2017 Bar Association of the Fifth Federal Circuit
Current Issues in Criminal Law

SUPREME COURT CASES FROM OCTOBER 2016 Term
(October 2016 through July 2017).

Manrique v. United States, 15-7250 (April 19, 2017)

After agents found child pornography on Marcelo Manrique's computer, he pleaded guilty to possessing a visual depiction of a minor engaging in sexually explicit conduct, an offense requiring restitution to the victim. The District Court imposed a prison sentence and acknowledged that restitution was mandatory but deferred determination of the amount. Manrique filed a notice of appeal. Months later, the Court entered an amended judgment, ordering petitioner to pay restitution to one victim. Manrique did not file a second notice of appeal, but challenged the restitution amount before the Eleventh Circuit, which held that he had forfeited any such challenge. The Supreme Court affirmed. A defendant wishing to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order. If he fails to do so and the Government objects, he may not challenge the restitution order on appeal. Both 18 U.S.C. § 3742(a), governing criminal appeals, and Federal Rule of Appellate Procedure 3(a)(1) contemplate that a defendant will file a notice of appeal after the Court has decided the issue sought to be appealed. The requirement is a mandatory claim-processing rule, which is "unalterable" if raised properly by the party asserting its violation. Deferred restitution cases involve two appealable judgments, not one; the notice of appeal did not "spring forward" to become effective on the date the Court entered its amended restitution judgment. Even if the Court's acknowledgment in the initial judgment that restitution was mandatory could qualify as a "sentence" that the Court "announced" under Rule 4(b)(2), Manrique never disputed that restitution was mandatory. A Court of appeals may, in its discretion, overlook defects in a notice of appeal other than the failure to timely file a notice. But it may not overlook the failure to file a notice of appeal at all.

Ziglar v. Abbasi, 15-1194 (June 19, 2017)

Following the September 11 terrorist attacks, the Government ordered the detention of hundreds of illegal aliens. Plaintiffs, subsequently removed from the U.S., filed a putative class action against Executive Officials and Wardens, seeking damages, alleging that harsh pretrial conditions were punitive and were based race, religion, or national origin and that the Wardens allowed guards to abuse them. They also cited 42 U.S.C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. The Supreme Court rejected all claims, reversing the Second Circuit. In 42 U.S.C. § 1983, Congress provided a damages remedy for plaintiffs whose constitutional rights were violated by state officials. There was no corresponding remedy for constitutional violations by Federal agents. In 1971, the Supreme Court recognized (in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388) an implied damages action for violations of the Fourth Amendment's prohibition against unreasonable searches and seizures by Federal agents. The Court later allowed *Bivens*-type remedies in Fifth Amendment gender-discrimination and Eighth Amendment Cruel and Unusual

Punishments cases. *Bivens* will not be extended to a new context if there are "special factors counseling hesitation in the absence of affirmative action by Congress." To avoid interference with sensitive Executive Branch functions or any inquiry into national-security issues, a *Bivens* remedy should not be extended to the claims concerning confinement conditions. With respect to the Wardens, Congress did not provide a damages remedy against Federal jailers in the Prison Litigation Reform Act 15 years after the Court's expressed caution about extending *Bivens*. Qualified immunity bars the claims under 42 U.S.C. 1985(3). Accordingly, the Court concludes that reasonable officials in defendants' positions would not have known with sufficient certainty that § 1985(3) prohibited their joint consultations and the resulting policies. There is no clearly established law on the issue whether agents of the same executive department are distinct enough to "conspire" within the meaning of the statute.

***Hernandez v. Mesa*, 15-118 (June 26, 2017)**

In 2010, a U.S. Border Patrol agent standing on U.S. soil shot and killed Jesus Hernández, an unarmed 15-year-old Mexican national, standing on Mexican soil. Hernandez had been playing a game that involved running up the embankment on the U.S. side of the border. After the Justice Department closed an investigation, declining to file charges, Hernández's parents filed suit, including a "*Bivens*" claims for damages against the agent. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The Fifth Circuit affirmed dismissal. The Supreme Court vacated and remanded. A "*Bivens*" implied right of action for damages against Federal officers alleged to have violated a citizen's constitutional rights is not available where there are special factors counselling hesitation in the absence of affirmative action by Congress. In light of recent Supreme Court precedent (*Abbasi*), the Fifth Circuit must consider "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." The Court noted that the Fourth Amendment question is sensitive and may have far-reaching consequences. The Court opined that it would be imprudent for it to resolve that issue when, in light of the intervening guidance provided in *Abbasi*, doing so might be unnecessary to resolve this particular case. With respect to petitioners' Fifth Amendment claim, the en banc Fifth Circuit found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was "an alien who had no significant voluntary connection to . . . the United States." 785 F. 3d, at 120. It was undisputed, however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. Facts an officer learns after the incident ends – whether those facts would support granting immunity or denying it – are not relevant. The en banc Fifth Circuit therefore erred in granting qualified immunity based on those facts.

***Lee v. United States*, 16-327 (June 23, 2017)**

Jae Lee moved to the U.S. from South Korea with his parents when he was 13. For 35 years he never returned to South Korea, nor did he become a U.S. citizen. He is a lawful permanent resident. In 2008, Lee admitted possessing ecstasy with intent to distribute. His attorney repeatedly assured him that he would not be deported as a result of pleading guilty. Lee accepted a plea and was

sentenced to a year and a day in prison. His conviction was an "aggravated felony," 8 U.S.C. § 1101(a)(43)(B), so he was subject to mandatory deportation. When Lee learned of this consequence, he moved to vacate his conviction, arguing that his attorney had provided constitutionally ineffective assistance. Lee and his plea-stage counsel testified that "deportation was the determinative issue" in Lee's decision to accept a plea. Lee's counsel acknowledged that although Lee's defense was weak, if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. The Sixth Circuit affirmed denial of relief. Holding that Lee had demonstrated that he was prejudiced by his counsel's erroneous advice, the Supreme Court reversed. Lee established that he was prejudiced by erroneous advice, demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court stated that the inquiry demands a "case-by-case examination." A defendant's decisionmaking may not turn solely on the likelihood of conviction after trial. When the inquiry is focused on what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected the defendant's decisionmaking. The Court reasoned that it could not say that it would be irrational for someone in Lee's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive.

