WHAT'S THE DECISION

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

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Kindall E. Browning and Hunter Rodgers, Editors & Authors, State Cases
Sydney Strickland and Leigh Ann Webster, Editors & Authors, 11th Circuit Cases

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Comments and Questions: Please direct them to Leigh Ann Webster: law@stricklandwebster.com
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SUPREME COURT

OBJECTION TO FORM OF VERDICT; MUTUALLY EXCLUSIVE CRIMES

Middleton v. State (S19G0852) July 1, 2020

Holding: A defendant does not have to object to the form of the verdict in order to raise the claim that crimes are mutually exclusive at a motion for new trial and convictions for Hijacking and Theft by Receiving of the same motor vehicle are mutually exclusive.
Facts: Mr. Middleton was convicted of hijacking a motor vehicle and theft by receiving the same motor vehicle. He appealed and was denied because he did not object to the form of the verdict. The Court of Appeals found that the lack of objection constituted a waiver and, as such, Mr. Middleton could not raise any complaint that the verdict was inconsistent, confusing, or otherwise irregular. However, the Supreme Court of Georgia reverses ruling, finding that Middleton was not required to object to the form of the verdicts in order to assert in his motion for new trial and on appeal that his convictions were mutually exclusive. Furthermore, the Supreme Court found that by finding Mr. Middleton guilty of hijacking, they found that he was the principal thief of the vehicle and therefore, he could not also be guilty of receiving the vehicle. This case was reversed and remanded for a new trial.

END OF SUA SPONTE REVIEW OF CONSTITUTIONAL SUFFICIENCY OF THE EVIDENCE

Davenport v. State (S20A0035) July 2, 2020

Announcement: In this case the Supreme Court of Georgia announced that it will end the practice of sua sponte reviewing the constitutional sufficiency of the evidence supporting convictions in

appeals of non-death penalty murder cases. This begins with cases that docket to the term of court that begins in December 2020.

COURT OF APPEALS

MISDEMEANOR DISMISSALS FOR WANT OF PROSECUTION IMPERMISSIBLE

State v. Walker (A20A0544) July 2, 2020

Holding: The trial court's dismissing a misdemeanor case for want of prosecution outside the statute of limitations is effectively a dismissal with prejudice, and thus, illegal.

Facts: Arrested for DUI at the end of 2016, Ms. Walker's case was set for a bench trial in May 2019. When the arresting officer—who was properly subpoenaed—failed to appear, the State moved for a continuance while Ms. Walker moved to dismiss the case for want of prosecution. The trial court granted the dismissal, and the State appealed.

Practice Tip: If outside the statute of limitations and the prosecutor's not ready at trial, do not move for a dismissal. Instead, file a plea in bar on constitutional speedy trial grounds. The prosecutor's unreadiness will mean that they are responsible for the delay, which should weigh heavily against them.

"EXPERT" OPINIONS ON ETHNIC STEREOTYPES PERMISSIBLE

Martinez-Arias v. State (A20A1080) July 14, 2020

Holding: State witness may testify about ethnic stereotypes' impact on a case if relevant, based on personal knowledge, and helpful for providing context to witness's testimony.

Facts: Mr. Martinez-Arias was charged with aggravated sexual battery, aggravated child molestation, and child molestation against his girlfriend's nine-year-old niece. The victim delayed her outcry because she was afraid of what would happen to her and did not think anyone would believe her. At trial, the victim's school counselor testified for the State about her relationship and observations with the victim. The counselor *also* testified about her experience with Latino culture, including its "machismo" and "collectivistic family" nature. Over objection, the trial court allowed the counselor to continue, where she described that part of the Latino "machismo culture" was that females "are supposed to be submissive to" the male head-of-household. Again, over yet another objection, the counselor testified that victims feel like it is their fault "for opening [their] legs and the boys are just supposed to be that way," due to their "urges." Finally, the counselor testified that in Mexican culture, "sexual education is a taboo topic among Latinos…because it's based on religious foundations."

Analysis: The Court of Appeals upheld the testimony against a relevance objection, finding that it was relevant to the delayed outcry and the defense's belief in fabrication. Second, the Court found that the counselor's opinions were rationally based on her first-hand knowledge as a member

of the Latino community. In a footnote, however, the Court said that trial counsel only objected to relevance, *not* Rule 403, nor was it argued under plain error on appeal.

