

**SIGNIFICANT DECISIONS:
UNITED STATES SUPREME COURT AND
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**Dallas, Texas
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*** Supreme Court case law from January 1, 2008, through April 6, 2009; and
Fifth Circuit case law from January 1, 2008, through February 10, 2009.**

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I. BAIL AND DETENTION

II. SEARCH AND SEIZURE

Virginia v. Moore, ____ U.S. ____, 128 S. Ct. 1598 (2008) (decision below: Moore v. Commonwealth, 636 S.E.2d 395 (Va. 2006)) A police officer does not violate the Fourth Amendment by making an arrest based on probable cause but prohibited by state law; accordingly, respondent's Fourth Amendment rights were not violated when Virginia state police arrested him upon probable cause he had committed an offense that was not an arrestable offense under Virginia state law. (Justice Ginsburg filed an opinion concurring in the judgment.)

Herring v. United States, ____ U.S. ____, 129 S. Ct. 695 (2009) (decision below: United States v. Herring, 492 F.3d 1212 (11th Cir. 2007)) County's failure to update its records to show that an outstanding arrest warrant had been recalled months earlier, resulting in defendant's erroneous arrest on the recalled warrant and search pursuant to arrest, even if a violation of the Fourth Amendment (which the Court assumed for purposes of decision), did not require suppression of the gun and drug evidence discovered as a consequence of the erroneous arrest/search; when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply; here, there was no evidence that errors in the county's records system were either routine or widespread. (Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, filed a dissenting opinion arguing that the exclusionary remedy was warranted even for negligent recordkeeping errors, given "the paramount importance of accurate recordkeeping in law enforcement" and the likely deterrent effect of applying the exclusionary rule to such errors. Justice Breyer, joined by Justice Souter, filed a dissenting opinion in which he "would apply the exclusionary rule when police personnel [as opposed to court personnel, see Arizona v. Evans, 514 U.S. 1 (1995),] are responsible for a recordkeeping error that results in a Fourth Amendment violation.")

Pearson v. Callahan, ____ U.S. ____, 129 S. Ct. 808 (2009) (decision below: Callahan v. Millard Cty., 494 F.3d 891 (10th Cir. 2007)) Under Saucier v. Katz, 533 U.S. 194 (2001), federal courts considering whether law enforcement officers were entitled to qualified immunity for alleged constitutional violations were generally required to decide first whether there was a constitutional violation, and, only if so, whether the violation was "clearly established" so that the officers should have been on notice of the unconstitutionality of their behavior; under the Saucier rubric, the Tenth Circuit found that a warrantless search of plaintiff's home violated the Fourth Amendment; the Tenth Circuit declined to adopt the "consent once removed" exception to the Fourth Amendment warrant requirement adopted by other circuits, which authorized police officers to enter a home without a warrant immediately after an undercover informant bought drugs inside; the Tenth Circuit then found that the officers were not entitled to qualified immunity for the warrantless search; on review, the Supreme Court held that Saucier does not inflexibly require lower federal courts to decide a difficult constitutional question first, when the case may be easily disposed of on the question of qualified

immunity (i.e., whether the alleged constitutional violation is “clearly established”); applying this option here, the Court held that defendant officers were entitled to qualified immunity; it was not clearly established that the warrantless search here was unconstitutional, given that several state supreme courts and federal courts of appeals had accepted the “consent once removed” doctrine.

Arizona v. Johnson, ____ U.S. ____, 129 S. Ct. 781 (2009) (decision below: State v. Johnson, 170 P.3d 667 (Ariz. App. 2007)) Police officer’s patdown search of passenger in a vehicle that had been lawfully stopped did not violate the Fourth Amendment; in a traffic-stop setting, the first condition of Terry v. Ohio, 392 U.S. 1 (1968) – a lawful investigatory stop – is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation; the police need not have, in addition, cause to believe any occupant of the vehicle is involved in a criminal activity; to justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous; here, defendant was still lawfully detained pursuant to a valid vehicle stop, and thus could be patted down if the police had a reasonable belief that he was armed and dangerous; given that the court below had merely assumed, without deciding, that such a reasonable belief existed, the Supreme Court reversed the judgment below and remanded for further proceedings.

Arizona v. Gant, cert. granted, ____ U.S. ____, 128 S. Ct. 1443 (Feb. 25, 2008) (No. 07-542) (granting cert. to State v. Gant, 162 P.3d 640 (Ariz. 2007)) Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle’s recent occupants have been arrested and secured?

United States v. Troop, 514 F.3d 405 (5th Cir. 2008) District court reversibly erred in denying defendant’s motion to suppress; warrantless search of defendant’s home was not justified by exigent circumstances because the evidence did not support a finding that it was necessary to enter the home in order to provide immediate, emergency medical aid to the illegal aliens suspected to be within; because the search of defendant’s home was thus not permitted under the Fourth Amendment, the Fifth Circuit reversed the district court’s order denying defendant’s motion to suppress, vacated defendant’s conviction, and remanded for further proceedings.

United States v. Mata, 517 F.3d 279 (5th Cir. 2008) District court did not err in upholding the warrantless protective search conducted of defendant’s commercial garage; the search was not justifiable as a search incident to arrest or a search of immediately adjoining areas to prevent surprise attacks (neither of which requires any quantum of particularized suspicion); however, the protective search did pass muster under the third variation of protective searches, namely, protective sweeps conducted of larger areas where the police have articulable facts plus rational inferences that allow a reasonable officer to suspect that an individual dangerous to the officers is within the area to be searched; the police did not manufacture the exigent circumstances that justified their entry without a warrant; furthermore, the district court did not err in holding that a more comprehensive search of

the garage was justified by defendant's and his wife's consent. (Judge Jolly concurred in the judgment only.)

United States v. Looney, 532 F.3d 392 (5th Cir. 2008) District court did not err in denying one defendant's motion to suppress evidence recovered from his home pursuant to a search warrant; although the district court did find that one statement in the search warrant affidavit was false, the district court also found that the inclusion of the false statement was inadvertent, not deliberate or reckless so as to require excision of the statement under Franks v. Delaware, 438 U.S. 154 (1978), and that finding was not clearly erroneous; the district court thus did not err in invoking the good faith exception and examining the entire warrant affidavit, including the challenged statement, to see whether it established probable cause; with respect to other alleged false statements in the indictment, these were raised for the first time on appeal, and, even if they were not waived, the district court did not plainly err by failing sua sponte to excise those statements.

United States v. Casper, 536 F.3d 409 (5th Cir. 2008):

(1) With respect to one search challenged by defendant, district court did not abuse its discretion in declining to hold an evidentiary hearing on defendant's motion to suppress; although defendant did not stipulate to the government's account of events, he did not offer an alternative account or specifically contest that he was arrested before the search; instead, his motion to suppress raised principally a legal challenge; without defendant's presenting an alternate account, the court could not have known that there were any disputed facts that required a hearing; failure to stipulate to the government's version of the facts is insufficient to mandate a hearing.

(2) With respect to another search challenged by defendant, telephone complaint to the Dallas Police – alleging that complainant's life had been threatened at a motel by a white male with a firearm who was driving a white Ford Ranger pickup truck with Illinois license plates – provided reasonable suspicion to stop defendant, who was observed leaving the motel parking lot in a white Ford Range pickup with Illinois plates; the tip was not anonymous because instant caller identification allowed the police to trace the identity of the telephone informant; the ready identifiability of the caller increased the reliability of the tip; moreover, an informant who explains the basis for his knowledge increases his reliability, especially if he is a person relating the details of a crime he has personally suffered; finally, the specificity of the information in the tip and the fact that the tip addressed very recent events also indicated reliability and helped create reasonable suspicion. (Judge Dennis filed an opinion specially concurring and concurring in the judgment in which he questioned some of the premises on which the majority had based its finding of reasonable suspicion, but he ultimately agreed with that finding.)

United States v. Baker, 538 F.3d 324 (5th Cir. 2008) In child pornography prosecution, district court did not reversibly err in denying defendant's motion to suppress evidence obtained pursuant to a search, with a warrant, of defendant's residence; defendant's appellate claim – that the warrant affidavit contained misstatements that were intentional or made with reckless disregard for the truth – was not made in the district court; **although noting a circuit split on the issue**, the Fifth

Circuit held that, consistent with its precedent, the issue was waived (not simply forfeited) by the failure to raise it below; even if issue was not waived, but simply forfeited, district court did not plainly err in failing to find intentionally or recklessly made erroneous statements in the warrant affidavit.

United States v. Vickers, 540 F.3d 356 (5th Cir. 2008) In prosecution for possession of a firearm by a previously convicted felon, district court did not err in denying defendant's motion to suppress the warrantless stop and frisk leading to the gun which formed the basis for the prosecution; the basis for the stop was a 911 call by an identified person who claimed that his home had just been burglarized and who gave a description that matched defendant, who was found close to the caller's home; for purposes of establishing reasonable suspicion, there is a presumption of reliability attaching to an eyewitness 911 call reporting an emergency situation, particularly when the caller identifies who he or she is; because the 911 caller gave his name and other information to identify both himself and the burglar, the 911 call was sufficiently detailed to establish reasonable suspicion to stop defendant; nor was it unreasonable for the police to frisk defendant once they had stopped him, because, based on the situation and their experience, the police had a reasonable belief that a frisk was required for their safety.

United States v. Zavala, 541 F.3d 562 (5th Cir. 2008) In drug prosecution, district court reversibly erred in denying defendant's motion to suppress the fruits of the search of his cellphone at the time of his arrest; at the time the police searched defendant's cellphone, the police had a reasonable suspicion of drug trafficking activity, but they did not have probable cause to arrest him and charge him with a crime; therefore, the search could not be upheld as a valid search incident to arrest; nor was the search of the cell phone permissible under a consent theory; given that defendant's phone was immediately removed from his person and placed on the roof of his car, it was not objectively reasonable to understand his consent to search the car as consent to search the phones; nor was the search of the cellphone the equivalent of a routine license check; the Fifth Circuit also held that the government could not rely on the "independent source" doctrine to prevent application of the exclusionary rule, because the information unlawfully obtained was of a higher quality and from a better source (a police officer) than the similar information obtained from defendant's co-conspirator; the Fifth Circuit also refused to apply the "inevitable discovery" doctrine because, on the record before the Fifth Circuit, the government did not establish by a preponderance of the evidence that there was a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct; because the erroneous admission of this evidence was not harmless beyond a reasonable doubt, the Fifth Circuit reversed defendant's convictions and remanded for a new trial.

United States v. Garcia-Ruiz, 546 F.3d 716 (5th Cir. 2008) Fifth Circuit declined to reach the merits of defendant's suppression-of-evidence claim because even if the district court erred in its suppression ruling, the error was rendered harmless by the fact that, in connection with a bench trial on the charge of conviction, defendant stipulated to facts that easily established his conviction beyond a reasonable doubt; in other words, to establish defendant's guilt, the government no longer needed the evidence he claimed should have been suppressed; unlike in United States v. Mendoza,

491 F.2d 534 (5th Cir. 1974) (where the Fifth Circuit did examine the merits of a suppression issue notwithstanding the defendants' stipulation to all the essential elements necessary for their conviction), here defendant did not, when he stipulated to the facts, expressly reserve his right to appeal from the order denying his motion to suppress.

III. INTERROGATIONS AND CONFESSIONS/FIFTH AMENDMENT

Corley v. United States, ____ U.S. ____, 2009 WL 901513 (Apr. 6, 2009) (decision below: United States v. Corley, 500 F.3d 210 (3d Cir. 2007)) Although 18 U.S.C. § 3501(c) limited the rule of McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957) (requiring suppression of a confession obtained in violation of the requirement that an arrested defendant be promptly presented to a judge), § 3501(c) did not completely eliminate the McNabb/Mallory rule; under the rule as revised by § 3501(c), a district court with such a confession claim must find whether the defendant confessed within six hours (or a reasonable transportation delay period); if the confession came within that safe-harbor period, it is admissible, subject to the other Rules of Evidence, so long as it was made voluntarily and the weight to be given it is left to the jury; if, however, the confession occurred before presentment and beyond six hours, the court must decide whether delaying that long was unreasonable or unnecessary under McNabb and Mallory, and if it was, the confession is to be suppressed, regardless of its voluntariness. (Justice Alito filed a dissenting opinion, in which he was joined by Chief Justice Roberts and Justices Scalia and Thomas.)

Kansas v. Ventris, cert. granted, ____ U.S. ____, 129 S. Ct. 29 (Oct. 1, 2008) (No. 07-1356) (granting cert. to State v. Ventris, 176 P.3d 920 (Kan. 2008)) Is a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," Michigan v. Harvey, 494 U.S. 344, 354 (1990), admissible for impeachment purposes – a question the Court expressly left open in Harvey and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

Montejo v. Louisiana, cert. granted, ____ U.S. ____, 129 S. Ct. 30 (Oct. 1, 2008) (No. 07-1529) (granting cert. to State v. Montejo, 974 So.2d 1238 (La. 2008)) When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present? (By post-argument order of March 27, 2009, the Court asked the parties to brief this additional question: Should the Court overrule its decision in Michigan v. Jackson, 475 U.S. 625 (1986)?)

Maryland v. Shatzer, cert. granted, ____ U.S. ____, 129 S. Ct. 1043 (Jan. 26, 2009) (No. 08-680) (granting cert. to Shatzer v. State, 954 A.2d 1118 (Md. 2008)) Is the Edwards v. Arizona prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody

or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda v. Arizona?

United States v. Guanespen-Portillo, 514 F.3d 393 (5th Cir. 2008) District court did not err in failing, sua sponte, to hold a hearing on the voluntariness of one defendant's Miranda waiver and confession, where the defendant failed to request one; under the Fifth Circuit's precedent, a district court must hold a hearing on the voluntariness of a confession sua sponte when the evidence clearly reflects an issue of voluntariness; here, however, the evidence as a whole did not clearly raise a question before the judge of the voluntariness of the defendant's waiver or confession, for the same reason, the district court did not plainly err in failing to instruct the jury, sua sponte, to consider the voluntariness of the confession, as required by 18 U.S.C. § 3501(a) (even assuming that § 3501(a) survives the Supreme Court's decision in Dickerson v. United States, 530 U.S. 428 (2000), a question that the Fifth Circuit did not decide).

United States v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008) In prosecution of defendant for making false statements in his application for naturalization as a United States citizen as well as during his naturalization interview, district court reversibly erred in suppressing the statements made by the defendant in his naturalization interview; whatever the extent of due process protections attaching to naturalization proceedings (which question the Fifth Circuit did not decide), the true basis for the district court's suppression of the statements – that incompetent translation of the questions posed to defendant during the interview caused him to misunderstand, and hence misanswer, those questions – was flawed; the record simply did not support a finding of fundamental ambiguity, necessary in order to uphold the district court's order suppressing defendant's statements.

IV. OTHER PRETRIAL MATTERS

A. Double Jeopardy/Multiplicity

Yeager v. United States, cert. granted, ___ U.S. ___, 129 S. Ct. 593 (Nov. 14, 2008) (No. 08-67) (granting cert. to United States v. Yeager, 521 F.3d 367 (5th Cir. 2008)) When a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, does collateral estoppel bar a retrial on the hung counts?

United States v. Yeager, 521 F.3d 367 (5th Cir. 2008), **cert. granted**, ___ U.S. ___, 129 S. Ct. 593 (Nov. 14, 2008) (No. 08-67) In fraud/insider trading/money laundering prosecution, reprosecution of defendants was not barred by the collateral estoppel strand of the Fifth Amendment's protection against double jeopardy; in order to invoke protection under the collateral estoppel doctrine, defendants have the burden of showing that one of the facts necessarily determined

in the former trial is an essential element of the offense sought to be prosecuted in the second trial; here, as to two of the three defendants under consideration, the acquittals did not necessarily represent a favorable factual finding precluding prosecution on the mistried counts; as to the third defendant, looking only at the acquitted counts, it appeared that collateral estoppel would indeed bar reprosecution; however, Fifth Circuit precedent requires the court to weigh mistried counts as well as counts resulting in acquittal; in other words, collateral estoppel does not apply if the uncertainty raised by the mistried counts precludes a defendant from meeting his burden of showing the jury necessarily determined, in his favor, the issue he seeks to foreclose; accordingly, collateral estoppel did not bar the retrial of any of the three defendants.

United States v. Ogba, 526 F.3d 214 (5th Cir. 2008) Although defendant waived claim of multiplicity of counts by failing to file a pretrial motion, he could still raise a claim of multiplicitous sentences; under the reasoning of Whalen v. United States, 445 U.S. 684 (1980), defendant's convictions for illegal remuneration under 42 U.S.C. § 1320a-7b(b) and health care fraud under 18 U.S.C. § 1347 were multiplicitous and violated double jeopardy, because – given the charging instrument, the trial proof, and the general verdict in this case – the health care fraud conviction could have been based on a theory (illegal remuneration plus specific intent to defraud), of which the illegal remuneration, standing alone, was a lesser-included offense; accordingly, even under the plain-error standard of review, the Fifth Circuit reversed in part, remanding to the district court for resentencing (and, presumably, election of a count to be dismissed) to remedy the multiplicity of sentences.

United States v. Campbell, 544 F.3d 577 (5th Cir. 2008) Second trial on firearms charge, after district court declared a mistrial in the first trial over defendant's objection, did not violate the Double Jeopardy Clause of the Fifth Amendment; the district court did not clearly err in concluding that one of the jurors was unable to participate in the jury deliberative process (and likely had not completely understood the trial testimony) due to his limitations in speaking and comprehending English; nor did the district court abuse its discretion in refusing to provide an interpreter for the jury deliberations, as this would have done nothing to address the concern that the juror had not understood the trial testimony; nor did the district court abuse its discretion in electing to declare a mistrial rather than to proceed with only eleven jurors over defendant's objection; for these reasons, the district court properly determined that a "manifest necessity" required it to declare a mistrial in defendant's first trial, and accordingly there was no double jeopardy violation in defendant's second trial and subsequent conviction.

United States v. Hope, 545 F.3d 293 (5th Cir. 2008) Even on plain-error review, defendant's separate convictions and sentences under 18 U.S.C. § 922(g)(1), for possession of the same gun when arrested and on the previous day in a robbery, were, absent evidence that the possession was interrupted, multiplicitous and violated the Double Jeopardy Clause; the fact that the same firearm was possessed both on the day of arrest and on the previous day raised an inference of continuous possession; because defendant received a sentence of 135 months' imprisonment, in excess of the statutory maximum of 120 months' imprisonment available for one offense, his substantial rights were affected; finding that the error also seriously affected the fairness of the judicial proceeding,

the Fifth Circuit exercised its discretion to vacate the conviction and sentence on one of the counts of firearm possession and to remand the case for resentencing on the remaining count.

United States v. Achobe, ___ F.3d ___, 2008 WL 5726397 (5th Cir. 2008), on denial of reh'g, ___ F.3d ___, 2009 WL 311403 (5th Cir. Feb. 10, 2009) Where a conviction is not finally attained, for instance with a hung jury, or where it is overturned on grounds not implicating sufficiency of the evidence, there is no double jeopardy bar to retrial, because in such cases jeopardy never ceased; thus, defendant could not, on the appeal of his conviction after a second trial, challenge the sufficiency of the evidence in his first trial, which ended in a mistrial due to a hung jury.

United States v. Severns, ___ F.3d ___, 2009 311405 (5th Cir. Feb. 10, 2009) Under the elements test of Blockburger v. United States, 284 U.S. 299 (1932), it did not violate double jeopardy for defendant to be convicted and sentenced for arson, mail fraud, and use of fire to commit mail fraud (or arson, wire fraud, and use of fire to commit wire fraud) all based upon a single insurance-fraud fire; however, the Fifth Circuit held that a single fire could result in only a single conviction for use of fire to commit another offense (in violation of 18 U.S.C. § 844(h)(1), even if a different object offense is alleged in each count; accordingly, defendant's two § 844(h)(1) convictions and consecutive ten-year sentences on those counts violated double jeopardy; the Fifth Circuit therefore vacated his sentences on those two counts and remanded for the government to elect on which of the two counts it wished to proceed, after which defendant was to be resentenced and the other count dismissed.

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

Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283 (2009) (decision below: State v. Brillon, 955 A.2d 1108 (Vt. 2008)) In conducting a constitutional-speedy-trial analysis under Barker v. Wingo, 407 U.S. 514 (1972), the Vermont Supreme Court reversibly erred in charging the time attributable to delays occasioned by court-appointed counsel to the State; court-appointed counsel, like retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent; this rule is not absolute, and delays resulting from a systemic breakdown in the public defender system could be charged to the State; there is no indication, however, that such was the case here; the Vermont Supreme Court also erred in treating the period of each counsel's representation discretely, without taking into account the role played by defendant's disruptive behavior (seeking to dismiss one attorney on the eve of trial, and threatening another, causing the attorney's withdrawal); accordingly, the Supreme Court reversed the decision dismissing defendant's case for a Sixth Amendment speedy trial violation and remanded for further proceedings. (Justice Breyer, joined by Justice Stevens, filed a dissenting opinion, in which he would dismiss the writ of certiorari as improvidently granted.)

United States v. Edelkind, 525 F.3d 388 (5th Cir. 2008) The offense of willfully failing to pay a child support obligation, in violation of 18 U.S.C. § 228(a)(3), is a continuing offense for statute of limitations purposes; the Fifth Circuit rejected defendant's argument that the crime is complete when the child support obligation remains unpaid for longer than two years or exceeds

\$10,000; accordingly, defendant's prosecution for failure to pay child support was not time-barred even though the unpaid obligation reached \$10,000 at the latest on October 1, 1999, more than five years before the indictment was returned (on October 12 2005).

United States v. Gulley, 526 F.3d 809 (5th Cir. 2008) District court did not err in failing to hold a hearing to allow defendant to try to flesh out whether the government's delay in filing the indictment against him was in bad faith; here, the district court found, after carrying defendant's motion to dismiss with the trial, that defendant had suffered no prejudice from the delay; thus, even if discovery or a hearing could have unearthed evidence that the government sought to gain a tactical advantage by delaying the prosecution, defendant would not be entitled to relief for pre-indictment delay, because this requires a defendant to show both bad faith and prejudice.

United States v. Rabhan, 540 F.3d 344 (5th Cir. 2008) District court reversibly erred in dismissing, as time-barred by the statute of limitations, a count of the indictment charging the defendant with aiding and abetting a violation of 18 U.S.C. § 1014; the aiding-and-abetting statute (18 U.S.C. § 2) simply affords a separate method of proving liability under substantive statutes like § 1014, rather than constituting a separate offense; therefore, the applicable statute of limitations was the ten-year statute of limitations found in 18 U.S.C. § 3293 (which explicitly covers § 1014) rather than the five-year default statute of limitations found in 18 U.S.C. § 3282(a) (which the district court had applied because it had construed the charge as one only under 18 U.S.C. § 2).

United States v. Seale, 542 F.3d 1033 (5th Cir. 2008), **reh'g en banc granted, 550 F.3d 377 (5th Cir. Nov. 14, 2008) (en banc)** Where defendant was not federally indicted until 2007 for two counts of kidnapping and one count of conspiracy to commit kidnapping (in violation of 18 U.S.C. § 1201(a) and (c)), but the kidnappings occurred in 1964, defendant's prosecution for these offenses was barred by the statute of limitations; although these offenses were, in 1964, capital offenses that were not subject to a statute of limitations, see 18 U.S.C. § 3281, in 1968 the United States Supreme Court invalidated the death penalty for the federal kidnapping statute, and in 1972 Congress amended the federal death penalty statute to eliminate the death penalty as a possible punishment; the amendment decapitalizing the offenses with which defendant was ultimately charged was retroactive with respect to the applicable statute of limitations, which then became the standard five-year statute of limitations applicable to noncapital offenses, see 18 U.S.C. § 3282; moreover, the 1994 amendments reinstating the death penalty as a possible punishment for these offenses could not revive the limitations period for these offenses, inasmuch as that limitations period had expired well before 1994; accordingly, the Fifth Circuit panel vacated defendant's convictions and rendered a judgment of acquittal.

C. Conflict of Interest/Recusal

United States v. Burns, 526 F.3d 852 (5th Cir. 2008) Even though defendant's attorney had previously represented a government witness in an asset forfeiture proceeding four years before

defendant's trial, any conflict of interest remained purely hypothetical where the representation had been unequivocally terminated, the facts and the issues of the previous representation had not relation to the charges brought against defendant, the attorney had very limited contact with the former client, and the cross-examination of the witness was done by the affected attorney's co-counsel; moreover, defendant failed to demonstrate that there was some plausible alternative defense strategy that could have been pursued, but was not, because of the conflict; furthermore, because defendant did not demonstrate that counsel labored under an actual conflict, there was no error in failing to conduct a conflict hearing under United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

United States v. Sanchez Guerrero, 546 F.3d 328 (5th Cir. 2008) After Wheat v. United States, 486 U.S. 153 (1988), a district court's disqualification of a defense attorney based on a conflict of interest is reviewed for abuse of discretion (disavowing contrary standard of review – "simple error" – found in United States v. Snyder, 707 F.2d 139, 144 (5th Cir. 1983), as superseded by Wheat); here, the district court did not abuse its discretion in disqualifying defendant's attorney; the attorney was attempting to represent both defendant and his brother, who were both in leadership positions in a criminal enterprise spanning two decades; attorney was also attempting to represent a witness who was testifying against defendant in exchange for a reduction in his sentence; the district court was not required to defer to defendant's waiver of any conflict of interest; to the extent that United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), permitted an absolute waiver of any conflicts of interest, it is no longer good law in light of the Supreme Court's subsequent decision in Wheat.

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) District court did not reversibly err in denying, without an evidentiary hearing, defendant's motion for new trial based upon his counsel's alleged conflict of interest arising from counsel's representation's of an unindicted co-conspirator; defendant did not sufficiently allege an actual conflict of interest to warrant overturning his conviction or sentence, or even to justify a remand for an after-the-fact hearing.

D. Severance

E. Other

Rothgery v. Gillespie County, Texas, ____ U.S. ____, 128 S. Ct. 2578 (2008) (decision below: Rothgery v. Gillespie County, Texas, 491 F.3d 293 (5th Cir. 2007)) A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel; attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct; thus, contrary to the Fifth Circuit's holding below, Texas arrestee's right to counsel attached when he was magistrated under Tex. Crim. Proc. Code §§ 14.06(a) and 15.17(a). (Chief Justice Roberts filed a concurring opinion in which he was joined by Justice Scalia. Justice Alito filed a concurring opinion

in which he was joined by Chief Justice Roberts and Justice Scalia; the chief point of this opinion was to distinguish between the question at issue here – when the right to counsel “attaches” – and the question of when a defendant is entitled to the assistance of appointed counsel. Justice Thomas filed a dissenting opinion)

United States v. Miller, 520 F.3d 504 (5th Cir. 2008) Assuming arguendo that the indictment charging defendant with tax evasion under 26 U.S.C. § 7201 was duplicitous, the principal danger of duplicity – i.e., the danger of a nonunanimous jury verdict – was avoided by the jury instructions given by the district court, which required the jury to unanimously find exactly what the defendant said the government had to prove.

United States v. Sealed Appellant, 526 F.3d 241 (5th Cir. 2008) Because an unconditional guilty plea ordinarily waives all non-jurisdictional defects in the proceedings below, defendant’s unconditional guilty plea barred his right to challenge on appeal the district court’s denial of his motion to suppress as well as his constitutional challenge to one of his statutes of conviction (18 U.S.C. § 2251(a)); the types of “jurisdictional” matters that survive an unconditional guilty plea for appeal are not ones going to the legislative jurisdiction of Congress to enact statutes, but only to judicial subject matter jurisdiction to adjudicate the particular case.

United States v. Hazlewood, 526 F.3d 862 (5th Cir. 2008) Magistrate judge did not lack jurisdiction to preside over defendant’s trial for assault under 18 U.S.C. § 111; even though 18 U.S.C. § 111 includes both a misdemeanor offense (over trials of which magistrate judges may preside) and felony offenses (over trials of which magistrate judges may not preside), the bill of information in defendant’s case makes clear that she was charged only with simple assault, a misdemeanor offense, because the information did not allege any physical contact.

United States v. Saltzman, 537 F.3d 353 (5th Cir. 2008) Where prosecution added charges against defendant after he successfully withdrew his guilty plea to a single charge with the design of contesting his guilt on that charge, district court reversibly erred in dismissing three of the four new charges for prosecutorial vindictiveness; particularly, the district court erred in applying a presumption of vindictiveness when the addition of new charges here was functionally no different from the addition of new charges found not to justify a presumption of vindictiveness in Bordenkircher v. Hayes, 434 U.S. 357 (1978), and United States v. Goodwin, 457 U.S. 368 (1982); under these authorities, it was of no moment that the prosecutor had known, at the time of the original charging instrument, of the facts supporting the newly added charges but had declined to include them in that original charging instrument; the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution, but rather may reflect a legitimate attempt to induce a defendant to plead guilty without the time and expense of a trial; because the district court erred in applying a presumption of vindictiveness, and because defendant adduced no evidence of actual prosecutorial vindictiveness, the Fifth Circuit reversed the district

court's dismissal of three counts of the superseding indictment and remanded for further proceedings.

