Significant Decisions

IN THE SUPREME COURT AND FIFTH CIRCUIT, MAY 2016 TO SEPTEMBER 26, 2017

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I. SEARCH AND SEIZURE

***United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017): The FBI began a child-pornography investigation of Jarman, an attorney, in November 2007, based on a report by Jarman's computer-repair service that a customer had recently asked to transfer data from an old hard drive onto a new computer and wipe the old hard drive clean. The FBI asked the service to retain the hard drive and not wipe it clean. In January 2008, the FBI re-interviewed the service, which then identified Jarman as the customer. The service now said, for the first time, that it believed CP images had been transferred from the old drive to the new computer. The FBI sought a warrant for Jarman's home in March 2008. In December 2008, the FBI submitted the warrant to a judge, and it was signed. Agents seized Jarman's computers and produced a report in August 2009. The prosecution team received reports in September 2009 and July 2010. Jarman was charged with receiving child pornography.**

Jarman moved to suppress the materials seized from his home, arguing that the affidavit supporting the warrant did not establish probable cause, that it omitted material information, and that it contained misrepresentations and unreliable information. After the hearing on the motion, the district court found that there were material inconsistencies between the warrant and the agent's testimony. However, the court denied the motion to suppress, finding that the lapse of time between the warrant and the hearing demonstrated that the agent's incorrect statements were not deliberate. The court found that the "good faith exception" applied and denied the motion.

On appeal, Jarman challenged the good-faith holding and argued that the Government's delay in searching Jarman's computers violated the Fourth Amendment and Federal Rule of Criminal Procedure 41. The Court of Appeals held that Jarman had not carried his burden on the "good faith" argument and that, under the circumstances, the Government's delay was reasonable. Jarman had forfeited the Rule 41 argument.

***United States v. Monsivais*, 848 F.3d 353 (5th Cir. 2017): Officers stopped after seeing car parked by side of highway. A man walking away from the car, toward Fort Worth walked past the patrol car without stopping. The officers began asking questions. Monsivais seemed nervous and kept putting his hands in and out of his pockets, even after being asked to stop. The officers frisked him for weapons and, when Monsivais told them he had a gun, seized the firearm. They then found a pipe and methamphetamine. At the suppression hearing, the officers testified that they did not suspect Monsivais of criminal activity and if Monsivais had continued to refuse putting his hands in his pockets, they would have just let him go. Two judges on the Fifth Circuit panel concluded that, on these facts, the officers did not have reasonable suspicion to seize Monsivais. Very vocal dissent from Judge Jones.**

United States v. Wallace, 866 F.3d 605 (5th Cir. 2017): Suppression is not a remedy for violations of the federal pen-trap statute. Remedies are provided in the statute itself.

United States v. Broca-Martinez, 855 F.3d 675 (5th Cir. 2017): Officer pursuing a tip of illegal-alien activity in the area, and a BOLO regarding the defendant's car, received response from state computer base that insurance status of defendant's car was "unconfirmed." Based on that response, the officer stopped the defendant. The officer did not ask to see the defendant's proof insurance because, he testified, he already knew the defendant didn't have any. He testified that the computer database was generally accurate in identifying persons without coverage. Based on this evidence, the court of appeals found the officer had reasonable suspicion to make the stop.

United States v. Henry, 853 F.3d 754 (5th Cir. 2017): Officer stopped Henry based on the belief that a statute requiring that license plates be free from foreign materials and be legible prohibited obstruction of attached registration stickers. This was incorrect. However, the court of appeals found that the officer's belief was objectively reasonable, and thus there was reasonable suspicion to stop the car.

United States v. Ramirez, 839 F.3d 437 (5th Cir. 2016): Ramirez was stopped about 45 miles from the border, on Highway 77. He was driving a Ford F-150 pick-up truck, and, according to the officer who stopped him, that truck is popular with drug smugglers. The officer also testified that Highway 77 was a popular route for smugglers and that drug traffic was especially high on Wednesdays—the day that Ramirez was stopped. The officer saw Ramirez's head appear to dip and rise again and, as he followed the truck, saw other heads dip and rise. Under a totality of the circumstances analysis that accounted for the proximity to the border, the court concluded the officer had sufficient suspicion to make the stop.

