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I. INTRODUCTION

Last year was another busy year for the United States Court of Appeals for the Eleventh Circuit. While the court continued developing federal criminal law within the circuit, the court was also forced to adjust its own precedents in light of several landmark opinions by the Supreme Court of the United States.

In *United States v. Davis*,[1] for example, the Supreme Court struck down the residual clause in 18 U.S.C. § 924(c),[2] thus overruling the Eleventh Circuit's en banc decision in *Ovalles v. United States*.[3] Another one of the Supreme Court's most noteworthy opinions came on appeal directly from the Eleventh Circuit in *Rehaif v. United States*,[4] where a majority of the Court held that a defendant must have knowledge of his unlawful status to be convicted of unlawful possession of a firearm under 18 U.S.C. §§ 922(g)[5] or 924(a)(2).[6]

This Article explains how the Eleventh Circuit has adapted its case law in response to these rulings. Just as importantly, it provides a comprehensive review of the court's other published opinions covering criminal law in 2019, with a focus on the key holdings from each decision. Section II of this Article reviews opinions addressing substantive offenses, such as fraud, violent crimes, and drug offenses. Section III covers criminal procedure, the rules of evidence, and constitutional issues arising in criminal prosecutions, and Section IV reviews opinions discussing the

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1. 139 S. Ct. 2319 (2019).

2. 18 U.S.C. § 924(c) (2020).

3. Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc), *overruled by Davis*, 139 S. Ct. 2319.

4. 139 S. Ct. 2191 (2019).

5. 18 U.S.C. § 922(g) (2020).

6. 18 U.S.C. § 924(a)(2) (2020); *Rehaif*, 139 S. Ct. at 2194.

proper application of the Federal Sentencing Guidelines. This Article does not cover post-conviction proceedings.

II. SUBSTANTIVE OFFENSES

A. Economic Offenses

The Eleventh Circuit's 2019 docket covered a variety of fraud offenses and other economic crimes. One of the court's most noteworthy opinions came in *United States v. Waters*,[7] where the court reviewed the trial court's jury instructions distinguishing between a mere "scheme to deceive" and the type of "scheme to defraud" necessary to prove wire fraud.[8]

Waters involved a substantial discussion of the court's 2016 opinion in *United States v. Takhalov*,[9] in which the court held that there was insufficient evidence of wire fraud where the defendant bar owners failed to disclose to customers that they had hired women to pose as tourists and lure them to their nightclubs.[10] In *Takhalov*, the court held that the defendants had only carried out a scheme to deceive, rather than defraud, because the defendants had not intended to harm the victims, thus drawing a line between "schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid . . . and schemes that depend for their completion on a misrepresentation of an essential element of the bargain."[11]

In *Waters*, the defendant tried to obtain a loan by sending a private lender a fake letter purporting to reflect the IRS approving a payment plan for the defendant's outstanding federal taxes.[12] The defendant argued that the letter wasn't material, that the loan would have been approved anyway, and that he was entitled to a jury instruction that distinguished between a scheme to deceive and a scheme to defraud, where one intends to cause harm, though the defendant's proposed instructions failed to define what constitutes "harm."[13] The court affirmed the district court's refusal to instruct the jury and clarified that a scheme to defraud includes a defendant's intent to cause harm by lying "about the nature of the bargain itself."[14] In affirming the defendant's conviction, the court concluded:

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7. 937 F.3d 1344 (11th Cir. 2019).
8. *Id.* at 1353.
9. 827 F.3d 1307 (11th Cir. 2016).
10. *Waters*, 937 F.3d at 1352 (citing *Takhalov*, 827 F.3d at 1310).
11. *Id.* at 1352–53 (citations omitted).
12. *See id.* at 1348–49.
13. *Id.* at 1353.
14. *Id.* at 1354.

> In a scheme to deceive, the victim of the lie hasn't been harmed because he still received what he paid for. But in a scheme to defraud, the victim has been harmed because the misrepresentation affected the nature of the bargain, either because the perpetrator lied about the value of the thing (for example, promising something costs $10 when it actually costs $20), or because he lied about the thing itself (for example, promising a gemstone is a diamond when it is actually a cubic zirconium).[15]

In addition to clarifying the elements of wire fraud, the court also issued an opinion addressing the elements of honest-services fraud when such a charge is predicated on bribery. In *United States v. Van Buren*,[16] the court reviewed whether the defendant, a police officer, had committed an "official act" when, in exchange for a loan from a criminal he was familiar with, the defendant searched a law enforcement database in order to tip off the criminal regarding the existence of an undercover officer.[17]

The defendant was convicted of honest-services fraud after the trial court refused to instruct the jury that a bribe must be given in exchange for the performance of an "official act," such as a "lawsuit, hearing, or administrative determination."[18] On appeal, the court reversed, explaining that the trial court's refusal to include this analogy was not a harmless error since an official act "must involve the formal exercise of governmental power," and without further explanation, the trial court's instructions defined "official act" too broadly.[19] There was no "official act" here based on the defendant sharing information from the database because he was "merely divulging information to a civilian," and the Government had not identified a pending investigation or formal matter that the defendant could influence through an official act.[20]

The court also issued important opinions regarding bank fraud and identity fraud. In *United States v. Munksgard*,[21] the defendant was convicted of bank fraud and aggravated identity theft after making false statements on several loan applications indicating that he had contracts with several companies in order to bolster his eligibility for a loan.[22] On appeal, he argued that, even if he had made false statements on the bank loans, the Government failed to prove that the bank in question was

15. *Id.*
16. 940 F.3d 1192 (11th Cir. 2019).
17. *Id.* at 1197–98.
18. *Id.* at 1203.
19. *Id.* at 1203–06.
20. *Id.* at 1204.
21. 913 F.3d 1327 (11th Cir. 2019).
22. *Id.* at 1329.

FDIC-insured, a necessary element of federal bank fraud.[23] Over Judge Tjoflat's dissent,[24] and despite the fact that there was absolutely no direct evidence at trial that the bank was FDIC-insured at the time of the offense, the majority affirmed the defendant's conviction, "albeit reluctantly."[25]

The court held that, in the light most favorable to the verdict, there was sufficient evidence of the bank's insured status at the time of the offense based on the Government presenting evidence (1) that the bank was insured when it was initially chartered in 1990, twenty-three years before the offense; (2) that the bank was insured at the time of trial; and (3) that the bank wasn't required to renew its FDIC certificate often.[26] The court explained that this circumstantial evidence was "good enough" to support an inference that the bank was insured at the time of trial.[27] Still, the majority made sure to use some colorful language in issuing a "warning to federal prosecutors" that they are "cruisin' for a bruisin'" if they continue failing to present contemporaneous evidence of a bank's insured status in bank fraud trials.[28]

The panel in *Munksgard* also took a close look at aggravated identity theft under 18 U.S.C. § 1028A,[29] specifically the element requiring proof that the defendant "used" another person's means of identification.[30] The defendant argued that he had not "used" his employee's identity by forging the employee's name on a fake contract that he submitted with the loan application because he had never purported to be the employee or otherwise act on his behalf.[31] The court rejected the defendant's narrow definition of "use" and held that the plain and "ordinary meaning" of the word only requires that the defendant employs, puts into action, or avails himself of another's identity "for the accomplishment of some purpose."[32]

Another identity fraud opinion came in *United States v. Delva*,[33] where the court affirmed the defendant's conviction for possession of unauthorized access devices and aggravated identity theft.[34] First, the court held that there was sufficient evidence supporting the conviction on the access

23. *Id.* at 1331.
24. *See id.* at 1336.
25. *Id.* at 1329.
26. *Id.* at 1333.
27. *Id.*
28. *Id.* at 1329.
29. 18 U.S.C. § 1028A (2020).
30. *Munksgard*, 913 F.3d at 1333.
31. *Id.* at 1334.
32. *Id.*
33. 922 F.3d 1228 (11th Cir. 2019).
34. *Id.* at 1235.

device counts, noting that the defendant was seen by an undercover informant in a townhouse where fraudulent activity was being undertaken, and was seen surrounded by laptops, documents listing personally identifying information, debit cards, and fraudulent tax documents, which were mixed along with his own personal items and contained his fingerprints.[35] The defendant had also made statements to law enforcement indicating that he knew the personal information and debit cards were being used to commit identity theft and tax fraud.[36]

The court also affirmed the defendant's conviction for aggravated identity theft, rejecting the defendant's argument that the Government failed to prove the defendant knew "that the means of identification at issue belonged to another person."[37] While there was no direct evidence of the defendant's knowledge, the court held that a jury could infer knowledge from a defendant's use of a victim's information to fraudulently obtain refunds from the IRS, which verifies the information and matches it to a real person before issuing a refund.[38] The court added that a defendant's knowledge can also be inferred by the origin of the personal information being used, which in this case came from the records of a state agency.[39]

The court also took a look at the elements of bankruptcy fraud. In *United States v. Annamalai*,[40] the court reversed the defendant's convictions for bankruptcy fraud.[41] The defendant had operated a Hindu temple, referred to by prosecutors as a "scam," that took donations and credit card transactions for "spiritual services."[42] When the first temple went bankrupt, a bankruptcy trustee was appointed and quickly shut down the temple.[43] Undeterred, the defendant opened a new temple, serving largely the same congregation and providing the same spiritual services.[44] The Government alleged that the defendant's operation of the second temple constituted bankruptcy fraud because he concealed the second temple's profits from the bankruptcy trustee, and these profits should have been considered part of the first temple's bankruptcy estate.[45]

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35. *Id.* at 1247.
36. *Id.*
37. *Id.* at 1249.
38. *Id.* at 1250.
39. *Id.*
40. 939 F.3d 1216 (11th Cir. 2019).
41. *Id.* at 1232.
42. *Id.* at 1222, 1224.
43. *Id.* at 1221–22.
44. *Id.* at 1222.
45. *Id.* at 1225–26.