Practice Tip: If you object to something on relevance grounds, *always* argue Rule 403 in the alternative. "Judge, it's not even remotely relevant! But even if it possesses a mere iota of relevance, its probative value is dwarfed by its undeniable prejudicial effect!"

TIMELINESS OF MOTION TO SUPRESS

Riley v. State (A20A1376) July 21, 2020

Holding: Defendants cannot circumvent timeliness requirements for evidentiary pretrial motions by calling them a motion in limine.

Facts: Mr. Riley was pulled over by police for failure to maintain lane. Riley gave ID, but his passenger did not, and while the cop twiddled around trying to get an ID, a K9 unit arrived and alerted to the presence of drugs. Cops search the car, find a bunch of debit cards and a magnetic reader/writer in the passenger's side, and arrest everyone involved. Six days before trial and nine months after arraignment, Riley's counsel filed a motion in limine seeking to bar the police from testifying about the items found in the car because the search which produced the evidence was unconstitutional, which the trial court denied.

Practice Tip: Do not wait until the last minute to file a motion to suppress.

11th CIRCUIT CASES

ABOVE-GUIDELINES SENTENCES: If a court imposes an above-Guidelines sentence, it should ensure that the justification is sufficiently compelling to support the degree of the variance, but it is not required to explicitly consider each of the 18 U.S.C. § 3553(a) factors.

United States v. Harris, No. 18-15055 (July 1, 2020)

The Facts: Orlando Harris, Jr. pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The charges arose from an incident in which Harris essentially started a gunfight involving several gang members that resulted in the death of one person and serious injuries to four others. Harris and the government agreed that the offense conduct was most analogous to the Guidelines offense of aggravated assault, resulting in a sentencing range of 33-41 months.

The Government argued for a sentence within the middle of the Guidelines range. The Court, however, imposed a sentence of 92 months, taking into account Harris's "extensive record" of violent crimes, and the fact that Harris's underlying offense conduct led to someone's death.

The Reasoning: On appeal, Harris argued that the district court did not adequately explain its deviation from the Guidelines. He further argued that in light of his exemplary post-offense behavior, his lengthy sentence was greater than necessary to comply with the sentencing purposes identified in 18 U.S.C. § 3553(a)(2).

The Court affirmed. As to the procedural reasonableness of the sentence, the Court found that the district court had adequately explained its chosen sentence, and it was not required to discuss each of the § 3553(a) factors. The Court also found that the 92-month sentence was substantively reasonable, as the district court did not consider his post-offense behavior, and regardless, it was not an abuse of discretion to give great weight to Harris's criminal history and the seriousness of the offense.

This is an appeal from the Middle District of Alabama. The panel consisted of Chief Judge William Pryor, Judge Grant, and Judge Jung of the Middle District of Florida.

FOURTH AMENDMENT: A suspect's alleged abandonment of his privacy or possessory interest in the object of a search or seizure does not implicate his Article III standing, and accordingly, the government may waive an abandonment argument.

United States v. Ross, No. 18-11679 (July 7, 2020)

The Reasoning: This case was back before the Court on remand from the en banc court. In *United States v. Ross*, No. 18-11679, 2020 WL 3445818 (11th Cir. June 24, 2020) (en banc), the full court unanimously overruled *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015), and held "that a suspect's alleged abandonment [of his privacy or possessory interest in the object of a search or seizure] implicates only the merits of his Fourth Amendment challenge—not his Article III standing—and, accordingly, that if the government fails to argue abandonment, it waives the issue." *Ross*, 2020 WL 3445818, at *1. Applying that holding here, the panel concluded that the government waived its abandonment argument by failing to raise it in the district court.

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.

CONFRONTATION CLAUSE: Business records are not testimonial.

RIGHT TO PRESENT A COMPLETE DEFENSE: A court's exclusion of defense evidence may violate the Constitution only if the evidence directly pertained to an element of the charged offense, could make the existence of an element or an affirmative defense more or less certain, could have a substantial impact on the credibility of an important government witness, or tends to place the government's theory of prosecution in a significantly different light.

EXPERT TESTIMONY: A physician need not be a specialist in the particular medical discipline to render expert testimony relating to that discipline.

SENTENCING: A district court's statement that it would have imposed the same sentence regardless of the Guidelines does not necessarily render any errors harmless.

