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Thomas D. Church

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by Thomas D. Church *

I. INTRODUCTION

This Article provides a comprehensive review of the Eleventh Circuit's most noteworthy criminal law opinions from 2020, with a focus on the key holdings from each decision.[1] Section II of this Article addresses substantive criminal offenses, such as economic crimes, drug offenses, and firearm offenses, while Section III covers criminal procedure, the rules of evidence, and constitutional issues arising in criminal prosecutions. Section IV deals with the Federal Sentencing Guidelines and other sentencing issues, and Section V provides a limited review of the Eleventh Circuit's decisions in post-conviction proceedings.

II. SUBSTANTIVE OFFENSES

A. Economic Crimes

The United States Court of Appeals for the Eleventh Circuit issued several important opinions involving fraud, theft of government property, and other economic offenses. Several of these opinions included matters of first impression or clarified the elements for certain offenses. In *United States v. Graham*,[2] for example, the Eleventh Circuit reviewed as a matter of first impression the elements for corruptly endeavoring to obstruct the administration of the Internal Revenue Code under 26 U.S.C. § 7212(a)[3] in light of the United States Supreme Court's holding

* Trial Attorney at Pate, Johnson & Church, LLC, Atlanta, Georgia. Emory University (B.A. 2012). University of Georgia School of Law (J.D. 2017). Member, State Bar of Georgia. Tom is also the author of thefederaldocket.com, a law blog dedicated to highlighting noteworthy circuit court opinions and news in the area of federal criminal law.

[1] For an analysis of last year's criminal law and federal sentencing guidelines during the survey period, see Thomas D. Church, *Criminal Law*, *2019 Eleventh Circuit Survey*, 71 MERCER L. REV. 967 (2020).

[2] 981 F.3d 1254 (11th Cir. 2020).

[3] 26 U.S.C. § 7212(a).

in *Marinello v. United States*,[4] where the Court held that, in addition to proving that a defendant knowingly and corruptly tried to obstruct or impede the due administration of the internal revenue laws, the Government must also prove "a nexus between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action."[5] Graham submitted a falsified "international bill of exchange" to satisfy an outstanding tax liability, and the Eleventh Circuit concluded that the IRS's "collection activity" against Graham qualified as a "particular administrative proceeding" given it was a "targeted administrative action" and included the IRS sending Graham multiple lien and levy notices and confiscating and selling some of Graham's assets after Graham only made small payments.[6]

Similarly, in *United States v. Bazantes*,[7] the Eleventh Circuit affirmed a second-tier subcontractor's conviction for making false statements under 18 U.S.C. § 1001[8] based on falsified payroll records the defendant submitted to the primary contractor.[9] After an extensive discussion of the legislative history of § 1001(a) and the Copeland Act, which imposes certain requirements on contractors and subcontractors working on federal construction projects, the court held that the falsified payroll documents were made or used "in a matter within the jurisdiction" of the federal government.[10] The court also rejected the defendant's argument that the statements were not material since the statements were not submitted directly to the government agency.[11]

In *United States v. Maher*,[12] the Eleventh Circuit affirmed the defendant's conviction, under 18 U.S.C. § 641,[13] for receiving, concealing, or retaining government property.[14] The court rejected Maher's argument that his prosecution was barred by the statute of limitations because five years had passed since he had fraudulently obtained the federal grant money at issue, holding that the act of "retaining" or "possessing" is continuous and "is not complete until the possessor parts

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[4] 138 S. Ct. 1101, 1109 (2018).

[5] *Graham*, 981 F.3d at 1257 (citing *Marinello*, 138 S. Ct. at 1109).

[6] *Id.* at 1257–60.

[7] 978 F.3d 1227 (11th Cir. 2020).

[8] 18 U.S.C. § 1001.

[9] *Id.* at 1231.

[10] *Id.* 1236–45.

[11] *Id.* at 1247–48.

[12] 955 F.3d 880 (11th Cir. 2020).

[13] 18 U.S.C. § 641.

[14] *Maher*, 955 F.3d at 882.

with the item," comparing Maher's offense to other continuous offenses like unlawful possession of a firearm or controlled substance.[15] Because "the crime of retaining property unlawfully is not complete until the holder relinquishes the property to its rightful owner . . . . Maher's offense of retaining government property continued so long as he possessed the federal grant money."[16]

In *United States v. Melgen*,[17] the Court for the Eleventh Circuit considered the standard for proving the "materiality" of a false statement in light of the Supreme Court's decision in *United Health Services, Inc. v. United States ex rel. Escobar*,[18] where the Court held that materiality, at least in the False Claims context, "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[19] The Eleventh Circuit rejected the defendant's argument that the trial court should have used this language in its jury instructions rather than the "capable of influencing" language in the pattern instructions, holding that (1) the definition of materiality set forth in *Escobar* is not inconsistent with the "objective standard that our current materiality standard is based on," and (2) to the extent that *Escobar* created a heightened materiality standard, that standard is limited to false claims based on "implied false certification[s]," not all criminal fraud cases.[20]

In another healthcare fraud case, *United States v. Chalker*,[21] the Eleventh Circuit considered the type of evidence sufficient under 18 U.S.C. §§ 1347 and 1349[22] to convict a defendant of conspiracy and substantive counts of healthcare fraud.[23] Regarding the conspiracy count, the court held that there was sufficient evidence based on witnesses testifying about the numerous "red flags" they found when conducting audits of Chalker's pharmacy, including the fact that a majority of the pharmacy's customers were from out of state, the high price of the prescriptions, complaints from patients, and discrepancies in billing and inventory.[24] Regarding the substantive counts, the court held there was

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[15] *Id.* at 886 (citing United States v. D'Angelo, 819 F.2d 1062, 1066 (11th Cir. 1987)).

[16] *Maher*, 955 F.3d at 886.

[17] 967 F.3d 1250 (11th Cir. 2020).

[18] 136 S. Ct. 1989 (2016).

[19] *Melgen*, 967 F.3d at 1259 (citing *Escobar, Inc.*, 136 S. Ct. at 2002).

[20] *Melgen*, 967 F.3d at 1259–60.

[21] 966 F.3d 1177 (11th Cir. 2020).

[22] 18 U.S.C. §§ 1347, 1349.

[23] Chalker, 966 F.3d at 1182.

[24] *Id.* at 1185–88.

sufficient evidence based on witnesses testifying that they were given medically unnecessary medicine.[25]

In *United States v. Grow*,[26] the Court for the Eleventh Circuit affirmed another defendant's healthcare fraud conviction for recruiting Tricare beneficiaries as patients to request pain creams, scar creams, and vitamins that were not medically necessary.[27] Although Grow argued that bona fide doctors had issued valid prescriptions based on their medical judgment, the court countered defendant's argument and held that a prescription is not a "get-out-of-jail-free card" and recounted the numerous patient-witnesses who testified that they did not need the prescriptions and had only participated to get paid by Grow's marketers.[28] Also, the court held there was sufficient evidence of Grow's intent to defraud and "deliberate indifference" to whether the medical products were medically necessary, noting that Grow's marketers told doctors what to prescribe and prepared prefilled prescriptions. Moreover, Grow himself instructed marketers to always get the most expensive products and knew that a recruit received scar cream despite not having a scar.[29]

The Eleventh Circuit also issued a pair of important opinions involving violations of the federal "Anti-kickback" statute,[30] which prohibits providers from receiving kickbacks, bribes, or other benefits in return for referrals for, or purchases of, certain items and services billable to federal healthcare programs.[31] In *United States v. Shah*,[32] the court held that a conviction under the anti-kickback statute does not require any proof of the defendant's motivation for accepting the kickbacks, though the court recognized that "motive matters for the payor crime even though it does not for the payee crime."[33]

In *United States v. Ruan*,[34] a "pill-mill" and healthcare fraud case, the Eleventh Circuit issued a rare reversal for the defendant's conviction under the anti-kickback statute.[35] The court held there was insufficient evidence to support one of the illegal kickback convictions due to

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[25] *Id.* at 1188–89.

[26] 977 F.3d 1310 (11th Cir. 2020).

[27] *Id.* at 1321.

[28] *Id.* at 1317–22.

[29] *Id.* at 1322.

[30] 42 U.S.C. § 1320a-7b (2021).

[31] *Id.*

[32] 981 F.3d 920 (11th Cir. 2020).

[33] *Id.* at 926.

[34] 966 F.3d 1101 (11th Cir. 2020).

[35] *Id.* at 1120.

insufficient evidence that the fraud involved a "[f]ederal health care program."[36] The evidence showed that the defendants' operation involved a workers' compensation dispensary that billed the Department of Labor (DOL) but did not show that prescriptions were paid for by DOL, and the Government could not provide any other "indication that federal monies actually passed through the dispensary."[37]

The Eleventh Circuit also issued a noteworthy opinion in *United States v. Singer*[38] regarding the *mens rea* requirement for criminal violations of the International Emergency Economic Powers Act (IEEPA)[39] in a case where the defendant was charged with exporting modems to Cuba.[40] As a matter of first impression, the court held that a conviction for unlawful exportation under 50 U.S.C. § 1705, which criminalizes "willful" violations of the IEEPA, requires evidence that a defendant actually knew they were violating the law because "the exportation of goods from the United States is not so obviously evil or inherently bad that the willfulness requirement is satisfied."[41] At defendant's trial, however, the court held there was sufficient evidence to prove defendant's knowledge based on defendant receiving multiple warnings to comply with commerce regulations and licensing requirements, in addition to defendant's letters discussing such requirements.[42] The defendant also traveled with the modems in a hidden compartment and did not declare them to officials.[43]

Additionally, the court rejected defendant's claim that the trial court erred in declining to adopt their proposed jury instruction that "in this case ignorance of the law is a defense to crimes charged against the defendant" based on the *mens rea* requirement.[44] Thus, the trial court appropriately instructed the jury it had to find that "the Defendant knew that exportation or sending of the merchandise was contrary to law or regulation," which was an accurate statement of law that captured the substance of defendant's proposed instruction.[45]

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[36] *Id.* at 1144–45.

[37] *Id.* at 1145–46.

[38] 963 F.3d 1144 (11th Cir. 2020).

[39] 50 U.S.C.S §§ 1701–1708 (2021).

[40] *Singer*, 963 F.3d at 1148–49.

[41] *Id.* at 1157–58.

[42] *Id.* at 1158.

[43] *Id.* at 1158–59.

[44] *Id.* at 1161–62.

[45] *Id.* at 1162–63.

