Significant Decisions

IN THE FIFTH CIRCUIT COURT OF APPEALS,
AUGUST 2020 TO SEPTEMBER 2021

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I. BAIL AND DETENTION

United States v. Baltazar-Sebastian, 990 F.3d 939 (5th Cir. Mar. 10, 2021). Baltazar was arrested at her place of employment during an ICE worksite enforcement action. She admitted she was not in possession of proper immigration documents, ICE took her into custody, and she was civilly charged with being inadmissible under the INA and was booked into an ICE detention facility. Shortly thereafter, Baltazar was charged with misusing a social-security number, in violation of 42 U.S.C. § 408(a)(7)(B). A warrant was issued for her arrest; and, in response, ICE transferred her to the Southern District of Mississippi for her initial appearance. Before the transfer, ICE lodged a detainer, advising Baltazar would return to immigration detention in the event of her release by the district court. Baltazar pleaded not guilty to her criminal charges, and she was ordered released under the Bail Reform Act (BRA). One condition required that Baltazar remain in the judicial district during the pendency of the criminal proceedings. ICE took Baltazar back into immigration detention in another judicial district, under its authority under the INA to detain inadmissible people. The district court granted Baltazar's request to enforce the September release order, precluding ICE detention. The Government appealed that order.

The Fifth Circuit addressed its jurisdiction and held it would lack jurisdiction over the initial release order because it was issued by a magistrate judge and not a district court. The Court, however, had jurisdiction over the district court's enforcement order. On the merits, the Court held the district court's order releasing Baltazar pursuant to the BRA pending trial, subject to conditions, did not prevent ICE from exercising its authority under the INA to facilitate Baltazar's removal upon her release, although her criminal case was still pending, given that she was subject to a lawful immigration detainer and a valid, preexisting removal order. The BRA and the INA did not conflict, and pretrial release under the BRA did not preclude pre-removal detention under the INA.

II. SEARCH AND SEIZURE

United States v. Flowers, 6 F.4th 651 (5th Cir. July 30, 2021). The issues on appeal were whether Flowers was seized when officers in separate patrol cars surrounded his parked car with flashing lights, and whether the officers had reasonable suspicion to support that seizure. The majority said even if Flowers was seized, there was reasonable suspicion—largely because the car was parked facing the convenience store wall (instead of the glass windows/doors) and it was a high crime neighborhood. The majority argued officers should be allowed to approach persons in cars for questioning in this manner in high crime areas because officers "may well require safety in numbers, while the law-abiding citizens desperately need protection that will be denied if law enforcement officials believe that incriminating evidence will be suppressed or they will be sued for alleged violations of rights."

Judge Elrod dissented. She thought precedent clearly supported there being a seizure. She warned that the decision "'comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment.'"

United States v. Norbert, 990 F.3d 968 (5th Cir. 2021), rehearing, en banc, granted, 2021 WL 2641007 (5th Cir. June 25, 2021). The Government appealed the district court's granting Norbert's motion to suppress evidence. A panel of the Fifth Circuit held the district court did not err in finding that the officers did not have reasonable suspicion to conduct an investigatory stop.

The stop was based on a caller, who was unknown to the police, and only identified herself as a manager of the Millsaps Apartments. She did not provide her name, phone number, or any other identifying information, and the police did not take any further steps to verify her identity. The panel noted the reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Note: The Fifth Circuit granted en banc review, vacating this opinion.

United States v. Morton, 984 F.3d 421 (5th Cir. 2021), rehearing, en banc, granted, 2021 WL 1990794 (5th Cir. May 18, 2021). A panel of the Fifth Circuit held that officers lacked probable cause to search Morton's cell phone for photographs. The affidavit in support of the search warrant relied on the officer's knowledge of the behavior of drug traffickers. The panel held that the officer could not rely on these assertions to search the photo contents of the cellphone because Morton was only charged with simple possession. And the officer, in his affidavit, was not allowed to ignore the evidence that negated probable cause as to trafficking, such as the lack of any evidence of trafficking present when the usable quantity of drugs was found on Morton.

The panel also held good faith did not apply because the fact known to the officer and relied on for the search warrant lead to the sensible conclusion that Morton was a consumer of drugs, not a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval. Any additional assertions in the affidavits were too minimal and generalized to provide probable cause for the magistrate to authorize the search of the photographs.

Note: The Fifth Circuit granted rehearing en banc, vacating the opinion.

United States v. Thomas, 997 F.3d 603 (5th Cir. May 17, 2021). Thomas challenges the district court's denial of his motion to suppress evidence of a firearm discovered during a stop and frisk. Officers were patrolling an area of Dallas known for drugs and violence. The officers had been informed earlier that day that a vehicle stolen 10 days earlier, in an aggravated robbery, was in the area. The officers saw the stolen vehicle near an apartment building. They saw two people sitting inside the vehicle, while another four people, including Thomas, were standing in the immediate vicinity. The officers decided to stop and frisk all six people. They drew their firearms for officer safety and ordered everybody to get on the ground. The officers then handcuffed four of them, including Thomas, behind their backs and frisked all for weapons. A loaded firearm was found in Thomas's waist area.

Thomas was indicted for being a felon in possession of a firearm. He filed a motion to suppress evidence, arguing the officers did not have reasonable suspicion for the stop, and the circumstances of his detention converted the investigatory stop into an arrest for which the officers lacked probable cause. He also argued that the officers lacked reasonable suspicion to frisk him. He pleaded not guilty, had a bench trial in which he stipulated the Government could prove the basic facts necessary for conviction, and reserved the right to appeal the denial of his motion to suppress.

On appeal, the Fifth Circuit held the officers had a particularized and objective basis for suspecting that Thomas was involved in the crime. It was not objectively unreasonable for the officers to be uncertain how many people had responsibility for the earlier robbery, and it was not unreasonable to suspect that those inside the vehicle might not be the culprits and instead were only being allowed to admire the vehicle stolen by someone standing outside. The passage of 10 days since the car was stolen did not eliminate the reasonableness of the officers' suspicions.

The Court also held that the stop was not converted into an arrest prior to Thomas being frisked. The officers were outnumbered six to two in a high-crime area known for drug and violent crime, and the crime they were investigating was an aggravated robbery involving a weapon, and Thomas and the others were kept on the ground for about ten minutes. The Court also held the frisk was reasonable for the same reasons.

United States v. Bass, 996 F.3d 729 (5th Cir. May 11, 2021). Police officer had reasonable suspicion to conduct an investigatory stop of Bass based on a tip by an off-duty officer. The tip reported suspicious activity in a high-crime area known for drug dealing, and that a man was standing next to his vehicle and appeared to be selling items from the trunk. The Fifth Circuit held that Bass's behavior and response to questions supported the officer's suspicion, so the stop was justified at its inception. As for the scope of the stop, the officer did not unreasonably prolong Bass's investigatory stop because within the first minute of questioning, Bass told the officer he had illegal CDs in his car, and acknowledged he was selling CDs and DVDs, that he didn't have any

identification, he didn't own the vehicle he was driving, and he had previously been charged with illegally selling CDs.

Bass's consent to search was voluntarily given; he was calm and cooperative, the record does not indicate the officer made any threats, and Bass was aware he had the right to refuse consent. His consent to search allowed the officers to search the entire vehicle because Bass did not appear to place any limitation on the places to be searched. A consent to search a car will support an officer's search of unlocked containers within it. The officer found drugs and a gun in the car.

United States v. McKinney, 980 F.3d 485 (5th Cir. Nov. 16, 2020). McKinney moved to suppress a gun found after officers conducted a pat-down search. This occurred after the officers observed gang members hanging out near a gas station. The police report asserted that the group was wearing red colors, and that McKinney was wearing a jacket and hat even though it was warm and humid out. The report also stated that when one of the men saw the officers, he turned and appeared to drop something very small. The officers approached the group and frisked the men due to the area being a Bloods gang location and the recent shootings there. The district court denied the motion.

The Fifth Circuit held McKinney and each person in the group was "seized" when the officer jumped out of the police car and approached the group, shined his flashlight on the woman who appeared to be walking away and ordered that she return. No reasonable person would have felt free to walk away. The Court also held the officers lacked reasonable suspicion for the seizure, noting a person's presence in an area of expected criminal activity, standing alone, was not enough to support a reasonable, particularized suspicion that the person was committing a crime. The officers were patrolling the area in response to recent shootings, but those shootings did not justify stopping anyone absent an articulable suspicion about a connection between the person and those crimes. Nothing observed by the officers connected McKinney or anyone else to the recent and nearby shootings that had been made from passing vehicles. Although McKinney was wearing red, and he was the only one, the Court found this was did not provide reasonable suspicion because red is not an unusual color. Because the record lacked evidence of

reasonable suspicion justifying the initial stop, the Court did not need to reach the question of whether the officers had reasonable suspicion justifying the frisk of McKinney that led to the incriminating evidence.

Note: On remand, the district court held a suppression hearing and denied the motion to suppress. The new appeal is pending.

United States v. Beaudion, 979 F.3d 1092 (5th Cir. Nov. 11, 2020). The defendant was convicted of drug trafficking. He challenged a search warrant that relayed to officers the GPS coordinates of his girlfriend's vehicle in real time. Based on this information, officers found the vehicle, stopped it, and found drugs. The Fifth Circuit affirmed the conviction because the defendant lacked Fourth Amendment standing on the basis that the information all pertained to his girlfriend and her vehicle.

United States v. Kendrick, 980 F.3d 432 (5th Cir. Nov. 3, 2020). A defendant was convicted of conspiracy to distribute crack cocaine and felon in possession of a firearm. He challenged a wiretap affidavit as recklessly false and misleading. The Fifth Circuit, applying its analysis from *United States v. Ortega*, 854 F.3d 818, 826 (5th Cir. 2017), considered what was left of the affidavit after all allegedly false statements were omitted and found probable cause still existed.

United States v. Smith, 977 F.3d 431 (5th Cir. Oct. 8, 2020). The Fifth Circuit held that there was no right to a suppression hearing if motion to suppress is conclusory in an unspecified way and/or repeats allegations made in a prior hearing. Here, the defendant was convicted of sex trafficking and moved to suppress evidence from his cell phone, arguing that forensic evidence showed the police had accessed the phone before they received a warrant. The district court denied the motion. On the morning of trial, the defendant, who was pro se, decided he wanted a lawyer. Because that request was denied, a divided panel of the Fifth Circuit reversed the conviction.

The defendant was convicted conviction again, this time by plea and with a lawyer. On appeal from his second conviction, he contended that the court erred in denying him a new (counseled) suppression hearing to challenge the seizure of evidence from his cell phone. The court of appeals

rejected the argument because it found the allegations in the motion to suppress "conclusory." The court also noted that the motion did not say he would elicit any facts not already before the court in the first hearing. The court also held that the absence of counsel at the first hearing did not require the hearing to be redone, absent facially adequate allegations in the motion to suppress. Further, it concluded on the merits that the evidence need not have been suppressed.

United States v. Aguilar, 973 F.3d 445 (5th Cir. Sept. 2, 2020). The defendant was stopped entering the US from Mexico at the POE. He was accompanying two women carrying cans to which a drug-dog alerted and an x-ray displayed anomalies. The Border Patrol (BP) agents suspected the three were involved in drug importation. The BP agents took the defendant's phone. Nine days later, a BP agent forensically examined the phone's SIM card without a warrant. The agent discovered cell phone calls to Mexico. Even later, the investigation determined that the cans contained meth. The defendant was charged with conspiring to import and importing meth. He filed a motion to suppress, arguing that, under *Riley v. California*, 573 U.S. 373 (2014), the officers illegally searched the contents of the phone. The district court denied the motion, holding that the good faith exception applied.

On appeal, the 5th Circuit agreed with the district court. Even though the cell phone search occurred after *Riley*, it took place at the border, where the government's interests are at their zenith. Neither the Supreme Court nor the 5th Circuit have held that digital border searches require individualized suspicion. At the time of the search, two federal courts of appeal and one federal district court had held that forensic digital searches require reasonable suspicion. *See United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *United States v. Saboonchi*, 48 F. Supp. 3d 815 (D. Md. 2014). However, no court had required a warrant to conduct a forensic search at the border. The 5th Circuit panel did note in a footnote that Judge Costa, in a concurring opinion in *United States v. Molina-Isidro*, 884 F.3d 287 (5th Cir. 2018), had expressed concerns about border cell phone searches for items other than contraband, it was not a holding requiring a warrant. Accordingly, the Border Patrol agents had a good faith, reasonable belief that they could search the defendant's

phone without a warrant. They also had reasonable suspicion for doing so.

United States v. Burgos-Coronado, 970 F.3d 613 (5th Cir. Aug. 18, 2020). The defendants appealed from the district court's denial of their motions to suppress. Around midnight in May 2018, the defendants drove a Toyota with Florida license plates into a "driver's safety checkpoint" set up by Mississippi State Troopers. The purpose of the checkpoint was to check driver's licenses, insurance, seat belts, and other safety matters. The trooper asked the driver, Molina-Borroto, for his driver's license and insurance. He presented a temporary Florida driver's license and said that the car was rental. The trooper asked him about the backseat passengers. The male passenger, Burgos-Coronado, provided another temporary Florida driver's license, while the female passenger, Balza, provided a Venezuelan passport. The trooper noticed that the passport did not have a stamp indicating that Balza had legally entered the U.S. The trooper was suspicious because the passport could indicate that Balza was illegally in the US and the weird seating arrangement—driver, empty front passenger seat, male and female passengers in the back seat—raised a human-trafficking concern. About 25 to 30 seconds after the Toyota was stopped at the checkpoint, a Volkswagon with Florida plates came into the checkpoint. The driver provided a Venezuelan passport. In the end, both cars were searched and evidence of fraud and identify theft was found. The 5th Circuit held that the checkpoint was a permissible driver's license checkpoint, citing *Delaware v. Prouse*, 440 U.S. 648 (1979). The defendants argued that, after the trooper had obtained their identification documents, the purpose of the stop was completed and that the stop was illegally extended after that. The 5th Circuit held that, by that time, the trooper had already developed reasonable suspicion that a crime was being committed, namely, human trafficking.

United States v. Gallegos-Espinal, 970 F.3d 586 (5th Cir. Aug. 17, 2020), *cert. denied*, 141 S. Ct. 1247 (2021). Agents suspected Gallegos of participating in his mother's alien smuggling scheme, and he signed a consent allowing them to search his iPhone. When they searched the iPhone, they found child pornography. Gallegos moved to dismiss the evidence from the iPhone, and the district court found that Gallegos's

written consent to a "complete search" of the iPhone could not support a review of extracted data three days after the phone was returned. The Government filed an interlocutory appeal. The Fifth Circuit majority found that a typical reasonable person would have interpreted the written consent to allow a forensic search of the phone. The Court reviewed the totality of the circumstances surrounding the oral and written consent.

Judge Graves dissented. He would have found the search exceeded the scope of consent because "the consent form insufficiently explained that the iPhone's data would be extracted for later review and because the Cellebrite iPhone extraction occurred outside of Gallegos-Espinal's presence…."

III. GUILTY PLEAS

United States v. Escajeda, 8 F.4th 423 (5th Cir. Aug. 11, 2021). The defendant pleaded guilty to, among other things, conspiracy to distribute drugs. On appeal, he argued that the factual basis was insufficient to support the plea. The Fifth Circuit acknowledged that certain case law appeared to provide for colorable arguments. First, a single buy-sell agreement cannot be a conspiracy under the "buyer-seller" exception to drug distribution conspiracies. Here, however, the defendant twice sold drugs to the government informant, so the exception did not apply. Second, an agreement with a government informant cannot be the basis for a conspiracy because the informant does not share the required criminal intent. Here, the two controlled buys could not serve as proof of a conspiracy since both were with the informant. The Fifth Circuit held, however, that the factual basis was sufficient because of circumstantial evidence of the defendant's involvement in a drug distribution conspiracy. This evidence included sizeable amounts of cash, large quantities of drugs, and the presence of weapons.

