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*** Supreme Court case law from October 5, 2014 through June 29, 2015 (October Term October Term 2014 and cases pending for decision in October Term 2015); and Fifth Circuit case law from May 1, 2014 through August 11, 2015.**

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II. SEARCH AND SEIZURE

Carroll v. Carman, ____ U.S. ____, 135 S. Ct. 348 (2014) (per curiam) (decision below: Carman v. Carroll, 749 F.3d 192 (3d Cir. 2014)) At a minimum, it is unclear whether the Fourth Amendment requires that police begin a "knock and talk" encounter at the front door of a residence, as opposed to some other entryway that appears to be open to visitors (here, a sliding glass door that the police accessed by going through plaintiffs' backyard and onto a ground-level deck); this lack of clarity means that the police did not violate clearly established law, and therefore the Third Circuit erred in denying the police officer's claim of qualified immunity in this action under 42 U.S.C. § 1983; accordingly, the Supreme Court reversed the judgment of the Court of Appeals and remanded for further proceedings.

Heien v. North Carolina, ____ U.S. ____, 135 S. Ct. 530 (2014) (decision below: State v. Heien, 749 S.E.2d 278 (N.C. 2013)) A police officer's reasonable mistake of law may supply the reasonable suspicion required for a traffic stop; here, it was reasonable for the police officer to conclude that defendant's nonfunctioning brake light was a violation justifying his stop of defendant's vehicle; even though the North Carolina Court of Appeals held in this case that the North Carolina statute required only one working brake light (which meant there was no violation here), the police officer's contrary conclusion was reasonable given the wording of the North Carolina statute and the lack of any case law construing the statute; accordingly, the stop of defendant did not violate the Fourth Amendment. (Justice Kagan filed a concurring opinion, in which she was joined by Justice Ginsburg; she wanted to emphasize that (1) an officer's subjective understanding is irrelevant in this inquiry, and (2) the reasonableness inquiry permitted by the Court in this decision is more demanding than the one that courts undertake before awarding qualified immunity. Justice Sotomayor filed a dissenting opinion; she would hold that "an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment.").

Grady v. North Carolina, ____ U.S. ____, 135 S. Ct. 1368 (2015) (per curiam) (decision below: State v. Grady, 762 S.E.2d 460 (N.C. 2014)) Where North Carolina defendant was subjected to post-conviction satellite-based monitoring ("SBM") (with an ankle monitor) as a recidivist sex offender, the North Carolina courts erred in holding that SBM did not constitute a Fourth Amendment "search"; under United States v. Jones, 565 U.S. ____ (2012), and Florida v. Jardines, 569 U.S. ____ (2013), a state also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that person's movements; the state's SBM program is plainly designed to obtain information, and since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search; because the North Carolina courts did not view SBM as a Fourth Amendment search, they did not examine whether SBM was reasonable – when properly viewed as a search, and the Supreme Court declined to do so in the first instance here; accordingly, the Supreme Court granted the defendant's petition for certiorari,

vacated the judgment of the Supreme Court of North Carolina, and remanded for further proceedings.

Rodriguez v. United States, ____ U.S. ____, 135 S. Ct. 1609 (2015) (decision below: United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014)) A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's prohibition of unreasonable seizures; a seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation, unless it is justified by reasonable suspicion of other criminal activity; the Court thus rejected the position that police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. (Justice Kennedy filed a dissenting opinion. Justice Thomas filed a dissenting opinion, which Justice Alito joined in full and which Justice Kennedy joined all but Part III.)

City of Los Angeles v. Patel, ____ U.S. ____, 135 S. Ct. 2443 (2015) (decision below: Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013) (en banc)) The Los Angeles municipal ordinance permitting police to inspect hotel registers was facially unconstitutional under the Fourth Amendment because it failed to provide hotel operators with an opportunity for precompliance review. (Justice Scalia filed a dissenting opinion, in which he was joined by the Chief Justice and Justice Thomas. Justice Alito filed a dissenting opinion in which he was joined by Justice Thomas.)

United States v. Hill, 752 F.3d 1029 (5th Cir. 2014) Under the totality of the relevant circumstances (defendant and his girlfriend sitting in a car in apartment parking lot around 11 p.m. on a Saturday night; upon seeing police, girlfriend got out of car and walked briskly away; alleged high-crime area), police officer did not have reasonable suspicion, based upon articulable facts, that defendant was engaged in reasonable activity; therefore, the seizure and frisk of defendant, leading to the discovery of a gun (for which he was later prosecuted for being a felon in possession), violated the Fourth Amendment; accordingly, the Fifth Circuit reversed the district court's denial of defendant's motion to suppress, and vacated the conviction and sentence.

United States v. Blevins, 755 F.3d 312 (5th Cir. 2014) In prosecution for drug and gun charges, district court did not err in denying defendant's motions to suppress evidence; she failed to show that any alleged misrepresentations in the affidavit for her arrest warrant were so significant as to mean that there was no probable cause for her arrest; furthermore, the entry into, and search of, defendant's home at the time of the execution of the arrest warrant did not violate defendant's Fourth Amendment rights; the arrest warrant allowed the officers to enter the home to arrest defendant once they had a reasonable belief that she was there (which they did, because she answered the door); once inside, the police could reasonably perform a protective sweep of the premises; finally, defendant's consent to search was not involuntary; a suspect need not be given Miranda warnings before consenting to a search.

United States v. Massi, 761 F.3d 512 (5th Cir. 2014) District court did not reversibly err in denying defendant's motion to suppress arising from the search, pursuant to a search warrant,

of his airplane (later found to contain marijuana); although defendant was unlawfully detained by law enforcement (a de facto arrest unsupported by probable cause), the good-faith exception of United States v. Leon, 468 U.S. 897 (1984), applied and precluded application of the exclusionary rule; where prior unconstitutional law enforcement conduct uncovered evidence used to obtain the search warrant, two requirements must be met for evidence uncovered by the search warrant to be admissible; ***first,*** the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct; ***second,*** the resulting search warrant must have been sought and executed by a law enforcement officer in good faith as prescribed by Leon; both of these requirements were satisfied here. (Judge Graves filed a dissenting opinion.)

United States v. Iraheta, 764 F.3d 455 (5th Cir. 2014) Fifth Circuit affirmed district court's order suppressing drugs discovered pursuant to an automobile search by police following a traffic stop; the two defendants as to whom the district court granted the motion had "standing" to challenge the search of the bag in the trunk found to contain cocaine and methamphetamine, because passengers in a vehicle have standing to challenge searches to their luggage, and defendants did not abandon or disclaim ownership prior to the search; furthermore, a third defendant's consent to search the vehicle did not, under the circumstances, authorize the search of all the luggage in the car; the police were on notice that at least some of the luggage did not belong to the consenting co-defendant; additionally, there was no evidence that the other two defendants heard the third one consent to a search, nor were they ever informed of that third one's consent by the officers; therefore, those two defendants did not ratify the third one's consent by failing to contravene that consent; in sum, it was unreasonable for the officers to rely on the third defendant's consent alone in searching the bag; the search was unconstitutional, and the district court properly granted the motion to suppress.

United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014) In prosecution for racketeering/murder charges arising out of activities of the Texas Mexican Mafia, government violated the Stored Communications Act in the way it obtained historical cell site location data pertaining to defendant's phone; under 18 U.S.C. § 2703(d), the proper procedure for seeking such data is to seek a court order by submitting a detailed application; here, however, the federal government simply got the data from state officials, who themselves had used a subpoena, not a Section 2703(d) order, to receive the information; however, suppression is not a remedy for a violation of the Stored Communications Act; under the reasoning of In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013), the obtaining of that information did not violate the Fourth Amendment; nothing in Riley v. California, 134 S. Ct. 2473 (2014), unequivocally overruled Historical Cell Site Data, or the Supreme Court's earlier decision in Smith v. Maryland, 442 U.S. 735 (1979), on which Historical Cell Site Data was based.

Luna v. Mullenix, 773 F.3d 712 (5th Cir. 2014), on denial of reh'g *en banc*, 777 F.3d 221 (5th Cir. Dec. 19, 2014) Where police officer shot at a fleeing vehicle in an attempt to halt the driver's flight (and resulting in the driver's being shot and killed), police officer was not entitled to qualified immunity in survivors' suit alleging a Fourth Amendment excessive-force claim under

42 U.S.C. § 1983; the plaintiffs produced facts that, viewed in their favor and supported by the record, establish that the police officer's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment; furthermore, at the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment; accordingly, the Fifth Circuit affirmed the district court's denial of summary judgment to the officer on the issue of qualified immunity.

United States v. Montgomery, 777 F.3d 269 (5th Cir. 2015) Even if the frisk of defendant violated the Fourth Amendment, the evidence in question – child pornography found on defendant's cell phone – was obtained by defendant's consent, which was the product of an intervening independent act of free will on defendant's part that purged the taint of any alleged constitutional violation; although the temporal proximity of the discovery of the evidence to the alleged constitutional violation was a factor that favored defendant, the other two factors ((1) intervening circumstances, particularly defendant's unsolicited consent to search the cell phone, and (2) the flagrancy of any police misconduct) did not; collectively, the factors favored the government; because the discovery of the evidence was sufficiently attenuated from the alleged constitutional violation, the evidence did not have to be suppressed as the fruit of the poisonous tree. (Judge Graves filed a concurring opinion.)

United States v. Ortiz, 781 F.3d 221 (5th Cir. 2015) Agents had reasonable suspicion to stop defendant suspected of (and eventually convicted of) false statements in connection with the acquisition of a firearm ("straw-buying") based on a tip from the gun-shop employee from whom defendant bought the firearms; additionally, the warrantless search of defendant's vehicle was permissible under the automobile exception because defendant's own statements to the agents provided probable cause for the search.

United States v. Alvarado-Zarza, 782 F.3d 246 (5th Cir. 2015) The Fifth Circuit reversed the district court's denial of defendant's motion to suppress the evidence of cocaine found during a stop for a traffic violation premised on defendant's failure to signal properly before turning; the record demonstrated that the stopping officer had an incorrect legal understanding of the traffic statute that he sought to invoke (he thought simply changing lanes was an event requiring an advance signal); although an objectively reasonable mistake of law does not violate the Fourth Amendment, see Heien v. North Carolina, ____ U.S. ____, 135 S. Ct. 530 (2014), here the mistake of law was not objectively reasonable because the relevant interpretive case law far predated the stop in this case and the statute on its face gave no support to the officer's erroneous interpretation of the statute; the officer also committed a critical mistake of fact in this case; it was not objectively reasonable for the officer to conclude that defendant had failed to signal 100 feet prior to turning; in fact, when the law in question is given its proper interpretation, the evidence (the video of the stop and the defense expert's testimony) showed that defendant had signaled 300 feet before actually turning (as opposed to simply changing lanes)).

III. INTERROGATIONS AND CONFESSIONS

United States v. Blevins, 755 F.3d 312 (5th Cir. 2014): In prosecution for drug and gun charges, the district court did not err in denying defendant's motion to suppress statements given after she was given Miranda warnings; unlike in Missouri v. Seibert, 542 U.S. 600 (2004), there was no evidence that the Mirandized statements were the product of a deliberate earlier questioning "outside Miranda."

United States v. Boche-Perez, 755 F.3d 327 (5th Cir. 2014) The district court did not err in declining to suppress defendant's first two confessions based on lack of prompt presentment to a magistrate; even though these confessions were made outside the six-hour "safe harbor" period set out in 18 U.S.C. § 3501, such confessions still do not warrant suppression if the delay was reasonable under the pre-§ 3501 McNabb/Mallory line of cases; here, the delay was reasonable for both of those two confessions; the Fifth Circuit declined to address the third confession because, even if it should have been suppressed for lack of prompt presentment, the error was harmless; furthermore, the confessions were all voluntary; finally, the failure to give fresh Miranda warnings before the last confession did not taint that confession, because defendant had been given Miranda warnings before each of his two earlier confessions; additional warnings were not required. (Judge Dennis filed a concurring opinion.)

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) In prosecution of defendant for aiding and abetting bank robbery (in violation of 18 U.S.C. §§ 2113(a) and 2), district court did not err in denying defendant's motion to suppress his interrogation video because the totality of the circumstances supported the conclusion that defendant was properly apprised of his Miranda rights and that his confession was knowing and voluntary.

United States v. Wright, 777 F.3d 769 (5th Cir. 2015) Defendant, ultimately charged with and convicted of possession and distribution of child pornography, was not "in custody" for Miranda purposes where, while numerous officers were executing a search warrant on defendant's residence, defendant went into a police vehicle and was questioned for about an hour by two law enforcement officers; defendant was told he was not under arrest and was free to leave.

United States v. Ortiz, 781 F.3d 221 (5th Cir. 2015) Defendant, ultimately charged with and convicted of false statements in connection with the acquisition of a firearm ("straw-buying"), was not "in custody" for Miranda purposes where he was questioned in a law-enforcement vehicle by two agents for about 20 minutes. (Judge Graves filed an opinion concurring in part and dissenting in part, in which he dissented from this holding. He would have found that defendant was "in custody.")

IV. OTHER PRETRIAL MATTERS

A. Double Jeopardy/Multiplicity

United States v. Conlan, 786 F.3d 380 (5th Cir. 2015) Defendant's two convictions under 18 U.S.C. § 2261A(2) were not multiplicitous and did not violate the Double Jeopardy Clause, even though they arose out of the same conduct; the unit of prosecution for § 2261A(2) is the targeted individual, and thus the government need to prove different intents to harm two victims to convict the defendant on the two separate counts.

B. Speedy Trial/Continuance/Pre-Indictment Delay/Statute of Limitations/IAD

Musacchio v. United States, cert. granted, ____ U.S. ____, 135 S. Ct. 2889 (June 29, 2015) (No. 14-1095) (decision below: United States v. Musacchio, 590 Fed. Appx. 359 (5th Cir. 2014) (unpublished)) Is a statute-of-limitations defense not raised at or before trial reviewable on appeal?

United States v. Blevins, 755 F.3d 312 (5th Cir. 2014): In prosecution for drug and gun charges, the district court did not abuse its discretion in dismissing, under the Speedy Trial Act, the first indictment against defendant without prejudice, and thus it properly denied defendant's motion to dismiss the second indictment; the seriousness of the charges, the absence of prejudice to the defendant, and most of the other relevant factors weighed in favor of dismissal without prejudice.

United States v. Curtis, 769 F.3d 271 (5th Cir. 2014) (on reh'g) Where federal defendant convicted of bankruptcy fraud under 18 U.S.C. § 152 challenged his conviction under 28 U.S.C. § 2255 for alleged ineffective assistance of counsel, defendant was not entitled to relief based on trial attorney's failure to research the statute-of-limitations because the indictment was, in fact, timely; pursuant to Fed. R. Crim. P. 45(a)(1)(A) (which the Fifth Circuit found to apply here), where defendant's bankruptcy discharge occurred on July 23, 2003, the statute of limitations did not begin to run until the next day; therefore, the indictment, which was filed on July 23, 2008, was filed within (albeit on the last day of) the five-year limitations period.

United States v. Lewis, 774 F.3d 837 (5th Cir. 2014) Defendant waived his arguments that he was prosecuted outside the applicable statute of limitations by failing to raise his statute-of-limitations defense until a post-conviction motion for judgment of acquittal; a statute-of-limitations defense is an affirmative defense that must be affirmatively asserted ***at trial*** in order to preserve it for appeal; by requiring a defendant to raise and develop his statute-of-limitations defense at trial, the prosecution will have a chance to rebut the defendant's arguments with evidence of its own.

United States v. Diehl, 775 F.3d 726 (5th Cir. 2015) Defendant's charges of production of child pornography (in violation of 18 U.S.C. § 2251(a)) were not subject to the five-year statute of limitations in 18 U.S.C. § 3282(a); rather, a violation of § 2251(a) is "an offense involving the sexual or physical abuse of a child under the age of 18 years" which, under 18 U.S.C. § 3283, could be prosecuted up until the child attained the age of 25 years; because it was undisputed that none of defendant's minor victims had attained the age of 25 at the time of the indictment, the indictment was timely.

United States v. Tavarez-Levario, 788 F.3d 433 (5th Cir. 2015) The offense of "use" of an immigration document, "knowing it to be forged, counterfeited, altered, or falsely made" or "procured by fraud or unlawfully obtained" – in violation of 18 U.S.C. § 1546(a) – is not a "continuing offense" for statute-of-limitations purposes; consequently, the indictment in this case was filed outside the applicable five-year limitations period; accordingly, the Fifth Circuit reversed defendant's conviction and remanded for dismissal of the indictment.

C. Conflict of Interest/Recusal

D. Severance

E. Other

Luis v. United States, cert. granted, ____ U.S. ____, 135 S. Ct. 2798 (June 8, 2015) (No. 14-419) (decision below: United States v. Luis, 564 Fed. Appx. 493 (11th Cir. 2014) (unpublished)) Does the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments?

United States v. Blevins, 755 F.3d 312 (5th Cir. 2014): In prosecution for drug and gun charges, indictment adequately charged, and gave defendant notice that she was being charged with, possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); the fact that the indictment also included surplus language pertaining to a "use or carrying" violation of § 924(c) was, at most, a technical defect that did not obscure which offense was being charged; any ambiguity in the charge's language was cured by the caption of the charge.

V. DISCOVERY/PRETRIAL INVESTIGATION & PREPARATION

United States v. Boyd, 773 F.3d 637 (5th Cir. 2014) District court did not abuse its discretion in denying tax-evasion defendant Criminal Justice Act funding under 18 U.S.C. § 3006A(e) for a neuropsychological examination to determine whether defendant suffered from a mental impairment that contributed to a good-faith belief that the tax returns he filed were truthful and lawful; there was no evidence of any concerns about defendant's cognitive abilities during the time period in question.

VI. TRIAL

A. Jury Selection

Foster v. Chatman [name under which cert. granted: Foster v. Humphrey], cert.

granted, ____ U.S. ____, 135 S. Ct. 2349 (May 26, 2015) (No. 14-8349) Did the Georgia courts erred in failing to recognize race discrimination under Batson v. Kentucky in the extraordinary circumstances of this death penalty case?

United States v. Rosbottom, 763 F.3d 408 (5th Cir. 2014) In prosecution for bankruptcy fraud and related charges, defendants were not entitled to relief under the Jury Selection and Service Act of 1968, 28 U.S.C § 1863 et seq., ("JSSA") based on the district court's refusal to strike a reserve deputy marshal for Bossier City, Louisiana; the defendants' JSSA challenge was not timely under 28 U.S.C. § 1867(d) because that challenge could have been, but was not, made before voir dire examination began.

B. Admission and Exclusion of Evidence

United States v. Willett, 751 F.3d 335 (5th Cir. 2014) Even assuming arguendo that district court, in healthcare-fraud bench trial, erred in excluding evidence of an exculpatory polygraph result by defendant under Fed. R. Evid. 403 as prejudicial, the error was harmless in this case.

United States v. Gutierrez-Mendez, 752 F.3d 418 (5th Cir. 2014) In prosecution for alien-harboring conspiracy and substantive alien-harboring charges, district court abused its discretion in admitting, pursuant to Fed. R. Crim. P. 404(b), evidence of a 2009 traffic stop (not culminating in arrest or prosecution), in which defendant was discovered to have two aliens in his vehicle; the government failed to establish the evidence's conditional relevance under Fed. R. Evid. 104(b) because it presented insufficient evidence that defendant knowingly harbored illegal aliens at the time of the traffic stop; however, the improperly admitted evidence was harmless, in light of (1) that evidence's weak and benign nature relative to the conduct for which defendant was on trial, and (2) the multiple limiting instructions given by the district court.

United States v. Davis, 754 F.3d 278 (5th Cir. 2014) In bench trial for passing an altered obligation of the United States with intent to defraud:

(1) District court did not plainly err in admitting the counterfeit $100 bill allegedly passed by defendant at the Dollar Tree store on April 11, 2012; the bill introduced into evidence was, under the circumstances, adequately authenticated as the one passed by defendant;

(2) District court did not plainly err in admitting the in-court identifications of three Dollar Tree employees; as to two of the employees, even if the out-of-court identifications were impermissibly suggestive, there was no substantial likelihood of irreparable misidentification; as to the third employee, risk of misidentification was a closer question, but defendant's substantial rights were not affected, in light of the identification of the defendant by the two other employees.

