CFACDL Presentation

2016 – A Year in Review

11th Circuit Case Law Update

Outline[1]

RIGHT TO COUNSEL OF CHOICE

United States v. Jimenez-Antunez, 820 F.3d 1267 (11th Cir. 2016) – bad news for the 'real' lawyers – in an opinion written by (future Justice?) Wm Pryor, in a matter of first impression for the circuit, the D did not have to show good cause for dismissal of retained counsel.

STATUTE OF LIMITATIONS

United States v.Farias, 836 F.3d 1315 (11th Cir. 2016) - Superseding grand jury indictment for conspiracy charge, related back to original, timely indictment, for statute of limitations purposes, where superseding indictment narrowed, rather than broadened.

The filing of a timely indictment tolls the statute of limitations for a superseding or new indictment if the subsequent indictment does not broaden or substantially amend the original charges. To establish that the government's delay in bringing the indictment, which was statutorily timely, violated defendant's due process rights, defendant had to establish both that: (1) the delay actually prejudiced his defense, and (2) the delay resulted from a deliberate design by the government to gain a tactical advantage over him

SPEEDY TRIAL

United States v. Ammar, 842 F.3d 1203 (11th Cir. 2016) - District Court failed to make proper ends-of-justice findings to permit tolling of Speedy Trial Act clock during continuance of over one year between the indictment and trial date, warranting dismissal of indictment.

United States v. Hughes, 840 F.3d 1368 (11th Cir. 2016) - For motions that require hearings, excludable pretrial-motion delay under the Speedy Trial Act encompasses all time between the filing of the motion and the conclusion of the

[1] DISCLAIMER – The summaries contained herein are only meant for use by criminal defense attorneys. They should not be relied on as primary authority – read the case yourself. Also, there are some editorial comments in these summaries – the opinions are mine only and do not reflect the views of FACDL, CFACDL, the Federal Defender's Office or any other person / group.

hearing on that motion, whether or not a delay in holding that hearing is reasonably necessary. Government's oral motion for D's detention based on his violation of pre-trial conditions of release and D counsel's motion to continue the show cause hearing triggered excludable time.

IMPARTIAL JURY

United States v. Sammour, 816 F.3d 1328 (11th Cir. 2016): "This appeal requires us to review the convictions and sentence of Nael Sammour, who participated in a scheme to file fraudulent income tax returns with stolen identities. Sammour, an Arab Muslim, argues that he was denied a fair trial after a juror, at the start of deliberations, slipped a note to the clerk stating that she feared for her safety because "this reeks of al Qaeda." The juror expressed this fear even though Sammour was charged with identity theft; the case had nothing to do with terrorism or al Qaeda. Exercising its "broad discretion" in dealing with potential juror bias, …the district court questioned the juror outside the presence of the other jurors, dispelled her fears, and found she could be fair and impartial before returning her to the jury room. Sammour quibbles with the questions the district court asked and the credibility determination it made, but the district court is expert in these matters. It interacts with jurors every day (we never do), and it was present when the juror answered its questions (we were not). The district court did not abuse its discretion."

The juror had sent a handwritten note asking "Will we be offered the jury protection program?" and the Court concluded that she could be fair and impartial. Enough said.

MARITIME DRUG LAW ENFORCEMENT ACT

United States v. Iguaran, 821 F3.d 1335 (11th Cir. 2016): The Maritime Drug Law Enforcement Act makes it a crime to conspire to distribute a controlled substance while on board a vessel subject to the jurisdiction of the United States. The Act also states that jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense and that jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge. Based on that language, this Court has interpreted the 'on board a vessel subject to the jurisdiction of the United States' portion of the MDLEA as a congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement contained in 28 U.S.C. § 1332. Here, the district court did not expressly make any factual findings regarding its jurisdiction. Case remanded with opportunity for government to be afforded the opportunity to submit evidence to support its assertion that the vessel was subject to the jurisdiction of the United States.

United States v. Wilchcombe, 838 F.3d 1179 (11th Cir. 2016) – Defendants first argue that the MDLEA violates the Due Process Clause because it does not require

proof of a nexus between the United States and a defendant. Because we have previously rejected this argument, … they seek en banc review. We cannot reconsider this issue, nor do we support en banc review. The text of the MDLEA does not require a nexus between the defendants and the United States; it specifically provides that its prohibitions on drug trafficking are applicable even though the act is committed outside the territorial jurisdiction of the United States.

United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016) – Conviction under MDLEA does not violate due process. The MDLEA prohibits knowingly or intentionally possessing a controlled substance, with the intent to distribute, onboard any vessel subject to the jurisdiction of the United States. It was enacted under Congress's authority provided by the Felonies Clause to define and punish felonies committed on the high seas. Under the MDLEA, "a vessel without nationality" is "subject to the jurisdiction of the United States" and it defines a stateless vessel as including "a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed."