United States v. Ramos, 537 F.3d 439 (5th Cir. 2008) In prosecution of two Border Patrol agents for charges arising out of the shooting of a fleeing drug smuggling suspect, Fifth Circuit rejected defendants' argument that the indictment was defective with respect to their charges under 18 U.S.C. § 924(c)(1)(A) simply because the indictment alleged a "discharge" of a firearm, rather than using the statutory language which speaks of a "use" of the firearm; the term "discharge" is but a specific manner of use, falling within the broad term "use," and it gave defendants fair notice of the crime against which they needed to defend.

United States v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008) District court reversibly erred in dismissing indictment (charging defendant with making false statements in his application for naturalization as a United States citizen as well as during his naturalization interview) for outrageous governmental misconduct; the district court erred in finding that the naturalization interview was merely a pretext for a criminal investigation, because nothing in the record suggested that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations; nor did the questions posed by the government during the interview exceed the legitimate scope of the inquiry delineated by the regulations; moreover, a claim of outrageous governmental misconduct will not lie where, as here, the defendant was an active, willing participant in the conduct that leads to his arrest.

United States v. Daughenbaugh, 549 F.3d 1010 (5th Cir. 2008) Defendant's unconditional guilty plea to an information waived his claim that he did not knowingly and voluntarily waive his right to a grand jury indictment; any defect in the use of an information instead of an indictment is, like most defects in indictments, see United States v. Cotton, 535 U.S. 625, 630-31 (2002), not jurisdictional; therefore, the alleged error was subject to the usual rule that a voluntary and unconditional guilty plea waives all nonjurisdictional defects in the prior proceedings.

United States v. Mauskar, 557 F.3d 219 (5th Cir. 2009) Defendant's motion to dismiss a count of his indictment for duplicity was not untimely, even though it was filed only before his second trial (his first trial had ended in a mistrial); the declaration of a mistrial rendered nugatory all antecedent trial proceedings with the same result as if there had been no trial at all; therefore, the motion was filed "before trial" and was timely under Fed. R. Crim. P. 12; however, on the merits, the Fifth Circuit rejected defendant's duplicity claim on the grounds (1) that there was no duplicity, but rather the proper charging of a conspiracy with multiple objects; and (2) in any event, defendant was not prejudiced because the district court's specific unanimity instruction was sufficient to guard against a non-unanimous verdict; nor was defendant prejudiced by the general verdict returned on the conspiracy count because the general nature of the verdict did not, in light of USSG § 1B1.2(d) & Application Note 4 thereto, adversely affect defendant's sentence.

V. DISCOVERY/PRETRIAL INVESTIGATION & PREPARATION

United States v. Miller, 520 F.3d 504 (5th Cir. 2008) Government did not violate the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over (1) a letter by the U.S. Trustee in Montana referring a key government witness for prosecution, or (2) business records gathered in connection with the subject matter of that referral; assuming these were “suppressed” for purposes of Brady, the evidence was cumulative and would have had only slight impeachment value, and certainly was not material in light of a substantial body of evidence left unscathed by the undisclosed evidence.

Mahler v. Kaylo, 537 F.3d 494 (5th Cir. 2008) In Louisiana state manslaughter prosecution, the state violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to provide defendant with certain pretrial witness statements that either contradicted or were inconsistent with the trial testimony; the undisclosed statements were material because they corroborated defendant’s defense that a struggle was ongoing at the time of the shooting and impeached state witness testimony that the struggle had already concluded when defendant shot the victim; accordingly, the Fifth Circuit reversed the district court’s denial of the writ and remanded with instructions to grant the writ of habeas corpus unless the state retried defendant within a reasonable time.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) In prosecution of former CEO of Enron, prosecution did not suppress evidence within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), simply because they cross-examined a government witness on the premise that he would, under his plea agreement, be sentenced to not less than ten years in prison, but then the judge later sentenced the witness to only six years in prison; the defense knew or at least should have known that the judge could reduce the sentence below ten years; the Fifth Circuit refused to consider a claim that there was an undisclosed side deal with respect to this witness, because the claim was not sufficiently raised below; nor did the prosecution’s use of an “open file” result in the de facto suppression of exculpatory evidence; the Fifth Circuit left open the possibility that the use of a voluminous open file might, in some instances, violate Brady, but found that in the circumstances presented here, there was no violation; finally, with respect to alleged Brady violations stemming from discrepancies between FBI 302 reports and the raw interview notes from which they were generated, the Fifth Circuit held that some of these were not material and that, as for the rest, it could not review these in the first instance since the district court did not consider them; the Fifth Circuit suggested that the proper vehicle for the latter group was a motion for a new trial under Fed. R. Crim. P. 33.

VI. TRIAL

A. Jury Selection

Snyder v. Louisiana, ____ U.S. ____, 128 S. Ct. 1203 (2008) (decision below: State v. Snyder, 942 So.2d 484 (La. 2006)) The trial judge committed clear error when it rejected defendant’s objection that the prosecution had exercised a peremptory strike against one potential

juror on the basis of his race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986); despite the deference owed to the trial judge's on-the-spot assessment of the prosecutor's motives, here the prosecutor's explanation of the reasons for his peremptory strike of the potential juror were insufficient; first, it cannot be presumed that the trial judge credited the prosecutor's first race-neutral explanation – *i.e.*, that the potential juror looked nervous – since the trial judge simply allowed the challenge without explanation; the prosecutor's second explanation – *i.e.*, the potential juror's student-teaching obligation – likewise failed even under the highly deferential standard of review applicable here, where the implausibility of the explanation was reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations at least as serious as this potential jurors; accordingly, the Court reversed the judgment below and remanded for further proceedings. (Justice Thomas filed a dissenting opinion in which he was joined by Justice Scalia.)

Gonzalez v. United States, ___ U.S. ___, 128 S. Ct. 1765 (2008) (decision below: United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007)) A federal magistrate judge may preside over jury examination and jury selection if the parties, or the attorneys for the parties, consent; it is not necessary that a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire; here, defendant's attorney's consent to the magistrate judge's presiding over jury selection was sufficient; the Court left open the questions (1) whether an attorney's consent could validate magistrate judge participation even over the party's express and timely objection; and (2) whether consent could be inferred by a failure by a party and his or her attorney to object to the presiding by a magistrate judge. (Justice Scalia filed an opinion concurring in the judgment, in which he would "adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel." Justice Thomas filed a dissenting opinion, in which he stated he would overrule Peretz v. United States, 501 U.S. 923 (1991), which held that the Federal Magistrates Act authorizes magistrate judges to preside over felony jury selection if the parties consent.)

Rivera v. Illinois, ___ U.S. ___, 2009 WL 815033 (Mar. 31, 2009) (decision below: People v. Rivera, 879 N.E.2d 876 (Ill. 2007)) Provided that all jurors seated in a criminal case are qualified and unbiased, the Fourteenth Amendment's Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's peremptory challenge to a juror; because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution; thus, even though the trial court may have erred in denying defendant's peremptory challenge of a veniremember who ultimately sat on the jury, that error did not require reversal of defendant's conviction as a matter of federal constitutional law.

Haynes v. Quarterman, 526 F.3d 189 (5th Cir. 2008) Texas death-sentenced inmate was entitled to a certificate of appealability ("COA") for his claim that the prosecution had exercised peremptory challenges against two veniremembers based on racially discriminatory reasons, in violation of Batson v. Kentucky, 476 U.S. 79 (1986); under the application of Batson made in Snyder v. Louisiana, 128 S. Ct. 1203 (2008), an appellate court applying Batson arguably should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's

demeanor on which the prosecutor based his peremptory challenge; as to two of the struck veniremembers, the state trial judge could not possibly have credited the prosecutor's explanation that they were struck because of their demeanor during individual questioning, because the trial judge did not preside during the individual examination of the veniremembers; nor did the district court find another credible non-racial explanation that could satisfy the state courts' determination that the peremptory challenge of these two veniremembers was race-neutral.

United States v. Fambro, 526 F.3d 836 (5th Cir. 2008) The Fifth Circuit was critical of the prosecutor's "commitment" questions during voir dire (i.e., hypothetical questions that ask potential jurors how they would react to facts very similar to those that will be presented at trial); nevertheless, in the absence of any Supreme Court or federal appellate court decision reversing a conviction on the basis of such questions, the Fifth Circuit found that the error, if any, was not "plain" for purposes of plain-error review.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) District court did not abuse its discretion in refusing to ask potential jurors about their ability to accept certain legal propositions central to the defendants' defense; a trial court is not obligated to inquire as to whether the prospective jurors would accept any particular proposition of law; rather, it is sufficient if the district court simply asks, and ascertains, generally whether the jury would follow the law as instructed.

United States v. Williamson, 533 F.3d 269 (5th Cir. 2008) The government's use of a peremptory challenge to strike one of the two African-American members of the venire (it also struck the other one) violated the Equal Protection Clause as construed in Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny; conducting the sort of comparative analysis endorsed by the Supreme Court in Snyder v. Louisiana, 128 S. Ct. 1203 (2008), the Fifth Circuit concluded that the prosecutor's explanation for striking this veniremember was "unconvincing" and "g[ave] rise to an inference of discriminatory intent"; the district court thus clearly erred in overruling defendant's Batson objection as to this veniremember; accordingly, finding the evidence sufficient to support defendant's conviction, the Fifth Circuit reversed defendant's conviction and remanded for a new trial.

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) Government's peremptory challenge of African-American veniremember did not run afoul of the principles of Batson v. Kentucky, 476 U.S. 79 (1986); the government had a legitimate, non-race-based reason for striking the veniremember (particularly, the lack of candor evidenced by the veniremember's failure to report a prior assault conviction); the Fifth Circuit rejected the argument that the district court was obliged to inquire into whether the government had not investigated everyone, but rather had singled out the African-American veniremember for the background check that revealed the undisclosed conviction; standing alone, mere allegations of discriminatory investigations or selective criminal background checks do not require further inquiry from a district court.

Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009) Death-sentenced Texas capital murder defendant was entitled to federal habeas relief on his claim that the State violated Batson v.

Kentucky, 476 U.S. 79 (1986), when it used peremptory challenges to strike African-Americans from the jury venire; defendant's comparative analysis (comparing the African-American jurors struck with white jurors who were allowed to remain on the panel) was not procedurally barred, because the entire voir dire transcript was available to the state courts even if they chose not to consult it; this comparative analysis revealed that the State's reasons for striking the African-American jurors were pretextual; additionally, defendant presented the same historical evidence of racial bias in jury selection that was considered in Miller-El v. Dretke, 545 U.S. 231 (2005); accordingly, the Fifth Circuit reversed the district court's denial of federal habeas relief and remanded to the district court with instructions to grant the writ unless the State retried defendant within 120 days from the date of the district court's order.

B. Admission and Exclusion of Evidence

United States v. Yanez Sosa, 513 F.3d 194 (5th Cir. 2008) Even if some of law enforcement officers' testimony (about the use of chemicals in drug manufacturing, modifications to firearms, and the reasons why drug dealers carry guns) was erroneously admitted as lay opinion testimony under Fed. R. Evid. 701 (which the Fifth Circuit did not conclusively resolve), any error was harmless because the evidence against defendant, apart from the disputed testimony was substantial; furthermore, even assuming that some of the evidence should have been treated as expert testimony, the underlying bases for which were subject to disclosure upon request under Fed. R. Crim. P. 16, defendant suffered no prejudice from the nondisclosure because defendant had notice of the testimony from the first trial in his case (which resulted in a mistrial; defendant's conviction occurred after the second trial).

United States v. Auster, 517 F.3d 312 (5th Cir. 2008) District court reversibly erred in ruling inadmissible, under the psychotherapist-patient privilege, defendant's statements, made to his psychotherapist, in which he threatened the managers of his workers compensation insurance claim and others; under Jaffee v. Redmond, 518 U.S. 1 (1996), the federal psychotherapist-patient privilege applies only to **confidential** communications made to licensed psychiatrists and psychologists; here, however, defendant had no reasonable basis to conclude that his statements would be confidential, because he was repeatedly informed by his therapists that they had a legal duty to warn the potential victims of the violent threats; **in so holding, the Fifth Circuit disagreed with the holdings of the Ninth Circuit in United States v. Chase, 340 F.3d 978 (9th Cir. 2003) (en banc), and the Sixth Circuit in United States v. Hayes, 227 F.3d 578 (6th Cir. 2000), both of which held that such statements, though made without a reasonable expectation of confidentiality, are nonetheless privileged**; accordingly, the Fifth Circuit reversed the district court's ruling excluding that evidence and remanded for further proceedings.

United States v. Cisneros-Gutierrez, 517 F.3d 751 (5th Cir. 2008) In drug conspiracy prosecution, district court did not abuse its discretion in admitting, as substantive evidence under Fed. R. Evid. 801(d)(1)(A) (prior inconsistent statement) a redacted version of the factual résumé that provided the factual basis for witness's prior guilty plea; a witness's feigned memory loss can be considered inconsistent under this Rule; although the factual résumé was drafted by the

government, the witness admitted under oath at the plea hearing that the factual résumé was “true and correct in every respect”; this was a sufficient adoption of the factual résumé for purposes of Rule 801(d)(1)(A); nor, on plain-error review, could the Fifth Circuit conclude that the government had called the witness primarily to put otherwise inadmissible evidence before the jury under the guise of impeachment; finally, there was not a significant danger that the jury used for an improper substantive purpose evidence properly admitted only for impeachment.

United States v. Eff, 524 F.3d 712 (5th Cir. 2008) In prosecution for arson (based on setting fires in a federal forest), district court did not abuse its discretion in excluding the testimony of defendant’s two expert witnesses, who would have testified about a neurogenetic defect (Klinefelter’s Syndrome) defendant has, and its effects on him; to the extent that the experts’ testimony would have been their conclusion that defendant was, due to this syndrome, unable to appreciate the nature and quality or wrongfulness of his acts, it was impermissible testimony on an ultimate issue, barred by Fed. R. Evid. 704(b); the district court likewise did not abuse its discretion in excluding the balance of the experts’ testimony, because that testimony, standing alone, was not sufficient to warrant a jury instruction on defendant’s insanity defense; at best, the expert testimony established only that defendant had a diminished capacity to understand and anticipate the consequences of his actions, not that he was completely unable to appreciate the nature and quality or wrongfulness of his actions, as required for an insanity defense under 18 U.S.C. § 17; this sort of expert testimony – showing a diminished ability to inability to inhibit inappropriate behavior – is precisely the sort of legal excuse that Congress sought to preclude when it amended 18 U.S.C. § 17 to delete the “volitional prong” of the insanity defense.

United States v. Ogba, 526 F.3d 214 (5th Cir. 2008):

(1) In Medicare fraud case, district court did not abuse its discretion in refusing to allow in evidence that, defendant argued, tended to show that a recruiter (a codefendant who was testifying as a witness for the government) had a long history of mental illness, had pleaded guilty involuntarily in order to escape immediate incarceration, and was fearful of increased incarceration if she did not “play ball” with the government; the probative thrust of the evidence (which consisted of an e-mail from the Federal Public Defender to the Assistant Federal Public Defender representing the witness, and a colloquy between the district court and the witness during trial) went to aspects of the witness’s credibility and motivations to testify that were adequately brought out during cross-examination and by the introduction of other evidence.

(2) District court did not abuse its discretion in admitting into evidence the government’s summary chart, where the chart accurately reflected the underlying records and testimony and where the jury was instructed that the chart was not itself evidence or proof of any facts.

United States v. Gulley, 526 F.3d 809 (5th Cir. 2008) In prison murder case, decedent’s prior specific acts were not admissible to prove his alleged propensity for violence; the plain language of Fed. R. Evid. 405(b) limits the use of specific instances of conduct to prove essential elements of a charge or defense; moreover, the decedent’s character was not an essential element of defendant’s

self-defense claim in the strict sense because a self-defense claim may be proven regardless of whether the victim has a violent or passive character.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) District court did not abuse its discretion in excluding written conviction records of prior convictions which government witness admitted on direct examination and about which he was cross-examined; district court did abuse its discretion in failing to admit the conviction records for witness's assault conviction, as these provided evidence not squarely admitted by the witness that tended to show witness's bias (by showing that a charge was pending, and that he had a motive to curry favor, at the time he acted as a confidential informant); likewise, district court abused its discretion in refusing to admit documentary evidence of witness's conviction for theft-by-check; however, the district court's evidentiary errors were harmless.

United States v. Garcia, 530 F.3d 348 (5th Cir. 2008) Where an interrogating agent testified from memory as to the substance of his post-arrest interview with defendant, the "rule of completeness" found in Fed. R. Evid. 106 did not require that the defense be permitted to introduce the transcript of the tape recording of that interview; the Fifth Circuit noted, but took no position on, the Eleventh Circuit's "tantamount to" gloss on Rule 106, see United States v. Pendas-Martinez, 845 F.2d 938, 943 (11th Cir. 1988) (applying Rule 106 where a party elicits testimony that is "tantamount to the introduction of" the writing or recorded statement), as the Fifth Circuit found that that standard was not satisfied in this case; nor was the transcript admissible under the common law rule of completeness, which, the Supreme Court has acknowledged, is of broader scope than Rule 106; although common law rule of completeness cases like United States v. Paquet, 484 F.2d 208, 212 (5th Cir. 1973), allow parties to present evidence explaining, varying, or contradicting a witness's portrayal of a conversation, these cases do not provide *carte blanche* to do so by any means desired; here, defendant was given ample opportunity to explain his side of the conversation by other means offered or suggested by the district court. (Judge Reavley filed a concurring opinion, in which he opined that the matter of the transcript "could have been handled better, but concluded that "[t]he court did allow defense counsel to make full use of the transcript in cross-examination of the agent . . .").

United States v. Dillon, 532 F.3d 379 (5th Cir. 2008) In civil rights prosecution under 18 U.S.C. § 242, charging defendant (a former assistant city attorney of New Orleans) with extorting sexual favors from two women in exchange for the favorable exercise of his prosecutorial authority, district court did not abuse its discretion in admitting, pursuant to Fed. R. Evid. 413, evidence of defendant's sexual assaults of two other women he encountered in his official capacity.

United States v. Ramos, 537 F.3d 439 (5th Cir. 2008) In prosecution of two Border Patrol agents for charges arising out of the shooting of a fleeing drug smuggling suspect, defendants were not impermissibly placed at risk of being convicted simply for violating Border Patrol policies, in violation of United States v. Christo, 614 F.2d 486 (5th Cir. 1980); here, unlike in Christo, it was never suggested that violation of the Border Patrol policies could in and of itself be considered illegal, and, in fact, the defendants elicited testimony that violation of the policies was not identical

to a violation of the criminal law; moreover, the government permissibly used the policies only as evidence of defendants' state of mind, a use for which such evidence has been approved by prior cases; finally, unlike in Christo, the jury was not told that it had to decide whether the defendants violated the policies in order to establish criminal culpability.

United States v. Baker, 538 F.3d 324 (5th Cir. 2008) In child pornography prosecution, district court reversibly erred in admitting two exhibits (a report and printouts of images obtained from the National Center for Missing and Exploited Children) for which the government had not laid a sufficient foundation for their admission as either business records or public records; because the admission of one exhibit was harmful error and the admission of the other was plain error, the Fifth Circuit (1) vacated defendant's conviction on one count (for distribution of child pornography), (2) found the error did not affect the remaining three counts of conviction (for receiving and possessing pornography), but (3) vacated defendant's sentence and remanded for resentencing.

United States v. King, 541 F.3d 1143 (5th Cir. 2008) Admission of transcripts of tape-recorded conversations between defendant and his wife did not violate the evidentiary privilege attaching to spousal communications; the privilege does not apply to conversations between husband and wife about crimes in which they are jointly participating when the conversations occur; district court did not abuse its discretion in finding this exception applicable on the ground that the conversations at issue involved the potential criminal activity of hiding/concealing assets.

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) Alleged "spillover" effect of evidence of defendant's wealthy lifestyle/lavish spending (offered to support money laundering counts which were withdrawn by the government during trial or on which defendant was acquitted) did not require reversal of defendant's convictions; regardless of whether the controverted evidence would have been admitted in a trial solely on the remaining counts, defendant failed to prove the evidence prejudiced him where he identified no instances where the prosecution inappropriately used this evidence and where the jury's mixed verdict, including some acquittals, suggests that it was discerning and did not allow any potential bias against defendant to sway its verdict.

United States v. Dunigan, 555 F.3d 301 (5th Cir. 2008) District court did not abuse its discretion in allowing FBI agent to testify that there are no Dodge Avengers in Texas with the letter "Q" in the license plate (information used to track down the defendant bank robber); the information was not hearsay because it was not offered for the truth of the matter asserted, but rather was merely background information to explain how the police investigated the crime and why the investigators took the actions they did; nor did the evidence's unfair prejudicial effect outweigh its probative value, so as to require the evidence's exclusion under Fed. R. Evid. 403; likewise, information about the description of the bank robber gleaned from eyewitnesses was not hearsay, but rather permissible background information to explain the investigation.

C. Cross-Examination/Confrontation/Compulsory Process

Giles v. California, ___ U.S. ___, 128 S. Ct. 2678 (2008) (decision below: People v. Giles, 152 P.2d 433 (Cal. 2007)) A criminal defendant does not forfeit his Sixth Amendment right to confrontation of a witness merely upon a showing that the defendant committed an wrongful act that resulted in the unavailability of the witness; rather, the doctrine of forfeiture by wrongdoing applies only when the defendant specifically intends to make the witness unavailable. (Justice Thomas filed a concurring opinion. Justice Alito filed a concurring opinion. Justice Souter filed an opinion concurring in part, in which he was joined by Justice Ginsburg. Justice Breyer filed a dissenting opinion, in which he was joined by Justices Stevens and Kennedy.)

Melendez-Diaz v. Massachusetts, cert. granted, ___ U.S. ___, 128 S. Ct. 1647 (Mar. 17, 2008) (No. 07-591) (granting cert. to Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152 (Mass. Ct. App. July 31, 2007)) Is a state forensic analyst’s laboratory report, prepared for use in a criminal prosecution, “testimonial” evidence subject to the demands of the Confrontation Clause as set forth in Crawford v. Washington, 541 U.S. 36 (2004)?

United States v. Skelton, 514 F.3d 433 (5th Cir. 2008) In prosecution for extortionate threat under 18 U.S.C. § 875(b), district court did not violate defendant’s confrontation rights by disallowing cross-examination of the complaining witness tending to show that he had stolen funds from a company for which he had worked and had lied to the IRS about that matter; the line of questioning showed that complaining witness had a motive to lie, to avoid federal prosecution for these matters, and thus was properly considered as evidence of bias; the admissibility of bias evidence, however, is subject to Fed. R. Evid. 403; under that rule, district court did not err in refusing to allow defendant to introduce extrinsic evidence on those subjects, where it did allow defendant to ask complainant about those matters, thus giving defendant ample room to explore the issue of bias and to expose to the jury the facts from which the jurors could appropriately draw inferences about the reliability of the witnesses; nor did the district court violate defendant’s confrontation rights by refusing to allow him cross-examine the government’s rebuttal character witnesses about specific instances of (bad) conduct on the part of complainant; although Fed. R. Crim. P. 608 permits questions about specific instances of conduct to impeach the credibility of a rebuttal character witness, there is no constitutional right to do so.

United States v. Alvarado-Valdez, 521 F.3d 337 (5th Cir. 2008) Drug conspiracy defendant’s confrontation rights were violated by a law enforcement officer’s reading into evidence portions of the interrogation of a co-defendant, who had absconded to Mexico before trial; for this type of Confrontation Clause violation (i.e., the introduction of inadmissible testimony), the government must prove beyond a reasonable doubt that the tainted evidence did not contribute to the conviction; here, the government could not meet that burden, given its insistent reliance on that testimony in its closing argument; accordingly, the Fifth Circuit vacated the judgment of conviction and remanded for a new trial or other proceedings as appropriate.

United States v. Ramos-Cardenas, 524 F.3d 600 (5th Cir. 2008) The admission of two co-defendants’ statements did not violate the other defendants’ confrontation rights under Bruton v. United States, 391 U.S. 123 (1968), and its progeny; where, as here, the jury is instructed that the

testimony is to be considered only against the speaker, other defendants normally have not suffered a violation of their Confrontation Clause rights; although the officer testifying as to one co-defendant's statement twice used the pronoun "they" in describing the activities confessed to, the Fifth Circuit held that these references did not give rise to the same kind of troubling inferences that the Supreme Court found offensive to the Confrontation Clause in Gray v. Maryland, 523 U.S. 185 (1998); along the way, the Fifth Circuit noted that, even after Crawford v. Washington, 541 U.S. 36 (2004), Confrontation Clause challenges of the type at issue here continue to be governed by Bruton and its progeny.

United States v. Ogba, 526 F.3d 214 (5th Cir. 2008) In Medicare fraud case, case agent's hearsay evidence about statements that wheelchair recipients made to him violated defendant's Confrontation Clause rights; nevertheless, in light of the quantity of non-hearsay evidence of health care fraud presented at trial, the error was harmless beyond a reasonable doubt.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) In joint trial, admission of one defendant's statements to law enforcement violated the Confrontation Clause rights of the other defendant under Crawford v. Washington, 541 U.S. 36 (2004), notwithstanding the fact that these statements were introduced, and the district court instructed the jury to consider them, only against the first defendant and not against the second; Crawford draws no such distinction; however, the error was harmless beyond a reasonable doubt, given the court's limiting instruction and under the facts of the case.

Burbank v. Cain, 535 F.3d 350 (5th Cir. 2008) In Louisiana state prosecution for murder, the state trial court unconstitutionally restricted the defense's cross-examination of the state's principal witness regarding whether she had reached a plea agreement with the state concerning the criminal charges then pending against her; even though the defense was able to bring out some impeachment information, that was no substitute for the ability to question witness about a proposed plea agreement (the existence of which was proffered in camera at trial) that would lower her sentencing exposure from twenty years to life, down to a one-year sentence; because there was more than a reasonable possibility that the verdict would have been different had defense counsel been allowed to inquire fully into the proposed plea agreement, the constitutional error in restricting cross-examination was not harmless; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief.

Fratta v. Quarterman, 536 F.3d 485 (5th Cir. 2008) In the Texas state court trial of defendant for arranging the murder-for-hire of his wife (for which he was sentenced to death), defendant's Confrontation Clause rights were violated by the introduction of out-of-court statements made by the two men who carried out the murder (who were tried separately and were unavailable for cross-examination); custodial confessions by these two men were "presumptively unreliable," and the presumption of unreliability was not rebutted under the circumstances of this case; as to one set of statements made by one of these men to another witness, the Texas Court of Criminal Appeals ("TCCA") erred in applying the confrontation rubric of Bruton v. United States, 391 U.S. 123 (1968) (a case where multiple defendants were on trial at the same time), to this single-defendant trial; as

to another set of statements, the TCCA erred in holding that the statements to witness were within the firmly rooted “co-conspirators’ statements” exception to the rule against hearsay, because the statements were not made in an effort to advance the cause of or facilitate the conspiracy; the statements to this witness lacked particularized guarantees of trustworthiness and thus violated defendant’s rights under the Confrontation Clause; moreover, the erroneous admission of these statements in violation of the Confrontation Clause was not harmless, because the inadmissible evidence was vital to the State’s case on the critical element of whether defendant had engaged the two men to commit the murder for remuneration; accordingly, the Fifth Circuit affirmed the district court’s grant of federal habeas relief.

United States v. Ramos, 537 F.3d 439 (5th Cir. 2008) In prosecution of two Border Patrol agents for charges arising out of the shooting of a fleeing drug smuggling suspect, district court did not violate defendants’ Sixth Amendment rights to confront witnesses or to present a complete defense when the court prevented defendants from introducing evidence of the value and amount of drugs transported by the suspect or from cross-examining him about his alleged involvement in another drug-trafficking incident; the value and amount of the drugs was cumulative in light of other evidence before the jury and argued by the defendants; furthermore, the suspect was properly allowed to invoke his Fifth Amendment privilege against self-incrimination with respect to the further incident, as it was not within the scope of the immunity agreement that he had entered into with the government, and thus could conceivably form the basis of future charges against him; nor did the district court err in barring the defense from presenting independent evidence of this previous transaction, as the district court did not abuse its discretion in concluding that the minimal probative value of such evidence was substantially outweighed by the danger of confusion of the issues and unfair prejudice to the conduct of the trial.

United States v. King, 541 F.3d 1143 (5th Cir. 2008) Admission of statements made by defendant’s co-conspirators did not violate his rights under the Confrontation Clause as interpreted by Crawford v. Washington, 541 U.S. 36 (2004); statements made by co-conspirators in furtherance of the conspiracy are not “testimonial” and hence do not fall within the ambit of Crawford’s protection.

