

**SIGNIFICANT DECISIONS:
UNITED STATES SUPREME COURT AND
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
25th Annual Staff Conference and CJA Seminar
Sponsored by the Office of the
Federal Public Defender for the Southern District of Texas
Corpus Christi, Texas
September 15-16, 2011**

**Timothy Crooks
Supervisory Asst. Federal Public Defender
Southern District of Texas
440 Louisiana St., Suite 1350
Houston, TX 77002
(713) 718-4600
*tim_crooks@fd.org***

*** Supreme Court case law from October 4, 2010, through June 28, 2011 (October Term 2010); and Fifth Circuit case law from July 13, 2010 through September 7, 2011.**

TABLE OF CONTENTS

BAIL AND DETENTION 1

SEARCH AND SEIZURE 1

INTERROGATIONS AND CONFESSIONS. 7

OTHER PRETRIAL MATTERS. 8

 A. Double Jeopardy/Multiplicity. 8

 B. Speedy Trial/Continuance/Pre-Indictment Delay/Statute of Limitations/IAD..... 10

 C. Conflict of Interest/Recusal. 12

 D. Severance..... 12

 E. Other. 12

DISCOVERY/PRETRIAL INVESTIGATION & PREPARATION. 14

TRIAL.....15

 A. Jury Selection..... 15

 B. Admission and Exclusion of Evidence..... 15

 C. Cross-Examination/Confrontation/Compulsory Process. 19

 D. Prosecutorial/Judicial Misconduct. 22

 E. Jury Instructions..... 23

 F. Jury Deliberations and Verdict/Publicity. 26

 G. Other. 26

TABLE OF CONTENTS – (Cont’d)

GUILTY PLEAS.. 28

 A. Rule 11/Boykin Errors. 28

 B. Breach of Plea Agreement. 28

 C. Other. 29

SENTENCING. 29

 A. Constitutional Challenges. 29

 B. Rule 32/Other Statutory Challenges. 31

 C. (Selected) Guidelines Issues. 37

 D. Fines and Restitution. 48

 E. Resentencing/Sentence Reduction. 49

 F. Time Credit/Place and Conditions of Confinement/Release on Parole. 52

 G. Forfeiture/Return of Property under Fed. R. Crim. P. 41(g). 53

APPEAL. 54

REVOCATION OF PROBATION/SUPERVISED RELEASE/PAROLE. 57

 A. Probation. 57

 B. Supervised Release. 57

 C. Parole. 59

§ 2255/HABEAS CORPUS/POST-CONVICTION RELIEF/INEFFECTIVE ASSISTANCE OF COUNSEL/AEDPA. 59

 A. § 2255 generally. 59

TABLE OF CONTENTS – (Cont’d)

B. Habeas Corpus (§ 2254) generally.	59
C. Ineffective Assistance of Counsel/Conflict of Interest.	67
D. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).	71
E. Other.	75
MISCELLANEOUS.	77
A. Particular Substantive Offenses (and Defenses)..	77
B. Insanity/Competency/Civil Commitment.	81
C. Reversals for Insufficiency of the Evidence or Multiplicity.	81

I. BAIL AND DETENTION

II. SEARCH AND SEIZURE

Tolentino v. New York, ____ U.S. ____, 131 S. Ct. 1387 (2011) (per curiam) (decision below: People v. Tolentino, 926 N.E.2d 1212 (N.Y. 2010)) The Court had granted cert. to consider the following question: Are pre-existing identity-related governmental documents, such as motor vehicle records, obtained as the direct result of police action violative of the Fourth Amendment, subject to the exclusionary rule? However, after briefing and oral argument, the Court dismissed the writ of certiorari as improvidently granted.

Kentucky v. King, ____ U.S. ____, 131 S. Ct. 1849 (2011) (decision below: King v. Commonwealth, 302 S.W.2d 649 (Ken. 2010)) A warrantless entry based on exigent circumstances is reasonable, and thus does not violate the Fourth Amendment, when the police did not create the exigency by engaging, or threatening to engage, in conduct violating the Fourth Amendment; assuming arguendo that an exigency existed (a question left to the Kentucky Supreme Court on remand), the Supreme Court saw no evidence that the officers created the exigency by either violating the Fourth Amendment or threatening to do so; simply banging on the apartment door and announcing “Police” did not violate the Fourth Amendment; accordingly, the Supreme Court reversed the judgment below. (Justice Ginsburg filed a dissenting opinion.)

Camreta v. Greene, ____ U.S. ____, 131 S. Ct. 2020 (2011) (decision below: Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009)) The Court had granted certiorari to consider the following Fourth Amendment questions: (1) Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? and (2) Where a minor child was interviewed at her school by a child-protection caseworker and a law enforcement officer (about allegations that she was abused by her father), did the Ninth Circuit err in applying the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals, rather than applying the balancing standard appropriate when a witness is temporarily detained, as other circuits have done? However, after briefing and argument, the Supreme Court found that the case was moot because the child who had been interviewed had moved to another state and was nearly eighteen years old, and thus faced no prospect that she would be subjected to such questioning again; accordingly, the Supreme Court vacated the Ninth Circuit’s ruling on the constitutional questions (leaving intact the ruling that the law enforcement defendants were entitled to qualified immunity). (Justice Sotomayor filed an opinion concurring in the judgment, in which she was joined by Justice Breyer. Justice Kennedy filed a dissenting opinion, in which he was joined by Justice Thomas.)

Davis v. United States, ____ U.S. ____, 131 S. Ct. 2419 (decision below: United States v. Davis, 598 F.3d 1259 (11th Cir. 2010)) Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule; thus, search of defendant’s

vehicle which violated the Fourth Amendment under Arizona v. Gant, 556 U.S. 332 (2009), but which comported with pre-Gant Eleventh Circuit precedent in effect at the time of the search (a full two years before the Court announced its new rule in Gant), did not require suppression of the evidence unturned by the search; the Court reasoned that the acknowledged absence of police culpability (due to the police officers' objectively reasonable good-faith belief that their conduct was lawful, as it was under the precedent then in effect) should not trigger application of the exclusionary rule. (Justice Sotomayor filed an opinion concurring in the judgment, in which she opined that Davis should not govern the situation where the governing law is unsettled, as opposed to where (as in this case) the governing law at the time of the search plainly authorizes the officers' actions. Justice Breyer filed a dissenting opinion, in which he was joined by Justice Ginsburg.)

Florence v. Board of Chosen Freeholders of the County of Burlington, cert. granted, ___ U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-945) (granting cert. to Florence v. Board of Chosen Freeholders of the County of Burlington, 621 F.3d 296 (3d Cir. 2010)) Does the Fourth Amendment permit a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances?

Messerschmidt v. Millender, cert. granted, ___ U.S. ___, 131 S. Ct. 3057 (2011) (No. 10-704) (granting cert. to Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir. 2010)) Are police officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search? Should the standards of United States v. Leon, 468 U.S. 897 (1984), and Malley v. Briggs, 475 U.S. 335 (1986), be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

United States v. Jones, cert. granted, ___ U.S. ___, 131 S. Ct. 3064 (June 27, 2011) (No. 10-1259) (granting cert. to United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010))

QUESTION PRESENTED BY THE PETITIONER: Did the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violate the Fourth Amendment?

QUESTION ADDED BY THE COURT: Did the government violate respondent's Fourth Amendment rights by installing the GPS tracking device on defendant's vehicle without a valid warrant and without his consent?

United States v. Roberts, 612 F.3d 306 (5th Cir. 2010) Where police arrived at door of apartment to arrest one defendant on traffic warrants, and defendant, after confirming that he was the

subject of the warrants, stepped inside, at the officers' request, to get identification to confirm that he was the proper arrestee, police did not violate the Fourth Amendment by following him into the apartment without a warrant; under Washington v. Chrisman, 455 U.S. 1 (1982), a warrantless entry into a residence to maintain control over someone being placed under arrest is reasonable under the Fourth Amendment even in the absence of exigent circumstances; that was especially true here, where the officers had affirmative information about the presence of weapons in the apartment, and where defendant had stepped into a darkened room where at least three other persons were in the room; nor did the officers' protective sweep of the apartment violate the Fourth Amendment; the officers entered pursuant to a legitimate law enforcement purpose and had information about weapons; the circumstances on which the officers could reasonably rely in determining that a protective sweep was necessary were not limited to the threat posed by the defendant, but the potential threat of any of the other occupants of the apartment where weapons were clearly present; moreover, the police did not violate the Fourth Amendment in seizing firearms without a warrant; although the illegal nature of the weapons (based on their possession by persons who had no lawful right to possess them) was not immediately apparent to the police when they entered the police, the police were nevertheless justified in temporarily seizing the firearms under the circumstances present here; the officers were entitled to maintain control over the weapons while they completed their investigation of the individuals inside the apartment; during that investigation, the police acquired knowledge that the two defendants could not lawfully possess firearms, thus justifying a permanent seizure.

United States v. Pack, 612 F.3d 241 (5th Cir. 2010), modified on denial of panel reh'g, 622 F.3d 383 (5th Cir. Sept. 30, 2010), reh'g en banc denied (by a 9-7 vote), 2010 WL 3861067 (5th Cir. Sept. 30, 2010) (en banc) Assuming arguendo that defendant (a passenger in a vehicle stopped for speeding) had "standing" to assert a violation of his Fourth Amendment rights arising from an overlong detention (the district court had found that he did not have "standing"), defendant still did not make out a violation of his Fourth Amendment rights:

(1) As made clear in United States v. Brigham, 382 F.3d 500 (5th Cir. 2004) (en banc), an officer may, in the course of a traffic stop, question and require identification of passengers in the vehicle and run computer checks on them.

(2) Turning to the question of reasonable suspicion, the Fifth Circuit held, under Brigham, both the scope and length of the officer's investigation must be reasonable in light of the facts articulated as having created the reasonable suspicion of criminal activity; in order for the scope of an officer's detention to be reasonable in light of the facts having created the reasonable suspicion, each crime he investigates should, if established, be reasonably likely to explain those facts.

(3) After Brigham, a detention during a valid traffic stop does not violate the detainees' Fourth Amendment rights where it exceeds the amount of time needed to investigate the traffic infraction that initially caused the stop, so long as (a) the facts that emerge during the police officer's investigation of the original offense create reasonable suspicion that additional criminal activity warranting additional present investigation is afoot, (b) the length of the entire detention is reasonable in light of the suspicious facts, and (c) the scope of the additional investigation is reasonable in light

of the suspicious facts, meaning that it is reasonable to believe that each crime investigated, if established, would likely explain the suspicious facts that gave rise to the reasonable suspicion of criminal activity.

(4) Under these principles, there was no unconstitutionally overlong detention of defendant; by the time all the checks relating to the traffic stop had been accomplished, the officer had reasonable suspicion of criminal activity warranting further investigation; even if inconsistent stories alone might sometimes be insufficient to establish reasonable suspicion, here the inconsistencies were more serious and more likely intentionally deceptive than in other cases where inconsistent stories were found to be insufficient, plus the government also relied on other factors to establish reasonable suspicion; moreover, the length of the entire detention (only eight minutes beyond the completion of the computer checks) was reasonable in light of the suspicious facts the officer had observed; finally, the scope of the investigation that the officer conducted during the detention was reasonable in light of the suspicious facts he had observed; the decision to investigate the possibility of drug trafficking was reasonable, because drug trafficking provided a reasonably likely explanation for the suspicious facts he had observed.

(Judge Dennis dissented. He would hold that, under Brendlin v. California, 551 U.S. 249 (2007), defendant clearly had “standing” to challenge the stop/detention; and because the district court based its denial of defendant’s motion on his lack of “standing,” Judge Dennis would vacate and remand to allow the district court to decide the question of reasonable suspicion in the first instance. In the alternative, he also dissented from the majority’s discussion and application of the law governing whether a detention is constitutionally overlong.)

United States v. Rains, 615 F.3d 589 (5th Cir. 2010) In prosecution for manufacture and distribution of methamphetamine, police had sufficient reasonable suspicion of criminal activity to justify an investigatory stop of defendant’s car; particularly, the police had received information that (1) a woman in this car had just purchased an unusual quantity of concentrated liquid iodine (an ingredient used in the manufacture of methamphetamine) from a veterinary clinic, (2) the same woman had made repeated purchases of iodine from the same clinic over the past nine months, and (3) the person had traveled from Odessa, Texas, to Andrews, Texas, a rural area thirty-five miles away, to make the purchases; it was reasonable for the police to infer, from previous discussions with the veterinarian about typical sales of iodine in the clinic, to infer that the purchase of such a large quantity in a relatively short period of time indicated that the purchaser intended to use the iodine illegally, for the production of methamphetamine.

Jimenez v. Wood County, Texas, 621 F.3d 870 (5th Cir. 2010), **reh’g en banc granted, 626 F.3d 870 (5th Cir. Nov. 18, 2010) (en banc)** The panel was bound by Fifth Circuit precedent holding that a strip search of an individual arrested for a minor offense must be premised on reasonable suspicion that the detainee is carrying weapons or contraband; if the rule is to be changed, it must be done by the Fifth Circuit sitting en banc (as the Ninth and the Eleventh Circuits recently have done); under this rule, plaintiffs were entitled to relief under 42 U.S.C. § 1983 because they

were arrested for minor offenses and were strip-searched without the requisite reasonable suspicion.

United States v. Gomez, 623 F.3d 265 (5th Cir. 2010) District court did not err in denying defendant's motion to suppress because the decision to stop defendant's vehicle was supported by reasonable suspicion; even if the tip on which the stop decision was based (that the defendant had a pistol) is considered an "anonymous" tip (which, the Fifth Circuit said, was doubtful under the circumstances), the officers still had reasonable suspicion under the 4-factor test set out in United States v. Martinez, 486 F.3d 855 (5th Cir. 2007).

United States v. Allen, 625 F.3d 380 (5th Cir. 2010) District court did not reversibly err in denying defendant's motion to suppress evidence (child pornography) seized pursuant to a search warrant; although the search warrant was not sufficiently particularized and although the attachment detailing the items to be seized was not incorporated by reference in the warrant, the fruits of the search were nevertheless admissible under the good-faith exception to the exclusionary rule; under the analysis of Herring v. United States, 555 U.S. 135 (2009), the particularity defects in the warrant did not merit application of the exclusionary rule; furthermore, the information in the search warrant affidavit was not stale (even though it was 18 months old on the date the warrant was issued), and thus the affidavit stated probable cause supporting issuance of the warrant.

United States v. Oliver, 630 F.3d 397 (5th Cir. 2011) In mail fraud/aggravated identity theft prosecution, district court did not err in denying defendant's motion to suppress the contents of a cardboard box located in defendant's girlfriend's apartment and searched by her, prior to her turning over to the police; where a private individual examines the contents of a closed container, a subsequent search of the container by government officials does not constitute an unlawful search for purposes of the Fourth Amendment as long as the government search does not exceed the scope of the private search; the lawfulness of the subsequent police search does not depend on the police's knowledge of the prior private search; the initial private search, which was reasonably foreseeable, and the searcher's act, later that day, of voluntarily giving authorities the box, in which no reasonable expectation of privacy remained, rendered the subsequent police search permissible under the Fourth Amendment; additionally, the contents of defendant's laptop were admissible under the independent source doctrine; the search warrant affidavit contained sufficient independent information to make the resulting warrant a distinct, untainted source that permitted the agents to re seize and search the laptop lawfully; finally, defendant could not challenge the search of his clothes pockets; because this argument for suppression was made only in a motion for reconsideration of the originally filed motion to suppress, it was untimely and thus waived. (Judge Garza filed a dissenting opinion, in which he contended that Fifth Circuit case law did not support the proposition that a private search could validate subsequent police action even if the police did not know about the private search.)

United States v. Raney, 633 F.3d 385 (5th Cir. 2011) In felon-in-possession case, district court reversibly erred in denying defendant's motion to suppress; the district court incorrectly held that driving in the wrong lane of traffic was a per se violation, and the government failed to prove that defendant committed any other violation of traffic laws; in the absence of proof that defendant committed a traffic violation, the stop of defendant's car was unconstitutional, and the firearm

discovered pursuant thereto was inadmissible; accordingly, the Fifth Circuit vacated the district court's denial of defendant's motion to suppress and rendered judgment of acquittal for defendant; along the way, the Fifth Circuit (1) commented on several improper remarks made by the prosecutor during closing argument, and (2) noted that if the government continued to make these types of remarks and arguments, the court might need to reconsider its jurisprudence on curative instructions and plain error in this context. (Judge Benavides dissented from the reversal of the district court's order denying suppression, finding sufficient evidence of a traffic violation; but he believed that the panel should reach the issue of whether the improper prosecutorial arguments constituted reversible error.)

United States v. Olivares-Pacheco, 633 F.3d 399 (5th Cir. 2011) The district court reversibly erred in denying defendant's motion to suppress evidence arising from a roving Border Patrol stop of his vehicle, because the agents lacked reasonable suspicion that defendant was engaged in alien smuggling or other illegal activity; first, although proximity to the border is a "paramount factor," with 50 miles as the usual dividing line for an inference that the vehicle came from the border, the stop here occurred some 200 miles from the border; viewing the other factors "charily" in light of this fact, the Fifth Circuit found that the facts relied upon by the agents – (1) the presence of brush underneath defendant's truck; (2) the pointing by one of the passengers to a field in the opposite direction of the agents; (3) the fact the truck was registered in the Dallas/Fort Worth area; (4) the alien-smuggling reputation of this stretch of I-20 (near Odessa, Texas); and (5) the agents' experience – were insufficient to constitute reasonable suspicion supporting the vehicle stop; after surveying the case law, the Fifth Circuit concluded that if they affirmed the denial of the motion to suppress, "we would be doing so on the barest articulation of facts that we have ever credited as constituting reasonable suspicion," which it was "unwilling to do"; accordingly, the Fifth Circuit reversed the district court's denial of the suppression motion and vacated defendant's conviction and sentence.

United States v. Curtis, 635 F.3d 704 (5th Cir. 2011) District court did not err in refusing to suppress text messages uncovered as the result of a warrantless search of defendant's cellphone; in United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007), the Fifth Circuit held that the police can search the contents of an arrestee's cellphone incident to a valid arrest; even if Finley was cast into doubt by the Supreme Court's later decision in Arizona v. Gant, 556 U.S. 332 (2009), suppression was not called for because the search was conducted in good faith reliance upon the pre-Gant precedent then in effect (i.e., Finley) which permitted such a search.

United States v. Ned, 637 F.3d 562 (5th Cir. 2011) The automobile exception to the Fourth Amendment's warrant requirement applies with equal force to unoccupied, parked cars in places not used for residential purposes; here, the police had more than sufficient probable cause to believe that defendant's vehicle, parked on the street outside a nightclub, contained drugs, based on the tip of defendant's girlfriend and an alert by a narcotics dog.

United States v. Flores, 640 F.3d 638 (5th Cir. 2011) Even if defendant had "standing" to contest the search (pursuant to a warrant) of a California house, the good-faith exclusionary rule

applied under the facts of this case; there was no evidence that the police were dishonest or reckless in relying on the search warrant.

United States v. Hernandez, 647 F.3d 216 (5th Cir. 2011) District court did not err in denying defendant's motion to suppress based upon the warrantless insertion of a GPS device on the undercarriage of defendant's brother's truck; defendant did not have "standing" to challenge the placement of the GPS device on his brother's truck, as he failed to demonstrate that he had a legitimate expectation of privacy in the invaded place; he did, however, have "standing" to challenge the use of the GPS device to follow the truck's path, since he had his brother's permission to drive the truck; on the merits, however, the Fifth Circuit found that the use of the hidden GPS was not an unconstitutional warrantless search; this one-off use of GPS monitoring was not a search governed by the Fourth Amendment; the Fifth Circuit put off for another day the more troubling question of whether extensive GPS monitoring of a subject's movements over a lengthier course of time might rise to the level of a Fourth Amendment search. **(NOTE: This latter issue will be decided by the United States Supreme Court in United States v. Jones, cert. granted, ___ U.S. ___, 131 S. Ct., 3064 (June 27, 2011) (No. 10-1259) (granting cert. to United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).)**

United States v. Soto, ___ F.3d ___, 2011 WL 3447425 (5th Cir. Aug. 9, 2011) Although finding it an "admittedly close case," the Fifth Circuit upheld the district court's denial of defendant's motion to suppress the fruits of the roving Border Patrol stop leading to defendant's prosecution for alien smuggling; under the totality of the circumstances – including, most prominently, one of the aliens ducking or slumping down in his seat upon seeing the agents alongside – there was reasonable suspicion that illegal activity was afoot. (Judge Graves filed a dissenting opinion.)

III. INTERROGATIONS AND CONFESSIONS

J.D.B. v. North Carolina, ___ U.S. ___, 131 S. Ct. 2394 (2011) (decision below: In re J.D.B., 686 S.E.2d 135 (N.C. 2009)) A child's age properly informs the Miranda custody analysis; in some circumstances, a child's age may affect how a reasonable person in the suspect's position would perceive his or her freedom to leave; this is an objective inquiry and does not involve a determination of how youth affects a particular child's subjective state of mind; so long as the child's age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the Miranda test's objective nature; because the North Carolina Supreme Court had categorically refused to factor in the child suspect's age into the Miranda custody analysis, the Court remanded for consideration of whether the child was in custody when he was interrogated, taking into account all of the relevant circumstances of the interrogation, including the child's age at the time. (Justice Alito filed a dissenting opinion, in which he was joined by Chief Justice Roberts and Justices Scalia and Thomas.)

Howes v. Fields, cert. granted, ___ U.S. ___, 131 S. Ct. 1047 (Jan. 24, 2011) (No. 10-680) (granting cert. to Fields v. Howe, 617 F.3d 813 (6th Cir. 2010)) Does this Court's clearly

established precedent under 28 U.S.C. § 2254 hold that a prisoner is always “in custody” for purposes of Miranda any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances?

United States v. Chavira, 614 F.3d 127 (5th Cir. 2010) In prosecution for making a false statement to Customs and Border Patrol Officers (particularly, that the illegal minor girl accompanying defendant was her daughter and a United States citizen), the district court reversibly erred in denying defendant’s motion to suppress her statements, because those statements were taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966); under the circumstances of this case, defendant was in “custody” for purposes of Miranda; these circumstances included the facts that during questioning, (1) defendant was isolated in a small windowless room, in a trailer in the secondary processing area that was not accessible to the public and was surrounded by a ten-foot chain-link fence; and (2) defendant’s left hand was handcuffed to the chair in which she was seated; the Fifth Circuit also rejected the government’s argument that the questioning of defendant did not constitute “interrogation” for purposes of Miranda; the Fifth Circuit noted the defendant, in connection with her bench trial, had stipulated to facts wholly apart from the tainted statements that might be sufficient to sustain her conviction; however, because the district court, in finding her guilty, relied on the entire stipulation, including the statements held inadmissible under Miranda, and because nothing indicated that the district court would have found her guilty without those statements, the Fifth Circuit vacated the judgment of conviction and sentence and remanded for a new trial.

United States v. Oliver, 630 F.3d 397 (5th Cir. 2011) In mail fraud/aggravated identity theft prosecution, district court did not err in denying defendant’s motion to suppress his statements to law enforcement; under the circumstances, defendant validly waived his Miranda rights by voluntarily speaking to the police, notwithstanding his refusal to sign a written waiver form.

Wilson v. Cain, 641 F.3d 96 (5th Cir. 2011) In Louisiana state attempted manslaughter case (committed while defendant was in prison on another charge), the Louisiana court did not unreasonably apply clearly established Supreme Court law in rejecting defendant’s claim that his post-incident questioning by prison officials violated Miranda v. Arizona; because the questioning was conducted by members of the prison staff, using the prison’s routine immediate “post-fight” procedure to ensure the safety of the general prison population, it was not objectively unreasonable for the state court to conclude that this was more like general on-the-scene questioning rather than a custodial interrogation of the type addressed by the Supreme Court in Mathis v. United States, 391 U.S. 1 (1968), and Maryland v. Shatzer, ___ U.S. ___, 130 S. Ct. 1213 (2010); accordingly, the Fifth Circuit affirmed the district court’s denial of federal habeas relief.

IV. OTHER PRETRIAL MATTERS

A. Double Jeopardy/Multiplicity

United States v. Fisher, 624 F.3d 713 (5th Cir. 2010) Where district court sua sponte declared a mistrial after two prosecution witnesses became unavailable to testify as scheduled, defendant did not impliedly consent to the mistrial by failure to sufficiently object; this is a case-by-case determination, and under the circumstances here – including, most prominently, the district judge’s finding that defendant had sufficiently objected – there was no implied consent to the mistrial; that being the case, to retry the defendant after this mistrial would violate his double jeopardy rights unless there was a manifest necessity for the mistrial; because the basis for the mistrial was the unavailability of critical prosecution evidence, the district court’s decision was subject to the strictest scrutiny; that standard requires the government to show that the district court carefully considered whether reasonable alternatives existed but that the court found none; here, the government did not show – nor did the record independently show – that the district court carefully considered reasonable alternatives before declaring a mistrial; nor was the mistrial excused by the defendant’s refusal to stipulate to the testimony of the two witnesses; because the defendant did not consent to the mistrial and because the district court did not carefully consider reasonable alternatives to a mistrial, defendant’s prosecution was barred by double jeopardy; accordingly, the Fifth Circuit reversed the district court’s denial of defendant’s motion to dismiss the indictment, and it rendered a judgment of dismissal.

United States v. Hoeffner, 626 F.3d 857 (5th Cir. 2010) Where (1) defendant was indicted for mail and wire fraud under alternative theories of deprivation of honest services and deprivation of money and property, (2) the government abandoned the honest-services theory during trial, and (3) the jury failed to reach a verdict, resulting in the declaration of a mistrial, the government’s abandonment of the honest-services theory during the first trial meant that the Double Jeopardy Clause barred retrial on the honest-services theory; however, retrial was not precluded on the money-and-property-fraud theory; the district court therefore did not err in denying the defendant’s double-jeopardy-based motion to dismiss the indictment filed following the mistrial.

United States v. Rabhan, 628 F.3d 200 (5th Cir. 2010) Where defendant had previously pleaded guilty, in the Southern District of Georgia, to an 18 U.S.C. § 371 conspiracy to make material false statements, in violation of 18 U.S.C. § 1014, in connection with attempts to obtain a loan to catfish processing plant in Georgia, the district court reversibly erred in refusing to dismiss, as violative of double jeopardy, a § 371 count charging defendant, in the Northern District of Mississippi, with violating § 1014 and 18 U.S.C. § 1344 (the bank-fraud statute) by making false statements in connection with an attempt to secure a different loan for purposes of purchasing a catfish farm in Mississippi; under the 5-factor test of United States v. Marable, 578 F.2d 121, 154 (5th Cir. 1978), defendant established a strong prima facie case that the two conspiracies were the same offense for double jeopardy purposes; because the government failed to rebut defendant’s prima facie showing, the Fifth Circuit concluded that prosecution of the conspiracy count in the Mississippi indictment was barred by double jeopardy; accordingly, the Fifth Circuit reversed the district court’s order denying the motion to dismiss the indictment and remanded for entry of an order granting the motion and dismissing the Mississippi conspiracy count against defendant.

Martinez v. Caldwell, 644 F.3d 238 (5th Cir. 2011) Where state pretrial detainee, charged with second-degree murder, had raised, in a federal habeas petition under 28 U.S.C. § 2241, the federal district court erred in granting federal habeas relief precluding defendant's retrial; where a case ends in a mistrial at the defendant's behest, or with the defendant's consent, the Double Jeopardy Clause bars retrial only if the prosecution or the court intended to goad the defendant into requesting a retrial; here, the record read as a whole did not support the district court's conclusion that the presiding trial judge purposefully withheld his knowledge of how the jury was split (9 to 3 in favor of acquittal) in order to goad the defense into requesting a mistrial based on the jury's deadlock; accordingly, the Fifth Circuit vacated the district court's order granting relief and denied defendant's habeas petition.

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

United States v. Tinklenberg, ____ U.S. ____, 131 S. Ct. 2007 (2011) (decision below: United States v. Tinklenberg, 579 F.3d 589 (6th Cir. 2009)) The time between the filing of a pretrial motion and its disposition is automatically excluded from the 70-day period for commencing trial under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(D), irrespective of whether the motion has any impact on when the trial begins; the Supreme Court rejected the Sixth Circuit's position that the time is excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial; however, the Sixth Circuit also misinterpreted, to defendant's detriment, 18 U.S.C. § 3161(h)(1)(F), which excludes from the 70-day Speedy Trial Act period "delay resulting from transportation" for mental health examinations "except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable"; particularly, the Sixth Circuit erred in applying the counting rule of the then-in-effect version of Fed. R. Crim. P. 45(a), thereby excluding 8 weekend days and holidays; the Speedy Trial Act does not incorporate Rule 45, and the best reading of the statute is that such days are counted; because the Sixth Circuit's error in excluding these 8 days from the 70-day period cancelled out its error in failing to exclude the time (9 days) that pretrial motions were pending, the Supreme Court affirmed the judgment below. (Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which he was joined by Chief Justice Roberts and Justice Thomas. Justice Kagan took no part in the case.)