II. OTHER PRETRIAL MATTERS

Motions to Sever

United States v. Rodriguez, 831 F.3d 663 (5th Cir. 2016): Defendant cannot successfully challenge denial of motion to sever merely by showing that the large amount of evidence of guilt of his co-defendants had a "spillover" effect on his case. Instead, he must isolate particular events and show how they prejudiced him.

III. TRIAL

Double Jeopardy

***Bravo-Fernandez v. United States*, 137 S. Ct. 352 (2016): When a jury returns inconsistent verdicts, convicting on one count and acquitting on another, and both counts turn on the same issue of ultimate fact, double jeopardy bars Government from challenging the acquittal, but, because the verdicts are rationally irreconcilable, the acquittal does not preclude relitigating issues. This is so because if the same jury reaches irreconcilable results, the defendant cannot demonstrate that the issue he seeks to preclude was actually decided by the verdict.**

Sufficiency of Evidence/Proving an Offense

***Maslenjak v. United States*, 137 S. Ct. 1918 (2017): Maslenjak, an ethnic Serb living in Bosnia, sought and gained refugee status in the United States. During her interview, she said that she and her family would be persecuted in Bosnia because her husband had evaded service in the Bosnian Serb Army. Later, Maslenjak applied for naturalization and answered "no" to questions asking whether she had ever given false or misleading information to a government official in an immigration matter. The facts revealed that her husband had not fled the Bosnian civil war and had, in fact, served in the Bosnian Serb Army. Maslenjak was charged with breaking a law (18 U.S.C. § 1015, which makes it a crime to make a false statement in a naturalization proceeding) in the course of seeking naturalization, in violation of 18 U.S.C. § 1425. At trial, Maslenjak sought an instruction that her statements would have to have affected the naturalization decision to be the basis for a conviction. The district court disagreed. In the Supreme Court, the Government argued that *any* false statement could be the basis of a § 1425 statement. The Supreme Court held that a false statement must have "played some role" in the naturalization decision.**

Jury Instructions

***United States v. Gonzales*, 841 F.3d 339 (5th Cir. 2016): When a district court includes special questions in a verdict, the sufficiency of the evidence for conviction must be measured against the jury's responses to those questions. In this case, the Government sought conviction of eight defendants for drug and firearms offenses and for murder—under alternate theories of joint and personal liability. The jury was asked special questions about the defendants' liability under each theory. On the murder counts, the jurors found that three defendants were guilty under a theory of personal liability. The court of appeals reluctantly vacated the convictions, as there was no evidence of personal liability.**

Salman v. United States, 137 S. Ct. 420 (2016): A person may not disclose inside corporate trading information for his "personal advantage." A person who receives such information may be liable for securities fraud if he knew that the disclosure breached the tipper's duty of trust and confidence to his corporation. In *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), the Second Circuit held that a jury may not infer a personal benefit to the tipper from a gift to a relative or friend without proof of a "meaningful close personal relationship" between the tipper and tippee "that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similar valuable nature." The defendant in *Salman* argued that this rule should have been applied in his case. The Supreme Court disagreed, holding that the tipper always personally benefits because the passing of information is the same thing as trading by the tipper, followed by a gift of the proceeds. Nor must the tipper receive anything of pecuniary value in exchange for the information.

Shaw v. United States, 137 S. Ct. 462 (2016): 18 U.S.C. § 1344(1) makes it a crime to "knowingly execute[ ] a scheme . . . to defraud a financial institution." Shaw used identifying numbers of a bank account belonging to a bank customer to transfer funds from that account to accounts at other institutions, where Shaw could obtain the funds. The Court rejected Shaw's arguments that he was not guilty under § 1344, because he intended only to cheat the depositor, not the bank. The bank had property rights in the account. In addition, the harm to the bank need not be financial harm. And, there is no additional "purpose" or "intent" requirement in the statute other than knowledge.

McDonnell v. United States, 136 S. Ct. 2355 (2016): Agreeing to set up a meeting, host events, or contact Government officials are not "official acts" for purposes of the bribery of public officials statute, 18 U.S.C. § 201.

Taylor v. United States, 136 S. Ct. 2074 (2016): The commerce element of a Hobbs Act prosecution is satisfied if the prosecution shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds.