In a footnote, the Court noted a discrepancy in the case law regarding whether a large quantity of drugs alone may serve as sufficient proof of a conspiracy. It did not "wade into the issue" because here there were

weapons and cash. However, it suggested that the discrepancy may have to do with the actual quantity of drugs involved.

United States v. Butler, 7 F.4th 408 (5th Cir. Aug. 10, 2021). Butler pleaded guilty pursuant to a plea agreement that waived the right to appeal her sentence. On appeal, she argued that the district court failed to sentence her in accordance with the agreement and that the waiver did not apply to her argument that her federal benefits should not have been denied under 21 U.S.C. § 862. That statute gives courts the discretion to deny federal benefits for up to 5 years after a first drug conviction and up to 10 years after a second drug conviction; after a third drug conviction, a defendant is permanently ineligible for Federal benefits. The Fifth Circuit held that the plea agreement did not delineate all aspects of Butler's sentence, and the district court could deny benefits under § 862 even though the agreement did not specifically say it could. The Court also held that Butler knowingly waived her right to appeal her sentence, which included waiving any challenge to how the district court applied § 862.

United States v. Jackson, 7 F.4th 261 (5th Cir. July 28, 2021). On plain error review, the Fifth Circuit vacated Jackson's RICO conviction that was based on his intent to commit a crime of violence (as defined by 18 U.S.C. § 16), identified as sex trafficking of children under 18 U.S.C. § 1591(a)(1) and (b)(2). After Jackson had pleaded guilty and been sentenced, the Supreme Court ruled that § 16(b) (the residual clause) was unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Government conceded the first three prongs of plain error. The Court agreed after conducting its own analysis. First, there was error because, as explained by the Fourth Circuit in *United States v. Fuertes*, 805 F.3d 485, 499 (4th Cir. 2015), sex trafficking by force, fraud, or coercion can be committed nonviolently and does not qualify as a crime of violence under the § 16(a) force element clause. Second, the error was clear or obvious because the plain terms of the statute establish that it does not qualify as a crime of violence. Third, there is a reasonable probability that Jackson would not have pleaded guilty to that offense if he had known the factual basis failed to show his conduct violated the statute. The Government argued the Court should not exercise its discretion to vacate the conviction under the fourth prong because the Government could

prosecute Jackson for other offenses and Jackson would face higher Guidelines and statutory minimum if convicted of those other charges. The Court chose to exercise its discretion because "to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution"

United States v. Smith, 997 F.3d 215 (5th Cir. May 5, 2021). On plain error review, the Fifth Circuit finds there was an insufficient factual basis to support Smith's guilty plea to being a felon in possession of a firearm. The Court found there was no evidence in the record that Smith had either actual or constructive possession of the firearm. Smith did not control the relevant premises where the gun was located, and there was no evidence in the record that Smith owned the gun or otherwise controlled it or its location. The only evidence regarding Smith's interaction with firearm was his admission to "touching" the firearm. But, briefly sampling or handling contraband does not constitute constructive possession.

The Court rejected the government's argument that Smith's possession could be inferred from the fact that he knew the caliber of the firearm without officers mentioning it to him. The Court noted that "even if we made the questionable assumption that an individual's knowledge of an object's features can imply prior control over the object, the officers here showed Smith the picture of the .38 revolver before he told them its caliber."

Judge Smith dissented. He argued the majority "engrafts a requirement reminiscent of constructive possession onto our law about actual possession and splices part of an affirmative defense onto § 922(g)'s possession requirement." On plain error review, which allows for a complete review of the record, the facts that Smith, by his own admission, is the leader of a street gang that burgles vehicles, sells narcotics, and steals, possesses, and sells firearms, should have supported the factual basis in support of the plea.

United States v. Brune, 991 F.3d 652 (5th Cir. Mar. 22, 2021). In charging Brune with a distribution of methamphetamine offense, the government accidentally cited the penalty provision in 21 U.S.C. §§

841(b)(l)(C) instead of (b)(1)(B). After Brune had pleaded guilty, the court copied that error into its order accepting his plea but later corrected it. Brune contended that the court's correction of the erroneous citation amounted to double jeopardy. The Fifth Circuit held that no double-jeopardy interest "is implicated" in the "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending." Thus, double jeopardy did not bar prosecution of a greater offense after a plea of a lesser-included offense.

United States v. Medel-Guadalupe, 987 F.3d 424 (5th Cir. Feb. 8, 2021). The defendant pleaded guilty to one count of harboring illegal aliens. On appeal, he argued that 8 U.S.C. § 1324, which includes a separate provision on aiding and abetting, was duplicitous. The Fifth Circuit held that the defendant waived the argument by pleading guilty.

United States v. Corrall, 831 F. App'x 147 (5th Cir. Dec. 11, 2020). Corrall challenged the sufficiency of the evidence to support his guilty plea to conspiracy to possess with intent to manufacture and distribute more than 50 grams of actual methamphetamine. Relying on *McFadden v. United States*, 576 U.S. 186, 194 (2015), he argued that the factual basis was insufficient because there was no indication that he knew the type of controlled substance involved in the offense and no evidence suggesting that he participated in manufacturing methamphetamine. Because Corrall did not object to the sufficiency of the factual basis, review was for plain error. The Court found the factual basis sufficient, noting that knowledge of the type and quantity of a controlled substance is not an element of a 21 U.S.C. § 841 offense and that it is not clear or obvious that *McFadden*'s holding extends beyond the Controlled Substance Analogue Enforcement Act or that it changes this Court's precedent in non-analogue cases.

United States v. Cooper, 979 F.3d 1084 (5th Cir. Nov. 9, 2020). The defendant pleaded guilty to drug trafficking as well as one 18 U.S.C. § 924(c) count for possessing a firearm in furtherance of a drug trafficking crime. The defendant argued that there was an insufficient factual basis to show that his firearm possession was in furtherance of drug trafficking because the district court failed to investigate whether he knew about a firearm in the vehicle or knew only about the backpack containing the

firearm. The Fifth Circuit affirmed, explaining that the district court's duty was to compare the facts contained in the factual resume with the elements of the offense. Further, the circumstantial evidence was sufficient to show knowledge of the firearm because the backpack also contained drug paraphernalia and firearms are often used by drug traffickers.

United States v. King, 979 F.3d 1075 (5th Cir. Nov. 6, 2020). The defendant pleaded guilty to production of child pornography. On appeal, he argued, under plain error review, that the magistrate judge committed a Rule 11(b)(1)(M) error during the plea colloquy The Fifth Circuit affirmed, holding that there was no confusion about the possible sentencing range because it was clearly stated that the range was 15 to 30 years.

United States v. Avalos-Sanchez, 975 F.3d 436 (5th Cir. Sept. 11, 2020). The defendant and others intended to rob the home of drug dealers, to steal drugs and money. On the day of the robbery, however, they hit the wrong house. So, they robbed the four occupants, who were not drug dealers. The defendant was charged with and pleaded guilty, pursuant to a plea agreement, to a Hobbs Act robbery, under 18 U.S.C. § 1951(a). On appeal, he argued that there was an insufficient factual basis to prove the Commerce Clause element. The 5th Circuit, reviewing for plain error, disagreed. First, the Court noted that, when it examines factual-basis sufficiency under plain error review, it can scan the entire record for facts supporting the conviction. Second, the Court pointed to the Supreme Court's opinion in *United States v. Taylor*, 136 S. Ct. 2074 (2016), holding that, for Commerce Clause purposes, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds. Here, the defendant admitted that he and the others intended to steal drugs and drug money. The defendant attempted to distinguish *Taylor* by arguing, among other things, that, because they had actually robbed from individuals there was no "commerce" involved, citing *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), and *United States v. Johnson*, 194 F.3d 657 (5th Cir. 1999). Those two cases noted that when individuals rather than businesses are the victims of Hobbs Act robberies, courts should be reluctant to find the Commerce Clause element satisfied. The 5th Circuit disagreed, noting that neither of those cases involved Hobbs

Act robberies (or attempted robberies) of drugs, and that *Taylor* foreclosed his argument.

Note: The difference between individuals and businesses in terms of the Commerce Clause element comes up repeatedly in this area. There was a circuit split as to whether a drug dealer is an individual or a business. The Supreme Court resolved that issue in *Taylor*, holding that a drug dealer is a business.

United States v. Montgomery, 974 F.3d 587 (5th Cir. Sept. 10, 2020). The defendant pleaded guilty to being a felon in possession of a firearm, 18 U.S.C. § 922(g), and was sentenced to the mandatory minimum sentence of 15 years' imprisonment under the ACCA. The 5th Circuit held that the defendant could not show that the error under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), affected his substantial rights because the evidence—he had recently spent over 3 years in prison (for offenses for which he had been sentenced to 10 and 12 years in prison) and was on parole at the time he committed the § 922(g) offense—showed that he knew he was a felon at the time he possessed the firearm.

United States v. Jones, 969 F.3d 192 (5th Cir. Aug. 7, 2020). The defendant argued that the factual basis for his guilty plea to the crime of distribution of a kilogram or more of heroin was insufficient. Because the defendant did not object, it was reviewed for plain error. Under plain error review of the factual sufficiency for a plea, the Court may look beyond the facts the defendant admitted in the plea colloquy to the entire record. The 5th Circuit rejected the defendant's argument that the factual basis did not support his involvement in the larger conspiracy. The defendant admitted purchasing wholesale quantities of heroin from two conspirators. From this, a reasonable fact finder could determine that the defendant was part of a common venture, including the two conspirators, with a shared goal of distributing drugs for profit.

The defendant also argued that his guilty plea was unknowing and involuntary because the district court misinformed him about the government's burden for proving conspiracy and attributing the quantity of drugs to him. The district court admonished the defendant that the government would have to prove, at trial, that the overall scope of the

conspiracy involved at least one kilogram of heroin. 5th Circuit precedent held that a defendant is responsible for only "the quantity of drugs with which the defendant was directly involved or that were reasonably foreseeable to him." *United States v. Haines*, 803 F.3d 713, 740-41 (5th Cir. 2015). Here, the Court held no reversible error because the defendant cannot show that but-for the error he would have chosen not to plead guilty.

IV. TRIAL

PRETRIAL MATTERS

United States v. Torres, 8 F.4th 413 (5th Cir. Aug. 10, 2021). Torres was charged with arson of a church building. He moved to dismiss the 18 U.S.C. § 844(i) count on Commerce-Clause grounds, arguing that the church did not conduct business activities affecting interstate commerce. The district court denied his motion and found him guilty after a bench trial on stipulated facts. On appeal, the Court affirmed. It first clarified that "[a] claim of insufficient connection to interstate commerce is a challenge to one of the elements of the government's case and is considered a claim about the sufficiency of the evidence[,]" not a challenge to the district court's jurisdiction to determine the case. Here, the church building was used for commercial purposes: it rented its facilities, operated childcare programs, and processed the paperwork related to funeral services. Those interstate connections are direct, regular and substantial.

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants in this case were tried by a jury for drug offenses, gun offenses, and organized crime. The Fifth Circuit held that the district court did not clearly err in its determination that the defendants committed *Batson* error. The district court considered the race-neutral reasons offered by the defense—such as past military service—and concluded that they were pretextual because all eleven strikes were used against white jurors and because many of the reasons given appeared to be "frivolous."

The Court also held that a defendant's factual basis was properly used as substantive evidence under the Federal Rules of Evidence as a prior inconsistent statement.

United States v. Duran-Gomez, 984 F.3d 366 (5th Cir. Dec. 23, 2020). In 2006, immigration authorities learned that Duran-Gomez directed an international alien-smuggling operation and that there was a report that he had recently killed two smuggled individuals. ICE soon learned that, after entering the United States with a visa, Duran-Gomez committed two crimes involving moral turpitude—rendering his presence in the United States unlawful. On November 21, 2006, Duran-Gomez was arrested for civil immigration violations. A few days later, Duran-Gomez called his family from the immigration detention center and asked them to destroy evidence of his smuggling scheme. He was subsequently charged with obstruction of justice, to which he pleaded guilty in May 2007. In January 2011, he was sentenced to 60 months of imprisonment for that crime. Meanwhile, law enforcement officials continued to investigate Duran-Gomez's homicide and smuggling offenses.

On July 1, 2010, the government indicted Duran-Gomez with conspiring to smuggle aliens into the United States and harboring aliens resulting in the deaths of two men. On January 10, 2017, Duran-Gomez was charged in a superseding indictment with the additional counts of kidnapping and hostage-taking resulting in the deaths of the two men.

After a lengthy review process, the government informed Duran-Gomez that it would seek his death. A codefendant was a fugitive at the time of the 2010 indictment and was not arrested until April of 2013. After his capture, the government initiated the death penalty review process, but it was protracted at least in part by codefendant's attempts to dissuade the government from seeking his death based on an alleged intellectual disability. In February 2017, the government filed its Notice of Intent to seek the codefendant's death.

From when Duran-Gomez was indicted in July 2010 to when he moved to dismiss for speedy trial violations in August 2019, he either moved or joined his co-defendants in moving for continuances on seventeen different occasions. The district court, after ruling on several pretrial

motions and adding defense counsel to Duran-Gomez's case, later adopted the parties' joint proposed schedule, setting trial for March 8, 2021. A few months later, on August 26, 2019, Duran-Gomez moved to dismiss all charges against him for purported violations of his Sixth Amendment right to a speedy trial. The district court dismissed all charges with prejudice on March 12, 2020 and ordered Duran-Gomez released. Finding that Duran-Gomez's speedy trial right attached in 2006, the district court held that Duran-Gomez had been severely prejudiced by the delay, warranting dismissal of all charges against him.

The government timely appealed. The Fifth Circuit reversed the district court's dismissal of charges. The Court found 1) Duran-Gomez's speedy trial right attached no later than 2010, and the at least nine-year delay weighs heavily against the government, under the *Barker v. Wingo* factors; 2) the continuances sought by Duran-Gomez weighed against him; 3) the time the government took to decide whether to seek codefendant's death did not weigh against the government, and the government, which maintained an open file policy, was not negligent in its production of 65,000 pages of discovery, despite the length of time it took to produce it in a more organized fashion; 4) Duran-Gomez's lack of assertion of his speedy trial rights until 2019, after proposing a 2022 trial date weighed heavily against him; 4) because two of the first three Barker factors weighed heavily against Duran-Gomez, the Court would not presume prejudice and Duran-Gomez had failed to prove that he suffered actual prejudice either due to anxiety caused by pretrial incarceration, speculative defense-impairment, or the failure to contact several deported witnesses, some of whom he had deposed prior to his obstruction trial.

JURY INSTRUCTIONS

United States v. Muhammad, ___ F.4th ___, 2021 WL 4205213 (5th Cir. Sept. 16, 2021). The issue was whether the district court erred by failing to instruct the jury that the government had to prove, beyond a reasonable doubt, that Muhammad knew he was dealing with a controlled substance. When the controlled substance is an analogue, the government can satisfy the knowledge element in one of two ways, by

showing that 1) the defendant knew the substance was controlled under the Analogue Act, or 2) the defendant knew the specific features of the substance that make it a controlled substance analogue. *McFadden v. United States*, 576 U.S. 186 (2015). The Fifth Circuit held that the district court erred by failing to properly instruct the jury but that the error was harmless. The Court pointed to Muhammad's testimony that he had watched YouTube videos to find the chemical structures of the drugs he wanted to sell and compared them with images of known controlled substances, to see "the difference between that is considered substantially similar."