United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010) District court did not err in denying defendant's motion to dismiss under the Speedy Trial Act ("STA"); the delay associated with the government's oral motion for detention was excludable under 18 U.S.C. § 3161(h)(1)(D), and thus defendant's indictment was returned within the 30-day window prescribed by the STA; the Fifth Circuit "join[ed] almost all of [its] sister circuits in holding that when an oral pretrial motion is made on the record with both parties present, it is 'filed' just like a written motion for purposes of § 3161(h)(1)(D)."

United States v. McNealy, 625 F.3d 858 (5th Cir. 2010) In prosecution for possession and receipt of child pornography, defendant was not impermissibly tried beyond the 70-day period

prescribed by the Speedy Trial Act (“STA”); the district court satisfied the STA’s reasons requirement for an “ends of justice” continuance by stating its reasons for the continuance in its ruling denying defendant’s motion to dismiss under the STA and by stating that those reasons were in the district court’s mind at the time it granted the continuance; moreover, although the first continuance was open-ended and did not specify a trial date, a district court may decide to continue a trial indefinitely when it is impossible, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance; that condition was satisfied by defendant’s initial counsel’s having to attend National Guard Training and pro hac vice counsel’s difficulties in getting permission to represent defendant; finally, a second continuance, granted at the behest of the government based on the unavailability of a witness for trial, likewise resulted in excludable time under the STA; moreover, the requirement to set out ends-of-justice findings did not apply, because the continuance was granted under 18 U.S.C. § 3161(h)(3) based on the “absence or unavailability of . . . an essential witness,” and was not granted under 18 U.S.C. § 3161(h)(7).

United States v. Bishop, 629 F.3d 462 (5th Cir. 2010) Post-indictment delay in trying defendant on charges of making false statements in tax returns did not violate defendant’s constitutional right to a speedy trial; because the delay was less than 5 years, it was not presumptively prejudicial in and of itself; nor could the 6-year pre-indictment delay be factored into the analysis; pre-indictment delay is analyzable under the Due Process Clause, not the Speedy Trial Clause, and defendant waived her claim of pre-indictment delay by failing to move for dismissal on that basis; examining all the factors whose consideration is mandated under Barker v. Wingo, 407 U.S. 514 (1972), the Fifth Circuit found that these did not, even in combination, suffice to create a presumption of prejudice in this case; because defendant did not demonstrate any actual prejudice, her speedy trial claim failed.

United States v. Burrell, 634 F.3d 284 (5th Cir. 2011) District court reversibly erred in denying defendant’s motion to dismiss under the Speedy Trial Act, because defendant was not brought to trial within 70 countable days as required by the Act; particularly, the delay attributable to the alleged unavailability of a witness (a deputy sheriff who needed to get a recertification) was not excludable under either 18 U.S.C. § 3161(h)(3) (dealing with the absence or unavailability of an essential witness) or 18 U.S.C. § 3161(h)(7) (the catch-all “ends of justice” exclusion), because the government failed to present any evidence to explain why the witness’s presence could not be obtained through reasonable efforts (for example, either by working around the certification or by seeking rescheduling of the certification); because the 70-day Speedy Trial Act period was exceeded, the Fifth Circuit reversed defendant’s conviction and sentence and remanded to the district court for dismissal of the indictment, with the district court to decide in the first instance whether that dismissal should be with or without prejudice.

Amos v. Thornton, 646 F.3d 199 (5th Cir. 2011) Mississippi Supreme Court did not unreasonably apply United States Supreme Court law in rejecting life-sentenced murder defendant’s constitutional speedy trial claim; especially given that defendant was unable to show any substantial

prejudice from the pretrial delay, the state court did not unreasonably apply the factors of Barker v. Wingo, 407 U.S. 514 (1972), in finding no Sixth Amendment speedy trial violation; for the same reasons (again, especially the lack of prejudice from the delay), it was objectively reasonable for the state court to reject defendant's ineffective assistance of counsel claim based on trial counsel's failure to move for a speedy trial.

C. Conflict of Interest/Recusal

D. Severance

United States v. Thomas, 627 F.3d 146 (5th Cir. 2010) Where two defendants (half-brothers) were charged with numerous bank robberies and related offenses, district court did not abuse its discretion in refusing to sever the two defendants' trials; the defendants failed to demonstrate, even on appeal, any prejudice which could not be cured by the limiting instructions given by the district court.

E. Other

Bond v. United States, ____ U.S. ____, 131 S. Ct. 2355 (2011) (decision below: United States v. Bond, 581 F.3d 128 (3d Cir. 2009)) Criminal defendant convicted under a federal statute (18 U.S.C. § 229) had standing to challenge her conviction on grounds that, as applied to her, the statute was beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment. (Justice Ginsburg filed a concurring opinion, in which she was joined by Justice Breyer.)

Turner v. Rogers, ____ U.S. ____, 131 S. Ct. 2507 (2011) Due process does not *automatically* require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration; rather, in many cases of this type, substitute procedural safeguards may adequately protect the due process interest in making the civil proceeding fundamentally fair, see Mathews v. Eldridge, 424 U.S. 319, 335 (1976); here, however, defendant was provided with neither counsel nor these substitute procedural safeguards; under these circumstances, defendant's incarceration violated due process; accordingly, the Supreme Court vacated the judgment of the South Carolina Supreme Court and remanded for further proceedings. (Justice Thomas filed a dissenting opinion – which Justice Scalia joined in full, and which Chief Justice Roberts and Justice Alito joined in part – in which he would simply hold there was no right to counsel without reaching the question of whether alternative procedures were required, since that issue was raised only in an amicus brief.)

Perry v. New Hampshire, cert. granted, ____ U.S. ____, 131 S. Ct. 2932 (May 31, 2011) (No. 10-8974) (granting cert. to State v. Perry, No. 2009-0950 (N.H. Nov. 18, 2010)) Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeals and other federal

courts of appeals, or only when the suggestive circumstances were orchestrated by the police, as held by the New Hampshire Supreme Court and other courts?

United States v. Jeong, 624 F.3d 706 (5th Cir. 2010) Where defendant, a South Korean national, was prosecuted for bribery in an American court on the basis of the same bribery scheme for which he had been previously convicted in South Korea, his subsequent, American conviction was not barred by the Convention on Combating Bribery of Foreign Officials; Article 4.3 of this Convention does not prohibit two signatory countries from prosecuting the same offense; rather, it imposes an obligation only to consult on jurisdiction when one of the countries so requests; here, no such request was made; nor did the United States waive its jurisdiction to prosecute defendant by dint of assisting South Korea in that country's investigation of defendant or by dint of the United States' representation, in its request for mutual legal assistance, that it was "not seeking to further prosecute [defendant]"; no source of domestic or international law suggested that the United States either impliedly or expressly ceded its right of prosecution to South Korea.

United States v. McNealy, 625 F.3d 858 (5th Cir. 2010):

(1) In prosecution for possession and receipt of child pornography, district court did not err in denying defendant's motion to dismiss the indictment for failure to receive a fair trial; contrary to defendant's allegations, the alleged child pornography was, at all times, "reasonably available" for inspection by the defense, as required by 18 U.S.C. § 3509(m)(2); defendant had full access to the child pornography exhibits and could have done all the forensic tests that he allegedly was prevented from doing; any concerns about prosecution of a defense expert for possession of child pornography could have been allayed by obtaining a protective order; finally, defendant did not identify any expert that he wished to consult, but was somehow prohibited from doing so.

(2) District court did not err in finding that the government's destruction of defendant's computer (done after the course of civil forfeiture proceedings) was not done in bad faith; even though defendant had indicated that he intended to contest the forfeiture, and even though the government was negligent in failing to provide defendant with adequate notice of the forfeiture proceedings, there was no evidence that the destruction of the computer was done in order to impeded defendant's defense in the criminal case; moreover, it appears highly likely that all relevant evidence was preserved in the forensic images of the working hard drives of defendant's computers; accordingly, the destruction of the computer did not violate defendant's due process rights.

United States v. Wilcox, 631 F.3d 740 (5th Cir. 2011) In case involving kidnapping of children, district court did not abuse its discretion in denying, without a hearing, defendant's motion for a change of venue; defendant did not show pretrial publicity so pervasive as to support a presumption of prejudice; moreover, even if a presumption were applied, it would be overcome by the voir dire procedures used by the district court, which probed the veniremembers' exposure to pretrial publicity about the case.

United States v. Villanueva-Diaz, 634 F.3d 844 (5th Cir. 2011) Alien defendant's 2000 removal (following a 1998 removal order, affirmed by the Board of Immigration Appeals ("BIA's") in 1999) was not so fundamentally unfair as to bar its being used as an element of defendant's new prosecution for illegal reentry under 8 U.S.C. § 1326; it is true that the legal basis of defendant's removal (i.e., that his felony driving-while-intoxicated conviction was an "aggravated felony") was discredited by a Fifth Circuit ruling (United States v. Chapa-Garza) issued only four months after defendant's removal; defendant also alleged that his later-disbarred immigration attorney did not inform him of the BIA's ruling and that if he had known of that ruling, he would have filed a petition for review with the Fifth Circuit which might well have come to the same conclusion as in Chapa-Garza; however, the lack of personal notice to defendant of the BIA's action did not render the proceedings fundamentally unfair, as notice to counsel is traditionally considered to be constitutionally adequate notice to the represented party; nor, in the absence of a constitutional right to the effective assistance of counsel, could defendant ground a due process claim on deficiencies in his counsel's performance; finally, it was mere speculative hindsight to assume that, at the time of the BIA decision, defendant would have appealed further, given that Fifth Circuit precedent was, at the time, squarely against him; accordingly, the district court did not err in denying defendant's motion to dismiss the indictment on this basis.

United States v. Portillo-Muñoz, 643 F.3d 437 (5th Cir. 2011) Illegal alien's conviction for possession of a firearm, in violation of 18 U.S.C. § 922(g)(5), did not violate the Second Amendment; the phrase "the people" in the Second Amendment does not include aliens illegally in the United States like defendant. (Judge Dennis filed an opinion concurring in part and dissenting in part, in which he disagreed with the majority's categorical exclusion of illegal aliens from the protections of the Second Amendment; instead, he would apply a test that an illegal alien defendant is part of "the people" referred to in the Second Amendment if he is voluntarily present in the United States, and he has accepted several societal obligations in the United States; under this test, the alien here qualified for Second Amendment protection, so Judge Dennis would remand to allow the district court to review the merits of defendant's Second Amendment claim in the first instance.)

V. DISCOVERY/PRETRIAL INVESTIGATION & PREPARATION

Smith v. Cain, cert. granted, ____ U.S. ____, 131 S. Ct. 2988 (June 13, 2011) (No. 10-8145) (granting cert. to State v. Smith, 45 So.3d 1065 (La. 2010)) In Louisiana state first-degree murder case, is there a reasonable probability that, given the effect of the violations of Brady v. Maryland, Napue v. Illinois, and Giglio v. United States in Smith's case, the outcome of the trial would have been different? Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith's Brady and Napue/Giglio claims?

LaCaze v. Warden, Louisiana Correctional Institute for Women, 645 F.3d 728 (5th Cir. 2011), as amended on denial of reh'g, ____ F.3d ____, 2011 WL 3300677 (5th Cir. Aug. 2, 2011) In Louisiana second-degree murder case, prosecution withheld material exculpatory/impeachment information in violation of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny; particularly,

where defendant was alleged to have solicited one Robinson to kill her husband, it violated Brady to withhold information that Robinson had been promised that his 14-year-old son (who drove his father to and from the shooting) would not be arrested; Robinson's testimony was the only direct evidence of defendant's intent, and disclosure of his bias to the jury might have put the whole case in a different light; under these circumstances, there was a reasonable probability that disclosure of the agreement between the prosecution and Robinson would have produced a different result; accordingly, the Fifth Circuit reversed the district court's decision denying a writ of habeas corpus and remanded with instructions to grant the writ.

United States v. Brown, ___ F.3d ___, 2011 WL 3524412 (5th Cir. Aug. 12, 2011) For defendant convicted, after trial, of perjury and obstruction of justice, there was no reversible error under Brady v. Maryland, 373 U.S. 83 (1963), because the evidence suppressed (or arguably suppressed) by the government (including raw notes of two witnesses' interviews, and grand jury and SEC testimony of another witness) was not material.

VI. TRIAL

A. Jury Selection

Stevens v. Epps, 618 F.3d 489 (5th Cir. 2010) Death-sentenced Mississippi state defendant was not entitled to federal habeas relief on his claim that the prosecution had exercised a peremptory challenge on a black prospective juror on the basis of race (in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny); the prosecution offered more than one race-neutral reason for striking the juror, and the defendant failed to rebut one of those reasons (the prospective juror's alleged inattentiveness); the Mississippi Supreme Court's decision that the trial judge allowed the strike because it implicitly credited the prosecutor's assertion of inattentiveness, and its decision to defer to the trial court's implicit factual finding, is not an unreasonable application of Batson and its progeny; along the way, the Fifth Circuit noted that, in Thaler v. Haynes, ___ U.S. ___, 130 S. Ct. 1171 (2010) (per curiam), the Supreme Court had reversed the Fifth Circuit's understanding of the decision in Snyder v. Louisiana, 552 U.S. 472 (2008), and had limited the latter decision's holding to cases where a trial judge did not explain why he overruled a Batson challenge and one of the allegedly race-neutral reasons offered by the prosecutor was race-based. (Judge Haynes concurred in the judgment. She affirmed on the Batson issue "only because of the highly deferential review standard required by AEDPA" and noted that, given some of the "disturbing and inappropriate" remarks in this record, "[h]ad this been a direct appeal of the state trial court's decision, [her] decision very likely would have been different.")

B. Admission and Exclusion of Evidence

United States v. McCann, 613 F.3d 486 (5th Cir. 2010):

(1) In felon-in-possession trial, district court did not reversibly err in admitting, over defendant's objection, a death threat shouted at the arresting officer after defendant's arrest; evidence that a defendant engaged in conduct more serious than the charged offense can create substantial unfair prejudice; that was not the case here, as the threat was less severely punished than the felon-in-possession offense for which defendant was being tried; nevertheless, the Fifth Circuit did agree that the evidence of the death threat still created a moderate risk of unfair prejudice; however, the statement had material probative value because it suggested that defendant was conscious of his guilt and wanted to intimidate the principal witness against him; accordingly, the Fifth Circuit could not say that the district court abused its discretion in holding that the material probative value outweighed the risk of unfair prejudice.

(2) Fifth Circuit declined to decide whether admission of photograph of defense witness, with text added that made it arguably resemble a mug shot or a "Wanted" poster, was an abuse of discretion because, even if it was, admission of the exhibit did not affect defendant's substantial rights, given its extremely minor role in defendant's trial.

United States v. Armstrong, 619 F.3d 380 (5th Cir. 2010):

(1) In fraud/money laundering trial arising out of allegedly fraudulent property insurance claims, district court did not reversibly err in admitting the government's summary chart; the Fifth Circuit noted a conflict in Fifth Circuit precedent about whether Fed. R. Evid. 1006 allows the introduction of summaries of any evidence that is already before the jury or whether instead it is limited to summaries of voluminous records that have not been presented in court; nevertheless, the Fifth Circuit did not resolve this conflict in this case because the introduction of the summary chart, even if erroneous, was harmless.

(2) Admission of insurance adjusters' logs did not constitute plain error; the logs themselves qualified for the "business records" exception to the hearsay rule, see Fed. R. Evid. 803(6); there is no requirement that the witness who lays the foundation for a business record be the author of the record or be able to personally attest to its accuracy; moreover, statements within the logs that defendant had called one of the insurance adjusters were not hearsay, because they were not offered for the truth of the matter asserted, see Fed. R. Evid. 801(c); rather, the government offered the evidence to prove that defendant had contacted the insurance companies in regard to particular claims, that is, to prove the identity of the caller.

(3) District court did not abuse its discretion in allowing a postal inspector to testify as a summary witness for the government; here, the evidence had sufficient complexity to justify the use of a summary witness; moreover, nothing in the record suggested that the witness's testimony went beyond summarizing the record, and the witness was subject to extensive cross-examination; finally, even though the district court's instructions did not explicitly address summary testimony, they did warn the jury generally not to take summaries as substantive evidence.

(4) Finally, district court's admission of insurance claim files with colored flags placed on them; although defendant objected that this bolstered the government's case by attempting to convey the preparer's opinion about certain pieces of evidence, any danger of this was obviated by the district court's specific curative instruction that the tabs and their placement was not evidence, but was simply an organizational aid to the government.

United States v. Williams, 620 F.3d 483 (5th Cir. 2010):

(1) In prosecution for being a felon in possession of a firearm, district court did not abuse its discretion in admitting, pursuant to Fed. R. Evid. 404(b), evidence of two of defendant's arrests for firearm possession; here, unlike in United States v. Jones, 484 F.3d 783 (5th Cir. 2007), the government did not solely rely upon a theory of actual possession, but also put forward a theory of constructive possession; as the Fifth Circuit noted in Jones, a constructive-possession case is a classic case for introducing prior instances of gun possession, since the government would otherwise find it extremely difficult to prove that the charged possession was knowing; nor did the unfair prejudicial effect of this evidence substantially outweigh its probative value, so as to preclude admission under Fed. R. Evid. 403.

(2) District court did not abuse its discretion in admitting "Track 8," a recorded jailhouse conversation between defendant and his mother; even assuming that the recording should have been excluded under Fed. R. Evid. 403, there was not a reasonable possibility that the error contributed to defendant's conviction, and so any error was harmless.

United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010) In drug prosecution, although district court committed no error in admitting some background-type testimony from the DEA case agent, it plainly erred in admitting other testimony that crossed over the line into impermissible drug-courier-profile evidence or impermissible evidence on the ultimate issue of knowledge; however, these errors did not require reversal on plain-error review because the defendant failed to show a reasonable probability of a different outcome at trial but for the erroneously admitted evidence.

United States v. Jefferson, 623 F.3d 227 (5th Cir. 2010) In RICO conspiracy trial, district court erred in excluding evidence of defendant's prior convictions for bribery and obstruction of justice for purposes of impeaching the defendant's testimony; these offenses were ones involving dishonesty or false statement, and thus were proper fodder for impeachment pursuant to Fed. R. Evid. 609(a)(2); moreover, the district court had no discretion to exclude these convictions because Rule 609(a)(2) required their admission; accordingly, the Fifth Circuit vacated the district court's order prohibiting impeachment with these convictions.

United States v. Templeton, 624 F.3d 215 (5th Cir. 2010) In prosecution for (1) using a firearm and committing murder during and in relation to a drug trafficking crime and (2) possession of cocaine with intent to distribute, district court did not abuse its discretion in admitting, under Fed. R. Evid. 404(b), evidence that defendant had previously sold large amounts of crack cocaine and that

defendant had previously been arrested for possession of nine ounces of cocaine; even though defendant offered to stipulate as to intent to distribute, the evidence was admissible not just to show intent, but also knowledge plus the motive for the decedent's murder; United States v. Yeagin, 927 F.2d 798 (5th Cir. 1991) (finding reversible error in the admission of evidence after an offer to stipulate was refused) was distinguishable because the evidence there went only to intent, to which defendant offered to stipulate, and, additionally, the admitted evidence in that case was far less relevant and far more prejudicial.

United States v. McNealy, 625 F.3d 858 (5th Cir. 2010) In prosecution for possession and receipt of child pornography, district court did not err in admitting images of putative child pornography retrieved from defendant's computer, notwithstanding the fact that no expert testified that these were unaltered images of actual minors actually engaged in the conduct depicted; the Fifth Circuit has held (as have other circuits) that the question of whether images depict actual minors may be decided by lay jurors (or judges) without the need for such expert testimony; this case law compelled the conclusion that there was no authentication problem barring admission of the images, especially in the absence of any evidence that the images were not of actual children or any evidence that the state of technology is such that the images could have been of merely "virtual" children.

United States v. Morin, 627 F.3d 985 (5th Cir. 2010) In drug prosecution, although district court committed no error in admitting some background-type testimony from testifying Border Patrol and DEA agents, it plainly erred in admitting other testimony that crossed over the line into impermissible drug-courier-profile evidence or impermissible evidence on the ultimate issue of knowledge; however, these errors did not require reversal on plain-error review because the defendant failed to show a reasonable probability of a different outcome at trial but for the erroneously admitted evidence; the Fifth Circuit, however, "again 'pause[d] to caution that it is time for our able trial judges to rein in this practice' of permitting prosecutors to rely on opinion testimony that is unacceptable profile evidence."

United States v. Isiwele, 635 F.3d 196 (5th Cir. 2011) In healthcare fraud trial, district court erred in excluding, on grounds of insufficient authentication, three documents offered as prior inconsistent statements of three different witnesses; because each of the three witnesses identified his or her signature on the document, there was sufficient authentication; the fact that the witnesses disavowed the contents went to the weight of the evidence, not to its admissibility; nevertheless, the exclusion of the documents – which were offered only for impeachment of the three witnesses, not as substantive evidence – was harmless in light of the other evidence presented at trial.

United States v. Diaz, 637 F.3d 592 (5th Cir. 2011) In drug case, district court did not abuse its discretion by permitting a government agent to testify that defendant was at the scene of the drug transaction "as a lookout"; this was not a forbidden expert opinion on defendant's mental state in violation of Fed. R. Evid. 704(b), but rather was permissible lay opinion testimony based on personal perception and common-sense interpretation of defendant's behavior, and not resting on scientific, technical, or specialized knowledge; in any event, even if there were some error, it was harmless.

United States v. Ned, 637 F.3d 562 (5th Cir. 2011) District court did not abuse its discretion in admitting defendant's girlfriend told her, "Go to the front door."; this was non-assertive oral conduct that simply was not hearsay; nor did district court abuse its discretion by admitting his Auto Zone card into evidence because there was a sufficient predicate laid to admit this under the business-records exception to the hearsay rule; there is no requirement that the witness who lays the foundation for the admission of a record under the business-records exception be the author of the record or be able to personally attest to its accuracy; rather, a qualified witness is one who can explain the record-keeping system of the organization and vouch that the requirements of the business-records exception are met; nor was the Auto Zone card more unfairly prejudicial than probative; finally, objection that jailhouse snitch, to whom defendant allegedly confessed, had given speculative testimony unfounded on personal knowledge was without merit, as he later established the basis for his knowledge; in any event, any error was harmless because cumulative of other, properly admitted evidence.

United States v. Flores, 640 F.3d 638 (5th Cir. 2011) In drug case, district court did not abuse its discretion in admitting evidence of a drug lab at defendant's house at an earlier time; the evidence was not extrinsic evidence governed by Fed. R. Evid. 404(b), but rather was evidence "intrinsic" to the crime charged, because it was inextricably intertwined with evidence about the charged crime; with respect to an earlier controlled buy, even if there were some error, that error was harmless in light of the other evidence of guilt.

United States v. Olguin, 643 F.3d 384 (5th Cir. 2011) District court did not abuse its discretion in admitting phone records offered by the government against the defendant; although defendant claimed a lack of notice in violation of Fed. R. Evid. 902(11), the records themselves were provided to defense counsel six months before trial, along with an affidavit, and the government provided the defense with written notice that it intended to introduce the phone records; this was sufficient time to allow the records to be vetted for objection or impeachment in advance, which is the purpose of the notice requirement.

United States v. Potts, 644 F.3d 233 (5th Cir. 2011) Because the Fifth Circuit has never conclusively established whether evidence of a defendant's pre-arrest/pre-Miranda silence, in the face of police questioning, violates the Fifth Amendment, any error in the admission of such evidence was not "plain," and hence did not require reversal on plain-error review.

United States v. Girod, 646 F.3d 304 (5th Cir. 2011) In healthcare fraud prosecution, evidence that one defendant provided alcoholic beverages and marijuana to two of defendant's company's clients was not "intrinsic" to defendant's charges, but rather was "extrinsic" evidence subject to the strictures of Fed. R. Evid. 404(b); the Fifth Circuit also expressed "skeptical[ism]" that this evidence would pass a Fed. R. Evid. 403 inquiry; nevertheless, any error in the admission of this evidence was harmless.

C. Cross-Examination/Confrontation/Compulsory Process

Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143 (2011) (decision below: People v. Bryant, 768 N.W.2d 65 (Mich. 2009)) Wounded shooting victim’s statements to police, in which victim identified and described shooter and gave location of shooting, were not “testimonial” statements – and hence their admission at defendant’s trial for the murder of the victim did not violate the Confrontation Clause – because their primary purpose was to enable police assistance to meet an ongoing emergency; the Court began by noting that the “primary purpose” inquiry was objective, not subjective; moreover, the statements and actions of both the declarant and the interrogators can provide objective evidence of the interrogation’s primary purpose; here, the circumstances of the encounter as well as the statements and actions of the victim and the police objectively indicated that the interrogation’s primary purpose was to enable police assistance to meet an ongoing emergency, not to establish or prove past events potentially relevant to later criminal prosecution. (Justice Thomas filed an opinion concurring in the judgment, in which he espoused his different view of what makes a statement “testimonial.” Justice Scalia and Justice Ginsburg filed dissenting opinions.)

Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011) (decision below: State v. Bullcoming, 226 P.3d 1 (N.M. 2010)) In New Mexico state prosecution for driving while intoxicated, defendant’s Confrontation Clause rights were violated when the prosecution was permitted to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the particular laboratory analysis described in the statements. (Justice Ginsburg wrote the opinion for the Court, except for Part IV, which Justices Thomas, Sotomayor, and Kagan did not join, and footnote 6, which Justice Thomas did not join. Justice Sotomayor filed an opinion concurring in the judgment. Justice Kennedy filed a dissenting opinion, in which he was joined by the Chief Justice and Justices Breyer and Alito.)

Williams v. Illinois, cert. granted, ___ U.S. ___, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505) (granting cert. to People v. Williams, 939 N.E.2d 268 (Ill. 2010)) Does an Illinois state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violate the Confrontation Clause?

United States v. Templeton, 624 F.3d 215 (5th Cir. 2010) In prosecution for (1) using a firearm and committing murder during and in relation to a drug trafficking crime and (2) possession of cocaine with intent to distribute, district court did not abridge defendant’s Confrontation Clause rights or otherwise err by preventing defense counsel from cross-examining a witness (defendant’s sister) about abuse allegedly inflicted upon her by her husband; although the defense alleged that the sister had been coerced or intimidated by her husband into testifying against her brother (the defendant), questioning of the sister outside the presence of the jury failed to substantiate this theory of bias, and the defense failed to present any other evidence to substantiate this theory.

United States v. Wilcox, 631 F.3d 740 (5th Cir. 2011) In case involving kidnapping of children, district court did not improperly abridge defendant’s right to cross-examine one of the child victims when the court simply told defense counsel to “move on” from questioning about a point

peripheral to the charges for which defendant was on trial; moreover, any error was harmless beyond a reasonable doubt, given the insignificance of the point on which further cross-examination was sought.

United States v. McCullough, 631 F.3d 783 (5th Cir. 2011) In case where prison inmate and others were charged with solicitation of the murder-for-hire of a state prosecutor, district court did not abridge defendants' right to cross-examine the fellow prisoner/informant who was purporting to help find a hired killer for the defendants but who was in truth cooperating with the FBI; defendants were allowed to question the informant about numerous issues that implicated both his motivation to lie and his previous history of dishonest and untruthful behavior, including admissions of lying in court and to an FBI agent, several frivolous and harassing filings against federal prosecutors, the government's offer to try to reduce his sentence in exchange for his cooperation in this case, and basic information about his prior convictions; the excluded areas of inquiry – namely, (1) the particulars of the informant's prior armed robbery offense and (2) a previous filing by a government prosecutor in the armed robbery case concerning instances of informant's untruthfulness – were (1) properly excludable under Fed. R. Evid. 403 and (2) properly excludable as cumulative, respectively. (Judge Wiener concurred in the judgment only.)

United States v. Jackson, 636 F.3d 687 (5th Cir. 2011) (on grant of reh'g to 625 F.3d 875 (5th Cir. 2010)) District court violated defendant's rights under the Confrontation Clause by admitting into evidence notebook ledgers received from a co-conspirator during a proffer session, and an investigating officer's testimony pertaining thereto, both of which were used to show the amount of cocaine the co-conspirator distributed to defendant; the notebook ledgers fell outside the business-records and co-conspirator-statement exceptions to the right of confrontation recognized in Crawford v. Washington, 541 U.S. 36 (2004), and hence were "testimonial"; the notebooks ledgers were not properly authenticated as business records because the agent through whom they were introduced offered no testimony as to who had prepared the ledgers and entries, and under what circumstances; there was no evidence that they were kept in the regular course of a drug-trafficking enterprise; for similar reasons, the notebook ledgers were not sufficiently authenticated so as to render them admissible under the co-conspirator-statement exception; accordingly, the district court erred in admitting them; furthermore, this error was not harmless beyond a reasonable doubt; given the government's reliance on the notebooks in its closing argument, the government could not show that the notebooks did not contribute to the conviction; accordingly, the Fifth Circuit vacated the conviction and remanded for further appropriate proceedings, including an opportunity for a new trial.