United States v. Medeles-Cab, 754 F.3d 316 (5th Cir. 2014) At defendant's trial for possession of cocaine with intent to distribute, district court did not err, much less plainly err, in admitting agent's testimony; contrary to defendant's argument, the testimony was not improper

drug courier profile evidence; inadmissible drug courier profile testimony involves an agent drawing a direct connection between a drug courier characteristic (or characteristics) and the defendant in order to establish the defendant's guilt; if, however, the agent merely testifies to certain characteristics of drug trafficking, without drawing the connection, the testimony is generally admissible; here, the agent's testimony fit comfortably within that category of permissible testimony that includes explanations of conduct or methods of operation unique to the drug business.

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) In prosecution of defendant for aiding and abetting bank robbery (in violation of 18 U.S.C. §§ 2113(a) and 2), district court did not abuse its discretion in refusing to admit, at defendant's trial, evidence that pleading co-defendant had robbed another bank about two weeks before the bank robbery that was the subject of the trial here; district court did not err in refusing to admit the interrogation video of an uncharged passenger in defendant's car, because defendant did not establish why the interrogation video fell under a hearsay exception; finally, district court did not abuse its discretion in excluding evidence of pleading co-defendant's mental condition because defendant did not provide any reason why this was error.

United States v. Escobedo, 757 F.3d 229 (5th Cir. 2014) Where defendant initially agreed to plead guilty to a charge of conspiracy to transport an illegal alien in the United States, but then withdrew his plea as a matter of right before it was accepted by the district court, it was reversible error, at the later trial on that charge, to allow the prosecution to introduce evidence of the withdrawn guilty plea and related inculpatory statements; although the plea agreement for the failed plea purported to contain a waiver of defendant's rights (under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410) to keep out such evidence, the Fifth Circuit concluded that the plea agreement was ambiguous respecting whether that waiver provision was meant to be effective immediately or whether, rather, it was meant to be contingent upon the district court's acceptance of the plea, which never occurred; because an ambiguous plea agreement must be reasonably construed in favor of the defendant, the district court erred in reading the waiver as taking effect immediately rather than upon its acceptance of the guilty plea; hence, the district court also erred in allowing the government to introduce defendant's withdrawn guilty plea and related inculpatory statements at trial; accordingly, the Fifth Circuit reversed defendant's conviction and remanded for further proceedings.

United States v. Blocker, 759 F.3d 486 (5th Cir. 2014) In jury trial on charges of conspiracy to possess with intent to distribute 500 or more grams of methamphetamine and distribution of smaller quantities of methamphetamine, the district court did not abuse its discretion in admitting, pursuant to Fed. R. Evid. 404(b), defendants' convictions for possession of methamphetamine and manufacturing methamphetamine; under United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993), a prior conviction for narcotics possession or manufacture is probative of a defendant's intent when he is charged with conspiracy to distribute; furthermore, the convictions were not too remote to be considered; remoteness may weaken a conviction's probative value, but remoteness have never been held to be a per se bar to the admission of a prior conviction; moreover, any unfair prejudice was alleviated by the district court' limiting instruction.

United States v. Vasquez, 766 F.3d 373 (5th Cir. 2014) In prosecution for conspiracy to possess methamphetamine with intent to distribute, district court did not err in admitting, pursuant to Fed. R. Evid. 404(b), evidence of defendant's prior California conviction for possession of heroin, notwithstanding defendant's objection that there was insufficient evidence that he was the one convicted; the government need only provide ***some*** evidence that the defendant committed the prior bad act; here, the California police officer who made the 1998 arrest testified that defendant looked just like the pictures of the person convicted in California, who also had the same last name as defendant; district court also did not plainly err under Fed. R. Evid. 403 in admitting a picture, found on defendant's phone, of an AK-47; plain-error review applied because, although defendant objected at his first trial, a mistrial was declared, and he did not object at the second trial.

United States v. Lewis, ____ F.3d ____, 2015 WL 4743670 (5th Cir. Aug. 10, 2015) In trial of defendant charged with violating 18 U.S.C. § 2423(a) by transporting persons under the age of 18 years across state lines with the intent that they engage in criminal sexual activity, the district court did not plainly err in admitting evidence of uncharged sexual assaults by defendant.

C. Cross-Examination/Confrontation/Compulsory Process

Ohio v. Clark, ____ U.S. ____, 135 S. Ct. 2173 (2015) (decision below: State v. Clark, 999 N.E.2d 592 (Ohio 2013)) Where defendant was charged with child abuse, it did not violate defendant's Confrontation Clause rights to introduce against him one child's out-of-court statement, made to his preschool teachers, that defendant was the one who had inflicted injuries upon him; the child's statement was not "testimonial" within the meaning of the Confrontation Clause because it was not made with the primary purpose of creating evidence for defendant's prosecution, and it did not bear other hallmarks of a testimonial statement; indeed, statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers; it was irrelevant that the teachers' questions and their state-law-mandated duty to report had the natural tendency to result in defendant's prosecution. (Justice Scalia filed an opinion concurring in the judgment, in which he was joined by Justice Ginsberg. Justice Thomas filed an opinion concurring in the judgment, expressing his view that the child's statements did not bear sufficient indicia of solemnity to qualify as testimonial.)

United States v. Rosbottom, 763 F.3d 408 (5th Cir. 2014) In prosecution for bankruptcy fraud and related charges, defendants' constitutional rights were not violated by the district court's limitation of further questioning into the bankruptcy trustee's alleged bias; to the limited extent that any such bias was relevant to the case against defendants, defendants retained ample room to explore the issue of the trustee's bias at trial.

United States v. Vasquez, 766 F.3d 373 (5th Cir. 2014) In prosecution for conspiracy to possess methamphetamine with intent to distribute, district court did not plainly violate the Confrontation Clause rights of one defendant by admitting, at their joint trial, evidence that the second defendant had made a jailhouse confession to another inmate; most of the circuits have

held that the rule of Bruton v. United States, 391 U.S. 123, 126-28 (1968), applies only to statements of co-defendants that are "testimonial" under Crawford v. Washington, 541 U.S. 36, 51 (2004), and the Supreme Court has described "statements from one prisoner to another" as "clearly nontestimonial" under Crawford.

United States v. Richardson, 781 F.3d 237 (5th Cir. 2015) The trial testimony of a government witness, elicited in contravention of the defendant's right to self-representation, constitutionally may be admitted in the defendant's retrial when the witness becomes unavailable between the first and the second trials and when the defendant had an adequate opportunity for cross-examination at the first trial, at least when the defendant has not claimed that he received ineffective assistance of counsel at the first trial; therefore, at retrial following reversal of defendant's conviction for improper denial of his right to proceed pro se, the district court did not violate defendant's Sixth Amendment right to confrontation by allowing the introduction of the testimony of a witness (murdered between the first trial and the second trial), even though the cross-examination was conducted through an attorney whom defendant did not want; although the cross-examination may not have been exactly as the defendant wished it, it was adequate and meaningful under the law, and did not constitute ineffective assistance of counsel.

United States v. Ceballos, 789 F.3d 607 (5th Cir. 2015) In alien-transporting trial, defendant waived her Confrontation Clause challenge to the out-of-court testimony of the alien she was supposed to pick up; counsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent strategy; a permissible waiver of the right of confrontation is not contingent on evidence that the defendant affirmatively and personally agreed to counsel's stipulation; she just must not dissent from that decision.

D. Prosecutorial/Judicial Misconduct

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) In prosecution of defendant for aiding and abetting bank robbery (in violation of 18 U.S.C. §§ 2113(a) and 2):

(1) Where a potential defense witness (an uncharged passenger in defendant's car on the day of the bank robbery) initially agreed to testify for the defendant, but then changed his mind and exercised his Fifth Amendment right not to testify, there was no viable claim of governmental interference with the defense witness, because an on-the-record colloquy between the witness and his attorney showed that the witness's decision not to testify was a result of a deliberative process free and clear of government intimidation.

(2) Prosecutor's argument that the uncharged participant was facing life in prison in state court was improper because it referenced facts not in evidence at trial; however, that improper comment did not warrant reversal because (1) the jury was instructed to disregard the comment and was also several times instructed that the attorneys' arguments were not evidence; (2) the comment had nothing to do with defendant; and (3) the other evidence of defendant's guilt was

more than sufficient to convict defendant.

United States v. Rodriguez-Lopez, 756 F.3d 422 (5th Cir. 2014) In prosecution for conspiracy to distribute marijuana, it was improper for prosecutor to refer, in closing argument, to second defendant's counsel as "lend[ing] [his] credibility to representing drug traffickers and firearms dealers"; "[d]isparaging defense counsel's motives for representencing a criminal defendant is a foul blow"; however, the district court did not abuse its discretion in denying second defendant's motion for a new trial on the basis of this remark, given the district court's prompt rebuke of the remark, the curative instructions given, and the strength of the evidence against the second defendant.

United States v. Wright, 777 F.3d 769 (5th Cir. 2015) In trial of defendant charged with possession and distribution of child pornography, even if the government violated Doyle v. Ohio, 426 U.S. 610 (1976), by commenting, during closing argument, on defendant's refusal to answer certain questions during his interrogation, any error was harmless beyond a reasonable doubt under the circumstances of this case.

E. Jury Instructions

United States v. Salazar, 751 F.3d 326 (5th Cir. 2014) In drug and gun case, district court did not abuse its discretion in refusing to give an instruction on withdrawal as a defense to conspiracy charges; to be timely, withdrawal from a conspiracy must precede the commission of an overt act; here, by the time defendant attempted to withdraw, several overt acts in furtherance of both conspiracies had occurred.

United States v. Phea, 755 F.3d 255 (5th Cir. 2014) In trial of defendant for sex trafficking of a minor (in violation of 18 U.S.C. § 1591(a)) and aiding and abetting the promotion of prosecution (in violation of 18 U.S.C. § 1952(a)(3)):

(1) Any error in instructing the jury that a § 1591(a) conviction could lie simply where the defendant had a reasonable opportunity to observe the victim (i.e., making the victim's minority essentially strict liability, without requiring that the defendant have known or at least recklessly disregard that fact) was not plain, given the lack of any Fifth Circuit decision on the question, and given the fact that the Second Circuit had rejected the defendant's argument.

(2) Any error in failing to require the jury to find that § 1591(a) requires the defendant to have known that his conduct affected interstate commerce was not plain, given the lack of a Fifth Circuit decision on this point, and given that at least two circuits have declined to impose such a requirement.

United States v. Colorado Cessa, 785 F.3d 165 (5th Cir. 2015) In a case charging an 18 U.S.C. § 1956(h) conspiracy to commit concealment-type money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), the district court abused its discretion in instructing the jury that "the commingling of illegal proceeds with legitimate business funds is evidence of intent to conceal or

disguise"; a jury instruction must make clear that an inference of this type is permissive and not mandatory, and this instruction does not do so; although this error was harmless beyond a reasonable doubt as to two defendants, it was not harmless as to another defendant; accordingly, the Fifth Circuit vacated that defendant's conviction, sentence, and money judgment and remanded for further proceedings.

United States v. Macedo-Flores, 788 F.3d 181 (5th Cir. 2015) In trial of drug offenses, district court did not abuse its discretion in denying defendant's request for an instruction on sentencing entrapment (i.e., that the agents purposefully inflated the drug quantity); although the Fifth Circuit has never recognized this defense, the court has stated that, if it did accept the defense, it would only be cognizable in cases involving "true entrapment" or where there is proof of overbearing and outrageous conduct on the government's part; defendant's case did not meet this standard.

F. Jury Deliberations and Verdict/Publicity

United States v. Salazar, 751 F.3d 326 (5th Cir. 2014):

(1) In drug and gun case, defendant did not "invite" the district court's error in directing a verdict of guilty against him in violation of his Sixth Amendment right to trial by jury; nothing in the record suggested that defendant wished to change his plea of not guilty to a plea of guilty or that defendant consented to the directed verdict; likewise defendant did not forfeit this error so as to trigger plain-error review; the district court explicitly acknowledged that defendant was preserving this argument for appeal; even though defense counsel did not specifically reference the Sixth Amendment interest at stake or provide any legal authority demonstrating error, the court was well aware of the issue before it.

(2) By telling the jury "to go back and find the Defendant guilty," district court improperly directed a verdict in violation of defendant's Sixth Amendment right to trial by jury; it did not matter that the defendant took the stand and essentially confessed to the crimes for which he was on trial; nothing suggests that the defendant wished to change his plea to guilty, and no amount of compelling evidence can override a defendant's right to have a jury determine his guilt; because this error was not susceptible of harmless-error analysis, the Fifth Circuit vacated defendant's convictions and remanded for further proceedings.

G. Other

Warger v. Shauers, ____ U.S. ____, 135 S. Ct. 521 (2014) (decision below: Warger v. Shauers, 721 F.3d 606 (8th Cir. 2013)) Federal Rule of Evidence 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during voir dire. **(NOTE: The Supreme Court observed that the Fifth Circuit had held to the contrary in Missouri v. P.R. Co., 798 F.2d 764, 770 (5th Cir. 1986).)**

United States v. Davis, 754 F.3d 278 (5th Cir. 2014) In bench trial for passing an altered obligation of the United States with intent to defraud, district court did not plainly err in having defendant handcuffed and shackled at trial; first, it is unclear – and thus not "plain" – the extent to which the judicial prohibition on such restraints applies to bench trials, as opposed to jury trial; in any event, the record demonstrated circumstances making it apparent that shackling was justified, including threatening witnesses in this case and previous cases.

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) In prosecution of defendant for aiding and abetting bank robbery (in violation of 18 U.S.C. §§ 2113(a) and 2), district court did not abuse its discretion in denying defendant's motion for new trial based on newly discovered evidence; part of that newly discovered evidence would be inadmissible at trial, and inadmissible evidence may not form the basis for a new trial based on newly discovered evidence; with regard to the other newly discovered evidence (that the co-defendant was found incompetent to stand trial), defendant did not explain how it would have assisted in his defense.

United States v. Rodriguez-Lopez, 756 F.3d 422 (5th Cir. 2014) In prosecution for conspiracy to distribute marijuana, one defendant's challenge to venue was waived by his failure to specifically make a venue argument in his motion for judgment of acquittal; regardless, even if it were not waived, venue was proper in the Eastern District of Texas; venue is proper in conspiracy offense in any district where the agreement was formed or an overt act occurred.

United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014) In prosecution for racketeering/murder charges arising out of activities of the Texas Mexican Mafia, defendant's argument that, under the Juvenile Justice and Delinquency Act, district court lacked jurisdiction to try defendant on racketeering conspiracy was foreclosed by United States v. Tolliver, 61 F.3d 1189 (5th Cir. 1995), judgment vacated on other grounds by Moore v. United States, 519 U.S. 802 (1996); under Tolliver, a defendant, after he turns 18, may be tried for a conspiracy which temporally overlaps his 18th birthday, if the government can show that the defendant ratified his involvement in the conspiracy after reaching the age of majority; moreover, ratification in this context simply means that a defendant continues to participate in an ongoing conspiracy after his 18th birthday; given the considerable evidence of defendant's post-18 engagement in the RICO conspiracy, the district court had jurisdiction to try defendant on that charge.

United States v. Hollingsworth, 783 F.3d 556 (5th Cir. 2015) Where defendant was charged with a petty offense committed on a federal enclave (a naval air station in Belle Chasse, Lousiana), it was not unconstitutional for a magistrate judge to try him, convict him, and sentence, even without his consent; he had no right to trial before an Article III judge. (Judge Higginbotham filed a concurring opinion stressing that his agreement with the majority opinion turned in large part on the fact that this was a petty offense. Judge Higginson filed a dissenting opinion, stating that he would hold that, absent consent, it was not constitutional for a non-Article III judge to try and convict a person unless an Article III judge reserves the ultimate decision-making authority.)

United States v. Mix, 791 F.3d 603 (5th Cir. 2015) In trial of BP engineer for obstruction of justice (based on deleting a text message exchange between himself and his boss respecting the amount of oil spilling out of the Macondo well as a consequence of the Deepwater Horizon accident), district court did not abuse its discretion in granting defendant a new trial based on extrinsic influence on the jury (namely, one juror's overhearing that other BP employees were going to be prosecuted, and her telling other jurors that she had overheard something that gave her comfort in pleading guilty); to be entitled to a new trial based on an extrinsic influence on the jury, a defendant must first show that the extrinsic influence likely caused prejudice; the government then bears the burden of proving the lack of prejudice; here, defendant met his initial burden of showing that prejudice was likely, and the government did not meet its burden of showing a lack of prejudice; accordingly, the Fifth Circuit affirmed the district court's order granting a new trial.

United States v. McRae, ____ F.3d ____, 2015 WL 4542651 (5th Cir. July 28, 2015) Defendant (a former New Orleans police officer charged with offenses arising out of a police cover-up in the aftermath of Hurricane Katrina) was not entitled to a new trial based upon his post-trial diagnosis of suffering from post-traumatic stress disorder at the time of his offenses; likewise, he was not entitled to a new trial based on evidence that persons in the Department of Justice, not directly involved in his trial, made anonymous postings about his proceedings in the comments sections of various NOLA.com articles.

VII. GUILTY PLEAS

A. Rule 11/Boykin Errors

B. Breach of Plea Agreement

United States v. Chavful, 781 F.3d 758 (5th Cir. 2015) Where government, in its plea agreement with defendant, agreed that information obtained from defendant's cooperation was "not to be used to increase [defendant's] Sentencing Guideline level or used against [defendant] for further prosecution, and where agreement specifically referenced USSG § 1B1.8, the government breached the plea agreement by using protected information to increase his sentence; accordingly, the Fifth Circuit vacated defendant's sentence and remanded the case for resentencing by a different district judge.

C. Other

VIII. SENTENCING

A. Constitutional Challenges

Johnson v. United States, ____ U.S. ____, 135 S. Ct. 2551 (2015) (decision below: United States v. Johnson, 526 Fed. Appx. 708 (8th Cir. 2013) (unpublished)) The residual clause in the Armed Career Criminal Act of 1984, 18 U. S. C. §924(e)(2)(B)(ii), is unconstitutionally vague; because defendant was found to qualify as an armed career criminal on the basis of a conviction for unlawful possession of a short-barreled shotgun (which qualified as a predicate "violent felony" only under the residual clause), the Supreme Court reversed the Eighth Circuit's decision affirming defendant's enhanced sentence under the ACCA and remanded for further proceedings. (Justice Kennedy filed an opinion concurring in the judgment. He disagreed that the residual clause was vague, but would hold that defendant's prior conviction for possession of a short-barreled shotgun nevertheless was not a "violent felony" under the residual clause or otherwise. Justice Thomas filed an opinion concurring in the judgment. He disagreed that the residual clause was vague (and questioned the Court's vagueness precedents), but would hold that defendant's prior conviction for possession of a short-barreled shotgun nevertheless was not a "violent felony" under the residual clause or otherwise. Justice Alito filed a dissenting opinion. He would hold that defendant's conviction qualified as a "violent felony" and that the residual clause is not vague.)

Glossip v. Gross, ____ U.S. ____, 135 S. Ct. 2726 (2015) (decision below: Warner v. Gross, 776 F.3d 721 (10th Cir. 2015)) The Tenth Circuit did not err in affirming the district court's denial of Oklahoma death-row inmates' motion for a preliminary injunction to enjoin the use of midazolam as the first drug in a three-drug execution protocol, because the inmates failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment; the inmates failed to establish that any risk of harm from the use of midazolam was substantial when compared to a known and alternative method of execution; the district court did not commit clear error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride (the second and third drugs in the three-drug protocol). (Justice Scalia and Justice Thomas each filed a concurring opinion responding to Justice Breyer's dissenting opinion. Justice Breyer filed a dissenting opinion, joined by Justice Ginsburg, in which he joined Justice Sotomayor's dissenting opinion, but also expressed at some length his view that it is "highly likely that the death penalty violates the Eighth Amendment" and that the Court should call for full briefing on that question. Justice Sotomayor filed a dissenting opinion on the midazolam issue, joined by Justices Ginsburg, Breyer, and Kagan.)

Hurst v. Florida, cert. granted, ____ U.S. ____, 135 S. Ct. 1531 (Mar. 9, 2015) (granting cert. to Hurst v. State, 147 So.3d 435 (Fla. 2014) Does Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002)?

Montgomery v. Louisiana, cert. granted, ____ U.S. ____, 135 S. Ct. 1546 (Mar. 23, 2015) (granting cert. to State v. Montgomery, 141 So.3d 264 (La. 2014)) QUESTION PRESENTED BY THE PETITION: Is the holding of Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, 83 L.Ed.2d 407 (2012) – namely that it violates the Eighth Amendment to require lifetime incarceration without the possibility of parole for persons convicted of homicides

committed when under age 18 – a new substantive rule which applies retroactively to covered persons whose convictions were final before Miller was handed down? QUESTION ADDED BY THE COURT: Does the United States Supreme Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to the United States Supreme Court's decision in Miller?