United States v. Gaspar-Felipe, 4 F.4th 330, 336 (5th Cir. July 13, 2021). Gaspar was tried for transporting "illegal aliens" and challenged this sentence of the "commercial advantage" jury instructions: "The government need not prove that the defendant was going to directly financially benefit from his part in the venture." He argued this misstated the requirement that the increased punishment applies only if "the offense was done for the purpose of commercial advantage or private financial gain." 8 U.S.C. § 1324(a)(2)(B)(ii). The Fifth Circuit disagreed. The Court explained the Government did not have to prove Gaspar directly received payments but instead could prove the financial-purpose element with circumstantial evidence: that someone else in the operation receiving payment supports the inference that Gaspar would be paid as well. "Viewed in that light, the challenged instruction's statement … accurately stated the law" and was not an abuse of discretion. Note: The Court still requires the defendant to have the intent to profit, but circumstantial evidence that another smuggler profited was enough for the jury to infer that intent.

United States v. Trevino, 989 F.3d 402 (5th Cir. Mar. 2, 2021). Trevino was convicted by a jury of being a felon in possession of a firearm. The Court rejected his argument that the district court erred in failing to instruct the jury that the Government was required to prove he knew he was prohibited from possessing a firearm.

United States v. Barnes, 979 F.3d 283 (5th Cir. Oct. 28, 2020). Doctors and administrators were convicted of conspiracy to commit health care fraud. On appeal, the defendants challenged the district court's refusal

to allow Medicare regulations in the jury instructions. Even if the instructions were substantially correct, they did not impair the defendant's ability to present his defense.

United States v. Comstock, 974 F.3d 551 (5th Cir. Sept. 9, 2020). The defendant and others were charged with conspiracy to commit wire fraud and six counts of aiding and abetting wire fraud. These charges were the result of Comstock ordering his employees to fabricate time sheets to justify his company's billings to the City of San Antonio, with whom his company had a contract to provide janitorial services at the Alamodome. The jury convicted Comstock on all charges, and he was sentenced to 25 months in prison and over $350,000 in restitution. On appeal, Comstock argued that the district court had erred by failing to instruct the jury on the defensive theory of the case. The proposed instruction that the defense provided to the district court stated:

> "It is a defense theory that _____. If the defendant's theory of the case causes you to have a reasonable doubt as to any element of that the government is required to prove beyond a reasonable doubt, then you shall find the defendant not guilty."

The 5th Circuit held that the district court did not err in not instructing the jury because the defense never filled in the blank. And although defense counsel objected to the court's instructions because they omitted the theory of the defense, his explanation was that "there's some Texas state contract provisions that are applicable," but those provisions were never identified. On appeal, counsel still failed to identify those state law provisions or indicate what would have been in place of the blank.

United States v. Coffman, 969 F.3d 186 (5th Cir. Aug. 6, 2020). The defendant was indicted for making false statements to obtain federal workers compensation benefits, 18 U.S.C. § 1920, and for theft of public money, 18 U.S.C. § 641. The jury convicted her on both counts. On appeal, the defendant argued that the district court erred by not instructing the jury that it had to be unanimous on whether she had embezzled public money or stole public money, under § 641. The defendant was charged under the first paragraph of § 641—"whoever

embezzles, steals, purloins, or knowingly converts to his use … or without authority sells, conveys or disposes of any … thing of value of the United States." The first and second paragraph of 641 list different acts and therefore different crimes—paragraph one covers stealing from the US and paragraph two covers knowingly receiving stolen US property. *United States v. Fairley*, 880 F.3d 198, 204 (5th Cir. 2018). That there are two separate paragraphs indicates that there are two separate crimes, not seven in the first paragraph alone. The verbs in paragraph one list alternative means of committing the crime, they are not separate elements and therefore the jury did not have to be unanimous on them.

United States v. Penn, 969 F.3d 450 (5th Cir. Aug 5, 2020). The defendant was convicted, among other things, of being a felon in possession of a firearm, 18 U.S.C. § 922(g). The defendant argued that the district court erred by not instructing the jury on his justification defense. The defendant was heading to his mom's apartment for lunch. When he arrived at the complex, he saw two men there—Scott and Robinson—with whom his family had problems. When the defendant got out of his car, Scott pulled a gun. The defendant's aunt ran over and gave him her gun. Robinson started shooting at the defendant, who returned fire. The defendant jumped in his car and took off. Scott and Robinson followed with Robinson shooting at the defendant from the passenger window. The defendant eventually lost the two men. But then a police car pulled up behind him because the car matched the description from the shootout. The defendant started trying to evade the police car. He speeded up and crashed into a gate, ran from the car, threw the gun over a fence, and ran away. The police found him a month later. At trial, the defendant tried to put on a justification, or duress, defense, but the court did not allow it. On appeal, the defendant argued that the district court had erred by not instructing the jury on his justification defense. To establish the defense, the defendant must show that 1) he was under imminent threat of death or serious bodily injury, 2) he did not recklessly or negligently place himself in the situation, 3) he had no reasonable, legal alternative to possessing the gun, 4) possessing the gun had a direct causal relationship to abating the threat, and 5) he possessed the gun only during the time of danger. The 5th Circuit held that the defendant had failed to prove that he had possessed the gun only during the time of

danger because he kept the gun and threw it over a fence when he could have given it to the police.

EVIDENTIARY ISSUES

United States v. Sims, ___ F.4th ___, 2021 WL 3732266 (5th Cir. Aug. 24, 2021). Issue of first impression in Fifth Circuit on admissibility, under Federal Rule of Evidence 403, of rap videos. Sims was charged with sex trafficking of a minor, conspiracy to sex traffic, and sex trafficking by force, fraud, or coercion. The jury found Sims' guilty of the first two charges but not the third. At trial, the district court allowed the government to put into evidence rap videos that Sims, who was a Houston-based rapper, had performed in. Sims argued that the probative value was significantly outweighed by the danger of unfair prejudice. The Fifth Circuit noted that other courts of appeals had dealt with this issue and concluded that explicit rap videos are probative and outweigh substantial prejudice when the defendant performs the song, describes events closely related to the crime charged, and the evidence is not cumulative. Here, the videos portrayed Sims with guns and money while rapping about drug usage, violence, and pimping. The Court noted that the drug usage and weapons in the videos were relevant to the charge that Sims had sex trafficked by force, fraud, or coercion.

United States v. Sharp, 6 F.4th 573 (5th Cir. July 26, 2021). Fifth Circuit held that admission of a confidential informant's (CI) out-of-court statement violated the Confrontation Clause. A detective testified another agent got a call from a CI saying Sharp was in possession of a large amount of methamphetamine. The Government argued that it introduced the tip for a nonhearsay purpose: to explain the course of the investigation rather than to assert that the informant's account was true. But the Court explained the mere existence of a purported nonhearsay purpose does not insulate an out-of-court statement from a Confrontation Clause challenge. The detective "relayed an out-of-court statement of the most damaging kind—that Sharp was committing the crime—and left Sharp with no opportunity to confront his accuser." Recognizing that "backdooring highly inculpatory hearsay via an explaining-the-investigation rationale is a recurring problem," the Court told the

Government it "must take care to avoid eliciting this kind of unconstitutional testimony."

United States v. Gaspar-Felipe, 4 F.4th 330 (5th Cir. July 13, 2021). Gaspar was tried for transporting "illegal aliens" and objected, under the Confrontation Clause, to the introduction of videotaped depositions of material witnesses who had since been deported. He argued the Government had not made a good faith effort to secure the witnesses, so they were not "unavailable" and their depositions could not be admitted. The Fifth Circuit disagreed and found the Government's efforts reasonable. The Government told the witnesses at the depositions that they would need to testify at a later trial and gave them a letter in Spanish explaining how to go to the border to request entry once they received the subpoenas. The Government got their contact information (under oath) and told them their travel, food, and lodging would be paid for. Starting a month after they were deported and until trial, an agent phoned the witnesses approximately nine times without reaching them. The Court rejeced arguments the Government needed to promise work permits, advance travel funds, better corroborate contact information, or contact them sooner than one month after deportation.

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants in this case were tried by a jury on drug offenses, gun offenses, and organized crime. The Fifth Circuit rejected the defendant's challenge to the use of uncorroborated testimony of a coconspirator who had accepted a plea bargain. A conviction can be based on such testimony unless the coconspirator's testimony is incredible. Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature.

United States v. Herman, 997 F.3d 251 (5th Cir. May 6, 2021). The Hermans owned and operated three restaurants. This case was based on the IRS's undercover operation to determine whether the Hermans' business tax returns understated gross receipts from their restaurants and whether they claimed personal expenses as business expenses on those returns. A jury convicted the Hermans of conspiracy to defraud the United States, and of willfully filing false tax returns. On appeal, they

argued the district court erred in excluding audio clips from secretly recorded conversations between the Hermans and the undercover agent, who was posing as a prospective buyer. The Hermans argued that these audio clips were necessary under the Rule of Completeness (Rule of Evidence 106) to put into context inculpatory clips admitted by the government. The government objected to the supplemental recordings as inadmissible hearsay. The Fifth Circuit examined each clip and determined that some did not counter the inculpatory clips and some did but their omission was harmless in light of other inculpatory evidence admitted at trial.

The Court also ruled the district court did not abuse its discretion by excluding a defense expert witness who could have testified the Hermans also paid business expenses out of personal accounts, had overreported some gross receipts, and maintained a general messiness in their bookkeeping, thus negating the willfulness in their tax offenses. The Court held the district court properly excluded the testimony as too likely to confuse the jury and so was inadmissible under Rule of Evidence 403.

Finally, the Court rejected the appellant's attempt to stretch the Supreme Court's holding in *Marinello v. United States*, 138 S. Ct. 1101 (2018) to the general conspiracy to defraud statute, 18 U.S.C. § 371. The *Marinello* Court held that to convict under 26 U.S.C. § 7212(a)'s omnibus clause, the government must show a "nexus" between the defendant's conduct and a pending or reasonably foreseeable tax-related proceeding, such as an investigation or audit. The Fifth Circuit held that nexus is not required to prove a § 371 conspiracy to defraud.

United States v. Coffman, 969 F.3d 186 (5th Cir. Aug. 6, 2020). The defendant was indicted for making false statements to obtain federal workers compensation benefits, 18 U.S.C. § 1920, and for theft of public money, 18 U.S.C. § 641. The jury convicted her on both counts. On appeal, the defendant argued that the district court improperly allowed inadmissible testimony by a government witness, a doctor who treated her for the back injury. The challenged testimony came after the prosecutor asked the doctor to explain why she no longer took workers compensation cases. The doctor testified: "In the process of doing these cases, I discovered that people are not the most honest …" The defendant

did not object. The prosecutor then asked, "did you have that feeling about the defendant?" The defendant objected and the district court sustained. On appeal, the defendant argued that the earlier testimony was inadmissible because, among other things, it was irrelevant. The 5th Circuit held the claim was subject to plain error review because the defendant did not contemporaneously object. Although guilt-by-association evidence can be highly prejudicial, here it was an isolated remark, not mentioned again, and there was similar unobjected-to testimony by another witness. So, the defendant could not prove affected substantial rights.

United States v. Portillo,969 F.3d 144 (5th Cir. Aug. 5, 2020). In this multi-issue RICO appeal, the defendant argued the district court abused its discretion by admitting a cooperating witness's prior consistent statements. The Fifth Circuit agreed but found that the error was harmless. In finding error, the Court rejected the government's argument that the prior consistent statements were admissible under Federal Rule of Evidence 801(d)(1)(B)(i) to rebut an inference that the statements were fabricated in hopes of gaining leniency from the government. The Court held that the statements did not rebut a recent motive to fabricate because the claimed motive to fabricate also existed at the time that the prior consistent statements were made. The Court also rejected the Government's argument that the statements were admissible under 801(d)(1)(B)(ii)—to rehabilitate the declarant's credibility as a witness when attacked on another ground—because the credibility was not attacked on another ground. The credibility was attacked on the ground already covered by 801(d)(1)(B)(i)—a motive to fabricate.

SUFFICIENCY OF EVIDENCE/PROVING AN OFFENSE

United States v. Aguirre-Rivera, 8 F.4th 405 (5th Cir. Aug. 10, 2021). Aguirre was charged with conspiring to possess with intent to distribute 1 kilogram or more of heroin. The district court instructed the jury that, to find Aguirre guilty, they had to find that the Government proved beyond a reasonable doubt five elements: (1) two or more people reached an agreement to possess heroin with intent to distribute it, (2) Aguirre knew the unlawful purpose of the agreement, (3) he joined in the

agreement willfully, (4) that the overall scope of the conspiracy involved at least 1 kilogram of heroin mixture, and (5) that he knew, or reasonably should have known, that the scope of the conspiracy involved at least 1 kilogram or more of heroin mixture. The court also provided the jury with two special interrogatories. One restated the fourth element, and the other restated the fifth one. The jury returned forms finding Aguirre guilty of the offense, answering "yes" to the conspiracy involving at least 1 kilogram of heroin, but "no" to whether Aguirre knew or reasonably should have known that scope. The court denied his motion for judgment of acquittal and, over his objection, adopted the presentence report which concluded he should be sentenced under the penalty provision for an offense involving 100 grams or more of heroin. He was sentenced to 60 months' imprisonment.

On appeal, Aguirre argued the conviction should be vacated because of the conflicting jury answers. The Fifth Circuit disagreed, concluding that the jury's special interrogatory only negated the fifth element, that Aguirre knew the scope of the conspiracy involved 1 kilogram or more. Under *United States v. Daniels*, 723 F.3d 562 (5th Cir. 2013), that is just a "sentencing element," and not an "essential element" of the drug conspiracy conviction. Thus, the conviction stands, but he was not subject to the 10-year mandatory minimum.

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants argued their convictions under 18 U.S.C. § 924(c), which prohibits the use of a firearm during or in furtherance of a crime of violence or drug-trafficking offense, must be reversed because they were predicated on a RICO conspiracy, which is not a crime of violence under *United States v. Jones*, 935 F.3d 266, 271 (5th Cir. 2019). The Fifth Circuit agreed. RICO conspiracy is not a crime of violence. Because it could not determine whether the jury relied on the RICO or the drug-trafficking predicate, the basis for conviction may have been improper. The Court concluded that it was plain error to permit the jury to convict defendants and reversed the firearms convictions.

United States v. Gas Pipe, Inc., 997 F.3d 231 (5th Cir. May 6, 2021). The defendants' stores sold synthetic cannabinoids branded as "herbal incense," "potpourri," or "aroma therapy products," products, commonly

known as "spice." The products were labeled "not for human consumption" even though the defendants intended them for exactly that. A jury convicted the defendants of one count of conspiracy to defraud the United States, based on their efforts to defraud the FDA and to misbrand drugs. The Fifth Circuit found the evidence was sufficient to show defendants intended to defraud the FDA. In a conspiracy to defraud the FDA under 18 U.S.C. § 371, the Government is not required to establish the FDA's participation in the underlying criminal investigation or the defendants' knowledge of any such participation. The defraud clause of § 371 reaches any conspiracy designed to impair, obstruct, or defeat the lawful function of any department of the government. In this case, a conspiracy to avoid contact with the FDA was to avoid regulation. The supplier and an employee both testified that the defendants labeled these products "not for human consumption" to avoid scrutiny or regulation by the FDA.

