RICHARD LEVITT'S

SECOND CIRCUIT CRIMINAL LAW UPDATE

2014 UPDATE
(COVERING 2013 CASES)

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Stacey Richman, President
May 12, 2014, CLE program
co-sponsored by The New York Criminal Bar Association
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MCLE FORUM ANNOUNCEMENT

On Monday, May 12, 2014, the New York Criminal Bar Association ("NYCBA") and The Legal Aid Society will sponsor a program entitled:

SECOND CIRCUIT CRIMINAL LAW ROUNDUP
A REVIEW OF THE COURT'S DECISIONS

The speaker will be:

RICHARD WARE LEVITT

Richard W. Levitt, Esq., has a national reputation for excellence. Described by a Second Circuit Judge in the Foreword of a popular legal treatise as "an outstanding defense lawyer with a scholarly bent," he is author of, *The Second Circuit Criminal Law Update*, a 1,400-page outline of Second Circuit criminal Law (North Law Publishers 2013).

This program will be held from 5:30 p.m. to 7:15 p.m. at the Ceremonial Court Room (9C) at the SDNY Courthouse, 500 Pearl Street, New York **Please arrive by 5:00 p.m. to register as MCLE rules prohibit awarding credit to late comers.** This yearly event is a stunning one man show which provides an extraordinary knowledge in an engaging and riveting manner. The summary materials are a bonus which will serve you well!

Two hours of New York State MCLE credit will be awarded in the area of Professional Practice. Certificates of attendance at this program will be issued by The Legal Aid Society, which is an accredited MCLE provider. This program is suitable for both newly admitted and experienced attorneys. We look forward to seeing you there.

Stacey Richman
President
New York Criminal Bar Associations

SEYMOUR W. JAMES, JR.
Attorney-in-Charge of
Criminal Defense Practice
The Legal Aid Society

THE PROGRAM IS FREE FOR NYCBA MEMBERS; ALL LEGAL AID SOCIETY ATTORNEYS; THE JUDICIARY AND COURT ATTORNEYS
THERE IS A MATERIALS FEE OF $25.00 FOR ALL OTHERS

The Legal Aid Society has been certified by the N.Y.S. Continuing Legal Education Board as an accredited provider for continuing legal education in New York State. Questions about this program should be directed to Stacey Richman, C.L.E. Coordinator, New York Criminal Bar Association, srichmanlaw@msn.com.

Richard Ware Levitt

Richard Ware Levitt is a criminal defense lawyer in private practice in New York City, focusing on trials and appeals in the state and federal courts. He is author of the Second Circuit Criminal Law Update and is a frequent lecturer on behalf of several organizations. Mr. Levitt is a former Board Member and Honoree of the New York Criminal Bar Association. He practices with his partner, Nicholas Kaizer and associates, Yvonne Shivers and Emily Golub.

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APPEALS

Abuse of Discretion Standard

"An abuse of discretion may consist of an erroneous view of the law, a clearly erroneous assessment of the facts, or a decision that cannot be located within the range of permissible decisions." *Grullon v. City of New Haven*, 720 F.3d 133 (2d Cir. 2013) (Kearse).

Credibility Determinations

"The rule of appellate review after a conviction that the evidence is to be viewed in the light most favorable to the prosecution, *see United States v. Chavez*, 549 F.3d 119, 124 (2d Cir.2008), does not require us to accept Hussain's code word claim where no reasonable juror could believe the claim was true." Jacobs concurs and dissents. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. August 22, 2013) (Newman).

Habeas Corpus

Addressing an issue of first impression in the Circuit, court holds that its jurisdiction to hear an appeal brought by a state (as opposed to federal) prisoner from the denial of a § 2241 petition requires the issuance of a certificate of appealability, which it grants to the prisoner in this instance nunc pro tunc. *Hoffler v. Bezio*, 726 F.3d 144 (2d Cir. August 8, 2013) (Raggi).

Harmless Error

Addressing standard of reversibility based on evidentiary error, court says, "We will grant a retrial for improper evidentiary rulings only where these rulings were 'so clearly prejudicial to the outcome of the trial that we are convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' *United States v. Bell*, 584 F.3d 478, 486 (2d Cir. 2009) (quoting *Phillips v. Bowen*, 278 F.3d 103, 111 (2d Cir. 2002))." *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. August 12, 2013) (Livingston).

Magistrate's Report and Recommendation

Agreeing to consider an argument that the district court, on motion for reargument, said was waived because it was not the subject of an objection in the magistrate judge's Report and Recommendation, court explains, at n.7: "We have adopted the rule that failure to object timely to a magistrate judge's report may operate as a waiver of any further judicial review of the decision, as long as the parties receive clear notice of the consequences of their failure to object. The rule is enforced under our

[1] **Bold** lettering indicates noteworthy decision.

supervisory powers and 'is a nonjurisdictional waiver provision whose violation we may excuse in the interest of justice.' *United States v. Male Juvenile*, 121 F.3d 34, 38–39 (2d Cir. 1997) (citations omitted). While the record is somewhat unclear on this issue, assuming the objection was not properly raised, under the circumstances of this appeal, we excuse any failure to object 'in the interest of justice.'" *Cardoza v. Rock*, 731 F.3d 169 (2d Cir. September 24, 2013) (Sack).

Mandate, Recall

Denying defendant's motion to recall the mandate in light of new Supreme Court precedent, court explains: "Our power to recall a mandate is unquestioned.... However, this power must be exercised sparingly only in exceptional circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies…. This restraint is justified by the need to preserve finality in judicial proceedings." *United States v. Redd*, 735 F.3d 88 (2d Cir. November 5, 2013) (p.c.).

Pendent Appellate Jurisdiction

On review of denial of motion for summary judgment based on qualified immunity, made by police officer who arrested alleged shoplifter, court observes that it "may exercise pendent jurisdiction to decide whether plaintiff 'has alleged a constitutional violation at all' before deciding whether [defendant] is shielded by qualified immunity," and that "because the probable cause inquiry is inextricably intertwined with the immunity question, [court would] exercise [its] 'discretion[] [to] consider otherwise nonappealable issues' based on [its] review of the question of qualified immunity." *Stansbury v. Wertman*, 721 F.3d 84 (2d Cir. June 26, 2013) (Wesley).

Plain Error Analysis

Court rejects arguments that trial court failed to personally inform defendant of ten-year minimum sentence where defendant failed to object prior to sentence – invoking plain error analysis – and the record established defendant in fact was aware of the minimum, as the government specifically referenced it. Court advises that where the district court relies on the government to state certain relevant facts such as statutory minimum sentences, it should ask the defendant whether he/she understands what the prosecutor has communicated. Court also opines on methods to assure the defendant's understanding of a cooperation agreement where confidentiality is required. *United States v. Rodriguez*, 725 F.3d 271 (2d Cir. August 8, 2013) (Lohier).

A defendant's argument that his appeal waiver entered pursuant to a plea agreement was not knowingly made as required by Fed. R. Crim. P. 11(b)(1)(N) is subject to plain error analysis where not objected to before sentence. Here, court rejects defendant's appeal, finding that defendant failed to demonstrate either that he didn't understand that he was waiving appeal from any sentence of 60 months or less, or that he

would not have pleaded guilty but for the error. *United States v. Cook*, 722 F.3d 477 (2d Cir. July 16, 2013) (Jacobs).

ATTORNEY-CLIENT RELATIONSHIP

Court denies motion, filed by attorney who only represented defendant for bail purposes, for appointment of CJA counsel and to relieve retained counsel, finding that motion should have been made by retained counsel, with affidavit of indigence and additional information regarding the client's fee arrangements with retained counsel. *United States v. Vilar*, 731 F.3d 255 (2d Cir. October 1, 2013) (p.c.).

Court relieves federal defender of representing defendant, where defendant, having been informed of his right to counsel, stated that he did not wish to have appointed counsel, made no attempt to establish his financial eligibility for appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, and refused to recognize the movant as his attorney. *United States v. Barton*, 712 F.3d 111 (2d Cir. April 2, 2013) (Lynch).

CIVIL RIGHTS ACTIONS

Civil Commitment

Affirming denial of defendants' motion to dismiss, court holds that civil commitment of sexually violent predators following the expiration of their criminal sentences without notice and a predeprivation hearing violated procedural due process and defendants were not entitled to qualified immunity as the basic proposition that due process requires a predeprivation hearing unless there is an immediate danger to society was well established prior to 2005 when the cause of action arose. *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. February 14, 2013) (Sack).

Deadly Force

Court reverses defense verdict in civil rights action alleging that police officer wrongly used deadly force during execution of search warrant at the deceased's residence, finding that district court erred by failing to charge the jury in accordance with *Tennessee v. Garner*, 471 U.S. 1, 3, 11 (1985), and *O'Bert ex rel. O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003), that "[i]t is not objectively reasonable for an officer to use deadly force . . . unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Raggi dissents. *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. July 19, 2013) (Calabresi).

Eighth Amendment

Court reverses dismissal of Eighth Amendment claim brought by pro se inmate who alleged that certain masked prison guards sprayed him with vinegar, oil and feces, burning his eyes and leaving him with physical and emotional injuries, disagreeing with

district court's conclusion that the alleged violation was *de minimis*. Such conduct, if proven, is unequivocally contrary to "contemporary standards of decency," "repugnant to the conscience of mankind" and therefore violates the Eighth Amendment. *Hogan v. Fischer*, 12-4246 (2d Cir. December 20, 2013) (Chin).

Reversing dismissal of Eighth Amendment claim brought by pro se inmate grounded in allegedly horrendous conditions within a six-inmate prison cell at FCI Ray Brook, court finds that the described conditions, if true, violate the Eighth Amendment and that prison officials were not entitled to qualified immunity because, liberally construed, the complaint adequately alleged that defendants knew of and disregarded the excessive risks to inmate's health and safety to which he was exposed. *Walker v. Schult*, 717 F.3d 119 (2d Cir. May 23, 2013) (Chin).

Immunity

Affirming the dismissal of claim under 42 U.S.C. § 1983, stemming from drug-related arrest and body cavity search, court finds that police had arguable probable cause to arrest defendant (even though his conviction was eventually reversed for unlawful search), and that the right to be free from suspicionless strip search or visual body cavity search following arrest for felony drug possession was not clearly established at the time defendants searched petitioner. Pooler dissents. *Gonzalez v. City of Schenectady*, 728 F.3d 149 (2d Cir. August 28, 2013) (Jacobs).

Court reverses dismissal of action under 42 U.S.C. § 1983, holding that detaining an individual pursuant to a material witness arrest warrant was not a prosecutorial function that was entitled to absolute immunity; case is therefore remanded for further proceedings, including determination of whether defendants are entitled to qualified immunity. Court observes that the process of *obtaining* a material witness order is a prosecutorial function for which a district attorney is entitled to absolutely immunity, but the *execution* of a material witness warrant is a police function, not a prosecutorial function. Court explains: "Once defendants decided that Simon should be detained for questioning by Longobardi and the officers, however, and compelled her attendance at the Queens DA for two days of intermittent questioning, rather than bringing her before the court to have her status settled, their actions fell outside the protection of the warrant. They were not acting in the role of advocate in connection with a judicial proceeding. A material witness warrant secures a witness's presence at a trial or grand jury proceedings; it does not authorize a person's arrest for purposes of subjecting that person to extrajudicial interrogation by a prosecutor….A material witness warrant serves the purpose of securing a witness's presence at a trial or grand jury proceeding. It does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor." *Simon v. City of New York*, 727 F.3d 167 (August 16, 2013) (Lynch).

Court reverses denial of motion to dismiss based on qualified immunity, finding that defendant had probable cause and "arguable probable cause" to arrest and prosecute

plaintiff for shoplifting. *Stansbury v. Wertman*, 721 F.3d 84 (2d Cir. June 26, 2013) (Wesley).

Court affirms dismissal of Federal Tort Claims action alleging intentional infliction of emotional distress resulting from false federal grand jury testimony of Connecticut law enforcement officers, finding that the officers enjoy absolute immunity under Connecticut law for grand jury testimony and that the United States may assert that defense under 28 U.S.C. § 2674. In FTCA suits, the United States may assert common law defenses available to private individuals under relevant state law. *Vidro v. United States*, 720 F.3d 148 (2d Cir. June 21, 2013) (Walker).

Reversing dismissal, on grounds of qualified immunity, of claims alleging constitutional violations stemming from administrative – rather than judicial – imposition of postrelease supervision against former inmates, court holds that *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), clearly established the unconstitutionality of the administrative imposition or enforcement of postrelease conditions that were not judicially imposed, and that persons responsible for the imposition or enforcement of such conditions after the date *Earley* was decided were not entitled to qualified immunity. *Vincent v. Yelich*, 718 F.3d 157 (2d Cir. June 4, 2013) (Kearse).

Reversing denial of qualified immunity, court holds that, although scope of plaintiff's consent to search her car did not include permission to read her mail, plaintiff's right to not have her mail read in this context was not clear at the time of the search. Officer's actions were "objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken," because there were no Second Circuit cases addressing the narrow question of whether "[i]t is a Fourth Amendment violation when a police officer reads a suspect's private papers, the text of which is not in plain view, while conducting a search authorized solely by the suspect's generalized consent to search the area in which the papers are found." *Winfield v. Trottier*, 710 F.3d 49 (2d Cir. March 6, 2013) (Jacobs, C.J.).

Malicious Prosecution

Use of police officer's grand jury testimony for impeachment purposes in action under 42 U.S.C. § 1983 for malicious prosecution and related causes of action based on charge that police officers arrested defendant without probable cause and then lied about it, did not violate rule of *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012), that "a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony." *Marshall v. Randall*, 719 F.3d 113 (2d Cir. June 12, 2013) (Walker).

Medical Treatment

DOCS officials were entitled to qualified immunity in lawsuit alleging that inmate's due process and Eighth Amendment rights were violated by refusal of DOCS to grant plaintiff a medical leave of absence to receive outside mental health treatment. One defendant was not claimed to have had personal involvement in the violation of

plaintiff's Fifth and Eighth Amendment rights, which were based on DOCS's alleged policy of denying leaves of absence for absolutely necessary *mental health* treatment while affording such leaves for the provision of other absolutely necessary *medical care*. As to other defendants, even assuming that the mental health treatment plaintiff sought was absolutely necessary and not otherwise available through DOCS, plaintiff's equal protection argument (i.e., that those with mental vs. physical issues are discriminated against) fails; defendants were entitled to qualified immunity because plaintiff did not provide a sufficient basis on which to conclude that defendants could not reasonably have believed that DOCS's alleged policy had a rational basis. Further, plaintiff's Eighth Amendment claim fails because there was no evidence that defendants thought that denying plaintiff's request for a leave of absence would cause him serious harm. *Spavone v. New York State Department of Correctional Services*, 719 F.3d 127 (2d Cir. June 20, 2013) (Livingston).