Ruan v. United States, No. 17-12653 (July 10, 2020)

The Facts: Following a seven-week trial, pain management physicians Xiulu Ruan and John Patrick Couch were convicted by a jury of conspiring to run a medical practice constituting a racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); conspiring to violate the Controlled Substances Act, 21 U.S.C. §§ 846 & 841(a)(1), by dispensing Schedule II drugs, fentanyl, and Schedule III drugs outside the usual course of professional practice and without a legitimate medical purpose; conspiracies to commit health care fraud and mail or wire fraud in violation of 18 U.S.C. §§ 1347(a) & 1349; and conspiracies to receive kickbacks in relation to a Federal health care program in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b). In addition, Ruan and Couch were individually convicted of multiple counts of substantive drug distribution in violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(1). Ruan was further convicted of a money laundering conspiracy in violation of 18 U.S.C. § 1956(h) and two counts of substantive money laundering in violation of 18 U.S.C. § 1957. Ruan was sentenced to 252 months' imprisonment, to be followed by four years of supervised release, and ordered to pay over $15 million in restitution. Couch was sentenced to 240 months' imprisonment, followed by four years of supervised release, and ordered to pay over $16 million in restitution.

The Reasoning: The appellants challenged the sufficiency of the evidence on all counts. The Court upheld all but Count 16, which charged a violation of the Anti-Kickback statute—specifically, that the appellants conspired with certain doctors to accept kickbacks in exchange for running their in-officer workers' compensation dispensary. The Court found that there was no "Federal health care program," involved, as there was no showing that federal funds passed through the workers' compensation dispensary.

Admission of prescribing data: The appellants challenged the government's use of prescribing data pulled from Alabama's PDMP and similar databases from Florida and Mississippi. The PDMP is a database of all controlled substance prescriptions dispensed in Alabama. The Alabama Department of Public Health ("ADPH") maintains the PDMP database, and the government called state pharmacy director Nancy Bishop, who oversees the PDMP, to explain the system and offer the records. PDMP data is entered by the pharmacist either directly or via software that automatically transmits the data to the PDMP as they dispense the mediation. The appellants argued that the PDMP data contained multiple levels of hearsay and violated the Confrontation Clause. As to the hearsay argument, the Court concluded that the reports were an admissible "data compilation" pursuant to Fed.R.Evid. Rule 803(6), and the prescriptions themselves were business records of the reporting pharmacies admissible under the same Rule. As to the Confrontation Clause argument, the Court found that the reports were not testimonial because their primary purpose was for record keeping and not for use in a prosecution.

Exclusion of Defense Evidence: The appellants argued that the district court erroneously excluded as irrelevant information about patients who received legitimate medical care and videos of undercover agents posing as patients attempting to obtain opioids from Ruan and being denied.

As to the "good patient" evidence, the Court found that (1) the evidence did not pertain to a formal element of the charged offense, as the government did not allege that the practice was a total fraud; (2) it did not prove a collateral matter relating to the defense because it would not have proven that Couch was operating a legitimate practice, as the testimony would not have any tendency to negate the mens rea of the charged offense; and (3) the evidence would not have "completed the picture" of the charged crime because it was undisputed that the appellants did not mistreat all or even most of their patients. Likewise, the exclusion of the videos of undercover agents was not prejudicial because they did not refute the inculpatory evidence or the government's theory.

Expert Testimony: The appellants argued that government expert Dr. Aultman was not qualified because she was not a board-certified pain management physician and did not have her own specialty clinic like the appellants. However, the Court has previously held that a "proffered physician need not be a specialist in the particular medical discipline to render expert testimony relating to that discipline." Dr. Aultman's familiarity with prescribing opioids and treating chronic pain qualified her to opine on the appellants' conduct.

Cross-examination regarding bias and motive: The Court agreed that the district court erred in sustaining the government's objection to the defense's question asking Dr. Aultman to confirm that over a 4-year period she had made over $325,000 from contracts with the DEA and the DOJ. Although the jury knew about her $7,600 fee from this case, the fact that she had signed contracts totaling over 40 times that much from the government was probative of her credibility. The error was harmless, though, in light of the overwhelming evidence of guilt.

