U.S. Fifth Circuit Court of Appeals Recent Decisions

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I. SEARCH AND SEIZURE

United States v. Glenn, 935 F.3d 313 (5th Cir. Aug. 15, 2019). After receiving a child pornography (CP) cybertip, the police obtained a search warrant for the defendant's residence. Although the affidavit indicated the defendant had lived at this residence as of Aug. 1, when he was receiving the CP, the defendant had not lived there until Aug 9. The magistrate issued the search warrant. At the residence, the defendant agreed to speak with law enforcement. He admitted that he uploaded and downloaded CP and that his username was TexPerv. Although the defendant could not remember the CP obtained through the cybertip, he stated that obviously he saved it if he sent it out. Meanwhile an agent had located the defendant's laptop and recovered many CP images. Later, in the lab, when the agent attempted to image the hard drive, the computer started updating, which destroyed some of the data.

Before trial, the defendant had moved to suppress evidence from the search warrant because of the incorrect address. The district court held a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and denied the motion. The 5th Circuit held that the district court had not erred. At the *Franks* hearing, because the parties agreed there was a false statement in the affidavit, the question was whether the statement was made intentionally or with reckless disregard for the truth. The court found the agent's testimony credible, her mistake understandable given the nature of the records, and the agent not even negligent.

United States v. Glenn, 931 F.3d 424 (5th Cir. July 26, 2019). Three men were pulled over on I-10 for a traffic violation. The officer extended the stop after seeing screwdrivers in the door pocket and learning it was a rental vehicle with a tinted license-plate cover. Glenn appealed the district court's denial of his motion to suppress. The 5th Circuit noted that the issue of standing was a close one—5th Circuit precedent says the driver of a rental vehicle who was not authorized under the rental agreement did not have a reasonable expectation of privacy in the vehicle, but Glenn argued he had standing under *Byrd v. United States*, 138 S. Ct. 1518 (2018). (In *Byrd*, the Supreme Court held that "someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him

or her as an authorized driver.") Because Glenn loses on the merits, the 5th Circuit did not resolve the question about standing. The 5th Circuit said the officer had reasonable suspicion to extend the stop and that Glenn's consent to the search was voluntary.

United States v. Daniels, 930 F.3d 393 (5th Cir. July 10, 2019). Assuming Daniels had standing to challenge the motel room search, exigent circumstances supported the search. Officers knocked for 2 minutes, announced they were police, and heard running throughout the room and a toilet flush. The 5th Circuit held the officers did not create the exigency by knocking vigorously for 2 minutes. The 5th Circuit recognized that the right to confront witnesses applies to suppression hearings but rejected Daniels's Sixth Amendment challenge. An agent involved in the search and seizure did not testify because he was facing an investigation for misconduct and asserted his Fifth Amendment right against self-incrimination. Daniels argued that only that agent heard the toilet flush, but another agent testified to it at the hearing without a hearsay objection. Daniels can't "compel the Government to call its own witnesses. And even if Daniels were arguing that he wanted to call [that agent] in his own defense, we have held that a witness's right against self-incrimination will outweigh a defendant's right to force that witness to testify."

Mitchell v. Wisconsin, 139 S. Ct. 2525 (U.S. June 27, 2019). Plurality holds the exigent-circumstances exception to the 4th Amendment's warrant requirement almost always permits blood tests without a warrant where driver suspected of drunk driving is unconscious and cannot be given a breath test. They "do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Justice Thomas's concurrence would apply a *per se* rule that the natural metabolization of alcohol in the blood stream creates an exigency once police have probable cause to believe the driver is drunk, regardless of whether the driver is conscious.

United States v. Fulton, 928 F.3d 429 (5th Cir. June 27, 2019) substituting original opinion in 914 F.3d 390 (5th Cir. Jan. 29, 2019). A jury convicted the defendant of sex trafficking, 18 U.S.C. § 1591(a)-(b). The defendant had filed a motion to suppress evidence obtained as a result of the seizure and search of his cell phone. Police investigating defendant on drug offenses obtained a search warrant to search his house. The warrant included "ledgers." The 5th Circuit originally held that the cell phone was properly seized under this warrant because it is a special kind of "ledger." The 5th Circuit withdrew that opinion and substituted a new opinion holding that seizing the cell phone was not covered by the warrant's inclusion of "ledgers." A ledger is not the "functional equivalent" of a cell phone. While a ledger can serve one of the many purposes of a cell phone, a ledger is not the functional equivalent of a cell phone. But the cell phone did not have to be suppressed because the officers acted in good faith reliance on the search warrant.

United States v. Tello, 924 F.3d 782 (5th Cir. May 21, 2019). 5th Circuit held that the district court did not err in denying the defendant's motion to suppress. The defendant was charged with alien transporting. At trial, the Border Patrol agents testified that the defendant was stopped at the BP checkpoint. One of the agents asked the defendant if he was a citizen; when the defendant answered that he was naturalized, the agent was satisfied and did not ask for documentation. Because the agent wanted to give the dog more time to sniff the tractor trailer truck, he asked the defendant what he was hauling and whether he had made any stops. At that point, the dog handler said that the truck needed sent to secondary. The defendant gave his consent to search the truck. During the trial, after the agents had testified, the defendant moved to suppress the evidence.

The defendant argued that the agents had impermissibly extended the immigration checkpoint stop beyond its limited immigration purpose. 5th Circuit disagreed. At an immigration checkpoint, the permissible duration of the stop includes the time necessary to inquire about citizenship status, ascertain the number and identify of occupants, request documentation, and seek consent to extend the detention. *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). BP agents

may conduct a dog sniff to search for drugs or concealed aliens at immigration checkpoints as long as the sniff does not lengthen the stop beyond the time necessary to verify immigration status. The question is not whether the dog sniff occurred before or after the purpose of the stop was completed, but whether conducting the dog sniff prolonged the purpose of the stop. *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015). 5th Circuit found that the dog sniff did not prolong the immigration stop. The stop lasted about 30 seconds. The agent asked permissible questions. The agent started questioning the defendant when the dog and handler were already circling the truck. At most, mere seconds elapsed before the dog alerted & the defendant consented.

The defendant also argued that the 5th Circuit case law, especially *Machuca-Barrera*, focusing on the length of the detention rather than the questions asked, did not survive the Supreme Court's *Rodriguez* decision. In *Rodriguez*, the Supreme Court rejected the position that a "de minimus" extension of a detention did not violate the 4th Amendment. The 5th Circuit disagreed that *Rodriguez* overruled *Machuca-Barrera*. It noted that *Rodriguez* was a traffic stop while *Machuca-Barrera* was an immigration checkpoint stop. Also *Rodriguez* did not dictate a script for officers but instead allowed for stops of a "tolerable duration"—a duration that is circumscribed by the reason for the stop.

United States v. Ganzer, 922 F.3d 579 (5th Cir. Apr. 24, 2019), *petition for cert. filed* (U.S. July 25, 2019) (No. 19-5339). 5th Circuit held that law enforcement agents acted in good faith reliance on a Network Investigative Technique (NIT) warrant issued by a US magistrate in the ED of VA that obtained IP information on the defendant in San Antonio, TX. This case was one of many that arose out of an FBI investigation into a child pornography website, "Playpen," that operated on the TOR anonymity network. The FBI obtained a warrant from a magistrate judge in the EDVA, allowing it to deploy a NIT, a form of malware that sent messages to Playpen users' computers to send identifying information to a government computer. Through the use of NIT, FBI was able to identify the defendant in San Antonio as one of the Playpen users. The defendant filed a motion to suppress, arguing that the search of his home violated the 4th Amendment because the NIT warrant violated the Federal Magistrate's Act and Fed. R. Crim. P. 41(b). The district court agreed

with the defendant that the NIT warrant impermissibly authorized a search of the defendant's computer outside of the EDVA. The court denied the motion to suppress, however, under the Good Faith Exception. On appeal, the defendant argued that good faith should not apply because 1) the warrant was void ab initio; 2) the government acted recklessly in seeking the NIT warrant because it knew that Rule 41(b) did not allow for its issuance.

The 5th Circuit assumed, without deciding, that there was a 4th Amendment violation. Nevertheless, it held that good faith applied. It held that a warrant that is void ab initio can still be the basis for good faith as long as the agents' reliance on it was objectively reasonable. It rejected the defendant's argument that the government had not acted in good faith because it knew that the warrant was beyond the scope of Rule 41(b). The DOJ had earlier taken action to get Rule 41(b) amended to specifically cover NIT warrants. The 5th Circuit held that this behavior was not one of the four situations identified by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984), that indicate bad faith. Also, the 5th Circuit held that the government did not act unreasonably in seeking to clarify the application of Rule 41(b). Finally, the 5th Circuit could not find any deterrent benefit in applying the exclusionary rule in this case. The 5th Circuit's decision is consistent with the decisions of 8 other federal courts of appeal.

United States v. Richmond, 915 F.3d 352 (5th Cir. Feb. 8, 2019). Holding: Officer pushing his fingers against a truck's tire to determine if it contained drugs was a search under the trespass theory of the 4th Amendment. The search was reasonable, however, because the officer had probable cause to believe that the tire posed a safety risk. An officer saw the defendant driving a truck with tires that were shaking, wobbly, and unbalanced. When the truck crossed the white line, the officer did a traffic stop. The officer walked by the tire and noticed that the bolts had been stripped. At that point, the officer pushed on the tire with his hand. The resulting sound indicated there was something in the tire besides air. The officer obtained the defendant's consent to search the truck. The officer ended up removing the tires and taking them to a car dealership where the technicians found secret compartments in the tires containing methamphetamine. The defendant filed a motion to suppress arguing,

among other things, that the officer's tapping on the tire was a search not supported by probable cause. The district court denied the motion.

On appeal, the government argued that this issue was controlled by 5th Circuit precedent. *United States v. Muniz-Melchor*, 894 F.2d 1430 (5th Cir. 1990). The 5th Circuit noted that *Muniz-Melchor* was decided after *Katz v. United States*, 389 U.S. 347 (1967) but before *United States v. Jones*, 565 U.S. 400 (2012). Under *Katz*, for there to be a search the defendant must have a reasonable expectation of privacy in the object searched. The *Muniz-Melchor* Court held that the owner of the tapped propane tank did not have that expectation of privacy. But in *Jones*, the Supreme Court revived the trespass approach to 4th Amendment searches. It held that when a police officer put a GPS tracker on the bottom of a car that was a common law trespass. A trespass alone is not a search. It must be conjoined with an attempt to find something or obtain information. Here, the officer's tapping of the tire was not just incidental contact. He touched the tire to try to find out what was inside. Because the trespass occurred to learn what was inside the tires, it qualified as a search. The 5th Circuit held that the search was reasonable, however. The officer had probable cause to believe that the tire posed a safety risk. It did not matter that the officer also wanted to find out about drugs. The government's interest in making sure a loose tire did not pose a safety risk strongly outweighed the minor intrusiveness of the tap on the tire.

United States v. Contreras, 905 F.3d 853 (5th Cir. Oct. 1, 2018). Homeland Security Investigations (HSI) agent saw that user "alex2smith13" had uploaded CP to a group chat on Kik, a mobile messaging application. Pursuant to grand jury subpoenas, Kik turned over records showing the IP address for that user, and Frontier Communications provided the name and home address information for the IP address. HSI applied for a search warrant for the residence to seize cell phones, computers, and computer hardware. On appeal, defendant argued, among other things, that CP evidence found in search of his home should have been suppressed because the Government violated his reasonable expectation of privacy in his home address when it obtained records from Frontier Communications without a warrant. The 5th Circuit held that, under the third party doctrine, the defendant had no

reasonable expectation of privacy in his home address in Frontier's records.

United States v. Reddick, 900 F.3d 636 (5th Cir. Aug. 17, 2018), *cert. denied*, 139 S. Ct. 1617 (2019). The 5th Circuit held that search of computer files by police was justified under Private Search Doctrine. The defendant uploaded digital CP image files to Microsoft SkyDrive, a cloud hosting service. SkyDrive uses a program PhotoDNA to automatically scan the "hash values" of user-uploaded files and compare them to the hash values of known CP images. A hash value is an algorithmic calculation that yields an alphanumeric value for a file. Hash values are regularly used to compare the contents of two files without the need to involve human investigators. When PhotoDNA detects a match, it creates a CyberTip and sends the file and the uploader's IP address on to the National Center for Missing & Exploited Children, who sends it on to the appropriate law enforcement agency. In this case, the CyberTip went to the Corpus Christi police who opened each of the suspect files to confirm that each contained CP. The police got a search warrant and found more CP at defendant's house. The defendant moved to suppress the evidence as based on an unlawful search—the officer's warrantless opening of the files received through CyberTips. The 5th Circuit held that, under the private search doctrine, defendant's expectation of privacy was already frustrated by Microsoft's PhotoDNA program. When the officer opened the files, there was no significant expansion of the search that had already been conducted by a third party.

II. GUILTY PLEAS

United States v. Leal, 933 F.3d 426 (5th Cir. Aug. 5, 2019). The defendant challenged, under *Paroline v. United States*, 572 U.S. 434 (2014), the restitution amount ordered as part of his sentences. The 5th Circuit held that the appeal waiver in the defendant's plea agreement did not bar the challenge to the restitution amount on appeal because it did not cover a challenge to a sentence exceeding the statutory maximum. Under 5th Circuit precedent, a "*Paroline*-based appeal to the district court's restitution order" is an "appeal of a sentence exceeding the statutory maximum punishment." *United States v. Winchel*, 896 F.3d 387

(5th Cir. 2018). And a challenge to a sentence exceeding the statutory maximum punishment is not barred by an appeal waiver. *United States v. Keele*, 755 F.3d 752 (5th Cir. 2014). The defendant failed to establish that the restitution order was plainly erroneous.

United States v. Lord, 915 F.3d 1009 (5th Cir. Feb. 15, 2019). Defendants pleaded guilty to conspiracy to operate an unlicensed money serving business, in violation of 18 U.S.C. § 1960. Before sentencing, the defendants attempted to withdraw their guilty pleas, arguing that the state of Louisiana did not require virtual currency exchanges to have a state license. The 5th Circuit held that the district court did not abuse its discretion in denying the motion to withdraw. The court went through the factors from *United States v. Carr*, 740 F.3d 339 (5th Cir. 1984). These factors included, among others, that 1) the defendants were not asserting their actual innocence but rather their legal innocence based on a potential defense to the crime; and 2) the pleas were knowingly and voluntary because, while the government could not prove the § 1960 violation based on a state licensing requirement, it could prove the failure to comply with a federal registration requirement. An IRS agent had testified at the plea hearing that a federal regulation required bitcoin exchangers to register with FinCen. The 5th Circuit held that the factors weighed in favor of the denial.

United States v. Najera, 915 F.3d 997 (5th Cir. Feb. 14, 2019). Opinion regarding using a bench trial to preserve the denial of a pretrial motion. The defendant was charged with transporting illegal aliens. He filed a motion to suppress that the district court denied. The defendant sought a conditional plea, under Fed. R. Crim. P. 11(a)(2). The government refused to enter into a conditional plea. The defendant proceeded to a bench trial in which he did not contest the facts because he just wanted to preserve his right to appeal. At the bench trial, the government introduced the suppression transcript and the material witness deposition. The defendant did not make an opening statement, present any evidence, or make a closing statement. The district court found him guilty. The PSR recommended denying acceptance of responsibility because the defendant had a bench trial. The 5th Circuit clarified the law on preserving pretrial motions: "a defendant who proceeds to trial on an admission or stipulation of the facts necessary for conviction while

expressly reserving the right to appeal from an adverse suppression ruling will NOT be deemed to have waived the suppression issue," nor will it render the suppression error harmless, and the defendant remains eligible for an acceptance of responsibility reduction.

United States v. De Leon, 915 F.3d 386 (5th Cir. Feb. 12, 2019). The 5th Circuit rejected the defendant's arguments that the district court restricted his right to withdraw his guilty plea and interfered in plea negotiations. The defendant was charged with receipt of CP and pleaded guilty before a magistrate judge pursuant to a plea agreement. At the sentencing hearing, the defendant indicated that he didn't think viewing CP was illegal. The district court gave him the choice of withdrawing his plea and going to trial. On the day of trial, the court held a pretrial conference at which defense counsel indicated that he was not raising an entrapment defense. In response, the court stated that the only reason it had scheduled a trial was for an entrapment defense and that it had not withdrawn the guilty plea. The court informed the defendant that ignorance of the law was not a defense and that the number of images was not a trial matter but a sentencing matter. The defendant decided to plead guilty. When the court asked him if he had been coerced, he replied, "in a way, [the court] shot my defense down."

On appeal, the 5th Circuit held that the district court had not committed any errors. The court had not restricted the defendant's right to withdraw his plea because the defendant had never formally requested to withdraw his plea. The 5th Circuit held that the district court had not improperly conditioned the defendant's plea withdrawal on his decision to pursue an entrapment defense. Instead, "the court merely expressed confusion as to whether De Leon was intent on going to trial." After all, the court was "understandably puzzled" over defense counsel's decision not to present an entrapment defense. The 5th Circuit held that the court did not participate in plea negotiations because the comments at issue occurred after the defendant had signed the plea agreement and disclosed it to the court.

III. TRIAL

PRETRIAL MATTERS

United States v James, __ F.3d __, No. 19-30049, 2019 WL 4410005 (5th Cir. Sept. 16, 2019). 5th Circuit held that the government must prove the four factors for forced medication, under *Sell v. United States*, 539 U.S. 166 (2008), by clear and convincing evidence.