Kansas v. Carr, cert. granted, ____ U.S. ____, 135 S. Ct. 1698 & ____ U.S. ____, 135 S. Ct. 1698 (No. 14-449 c/w No. 14-450) (granting cert. to State v. Carr, 329 P.3d 1195 (Kan. 2014) & State v. Carr, 331 P.3d 544 (Kan. 2014)) (1) Does the Eighth Amendment require that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or is the Eighth Amendment instead satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances? (2) Did the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here – a decision that comports with the traditional approach preferring joinder in circumstances like this -- violate an Eighth Amendment right to an "individualized sentencing" determination; and was the decision to sever harmless in any event?

Kansas v. Gleason, cert. granted, ____ U.S. ____, 135 S. Ct. 1698 (Mar. 30, 2015) (No. 14-452) (granting cert. to State v. Gleason, 329 P.3d 1102 (Kan. 2014)) Does the Eighth Amendment require that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or is the Eighth Amendment instead satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

Jordan v. Epps, 756 F.3d 395 (5th Cir. 2014) Where (1) Mississippi capital defendant entered into an agreement for life without parole in exchange for his promise not to challenge his sentence, (2) but then he successfully challenged his sentence on the ground that life with parole was not a permissible statutory option at the time, and (3) on remand, the prosecutor refused to offer the same life-without-parole agreement, and successfully sought a death sentence at trial, defendant was not entitled to a certificate of appealability ("COA") on his claim of prosecutorial vindictiveness; there was no evidence of actual vindictiveness; the fact that the prosecutor refused to enter into a new sentence agreement due to defendant's previous violation of his agreement not to challenge his sentence did not establish actual vindictiveness; nor did defendant make out a claim of presumptive vindictiveness; under Fifth Circuit law, no presumption of vindictiveness arises where there is no change in the charges filed or punishment sought; here, defendant was always subject to the death penalty that was ultimately imposed upon him. (Judge Dennis filed an opinion concurring in part and dissenting in part. He would hold that defendant had made out a sufficient showing of presumptive vindictiveness to warrant the granting of a COA.)

United States v. Blocker, 759 F.3d 486 (5th Cir. 2014) The United States Supreme Court's decision in Alleyne v. United States, ____ U.S. ____, 133 S. Ct. 2151 (2013), did not

overrule Almendarez-Torres v. United States, 523 U.S. 224, 239-47 (1998), which held that the Constitution does not require prior convictions to be treated like offense elements (i.e., charged in an indictment or proved to a jury beyond a reasonable doubt) even where they raise the statutory maximum (or, after Alleyne, the statutory minimum); because the prior-conviction exception of Almendarez-Torres survived Alleyne, it was not unconstitutional to enhance defendants' sentence under 21 U.S.C. § 851 notwithstanding the lack of a grand jury indictment charging the prior convictions and the lack of a jury finding beyond a reasonable doubt in this case.

United States v. Myers, 772 F.3d 213 (5th Cir. 2014) In false-claims/fraud/identity-theft/tax-fraud case, it was a plain violation of the Ex Post Facto Clause (applicable to the advisory Sentencing Guidelines, as made clear in Peugh v. United States, 133 S. Ct. 2072 (2013)) to sentence defendant under the 2012 Guidelines in effect on the date of sentencing because the 2007 Guidelines in effect on the date of the commission of the offense were significantly more lenient; particularly, due to a more stringent definition of who constituted a "victim" of the offense, defendant would not have received a six-level enhancement for 250 or more "victims"; because this raised defendant's Guideline range from 46 to 57 months, up to 87 to 108 months, defendant's substantial rights were affected, and the Fifth Circuit exercised its discretion to vacate defendant's sentence and remand for resentencing.

United States v. King, 773 F.3d 48 (5th Cir. 2014) In sentencing defendant for a drug offense, the Fifth Circuit, joining four other federal circuits, held that there is no constitutional error under Alleyne v. United States, 133 S. Ct. 2151 (2013), in permitting a judge to find the facts that render the "safety valve" exception to mandatory-minimum sentences (see 18 U.S.C. § 3553(f)) inapplicable; the "safety valve" does not increase the mandatory minimum; it removes it.

B. Rule 32/Other Statutory Challenges

Lockhart v. United States, cert. granted, ____ U.S. ____, 135 S. Ct. 2350 (May 26, 2015) (No. 14-8358) (decision below: United States v. Lockhart, 749 F.3d 148 (2d Cir. 2014) Is the mandatory minimum sentence of 18 U.S.C. § 2252(b)(2) is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward"? (NOTE: The Fifth Circuit answered this question in the affirmative in United States v. Hubbard, 480 F.3d 341, 350 (5th Cir. 2007).)

Luna Torres v. Lynch, cert. granted, ____ U.S. ____, 135 S. Ct. 2918 (June 29, 2015) (No. 14-1096) (decision below: Luna Torres v. Holder, 764 F.3d 152 (2d Cir. 2014)) Does a state offense constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks? (NOTE: The Fifth Circuit answered this question in the affirmative in Nieto Hernandez v. Holder, 592 F.3d 681, 685 (5th Cir. 2009).)

Contreras v. Holder, 754 F.3d 286 (5th Cir. 2014) Pretermitting the question whether Chevron deference was owed to the interpretation of the Board of Immigration Appeals' definition of the term "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A), the Fifth Circuit held that, even under its differing definition of the term, defendant's prior conviction under the first paragraph of Va. Code § 18.2-63 (1992) (for carnal knowledge of a child 13 or 14 years old without the use of force) was the "aggravated felony" of "sexual abuse of a minor."

United States v. Blevins, 755 F.3d 312 (5th Cir. 2014) Where a penalty enhancement information under 21 U.S.C. § 851(a) was filed in connection with a first indictment that was dismissed without prejudice for a Speedy Trial Act violation, that information was no longer valid for the new prosecution resulting from the filing of a second indictment; the propriety of sentence enhancement thus turned on whether the penalty enhancement information filed during the ***second*** prosecution was valid; because that required the resolution of factual questions about whether the defendant received proper notice of the second information, the Fifth Circuit vacated the enhanced sentence and remanded for a determination of whether the second information was properly filed and served upon defendant.

United States v. Elizondo-Hernandez, 755 F.3d 779 (5th Cir. 2014) Even after the Fifth Circuit's en banc decision in United States v. Cabecera Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 134 S. Ct. 512 (2013), defendant's conviction for indecency with a child under 17 by contact (in violation of Tex. Penal Code § 21.11(a)(1)) was still a "crime of violence" for purposes of USSG § 2L1.2; furthermore, even if the characterization of that offense as an "aggravated felony" were an issue in this case (the Fifth Circuit held that it was not), defendant's conviction was, under Fifth Circuit precedent, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F).

United States v. Mackay, 757 F.3d 195 (5th Cir. 2014) District court reversibly erred in denying defendant's motion to correct his presentence report ("PSR") under Fed. R. Crim. P. 36, which permits a district court "at any time [to] correct a clerical error in a judgment, order, or other part of the record"; because the PSR affects the right and obligations of the defendant, it is of like kind or character as a "judgment" or "order," and thus is embraced by the term "other part of the record" as used in Rule 36; moreover, the error in the PSR – referring to defendant's drug convictions as involving cocaine, not marijuana – was not harmless; accordingly, the Fifth Circuit reversed the district court's order denying correction of the PSR and remanded with instructions to the district court to correct the clerical error in the PSR.

Garcia v. Holder, 756 F.3d 839 (5th Cir. 2014) Immigrant's 1998 New Mexico conviction for auto burglary (in violation of N.M. Stat. § 30-16-3(B)) was an "aggravated felony"; the Fifth Circuit held that a conviction for unauthorized entry of a vehicle with intent to commit a theft therein constituted an attempted theft offense under 8 U.S.C. § 1101(a)(43)(G) & (U), thus rendering immigrant ineligible to apply for cancellation of removal. (Judge Garza filed a specially concurring opinion.)

United States v. Blocker, 759 F.3d 486 (5th Cir. 2014) In prosecution on charges of conspiracy to possess with intent to distribute 500 or more grams of methamphetamine and distribution of smaller quantities of methamphetamine, the error in one defendant's penalty enhancement information (under 21 U.S.C. § 851) – namely, the mischaracterization of the prior conviction upon which enhancement was predicated – did not vitiate the enhancement of defendant's sentence; the record showed that the defense was aware of the correct characterization of the prior conviction, and defendant failed to sufficiently explain how he was prejudiced by the government's error.

United States v. Sanchez-Espinal, 762 F.3d 425 (5th Cir. 2014) District court did not err in concluding that illegal-reentry defendant had previously been convicted of aggravated criminal contempt under N.Y. Penal Law § 212.52(1); furthermore, a violation of § 212.52(1) is a "crime of violence" under 18 U.S.C. § 16(b), making defendant's prior conviction an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F); the district court therefore did not err in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C).

United States v. Estrada Nava, 762 F.3d 451 (5th Cir. 2014) Where illegal-reentry defendant was sentenced in the Northern District of Texas to 27 months' imprisonment, to run consecutively to any sentence imposed upon a pending revocation of supervised release in the Western District, defendant was not entitled, on plain-error review, to vacatur of the Northern District sentence and resentencing; under United States v. Quintana-Gomez, 521 F.3d 495, 498 (5th Cir. 2008), the order to run the illegal-reentry sentence consecutively with the not-yet-imposed federal revocation sentence was clear and obvious error, satisfying the first two prongs of plain-error review; however, defendant failed to show that his substantial rights were affected, given that the Western District ultimately imposed a consecutive sentence anyway and given that consecutive sentencing was the recommendation of the Guidelines.

United States v. Rodriguez-Salazar, 768 F.3d 437 (5th Cir. 2014) The offense of theft by deception under Texas law is within the generic definition of "theft"; therefore, defendant's Texas theft conviction was a "theft offense," and thus an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(G). (Judge Southwick filed a concurring opinion.)

Franco-Casasola v. Holder, 773 F.3d 33 (5th Cir. 2014) (on reh'g) Under Descamps v. United States, 133 S. Ct. 2276 (2013), immigrant's prior conviction for violating 18 U.S.C. § 554(a) (prohibiting the export of "merchandise, article[s], or object[s] contrary to any law or regulation of the United States") is a "divisible" statute; the statute sets out a finite, though lengthy list of every statute or regulation of the United States that prohibits such export; because the statute is "divisible," it was permissible under Descamps to use the "modified categorical approach" to narrow the basis for immigrant's prior conviction, and, under that approach, to determine that the conviction was for the unlawful purchase of firearms for export, and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(C) (including as an "aggravated felony" "illicit trafficking in firearms"). (Judge Graves filed a dissenting opinion. He disagreed that the statute at issue was "divisible" under Descamps, and therefore he also disagreed with the majority's narrowing of that

statute.)

United States v. Lagrone, 773 F.3d 673 (5th Cir. 2014) Reversing course from an earlier opinion in this case, see United States v. Lagrone, 773 F.3d 673 (5th Cir. 2014), the Fifth Circuit panel held that 18 U.S.C. § 641 authorizes a felony penalty for the first theft committed when it involves less than $1,000 and would, on its own, result only in a misdemeanor penalty for the defendant, but when aggregated with one or more subsequent thefts, the total amount involved exceeds $1,000; contrary to defendant's contention that allowing felony penalties on all counts of theft when an initial theft does not exceed $1,000 make the initial theft retroactively more serious, § 641 plainly declares that ***all*** thefts are ***already*** felonies; it is only if the aggregate value of the thefts does not exceed $1,000 that the defendant may receive the benefit of § 641's lentiy provision and be sentenced under a misdemeanor penalty scheme.

United States v. Campbell, 775 F.3d 664 (5th Cir. 2014) 18 U.S.C. § 924(c)(1) does not authorize multiple convictions for a single possession of a firearm; the statute only allows for as many firearms counts as there are possessions of a firearm; in this case, it would have been error for the jury to base two § 924(c)(1) convictions on a single firearm possessed, even if it was possessed in connection with more than one predicate crime; therefore, the jury should have been required to decide the question of whether defendant possessed a second, separate firearm; however, on plain-error review, defendant was not entitled to relief from his second § 924(c)(1) conviction (for which he received a consecutive mandatory minimum sentence of 25 years in prison) because the error here was not clear or obvious.

United States v. Diehl, 775 F.3d 726 (5th Cir. 2015) Even though defendant's 600-month sentence was a substantial upward variance from the advisory Guideline imprisonment range of 210 to 262 months, that sentence was neither procedurally nor substantively unreasonable.

United States v. Fernandez, 776 F.3d 344 (5th Cir. 2015) Where defendant was convicted of failing to register as a sex offender (in violation of 18 U.S.C. § 2250(a)), the district court abused its discretion in imposing a lifetime special condition of supervised release requiring defendant to install computer filtering software to block/monitor access to sexually oriented websites for any computer he possessed or used; neither the failure-to-register offense nor defendant's criminal history had any connection to computer use or the Internet; the district court's general concerns about recidivism or that defendant would use a computer to perpetrate future sex crimes were insufficient to justify the imposition of the software-installation special condition; accordingly, the Fifth Circuit vacated that condition and remanded for entry of a corrected judgment.

United States v. Wright, 777 F.3d 769 (5th Cir. 2015) District court did not violate defendant's right, under Fed. R. Crim. P. 32(i)(4)(A)(i), to have his attorney speak on his behalf; although the district court did not permit defense counsel to respond to the government's oral presentation, defense counsel was given a full opportunity to speak before the prosecutor spoke, and the matters that the prosecution referenced were in the presentence report and hence were not new.

United States v. Fields, 777 F.3d 799 (5th Cir. 2015) In sentencing defendant convicted of failing to register as a sex offender, district court did not plainly err in imposing a special condition of supervised release prohibiting the defendant from "residing or going to places where a minor or minors are known to frequent without prior approval of the probation officer," especially given the defendant's repeated failure to comply with registration requirements and the fact that the probation officer could, in appropriate instances, authorize defendant to go to such places.

United States v. Sealed Juvenile, 781 F.3d 747 (5th Cir. 2015) In setting conditions for juvenile adjudicated delinquent on a charge of abusive sexual contact with a minor under 12, the district court did not abuse its discretion in (1) forbidding contact with children under 16 without prior probation-officer approval, (2) forbidding loitering around places primarily used by children under 16, (3) requiring monitoring of his computer and Internet use, (4) requiring juvenile to submit to searches and seizures, and (5) requiring juvenile to produce financial records; additionally, district court did not plainly err in forbidding juvenile from engaging in an occupation where he has access to children, without prior probation-officer approval; however, the Fifth Circuit found that the condition forbidding any computer or Internet use or access without prior probation-officer approval was too restrictive; accordingly the Fifth Circuit ordered that this condition "is not to be construed or enforced in such a manner that the Juvenile would be required to seek prior written approval every single time he must use a computer or access the Internet; in light of this ruling, the Fifth Circuit also struck the special condition requiring juvenile to produce evidence that no payments were made to gain access to the Internet.

United States v. Mendoza, 783 F.3d 278 (5th Cir. 2015) District court did not plainly err in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) on the basis of defendant's prior federal conviction for conspiracy to launder monetary instruments, in violation of 18 U.S.C § 1956(h); whether the money-laundering-conspiracy conviction qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(D) turned on whether more than $10,000 was laundered; this inquiry was not subject to the categorical/modified categorical approach, but rather, under Nijhawan v. Holder, 557 U.S. 29 (2009), was a circumstance-specific inquiry not subject to the proof constraints of the categorical/modified categorical approach; the evidence a court may consider under a circumstance-specific inquiry is broader than the evidence that may be considered under a modified-categorical analysis inquiry; the district court thus did not err in relying on defendant's presentence report and attached documents to determine that defendant's prior conviction involved over $10,000.

United States v. Pillault, 783 F.3d 282 (5th Cir. 2015) In sentencing defendant convicted of a threat to kill and injure and to unlawfully damage and destroy buildings by means of fire and explosives (in violation of 18 U.S.C. § 844(e)), district court did not improperly rely on rehabilitation or defendant's need for treatment in imposing its 72-month prison sentence – a significant upward variance; rather, the record showed that the primary justification for the sentence was public protection, and rehabilitation was simply a permissible secondary concern/additional justification.

United States v. Clay, 787 F.3d 328 (5th Cir. 2015) The district court misapprehended its authority to vary downward from the Guideline range established by the "career offender" Guidelines; a district court has discretion to vary from a Guideline sentencing range irrespective of whether that particular sentencing recommendation arises under the "career offender" provision in USSG § 4B1.1; a district court's sentencing discretion is no more burdened when a defendant is characterized as a "career offender" under USSG § 4B1.1 than it would be in other sentencing decisions; a district court's failure to recognize its discretion to vary in this context constitutes procedural error; because the government did not establish that the error was harmless, the Fifth Circuit vacated defendant's sentence and remanded for resentencing; the Fifth Circuit noted that the district court had, apparently inadvertently, failed to give defendant an opportunity to allocate at his first sentencing hearing, but the court was "confident that the district court will allow [defendant] an opportunity to allocate prior to resentencing."

United States v. Duke, 788 F.3d 392 (5th Cir. 2015) In sentencing defendant convicted of receipt of child pornography, the district court abused its discretion by imposing a special condition of supervised release that prohibited defendant from accessing computers or the Internet for the rest of his life; such a condition is not narrowly tailored and therefore imposes a greater deprivation than reasonably necessary to prevent recidivism and protect the public, especially in light of the ubiquity and importance of the Internet; the district court also abused its discretion by imposing an absolute, lifetime special condition of supervised release prohibiting defendant from having any contact with minors for the rest of his life; accordingly, the Fifth Circuit vacated those two special conditions of supervised release and remanded for resentencing.

C. (Selected) Guidelines Issues

United States v. Gutierrez-Mendez, 752 F.3d 418 (5th Cir. 2014) In prosecution for alien-harboring conspiracy and substantive alien-harboring charges, the Fifth Circuit noted that it was an "open question" whether it was impermissible "double-counting" to apply Sentencing Guideline enhancements under both USSG § 2L1.1(b)(5) and USSG § 2L1.1(b)(6) based upon the same conduct (here, the rape and attempted rape at knifepoint of two harbored aliens; however, the Fifth Circuit held that it did not need to resolve that question because the district court had explained that it would have given defendant the same sentence (the statutory maximum of 120 months) even if it were mistaken in its application of the Guidelines; this rendered any error harmless.

United States v. Hinojosa, 749 F.3d 407 (5th Cir. 2014) The district court did not err in assessing certain drug quantities as "relevant conduct" under the Guideline; or, if there was error, it was harmless because the drug quantity in question did not change the Guideline range; finally, the district court did not err in applying a two-level enhancement for obstruction of justice under USSG § 3C1.1; an obstructive act need only materially affect an investigation when it is done contemporaneously with the defendant's arrest; here, the allegedly obstructive act (a phone call to the defendant's sister, telling her to remind a co-defendant about an agreed-upon story) did not

occur contemporaneously with his arrest; the obstruction enhancement might also have been supported by defendant's pre-plea letter to the district judge, in which defendant denied guilt (falsely, as he later admitted).

United States v. Villegas Palacios, 756 F.3d 325 (5th Cir. 2014) District court reversibly erred in denying defendant an additional one-level reduction for acceptance of responsibility under USSG § 3E1.1(b) where the government's refusal to move for the § 3E1.1(b) reduction was based on the defendant's refusal to waive his right to appeal; under Amendment 775 to the Sentencing Guidelines, this was an improper basis to withhold the motion; even though defendant was sentenced before Amendment 775 took effect (on November 1, 2013), defendant was entitled to the benefit of Amendment 775; to the extent United States v. Newson, 515 F.3d 374 (5th Cir. 2008), might counsel a different result, it was, with the assent of all the active judges of the Fifth Circuit, held to be abrogated by Amendment 775; accordingly the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Herrera-Alvarez, 753 F.3d 132 (5th Cir. 2014) For purposes of USSG § 2L1.2, the offense of aggravated battery under La. Rev. Stat. § 14:34 does not categorically have as an element the use, attempted use, or threatened use of physical force against the person of another, because the offense may be committed by administering poison, which does not necessarily entail the use of destructive or violent physical force; here, however, the modified categorical approach could properly be used to exclude the possibility of a violation by administering poison; the Fifth Circuit held that the Louisiana crime of aggravated battery under § 14:34, as narrowed under the modified categorical approach to exclude poisoning, was a "crime of violence" under USSG § 2L1.2 because it necessarily contains, as an element, the use, attempted use, or threatened use of physical force. (Judge Garza concurred in the judgment only.)

