Significant Decisions

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

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I. BAIL AND DETENTION

United States v. Baltazar-Sebastian, 990 F.3d 939 (5th Cir. Mar. 10, 2021). Baltazar was arrested at her place of employment during an ICE worksite enforcement action. She admitted she was not in possession of proper immigration documents, ICE took her into custody, and she was civilly charged with being inadmissible under the INA and was booked into an ICE detention facility. Shortly thereafter, Baltazar was charged with misusing a social-security number, in violation of 42 U.S.C. § 408(a)(7)(B). A warrant was issued for her arrest; and, in response, ICE transferred her to the Southern District of Mississippi for her initial appearance. Before the transfer, ICE lodged a detainer, advising Baltazar would return to immigration detention in the event of her release by the district court. Baltazar pleaded not guilty to her criminal charges, and she was ordered released under the Bail Reform Act (BRA). Without objection from either party, one condition required that Baltazar remain in the judicial district during the pendency of the criminal proceedings. Despite the condition, ICE took Baltazar back into immigration detention in another judicial district, under its authority under the INA to detain inadmissible people. Upon motion by Baltazar, the district court granted Baltazar's request to enforce the September release order, precluding ICE detention. The Government appealed that order.

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

II. SEARCH AND SEIZURE

United States v. Flowers, __ F.4th __, No. 20-60056, 2021 WL 3234279, at *3 (5th Cir. July 30, 2021). The questions were whether Flowers was seized when officers in separate patrol cars surrounded his parked car with flashing lights, and whether the officers had reasonable suspicion to support that seizure. The majority said even if Flowers was seized, there was reasonable suspicion—largely because the car was parked facing the convenience store wall (instead of the glass windows/doors) and it was a high crime neighborhood. The majority argued officers should be allowed to approach persons in cars for questioning in this manner in high crime areas because officers "may well require safety in numbers, while the law-abiding citizens desperately need protection that will be denied if law enforcement officials believe that incriminating evidence will be suppressed or they will be sued for alleged violations of rights."

Judge Elrod dissented on the Fourth Amendment issue. She thought precedent clearly supported there being a seizure, took issue with the suspicions the officers and majority drew from where Flowers parked in the small parking lot, and found suspicion lacking. She warned that the decision "'comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment.'" (quoting a dissent written by Judge Smith in *United States v. Rideau*, 969 F.2d 1572, 1577 (5th Cir. 1992), who was part of the majority in this case).

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

The stop was based on a caller, who was unknown to the police, and only identified herself as a manager of the Millsaps Apartments. She did not provide her name, phone number, or any other identifying information, and the police did not take any further steps to verify her identity. All

the police had to go on in this case was the bare report of an unknown, unaccountable informant and while an accurate description of a suspect's readily observable location and appearance will help the police correctly identify the person being accused, the tip does not show that the tipster has knowledge of concealed criminal activity. The Court noted, the reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. **Note: In granting en banc review, the Court vacated this opinion**.

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

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

Note: The Fifth Circuit ordered that the case shall be reheard by the court en banc, and the Court vacated the opinion.

<u>United States v. Thomas</u>, 997 F.3d 603 (5th Cir. May 17, 2021). Thomas challenges the district court's denial of his motion to suppress evidence of a firearm discovered during a stop and frisk. Officers were patrolling an area of Dallas, known for pervasive crime involving drugs and violence. The officers had been informed earlier that day that a vehicle stolen 10 days earlier, in an aggravated robbery, had been identified in the area. The officers saw the stolen vehicle near the entrance to an apartment building. They saw two people sitting inside the stolen vehicle, while another four people, including Thomas, were standing in the immediate vicinity of the car. Thomas was standing closest to the car, by the driver's side.

Relying on what they observed and what they knew from the report of the aggravated robbery, the officers decided to stop and frisk all six people in and around the car. The officers drew their firearms for officer safety because the underlying crime was an aggravated robbery, so a weapon was involved. The officers ordered everybody to get on the ground and all complied. The officers then handcuffed four most of them, including Thomas, behind their backs as they were lying face down. The officers frisked each person for weapons, which they said was necessary even though they were on the ground and handcuffed because it remained possible for them to access a concealed weapon. The officer who frisked Thomas found a loaded firearm in his waist area.

Thomas was indicted for being a felon in possession of a firearm. He filed a motion to suppress evidence, arguing that it was not enough to justify the stop that officers saw him in the vicinity of the stolen vehicle and reportedly saw him speak to the occupants. He also argued that the circumstances of his detention — the officers' drawing their firearms, ordering him to the ground, and handcuffing him — converted the investigatory stop into an arrest for which the officers lacked probable cause. He also argued that, even if *Terry* applied, the officers lacked reasonable suspicion to stop him or to frisk him. He pleaded not guilty, had a bench trial in which he stipulated the Government could prove the basic facts necessary for conviction, and reserved the right to appeal the denial of his motion to suppress.

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

The Court also held the frisk was reasonable because the robbery involved the use of a weapon, and the officers were outnumbered six to two and unable to secure all six people because they only had four sets of handcuffs.

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

Finally, the Court rejected Thomas's argument that the officers cannot rely on *Terry* unless they have an investigatory purpose in mind. The testifying officer said Dallas Police Department policy prohibited an officer from asking questions about the underlying crime unless the detective assigned to the investigation was present. Thomas argued lacked the requisite investigatory purpose to justify a *Terry* stop.

United States v. Bass, 996 F.3d 729 (5th Cir. May 11, 2021). Police officer had reasonable suspicion to conduct a *Terry* stop of Bass based on a tip by an off-duty officer. The tip reported suspicious activity in a high-crime area known for drug dealing, and that a man was standing next to his vehicle and appeared to be selling items from the trunk. The tip provided reasonable suspicion because it was marked by "indicia of reliability," and was specific to an area well-known for illegal activity. When the officer approached him, Bass admitted he was selling CDs; and when the officer asked Bass whether there was anything illegal in the

vehicle, Bass answered, Just the CDs. The Fifth Circuit held that Bass's behavior and response to questions supported the officer's suspicion, so the *Terry* stop was justified at its inception. As for the scope of the *Terry* stop, the officer did not unreasonably prolong Bass's investigatory stop because within the first minute of questioning, Bass told the officer he had illegal CDs in his car, and acknowledged he was selling CDs and DVDs, that he didn't have any identification, he didn't own the vehicle he was driving, and he had previously been charged with illegally selling CDs.

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

At sentencing, the district court applied the Armed Career Criminal Act's sentence enhancement for a prior controlled substance offense, under 18 U.S.C. 924(e). The Fifth Circuit rejected Bass's assertion that his prior Arkansas delivery of controlled substance offenses did not support his ACCA sentence enhancement. Contrary to Bass's argument, the Arkansas statute does not include an offer to sell within its definition of delivery.

United States v. McKinney, 980 F.3d 485 (5th Cir. Nov. 16, 2020). McKinney moved to suppress a gun found after officers conducted a pat-down search. This occurred after the officers observed gang members hanging out near a gas station. The police report asserts that "[t]he group was wearing red colors," though in fact only McKinney had red clothing, and that McKinney was wearing a jacket and hat even though "[i]t was quite warm and humid out." The report also states that when one of the men saw the officers, he "turned and appeared to drop something very small." Finally, it claims that the officers approached the group and frisked the men "due to the area being a [B]loods gang location and all of

[the] [recent] shooting[s] at this location." The district court denied the motion.

The Court held McKinney and each person in the group was "seized" when the officer jumped out of the police car and approached the group, shined his flashlight on the woman who appeared to be walking away and ordered that she return. No reasonable person would have felt free to walk away. Thus, the initial detention must be justified at its inception, and the issue is whether the officers had reasonable suspicion based on their observations at the time they ordered the woman to stop.

The Court also held the officers lacked reasonable suspicion, noting a person's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. The officers were patrolling the area in response to recent shootings, but those shootings do not justify stopping anyone absent an articulable suspicion about a connection between the person and those crimes. Nothing observed by the officers connected McKinney or anyone else standing on the sidewalk to the recent and nearby shootings that had been made from passing vehicles. Only McKinney was wearing red, identified as a gang color by the officers. The Court declined to accept that there is reasonable suspicion for questioning everyone in a crime-ridden neighborhood wearing one article of clothing that is not an unusual color but happens also to be the color of choice for a gang. Because the record lacked evidence of reasonable suspicion justifying the initial stop, the Court did not need to reach the question of whether the officers had reasonable suspicion justifying the frisk of McKinney that led to the incriminating evidence.

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

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

because the defendant lacked Fourth Amendment standing on the basis that the information all pertained to his girlfriend and her vehicle.

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

United States v. Smith, 977 F.3d 431 (5th Cir. Oct. 8, 2020). The Fifth Circuit held that there was no right to a suppression hearing if motion to suppress is conclusory in an unspecified way and/or repeats allegations made in a prior hearing.

A defendant convicted of sex trafficking appealed his conviction and sentence. He first elected to proceed pro se, and moved to suppress evidence from his cell phone, arguing that forensic evidence showed the police had accessed the phone before they received a warrant. The district court and government thought that the forensic evidence could be explained in other ways, and the district court denied the motion to suppress. On the morning of trial, the defendant changed his mind and decided he wanted a lawyer. Because that request was denied, a divided panel of the Fifth Circuit reversed the conviction.

The defendant was convicted conviction again, this time by plea and with a lawyer. On appeal from his second conviction, he contended that the court erred in denying him a new (counseled) suppression hearing to challenge the seizure of evidence from his cell phone. The court of appeals rejected the argument because it found the allegations in the motion to suppress "conclusory." It repeated the standard set forth in *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983), for the grant or denial of hearings: "Hearings on a motion to suppress are only required where the movant 'alleges sufficient facts which, if proven, would justify relief.'" It is not entirely clear, however, why the Court did not think this standard had been met. The opinion first suggests that the motion to suppress did not allege a link between the illegal search of the cell phone and any

evidence introduced at trial. But the court then conceded that it "complained that various 'e-mail addresses and photographs' were seized in a pre-warrant search." It found this "complaint" insufficient because the motion "provided no basis whatsoever for that contention," a rationale that probably requires more than a factual allegation of a fourth amendment violation. The court then suggested that the decision was influenced by the fact of a prior hearing. According to the court, the motion did not say he would elicit any facts not already before the court in the first hearing.

<u>Note:</u> The opinion certainly reflects hostility to the defendant's right to a suppression hearing on mere allegation of a fourth amendment violation. But the case might often be distinguishable on the ground that it involved a warrant. Defendants seeking a hearing to challenge warrantless searches and seizures might still be able to rely on the government's burden of proof to justify such activity.

The court also held that the absence of counsel at the first hearing did not require the hearing to be redone, absent facially adequate allegations in the second motion to suppress. Further, it concluded on the merits that the evidence need not have been suppressed. Although the defense showed that some activity occurred on the phone between its seizure and the issuance of a warrant, it did not show that this activity represented the police searching the phone.

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

On appeal, the 5th Circuit agreed with the district court. Even though the cell phone search occurred after *Riley*, it took place at the border, where the government's interests are at their zenith. Neither the Supreme Court nor the 5th Circuit have held that digital border searches require individualized suspicion. At the time of the search, two federal courts of appeal and one federal district court had held that forensic digital searches require reasonable suspicion. *See United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *United States v. Saboonchi*, 48 F. Supp. 3d 815 (D. Md. 2014). However, no court had required a warrant to conduct a forensic search at the border. The 5th Circuit panel did note in a footnote that Judge Costa, in a concurring opinion in *United States v. Molina-Isidro*, 884 F.3d 287 (5th Cir. 2018), had expressed concerns about border cell phone searches for items other than contraband, it was not a holding requiring a warrant. Accordingly, the Border Patrol agents had a good faith, reasonable belief that they could search the defendant's phone without a warrant. They also had reasonable suspicion for doing so.