United States v. Pervis, __ F.3d __, 17-20689, 2019 WL 4126665 (5th Cir. Aug. 30, 2019). Issue on appeal was whether the district court had erred in concluding that the defendant was competent to stand trial. The court had considered the reports and evaluations of three experts on the defendant's intellectual disability. Intellectual disability includes not only sub average intellectual functioning but also significant limitations in adaptive skills. All of the expert's objective assessments showed sub average intellectual functioning. These assessments were not reliable, however, because of the defendant's intentional poor effort. The first expert suspected malingering, the second and third confirmed it. One of the experts also considered the defendant's behavior while not under observation. The court found the observations and recordings of the defendant's behavior while at FCI Fort Worth to be most reliable. The 5th Circuit noted that, in a decision issued after the district court's competency determination, the Supreme Court had cast doubt on the informational value of behavior observed in the correctional setting. The 5th Circuit noted, however, that given the defendant's malingering and the questionable value of the objective assessments, the district court had little other material with which to evaluate the defendant's adaptive skills. Regarding the defendant's ability to understand and assist in the legal process, the district court considered the defendant's recorded phone calls. Although there were different interpretations of these phone calls, in terms of the defendant's understanding of the proceedings, the 5th Circuit found the court's interpretation was reasonable. The experts' compiled findings were complicated and open to inferences. The court of appeals' task is to take a hard look at the facts to determine whether the district court's competency finding was "clearly arbitrary or unwarranted." Here, it was not.

United States v. Pedroza-Rocha, 933 F. 3d 490 (5th Cir. Aug. 8, 2019). The district court had dismissed Pedroza's indictment under 8 U.S.C. § 1326 because the deportation order was based on a notice to appear without a hearing time. See *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The government appealed the dismissal. The 5th Circuit held that the appeal was not moot under *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), which "severely undermine[d]" the holding in *United States v. Sarmiento-Rozo*, 592 F.2d 1318 (5th Cir. 1979), that a defendant's deportation mooted a government appeal from an indictment's dismissal. The 5th Circuit also found that the government suffers an injury by having to file a new indictment if Pedroza returns. On the merits, the panel relied on *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019). It also held that the district court should have denied the motion to dismiss because the defendant failed to satisfy the criteria in 1326(d).

Pierre-Paul v. Barr, 930 F.3d 684 (5th Cir. July 18, 2019): Several district courts had dismissed illegal reentry indictments based on removal proceedings commenced by a notice to appear (NTA) without a hearing time after *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) held a hearing time was necessary in order for the NTA to trigger the stop-time rule. The 5th Circuit rejected the argument that a notice to appear must have a hearing time in order for an immigration judge to have jurisdiction to issue a removal order. It found the NTA without a hearing time was not defective; that even if it was, the immigration court cured it by issuing a notice of hearing; and that even if the NTA could not be cured, it is a claim-processing rule and not jurisdictional.

United States v. McKown, 930 F.3d 721 (5th Cir. July 22, 2019): McKown argued 18 U.S.C. § 4241(d) violates due process by requiring commitment to the AG's custody for "a reasonable period of time, not to exceed four months, as is necessary to determine whether there is substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward." After both parties had McKown examined by psychiatrists (one said commitment might work to restore competency, the other said only long-term outpatient therapy would work), the district court committed him to the AG's custody for four months, but stayed the commitment order pending the appeal. The

5th Circuit held that it had jurisdiction because a court's ruling under § 4241(d) is reviewable as a collateral order. It agreed with the other court of appeals to hold that § 4241(d) complies with due process: judge has to find by preponderance of evidence that the defendant lacks capacity, then the judge has to commit to AG's custody for a maximum 4-month period, and then if not improved, the court must schedule a "dangerousness hearing" and release him if, by clear and convincing evidence, the court finds the defendant is not a sexually dangerous person or does not pose a substantial risk of bodily injury to another person or serious damage to property of another.

Gundy v. United States, 139 S. Ct. 2116 (U.S. June 20, 2019). Supreme Court held SORNA's provision authorizing the AG to specify the applicability of SORNA's registration requirements to offenders convicted of sex offenses before SORNA's enactment did not violate the nondelegation doctrine. The plurality interpreted SORNA as requiring that the AG require pre-SORNA offenders to register as soon as possible, only delegating to the AG temporary authority to address administrative transitional issues. The dissent interprets SORNA as giving the AG free reign to require registration or not.

United States v. Arellano-Banuelos, 927 F.3d 355 (5th Cir. June 17, 2019). Defendant was convicted by a jury of illegal reentry. This case had previously been before the Court on the question of whether his confession was admitted in violation of *Miranda*. It was remanded to the district court to determine whether the defendant was in custody. The district court found he was not in custody. 5th Circuit held that the court did not err in concluding that the defendant was not in custody, for *Miranda* purposes. The defendant was in prison when he was interviewed by an ICE agent. Imprisonment alone is not enough to create custody for purposes of *Miranda*. However, prisoners sometimes are in custody for *Miranda*. The 5th Circuit compared the defendant's situation with that of the defendant in *Howes v. Fields*, 565 U.S. 499 (2012), in which the Supreme Court held that the prisoner was not in custody. Defendant's ICE interview had fewer hallmarks of *Miranda* custody. The interview was short—only 10 to 15 minutes. Multiple people were in the interview room, so the defendant was not isolated. Neither the ICE agent nor the prison guard were armed. The ICE agent did not raise his voice,

use a sharp tone, or use profanity. The defendant pointed to facts distinguishing his case from *Fields*—he was never told that he was free to leave. But the 5th Circuit noted that there were other statements and circumstances that would suggest to a reasonable person that he was free to end the questioning and leave. The ICE agent told the defendant that his statement had to be voluntary and that the interview would end if the defendant chose not to speak to him. Also told defendant that any statement he made could be used against him in administrative or criminal proceedings. The defendant also pointed to facts to show that the interview was uncomfortable—before the interview, he had to stand in the hallway with nothing to lean on; he was not given the chance to use the restroom; the a/c was going out and the room was hot. 5th Circuit stated that, while these facts indicate the interview process was uncomfortable, they were not tied to defendant's cooperation with ICE.

United States v. Vinagre-Hernandez, 925 F.3d 761 (5th Cir. June 7, 2019), *petition for cert. filed* (Aug. 23, 2019) (No. 19-5397). 5th Circuit held that indictment charging defendant with drug offense did not violate the Speedy Trial Act. Under the Act, an indictment must be filed within 30 days from the date on which the defendant was arrested. 18 U.S.C. § 3161(b). Here, the defendant was arrested on 5/11/17. Exclude that date and start counting from 5/12/17. Day 30 is 6/10/17 a Saturday. The first non-weekend day is 6/12/17. The indictment was filed on 6/13/17—one day beyond the 30-day limit. However, on 5/12/17, the government filed a motion to detain. On 5/19/17, a hearing on the motion was held and the court entered an order. The government argued that the time spent on this motion should be excluded from the 30-day limit. 5th Circuit agreed, holding that the government's motion to detain counts as "any pretrial motion," under § 3161(h)(1)(D), and the time spent on that motion is excluded from the 30-day limit.

United States v. Tello, 924 F.3d 782 (5th Cir. May 21, 2019). 5th Circuit held that the district court did not err in denying the defendant's motion to suppress. At trial, the Border Patrol agents testified that the defendant was stopped at the BP checkpoint. One of the agents asked the defendant if he was a citizen; when the defendant answered that he was naturalized, the agent was satisfied and did not ask for documentation. Because the agent wanted to give the dog more time to sniff the tractor

trailer truck, he asked the defendant what he was hauling and whether he had made any stops. At that point, the dog handler said that the truck needed sent to secondary. The defendant gave his consent to search the truck. During the trial, after the agents had testified, the defendant moved to suppress the evidence.

5th Circuit noted that a motion to suppress must be made before trial. Fed. R. Crim. P. 12(b)(3)(C). However, a court can consider an untimely motion if there is good cause. Here, the defense attorney stated that he was not aware until the agents testified that the defendant was detained, after his citizenship was determined, to allow the dog to continue to search the truck.

United States v. Parrales-Guzman, 922 F.3d 706 (5th Cir. May 2, 2019). The defendant, who was charged with illegal reentry, moved to dismiss the indictment, claiming that his 2001 removal order was invalid. In 2001, he had been removed based on his Texas felony DWI conviction being an aggravated felony because it was a crime of violence under 18 U.S.C. § 16(b). On reentry, the defendant argued that his earlier removal was invalid because § 16(b) was unconstitutional. The defendant argued that § 1326(d)'s bar on collateral attacks did not apply because his 2001 removal order was void ab initio, as it rested on an unconstitutionally vague statue. The 5th Circuit held that § 1326(d) did apply. To hold otherwise would "upend Congress's mandate" that collateral review in § 1326 cases "be available only in a narrow set of circumstances." 5th Circuit also held that the defendant failed to show that he had exhausted administrative remedies.

United States v. Garcia De Nieto, 922 F.3d 669 (5th Cir. Apr. 30, 2019). The defendant was convicted, after a jury trial, of conspiracy to defraud the U.S., mail fraud, and aggravated identify theft. An investigation had determined that the defendant had been preparing false tax returns in Mexico and having associates in the U.S. file them. When the associates received the checks, they would mail them to the defendant in Mexico. A man attempting to enter the U.S. from Mexico had a package containing prepared tax returns. He admitted working for the defendant. The defendant was called and told to come to the border to pick up the package. A woman arrived and claimed to be the defendant.

She was not—she was Yolanda. After she was arrested, and in the presence of her attorney, Yolanda explained that the defendant had instructed her to get the returns by impersonating her. Yolanda pleaded guilty and implicated the defendant. Before trial, the government filed a motion to disqualify the defendant's attorney because he had also been Yolanda's attorney in this matter. Without holding a hearing, the court granted the motion and appointed new counsel. On appeal, the defendant argued that the district court had violated her 6th Amendment right to counsel by disqualifying her original attorney without a hearing. The 5th Circuit held that the district court did not abuse its discretion in disqualifying the defendant's first attorney because of the actual and multiple potential conflicts of interest. The 5th Circuit also held that the defendant was wrong in claiming that a court must always hold a hearing before disqualifying an attorney. Here, no hearing was required because the actual and potential conflicts were clear on the record. Even assuming that the court erred in not holding a hearing, any error was harmless.

United States v. Porter, 907 F.3d 374 (5th Cir. Oct. 26, 2018). District court eventually determined, after committing Porter to FMC Devens for evaluation, that Porter was malingering and competent to stand trial. The 5th Circuit affirmed that decision, finding that the court's determination, supported by a 62-page opinion evaluating the experts' opinions and Porter's courtroom demeanor, was not clearly arbitrary or unwarranted.

United States v. Vasquez, 899 F.3d 363 (5th Cir. Aug. 7, 2018), *cert. denied*, 139 S. Ct. 1543 (2019). Case involved the prosecution of a boss of the Zetas Cartel operating out of Piedras Negras, Mexico. Defendant filed a post-verdict motion for judgment of acquittal arguing that 21 U.S.C. § 848(e)(1)(A)—which punishes killing while engaged in drug trafficking crimes under 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)—did not reach extraterritorial conduct. The 5th Circuit disagreed. First the Court held that the defendant's motion was untimely. Under Fed. R. Crim. P. 12, the defendant should have filed a pretrial motion to dismiss the indictment. That is so because an argument that a statute does not apply extraterritorially is not an argument that the court lacks jurisdiction. The government argued, accordingly, that the issue was waived. Before

2014, Rule 12 deemed a motion "waived" if untimely. That language was removed from the Rule, which now states that the motion is merely "untimely." The advisory committee notes state that this change was made to remove the issue of waiver. So the defendant's extraterritoriality argument was reviewable, but for plain error. The 5th Circuit held that § 848(e)(1)(A) gives a clear affirmative indication that it applies extraterritorially because the underlying predicate drug trafficking offenses apply extraterritorially.

The defendant also argued that the convictions for the § 848 offense and the predicate drug offenses were multiplicitous and violated double jeopardy. Once again, this should have been raised in a pretrial motion, so it was subject to plain error. The text of § 848(e)(1) states that it applies "in addition to the other penalties set forth in this section." 5th Circuit held that § 848(e)(1)(A) sets forth a separate offense and Congress intended punishment in addition to the predicate drug offenses.

JURY SELECTION

Flowers v. Mississippi, 139 S. Ct. 2228 (U.S. June 21, 2019). Supreme Court found trial court clearly erred in concluding State's peremptory strike of black prospective juror was not motivated in substantial part by discriminatory intent, in violation of *Batson*. Flowers was tried six times for murder, and the State had a persistent pattern of striking black prospective jurors. The State also spent far more time questioning black prospective jurors than accepted white jurors. The race-neutral reasons the State gave for striking a prospective black juror also applied to accepted white jurors.

United States v. Ayelotan, 917 F.3d 394 (5th Cir. March 4, 2019), *petition for cert. filed* (U.S. June 3, 2019) (No. 18-9558). The three defendants were part of an Africa-based international scam that used dating websites on the internet to establish romances with unwary victims in the US and then get them to launder money that the defendants had acquired by stealing IDs. The defendants were convicted by the jury of numerous fraud offenses. 5th Circuit held that the district court did not err by dismissing a juror who slept through much of the trial, but denied it when questioned by the court; did not understand or

else did not follow the court's instructions to the jury; and did not deliberate. The fact that he was the sole hold-out on the jury did not matter. "Even hold-out jurors are not immune from dismissal based upon just cause."

JURY INSTRUCTIONS

United States v. Martinez, 921 F.3d 452 (5th Cir. Apr. 16, 2019). The defendants were convicted by a jury of conspiracy to commit health care fraud and several counts of health care fraud. At trial, the government requested that the jury be instructed on deliberate ignorance. The 5th Circuit noted that the district court would not have abused its discretion by giving that instruction. But that is not what the district court did. Instead, it gave an instruction on circumstantial evidence:

"The defendants must be found to have acted knowingly and willfully. Circumstantial facts tend to be the only kind available for subjective facts, something about which the jury lacks direct access to the defendant's mind. For instance, the jury may infer knowledge and intent from conduct or context. Attempts to eliminate or minimize evidence of knowledge may justify an inference of it. Knowledge does not require certainty. The law permits inferred, expected judgments to count as knowledge. These inferences must be beyond a reasonable doubt."

The defendants objected and argued on appeal that this "flawed" deliberate ignorance instruction allowed the jury to infer knowledge based on a defendant's negligence. The 5th Circuit held that the district court erred in giving this instruction not because it lowered the standard of proof but because it gave a confusing muddled standard. The error, however, was harmless.

United States v. Araiza-Jacobo, 917 F.3d 360 (5th Cir. Feb. 28, 2019), *petition for cert. filed* (U.S. Aug. 2, 2019) (No. 19-5436). 5th Circuit held that the district court erred by instructing the jury on deliberate ignorance. But the Court also held that the error was harmless because there was substantial evidence that the defendant actually knew he was carrying a controlled substance. The defendant, carrying two sandwiches and two bags of candy, entered the US from Mexico at a port of entry.

The CBP agent examined the bags of candy and determined that there were two types of candy inside; one type did not match the pictures on the outside of the bag, and it was harder and had a strange texture. After the candy was cut into, a white powder fell out that was 98% pure methamphetamine. The defendant was arrested and charged with drug offenses. At trial, the government's theories were that the defendant 1) actually knew that he was carrying a controlled substance, or 2) had remained deliberately ignorant of the fact. Over the defendant's objection, the district court instructed the jury on deliberate ignorance. On appeal, the 5th Circuit stressed that the deliberate ignorance instruction should rarely be given. The instruction is appropriate only when the evidence shows 1) the defendant's subjective awareness of a high probability of the existence of illegal conduct and 2) purposeful contrivance by the defendant to avoid learning of the illegal conduct. After reviewing the totality of the evidence, the 5th Circuit concluded that the district court had erred by giving the instruction because there was no evidence of purposeful contrivance by the defendant.

United States v. Fulton, 928 F.3d 429 (5th Cir. June 27, 2019) *substituting original opinion* in 914 F.3d 390 (5th Cir. Jan. 29, 2019). A jury convicted the defendant of sex trafficking. The defendant argued that there was an improper amendment of the indictment concerning his knowledge of the victim's age. 18 U.S.C. § 1591(a) has alternative theories for conviction—that defendant knew or recklessly disregarded (1) force or coercion, or (2) victim under 18 years old. Under § 1591(c) the government is not required to prove knowledge or reckless disregard under 18 if the defendant had a reasonable opportunity to observe the victim. Here, the indictment did not mention the reasonable opportunity to observe alternative. The district court, however, instructed the jury on that alternative. The 5th Circuit had previously held that this was an error in that the court transformed the offense the indictment charged from one requiring a specific mens rea into a strict liability offense. *See United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016). Because the defendant did not object in the district court, however, it was under plain error review. The 5th Circuit refused to exercise its discretion to correct the error because of the substantial evidence against the defendant.

United States v. Baker, 923 F.3d 390 (5th Cir. Apr. 26, 2019). The defendant was convicted of a number of fraud charges, including wire and securities fraud, and making a false statement to the SEC, related to a "channel-stuffing" scheme. The defendant was the CEO of a publicly-traded medical device company. The scheme involved sending excess products to a distributor, who did not need them, and then falsely reporting these shipments as legitimate sales in the company's financial reports. When the scheme was uncovered, the company restated its value, causing its stock price to drop. On appeal, the defendant made a number of challenges to his conviction. He argued that the wire fraud statute, 18 U.S.C. § 1343, required the government to prove that the defendant "intended to obtain money or property from the deceived investors." Here, the jury instruction defined a scheme to defraud to also include "to bring about some financial gain to the person engaged in the scheme." Based on the language of § 1343, and the Supreme Court's decisions in *Skilling v. United States*, 561 U.S. 358 (2010), and *Sekhar v. United States*, 570 U.S. 729 (2013), the defendant argued that the wire fraud statute imposes a "mirror image" requirement. That the victim's loss of money or property supplied the defendant's gain. The 5th Circuit rejected this argument, holding that *Skilling* did not impose a "mirror image" requirement but merely commented on the differences between traditional fraud and honest-services fraud.