United States v. Diaz, 637 F.3d 592 (5th Cir. 2011) In drug case, district court did not impermissibly infringe upon defendant's right to confrontation by barring him from questioning government agent about defendant's status as an illegal immigrant or his employment at an auto sales business close to where the drug deal at issue occurred; these rulings did not bar inquiries into witness credibility or reliability, the issues that are the touchstone of the cross-examination rights protected by the Confrontation Clause; although defendant's immigration status might have been relevant to provide an alternative explanation for his perceived actions (namely, that he had a reason to be

looking out for law enforcement because of fear of arrest or deportation), the restriction on questioning on this subject likewise was not, under the circumstances of this case, an abuse of discretion.

United States v. Olguin, 643 F.3d 384 (5th Cir. 2011) District court did not violate one defendant's Confrontation Clause rights by admitting phone calls and transcripts of phone calls; the phone calls did not even implicate the defendant who complained about their admission, and a defendant's confrontation right is triggered only by a witness testifying against *him*; additionally, the calls qualified as co-conspirator statements, which are not "testimonial" for purposes of the Sixth Amendment; moreover, the speakers' identities were sufficiently authenticated; finally, any error in the admission of these calls and transcripts was harmless vis-à-vis the complaining defendant, since the calls did not implicate him.

D. Prosecutorial/Judicial Misconduct

United States v. McCann, 613 F.3d 486 (5th Cir. 2010) In felon-in-possession trial, prosecutor's remark (made in the first part of the government's closing argument) that the testifying officers would put their careers on the line if they lied in order to convict the innocent was not improper; in contrast to other cases where this type of remark was found to be problematic, here the prosecutor had actually elicited testimony from a police officer on redirect about the consequences he would face if he were found to have lied on the stand to convict someone; the prosecutor's remark, therefore, was merely restating evidence of record; however, it was improper for the prosecutor, in the rebuttal portion of the government's closing argument, to make a largely emotional appeal to the jury to credit the arresting officers' testimony because they were police officers with a hard job to do; nevertheless, this improper remark did not affect the defendant's substantial rights, given that the prosecutorial misconduct was balanced against a significant counterweight of improper defense argument that at least partially prompted the prosecutor's argument.

United States v. Bohuchot, 625 F.3d 892 (5th Cir. 2010) Even if prosecutor's comments during closing argument could be construed as an impermissible comment on one defendant's failure to testify (and the Fifth Circuit suggested that this was questionable, as the government's innocent explanation of the statements was "plausible"), the comments nevertheless did not require reversal on plain-error review, because they were not sufficiently prejudicial to cast serious doubt on the correctness of the jury's verdict, especially given the district court's cautionary instruction to draw no inference from a defendant's failure to testify.

United States v. Morin, 627 F.3d 985 (5th Cir. 2010) In drug prosecution, it was improper for prosecutor to ask defendant, on cross-examination at trial, "Do you know or do you call other drug dealers?" because there was no factual predicate laid that defendant had made other calls to drug dealers; however, when viewed in the context of the proceedings as a whole and the totality of the evidence arrayed against defendant at trial, this isolated question did not affect the jury's verdict and hence did not require reversal on plain-error review.

United States v. Raney, 633 F.3d 385 (5th Cir. 2011) In felon-in-possession case, although the Fifth Circuit reversed on the ground that the district court had erroneously denied defendant's motion to suppress, the Fifth Circuit also (1) commented on several improper remarks made by the prosecutor during closing argument, and (2) noted that if the government continued to make these types of remarks and arguments, the court might need to reconsider its jurisprudence on curative instructions and plain error in this context. (Judge Benavides dissented from the reversal of the district court's order denying suppression, finding sufficient evidence of a traffic violation; but he believed that the panel should reach the issue of whether the improper prosecutorial arguments constituted reversible error.)

United States v. Aguilar, 645 F.3d 319 (5th Cir. 2011) On appeal of ambulance driver's convictions for conspiracy to possess, and possession of, marijuana found in a hidden compartment in the ambulance, the Fifth Circuit found that prosecutor's closing argument crossed the line from permissible response on the issue of the agents' lack of motive to lie into an impermissible emotional appeal to believe the agents simply because of their status as agents; the error was plain as the argument was clearly impermissible under existing precedent; moreover, even on plain-error review, the improper argument merited reversal of defendant's convictions, given that credibility – and particularly, the content of an alleged statement by defendant – was central to the case; accordingly, the Fifth Circuit vacated the convictions and remanded for a new trial.

United States v. Girod, 646 F.3d 304 (5th Cir. 2011) In healthcare fraud prosecution, government did not impermissibly intimidate defense witnesses from testifying so as to require dismissal of the indictment; although two defense witnesses did subsequently decline to testify after being visited by government agents, the government had a right to talk to these witnesses, and the agents engaged in no behavior constituting a substantial interference with the witnesses' free choice to decide for themselves whether they wished to testify for the defense; nor did the government impermissibly impede defense access to a prosecution witness.

E. Jury Instructions

United States v. Armstrong, 619 F.3d 380 (5th Cir. 2010) In fraud/money laundering case with a conspiracy charge, there was no error in failing to include, in the part of the jury instructions dealing with conspiracy, the elements of the object offense of mail fraud, where these elements were given elsewhere in the jury instructions in connection with the substantive mail fraud charge; the same was true with regard to the alleged failure to include an element of the object offense in the instructions dealing with conspiracy to engage in monetary transactions with property derived from specified unlawful activity; nor was there any reversible error in the instruction given on vicarious liability under the doctrine of Pinkerton v. United States; the Pinkerton instruction tracked the Fifth Circuit pattern instruction, which the Fifth Circuit has previously held to state the law correctly; finally, although the jury was incorrectly instructed that Pinkerton liability could be applicable to another conspiracy, not just substantive crimes, there was no plain error requiring reversal; the defendants' substantial rights were not affected because the prosecutor made plain in closing argument that Pinkerton liability applies only to substantive crimes.

United States v. Templeton, 624 F.3d 215 (5th Cir. 2010) In prosecution for (1) using a firearm and committing murder during and in relation to a drug trafficking crime and (2) possession of cocaine with intent to distribute, district court did not abuse its discretion by instructing the jury that evidence of flight could reflect a consciousness of guilt; a flight instruction is proper when the evidence supports 4 inferences: (1) the defendant’s conduct constituted flight; (2) the defendant’s flight was the result of consciousness of guilt; (3) the defendant’s guilt related to the crime with which he was charged; and (4) the defendant felt guilty about the crime charged because he, in fact committed the crime; the evidence here supported each of the four inferences; moreover, even if the district court had erred in this regard, any error was harmless in light of the strong evidence of defendant’s guilt.

United States v. Bohuchot, 625 F.3d 892 (5th Cir. 2010):

(1) In prosecution for bribery, conspiracy to commit bribery, and money laundering conspiracy, defendants’ objection to the definition of the “corruptly” element of bribery did not preserve their claim that the indictment was constructively amended by the proof adduced at trial; on plain-error review, it was questionable whether there was clearly or obviously a constructive amendment of the indictment; in any event, neither the third nor the fourth prong of plain-error review was satisfied; it was defendants who first touched upon the areas of evidence that they claimed on appeal should not have been before the jury; moreover, the evidence of bribery was strong, and it was improbable that the jury would have acquitted if only the evidence of which the defendants complained on appeal had been excluded.

(2) Assuming, without deciding, that the jury instructions for the money laundering conspiracy count (a violation of 18 U.S.C. § 1956(h)) incorrectly instructed the jury on the mens rea for that offense, the error was harmless beyond a reasonable doubt because, given the overwhelming evidence, no jury could fail to find the defendants guilty of money laundering conspiracy under the correct standard; a fortiori, there was no plain error (the standard applicable in the absence of an objection to the instructions).

United States v. Wilcox, 631 F.3d 740 (5th Cir. 2011) In a kidnapping case, district court did not plainly err in its response to a jury note asking for guidance about the meaning of the terms “inveigle” and “kidnap”; the district court simply referred the jury back to the original charge, which accurately stated the law (and which the defense had originally requested).

United States v. Wright, 634 F.3d 770 (5th Cir. 2011) Drug defendant – a Louisiana state deputy sheriff – was not entitled to an instruction that, under 21 U.S.C. § 885(d), he was authorized by virtue of his commission as a deputy sheriff to conduct undercover drug operations; defendant was assigned to jailer duties, not to law enforcement activities or the prevention or detection of crime, and this sort of assignment did not automatically authorize defendant to do undercover narcotics operations; to the extent defendant might have been specially authorized to do so, the district court’s general instruction on the public authority defense was sufficient; nor did the district court err in excluding evidence of defendant’s prior participation in investigations, since this was irrelevant to the

question whether he was in this particular instance authorized to possess narcotics in the course of a criminal investigation.

United States v. Ortiz-Mendez, 634 F.3d 837 (5th Cir. 2011) **Agreeing with the Seventh and Tenth Circuits, but disagreeing with the First, Eighth, and Ninth Circuits**, the Fifth Circuit held that the offense of marriage fraud under 8 U.S.C. § 1325(c) does not require the government to prove that the defendant did not intend to establish a life together with his or her spouse; rather, the government need only show that the defendant entered into the marriage with the purpose of evading immigration laws; accordingly, the district court did not abuse its discretion in refusing the defendant's requested instruction on intent (or lack of intent) to establish a life together; nor did the district court abuse its discretion in refusing to instruct the jury not to find the defendant guilty of marriage fraud simply because the putative spouse intended to commit marriage fraud; defendant was sufficiently protected from such an imputation of guilt by the requirement that the jury had to find beyond a reasonable doubt that she "knowingly" entered into the marriage for the purpose of evading immigration laws.

United States v. Rios, 636 F.3d 168 (5th Cir. 2011) In trial for aiding and abetting the transportation of illegal aliens within the United States, district court did not abuse its discretion in refusing to give a "missing witness" instruction with respect to the government's failure to call a co-defendant who pleaded guilty on the morning of trial and invoked his Fifth Amendment privilege against self-incrimination; a district court should not grant a missing witness instruction unless the person who is the subject of that instruction (1) is peculiarly within one party's power to produce, and (2) would provide testimony that would elucidate facts at issue; notwithstanding the fact that the government technically has the power to override the Fifth Amendment privilege by granting immunity, the Fifth Circuit refused to find that the government's failure to grant immunity to a witness who invokes the Fifth Amendment privilege automatically entitles a defendant to a "missing witness" instruction.

United States v. Diaz, 637 F.3d 592 (5th Cir. 2011) In drug case, brief omission of single word from written instructions, which was corrected within minutes of the jurors' retiring to deliberate, did not, especially on plain-error review, require reversal, given the brief period of time in which the jury deliberated under the erroneous instructions and given the content of the instructions taken as a whole.

United States v. Skilling, 638 F.3d 480 (5th Cir. 2011) On remand from the United States Supreme Court, see Skilling v. United States, ___ U.S. ___, 130 S. Ct. 2896 (2010), the Fifth Circuit was tasked with deciding whether the submission of the case to the jury on a flawed "honest-services fraud" theory was harmless error; under Hedgpeth v. Pulido, 555 U.S. 57 (2008), and Neder v. United States, 527 U.S. 1 (1999), an alternative-theory error – *i.e.*, where a jury rendering a general verdict was instructed on alternative theories of guilt, one of which was legally flawed – is harmless if (1) the verdict would have been the same absent the error, because the jury could not rationally acquit on the valid theory, or theories, of guilt, or (2) the jury, in convicting on the invalid theory of guilt, necessarily found facts establishing guilt on a valid theory; the Fifth Circuit repudiated

pre-Pulido precedent applying a more stringent test of harmlessness (the “impossible to tell” harmless-error standard); under the applicable standard, the submission of the erroneous “honest services” theory to the jury did not require reversal of defendant’s conspiracy conviction because there was overwhelming evidence of guilt on the legally valid theory of guilt; because defendant’s challenges to his remaining convictions piggybacked off the claimed error with respect to the conspiracy conviction, it followed that the harmlessness of the error with respect to the conspiracy conviction likewise meant that there was no basis on which to challenge the remaining convictions.

United States v. Simpson, 645 F.3d 300 (5th Cir. 2011) Where noncapital defendant was scheduled to be tried along with a defendant against whom the government was seeking the death penalty, but then that defendant pleaded guilty after the jury had been selected, it did not violate defendant’s Fifth and Sixth Amendment right to be tried by a fair cross-section of the community when defendant was then tried by the death-qualified jury; in such a circumstance, the trial court need not – but of course may – allow a new jury to be selected.

United States v. Thompson, 647 F.3d 180 (5th Cir. 2011) In Hobbs Act extortion prosecution under 18 U.S.C. § 1951, government’s proof at trial did not effect a constructive amendment of the indictment; although the government’s trial proof focused on the obtaining of property from a single individual, as opposed to the indictment, which focused on the obtaining of property from a political entity, this did not rise to the level of a constructive amendment of the indictment; under all the circumstances presented here, the Fifth Circuit did not believe that the jury was permitted to convict defendant upon a factual basis that effectively modified an essential element of the offense charged or on a materially different theory or set of facts than that with which he was charged; to the extent there was a variance short of a constructive amendment, defendant conceded he was not prejudiced thereby, so that did not require reversal either.

F. Jury Deliberations and Verdict/Publicity

G. Other

United States v. Banks, 624 F.3d 261 (5th Cir. 2010) Where (following a limited remand for clarification) it was determined that defendant had proceeded to a bench trial on stipulated facts, the evidence was sufficient to support defendant’s conviction for aggravated identity theft under 18 U.S.C. § 1028A; particularly, the Fifth Circuit noted that in a Memorandum of Agreement attached to the Stipulation of Evidence, defendant had expressly stipulated that the facts in the Stipulation “constitute[d] sufficient evidence for the [c]ourt to find him guilty as charged . . . beyond a reasonable doubt”; because defendant’s agreement on this point foreclosed any challenge to the sufficiency of the evidence, the Fifth Circuit affirmed the judgment of conviction.

United States v. Thomas, 627 F.3d 146 (5th Cir. 2010) District court did not abuse its discretion in denying defendant’s motion for a new trial, or for an evidentiary hearing, on defendant’s allegations that, by withholding information during voir dire, a biased juror sat on his jury; a party seeking a new trial on this basis must demonstrate that a juror failed to answer honestly a material

question on voir dire, and then must further show that a correct response would have provided a valid basis for a challenge for cause; here, defendant failed to show even that the juror lied, much less any actual or implied bias that would have disqualified the juror from service.

United States v. Bishop, 629 F.3d 462 (5th Cir. 2010) Where defendant was convicted of making false statements in tax returns, the district court did not err in denying defendant's motion for a new trial without holding a hearing to examine her ineffective-assistance-of-counsel ("IAC") claims on the merits; although a defendant may raise IAC claims in a motion for a new trial, a post-conviction motion under 28 U.S.C. § 2255 is the preferred vehicle for raising IAC claims; here, in light of the significant factual issues necessary to the IAC claim, it was not an abuse of the district court's discretion to deny the motion for new trial in favor of allowing defendant to raise those issues in § 2255 proceedings; it was within the district court's discretion to decline to prolong its original proceedings to consider matters that would be better raised collaterally.

United States v. Delgado, 631 F.3d 685 (5th Cir. 2011), **reh'g en banc granted**, 646 F.3d 222 (5th Cir. July 7, 2011) (**en banc**) On appeal of convictions for drug charges, the Fifth Circuit sua sponte found the evidence insufficient to support defendant's drug conspiracy charge; accordingly the Fifth Circuit vacated that conviction and its sentence, and ordered that charge dismissed; with respect to defendant's other conviction (for possession of marijuana with intent to distribute), the Fifth Circuit vacated that conviction and sentence, and remanded for a new trial, based on a finding of cumulative error including: (1) improper closing argument by the prosecutor; (2) improper testimony by a government witness; (3) improper submission of a deliberate ignorance instruction to the jury; (4) failure of the district court to instruct the jury that a mere buyer/seller relationship does not establish a conspiracy; (5) failure of the district court to instruct the jury that it could not legally convict the defendant of conspiring only with the government informant, who secretly intended to frustrate the ostensible agreement; and (6) the absence of a complete transcript of defendant's trial (there were some 119 ellipses in the 491-page transcript of the jury selection and 2-day trial). (Judge Clement dissented.)

United States v. McCullough, 631 F.3d 783 (5th Cir. 2011) In case where prison inmate and others were charged with solicitation of the murder-for-hire of a state prosecutor, variance between indictment, which referred to two victims, and proof at trial which showed only a single victim, was not material and did not require reversal, especially on plain-error review. (Judge Wiener concurred in the judgment only.)

United States v. Curtis, 635 F.3d 704 (5th Cir. 2011) A defendant's right to presence imposes two requirements on the exercise of peremptory challenges; first, the defendant must be present for the substantial majority of the jury-selection process; second, the defendant must be present in the courtroom at the moment when the court gives the exercise of peremptory challenges formal effect by reading into the record the list of jurors who were not struck; under this rubric, defendant's right to be present at the jury-selection phase of his trial was not violated; defendant was present during the voir dire questioning and when the peremptory challenges were allotted; he was also present at the lunch recess when the defense's peremptory challenges were submitted and when

the challenges were given formal effect via the impaneling of the jury; he was absent only for a short time before the lunch recess, apparently while his counsel was mulling over the peremptories; this did not constitute error, much less plain error (the standard applicable in the absence of an objection).

United States v. Simpson, 645 F.3d 300 (5th Cir. 2011) Defendant was not entitled to appointment of substitute counsel; even if there was a complete breakdown of communications between defendant and counsel, that breakdown was attributable to the intransigence of the defendant in refusing to talk with counsel, and not to the neglect of defense counsel or the trial court; nor did the appointment of “liaison counsel” – whose role was to try to bridge the communication gap between defendant and his appointed counsel – violate the Sixth Amendment right to counsel; liaison counsel’s role was limited and clearly delineated, and hence was not impermissibly ambiguous or indefinite; the Fifth Circuit also rejected defendant’s claim that liaison counsel had a conflict of interest because he was serving two masters (the court and defendant); the limitations on liaison counsel’s duties were reasonable because defendant was already represented by two capable attorneys.

VII. GUILTY PLEAS

A. Rule 11/Boykin Errors

United States v. Garcia-Paulin, 627 F.3d 127 (5th Cir. 2010) District court committed reversible plain error in finding that there was an adequate factual basis to support defendant’s guilty plea to bringing an alien to the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(i) and 18 U.S.C. § 2; “bringing to the United States” under this statute contemplates that the defendant have actually accompanied the alien, or arranged to have him accompanied, across the border into the United States, or at least lead them to or meet them at the border; defendant did not commit this offense simply by his stipulated conduct of obtaining a fraudulent I-551ADIT immigration stamp for the alien’s Mexican passport and telling the alien that the stamp would not work to accomplish entry at the border, but would allow the alien to work once he had come here illegally on his own power; the error was clear and obvious, it affected defendant’s substantial rights, and the Court of Appeals exercised its discretion on plain-error review to vacate the conviction and remand for further proceedings.

United States v. Oliver, 630 F.3d 397 (5th Cir. 2011) There was no reversible plain error under Fed. R. Crim. P. 11(b)(1)(N) (requiring a district court, when taking a guilty plea, to admonish the defendant about the terms of any plea agreement purporting to waive a defendant’s appellate rights); although the court did not read the appeal waiver to defendant (defendant in fact waived reading of the plea agreement), the district court’s colloquy was sufficient to ensure that defendant understood the terms of the waiver.

B. Breach of Plea Agreement

United States v. Roberts, 624 F.3d 241 (5th Cir. 2010) Where the government had agreed, in its plea agreement with defendant, to a particular base offense level, but the parties had left open that other adjustments might or might not apply, it was a breach of the plea agreement for the government to support the PSR's application of the career offender Guidelines to defendant; the career offender Guidelines were not simply an adjustment to the Guidelines (as to which the government retained its discretion to advocate), but rather resulted in a new base offense level, in contravention of the government's plea-bargain stipulation to a base offense level of 30; the government's conduct was inconsistent with the defendant's reasonable understanding of the plea agreement, and defendant was entitled to specific performance of the agreement; accordingly, the Fifth Circuit vacated defendant's sentence and remanded to the district court for reassignment to a different judge and for resentencing not inconsistent with the Fifth Circuit's opinion. (Judge DeMoss dissented, being of the view that the career offender enhancement was a Guideline *adjustment*, for which the government remained free to advocate.)

United States v. Harper, 643 F.3d 135 (5th Cir. 2011) The government breached its plea agreement with defendant by using defendant's immunized statements to advocate for the presentence report's ("PSR's") Guideline calculation; this use was inconsistent with any reasonable understanding of the plea agreement, and none of the government's proffered justifications for its actions was availing; accordingly, as the defendant requested, the Fifth Circuit vacated the sentence and remanded for resentencing before a different judge.

C. Other

United States v. Oliver, 630 F.3d 397 (5th Cir. 2011) District court did not err in denying defendant's motion to reinstate his right to appeal, which he had given up pursuant to a plea agreement; once a district court has accepted a plea agreement, it generally may not later reject or modify it; moreover, even if defendant's standby counsel erroneously informed defendant about the appeal waiver, that did not supply a basis to nullify the appeal waiver, given that, at the guilty-plea proceeding, the district court ascertained that defendant had read and understood his plea agreement (which included the appeal waiver); finally, the provision of defendant's plea agreement waiving his right to appeal his sentence did not violate United States v. Booker, 543 U.S. 220 (2005); because defendant knowingly and voluntarily waived his right to appeal his sentence, and because the government invoked that waiver on appeal, the Fifth Circuit refused to consider defendant's challenges to his sentence.

VIII. SENTENCING

A. Constitutional Challenges

United States v. Thomas, 627 F.3d 146 (5th Cir. 2010) Defendant's 1,435-month conviction (151 months for conspiracy and bank robbery, and 1,284 months for firearms offenses under 18

U.S.C. § 924(c)(1)) did not constitute cruel and unusual punishment under the Eighth Amendment, because it was not grossly disproportionate to the violent crimes committed.

United States v. Rubio Rubio, 629 F.3d 490 (5th Cir. 2010) District court did not err in assigning criminal history points to defendant's prior uncounseled misdemeanor convictions, notwithstanding defendant's claim that he was improperly denied his Sixth Amendment right to counsel on those convictions; the allocation of the burden of proof on such a claim is dictated by the law of the state where the conviction was sustained, and Texas law (the situs of the relevant convictions) placed the burden on defendant to prove that he did not validly waive his right to counsel during plea negotiations; defendant did not carry that burden here; there was an indication in the record that a waiver of counsel occurred, although the record did not indicate exactly when the waiver occurred; moreover, although defendant testified that he was not offered counsel, a defendant must do more than this when (as in this case) the right to counsel was firmly established in the state.

United States v. Marban-Calderon, 631 F.3d 210 (5th Cir. 2011) Following United States v. Castillo-Estevez, 597 F.3d 238 (5th Cir. 2010), the Fifth Circuit once again held that, after United States v. Booker, 543 U.S. 220 (2005), rendered the Sentencing Guidelines merely advisory, there was no plain ex post facto error in applying the 2008 version of the Sentencing Guidelines even though defendant's conduct was concluded before that version of the Guidelines took effect; under the 2008 Guidelines, there was no error in applying a 16-level "drug trafficking offense" enhancement under USSG § 2L1.2(b)(1)(A)(i) based on defendant's prior Texas conviction for delivery of a controlled substance; although the definition of "drug trafficking offense" was formerly held to exclude "offers to sell" (one method of violating the Texas delivery statute), effective November of 2008, the definition of "drug trafficking offense" was specifically amended to include offers to sell; after that amendment, Texas deliveries are, no matter how committed, qualifying "drug trafficking offenses."

United States v. Hernandez, 633 F.3d 370 (5th Cir. 2011) Defendant's 97-month sentence – an upward departure from the Guideline range of 51 to 63 months – did not violate the Sixth Amendment as applied; it is true that Justice Scalia has, in a number of separate opinions, recognized the possibility that, even under an advisory Guideline scheme, a sentence could violate the Sixth Amendment if it could only be upheld as reasonable based on judge-found facts; that argument is, however, foreclosed by Fifth Circuit precedent; moreover, the Fifth Circuit has repeatedly held that the sentencing court is entitled to find by a preponderance of the evidence all facts relevant to the determination of a sentence below the statutory maximum; finding that the sentence was otherwise procedurally and substantively reasonable, the Fifth Circuit affirmed the sentence.

United States v. Pino Gonzalez, 636 F.3d 157 (5th Cir. 2011) District court did not err in assigning Guideline criminal history points on the basis of defendant's uncounseled 2008 South Carolina misdemeanor conviction for unlawful entry into an enclosed place; under South Carolina law, defendant has the burden of collaterally attacking a prior conviction on the ground that he did not knowingly and intelligently waive his right to the assistance of counsel; especially given the presumption of regularity attaching to the prior South Carolina proceedings, defendant did not carry

his burden; even though the transcript did not reflect that the state court advised defendant of his right to court-appointed counsel at no cost to him, he did not show or even assert that he was *unaware* of this right; moreover, defendant was 34 years old at the time of his plea, and had previously served 7 years for an aggravated assault conviction, on which he had been represented by counsel; accordingly, the waiver of counsel was not constitutionally invalid.

In re Hearst Newspapers, L.L.C. (United States v. Cardenas-Guillen), 641 F.3d 168 (5th Cir. 2011) The district court erred in issuing an order closing the sentencing proceeding of a drug cartel leader without giving the press, and the public, notice and an opportunity to be heard regarding the decision to close the hearing; the press and the public have a First Amendment right of access to sentencing hearing.

United States v. Murray, ___ F.3d ___, 2011 WL 3133105 (5th Cir. July 27, 2011) Following United States v. Castillo-Estevez, 597 F.3d 238 (5th Cir. 2010), the Fifth Circuit once again held that, after United States v. Booker, 543 U.S. 220 (2005), rendered the Sentencing Guidelines merely advisory, there was no plain ex post facto error in applying the November 1, 2001 version of the Sentencing Guidelines even though defendant’s conduct was concluded before that version of the Guidelines took effect.

B. Rule 32/Other Statutory Challenges

Abbott v. United States, ___ U.S. ___, 131 S. Ct. 18 (2010) (decisions below: United States v. Abbott, 574 F.3d 203 (3d Cir. 2009) & United States v. Gould, 329 Fed. Appx. 569 (5th Cir. 2009) (unpublished)) Interpreting the language in 18 U.S.C. § 924(c)(1)(A) providing for a mandatory minimum penalty unless “a greater minimum sentence is . . . provided . . . by any other provision of law,” the Court held that this language means that a defendant is subject to the highest mandatory minimum specified for his conduct in § 924(c), unless another provision of law directed to conduct prescribed by § 924(c) imposes an even greater mandatory minimum; in other words, the language at issue is triggered only when another provision commands a longer term for conduct violating § 924(c), and it does not apply where the defendant is subject to a higher mandatory minimum sentence for other conduct (e.g., a drug mandatory minimum). (Justice Kagan took no part in this decision.)

Pepper v. United States, ___ U.S. ___, 131 S. Ct. 1229 (2011) (decision below: United States v. Pepper, 570 F.3d 958 (8th Cir. 2009)) When a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s postsentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory Sentencing Guidelines range; although 18 U.S.C. § 3742(g)(2) prohibits a district court at resentencing from imposing a sentence outside the Guidelines range except upon a ground it relied upon at the prior sentencing, that provision is unconstitutional and invalid in light of United States v. Booker, 543 U.S. 220 (2005), since the provision requires sentencing courts to treat the Guidelines as mandatory in an entire set of cases; furthermore, although 18 U.S.C. § 3553(a)(5) requires sentencing courts to consider the Guidelines’ policy statements – including the policy statement

forbidding departures for postsentencing rehabilitation – courts may disagree as a policy matter with those policy statements, and here the rationale behind the policy statement is particularly unpersuasive; because the Eighth Circuit erred in categorically precluding the district court from considering evidence of defendant’s postsentencing rehabilitation after his initial sentence was set aside, the Supreme Court vacated the Eighth Circuit’s judgment with respect to the sentence and remanded for resentencing; however, the law-of-the-case doctrine did not require that, on resentencing, defendant be given the same 40% reduction in sentence for substantial assistance that he received from the original sentencing judge; this was so because the Eighth Circuit had, before the resentencing, vacated the entire sentence and remanded for a de novo resentencing, thus wiping the slate clean. (Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justice Alito filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Justice Thomas filed a dissenting opinion. Justice Kagan took no part in the decision.)

McNeill v. United States, ____ U.S. ____, 131 S. Ct. 2218 (2011) (decision below: United States v. McNeill, 598 F.3d 161 (4th Cir. 2010)) A federal sentencing court must determine whether “an offense under State law” is a “serious drug offense” under 18 U.S.C. § 924(e)(2)(A)(ii) of the Armed Career Criminal Act (“ACCA”) by consulting the “maximum term of imprisonment” applicable to a defendant’s prior state drug offense at the time of the defendant’s conviction for that offense; because defendant’s prior drug convictions carried a 10-year statutory maximum at the time they were sustained, they were qualifying “serious drug offenses” notwithstanding the fact that the state had subsequently reduced the statutory maximum to less than the 10-year threshold required by the ACCA.