United States v. Burgos-Coronado, 970 F.3d 613 (5th Cir. Aug. 18, 2020). The defendants appealed from the district court's denial of their motions to suppress. Around midnight in May 2018, the defendants drove a Toyota with Florida license plates into a "driver's safety checkpoint" set up by Mississippi State Troopers. The purpose of the checkpoint was to check driver's licenses, insurance, seat belts, and other safety matters. The trooper asked the driver, Molina-Borroto, for his driver's license and insurance. He presented a temporary Florida driver's license and said that the car was rental. The trooper asked him about the backseat passengers. The male passenger, Burgos-Coronado, provided another temporary Florida driver's license, while the female passenger, Balza, provided a Venezuelan passport. The trooper noticed that the passport did not have a stamp indicating that Balza had legally entered the U.S. The trooper was suspicious because the passport could indicate that Balza was illegally in the US and the weird seating arrangement—driver, empty front passenger seat, male and female passengers in the back seat—raised a human-trafficking concern. About 25 to 30 seconds after the Toyota was stopped at the checkpoint, a

Volkswagon with Florida plates came into the checkpoint. The driver provided a Venezuelan passport. In the end, both cars were searched and evidence of fraud and identify theft was found. The 5th Circuit held that the checkpoint was a permissible driver's license checkpoint, citing *Delaware v. Prouse*, 440 U.S. 648 (1979). The defendants argued that, after the trooper had obtained their identification documents, the purpose of the stop was completed and that the stop was illegally extended after that. The 5th Circuit held that, by that time, the trooper had already developed reasonable suspicion that a crime was being committed, namely, human trafficking.

United States v. Gallegos-Espinal, 970 F.3d 586 (5th Cir. Aug. 17, 2020), *cert. denied*, 141 S. Ct. 1247, 208 L. Ed. 2d 634 (2021). Agents suspected Gallegos of participating in his mother's alien smuggling scheme, and he signed a consent allowing them to search his iPhone. When they searched the iPhone, they found child pornography. Gallegos moved to dismiss the evidence from the iPhone, and the district court found that Gallegos's written consent to a "complete search" of the iPhone could not support a review of extracted data three days after the phone was returned. The Government filed an interlocutory appeal. The Fifth Circuit majority found that a typical reasonable person would have interpreted the written consent to allow a forensic search of the phone. The Court reviewed the totality of the circumstances surrounding the oral and written consent. Judge Graves dissented. He would have found the search exceeded the scope of consent because "the consent form insufficiently explained that the iPhone's data would be extracted for later review and because the Cellebrite iPhone extraction occurred outside of Gallegos-Espinal's presence…."

III. GUILTY PLEAS

United States v. Butler, __ F.4th __, No. 19-40095, 2021 WL 3508716, at *3 (5th Cir. Aug. 10, 2021). Butler pleaded guilty pursuant to a plea agreement that waived the right to appeal her sentence. On appeal, she argued that the district court failed to sentence her in accordance with the agreement and that the waiver did not apply to her argument that her federal benefits should not have been denied under 21 U.S.C. § 862.

That statute gives courts the discretion to deny federal benefits for up to 5 years after a first drug conviction and up to 10 years after a second drug conviction; after a third drug conviction, a defendant is permanently ineligible for Federal benefits. The Fifth Circuit held that the plea agreement did not delineate all aspects of Butler's sentence, and the district court could deny benefits under § 862 even though the agreement did not specifically say it could. The Court also held that Butler knowingly waived her right to appeal her sentence, which included waiving any challenge to how the district court applied § 862.

United States v. Jackson, __ F.4th __, No. 19-10627, 2021 WL 3185850 (5th Cir. July 28, 2021). On plain error review, the Fifth Circuit vacated Jackson's RICO conviction that was based on his intent to commit a crime of violence (as defined by 18 U.S.C. § 16), identified as sex trafficking of children under 18 U.S.C. § 1591(a)(1) and (b)(2). After Jackson had pleaded guilty and been sentenced, the Supreme Court ruled that § 16(b) (the residual clause) was unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Government conceded the first three prongs of plain error. The Court agreed after conducting its own analysis. First, there was error because, as explained by the Fourth Circuit in *United States v. Fuertes*, 805 F.3d 485, 499 (4th Cir. 2015), sex trafficking by force, fraud, or coercion can be committed nonviolently and does not qualify as a crime of violence under the § 16(a) force element clause. Second, "the error was clear or obvious because the plain terms of the … statute establish that it does not qualify as a crime of violence." Third, there is a reasonable probability that Jackson would not have pleaded guilty to that offense if he had known the factual basis failed to show his conduct violated the statute. The Government argued the Court should not exercise its discretion to vacate the conviction under the fourth prong because the Government could prosecute Jackson for other offenses and Jackson would face higher Guidelines and statutory minimum if convicted of those other charges. The Court chose to exercise its discretion because "to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution" (cleaned up).

United States v. Smith, 997 F.3d 215 (5th Cir. May 5, 2021). On plain error review, the Fifth Circuit finds there was an insufficient factual

basis to support Smith's guilty plea to being a felon in possession of a firearm. The Court found there was no evidence in the record that Smith had either actual or constructive possession of the firearm. Smith did not control the relevant premises where the gun was located, and there was no evidence in the record that Smith owned the gun or otherwise controlled it or its location. The only evidence regarding Smith's interaction with firearm was his admission to "touching" the firearm. But, briefly sampling or handling contraband does not constitute constructive possession.

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

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

United States v. Brune, 991 F.3d 652 (5th Cir. Mar. 22, 2021). In charging Brune with a distribution of methamphetamine offense, the government accidentally cited the penalty provision in 21 U.S.C. §§ 841(b)(l)(C) instead of (b)(1)(B). After Brune had pleaded guilty, the court copied that error into its order accepting his plea but later corrected it. Brune contended that the court's correction of the erroneous citation amounted to double jeopardy. The Fifth Circuit held that no double-jeopardy interest "is implicated" in the "acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending." Thus, double jeopardy did not bar prosecution of a greater offense after a plea of a lesser-included offense.

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

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

United States v. Cooper, 979 F.3d 1084 (5th Cir. Nov. 9, 2020). The defendant pleaded guilty to drug trafficking as well as one 18 U.S.C. § 924(c) count for possessing a firearm in furtherance of a drug trafficking crime. The defendant argued that there was an insufficient factual basis to show that his firearm possession was in furtherance of drug trafficking because the district court failed to investigate whether he knew about a firearm in the vehicle or knew only about the backpack containing the firearm. The Fifth Circuit affirmed, explaining that the district court's duty was to compare the facts contained in the factual resume with the elements of the offense. Further, the circumstantial evidence was sufficient to show knowledge of the firearm because the backpack also contained drug paraphernalia and firearms are often used by drug traffickers.

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

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

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

The Supreme Court resolved that issue in *Taylor*, holding that a drug dealer is a business.

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

United States v. Jones, 969 F.3d 192 (5th Cir. Aug. 7, 2020). The defendant argued that the factual basis for his guilty plea to the crime of distribution of a kilogram or more of heroin was insufficient. Because the defendant did not object, it was reviewed for plain error. Under plain error review of the factual sufficiency for a plea, the Court may look beyond the facts the defendant admitted in the plea colloquy to the entire record. The 5th Circuit rejected the defendant's argument that the factual basis did not support his involvement in the larger conspiracy. The defendant admitted purchasing wholesale quantities of heroin from 2 conspirators. From this, a reasonable fact finder could determine that the defendant was part of a common venture, including the two conspirators, with a shared goal of distributing drugs for profit.

The defendant also argued that his guilty plea was unknowing and involuntary because the district court misinformed him about the government's burden for proving conspiracy and attributing the quantity of drugs to him. The district court admonished the defendant that the government would have to prove, at trial, that the overall scope of the conspiracy involved at least one kilogram of heroin. 5th Circuit precedent holds that a defendant is responsible for only "the quantity of drugs with which the def was directly involved or that were reasonably foreseeable to him." *United States v. Haines*, 803 F.3d 713, 740-41 (5th Cir. 2015). Here, the 5th Circuit held no reversible error because the defendant cannot show that but-for the error he would have chosen not to plead

guilty. That is so because the factual basis indicated that the defendant was directly involved in distributing at least one kilogram of heroin.

IV. TRIAL

PRETRIAL MATTERS

United States v. Torres, __ F.4th __, No. 20-40611, 2021 WL 3504459, at *1 (5th Cir. Aug. 10, 2021). Torres was charged with arson of a church building. He moved to dismiss the 18 U.S.C. § 844(i) count on Commerce-Clause grounds, arguing that the church did not conduct business activities affecting interstate commerce. The district court denied his motion and found him guilty after a bench trial on stipulated facts. On appeal, the Court affirmed. It first clarified that "[a] claim of insufficient connection to interstate commerce is a challenge to one of the elements of the government's case and is considered a claim about the sufficiency of the evidence[,]" not a challenge to the district court's jurisdiction to determine the case. Here, the church building was used for commercial purposes: it rented its facilities, operated childcare programs, and processed the paperwork related to funeral services. Those interstate connections are "direct, regular and substantial."

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants in this case were tried by a jury for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Federal Controlled Substances Act, the Federal Gun Control Act, and the Violent Crimes in Aid of Racketeering Act (VICAR).

The district court did not clearly err in its determination that the defendants committed *Batson* error. The district court considered the race-neutral reasons offered by the defense—such as past military service—and concluded that they were pretextual because all eleven strikes were used against white jurors and because many of the reasons given appeared to be "frivolous."

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

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

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

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

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

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

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

JURY INSTRUCTIONS

United States v. Gaspar-Felipe, 4 F.4th 330, 336 (5th Cir. July 13, 2021). Gaspar was tried for transporting "illegal aliens" and challenged this sentence of the "commercial advantage" jury instructions: "The government need not prove that the defendant was going to directly financially benefit from his part in the venture." He argued this misstated the requirement that the increased punishment applies only if "the offense was done for the purpose of commercial advantage or private

financial gain." 8 U.S.C. § 1324(a)(2)(B)(ii). The Fifth Circuit disagreed. The Court explained the Government did not have to prove Gaspar directly received payments but instead could prove the financial-purpose element with circumstantial evidence: that someone else in the operation receiving payment supports the inference that Gaspar would be paid as well. "Viewed in that light, the challenged instruction's statement … accurately stated the law" and was not an abuse of discretion. Note: The Court still requires the defendant to have the intent to profit, but circumstantial evidence that another smuggler profited was enough for the jury to infer that intent.

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

United States v. Barnes, 979 F.3d 283 (5th Cir. Oct. 28, 2020). Doctors and administrators were convicted of conspiracy to commit health care fraud. On appeal, the defendants challenged the district court's refusal to allow Medicare regulations in the jury instructions. Even if the instructions were substantially correct, they did not impair the defendant's ability to present his defense. [Note: this is a very lengthy opinion and should be reviewed if going to trial on a Medicare or Medicaid fraud case.]

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

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

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

United States v. Coffman, 969 F.3d 186 (5th Cir. Aug. 6, 2020). The defendant was indicted for making false statements to obtain federal workers compensation benefits, 18 U.S.C. § 1920, and for theft of public money, 18 U.S.C. § 641. The jury convicted her on both counts. On appeal, the defendant argued that the district court erred by not instructing the jury that it had to be unanimous on whether she had embezzled public money or stole public money, under § 641. The defendant was charged under the first paragraph of § 641—"whoever embezzles, steals, purloins, or knowingly converts to his use … or without authority sells, conveys or disposes of any … thing of value of the United States." The first and second paragraph of 641 list different acts and therefore different crimes—paragraph one covers stealing from the US and paragraph two covers knowingly receiving stolen US property. *United States v. Fairley*, 880 F.3d 198, 204 (5th Cir. 2018). That there are two separate paragraphs indicates that there are two separate crimes, not seven in the first paragraph alone. The verbs in paragraph one list alternative means of committing the crime, they are not separate elements and therefore the jury did not have to be unanimous on them.

United States v. Penn, 969 F.3d 450 (5th Cir. Aug 5, 2020). The defendant was convicted, among other things, of being a felon in possession of a firearm, 18 U.S.C. § 922(g). The defendant argued that the district court erred by not instructing the jury on his justification defense. The defendant was heading to his mom's apartment for lunch.