We have always upheld extraterritorial convictions under our drug trafficking laws as an exercise of power under the Felonies Clause. …. As we explained, a criminal act does not need a nexus to the United States in order to be criminalized under the MDLEA "because universal and protective principles support its extraterritorial reach." In other words, because the Felonies Clause empowers Congress to punish crimes committed on the high seas, and because "the trafficking of narcotics is condemned universally by law-abiding nations," we rejected the argument "that it is fundamentally unfair for Congress to provide for the punishment of persons apprehended with narcotics on the high seas." … The "Due Process Clause of the Fifth Amendment does not prohibit the trial and conviction of an alien captured on the high seas while drug trafficking." In our view, the MDLEA "provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas."

INCORRECT VERDICT FORM

United States v. Davis, 841 F.3d 1253 (11th Cir. 2016) - The defendants here were charged (and found guilty of several counts) in an eight-count superseding indictment. The verdict forms given to the jury mistakenly listed one count as "robbery" instead of "using a firearm during and in relation to [a robbery]." Everyone missed the error—the defendants and the government (who jointly submitted the verdict forms), the district court judge, and court personnel—and the error was later transposed onto the defendants' written judgments, where it was not discovered until over five months after the trial. When the district court learned of the error, it gave the parties notice and amended the judgments under Rule 36 of the Federal Rules of Criminal Procedure, which provides in full: "After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or

omission." The defendants argue on appeal that the amendment was improper and that the original (erroneous) judgments should be reinstated, consistent with what the jurors found.1 After close review and oral argument, we conclude that the district court properly amended the judgments and we affirm.

MOTION TO SUPPRESS

United States v. Pierre, 825 F.3d 1183 (11th Cir. 2016) - District court did not err in denying defendants' motion to suppress evidence of debit cards seized from vehicle after traffic stop in defendants' prosecution for various crimes arising out of scheme to establish a sham tax preparation business and file fraudulent tax returns, where probable cause existed for traffic stop due to darkened windows that officer knew from experience violated window-tint law, and passenger of vehicle gave consent to search vehicle.

United States v. Barron-Soto, 820 F.3d 409 (11th Cir. 2016) - If the government violates the Fourth Amendment in conducting an illegal search, the independent source doctrine allows admission of evidence discovered by means wholly independent of any constitutional violation. Court applies two-part analysis to determine whether evidence seized during the execution of a search warrant was discovered independent of the initial illegal entry, and is therefore admissible under independent source doctrine regardless of whether that entry violated the Fourth Amendment: the first step is to excise from the search warrant affidavit any information gained during the alleged illegal entry and determine whether the remaining information supports a finding of probable cause, and the second step is to determine whether the officer's decision to obtain a search warrant was prompted by what he observed during the illegal entry, which is a question of fact.

CONSTRUCTIVE AMENDMENT

United States v. Leon, 841 F.3d 1187 (11th Cir. 2016) - indictment that charged defendant, not with violating the antistructuring section of the currency transaction reporting statute, but with violating separate section of statute that prohibits anyone from attempting to prevent a financial institution from filing a required CTR, was not constructively amended by government's references to defendant's conduct as "structuring"

COMMENTING ON RIGHT TO REMAIN SILENT

United States v. Zitron, 810 F.3d 1253 (11th Cir. 2016): During cross-examination, the government's tax expert commented "if the cash didn't come from the other person's check, I would usually ask the question, well, where is this money coming from?" D objected this commented on his right to remain silent. The court

rejected this argument, finding that the question came during cross-examination and that it did not directly refer to the D's failing to testify.

GARRITY RIGHTS

United States v. Smith, 821 F.3d 1293 (11th Cir. 2016) - Under *Garrity v. New Jersey*, "a public employee may not be coerced into surrendering his Fifth Amendment privilege by threat of being fired or subjected to other sanctions."

"The main question we address today, one of first impression, is whether a state employee can, after he has been fired, waive his Garrity rights and allow his prior compelled and protected statements to be used by the federal government in a criminal investigation. Our answer is that Garrity rights may be waived in such circumstances, as long as the employee's waiver is voluntary, knowing, and intelligent. And because we conclude that D voluntarily, knowingly, and intelligently waived his Garrity rights when he spoke to agents of the Federal Bureau of Investigation following his termination by the Alabama Department of Corrections, we hold that the government did not violate the Fifth Amendment when it used his prior statements in a federal criminal investigation concerning the beating and death of an inmate."

