WHAT'S THE DECISION

RECENT IMPORTANT DECISIONS OF GEORGIA SUPREME COURT, COURT OF APPEALS, AND FEDERAL COURTS

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SUPREME COURT

AFFIRMATIVE DEFENSES, INCONSISTENT DEFENSES, DEFENDANT NOT REQUIRED TO ADMIT TO THE ELEMENTS OF THE CRIME TO BE ENTITLED TO RAISE AN AFFIRMATIVE DEFENSE

McClure v. State (S18G1599) October 7, 2019[1]

The Court granted certiorari to answer the following question: "What, if anything, must a criminal defendant admit in order to raise an affirmative defense? Must the defendant make any such admissions for all purposes or only more limited purposes?" The short answer is "an affirmative defense is one in which the defendant argues that, even if the allegations of the indictment or accusation are true, there are circumstances that support a determination that he cannot or should not be held criminally liable." More to the point, "in asserting an affirmative defense, a criminal defendant may accept for the sake of argument that the evidence authorizes a finding that he committed the act alleged in the charge at issue." Also, a defendant is free to pursue alternate defenses, even if they are inconsistent with one another. A defendant need not admit to anything to be entitled to an affirmative defense and is entitled to a jury instruction even if only slight evidence supports it.

Under the specific facts in the case, Mr. McClure was charged with committing an aggravated assault with a BB gun. He requested a jury instruction on justification, which the trial court refused to give because Mr. McClure admitted to carrying but denied pointing the gun at the victims. The

[1] In a similar case, *Pennington v. State*, S18G1495 (October 7, 2019), the Court held that a defendant charged with possession with intent to distribute methamphetamine within 1,000 feet of an elementary school was entitled to an instruction on the affirmative defense that no minors were present, that the drugs were in a private residence, and that conduct was not undertaken for financial gain, in spite of the fact that he did not admit to possessing the drugs or being involved in the conduct. The Court applied the same principle as those in *McClure* in reaching its decision.

Supreme Court reversed, reasoning that he was in a moral quandary because he did admit to pointing the gun but the situation in which he found himself would have supported the defense of justification.

This case counters a well-entrenched prosecutorial urban legend that a defendant was required to testify and admit to the elements of the crime before being entitled to an instruction on an affirmative defense.

PRACTICE TIP: Today's practice tip comes from Justice Nahmias's concurring opinion. It is not ineffective assistance of counsel to fail to throw the kitchen sink at your client's defense. Just because you can present alternate defenses does not mean that you should. Also, lest we think that we can start throwing a variety of requests to charge on affirmative defenses at the court, the concurrence notes that it will often be harmless error to refuse charges where there is only slight evidence in support.

EXTRAORDINARY MOTION FOR NEW TRIAL, HABEAS CORPUS, NEWLY-DISCOVERED EVIDENCE

Mitchum v. State (S19A0554) October 7, 2019[2]

The Appellant brought an extraordinary motion for new trial alleging that he was entitled to relief based upon newly-discovered evidence that was not brought to his attention for several years, of improper communications with the jury. Specifically, Mr. Mitchum introduced affidavits that the jurors, defense counsel, the prosecutor, the trial judge and another judge were seen having meals together during the trial at a local restaurant.

The Supreme Court held that the newly-discovered evidence related to the manner in which the case was tried and was not directly related to the guilt or innocence of the accused. Therefore, it could not be brought in an extraordinary motion for new trial and could only be brought in a habeas corpus proceeding. The case was remanded with instruction to the trial court to dismiss, rather than deny, the extraordinary motion for new trial.

MOTION TO WITHDRAW GUILTY PLEA, COUNSEL'S ON-GOING DUTY TO REPRESENT A CLIENT UNTIL THE END OF THE COURT TERM, THE SUPREME COURT'S IDEA OF A "CONSCIENTIOUS" CRIMINAL DEFENSE ATTORNEY

Dos Santos v. State (S19A1352) October 21, 2019

This is a groundbreaking case involving an attorney's ongoing responsibility to the client after the entry of a guilty plea. That responsibility includes assisting the client with withdrawing the plea. And the failure to do so, indeed the failure to learn that the client has filed a pro se motion to withdraw the plea, is ineffective assistance of counsel. The Supreme Court of Georgia advises "conscientious lawyers" to file boilerplate motions to withdraw the plea shortly after the plea is entered.

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[2] Scott Key was counsel in this case before the Supreme Court of Georgia.

In this case, Dos Santos filed a motion to withdraw his plea within the same term in which his plea was entered. The term passed. The Supreme Court held that the motion to withdraw was a nullity because the client was still represented by plea counsel. The Court held that "Dos Santos was still represented by her plea counsel, who had a duty … to continue his representation of her at least through the end of the term of court, unless he properly withdrew from the case or was replaced by substitute counsel." Going forward, the Court announces that it will dismiss appeals of motions to withdraw in situations such as these. And "Georgia lawyers cannot simply abandon their criminal defendant clients immediately after the defendants enter guilty pleas and are sentenced. Defense counsel are obligated to continue to represent their clients at least until the time for these post-conviction remedies expires (and if such remedy is timely pursued, until it is resolved) – unless the lawyer is properly authorized by the trial court to withdraw from the representation or is properly replaced by substitute counsel." The Court advises:

- Before the plea is entered, defense lawyers can explain to their clients the basic processes for (and limitations on) post-conviction challenges to guilty pleas, leaving only the decision to be made about whether to invoke the process;
- And when time is tight, plea counsel may protect their client's interests by filing a timely, bare-bones "placeholder" motion to withdraw guilty plea.