When he arrived at the complex, he saw two men there—Scott and Robinson—with whom his family had problems. When the defendant got out of his car, Scott pulled a gun. The defendant's aunt ran over and gave him her gun. Robinson started shooting at the defendant, who returned fire. The defendant jumped in his car and took off. Scott and Robinson followed with Robinson shooting at the defendant from the passenger window. The defendant eventually lost the two men. But then a police car pulled up behind him because the car matched the description from the shootout. The defendant started trying to evade the police car. He speeded up and crashed into a gate, ran from the car, threw the gun over a fence, and ran away. The police found him a month later. At trial, the defendant tried to put on a justification, or duress, defense, but the court did not allow it. On appeal, the defendant argued that the district court had erred by not instructing the jury on his justification defense. To establish the defense, the defendant must show that 1) he was under imminent threat of death or serious bodily injury, 2) he did not recklessly or negligently place himself in the situation, 3) he had no reasonable, legal alternative to possessing the gun, 4) possessing the gun had a direct causal relationship to abating the threat, and 5) he possessed the gun only during the time of danger. The 5th Circuit held that the defendant had failed to prove that he had possessed the gun only during the time of danger because he kept the gun and threw it over a fence when he could have given it to the police.

EVIDENTIARY ISSUES

United States v. Sharp, __ F.4th __, No. 20-60437, 2021 WL 3136040 (5th Cir. July 26, 2021). Admission of an informant's out-of-court statement violated the Confrontation Clause. A detective testified that "another agent … got a call from a confidential informant saying Mr. Sharp was at [the county courthouse], and he was in possession of a large amount of methamphetamine." The Government argued it introduced the tip for a nonhearsay purpose: to explain the course of the investigation rather than to assert that the informant's account was true. But the Court explained "the mere existence of a purported nonhearsay purpose does not insulate an out-of-court statement from a Confrontation Clause challenge." The detective "relayed an out-of-court statement of the most damaging kind—that Sharp was committing the crime—and left Sharp

with no opportunity to confront his accuser." Recognizing that "[b]ackdooring highly inculpatory hearsay via an explaining-the-investigation rationale is a recurring problem," the Court told the Government it "must take care to avoid eliciting this kind of unconstitutional testimony." This obvious error did not affect the outcome of the proceeSunsam53!
dings.

United States v. Gaspar-Felipe, 4 F.4th 330, 336 (5th Cir. July 13, 2021). Gaspar was tried for transporting "illegal aliens" and objected, under the Confrontation Clause, to the introduction of videotaped depositions of material witnesses who had since been deported. He argued the Government had not made a good faith effort to secure the witnesses, so they were not "unavailable" and their depositions could not be admitted. The Fifth Circuit disagreed and found the Government's efforts reasonable. The Government told the witnesses at the depositions that they would need to testify at a later trial and gave them a letter in Spanish explaining how to go to the border to request entry once they received the subpoenas. The Government got their contact information (under oath) and told them their travel, food, and lodging would be paid for. Starting a month after they were deported and until trial, an agent phoned the witnesses approximately nine times without reaching them. The Court says this was enough effort and rejects arguments the Government needed to promise work permits, advance travel funds, better corroborate contact information, or contact them sooner than one month after deportation.

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants in this case were tried by a jury for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Federal Controlled Substances Act, the Federal Gun Control Act, and the Violent Crimes in Aid of Racketeering Act (VICAR).

The Court rejected the defendant's challenge to the use of uncorroborated testimony of a coconspirator who had accepted a plea bargain. A conviction can be based on such testimony unless the coconspirator's testimony is incredible. Testimony is incredible as a matter of law only if

it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature.

United States v. Herman, 997 F.3d 251 (5th Cir. May 6, 2021). The Hermans owned and operated three restaurants. This case was based on the IRS's undercover operation to determine whether the Hermans' business tax returns understated gross receipts from their restaurants and whether they claimed personal expenses as business expenses on those returns. A jury convicted the Hermans of conspiracy to defraud the United States, and of willfully filing false tax returns. On appeal, they argued the district court erred in excluding audio clips from secretly recorded conversations between the Hermans and the undercover agent, who was posing as a prospective buyer. The Hermans argued that these audio clips were necessary under the Rule of Completeness (Rule of Evidence 106) to put into context inculpatory clips admitted by the government to prove its case. The Government objected to the supplemental recordings as inadmissible hearsay.

The Fifth Circuit examined each clip and determined that some did not counter the inculpatory clips and some did but were harmless in light of other inculpatory evidence admitted at trial.

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

Finally, the Court rejected the appellant's attempt to stretch the Supreme Court's holding in *Marinello v. United States*, —— U.S. ——, 138 S. Ct. 1101 (2018) to the general conspiracy to defraud under 371. In Marinello, the court held that to convict under 26 U.S.C. § 7212(a)'s omnibus clause, the Government must show a "nexus" between the defendant's conduct and a pending or reasonably foreseeable tax-related

proceeding, such as an investigation or audit, id. at 1109–10. That nexus is not required to prove a 371 conspiracy to defraud.

United States v. Coffman, 969 F.3d 186 (5th Cir. Aug. 6, 2020). The defendant was indicted for making false statements to obtain federal workers compensation benefits, 18 U.S.C. § 1920, and for theft of public money, 18 U.S.C. § 641. The jury convicted her on both counts. On appeal, the defendant argued that the district court improperly allowed inadmissible testimony by a government witness, a doctor who treated her for the back injury. The challenged testimony came after the prosecutor asked the doctor to explain why she no longer took workers compensation cases. The doctor testified: "In the process of doing these cases, I discovered that people are not the most honest …" The defendant did not object. The prosecutor then asked, "did you have that feeling about the defendant?" The defendant objected and the district court sustained. On appeal, the defendant argued that the earlier testimony was inadmissible because, among other things, it was irrelevant. The 5th Circuit held the claim was subject to plain error review because the defendant did not contemporaneously object. Although guilt-by-association evidence can be highly prejudicial, here it was an isolated remark, not mentioned again, and there was similar unobjected-to testimony by another witness. So, the defendant could not prove affected substantial rights.

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

attacked on another ground. The credibility was attacked on the ground already covered by 801(d)(1)(B)(i)—a motive to fabricate.

The Court also affirmed the admission of an FBI special agent's expert testimony on motorcycle clubs. The testifying agent was not the case agent, had years of investigative training, and testified about the inner-workings of organized crime. His testimony did not impermissibly reveal hearsay; he "used his expertise to synthesize 'various source materials,' rather than simply regurgitating information he learned from those sources."

This lengthy opinion addressed many other issues, including: (1) defendant had no right to counsel at initial appearance before magistrate judge, (2) empaneling of anonymous jury and other security measures were justified, (3) evidence of VICAR was sufficient, (4) court's comment regarding a well-known mafia was not plain error, (5) prosecution witness did not waive psychotherapist-patient privilege, and (6) defense witness's prior convictions were admissible to contradict testimony that his motorcycle club was simply "fun-loving" entertainment.

SUFFICIENCY OF EVIDENCE/PROVING AN OFFENSE

United States v. Aguirre-Rivera, __ F.4th __, No. 20-50609, 2021 WL 3501998 (5th Cir. Aug. 10, 2021). Aguirre was charged with conspiring to possess with intent to distribute 1kg or more of heroin. The district court instructed the jury that, to find Aguirre guilty, they had to find that the Government proved beyond a reasonable doubt 5 elements: (1) two or more people reached an agreement to possess heroin with intent to distribute it, (2) Aguirre knew the unlawful purpose of the agreement, (3) he joined in the agreement willfully, (4) that the overall scope of the conspiracy involved at least 1kg of heroin mixture, and (5) that he "knew, or reasonably should have known, that the scope of the conspiracy involved at least 1kg or more of" heroin mixture. The court also provided the jury with two special interrogatories. One restated the fourth element, and the other restated the fifth one. The jury returned forms finding Aguirre guilty of the offense, answering "yes" to the conspiracy involving at least 1kg of heroin, but "no" to whether Aguirre knew or reasonably should have known that scope. The court denied his

motion for judgment of acquittal and, over his objection, adopted the presentence report which concluded he should be sentenced under the penalty provision for an offense involving 100 grams or more of heroin. He was sentenced to 60 months' imprisonment.

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

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

United States v. Michaelis, __ F. App'x __, No. 20-50553, 2021 WL 2772839 (5th Cir. June 30, 2021). Michaelis was tried by a jury on a charge of conspiracy to possess with intent to distribute 50 grams or more of methamphetamine. The evidence showed that, during an execution of a search warrant, detectives found a locked safe in a motel room that contained 101 grams of a substance that contained methamphetamine. A witness testified that Michaelis had been in the motel room earlier that day, that the methamphetamine in the safe was Michaelis's, and that Michaelis had sold drugs from that room. An officer also testified that Michaelis admitted to ownership of the methamphetamine. Laboratory tests confirmed that the substance contained methamphetamine, but the substance was not tested for purity or concentration.

Michaelis moved for judgment of acquittal, arguing the Government had not proved that he was the one who conspired to sell the specific methamphetamine found in the search, and that the evidence did not indicate he ever possessed those drugs. The jury convicted Michaelis of

conspiring to possess with intent to distribute actual methamphetamine.

On appeal, Michaelis argued a different sufficiency point: that the government failed to show the purity and concentration of the methamphetamine and due to this failure, his conviction for conspiracy to deliver *actual* methamphetamine was based on insufficient evidence. As an initial matter, the Court found that, because Michaelis, in his motion for judgment of acquittal, urged a specific challenge as to the evidence of the conspiracy and possession of the seized drugs, and not a general sufficiency argument, he failed to preserve his current challenge as to the purity and concentration of the methamphetamine. The Court held, however, regardless of the standard of review, Michaelis's argument failed. Drug quantity and type are not "formal" elements of a conspiracy or a possession offense; any failure by the Government to prove quantity and type affects only the statutorily prescribed sentence that the court may or must impose under § 841(b).

However, the Court found plain sentencing error because the district court calculated the guidelines based on a quantity of actual methamphetamine instead of a mixture or substance containing methamphetamine.

United States v. McClaren, 998 F.3d 203 (5th Cir. May 18, 2021). The defendants in this case were tried by a jury for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Federal Controlled Substances Act, the Federal Gun Control Act, and the Violent Crimes in Aid of Racketeering Act (VICAR).

1) The evidence was insufficient to prove co-defendant Fortia was aware of the drug amount scope of the conspiracy. Simple participation in the conspiracy did not prove Fortia was aware. Unlike the other Defendants, the government did not establish that Fortia saw or knew of drug sales by other gang members with sufficient regularity that the jury could surmise foreseeability. The Court vacated Fortia's conviction under § 846 and remand for resentencing.

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

United States v. Gas Pipe, Inc., 997 F.3d 231 (5th Cir. May 6, 2021). The Appellants' stores sold synthetic cannabinoids branded as "herbal incense," "potpourri," or "aroma therapy products," products, commonly known as "spice." The products were labeled "not for human consumption" even though the appellants intended them for exactly that. A jury convicted the appellants of one count of conspiracy to defraud the United States, based on their efforts to defraud the FDA and to misbrand drugs. The Fifth Circuit found the evidence was sufficient to show defendants intended to defraud the FDA. In a conspiracy to defraud the FDA under 18 U.S.C.. 371, the Government is not required to establish the FDA's participation in the underlying criminal investigation or the appellants' knowledge of any such participation. "The defraud clause of § 371 reaches ... any conspiracy designed to impair, obstruct, or defeat the lawful function of any department of the government." In this case, a conspiracy to avoid contact with the FDA to avoid regulation. The appellants' supplier and their employee both testified that the appellants labeled these products "not for human consumption" to avoid scrutiny or regulation by the FDA.

United States v. Onyeri, 996 F.3d 274 (5th Cir. Apr. 28, 2021). The Court found the evidence sufficient to support the defendant's RICO convictions based on evidence that he engaged associates to assist him in carrying out his many fraudulent schemes, and that they met to discuss the organization and plan activities in furtherance of the enterprise, including mail fraud, wire fraud, and murdering a state judge.

Finally, the district court did not err in denying Onyeri's suppression motion based on the police officer's testimony that he saw Onyeri make too wide a right turn, which gave him probable cause to make the stop.