Medicating Inmate

Court affirms district court order, entered pursuant to *Washington v. Harper*, 494 U.S. 210 (1990), to forcibly medicate defendant who, because of a mental illness, poses a danger to the prison community. Court does not reach question of whether district court also correctly ordered medication pursuant to *Sell v. United States*, 539 U.S. 166 (2003), for the purpose of restoring defendant to competency to stand trial for capital murder. *United States v. Hardy*, 724 F.3d 280 (2d Cir. August 2, 2013) (Kearse).

Prison Conditions

District court erred in dismissing inmate's pro se individual-capacity claims against Warden, alleging unlawful prison conditions, without granting leave to amend the complaint to add a plausible allegation that Warden had been informed of the alleged denials and deprivations. Inmate's initial complaint did not adequately plead the Warden's personal involvement, but, generally, pro see litigants should be permitted at least one opportunity to amend and here, the district court's dismissal was based on a series of factual and legal misstatements. *Grullon v. City of New Haven*, 720 F.3d 133 (2d Cir. 2013) (Kearse).

RLUIPA

Court affirms dismissal of RLUIPA claim, holding that the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc–1, does not authorize monetary damages against state officers in their official capacities because the legislation was enacted pursuant to Congress' spending power, *see* 42 U.S.C. § 2000cc–1(b)(1), which allows the imposition of conditions, such as individual liability, only on those parties actually receiving the state funds (*see Sossamon v. Texas*, —— U.S. ——, 131 S. Ct. 1651 (2011)) and does not create a private right of action against state officers in their individual capacities. *Washington v. Gonyea*, 731 F.3d 143 (2d Cir. September 20, 2013) (p.c.).

Second Amendment

Court affirms dismissal of suit challenging NYC license fee on guns, holding that $340 residential handgun licensing fee – which does not exceed the City's administrative costs attendant to the licensing scheme – did not impose an unconstitutional burden on licensees' Second Amendment rights, and that N.Y. Penal Law § 400.14, allowing city and county to set the residential handgun licensing fee outside the $3–10 range permitted in the rest of New York State, did not violate the Equal Protection Clause. Even under intermediate scrutiny, a regulation that burdens a plaintiff's Second Amendment rights "passes constitutional [due process] muster if it is substantially related to the achievement of an important governmental interest. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)." Plaintiff's equal protection argument was subject to "rational basis" review, which it easily satisfied. Walker concurs. *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. July 9, 2013) (Cabranes).

Court certifies following question to the New York State Court of Appeals: "Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?" *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. January 29, 2013) (O'Connor, USSC [ret.]).

SHU

Inmate's civil rights suit for damages stemming from confinement in Special Housing Unit ("SHU") for 188 days following his termination from Witness Security Program should not have been dismissed as his confinement was a significant enough hardship to trigger liberty interest, and inmate should therefore be permitted to replead his complaint to allege that the confinement was punitive rather than administrative. *J.S. v. T'Kach*, 714 F.3d 99 (2d Cir. April 10, 2013) (Parker).

Statute of Limitations

Eighth amendment claim against "John Does" who allegedly sprayed a mixture of vinegar, oil and feces on inmate was not time barred because, under New York law, CPLR § 1024, substitution of John Does with real names relates back to the filing of the complaint *nunc pro tunc* so long as the party exercised due diligence in finding the true identities of the John Does before the running of the limitations period and the party described the John Doe party "in such form as will fairly apprise the party that [he] is the intended defendant." *Hogan v. Fischer*, 12-4246 (2d Cir. December 20, 2013) (Chin).

Witness Security Program

Inmate did not have a right to due process before being terminated from WITSEC program for contacting unauthorized person, and district court was without authority to consider challenge to inmate's expulsion from such program. *See* 18 U.S.C. § 3521(f), which provides that the Attorney General's decision to terminate protection is not subject

to judicial review. Court rejects argument that the court can nonetheless consider inmate's claim that he was denied due process, since he is unable to show that he has been deprived of a property right for which process is due because "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Hall and Parker concur. *J.S. v. T'Kach*, 714 F.3d 99 (2d Cir. April 10, 2013) (Parker).

CONFESSIONS

Right to Counsel

Court reverses defendant's conviction upon three counts of illegally bringing aliens into the country, finding that the trial court erred in permitting the government to introduce, during its case in chief, evidence that defendant requested an attorney after border patrol agent initiated an interview with defendant prior to his arrest. Error was not harmless beyond a reasonable doubt. Interpreting *Salinas v. Texas*, —— U.S. ——, 133 S. Ct. 2174 (2013), court explains, "whether the government may use a defendant's prearrest silence as substantive evidence of guilt—is properly analyzed in two parts: first, whether the defendant's silence constituted an 'assertion of the privilege against self-incrimination,' and second, if so, 'whether the prosecution may use [that assertion] ... as part of its case in chief…'" and answers in the affirmative question left open in *Salinas*, "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *United States v. Okatan*, 728 F.3d 111 (2d Cir. August 26, 2013) (Lynch).

Court rejects argument that statements defendant made to a government informant should have been suppressed because defendant, at the time, was charged in a sealed indictment, finding *first*, that defendant did not appeal the magistrate judge's decision and therefore waived the issue; and, *second*, that the Sixth Amendment is charge-specific and the charge in the sealed indictment was thereafter dismissed (thus the statement was not used against defendant with respect to the charge that was pending when the statement was made). Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

CONFRONTATION AND CROSS-EXAMINATION

District court did not abuse its discretion in sustaining government objection to question posed by defense counsel to 15-year-old regarding whether she had told defendant – charged with transporting her between states knowing or in reckless disregard of the fact that she had come to, entered, or remained in the United States in violation of law – that she had permission to be in the U.S., since defense counsel made no offer of proof that the witness would respond that she told this to the defendant *before* he transported or harbored her, and "failed even to specify any sort of time frame for the question, so that even an affirmative response from [the girl] would not necessarily have been relevant to [defendant's] culpability." *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. August 12, 2013) (Livingston).

District court did not abuse its discretion in prohibiting defense counsel from asking defense witness in securities fraud case, who had worked with defendant at a different brokerage house some 20 years previous, about payments to brokers that were not disclosed to customers and other matters that either were irrelevant or required that witness be qualified as an expert – which he was not. *United States v. Nouri*, 711 F.3d 129 (2d Cir. March 4, 2013) (Leval).

Rejecting defendants' argument that their confrontation rights were violated by admission of testimony by doctors other than those who created autopsy reports about which they testified, court holds that the reports were not testimonial – and therefore did not implicate the Confrontation Clause – because they were not created "for the purpose of establishing or proving some fact at trial." Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

Trial court's refusal to permit defendants to cross-examine coconspirator/cooperator regarding a conversation with the deceased's wife after husband's death was not error, given that defendants were not arguing that the content of that discussion should have been admissible and the mere fact that a conversation occurred was irrelevant. Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

CONTROLLED SUBSTANCES

Marijuana

The October 2009 "Ogden Memorandum" and its progeny, which stated that the DOJ would not prioritize the prosecution of those who used medical marijuana in states permitting its use, did not purport to reschedule Marijuana from a Schedule I drug, nor could it have done so without following the specific rules through which the Attorney General may do so. *United States v. Canori*, 12-4837 (2d Cir. December 4, 2013) (Cabranes).

DOUBLE JEOPARDY

Prior to considering defendant's sufficiency argument, court agrees that defendant was in jeopardy at his first state court murder trial; although state court granted him a new trial because the trial court gave the jury venire the incorrect oath, the error rendered the judgment of conviction voidable but not void. Court agrees there exists at least a prudential (if not constitutional) rule requiring that appellate courts review sufficiency claims even if they find other errors requiring a new trial. On the merits of the sufficiency claim, however, court finds that retrial would not violate double jeopardy, because the evidence was sufficient to support defendant's conviction for witness-elimination murder. *Hoffler v. Bezio*, 726 F.3d 144 (2d Cir. August 8, 2013) (Raggi).

EFFECTIVE ASSISTANCE OF COUNSEL

Generally

Court affirms district court finding that defendant was not denied effective assistance of counsel at his previous deportation proceeding. Although counsel did not argue in support of relief from deportation that defendant had cooperated with the government in his underlying case, the relevant information was contained in documents that the immigration judge reviewed. Counsel's failure to perfect an appeal did not prejudice defendant because he was unlikely to prevail. *United States v. Williams*, 733 F.3d 448 (2d Cir. September 23, 2013) (Sack).

Court affirms denial of coram nobis relief sought by defendant who argued his attorneys gave him inaccurate advice regarding the immigration consequences of his guilty plea and wrongly failed to advise him to withdraw his plea unless the government agreed to modify the plea to avoid the likelihood of deportation. Defendant in fact was advised accurately, prior to the acceptance of the plea, that his plea would result in him being convicted of an aggravated felony and subject to deportation; defendant had no intention of withdrawing his guilty plea even if he could show that withdrawal was likely to have been granted; and district court properly found that his petition was untimely since he could have brought it as early as 2003. *Chhabra v. United States*, 720 F.3d 395 (June 20, 2013) (Kearse).

Court affirms denial of habeas petition, agreeing that defense counsel was not ineffective for having failed to challenge government's second felony offender notice, where the notice's deficiency in categorically alleging that defendant's prior Connecticut drug conviction was a "serious drug offense" under 21 U.S.C. § 924(e) when in fact a court thereafter held it was not (since the statute proscribed, inter alia, conduct that was not considered a felony drug offense under 21 U.S.C. § 841(b)(1)), had not yet been acknowledged. Further, counsel was not ineffective in not realizing that an *Alford* plea to Connecticut's controlled substance laws could not categorically serve as the basis to enhance a sentence under 21 U.S.C. § 841(b). *McCoy v. United States*, 707 F.3d 184 (2d Cir. January 30, 2013) (p.c.).

Conflict of Interest

Evidence below did not support habeas petitioner's claim that defense counsel was part of petitioner's drug conspiracy and therefore operated under an actual conflict of interest. *Cardoza v. Rock*, 731 F.3d 169 (2d Cir. September 24, 2013) (Sack).

Sentencing

Defendant was denied effective assistance of counsel at sentencing, as defense counsel did not accompany defendant to his pre-sentence interview, did not visit him until just before sentencing and spent only 15 minutes with him discussing the PSR, did not submit a sentencing memorandum on his behalf, failed to seek any sentencing leniency based on defendant's attempts to cooperate with the government, failed to challenge the imposition of an aggravating role enhancement, and failed to seek a downward departure. The district court erred in applying too strict a sentencing standard, requiring defendant to show that counsel's deficiencies "had an adverse effect" on the sentence. Although defendant was sentenced at the bottom of the Guidelines range, counsel could have moved for a downward departure and might have reduced defendant's Guidelines level by pointing out discrepancies with regard to the quantities of drugs at issue. Accordingly, court remands for resentencing. *Gonzalez v. United States*, 722 F.3d 118 (2d Cir. July 10, 2013) (Kearse).

EIGHTH AMENDMENT

Court remands for resentencing 30-month sentence imposed on defendant who pleaded guilty to distributing child pornography, finding that district court erred when it held that mandatory five-year sentence violated the Eighth Amendment, since "the application of a mandatory five-year sentence to the distribution crime of conviction in this particular case does not give rise to an inference of gross disproportionality suggestive of cruel and unusual punishment." Court says, at n.13, "We … leave open the possibility that the Eighth Amendment may preclude a congressionally-mandated five-year minimum sentence for much less serious conduct." Sack concurs. *United States v. Reingold*, 731 F.3d 204 (2d Cir. September 26, 2013) (Raggi).

ENTRAPMENT

Court rejects arguments that defendants were entrapped as a matter of law or that the government committed outrageous conduct in violation of due process when they offered defendants $250,000 to commit terrorist bombings against airport and synagogue. With respect to entrapment, court finds that defendant manifested the requisite predisposition before informant approached him because, prior to inducement, he had an "already formed *design* to commit the crime or similar crimes." Focusing on meaning of defendant's "design" in context of showing predisposition, court explains: "When used as one of the three means of showing predisposition, we think 'design' must take its meaning from the context of the type of criminal activity comprising the specific offenses a defendant has committed. With respect to a category as varied as terrorist activity, the requisite design in the mind of a defendant may be broader than the design for other narrower forms of criminal activity. In view of the broad range of activities that can constitute terrorism, especially with respect to terrorist activities directed against the interests of the United States, the relevant prior design need be only a rather generalized idea or intent to inflict harm on such interests. A person with such an idea or intent can readily be found to be 'ready and willing to commit the offence charged, whenever the opportunity offered.'" Jacobs concurs and dissents. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. August 22, 2013) (Newman).

EVIDENCE

Arguments At Previous Trial

District court did not abuse its discretion when it denied defendants' motion to introduce prosecutor's summation at the trial of a cooperator where it placed most of the blame for murder on the cooperator, but now placed it on the defendants; court's ruling was reasonable because the government provided a credible explanation for its change of heart, i.e., debriefing the previous defendant when she decided to cooperate and corroborating her version of events through additional investigation. Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

Classified Documents

Defendants in case charging a conspiracy to blow up JFK Airport were not entitled to obtain fully declassified version of government memo discussing plan to develop case against defendant, where defendant failed to show what might be obtained from the document that was not available through cross-examination. *United States v. Kadir*, 718 F.3d 115 (2d Cir. May 31, 2013) (Walker).

Coconspirator Statements

Court rejects argument that codefendant had withdrawn from the conspiracy at the time the defendant made inculpatory statements to a government informant, which were therefore admissible under Fed. R. Evid. 801(d)(2)(E); merely having a falling out with a fellow conspirator does not evidence withdrawal from the conspiracy. Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

Experts

Court reverses defendant's drug conviction for several reasons, including permitting agent to give expert testimony under the guise of lay opinion testimony pursuant to Fed. R. Evid. 701, involving the effect of drug packages in gas tank: "Officer Rabideau's testimony was improperly admitted… because his opinion was based on specialized training and experience. Officer Rabideau did more than simply describe what he found in the gas tank and what he perceived. He described how the float on the outside of the gas tank worked and why the gas gauge would have registered zero to empty while the drugs were in the gas tank… Officer Rabideau acquired his knowledge of how a fuel tank operates through his experience as a border agent inspecting vehicles, not through the reasoning processes of the average person." *United States v. Haynes*, 729 F.3d 178 (2d Cir. September 5, 2013) (Koeltl).

