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I. INTRODUCTION

This Article provides a comprehensive review of the United States Court of Appeals for the Eleventh Circuit's most noteworthy criminal law opinions from 2021. Section II of this Article addresses substantive criminal offenses, such as economic crimes, drug offenses, and firearm offenses, while Section III covers criminal procedure and constitutional issues arising in criminal prosecutions. Section IV deals with the Federal Sentencing Guidelines (the Guidelines) and other sentencing issues, and Section V provides a limited review of the court's decisions in post-conviction proceedings.[1]

II. SUBSTANTIVE OFFENSES

A. Drug Offenses

The United States Court of Appeals for the Eleventh Circuit published several opinions governing drug offenses in 2021. In *United States v. Colston*,[2] the court affirmed the defendant's conviction under the Controlled Substances Act where, despite the government and defendant's agreement to the contrary, the court held that the government did not have to prove the defendant's knowledge of the

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1. For an analysis of last year's criminal law and the Guidelines during the prior survey period, see Thomas D. Church, *Criminal Law*, *Eleventh Circuit Survey*, 72 MERCER L. REV. 967 (2021).

2. 4 F.4th 1179 (11th Cir. 2021).

specific drug she possessed even though the indictment alleged a specific type and quantity of the drug.[3]

The Eleventh Circuit also addressed the thorny issue of allowing law enforcement agents to testify as experts in drug cases, specifically regarding the use of coded language in intercepted phone calls discussing drugs. In *United States v. Perry*,[4] the court held that the agent had been properly qualified to interpret the code words, though the court cautioned against crossing the line "from interpreting coded drug language to opining about plain language, speculating, summarizing the evidence or telling the jury what inferences to draw from the conversations."[5] The court also held that admission of a recorded call between the defendant and a non-testifying co-conspirator did not violate the Confrontation Clause, since the co-conspirator's hearsay statements provided context for the defendant's statements.[6]

Finally, in the Eleventh Circuit's split with the United States Court of Appeals for the Second Circuit's interpretation[7] of the Maritime Drug Law Enforcement Act[8] in *United States v. Nunez*,[9] it held that the United States had jurisdiction over a boat that had been stopped and searched by the Coast Guard.[10] The court concluded that the boat fell within the definition of a "vessel without nationality[,]" even though the occupants had not been specifically asked if they claimed any nationality, reasoning that the boat flew no flag, carried no documents or other identifying information, and no one aboard it claimed that the craft was registered to any nation.[11]

B. Economic Offenses

The court rendered a series of notable opinions governing fraud offenses, bribery, and other financial crimes. Regarding wire fraud offenses, the court issued several important rulings. In *United States v. Wheeler*,[12] the Eleventh Circuit affirmed the convictions of three defendants and reversed the United States District Court for the

3. *Id.* at 1187–89, 1193.
4. 14 F.4th 1253 (11th Cir. 2021).
5. *Id.* at 1262–65.
6. *Id.* at 1273–74.
7. United States v. Prado, 933 F.3d 121 (2d Cir. 2019).
8. 46 U.S.C. §§ 70501–70508 (2016).
9. 1 F.4th 976 (11th Cir. 2021).
10. *Id.* at 980.
11. *Id.* at 985–86.
12. 16 F.4th 805 (11th Cir. 2021).

Southern District of Florida's judgment of acquittal for two others.[13] It held that there was sufficient evidence that the defendants had an intent to defraud, as opposed to a mere intent to deceive, in a telemarketing scheme where they misled investors regarding how much profit their company made; lied about their company's association with high-profile companies and executives; told investors that the company planned to go public; assured the investors that they were paid in stock rather than commissions on stock sales; and concealed that there would be restrictions on selling their stock.[14]

The Eleventh Circuit also affirmed convictions for wire fraud in *United States v. Estepa*,[15] holding there was sufficient evidence of a scheme to defraud where the defendants won contracting bids from their local government based on material misrepresentations that they would comply with the "prevailing local wage" requirements, despite the fact that the government did not suffer a financial loss as a result of this representation.[16] In another important case, the court held that the government was able to subpoena privileged communications from a politician's attorney because the government was able to establish a "prima facie case of wire fraud" by the candidate at the time he was soliciting the attorney's advice and because there was a sufficient nexus between the communications and the alleged wire fraud scheme.[17]