United States v. Hernandez, 841 F. App'x 736 (5th Cir. Apr. 1, 2021). Hernandez was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On appeal, he raised a novel argument: whether the district court plainly erred by accepting his guilty pleas absent evidence that he personally moved a firearm in interstate commerce or that a firearm was moved in interstate commerce in the recent past, which he argued are required elements of a § 922(g)(1) offense. Hernandez acknowledged that the Court's precedent, *United States v. Fitzhugh*, 984 F.2d 143 (5th Cir. 1993) forecloses his argument, but he asserts that the Supreme Court's intervening decision in in *United States v. Bond*, 572 U.S. 844 (2014), abrogated *Fitzhugh*. The Court denied the Government motion for summary affirmance because neither party cites published authority addressing *Bond*'s effect on the interpretation of § 922(g)(1). Because it cannot be said that the Government's position is "clearly right as a matter of law," summary affirmance is inappropriate in this case. For the same reason, however, the Court held Hernandez cannot show plain error.

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

Knowlton argues that the computer files he downloaded are themselves child pornography punishable under § 2252A(a)(2)(A), and so he cannot be found guilty of receiving "material that contains child pornography" under § 2252A(a)(2)(B). The Court concluded that the computer files themselves are plainly *material* containing child pornography. The term "material" in the receipt offense is not limited to only tangible units of storage like books, magazines, boxes, and computer disks.

Second, Knowlton argues that the dates of child-pornography downloads proven at trial materially varied from the dates alleged in his indictment. The Court concluded that the dates of receipt Knowlton points to for those files do not materially vary from the dates alleged in the indictment. When the evidence at trial varies from the facts alleged in an indictment, the question is whether the defendant was fairly put on notice to defend himself. If an indictment uses the term "on or about" to allege a date, the government is not required to prove the exact date; it suffices if a date reasonably near is established. The two and a half variance from date alleged and date proved was reasonably near the date alleged to put Knowlton on notice.

United States v. Masha, 990 F.3d 436 (5th Cir. Mar. 8, 2021). Masha was indicted on eight counts of false use of a passport, violations of 18 U.S.C. § 1543, and eight counts of misuse of a passport, violations of 18 U.S.C. § 1544. Evidence at trial demonstrated that Masha used passports that looked like they were issued by Nigeria and the United Kingdom. However, the testifying agent acknowledged he could not testify as to whether or not the passports had been actually issued by those nations. A Bank of America investigator testified that one passport appeared counterfeit since it did not match any person on public records with that name. Finally, the Government's case centered on the passports being counterfeit.

The Court held there was insufficient evidence at trial to demonstrate that the passports used by Masha were in fact issued by a government entity for someone else. Thus, the convictions for misuse of a passport under 1544 are vacated. The remaining convictions and sentences for false use of a passport are affirmed.

United States v. Nora, 988 F.3d 823 (5th Cir. Feb. 24, 2021). A jury convicted Nora of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349; conspiracy to pay or receive illegal health care kickbacks, in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(2); and aiding and abetting health care fraud, in violation of 18 U.S.C. §§ 1347 and 2. The Court reversed Nora's convictions and sentences based on insufficient evidence. This case involved a multi-defendant health care fraud involving a home-health care company called Abide. Nora's role at

Abide was extensive. It implicated him in three practices that were central to Abide's fraud and kickback schemes. First was Abide's use of house doctors to approve medically unnecessary plans of care so that it could bill Medicare for patients who would otherwise not qualify for home health services. Second was Abide's pay-for-referral system, which the government deemed an illegal kickback scheme. Third was Abide's practice of unnecessarily recertifying patients for additional 60-day episodes of care.

The Court, after defining the term "willfully," as used in the various charged fraud offenses, held that, while the Government presented evidence at trial detailing Nora's role at Abide and his work responsibilities, the evidence did not prove that Nora understood Abide's various practices and schemes to be fraudulent or unlawful, and thus there was insufficient evidence to conclude that Nora acted with "bad purpose" in carrying out his responsibilities at Abide.

United States v. Delgado, 984 F.3d 435 (5th Cir. Jan. 5, 2021). Rodolfo Rudy Delgado was convicted by a jury of numerous bribery-related offenses carried out in connection with his duties as a state judge in Hidalgo County, Texas. The jury found that over the course of a decade, attorney Noe Perez would routinely bribe Delgado in order to secure Personal Recognizance ("PR") bonds for his clients who had pending criminal matters before Delgado, when Delgado still presided as a judge. The jury convicted Delgado on eight felony counts including conspiracy under 18 U.S.C. § 371 to commit federal program bribery in violation of 18 U.S.C. § 666(a)(1)(B) and federal program bribery in violation of 18 U.S.C. § 666(a)(1)(B). The bribery statutes under which Delgado was convicted required a showing of a "transactional value" of at least $5,000.

The Court affirmed the jury's findings that Delgado's offense involved this transactional value. The Court noted that it is not only the amount paid as a bribe that determines the transactional value; instead, multiple valuation methods are used. Here, rather than looking to the bribe amount, the trial evidence focused on the value of the PR bonds to Perez's clients, who qualify as interested third parties to the transactions between Delgado and Perez. Delgado effectively acknowledged the benefit to be worth at least $5,000 by setting that amount as the face

value of the bonds. The Court held that "a rational juror could conclude that an individual who was willing to risk forfeiting $5,000 in order to secure a PR bond valued the benefit of that bond (the "thing of value") to be at least $5,000. And to the extent the jury also considered the value of difficult-to-quantify benefits such as the clients' liberty interests, that is precisely where the wisdom of the jury is most useful and where courts should be reluctant to step in on review."

Delgado also challenged the district court's application of a six-level increase based on the calculation of "the benefit received" in return for the bribe payments under U.S.S.G. §§ 2C1.1(b)(2) and 2B1.1(b)(1). Specifically Delgado challenged the district court's calculation that the PR bonds awarded by Delgado should be valued at $5,000 (and $10,000, in the case of one of Perez's pre-investigation clients). The Guidelines define "the benefit received" in return for bribe payments as "the net value of such benefit." U.S.S.G. § 2C1.1 cmt. n.3 (2018). The Court acknowledged that this definition is legally distinct from the Court's discussion regarding the transactional value element of § 666(a)(1)(B), the question of the "net value" of the PR bonds to Perez's clients is conceptually similar. At its core, the "value" someone receives from a PR bond is intertwined with a liberty interest that is hard to definitively quantify. The Court held that there was no clear error for the district court to value the bonds at the amount Perez's clients were willing to risk forfeiting to secure the bonds.

United States v. LaBrandon Gill, 830 F. App'x 745 (5th Cir. Dec. 8, 2020). Gill was convicted by a jury of two counts of bank robbery by intimidation per 18 U.S.C. § 2113(a). On appeal, Gill argued that the evidence was insufficient to satisfy the intimidation element of § 2113(a) for each robbery. Applying a plain error standard of review, the 5th Circuit affirmed finding no clear or obvious error in the sufficiency of the evidence. The evidence was that 1) Gill gave a note to a teller that said "$10,000 in bundles" and orally told her to "just make this easy," and 2) he gave a note to a teller instructing her to "go to the vault and get $10,000" and not to "make this harder than it has to be."

Note: Gill argued the sufficiency challenge was preserved despite no motion for judgment of acquittal because he moved for a mistrial. The 5th

Circuit rejected that argument because the mistrial request was about an alleged perjurious witness, not a sufficiency challenge. The Court applied a plain error standard and did not mention "manifest miscarriage of justice," which is a standard typically applied when no judgment of acquittal is requested.

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

In a challenge to the district court's calculation of the amount of loss, the Dubins claimed they were entitled to an offset calculated at actual value of services provided. They assert, the Court's precedent requires deducting the amount Medicaid would have paid, but-for the fraud. The Court disagreed, noting the defendant carries the burden to establish two prongs to prove a valid offset: (1) that the services provided to Medicare beneficiaries were legitimate and (2) that Medicare would have paid for those services but for his fraud. In this case, the Government provided substantial evidence that the purported services were illegitimate: poor record keeping by the Dubins, improper billing based on who performed the services, and services performed by individuals who were not employees at the time they provided services. Thus, the Court concluded the Dubins fell short of carrying their burden.

Note: reh'g en banc granted, opinion vacated, 989 F.3d 1068 (5th Cir. March 12, 2021)

United States v. Anderson, 980 F.3d 423 (5th Cir. Nov. 6, 2020). Defendants were convicted, at trial, of multiple counts of health care fraud and identity theft. All issues on appeal concerned the sufficiency of

the evidence. The defendants argued, in a motion to judgment of acquittal and on appeal, that BCBS was not a health care benefit program. Based on the statutory text and two out-of-circuit opinions, the Fifth Circuit concluded that BCBS was such a program.

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

United States v. Barnes, 979 F.3d 283 (5th Cir. Oct. 28, 2020). Doctors and administrators were convicted of conspiracy to commit health care fraud. On appeal, the defendants challenged the sufficiency of the evidence. The Fifth Circuit affirmed, finding 18 U.S.C. § 1516's jurisdictional element is satisfied when the audit *relates* to a program receiving more than $100,000 from the United States as opposed to requiring the *defendant* to have received more than $100,000 from the United States. The Court also held that the defendants' case numbers and diagnosis frequencies were high enough that a reasonable jury could have found chance or mistake did not account for what happened. The Court further held that "[e]vidence of a financial incentive for home health care referrals and statistical evidence probative of fraudulent conduct are circumstantial evidence of Barnes's knowledge." One defendant also raised a claim of improper jury argument, based on the government's statement that one of its expert doctors would not go to a fancy restaurant if the defense attorneys were also there. The Court agreed that the statement was improper but affirmed nonetheless because it did not affect the defendant's substantial rights. Next, a defendant objected to the district court's refusal to allow Medicare regulations in the jury instructions. Even if the instructions were substantially correct, they did not impair the defendant's ability to present his defense. [Note: this is a very lengthy opinion and should be reviewed if going to trial on a Medicare or Medicaid fraud case.]

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

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

<u>United States v. Comstock</u>, 974 F.3d 551 (5th Cir. Sept. 9, 2020). The defendant and others were charged with conspiracy to commit wire fraud and six counts of aiding and abetting wire fraud. These charges were the result of Comstock ordering his employees to fabricate time sheets to justify his company's billings to the City of San Antonio, with whom his company had a contract to provide janitorial services at the Alamodome.

The jury convicted Comstock on all charges, and he was sentenced to 25 months in prison and over $350,000 in restitution. On appeal, Comstock challenged the sufficiency of the evidence against him. The Court noted that Comstock's defense was that he believed he had an agreement contract with the City. A number of his employees testified that there was no such agreement and that Comstock had instructed them to fabricate the records. The Government also introduced audio recordings, by one of these employees, of Comstock and other discussing the billing. One employer, Anna Becerra, was repeatedly heard, on these recordings, saying that there was no unwritten agreement and that what they were being asked to do was fraud. The 5th Circuit held that, based on the testimony and recordings, there was sufficient evidence.

V. MISCELLANEOUS TRIAL MATTERS

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

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

adopt the following procedure (from the D.C. Circuit) when allowing jurors to submit questions:

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

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

United States v. Crittenden, 971 F.3d 499 (5th Cir. Aug. 20, 2020). In a 2/1 decision, the 5th Circuit affirms the district court's (J. Briones) granting of the defendant's motion for new trial. The defendant and his wife, Dominguez, were charged with conspiracy to possess meth with the intent to distribute it, and possession of meth with the intent to distribute it. The evidence showed that the defendant's wife, Dominguez, exchanged phone calls with a drug dealer regarding the purchase/sale of meth. When DEA agents set up surveillance at their house, they saw the defendant and Dominguez drive off in separate cars. The defendant went to a second house, which Dominguez arrived at later. At that point, the DEA saw the defendant leave the house and hand Dominguez a black bag through her window. The bag contained meth. When the defendant was interviewed, he said he had moved the bags, which belonged to his wife, because he believed they contained marijuana. When Dominguez called him to retrieve one of the bags, he did so. At trial, Dominguez testified that she used to buy marijuana for her and her friends. At some point, she and the defendant decided to have another child and resolved to take care of their family without drugs. She explained that she started getting phone calls from a drug dealer she knew and that he had given her the bags. When she told the defendant about it, he said he did not want anything to do with the matter and did not want the bags in the house with the children. Dominguez testified that the defendant then moved the bags to the other house. She also testified that on the day of the arrest, she had just instructed the defendant to grab a bag for her without telling him what it contained. She said that he was not involved in any of the transactions and did not know the drug dealer. The jury convicted both of them on both charges.