In *United States v. Caldwell*,[46] the Eleventh Circuit affirmed the defendant's conviction for bank robbery, holding that, while the Government should "ideally" provide evidence of a bank's "contemporaneously held [Federal Deposit Insurance Corporation] (FDIC) insurance" to satisfy the jurisdictional element under 18 U.S.C. § 2113,[47] there was sufficient evidence to support a conviction. Such evidence included a FDIC certificate from seventeen years before the offense, witness testimony that the bank was consistently and current on its insurance payments, and the "universal presumption . . . that all banks are federal insured."[48] The court repeatedly emphasized the low threshold for proving a bank's insured status under § 2113.[49]

Finally, in *United States v. McGregor*,[50] an access device fraud case, the Eleventh Circuit held that the trial court did not err in allowing evidence of the defendant's firearm, which included the firearm itself, photos of the defendant holding the firearm with cash, and the fact that the gun was found near the defendant's personal identifying information (PII) at issue in the case.[51] The court held that evidence of the firearm—which had the defendant's fingerprints on it—was relevant to tying the defendant to the PII and establishing their possession of it, and that it did not unfairly prejudice the defendant given its "substantial probative force" in undermining defendant's "wrong place at the wrong time" defense.[52] The court added that "the possession of a firearm today is not so inherently prejudicial as to necessarily outweigh its probative value."[53]

B. Drug Offenses

The Eleventh Circuit issued several notable opinions regarding drug offenses during this survey period. In *United States v. Davila-Mendoza*,[54] for example, the court held that the Maritime Drug Law Enforcement Act (MDLEA)[55] was unconstitutional as applied to the defendants, who were foreign nationals while aboard a foreign vessel in the territorial waters

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[46] 963 F.3d 1067 (11th Cir. 2020).

[47] 18 U.S.C. § 2113.

[48] *Caldwell*, 963 F.3d at 1076–78 (11th Cir. 2020) (citing United States v. Munskgard, 913 F.3d 1327, 1332–33 (11th Cir. 2019)).

[49] *Id.* at 1077–78.

[50] 960 F.3d 1319 (11th Cir. 2020).

[51] *Id.* at 1322.

[52] *Id.* at 1323–25.

[53] *Id.* at 1325.

[54] 972 F.3d 1264 (11th Cir. 2020).

[55] 46 U.S.C. § 70501 (2021).

of Jamaica.[56] The court held that the MDLEA was not a valid exercise of Congressional power under Article I's Foreign Commerce Clause or the Necessary and Proper Clause in this case, reasoning that the MDLEA did not reflect any congressional findings regarding international drug trafficking's effect on foreign commerce, there was no evidence connecting the defendants or their vessels to the United States, and the MDLEA predated the United States treaty with Jamaica regarding illegal trafficking.[57]

On the other hand, the Eleventh Circuit rejected the defendants' constitutional challenges to the MDLEA in *United States v. Cabezas-Montano*.[58] The court held that the MDLEA is a valid exercise of Congress's power under the Felonies Clause, that the Due Process Clause does not prohibit charging aliens captured on the high seas because the MDLEA provides notice to all nations, and that the MDLEA's jurisdictional requirement is not a substantive element of the offense and thus does not have to be submitted to a jury.[59] The Eleventh Circuit upheld the trial court's jurisdiction because the defendants did not claim a nationality for the vessel (though the vessel was later tied to Ecuador), and then held that it was not plain error for the Government to delay seven weeks before presenting the defendant before a court after his arrest or for the Government to comment on the defendant's post-arrest silence.[60]

Around the same time, the Eleventh Circuit issued its opinion in *United States v. Tigua*,[61] where it considered as a matter of first impression whether defendants, who had pleaded guilty to violations under the MDLEA but had not yet been sentenced at the time the First Step Act[62] was passed, were eligible for safety valve relief under 18 U.S.C. § 3553(f), which the First Step Act amended to include MDLEA offenses.[63] The court concluded that the defendants were ineligible because their convictions had been "entered" when the district court accepted their guilty pleas.[64] Both the Government and the defendants had argued that "conviction entered" under the First Step Act referred to

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[56] *Davila-Mendoza*, 972 F.3d at 1277–78.

[57] *Id.* at 1274–78.

[58] 949 F.3d 567 (11th Cir. 2020).

[59] *Id.* at 586–87.

[60] *Id.* at 590–612.

[61] 963 F.3d 1138 (11th Cir. 2020).

[62] 18 U.S.C. § 3553(f).

[63] *Tigua*, 963 F.3d at 1142.

[64] *Id.* at 1142–43.

the "judgment of conviction," which includes "the plea, the verdict or findings, the adjudication, and the sentence."[65]

The Eleventh Circuit also issued a trio of important opinions in cases involving "pill mills." In *United States v. Gayden*,[66] the court held that Dr. Gayden did not have standing to challenge law enforcement's warrantless search, via administrative subpoena, of automated prescription records maintained in Florida's Prescription Drug Monitoring Program (PDMP).[67] The court reasoned that Dr. Gayden did not have a reasonable expectation of privacy in the prescriptions he wrote for his patients in part because he "voluntarily disclosed those prescription records to others through his participation in the computerized tracking system."[68] Moreover, the court also rejected Dr. Gayden's argument that the Government's expert testimony should have been excluded because the witness reviewed inflammatory material about Dr. Gayden before forming his opinion, and defense counsel's "difficult tactical decision" whether to ask about the witness about the inflammatory material and his potential bias on cross-examination was "not the kind of Hobson's choice that mandates striking the expert from testifying."[69]

In *United States v. Benjamin*,[70] the Eleventh Circuit affirmed a doctor-defendant's conviction for multiple counts of unlawfully distributing opioids, including one that resulted in a person's death.[71] The court held there was sufficient evidence to show that Dr. Benjamin's unlawful prescriptions were the "but-for" cause of a victim's overdose death where an expert toxicologist testified that the victim tested positive for fentanyl and had no underlying conditions that could have caused her death, and the fentanyl was linked to Dr. Benjamin via text messages on the victim's phone to her dealer, who in turn got the fentanyl from Dr. Benjamin.[72] Additionally, agents had seized a pill press from Dr. Benjamin's home and storage unit and found internet search history involving fentanyl.[73] The court also rejected Dr. Benjamin's arguments that the trial court failed to instruct the jury that it must find that Dr.

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[65] *Id.* at 1142 (citing *Judgment of Conviction*, *Black's Law Dictionary* (11th ed. 2019)).

[66] 977 F.3d 1146 (11th Cir. 2020).

[67] *Id.* at 1152.

[68] *Id.*

[69] *Id.* at 1153.

[70] 958 F.3d 1124 (11th Cir. 2020).

[71] *Id.* at 1128.

[72] *Id.* at 1131–32.

[73] *Id.* at 1132.

Benjamin knew furanyl fentanyl was a "controlled substance analogue," holding that the Supreme Court's decision in *McFadden v. United States*[74] allows the Government to prove intent by showing the defendant either knew he was dealing with a controlled substance analogue or knew the identity of the substance he possessed, even if he did not know its status as an analogue.[75]

Finally, in *United States v. Iriele*,[76] the Court affirmed the conviction for a pharmacist accused of conspiring with an alleged "pill mill" to unlawfully dispense controlled substances.[77] The court held there was sufficient circumstantial evidence to establish the conspiracy based on the extensive contact between the pharmacy and the alleged pill mill, especially regarding the kinds of prescriptions issued and those in stock, the disproportionate amount and kind of prescriptions the pharmacy filled from the alleged pill mill, the fact that other pharmacies would not fill prescriptions from the alleged pill mill, and evidence that the pharmacy's customers coming from the alleged pill mill "exhibited signs of being drug addicts."[78] Essentially, the pharmacist was exposed to many of the same "red flags" that are generally sufficient to find a doctor-defendant's participation in a "pill mill" conspiracy.[79]

The court did hold, however, that the trial court erred in instructing the jury that the standard for proving unlawful dispensation under 21 U.S.C. § 841[80] is the same for pharmacists as applied to physicians because the proper standard is actually whether the pharmacist "filled a prescription knowing that a physician issued the prescription without a legitimate medical purpose or outside the usual course of professional practice."[81] However, the court concluded that the defendant did not meet the third prong under the plain error analysis, given overwhelming evidence of his knowledge.[82]

The Eleventh Circuit also published opinions involving more conventional drug offenses. In *United States v. Amede*,[83] a drug conspiracy case where the defendant acted as an intermediary for a drug

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[74] 135 S. Ct. 2298 (2015).

[75] *Benjamin*, 958 F.3d at 1133–34 (*citing McFadden*, 135 S. Ct. at 2305).

[76] 977 F.3d 1155, 1169–70 (11th Cir. 2020).

[77] *Id.* at 1169–70.

[78] *Id.* at 1169–72.

[79] *Id.* at 1171.

[80] 21 U.S.C. § 841.

[81] *Iriele*, 977 F.3d at 1180.

[82] *Id.*

[83] 977 F.3d 1086 (11th Cir. 2020).

transaction between his unindicted co-conspirator and an undercover officer, the court held that the district court properly admitted out-of-court statements made by a co-conspirator to the officer before the defendant had joined in the conspiracy.[84] The court held the statements were not hearsay under Rule 801(d)(2)(E),[85] despite the defendant not being part of the conspiracy at the time the statements were made, and that the Government had proved the existence of a conspiracy by a preponderance of the evidence before introducing the statements.[86] The court noted that the Government's evidence included the co-conspirator referring to the defendant as "my guy," his detailing how "my guy" would travel to meet with the purchaser, the defendant's statement to the officer referring to himself as his co-conspirator's "guy," and the defendant's contact between the co-conspirator and officer after that point.[87]

Additionally, the Eleventh Circuit held that the trial court did not err in limiting the defendant's testimony or cross-examination of the agent regarding post-arrest statements that the defendant argued would have corroborated his defense of duress.[88] The court held that the defendant failed to carry his burden of proving that he "had no reasonable opportunity to escape or inform law enforcement" as required to establish a duress defense, and it was not enough that the defendant had a "subjective and general lack of faith in law enforcement" to protect him or his family.[89] The court also made clear that, despite the language in the indictment alleging the defendant acted "knowingly and willfully," the Government was not required to prove "willfulness" under 21 U.S.C. § 841.[90]

In *United States v. Mancilla-Ibarra*,[91] the Eleventh Circuit affirmed denial of the defendant's suppression motion where there was probable cause to arrest a defendant drug supplier based on information obtained from a government informant.[92] The defendant was arrested while attempting to deliver methamphetamine to another dealer-turned-informant who the Government had been able to secure

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[84] *Id.* at 1097–98.

[85] FED. R. EVID. 801(d)(2)(E).

[86] *Iriele*, 977 F.3d at 1097–98.

[87] *Id.* at 1098.

[88] *Id.* at 1102.

[89] *Id.* at 1103.

[90] *Id.* at 1099–1100.

[91] 947 F.3d 1343 (11th Cir. 2020).