On appeal, the court disagreed with the Government's "alter ego theory" that the first and second temple were "one and the same," and were thus part of the same bankruptcy estate.[46] Likening the case to corporate law, the court held that a bankruptcy estate is "separate and distinct from the corporate debtor" and that the Government must "pierce the corporate veil," which the Government failed to do here.[47]

In *United States v. Harris*,[48] the court reviewed the elements of Hobbs Act extortion in a case where the defendant, a prison guard, had been confiscating contraband items from inmates for his own personal use.[49] Specifically at issue was whether there was sufficient evidence that the inmates had "consented" to the confiscation of their property, as opposed to a forceful and non-consensual taking, where the defendant had obtained the items by "shak[ing] down" the inmates and threatening to report them unless they stayed quiet.[50] The court concluded that there was sufficient evidence that the inmates had consented to giving their contraband items to the defendant because, though they feared the defendant would report them if they refused, they "'retain[ed] some degree of choice in whether to comply with the extortionate threat' because they *could* have reported" the defendant or refused to participate in his "extortionate scheme."[51]

B. Violent Crimes

The Eleventh Circuit's most significant opinions addressing violent crimes came in its opinions defining "crimes of violence" under the Armed Career Criminal Act (ACCA).[52] In *United States v. St. Hubert*,[53] for example, a majority of the Eleventh Circuit declined to hear the case en banc, leaving in place its prior panel holding that attempted Hobbs Act robbery, and perhaps attempts to commit other violent offenses, are

46. *Id.* at 1230–31.

47. *Id.*

48. 916 F.3d 948 (11th Cir. 2019).

49. *Id.* at 951.

50. *Id.* at 954. Extortion under 18 U.S.C. § 1951(b)(2) (2020) is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

51. *Harris*, 916 F.3d at 957–58 (quoting United States v. Xiao, 428 F.3d 361, 371 (11th Cir. 2005)).

52. 18 U.S.C. § 924 (2020).

53. 918 F.3d 1174 (11th Cir. 2019) (denying rehearing en banc).

crimes of violence under the ACCA.[54] In *United States v. Harris*,[55] the court reiterated that "[i]t makes no difference that [the defendant] was convicted of only attempting [a violent felony]" and held that the defendant's Alabama conviction for attempted first-degree assault was a crime of violence under the ACCA's element clause when the defendant acted intentionally and not recklessly.[56]

The court also issued an important opinion that has since been vacated while pending a rehearing en banc.[57] The court vacated its prior panel opinion in *United States v. Moss*,[58] where the panel held that a conviction for aggravated assault under Georgia law does not qualify as a "crime of violence" under the elements clause of the ACCA.[59] The panel reasoned that "a conviction predicated on a *mens rea* of recklessness does not satisfy the 'use of physical force' requirement . . . . Rather, for a conviction to qualify as a predicate crime of violence under the elements clause, it must require 'the *intentional* use of force.'"[60]

Apart from its opinions further interpreting the scope of the ACCA, the court in *United States v. Gillis*[61] considered the various approaches for defining a crime of violence as applied to the defendant's conviction under 18 U.S.C. § 373[62] for soliciting another to commit the crime of kidnapping.[63] Citing Eleventh Circuit precedent and similar language in 18 U.S.C. §§ 924(c)(1)(A) and (c)(3)(A)[64], the court first held that it was bound to apply the categorical approach in determining whether the defendant's conviction for solicitation of another to commit a crime of violence itself constituted a "crime of violence" under § 373.[65]

Under the categorical approach, rather than looking at the actual conduct of the defendant's crime, which in *Gillis* involved physical violence,

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54. *Id.* at 1211–12 (Pryor, J., dissenting) (criticizing the majority opinion's conclusion that "an attempt to commit a crime should be treated as an attempt to commit every element of that crime.").

55. 941 F.3d 1048 (11th Cir. 2019).

56. *Id.* at 1056–57 (quoting Hylor v. United States 896 F.3d 1219, 1223 (11th Cir. 2018)).

57. United States v. Moss, 928 F.3d 1340 (11th Cir. 2019).

58. 920 F.3d 752 (11th Cir. 2019), *vacated en banc*, 928 F.3d 1340.

59. *Id.* at 759.

60. *Id.* at 756–57 (quoting United States v. Palomino Garcia, 606 F.3d 1317, 1336 (11th Cir. 2010)).

61. 938 F.3d 1181 (11th Cir. 2019).

62. 18 U.S.C. § 373 (2012).

63. *Gillis*, 938 F.3d at 1195–96.

64. 18 U.S.C. §§ 924(c)(1)(A), (c)(3)(A) (2020).

65. *Id.* at 1199 (citing United States v. McGuire, 706 F.3d 1333, 1336–37 (11th Cir. 2013)).

courts must look at the elements of the solicited crime underlying the § 373 charge, in this case kidnapping, and determine whether the underlying crime has an element requiring "'the use, attempted use, or threatened use of physical force' against another person or property."[66] Applying the categorical approach to kidnapping under 18 U.S.C. § 1201(a)[67], and citing sister circuits and Supreme Court precedent, the court held that "§ 1201(a) can be violated without the use, attempted use, or threatened use of physical force . . . as required by § 373's force clause."[68] Accordingly, the court reversed the defendant's § 373 conviction because it was not based on an underlying crime of violence.[69]

C. Drug Offenses

There were two especially noteworthy opinions concerning drug offenses published by the Eleventh Circuit in 2019. The first, *United States v. Feldman*,[70] involved a pill mill in Florida operated by a doctor and his wife.[71] Among other things, the defendant challenged the trial court's refusal to exclude the Government's expert's testimony, which included his opinion as to all 3,000-plus of the defendant's patient files based on an extrapolation from only a small number of files.[72] The court rejected the defendant's claim under plain error review, despite the fact that the defendant had filed a motion *in limine* to limit the Government's expert's testimony regarding his conclusion based on his extrapolation, explaining that the magistrate had not made a "definitive ruling on the extrapolation issue."[73]

The defendant also challenged the trial court's refusal to instruct the jury on the physician's "duty and obligation to try to relieve a patient's pain."[74] The defendant's proposed instruction described an "ethical and medically justifiable" obligation for a physician to prescribe a controlled substance to a pain patient "even if the patient has developed a tolerance or addiction to those substances."[75] The court held that this instruction

66. *Id.* at 1202–03.

67. 18 U.S.C. § 1201(a) (2020).

68. *Gillis*, 938 F.3d at 1203–10 (citing United States v. Jenkins, 849 F.3d 390, 393–94 (7th Cir. 2017); United States v. Lentz, 383 F.3d 191, 203–04 (4th Cir. 2003); United States v. Garcia, 854 F.2d 340, 344–45 (9th Cir. 1988); Chatwin v. United States, 326 U.S. 455, 460–62 (1946)).

69. *Gillis*, 938 F.3d at 1210.

70. 936 F.3d 1288 (11th Cir. 2019).

71. *Id.* at 1295.

72. *Id.* at 1299.

73. *Id.* at 1300.

74. *Id.* at 1304.

75. *Id.*

was argumentative, not an accurate statement of law, and that it was up to the defendant to explain that theory to the jury.[76]

Perhaps the most important part of the opinion, however, addressed the sufficiency of evidence regarding the death counts in the indictment under 21 U.S.C. § 841(a)[77] and whether the Government had sufficiently proved that the doctor defendant's prescriptions were the but-for cause of each victim's death.[78] First, the court held that there was sufficient evidence that the defendant was the source of the drugs that caused the overdose deaths, noting that the specific type of substances prescribed by the defendant were in the victims' systems at their time of death, the bottles for the pills were found in the victims' homes at the time of death, and the prescriptions were issued a week or less before each death.[79]

The court also held that there was sufficient evidence to prove that the drugs prescribed by the defendant were the but-for cause of each victim's death.[80] The court rejected the defendant's argument that the Government was required to prove that the defendant's drugs were the "sole" or "independent" cause of the victim's death, and in a lengthy discussion of the Supreme Court's decision in *Burrage v. United States*,[81] the court concluded that the defendant's Schedule II prescriptions were the but-for cause of death because, even though the victims had ingested other drugs that exacerbated the effects of the Schedule II drugs, the victims would not have died if they hadn't ingested the Schedule II drugs.[82]

However, the court also concluded that there was a fatal flaw in the special verdict form given to the jury, as the verdict form failed to specifically identify which drugs prescribed by the defendant caused the patients' deaths and thus "failed to establish that the jury actually found that the Schedule II drugs were the but-for causes of the victims' deaths."[83] Since the jury had not properly found that the defendant's Schedule II drugs caused the victims' deaths as alleged, he could not be subjected to an enhanced sentence under § 841(b)(1)(C),[84] and the court reversed the district court's application of the statute's twenty-year mandatory minimum.[85]

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76. *Id.* at 1305.
77. 21 U.S.C. § 841(a) (2020).
78. *Feldman*, 936 F.3d at 1308.
79. *Id.* at 1308–10.
80. *Id.* at 1318.
81. 571 U.S. 204 (2014).
82. *Feldman*, 936 F.3d at 1310–15 (citing *Burrage*, 571 U.S. 204).
83. *Id.* at 1320–21 (citing Alleyne v. United States, 570 U.S. 99 (2013)).
84. 21 U.S.C. § 841(b)(1)(C) (2020).
85. *Feldman*, 936 F.3d at 1321–22.