The defendant filed a motion for new trial. The district court granted it on both counts. In its order, the court concluded that the government had failed to prove that the defendant participated in a conspiracy or that he had the knowledge necessary to convict him of possessing meth with the intent to distribute it. The court found that "belief" was not enough to establish knowledge, and cited *McFadden v. United States*, 576 U.S. 186 (2015). In *McFadden*, the Supreme Court determined that knowledge, for purposes of the Controlled Substances Act, 21 U.S.C. § 841(a)(1), can only be established two ways: either by knowledge that a

controlled substance is listed or by knowledge of the identity of the controlled substance. At most, the defendant believed that the bags contained something illegal. That belief was insufficient to establish knowledge. The government appealed the grant of a new trial as to the PWID count.

The 5th Circuit majority reviewed the district court's grant of the new trial for abuse of discretion. It held that the district court had "correctly stated the relevant law and permissibly applied it to the facts of this case." The court did not abuse its discretion by granting the new trial on the basis of insufficient evidence of knowledge. The majority acknowledged the dissent's concerns for the role of juries. It noted, however, that 5th Circuit precedent affords the district courts considerable discretion on motions for new trial and has held that a district court may grant a motion for new trial even when there is sufficient evidence but the court concludes, after cautiously reweighing it, that the evidence "preponderates heavily against the guilty verdict." Dissenting Opinion by Judge Costa.

Note: In **United States v. Crittenden**, 827 F. App'x 448 (5th Cir. Oct. 1, 2020), the opinion was withdrawn and the case remanded because the Court determined the basis for the district court's decision to grant the JOA was unclear.

VI. PROSECUTORIAL/JUDICIAL MISCONDUCT

United States v. Beaulieu, 973 F.3d 354 (5th Cir. Aug. 31, 2020). The defendant was prosecuted for contempt after he refused to testify at an earlier trial for which he had been granted immunity by the government and ordered to testify by the district court. Prior to the contempt hearing, his new attorney filed a motion to disqualify AUSA McMahon, who was prosecuting the contempt. Attached to the motion was an affidavit from Ms. Cimino, the defendant's attorney on the earlier case, explaining that the defendant had been concerned b/c the government's immunity letters contained exceptions that could result in him being charged with false statements, obstruction, or perjury. AUSA McMahon had told Ms. Cimino that he would prosecute the defendant to the fullest extent of the

law if his testimony differed in any way from the FBI agent's 302 memorandum. The district court denied the motion.

At the contempt trial, the government put on one witness, the FBI agent who had interviewed the defendant and memorialized the interview in the 302. The defense put on one witness, Ms. Cimino. She testified about the immunity letters, the exceptions, and the defendant's concerns. The defendant had noted 3 facts in the 302 that he could not testify to: 1) the kind of vehicle, 2) a quote that the FBI agent had put in, and 3) a statement about a phone call that the defendant swore he never received. Ms. Cimino testified that she had asked AUSA McMahon what would happen if the defendant "testified a little bit differently from what the agent wrote in the 302." McMahon repeatedly told her that he would prosecute the defendant to the fullest extent. AUSA McMahon cross-examined Ms. Cimino, and, in doing so, acted like a fact witness. "I never said any discrepancy, did I?"; "Do you think that I'm as dumb as I look? You don't think I know the law of perjury?" When Ms. Cimino reiterated that McMahon repeatedly had told her that he would prosecute the defendant, McMahon responded, "I am telling you that's not true." During closing argument, McMahon made numerous arguments involving facts not in evidence, such as that the defendant refused to testify because he did not want to be called a "rat," (there was no evidence of this), and that McMahon had never said he would prosecute the defendant (there was no evidence contradicting Ms. Cimino's testimony that he had). AUSA McMahon also made inappropriate statements urging the jury to consider the effect of its verdict on the judge—that not finding the defendant guilty would disrespect the judge.

On appeal, the government conceded that AUSA McMahon's closing argument statements constituted prosecutorial misconduct. The 5th Circuit found them to be "textbook examples of prosecutorial misconduct." The Court also held that the defendant had shown he was prejudiced by the statements—the "remarks cast serious doubt on the correctness of the jury's verdict." The AUSA's inappropriate statements touched almost every part of the trial and their prejudicial effect was "overwhelming." Finally, the government's evidence that the defendant willfully violated the court's order was weak. Indeed, the Court found it impossible to separate AUSA McMahon's existence as the prosecutor

from the evidence against the defendant. If the jury believed that the AUSA had threatened to prosecute the defendant for correcting factual errors in the 302, then it could also reasonably determine that the defendant's refusal to testify was a good-faith effort to avoid perjury. The government's only evidence on this was AUSA McMahon's "testimony" offered inappropriately in the form of argument from counsel table. Even when a proceeding is contentious, "a prosecutor must always adhere to the highest ethical standard of the legal profession. The integrity of the criminal-justice system depends on it." The conviction was vacated.

United States v. Angeles, 971 F.3d 535 (5th Cir. Aug. 24, 2020). The defendant pleaded guilty to conspiracy to possess with intent to distribute meth. In the PSR, the relevant conduct greatly increased the guideline range. The defendant filed objections contesting, among other things, the drug quantity. In the PSR addendum, the probation officer concluded that the defendant was frivolously denying relevant conduct and should lose acceptance of responsibility. The day before the sentencing hearing, the district court issued an order stating that it had "tentatively" concluded that the defendant's PSR objections were meritless and that she should be denied acceptance. At sentencing, the court asked the defendant whether she intended to pursue her PSR objections and, if so, which ones. Defense counsel announced that she would withdraw her objections. The court then considered acceptance, noting its "tentative conclusion" that it should be denied. Counsel asked that the defendant not be "penalized for zealous representation." The court expressed misgivings that the defendant had not met her burden, under §3C1.1, by falsely denying relevant conduct in her "frivolous" PSR objections. After counsel argued that the defendant had never denied her behavior in the offense, the court ruled that it would give her acceptance.

On appeal, the defendant argued that the district court had "effectively coerced" her into withdrawing her PSR objections by threatening to take away acceptance. The 5th Circuit disagreed. The district court had not pressured the defendant by conveying its tentative conclusion that her objections were meritless. And at sentencing, even after the defendant withdrew her objections, the court was still considering denying acceptance. It was only after hearing additional argument by counsel

that the court relented. The 5th Circuit also noted that the defendant did not argue, on appeal, that her PSR objections had merit.

United States v. Penado-Aparicio, 969 F.3d 521 (5th Cir. Aug. 12, 2020). The 5th Circuit held that the district court imposed a vindictive sentence. The defendant was convicted of illegal reentry, 8 U.S.C. § 1326. At the time of the offense, he was on supervised release. First sentencing: the district court imposed a within-guideline sentence of 72 months' imprisonment. On the revocation, the court imposed a 24-month sentence to run concurrent with the 72-month sentence; so, the total sentence was 72 months. The defendant appealed his 72-month sentence, arguing that it violated the ex post facto clause because the incorrect Guidelines Manual was used. The judgment was vacated, and the case remanded for a new sentencing. Second sentencing: No new PSR was prepared for the resentencing. The guideline range under the appropriate Guidelines Manual was 30-37 months. The district court found the range was inadequate and imposed an above-guideline sentence of 60 months. Although the court acknowledged that it had previously ordered the sentences to run concurrent, it was now ordering them to run consecutive. Thus, on remand the defendant's total sentence was now 84 months.

On appeal, the defendant argued that his sentence on remand was unconstitutionally vindictive. The 5th Circuit reviewed the issue for plain error because the defendant had failed to object in the district court. "Whenever a judge imposes a more severe sentence" after a successful appeal, there is a presumption of vindictiveness. If the new sentence is greater than the original sentence in its totality, then the new sentence is considered more severe. Here, the parties agreed, and the 5th Circuit held, that because the district court imposed a more severe sentence on remand, the sentence is presumptively vindictive. The presumption may be rebutted if the court articulated specific reasons for the higher sentence based on either newly discovered evidence or events that occurred after the original sentencing. The 5th Circuit held that the presumption of vindictiveness was not rebutted because the court pointed to the defendant's criminal history, which was detailed in the PSR before the original sentencing. The Court exercised its discretion to correct the plain error because of the nature of the constitutional error and the

remedy available—modification of the judgment. The Court modified the judgment to reflect that the 60-month sentence runs concurrent with the 24-month revocation sentence.

VII. CATEGORICAL APPROACH

<u>Ochoa-Salgado v. Garland</u>, __ F.4th __, No. 19-60519, 2021 WL 3012828 (5th Cir. July 16, 2021). One of the confusing aspects of the categorical approach is that there are so many federal definitions that sound similar but are different. After the Supreme Court clarified the divisibility analysis in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Fifth Circuit held that a conviction under Texas Health and Safety Code § 481.112 for delivery of a controlled substance is *not* a controlled substance offense (CSO) under guideline §4B1.2 because the Texas offense includes offer to sell, which is not covered in the CSO definition. *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). But the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2), which is also cross-referenced as an aggravated felony for immigration purposes in 8 U.S.C. § 1101(a)(43)(B), is different. A "drug trafficking crime" is "any felony punishable under the Controlled Substances Act (CSA).

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

<u>Note:</u> In *United States v. Prentice*, the Fifth Circuit held that § 481.112 is a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii) for the Armed Career Criminal Act. The Court applied *Shular v. United States*, 140 S. Ct. 779 (2020), finding that *Shular* "broadens the understanding of 'a serious drug offense'" to "whether the elements of the state law offense involve the generic *conduct* specified in the federal statute." The question becomes whether a § 481.112 conviction involves

conduct "*that is a part of a process of* distribution." It does because offering to sell a controlled substance is part of that process.

United States v. Trujillo, ___ F.4th ___, No. 20-10679, 2021 WL 2879780 (5th Cir. July 9, 2021). Trujillo was convicted of illegal reentry and sentenced under the provision in 8 U.S.C. 1326(b)(2) for having an aggravated felony conviction prior to his removal. The term "aggravated felony" includes a "crime of violence," under 18 U.S.C. § 16. The Court held that Trujillo's conviction under Texas's intoxication manslaughter statute, Texas Penal Code § 49.08(a), does not constitute a "crime of violence" under 18 U.S.C. § 16. As a result, the district court erred when it convicted and sentenced Trujillo under 8 U.S.C. § 1326(b)(2) based on this prior conviction. But the error did not ultimately affect his sentence. The Court reformed the judgment to correct the error under 8 U.S.C. § 1326(b)(2) and affirmed the sentence as reformed.

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

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

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

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

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

VIII. SENTENCING

CONSTITUTIONAL CHALLENGES

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

United States v. Leontaritis, 977 F.3d 447 (5th Cir. Oct. 9, 2020). Leontaritis was convicted by a jury of conspiracy to commit money laundering and conspiracy to distribute methamphetamine. The jury returned a special verdict finding that the conspiracy involved 500

grams or more, but the jury also found that Leontaritis was only responsible for less than 50 grams as the amount reasonably foreseeable to him. At sentencing, the district court found by a preponderance of the evidence that Leontaritis was responsible for 176 kilograms and sentenced him to 240 months' imprisonment. On appeal, he argued the court's disregard of the jury's finding violated the Fifth and Sixth Amendments.

The Fifth Circuit explained that the jury found that the Government failed to prove 50 or more grams beyond a reasonable doubt, not that the jury found beyond a reasonable doubt that Leontratis was accountable for less than 50 grams. The district court's findings at sentencing did not conflict with the jury's conclusions. Plus, the court gets to decide the Guidelines and sentence within the statutory minimums and maximums, whereas the jury is tasked with making statutory findings.