Jury Instructions: The Court found that the trial court properly rejected the defense's proposed instruction regarding a physician's liability for violations of the Controlled Substantive Act. The defense requested a "good faith" instruction, which was an incorrect statement in the law in light of 11th Circuit precedent holding that whether a defendant acts in the usual course of his professional practice must be evaluated based on an objective standard, not a subjective standard. Likewise, the proposed instruction requiring the jury to find that the defendants acted as a "drug pusher" was also an incorrect statement of the law as there was no such requirement for a CSA conviction.

Sentencing Issues: Ruan argued that the district court clearly erred in finding that at least 10.6% of the prescriptions written were illegal and in applying two enhancements. The Court rejected the government's argument that any error was harmless because the district court said that it would have imposed the same sentence regardless of any errors in calculating the guidelines range, because the alleged errors would have resulted in a lower guideline range and the district court did not provided sufficient fact-finding to support a significant upward variance, rendering the sentence substantively unreasonable. However, there were no clear errors in the court's drug quantity calculations or the application of the obstruction of justice enhancement. While there was error in the application of a money-laundering enhancement, it would not have affected the final guideline range. This claim was not preserved in the district court and failed plain error review because it did not affect Ruan's substantial rights.

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

SENTENCING GUIDELINES: The U.S.S.G. § 2K2.1(b)(6)(B) enhancement for possessing a firearm in connection with another felony offense may apply even if the other offense didn't actually happen.

United States v. Martinez, No. 18-12950 (July 14, 2020)

The Facts: Michael Martinez was arrested after a traffic stop produced a stolen shotgun and charged with felon in possession. He pleaded guilty without a plea agreement. The district court applied a four-point enhancement pursuant to U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm in connection with another felony offense. The district court found that the enhancement applied based on three findings of fact: (1) Martinez's plan to sell the stolen shotgun for the pound of dope was a drug trafficking offense; (2) the stolen shotgun had the potential of facilitating the pound-of-dope sale; and (3) the stolen shotgun was in close proximity to the drug paraphernalia, the scale.

The Reasoning: Martinez's appeal challenged the application of the §2K2.1(b)(6)(B) enhancement. The Court affirmed, concluding that the § 2K2.1(b)(6)(B) enhancement applies if the government proves by a preponderance of the evidence that the defendant knew, intended, or had reason to believe (rather than hoped, wished, or dreamed) the gun was going to be used to buy drugs, and the sale would have (rather than may or might have) happened but for the defendant's arrest or something else getting in the way. Here, the government proved by a preponderance of the evidence that Martinez intended to distribute the pound of drugs. This evidence included the digital scale and baggies found near the shotgun, as well as the quantity of drugs.

This is an appeal from the Middle District of Florida. The panel consisted of Chief Judge William Pryor, Judge Jill Pryor, and Judge Luck.

JURY INSTRUCTIONS: The district court does not err by refusing to give requested instructions if the proposed instructions are covered by other instructions.

United States v. Gumbs, No. 18-13182 (July 15, 2020)

The Facts: Shusta Traverse Gumbs was sitting in his car, surrounded by officers trying to arrest him due to his status as a fugitive, when he suddenly accelerated, hitting three cars and an officer. He was subsequently charged with two counts of using a deadly weapon to forcibly assault, resist, oppose, impede, or interfere with a federal officer, in violation of 18 U.S.C. § 111(a)(1) and (b). During jury deliberations, the jury asked the district court whether a car was "still a deadly weapon if you don't intend to use it that way." The court repeated its instruction defining what a deadly weapon was. Gumbs was convicted and sentenced to 235 months in prison.

On appeal, Gumbs argued that the district court erred by refusing to give his requested instructions, which defined forcibly and the use of a deadly weapon, and by refusing to instruct on the lesser-included of simple assault, under 18 U.S.C. § 111(a). Gumbs also argued that the district court should have instructed the jury that the answer to its question was no. The Court affirmed.

The Reasoning:
Forcibly: Gumbs asked for an instruction that "forcibly" meant the "intentional use or threatened use of physical force against the officer and that every means of violating § 111 requires such force. The Court held that the proposed instruction was substantially covered by other instructions, as the given instructions tracked the statutory language, which was easily understandable.