[92] *Id.* at 1345.

based on yet another, third informant's tips. The court held the information provided by the informant was reliable based on his personal observations of the defendant's criminal activity, his consent for officers to search his home, his voluntarily turning over drug proceeds, and video surveillance corroborating some of the information he provided.[93]

C. Firearm Offenses

The Eleventh Circuit ruled on several important issues arising in prosecutions of federal firearm offenses, especially those under *Rehaif v. United States*,[94] where the Supreme Court held that a conviction for unlawful possession of a firearm under 18 U.S.C. § 922(g)[95] requires proof that a defendant knew of their "unlawful status" that prohibited possession of firearms.[96]

For example, in *United States v. Johnson*,[97] the Eleventh Circuit considered whether to vacate the defendant's conviction for possession of a firearm by a domestic violence misdemeanant in light of *Rehaif*, holding that it was plain error for the indictment to fail to allege that the defendant had knowledge of his prohibited status and to convict the defendant without sufficient evidence of that knowledge.[98] The court affirmed defendant's conviction, holding as a matter of first impression that a conviction under § 922(g) based on a defendant's misdemeanor crime of domestic violence requires proof that the defendant knows (1) that he has been convicted of a misdemeanor crime; (2) that the conviction required that he knowingly or recklessly engaged in at least the slightest offensive touching; and (3) that the victim of his misdemeanor crime was his current or former spouse, parent, or guardian.[99]

Here, the court held that the plain errors did not affect defendant's substantial rights because the evidence established that defendant knew that he had previously been convicted of domestic battery in Florida, that the victim was his wife, that he had served six months for that conviction, and that he knew he was a misdemeanant, albeit did not know that meant he could not possess firearms.[100] The court also rejected

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[93] *Id.* at 1349–50.

[94] 139 S. Ct. 2191 (2019).

[95] 18 U.S.C. § 922(g).

[96] *Rehaif*, 139 S. Ct. at 2196–98.

[97] 981 F.3d 1171 (11th Cir. 2020).

[98] *Id.* at 1179–81.

[99] *Id.* at 1183.

[100] *Id.* at 1188–89.

defendant's constitutional challenge to § 922(g) as applied to misdemeanants convicted of domestic violence.[101]

In *United States v. Innocent*,[102] the Eleventh Circuit rejected *Rehaif* challenges from the defendants based on their inability to prove that their substantial rights were affected by the failure of the Government to allege or prove knowledge of their prohibited status.[103] Regarding the first defendant, the court emphasized that most "people convicted of a felony know that they are felons" and the defendant in this case had been convicted of four felonies before, despite the fact that the defendant never served more than a year in prison, and rejected that defendant's argument that his low IQ score did not show he "could not understand that he was a felon."[104] Regarding the second defendant, the court relied on the evidence that the defendant had previously told an officer that he was a felon, he had already been convicted once of possession of a firearm by a convicted felon, he had previously spent years in prison, and he behaved in a way that suggested he knew he couldn't own a gun when police approached him.[105] Similarly, in *United States v. Moore*,[106] the Eleventh Circuit held that the failure to allege the defendant's knowledge in the indictment did not deprive the district court of subject matter jurisdiction and that this plain error did not affect the defendant's substantial rights based on evidence that he had previously served a long sentence and stipulated that he had a prior felony.[107]

However, the Eleventh Circuit did reverse at least one defendant's convictions based on the Supreme Court's holding in *Rehaif*. In *United States v. Russell*,[108] the Eleventh Circuit vacated a defendant's conviction after he established plain error in the Government's failure to allege or prove that he had knowledge of "his status as a person barred from possessing a firearm."[109] The court concluded that the defendant met his burden of showing his substantial rights were affected because he had "consistently challenged the nature of his immigration status throughout the district court proceedings," he had made statements that he believed he was in the U.S. legally, and the district court had excluded evidence

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[101] *Id.* at 1191.

[102] 977 F.3d 1077 (11th Cir. 2020).

[103] *Id.* at 1079.

[104] *Id.* at 1082–83.

[105] *Id.* at 1083–84.

[106] 954 F.3d 1322 (11th Cir. 2020).

[107] *Id.* at 1336.

[108] 957 F.3d 1249 (11th Cir. 2020).

[109] *Id.* at 1250.

he sought to admit at trial regarding his applications for immigration relief and his belief that he was legally present in the U.S.[110]

The Eleventh Circuit considered other issues arising from firearm offenses. In *United States v. Bolatete*,[111] a case where a defendant was convicted of possessing an unregistered firearm silencer and was preparing to engage in a mass shooting at a mosque, the Eleventh Circuit held that National Firearms Act[112] does not exceed Congress's authority to levy taxes or violate the Second Amendment through its ban on unregistered silencers.[113]

Also, the court held there was sufficient evidence of the defendant's predisposition to buy an unregistered silencer, despite his initial reluctance to buy the silencer from the undercover officer and his statements that a silencer would not be necessary for the mosque shooting.[114] Based on evidence that he knew a lot about silencers, the defendant told the undercover officer he owned one before and shot someone with it, and he was "the first one to mention an unregistered silencer" and advised the undercover officer not to register his silencer.[115] In another case involving an unregistered firearm, *United States v. Wilson*,[116] the Eleventh Circuit held that because there was sufficient evidence of the defendant's knowledge that his sawed-off shotgun was less than twenty-six inches in overall length and had a barrel less than eighteen inches long, the Government did not have to prove knowledge that the gun was unregistered or that possession of the firearm was unlawful.[117]

In *United States v. McLellan*,[118] a defendant's conviction for possession of a firearm by a convicted felon, the Eleventh Circuit held that the trial court did not err in allowing an agent to testify that the under-a-gram quantity of methamphetamine found near the firearms was a "sellable amount."[119] The court reasoned that in cases where a defendant denies knowingly possessing a firearm, "evidence of possession of illegal drugs is relevant in determining whether a defendant

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[110] *Id.* at 1253–54.

[111] 977 F.3d 1022 (11th Cir. 2020).

[112] 26 U.S.C. § 53.

[113] *Bolatete*, 977 F.3d at 1035–36.

[114] *Id.* at 1036–37.

[115] *Id.*

[116] 979 F.3d 889 (11th Cir. 2020).

[117] *Id.* at 904–05.

[118] 958 F.3d 1110 (11th Cir. 2020).

[119] *Id.* at 1115.

knowingly possessed a weapon found in close proximity to drugs."[120] Additionally, the methamphetamine was found near a digital scale, several baggies, and other items associated with distribution.[121]

D. Violent Crimes and the Armed Career Criminal Act

The Eleventh Circuit issued several important opinions clarifying the scope of the Armed Career Criminal Act (ACCA)[122] and other violent crimes. In *United States v. Green*,[123] the court reversed the defendants' convictions for carrying a firearm in connection with a crime of violence under 18 U.S.C. § 924(c),[124] holding as a matter of first impression that a RICO conspiracy is not categorically a "crime of violence."[125] The court reasoned that, as with a Hobbs Act[126] robbery conspiracy, "the elements of a RICO conspiracy focus on the agreement to commit a crime, which does not necessitate the existence of a threat or attempt to use force."[127]

Conversely, in *United States v. De Andre Smith*,[128] the Eleventh Circuit affirmed defendant's conviction for Hobbs Act robbery involving multiple armed robberies and a carjacking.[129] The court held there was sufficient evidence of the element requiring defendant's conduct to have an "actual effect" on interstate commerce when he robbed a victim who owned a business that was engaged in interstate commerce, took items used in connection with her business, including a thumb drive, cell phone, and cash, and the court concluded that there did not have to be any "commercial relationship" between the defendant and a victim to sustain a conviction under the Hobbs Act.[130] The court also rejected Smith's argument that the fact that the victim is an individual limits the theories under which the Government can charge and convict a defendant for Hobbs Act robbery.[131]

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[120] *Id. (citing* United States v. Thomas, 242 F.3d 1028, 1031 (11th Cir. 2001)).

[121] *Id.* at 1115–16.

[122] 18 U.S.C. § 924 (2021).

[123] 981 F.3d 945 (11th Cir. 2020).

[124] 18 U.S.C. § 924(c).

[125] *Green*, 981 F.3d at 952.

[126] 18 U.S.C. § 1951.

[127] *Green*, 981 F.3d at 952, (*citing* Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019)).

[128] 967 F.3d 1196 (11th Cir. 2020).

[129] *Id.* at 1200.

[130] *Id.* at 1208–10.

[131] *Id.* at 1207–08.

In *United States v. Gumbs*,[132] where the defendant was convicted of using a deadly weapon—his car—to forcibly assault, resist, oppose, impede, intimidate, or interfere with federal officers, the court affirmed the defendant's conviction.[133] The court held there was sufficient evidence where the defendant was a fugitive on the run, used his car to escape agents who had caught up to him, and hit or almost hit several of them while escaping.[134] The court also rejected defendant's arguments regarding his proposed jury instructions, which the trial court declined to adopt, including those defining "forcibly," explaining when a car constitutes a "deadly weapon" because 18 U.S.C. § 111(b)[135] is a general intent crime.[136] Therefore, the court had no obligation to instruct the jury that the defendant had to intend to use the car as a deadly weapon to warrant a conviction.[137] Similarly, in *United States v. Bates*,[138] the Eleventh Circuit ruled on an issue of first impression that an assault on a federal officer through use of a deadly weapon or by inflicting bodily injury under § 111(b) categorically qualifies as a crime of violence under 18 U.S.C. § 924(c).[139]

The Eleventh Circuit also focused on the ACCA in several published opinions during this survey period. In *United States v. Carter*,[140] the court considered whether a defendant's prior convictions for distributing marijuana and distributing cocaine, which were alleged in a single indictment, were independent offenses for the purposes of qualifying him as a "career criminal" under the ACCA.[141] Looking at the indictment and plea transcript[142] from the prior case, the court found that the offenses were "more likely than not" committed "on occasions different from one another."[143] Because the indictment alleged a location-based enhancement for distributing drugs near a school or public housing in

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[132] 964 F.3d 1340 (11th Cir. 2020).

[133] *Id.* at 1350–51.

[134] *Id.* at 1351.

[135] 18 U.S.C. § 111(b).

[136] *Gumbs*, 964 F.3d at 1347–48.

[137] *Id.*

[138] 960 F.3d 1278 (11th Cir. 2020).

[139] *Id.* at 1287.

[140] 969 F.3d 1239 (11th Cir. 2020).

[141] *Id.* at 1241.

[142] The court added that it may not have been appropriate for the district court to rely on the plea transcript because the defendant had not "confirmed" the factual basis for the plea. *Id.* at 1243.