United States v. Knowlton, 993 F.3d 354 (5th Cir. Apr. 1, 2021). Knowlton possessed 3,469 images and 249 videos of child pornography on various devices in his house. He was convicted of one count of possession of child pornography and one count of receiving material containing child pornography. He appealed his conviction on the receipt count.

First, Knowlton argued that the computer files he downloaded were themselves child pornography under 18 U.S.C. § 2252A(a)(2)(A), and so he could not be found guilty of receiving "material that contains child pornography" under § 2252A(a)(2)(B). The Fifth Circuit concluded the computer files are plainly *material* containing child pornography. The term "material" in the receipt offense is not limited to only tangible units of storage like books, magazines, boxes, and computer disks.

Second, Knowlton argued that the dates of child-pornography downloads proven at trial materially varied from the dates alleged in his indictment. The Court concluded that the dates of receipt Knowlton pointed to did not materially vary from the dates alleged in the indictment. When the evidence at trial varies from the facts alleged in an indictment, the question is whether the defendant was fairly put on notice to defend himself. If an indictment uses the term "on or about" to allege a date, the government is not required to prove the exact date; it suffices if a date

reasonably near is established. The two and a half month variance from date alleged and date proved was reasonably near the date alleged to put Knowlton on notice.

United States v. Masha, 990 F.3d 436 (5th Cir. Mar. 8, 2021). Masha was indicted on eight counts of false use of a passport, 18 U.S.C. § 1543, and eight counts of misuse of a passport, 18 U.S.C. § 1544. On the misuse of a passport counts, evidence at trial demonstrated that Masha used passports that looked like they were issued by Nigeria and the United Kingdom. The agent acknowledged, however, that he could not testify as to whether or not the passports had been actually issued by those nations. The government's case centered on the passports being counterfeit. The Fifth Circuit held there was insufficient evidence at trial to demonstrate that the passports used by Masha were in fact issued by a government entity for someone else. Thus, the convictions for misuse of a passport under § 1544 are vacated. The remaining convictions and sentences for false use of a passport are affirmed.

United States v. Nora, 988 F.3d 823 (5th Cir. Feb. 24, 2021). A jury convicted Nora of conspiracy to commit health care fraud, 18 U.S.C. § 1349; conspiracy to pay or receive illegal health care kickbacks, 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(2); and aiding and abetting health care fraud, 18 U.S.C. §§ 1347 and 2. The Fifth Circuit reversed Nora's convictions and sentences based on insufficient evidence. This case was a multi-defendant health care fraud involving a home-health care company called Abide. Nora's role at Abide was extensive. It implicated him in three practices that were central to Abide's fraud and kickback schemes. First was Abide's use of house doctors to approve medically unnecessary plans of care so that it could bill Medicare for patients who would otherwise not qualify for home health services. Second was Abide's pay-for-referral system, which the government deemed an illegal kickback scheme. Third was Abide's practice of unnecessarily recertifying patients for additional 60-day episodes of care.

The Court, after defining the term "willfully," as used in the various charged fraud offenses, held that, while the government presented evidence at trial detailing Nora's role at Abide and his work responsibilities, the evidence did not prove that Nora understood Abide's

various practices and schemes to be fraudulent or unlawful, and thus there was insufficient evidence to conclude that Nora acted with "bad purpose" in carrying out his responsibilities at Abide.

United States v. Delgado, 984 F.3d 435 (5th Cir. Jan. 5, 2021). Delgado was convicted by a jury of numerous bribery-related offenses carried out in connection with his duties as a state judge in Hidalgo County, Texas. The jury found that over the course of a decade, attorney Perez would routinely bribe Delgado to secure Personal Recognizance (PR) bonds for his clients, who had pending criminal matters before Delgado. The jury convicted Delgado on eight felony counts for federal program bribery, 18 U.S.C. § 666(a)(1)(B). The bribery statute required a showing of a transactional value of at least $5,000.

The Fifth Circuit affirmed the jury's findings that Delgado's offense involved this transactional value. The Court noted that it is not only the amount paid as a bribe that determines the transactional value; instead, multiple valuation methods are used. Here, rather than looking to the bribe amount, the trial evidence focused on the value of the PR bonds to Perez's clients, who qualify as interested third parties to the transactions between Delgado and Perez. Delgado effectively acknowledged the benefit to be worth at least $5,000 by setting that amount as the face value of the bonds. The Court held that "a rational juror could conclude that an individual who was willing to risk forfeiting $5,000 in order to secure a PR bond valued the benefit of that bond (the "thing of value") to be at least $5,000." To the extent the jury also considered the value of difficult-to-quantify benefits such as the clients' liberty interests, that is precisely where the wisdom of the jury is most useful and where courts should be reluctant to step in on review.

United States v. Dubin, 982 F.3d 318 (5th Cir. Mar. 12, 2020), reh'g en banc granted, opinion vacated, 989 F.3d 1068 (5th Cir. 2021). The defendants were convicted of conspiracy to pay and receive healthcare kickbacks, offering to pay, and paying, illegal remuneration for patients, and aiding and abetting and aggravated identity theft. In a matter of first impression, the Fifth Circuit held the defendant's fraudulently billing Medicaid for services not rendered constituted an illegal "use" of a means of identification of another person, in violation of the identity-theft

statute. The defendant used a patient's Medicaid reimbursement number in submissions to Medicaid, asserting the patient received services he did not receive.

Note: The Court granted rehearing en banc, vacating the opinion. Oral argument was heard on May 24, 2021.

United States v. Anderson, 980 F.3d 423 (5th Cir. Nov. 6, 2020). Defendants were convicted, at trial, of multiple counts of health care fraud and identity theft. All issues on appeal concerned the sufficiency of the evidence. The defendants argued, in a motion to judgment of acquittal and on appeal, that BCBS was not a health care benefit program. Based on the statutory text and two out-of-circuit opinions, the Fifth Circuit concluded that BCBS was such a program.

United States v. King, 979 F.3d 1075 (5th Cir. Nov. 6, 2020). The defendant pleaded guilty to production of child pornography. On appeal, he argued, under plain error review, that there was insufficient evidence to establish the jurisdictional hook of 18 U.S.C. § 2251(a)—that "materials" used in the production of child pornography were moved in interstate commerce. The Fifth Circuit affirmed, holding that the defendant's argument was defeated because the signed factual resume stated that the electronic device was manufactured outside of Texas.

United States v. Barnes, 979 F.3d 283 (5th Cir. Oct. 28, 2020). Doctors and administrators were convicted of conspiracy to commit health care fraud. On appeal, the defendants challenged the sufficiency of the evidence. The Fifth Circuit affirmed, finding 18 U.S.C. § 1516's jurisdictional element is satisfied when the audit *relates* to a program receiving more than $100,000 from the United States as opposed to requiring the *defendant* to have received more than $100,000 from the United States. The Court also held that the defendants' case numbers and diagnosis frequencies were high enough that a reasonable jury could have found chance or mistake did not account for what happened. The Court further held that "[e]vidence of a financial incentive for home health care referrals and statistical evidence probative of fraudulent conduct are circumstantial evidence of Barnes's knowledge."

United States v. Sila, 978 F.3d 264 (5th Cir. Oct. 20, 2020). Following a conviction for tax fraud, the defendant argued that the evidence was insufficient to show that a particular IP address reflected his activity when: the IP address was assigned to a business and the address continued to be used after the defendant was in custody. The Fifth Circuit agreed that there was not sufficient information tying the defendant to the specific IP address for the actual fraudulent transaction charged, and remanded for resentencing on the remaining counts of conviction.

United States v. Reed, 974 F.3d 560 (5th Cir. Sept. 9, 2020). The defendant was convicted by a jury of being a felon in possession of a firearm, 18 U.S.C. § 922(g). After his conviction and sentence, the Supreme Court issued its decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), holding that the government must prove that the defendant knew of his prohibited status at the time he knowingly possessed the firearm. On appeal, the defendant argued that, based on the holding in *Rehaif*, there was insufficient evidence to support his conviction. The Fifth Circuit focused on its determination that the defendant could not show that any error affected his substantial rights. That is so because 1) the defendant didn't argue or even suggest a possibility that he actually lacked knowledge of his status, and 2) he had a long criminal record of serious prior felonies such that he likely would have stipulated to the felon status and his knowledge of that status rather than have the jury hear the details on his prior criminal record. The Court also stated that evidence before the jury, such as, the defendant's stipulation that he had a prior felony conviction and a letter with the defendant's Department of Corrections number on it, lent further support to its conclusion that there was no reasonable probability that a properly instructed jury viewing the evidence admitted at trial would have returned a different verdict.

United States v. Comstock, 974 F.3d 551 (5th Cir. Sept. 9, 2020). The defendant and others were charged with conspiracy to commit wire fraud and six counts of aiding and abetting wire fraud. These charges were the result of Comstock ordering his employees to fabricate time sheets to justify his company's billings to the City of San Antonio, with whom his company had a contract to provide janitorial services at the Alamodome. The jury convicted Comstock on all charges, and he was sentenced to 25 months in prison and over $350,000 in restitution. On appeal, Comstock

challenged the sufficiency of the evidence against him. The Court noted that Comstock's defense was that he believed he had an agreement contract with the City. A number of his employees testified that there was no such agreement and that Comstock had instructed them to fabricate the records. The Government also introduced audio recordings, by one of these employees, of Comstock and other discussing the billing. One employer, Anna Becerra, was repeatedly heard, on these recordings, saying that there was no unwritten agreement and that what they were being asked to do was fraud. The 5th Circuit held that, based on the testimony and recordings, there was sufficient evidence.

V. MISCELLANEOUS TRIAL MATTERS

United States v. Torres, 997 F.3d 624 (5th Cir. May 19, 2021). The district court plainly violated the *Geders* rule by prohibiting Torres from speaking with his counsel during a 13-hour overnight recess declared in the middle of his direct examination, right before the end of the trial the next day. In *Geders v. United States*, 425 U.S. 80, 91 (1976), the Supreme Court held that an order preventing a testifying defendant from consulting with his counsel "about anything" during a 17-hour overnight recess between his direct and cross-examination violated his Sixth Amendment right to the assistance of counsel. Discussions during an overnight recess may encompass "matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." By contrast, barring discussion with counsel during a short recess is not prohibited. Even under plain error review, the *Geders* violation requires reversal.

United States v. Kieffer, 991 F.3d 630 (5th Cir. Mar. 19, 2021). The Fifth Circuit held that the district court did not abuse its discretion by allowing jurors to submit questions that the court asked witnesses, without advance notice to counsel. On appeal, the parties did not identify any inappropriate questions or prejudice. The Court suggested courts should adopt the following procedure (from the D.C. Circuit) when allowing jurors to submit questions:

1. The court should inform counsel in advance that juror questions will be allowed.
2. The court should require that all juror questions be submitted in writing.
3. The court should review the questions with counsel out of the presence of the jury (evaluating objections, if any).
4. If it finds the question proper, the court should itself ask the question of the witness.
5. Before any questioning begins, the court should instruct the jurors about the function of the questioning procedure in clarifying factual (not legal) issues and should direct them to remain neutral and, if the judge fails to ask a particular question, not to take offense or to speculate as to the reasons therefor or what answer might have been given.
6. After a particular witness has responded to the questions, the court should permit counsel to re-question the witness.
7. The court should also repeat the instructions in the closing charge.

United States v. Arayatanon, 980 F.3d 444 (5th Cir. Nov. 13, 2020). The defendant was convicted by a jury of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine under 21 U.S.C. § 846 and sentenced as a career offender to life in prison. On appeal, the defendant argued that during his trial, the district court abused its discretion by excusing two case agents from sequestration under Federal Rule of Evidence 615, and by admitting jailhouse telephone calls that he argues undermined his presumption of innocence. The Fifth Circuit affirmed. As to sequestration, the government argued that the two case agents were essential, and the defendant did not overcome that argument. As to the jail calls, the Court held that their admission did not pose the same constant and visible risk of prejudice as shackling, prison garb or other external signs of a defendant's incarceration or perceived threat to the community at large.

VI. CATEGORICAL APPROACH

Ochoa-Salgado v. Garland, 5 F.4th 615 (5th Cir. July 16, 2021). The Fifth Circuit held that an offense under Texas Health and Safety Code §

481.112 is a felony punishable under the Controlled Substances Act (CSA) because an offer to sell under § 481.112 constitutes attempted delivery under the Act. The Ninth Circuit came to a different conclusion in *United States v. Rivera-Sanchez*, 247 F.3d 905, 908–09 (9th Cir. 2001) (en banc), finding "an offer to sell 'criminalizes solicitation'—as distinct from attempt—which doesn't fall within the CSA."

Note: One of the confusing aspects of the categorical approach is that there are so many federal definitions that sound similar but are different. For example, a conviction under § 481.112 for delivery of a controlled substance is *not* a controlled substance offense (CSO) under guideline §4B1.2 because the Texas offense includes offer to sell, which is not covered in the CSO definition. *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). But § 481.112 is a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii) for the Armed Career Criminal Act. *United States v. Prentice*, 956 F.3d 295 (2020) (citing *Shular v. United States*, 140 S. Ct. 779 (2020)).

United States v. Trujillo, 4 F.4th 287 (5th Cir. July 9, 2021). Trujillo was convicted of illegal reentry and sentenced under 8 U.S.C. 1326(b)(2) for having an aggravated felony conviction prior to his removal. The term "aggravated felony" includes a "crime of violence," under 18 U.S.C. § 16. The Court held that Trujillo's conviction for intoxication manslaughter, Texas Penal Code § 49.08(a), did not constitute a "crime of violence" under 18 U.S.C. § 16. As a result, the district court erred when it convicted and sentenced Trujillo under 8 U.S.C. § 1326(b)(2) based on this prior conviction. But the error did not ultimately affect his sentence. The Court reformed the judgment to correct the error under 8 U.S.C. § 1326(b)(2) and affirmed the sentence as reformed.

United States v. Bass, 996 F.3d 729 (5th Cir. May 11, 2021). Bass was charged and convicted of being a felon in possession of a firearm. At sentencing, the district court applied the Armed Career Criminal Act's sentence enhancement for a prior controlled substance offense, under 18 U.S.C. § 924(e). The Fifth Circuit rejected Bass's assertion that his prior Arkansas delivery of controlled substance offenses did not support his ACCA sentence enhancement. Contrary to Bass's argument, the

Arkansas statute does not include an offer to sell within its definition of delivery.

United States v. Kieffer, 991 F.3d 630 (5th Cir. Mar. 19, 2021). For purposes of 18 U.S.C. § 924(c)(1)(A), which proscribes the use of a firearm during a "crime of violence," bank robbery in violation of 18 U.S.C. § 2113(a) is a crime of violence, but conspiracy to commit bank robbery in violation of 18 U.S.C. § 371 is not.

United States v. Frierson, 981 F.3d 314 (5th Cir. Nov. 11, 2020). The defendant argued he was not a career offender, under guideline §4B1.1, because his prior Louisiana conviction for possession with intent to distribute cocaine was broader than the generic offense. The Fifth Circuit affirmed under the modified categorical approach because the Louisiana statute was divisible.

In re Hall, 979 F.3d 339 (5th Cir. Oct. 30, 2020). A death penalty defendant challenged one of his 18 U.S.C. § 924(c) convictions as infirm in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), because its predicate (kidnapping) was a residual-clause offense. The Fifth Circuit affirmed, holding that kidnapping resulting in death qualifies under the § 924(c) elements clause. But, the Court continued, even a residual-clause offense would likely still stand in a successive habeas action because the Supreme Court has yet to expressly make *Davis* retroactive.