Use of a Deadly Weapon: The Court again held that the proposed instruction was covered by other instructions and that the failure to give it did not seriously impair Gumbs' defense. The proposed instruction – that for a car to qualify as a deadly or dangerous weapon, the defendant must use it as a deadly or dangerous weapon and not simply as a mode of transportation – was basically a repeat of the portion of the instruction that the district court did give. Moreover, he only needed to intend to use the car; the law did not require that he intended to use the car as a weapon.

Lesser-Included Offense: The Court rejected Gumbs' argument about the lesser-included offense because there was no way for the jury to convict Gumbs of simple assault without also convicting him of the charged offenses.

Jury Question: The Court correctly answered the question, as there was no need for the defendant to specifically intend to use a car as a deadly weapon.

This is an appeal from the Northern District of Georgia. The panel consisted of Chief Judge William Pryor, Judge Jill Pryor, and Judge Luck.

PLAIN ERROR: No matter how right you are about the law, if you can't establish that the result of trial would have been different, you lose.

United States v. Deason, No. 17-12218 (July 17, 2020)

The Facts: Steven Deason was charged with attempted online enticement of a minor in violation of 18 U.S.C. §2422(b) and six counts of attempted transfer of obscene matter to a minor in violation of 18 U.S.C. §1470. The charges stemmed from Deason's conversations with "Amber," a special agent pretending to be a 14-year-old girl, and the fact that he sent her pornographic images and videos.

On appeal, Deason—represented by your federal editors—argued that (1) the indictment was insufficient to charge him with violating §1470 because it did not specify which transfers were at issue; (2) the indictment was duplicitous as to the § 1470 counts; (3) the district court plainly erred by failing to instruct the jury that it had to be unanimous as to which transfers were at issue; (4) the evidence was insufficient as to one count that charged him with sending videos because the government failed to introduce the entire videos and relied on agent testimony instead; (5) the district court plainly erred by allowing the agent to describe the videos; and (6) the court erred by denying the motion to suppress his statements. The Court affirmed.

The Reasoning:
The opinion began with a notation that:

> This is one of the many cases we see in which an adult male pedophile communicates with and propositions an underage female via the internet only to discover to his surprise that she is not underage and often, as in this case, not even female. Surprise is followed by arrest and prosecution, which are usually followed by conviction and appeal, which are usually followed by affirmance. So it is here.

Motion to Suppress: The Court held that, when agents told Deason that he was not in custody and when Deason's wife interrupted the interview (which was at his home) and demanded to speak to him alone, Deason was not in custody, such that the agents were not required to *Mirandize* him.

Indictment: The Court held that the first challenge to the indictment was invited because, after counsel had filed a motion to challenge the first indictment, the government had superseded and defense counsel pretty plainly indicated to the court that the superseding indictment alleviated her concerns. As to the duplicitous argument, the district court found that it had not affected his substantial rights because there was no reasonable possibility that the jury would not have been unanimous as to any of the counts.

Unanimity Instruction: Despite other decisions holding that the failure to give a unanimity instruction with a duplicitous indictment constituted plain error due to the possibility that the jury would not be unanimous, the Court held that Deason had not shown a reasonable probability of a different outcome.

Sufficiency: For something to be obscene, the jury must consider the item in its totality. Because the government did not introduce the videos, Deason argued that there was insufficient evidence that would have allowed the jury to consider the videos in its totality. The Court held that the agent's testimony as to the contents of the video was sufficient.

Evidentiary Challenges: The Court held that even if Deason was right about the merits of the evidentiary issues, he could not show that there was a reasonable probability of a different result on appeal.

This is an appeal from the Middle District of Georgia. The panel consisted of Branch, Tjoflat, and Ed Carnes.

SUBSTANTIVE REASONABLENESS: If you've committed a series of sex crimes against children, the Court will affirm your sentence, even if it is 25 years above the guideline range.

United States v. Hall, No. 18-14145 (July 21, 2020)

The Facts: John William Hall pled guilty to one count of receipt of child pornography, but this conviction followed a long history of child molestation and sexual offenses, even after being required to register as a sex offender. He faced a guideline range of 15 years—the mandatory

minimum--as his guideline range as calculated would have been 121 to 151 months. Due to his long history of abusing children and the materials found on his computer, the district court varied upwards and gave him the statutory maximum—40 years.

On appeal, he argued that (1) the district court violated his due process rights by sentencing him on the basis of unreliable hearsay evidence, specifically, the case file from his 2002 conviction; (2) the district court's sentence was an upward departure, not a variance, and it failed to provide the requisite notice; and (3) the sentence was substantive unreasonable.