DePierre v. United States, ____ U.S. ____, 131 S. Ct. 2225 (2011) (decision below: United States v. DePierre, 599 F.3d 25 (1st Cir. 2010)) The term “cocaine base,” as used in 21 U.S.C. § 841(b)(1) means not just “crack cocaine,” but cocaine in its chemically basic form; the fact that the Sentencing Guidelines define “cocaine base” as “crack” is not dispositive; the Court has never held, when interpreting a term in a criminal statute, that deference is warranted to the Sentencing Commission’s definition of the same term in the Guidelines, and this case provides no opportunity for the Court to decide the question of deference, given that the Guidelines do not purport to interpret the statute. (Justice Scalia filed a concurring opinion in which he agreed with the result and the interpretation of the text of the statute, but decried the Court’s examination of legislative history.)

Sykes v. United States, ____ U.S. ____, 131 S. Ct. 2267 (2011) (decision below: United States v. Sykes, 598 F.3d 334 (7th Cir. 2010)) The Indiana felony offense of using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop is a “violent felony” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e); this offense falls within § 924(e)(2)(B)(ii)’s residual clause because, as a categorical matter, it presents a serious potential risk of physical injury to another. (Justice Thomas filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion in which he opined that the ACCA’s residual clause was “a drafting failure” which the Court should “declare [] void for vagueness.” Justice Kagan filed a dissenting opinion, in which she was joined by Justice Ginsburg.)

Tapia v. United States, ____ U.S. ____, 131 S. Ct. 2382 (2011) (decision below: United States v. Tapia, 376 Fed. Appx. 707 (9th Cir. 2010) (unpublished)) Under 18 U.S.C. § 3582(a), a sentencing court may not impose or lengthen a prison term in order to foster a defendant's rehabilitation; moreover, here the sentencing transcript suggested the possibility that defendant's sentence may have been lengthened in light of her rehabilitative needs (particularly, to make her eligible for the Bureau of Prisons' Residential Drug Abuse Program [the 500 Hour Drug Program]); accordingly, the Court vacated the judgment below and remanded for further proceedings consistent with its opinion, including consideration of the effect of defendant's failure to object to the sentence when it was imposed. (Justice Sotomayor filed a concurring opinion, joined by Justice Alito, in which she expressed doubt whether the district judge had in fact lengthened defendant's sentence to promote rehabilitation; nevertheless, because the record was not clear on this point, she concurred in the decision to remand.)

Kawashima v. Holder, cert. granted, ____ U.S. ____, 131 S. Ct. 2900 (May 23, 2011) (No. 10-577) (granting cert. to Kawashima v. Holder, 615 F.3d 1043 (9th Cir. 2010)) Did the Ninth Circuit err in holding (in direct conflict with the Third Circuit) that petitioners' convictions for filing, and abetting and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. § 7206(1) and (2) were "aggravated felonies" involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), thereby rendering petitioners removable?

Setser v. United States, cert. granted, ____ U.S. ____, 131 S. Ct. 2988 (June 13, 2011) (No. 10-7387) (granting cert. to United States v. Setser, 607 F.3d 128 (5th Cir. 2010)) Does a district court have authority to order a federal sentence to run consecutively to an anticipated, but not-yet-imposed, state sentence? Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

United States v. Rains, 615 F.3d 589 (5th Cir. 2010) Agreeing with the majority of a split panel decision in United States v. Nelson, 484 F.3d 257 (4th Cir. 2007), the Fifth Circuit held that defendant's prior conviction for possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) was a "felony drug offense" that could, in conjunction with another prior conviction for a "felony drug offense," properly enhance defendant's sentence up to mandatory life imprisonment without release, pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851; although 18 U.S.C. § 924(c) could also be violated by possession or use of a weapon in connection with a crime of violence as well as a drug trafficking offense, it was proper, under United States v. Curry, 404 F.3d 316 (5th Cir. 2005), to examine the record of conviction to determine that defendant's § 924(c) offense had been tied to drug trafficking, not a crime of violence; the Fifth Circuit expressed disquietude that its decision could be read to support a double enhancement where the same underlying conduct gives rise to both a substantive drug offense and a § 924(c) conviction; although the government professed that it would not pursue a double enhancement under those circumstances, the Fifth Circuit "want[ed] to be clear that it [was] not [its] intention to authorize such a double enhancement."

United States v. Williams, 620 F.3d 483 (5th Cir. 2010) In felon-in-possession case, district court did not plainly err in upwardly varying from a Guideline range of 51 to 63 months, up to a 108-month sentence; even if the district court committed error in considering defendant’s arrest record as a basis for upward variance, the error did not affect defendant’s substantial rights; given the number of other significant, and clearly permissible, grounds on which the district court based its variance, defendant could not show a reasonable probability that his sentence would have been different but for the consideration of his bare arrest record; accordingly, the Fifth Circuit affirmed the sentence.

United States v. Gamboa-Garcia, 620 F.3d 546 (5th Cir. 2010) District court did not err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was deported following an “aggravated felony” conviction; in 2004, defendant pleaded guilty to illegal reentry following an “aggravated felony” conviction, in violation of 8 U.S.C. § 1326(a) and (b)(2), which is itself an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(O); having pleaded guilty to that charge, defendant would not be allowed to relitigate the issue of whether the (b)(2) “aggravated felony” enhancement in that case was correctly applied or not; in the alternative, the Fifth Circuit held that, in any event, the prior conviction on which the 2004 enhancement was predicated – a 2001 Idaho conviction for being an accessory to first-degree murder – was indeed an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(S) (offenses relating to obstruction of justice).

United States v. Schmidt, 623 F.3d 257 (5th Cir. 2010) Defendant’s prior federal conviction for theft of a firearm from a licensed gun dealer, in violation of 18 U.S.C. § 922(u), was one for a “violent felony” within the meaning of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act (“ACCA”); therefore, district court did not err in enhancing defendant’s sentence under the ACCA.

United States v. Gonzalez, 625 F.3d 824 (5th Cir. 2010) Where defendant sought to argue that he was not the person convicted in a 1988 drug conviction that was used to enhance his sentence to mandatory life imprisonment under 21 U.S.C. § 851, defendant’s challenge was not barred by the 5-year time limit contained in 21 U.S.C. § 851(e); that time limit applies only to challenges to the *validity* of the prior conviction; it does not prevent a defendant from arguing that he was not the person who was convicted of the offense; however, on the merits, defendant’s challenge to the enhancement failed because the government carried its burden of proving beyond a reasonable doubt, *see* 21 U.S.C. § 851(c)(1), that defendant was the person convicted in that prior case, notwithstanding the absence of fingerprint exemplars or other physical evidence to that effect.

United States v. Houston, 625 F.3d 871 (5th Cir. 2010) Where defendant received a 25-year sentence under 18 U.S.C. § 924(c) for brandishing a firearm in connection with one Hobbs Act robbery, and a 7-year consecutive sentence under the same statute for brandishing a firearm in connection with *another* Hobbs Act robbery, the 7-year consecutive sentence was not barred by the first clause of § 924(c)(1)(A)(i) (“Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law”); the Fifth Circuit held that the statute’s “greater minimum sentence” exception most reasonably refers only to another, greater sentence for *the same, specific crime* of firearm possession; here, the 25-year sentence and the 7-year sentence were for separate crimes of firearms possession; **the Fifth Circuit noted, but rejected, the**

Second Circuit’s different rule, namely, that the “except” clause applied to conduct arising from the same criminal transaction or set of operative facts as the crime yielding the greater mandatory minimum sentence, see United States v. Parker, 577 F.3d 143, 147 (2d Cir. 2009).

United States v. Echeverria-Gomez, 627 F.3d 971 (5th Cir. 2010) District court did not plainly err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was deported following an “aggravated felony” conviction; defendant’s prior felony conviction for first-degree residential burglary under Cal. Penal Code §§ 459 & 460(a) (i.e., burglary of an inhabited dwelling house) was a “crime of violence” under 18 U.S.C. § 16(b) (and hence an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F)) because it presented a substantial risk that physical force would be used in the course of committing the offense, in the form of a confrontation with the householder.

United States v. Sanchez-Ledezma, 630 F.3d 447 (5th Cir. 2011) District court did not err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was deported following an “aggravated felony” conviction; defendant’s prior felony conviction for evading arrest or detention with a motor vehicle (in violation of Tex. Penal Code § 38.04(b)(1)) was a “crime of violence” under 18 U.S.C. § 16(b) (and hence an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F)) because it presented a substantial risk that physical force would be used in the course of committing the offense, in the form of a confrontation with the officer being disobeyed.

United States v. Doggins, 633 F.3d 379 (5th Cir. 2011) The Fair Sentencing Act of 2010, which lowered the statutory penalties for many crack cocaine offenses, does not apply retroactively to persons sentenced before its enactment date (August 3, 2010), notwithstanding the fact that their cases are still on direct appeal.

United States v. Jasso, 634 F.3d 305 (5th Cir. 2011) Where defendant was subject to a 10-year (120-month) statutory minimum sentence, district court reversibly erred in imposing a 70-month prison sentence; defendant was not eligible for the “safety valve” of 18 U.S.C. § 3553(f) and USSG § 5C1.2 because he had more than one criminal history point (he had two criminal history points); the greater sentencing discretion granted to sentencing courts under United States v. Booker, 543 U.S. 220 (2005), did not permit the district court to treat as advisory the Guideline provisions that are preconditions for the application of *statutory* “safety valve” relief under 18 U.S.C. § 3553(f); because defendant had two criminal history points, the district court had no discretion to do anything other than impose a sentence at or above the statutory minimum; accordingly, the Fifth Circuit vacated defendant’s sentence and remanded for resentencing.

United States v. Gore, 636 F.3d 728 (5th Cir. 2011) Defendant’s prior Texas conviction for conspiracy to commit aggravated robbery was a “violent felony” that qualified defendant for the enhanced penalties of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e); the offense presents a serious potential risk of injury and qualifies under the Residual Clause of the ACCA’s “violent felony” definition in 18 U.S.C. § 924(e)(2)(B)(ii). (Judge Higginbotham joined the panel opinion, but filed a separate opinion specially concurring in the judgment.)

United States v. Rhine, 637 F.3d 525 (5th Cir. 2011) In the original sentencing in this case, the district court calculated defendant’s Guideline imprisonment range as 292 to 365 months and imposed a near-the-top-of-the-Guidelines sentence of 360 months; on remand from the first appeal, the Guidelines dropped to 30 to 37 months as a result of the favorable “relevant conduct” ruling made by the Fifth Circuit in the first appeal, but the district court went significantly upward to impose an aggregate sentence of 180 months; concluding that this sentence was a variance, not a Guideline-based departure, the panel majority affirmed this sentence; finding that it was neither procedurally nor substantively unreasonable. (Judge Dennis filed a lengthy dissenting opinion, opining that, as a variance, the sentence was procedurally unreasonable (as inadequately explained) and substantively unreasonable (because apparently just plucked from the air). He also believed that, even as a departure, the sentence was unsalvageably flawed.)

United States v. Henderson, 646 F.3d 223 (5th Cir. 2011) Defendant’s motion to correct sentence under Fed. R. Crim. P. 35(a) did not preserve for appeal the claimed error in this (i.e., that the district court impermissibly increased defendant’s sentence – from a Guideline range of 33 to 41 months, up to a sentence of 60 months – for rehabilitative purposes, in violation of Tapia v. United States, ___ U.S. ___, 131 S. Ct. 2382 (2011)); a Rule 35 (a) motion cannot preserve an error unless the error is arithmetical, technical, or otherwise clear; because the claimed error here was not clear in the Fifth Circuit at the time of sentencing, the Rule 35(a) motion did not preserve error, so the Fifth Circuit reviewed only for plain error; likewise, because the error was not clear in the Fifth Circuit before Tapia, defendant’s plain-error claim foundered upon the second requirement of plain-error review, namely, the requirement that the error be “plain” at the time of trial.

United States v. Johnson, ___ F.3d ___, 2011 WL 3200287 (5th Cir. 2011) District court erred in imposing a 63-month upward variance sentence (from a Guideline range of 37 to 46 months) in part on the basis of a bare arrest record without any underlying facts of the circumstances prompting the arrests; the Fifth Circuit held that “for a non-Guidelines sentence, just as for a Guidelines sentence, it is error for a district court to consider a defendant’s ‘bare arrest record’ at sentencing”; because the error was preserved, the burden was on the government to convincingly demonstrate that the sentence would have been the same absent the error; because the Fifth Circuit was uncertain whether the district court would have imposed the same sentence absent the arrests, the error was not harmless; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing. (Judge Smith filed a dissenting opinion, in which he contended that the record was clear that the district court had not relied upon the arrests in imposing sentence.)

United States v. Rios-Cortes, ___ F.3d ___, 2011 WL 3370352 (5th Cir. Aug. 5, 2011) Where defendant (1) was originally sentenced, on his theft offense, to two years’ imprisonment, suspended for five years’ probation, (2) violated his probation, had his probation revoked, and was resentenced to 180 days’ imprisonment, and then (3) was deported from the United States, his theft conviction was a qualifying “aggravated felony” under 8 U.S.C. § 1101(a)(43)(G) and USSG § 2L1.2; the original suspended prison sentence exceeded the one-year threshold necessary to make the conviction an “aggravated felony,” and it would be perverse to afford a defendant who violated his probation more favorable treatment than one who did not.

C. (Selected) Guidelines Issues

United States v. Blocker, 612 F.3d 413 (5th Cir. 2010) District court erred in assessing two criminal history points to defendant's Guideline criminal history score pursuant to USSG § 4A1.1(d) (on the ground of an outstanding bench warrant for probation revocation); under USSG § 4A1.2(m) and Application Note 4 to USSG § 4A1.1, a violation warrant of this type is countable under USSG § 4A1.1(d) only if the underlying criminal justice sentence is also countable; here, because the prior sentence was over 21 years old, it was not countable, and thus neither was the active probation revocation bench warrant; although this error raised defendant's Criminal History Category from I to II, and his Guideline imprisonment range from 70-87 months up to 78-97 months, the error did not, on plain-error review, require reversal of defendant's sentence; defendant's sentence of 85 months' imprisonment fell within the correct Guideline range, and defendant did not carry his burden of proving a reasonable probability that the sentence would have been different, given the district court's refusal to depart downward or even to sentence at the bottom of the incorrect range.

United States v. Bustillos-Peña, 612 F.3d 863 (5th Cir. 2010) Where defendant (1) was, in 2001, convicted of delivery of marijuana and sentenced to ten years' probation, (2) was deported to Mexico in 2003 and illegally reentered the same year, and, (3) in 2005, had his probation revoked for the delivery offense and a five-year prison sentence imposed, district court reversibly erred in enhancing defendant's sentence under USSG § 2L1.2(b)(1)(A)(i) for deportation or unlawfully remaining in the United States following a drug trafficking conviction for which the sentence imposed exceeded 13 months' imprisonment; because the Fifth Circuit found that it was ambiguous whether the USSG § 2L1.2(b)(1)(A)(i) enhancement applied where the defendant was deported before being sentenced to more than 13 months' imprisonment on a conviction that predated his deportation, it applied the rule of lenity and held that the revocation sentence did not relate back to the date of the original conviction; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing. (Judge Clement dissented.)

United States v. McCann, 613 F.3d 486 (5th Cir. 2010) District court committed reversible plain error in characterizing, solely on the basis of the presentence report, defendant's prior Louisiana manslaughter conviction as a "crime of violence" warranting an offense-level enhancement under USSG § 2K2.1; Louisiana manslaughter includes offenses that do not fit within § 2K2.1's "crime of violence" definition, since it is possible to be convicted of manslaughter in Louisiana if a death occurred during a non-violent offense like a theft; because (as the government admitted) the documents that could permissibly have been used, under Shepard v. United States, 544 U.S. 13 (2005), to narrow defendant's manslaughter conviction to one that qualified as a "crime of violence" were lost in Hurricane Katrina, the district court would have been compelled to apply a lower offense level had it used the correct procedure at sentencing; moreover, defendant's substantial rights were affected because the correction of the error would lower the Guideline imprisonment range from 92-115 months (defendant received a 100-month sentence) down to 63-78 months; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing (but noted that nothing barred the government from introducing on remand any Shepard-approved documents it might be able to locate, in order to narrow the defendant's prior conviction).

United States v. Ortiz, 613 F.3d 550 (5th Cir. 2010) In the Guideline sentencing calculation for a conviction for possession of marijuana with intent to distribute, district court reversibly erred by including as “relevant conduct” a quantity of cocaine found in a suitcase (belonging to another person) which was found in a condominium leased by the defendant for his girlfriend, and where marijuana was stored; the cocaine was not shown to be part of a “common scheme or plan” with respect to the offense of conviction; nor was the cocaine shown to be part of the “same course of conduct”; because the exclusion of the cocaine produced a lower Guideline range than that under which defendant was sentenced, the Fifth Circuit vacated the sentence and remanded for resentencing, with an additional admonition that the offense of conviction was carrying a 5-year mandatory minimum prison sentence, not a 10-year mandatory minimum.

United States v. Goncalves, 613 F.3d 601 (5th Cir. 2010) District court did not err in refusing to group, pursuant to USSG § 3D1.2, defendant’s convictions for passing counterfeit notes (in violation of 18 U.S.C. § 472) and for using a falsely altered military discharge certificate (in violation of 18 U.S.C. §§ 498 & 2); grouping is not mandatory or automatic simply because a defendant is charged with an offense that falls under a guideline listed in § 3D1.2(d); because the crimes involved different schemes, different objectives, and different victims, and took place at different times, the crimes were not of “the same general type”; furthermore, the offense levels for the two crimes were not “determined largely on the basis of the total amount of harm or loss”; nor was the offense level calculated pursuant to Guidelines “written to cover “behavior [that] is ongoing or continuous in nature”; likewise, the district court did not err in applying, in calculating the Guidelines for the passing-counterfeit-notes conviction, a two-level enhancement under USSG § 2B5.1(b)(5) on the ground that part of the offense occurred outside the United States; the Sentencing Commission did not exceed its authority when it extended this enhancement to convictions under 18 U.S.C. § 472, even though the congressional enactment from which this stemmed required the enhancement only for convictions under 18 U.S.C. § 470; the Commission may enact Guidelines that are not inconsistent with federal law, but which are broader than a congressional directive, when the Commission evinces a clear intent to do so; finally, the district court did not clearly err in finding that part of defendant’s counterfeit-notes offense occurred outside the United States.

United States v. Zapata-Lara, 615 F.3d 388 (5th Cir. 2010) In sentencing defendant for conspiracy to possess cocaine with intent to distribute, district court reversibly erred in applying a two-level enhancement under USSG § 2D1.1(b)(1) for possession of a dangerous weapon; the district court did not make adequate findings to support application of the enhancement to defendant either via the relevant conduct provisions of USSG § 1B1.3 or on a theory of personal possession; accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing, with instructions that, if the district court again applied the enhancement on remand, it should make the appropriate findings and state plainly the basis for its decision.

United States v. Bautista-Montelongo, 618 F.3d 464 (5th Cir. 2010) District court did not reversibly in applying a 2-level enhancement under then-USSG § 2D1.1(b)(2)(B) (now USSG § 2D1.1(b)(2)(C) for being the captain, pilot, or navigator of a boat carrying a controlled substance; following the three other circuits to have addressed the issue, the Fifth Circuit rejected defendant’s argument that this enhancement applies only when a defendant is a professional captain or pilot or

has some higher degree of special skill, such as high seas navigation; special skills, as defined in USSG § 3B1.3, are not required for this enhancement.

United States v. Dowl, 619 F.3d 494 (5th Cir. 2010) Where defendant was prosecuted for fraudulently obtaining government funds to rebuild a home in New Orleans, Louisiana, after Hurricane Katrina, defendant was not entitled to have the Guideline loss amount under USSG § 2B1.1 offset by the \$46,000 paid by the Road Home program to the Small Business Administration (“SBA”) upon the Road Home program’s discovery that defendant had already received SBA funds for the same purpose; the Fifth Circuit held that defendant’s case was different from amounts repaid before a fraud was discovered, or even the money returned to investors in a Ponzi scheme, both of which do result in offsets; defendant did not herself return the funds; moreover, defendant would have received all the funds if the federal government had not discovered the overlap; the Fifth Circuit refused to construe the Guidelines to give credit to defendant for the detection and required repayment of overlapping funds by the government – the defrauded party.

United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010) Two judges (Judges King and Jolly) of a three-judge panel held that defendant – convicted of possession of a firearm (which was a sawed-off shotgun) – was properly sentenced as a “career offender” under USSG § 4B1.1, but all three of the judges wrote separately; Judge Jolly would hold that in determining whether the “instant offense” is a “crime of violence” for purposes of the “career offender” Guideline, a sentencing court is not bound by the elements-based categorical/modified categorical approach of Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005), but rather is specifically authorized to examine the conduct alleged in the indictment; this approach was satisfied here because the indictment to which defendant pleaded guilty specifically charged him with violating 18 U.S.C. § 922(g)(1) by possessing a sawed-off shotgun; Judge King agreed that an elements-based categorical/modified categorical approach was not required, given the Guidelines’ explicit reference to conduct; she declined, however, to rely on defendant’s plea to the indictment as constituting an admission to all the facts contained therein (including the identity of the firearm as a sawed-off shotgun); instead., she would hold that where the “career offender” enhancement turns on the characterization of the “instant offense” rather than that of a prior offense, it is not improper for the sentencing judge to make the critical factual findings in the same way as any other sort of finding at sentencing; Judge Stewart dissented, opining that (1) the categorical/modified categorical approach does apply, and (2) under that approach, there was no cognizable evidentiary basis for the conclusion that the firearm in question was a sawed-off shotgun.

United States v. Johnson, 619 F.3d 469 (5th Cir. 2010) In sentencing defendant convicted of bank robbery under 18 U.S.C. § 2113(a), district court did not err in applying a 4-level enhancement under USSG § 2B3.1(b)(4)(A) for abduction of a victim; even though the victim (a teller) was not made to enter or exit a building, defendant did (1) force teller from behind her counter to the front of the bank, (2) force her back to her drawer for a key to the back door, and (3) force her to accompany him to the rear door to unlock it for him, facilitating his escape.

United States v. Gamboa-Garcia, 620 F.3d 546 (5th Cir. 2010) District court did not err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was

deported following an “aggravated felony” conviction; in 2004, defendant pleaded guilty to illegal reentry following an “aggravated felony” conviction, in violation of 8 U.S.C. § 1326(a) and (b)(2), which is itself an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(O); having pleaded guilty to that charge, defendant would not be allowed to relitigate the issue of whether the (b)(2) “aggravated felony” enhancement in that case was correctly applied or not; in the alternative, the Fifth Circuit held that, in any event, the prior conviction on which the 2004 enhancement was predicated – a 2001 Idaho conviction for being an accessory to first-degree murder – was indeed an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(S) (offenses relating to obstruction of justice).

United States v. Ruiz, 621 F.3d 390 (5th Cir. 2010) In sentencing former Customs and Border Protection agent for bribery of a public official, district court did not err in cross-referencing, pursuant to USSG § 2C1.1(c), to the drug guidelines, on the ground that he facilitated the offense of conspiracy to possess cocaine with intent to distribute; nor did the district court err in enhancing the offense level by 2 levels pursuant to USSG § 2D1.1(b)(1) for possessing a weapon in connection with the offense, where defendant carried his official sidearm while participating in the crime; finally, there was no error in declining to award defendant a 2-level “safety valve” reduction under USSG §§ 2D1.1(b)(11) and 5C1.2(a)(1)-(5); defendant was ineligible for the “safety valve” because he had possessed a firearm during his offense.

United States v. Flores-Gallo, 625 F.3d 819 (5th Cir. 2010) District court did not err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii); defendant’s prior Kansas state conviction for aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(1)(B), was one for a qualifying “crime of violence,” because the offense has as an element at least the threatened use of physical force.

United States v. Mata, 624 F.3d 170 (5th Cir. 2010) In alien transporting case, district court did not err in applying the reckless-endangerment enhancement of USSG § 2L1.1(b)(6); the enhancement was supported by the district court’s findings (1) that a baby stroller, under which the alien was hidden, would impede their ability to exit the vehicle quickly in case of an accident and (2) that the stroller could cause serious injury to the alien in the event of an accident, and those findings were not clearly erroneous; nor did the district court err by applying the use-of-a-minor enhancement under USSG § 3B1.4; a defendant who makes a decision to bring a minor along during the commission of a previously planned crime as a diversionary tactic or in an effort to reduce suspicion is subject to this enhancement; not every defendant who brings a minor child along while smuggling drugs or aliens will be subject to this enhancement, and the district court should consider additional circumstantial evidence to determine whether the defendant used the minor to avoid detection; here, the district court’s findings, none of which was clearly erroneous, supported its determination that the minor in this case had been brought along to avoid detection.

United States v. Nava, 624 F.3d 226 (5th Cir. 2010) District court did not clearly err in finding that defendant was a manager or supervisor within the drug conspiracy of which he was convicted, so as to warrant a 3-level enhancement under USSG § 3B1.1(b).

United States v. Mendez-Casarez, 624 F.3d 233 (5th Cir. 2010) Where Application Note 5 to USSG § 2L1.2 provides that the list of qualifying enhancement predicate offenses “include[s] the offenses of aiding and abetting, conspiring, and attempting” to commit such offenses, that list does not constitute an exclusive list; therefore, other offenses may be comprehended within Application Note 5, provided that they are sufficiently similar to the listed offenses; the Fifth Circuit then determined that solicitation under North Carolina law was sufficiently similar to the listed offenses to as to fall within the ambit of Application Note 5; accordingly, defendant’s North Carolina law for solicitation to commit assault with a deadly weapon inflicting seriously bodily injury was properly countable as a “crime of violence” for purposes of USSG § 2L1.2(b)(1)(A)(ii).

United States v. Martinez Garcia, 625 F.3d 196 (5th Cir. 2010) District court did not err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii); defendant’s prior Georgia state conviction for burglary, in violation of Ga. Code Ann. § 16-7-1(a), was one for the enumerated “crime of violence” of “burglary of a dwelling.”

United States v. Cashaw, 625 F.3d 271 (5th Cir. 2010) District court did not err in denying minor-role adjustment, under USSG § 3B1.2, to defendant sentenced as a “career offender” under the Guidelines; the only Chapter Three adjustment permitted for career offenders is the adjustment for acceptance of responsibility under USSG § 3E1.1; thus, career offenders are categorically ineligible for mitigating role reductions under USSG § 3B1.2.

United States v. Cruz-Rodriguez, 625 F.3d 274 (5th Cir. 2010) District court did not err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii); although defendant’s prior California state conviction for making criminal threats (in violation of Calif. Penal Code § 422) was not a qualifying “crime of violence” conviction, defendant’s prior California state conviction for willful infliction of corporal injury (in violation of Calif. Penal Code § 273.5) *was* a qualifying “crime of violence” under § 2L1.2’s residual “crime of violence” definition.

United States v. Bohuchot, 625 F.3d 892 (5th Cir. 2010) In bribery case, district court erred in calculating the value of the bribe for purposes of USSG § 2C1.1; particularly, it was error to ascribe to defendant a portion of the value of two yachts he was permitted to use when he had no ownership interest in those yachts; however, the error was harmless because, including the fair rental value of comparable yachts as part of the value of the bribe to the defendant, the same 14-level Guideline enhancement would have applied, and thus the Guideline range would have been unchanged.

United States v. Marquez, 626 F.3d 214 (5th Cir. 2010) Defendant’s prior conviction for possession of a deadly weapon by a prisoner (in violation of N.M. Stat. Ann. § 30-22-16) was one for a “crime of violence” under the “residual clause” of USSG § 4B1.2(a)(2); therefore, defendant was properly treated as a “career offender” under the Sentencing Guidelines. (Judge Dennis filed a dissenting opinion.)

United States v. Juarez, 626 F.3d 246 (5th Cir. 2010) District court did not clearly err in applying a 4-level increase under USSG § 2K2.1(b)(5) (for “engag[ing] in the trafficking of

firearms”); there was considerable evidence from which the district court could infer that defendant knew, or had reason to believe, that her conduct would result in the transport, transfer, or disposal of a firearm to a person who intended to use or dispose of the firearm unlawfully; nor did the district court err in apply a 4-level increase under USSG § 2K2.1(b)(6) (for knowledge, or constructive knowledge, that the firearm “would be used or possessed in connection with another felony offense”); first, the district court did not plainly err in concluding that another firearms possession or trafficking offense (here, the illegal transportation or smuggling of guns into Mexico) could constitute “another felony offense” under this Guideline; amendments to the Guidelines make clear that another firearms offense may be the “another felony offense” if, as here, that other offense is not the one that serves as the basis for the defendant’s instant federal conviction; finally, the district court did not clearly err in concluding that defendant knew or should have known that the guns would be used or possessed in connection with the offense of smuggling guns into Mexico.

United States v. Echeverria-Gomez, 627 F.3d 971 (5th Cir. 2010) District court did not plainly err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was deported following an “aggravated felony” conviction; defendant’s prior felony conviction for first-degree residential burglary under Cal. Penal Code §§ 459 & 460(a) (i.e., burglary of an inhabited dwelling house) was a “crime of violence” under 18 U.S.C. § 16(b) (and hence an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F)) because it presented a substantial risk that physical force would be used in the course of committing the offense, in the form of a confrontation with the householder.