When counsel is not "conscientious," the defendant will have the right to habeas or an out of time appeal when "abandoned" by plea counsel.

Would it be too much to ask the trial court to add language to the plea colloquy? Also, it seems awkward when judges ask us if we know if any reason the plea should not be accepted to say "no," only to turn around and file a written motion to withdraw the plea. But who are we to be anything less than conscientious?

PRACTICE TIP: It would be hard to add to what the Supreme Court has already said we must do to be conscientious. Lawyers would be well-advised to prepare a form for clients to sign advising them of the right to withdraw their plea within their term of court. It may be worth filing your withdrawal-of-plea advisement form when the plea is entered. And it might also be worth asking your client about all of this on the record. It may be worth bringing a withdrawal order to the plea hearing (but I'm not sure how to give the client notice of intent to withdraw ten days in advance). Another pesky problem is how to address the client who files the pro se withdrawal motion without noticing the lawyer? Should lawyers (including public defenders) troll the criminal docket until the end of the term of court just in case there's a withdrawal motion out there? We, the editors, wish we had an answer.

MOTION FOR OUT-OF-TIME APPEAL, INEFFECTIVE ASSISTANCE OF COUNSEL

Collier v. State (S19A0658) October 21, 2019

The Court has held that a criminal defendant is entitled to an out-of-time appeal if counsel's deficient performance deprived him of an appeal of right that he otherwise would have pursued. A defendant seeking such an appeal must allege and prove "an excuse of constitutional magnitude for failing to file a timely direct appeal." Generally, such proof will come in the form of ineffective assistance of counsel. There is no burning news here. However, the next part is new. The Court

held that "unfortunately, we have long erroneously held that a defendant seeking an out-of-time appeal directly from a judgment entered on a guilty plea must satisfy the prejudice component of the *Strickland* standard by showing his appeal would have had merit." The Court overrules that line of cases. The Court holds that the defendant need only show that the deficiency in trial counsel's performance frustrated the right to appeal, not that the appeal that was frustrated would have been successful. The Court also declined the State's invitation (from the District Attorney, not the Attorney General) to vault out-of-time appeal over to habeas corpus.

Four justices (Blackwell, Boggs, Peterson, and Bethel) issued a special concurrence. The first line is worth quoting, "We have created out of whole cloth what appellate judges of this state have recognized for nearly 20 years as a tangled mess of post-conviction jurisprudence. We never should have started making things up, and we ought to stop now." That paragraph concludes "We may need the General Assembly to save us from ourselves." This concurring opinion then takes a critical look at the way we do ineffective assistance of counsel claims in Georgia (the requirement that it be brought on direct appeal or else it is waived and the ability to expand the record to make the claims).

Our system places ineffective assistance of counsel on a pedestal in inverse proportion to the likelihood that such a claim will prove successful (if more people in other professions knew that they could be judged by the *Strickland* standard, we would likely have even more criminal defense attorneys than we do now. It is a good thing that air traffic controllers and surgeons aren't judged by the *Strickland* standard.). It virtually guarantees that appellate counsel will focus much time and attention to putting trial counsel on trial, sometimes to the detriment of bread and butter claims of error, and it encourages lawyers to give in to the client's propensity for the client to blame trial counsel for the state of things when appellate counsel enters the stage. However, there is no right to counsel in habeas; so, vaulting ineffective assistance over to the habeas stage will leave indigents who received ineffective assistance of counsel to fend for themselves to try to prove it.

A whole bunch of changes may await us in the upcoming session.

PRACTICE TIP: Be effective!

MOTION TO SUPPRESS, VEHICULAR HOMICIDE, THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT

Mobley v. State (S18G1546) October 21, 2019

This case involves a motion to suppress evidence obtained from the download of data from a vehicle's ACM (also known as the black box). As a threshold matter, when law enforcement enters a vehicle, connects a CDR device, and downloads data, a search of the defendant's "effects" has taken place. The warrantless search of an ACM is covered by the Fourth Amendment under such circumstances. The Court then devotes the bulk of its attention on whether the exclusionary rule should apply since the black box data would arguably have been inevitably discovered. The Court rejected the argument that O.C.G.A. § 17-5-30 provides that the exclusionary rule always applies to illegal searches and overrules *Gary v. State*, 262 Ga. 574 (1991). With this case, the *Leon* good-faith exception to the exclusionary rule is now law in Georgia. The Court holds "today,

we disavow the unsound reasoning of *Gary*, hold that it does not extend to any context other than the reliance of an office in good faith upon the veracity of a search warrant, and conclude that, in all other contexts, O.C.G.A. § 17-5-30 means what it most naturally and reasonably is understood in context to mean – it establishes a procedure for applying the exclusionary rule but does not itself require the suppression of any evidence."

In this particular case, the exclusionary rule applied because there was no evidence that law enforcement was in the act of applying for a warrant at the time the ACM data was downloaded.