After a lengthy recitation of the facts of all of his prior offenses and the conduct leading to the instant charge, the Court affirmed.

The Reasoning:

Hearsay: There was sufficient corroboration in the 2002 case file to ensure that it had the requisite indicia of reliability. The only thing contradicting the information in that file were Hall's self-serving statements, but those were false, especially as he had essentially confessed in other contexts.

Notice: No notice was required because the district court clearly varied upward, as its reasoning was based in the 18 U.S.C. §3553(a) factors. Because the district court did not depart upward pursuant to the Sentencing Guidelines, no notice was required.

Substantive Reasonableness: The Court discussed all of the bad facts about this case before concluding that the 480-month sentence was reasonable. In sum, the Court concluded that it was reasonable because "Hall caused serious and lasting harm to his victims and others, . . . he lacks remorse, [and] he poses a danger to the public, particularly to little girls.

This is an appeal from the Northern District of Florida. The panel consisted of Rosenbaum, Ed Carnes, and Vinson (N.D. Fla.).

HOBBS ACT: Robbing an individual can justify Hobbs Act charges, even if the robber does not know that the robbery would affect interstate commerce. So long as the robbery of the victim affects interstate commerce, even if not intended or even anticipated, the interstate commerce requirement is met.

United States v. Smith, No. 18-13969 (July 30, 2020)

The Facts: De Andre Smith was charged with multiple counts of Hobbs Act robbery and carjacking, as well as four 18 U.S.C. §924(c) counts. He was convicted after trial, and sentenced to 1,105 months in prison. On appeal, he raised numerous challenges to his convictions and sentences, including (1) the admission of eyewitness identification of Smith as the robber, (2) the admission of the music video of Smith's rap song, "Sauce Drippin"; (3) the failure to instruct the jury on the interstate commerce element; (4) sufficiency of the evidence on one Hobbs Act robbery; (5) he should have received the benefit of the First Step Act as it related to the §924(c)

counts; (6) his sentence was cruel and unusual under the Eighth Amendment; and (7) his sentence was substantively unreasonable.

The Reasoning:

Eyewitness Identification: Smith challenged one eyewitness identification because Smith was the only person in the lineup with two-toned dreadlocks, a distinctive characteristic. The Court held that the lineup was not unduly suggestive because other people had dreadlocks, one of the other photos had dreadlocks that appeared to be more than one color, and the photographs were in black and white, such that the color difference in his dreadlocks was less obvious. The lineup was also administered in ways to minimize the suggestive nature.

Music Video: Smith argued that the music video from one of his rap songs should have been excluded under the First Amendment and Rule 403. The Court held that it did not violate the First Amendment because he was not being punished for his speech; his speech was admitted for various evidentiary reasons. Rule 403 did not require exclusion of the evidence because, despite the possibility of some prejudice due to the violent nature of his lyrics, it had significant probative value, including his identity and whether he brandished a gun when he committed the crimes.

Interstate Commerce: Smith argued that additional instructions were necessary for one count of Hobbs Act robbery where the victim was an individual, not a business with nationwide locations. The Court concluded that his proposed instruction was not substantively correct, so the district court was correct not to give it. Smith argued that the government was required to prove the interstate commerce by proving one of three circumstances articulated in *United States v. Diaz*, 248 F.3d 1065 (11th Cir. 2001, but the Court had already rejected that reading before, concluding that the list in *Diaz* was non-exhaustive.

Sufficiency: As to the Hobbs Act count involving the individual, the Court concluded that there was sufficient evidence for the jury to conclude that the robbery "depleted the assets of a business engaged in interstate commerce" because her business was engaged in interstate commerce. There was no requirement that the robbery target the victim because of her business, such that any robbery of an individual could justify Hobbs Act charges, so long as the robbery affected the interstate commerce of the individual's business.

First Step Act: Only defendants sentenced after the enactment of the First Step Act benefit from the reduced §924(c) penalties.

Eighth Amendment: The Eighth Amendment challenge was precluded by prior decisions from the Supreme Court and the Eleventh Circuit.

Substantive Reasonableness: The Court noted that 984 months of the 1,105 sentence were required by the mandatory minimums for the §924(c) counts. The additional 121 months was not an abuse of discretion, especially given the victim's testimony and the nature of the offenses.