***Turner v. United States*, 15-15503 (June 22, 2017)**

Defendants were indicted for the kidnapping, robbery, and brutal murder of Catherine Fuller. The prosecution argued that Fuller was attacked by a large group, producing the testimony of two men who confessed to participating in a group attack and cooperated in return for leniency. Other witnesses corroborated aspects of their testimony. The prosecution played a videotape of defendant Yarborough's statement to detectives, describing how he was part of a large group that carried out the attack. None of the defendants rebutted the witnesses' claims that Fuller was killed in a group attack. Long after their convictions became final, seven defendants discovered that the government had withheld evidence: the identity of a man seen running into the alley after the murder and stopping near the garage where Fuller's body had already been found; statements of a passerby who claimed to hear groans coming from a closed garage; and evidence tending to impeach three witnesses. The Supreme Court affirmed the D.C. courts in rejecting defendants' claims, finding the withheld evidence not material under *Brady*. Evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, given the context of the entire record. An argument that, had defendants known about the withheld evidence, they could have raised an alternative theory, that a single perpetrator (or two) had attacked Fuller "is too little, too weak, or too distant from the main evidentiary points to meet *Brady's* standards." The undisclosed impeachment evidence was largely cumulative of impeachment evidence already in use at trial. A group attack was the very cornerstone of the Government's case, and virtually every witness to the crime agreed that Fuller was killed by a large group of perpetrators. It was not reasonably probable that the withheld evidence could have led to a different result at trial.

***Weaver v. Massachusetts*, 16-240 (June 22, 2017)**

When Kentel Weaver was tried in a Massachusetts trial court, the courtroom could not accommodate all potential jurors. During jury selection, a court officer excluded any member of the public who was not a potential juror, including Weaver's mother and her minister. Defense counsel neither objected at trial nor raised the issue on direct review. Weaver was convicted of murder. Five years later, he sought a new trial, arguing that his attorney had provided ineffective assistance by failing to object to the closure. The Supreme Court affirmed the state courts in rejecting the argument. In the context of a public trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance claim, the defendant must demonstrate prejudice to secure a new trial. A public trial violation is a structural error, which "affect[s] the framework within which the trial proceeds," but does not always lead to fundamental unfairness. If an objection is made and the issue is raised on direct appeal, the defendant generally is entitled to automatic reversal. If the defendant does not preserve a structural error on direct review but raises it later in an ineffective-assistance claim, the defendant generally bears the burden to show "a reasonable probability that . . . the result of the proceeding would have been different" but for attorney error or that the violation was so serious as to render the trial fundamentally unfair. Because Weaver had not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial. Although potential jurors might have behaved differently had petitioner's family or the public been present, petitioner has offered no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to demonstrate fundamental unfairness. His mother and her minister were indeed excluded during jury selection. But his trial was not conducted in secret or in a remote place; closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern, other than the closure itself. There was no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case, *e.g.*, misbehavior by the prosecutor, judge, or any other party. Thus, even though this case came to the Supreme Court on the assumption that the closure was a Sixth Amendment violation, the Court found violation here did not pervade the whole trial or lead to basic unfairness.

***McWilliams v. Dunn*, 16-5294 (June 19, 2017)**

In 1985, Alabama charged James Edmond McWilliams, Jr. with rape and murder, one month after the Supreme Court's decision in *Ake v. Oklahoma*, 470 U. S. 68 (1985). Finding McWilliams indigent, the court ordered a psychiatric evaluation. The state convened a commission, which concluded that McWilliams was competent and had not been suffering from mental illness at the time of the offense. A jury convicted McWilliams and recommended a death sentence. Before sentencing, defense counsel successfully requested neurological and neuropsychological testing. McWilliams was examined by a neuropsychologist employed by the state, who concluded that McWilliams was likely exaggerating his symptoms, but apparently experienced genuine neuropsychological problems. Counsel then received updated records from the commission and Department of Corrections mental health records. At the sentencing hearing, defense counsel unsuccessfully requested a continuance to evaluate the new material and assistance by someone with expertise in psychological matters. The court sentenced McWilliams to death. The Alabama Supreme Court affirmed. The Supreme Court reversed the Eleventh Circuit's denial of habeas relief. The Alabama courts'

determination that McWilliams received all the assistance to which *Ake* entitled him was contrary to, or an unreasonable application of, clearly established Federal law. *Ake* requires the state to provide an indigent defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Even if Alabama met the examination requirement, it did not meet any of the others. The Supreme Court's concern was that the indigent defendant have access to a competent psychiatrist for these purposes. Unless a defendant is "assure[d]" the assistance of someone who can effectively perform these functions, he has not received the "minimum" to which *Ake* entitles him.

***Packingham v. North Carolina*, 15-1194 (June 19, 2017)**

North Carolina law made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. 14–202.5(a), (e). The state has prosecuted over 1,000 people under that law. Lester Gerard Packingham, when a 21-year-old college student, had sex with a 13-year-old girl. He consequently pleaded guilty to taking indecent liberties with a child. Because this crime qualified under North Carolina law as "an offense against a minor," Packingham was required to register as a sex offender. North Carolina indicted Packingham after posting a statement on his personal Facebook profile about a positive traffic court experience. In 2010, a state court dismissed a traffic ticket against Packingham. In response, he logged on to Facebook.com and posted the following statement on his personal profile: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent []. Praise be to GOD, WOW! Thanks JESUS!" State courts upheld the law. The Supreme Court reversed. The statute impermissibly restricts lawful speech in violation of the First Amendment. Today, one of the most important places to exchange views is cyberspace, particularly social media. Even if the statute is content-neutral and subject to intermediate scrutiny, the provision is not "narrowly tailored to serve a significant governmental interest." While social media will be exploited by criminals and sexual abuse of a child is a most serious crime, the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." The statute "enacts a prohibition unprecedented in the scope of First Amendment speech it burdens…. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." The state did not establish that this sweeping law is necessary to keep convicted sex offenders away from vulnerable victims.