United States v. McCall, 833 F.3d 560 (5th Cir. 2016): To prove production of child pornography, the Government must prove the defendant acted with the intent that a child engage in sexually explicit conduct. Among the ways of proving this element, the Government may show that the defendant intended that the minor lasciviously exhibited her genitalia. In this case, the defendant secured video recordings of a minor without the minor's knowledge. He argued on appeal that there was an insufficient basis for his plea of guilty, because the minor was not aware of the video camera and therefore did not exhibit her genitalia. Under plain-error review, the court rejected that argument.

United States v. Fisch, 851 F.3d 402 (5th Cir. 2017): Evidence was sufficient to show that defendant, a criminal defense attorney, had conspired to obstruct justice when evidence showed that defendant solicited "attorney's fees" in exchange for offering to favorably influence outcome of proceedings. To the extent that providing bona fide legal services is an affirmative defense, it must be raised at trial, and defendant did not do so.

United States v. Thomas, 847 F.3d 193 (5th Cir. 2017): The defendant was a contractor for the New Orleans traffic court. In that capacity, he overbilled the court for his services and backdated transactions in order to conceal his activity. Between 2008 and 2011, he received between $600,000 and $800,000 for services he did not provide. A jury convicted him for theft from a program receiving federal funds, money laundering, and illegal payment structuring. On appeal, Thomas argued, among other things, that he could not be convicted for theft from a program receiving federal funds because the Government did not prove that he was an "agent" of a government, as required by 18 U.S.C. § 666. Whether a defendant is an "agent" depends on whether he was authorized to act on behalf of an agency with respect to its funds. The key is the nexus between the criminal activity and the government entity receiving funds, not between the criminal activity and any particular federal funds. Here, the entity was the City of New Orleans. Although the Government failed to provide the district court with record evidence that Thomas had authority to act on behalf of the City with respect to its funds, the court of appeals conducted an independent review of the record and concluded

that he did. Accordingly, the Court found the evidence sufficient on these counts. It also concluded that construing § 666 to include Thomas's conduct did not render it unconstitutional as applied to Thomas.

Confrontation Clause

***United States v. Nanda*, 867 F.3d 522 (5th Cir. 2017): It did not violate *Bruton*'s Confrontation Clause rule for trials involving codefendants to admit one codefendant's confession at their joint trial. The confession did not mention the defendant directly. While it did refer to the business the defendant worked for, that reference could have been to any number of other people who worked for the same business.**

IV. PROSECUTORIAL MISCONDUCT

United States v. Casillas, 853 F.3d 215 (5th Cir. 2017): A breach of a plea agreement occurs when prosecutor affirmatively agrees to do one thing but then actively advocates for something else. Thus, neither disclosing factual information that might influence a court not to award safety-valve relief nor giving a "begrudging" recommendation violates an agreement to recommend a safety-valve reduction.

V. MISCELLANEOUS TRIAL MATTERS

Rippo v. Baker, 137 S. Ct. 905 (2017): When deciding whether judicial recusal was warranted because of bias, a court need not find "actual bias." Rather, the question is whether, "objectively speaking, 'the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.'"

United States v. Sanders, 843 F.3d 1050 (5th Cir. 2016): Difficult defendant asked to have his first attorney replaced before he entered his plea and then, after the plea was entered, moved to have his second attorney replaced. Before sentencing, he filed a motion and requested that his third attorney be permitted to withdraw and he be permitted to proceed pro se. At a hearing, the district court denied the motion for the attorney to withdraw. At sentencing, the court initially required the

defendant to speak through his attorney but, at the end of the proceeding, permitted the defendant to speak. The court said it had "granted" the motion for counsel to withdraw and had retained him only as standby counsel. On appeal, the court of appeals said that the record did not support this characterization and that the defendant had been denied his right to represent himself under *Faretta*. The court vacated the sentence and remanded the case.