The Eleventh Circuit issued two noteworthy opinions regarding bribery offenses. In one case involving a matter of first impression, the court held the "official act" requirement from *McDonnell v. United States*[18] does not apply to "[f]ederal program" bribery, namely bribery offenses involving federally funded programs.[19] In another case, *United States v. Mayweather*,[20] the court held the United States District Court for the Northern District of Georgia's instruction on "official act" in a Hobbs Act extortion trial, involving corrupt prison guards smuggling drugs into the prison, was reversible error where the instruction did not allow the jury to determine whether the officers wearing their uniforms during their offense amounted to an "official act."[21]

13. *Id.* at 811.
14. *Id.* at 811–12.
15. 998 F.3d 898 (11th Cir. 2021).
16. *Id.* at 900–01, 909–10.
17. In re Grand Jury Subpoena, 2 F.4th 1339, 1346, 1351 (11th Cir. 2021).
18. 579 U.S. 550 (2016).
19. United States v. Roberson, 998 F.3d 1237, 1247 (11th Cir. 2021).
20. 991 F.3d 1163 (11th Cir. 2021).
21. *Id.* at 1168.

Finally, the Eleventh Circuit addressed healthcare fraud in a pair of opinions. In *United States v. Abovyan*,[22] it affirmed a physician's conviction for conspiracy to commit healthcare fraud based on circumstantial evidence that (1) he created standing orders resulting in his facilities ordering unnecessary lab tests three times per week per patient; (2) he presigned forms that resulted in more unnecessary testing; (3) he had different standards for uninsured patients; (4) he provided his login information and presigned prescription pads to employees who prescribed unnecessary drugs when he was not present; (5) he took no action after he was warned there were billing issues; and (6) he deferred medical decisions to the clinic's owner, who had no medical training.[23]

In another case involving healthcare fraud and "pill mill" charges, the Eleventh Circuit held that a defendant can be found guilty of healthcare fraud based on the defendant's knowledge or participation in the submission of medical claims relating to illegal prescriptions.[24] And while the United States District Court for the Middle District of Alabama was "unquestionably wrong" in instructing the jury that the parties had stipulated to a disputed fact that they had not actually stipulated to, the court held that the stipulation did not amount to a directed verdict since the stipulation did not establish any element of the charged offenses or any facts necessary to establish any elements nor did it rise to a "constitutional violation" since the defendant was otherwise able to present their theory of defense.[25]

C. Firearm Offenses

The Eleventh Circuit issued several important opinions regarding firearm offenses in 2021. In *United States v. Harris*,[26] in a "reverse sting police corruption case," the court affirmed the drug and firearm convictions of two police officers who had served as protection for drug couriers, holding there was sufficient evidence to convict them for carrying a firearm in furtherance of drug trafficking where the officers carried their department-issued firearms while accompanying the drug couriers even though the guns were not visible.[27]

22. 988 F.3d 1288 (11th Cir. 2021).
23. *Id.* at 1303.
24. United States v. Akwuba, 7 F.4th 1304, 1307 (11th Cir. 2021).
25. *Id.* at 1313.
26. 7 F.4th 1276 (11th Cir. 2021).
27. *Id.* at 1281–82.

In cases involving possession of a firearm by a convicted felon, the Eleventh Circuit continued adapting its case law to the Supreme Court's decision in *Rehaif v. United States*.[28] In *United States v. Roosevelt Coats*,[29] the court held that it was plain error for the United States District Court for the Middle District of Georgia to accept the defendant's guilty plea without informing him the government had to prove that he knew he was a felon but concluded this was not a "structural error[,]" and the defendant failed to show he would not have pleaded guilty had he been advised of the government's burden.[30] In another case, the court upheld an indictment against the defendant's challenge that an indictment alleging a violation of Title 18 § 922(g) of the United States Code[31] must also mention Title 18 § 924(a)(2),[32] which sets out the penalties for violating section 922(g).[33]