***Honeycutt v. United States*, 16-142 (June 5, 2017)**

Terry Honeycutt managed sales and inventory for a Tennessee hardware store owned by his brother, Tony Honeycutt. They were indicted for Federal drug crimes including conspiracy to distribute a product used in methamphetamine production. The Government sought judgments of $269,751 against each brother, under the Comprehensive Forfeiture Act, which mandates forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug crimes, 21 U.S.C. § 853(a)(1). Tony pleaded guilty and agreed to forfeit $200,000. Terry was convicted. Despite conceding that Terry had no controlling interest in the store and did not stand to benefit personally from sales of the product, the Government asked the Court

to hold him jointly and severally liable for the profits from the illegal sales and sought a judgment of $69,751.98, the outstanding conspiracy profits. The Sixth Circuit agreed that the brothers, as co-conspirators, were jointly and severally liable. The Supreme Court reversed. Because forfeiture pursuant to §853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime, that Court found that the provision did not permit forfeiture with regard to Terry Honeycutt, who had no ownership interest in his brother's store and did not personally benefit from the illegal sales. Use of the adverbs "directly" and "indirectly" to refer to how a defendant obtains the property does not negate the requirement that he "obtain" it. The plain text and structure of § 853 left no doubt that Congress did not, as the Government claimed, incorporate the principle that conspirators are legally responsible for each other's foreseeable actions in furtherance of their common plan.

***Kokesh v. Securities and Exchange Commission*, 16-529 (June 5, 2017)**

In the 1970s, Federal District Courts began ordering disgorgement in Securities and Exchange Commission enforcement proceedings. The Commission may also seek monetary civil penalties; 28 U.S.C. § 2462 establishes a five-year limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In 2009, the Commission brought an enforcement action against Charles Kokesh for concealing the misappropriation of $34.9 million from business development companies, seeking monetary civil penalties, disgorgement, and an injunction. A jury found that Kokesh's actions violated securities laws. The District Court determined that § 2462's limitations period applied to the monetary civil penalties but did not apply to the $34.9 million disgorgement judgment because disgorgement was not a penalty. The Tenth Circuit affirmed. A unanimous Supreme Court reversed, holding that SEC disgorgement operates as a penalty under § 2462. Consequently, any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued. The Supreme Court reasoned that it is imposed by the Courts as a consequence for violating public laws, *i.e.*, a violation committed against the United States rather than an aggrieved individual, and is imposed for punitive purposes. SEC disgorgement is often not compensatory. Disgorged profits are paid to the Courts, which have discretion to determine how the money will be distributed. When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment is a penalty. Although disgorgement may sometimes serve compensatory goals, "sanctions frequently serve more than one purpose."

***Nelson v. Colorado,* 15-1256 (April 19, 2017)**

Shannon Nelson was convicted by a Colorado jury of two felonies and three misdemeanors arising from the alleged abuse of her children. The trial court sentenced her to 20 years in prison and ordered to pay $8,192.50 in court costs, fees, and restitution. Nelson's conviction was reversed, and on retrial she was acquitted. Louis Alonzo Madden was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted sexual assault. The trial court imposed an indeterminate prison sentence and ordered him to pay $4,413.00 in costs, fees, and restitution. After one of Madden's convictions was reversed on direct review and the other vacated on post-conviction review, the State elected not to appeal or retry the case.The Colorado Department of Corrections withheld $702.10 from Nelson's inmate account between her conviction and acquittal. Madden paid the state $1,977.75 after his conviction. Once their convictions were invalidated, they

both sought refunds. The Colorado Supreme Court reasoned that Colorado's Exoneration Act provided the exclusive authority for refunds and that neither petitioner had filed a claim under that Act; the court also upheld the constitutionality of the Act, which permits Colorado to retain conviction-related assessments until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. The Supreme Court reversed, holding that the Act's scheme violates the guarantee of due process. Petitioners have an obvious interest in regaining the money. The state may not retain these funds simply because their convictions were in place when the funds were taken; once the convictions were erased, the presumption of innocence was restored. Colorado may not presume a person, adjudged guilty of no crime, guilty enough for monetary exactions. Colorado's scheme created an unacceptable risk of the erroneous deprivation of defendants' property. The Exoneration Act conditions refund on defendants' proof of innocence by clear and convincing evidence, but defendants in petitioners' position are presumed innocent. Moreover, the Act provides no remedy for assessments tied to invalid misdemeanor convictions. And when, as here, the recoupment amount sought is not large, the cost of mounting a claim under the Act and retaining counsel to pursue it would be prohibitive. Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. The State has identified no equitable considerations favoring its position, nor indicated any way in which the Exoneration Act embodies such considerations.

***Manuel v. City of Joliet*, 14-9496 (March 21, 2017)**

During a traffic stop, officers searched Manuel and found a vitamin bottle containing pills. Suspecting the pills were illegal drugs, officers conducted a field test, which came back negative for any controlled substance. They arrested Manuel. At the police station, an evidence technician tested the pills and got a negative result, but claimed that one pill tested "positive for the probable presence of ecstasy." An arresting officer reported that, based on his "training and experience," he "knew the pills to be ecstasy." Another officer charged Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a judge found probable cause to detain Manuel pending trial. The Illinois police laboratory tested the pills and reported that they contained no controlled substances. Manuel spent 48 days in pretrial detention. More than two years after his arrest, but less than two years after his case was dismissed, Manuel filed a 42 U.S.C. 1983 lawsuit against Joliet and the officers. The District Court dismissed, holding that the two-year statute of limitations barred his unlawful arrest claim and that pretrial detention following the start of legal process could not give rise to a Fourth Amendment claim. The Seventh Circuit affirmed. The Supreme Court reversed. Pretrial detention can violate the Fourth Amendment when it precedes or when it follows, the start of the legal process. The Fourth Amendment prohibits government officials from detaining a person absent probable cause. Where legal process has begun but has done nothing to satisfy the probable-cause requirement, it cannot extinguish a detainee's Fourth Amendment claim. Because the Judge's determination of probable cause was based solely on fabricated evidence, it did not expunge Manuel's Fourth Amendment claim. On remand, the Seventh Circuit should determine the claim's accrual date, unless it finds that the city waived its timeliness argument.