The defendant was charged as both a principal and an aider/abettor, under 18 U.S.C. § 2, for the fraud charges. The defendant argued that the jury instructions were erroneous because they lacked an express "advance knowledge" instruction for accomplice witness liability, under *Rosemond v. United States*, 572 U.S. 65 (2014). The 5th Circuit originally held that an express "advance knowledge" instruction is necessary only for "combination offenses." 912 F.3d 297. The Court later substituted that opinion for another and held that it did not need to address the *Rosemond* challenge to the jury instructions because they were also correctly instructed on *Pinkerton* liability.

United States v. Piper, 912 F.3d 847 (5th Cir. Jan. 10), *cert. denied*, 139 S. Ct. 1639 (2019). Defendants were charged with conspiracy to possess with intent to distribute methamphetamine. The defendants challenged the district court's jury instructions. The 5th Circuit held that

the defendants had failed to demonstrate plain error. On one claim, the court held that there was no meaningful distinction between the language used in the jury instructions—"at least 500 grams"—and the statutory language—"500 grams or more."

United States v. Vasquez, 899 F.3d 363 (5th Cir. Aug. 7, 2018), *cert. denied*, 139 S. Ct. 1543 (2019). Case involved the prosecution of a boss of the Zetas Cartel operating out of Piedras Negras, Mexico. It was alleged that the defendant, as part of the Zetas drug-trafficking organization, kidnapped, tortured, and killed scores of people. Defendant pleaded not guilty, but was convicted by the jury on all counts, including killing while engaged in drug trafficking crimes under 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1), under 21 U.S.C. § 848(e)(1)(A), and various drug trafficking offenses.

The defendant argued that the district court erred by failing, in the jury instructions, to further define the "engaging in" element of 21 U.S.C. § 848(e)(1)(A). He argued that the instructions as given allowed the jury to convict based on a mere temporal connection between the drug trafficking and the killings rather than a "substantive connection." Because the defendant neither objected to the jury instructions nor requested further definition of "engaging in," review was for plain error. "It is the rare case in which an improper jury instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." This was an issue of first impression in the 5th Circuit—so it couldn't be plain. The courts of appeals that had addressed the issue all held that "engaging in" required a "substantive connection," but they don't agree on what that means. 5th Circuit did not need to decide.

CONFRONTATION CLAUSE

United States v. Daniels, 930 F.3d 393 (5th Cir. July 10, 2019). The 5th Circuit recognized that the right to confront witnesses applies to suppression hearings but rejected Daniels's Sixth Amendment challenge. An agent involved in the search and seizure did not testify because he was facing an investigation for misconduct and asserted his Fifth Amendment right against self-incrimination. Daniels argued that only that agent heard the toilet flush, but another agent testified to it at the

hearing without a hearsay objection. Daniels can't "compel the Government to call its own witnesses. And even if Daniels were arguing that he wanted to call [that agent] in his own defense, we have held that a witness's right against self-incrimination will outweigh a defendant's right to force that witness to testify."

United States v. Jones, 930 F.3d 366 (5th Cir. July 2, 2019). Decision on the impermissible use of information from a nontestifying confidential source (CI). Jones was charged with methamphetamine and gun offenses. After holding that the district court did not err in admitting Jones's prior conviction as substantive evidence of the felon-in-possession charge and to establish intent for the drug conspiracy, the 5th Circuit held that Jones's 6th Amendment Confrontation Clause (CC) rights were violated when an agent testified he knew Jones had received meth because CI had told him. Based on info from a CI, officers set up surveillance and saw Jones meeting with drug dealer, but never saw drugs. One day, agent received tip from CI that drug deal was going to happen. Officers saw vehicles but did not see any transaction. Officers followed Jones, stopped him, and searched his car but found no drugs or guns. Officers searched the road and found a gun and a bag of meth.

Pretrial, Jones moved to compel disclosure of CI and to exclude testimony related to the CI. At trial, officers testified about CI's tips and other information. On direct, prosecutor asked agent why he followed Jones. Agent: because we knew he had just received meth. On cross, defense counsel questioned basis of the agent's knowledge—didn't see drug deal; may believe had meth but didn't know. On redirect, prosecutor asked agent how he knew. Agent: when it looked like drug deal, I called my CI, who made some calls, and said deal had happened. After each question, defense counsel objected. Court held admissible to explain officers' actions. Defendant reurged motion for disclosure of CI. Court held that defense had opened the door. Prosecutor stressed this testimony in opening and closing arguments.

5th Circuit held that police officers may not testify about the substance of CI's out-of-court statements that incriminate the defendant. Here the agent testified that he knew Jones had meth because of what CI told him that he had heard from others. Both the agent and the prosecutor

"blatantly linked" Jones to the drug deal based on the CI's information. Government argued that statements not for truth but to explain the actions of the officer. District court gave that instruction to the jury.

5th Circuit held that this went beyond permissible explanation of actions—agent's testimony about his conversation with CI pointed directly at Jones and his guilt. And jury instructions could not cure the CC error. Some statements are too powerfully incriminating. Government argued that Jones's attorney invited the error by his questions to the agent. 5th Circuit disagreed. Questioning an agent's basis of knowledge does not permit the prosecution to directly elicit incriminating hearsay testimony on redirect. Also for invited error, the defense must have purposefully rather than inadvertently inquired into the forbidden topic. Here, the defense was not informed before trial that the CI had provided this information. 5th Circuit held error was not harmless because the inadmissible evidence was highly incriminating. The CI's confirmation that drug deal occurred directly inculpated Jones on contested issue of possession. 5th Circuit vacated all four convictions because they were deeply intertwined with the Jones's alleged meth dealing, and remanded for new trial. Court also remanded for reconsideration of motion for disclosure of the CI. Finally, Court vacated Jones's supervised release revocation because the district court did not make any independent factual findings.

United States v. Fulton, 928 F.3d 429 (5th Cir. June 27, 2019). A jury convicted the defendant of sex trafficking, 18 U.S.C. § 1591(a)-(b). The defendant argued that his Confrontation Clause rights were violated when the district court refused to allow him to cross examine a minor victim about her pending aggravated assault charge. The defense theory was that the victim only became cooperative after the assault charges were filed because she hoped for a benefit. The 5th Circuit held that there was no error because there was no evidence that the federal prosecutor in this case could have influenced the victim's state juvenile court proceedings. Distinguishing *Davis v. Alaska*, 415 U.S. 308 (1974).

United States v. Sarli, 913 F.3d 491 (5th Cir. Jan. 16, 2019), *cert. denied*, 139 S. Ct. 1584 (2019). Issue: whether admitting detective's testimony of CI's out-of-court statement—that a drug delivery was going

to be made by a Hispanic man named Arturo driving a white Avalanche—violated the Confrontation Clause. At trial, the defendant objected when 1) the prosecutor asked the detective how the investigation came about, and 2) when the prosecutor referenced this testimony in closing arguments. Split decision 2/1. The majority, assuming without deciding that the Confrontation Clause was violated, held that the error was harmless. There was no reasonable possibility that the evidence contributed to the verdict because the government's case turned on statements made by in-court witnesses and not the out-of-court statements. "To be sure," the CI placed the defendant at the scene of the crime—"providing Sarli's name, identifying his vehicle, and alleging that he would be transporting meth to a particular location on a particular date"—but "so did the officers who pursued the tip and caught Sarli red-handed."

Judge Duncan dissented. He found a clear CC violation and a reasonable possibility that it contributed to the verdict. He pointed out that the prosecutor repeatedly referred to the testimony in her closing argument. He also accused the majority of asking the wrong question: "the question is not whether there was sufficient *untainted* evidence to convict Sarli, but whether the government demonstrated beyond a reasonable doubt that the *tainted* evidence did not contribute to the conviction."

EVIDENTIARY ISSUES

United States v. Vasquez-Hernandez, 924 F.3d 164 (5th Cir. May 8, 2019). A case challenging the family separation policy in the context of criminal prosecutions for misdemeanor illegal entry, under 8 U.S.C. § 1325(a). Five defendants, Honduran & El Salvadoran citizens, were arrested entering the U.S. from Mexico, each accompanied by a child. They told Border Patrol agents they feared persecution at home. The government detained the parents but separated the children. The defendants were convicted after a stipulated bench trial. They appealed to the district court, which affirmed and explained that "the soundness of the government's policies regarding arriving asylum seekers and their minor children is not before this court." They appealed to the 5th Circuit, which rejected all of the challenges:

1) Pretrial punishment: Rejected argument that, because they were bona fide asylum seekers, they had a right to an asylum hearing before any criminal proceedings. Nothing in 8 U.S.C. § 1225(b)(1)(A)(ii) prevents the government from initiating criminal prosecution before or even during the mandated asylum process. Also, the defendants failed to show that qualifying for asylum would be relevant to a prosecution for illegal entry. *See United States v. Brizuela*, 605 F. App'x 464 (5th Cir. 2015).
2) 8th Amendment: Rejected argument that being deported without their children was cruel and unusual punishment. Failed to show that their deportations were caused by their convictions. They did not argue that their convictions rendered them inadmissible or made it more difficult to locate and regain custody of their children.
3) Outrageous government conduct: Rejected argument that separation was so outrageous due process would bar prosecution. Defendants did not challenge the government's justification for detaining them pending criminal prosecution and nothing in the record suggested that the separation aided the government in obtaining convictions.
4) Right of access to evidence: Rejected argument that, by removing the children, the government violated *Brady* and acted in bad faith. Argument was based on the children being able to testify about the dangerous conditions in Central America, and testimony being relevant to duress defense. Held no *Brady* violation because defendants knew what their children would have testified to but made no effort to call them as witnesses, did not request the children be made available for defense counsel to interview, did not attempt to subpoena them, did not request a continuance to obtain their testimony. Further, the testimony would not have been material to a duress defense, which requires a present, imminent, and impending threat inducing a well-founded apprehension of death or serious bodily injury with no reasonable legal alternative. The danger in the home countries did not translate to a danger at the border with no legal alternative to crossing into the US at an undesignated place.

United States v. Baker, 923 F.3d 390 (5th Cir. Apr. 26, 2019). The defendant was convicted of a number of fraud charges, including wire and securities fraud, and making a false statement to the SEC, related to a "channel-stuffing" scheme. On appeal, the defendant argued that the FBI case agent's testimony was improper "summary witness" testimony.

The 5th Circuit disagreed. Much of the agent's testimony was not summary witness testimony—his testimony involved identifying numerous government exhibits and reading aloud the contents of those exhibits. The agent's testimony was summary witness testimony when it tied specific already-admitted exhibits to the substantive indictment counts listed on a demonstrative chart. The 5th Circuit held that this was permissible summary witness testimony because "channel-stuffing" is a relatively complicated type of fraud. The 5th Circuit also held that, where the agent's testimony went too far, any error was harmless because 1) the testimony had an adequate foundation in the admitted evidence, 2) the jury was given a limiting instruction, and 3) the defendant cross-examined the agent.

The defendant also argued that the district court should have admitted the SEC deposition testimony of the company's former controller, who invoked the 5th Amendment and did not testify at defendant's trial. The defendant claimed that it was admissible as former testimony, under Rule 804(b)(1). The 5th Circuit held that it was not former testimony because, although there was some cooperation between the two agencies, the DOJ and SEC were not the same party for 804(b) purposes and, even if they were the same party, the DOJ and SEC did not have sufficiently similar motives in developing the controller's testimony. When testimony in a prior civil proceeding is being offered against the government in a subsequent criminal proceeding, the court considers 1) the type of proceeding, 2) trial strategy, 3) potential penalties, and 4) number of issues and parties. Considering these factors, the 5th Circuit held that the deposition was not admissible as former testimony.

United States v. Ayelotan, 917 F.3d 394 (5th Cir. March 4, 2019), *petition for cert. filed* (U.S. June 3, 2019) (No. 18-9558). The three defendants were part of an Africa-based international scam that used dating websites on the internet to establish romances with unwary victims in the US and then get them to launder money that the defendants had acquired by stealing IDs. The 5th Circuit held that the district court did not err in admitting emails that the defendants sent to their targets. The Court held that the emails & transmittal records, accompanied by Google and Yahoo records-custodian certificates, were self-authenticating business records. The 5th Circuit noted that there

were two levels of possible hearsay: 1) the transmittal record—the email provider's statement that one user wrote and sent a message to another user at the recorded time and 2) the content of each email. The 5th Circuit held that first group, the transmittal records, came within the business records exception and the certificates rendered them self-authenticating. On the second group, the 5th Circuit held that the emails content was admissible because the government did not offer the statements to prove the truth of the matter asserted. These statements were "paradigmatic nonhearsay"—the operative words of the criminal action. The remaining content in the emails was admissible as opposing party and coconspirators statements. Admitting the emails did not violate the Confrontation Clause because none of the statements were testimonial.

United States v. Anderton, 901 F.3d 279 (5th Cir. Aug. 16, 2018). Defendant challenged, for the first time on appeal, the crime of encouraging or inducing an alien to come to, enter, or reside in the U.S., 8 U.S.C. § 1324(a)(1)(A)(iv), as unconstitutionally vague. The 5th Circuit did not find plain error, especially since the district court instructed the jury that "[e]ncourage means to knowingly instigate, help or advise. Induce means to knowingly bring about, to effect or cause or to influence an act or course of conduct." Even though residing in the U.S. without permission is not a crime, it is a civil offense. "Aliens who reside here without authorization are 'in violation of law' for purposes of Sections 1324(a)(1)(A)(iv) and (v)." The Fifth Circuit also found sufficient evidence that his actions went beyond "mere employment" of illegal aliens, and sufficient evidence of the false statement offense (that he would pay the aliens more than he actually did). Anderton argued that the search warrants were not particularized, but the Fifth Circuit finds the warrant sufficiently particular for the good-faith exception to apply.

SUFFICIENCY OF EVIDENCE/PROVING AN OFFENSE

United States v. Anderson, 932 F.3d 344 (5th Cir. July 30, 2019). Anderson and Gonzalez appealed their convictions of conspiracy to possess the proceeds of extortion, attempted money laundering, and conspiracy to violate the Travel Act. These teenagers had agreed to pick up what they thought was Pancho's drug money. They didn't know the money was really from extorting a person whose brothers had been

kidnapped in Mexico. Before leaving McAllen to get the money, they decided they would steal it and use it buy clothes for themselves. They set off to retrieve the money, which they had been told was at a Home Depot in Fort Worth. While attempting to get the bag in the parking lot, they were arrested by FBI agents. They challenged the sufficiency of evidence for all counts at the bench trial and on appeal. The 5th Circuit reversed the conviction for attempted money laundering because there was no substantial step: the money they attempted to pick up was not yet "proceeds" (they were arrested before the unlawful transaction was complete), and they never purchased other items with it (mere plans to do so is not enough). The 5th Circuit also reversed Anderson's conviction for conspiracy to possess extortion proceeds because, even though the mens rea for possession of extortion proceeds is just that the monies were unlawfully obtained, the mens rea for *conspiracy* is more demanding—Anderson must have entered an agreement with the specific intent that some member of the conspiracy possess extortion proceeds. But Anderson had no knowledge that extortion was afoot. The 5th Circuit affirmed the Travel Act conviction because of evidence they used an interstate facility (cell phone) with intent to promote an unlawful activity. A continuous business enterprise involving narcotics is an unlawful activity under the statute, and it would be reasonable to infer from the evidence presented that they knew Pancho had a drug enterprise.

United States v. Buluc, 930 F.3d 383 (5th Cir July 9, 2019). 5th Circuit held that "takes any other action," in 8 U.S.C. § 1253(a)(1)(C), does not require joint action. The defendant was ordered removed from the US to Turkey. He advised ICE officers that he would not board the plane. When the officers attempted to get the defendant on board, he refused by kicking, screaming, etc… Turkish Airlines refused to board him. He was charged with taking action that was designed to prevent or hamper his removal. The statute penalizes "any alien who 'connives or conspires, or takes any other action, designed to prevent or hamper'" his removal. The defendant argued that, under two rules of statutory construction, "takes action" requires the government prove joint action. The district court disagreed. The 5th Circuit held that neither ejusdem generis ("of the same kind") nor noscitur a sociis ("it is known by its associates") supported the defendant's argument. That is because both require a list of specific terms followed by a general term or terms. Here, the statute

has two grammatically distinct categories of verbs ("connives or conspires" and "takes any other action") separated by a disjunctive. Nothing in the text or context suggests that Congress meant to limit "take any other action" to joint action.

Rehaif v. United States, 139 S. Ct. 2191 (U.S. June 21, 2019). The Supreme Court held, "[i]n a prosecution under § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Section 924(a)(2) describes the punishment for "knowingly" violating § 922(g). Courts had previously only required knowing possession, not knowing status. The Court held "knowingly" applies to all non-jurisdictional elements of § 922(g), reversed the court of appeals judgment, and remanded.

Rehaif had been convicted of possessing a firearm while being in the U.S. unlawfully. He had entered on a nonimmigrant student visa but the university dismissed him after he received poor grades, and he did not enroll in another university. Over Rehaif's objection, the trial judge instructed the jury that the government does not have to prove he was illegally or unlawfully in the U.S.

United States v. Salcedo, 924 F.3d 172 (5th Cir. May 10, 2019), *petition for cert. filed* (U.S. Aug, 8, 2019) (No. 19-5577). The defendant was convicted, under 18 U.S.C. § 1470, of using a means of interstate commerce to knowingly attempt to transfer obscene material to a minor under age 16. An undercover agent claimed, on Craigslist, to want someone to teach her minor daughters how to have sex. The defendant responded and, after a series of text messages, he sent the agent a photograph of a man [supposedly him but not] prominently displaying his erect penis. The defendant went to trial before a jury. He moved for a judgment of acquittal, arguing that the government did not prove that the picture of the penis was obscene material. The district court denied the motion. On appeal, the defendant argued that the photo was not obscene. The 5th Circuit disagreed and affirmed.