This is an appeal from the Southern District of Florida. The panel consisted of Luck, Ed Carnes, and Marcus.

HOBBS ACT

United States v. Melgen, No. 18-10991 (July 31, 2020)

The Facts: Salomon Melgen, an ophthalmologist, was charged with, in essence, operating a multi-year scheme to defraud Medicare by providing unnecessary services, in part because he over-diagnosed patients with a particular condition. After an 8-week trial, he was convicted on 67 counts, and he was sentenced to 204 months. On appeal, Melgen primarily argued that (1) the district court erred by giving the pattern instruction on materiality; (2) the district court erred by admitting summary charges comparing Melgen's billing to peer physicians; (3) the government had withheld *Brady* evidence; and (4) the amount of loss calculations were incorrect. There were other issues raised that did not receive extensive treatment by the Eleventh Circuit, such that they will not be discussed here.

The Reasoning:
Jury Instruction: Melgen argued that the pattern instruction had, in essence, been abrogated by a Supreme Court case, but that case involved claims under the False Claims Act. Therefore, the Court concluded that it did not abrogate the long-standing materiality requirement in criminal fraud cases.

Summary Charts: The Court concluded that the summary charts were admissible under Federal Rule of Evidence 1006 and did not violate the Confrontation Clause, in part because the records used to produce the charts were non-testimonial business records. Melgen argued that the process of choosing which files to include in the summary charts was testimonial, such that he should be able to cross-examine the prosecutors who directed the creation of the exhibit, but the Court rejected that argument as having no basis in law.

Brady: Melgen argued that a government witness testified at sentencing that the use of certain medications could have hid signs of the disease that the government argued Melgen had over-diagnosed. The Court held that this was not *Brady* evidence because it was medical testimony that Melgen himself could have introduced. Melgen argued that the fact that the government's witness agreed with him on this fact made it *Brady*, but the Court concluded that "inappropriately focuses on the *who*, rather than the *what,* of the testimony."

Amount of Loss: The Court concluded that there was sufficient evidence to support the government's contention that the sample patient group used to calculate the loss amount was a sufficiently representative sample. The Court noted that the sample did not cover all of the years charged in the indictment.

This is an appeal from the Southern District of Florida. The panel consisted of Martin, Grant, and Lagoa.


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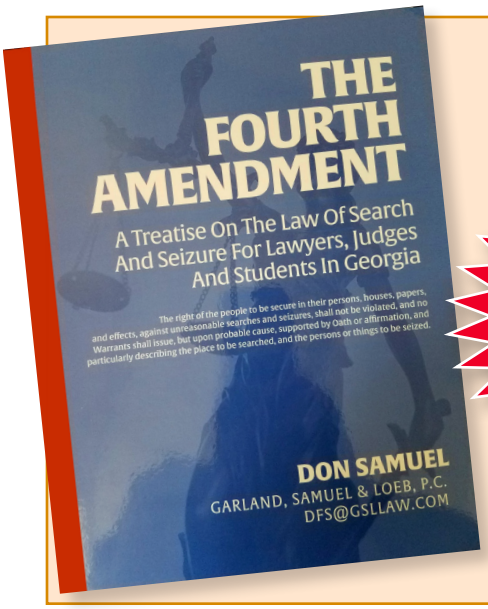