Court reverses defendant's drug conviction for several reasons, including that "Agent Linstad's testimony regarding whether the defendant 'realized' that there were drugs in the car was erroneously admitted because it is expert testimony about the defendant's state of mind" in violation of Fed. R. Evid. 704(b). *United States v. Haynes*, 729 F.3d 178 (2d Cir. September 5, 2013) (Koeltl).

Affirming defendants' conviction stemming from fraudulent accounting to inflate company's reported earnings in SEC filings, court holds that testimony of accountant regarding how he would have treated certain payments had he known the true facts, was admissible either as fact testimony or as lay opinion testimony under Fed. R. Evid. 701, and was not improper expert testimony under Fed. R. Evid. 702. *United States v. Cuti*, 720 F.3d 453 (2d Cir. June 26, 2013) (Walker).

In case charging conspiracy to blow up JFK Airport, where government's allegation was that defendants intended to obtain support from al Qaeda and Hezbollah, and/or identified with their "17 goals," trial court did not err when it permitted government to elicit dry, academic testimony of expert describing al Qaeda and Hezbollah and their activities in South America and defining various terms related to terrorism. *United States v. Kadir*, 718 F.3d 115 (2d Cir. May 31, 2013) (Walker).

Forfeiture

Along the way to finding that district court committed plain error in applying the pre-CAFRA standard for civil forfeiture, court observes, at n.8, that in a civil forfeiture proceeding under CAFRA, there is no basis for admitting double hearsay in officer's affidavit in support of summary judgment. *See* *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 510 (5th Cir. 2008) ("[B]y enacting CAFRA, Congress intended to end the practice of reliance on hearsay in civil forfeiture decisions. The Government's only argument to the contrary rests on outdated cases that use the pre-CAFRA probable cause standard, which obviously does not apply to this post-CAFRA proceeding."). *United States v. The Sum of $185,336.07*, 731 F.3d 189 (2d Cir. September 25, 2013) (Cabranes).

Hearsay

Trial court – in case alleging plot to blow up JFK Airport – did not abuse its discretion in excluding a tape made by informant in which a student of defendant's says, "we are not with al Qaeda. We don't agree with what al Qaeda does. We don't agree with killing innocent people." Defendant's response to this statement, "a hum, a hum" was ambiguous and did not necessarily indicate agreement. *United States v. Kadir*, 718 F.3d 115 (2d Cir. May 31, 2013) (Walker).

Court grants government's interlocutory appeal and holds that restraining order enjoining defendant from, inter alia, withdrawing certain funds from bank was not inadmissible hearsay, but rather was admissible as evidence of defendant's state of mind when he withdrew funds that the previously entered credit agreement required to be maintained at the bank; "the significance of the Order lies in the fact that it issued—making it less likely that [defendant], aware of the August 4 Order, could be *unaware* of relevant provisions in the Credit Agreement on which it was premised and that he allegedly disregarded in diverting funds to his personal use." A statement is not hearsay where it is offered not for its truth, but to show that a listener was put on notice. Because the district court misconstrued the use to which the order was to be put, it erred when it also excluded the order under Fed. R. Evid. 403, and court remands for further consideration under rule 403. *United States v. Dupree*, 706 F.3d 131 (2d Cir. January 28, 2013) (Livingston).

Impeachment

Affirming defendant's convictions for arson and obstruction of justice, court agrees that district court did not abuse its discretion in permitting government, over a Rule 403 objection, to cross-examine defendant under Fed. R. Evid. 608(b) regarding letters he wrote evidencing a similar plan to dissuade a witness from testifying in a New Jersey state prosecution, since it severely undermined defendant's innocent explanation for the plan to fabricate evidence in this case. Additionally, the district court issued a timely and appropriate limiting instruction and the government never revealed what the

underlying New Jersey crime was. *United States v. Desposito*, 704 F.3d 221 (2d Cir. January 11, 2013) (Chin).

Monsanto Hearings

Hearsay is admissible at *Monsanto* hearings. Additionally, court did not err in quashing defense subpoenas at *Monsanto* hearing, which district court said would merely provide the defense a dress rehearsal of the cooperators' testimony. *United States v. Walsh*, 712 F.3d 119 (2d Cir. April 2, 2013) (Jacobs).

Other Acts and Crimes

While reversing on other grounds, court finds no abuse of discretion in district court's admission, under Fed. R. Evid. 404(b), of defendant's previous admission, in another case, to misusing her work computer in furtherance of a drug conspiracy, as proof of her knowledge that, in the instant case, she was using her work computer for a similar purpose, with regard to a different drug conspiracy. *United States v. Moran-Toala*, 726 F.3d 334 (2d Cir. August 12, 2013) (Sach).

Photos

Photos of defendant with guns were admissible in case involving plot to blow up JFK airport. Not only was it clear that defendant himself always intended to introduce the photos and that he was therefore simply attempting to control their introduction, but the photos were relevant to rebut defendant's claim that his intent was limited to future fundraising for a mosque, and their relevance was not substantially outweighed by the risk of unfair prejudice. *United States v. Kadir*, 718 F.3d 115 (2d Cir. May 31, 2013) (Walker).

Plea Offer

Court did not abuse its discretion in excluding evidence that defendant rejected plea offer, distinguishing *United States v. Biaggi*, 909 F.2d 662, 690-93 (2d Cir. 1990), where defendant's decision to decline immunity was relevant to show his "consciousness of innocence." *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

Sur-rebuttal Testimony

Court reverses defendant's marijuana conviction, finding that when the government on rebuttal introduced cell cite records to show that defendant supposedly lied when he testified to having only been to his friend's house, where the marijuana was grown, five or seven times, defendant should have been permitted to offer sur-rebuttal evidence of other explanations for the 97 calls on the cell tower nearest the friend's house. Hall dissents. *United States v. Murray*, 736 F.3d 652 (2d Cir. November 27, 2013) (Leval).

Proffer Agreement

Introduction of statements made by defendant in a telephone conversation with agent during defendant's effort to cooperate was not improper where defendant's proffer agreement excluded only statements made at meetings and not other oral statements. The phone conversations were not "plea bargaining" within Fed. R. Evid. 410 because the person with whom defendant was speaking was an ICE agent and not an attorney, and the conversation was not shown to have been within the course of plea discussions. Government could also elicit testimony from a witness located as a result of defendant's statements, since the proffer agreement permitted the government to use defendant's statements to obtain leads to other evidence. *United States v. Gomez*, 705 F.3d 68 (2d Cir. January 15, 2013) (Kearse).

EXTRADITION

Courts will not evaluate the legality of the defendant's extradition by a foreign country to the United States, even where, as here, defendant argues that the extraditing country was subject to unreasonable pressure by the United States. Likewise, under the *Ker-Frisbie* doctrine, "the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him." *United States v. Bout*, 731 F.3d 233 (2d Cir. September 27, 2013) (Cabranes).

Court finds that the factual record does not support defendant's claim that his prosecution violated the rule of specialty, which is invoked where a defendant is prosecuted for crimes other than that for which our country sought the defendant's extradition. *United States v. Bout*, 731 F.3d 233 (2d Cir. September 27, 2013) (Cabranes).

EXTRATERRITORIALITY

Court answers in the negative question left open in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), i.e., whether *criminal* liability under Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") extends to conduct in connection with an extraterritorial purchase or sale of securities; however, district court's failure to require proof of domestic securities transactions was not "plain error" since it did not affect the outcome of the proceedings, as defendant committed fraud with regard to domestic securities transactions. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

FIREARMS

Affirming conviction, court rejects argument that 18 U.S.C. § 922(g)(1), prohibiting the possession of a firearm by a convicted felon, is unconstitutional in light of *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010). *United States v. Bogle*, 717 F.3d 281 (2d Cir. May 23, 2013) (p.c.).

FORFEITURE

CAFRA

Court sua sponte finds plain error in district court's use of pre-CAFRA law in granting summary judgment on behalf of the government in forfeiture case: "The District Court stated three outdated standards from pre-CAFRA case law: (1) it required the government to show 'reasonable grounds' for forfeiture based on the less-stringent 'probable cause' requirement, *see, e.g.*, [*United States v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993)]; (2) it rejected the more demanding 'substantial connection' test laid out in CAFRA, *see* 18 U.S.C. § 983(c)(3), in favor of the outdated 'nexus' test, which courts no longer apply; and (3) most problematically, it placed the ultimate burden of proof on Pellegrino by using a burden-shifting framework which CAFRA had overhauled." *United States v. The Sum of $185,336.07*, 731 F.3d 189 (2d Cir. September 25, 2013) (Cabranes).

Eighth Amendment

Court holds that the Eighth Amendment's prohibition on disproportionate punishment does not apply to forfeitures of assets under 21 U.S.C. § 881(a)(6) where the asserts are the proceeds of illicit drug sales, rather than conveyances and real estate under 21 U.S.C. § 881(a)(4) and 21 U.S.C. § 881(a)(7). *United States v. The Sum of $185,336.07*, 731 F.3d 189 (2d Cir. September 25, 2013) (Cabranes).

Fifth Amendment

District court did not abuse its discretion in failing to "accommodate" forfeiture claimant's invocation of his Fifth Amendment privilege (*see United States v. Certain Real Property & Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78 (2d Cir. 1995)), where claimant only belatedly raised the issue in response to the government's summary judgment motion. *United States v. The Sum of $185,336.07*, 731 F.3d 189 (2d Cir. September 25, 2013) (Cabranes).

Monsanto Hearing

Court affirms district court's refusal to release seized proceeds of house sale, agreeing that, although the house was not purchased with tainted funds, they became tainted under the "drugs in, first out" rubric of *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), when defendant received the house as a result of a divorce settlement that included his agreement to give his wife approximately $12 million, at least $6 million of which was crime fruits. *United States v. Walsh*, 712 F.3d 119 (2d Cir. April 2, 2013) (Jacobs).

Proceeds

Affirming forfeiture judgment, court holds that criminal forfeiture under 18 U.S.C. § 982 requires forfeiture of the gross receipts of defendant's criminal violation (in which he overvalued assets used to secure and maintain a revolving line of credit at Chase Bank), not only the profits. Although use of the term "proceeds" was ambiguous, court looks at punitive purpose of criminal forfeiture and agrees with the government that doing no more than returning a "wrongdoer to the economic position he occupied before he committed his criminal offense does not provide much of a deterrent to those who might be tempted to follow in his footsteps." Court also holds that in light of defendant's near total control over the companies involved in the violation and their assets, he "indirectly" obtained the proceeds of the charged fraud through the companies and can therefore be held accountable for criminal forfeiture of those proceeds under § 982. *United States v. Peters*, 732 F.3d 93 (2d Cir. October 9, 2013) (Sack).

FRAUD OFFENSES

Identity Theft

Health care fraud is a predicate offense triggering the minimum two-year sentence under 18 U.S.C. § 1028A (Aggravated Identity Theft), even though subsection (c)(5) provides, "[f]or purposes of this section, the term 'felony violation enumerated in subsection (c)' means any offense that is a violation of . . . any provision contained in chapter 63 (relating to mail, bank, and wire fraud)," since the language "relating to mail, bank, and wire fraud" "serves only an explanatory or descriptive purpose and does not expressly limit the definition of felony violation to only those offenses identified in the parenthetical." *United States v. Abdur-Rahman*, 708 F.3d 98 (2d Cir. February 15, 2013) (p.c.).

Mail and Wire Fraud

Court rejects argument by healthcare executive convicted of honest services fraud for bribing elected states officials, that the application of the mail fraud statute to the government's "as opportunities arise" theory of prosecution was void for vagueness. Court also rejects argument that defendant's consulting contracts with the legislators were authorized under New York's Public Officer's Law since the law in fact prohibits legislators from accepting compensation for services related to State legislature activity or matters before any State agency, etc. Although certain of the contracts provided that the legislators would consult only on non-State matters, the district court properly rejected defendant's urged conclusion and explicitly found that the agreements were a sham intended to provide a "plausible 'cover' for the bribes." Further, court finds there was sufficient evidence that defendant acted with the specific intent to enter into illegal quid pro quo arrangements with the legislators. *United States v. Rosen*, 716 F.3d 691 (2d Cir. May 29, 2013) (Lohier).

Securities Fraud

Under Section 10(b) or Rule 10b-5, government need not prove that the victims of a fraudulent scheme actually relied on the alleged material misrepresentations or omissions. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

GAMBLING

Court reverses dismissal of gambling conviction and holds that Texas Hold'em poker is prohibited under the Illegal Gambling Business Act. The IGBA's definition of gambling is not ambiguous and is not limited to games of chance. *United States v. DiCristina*, 726 F.3d 92 (2d Cir. August 6, 2013) (Straub).

GOVERNMENT MISCONDUCT

Outrageous Government Misconduct

Fact that defendant, a suspected international arms dealer, was arrested via an elaborate sting by agents who aggressively pursued him, did not establish that he fell victim to a vindictive prosecution: "Generally, to be 'outrageous,' the government's involvement in a crime must involve either coercion or a violation of the defendant's person. It does not suffice to show that the government created the opportunity for the offense, even if the government's ploy is elaborate and the engagement with the defendant is extensive. Likewise, feigned friendship, cash inducement, and coaching in how to commit the crime do not constitute outrageous conduct." *United States v. Bout*, 731 F.3d 233 (2d Cir. September 27, 2013) (Cabranes).

Perjured Testimony

Court agrees that it is clear that government cooperator in domestic terrorism case falsely denied offering defendant $250,000 to participate in terrorist acts, and that the testimony overwhelmingly should have clued the government to the falsity of the statement, but holds that there was no reasonable likelihood that the lie affected the verdict since "The very force of the evidence that shows that no reasonable person could believe [the witness'] testimony about the $250,000, is sufficient not only to charge the prosecution with imputed knowledge, but also to show that the jury had to recognize that the testimony was false." Jacobs concurs and dissents. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. August 22, 2013) (Newman).

GUILTY PLEAS

Voluntariness

District court did not commit plain error by failing to inquire of defendant at time of plea regarding confidential cooperation agreement between defendant and government. Although it would have been preferable for the district court to use tools available to it to

address the agreement while protecting defendant (e.g., sealing the proceeding), defendant failed to show a "reasonable probability that, but for [any] error, he would not have entered the plea." *United States v. Tarbell*, 728 F.3d 122 (2d Cir. August 26, 2013) (Cabranes).