The 5th Circuit discussed the proper standard of review for the denial of a judgment of acquittal based on whether an image was obscene. The

denial of a motion for judgment of acquittal is reviewed de novo but "highly deferential to the verdict." But because of the First Amendment implications of obscenity laws, the Court must exercise "independent constitutional judgment" as to the obscenity of the materials in question. The case law does not explain what "independent constitutional judgment" entails. The Court does not resolve the issue because even a de novo review of the photo establishes its obscenity. The next question regarding review for obscenity is what material the Court can consider in assessing the photo's obscenity. Defendant argues that the photo must be considered alone, while the government urges the Court to consider the photo taken in the context of the text messages. Once again the case law is not clear on this issue, but the Court need not decide because "even devoid of context" the photo is obscene.

Because § 1470 does not define "obscene material," the Court looks to the 3-part test in *Miller v. California*, 413 US 15 (1973). The second part of the test, and the only one the defendant challenged, asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the application state law." *Id.* at 24. Determining what is "patently offensive" is a question of fact to be decided using contemporary community standards, which are assessed based on the average adult, not the average minor. In defining "patently offensive," *Miller* included "lewd exhibition of the genitals." *Id.* at 25. Looking solely to the photo itself, and exercising independent constitutional judgment, the Court finds that the photo was a patently offensive lewd exhibition of genitals.

United States v. Baker, 923 F.3d 390 (5th Cir. Apr. 26, 2019). The defendant was convicted of a number of fraud charges, including wire and securities fraud, and making a false statement to the SEC, related to a "channel-stuffing" scheme. The defendant was the CEO of a publicly-traded medical device company. The scheme involved sending excess products to a distributor, who did not need them, and then falsely reporting these shipments as legitimate sales in the company's financial reports. When the scheme was uncovered, the company restated its value, causing its stock price to drop. On appeal, the defendant argued that the wire fraud statute, 18 U.S.C. § 1343, required the government to prove that the defendant "intended to obtain money or property from

the deceived investors." Here, the jury instruction defined a scheme to defraud to also include "to bring about some financial gain to the person engaged in the scheme." Based on the language of § 1343, and the Supreme Court's decisions in *Skilling v. United States*, 561 U.S. 358 (2010), and *Sekhar v. United States*, 570 U.S. 729 (2013), the defendant argued that the wire fraud statute imposes a "mirror image" requirement. That the victim's loss of money or property supplied the defendant's gain. The 5th Circuit rejected this argument, holding that Skilling did not impose a "mirror image" requirement but merely commented on the difference between traditional fraud and honest-services fraud.

United States v. Reed, 908 F.3d 102 (5th Cir. Nov. 5, 2018). Defendants were convicted of wire fraud, conspiracy to commit wire fraud, and money laundering based on a scheme to defraud donors to Reed's campaign for reelection as DA of money by using it for personal purposes and not campaign purposes. The defendant argued that the prosecution violated principles of federalism by enforcing Louisiana state campaign finance law. The defendant cited to the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which convictions for honest services wire fraud by bribery were overturned based on concerns that the federal bribery statute (in particular the term "official act") if broadly construed would result in the federal government setting standards of good government for local and state officials. The 5th Circuit held that *McDonnell* did not control Reed's case because he was convicted for fraudulently obtaining the property of others and not under honest services fraud. Additionally, the federal government prosecuted under federal law—the federal fraud statute—and used state law only to prove mens rea and donor expectations.

United States v. Lewis, 907 F.3d 891 (5th Cir. Nov. 1, 2018). Reiterating that conspiracy to commit Hobbs Act is not a crime of violence for purposes of 18 U.S.C. § 924(c). 5th Circuit vacates all the sentences (Hobbs Act conspiracy, seven Hobbs Act robberies, one monetary transaction, felon in possession, and three § 924(c)s), because the conviction on the one § 924(c) affected the other § 924(c) convictions.

United States v. Perez-Ceballos, 907 F.3d 863 (5th Cir. Oct. 30, 2018). The defendant was charged with money laundering and bank fraud. At trial, the Government conceded that it had not proved FDIC-insured status as to two of the banks. At the end of the trial, the jury acquitted defendant of money laundering but found her guilty of bank fraud with regard to the one remaining bank—Chase Bank. On appeal, the defendant argued that the evidence was insufficient to prove that she had executed a scheme to defraud Chase. The 5th Circuit agreed. There was evidence that defendant made false statements to the other, dismissed, financial institutions, but there was no similar evidence of false statements to Chase. The Court held that the Government also failed to prove that the defendant intended to obtain money from Chase Bank or otherwise exposed Chase Bank to "risk of loss." The Government's theory of risk of loss was largely based on the allegation that the defendant's funds were proceeds from money laundering. The 5th Circuit stated that "the jury's refusal to convict on money laundering removes that predicate." Conviction vacated. Opinion written by J. Jones.

United States v. Bowens, 907 F.3d 347 (5th Cir. Oct. 24, 2018), *petition for cert. denied* (Mar. 4, 2019) (No. 18-7612). The defendant was convicted of, among other things, two counts of Hobbs Act robbery, under 18 U.S.C. § 2 and § 1951(a), and two counts of using and carrying a gun in relation to a crime of violence (COV), under 18 U.S.C. § 2 and § 924(c). The defendant argued that the evidence was insufficient as to the first § 924(c) count. On that count, the jury had been instructed on aiding and abetting the using or carrying of a gun in relation to a COV. The defendant argued that the evidence was insufficient because it proved that he was the principal—he carried the gun—not the aider and abettor. The 5th Circuit held that, regardless of which person had the gun, a reasonable juror could have concluded beyond a reasonable doubt that the § 924(c) offense was committed by "some person"—which is the language used in the 5th Circuit Pattern Jury Instructions.

United States v. Martinez, 900 F.3d 721 (5th Cir. Aug. 21, 2018). The defendant was tried and found guilty of numerous counts involving, among other things, the unlawful employment of illegal aliens. All of the convictions were affirmed on appeal. The opinion has an interesting discussion in footnote 5—it notes that 8 U.S.C. § 1324(a)(3)(A)

criminalizes the unlawful employment, within one year, of at least 10 illegal aliens. The Court notes that "alien" is defined in 8 U.S.C. § 1324(a)(3)(B) as "is an unauthorized alien ..." and "has been brought into the United States in violation of this subsection." What's interesting is that the definition would seem to require that the employer not only employed the aliens but also brought them into the US. The 5th Circuit stated that it had not previously fleshed out the "complexities and nuances" of this definition of alien. The Court also decided that it did not need to do so in this case, because the defendant did not raise the issue.

In footnote 8, the Court noted that it had not yet decided the issue of whether a conviction under 8 U.S.C. § 1324(a)(1)(A)(iv)—wrongfully encouraging or inducing an alien to reside in the US—could be sustained where the aliens in question already resided in the US.

United States v. Brown, 898 F.3d 636 (5th Cir. Aug. 6, 2018). Defendant convicted of one count of making false entries to a federal credit institution, in violation of 18 U.S.C. § 1006. Defendant argued that venue was incorrect, claiming that venue for a false statement must be in the district in which the statement was received by the government. The 5th Circuit explained that the defendant was relying upon old law. The court of appeals had previously held that false statement offenses are continuing offenses so venue is proper in the district in which the false statement was made (here the EDTX).

IV. MISCELLANEOUS TRIAL MATTERS

United States v. Piper, 912 F.3d 847 (5th Cir. Jan. 10), *cert. denied*, 139 S. Ct. 1639 (2019). Two defendants—Piper and Cortinas—were charged with conspiracy to possess with intent to distribute methamphetamine. Defendant Piper subpoenaed two witnesses who were in prison—Castle and Ely. Castle came to trial but invoked his 5th Amendment right against self-incrimination. Ely did not come to trial as the government refused to bring him because he was incompetent and his testimony would have been inadmissible. On appeal, Piper argued that he was deprived of due process and compulsory process when the government failed to produce Ely as a witness at trial. The 5th Circuit

reviewed the issue for plain error. The Court held that there was no error because Ely's testimony would have been inadmissible hearsay. Piper argued that the out-of-court statements would have come in as statements against penal interest, Rule 804(b)(3). The 5th Circuit reviewed Ely's written statement in which he set out what he had overheard Castle telling Piper in prison. Although Castle was unavailable, the 5th Circuit held that the statements did not come in under Rule 804(b)(3) because not all of Castle's statements were against penal interest (some were self-serving), and the circumstances did not clearly indicate that the statements were trustworthy.

V. SENTENCING

CONSTITUTIONAL CHALLENGES

United States v. Davis, 139 S. Ct. 2319 (U.S. June 24, 2019). Supreme Court (5-4) affirmed the 5th Circuit's decision that the residual clause of 18 U.S.C. § 924(c) is unconstitutionally vague. The defendants were convicted of two § 924(c) offenses—one based on Hobbs Act robbery and the other on conspiracy to commit Hobbs Act robbery. The 5th Circuit had held that *conspiracy* to commit a Hobbs Act robbery is not a crime of violence because conspiracy to commit an offense is merely an agreement to commit an offense and does not have force as an element.

United States v. Bowens, 907 F.3d 347 (5th Cir. Oct. 24, 2018), *cert. denied*, 139 S. Ct. 1299 (2019). The defendant was convicted of, among other things, Hobbs Act robbery, under 18 U.S.C. § 1951(a), and using and carrying a gun in relation to a crime of violence, under 18 U.S.C. § 924(c). The defendant argued that Hobbs Act robbery does not qualify as a crime of violence predicate for § 924(c). The 5th Circuit held that circuit precedent foreclosed the defendant's argument, citing *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017). In a footnote, the Court pointed out that its position—that Hobbs Act robbery has as an element the use of force—accords with the position taken by many other circuits. These include the 2d, 3rd, 6th, 7th, 8th, 9th, 10th, and 11th.

STATUTORY CHALLENGES

United States v. Escalante, 933 F.3d 395 (5th Cir. Aug. 2, 2019). 5th Circuit reversed defendant's failure-to-register-under-SORNA sentence because the district court deviated from the categorical approach in classifying the defendant as a Tier II sex offender. The PSR stated that the defendant's prior Utah state conviction for unlawful sexual activity with a minor was comparable to abusive sexual conduct in 18 U.S.C. § 2244. *See* U.S.S.G. §2A3.5; 34 U.S.C. § 20911(3). The defendant objected, arguing that the UT statute was broader because 1) it provides an affirmative defense if the defendant reasonably believed that the victim was > 16; 2) it does not require the prosecution to prove a 4-year differential between the defendant and the victim. On appeal, the 5th Circuit rejected the defendant's first argument, holding that the categorical approach looks exclusively to elements and that an affirmative defense is not the same as an element.

The issue in the defendant's second argument had been left open by the 5th Circuit's opinion in *United States v. Young*, 872 F.3d 742 (5th Cir. 2017). Does SORNA require courts to perform a circumstance-specific inquiry to determine whether the victim was a minor when applying the categorical approach to classifying a sex offender Tier levels? The 5th Circuit held that when classifying a sex offender tier level under 34 U.S.C. § 20911(2)-(4)—to determine whether the victim was a minor or a minor<13—the text requires the circumstance-specific inquiry. However, on the age-differential issue, the text of the statutes do not suggest abandoning the categorical approach. The UT statute criminalized consensual sexual conduct between an 18 year old and a 15 year old. The federal statute does not. Therefore, under the categorical approach, the UT offense sweeps more broadly than the comparable federal statute.

5th Circuit noted that this analysis does not apply to 34 U.S.C. § 20911(5)(C), because the text of that statute is consistent with the circumstance-specific inquiry. *See United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014). At the very end of the opinion, the Court urges the Supreme Court to reconsider the categorical approach.

Quarles v. United States, 139 S. Ct. 1872 (U.S. June 10, 2019). The ACCA requires a 15-year mandatory minimum sentence if a defendant has three prior convictions for a violent felony or serious drug offense. Violent felony is defined to include "burglary." In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court defined burglary as the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." The issue here was whether *remaining-in* burglary (1) occurs only if a person has the intent to commit a crime *at the exact moment* when he *first* unlawfully remains in a building or structure, or (2) more broadly, occurs when a person forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure. The Supreme Court defines remaining-in burglary, for purposes of 18 U.S.C. § 924(e), to occur when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. The decision is based on the meaning of "remaining," Congress's purpose for including burglary as a violent felony, and the fact that defining it more narrowly would result in many state burglary statutes being excluded.

United States v. Herrold, 883 F.3d 517 (5th Cir. 2018) (en banc), *cert. granted, vacated and remanded* 139 S. Ct. 2712 (June 17, 2019). The 5th Circuit held that Texas burglary was not generic burglary. The government petitioned for certiorari, and the Supreme Court GVR'd in light of *Quarles v. United States*, 139 S. Ct. 914 (2019). On remand to the 5th Circuit, supplemental briefing was filed and case is still pending.

United States v. Figueroa-Coello, 920 F.3d 260 (5th Cir. Apr. 3, 2019). On appeal, the defendant argued that the district court committed plain error by failing to give him the opportunity to speak at his sentencing hearing. 5th Circuit held that the error was clear and obvious. *See* Fed. R. Crim. P. 32(i)(4)(A)(ii). The error affected his substantial rights because he was sentenced at the top of the Guidelines range. The real issue was whether the 5th Circuit should exercise its discretion and remand the case to the district court. The Court will not remand cases for plain error involving allocution unless the defendant offers mitigating evidence that likely would have moved the district court to grant a more lenient sentence. Here, the defendant provided additional mitigating facts on appeal. The 5th Circuit reviewed each one: 1) he returned to the

US to support his family—this additional detail was likely not enough on its own to move the district court; 2) his mother was recently diagnosed with Alzheimer's—this fact is cast into doubt by his statement in the PSR that he was not sure of his parent's health status; 3) his willingness to address his alcohol problem and maintain sobriety—this fact goes to the root of his prior criminal activity, which was the basis for the court's decision for the higher sentence. Held that allowing the defendant to allocate would provide detail to his plea for a lesser sentence.

United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir Nov. 30, 2018) (en banc). This en banc decision overturned significant 5th Circuit precedent. Held: in using the modified categorical approach to determine whether a prior conviction is a crime of violence, the court can consider the charging instrument even if it does not charge the offense for which the defendant was convicted. The Court held that the Missouri voluntary manslaughter statute at issue here was divisible and that the defendant had been convicted of the subsection that equated generic manslaughter.

The Court also held that causing bodily injury was the same thing as using physical force, citing *United States v. Castleman*, 572 U.S. 157 (2014). There is no difference, for purposes of determining whether the statute has as an element the use of physical force, whether that force is applied directly or indirectly. Poisoning someone is using physical force. The Court held that the subsection of the voluntary manslaughter statute that involved assisting in self-murder had as an element the use of physical force, even though there were examples in which the defendant merely provided the victim with a gun or poison.

United States v. Torres, 923 F.3d 420 (5th Cir. May 6, 2019). 5th Circuit held that Texas conviction for aggravated assault family violence, under § 22.01(a)(2), has as an element the threatened use of physical force for purposes of 18 U.S.C. § 16(a). The state documents did not identify under which statute the defendant was convicted. Texas aggravated assault consists of an assault, as defined in § 22.01, combined with an aggravating factor, in § 22.02. Court decided that Texas assault, under § 22.01, is a divisible statute. Using the modified categorical approach, the Court looked at the indictment and determined that the aggravated assault was based on an assault under § 22.01(a)(2)—

intentionally or knowingly threatens another with imminent bodily injury. Defendant argued that Texas assault under § 22.01(a)(2) did not have as an element the threatened use of force, relying on decisions before the en banc decision in *Reyes-Contreras*,. Those cases are no longer good law. After *Reyes-Contreras*, there is no distinction between direct or indirect force. A defendant commits a crime of violence if he attempts, threatens, or actually "applies or employs force capable of causing physical pain or injury" while knowing that the force is substantially likely to cause physical pain or injury. A knowing threat to another of imminent bodily injury is knowingly threatening to employ a force capable of causing physical pain or injury.

United States v. Flores, 922 F.3d 681 (5th Cir. Apr. 30, 2019). The defendant, who was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g), challenged his sentence under the ACCA. He argued that his prior Texas juvenile adjudication for aggravated assault was not a violent felony. A juvenile adjudication can be an ACCA predicate if it has force as an element or is one of the enumerated offenses AND involves "the use or carrying of a firearm, knife, or destructive device." 5th Circuit held that the categorical approach applies to juvenile adjudications for purposes of the ACCA. "We can discern no basis to treat determination of the nature of juvenile adjudications differently than adult convictions." 5th Circuit held that the prior adjudication for aggravated assault with a firearm did not count as a violent felony for the ACCA. That is so because the first prong of Texas aggravated assault, causing serious bodily injury, does not categorically require the use or carrying of a firearm, knife, or destructive device. For the second prong, using a deadly weapon, under Texas law a deadly weapon "could be anything," including a hand or foot. Therefore, because Texas aggravated assault does not categorically require the use or carrying of a firearm, knife, or destructive device, it does not qualify as an ACCA predicate for juvenile adjudications.

United States v. Burris, 908 F.3d 152 (5th Cir. Apr. 10, 2019). Original opinion was withdrawn. The 5th Circuit held that Texas robbery, § 29.02(a), qualifies as a violent felony. *See Stokeling v. United States*, 139 S. Ct. 544 (2019). Texas robbery has 2 alternatives: (a)(1) robbery-by-injury and (a)(2) robbery-by-threats. In this case, the Texas conviction

documents do not specify under which alternative the defendant was convicted. He was indicted for aggravated robbery but convicted of robbery. The *Reyes-Contreras* en banc decision instructed that courts may "make reasonable use of the indictment, together with the judgment, to identify the crime of conviction." The indictment and the judgment both state that the defendant caused bodily injury. So it appears that the defendant pleaded guilty to robbery-by-injury. 5th Circuit held that Texas robbery-by-injury, (a)(1), categorically requires the use of physical force; and that Texas robbery-by-threats, (a)(2), requires the attempted use or threatened use of physical force.