The court issued another important opinion in *United States v. Achey*,[86] a case involving a conspiracy to distribute fentanyl and fentanyl analogues.[87] The defendant appealed his conviction, arguing that the Government had failed to prove at trial that the alleged conspiracy specifically involved fentanyl or DMT (another highly regulated drug), which were identified by name in the indictment.[88] The indictment alleged that the defendant knowingly distributed "a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of . . ." fentanyl and DMT, and was therefore punished under 21 U.S.C. § 841(b)(1)(C).[89]

The court affirmed the defendant's conviction, holding that the Government was only required to prove a conspiracy to distribute a generic controlled substance and that referring to a specific substance in the indictment "does not necessarily put the government to the burden of proving a conspiracy to distribute the specific controlled substance."[90] Rather, in this case, the reference to the specific controlled substance could be "fairly read to apply to the sentencing enhancement provision of the statute and not to the elements of the offense."[91] The court conceded, however, that the Government's burden would be different "if the indictment charges a specific type of drug in the place of the generic drug element of the offense."[92]

D. Sex Offenses

The court issued important decisions defining the elements of different sex offenses involving minors and explaining the different ways in which district courts can calculate restitution to victims of child pornography. In *United States v. Caniff*,[93] the court held that there was sufficient evidence to convict the defendant of making a notice or advertisement of child pornography under 18 U.S.C. § 2251(d)[94] based solely on his text messages to an undercover officer, who he believed was a minor, requesting nude pictures.[95]

86. 943 F.3d 909 (11th Cir. 2019).
87. *Id.* at 912.
88. *Id.*
89. *Id.*
90. *Id.* at 913.
91. *Id.*
92. *Id.* at 914.
93. 916 F.3d 929 (11th Cir. 2019).
94. 18 U.S.C. § 2251(d) (2020).
95. *Caniff*, 916 F.3d at 930.

The majority of the panel reasoned that the word "notice" simply means "a written or printed announcement," that the defendant's request for pictures did not have to be communicated to the general public or a group of people in order to constitute an "announcement,"[96] and that the defendant's "individually directed text messages" to the officer each constituted a notice.[97] Judge Newsom dissented, arguing that the majority's interpretation of the word "notice" was "just not how people talk" and that the definition should be limited to the context of printing or publishing, not "private, person-to-person text messages."[98]

In *United States v. Whyte*,[99] the court reviewed the elements of sex trafficking of minors under 18 U.S.C. § 1591(a),[100] which generally requires that the Government prove beyond a reasonable doubt that the defendant knew or recklessly disregarded the age of the victim.[101] In affirming the defendants' convictions, the court held that, under § 1591(c),[102] the Government does not need to prove the defendant's *mens rea* as to the victim's age so long as the defendant "had a reasonable opportunity to observe" the victim.[103] Here, the defendants had a reasonable opportunity to observe the victim during the two months that they lived and hung out together.[104]

Meanwhile, the court in *United States v. Stahlman*[105] held that there was sufficient evidence of the defendant's intent and a "substantial step" to support his conviction under 18 U.S.C. § 2422(b)[106] for attempting to entice a minor.[107] The court held that the jury was not required to accept the defendant's explanations that he believed he was playing out a fantasy with an adult, and the court further held that the defendant's sexually explicit conversations with the undercover officer, who was posing

96. *Id.* at 933.

97. *Id.* at 936.

98. *Id.* at 941 (Newsom, J., dissenting). The court has since revisited this opinion *sua sponte*, where it vacated Caniff's conviction and held that, as under Caniff's circumstances, "private, person-to-person text messages asking an individual he thought was a minor to send him sexually explicit pictures of herself cannot support a conviction for 'making' a 'notice' to receive child pornography in violation of 18 U.S.C. § 2251(d)(1)" *United States v. Caniff*, No. 17-12410, 2020 U.S. App. LEXIS 11160 (11th Cir. Apr. 9, 2020).

99. 928 F.3d 1317 (11th Cir. 2019).

100. 18 U.S.C. § 1591(a) (2020).

101. *Whyte*, 928 F.3d at 1322.

102. 18 U.S.C. § 1591(c) (2020).

103. *Whyte*, 928 F.3d at 1322 (citing United States v. Mozie, 752 F.3d 1271, 1282 (11th Cir. 2014)).

104. *Id.* at 1331.

105. 934 F.3d 1199 (11th Cir. 2019).

106. 18 U.S.C. § 2422(b) (2020).

107. *Stahlman*, 934 F.3d at 1226.

as the minor victim's father, and his act of driving to meet with them to engage in sexual activity was sufficient evidence of attempting to entice a minor.[108] The court warned, however, that the agent's testimony discussing "flagged posts on Craigslist" and interpreting the defendant's electronic statements veered on specialized testimony that would have required qualifying the agent as an expert, though in this case, the error in admitting his testimony without qualification would have been harmless.[109]

The court also issued a helpful opinion reflecting the wide discretion that district courts have in awarding restitution to victims in child pornography cases. In *United States v. Rothenberg*,[110] the court reviewed a restitution order mandating that the defendant pay restitution to nine victims depicted in the images he possessed.[111] Guided by the Supreme Court's decision in *Paroline v. United States*,[112] which set a standard of proximate causation and required adjusting a restitution award based on the defendant's "relative role" in causing the victim's loss, the Government and the defendant argued over the proper way to calculate the defendant's restitution obligation.[113]

The defendant argued that the district court should have begun its calculation by "disaggregating" the victim's losses among distributors, producers, and possessors before determining his restitution obligation.[114] The district court instead adopted the Government's preferred method, dubbed the "1/n method," wherein the court "would divide the total amount of each victim's losses by the number of defendants, across multiple prosecutions, who had been ordered to pay restitution to the victim" and then exercise its discretion to calculate the restitution amount based on the defendant's relative role.[115]

On appeal, the court held that "a district court is not required to determine, calculate, or disaggregate the specific amount of loss caused by the original abuser-creator or distributor of child pornography before it can decide the amount of the victim's losses caused by the later defendant who possesses and views the images."[116] The court emphasized the broad discretion that district courts have in determining a defendant's

108. *Id.* at 1225–26.
109. *Id.* at 1223–24.
110. 923 F.3d 1309 (11th Cir. 2019).
111. *Id.* at 1323.
112. 572 U.S. 434 (2014).
113. *Rothenberg*, 923 F.3d at 1314 (citing *Paroline*, 572 U.S. 434).
114. *Id.*
115. *Id.*
116. *Id.* at 1333.

restitution obligation but cautioned in a footnote that a "strict 1/n approach," without considering the defendant's relative role, would likely fail to meet the "individualized assessment requirement of *Paroline*."[117]

E. Firearm Offenses

The court issued a pair of important opinions regarding firearm offenses in 2019, including an opinion on remand from the Supreme Court after the landmark holding in *Rehaif v. United States*.[118] In *United States v. Reed*,[119] the court was tasked with determining whether the defendant's conviction should be reversed because, based on *Rehaif*, it was plain error where the defendant's indictment failed to allege, the jury was not instructed to find, and the Government was not required to prove "that [the defendant] knew he was a felon when he possessed the firearm."[120] The court agreed that these errors were plain in light of *Rehaif* but ultimately affirmed the conviction after finding that the defendant's rights were not substantially affected, citing Reed's eight prior felonies, his stipulation with the Government, and his testimony that he knew he was not supposed to have a gun.[121]

The court issued another significant opinion governing firearm offenses in *United States v. Vereen*,[122] where the court held that the "innocent transitory possession" defense is not available for defendants charged with possession of a firearm by a convicted felon.[123] The defendant had requested that the jury be instructed "that his faultless and brief possession of the a firearm did not constitute 'possession' under § 922(g)(1)."[124] On appeal, the court affirmed the defendant's conviction and explained that the text of the statute, which "only requires that the possession be knowing," establishes § 922(g) as a general intent crime—"the purpose behind a defendant's possession is irrelevant."[125] The court also noted that the innocent transitory possession offense would be "extremely difficult to administer" as a practical matter.[126]

117. *Id.* at 1335 n.8.

118. United States v. Reed, 941 F.3d 1018 (11th Cir. 2019) (citing *Rehaif*, 139 S. Ct. 2191).

119. 941 F.3d 1018 (11th Cir. 2019).

120. *Id.* at 1019–20.

121. *Id.* at 1021–22.

122. 920 F.3d 1300 (11th Cir. 2019).

123. *Id.* at 1311–12.

124. *Id.* at 1304.

125. *Id.* at 1308–09.

126. *Id.* at 1308.

F. Civil Rights Offenses

The court published a noteworthy opinion regarding police brutality in *United States v. Brown*,[127] where the defendant police officer kicked, punched, and tased the occupants of a car after a high-speed chase and the defendant's supervisor helped him cover it up.[128] After being convicted at trial for deprivation of rights under color of law under 18 U.S.C. § 242,[129] the defendant officer argued that there was insufficient evidence supporting his conviction because his use of force was reasonable given the victim's active resistance, and he did not act willfully.[130]

On appeal, the court disagreed, noting that a jury must "weigh the quantum of force employed against the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect actively resisted arrest or attempted to evade arrest by flight."[131] Here, the evidence reflected that the only thing the victim did to merit the officer's use of force was that he failed to comply with the officer's verbal demands, though the evidence also indicated that the victim may not have even had a chance to comply before being beaten and tased.[132] The court also noted that resisting arrest without violence does not merit an officer punching, kicking, and tasing the suspect and that the officer began using force against the victim "within seconds" of arriving at the vehicle.[133]

III. CRIMINAL PROCEDURE, THE RULES OF EVIDENCE, AND THE U.S. CONSTITUTION

A. Fourth Amendment Issues

The court broke ground in several cases involving the Fourth Amendment[134] and its protections against unreasonable searches and seizures. Perhaps the most significant opinion came in the court's en banc decision in *United States v. Johnson*,[135] which spawned one majority opinion, two concurring opinions, and three dissenting opinions.[136] In *Johnson*, the court reversed the prior panel opinion finding that the officer exceeded

127. 934 F.3d 1278 (11th Cir. 2019).
128. *Id.* at 1285.
129. 18 U.S.C. § 242 (2020).
130. *Brown*, 934 F.3d at 1294–95.
131. *Id.* at 1295 (citing Dukes v. Deaton, 852 F.3d 1035, 1042 (11th Cir. 2017)).
132. *Id.* at 1295–96.
133. *Id.* at 1296.
134. U.S. CONST. amend. IV.
135. 921 F.3d 991 (11th Cir. 2019).
136. *See id.*

the scope of a permissible *Terry*[137] frisk when he reached into the defendant's pocket to remove a round of ammunition and an empty holster.[138] The panel had held that the officer's conduct did not fall under the exception for officer safety, which allows for the seizure of weapons found during a frisk.[139]