[143] *Id.* at 1243–44.

only one of the counts, the court concluded that the offenses "most likely happened at different places and, by extension, different times."[144]

In *Welch v. United States*,[145] the Eleventh Circuit held that the defendant's prior Florida convictions for strong-arm robbery and felony battery were violent felonies under the elements clause of the ACCA because they required more than "mere snatching."[146] In *United States v. Oliver*,[147] the defendant was sentenced under the ACCA based on his prior conviction under Georgia law for making terroristic threats.[148] The court held that the statute was divisible and "a threat to commit 'any crime of violence' under Georgia law" is always a violent felony under the ACCA.[149] In *United States v. Smith*,[150] the court held that the defendant's prior Florida conviction for sale of cocaine was a "serious drug offense" under the ACCA and rejected his argument that he received ineffective assistance of counsel based on his counsel's plea negotiations in the concurrent state and federal cases.[151] In *Hollis v. United States*,[152] the court held that the defendant's Alabama convictions for distributing cocaine were predicate "serious drug offense[s]" and so was his Georgia conviction for trafficking cocaine.[153]

E. Immigration Crimes

The Eleventh Circuit issued three important opinions regarding immigration offenses. In *United States v. Estrada*,[154] the defendants were convicted under 8 U.S.C. § 1324(a)(2)[155] for bringing four noncitizen baseball players to the United States, and the defendants argued on appeal that their conduct was legal under the Cuban Adjustment Act and Wet Foot/Dry Foot Policy, which protects Cubans who come to the country and allows them to apply for permanent residency.[156] The court rejected this argument, and held that the Act and Policy did not provide

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[144] *Id.* at 1245.
[145] 958 F.3d 1093 (11th Cir. 2020).
[146] *Id.* at 1095–98.
[147] 962 F.3d 1311 (11th Cir. 2020).
[148] *Id.* at 1314.
[149] *Id.* at 1314–15.
[150] 983 F.3d 1213 (11th Cir. 2020).
[151] *Id.* at 1220–21.
[152] 958 F.3d 1120 (11th Cir. 2020).
[153] *Id.* at 1122.
[154] 969 F.3d 1245 (11th Cir. 2020).
[155] 8 U.S.C. § 1324(a)(2).
[156] *Estrada*, 969 F.3d at 1259.

the defendants with "prior official authorization" to enter or reside in the United States.[157] Additionally, the court held there was sufficient evidence to support their convictions for aiding and abetting bringing an alien to the United States under § 1342(a)(2), holding that "bringing" an alien does not require "evidence of physical accompaniment across the border" and that "it was enough that the defendants and other members of the smuggling operation made all the arrangements for the players' border crossings."[158]

In *United States v. Santos*,[159] the Eleventh Circuit reviewed the defendant's convictions for procuring naturalization unlawfully and misuse of evidence of an unlawfully issued certificate of naturalization based on the defendant failing to disclose on a Form N-400 Application that he had previously been convicted of voluntary manslaughter in the Dominican Republic.[160] Defendant argued at trial that he had not "knowingly" made the false statements because he thought that the questions on the form regarding prior convictions only referred to convictions in the United States, and they were not "material" to his procuring naturalization.[161] Regarding the knowledge element, the court held there was sufficient evidence based on several other false statements wherein defendant failed to disclose other illegal but uncharged conduct he engaged in, his prior travel outside the United States, and his use of another name. The court also noted that the form asked for the "Country" of any arrests and charges.[162] The court held that the false statements were material, citing the disqualifying-fact theory and investigation-based theory set forth in the Supreme Court's recent decision in *Maslenjak v. United States,*[163] because "a reasonable USCIS officer adjudicating Santos's Form N-400 Application, knowing about Santos's Dominican conviction, would have denied the Application."[164]

Finally, in *United States v. Jimenez*,[165] the court affirmed the defendant's conviction for immigration document fraud and money laundering offenses based on the defendant submitting fraudulent

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[157] *Id.* at 1262–63.

[158] *Id.* at 1268.

[159] 947 F.3d 711 (11th Cir. 2020).

[160] *Id.* at 716–17.

[161] *Id.* at 731.

[162] *Id.* at 731–32.

[163] 137 S. Ct. 1918 (2017).

[164] *Santos*, 947 F.3d at 732–34.

[165] 972 F.3d 1183 (11th Cir. 2020).

employer petitions in order to obtain work visas for Chinese nationals.[166] The court held that the I-140 petitions qualify under 18 U.S.C. § 546(a)[167] as an "other document required by the immigration laws or regulations" and that the evidence was sufficient where the Government introduced evidence that the defendant had paid individuals to submit petitions on behalf of their business, lied about their businesses relationship with Chinese businesses, and forged their names on the forms.[168]

F. Sex Offenses

Lastly, the Eleventh Circuit issued a pair of noteworthy opinions involving sex offenses. In *United States v. Caniff*,[169] the panel vacated a prior opinion it had issued in 2019, wherein it held under 18 U.S.C. § 2251(d)(1)[170] that a defendant sending text messages requesting nude pictures from an undercover officer posing as a minor was guilty of making a "notice" seeking or offering child pornography.[171] This time around, the court reversed Caniff's conviction.[172] The court reasoned that the context of the statute focused more on advertising and publishing in the media and other forms of "public communications."[173] In this context, the word "notice" is ambiguous, and as such, the rule of lenity applies and precludes § 2251(d)(1) from reaching "private, person-to-person text messages" requesting or offering child pornography.[174]

In *United States v. Deason*,[175] the court considered whether under 18 U.S.C. § 1470,[176] there was sufficient evidence to convict a defendant of attempting to transfer obscene matter to a minor.[177] At trial, the Government had only introduced screenshots of videos that the defendant had sent an undercover officer posing as a minor, along with an agent's testimony describing the contents of the videos, rather than play the videos in its entirety.[178] The defendant argued the evidence was

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[166] *Id.* at 1184.

[167] 18 U.S.C. § 546(a).

[168] *Jimenez*, 972 F.3d at 1192–94.

[169] 955 F.3d 1183 (11th Cir. 2020).

[170] 18 U.S.C. § 2251(d)(1).

[171] *Caniff*, 955 F.3d at 1185 (*vacated*, United States v. Caniff, 916 F.3d 929 (11th Cir. 2019)).

[172] *Caniff*, 955 F.3d at 1185.

[173] *Id.* at 1188–90.

[174] *Id.* at 1191–92.

[175] 965 F.3d 1252 (11th Cir. 2020).

[176] 18 U.S.C. § 1470.

[177] *Deason*, 965 F.3d at 1262.

[178] *Id.*

insufficient, relying on the Supreme Court's opinion in *Miller v. California*,[179] which lays out a three-part test for determining if a matter is "obscene" based on:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[180]

The Eleventh Circuit disagreed, holding that *Miller* "does not require that all the matter alleged to be obscene be admitted into evidence and put before the trier of fact."[181] Rather, the court explained, *Miller* is about ensuring "that the matter is placed in context" and "that any serious literary, artistic, political, or scientific value present in the matter as a whole is not lost because only select portions are viewed."[182] Here, nothing was omitted from the screenshots or testimony that would have given the videos redeeming value, the court reasoned, and the selected portions in evidence were enough for the jury to conclude that the underlying videos, "taken as a whole," were obscene.[183] The court also rejected defendant's arguments that the six counts of obscenity in the indictment were flawed because they were based on the date the materials were sent rather than each of the specific materials themselves, that the admission of the screen shots and testimony violated the best evidence rule and constituted reversible plain error, and that, even assuming the obscenity counts were duplicitous, defendant had not shown his substantial rights were prejudiced because he had not made any argument "as to how a reasonable juror could conclude that any of those images are not obscene."[184]

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

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[179] 413 U.S. 15 (1973).

[180] *Deason*, 965 F.3d at 1262 (citing *Miller*, 413 U.S. at 24).

[181] *Id.*

[182] *Id.* at 1262–63.

[183] *Id.* at 1263.

[184] *Id.* at 1264–69.

CONSTITUTION

A. Fourth Amendment Issues

The Fourth Amendment[185] occupied a substantial amount of the Eleventh Circuit's time in 2020, with most of the court's decisions cutting against the suppression of unlawfully obtained evidence, including in cases involving blatant violations of the Fourth Amendment. The Supreme Court of the United States also declined to grant certiorari in *Williams v. United States*,[186] leaving intact a circuit split wherein the Eleventh Circuit remains the sole circuit that does not require law enforcement to have any level of suspicion before searching an individual's electronic device at the border.[187]

In *United States v. Campbell*,[188] the panel vacated its own prior opinion[189] from January 2019 in which it held that an officer had unlawfully prolonged a traffic stop under the Supreme Court's recent decision in *Rodriguez v. United States*,[190] where the Supreme Court held that a traffic stop is unlawful as soon as the officer detains the motorist longer than necessary to complete the purpose of the stop and there is no reasonable suspicion to warrant further detaining them.[191] This time around, the Eleventh Circuit held that the good faith exception applied because the officers were relying on then-binding case law.[192] At the end of the year, the Eleventh Circuit vacated the opinion and voted in favor of granting a rehearing en banc.[193]

In *United States v. Evans*,[194] the Eleventh Circuit upheld law enforcement's warrantless entry and protective sweep of a defendant's residence under the "emergency aid exception" to the Fourth Amendment's warrant requirement.[195] The court held that, under the circumstances, it was reasonable for the officers to believe—erroneously, it turns out—that there was someone in the house in need of aid based

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[185] U.S. CONST. amend. IV.

[186] 141 S.Ct. 235 (2020).

[187] *See* United States v. Touset, 890 F.3d 1227 (11th Cir. 2018); United States v. Vergara, 884 F.3d 1309 (11th Cir. 2018).

[188] 970 F.3d 1342 (11th Cir. 2020).

[189] *Id.*

[190] 135 S. Ct. 1609 (2015).

[191] *Id.* at 1346 (citing *Rodriguez*, 135 S. Ct. at 1609).

[192] *Id.*

[193] United States v. Campbell, 981 F.3d 1014–15 (Mem) (11th Cir. 2020).

[194] 958 F.3d 1102 (11th Cir. 2020).

[195] *Id.* at 1104–06.

on hearing a whimpering dog, noting the officers were responding to 911 calls about gunshots, Evans' girlfriend told them Evans had threatened to kill himself inside, and once Evans did come outside, he locked the door behind him.[196]

Similarly, in *United States v. Yarbrough*,[197] the Eleventh Circuit reversed a district court's suppression order and held that the officers were justified in executing a warrantless protective sweep of the defendant's house after they arrested the defendant in his yard and his wife inside their house.[198] The court held that the officers' reentry after the defendants were arrested was warranted because the totality of the circumstances supported "a reasonable suspicion that a dangerous individual was located inside the house," citing the anonymous tip that the house hosted drug trafficking, the number of vehicles at the house, others hanging outside the house, and the "evasive or furtive behavior" of the defendant's wife when she tried to flee the officers.[199]

The Eleventh Circuit reversed another district court's suppression order in *United States v. Watkins*,[200] a case involving a post office supervisor who was smuggling narcotics through her branch and who was discovered after agents put a tracking device in one of the narcotics packages.[201] Although the court acknowledged, and the Government conceded, that the agents violated Watkins' Fourth Amendment rights when they activated and monitored the tracking device without a warrant when the device was inside her home, the court held that the inevitable discovery exception applied because there was a "reasonable probability" that the agents would have eventually conducted a "knock and talk" at Watkins' house based on her status as a suspect, her anxious appearance when they previously visited her office, and other similar facts.[202] The court added that the district court abused its discretion by disregarding the credibility determinations of the magistrate judge without conducting another hearing.[203]

Regarding electronic data, the Eleventh Circuit held in *United States v. Trader*[204] that the Government does not have to seek a search warrant

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[196] *Id.* at 1106–07.