Court vacates two guilty pleas entered by defendant who pleaded guilty to bribery and passport fraud, finding that district court failed to make sufficient inquiry after it appeared that defendant did not understand the proceedings and after defendant stated that he was taking prescription medication. Court notes that it has "adopted a standard of strict adherence to Rule 11 …[and] therefore . . . we examine critically even slight procedural deficiencies to ensure that the defendant's guilty plea was a voluntary and intelligent choice, and that none of the defendant's substantial rights has been compromised." *United States v. Yang Chia Tien*, 720 F.3d 464 (2d Cir. June 26, 2013) (Keenan).

Waiver of Appeal

Defendant effectively waived appeal of any sentence less than 120 months and nothing suggests that defendant did not understand the waiver or that it was otherwise involuntary. Further, the government gave consideration for the waiver insofar as it agreed to a lower loss amount than was otherwise justified. *United States v. Coston*, 737 F.3d 235 (2d Cir. December 10, 2013) (p.c.).

HABEAS CORPUS

Generally

Heck v. Humphrey, 512 U.S. 477 (1994), requiring a defendant who brings a 42 U.S.C. § 1983 action that necessarily challenges the validity of his conviction to first show "that the challenged conviction has been reversed, expunged, invalidated, or called into question," does not apply to a former inmate who, after his conviction was vacated for a *Brady* violation and who thereafter pleaded guilty, was no longer in custody and therefore was without means to challenge his conviction through habeas corpus. Court observes that the present § 1983 claim does not challenge plaintiff's second conviction but rather seeks damages resulting from the *Brady* violation that resulted in his first conviction, which was vacated. Jacobs dissents. *Poventud v. City of New York*, 715 F.3d 57 (2d Cir. April 19, 2013) (pending decision en banc).

Court reverses grant of habeas to state robbery defendant, finding that district court erred in finding that state trial court's wrongful admission of hearsay violated defendant's right to due process. Court says, after holding that no Supreme Court case directly holds that the admission of hearsay in violation of state evidentiary rules violates due process, "Under these circumstances, assuming arguendo that Supreme Court cases establish a general principle that the reliance on hearsay testimony to support a conviction can violate the requirement of due process, we could not conclude that the state court's affirmance of Evans's conviction, finding any state evidentiary error

harmless and Evans's trial fundamentally fair, was an unreasonable application of that principle." *Evans v. Fischer*, 712 F.3d 125 (2d Cir. April 3, 2013) (Lynch).

Guilty Pleas

Court reverses grant of habeas, finding – contrary to district court – that defense counsel was not ineffective in failing to tell defendant that he had an option of pleading guilty to a lesser sentence without cooperation where state court's finding that an offer – 17 years to life for a plea to the top count – in fact had been made to him by the DA in open court was not clearly erroneous. *Cardoza v. Rock*, 731 F.3d 169 (2d Cir. September 24, 2013) (Sack).

Special Needs Doctrine

NYPD Interim Order 52 ("IO–52"), which requires the administration of a breathalyzer test to any officer whose discharge of his firearm within New York City results in death or injury to any person, the purposes of which are personnel management of, and public confidence in, the NYPD, is reasonable under the special needs doctrine; these special needs "greatly outweigh officers' reduced expectation of privacy with respect to alcohol testing at the time of any firearms discharge causing death or personal injury, thereby rendering warrantless, suspicionless IO–52 testing constitutionally reasonable as a matter of law" under the Fourth Amendment. *Lynch v. City of New York*, 737 F.3d 150 (2d Cir. November 15, 2013) (Raggi).

Successive Petitions

Court treats defendant's motion to recall the court's mandate as a second habeas petition which may be permitted only if it is based on "newly discovered evidence," or on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. Defendant's argument, that his drug conviction was unconstitutional given the Supreme Court's recent decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), *overruling* *Harris v. United States*, 536 U.S. 545 (2002), is rejected because *Alleyne* was not made retroactive by the Supreme Court. The Supreme Court has neither said it is retroactive nor has it placed *Alleyne* within a category of cases previously held to be retroactive, i.e., new substantive rules that place "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;'" and new procedural rules that "'are implicit in the concept of ordered liberty.'" *United States v. Redd*, 735 F.3d 88 (2d Cir. November 5, 2013) (p.c.).

Court denies inmate's application to file a successive habeas petition alleging he was denied effective assistance by his attorney's failure to properly advise him regarding a possible guilty plea. To the extent that he previously attempted to litigate the same issue, he may not do so again, and to the extent that his claim is based on the "new" rule announced in *Lafler v. Cooper*, —— U.S. ——, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, —— U.S. ——, 132 S. Ct. 1399 (2012), court finds that those cases do not establish

a "new" rule and that, to the extent they do, such "new" rule has not been declared retroactive by the Supreme Court. *Gallagher v. United States*, 711 F.3d 315 (2d Cir. March 28, 2013) (Jacobs).

Three Strikes Rule

Reversing dismissal of habeas corpus petition for failure to pay filing fee after court denied in forma pauperis status under the three strikes provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g), court holds that dismissals of habeas petitions and appeals from habeas petitions challenging the duration of an inmate's confinement are not strikes under the three strikes provision of the PLRA since they are not "civil" in nature. *Jones v. Smith*, 720 F.3d 142 (2d Cir. 2013) (Katzmann).

IMMUNITY

District court did not abuse its discretion in denying defendant's motion for an order compelling the government to immunize potential defense witness who supposedly would have supported defendant's "advice of counsel" defense in a case where defendant, a medical corporation executive, was charged with honest services fraud after entering into allegedly sham consulting contracts with New York State legislators in exchange for their influence. The putative witness was a potential target for criminal prosecution and defendant failed to show that the potential testimony was "material, exculpatory, and unobtainable from other sources." *United States v. Rosen*, 716 F.3d 691 (2d Cir. May 29, 2013) (Lohier).

INDICTMENT

Constructive Amendment

Where the "core of criminality" in count charging violation of the Economic Espionage ACT (EEA), 18 U.S.C.§ 2314, was the theft of trade secrets in the form of printed computer code, the language of the "to-wit" clause, referencing the initial theft rather than the unlawful keeping of the code thereafter, was illustrative rather than definitional of the core of criminality charged by the grand jury and court did not constructively amend the indictment by referencing defendant's continued unauthorized possession of the code in its jury instructions. *United States v. Agrawal*, 726 F.3d 235 (2d Cir. August 1, 2013) (Raggi).

Although mail fraud charge in the indictment specified that the mailing itself was false or fraudulent, district court's instruction permitting the jury to convict the defendants based on a mailing that itself contained no false or fraudulent statement did not constructively amend indictment. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

Duplicity

Court rejects argument that conspiracy count of indictment was duplicitous, finding that schemes can be characterized as part of one conspiracy to defraud investors by (1) lying about the nature of their investments and (2) continuing to mislead them into believing that their money was safe and invested in accordance with the representations they had received from defendants Vilar and Tanaka. Court also rejects constructive amendment argument. Court further finds that evidence was sufficient to prove a single conspiracy to fraudulently sell securities and to cover up a previous fraud, rather than multiple conspiracies. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

Sufficiency

Indictment sufficiently charged defendant with conspiracy to murder United States nationals and conspiracy to murder United States officers and employees, notwithstanding that the indictment did not refer explicitly to "murder." *United States v. Bout*, 731 F.3d 233 (2d Cir. September 27, 2013) (Cabranes).

Indictment charging defendant with aggravated identify theft under 18 U.S.C. § 1028A(c) was sufficient, notwithstanding that it failed to identify the persons whose identities were stolen, since indictment tracked the language of the statute and the government identified the victims in discovery. Distinguishing *Russell v. United States*, 369 U.S. 749 (1962). *United States v. Stringer*, 730 F.3d 120 (2d Cir. September 17, 2013) (Leval).

JUDICIAL NOTICE

Special Maritime Jurisdiction

Court affirms defendant's conviction for assaulting an inmate at MDC and thereby causing victim serious injury, in violation of 18 U.S.C. § 113(a)(6), finding that although the evidence did not establish that MDC is within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7(3), the court may – and does – take judicial notice of this adjudicative fact based on the relevant, indisputable documents. Court also finds that by its general verdict of guilt, jury necessarily found that the assault occurred at the MDC. *United States v. Davis*, 726 F.3d 357 (2d Cir. August 14, 2013) (Furman).

JURIES AND JURORS

Juror Misconduct

Court reverses defendant's drug conviction upon finding that the district court abused its discretion by not conducting any inquiry of alternate juror about what the district court acknowledged might well be an accurate allegation of juror

misconduct involving premature deliberations and disregarding the presumption of innocence. *United States v. Haynes*, 729 F.3d 178 (2d Cir. September 5, 2013) (Koeltl).

Jury Selection

Trial court did not abuse its discretion in selecting anonymous jury in terrorist case, where court conducted careful voir dire and told jurors they would remain anonymous because of pretrial publicity and to protect their privacy. *United States v. Kadir*, 718 F.3d 115 (2d Cir. May 31, 2013) (Walker).

JURY INSTRUCTIONS

Allen Charge

Court reverses defendant's drug conviction for several reasons, including that repeating a previously given modified Allen charge, without a request from the jury, could reasonably have been perceived by the jurors as the Court communicating its insistence on the jury reaching a unanimous verdict. Charge did not contain the admonition not to give up conscientiously held beliefs and court stated that it "believe[d]" that the jury would "arrive at a just verdict" the following Monday. Under these circumstances, "A reasonable juror could view this instruction as lending the Court's authority to the incorrect and coercive proposition that the only just result was a verdict… Under these circumstances, the Court should have given the balancing, cautionary instruction that no juror should give up conscientiously held beliefs." *United States v. Haynes*, 729 F.3d 178 (2d Cir. September 5, 2013) (Koeltl).

"Allen charge" given to jury that said it was deadlocked after only an hour of deliberation was a traditional rather than a modified charge because it suggested that minority jurors reconsider their position, but, under the circumstances, charge was not unduly coercive, as evidenced by the fact that the jury deliberated another four hours before convicting. *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. August 12, 2013) (Livingston).

Civil Rights Actions

Special Duties

Under New York law, question whether municipality owed a special duty to plaintiff – a police informant who provided information leading to a raid on a house at which plaintiff was present but not arrested, and who was thereafter killed apparently because others thought he was cooperating – was properly a jury question, regardless whether claim was that officers were guilty of nonfeasance or misfeasance. Further, special duty does not arise unless and until it reasonably appears that the informant is in danger. *Velez v. City of New York*, 730 F.3d 128 (2d Cir. September 18, 2013) (Lynch).

Conscious Avoidance

Conscious avoidance charge given at trial of defendant charged with complicity in the bombings of United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, was proper because there was evidence from which the jury could find that the defendant was aware of a high probability of a plot to detonate explosives involving U.S. properties. *United States v. Ghailani*, 733 F.3d 29 (2d Cir. October 24, 2013) (Cabranes).

Conscious avoidance instruction in insider trading case was appropriate where defendant claimed ignorance regarding the source of the tip he relied on to purchase 3Com stock, and there was sufficient evidence to support the inference that if defendant Kimelman did not know those facts, he had to have consciously avoided becoming aware of them. Court also rejects argument that trial court's conscious avoidance charge was incorrect in light of *Global-Tech Appliances, Inc. v. SEB S.A.*, ___ U.S. ___, 131 S. Ct. 2060 (2011), finding that *Global-Tech* did not alter prevailing law. *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

Court rejects defendant's argument that there was an insufficient factual predicate to give conscious avoidance instruction in case where CFO was convicted of fraud with respect to his accounting treatment of certain corporate transactions, where, in response to government's argument that defendant was aware that transactions he was reporting were fraudulent, defendant argued the evidence was lacking that he knew of the fraud and that the facts of which he was aware were insufficient to alert him to a high probability of fraud. This purported lack of knowledge defense, despite defendant's deep involvement in the transactions that effectuated the fraud, "all but invited the conscious avoidance charge." *United States v. Cuti*, 720 F.3d 453 (2d Cir. June 26, 2013) (Walker).

Entrapment

Court rejects holding of en banc Seventh Circuit, in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir.1994) (en banc), that an entrapment defense succeeds as a matter of law unless a defendant, whom government agents have induced to commit an offense, is "'in a position without the government's help to become involved in illegal activity.' *Id.* at 1200." Jacobs concurs and dissents. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. August 22, 2013) (Newman).

Fraud

Honest Services

Court agrees that district court's instructions with respect to honest services wire fraud count were erroneous because they were not limited to bribery and kickbacks as required by the subsequent ruling in *Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010), but there was no objection to the charge and error was not plain error as it did not affect the defendants' substantial rights. Court notes that the charged scheme concerned

bribing brokers to sell stock in defendants' company and defendants in fact were convicted of bribery. Additionally, district court erred in instructing the jury that defendants could be convicted of security fraud on an "honest services" theory, which in fact does not apply to securities fraud but, again, there was no objection and error was not plain error. *United States v. Nouri*, 711 F.3d 129 (2d Cir. March 4, 2013) (Leval).

Although court's failure to instruct jury that defendant could be convicted of honest services fraud only if the defendant's conduct involved a bribery or kickback scheme, the error was harmless since bribery was the only theory of honest services fraud available to the jury based on the evidence and the attorneys' arguments. *United States v. Botti*, 711 F.3d 299 (2d Cir. March 28, 2013) (Koeltl).

Securities Fraud

Court rejects attack on jury instruction in insider trading case that jury could convict defendant if the "material non-public information given to the defendant was a factor, however small, in the defendant's decision to purchase or sell stock" as that instruction was, if anything, more favorable than the "knowing possession" standard that is the law in the Second Circuit. *United States v. Rajaratnam*, 719 F.3d 139 (2d Cir. June 24, 2013) (Cabranes).

Harboring Alien

Court rejects argument that trial court's jury instruction on harboring alien in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) was erroneous to the extent it initially instructed that "harbor" "simply means to shelter, to afford shelter to," and failed to require some element of preventing detection by the authorities. Acknowledging that the Circuit's interpretation of "harbor" has not been uniform, court agrees that "harbor" means conduct that is intended to facilitate an alien's remaining in the United States illegally and to prevent detection by the authorities of the alien's unlawful presence. While the district court stated that "'Harboring' simply means to shelter, to afford shelter to," the court then properly instructed the jury that to find that defendant harbored a 15-year-old illegal alien, it must "find based on the evidence in this case that the Government proved that the defendant ... afforded shelter to[ ] [Jaire] *in a way intended to substantially facilit[ate] her remaining here illegally.*" *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. August 12, 2013) (Livingston).