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

STATUTORY CHALLENGES

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

United States v. Diaz, 989 F.3d 390 (5th Cir. Mar. 1, 2021). Diaz was convicted of conspiring to acquire a firearm from a licensed firearms dealer by false or fictitious statement, in violation of 18 U.S.C. §§ 371 and 922(a)(6). She sought to extend *Rehaif*'s reasoning to § 922(a)(6). The Court rejected her argument, and held that, to convict for conspiracy to

violate § 922(a)(6), the government does not need to prove that the defendant knew the seller was a licensed dealer.

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

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

United States v. Warren, 986 F.3d 557 (5th Cir. Jan. 22, 2021). Warren and Martinez were convicted under various fraud statutes for their roles in a timeshare resale telemarketing scam. The scam involved falsely representing to timeshare owners that there was a buyer for their timeshare. The timeshare owner was then billed for closing fees and other costs. Part of the scam was getting the timeshare owner to sign a verification letter acknowledging that the scammer had no buyer. To get the owners to sign this "false" verification, the scammers would explain that it was necessary because, as marketing and advertising agents, they

could not commit a buyer until a property was listed. In addition to finding the evidence sufficient to support the convictions, the Fifth Circuit addressed two sentencing issues. First, both Warren and Martinez argued that the district court erred by imposing consecutive six-month sentences under 18 U.S.C. § 2326(1). That statute provides that a person convicted of certain enumerated fraud offenses, "in connection with the conduct of telemarketing or email marketing ... shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of [the enumerated offenses]." They argued that that statute only raised the statutory maximums for the underlying fraud offenses, it did not require a consecutive sentence to be imposed on top of the sentence for the underlying fraud offense. The Court disagreed and noted that "[a]s a matter of common usage, we have regularly described consecutive sentences as being 'in addition to' the sentence for the underlying or other offense." "As written, § 2326 authorizes a consecutive sentence to be imposed on top of the sentence for the underlying fraud offense."

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

(SELECTED) GUIDELINE ISSUES

United States v. Gaspar-Felipe, 4 F.4th 330, 336 (5th Cir. July 13, 2021). A jury convicted Gaspar transporting "illegal aliens" but found—by answering a special interrogatory—that his offense did not result in the death of one of the migrants. He objected to not receiving a reduction

for accepting responsibility since he had been willing to plead to the lesser charges. The Court found Gaspar had challenged other elements of the offenses at trial and thus did not warrant acceptance. “Nothing stopped him from pleading guilty to those charges and going to trial only on Count Three.”

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

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

The Fifth Circuit held that the district court erred by not applying section §2K2.1(a)(4)(B) of the Guidelines in light of the accompanying commentary. The commentary defines a “semiautomatic firearm that is capable of accepting a large capacity magazine” as “a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense” a “magazine or similar device that could accept more than 15 rounds of ammunition” was “attached to” the firearm or was “in close proximity to” it. The Court noted, “neither the PSR nor the Government even acknowledged the language of the commentary—let alone gave the district court a basis for applying it.”

The addendum to the PSR relied on the website of the firearm manufacturer as evidence of what kind of magazines come standard with that firearm. The Court said that might have been sufficient if the

Government had demonstrated that Abrego bought the firearm either directly from the manufacturer or in the exact same condition as marketed on the manufacturer's website. Abrego is entitled to be resentenced in compliance with both the Guidelines and the accompanying commentary.

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

<u>Note:</u> Reyna-Aragon argued his claim of error was preserved by defense counsel's statements at sentencing, that without a more complete record of what occurred, it is hard to gauge this conduct. The Court held that was insufficient to preserve an objection that the district court was erring by relying on a bare arrest record.

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

that Masha's purpose and motivation in opening the accounts was fraud and that the PSR's loss amount calculation was correct.

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

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

This decision drew a strong dissent from Judge Dennis, who concluded that the majority decision was "inconsistent with our circuit precedent, *United States v. Southerland*, 405 F.3d 263 (5th Cir. 2005) and the sentencing guidelines." Judge Dennis found, "because the flight did not have a nexus to Deckert's offense of conviction of possessing methamphetamines on a separate date, the adjustment was not permissible under the United States Sentencing Guidelines." (cleaned up).

United States v. Crosby, 838 F. App'x 891 (5th Cir. Mar. 8, 2021). District court did not plainly err in counting Crosby's prior convictions for attempted simple robbery and attempted distribution of methamphetamine under Louisiana law as predicates for the career offender enhancement. Crosby argued that the career offender guideline does not list these "attempted" offenses as enumerated offenses and that the commentary improperly expands the definition beyond the language of the Guideline itself. He cites case law from the D.C. Circuit, which held that the commentary to § 4B1.2 impermissibly expanded the definition of "crime of violence." *See United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018). The Court held that "[g]iven the lack of precedent in our circuit, we conclude that Crosby has failed to show that any error is plain."

United States v. Zuniga, 831 F. App'x 124 (5th Cir. Dec. 8, 2020). Zuniga was convicted of maintaining a drug-involved premises, in violation of 18 U.S.C. § 856(a)(1). She argued in the district court and on appeal that the court erred in imposing the enhancement in Guideline §2D1.1(b)(12) for maintaining-a-drug-premises, asserting the act of maintaining a drug premises is already factored into the base offense level for violating 18 U.S.C. § 856(a)(1) and applying the enhancement constituted impermissible double counting. The 5th Circuit affirmed, applying the law that "[d]ouble counting is prohibited only if the particular guidelines at issue specifically forbid it." (citing *United States v. Jimenez-Elvirez*, 862 F.3d 527, 541 (5th Cir. 2017)). The Court found no error because neither Guideline §2D1.1 nor §2D1.8 expressly prohibit double counting.

United States v. Dubin, 982 F.3d 318 (5th Cir. Dec. 4, 2020), reh'g en banc granted, opinion vacated, 989 F.3d 1068 (5th Cir. March 12, 2021). The defendants were convicted of conspiracy to pay and receive healthcare kickbacks, offering to pay, and paying, illegal remuneration for patients, and aiding and abetting and aggravated identity theft. In a challenge to the district court's calculation of the amount of loss, the Dubins claimed they were entitled to an offset calculated at actual value of services provided. The Court disagreed, noting the defendant carries the burden to establish two prongs to prove a valid offset: (1) that the services provided to Medicare beneficiaries were legitimate and (2) that

Medicare would have paid for those services but for his fraud. In this case, the Government provided substantial evidence that the purported services were illegitimate: poor record keeping by the Dubins, improper billing based on who performed the services, and services performed by individuals who were not employees at the time they provided services. Thus, the Court concluded the Dubins fell short of carrying their burden.

United States v. Arayatanon, 980 F.3d 444 (5th Cir. Nov. 13, 2020). The defendant was convicted by a jury of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine under 21 U.S.C. § 846 and sentenced as a career offender to life in prison. On appeal, the defendant argued that the district court erred at sentencing in calculating his offense level based on an incorrect drug quantity, imposing a two-level enhancement because the drugs were imported, and applying the career offender enhancement. The Fifth Circuit affirmed. As to the drug quantity, the Fifth Circuit held that the PSR was sufficiently reliable even if based on a co-conspirator's "imprecise" testimony, especially absent any competent rebuttal evidence from the defendant. As to the importation enhancement, it was effectively foreclosed by prior precedent in *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012). As to the career offender enhancement, the district court did not clearly err in concluding that the prior California convictions occurred even though copies of the judgments were not provided.

United States v. Kendrick, 980 F.3d 432 (5th Cir. Nov. 3, 2020). A defendant was convicted of conspiracy to distribute crack cocaine and felon in possession of a firearm. The Fifth Circuit upheld a sentencing enhancement for in connection with a drug offense based on the presence of mannitol and a digital scale. The Court also affirmed the classification of Kendrick as a career offender even though his prior drug convictions were conspiracies. The commentary to §4B1.2 added conspiracies to the controlled substance offense definition, and a prior case said the addition was lawful. *See United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997). [Note: other circuits disagree, *see United States v. Nasir*, 982 F.3d 144, 160 (3d Cir. 2020), and a panel noted it was inclined to agree with the Third Circuit but for *Lightbourn*, *see United States v. Goodin*, 835 F. App'x 771, 782 n.1 (5th Cir. Feb. 10, 2021).]

United States v. Medel-Guadalupe, 979 F.3d 1019 (5th Cir. Oct. 27, 2020). The defendant pleaded guilty to one count of harboring illegal aliens. On appeal, he challenged the "reckless endangerment" and "bodily injury" sentencing enhancements. The Fifth Circuit held that any error was harmless because the district court expressed an intent to impose the same sentence irrespective of the enhancements.

United States v. Ramirez, 979 F.3d 276 (5th Cir. Oct. 27, 2020). The defendant was convicted of health care fraud and challenged the district court's guidelines calculation. Specifically, the defendant challenged: (1) the loss amount; (2) an enhancement for transfer or production of a means of identification; and (3) an enhancement for "10 or more victims." The Fifth Circuit affirmed, holding: (1) the evidence was sufficient, under relevant conduct principles, to support the loss amount; (2) the scheme triggered the production of a unique Medicare-issued claim number for each beneficiary; and (3) each beneficiary was a victim, not just Medicare as a whole.

United States v. Barry, 978 F.3d 214 (5th Cir. Oct. 16, 2020). The defendant pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. On appeal, he challenged a cash-to-drugs conversion on sufficiency and relevant conduct grounds. Specifically, the defendant argued: (1) the district court was required to find that the amount of drugs seized did not reflect the scale of the offense; and (2) there was insufficient evidence connecting the money to drug sales. As to the first point, the Fifth Circuit held that the district court's denial of the defendant's objection was a sufficient implicit finding. As to the second point, the Fifth Circuit affirmed due to "ample circumstantial evidence."

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

Rejecting this argument, the court first offered extensive dicta as to the application of lenity to the Guidelines after *Beckles v. United States*, 137 S. Ct. 886 (2017). The court acknowledged *United States v. Bustillas-Pena*, 612 F.3d 863 (5th Cir. 2010), which it characterized as the only case applying lenity to the Guidelines after *Booker*. But it thought this case might not survive *Beckles*. The appeal in *United States v. Cortez-Gonzalez*, 929 F.3d 200, 205 (5th Cir. 2019), decided after *Beckles*, was dismissed because the court in that case found the Guideline unambiguous. The *Smith* court rejected the application of lenity because the Guideline unambiguously connects § 1591(b)(1) to the elevated base offense level in §2G3.1.

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

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

months. But instead of determining the "total punishment," the court imposed 108 months on both counts to run consecutive.

Note: After calculating the guideline range, the court should have determined the total punishment, for example: 130 months, and then apportioned the sentences to reach that total, for example: 108 months for the drug offense and 22 months for the failure-to-appear offense to run consecutively.

United States v. Lima-Rivero, 971 F.3d 518 (5th Cir. Aug. 21, 2020). The Court found a case agent's mere speculation that the defendant was not forthcoming was an insufficient basis for denying safety valve relief. Such testimony must be supported by "specific factual findings" or "easily recognizable support in the record." Here, the agent said his conclusion was based on his personal belief (after reviewing cell phones and speaking to codefendants) but did not offer specific concrete information. Moreover, the district court did not understand that the court decided whether the defendant provided truthful information about the offense, and that it did not have to accept the Government's determination. Judge Haynes dissented. She reasoned that, while the district court may have initially misunderstood the legal standard, the fact that the court had the agent testify showed an understanding that it was not bound by the Government's determination of truthfulness. And she would find the case agent's testimony sufficient.

CONCURRENT/CONSECUTIVE SENTENCING

United States v. Freeman, ___ F. App'x ___, No. 20-50181, 2021 WL 2908510 (5th Cir. July 9, 2021). Freeman was convicted of possession of a firearm by a convicted felon. The district court sentenced him to 96 months of imprisonment but did not make a finding as to whether the sentence would run concurrently to any pending state offense. On appeal, Freeman argued the district court plainly erred by not applying Guideline § 5G1.3(c) to order his sentence to run concurrently with any state sentence to be imposed on "related" offenses. Section 5G1.3(c) provides that when "a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction the sentence for the instant offense shall be imposed to run

concurrently to the anticipated term of imprisonment." (cleaned up). The presentence report listed three pending state charges "related" to Freeman's federal offense. The district court adopted the report and its factual findings. The Court held that, because of these facts, § 5G1.3(c) applied to Freeman's sentencing. The district court, however, failed to mention § 5G1.3(c) when determining Freeman's sentence.