United States v. Conde-Castañeda, 753 F.3d 172 (5th Cir. 2014) Where defendant was indicted in Texas state court for burglary of a habitation under both Tex. Penal Code § 30.02(a)(1) (which qualifies as a "crime of violence" under USSG § 2L1.2) and Tex. Penal Code § 30.02(a)(3) (which does not), and where defendant in the judicial confession accompanying his plea admitted that he had committed every act charged in the indictment, this was sufficient to show that defendant was convicted of violating both of the offenses charged in the indictment; the district court therefore did not err in applying the 16-level "crime of violence" enhancement; to the extent United States v. Espinoza, 733 F.3d 568 (5th Cir. 2013), might support a different result, Espinoza conflicted with the earlier decision in United States v. Garcia-Arellano, 522 F.3d 477 (5th Cir. 2008), and thus Espinoza had to give way to Garcia-Arellano.

United States v. McLauling, 753 F.3d 557 (5th Cir. 2014) District court did not err in refusing to "group," pursuant to USSG § 3D1.2, defendant's convictions for being found unlawfully present in the United States after deportation (8 U.S.C. § 1326(a) and (b)(1)) and for possession of a firearm by an alien unlawfully present in the United States (18 U.S.C. §§ 922(g)(5) and 924(a)(2)); the two offenses did not "involve[e] substantially the same harm" because they harm different societal interests; nor were the two offenses groupable under USSG § 3D1.2(a)

because they did not involve the same victim as required by that Guideline; according to the Guideline commentary, for crimes with no identifiable victims where the victim is society at large, the victim is deemed to be the "societal interest that is harmed," USSG § 3D1.2, comment. (n.2); because the societal interests harmed by the two offenses here were different, § 3D1.2 did not require their grouping.

United States v. Davis, 754 F.3d 278 (5th Cir. 2014) In sentencing defendant for passing an altered obligation of the United States with intent to defraud, district court did not err in applying a two-level enhancement under USSG § 2B5.1(b)(2)(A) (for manufacturing or producing a counterfeit obligation or possessing or having custody of or control over a counterfeiting device or materials) and thus did not err in raising defendant's base offense level to 15 pursuant to USSG § 2B5.1(b)(3).

United States v. Elizondo-Hernandez, 755 F.3d 779 (5th Cir. 2014) Even after the Fifth Circuit's en banc decision in United States v. Cabecera Rodriguez, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 134 S. Ct. 512 (2013), defendant's conviction for indecency with a child under 17 by contact (in violation of Tex. Penal Code § 21.11(a)(1)) was still a "crime of violence" for purposes of USSG § 2L1.2; furthermore, even if the characterization of that offense as an "aggravated felony" were an issue in this case (the Fifth Circuit held that it was not), defendant's conviction was, under Fifth Circuit precedent, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F).

United States v. Jones, 752 F.3d 1039 (5th Cir. 2014) District court reversibly erred in enhancing defendant's offense level from 14 to 20 pursuant to USSG § 2K2.1(a)(4)(A) because defendant's prior federal escape conviction (under 18 U.S.C. § 751) did not qualify as a "crime of violence" under USSG § 4B1.2; this was so because the conduct charged in the indictment under which defendant was convicted was absconding from a halfway house, which does not categorically present a serious potential risk of physical injury to another; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Garcia-Figueroa, 753 F.3d 179 (5th Cir. 2014):

(1) District court did not err in applying a 12-level "crime of violence" enhancement to defendant under USSG § 2L1.2 because his 1991 Florida conviction for attempted aggravated battery on a law enforcement officer with a law enforcement officer's firearm (in violation of Fla. Stat. §§ 784.07, 777.04, and 775.0875 (1991)); the object offense of aggravated battery had as an element the use, attempted use, or threatened use of physical force against the person of another, and Florida attempt was within the generic meaning of "attempt[t]" under Application Note 5 to USSG § 2L1.2.

(2) Where defendant was convicted of conspiracy to bring illegal aliens into the United States (Count 1), bringing illegal aliens into the United States (Count 2), and being unlawfully present in the United States following a prior deportation (Count 3), the district court reversibly

erred in failing to group Count 3 with Counts 1 and 2 for purposes of calculating defendant's Guideline range; all three counts had the same victim – namely, society in general – and thus should have been grouped under USSG § 3D1.2; because the error was not harmless, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Anderson, 755 F.3d 782 (5th Cir. 2014) In prosecution of defendant for aiding and abetting bank robbery (in violation of 18 U.S.C. §§ 2113(a) and 2), district court did not err in sentencing defendant as a "career offender" under USSG § 4B1.1; although Texas burglary of a habitation is not necessarily the generic "crime of violence" of "burglary of a dwelling" under USSG § 4B1.2 (because Tex. Penal Code § 30.02(a)(3) is not generic "burglary"), here the judicial confession from defendant's prior Texas case makes clear that defendant pleaded guilty to an offense that meets the elements of generic burglary.

United States v. Rodriguez-Lopez, 756 F.3d 422 (5th Cir. 2014) In prosecution for conspiracy to distribute marijuana, district court clearly erred in applying to second defendant, pursuant to USSG § 3B1.1(b), a three-level enhancement for managerial or supervisory role in the drug conspiracy.

United States v. Ramos-Delgado, 763 F.3d 398 (5th Cir. 2014) In alien-smuggling case, culminating in a vehicle crash where one alien was severely injured and ultimately died after being air-lifted back several months later to Honduras, district court did not err in applying to defendants a 10-level enhancement under USSG § 2L1.1(b)(7)(D) based on that death; this enhancement does not require proof that the defendants' conduct was the proximate cause of the death; it does, however, impose a requirement of but-for causation; here, the district court did not, on the record in this case, clearly err in finding the defendants' conduct to be a but-for cause of the victim's death.

United States v. Cedillo-Narvaez, 761 F.3d 397 (5th Cir. 2014) Where defendant was convicted, on his guilty plea, of a hostage-taking conspiracy (in violation of 18 U.S.C. §§ 1203(a) & 2):

(1) District court did not plainly err in applying ransom enhancement under USSG § 2A4.1(b)(1); there was no double-counting because a ransom demand is not an element of the offense of hostage-taking under 18 U.S.C. § 1203; in any event, double-counting is permissible unless the Guidelines explicitly disallow it, which they do not here.

(2) District court did not plainly err in applying a vulnerable-victim enhancement under USSG § 3A1.1(b) based on victims' status as illegal aliens; an alien's illegal status is not a prerequisite to the offense of hostage-taking, and that characteristic is not already accounted for in the base offense level.

(3) District court did not plainly err in applying the minor-victim enhancement of USSG § 2A4.1(b)(6); the language of that enhancement unambiguously applied to this case; the First

Circuit's decision in United States v. Alvarez-Cuevas, 415 F.3d 122 (1st Cir. 2005), was distinguishable. (Judge Graves would hold that the enhancement plainly should not have been applied, but, finding that the defendant's substantial rights were not affected, he would nevertheless not reverse the sentence.)

United States v. Sanchez-Espinal, 762 F.3d 425 (5th Cir. 2014) District court did not err in concluding that illegal-reentry defendant had previously been convicted of aggravated criminal contempt under N.Y. Penal Law § 212.52(1); furthermore, a violation of § 212.52(1) is a "crime of violence" under 18 U.S.C. § 16(b), making defendant's prior conviction an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F); the district court therefore did not err in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C).

United States v. Pringler, 765 F.3d 445 (5th Cir. 2014) In sentencing defendant convicted of aiding and abetting sex trafficking of a minor (in violation of 18 U.S.C. § 1591(a)):

(1) District court did not err in applying a two-level enhancement for use of a computer under USSG § 2G1.3(b)(3); although the enhancement would not apply under the terms of Application Note 4 to USSG § 2G1.3, the Fifth Circuit, **taking sides in a circuit split**, held that Application Note 4 was inconsistent with the text of § 2G1.3(b)(3)(B), and therefore should not be followed.

(2) District court did not err in applying a two-level enhancement for undue influence of a minor pursuant to USSG § 2G1.3(b)(2)(B); application of the enhancement is appropriate where victims testify to their fear of leaving, as the victim did here; there was sufficient evidence to conclude that defendant "compromised the voluntariness of the minor's behavior," USSG § 2G1.3, comment. (n.3(B)).

United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014) In prosecution for racketeering/murder charges arising out of activities of the Texas Mexican Mafia, defendant was properly sentenced as a "career offender" for conviction of assault of a prison guard while awaiting sentencing on the two cases used as predicates; prior convictions for which a defendant has not yet been sentenced still count as "convictions" in determining "career offender" status.

United States v. Teran-Salas, 767 F.3d 453 (5th Cir. 2014) District court did not err in treating illegal-reentry defendant's prior Texas conviction for possession of four to 200 grams of cocaine with intent to distribute as a "crime of violence" under USSG § 2L1.2 and as an "aggravated felony" under USSG § 1101(a)(43)(B); the Fifth Circuit acknowledged that, on the face of the Texas delivery statute, the offense of delivery could theoretically be committed in a way that did not qualify under § 2L1.2 or § 1101(a)(43)(B), namely, by "administering" a controlled substance; however, the Fifth Circuit held that defendant had not shown a reasonable probability that Texas would prosecute under such a nonqualifying theory and that, under Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007), this failure precluded a finding that defendant's prior Texas conviction was nonqualifying.

United States v. Rodriguez-Salazar, 768 F.3d 437 (5th Cir. 2014) The offense of theft by deception under Texas law is within the generic definition of "theft"; therefore, defendant's Texas theft conviction was a "theft offense," and thus an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(G). (Judge Southwick filed a concurring opinion.)

United States v. Fernandez, 770 F.3d 340 (5th Cir. 2014) In sentencing defendant upon his conviction for a hostage-taking conspiracy (in violation of 18 U.S.C. § 1203(a)), district court did not err in applying a six-level enhancement pursuant to USSG § 2A4.1(b)(1) for a ransom demand; the ransom enhancement applies anytime that a defendant demands money from a third party for release of a victim, regardless of whether that money is already owed to the defendant; thus, defendant's belief that he and his co-conspirators were going to demand repayment of a debt was a sufficient ground to apply the ransom enhancement; it did not have to be foreseeable to defendant that the original scheme was going to morph into a classic kidnapping of another person with a demand for ransom.

United States v. Segovia, 770 F.3d 351 (5th Cir. 2014) Illegal-reentry defendant's prior Maryland conviction for conspiracy to commit robbery with a dangerous and deadly weapon was a "crime of violence" supporting a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Cortez-Cortez, 770 F.3d 355 (5th Cir. 2014) Illegal-reentry defendant's prior Indiana conviction for sexual misconduct with a minor (in violation of Ind. Code § 35-42-4-9(b)(1)) was one for "sexual abuse of a minor" and hence was a "crime of violence" supporting a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Myers, 772 F.3d 213 (5th Cir. 2014) In false-claims/fraud/identity-theft/tax-fraud case, the district court did not clearly err in applying to defendant a two-level "vulnerable victim" enhancement under USSG §3A1.1(b)(1); defendant knew that she had gotten names and identities from a list of persons at a nursing home; defendant should have known that at least some people in nursing homes suffer from physical and mental disabilities that render them vulnerable.

United States v. Albornoz-Albornoz, 770 F.3d 1129 (5th Cir. 2014) Illegal-reentry defendant's prior New York conviction for second-degree burglary (in violation of N.Y. Penal Law § 140.25) was one for generic "burglary of a dwelling" and hence was a "crime of violence" supporting a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Rodriguez-Negrete, 772 F.3d 221 (5th Cir. 2014) Although illegal-reentry defendant's prior conviction under S.C. Code § 44-53-370(a)(1) was not categorically a "drug trafficking offense" for purposes of USSG § 2L1.2, application of the modified categorical approach to the record of conviction in that prior case – and particularly, a document called the "sentencing sheet" – made clear that defendant was in fact convicted of a qualifying "drug trafficking offense."

United States v. Castellon-Aragon, 772 F.3d 1058 (5th Cir. 2014) Although a violation of Cal. Health & Safety Code § 11378 is not categorically a "drug trafficking offense" for purposes of USSG § 2L1.2, the district court did not plainly err in categorizing defendant's § 11378 conviction as such given the lack of any indication that the defendant might have been convicted in any way other than that charged in the criminal complaint (which charged possession of methamphetamine for sale, a qualifying offense).

United States v. King, 773 F.3d 48 (5th Cir. 2014) In sentencing defendant for a drug offense, district court did not violate due process or Rule 32 in its ruling on defendant's objection to a two-level enhancement under USSG § 2D1.1(b)(1) for possession of a firearm; a district court may fulfill the obligation to rule on an objection by adopting the presentence report ("PSR"), and here the district court stated it was overruling the objection for the reasons stated in the addendum to the PSR; on the merits, the district court did not clearly err (the applicable standard, United States v. Zapata-Lara, 615 F.3d 388 (5th Cir. 2010), notwithstanding) in applying the § 2D1.1(b)(1) enhancement; it was plausible in light of the record as a whole that the government proved by a preponderance of the evidence that a spatial relationship existed between the handgun, defendant, and the offense of conspiracy with intent to distribute heroin; it was also plausible that defendant failed to show that it was "clearly improbable" that the firearm was connected to his offense of conviction.

United States v. Vigil, 774 F.3d 331 (5th Cir. 2014) Illegal-reentry defendant's prior Louisiana conviction for sexual battery (in violation of La. Rev. Stat. § 14.43.1) was one for "sexual abuse of a minor" and hence was a "crime of violence" supporting a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Ramos Ceron, 775 F.3d 222 (5th Cir. 2014) In sentencing illegal-reentry defendant, district court did not err in applying a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii) on the basis of defendant's prior Florida conviction for aggravated battery under Fla. Stat. § 784.045; the offense of which defendant was convicted had the requisite "force" element.

United States v. Fuentes, 775 F.3d 213 (5th Cir. 2014) District court did not impose an unreasonable sentence when it departed upward, pursuant to Application Note 7 to USSG § 2L1.2, from a Guideline range of 6 to 12 months to an ultimate sentence of 24 months (the statutory maximum); the district court did not err when it concluded that defendant's applicable offense level substantially understated the seriousness of his previous convictions; it was procedurally reasonable to consider the conduct underlying defendant's convictions as a basis for an upward departure.

United States v. Rodriguez-Rodriguez, 775 F.3d 706 (5th Cir. 2015) The district court erred in applying a 16-level "crime of violence" enhancement to illegal-reentry defendant on the basis of defendant's prior Texas conviction for stalking (in violation of Tex. Penal Code § 42.072);

that offense was not an enumerated "crime of violence" and likewise did not have as an element the use, attempted use, or threatened use of physical force against the person of another; however, the district court's error was harmless because the district court imposed the same sentence, in the alternative, as a non-Guidelines sentence; the district court's "alternative sentence" rendered the Guideline application error harmless because, in imposing it, the district court contemplated the correct Guideline range and justified the sentence with permissible factors.

United States v. Ochoa-Gomez, 777 F.3d 278 (5th Cir. 2015) Although USSG § 3B1.1 and its commentary provide that a defendant may not receive an aggravating-role adjustment where he does not exercise control over a ***person*** (as opposed to property), the Fifth Circuit has held, in United States v. Delgado, 672 F.3d 320, 345 (5th Cir. 2012) (en banc), that the adjustment may be applied even where the defendant did not exercise control over another participant, if he exercised management responsibility over the property, assets, or activities of a criminal organization – in other words, under Delgado, a § 3B1.1 adjustment may be based on ***either*** control over people or management of assets; because the district court could plausibly determine that defendant exercised management responsibility over the property, assets, or activities of a criminal organization, that court did not clearly err in applying a § 3B1.1 enhancement to defendant. (Judge Prado filed a concurring opinion, in which he was joined by Judge Elrod. He agreed that Delgado compelled the result reached, but suggested that Delgado had inadvertently diverged from Fifth Circuit law correctly interpreting § 3B1.1 and that the Fifth Circuit should go en banc to correct this divergence.)

United States v. Reyna-Esparza, 777 F.3d 291 (5th Cir. 2015) In sentencing defendant convicted of alien harboring, district court did not err in applying, pursuant to USSG § 2L1.1(b)(5)(B), a four-level enhancement for "brandishing" a deadly weapon; given the circumstances of the case, the district court did not clearly err in finding that defendant displayed the weapon to the harbored aliens with intent to intimidate.

United States v. Torres-Perez, 777 F.3d 764 (5th Cir. 2015) Defendants adequately preserved their objection that the government had improperly withheld a motion for a third-level reduction under USSG § 3E1.1(b) because of defendant's refusal to waive his right to appeal; under United States v. Villegas Palacios, 756 F.3d 325 (5th Cir. 2014), this was improper; moreover, the error was not harmless because there was insufficient evidence that that the sentencing court would have imposed the same sentence even in the absence of the error; accordingly, the Fifth Circuit vacated the defendants' sentences and remanded for resentencing.

United States v. Fidse, 778 F.3d 477 (5th Cir. 2015) On the record before it, the Fifth Circuit could not determine whether the district court correctly applied the terrorism enhancement of USSG § 3A1.4(a) to defendant convicted of obstructing, and making false statements in connection with, asylum proceedings; although the terrorism enhancement may apply when the offense of conviction is not itself a "federal crime of terrorism," a district court must, in such an instance, identify which enumerated "federal crime of terrorism" the defendant intended to promote and support its conclusions by a preponderance of the evidence with facts from the record;

here, the district court did not identify the "federal crime of terrorism" underlying its enhancement of defendant's sentence; in light of this missing finding and the uncertainty arising from inconsistent factual findings, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Sarabia-Martinez, 779 F.3d 274 (5th Cir. 2015) District court committed reversible plain error in applying a 16-level "drug trafficking offense" enhancement to illegal-reentry defendant under USSG § 2L1.2(b)(1)(A)(i); the statute under which defendant's prior conviction was sustained (Fla. Stat. § 893.135(1)(f), although referred to as "trafficking" in Florida law, includes simple possession of a controlled substance, which is not a "drug trafficking offense" under USSG § 2L1.2; moreover, no documents allowed the offense of conviction to be narrowed under the modified categorical approach; the district court erred in relying on facts in the presentence report to determine that defendant had been convicted of drug distribution rather than mere possession; the error affected defendant's rights, and the Fifth Circuit exercised its discretion to correct the error by vacating the sentence and remanding for resentencing.

United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015) District court reversibly erred in applying a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii) based on defendant's Florida manslaughter conviction under Fla. Stat. § 782.07; Florida manslaughter does not have as an element the use, attempted use, or threatened use of physical force against the person of another; nor is Florida manslaughter equivalent to generic manslaughter because the Florida offense can be committed with a mens rea less than recklessness; although the Fifth Circuit had previously held to the contrary in an unpublished decision, that decision did not have the benefit of a later, clarifying decision of the Florida Supreme Court; because the government did not meet its burden of proving the error to have been harmless, the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Sanchez-Sanchez, 779 F.3d 300 (5th Cir. 2015) District court did not err in applying a 12-level "crime of violence" enhancement to illegal-reentry defendant, because the record adequately narrowed his prior Texas conviction to one that qualified as the enumerated "crime of violence" of "aggravated assault"; the record showed that defendant was indicted for, and pleaded guilty to, a violation of Tex. Penal Code §22.02(a)(4) (1989) – aggravated assault with a deadly weapon – which meets the generic, contemporary definition of "aggravated assault"; the fact that the Texas judgment did not contain an affirmative deadly-weapon finding did not cast doubt on the fact of his conviction under § 22.02(a)(4), because in Texas a defendant can stand convicted of aggravated assault with a deadly weapon even where the trial court did not enter a separate and affirmative deadly-weapon finding.

United States v. Castillo, 779 F.3d 318 (5th Cir. 2015) After Amendment 775 (effective Nov. 1, 2013) to USSG § 3E1.1 and its commentary the government may withhold a § 3E1.1(b) motion (for an additional one-level reduction for acceptance of responsibility) based on an interest identified in either subsection (a) or (b) of § 3E1.1; however, if a defendant has a ***good-faith*** dispute as to the accuracy of the findings in the presentence report, it is impermissible for the

government to refuse to move for a reduction under § 3E1.1(b) simply because the defendant requests a hearing to litigate the dispute; accordingly, the Fifth Circuit vacated this defendant's sentence and remanded to allow the district court to determine whether her challenge to the amount of funds stolen (on which a Guideline "loss" enhancement turned) was made in good faith. (Judge Graves filed an opinion concurring in part and dissenting in part, in which he opined that "a post-plea sentencing objection is simply not a valid basis upon which the government may withhold a § 3E1.1(b) motion.")