Malicious Prosecution

In malicious prosecution action, court was not required to instruct jury, when informing it that prosecution had been terminated in favor of plaintiff, that such termination was not by acquittal but rather based on speedy trial violation – which is a "favorable" termination for purposes of bringing an action under 42 U.S.C. § 1983. *Marshall v. Randall*, 719 F.3d 113 (2d Cir. June 12, 2013) (Walker).

LIMITATIONS PERIOD

Immigration Offenses

Court affirms denial of defendant's motion to dismiss prosecution for illegal reentry based on claim that he had been "found in" the United States more than five years previous to indictment when INS "validation" process disclosed that he had been arrested a few years prior on a state court charge and had thereafter become a fugitive. For purposes of the statute of limitations, a person who has illegally reentered is "found in" the United States when his or her "presence is discovered," which means that the federal authorities possess reliable information as to the alien's whereabouts. *United States v. Williams*, 733 F.3d 448 (2d Cir. September 23, 2013) (Sack).

NEW TRIAL

Court affirms denial of new trial motion of defendant convicted of racketeering and murder, finding that undisclosed evidence would not have materially undermined testimony of informant regarding his and defendant's involvement in murder. Nor was new trial required by disclosure that FBI agent DeVecchio had falsely testified that he did not allow confidential informants under his supervision to commit crimes in the absence of his superiors' approval, and, even with such approval, did not allow informants to commit serious crimes, when in fact he permitted informant Gregory Scarpa to commit serious crimes without his superiors' approval. *United States v. Sessa*, 711 F.3d 316 (2d Cir. March 29, 2013) (Newman).

PROBATION AND SUPERVISED RELEASE

Although U.S.S.G. § 5D1.1(c) provides that a court generally should not impose a period of supervised release on a defendant who is likely to be deported, court properly imposed such a condition here upon finding that supervised release would deter defendant from returning to the country unlawfully. *United States v. Alvarado*, 720 F.3d 153 (2d Cir. June 24, 2013) (p.c.).

Denial of defendant's motion to modify the terms of his supervised release to permit him, upon release from prison, to reside and be supervised in Michigan instead of the district of conviction – Vermont – is vacated and remanded for further proceedings because district court did not recognize that it had discretion, under application of applicable criteria, to grant the modification, subject to consideration of Michigan's reasonable request that, given defendant's history, defendant serve six months in a halfway house before being released to the public. *United States v. Murdock*, 735 F.3d 106 (2d Cir. November 8, 2013) (Kearse).

PROSECUTORIAL MISCONDUCT

Coercion

District court properly rejected defendant's motion for a new trial based on witness' claim that he (i.e., the witness) had been coerced into cooperating by a prosecutor who, the district court found, had not even been in the USAO at the time the witness allegedly was coerced, and where the witness did not even disclaim his testimony. Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

REMANDS

Court for a second time vacates sentence imposed on defendant for unlawfully retaining classified information because district court, in resentencing defendant after Circuit's determination that wrong Guideline section had been used, imposed upward adjustment for abuse of position of trust where the government, at initial sentencing, had not objected to court's refusal to impose this adjustment and government did not appeal therefrom; under the mandate rule, a remand for resentencing is for a limited purpose and not *de novo*, absent circumstances not present here. *United States v. Malki*, 718 F.3d 178 (2d Cir. June 11, 2013) (p.c.).

RES JUDICATA AND COLLATERAL ESTOPPEL

District court erred, with certain exceptions, when it ruled that inmate's present claims alleging denial of due process at periodic hearings that considered his continued placement in SHU were precluded by principles of claim and/or issue preclusion when such claims were not part of his complaint in early proceeding – which focused on the initial determination to place him in SHU for administrative reasons – even if they were mentioned in papers he submitted in opposition to summary judgment. *Proctor v. LeClaire*, 715 F.3d 402 (2d Cir. April 25, 2013) (Kearse).

RIGHT TO COUNSEL

Addressing issue of first impression in the Second Circuit, court holds that, "all a defendant need do to trigger a Monsanto or Monsanto-like hearing is to demonstrate, beyond the bare recitation of the claim, that he or she does not have sufficient alternative assets to fund counsel of choice. This requires more than a mere recitation; the defendant must make a sufficient evidentiary showing that there are no sufficient alternative, unrestrained assets to fund counsel of choice. We do not believe that the defendant must make a formal prima facie showing that the funds were illegitimately restrained, see Jones, 160 F.3d at 647, beyond providing a basis for bringing a motion for a Monsanto or Monsanto-like hearing in the moving papers. At the subsequent hearing [in a criminal case], the government *** must demonstrate that probable cause exists to believe both that the criminal defendant committed the charged offenses and that the restrained assets are properly forfeitable. Monsanto, 924 F.2d at 1203. Meanwhile, in a Monsanto-like

hearing in a civil in rem action, the government must demonstrate only that probable cause exists to believe that the restrained assets are properly forfeitable under the civil forfeiture statute." Here, defendant's affidavit was inadequate because defendant "did not disclose his net worth, provide a comprehensive list of his assets, or explain how he has been paying his significant living expenses. While the affidavits describe the aggregate balances of bank accounts enumerated in the government's submissions, they do not clarify whether [defendant] has access to other accounts and, if so, their value." *United States v. Bonventre*, 720 F.3d 126 (2d Cir. June 19, 2013) (Walker).

SEARCH AND SEIZURE

Automobile Stops

Court rejects argument that the NYPD's use of computer database at a traffic stop to seek out felons was constitutionally unreasonable because not closely related to the purpose of the checkpoint, finding that the computer search, which took only a minute, did not unreasonably prolong the stop and was a *de minimis* intrusion on motorists. "The fact that 'ordinary criminal wrongdoing' was uncovered in the course of an otherwise lawful checkpoint designed for a permissible purpose does not invalidate the checkpoint or the arrest." *United States v. Bernacet*, 724 F.3d 269 (2d Cir. August 1, 2013) (Wesley).

Reversing grant of summary judgment to defendant-cops in case stemming from encounter between cops and car passenger, court finds that cop's instruction to plaintiff to reenter car was a sufficient interference with plaintiff's liberty to constitute a Fourth Amendment seizure and that plaintiff's act in giving cop the "ancient gesture" of a raised middle finger was "not the basis for a *reasonable* suspicion of a traffic violation or impending criminal activity." Further, taking plaintiff's averments as true, probable cause to arrest him for disorderly conduct lacked where all he did was say he wanted to speak with the officer "man to man" and that "[he felt] like an ass." Malicious prosecution claim survives because, among other things, requiring plaintiff to return to court for various court appearances after commencement of criminal proceedings against him was sufficient to satisfy post-arrest seizure requirement applicable to when a 42 U.S.C. § 1983 claim is brought alleging malicious prosecution. *Swartz v. Insogna*, 704 F.3d 105 (2d Cir. January 3, 2013) (Newman).

Electronic Surveillance

Calls between defendant and another insider trading conspirator were lawfully recorded by the coconspirator both because they were recorded in the ordinary course of business and therefore within an exception to Title III (18 U.S.C. § 2510(5)(a)(i)), and because the coconspirator consented to the recordings (18 U.S.C. § 2511(2)(d)). Although calls recorded to commit a crime cannot fall within these Title III exceptions, the recordings were made because the coconspirator was hard of hearing and not to advance the criminal activity. The fact that an illegal enterprise was discussed in the recorded conversation is not determinative of whether the recording falls within the

consent provision of § 2511(2)(d) because courts will look to the "intended use of the recordings" to determine the purpose of the recording. *United States v. Jiau*, 734 F.3d 147 (2d Cir. October 23, 2013) (Walker).

Government complied with 18 U.S.C. § 2517(5)'s requirement that it inform court if it intercepts evidence of crime for which it cannot seek a wiretap – here, securities fraud – during surveillance properly initiated pursuant to warrant authorizing search for evidence as to which it could seek a wiretap – here, wire fraud – by informing court *before* wiretap order was issued that it anticipated intercepting evidence of securities fraud, since there was no evidence of subterfuge or mal-intent: "Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his illegal activities merely because law enforcement agents are aware of his diversified criminal portfolio." *United States v. McKinnon*, 721 F.2d 19, 23 (1st Cir. 1983). *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

Affirming defendant's conviction for insider trading, etc., court holds: (1) district court properly analyzed the misstatements and omissions in the government's Title III wiretap application under the analytical framework of *Franks v. Delaware*, 438 U.S. 154 (1978); and (2) the alleged misstatements and omissions in the wiretap application did not require suppression because (a) contrary to the district court's conclusion, the government did not omit information about the SEC investigation of defendant with "reckless disregard for the truth;" and (b) the alleged misstatements and omissions in the wiretap application were not "material." *United States v. Rajaratnam*, 719 F.3d 139 (2d Cir. June 24, 2013) (Cabranes).

Exclusionary Rule

Foreign Searches

Court declines to apply the exclusionary rule to searches conducted by Israeli police because (a) the searches, even if unlawful, did not shock the conscience of the court and therefore did not implicate the court's supervisory power; (b) the cooperation of Israeli law enforcement with U.S. law enforcement did not implicate constitutional restrictions as the U.S. did not direct and control the INP and the INP therefore did not act as "virtual agents" of U.S. law enforcement, nor did U.S. law enforcement use the INP to evade constitutional requirements applicable to U.S. officials; and (c) the court declines to adopt the "joint venture" doctrine in the context of the Fourth Amendment. *United States v. Getto*, 729 F.3d 221 (2d Cir. September 9, 2013) (Cabranes).

Applying the rule that foreign searches conducted with U.S. participation need only be "reasonable" under the totality of the circumstances, court affirms district court's denial of search executed in the United Kingdom. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

Court remands BIA decision declining to suppress alienage evidence as the fruit of an unlawful search following ICE agents' early morning warrantless entry into Petitioners' home. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest"), confirmed an existing jurisdictional rule, rather than announcing a new evidentiary rule, and therefore does not preclude the suppression of alienage evidence found to be the fruit of a primary illegality. Here, BIA erred in concluding that the government had met its burden of establishing that certain alienage-related evidence had been obtained independent of any constitutional violation. Court therefore remands to BIA for consideration of whether government agents seized evidence of alienage from Petitioners in the course of committing an egregious Fourth Amendment violation. *Pretzantzin v. Holder*, 736 F.3d 641 (2d Cir. September 16, 2013) (Wesley).

Court affirms denial of motion to suppress fruits of Jamaican wiretaps. DEA was not "agent" of the Jamaican officials requiring application of exclusionary rule, notwithstanding the signing of a Memorandum of Understanding, the provision of monitoring equipment to the Jamaicans and the sharing of the wiretap fruits, etc., since "Jamaican law enforcement officials (1) initiated their investigation into the marijuana trafficking organization with which defendant was associated *before* the DEA commenced its investigation; and (2) did not solicit the views, much less approval, of DEA agents prior to conducting surveillance. Moreover, DEA agents were likewise not involved in the actual interception or translation, from Jamaican dialect, of the conversations at issue. Nor did the DEA make a formal request that Jamaican authorities conduct surveillance on [defendant] or other members of the marijuana trafficking organization." Referencing its prior decisions, court adds: "In adopting these standards, we explicitly acknowledged—and declined to adopt—the 'joint venture' theory employed by other courts of appeal, to determine whether the conduct of foreign law enforcement officers rendered them "virtual agents" of the United States. *Maturo*, 982 F.2d at 61-62 (citing *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987)). Although our case law in the intervening period has 'implicitly adopted' the 'joint venture' theory in the context of suppressing overseas interrogations under the Fifth Amendment's Due Process Clause, *see United States v. Yousef*, 327 F.3d 56, 145-46 (2d Cir. 2003), we have not done so in the context of the Fourth Amendment, *see generally United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (noting that the Fourth Amendment 'operates in a different manner than the Fifth Amendment'), and Lee has not asked us to do so in this case. Our holding today does not disturb our prior views of the 'joint venture' theory." Nor was the defendant entitled to discovery of the Jamaican wiretap applications, which were not in the U.S. government's possession. *United States v. Lee*, 723 F.3d 134 (2d Cir. June 7, 2013) (Cabranes).

Good Faith Exception

Court upholds denial of motion to suppress evidence derived from warrantless installation of GPS tracking device on car notwithstanding subsequent Supreme Court decision in *United States v. Jones*, 132 S. Ct. 945 (2012), which held

that installation of a GPS device on a car is a search under the Fourth Amendment, finding that the police relied in good faith on previous Supreme Court precedent, including *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984). *United States v. Aquiar*, 737 F.3d 251 (2d Cir. December 13, 2013) (Pooler).

Inevitable Discovery

Court agrees with district court that government would have inevitably discovered documents that were held to have been illegally seized during search pursuant to overbroad warrant, finding that it was inevitable that government would have obtained the same documents by grand jury subpoena – which it in fact did. Distinguishing *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992). Under the inevitable discovery doctrine, illegally-obtained evidence will be admissible only where a court can find, with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor. In other words, the government must prove that each event leading to the discovery of the evidence would have occurred with a sufficiently high degree of confidence for the district judge to conclude, by a preponderance of the evidence, that the evidence would inevitably have been discovered. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

On appeal following bench trial, court suppresses firearms discovered pursuant to intentionally warrantless search of defendant's motel room, rejecting district court's application of inevitable discovery rule. Court "once again note[s] the difference between 'proving by a preponderance that something would have happened and proving by a preponderance that something would inevitably have happened,' id., and reiterate[s] that appellate courts review de novo the district court's *application* of the inevitable discovery doctrine." District court found that the firearms would have been discovered if defendant left the motel with them and was arrested pursuant to existing probable case, or they would have been discovered if defendant left the firearms in the motel room, because the motel staff, as a matter of course, would have found them and called the police. Court rejects these findings because they failed to account for other contingencies, including the possibility that the other person registered to the room and as to whom the police did not have probable cause, might have removed the firearms or that the firearms might have been left in the hotel room but not discovered by the hotel staff in the normal course of business. *United States v. Stokes*, 733 F.3d 438 (2d Cir. August 20, 2013) (Lynch).

Parole Violations

Court agrees that defendant's conduct that resulted in his arrest for a parole violation – i.e., staying out later than 9:00 p.m. – was not a crime under New York law, but holds that the arrest was constitutionally permissible and therefore does not require application of the exclusionary rule, because probable cause to believe a parolee committed a violation that, if proven, could result in the loss of liberty, provides

sufficient grounds for a constitutional warrantless arrest. *See* *Virginia v. Moore*, 553 U.S. 164, 167 (2008). *United States v. Bernacet*, 724 F.3d 269 (2d Cir. August 1, 2013) (Wesley).