RANDOM SELECTION OF GRAND JURORS

State v. Towns (S19A0557) October 21, 2019

50 prospective Telfair County jurors were summoned to appear at a particular time and day for service on the grand jury. However, fewer than 16 showed up. The presiding judge ordered the sheriff to locate the missing jurors. As luck would have it, 150 people had been summoned to serve as petit jurors the next day. So, the clerk planned to pull some of them over for grand juror service. This sort of thing is allowed by O.C.G.A. § 15-12-66.1. The problem was that two of the prospective grand jurors were put on the panel because the clerk knew them and rustled them up to serve. As such, they were not chosen at random, as per O.C.G.A. § 15-12-66.1. The trial court granted a motion to dismiss the indictment, and the Supreme Court affirmed.

Two dissenters, Justices Ellington and Boggs (both former South Georgia trial judges), reasoned that the clerk's method of selecting the grand jurors was not an "essential and substantial" provision of the statutory scheme governing jury selection.

COURT SITTING AS THIRTEENTH JUROR, STANDARD OF REVIEW

State v. Beard (S19A0535) October 31, 2019

Remember last month when we wrote that judges are virtually appeal proof when they act as the thirteenth juror and reverse a conviction? The State has not yet gotten the memo. The facts are not really important to summarize other than to say that the judge acted under the authority of O.C.G.A. §§ 5-5-20 and 5-5-21 to set aside a verdict. The Court affirmed, reasoning "[w]e have reiterated that the trial court has 'substantial' discretion when granting a motion for new trial on the general grounds."

There are fun gems in this case such as this: "Contrary to the State's bizarre argument, the jury's verdict was not demanded by the 'great physical laws of the universe.'" (And we thought only defense attorneys attend new-age-ish trial skills workshops). More fun language is in the concurring opinion. Justice Nahmias writes, "before the State exercises its right to appeal an order granting a new trial on general grounds, the State's lawyers should think hard about whether the appeal will amount to anything other than an unnecessary delay in the new trial and a waste of the limited resources of the State, the publicly funded lawyers who represent most of the defendants in these cases, and this Court."

I predict that the State will continue to appeal these decisions.

EXPERT WITNESS TESTIMONY, DISCOVERY, CURE FOR DISCOVERY VIOLATIONS

Green v. State (S19A0644) October 31, 2019

Defense counsel exchanged emails with the prosecutor regarding the production of an expert witness report. Defense counsel broadly summarized the testimony he anticipated from those experts but never furnished a report. At trial, the Court excluded the witness's testimony. The Supreme Court reversed, reasoning "the parties and the trial court seem to have been operating under the assumption that a defendant's intention to present any expert testimony required the defendant, in this case Green, to make available or to serve a report summarizing the entirety of the expert's opinion under O.C.G.A. § 17-16-4(b)(2). However, that is not what Georgia law requires. The statute does not require a report to be prepared and made available or served unless a defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of 'scientific tests or experiments.'" Since the expert's opinion did not entirely rest upon independent tests or experiments, exclusion was not the proper remedy. Finally, because the error was not harmless a new trial was required.

PRACTICE TIP: Read the statute. Don't assume that because the court or State are talking with an air of authority that they are right.

THE DIVISION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Ford v. Tate (S19A0825 S19A0826) October 31, 2019

This is an appeal and cross-appeal from state habeas reviewing a death sentence. Essentially, the issue is framed by the following factual development: while the defendant was awaiting trial, he found religion. And his emerging religious beliefs led him to conclude that he should not thwart the State's efforts to kill him. He pleaded guilty and opted to bench trial the penalty phase, which led to exactly the result one might expect in Georgia. He also did not authorize much in the way of mitigating evidence. The client then objected to counsel's decision to pursue a motion for new trial instead of direct appeal. And when this case was on habeas, the client said that he did not want his lawyer to pursue a habeas. The Court upholds the sentence of death, adding "[t]here is no provision of the Rules of Professional Conduct that relieves a lawyer of [the] obligation [to respect the wishes of the client] simply because the client is under sentence of death or the lawyer believes that the decision of his client is a bad one. A lawyer with a competent client under a death sentence is not free to do whatever the lawyer wants, irrespective of the wishes of his client."

PRACTICE TIP: Early in my career, I would become frustrated with clients who would turn down reasonable, even generous plea offers to proceed to trial or to forego a trial where I thought the client would prevail. Over time, I learned that this was the client's case ultimately. The client chooses whether to proceed to trial or enter a plea, whether to testify at trial, and whether to continue with or to cease the litigation. The lawyer directs everything else, in consultation with the client. It is a division of labor we all know. But it is often harder in practice than in theory. A colleague of mine tells clients, on occasion, "I'm like the guy who cuts your grass. You tell me how high you want it."

COURT OF APPEALS

404(b) ANALYSIS; EXAMINATION OF KNOWLEDGE, IDENTITY, INTENT, OR ESTABLISHING ABSENCE OF MISTAKE OR ACCIDENT

Green v. State, A19A1122 (October 15, 2019)

Holding: Other act evidence that does not serve the limited purpose of proving knowledge, identity, intent, or to establish the absence of mistake or accident is not admissible under O.C.G.A. § 24-4-404(b).