The court also addressed sentencing issues in firearm cases. In *United States v. Matthews*,[34] it held, as a matter of first impression, that the enhancement under Section 2K2.1(a)(3) of the United States Sentencing Guidelines[35] for an offense involving a "semiautomatic firearm capable of accepting a large capacity magazine" was warranted in a case where the defendant attempted to purchase a rifle "which comes standard with a magazine of 30 rounds."[36] In *United States v. Montenegro*,[37] the Eleventh Circuit affirmed the United States District Court for the Middle District of Florida's decision to apply a firearms enhancement under Section 2D1.1(b)(1) of the United States Sentencing Guidelines[38] over the objections of not only the defendant but also the government, holding that the presence of a bolt-action rifle at the defendant's residence, where drug evidence was found, shifted the burden to the defendant to negate a connection between the rifle and his drug charge, which he did not do.[39]

28. 139 S.Ct. 2191 (2019).
29. 8 F.4th 1228 (11th Cir. 2021).
30. *Id.* at 1235–38.
31. 18 U.S.C. § 922(g) (2015).
32. 18 U.S.C. § 924(a)(2) (2018).
33. United States v. Leonard, 4 F.4th 1134, 1142–43 (11th Cir. 2021).
34. 3 F.4th 1286 (11th Cir. 2021).
35. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(3) (U.S. SENT'G COMM'N 2018).
36. *Matthews*, 3 F.4th at 1287–88, 1290–91, 1299.
37. 1 F.4th 940 (11th Cir. 2021).
38. U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(1) (U.S. SENT'G COMM'N 2018).
39. *Montenegro*, 1 F.4th at 945, 947–48.

D. Sex Offenses

The Eleventh Circuit published several notable opinions relating to cases involving child pornography. In *United States v. Phillips*,[40] for example, the court affirmed a defendant's conviction for production of child pornography, holding that the United States District Court for the Northern District of Florida did not constructively amend the indictment when it instructed the jury that it did not have to find that the defendant knew the victim's age to convict, since this is not an element of production under Title 18 § 2251 of the United States Code.[41]

In *United States v. Litzky*,[42] the court affirmed the defendant-mother's conviction for production of child pornography, holding that the United States District Court for the Middle District of Florida properly excluded the defendant's expert testimony that the defendant's intellectual disability, coupled with a history of victimization, made her extremely vulnerable and that she would not have produced the pornographic content absent the defendant-father's manipulation.[43] The court held that such testimony would have been irrelevant and was not trustworthy.[44]

The Eleventh Circuit also addressed several sentencing issues in child pornography cases. In *United States v. Dominguez*,[45] the court considered for the first time whether, as the United States Court of Appeals for the Seventh Circuit has held, "sexual activity" under Section 2G2.2(b)(5) of the United States Sentencing Guidelines[46] requires physical contact.[47] The court concluded that "sexual activity" under the Guidelines and Title 18 § 2422(b) of the United States Code "does not require actual or attempted physical contact."[48] Regarding the enhancement under Section 2G2.1(b)(5) of the United States Sentencing Guidelines,[49] which applies when the minor victim is "in the custody, care, or supervisory control of the defendant," the court held in *United States v. Isaac*[50] that the enhancement applied where the defendant was akin to a "temporary caretaker" with "caretaking responsibilities"

40. 4 F.4th 1171 (11th Cir. 2021).
41. *Id.* at 1175, 1178; 18 U.S.C. § 2251 (2008).
42. 18 F.4th 1296 (11th Cir. 2021).
43. *Id.* at 1299, 1304–05.
44. *Id.* at 1304.
45. 997 F.3d 1121 (11th Cir. 2021).
46. U.S. SENT'G GUIDELINES MANUAL § 2G2.2(b)(5) (U.S. SENT'G COMM'N 2018).
47. *Dominguez*, 997 F.3d at 1123.
48. *Id.*
49. U.S. SENT'G GUIDELINES MANUAL § 2G2.1(b)(5) (U.S. SENT'G COMM'N 2018).
50. 987 F.3d 980 (11th Cir. 2021).