Franks Hearing

District court properly denied defendant's application for a *Frank's* hearing based on statement in warrant misrepresenting the phone number to which CI had placed a recorded call, because even if the misstatement were excised, probable cause would have existed for the requested pen register and trap and trace warrant. *United States v. Aguiar*, 737 F.3d 251 (2d Cir. December 13, 2013) (Pooler).

Immigration Cases

Court vacates and remands BIA's decision affirming Immigration Judge's denial of motion to suppress Petitioner's Guatemalan passport, found by ICE officers during 4:00 a.m. search of his bedroom. Contrary to IJ and BIA's findings, Petitioner's evidence was sufficient to shift burden to government to show consent for the search, even though defendant's witnesses did not personally see the agents enter. Further, IJ and BIA erred in finding that, to prove requisite "egregious" Fourth Amendment violation requiring suppression, Petitioner had to present prima facie evidence establishing threat or realization of physical violence. On the contrary, although an "egregious" violation must be something more than "unreasonable," it is sufficient that, on all the facts, the evidence was obtained in a "fundamentally unfair manner." "Breaking into someone's home at 4:00 a.m. without a warrant or any legitimate basis need not also include physical injury or the threat thereof for such conduct to qualify as egregious." Relevant factors include: "whether the violation was intentional; whether the seizure was 'gross or unreasonable' and without plausible legal ground; whether the invasion involved 'threats, coercion[,] physical abuse' or 'unreasonable shows of force'; and whether the seizure or arrest was based on race or ethnicity." *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. July 31, 2013) (Wesley).

Probable Cause

Fact that police had determined, during late evening traffic stop, that defendant was on parole, combined with officer's uncontested assertion that most parolees have 9:00 p.m. curfews, established probable cause to believe that defendant was in violation of his parole. *United States v. Bernacet*, 724 F.3d 269 (2d Cir. August 1, 2013) (Wesley).

Reasonable Expectation of Privacy

Affirming denial of suppression motion, court holds that where, as a condition of both (i) the modification of defendant's supervised release, and (ii) his residency at a halfway house, defendant agreed to subject himself to searches of his person and property "at any time," he had no reasonable expectation of privacy in apartment he sublet following his escape from halfway house; "[a] person whose 'legitimate privacy

expectations [are] severely curtailed' cannot 'expand his legitimate expectations of privacy by escaping.'" *See* *United States v. Roy*, 734 F.2d 108, 111-12 (2d Cir. 1984). *United States v. Edelman*, 726 F.3d 305 (2d Cir. August 9, 2013) (Pooler).

***Terry* Stops**

Court reverses denial of suppression motion and vacates defendant's conviction finding police seized defendant when they initially put him in a "bear hug" and not later after they had wrestled him to the ground; at the time of the seizure they did not have reasonable suspicion to conduct a *Terry* stop because they knew only that two anonymous informants claimed that someone meeting defendant's description was carrying a gun. A stop based upon an anonymous tip is only warranted where the tip is established to be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Wesley concurs in part and dissents in part. *United States v. Freeman*, 735 F.3d 92 (November 7, 2013) (Pooler).

Warrants and Warrantless Searches

Warrants

Probable Cause

Court vacates conditional guilty plea to child pornography offenses and remands for further proceedings regarding defendant's motion to suppress the fruits of search of a computer found in his home pursuant to a warrant. Court agrees with district court's determination that the warrant application failed to establish probable cause to search for evidence of child pornography, and its determination that the warrant's references to the New York State Penal Law and "Federal Statutes" were impermissibly broad, but disagrees with the analysis used by the district court to determine whether the improper portions of the warrant were severable from the adequate ones (e.g., the portion that authorized a search for evidence that defendant, who was required to register as a sex offender, had violated a Correction Law provision that requires sex offenders to register certain internet service provider and communications accounts) and directs that severability be reconsidered under the rubric set forth in *United States v. Sells*, 463 F.3d 1148 (10th Cir. 2006), i.e., first, the court must separate the warrant into its constituent clauses. Second, the court must examine each individual clause to determine whether it is sufficiently particularized and supported by probable cause. Third, the court must determine whether the valid parts are distinguishable from the non-valid parts. Court also directs district court to further examine the application of the plain view doctrine and, if necessary, the good faith doctrine. *United States v. Galpin*, 720 F.3d 436 (2d Cir. June 25, 2013) (Swain).

Warrantless Searches

Cell Phones

Without reaching the issue of whether warrantless search of cell phone, two months after it was found in car at time of defendant's arrest, was lawful, court finds that the introduction of the evidence found pursuant to the search was harmless in light of the "volume of evidence" establishing defendant's guilt. *United States v. Aguiar*, 737 F.3d 251 (2d Cir. December 13, 2013) (Pooler).

SECOND AMENDMENT – See also CIVIL RIGHTS ACTIONS

Affirming conviction under 18 U.S.C. § 924(c), court holds that the Second Amendment, as interpreted by *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not permit a person to possess a shotgun – even if legally acquired and for his own protection at home – when possessed in furtherance of drug trafficking. *United States v. Bryant*, 711 F.3d 364 (2d Cir. April 3, 2013) (p.c.).

SECOND CIRCUIT

En Banc Review

See discussion of concurrence and dissent, in denial of en banc review, in *Young v. Conway*, 715 F.3d 79 (2d Cir. April 23, 2013).

SELF-INCRIMINATION

Court affirms contempt order and an order compelling contemnor to comply with a grand jury subpoena directing him to produce records he was required to maintain pursuant to the Bank Secrecy Act with respect to his foreign accounts. Contemnor was not entitled to assert the "act of production" privilege because the BSA's recordkeeping requirements at issue are "essentially regulatory," the subpoenaed records are customarily kept," and the records have "public aspects" sufficient to render the public records exception to the act of production privilege applicable. *In re Grand Jury Subpoena Dated February 2, 2012*, 13-403 (2d Cir. December 19, 2013) (Wesley).

SENTENCING

Adjustments and Departures

Generally

Court affirms, as substantively reasonable, below-Guidelines 144-month sentence imposed on career criminal in minor crack case, with concurrences by Calabresi and Raggi addressing, under *United States v. Preacely*, 628 F.3d 72, 84 (2d Cir. 2010), the need for a sentencing court to consider a horizontal departure from a defendant's Criminal History Category to obtain the appropriate "anchoring" Guideline before

considering whether to impose a non-Guidelines sentence under *Booker*. *United States v. Ingram*, 721 F.3d 35 (2d Cir. June 14, 2013) (p.c.).

Acceptance of Responsibility

Defendant was not entitled to Guidelines reduction for acceptance of responsibility in securities fraud case where he went to trial and his attorney, during summation, denied that defendant acted with intent to defraud. *United States v. Nouri*, 711 F.3d 129 (2d Cir. March 4, 2013) (Leval).

District court properly denied defendant a Guidelines reduction for acceptance of responsibility where he attempted to smuggle drugs into jail between plea and sentence, notwithstanding that his attempts did not succeed and he allegedly engaged in the conduct because he was a drug addict denied proper medical assistance. *United States v. Chu*, 714 F.3d 742 (2d Cir. May 7, 2013) (p.c.).

Child Pornography

Employing categorical approach – which district court should have used, rather than the modified categorical approach – court affirms imposition of 121-month sentence on defendant who plead guilty to possessing child pornography, agreeing that his prior conviction in Vermont state court for "lewd or lascivious conduct with a child," in violation of 13 Vt. Stat. Ann. § 2602, triggered a mandatory minimum sentence of ten years' imprisonment pursuant to 18 U.S.C. § 2252(b)(2). Court explains the difference between the two approaches as follows (at n.2): "the 'categorical approach' only takes into account the language of the underlying state statute, while the 'modified categorical approach' permits courts to probe, to a limited extent, the actual nature of the defendant's prior crime." The modified categorical approach "is appropriate only where a statute is divisible into qualifying and non-qualifying offenses, and not where the statute is merely worded so broadly to encompass *conduct* that might fall within ... the definition of the federal predicate offense ... as well as other conduct that does not." *United States v. Simard*, 731 F.3d 156 (2d Cir. September 10, 2013) (p.c.).

Remanding 30-month sentence imposed on defendant who pleaded guilty to distributing child pornography under 18 U.S.C. § 2252(a)(2) because court was required to at least impose mandatory five-year sentence, court also makes findings regarding certain enhancements the district court declined to impose, i.e., (1) court could not properly decline to find that defendant engaged in a pattern of sexual abuse or exploitation of a minor, per U.S.S.G.§ 2G2.2(b)(5), based on his minority, lack of temporal proximity, and inadequate supervision; (2) the use of a computer to commit the crime of conviction, per § 2G2.2(b)(6), is not double counting; and (3) the distribution of child pornography, per § 2G2.2(b)(3)(F), is not double counting where defendant pleaded guilty to distribution because, inter alia, neither the applicable Guideline, U.S.S.G. § 2G2.2, nor the base offense level dictated by that Guideline for this case, is limited to distribution crimes. Court also holds that placing pictures in a shared folder constitutes distribution regardless of whether

anyone actually obtains an image from the folder. *United States v. Reingold*, 731 F.3d 204 (2d Cir. September 26, 2013) (Raggi).

Role in the Offense

Defendant convicted of transporting a woman interstate for purposes of prostitution was properly subject to a four-level adjustment under U.S.S.G. § 3B1.1 for her leadership role in the offense, where six or seven prostitutes were provided by the defendant to brothels and defendant used several taxi drivers to transport the prostitutes. *United States v. Mi Sun Cho*, 713 F.3d 716 (2d Cir. April 16, 2013) (p.c.).

Consecutive Sentences

Consecutive sentences imposed on defendant convicted under 18 U.S.C. §§ 2423(a) (transporting a minor with intent to engage in criminal sexual activity) and 2423(b) (travel with intent to engage in illicit sexual conduct), who travelled domestically and internationally with his young daughter, molesting her for years, did not violate double jeopardy under the applicable *Blockberger* test because each statute contains an element the other does not, and does not violate Congressional intent because the two offenses are distinct crimes and cannot be characterized as a preliminary step and a consummated act. *United States v. Weingarten*, 713 F.3d 704 (2d Cir. April 16, 2013) (Lynch).

Cooperation

No hearing was necessary regarding defendant's motion for a hearing to address his claim that the government acted in bad faith when it refused, pursuant to his cooperation agreement, to file a 5K1.1 motion, since defendant failed to rebut government's response that defendant had failed to provide substantial assistance. *United States v. Tarbell*, 728 F.3d 122 (2d Cir. August 26, 2013) (Cabranes).

Government was not required to file a 5K1.1 motion for defendant who went to trial after initially cooperating because his proffer agreement explicitly stated it was not a cooperation agreement and that the government was not agreeing to make a motion on his behalf. Additionally, defendant violated his agreement in several ways, including by repeatedly lying during proffer sessions. District court did not err, however, in refusing to consider, at the resentencing, information that the government inexplicably failed to have proffered at the initial sentencing. *United States v. Gomez*, 705 F.3d 68 (2d Cir. January 15, 2013) (Kearse).

Crack Sentences

Because the 120–month mandatory minimum applicable when defendant was initially sentenced (although defendant in fact received a lower sentence pursuant to his cooperation) was neither displaced nor reduced to 60 months by the Fair Sentencing Act and therefore remained applicable to defendant, court concludes that the Sentencing

Commission would not deem defendant eligible for relief under 18 U.S.C. § 3582(c)(2) (which authorizes sentencing relief under certain Guidelines amendments). Court also rules, however, that since the government did not appeal the district court's reduction of defendant's sentence (though not as great a reduction as defendant requested), court would not disturb the reduction, which it concluded the district court had jurisdiction to impose, even though it did so erroneously. *United States v. Johnson*, 732 F.3d 109 (2d Cir. October 15, 2013) (Newman).

Court vacates order denying defendant's motion to reduce sentence despite his eligibility for such a reduction under 18 U.S.C § 3582(c)(2), finding that the court did not provide a sufficient explanation of its decision not to grant the motion. *United States v. Christie*, 736 F.3d 191 (2d Cir. November 15, 2013) (Droney).

Court remands for a new determination of whether defendant's sentence should be reduced pursuant to reduced Guidelines because trial court did not realize that pursuant to the holding in *Dorsey v. United States*, 132 S. Ct. 2321 (2012), defendant was no longer subject to five-year mandatory minimum. *United States v. Bethea*, 735 F.3d 86 (2d Cir. October 31, 2013) (p.c.).

Affirming sentence that reduced defendant's sentence under the Fair Sentencing Act but declined to depart or vary from the amended Guidelines ranges, court holds that U.S.S.G. § 1B1.10(b)(2)(A) prohibited the district court from departing or varying from the defendants' amended guideline ranges, and that the scope of this prohibition includes departures under U.S.S.G. § 4A1.3 (addressing departures based on criminal history category). Court rejects argument that the Sentencing Commission exceeded its authority when it enacted § 1B1.10(b)(2)(A) and that this section does not prohibit a departure under § 4A1.3. *United States v. Montanez*, 717 F.3d 287 (2d Cir. May 30, 2013) (p.c.).

Affirming denial of downward variance requested by defendant convicted of crack offense who moved for reduction of sentence under Guidelines Amendment 750, court upholds, against various attacks, U.S.S.G. § 1B1.10, which prohibits courts (except in the case of cooperators) from reducing a "'defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) to a term that is less than the minimum of the amended guideline range . . . . U.S.S.G § 1B1.10(b)(2)(A)." *United States v. Erskine*, 717 F.3d 131 (2d Cir. May 23, 2013) (Straub).

District court did not abuse its discretion when, after having reduced defendant's sentence in 2008 in consideration of amended crack guidelines, it declined to do so again in 2011 pursuant to Amendment 750. Amendment authorized a modification of sentence (not a resentencing) and district court was free to grant it or not. Here, it determined, in consideration of defendant's disciplinary history and other factors, that 168 months was the lowest appropriate sentence. *United States v. Wilson*, 716 F.3d 50 (2d Cir. May 16, 2013) (p.c.).

Affirming limited sentence reduction under the crack amendments, court holds that U.S.S.G. § 1B1.10 and 18 U.S.C. § 3582(c)(2) together do not permit resentencing

court to downwardly depart from the amended Guidelines range, even if a downward departure was granted in the original sentencing (here, from CHC VI to CHC V), absent a government motion for a departure based on substantial assistance. Sentencing reductions must be in accord with the applicable Guidelines policy statement that, in this case, applies the reduction against "'the offense level and criminal history category determined pursuant to § 1B1.1(a), *which is determined before consideration of any departure provision in the Guidelines Manual or any variance.'* U.S.S.G. § 1B1.10 cmt. n. 1(A) (emphasis added)." The foregoing represents the rule under § 1B1.10 after the enactment of Guidelines Amendment 759, which post-dates the court's decision in *United States v. Rivera*, 662 F.3d 166 (2d Cir. 2011). *United States v. Steele*, 714 F.3d 751 (2d Cir. May 9, 2013) (p.c.).