Facts: Green was convicted of Aggravated Assault and Possession of a Firearm by a Convicted Felon stemming from a shooting incident in 2012. The trial court ruled that Green's 1982 guilty plea to Felony Murder was admissible as 404(b) evidence. The Court of Appeals painstakingly examines each possible 404(b) purpose including identity, absence of mistake or accident, knowledge, and intent. They also address the Rule 403 balancing test, probative value, prejudicial effect, and harm as it applies to the 404(b) evidence in Green's case. Ultimately, the Court of Appeals reversed and granted Mr. Green a new trial because the 1982 conviction was improperly admitted as 404(b) evidence.

IMPROPER EXPRESSION OF OPINION AS TO GUILT BY TRIAL COURT

Jones v. State, A19A1014 (October 18, 2019)

Holding: Trial court's comment during Defendant's cross examination of the victim, when the court said, "All of this is the truth" was an improper expression opinion of Defendant's guilt.

Facts: Ronnie Jones was tried and convicted of Rape and Aggravated Battery. He appeals his convictions asserting that the trial court improperly expressed an opinion as to his guilt during his trial. The Court of Appeals agreed, finding it was an improper expression of onion as to guilt when the trial court said, "All of this is the truth" referring to the testimony of the victim while Mr. Jones was cross-examining her. This case was reversed and remanded.

PRIOR CONVICTIONS NECESSARY FOR FELONY SHOPLIFING; PRESUMPTION OF REGULARITY

Athey v. State, A19A1015 (October 22, 2019)

Holding: Presumption of regularity attaches when the State can show the right to counsel was waived but that presumption can be rebutted by testimony showing irregularities in waiver of counsel paperwork and pleas.

Facts: Athey was charged with one count of felony Theft by Shoplifting. The accusation listed five prior offenses of Theft by Shoplifting. Athey challenged the State's ability to use her prior offenses to enhance the misdemeanor shoplifting to a felony because she had not been represented by counsel for any of the prior shoplifting convictions and thus did not knowingly and intelligently waive her rights. At a hearing the State presented evidence that Athey had signed waivers of her right to counsel for each prior conviction. Athey presented testimony that she had a limited

education, that she had used drugs, and that she had not read the forms before signing them. The trial court weighed the evidence submitted and found that Athey's prior guilty pleas were not informed and voluntary. The Court of Appeals affirmed, ruling those convictions could not be used to enhance a misdemeanor shoplifting to a felony.

USE OF "KNOCK AND TALK" PROCEDURE; EXPECTATION OF PRIVACY AT THE BACK DOOR

State v. Newsome, A19A1623 (October 25, 2019)

Holding: Officer exceeded scope of a permitted "knock and talk" procedure when he approached the back door of the apartment after knocking on the front door and receiving no answer.

Facts: Investigator went to Newsome's apartment on a tip about some stolen tools. The investigator knows he doesn't have enough for a search warrant, so he deploys the "knock and talk" procedure at Newsome's apartment. He knocked on the front door and no one answered so he helped himself up a flight of stairs to the back door of Newsome's residence which was on the second floor, surrounded by railing, and was separated from a neighbor by a wooden privacy partition. Here, the officer looks through the glass sliding door and sees some tools that might be stolen. The officer snapped some pictures and sent them to the victim who identified the tools. Then the officer obtains a search warrant. Newsome moved to suppress the search warrant because the information used to support the issuance of a warrant was obtained by unlawful intrusion into his home's curtilage.

The trial court granted Newsome's motion to suppress. The Court of Appeals affirmed finding that the officer was not entitled to enter the curtilage of the home and that he was not in a place that he was authorized to be when he viewed the contraband.

MERGER; IDENTICAL INDICTMENT LANGUAGE IN SEPARATE COUNTS EXCEPT FOR DATES

Thomas v. State, A19A1195 (October 29, 2019)

Holding: Dates alleged in an indictment, without more, are not a material allegation of the incident unless the indictment specifically states that the alleged dates are material.

Facts: Mr. Thomas was convicted of two counts of Possession of a Firearm by a First Offender. The two charges were alleged to have occurred on different dates. The trial court refused to merge the two charges for purposes of sentencing. The Court of Appeals affirmed the convictions but remanded with direction for the two counts to be merged. The Court of Appeals ruled that unless an indictment specifically alleges that the dates are material, they are not.

Note: This case overrules a contrary line of authority about the materiality of dates in an indictment finding those cases were decided in an error of law. Those cases are *Hamilton v. State, 167 Ga. App. 370 (1983), Salley v. State, 199 Ga. App. 358 (1991), Byrd v. State, 344 Ga. App. 780 (2018), and Williams v. State, 130 Ga. App. (1973).*

FINALITY OF COMPLETED CONDITIONAL DISCHARGE

Whipkey v. State, A19A0897 (October 30, 2019)

Holding: The State cannot move to "modify" a sentence after a defendant has completed a probated sentence under the Conditional Discharge Act and the trial court had granted a petition for discharge under O.C.G.A. § 16-13-2 regardless of whether the defendant was ineligible for a sentence under the Conditional Discharge Act at the time of the original plea.