for the victim after he agreed to house the victim and her family and was providing them with "basic living necessities."[51]

In *United States v. Kushmaul*,[52] in applying the categorical approach under the plain error standard of review, the court held that a defendant's prior conviction under Fla. Stat. § 827.071(3)[53] constituted a prior conviction of "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" sufficient to trigger the enhanced mandatory minimum sentence under Title 18 § 2252(b)(1) of the United States Code.[54]

Finally, the court addressed restitution in child pornography cases, holding in *United States v. Williams*[55] that the United States District Court for the Southern District of Florida was required to award the victim restitution even after she stated that she did not want it—given the terms of the Trafficking Victims Protection Act.[56]

E. Immigration Offenses

The Eleventh Circuit issued two important opinions interpreting Title 18 § 1546(a) of the United States Code,[57] which prohibits the possession of a forged "document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States."[58] In *United States v. Chinchilla*[59] and *United States v. Maradiaga*,[60] the defendants were each charged with violations of section 1546(a) for possessing forged "orders of supervision," which are forms issued by United States Immigration and Customs Enforcement that permit an unlawful alien's release from custody subject to conditions pending their removal.[61] Affirming the defendant's conviction in one case and reversing dismissal of the indictment in the other, the Eleventh Circuit held that an "order of supervision" is properly within the class of documents covered by section 1546(a) because the form

51. *Id.* at 991–93.
52. 984 F.3d 1359 (11th Cir. 2021).
53. FLA. STAT. § 827.071(3) (2012).
54. *Kushmaul*, 984 F.3d at 1364–67; 18 U.S.C. § 2252(b)(1) (2012).
55. 5 F.4th 1295 (11th Cir. 2021).
56. *Id.* at 1304, 1306, 1309.
57. 18 U.S.C. § 1546(a) (2002).
58. *Id.*
59. 987 F.3d 1303 (11th Cir. 2021).
60. 987 F.3d 1315 (11th Cir. 2021).
61. *Chinchilla*, 987 F.3d at 1305, 1309; *Maradiaga*, 987 F.3d at 1319.

provides "evidence of authorized stay in the United States"—even though such an authorized stay is temporary.[62]

The court also considered sentencing issues arising in illegal reentry cases. In *United States v. Osorto*,[63] the court upheld the defendant's enhancements for illegal reentry as a previously-convicted felon, rejecting the defendant's argument that this guideline violated the equal protection rights of non-citizens.[64] The court agreed that Title 28 § 994(d) of the United States Code[65] prohibits courts from considering a defendant's national origin but reasoned that "alienage—not being a citizen of the United States—differs from national origin, [namely,] the particular country in which one was born."[66]

F. The Armed Career Criminal Act, Terrorism Offenses, and Other Violent Crimes

The court continued interpreting the proper application and scope of the Armed Career Criminal Act (ACCA)[67] in 2021. In *United States v. Dudley*,[68] for example, the court held that a district court considering a defendant's prior convictions may rely on the prosecutor's proffered factual basis during the defendant's previous plea proceeding to determine whether the defendant's predicate offenses were committed on different occasions from one another.[69] However, the court indicated there must be some evidence of "confirmation of the factual basis for the plea by the defendant—be it express or implicit confirmation."[70]

The court also held that a prior conviction for aggravated assault under Georgia law is not a prior conviction for a "violent felony" under the ACCA,[71] while a conviction under Virginia law for possession of cocaine with intent to distribute was a "serious drug offense" under the ACCA even though the defendant had merely been "sharing" the drugs with another.[72] As a matter of first impression, the court also held in *United States v. Sharp*[73] that the government did not waive its

62. *Chinchilla*, 987 F.3d at 1307, 1315; *Maradiaga*, 987 F.3d at 1321.
63. 995 F.3d 801 (11th Cir. 2021).
64. *Id.* at 821–22.
65. 28 U.S.C. § 994(d) (2006).
66. *Osorto*, 995 F.3d at 822.
67. 18 U.S.C. § 924(e)(1) (2018).
68. 5 F.4th 1249 (11th Cir. 2021).
69. *Id.* at 1261–63.
70. *Id*. at 1262.
71. United States v. Carter, 7 F.4th 1039, 1041, 1045–46 (11th Cir. 2021).
72. United States v. Stancil, 4 F.4th 1193, 1197–98 (11th Cir. 2021).
73. 21 F.4th 1282 (11th Cir. 2021).