In reversing the panel's opinion, the majority of the court sitting en banc held that, under the totality of the circumstances, the officers were justified in seizing the bullet and holster under the exception for officer safety given the fact that they were in a high crime area at night, the firearm for the bullet had not been found yet, and there were likely accomplices nearby.[140] The court disregarded the fact that the defendant was in handcuffs while he was being frisked, noting that "handcuffs do not always work."[141] Curiously, the court added that removing the bullet from the defendant's pocket could help the officers identify the kind of gun that might be nearby, though the court acknowledged that a frisk cannot be used to "gather evidence."[142] Regarding the defendant's argument that "ammunition, by itself, posed no danger," the court responded that this failed "to appreciate the grave injury that could have been caused by his ammunition if it had been loaded into a gun," though no gun had been found on or near the defendant.[143]

In light of the Supreme Court's decision in *Rodriguez v. United States*,[144] the court also broke ground in redefining what constitutes an unlawfully prolonged traffic stop.[145] In doing so, the court overruled its prior precedent holding that a stop is unlawfully prolonged if the length of the stop is "overall unreasonable," holding now that the proper inquiry is whether the duration of the stop is "longer than necessary to complete its mission" and that a stop is unlawfully prolonged "when an officer, without reasonable suspicion, diverts from the stop's purpose and adds time to the stop in order to investigate other crimes."[146]

Here, the officers prolonged the traffic stop of the defendant's vehicle without reasonable suspicion.[147] While the initial stop was valid, and the

137. Terry v. Ohio, 392 U.S. 1 (1968).

138. *Johnson*, 921 F.3d at 995.

139. *Id.* at 997.

140. *Id.* at 998.

141. *Id.* at 1001.

142. *Id.* at 998.

143. *Id.*

144. 135 S. Ct. 1609 (2015).

145. United States v. Campbell, 912 F.3d 1340, 1344 (11th Cir. 2019) (citing *Rodriguez*, 135 S. Ct. 1609).

146. *Id.* at 1352–53 (citing United States v. Griffin, 696 F.3d 1354 (11th Cir. 2012)).

147. *Id.* at 1354–55.

officer's questions relating to the defendant's travel plans were relevant to his traffic violation, the officer's questions regarding whether there were counterfeit items, alcohol, drugs, or dead bodies in the car were not based on any reasonable suspicion and added twenty-five seconds to the stop, making the stop unlawful.[148] The court held that suppression was not warranted, however, under the good faith exception.[149]

In contrast, in *United States v. Bishop*,[150] the court rejected the defendant's challenge to the traffic stop.[151] Law enforcement officers conducted a traffic stop of the defendant after he ran a stop sign and after a woman they arrested for drug possession told them that she was heading to the defendant's house. Based on the woman's statement and the defendant's reputation as a drug dealer (one officer knew him as a prior inmate at the county jail), the officers called for a drug dog and proceeded to pat down the passenger while the defendant told the officers they had "no right to stop us." One of the officers later testified that the defendant was agitated and "fidgeting around" and kept arguing with the officers before eventually complying with their requests for him to exit the vehicle. When the defendant eventually exited the car, the officers patted him down and found a firearm; meanwhile, the K-9 gave a positive alert, and the officers found drugs in the car.[152] On appeal from his conviction, the court rejected the defendant's argument that the officers lacked reasonable suspicion to detain him.[153]

The court issued several other decisions implicating the Fourth Amendment as applied to traffic stops and vehicle searches. In *United States v. Gibbs*,[154] the court considered whether officers had lawfully detained the defendant during a traffic stop where he was not the driver, not in the driver's vehicle, nor suspected of criminal activity.[155] Officers arrived at the scene where an Audi had pulled into oncoming traffic and come to a stop next to another car that was parked on the shoulder of the road. The driver of the Audi and the defendant were standing between the two cars when officers arrived, and the manner in which the officers approached them essentially trapped them there. The officers arrived with their guns drawn, wearing tactical vests with POLICE written on the front, the lights of their cars activated, and as they approached, the

148. *Id.*
149. *Id.* at 1356.
150. 940 F.3d 1242 (11th Cir. 2019).
151. *Id.* at 1246.
152. *Id.*
153. *Id.* at 1249.
154. 917 F.3d 1289 (11th Cir. 2019).
155. *Id.* at 1296–97.

defendant put his hands up and informed the officers that he had a firearm on his person.[156]

On appeal for the defendant's conviction for possessing a firearm as a convicted felon, the court held that the defendant had indeed been detained, though as part of a lawful traffic stop and not a *Terry* stop as the district court had held.[157] The court also held that the defendant's detention was justified given his proximity to the driver and the car, the brief time period before he made incriminating statements, and the officers' reasonable uncertainty regarding who was the driver of the car.[158]

The court's opinion in *United States v. Delva* addressed whether law enforcement officers had probable cause to search the defendant's Mercedes based on their suspicion that the defendants were engaged in identity theft and tax fraud.[159] The court held that probable cause supported the warrantless search—a confidential source had informed the agents that the defendants were conducting identity theft out of their townhouse and took pictures and video of a box in the townhouse containing numerous debit cards and documents with personal identifying information.[160] The agents also witnessed one of the defendants removing several shoeboxes from the townhouse and loading them in the Mercedes and, when they executed a search warrant for the townhouse, they saw a box of debit cards in the car.[161]

Aside from traffic stops, the Eleventh Circuit in 2019 became the latest Court of Appeals, the eleventh to be specific, to rule on the constitutionality of the "NIT warrant," a warrant issued by a magistrate judge in the Eastern District of Virginia that authorized a "nationwide, remote-access computer search" as part of a child pornography investigation.[162] The FBI gained control of a notorious child pornography distribution website called Playpen, and, after securing the warrant, deployed a malware program through the website that installed itself on the website visitor's computer and transmit user information back to the FBI.[163]

In *United States v. Taylor*,[164] the court first held that the malware's extraction and transmission of user information constitutes a "search"

156. *Id.* at 1292.
157. *Id.* at 1296.
158. *Id.* at 1296–97.
159. 922 F.3d at 1243–44.
160. *Id.*
161. *Id.* at 1244.
162. United States v. Taylor, 935 F.3d 1279, 1281 (11th Cir. 2019).
163. *Id.* at 1283.
164. 935 F.3d 1279.

under the Fourth Amendment.[165] The court also held that the malware was not a permissible "tracking device" as authorized under Rule 41(b) of the Federal Rules of Criminal Procedure,[166] and as such, that the magistrate violated Rule 41(b) by issuing a warrant authorizing a search outside her district.[167] The court further held that, because the magistrate had exceeded her jurisdiction, the warrant was "void at issuance," making the ensuing search "effectively warrantless" in violation of the Fourth Amendment.[168] The court concluded, however, that suppression was not warranted under the good faith exception since the exclusionary rule "is concerned with deterring *officer* misconduct and punishing *officer* culpability—not with setting judges straight."[169] Judge Tjoflat dissented, arguing that the officials assured the magistrate that the search would occur within the district when they "knew or should have known that there was an issue with jurisdiction and that the search would occur outside the district."[170] To allow such conduct, he wrote, "makes a mockery of the warrant process."[171]

The court also addressed some of the problems that arise regarding the all-important issue of standing in the Fourth Amendment context. In *United States v. Ross*,[172] the court considered its prior precedent and, despite "misgivings" about its correctness, held that the Government had not waived its ability to contest Fourth Amendment standing for appellate purposes since "the issue isn't waivable."[173] Regarding law enforcement's initial warrantless entry into the defendant's motel room, the court held that the defendant had standing to contest the search and had not "abandoned" his reasonable expectation of privacy in his motel room when he fled from law enforcement upon their arrival.[174] Though the defendant had fled from the police when they arrived at his room, the court noted that motel rooms are more like residences than automobiles, thereby meriting stronger Fourth Amendment protection, and the defendant here had locked his room, kept his key with him, kept his car in

165. *Id.* at 1284.
166. FED. R. CRIM. P. 41(b).
167. *Taylor*, 935 F.3d at 1286.
168. *Id.* at 1288.
169. *Id.* at 1290.
170. *Id.* at 1293 (Tjoflat, J., dissenting).
171. *Id.*
172. 941 F.3d 1058 (11th Cir. 2019).
173. *Id.* at 1065.
174. *Id.* at 1066.

the parking lot, and only ten minutes had elapsed between his flight and the officers' warrantless search.[175]

After the court found that the defendant had standing, it held that the officers' warrantless entry, during which they conducted a protective sweep and seized a firearm, was a lawful sweep and seizure.[176] The court reasoned that the officers had several outstanding arrest warrants when they arrived at the motel room and had a reasonable belief that the defendant had returned to his room after initially fleeing from them.[177] Turning to the second search by law enforcement, however, after they came back with a search warrant, the court concluded that the defendant lacked standing to challenge the this search.[178] Though the defendant had standing to challenge the officers' initial entry and warrantless search, the officers did not execute the search warrants until after the defendant's "checkout time" of 11:00 A.M., after which his reasonable expectation of privacy in the room had expired.[179]

In *United States v. Cooks*[180] and *United States v. Babcock*,[181] the court also looked at warrantless searches. In *Cooks*, the defendant challenged law enforcement's warrantless search of a crawlspace in his house following his arrest after a stand-off.[182] The court held that, while the search was not warranted as a protective sweep incident to an arrest, it was justified under the "emergency-aid aspect of the exigent-circumstances doctrine," given the officers' reasonable belief that hostages were in the crawlspace, and because the search was "strictly circumscribed" and "took no longer than necessary to verify the crawlspace was empty."[183] The dissent pointed out that there was no evidence indicating that anyone was in the crawlspace, "let alone that someone there was in immediate danger," and noted that none of the officers ever called down into the crawl space to determine whether someone was there.[184]