United States v. Martinez-Lugo, 782 F.3d 198 (5th Cir. 2015) (substituted for previous decision in United States v. Martinez-Lugo, 773 F.3d 678 (5th Cir. 2014)) District court did not reversibly err in applying a 16-level "drug trafficking offense" enhancement under USSG § 2L1.2(b)(1)(A)(i) on the basis of defendant's prior Georgia conviction for possession with intent to distribute marijuana (in violation of Ga. Code § 16-13-30(j)(1) (2002)); the Fifth Circuit rejected the notion that, to be included as a "drug trafficking offense" under USSG § 2L1.2, an offense must require proof of remuneration or commercial activity; an offense that matches the listed "drug trafficking offenses" in the definitional Application Note – as this Georgia offense does – qualifies for enhancement even if the offense does not require such proof. (Judge Dennis filed a dissenting opinion, in which he argued that the term "drug trafficking" in the text of the Guideline ***does*** require proof of remuneration or commercial activity.)

United States v. Gomez-Alvarez, 781 F.3d 787 (5th Cir. 2015) District court did not reversibly err in applying to illegal-reentry defendant a 16-level "drug trafficking offense" enhancement under USSG § 2L1.2(b)(1)(A)(i); although defendant's previous offense of conviction (possession of a controlled substance for sale, in violation of Cal. Health & Safety Code § 11351) is not categorically a "drug trafficking offense," defendant's conviction was permissibly narrowed to one for possession of heroin for sale, which does qualify as a "drug trafficking offense"; in applying the modified categorical approach, the district court did not clearly err in finding that the criminal complaint was the charging instrument under which defendant was convicted, given the lack of any evidence to the contrary; finally, the district court did not, on this record, clearly err in finding that defendant was indeed the person convicted in the prior California case.

United States v. Rodriguez-Bernal, 783 F.3d 1002 (5th Cir. 2015) Where defendant was originally sentenced to two years' imprisonment for his Texas conviction for possession of heroin with intent to deliver, but then, after he had served 10 months, his sentence was discharged, and he was released to immigration detainers and removed to El Salvador, defendant's sentence was nevertheless a "drug trafficking offense for which the sentence imposed exceeded 13 months"; although any portion of a sentence that is "suspended" does not count toward the 13-month threshold, the discharge did not count as a suspended sentence because it was not suspended by a court; additionally, a discharged sentence under Texas law is not equivalent to a suspended sentence; accordingly, the Fifth Circuit affirmed the application of a 16-level "drug trafficking offense" enhancement under USSG § 2L1.2(b)(1)(A)(i). (Judge Graves filed a dissenting opinion.)

United States v. Pillault, 783 F.3d 282 (5th Cir. 2015) In sentencing defendant convicted of a threat to kill and injure and to unlawfully damage and destroy buildings by means of fire and explosives (in violation of 18 U.S.C. § 844(e)), district court did not err in applying a six-level enhancement under USSG § 2A6.1(b)(1) for conduct evidencing an intent to carry out the threat; although some sort of overt act is required to justify a § 2A6.1(b)(1) enhancement, here the district court did not clearly err in crediting testimony that defendant had committed such acts (e.g., buying copper pipe for a pipe bomb).

United States v. Groce, 784 F.3d 291 (5th Cir. 2015) In sentencing defendant convicted of receiving child pornography (in violation of 18 U.S.C. § 2252(a)(2)), the district court did not err in applying a five-level enhancement under USSG § 2G2.2(b)(3)(B) for distributing child pornography for the receipt of a non-pecuniary thing of value; generally, when a defendant knowingly uses peer-to-peer file sharing software (as the defendant did in this case), he engages in the kind of distribution contemplated by § 2G2.2(b)(3)(B); by using this software as defendant did, the user agrees to distribute the child pornography on his computer in exchange for additional child pornography; this is precisely the sort of exchange contemplated by § 2G2.2(b)(3)(B); here, defendant knew that other users could download his files and that, by allowing users to do so, he would be distributing child pornography; he also implied that he had knowingly let some users download from him; the Fifth Circuit did not reach the merits of the five-level enhancement for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor, see USSG § 2G2.2(b)(5) because any error in this regard was harmless.

United States v. Hernandez-Rodriguez, 788 F.3d 193 (5th Cir. 2015) District court reversibly erred in applying a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii) based on defendant's 2006 Louisiana conviction for aggravated battery (in violation of La. Rev. Stat. § 14:34); defendant's offense of conviction did not necessarily have as an element the use, attempted use, or threatened use of physical force, because the prior-conviction documents did not rule out a conviction under the administration-of-poison alternative of the Louisiana statute; furthermore, a conviction for the least culpable violation of the statute does not constitute generic "aggravated assault"; because the government did not carry its burden of proving this error harmless, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Morales-Rodriguez, 788 F.3d 441 (5th Cir. 2015) Although it would have been error for the government to withhold a motion for a third-level reduction under USSG § 3E1.1(b) simply because the defendant refused to waive appeal, see United States v. Villegas Palacios, 756 F.3d 325 (5th Cir. 2014), it was not plain that the government withheld the § 3E1.1(b) for this reason; accordingly, defendant was not entitled to relief on plain-error review.

D. Fines and Restitution

United States v. Keele, 755 F.3d 752 (5th Cir. 2014) Defendant's appellate challenge to his restitution order was barred by the appeal-waiver provision of his plea agreement, which waiver

was knowing and voluntary; the Fifth Circuit noted that a properly raised argument that the restitution order exceeded the statutory maximum would ***not*** be barred by an appeal waiver, but that the defendant had made no such argument here; the appeal waiver also barred defendant's appellate challenge that his restitution order violated the Eighth Amendment; because defendant's appellate challenges were all barred by the appeal waiver, the Fifth Circuit dismissed the appeal

United States v. Rosbottom, 763 F.3d 408 (5th Cir. 2014) In prosecution for bankruptcy fraud and related charges, defendant's conclusory briefing on the subject of the restitution order against him provided no clear basis for finding that the district court plainly erred in the amount of that order; the Fifth Circuit also rejected as foreclosed the defendant's claims that he was entitled to a jury determination of the amount of forfeiture or the amount of restitution.

United States v. Beacham, 774 F.3d 267 (5th Cir. 2014) In sentencing defendants convicted of various offenses related to fraudulent real estate loans, the district court reversibly erred in setting the amount of restitution for which defendants were responsible; the proper amount of restitution owed to a victim that purchased a fraudulently procured loan on the secondary market is what the victim paid for the mortgage, less any proceeds obtained through foreclosure; here, however, the district court erroneously used the difference between the original loan amount and the foreclosure proceeds; because the government did not carry its burden of established the proper restitution amount as it pertained to the secondary-market purchasers, the defendants' restitution orders had to be vacated; because the Fifth Circuit could not tell how the restitution orders fit into the sentencing court's "balance of sanctions," the Fifth Circuit vacated the defendants' sentence in their entirety and remanded for resentencing.

United States v. Pacheco-Alvarado, 782 F.3d 213 (5th Cir. 2015) District court did not err in sentencing an illegal-reentry defendant to a $2,500 within-Guidelines fine and an alien defendant convicted of drug and gun offenses to a $5,000 within-Guideline fine, with a monthly payment schedule set at 1/3 of each defendant's prison earnings, conditional on the prisoner's being allowed to work while in prison; the district court's order did not impermissibly trench upon the Federal Bureau of Prisons' authority to administer its Inmate Financial Responsibility Program; furthermore, although the defendants' presentence reports indicated that they had no present ability to pay, the district court's fines were based upon implicit conclusions about defendants' future ability to pay and were not unreasonable; the Fifth Circuit did remand one defendant's case to correct the written judgment to reflect the district court's orally pronounced payment schedule.

United States v. Elashi, 789 F.3d 547 (5th Cir. 2015) State-law limitations on garnishment – applicable under the Federal Debt Collection Practices Act ("FDCPA") – do not apply when the government is enforcing a federal criminal debt under the Mandatory Victims Restitution Act ("MVRA"); in this context, the MVRA controls over the FDCPA; accordingly, the district court did not abuse its discretion in entering a garnishment order against a criminal defendant's wife in order to collect the balance of the $3,500 special assessment that was part of her husband's sentence.

United States v. Lozano, 791 F.3d 535 (5th Cir. 2015) In sentencing defendant convicted, on her guilty plea, of a conspiracy to defraud Medicare and Medicaid, the Fifth Circuit rejected one plain-error challenge to defendant's restitution order, but held that the district court committed reversible plain error with respect to another aspect of that restitution order; particularly, the Fifth Circuit held it was error that was plain to base restitution on losses outside the proper temporal scope (the temporal scope of the offense of conviction was from April 30, 2005 through January 10, 2006, but the district court ordered restitution for losses to commencing on September 20, 2001); the error affected defendant's substantial rights because it was excessive in the amount of $80,533.96; finally, the Fifth Circuit held that it would exercise its discretion to correct the error even on plain-error review; accordingly, the Fifth Circuit vacated the restitution order and remanded to the district court for a recalculation of the restitution amount. (Judge Smith dissented. He would find that there was no error; that, even if there were error, it was not plain; and that, even if there were plain error affecting substantial rights, the appellate court should not exercise its discretion to correct the error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.)

E. Resentencing/Sentence Reduction

United States v. Banks, 770 F.3d 346 (5th Cir. 2014) Where drug defendant's first sentence reduction under 18 U.S.C. § 3582(c)(2) lowered his offense level under USSG § 2D1.1 sufficiently so as to cause his sentence instead to be calculated under the "career offender" Guidelines (USSG §§ 4B1.1 and 4B1.2), defendant was not entitled to a second sentence reduction under § 3582(c)(2), notwithstanding a further reduction in the offense level under USSG § 2D1.1; defendant's new sentence was not imposed under § 2D1.1, but rather under §§ 4B1.1 and 4B1.2, so the latest Guideline amendment to § 2D1.1 would not result in a lower Guideline range applicable to this defendant.

F. Time Credit/Place and Conditions of Confinement/Release on Parole

Holt v. Hobbs, ____ U.S. ____, 135 S. Ct. 853 (2015) (decision below: Holt v. Hobbs, 509 Fed. Appx. 561 (8th Cir. 2013) (unpublished)) The grooming policy of the Arkansas Department of Corrections – prohibiting inmate, a devout Muslim, from growing a ½-inch beard in accordance with his sincerely held religious belief –violated inmate's right under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq.; the Department failed to show that enforcing the beard prohibition against the inmate furthered the Department's compelling interests in preventing prisoners from hiding contraband and disguising their identities; furthermore, the Department also failed to establish that its policy was the least restrictive means of accomplishing its identified interests; accordingly, the Supreme Court reversed the judgment below and remanded for further proceedings. (Justice Ginsburg filed a concurring opinion, in which she was joined by Justice Sotomayor. Justice Sotomayor also filed her own separate concurring opinion.)

Wilkerson v. Goodwin, 774 F.3d 845 (5th Cir. 2014) Where Louisiana prisoners held in solitary confinement filed a lawsuit challenging the conditions under which they were held, the district court denied qualified immunity to the prison officials, and the Fifth Circuit upheld the denial of qualified immunity; coupled with the extraordinary length of time the prisoners were held in solitary, the conditions in the Louisiana prisons in question were sufficiently restrictive so as to constitute an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," giving rise to a cognizable liberty interest; furthermore, this liberty interest was clearly established at the relevant time.

Toney v. Owens, 779 F.3d 330 (5th Cir. 2014) District court did not err in granting qualified immunity and dismissing Texas state prisoner's 42 U.S.C. § 1983 suit against various prison officials; prisoner alleged that his due-process rights were violated by being classified as a sex offender, but the Fifth Circuit concluded that neither the prisoner's classification as a sex offender, nor the consequences flowing from that classification, implicated the prisoner's liberty interests under the Due Process Clause, where prisoner was never mandated to undergo sex-offender treatment or subjected to sex-offender conditions of parole.

Price v. Warden, Forcht Wade Correctional Center, 785 F.3d 1039 (5th Cir. 2015) Where Louisiana state defendant, convicted of armed robbery in 1985, was subjected to a 1997 Louisiana statute governing the forfeiture of "good time" time upon revocation of parole that was less favorable than the forfeiture rule in effect at the time of his offense, the Louisiana state courts' rejection of prisoner's ex post facto challenge was contrary to clearly established federal law as established by the Supreme Court, namely, the Supreme Court's summary affirmance in Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967) (three-judge panel), aff'd mem., 390 U.S. 713 (1968) (per curiam); by summarily affirming in Greenfield, the Supreme Court necessarily held that it violated the Ex Post Facto Clause to apply a "good time" forfeiture law enacted after a prisoner's sentencing even if the forfeiture is triggered by the parolee's post-enactment conduct; because Greenfield was materially distinguishable from this case, the Fifth Circuit reversed the district court's judgment denying federal habeas relief and remanded the case to the district court with instructions to order the State of Louisiana to either recalculate defendant's sentence using the law in effect at the time of his offense or release him from custody within 180 days of the date of the district court's order on remand.

Ball v. LeBlanc, 792 F.3d 584 (5th Cir. 2015) Where Louisiana death-row inmates sued, claiming that the heat they endure during the summer months violates the Eighth Amendment because of their pre-existing medical problems, the Fifth Circuit affirmed the district court's conclusion that housing these prisoners in very hot cells without access to heat-relief measures, while knowing that each suffers from conditions that render him extremely vulnerable to serious heat-related injury, violates the Eighth Amendment; however, the scope of the injunctive relief (effectively ordering the defendants to install air conditioning throughout death row) exceeded the Fifth Circuit's prior precedent; first, the district court erred in failing to consider other acceptable remedies short of facility-wide air conditioning; second, the district court erred in awarding relief facility-wide, instead of limiting such relief only to the plaintiffs; finally, the relief was not limited

to only the months in which the plaintiffs faced a heat risk; accordingly, the Fifth Circuit vacated the district court's injunction and remanded for reconsideration. (Judge Reavley dissented. He would affirm the injunction, which he viewed as only ordering that the heat index in the death row tiers be maintained below 88 degrees.)

G. Forfeiture/Return of Property Under Fed. R. Crim. P. 41(g)

Henderson v. United States, ____ U.S. ____, 135 S. Ct. 1780 (2015) (decision below: United States v. Henderson, 533 Fed. Appx. 851 (11th Cir. 2014) (unpublished)) A court-ordered transfer of a felon's lawfully owned firearms from government custody to a third party is not barred by 18 U.S.C. § 922(g) if the court is satisfied that the recipient will not give the felon control over the firearms, so that he could either use them or direct their use.

United States v. Rosbottom, 763 F.3d 408 (5th Cir. 2014) In prosecution for bankruptcy fraud and related charges, defendant's conclusory briefing on the subject of the restitution order against him provided no clear basis for finding that the district court plainly erred in the amount of that order; the Fifth Circuit also rejected as foreclosed the defendant's claims that he was entitled to a jury determination of the amount of forfeiture or the amount of restitution.

X. APPEAL

Musacchio v. United States, cert. granted, ____ U.S. ____, 135 S. Ct. 2889 (June 29, 2015) (No. 14-1095) (decision below: United States v. Musacchio, 590 Fed. Appx. 359 (5th Cir. 2014) (unpublished)) (1) Does the law-of-the-case doctrine require the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment? (2) Is a statute-of-limitations defense not raised at or before trial reviewable on appeal?

United States v. Salazar, 751 F.3d 326 (5th Cir. 2014) In drug and gun case, defendant did not "invite" the district court's error in directing a verdict of guilty against him in violation of his Sixth Amendment right to trial by jury; nothing in the record suggested that defendant wished to change his plea of not guilty to a plea of guilty or that defendant consented to the directed verdict; likewise defendant did not forfeit this error so as to trigger plain-error review; the district court explicitly acknowledged that defendant was preserving this argument for appeal; even though defense counsel did not specifically reference the Sixth Amendment interest at stake or provide any legal authority demonstrating error, the court was well aware of the issue before it.

United States v. Keele, 755 F.3d 752 (5th Cir. 2014) Defendant's appellate challenge to his restitution order was barred by the appeal-waiver provision of his plea agreement, which waiver was knowing and voluntary; the Fifth Circuit noted that a properly raised argument that the restitution order exceeded the statutory maximum would ***not*** be barred by an appeal waiver, but

that the defendant had made no such argument here; the appeal waiver also barred defendant's appellate challenge that his restitution order violated the Eighth Amendment; because defendant's appellate challenges were all barred by the appeal waiver, the Fifth Circuit dismissed the appeal.

United States v. Rainey, 757 F.3d 234 (5th Cir. 2014): In prosecution of BP's vice president of exploration for obstructing a congressional investigation into the 2010 explosion on the Deepwater Horizon drilling rig (in violation of 18 U.S.C. § 1505):

(1) Government's appeal of dismissal of charge was not untimely, even though it was filed 60 days after the initial dismissal, because it was filed within 30 days after the district court denied the government's motion to reconsider; under United States v. Healy, 376 U.S. 75, 77-78 (1964), a timely motion for reconsideration by the government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the motion for reconsideration; although there is some tension between Healy and its progeny on one hand, and Bowles v. Russell, 551 U.S. 205 (2007), on the other, the Fifth Circuit elected to follow the directly controlling precedent (Healy) in the absence of further direction from the Supreme Court.

(2) Under United States v. Stricklin, 591 F.2d 1112 (5th Cir. 1979), the return of a superseding indictment did not render the government's appeal of the district court's dismissal moot; it was still possible that the government might elect to proceed on both indictments.

(3) The Fifth Circuit declined the government's request to hold the appeal in abeyance pending the resolution of the defendant's motion to dismiss the superseding indictment, because resolution of this appeal would clarify the proceedings below, and because the superseding indictment might also be dismissed.

United States v. Moreno-Torres, 768 F.3d 439 (5th Cir. 2014) Noting the potential due-process problems when an English-language brief and motion to withdraw under Anders v. California, 386 U.S. 738 (1967), are served upon a non-English-speaking defendant, the Fifth Circuit commended defense counsel's efforts in this Anders case to communicate relevant information to the defendant in his native language; the panel also noted that all the active judges of the Fifth Circuit had concurred in a new directive to Anders counsel (contained in the Adners Guidelines on the Fifth Circuit's website) mandating certain requirements in the service of Anders documents on defendants in their native languages.

United States v. Myers, 772 F.3d 213 (5th Cir. 2014): In false-claims/fraud/identity-theft/tax-fraud case, where defendant raised a meritorious sentencing issue for the first time in her untimely reply brief, the Fifth Circuit exercised its discretion to consider the untimely reply brief ***and*** to consider the issue, notwithstanding the usual rule that the Fifth Circuit will not consider issues raised for the first time in a reply brief.

United States v. Polanco-Ozorto, 772 F.3d 1053 (5th Cir. 2014) Where a criminal

defendant who has pleaded guilty signs a statement indicating that he wishes to appeal only his sentence, and where the defendant's appellate counsel, in reliance on that statement, files an Anders brief addressing only issues related to sentencing, the defendant may not, in his pro se response to the Anders brief, raise issues related to his guilty plea and conviction; put another way, where a defendant provides sufficient indication (consistent with United States v. Garcia, 483 F.3d 289 (5th Cir. 2007)) that he intends to challenge only his sentence, the defendant may not revoke that decision after counsel has filed an Anders brief pretermitting any discussion of the defendant's guilty plea.

United States v. Ramos Ceron, 775 F.3d 222 (5th Cir. 2014) In sentencing illegal-reentry defendant, at least on plain-error review (applicable in the absence of an objection on this ground below), district court was not collaterally estopped from applying a 16-level "crime of violence enhancement to defendant on the basis of a prior Florida aggravated-battery conviction, simply because another district judge of that same district court had, in a prior illegal-reentry prosecution of defendant, sustained an objection to a 16-level enhancement on the basis of that prior Florida conviction; there was an inadequate district-court record to evaluate the collateral-estoppel claim, and defendant cited no authority applying collateral estoppel to a prior Sentencing Guidelines ruling.

United States v. Torres-Perez, 777 F.3d 764 (5th Cir. 2015) Defendants adequately preserved their objection that the government had improperly withheld a motion for a third-level reduction under USSG § 3E1.1(b) because of defendant's refusal to waive his right to appeal; under United States v. Villegas Palacios, 756 F.3d 325 (5th Cir. 2014), this was improper; moreover, the error was not harmless because there was insufficient evidence that that the sentencing court would have imposed the same sentence even in the absence of the error; accordingly, the Fifth Circuit vacated the defendants' sentences and remanded for resentencing.