D. Prosecutorial/Judicial Misconduct

United States v. Martinez-Larraga, 517 F.3d 258 (5th Cir. 2008) The government’s brief reference, in the rebuttal portion of its closing argument, to defendants’ post-arrest, post-Miranda warnings did not violate due process under the doctrine of Doyle v. Ohio, 426 U.S. 610 (1976); it was a fair response to defense counsel’s argument: the prosecutor simply explained why there were no statements from the defendants, the absence of which defense counsel had alluded to; the government’s argument did not assert that the jury should infer defendants’ guilt directly from their post-arrest silence; although the Fifth Circuit was more troubled about the prosecutor’s comment that the defendants had “basically lawyered up,” any error in this regard was harmless beyond a reasonable doubt under the circumstances of this case; finally, the prosecutor did not improperly bolster, in closing argument, the testimony of the government agents.

United States v. Mendoza, 522 F.3d 482 (5th Cir. 2008) Prosecutor’s comment on non-testifying defendant’s courtroom demeanor was improper; moreover, the error was preserved for review by defense counsel’s objection that “he’s testifying,” as this alerted the district court that the prosecutor was bringing before the jurors a matter that had not been introduced as evidence; however, this error did not require reversal; the error was not an improper comment on the defendant’s failure to testify, nor any other type of constitutional error that would require application of the harmless-beyond-a-reasonable-doubt standard; under the harmless standard applicable to nonconstitutional errors, the error was harmless in the circumstances of this case. (Judge DeMoss filed a dissenting opinion, arguing that the error was constitutional in magnitude, but required reversal of defendant’s conviction under any standard of harmless review.)

United States v. Gracia, 522 F.3d 597 (5th Cir. 2008) Prosecutor’s improper bolstering remarks in rebuttal closing argument – consisting of (1) a comment that the testifying government agents were “very, very credible”; (2) a rhetorical question whether an agent would throw away his life/career by lying under oath; (3) an exhortation to “respect their efforts as law enforcement officers and to believe the testimony that they offered”; and (4) an argument that, to acquit defendant, the jury would have to believe that he was the victim of a government conspiracy – constituted reversible plain error; because the government’s case against defendant consisted almost entirely of the agents’ testimony, the improper bolstering of those agents’ credibility affected defendant’s substantial rights and seriously affected the fairness, integrity, and public reputation of his trial; accordingly, the Fifth Circuit reversed defendant’s convictions and remanded for a new trial.

United States v. Fambro, 526 F.3d 836 (5th Cir. 2008) Noting arguably inconsistent opinions construing when there is an impermissible comment on post-arrest, post-Miranda silence, in violation of Doyle v. Ohio, 426 U.S. 610 (1976), Fifth Circuit held that, at a minimum, there was no plain error under Doyle where (1) the defendant did not maintain complete silence, but chose to speak on some subjects and (2) the prosecutor’s questioning and remarks focused more on what defendant said than on his silence.

United States v. Burns, 526 F.3d 852 (5th Cir. 2008) Prosecutor’s improper question – asking a witness whether a second witness’s veracity had been confirmed by the results of an earlier trial in which the second witness also testified – did not require reversal where the objection was sustained and, in general instructions, the jury was instructed to disregard questions where objections were sustained and not to speculate about what the witness might have said; moreover, prosecutorial argument that one witness’s testimony about second witness’s veracity was biased was no more than a comment on matters that the defense had already put before the jury and did not constitute plain error.

United States v. Achobe, ___ F.3d ___, 2009 WL 5726397 (5th Cir. 2008), on denial of reh’g, ___ F.3d ___, 2009 WL 311403 (5th Cir. Feb. 10, 2009) Although some of the district judge’s remarks during trial – especially in questioning the defendant during his testimony – gave the Fifth Circuit “some pause,” they did not, on plain-error review, require reversal of defendant’s convictions under the circumstances of this case; the Fifth Circuit distinguished its prior decision

in United States v. Saenz, 134 F.3d 697 (5th Cir. 1998), in which it did find improper judicial remarks to constitute reversible plain error.

United States v. McCall, 553 F.3d 821 (5th Cir. 2008) In prosecution for drug distribution, prosecutor engaged in improper guilt-by-association questioning when he asked police detective about friends/acquaintances of the defendant present at defendant's trial and their own drug-dealing activities; evidence that one is associated with, or in the company of, a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge; an associate's attendance at a person's criminal trial, which is a constitutional right enjoyed by savory and unsavory characters alike, is no better evidence of a defendant's guilt; however, in the context of the whole trial, the improper questioning was not so prejudicial that the district court committed plain error by failing to declare a mistrial sua sponte.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) In prosecution of former CEO of Enron, the government did not substantially interfere with defendant's ability to interview defense witnesses; nor did corporate plea agreements substantially interfere with defendant's ability to interview employees of those corporations, especially in light of the district court's letter to potential witnesses informing them that the government would not retaliate against them if they cooperated with defendant; nor did defendant prove his general or specific allegations of witness intimidation; thus, the district court did not clearly err in finding that defendant failed to show that any governmental misconduct interfered substantially with his ability to communicate with potential witnesses or otherwise to present his defense.

E. Jury Instructions

United States v. Yanez Sosa, 513 F.3d 194 (5th Cir. 2008) District court did not abuse its discretion in refusing to give defendant's requested jury instruction on the "in furtherance of" element of a charge under 18 U.S.C. § 924(c)(1) (possessing a firearm in furtherance of a drug trafficking offense), because the instruction actually given adequately conveyed that requirement to the jury; that instruction twice emphasized that the government had to prove beyond a reasonable doubt that the defendant's firearms possession actually furthered the drug trafficking offense, and it correctly listed the factors that the jury could examine in making this determination.

United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) In alien smuggling case, district court did not err (or at least did not plainly err) in failing to give the jury a specific unanimity instruction (i.e., that it needed to be unanimous as to which acts satisfied various statutory alternatives); distinguishing United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), Fifth Circuit held that "Gipson does not require a [jury] charge to be granulated to the point that a jury must find which specific acts were committed in finding the commission of the offense."

United States v. Ramos-Cardenas, 524 F.3d 600 (5th Cir. 2008) District court did not commit reversible error when, in responding to a jury note that asked why the indictment listed the name of only one defendant (not one of the defendants standing trial), the court informed the jury

that the named defendant had pleaded guilty, as had another defendant in the case; the named defendant actually testified at trial, and thus his guilty plea was properly admitted as impeachment during the course of the trial; the Fifth Circuit found more troubling the district court's disclosure of the guilty plea of the second defendant, who did not testify, but ultimately found that any error was harmless in light of substantial evidence of guilt and the district court's instruction that the guilty plea of an alleged accomplice is not evidence of any other defendant's guilt.

United States v. Edelkind, 525 F.3d 388 (5th Cir. 2008) In prosecution for willfully failing to pay a child support obligation, in violation of 18 U.S.C. § 228(a)(3), district court did not reversibly err in is refusing to instruct the jury that the element of "willfulness" was not met if the jury found that defendant had a good-faith belief that he was not obligated to pay a portion of his child support, even if that belief was unreasonable; although ignorance of what the law requires may be a defense to the element of willfulness, a defendant's belief that the underlying child support order is not valid is not a valid defense; a defendant in a failure-to-pay-child-support prosecution may not challenge the validity of the underlying state court child-support order.

United States v. Ogba, 526 F.3d 214 (5th Cir. 2008) In Medicare fraud case, district court did not abuse its discretion in giving a "deliberate ignorance" instruction, because the government met its burden of showing defendant's subjective awareness of illegality and a "purposeful contrivance" to avoid learning whether his conduct was illegal.

United States v. Patino-Prado, 533 F.3d 304 (5th Cir. 2008) In prosecution for conspiracy to possess with intent to distribute both marijuana and cocaine, district court did not abuse its discretion by refusing to instruct the jury that it must be unanimous as to which of these controlled substances was the object of the conspiracy; moreover, it was not erroneous to sentence defendant with the higher statutory maximum for the cocaine (twenty years' imprisonment), as opposed to the five-year statutory maximum for the marijuana where, in special interrogatories which the jury had to answer after its finding of guilt on the general conspiracy, the jury found beyond a reasonable doubt that the conspiracy involved both cocaine and marijuana.

United States v. Porter, 542 F.3d 1088 (5th Cir. 2008) In prosecution for 18 U.S.C. § 371 conspiracy to manufacture and utter counterfeit obligations of the United States (in violation of 18 U.S.C. §§ 471 and 472, respectively), district court did not abuse its discretion in refusing to give defendant's requested instruction defining the term "counterfeit" (defining that term as something that "bears such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest") and instead giving a definition that defined "counterfeit" as merely "hav[ing] a likeness or resemblance to genuine currency"; although defendant's requested definition of "counterfeit" might have been necessary had she been charged of conspiring to violate 18 U.S.C. § 473, the district court's definition of "counterfeit" was adequate for a conspiracy to violate 18 U.S.C. §§ 471 and 472. (Judge Haynes dissented on this point.)

United States v. Klein, 543 F.3d 206 (5th Cir. 2008) In mail fraud/health care fraud prosecution of physician for submission of false insurance claims, district court did not reversibly err in refusing a defense-proffered jury instruction defining a “scheme to defraud” as one that is “reasonably calculated to deceive persons of ordinary prudence”; the definition given by the district court (which was substantially similar to that in the Fifth Circuit pattern jury instructions) did not seriously impair defendant’s defense that he did not deceive the insurers because they were aware of where and how he treated his patients; nor did district court reversibly err in instructing the jury on the health care fraud charges under 18 U.S.C. § 1347; although an effect on interstate commerce is an element of the crime proscribed by § 1347, the district court’s instruction arguably included this requirement; in any event, the refusal to give the defense’s proffered instruction on “affecting commerce” did not seriously impair defendant’s ability to present his defense.

United States v. Orji-Nwosu, 549 F.3d 1005 (5th Cir. 2008) In prosecution for possession of more than five kilograms of cocaine with intent to distribute, district court did not abuse its discretion in giving a “deliberate ignorance” instruction; the evidence established that defendant was subjectively aware of a high probability of illegal conduct; moreover, defendant’s own trial testimony documented a purposeful contrivance to avoid learning of the illegal conduct; in any case, any error in giving a “deliberate ignorance” instruction is harmless where there is substantial evidence of actual knowledge; the evidence of defendant’s actual knowledge of the cocaine was substantial enough to render harmless any error in giving the “deliberate ignorance” instruction.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009):

(1) District court did not abuse its discretion in giving “deliberate ignorance” instruction; the danger usually posed by such an instruction – that the jury would convict for things the defendant merely should have known – was not present here, because defendant admitted that he knew of the allegedly illegal acts; moreover, any error in giving a “deliberate ignorance” instruction is harmless where there is substantial evidence of actual knowledge; finally, especially when viewed as a whole, the jury instructions gave an accurate description of the mental state required for conviction.

(2) In corporate fraud case, district court did not reversibly err in the materiality instructions it gave to the jury; district court did not err in refusing to instruct the jury that mere statements of opinion constitute “puffery” that is immaterial as a matter of law, as expressions of opinion may be (and the jury was entitled to find the expressions of opinion in this case) material; the district court’s materiality instruction adequately explained the concept of materiality to the jury and essentially covered all the areas of defendant’s proposed instruction; defendant’s challenge to the district court’s refusal to give his proposed instruction on secret side deals was waived under Fed. R. Crim. P. 30 because it was not submitted by the deadline set for the district court for proposed instructions; finally, the district court’s instruction on good-faith reliance correctly and through explained the law and adequately instructed the jury, and did not prevent defendant from defending himself on the basis of his good-faith reliance on the advice of business subordinates who in turn relied on counsel.

F. Jury Deliberations and Verdict/Publicity

United States v. Igbinosun, 528 F.3d 387 (5th Cir. 2008) Allegedly inconsistent verdicts in a drug case tried to the bench (not guilty of possession with intent to distribute, but guilty of importation) provided no basis for appellate relief; in such cases, the appellate court's role is limited to determining whether there was sufficient evidence to support the count or counts of conviction; the Fifth Circuit also found that it was unnecessary to remand for specific findings/reasons for verdict, because the defendant had not requested them, see Fed. R. Crim. P. 23(c), and the record did shed light on the district court's reasons; particularly, the Fifth Circuit held, the district court could rationally have acquitted the defendant on the possession with intent to distribute charge and convicted on the importation charge based on the different mens rea required for each charge.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) In fraud prosecution of former CEO of Enron, pretrial publicity/media coverage (indicative of a community bias against defendant) was sufficiently inflammatory and pervasive to raise a presumption of prejudice to defendant's right to a fair trial by an impartial jury; nevertheless, defendant was not entitled to his reversal of his convictions; the district court's "exemplary" voir dire more than mitigated any effects of the prejudice and assured that no biased jurors made it onto the jury; accordingly, the government met its burden of showing that the actual jury that convicted defendant was impartial, thus overcoming the presumption of prejudice.

G. Other

United States v. Howard, 517 F.3d 731 (5th Cir. 2008) District court did not err in vacating defendant's conviction for falsifying books and records and granting a new trial; based on the instructions given to the jury, the jury could have convicted the defendant on the basis of the "honest services" legal theory later discredited by the Fifth Circuit's decision in United States v. Brown, 459 F.3d 509 (5th Cir. 2006); under Yates v. United States, 354 U.S. 298 (1957), it is well settled that convictions must be vacated where it is unclear whether the convictions rested on legally valid or invalid bases.

United States v. Gulley, 526 F.3d 809 (5th Cir. 2008) Assuming arguendo that defendant was not present when a jury note (requesting the court to recess for the day) was read and responded to, any violation of defendant's right to presence was harmless, where defense counsel was present and objected to the district court's original response, and where defendant's claim of harm was speculative and unsupported by the record.

United States v. Igbinosun, 528 F.3d 387 (5th Cir. 2008) Defendant convicted after a bench trial failed to show that her waiver of a jury trial was not knowing and intelligent; defendant signed a written waiver of jury trial, and she failed to demonstrate prejudice sufficient to overcome the presumption, created by the written document, that she understandingly and intelligently waived her right to jury trial; it was not necessary for the district court to conduct an oral, on-the-record colloquy with the defendant about the waiver; additionally, defendant waived her constitutional right to make

a closing argument/summation to the court when, despite a meaningful opportunity to do so, she neither requested closing argument nor objected to the district court's failure to afford her closing argument.

VII. GUILTY PLEAS

A. Rule 11/Boykin Errors

Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008) Neither due process nor Federal Rule of Criminal Procedure 11 requires the court taking a guilty plea to advise the defendant of the collateral consequences of a guilty plea, like possible deportation based on the resulting conviction; this holding was not impugned by subsequent changes in immigration law increasing the likelihood of deportation for certain criminal convictions; accordingly, the magistrate judge's failure to warn defendant of the possible immigration consequences of his guilty plea did not render that plea involuntary.

B. Breach of Plea Agreement

Puckett v. United States, ___ U.S. ___, 2009 WL 763354 (Mar. 25, 2009) (decision below: United States v. Puckett, 505 F.3d 377 (5th Cir. 2007)) Where a defendant fails to make a timely objection to the government's alleged breach of its plea agreement with him, defendant's claim of breach is forfeited, and he may obtain relief on that claim only by satisfying the plain-error standard of Fed. R. Crim. P. 52(b), as that rule is customarily applied; moreover, when (as in this case) the rights acquired by the defendant in his plea agreement relate to sentencing, a showing of an effect on substantial rights (the third prong of plain-error review) requires a showing of a reasonable probability that, but for the breach, the outcome of the proceeding – i.e., the sentence – would have been different; because the Fifth Circuit was correct to apply the plain-error standard to defendant's breach-of-the-plea-agreement claim, the Supreme Court affirmed the judgment below. (Justice Souter, joined by Justice Stevens, filed a dissenting opinion, in which he agreed that plain error was the appropriate standard, but would hold that the "affecting substantial rights" (third) prong, as well as the fourth prong, of the plain-error test should focus on the fact that, in a breach scenario, the defendant has been convicted without either a trial or compliance with the terms of the plea agreement that relieved the government of its obligation to prove its case. He would hold that "a defendant's substantial rights have been violated whenever the Government breaches a plea agreement, unless the defendant got just what he bargained for anyway from the sentencing court.")

United States v. Elashyi, 554 F.3d 480 (5th Cir. 2008) By indicting defendant in the present case (generally concerning illegal exportation of computer equipment to Libya and Syria), the government breached its plea agreement in a previous, though related, case, in which it agreed that it would not prosecute defendant for any further criminal charges "arising out of the facts and circumstances known by the government at [that] time surrounding [defendant's] involvement in the crimes addressed in the superseding indictment"; accordingly, the Fifth Circuit reversed the order

denying defendant's motion to dismiss the indictment based on the previous plea agreement and vacated defendant's conviction.

C. Other

Padilla v. Kentucky, cert. granted, ___ U.S. ___, 129 S. Ct. 1317 (Feb. 23, 2009) (No. 08-651) (granting cert. to Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008)) (1) Are the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the Immigration and Naturalization Act, merely a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise? (2) Even assuming that immigration consequences are "collateral," can counsel's gross misadvice as to the collateral consequence of deportation constitute a ground for setting aside a guilty plea which was induced by that faulty advice?

In re Dean, 527 F.3d 391 (5th Cir. 2008) In case involving criminal prosecution of BP North America, Inc. ("BP") for deaths arising out of refinery explosion, district court, in denying victims' motion to reject plea agreement, misapplied the law and failed to accord the victims the rights conferred by the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771; particularly, the district court erred in proceeding ex parte, with an intentional delay of three months before the victims were notified; because the number of victims here did not render notice to, or conferring with, the victims to be impracticable, the victims should have been notified of the ongoing plea negotiations and should have been allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck with BP; nevertheless, the Fifth Circuit held that the extraordinary relief of mandamus was not appropriate under the circumstances (**agreeing with the Tenth Circuit in In re Antrobus, 519 F.3d 1123, 1127 (10th Cir. 2008), but disagreeing with the Ninth Circuit in Kenna v. United States District Court, 435 F.3d 1011, 1017 (9th Cir. 2006), and the Second Circuit in In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 563 (2d Cir. 2005).**)

United States v. Arami, 536 F.3d 479 (5th Cir. 2008) Under Fed. R. Crim. P. 11(d)(1), a defendant has an unconditional right to withdraw his guilty plea at any time before the district court accepts that plea; therefore, where defendant (who had pleaded guilty before a magistrate judge) moved to withdraw his plea eight days before the district court accepted the guilty plea, the district court plainly erred in denying defendant's motion to withdraw; accordingly, the Fifth Circuit reversed the judgment of the district court and remanded for defendant to withdraw his guilty plea and proceed to trial.

VIII. SENTENCING

A. Constitutional Challenges

Kennedy v. Louisiana, ___ U.S. ___, 128 S. Ct. 2641 (2008), opinions of denial of reh'g, ___ U.S. ___, 129 S. Ct. 1 (Oct. 1, 2008) (decision below: State v. Kennedy, 957 So.2d 757 (La.

2007)) The Eighth Amendment's Cruel and Unusual Punishment Clause bars a state from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. (Justice Alito filed a dissenting opinion in which he was joined by Chief Justice Roberts and Justices Scalia and Thomas.)

Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711 (2009) (decision below: State v. Ice, 170 P.3d 1049 (Or. 2007)) In light of historical practice and the States' authority over the administration of their criminal justice systems, the Sixth Amendment does not preclude States from assigning judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses; the Court declined to "extend the Appendi[v. New Jersey, 530 U.S. 466 (2000),] and Blakely[v. Washington, 542 US. 296 (2004)] line of decisions beyond the offense-specific context that supplied the historical grounding for those decisions." (Justice Scalia filed a dissenting opinion in which he was joined by Chief Justice Roberts and Justices Souter and Thomas.)

United States v. Cano, 519 F.3d 512 (5th Cir. 2008) Upon a defendant's timely request to represent himself, pursuant to Faretta v. California, 422 U.S. 806 (1975), it is error to summarily deny that request without conducting a Faretta hearing as to whether the defendant is knowingly and intelligently waiving his right to counsel; because the district court denied defendant's timely request to proceed pro se at sentencing without conducting a Faretta hearing, the Fifth Circuit vacated defendant's sentence and remanded for resentencing after a Faretta hearing.

United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008) District court committed reversible plain error in convicting and sentencing defendant under 8 U.S.C. § 1326(b)(2); under Appendi v. New Jersey, 530 U.S. 466 (2000), the date of removal with respect to a qualifying conviction is a fact that must be proved to a jury beyond a reasonable doubt; here, defendant's aggravated felony conviction (for aggravated assault) occurred in 2003, **after** the 1988 removal to which defendant admitted at his guilty plea; under Appendi, the district court could not rely on a subsequent 2006 removal to which defendant did not admit in order to increase his statutory maximum penalty from 2 years to 20 years; because defendant's 73-month sentence exceeded the 2-year statutory maximum that would have been permissible based on defendant's admissions alone, his substantial rights were affected; finally, Fifth Circuit determined that it would exercise its discretion to correct the error even on plain-error review; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Rodriguez, 523 F.3d 519 (5th Cir. 2008) Fifth Circuit rejected defendant's claim that the disparate application of "fast-track" sentencing reductions in illegal reentry cases (such a reduction was not available in the district where defendant was prosecuted) violated his equal protection rights; because defendant failed to establish that the distinction involved either a suspect class or a fundamental right, the challenge was subject only to rational-basis review; under that deferential standard, defendant's challenge failed.

United States v. Looney, 532 F.3d 392 (5th Cir. 2008) In methamphetamine and firearms prosecution, defendant’s 548-month prison sentence (480 months of which resulted from mandatory minimum sentences for firearms under 18 U.S.C. § 924(c)) was not so “grossly disproportionate” as to constitute cruel and unusual punishment under the Eighth Amendment; the Fifth Circuit did “observe that the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence . . . We trust that the prosecutors in this Circuit are aware of the potency of this weapon and its potential for abuse, and that they exercise extreme caution in their use of it, all in the interests of justice and fairness.”

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) Even though the pre-November 1, 2001 version of the Sentencing Guidelines would have provided for a lower sentence, it did not violate the Ex Post Facto Clause to use a later version of the Guidelines in sentencing fraud defendant, because the conspiracy of which he was convicted lasted until after November 1, 2001 (as evidenced by one overt act alleged to have occurred on January 7, 2002), and one substantive act of wire fraud also occurred after November 1, 2001.

B. Rule 32/Other Statutory Challenges

Burgess v. United States, ___ U.S. ___, 128 S. Ct. 1572 (2008) (decision below: United States v. Burgess, 478 F.3d 658 (4th Cir. 2007)) “A state drug offense punishable by more than one year [] qualifies as a ‘felony drug offense’ [for purposes of 21 U.S.C. § 841], even if state law classifies the offense as a misdemeanor”; the Court refused to read into the term of art “felony drug offense,” defined at 21 U.S.C. § 802(44), the separate definition of the term “felony” found in 21 U.S.C. § 802(13) (namely, any “offense classified by applicable Federal or State law as a felony”); as a result, the petitioner’s prior South Carolina drug conviction, which was punishable by up to two years’ imprisonment but which was classified as a “misdemeanor” by South Carolina, qualified as a “felony drug offense” for purposes of sentence enhancement under 21 U.S.C. § 841(b)(1)(A).

Begay v. United States, ___ U.S. ___, 128 S. Ct. 1581 (2008) (decision below: United States v. Begay, 470 F.3d 964 (10th Cir. 2006))) Felony driving while intoxicated (“DWI”) under New Mexico law is not a “violent felony” for purposes of the Armed Career Criminal Act (“ACCA”), even assuming that DWI “presents a serious potential risk of physical injury to another”; the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii) must be limited to include only offenses that are similar to the enumerated crimes, in that they involve purposeful, violent, and aggressive behavior; in contrast, DWI is, or is most comparable to, a strict liability crime, in respect to which the offender need not have had any criminal intent at all. (Justice Scalia filed an opinion concurring in the judgment; Justice Alito filed a dissenting opinion in which he was joined by Justices Souter and Thomas.)

United States v. Rodriquez, ___ U.S. ___, 128 S. Ct. 1783 (2008) (decision below: United States v. Rodriquez, 464 F.3d 1072 (9th Cir. 2006)) Defendant’s Washington state drug-trafficking

offense, for which state law authorized a ten-year sentence only because the defendant was a recidivist (otherwise, the maximum sentence was only five years), qualified as a “serious drug offense” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. 924(e); for purposes of the definition of “serious drug offense” in 18 U.S.C. § 924(e)(2)(A)(ii) – defining a “serious drug offense” as a narcotics offense for which “a maximum term of imprisonment of ten years or more is prescribed by law” – includes statutory recidivist enhancements (although the Court did suggest that, where it was not obvious from the sentence that the defendant had been subject to the prior recidivist enhancement, this fact must be proved up by evidence of the type approved in Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005)); finally, the Court rejected the argument that the “maximum term of imprisonment . . . prescribed by law” was set by the maximum of the Washington state guideline range applicable to defendant. (Justice Souter filed a dissenting opinion in which he was joined by Justices Stevens and Ginsburg.)

Irizarry v. United States, ____ U.S. ____, 128 S. Ct. 2198 (2008) (decision below: United States v. Irizarry, 458 F.3d 1208 (11th Cir. 2006)) Fed. R. Crim. P. 32(h) applies only to Guidelines-based “departures,” and not to “variances” resulting in non-Guidelines sentences; hence, a sentencing court is not obliged, under Rule 32(h), to give notice that it is contemplating imposing a variance sentence, even where the basis for the variance is not identified as such in either the presentence report or in a party’s presentencing submission. (Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion in which he was joined by Justices Kennedy, Souter, and Ginsburg.)

Moore v. United States, ____ U.S. ____, 129 S. Ct. 4 (2008) (*per curiam*) (decision below: United States v. Moore, 518 F.3d 577 (8th Cir. 2008)) Where district court clearly expressed its belief that it did not have discretion to sentence on the basis of its disagreement with the powder cocaine to crack cocaine quantity ratio inherent in the Sentencing Guidelines – a view later repudiated by Kimrough v. United States, ____ U.S. ____, 128 S. Ct. 558 (2007) – the Eighth Circuit erred in affirming the defendant’s sentence; instead the Eighth Circuit should have remanded the case to the district court for resentencing under Kimrough; accordingly, the Supreme Court reversed the Eighth Circuit’s judgment and remanded for further proceedings.

Chambers v. United States, ____ U.S. ____, 129 S. Ct. 687 (2009) (decision below: United States v. Chambers, 473 F.3d 724 (7th Cir. 2007)) Defendant’s Illinois conviction for failure to report for confinement was not one for a crime “otherwise involv[ing] conduct that presents a serious potential risk of injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii), and hence was not a “violent felony” within the meaning of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e); conceptually speaking, the crime amounts to a form of inaction, a far cry from the “purposeful, ‘violent,’ and ‘aggressive conduct’” that, the Court held in Begay v. United States, ____ U.S. ____, 128 S. Ct. 1581 (2008), was the hallmark of offenses qualifying as “violent felonies” under the ACCA’s “otherwise” clause; moreover, what little empirical information existed on the question (primarily a recent study done by the United States Sentencing Commission) cut against the government, because it strongly supported the intuitive belief that failure to report does not involve a serious potential risk of physical injury. (Justice Alito, joined by Justice Thomas, filed an opinion concurring in the judgment, in which he lamented that “only Congress can rescue the federal courts

from the mire into which ACCA’s draftsmanship and Taylor v. United States, 495 U.S. 575 (1990),]’s ‘categorical approach’ have pushed us.”)

Spears v. United States, ____ U.S. ____, 129 S. Ct. 840 (2009) (*per curiam*) (decision below: United States v. Spears, 533 F.3d 715 (8th Cir. 2008) (*en banc*)) Where district court categorically agreed with the 100-to-1 ratio inherent in the Guidelines for “crack” cocaine offenses, and instead assessed defendant’s sentence on the basis of a 20-to-1 ratio, the Eighth Circuit erred in reversing that sentence; under Kimbrough v. United States, ____ U.S. ____, 128 S. Ct. 558 (2007), “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines”; if district judges are entitled to disagree with the crack Guidelines, then a sentence based on that disagreement does not become unreasonable simply because the judge chose to specify his disagreement, and the degree of his disagreement, with the 100-to-1 ratio by specifically employing a different ratio; accordingly, the Court granted certiorari and summarily reversed the Eighth Circuit’s judgment reversing the sentence. (Justice Kennedy concurred in the granting of certiorari, but would set the case for oral argument. Justice Thomas dissented without opinion. Chief Justice Roberts filed a dissenting opinion, in which he was joined by Justice Alito.)