Meanwhile, in *Babcock*, the court held that the officers' seizure of the defendant's phone after a domestic disturbance, after which law enforcement held on to it for two days before eventually getting a search warrant, was not a permissible *Terry* stop of the phone, but rather a

175. *Id.* at 1067–68.
176. *Id.* at 1068.
177. *Id.* at 1068–69.
178. *Id.* at 1069.
179. *Id.* at 1069–70.
180. 920 F.3d 735 (11th Cir. 2019).
181. 924 F.3d 1180 (11th Cir. 2019).
182. *Cooks*, 920 F.3d at 737.
183. *Id.* at 746.
184. *Id.* at 748 (Gilman, J., dissenting).

full-blown seizure.[185] The court acknowledged that law enforcement had a compelling interest in seizing the phone based on their well-founded suspicions that it contained evidence of child pornography, but held that the duration and intrusiveness of the search, coupled with law enforcement's lack of diligence in seeking a warrant sooner, went beyond a valid *Terry* stop.[186]

However, the court held that the officers did have probable cause to believe the phone contained evidence of a crime and that exigent circumstances justified a warrantless seizure of the phone.[187] The officers arrived at the house based on a domestic disturbance call, saw a girl at the defendant's camper with cuts on her leg after the defendant denied anyone else's presence, were told by the defendant that he and the girl had consumed drugs and alcohol at a party the night before, and, among other things, were shown videos of the girl on the defendant's phone.[188] Exigent circumstances supported seizing the phone since the defendant could have deleted any of the incriminating evidence before officers could obtain a warrant.[189]

B. Fifth Amendment Issues

The court published a few noteworthy opinions involving various types of Fifth Amendment[190] claims. In *United States v. Ochoa*,[191] for example, the court held that the officers did not violate *Miranda*[192] by questioning the defendant before advising him of his rights under the "public safety exception."[193] In this case, officers knew that the defendant was a potentially violent suspect, possibly possessed a firearm, and they reasonably believed that other individuals may have been in the house where they arrested him.[194] As such, they were justified in asking the defendant if there was anything in the house "that could hurt my guys before we go in."[195] Regarding the defendant's later statements, after he was advised of his *Miranda* rights, the court held that the defendant's statement that he did not "agree with" the officer's statement that the defendant was

185. *Babcock*, 924 F.3d at 1184.
186. *Id.* at 1190–92.
187. *Id.* at 1195.
188. *Id.* at 1192–93.
189. *Id.* at 1195.
190. U.S. CONST. amend. V.
191. 941 F.3d 1074 (11th Cir. 2019).
192. Miranda v. Ariz., 384 U.S. 436 (1966).
193. *Ochoa*, 941 F.3d at 1098.
194. *Id.* at 1097–98.
195. *Id.* at 1098.

willing to talk without a lawyer present, and the defendant's initial hesitance to sign a waiver, did not constitute an "unambiguous or unequivocal" invocation of the defendant's right to counsel or to remain silent.[196]

In *United States v. Feldman*,[197] the court considered as a matter of first impression whether the Fifth Amendment's Double Jeopardy Clause barred a defendant's retrial or whether the defendant's conviction at the first trial (and later reversal) based on one theory of the offense resulted in an "implied acquittal" which barred another prosecution based on the same charges but a different theory of the offense.[198] Faced with two options on the verdict form at the first trial, both reflecting the Government's alternative theories of the case, the jury chose to convict the defendant of money laundering based on the Government's theory that he was transmitting and receiving funds internationally, as opposed to the alternative theory that he committed money laundering by concealing payments.[199]

After the Eleventh Circuit reversed the defendant's money laundering conviction on other grounds, the Government charged him again and retried him based on its concealment-of-payments theory of the offense.[200] The defendant argued that his prosecution on the concealment-based theory of money laundering was barred by the Double Jeopardy Clause because the jury at his first trial "did not find that he was guilty under that theory," which constituted an "implied-acquittal."[201] The court noted that it had previously held that a jury finding guilt under one theory of the offense, when a single count charges two different theories, does not bar retrial if the jury fails to reach a verdict about the alternative theory and a mistrial results.[202] Here, however, the jury had found the defendant guilty of one theory but was silent on the other.[203] The court concluded that this non-finding did not function as an implied acquittal under these circumstances, given that the conviction based on the first theory did not logically disprove the second theory, and that the defendant could not argue that jeopardy was terminated because the jury at the first trial was dismissed "without returning any express verdict," and the defendant had implicitly consented to their dismissal.[204]

196. *Id.* at 1099–1100.
197. 931 F.3d 1245 (11th Cir. 2019).
198. *Id.* at 1250.
199. *Id.* at 1251.
200. *Id.* at 1254–55.
201. *Id.* at 1255–56.
202. *Id.* at 1254.
203. *Id.* at 1254–55.
204. *Id.* at 1256.

The court also considered the issue of juror misconduct. In *United States v. Brown*, a police brutality case, one of the defendants argued that the jury that convicted him had been unduly prejudiced against him.[205] Specifically, the defendant filed a post-verdict motion requesting that the trial court *voir dire* a juror who alleged that several of the other jurors were biased due to "prior misconceptions about police officers" and had made up their minds before deliberating.[206] On appeal, the court affirmed the trial court's denial of the motion, holding that the allegations reflected "internal matters" by the jury that are inadmissible under Rule 606(b)[207] and did not fall under the exceptions identified by the Supreme Court in *Pena-Rodriguez v. Colorado*[208] or any of the four exceptions identified by Rule 606(b)(2)(A)–(C).[209] The court also held that the juror's allegations that she and others were bullied into voting guilty, and that she was made fun of for having a "crush" on the defendant, merely reflected "[a] typical feature[] of jury deliberations."[210]

C. Sixth Amendment Issues

The court published several opinions addressing Sixth Amendment[211] issues, especially those involving the Confrontation Clause of the Sixth Amendment, which ensures a defendant's right to confront the witnesses testifying against him or her.[212] In *United States v. Smith*,[213] for example, the court examined whether the defendants' confrontation rights had been violated when the district court admitted the videotaped deposition of one of the aliens allegedly smuggled into the country on the defendants' boat.[214] Initially, the parties had agreed to admit the witness's videotaped deposition based on the assumption that she would be deported back to Haiti and unavailable at trial, a shared expectation that was dashed

205. 934 F.3d at 1303.

206. *Id.*

207. FED. R. EVID. 606(b).

208. 137. S. Ct. 855 (2017).

209. *Brown*, 934 F.3d at 1302–03.

210. *Id.* at 1303.

211. U.S. CONST. amend. VI.

212. *Id.*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

213. 928 F.3d 1215 (11th Cir. 2019).

214. *Id.* at 1218.

when it turned out that the witness was accidentally released rather than deported.[215]

The defendants appealed the trial court's admission of the videotaped deposition over their objections, but the Government argued that it had made good faith, reasonable efforts to locate the witness, which included visiting her relatives and contacting her lawyer.[216] The court held that, under prior Supreme Court precedents, whether the witness was "unavailable" under the Confrontation Clause was "a question of reasonableness"[217] that is "fact-specific and examines the totality of the factual circumstances of each particular case."[218] Here, the court concluded that the Government had done enough to show the witness was unavailable, especially given her "obvious determination to go into hiding and elude capture."[219]

The court also addressed the defendant's Confrontation Clause challenge in *United States v. Hano*,[220] which revolved around the admissibility of a non-testifying co-defendant's statement to a witness that he and the defendant participated in the robbery of an armored truck.[221] For the first time in a published opinion, the court held that the "*Bruton* doctrine," which "prohibits the use of the confession of a nontestifying criminal defendant in a joint trial if the statement directly inculpates a codefendant," applies only to "testimonial statements."[222] Since the non-testifying co-defendant in this case made the statements in question when "no future prosecution was on the horizon," he was "not presently under investigation and had no reason to believe that his statement[] . . . would ever be used in court," and the witness "had no ground to suspect that he would ever testify" against the defendant, the statements were "plainly nontestimonial."[223] Rather, the court explained, the statements were merely part of a "friendly and informal exchange in which [the defendant] happened to reveal evidence that would ultimately be critical to the government's case."[224]

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215. *Id.* at 1222.
216. *Id.* at 1223–24.
217. *Id.* at 1227 (citing Ohio v. Roberts, 448 U.S. 56, 75 (1980)).
218. *Id.* at 1228.
219. *Id.* at 1230.
220. 922 F.3d 1272 (11th Cir. 2019).
221. *Id.* at 1286–87.
222. *Id.* (citing Bruton v. United States, 391 U.S. 123 (1968)).
223. *Id.* at 1287.
224. *Id.*

In another case involving foreign witnesses, the court again affirmed a defendant's conviction over his Confrontation Clause challenge.[225] In *United States v. Cooper*,[226] the defendant was convicted of defrauding a government work-exchange program in order to bring female students from Kazakhstan to work for him in Florida as sex workers.[227] At the trial, the case agent testified that the female victims, who had since returned to Kazakhstan, refused to return for trial or give deposition testimony because they feared further humiliation and stress.[228] The trial court also allowed the agent to testify regarding the incriminating statements of men who were interviewed after signing visitor logs at the apartments where the victims worked and that one of the victims had identified the defendant's voice during a monitored phone call.[229]

Regarding the agent's testimony relaying the victims' explanations for not wanting to return to testify, the court on appeal noted that the defense opened the door for this testimony by cross-examining the agent on why the Government could not procure the witnesses for trial and held that, either way, the agent did not offer testimonial statements since their reasons for refusing to testify did nothing to establish a fact relevant to the charged offense or the defendant's guilt.[230] And while the agent's testimony regarding the statements made by the defendant's clientele were testimonial, since they were made in response to investigative questioning, the error was harmless given other evidence showing how the defendant used the apartments.[231] As for the agent recounting the victim's authentication of the defendant's voice on the monitored call, the court held that the victim's statements were admitted to give context to the defendant's statements, not the truth of the matter asserted, and the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[232]

The court also issued a few noteworthy opinions regarding the Sixth Amendment right to counsel. In *Brewster v. Hetzel*,[233] involving a prisoner's motion brought under 28 U.S.C. § 2254,[234] the court held that the

225. United States v. Cooper, 926 F.3d 718, 727 (11th Cir. 2019).

226. *Id.*

227. *Id.* at 728. The defendant was convicted, among other things, of wire fraud under 18 U.S.C. § 1343 (2020), importing an alien for an immoral purpose under 8 U.S.C. § 1328 (2020), and sex trafficking under 18 U.S.C. § 1591 (2020).