LIMITATION OF CROSS-EXAMINATION OF COOPERATING WITNESSES

United States v. Rushin, 844 F.3d 933 (11th Cir. 2016) - We have previously explained that there are two requirements with regard to a defendant's confrontation clause rights: First, the jury, through the cross-examination that is permitted, must be exposed to facts sufficient for it to draw inferences relating to the reliability of that witness. And second, the cross-examination conducted by defense counsel must enable him to make a record from which he could argue why the witness might have been biased. United States v. Van Dorn, 925 F.2d 1331, 1335 (11th Cir. 1991). This is not unfettered however. There is "wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

We have not spoken on how limitations of the type in question here, prohibiting cross-examination on the potential sentences of cooperating witnesses, fits into the framework articulated in Van Dorn and Maxwell. However, other Circuits have done so. The First, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits have all held that limitations like the one in question here are acceptable. United States v. Luciano–Mosquera, 63 F.3d 1142, 1153 (1st Cir. 1995), amended (Sept. 28, 1995) (holding the Sixth Amendment does not require the "precise number of years" a cooperating witness may face), etc …

Upheld district court's decision to not allow defense counsel to review sentencing guidelines, discuss downward departures, etc.

SEARCH AND SEIZURE

United States v. Thomas, 818 F.3d 1230 (11th Cir. 2016): The Fourth Amendment guarantees people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Without a warrant, "a search is reasonable only if it falls within a specific exception to the warrant requirement." One exception is that a warrantless search is lawful when a person with actual or apparent authority voluntarily consents to law enforcement officers conducting a search. When two people share common authority over "premises or effects," the consent of one person "is valid as against the absent nonconsenting person with whom the authority is shared." The Supreme Court has explained that it is reasonable to recognize that any co-inhabitant can consent to a search of a jointly-controlled area because the co-inhabitants assume "the risk that one of their number might permit the common area to be searched." To determine whether a person has the authority to consent to a search of shared property, courts ask whether there is "mutual use of the property by persons generally having joint access or control for most purposes." Another formulation of this standard is whether the defendant has placed these items "in an area over which others do not share access and control." Wife had apparent authority to consent to search where (1) the computer was easily accessible and located in an unlocked room in the family's shared residence; (2) Wife had access to the computer and had used it that morning; and (3) Wife and Husband shared the password to access the computer.

RULE 404(B) EVIDENCE

United States vs. Green, 842 F.3d 1299 (11th Cir 2016) - We set out a three-part test for determining whether evidence of a prior bad act is admissible under Rule 404(b)… such evidence is admissible if: (1) the evidence is relevant to an issue other than a defendant's character, (2) there is sufficient proof to allow a jury to find that the defendant committed the act by a preponderance of the evidence, and (3) the evidence's probative value is not substantially outweighed by the risk of unfair prejudice under Rule 403. Defendant argues that because his 2006 Florida conviction for possession of ammunition by a convicted felon was entered based on a nolo plea, this conviction did not constitute proof sufficient to allow the jury to find it more likely than not that Defendant did, in fact, previously possess ammunition after having achieved felon status. To support his argument that a nolo conviction was not properly admissible to prove that he had actually possessed ammunition in the past, Defendant cited the district court to Federal Rules of Evidence 410 and 803(22)(A). After some discussion of prior unpublished opinions, the court held that "for purposes of Rule 404(b), Rule 803(22) precludes use of the 2006 nolo conviction here to prove that Defendant actually possessed ammunition in 2006. Instead, the Government should have introduced evidence proving that Defendant so possessed ammunition on the date in question."

United States v. Barron-Soto, 820 F.3d 409 (11th Cir. 2016) - The district court did not abuse its discretion by admitting evidence related to Hernandez's prior drug offense. Hernandez's not guilty pleas put his intent directly at issue, and prior drug offenses are highly probative of the crimes charged against Hernandez. Furthermore, Hernandez's contention that the prior drug offense (which occurred 7 years ago) was unduly prejudicial because of factual dissimilarities—drugs transported for a third party, a smaller amount and different type of drugs, and a different method of concealment—is unavailing. So Hernandez has not shown that the court abused its discretion admitting evidence of his prior charge or determining that the probative value of the evidence outweighed the risk of undue prejudice.

CIVIL WRIT OF BODILY ATTACHMENT = WARRANT

United States v. Phillips, 834 F.3d 1176 (11th Cir. 2016) - Civil writ of bodily attachment for unpaid child support issued under Florida law was a warrant within the meaning of the Fourth Amendment, and therefore, arrest on valid writ was per se reasonable; writ was only issued after defendant was found liable for civil contempt by a preponderance of the evidence, which was a higher standard than probable cause, writ was similar to bench warrants, which satisfied Fourth Amendment, and civil warrants were common historically.