argument that the defendant's prior conviction for terroristic threats under Georgia law qualified as a predicate offense where "the argument was foreclosed by binding precedent at the time of sentencing and the change in law occurred within the time to file a notice of appeal."[74]

The court also published important opinions relating to terrorism and other similar offenses. In *United States v. Arcila Ramirez*,[75] the court held as a matter of first impression that the government must prove that a defendant's offense was planned "to influence or affect the conduct of government by intimidation or coercion," even if that was not the defendant's "personal motive," to satisfy the "calculated" prong under Title 18 § 2332b of the United States Code,[76] the statute defining a "federal crime of terrorism."[77]

In *United States v. Grady*,[78] a case involving a group of religious activists opposed to nuclear weapons who snuck onto a naval installation, the court affirmed their convictions for destruction of government property and trespass, rejecting their argument that their charges should have been dismissed under the Religious Freedom Restoration Act (RFRA).[79] In another matter of first impression in *United States v. Fleury*,[80] the court held that the Federal Stalking Statute[81] was not facially overbroad.[82] Nor was it unconstitutionally applied to the defendant's case, which involved the defendant sending threatening and intimidating messages to the family and loved ones of victims killed in the school shooting in Parkland, as these were "true threats" not related to a matter of public concern.[83]

G. Computer Crimes

The Eleventh Circuit's prior decision in *United States v. Van Buren*[84] was reversed by the Supreme Court on June 3, 2021.[85] Back before the Eleventh Circuit, the court adopted the Supreme Court's holding that a

74. *Id.* at 1288.
75. 16 F.4th 844 (11th Cir. 2021).
76. 18 U.S.C. § 2332b (2015).
77. *Arcila Ramirez*, 16 F.4th at 848, 854–55.
78. 18 F.4th 1275 (11th Cir. 2021).
79. *Id.* at 1280–81.
80. 20 F.4th 1353 (11th Cir. 2021).
81. 18 U.S.C. § 2261A(2)(B) (2020).
82. *Fleury*, 20 F.4th at 1363.
83. *Id.* at 1366.
84. 940 F.3d 1192 (11th Cir. 2019), *rev'd*, 131 S. Ct. 1648 (2021).
85. 141 S.Ct. 1648 (2021).

person only violates Title 18 § 1030 of the United States Code,[86] the Computer Fraud Statute, if a person accesses a computer without authorization or "accesses a computer with authorization but then obtains information located in particular areas of that computer—such as files, folders, or databases—that are off limits to him."[87] The court accepted that section 1030 does not apply to defendants "who, like Van Buren, have improper motives for obtaining information that is otherwise available to them."[88]

III. FOURTH AMENDMENT ISSUES AND FEDERAL CRIMINAL PROCEDURE

A. The Fourth Amendment

The Eleventh Circuit issued several significant opinions dealing with the Fourth Amendment in 2021. Headlining these cases was *United States v. Watkins*,[89] where the court, sitting en banc, held that the government must show by a preponderance of the evidence that evidence subject to suppression would ultimately have been discovered anyway to trigger the inevitable discovery exception to the exclusionary rule.[90]

In *United States v. Braddy*,[91] the court upheld a traffic stop where officers searched the defendant's car after observing two drug detection dogs briefly exhibit unusual behavior around the defendant's vehicle, even though the dogs did not give a "final response" or alert, and the defendant had an expert testify that the dogs' behavior was not reliable enough to establish probable cause.[92] Concurring in part and dissenting in part, Judge Rosenbaum concluded that the officers' observations of the dogs' behavior were "closer to the kind of 'inarticulate hunches' that the Fourth Amendment forbids."[93]