228. *Id.* at 730.

229. *Id.* at 730–33.

230. *Id.* at 730–31.

231. *Id.* at 731–32.

232. *Id.* at 732.

233. 913 F.3d 1042 (11th Cir. 2019).

234. 28 U.S.C. § 2254 (2020).

defendant's trial counsel was ineffective for failing to object or move for a mistrial after the trial court repeatedly coerced a holdout juror into voting guilty.[235] The court first determined that the trial court's conduct amounted to juror coercion—the trial court had issued an *Allen*[236] charge, instructed the jury on three subsequent occasions to continue deliberating despite jurors repeatedly complaining that they were "really, really deadlocked," told the jury to take their oaths "seriously" when informed that the holdout juror was refusing to continue discussing the case, and, upon being told that the lone holdout had begun playing crossword puzzles, ordered that all reading materials be taken out of the jury room, after which the jury eventually returned a unanimous guilty verdict.[237]

The court concluded that, as opposed to the usual coercion case challenging an *Allen* charge or supplemental instructions, this was a "macro claim"[238] of juror coercion based on the "totality of the circumstances," including:

> (1) the total length of deliberations; (2) the number of times the jury reported being deadlocked and was instructed to resume deliberations; (3) whether the judge knew of the jury's numerical split when he instructed the jury to continue deliberating; (4) whether any of the instructions implied that the jurors were violating their oaths or acting improperly by failing to reach a verdict; and (5) the time between the final supplemental instruction and the jury's verdict.[239]

The "cumulative effect" of the trial court's instructions, the court held, was to send a message to the lone holdout to "stop being so stubborn and fall in line."[240] The court further concluded that trial counsel was ineffective for failing to move for a mistrial or at least object to the trial court's coercive conduct, and while the court did not draw a bright line establishing when trial counsel should have objected, it noted that the deliberations lasted for several days, the number of jurors holding out decreased over that time, and it "doesn't take Clarence Darrow to realize . . . that jury [was] not headed toward an acquittal."[241] Under these circumstances, "there was no conceivable reason, no reasonable strategy, for sitting silent and seeing how things would turn out."[242]

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235. *Hetzel*, 913 F.3d at 1059.
236. Allen v. United States, 164 U.S. 492 (1896).
237. *Hetzel*, 913 F.3d at 1047–48.
238. *Id.* at 1051.
239. *Id.* at 1053.
240. *Id.* at 1054–55.
241. *Id.* at 1059.
242. *Id.*

The court also criticized defense counsel's inaction in *Jefferson v. GDCP Warden*,[243] holding that trial counsel's performance during the penalty phase of a capital murder trial was constitutionally deficient where counsel failed to adequately investigate the defendant's mental health.[244] Specifically, defense counsel had failed to follow up with their retained psychologist's "unambiguous written recommendation" to seek a neuropsychological evaluation of the defendant to explain the defendant's "mental health and behavior at the time he committed the homicide."[245] The court also held that this mitigating information could have helped the defendant at the penalty phase of the trial since the evidence that was presented "was brief and weak," without any significant discussion of his mental impairment.[246]

As the court held in *Khan v. United States*,[247] not all inaction by defense counsel rises to the level of constitutional ineffectiveness.[248] In *Khan*, trial counsel for the defendant moved for leave to conduct depositions of people in Pakistan based on the charges against his client for providing material support to the Taliban in Pakistan. The district court granted the motion but required that trial counsel prove that the Pakistani government consented to the depositions or was aware of them, after which defense counsel communicated with the Pakistani government but could not get a formal answer or consent—nor could the Government. When the defense began showing these depositions during trial, the video signal "was abruptly lost," and the trial court essentially found that the Pakistani government was responsible. The trial court warned the defense that it could attempt to reestablish the connection with Pakistan, but that the trial would move forward the next week regardless. Trial counsel failed to restore the connection, his motion for mistrial was denied, and the defendant was convicted.[249]

On appeal from the district court's denial of the defendant's motion under 28 U.S.C. § 2255,[250] the court held that defense counsel was not ineffective for failing to comply with the district court's order to obtain the formal permission of the Pakistani government in order to conduct the depositions.[251] The court noted that defense counsel had been in

243. 941 F.3d 452 (11th Cir. 2019).
244. *Id.* at 455, 487.
245. *Id.* at 456.
246. *Id.* at 486.
247. 928 F.3d 1264 (11th Cir. 2019).
248. *Id.* at 1267.
249. *Id.* at 1269–71.
250. 28 U.S.C. § 2255 (2020).
251. *Khan*, 928 F.3d at 1272.

"uncharted territory" and, under the objective standard in *Strickland*,[252] he had acted reasonably in attempting to secure the Pakistani government's consent, including traveling to Pakistan and consulting with Pakistani government officials, who indicated to him that formal approval wasn't necessary.[253] The court added that the district court's order did not establish a "duty" on defense counsel, but rather imposed a condition in the event defense counsel sought to take a particular action.[254] Based on the unique circumstances of the case, trial counsel's failure to abide by that condition and pursue an alternative strategy was reasonable.[255] For good measure, the court also held that even if trial counsel had been ineffective, there was no prejudice, since describing the evidence against the defendant as "overwhelming" would have been an "understatement."[256]

Finally, in *United States v. Valois*,[257] the court considered whether the defense attorneys' dual representation of two groups of defendants during two separate prosecutions arising from the same conspiracy presented a conflict of interest.[258] First, the court held that a trial court's failure to hold a *Garcia*[259] hearing to determine whether a defendant voluntarily waived a conflict of interest would only be reversible if there was "an actual conflict of interest."[260] Here, the court held that, though the two groups of defendants were part of one conspiracy, there was no actual conflict because the Government had indicted the groups separately, was prosecuting them separately and on different days, and the defendants were facing slightly different charges.[261]

D. Criminal Procedure

Regarding criminal procedure, the court rendered two opinions in 2019 involving the limits, or lack thereof, of judicial and prosecutorial power. In *Hano*, the court considered the applicability of 18 U.S.C. § 3297,[262] which resets the statute of limitations for an offense when DNA testing

252. Strickland v. Washington, 466 U.S. 668 (1984).
253. *Khan*, 928 F.3d at 1274–75.
254. *Id.* at 1277.
255. *Id.* at 1279.
256. *Id.* at 1280.
257. 915 F.3d 717 (11th Cir. 2019).
258. *Id.* at 727.
259. United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).
260. *Valois*, 915 F.3d at 727 (citing *Garcia*, 517 F.2d at 277).
261. *Id.* at 727–28.
262. 18 U.S.C. § 3297 (2020).

newly implicates a suspect.[263] After robbing an armored truck, the defendants took the money and ran, and it wasn't until five years later, when law enforcement got a tip from a cooperator, that the Government conducted DNA testing that implicated the defendants in the robbery.[264]

After the Government charged them and a jury convicted them of Hobbs Act robbery, the defendants argued on appeal that § 3297 only applies if DNA testing implicates a defendant within the original statute of limitations period, essentially arguing that the statute only resets the limitation period for an offense, rather than starts a new one after the original term has expired.[265] The court disagreed, citing the plain meaning of § 3297, and holding that the statute allows for the revival of an already-expired statute of limitations when DNA testing implicates a defendant for the first time.[266]

The court also decided a case delineating the limits of a district court's jurisdiction to accept a plea when the Government fails to provide a factual basis that adequately addresses how it would have been able to prove each element of the offense.[267] Distinguishing an offense's "jurisdictional element" from a district court's "subject matter jurisdiction," the court in *United States v. Grimon*[268] reiterated its prior holdings that "the government's failure to sufficiently allege or prove the interstate commerce element does not deprive the district court of its subject matter jurisdiction over the criminal case."[269] It was sufficient for the parties to stipulate as to the jurisdictional element requiring proof of the effect on interstate commerce, since all that is required to invoke the district court's jurisdiction over a case if an indictment "alleges a violation of a valid federal statute."[270]

E. Rules of Evidence

Among the court's many opinions concerning the Federal Rules of Evidence, there were two significant opinions reviewing the propriety of having law enforcement agents provide trial testimony based on specialized knowledge. In *United States v. Hawkins*,[271] for example, the court reversed the defendants' convictions based on the district court's plain

263. 922 F.3d at 1283.
264. *Id.* at 1282.
265. *Id.* at 1283–84.
266. *Id.* at 1284.
267. United States v. Grimon, 923 F.3d 1302, 1303 (11th Cir. 2019).
268. *Id.*
269. *Id.* at 1306.
270. *Id.*
271. 934 F.3d 1251 (11th Cir. 2019).

error in allowing the lead case agent to give improper opinion testimony regarding the substance of communications on the defendant's phone calls and text messages.[272] While law enforcement agents can testify as experts in certain contexts, such as to help juries understand the drug business or coded language, the court held that the agents went well beyond such testimony in this case by "interpret[ing]" unambiguous language, mixing expert opinion with fact testimony, and straying into "speculation and unfettered, wholesale interpretation of the evidence."[273] When the Government argued on appeal that the agent had testified merely as a lay witness, the court countered that the agent had been "paraded before the jury as an expert" and criticized the "indiscriminate merging of fact testimony with expert testimony."[274] The court then detailed the difficulties and risks in allowing a lead case agent to testify as an expert witness before explicitly admonishing the Government that "the better practice is to avoid doing so."[275]

The result in *Delva* was much different, precisely because the trial court had let the case agent testify as an expert in "identity theft and tax fraud and the terminology and jargon" used by the defendants.[276] The court held that it is "well-settled" that law enforcement agents can testify as experts "to decode criminal conversations and operations that juror might not otherwise understand" and that the detective was properly qualified under Rule 702[277] for those purposes.[278]

The court also reviewed cases involving more conventional expert witnesses, such as its highly technical opinion in *United States v. Barton*,[279] which involved an expert on DNA evidence.[280] At the trial on whether the defendant possessed a firearm as a convicted felon, the Government introduced expert testimony regarding DNA evidence linking the defendant to the firearm.[281] On appeal, the defendant argued that the Government expert's methodology was unreliable because the expert failed to conduct a validation study on the DNA sample, which included the DNA

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272. *Id.* at 1260–61.