United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2010) In sentencing defendant, the district court erred in applying an 8-level “aggravated felony” enhancement under USSG § 2L1.2(b)(1)(C), rather than merely a 4-level “felony” enhancement under USSG § 2L1.2(b)(1)(D), because defendant’s conviction for delivery could have been based on an offer to sell; the correct Guideline range was therefore 6 to 12 months, not 12 to 18 months; moreover, this error was not harmless, even though the district court ultimately imposed a 36-month sentence based on defendant’s prior murder conviction, which the district court believed had been sentenced too leniently; a preserved error in the calculation of the Guidelines is harmless only if the government shows (1) the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing; because the government did not clear this high hurdle in this case, the Fifth Circuit vacated defendant’s sentence and remanded for resentencing.

United States v. Olalde-Hernandez, 630 F.3d 372 (5th Cir. 2011) District court did not err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii); defendant’s prior Georgia state conviction for child molestation (in violation of Ga. Code § 16-6-4(a)) was one for the enumerated “crime of violence” of “sexual abuse of a minor.”

United States v. Rodriguez, 630 F.3d 377 (5th Cir. 2011) In alien transporting case, district court reversibly erred in enhancing defendant’s Guideline offense level under USSG § 2L1.1(b)(6) for “intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person”; on this record, the Fifth Circuit could not conclude that defendant created a substantial risk

of death or serious bodily injury either by transporting 3 aliens in the cargo area of an SUV or by making a U-turn across the highway (the 2 reasons relied upon by the district court); accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Sanchez-Ledezma, 630 F.3d 447 (5th Cir. 2011) District court did not err in applying an 8-level enhancement under USSG § 2L1.2(b)(1)(C) on the ground that defendant was deported following an “aggravated felony” conviction; defendant’s prior felony conviction for evading arrest or detention with a motor vehicle (in violation of Tex. Penal Code § 38.04(b)(1)) was a “crime of violence” under 18 U.S.C. § 16(b) (and hence an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F)) because it presented a substantial risk that physical force would be used in the course of committing the offense, in the form of a confrontation with the officer being disobeyed.

United States v. Rodriguez-Juarez, 631 F.3d 192 (5th Cir. 2011) Although, under prior Fifth Circuit precedent, a sex offense committed with assent that did not amount to legally valid consent was not a “forcible sex offense” under USSG § 2L1.2, that precedent was abrogated by the November 1, 2008 amendment to USSG § 2L1.2 which explicitly provided that “forcible sex offenses” included ones where the consent to the conduct was not legally valid; this amendment was specifically meant to abrogate cases like the Fifth Circuit’s where courts had excluded offenses where there was assent in fact, but no legally valid consent; because this amendment scuttled defendant’s challenge to the 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii), and because defendant had no other nonfrivolous challenge on appeal, the Fifth Circuit granted defense counsel’s motion to withdraw under Anders v. California, 386 U.S. 738 (1967).

United States v. Wilcox, 631 F.3d 740 (5th Cir. 2011) In case involving kidnapping of children, district court did not err in applying a “vulnerable victim” enhancement under USSG § 3A1.1(b) of the Sentencing Guidelines based on the age and modest economic circumstances of the child victims; the young ages of the victims (8, 12, and 14) stunted their ability to thwart defendant’s plot; moreover, the evidence showed that defendant in fact targeted his victims based on their susceptibility due to their financial position; the victims’ families straitened financial circumstances made them unusually vulnerable to someone, like defendant, who was willing to spend money on them.

United States v. Dickson, 632 F.3d 186 (5th Cir. 2011) Where defendant was convicted of one count of possession of child pornography and one count of production of child pornography, the district court plainly erred in calculating the Guidelines when it failed to compute the total offense level for each offense and then apply the Guidelines’ grouping rules; the district court instead applied the base offense level for **production** and then applied an enhancement for sadistic or masochistic images that applied only to the **possession** offense; moreover, the error resulted in a Guidelines range of 360 months to life, rather than the correct range of 235 to 293 months; nevertheless, while the lack of an overlap usually means that a defendant’s substantial rights were affected by a Guidelines calculation error, that was not true here; the district court’s purposeful selection of the statutory maximum sentence of 840 months (240 months on the possession count and a consecutive 600-month sentence on the production count), for the stated purpose of incapacitating defendant from further crimes against children for the rest of his life, indicated that there was not a reasonable probability that

defendant would receive a lower sentence but for the error; moreover, the sadomasochistic content of the photos underlying the possession count could have been considered by the district court in imposing sentence, albeit not in the particular way the district court did here.

United States v. Hernandez-Galvan, 632 F.3d 192 (5th Cir. 2011) For purposes of USSG § 2L1.2 – which provides for a 16-level enhancement for, *inter alia*, “attempt[s]” to commit a qualifying “crime of violence,” *see* USSG § 2L1.2, comment. (n.5) – the applicable definition of attempt is the “generic,contemporary” meaning of attempt, which, the Fifth Circuit held, is the “substantial step” definition found in the Model Penal Code and utilized by the Fifth Circuit for federal crimes; even if there is arguably a theoretical distinction between this definition of attempt and that used by North Carolina, however, defendant failed to show a “realistic probability” – *i.e.*, a real case demonstrating – that North Carolina applies attempt liability more broadly than the “generic, contemporary” concept of attempt; without such a showing, the applicable attempt definitions were too similar to support defendant’s argument that his North Carolina attempted robbery conviction should not count under Application Note 5 to USSG § 2L1.2.

United States v. O’Connor, 632 F.3d 894 (5th Cir. 2011) Felon-in-possession defendant’s Louisiana conviction for unauthorized entry of an inhabited dwelling was a “crime of violence” under USSG § 4B1.2 and hence warranted a sentence enhancement under USSG § 2K2.1; although the Louisiana crime did not require that the unauthorized entry have been made for the purpose of committing a felony or theft within (and hence was not generic, contemporary “burglary of a dwelling”), it was still a “crime of violence” under the residual definition of USSG § 4B1.2(a)(2), because it was intentional and purposeful, and roughly similar, in kind as well as in degree of risk posed, to generic “burglary of a dwelling”; because the district court erred in refusing to treat this conviction as a “crime of violence,” the Fifth Circuit vacated the sentence and remanded for resentencing.

United States v. Hernandez, 634 F.3d 317 (5th Cir. 2011) Defendant’s prior Texas state misdemeanor conviction for “obstructing a highway or other passageway” was not excludable from defendant’s Guideline criminal history calculation under USSG § 4A1.2(c)(2), because it was not similar to the listed offense of loitering.

United States v. Gutierrez, 635 F.3d 148 (5th Cir. 2011) In sentencing defendant on his conviction for escape from a halfway house, district court did not reversibly err in varying upward from a Guideline imprisonment range of 15 to 21 months up to a sentence of 50 months’ imprisonment; the district court was not required to consider a departure under USSG § 4A1.3 (for underrepresentation of criminal history) prior to varying upward based on criminal history [EDITOR’S NOTE: This holding seems contrary to USSG § 1B1.1 (Application Instructions), as amended by Amendment 741 (Nov. 1, 2010), not mentioned by the court in the opinion.]; because the sentence was adequately explained, and because the length of the sentence was not unreasonable, the Fifth Circuit affirmed the sentence.

United States v. Isiwele, 635 F.3d 196 (5th Cir. 2011):

(1) In a healthcare fraud case, the amount fraudulently billed to Medicare/Medicaid is prima facie evidence of the amount of loss the defendant intended to cause (for Guideline sentencing purposes), but the amount billed does not constitute *conclusive* evidence of intended loss; the parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the billing party's intent; because the record left the Fifth Circuit uncertain as to what the district court understood the law to be, and because there was some evidence cutting against the use of the full billing amount here, the Fifth Circuit vacated the sentence and remanded for resentencing.

(2) District court did not err in applying the "mass-marketing" enhancement of USSG § 2B1.1(b)(2)(A)(ii) on the basis of defendant's use of a "recruiter," who went into the community and found Medicare/Medicaid beneficiaries as clients for the durable medical equipment ("DME") for which defendant billed Medicare/Medicaid; nor did district court err in applying an "abuse of trust" enhancement under USSG § 3B1.3 because, under United States v. Miller, 607 F.3d 144, 148-50 (5th Cir. 2010), defendant, as a DME supplier, was in a position of trust with respect to Medicare/Medicaid.

United States v. Lige, 635 F.3d 668 (5th Cir. 2011) District court did not err in calculating the Guideline loss figure applicable to defendant convicted of illegal possession of unauthorized access devices (in violation of 18 U.S.C. § 1029(a)(3)); where defendant fraudulently ordered phones from Sprint/Nextel in other persons' names, the loss was properly calculated using the retail price of the phones rather than the wholesale/replacement cost to Sprint/Nextel; the retail price represented the applicable "fair market value" of the stolen phones because the relevant market was the retail market in which the victim merchant would have sold them.

United States v. Moore, 635 F.3d 774 (5th Cir. 2011) District court did not err in finding that defendant's Louisiana aggravated battery conviction (under La. Rev. Stat. § 14.34) was a "crime of violence" under USSG § 4B1.2, making defendant a "career offender" under USSG § 4B1.2; the offense of which defendant was convicted – aggravated battery committed by means of a dangerous weapon (in his case, an automobile) – involves purposeful, violent, and aggressive conduct that presents a serious potential risk of physical injury to another; moreover, the offense is sufficiently similar both in kind and in degree of risk to the enumerated "crime of violence" of "aggravated assault"; accordingly, the Fifth Circuit affirmed defendant's 327-month "career offender" sentence.

United States v. Flores, 640 F.3d 638 (5th Cir. 2011) District court did not err in applying an enhancement for obstruction of justice under USSG § 3C1.1 in sentencing two defendants who testified at trial; the district court did not clearly err in finding that defendants had perjured themselves in various material assertions made at trial that were not worthy of credence in light of the weight of the physical evidence and that were flatly contradicted by other witnesses and the ultimate finding of the jury; however, the Fifth Circuit found erroneous the aggravating role enhancement (USSG § 3B1.1(c)) applied to one defendant because the presentence report ("PSR") facts on which it rested differed in several material respects from the evidence at trial; because the Fifth Circuit could not tell whether the district court would have applied the enhancement had the PSR correctly summarized the trial evidence, the error was not harmless, so the Fifth Circuit vacated this defendant's sentence and remanded for resentencing.

United States v. Flores-Vasquez, 641 F.3d 667 (5th Cir. 2011) Even if pleas under North Carolina v. Alford, 400 U.S. 25 (1970), do not normally admit the factual basis proffered by the prosecution for the plea, here defendant's plea agreement did admit the prosecution's factual basis; because that factual basis established that defendant was convicted of generic "robbery," a qualifying "crime of violence" under USSG § 2L1.2, the district court did not err in applying a 16-level "crime of violence" enhancement for defendant's 2006 District of Columbia robbery conviction under D.C. Code § 22-2801.

United States v. Gonzales, 642 F.3d 504 (5th Cir. 2011) Defendant's objection was sufficiently preserved below so as to trigger de novo review on appeal; on the merits, however, the Fifth Circuit held that the district court did not err in applying USSG § 2X1.1 in sentencing defendant convicted of conspiring to interfere with commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a).

United States v. Bacon, 646 F.3d 218 (5th Cir. 2011) Agreeing with all the circuits to have decided the question, the Fifth Circuit held that remote-in-time instances of sexual abuse or exploitation of a minor may form the basis of a 5-level "pattern of activity" enhancement under USSG § 2G2.2(b)(5); thus, district court did not err in applying the enhancement to child pornography defendant on the basis of his sexual abuse of his daughters over thirty years before.

United States v. Mudekunye, 646 F.3d 281 (5th Cir. 2011) District court committed reversible plain error in applying both an enhancement under USSG § 2T1.4(b)(1) and an enhancement under USSG § 3B1.3; Application Note 2 to § 2T1.4 clearly establishes that this is error; moreover, defendant's substantial rights were affected because, although the correct and the incorrect Guideline ranges overlapped by 1 month, defendant was sentenced well outside the 1-month overlap (the correct range was 63 to 78 months; defendant received a 97-month sentence, the top of the incorrect range of 78 to 97 months); moreover, the fourth prong of plain-error review was satisfied, because the substantial disparity between the imposed sentence and the applicable Guideline range warranted the court's exercise of its discretion to correct the error; accordingly, the Fifth Circuit vacated defendant's sentence and remanded for resentencing. (Judge Barksdale filed a dissenting opinion, decrying what he viewed as an insufficiently stringent application of plain-error review to Guideline calculation errors.)

United States v. Parajon Herrera, 647 F.3d 172 (5th Cir. 2011) Defendant's prior conviction for second-degree sexual assault, in violation of Ark. Code § 5-14-125, was a "forcible sex offense" and hence a "crime of violence" qualifying for a 16-level enhancement under USSG § 2L1.2(b)(1)(A)(ii); the Guideline definition of a "forcible sex offense" includes where consent is "coerced"; the Fifth Circuit held that the contemporary meaning of coercion is broad and covers both physical force and threats; additionally, an offense is a "forcible sex offense" "where consent to the conduct is involuntary"; this includes instances where a person engages in sexual conduct with a person who cannot legally give consent because of physical ailment or mental illness.

United States v. Murray, ____ F.3d ____, 2011 WL 3133105 (5th Cir. July 27, 2011) District court did not err in calculating the Guideline loss figure applicable to defendant's loan fraud

case; the trial testimony of a CPA who studied the loan accounts provided a sufficiently reliable basis for the loss figure used by the district court; moreover, the Guidelines do not require sentencing courts to consider extrinsic factors that affect the value of collateral when using the collateral to discount the amount of loss; the loss should be discounted by the fair market of collateral, not by the value the collateral could have had in better economic conditions; nor did the district court plainly err in applying a 4-level leader/organizer enhancement under USSG § 3B1.1(a); the government need not produce direct evidence demonstrating that a defendant directed or controlled other participants; rather, the district court may infer from available facts, including circumstantial evidence, that a defendant exercised a leader/organizer role; here, the circumstantial evidence provided a sufficient basis for the enhancement such that there was no plain error in its application.

United States v. Diaz-Corado, ___ F.3d ___, 2009 WL 8239170 (5th Cir. Aug. 2, 2011) District court did not err in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii); defendant’s prior Colorado state conviction for unlawful sexual contact (in violation of Col. Rev. Stat. § 18-3-4(a)) was one for a “forcible sex offense” under the Guideline as amended by Amendment 722 (effective Nov. 1, 2008); under the amended Guideline, offenses are covered where consent to the sexual activity is involuntary or cannot be given.

United States v. Simmons, ___ F.3d ___, 2011 WL 3300943 (5th Cir. Aug. 3, 2011) Where defendant was convicted of thirteen counts of making bomb threats to his ex-girlfriend’s workplace, the district court did not err in refusing to group all the counts of the indictment for Sentencing Guidelines purposes; although the calls all had a common purpose of causing disruption at the ex-girlfriend’s workplace generally, they were all received by different persons at different locations within that workplace; under the facts of this case, the district court did not err in concluding that there were multiple victims of defendant’s offenses.

United States v. Rios-Cortes, ___ F.3d ___, 2011 WL 3370352 (5th Cir. Aug. 5, 2011) Where defendant (1) was originally sentenced, on his theft offense, to two years’ imprisonment, suspended for five years’ probation, (2) violated his probation, had his probation revoked, and was resentenced to 180 days’ imprisonment, and then (3) was deported from the United States, his theft conviction was a qualifying “aggravated felony” under 8 U.S.C. § 1101(a)(43)(G) and USSG § 2L1.2; the original suspended prison sentence exceeded the one-year threshold necessary to make the conviction an “aggravated felony,” and it would be perverse to afford a defendant who violated his probation more favorable treatment than one who did not.

United States v. Scott, ___ F.3d ___, 2011 WL 3890773 (5th Cir. Sept. 2, 2011) District court did not err in adding one Guidelines criminal history point, pursuant to USSG § 4A1.1(f) for each of defendant’s grouped and otherwise uncounted deadly-conduct offenses, even though those offenses arose out of a single criminal episode; additionally, the addition of two criminal history points under USSG § 4A1.1(e) did not render a sentence within the resulting Guideline range unreasonable, even though § 4A1.1(e) was, after the date of sentencing, amended to delete the § 4A1.1(e) enhancement.

United States v. Robinson, ___ F.3d ___, 2011 WL 3890836 (5th Cir. Sept. 2, 2011) In bomb-threat case, district court did not err in applying, pursuant to USSG § 3B1.4, a 2-level enhancement for “use of a minor” in connection with the offense; there was sufficient circumstantial evidence to suggest that defendant asked his minor stepsister to buy the cellphone used to phone in the threat so as to avoid detection for the offense; moreover, nothing in § 3B1.4 requires that the use of the minor must be tied in some way to her minor status; therefore, it was of no moment that defendant could just as easily have employed an adult to buy the cellphone for him.

D. Fines and Restitution

United States v. Clayton, 613 F.3d 592 (5th Cir. 2010) Where defendant had been ordered to pay restitution in connection with his convictions for failing to file federal income returns (in violation of 26 U.S.C. § 7203), the Consumer Credit Protection Act (“CCPA”) (15 U.S.C. § 1673) did not preclude the government from garnishing more than 25% of his earnings; § 1673(b)(1)(C) of the CCPA exempts from the protections of the CCPA “any debt due for any State or Federal tax”; the restitution order here, requiring payment to the IRS in the amount of tax the defendant avoided paying in the three tax years underlying defendant’s convictions, was a “debt due for any . . . Federal tax”; because defendant had only appealed from the garnishment order, and not from his underlying convictions, the Fifth Circuit refused to consider defendant’s arguments going to the merits of the restitution order.

United States v. Gonzales, 620 F.3d 475 (5th Cir. 2010) Based on the record before the Fifth Circuit, it was unclear whether the district court, upon revocation of defendant’s probation, considered her “financial resources,” as required by 18 U.S.C. § 3572(a)(1) & (2), before ordering her to immediately pay the \$4,000 balance of a previously imposed fine; accordingly, the Fifth Circuit remanded so that the district court could clarify whether it had considered defendant’s financial resources, as required by 18 U.S.C. § 3572, before ordering the immediate payment of the fine.

United States v. DeCay, 620 F.3d 534 (5th Cir. 2010) In order to satisfy restitution obligations owed by two defendants, the federal government could garnish those defendants’ retirement benefits held by a Louisiana state pension fund; neither the Internal Revenue Code, the Tenth Amendment, nor Louisiana law barred garnishment of those retirement benefits; moreover, the federal government could compel a “cash-out” of one defendant’s benefits; however, as to a second defendant, whose benefits were paid out in monthly payments, the Consumer Credit Protection Act limited the federal government’s right to garnish defendant’s pension to only 25% of his monthly benefits; accordingly, the Fifth Circuit affirmed the garnishment order against the first defendant, but reversed the garnishment order as to the second defendant and remanded for entry of a garnishment order consistent with the court’s opinion.

In re Amy Unknown, 636 F.3d 190 (5th Cir. 2010) Under the Crime Victims Rights Act (“CVRA”), 18 U.S.C. § 3771(a)(6), former minor who was depicted in images of child pornography possessed by criminal defendant could seek redress via a petition for a writ of mandamus from an order denying her request for restitution from that defendant under the CVRA; the Fifth Circuit rejected the requirement, imposed by the district court, that there had to be a showing that the offense

of conviction proximately caused defendant's losses; only losses under the catchall provision of 18 U.S.C. § 2259(b)(3)(F) are subject to a proximate-cause limitation; the other categories of losses, set out in subsections (A) through (E) are not; because incorporating a proximate causation requirement where none existed was a clear and indisputable error, and because victim was entitled to restitution under the CVRA, the Fifth Circuit granted her petition for mandamus and remanded to the district court to determine how much restitution victim was entitled to and what fraction of that restitution was attributable to defendant.

United States v. Wright, 639 F.3d 679 (5th Cir. 2011) In child pornography case, Fifth Circuit vacated \$529,661 restitution award to former minor depicted in some of the child pornography images defendant possessed; under In re Amy Unknown, 636 F.3d 190 (5th Cir. 2011), minor was entitled to restitution without the need for proof of a causal connection between defendant's offense conduct and the victim's recoverable losses; nevertheless, the award could not stand because the Fifth Circuit could not discern any supportable rationale for the selection of this particular amount of restitution; accordingly, the Fifth Circuit remanded for the district court to reconsider the restitution order and to set forth its reasons for whatever restitution award it made on remand. (Judge Davis, joined by Judges King and Southwick, filed a specially concurring opinion, disagreeing with In re Amy Unknown to the extent that it refused to impose any sort of proximate-cause limitation upon this type of restitution order, and urging that this case be consolidated with In re Amy Unknown for en banc rehearing.)

E. Resentencing/Sentence Reduction

Freeman v. United States, ____ U.S. ____, 131 S. Ct. 2685 (2011) (decision below: United States v. Goins, 355 Fed. Appx. 1 (6th Cir. 2009) (unpublished)) The Court held that defendant was not ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) (based on a retroactive favorable revision to the Sentencing Guidelines) solely because the district court accepted a plea agreement that, as permitted by Fed. R. Crim. P. 11(c)(1)(C), provided for a binding specific sentence or sentencing range; however, no one rationale commanded a majority; the plurality opinion, written by Justice Kennedy and joined by Justices Ginsburg, Breyer, and Kagan, would hold that because the Guidelines must be consulted before a judge accepts a (c)(1)(C) agreement, the sentence resulting from that agreement is sufficiently "based on" the Guidelines so as to give the district court the authority to entertain a § 3582(c)(2) motion if the relevant Guidelines are subsequently amended and that amendment given retroactive effect; Justice Sotomayor, in contrast, would hold that a (c)(1)(C) sentence is "based on" the agreement itself, not the judge's calculation of the Guidelines; however, she opined, if a (c)(1)(C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Sentencing Commission, the sentence is "based on" the range employed, and the defendant is eligible for sentence reduction under § 3582(c)(2); because that was the case here, she concurred in the judgment of the Court vacating the Sixth Circuit's judgment and remanding for further proceedings. (Chief Justice Roberts filed a dissenting opinion, in which he was joined by Justices Scalia, Thomas, and Alito.)

United States v. Carales-Villalta, 617 F.3d 342 (5th Cir. 2010) Where Fifth Circuit had previously remanded case on ground that 8-level "aggravated felony" enhancement under USSG §

2L1.2(b)(1)(C) was erroneous, government was not, on remand, precluded from presenting (and district court was not precluded from considering) additional evidence, not presented at the first sentencing proceeding, that the conviction in question did indeed qualify as an “aggravated felony”; in the absence of a specific mandate, and in the interest of truth and fair sentencing, the district court may consider any corrections and additions relevant to the issues addressed by the Fifth Circuit on appeal; therefore, when the case is remanded for resentencing without specific instructions, the district court should consider any new evidence from either party relevant to the issues raised on appeal; although the Fifth Circuit may mandate a particular result on remand, or limit consideration on remand to only particular evidence when it is prudent to do so, it did not do so in the prior appellate decision; therefore, district court did not reversibly err in once again applying the 8-level enhancement (and imposing the same sentence), based on the new documentary evidence presented on remand.

United States v. Meza, 620 F.3d 505 (5th Cir. 2010) Where (1) district court mistakenly sentenced defendant to 33 months on a new charge, plus a consecutive 10-month sentence for supervised release revocation, for a total sentence of 43 months, but then, recognizing its error, (2) changed the new charge sentence to 30 months, and increased the supervised release revocation sentence to 13 months, so as to keep the total sentence at 43 months, the district court did not exceed its authority or jurisdiction in increasing the supervised release revocation sentence; unlike the sentence increase overturned in United States v. Ross, 557 F.3d 237 (5th Cir. 2009), here the application for a modification (albeit of the sentence on the new charge) was made by a party and it occurred in the same hearing, and within moments of, the original pronouncement; the instant case was also distinguishable from United States v. Cross, 211 F.3d 593, 2000 WL 329247 (5th Cir. 2000) (unpublished); in Cross, the district court had already gaveled the sentencing hearing to a close, and had to reconvene the hearing in order to enter a new sentence; here, in contrast, there was no formal break in the proceedings from which to logically and reasonably conclude that sentencing had finished.

United States v. Wanambisi, 624 F.3d 724 (5th Cir. 2010) In denying defendant’s motion for reduction of sentence under 18 U.S.C. § 3582(c)(2), the district court erroneously treated defendant’s motion as having been filed under Amendment 706 (pertaining only to crack cocaine offenses) rather than under Amendment 505 (applicable to heroin offenses like defendant’s); however, the Court of Appeals affirmed the denial of defendant’s motion on the alternate ground that Amendment 505 did not reduce the base offense level for the amount of heroin for which defendant was responsible.

United States v. Bowman, 632 F.3d 906 (5th Cir. 2011) District court did not err in denying kidnapping defendant’s motion to reduce sentence pursuant to 18 U.S.C. .§ 3582(c)(2); although Amendment 599 to the Guidelines (which took effect in 2000, after defendant’s 1996 sentencing) was retroactive, it did not alter the general rule – in effect in 1996 – that firearms enhancements should not be applied to the underlying offense where the defendant was also convicted under 18 U.S.C. § 924(c); moreover, the enhancement that defendant challenged as flawed under Amendment 599 (a four-level enhancement under USSG § 2A3.1(b)(1)) was **not** imposed on the basis of the firearm use underlying defendant’s § 924(c) conviction; rather, it was based on the use of force independent of the firearm in order to commit an aggravated sexual abuse that occurred during the kidnapping;

therefore, the § 2A3.1(b)(1) enhancement did not constitute impermissible double-counting of the use of the gun.

United States v. Larry, 632 F.3d 933 (5th Cir. 2011) In ruling on a motion to reduce sentence under 18 U.S.C. § 3582(c)(2), a district court must consider the sentencing factors listed in 18 U.S.C. § 3553(a); here, there was no indication in the record that the district court considered the factors when it determined whether a reduction was warranted; it did not state that it considered the factors or explain how the factors supported its finding that sentence reduction was not warranted; moreover, it did not consider argument concerning the factors, in part because the district court did not give the parties an opportunity to make such arguments (indeed, the district court made a sua sponte motion for sentence reduction shortly after the retroactive crack Guideline amendments took effect and then denied that motion the same day, before either party knew the district court had made the sua sponte motion); the Fifth Circuit refused to infer that the district court considered all the relevant factors simply because the district court had a report calculating defendant's amended Guideline range and detailing defendant's post-sentencing disciplinary incidents; finding that the district court abused its discretion and that the abuse of discretion was not harmless, the Fifth Circuit vacated the district court's order and remanded for further proceedings. (Judge King dissented.)

United States v. Caulfield, 634 F.3d 281 (5th Cir. 2011) District court did not err in ruling on defendant's motion to reduce sentence under 18 U.S.C. § 3582(c)(2); particularly, defendant was not entitled to have the court consider only Amendment 706 to the Guidelines, without also considering Amendments 715 and 716, which were designed to correct anomalies in Amendment 706; even though Amendment 706 was the only amendment in place at the time defendant brought his motion, there was no ex post facto violation in applying also Amendments 715 and 716, because these did not increase the possible punishment from that available at the time the offense was committed; that defendant might have been eligible for a greater discretionary reduction under Amendment 706 standing alone does not give rise to an ex post facto violation; nor was the defendant's argued application consistent with Sentencing Commission intent, which was clearly that the anomalies in Amendment 706 should not persist.

United States v. Henderson, 636 F.3d 713 (5th Cir. 2011) In each of three defendants' cases, district court reversibly erred in denying the defendant's motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) (based on the retroactive amendments to the crack cocaine Guidelines); in denying each motion, the district court implied that it had not reconsidered the sentencing factors of 18 U.S.C. § 3553(a) in making this decision, because it had already considered those factors in imposing a below-Guidelines sentence at the original sentencing; as such, in each of these cases, the district court did not recognize, and therefore did not satisfy, the requirement that they reconsider the § 3553(a) factors when deciding whether to reduce a sentence in response to a § 3582(c)(2) motion; accordingly, the Fifth Circuit reversed the orders denying defendants' § 3582(c)(2) motions and remanded for reevaluation of those motions.

United States v. Booker, 645 F.3d 328 (5th Cir. 2011) Defendant's appeal of the district court's disposition of his motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) (based on

the retroactive amendments to the crack cocaine Guidelines) was rendered moot by his release from prison onto his term of supervised release.

United States v. Hernandez, 645 F.3d 709 (5th Cir. 2011) Defendant could not, in conjunction with a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) (based on the retroactive amendments to the crack cocaine Guidelines), relitigate the district court's finding, made in conjunction with the original sentencing, that he was responsible for 32.5 kilograms of crack cocaine; even if reconsideration were permitted, the district court still did not abuse its discretion in finding that defendant was responsible for more than 4.5 kilograms of crack cocaine; under either of these figures, defendant was ineligible for a sentence reduction under § 3582(c)(2).