The court upheld another vehicle search in *United States v. Isaac*, where officers seized the defendant's phone, which was later found to contain child abuse images, from his car during a "routine inventory search" of his vehicle after it was impounded.[94] The court rejected the defendant's argument that the phone must be suppressed because the

86. 18 U.S.C. § 1030 (2020).
87. United States v. Van Buren, 5 F.4th 1327, 1327 (11th Cir. 2021).
88. *Id.*
89. 10 F.4th 1179 (11th Cir. 2021) (en banc).
90. *Id.* at 1181, 1185.
91. 11 F.4th 1298 (11th Cir. 2021).
92. *Id.* at 1306, 1312–13.
93. *Id.* at 1315 (Rosenbaum, J., concurring in part and dissenting in part).
94. *Isaac*, 987 F.3d at 984.

officers did not give him a chance to have someone retrieve his vehicle as an alternative to impoundment, contrary to their department's policy, holding that the United States District Court for the Middle District of Florida did not clearly err in crediting the officer's testimony that the "alternatives to impoundment" were impractical.[95]

Finally, the Eleventh Circuit provided a reminder of the power of the good faith exception under *United States v. Leon*,[96] holding in *United States v. Morales*[97] that, even assuming the magistrate judge erred in issuing a search warrant based on officers finding small amounts of marijuana during two close-in-time trash pulls, the officers reasonably relied on the warrant, rendering suppression unwarranted.[98]

B. Criminal Procedure

In cases dealing with procedural issues, the Eleventh Circuit issued two noteworthy opinions relating to juror disqualification. After rehearing the case en banc in *United States v. Brown,*[99] the court vacated a defendant's convictions and remanded for a new trial after the United States District Court for the Middle District of Florida dismissed a juror for stating, shortly after the start of deliberations, that the Holy Spirit had told him the defendant was not guilty.[100] The court reasoned that this statement did not categorically disqualify the juror since jurors may consult their religious beliefs so long as they do not contradict the law, and the record here otherwise established a substantial possibility that the juror was rendering proper jury service.[101]

In *United States v. Pendergrass*,[102] the court affirmed the defendant's conviction, finding no error in the United States District Court for the Northern District of Georgia's refusal to excuse a juror for cause based on her employment as a Georgia probation officer, though Title 28 § 1863(b)(6) of the United States Code[103] bars members of the "police departments of any State" or subdivision thereof from jury service.[104] Though Georgia law gives probation officers arrest powers and requires

95. *Id.* at 989–90.
96. 468 U.S. 897 (1984).
97. 987 F.3d 966 (11th Cir. 2021).
98. *Id.* at 972, 974–76.
99. 996 F.3d 1171 (11th Cir. 2021).
100. *Id.* at 1175.
101. *Id.* at 1194.
102. 995 F.3d 858 (11th Cir. 2021).
103. 28 U.S.C. § 1863(b)(6) (1992).
104. *Pendergrass*, 995 F.3d at 871.

them to be Georgia Peace Officer Standards and Training Council (POST) certified, the court concluded probation officers are nevertheless not "members of . . . police departments" under the plain language of the statute.[105]

The Eleventh Circuit also issued a significant opinion regarding the defense of entrapment. In *Mayweather*, the court held the defendants were entitled to jury instructions on entrapment where they met the "light" standard of proving government inducement.[106] In that case, undercover government agents persuaded prison guards to help smuggle drugs into prisons by promising them more money, minimizing their chances of getting caught, and doing so despite some hesitation by the defendant.[107] Conversely, in *United States v. Cannon*,[108] the court held the government's actions did not amount to entrapment or "outrageous government conduct" where the government presented the defendants with an "opportunity to rob a stash house," but the defendants were involved in planning and executing the robbery.[109]

IV. FEDERAL SENTENCING

The Eleventh Circuit decided several noteworthy cases involving the proper application of the Guidelines and other important sentencing issues. Of particular note for federal practitioners, the court published two opinions regarding the "safety valve" under Title 18 § 3553(a) of the United States Code,[110] which allows courts to sentence qualifying defendants under the mandatory minimum in drug cases and which was recently expanded under the First Step Act of 2018.[111]