United States v. Gracia-Cantu, 920 F.3d 252 (5th Cir. Apr. 2, 2019), *petition for cert. filed* (U.S. June 25, 2019) (No. 18-1593). Defendant argued that his Texas conviction for assault family violence, § 22.01(a)(1) & (b)(2), is not a crime of violence, under 18 U.S.C. § 16, and therefore not an aggravated felony. 5th Circuit rejected the argument, after the *Reyes-Contreras* en banc decision. "Use of force" includes both direct and indirect applications of force. All that § 16(a) requires is conduct that: (1) is committed intentionally, knowingly, or recklessly, and (2) employs a force capable of causing physical pain or injury (3) against the person of another. Texas assault family violence meets this definition—assault causing bodily injury, defined as "physical pain, illness or impairment of physical condition." Defendant also argues that the degree of force required by the Texas statute, for example, the impairment of physical condition, is too minimal to constitute a crime of violence. 5th Cir held that defendant cannot show a reasonable probability that the statute could be enforced and applied in such a way. The defendant's case law examples—knowingly transmitting HIV and knowingly injecting bleach through an IV into the victim's bloodstream—involve force capable of causing physical pain or injury. They are no different from the "deadly instruments" in *Reyes-Contreras*, a gun, poison-laced o.j., & a plastic bag. These cases involved the knowing employment of deadly instruments with the understanding that they were substantially likely to cause physical pain, injury or death.

United States v. Gomez-Gomez, 917 F.3d 332 (5th Cir. Feb. 25, 2019), *petition for cert. filed* (U.S. July 19, 2019) (No. 19-5325). 5th Circuit held that Texas aggravated assault has as an element the use of force under

the reasoning in the *Reyes-Contreras* en banc decision. The "use of force" encompasses the common law definition of force–including indirect applications of force. 5th Circuit rejected argument that *Reyes-Contreras* should not apply to the defendant because it was a change in the law that occurred after his arrest. Court held that applying *Reyes-Contreras* to defendant's case did not violate due process or ex post facto.

Stokeling v. United States, 139 S. Ct. 544 (U.S. Jan. 15, 2019). Robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of "physical force" within the meaning of the ACCA's violent felony definition. "Force" encompasses common law robbery, the quintessential ACCA predicate crime before statutory revisions intended to expand predicate offenses. Florida robbery is a violent felony.

United States v. Stitt, 139 S. Ct. 399 (U.S. Dec. 10, 2018). Burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation qualifies as the enumerated violent felony of burglary for the ACCA. [Citing *Stitt*, the 5th Circuit held that such a burglary is an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *United States v. Perdomo*, 914 F.3d 356 (5th Cir. 2019).]

United States v. Valle-Ramirez, 908 F.3d 981 (5th Cir. Nov. 19, 2018). On remand from the Supreme Court in light of *Dimaya v. Sessions*, 138 S. Ct. 1204 (2018), the 5th Circuit held that the defendant's prior Georgia conviction for aggravated assault with a deadly weapon was an aggravated felony. The defendant argued that the GA statute did not have the necessary mens rea. The 5th Circuit noted that the Supreme Court had recently held that the word "use" in "use of force" was indifferent to whether the defendant had the mental state of intentional, knowing, or reckless with respect to the consequences of his conduct. *See Voisine v. United States*, 136 S. Ct. 2272 (2016). The concern is whether the conduct was volitional in contrast to accidental. GA assault occurs when the defendant commits an act that placed another in reasonable apprehension of immediately receiving a violent injury. GA courts have held that for assault the defendant must intend to commit the act that causes the victim to feel reasonable apprehension, though the defendant

need not intend to cause the apprehension. The 5th Circuit held that this required mens rea more than satisfied merely volitional conduct.

United States v. Gomez, 905 F.3d 347 (5th Cir. Sept. 26, 2018). 5th Circuit remanded case for limited purpose of determining whether the district court wished to resentence the defendant in light of *Dean v. United States*, 137 S. Ct. 1170 (2017). Defendant was convicted of drug counts and two § 924(c) counts. The drug counts were grouped and the resulting Guideline range was 292–365. The first § 924(c) count required a 5-year minimum consecutive sentence; the second § 924(c) required 25 years minimum consecutive.* At sentencing, the defendant urged the district court not to "stack" the two firearms counts. The court sentenced defendant to 652 months' imprisonment—292 months on drugs and 360 months on guns. The court noted that it found the sentence excessive but believed it was required to give this sentence under the statute.

On appeal, the defendant argued that the district court erroneously believed that it was not authorized to consider the counts carrying mandatory minimum sentences in determining the aggregate sentence. The 5th Circuit held that it appeared that the court had not realized that *Dean* clearly authorized sentencing courts to consider the length of the mandatory-minimum sentence in fashioning a sentence on the discretionary, non-mandatory counts. Because the 5th Circuit could not determine whether the district court would have deviated downward on those counts, a limited remand was appropriate.

*The First Step Act has changed this. Under Section 403, the 25 year mandatory consecutive sentence applies only when the offender has a prior § 924(c) conviction that has become final.

(SELECTED) GUIDELINE ISSUES

United States v. Khan, __ F.3d __, No. 18-20519, 2019 WL 4410002 (5th Cir. Sept. 16, 2019). 5th Circuit held that the district court committed procedural error in concluding, as a matter of law, that the terrorism enhancement, under §3A1.4, did not apply to the defendant's sentence. The defendant pleaded guilty to providing material support—namely, personnel—to a foreign terrorist organization (FTO), under 18 U.S.C. §

2339B(a)(1). At sentencing, the district court refused to apply the terrorism enhancement because (1) that would be impermissible double counting; (2) the adjustment did not apply to conduct intended to influence a foreign government; and (3) there were "degrees of terrorism" and not all of the defendant's actions were terroristic. The government appealed.

The 5th Circuit held that the district court erred because (1) double counting is only prohibited if it is specifically forbidden by the particular guideline at issue, and here neither §2M5.3 nor §3A1.4 had such a prohibition; (2) the terrorism enhancement applies to conduct intended to influence a foreign government as § 2339b(g)(5) refers broadly to government, foreign or otherwise; and (3) the degree of terrorism, while maybe a relevant factor when considering the § 3553(a) factors, is immaterial in determining whether the enhancement applies. The 5th Circuit vacated the sentence and remanded to the district court to determine, in the first instance, whether, as a factual matter, the terrorism enhancement applied.

United States v. Ainabe, __ F.3d __, No. 18-20689, 2019 WL 4386376 (5th Cir. Sept. 13, 2019). The defendant was convicted of numerous counts of health care fraud based on falsely billing Medicare for services. At sentencing, the district court applied, over the defendant's objections, two levels, under §2B1.1(b)(2)(A)(i), for the offense involving more than 10 victims, and 18 levels, under §2B1.1(b)(1)(J), for the amount of loss. On appeal, the defendant argued that the district court erred in applying the increase for 10 or more victims because the Medicare beneficiaries did not spend any of their own money. This argument is foreclosed by 5th Circuit precedent, *United States v. Barson*, 845 F.3d 159 (5th Cir. 2016) (per curiam). Judge Dennis filed a special concurrence, arguing that *Barson* was wrongly decided.

The defendant also argued that, in determining the amount of loss, the district court erred by including, as relevant conduct, two other Medicare fraud schemes because §1B1.3(a)(2) is limited to acts that occurred during the commission of the offense of conviction, the preparation for that offense, or in the course of attempting to avoid detection. The 5th Circuit held that this was an incorrect interpretation of the guideline

language, which only refers to (1)(A) and (1)(B), not the "occurred during the commission" language, which belongs more generally to §1B1.3(a)(1).

United States v. Torres-Magana, __ F.3d __, No. 18-50056, 2019 WL 4266118 (5th Cir. Sept. 10, 2019). The 5th Circuit held that the district court did not clearly err in applying a sentencing enhancement for using "fear, impulse, friendship, affection or some combination" to involve someone in a drug offense because its findings were plausible in light of the whole record. For the enhancement under §2D1.1(b)(16)(A) to apply, the defendant must have received a leadership role adjustment, under §3B1.1, and (1) used fear, impulse, friendship, affection or some combination" to involve another person in the "illegal purchase, sale, transport or storage" of a controlled substance; (2) the person "received little or no compensation" from the offense; and (3) the person had "minimal knowledge of the scope and structure of the enterprise." The 5th Circuit noted that, although the defendant had objected to the PSR, he put on only unsworn objections and mere argument—not "cognizable testimony or affidavits."

United States v Kalu, __ F.3d __, No. 18-20399, 2019 WL 4126666 (5th Cir. Aug. 30, 2019). 5th Circuit held that the district court did not err in applying the 2-level enhancement, under §2B1.1(b)(11)(C)(i), for the offense involving the use of a means of identification to produce another means of identification. Here, the defendant used beneficiaries' Medicare information (a means of identification) to produce fraudulent health care claims to bill Medicare. Each claim had a unique, Medicare-issued claim number tied to a particular beneficiary and was therefore a means of identification. The 5th Circuit relied upon the plain language of the guideline, and the broad non-exhaustive nature of the "means of identification" definition in 18 U.S.C. § 1028(d)(7).

United States v. Aguilar-Alonzo, __ F.3d __, No. 18-50627, 2019 WL 4022173 (5th Cir. Aug. 27, 2019). 5th Circuit held that to "use" fear, friendship or affection to involve another person in a drug offense requires that the defendant have actively employed or played upon affection. U.S.S.G. §2D1.1(b)(16)(A) (effective Nov. 1, 2018). The majority's decision was based on many Supreme Court and 5th Circuit cases defining "use" to require the active employment of something. *See,*

e.g., *United States v. Bailey*, 516 U.S. 137, 143 (1995); *Jones v. United States*, 529 U.S. 848, 855 (2000). The majority held that the government had not met its burden of establishing the facts for the adjustment. Here, the defendant asked the codefendant to accompany him to pick up drugs. The defendant and codefendant had been dating for a year; the codefendant knew that the defendant was involved in drug trafficking; the codefendant said that she only agreed to go because she was afraid that the defendant would break up with her. The majority stated that the mere existence of a romantic or familial relationship does not support the increase. The district court clearly erred in applying the adjustment, and the sentence was vacated. Judge Smith dissented, challenging the majority's application of clear-error review.

United States v. Del Carpio Frescas, 932 F.3d 324 (5th Cir. July 29, 2019). 5th Circuit affirmed the jury conviction and restitution order in this case involving wire fraud and money laundering. But it vacated the 235-month and 120-month concurrent sentences and remanded for resentencing because the district court's Guidelines calculation was off by one point. The district court sentenced Del Carpio under the money laundering guideline, §2S1.1(a). Per the guideline commentary, any Chapter Three adjustments are to be based on the money laundering conduct, not the underlying offense from which the laundered funds were derived. But the court imposed the abuse-of-trust enhancement and the leadership enhancement based on Del Carpio's *wire fraud* conduct, not his money laundering conduct. This was plain error that affected Del Carpio's substantial rights and merited reversal. Judge Oldham concurred, describing the evolution of plain-error review and arguing that it isn't much of a barrier for Guidelines cases anymore.

United States v. Garcia-Solis, 927 F.3d 308 (5th Cir. June 12, 2019). 5th Circuit held that, on the facts of this case, the defendant's reckless driving alone supported the 2-level increase for reckless endangerment, under 2L1.1(b)(6). According to the PSR, while BP agents were pursuing him, the defendant drove 20 mph over the speed limit, wove thru traffic, and ran a red light. At one point, the defendant slowed down & pulled over but then sped off, driving up to 100 mph through traffic. The district court credited the PSR, which was based on statements by the BP agents & some of the persons being illegally transported. The district court did

not credit the defendant's version. 5th Circuit held that the reckless endangerment determination based on reckless driving is fact-intensive and case-specific. Not every instance of reckless driving will support the enhancement.

United States v. Perez-Mateo, 926 F.3d 216 (5th Cir. June 10, 2019). 5th Circuit held the district court plainly erred by assessing two criminal history points based on the defendant's Feb. 2007 conviction for which he was sentenced to probation, revoked, and resentenced to 150 days' custody. For two criminal history points, the prior sentence will count only if it was "imposed within 10 years of the commencement of the instant offense." §4A1.2(e)(2). Here, the PSR stated that the defendant illegally reentered on March 2, 2018, not earlier. The government argued that the appeal raised a question of fact capable of resolution in the district court that this Court has held can never constitute plain error. The 5th Circuit rejected the argument: the defendant did not contend that the district court made erroneous factual findings. Rather, the appeal relied on the dates in the PSR adopted by the district court.

United States v. Randall, 924 F.3d 790 (5th Cir. May 22, 2019). Defendant pleaded guilty to four counts: Ct I Production child pornography (CP); Ct II Transportation CP, Ct III Possession CP, Ct IV committing felony offense involving a minor while required to register as a sex offender. The production count involved one child, Jane Doe 5 (JD5). That count was calculated separately from the other counts of conviction, resulting in an offense level of 40. There was evidence, however, that the defendant had also produced CP involving five other minors. The PSR included separate offense level calculations for five "pseudo counts." These resulted in offense levels of 38 to 42. The PSR applied the multi count adjustment to the groups, under §3D1.4, and added 5 levels to the highest offense level. The resulting guideline range was Life. The court imposed a downward variance of 45 years' imprisonment because a Life sentence was greater than necessary.

Defendant argued the district court plainly erred in applying §2G2.1(d)(1) to create "pseudo counts" of CP. 5th Circuit agreed. Under §2G2.1 and the grouping rules, multi counts involving production of CP with different minors are not grouped together for §3D1.2. The pseudo

counts also did not constitute relevant conduct. §2G2.1(a), cmt. (n.7). The pseudo counts did not involve conduct that occurred during, in preparation for, or in the course of attempting to avoid detection of responsibility for the offense of conviction. §1B1.3(a)(1)(A). And the pseudo counts were not relevant conduct under §1B1.3(a)(2), "same course of conduct or common scheme or plan" as the offense of conviction. §1B1.3(a)(2) is limited to offenses that must be grouped under §3D1.2(d). Guidelines §2G2.1 and §3D1.2(d) expressly exclude CP offenses. 5th Circuit held there was error and it was obvious under the plain language of the guidelines—even though it required "careful parsing" of the Guidelines Manual. The error is sufficiently obvious that it would not have occurred if the issue had been raised before and properly argued to the district court. It affected the defendant's substantial rights because the correctly calculated Guidelines range would have been lower than the sentence imposed. 5th Circuit exercised its discretion to correct the error, "to a prisoner [additional] time is not some theoretical or mathematical concept." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018).

United States v. Dinh, 920 F.3d 307 (5th Cir. Apr. 4, 2019). Defendant convicted of distributing large volume of pills containing Fentanyl analogues. Two different labs—Texas DPS and the DEA—tested samples of the pills and concluded that all contained Fentanyl analogues. The defendant objected to the quantity arguing that it violated due process not to determine the exact composition of each pill. 5th Circuit noted that the default rule for calculating the weight of a controlled substance is its mixture weight. U.S.S.G. §2D1.1(c). The Supreme Court already held that mixture weight calculations do not violate due process when drug cannot be easily separated from mixture and is intended for sale and consumption in mixture. *Chapman v. United States*, 500 U.S. 453 (1991).

United States v. Salinas, 918 F.3d 463 (5th Cir. March 20, 2019). The defendants were convicted of conspiracy to transport illegal aliens and, at sentencing, received a 10-level increase based on the death of one of the aliens. The defendants were driving the aliens in a pickup truck when the police started chasing them. The truck ended up crashing into a tree, and everyone got out of the truck and ran. One of the aliens suffered a heart attack while running from the police and died. At sentencing, a doctor testified that the heart attack was caused by the

chase. He acknowledged, however, that the individual had preexisting heart conditions and that a heart attack could have occurred at any time. The 5th Circuit had previously held that, for an increase under §2L1.1(b)(7), the defendant's conduct must be the but-for cause of the injury or death, not its proximate cause. Guideline §2L1.1(b)(7) does not have any causation requirement. Accordingly, the general but-for causation requirement in §1B1.3 applies. But-for causation requires the government to show merely that the harm would not have occurred in the absence of the defendant's conduct. Here, the defendants' conduct was the but-for cause of the alien's death.

United States v. Garcia-Sanchez, 916 F.3d 522 (5th Cir. Feb. 21, 2019). 5th Circuit held that the "single sentence rule" of §4A1.2(a)(2) applies to the offense-level enhancements under §2L1.2(b)(3). The single sentence rule of §4A1.2(a)(2) states that, for purposes of §4A1.1, "if prior sentences are treated as one sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment." The 5th Circuit held that this rule applied to §2L1.2(b)(3), because 1) the commentary to §2L1.2 specifically cross-references §4A1.1, and §4A1.1 and §4A1.2 must be read together; and 2) amendment 802 to §2L1.2 explains, in its reasons for the amendment, that the Commission adopted an approach "consistent with how criminal history is generally scored" in Chapter 4 of the Manual.

United States v. Lord, 915 F.3d 1009 (5th Cir. Feb. 15, 2019). Defendant pleaded guilty to conspiracy to distribute Alprazolam. On appeal, he challenged the two-level increase for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. §2D1.1(b)(12). The defendant and another person, Laghari, acquired a pill press and the materials for manufacturing Xanax. They stored the press and materials in a locked room at Laghari's dad's business. Laghari used the room to produce Xanax pills. In determining whether the increase applied, the Court considered whether the defendant had a possessory interest in the property and the extent to which he controlled access to, or activities at, the premises. The 5th Circuit held that there was no evidence that the defendant had unrestricted access to the premises. He had a possessory interest in the pill press, not the premises.