United States v. Heredia-Holguin, 789 F.3d 625 (5th Cir. 2015) Where appealing illegal-reentry defendant had completed his 12-month prison sentence and had been deported, but still was subject to a three-year term of supervised release, the Fifth Circuit dismissed his appeal; the Fifth Circuit noted tension between United States v. Lares-Meraz, 452 F.3d 352 (5th Cir. 2006), which suggested that the appeal was not moot, and United States v. Rosenbaum-Alaniz, 483 F.3d 381 (5th Cir. 2007), which suggested that the appeal ***was*** moot; however, the Fifth Circuit saw no need to resolve this tension, because defendant had indicated that he was not pursuing his sentencing appeal and was requesting simply that the Fifth Circuit vacate his remaining term of supervised release under the doctrine of equitable vacatur; the Fifth Circuit denied that request because, even assuming that the doctrine of equitable vacatur applies in criminal cases, defendant did not carry his burden of demonstrating that vacatur was appropriate on the facts and equities of his case.

United States v. Emeary, ____ F.3d ____, 2015 WL 4524299 (5th Cir. July 23, 2015) (Dennis, J., in chambers) Where defendant, sentenced to 15 years' imprisonment as an armed career criminal, had his appeal dismissed as frivolous pursuant to Anders v. California, 386 U.S.

738 (1967), but further review persuaded Judge Dennis that defendant had a meritorious challenge to his sentence, especially in light of the Supreme Court's recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015), Judge Dennis ordered that the mandate be recalled, that the appeal be reinstated and expedited, and that the defendant be appointed counsel.

United States v. Hernandez-Gomez, ____ F.3d ____, 2015 WL 4666156 (5th Cir. Aug. 6, 2015) Where defendant's notice of appeal was not filed within the 14-day period prescribed by Fed. R. App. P. 4(b)(1)(A)(i), nor the 30-day extension period set out in Fed. R. App. P. 4(b)(4)(B), the Fifth Circuit granted the government's motion to dismiss the appeal for untimeliness; although the time limits of Fed. R. App. P. 4(b) are not jurisdictional, and thus may be waived, the government did not waive its right to invoke those limits here; the Fifth Circuit held that a motion to dismiss for untimeliness filed with or before the government's first substantive filing (usually its first brief) is timely.

X. REVOCATION OF PROBATION/SUPERVISED RELEASE/PAROLE

A. Probation

B. Supervised Release

United States v. Juarez-Velasquez, 763 F.3d 430 (5th Cir. 2014) The district court lacked jurisdiction to revoke defendant's supervised release; time spent in state custody on a charge that was ultimately dismissed without conviction was not "in connection with a conviction" and hence did not toll the supervised-release period under 18 U.S.C. § 3624(e), notwithstanding the facts that (1) defendant was subject to an administrative immigration detainer at the time of the state dismissal, (2) the district court later entered an ultra vires order that defendant should receive credit on a later federal illegal-reentry charge for the time in state custody, and (3) the Bureau of Prisons later granted that credit; because there was no tolling, defendant's supervised release expired on March 25, 2013, before the warrant to revoke was issued and before the district court actually purported to revoke defendant's supervised release; because the district court lacked jurisdiction to revoke defendant's supervised release, the Fifth Circuit vacated the judgment of revocation, including the consecutive eight-month sentence imposed thereon.

United States v. Oswalt, 771 F.3d 849 (5th Cir. 2014) Where defendant had his supervised release revoked on three counts of conviction, and received six months of custody on each count (consecutive to one another), to be followed by 24 months of reimposed supervised release on each count (concurrent to one another), the district court did not run afoul of the statutory limits set on reimposition of supervised release by 18 U.S.C. § 3583(h); contrary to defendant's argument, the court was not required to subtract the full 18 months of imprisonment from the maximum 36-month supervised-release term originally available on each count of conviction; the formula in § 3583(h) is count-specific and does not contemplate subtracting the post-revocation terms of imprisonment imposed on all counts; because defendant could have received up to 30 months'

reimposed supervised release on each count (the original 36-month maximum less the six months' imprisonment imposed for that count), the 24-month reimposed supervised-release term did not exceed the statutory maximum.

United States v. Rivera, 784 F.3d 1012 (5th Cir. 2014), on denial of reh'g, ____ F.3d ____, 2015 WL 4745600 (5th Cir. Aug. 7, 2015) Where, on revocation of defendant's supervised release, the district court went above the Guideline range of 24 to 30 months (and rejected the magistrate judge's recommendation of a 28-month sentence) based primarily on the seriousness of the murder charge which constituted one of defendant's violations of supervised release, the district court committed error that was plain; sentencing error occurs when an impermissible consideration is a dominant factor in the court's revocation sentence, and in United States v. Miller, 634 F.3d 841 (5th Cir. 2011), the Fifth Circuit held that it is improper for a district court to rely on 18 U.S.C. § 3553(a)(2)(A) (referencing the seriousness of the offense, respect for the law, and the need for just punishment of the offense) in the revocation context; here, the seriousness of the murder and the need for just punishment were clearly dominant factors in defendant's revocation sentence; moreover, the district court's error affected defendant's substantial rights; however, because the Fifth Circuit case "[could not] say that the district court's revocation sentence of 60 months impugns the fairness, integrity, or public reputation of the court system," the plain-error standard was not met; therefore, the Fifth Circuit affirmed the district court's judgment. (Chief Judge Stewart concurred in the judgment only.)

C. Parole

XI. § 2255/HABEAS CORPUS/POST-CONVICTION RELIEF/INEFFECTIVE ASSISTANCE OF COUNSEL/AEDPA

A. § 2255 generally

United States v. Curtis, 769 F.3d 271 (5th Cir. 2014) (on reh'g) Where federal defendant convicted of bankruptcy fraud under 18 U.S.C. § 152 challenged his conviction under 28 U.S.C. § 2255 for alleged ineffective assistance of counsel ("IAC"):

(1) Defendant was not entitled to relief based on trial attorney's failure to research the statute-of-limitations because the indictment was, in fact, timely; pursuant to Fed. R. Crim. P. 45(a)(1)(A) (which the Fifth Circuit found to apply here), where defendant's bankruptcy discharge occurred on July 23, 2003, the statute of limitations did not begin to run until the next day; therefore, the indictment, which was filed on July 23, 2008, was filed within (albeit on the last day of) the five-year limitations period.

(2) Although criminal trial attorney failed to contact defendant's bankruptcy attorney about the bankruptcy matter that was at the heart of the criminal charge, defendant was not entitled to § 2255 relief for IAC because he failed to show that, had the criminal trial attorney contacted

the bankruptcy attorney, what the criminal trial attorney would have learned would have persuaded him to advise defendant not to plead guilty and instead to insist on going to trial.

(3) Although trial attorney's apparent failure to get and look at evidence and discovery "was less than commendable," defendant was not entitled to § 2255 relief for IAC where he failed to demonstrate that he was prejudiced by such deficient performance; indeed, he did not even allege that he would not have pleaded guilty but for this deficiency.

United States v. Fields, 761 F.3d 443 (5th Cir. 2014) Federal defendant, convicted of murder and sentenced to death, was not entitled to a certificate of appealability ("COA") for any of his rejected claims for relief under 28 U.S.C. § 2255:

(1) Defendant was not entitled to a COA on his claims of ineffective assistance of counsel ("IAC") with respect to his trial counsel's penalty-phase investigation, investigation of the charged crime, or alleged failure to challenge expert testimony about defendant's future dangerousness.

(2) Defendant was not entitled to a COA on his claim that he was incompetent to waive counsel and proceed pro se; even assuming that the district court had the discretion to require, under Indiana v. Edwards, 554 U.S. 164 (2008), a higher standard of competency for waiver of counsel, defendant did not show that his competency fell below a standard that would have required the district court to deny defendant's request to represent himself.

(3) Defendant was not entitled to a COA on his claim that the district court required him to reveal privileged trial strategy, in violation of his constitutional rights, by requiring him to do a practice ("dry run") cross-examination of one witness; the "dry run" was necessary to rein in pro se defendant's excesses, and defendant still had a reasonable opportunity to cross-examine the witness.

(4) Defendant was not entitled to a COA on his claim of violations of Brady v. Maryland because jurists of reason would not debate the district court's conclusion that no Brady violations occurred.

(5) Defendant was not entitled to a COA on his claim of actual innocence or on the district court's denial of DNA testing under 18 U.S.C. § 3600.

(6) Other claims (Allen charge; defendant required to wear stun belt during trial) were decided against defendant on direct appeal, and could not be relitigated.

(7) Defendant was not entitled to a COA to challenge the district court's denial of discovery or its denial of an evidentiary hearing.

United States v. Bernard, 762 F.3d 467 (5th Cir. 2014) Federal death-sentenced defendants were not entitled to a certificate of appealability to appeal any of the claims raised in

their motions under 28 U.S.C. § 2255; reasonable jurists could not debate the district court's rejection of their claims of ineffective assistance of counsel, their claims of violations of Brady v. Maryland, or any of their other claims.

United States v. Kayode, 777 F.3d 719 (5th Cir. 2014) Where defendant (convicted on his guilty plea of fraud and unlawful procurement of naturalization) alleged, in a motion under 28 U.S.C. § 2255, alleged that his attorney had provided him with ineffective assistance of counsel ("IAC") by failing to warn him of the immigration consequences of his plea (possible denaturalization and deportation), the district court did not reversibly err in granting the government's motion for summary judgment; although defendant sufficiently alleged deficient performance in this regard under Padilla v. Kentucky, 559 U.S. 356 (2010), defendant did not meet his burden to show prejudice from this deficient performance; accordingly, the Fifth Circuit affirmed the district court's grant of summary judgment to the government. (Judge Dennis filed a dissenting opinion. He would hold that defendant was entitled to an evidentiary hearing to further develop his IAC claim. Judge Dennis also wrote to express his view that a "perfunctory" judicial admonishment, at the guilty-plea proceeding, about possible immigration consequences of conviction should not weigh against a claim of prejudice caused by the ineffectiveness of counsel.)

United States v. Olvera, 775 F.3d 726 (5th Cir. 2015) Where defendant received a reduction of sentence under Fed. R. Crim. P. 35(b), resulting in the entry of an amended judgment, that fact did not restart the one-year period for filing a 28 U.S.C. § 2255 motion under § 2255(f)(1); the modification of a sentence does not affect the finality of a criminal judgment; nor was defendant's motion timely under 28 U.S.C. § 2255(f)(3), because the rule of Alleyne v. United States, ____ U.S. ____, 135 S. Ct. 2151 (2013), does not apply retroactively to cases on collateral review.

In re Jackson, 776 F.3d 292 (5th Cir. 2015) Federal prisoner was not entitled to authorization to file a successive 28 U.S.C. § 2255 because he failed to show that any of the Supreme Court decisions on which he relied – Begay v. United States, 553 U.S. 137 (2008), Johnson v. United States, 559 U.S. 133 (2010), and Descamps v. United States, ____ U.S. ____, 133 S. Ct. 2276 (2013) – announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as required by 28 U.S.C. § 2255(h)(2).

United States v. Fulton, 780 F.3d 683 (5th Cir. 2015) Where district court found that defendant's 28 U.S.C. § 2255 motion was successive and thus transferred the motion to the Court of Appeals pursuant to 28 U.S.C. § 1631, defendant could appeal the transfer without a certificate of appealability ("COA"); a transfer order under § 1631 is not a final order within the meaning of 28 U.S.C. § 2253(c)(1)(B), and the appeal of such an order does not require a COA; finding that the district court correctly determined that the § 2255 motion was successive, the Fifth Circuit affirmed the transfer order; because another panel of the Fifth Circuit had previously denied defendant's motion for authorization for a successive petition, the Fifth Circuit remanded the case to the district court with instructions to dismiss defendant's § 2255 motion for want of jurisdiction.

United States v. Jones, ____ F.3d ____, 2015 WL 4644629 (5th Cir. Aug. 4, 2015) A sentence reduction under 18 U.S.C. § 3582(c)(2) does not result in a new judgment, but rather only in the modification of an existing one, and a defendant may not thereby avoid the requirements for filing second or successive motions under 28 U.S.C. § 2255; because defendant's current § 2255 motion raised a claim that he could have raised in a prior application, and because no "new judgment" had intervened between the filing of his current § 2255 motion and the filing of his previous ones, his current § 2255 motion was successive to his previous ones; accordingly, the Fifth Circuit affirmed the district court's order transferring defendant's case to the Fifth Circuit and ordered defendant to file a motion for authorization of a successive § 2255 motion pursuant to 28 U.S.C. § 2244(b)(3)(A) within 30 days of notification by the Clerk; the defendant was advised that failure to do so would result in an order denying authorization.

B. Habeas Corpus (§ 2254) generally

Lopez v. Smith, ____ U.S. ____, 135 S. Ct. 1 (2014) (per curiam) (decision below: Smith v. Lopez, 731 F.3d 859 (9th Cir. 2013)) The Ninth Circuit erred in affirming the district court's grant of federal habeas relief to California state murder defendant; no United States Supreme Court decision clearly established the principle – necessary for habeas relief to be granted here – that a defendant, once adequately apprised of the possibility of conviction on an aiding-and-abetting theory by the information charging the murder, could nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial; the Supreme Court decisions cited by the Ninth Circuit stood only for the general proposition that a defendant must have adequate notice of the charges against him, and this proposition was far too general and abstract to establish the specific rule defendant needed; that left only a prior Ninth Circuit decision to bolster the Ninth Circuit's decision in this case, but circuit precedent cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced; accordingly, the Supreme Court granted certiorari, reversed the Ninth Circuit's judgment affirming the grant of habeas relief, and remanded for further proceedings.

Glebe v. Frost, ____ U.S. ____, 135 S. Ct. 429 (2014) (per curiam) (decision below: Frost v. Van Boening, 757 F.3d 910 (9th Cir. 2014) (en banc)) In Washington state prosecution for armed robberies and related crimes, constitutional error, if any, in forcing defendant to choose between a duress defense and a defense that the state had failed to meet its burden of proving defendant's guilt, was not clearly, under United States Supreme Court precedent, a structural error requiring automatic reversal (as opposed to a trial error, subject to review for harmlessness beyond a reasonable doubt); the sole Supreme Court authority cited by the Ninth Circuit for its conclusion that the error was structural (Herring v. New York, 422 U.S. 853 (1975)) was sufficiently different from its case so that it did not compel the conclusion that the error in this case was structural; the Ninth Circuit also erred in drawing support for its conclusion from two Ninth Circuit precedents; circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court," as required for federal habeas relief pursuant to 28 U.S.C. § 2254(d)(1); the Supreme Court also rejected the Ninth Circuit's characterization of the error here as tantamount to

extracting a concession of guilt from the defense, shifting the burden of proof, and directing a verdict of guilt; reasonable minds could differ about whether requiring the defense to choose between alternative theories of the defense constituted any of these errors; accordingly, the Supreme Court reversed the judgment of the Ninth Circuit and remanded for further proceedings; the Supreme Court declined to reach the alternative question of whether the Washington Supreme Court had misapplied the harmless-beyond-a-reasonable doubt standard in finding the error here to be harmless, because the en banc Ninth Circuit had not addressed that question.

Jennings v. Stephens, ____ U.S. ____, 135 S. Ct. 793 (2015) (decision below: Jennings v. Stephens, 537 Fed. Appx. 326 (5th Cir. 2013) (unpublished)) Where death-sentenced prisoner received federal habeas relief as to his death sentence on the basis of two theories of ineffective assistance of counsel ("IAC"), but not the third, and the state appealed the grant of habeas relief, prisoner could assert the third theory of IAC, on which he was unsuccessful in the court below, in defense of the judgment granting him a new punishment hearing; this did not require the taking of a cross-appeal by the filing of a separate notice of appeal; nor did it require defendant to seek a certificate of appealability ("COA"), as this requirement "assuredly does not embrace the defense of a judgment on alternative grounds"; the Court noted, but did not decide, the question whether the COA requirement applies where a habeas petition seeks to cross-appeal in a case that is already before court of appeals. (Justice Thomas filed a dissenting opinion, in which he was joined by Justices Kennedy and Alito.)

Christeson v. Roper, ____ U.S. ____, 135 S. Ct. 891 (2015) (per curiam) Where death-sentenced Missouri defendant's federal habeas counsel had a conflict of interest in representing him (because their untimely filing of defendant's federal habeas petition might have been attributable to their culpable abandonment of defendant, which would possibly excuse the late filing under the doctrine of equitable tolling, but which the attorneys could not be expected to raise against themselves), the district court erred in denying, and the Eighth Circuit erred in affirming the denial of, new attorneys' motion to substitute in; under Martel v. Clair, 565 U.S. ____, 132 S. Ct. 1276 (2012), a motion for substitution of an appointed attorney should be granted when it is in the "interests of justice"; that standard is met when a conflict of this sort is present, and none of the considerations relied upon by the district court justified the decision to deny defendant new counsel; because it was not plain that it would have been futile to appoint substitute counsel, the Supreme Court summarily reversed the Eighth Circuit's judgment and remanded for further proceedings (which, the Supreme Court suggested, might include a Fed. R. Civ. P. 60(b) motion to reopen the denial of federal habeas relief by showing that he was entitled to equitable tolling due to counsel's abandonment). (Justice Alito, joined by Justice Thomas, filed an opinion dissenting from the reversal of the Court of Appeals' decision without briefing and argument; he "th[ought] that plenary review would have been more appropriate in this case.")

Woods v. Daniel, ____ U.S. ____, 2015 WL 1400852 (Mar. 30, 2015) (per curiam) (decision below: Donald v. Rapelje, 580 Fed. Appx. 277 (6th Cir. 2014) (unpublished)) The Sixth Circuit erred in affirming the district court's grant of federal habeas relief to Michigan state murder/robbery defendant; no United States Supreme Court decision clearly establishes the rule

upon which habeas relief was predicated – namely, that an attorney provides per se ineffective assistance of counsel under United States v. Cronic, 466 U.S. 648 (1984), when he is briefly absent during testimony concerning other defendants; within the contours of Cronic, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case; because the Supreme Court has never held that Cronic applies in the circumstances presented in this case, federal habeas relief based upon Cronic was unavailable; accordingly, the Supreme Court granted certiorari, reversed the Sixth Circuit's judgment affirming the grant of habeas relief, and remanded for further proceedings.

Davis v. Ayala, ____ U.S. ____, 135 S. Ct. 1287 (2015) (decision below: Ayala v. Wong, 756 F.3d 656 (9th Cir. 2013), amended Feb. 25, 2014)) In California state prosecution for murder, resulting in a death sentence, where the defendant made Batson challenges to prosecution strikes, but then then the prosecution was allowed to explain its strikes in an ex parte hearing at which the defense was not present, the California Supreme Court did not unreasonably apply federal law in holding that any error was harmless beyond a reasonable doubt; a finding that an error is harmless is an adjudication on the merits triggering the AEDPA's strict standards; under Brecht v. Abrahamson, 507 U.S., 619 (1993), a federal habeas petitioner must demonstrate actual prejudice in order to obtain relief; Brecht subsumes the AEDPA's requirement when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967); here, the defendant failed to demonstrate actual prejudice as required by Brecht; accordingly, the Supreme Court reversed the Ninth Circuit's grant of habeas relief. (Justice Kennedy joined the opinion of the Court, but also filed a concurring opinion where he expressed concern about holding prisoners in solitary confinement for lengthy periods. Justice Thomas joined the opinion of the Court, but also filed a short concurring opinion responding to Justice Kennedy's concurring opinion. Justice Sotomayor filed a dissenting opinion in which she was joined by Justices Ginsburg, Breyer, and Kagan.)

Brumfield v. Cain, ____ U.S. ____, 135 S. Ct. 2269 (2015) (decision below: Brumfield v. Cain, 744 F.3d 918 (5th Cir. 2014)) In case where federal district court granted habeas relief on the ground that defendant was intellectually disabled, thus precluding execution under Atkins v. Virginia, 536 U.S. 304 (2002), but the Fifth Circuit reversed that decision, the Supreme Court held that defendant had satisfied the requirements of 28 U.S.C. § 2254(d)(2) and thus was entitled to have his Atkins claim considered on the merits in federal court; this was so because the two underlying factual determinations on which the state trial court's decision were premised – namely, (1) that defendant's IQ score was inconsistent with a diagnosis of intellectual disability and (2) that he presented no evidence of adaptive impairment – were unreasonable under § 2254(d)(2); because the § 2254(d)(2) standard was satisfied, there was no need to consider 28 U.S.C. § 2254(d)(1); the Court also declined to address the state's tardily raised argument that 28 U.S.C. § 2254(e)(1) supplies the governing standard when evaluating whether a habeas petitioner has satisfied § 2254(d)(2)'s requirements; accordingly, the Court vacated the Fifth Circuit's decision and remanded for further proceedings. (Justice Thomas filed a dissenting opinion, which the

Chief Justice and Justices Scalia and Thomas joined, except for Part I-C. Justice Alito filed a dissenting opinion in which the Chief Justice joined.)