273. *Id.* at 1261.

274. *Id.* at 1265–66.

275. *Id.* at 1268–69 (citing United States v. Holden, 603 Fed. Appx. 744, 752 (11th Cir. 2015)).

276. 922 F.3d at 1250–51 (11th Cir. 2019).

277. FED. R. EVID. 702.

278. *Delva*, 922 F.3d at 1251 (citing FED. R. EVID. 702).

279. 909 F.3d 1323 (11th Cir. 2019).

280. *Id.* at 1326.

281. *Id.* at 1327.

of at least three other individuals, and because the amount of DNA material was below the established threshold and thus unreliable.[282]

At the *Daubert*[283] hearing before the magistrate, the Government's expert had testified that she adhered to international and FBI standards and other professional guidelines, and while she admitted that the amount of DNA was less than "optimal," she was still able to draw reliable conclusions from the amount she tested.[284] The court affirmed the qualification of the Government's expert, noting that her testing met well-accepted standards for testing DNA and that the defendant had not presented any evidence indicating that the results would have been different had the expert conducted validation testing or had a bigger sample to test.[285] The defendant's arguments, the court explained, went to how much "weight" the jury should give the Government's expert's testimony, not its reliability.[286]

In *United States v. Gillis*, where the defendant was charged with enticing a minor and other offenses, the court reviewed whether the trial court had deprived the defendant of his rights by limiting the testimony of one of his expert witnesses and, under Rule 704(b),[287] prohibiting the testimony of another under.[288] Citing a lack of peer review and credibility under *Daubert*, the court held that the district court did not abuse its discretion in limiting the defense's expert's testimony to the ways people socialize online as opposed to the defendant's request to allow his expert to testify regarding "internet sub-culture for fantasy role-playing and sexual communications."[289]

The defendant also argued that his other expert should have been allowed to testify regarding his "psychosexual makeup" and "sexual development."[290] He argued that, "even if technically inadmissible under the rules governing expert testimony," the testimony should have been admitted "because it was necessary to negate the subjective intent element" of his kidnapping and attempt to entice charges.[291] The court rejected

282. *Id.* at 1332.

283. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

284. *Barton*, 909 F.3d at 1328.

285. *Id.* at 1333–34.

286. *Id.* at 1334. In a separate part of the opinion, the court rejected considering the defendant's newly available evidence regarding the guidelines and validity of DNA testing, holding that it was not in the record and the district court couldn't have abused its discretion by failing to consider evidence that was not available at the time. *Id.* at 1335.

287. FED. R. EVID. 704(b).

288. 938 F.3d at 1190.

289. *Id.* at 1191–92.

290. *Id.* at 1192.

291. *Id.* at 1192–93.

these arguments, holding that the district court had not abused its discretion in limiting or prohibiting the expert testimony where it would have gone to the defendant's state of mind under Rule 704(b) and the defendant had not demonstrated any "compelling reasons for exceptions to the rules of evidence."[292]

The court issued several other opinions grappling with the scope of Rule 704(b), which prohibits experts from opining on a defendant's state of mind when it is an element of the offense.[293] As in *Gillis*, the defendant in *United States v. Stahlman* sought to introduce expert testimony that the defendant did not intend to have sex with an actual minor, but rather that he intended to act out a fantasy involving consenting adults.[294] The court held that such testimony would clearly run afoul of Rule 704(b) but noted that an expert can testify regarding "the difference, generally speaking, between real-life attraction to children and online fantasy and role-playing" and whether the defendant has been diagnosed with "any psychiatric condition that was associated with a sexual attraction to children."[295]

Rule 704(b) came up in *United States v. Caniff* as well, where the court held that a law enforcement officer's testimony that he found "evidence of illegal activity" on the defendant's phone (text messages requesting child pornography) was not inadmissible under Rule 704(b), though it implied the defendant's state of mind by referencing its illegality.[296] The court noted that Rule 704(b) did not apply because the detective was not qualified as an expert and even if he had been, his testimony did not expressly address the defendant's mental state.[297]

IV. SENTENCING

A. The Federal Sentencing Guidelines

As it does every year, the court spent a lot of time in 2019 reviewing defendants' sentences and clarifying how the Federal Sentencing Guidelines should be applied. The court's opinions involving the Guidelines in 2019 tended to fall into two categories: opinions addressing the proper application of specific, conduct-based provisions and opinions addressing the procedure for applying the Guidelines.

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292. *Id.* at 1194–95.
293. FED. R. EVID. 704(b).
294. 934 F.3d at 1220–21.
295. *Id.* at 1221–22 (citing United States v. Hite, 769 F.3d 1154, 1168 (D.C. Cir. 2014)).
296. 916 F.3d at 940.
297. *Id.* at 939.

The first category of opinions involves questions regarding how specific Guidelines enhancements or provisions apply to discrete sets of facts. In *United States v. Perez*,[298] for example, the court reversed the sentencing court's application of U.S.S.G. § 2B3.1(b)(2)(F),[299] the enhancement for making threats of death during a robbery.[300] While acknowledging that all bank robberies under 18 U.S.C. § 2113(a)[301] involve some form of violence or intimidation, the court held that "something more" is required to transform a "general threat of harm inherent in every bank robbery . . . into a threat of death."[302] Applying an objective test to determine "whether the defendant's overall conduct would have instilled the fear of death in a reasonable person," the court held that the defendant's written notes to the bank tellers demanding that they put money in an envelope "and no one will get hurt" were insufficient to warrant the enhancement.[303]

The court also issued a pair of published opinions involving Guidelines enhancements in firearms cases. In *United States v. Gordillo*,[304] the court held that U.S.S.G. § 2K2.1(a)(4),[305] which applies when an offense involves a "semiautomatic firearm that is capable of accepting a large capacity magazine," was properly applied where the defendant's firearms were kept in "close proximity" to the magazine, even though the firearm was in a locked case while the magazine was in a separate bag across the room.[306] The court reasoned that "close proximity" is based on "physical distance" and "accessibility" and explained that the defendant had failed to argue that the gun and magazine were not readily accessible based on being kept in separate containers.[307]

In *United States v. Bishop*, the question was whether the district court properly applied the enhancement for "possessing a firearm in connection with another felony offense—namely, possession of one hydromorphone pill."[308] Under the Application Notes, the enhancement automatically applies based solely on a firearm's proximity to drugs if the felony in question is a drug trafficking offense.[309] Otherwise, the court must find that

298. 943 F.3d 1329 (11th Cir. 2019).
299. U.S.S.G. § 2B3.1(b)(2)(F) (2020).
300. *Perez*, 943 F.3d at 1330–31.
301. 18 U.S.C. § 2113(a) (2020).
302. *Perez*, 943 F.3d at 1335.
303. *Id.* at 1333–35.
304. 920 F.3d 1292 (11th Cir. 2019).
305. U.S.S.G. § 2K2.1(a)(4) (2020).
306. *Gordillo*, 920 F.3d at 1296, 1300.
307. *Id.* at 1300.
308. 940 F.3d at 1250 (citing U.S.S.G. § 2K2.1(b)(6)(B) (2020)).
309. *Id.* at 1250 (citing U.S.S.G. § 2K2.1 cmt. n.14(A) (2020)).

the firearm "facilitated or had the potential to facilitate" the felony offense.[310] The court reversed the sentencing court's application of the enhancement because the defendant's possession of one pill was not a drug trafficking offense and "mere proximity between a firearm and drugs possessed for personal use cannot support the § 2K2.1(b)(6)(B)[311] enhancement without a finding that the gun facilitated or had the potential to facilitate the defendant's drug possession."[312]

Beyond firearms, the court also reviewed the applicability of U.S.S.G. § 3B1.5[313] for using body armor during a drug trafficking crime or crime of violence.[314] The Application Notes to § 3B1.5 define "using" body armor as "active employment in a manner to protect the person from gunfire" or "as a means of bartering."[315] In *United v. Bankston*,[316] the court held that the defendant selling body armor did not constitute "using" body armor since, under the common usage and dictionary definition of the word, to "barter" is to trade goods or services without money.[317]

It wasn't all drugs and guns at the Eleventh Circuit, however, as the Court issued an important opinion regarding the proper method for calculating loss amounts in fraud cases in *United States v. Annamalai*, where the loss amount was derived from the number of credit card disputes by followers of the defendant's Hindu temple.[318] In reversing the district court, the court noted that only a small subset of the disputes included records detailing the reasons for the dispute, and some of the same individuals disputed certain charges from the temple while approving others.[319] The court rejected the IRS agent's testimony that these disputed charges reflected a "pattern of fraud" and held that extrapolating the documented credit card disputes to include all of the disputes in the loss amount was "a step too far" and unduly speculative.[320]