Defendant also challenged the two-level increase for use of a "special skill." §3B1.3. The commentary states that a special skill is one "not possessed by members of the general public and usually requiring substantial education." §3B1.3, cmt. (n.4). The district court applied the increase here because of the defendant's self-taught computer skills. 5th Circuit held that increase was not supported by the facts. Similar cases had required at least some informal course of study. Defendant had dropped out of school in the 10th grade, had gotten his GED, but had no higher education. He also did not have any license or certificate pertaining to computers. The 5th Circuit noted that other circuits had warned against routine application of the special skills increase for people with computer skills. Here, the defendant's self-taught skills were not in the class of "pilots, lawyers, and doctors." §3B1.3, comment. n.4.

United States v. Najera, 915 F.3d 997 (5th Cir. Feb. 14, 2019). The defendant was charged with transporting illegal aliens. He filed a motion to suppress, arguing that law enforcement did not have reasonable suspicion to stop him. The district court denied the motion. The defendant sought a conditional plea, under Fed. R. Crim. P. 11(a)(2), but the Government refused. The defendant proceeded to a bench trial in which he did not contest the facts because he just wanted to preserve his right to appeal. The PSR, under Acceptance of Responsibility, noted that the defendant "regrets every moment" of the offense and that he was very remorseful. However, the PSR recommended denying acceptance of responsibility because the defendant had a bench trial and had filed a motion to suppress, at which he "contested the validity of the facts of the case." The 5th Circuit held that the district court had erred in denying the reduction because the defendant had "clearly demonstrated acceptance of responsibility." The Court stressed the difference between "denial of factual guilt and denial of legal guilt." Here, the defendant had not contested the facts; he had argued that the facts were legally insufficient for reasonable suspicion.

United States v. Eaden, 914 F.3d 1004 (5th Cir. Feb. 5, 2019). Law enforcement searched the defendant's house and found 5.5 grams of crack cocaine and 19 rounds of ammunition. No firearm was found. Defendant was charged with and pleaded guilty to being a felon in possession of

ammo. The PSR recommended a 4-level increase under §2K2.1(b)(6)(B) for possessing the ammo in connection with another felony offense. The only description of how the ammo was connected to the cocaine was that the ammo was "easily accessible" and "stored in close proximity to" the cocaine. Defendant objected to the enhancement.

In reversing the sentence, the 5th Circuit answered 3 questions:
1. Whether possession of ammo alone can facilitate a drug trafficking offense (DTO) for purposes of §2K2.1(b)(6)(B)?

- Yes, possession of ammo alone, under certain circumstances, can facilitate a DTO for §2K2.1(b)(6)(B). See Note 14(A).

2. Whether there is a presumption that the possession of ammo alone facilitates a DTO for §2K2.1(b)(6)(B)?

- No, there is no presumption of facilitation of a DTO based on the possession of ammo. There is a presumption of facilitation when a firearm is possessed in close proximity to drugs during a DTO. See §2K2.1, Note 14(B). There is no reference to ammo in Note 14(B). No reason to expand this presumption beyond possession of a firearm during a DTO. *Cf. United States v. Jeffries*, 587 F.3d 690 (5th Cir. 209) (no presumption when defendant possessed firearm during possession of drugs but not DTO).

3. Whether the 4-level adjustment under §2K2.1(b)(6)(B) was properly applied to the defendant?

- No. Ammo has the potential to facilitate a DTO when it is displayed or brandished in a manner that has the potential to embolden the trafficker and protect his operation by implying that he has a gun. There was no evidence here to support the enhancement.

United States v. Douglas, 910 F.3d 804 (5th Cir. Dec. 12, 2018). 5th Circuit panel noticed a guidelines error not raised by the defendant in the district court or on appeal and requested supplemental briefing. The 5th Circuit held that the error was plain, affected substantial rights, and exercised its discretion to correct it. The Court noted, however, that generally it will not address (much less reverse on) an error not raised by the defendant. The defendant was convicted of kidnapping in Texas and a drug offense in Louisiana. The kidnapping case was transferred to Louisiana. The probation officer produced a separate PSR for each offense. The guidelines error involved the grouping rules in Chapter 3

Part D. Section 1B1.1 maps out the manner in which a sentencing court is to apply the guidelines. The Guidelines must be followed in that order.

United States v. Blount, 906 F.3d 381 (5th Cir. Oct. 18, 2018). Defendant, who pleaded guilty to wire and securities fraud, argued on appeal that the district court erred in applying the 2-level increase, under §2B1.1(b)(9)(C), for violating a prior administrative order. The prior order was handed down by the Financial Industry Regulatory Authority (FINRA). Defendant practiced as a FINRA licensed securities broker for more than 10 years. During that time there were 100s of complaints filed against him. FINRA opened a regulatory investigation and banned the defendant from associating with any FINRA member. This order effectively barred defendant from dealing in securities. Defendant disregarded the order and set up a Ponzi scheme that resulted in 72 investors being defrauded out of millions of dollars. On appeal, he argued that he did not violate the FINRA order because he was selling insurance products, not securities. The 5th Circuit held that these were "substantially securities" for purposes of the Securities Exchange Act. Defendant also argued that the FINRA order was not an administrative order because FINRA was a private entity not a governmental body. Because the defendant had not raised this argument in the district court, it was reviewed for plain error. The Court held that any error could not be plain because there was no 5th Circuit precedent addressing this "novel" argument.

United States v. Ponce-Flores, 900 F.3d 215 (5th Cir. Aug. 14, 2018). The defendant was being sentenced for illegal reentry. He had 3 prior CA convictions that were all charged in the same indictment and the sentences were all imposed on the same day. The sentences were: 4 years' imprisonment on a drug offense, a concurrent 2 years' imprisonment on a weapon offense, and a consecutive one year of imprisonment on another drug offense. The PSR increased the defendant's offense level by 10 levels, under §2L1.2(b)(2)(A), based on the aggregate sentence of 5 years. Issue on appeal was whether the sentence aggregation rule in §4A1.2(a)(2) applies to §2L1.2(b)'s enhancements for prior sentences. The 5th Circuit did not decide the issue because the defendant failed to object in the district court and so was on plain error review. The Court held that any error would not be plain because it had not previously addressed the

issue, the plain language of the guideline did not answer the issue, and the only court to address the issue, the 4th Circuit, had held that it was appropriate to apply §4A1.2's sentence aggregation rule to §2L1.2(b).

SUBSTANTIVE REASONABLENESS

United States v. Fields, 932 F.3d 316 (5th Cir. July 29, 2019). 5th Circuit affirmed upward variance relying on arrests for offenses involving injury to a child, even though the Texas grand juries ultimately no-billed those charges. The PSR had detailed offense reports explaining details of those alleged offenses. The no-bill did not render that description unreliable. Under Texas law, a no-bill is "merely a finding that the specific evidence brought before the particular grand jury did not convince them to formally charge the accused with the offense alleged."

United States v. Taffaro, 919 F.3d 947 (5th Cir. Mar. 29, 2019). The defendant, Chief Deputy of a Sheriff's Office, was convicted of several counts of tax evasion and filing false income tax returns over a 12 year period. The district court downwardly varied to a sentence of 60 months' probation. The government appealed the sentence as substantively unreasonable. 5th Circuit disagreed and affirmed the sentence. The majority opinion, authored by J. Clement, noted the review for substantive reasonableness was "highly deferential." Under that review, the sentence was substantively reasonable because 1) the variance was relatively small, 2) the defendant had no prior criminal history, and 3) the district court considered the defendant's age, physical condition, family responsibilities, charitable activity, work as a law enforcement officer, and voluntary service in military during Vietnam War.

Concurring opinion by J. Ho acknowledged the highly deferential standard but argued that the probation sentence for a law enforcement officer, who secured letters of support from prominent state and local officials, "will only further fuel public cynicism and distrust of our institutions of government." J. Ho also expressed doubt that "an ordinary citizen of Louisiana—one without the power and connections that come with holding powerful office—who defrauded the US" would have received zero prison time as well.

United States v. Hoffman, 901 F.3d 523 (5th Cir. Aug. 24, 2018). 5th Circuit found a downward departure from a 168-210 Guidelines range to 60 months of probation and a $40,000 fine substantively unreasonable. Defendant was convicted by a jury of a sophisticated mail and wire fraud scheme involving tax credits for the film industry, abusing his position of trust as a lawyer to facilitate the fraud, with a loss exceeding $3.5 million (intended loss, actual loss was zero); he also obstructed justice by lying at trial. The district court noted a "serious dispute" that the project may have been entitled to more tax credits than were fraudulently obtained, inconsistencies in how much Louisiana lost, the defendant's health issues, and its view that a sentence of probation was sufficient to deter criminal conduct. The 5th Circuit disagreed with that last point: "Giving probation to the leader of a sophisticated, multimillion dollar fraud scheme—particularly a defendant undeterred by a previous term of probation for a federal economic crime and who also lied at trial—perpetuates one of the problems Congress sought to eliminate in creating the Sentencing Commission: that sentencing white-collar criminals to little or no imprisonment creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business." It also noted "significant and unwarranted sentencing disparities with others engaged in frauds of similar magnitude who receive sentences at least in the ballpark of what the Guidelines recommend." Judge Dennis dissented, highlighting the extenuating circumstances of this case, and the deference given to the sentencing court (even for considerable upward variances).

SUPERVISED RELEASE/PROBATION

Sealed Appellant v. Sealed Appellee, __ F.3d __, No. 18-50115, 2019 WL 4199797 (July 30, 2019). The 5th Circuit affirmed supervised release conditions requiring sex offender treatment and assessment on plain error review. Appellant was convicted of a drug offense and had decades-old convictions for sex assault on a child. At sentencing, the court said the defendant must participate in a sex offense specific assessment, which is recommended to determine if he is still a danger to the community. The court also required sex offense specific treatment. The written judgment required the defendant to participate in the treatment

program and the assessment, but said the assessment is recommended to determine if he is still a danger to the community; if he is, then he shall participate in the treatment program. The defendant challenged the treatment condition as an improper delegation of judicial authority to the assessment provider. The 5th Circuit held that the discrepancy between the oral pronouncement and written judgment was an ambiguity, not a conflict, and that the district court intended to mandate both the assessment and the treatment condition. The 5th Circuit modified the written judgment to remove any doubt that treatment was required.

United States v. Haymond, 139 S. Ct. 2369 (U.S. June 26, 2019). In a split decision (4-1-4), the Supreme Court held 18 U.S.C. § 3583(k) is unconstitutional. Section 3583(k) requires a 5-year minimum sentence of imprisonment upon revocation of supervised release for certain offenses, e.g., possessing child pornography (CP), if the judge finds by a preponderance of evidence that a defendant committed one of the enumerated offenses, including CP possession. Justice Breyer wrote the controlling concurrence. While Breyer would not transplant the *Apprendi* line of cases to the supervised-release context as Justice Gorsuch's plurality did, he determined § 3583(k) is more like punishment for a new offense, to which the jury right would typically attach. Justice Alito's dissent accused Gorsuch of suggesting that the entire system of supervised release is fundamentally flawed.

United States v. Diggles, 928 F.3d 380 (5th Cir. June 26, 2019), *reh'g en banc granted* 928 F.3d 1120 (5th Cir. July 15, 2019). 5th Circuit held that the district court abused its discretion by imposing a special condition of supervised release in the written judgment that had not been orally pronounced at the sentencing hearing. The special condition was in the PSR and at sentencing the court told the defendant that it was imposing the condition that was in the PSR. The panel found itself bound by precedent, holding that the district court abused its discretion in telling the defendant only that the conditions in the PSR would be imposed and not pronouncing each aloud. *United States v. Rivas-Estrada*, 906 F.3d 346, 350-51 (5th Cir. 2018). However, the panel also expressed its belief that *Rivas-Estrada* conflicted with earlier precedent in *United States v. Rouland*, 726 F.3d 728, 734 (5th Cir. 2013).

United States v. Bree, 927 F.3d 856 (5th Cir. June 19, 2019). 5th Circuit held that the district court plainly erred by imposing a special condition of supervised release requiring the defendant to participate in mental health treatment "because of his substance problems." By itself, a history of substance abuse does not justify imposing a mental health condition. Here, the district court had already imposed a condition requiring substance-abuse treatment. Also, 5th Circuit precedent requires specific record facts demonstrating mental instability before a mental health condition can be imposed. *See United States v. Gordon*, 838 F.3d 597, 604 (5th Cir. 2016).

United States v. Campos, 922 F.3d 686 (5th Cir. Apr. 30, 2019). 5th Circuit held that the district court plainly erred by imposing an 8-year supervised release term on the mistaken belief that it was the mandatory minimum term required on revocation. The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin within 1000 feet of a vocational school and college. He was sentenced to a term of imprisonment and 8 years of supervised release, which was the mandatory minimum supervised release under the statutes. *See* 21 U.S.C. §§ 841(b)(1)(B) (requiring minimum 4 year supervised release term); 860(a) (doubling term required in § 841). On revocation of supervised release, the probation officer prepared a Violation Worksheet stating that the period of supervised release was "no less than 8 years to life." At the hearing, the district court stated that the relevant supervised release term was "no less than 8 years up to life." The court sentenced the defendant to 8 years of supervised release. No explanation was given for the supervised release term. The 5th Circuit held that the defendant was not subject to a mandatory minimum term of 8 years supervised release on revocation. While that applied at the original sentencing, the 8 years mandatory minimum did not apply to the post-revocation supervised release. *See* 18 U.S.C. § 3583(h); U.S.S.G. §7B1.3(g)(2).

United States v. Hathorn, 920 F.3d 982 (5th Cir. Apr. 11, 2019), *petition for cert. filed* (U.S. June 28, 2019) (No. 19-5045). Defendant on supervised release from his drug-trafficking offense was revoked for multiple violations involving drug usage and lying about it. As part of the revocation sentence, the district court ordered a special condition of supervised release requiring that he submit "his computers, cell phones,

and all other electronics" to searches by the Probation Office to be conducted in a reasonable manner, "under reasonable suspicion of contraband or illegal activity." The defendant objected to this condition, arguing that it was typically given to sex offenders not drug offenders. The district court overruled the objection, explaining that it was imposing the condition because he had a conviction for drug-dealing, he was addicted to drugs, and "one of the best ways to discover using illegal drugs is to look at somebody's cell phone." 5th Circuit held that the special condition was 1) reasonably related to the 3553(a) factors—the district court was attempting to help the defendant combat his continued involvement with illegal drugs; 2) was not a greater deprivation of liberty than necessary—individuals on supervised release do not have absolute liberty and the condition was limited by requirement of reasonable suspicion; and 3) was consistent with the U.S.S.G.—district courts have wide discretion to apply special conditions even if the Guidelines do not recommend them.

United States v. Cabello, 916 F.3d 543 (5th Cir. Feb. 22, 2019). On appeal, the defendant argued that the district court erred by imposing a "standard" condition of supervised release and by failing to explain its reasons for the imposition. Because defendant did not object, review was for plain error. Per Curiam opinion held that, since the 5th Circuit has never addressed the constitutionality or reasonableness of the condition nor has it addressed whether district courts must explain standard conditions, there can't be plain error. Two concurring opinions:
J. Elrod—District courts should give reasons for imposing "standard" conditions of supervised release. That is because the "standard" conditions are really discretionary conditions under 18 U.S.C. § 3583(d). The statute has only mandatory conditions and discretionary conditions. The term "standard" condition comes from the Sentencing Guidelines. §5D1.3. But these remain discretionary conditions under the statute, and all discretionary conditions typically require an explanation by the sentencing court. *See* 18 U.S.C. § 3553(c). The 7th Circuit requires its district courts to explain why they are imposing standard conditions. Believes the 5th Circuit should as well.
J. Higginbotham—Plain language of § 3583(d) does not require district court to explain each standard condition. Requiring that would end up being a "robotic delivery" of a "laundry list" in busy districts.

United States v. Pittman, 915 F.3d 1005 (5th Cir. Feb. 14, 2019). Because the defendant was soon to be released from prison, he moved for relocation of his supervised release from NDTX to NDGA. The district court denied the motion as premature, because the defendant was not yet on supervised release. The defendant appealed. The 5th Circuit dismissed the appeal for want of jurisdiction. It held that the district court's order that the motion was premature was not a final order under 28 U.S.C. § 1291. The Court also held that it did not come within the "collateral order doctrine." It noted that, in criminal cases, the Supreme Court has found denials of only three pretrial motions to be immediately appealable: motions to reduce bail, motions to dismiss on double jeopardy grounds, and motions to dismiss under the Speech or Debate Clause.

RESTITUTION/FORFEITURE/SPECIAL ASSESSMENTS

United States v. Butt, 930 F.3d 410 (5th Cir. July 15, 2019). Babar Javed Butt was convicted of mail fraud, and the government seized cash and 452 electronic devices. The district court granted the government's motion to forfeit 360 of the devices to the U.S. in partial satisfaction of the forfeiture order. Two individuals, not parties to the criminal proceeding, filed pro se motions seeking ancillary hearings and return of property. One, Huma, claimed she had paid off a debt Babar owed to a third party. The other, Salahuddin, claimed he was a secured creditor of Babar's and had a superior lien. The district court denied the motions, and they appealed. The 5th Circuit held that Huma did not state a claim under 21 U.S.C. § 853(n) because she was not a bona fide purchaser of the forfeited items and, as an unsecured creditor, she cannot establish a legal right to any property in the debtor's estate. But the 5th Circuit held Salahuddin adequately alleged a secured interest in the devices because of the loan agreement exchanged value, indicated Babar had rights in the electronic devices he was purchasing, and described the property as serving collateral.

United States v. Rand, 924 F.3d 140 (5th Cir. Apr. 22, 2019). Defendant convicted of securities fraud was ordered to pay over $99 million in restitution. The written judgment, which originally stated that the restitution was due during imprisonment, was amended to reflect the

court's oral pronouncement of a payment schedule beginning after his release. While in prison, the defendant accrued almost $1700 in his inmate trust account. The government moved in the district court for an order directing the BOP to turn over the funds for payment on restitution. Within 3 days of the filing, the district granted the turnover order.