[197] 961 F.3d 1157 (11th Cir. 2020).

[198] *Id.* at 1159.

[199] *Id.* at 1163–65.

[200] 981 F.3d 1224 (11th Cir. 2020).

[201] *Id.* at 1228.

[202] *Id.* at 1231–35.

[203] *Id.* at 1234–35.

[204] 981 F.3d 961 (11th Cir. 2020).

to request email addresses and IP addresses associated with a user's profile on social media applications, where the defendant allegedly solicited naked pictures from someone he believed was a minor.[205] The court held that the Supreme Court's decision in *Carpenter v. United States*,[206] where the Court held that the third-party doctrine does not excuse the Government from seeking a warrant before obtaining cell site location data, does not extend to email or IP addresses.[207] Unlike cell site location data, a defendant's email address and IP address as maintained in a social media application are ordinary "business records" that do not "directly record[] an individual's location."[208]

In *United States v. Knights*,[209] the Eleventh Circuit considered whether the officers had conducted an investigatory stop when they approached the defendant and another person who were smoking marijuana by a car.[210] The court held that there was no investigatory stop or "seizure" under the Fourth Amendment and that the encounter was "initially consensual," citing the fact that defendant was free to leave (and his friend did leave), the officers did not display their weapons, touch defendant or speak to him, and that they did not activate the lights or sirens on their patrol car.[211] The case was distinguishable to those where officers approaching defendants have the practical effect of cornering them or making them feel they are not free to leave.[212]

In *United States v. Bruce*,[213] the officers conducted a Fourth Amendment stop by tackling the defendant while he was allegedly fleeing upon their approach. The court held that reasonable suspicion existed to believe that the defendant had engaged in criminal activity based on the officers receiving a 911 call from an anonymous tipster who claimed to be an eye witness, the call coming late at night regarding individuals engaged in an argument while in a high-crime area, and one of the individuals with the defendant fleeing upon approach by the officers. [214] The court focused on the reliability of the tipster as well.[215]

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[205] *Id.* at 964.

[206] 138 S. Ct. 2206 (2018).

[207] *Id.* at 2217.

[208] *Trader*, 981 F.3d at 968.

[209] 967 F.3d 1266 (11th Cir. 2020).

[210] *Id.* at 1268.

[211] *Id.* at 1270–71.

[212] *Id.* at 1271–72 (citing United States v. Beck, 602 F.2d 726, 727 (5th Cir. 1979)).

[213] 977 F.3d 1112 (11th Cir. 2020).

[214] *Id.* at 1115, 1118–21.

[215] *Id.* at 1118–1119.

In *United States v. Mastin*,[216] the Eleventh Circuit held officers did not violate the Fourth Amendment by entering a hotel room to execute arrest warrants which the defendant was not subject to.[217] The court first concluded that the officers' entry into the hotel room was based on a reasonable belief that the subjects of the arrest warrants were dwelling at the hotel room.[218] The court also held that the officers did not violate defendant's rights by forcing him to crawl out of the room, which revealed a firearm he was prohibited from possessing, reasoning that the officers were pursuing "violent felons who were known to be armed" and were thus justified in detaining the defendant and forcing him to crawl on the ground to ensure their own safety.[219]

However, not all of the Eleventh Circuit's Fourth Amendment opinions cut against defendants. In the Eleventh Circuit's en banc opinion in *United States v. Ross*,[220] the court held that a suspect's alleged "abandonment" of property that is the object of a search or seizure still has standing under Article III[221] to challenge the search, as the alleged abandonment of property "implicates only the merits of his Fourth Amendment challenge."[222] Therefore, "if the government fails to argue abandonment, it waives the issue."[223]

B. Fifth Amendment Issues

The Eleventh Circuit broke ground in several opinions involving the Fifth Amendment,[224] including cases involving defendants' Miranda rights. One notable case was *McKathan v. United States*,[225] where the court vacated a defendant's conviction for receipt of child pornography and held that the statements he made to his probation officer while on supervised release, which led to a revocation of his release and formed the basis of a subsequent charge and conviction, were compelled in violation of his Miranda rights.[226] The court reasoned that the defendant's Fifth Amendment rights were "self-executing" because the

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[216] 972 F.3d 1230 (11th Cir. 2020).

[217] *Id.* at 1233.

[218] *Id.* at 1236–37.

[219] *Id.* at 1237–39.

[220] 963 F.3d 1056 (11th Cir. 2020).

[221] U.S. CONST. art. III.

[222] *Ross*, 963 F.3d at 1057.

[223] *Id.*

[224] U.S. CONST. amend. V.

[225] 969 F.3d 1213 (11th Cir. 2020).

[226] *Id.* at 1217.

Government had created a "classic penalty situation" where in the defendant had to either make incriminating statements to his probation officer or violate his conditions of release.[227] Thus, the statements could be used to revoke the defendant's supervised release but could not form the basis of a new prosecution.[228]

In *Deason*, the Eleventh Circuit held that the defendant was not in custody when he made incriminating statements to agents after officers executed a search warrant for the defendant's phone.[229] The court noted that the defendant had agreed to talk to the officers after he was repeatedly told he was not under arrest, he was told that the officers could leave if asked, and he insisted on continuing to talk to the agents after his wife advised him to stop talking.[230]

Several of the Eleventh Circuit's other Fifth Amendment opinions reflect how difficult it is for defendants to obtain reversals based on Government misconduct and other due process issues. In *United States v. Gallardo*,[231] for example, the court affirmed a defendant's conviction and the trial court's denial of motion for mistrial after an agent testified falsely during the Government's rebuttal in order to bolster the credibility of a confidential source.[232] Despite expressing significant concern with the agent's credibility, the trial court instead determined that the agent could not provide any further rebuttal testimony and gave a curative instruction to the jury to disregard the agent's rebuttal testimony in its entirety.[233] The court held that, under these circumstances, the testimony was not "so prejudicial that no instruction could cure it."[234]

Also, the panel in *Gallardo* concluded that the Government did not plainly violate *Brady v. Maryland*[235] or *Giglio v. United States*, [236] when it disclosed, during trial, that the Government had deactivated their confidential source witness based on self-dealing.[237] The court reasoned that there was no Brady violation because it was not reasonably probable that the outcome of the case would have been different had the evidence

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[227] *Id.* at 1224–26.

[228] *Id.* at 1229.

[229] *Deason*, 965 F.3d at 1252.

[230] *Id.* at 1260–62.

[231] 977 F.3d 1126 (11th Cir. 2020).

[232] *Id.* at 1136.

[233] *Id.* at 1136–37.

[234] *Id.* at 1139.

[235] 373 U.S. 83 (1963).

[236] 405 U.S. 150 (1972).

[237] *Gallardo*, 977 F.3d at 1142–43.

been disclosed sooner, and there was no *Giglio* violation because the evidence did not reveal that any of the Government's witnesses had testified falsely.[238] The court also rejected the defendant's motion for new trial based on the Government engaging in sentencing factor manipulation, where the Government "manipulates a sting operation to increase a defendant's sentence," holding that the evidence showed the defendant was a willing participant in finding additional drug quantities for the confidential source and, in either case, the proper remedy would be a sentence reduction rather than new trial.[239]

In *Gayden*, a "pill mill" case, the court affirmed the denial of a defendant's motion to dismiss based on pre-indictment delay despite the fact that the defendant was prejudiced by his inability to call his mother and former office manager as witnesses due to their death and by the destruction of records obtained under administrative subpoenas.[240] Based on the Government's explanation that the two-year delay was necessary so it could retain a new expert, and the defendant's failure to show "a deliberate act by the government designed to gain a tactical advantage over him," the district court did not abuse its discretion in denying the motion.[241]

In *Moore*, the court held that the shackling of the defendants during their trial was not reversible plain error even though the record did not reflect a "particularized determination of the security needs" necessary to warrant shackling the defendants.[242] The court reasoned that, putting the apparent violation of due process aside, the defendant had failed to meet his burden in showing that the outcome may have been different at trial, citing the split verdict by the jury as an indication that the presumption of innocence had not been "undermined" by the sight of the defendants in shackles.[243] The court did "admonish" trial courts to state on the record why restraints are necessary.[244]

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[238] *Id.* at 1143.

[239] *Id.* at 1144.

[240] *Gayden*, 977 F.3d at 1150.

[241] *Id.* at 1150–51.

[242] *Moore*, 954 F.3d at 1329.

[243] *Id.* at 1330.

[244] *Id.*

C. Sixth Amendment Issues

The Eleventh Circuit issued several opinions discussing the Sixth Amendment[245] right to counsel. In *United States v. Muho*,[246] the court affirmed a defendant's conviction after the defendant argued that the trial court violated his Sixth Amendment right to counsel "when he was allowed to continue to represent himself, even after he vacillated about self-representation."[247] Where the validity of the defendant's waiver of counsel was unchallenged, clearly voluntary, and "repeatedly reaffirmed after signs of uncertainty," the trial court did not err in failing "to override sua sponte the defendant's waiver of his right to counsel."[248]

The Eleventh Circuit considered another right-to-counsel issue in *Amede*,[249] where the district court denied the defendant's request for counsel at sentencing after he had discharged two other attorneys.[250] The court held that the defendant had not established "good cause" where he had refused to communicate with his trial attorney, his complaints regarding that attorney were based on her refusal to file meritless *pro se* motions, and his "general loss of confidence or trust" in his attorney was not sufficient.[251] Regarding the second attorney, who the defendant retained before sentencing and then discharged him during the sentencing hearing, the court held that the sentencing court did not err in allowing the defendant to discharge his attorney and proceed *pro se* without conducting a formal colloquy, despite the defendant repeatedly stating that he needed counsel.[252]

The court held that the defendant had knowingly and voluntarily waived his right to counsel despite the statements he made after firing his second attorney, noting that the district court had continued sentencing twice to give the defendant's attorney time to prepare, the defendant refused to speak with his attorney at the hearing, the defendant twice insisted on proceeding without that attorney, the district court advised the defendant of the risks of proceeding without counsel, and "the totality of the record."[253] The court added that the defendant's "uncooperative conduct throughout the case" reflected his knowing and

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[245] U.S. CONST. amend. VI.