Judge Dennis dissented, arguing the majority's holding that *Davis* has not been made retroactive is contrary to Fifth Circuit precedent, *United Sates v. Reece*, 938 F.3d 630 (5th Cir. 2019), and *In re Sparks*, 657 F.3d 258 (5th Cir. 2011), as well as the holdings of four other federal courts of appeals.

United States v. Montgomery, 974 F.3d 587 (5th Cir. Sept. 10, 2020). The defendant pleaded guilty to being a felon in possession of a firearm, 18 U.S.C. § 922(g), and was sentenced to the mandatory minimum sentence of 15 years' imprisonment under the ACCA. The 5th Circuit held that Louisiana simple burglary, LA. Rev. Stat. Ann. § 14:62.2(A), qualified as generic burglary and thus was a violent felony for purposes of the ACCA.

VII. SENTENCING

CONSTITUTIONAL CHALLENGES

United States v. Bonilla-Romero, 984 F.3d 414 (5th Cir. Dec. 30, 2020). In sentencing juvenile offender, tried as an adult, for first degree murder, district court could impose sentence of imprisonment for any term of years, despite that the statute carried a sentence of death or of mandatory life imprisonment without possibility of parole. Both of those sentences are unconstitutional as applied to a juvenile offender under *Miller v. Alabama*, 567 U.S. 460 (2012) (holding mandatory life without parole unconstitutional for juveniles); and *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the same for the death penalty). Excising mandatory minimum nature of life sentence was all that is needed to satisfy constitutional issue for juveniles, and substituting punishment provision for second degree murder under statute was proper because elements of second degree murder were met by pleading to first degree murder.

United States v. Leontaritis, 977 F.3d 447 (5th Cir. Oct. 9, 2020). Leontaritis was convicted by a jury of conspiracy to commit money laundering and conspiracy to distribute methamphetamine. The jury returned a special verdict finding that the conspiracy involved 500 grams or more, but the jury also found that Leontaritis was only responsible for less than 50 grams as the amount reasonably foreseeable to him. At sentencing, the district court found by a preponderance of the evidence that Leontaritis was responsible for 176 kilograms and sentenced him to 240 months' imprisonment. On appeal, he argued the court's disregard of the jury's finding violated the Fifth and Sixth Amendments.

The Fifth Circuit explained that the jury found that the Government failed to prove 50 or more grams beyond a reasonable doubt, not that the jury found beyond a reasonable doubt that Leontratis was accountable for less than 50 grams. The district court's findings at sentencing did not conflict with the jury's conclusions. Plus, the court gets to decide the

Guidelines and sentence within the statutory minimums and maximums, whereas the jury is tasked with making statutory findings.

Judge Elrod dissented to that part of the opinion. She believed the interrogatory asked the jury to determine the actual amount of methamphetamine for which Leontratis was accountable beyond a reasonable doubt. The district court's finding at sentencing contradicted the jury's finding and cannot be reasoned away by the division of labor.

STATUTORY CHALLENGES

United States v. Aguirre-Rivera, 8 F.4th 405 (5th Cir. Aug. 10, 2021). Aguirre was charged with conspiring to possess with intent to distribute 1 kilogram or more of heroin. The district court instructed the jury that, to find Aguirre guilty, they had to find that the Government proved beyond a reasonable doubt five elements: (1) two or more people reached an agreement to possess heroin with intent to distribute it, (2) Aguirre knew the unlawful purpose of the agreement, (3) he joined in the agreement willfully, (4) that the overall scope of the conspiracy involved at least 1 kilogram of heroin mixture, and (5) that he knew, or reasonably should have known, that the scope of the conspiracy involved at least 1 kilogram or more of heroin mixture. The court also provided the jury with two special interrogatories. One restated the fourth element, and the other restated the fifth one. The jury returned forms finding Aguirre guilty of the offense, answering "yes" to the conspiracy involving at least 1 kilogram of heroin, but "no" to whether Aguirre knew or reasonably should have known that scope. The court denied his motion for judgment of acquittal and, over his objection, adopted the presentence report which concluded he should be sentenced under the penalty provision for an offense involving 100 grams or more of heroin. He was sentenced to 60 months' imprisonment.

Aguirre challenged the 60-month sentence, arguing that the district court unconstitutionally imposed a mandatory minimum sentence even though the jury did not find he knew the conspiracy involved 100 grams or more of heroin. The Fifth Circuit agreed and vacated the sentence.

United States v. Naidoo, 995 F.3d 367 (5th Cir. Apr. 19, 2021). Under 18 U.S.C. § 2252(a)(4)(B), which prohibits the possession of "1 or more" matters containing child pornography, the simultaneous possession of multiple images of or matters containing child pornography constitutes a single violation of the statute.

United States v. Diaz, 989 F.3d 390 (5th Cir. Mar. 1, 2021). Diaz was convicted of conspiring to acquire a firearm from a licensed firearms dealer by false or fictitious statement, in violation of 18 U.S.C. §§ 371 and 922(a)(6). She sought to extend *Rehaif*'s reasoning to § 922(a)(6). The Court rejected her argument, and held that, to convict for conspiracy to violate § 922(a)(6), the government does not need to prove that the defendant knew the seller was a licensed dealer.

United States v. Cline, 986 F.3d 873 (5th Cir. Jan. 29, 2021). Cline was convicted of violating the Violence Against Women Act. The Act creates a criminal offense for a person who travels in interstate or foreign commerce with intent to violate certain portions of a "protection order" that protect against "violence, threats, or harassment against, contact or communication with, or physical proximity to, another person." 18 U.S.C. § 2262(a)(1). The Court rejected Cline's argument that his Colorado mandatory domestic violence protection order does not fit within the Act's definition of protection order. Cline argued that any protection order, under the Act, must have been "issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection," 18 U.S.C. § 2266(5)(A), and that the Colorado protection orders were mandatory and issued pursuant to state statute without the victim's request. The Court held that the fact that the protection order at issue was not issued pursuant to the victim's request did not exclude such an order from the Act's definition of "protection order."

The Court also held that each violation of the protection order, although through one continuous course of conduct, gave rise to two separate offenses. The Court based this conclusion of the text of the statute, which refers to "a" protection order in the singular when describing the offense, and specifies that an offense occurs when a person engages in conduct that violates a particular "portion" of a protection order.

United States v. Warren, 986 F.3d 557 (5th Cir. Jan. 22, 2021). Warren and Martinez were convicted under various fraud statutes for their roles in a timeshare resale telemarketing scam. Warren and Martinez argued that the district court erred by imposing consecutive six-month sentences under 18 U.S.C. § 2326(1). That statute provides that a person convicted of certain enumerated fraud offenses, "in connection with the conduct of telemarketing or email marketing ... shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of [the enumerated offenses]." They argued that the statute only raised the statutory maximums for the underlying fraud offenses, it did not require a consecutive sentence to be imposed on top of the sentence for the underlying fraud offense. The Fifth Circuit disagreed and noted that "[a]s a matter of common usage, we have regularly described consecutive sentences as being 'in addition to' the sentence for the underlying or other offense." The plain language of § 2326 authorizes a consecutive sentence to be imposed on top of the sentence for the underlying fraud offense.

(SELECTED) GUIDELINE ISSUES

United States v. Martinez, ___ F.4th ___, 2021 WL 3825354 (5th Cir. Aug. 27, 2021). Martinez pleaded guilty to a drug conspiracy charge. The charge was based on a search of his tobacco shop, which occurred after undercover agents conducted five controlled buys of cocaine there. The search discovered cocaine, marijuana, THC, and Xanax pills. Cash in the sum of $12,424 was also found. The issue on appeal was whether the district court clearly erred in treating all of the cash as proceeds of cocaine sales. The Fifth Circuit held that it was clear error.

The presentence report (PSR) had originally treated the cash as the proceeds of marijuana sales. It was amended later to change that to cocaine sales, which resulted in a higher guideline range. At sentencing, Martinez objected to the cash conversion and argued that there were other possible sources for the money. The district court overruled the objection and adopted the PSR. In holding that the district court erred, the Fifth Circuit pointed to the other possible sources, including legal tobacco sales and illegal sales of marijuana, THC, or Xanax, any of which

would have resulted in a lower guideline range. Martinez's tax records and revenue reports supported his argument that at least some of the money came from tobacco sales. The cocaine controlled buys, on which the PSR based the cash conversion, amounted to no more than a few hundred dollars total and were for cocaine because that is what the agents asked for. The Court vacated the sentence and remanded for resentencing.

United States v. Gaspar-Felipe, 4 F.4th 330, 336 (5th Cir. July 13, 2021). A jury convicted Gaspar of transporting "illegal aliens" but found—by answering a special interrogatory—that his offense did not result in the death of one of the migrants. He objected to not receiving a reduction for accepting responsibility since he had been willing to plead to the lesser charges. The Court found Gaspar had challenged other elements of the offenses at trial and thus did not warrant acceptance. "Nothing stopped him from pleading guilty to those charges and going to trial only on Count Three."

Gaspar also objected to the 10-level death enhancement under guideline §2L1.1(b)(7)(D). The Court affirmed, citing the Government's easy burden: "the government need show only that the defendant's alien-smuggling conduct was a but-for cause of someone's death." The death did not have to be a foreseeable consequence of Gaspar's offense. Without Gaspar guiding the victim from Mexico, the victim would not have been in a car fleeing from police who then shot him. The Court also rejected Gaspar's arguments that the within-Guidelines 78-month sentence was procedurally and substantively unreasonable.

United States v. Abrego, 997 F.3d 309 (5th Cir. May 11, 2021). Abrego pleaded guilty to making false statements regarding firearm records, 18 U.S.C. § 924(a)(1)(A). At sentencing and on appeal, Abrego challenged the district court's determination of his base offense level pursuant to U.S.S.G. §2K2.1(a)(4)(B), which provides for a higher offense level if the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine.

The Fifth Circuit held that the district court erred by not considering the commentary to guideline §2K2.1(a)(4)(B). The commentary defines a

"semiautomatic firearm that is capable of accepting a large capacity magazine" as "a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense" a "magazine or similar device that could accept more than 15 rounds of ammunition" was "attached to" the firearm or was "in close proximity to" it. The Court noted that neither the PSR nor the Government even acknowledged the language of the commentary—let alone gave the district court a basis for applying it.

The addendum to the PSR relied on the website of the firearm manufacturer as evidence of what kind of magazines come standard with that firearm. The Court said that might have been sufficient if the Government had demonstrated that Abrego bought the firearm either directly from the manufacturer or in the exact same condition as marketed on the manufacturer's website.

United States v. Reyna-Aragon, 992 F.3d 381 (5th Cir. Mar. 26, 2021). Reyna-Aragon argued that the district court violated the rule that it is error to consider a defendant's "bare arrest record" at sentencing by considering his no-billed Texas sexual assault arrest. The Court held that, despite the no-bill of the charge, there was more than a bare arrest record. In addition to the date, charge, jurisdiction, and disposition of the Reyna-Aragon's sexual assault arrest, the presentence report described the allegations contained in the criminal complaint, including the identity of the alleged victim and the specific conduct of the alleged offense.

United States v. Masha, 990 F.3d 436 (5th Cir. Mar. 8, 2021). Masha was indicted on eight counts of false use of a passport, 18 U.S.C. § 1543, and eight counts of misuse of a passport, 18 U.S.C. § 1544. The Fifth Circuit held the district court's loss calculation, which was based on total amount of funds that passed through the accounts Masha opened using false passports, was not clearly erroneous. It was plausible that the total amount of funds deposited was from fraudulent activity given the examples of fraudulent transfers involving the accounts, as well as to the fact that Masha used fake names, addresses, phone numbers, and counterfeit passports to open the accounts. Given this evidence, coupled with the fact that Masha failed to offer any rebuttal evidence legitimizing

the remaining funds, the district court concluded that a preponderance of the evidence supported the conclusion that Masha's purpose and motivation in opening the accounts was fraud and that the PSR's loss amount calculation was correct.

United States v. Deckert, 993 F.3d 399 (5th Cir. Apr. 8, 2021). At sentencing and on appeal, Deckert challenged the application of the 2-level reckless endangerment enhancement in U.S.S.G. § 3C1.2. The enhancement was based on his high-speed flight from police when they were trying to stop him for a traffic violation. After Deckert was caught and searched, the police found a distributable quantity of methamphetamine. Deckert was indicted for possession with the intent to distribute that methamphetamine, but he was also charged with a PWID methamphetamine that occurred a few days prior to this stop.

Deckert pleaded guilty to the prior PWID, but not the one related to his traffic stop. The issue on appeal was whether the reckless endangerment that occurred during a different offense, which was not "during, in preparation for, or while covering up the offense for which he was convicted" could be used to apply this Chapter Three enhancement. After a careful parsing of the relevant conduct policy statement in U.S.S.G. §1B1.3, the Court held the application was proper. The Court relied on Section 1B1.3(a)(2), which defines the defendant's relevant conduct for a groupable offense as "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." Because the reckless endangerment flight occurred during an offense that was of the sort that would be grouped with Deckert's offense of conviction–the prior PWID offense–it was relevant conduct, and the enhancement was proper.

Judge Dennis dissented, arguing that the majority decision was inconsistent with circuit precedent, *United States v. Southerland*, 405 F.3d 263 (5th Cir. 2005) and the guidelines. Because "the flight did not have a nexus to Deckert's offense of conviction of possessing methamphetamines on a separate date, the adjustment was not permissible under the United States Sentencing Guidelines."

United States v. Warren, 986 F.3d 557 (5th Cir. Jan. 22, 2021). Warren was convicted under various fraud statutes for his role in a timeshare resale telemarketing scam. The Fifth Circuit held that the district court did not clearly err in assigning a "manager or organizer" role for Warren, despite that the district court's findings suggested that Warren, in fact, did not manage or supervise any other participant. The Court noted that, although they disagreed with its precedent, the Court was bound by cases that uphold the manager/supervisor adjustment based solely on management of property, assets or activities. Because the evidence showed that Warren controlled the telemarketing operations' technology, it was not clear error in light of precedent which applied the adjustment based on management of property. The Court referenced *United States v. Ochoa-Gomez*, 777 F.3d 278, 284-86 (5th Cir. 2015) (Prado, J., concurring), in which Judge Prado in a concurring opinion stated his belief that this precedent is wrong and merits en banc review.

United States v. Dubin, 982 F.3d 318 (5th Cir. Dec. 4, 2020), reh'g en banc granted, opinion vacated, 989 F.3d 1068 (5th Cir. March 12, 2021). The defendants were convicted of conspiracy to pay and receive healthcare kickbacks, offering to pay, and paying, illegal remuneration for patients, and aiding and abetting and aggravated identity theft. In a challenge to the district court's calculation of the amount of loss, the Dubins claimed they were entitled to an offset calculated at actual value of services provided. The Court disagreed, noting the defendant carries the burden to establish two prongs to prove a valid offset: (1) that the services provided to Medicare beneficiaries were legitimate and (2) that Medicare would have paid for those services but for his fraud. In this case, the Government provided substantial evidence that the purported services were illegitimate: poor record keeping by the Dubins, improper billing based on who performed the services, and services performed by individuals who were not employees at the time they provided services. Thus, the Court concluded the Dubins fell short of carrying their burden.