In its initial opinion, that was enough to find plain error and warrant vacating the sentence. But then the panel withdrew that opinion and substituted one finding no error—emphasizing that it was the defendant's burden to show entitlement to relief for plain error and claiming that he did not meet this burden. In the reply brief, he cited only out-of-circuit cases addressing the applicability of §5G1.3(c), and that is insufficient.

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

The Fifth Circuit agreed that Horton's offenses were in close temporal proximity to the instant federal offense, but the Court held that neither offense involved similar conduct because they involved either no drugs or

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

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

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

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

First, if a district court wants to reduce a defendant's sentence for time already served, it must do so by reducing the judgment by that amount of time and noting the reason for the reduction. Here, the district court announced that it was beginning the federal sentence as of the date the defendant was taken into custody but the written judgment ordered that the defendant "shall receive credit for time served from July 9, 2018." The 5th Circuit noted that the district court is not permitted to compute

the credit for time served or to order the backdated commencement of a sentence, because BOP alone is authorized to take these actions. *Citing United States v. Wilson*, 503 U.S. 329 (1992); *United States v. Flores*, 616 F.2d 840 (5th Cir. 1980).

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

PROCEDURAL REASONABLENESS

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

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

United States v. Bostic, 970 F.3d 607 (5th Cir. Aug. 18, 2020). The defendant, Bostic, pleaded guilty without a plea agreement to conspiracy to possess with intent to distribute meth. The guideline range was 21-27 months, but the district court imposed a 235-month sentence of imprisonment. The 5th Circuit, in a 2/1 decision, held that the district

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

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

Judge Ho dissented. He would have held that there was neither procedural nor substantive error. But he took "heart in the majority's invitation to the district court to impose precisely the same sentence on

remand." And he stated that there was "nothing substantively unreasonable" about a sentence that was half of the maximum 40-year sentence set by Congress.

Substantive Reasonableness

United States v. Hudgens, __ F.4th __, 2021 WL 3009163 (5th Cir. July 16, 2021). Hudgens was one of Bostic's co-defendants in a drug case that involved the death of AF, although the Government did not pursue the enhanced penalty for drug distribution resulting in death—a 240-month mandatory minimum—because the drugs distributed were not a but for cause of AF's death. Bostic's Guidelines range was 21 to 27 months, and he was sentenced to 235 months. The 5th Circuit remanded based on procedural unreasonableness—the district court failed to adequately explain that drastic increase. On remand, Bostic was sentenced to 168 months' imprisonment. Meanwhile, Hudgens's case was pending before a different panel and had been placed in abeyance pending the decision in Bostic. Hudgens's Guidelines range was 120 to 121 months, and he was sentenced to 240 months.

Unlike in *Bostic*, the Court did not review Hudgens's sentence for procedural reasonableness because that was not raised in the opening brief. The review for substantive reasonableness depends on the totality of the circumstances, and the district court should articulate its reasons more thoroughly for a non-Guidelines sentence. "A non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors where it (1) does not account for a factor that should have received significant weight, (2) gives significant eight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." The Court held the district court did not improperly punish Hudgens for causing AF's death; instead, the court properly considered Hudgens's behavior: bringing heroin to AF's house, allowing her to ingest it even though he knew of her heart problems, recording a cell phone video instead of helping her, and disposing of evidence instead of calling 911 after she stopped breathing.

Judge Graves dissented. He argued the majority, consistent with *Gall v. United States*, 552 U.S. 38 (2007), and *United States v. Fraga*, 704 F.3d

432 (5th Cir. 2013), should have considered procedural unreasonableness even if it was not briefed. And he thought Hudgens was arguing procedural unreasonableness even if the argument heading referred to substantive unreasonableness. He would have found an improper emphasis on AF's death.

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

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

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

The Court reversed Khan's sentence as substantively unreasonable and remanded for a second resentencing. And because the sentencing judge

seemed immovable and displayed bias against the government, the Court reassigned the case to a different judge.

SUPERVISED RELEASE/PROBATION

United States v. Tinney, ___ F.4th ___, No. 20-10849, 2021 WL 2660210 (5th Cir. June 29, 2021). On appeal, Tinney argued the district court improperly delegated its sentencing authority in imposing a special condition of supervised release requiring him *to follow all instructions* of the probation officer. He relies on cases that hold a district court may not require a criminal defendant to follow lifestyle restrictions or treatment requirements imposed by a private therapist as a condition of supervised release. But, the Court noted, that rule does not control Tinney's challenge.

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

United States v. Aldridge, ___ F. App'x ___, No. 20-10447, 2021 WL 2461004 (5th Cir. June 16, 2021). This appeal involved a factual inquiry: whether Aldridge was previously sentenced to five terms of supervised release stemming from five different convictions, or only one term—a result supported by the written judgment/s in the prior cases. The Fifth Circuit held that, even if Aldridge could establish on plain error that he was serving only one supervised release term, he could not show the district court plainly erred in imposing five consecutive terms of imprisonment upon the revocation of that one term. The Court noted it had not yet determined whether revocation of a single term of supervised release followed by imposition of multiple consecutive terms of imprisonment is erroneous, so no plain error.

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

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

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

Note: In a subsequent case, **United States v. Mena Martinez**, 850 F. App'x 924 (5th Cir. June 24, 2021), the Court noted the simultaneously issued decisions in *Martinez* and *Medel-Guadalupe*. Without much

analysis, the Court held that the district court plainly erred in delegating authority to the probation officer to determine whether Martinez should participate in inpatient or outpatient treatment.

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

United States v. Johnson, 850 F. App'x 894 (5th Cir. Mar. 31, 2021). Appellant challenged imposition of two special supervised release conditions that were recommended in an appendix to the presentence report. At sentencing the district court did not orally pronounce those conditions and did not specifically adopt the presentence report. Under *Diggles*, the district court was required to either orally pronounce the conditions, or orally adopt the PSR and its appendix. The district court did neither. The Court concluded that, under its precedent, the district court's failure to do either constitutes an abuse of discretion, and the case must be remanded so that the unpronounced conditions can be stricken from the judgment.

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

sentence—by varying upward is uncertain. Cano's speculation is insufficient to show plain error.

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

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

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

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

Note: this is a follow-on to *United States v. Hampton*, 633 F.3d 334 (5th Cir. 2011), which rejected a cumulative limit on post-revocation terms of

release equal to the maximum term of release available at the original sentencing.

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

United States v. Becerra, 973 F.3d 373 (5th Cir. Oct. 6, 2020). A child pornography defendant challenged special conditions of supervised release that imposed blanket bans on the use of the Internet, computers, and electronic devices. Based on prior precedent, the Fifth Circuit vacated the conditions and remanded to the district court, on plain error review.

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

The Confrontation Clause does not apply to revocation hearings. But because of the liberty interest at stake, there is a Due Process right to confront and cross-examine adverse witnesses. This limited right may be denied by the district court if it specifically finds good cause for doing

so. Because the defendant did not object, review is for plain error. The defendant must show 1) an error, 2) that is clear or obvious, and 3) that affects his substantial rights. If these three prongs are met, the court of appeals can exercise discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Here the 5th Circuit held the defendant had failed to show plain error. First, it is not clear or obvious that the district court is required to make this finding when the defendant makes no hearsay or confrontation objection. In the cases holding that such a finding is required, the defendants objected in the district court. Second, the defendant cannot show that the alleged error affected his substantial rights b/c if the district court had done the balancing test sua sponte, it would have found good cause for considering, at a minimum, testimony about the 911 emergency call.

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

construction: a prohibition on gaming consoles that allow internet communication. The Court so modified the judgment here as well.

<u>United States v. Garner</u>, 969 F.3d 550 (5th Cir. Aug. 13, 2020). The 5th Circuit held that 18 U.S.C. § 3583(g), which requires revocation of supervised release and a term of imprisonment for certain drug and gun violations, is constitutional even given *United States v. Haymond*, 130 S. Ct. 2369 (2019). In *Haymond*, the Supreme Court held that a different provision of the supervised release statute, 18 U.S.C. § 3583(k), is unconstitutional. The decision was a plurality with a concurrence by Justice Breyer. Because Justice Breyer's concurring opinion was the "narrowest grounds" it represents the "holding of the court." *See Marks v. United States*, 430 U.S. 188, 193 (1977). The concurring opinion held that § 3583(k) violates the constitution because 1) it applies only to certain federal offenses; 2) it takes away the judge's discretion on whether to impose imprisonment and for how long; and 3) it mandates a 5-year minimum sentence. Here, the 5th Circuit held that § 3583(g) is not like 3583(k), because 1) it singles out conduct, only some of which is criminal; 2) while it requires imprisonment, it does not dictate the length of the sentence; and 3) it does not require the judge impose a mandatory minimum sentence. Thus, § 3583(g) looks more like revocation as it is "typically understood"—as "part of the penalty for the initial offense" rather than punishment for a new crime. *Haymond*, 139 S. Ct. at 2396.

<u>United States v. Diggles</u>, 957 F.3d 551 (5th Cir. Apr. 29, 2020) (en banc). The en banc 5th Circuit clarified and reconciled its law on what is required for the oral pronouncement of supervised release conditions. The district court need not orally pronounce standard or mandatory conditions of supervised release in 18 U.S.C. § 3583(d). The court must, however, orally pronounce discretionary conditions in § 3583(d). Oral pronouncement is required so that the defendant has notice and an opportunity to object to those discretionary conditions, which are required to be "reasonably related" to certain statutory sentencing factors, and involve no greater deprivation of liberty than is necessary. § 3583(d). The oral pronouncement requirement is satisfied when the court orally adopts conditions set out in the PSR, in Standing Orders, or in another document. If the defendant fails to raise a pronouncement

objection in the district court, when he had notice of the conditions and an opportunity to object, then review on appeal will be for plain error.

RESTITUTION/FORFEITURE

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

United States v. Madrid, 978 F.3d 201 (5th Cir. Oct. 15, 2020). A child pornography defendant challenged a series of monetary penalties, arguing that the district court erroneously assessed him a monetary penalty under the "Amy, Vicky, and Andy Child Pornography Victim Assistance Act," (AVAA) and erroneously appears to have imposed two "Justice for Victims of Trafficking Act" (JVTA) special assessments. Additionally, the defendant argued that the district court erroneously believed the Bureau of Prisons (BOP) would give him credit for time incarcerated on state charges prior to going into federal custody. Despite the presence of an appeal waiver, the Fifth Circuit decided to reach the merits and affirmed. Regarding the AVAA, the court held that a monetary penalty under the AVAA is separate and distinct from restitution, and a special assessment under 18 U.S.C. § 2259A does not require identification of a victim and proof of losses, the district court did not err in assessing a monetary penalty under the AVAA. Regarding the two JVTA assessments, the Court held that the judgment only reflected one such assessment. Regarding the district court view of BOP credit, the Court interpreted the record as showing that the district court was aware that it lacked authority to determine if time in state custody should be credited towards a sentence. The district court did, however, have the authority to vary downward at sentencing and declined to do so.

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

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

IX. APPEALS

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

The Court also found the evidence sufficient to support the defendant's RICO convictions based on evidence that he engaged associates to assist him in carrying out his many fraudulent schemes, and that they met to discuss the organization and plan activities in furtherance of the enterprise, including mail fraud, wire fraud, and murdering a state judge.

Finally, the district court did not err in denying Onyeri's suppression motion based on the police officer's testimony that he saw Onyeri make too wide a right turn, which gave him probable cause to make the stop.

United States v. Emakoji, 990 F.3d 885 (5th Cir. Mar. 9, 2021). Emakoji entered a plea agreement to plead guilty to fraud charges. He was living in Alabama at the time he entered into the plea agreement. He requested two continuances of the plea hearing, citing fears about traveling to the courthouse during the Covid pandemic. The district court declined and sua sponte ordered Emakoji to obtain housing in the Northern District of Texas. Emakoji appealed the court's pretrial housing order.