VI. REVOCATION OF PROBATION/SUPERVISED RELEASE/PAROLE

***United States v. Jimison*, 825 F.3d 260 (5th Cir. 2016): Defendants have a qualified right of confrontation at supervised-release revocation hearings, but this right can be overcome by a showing of good cause. District court denied revocations defendant's request to confront confidential informant about alleged drug transactions. Without specifically ruling on defendant's objection, the court held that the Government had satisfied its burden and revoked defendant's supervised release. The court of appeals held that the trial court had erred in failing to make a "good cause" finding. However, the court of appeals has excused such failures when implicit good cause is apparent in the record. Here, the court could not say implicit good cause existed.**

VII. SENTENCING

Constitutional Challenges

Beckles v. United States, 137 S. Ct. 886 (2017): The constitutional rule established in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck as vague the "residual clause" of the ACCA does not apply to similarly worded clauses in the United States Federal Sentencing Guidelines.

Statutory Challenges

***Dean v. United States*, 137 S. Ct. 1170 (2017): Trial court may considered the effect of mandatory sentences under § 924(c) when deciding the length of the sentence to be imposed under**

additional counts, which, under the statute, must run consecutively to the § 924(c) sentence.

(Selected) Guideline Issues

***United States v. Garcia*, 857 F.3d 708 (5th Cir. 2017): Pointing gun at persons and telling them to lie on the floor during a bank robbery does not trigger the "physical restraining" enhancement under §2B3.1**

***United States v. Guzman-Rendon*, 864 F.3d 409 (5th Cir. 2017): If a trial court, before imposing an erroneous sentence under the guidelines, considered both the correct and incorrect range and explained it would give the same sentencing anyway, the error is harmless. If the court failed to consider the correct range when committing the error, the proponent of the sentence must show that the court would have imposed the same sentence anyway and that it would have done so for the same reasons.**

United States v. Holt, 866 F.3d 618 (5th Cir. 2017): Possession of "silencers" was sufficient to warrant an enhancement under §2K2.1(b)(6)(B) that calls for increased punishment if "the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense."

United States v. Nesmith, 866 F.3d 677 (5th Cir. 2017): A picture of a man's penis on a 14-year-old girl's mouth did not portray "sadistic or masochistic conduct or other depictions of violence" sufficient to justify a four-level enhancement under U.S.S.G. § 2G2.1(b)(4).

United States v. Guzman-Reyes, 853 F.3d 260 (5th Cir. 2017): District court imposed sentencing enhancement to Guzman's guidelines calculations based on its finding that Guzman had maintained premises for drug distribution. To secure such an enhancement, Government must show that defendant exercised sufficient dominion and control over the premises. Here, Guzman's name was not on the premises' formal lease agreement or ownership documents. However, he paid money from

methamphetamine proceeds for the property, used the property solely for storing drugs, and had unrestricted access to the premises.

United States v. Velasco, 855 F.3d 691 (5th Cir. 2017): District court did not err in concluding that shoes were a "dangerous weapon" for purposes of the enhancement in U.S.S.G. §2A2.2(b)(2)(B); shoes were used to stomp in defendant's head, resulting in serious injuries.

United States v. Morales-Ramirez, 850 F.3d 246 (5th Cir. 2017): District court plainly erred by double counting one of Morales's prior convictions when calculating his criminal-history score. That error affected Morales's substantial rights. However, the court decided that it should not, under the fourth prong of plain-error review, correct the mistake.

United States v. Casillas-Casillas, 845 F.3d 623 (5th Cir. 2017): Sentencing enhancement for fraudulent use of a U.S. passport during a reentry offense applies if defendant used a passport card rather than a passport booklet.

United States v. Malone, 828 F.3d 331 (5th Cir. 2016): Evidence presented at sentencing was sufficient to show that AM-2201, a controlled substances analogue, is most closely related to THC rather than, as defendants alleged, marijuana.