United States v. Arayatanon, 980 F.3d 444 (5th Cir. Nov. 13, 2020). The defendant was convicted by a jury of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine under 21 U.S.C. § 846 and sentenced as a career offender to life in prison. On appeal, the defendant argued, among other things, that the district court

erred at sentencing in calculating his offense level based on an incorrect drug quantity. The Fifth Circuit affirmed, holding that the PSR was sufficiently reliable even if based on a co-conspirator's "imprecise" testimony, especially absent any competent rebuttal evidence from the defendant.

United States v. Kendrick, 980 F.3d 432 (5th Cir. Nov. 3, 2020). A defendant was convicted of conspiracy to distribute crack cocaine and felon in possession of a firearm. The Fifth Circuit affirmed the classification of Kendrick as a career offender even though his prior drug convictions were conspiracies. The commentary to §4B1.2 added conspiracies to the controlled substance offense definition, and a prior case said the addition was lawful. *See United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997).

United States v. Ramirez, 979 F.3d 276 (5th Cir. Oct. 27, 2020). The defendant was convicted of health care fraud and challenged the district court's enhancements for transfer or production of a means of identification, and for 10 or more victims. The Fifth Circuit affirmed, holding: the scheme triggered the production of a unique Medicare-issued claim number for each beneficiary; and each beneficiary was a victim, not just Medicare as a whole.

United States v. Smith, 977 F.3d 431 (5th Cir. Oct. 8, 2020). A defendant convicted of sex trafficking appealed his conviction and sentence. As pertained to the sentence, the defense argued that the district court misapplied the Guidelines by failing to apply the rule of lenity. Specifically, the indictment and factual resume identified two different statutory provisions, 18 U.S.C. § 1591(b)(1) and (b)(2), which corresponded to two different base offense levels in guideline §2G1.3. The defendant contended that lenity required the court to apply the lesser base offense level.

Rejecting this argument, the court first discussed the application of lenity to the Guidelines after *Beckles v. United States*, 137 S. Ct. 886 (2017). The court acknowledged one case applying lenity to the Guidelines after *Booker—United States v. Bustillas-Pena*, 612 F.3d 863 (5th Cir. 2010), but thought this case might not survive *Beckles*. The appeal in *United*

States v. Cortez-Gonzalez, 929 F.3d 200, 205 (5th Cir. 2019), decided after *Beckles*, was dismissed because the court in that case found the Guideline unambiguous. The *Smith* court rejected the application of lenity because the Guideline unambiguously connects § 1591(b)(1) to the elevated base offense level in §2G3.1.

United States v. Izaguirre, 973 F.3d 377 (5th Cir. Aug. 31, 2020). The defendant argued that the district court had committed procedural plain error by sentencing him to 108 months on his failure-to-appear offense consecutive to 108 months on the underlying offense. On plain error review, the 5th Circuit agreed and vacated the sentence, remanding for resentencing. First, the 5th Circuit clarified that, when sentencing a defendant for a failure-to-appear offense, the court must group it with the underlying offense, for which the defendant failed to appear. See U.S.S.G. §2J1.6, n.3. This clarification recognized that, based on a 1998 amendment to note 3 of guideline §2J1.6, the 5th Circuit's holding in *United States v. Packer*, 70 F.3d 357 (5th Cir. 1995), was no longer good law.

Izaguirre was being sentenced for both the underlying drug offense and the offense for failing to appear for the drug offense. Under §2J1.6, in that situation, the failure-to-appear offense is treated, under §3C1.1, as an obstruction of the underlying offense, and the two offenses are grouped together under §3D1.2(c). The failure-to-appear statute, 18 U.S.C. § 3146(b)(2), requires that if a sentence of imprisonment is imposed for a failure to appear, it must run consecutive to the sentence for the underlying offense. This is accomplished by calculating the guideline range for the grouped offenses, determining what the "total punishment" should be, and apportioning the sentence between the two offenses for an incremental punishment. Here, the district court calculated the guideline range for the grouped offenses as 108-135 months. But instead of determining the "total punishment," the court imposed 108 months on both counts to run consecutive.

United States v. Lima-Rivero, 971 F.3d 518 (5th Cir. Aug. 21, 2020). The Court found a case agent's mere speculation that the defendant was not forthcoming was an insufficient basis for denying safety valve relief. Such testimony must be supported by "specific factual findings" or "easily

recognizable support in the record." Here, the agent said his conclusion was based on his personal belief (after reviewing cell phones and speaking to codefendants) but did not offer specific concrete information. Moreover, the district court did not understand that the court decided whether the defendant provided truthful information about the offense, and that it did not have to accept the Government's determination.

Judge Haynes dissented. She reasoned that, while the district court may have initially misunderstood the legal standard, the fact that the court had the agent testify showed an understanding that it was not bound by the Government's determination of truthfulness. And she would find the case agent's testimony sufficient.

CONCURRENT/CONSECUTIVE SENTENCING

United States v. Horton, 993 F.3d 370 (5th Cir. Apr. 6, 2021). The Supreme Court remanded this case in light of *Davis v. United States*, — U.S. —, 140 S. Ct. 1060, 1061 (2020), which reversed Fifth Circuit's prior rule that unpreserved claims of factual error are unreviewable on appeal. Instead, under *Davis*, unpreserved claims of factual error are reviewed under the full plain error test. The claim of plain error in this case was that the district court failed to treat Horton's prior and pending state cases as relevant conduct to his federal offense. Horton was convicted of possession with intent to distribute methamphetamine, which involved acting as a courier for a large-scale trafficking operation. Horton argued that the relevant conduct to the instant offense should have included his two prior state convictions, which were possession of 6.3 grams of methamphetamine, and possession of drug paraphernalia. He argued that the underlying conduct of these convictions was part of regular and repetitive conduct as the instant offense and was similar and in close temporal proximity to it as well. Horton asserted that because these offenses should have been treated as relevant conduct, he should not have received criminal history points and his federal sentence should run concurrently to the undischarged state sentences.

The Fifth Circuit agreed that Horton's offenses were in close temporal proximity to the instant federal offense, but the Court held that neither

offense involved similar conduct because they involved either no drugs or only small, personal use amounts of methamphetamine, whereas the conduct underlying his instant offense involved trafficking large quantities of methamphetamine. The court also found no plain error in the district court's holding that pending state charges, which also involved only small amounts of methamphetamine, were not relevant conduct.

In addressing Horton's procedural error claims, the Court rejected his argument that he had not had a reasonable opportunity to object because the district court told him "you may stand aside," and further objection would be futile. The Court found the record did not reflect that the district court gave the impression that a request for further explanation of the sentence would not be entertained or that any objection would have been futile.

United States v. Ochoa, 977 F.3d 354 (5th Cir. Oct. 2, 2020). Guideline §5G1.3(c) provides that the sentence "shall be imposed to run concurrently" to an anticipated state term of imprisonment from an offense that is relevant conduct to the instant offense of conviction. But Ochoa did not present evidence that the pending state cases were part of the same course of conduct or common scheme or plan as the offense of conviction. Defense counsel's proffer that "there may be some scattered state prosecutions of relevant conduct" was insufficient. The Fifth Circuit found the district court did not err by concluding the state cases were unrelated.

United States v. Taylor, 973 F.3d 414 (5th Cir. Sept. 2, 2020). The 5th Circuit ordered a limited remand in this appeal. The defendant had challenged two parts of his felon-in-possession judgment. The 5th Circuit agreed that the district court had erred in both.

First, if a district court wants to reduce a defendant's sentence for time already served, it must do so by reducing the judgment by that amount of time and noting the reason for the reduction. Here, the district court announced that it was beginning the federal sentence as of the date the defendant was taken into custody but the written judgment ordered that the defendant "shall receive credit for time served from July 9, 2018."

The 5th Circuit noted that the district court is not permitted to compute the credit for time served or to order the backdated commencement of a sentence, because BOP alone is authorized to take these actions. *Citing United States v. Wilson*, 503 U.S. 329 (1992); *United States v. Flores*, 616 F.2d 840 (5th Cir. 1980).

Second, the 5th Circuit held that the district court's statement regarding having the federal sentence run concurrent to state sentences was ambiguous. That is so because there were multiple potential state sentences and it was unclear which one or ones the court intended to run concurrent. On both issues, the 5th Circuit ordered a limited remand—telling the district court what it must resolve on remand.

PROCEDURAL REASONABLENESS

United States v. Burney, 992 F.3d 398 (5th Cir. Mar. 29, 2021). The Fifth Circuit held the district court appropriately considered a defendant's "good childhood" as an aggravating sentencing factor. While a defendant's socioeconomic status "is never relevant at sentencing," a defendant's childhood—disadvantaged or good—is an appropriate consideration of his background and characteristics.

United States v. Coto-Mendoza, 986 F.3d 583 (5th Cir. Jan. 25, 2021). Coto-Mendoza argued that the district court did not adequately respond to his arguments for a below-Guidelines sentence when it merely stated that the sentence was imposed pursuant to 18 U.S.C. § 3553. The Court addressed whether Coto-Mendoza's procedural unreasonableness claim was preserved, despite that he made no objection at sentencing. The Court held the rule in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), that a defendant does not need to object to the unreasonableness of a sentence for a claim of substantive unreasonableness to be preserved does not apply to claims of procedural unreasonableness.

United States v. Bostic, 970 F.3d 607 (5th Cir. Aug. 18, 2020). The defendant, Bostic, pleaded guilty without a plea agreement to conspiracy to possess with intent to distribute meth. The guideline range was 21-27

months, but the district court imposed a 235-month sentence of imprisonment. The 5th Circuit, in a 2/1 decision, held that the district court needed to better explain the reason for that sentence or impose a lower one. Facts: AF was a 24-year-old woman with an enlarged heart who had recently had heart surgery. Her boyfriend gave her some heroin. When she complained about the effects, he called Bostic, a drug dealer, and asked for some meth. Bostic came over, saw the AF was having a drug overdose, and gave the boyfriend the meth. AF died. The medical examiner determined that "while it was likely that drug use contributed to AF's death, her preexisting health condition prevented a showing of but-for causation." Bostic was indicted under 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). He was not indicted for death resulting because the meth was not the but-for cause of AF's death. *See Burrage v. United States*, 571 U.S. 204 (2014). At sentencing, the guideline range was 21-27 months. Bostic argued that the 3553(a) factors counseled against a sentence outside of the range. The government argued for a "modest upward departure" because while it "can't in good faith say Bostic caused a death … he stood by and watched it and did nothing." The district court adopted the PSR but found the guideline range "wanting." The court noted that if the government had been able to charge Bostic for death resulting, he would have faced a mandatory minimum 20-year sentence. The court then sentenced Bostic to 235 months' imprisonment. Defense counsel objected that the sentence was procedurally and substantively unreasonable. The court responded "noted." The Statement of Reasons incorrectly indicated that the sentence was within the guideline range.

The 5th Circuit majority held that the district court had procedurally erred by "failing to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007). When the sentence is outside of the guideline range, the district court must state on the record the specific reason for the sentence. This explanation allows for meaningful appellate review. A major difference from the range requires a more significant and compelling justification. Because the district court offered an inadequate explanation, it abused its discretion. The majority noted that its decision should not be read as taking a position on the sentence itself.

Judge Ho dissented. He would have held that there was neither procedural nor substantive error. But he took "heart in the majority's invitation to the district court to impose precisely the same sentence on remand." And he stated that there was "nothing substantively unreasonable" about a sentence that was half of the maximum 40-year sentence set by Congress.

SUBSTANTIVE REASONABLENESS

United States v. Hudgens, 4 F.4th 352 (5th Cir. July 16, 2021). Hudgens was one of Bostic's co-defendants in a drug case that involved the death of AF, although the Government did not pursue the enhanced penalty for drug distribution resulting in death—a 240-month mandatory minimum—because the drugs distributed were not a but for cause of AF's death. Bostic's Guidelines range was 21 to 27 months, and he was sentenced to 235 months. The 5th Circuit remanded based on procedural unreasonableness—the district court failed to adequately explain that drastic increase. On remand, Bostic was sentenced to 168 months' imprisonment. Meanwhile, Hudgens's case was pending before a different panel and had been placed in abeyance pending the decision in Bostic. Hudgens's Guidelines range was 120 to 121 months, and he was sentenced to 240 months.

Unlike in *Bostic*, the Fifth Circuit did not review Hudgens's sentence for procedural reasonableness because that was not raised in the opening brief. The review for substantive reasonableness depends on the totality of the circumstances, and the district court should articulate its reasons more thoroughly for a non-Guidelines sentence. The Court held the district court did not improperly punish Hudgens for causing AF's death; instead, the court properly considered Hudgens's behavior: bringing heroin to AF's house, allowing her to ingest it even though he knew of her heart problems, recording a cell phone video instead of helping her, and disposing of evidence instead of calling 911 after she stopped breathing.

Judge Graves dissented. He argued the majority should have considered procedural unreasonableness even if it was not briefed. And he thought Hudgens was arguing procedural unreasonableness even if the argument

heading referred to substantive unreasonableness. He would have found an improper emphasis on AF's death.

United States v. Khan, 997 F.3d 242 (5th Cir. May 6, 2021). Khan pled guilty to a terrorism charge. Khan increasingly became radicalized through internet propaganda. He decided to move to the Middle East to join ISIS. Around the same time, he got in touch with Garcia. Khan told Garcia that he was planning to join ISIS in Syria and invited Garcia to come along. Garcia said that he wanted to travel with Khan to join ISIS. Khan's family found out about Khan's plans and tricked him into returning home. Meanwhile, Garcia, through contacts provided by Khan, joined ISIS, and died in Iraq fighting for ISIS.

At Khan's initial sentencing for providing material support to a terrorist organization, the district court imposed an 18-month sentence and declined to apply the terrorism adjustment. The Fifth Circuit reversed and remanded for resentencing. The government sought a 180-month sentence, which was the statutory maximum. Khan asked for the same sentence, and the district court sentenced him to 18 months. After finding the terrorism enhancement applicable, the judge gave reasons to depart downward, including Khan's lack of criminal history, studies, work, volunteering, steps toward rehabilitation, and age.

The Fifth Circuit found the 18-month sentence substantively unreasonable. The Court held that the district court failed to give "significant weight" to the seriousness of Khan's offense. Contrary to the district court's finding at sentencing, in his plea agreement, Khan explicitly agreed that the material support he provided to ISIS included his friend, Garcia. Khan agreed to the fact that he "began recruiting" Garcia to join ISIS. They were not equally enthusiastic to join.

The Court reversed Khan's sentence as substantively unreasonable and remanded for a second resentencing. And because the sentencing judge seemed immovable and displayed bias against the government, the Court reassigned the case to a different judge.

SUPERVISED RELEASE/PROBATION

United States v. Tinney, 3 F.4th 147 (5th Cir. June 29, 2021). On appeal, Tinney argued the district court improperly delegated its sentencing authority in imposing a special condition of supervised release requiring him *to follow all instructions* of the probation officer. He relies on cases that hold a district court may not require a criminal defendant to follow lifestyle restrictions or treatment requirements imposed by a private therapist as a condition of supervised release. But, the Fifth Circuit noted, that rule does not control Tinney's challenge.

Unlike the unfettered authority of a private therapist, a probation officer's authority to "instruct" a criminal supervisee is substantially limited by statute. *See* 18 U.S.C. § 3603(1) (providing that a probation officer "shall instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court"). And unlike private therapists, probation officers are appointed by, and serve at the pleasure of, the district courts. 18 U.S.C. § 3602(a). Thus, the Court found no plain error in the district court's imposition of this special condition.