Facts: In September 2010, Whipkey entered a guilty plea to one count of Theft by Taking and three counts of violating the Georgia Controlled Substances Act. The plea was entered under the Conditional Discharge Act. Whipkey told the trial court during his plea hearing that he had never pled guilty to a felony or a drug offense. Whipkey successfully completed his three years of probation and the trial court granted a petition for discharge under O.C.G.A. § 16-13-2 on May 20, 2014. In September 2014, the State moved to set aside the discharge and adjudicate Whipkey guilty citing to the fact that he was not eligible for a sentence under the Conditional Discharge Act at the time he pled guilty in 2010. The trial court vacated the earlier order discharging Whipkey and adjudicated Whipkey guilty.

The Court of Appeals reversed finding that that the trial court erred when it grated the State's motion to set aside the discharge order. The order of discharge was not a sentencing order and was not subject to modification. The discharge order acted as a dismissal and as such it divested the trial court of jurisdiction to take further action in the case.

The State argued that the discharge order resulted from perjury, so the Court of Appeals found that the trial court could have retained jurisdiction to decide the motion. However, the State presented no evidence that Whipkey had been convicted of perjury related to this plea, so it was error for the trial court to grant the State's motion.

PLEA IN BAR; SECOND PROSECUTION WHERE SERIES OF EVENTS OCCURS IN TWO DIFFERENT COUNTIES

Arnold v. State, A19A1227 (October 30, 2019)

Holding: Subsequent prosecution in Fulton County was barred by the State's agreement to nolle prosqui the charges against Defendant in Clayton County in exchange for his guilty plea to other charges.

Facts: Kenneth Arnold was indicted in Clayton County for Attempted Rape, Kidnapping, False Imprisonment, Aggravated Assault, and Family Violence Battery that occurred on July 3, 2015. Arnold pled guilty to Family Violence Battery, Disorderly Conduct, and Family Violence Simple Assault as part of a negotiated plea where in return the State nolle prossed the Attempted Rape and Kidnapping charges. Two years later, a Fulton County grand jury indicted Arnold for Kidnapping, Attempted Rape, and False Imprisonment based on the same incident which started in Fulton County and ended in Clayton County with the same victim on the same day. The Court relied on *Clue v. State, 273 Ga. App. 672 (2005),* to reaffirm that a plea agreement is a contract between the defendant and the State and in many circumstances it is appropriate to view the agreement as a

package deal and treat it as a cohesive whole. The Court of Appeals held that the subsequent prosecution in Fulton County was barred by the consummation of the plea agreement between the State and Arnold. Trial court's order denying Arnold's motion to dismiss was reversed.

GEORGIA'S EAVESDROPPING STATUTE O.C.G.A. §16-11-62; ADMISSIBILITY OF CELLPHONE RECORDINGS BY THIRD PARTIES TO AN ARGUMENT IN A HOME

Weintraub v. State, A19A1284 (October 31, 2019)

Holding: This was an evaluation of the admissibility of audio/video cell phone recording evidence through the lens of O.C.G.A. § 16-11-62, Georgia's Eavesdropping Statute. It was an interlocutory appeal and was remanded for the trial court to make more specific findings.

Facts: Weintraub and his pregnant wife got in an argument while in their home. A gentleman who was staying at their house temporarily (sleeping on their couch) recorded the interaction without either Weintraub or his wife knowing. The State used said recording as the basis for charging Weintraub with one count of Family Violence- Simple Battery. Weintraub moved to exclude the video/recoding arguing it was inadmissible under O.C.G.A. § 16-11-62. The Trial court denied the motion to suppress but granted a certificate of immediate review.

The Court of Appeals vacated the trial court's decision and remanded with direction, asking that the trial court consider whether the cell phone recording took place in a "private place" and whether the recording in question was done in a "clandestine manner."

Note: The evaluation of admissibility of evidence through O.C.G.A. § 16-11-62 is a "fact-intensive analysis." Treat it accordingly.

11th CIRCUIT CASES

RESTITUTION: When the appropriate restitution amount is definite and easy to calculate, the government cannot satisfy its burden of proof by relying on a "reasonable estimate" of loss.

United States v. Sheffield, No. 17-13682 (October 1, 2019).

The Facts: Roberta Sheffield pled guilty to charges relating to her involvement in a fraudulent tax credit scheme. The scheme involved the submission of thousands of tax returns by falsely claiming a $1,000 credit. At sentencing, the government introduced, without objection, a spreadsheet purportedly listing each fraudulent return and the amount of the tax credit refund issued by the IRS. According to the spreadsheet, the loss was $3,461,638. Sheffield objected that the amount was incorrect, as the spreadsheet contained some duplicative entries. The government responded that "restitution does not have to be calculated with absolute precision" and maintained that it was the defendant's burden to point out why the government's calculation was inaccurate and to point out what the restitution amount should be. Sheffield did not provide the court with a list of entries she believed were duplicative, and as a result, the court overruled her objection and ordered the restitution set out in the spread sheet.

The Reasoning: Reviewing for clear error, the Court of Appeals reversed. The use of estimation is not permissible when the losses suffered by the victim are definite and easy to calculate. Because each fraudulent return in this case triggered a refund of exactly $1,000, that amount should have been multiplied by the number of false returns to determine the amount of restitution. The Court further concluded that, once the government acknowledged that there was some duplication in the spreadsheet, it could not carry it's burden to put forth "reliable and specific evidence" without correcting the spreadsheet.

This is an appeal from the Northern District of Georgia. The panel consisted of Judges Tjoflat, Jordan, and Anderson.