Nelson v. United States, ____ U.S. ____, 129 S. Ct. 890 (2009) (*per curiam*) (decision below: United States v. Nelson, 276 Fed. Appx. 331 (4th Cir. 2008) (unpublished)) The Fourth Circuit erred in affirming defendant’s sentence because the district court impermissibly presumed that a Guideline sentence was reasonable, in violation of Rita v. United States, 127 S. Ct. 2456, 2458 (2007), and Gall v. United States, 128 S. Ct. 586, 596-97 (2007); “[t]he Guidelines are not only **not mandatory** on sentencing court; they are also not to be **presumed** reasonable”; accordingly, the Supreme Court summarily reversed the judgment below and remanded for further proceedings.

Nijhawan v. Mukasey, cert. granted, ____ U.S. ____, 129 S. Ct. 988 (Jan. 16, 2009) (No. 08-495) (granting cert. to Nijhawan v. Attorney General of the United States, 523 F.3d 387 (3d Cir. 2008)) Does petitioner’s conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualify as a conviction for conspiracy to commit an ‘offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,’ 8 U.S.C. § 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded \$100 million, and the judgment of conviction and restitution order calculated total victim loss as more than \$680 million?

Johnson v. United States, cert. granted, ____ U.S. ____, 129 S. Ct. 1315 (Feb. 23, 2009) (No. 08-6925) (granting cert. to United States v. Johnson, 528 F.3d 1318 (11th Cir. 2008)) (1) When a state’s highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, is that holding binding on federal courts in determining whether that same offense qualifies as a “violent felony” under the federal Armed Career Criminal Act, 18 U.S.C. § 924(e), which defines “violent felony” as, *inter alia*, any crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another”? (2) Should this Court should resolve a circuit split on whether a prior

state conviction for simple battery is in all cases a “violent felony” – a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; and, further, should this court should resolve a circuit split on whether the physical force required is a de minimis touching in the sense of “Newtonian mechanics,” or whether the physical force required must be in some way violent in nature – that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so?

United States v. Hawley, 516 F.3d 264 (5th Cir. 2008) Defendant’s 1984 California conviction for grand theft from a person, in violation of Cal. Penal Code § 487(2), was a “violent felony” under the Otherwise Clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), because the offense presented a serious potential risk of physical injury to another person; accordingly, district court did not err in enhancing defendant’s sentence under the ACCA.

United States v. Williams, 517 F.3d 801 (5th Cir. 2008) Fraud/money laundering defendant’s 172-month non-Guidelines sentence – a considerable upward variance from the Guideline imprisonment range applicable to defendant (97 to 121 months) – was not an abuse of discretion, even though it was based on factors (the number of victims, the harm to individuals, the expansive reach of the crime, or the complexity of the fraudulent scheme); although the applicable Guideline range may have taken these factors into account, they were still permissible factors for consideration under 18 U.S.C. § 3553(a) in determining whether a sentence inside or outside the Guidelines would be appropriate; **the Fifth Circuit noted that although some of its decisions indicated otherwise – namely, United States v. Walters, 490 F.3d 371, 374 (5th Cir. 2007), United States v. Perrin, 478 F.3d 672, 678 (5th Cir. 2007), and United States v. Sanchez-Ramirez, 497 F.3d 531, 535-36 (5th Cir. 2007) – but suggested that these were no longer good law in light of Rita v. United States, ___ U.S. ___, 127 S. Ct. 1456 (2007), Gall v. United States, ___ U.S. ___, 128 S. Ct. 586 (2007), and Kimbrough v. United States, ___ U.S. ___, 128 S. Ct. 558 (2007).**

United States v. Herrera-Garduno, 519 F.3d 526 (5th Cir. 2008) Illegal reentry defendant’s 60-month, although a considerable upward variance from the advisory Guideline imprisonment range of 21 to 27 months, was not unreasonable; the district court did not abuse its discretion in considering the underlying facts of a prior conviction to conclude that the Guidelines categorization did not properly reflect the seriousness of that prior conviction; the district court addressed these facts and their relation to the 18 U.S.C § 3553(a) factors in some detail; because the district court considered only relevant, proper factors in sentencing, and neither considered improper factors nor committed an error of judgment in balancing the sentencing factors; along the way, the Fifth Circuit made the point that, in light of Kimbrough v. United States, 128 S. Ct. 558, 570 (2007), district courts **are** free to vary from the Guidelines based solely on policy considerations, including disagreements with the Guidelines.

Martinez v. Mukasey, 519 F.3d 532 (5th Cir. 2008) Immigrant’s federal bank fraud conviction under 18 U.S.C. § 1344 was an “aggravated felony” that supported his order of removal from the United States; under James v. Gonzales, 464 F.3d 505, 508 (5th Cir. 2006), the conviction was one for an offense “involv[ing] fraud or deceit,” 8 U.S.C. § 1101(a)(43)(M)(i); assuming arguendo that the Fifth Circuit would accept the idea of “hybrid” fraud/theft offenses that must meet

the requirement of both 8 U.S.C. § 1101(a)(43)(G) and 8 U.S.C. § 1101(a)(43)(M)(i), the bank fraud offense at here was not also a “theft offense,” as the Fifth Circuit had previously defined it, and hence it would not fall under the hybrid offense rubric.

United States v. Quintana-Gomez, 521 F.3d 495 (5th Cir. 2008) Federal district courts do not have the authority to order that their sentences run consecutively to not-yet-imposed sentences from other federal courts; the Fifth Circuit distinguished its decision in United States v. Brown, 920 F.2d 1212, 1216 (5th Cir. 1991), which held that a federal court may enter such an order with respect to a not-yet-imposed state sentence; although the Northern District of Texas federal court thus erred in ordering its sentence to run consecutively to a not-yet-imposed federal sentence in the Southern District of Texas, that error was not “plain” so as to warrant correction on plain-error review; accordingly, the Fifth Circuit affirmed the judgment under consideration but noted that the consecutive portion of the judgment “is without effect and may be disregarded by the Federal Bureau of Prisons in light of this holding.”

United States v. Gomez-Herrera, 523 F.3d 554 (5th Cir. 2008) Although federal sentencing courts are mandated to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” 18 U.S.C. § 3553(a)(6), any disparity resulting from the district-by-district implementation of “fast-track” programs (granting sentence reductions for rapid disposition of immigration cases) is not “unwarranted” disparity, as that disparity was intended by Congress; thus, said the Fifth Circuit, “it would be an abuse of discretion for the district court to deviate from the Guidelines on the basis of sentencing disparity resulting from fast track programs that was intended by Congress.”

United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008) District court erred in applying the 16-level “crime of violence” enhancement found in USSG § 2L1.2(b)(1)(A) in sentencing defendant; because nothing in the record allowed the court to pare down the precise subsection of the statute (New York Penal Law § 125.15) under which defendant’s attempted manslaughter conviction was sustained, and because parts of that statute did not qualify as generic, contemporary “manslaughter,” the government did not meet its burden of proving the applicability of the “crime of violence” enhancement; nevertheless, the district court’s error did not require reversal of the sentence where the district court said, “[E]ven if I am wrong about the guidelines, this is the sentence I would impose in any event.”; the record showed that the district court had at least implicitly considered both the correct and the incorrect Guideline ranges in pronouncing its alternative non-Guideline sentence – a practice permissible under United States v. Tzep-Mejia, 461 F.3d 522, 526 (5th Cir. 2006); because the sentence, even when viewed as a non-Guideline sentence, was sufficiently justified and reasonable, the Fifth Circuit affirmed the sentence. (Judge Garza dissented, arguing that this case was distinguishable from Tzep-Mejia because here, unlike in Tzep-Mejia, there was no explicit evidence that the district court had considered the correct Guideline range, and arguing in the alternative that the non-Guideline sentence was not sufficiently explained in terms of the factors set forth in 18 U.S.C. § 3553(a).)

Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. 2008) Immigrant’s conviction for knowingly filing a false federal tax return, in violation of 26 U.S.C. § 7206(1), was an “aggravated

felony” under 8 U.S.C. § 1101(a)(43)(M)(i) (an offense involving fraud or deceit with loss to the victims exceeding \$10,000); the majority rejected the approach of the Third Circuit, in Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004), which held a federal tax offense other than tax evasion (which is specifically mentioned in 8 U.S.C. § 1101(a)(43)(M)(ii)) may not constitute an aggravated felony under § 1101(a)(43)(M), and instead agreed with then-Judge Alito’s dissent in Lee and the Ninth Circuit’s decision in Kawashima v. Gonzales, 503 F.3d 997 (9th Cir. 2007); the majority also found that there was sufficient proof that the loss to the victims from the offense of conviction exceeded \$10,000; the majority also held that, in making this determination, when the amount of loss to a victim is not an element of the offense, a tribunal should not (as under the “categorical” or “modified categorical” approach) be limited to the record of conviction itself (**court noted a circuit split with the Second, Ninth, and Eleventh Circuits on this issue**); here, the presentence report (“PSR”) from the prior offense provided clear and convincing evidence of a loss exceeding \$10,000, thus qualifying the prior offense as an aggravated felony. (Judge Dennis filed a dissenting opinion (1) stating he would follow the Third Circuit majority in Lee and (2) criticizing the reliance on the PSR to establish the loss amount as inconsistent with the “categorical”/“modified categorical” approach that should be applied in immigration cases.)

Patel v. Mukasey, 526 F.3d 800 (5th Cir. 2008) Immigrant’s conviction for misprision of a felony offense involving a loss to a victim that exceeds \$10,000 is an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(M)(i); although the immigration judge and the Board of Immigration Appeals both erred in going beyond the statutory definition of the offense of misprision of a felony under 18 U.S.C. § 4, immigrant was nevertheless not entitled to relief; the third statutory element of misprision of a felony (namely, an affirmative step to conceal the felony) necessarily entails fraud or deceit; nor could he dispute that the loss exceeded \$10,000; the record of conviction contained an order of restitution exceeding \$10,000, and immigrant could not now collaterally attack the validity of that restitution order.

United States v. Burns, 526 F.3d 852 (5th Cir. 2008) Where defendant unsuccessfully requested a sentence below the advisory Guideline range on the basis of the disparity in the Guidelines’ treatment of cocaine base/“crack” versus powder cocaine, defendant was, in light of the intervening Supreme Court decision in Kimbrough v. United States, 128 S. Ct. 558 (2007), entitled to a remand for resentencing.

United States v. Molina, 530 F.3d 326 (5th Cir. 2008) Defendant’s 90-month sentence (consisting of 30 months on a drug charge and a felon-in-possession charge, and a mandatory consecutive 60-month term for a charge under 18 U.S.C. § 924(c)) was not unreasonable simply because the Guidelines would have dictated a sentence of 30-37 months for the same conduct in the absence of the mandatory consecutive § 924(c) charge; electing to proceed under § 924(c) was a valid exercise of prosecutorial discretion, and, just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced; here, defendant did not argue any impermissible prosecutorial vindictiveness that would allow the court to look behind the charging decision; moreover, to the extent that defendant’s argument was founded on a theory that Congress did not intend for a person convicted of both drug trafficking and a weapons offense

under § 924(c) to be imprisoned longer than § 924(c)'s mandatory minimum (at least in the absence of aggravating circumstances), that argument was refuted by the plain language of § 924(c) and the Guidelines' application notes, which clearly contemplate the imposition of the mandatory consecutive sentence in addition to another sentence.

United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008) Where defendant did not dispute that his previous conviction for simple possession of a controlled substance was valid or that it was final at the time he committed the conduct underlying a second, possession-type offense under California law, the second offense corresponded to recidivist possession under 21 U.S.C. § 844(a), a felony under the federal Controlled Substances Act, and hence was an "aggravated felony" under 8 U.S.C. §§ 1101(a)(43) and 1326 and USSG § 2L1.2.

United States v. Rowan, 530 F.3d 379 (5th Cir. 2008) Where child pornography defendant faced an advisory Guideline range of 46 to 57 months of imprisonment, Fifth Circuit had originally vacated defendant's 5-year probation sentence as unreasonable; however, after the Supreme Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007), the Fifth Circuit on remand affirmed the probation sentence "in light of the deferential standard set forth in Gall."

United States v. Rodriguez-Rodriguez, 530 F.3d 381 (5th Cir. 2008) On original submission, the Fifth Circuit had affirmed as reasonable the within-Guidelines sentence of 57 months' imprisonment imposed on defendant convicted of being found unlawfully present in the United States; although the Supreme Court later granted certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007), the Fifth Circuit on remand again affirmed the district court's sentence; nothing in Gall called for a different result; "the district court duly considered and gave individualized attention to the defense pleas for a sentence lower than 57 months, but reasonably concluded, as it sufficiently explained at sentencing, that other factors, specifically including several factors not to any extent reflected in the applicable Guideline advisory range, counseled against such a sentence"; moreover, assuming arguendo that pre- Gall decisions from the Fifth Circuit impermissibly constrained a district court's discretion to impose a non-Guideline sentence, there is nothing in the record to indicate that the district court would have imposed a lesser sentence had it not felt constrained by the Fifth Circuit's jurisprudence; accordingly, defendant could not, on plain-error review, show that any error affected his substantial rights; finding nothing to overcome the presumption of reasonableness attaching to sentences within a correctly calculated Guideline range, the Fifth Circuit affirmed the sentence.

United States v. Campos-Maldonado, 531 F.3d 337 (5th Cir. 2008) Illegal reentry defendant's 57-month prison sentence – the bottom of the correctly calculated advisory Guideline range of 57 to 71 months – was reasonable; although defendant argued (1) that the illegal reentry Guideline was flawed because it was not empirically based, and (2) that Fifth Circuit precedent had unduly restrained the district court's sentencing discretion in light of later Supreme Court cases, the Fifth Circuit reviewed these arguments only for plain error since they were not made below; the Fifth Circuit concluded that there was no reversible error where there was no indication that the district court felt restricted by precedent from imposing a below-Guideline sentence and where the record

shows that the district court was aware of defendant's particular arguments for a below-Guideline sentence, but simply felt that the Guidelines provided the appropriate sentencing range; because defendant failed to overcome the presumption of reasonableness attaching to sentences within a correctly calculated Guideline range, the Fifth Circuit affirmed the sentence.

United States v. Casper, 536 F.3d 409 (5th Cir. 2008) Court noted the force of defendant's argument that it was anomalous – and therefore his sentence was unreasonable – because, as a result of the jury's acquitting him on a firearm charge under 18 U.S.C. § 924(c), he received a **greater** sentence (due to a gun enhancement under USSG § 2D1.1) than if he had been convicted of the § 924(c) count; nevertheless, any error was not plain so as to warrant correction in the absence of an objection. (Judge Dennis filed an opinion specially concurring and concurring in the judgment, in which he concurred in the affirmance of the sentence under the plain-error standard but confessed that he was “greatly troubled that a district court can use conduct acquitted by a jury for a sentence enhancement beyond that the defendant would have obtained had he been convicted by the jury for that same conduct.)

United States v. Brantley, 537 F.3d 347 (5th Cir. 2008) Even though defendant, convicted of bank fraud and passing counterfeit checks, was subject to a Guideline imprisonment range of 41 to 51 months, the district court's aggregate sentence of 180 months' imprisonment was not unreasonable, given defendant's eight prior convictions for theft or fraud offenses and the need for a lengthy incarceration period to provide just punishment, to ensure adequate deterrence, and to protect the public.

United States v. Vickers, 540 F.3d 356 (5th Cir. 2008) District court did not err in treating defendant's prior Texas conviction for delivery of cocaine as a “serious drug offense” warranting enhancement under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e); the Fifth Circuit noted that, for purposes of the Sentencing Guidelines, it had held that, inasmuch as the Texas offense could be committed by “offer to sell,” it was not categorically a “drug trafficking offense” or “controlled substance offense” under the Guidelines; here, however, although defendant's conviction could have been based on an offer-to-sell theory, the ACCA's definition of a “serious drug offense” is broader than the Guidelines' definition of a “drug trafficking offense” or “controlled substance offense”; particularly, the ACCA definition, unlike the other definitions, speaks of an offense “involving” certain types of drug trafficking activities; giving the word “involving” a broad reading, as informed by the statutory purpose of the ACCA, the Fifth Circuit held that even offer-to-sell Texas delivery qualified as a “serious drug offense” under the ACCA.

United States v. Duhon, 541 F.3d 391 (5th Cir. 2008) On original submission, see United States v. Duhon, 440 F.3d 711 (5th Cir. 2006), the Fifth Circuit had, on the government's appeal, vacated child pornography defendant's 5-year probation sentence (a downward variance from the correct Guideline range of twenty-seven to thirty-three months' imprisonment) as unreasonable; however, after the Supreme Court vacated the Fifth Circuit's judgment and remanded for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007), see Duhon v. United States, 128 S. Ct. 853 (2008), the Fifth Circuit affirmed the district court's probation sentence; first, even though the district court miscalculated the Guidelines by refusing to apply certain enhancements, the

court stated that it would impose the same sentence even if had miscalculated the Guideline range; second, although the district court erred in (1) considering the sentencing disparity between defendant and his co-defendant and (2) apparently not considering Guideline provisions precluding probation, these errors did not entitle the government to reversal of the sentence on plain-error review, because the government did not show that this improper consideration was so essential to the judgment as to affect substantial rights; finally, the sentence was not substantively unreasonable, especially in light of the Fifth Circuit's affirmance of a similar sentence in United States v. Rowan, 530 F.3d 379 (5th Cir. 2008).

United States v. King, 541 F.3d 1143 (5th Cir. 2008) Although it is improper, under Rita v. United States, 127 S. Ct. 2456, 2458 (2007), and Gall v. United States, 128 S. Ct. 586, 596-97 (2007), for a district court to presume that a sentence within the applicable Sentencing Guideline range is reasonable, the district court did not expressly apply such a presumption here, nor did it require the defendant to prove "extraordinary circumstances" before it would impose a non-Guidelines sentence (which, the Fifth Circuit has observed, is akin to applying a presumption of reasonableness); it was appropriate for the district court to refer to the applicable Guideline range when determining the sentence; statements by a sentencing court indicating that a Guideline sentence is "appropriate," or that there is no reason not to apply a Guideline sentence, are not inappropriate.

United States v. Constante, 544 F.3d 584 (5th Cir. 2008) District court reversibly erred in characterizing defendant's prior Texas convictions for burglary of a habitation under Tex. Penal Code § 30.02(a)(3) as convictions for the enumerated "violent felony" of "burglary" for purposes of sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e); under the reasoning of United States v. Herrera-Montes, 490 F.3d 390, 391-92 (5th Cir. 2007), the defendant's convictions under § 30.02(a)(3) did not meet the "generic, contemporary" definition of "burglary" set out in Taylor v. United States, 495 U.S. 575 (1990), because, as with the Tennessee statute at issue in Herrera-Montes, § 30.02(a)(3) does not require intent to commit a crime at the time of the unlawful entry; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Woods, 547 F.3d 515 (5th Cir. 2008) District court abused its discretion in imposing a discretionary condition of defendant's supervised release forbidding her from residing with any person to whom she was not ceremonially married or related by blood; the condition ran afoul of the standards set out in 18 U.S.C. § 3583(d) because the condition was overbroad and involved a greater deprivation of liberty than was reasonably necessary to achieve the purposes of supervised release; accordingly, while affirming the remainder of defendant's sentence, the Fifth Circuit vacated this supervised release condition and remanded the case to the district court to allow it (if it chose) an opportunity to fashion an alternative supervised release condition not inconsistent with the Fifth Circuit's opinion.

United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009) It was not, under United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008), plain error for district court to increase statutory maximum from 2 years under 8 U.S.C. § 1326(a) to 20 years on the basis of a prior deportation, where that prior deportation appeared in the defendant's presentence report ("PSR") and defendant

agreed to the accuracy of the PSR; Rojas-Luna was distinguishable because in that case there was no evidence that the defendant had ever agreed to the accuracy of the PSR; alternatively, any error did not affect the fairness, integrity or public reputation of the judicial proceedings given that the relevant deportation was essentially uncontroverted. (Notably, this error was not raised by defense counsel, but rather was raised by **government** counsel sua sponte.)

United States v. Rodriguez, 558 F.3d 408 (5th Cir. 2009) In sentencing defendant convicted of assault on a federal officer in violation of 18 U.S.C. § 111, district court did not abuse its discretion in imposing supervised release conditions prohibiting defendant's unsupervised association with children under 18 and also prohibiting defendant's residence within 1,000 feet of a school, playground, or other facility frequented by children; the conditions were reasonably related to the offense or to the offender because, even though defendant was not, and had not ever been, convicted of a sex offense, there was evidence that defendant had previously committed sexual assault against a child and had a sexual attraction to children; nor were the conditions impermissibly overbroad; finally, the district court did not inappropriately delegate its judicial duties to the Probation Office in policing these conditions.

C. (Selected) Guidelines Issues

United States v. Lopez-Salas, 513 F.3d 174 (5th Cir. 2008) District court reversibly erred in characterizing defendant's prior North Carolina conviction for conspiracy to transport marijuana as a "drug trafficking offense" for purposes of USSG § 2L1.2(b)(1)(A)(i); particularly, the district court erred in characterizing a conviction for simple possession of marijuana as involving an intent to distribute, and hence "drug trafficking," based solely on an inference arising from the quantity of marijuana involved; for purposes of federal sentencing, criminal intent to distribute must be proven as an element of the offense, and not merely implied.

United States v. Juarez Duarte, 513 F.3d 204 (5th Cir. 2008) District court did not reversibly err in assessing a Guideline enhancement for obstruction of justice under USSG § 3C1.1; the district court's finding that the defendant had willfully obstructed and attempted to obstruct the administration of justice, by falsely insisting that he needed an interpreter when in actuality he did not, was not clearly erroneous; moreover, this false contention was material within the contemplation of this Guideline because it led to the district court's vacating defendant's original guilty plea – made without the assistance of an interpreter – due to the doubts created by the later-asserted need for an attorney.

United States v. Lopez-DeLeon, 513 F.3d 472 (5th Cir. 2008) In order to qualify as the enumerated "crime of violence" of "statutory rape" in USSG § 2L1.2, an offense must have been perpetrated against someone younger than sixteen years old; this is so because the ordinary, contemporary, and common meaning of the term "minor" in this context is a person under sixteen, which is the age of sexual consent in a majority of American jurisdictions; here, however, the judicially cognizable documents demonstrated that defendant's prior California conviction was for sexual intercourse with a person under fourteen, which did qualify defendant for this sentencing enhancement.

United States v. Newson, 515 F.3d 374 (5th Cir. 2008) The district court did not err in refusing to grant defendant an extra one-level reduction for acceptance of responsibility under USSG § 3E1.1(b), because the government did not make the motion for that reduction, as required by the Guideline (whose requirement was, in turn, compelled by Congress in the PROTECT Act of 2003); the government-motion requirement does not violate principles of separation of powers; furthermore, a court can review the government’s refusal to file such a motion and grant a remedy only if it finds that the refusal was (1) animated by an unconstitutional motive, or (2) not rationally related to a legitimate government end; the basis cited by the government for its refusal to file a § 3E1.1(b) motion – namely, the defendant’s refusal to waive his right to appeal – is a proper basis for refusing to file a § 3E1.1(b) motion, as it is rationally related to the purpose of the rule and is not based on an unconstitutional motive.

United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) In alien smuggling case (in which one of the smuggled aliens died of dehydration exposure, or both) district court did not err in enhancing one defendant’s sentence under USSG § 2L1.1(b)(5) (for substantial risk of death or serious bodily injury to another person) and under USSG § 2L1.1(b)(6) (for death of a person in connection with the offense); it was at least reasonably foreseeable that serious injury or death might result from heat exhaustion or dehydration in this hostile terrain during the summer months (the smuggling occurred in July of 2003).

United States v. Price, 516 F.3d 285 (5th Cir. 2008) The district court committed reversible plain error in treating defendant’s prior Texas conviction for delivery of cocaine as a “controlled substance offense” for purposes of USSG § 2K2.1 (incorporating by reference the “controlled substance offense” definition contained in USSG § 4B1.2); the crime of delivery under Texas law can be committed by a mere offer to sell a controlled substance, which plainly does not fall within the definition of “controlled substance offense” (as the Fifth Circuit previously held with respect to the essentially identical term “drug trafficking offense” in USSG § 2L1.2, see United States v. Gonzales, 484 F.3d 712 (5th Cir. 2007)); moreover, under the circumstances presented by this case – *i.e.*, where the sentence actually imposed (the minimum under the incorrect Guideline range) was eighteen months greater than the minimum of the correct range, the remaining requirements for correcting the error under plain-error review were satisfied, even though the two Guideline ranges overlapped somewhat; the Fifth Circuit noted but did not resolve a conflict in Fifth Circuit case law about the treatment, on plain-error review, of Guideline application errors resulting in overlapping ranges.

United States v. Tellez-Martinez, 517 F.3d 813 (5th Cir. 2008) District court did not err in applying a sixteen-level “crime of violence” sentencing enhancement to defendant under USSG § 2L1.2; defendant’s prior California robbery conviction under Cal. Penal Code § 211 fell within the generic, contemporary meaning of the enumerated “crime of violence” of “robbery” – namely, aggravated larceny containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person; that California robbery could be committed by creating a fear of unlawful injury to **property** as well as to the person did not take California robbery outside this generic definition.

United States v. Najera-Najera, 519 F.3d 509 (5th Cir. 2008) Defendant’s prior Texas conviction for indecency with a child by contact (in violation of Tex. Penal Code § 21.11(a)(1)) was “sexual abuse of a minor,” and hence a “crime of violence,” warranting a sixteen-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Williams, 520 F.3d 414 (5th Cir. 2008) In sentencing federal prisoner convicted of forcibly assaulting a federal officer (a prison guard), district court did not err in concluding that prisoner “otherwise used” a dangerous weapon (a shank) for purposes of USSG § 2A2.2(b)(2)(A), rather than merely “brandishing” it, where prisoner did more than merely display the shank or make its presence known in order to intimidate; district court likewise did not err in concluding that offense was motivated by officer’s status as a government employee, for purposes of the sentencing enhancement contained in USSG § 3A1.2(b); even though prisoner claimed that his action was motivated by guard’s improper touching during a security patdown, the sole reason the case arose was because the officer was employed as a corrections officer at the federal penitentiary.

United States v. Garcia-Arellano, 522 F.3d 477 (5th Cir. 2008) A written judicial confession accompanying a guilty plea under Texas law is a document that may, under Shepard v. United States, 544 U.S. 13 (2005), be used to determine whether an offense qualifies for sentencing enhancement under the categorical/modified categorical method of Taylor v. United States, 495 U.S. 575 (1990); in this case, defendant written judicial confession established that his prior Texas conviction for delivery of a controlled substance was a “drug trafficking offense” for purposes of USSG § 2L1.2, because, in it, the defendant admitted that he had committed the offense exactly as alleged in the indictment – which charged him with actually transferring and constructively transferring a controlled substance (qualifying) in addition to offering to sell a controlled substance (non-qualifying).

United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008) District court erred in applying the 16-level “crime of violence” enhancement found in USSG § 2L1.2(b)(1)(A) in sentencing defendant; because nothing in the record allowed the court to pare down the precise subsection of the statute (New York Penal Law § 125.15) under which defendant’s attempted manslaughter conviction was sustained, and because parts of that statute did not qualify as generic, contemporary “manslaughter,” the government did not meet its burden of proving the applicability of the “crime of violence” enhancement; nevertheless, the district court’s error did not require reversal of the sentence where the district court said, “[E]ven if I am wrong about the guidelines, this is the sentence I would impose in any event.”; the record showed that the district court had at least implicitly considered both the correct and the incorrect Guideline ranges in pronouncing its alternative non-Guideline sentence – a practice permissible under United States v. Tzep-Mejia, 461 F.3d 522, 526 (5th Cir. 2006); because the sentence, even when viewed as a non-Guideline sentence, was sufficiently justified and reasonable, the Fifth Circuit affirmed the sentence. (Judge Garza dissented, arguing that this case was distinguishable from Tzep-Mejia because here, unlike in Tzep-Mejia, there was no explicit evidence that the district court had considered the correct Guideline range, and arguing in the alternative that the non-Guideline sentence was not sufficiently explained in terms of the factors set forth in 18 U.S.C. § 3553(a).)

United States v. Tushnet, 526 F.3d 823 (5th Cir. 2008) In calculating drug quantity for purposes of the Sentencing Guidelines, district court did not err in using the “presumed weight” of 250 mgs. per pill, rather than the 100 mgs. of actual MDMA (Ecstasy) that the 5,000 pills sampled (out of 45,331) each contained; MDMA is not one of the drugs designated in the Guidelines as to be measured only by the amount of controlled substance alone, as opposed to the drug’s weight in combination with a filler.

United States v. Rosas-Pulido, 526 F.3d 829 (5th Cir. 2008) District court reversibly erred in characterizing defendant’s prior Minnesota conviction for fourth-degree criminal sexual conduct (Minn. Stat. § 609.345 (2003)) as a “crime of violence” for purposes of USSG § 2L1.2(b)(1)(A)(ii).