In *United States v. Garcon*,[112] the court considered the proper interpretation of the expanded safety valve under Title 18 § 3553(f) of the United States Code,[113] which states that defendants may qualify for the safety valve if, among other criteria, they do not have "(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; *and* (C) a prior 2-point violent offense, as

105. *Id.* at 871–72.
106. *Mayweather*, 991 F.3d at 1177–79.
107. *Id.* at 1168–69.
108. 987 F.3d 924 (11th Cir. 2021).
109. *Id.* at 942.
110. 18 U.S.C. § 3553(a) (2018).
111. *Id.*
112. 997 F.3d 1301 (11th Cir. 2021).
113. 18 U.S.C. § 3553(f) (2018).

determined under the sentencing guidelines[,]" concluding that these provisions must be read disjunctively despite the use of the word "and."[114] Otherwise, as the government noted, this provision would bar very few defendants.[115] The decision would have created a circuit split based on the United States Court of Appeals for the Ninth Circuit's contrary holding in *United States v. Lopez*,[116] but the Eleventh Circuit subsequently vacated the opinion and agreed to consider the issue sitting en banc.[117]

Regarding the safety valve under the Guidelines, the court reiterated in *United States v. Carrasquillo*[118] that there are different standards for applying the gun enhancement under section 2D1.1(b)(1) and the safety valve under section 5C1.2, as "not all defendants who receive the firearm enhancement under § 2D1.1(b)(1) are precluded from relief under § 5C1.2(a)(2)."[119] While the gun enhancement may be applied based on the presence of a firearm, which shifts the burden to the defendant to prove it is "clearly improbable" that the firearm was connected to the offense, the safety valve provision applies if the defendant shows it is "more likely than not that the possession of the firearm was not in connection with the offense."[120]

The court also decided an important case regarding the advisory nature of the Guidelines. In *United States v. Henry*,[121] in which the panel vacated its prior opinion,[122] the court upheld the defendant's sentence even though the United States District Court for the Middle District of Alabama had failed to give him credit for time served for an undischarged term of state imprisonment under section 5G1.3(b)(1) of the United States Sentencing Guidelines,[123] finding section 5G1.3(b)(1) was not mandatory in light of *United States v. Booker*.[124] Dissenting, Judge Pryor argued that section 5G1.3(b) is still mandatory because it does not relate to calculating the range of imprisonment, but rather

114. *Garcon*, 997 F.3d at 1302–03.

115. *Id*. at 1305 n.2.

116. 998 F.3d 431 (9th Cir. 2021).

117. United States v. Garcon, No. 19–14650, 2022 U.S. App. LEXIS 1938 (11th Cir. Jan. 21, 2022).

118. 4 F.4th 1265 (11th Cir. 2021).

119. *Id.* at 1272–73.

120. *Id*. at 1272.

121. 1 F.4th 1315 (11th Cir. 2021).

122. United States v. Henry, 968 F.3d 1276 (11th Cir. 2020), *vacated*, 1 F.4th 1315.

123. U.S. SENT'G GUIDELINES MANUAL § 5G1.3(b)(1) (U.S. SENT'G COMM'N 2016).

124. *Henry*, 1 F.4th at 1319–20 (citing United States v. Booker, 543 U.S. 220 (2005)).

tells courts "which kind of sentence to impose—a concurrent sentence or a consecutive sentence."[125]

V. POST-CONVICTION PROCEEDINGS

The Eleventh Circuit rendered several significant opinions in post-conviction proceedings, most notably involving inmate petitions for "compassionate release" under Title 18 § 3582(c)(1)(A) of the United States Code.[126] Under section 3582(c)(1)(A), a district court may release an inmate or reduce their sentence if there are "extraordinary and compelling reasons" warranting relief, and relief is otherwise consistent with the factors under 18 U.S.C. § 3553(a).[127] The First Step Act of 2018 amended this statute to allow inmates to file their own motions directly with the court, rather than leaving it exclusively within the discretion of the Bureau of Prisons (BOP), after the inmate has exhausted their administrative remedies or after thirty days have elapsed after the warden's receipt of the inmate's request.[128]