HONEST-SERVICES FRAUD: The jury must be instructed that an "official act" is a decision of action on a "question" or "matter" that is "comparable in scope to a lawsuit, hearing, or administration determination."

United States v. Van Buren, No. 18-12024 (October 10, 2019).

The Facts: Nathan Van Buren, a sergeant with the Cumming Police Department, came to know a man in the community named Andrew Albo. Albo allegedly enjoyed the company of younger women, including minors and prostitutes, and he sometimes paid prostitutes and then accused the women of stealing the money he gave them. Albo was known in the Police Department and was considered to be "very volatile." Van Buren often handled the disputes between Albo and various women. At some point, he asked Albo for a loan, falsely claiming that he needed $15,368 to pay his son's medical bills. Albo reported Van Buren's request and the FBI created a sting operation. The plan was to give Van Buren some cash, and in exchange, Albo was to ask Van Buren to tell him whether a woman Also supposedly met at a strip club was in fact an undercover police officer. At Albo's request, Van Buren searched for a license plate number purportedly associated with the woman in the Georgia Crime Information Center ("GCIC") database, which is maintained by the GBI and connected to the National Crime Information Center maintained by the FBI. Van Buren then texted Albo to tell him he had information for him.

Van Buren was charged with one count of honest-services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, and one count of felony computer fraud. As to the honest-services count, Van Buren requested that the jury be instructed that an "official act" "must be similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." The district court refused, reasoning that the instruction was inapplicable to Van Buren's case and would only confuse the jury. Instead the court instructed that "to qualify as an official act, the public official must have made a decision or taken an action on a question or matter. The question or matter must involve the formal exercise of governmental power. It must also be something specific which requires particular attention to the question or matter by the public official. Van Buren was convicted of both counts.

The Reasoning: The government theorized that Van Buren deprived the public of his honest services by accepting a bribe, as that act is defined by the federal bribery statute, 18 U.S.C. § 201.

Under § 201, a public official may not seek or receive anything of value in return for "being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2). The statute defines an "official act," in turn, as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.* § 201 (a)(3). *In McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court observed that the words "cause, suit, proceeding or controversy" in § 201(a)(3) "connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination." This qualification provides crucial context for what "formal exercise of governmental power means," and without it, the phrase could mean "anything that a public official does that falls within the scope of the official's duty." The omission of this qualification deprived Van Buren of a "potent argument" –that running the license plate was not similar in nature to a lawsuit before a court, determination before an agency, or a hearing before a committee—and allowed the jury to convict him without identifying a qualifying "question" or "matter" on which Van Buren acted. Accordingly, it was error for the district court to refuse to give the instruction.

The Court noted that, to the extent that its prior precedent held that an "official act" was simply every action in the range of official duty, *e.g. U.S. v. Moore*, 525 F.3d 1033(11th Cir. 2008), it was abrogated by *McDonnell.*

While the court vacated the honest-services-fraud conviction, it found that the there was sufficient evidence presented in the first trial for Van Buren to be re-tried on the matter. Specifically, if the government had identified the underlying matter as something like an investigation into illegal activity, such as prostitution, at the strip club, it may have been able to prove its case. Such an investigation would have been a specific, formal government action, within the ambit of police activity, that is comparable to a lawsuit, hearing, or administrative determination. "The government presented evidence that Van Buren was fully prepared, and acted, to compromise a potential investigation, in exchange for money. His guilt or innocence cannot turn on whether he was lucky enough that the person he searched for fortuitously did not exist or that no investigation of the strip club was actually occurring."

This is an appeal from the Northern District of Georgia. The panel consisted of Judges Martin, Rosenbaum, and Boggs of the Sixth Circuit Court of Appeals.

RESENTENCING: A district court need not conduct a full resentencing when correcting the error does not change the guideline range and the district court does not make the sentence more onerous.

United States v. Thomason, No. 17-11668 (October 10, 2019).

The Facts: The district court granted Ric Thomason Jr.'s motion to correct his sentence, 28 U.S.C. § 2255, based on *Johnson.* The error affected four of his eight counts of conviction, but did not change his guideline range. The district court did not conduct a full resentencing hearing, but instead, invited the parties to file any written materials they wished the court to consider in the resentencing. The district court found that the guidelines were not affected by the vacatur of the four convictions, but still lowered Thomason's sentence from 327 months to 293 months.

Thomason appealed, arguing that the court abused its discretion in failing to hold a resentencing hearing with the defendant present.

The Reasoning: The Eleventh Circuit concluded that the district court was not required to conduct a hearing to resentence Thompson in this circumstance. A defendant does not have a right to be present whenever the court modifies his sentence. Instead, the defendant must be present only if the modification constitutes a "critical stage" where his presence would contribute to the fairness of the proceeding.

To determine if a sentence correction is a critical stage requiring a hearing with the defendant present, there are two considerations: (1) whether the errors that the grant of habeas relief undermined the sentence as a whole (i.e. when an error on one count forces the court to revisit the entire sentence); and (2) whether the sentencing court exercised significant discretion in modifying the defendant's sentence that was not exercised in the original sentencing (such as when a mandatory minimum limited the court's discretion in the original sentencing). If these factors are present, the district court may not modify the defendant's sentence without holding a hearing with the defendant present. A district court need not conduct a full resentencing when correcting the error does not change the guideline range and the district court does not make the sentence more onerous.