SUFFICIENCY OF EVIDENCE

United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016) - Evidence would support defendant's conviction for attempting to persuade, induce, entice, or coerce a minor into engaging in prostitution or unlawful sex arising from his interactions with fictitious 15-year old girl created by police as part of sting operation; evidence indicated that defendant initiated contact with girl after seeing her online ad and offered to pay a sum of money to induce her to agree to have sex with him, defendant did not merely passively accept an offer posed by girl, as he engaged in active negotiations on price and particular sexual activities, and paying money for sex could constitute inducement even with a prostitute holding herself out for sex.

United States v. Green, 818 F.3d 1258 (11th Cir. 2016) - Evidence established that pharmacy's owner and manager knew that they were dispensing and distributing controlled substances in large quantities to a customer base that included numerous drug dealers and consumers who used these drugs illegally, which would sustain defendants' convictions for conspiracy to distribute controlled substances; as for conspiring with others, several drug dealers testified that they used the pharmacy to fill their fake patients' bogus prescriptions, and that defendants frequently served them, the jury also heard from prescribing doctors and managers of clinics, who were the players responsible for churning out the prescriptions that

fueled the underground market, and there was also plenty of evidence showing that defendants conspired with each other to distribute controlled substances, knowing that many of their customers were drug dealers or illicit users of drugs.

United States v. Gonzalez, 834 F.3d 1206 (11th Cir. 2016) - Evidence would prove that defendant, who purportedly worked as nurse at clinic that treated HIV patients, was knowing and voluntary participant in conspiracies at clinic to defraud Medicare program, as required to support convictions for conspiracy to defraud United States and conspiracy to commit health care fraud by presenting false claims to Department of Health and Human Services for HIV infusion therapy medications and by paying kickbacks to Medicare patients; testimony and other evidence showed that defendant had repeatedly and over period of five months paid between $150 and $250 in cash to patients who came to clinic to receive treatments that would be reimbursed by Medicare, that defendant advised clinic operator how much cash she would need on hand each day to make such payments, that defendant knew exactly what to do from moment she first arrived at clinic, that defendant made cash payments to patients behind closed doors that were locked that treatments supposedly provided at clinic and billed to Medicare were not medically necessary, and that patients never stayed in infusion room for longer than 30 minutes, but that defendant filled out and signed billing paperwork indicated that she provided treatment for longer periods.

United States v. Campo, 840 F.3d 1249 (11th Cir. 2016) - "We review de novo whether there is sufficient evidence to support a jury's verdict in a criminal trial." In performing this review, we view the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility determinations in favor of the jury's verdict. Evidence is sufficient to support a conviction if a reasonable jury could find that the evidence established guilt beyond a reasonable doubt. We will not vacate a conviction on sufficiency of the evidence grounds when a defendant does nothing more than "put forth a reasonable hypothesis of innocence," because "the issue is not whether a jury reasonably could have acquitted but whether it reasonably could have found guilt beyond a reasonable doubt."

JURY INSTRUCTIONS / WIRE FRAUD

United States v. Takhalov, 827 F.3d 1307 (11th Cir. 2016) - The law in the Eleventh Circuit makes clear that a defendant "schemes to defraud" only if he schemes to "deprive someone of something of value by trick, deceit, chicane, or overreaching." But if a defendant does not intend to harm the victim—"to obtain, by deceptive means, something to which [the defendant] is not entitled"—then he has not intended to defraud the victim. From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not "schemed to defraud" so long as he does not intend to harm the person he intends to trick. And this is so

even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.

JURY INSTRUCTIONS / MEDICARE FRAUD

United States v. Clay, 832 F.3d 1259 (11th Cir. 2016) - In a health care fraud case such as this, "the defendant must be shown to have known that the claims submitted were, in fact, false." Although the government must prove the defendant's knowledge of falsity, a defendant's knowledge can be proven in more than one way. Here, the district court properly instructed the jury that a "statement or representation is false or fraudulent if it is about a material fact that the speaker knows is untrue or makes with deliberate indifference as to the truth and makes with intent to defraud." Representations made with deliberate indifference to the truth and with intent to defraud adequately satisfy the knowledge requirement in § 1347 cases.

United States v. Gonzalez, 834 F.3d 1206 (11th Cir. 2016) - Jury instructions defining charges against defendant for conspiracy to defraud United States and conspiracy to commit health care fraud, for defendant's participation in conspiracy at health care clinic involving presentation of false claims to Department of Health and Human Services seeking Medicare reimbursement for HIV infusion therapy medications and paying kickbacks to Medicare patients to induce them to receive such treatments at clinic, did not affect defendant's substantial rights under due process clause by conflating two conspiracy offenses or indicating that guilty verdict on one count necessarily controlled verdict on other, as required to establish plain error; instructions pointed out that two counts were separate conspiracies, and identified unique elements required by each count, and even if the instructions were erroneous, there was no showing that had instructions been more clear that defendant would not have been convicted of both conspiracies, given ample evidence to support both convictions.