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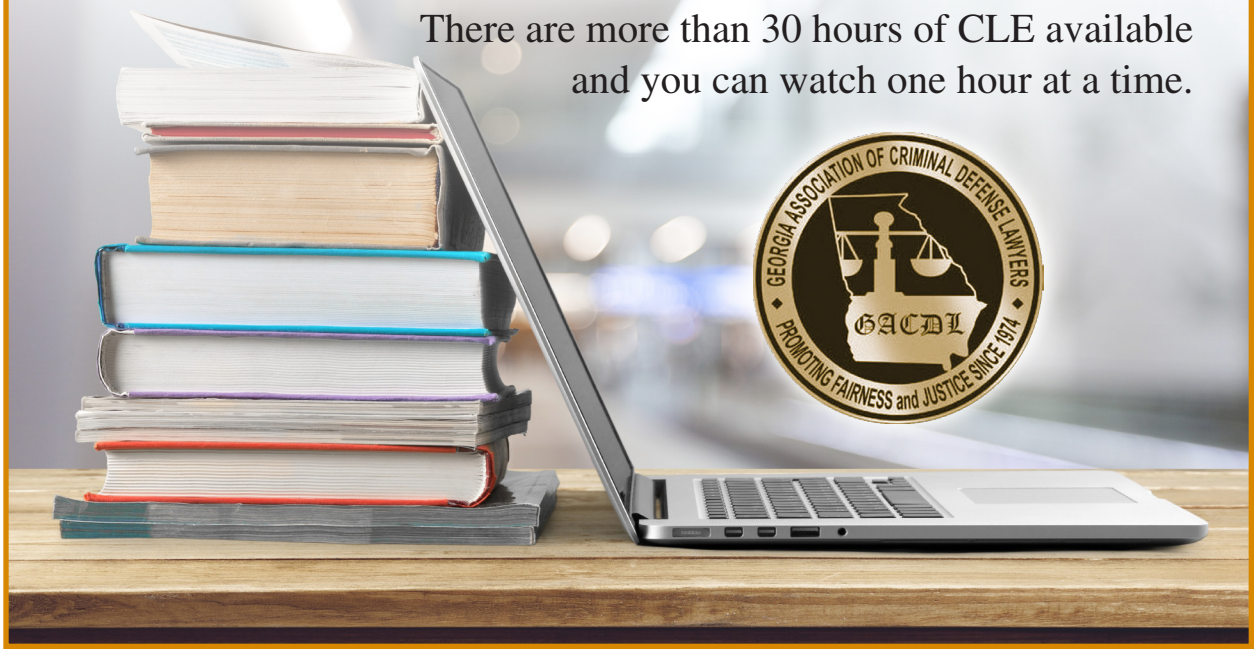

To help collect the various information regarding COVID 19, GACDL's home page now has a link to important resources, contact information, court orders, and messages.

Visit the link here:

https://gacdl.memberlodge.org/

We will continue to update this information as quickly as possible.

If you need assistance logging into the GACDL Members Only section, please visit the help page or contact Brandie (brandie@gacdl.org).

Please continue to use the listserv for communicating details, but note that we are collecting data in a central location to be helpful to our membership.

We all need each other, now more than ever!

WHAT'S THE DECISION

EDITORS & AUTHORS

SUPREME COURT CASES

KINDALL E. BROWNING is a 2012 graduate of Ball State University in Muncie, Indiana. She got tired of being cold in the winter, so she migrated south and graduated from Mercer University School of Law in 2015. She's been a diligent public servant at the Public Defender's Office in Houston County, Georgia since November 2016. Kindall has been a member of GACDL since 2016 and is very active in the Young Lawyers Division of the Georgia Bar. In her free time, Kindall lives the life of a very content 80-year-old woman. he enjoys crochet, reading, gardening, and spending quality time with her three cats, Symba, Raj, & Flossie Carter and her handsome dogs, Maxwell and Nox.

COURT OF APPEALS CASES

A second-generation criminal defense lawyer, Hunter Rodgers practices in Paulding County, where he specializes in complex motions practice, appellate issues, and making his name a curse word for prosecutors. He graduated in 2018 from Georgia State College of Law, where he set the unofficial records for taking the most constitutional law classes (ten), and being the first person to serve as a teaching assistant in three Trial Advocacy courses simultaneously. He also got the highest grade in three classes (his father only got two), won a national championship in Mock Trial (his father did not), and when he realized that the law school did not have an Order of Barristers chapter (his father was a member), he spearheaded the application process to found Georgia State's chapter—not that he's competitive, or anything. Most recently, he had the privilege of attending GACDL's 2019 Bill Daniel Advocacy Program where he probably only annoyed most of his instructors.

FEDERAL COURT CASES

SYDNEY STRICKLAND and **LEIGH ANN WEBSTER** are the owners and operators of Strickland Webster, LLC, which focuses primarily on appeals and post-conviction cases in the state system and federal cases at all levels. They met while working at the Eleventh Circuit Court of Appeals' Staff Attorney's Office, where they bonded over being some of the few people who believed in actually granting relief to criminal defendants. They launched their firm in 2015 and have been the federal editors of What's the Decision since May 2017. Leigh Ann and Sydney both love animals and will travel stupidly long distances to see them. Tell your dogs they said hi.