Many inmates began filing such motions when the COVID-19 pandemic began. As the COVID-19 pandemic continued, inmates continued filing motions for compassionate release. A critical issue that emerged was whether, in light of the amendments to section 3582(c)(1)(A)(i), district courts have discretion to determine what constitutes "extraordinary and compelling reasons."[129] Previously, section 1B1.13 of the United States Sentencing Guidelines[130] provided four narrow categories of circumstances that constitute such reasons, namely based on an inmate's health or family circumstances, and this policy was binding on district courts.[131]

In a break with every other circuit to consider the issue, the Eleventh Circuit held in *United States v. Bryant*[132] that section 1B1.13 remains a binding policy statement limiting the circumstances that can constitute "extraordinary and compelling reasons" warranting a sentence reduction under section 3582(c)(1)(A).[133] Dissenting, Judge Martin noted that the plain language of section 1B1.13 states that "the policy

125. *Id.* at 1332–33 (Pryor, J., dissenting).
126. 18 U.S.C. § 3582(c)(1)(A) (2018).
127. *Id.*
128. *Id.*
129. *Id.*
130. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).
131. *Id.*
132. 996 F.3d 1243 (11th Cir. 2021).
133. *Id.* at 1251–52, 1265.

statement applies only to motions brought by the Director of the BOP[,]" and not for motions brought by inmates.[134]

The court decided several other opinions governing the applicability of section 3582(c)(1)(A). For example, a district court does not err when it denies a motion under section 3582(c)(1)(A) based on the section 3553(a) factors without determining whether a defendant had presented "extraordinary and compelling reasons."[135] Similarly, a district court is not required to analyze those factors if it first determines there are no "extraordinary and compelling reasons."[136]

In cases involving motions for sentence reductions based on the crack-cocaine provisions of the First Step Act, the court vacated the United States District Court for the Southern District of Florida's summary denial of the defendant's motion in *United States v. Stevens*,[137] holding for the first time that, though the district court is not required to consider the section 3553(a) sentencing factors in this context, an order on such a motion was nevertheless invalid if it did not "adequately explain its sentencing decision to allow for meaningful appellate review."[138]

In another matter of first impression, the court in *Armstrong v. United States*[139] held that a sentence reduction under Title 18 § 3582(c) of the United States Code, does not lift the bar on successive habeas petitions.[140] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires petitioners to seek authorization before they can submit additional petitions under Title 28 § 2255 of the United States Code,[141] unless there has been a new intervening judgement between the petitions.[142] Because modifications under section 3582(c) are mere "limited adjustment[s]," not *de novo* resentencing, however, modifications do not lift the AEDPA bar.[143]

Finally, in *United States v. Gonzalez*,[144] the court held as a matter of first impression that a defendant sentenced upon revocation of supervised release may still be eligible for a sentence reduction under

134. *Id.* at 1269 (Martin, J., dissenting).
135. United States v. Tinker, 14 F.4th 1234, 1240 (11th Cir. 2021).
136. United States v. Giron, 15 F.4th 1343, 1345–46 (11th Cir. 2021).
137. 997 F.3d 1307 (11th Cir. 2021).
138. *Id.* at 1317.
139. 986 F.3d 1345 (11th Cir. 2021).
140. *Id.* at 1347.
141. 28 U.S.C. § 2255 (2008).
142. *Armstrong*, 986 F.3d at 1351.
143. *Id.*
144. 9 F.4th 1327 (11th Cir. 2021).

the First Step Act if the defendant's underlying offense is a covered offense within the meaning of the Act.[145]

VI. CONCLUSION

This concludes our tour of the Eleventh Circuit's criminal docket in 2021. The court considered several important and noteworthy issues last year, and many of those issues may not be resolved until later this year, as the court will be rehearing several cases en banc, such as *United States v. Garcon*. Other cases are on their way to the Supreme Court of the United States, such as the Eleven Circuit's circuit-splitting decision in *United States v. Nunez*. While the future is unpredictable, defense lawyers, prosecutors, and judges are always well-served considering the cases that came before them.

145. *Id.* at 1331.