ADMISSION OF TESTIMONY (SWAT OFFICER)

United States v Pierre, 825 F.3d 1183 (11th Cir. 2016) - District court did not commit plain error in permitting government to present testimony of SWAT team member involved in execution of search warrant of defendant's residence, in defendant's prosecution for various crimes arising out of scheme to establish sham tax preparation business and file fraudulent tax returns, despite defendant's argument that testimony inferred that defendant was a violent person, where testimony regarding the operation employed, the SWAT team members' locations on perimeter of residence, equipment they possessed, and removal of residents was relevant to events surrounding the search, and SWAT member testified on cross-examination that no force was necessary during execution of warrant and that defendant was not even present at time.

Sex Trafficking

United States v. Baston, 818 F.3d 651 (11th Cir. 2016): International man of mystery: Exercise of extraterritorial jurisdiction over non-citizen defendant's sex trafficking by force, fraud, or coercion in Australia was neither arbitrary nor fundamentally unfair, and thus satisfied due process; defendant used United States as home base and took advantage of its laws, as he portrayed himself as United States citizen, he resided in Florida, where he rented property, started businesses, and opened bank accounts, he was present at his mother's home in New York when arrested, he used Florida driver's license and United States passport to facilitate his criminal activities, he trafficked victim in both United States and Australia, and when he trafficked her in Australia, he wired proceeds back to Miami.

PRODUCTION OF CHILD PORNOGRAPHY

United States v. Miller, 819 F.3d 1314 (11th Cir. 2016) – D (with a prior sex battery conviction) engaged in an ongoing sexual relationship with a minor. He took explicit photographs of her on several occasions, and he asked her to send him explicit photographs of herself. That led to his being charged with, and a jury finding him guilty of, three counts of producing child pornography, and of one count of committing those crimes while under obligation to register as a sex offender, in violation of 18 U.S.C. § 2260A. The district court sentenced him to 420 months imprisonment. Relying on *Lockhart v. US*, the 2016 Supreme Court case, the court held that D's prior conviction for Florida sexual battery (FS 794.011(5)) qualified as a predicate offense warranting a 25 year minimum mandatory.

United States v. Holmes, 814 F.3d 1246 (11th Cir 2016): D set up a video camera in his teenaged stepdaughter's bathroom to capture her daily routine without her knowledge. Charged w/ using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct and attempting to employ the minor for the same purpose. D argued that the minor had not engaged in any sexual explicit conduct, but rather was doing her normal everyday conduct, and that mere nudity did not equate to 'lascivious display …" . Court rejected the argument, finding that "depictions of otherwise innocent conduct may in fact constitute a "lascivious exhibition of the genitals or pubic area" of a minor based on the actions of the individual creating the depiction." Looked to the intent of the producer or editor of the image. Holding: "a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently. Viewing the evidence in the light most favorable to the government, a reasonable jury could have found that Holmes's conduct—including placement of the cameras in the bathroom where his stepdaughter was most likely to be videoed while nude, his

extensive focus on videoing and capturing images of her pubic area, the angle of the camera set up, and his editing of the videos at issue—was sufficient to create a lascivious exhibition of the genitals or pubic area." (Aside: sentenced to 15 years).

FELON IN POSSESSION OF A FIREARM

United States v. Clarke, 822 F.3d 1213 (11th Cir. 2016) – the Eleventh Circuit certified a question to the Florida Supreme Court; "A guilty plea for which adjudication was withheld does not qualify as a conviction."

United States v. Adams, 815 F.3d 1291, 1292-93 (11th Cir. 2016): After *Johnson II*, Adams's convictions for fleeing or attempting to elude, under Fla. Stat. § 316.1935, can serve as predicate offenses only if they qualify as violent felonies under a different ACCA provision. But Fla. Stat. § 316.1935(1) and (2) do not have "as an element the use, attempted use, or threatened use of physical force against the person of another," are not "burglary, arson, or extortion," and do not involve the "use of explosives." And the government concedes that after *Johnson*, Adams's convictions for fleeing or attempting to elude, under Fla. Stat. § 316.1935, are no longer ACCA-qualifying offenses and cannot form the basis for a sentencing enhancement under the ACCA. We agree."

United States v. Lockett, 810 F.3d 1262 (11th Cir. 2016) – South Carolina burglary statute was broader than generic burglary and did not qualify under the ACCA's enumerated offenses; SC burglary statue was not divisible, and sentencing court could not use the modified categorical approach to determine whether the defendant was convicted of generic burglary under SC's burglary statute.