United States v. Medel-Guadalupe, 987 F.3d 424 (5th Cir. Feb. 8, 2021), withdrawing opinion at 979 F.3d 1019 (5th Cir. Oct. 27, 2020). The defendant pleaded guilty to one count of harboring illegal aliens. On appeal, he argued that the district court impermissibly delegated judicial authority through the wording of two special conditions of supervised release. Specifically, he argued there was improper delegation by allowing the probation officer to decide whether the treatment will be "inpatient or outpatient" and the "modality, duration, intensity" of that treatment. The Court held no improper delegation because the district court expressly required that Medel-Guadalupe participate in the treatment program. The probation officer was not tasked with decisions regarding the core feature of the special condition. Instead, "inpatient or outpatient" and "modality, intensity, duration" are all *details* of the conditions, which can be properly delegated. The Court also noted that because Medel-Guadalupe's imprisonment term is lengthy—10 years—a court cannot predict what the need for substance abuse treatment during supervised release will be. If, upon his release nearly a decade from now,

Medel-Guadalupe disagrees with the inpatient/outpatient determination, the district court will have the final say over the decision.

The Court contrasted this case with *United States v. Martinez*, 987 F.3d 432, 435–25 (5th Cir. Feb. 8, 2021), issued the same day, which prohibited delegation of the inpatient–outpatient decision after a shorter, 10-month sentence.

United States v. Martinez, 987 F.3d 432 (5th Cir. Feb. 8, 2021), withdrawing opinion at 979 F.3d 271 (5th Cir. Oct. 27, 2020). As noted above, in *Martinez*, the Court held the condition allowing a probation officer to decide whether a defendant's treatment will be inpatient or outpatient is an improper judicial delegation. The Court addressed *Medel-Guadalupe* and distinguished it based on length of sentence imposed. If a sentence is short, like the 10-month sentence in *Martinez*, the delegation is improper, but if the sentence is long, like the 10-year sentence in *Medel-Guadalupe* then the delegation is not improper.

United States v. Huerta, 994 F.3d 711 (5th Cir. Apr. 21, 2021). District court orally pronounced special supervised release condition requiring substance abuse treatment by adopting presentence report, which recommended the condition. District court did not clearly err by delegating supervision of the "modality, duration, intensity, etc." of treatment to the probation officer. In reaching its holding, the Court compares and discusses the original decisions in *Martinez* and *Medel-Guadalupe*. In Huerta's case, the Court noted the 52-month sentence was relatively short but found no indication of improper delegation because there is no indication the probation officer will be able to independently decide "to lock Huerta up" for inpatient treatment, without the district court having the "final say" over that matter, and that to do so would be improper.

United States v. Cano, 981 F.3d 422, 426 (5th Cir. Dec. 2, 2020). District court's passing reference to Cano's lack of respect for the law does not make it plain that the district court impermissibly used Cano's history of absconding to impose an upward departure revocation sentence. A defendant's history is one of the factors that informs sentencing when supervised release is revoked. Here, whether the

district court was attempting to promote respect for the law—a factor a court is not to consider in imposing a supervised release revocation sentence—by varying upward is uncertain. Cano's speculation is insufficient to show plain error.

United States v. Cartagena-Lopez, 979 F.3d 356 (5th Cir. Nov. 2, 2020). The Fifth Circuit considered, as an issue of first impression, whether a defendant's status as a fugitive tolled his period of supervision. The court held that the fugitive tolling doctrine applies to supervised release and therefore affirmed the revocation of the defendant's supervision even though his term of supervised release would have otherwise expired.

United States v. Napper, 978 F.3d 118 (5th Cir. Oct. 8, 2020). Defendant suffered multiple revocations and raised four challenges to his most recent, all on plain error.
First, he argued that his plea agreement forbade a cumulative term of imprisonment from his revocations exceeding his original term of supervised release. His plea agreement said:

> Sentence: The minimum and maximum penalties the Court can impose include …. a term of supervised release of not more than 5 years, which must follow any term of imprisonment. If Napper violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release…

Thus, he contended that the maximum cumulative term that could be imposed over multiple revocations could not exceed "the entire term of supervised release" imposed at the original sentencing. Alternatively, he contended that under the agreement, no term of imprisonment imposed on revocation could exceed the term of release that gave rise to the revocation. The court rejected these arguments, however, because the agreement referred to "a term of supervised release of not more than 5 years." The Court thought that the singular expression "a term" referred only to the first term of release imposed, not to any term of release imposed on another revocation. As to subsequent terms of release and revocations, the document contained no agreement.

Note: this is a follow-on to *United States v. Hampton*, 633 F.3d 334 (5th Cir. 2011), which rejected a cumulative limit on post-revocation terms of release equal to the maximum term of release available at the original sentencing.

Second, defendant argued that his most recent 37-month term of imprisonment on revocation was substantively unreasonable when coupled with the 240-month term of imprisonment imposed for a new drug offense. He cited *Dean v. United States*, 137 S. Ct. 1170 (2017), for the proposition that sentencing courts should consider all consecutive sentences imposed at the same time when applying 18 U.S.C. § 3553(a). The court rejected the argument, stressing that terms of imprisonment imposed upon revocation serve different goals (including punishment for a "breach of trust") from terms of imprisonment imposed at an original sentencing. It adopted its unpublished opinion in *United States v. Daughenbaugh*, 793 F. App'x 237 (5th Cir. 2019).

United States v. McDowell, No. 19-50851 (5th Cir. Aug. 31, 2020). The defendant was on supervised release for a drug offense when he violated his conditions of release by committing assault and robbery. At the revocation hearing, the defendant pleaded not true, and the government presented a detective as the only witness. The detective testified to the victim's 911 call, in which he identified the defendant as the assailant, as well as subsequent statements by the victim. The district court revoked the defendant's supervised release. On appeal, the defendant argued that the district court had plainly erred by considering the victim's out-of-court statements without specifically finding good cause to contravene the defendant's right to confrontation.

The Confrontation Clause does not apply to revocation hearings. But because of the liberty interest at stake, there is a Due Process right to confront and cross-examine adverse witnesses. This limited right may be denied by the district court if it specifically finds good cause for doing so. Because the defendant did not object, review is for plain error. Here the 5th Circuit held the defendant had failed to show plain error. First, it is not clear or obvious that the district court is required to make this finding when the defendant makes no hearsay or confrontation objection. In the cases holding that such a finding is required, the defendants

objected in the district court. Second, the defendant cannot show that the alleged error affected his substantial rights because if the district court had done the balancing test sua sponte, it would have found good cause for considering, at a minimum, testimony about the 911 emergency call.

United States v. Abbate, 970 F.3d 601 (5th Cir. Aug. 18, 2020). The defendant was convicted of possession of child pornography and sentenced to imprisonment along with lifetime supervised release. Soon after being released from prison, he violated his supervised release. After revocation, in which the district court reimposed, among other things, the lifetime supervised release term, the def challenged two of the special conditions. First, he argued that the condition prohibiting possession of "pornographic matter" is vague and overbroad in violation of due process and the First Amendment. The 5th Circuit held that, while "pornography" is difficult to define in artistic contexts, it is not difficult in the criminal context, which provides a commonsense understanding of the term. Citing definitions in 18 U.S.C. §§ 2256(2) and (8). The Court also held that the condition did not violate the defendant's First Amendments rights because it covered adult pornography as well. The Court has found a nexus between possession of legal adult pornography and child pornography. *See United States v. Miller*, 665 F.3d 114, 136 (5th Cir. 2011). Second, the defendant argued that the special condition prohibiting his use or possession of "any gaming consoles" without prior permission is overly restrictive, in violation 18 U.S.C. § 3583(d)(2). The Court agreed. In *United States v. Montanez*, 797 F. App'x 145 (5th Cir. 2019), the 5th Circuit had held, on plain error review, that this condition was overbroad and narrowed it to a commonsense construction: a prohibition on gaming consoles that allow internet communication. The Court so modified the judgment here as well.

United States v. Garner, 969 F.3d 550 (5th Cir. Aug. 13, 2020). The 5th Circuit held that 18 U.S.C. § 3583(g), which requires revocation of supervised release and a term of imprisonment for certain drug and gun violations, is constitutional even given *United States v. Haymond*, 130 S. Ct. 2369 (2019). In *Haymond*, the Supreme Court held that a different provision of the supervised release statute, 18 U.S.C. § 3583(k), is unconstitutional. The decision was a plurality with a concurrence by Justice Breyer. Because Justice Breyer's concurring opinion was the

"narrowest grounds" it represents the "holding of the court." *See Marks v. United States*, 430 U.S. 188, 193 (1977). The concurring opinion held that § 3583(k) violates the constitution because 1) it applies only to certain federal offenses; 2) it takes away the judge's discretion on whether to impose imprisonment and for how long; and 3) it mandates a 5-year minimum sentence. Here, the 5th Circuit held that § 3583(g) is not like 3583(k), because 1) it singles out conduct, only some of which is criminal; 2) while it requires imprisonment, it does not dictate the length of the sentence; and 3) it does not require the judge impose a mandatory minimum sentence. Thus, § 3583(g) looks more like revocation as it is "typically understood"—as "part of the penalty for the initial offense" rather than punishment for a new crime. *Haymond*, 139 S. Ct. at 2396.

RESTITUTION/FORFEITURE

United States v. Kim, 988 F.3d 803 (5th Cir. Feb. 19, 2021). The Court addressed the issue of whether a defendant may appeal a restitution order in excess of the statutory maximum where he has broadly waived his right to appeal and his appeal waiver contains no provision requiring his sentence to be within the statutory maximum. The Court held that that the appeal waiver did not bar Kim's challenge to the restitution order. An otherwise valid appeal waiver is not enforceable to bar a defendant's challenge on appeal that his sentence, including the amount of a restitution order, exceeds the statutory maximum, notwithstanding the lack of an express reservation to bring such a challenge.

United States v. Madrid, 978 F.3d 201 (5th Cir. Oct. 15, 2020). A child pornography defendant challenged a series of monetary penalties, arguing that the district court erroneously assessed him a monetary penalty under the "Amy, Vicky, and Andy Child Pornography Victim Assistance Act," (AVAA). Additionally, the defendant argued that the district court erroneously believed the Bureau of Prisons (BOP) would give him credit for time incarcerated on state charges prior to going into federal custody. Despite the presence of an appeal waiver, the Fifth Circuit decided to reach the merits and affirmed. Regarding the AVAA, the court held that a monetary penalty under the AVAA is separate and distinct from restitution, and a special assessment under 18 U.S.C. §

2259A does not require identification of a victim and proof of losses, the district court did not err in assessing a monetary penalty under the AVAA. Regarding the district court view of BOP credit, the Court interpreted the record as showing that the district court was aware that it lacked authority to determine if time in state custody should be credited towards a sentence. The district court did, however, have the authority to vary downward at sentencing and declined to do so.

United States v. Comstock, 974 F.3d 551 (5th Cir. Sept. 9, 2020). The defendant and others were charged with conspiracy to commit wire fraud and six counts of aiding and abetting wire fraud. These charges were the result of Comstock ordering his employees to fabricate time sheets to justify his company's billings to the City of San Antonio, with whom his company had a contract to provide janitorial services at the Alamodome. The jury convicted Comstock on all charges, and he was sentenced to 25 months in prison and over $350,000 in restitution. On appeal, Comstock challenged his sentence, arguing that the district court erred in its loss calculation and its restitution amount, which was the same as the loss calculation. Because the loss calculation was a very conservative estimate, the 5th Circuit held there was no error. As to restitution, the Court noted that the district court had offered to hold a separate restitution hearing, but defense said no.

United States v. Penn, 969 F.3d 450 (5th Cir. Aug. 5, 2020). The defendant was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g). The defendant argued that the district court erred by ordering him to pay restitution for damages during an associated shoot out and automobile crash. Restitution can be imposed only by statute. 18 U.S.C. § 3663 allows for restitution to the victim of the defendant's offense. The Supreme Court has held that the statute authorizes restitution "only for the loss caused by the specific conduct that is the basis for the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990). This is known as the "*Hughey* rule." The 5th Cir held that the court erred in imposing the restitution order under § 3663 because the victim's losses were not caused by the § 922(g) offense conduct. The Court also held that the restitution could not be imposed as a condition of supervised release because the *Hughey* rule applies to 18 U.S.C. 3583(d) as well. Note: Lucien B. Campbell, former Federal Public

Defender for the Western District of Texas, argued and won *Hughey* before the Supreme Court.

VIII. APPEALS

United States v. Muhammad, ___ F.4th ___, 2021 WL 4205213 (5th Cir. Sept. 16, 2021). The issue was whether the district court erred by failing to instruct the jury that the government had to prove, beyond a reasonable doubt, that Muhammad knew he was dealing with a controlled substance. When the controlled substance is an analogue, the government can satisfy the knowledge element in one of two ways, by showing that 1) the defendant knew the substance was controlled under the Analogue Act, or 2) the defendant knew the specific features of the substance that make it a controlled substance analogue. *McFadden v. United States*, 576 U.S. 186 (2015).

The Fifth Circuit held that the district court erred by failing to properly instruct the jury. But this was not, as Muhammad argued, structural error. *Neder v. United States*, 527 U.S. 1 (1999). The Court held that any indications otherwise in its opinion in *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), squarely conflicted with the Supreme Court precedent.

United States v. Onyeri, 996 F.3d 274 (5th Cir. Apr. 28, 2021). As a matter of first impression, the Fifth Circuit holds that the defendant was required to file second timely notice of appeal in order to obtain review of the final order of garnishment. In Onyeri's case, the final order of garnishment arose when the government sought to enforce the restitution order via the Fair Debt Collection Practices Act. The order was issued several months after the initial judgment and followed a proceeding that looked more civil than criminal, even though it proceeded under the same criminal docket number as the underlying criminal prosecution.

United States v. Emakoji, 990 F.3d 885 (5th Cir. Mar. 9, 2021). Emakoji entered a plea agreement to plead guilty to fraud charges. He

was living in Alabama at the time he entered into the plea agreement. He requested two continuances of the plea hearing, citing fears about traveling to the courthouse during the Covid pandemic. The district court declined and sua sponte ordered Emakoji to obtain housing in the Northern District of Texas. Emakoji appealed the court's pretrial housing order.

The Fifth Circuit noted the collateral order doctrine allows an appeal before final judgment where the district court's order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. It is generally limited to the denial of: (1) motions to reduce bail; (2) motions to dismiss on double jeopardy grounds, and (3) motions to dismiss under the Speech or Debate Clause. The district court's pretrial housing order did not fall within the grounds for a collateral appeal. The Court declined to extend the collateral order doctrine's reach to societal interests such as preventing spread of Covid-19.

United States v. Strothers, 977 F.3d 438 (5th Cir. Oct. 9, 2020). The 5th Circuit held that appeal waivers including an ineffective assistance of counsel (IAC) exception do not preclude appeal of a motion to withdrawal the guilty plea premised on IAC; defendant seeking to withdraw plea must make substantial showing of innocence for "protestation of innocence" factor to weigh in his or her favor. The defendant was indicted for being a felon in possession of a firearm. Trial counsel sought to withdraw after jail calls surfaced between defendant and his partner. But this motion was itself withdrawn after defendant decided to plead guilty and waive appeal. Subsequently, however, defendant again moved to withdraw the plea, alleging a conflict of interest by counsel, and submitting affidavits from himself and his partner attesting to his innocence. Trial counsel then successfully withdrew. The court denied the motion to withdraw the plea. Defendant appealed, challenging the denial of the motion to withdraw the plea.

The Fifth Circuit first addressed whether appeal waiver's exception for "ineffective assistance of counsel" permitted an appeal of the denial of the motion to withdraw the plea of guilty. Court held that it permitted the

appeal because the IAC claim was central to the motion to withdraw the plea.