[246] 978 F.3d 1212 (11th Cir. 2020).

[247] *Id.* at 1217.

[248] *Id.* at 1218.

[249] 977 F.3d at 1086.

[250] *Id.* at 1104–05.

[251] *Id.* at 1106–07.

[252] *Id.* at 1110.

[253] *Id.* at 1110–11.

voluntary waiver and, while he at one point stated he had "other counsel lined up," he did not assert that such counsel was present and ready to proceed with sentencing.[254]

In another case involving a *pro se* defendant, *Wilson*,[255] the court held that the defendant had knowingly waived his right to counsel when he repeatedly refused to request a continuance when his standby counsel was unavailable, hoping to let this speedy trial clock run.[256] Similarly, in *United States v. Owen*,[257] the court held that the trial court did not err in allowing the defendant to represent himself based on his knowing waiver, noting that the defendant had articulated his knowledge and voluntariness, he had no mental disability, he had formerly worked as a paralegal, and he had been able to strike jurors, request preliminary instructions, and persuade the trial court to exclude evidence.[258] The court did weigh the lack of standby counsel in defendant's favor, however, though it did not otherwise invalidate the valid waiver.[259]

The Eleventh Circuit also published a pair of important opinions involving ineffective assistance of counsel claims. In *Martin v. United States*,[260] the court held that the defendant's attorney was not constitutionally ineffective based on the attorney's failure to advise the defendant that he would be deported if he pleaded guilty to access device fraud and identity theft.[261] Defense counsel had advised the defendant that he could face "adverse immigration consequences," but since it was not certain that the defendant's conviction would be an "aggravated felony" until the loss amount was determined at sentencing, defense counsel was not required to advise the defendant that he would be pleading to an aggravated felony that made deportation presumptively mandatory.[262]

Conversely, in *Carmichael v. United States*,[263] the court held that the defendant's counsel was deficient in failing to advise the defendant of his potential sentencing exposure, not making a plea offer to the government as directed by the defendant, and not conveying the government's

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[254] *Id.* at 1111.

[255] 979 F.3d at 889.

[256] *Id.* at 913–14.

[257] 963 F.3d 1040 (11th Cir. 2020).

[258] *Id.* at 1049–51.

[259] *Id.* at 1051.

[260] 949 F.3d 662 (11th Cir. 2020).

[261] *Id.* at 667.

[262] *Id.* at 668–69.

[263] 966 F.3d 1250 (11th Cir. 2020).

time-limited plea offer.[264] However, the court declined to vacate the defendant's conviction because he had not proven he was adversely affected, citing defendant's rejection of two prior plea offers and the lack of evidence that he would have been able or willing to gain a reduction through cooperating given his prior refusal to attend a proffer session.[265]

The court also ruled on other important Sixth Amendment issues. In *Moore*,[266] the court rejected a defendant's challenge regarding juror misconduct where the jurors had expressed safety concerns about putting their names on the verdict form.[267] The court explained that the "best course of action" in such a situation is for the trial court to "confer with counsel to discuss the contours of an in camera review," interview the juror or jurors in camera, summarize its assessment of the interviews on the record for the parties, and having the court reporter read the transcript of the in camera interview to the parties.[268] In *United States v. Pon*,[269] the court held that a defendant potentially had a Sixth Amendment right to present surrebuttal evidence but that the defendant had failed to preserve the issue for appeal because he had raised an objection on evidentiary grounds, not constitutional grounds, and denial of a defendant's surrebuttal was harmless based on sufficient evidence that the jury's verdict was not affected.[270]

D. Federal Rules of Criminal Procedure

The court discussed the Federal Rules of Criminal Procedure in several cases where those rules intersected with evidentiary rules and constitutional issues, but it also addressed a few specific rules. In *United States v. Andres*,[271] for example, the court held that the district court did not err inn denying the defendant's motion to suppress as untimely because the good cause exception to Rule 12's[272] timeliness requirement does not apply to strategic delays or inadvertence.[273]

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[264] *Id.* at 1258.

[265] *Id.* at 1260–61.

[266] 954 F.3d at 1322.

[267] *Id.* at 1330–31.

[268] *Id.* at 1331.

[269] 963 F.3d 1207 (11th Cir. 2020).

[270] *Id.* at 1225–28.

[271] 960 F.3d 1310 (11th Cir. 2020).

[272] FED. R. CIV. P. 12.

[273] *Andres*, 960 F.3d at 1316.

In *United States v. Melgen*,[274] the court affirmed the denial of a defendant's motion for a new trial under Rule 33,[275] holding that defendant-favorable testimony rendered by the government's expert at the sentencing hearing was not new evidence warranting a new trial because it could have been obtained before trial, on cross-examination, and the evidence "at best" could have been used for impeachment purposes only.[276]

E. Federal Rules of Evidence

The Eleventh Circuit addressed several different kinds of evidentiary issues in 2020. The court's decision in *Santos*,[277] for example, involved issues arising from the trial court's admission of an annotated copy of the Form N-400 Application that reflected corrections and clarifications that the immigration officer made while interviewing the defendant, who was convicted of procuring citizenship unlawfully based in part on his failure to disclose a prior conviction for manslaughter.[278] The court held that the annotated form was admissible as non-hearsay statements adopted by an opposing party and under the public records exception and that admission of the form did not violate the defendant's confrontation rights because the form was "nontestimonial public record produced as a matter of administrative routine, . . . for the primary purpose of determining the [defendant's] eligibility for naturalization."[279]

The court also affirmed the trial court's decision to allow testimony regarding an inculpatory portions of the defendant's post-Miranda statements but not the subsequent, exculpatory portions of the statement.[280] Defendant had revealed to an immigration officer that he was previously convicted of manslaughter in another country, contrary to his disclosure on immigration forms, but explained that he thought the form referred only to convictions in the United States.[281] The court rejected the defendant's argument that the exculpatory explanation should have been admitted under the "rule of completeness" and Rule 106,[282] holding that the facts of the defendant's prior conviction and his

[274] 967 F.3d 1250 (11th Cir. 2020).

[275] FED. R. CIV. P. 33.

[276] *Melgen*, 967 F.3d at 1264–65.

[277] 947 F.3d at 716.

[278] *Id.* at 723–24.

[279] *Id.* at 729.

[280] *Id.* at 729–30.

[281] *Id.* at 732.

[282] FED. R. EVID. 106.

subsequent explanation for failing to disclose were "separate and different" topics, and the exculpatory portion "was not necessary to explain or clarify the earlier inculpatory part."[283]

In *United States v. Clotaire*,[284] the court considered whether photograph stills of an ATM surveillance video showing the defendant were inadmissible testimonial hearsay.[285] The court held that they were admissible as business records, rejecting the defendant's argument that they ceased being business records when the Government isolated certain images in the video for the purpose of litigation.[286] The court also held that the defense was not entitled to cross-examine the person who prepared the stills.[287]

The court also considered whether the trial court erred in admitting a picture of the defendant's mugshot.[288] The court reasoned that there was a demonstrable need for the Government to introduce the mugshot because the identification of the defendant was "central to the government's case," there was no implication that it was from a prior arrest, the parties had stipulated it was taken on the same day as the defendant's arrest, and the Government "did not draw attention to how or under what circumstances the photographs were taken."[289]

The court also issued important opinions regarding conventional identification evidence. In *Caldwell*, the court held that the trial court did not clearly err in admitting an out-of-court identification in a bank robbery trial where officers brought a bank teller to the defendant immediately upon his apprehension to conduct a "show-up identification," and the bank teller was only able to "point out similarities between Caldwell and the robber [and] could not positively identify him as the robber at that time."[290] The court held that, even assuming the "show-up" procedure was unduly suggestive, it was nonetheless sufficiently reliable under the circumstances, which included the teller's close visual contact with the robber, detailed description of the robber, and her statements regarding the similarities between the defendant's appearance and that of the robber.[291] The court also affirmed the district

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[283] *Santos*, 947 F.3d at 729–30.

[284] 963 F.3d 1288 (11th Cir. 2020).

[285] *Id.* at 1293.

[286] *Id.* at 1293–94.

[287] *Id.* at 1294–95.

[288] 963 F.3d 1288, 1299 (11th Cir. 2020).

[289] *Id.* at 1300–02.

[290] *Caldwell*, 963 F.3d at 1071.

[291] *Id.* at 1075–76.

court's denial of defendant's motion for new trial based on new evidence, provided by the FBI after trial and establishing that the agent's testimony on DNA evidence was materially incorrect in several aspects, because the non-DNA evidence was overwhelming.[292]

In *Iriele*, the court held that the trial court had properly admitted an agent's testimony identifying the defendant's handwriting on a ledger listing alleged money laundering transactions.[293] The court hinged its decision on finding that Rule 901(b)(2)[294] did not preclude the testimony because the agent's opinion was based on familiarity with the defendant's handwriting that he obtained "in the course of investigating a crime," and it was not "acquired for the current litigation."[295] The court supported this distinction by considering the purpose of the rule, which was intended to prevent lay witnesses from testifying as experts, and concluded that an agent

> who becomes familiar with the defendant's handwriting for the purpose of solving a crime is different from a lay witness who makes a handwriting comparison so he can testify about it at trial. That investigator is in the same position as any other lay witness who, as part of his job or in his day-to-day affairs, has seen examples of the defendant's handwriting.[296]

In *United States v. Joseph*,[297] a heroin and fentanyl case, the court considered whether the trial court had erred in admitting certain evidence under Rules 403[298] and 404(b)[299] of the Federal Rules of Evidence.[300] First, the court affirmed the trial court admitting evidence that the defendant had used a false identity to rent an apartment despite him not being charged with identity theft, holding the evidence was "inextricably intertwined" with evidence of the drug charges because it showed the defendant exercised control over the drugs in the property and used the property to conceal his drug activity.[301] The court also held

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[292] *Id.* at 1079–80.

[293] *Iriele*, 977 F.3d at 1166.

[294] FED. R. EVID. 901(b)(2).

[295] *Iriele*, 977 F.3d at 1166.

[296] *Id.* at 1167.

[297] 978 F.3d 1251 (11th Cir. 2020).

[298] FED. R. EVID. 403.

[299] FED. R. EVID. 404.

[300] *Joseph*, 978 F.3d at 1263.