United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016) - Georgia's burglary statute, which encompassed entry into the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another, set out alternative locational elements of the crime of burglary, and the statute was divisible, warranting application of modified categorical approach to determining whether defendant's prior Georgia burglary convictions qualified as predicate violent felony offenses for 15-year mandatory minimum sentence under Armed Career Criminal Act (ACCA)

United States v. McCloud, 818 F.3d 591 (11th Cir. 2016): Reminder: Object to PSR – "We have long held that challenges to the facts contained in the PSI must be asserted with specificity and clarity." For a defendant to receive the 15–year minimum sentence under ACCA, the Government must prove by a preponderance of the evidence, using "reliable and specific evidence," that the defendant's prior convictions each "arose out of a separate and distinct criminal episode," To qualify as separate under the ACCA, the predicate crimes must be "successive rather than simultaneous"—in other words, "temporally distinct." A crime is "successive" when

the defendant had "a meaningful opportunity to desist ... activity before committing the second offense" and "the crimes reflect distinct aggressions." The government must rely only on the Shepard-documents (readily ascertainable court documents). Here, the documents from the underlying predicate offense were not sufficiently clear to prove that the offense were separate. Therefore 15 year sentence reversed and remanded for new sentencing.

United States v. Esprit, 841 F.3d 1235 (11th Cir. 2016) - Florida burglary statute under which defendant was previously convicted created a single indivisible crime, which included non-generic burglary, so categorical approach applied, and no conviction under this Florida statute could serve as ACCA predicate offense, at least not under the ACCA's enumerated offense clause.

United States vs. Green, 842 F.3d 1299 (11th Cir 2016 – Florida battery conviction could still be a predicate for ACCA by applying the modified categorical approach. The court held that Fla battery conviction under 784.041 (causing great bodily injury) is divisible and the modified categorical approach could be used. (Keep objecting – the court had decided otherwise in Vail-Bailon. However, that case has been withdrawn pending rehearing en banc.)

United State v. Fritts, 841 F.3d 937 (11th Cir. 2016) - defendant's prior Florida state court conviction of armed robbery categorically qualified as prior conviction for "violent felony" under the "elements" clause of the Armed Career Criminal Act (ACCA), and with defendant's other prior violent felony or narcotics convictions, subjected him to mandatory minimum sentence of 15 years.

United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016) – Florida conviction for armed robbery convictions under FS 812.13 qualify as violent felonies under the ACCA.

United States v. White, 837 F.3d 1225 (11th Cir. 2016) - defendant's prior conviction under Alabama statute criminalizing possession of marijuana for "other than personal use" qualified as serious drug offense under ACCA, and defendant's prior conviction under Alabama statute criminalizing cocaine trafficking qualified as serious drug offense under ACCA.

FLORIDA BURGLARY – NOT "BURGLARY OF A DWELLING" UNDER 2L1.2

United States v. Garcia-Martinez, 845 F.3d 1126 (11th Cir. 2017) - we come to the same conclusion it did: Florida's inclusion of curtilage in its definition of dwelling makes its burglary of a dwelling offense non-generic. It is also a non-divisible statute and the district court erred in determining that the conviction should warrant an increased offense level. (Aside: The sentencing Guidelines for illegal reentry were amended significantly in November 2016, eliminating burglary as a predicate and

instead using the length of prior sentences as the primary determination for specific offense characteristics.)

USSG §2K2.1, ENHANCEMENT FOR OBLITERATED SERIAL NUMBER

United States v. Warren, 820 F.3d 406, 408 (11th Cir 2016): D charged with possession of a firearm while under indictment. The gun had its serial number imprinted at two locations, on the frame and on its slide. Although the serial number of the frame was intact, the serial number of the slide had been altered or obliterated.

Holding: One obliterated SN is good enough for the guidelines: "The guidelines require only that the firearm in question "had *an* altered or obliterated serial number." As the First Circuit has recently explained, that language "does not require that all of the gun's serial numbers be so affected." We have said in other contexts that "[i]n common terms, when 'a' or 'an' is followed by a restrictive clause or modifier, this typically signals that the article is being used as a synonym for either 'any' or 'one.' " United States v. Alabama, 778 F.3d 926, 932 (11th Cir.2015). For example, if a speaker says, "Give me an apple," most reasonable listeners would interpret that as, "Give me any apple," or, "Give me just one apple." Read in that fashion, the § 2K2.1(b)(4)(B) enhancement applies either when any serial number on a gun has been altered or obliterated or when just one serial number has been altered or obliterated. Warren loses under either reading because one serial number on his gun was altered or obliterated. The enhancement applies in this case."