The Court applied the familiar 7-factor *Carr* test and affirmed. As to the first factor—whether the defendant asserted innocence—the court held that district courts could weigh competing evidence of innocence in deciding the weight to give this factor. It did not think the district court erred in giving the plea colloquy more weight than the affidavits asserting innocence. The remaining factors, including a three-month delay, were held not to support withdrawal.

United States v. Napper, 978 F.3d 118 (5th Cir. Oct. 8, 2020). Defendant suffered multiple revocations and raised four challenges to his most recent, all on plain error. The court applied plain-error review to a substantive reasonableness claim, notwithstanding *Holguin-Hernandez v. United States*, 140 S.Ct. 762 (2020), because the trial attorney made no argument for a sentence below the statutory maximum at the revocation.

United States v. Lindsey, 969 F.3d 136 (5th Cir. Aug. 5, 2020). This case was remanded from the Supreme Court because the 5th Circuit had affirmed the district court by relying on the circuit rule that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." The Supreme Court rejected that rule in *Davis v. United States*, 140 S. Ct. 1060 (2020). The 5th Circuit proceeded to analyze the defendant's challenge to the district court's ordering his sentence to run consecutive to any further state sentence imposed for earlier state charges. The defendant argued that the order was erroneous because the state charges were based on offenses that were relevant conduct for this federal offense. The 5th Circuit then did an extensive analysis of the law regarding relevant conduct, consecutive/concurrent sentences, and anticipated state sentences. Whether the offenses were part of the same course of conduct—the degree of similarity, the regularity, and the time interval between the offenses. In the end, the 5th Circuit held that the offenses were not part of the same course of conduct and thus the district court did not err in ordering the sentence consecutive to the anticipated state sentences.

IX. POST-CONVICTION

United States v. Garrett, ___ F.4th ___, 2021 WL 4099601 (5th Cir. Sept. 9, 2021). Garrett, an inmate at BOP, filed a motion for compassionate release (CR) with the district court in May 2020, based on the pandemic and his health conditions making him more susceptible to serious illness from the virus. In the motion, he stated that he had requested CR from the BOP warden in April and May 2020. He also requested in June 2020, and the BOP acknowledged receipt of this request and denied it in July. The district court denied Garrett's CR for failing to exhaust administrative remedies. He filed a motion for reconsideration in October 2020 that the district court denied for failure to exhaust. Garrett appealed.

Under 18 U.S.C. § 3582(c)(1)(A), a prisoner can file his CR motion in the district court upon expiration of one of two events: 1) full exhaustion of administrative remedies, or 2) after the lapse of 30 days from the receipt of such a request by the warden. In denying the CR, the district court held that so long as the BOP responds to the prisoner's request within 30 days, the inmate is required to pursue the administrative remedies process with the BOP to its conclusion before filing a CR with the court. The Fifth Circuit held that the district court was incorrect.

However, the majority held that the district court was correct in its initial ruling, that Garrett had failed to exhaust because the requisite 30-day period had not yet lapsed. Although at the time of the motion for reconsideration the 30 days had lapsed, the Fifth Circuit held that reconsideration was not the proper vehicle. Garrett should have filed a new CR motion instead. Therefore, the district court was affirmed.

Judge Graves dissented. He agreed with that the district court had misinterpreted the exhaustion requirement. However, he disagreed that the court arrived at the correct outcome. He noted that there is a circuit split on the question of whether a prisoner may file a CR motion in federal court 30 days after submitting his request to BOP, regardless of whether the warden responds during that period. *See United States v. Harris*, 973 F.3d 170 (3d Cir. 2020); *United States v. Gunn*, 980 F.3d 1178 (7th Cir.

2020). *See also United States v. Ward*, 832 F. App'x 334 (5th Cir. 2020) (discussing split).

United States v. Castro, 4 F.4th 345 (5th Cir. July 14, 2021). The Fifth Circuit held, as a matter of first impression, that the grant of a certificate of appealability (COA) that did not raise a constitutional claim was a patent error warranting vacatur of the COA and dismissal of the appeal. Even when the district court identifies relief on a procedural ground, the COA must identify a constitutional issue to be valid. *See Gonzalez v. Thaler*, 565 U.S. 134 (2012). The parties agreed the COA was invalid, but Castro argued that once a COA is issued, it cannot be vacated. The Court rejected that argument.

United States v. Clark, 852 F. App'x 812 (5th Cir. April 27, 2021) (per curiam). Fifth Circuit grants relief on a successive 28 U.S.C. § 2255 based on *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the residual clause in the definition of crime of violence in 18 U.S.C. § 924(c) was unconstitutionally vague. The Court held Clark passed the jurisdictional hurdle to successive § 2255 relief because he proved the relief he sought relied on a new, retroactive rule of constitutional law and that it was more likely than not that the district court sentenced him under the part of § 924(c)'s crime-of-violence definition rendered unconstitutional. Clark's § 924(c) conviction was premised on a theft of firearms from a federal firearms licensee offense. Because the offense lacks an element of force, the § 924(c) conviction must have been premised on the now invalidated residual clause.

The Fifth Circuit also held that the district court abused its discretion by *sua sponte* denying relief based on a finding of procedural bar, where the government intentionally waived that defense and Clark had minimal notice regarding the procedural bar issue.

United States v. Cooper, 996 F.3d 283 (5th Cir. Apr. 28, 2021). Cooper, who was serving 40-year sentence for drug-trafficking and firearms convictions, filed a motion for compassionate release under the First Step Act, based on extraordinary and compelling reasons, including the non-retroactive changes to the way firearms offenses under 18 U.S.C. § 924(c) are punished. The district court agreed that if Cooper were sentenced

today, he would be subjected to a significantly lower sentence because of the non-retroactive changes to § 924(c). But, the court noted the unsettled caselaw as to whether it had discretion to consider "extraordinary and compelling reasons" not articulated by the Sentencing Commission's corresponding policy statement, § 1B1.13. But the district court expressly invited Cooper to renew his motion if the Fifth Circuit clarified the scope of its discretion under the First Step Act.

While the case was pending on appeal, the Fifth Circuit held in *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021) that the district court is not bound by § 1B1.13 when considering compassionate release motions brought by prisoners. The Court rejected the government's argument that the district court denied Cooper's motion based exclusively on the sentencing factors under 18 U.S.C. § 3553(a). The Court remanded the case so that the district court could reassess Cooper's motion for compassionate release.

United States v. Shkambi, 993 F.3d 388 (5th Cir. Apr. 7, 2021). The Fifth Circuit reverses a district court's determination that it lacked jurisdiction to modify Shkambi's sentence based on the "compassionate release" provisions in 18 U.S.C. § 3582(c)(1)(A). The key portion of the decision is the Court's determination that a district court is not bound by the old pre-First Step Act of 2018 (FSA) policy statement in U.S.S.G §1B1.13 that limited compassionate release sentence reductions to those based on motion by the Bureau of Prisons. The FSA eliminated the requirement for a § 3582 motion to be brought by the BOP. For the first time, prisoners like Shkambi could move on their own accord. The Court concluded that the limitations in policy statement §1B1.13 pertain only to motions filed by BOP, not to motions filed by a prisoner on his or her own behalf. The district court on remand is bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a).

United States v. Winters, 986 F.3d 942 (5th Cir. Feb. 3, 2021). Winter's conviction for a dual-object conspiracy involving both crack cocaine and powder cocaine was a covered offense under the First Step Act.

United States v. Batiste, 980 F.3d 466 (5th Cir. Nov. 13, 2020). The defendant sought to reduce his sentence for crack cocaine under the First

Step Act. The effect of the First Step Act was to reduce his statutory range from 20 years to life to 10 years to life. He argued that a reduction was warranted in light of post-sentencing conduct, the circumstances of his case, and the 18 U.S.C. § 3553(a) factors. The Fifth Circuit affirmed the sentence, emphasizing that the district court has discretion under the First Step Act and that it did not rely on a misinterpretation of either prior precedent or the Act itself. The Court, however, remanded for the district court to consider the proper term of supervised release.

Atkins v. Hooper, 979 F.3d 1035 (5th Cir. Nov. 3, 2020), withdrawing opinion at 969 F.3d 200 (5th Cir. Aug. 7, 2020). Atkins argued that the state court's decision denying his Sixth Amendment right to confrontation was contrary to and involved an unreasonable application of Supreme Court precedent. The 5th Circuit initially agreed but, after rehearing, decided any error was harmless. In Louisiana state court, Atkins was charged with robbery. At his jury trial, in opening statement, the prosecutor stated that a Lawrence Horton was also involved in the robbery and would testify that he met Atkins the morning of the robbery and they went over to the victim's house; Atkins kicked in the door and robbed and beat the victim. During trial, the prosecutor questioned Detective Dowdy (really):
Q: Did you speak with Horton? A: Yes
Q: Did he provide a statement? A: Yes
Q: was the statement inculpatory? A: Yes
Q: did he implicate somebody else? A: Yes
Q: Alright, he implicated someone else. What did you do next with regard to your investigation?
A: Based on the information that Horton provided, I was able to obtain a warrant.
Q: For whom? A: Atkins.
The State rested without calling Horton. In closing argument, the prosecutor stated that Detective Dowdy interviewed Horton and then obtained an arrest warrant for Atkins. Atkins was convicted. The state courts denied Atkins' applications for post-conviction relief. The federal district court denied his § 2254 application and certificate of appealability. The 5th Circuit granted certificate of appealability.
1) The 5th Circuit will not consider procedural default when the government intentionally waived the procedural defense, as it did here.

2) To determine whether the state court decision was contrary to or involved an unreasonable application of Supreme Court precedent, the 5th Circuit must first identify the "last reasoned decision" by the state courts. The LA Supreme Court decision referred only to a state procedural provision in apparently addressing this issue as well as Atkins' IAC claims. It was not sufficient for the needed analysis. The LA court of appeals decision listed a string cite and failed to provide sufficient reasoning. So, the 5th Circuit reviewed the decision of the state district court.

The district court denied Atkins post-conviction application, holding that 1) Atkins right to confrontation was not violated because Det. Dowdy's testimony did not refer to Horton's actual out of court statements and so was not hearsay, and 2) Det. Dowdy's testimony was permissibly used to explain the events that led up to Atkins arrest. The 5th Circuit held, as to the first reason, that it was an unreasonable application of the holding in *Gray v. Maryland*, 523 U.S. 185 (1998), in which the Supreme Court held that the defendant's confrontation clause rights were violated by admission of redacted statements that obviously refer to the defendant.

The Court did not go further (in its revised opinion) because, even though the State did not raise harmlessness, the Court did. It found the challenged testimony was harmless.

Judge Costa dissented. He argued that considering the State's harmlessness argument, raised in the petition for rehearing but not in the earlier briefing, was unfair—particularly after the panel had decided after full briefing and oral argument not to sua sponte raise harmlessness even though it recognized it had the discretion to do so. "[T]he leniency the majority affords the government's forfeiture is hardly, if ever, shown when habeas prisoners fail to raise an issue in the district court." He took issue with the majority's claim it is "desirable in most AEDPA cases to consider harmlessness": "A presumption that excuses the state, but not pro se litigants, for failing to raise an issue in the district court is not consistent with equal justice under law."

United States v. Franco, 973 F.3d 465 (5th Cir. Sept. 3, 2020). The defendant filed a motion for compassionate release (CR), under 18 U.S.C.

§ 3582(c)(1)(A), with the district court. She had not filed a request for CR with the BOP and argued that she should be excused because of the COVID crisis. The court dismissed the motion, without prejudice to the defendant refiling it once she had exhausted administrative remedies. The defendant appealed to the 5th Circuit instead. The 5th Circuit held that, under the language of the First Step Act, a "court may not modify a term of imprisonment" if the defendant has not filed a request with BOP. While the request to BOP is not a jurisdictional requirement, it is a mandatory claims processing rule. The defendant argued that because she was being held at a halfway house (a Residential Reentry Management Facility) there was no warden to make the request to. The 5th Circuit pointed out that BOP regulations define "warden" to include "the chief executive officer of … any federal penal or correctional facility." Accordingly, individuals who are in federal, but not BOP, custody may file the request for CR with the chief executive officer of the facility in which they are housed.

United States v. Valdez, 973 F.3d 396 (5th Cir. Sept. 1, 2020). Valdez filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel because his defense attorney never advised him that the murder cross-reference could apply to calculate his guidelines range. The district court denied the 2255, and the 5th Circuit affirmed. Valdez was charged with being a felon in possession of a firearm. This charge stemmed from Valdez, at his home, shooting another man. Counsel advised Valdez that his Guidelines range was 27-33 months. Valdez requested a jury trial. After the jury was selected and sworn, the district court informed Valdez that it was not going to allow a justification defense. After discussing with his attorney, Valdez pleaded guilty. At sentencing, his guideline range was 324-405 months based on the murder cross-reference. Valdez was sentenced to the statutory maximum on 120 months. After Valdez filed his 2255, his attorney filed an affidavit in which he admitted he had not considered the murder cross-reference and, in fact, had never told Valdez that the court could consider the murder in sentencing him on the felon in possession charge.

The 5th Circuit majority (2/1) held that Valdez had failed to show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) he was prejudiced. *Strickland v. Washington*,

466 U.S. 668 (1984). The majority found that counsel's performance was not deficient because he had advised Valdez of the statutory maximum and that his guideline estimate was not a guarantee. In a footnote, the majority also stated that "it is not at all uncommon for a cross-reference to be overlooked," and the court routinely deals with reversible plain error based on guideline mistakes. Valdez was not prejudiced because he decided to plead guilty because the district court had refused his justification defense. It was a strategic decision by counsel that Valdez might be able to get some benefit from a guilty plea that he could not get from a jury trial.

Judge Wiener dissented. That majority seems to indicate that as long as defense counsel informs the client of the statutory maximum his/her performance will not be deficient. Disagrees because the sentencing guidelines, even if discretionary, are still the lodestone for federal sentencing. Points to the ABA standards, and others, requiring defense counsel to "investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practice of the sentencing judge, and advise the client on all of these matters." Criminal Justice Standards for the Def. Function § 4-6.3 (Am. Bar Ass'n 4th ed. 2017). The judge also points to decisions of many other federal circuit courts requiring defense counsel to make a minimally competent guideline estimate or at least a good faith attempt. There is also 5th Circuit precedent supporting that position as well. *See, e.g.*, *United States v. Rivas-Lopez*, 678 F.3d 353 (5th Cir. 2012). And there is no 5th Circuit binding precedent holding that informing the defendant of the maximum sentence renders counsel's otherwise erroneous guideline calculation reasonable under *Strickland*. The counsel's performance in making a guideline calculation is unreasonable when, because of ignorance of basic guideline provisions, counsel makes an error of significant magnitude. That is what happened here. Counsel had to do little more than read the guideline—as the cross-reference is in the same section that estimates the base offense level—to avoid a plainly incorrect estimate. But counsel also failed to understand the basic structure and mechanics of the guidelines. Counsel entirely failed to advise Valdez that he could effectively be sentenced for murder. When, as here, counsel grossly misestimates a guideline calculation b/c of ignorance of a plainly obvious provision his performance is unreasonable.

The dissenting judge would also find that Valdez was prejudiced. There is a reasonable probability that had Valdez been correctly informed about the cross-reference, he would not have pleaded guilty. Counsel's error led Valdez to believe there was a real benefit from pleading guilty in the potential 3-level reduction for acceptance. But with the correct calculation, even with 3 levels off, the guideline range would have been above the statutory maximum. Even though the chance of acquittal was small, when the consequences of plea or trial are similarly dire, a potential acquittal may look attractive.