Categorical Approach

***United States v. Howell*, 838 F.3d 489 (5th Cir. 2016): Defendant argued on appeal that his prior Texas felony assault conviction was not a violent felony under the career-offender guideline. The offense was a felony under a provision that made it so if the defendant intentionally, knowingly or recklessly impeded the victim's normal breathing or circulation of the blood. Although *Johnson* was decided while the case was on appeal, the court of appeals decided to avoid the constitutional question by addressing whether the statute had, as an element, the use of force. Although the offense could be committed recklessly or intentionally, the defendant made what was arguably a judicial admission that he had committed it intentionally. Applying**

***Mathis*, however, the Court found that the statute was not divisible re: mental state. Therefore, it had to decide whether a reckless assault by strangulation qualifies under the career-offender guideline as a violent felony. The court held that it does.**

***United States v. Tanksley*, 854 F.3d 284 (5th Cir. 2017): Texas delivery of a controlled substance is an indivisible offense.**

***United States v. Renteria-Martinez*, 847 F.3d 297 (5th Cir. 2017): District court imposed a sentencing enhancement under U.S.S.G. §2L12(b)(1)(A)(i) based on its conclusion that defendant's prior Texas conviction was for a "drug trafficking offense." The PSR described the prior offense as possession of cocaine with the intent to deliver. The state judgment, however, said Renteria was convicted of mere possession. On appeal, the Government pointed to a number of documents—including Renteria's judicial confession—indicating that the offense actually involved an intent to deliver. The court of appeals held that the additional documents did not carry the same weight as the judgment and therefore that the prior conviction was not for a drug-trafficking offense. However, Renteria did not object in the trial court. The court of appeals assumed error that affected his substantial rights, but refused to correct the error under the fourth prong of the plain-error analysis.**

***United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017): For purposes of career-offender guideline, federal bank robbery is a crime of violence. That the offense may be committed by intimidation is immaterial; such intimidation is inherently tied to the use of force. An implicit threat of force is required.**

***United States v. Martinez-Rodriguez*, 821 F.3d 659 (5th Cir. 2016): After *Mathis*, Texas Injury of a Child, § 22.04(a) is not a divisible statute and is categorically broader than the "crime of violence" definition in U.S.S.G. §2L1.2.**

United States v. Uribe, 838 F.3d 667 (5th Cir. 2016): Texas burglary *is* a divisible statute, even after *Mathis* (motion for en banc review pending).

United States v. Perlaza-Ortiz, No. 16-40331, 2017 WL 3614193 (5th Cir. Aug. 23, 2017): Overruling precedent, the court held that Texas's Deadly Conduct statute is indivisible, which means district courts may not resort to charging documents to determine whether it is a crime of violence. Because some of the conduct proscribed in the provision does not qualify as a crime of violence under U.S.S.G. §2L1.2, the provision itself does not so qualify.

United States v. Reyes, 866 F.3d 316 (5th Cir. 2017): Illinois aggravated battery is a divisible offense; some of the offenses described in the statute are crimes of violence, including the offense of committing aggravated battery involving use of a deadly weapon.

United States v. Solano-Hernandez, 847 F.3d 170 (5th Cir. 2017): Solano pleaded guilty to illegal reentry. The district court enhanced his offense level by 12 levels based its finding that a prior New Jersey conviction for "Endangering the Welfare of a Child" was for a crime of violence—a conclusion also reached for a previous reentry. On appeal, Solano argued that, under a modified-categorical analysis, the offense was not a crime of violence. Although a statement of reasons for the judgment recited facts that would render Solano's prior offense "sexual abuse of a minor," Solano argued that this document contained no indication that Solano had assented to those facts. The court of appeals agreed. However, Solano had not objected in the trial court. The court declined to exercise its discretion to vacate the sentence under the fourth prong of the plain-error standard, holding that, to merit reversal, the error must "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge."

United States v. Montiel-Cortez, 849 F.3d 221 (5th Cir. 2017): Statute under which defendant had previously been convicted, California robbery, was indivisible and, therefore, district court erred in applying modified categorical approach to conclude the statute proscribed generic robbery, which would make it an enumerated crime of violence under the

illegal-reentry statute. However, the statute proscribed another generic offense, extortion.