2B1.1 ENHANCEMENT – PRODUCTION OF UNAUTHORIZED ACCESS DEVICES

United States v. Taylor, 818 F.3d 671 (11th Cir. 2016) - Production of unauthorized access device/means of identification was separate and distinguishable from mere transfer, possession, or use of such device, and imposition of two-level enhancement for production of unauthorized access devices was not prohibited in defendant's prosecution for trafficking in unauthorized access devices due to fact that he was also convicted of aggravated identity theft, so long as enhancement was premised on defendant's production of unauthorized access device and government sufficiently showed that defendant engaged in such conduct.

TAX LOSS CALCULATION

United States v. Cobb, 842 F.3d 1213 (11th Cir. 2016) - The district court is only required to make a reasonable estimate of the loss, and we defer appropriately to its determination. To make the loss determination, the district court may use evidence from trial, undisputed PSR facts, and evidence from the sentencing hearing. Although reasonable estimates are permissible, speculation is not. The Government must establish the facts by a preponderance of the evidence and support the loss calculation with reliable and specific evidence.

USSG – VULNERABLE VICTIM

United States v. Birge, 830 F.3d 1229 (11th Cir. 2016) - Defendant, who wrote herself checks drawn from conservatorship accounts belonging to minors, incapacitated adults, and estates, knew or should have known that victims of her mail fraud offense were vulnerable, as required to apply Sentencing Guidelines enhancement for vulnerable victim, where defendant was chief clerk of probate court in Georgia, and Georgia law provided that conservators were appointed to protect assets of those who lacked capacity to do so themselves.

851 ENHANCEMENT

United States v. DiFalco, 837 F.3d 1207 (11th Cir. 2016) - statutory procedures with which government had to comply in order to seek enhanced penalties were not jurisdictional; defendant knowingly and voluntarily waived his right to challenge government's failure to comply with statute requiring it to file proper information to support his enhanced sentence; information filed by government provided defendant with sufficient notice of its intent to seek enhancement; information was filed in timely manner; and magistrate judge adequately informed defendant during plea colloquy that his prior conviction subjected him to enhanced mandatory minimum sentence.

GROUPING

United States v. Doxie, 813 F.3d 1340 (11th Cir 2016): We conclude that the district court did not err in refusing to group Doxie's tax offense counts with his wire and mail fraud counts under either (c) or (d) of § 3D1.2. We note that the majority of circuits to address this issue have concluded that fraud counts and tax offense counts involving the proceeds of the fraud should not be group together under subsection (c) or (d) of § 3D1.2. [1st Cir., 3rd Cir., 6th, Cir, 7th Cir., 8th Cir., 10th Cir.] We agree with the majority of circuits.

924(C)

United States v. Bowers, 811 F.3d 412 (11th Cir. 2016): D appealed a sentence of 182 years on 8 robbery / firearms charges. To determine whether a particular non-capital sentence violates the Eighth Amendment, a reviewing court must make a threshold determination that the sentence imposed is grossly disproportionate to the offense committed and, if it is grossly disproportionate, the court must then consider the sentences imposed on others convicted in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions. … With that framework in mind, the threshold question then is whether Bowers's 182–year sentence is "grossly disproportionate" to the offenses committed, namely brandishing a firearm during eight robberies. Supreme Court and Eleventh Circuit precedent

have set a high bar for a sentence to be "grossly disproportionate." No 8th Amendment violation.

LIFETIME SR OK FOR FAILURE TO REGISTER AS A SEX OFFENDER

United States v. Trailer, 827 F.3d 933 (11th Cir. 2016) – imposition of a lifetime term of supervised release on D convicted of failure to register was substantively reasonable. (Aside: the court noted that the D is not without recourse since he can apply for an early termination of the SR and that he can appeal the denial of such a motion.)

VOSR SENTENCING

United States v. Parks, 823 F.3d 990 (11th Cir. 2016) – The court held that §3553(c) requires that the sentencing judge announce in open court the reasons for imposing sentence and the reasons for a variance even in a VOSR sentence. Here, the court held that the sentencing judge's explanation for a statutory maximum sentence was insufficient, remanded for resentencing.

BREACH OF PLEA AGREEMENT

United States v. Hunter, 835 F.3d 1320 (11th Cir. 2016) - Government breached provision of plea agreement, which required it to recommend a two-level sentencing reduction for acceptance of responsibility in exchange for defendant's plea of guilty to four charges; the government induced the defendant to plead guilty to all charges against him based, in part, on promise that the government would recommend the reduction on his behalf, but, at sentencing, the government not only failed to recommend the reduction, but also objected to it and argued against defendant receiving the reduction based on its belief that defendant had committed perjury during earlier hearing on his motion to suppress, which was a fact that the government knew prior to offering the plea deal, given district court's explicit finding at suppression hearing that defendant's testimony was not credible. Remanded for resentencing before a different district court judge.