United States v. Sanchez, 527 F.3d 463 (5th Cir. 2008) In sentencing defendant for failure to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C. § 2250, district court committed reversible plain error by failing to consider a Guideline for SORNA failure-to-register offenses that the Sentencing Commission had proposed but that had not yet taken effect at the time of sentencing; because the 60-month prison sentence imposed on defendant substantially exceeded the 21-27 month range recommended by the proposed Guideline, the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Gould, 529 F.3d 274 (5th Cir. 2008) In drug/firearm case, district court reversibly erred in applying enhancement for reckless endangerment during flight under USSG § 3C1.2; the record – which showed only that defendant fled from the police for an undefined but short distance, in a “grass field” – was too sparse to show that defendant acted recklessly and in a manner that created a substantial risk of injury; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing at which the government could adduce additional relevant evidence of the flight if the government had any to offer.

United States v. Gonzalez-Terrazas, 529 F.3d 293 (5th Cir. 2008) Under United States v. Ortega-Gonzaga, 490 F.3d 393 (5th Cir. 2007), the district court plainly erred in treating defendant’s conviction for residential burglary under Cal. Penal Code § 459 as “burglary of a dwelling,” and hence a “crime of violence,” for purposes of the 16-level enhancement of USSG § 2L1.2(b)(1)(A); because the sentence actually imposed (57 months’ imprisonment) greatly exceeded the maximum of the correct Guideline range (24 to 30 months’ imprisonment), defendant’s substantial rights were affected, and the Fifth Circuit exercised its discretion to correct the error on plain-error review. (Judge Owen filed a concurring opinion agreeing that this result was compelled by Ortega-Gonzaga, but argued that the court should go en banc to decide whether courts may conclude that there has been a conviction for a generic enumerated offense if the defendant was charged with and pled guilty to all the elements of a generic offense, but the statute of conviction lacks one or more of those elements.)

United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008) Where defendant did not dispute that his previous conviction for simple possession of a controlled substance was valid or that it was final at the time he committed the conduct underlying a second, possession-type offense under California law, the second offense corresponded to recidivist possession under 21 U.S.C. § 844(a),

a felony under the federal Controlled Substances Act, and hence was an “aggravated felony” under 8 U.S.C. §§ 1101(a)(43) and 1326 and USSG § 2L1.2.

United States v. Sanchez-Cortez, 530 F.3d 357 (5th Cir. 2008) Defendant’s military court martial conviction for being absent without leave (“AWOL”), for which he received a 114-day confinement sentence, was countable under the Guidelines’ criminal history scoring rules; because defendant received 114 days for his prior AWOL conviction, it would not qualify for exclusion under USSG § 4A1.2(c)(1) even if it were similar to a listed offense; nor did it qualify for exclusion under USSG § 4A1.2(c)(2); under the multi-factor approach announced by the Fifth Circuit in United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991), defendant’s AWOL offense was not similar to the listed offense of truancy.

United States v. Crawley, 533 F.3d 349 (5th Cir. 2008) In computing the Guideline loss amount for a union president convicted of voter fraud in connection with his being elected president, the district court did not err in including defendant’s entire salary and pension over the period at issue; in response to defendant’s argument that he was entitled to an offset for the value of legitimate services provided to the union, the Fifth Circuit agreed with the district court that legitimate services, if any, were not capable of being severed from non-legitimate services.

United States v. Kimbrough, 536 F.3d 463 (5th Cir. 2008) Where defendants were convicted of conspiracy to obstruct justice, obstruction of justice, and accessory after the fact – all based on their conduct resulting in members of a cocaine trafficking organization being informed about an investigation by the Drug Enforcement Administration – the district court reversibly erred in calculating the defendants’ Guideline ranges under USSG § 2J1.2 (the Guideline for obstruction of justice) rather than USSG § 2X3.1 (the accessory-after-the-fact Guideline); particularly, the district court erred by requiring that the defendants have had specific knowledge of the drug quantities involved in the underlying offense in order for those quantities to be used in determining the base offense level under § 2X3.1; the knowledge/reasonable foreseeability requirement of § 2X3.1 applies only to specific offense characteristics, not to the base offense level; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Conner, 537 F.3d 480 (5th Cir. 2008) In access-device fraud/wire fraud case, district court reversibly erred in applying a four-level enhancement under USSG § 2B1.1(b)(2)(B) on the ground that the offense involved between 50 and 250 “victims”; credit card account holders whose credit cards were fraudulently used, but who suffered no losses because the credit card companies fully reimbursed their accounts for all fraudulent charges temporarily made to their accounts, were not “victims” because they did not suffer any “actual loss,” see USSG § 2B1.1, comment. (n.1); accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing. (Judge Garza dissented from this holding.)

United States v. Fuentes-Oyervides, 541 F.3d 286 (5th Cir. 2008) District court did not err in applying a twelve-level enhancement of defendant’s base level under USSG § 2L1.2(b)(1)(B), because defendant’s conviction under Ohio Rev. Code Ann. § 2925.03(A)(2) (criminalizing “[p]repar[ing] for shipment [, etc.] a controlled substance, when the offender knows or has

reasonable cause to believe that the controlled substance is intended for sale or resale”) was a qualifying “drug trafficking offense”; such an individual effectively “commits an act of distribution under the Guidelines.”

United States v. Garza, 541 F.3d 290 (5th Cir. 2008) In sentencing defendant convicted of transporting an unlawful alien, district court reversibly erred in applying an enhancement under USSG § 2L1.1(b)(6) (2006) for creating a “substantial risk of death or serious bodily injury to another person”; particularly, the district court erred in applying effectively a per se rule that transporting aliens through the South Texas brush necessarily and always involved subjecting them to a substantial risk of death or serious bodily injury; it is not enough to say, as the district court did here, that traversing an entire geographical region is inherently dangerous; rather, it must be dangerous on the facts presented and used by the district court; nor could the Fifth Circuit infer such particularized danger from the record of the case (which included the fact that the group of aliens at issue slept overnight in a motel); accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Reasor, 541 F.3d 366 (5th Cir. 2008) In sentencing defendant convicted of fraud and false statement offense (involving church funds taken by defendant during her tenure as the office manager of a Catholic church), district court did not err in applying a two-level upward adjustment, under former USSG § 2F1.1(b)(4)(A), for an “offense involv[ing] . . . a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization”; adopting the majority approach to this Guideline and its successor (USSG § 2B1.1(b)(8)(A)), and rejecting the contrary view of the Tenth Circuit in United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995), the Fifth Circuit held that there was no requirement that the defendant have misrepresented her authority to act on behalf of the organization or that the defendant’s conduct have exploit the victims’ altruistic impulses or motivations.

United States v. Moreno-Flores, 542 F.3d 445 (5th Cir. 2008) District court committed reversible plain error in characterizing defendant’s prior California conviction for kidnapping (Cal. Penal Code § 207(a)) as a “crime of violence” for purposes of USSG § 2L1.2(b)(1)(A)(ii); because California practice permits a conviction under any one of several disjunctively-charged elements, the record did not necessarily establish that defendant was convicted of an offense with the requisite force element; nor did the California offense qualify as the enumerated crime of violence of “kidnapping” listed in § 2L1.2 because the California offense did not meet all the elements of the generic, contemporary definition of “kidnapping.”

United States v. Ayala, 542 F.3d 494 (5th Cir. 2008) Although acknowledging authority that the “generic, contemporary” meaning of the term “minor” (for purposes of the enumerated offenses of “statutory rape” and “sexual abuse of a minor”) contemplated a person under sixteen years of age, see United States v. Lopez-De Leon, 513 F.3d 472 (5th Cir. 2008), the Fifth Circuit held that precedent (particularly, United States v. Zavala-Sustaita, 214 F.3d 601, 604 (5th Cir. 2000)) compelled the conclusion that defendant’s prior Texas conviction for indecency with a child under seventeen (in violation of Tex. Penal Code § 21.11(a)(1)) was “sexual abuse of a minor,” and hence

a “crime of violence,” warranting a sixteen-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Dial, 542 F.3d 1059 (5th Cir. 2008) Fifth Circuit noted an intracircuit split on the standard of review of a district court’s application of a Guidelines enhancement for abuse of position of trust under USSG § 3B1.3; because earlier decisions applied a clearly erroneous standard, the Circuit’s “rule of orderliness” compelled application of that standard in this case, “[d]espite whatever persuasiveness” later decisions applying de novo review might have; under this standard, the district court did not clearly err in applying the § 3B1.3 enhancement to defendant insurance adjuster, who abused his discretionary authority to settle and pay insurance claims to facilitate the payment of fraudulent claims.

United States v. Pillado-Chaparro, 543 F.3d 202 (5th Cir. 2008) Defendant’s prior conviction for using a telephone to facilitate a conspiracy to distribute marijuana and/or cocaine (a violation of 21 U.S.C. § 843(b)) was a “drug trafficking offense” that qualified for a sixteen-level enhancement under USSG § 2L1.2(b)(1)(A)(i).

United States v. Klein, 543 F.3d 206 (5th Cir. 2008) In mail fraud/health care fraud prosecution of physician for submission of false insurance claims, misapplied the Guidelines and reversibly erred when, in calculating the Guideline “loss” figure, it failed to give defendant physician credit for the fair market value of medications actually dispensed, as required by USSG § 2B1.1, comment. (n.3(E)(i)); the district court also reversibly erred in computing the restitution award, because it used defendant’s gross proceeds from his fraud, and not the actual loss to the insurers (because the insurers would have had to reimburse at least some portion of the claims); accordingly, the Fifth Circuit vacated the sentence and the restitution order and remanded for resentencing.

United States v. Cardenas-Cardenas, 543 F.3d 731 (5th Cir. 2008) Holding that nothing in James v. United States, 127 S. Ct. 1586 (2007), overruled its prior precedent on the subject, Fifth Circuit adhered to that precedent and held that defendant’s conviction for burglary of a habitation under Tex. Penal Code § 30.02(a)(1) was “burglary of a dwelling” as contemplated by USSG § 2L1.2 and hence was a “crime of violence” warranting a sixteen-level enhancement under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Sandoval-Ruiz, 543 F.3d 733 (5th Cir. 2008) Defendant’s prior conviction for delivery of marijuana, in violation of the Illinois Cannabis Control Act (720 Ill. Comp. Stat. § 550/5(g) (West 1999)) qualified as a “drug trafficking offense” warranting a sixteen-level enhancement under USSG § 2L1.2(b)(1)(A)(i); the Fifth Circuit rejected defendant’s contention that Illinois accountability law encompassed a broader range of conduct than that contemplated by USSG § 2L1.2.

United States v. Gomez-Gomez, 547 F.3d 242 (5th Cir. 2008) (en banc) Panel had originally held, see United States v. Gomez-Gomez, 493 F.3d 562 (5th Cir. 2007), that the district court had reversibly erred in enhancing defendant’s sentence by 16 levels under USSG § 2L1.2(b)(1)(A)(ii) because, under the reasoning of United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004),

defendant's 1991 prior conviction for "forcible rape" under Cal. Penal Code § 261 (1990) was not a "crime of violence," either under the "has as an element" prong or as a "forcible sex offense." **However, on rehearing en banc, the Fifth Circuit affirmed the district court's application of the "crime of violence" enhancement; the Court held that sex offenses committed using constructive force that would cause a reasonable person to succumb qualify as "forcible sex offenses," and therefore "crimes of violence," under USSG § 2L1.2; such offenses, by definition, involve victims who have not consented in fact, even if the victim has putatively consented/assented. (Court noted, but did not rely upon, the then-pending proposed amendment to the definition of "forcible sex offense" in this Guideline, which included offenses "where consent to the conduct is not given or is not legally valid, such as where the consent to the conduct is involuntary, incompetent, or coerced." USSG § 2L1.2, comment. (n.1(b)(iii)) (Nov. 1, 2008).)**

United States v. Goss, 549 F.3d 1013 (5th Cir. 2008) In computing the Guideline loss amount in mortgage-lending fraud case, district court reversibly erred in refusing to credit the fair market value of the collateral for each of the home-mortgage loans involved in the scheme against the loss to the victim; although there are situations (including some in the Fifth Circuit's jurisprudence, *see, e.g., United States v. Morrow*, 177 F.3d 272 (5th Cir. 1999)) where the deduction of collateral may not provide the fairest loss assessment, that was not the case here; particularly, the Fifth Circuit could not conclude, especially given the real, immovable nature of the collateral securing the loans, that defendant was so consciously indifferent or reckless about the repayment of the loans so as to impute to him the intention that the lenders should not recoup their loans, whether by payment by the borrowers or through recovering the collateral in the event of default; stressing the fact-intensive, loan-by-loan nature of the Guideline loss inquiry, the Fifth Circuit found that, in this case, the district court had erred in refusing to credit the value of collateral (except in the case of defendant's own home loan); accordingly, the Fifth Circuit remanded for the district court to recalculate loss, with a credit for fair market value of the collateral at the time of the initial sentencing (a measure which, the Court indicated, was appropriate for this case, but not a blanket rule for all future cases).

United States v. Elashyi, 554 F.3d 480 (5th Cir. 2008) In sentencing defendants for illegal exportation of computer equipment to Libya and Syria, the district court did not err in concluding that defendants' violations evaded "national security controls" under USSG § 2M5.1(a), thus requiring a starting Guideline base offense level of 26, instead of the otherwise applicable base offense level of 14; export regulations targeted against state sponsors of terrorism are "national security controls" under USSG § 2M5.1(a).

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009):

(1) District court did not reversibly err in enhancing sentence of former CEO of Enron for obstruction of justice under USSG § 3C1.1 on the basis of defendant's perjurious statement to the SEC; the Fifth Circuit recognized that, in the guilt phase of a prosecution, it may be appropriate to suppress statements made to an agency, where the agency deliberately misleads the maker of the statements as to the nature of the investigation, *see, e.g., United States v. Tweel*, 550 F.2d 297, 299-

300 (5th Cir. 1977); it does not follow, however, that such evidence may not be used at sentencing; rather, whether evidence should be suppressed at sentencing should be decided on a case-by-case basis; here, suppression was not called for, because the agency proceeding did not result in the production of truthful but incriminating evidence (as in Tweel); rather, the evidence in question was defendant's own false statement, and defendant offered no justification for lying under oath.

(2) District court did reversibly err in enhancing defendant's Guideline offense level by four levels for substantially jeopardizing the soundness of a financial institution, see USSG § 2F1.1(b)(8)(A) (2000); Enron's retirement plans were not "financial institutions" within the meaning of this Guideline; although the government made reasonable arguments that the retirement plans did qualify as "financial institutions" (either as "pension funds" or as falling within the "any similar entity" catch-all within the relevant definition found in Application Note 19 to that Guideline), the defendant's arguments were also reasonable; therefore, the rule of lenity required that any doubts about the proper interpretation to be resolved in favor of the defendant; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Mohr, 554 F.3d 604 (5th Cir. 2009) Defendant's prior South Carolina conviction for stalking (in violation of S.C. Code Ann. § 16-3-1700(B) (2002)) was a "crime of violence" under USSG § 4B1.2 (as incorporated by reference in USSG § 2K2.1, the Guideline under which defendant was sentenced); especially as honed down by the state charging document and judgment, it was clear that defendant's prior offense "involve[d] conduct that present[ed] a serious potential risk of physical injury to another" under USSG § 4B1.2(a)(2).

United States v. Ollison, 555 F.3d 152 (5th Cir. 2009) In sentencing secretary for Dallas Independent School District ("DISD") (convicted under 18 U.S.C. § 666(a)(1)(A) for theft of funds from an organization receiving federal funds, based upon her unauthorized use of a DISD credit card), district court reversibly erred in applying a two-level enhancement for abuse of position of trust under USSG § 3B1.3; such an enhancement requires (1) that the defendant occupy a position of trust, and (2) if so, that she use that position to facilitate or conceal the offense; here, defendant did not occupy a position of trust because her limited authority to make purchases with the DISD credit card was not the type of professional or managerial discretion contemplated by the commentary to USSG § 3B1.3; defendant's secretarial position did not give her substantial discretionary judgment, the exercise of which permitted her to perpetrate her crime; nor did the government prove that defendant used her secretary position in a manner that significantly facilitated the commission or concealment of the theft; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing. (Judge Garza dissented as to this holding.)

United States v. Ekanem, 555 F.3d 172 (5th Cir. 2009) In health care fraud prosecution under 18 U.S.C. § 1347, district court erred in attributing to defendant, under the relevant conduct provisions of USSG § 1B1.3, fraudulent activity of another person; there was no evidence that defendant agreed to jointly undertake the distinct criminal activity engaged in by the other person; defendant's mere awareness that the other person was operating an identical fraudulent scheme was insufficient to hold defendant responsible for the other person's actions; moreover, remand for resentencing was appropriate even though defendant originally received a downward departure,

because the record did not disclose whether the district court would have imposed the same sentence had it started from the lower Guideline range.

United States v. Dunigan, 555 F.3d 301 (5th Cir. 2008) District court did not reversibly err in finding that bank robber “otherwise used” his gun within the meaning of USSG § 2B3.1(b)(2)(D), rather than “brandished” it within the meaning of USSG § 2B3.1(b)(2)(E); in order for a gun to be “otherwise used” under this Guideline, the threat to the victim must be specific rather than general; thus, displaying a weapon without pointing or targeting should be classified as “brandished,” but pointing the weapon at any individual or group of individuals should be “otherwise used”; here, the bank robber’s conduct (pointing the gun in the teller’s face) clearly qualified as “otherwise us[ing]” the gun; likewise, district court did not err in concluding that the BB gun used by defendant qualified as a “dangerous weapon” under USSG § 2B3.1(b)(2)(D), because the gun met the definition of a “dangerous weapon” found in Application Note 1(D) to USSG § 1B1.1.

United States v. Alfaro, 555 F.3d 496 (5th Cir. 2008) In sentencing defendant for production of child pornography, district court did not err in applying a two-level enhancement under USSG § 2G2.1(b)(5) on the ground that the minor at issue was in the defendant’s custody, care or supervisory control; 36-year-old defendant occupied a sufficiently “entrustful relationship” vis-à-vis the 15-year-old victim (who was his sister-in-law), even though the victim’s mother disapproved of the relationship.

United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009) District court did not plainly err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii) to defendant on the basis of his 2003 New Jersey conviction for aggravated assault under N.J. Stat. Ann. § 2C:12-1b(7); at least on plain-error review, that offense was sufficiently like the ordinary, contemporary, and common meaning of “aggravated assault,” an enumerated “crime of violence” under this Guideline.

United States v. Johnston, ___ F.3d ___, 2009 WL 313346 (5th Cir. Feb. 10, 2009) Where defendant was convicted of aiding and abetting her husband’s possession of a firearm (a violation of 18 U.S.C. § 922(g)(1), because he was a previously convicted felon), the district court reversibly erred in calculating her Guidelines when it cross-referenced, pursuant to USSG § 2K2.1(c)(1), to the Guideline for attempted murder; for a § 2K2.1 cross-reference to another offense to apply, the person being sentenced must know that the firearm **will** be used to facilitate the other offense; it is not sufficient (as the district court believed here) that the defendant simply know that the firearm is capable of facilitating another offense; nor can the cross-reference be applied on a “should have known” basis; because the district court’s application of the cross-reference was based upon these two erroneous premises of law, the Fifth Circuit vacated defendant’s sentence and remanded for resentencing.

D. Fines and Restitution

United States v. Nolen, 523 F.3d 331 (5th Cir. 2008) Fifth Circuit acknowledged that, in originally reversing the restitution order of the district court, see United States v. Nolen, 472 F.3d

362 (5th Cir. 2006), it had been “overbroad and imprecise”; the Fifth Circuit did not, as the district court believed, intend to prevent the district court from ordering restitution as a condition of supervised release; accordingly, the Fifth Circuit remanded for the district court to determine whether to impose restitution as a condition of supervised release, and if so, in what amount.

United States v. Smith, 528 F.3d 423 (5th Cir. 2008) Acknowledging a split of authority on the issue whether a general appeal waiver bars review of a restitution order when the plea agreement does not discuss restitution, the Fifth Circuit pretermitted consideration of whether defendant’s appeal of her restitution order was barred by the waiver provision and instead held, on the merits, that the district court; did not abuse its discretion in ordering defendant to pay \$346,946 in restitution jointly and severally with her codefendants; this was so because the defendant came forward with no rebuttal evidence to contradict the presentence report’s calculation of that amount of loss.

United States v. Crawley, 533 F.3d 349 (5th Cir. 2008) In sentencing union president convicted of voter fraud in connection with his being elected president, the district court did not err in including defendant’s entire salary and pension in the amount of restitution ordered; defendant acquired the salary and pension through his fraudulent acts, bringing his conduct within the plain language of 18 U.S.C. § 3663A(b)(1)(A) of the Mandatory Victims Restitution Act (“MVRA”).

United States v. Brantley, 537 F.3d 347 (5th Cir. 2008) District court did not plainly err in requiring defendant, convicted of bank fraud and passing counterfeit checks, to pay a fine of \$65,000; although a defendant may rely on the presentence report (PSR) to establish his inability to pay a fine, here the PSR found only that defendant was unable to pay both fine and restitution at the time of sentence, and it did not speak to his future earning capacity; furthermore, the district court considered defendant’s ability to pay in setting a payment schedule for the fine; finally, defendant’s substantial rights were not affected because he at least arguably could have been ordered to pay essentially the same amount in restitution.

United States v. Gutierrez-Avascal, 542 F.3d 495 (5th Cir. 2008) Where defendant was convicted of conspiracy to possess marijuana with intent to distribute (in violation of 21 U.S.C. § 846), district court did not err in ordering restitution for injuries caused when, in the course of defendant’s flight from law enforcement officers, he collided with another vehicle; the restitution award was authorized by statute because, even though 18 U.S.C. § 3663(a)(1) did not specifically list 21 U.S.C. § 846 as one of the offenses for which restitution could be ordered, § 846 itself provides that a person convicted of conspiracy under this section “shall be subject to the same penalties as those prescribed for the offense [that is the object of the conspiracy]”; because restitution is allowed upon conviction of possession of marijuana with intent to distribute (the object offense here), it was likewise permissible upon defendant’s conviction of conspiracy to commit that offense; nor were the losses that were the subject of the restitution award too attenuated from the offense of conviction; defendant was engaging in activity in furtherance of the marijuana conspiracy (flight from pursuing law enforcement officers) when his vehicle collided with the other vehicle.

United States v. Klein, 543 F.3d 206 (5th Cir. 2008) In mail fraud/health care fraud prosecution of physician for submission of false insurance claims, misapplied the Guidelines and reversibly erred when, in calculating the Guideline “loss” figure, it failed to give defendant physician credit for the fair market value of medications actually dispensed, as required by USSG § 2B1.1, comment. (n.3(E)(i)); the district court also reversibly erred in computing the restitution award, because it used defendant’s gross proceeds from his fraud, and not the actual loss to the insurers (because the insurers would have had to reimburse at least some portion of the claims); accordingly, the Fifth Circuit vacated the sentence and the restitution order and remanded for resentencing.

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) In sentencing defendant attorney convicted of fraud with respect to claims to the settlement fund for Fen-Phen litigation, the district court erred in including, in its restitution award, the requirement that defendant reimburse the fund for three claims (totaling \$54,000) as to which there was no evidence of their falsity; furthermore, imposing a restitution order against defendant in the amount of the whole fraudulent take did not violate the Eighth Amendment, even though defendant personally received only a fraction of the proceeds of the fraudulent scheme; this was especially true in light of the fact that the restitution obligation was joint and several with the other fraudfeasors, thus entitling defendant to contribution from them for any restitution amounts in excess of his personal share of the proceeds; finally, the district court’s restitution payment schedule did not constitute plain error; the district court considered defendant’s financial circumstances in setting that schedule, and the court did not impermissibly delegate to the Probation Office the duty of setting the schedule.

E. Resentencing/Sentence Reduction

United States v. Spencer, 513 F.3d 490 (5th Cir. 2008) District court’s amendment of its original judgment – done over a decade after entry of the original judgment – was not a time-barred alteration of sentence governed by Fed. R. Crim. P. 35(a), but rather was only correction of clerical error governed by Fed. R. Crim. P. 36, which has no time limits; the amendment simply corrected an arithmetic error in the total amount of restitution due, but did not alter the specific awards of restitution made orally at the sentencing hearing; thus, in amending its judgment, the district court merely corrected its original written judgment to conform with the sentence announced orally; it did not substantively alter defendant’s sentence.

United States v. Williams, 517 F.3d 801 (5th Cir. 2008) Where, prior to United States v. Booker, 543 U.S. 220 (2005), the Fifth Circuit had vacated defendant’s 172-month upward departure sentence as an erroneous application of the Guidelines (because the fraudulent scheme’s complexity and number of victims were not so exceptional as to take the case outside the heartland of the applicable then-mandatory Guidelines), district court was not barred by the law-of-the-case doctrine, from imposing the same sentence on the same grounds, as an exercise of its post-Booker discretion; the Supreme Court’s decision in Booker, which rendered the Guidelines advisory only, represented a dramatic shift in sentencing law was intervening law that created one of the recognized exceptions to the law-of-the-case doctrine.

United States v. Griffith, 522 F.3d 607 (5th Cir. 2008) On remand for resentencing, two defendants were barred, by the mandate rule, from raising requests for minimal or minor role reductions that could have been, but were not, litigated in the first appeal; the same was true for the objection to an obstruction-of-justice enhancement also made by one of these defendants; as for the two other defendants, the mandate rule did not bar their requests for mitigating role reductions, because they had (successfully) challenged the only conviction on which they had a sentence (the district court had imposed sentence only on these defendants' CCE convictions, later overturned by the Fifth Circuit, and had not imposed sentence on their conspiracy convictions); a defendant need not object to every possible permutation a case may assume after remand; rather, a defendant need only raise all issues germane to the case as appealed; however, on the merits, the district court's alternative rejection of a mitigating role reduction for these defendants was not clearly erroneous.

United States v. Robinson, 542 F.3d 1045 (5th Cir. 2008) Where a criminal defendant had filed a pro se appeal from the district court's ruling on defendant's motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2) motion (based on the retroactive reductions to the Guideline for crack cocaine offenses), Fifth Circuit held that it would exercise its discretion to appoint appellate counsel for defendant "in the interest of justice"; noting that it had previously held that a defendant had no constitutional or statutory right to counsel in connection with § 3582(c)(2) motions, it suggested that the legal landscape might have changed sufficiently since those decisions so as to possibly produce a different result today; nevertheless, it pretermitted those issues, since it elected to make a discretionary "interest of justice" appointment of counsel for defendant; the Fifth Circuit noted that having attorneys on both sides would allow a fuller airing of a number of weighty issues, including the entitlement of defendant to counsel in the district court and the applicability of United States v. Booker, 543 U.S. 220 (2005), to § 3582(c)(2) proceedings. (Judge Owen joined only Part III of the Court's opinion [which, however, contained all of the holdings listed above].)

United States v. Ross, 557 F.3d 237 (5th Cir. 2009) Where district court originally sentenced child pornography defendant to 60 months' imprisonment (a below-Guidelines sentence), it lacked authority to sua sponte resentence defendant some 10 days later to 70 months' imprisonment (the low end of the applicable Guidelines); the only even arguable authority for resentencing would have been Fed. R. Crim. P. 35(a); however, although the district court acted within the time period set by that rule, the resentencing in this case was not authorized by Rule 35(a); although the Fifth Circuit was "skeptical" that Rule 35(a) provided a basis for a district court to revisit its sentence on the ground that the original sentence was not "reasonable"; the Fifth Circuit was "confident, however, that a district court is not permitted to withdraw a reasonable sentence and impose what is, in its view, a more reasonable one"; because the original 60-month sentence was reasonable, the Fifth Circuit vacated the second, 70-month sentence and remanded for reinstatement of the original sentence.

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

Wallace v. Quarterman, 516 F.3d 351 (5th Cir. 2008) Changes in Texas parole rules in 1995, increasing the size of parole voting panels, did not violate the Ex Post Facto Clause when applied to a defendant convicted of capital murder in 1981; the relevant language of the 1981 version of the

Texas code was discretionary and did not create any pre-existing right to release; because of the discretionary nature of the 1981 code, the 1995 code language did not, in and of itself, produce a sufficient risk of increasing the measure of punishment attached to the covered crimes; nor did defendant show specific, nonspeculative facts that the rule changes had produced a risk of increased confinement; accordingly, Texas court's rejection of defendant's ex post facto claim was not contrary to clearly established Supreme Court federal law, and district court did not err in denying federal habeas relief on that claim.