Pena-Rodriguez v. Colorado, 15-606 (March 6, 2017)

A Colorado jury convicted Miguel Angel Peña-Rodriguez of harassment and unlawful sexual contact. Following the jury's discharge, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward Peña-Rodriguez and his alibi witness. Counsel, with court supervision, obtained affidavits from the two jurors describing H.C.'s biased statements. The court acknowledged H.C.'s apparent bias but denied a motion for a new trial, stating that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations during an inquiry into the validity of the verdict. The Colorado Supreme Court affirmed, citing Supreme Court precedent rejecting constitutional challenges to the federal no-impeachment. The Supreme Court reversed. Where a juror makes a clear statement indicating that he relied on racial stereotypes or animus to convict a defendant, the Sixth Amendment requires that the no-impeachment rule give way. The Court noted that it has previously indicated that the rule may have exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged" and that racial bias, unlike the behavior in previous cases, implicates unique historical, constitutional, and institutional concerns that, unaddressed, threaten systemic injury to the administration of justice. Before the no-impeachment bar can be set aside, there must be a threshold showing that a juror made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of deliberations and verdict. The statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. The Court did not address what procedures a court must follow when deciding a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside.

Buck v. Davis, 15-8049 (February 22, 2017)

Buck was convicted of murder; under Texas law, the jury could impose a death sentence only if it found unanimously, beyond a reasonable doubt, that Buck was likely to commit future acts of violence. Buck's attorney called a psychologist, Dr. Quijano, who had been appointed to evaluate Buck. While concluding that Buck was unlikely to be a future danger, Quijano stated, in his report and testimony, that Buck was statistically more likely to act violently because he is black. The jury returned a sentence of death. In his first post-conviction proceeding, Buck did not argue ineffective assistance of counsel. In the meantime, the Supreme Court vacated the judgment in a case in which Quijano had testified that Hispanic heritage weighed in favor of a finding of future dangerousness. The Texas Attorney General then identified six cases in which Quijano had testified and, in five cases, consented to resentencing. Buck's second state habeas petition, alleging ineffective assistance, was dismissed for failure to raise the claim in his first petition. Buck sought federal habeas relief (28 U.S.C. 2254). His claim was held procedurally defaulted. The Supreme Court subsequently issued holdings (*Martinez* and *Trevino*) under which Buck's claim could have been heard, had he demonstrated that state post-conviction counsel was constitutionally ineffective in failing to raise a claim that had some merit. The Fifth Circuit affirmed rejection of Buck's motion to reopen, finding that Buck had not established extraordinary circumstances or ineffective assistance. The Supreme Court reversed. The question was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. No competent defense attorney would introduce evidence that his client is liable to be a future danger because of his race. There is a reasonable probability that Buck was sentenced to death in part because of his race, a concern that supports

Rule 60(b)(6) relief. The Court rejected, as waived, the state's argument that *Martinez* and *Trevino* did not apply.

***Shaw v. United States*, 15-5991 (December 12, 2016)**

Shaw used identifying numbers of Hsu's bank account in a scheme to transfer funds from that account to accounts at other institutions from which Shaw was able to obtain Hsu's funds. Shaw was convicted under 18 U.S.C. 1344(1), which makes it a crime to "knowingly execut[e] a scheme . . . to defraud a financial institution." The Ninth Circuit affirmed. A unanimous Supreme Court vacated and remanded for consideration of whether the District Court improperly instructed the jury that a scheme to defraud a bank must be one to deceive the bank or deprive it of something of value, instead of one to deceive and deprive. The Court rejected Shaw's other arguments. Subsection (1) of the statute covers schemes to deprive a bank of money in a customer's account. The bank had property rights in Hsu's deposits as a source of loans from which to earn profits or as a bailee. The statute requires neither a showing that the bank suffered ultimate financial loss nor a showing that the defendant intended to cause such loss. Shaw knew that the bank possessed Hsu's account, Shaw made false statements to the bank, Shaw believed that those false statements would lead the bank to release from that account funds that ultimately, wrongfully ended up with Shaw. Shaw knew that he was entering into a scheme to defraud the bank even if he was not familiar with bank-related property law. Subsection (2), which criminalizes the use of "false or fraudulent pretenses" to obtain "property . . . under the custody or control of" a bank, does not exclude Shaw's conduct from subsection (1).

Cases Currently Pending Before the SCOTUS

Rodney Class v. United States
Docket No. 16-424

In May 2013, Rodney Class was arrested in the District of Columbia for possession of three firearms on United States Capitol Grounds in violation of 40 U.S.C. §5104(e). Class, representing himself, pleaded guilty in the District Court. He appealed to the U.S. Court of Appeals for the District of Columbia Circuit on grounds of constitutional error and statutory error. The Appellate Court affirmed the judgment of the District Court and found Class guilty due to his guilty plea. The Appellate Court explained that the its precedent in *United States v. Delgado-Garcia*--which held that, "[u]nconditional guilty pleas that are knowing and intelligent...waive the pleading defendant['s] claims of error on appeal, even constitutional claims"--is binding on this case. *Delgado* articulates two exceptions to this rule in which a defendant may appeal: (1) "the defendant's claimed right to not be haled into court at all" and (2) "that the court below lacked subject-matter jurisdiction over the case…" However, the Court held that neither exception applied here.

Question presented:

Does a guilty plea inherently waive a defendant's right to challenge the constitutionality of his conviction?