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

Brown v. Plata, ___ U.S. ___, 131 S. Ct. 1910 (2011) (decision below: Coleman v. Schwarzenegger, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010) Order of three-judge court limiting overall capacity of California prisons to 137.5% of total design capacity, to be accomplished within two years, was necessary to remedy the violation of prisoners' constitutional rights (to basic sustenance, including medical care, under the Eighth Amendment) and was authorized by the Prison Litigation Reform Act; it was reasonable to convene a three-judge court given the lack of success of prior orders; nor did the three-judge court err in finding that crowding was the primary cause of the constitutional violations; moreover, the prospective relief ordered here was narrowly drawn, extended no further than necessary to correct the violation, and was the least intrusive means necessary to correct the violation; the three-judge court also properly gave "substantial weight" to public safety concerns, as required under the PLRA; accordingly, the Supreme Court affirmed the three-judge court's order, subject to the State's right to seek its modification in appropriate circumstances. (Justice Scalia filed a dissenting opinion, in which he was joined by Justice Thomas. Justice Alito filed a dissenting opinion, in which he was joined by Chief Justice Roberts.)

Pierce v. Holder, 614 F.3d 158 (5th Cir. 2010) Where federal prisoner filed a habeas petition, pursuant to 28 U.S.C. § 2241, seeking a nunc pro tunc designation of the state facility where he had served a previous sentence as the place in which he would serve his federal sentence (which would have had the effect of causing the federal sentence to run concurrently with the state sentence, thus giving the prisoner back credit for the time spent in state custody), district court should have dismissed petition for lack of jurisdiction; until the Attorney General has made a determination of a federal prisoner's time credit (including a final decision on the prisoner's nunc pro tunc request, there is no case or controversy ripe for review; because the Bureau of Prisons had not done so at the time prisoner filed his federal habeas petition, the district court lacked jurisdiction to rule on the petition; accordingly, the Fifth Circuit vacated the district court's decision denying prisoner's petition on the merits and remanded to the district court with instructions to dismiss the petition for lack of jurisdiction.

Hunter v. Tamez, 622 F.3d 427 (5th Cir. 2010) District court did not err in denying defendant's habeas petition, filed pursuant to 28 U.S.C. § 2241, challenging the Federal Bureau of Prisons' (BOP's) failure to grant him (by means of a nunc pro tunc designation) credit against his

federal sentence for time spent in Texas state custody for unrelated state convictions; although defendant argued that the BOP's failure to give effect to the state court's direction that the state sentence run concurrently with the federal sentence, violated principles of federalism and comity, that argument was foreclosed by Leal v. Tombone, 341 F.3d 427, 428-30 & nn.13 & 19 (5th Cir. 2003); nor was there any separation of powers problems; in the absence of specific direction from the federal sentencing judge, the federal sentence was presumed to be consecutive; the request for a nunc pro tunc designation, so as to make the federal sentence effectively concurrent, was thus equivalent to a request for clemency or commutation of sentence, which are traditionally prerogatives of the Executive Branch; finally, the Fifth Circuit denied relief on defendant's claim that the frustration of the parties' understanding about his sentences running concurrently rendered his state plea involuntary; while possibly true, that claim was not cognizable here, because defendant was no longer "in custody" on the state conviction.

Jones v. Joslin, 635 F.3d 673 (5th Cir. 2011) District court did not err in denying defendant's habeas petition, filed pursuant to 28 U.S.C. § 2241, challenging the Federal Bureau of Prisons' (BOP's) failure to err in denying defendant's habeas petition, filed pursuant to 28 U.S.C. § 2241, challenging the Federal Bureau of Prisons' (BOP's) treating his federal sentence as consecutive to, rather than concurrent with, a previously imposed state sentence; when a sentencing court makes no mention of a prior state sentence, the federal sentence shall run consecutively to the state sentence; the federal judgment here, although inartfully worded and perhaps even ambiguous, never mentions the state sentence and therefore cannot be deemed to order the federal sentence to run concurrently with the state sentence; if the federal district court wanted to depart from the usual presumption of 18 U.S.C. § 3584(a) (that is, if it wanted the federal sentence to be concurrent, not consecutive), it should have discussed why this departure was justified with reference to the 18 U.S.C. § 3553(a) factors and the specific offenses for which defendant was convicted; the district court, however, offered no such discussion; moreover, the BOP did fully comply with 18 U.S.C. § 3585(b) by crediting defendant with all his days in federal custody that were not credited toward the state sentence.

Hale v. King, 642 F.3d 492 (5th Cir. 2011) (on denial of reh'g to 624 F.3d 178 (5th Cir. 2010)) Title II of the Americans with Disabilities Act of 1990 ("ADA") validly abrogates a state's Eleventh Amendment sovereign immunity where the alleged misconduct also constitutes a violation of the Fourteenth Amendment; however, the Fifth Circuit held that, as a threshold matter, plaintiff prisoner raising claims of inadequate medical care had not alleged valid claims under Title II; the Fifth Circuit remanded the case to allow the plaintiff (who had been proceeding pro se previously in the district court) an opportunity to amend his claims to remedy the deficiencies and to bring them within Title II.

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

United States v. Olguin, 643 F.3d 384 (5th Cir. 2011) Agreeing with all the other circuit courts to have considered the issue, the Fifth Circuit held that the Comprehensive Forfeiture Act ("CFA"), 21 U.S.C. § 853, permits the imposition of personal money judgments against defendants; nor did district court err in entering judgment against the two challenging defendants for the full

proceeds of the conspiracy; finally, the district court did not err in deciding that the “proceeds” of the conspiracy meant gross receipts, not just net profits; the Supreme Court’s decision in United States v. Santos, 553 U.S. 507 (2008), does not compel a net-profits interpretation in cases involving drug trafficking.

X. APPEAL

Turner v. Rogers, ____ U.S. ____, 131 S. Ct. 2507 (2011) Where defendant, sentenced to 12 months’ imprisonment for contempt of court based on his failure to pay child support, had completed that sentence, his challenge to the denial of counsel at the contempt hearing was nevertheless not moot; the case was capable of repetition, yet evading review, given that (1) the term of imprisonment was too short to be fully litigated up to and including the United States Supreme Court before that term’s expiration and (2) there was more than a reasonable likelihood that defendant would again be subjected to the same action.

United States v. Juvenile Male, 131 S. Ct. 2860 (2011) (*per curiam*) Where federal juvenile delinquent was (as a special condition of his supervision on his adjudication of delinquency on a charge of sexual acts with a child under 12) ordered to register as a sex offender in Montana pursuant to the Sex Offender Registration and Notification Act (“SORNA”) until his 21st birthday, juvenile’s challenge to that order became moot upon his 21st birthday; the federal order expired on that date, and, as the Montana Supreme Court confirmed, the (former) juvenile’s obligation to register as a sex offender in Montana was not contingent upon the validity of the federal order; nor did any exception to mootness apply; accordingly, the Supreme Court vacated the Ninth Circuit’s judgment finding the condition to be an *ex post facto* violation and remanded with instructions to dismiss the appeal. (Justices Ginsburg, Breyer, and Sotomayor would remand the case to the Ninth Circuit for that court to consider the question of mootness in the first instance. Justice Kagan took no part in the consideration or decision of this case.)

United States v. Jefferson, 623 F.3d 227 (5th Cir. 2010) The Court of Appeals had jurisdiction, pursuant to 18 U.S.C. § 3731, over the government’s interlocutory appeal of the district court’s order ruling inadmissible proof of defendant’s prior convictions for bribery and obstruction of justice; the district court erred in concluding that § 3731 permits an interlocutory appeal only when the excluded evidence relates to an element of the charged offense; § 3731 contains no such limitation and instructs courts to liberally construe the statute to effectuate its purpose; moreover, the statute itself limits such appeals to evidence that is “substantial proof of a fact material in the proceeding,” not evidentiary rulings concerning matters that involve elements of the charged offense; finally, under the statute, this evaluation is to be made *by the United States Attorney*, not by the district court; indeed, once the government files a timely appeal under § 3731 and the United States Attorney makes the required certification, the Court of Appeals cannot evaluate the materiality of the excluded evidence to decide whether or not to hear the appeal; because the Court of Appeals did acquire jurisdiction upon filing of the government’s notice of appeal, the district court was divested of jurisdiction to take further action in the case; accordingly, the Fifth Circuit vacated all orders issued by the district court following the filing of the notice of appeal.

Pearson v. Holder, 624 F.3d 682 (5th Cir. 2010) Where Texas state prisoner sued under 42 U.S.C. § 1983, challenging SORNA and state sex-offender registration laws as unconstitutional, district court reversibly erred in dismissing prisoner's claims as not ripe; in determining ripeness, a court must balance the issues' fitness for judicial decision against the hardship to the parties resulting from withholding court consideration; inasmuch as the prisoner's release date was only some two years hence, the Fifth Circuit concluded that his case was sufficiently ripe for adjudication; there was no further factual uncertainty, and the prisoner could suffer harm if his claims were not adjudicated as soon as practicable; accordingly, the Fifth Circuit reversed the judgment dismissing the prisoner's claims and remanded for further proceedings.

United States v. Thomas, 627 F.3d 146 (5th Cir. 2010) The evidence was sufficient for a rational jury to find defendants guilty of numerous bank robberies and related offenses; circumstantial evidence that is not incriminating standing alone may recur in a pattern, from which jurors can reasonably infer that evidence otherwise susceptible of innocent interpretation is plausibly explained only as part of the pattern; under this rubric, a reasonable inference from the evidence is that the defendants committed all the robberies; four of them shared a number of common characteristics; although the evidence was weaker as to one defendant on the fifth one, the jury could reasonably infer that the other defendant had the same partner on that robbery as on all the rest of the robberies.

United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2010) In sentencing defendant, the district court erred in applying an 8-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C), rather than merely a 4-level "felony" enhancement under USSG § 2L1.2(b)(1)(D), because defendant's conviction for delivery could have been based on an offer to sell; the correct Guideline range was therefore 6 to 12 months, not 12 to 18 months; moreover, this error was not harmless, even though the district court ultimately imposed a 36-month sentence based on defendant's prior murder conviction, which the district court believed had been sentenced too leniently; a preserved error in the calculation of the Guidelines is harmless only if the government shows (1) the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing; because the government did not clear this high hurdle in this case, the Fifth Circuit vacated defendant's sentence and remanded for resentencing.

United States v. Flores, 632 F.3d 229 (5th Cir. 2011) The Fifth Circuit "wr[ote] in this case to signal a change in th[at] court's approach to" cases in which counsel filed a brief, and moved to withdraw, under Anders v. California, 386 U.S. 738 (1967); the Fifth Circuit indicated that it would no longer independently scour the record for any possibly nonfrivolous point that could support an appeal; rather, said the Fifth Circuit, it would henceforth follow the approach of the Third and the Seventh Circuits and would be guided in reviewing the record by the Anders brief itself, provided that the brief is adequate on its face; here, the Anders brief was adequate on its face; after review of the brief and the portions of the record referenced therein, the Fifth Circuit accepted counsel's assessment that defendant had no nonfrivolous issues to raise on appeal; accordingly, the Fifth Circuit granted defendant's motion to withdraw and dismissed the appeal as frivolous.

United States v. Garland, 632 F.3d 877 (5th Cir. 2011) In a companion case to United States v. Flores, 632 F.3d 229 (5th Cir. 2011), the Fifth Circuit outlined what it required for an adequate Anders brief; “‘Anders requires counsel to isolate possibly important issues and to furnish the court with references to the record and legal authorities to aid it in its appellate function’”; although counsel has broad discretion in the preparation of his brief, and no particular form is required, the Fifth Circuit noted that a brief that covers the points raised in the guidelines and checklist for Anders briefs contained on the Fifth Circuit’s website will ordinarily be found to be adequate; if counsel submits such a brief, the Fifth Circuit, as it held in Flores, will no longer independently scour the record looking for appellate issues; here, however, counsel’s Anders brief fell short of the guidelines and the checklist in several respects, and hence it was not adequate; accordingly, the Fifth Circuit denied counsel’s motion to withdraw and instructed him to file either a compliant Anders brief or a brief on the merits of any nonfrivolous issue he deemed appropriate.

United States v. Villanueva-Diaz, 634 F.3d 844 (5th Cir. 2011) Alien defendant’s appeal of his conviction, as to which the sentence (both prison term and supervised release term) had expired, was not moot; under Sibron v. New York, 392 U.S. 40, 55 (1968), there is a presumption that criminal convictions do entail adverse collateral legal consequences sufficient to defeat a claim of mootness; moreover, this conviction is, under 8 U.S.C. § 1101(a)(43)(O), at least arguably an “aggravated felony” triggering a bar on admissibility under 8 U.S.C. § 1182(a)(9)(A), which the Fifth Circuit has previously held is a “concrete disadvantage” that avoids mootness.

United States v. Jacobs, 635 F.3d 778 (5th Cir. 2011) Where district court sentenced defendant to 36 months’ imprisonment as an upward *variance* from the correct Guideline imprisonment range of 4 to 10 months, appeal of that sentence was barred by the appeal waiver provisions of defendant’s plea agreement, which allowed him to appeal only an upward *departure* not requested by the government; sentencing departures are distinct from variances; if the parties had intended to allow defendant to appeal any sentence exceeding the high end of the Guideline range, they could have drafted the waiver of appeal to say so; finding that the waiver barred defendant’s appeal, the Fifth Circuit granted the government’s motion to dismiss the appeal. **(The Fifth Circuit rejected the Eleventh Circuit’s seemingly contrary decision in United States v. Manuel, 208 Fed. Appx. 713, 716 n.1 (11th Cir. 2006) (unpublished).)**

In re Hearst Newspapers, L.L.C. (United States v. Cardenas-Guillen), 641 F.3d 168 (5th Cir. 2011) Newspaper’s appeal of district court’s order closing the sentencing of a notorious drug cartel leader was not moot, even though the sentencing had already occurred, because the issues in this case were capable of repetition, yet evading review; the newspaper is a prominent newspaper that seeks to cover major cases, and it is reasonable to expect that district courts will close other criminal proceedings to the newspaper in future cases; at the same time, these issues often evade review due to the short duration of criminal trials.

United States v. Gonzales, 642 F.3d 504 (5th Cir. 2011) Defendant’s objection to the use of USSG § 2X1.1 (as opposed to USSG § 2B3.1) in sentencing him was sufficiently preserved below so as to trigger *de novo* review on appeal; to preserve error, an objection must be sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for

correction; exacting precision is not required; here, although defendant did not specifically argue that USSG § 2B3.1 applied, his argument necessarily required the application of § 2B3.1; moreover, the government, in responding to the objection, clearly understood the issue to be the choice between the two Guideline sections.

United States v. Potts, 644 F.3d 233 (5th Cir. 2011) Defendant did not preserve for plenary review his Fifth Amendment challenge to the admission of his pre-arrest/pre-Miranda silence, in the face of police questioning; although he objected, his mere objection did not suffice; the district court offered a curative instruction, which the defense accepted; by accepting the instruction, defendant failed to obtain a definitive ruling on his objection; there was no implicit overruling, but rather no ruling at all; following that failure to obtain a ruling, defendant accepted the curative instruction without objection; because defendant effectively received all of the relief that he requested from the district court, the objection was not preserved, and the claim was subject only to plain-error review.

United States v. Henderson, 646 F.3d 223 (5th Cir. 2011) Defendant's motion to correct sentence under Fed. R. Crim. P. 35(a) did not preserve for appeal the claimed error in this (i.e., that the district court impermissibly increased defendant's sentence – from a Guideline range of 33 to 41 months, up to a sentence of 60 months – for rehabilitative purposes, in violation of Tapia v. United States, 131 S. Ct. 2382 (2011)); a Rule 35 (a) motion cannot preserve an error unless the error is arithmetical, technical, or otherwise clear; because the claimed error here was not clear in the Fifth Circuit at the time of sentencing, the Rule 35(a) motion did not preserve error, so the Fifth Circuit reviewed only for plain error; likewise, because the error was not clear in the Fifth Circuit before Tapia, defendant's plain-error claim foundered upon the second requirement of plain-error review, namely, the requirement that the error be "plain" at the time of trial.

X. REVOCATION OF PROBATION/SUPERVISED RELEASE/PAROLE

A. Probation

B. Supervised Release

United States v. Minnitt, 617 F.3d 327 (5th Cir. 2010) District court did not reversibly err in revoking defendant's supervised release; with respect to defendant's due-process confrontation objection to the introduction of lab reports and testimony about their contents, district court erred in failing to articulate the basis on which it found good cause to deny defendant confrontation of the lab technicians; however, this error was harmless, because the record showed that defendant's interest in confronting the lab technicians was minimal and that there was indeed good cause to deny confrontation; nor did the district court violate defendant's due-process confrontation rights by allowing the probation officer to testify to the feasibility of defendant's false-positive theories; although the probation officer's hearsay testimony about defendant's missed counseling session presented a more troublesome due-process confrontation question, unchallenged testimony supported the district court's finding that defendant violated this condition of supervised release as well.

United States v. Hampton, 633 F.3d 334 (5th Cir. 2011) The introductory language in 18 U.S.C. § 3583(e)(3) (allowing a court to “revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release”) does not limit the aggregate amount of revocation imprisonment to no more than the length of the supervised release term authorized for the underlying offense; accordingly, even though the maximum supervised release term for defendant’s underlying offense was 3 years, and even though she had previously received a 24-month revocation prison sentence, it did not violate the statute, on defendant’s second revocation of supervised release, to impose another 24-month prison sentence.

United States v. Shabazz, 633 F.3d 342 (5th Cir. 2011) Pursuant to the April 30, 2003 amendment made by the PROTECT Act, the maximum revocation set out in 18 U.S.C. § 3583(e)(3) is now a *per-revocation* maximum; therefore, it did not violate § 3583(e)(3) for defendant to be sentenced to a 12-month revocation sentence, even though he had previously been sentenced to 24 months on an earlier revocation of the same supervised release term, because defendant faced up to 2 years’ imprisonment upon each revocation.

United States v. Miller, 634 F.3d 841 (5th Cir. 2011):

(1) Resolving a question left open in previous cases, the Fifth Circuit held that, even after United States v. Booker, 543 U.S. 220 (2005), supervised release revocation sentences should be reviewed on appeal under a “plainly unreasonable” standard; under this standard, the appellate court evaluates whether the district court procedurally erred before the appellate court considers the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard; if the sentence is unreasonable, then the appellate court considers whether the error was obvious under existing law.

(2) **Agreeing with the Fourth and Ninth Circuits, but disagreeing with the Sixth Circuit**, the Fifth Circuit held that, in modifying or revoking a supervised release term, a district court may not rely upon 18 U.S.C. § 3553(a)(2)(A), which directs a court initially imposing sentence to consider the need for the sentence imposed “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”; Congress deliberately omitted § 3553(a)(2)(A) from the list of permissible factors in 18 U.S.C. § 3583(e); accordingly, the district court erred by determining that defendant’s supervised release revocation sentence was appropriate due to the “seriousness of the offense” and defendant’s lack of “respect for the law”; despite this mistake, however, the district court’s error was not plainly unreasonable because (1) when the district court sentenced defendant, the Fifth Circuit’s law on this question was not clear, and (2) therefore, that court’s consideration of § 3553(a)(2)(A) was not an obvious error; accordingly, the Fifth Circuit affirmed the sentence.

United States v. Garcia-Rodriguez, 640 F.3d 129 (5th Cir. 2011) A deportable alien’s supervised release term begins when he is released from the custody of the Federal Bureau of Prisons (having discharged his prison sentence) to the custody of Immigration and Customs Enforcement to await deportation; under that rubric, it was unclear precisely when defendant began his supervised

release term, and at least one possible date in the record suggested that the supervised release warrant might have issued *after* the supervised release expiration date, thus depriving the district court of jurisdiction to revoke supervised release; because the start date of defendant's supervised release could not be ascertained on the present record, the Fifth Circuit ordered a limited remand to the district court for that court to determine exactly when defendant's supervised release began.

United States v. Breland, 647 F.3d 284 (5th Cir. 2011) The Fifth Circuit adhered to its decision in United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994), holding that, upon revocation of supervised release, a district court may impose a longer prison sentence to address the rehabilitative needs of the defendant; although the Supreme Court recently held, in Tapia v. United States, 131 S. Ct. 2382 (2011), that courts may not impose or lengthen a prison term to promote an offender's rehabilitation, that holding is limited only to *initial* sentencing, not revocation sentencing; 18 U.S.C. § 3583, the statute governing supervised release, specifically *requires* courts to consider rehabilitation when revoking a defendant's supervised release and sentencing him thereon; therefore, the district court did not err in imposing a 35-month revocation sentence based, in part, on the desire to make sure that defendant could participate in the Federal Bureau of Prisons' 500-hour drug-treatment program. [NOTE: The First Circuit has held to the contrary, in an opinion authored by former Justice Souter, sitting by designation. See United States v. Molignaro, ____ F.3d ____, 2011 WL 2628330, at *1 & *4 (1st Cir. July 6, 2011).]

C. Parole

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

A. § 2255 generally

B. Habeas Corpus (§ 2254) generally

Wilson v. Corcoran, ____ U.S. ____, 131 S. Ct. 13 (2010) (*per curiam*) (decision below: Corcoran v. Levenhagen, 593 F.3d 547 (7th Cir. 2010)) The Seventh Circuit erred in granting federal habeas relief to death-sentenced Indiana prisoner; the basis for relief – that the trial judge had improperly considered nonstatutory aggravating factors in imposing the death penalty – stated only a violation of Indiana *state* law; it is only noncompliance with *federal* law that renders a state's criminal judgment susceptible to collateral attack in the federal courts; accordingly, the Supreme Court granted the State of Indiana's petition for certiorari, vacated the Seventh Circuit's judgment, and remanded for further proceedings consistent with the Supreme Court's opinion.

Premo v. Moore, ____ U.S. ____, 131 S. Ct. 733 (2011) (decision below: Moore v. Czerniak, 574 F.3d 1092 (9th Cir. 2009)) The Oregon state courts did not unreasonably apply clearly established federal law (*i.e.*, the rule of Strickland v. Washington, 466 U.S. 668 (1984)) in rejecting defendant's claim of ineffective assistance of counsel premised on defense counsel's decision not to move to suppress defendant's confession; it would not have been unreasonable for the state courts

to accept as a justification for counsel's action the fact that suppression would have been futile in light of defendant's admissible confession to two other witnesses; given the vagaries and uncertainties of the plea bargaining process, counsel acted reasonably in foregoing a motion to suppress in light of a quick plea that may have staved off a capital prosecution; the Court of Appeals erred in importing into the ineffective-assistance-of-counsel inquiry the standard of Arizona v. Fulminante, 499 U.S. 279 (1991), which dealt with the erroneous admission of an involuntary confession in violation of the Fourth Amendment; moreover, the state courts could also reasonably have concluded that defendant was not prejudiced by counsel's action, because those courts could reasonably have concluded that defendant would have accepted the plea agreement even if his second confession had been ruled in admissible; again, the Ninth Circuit erred in importing into this inquiry the analysis of Fulminante, which did not deal with Strickland's prejudice standard or contemplate prejudice in the plea bargain context; accordingly, the Court reversed the Ninth Circuit's judgment granting federal habeas relief. (Justice Ginsburg filed an opinion concurring in the judgment. Justice Kagan took no part in the decision.)

Harrington v. Richter, ____ U.S. ____, 131 S. Ct. 770 (2011) (decision below: Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc)) The provisions of 28 U.S.C. § 2254(d), and the deferential review required therein, applied to defendant's federal habeas petition, even though the state court's order denying relief was unaccompanied by an opinion explaining the court's reasoning; even where a state court denies relief with only a summary order, it can be presumed that the adjudication was on the merits, absent any contrary indication or state-law procedural principles; on the merits, California murder defendant was not entitled to federal habeas relief for ineffective assistance of counsel in the sentencing phase, because he failed to show that the California state courts unreasonably applied clearly established federal law (*i.e.*, the rule of Strickland v. Washington, 466 U.S. 668 (1984)) in denying his claim; contrary to the Ninth Circuit's ruling, it was not unreasonable for the state courts to conclude that defense counsel provided adequate representation even though he did not consult forensic blood experts or introduce expert evidence; counsel is entitled to balance limited resources in accord with effective trial tactics and strategies, and counsel could reasonably have concluded it was not advisable to use such evidence here; moreover, the Ninth Circuit also erred in finding Strickland prejudice; the state courts reasonably concluded that the blood evidence in question fell short of Strickland's prejudice standard, *i.e.*, a reasonable probability of a different result; accordingly, the Court reversed the Ninth Circuit's judgment granting federal habeas relief. (Justice Ginsburg filed an opinion concurring in the judgment, in which she opined that it was deficient performance not to even consult blood experts in preparation for trial, but that defendant was not sufficiently prejudiced thereby so as to warrant habeas relief. Justice Kagan took no part in the decision.)

Swarthout v. Cooke, ____ U.S. ____, 131 S. Ct. 859 (2011) (per curiam) (decisions below: Cooke v. Solis, 606 F.3d 1206 (9th Cir. 2010), and Clay v. Kane, 384 Fed. Appx. 544 (9th Cir. 2010) (unpublished)) The Ninth Circuit erred in granting federal habeas relief to California state prisoners who alleged improper denial of state parole; although California law requires "some evidence" that a prisoner is unsuitable for parole, the California courts' application of that standard to these prisoners' cases is not a proper subject for federal habeas relief, because federal habeas corpus relief does not lie for errors of state law; nor was there any clearly established federal constitutional

violation; although the Court has held that a denial of good-time credits must constitutionally be based on “some evidence,” see Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 U.S. 445 (1985), the Court has never imposed such a requirement for denial of parole; rather, the only federal constitutional requirements for parole are *procedural* ones not going to the merits of the parole decision; accordingly, the Court reversed the judgments of the Ninth Circuit. (Justice Ginsburg filed a concurring opinion.)

Walker v. Martin, ____ U.S. ____, 131 S. Ct. 1120 (2011) (decision below: Martin v. Walker, 357 Fed. Appx. 793 (9th Cir. 2009) (unpublished)) California’s indeterminate “reasonableness” standard for determining whether a state habeas petition is timely (focusing on whether the petition was filed without substantial delay after the time the petitioner knew or should have known of the factual basis of the claim) qualifies as an independent state ground adequate to bar habeas corpus relief in federal court; a state procedural rule can operate as an adequate and independent bar to federal habeas relief even if it permits an appropriate exercise of discretion that would permit consideration of a federal claim in some cases but not others; the California rule is not too vague to qualify as firmly established, because the application of indeterminate language in particular circumstances can supply the requisite clarity; nor is there any viable argument that this procedural rule is not regularly followed; the mere fact that outcomes may vary from case to case does not automatically disqualify a discretionary rule from qualifying as an adequate and independent state bar; indeed, discretion enables a court to avoid the harsh results that may attend consistent application of an unyielding rule; although a state ground may be inadequate when a court has exercised its discretion in an surprising or unfair manner, petitioner made no such contention here; in conclusion, although federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights, there is, on the record here, no indication that California’s timeliness rule does so; accordingly, contrary to the Ninth Circuit’s holding, petitioner was not entitled to a federal merits determination of claims that were denied as untimely in the California Supreme Court.

Felkner v. Jackson, ____ U.S. ____, 131 S. Ct. 1305 (2011) (per curiam) (decision below: Jackson v. Felkner, 389 Fed. Appx. 640 (9th Cir. 2010) (unpublished)) The Ninth Circuit erred in granting federal habeas relief based on defendant’s claim that two jurors in his California state trial had been struck for racially discriminatory reasons, in violation of Batson v. Kentucky, 476 U.S. 79 (1986); the state trial court credited the prosecutor’s race-neutral reasons for the strikes, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court’s findings; the state appellate court’s decision was plainly not unreasonable, and “[t]here was simply no basis for the Ninth Circuit to reach the opposition conclusion, particularly in such a dismissive manner” (the Supreme Court called the Ninth Circuit’s decision “as inexplicable as it is unexplained”); accordingly, the Supreme Court reversed the Ninth Circuit’s judgment.

Cullen v. Pinholster, ____ U.S. ____, 131 S. Ct. 1388 (2011) (decision below: Pinholster v. Ayers, 590 F.3d 651 (9th Cir. 2009)) Review under 28 U.S.C. § 2254(d)(1) (for a state-court decision allegedly “contrary to, or involv[ing] an unreasonable application of, clearly established Federal law”) is limited to the record that was before the state court that adjudicated the claim on the merits; on the record before the state court, defendant was not entitled to relief on his claim of

ineffective assistance of counsel in the presentation of mitigating evidence at the penalty phase of his trial; the state court's finding of no deficient performance was not unreasonable; in finding to the contrary, the Ninth Circuit erred in finding a categorical "constitutional duty to investigate" and in concluding that it was prima facie ineffective for counsel to abandon an investigation based on rudimentary knowledge of defendant's background; beyond the general requirement of reasonableness, "specific guidelines are not appropriate"; nor did the state court unreasonably conclude that defendant was not prejudiced by any deficient performance; accordingly, the Supreme Court reversed the grant of federal habeas relief. (Justice Alito filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Sotomayor filed a dissenting opinion, in which she was joined in part by Justices Ginsburg and Kagan.)