[301] *Id.*

that the trial court properly admitted a detective's testimony regarding the dangers of fentanyl overdoses, holding that it was admissible under Rule 403 because "Joseph was charged with a crime involving fentanyl," and he could not prove prejudice because "the general public already is aware that heroin and fentanyl can be deadly."[302]

In *United States v. Smith*,[303] a case involving a violent robbery, the court considered whether the district court erred in admitting a music video into evidence that featured the defendant carrying firearms and rapping about committing violent acts.[304] The court held that the video's admission did not violate the defendant's First Amendment rights because the video was not used to establish the element of a crime, and neither did the admission of the video violate Rule 403.[305] While the video certainly created the risk of undue prejudice, the defendant's appearance in the music video corroborated key aspects of the victim's testimony regarding the defendant and thus was properly admitted.[306]

Regarding expert evidence, in *Pon*,[307] a healthcare fraud case, the court ruled that the district court did not abuse its discretion in excluding the defendant's proposed expert testimony from the former director of a company that made products the defendant used on his patients that the defendant's treatments were suitable.[308] The court upheld the trial court's finding that the expert's relied upon theory lacked testing, known or potential error rates and control standards, and acceptance within the scientific community.[309] The court also ruled that the trial court did not err in allowing the Government to introduce rebuttal evidence of fraudulent billings the defendant generated regarding one patient in particular because the defendant testified that he treated patients for reasons other than profit.[310] In *United States v. Bates*, the court affirmed the trial court's exclusion of the defendant's expert psychiatrist regarding the defendant's prior trauma and its potential relationship to his attack on federal officers.[311]

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[302] *Id.* at 1264.

[303] 967 F.3d 1196 (11th Cir. 2020).

[304] *Id.* at 1204.

[305] *Id.* at 1204–06.

[306] *Id.* at 1205–06.

[307] 963 F.3d at 1207.

[308] *Pon*, 963 F.3d at 1215.

[309] *Id.* at 1220–21.

[310] *Id.* at 1222.

[311] Bates, 960 F.3d at 1290.

In *United States v. McLellan*, the court affirmed the trial court's decision to allow an officer, in a felon in possession of a firearm case, to improperly "testify as an expert" regarding the correlation between guns and drug activity and that the defendant was selling drugs based on finding a "sellable amount" of meth, in this case less than a gram.[312] The court held that the testimony was not expert testimony requiring the agent's qualification as an expert because it did not require any scientific, technical, or specialized knowledge, but was rather "lay opinion testimony based on his professional experiences."[313] The court distinguished the testimony from improper expert testimony by agents in other contexts, such as interpreting otherwise unambiguous phone calls in drug cases.[314]

IV. SENTENCING

A. The Federal Sentencing Guidelines

The Eleventh Circuit issued several important opinions interpreting and applying the Federal Sentencing Guidelines. In *United States v. Bazantes*, the defendant, a secondary contractor, won a rare reversal and resentencing based on the Government's failure to prove a loss amount for an offense that involved submitting falsified payroll forms in connection with a contract supplying drywall workers for a federal agency, the Centers for Disease Prevention and Control (CDC).[315] The sentencing court had based the $5 million loss amount on the contracts the defendants had earned in connection with submitting falsified payroll information, but there was no evidence that the CDC had suffered any "pecuniary harm," and it was insufficient that the defendants' conduct "compromised the integrity of the federal contract bidding process."[316] The court added that the CDC "would have paid the same amount and received the same benefit" even if had stopped payment until the defendants properly classified its employees, and to the extent there could have been a loss, it "must be offset by the fair market value of the services that the CDC received," which was the "the full, bargained-for benefit."[317]

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[312] *McLellan*, 958 F.3d at 1113–14.

[313] *Id.* at 1114.

[314] *Id.* at 1114–15.

[315] *Bazantes*, 978 F.3d at 1249–50.

[316] *Id.* at 1250.

[317] *Id.*

In another case involving loss amount, *United States v. Stein*,[318] the court revisited the defendant's sentence after it had previously remanded his case for recalculating the loss amount and "considering evidence of investor reliance and intervening events that may have cause the stock price to decline."[319] This time around, the court affirmed the significantly lower loss amount, holding that the district court based the loss amount on a reasonable methodology, not mere speculation, and that specific circumstantial evidence of investor reliance is sufficient to prove causation in calculating loss, notwithstanding drops in stock price and market efficiency.[320]

In *United States v. Cingari*,[321] the defendants were convicted of falsifying federal immigration documents and mail fraud based on a scheme of helping immigrants obtain driver's licenses by submitting fraudulent paperwork. In that case, the court considered whether the sentencing court should have calculated the defendant's Guidelines range under U.S.S.G. § 2B1.1,[322] which covers fraud offenses, or § 2L2.1,[323] which covers immigration offenses.[324] The court affirmed the sentencing court's application of § 2B1.1 because, despite the fraud guideline's cross-reference to § 2L2.1 specifically, the defendants' conduct was "more aptly covered" by § 2B1.1, which also provided for a higher Guidelines range.[325]

In *Muho*, a bank fraud case, the court ruled on a matter of first impression involving the enhancement under U.S.S.G. § 2B1.1(b)(16)(A)[326] for deriving more than $1 million in gross receipts from one or more financial institutions.[327] Rejecting the defendant's argument that the enhancement does not apply unless the financial institution owns, invests, or has unrestrained discretion to control the funds that are obtained through fraud, the Eleventh Circuit held that, "at least in a case involving property held by a financial institution for a depositor, the financial institution (1) must be the source of the property, which we interpret as having property rights in the property, and (2)

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[318] 964 F.3d 1313 (11th Cir. 2020).

[319] *Id.* at 1318.

[320] *Id.* at 1319–20.

[321] 952 F.3d 1301 (11th Cir. 2020).

[322] U.S.S.G. § 2B1.1.

[323] U.S.S.G. § 2L2.1.

[324] *Cingari*, 964 F.3d at 1304.

[325] *Id.* at 1307.

[326] U.S.S.G. § 2B1.1(b)(16)(A).

[327] *Muho*, 978 F.3d at 1220–21.

must have been victimized by the offense conduct."[328] The court held that a financial institution "need not have full ownership" of the funds obtained but must be "victimized by the [fraud]."[329] The enhancement does not apply, for example, where "the bank holds the property, but is not the victim of the heist," or is "just a conduit for a transfer of property that resulted from criminal conduct directed elsewhere."[330]

In *United States v. Johnson*,[331] the Eleventh Circuit affirmed the sentencing court's total drug quantity under U.S.S.G. § 2D1.1,[332] which was calculated by adding the number of marijuana packages shipped to defendant and multiplying by the approximate quantity per package.[333] While the sentencing court based these numbers on hearsay statements made by an agent—without corroborating evidence or the opportunity to make a credibility determination—defendant had not objected to the number of packages sent and other evidence supporting the alleged quantity in each package.[334] The court added that a sentencing court need not make "express findings that hearsay evidence is reliable before it can be considered in sentencing."[335] Separately, the court affirmed defendant's enhancement for engaging in criminal conduct "as a livelihood" under § 4B1.3,[336] holding that a defendant can still receive the enhancement if he has a legitimate job as long as the criminal conduct is his primary occupation.[337]

In another case involving drug quantity under § 2D1.1, the court in *United States v. Delgado*[338] affirmed the sentencing court's finding that a box with a controlled substance analogue was attributable to the defendant as "relevant conduct."[339] The defendant had ordered two boxes from China, the first with a controlled substance analogue and the second with an scheduled substance, and the defendant argued that his ordering the first box was not relevant conduct because at that point he had not known it was an illegal substance.[340] Citing the Supreme Court's holding

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[328] *Id.* at 1221.
[329] *Id.* at 1221–23.
[330] *Id.* at 1225–26.
[331] 980 F.3d 1364 (11th Cir. 2020).
[332] U.S.S.G. § 2D1.1.
[333] Johnson, 980 F.3d at 1372.
[334] *Id.* at 1372–74.
[335] *Id.* at 1373.
[336] U.S.S.G. § 4B1.3.
[337] *Johnson*, 980 F.3d at 1376–77.
[338] 981 F.3d 889 (11th Cir. 2020).
[339] *Id.* at 899.
[340] *Id.* at 900.

in *McFadden*, the court concluded there was sufficient circumstantial evidence that the defendant knew the substance in the first package was illegal.[341] The court also affirmed the defendant's enhancement for possessing a firearm in connection with a drug offense, rejecting the defendant's argument that the firearms were kept for sporting and collection purposes and were not related to the shipments he ordered from China.[342] The court held that the district court properly based the enhancement on the number of firearms and silencers in the defendant's safe and their proximity to other illegal substances the defendant had at his home, which was also the intended destination of the illegal drugs he ordered.[343]

The Eleventh Circuit issued several important opinions under U.S.S.G. § 3C1.1[344] relating to the obstruction of justice enhancement. In *Singer*,[345] for example, the Eleventh Circuit affirmed a defendant's enhancement under § 3C1.1 based on a finding that the defendant perjured himself while testifying at his trial.[346] In a trial involving illegal exports to Cuba, defendant testified that he was hiding the exported materials from Cuban, not American authorities, and the court found that this testimony was perjury because the testimony was material to his defense and "the jury chose not to believe him."[347] Defendant argued that the sentencing court had failed to make "specific, independent findings of perjury and instead merely found the jury's verdict to be a 'definitive referendum' on the falsity of [the defendant's] testimony."[348] The Eleventh Circuit disagreed, holding that the enhancement was properly applied because the sentencing court identified the specific testimony it found to be false, "evaluated the materiality of that testimony, and provided a sufficient explanation."[349]

The Eleventh Circuit also affirmed an enhancement § 3C1.1 for a doctor-defendant in a "pill mill" case, *Gayden*, finding that the district court properly based the enhancement on Dr. Gayden "updating" his patient records to reflect more due diligence in his prescribing practices

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[341] *Id.* at 901.
[342] *Id.* at 902–03.
[343] *Id.*
[344] U.S.S.G. § 3C1.1.
[345] 963 F.3d at 1144.
[346] *Id.* at 1167.
[347] *Id.* at 1164–65.
[348] *Id.* at 1165.
[349] *Id.* at 1165–66.

after the state obtained his files through a search warrant.[350] In *Johnson*, a marijuana conspiracy case, the court affirmed the sentencing court's application of the obstruction enhancement based on Johnson's violation of a protective order when he took pictures of discovery materials involving cooperators and sent them to a potential witness.[351] The court concluded that the sentencing court did not clearly err despite the fact that Johnson eventually accepted responsibility and pled guilty.[352]

While the court affirmed the obstruction enhancement in *Johnson*, it also issued an important ruling under § 3E1.1(b)[353] on the Government's refusal to move for an additional one-point decrease for Johnson's acceptance of responsibility.[354] While the court ultimately concluded the error was not plain, it did recognize that "there [are] limits to the Government's discretion to withhold a motion."[355] Citing other circuits on the issue and comparing their approaches, the court concluded that, "in the case of a timely notification of a decision to plead guilty, it is clear that the Government can no longer base its refusal to move for a third-level reduction on a defendant's refusal to waive appellate rights," though the court left open the possibility that the Government can refuse to move for the additional point if the defendant insists on a suppression hearing or otherwise creates extra work for the Government[356] Critically, the court indicated the Government's refusal based on the defendant's obstruction would not have been proper because the Defendant's violation of the protective order, "did not cause the Government additional work. [357]Nor was untimeliness in any way implicated by the Defendant's conduct."[358]

While the court affirmed the defendant's conviction for Hobbs Act robbery in *Smith*,[359] it issued a noteworthy opinion in *United States v. Eason*[360] holding as a matter of first impression under § 4B1.2[361] that Hobbs Act robbery does not qualify as a "crime of violence."[362] The court

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[350] *Gayden*, 977 F.3d at 1154.