Timothy Ivory Carpenter v. United States
Docket No. 16-402

In April 2011, police arrested four men in connection with a series of armed robberies. One of the men confessed to the crimes and gave the FBI his cell phone number and the numbers of the other participants. The FBI used this information to apply for three orders from Magistrate Judges to obtain "transactional records" for each of the phone numbers, which the Judges granted under the Stored Communications Act, 18 U.S.C. 2703(d). That Act provides that the Government may require the disclosure of certain telecommunications records when "specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." The transactional records obtained by the government include the date and time of calls, and the approximate location where calls began and ended based on their connections to cell towers—"cell site" information.

Based on the cell-site evidence, the Government charged Timothy Carpenter with, among other offenses, aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951. Carpenter moved to suppress the Government's cell-site evidence on Fourth Amendment grounds, arguing that the FBI needed a warrant based on probable cause to obtain the records. The District Court denied the motion to suppress, and the Sixth Circuit affirmed.

Question presented:

Does the warrantless search and seizure of cell phone records, which include the location and movements of cell phone users, violate the Fourth Amendment?

Carlo J. Marinello, III v. United States
Docket No. 16-1144

Carlo J. Marinello II owned and operated a freight service that couriered items to and from the United States and Canada. Between 1992 and 2010, Marinello did not keep an accounting of his business, nor did he file personal or corporate income tax returns. Indeed, he shredded bank statements and business records. After an investigation by the IRS, Marinello was indicted by a grand jury on nine counts of tax-related offenses, and a jury found him guilty on all counts. He was sentenced to 36 months in prison, one year of parole, and was ordered to pay over $350,000 to the IRS in restitution.

One of the counts of which Marinello was charged and convicted was violation of 26 U.S.C. § 7212(a), which imposes criminal liability on one who "in any . . . way corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title." Marinello appealed his conviction on the grounds that the phrase "the due administration of this title" requires the defendant be aware of IRS action, and the Government provided no evidence at trial that Marinello knew of a pending IRS investigation against him. Finding that knowledge of a pending investigation is not an element of the offense of which Marinello was convicted, the Second Circuit affirmed his conviction and sentence.

Question presented:

Does a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws require that the Government prove the defendant acted with knowledge of a pending Internal Revenue Service action?

Notable Recent Decisions from the United States Court of Appeal for the Fifth Circuit

***United States v. Silva*, No. 16-40167**

Before STEWART, Chief Judge, JOLLY, and WIENER, Circuit Judges.
(PER CURIAM).

In March 2015, the U.S. Marshals Service executed an arrest warrant on Eloy Silva for violation of his parole. After Silva was detained outside his trailer, two U.S. Marshals with the Gulf Coast Violent Offender Task Force conducted a protective sweep of the trailer to check for individuals inside. They did not have a search warrant. During the sweep, one of the marshals opened a compartment under a mattress and discovered a shotgun, ammunition, and body armor. No one other than Silva was found in the trailer or on the property. Silva, a felon with an extensive criminal history, was charged with one count of being a felon in possession of a firearm and ammunition. He filed a motion to suppress the firearm and ammunition, claiming that (1) the protective sweep was neither reasonable nor permissible, and (2) alternatively, the officers exceeded the scope of a lawful protective sweep. After conducting an extensive suppression hearing, the District Court denied Silva's motion. He subsequently pleaded guilty without a plea agreement.

In arguing that the protective sweep was unjustified, Silva contended there were no exigent circumstances. He contended alternatively that the agents created the exigent circumstances. Disagreeing with Silva, the Fifth Circuit concluded that the evidence before the District Court demonstrated that the marshals' protective sweep was justified. U.S. Marshal Alfredo Lujan, the "primary" officer among the team of marshals that executed the warrant, testified that he reviewed Silva's criminal history before executing the arrest warrant. Lujan described Silva's criminal history as "pretty extensive." His numerous convictions included assault, aggravated kidnapping with a weapon, and making a terroristic threat. At the time of the instant arrest, there were seven outstanding warrants for Silva's arrest – three for impersonating a peace officer, at times with a weapon; three for "unlawful contract with a surety bond company"; and one for violation of parole. Lujan also testified that he was aware that Silva was a member of the Tango Blast gang, and had received information that there might be a weapon in the trailer. At the end of the suppression hearing, the District Court concluded that it was reasonable for the officers "to be concerned about other people who may be affiliated with the Defendant who would want to help [him and] that might still be in the trailer." The District Court explained that someone else could have been in the trailer and "could have stuck a gun out the window [and] shot at the officers." The District Court ruled that, as a result, the protective sweep was justified. Given the testimony presented at the suppression hearing, Silva's criminal history, his gang affiliation, and the officers' concern that someone might have been inside the trailer with a weapon, the Fifth Circuit decided that the District Court did not clearly err in concluding that the officers were reasonably concerned about their safety.

In the absence of a search warrant, a protective sweep must be "quick and limited" and "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). Lujan testified that he spent about five to ten seconds in the trailer, and U.S. Marshal Ray Tamez testified that he spent about 35 to 40 seconds in the trailer. Silva presented no evidence to contradict this testimony. Lujan testified that he inspected every crawl

space in which an individual could hide. He removed cushions from two benches, looked under the mattress of a fold-out couch, and checked inside cabinets. Tamez found the firearm, ammunition, and body armor after he saw a large, "waterbed-type mattress on top of wood, box [sic] underneath." He testified that he believed the wooden box under the mattress was hollow and large enough for a person to hide inside, as it was "about seven, eight feet in length, maybe six feet wide" and "[a]bout a foot and a half tall." He testified that nothing prevented him from lifting the mattress or the plywood cover and that there was no locking mechanism on the wooden box. The District Court concluded that, based on the agents' testimony regarding their experience finding individuals in small and hollowed-out spaces, Tamez's lifting of the mattress "was certainly justified" because it was possible that a person could hide in the wooden compartment underneath it. The Fifth Circuit concluded that Silva failed to demonstrate that the District Court clearly erred in determining that the compartment under the mattress was large enough to conceal a person, a conclusion that was amply supported by the uncontroverted evidence in the record. Elaborating, the Court reasoned: "In light of Lujan's testimony regarding his experience locating individuals in 'very unique' places and Tamez's unrefuted testimony that he believed that a person could have been hiding in the wooden compartment under the mattress, the search of the trailer, including the wooden box under the mattress, did not exceed the scope of a lawful protective sweep."