Bobby v. Mitts, ____ U.S. ____, 131 S. Ct. 1762 (2011) (decision below: Mitts v. Bagley, 620 F.3d 650 (6th Cir. 2010)) The Sixth Circuit erred in holding that the penalty phase instructions of death-sentenced Ohio defendant's trial were constitutionally flawed under Beck v. Alabama, 447 U.S. 625 (1980); Beck had to do with the danger of forcing a jury into an all-or-nothing choice between guilt of capital murder and outright acquittal, by removing from the jury's consideration the possibility of guilt on a lesser, non-capital offense; the logic of Beck does not, however, directly apply to penalty phase proceedings; here, the jury could not plausibly have thought that, if they declined to recommend the death penalty, defendant would escape all penalties for his participation in the crime; accordingly, the Supreme Court reversed the Sixth Circuit's grant of habeas relief.

Howes v. Fields, cert. granted, ____ U.S. ____, 131 S. Ct. 1047 (Jan. 24, 2011) (No. 10-680) (granting cert. to Fields v. Howe, 617 F.3d 813 (6th Cir. 2010)) Does this Court's clearly established precedent under 28 U.S.C. § 2254 hold that a prisoner is always "in custody" for purposes of Miranda any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances?

Maples v. Thomas, cert. granted, ____ U.S. ____, 131 S. Ct. 1718 (Mar. 21, 2011) (No. 10-63) (granting cert. to Maples v. Allen, 586 F.3d 879 (11th Cir. 2009)) Where state court orders were mailed to defendant's state habeas counsel, but then were returned to the state court unopened with the notation "Return to Sender – Left Firm," was there "cause" to excuse any procedural default in a missed filing deadline, given that the petitioner was blameless for the default, the State's own conduct contributed to the default (the State took no action upon receipt of the returned mail), and petitioner's attorneys of record were no longer functioning as his agents at the time of any default?

Martinez v. Ryan, cert. granted, ____ U.S. ____, 131 S. Ct. 2960 (June 6, 2011) (No. 10-1001) (granting cert. to Martinez v. Schriro, 623 F.3d 731 (9th Cir. 2010)) Does a defendant in a state criminal case – who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding – have a federal constitutional right to effective assistance

of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim?

Martel v. Clair, cert. granted, ____ U.S. ____, 131 S. Ct. 3064 (June 27, 2011) (No. 10-1265) (granting cert. to Clair v. Ayers, 403 Fed. Appx. 276 (9th Cir. 2010) (unpublished)) Is a condemned state prisoner in federal habeas corpus proceedings entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence?

Sixta v. Thaler, 615 F.3d 569 (5th Cir. 2010) Agreeing with the Fourth Circuit in Thompson v. Greene, 427 F.3d 263 (4th Cir. 2005), the Fifth Circuit held that, under the Federal Rules of Civil Procedure and the Rules Governing Section 2254 Cases, the habeas respondent (i.e., the custodian) is required to serve the respondent's answer, plus any exhibits thereto, upon the habeas petitioner; here, however, the respondent did not attach any exhibits to his answer, and thus there were none to serve; the Fifth Circuit declined to reach the question about whether the Constitution or applicable procedural rules required the respondent to attach some portion of the state court records as exhibits to the answer and then to serve those exhibits together with the answer pursuant to applicable procedural rules.

Stevens v. Epps, 618 F.3d 489 (5th Cir. 2010) Death-sentenced Mississippi state defendant was not entitled to federal habeas relief on his claim that the prosecution had exercised a peremptory challenge on a black prospective juror on the basis of race (in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny); the prosecution offered more than one race-neutral reason for striking the juror, and the defendant failed to rebut one of those reasons (the prospective juror's alleged inattentiveness); the Mississippi Supreme Court's decision that the trial judge allowed the strike because it implicitly credited the prosecutor's assertion of inattentiveness, and its decision to defer to the trial court's implicit factual finding, is not an unreasonable application of Batson and its progeny; along the way, the Fifth Circuit noted that, in Thaler v. Haynes, 130 S. Ct. 1171 (2010) (per curiam), the Supreme Court had reversed the Fifth Circuit's understanding of the decision in Snyder v. Louisiana, 552 U.S. 472 (2008), and had limited the latter decision's holding to cases where a trial judge did not explain why he overruled a Batson challenge and one of the allegedly race-neutral reasons offered by the prosecutor was race-based; the Fifth Circuit also declined to grant a certificate of appealability on defendant's claim that the representation afforded him in the Mississippi post-conviction review process was so deficient as to deny defendant due process; a defendant has no constitutional right to appointed counsel in post-conviction proceedings at all, and hence no constitutional redress if post-conviction counsel performs deficiently. (Judge Haynes concurred in the judgment. She affirmed on the Batson issue "only because of the highly deferential review standard required by AEDPA" and noted that, given some of the "disturbing and inappropriate" remarks in this record, "[h]ad this been a direct appeal of the state trial court's decision, [her] decision very likely would have been different.")

Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010) District court did not err in holding a federal evidentiary hearing on death-sentenced Mississippi defendant's claim, under Atkins v. Virginia, 536

U.S. 304 (2002), that he was ineligible for the death penalty due to being mentally retarded; because the Mississippi Supreme Court improperly denied defendant's Atkins claim without a hearing, the district court was not required to afford the state court decision deference under the AEDPA; finally, the district court did not clearly err in finding defendant mentally retarded under the 4-prong test applicable in Mississippi; accordingly, the Fifth Circuit affirmed the district court's grant of federal habeas relief invalidating the death sentence imposed on defendant. (Judge Jolly concurred in the judgment only.)

Maldonado v. Thaler, 625 F.3d 229 (5th Cir. 2010) Death-sentenced Texas defendant was not entitled to federal habeas relief on his claim, under Atkins v. Virginia, 536 U.S. 304 (2002), that he was ineligible for the death penalty due to being mentally retarded; defendant did not overcome the presumption of correctness that attached to the state habeas court's conclusion that he did not meet his burden of establishing mental retardation; therefore, the state court's denial of relief was neither an unreasonable application of federal law, now an unreasonable determination of the facts in light of the evidence, as required for federal habeas relief under the AEDPA; accordingly, the Fifth Circuit affirmed the district court's denial of federal habeas relief.

Rocha v. Thaler, 626 F.3d 815 (5th Cir. 2010) (supplementing, and on denial of rehearing in, 619 F.3d 387 (5th Cir. 2010)), reh'g en banc denied, 628 F.3d 218 (5th Cir. Dec. 17, 2010) Texas state death-sentenced defendant was not entitled to federal habeas relief on his claim, under Brady v. Maryland, 373 U.S. 83 (1963), that the state withheld material impeaching evidence about one of the investigating detectives (namely, his professional and romantic relationship with the sister of one of the state's witnesses, and an unspecified disciplinary record); the evidence did not create a reasonable probability of a different outcome, and hence was not material under Brady, given the fact that the evidence was redundant of the testimony of the other investigating detective and given defendant's confession; the same was true with respect to the testimony of the witness himself; furthermore, defendant was not entitled to a certificate of appealability ("COA") on the question whether the state violated his rights (as a Mexican citizen) under the Vienna Convention and whether such a violation requires suppression of his confession. On initial consideration, the panel held that, under Balentine v. Thaler, 609 F.3d 729 (5th Cir. 2010) (later withdrawn), defendant had at least a colorable argument that his ineffective-assistance-of-counsel claim (based on the failure to investigate/produce available mitigation evidence) was denied by the Texas Court of Criminal Appeals on the merits, not as the result of an adequate and independent state law procedural ground; accordingly, the panel initially granted a COA on this claim. **However, on denial of rehearing, the panel held that under a proper view of the law (also reflected in the substituted opinion in Balentine), the state court's decision on this issue had to be viewed as rested on an adequate and independent state law procedural bar, thus precluding federal habeas relief. (Judge Haynes filed a specially concurring opinion, in which she agreed that precedent required this construction of the state court's decision, but she suggested that it might bear further examination by some court.) On petition for rehearing en banc, the poll for rehearing en banc failed by a vote of 11-4. Judge Dennis filed a lengthy dissent from denial of rehearing en banc, in which he was joined by Judge Benavides. Judge Haynes filed a short statement dissenting from denial of rehearing en banc.**

Balentine v. Thaler, 626 F.3d 842 (5th Cir. 2010) (withdrawing and replacing 609 F.3d 729 (5th Cir. 2010)), reh'g en banc denied, 629 F.3d 470 (5th Cir. Dec. 29, 2010) In its initial opinion, the Fifth Circuit panel had held that, in light of Ex parte Campbell, 226 S.W.2d 418 (Tex. Crim. App. 2007), and Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007), the district court should have, pursuant to Fed. R. Civ. P. 60(b), set aside its judgment denying Texas death-sentenced defendant federal habeas relief due to a supposedly adequate and independent state procedural default; accordingly, the Fifth Circuit initially reversed the district court's order denying defendant's Rule 60(b) motion and remanded for consideration of the merits of defendant's ineffective assistance of counsel claim, including any necessary evidentiary hearing. **However, in the substituted opinion, the panel held that it had erred in interpreting Ruiz to mean that uncertainty about the basis of a state-court decision should give rise to a presumption that the state court reached the merits rather than relying upon a state procedural bar; in light of this correct understanding of Ruiz, the district court did not err in denying defendant's Rule 60(b) motion, because the district court did not err in concluding that the state-court decision on defendant's ineffective-assistance-of-counsel claim was grounded on an adequate and independent state procedural bar, the Fifth Circuit affirmed the district court's denial of defendant's Rule 60(b) motion. On petition for rehearing en banc, the poll for rehearing en banc failed by a vote of 11-4. Judge Dennis filed a lengthy dissent from denial of rehearing en banc, in which he was joined by Judge Benavides. Judge Haynes filed a short statement dissenting from denial of rehearing en banc.**

Scott v. Hubert, 635 F.3d 659 (5th Cir. 2011) Federal district court reversibly erred in dismissing, for failure to exhaust state remedies, Louisiana state defendant's habeas claim respecting his sexual-battery conviction (claims relating to alleged racial discrimination by the prosecution in jury selection, in violation of Batson v. Kentucky, 466 U.S. 668 (1984)); in state court, defendant did fully develop his legal claim and offered material support for it in the form of the transcript of the state-court voir dire; the district court erroneously reached a contrary conclusion because the record before it did not contain these filings; accordingly, the Fifth Circuit reversed the judgment of dismissal and remanded for further proceedings.

Wilson v. Cain, 641 F.3d 96 (5th Cir. 2011) In Louisiana state attempted manslaughter case (committed while defendant was in prison on another charge), the Louisiana court did not unreasonably apply clearly established Supreme Court law in rejecting defendant's claim that his post-incident questioning by prison officials violated Miranda v. Arizona; because the questioning was conducted by members of the prison staff, using the prison's routine immediate "post-fight" procedure to ensure the safety of the general prison population, it was not objectively unreasonable for the state court to conclude that this was more like general on-the-scene questioning rather than a custodial interrogation of the type addressed by the Supreme Court in Mathis v. United States, 391 U.S. 1 (1968), and Maryland v. Shatzer, ___ U.S. ___, 130 S. Ct. 1213 (2010); accordingly, the Fifth Circuit affirmed the district court's denial of federal habeas relief.

Puckett v. Epps, 641 F.3d 657 (5th Cir. 2011) In Mississippi capital murder prosecution resulting in death sentence, the state court did not unreasonably apply Supreme Court law in rejecting defendant's claim of racial discrimination in jury selection (in violation of Batson v. Kentucky, 466 U.S. 668 (1984)); it was not unreasonable for the state court to find that the prosecutor's explanation

for his strikes was not pretextual; the Fifth Circuit did note that it “m[ight] have reached a different conclusion reviewing this issue in the first instance,” but ultimately held that defendant had not met the high standard for federal habeas relief on this claim; with respect to defendant’s claim of improper use of post-arrest silence (in violation of Doyle v. Ohio, 426 U.S. 610 (1976)), the Fifth Circuit held that this claim was not procedurally barred; however, on the merits, the state court did not unreasonably apply Doyle and its Supreme Court progeny in rejecting defendant’s claim; Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements; where a defendant makes a post-arrest statement that is sufficiently incomplete with respect to a trial statement on the same subject matter as to be arguably inconsistent, comment upon the omissions is permitted.

Gonzales v. Thaler, 643 F.3d 425 (5th Cir. 2011) District court did not err in denying federal habeas corpus relief to defendant convicted of armed robbery in Texas state court; the failure, at defendant’s trial, to redact, from a warrant admitted into evidence, the arresting officer’s affirmation of belief that defendant was the robber, did not render defendant’s trial so fundamentally unfair as to violate due process; the Fifth Circuit was not persuaded that the statements made in the warrant affidavit were a crucial, critical, highly significant factor upon which the jury based its verdict of guilty; the Fifth Circuit noted that its denial of habeas relief was not an endorsement that the evidence was overwhelming; it commented that the evidence consisted primarily of cross-racial identifications, which scientific studies have demonstrated to be particularly unreliable.

Kinsel v. Cain, 647 F.3d 265 (5th Cir. 2011) In federal habeas action challenging defendant’s conviction for sexual abuse of a child, although the child victim, as an adult, later approached the district attorney and voluntarily recanted, under oath, her incriminating testimony, this did not provide any basis for federal habeas corpus relief, especially under the stringent standard applicable for a successive habeas corpus petition; there was not any evidence that the prosecutor *knew* the victim was going to provide perjured testimony at trial; nor did the subsequent recantation mean that defendant was deprived of either his right to confrontation or his right to a fair trial; the Fifth Circuit further held that a federal habeas court could not take cognizance of any alleged misapplication of Louisiana’s postconviction procedural law; infirmities in state habeas proceedings do not constitute grounds for relief in federal court; accordingly, although finding it “beyond regrettable that a possible innocent man will not receive a new trial in the face of the of the preposterously unreliable testimony of the victim and sole eyewitness to the crime of which he was convicted,” the Fifth Circuit affirmed the district court’s denial of federal habeas relief.

Druery v. Thaler, ___ F.3d ___, 2011 WL 2859877 (5th Cir. July 20, 2011) Fifth Circuit rejected death-sentenced Texas defendant’s constitutional challenge to Texas’s “12-10” jury instruction (pertaining to the number of juror votes needed for the punishment special issues); defendant’s claim that the trial court should have sua sponte given a lesser-included instruction on murder was procedurally barred by the invited-error doctrine; finally, the Fifth Circuit rejected defendant’s claim that it was error not to instruct the jury on the burden of proof for the mitigation special issue.

Simmons v. Epps, ___ F.3d ___, 2011 WL 3802963 (5th Cir. Aug. 30, 2011) In Mississippi capital prosecution, there was insufficient evidence to support the aggravating circumstance that defendant knowingly created a great risk of death to many people; nevertheless, the erroneous submission of this aggravator to the jury was harmless under the facts of this case and did not require reversal of defendant’s death sentence; nor did the state courts unreasonably apply Supreme Court law in concluding that the refusal to admit, in the penalty phase, a videotape of defendant (held to be inadmissible hearsay under state law) did not render the trial fundamentally unfair. (Judge Garza filed a dissenting opinion, in which he disagreed that the erroneous submission of the “great risk” aggravator was harmless error.)

C. Ineffective Assistance of Counsel/Conflict of Interest

Premo v. Moore, ___ U.S. ___, 131 S. Ct. 733 (2011) (decision below: Moore v. Czerniak, 574 F.3d 1092 (9th Cir. 2009)) The Oregon state courts did not unreasonably apply clearly established federal law (i.e., the rule of Strickland v. Washington, 466 U.S. 668 (1984)) in rejecting defendant’s claim of ineffective assistance of counsel premised on defense counsel’s decision not to move to suppress defendant’s confession; it would not have been unreasonable for the state courts to accept as a justification for counsel’s action the fact that suppression would have been futile in light of defendant’s admissible confession to two other witnesses; given the vagaries and uncertainties of the plea bargaining process, counsel acted reasonably in foregoing a motion to suppress in light of a quick plea that may have staved off a capital prosecution; the Court of Appeals erred in importing into the ineffective-assistance-of-counsel inquiry the standard of Arizona v. Fulminante, 499 U.S. 279 (1991), which dealt with the erroneous admission of an involuntary confession in violation of the Fourth Amendment; moreover, the state courts could also reasonably have concluded that defendant was not prejudiced by counsel’s action, because those courts could reasonably have concluded that defendant would have accepted the plea agreement even if his second confession had been ruled in admissible; again, the Ninth Circuit erred in importing into this inquiry the analysis of Fulminante, which did not deal with Strickland’s prejudice standard or contemplate prejudice in the plea bargain context; accordingly, the Court reversed the Ninth Circuit’s judgment granting federal habeas relief. (Justice Ginsburg filed an opinion concurring in the judgment. Justice Kagan took no part in the decision.)

Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388 (2011) (decision below: Pinholster v. Ayers, 590 F.3d 651 (9th Cir. 2009)) Review under 28 U.S.C. § 2254(d)(1) (for a state-court decision allegedly “contrary to, or involv[ing] an unreasonable application of, clearly established Federal law”) is limited to the record that was before the state court that adjudicated the claim on the merits; on the record before the state court, defendant was not entitled to relief on his claim of ineffective assistance of counsel in the presentation of mitigating evidence at the penalty phase of his trial; the state court’s finding of no deficient performance was not unreasonable; in finding to the contrary, the Ninth Circuit erred in finding a categorical “constitutional duty to investigate” and in concluding that it was prima facie ineffective for counsel to abandon an investigation based on rudimentary knowledge of defendant’s background; beyond the general requirement of reasonableness, “specific guidelines are not appropriate”; nor did the state court unreasonably conclude that defendant was not prejudiced by any deficient performance; accordingly, the Supreme

Court reversed the grant of federal habeas relief. (Justice Alito filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Sotomayor filed a dissenting opinion, in which she was joined in part by Justices Ginsburg and Kagan.)

Lafler v. Cooper, cert. granted, ___ U.S. ___, 131 S. Ct. 856 (Jan. 7, 2011) (No. 10-209) (granting cert. to Cooper v. Lafler, 376 Fed. Appx. 563 (6th Cir. 2010) (unpublished)) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial? QUESTION ADDED BY THE COURT: What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

Missouri v. Frye, cert. granted, ___ U.S. ___, 131 S. Ct. 856 (Jan. 7, 2011) (No. 10-444) (granting cert. to Frye v. State, 311 S.W.3d 350 (Mo. Ct. App. 2010)) Contrary to the holding in Hill v. Lockhart, 474 U.S. 52 (1985) – which held that a defendant must allege that, but for counsel’s error, the defendant would have gone to trial – can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel’s error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? QUESTION ADDED BY THE COURT: What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

Gray v. Epps, 616 F.3d 436 (5th Cir. 2010) District court did not err in denying death-sentenced Mississippi defendant’s federal habeas petition alleging ineffective assistance of counsel at the penalty phase of his capital murder trial; the Fifth Circuit pretermitted the question whether trial counsel had provided deficient performance by failing to present mitigating evidence about defendant’s childhood, psychological condition, low intelligence, and good character because, even if counsel was deficient, the Mississippi Supreme Court was not unreasonable in concluding that the proffered mitigation evidence does not establish prejudice (i.e., a reasonable likelihood of a different outcome with respect to the sentence).

Paredes v. Thaler, 617 F.3d 315 (5th Cir. 2010) The Texas courts did not unreasonably apply clearly established Supreme Court law in rejecting death-sentenced defendant’s claim that the state trial court violated his constitutional rights by failing to require a unanimous verdict as to which two or more three decedents defendant murdered; the principal Supreme Court decision on the issue of what the Constitution requires by way of jury unanimity – Schad v. Arizona, 501 U.S. 624 (1991) – was a decision that produced no majority opinion, and neither the plurality opinion in that case nor the concurring opinion of Justice Scalia (who provided the necessary fifth vote for the outcome) provides a clear answer to the question presented here; moreover, the very general nature of each of these analyses means that a broader range of outcomes will be considered reasonable; in any event, even if there were some error in the failure to require jury unanimity, defendant failed to show prejudice from any such error, because the jury was also permitted to find defendant guilty under

Texas's law of parties even if he did not personally shoot any of the victims, and the evidence of defendant's guilt under the law of parties was overwhelming and virtually unchallenged; for the same reasons defendant suffered no prejudice from any deficient performance by his trial attorney in failing to request a unanimity instruction.

Stevens v. Epps, 618 F.3d 489 (5th Cir. 2010) Fifth Circuit declined to grant a certificate of appealability on death-sentenced Mississippi state defendant's claim that the representation afforded him in the Mississippi post-conviction review process was so deficient as to deny defendant due process; a defendant has no constitutional right to appointed counsel in post-conviction proceedings at all, and hence no constitutional redress if post-conviction counsel performs deficiently.

United States v. Bishop, 629 F.3d 462 (5th Cir. 2010) Where defendant was convicted of making false statements in tax returns, the district court did not err in denying defendant's motion for a new trial without holding a hearing to examine her ineffective-assistance-of-counsel ("IAC") claims on the merits; although a defendant may raise IAC claims in a motion for a new trial, a post-conviction motion under 28 U.S.C. § 2255 is the preferred vehicle for raising IAC claims; here, in light of the significant factual issues necessary to the IAC claim, it was not an abuse of the district court's discretion to deny the motion for new trial in favor of allowing defendant to raise those issues in § 2255 proceedings; it was within the district court's discretion to decline to prolong its original proceedings to consider matters that would be better raised collaterally.

Charles v. Thaler, 629 F.3d 494 (5th Cir. 2011) Defendant, sentenced to an aggregate term of 40 years' imprisonment for offenses committed when he was 14 years old, was not entitled to federal habeas relief on his claims that he received ineffective assistance of counsel ("IAC") in his punishment trial; the state court did not unreasonably apply federal law in concluding that defendant did not receive remediable IAC by his counsel's failure to object to two portions of the prosecutor's closing argument, by counsel's failure to object to two portions of a prosecution witness's testimony, by counsel's failure to object to a question by the prosecutor, or by counsel's elicitation of prejudicial information from defendant and failure to object to the prosecutor's cross-examination of defendant on the same subject.

Arnold v. Thaler, 630 F.3d 367 (5th Cir. 2011) Where Texas state defendant alleged ineffective assistance of counsel ("IAC") in his trial counsel's failure to inform him about favorable plea offers, the federal district court clearly erred in finding that defendant had never alleged that he would have accepted the plea offers had they been communicated to him; to the contrary, in his habeas petition and in a supporting affidavit, defendant alleged that he would have accepted those offers; along the way, the Fifth Circuit rejected a requirement that, in order to show prejudice, the defendant must show not only a reasonable probability that he would have accepted the plea offer, but also a reasonable probability that the trial court would have approved and accepted the plea offer; because the district court's ruling rested on its clearly erroneous fact-finding, and because the state court made no findings on whether defendant would have accepted the plea offer, the Fifth Circuit reversed the judgment below and remanded for further proceedings.

McAfee v. Thaler, 630 F.3d 383 (5th Cir. 2011) Texas state defendant, convicted of aggravated robbery, was not entitled to federal habeas relief on his allegations (1) that he received ineffective assistance of counsel (“IAC”) from trial counsel with respect to his motion for a new trial or (2) that he did not receive a fair hearing on his motion for new trial; at the outset, the Fifth Circuit, agreeing with other circuits and the Texas Court of Criminal Appeals, held that there is a Sixth Amendment right to the assistance of counsel on a motion for new trial, during the post-trial, pre-appeal period, in Texas, because it is a critical stage of the proceedings; disagreeing with the state court, the Fifth Circuit found that trial counsel’s performance with respect to the motion for a new trial was deficient; however, although the Fifth Circuit also found that “this [was] arguably a close case on prejudice,” it ultimately could not find unreasonable the state-court’s finding that defendant was not prejudiced by any deficiency; finally, the failure to appoint different counsel for the hearing on the new-trial motion likewise did not warrant federal habeas relief, because the prejudice inquiry was the same as for the IAC question.

Cantu v. Thaler, 632 F.3d 157 (5th Cir. 2011) In Texas capital murder prosecution where defendant was sentenced to death, trial counsel did not provide ineffective assistance of counsel (“IAC”) at the sentencing phase by failing to discover and present evidence of defendant’s bipolar disorder; trial counsel made a reasonable strategic decision not to investigate defendant’s mental health problems, which would have been inconsistent with the strategy actually used at trial and which would have opened the door to a state psychiatrist’s examination which could have strengthened the State’s position that defendant was a psychopath and thus a future danger; with respect to defendant’s claim of IAC during the guilt/innocence phase, this claim was procedurally defaulted because the claim had not been raised in state postconviction proceedings and Texas state courts would not consider it if raised in a successive state petition; nor could defendant show cause and actual prejudice, or a fundamental miscarriage of justice, that would allow defendant to overcome the procedural bar and secure federal habeas review of that claim; finally, even assuming arguendo that freestanding actual innocence may in some circumstances be cognizable in federal habeas, here defendant did not meet the “extraordinarily high” standard that would be necessary for such a claim.

Mitchell v. Epps, 641 F.3d 134 (5th Cir. 2011) Death-sentenced Mississippi defendant was not entitled to a certificate of appealability (“COA”) on his claim that his trial attorneys provided ineffective assistance of counsel by failing to investigate, discover, and introduce readily available mitigating evidence concerning defendant’s background and mental condition; this could have been a reasonable strategy designed to keep out other, unfavorable information; in any event, reasonable jurists would not find debatable the district court’s conclusion that defendant was not prejudiced by the failure to present the mitigating evidence in question; nor was defendant entitled to a COA on his claim that he was mentally retarded, such that his execution would violate the Eighth Amendment; there was little to show that defendant was cognitively challenged; to the contrary, there was much evidence in the record of normal to above-average functioning.

Pape v. Thaler, 645 F.3d 281 (5th Cir. 2011) Although federal district court had, after an evidentiary hearing, granted federal habeas relief on the ground of ineffective assistance of counsel in the investigation and presentation of the defense case in defendant’s prosecution for aggravated sexual assault of a child and indecency with a child, the Fifth Circuit reversed the district court’s

decision and denied the habeas petition; first, under the Supreme Court's decision in Cullen v. Pinholster, 131 S. Ct. 1388 (2011), the federal district court erred in holding an evidentiary hearing on defendant's allegations and relying upon evidence developed at that hearing to grant defendant relief; under Pinholster, a habeas petitioner must overcome the limitations of 28 U.S.C. § 2254(d)(1) based solely upon the record that was before the state court; on the merits, and as judged on the state record alone, the state court did not unreasonably apply Supreme Court precedent when it found that defense counsel's actions were legitimate trial strategy not constituting ineffective assistance of counsel.

Amos v. Thornton, 646 F.3d 199 (5th Cir. 2011) Mississippi Supreme Court did not unreasonably apply United States Supreme Court law in rejecting life-sentenced murder defendant's constitutional speedy trial claim; especially given that defendant was unable to show any substantial prejudice from the pretrial delay, the state court did not unreasonably apply the factors of Barker v. Wingo, 407 U.S. 514 (1972), in finding no Sixth Amendment speedy trial violation; for the same reasons (again, especially the lack of prejudice from the delay), it was objectively reasonable for the state court to reject defendant's ineffective assistance of counsel claim based on trial counsel's failure to move for a speedy trial.

Druery v. Thaler, ___ F.3d ___, 2011 WL 2859877 (5th Cir. July 20, 2011) Death-sentenced Texas defendant was not entitled to a certificate of appealability on his rejected federal habeas claims of ineffective assistance of counsel pertaining to (1) counsel's failure to request an instruction on the lesser-included offense of murder, (2) counsel's failure to investigate and plan mitigating mental health evidence.

Rabe v. Thaler, ___ F.3d ___, 2011 WL 3311756 (5th Cir. Aug. 3, 2011) Under Cullen v. Pinholster, 131 S. Ct. 1388 (2011), a federal habeas court is limited to considering only the evidence in the state-court record underlying the state-court decision whose reasonableness is being reviewed; based solely upon that record, the state court's conclusion that defense counsel was not ineffective for failing to call an alibi witness was not unreasonable, because the state-court record did not show that the witness was willing and able to testify.

D. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

Wall v. Kholi, ___ U.S. ___, 131 S. Ct. 1278 (2011) (decision below: Kholi v. Wall, 582 F.3d 147 (1st Cir. 2009)) Defendant's sentence-reduction motion, filed in Rhode Island state court, constituted an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the AEDPA's one-year limitations period for a state prisoner to file a federal habeas corpus petition; the term "collateral review" in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review; a sentence-reduction motion under Rhode Island Rule 35 calls for "review" of the sentence within § 2244(d)(2)'s meaning; the Court rejected the argument that "collateral review" encompasses only "legal" challenges to a conviction or sentence and thus excludes motions for a discretionary sentence reduction; the Court also rejected that the term "collateral review" turned on whether a motion was part of the same criminal case. (Justice Scalia filed an opinion concurring in part.)

Greene v. Fisher, cert. granted, ___ U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637) (granting cert. to Greene v. Palakovich, 606 F.3d 85 (3d Cir. 2010)) For purposes of adjudicating a state prisoner’s petition for federal habeas relief, what is the temporal cutoff for whether a decision from the United States Supreme Court qualifies as “clearly established Federal law” under 28 U.S.C. § 2254(d), as amended by the AEDPA?