The defendant appealed, arguing that 1) the oral pronouncement that restitution began after release precluded the government from pursuing his inmate trust account; 2) the funds in his inmate trust account were exempt from seizure; and 3) his due process rights were violated by the district court entering the order so quickly, thus denying him a notice and an opportunity to respond. A court's turnover order is reviewed for abuse of discretion. Argument 1: restitution operates as a lien by the US. Restitution is due immediately except when, in the interest of justice, the court provides a payment schedule. But, as long as the judgment contains nothing to the contrary, the government can pursue immediate payment. Here there was nothing in the judgment that prohibited the government requesting the turnover order. Argument 2: As a general matter, the law treats restitution and tax liability alike. However, Congress specified a list of exemptions for restitution and only included some of the property that is exempt from tax liability. These did not include inmate trust accounts. Argument 3: the 5th Circuit adopted a standard for the amount of due process owed to an inmate subject to a restitution-based turnover order. The central question is whether the response would have affected the outcome of the district court's decision. Here, the defendant failed to show that his response would have affected the outcome.

United States v. Mathew, 916 F.3d 510 (5th Cir. Feb. 21, 2019). The defendant pleaded guilty, without a plea agreement, to "knowingly possessing, with the intent to use unlawfully or transfer unlawfully, five or more authentication features"—health insurance claim numbers—issued by or under the authority of the US. As part of the sentence, the district court ordered the defendant to pay restitution to Medicare. The defendant appealed the restitution order. The 5th Circuit held that the district court erred by including amounts paid by Medicare that preceded the temporal scope of the conviction. *See* 18 U.S.C. § 3663A (Mandatory Victim Restitution Act). Because the offense of conviction did not involve a scheme, conspiracy or pattern of criminal activity, and because the

defendant did not agree to enlarge the scope of restitution (such as in a plea agreement), the MVRA required the court to limit restitution to the actual loss directly and proximately caused by the offense of conviction.

United States v. Hughes, 914 F.3d 947 (5th Cir. Feb. 1, 2019). When a restitution order specifies an installment plan, unless there is language that the funds are also immediately due, the government cannot attempt to enforce the order beyond its plain terms unless the defendant has defaulted on the payment plan or the restitution order has been modified. The defendant was ordered to pay about $190,000 in restitution. The judgment provided that $100 was due immediately and provided a payment schedule for the remaining amount. Several years later, the government discovered that the defendant had acquired about $3,500 in his inmate trust account mainly as prison wages. The government moved for the immediate turnover of those funds, and the district court granted it over defendant's objection. The 5th Circuit reversed. It held that the government lacked authority to obtain the funds unless the defendant defaulted on his payments or the district court modified the payment schedule. The 5th Circuit rejected the government's argument that it was entitled to the funds under 18 U.S.C. § 3664(n) because this provision—referring to an inmate receiving "substantial resources"—refers to windfalls and not the gradual accumulation of prison wages. The 5th Circuit also rejected the government's argument that it was entitled to the funds under § 3664(k), which grants the district court authority to modify a payment schedule because of a "material change in the defendant's economic circumstances." The 5th Circuit noted that this was not the basis for the district court's turnover order. It also stated that it was dubious whether accumulating prison wages constituted a "material change in the defendant's economic circumstances."

United States v. Graves, 908 F.3d 137 (5th Cir. Nov. 8, 2018), *cert. denied*, 139 S. Ct. 1360 (Mar. 18, 2019). 5th Circuit held that in determining whether a defendant is "non-indigent" for purposes of imposing a mandatory $5,000 special assessment, under 18 U.S.C. § 3014(a)(3), the district court is to consider not only the defendant's current financial resources but also his future ability to pay. The defendant pleaded guilty to possessing child pornography. The district court ordered the defendant to pay a $5,000 special assessment for being

a non-indigent person who committed an offense related to sexually exploiting children. The defendant objected, arguing that he was currently indigent and that the court could not consider his potential future earnings. The 5th Circuit disagreed based on the language of § 3014(a)(3). It found that the ordinary meaning of "indigent" includes a forward-looking assessment of the defendant's means. It noted that Congress had set the obligation to pay the assessment for 20 years after release from imprisonment or entry of judgment, whichever is later. The duration of the obligation underscored that the district court must impose the $5,000 special assessment unless it finds that the defendant could not pay it today or at any point for the next 20 years.

VI. APPEALS

United States v. Jones, 935 F.3d 266 (5th Cir. Aug. 12, 2019). The defendants were convicted of racketeering, drug, and firearm offenses as members of the NOLA "Ride and Die" gang. For each of the offenses under 18 U.S.C. § 924(c), a RICO conspiracy was alleged as the predicate crime of violence (COV) and a drug trafficking conspiracy (DTO) was alleged as the controlled substances predicate. The verdict form used at trial did not require the jury to specify which predicate it was relying upon. The parties agreed that a RICO conspiracy is not a § 924(c) COV under *Davis*, which was issued after oral argument in this case. The defendants argued that permitting a § 924(c) conviction based on a RICO conspiracy was structural error. The 5th Circuit rejected the structural error argument but reversed the § 924(c) convictions under plain error.

The 5th Circuit held that the record evidence demonstrated a reasonable probability that the jury would not have convicted the defendants of the § 924 offenses if the invalid COV predicates were not included. The indictment showed that the RICO conspiracy was more extensive than the DTO conspiracy. There was more conduct alleged in the indictment as part of the RICO conspiracy. Each § 924(c) conviction was paired with a violent offense, such as a VICAR "in aid of racketeering," based on the same conduct. This suggested a connection between the § 924(c) and the RICO conspiracy. The government in its opening and closing statements emphasized the use of guns in acts of violence unrelated to the drug

activity. Finally, the *Davis* error significantly increased the defendants' sentences.

United States v. Leal, 933 F.3d 426 (5th Cir. Aug. 5, 2019). The defendant challenged, under *Paroline v. United States*, 572 U.S. 434 (2014), the restitution amount ordered as part of his sentences.

1. The pro se notice of appeal (NOA) was timely filed and would be construed to cover two related cases. The defendant filed his pro se NOA under only one case number of his two related child pornography cases. The 5th Circuit held that the NOA failed to "designate the judgment …" under Rule 3(C)(1)(B). However, that rule is not jurisdictional, and the requirements of Rule 3 are liberally construed. Additionally, pro se NOAs are to be liberally construed. Finally, the government did not argue that it had been prejudiced or misled.

2. The appeal waiver in the plea agreement did not bar the defendant from challenging the restitution amount on appeal because it did not cover a challenge to a sentence exceeding the statutory maximum. Under 5th Circuit precedent, a "*Paroline*-based appeal to the district court's restitution order" is an "appeal of a sentence exceeding the statutory maximum punishment." *United States v. Winchel*, 896 F.3d 387 (5th Cir. 2018). And a challenge to a sentence exceeding the statutory maximum punishment is not barred by an appeal waiver. *United States v. Keele*, 755 F.3d 752 (5th Cir. 2014).

3. The defendant failed to establish that the restitution order was plainly erroneous, however.

United States v. Sanchez-Hernandez, 931 F.3d 408 (5th Cir. July 25, 2019). Held that district court did not plainly err in calculating the Guidelines range because the defendant could not show that any error affected his substantial rights. Although the government conceded the first two prongs of plain error review, the 5th Circuit appeared to reject that concession—"the government cannot waive the proper interpretation of Rule 52." The Court said that it did not need to decide if there was error because the defendant lost on the third prong. While the Supreme Court in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), had predicted that erroneous Guidelines ranges will normally suffice to meet the 3rd prong, that is not a presumption. The question, the panel said, is what was driving *this* judge's decision to impose *this*

sentence for *this* defendant. What was driving the judge in this case was defendant's recent prior § 1326 sentence creating the need for the district court held that a higher sentence on this § 1326.

United States v. Perez-Mateo, 926 F.3d 216 (5th Cir. June 10, 2019). Held that the district court plainly erred by assessing two criminal history points when the defendant's prior sentence of 150 days' custody was not "imposed within 10 years of the defendant's commencement of the instant offense." §4A1.2(e)(2). The government argues that this appeal raises a question of fact capable of resolution in the district court that this Court has held can never constitute plain error. The 5th Circuit rejected that argument: the defendant did not contend that the district court made erroneous factual findings. Rather, the appeal relies on the uncontested dates in the PSR adopted by the district court.

United States v. Garcia De Nieto, 922 F.3d 669 (5th Cir. Apr. 30, 2019). The defendant was convicted, after a jury trial, of conspiracy to defraud the U.S., mail fraud, and aggravated identify theft. On appeal, the defendant argued that the district court had violated her 6th Amendment right to counsel by disqualifying her original attorney without a hearing. The 5th Circuit held that the district court did not abuse its discretion in disqualifying the defendant's first attorney because of the actual and multiple potential conflicts of interest. The 5th Circuit also held that the defendant was wrong in claiming that a court must always hold a hearing before disqualifying an attorney. Here, no hearing was required because the actual and potential conflicts were clear on the record. Even assuming that the court erred in not holding a hearing, any error was harmless. The defendant's first attorney also entered an appearance as her appellate counsel. The 5th Circuit remanded to the district court to determine whether the attorney was disqualified from representing the defendant on appeal. The district court held that he was.

United States v. Dinh, 920 F.3d 307 (5th Cir. Apr. 4, 2019). Defendant convicted of distributing large volume of pills containing Fentanyl analogues argued that it violated due process not to determine the exact composition of each pill. 5th Circuit noted that the default rule for calculating the weight of a controlled substance is its mixture weight.

U.S.S.G. §2D1.1(c). The Supreme Court already held that mixture weight calculations do not violate due process when drug cannot be easily separated from mixture and is intended for sale and consumption in mixture. *Chapman v. United States*, 500 U.S. 453 (1991). 5th Circuit stated that it was troubled by the fact that counsel did not mention *Chapman*, let alone try to distinguish it. "Counsel is reminded of his duties, as an officer of the court and member of the legal profession, to exercise due diligence and candor with the court when briefing his client's arguments."

United States v. Fulton, 914 F.3d 390 (5th Cir. Jan. 29, 2019). A jury convicted the defendant of sex trafficking. The defendant raised a number of issues on appeal. In the briefing, the defense attorney also "suggested" that the court of appeals "review the propriety of the district court's determinations" on a *Brady* request. The attorney reiterated that suggestion at oral argument. The 5th Circuit noted that it will not consider "such passing references that are devoid of legal analysis."

United States v. Kelly, 915 F.3d 344 (5th Cir. Feb. 8, 2019). Defendant pleaded guilty, pursuant to a plea agreement, to being a felon in possession of a firearm and was enhanced under the Armed Career Criminal Act (ACCA). His plea agreement included a provision waiving his right to appeal "the conviction ... on any ground whatsoever including ... set forth in 18 U.S.C. § 3742." He appealed, raising two issues: 1) the district court plainly erred in applying the ACCA enhancement, and 2) his trial attorney committed ineffective assistance of counsel (IAC) by failing to object to the ACCA enhancement. The 5th Circuit held that the challenge to the ACCA enhancement was waived because it was covered by the plea agreement. The 5th Circuit held that the IAC claim was not barred by the plea agreement but it was not ripe for review. The general rule in the 5th Circuit is that an IAC claim cannot be resolved on direct appeal. That defendant argued that this was one of those rare cases in which the record was sufficiently developed to reach the merits of his IAC claim—the failure of trial counsel to challenge his prior convictions post-*Johnson* and *Mathis*. The 5th Circuit held that the claim was not ripe because there had been no hearing about counsel's conduct and motivations.

United States v. Douglas, 910 F.3d 804 (5th Cir. Dec. 12, 2018). 5th Circuit panel noticed a Guidelines error not raised by the defendant in the district court or on appeal and requested supplemental briefing. The 5th Circuit held that the error was plain, affected substantial rights, and exercised its discretion to correct it. This is very unusual and the Court noted that generally it will not address (much less reverse on) an error not raised by the defendant.

United States v. Nino-Carreon, 910 F.3d 194 (5th Cir. Dec. 3, 2018). The 5th Circuit held that, although the defendant demonstrated criminal history error that was plain, his substantial rights were not affected because there was no reasonable probability that his sentence would have been different under the lower Guidelines range. The district court sentenced the defendant to an above-guidelines sentence of 50 months. The 5th Circuit held that there was no reasonable probability of a lower sentence because the court stated that the 50-month sentence was "absolutely necessary" and emphasized the defendant's criminal history.

United States v. Valle-Ramirez, 908 F.3d 981 (5th Cir. Nov. 19, 2018). On remand from the Supreme Court in light of *Dimaya v. Sessions*, 138 S. Ct. 1204 (2018), the 5th Circuit held that the defendant's prior Georgia conviction for aggravated assault with a deadly weapon was an aggravated felony. In a footnote, the Court mentioned that the defendant had already served his imprisonment sentence on his § 1326 conviction. The issue on appeal was not moot, however, because a conviction under § 1326(b)(2) has consequences—in that it is itself an aggravated felony, rendering the defendant permanently inadmissible to the US.

United States v. Gonzalez, 907 F.3d 869 (5th Cir. Oct. 31, 2018). The defendant was convicted, after a jury trial, of conspiracy to distribute cocaine. On appeal, the defendant argued that the evidence was insufficient for him to be convicted of participating in the conspiracy. The 5th Circuit noted that the AFPD "appears to have materially misrepresented the record in this portion" of the brief. The brief stated "As his PSR indicates, the defendant was in the United States on a work permit." However, the 5th Circuit noted this is what the defendant told the probation officer during the PSR interview, and the PSR states that it was "unverified." Elsewhere the PSR "explicitly" states that the

defendant is an illegal alien. "Counsel is cautioned regarding the importance of accurately representing the record."

United States v. Fuentes-Canales, 902 F.3d 468 (5th Cir. Aug. 30, 2018), *cert. denied* 139 S. Ct. 1318 (Mar. 18, 2019). The defendant argued that the district court had plainly erred in calculating his Guidelines range. The 5th Circuit panel held that the application of the 16-level enhancement was plain error that affected the defendant's substantial rights, but refused to correct the error under the fourth prong. The panel held that this case involved "countervailing factors" such that the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." The countervailing factors included that the Texas state jury necessarily found beyond a reasonable doubt that the defendant committed generic burglary, generic aggravated assault, or both. So the defendant actually committed a crime just as serious as generic burglary. Additionally, there was compelling evidence that he committed generic burglary and used a deadly weapon in the process. While the underlying facts could not be considered to apply the 16-level enhancement, they are countervailing factors leading the panel to conclude that the public reputation of judicial proceedings would not be comprised by this defendant's sentence being affirmed on appeal.

United States v. Richard, 901 F.3d 514 (5th Cir. Aug. 23, 2018). The 5th Circuit held that the defendant had waived his challenge to the factual basis for his guilty plea. During sentencing, the defendant had objected to certain guideline adjustments based on the facts. The district court told the defendant that if he believed that the factual basis for his plea was not correct, then his remedy was to file a motion to undo his guilty plea, or the court would deny him acceptance of responsibility. The defendant's attorney did not file a motion to withdraw the guilty plea and responded that "we don't intend to say he's pleading guilty but he's not really guilty." On appeal, the defendant argued that the factual basis did not support his conviction. The 5th Circuit held that the defendant had waived the issue.

United States v. Sanchez, 900 F.3d 678 (5th Cir. Aug. 20, 2018). Defendant, who was on supervised release, knifed someone and was charged in Texas state court. The murder charges were dismissed after

the prosecutors determined that he had acted in self-defense. Based on this conduct, a motion to revoke his supervised release was filed. The district court found that the defendant had not acted in self-defense and imposed a 32-month sentence citing the need to protect the public and deter the defendant from future reckless and dangerous acts. The 5th Circuit held that the 32-month above-Guideline revocation sentence was not plainly unreasonable. The Court explained that revocation sentences are reviewed under the "plainly unreasonable" standard. That standard has two steps: 1) determine if the sentence is either procedurally or substantively unreasonable, and, if it is, then 2) vacate the sentence but only if the identified error is "obvious under existing law" such that the sentence is not just unreasonable but plainly unreasonable.

United States v. Urbina-Fuentes, 900 F.3d 687 (5th Cir. Aug. 20, 2018). The 5th Circuit held that sentencing the defendant under the 2016 Manual violated the ex post facto clause. For the first time on appeal, the defendant argued that the 2015 Manual should have been used because, using the analysis in *Mathis v. United States*, 136 S. Ct. 2243 (2016), his prior Florida attempted burglary conviction did not qualify as generic burglary. The Government argued that the error was not clear. The 5th Circuit held that a statute's indivisibility under *Mathis* can be sufficiently clear even when pre-*Mathis* precedent points in the opposite direction.

The 5th Circuit analyzed the 4th prong of plain error review after *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). It held that "we need not worry about exercising our 4th prong discretion 'sparingly' in cases like this one"; when a sentencing error is clear and reasonably likely to have resulted in a longer prison sentence, "most defendants" will be entitled to relief; criminal history is irrelevant to the court of appeals' decision whether to grant plain error relief; and the size of the sentencing disparity is not a countervailing factor given that *Rosales-Mireles* involved overlapping ranges. "We start with the proposition" that defendants such as Urbina "should ordinarily be entitled to relief." The Court found that the record did not contain the kind of "countervailing factors" that suggest a departure from "the new normal."

United States v. Neba, 901 F.3d 260 (5th Cir. Aug. 16, 2018), *cert. denied* (Mar. 18, 2019) (No. 18-596). The defendant was convicted of numerous offenses related to a 9-year Medicare conspiracy. She was the leader and defrauded Medicare of about $13 million. The PSR calculated her Guidelines range as Life. She argued for a sentence below the Guidelines because, among other things, she had recently been diagnosed with metastasized breast cancer. The district court rejected her request and sentenced her to 900 months' imprisonment. On appeal, she argued that her sentence was unreasonable. The 5th Circuit found that the sentence, which was within the Guidelines range, was presumptively reasonable.

