehabilitation

Guidelines: Variance – 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.3d 1351 (11th Cir. 2011)
Guidelines: Variance – 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)

Synthetic Marijuana

Guidelines: Variance – Synthetic Marijuana
U.S. v. Hossain, 2016 WL 70583, *6 (S.D. Fla. 2016); U.S. v. Ritchie, U.S. Dist. LEXIS 26755, *8 (D. Nev. 2200); U.S. v. Ramos, 814 F.3d 910, 924 (8th Cir. 2018) (dissent); see also RPM sentencing memo in Northern District of Florida case U.S. v. Ricktavious Acey

Unreasonable Downward Variance

Guidelines: Variance – Unreasonable Downward Variance (Health Care Fraud)
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, 711 F.3d 1321 (11th Cir. 2013)
Guidelines: Variance – Unreasonable Downward Variance (Child Pornography)
In an ugly child abuse case, the Court of Appeals held that the downward variance from 30 years to 17 2 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)

Guidelines: Variance – Unreasonable Downward Variance (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)
Guidelines: Variance - Unreasonable Downward Variance (Probation in Child 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)
Guidelines: Variance – Unreasonable Downward Variance (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)
Guidelines: Variance – Unreasonable Downward Variance (Acquittal of Individual Most Responsible Wasn't a Legitimate Consideration)
U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Guidelines: Variance – Unreasonable Downward Variance (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)
Guidelines: Variance – Unreasonable Downward Variance (Bank Fraud)
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)

Upward

Guidelines: 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)
Guidelines: 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 facts, 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)
Guidelines: 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)
Guidelines: Variance - Upward (Production of False Identification Documents)
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)

Veterans

Guidelines: Variance - 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)

Youth

Guidelines: Variance – Youth (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)
Guidelines: Variances – Youth
See Miller v. Alabama, 567 U.S. 460 (2012)

GUILTY PLEAS

Colloquy

Guilty Plea: Colloquy - 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: Colloquy - 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 Rule 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: Colloquy - Adequacy (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, 208 F.3d 945 (11th Cir. 2000)
Guilty Plea: Adequacy of Colloquy Re: Nature of the Offense

See: U.S. v. Mosley, No. 96-9475 (11th Cir. 4/26/99); U.S. v. James, No. 97-9212 (11th Cir 4/27/00)

Knowingly

Guilty Plea: Knowingly - 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)

Miscellaneous

Guilty Plea: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous – 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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: Miscellaneous - 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 Plea: Miscellaneous - Jurisdiction (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)

Plea Agreement

Guilty Plea: Plea Agreement - Due Process Requires Govt. to Adhere to Promises
U.S. v. Al-Arian, Case No. 06-16008 (11th Cir. 1/25/08)

Guilty Plea: Plea Agreement - 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: Plea Agreement - 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: 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: Plea Agreement - 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); U.S. v. Malone, No. 20-12744 (11th Cir. 10/26/2)

Guilty Pleas: Plea Agreement – OK to Forego Appeal
U.S. v. Howle, 166 F.3d 1166 (11th Cir. 1999)
Guilty Plea: Plea Agreement - Not Final Until Court Reviews PSR
Under the sentencing guidelines a court's acceptance or rejection of a plea agreement is not final until after the court has had the opportunity to consider the presentence report.
U.S. v. Howle, 166 F.3d 1166 (11th Cir. 1999)

Waiver

Guilty Plea: Waiver - 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: Waiver - 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)

Withdrawal

Guilty Plea: Withdrawal – Presumption Statements Made During Plea Colloquy are True
There is a strong presumption that the statements made during the plea colloquy are true.
U.S. v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)
Guilty Plea: Withdrawal – Standard for Review (An Abuse of Discretion)
The denial of a motion to withdraw a guilty plea is an abuse of discretion only if the denial was arbitrary and unreasonable.
U.S. v. Izquierdo, 448 F.3d 1269, 1276 (11th Cir. 2006)
Guilty Plea: Withdrawal
Whether a guilty plea may be withdrawn is dependent 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, 275 F.3d 1320 (11th Cir. 2001); 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); U.S. v. Buckles, 843 F.2d 469, 472 (11th Cir. 1988) 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)