REASONABLENESS OF SENTENCES UPHELD

United States v. Croteau, 819 F.3d 1293 (11th Cir. 2016) - The weight given to any specific § 3553(a) factor is committed to the sound discretion of the district court. The district court has considerable discretion in deciding whether the § 3553(a) factors justify a variance and the extent of such a variance. We will not remand for resentencing unless we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

We do not presume that a sentence falling within the guidelines range is reasonable, but we ordinarily expect it to be so. A sentence imposed well below the statutory maximum penalty is another indicator of reasonableness.

United States v. Osorio-Moreno, 814 F.3d 1282 (11th Cir. 2016) – First sentence: "This appeal requires us to decide whether a sentence above the guideline range for an offender with 20 prior convictions—ranging from drug trafficking to offenses related to firearms and prostitution to violent crimes against women and police officers—is substantively reasonable." D charged with illegal reentry and the court found guidelines range of 51 to 63 months. Court imposed statutory maximum 120 months. Upheld: "Osorio has engaged in a life of crime, with a staggering 20 convictions, and the district court reasonably concluded that Osorio's guideline range understated his criminal history. Osorio's repeated acts of violence against women and law-enforcement officers and his return trips to jail also support the conclusion that a lengthy sentence was necessary to promote deterrence and respect for the law. In the light of Osorio's extensive criminal history, his sentence is substantively reasonable."

United States v. Nagel, 835 F.3d 1371 (11th Cir. 2016) - Nagel appealed his 292-month sentence, imposed after he pleaded guilty to three counts of enticement of a minor to engage in sexual activity under 18 U.S.C. § 2422(b). On appeal, Nagel challenged the procedural and substantive reasonableness of his sentence. The Eleventh Circuit held, however, that Nagel's sentence was both procedurally and substantively sound. First, it held that the district court's decision not to group Count One and Count Two of Nagel's convictions was under § 3D1.2 of the United States Sentencing Guidelines (the Guidelines) because the conduct underlying each count caused a separate and distinct harm to the victim. Next, it held that the district court explained the within-guideline sentence it imposed. And finally, it held that the district court acted within its discretion by selecting a substantively reasonable sentence and did not, as Nagel argued, impose a sentence greater than necessary to comply with the statutory goals of sentencing. So the Eleventh Circuit affirmed the district court.

SENTENCE REVERSED AS UNREASONABLE

United States v. Plate, 839 F.3d 950 (11th Cir. 2016), District court, at sentencing, announced "The Court would be glad under this case to give you probation if you had paid back the restitution; but with all this restitution still outstanding, the Court just can't do it. …. What the Court will do is if you, your friends and supporters step up and pay your restitution, I will immediately convert your prison term to probation."

Plate first argues that the district court violated her constitutional rights by conditioning her liberty on her ability to pay restitution in full. Supreme Court precedent supports her claim. The Supreme Court held that it violates equal

protection principles to incarcerate a person "solely because he lacked the resources to pay" a fine or restitution. It is apparent that Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional, as multiple courts have held. Reversed and remanded for resentencing before a different district court judge.

RE-SENTENCING AFTER GUIDELINES AMENDMENT

United States v. Marroquin-Medina, 817 F.3d 1285 (11th Cir. 2016) - Where defendant was previously granted a sentencing departure for providing substantial assistance to government and sought reduction under a statute permitting modification of sentence where sentence was based on a range that was subsequently lowered through amendment, district court could grant a comparable substantial assistance reduction by applying a percentage-based approach, but did not have to do so; guidelines did not require court to employ any particular methodology, and guidelines application note provided example using percentage-based approach, but did not state that such an approach was the only method and original sentence in example used percentage-based approach to calculate departure

United States v. Frazier, 823 F.3d 1329 (11th Cir. 2016) - A district court may modify a defendant's term of imprisonment if the defendant was sentenced based on a sentencing range that subsequently has been lowered by the Sentencing Commission. When themaritime district court considers a § 3582(c)(2) motion, it must engage in a two-part analysis: (i) recalculate the defendant's guideline range under the amended guidelines, then (ii) decide whether, in its discretion, it will elect to impose the newly calculated sentence under the amended guidelines or retain the original sentence. Any reduction, however, must follow applicable policy statements issued by the Sentencing Commission. The district court must consider the § 3553(a) factors and the nature and severity of the danger to any person or the community posed by a sentence reduction. It also may consider the defendant's post-sentencing conduct. See U.S.S.G. § 1B1.10 cmt. 1(B)(iii). Here, the district court did not abuse its discretion by denying D's 3582(c)(2) motion. The district court referenced several facts relating to the § 3553(a) factors that weighed against a sentence reduction, including the severe nature of D's offense and his history of violent crime. The court also asserted that D's post-sentencing conduct, which included several disciplinary infractions, weighed against a sentence reduction. Such an analysis is all that is required to survive our level of scrutiny.