In a concurring opinion, Judge Jones lamented "the lack of meaningful judicial standards for determining the substantive reasonableness of Guidelines sentences." Courts are permitted to apply a presumption of reasonableness for within Guideline sentences and the Supreme Court has indicated that these presumptions are rebuttable. J. Jones argued, however, that "if there is a threshold for an appellate finding of substantive unreasonableness, rebutting the presumption," the Supreme Court has not clarified it. "The presumption is non-binding in theory but nearly ironclad in fact." There are very few cases in which any court has vacated sentences for substantive unreasonableness. The judge found the 900-month sentence for Medicare fraud to be "uniquely onerous" and "well outside the heartland" of similar crimes and "far from proportional to the sentences for life-threatening crimes." J. Jones called upon the Supreme Court to articulate some rules for substantive reasonableness.

In re: Rosendo Rodriguez III, 891 F.3d 576 (5th Cir. June 5, 2018). Warning from 5th Circuit to attorneys appearing before the Court. This opinion came in a death habeas case. The 5th Circuit ordered the habeas attorneys to show cause as to why, among other things, they had failed to address facts (in the form of an affidavit) that the State had presented to undermine the defense arguments. The Court noted that counsel never really answered that inquiry but instead gave reasons why the Court should discredit the affidavit. The Court warned the attorneys that their "failure to address a crucial fact militating against their [argument] ... bespeaks lack of candor to the court." The attorneys, who were mentioned

by name, were admonished that their filings in future cases "will be scrutinized" by the Court.

VIII. POST-CONVICTION

United States v. Reece, __ F.3d __, No. 17-11078, 2019 WL 4252238 (5th Cir. Sept. 9, 2019). 5th Circuit held that the ruling in *United States v. Davis*, 138 S. Ct. 1204 (2018), holding the residual clause of 18 U.S.C. § 924(c) was unconstitutionally vague, was a new rule of constitutional law that applies retroactively to cases on collateral review. Three of the defendant's four § 924(c) convictions were based on conspiracy to commit bank robbery. A conspiracy conviction is not a crime of violence under the elements clause of § 924(c). Remedy: the 5th Circuit vacated entire sentence, including the § 924(c) conviction based on substantive bank robbery, and remanded all for resentencing.

United States v. London, __ F.3d __, No. 17-30675, 2019 WL 4065601 (5th Cir. Aug. 29, 2019). 5th Circuit held that a petition under 28 U.S.C. § 2255 challenging the constitutionality of the career offender's residual clause in §4B1.2, under the pre-*Booker* mandatory guidelines, filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), was untimely. That is because the right asserted—that a sentencing determined by the vague language of the residual clause in guideline §4B1.2 pre-*Booker* violates constitutional due process—is not dictated by *Johnson*. Six other circuits have held the same; two circuits have not.

Concurring opinion by Judge Costa, in which he acknowledges that precedent, *United States v. Williams*, 897 F.3d 660 (5th Cir. 2018), requires treating this § 2255 motion as untimely. The judge believes, however, that this misinterprets the requirement in § 2255(f)(3)—that a petitioner assert a "right … newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"—to require the petitioner to prove that the right applies to his situation. That is not what the statutory language requires. This interpretation delays the presentation of habeas claims and the circuit split on the issue places prisoners in the posture of either too early or too late. He calls for an

answer to this issue "that has divided so many judges within and among the circuits and that affects so many prisoners."

United States v. Hegwood, 934 F.3d 414 (5th Cir. Aug. 8), *petition for cert. filed* (U.S. Aug. 26, 2019) (No. 19-5743). 5th Circuit held that the First Step Act does not allow for plenary resentencing in retroactive litigation. The defendant was convicted in 2008 of possession with intent to distribute 5 grams or more of cocaine base. Because of prior drug convictions, the defendant was a career offender and his guideline range was 188 to 235 months. He was sentenced to 200 months. In 2019, the defendant filed a motion under the First Step Act, arguing that he was eligible for a reduction based on the lowered mandatory minimum quantities and also that under current law he was no longer a career offender. The district court granted the reduction based on the change to the mandatory minimums but rejected the career offender argument. The issue on appeal was whether district courts are authorized to conduct plenary resentencing under the First Step Act. The 5th Circuit, focusing on the text of 404(a) and (b), held that the First Step Act grants a district court limited authority to consider reducing a sentence. The guideline calculations previously made are to be adjusted "as if" the lower drug offense sentences were in effect at the time of the commission of the offense. No other change may be made. 5th Circuit likens the resentencing under the First Step Act to sentencing modification under 18 U.S.C. § 3582(c).

Ayestas v. Davis, 933 F.3d 384 (5th Cir. July 31, 2019). The case had been remanded from the Supreme Court because the 5th Circuit had required a showing of "substantial need." The Supreme Court held in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), that the standard is only whether funding is "reasonably necessary." Evaluating state-habeas counsel's performance (failing to develop substance abuse and mental illness evidence) against the norms that existed in 1998, the 5th Circuit interpreted the omission of a mitigation claim based on substance abuse as a strategic decision. There was evidence that counsel contemplated bringing that claim but then decided not to. There was no evidence of mental illness until after the state-habeas application was filed, and the counsel's notes indicated Ayestas didn't start exhibiting signs of schizophrenia until after trial, and counsel leveraged his psychological

evaluation finding Ayestas was not intellectually disabled in a different way—to argue trial counsel was deficient for failing to call Ayestas to testify. Given the evidence that state-habeas counsel was not deficient, and the unlikelihood of locating new information suggesting otherwise, the funding was not reasonably necessary.

Jones v. Davis, 927 F.3d 365 (5th Cir. June 18, 2019). The defendant was convicted in Texas state court of murder and sentenced to death. In state court, the defendant argued that his un-Mirandized confession was erroneously admitted at sentencing in violation of his 5th Amendment rights. The federal district court denied habeas relief. Before the 5th Circuit, the defendant argued that the state court's harmlessness determination was contrary to clearly established federal law because *Miranda* violations should not be subject to harmless error analysis. The 5th Circuit held that because the Supreme Court has not held that *Miranda* violations are not subject to harmless error analysis, the state court's decision to apply harmless-error analysis was not contrary to clearly established federal law. The defendant also appealed the federal district court's denial of investigative funding under 18 U.S.C. § 3599(f). The 5th Circuit noted that the Supreme Court had recently "rejected our prior 'substantial need' standard for reviewing challenges to denial of 3599 funding," finding that it was more demanding than the statute's requirement that services sought be "reasonably necessary." *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018). However, the Supreme Court made clear that, in applying the "reasonably necessary" standard, courts are required to consider the potential merits of the defendant's claims. Here, the 5th Circuit held that the district court's denial of funding did not hinge on the non-rejected requirement of substantial need for the funding.

United States v. Palacios, 928 F.3d 450 (5th Cir. July 1, 2019). Defendant pleaded guilty to drug offenses. She filed a motion under 28 U.S.C. § 2255 claiming ineffective assistance of counsel (IAC) because her attorney was operating under a conflict of interest. The 5th Circuit held that the alleged conflict did not render the guilty plea unknowing and involuntary. The defendant had testified at the plea hearing, when she already knew that her attorney had been paid by her co-defendant cousin, that she was satisfied with her attorney's representation, had no

complaints, and her decision to plead was knowing and voluntary. A defendant waives a conflict-of-interest claim when he voluntarily pleads guilty.

United States v. Doe, 932 F.3d 279 (5th Cir. June 27, 2019). The 5th Circuit affirmed the district court's denial of the Government's Rule 35(b) motion to reduce Doe's 25-year sentence. It held that it had jurisdiction over the Rule 35(b) denial under 18 U.S.C. § 3742(a)(1) per *United States v. McMahan*, 872 F.3d 717 (5th Cir. 2017). The 5th Circuit said it was bound by *McMahan* even though it "is not obvious *McMahan* was correct." On the merits, the 5th Circuit emphasized that, once the government files a Rule 35(b) motion, the district court has discretion whether to reduce the sentence and that it can rely on 18 U.S.C. § 3553(a) factors. The court did not have to grant the reduction, and the 5th Circuit doesn't have jurisdiction to review discretionary denials of Rule 35(b) motions except for possibly denials that were a "gross abuse of discretion." Doe forfeited any potential argument that the district court grossly abused its discretion by not raising it.

United States v. Allen, 918 F.3d 457 (5th Cir. March 20, 2019). The defendant filed a motion under 28 U.S.C. § 2255 alleging that 1) the government breached the plea agreement by not informing the district court of his cooperation in a murder investigation, and 2) his attorney rendered ineffective assistance of counsel (IAC) by not informing the court of the government's failure. The 5th Circuit granted a certificate of appealability on both claims. After full briefing, the 5th Circuit held that the defendant had procedurally defaulted on the first claim by failing to raise it in the district court. But the Court also acknowledged that to decide the second claim – the IAC claim – it would have to decide whether the government breached the plea agreement. The 5th Circuit held that the district court erred by not holding an evidentiary hearing or otherwise inquiring further on the defendant's IAC claim, because the record does not conclusively show that the IAC claim fails. Judgment vacated and remanded for a limited evidentiary hearing.

Moore v. Texas, 139 S. Ct. 666 (U.S. Feb. 19, 2019). Supreme Court held that the Texas Court of Criminal Appeals erred in determining that the prisoner was not intellectually disabled for purposes of 8th Amendment

protection against execution. The appeals court emphasized Moore's adaptive strengths rather than his deficits, and relied on questionable evidence such as pro se filings and letters. The appeals court's opinion "rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court." The Court found that Moore has an intellectual disability and reversed. The dissent criticized the majority's factfinding rather than remanding with a clearer articulation of the decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017).

United States v. Harrison, 910 F.3d 824 (5th Cir. Dec. 13, 2018). The 5th Circuit held that the magistrate judge's failure to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255 was an abuse of discretion. In the § 2255 motion, the defendant claimed that his attorney had an actual conflict of interest because he had represented a codefendant in plea negotiations. Specifically, and as set out in two affidavits by the codefendant, the attorney advised the codefendant to plead guilty pursuant to a plea agreement in which he pointed the finger at the defendant. A § 2255 motion requires an evidentiary hearing unless either 1) the claims are clearly frivolous or based on unsupported generalizations, or 2) even if the factual assertions were true, the movant would not be entitled to relief as a matter of law. The magistrate denied the § 2255 motion without a hearing, holding that the allegations were not supported by the record because the codefendant had a different attorney at the guilty plea hearing. The 5th Circuit found that the fact that a different attorney represented the codefendant at the hearing did not preclude the possibility that he was also represented by the defendant's attorney. The § 2255 denial was reversed and the case was remanded for an evidentiary hearing.

Rubio v. Davis, 907 F.3d 860 (5th Cir. Oct. 30, 2018). Rubio's habeas petition under 28 U.S.C. § 2254 was dismissed because the district court deemed that he was not "in custody." A prisoner serving consecutive sentences is in "custody" under all of his sentences, even if the sentences were imposed by different authorities. The 5th Circuit held that the same is true even if one of the sentences is for civil commitment. The Court

reversed and remanded to the district court to hear the petition in the first instance.

United States v. Vialva, 904 F.3d 356 (5th Cir. Sept. 14, 2018), *petition for cert. filed* (Mar. 19, 2019) (No. 18-6992). Petitioners filed motions under Fed. R. Civ. P. 60(b), seeking to reopen their initial habeas proceedings under 28 U.S.C. § 2255. The district court concluded that the motions were second or successive § 2255 petitions and dismissed for lack of jurisdiction and denied certificate of appealability (COA). The petitioners sought COA in the 5th Circuit. The basis for the Rule 60(b) motions was that there had been procedural defects in the integrity of their habeas proceedings. These defects were based on claims that the district judge was unfit to conduct the proceedings because of impairments. The 5th Circuit held that the district court's determination that the Rule 60(b) motions were successive § 2255s was not reasonably debatable. Courts must construe a Rule 60(b) motion as a successive habeas petition if it seeks to add a new ground for relief or attacks the previous decision on the merits. Here, the 5th Circuit held that the petitioners spent much time rearguing the merits from the original § 2255. The allegations that the district judge had engaged in unrelated misconduct did not provide evidence that the judge was impaired or unfit to oversee their trial or subsequent habeas. To hold otherwise, the 5th Circuit noted, would implicate every one of the district judge's decisions for nearly the past 20 years.

Black v. Davis, 902 F.3d 541 (5th Cir. Sept. 5, 2018). A Texas inmate filed an application for federal habeas relief, under 28 U.S.C. § 2254, which the district court denied. The district court also denied a certificate of appealability (COA). The applicant moved for a COA in the 5th Circuit. A motions judge denied COA on many issues but granted COA on two involving denial of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The questions before the 5th Circuit panel were 1) if an issue was not presented to the district court, is a grant of a COA by the 5th Circuit valid? and 2) did the applicant sufficiently raise the *Cronic* issues in the district court. The 5th Circuit started by looking at the relevant language of AEDPA, in 28 U.S.C. § 2253(c)(1)—it discusses the need for a court of appeals to issue a COA and does not require a ruling by the district court. Federal Rule of Appellate Procedure 22 previously included language

that required the district court to issue a COA or state why not, but that language was removed and the requirements are now in Rule 11(a). Habeas Rule 11(a) states that a district court must issue or deny a COA when it enters a final order adverse to the applicant. The 5th Circuit decided that earlier precedent under Rule 22 was still applicable. That precedent required a district court to deny a COA before the applicant could receive a COA from the court of appeals. The 5th Circuit had previously held that "the lack of a ruling on a COA in the district court causes this court to be without jurisdiction to consider the appeal." So the 5th Circuit decided that it was without jurisdiction to issue a COA on an issue on which the district court did not deny a COA. Here, the applicant did not present to the district court a claim that he was constructively denied counsel. The district court did not consider the *Cronic* issues on which the motions judge granted a COA. Therefore, the COA was granted without jurisdiction.

In re: Bourgeois, 902 F.3d 446 (5th Cir. Aug. 23, 2018). The defendant, a death row inmate, asked the Court to authorize consideration of a successive motion under 28 U.S.C. § 2255. In his second motion, the defendant raised the same claim, under *Atkins v. Virginia*, 536 U.S. 304 (2002), that he had raised in his prior § 2255 motion. The 5th Circuit held that the defendant was barred from relitigating his *Atkins* claim under 28 U.S.C. § 2244(b)(1). The Court rejected the defendant's argument that § 2244(b)(1) applied to motions under § 2254, not under § 2255. It held that the strict relitigation bar of § 2244(b)(1) was incorporated by 28 U.S.C. § 2255(h).

United States v. Calton, 900 F.3d 706 (5th Cir. Aug. 20, 2018). The district court denied the defendant's first pro se motion to reduce his sentence based on retroactive amendment to the drug guideline, and the 5th Circuit affirmed. The defendant filed a second motion, which the district court denied. The 5th Circuit appointed counsel, held that the district court had jurisdiction to consider a second motion, and that the 5th Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291. It further held that res judicata and law of the case did not bar consideration of the second motion. The 5th Circuit had not previously decided whether the defendant was eligible for a reduction but dismissed the first appeal as untimely. It held the district court erred in finding the

defendant ineligible as a career offender because he was sentenced under the drug guideline.

Sealed Appellee v. Sealed Appellant, 900 F.3d 663 (5th Cir. Aug. 17, 2018). Defendant filed a 28 U.S.C. § 2255 motion arguing that his attorneys' potential criminal liability created a conflict that infringed his 6th Amendment right to effective counsel. The 5th Circuit held that the defendant had waived his right to conflict-free counsel. The defendant, a former Texas state court judge, was indicted on numerous counts based on an FBI corruption investigation. The investigation determined that the defendant had been taking money and services from criminal defense attorneys in exchange for favorable judicial rulings. The FBI arrested one of the criminal defense attorneys, who agreed to cooperate. He claimed that the judge had taken money from other attorneys, including AB & JN. When the FBI confronted the defendant with the allegations, he asked to speak to his attorney, AB. When defendant was indicted, he retained AB & JN to represent him. At one point, the government filed a notice of potential conflict regarding another defendant who was also represented by AB. The district court addressed the potential conflict with the defendant—explaining that a conflict could affect his attorney's performance and that he had the right to conflict-free counsel. The defendant said that he understood and wanted to proceed with AB & JN. The defendant pleaded guilty pursuant to a Rule 11(c)(1)(C) plea agreement, and the court sentenced him to 24 months in prison. About 6 months later, the defendant asked to speak with the FBI. He told the agents that AB & JN had paid him for favorable rulings. The FBI was unable to substantiate the defendant's allegations against AB & JN. In his § 2255 motion, the defendant claimed that AB & JN were suspects in the FBI's corruption investigation and that this conflict violated his 6th Amendment right to counsel. The district court denied the motion, holding that the defendant had failed both prongs of *Strickland v. Washington*, 466 US 668 (1984).

The 5th Circuit did not address the district court's *Strickland* ruling. Instead, the Court held that the defendant had knowingly, intelligently, and voluntarily waived his right to non-conflicted counsel. A defendant may "waive his right to independent counsel ... by intentionally, and in bad faith, pursuing a course of action deliberately designed to lay ground

work for reversal." That is what the defendant did here. The defendant, a former prosecutor, criminal defense attorney, and state judge, was aware of the alleged conflict and knew of the potential risks and even tried to take advantage of that. The 5th Circuit also took the opportunity to "remind prosecutors that the prudent course in a case like this is promptly and fully disclose a potential conflict to the district court."

Crutsinger v. Davis, 898 F.3d 584 (5th Cir. Aug. 3, 2018), *cert. denied*, 139 S. Ct. 801 (2019). The 5th Circuit denied the defendant, a Texas inmate sentenced to death for capital murder, $500 in funding under 18 U.S.C. § 3599 for a preliminary review of DNA evidence. The 5th Circuit held that the defendant had failed to show that the DNA testing was reasonably necessary to support a constitutional claim. An applicant must articulate specific reasons why the services are warranted—which includes demonstrating that the underlying claim is at least plausible.