United States v. Bernel-Aveja, 844 F.3d 206 (5th Cir. 2016): Bernel was convicted of illegal reentry. He had a prior burglary conviction in Ohio. As charged in his indictment, Ohio made it a crime to "knowingly enter or remain on the land or premises of another" with the purpose of committing any misdemeanor. At sentencing, the district court applied a 12-level enhancement under guideline §2L1.2(b)(1)(A)(ii), based on the court's conclusion that the burglary was a "crime of violence." In *Herrera-Montes*, the Fifth Circuit held that, to qualify as generic burglary, a burglary statute must require that a defendant had the intent to commit another crime at the time he entered the premises. The Court found that the Ohio provision was indivisible and that Bernel had not been convicted of a prior crime of violence. Strong concurrence by Judge Higginbotham, explaining the wisdom of hewing to the categorical approach and the court's definition of generic burglary. Special concurrence by Judge Owen (who wrote the majority opinion) to contend that the definition set out in *Herrera-Montes* does not conform to the Supreme Court's decision in *Taylor v. United States.*

United States v. Wikkerink, 841 F.3d 327 (5th Cir. 2016): The defendant pleaded guilty to receiving child pornography. The district court enhanced his sentence based on a prior conviction for aggravated incest, which the court concluded was a prior "sex offense conviction" under U.S.S.G. § 4B1.5(a). Section 4B1.5(a) provides for a sentencing enhancement "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction." A prior "sex offense conviction" is defined by reference to 18 U.S.C. § 2426(b)(1), *see* U.S.S.G. § 4B1.5 cmt. 3(A)(ii), which defines the term as a conviction: (A) under this chapter [117], chapter 109A, chapter 110, or section 1591; or (B) under State law for an offense consisting of conduct that would have been an offense under a chapter referred to in paragraph (1) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States.... 18 U.S.C. § 2426. The court of appeals

found that the Louisiana statute under which the defendant had been convicted was broader than some of the statutes referenced in the statutory definition. However, Wikkerink had not objected on these grounds at sentencing, and the court found he had not satisfied the fourth prong of the plain-error review standard.

United States v. Hernandez-Montes, 831 F.3d 284 (5th Cir. 2016): Florida attempted second-degree murder is not a crime of violence because it is not a lesser-included of attempted murder.

United States v. Sanchez-Rodriguez, 830 F.3d 168 (5th Cir. 2016): Prior conviction for Florida trafficking in stolen property was not a conviction for an aggravated felony under guideline §2L1.2(b)(1)(C).

United States v. Martinez-Vidana, 825 F.3d 272 (5th Cir. 2016): The underlying drug offense is an element of facilitating a drug offense. Thus, when determining whether that offense is a drug-trafficking offense, court must apply a modified-categorical approach.

United States v. Castillo-Rivera, 853 F.3d 218 (5th Cir. 2017) (en banc): Defendant's prior conviction for possession of a firearm is an aggravated felony, for purposes of U.S.S.G. §2L1.2.

United States v. Shepherd, 848 F.3d 425 (5th Cir. 2017): Shepherd appealed from his sentence based on (1) the argument that his prior delivery of a controlled substance conviction was not for a drug-trafficking offense under U.S.S.G. §2K2.1(a)(2) and (2) that his aggravated assault was not a crime of violence under 18 U.S.C. § 922. Shepherd had objected at trial to the first error; he had not objected to the second. Saying that this was "an appeal that should not have been pursued," the court of appeals held that the district court had indicated it would have imposed the same sentence regardless of any error by saying that its downward variance "mooted" the objection. As for the unobjected-to error, the court held that there was no error, plain or otherwise. Very harsh language from the court regarding sentencing appeals.

Imposition of Supervised Release

***United States v. Barber*, 865 F.3d 837 (5th Cir. 2017): Requirement imposed on supervised release that defendant undergo substance abuse treatment "as deemed necessary and approved by the Probation Office" was plainly erroneous, as it was ambiguous as to whether district court had improperly delegated its authority.**

***United States v. Morin*, 832 F.3d 513 (5th Cir. 2016): District court ordered, as condition of supervised release, that SORNA defendant "follow all lifestyle restrictions or treatment requirements imposed by a therapist." The court of appeals struck the condition, agreeing with defendant that, as written, it would permit the therapist to impose restrictions beyond the treatment period and expose the defendant to revocation if he did not comply with them, even though he was no longer being treated. Court of course may order treatment and order compliance with therapist, but the condition has to be cabined by the treatment period; otherwise, there is an improper delegation of authority.**

United States v. Billups, 850 F.3d 762 (5th Cir. 2017): District court imposed both requirement that defendant get sex-offender treatment and that he get mental-health treatment, as conditions of supervised release. Although defense counsel objected, district court provided no explanation. Remand was required to determine whether both conditions were sufficiently linked to sentencing factors, including defendant's offense.