***United States v. Zuniga*, No. 14-11304**

Before DENNIS, ELROD, and **GRAVES**, Circuit Judges.

In March 2014, the San Angelo Police Department ("SAPD") and the Texas Department of Public Safety ("DPS"), based on a tip from a cooperating defendant, combined efforts to interdict a traffic stop which confirmed – via the warrantless search of Steve Cuellar Zuniga's person and the vehicle within which he rode as a passenger – that Zuniga was a methamphetamine supplier. The cooperating defendant agreed to participate in a controlled buy from Zuniga. While surveilling Zuniga's residence, Detective Eddie Chavarria observed a porch light come on and a man emerge from the house and approach the truck while shining a flashlight. Moments later, another person emerged, and Detective Chavarria observed the duo conduct what appeared to be a vehicle inspection: one individual inspected the vehicle while the other tested the emergency flashers, left and right turn signals, brake lights, and the high beams. Detective Chavarria immediately relayed this information to other officers. Twenty minutes later, the vehicle left Zuniga's residence and Detective Chavarria decided to follow the vehicle. Approximately one block from the house, he witnessed the vehicle fail to signal for 100 feet continuously before turning left, in violation of Texas transportation law. Chavarria immediately informed other officers they had grounds to stop the vehicle. When none of his fellow officers made the stop, Chavarria trailed the vehicle. After driving 18 blocks, Zuniga's vehicle pulled up to a convenience store and parked in a "disabled only" space. Chavarria radioed the truck's location and the potential parking violation.

Sergeant David Egger heard Detective Chavarria's report and drove past the area. Sergeant Egger then instructed Detective Mark Medley to walk in front of the truck to see whether a disabled parking placard hung from the rear-view mirror. Detective Medley reported back that he had observed something hanging from the rear-view mirror, though he could not be sure that it was the required parking placard. Based on this information, Sergeant Egger asked Officer Cody Pruit, who

had been notified at the start of his shift that his assistance might be needed later, to stop the vehicle shortly after it had left the parking lot. Officer Pruit – who later testified he only stopped the truck at Sergeant Egger's instruction, had not personally witnessed the alleged parking violation and was told that Zuniga would be driving the vehicle without a valid driver's license—effected the stop. Zuniga was not driving; instead, Angela Favila drove as Zuniga rode along as a passenger. After dispatch revealed that Favila did not have a valid driver's license and Zuniga had two outstanding city warrants, both were arrested. A subsequent search of Zuniga's person yielded a plastic bag of methamphetamine. While searching Zuniga's vehicle, officers discovered a backpack containing more methamphetamine, a nylon holster, a semiautomatic pistol, Mexican Mafia-affiliated paperwork, and two cell phones.

Zuniga moved to suppress all evidence stemming from the traffic stop. The District Court denied Zuniga's motion, reasoning that both traffic violations witnessed by Detective Chavarria were imputed to Officer Pruit under the collective knowledge doctrine, which provided him reasonable suspicion and justification for stopping the vehicle. Zuniga was subsequently charged by a Federal grand jury with four counts. He entered a conditional guilty plea only to one count of Possession with Intent to Distribute 500 Grams or More of Methamphetamine and Aiding and Abetting, preserving his right to challenge the suppression ruling. Zuniga appealed.

The Fifth Circuit first considered Zuniga's challenge of the denial of his motion to suppress evidence found during the warrantless search following the vehicle stop. Upholding the denial, the Court determined there existed enough information to support a finding of reasonable suspicion to stop the vehicle within which Zuniga rode as a passenger. Zuniga argued that the justifications supporting the stop should not have been considered, first, due to "staleness" concerns regarding the turn-signal offense and, second, because the parking infraction was not confirmed until after the stop. Zuniga's staleness argument was not wholly devoid of support. The record indicated that the turn-signal offense occurred and was immediately relayed; yet, the call went unanswered by fellow officers; and Zuniga was not stopped for this violation until approximately 15 minutes after it was observed. Still, the totality of the circumstances did not dictate a finding that the turn-signal violation was too stale to justify stopping the vehicle. The Court made no attempt to articulate a specific time limitation to which officers must adhere in effecting a stop following a traffic violation, but only stressed that, consistent with its holdings in similar contexts, stops following transportation violations must be reasonable in light of the circumstances. Because the turn-signal violation provided the requisite reasonable suspicion to stop Zuniga's vehicle, the Court did not need not decide whether the second traffic violation provides an independent justification for the stop. Having determined there existed reasonable suspicion to stop Zuniga's vehicle, the Court next determined that the collective knowledge doctrine provided the grounds for imputation of that information to Officer Pruit.

***United States v. Bams*, No. 16-41197**

Before JOLLY, **SMITH**, and GRAVES, Circuit Judges.

Henry Bams and Frederick Mitchell were stopped by Officer Dale Baggett in Nacogdoches County, Texas, for speeding. Bams was the driver, and when Baggett approached the vehicle, he detected a

strong odor of marihuana and saw that Bams's eyes were bloodshot. Baggett asked Bams and Mitchell about their travel plans, and they gave conflicting answers. Baggett asked Mitchell whether there was any contraband in the car, and Mitchell said no. Baggett then asked whether there was any luggage, and Mitchell said he had a duffel bag and Bams had a Nike bag, both of which were in the trunk. After a search of the vehicle, Baggett found both bags and discovered five plastic bags of cash in them. The currency had been separated into stacks wrapped by rubber bands. Mitchell stated that the money was his but that he was unsure how much there was. A later count established $253,341. Bams and Mitchell were arrested for money laundering, and the cash was seized. Several days later, the district attorney reached a settlement with Bams and Mitchell, whereby they agreed to forfeit $100,000 of the seized cash; the county returned the remaining currency to them. That returned money was ultimately deposited into an account owned by Bams.