Hoffman v. Cain, 752 F.3d 420 (5th Cir. 2014), opinion amended on denial of reh'g and reh'g *en banc*, 763 F.3d 403 (5th Cir. Aug. 13, 2014) The Fifth Circuit affirmed the district court's denial of federal habeas relief, holding particularly as follows:

(1) Under Harrington v. Richter, ____ U.S. ____, 131 S. Ct. 770 (2011), when a federal claim has been presented to a state court and the state court has denied relief, it must be presumed that the state court adjudicated the claim on the merits, although that presumption can be overcome; here, with respect to Louisiana capital defendant's claim that trial counsel were ineffective for failing to investigate and present evidence of the circumstances of the crime, the Richter presumption was not overcome; therefore, the state court's implicit denial of that unaddressed claim qualified as a decision on the merits for which AEDPA deference was owed.

(2) The state court did not unreasonably apply federal law in rejecting defendant's claims that trial counsel were ineffective by failing to properly prepare for the mitigation phase of the trial or by investigating and presenting the circumstances of the crime.

(3) The state court did not err in rejecting defendant's claim of the suppression of material and exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83 (1963); the suppressed evidence (a coroner's investigative report) was neither favorable, nor material.

(4) Defendant's claim of racial discrimination in the selection of the grand-jury foreperson was abandoned by defendant before trial and thus was procedurally defaulted under Louisiana law; because defendant did not meet the narrow exception to such default, the Fifth Circuit could not review the merits of that claim.

(5) State courts did not err in rejecting defendant's claims of racial discrimination in selection of the petit jury under Batson v. Kentucky, 476 U.S. 79 (1986); the record supported the state appellate courts' conclusions that the state's peremptory strikes were race-neutral.

(6) The state court did not act unreasonably in rejecting defendant's claim of racial discrimination by the petit jury, evidenced by the alleged affidavit of one of the jurors; the consideration of such affidavits is disfavored, if not barred completely, by La. Code Evid. Art. 606(b); in any event, the state court would likewise not have acted unreasonably or contrary to law in concluding that the affidavit did not support a finding of intentional bias or discrimination; furthermore, the affidavit indicated that the jury acted on the basis of the evidence and the jury instructions.

In re Campbell, 750 F.3d 523 (5th Cir. 2014) Fifth Circuit granted Louisiana death-sentenced prisoner authorization to file a successive petition contending that, under Atkins v. Virginia, 536 U.S. 304 (2002), he was ineligible for the death penalty due to his intellectual

disability; there was considerable evidence of intellectual ability, including IQ tests that were not disclosed by the state, despite a request and an earlier Atkins challenge; even though prisoner's petition was time-barred under the AEDPA because it was filed more than 10 years after the date the Supreme Court decided Atkins, the state's nondisclosure of evidence of intellectual disability might constitute grounds for equitable tolling of the AEDPA statute of limitations, and the district court would be best-positioned to determine whether equitable tolling applied; finally, the Fifth Circuit held that prisoner had made a sufficient showing of likelihood of success on the merits so as to warrant a stay of prisoner's execution.

Jordan v. Epps, 756 F.3d 395 (5th Cir. 2014) Where (1) Mississippi capital defendant entered into an agreement for life without parole in exchange for his promise not to challenge his sentence, (2) but then he successfully challenged his sentence on the ground that life with parole was not a permissible statutory option at the time, and (3) on remand, the prosecutor refused to offer the same life-without-parole agreement, and successfully sought a death sentence at trial, defendant was not entitled to a certificate of appealability ("COA") on his claim of prosecutorial vindictiveness; there was no evidence of actual vindictiveness; the fact that the prosecutor refused to enter into a new sentence agreement due to defendant's previous violation of his agreement not to challenge his sentence did not establish actual vindictiveness; nor did defendant make out a claim of presumptive vindictiveness; under Fifth Circuit law, no presumption of vindictiveness arises where there is no change in the charges filed or punishment sought; here, defendant was always subject to the death penalty that was ultimately imposed upon him. (Judge Dennis filed an opinion concurring in part and dissenting in part. He would hold that defendant had made out a sufficient showing of presumptive vindictiveness to warrant the granting of a COA.)

Mays v. Stephens, 757 F.3d 211 (5th Cir. 2014):

(1) Texas capital defendant was not entitled to a certificate of appealability ("COA") to appeal the denial of federal habeas relief from his death sentence based on his attorneys' alleged ineffective assistance of counsel ("IAC") in failing to investigate whether he had "organic brain damage" mitigating his culpability, because there was a reasonable argument that defendant was not prejudiced thereby; likewise, even if trial counsel provided IAC by failing to request a competency hearing, defendant could not establish prejudice; there was no evidence presented that defendant was incompetent (as opposed to simply mentally ill), and consequently defendant failed to show that there was a reasonable probability that, but for the alleged IAC, he would have been found incompetent to stand trial.

(2) Defendant was also not entitled to a COA on his claim that he was intellectually disabled, thereby precluding his execution under the Eighth Amendment; along the way, the Fifth Circuit held that the Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014), did not render unconstitutional the Texas Court of Criminal Appeals' test for finding intellectual disability (see Ex parte Briseño, 135 S.W.3d 1, 5-9 (Tex. Crim. App. 2004)); Hall simply dealt with the constitutionality of mandatory, strict IQ test cutoffs in making the intellectual-disability determination.

(3) Finally, defendant was not entitled to a COA on his claim that his mental illness precluded his execution under the Eighth Amendment; no Supreme Court opinion prohibits the execution of mentally ill persons who are not legally insane.

Garcia v. Stephens, 757 F.3d 220 (5th Cir. 2014):

(1) Texas capital defendant was not entitled to a certificate of appealability ("COA") to appeal the denial of federal habeas relief from his death sentence based on his claim that he was intellectually disabled, thereby precluding his execution under the Eighth Amendment; reasonable jurists would not debate the state court's rejection of that claim based on the failure to make a prima facie showing of intellectual disability; furthermore, reasonable jurists would also not debate the federal district court's alternative resolution of this claim under de novo review because, even considering the evidence defendant presented for the first time in federal court, defendant failed to demonstrate that he had significantly subaverage intellectual functioning; nor did the Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014), cast doubt upon the debatability of the decision denying habeas relief; unlike in Hall, Texas does not preclude individuals with an IQ score between 70 and 75 from presenting additional evidence of difficulties in adaptive functioning in support of an intellectual-disability claim.

(2) Defendant was also not entitled to a COA on his claim that his attorneys provided ineffective assistance of counsel by eliciting, from defense witness Dr. Walter Quijano (who was testifying for the defense on the question of future dangerousness), testimony that minorities (blacks and Hispanics) "are overrepresented in the . . . so-called dangerous population"; the state court reasonably concluded that Dr. Quijano's isolated comment was not harmful.

Newbury v. Stephens, 756 F.3d 850 (5th Cir. 2014) On remand from the United States Supreme Court in light of Treviño v. Thaler, 133 S. Ct. 1911 (2013), the Fifth Circuit once again denied death-sentenced Texas defendant's request for a certificate of appealability ("COA") on his claims of ineffective assistance of counsel ("IAC"); because the federal district court addressed the merits of defendant's IAC claims, including the evidence presented for the first time in federal court, defendant already received all of the relief available to him under Treviño and Martinez v. Ryan, 132 S. Ct. 1309 (2012) (which, Treviño held, applied with equal force to Texas); considering all of defendant's evidence, including that presented for the first time in federal court, reasonable jurists would not debate the district court's decision that defendant's IAC claim lacked merit; because defendant did not present a debatable IAC claim, he was not entitled to a COA notwithstanding the district court's procedural error in concluding that ineffective habeas counsel could not constitute cause for a procedural default.

Williams v. Stephens, 761 F.3d 561 (5th Cir. 2014) Death-sentenced Texas defendant was not entitled to a certificate of appealability ("COA") to appeal the district court's denial of his claim that his trial counsel provided ineffective assistance of counsel in eight specific instances; nor was defendant entitled to a COA to appeal the district court's rejection of his claim that he was

ineligible for the death penalty under Atkins v. Virginia, 536 U.S. 304 (2002); defendant did not meet his burden of showing that the jury's finding of no intellectual disability was clearly wrong.

In re Coleman, 768 F.3d 367 (5th Cir. 2014) Where death-sentenced Texas defendant filed a motion for relief from judgment under Fed. R. Civ. P. 60(b) from the judgment denying federal habeas relief, the motion was properly treated as a successive habeas petition because the claims it made – relating to newly discovered evidence not previously discovered because of ineffective assistance of counsel – were fundamentally substantive, not procedural as required under Fed. R. Civ. P. 60(b); defendant was not entitled to relief on the successive petition because the claim was previously raised and rejected, and, in any event, did not meet the standard for a successive petition; for these reasons, defendant was also not entitled to a stay of execution.

Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014) Louisiana state second-degree murder defendant successfully made out a prima facie case of racial discrimination in the selection of the grand jury foreperson, and the state failed to rebut that prima facie case; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief.

Speer v. Stephens, 781 F.3d 784 (5th Cir. 2015) Where federal habeas counsel for death-sentenced Texas defendant was also defendant's state habeas counsel, the mere fact that ineffectiveness of state habeas counsel might (under Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Treviño v. Thaler, 133 S. Ct. 1911 (2013)) constitute cause for failure to raise an ineffective-assistance-of-counsel claim did not require the appointment of additional federal habeas counsel to investigate whether defendant had any viable claim under Martinez or Treviño; however, in the interest of justice, the Fifth Circuit exercised its authority under 18 U.S.C. § 3599 to appoint supplemental counsel for the sole purpose of determining whether defendant had additional habeas claims that ought to have been brought; the Fifth Circuit denied the original counsel's motion to withdraw and remanded the case for appointment of supplemental counsel and to consider in the first instance whether defendant had any claims pursuant to Martinez and Treviño that he might raise, and if so, whether those claims merited relief.

Sandoval Mendoza v. Stephens, 783 F.3d 203 (5th Cir. 2015) Citing Speer v. Stephens, the majority granted death-sentenced Texas defendant's motion for new supplemental federal habeas counsel and remanded the case for appointment of supplemental counsel and to consider in the first instance whether defendant had any claims pursuant to Martinez and Treviño that he might raise, and if so, whether those claims merited relief. (Judge Owen filed a concurring opinion to explain more fully why she concluded that supplemental counsel was necessary in this case.)

Matamoros v. Stephens, 783 F.3d 212 (5th Cir. 2015) Fifth Circuit rejected death-sentenced Texas defendant's claim, that under Atkins v. Virginia, 536 U.S. 304 (2002), he was ineligible for the death penalty due to his intellectual disability; even though the only competent scientific evidence in the record suggested that defendant has deficits in numerous adaptive behavior areas (the state's expert was later discredited), defendant failed to show, by clear and

convincing evidence, that the Texas Court of Criminal Appeals unreasonably determined that defendant does not exhibit adaptive behavioral deficits that originated before age 18.

Lopez v. Stephens, 783 F.3d 524 (5th Cir. 2015) The district court committed no error in finding that death-sentenced Texas defendant was competent to waive federal habeas review and that he did so knowingly and voluntarily; the inquiry conducted by the district court comported with Mata v. Johnson, 210 F.3d 324, 328-31 (5th Cir. 2000), and was constitutionally sufficient.

Castro Perez v. Stephens, 784 F.3d 276 (5th Cir. 2015) Fifth Circuit dismissed for lack of jurisdiction death-sentenced Texas defendant's appeal of the denial of his federal habeas petition; the defendant failed to file a notice of appeal within 30 days of the judgment as required by Fed. R. App. P. 4(a)(1), and the district court erred by reopening the appeal time pursuant to Fed. R. App. P. 4(a)(6); the district court's action was barred by a previous Fifth Circuit ruling in this case that Rule 4(a)(6) was not available, and, in any event, represents a misapplication of Rule 4(a)(6). (Judge Dennis filed a dissenting opinion. He would hold that the prior opinion comments about Rule 4(a)(6) were simply dicta and that the district court did not abuse its discretion in reopening the appeal time, because defendant's attorney abandoned him.)

Woodfox v. Cain, 789 F.3d 565 (5th Cir. 2015) Where -- after the Fifth Circuit affirmed the district court's grant of federal habeas relief to Louisiana state defendant on the ground of racial discrimination in the selection of the grand jury foreperson, see Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014) – the district court issued an unconditional writ releasing defendant and prohibiting retrial, the Fifth Circuit granted the State of Louisiana's motion for a stay of the district court's order for the duration of the appeal on the merits; to succeed on the merits of the appeal, the state must show that the district court abused its discretion by ordering defendant's unconditional release and prohibiting retrial; here, the state made a strong showing of likelihood of success on the merits; a federal court's absolute bar on retrial by the state court is rarely warranted; additionally, the remaining stay factors – the state's irreparable injury and the public interest – also favored the state; indeed, the state maintained that defendant was still both dangerous and a flight risk; although the Fifth Circuit granted the motion for a stay pending appeal, it also sua sponte ordered the appeal on the merits expedited.

C. Ineffective Assistance of Counsel/Conflict of Interest

Woods v. Daniel, ____ U.S. ____, 135 S. Ct. 1372 (2015) (per curiam) (decision below: Donald v. Rapelje, 580 Fed. Appx. 277 (6th Cir. 2014) (unpublished)) The Sixth Circuit erred in affirming the district court's grant of federal habeas relief to Michigan state murder/robbery defendant; no United States Supreme Court decision clearly establishes the rule upon which habeas relief was predicated – namely, that an attorney provides per se ineffective assistance of counsel under United States v. Cronic, 466 U.S. 648 (1984), when he is briefly absent during testimony concerning other defendants; within the contours of Cronic, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case; because

the Supreme Court has never held that Cronic applies in the circumstances presented in this case, federal habeas relief based upon Cronic was unavailable; accordingly, the Supreme Court granted certiorari, reversed the Sixth Circuit's judgment affirming the grant of habeas relief, and remanded for further proceedings.

Hoffman v. Cain, 752 F.3d 420 (5th Cir. 2014), opinion amended on denial of reh'g and reh'g *en banc*, 763 F.3d 403 (5th Cir. Aug. 13, 2014) Under Harrington v. Richter, ____ U.S. ____, 131 S. Ct. 770 (2011), when a federal claim has been presented to a state court and the state court has denied relief, it must be presumed that the state court adjudicated the claim on the merits, although that presumption can be overcome; here, with respect to Louisiana capital defendant's claim that trial counsel were ineffective for failing to investigate and present evidence of the circumstances of the crime, the Richter presumption was not overcome; therefore, the state court's implicit denial of that unaddressed claim qualified as a decision on the merits for which AEDPA deference was owed; the state court did not unreasonably apply federal law in rejecting defendant's claims that trial counsel were ineffective by failing to properly prepare for the mitigation phase of the trial or by investigating and presenting the circumstances of the crime.

Mays v. Stephens, 757 F.3d 211 (5th Cir. 2014) Texas capital defendant was not entitled to a certificate of appealability to appeal the denial of federal habeas relief from his death sentence based on his attorneys' alleged ineffective assistance of counsel ("IAC") in failing to investigate whether he had "organic brain damage" mitigating his culpability, because there was a reasonable argument that defendant was not prejudiced thereby; likewise, even if trial counsel provided IAC by failing to request a competency hearing, defendant could not establish prejudice; there was no evidence presented that defendant was incompetent (as opposed to simply mentally ill), and consequently defendant failed to show that there was a reasonable probability that, but for the alleged IAC, he would have been found incompetent to stand trial.

Garcia v. Stephens, 757 F.3d 220 (5th Cir. 2014) Texas capital defendant was not entitled to a certificate of appealability on his claim that his attorneys provided ineffective assistance of counsel by eliciting, from defense witness Dr. Walter Quijano (who was testifying for the defense on the question of future dangerousness), testimony that minorities (blacks and Hispanics) "are overrepresented in the . . . so-called dangerous population"; the state court reasonably concluded that Dr. Quijano's isolated comment was not harmful.

Newbury v. Stephens, 756 F.3d 850 (5th Cir. 2014) On remand from the United States Supreme Court in light of Treviño v. Thaler, 133 S. Ct. 1911 (2013), the Fifth Circuit once again denied death-sentenced Texas defendant's request for a certificate of appealability ("COA") on his claims of ineffective assistance of counsel ("IAC"); because the federal district court addressed the merits of defendant's IAC claims, including the evidence presented for the first time in federal court, defendant already received all of the relief available to him under Treviño and Martinez v. Ryan, 132 S. Ct. 1309 (2012) (which, Treviño held, applied with equal force to Texas); considering all of defendant's evidence, including that presented for the first time in federal court, reasonable jurists would not debate the district court's decision that defendant's IAC claim lacked merit;

because defendant did not present a debatable IAC claim, he was not entitled to a COA notwithstanding the district court's procedural error in concluding that ineffective habeas counsel could not constitute cause for a procedural default.

United States v. Curtis, 769 F.3d 271 (5th Cir. 2014) (on reh'g) Where federal defendant convicted of bankruptcy fraud under 18 U.S.C. § 152 challenged his conviction under 28 U.S.C. § 2255 for alleged ineffective assistance of counsel ("IAC"):

(1) Defendant was not entitled to relief based on trial attorney's failure to research the statute-of-limitations because the indictment was, in fact, timely; pursuant to Fed. R. Crim. P. 45(a)(1)(A) (which the Fifth Circuit found to apply here), where defendant's bankruptcy discharge occurred on July 23, 2003, the statute of limitations did not begin to run until the next day; therefore, the indictment, which was filed on July 23, 2008, was filed within (albeit on the last day of) the five-year limitations period.

(2) Although criminal trial attorney failed to contact defendant's bankruptcy attorney about the bankruptcy matter that was at the heart of the criminal charge, defendant was not entitled to § 2255 relief for IAC because he failed to show that, had the criminal trial attorney contacted the bankruptcy attorney, what the criminal trial attorney would have learned would have persuaded him to advise defendant not to plead guilty and instead to insist on going to trial.

(3) Although trial attorney's apparent failure to get and look at evidence and discovery "was less than commendable," defendant was not entitled to § 2255 relief for IAC where he failed to demonstrate that he was prejudiced by such deficient performance; indeed, he did not even allege that he would not have pleaded guilty but for this deficiency.

Canales v. Stephens, 765 F.3d 551 (5th Cir. 2014) There was some apparent merit to death-sentenced Texas defendant's claim of ineffective assistance of counsel ("IAC") with respect to the punishment phase of his trial; trial counsel performed deficiently by failing to conduct a mitigation investigation; furthermore, there was also some merit to the claim that defendant was prejudiced by his trial counsel's deficient performance, as a mitigation evidence could have uncovered a large body of evidence of a childhood full of violence, abuse, and privation; because defendant had not yet had the opportunity to develop the factual basis for this claim (until the Supreme Court's ruling in Treviño v. Thaler, the claim was procedurally defaulted), the Fifth Circuit reversed the district court's denial of relief on this ground and remanded for further proceedings; the Fifth Circuit, however, affirmed the denial of relief on defendant's remaining claims.

United States v. Kayode, 777 F.3d 719 (5th Cir. 2014) Where defendant (convicted on his guilty plea of fraud and unlawful procurement of naturalization) alleged, in a motion under 28 U.S.C. § 2255, alleged that his attorney had provided him with ineffective assistance of counsel ("IAC") by failing to warn him of the immigration consequences of his plea (possible denaturalization and deportation), the district court did not reversibly err in granting the

government's motion for summary judgment; although defendant sufficiently alleged deficient performance in this regard under Padilla v. Kentucky, 559 U.S. 356 (2010), defendant did not meet his burden to show prejudice from this deficient performance; accordingly, the Fifth Circuit affirmed the district court's grant of summary judgment to the government. (Judge Dennis filed a dissenting opinion. He would hold that defendant was entitled to an evidentiary hearing to further develop his IAC claim. Judge Dennis also wrote to express his view that a "perfunctory" judicial admonishment, at the guilty-plea proceeding, about possible immigration consequences of conviction should not weigh against a claim of prejudice caused by the ineffectiveness of counsel.)

Speer v. Stephens, 781 F.3d 784 (5th Cir. 2015) Where federal habeas counsel for death-sentenced Texas defendant was also defendant's state habeas counsel, the mere fact that ineffectiveness of state habeas counsel might (under Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Treviño v. Thaler, 133 S. Ct. 1911 (2013)) constitute cause for failure to raise an ineffective-assistance-of-counsel claim did not require the appointment of additional federal habeas counsel to investigate whether defendant had any viable claim under Martinez or Treviño; however, in the interest of justice, the Fifth Circuit exercised its authority under 18 U.S.C. § 3599 to appoint supplemental counsel for the sole purpose of determining whether defendant had additional habeas claims that ought to have been brought; the Fifth Circuit denied the original counsel's motion to withdraw and remanded the case for appointment of supplemental counsel and to consider in the first instance whether defendant had any claims pursuant to Martinez and Treviño that he might raise, and if so, whether those claims merited relief.