In this case, the district court did not abuse its discretion in rejecting Thomason's request for a hearing. The *Johnson* error in Thomason's original sentencing did not undermine his sentence as a whole. In imposing the original sentence for Thomason's four felon-in-possession counts, the district court did not rely on a guideline range that was affected by the *Johnson* error, nor did it appear to rely on the erroneous 15-year mandatory minimum. It instead calculated a guideline range that was unaffected by the error and then, after determining that the top of that range was insufficient, departed upwards—147 months above the mandatory minimum. This record made it simple to correct Thomason's sentence.

This is an appeal from the Northern District of Florida. The panel consisted of Judges William Pryor, Jill Pryor, and Robreno of the Eastern District of Pennsylvania.

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§ 924(c): *Rosemond v. United States,* 572 U.S. 65 (2014), which held that, to sustain a conviction for aiding and abetting a § 924(c) offense, the government must prove that the defendant had advance knowledge his co-conspirators would use or carry a firearm during the underlying crime of violence, is retroactively applicable to cases on collateral review.

United States v. Steiner, No. 17-1555 (October 16, 2019)

The Facts: James Steiner filed a 28 U.S.C. § 2255 motion to vacate, challenging his conviction for aiding and abetting the offense of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c). Steiner argued that the district court erred by denying his motion because the government did not present sufficient evidence at trial that he had advance knowledge his co-conspirators would use or carry a firearm during the underlying crime of violence, as required by *Rosemond v. United States*. 572 U.S. 65, 67 (2014).

The Reasoning: The Court conducted the *Teague* retroactivity analysis and determined that *Rosemond* is retroactively applicable to cases on collateral review. However, viewing the evidence in Steiner's trial in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Steiner had advance knowledge that his co-conspirators would use or carry a firearm during and in relation to the carjacking. Accordingly, he was not entitled to § 2255 relief.

This is an appeal from the Middle District of Alabama. The panel consisted of Judges Wilson, Newsom, and Proctor of the Northern District of Alabama.

FOURTH AMENDMENT STANDING: Fleeing from a hotel room does not necessarily constitute abandonment for standing purposes.

FOURTH AMENDMENT STANDING: Any reasonable expectation of privacy in a hotel room is lost at checkout time.

United States v. Ross, No. 18-11679 (October 29, 2019)

The Facts: A joint federal-state task force sought to arrest Wali Ross on three outstanding felony warrants. They located Ross at a motel room. The officers knew that Ross was a fugitive with a history of violence and drug crimes. Ross was not registered at the motel, so they set up surveillance and waited for him to appear. At around 9 am, Ross came out of a motel room, spotted the officers, jumped a fence, and ran toward the interstate. The officers chased Ross but could not find him. They then sent officers to the motel room to see if he had circled back to it. The officers obtained a key from the front desk and entered the hotel room to execute the warrants and arrest Ross. Once inside, they conducted a protective sweet and saw a firearm in plain view. The officers seized the gun and left.

An ATF agent arrived and sought to search the room. The motel's manager informed the agent that the room could be searched after the motel's standard checkout time of 11 am. Until that time, the manager would not let them enter. At 11 am, the agents entered the room and found a cell phone and drugs.

Ross moved to suppress the evidence in the warrantless searches of his motel room, arguing that the initial entry and the protective sweep violated the Fourth Amendment because there were no grounds for the officers to believe that a dangerous individual (or anyone) was inside the room, and the second search was illegal because it would not have occurred but-for the first illegal search. The district court denied the motion, and Ross pleaded guilty while preserving the issues for appeal.

The Reasoning: The Court affirmed. As an initial matter, the Court rejected the government's argument that Ross had abandoned any reasonable expectation of privacy in the motel room when he fled with no intention of returning. While noting that it was a close call, the Court found that, based on the fact that Ross had locked his room and kept the key, and only 10 minutes elapsed between his flight and the warrantless entry, it could not conclude that Ross had abandoned his privacy interest in the room. Notably, the court distinguished the privacy interest in a hotel room

from that in a car, as the Court has previously held in *United States v. Edward*, 441 F.2d 749 (5th Cir. 1971), that an individual *can* abandon a reasonable expectation of privacy solely as a result of police pursuit or presence.

While Ross had standing to contest the first search, the Court concluded that the search itself was lawful. The officers arrived at the motel to arrest Ross of several outstanding warrants, which implicitly carry with them the limited authority to enter a dwelling when there is a reasonable belief the suspect is inside. The officer's belief that Ross could have circles back to the motel when they lost him in the chase was reasonable given that no one had stayed behind to surveil the motel. Additionally, Ross's truck was still in the motel parking lot. Because the officers had the authority to enter to execute the arrest warrants, they were also permitted to conduct a protective sweep and to seize the gun that was in plain view.

As to the second search, the Court found that Ross did *not* have standing. Ross was "an overnight guest in an ordinary motel room"; a room that was, in fact, rented in someone else's name. As such, his connection to the motel room was not "regular or personal." Accordingly, the Court held that "a short-term hotel guest like Ross has no reasonable expectation of privacy in his room after checkout time."

This is an appeal from the Northern District of Florida. The panel consisted of Judges Wilson, Newsom, and Proctor of the Northern District of Alabama.