Weeks later, Bams and Mitchell were stopped by Officer Adam Pinner in Arkansas for making an unsafe lane change. Bams was driving the vehicle, which was registered to him, and Mitchell was the only passenger. When Pinner asked Bams for his license, he noticed that Bams's hands were shaking and that he appeared nervous. Pinner also saw that one of the rear quarter panels appeared to have been tampered with, that there was a single key in the ignition, and that there were energy drinks in the vehicle. Pinner testified that those observations were consistent with drug trafficking. After receiving consent from Bams, Pinner searched the vehicle and found ten kilograms of cocaine concealed within two false compartments in the rear quarter panels. Bams and Mitchell were indicted for (1) conspiracy to possess with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 846, and for (2) use of an interstate facility in aid of racketeering, in violation of 18 U.S.C. §§ 2 and 1952(a)(3). Bams moved to suppress evidence obtained from the Arkansas traffic stop, and the District Court denied the motion. After a four-day jury trial, Bams was convicted of both counts.

Appealing, Bams's first contended that the evidence obtained from the Arkansas should have been suppressed. The Fifth Circuit analyzes the Constitutionality of a traffic stop using the two-step inquiry set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). At the first step, the Court "determine[s] whether the stop was justified at its inception." *Id.* "For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle." *Id.* Reasonable suspicion can rest upon a mistake of law or fact if the mistake is objectively reasonable. Assuming the stop was justified, the Court moves to the second step, where it determines "whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop of the vehicle in the first place." *Id.* Bams challenged the Arkansas stop on both prongs of *Terry*, and both of those challenges failed. The Court credited the Government's assertion that Pinner had reasonable suspicion to stop Bams because he had violated ARK. CODE ANN. § 27-51-306. That statute provides, in relevant part, that "[t]he driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." According to Pinner, Bams passed a tractor-trailer on the left side of the road and returned to the right side when he was only fifty feet in front of the tractor-trailer, which Pinner believed was insufficient to be "safely clear" of the truck. He based that belief on ARK. CODE ANN. § 27-51-305, which prohibits tractor-trailers from following within two hundred feet of another motor vehicle. Bams did not dispute Pinner's description of the events. Instead, he disagreed with Pinner's interpretation of the statute. No Arkansas court has construed the meaning of "safely clear" in § 27-51-306, but, even assuming that

Pinner's interpretation were incorrect, the Court concluded that his understanding was "objectively reasonable." As for *Terry's* second prong, the Court rejected Bams's argument that Pinner had unreasonably prolonged his detention without reasonable suspicion, thus tainting his consent.

Bams's next contention was that there was insufficient evidence for conviction. The Court concluded that the evidence, taken together, would permit a rational jury to conclude that Bams and Mitchell had agreed to distribute cocaine. They were stopped with a large sum of cash that reasonably could relate to drug trafficking. The returned portion ended up in Bams's account. And then, several weeks later, the same two people were stopped again, this time with ten kilograms of cocaine. That evidence, the Court found, was sufficient.

***United States v. Broca-Martinez*, 16-40817**

Before KING, JOLLY, and **PRADO**, Circuit Judges.

Cecilio Broca-Martinez appealed the District Court's denial of his motion to suppress. While on patrol in December 2015, Officer Juan Leal began following Broca-Martinez's vehicle because it matched a description Homeland Security agents had provided the Laredo Police Department. Officer Leal stopped Broca-Martinez after a computer search indicated the vehicle's insurance status was "unconfirmed." The traffic stop led to the discovery that Broca-Martinez was in the country illegally and that he was harboring undocumented immigrants at his residence. Broca-Martinez was indicted by a grand jury on three counts of conspiring to harbor illegal aliens in violation of 8 U.S.C. § 1324. He filed a motion to suppress evidence that argued there was no reasonable suspicion justifying the initial stop and that the exclusionary rule barred all evidence obtained as a result of the stop. Officer Leal testified at a hearing on the motion to suppress. He admitted that during the stop he did not ask for proof of insurance. He stated that he "already knew that the vehicle wasn't insured" based on the "unconfirmed" status generated by the computer. However, the District Court questioned why Officer Leal did not seek to confirm the computer's report, asking specifically whether "reports are sometimes inaccurate." He responded: "For the most part, no." The District Court denied Broca-Martinez's motion to suppress. Broca-Martinez then entered a conditional plea to one count of conspiracy to transport undocumented aliens, but preserved his right to appeal the District Court's denial of his motion to suppress. In appealing, Broca-Martinez contended that there was no reasonable suspicion justifying the initial stop.

Under Texas law, "[a] person may not operate a motor vehicle in [Texas] unless financial responsibility is established for that vehicle through" either a "motor vehicle liability insurance policy" or other means such a surety bond, a deposit, or self-insurance. Tex. Transp. Code Ann. § 601.051. The Fifth Circuit had never before addressed whether a state computer database indication of insurance status may establish reasonable suspicion. However, several other Circuits have found that such information may give rise to reasonable suspicion as long as there is either some evidence suggesting the database is reliable or at least an absence of evidence that it is unreliable. *See United States v. Cortez-Galaviz*, 495 F.3d 1203 (10th Cir. 2007); *United States v. Miranda-Sotolongo*, 827 F.3d 663, 669 (7th Cir. 2016); *United States v. Sandridge*, 385 F.3d 1032, 1036 (6th Cir. 2004); and *United States v. Stephens*, 350 F.3d 778, 779 (8th Cir. 2003). Agreeing with these other Circuits, the Fifth Circuit decided that a state computer database indication of insurance status may establish reasonable

suspicion when the officer is familiar with the database and the system itself is reliable. In such a case, a seemingly inconclusive report such as "unconfirmed" will be a specific and articulable fact that supports a traffic stop. Here, when viewed in the light most favorable to the Government, Officer Leal's testimony provided sufficient support for the reliability of the database. In testifying, he explained the process for inputting license plate information, described how records in the database were kept, and noted that he was familiar with these records. Moreover, when Broca-Martinez's attorney questioned the system's reliability, Officer Leal confirmed that it was usually accurate. The Court went on to state that even if Officer Leal had not been positive Broca-Martinez was uninsured, he nevertheless cleared the bar for reasonable suspicion. An officer does not have to be certain a violation has occurred. *See United States v. Castillo*, 804 F.3d 361, 366 (5th Cir. 2015). "This would raise the standard for reasonable suspicion far above probable cause or even a preponderance of the evidence, in contravention of the Supreme Court's instructions." *Id.* In the end, the Court found reasonable suspicion supported the stop and therefore it affirmed the denial of Broca-Martinez's motion to suppress.