Sandoval Mendoza v. Stephens, 783 F.3d 203 (5th Cir. 2015) Citing Speer v. Stephens, the majority granted death-sentenced Texas defendant's motion for new supplemental federal habeas counsel and remanded the case for appointment of supplemental counsel and to consider in the first instance whether defendant had any claims pursuant to Martinez and Treviño that he might raise, and if so, whether those claims merited relief. (Judge Owen filed a concurring opinion to explain more fully why she concluded that supplemental counsel was necessary in this case.)

United States v. Batamula, 788 F.3d 166 (5th Cir. 2015) Where noncitizen defendant – convicted on his guilty plea of making a false statement to a federal agent (18 U.S.C. § 1001) and making a false statement in an application for a passport (18 U.S.C. § 1542) – raised, in a 28 U.S.C. § 2255 motion, a claim under Padilla v. Kentucky, 559 U.S. 356 (2010) (i.e., a claim that he had been provided ineffective assistance of counsel because his counsel had not advised him that the offenses to which he was pleading guilty would result in his deportation), the district court erred in granting the government's motion for summary judgment and denying defendant's motion; a judge's statement at the guilty-plea proceeding that deportation is "likely" is not dispositive of whether a petitioner whose counsel failed to advise him regarding the immigration consequences of his plea can demonstrate prejudice therefrom; defendant thus was not foreclosed from challenging his guilty plea under Padilla solely because the district court notified him that deportation following the service of his sentence was "likely," and the district court erred in holding to the contrary; because the record was insufficiently developed to determine whether

defendant was entitled to relief on his claim, the Fifth Circuit reversed and remanded for further proceedings.

D. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

Jennings v. Stephens, ____ U.S. ____, 135 S. Ct. 793 (2015) (decision below: Jennings v. Stephens, 537 Fed. Appx. 326 (5th Cir. 2013) (unpublished)) Where death-sentenced prisoner received federal habeas relief as to his death sentence on the basis of two theories of ineffective assistance of counsel ("IAC"), but not the third, and the state appealed the grant of habeas relief, prisoner could assert the third theory of IAC, on which he was unsuccessful in the court below, in defense of the judgment granting him a new punishment hearing; this did not require the taking of a cross-appeal by the filing of a separate notice of appeal; nor did it require defendant to seek a certificate of appealability ("COA"), as this requirement "assuredly does not embrace the defense of a judgment on alternative grounds"; the Court noted, but did not decide, the question whether the COA requirement applies where a habeas petition seeks to cross-appeal in a case that is already before court of appeals. (Justice Thomas filed a dissenting opinion, in which he was joined by Justices Kennedy and Alito.)

E. Other

Glossip v. Gross, ____ U.S. ____, 135 S. Ct. 2726 (2015) (decision below: Warner v. Gross, 776 F.3d 721 (10th Cir. 2015)) The Tenth Circuit did not err in affirming the district court's denial of Oklahoma death-row inmates' motion for a preliminary injunction to enjoin the use of midazolam as the first drug in a three-drug execution protocol, because the inmates failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment; the inmates failed to establish that any risk of harm from the use of midazolam was substantial when compared to a known and alternative method of execution; the district court did not commit clear error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride (the second and third drugs in the three-drug protocol). (Justice Scalia and Justice Thomas each filed a concurring opinion responding to Justice Breyer's dissenting opinion. Justice Breyer filed a dissenting opinion, joined by Justice Ginsburg, in which he joined Justice Sotomayor's dissenting opinion, but also expressed at some length his view that it is "highly likely that the death penalty violates the Eighth Amendment" and that the Court should call for full briefing on that question. Justice Sotomayor filed a dissenting opinion on the midazolam issue, joined by Justices Ginsburg, Breyer, and Kagan.)

Sells v. Livingston, 750 F.3d 478 (5th Cir. 2014) District court abused its discretion in issuing a preliminary injunction on death-sentenced Texas defendant's execution, pending the disclosure of information about the lethal drugs that would be used to execute him; no appellate decision supports the notion that a defendant has a liberty interest in obtaining information about execution protocols; thus, defendant failed to make a sufficient showing of a likelihood of success

on the merits; accordingly, the Fifth Circuit reversed the preliminary injunction and vacated the district court's stay of execution.

Brown v. Stephens, 762 F.3d 454 (5th Cir. 2014) Federal district court did not abuse its discretion in denying death-sentenced Texas defendant's motion, pursuant to 18 U.S.C. § 3599, for funds for a clemency-related investigation; defendant did not show that the funds he requested for investigative services were "reasonably necessary" for clemency proceedings, because it was only speculative that such an investigation would uncover any material information over and above what had already been uncovered in the investigation that was done by a mitigation specialist in state habeas proceedings.

XII. MISCELLANEOUS

A. Particular Substantive Offenses (and Defenses)

Whitfield v. United States, ____ U.S. ____, 135 S. Ct. 785 (2015) (decision below: United States v. Whitfield, 548 Fed. Appx. 70 (4th Cir. 2013) (unpublished)) A bank robber "forces [a] person to accompany him," for purposes of 18 U.S.C. § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance, as was the case here; therefore, fleeing bank robber was properly subject to § 2113(e) when he entered an elderly woman's house and forced her to accompany him from the hallway to a computer room four to nine feet away, where the woman suffered a fatal heart attack.

Yates v. United States, ____ U.S. ____, 135 S. Ct. 1074 (2015) (decision below: United States v. Yates, 733 F.3d 1059 (11th Cir. 2013)) Under 18 U.S.C. § 1519, which criminalizes the destruction of, and other acts upon, "any record, document, or tangible object," the term "tangible object" cannot be construed literally, but rather should be limited to objects that are similar to records and documents in that they are used to record or preserve information; thus, defendant was not properly convicted under 18 U.S.C. § 1519 for destroying purportedly undersized, harvested fish from the Gulf of Mexico after a federally-deputized officer had issued him a civil citation and instructed him to bring them back to port. (Per a plurality opinion [authored by Justice Ginsburg and joined by Chief Justice Roberts and Justices Breyer and Sotomayor], and the separate opinion of Justice Alito, concurring in the judgment. Justice Kagan filed a dissenting opinion, in which she was joined by Justices Scalia, Kennedy, and Thomas.)

Elonis v. United States, ____ U.S. ____, 135 S. Ct. 2001 (2015) (decision below: United States v. Elonis, 730 F.3d 321 (3d Cir. 2013)) The defendant's conviction, under 18 U.S.C. § 875(c), for transmitting a threat in interstate commerce (by Facebook posts which the defendant claimed were raps not intended to threaten) could not stand because the jury was instructed that they could consider the raps to be threats if a reasonable person viewed them as such; even though § 875(c) does not specify a scienter requirement, there is a presumption in favor of a scienter requirement where an element criminalizes otherwise innocent conduct; under this rule, the

threatening nature of the communication was subject to some scienter requirement more than the mere negligence standard conveyed by the jury instruction; although this element is satisfied where the defendant transmits a communication with the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat, the Court declined to address, as unnecessary, whether a mental state of recklessness would also suffice; the Court also declined to consider, as unnecessary, any First Amendment issues . (Justice Alito filed an opinion concurring in part and dissenting in part, in which he would hold that a defendant may be convicted under § 875(c) if he consciously disregards the risk that the communication transmitted will be regarded as a true threat – i.e., a recklessness standard. He would also hold that such an interpretation does not violate the First Amendment. Justice Thomas filed a dissenting opinion, holding that defendant was properly convicted under a general-intent standard, and that the communications transmitted by defendant were true threats unprotected by the First Amendment.)

McFadden v. United States, 135 S. Ct. 2298 (2015) (decision below: United States v. McFadden, 753 F.3d 432 (4th Cir. 2014)) In a prosecution for trafficking in controlled substance analogues, the government is required to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act; that knowledge requirement can be established in two ways: by evidence that the defendant knew that the substance he was distributing is controlled under the statutory scheme, or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status; the jury instruction given by the district court did not properly convey this mental-state requirement; accordingly, the Court vacated the Fourth Circuit's judgment and remanded for further proceedings (including consideration of whether the error was harmless). (Chief Justice Roberts filed a decision concurring in part and concurring in the judgment. He would hold that "a defendant needs to know more than the identity of the substance; he needs to know that the substance is ***controlled***.")

Ocasio v. United States, cert. granted, ____ U.S. ____, 135 S. Ct. 1491 (Mar. 2, 2015) (No. 14-361) (granting cert. to United States v. Ocasio, 750 F.3d 399 (4th Cir. 2014)) Does a conspiracy to commit extortion, in violation of the Hobbs Act (18 U.S.C. § 1951), require that the conspirators agree to obtain property from someone outside the conspiracy?

United States v. Phea, 755 F.3d 255 (5th Cir. 2014) In trial of defendant for sex trafficking of a minor (in violation of 18 U.S.C. § 1591(a)) and aiding and abetting the promotion of prosecution (in violation of 18 U.S.C. § 1952(a)(3)):

(1) Any error in instructing the jury that a § 1591(a) conviction could lie simply where the defendant had a reasonable opportunity to observe the victim (i.e., making the victim's minority essentially strict liability, without requiring that the defendant have known or at least recklessly disregard that fact) was not plain, given the lack of any Fifth Circuit decision on the question, and given the fact that the Second Circuit had rejected the defendant's argument.

(2) Any error in failing to require the jury to find that § 1591(a) requires the defendant to have known that his conduct affected interstate commerce was not plain, given the lack of a Fifth

Circuit decision on this point, and given that at least two circuits have declined to impose such a requirement.

United States v. Richards, 755 F.3d 269 (5th Cir. 2014) District court erred in dismissing 18 U.S.C. § 48 charges against defendants on the ground that the statute was unconstitutional; unlike the 1999 version of the same statute, which was held unconstitutional under the First Amendment by the United States Supreme Court in United States v. Stevens, 559 U.S. 460 (2010), the 2010 reenactment of § 48 covers only depictions that were obscene under the test of Miller v. California, 413 U.S. 15, 24 (1973); thus, the new version of the statute covers only speech that is unprotected by the First Amendment; the Fifth Circuit also rejected defendants' argument that § 48 violated the First Amendment under R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); although § 48 does regulate a content-based subclass of proscribable speech, it does so based on the secondary effects of that speech (namely, the torture and killing of animals), an exception noted as permissible in R.A.V.; moreover, § 48 serves that interest in a reasonably tailored way; § 48 is thus a permissible regulation of a subset of proscribable speech.

United States v. Rainey, 757 F.3d 234 (5th Cir. 2014): In prosecution of BP's vice president of exploration for obstructing a congressional investigation into the 2010 explosion on the Deepwater Horizon drilling rig (in violation of 18 U.S.C. § 1505), the Fifth Circuit reversed the district court's first basis for dismissing the § 1505 count against defendant – namely, that the defendant could not be prosecuted under § 1505 for obstructing a congressional ***sub***committee; the Fifth Circuit interpreted the statutory class of "any committee of either House" to include congressional subcommittees; the Fifth Circuit also rejected the district court's alternative basis for dismissing this charge – namely, that the indictment did not adequately allege that defendant knew of the pending congressional investigation that he allegedly obstructed; read as a whole, the indictment fairly imported the element of knowledge.

United States v. Gonzalez-Medina, 757 F.3d 425 (5th Cir. 2014) For purposes of determining whether defendant's prior Wisconsin conviction for having sexual intercourse with a child 16 or older (Wis. Stat. § 948.09) was a qualifying "sex offense" triggering a duty to register under the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901 et seq., the age-differential portion of the exception contained in 42 U.S.C. § 16911(5)(C) (namely, that an offense is not a "sex offense" where it involved consensual sexual activity between a victim at least 13 years old and an offender not more than 4 years older than the victim") is not subject to the categorical/modified categorical approach to prior convictions, but rather is a circumstance-specific provision that is subject to broader methods of proof than under the categorical/modified categorical approach; here, even though the Wisconsin statute did not include a four-year age differential as an element, the Wisconsin judgment listed defendant as 24 years old at the time of his Wisconsin offense; accordingly, the Fifth Circuit upheld defendant's SORNA conviction. (Judge Garza filed a dissenting opinion, in which he disagreed with the panel majority's use of the circumstance-specific approach. He would apply the categorical/modified categorical approach to § 16911(5)(C)'s age-differential requirement, and because defendant's Wisconsin conviction was under a statute that lacked a comparable requirement, Judge Garza would vacate the conviction.)

United States v. Traxler, 764 F.3d 486 (5th Cir. 2014) Where defendant pleaded guilty to mail fraud (18 U.S.C. § 1341) in connection with making unauthorized personal charges on her company's credit cards and opening up additional unauthorized accounts, there was a sufficient use of the mails to trigger federal jurisdiction over the case; as in United States v. Mills, 199 F.3d 184 (5th Cir. 1999), defendant's continued fraud depended upon her employer's receiving and paying the credit card bills through the mails, so that the credit card company would not become aware of her fraud or decline her subsequent purchases.

United States v. Torres, 767 F.3d 426 (5th Cir. 2014) Under the Fifth Circuit's precedent in United States v. Johnson, 632 F.3d 912 (5th Cir. 2011), the Attorney General's Interim Rule of February 28, 2007 (which applied the Sex Offender Registration and Notification Act ["SORNA"] retroactively to pre-enactment sex offenders) was valid as to offenders like defendant (**although the Fifth Circuit noted that the circuits are divided on this issue**); because the Interim Rule validly extended SORNA's requirements to defendant, the Fifth Circuit upheld defendant's conviction for failing to register under SORNA after the Interim Rule was promulgated.

United States v. Howard, 766 F.3d 414 (5th Cir. 2014) In prosecution for attempt to knowingly persuade, entice, or coerce a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b):

(1) The evidence was sufficient to convict defendant; grooming behavior plus other acts strongly corroborative of intent to entice illegal sex – such as detailed discussions to arrange a meeting with the minor victim – can suffice to establish a substantial step for attempt under § 2422; the Fifth Circuit noted, however, that "[i]n light of the government's conduct [in this case], finding criminal attempt in this case is a close call, and we hope that this is the outer bounds of a case the government chooses to prosecute under § 2422(b)"; the Fifth Circuit also noted that "[w]ere we the triers of fact, we might reach a conclusion different from the district court in this case."

(2) The word "attempt" in 18 U.S.C. § 2422(b) does not render that statute unconstitutionally vague; nor is § 2422(b) unconstitutionally overbroad; it does not criminalize protected speech.

United States v. Quezada Rojas, 770 F.3d 366 (5th Cir. 2014) Defendant stopped at the border crossing in El Paso, Texas while in a bus bound for Mexico was properly prosecuted for being "found in" the United States after deportation in violation of 8 U.S.C. § 1326; although a line of cases holds that an alien is not "found in" the United States if he voluntarily presents himself to immigration authorities when seeking ***entry*** into the United States, that rule has not been extended to the case of an alien, like defendant, seeking to ***exit*** the country; likewise, although some cases hold that an alien has not truly "entered" the United States if he was never free of "official restraint" from the time he crossed the border, the "official restraint" doctrine has been applied only to persons entering the country, not to persons leaving.

United States v. Diehl, 775 F.3d 726 (5th Cir. 2015) There was sufficient evidence on the interstate-commerce element of 18 U.S.C. § 2251(a); the evidence showed that the images were produced in Texas, but were later found on computers in other states and Australia; moreover, there was specific evidence from which it could be inferred that defendant himself transmitted the images across state lines via the Internet and physically transported the images across state lines.

United States v. Kaluza, 780 F.3d 647 (5th Cir. 2015) Where defendants (well site leaders on the Deepwater Horizon drilling rig) were charged with 11 counts of seaman's manslaughter (in violation of 18 U.S.C. § 1115) based on the 11 deaths on the Deepwater Horizon following the blowout of the Macondo well, the district court did not err in dismissing those counts of the indictment because neither defendant fell within the meaning of the phrase "[e]very . . . other person employed on . . . any vessel" in § 1115; the Fifth Circuit agreed with the district court that this phrase covered only persons with responsibility for the "marine operations, maintenance, and navigation of the vessel" and that defendants were not such persons.

United States v. Conlan, 786 F.3d 380 (5th Cir. 2015) On plain-error review, the Fifth Circuit held that the federal stalking statute, 18 U.S.C. § 2261A, is not unconstitutionally vague simply because the statute does not define the terms "harass" and "intimidate"; these are not obscure words and are readily understandable by most people; any vagueness concerns are further alleviated by the list of easily understood terms surrounding "harass" and "intimidate" – kill, injury . . . or cause substantial emotional distress" – and by the statute's scienter requirement, which narrows its scope and mitigates arbitrary enforcement.

United States v. Macedo-Flores, 788 F.3d 181 (5th Cir. 2015) In trial of drug offenses, district court did not abuse its discretion in denying defendant's request for an instruction on sentencing entrapment (i.e., that the agents purposefully inflated the drug quantity); although the Fifth Circuit has never recognized this defense, the court has stated that, if it did accept the defense, it would only be cognizable in cases involving "true entrapment" or where there is proof of overbearing and outrageous conduct on the government's part; defendant's case did not meet this standard.

United States v. Gonzalez, 792 F.3d 534 (5th Cir. 2015) The magazine of an AK-47 is a "component" of the AK-47 for purposes of laws prohibiting the unlicensed export of firearms and certain related items, regardless of whether it is loaded with cartridges when shipped; the Fifth Circuit pretermitted whether this determination was normally one for the jury, because the defendant here forfeited that issue by treating the determination as a question of law for the court to decide on his motion to dismiss the indictment.

United States v. Roetcisoender, 792 F.3d 547 (5th Cir. 2015) The evidence supporting defendant's convictions for distribution of child pornography was sufficient; although there was no direct evidence that defendant knew that the "Incoming" folder of his computer (into which eMule, a peer-to-peer file-sharing program downloaded files) was accessible by others, the government adduced sufficient circumstantial evidence from which the jury could infer that the child pornography stored in the "Incoming" folder was available for sharing with other eMule

users.

B. Insanity/Competency/Civil Commitment

United States v. Washington, 764 F.3d 491 (5th Cir. 2014) Where defendant charged with bank robbery, but found not guilty by reason of insanity, was conditionally released pursuant to 18 U.S.C. § 4243(d), the district court did not err in revoking defendant's conditional release pursuant to 18 U.S.C. §4243(g) because the district court did not clearly err in finding that (1) defendant violated his prescribed treatment regimen, and (2) defendant's continued release posed a substantial risk to the public.

Sealed Appellee 1 v. Sealed Appellant 1, 767 F.3d 418 (5th Cir. 2013) District court did not err in committing federal prisoner to a mental-health treatment facility pursuant to 18 U.S.C. § 4245; contrary to prisoner's argument, § 4245 does not require a physical transfer to a different facility; rather, § 4245 could be used to move prisoner to a different unit of the same facility to facilitate treatment; because prisoner objected in writing to the purpose of her hospitalization (treatment of her mental illness), the government's petition for a commitment hearing under § 4245 was authorized; the Fifth Circuit pretermitted the question of whether commitment under § 4245 required clear and convincing evidence, as opposed to only a preponderance of the evidence, because the evidence of mental disease or defect and the need for commitment for treatment was sufficient under either standard.

C. Reversals for Insufficiency of the Evidence or Multiplicity

United States v. Colorado Cessa, 785 F.3d 165 (5th Cir. 2015) In a case charging an 18 U.S.C. § 1956(h) conspiracy to commit concealment-type money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), the evidence was insufficient to sustain the conviction of one defendant (the horse trainer who trained the quarter-horses that were the center of the laundering operation; particularly, the evidence was insufficient to show that he joined the conspiracy knowing that its purpose was to conceal the source or nature of illegal funds.

United States v. McRae, ____ F.3d ____, 2015 WL 4542651 (5th Cir. July 28, 2015) On his second appeal following a remand to the district court for resentencing, see United States v. McRae, 702 F.3d 806 (5th Cir. 2012), defendant (a former New Orleans police officer charged with offenses arising out of a police cover-up in the aftermath of Hurricane Katrina) contended that his conviction under 18 U.S.C. § 1519 could not stand in light of the Supreme Court's intervening decision in Yates v. United States, 135 S. Ct. 1074 (2015); the Fifth Circuit agreed, and accordingly vacated the conviction on that count and remanded for resentencing on the remaining counts.