Mayfield v. Texas Department of Criminal Justice, 529 F.3d 599 (5th Cir. 2008) In prisoner lawsuit arguing that Texas Department of Criminal Justice ("TDCJ")'s policies and practices unlawfully impeded prisoner's exercise of the Odinist/Asatru religious faith, the Fifth Circuit affirmed in part, and vacated and remanded in part, the district court's grant of summary judgment to TDCJ; the Fifth Circuit affirmed the summary judgment insofar as prisoner sought compensatory damages, barred by 42 U.S.C. § 1997e(e), as well as the district court's dismissal of prisoner's non-damage claims against TDCJ, and prisoner's 42 U.S.C. § 1983 claims against TDCJ officers concerning the possession of runestones; the Fifth Circuit, however, vacated the district court's summary judgment on (1) prisoner's § 1983 claims against TDCJ officers based on TDCJ's application of an outside-volunteer requirement for religious group meetings and based on TDCJ's denial of rune-related literature; and (2) prisoner's claims, under the Religious Land Use and Institutionalized Persons Act ("RLUIPA), 42 U.S.C. §§ 2000cc, et seq., concerning the volunteer policy and the overall runestones policy to the extent these claims sought declaratory and injunctive relief; finally, because the Fifth Circuit had reversed part of the district court's ruling against the defendant, the Fifth Circuit also reversed the district court's imposition of a "strike" under 28 U.S.C. § 1915(g).

Boss v. Quarterman, 552 F.3d 425 (5th Cir. 2008) At a minimum, it was not "clearly established" that the "some evidence" standard of Superintendent v. Hill, 472 U.S. 445 (1985) (considering the process due when a prison disciplinary board revokes an inmate's "good time" credit because of a violation of a prison rule) applied to the Texas Board of Pardons and Paroles' decision to deny Texas prisoner's release onto mandatory supervision; rather, the procedural protections due before a state denies a prisoner conditional release continue to be defined by Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979).

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

Alvarez v. Smith, cert. granted, ___ U.S. ___, 129 S. Ct. 1401 (Feb. 23, 2009) (No. 08-351) (granting cert. to Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008)) In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in United States v. \$8,850, 461 U.S. 555 (1983), and Barker v. Wingo, 407 U.S. 514 (1972), or the three-part due process analysis set forth in Mathews v. Eldridge, 424 U.S. 319 (1976)?

United States v. \$92,203.00 in United States Currency, 537 F.3d 504 (5th Cir. 2008) After the enactment of the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) (which, among other things, elevated the government’s burden of proof in forfeiture proceedings from mere probable cause to a preponderance of the evidence, see 18 U.S.C. § 983(c)(1)), courts may no longer rely on hearsay (absent an exception to the hearsay rule) when deciding the merits of a civil forfeiture proceeding brought under CAFRA; instead, any affidavits submitted by the parties must be based on personal knowledge; accordingly, the district court reversibly erred in granting summary judgment for the government on the basis of an Immigration and Customs Enforcement’s agent’s affidavit that was based on hearsay and not on his own personal knowledge.

X. APPEAL

Greenlaw v. United States, ___ U.S. ___, 128 S. Ct. 2559 (2008) (decision below: United States v. Carter, 481 F.3d 601 (8th Cir. 2007)) Absent a government appeal or cross-appeal, a federal court of appeals may not, on its own initiative, order an increase in a criminal defendant’s sentence; thus, where the government did not cross-appeal, the Eighth Circuit erred in ordering, in connection with the *defendant’s* appeal, the district court to increase defendant’s sentence by 15 years to correct a plain error that the district court had committed in sentencing defendant (namely, imposing “only” 10 years for a conviction under 18 U.S.C. § 924(c), rather than the 25 years required for a second or subsequent conviction under that statute). (Justice Alito filed a dissenting opinion in which he was joined in full by Justice Stevens and joined in part by Justice Breyer.)

United States v. Agofsky, 516 F.3d 280 (5th Cir. 2008) The law-of-the-case doctrine barred second appellate panel from reconsidering death-sentenced federal prisoner’s challenge – made and rejected in a first appeal that resulted in remand on other grounds – that the jury’s verdict of guilt was inconsistent with special findings it made in the course of sentencing defendant to death; Fifth Circuit rejected the notion that its prior decision was clearly erroneous in light of the Supreme Court’s decision in Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

United States v. Griffith, 522 F.3d 607 (5th Cir. 2008) On remand for resentencing, two defendants were barred, by the mandate rule, from raising requests for minimal or minor role reductions that could have been, but were not, litigated in the first appeal; the same was true for the objection to an obstruction-of-justice enhancement also made by one of these defendants; as for the two other defendants, the mandate rule did not bar their requests for mitigating role reductions, because they had (successfully) challenged the only conviction on which they had a sentence (the district court had imposed sentence only on these defendants’ CCE convictions, later overturned by the Fifth Circuit, and had not imposed sentence on their conspiracy convictions); a defendant need not object to every possible permutation a case may assume after remand; rather, a defendant need only raise all issues germane to the case as appealed; however, on the merits, the district court’s alternative rejection of a mitigating role reduction for these defendants was not clearly erroneous.

United States v. Sealed Appellant, 526 F.3d 241 (5th Cir. 2008) Because an unconditional guilty plea ordinarily waives all non-jurisdictional defects in the proceedings below, defendant’s

unconditional guilty plea barred his right to challenge on appeal the district court's denial of his motion to suppress as well as his constitutional challenge to one of his statutes of conviction (18 U.S.C. § 2251(a)); the types of "jurisdictional" matters that survive an unconditional guilty plea for appeal are not ones going to the legislative jurisdiction of Congress to enact statutes, but only to judicial subject matter jurisdiction to adjudicate the particular case.

United States v. Fambro, 526 F.3d 836 (5th Cir. 2008) Fifth Circuit noted that defendant, sentenced as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), had at least a colorable argument that the record did not support a finding that his 1980 burglary conviction was a qualifying predicate under the ACCA; nevertheless, because defendant did not raise this issue in his opening brief, and rather raised it for the first time in his reply brief, the Fifth Circuit declined to consider the issue under its precedent holding that ordinarily it will not consider an issue raised for the first time in an appellant's reply brief; Fifth Circuit noted that it expected that whether counsel was ineffective for allowing defendant to be sentenced as an armed career criminal "will[] be considered in a proceeding under 28 U.S.C. § 2255."

United States v. Smith, 528 F.3d 423 (5th Cir. 2008) Acknowledging a split of authority on the issue whether a general appeal waiver bars review of a restitution order when the plea agreement does not discuss restitution, the Fifth Circuit pretermitted consideration of whether defendant's appeal of her restitution order was barred by the waiver provision and instead held, on the merits, that the district court did not abuse its discretion in ordering defendant to pay \$346,946 in restitution jointly and severally with her codefendants; this was so because the defendant came forward with no rebuttal evidence to contradict the presentence report's calculation of that amount of loss.

United States v. Davis, 530 F.3d 318 (5th Cir. 2008) When a defendant has waived appeal pursuant to a plea agreement but nevertheless appeals, defense counsel must, prior to relying on the appeal waiver in order to move to withdraw under Anders v. California, 386 U.S. 738 (1967), ascertain whether the government intends to enforce the appeal waiver against the defendant, as required by United States v. Acquaye, 451 F.3d 380, 381-82 (5th Cir. 2006); here, defense counsel's representation – that the government had, more than one year before, generally represented that it would be enforcing appeal waivers – was inadequate to discharge his duty under Acquaye, given that, in an earlier case, the same defense counsel had acknowledged that the same United States Attorney's Office had backed off its categorical approach and had acknowledged that it would consider foregoing enforcement of an appeal waiver in an appropriate case; accordingly, the Fifth Circuit denied defense counsel's motion to withdraw under Anders without prejudice, subject to defense counsel's ascertaining whether the government would seek to enforce the appeal waiver in this particular defendant's case.

United States v. Hayes, 532 F.3d 349 (5th Cir. 2008) Government's notice of appeal (of the district court's ruling granting 28 U.S.C. § 2255 relief as to defendant's sentence) was timely; the sixty-day period of Fed. R. App. P. 4(a) (applicable to civil cases) applied to the government's appeal, notwithstanding the government's erroneous citation to Fed. R. App. P. 4(b)(1)(B) (pertaining to appeals in criminal cases); moreover, where the relief granted on a § 2255 motion is

resentencing, there is no final judgment, and the government hence may not appeal, until the resentencing actually takes place and judgment is entered thereon.

United States v. Mauskar, 557 F.3d 219 (5th Cir. 2009) Court of appeals had jurisdiction to review defendant's challenges to his convictions, even though his notice of appeal indicated an intent to appeal only his sentence.

X. REVOCATION OF PROBATION/SUPERVISED RELEASE/PAROLE

A. Probation

B. Supervised Release

United States v. McKinney, 520 F.3d 425 (5th Cir. 2008) In computing the advisory Guidelines upon revocation of supervised release, where the district court is directed to use Guideline Criminal History Category "determined at the time the defendant originally was sentenced to the term of supervision," the district court did not err in using Criminal History Category VI – the category into which defendant's countable criminal history points placed him – rather than Criminal History Category III, the category which (the district court found in the course of making a criminal history overrepresentation downward departure at the original sentencing) was more representative of the defendant's criminal history; where a district court granted an overrepresentation departure pursuant to USSG § 4A1.3 at the time the defendant originally was sentenced to a term of supervised release, the applicable Criminal History Category for determining the advisory revocation range under USSG § 7B1.3(a) is the Criminal History Category determined prior to any such departure.

United States v. Vera, 542 F.3d 457 (5th Cir. 2008) In reimposing supervised release after revocation pursuant to 18 U.S.C. § 3583(h), a district court must reduce the maximum supervised release term by the terms of imprisonment imposed upon revocation of supervised release; because the district court had imposed a 6-month prison term in the first revocation, and an 11-month prison term in the second revocation, defendant could, under § 3583(h), receive no more than 19 months' supervised release (the statutory maximum of 3 years' supervised release less the aggregate of 17 months' imprisonment); the 25-month term of supervised release was therefore in excess of the statutory maximum and plainly erroneous; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

C. Parole

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

A. § 2255 generally

United States v. Hayes, 532 F.3d 349 (5th Cir. 2008) Government’s notice of appeal (of the district court’s ruling granting 28 U.S.C. § 2255 relief as to defendant’s sentence) was timely; the sixty-day period of Fed. R. App. P. 4(a) (applicable to civil cases) applied to the government’s appeal, notwithstanding the government’s erroneous citation to Fed. R. App. P. 4(b)(1)(B) (pertaining to appeals in criminal cases); moreover, where the relief granted on a § 2255 motion is resentencing, there is no final judgment, and the government hence may not appeal, until the resentencing actually takes place and judgment is entered thereon; on the merits, the Fifth Circuit concluded that defense counsel may have provided deficient performance by failing to make a “related cases” objection under the Guidelines that would have precluded defendant’s being sentenced as a career offender; moreover, the error was demonstrably prejudicial because it caused the defendant to receive a sentence that was 150 months longer than he would otherwise have received (as evidenced by the fact that the district court, in granting § 2255 relief, lowered defendant’s sentence from 360 months’ imprisonment to 210 months’ imprisonment); nevertheless, because the district court did not hold an evidentiary hearing, the record did not disclose whether trial counsel’s decision not to make this objection was strategic, and therefore the Fifth Circuit could not finally determine whether defense counsel performed unreasonably; accordingly, the Fifth Circuit vacated the order granting § 2255 relief and remanded to the district court for an evidentiary hearing regarding the ineffective assistance of counsel claim.

United States v. Plascencia, 537 F.3d 385 (5th Cir. 2008) Where defendant failed to file his notice of appeal within the period prescribed by Fed. R. Crim. P. 4(b), and the appeal was ultimately dismissed for untimeliness after the district court found no good cause or excusable neglect permitting the late filing, defendant’s one-year period for filing a 28 U.S.C. § 2255 motion commenced upon the expiration of the time for filing a timely notice of appeal (on January 12, 2004); defendant’s § 2255 motion was thus due on or before January 12, 2005; because defendant did not file his § 2255 motion until June 15, 2005, the district court did not err in dismissing the motion as untimely; the Fifth Circuit rejected the defendant’s argument that the AEDPA one-year statute of limitations did not begin to run until 90 days (the time for filing a petition for writ of certiorari) from the decision dismissing the appeal as untimely (which dismissal occurred on June 9, 2004). (Judge Owen dissented and would hold that the AEDPA one-year statute of limitations did not begin to run until 90 days after the June 9, 2004 dismissal.)

B. Habeas Corpus (§ 2254) generally

Bell v. Kelly, ___ U.S. ___, 129 S. Ct. 393 (2008) (per curiam) (decision below: Bell v. Kelly, 260 Fed. Appx. 599 (4th Cir. 2008) (unpublished)) The Supreme Court had granted certiorari to decide whether the Fourth Circuit erred when – in conflict with decisions of the Ninth and Tenth Circuits – it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims “adjudicated on the merits” in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing; however, after argument, the Supreme Court dismissed the writ of certiorari as improvidently granted.

Hedgpeth v. Pulido, ____ U.S. ____, 129 S. Ct. 530 (2008) (per curiam) (decision below: Pulido v. Chrones, 487 F.3d 669 (9th Cir. 2007)) Where a jury is instructed on alternative theories of guilt, one of which is invalid, see Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1957), the error is not “structural,” but rather is subject to harmless-error review; because the Ninth Circuit erroneously treated the error as structural and not subject to harmless-error review, the Supreme Court vacated the Ninth Circuit’s judgment affirming habeas relief and remanded for it to determine whether, under Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), the error “had substantial and injurious effect or influence in determining the jury’s verdict” (Justice Stevens filed a dissenting opinion in which he was joined by Justices Souter and Ginsburg. He agreed that the error in question was not structural and was subject to harmless-error analysis, but would affirm on the ground that, notwithstanding the reference to structural error, the Ninth Circuit in fact conducted the analysis required by Brecht.)

Waddington v. Sarausad, ____ U.S. ____, 129 S. Ct. 823 (2009) (decision below: Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007), reh’g en banc denied, 503 F.3d 822 (9th Cir. Sept. 10, 2007)) The lower federal courts erred in granting federal habeas relief on the basis of the jury instructions on accomplice liability given in a homicide case; the state courts’ conclusion that the jury instructions (which quoted the state statute) were unambiguous was objectively reasonable, and the federal courts, sitting in habeas, should have gone no further; moreover, even if the instruction were ambiguous, the Ninth Circuit erred in finding it so ambiguous as to merit federal habeas relief under the AEDPA; the state courts reasonably applied United States Supreme Court precedent when they found no “reasonable likelihood” that the jury applied the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt, especially given the strength of the evidence against the defendant and the jury’s failure to convict a co-defendant also prosecuted as an accomplice. (Justice Souter filed a dissenting opinion, in which he was joined by Justices Stevens and Ginsburg.)

Cone v. Bell, cert. granted, ____ U.S. ____, 128 S. Ct. 2961 (June 23, 2008) (No. 07-1114) (granting cert. to Cone v. Bell, 492 F.3d 743 (6th Cir. 2007)) (1) Is a federal habeas claim “procedurally defaulted” because it has been presented twice to the state courts? (2) Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

Bobby v. Bies, cert. granted, ____ U.S. ____, 129 S. Ct. 988 (Jan. 16, 2009) (No. 08-598) (granting cert. to Bies v. Bagley, 519 F.3d 324 (6th Cir. 2008)) (1) Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of “acquittal” that conflicts with this Court’s decisions? (2) Do the Double Jeopardy Clause’s protections apply to a stat post-conviction hearing on the question of a death-sentenced inmate’s mental retardation under Atkins v. Virginia, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional punishment? (3) Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause’s collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate’s mental retardation

under Atkins even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

McDaniel v. Brown, cert. granted, ___ U.S. ___, 129 S. Ct. 1038 (Jan. 26, 2009) (No. 08-559) (granting cert. to Brown v. Farwell, 525 F.3d 787 (9th Cir. 2008)) (1) What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)? (2) Does an analysis of a sufficiency-of-the-evidence claim pursuant to Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

Smith v. Spisak, cert. granted, ___ U.S. ___, 129 S. Ct. 1319 (Feb. 23, 2009) (No. 08-724) (granting cert. to Spisak v. Hudson, 512 F.3d 852 (6th Cir. 2008)) (1) Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and Carey v. Musladin, 127 S. Ct. 649 (2006), when it applied Mills v. Maryland, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in Mills? (2) Did the Sixth Circuit exceed its authority under AEDPA when it applied United States v. Cronin, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court’s reasonable rejection of the claim under Strickland v. Washington, 466 U.S. 668 (1984)?

Mallard v. Cain, 515 F.3d 379 (5th Cir. 2008) District court did not err in denying federal habeas relief to Louisiana state prisoner; on collateral review, Louisiana law (permissibly) places on a criminal defendant the burden of proving that a waiver of counsel was not knowing and voluntary, and the state court’s determination that defendant had not carried his burden of overcoming the presumption of regularity afforded to waiver of counsel, was not contrary to, or an unreasonable application of clearly established federal law on the subject of what is necessary for a valid waiver (most prominently, Iowa v. Tovar, 541 U.S. 77 (2004)).

Smith v. Quarterman, 515 F.3d 392 (5th Cir. 2008) Texas state death-sentenced defendant’s federal habeas claim (that his counsel were ineffective for failing to investigate and present mitigating evidence) was unexhausted because defendant changed the focus of his federal claim to substantive areas not previously raised in the state courts and because he alleged new facts in his federal petition not considered by the state court; Fifth Circuit alternatively held that defendant would not be entitled to relief on the merits of failure-to-investigate claim; finally, the Texas special issues did not, in petitioner’s case, impinge upon his right to have the jury give full effect to his mitigating evidence; the evidence of voluntary intoxication and drug addiction could be adequately considered within the framework of the special issues; furthermore, the fact that defendant grew up in a poor, crime-ridden neighborhood had only a tenuous connection to his moral culpability for the murder of which he was convicted and did not constitute the “particularized childhood experience of abuse and neglect” that prior cases have found the Texas special issues inadequate to address.

Hardemon v. Quarterman, 516 F.3d 272 (5th Cir. 2008) District court reversibly erred in dismissing Texas state defendant's federal habeas as second or successive; although the charges, brought in separate indictments, were disposed of at one time, in consolidated trial and sentencing proceedings, a separate judgment was entered on each charge; under the pre-2004 version of the Rules Governing Section 2254 Cases in the United States District Courts, defendant was permitted, but not required, to challenge these separate convictions, resulting in separate judgments, in a single 28 U.S.C. § 2254 petition; defendant's first federal habeas petition, relating to one of these convictions and judgments, thus did not render his later habeas petition second or successive.

Tassin v. Cain, 517 F.3d 770 (5th Cir. 2008) In capital murder prosecution, defendant's due process rights were violated by the nondisclosure of a co-defendant's understanding with the state that she would receive more lenient treatment if she testified for the state against the defendant (her husband); it was not necessary, as the state court erroneously concluded, that there be a firm promise for a lower sentence, where there was an "understanding or agreement" between the state and the witness that went beyond the mere hope or expectation of a lenient sentence; moreover, in addition to failing to disclose that understanding, the state also violated due process by presenting and failing to correct the witness's false testimony to the effect that she did not know whether she stood to gain anything by testifying for the state; finally, the due process violation was material because that witness's testimony was key to the state's felony murder case against defendant; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief.

Moore v. Quarterman, 517 F.3d 781 (5th Cir. 2008) District court did not err in rejecting death-sentenced Texas defendant's federal habeas claim that his execution would violate the Eighth Amendment under Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded); given the conflicting evidence respecting whether defendant was mentally retarded, and the weaknesses in the evidence in defendant's favor, defendant could not overcome the deference owed to the state court's finding of no mental retardation; the Fifth Circuit also noted that there was conflicting evidence respecting the element of onset before age 18, another element of mental retardation analysis.

Ries v. Quarterman, 522 F.3d 517 (5th Cir. 2008) Where, in federal habeas petition, death-sentenced Texas capital murder defendant claimed (1) trial counsel was ineffective in failing to voir dire the jury panel on mitigating evidence, (2) trial counsel was ineffective in the presentation of mitigation evidence during the penalty phase of the trial, and (3) trial counsel was ineffective in arguing the case for mitigation in closing, after the penalty phase of the trial, the federal district court did not err in dismissing the first and third of these claims (dealing with voir dire and argument) as unexhausted; notwithstanding defendant's broadly worded claim in his state application for postconviction relief, defendant's claim as presented to the state courts was limited to a claim that his attorneys should have questioned witnesses more extensively and elicited more detailed testimony relating to defendant's abusive and deprived upbringing; as such, defendant's voir dire and argument claims were not fairly presented to the state courts.

Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008) Although state trial judge's conduct during trial of death-sentenced Texas capital murder defendant's trial was "very troubling"

(including a remark by the judge that he was “doing God’s work to see that defendant Buntion gets executed,” and the judge’s placement of a postcard of hanging judge Judge Roy Bean on the bench during voir dire), the Fifth Circuit could not, in light of the lack of more specific guidance on judicial bias in the United States Supreme Court’s handful of cases on the subject, conclude that the Texas state courts had unreasonably applied clearly established Supreme Court law as required for federal habeas relief to be granted under the AEDPA; accordingly, the Fifth Circuit vacated the district court’s grant of habeas relief on defendant’s judicial bias claim and denied habeas relief.

Haynes v. Quarterman, 526 F.3d 189 (5th Cir. 2008):

(1) Court acknowledged persuasive authorities from the Sixth and Tenth Circuits holding that pro forma blanket denials of certificates of appealability (“COAs”) violate the requirement, arguably implicit in Fed. R. App. 22(b)(1), that district courts supply adequate individualized reasons for their denial of a COA; nevertheless, even assuming arguendo such a requirement, Rule 22 does not require the remedy of vacating the defective COA order and remanding the case back to the district court, where, as here, the district court’s reasons for denying a COA are apparent from its order denying habeas relief, the parties had fully briefed the important issues on appeal, and such a remedy would only delay the judicial process and frustrate the legislative purpose of facilitating appellate review.

(2) Under the standard of Rhines v. Weber, 544 U.S. 269 (2005), federal district court did not abuse its discretion in denying a stay and abeyance in order to allow habeas petitioner an opportunity to exhaust unexhausted state claims; assuming arguendo that petitioner had good cause for failure to exhaust, his unexhausted claims had no merit, since he had no meritorious argument that the Texas Court of Criminal Appeals would allow him to file a successive application for post-conviction relief on the unexhausted claims.

(3) Texas death-sentenced inmate was entitled to a certificate of appealability (“COA”) for his claim that the prosecution had exercised peremptory challenges against two veniremembers based on racially discriminatory reasons, in violation of Batson v. Kentucky, 476 U.S. 79 (1986); under the application of Batson made in Snyder v. Louisiana, 128 S. Ct. 1203 (2008), an appellate court applying Batson arguably should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror’s demeanor on which the prosecutor based his peremptory challenge; as to two of the struck veniremembers, the state trial judge could not possibly have credited the prosecutor’s explanation that they were struck because of their demeanor during individual questioning, because the trial judge did not preside during the individual examination of the veniremembers; nor did the district court find another credible non-racial explanation that could satisfy the state courts’ determination that the peremptory challenge of these two veniremembers was race-neutral.

Gomez v. Quarterman, 529 F.3d 322 (5th Cir. 2008) In Texas capital murder prosecution, death-sentenced defendant was not entitled to a certificate of appealability (“COA”) to appeal the denial of federal habeas relief; defendant’s claim that, as a Mexican citizen, his rights were violated under the Vienna Convention, thus entitling him to suppression of his confession, was foreclosed

by Sanchez-Llamas v. Oregon, 126 S. Ct. 2699 (2006), and Medellin v. Texas, 128 S. Ct. 1346 (2008); nor was defendant entitled to a COA that veniremembers were improperly excluded based on their opposition to the death penalty, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968); defendant's claim as to all but one of these veniremembers was procedurally defaulted, and the state trial court's ruling on that one was not an abuse of discretion, since even on the stale printed page, the veniremember came across as someone whose personal views would taint her ability fairly to answer questions that might affect whether to impose the death penalty; nor was counsel ineffective for failing to object to the exclusion of the other four veniremembers; finally, no reasonable jurist could agree with defendant's argument that the state trial court's failure to instruct the jury about parole eligibility violated the Compulsory Process Clause; indeed, the Fifth Circuit noted, it rejected essentially the same argument in Thacker v. Dretke, 396 F.3d 607, 617-18 (5th Cir. 2005).

Perez v. Cain, 529 F.3d 588 (5th Cir. 2008) The state courts unreasonably applied established Supreme Court precedent concerning sufficiency of the evidence in upholding defendant's Louisiana conviction for first-degree murder of a police officer, because defendant established at trial that he was insane at the time of the offense and because no rational juror could have found otherwise; defendant produced lay testimony of odd or bizarre behavior preceding the offense, the defendant's insanity at the time of the offense was supported by expert testimony from largely disinterested doctors (court-appointed experts and doctors employed at the state facility where defendant was committed to restore him to competency), and the state produced insufficient evidence solely through cross-examination and argument to controvert defendant's claim; accordingly, the Fifth Circuit affirmed the district court's grant of habeas relief for insufficient evidence (as well as the order that the state trial court should conduct proceedings under La. Code Crim. Proc. art. 654, requiring a dangerousness commitment hearing for insanity acquittees).

Hughes v. Quarterman, 530 F.3d 336 (5th Cir. 2008) District court did not err in concluding that Texas death-sentenced defendant's Penry claim was procedurally defaulted where the claim was raised in the state courts for the first time on a second application for postconviction relief which the Texas Court of Criminal Appeals ("TCCA") dismissed as an abuse of the writ; furthermore, in assessing whether the error of admitting at trial a prior aggravated sexual assault conviction that was later reversed on appeal required reversal, the TCCA did not unreasonably apply harmless-error review where the facts and circumstances of the offense underlying the subsequently invalidated conviction were before the jury in the form of the testimony of the victim of that offense; finally, the TCCA did not unreasonably apply federal law in concluding that improper prosecutorial remarks in closing argument during the punishment phase (criticizing the defense for cross-examining the testifying aggravated assault victim) were harmless, especially given the trial court's prompt curative instruction.

Moore v. Quarterman, 533 F.3d 338 (5th Cir. 2008) (en banc) Even if death-sentenced Texas defendant failed to exhaust his claim that he was mentally retarded, thus precluding execution under Atkins v. Virginia, 536 U.S. 304 (2002), the unique circumstances in this case established cause for prisoner's default and prejudice in the absence of federal court review; defendant had cause for misunderstanding Texas's successive writ procedures because, when he filed his Atkins claim, the factual criteria that must be pleaded had not become clear under the case law; nor had Texas yet

adopted any procedure to implement the constitutional rule of Atkins; finally, defendant would plainly suffer prejudice from being unable to establish the facts involved in his mental retardation claim, because his evidence, taken at face value, presented a substantial Atkins claim; accordingly, the en banc court held that the federal district court had the authority to review defendant's Atkins claim, even if it was not exhausted, and was under no obligation to defer to the state court's decision; the case was remanded to the panel for review of the ultimate Atkins determination of mental retardation under the clear error standard. (The federal district court had found defendant mentally retarded and granted the writ.)

Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008) Where death-sentenced Texas defendant claimed that he was mentally retarded, thus precluding execution under Atkins v. Virginia, 536 U.S. 304 (2002), the district court erred in denying federal habeas relief without holding an evidentiary hearing; a district court abuses its discretion in failing to hold an evidentiary hearing where the state court failed to provide a full and fair hearing; here, the state court's erroneous fact-finding and its refusal to accept more than paper submissions despite the development of a new constitutional standard and a lack of guidance from the state on that standard, deprived defendant of a full and fair hearing at the state level; nor were the district court's findings of "facts" from the disputed assertions of affidavits below adequate; accordingly, the Fifth Circuit vacated the district court's judgment denying federal habeas relief and remanded to that court for further proceedings, including an evidentiary hearing. (Judge Higginbotham filed an opinion concurring in part and dissenting in part, in which he highlighted the numerous shortcomings of the state proceedings and in which he would order the federal district court to enter an order barring the death penalty unless the state conducted a constitutionally adequate hearing on defendant's Atkins claim within 120 days.)

Moore v. Quarterman, 534 F.3d 454 (5th Cir. 2008) Death-sentenced Texas defendant was not entitled to a certificate of appealability ("COA") to appeal his claim that state officials withheld evidence favorable to his cause both as to guilt and punishment, contrary to Brady v. Maryland, 373 U.S. 83 (1963); the evidence was not withheld within the meaning of Brady because it was information that defendant already should have known or already should have obtained by his own reasonable investigation; even if there were room to debate the Brady claim on the merits, no reasonable jurist could debate the conclusion that defendant's Brady claim was procedurally defaulted where the claim was raised in a successive state application for postconviction relief that was dismissed as an abuse of the writ and where defendant could not show cause and prejudice excusing the default; nor was defendant entitled to a COA based on the prosecutor's references to the fact that there had been a previous trial in the case, given the fleeting nature of the references and the fact that the trial judge gave a prompt curative instruction; finally, defendant was not entitled to a COA on his claim that trial counsel provided ineffective assistance of counsel by failing to adequately investigate the facts surrounding the shooting at issue, where, in the state evidentiary hearing, defendant failed to adduce any evidence, or even cross-examine his trial counsel, about counsel's reasons for not investigating; likewise, there was no evidence that the witnesses that allegedly should have been interviewed would have provided helpful testimony.