In *United States v. Corbett*,[321] the court considered the number-of-victims enhancement under U.S.S.G. § 2B1.1(b)(2)(A)(i),[322] which applies

310. *Id.* (citing U.S.S.G. § 2K2.1 cmt. n.14(B) (2020)).
311. U.S.S.G. § 2K2.1(b)(6)(B) (2020).
312. *Id.* at 1252.
313. U.S.S.G. § 3B1.5 (2020).
314. United States v. Bankston, 945 F.3d 1316, 1317–18 (11th Cir. 2019).
315. *Id.* at 1319 (citing U.S.S.G. § 3B1.5, cmt. n.1 (2020)).
316. 945 F.3d 1316 (11th Cir. 2019).
317. *Id.* at 1319.
318. 939 F.3d at 1236.
319. *Id.* at 1237–38.
320. *Id.* at 1238.
321. 921 F.3d 1032 (11th Cir. 2019).
322. U.S.S.G. § 2B1.1(b)(2)(A)(i) (2020).

when the offense involves ten or more victims.[323] Under the Application Notes, victims in identity fraud cases are defined as those "whose means of identification were used unlawfully or without authority."[324] The court held that the sentencing court committed plain error when it counted as "victims" all of the individuals who had their identities stolen through an unauthorized transfer by the defendant, holding that the "mere sale or transfer" of their identifications was not "equivalent to its actual use."[325] The court explained that a defendant "uses" another person's identification when they adapt it as a means of identification to procure something of value.[326]

The court also published a couple of opinions clarifying the scope of certain enhancements applicable in sex offense cases. In *United States v. Whyte*, the court held that the enhancement under U.S.S.G. § 2G1.3(b)(2)(B)[327] for unduly influencing a minor to engage in sexual conduct applies even where the minor in question has previously engaged in prostitution.[328] The court also affirmed the sentencing court's application of the enhancement for using a computer to "entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor" based on the defendant's use of a smartphone to facilitate the minor for prostitution, despite the commentary to § 2G1.3(b)(3)(B)[329] stating that the enhancement only applies when a computer is used to "communicate directly with a minor or with a person who exercised custody, care, or supervisory control of the minor."[330] The court held that the application note was "patently inconsistent" with the plain language of the Guideline.[331]

Meanwhile, in *United States v. Fox*,[332] the court held for the first time that the enhancement for a defendant who engages in a "pattern of prohibited sexual conduct" can apply even when the defendant engages in such a pattern with only one minor victim.[333] The court noted that the plain language in the commentary lends itself to an interpretation that the enhancement can apply to prohibited sexual conduct involving the

323. *Corbett*, 921 F.3d at 1035.

324. *Id.* at 1038 (citing U.S.S.G. § 2B1.1 cmt. n.4(E) (2020)).

325. *Id.* (citing United States v. Hall, 704 F.3d 1317, 1323 (11th Cir. 2013)) (punctuation omitted).

326. *Id.* at 1038–39.

327. U.S.S.G. § 2G1.3(b)(2)(B) (2020).

328. 928 F.3d at 1336.

329. U.S.S.G. § 2G1.3(b)(3)(B) (2020).

330. *Whyte*, 928 F.3d at 1336–37 (citing U.S.S.G. § 2G1.3(b)(3)(B), cmt. n.4 (2020)).

331. *Id.* at 1337.

332. 926 F.3d 1275 (11th Cir. 2019).

333. *Id.* at 1280 (citing U.S.S.G. § 4B1.5(b)(1) (2020)).

same minor and, despite the language of the commentary defining a pattern as involving "at least two separate occasions," the enhancement can also apply when the acts are related.[334] Here, the district court properly applied the enhancement to the defendant's conduct, which included abusing one of his granddaughters on multiple occasions over the course of a year.[335]

The other category of opinions issued by the court addressed whether and how sentencing courts should apply the Guidelines on a broader level. Sometimes, the question was geographic in nature. In *United States v. Spence*,[336] the court held for the first time that the sentencing court can consider extraterritorial conduct when calculating a defendant's Guidelines range.[337] The defendant was arrested after arriving in the U.S. from Jamaica with a phone that contained child pornography, and the district court enhanced his offense level under U.S.S.G. § 2G2.2(b)[338] based on the defendant having "distributed" the images by showing them to people in Jamaica.[339] Despite the presumption against extraterritorial application of congressional legislation, the court held that the district court properly considered the defendant's extraterritorial conduct, explaining that the conduct was relevant for assessing the gravity of the offense, the Guidelines are silent on extraterritorial conduct, and other sentencing statutes, such as 18 U.S.C. § 3661,[340] state that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of defendants sentenced in federal court.[341]

In *United States v. Brown*, the court held that, for the purposes of determining which Guideline to apply to a defendant, a sentencing court can consider that the defendant acted with more than one intent.[342] In *Brown*, a police brutality case, the sentencing court erred in declining to apply the Guideline for aggravated assault after finding that the Government failed to prove that the defendant-officer used a taser on the victim intending to cause bodily injury "rather than to gain control over [the victim]."[343] The court vacated the defendant's sentence, holding that a

334. *Id.* at 1279.
335. *Id.* at 1277.
336. 923 F.3d 929 (11th Cir. 2019).
337. *Id.* at 930, 935.
338. U.S.S.G. § 2G2.2(b) (2020).
339. *Spence*, 923 F.3d at 930.
340. 18 U.S.C. § 3661 (2020).
341. *Spence*, 923 F.3d at 932–33 (quoting 18 U.S.C. § 3661).
342. 934 F.3d at 1307.
343. *Id.* at 1305.

defendant can have more than one intent when committing an act, and remanded for the district court to determine whether the defendant acted with the requisite intent to apply the Guideline for aggravated assault.[344] The court also held as an apparent matter of first impression that clear-error review applies to a finding regarding U.S.S.G. § 2A2.2's[345] definition of a defendant's intent.[346]

The court also clarified the admissibility of certain forms of evidence for purposes of calculating the Guidelines. In *United States v. Baptiste*,[347] the court held that inadmissible hearsay testimony can be used to calculate a defendant's Guidelines range so long as there is "sufficient indicia of reliability to support its probable accuracy."[348] The court also clarified that a district court is not required to make explicit findings about the reliability of such hearsay statements if "the reliability of the statements is apparent from the record."[349] That was the case here, where the witness's hearsay testimony went against her self-interest, a "traditional indicia of reliability."[350]

The court also explained how the Guidelines apply when a defendant with multiple counts of conviction has a Guidelines range that exceeds the statutory maximum.[351] In *United States v. Kirby*,[352] the court held that U.S.S.G. § 5G1.2(d)[353] directs courts to impose consecutive terms for multiple counts of conviction when "the sentence imposed on the count carrying the highest statutory maximum is less than the [ordinary guidelines recommendation] . . . but only to the extent necessary to produce a combined sentence equal to the [ordinary guidelines recommendation]."[354] Since the defendant's Guidelines range called for life, but his counts of conviction were capped at ten, twenty, and thirty years, the sentencing court properly added the counts together to calculate a Guidelines range of 1440 months in prison, which it imposed.[355]

344. *Id.* at 1307.
345. U.S.S.G. § 2A2.2 (2020).
346. *Brown*, 934 F.3d at 1305.
347. 935 F.3d 1304 (11th Cir. 2019).
348. *Id.* at 1315.
349. *Id.* at 1316.
350. *Id.* at 1316–17.
351. *See* United States v. Kirby, 938 F.3d 1254 (11th Cir. 2019).
352. *Id.*
353. U.S.S.G. § 5G1.2(d) (2020).
354. *Kirby*, 938 F.3d at 1257.
355. *Id.* at 1257–58.

Finally, it's worth noting that the court in *Lester v. United States*[356] voted against granting a rehearing en banc.[357] This left in place a prior panel opinion holding that, since the void-for-vagueness doctrine does not apply to the Guidelines, the residual clause of the Career Offender provision of the Guidelines is not vague based on *Johnson v. United States*,[358] even for defendants who were sentenced before *Booker*,[359] when the Guidelines were mandatory.[360] This opinion leaves in place what is essentially a bright line rule that the void-for-vagueness doctrine does not apply to the Guidelines.

Respecting the denial of a rehearing en banc, Judge Pryor wrote that, notwithstanding the vagueness argument, the rule in *Johnson* was not retroactive to pre-*Booker* sentences anyway, since the sentencing court would retain the power "to impose exactly the same sentence as before."[361] Judge Martin dissented, arguing that vagueness challenges should be allowed for sentences that were imposed under the mandatory Guidelines because they had "the force and effect of laws" and that it was inconsistent to apply *Johnson* retroactively to ACCA convictions but not career offender sentences imposed under the then-mandatory Guidelines.[362]

V. CONCLUSION

Many of the opinions issued in 2019 brought much-needed clarity to particularly challenging or murky areas of law. Several of the court's other opinions will likely be looked back upon one day as the starting point for further development of the law. Some of the cases may even be considered by the U.S. Supreme Court and find themselves back in the Eleventh Circuit on remand. Time will tell.

As always, however, it is crucially important that prosecutors, defense lawyers, and judges keep their fingers on the pulse of our legal system and stay up-to-date on recent developments in the law. While the need to stay current on the law is important for all lawyers, it is especially true for those who practice in the criminal justice world, where lives and livelihoods are on the lines every day. Whether setting new precedents or fighting to get others overturned, we should all strive to remember that.

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356. 921 F.3d 1306 (11th Cir. 2019).

357. *Id.* at 1307.

358. 135 S.Ct. 2551 (2015).

359. United States v. Booker, 543 U.S. 220 (2005).

360. *Lester*, 921 F.3d at 1307 (citing *Johnson*, 135 S. Ct. 2551); *see In re* Griffin, 823 F.3d 1350 (11th Cir. 2016)).

361. *Id.* at 1308 (Pryor, J., concurring).

362. *Id.* at 1322–23 (Martin, J., dissenting).