Gonzalez v. Thaler, ___ U.S. ___, 131 S. Ct. 2989 (June 13, 2011) (No. 10-895) (granting cert. to Arriaza Gonzalez v. Thaler, 623 F.3d 222 (5th Cir. 2010)):

QUESTIONS PRESENTED BY THE PETITIONER: Is state law relevant to determining when the States’ direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or does the AEDPA dictate a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held? Under the AEDPA, does the “conclusion of direct review” occur upon (i) issuance of an intermediate appellate court’s mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state’s highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court’s decision, as the Ninth Circuit has held? Does the phrase “expiration of the time for seeking [direct] review” under 28 U.S.C. § 2244(d)(1) include the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state’s highest court, as the Fourth and Seventh Circuits have held, or exclude that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held?

QUESTIONS AS WHICH THE COURT GRANTED CERTIORARI: Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner’s appeal? Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2241(d)(1) due to “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”?

Stone v. Thaler, 614 F.3d 136 (5th Cir. 2010) Where Texas state prisoner filed federal habeas petitions complaining of his parole revocation and errors in the calculation of his time-served credit, the AEDPA’s statute of limitations was tolled for 180 days following prisoner’s filing of a time-credit dispute-resolution request (“TDR”) pursuant to Tex. Gov’t Code § 501.0081; Texas law requires prisoners disputing time-served credit to file a TDR and to wait until they receive a written decision, or until 180 days elapse, before filing a state habeas application; a modest extension of the reasoning of Wion v. Quarterman, 367 F.3d 146 (5th Cir. 2009), leads to the conclusion that filing a TDR impedes a prisoner’s ability to file for state habeas relief, so the AEDPA limitations period was tolled during prisoner’s time-served credit dispute; however, defendant was not entitled to tolling for the entire time the dispute was pending because, after 180 days, defendant was entitled to file a state habeas petition; however, because the courts below had identified two different dates on which the limitations period commenced (one that would render the petitions timely and one that would render

them time-barred), and because the certificate of appealability granted by the Fifth Circuit did not authorize them to resolve that issue, the Fifth Circuit simply vacated the decisions below and remanded for further proceedings consistent with its opinion.

Mathis v. Thaler, 616 F.3d 461 (5th Cir. 2010) Death-sentenced Texas prisoner could not raise, in a successive habeas petition, his claim that his execution was unconstitutional under Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars execution of the mentally retarded) because prisoner did not show that his Atkins claim was “previously unavailable” as required by 28 U.S.C. § 2244(b)(2)(A); particularly, Atkins was decided in 2002, and petitioner did not show why he could not have raised his Atkins claim in his first federal habeas petition, filed in 2003; moreover, even if his petition had met the standards of 28 U.S.C. § 2244, the petition was nonetheless time-barred under the AEDPA’s statute of limitations, and the district court did not abuse its discretion when it denied equitable tolling.

Arriaza Gonzalez v. Thaler, 623 F.3d 222 (5th Cir. 2010), **cert. granted**, ____ U.S. ____, **131 S. Ct. 2989 (June 13, 2011) (No. 10-895)** The Supreme Court’s decision in Lawrence v. Florida, 549 U.S. 327 (2007), did not overrule the Fifth Circuit’s decision in Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003); thus, defendant’s Texas state conviction became “final” for AEDPA purposes when the time for seeking discretionary review from the Texas Court of Criminal Appeals expired (August 11, 2006), not when the Texas appellate court issued its mandate (September 26, 2006); accordingly, defendant’s federal habeas petition was untimely under the AEDPA; **the Fifth Circuit noted, but rejected as unpersuasive, the contrary decision of the Eighth Circuit in Riddle v. Kemna, 523 F.3d 850, 855-56 (8th Cir. 2008) (en banc).**

Henderson v. Thaler, 626 F.3d 773 (5th Cir. 2010) In case where death-sentenced Texas defendant was authorized to file a successive federal habeas petition raising a claim that he was mentally retarded and thus ineligible for execution under Atkins v. Virginia, 536 U.S. 304 (2002), the Fifth Circuit vacated the district court’s order finding the mental-retardation claim time-barred, and remanded for the district court to reconsider, in light of the intervening Supreme Court decision in Holland v. Florida, 130 S. Ct. 2549 (2010), whether defendant was entitled to equitable tolling of the AEDPA limitations period; the Fifth Circuit also held that there was no exception to the AEDPA’s limitation periods for person who are “actually innocent” of the death penalty; accordingly, the Fifth Circuit remanded for reconsideration of whether defendant’s successive petition was timely and, if it was found to be timely, whether the Atkins claim succeeded on the merits. (Judge Wiener filed a dissenting opinion, in which he expressed the view that the AEDPA’s statute of limitations was never meant to apply, and never should be applied to claims that a person is categorically ineligible for the death penalty under Atkins or similar rules; he argued that a fundamental miscarriage of justice would occur if defendant were not afforded a federal habeas opportunity to prove that he is ineligible for execution under Atkins.)

Matthis v. Cain, 627 F.3d 1001 (5th Cir. 2010) Where years after Louisiana state defendant’s conviction became final on direct review (on February 8, 2002), a Louisiana state district court granted postconviction relief and ordered a new trial, which relief was later reversed by the Louisiana Supreme Court (on January 7, 2008), defendant’s federal habeas petition, filed on July 28, 2008, was

untimely under the AEDPA because defendant did not acquire a new 1-year limitations period upon the grant, and then reversal, of state postconviction relief; the Fifth Circuit distinguished Jimenez v. Quarterman, 129 S. Ct. 681 (2009), on the ground that Jimenez had to do with the grant of an out-of-time *direct appeal*; the later rescinded grant of state postconviction relief did not affect the AEDPA “finality” date, which turns on when direct review is concluded.

Tharpe v. Thaler, 628 F.3d 719 (5th Cir. 2010) With respect to Texas state defendant’s challenges to the deferred adjudication order in his case, the AEDPA 1-year statute of limitations began to run upon that order’s becoming final, not upon the date that the subsequent adjudication of guilt and imposition of sentence became final; the Fifth Circuit’s prior decision so holding (Caldwell v. Dretke, 429 F.3d 521 (5th Cir. 2005)), was still good law as applied to this case, and was not overruled by the Supreme Court’s later decision in Burton v. Stewart, 549 U.S. 147 (2007).

Hernandez v. Thaler, 630 F.3d 420 (5th Cir. 2011) Where the district court applied the then-controlling rule of Salinas v. Dretke, 354 F.3d 425 (5th Cir. 2004), to deny defendant’s federal habeas petition as untimely under the AEDPA’s 1-year statute of limitations, but Salinas was later overruled by the Supreme Court in Jimenez v. Quarterman, 555 U.S. 113 (2009), that change in the law was not the sort of extraordinary circumstance that warranted relief from the adverse judgment under Fed. R. Civ. P. 60(b)(6); defendant could not use Rule 60(b)(6) to circumvent the principle that when the Supreme Court announces a new rule of law and applies it to the parties before it, the new rule is given retroactive effect only in cases that are still open on direct review.

Scott v. Hubert, 635 F.3d 659 (5th Cir. 2011) Federal district court reversibly erred in dismissing Louisiana state defendant’s habeas claim respecting his aggravated-burglary conviction as time-barred under the AEDPA’s one-year statute of limitations; consonant with Burton v. Stewart, 549 U.S. 147 (2007), when a state prisoner’s conviction is affirmed on direct appeal, but the sentence is vacated and the case is remanded for resentencing, the judgment of conviction does not become final within the meaning of 28 U.S.C. § 2244(d)(1)(A) until both the conviction and the sentence have become final by the conclusion of direct review or the expiration of the time for seeking such review; accordingly, defendant’s aggravated-burglary conviction became final not on March 24, 2004 (the date on which time expired for defendant to seek state-court direct review of the state court of appeals’ decision affirming his conviction), but on June 6, 2005 (the date on which time expired for defendant to seek state-court review of the court of appeals’ decision affirming his new sentence); therefore, defendant’s federal habeas petition challenging that conviction was timely.

Krause v. Thaler, 637 F.3d 558 (5th Cir. 2011) Texas state prisoner was not entitled to statutory tolling (under 28 U.S.C. § 2244(d)(1)(B), based on a state-created impediment) of the AEDPA’s 1-year statute of limitations; prisoner failed to allege facts indicating how prison system’s allegedly inadequate law library facilities prevented him from submitting a timely petition for habeas relief; accordingly, the Fifth Circuit affirmed the district court’s dismissal of prisoner’s federal habeas petition as time-barred.

Mark v. Thaler, 646 F.3d 191 (5th Cir. 2011) District court reversibly erred in dismissing Texas state defendant’s federal habeas petition as time-barred under the AEDPA; even though

defendant voluntarily dismissed his Texas direct appeal, he could still have filed a petition for direct review (“PDR”) with the Texas Court of Criminal Appeals within 30 days after the dismissal; accordingly, his conviction did not become final until 30 days after the dismissal of his appeal, which meant that his federal habeas petition was (with applicable exclusions) filed within the AEDPA’s 1-year statute of limitations; accordingly, the Fifth Circuit reversed the district court’s dismissal of the petition as time-barred and remanded for further consideration of the petition. (Judge Garwood dissented. He would hold that defendant’s conviction became final not later than the date on which the state appeal was dismissed, which date would render defendant’s federal habeas petition untimely.)

Ramirez Cardenas v. Thaler, ___ F.3d ___, 2011 WL 3672011 (5th Cir. Aug. 22, 2011) Under the rule formerly contained in Fed. R. App. P. 22, a district court’s failure to decide whether a certificate of appealability (“COA”) should issue deprives the appellate court of jurisdiction over a habeas appeal; although Fed. R. App. P. 2 allows a court of appeals to suspend the Federal Rules of Appellate Procedure in a particular case for good cause shown, Rule 2 cannot be used to bypass a jurisdictional requirement; accordingly, the Fifth Circuit remanded the case to the district court for the limited purpose of considering whether a COA should issue. (Judge Garza dissented; he would invoke Rule 2 to suspend Rule 22, and then would simply have the court of appeals itself deny COA.)

E. Other

Skinner v. Switzer, ___ U.S. ___, 131 S. Ct. 1289 (2011) (decision below: Skinner v. Switzer, 363 Fed. Appx. 302 (5th Cir. 2010) (unpublished)) A convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action under 42 U.S.C. § 1983; the federal courts had subject-matter jurisdiction over defendant’s claim, since he did not challenge state-court decisions, but rather challenged a state statute as construed by the state courts; moreover, § 1983 was an available remedy here because success in the suit for DNA testing would not “necessarily imply” the invalidity of his conviction (the test results might prove inconclusive or incriminating). (Justice Thomas filed a dissenting opinion, in which he was joined by Justices Kennedy and Alito.)

Pierce v. Holder, 614 F.3d 158 (5th Cir. 2010) Where federal prisoner filed a habeas petition, pursuant to 28 U.S.C. § 2241, seeking a nunc pro tunc designation of the state facility where he had served a previous sentence as the place in which he would serve his federal sentence (which would have had the effect of causing the federal sentence to run concurrently with the state sentence, thus giving the prisoner back credit for the time spent in state custody), district court should have dismissed petition for lack of jurisdiction; until the Attorney General has made a determination of a federal prisoner’s time credit (including a final decision on the prisoner’s nunc pro tunc request, there is no case or controversy ripe for review; because the Bureau of Prisons had not done so at the time prisoner filed his federal habeas petition, the district court lacked jurisdiction to rule on the petition; accordingly, the Fifth Circuit vacated the district court’s decision denying prisoner’s petition on the merits and remanded to the district court with instructions to dismiss the petition for lack of jurisdiction.

Garland v. Roy, 615 F.3d 391 (5th Cir. 2010) Federal prisoner’s claim – namely, that, in light of United States v. Santos, 553 U.S. 507 (2008), he had been wrongfully convicted of multiple nonexistent money laundering offense because the indictment and jury instructions did not require the government to prove he used “profits” to pay returns to investors in his illegal pyramid scheme – was properly brought under 28 U.S.C. § 2241 pursuant to the “savings clause” of 28 U.S.C. § 2255 (which allows for a habeas corpus action if the § 2255 remedy is “inadequate or ineffective to test the legality of [a prisoner’s] detention); the “savings clause” of § 2255 allows a § 2241 petition where (1) the petition raised a claim that is based on a retroactively applicable Supreme Court decision, (2) the claim was previously foreclosed by circuit law at the time when it should have been raised in petitioner’s trial, appeal, or first § 2255 motion, and (3) that retroactively applicable decision establishes that petitioner may have been convicted of a nonexistent offense; the Fifth Circuit found all of these requirements satisfied here; **notably, in holding that the third requirement was satisfied, the Fifth Circuit disagreed with every other circuit to have decided the question of what, exactly, was the precise holding of the splintered decision in Santos**; because petitioner’s claim satisfied all three requirements, the district court erred in dismissing that claim; accordingly, the Fifth Circuit reversed the district court’s denial of petitioner’s § 2241 petition and remanded for further proceedings.

Wilson v. Roy, 643 F.3d 433 (5th Cir. 2011) Defendant was not entitled to relief on his habeas petition (brought under 28 U.S.C. § 2241 pursuant to the “savings clause” of 28 U.S.C. § 2255) claiming that his money laundering conviction was defective under United States v. Santos, 553 U.S. 507 (2011); in Garland v. Roy, 615 F.3d 391 (5th Cir. 2010), the Fifth Circuit did hold that Santos applies retroactively, so defendant did satisfy this requirement for relief under the “savings clause”; however, unlike in Garland, here Santos did not establish that defendant was convicted of a nonexistent offense; viewing Justice Stevens’s separate concurrence in Santos as the controlling law, the Fifth Circuit held that, under the concurrent, when laundered money is derived from the sale of drugs and other contraband, Congress used “proceeds” in 18 U.S.C. § 1956 to mean gross receipts rather than net profits, regardless of any potential merger problem; because defendant was convicted of laundering money derived from the sale of contraband, *i.e.*, illegal drugs, Santos did not have the effect of undermining his conviction, and thus he could not satisfy the requirement that he may have been convicted of a nonexistent offense.

Martinez v. Caldwell, 644 F.3d 238 (5th Cir. 2011) Where state pretrial detainee, charged with second-degree murder, had raised, in a federal habeas petition under 28 U.S.C. § 2241, a double-jeopardy challenge to his being retried after the declaration of a mistrial in his first trial, the federal court correctly reviewed the state court’s decision *de novo*; the deference required by 28 U.S.C. § 2254(d) as amended by the AEDPA does not apply to habeas petitions brought by pretrial detainees under § 2241; however, on the merits, the federal district court erred in granting federal habeas relief precluding defendant’s retrial; where a case ends in a mistrial at the defendant’s behest, or with the defendant’s consent, the Double Jeopardy Clause bars retrial only if the prosecution or the court intended to goad the defendant into requesting a retrial; here, the record read as a whole did not support the district court’s conclusion that the presiding trial judge purposefully withheld his knowledge of how the jury was split (9 to 3 in favor of acquittal) in order to goad the defense into requesting a mistrial based on the jury’s deadlock; accordingly, the Fifth Circuit vacated the district court’s order granting relief and denied defendant’s habeas petition.

XII. MISCELLANEOUS

A. Particular Substantive Offenses (and Defenses)

Fowler v. United States, ____ U.S. ____, 131 S. Ct. 2045 (2011) (decision below: United States v. Fowler, 603 F.3d 883 (11th Cir. 2010)) In order to convict a defendant of murder under 18 U.S.C. § 1512(a)(1)(C) (killing a person with intent to prevent the communication of information to a federal law enforcement officer about a federal offense), the government must prove that there was a reasonable likelihood that a relevant communication would have been made to a federal law enforcement officer; because the Eleventh Circuit applied an erroneously low standard with respect to this element (requiring only the possibility or potentiality of a communication to federal authorities), the Supreme Court vacated the judgment below and remanded to the Eleventh Circuit for further proceedings. (Justice Scalia filed an opinion concurring in the judgment, in which he would require the government to prove beyond a reasonable doubt that the communication would have been made to a federal law enforcement officer. Justice Alito filed a dissenting opinion, in which he was joined by Justice Ginsburg.)

Flores-Villar v. United States, ____ U.S. ____, 131 S. Ct. 2312 (2011) (*per curiam*) (decision below: United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008)) The Court had granted certiorari to decide the following question: Where, under Nguyen v. INS, 533 U.S. 53 (2001), defendant in illegal reentry case was denied the right to assert the defense that he had in fact acquired United States citizenship through his father, when a similar claim of citizenship through the *mother* would have been successful, does the Court’s decision in Nguyen permit gender discrimination that has no biological basis? However, after briefing and argument, the Court divided 4-4 (Justice Kagan did not participate), and so the judgment was affirmed as a matter of law by the equally divided Court.

Reynolds v. United States, cert. granted, ____ U.S. ____, 131 S. Ct. 1043 (Jan. 24, 2011) (No. 10-6549) (granting cert. to United States v. Reynolds, 380 Fed. Appx. 125 (3d Cir. 2010) (unpublished)) Does a defendant, charged with failing to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”), have standing under the plain reading of the SORNA statute to raise claims concerning the Attorney General’s Interim Rule implementing SORNA, and is review by this Court needed to resolve the circuit conflict?

United States v. Garza-Robles, 627 F.3d 161 (5th Cir. 2010) In prosecution for kidnapping/conspiracy to kidnap in foreign commerce, in violation of 18 U.S.C. § 1201, evidence was insufficient to sustain the kidnapping convictions on an “inveigling” theory; “inveigling” requires that the victim have been lured or enticed by false representations or promises or other deceitful means; here, the victim well knew that by going over to Mexico with one of the defendants, he faced reprisals from the Gulf Cartel for a load of marijuana that his working partner had absconded with; however, the evidence was sufficient to sustain the kidnapping conviction on a theory of non-physical restraint – *i.e.*, the victim’s fear that if he did not go to Mexico with one of the defendant, his family would be killed; with respect to the conspiracy conviction, there was sufficient evidence to support a

conclusion that the defendants knew of the conspiracy and were acting in furtherance of that conspiracy both when one defendant transported the victim in foreign commerce to Mexico and when both defendants guarded the victim while he was in captivity in Mexico; it did not matter that the second defendant did not join the conspiracy until after the victim had been transported in foreign commerce; joining the conspiracy even after the transportation creates criminal responsibility for the prior acts.

United States v. Radley, 632 F.3d 177 (5th Cir. 2011) In case of commodities traders charged with wire fraud and with violations of the Commodities Exchange Act (“CEA”), 7 U.S.C. § 13(a)(2), the Fifth Circuit affirmed the district court’s dismissal of the indictment; the Fifth Circuit agreed with the district court that the activities charged as violations of the CEA were covered within the exemption/exclusion to the CEA’s reach found in 7 U.S.C. § 2(g); furthermore, since the “scheme to defraud” underlying the wire fraud counts consisted entirely of conduct covered by the § 2(g) exemption (conduct that was, therefore, not criminal), it was also proper to dismiss the wire fraud counts.

United States v. Dickson, 632 F.3d 186 (5th Cir. 2011) For purposes of 18 U.S.C. § 2252(a)(4)(B), images of child pornography are “produced” when they are copied or downloaded onto hard drives, disks, or CDs; therefore, because the government presented sufficient evidence that defendant possessed a CD onto which images of child pornography had been downloaded, and because that CD was manufactured in the Republic of China (thereby satisfying the interstate or foreign commerce element of the statute), the Fifth Circuit affirmed defendant’s conviction.

United States v. Franco, 632 F.3d 880 (5th Cir. 2011) Where defendant, a federal detainee in a contract detention facility run by a private correctional management company, bribed one of the facility’s correctional officers to smuggle contraband (including marijuana and a cell phone) into the facility, defendant could properly be prosecuted under 18 U.S.C. § 201; the correctional officer was a “public official” within the meaning of 18 U.S.C. § 201(a)(1); moreover, there was no constitutional impediment to the prosecution; this use of § 201 was constitutionally authorized under the Spending Clause and the Necessary and Proper Clause, given that federal dollars ultimately paid the correctional officer’s salary via the company’s contract with the federal government; the federal government has a spending interest in assuring that its dollars do not support a contracted prison official who, by accepting bribes, contravenes the rules of the U.S. Marshals respecting its prisoners; furthermore, the indictment was not, on plain-error review, reversibly deficient; the allegation that the correctional officer “smuggle[d]” contraband into the jail was sufficient to allege the element of an “act in violation of his lawful duty”; additionally, the requirement that the bribe consist of “anything of value” was sufficiently alleged by the indictment’s allegation of “a cash payment”; § 201 does not have a specific threshold amount requirement like 18 U.S.C. § 666, and the jury instructions thus did not erroneously fail to include such a requirement; nor was there any plain error in the instructions respecting the definition of a “public official” under this statute.

United States v. Johnson, 632 F.3d 912 (5th Cir. 2011) Assuming without deciding that defendant had prudential standing to raise the issue, the Fifth Circuit held that the Sex Offenders Registration and Notification Act (“SORNA”) did not violate the Tenth Amendment; the Tenth Amendment does not forbid conditioning federal funding on a state’s implementation of a federal

program, which is what SORNA does; the sex offender registry bargained for is a valid exercise of Congress's spending power; assuming without deciding that defendant had standing to challenge the Attorney General's adoption of an Interim Rule implementing SORNA, the Fifth Circuit, **disagreeing with the Second, Third, Eighth and Tenth Circuits**, held that Congress delegated to the Attorney General the decision whether to apply SORNA to pre-enactment offenders and that SORNA did not apply to offenders with pre-enactment convictions until the Attorney General issued the Interim Rule; moreover, in promulgating the Interim Rule, the Attorney General violated the notice and opportunity-to-comment requirements of the Administrative Procedures Act ("APA"); **disagreeing with the Fourth and Eleventh Circuits**, the Fifth Circuit found unpersuasive the Attorney General's reasons for bypassing those provisions and held that they did not constitute "good cause" therefor; however, the Attorney General's APA violations were harmless error.

United States v. Wright, 634 F.3d 770 (5th Cir. 2011) Drug defendant – a Louisiana state deputy sheriff – was not entitled to an instruction that, under 21 U.S.C. § 885(d), he was authorized by virtue of his commission as a deputy sheriff to conduct undercover drug operations; defendant was assigned to jailer duties, not to law enforcement activities or the prevention or detection of crime, and this sort of assignment did not automatically authorize defendant to do undercover narcotics operations; to the extent defendant might have been specially authorized to do so, the district court's general instruction on the public authority defense was sufficient; nor did the district court err in excluding evidence of defendant's prior participation in investigations, since this was irrelevant to the question whether he was in this particular instance authorized to possess narcotics in the course of a criminal investigation.

United States v. Hoang, 636 F.3d 677 (5th Cir. 2011), on denial of reh'g, 636 F.3d 746 (5th Cir. Mar. 25, 2011) **Agreeing with the Fourth, Sixth, Seventh, and Eleventh Circuits, but disagreeing with the Eighth and Tenth Circuits**, the Fifth Circuit held that the registration requirement of the Sex Offender Registration and Notification Act ("SORNA") became effective against state-law-registered pre-SORNA sex offenders only on the date the Attorney General issued the Interim Rule declaring SORNA retroactive (February 28, 2007), not on the date SORNA was enacted (July 27, 2006); because defendant traveled in interstate commerce and failed to register in his new jurisdiction after SORNA's enactment, but before the Attorney General issued the Interim Rule, SORNA did not apply to him; accordingly, the Fifth Circuit reversed defendant's conviction and remanded for dismissal of the indictment.

United States v. Steen, 634 F.3d 822 (5th Cir. 2011) Defendant's surreptitious recording of a 16-year-old in a room in a tanning salon did not violate the statute under which he was charged (18 U.S.C. § 2251(a), production of child pornography); examining the factors set out in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), the Fifth Circuit concluded that the video footage did not depict a lascivious exhibition of the genitals or pubic area; accordingly, the Fifth Circuit reversed the conviction. (Judge Higginbotham filed a concurring opinion, agreeing with the opinion of the court, but expressing misgivings about excessive reliance on the judicially created Dost factors, as opposed to simply focusing on the statutory term "lascivious.")

United States v. Ortiz-Mendez, 634 F.3d 837 (5th Cir. 2011) **Agreeing with the Seventh and Tenth Circuits, but disagreeing with the First, Eighth, and Ninth Circuits**, the Fifth Circuit

held that the offense of marriage fraud under 8 U.S.C. § 1325(c) does not require the government to prove that the defendant did not intend to establish a life together with his or her spouse; rather, the government need only show that the defendant entered into the marriage with the purpose of evading immigration laws; accordingly, the district court did not abuse its discretion in refusing the defendant's requested instruction on intent (or lack of intent) to establish a life together; nor did the district court abuse its discretion in refusing to instruct the jury not to find the defendant guilty of marriage fraud simply because the putative spouse intended to commit marriage fraud; defendant was sufficiently protected from such an imputation of guilt by the requirement that the jury had to find beyond a reasonable doubt that she "knowingly" entered into the marriage for the purpose of evading immigration laws.

United States v. Block, 635 F.3d 721 (5th Cir. 2011) With respect to the language in 18 U.S.C. § 2251A(a) – proscribing the transfer, or offer to transfer, "custody or control of a minor" with knowledge that the child will be depicted in child pornography, the "custody or control" that is transferred need not be coextensive with that exercised by a parent or guardian; the definitional statute itself provides that "custody or control" "includes *temporary* supervision" of the minor, 18 U.S.C. § 2256(7); accordingly, defendant could be guilty of aiding and abetting a violation of § 2251A(a) on the basis of an offer to let a minor child go with another person (in reality, an undercover agent) to Sea World for the day, when that person expressed his desire to engage in, and photograph, his sexual conduct with the child.

United States v. Winkler, 639 F.3d 692 (5th Cir. 2011) Evidence was sufficient to sustain defendant's conviction for knowing receipt of child pornography images found only in the temporary storage of defendant's hard drive; although there are concerns that files found only in the temporary cache of a computer may have been inadvertently accessed, here the evidence that defendant himself sought out, downloaded, viewed, and had the ability to manipulate the images at issue, was overwhelming; with respect to defendant's challenged conviction for possession of child pornography, there was sufficient evidence of defendant's knowing possession of those files and the interstate commerce element of the offense.

United States v. Portillo-Muñoz, 643 F.3d 437 (5th Cir. 2011) Illegal alien's conviction for possession of a firearm, in violation of 18 U.S.C. § 922(g)(5), did not violate the Second Amendment; the phrase "the people" in the Second Amendment does not include aliens illegally in the United States like defendant. (Judge Dennis filed an opinion concurring in part and dissenting in part, in which he disagreed with the majority's categorical exclusion of illegal aliens from the protections of the Second Amendment; instead, he would apply a test that an illegal alien defendant is part of "the people" referred to in the Second Amendment if he is voluntarily present in the United States, and he has accepted several societal obligations in the United States; under this test, the alien here qualified for Second Amendment protection, so Judge Dennis would remand to allow the district court to review the merits of defendant's Second Amendment claim in the first instance.)

United States v. Sariles, 645 F.3d 315 (5th Cir. 2011) The public authority defense requires a law enforcement officer who engages a defendant in covert activity to possess actual, rather than only apparent, authority to authorize the defendant's conduct; here, it was undisputed that the law enforcement officer in question lacked actual authority to authorize defendant's violation of the

federal drug laws; accordingly, the district court did not err in ruling that the public authority defense was unavailable to defendant.

United States v. Kebodeaux, 647 F.3d 137 (5th Cir. 2011) (replacing 634 F.3d 293 (5th Cir. 2011), **reh’g en banc granted**, ____ F.3d ____, 2011 WL 3087579 (5th Cir. July 25, 2011) (**en banc**) The registration provisions of the Sex Offender Registration and Notification Act (“SORNA”) do not, as to a federal sex offender who moves intrastate, exceed Congress’s authority to legislate; Congress had the authority under Article I of the Constitution to devise a narrow, non-punitive collateral regulatory consequence to this particular high-risk category of federal criminal convictions; defendant (who had a prior sex-offense conviction under military law) thus failed to overcome the presumption of constitutionality attaching to the statute at issue. (Judge Dennis filed an opinion concurring in the judgment, in which he would find the statute at issue valid as a regulation of intrastate activities necessary to make SORNA as a whole effective as a regulation of interstate commerce.)

United States v. Thompson, 647 F.3d 180 (5th Cir. 2011) In Hobbs Act extortion prosecution under 18 U.S.C. § 1951, the compensation paid to the individual extortion victim did not preclude a finding that he was deprived of property as required under the Hobbs Act.

B. Insanity/Competency/Civil Commitment

United States v. Simpson, 645 F.3d 300 (5th Cir. 2011) District court did not err in finding defendant competent to stand trial; although there was some evidence suggesting that defendant was suffering from a mental condition, the district court gave the question of defendant’s competency diligent attention over the course of five hearings, with the benefit of several medical professionals’ examinations, and that court’s conclusion that defendant was simply refusing to do that which he was volitionally capable of doing (i.e., that he was purposefully refusing to communicate with his attorneys) was neither arbitrary nor unwarranted.

C. Reversals for Insufficiency of the Evidence or Multiplicity

United States v. Delgado, 631 F.3d 685 (5th Cir. 2011), **reh’g en banc granted**, 646 F.3d 222 (5th Cir. July 7, 2011) (**en banc**) (conspiracy to possess marijuana with intent to distribute)

United States v. Steen, 634 F.3d 822 (5th Cir. 2011) (production of child pornography, in violation of 18 U.S.C. § 2251(a))