Burbank v. Cain, 535 F.3d 350 (5th Cir. 2008) In Louisiana state prosecution for murder, the state trial court unconstitutionally restricted the defense's cross-examination of the state's

principal witness regarding whether she had reached a plea agreement with the state concerning the criminal charges then pending against her; even though the defense was able to bring out some impeachment information, that was no substitute for the ability to question witness about a proposed plea agreement (the existence of which was proffered in camera at trial) that would lower her sentencing exposure from twenty years to life, down to a one-year sentence; because there was more than a reasonable possibility that the verdict would have been different had defense counsel been allowed to inquire fully into the proposed plea agreement, the constitutional error in restricting cross-examination was not harmless; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief.

Powell v. Quarterman, 536 F.3d 325 (5th Cir. 2008):

(1) In Texas death penalty proceeding, Texas Court of Criminal Appeals' decision to remand for a new punishment trial only, rather than also remanding for a new trial on guilt-innocence, did not run afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 564 (2002); all of the elements of capital murder necessary for imposition of the death penalty were submitted to a jury and proven beyond a reasonable doubt; Apprendi and Ring do not require a rule that, in bifurcated capital murder trials, the same jury that finds defendant guilty must also decide the special issues related to capital punishment.

(2) State court did not unreasonably apply federal law in concluding that the prosecutor's failure to timely disclose documents in which agents of the prosecution made factual assertions implicating another person in the victim's shooting did not violate defendant's due process rights under Brady v. Maryland, 387 U.S. 83 (1963); the state court's decision that the evidence was disclosed in time for defendant to have used it effectively at trial was not unreasonable; moreover, the state court could also reasonably have concluded that the evidence was not material because confidence in the outcome was not undermined.

(3) Defendant's Fifth and Fourteenth Amendment rights under Estelle v. Smith, 451 U.S. 454 (1981), were not violated when an emergency room doctor, who did not provide Miranda warnings to defendant when he examined defendant after defendant's arrest, testified for the prosecution about defendant's answers to questions the doctor asked during the examination; the doctor was not acting as an agent of the State when he conducted the examination of defendant at the behest of, and in the presence of, the police officers who brought defendant to the emergency room; the doctor was not court-appointed, he was not a psychiatrist, he did not conduct a psychiatric examination, and he did not express an opinion at trial regarding defendant's psychiatric condition; moreover, even if the doctor's testimony did violate defendant's Fifth Amendment privilege against self-incrimination, any error was harmless because that testimony did not have a substantial and injurious effect on the verdict.

Fratton v. Quarterman, 536 F.3d 485 (5th Cir. 2008) In the Texas state court trial of defendant for arranging the murder-for-hire of his wife (for which he was sentenced to death), defendant's Confrontation Clause rights were violated by the introduction of out-of-court statements made by the two men who carried out the murder (who were tried separately and were unavailable for cross-

examination); custodial confessions by these two men were “presumptively unreliable,” and the presumption of unreliability was not rebutted under the circumstances of this case; as to one set of statements made by one of these men to another witness, the Texas Court of Criminal Appeals (“TCCA”) erred in applying the confrontation rubric of Bruton v. United States, 391 U.S. 123 (1968) (a case where multiple defendants were on trial at the same time), to this single-defendant trial; as to another set of statements, the TCCA erred in holding that the statements to witness were within the firmly rooted “co-conspirators’ statements” exception to the rule against hearsay, because the statements were not made in an effort to advance the cause of or facilitate the conspiracy; the statements to this witness lacked particularized guarantees of trustworthiness and thus violated defendant’s rights under the Confrontation Clause; moreover, the erroneous admission of these statements in violation of the Confrontation Clause was not harmless, because the inadmissible evidence was vital to the State’s case on the critical element of whether defendant had engaged the two men to commit the murder for remuneration; accordingly, the Fifth Circuit affirmed the district court’s grant of federal habeas relief.

Richardson v. Quarterman, 537 F.3d 466 (5th Cir. 2008) In case where defendant claimed entitlement to habeas relief based upon trial judge’s failure to recuse himself (in murder trial where judge’s wife was acquainted with the murder victim), defendant was not entitled to federal habeas relief because clearly established federal law did not establish that the appearance of bias (at least in these circumstances) rose to the level of a due process violation; the Supreme Court has recognized “presumptive bias” (as opposed to actual bias) as a ground requiring recusal under the Due Process Clause in only three situations: (1) when the judge has a direct personal, substantial, and pecuniary interest in the outcome of the case, (2) when the judge has been the target of personal abuse or criticism from the party before him, and (3) when the judge has the dual role of investigating and adjudicating disputes and complaints; because defendant’s recusal claim did not fall into one of these three categories, the district court did not err in denying federal habeas relief; the state courts’ conclusion that the trial judge should have recused himself (they also found the error in failing to recuse was harmless) was irrelevant to the federal constitutional question presented.

Mahler v. Kaylo, 537 F.3d 494 (5th Cir. 2008) In Louisiana state manslaughter prosecution, the state violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to provide defendant with certain pretrial witness statements that either contradicted or were inconsistent with the trial testimony; the undisclosed statements were material because they corroborated defendant’s defense that a struggle was ongoing at the time of the shooting and impeached state witness testimony that the struggle had already concluded when defendant shot the victim; accordingly, the Fifth Circuit reversed the district court’s denial of the writ and remanded with instructions to grant the writ of habeas corpus unless the state retried defendant within a reasonable time.

Pondexter v. Quarterman, 537 F.3d 511 (5th Cir. 2008) In Texas capital murder prosecution, prosecutor’s use of inconsistent theories in defendant’s trial and that of his co-defendant did not state a basis for federal habeas relief; the use of inconsistent theories in the separate trials of co-defendants is not a violation of due process.

Lewis v. Quarterman, 541 F.3d 280 (5th Cir. 2008) Where death-sentenced Texas defendant claimed that he was mentally retarded, thus precluding execution under Atkins v. Virginia, 536 U.S. 304 (2002), the district court erred in refusing to consider a psychologist's affidavit, first offered in federal court, challenging a state psychologist's methodology for determining the defendant's IQ; when the propriety of reviewing the newly-tendered affidavit was reviewed, as it must, under the exhaustion doctrine, it was clear, under Fifth Circuit precedent, that the district court erred in refusing to consider it; because defendant specifically attacked the state psychologist's IQ methodology in the state court, the new affidavit merely supplemented, rather than fundamentally altered, defendant's Atkins claim; accordingly, the Fifth Circuit reversed the district court's denial of federal habeas relief and remanded for further proceedings.

Oliver v. Quarterman, 541 F.3d 329 (5th Cir. 2008) Texas capital sentencing jury's consultation and consideration of passages from the Bible during its deliberations on the punishment phase of defendant's capital murder trial (resulting in defendant's being sentenced to death) was an improper external/extrinsic influence on the jury in violation of the Sixth Amendment (as incorporated through the Fourteenth Amendment) under clearly established Supreme Court precedent (including, among others, Mattox v. United States, 146 U.S. 140 (1892), and Remmer v. United States, 347 U.S. 227 (1954)); nevertheless, the error did not warrant federal habeas relief with respect to defendant's death sentence; the state court made a factual finding that the jury's consultation and consideration of the Bible did not influence the jury's sentencing decision; such a finding is entitled to deference unless the defendant presents "clear and convincing" evidence to the contrary, see 28 U.S.C. § 2254(e)(1); here, although the record contained evidence that cut both ways on the question of the prejudicial effect of the Bible consultation, a presumption of correctness, there was at least "fair support in the record" for the district court's conclusion, and thus defendant did not carry his burden of rebutting the state court's no-prejudice finding by clear and convincing evidence; accordingly the Fifth Circuit affirmed the district court's judgment denying federal habeas relief.

Taylor v. Cain, 545 F.3d 327 (5th Cir. 2008) District court did not err in granting federal habeas relief to Louisiana state defendant convicted of second-degree murder and sentenced to life without parole; the Confrontation Clause claim on which federal habeas relief was granted was fairly presented to the state courts, and hence was exhausted for purpose of federal habeas review; although defendant did not, in the state courts, label his claim as a federal constitutional one, his brief on state direct appeal made the types of arguments that support a Confrontation Clause claim and cited authority directly connecting the error in allowing such hearsay testimony to an accused's federal Confrontation Clause rights; moreover, the state court, in disposing of this claim, cited a case that interpreted a similar hearsay challenge as raising a federal Confrontation Clause claim; on the merits, the state courts' conclusion – that a police officer's hearsay testimony about information received from an unidentified eyewitness did not violate defendant's rights – was an unreasonable application of the Supreme Court's Confrontation Clause jurisprudence even before Crawford v. Washington, 541 U.S. 36 (2004) (which did not apply because it was decided after defendant's conviction became final on direct appeal); finally, the district court did not err in concluding that the error had a substantial and injurious effect on the verdict, in light of the prosecution's dependence on a single witness's less-than-certain identification of defendant, combined with the use of tainted hearsay evidence both in testimony and in closing argument asserting that defendant was the perpetrator; the

state court's conclusion to the contrary was both contrary to, and an unreasonable application of, clear established United States Supreme Court law; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief.

Goodrum v. Quarterman, 547 F.3d 249 (5th Cir. 2008) Texas state courts did not unreasonably apply clearly established Supreme Court law in denying Texas aggravated sexual assault defendant's federal constitutional speedy trial claim, because the state courts did not unreasonably weigh and balance the four relevant factors under Barker v. Wingo, 407 U.S. 152 (1972); the state courts reasonably weighed the 2½-year delay in defendant's favor; the state court also reasonably weighed against the State (albeit not heavily so) the reasons for the delay (for which no explanation appeared in the record); the state courts' failure to weigh defendant's persistent invocation of his speedy trial right strongly in his favor was, however, contrary to clearly established federal law; there were also some errors in how the state courts assessed some aspects of the fourth Barker factor (prejudice) – particularly, the anxiety and concern over the pending charge, and worsened conditions of confinement which, defendant asserted; nevertheless, the Fifth Circuit held, its disagreement with some of the state courts' preliminary conclusions did not provide grounds for reversal so long as the ultimate decision was objectively reasonable, which, the Fifth Circuit held, it was; accordingly, the Fifth Circuit affirmed the district court's denial of federal habeas relief.

Williams v. Quarterman, 551 F.3d 352 (5th Cir. 2008) Federal district court erred in denying, without an evidentiary hearing, Texas death-sentenced defendant's federal habeas petition (alleging ineffective assistance of counsel based on his attorney's failure to obtain independent ballistics evidence and the testimony of an independent pathologist for defendant's capital murder trial); because the Texas Court of Criminal Appeals ("TCCA") did not explain which of the state habeas court's findings it accepted and which it rejected, no factual findings survived to which the federal district court could give deference; because the federal district court erroneously gave deference to those fact-findings that it deemed to be not inconsistent with the TCCA's decision, the Fifth Circuit reversed the district court's grant of summary judgment for the State and remanded for a full de novo evidentiary hearing on defendant's ineffective-assistance-of-counsel claims. (Judge Jolly dissented.)

Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009) Death-sentenced Texas capital murder defendant was entitled to federal habeas relief on his claim that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), when it used peremptory challenges to strike African-Americans from the jury venire; defendant's comparative analysis (comparing the African-American jurors struck with white jurors who were allowed to remain on the panel) was not procedurally barred, because the entire voir dire transcript was available to the state courts even if they chose not to consult it; this comparative analysis revealed that the State's reasons for striking the African-American jurors were pretextual; additionally, defendant presented the same historical evidence of racial bias in jury selection that was considered in Miller-El v. Dretke, 545 U.S. 231 (2005); accordingly, the Fifth Circuit reversed the district court's denial of federal habeas relief and remanded to the district court with instructions to grant the writ unless the State retried defendant within 120 days from the date of the district court's order.

In re Swearingen, 556 F.3d 344 (5th Cir. 2009) Fifth Circuit stayed death-sentenced Texas capital murder defendant's execution and authorized him to file a successive federal habeas petition to raise three claims as to which defendant made the requisite prima facie showing under 28 U.S.C. § 2244(b)(3)(C): (1) a claim that the medical examiner's testimony at trial was, in light of a subsequent affidavit given by the medical examiner, false or misleading on the critical issue of the date of the murder victim's death; (2) a claim that, based on the affidavit, trial counsel was ineffective in his cross-examination of the medical examiner; and (3) a claim that trial counsel was ineffective for failing to develop histological evidence with respect to a tissue sample of the victim. (Judge Wiener specially concurred, urging the en banc Fifth Circuit or the United States Supreme Court to address the "brooding omnipresence" of when, if ever, actual innocence may state a ground for federal habeas relief.)

C. Ineffective Assistance of Counsel/Conflict of Interest

Wright v. Van Patten, ____ U.S. ____, 128 S. Ct. 743 (2008) (per curiam) (decision below: Van Patten v. Endicott, 489 F.3d 827 (7th Cir. 2007)) The Seventh Circuit reversibly erred in holding that defendant was entitled to federal habeas relief on the ground that his lawyer provided presumptively prejudicial ineffective assistance of counsel by participating in a plea hearing via speaker phone; no decision of the Supreme Court squarely addresses the issue in this case or clearly establishes that the presumed prejudice rubric of United States v. Cronic, 466 U.S. 648 (1984), replaces the usual requirement of a showing of prejudice under Strickland v. Washington, 466 U.S. 668 (1984), in this novel factual context; nor do the Supreme Court's precedents clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel" on a par with the total absence of counsel; given this absence of clear Supreme Court precedent on the question presented, it cannot be said that the state court unreasonably applied clearly established federal law, as required for federal habeas relief under the AEDPA. (Justice Stevens filed an opinion concurring in the judgment, because "[r]egrettably, Cronic did not 'clearly establish' the full scope of the defendant's right to the presence of an attorney," so as to justify federal habeas relief under 28 U.S.C. § 2254(d)(1).)

Arave v. Hoffman, ____ U.S. ____, 128 S. Ct. 749 (2008) (decision below: Hoffman v. Arave, 455 F.3d 926 (9th Cir. 2006)) Court had previously granted certiorari, ____ U.S. ____, 128 S. Ct. 532 (Nov. 5, 2007) (No. 07-110), to decide the following questions: (1) In granting habeas relief to a death-sentenced prisoner based on alleged ineffective assistance of counsel who advised him to reject a plea deal for life imprisonment, did the Ninth Circuit err by rejecting the Supreme Court's prohibition regarding the use of hindsight to prove that the prisoner established deficient performance by the attorney? (2) Did the Ninth Circuit err by concluding that the prisoner had shown prejudice justifying habeas relief, where the prisoner failed to allege that he would have accepted the state's plea offer but for his attorney's advice? (3) What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial? **However, after cert. was granted, the prisoner (respondent here) moved to withdraw his claim of ineffective assistance of counsel in connection with plea bargaining and asked the Supreme Court to dismiss this issue with prejudice, so that he could proceed with the resentencing ordered by the district court as**

habeas relief on a different claim. The Supreme Court granted that motion, vacated the judgment below on that claim, and remanded to the Ninth Circuit with directions that it instruct the district court to dismiss the plea-bargaining claim with prejudice.

Knowles v. Mirzayance, ____ U.S. ____, 2009 WL 746274 (Mar. 24, 2009) (decision below: Mirzayance v. Knowles, No. 04-57102 (9th Cir. Nov. 8, 2007) (unpublished memorandum disposition)) California state defendant, convicted of first-degree murder, was not entitled to federal habeas relief on his claim that his counsel provided ineffective assistance of counsel (“IAC”) by advising defendant to abandon his insanity plea and to forgo a “not guilty by reason of insanity” (“NGI”) defense; although the lower courts granted relief on the theory that defendant had “nothing to lose” by proceeding with an NGI defense, the “nothing to lose” standard was not clearly established by Supreme Court decisions; nor was the state courts’ finding of no IAC an unreasonable application of the general IAC standard found in Strickland v. Washington, 466 U.S. 668 (1984); indeed, said the Court, even if the Court applied de novo review to defendant’s IAC claim, it would not find IAC; counsel could reasonably have believed that an NGI defense was doomed to fail, since the jury had already rejected essentially the same type of mental-health evidence when it convicted defendant of first-degree, rather than second-degree, murder; accordingly, the Court reversed the Ninth Circuit’s decision affirming the district court’s grant of the writ. (Justices Scalia, Souter, and Ginsburg joined all but Part II of the opinion, i.e., the part discussing why the claim failed under deferential AEDPA review.)

Padilla v. Kentucky, cert. granted, ____ U.S. ____, 129 S. Ct. 1317 (Feb. 23, 2009) (No. 08-651) (granting cert. to Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008)) (1) Are the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an “aggravated felony” under the Immigration and Naturalization Act, merely a “collateral consequence” of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise? (2) Even assuming that immigration consequences are “collateral,” can counsel’s gross misadvice as to the collateral consequence of deportation constitute a ground for setting aside a guilty plea which was induced by that faulty advice?

Ries v. Quarterman, 522 F.3d 517 (5th Cir. 2008) State courts did not unreasonably apply federal law in rejecting death-sentenced Texas capital murder defendant’s claims of ineffective assistance of counsel with respect to the penalty phase of his trial; trial counsel’s use of Texas Child Protective Services records, while it could possibly have been handled better, nevertheless could not be said to fall outside the wide range of reasonable professional assistance; the same was true about trial counsel’s closing argument; nor was defendant entitled to federal habeas relief on his claim that trial counsel was ineffective for failing to object to prosecutorial remarks in closing argument; finally, defendant was not entitled to federal habeas relief based on his claim that appellate counsel was ineffective for failing to challenge the trial court’s exclusion of evidence of defendant’s remorse because the challenge was of dubious merit with respect to the guilt-innocence phase and was not clearly preserved for review in the penalty phase.

Skinner v. Quarterman, 528 F.3d 336 (5th Cir. 2008) In federal habeas corpus appeal attacking his Texas capital murder conviction and death sentence, defendant was entitled to a

certificate of appealability (“COA”) on his claims that his trial counsel provided ineffective assistance of counsel (“IAC”) by (1) failing to present evidence of a blood spatter report that could arguably have bolstered the primary defense theory and (2) failing to interview, and present the testimony of, a witness whose testimony could have supported a theory that another person had committed the murders; defendant was not, however, entitled to a COA on his other IAC claims (including failure to conduct DNA testing and failure to impeach a state’s witness with a prior written statement).

United States v. Hayes, 532 F.3d 349 (5th Cir. 2008) Fifth Circuit concluded that defense counsel may have provided deficient performance by failing to make a “related cases” objection under the Guidelines that would have precluded defendant’s being sentenced as a career offender; moreover, the error was demonstrably prejudicial because it caused the defendant to receive a sentence that was 150 months longer than he would otherwise have received (as evidenced by the fact that the district court, in granting § 2255 relief, lowered defendant’s sentence from 360 months’ imprisonment to 210 months’ imprisonment); nevertheless, because the district court did not hold an evidentiary hearing, the record did not disclose whether trial counsel’s decision not to make this objection was strategic, and therefore the Fifth Circuit could not finally determine whether defense counsel performed unreasonably; accordingly, the Fifth Circuit vacated the order granting § 2255 relief and remanded to the district court for an evidentiary hearing regarding the ineffective assistance of counsel claim.

Moore v. Quarterman, 534 F.3d 454 (5th Cir. 2008) Death-sentenced Texas defendant was not entitled to a certificate of appealability (“COA”) to appeal his claim that trial counsel provided ineffective assistance of counsel by failing to adequately investigate the facts surrounding the shooting at issue, where, in the state evidentiary hearing, defendant failed to adduce any evidence, or even cross-examine his trial counsel, about counsel’s reasons for not investigating; likewise, there was no evidence that the witnesses that allegedly should have been interviewed would have provided helpful testimony.

Pondexter v. Quarterman, 537 F.3d 511 (5th Cir. 2008) In Texas capital murder prosecution, where defendant was sentenced to death, defendant was not entitled to federal habeas relief based on his claims that his trial counsel was ineffective for (1) failing to consult with and/or call a pathologist respecting the cause of death to the victim,(2) failing to interview defendant’s cellmate to whom defendant made statements respecting the crime, and (3) failing to object to inaccurate prosecutorial argument that it was defendant who shot the victim through the brain; as to the first and third, even assuming counsel’s performance was deficient, the defendant failed to show prejudice; as to the second, trial counsel’s failure to interview was not shown to be deficient performance, given that it was unclear that defendant had ever notified counsel of the need to do so; moreover, there was no prejudice resulting therefrom, since the statements made to the cellmate were not exculpatory.

Geiger v. Cain, 540 F.3d 303 (5th Cir. 2008) District court reversibly erred in granting federal habeas relief to Louisiana state defendant convicted of second-degree murder; even if prosecutorial argument suggesting that an absent witness would corroborate defendant’s guilt was

improper, that argument did not warrant federal habeas relief because the evidence of guilt was not so insubstantial that the conviction would not have occurred but for the improper argument; nor was counsel constitutionally ineffective for failing to move for a mistrial on the basis of this alleged prosecutorial misconduct; the decision not to do so may have been a valid strategic choice; in any event, there was no basis to conclude that the trial court would have granted the motion or would have reversibly erred by refusing it; finally, counsel did not provide constitutionally ineffective assistance of counsel by failing to request an instruction to weigh accomplice testimony cautiously; even if defendant was entitled to such an instruction under state law, he was not prejudiced because there was not a reasonable probability that the result of the trial would have been different.

Blanton v. Quarterman, 543 F.3d 230 (5th Cir. 2008) Death-sentenced Texas capital murder defendant was not entitled to federal habeas relief on his claims that (1) trial counsel was ineffective in his investigation and presentation of mitigation evidence, (2) trial counsel was ineffective for failing to properly preserve defendant's claim of racial discriminatory prosecutorial use of a jury shuffle, and (3) appellate counsel was ineffective for failing to raise the jury shuffle claim and was ineffective in her presentation of defendant's claim, under Batson v. Kentucky, 476 U.S. 79 (1986), that the prosecution's peremptory strike of a particular veniremember was impermissibly based on her race; the state courts did not unreasonably apply clearly established Supreme Court law in rejecting these claims as not constituting deficient performance under the circumstances or as not prejudicing defendant (or both).

Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008) District court did not err in denying misdemeanor defendant's petition for a writ of coram nobis based upon ineffective assistance of counsel; the defense attorneys representing defendant in connection with his prior plea did not affirmatively misrepresent the possibility or likelihood that deportation would, or would not, result from his guilty plea; furthermore, under Fifth Circuit precedent, see United States v. Banda, 1 F.3d 354 (5th Cir. 1993), an attorney does not provide deficient performance by failing to warn a defendant about collateral consequences of a guilty plea, like possible deportation; that holding was not impugned by subsequent changes in immigration law increasing the likelihood of deportation for certain criminal convictions. **(NOTE: This question will be considered by the United States Supreme Court in the coming Term, in Padilla v. Kentucky, cert. granted, ___ U.S. ___, 2009 WL 425077 (Feb. 23, 2009) (No. 08-651) (granting cert. to Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008)).)**

United States v. Cavitt, 550 F.3d 430 (5th Cir. 2008) Defendant was entitled to an evidentiary hearing on his claims, made in a motion to vacate sentence under 28 U.S.C. § 2255, that (1) his attorney rendered ineffective assistance of counsel by failing to pursue a motion to suppress, and (2) his plea was involuntary due to his attorney's ineffectiveness, including specifically the attorney's failure to advise defendant of his right to seek a conditional plea agreement; on the record of this case, the Fifth Circuit could not conclude that the search at issue was justified by either voluntary consent or reasonable suspicion; furthermore, the record did not allow the Fifth Circuit to conclude that the attorney's decision not to file a motion to suppress was strategic, conscious, and informed; nor could the Fifth Circuit assume that the attorney was familiar with the relevant facts and law in advising defendant to enter a guilty plea; because the record did not conclusively show

that defendant's ineffective-assistance-of-counsel claims were without merit, the Fifth Circuit vacated the district court's judgment denying defendant's § 2255 motion and remanded for an evidentiary hearing on those claims.

Dale v. Quarterman, 553 F.3d 876 (5th Cir. 2008) Federal district court did not err in denying Texas state defendant's petition for federal habeas corpus relief because the Texas state courts did not unreasonably apply clearly established federal law in concluding that the defendant had not received ineffective assistance of counsel during the sentencing phase of the revocation of his deferred adjudication probation; even though defendant received the statutory maximum prison sentence, defendant failed to show a reasonable probability that the additional mitigation evidence he alleged defense counsel should have presented would have resulted in a significantly lower sentence.

Rogers v. Quarterman, 555 F.3d 483 (5th Cir. 2008) In Texas capital murder prosecution, in which defendant (who was fifteen years old at the time of the offense, but certified to be tried as an adult) received an automatic life sentence, the Texas state courts did not unreasonably apply clearly established law in concluding that defendant had not received ineffective assistance of counsel ("IAC") as the result of his trial counsel's failure to preserve error as to the admissibility of defendant's confession; assuming arguendo that counsel's conduct constituted deficient performance, defendant failed to show a reasonable probability that the appellate courts would have found defendant's confession to be involuntary or inadmissible if that issue had been properly before them, especially since defendant's confession was more akin to the juvenile confessions found to be admissible in the jurisprudence than to those found inadmissible; therefore, defendant failed to show the necessary prejudice to prevail on his IAC claim.

D. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)

Jimenez v. Quarterman, ___ U.S. ___, 129 S. Ct. 681 (2009) (granting cert. to Jimenez v. Quarterman, No. 06-11240 (5th Cir. May 25, 2007) (unpublished order)) Where the Texas Court of Criminal Appeals granted petitioner an out-of-time direct appeal, the judgment did not become "final" on direct review for purposes of the 1-year AEDPA limitations period, see 28 U.S.C. § 2244(d)(1)(A), until the entirety of the (reinstated) state direct appellate review process was completed, on January 6, 2004; based on that date, petitioner's federal habeas petition was timely; for these reasons, the Fifth Circuit erred in refusing to grant petitioner a certificate of appealability ("COA") to challenge the district court's finding of untimeliness; accordingly, the Supreme Court reversed the Fifth Circuit's order denying a COA and remanded for the Fifth Circuit to consider whether petitioner was entitled to a COA on the merits of his federal constitutional claims.

McDaniel v. Brown, cert. granted, ___ U.S. ___, 129 S. Ct. 1038 (Jan. 26, 2009) (No. 08-559) (granting cert. to Brown v. Farwell, 525 F.3d 787 (9th Cir. 2008)) (1) What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)? (2) Does an analysis of a sufficiency-of-the-evidence claim pursuant to Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record

or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

Starns v. Andrews, 524 F.3d 612 (5th Cir. 2008) District court erred in dismissing federal habeas petition of Louisiana defendant convicted of manslaughter as untimely under the AEDPA; where the basis of the petition was exculpatory information learned, after defendant's trial, in a civil deposition of a witness (known to the State before the criminal trial) taken in a wrongful death suit, the relevant starting point for the AEDPA's expanded one-year limitation period under 28 U.S.C. § 2241(d)(1)(D) was the date on which defendant, or his criminal counsel, learned of the civil deposition testimony; the Fifth Circuit rejected the State's contention that defendant could have, through the exercise of due diligence, learned of this witness's testimony before or during his criminal trial, especially given the fact that the State had downplayed the witness's testimony beforehand; moreover, the knowledge of the civil attorney taking the deposition – who represented defendant's parents' homeowners insurance company – could not be attributed to defendant for purposes of the AEDPA statute of limitations; accordingly, the Fifth Circuit remanded for a determination of when defendant or his criminal attorney learned of the witness's deposition testimony.

United States v. Petty, 530 F.3d 361 (5th Cir. 2008) Federal prisoner attempting to proceed under 28 U.S.C. § 2255 was not entitled to equitable tolling of the AEDPA one-year filing deadline based upon allegedly incorrect advice from an assistant clerk of the federal district court as to when his appeal became "final," where prisoner had received correct advice about relevant dates from other sources, and the discrepancies should have alerted prisoner to inquire further; his failure to do so demonstrated the lack of proper diligence in his asserting his rights necessary to meet his burden of showing that equitable tolling was appropriate.

Butler v. Cain, 533 F.3d 314 (5th Cir. 2008) Where Louisiana state appellate court affirmed defendant's conviction on June 24, 1998, and defendant did not apply to Louisiana Supreme Court for a writ within the 30-day period prescribed by Louisiana Supreme Court Rule X, § 5(a), defendant's conviction became final for AEDPA purposes on July 24, 1998, notwithstanding the fact that defendant filed an out-of-time writ application that the Supreme Court denied without comment; consequently, the AEDPA one-year period for filing a federal habeas petition expired before the date on which defendant even filed his application for state postconviction review, much less the date on which he filed his federal petition; accordingly, the district court did not err in dismissing defendant's federal habeas petition as untimely.