The Court noted the collateral order doctrine allows an appeal before final judgment where the district court's order (1) conclusively determine[s] the disputed question, (2) resolve[s] an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. It is generally limited to

the denial of: (1) motions to reduce bail; (2) motions to dismiss on double jeopardy grounds, and (3) motions to dismiss under the Speech or Debate Clause. The district court's pretrial housing order did not fall within the grounds for a collateral appeal. The Court declined to extend the collateral order doctrine's reach to societal interests such as preventing spread of Covid-19.

United States v. LaBrandon Gill, 830 F. App'x 745 (5th Cir. Dec. 8, 2020). Gill was convicted by a jury of two counts of bank robbery by intimidation per 18 U.S.C. § 2113(a). On appeal, Gill argued that the evidence was insufficient to satisfy the intimidation element of § 2113(a) for each robbery. Applying a plain error standard of review, the 5th Circuit affirmed finding no clear or obvious error in the sufficiency of the evidence. Gill argued the sufficiency challenge was preserved despite no motion for judgment of acquittal because he moved for a mistrial. The 5th Circuit rejected that argument because the mistrial request was about an alleged perjurious witness, not a sufficiency challenge. The Court applied a plain error standard and did not mention the "devoid-of-evidence" standard, which is typically applied when there is no timely judgment of acquittal requested.

Note: Some members of the Court believe that the devoid-of-evidence standard is inadequate, even under a plain-error standard of review, on grounds rooted in protecting the constitutional standard of reasonable doubt in convicting criminal defendants. *See United States v. Delgado*, 672 F.3d 320, 349–54 (5th Cir. 2012) (finding that the devoid-of-evidence standard will result in criminal convictions supported by proof much less sufficient than required under a reasonable-doubt standard—less sufficient than required by due process of law) (Dennis, J., with Wiener, J., dissenting). The Ninth Circuit held that even when using plain-error review, a court should overturn conviction "if the record clearly show[s] that the evidence was insufficient." *See United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011). The Second Circuit rejected application of the devoid-of-evidence standard, holding a failure of the government to provide sufficient evidence affects substantial rights cognizable under Rule 52(b). *See United States v. Draper*, 553 F.3d 174, 181 (2d Cir. 2009).

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

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

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

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

United States v. Bostic, 970 F.3d 607 (5th Cir. Aug. 18, 2020). The defendant, Bostic, pleaded guilty without a plea agreement to conspiracy to possess with intent to distribute meth. The guideline range was 21 – 27 months, but the district court imposed a 235-month sentence of imprisonment. Bostic objected that the sentence was procedurally and substantively unreasonable. The 5th Circuit, in a 2/1 decision, held that the district court procedurally erred by failing to adequately explain the reasons for the sentence significantly outside of the guideline range.

Judge Ho dissented. He would have held that there was no procedural or substantive error. Judge Ho also noted that he would have reviewed for plain error. At sentencing, defense counsel argued for a within guideline sentence, citing the "nature and circumstances of the offense," which is under 18 U.S.C. § 3553(a)(1). After the sentence was imposed, defense counsel objected that the sentence was procedurally unreasonable— "Specifically, we object to the imposition of this sentence of the 3553(a)(2) factor as not considering [ ] the nature and circumstances of the offense, the health and use of the decedent in this particular case." According to Judge Ho, plain error review should apply because defense counsel cited § 3553(a)(2) when "nature and circumstances of the offense" is under § 3553(a)(1).

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

same course of conduct and thus the district court did not err in ordering the sentence consecutive to the anticipated state sentences.

VIII. Post-Conviction

United States v. Castro, 4 F.4th 345 (5th Cir. July 14, 2021). The Fifth Circuit held, as a matter of first impression, that the grant of a certificate of appealability (COA) that did not raise a constitutional claim was a patent error warranting vacatur of the COA and dismissal of the appeal. Even when the district court identifies relief on a procedural ground, the COA must identify a constitutional issue to be valid. *See Gonzalez v. Thaler*, 565 U.S. 134 (2012). The parties agreed the COA was invalid, but Castro argued that once a COA is issued, it cannot be vacated. The Court rejected that argument. The Court also refused to issue a COA on whether the residual clause of § 924(c) is unconstitutional post-*Davis*. That was not the argument Castro raised in his first habeas petition, and COA cannot issue on an argument different than the one presented to the district court. And his prior conviction under 18 U.S.C. § 2114(a) satisfies the elements clause because it has as an element putting another's life at risk by using a dangerous weapon, which, in his case, was a firearm.

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

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

United States v. Cooper, 996 F.3d 283 (5th Cir. Apr. 28, 2021). Cooper, who was serving 40-year sentence for drug-trafficking and firearms convictions, filed a motion for compassionate release under the First Step Act, based on extraordinary and compelling reasons, including the non-retroactive changes to the way firearms offenses under 18 U.S.C. 924(c) are punished. The district court agreed that if Cooper were sentenced today, he would be subjected to a significantly lower sentence because of the non-retroactive changes to 924(c). But, the district court noted the unsettled caselaw as to whether it had discretion to consider "extraordinary and compelling reasons" not articulated by the Sentencing Commission's corresponding policy statement, § 1B1.13.

After the district court denied the sentence reduction motion and while the case was pending on appeal, the Fifth Circuit held in *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021) that the district court is not bound by § 1B1.13 when considering compassionate release motions brought by prisoners like Cooper. The Court rejected the government's argument that the district court denied Cooper's motion based exclusively on the sentencing factors under 18 U.S.C. § 3553(a), which courts are still required to consider when either a prisoner or the BOP moves for compassionate release. Instead, the district court expressly invited Cooper to renew his motion if the Fifth Circuit clarified the scope of its discretion under the First Step Act, which the Court did in *Shkambi*. Case remanded so that the district court could reassess Cooper's motion for compassionate release.

Note: This is an important decision for compassionate release practitioners in the Fifth Circuit because it allows the district court to consider non-retroactive changes in sentencing law as an extraordinary and compelling reason for a sentence reduction; Cooper would have faced a mandatory minimum of 10 years, instead of the 30-year MM

imposed because of the First Step Act's non-retroactive changes to 924(c).

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

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

United States v. Batiste, 980 F.3d 466 (5th Cir. Nov. 13, 2020). The defendant sought to reduce his sentence for crack cocaine under the First Step Act. The effect of the First Step Act was to reduce his statutory range from 20 years to life to 10 years to life. He argued that a reduction was warranted in light of post-sentencing conduct, the circumstances of his case, and the 18 U.S.C. § 3553(a) factors. The Fifth Circuit affirmed the sentence, emphasizing that the district court has discretion under the First Step Act and that it did not rely on a misinterpretation of either prior precedent or the Act itself. The Court, however, remanded for the district court to consider the proper term of supervised release.

United States v. Robinson, 980 F.3d 454 (5th Cir. Nov. 13, 2020). The defendant, who was convicted of trafficking crack cocaine, sought a sentencing reduction under the First Step Act. He argued that the district court erred by refusing to consider a lower, non-career-offender sentencing range if he had been convicted in 2019 rather than 2010. The

Fifth Circuit affirmed, believing the most plausible explanation for the district court's decision was an exercise of its discretion after considering all relevant sentencing factors. [Note: this opinion is largely a copy-and-paste of *United States v. Batiste*, described above.]

United States v. Franco, 973 F.3d 465 (5th Cir. Sept. 3, 2020). The defendant filed a motion for compassionate release (CR), under 18 U.S.C. § 3582(c)(1)(A), with the district court. She had not filed a request for CR with the BOP and argued that she should be excused because of the COVID crisis. The court dismissed the motion, without prejudice to the defendant refiling it once she had exhausted administrative remedies. The defendant appealed to the 5th Circuit instead. The 5th Circuit held that, under the language of the First Step Act, a "court may not modify a term of imprisonment" if the defendant has not filed a request with BOP. While the request to BOP is not a jurisdictional requirement, it is a mandatory claims processing rule. The defendant argued that because she was being held at a halfway house (a Residential Reentry Management Facility) there was no warden to make the request to. The 5th Circuit pointed out that BOP regulations define "warden" to include "the chief executive officer of … any federal penal or correctional facility." Accordingly, individuals who are in federal, but not BOP, custody may file the request for CR with the chief executive officer of the facility in which they are housed.

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

considered the murder cross-reference and, in fact, had never told Valdez that the court could consider the murder in sentencing him on the felon in possession charge.

The 5th Circuit majority (2/1) held that Valdez had failed to show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) he was prejudiced. *Strickland v. Washington*, 466 U.S. 668 (1984). The majority found that counsel's performance was not deficient because he had advised Valdez of the statutory maximum and that his guideline estimate was not a guarantee. In a footnote, the majority also stated that "it is not at all uncommon for a cross-reference to be overlooked," and the court routinely deals with reversible plain error based on guideline mistakes. Valdez was not prejudiced because he decided to plead guilty because the district court had refused his justification defense. It was a strategic decision by counsel that Valdez might be able to get some benefit from a guilty plea that he could not get from a jury trial.

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

had to do little more than read the guideline—as the cross-reference is in the same section that estimates the base offense level—to avoid a plainly incorrect estimate. But counsel also failed to understand the basic structure and mechanics of the guidelines. Counsel entirely failed to advise Valdez that he could effectively be sentenced for murder. When, as here, counsel grossly misestimates a guideline calculation b/c of ignorance of a plainly obvious provision his performance is unreasonable. The dissenting judge would also find that Valdez was prejudiced. There is a reasonable probability that had Valdez been correctly informed about the cross-reference, he would not have pleaded guilty. Counsel's error led Valdez to believe there was a real benefit from pleading guilty in the potential 3-level reduction for acceptance. But with the correct calculation, even with 3 levels off, the guideline range would have been above the statutory maximum. Even though the chance of acquittal was small, when the consequences of plea or trial are similarly dire, a potential acquittal may look attractive.

Atkins v. Hooper, 979 F.3d 1035 (5th Cir. Nov. 3, 2020), withdrawing opinion at 969 F.3d 200 (5th Cir. Aug. 7, 2020). Atkins argued that the state court's decision denying his Sixth Amendment right to confrontation was contrary to and involved an unreasonable application of Supreme Court precedent. The 5th Circuit initially agreed but, after rehearing, decided any error was harmless. In Louisiana state court, Atkins was charged with robbery. At his jury trial, in opening statement, the prosecutor stated that a Lawrence Horton was also involved in the robbery and would testify that he met Atkins the morning of the robbery and they went over to the victim's house; Atkins kicked in the door and robbed and beat the victim. During trial, the prosecutor questioned Detective Dowdy (really):
Q: Did you speak with Horton? A: Yes
Q: Did he provide a statement? A: Yes
Q: was the statement inculpatory? A: Yes
Q: did he implicate somebody else? A: Yes
Q: Alright, he implicated someone else. What did you do next with regard to your investigation?
A: Based on the information that Horton provided, I was able to obtain a warrant.
Q: For whom? A: Atkins.

The State rested without calling Horton. In closing argument, the prosecutor stated that Detective Dowdy interviewed Horton and then obtained an arrest warrant for Atkins. Atkins was convicted. The state courts denied Atkins' applications for post-conviction relief. The federal district court denied his § 2254 application and certificate of appealability. The 5th Circuit granted certificate of appealability.

1) The 5th Circuit will not consider procedural default when the government intentionally waived the procedural defense, as it did here.

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

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

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

Judge Costa dissented. He argued that considering the State's harmlessness argument, raised in the petition for rehearing but not in the earlier briefing, was unfair—particularly after the panel had decided after full briefing and oral argument not to sua sponte raise harmlessness even though it recognized it had the discretion to do so. "[T]he leniency the majority affords the government's forfeiture is hardly, if ever, shown

when habeas prisoners fail to raise an issue in the district court." He took issue with the majority's claim it is "desirable in most AEDPA cases to consider harmlessness": "A presumption that excuses the state, but not pro se litigants, for failing to raise an issue in the district court is not consistent with equal justice under law."