SENTENCING GUIDELINES: Mere proximity between a firearm and drugs possessed for personal use cannot support the application of the 4-level enhancement under § 2K2.1(b)(6)(B) without a finding that the gun facilitated or had the potential to facilitate the defendant's drug possession.

United States v. Bishop, No. 17-15473 (October 11, 2019)

The Facts: Following a lawful traffic stop, police conducted a pat-down search of Michael Bishop's outer clothing and seized a high-capacity gun magazine, the matching firearm, one hydromorphone pill, and three syringes. He moved to suppress the evidence from the search, arguing that the officers unlawfully prolonged the traffic stop and lacked reasonable suspicion that he was armed and dangerous to justify the pat-down.

At the suppression hearing, the officer who conducted the stop testified that, earlier that day, he had arrested a woman for possessing heroin and drug paraphernalia, and the woman told him that "she was headed to Michael Bishop's house." Later, the officer saw a pickup truck drive through a stop sign while exiting a parking complex. He followed the truck and saw it run another stop sign. He pulled the truck over and found Bishop in the passenger seat and Antonio Davis driving. Because of the prior statement from the women and the officer's knowledge that Davis was a "know narcotics violator," the officer called for a K-9.

When the K-9 and its officers arrived, the officers asked Davis to exit the vehicle. He complied, and during Davis' pat-down, Bishop told the officers they had no right to stop them or ask them to get out of the vehicle. Bishop was agitated, fidgeting, and very defensive. The officers asked him

several times to exit the truck, and Bishop finally complied. The officers testified that, based on Bishop's movements in the truck, they were concerned that he was concealing a firearm.

Bishop pleaded guilty to knowingly possessing a firearm and ammunition as a convicted felon under §§ 924(g)(1) and 924(a)(2), but preserved the suppression issue for appeal. At sentencing he received a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony offense—possession of one hydromorphone pill and three syringes.

The Reasoning: The Court affirmed. As to the suppression motion, the Court rejected Bishop's argument that his nervous, fidgety, and defensive behavior, combined with the deputies' knowledge that he had previously been an inmate at the county jail, was insufficient to establish reasonable suspicion that he was armed and dangerous. Even separately, nervous, evasive behavior, as well as "argumentative or non-complaint behavior," may give rise to a reasonable suspicion that an individual is armed and dangerous. In this case, Bishop's known criminal history, non-compliance, argumentativeness, and nervous, agitated behavior following lawful orders to exit would cause a reasonably prudent officer to believe that his safety or that of his fellow officers was in danger.

While the Court affirmed the conviction, it remanded for resentencing because the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) should not have been applied. Section 2K2.1(b)(6)(B) provides a four-level enhancement to a defendant's base offense level if he "used or possessed any firearm or ammunition in connection with another felony offense." "Another felony offense" includes crimes that are punishable by imprisonment for a term exceeding one year under federal, state, or local law. Application of the enhancement depends on the type of felony alleged. If the offense involves drug trafficking, Section 2K2.1(b)(6)(B) applies automatically if "the firearm is found in close proximity" to drugs. For all other felonies, it applies only if the court finds that "the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense."

Here, the district court erred in relying on the firearm's proximity to the hydromorphone pill in applying the enhancement because proximity is only relevant when the other felony offense is a drug trafficking crime. Because possessing one hydromorphone pill is a felony drug possession offense, not a drug trafficking crime, the district court was required to find that the firearm facilitated, or had the potential to facilitate, the drug possession offense.

This is an appeal from the North District of Florida. The panel consisted of Judges Wilson, Newsom, and Coogler of the Northern District of Alabama.

ACCA ROUNDUP: New York first degree robbery and attempted second-degree murder qualify as violent felonies under the ACCA.

United States v. Sanchez, No. 18-10711 (October 2, 2019).
The Alabama attempted first degree assault statute, Ala. Code § 13A-6-20(a), is divisible. Convictions under §13A-6-20(a)(1) and (a)(2) are violent felonies under the elements clause. *United States v. Harris*, No. 18-11513 (October 29, 2019).

Alabama second-degree and third-degree robbery are ACCA predicate offenses. *United States v. Hunt*, No. 17-12365 (October 30, 2019).

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WHAT'S THE DECISION

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SUPREME COURT CASES

SCOTT KEY is the immediate past president of GACDL. He is the former chair of the appellate practice section of the State Bar of Georgia, an adjunct professor of law, and he has a private criminal practice devoted to appeals, post-conviction, and parole. He is frequently a speaker at CLE events.

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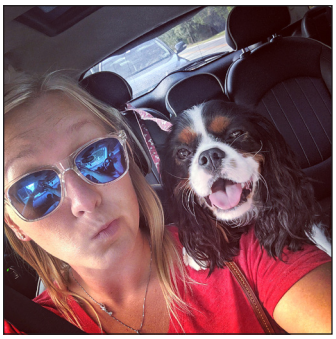

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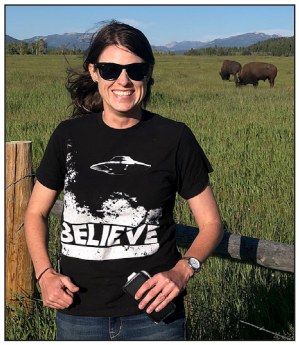

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