District court did not abuse its discretion when it declined to reduce defendant's sentence pursuant to an amendment to the crack guidelines, even though defendant was eligible. Court was not required to hold a hearing and could rely upon defendant's post-sentencing assaultive conduct, which defendant did not contest. *United States v. Figueroa*, 714 F.3d 757 (2d Cir. May 9, 2013) (p.c.).

Entrapment

Fact that government manufactured terrorist crime that would subject defendants to mandatory minimum 25-year sentence did not amount to sentencing entrapment, since, in light of defendants' predisposition to commit terrorist acts, government did nothing improper by testing to see just how far defendants would go in committing acts of terrorism. Jacobs concurs and dissents. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. August 22, 2013) (Newman).

Firearms Offenses

Court holds that the "except" clause of 18 U.S.C.§ 924(c)(1)(A) does not exempt a defendant, sentenced on multiple § 924(c) firearms convictions in a single judgment, from receiving consecutive mandatory minimum sentences for each of his § 924(c) convictions. *United States v. Robles*, 709 F.3d 98 (2d Cir. March 1, 2013) (p.c.).

Length

Life sentence imposed on defendant convicted of conspiring to commit terrorist bombings of United States Embassies in which 224 persons were killed was neither procedurally nor substantively unreasonable. *United States v. Ghailani*, 733 F.3d 29 (2d Cir. October 24, 2013) (Cabranes).

Court affirms 66-month sentence in insider trading case against claim of substantive unreasonableness; "Contrary to Drimal's assertions on appeal, the district court did not reveal a vendetta against the rich when it noted that Drimal did not have compelling reasons to warp the financial markets. Instead, Judge Sullivan recognized the

same moral principles that make Jean Valjean more sympathetic than Gordon Gekko." *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

Court vacates and remands 20-year sentences imposed on defendants who attempted an absurd three billion dollar fraud to borrow money to build a trans-Siberian pipeline, citing several procedural errors, including that the court gave insufficient consideration to 18 U.S.C. § 3553(a) factors; appeared to only consider deterrence; and failed to meaningfully consider grounds for a non-Guidelines sentence, including that the intended loss (where there was no actual loss) wildly overstated the seriousness of the offense. Court also observes: "If in fact the District Court treated 240 months as the only reasonable sentence (because the statutory maximum prohibited imposition of a true Guidelines sentence closer to life), then it committed procedural error." Court concludes, "In a case clouded by the possibility of error, we feel it appropriate to give the District Court an opportunity to clarify its thinking." Underhill concurs. *United States v. Corsey*, 723 F.3d 366 (2d Cir. July 24, 2013) (p.c.).

Fifty-seven month sentence imposed on defendant who pleaded guilty to illegal re-entry after previous conviction for an aggravated felony, which sentence was to run consecutively to undischarged portion of state sentence, was not excessive where within the Guidelines range and the sentencing court cited defendant's history, characteristics and the need for deterrence. Lynch concurs. *United States v. Rodriguez*, 715 F.3d 451 (2d Cir. May 15, 2013) (p.c.).

Where defendant had originally been sentenced to 30 years but one count of sentence – for which defendant received 10 years – was vacated, new sentence of 30 years would be considered more severe than original sentence on the non-reversed counts, but was not unlawful; as the district court found, the specific conduct underlying the vacated count did not account for a particular increment of the sentence, which was based on the overall pattern of abuse. *United States v. Weingarten*, 713 F.3d 704 (2d Cir. April 16, 2013) (Lynch).

Court affirms imposition of 54-month sentence on heroin-addicted defendant who pleaded guilty to possessing contraband in prison in violation of 18 U.S.C. § 1791, whose Guidelines were 24-36 months, where court believed it had given defendant a break when it sentenced him on a previous drug case to 60 months but that defendant continually relapsed and illegally possessed drugs while in prison. Although the highest sentence meted out in 14 similar cases involving prosecutions under § 1791 was 37 months, court finds the sentence reasonable given the break defendant previously received and his continuing criminality extending from before he was first sentenced to the present case. Court says: "It may well be that the nation would be better served by a medical approach to treating and preventing addiction than by a criminal-justice-based 'war on drugs.' See, e.g., Heather Schoenfeld, The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States, 15 J. Gender Race & Just. 315 (2012); Juan R. Torruella, Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon, 20 B.U. Pub. Int. L.J. 167 (2011). But Congress has made a different choice, and this case is

not a vehicle for deciding questions of comprehensive drug policy. For so long as the sale and possession of narcotics remain crimes, courts must struggle with the difficult task of sentencing those who commit such crimes." Calabresi concurs, stating: "There is also no question in my mind, however, that the incidence of this crime also demonstrates a significant level of culpability on the part of the jailing institution. [footnote]. When a prison cannot protect an addicted inmate from the capacity to relapse, it has failed to perform an essential obligation – an obligation that it owes both to the inmate and to the society that the inmate will someday rejoin." *United States v. Douglas*, 713 F.3d 694 (2d Cir. April 15, 2013) (Lynch).

Loss Calculation

Court upholds loss calculation in stock manipulation case, calculating losses as the amount the investor overpaid (as determined by regression analysis using a stock index to which the price changes in the manipulated stock closely corresponded), minus, in the event the investor sold the stock during the Manipulation Period, the amount the investor was overpaid by a later buyer. Court further explains: "Another way of understanding this calculation is as actual total loss—actual price paid less actual price recouped when sold … minus 'fair market' loss—[the] 'fair market price' on the date purchased less [the] 'fair market price' on the date sold. Thus, investors' losses were total losses minus any of those losses that would have happened even absent manipulation as a result of non-fraudulent factors." Court rejects argument that government expert's failure to conduct an "event study" (looking at factors unique to the manipulated stock and also identifying relevant dates on which disclosure of fraud is thought to have reached the market, and then quantifying the extent to which the market reacted in a way that can only have been a response to the relevant event) rendered the expert's analysis insufficient, observing, among other things, that the district court "had a factual basis for concluding that there were no company-specific disclosures concerning non-fraudulent information that would have affected GlobalNet's stock price." *United States v. Gushlak*, 728 F.3d 184 (2d Cir. May 1, 2013) (Sack).

Court remands sentences, imposed for various fraud violations, upon finding that district court should consider whether foreign securities sales – which in themselves are not a crime because Section 10(b) does not apply extraterritorially – should be considered "relevant conduct." *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

Court rejects argument that defendant's losses from insider trading in one stock can offset the gains he made in insider trading in a different stock. *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

District court committed clear error when it failed to consider, on remand, certain cleanup estimates in case involving defendant's fraudulent certification of asbestos removal. *United States v. Desnoyers*, 708 F.3d 378 (2d Cir. February 14, 2013) (Sack).

One Book Rule

District court properly sentenced defendant under the 2008 Guideline Manual, which resulted in a lower guideline than the Guideline Manual in use at the time of the defendant's sentencing, but court was also correct in not applying the more favorable crack Guidelines Amendments (748 and 750), as those amendments were substantive not clarifying. *United States v. Brooks*, 732 F.3d 148 (2d Cir. October 16, 2013) (p.c.).

Prior Felony Offenders

Court should have applied categorical approach – rather than modified categorical approach – to determine whether defendant had previously been convicted in Vermont for an offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," but same result is reached under categorical approach, i.e., defendant in fact was subject to mandatory minimum ten-year sentence under 18 U.S.C. § 2252(b)(2), following his most recent conviction for possessing child pornography. Per *Descamps v. United States*, 133 S. Ct. 2276 (2013), "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." Rather than having to meet a precise federal statutory formula, the Vermont statute satisfies the predicate-offense criteria in § 2252(b)(2) because it is "a law dealing with sexual misconduct [involving a minor]," defined generically as "misuse or maltreatment of a minor for a purpose associated with sexual gratification." *United States v. Barker*, 723 F.3d 315 (2d Cir. July 9, 2013) (p.c.).

Court affirms denial of habeas corpus, finding that defendant was a career felony offender under the Armed Career Criminal Act ("ACCA"), which includes drug felonies for which the possible sentence was ten years or more, even though one of the predicate felonies was an offense that thereafter was subject to a maximum nine-year sentence. Under *McNeill v. United States*, ––– U.S. ––––, 131 S. Ct. 2218 (2011) (abrogating *United States v. Darden*, 539 F.3d 116 (2d Cir. 2008)), the possible sentence at the time of the offense controls and, in any event, here, New York State made the lowered sentences applicable only as to A-1 drug felonies. *Rivera v. United States*, 716 F.3d 685 (2d Cir. May 24, 2013) (Chin).

Relevant Conduct

Court finds that defendant's sentence was procedurally unreasonable because, in considering relevant conduct, sentencing court failed to make particularized findings relating to the scope of the activity or the foreseeability of the conduct of defendant's coconspirator, stating only that it had "no quarrel with the [government's] conspiracy theory here from what I have read." *United States v. Getto*, 729 F.3d 221 (2d Cir. September 9, 2013) (Cabranes).

Although defendant's plea agreement held defendant responsible for only a limited amount of drugs, district court did not err when it relied also on relevant

conduct, i.e., the quantity of drugs defendant claimed, in a recorded conversation, to have sold during the previous year. Resulting 87-month sentence was not substantively unreasonable. *United States v. Chu*, 714 F.3d 742 (2d Cir. May 7, 2013) (p.c.).

Remands

District court did not err, on remand, in refusing to consider certain information bearing on loss and defendant's supposed "good deeds" proffered by the government that the government could have, but failed to, present at initial sentencing. *United States v. Desnoyers*, 708 F.3d 378 (2d Cir. February 14, 2013) (Sack).

Restitution

On authority of *Dolan v. United States*, 560 U.S. 605 (2010), court finds nothing improper with imposing restitution 18 months after sentencing, rather than within 90 days of sentencing, where district court said at sentencing it would impose restitution in the future and defendant could point to no prejudice resulting from the delay. *United States v. Gushlak*, 728 F.3d 184 (2d Cir. May 1, 2013) (Sack).

District court did not abuse its discretion in awarding restitution despite the complexity and duration of the restitution proceedings. *See* 18 U.S.C. § 3663A(c)(3)(B). *United States v. Gushlak*, 728 F.3d 184 (2d Cir. May 1, 2013) (Sack).

Remanding for a recalculation of restitution due to victim in child pornography case, court holds there was sufficient evidence to support a finding that defendant proximately caused victim's injuries and the district court reasonably estimated the share of the victim's losses attributed to defendant as her total loss divided by the number of persons convicted of possessing her images at the time of the restitution request, since the expert reports show that the victim continued to suffer harm as a result of learning about new possessors of images of her abuse during the time period when she would have learned about defendant. The district court abused its discretion, however, in its calculation of the numerator – i.e., the total amount attributable to defendant since (a) the court should have deducted the harm done by the victim's uncle who took the pictures; and (b) the court should not have included harm to the victim before defendant's arrest and therefore before the victim knew of – and thus was distressed by – defendant; and the district court also erred (as the government conceded) in finding that defendant should be jointly and severally liable along with all others convicted of possessing victim's images, for her total losses of $3,381,159 – which included losses that defendant could not have proximately caused (as discussed above), and which held him liable for harm caused by defendants who were not before the court. *United States v. Lundquist*, 731 F.3d 124 (2d Cir. September 9, 2013) (Chin).

Court remands for recalculation of restitution because the restitution computation – unlike the loss calculation for determining the applicable Guideline – is limited to the victims of the offense conduct and therefore does not include relevant conduct and here,

persons who suffered losses due to frauds occurring overseas are not victims of the charged fraud since the security fraud statute is not applied extraterritorially. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

District court did not err in refusing to consider evidence supporting additional restitution proffered by the government after the initial restitution order since there was no showing that the new losses were proffered within 60 days of discovery, as required by 18 U.S.C. § 3664(d)(5), nor did the government explain why the losses could not have been submitted at the initial sentencing. Court agrees with the government, however, that the restitution should have included all income received by defendant for his role in the fraudulent asbestos removal scheme, including for pre-abatement sampling and sampling during the abatement process. *United States v. Desnoyers*, 708 F.3d 378 (2d Cir. February 14, 2013) (Sack).

Role in the Offense

Court once again remands for resentencing, finding, inter alia, that at the initial remand, district court should have reconsidered its earlier refusal to find that defendant was an organizer, since circuit court, on remand, had reinstated a dismissed count that had changed the "factual mosaic related to th[e] offenses [of conviction]" such that district court was required to analyze the organizer enhancement anew. *United States v. Desnoyers*, 708 F.3d 378 (2d Cir. February 14, 2013) (Sack).

Supervised Release

Court vacates condition of supervised release, imposed on sex offender who was sentenced for violating reporting requirements, that defendant submit to plethysmograph examinations, which involve attaching an instrument to the penis and measuring arousal when pornographic pictures are viewed, and which may require subject to first masturbate to calibrate the instrument. Court describes the condition as "extraordinarily invasive," "unjustified," and "not reasonably related to the statutory goals of sentencing," and concludes that it "violates [defendant's] right to substantive due process." *United States v. McLaurin*, 731 F.3d 258 (2d Cir. October 3, 2013) (Calabresi and B.D. Parker).

Court agrees that the Supreme Court's decision in *Tapia v. United States*, 131 S. Ct. 2382 (2011), applies to violations of supervised release and that a sentence imposed upon revocation of supervised release therefore may not be increased for rehabilitative purposes, but such was not the case here, with respect to defendant convicted of distributing child pornography; "While the district court also considered Lifshitz's need for medical care, there is no indication in the record that the district court based the length of Lifshitz's sentence on his need for treatment." *United States v. Lifshitz*, 714 F.3d 146 (2d Cir. April 23, 2013) (p.c.).

SORNA

Court rejects argument that SORNA is unconstitutional pursuant to *Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), finding that SORNA, at least as applied to defendant (who pleaded guilty under 18 U.S.C. § 2250(a) to failing to update his SORNA registration after traveling from New York to Nevada), regulates activity involving travel in interstate commerce, as discussed in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010). *United States v. Robbins*, 729 F.3d 131 (2d Cir. September 3, 2013) (Calabresi).