United States v. Plascencia, 537 F.3d 385 (5th Cir. 2008) Where defendant failed to file his notice of appeal within the period prescribed by Fed. R. Crim. P. 4(b), and the appeal was ultimately dismissed for untimeliness after the district court found no good cause or excusable neglect permitting the late filing, defendant's one-year period for filing a 28 U.S.C. § 2255 motion commenced upon the expiration of the time for filing a timely notice of appeal (on January 12, 2004); defendant's § 2255 motion was thus due on or before January 12, 2005; because defendant did not file his § 2255 motion until June 15, 2005, the district court did not err in dismissing the motion as untimely; the Fifth Circuit rejected the defendant's argument that the AEDPA one-year

statute of limitations did not begin to run until 90 days (the time for filing a petition for writ of certiorari) from the decision dismissing the appeal as untimely (which dismissal occurred on June 9, 2004). (Judge Owen dissented and would hold that the AEDPA one-year statute of limitations did not begin to run until 90 days after the June 9, 2004 dismissal).

Wardlaw v. Cain, 541 F.3d 275 (5th Cir. 2008) District court did not err in dismissing Louisiana state prisoner's federal habeas petition as time-barred under the AEDPA; prisoner's state petition for postconviction relief was not "properly filed" so as to toll the AEDPA 1-year limitations period, see 28 U.S.C. § 2244(d)(2), because it was ultimately dismissed as untimely under state law; under the Supreme Court's decision in Pace v. DiGuglielmo, 544 U.S. 408 (2005), postconviction petitions rejected on the basis of "filing conditions" – including time limits for filing – are not "properly filed" for purposes of § 2244(d)(2) (as opposed to petitions rejected on the basis of procedural bars that go to the ability to obtain relief; although the Fifth Circuit had held to the contrary in Smith v. Ward, 209 F.3d 383 (5th Cir. 2000) (by holding that a Louisiana state postconviction petition could be "properly filed" even if ultimately dismissed as untimely, because the state statute governing timeliness contained certain exceptions which required some level of judicial review), the Fifth Circuit held that Smith v. Ward had been abrogated by the Supreme Court's decision in Pace. (Inasmuch as Smith v. Ward relied on a similar holding with respect to Texas law in Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999), it seems likely that Villegas is likewise no longer good law.)

E. Other

Danforth v. Minnesota, ____ U.S. ____, 128 S. Ct. 1029 (2008) (decision below: Danforth v. State, 718 N.W.2d 451 (Minn. 2006)) State courts are not required to use the standard announced in Teague v. Lane, 489 U.S. 288 (1989), to determine whether federal constitutional rules apply retroactively to state-court criminal cases pending on collateral review; rather, state courts on state post-conviction review are free to give broader retroactive effect to new rules of criminal procedure than is afforded on federal habeas review under Teague. (Chief Justice Roberts filed a dissenting opinion, in which Justice Kennedy joined.)

Medellin v. Texas, ____ U.S. ____, 128 S. Ct. 1346 (2008) (decision below: Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. Nov. 15, 2006)) The judgment of the International Court of Justice ("ICJ") in the Avena case is not directly enforceable as domestic law in state court because none of the relevant treaty sources (the Vienna Convention, the Optional Protocol, the U.N. Charter, or the ICJ Statute) is self-executing such that it creates binding federal law in the absence of implementing federal legislation (of which there is none); nor were state courts bound by President Bush's Memorandum purporting to require state courts to provide review of the Vienna Convention claims of the persons who were parties to the Avena judgment; although the President is authorized to act to comply with international treaty obligations by other means consistent with the Constitution, he may not rely upon a non-self-executing treaty, unaccompanied by implementing legislation, to establish binding rules of decision that preempt contrary state law. (Justice Stevens filed an opinion concurring in the judgment. Justice Breyer filed a dissenting opinion, in which he was joined by Justices Souter and Ginsburg.)

Baze v. Rees, ___ U.S. ___, 128 S. Ct. 1520 (2008) (decision below: Baze v. Rees, 217 S.W.3d 207 (Ky. 2006)) In a fractured decision, the Court affirmed the judgment of the Kentucky Supreme Court holding that Kentucky’s lethal injection protocol does not violate the Eighth Amendment’s ban on cruel and unusual punishments:

(1) In a plurality opinion announcing the judgment of the Court, and joined by Justices Kennedy and Alito, Chief Justice Roberts opined that (1) in order to violate the Eighth Amendment, a method of execution must be sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers; and (2) the existence of alternative methods of execution will not give rise to an Eighth Amendment claim unless (a) the alternative effectively addresses a substantial risk of serious harm, is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain, and (b) the State’s refusal to adopt such an alternative and its adherence to its current method of execution is without a legitimate penological justification. Under this standard, he reasoned, the Kentucky lethal injection protocol did not violate the Eighth Amendment. (Justice Alito joined this opinion, but also filed a separate concurring opinion explaining his view of how the holding should be implemented.)

(2) Justice Stevens filed an opinion concurring in the judgment. He believed that under the Court’s precedents, whether as interpreted by the Chief Justice or by Justice Ginsburg, the evidence adduced by petitioners failed to prove that the Kentucky lethal injection violated the Eighth Amendment. Recognizing that the constitutionality of the death penalty was settled by stare decisis, he nevertheless wrote at length to express his announce his arrival at the view that the death penalty was in all circumstances cruel and unusual punishment.

(3) Justice Scalia filed an opinion concurring in the judgment, in which he was joined by Justice Thomas, principally to respond to Justice Stevens’s opinion about the constitutionality of the death penalty.

(4) Justice Thomas filed an opinion concurring in the judgment, in which he was joined by Justice Scalia, because he could not subscribe to the plurality opinion’s formulation of the governing standard. Rather, he opined, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain; thus, he concluded, “[b]ecause Kentucky’s lethal injection protocol is designed to eliminate pain rather than to inflict it, petitioners’ challenge must fail.”

(5) Justice Breyer filed an opinion concurring in the judgment. He agreed with the standard for reviewing the claim set out in Justice Ginsburg’s opinion, but could not find, either in the record in this case or in the literature on the subject, sufficient evidence that Kentucky’s execution method constituted cruel and unusual punishment under that standard.

(6) Justice Ginsburg filed a dissenting opinion, in which she was joined by Justice Souter. She opined that “if readily available measures can materially increase the likelihood that the [execution] protocol will cause no pain, a State fails to adhere to contemporary standards of decency” – and thus violates the Eighth Amendment – “if it declines to employ those measures.” She would “remand with instructions to consider whether the failure to include readily available

safeguards to confirm that the inmate is unconscious after injection of sodium thiopental, in combination with other elements of Kentucky's protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain.”

Harbison v. Bell, ____ U.S. ____, 2009 WL 838173 (Apr. 1, 2009) (decision below: Harbison v. Bell, 503 F.3d 566 (6th Cir. 2007)) A certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(A) is not required to appeal an order denying a request for federally appointed habeas counsel under 18 U.S.C. § 3599 because § 2253(c)(1)(A) governs only final orders that dispose of a habeas proceeding's merits; furthermore, 18 U.S.C. § 3599 authorizes federally appointed habeas counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation. (Chief Justice Roberts and Justice Thomas each filed an opinion concurring in the judgment. Justice Scalia filed an opinion concurring in part and dissenting in part, in which he was joined by Justice Alito.) **(NOTE: The first holding [regarding the need for a COA] affirmed Fifth Circuit law on the subject; the second holding [regarding whether federally appointed counsel could represent their client in state clemency proceedings] overruled the Fifth Circuit's contrary decision in Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002).)**

District Attorney's Office for the Third Judicial District v. Osborne, cert. granted, ____ U.S. ____, 129 S. Ct. 488 (Nov. 3, 2008) (No. 08-6) (granting cert. to Osborne v. District Attorney's Office for the Third Judicial District, 521 F.3d 1118 (9th Cir. 2008)) (1) Where defendant was convicted years before of kidnapping, sexual assault, and physical assault, and where defendant subsequently filed an action under 42 U.S.C. § 1983, seeking access to the biological evidence for purposes of new DNA testing, may defendant use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material? (2) Does defendant have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

United States v. Denedo, cert. granted, ____ U.S. ____, 129 S. Ct. 622 (Nov. 25, 2008) (No. 08-267) (granting cert. to Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008)) Does an Article I military appellate court have jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.?

Tran v. Mukasey, 515 F.3d 478 (5th Cir. 2008) Under Zadvydas v. Davis, 533 U.S. 678 (2001), 8 U.S.C. § 1231(a)(6) does not authorize the indefinite detention of a removable alien based upon a determination by the government that the alien's mental illness makes him a dangerous risk to the community.

Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008) District court did not err in vacating magistrate judge's order granting writ of coram nobis with respect to misdemeanor plea/conviction over which the magistrate judge had presided; the magistrate judge's statutory authority to conduct misdemeanor trials and to sentence for petty offenses did not encompass the authority to hear a subsequent petition for a writ of coram nobis; nor did the magistrate judge possess

jurisdiction under 28 U.S.C. § 636(c)(1), because there was no indication in the record that the district court had ever referred or specially designated the petition to the magistrate judge, and, in fact, the district court noted that it had not done so.

Walker v. Epps, 550 F.3d 407 (5th Cir. 2008) Under Wilson v. Garcia, 471 U.S. 261 (1985), Mississippi’s 3-year statute of limitations for general personal injury suits applied to death-sentenced inmates’ suit, under 42 U.S.C. § 1983, challenging Mississippi’s method of execution, even though the suit requested only equitable relief; the Fifth Circuit rejected inmates’ argument that § 1983 method-of-execution actions should be subject only to the equitable doctrine of laches and not to a statute of limitations; moreover, such causes of action accrue on the later of two dates – the date direct review of an individual case is complete or the date on which the challenged execution protocol was adopted; under these rules, the statute of limitations had run as to inmates’ suit; because inmates were likewise not entitled to equitable tolling of the limitations period, the district court did not err in granting summary judgment to the State and against the inmates.

XII. MISCELLANEOUS

A. Particular Substantive Offenses (and Defenses)

United States v. Williams, ____ U.S. ____, 128 S. Ct. 1830 (2008) (decision below: United States v. Williams, 444 F.3d 1286 (11th Cir. 2006)) 18 U.S.C. § 2252A(a)(3)(B) – which prohibits “knowingly . . . advertis[ing], promot[ing], distribut[ing], or solicit[ing] . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the manner or purported material” is illegal child pornography – is not overly broad under the First Amendment, because it does not criminalize a substantial amount of protected expressive activity; nor is it unconstitutionally vague, because there is no indeterminacy in the incriminating facts that must be proved to establish guilt under this statute. (Justice Stevens filed a concurring opinion in which he was joined by Justice Breyer. Justice Souter filed a dissenting opinion in which he was joined by Justice Ginsburg.)

United States v. Ressam, ____ U.S. ____, 128 S. Ct. 1858 (2008) (decision below: United States v. Ressam, 474 F.3d 597 (9th Cir. 2007), *reh’g en banc denied*, 491 F.3d 997 (9th Cir. June 6, 2007)) Under 18 U.S.C. § 844(h)(2) – prescribing a mandatory ten-year term of imprisonment for any person who “carries an explosive during the commission of any felony which may be prosecuted in a court of the United States” – it is not necessary that the government prove that the explosives were carried “in relation to” the underlying felony; the word “during” connotes only a temporal link; thus, because defendant’s carrying of explosives was contemporaneous with the charged underlying felony (making a false statement, in violation of 18 U.S.C. § 1001), the evidence was sufficient to sustain defendant’s conviction under 18 U.S.C. § 844(h)(2). (Justice Thomas, joined by Justice Scalia, filed an opinion concurring in part and concurring in the judgment, noting that he did not join the parts of the Court’s opinion that discussed legislative history “[b]ecause the plain language of the statute squarely answer[ed] the question presented in this case.” Justice Breyer filed a dissenting opinion.)

Regalado Cuellar v. United States, ____ U.S. ____, 128 S. Ct. 1994 (2008) (decision below: United States v. Cuellar, 478 F.3d 282 (5th Cir. 2007) (*en banc*)) Although the crime of money laundering under 18 U.S.C. § 1956(a)(2)(B)(i) (transportation or attempted transportation of proceeds of unlawful activity “designed . . . to conceal or disguise [certain listed attributes of the money]” does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that the funds were concealed during transport; the statutory text makes clear that a conviction under this provision requires proof that the purpose – not merely the effect – of the transportation was to conceal or disguise a listed attribute; here, the evidence did not show that concealment was the purpose of the transportation; therefore, defendant’s conviction could not stand. (Justice Alito filed a concurring opinion in which he was joined by Chief Justice Roberts and Justice Kennedy.)

United States v. Santos, ____ U.S. ____, 128 S. Ct. 2020 (2008) (decision below: Santos v. United States, 461 F.3d 886 (7th Cir. 2006)) For purposes of defendant’s prosecution for money laundering under 18 U.S.C. § 1956(a)(1) – which makes it a crime to engage in a financial transaction using the “proceeds” of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds – the term “proceeds” meant the profits (*i.e.*, gross receipts less expenses) of the specified activity at issue there (illegal gambling), and not the gross receipts from the unlawful activities. (Justice Scalia filed an opinion announcing the judgment of the Court, in which he was joined in whole by Justices Souter and Ginsburg, and in part by Justice Thomas. He opined that the rule of lenity dictated this meaning for the term “proceeds” under any § 1956(a)(1) prosecution. Justice Stevens filed an opinion concurring in the judgment, in which he agreed with this interpretation in the case at hand, but in which he opined that the meaning of the term “proceeds” might be different depending on the particular underlying specified unlawful activity at issue. Justice Breyer filed a dissenting opinion. Justice Alito filed a dissenting opinion, in which he was joined by Chief Justice Roberts, Justice Kennedy, and Justice Alito.)

District of Columbia v. Heller, ____ U.S. ____, 128 S. Ct. 2783 (2008) (decision below: Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007)) The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home; accordingly, the Court upheld the D.C. Circuit’s decision striking down the District’s handgun ban and trigger-lock requirement, as, under any level of constitutional scrutiny, these impermissibly impinged on the interests at the core of the Second Amendment. (Justice Stevens filed a dissenting opinion, in which he was joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer filed a dissenting opinion, in which he was joined by Justices Stevens, Souter, and Ginsburg.)

United States v. Hayes, ____ U.S. ____, 129 S. Ct. 1079 (2009) (decision below: United States v. Hayes, 482 F.3d 749 (4th Cir. 2007)) For purposes of 18 U.S.C. § 922(g)(9) (proscribing possession of a firearm by a person previously convicted of a “misdemeanor crime of domestic violence”), Congress intended the term “misdemeanor crime of domestic violence” to include an offense “committed by” a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime; thus, although the government must, in a § 922(g)(9) prosecution, prove that the victim of the predicate offense had the specified relationship with the defendant, that relationship need not have

been denominated an element of the predicate offense. (Chief Justice Roberts filed a dissenting opinion, in which he was joined by Justice Scalia.)

Boyle v. United States, cert. granted, ___ U.S. ___, 129 S. Ct. 29 (Oct. 1, 2008) (No. 07-1309) (granting cert. to United States v. Boyle, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) (unpublished)) Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages – an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?

Flores-Figueroa v. United States, cert. granted, ___ U.S. ___, 129 S. Ct. 457 (Oct. 20, 2008) (No. 08-108) (granting cert. to United States v. Flores-Figueroa, 274 Fed. Appx. 501 (8th Cir. 2008) (unpublished)) In order to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), must the Government show that the defendant knew that the means of identification he used belonged to another person?

Abuelwaha v. United States, cert. granted, ___ U.S. ___, 129 S. Ct. 593 (Nov. 14, 2008) (granting cert. to United States v. Abuelwaha, 523 F.3d 415 (4th Cir. 2008)) Does the use of a telephone to buy drugs for personal use “facilitate” the commission of a drug “felony,” in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller’s distribution of the drugs to him (a felony)?

Dean v. United States, cert. granted, ___ U.S. ___, 129 S. Ct. 593 (Nov. 14, 2008) (No. 08-5274) (granting cert. to United States v. Dean, 517 F.3d 1224 (11th Cir. 2008)) Does 18 U.S.C. § 924(c)(1)(A)(iii) – establishing a ten-year mandatory minimum sentence for a defendant who “discharge[s]” a firearm during a crime of violence – require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary?

United States v. Dillon, 532 F.3d 379 (5th Cir. 2008) In civil rights prosecution under 18 U.S.C. § 242, charging defendant (a former assistant city attorney of New Orleans) with extorting sexual favors from two women in exchange for the favorable exercise of his prosecutorial authority, the evidence was sufficient to establish that defendant deprived the two women of their right to bodily integrity under color of law; the fact that defendant took advantage of his position to initially become acquainted with his victims does not alone suffice to find that his subsequent sexual assaults were under color of law; there needs to have been a more meaningful nexus between the defendant’s use or abuse of his position of actual or ostensible authority and the actual commission of the offense; here, however, that nexus was supplied by defendant’s statements, which, in substance, clearly invoked his actual or perceived power as a city prosecutor with the intent to compel the victims to comply with his sexual demands and not to report the sexual assaults.

United States v. Ramos, 537 F.3d 439 (5th Cir. 2008):

(1) In prosecution of two Border Patrol agents for charges arising out of the shooting of a fleeing drug smuggling suspect, Fifth Circuit rejected defendants' argument that they lacked fair notice/fair warning that 18 U.S.C. § 924(c)(1)(A) could be applied to law enforcement officers who used a firearm in the course of their duties; the statute on its face applies to "any person" and contains no language that law enforcement officers are excepted from its application; moreover, the cases in which § 924(c)(1)(A) has been applied appear to encompass the circumstances of this case; these cases provided notice to defendants that their conduct was within the scope of the statute.

(2) Defendants' convictions for obstruction of justice in connection with "an official proceeding" under 18 U.S.C. § 1512(c)(1) and (2) could not stand; the Border Patrol's internal investigation of defendant agents' alleged employee misconduct in failing to follow the agency's established policies concerning firearms was not "an official proceeding" within the meaning of § 1512(c); accordingly, the Fifth Circuit reversed those convictions and remanded for resentencing on the remaining convictions.

United States v. Valle, 538 F.3d 341 (5th Cir. 2008) In prosecution of Immigration and Customs Enforcement agent for bribery under 18 U.S.C. § 201(b)(2)(C) (based on agent's taking for money for allegedly removing nonexistent criminal charges against arrestee), evidence was sufficient to make out a violation of the bribery statute; it was of no moment that defendant did not have the power to remove criminal charges, or that there were in fact no criminal charges to remove; Congress intended the statute to be violated when an official takes a bribe, knowing that it was given for the purpose of inducing him to violate his official duty, whether or not he actually intended to follow through with the violation. (Judge Wiener dissented as to this holding, opining that the evidence was plainly insufficient as to the element of specific intent, since he could not have intended to be influenced respecting the performance of "an official act that was actually and legally impossible for him to perform, and thus legally impossible for him to intend to perform.")

United States v. Salazar, 542 F.3d 139 (5th Cir. 2008) Defendant convicted of witness intimidation, in violation of 18 U.S.C. § 1512(b)(2)(A), was subject to the enhanced penalty of 18 U.S.C. § 1512(j) (raising the statutory maximum sentence from the otherwise applicable ten years, up to the statutory maximum that could be imposed in the trial of the case to which the witness-intimidation offense was connected); the phrase "in connection with a trial of a criminal case" found in 18 U.S.C. § 1512(j) does not require proof that the trial was ongoing, or scheduled reasonably close in time to when the witness intimidation occurred; moreover, there was no violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), because the jury at the very least necessarily found (at least, by implication) that defendant's threats were made in connection with the trial of a criminal case.

United States v. Armstrong, 550 F.3d 382 (5th Cir. 2008):

(1) In prosecution for illegally dispensing controlled substance pharmaceuticals under 21 U.S.C. § 841, expert testimony is not always required in order to show that a physician is acting for other than proper medical purposes (required in such a case to make out a violation of 21 U.S.C. § 841); although expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other

than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions.

(2) A medical professional's conviction for illegally dispensing controlled substance in violation of 21 U.S.C. § 841 requires **either** proof of lack of a valid medical purpose **or** proof that the prescriptions were beyond the scope of professional practice, but not both; the district court thus did not err in giving an instruction that characterized these standards as disjunctive. **(The Fifth Circuit disagreed with the Ninth Circuit's holding, in United States v. Feingold, 454 F.3d 1001 (9th Cir. 2006), that allowing conviction under the "outside the scope of professional practice" standard alone would allow conviction for mere malpractice.)**

United States v. Brown, 553 F.3d 768 (5th Cir. 2008):

(1) In reviewing defendants' convictions for money laundering promotion under 18 U.S.C. § 1956(a)(1)(A)(i) (where the underlying "unlawful activity" was defendants' allegedly illegal distribution of controlled substance pharmaceuticals [in violation of 21 U.S.C. § 841(a)(1)], the Fifth Circuit noted the fractured nature of the Supreme Court's decision in United States v. Santos, ___ U.S. ___, 128 S. Ct. 2020 (2008), respecting the "proceeds" element of this statute; the Fifth Circuit held that, even under the Santos plurality's more stringent reading of the statute, the appellants still lost; in any event, because, after Santos, it is still unclear what the prosecution should be required to prove up the "proceeds" element in a context like this one, any error was not "plain" as required for relief under the plain-error standard.

(2) In reviewing defendants' convictions of money laundering concealment under 18 U.S.C. § 1956(a)(1)(B)(i), the Fifth Circuit found that the evidence was sufficient to prove the "designed . . . to conceal" element of that statute, even under the Supreme Court's decision in Cuellar v. United States, 128 S. Ct. 1994 (2008).

United States v. Achobe, ___ F.3d ___, 2009 WL 5726397 (5th Cir. 2008), on denial of reh'g, ___ F.3d ___, 2009 WL 311403 (5th Cir. Feb. 10, 2009) Noting, but not deciding, that the Fifth Circuit's case law on the "promotion" element was cast into some doubt by the plurality decision in United States v. Santos, ___ U.S. ___, 128 S. Ct. 2020 (2008), the Fifth Circuit found the evidence of the "promotion" element sufficient under even the more stringent standard in current Fifth Circuit law, because the evidence showed not simply an intent to spend ill-gotten gains, but rather an intent to promote the specified unlawful activity with ill-gotten gains.

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) Former CEO of Enron was not entitled to his reversal of his convictions under United States v. Brown, 459 F.3d 509 (5th Cir. 2006); although the Fifth Circuit did limit the reach of "deprivation of honest services"-type fraud in Brown, that limitation did not apply to the defendant here; in Brown, the corporate employee undertook the specific fraud in question at the direction of the employer; thus, because the decisionmaker sanctioned the specific fraudulent conduct, the corporate employee did not deprive the corporation of his honest services; here, however, no one sanctioned defendant's improper conduct.

United States v. Ollison, 555 F.3d 152 (5th Cir. 2009) Prosecution of secretary for Dallas Independent School District (“DISD”) under 18 U.S.C. § 666(a)(1)(A) (for theft of funds from an organization receiving federal funds, based upon her unauthorized use of a DISD credit card) was not unconstitutional under the Spending Clause, the Necessary and Proper Clause, or the Tenth Amendment; because DISD used its sizable federal grants to fund day-to-day expenses, it could not be said that defendant’s misuse of the credit card had no relationship whatsoever to federal funds and programs; the Fifth Circuit declined to carve out an exception to § 666 for low-level employees.

United States v. Sterling, 555 F.3d 452 (5th Cir. 2009) Defendant’s convictions for drug trafficking and firearms charges did not run afoul of the corpus delicti doctrine; under this doctrine, the corroborative evidence need not be sufficient, independent of the defendant’s own statements, to establish the corpus delicti; rather, the government need only produce substantial independent evidence tending to establish the trustworthiness of the statements; here, the government produced sufficient independent evidence to corroborate defendant’s statements, thus allowing the jury to conclude beyond a reasonable doubt that defendant committed the crimes to which he confessed; the Fifth Circuit also held (siding with the Sixth and Tenth Circuits, and answering a question left open in Watson v. United States, 128 S. Ct. 579 (2007)) that bartering drugs for guns constitutes “possession in furtherance of a drug trafficking crime” under 18 U.S.C. § 924(c)(1)(A).

B. Insanity/Competency/Civil Commitment

Indiana v. Edwards, ___ U.S. ___, 128 S. Ct. 2379 (2008) (decision below: Edwards v. State, 866 N.E.2d 252 (Ind. 2007)) The Constitution does not forbid states from insisting upon representation by counsel for those competent enough to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves. (Justice Scalia filed a dissenting opinion in which he was joined by Justice Thomas.)

Perez v. Cain, 529 F.3d 588 (5th Cir. 2008) The state courts unreasonably applied established Supreme Court precedent concerning sufficiency of the evidence in upholding defendant’s Louisiana conviction for first-degree murder of a police officer, because defendant established at trial that he was insane at the time of the offense and because no rational juror could have found otherwise; defendant produced lay testimony of odd or bizarre behavior preceding the offense, the defendant’s insanity at the time of the offense was supported by expert testimony from largely disinterested doctors (court-appointed experts and doctors employed at the state facility where defendant was committed to restore him to competency), and the state produced insufficient evidence solely through cross-examination and argument to controvert defendant’s claim; accordingly, the Fifth Circuit affirmed the district court’s grant of habeas relief for insufficient evidence (as well as the order that the state trial court should conduct proceedings under La. Code Crim. Proc. art. 654, requiring a dangerousness commitment hearing for insanity acquittees).

United States v. Bonin, 541 F.3d 399 (5th Cir. 2008) District court lacked authority to order pretrial releasee (charged with making threats to George Strait) committed to the custody of the Attorney General for dangerousness pursuant to 18 U.S.C. § 4246; under § 4246(a), the court may not sua sponte conduct a dangerousness hearing; rather, such a proceeding may occur only upon a certification of dangerousness by the director of a facility to which the defendant has been committed

for a competency evaluation pursuant to 18 U.S.C. § 4241(d); because there was no such certification here, the Fifth Circuit vacated the district court's order and remanded the case to the district court for the purpose of committing defendant to the custody of the Attorney General for placement in a federal medical facility, so that the director of the facility could determine whether a certificate should issue per § 4246(a).

C. Reversals for Insufficiency of the Evidence or Multiplicity

United States v. Ramos, 537 F.3d 439 (5th Cir. 2008) (obstruction of justice in connection with “an official proceeding” under 18 U.S.C. § 1512(c)(1) and (2) (the Border Patrol's internal investigation of defendant agents' alleged employee misconduct in failing to follow the agency's established policies concerning firearms was not “an official proceeding” within the meaning of § 1512(c))

United States v. Armstrong, 550 F.3d 382 (5th Cir. 2008) Five of registered nurse's convictions for aiding and abetting physician's illegal dispensation of controlled substance pharmaceuticals (in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2) were not supported by sufficient evidence where the jury had acquitted the prescribing physician as the principal with respect to the very same prescriptions; as to these counts, the jury had at least a reasonable doubt whether the prescriptions the physician wrote were illegitimate, and thus, as to these counts, there was no crime for the nurse to have abetted; accordingly, the Fifth Circuit reversed these five convictions and remanded for resentencing on the remaining counts.

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) Based upon government's concession that the evidence was insufficient, the Fifth Circuit reversed two of pharmacists' convictions for illegal distribution of controlled substance pharmaceuticals (in violation of 21 U.S.C. § 841(a)(1)).

United States v. Achobe, ___ F.3d ___, 2009 WL 5726397 (5th Cir. 2008), on denial of reh'g, ___ F.3d ___, 2009 WL 311403 (5th Cir. Feb. 10, 2009) Based upon government's concession that the evidence was insufficient, the Fifth Circuit reversed two of defendant's convictions for money laundering promotion.

United States v. McCall, 553 F.3d 821 (5th Cir. 2008) Evidence was insufficient to support the within-1,000-feet-of-a-school element of the charges against defendant under 21 U.S.C. § 860(a) (proscribing the distribution of drugs within 1,000 feet of a school or other protected location); accordingly, the Fifth Circuit reversed those convictions.

United States v. Severns, ___ F.3d ___, 2009 311405 (5th Cir. Feb. 10, 2009) Under the elements test of Blockburger v. United States, 284 U.S. 299 (1932), it did not violate double jeopardy for defendant to be convicted and sentenced for arson, mail fraud, and use of fire to commit mail fraud (or arson, wire fraud, and use of fire to commit wire fraud) all based upon a single insurance-fraud fire; however, the Fifth Circuit held that a single fire could result in only a single conviction for use of fire to commit another offense (in violation of 18 U.S.C. § 844(h)(1), even if a different object offense is alleged in each count; accordingly, defendant's two § 844(h)(1) convictions and consecutive ten-year sentences on those counts violated double jeopardy; the Fifth

Circuit therefore vacated his sentences on those two counts and remanded for the government to elect on which of the two counts it wished to proceed, after which defendant was to be resentenced and the other count dismissed.