United States v. Brown, 826 F.3d 835 (5th Cir. 2016): District court erred in imposing a 10-year term of supervised release in a SORNA case; a sentence of no more than five years' supervised release was authorized. The error affected the defendant's substantial rights. However, the defendant did not object at sentencing. Applying plain-error analysis, the court of appeals held the error should not be corrected because it did not affect the fairness or integrity of the proceedings. The district court's

sentence reflected its concern that the defendant did not have a permanent residence.

United States v. Heredia-Holguin, 823 F.3d 337 (5th Cir. 2016): A defendant's deportation does not render an appeal moot because he may challenge the remainder of his supervised release term.

Restitution/Forfeiture

***Honeycutt v. United States,* 137 S. Ct. 1626 (2017): Joint and several liability under forfeiture statute for serious drug crimes (21 U.S.C. § 853) did not apply when defendant did not personally benefit from offense or obtain tainted property as the result of it.**

***Manrique v. United States*, 137 S. Ct. 1266 (2107): A defendant wishing to appeal a restitution order must file a notice of appeal from that order—even if the order is entered sometime after sentencing. Failure to do so will result in waiver, if the Government invokes waiver.**

United States v. Lagos, 864 F.3d 320 (5th Cir. 2017): Under the Mandatory s Victims Restitution Act, defendant must pay restitution for legal and investigative expenses incurred by victim to investigate defendant's fraudulent conduct.

United States v. Ayika, 837 F.3d 460 (5th Cir. 2016): To win forfeiture of a specific asset, the Government must prove a sufficient nexus between the asset and the charged offense. Under 18 U.S.C. § 982(a)(7), which provides for forfeiture in health care fraud prosecutions, that nexus exists when the assets were derived, directly or indirectly, from the gross proceeds traceable to the offense. Here, the Government sought funds from the defendant's bank account, but did not demonstrate that all of the funds were traceable to the defendant's fraudulent conduct. The defendant argued that the fraudulent and legitimate funds were so co-mingled that forfeiture was not possible. The court held that it was possible, in the abstract, for the Government to distinguish such funds for purposes of forfeiture, but it had not done so here. However, the "substitute asset provision," 21 U.S.C. § 853(p), permits forfeiture when

"as a result of any act or omission of the defendant," the underlying forfeitable property "has been commingled with other property which cannot be divided without difficulty." On remand, the district court could consider forfeiture under that provision.

Capital Punishment

Buck v. Davis, 137 S. Ct. 759 (2017): On habeas review, Court held that presenting testimony that the defendant was more statistically likely to be violent in the future because he was black was prejudicial ineffectiveness. The State waived its argument that the claim was unreviewable because *Martinez* and *Trevino* announced a new rule under *Teague* that does not apply retroactively.

Moore v. Texas, 137 S. Ct. 1039 (2017): The Texas Court of Criminal Appeals erred in relying on its 2004 decision in *Briseno* to reject trial court's decision that defendant suffered from intellectual disability that disqualified him from death penalty. *Briseno* and the CCA's analysis depart from current medical standards regarding intellectual disability.

VIII. Ineffective Assistance of Counsel

***Lee v. United States*, 137 S. Ct. 1958 (2017): In deciding whether a defense attorney's failure to provide correct advice regarding the defendant's immigration offense was prejudicial, court should look to whether ineffectiveness contributed to the client's decision to plead guilty, not to the strength of any defense the defendant may have had.**

VIX. Miscellaneous

***Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017): Sex between a 21-year-old and a 17-year-old is not a generic forcible sex offense for the purposes of removability.**

> ***See United States v. Ovalle-Garcia*, 868 F.3d 313 (5th Cir. 2017) (applying *Esquivel-Quintana* in a §2L1.2 case).**

***Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017): The 1958 citizenship statute making it easier for children of unwed mothers to obtain derivative citizenship violates Equal Protection. However, the remedy is to apply the more stringent standard to all children.**

***Packingham v. North Carolina*, 137 S. Ct. 1730 (2017): North Carolina statute that prohibits all registered sex offenders from using social media violates the First Amendment.**