[351] *Johnson*, 980 F.3d at 1369.

[352] *Id.* at 1375.

[353] U.S.S.G. § 3E1.1(b).

[354] *Johnson*, 980 F.3d at 1377.

[355] *Id.* at 1377–79.

[356] *Id.* at 1385.

[357] *Id.* at 1384.

[358] *Id.*

[359] 967 F.3d at 1200.

[360] 953 F.3d 1184 (11th Cir. 2020).

[361] U.S.S.G. § 4B1.2.

[362] *Eason*, 953 F.3d at 1188–89.

reasoned that, under the categorical approach, Hobbs Act robbery is not a "crime of violence" because the offense can be committed by using, attempting, or threatening to use force against a person's property even when that property "is not physically proximate to the robbery victim."[363]

In *United States v. Martinez*,[364] the court held that enhancement under § 2K2.1(b)(6)(B),[365] for possessing a firearm in connection with drug activity was appropriate where the evidence showed Martinez intended to purchase and distribute drugs but for an intervening force, and his "stolen shotgun had the potential to facilitate the pound-of-dope sale" based on the defendant's plan to sell the gun for the dope.[366] In *United States v. Wilson*, the court affirmed application of an enhancement for being a "prohibited person" in possession of a firearm based on the uncontested facts in the PSR that Wilson's use of marijuana occurred "during the same time period" as his possession of an unregistered shotgun, and it was not necessary for the Government to show he used marijuana specifically at the time he purchased the gun, during his arrest, or "at the exact same time he possessed the firearm."[367]

Last, but certainly not least, the court held in *United States v. Henry*[368] that the Sentencing Guidelines remain binding if the provision in question does not enhance the defendant's sentence or mandate the imposition of a sentence within the guideline range.[369] Here, the court was required to impose a downward departure under § 5G1.3(b)(1)[370] based on time the defendant had already served in a related state case, and the court provided a detailed framework guiding sentencing courts to apply mandatory downward departures after determining the reasonable sentence under § 3553(a)[371] and applicable Guidelines range.[372]

B. Other Sentencing Issues

The court considered a variety of different sentencing issues in 2020. In *United States v. Grow*, for example, the court vacated defendant's

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[363] *Id.* at 1193.

[364] 964 F.3d 1329 (11th Cir. 2020).

[365] U.S.S.G. § 2K2.1(b)(6)(B).

[366] *Martinez*, 964 F.3d at 1338.

[367] *Wilson*, 979 F.3d at 916.

[368] 968 F.3d 1276 (11th Cir. 2020).

[369] *Id.* at 1284–85.

[370] U.S.S.G. § 5G1.3(b)(1).

[371] 18 U.S.C. § 3553(a).

[372] *Henry*, 968 F.3d at 1286.

twenty-year sentence for healthcare fraud after the jury had returned only a general verdict on count one, which charged a "dual-object conspiracy to commit healthcare fraud and wire fraud."[373] Analogizing the case to a multi-object drug conspiracy where different drug quantities trigger different sentencing ranges, the court held that a trial court can only sentence a defendant for "the least serious" of the charges in a multi-object fraud conspiracy—in this case the ten-year sentence for healthcare fraud rather than the twenty years for wire fraud—unless the court uses a special verdict.[374]

In *United States v. Gomez*,[375] the court affirmed a defendant's sentence for illegal reentry, which was ordered to run consecutively to a separate eight-year sentence, holding that the proper standard of review for the substantive reasonableness of such a sentence is abuse of discretion, not *de novo*.[376] Applying that standard in *United States v. Harris*,[377] the court held that the sentencing court did not abuse its discretion in sentencing Harris to ninety-two months, almost three times the low end of his Guidelines range, because it adequately explained its factual justifications for the variance and was allowed to weigh some § 3553(a) factors over others.[378]

In one of several opinions regarding the procedural and substantive reasonableness of a defendant' sentence, the court issued a rare holding in *United States v. Green* that the defendant's sentence was procedurally unreasonable where the district court did not identify or explain the applicable Guideline range it calculated, despite defendant's multiple requests to clarify.[379] Aside from reviewing sentences for reasonableness, the court also considered in *United States v. Boyd*[380] whether a defendant's appeal waiver, in a plea agreement that allowed him to appeal if he received an above-Guidelines sentence, was ambiguous regarding "who will calculate the guideline range."[381] The court held it was not given the multiple warnings to the defendant that the sentencing court would ultimately determine the Guidelines range.[382]

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[373] *Grow*, 977 F.3d at 1330.

[374] *Id.* at 1330–31.

[375] 955 F.3d 1250 (11th Cir. 2020).

[376] *Id.* at 1255.

[377] 964 F.3d 986 (11th Cir. 2020).

[378] *Id.* at 988–89.

[379] *Green*, 981 F.3d at 955.

[380] 975 F.3d 1185 (11th Cir. 2020).

[381] *Id.* at 1190–91.

[382] *Id.*

On a related note, the Eleventh Circuit held in *United States v. Hall*[383] that the district court only needs to provide advance notice to a defendant if it intends to depart upwards from the Guidelines, as opposed to varying upwards from the Guidelines based on § 3553(a) factors, and the court may consider the defendant's lack of remorse and any lasting effects on his victims.[384] The court also held that the sentencing court properly based its variance on hearsay statements made by the victims and defendant in prior civil litigation.[385] The court held there was more than sufficient "indicia of reliability" to justify the sentencing court considering the statements, the defendant did not refute the statements, they corroborated each other, and they were consistent with other evidence.[386]

The Eleventh Circuit also reviewed restitution issues in *United States v. Goldman*,[387] involving the theft of a unique gold bar from a museum by the appropriately-named Jarred Goldman.[388] After a lengthy discussion regarding how to define "value" under the Mandatory Victims Restitution Act (MVRA),[389] including whether to use the fair market value or another measure, the court concluded that, "when the loss involves a unique item or when no ready market for it exists, fair market value may not be an option."[390] As a matter of first impression, the court held that sentencing court's should base restitution for theft of unique items on a "reasonable estimate" of its "replacement value."[391]

V. POST-CONVICTION PROCEEDINGS

The Eleventh issued several important opinions involving post-conviction proceedings, especially in light of the First Step Act of 2018, which provided a variety of avenues for federal inmates to seek sentence reductions. While this Article does not cover most of the appeals from motions filed under 28 U.S.C. § 2255[392] or 2254,[393] it covers a few of the court's noteworthy opinions in other post-conviction contexts.

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[383] 965 F.3d 1281 (11th Cir. 2020).

[384] *Id.* at 1295–98.

[385] *Id.* at 1294.

[386] *Id.* at 1294–95.

[387] 953 F.3d 1213 (11th Cir. 2020).

[388] *Id.* at 1215–16.

[389] 18 U.S.C § 3663(A) (2021).

[390] *Goldman*, 953 F.3d at 1223–24.

[391] *Id.* at 1225–26.

[392] 28 U.S.C. § 2255.

[393] 28 U.S.C. § 2254.

Regarding proceedings under the First Step Act, the court ruled in *Denson*[394] that defendants seeking sentence reductions under the First Step Act are not entitled to a hearing or to be present if there is one.[395] As for determining inmates' eligibility for reduced sentences under the First Step Act, the court engaged in a detailed discussion in *United States v. Jones*[396] regarding what prior convictions qualify as a "covered offense" under the First Step Act's provision making the Fair Sentencing Act retroactive.[397] In *United States v. Taylor*,[398] the court held that the defendant was eligible for a sentence reduction based on his conviction for a crack cocaine offense that had a reduced sentencing range by the Fair Sentencing Act,[399] despite the fact that he was also convicted of other drug offenses that carried the same, higher sentencing range.[400]

The court also issued some important opinions regarding supervised release. In *United States v. Hill*,[401] the court held that the exclusionary rule under the Fourth Amendment does not apply to supervised release revocation proceedings, citing Supreme Court precedent that the exclusionary rule does not apply in the state parole revocation context.[402] In *United States v. Bobal*,[403] the court also created a circuit split where it held that a lifelong condition of the defendant's supervised release limiting his ability to use the internet was valid as long as it only lasted as long as the defendant's term of supervised release, which here was life.[404]

Finally, the court also issued a few opinions addressing uncommon issues. Regarding the effect of a sentence commutation, the court in *Andrews v. Warden*[405] engaged in a technical discussion regarding sentencing calculations and affirmed the Bureau of Prisons' (BOP) recalculation of the defendant's remaining time to serve where the defendant had been serving two different terms.[406] In *United States v.*

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[394] 963 F.3d at 1080.

[395] *Id.* at 1082.

[396] 962 F.3d 1290 (11th Cir. 2020).

[397] *Id.* at 1297.

[398] 982 F.3d 1295 (11th Cir. 2020).

[399] 21 U.S.C. § 841.

[400] *Taylor*, 982 F.3d at 1300–01.

[401] 946 F.3d 1239 (11th Cir. 2020).

[402] *Id.* at 1241–42.

[403] 981 F.3d 971 (11th Cir. 2020).

[404] *Id.* at 976–78 (citing United States v. Holena, 906 F.3d 288, 290 (3d Cir. 2018)).

[405] 958 F.3d 1072 (11th Cir. 2020).

[406] *Id.* at 1076.

Abreu,[407] the court affirmed the district court's denial of a defendant's petition for damages after her conviction for healthcare fraud was overturned on appeal, reasoning that the court held there was insufficient evidence of guilt beyond a reasonable doubt but did not "establish Dr. Abreu's innocence."[408]

VI. CONCLUSION

This concludes our tour of the Eleventh Circuit's criminal docket in 2020. As a new presidential administration takes over, the circuit will soon see several new faces join the bench and, with those new faces, perhaps some new approaches to building on the court's precedents and further clarifying our federal criminal laws. As the court continues working to continue developing the law, practitioners, prosecutors, and judges are, as always, well-served to remember what came before.

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[407] 976 F.3d 1263 (11th Cir. 2020).

[408] *Id.* at 1265–66.