Court rejects defendant's argument that he could not be subject to SORNA sex offender registration for the first time after he had completely served his military court sentence, holding that the issue was decided by *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), where the Supreme Court held that Congress, through the Military Regulation and the Necessary and Proper Clauses, possessed the authority to compel even federal offenders who had completed their sentences and severed their connection to the military to register as required by SORNA, as Kebodeaux's release was not "unconditional" because at all times relevant, Kebodeaux was subject to the similar Wetterling Act, and SORNA "[fell] within the scope [of] Congress' authority under the Military Regulation and Necessary and Proper Clauses." Court also rejects ex post facto argument, since the indictment charged defendant with failing to comply with SORNA after its enactment and the effective date of the regulations indicating that SORNA applies to all sex offenders. *United States v. Brunner*, 726 F.3d 299 (2d Cir. August 9, 2013) (Pooler).

SPEEDY TRIAL

Court affirms denial of constitutional speedy trial motion brought by defendant whose trial was delayed for some five years, first while he was interrogated – sometimes with enhanced techniques – by the CIA for two years to determine if he had information regarding terrorist activities, and then while he was held at Guantanamo awaiting trial before a military tribunal. Applying the four-factor test of *Barker v. Wingo*, 407 U.S. 514 (1972), court finds that the CIA-related delay was justified by national security interests and that the Guantanamo period – though chargeable against the government – was in good faith while the military trial (which never occurred) was being prepared. Further, defendant did not assert his right to a speedy trial until the end of this period and he could demonstrate no case-specific prejudice – his physical and emotional suffering being related to his CIA interrogation and not to his pretrial incarceration. *United States v. Ghailani*, 733 F.3d 29 (2d Cir. October 24, 2013) (Cabranes).

Court affirms denial of defendant's speedy trial motion, holding, (1) speedy trial clock starts running on the later of the filing date of the information or indictment and defendant's first appearance in the court where the charge is pending, per 18 U.S.C. § 3161(c)(1), and the 10-day limitation on excludable delay for periods of time when defendant is in transit, per 18 U.S.C. § 3161(h)(1)(F), applies only after the clock starts to run; and (2) defendant's personal consent to an otherwise proper speedy trial adjournment is not required and even though court's order contemplated that defendant would consent,

such consent was not necessary where court also made sufficient factual findings justifying the delay. *United States v. Lynch*, 726 F.3d 346 (2d Cir. August 13, 2013) (Droney).

Affirming defendant's tax fraud conviction against argument that the Speedy Trial Act was violated at defendant's retrial, court holds, "however preferable it may be for [18 U.S.C.] § 3161(e) findings extending the time for retrial to be made within the initial 70-day retrial period, the statute itself does not impose such a requirement. *** Section 3161(e) contains no limiting language comparable to § 3161(h)(7)(A)'s phrase 'unless the court' that signals Congress's intent to limit the exercise of judicial extension discretion." Court further upholds district court's finding that defendant's retrial occurred within 180 days of non-excludable delay. Pooler dissents. *United States v. Shellef*, 718 F.3d 94 (2d Cir. May 23, 2013) (Raggi).

STATUTE OF LIMITATIONS

Court reverses conviction for multi-year scheme to fix below-market rates on interest paid by General Electric to municipalities, finding that interest payments cannot serve as overt acts because the routine payments were scheduled to continue for years (if not decades) after the guaranteed investment contracts were awarded and after all concerted conduct had ended, distinguishing *United States v. Salmonese*, 352 F.3d 608, 614 (2d Cir. 2003): "The stream of GIC interest payments does not raise the underlying concern of concerted action, and therefore is not a continuous action that prolongs the life of the conspiracy." Kearse dissents. *United States v. Grimm*, 12-4310 (2d Cir. December 9, 2013) (Jacobs).

SUFFICIENCY OF EVIDENCE

Arson

Defendant "used" fire to commit a robbery, in violation of 18 U.S.C. § 844(h)(1), by setting a car on fire to distract the police while he robbed a bank. Statute was plainly applicable to such conduct and therefore did not offend due process notice requirement. *United States v. Desposito*, 704 F.3d 221 (2d Cir. January 11, 2013) (Chin).

Conspiracy

Court rejects defendant's argument that he did not join drug conspiracy because he had merely a buyer-seller relationship with his alleged coconspirator, finding instead that conviction was supported by evidence that defendant repeatedly purchased cocaine from the coconspirator and had several other drug-related conversations with him. *United States v. Aguiar*, 737 F.3d 251 (2d Cir. December 13, 2013) (Pooler).

Economic Espionage Act

Defendant's conduct in giving his employer's computer code to a competitor violated the Economic Espionage Act, 18 U.S.C. § 1832, even if, at the time he first removed the code from his employer's office, he did not have the intent to appropriate it for the competitor; the district court's instruction setting forth this principle was not a constructive amendment to the indictment. Addressing under plain error analysis whether the computer code satisfies the interstate commerce requirement, court finds the evidence sufficient, rejects the defendant's constructive amendment argument, and distinguishes *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012) (the restrictive reading of which has since been subject to Congressional amendment – *see* n.7), observing that, unlike in *Aleynikov*, here the government pursued the theory that the *securities* traded by defendant's employer using its proprietary systems, rather than the systems themselves, were the "product[s] ... placed in" interstate commerce. Court also rejects asserted error under *Yates v. United States*, 354 U.S. 298, 311 (1957) (identifying error in conviction if the "verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected"). Pooler concurs and dissents. *United States v. Agrawal*, 726 F.3d 235 (2d Cir. August 1, 2013) (Raggi).

Escape

Court affirms conviction for escape of defendant who absconded from residential reentry center, holding (though noting circuit split regarding custody issue) that his residence at the center as a condition of the modification of his supervised release constituted "custody . . . by virtue . . . of [a] conviction of any offense" under 18 U.S.C. § 751(a). *United States v. Edelman*, 726 F.3d 305 (2d Cir. August 9, 2013) (Pooler).

Firearms

Court vacates conviction for possessing a firearm in relation to a marijuana conspiracy in violation of 18 U.S.C. § 924(c)(1)(A), finding that five-year limitations period began to run when defendant was arrested in 2004 and the gun was seized. "[W]hile ordinarily when the gun possession is during and in relation to a conspiracy, which is a continuing offense, that possession is presumed to continue until the underlying conspiracy offense has run its course, it would defy all reason to give effect to that presumption after such time as the gun has in fact been seized by law enforcement authorities." *United States v. Praddy*, 725 F.3d 147 (2d Cir. July 30, 2013) (Kearse).

Fraud Offenses

Court rejects various sufficiency arguments in securities fraud/bribery case centered on bribes offered by company President and employees to broker to push their stock. The conduct of the broker violated the securities fraud statute because the broker did not disclose the bribes to his clients and this conduct also violated the wire fraud statute under a theory that the broker deprived his employer of his honest services by not

informing the employer of the bribes. *United States v. Nouri*, 711 F.3d 129 (2d Cir. March 4, 2013) (Leval).

Court affirms defendants' convictions for a conspiracy to commit a three billion dollar fraud centered on a cockamamie scheme to obtain a loan to build a trans-Siberian pipeline on behalf of a defunct Indian tribe, as against argument that no reasonable person would have taken the proposal seriously and that the defendants' statements therefore were not material. Court explains: "Taking the facts in the light most favorable to the government, we conclude that a reasonable jury could find that appellants' misrepresentations were material, regardless of whether Re, or others like him, should have heeded them or not. Appellants engaged in an illegal conspiracy to defraud potential investors the moment that Corsey offered Re billions of dollars in fake T-notes as collateral for a large loan." Further, court observes (at n.4): "appellants completed the crime of conspiracy the minute they agreed among themselves to offer five billion dollars in collateral for a loan and took a step in furtherance of that plan using the mail or wires. In other words, even if they never actually influenced anyone they could still have been found guilty of the crime of conspiracy to commit mail or wire fraud." Underhill concurs. *United States v. Corsey*, 723 F.3d 366 (2d Cir. July 24, 2013) (p.c.).

Evidence sufficed to convict defendant of insider trading. *United States v. Goffer*, 721 F.3d 113 (2d Cir. July 1, 2013) (Wesley).

Evidence satisfied all the elements of insider trading, to-wit: (1) the insider-tippers (Nguyen and Ng) were entrusted with the duty to protect confidential information, which (2) they breached by disclosing that information to their tippee (Jiau), who (3) knew of their duty, and (4) still used the information to trade a security or further tip the information for her benefit, and finally (5) the insider-tippers benefited in some way from their disclosure. The government was not required to call an expert to explain why the leaked information was material. *United States v. Jiau*, 734 F.3d 147 (2d Cir. October 23, 2013) (Walker).

Court rejects various sufficiency arguments attacking convictions for security, mail and wire fraud. *United States v. Vilar*, 729 F.3d 62 (2d Cir. August 30, 2013) (Calabresi).

Identity Theft

Court reverses conviction under 42 U.S.C. § 408(a)(7)(A) for using a social security number assigned on the basis of false information, because the government failed to prove that the number in question in fact had been "assigned" based on false information. Government contended that the element was satisfied because, years after the number was "assigned" to her, the defendant fraudulently changed her pedigree information to reflect that she was born in the United States, but by then the number had already been "assigned" based on accurate information. *United States v. Wilson*, 709 F.3d 84 (2d Cir. February 22, 2013) (p.c.).

Mann Act

Circumstantial evidence sufficed to prove that a dominant purpose of defendant's transport of a 15-year-old across state lines was to engage in sex with her. *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. August 12, 2013) (Livingston).

Evidence was sufficient to convict defendant of transporting a person over state lines to engage in prostitution, in violation of 18 U.S.C. § 2421: "By agreeing, either directly or through the CI, to provide a prostitution job for Jin, and by coordinating and prearranging the date and time on which she would travel, Cho arranged for Jin to travel from New Jersey to New York to engage in prostitution. Moreover, by providing the CI to drive Jin on the last, intrastate leg of her interstate trip, Cho directly organized Jin's transportation in interstate commerce." *United States v. Mi Sun Cho*, 713 F.3d 716 (2d Cir. April 16, 2013) (p.c.).

National Stolen Property Act

Court distinguishes *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012), and holds that defendant was properly convicted under the National Stolen Property Act, 18 U.S.C. § 2314, because, unlike in *Alenynikov*, where defendant stole computer code from his employer in intangible form by download, defendant here took it in physical form – i.e., on printed sheets of paper. Court also rejects argument that the evidence was insufficient because there was no market "in commerce" for the code, finding that in fact a market did exist for the stolen computer code, including the market created by the company with which defendant was seeking employment. Pooler concurs and dissents. *United States v. Agrawal*, 726 F.3d 235 (2d Cir. August 1, 2013) (Raggi).

Obstruction of Justice

Defendant's conduct, in writing 15 letters suggesting the creation of phony evidence to be used at defendant's arson trial, was sufficient to convict defendant of attempting to obstruct justice under 18 U.S.C. § 1512(c)(2) because the letters sufficiently demonstrated a nexus between defendant's actions and his criminal trial and also satisfied the "substantial step" requirement. *United States v. Desposito*, 704 F.3d 221 (2d Cir. January 11, 2013) (Chin).

RICO

Affirming RICO conviction, court finds there was sufficient evidence to show that defendant was not merely a low-level member of the enterprise, but was instead someone who participated in, and conspired to participate in, the operation of the enterprise. *United States v. Praddy*, 725 F.3d 147 (2d Cir. July 30, 2013) (Kearse).

TRIAL

Continuance

Trial court did not abuse its discretion in denying defendant's motion for a continuance. Courts have broad discretion to grant or deny continuances and here, defendant did not demonstrate the required "arbitrariness and prejudice." Superseding indictment did not alter defendant's understanding of the charges. *United States v. Stringer*, 730 F.3d 120 (2d Cir. September 17, 2013) (Leval).

Defense, Right to Present

In case charging defendant with transporting person interstate for purposes of entering into prostitution, court did not err in excluding evidence of prostitute's consent or in prohibiting comment on the supposed consent**.** *United States v. Mi Sun Cho*, 713 F.3d 716 (2d Cir. April 16, 2013) (p.c.).

Trial court did not err when it went directly into summations after the government rested without specifically inquiring of defense counsel whether he intended to present a defense case since, in the context of these proceedings, the court reasonably believed there would be no defense case and defense counsel did not object to proceeding with summations. *United States v. Gomez*, 705 F.3d 68 (2d Cir. January 15, 2013) (Kearse).

Public Trial

Court would not recognize as plain error exclusion of family from the courtroom during voir dire where defense counsel acquiesced to the exclusion. *United States v. Gomez*, 705 F.3d 68 (2d Cir. January 15, 2013) (Kearse).

Severance

District court did not err in denying defendant's motion for a severance from his codefendant who was charged with two additional murders; the additional murders were relevant to the racketeering charges against defendant to prove the formation, existence, and nature of the racketeering enterprise, which involved the murder of individuals to collect on their insurance policies, as well as to show the pattern of racketeering activity. Eaton concurs. *United States v. James*, 712 F.3d 79 (2d Cir. March 28, 2013) (Sack).

Shackled Defendant

Court reverses defendant's drug conviction on several grounds including that defendant was shackled during trial without apparent reason: "it was clear error and a violation of the defendant's constitutional right to due process of law to have required the defendant to stand trial in shackles without a specific finding of necessity on the record by the trial judge." *United States v. Haynes*, 729 F.3d 178 (2d Cir. September 5, 2013) (Koeltl).

Self-Representation

Affirming denial of habeas petition, court holds that state court's determination that trial court's fleeting failure to honor defendant's right to self-representation – introducing standby counsel as "the attorney for the defendant" – was not reversible error as it was not an unreasonable application of controlling Supreme Court law, as the Supreme Court had not decided whether such brief – and thereafter corrected – error denied defendant his right to self-representation. Although harmless error analysis does not apply in this context, "[i]t does not necessarily follow ... that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation." *Ramos v. Racette*, 726 F.3d 284 (2d Cir. August 9, 2013) (Jacobs).

Verdict

Court reverses conviction for improperly accessing a computer in furtherance of a drug conspiracy, finding error in district court's supplemental instruction that jury may return inconsistent verdicts, i.e., jury could convict defendant of using a computer in furtherance of drug conspiracy yet acquit defendant of being a member of that conspiracy. Although inconsistent verdict will not require reversal, courts should not instruct juries that they may return such verdicts. The error was non-structural but not harmless, since court "cannot say with any confidence that it is clear beyond a reasonable doubt that a properly instructed jury would have convicted Moran-Toala of felony level unlawful computer access conspiracy." *United States v. Moran-Toala*, 726 F.3d 334 (2d Cir. August 12, 2013) (Sach).