***United States v. Henry*, 16-30731**

Before **SMITH**, ELROD, and HAYNES, Circuit Judges.

Milton Henry appealed his convictions of possession of a firearm by a felon and possession of marijuana, contending that all of the evidence should have been suppressed. He asserted that the officers who stopped his vehicle had no reasonable suspicion that he had engaged in any illegal activity. The officers averred that they believed Henry was in violation of Louisiana law because his license-plate frame obstructed the expiration date on his registration sticker.

While patrolling in Baton Rouge, police officers Carl Trosclair and Marty Freeman noticed that Henry's license-plate frame obstructed the view of the expiration date on the plate's registration sticker. Believing that the obstruction violated Louisiana law, they pulled Henry over. Trosclair approached the vehicle. Upon coming into contact with Henry, Trosclair asked him for his license. While talking to Henry, Trosclair noticed a strong odor of marijuana and instructed Henry and his passenger to exit the vehicle. Trosclair advised Henry of his *Miranda* rights and asked whether he had any marijuana. Henry admitted that he had a marijuana blunt in the ashtray. He also informed Trosclair that his wife's gun was in the center console. Henry consented to a search of his vehicle, which produced two bags of marijuana, a digital scale, and a loaded handgun. Henry acknowledged that the marijuana and scale were his. After the officers had detained Henry in the back of their police car, Henry's wife arrived. She denied ownership of anything in the car, including the gun, and consented to a search of her and Henry's house, where officers discovered additional bags of marijuana, a bag of cocaine, and drug paraphernalia. Henry was indicted for possession of a firearm by a felon and for possession of marijuana. He moved to suppress evidence seized as a result of the traffic stop, but the District Court denied the motion, concluding that the stop was not unreasonable, even if based on a mistake of law. After a bench trial, the District Court convicted Henry on both counts.

Henry's appeal contended that the initial stop was not justified. Though he did not contest the District Court's finding that his license-plate frame obstructed the view of the expiration date on his

registration sticker, he did assert that § 32:53(A)(3) did not cover obstructed registration stickers. His interpretation of the statute, which provides that "[e]very permanent registration license plate [] shall be maintained free from foreign materials and in a condition to be clearly legible," required only that the letters and numbers on the plate itself be clearly legible. Disagreeing, the Government asserted that § 32:53 prohibits obstruction of attached registration stickers by a license-plate frame, which the Government categorized as a "foreign material[ ]." The Fifth Circuit took no position on the correct interpretation of § 32:53(A)(3) because Louisiana caselaw has established that the officers' interpretation, even if mistaken, was objectively reasonable. In *State v. Pena*, 988 So. 2d 841, 844 (La. App. 2 Cir. 7/30/08); 988 So. 2d 841, 844, the court considered whether an officer had reasonable suspicion to stop a vehicle based on, among other things, improper display of a license plate. "The photographs introduced into evidence revealed that although the numbers and letters on the license plate were clearly visible, the top and bottom portions of the plate were partially obscured by a license plate frame." *Id.* at 846. After citing Louisiana Statutes Annotated 47:507(B), the predecessor to § 32:53(A)(3), the court concluded that the officer "had reasonable suspicion that a traffic violation had occurred" because, in part, "the photographs introduced into evidence revealed that the license plate was partially obscured []." *Id.* at 846–47. In light of *Pena*, Freeman and Trosclair's belief that § 32:53(A)(3) prohibited an obscured registration sticker was objectively reasonable. *Pena* directly rejected Henry's position that § 32:53 applied only to the lettering and numbering on the plate itself. While *Pena* did not specifically address obscured registration stickers, the Fifth Circuit reasoned that its broad construction of the statute could reasonably be construed to apply to them. Thus, the officers had reasonable suspicion, which justified the traffic stop, and the Court affirmed the judgments of conviction.

***United States v. Escamilla*, 16-40333**

Before PRADO, **HIGGINSON,** and COSTA, Circuit Judges.

In December 2014 Border Patrol Agents Garcia and Freed were patrolling a privately owned ranch in Laredo, Texas. According to the agents, the ranch was a place that smugglers often cut through to avoid two Border Patrol checkpoints on either end of the property. Other traffic on the ranch primarily would have been oil industry workers in company vehicles. At about 6:30 a.m., the agents noticed two similar white trucks, a Ford F-250 and a Ford F-150, driving together northbound through the property. A few minutes later, they received an alert about a vehicle that had entered the ranch at an area where it should not have been. Because the white trucks resembled the vehicle in the alert, the agents located the trucks again to investigate. Again, the trucks, which appeared to be headed to exit the ranch, were traveling in tandem, which is common among smugglers. Further, it would have been unusual for oil workers to be exiting the ranch at that time of the morning. The agents also noticed details about the F-150 that distinguished it from a typical company truck, including the fact that it had temporary "paper" tags, common among smugglers, and was registered to an individual at a residence and not to a business. The agents believed that the F-150 was likely a "clone" – an everyday vehicle intended to resemble a legitimate oilfield truck but carrying undocumented immigrants or drugs.

When the agents activated their lights to stop to F-150, the F-250 sped away. The agents alerted other agents to track down the F-250. Miguel Escamilla, who was driving the F-150, stopped. The

agents noticed additional signs that distinguished the vehicle from a typical oilfield truck and made it appear to be a clone. Further, Escamilla appeared nervous and could not give a definitive answer as to why he was on the ranch. He consented to a search of the truck. After Agent Garcia asked him, "Do you mind if I look through your phone?[,]" Escamilla silently handed the phone to Agent Garcia. It was a flip phone containing only three numbers, two of which were stored under a single letter. After searching the phone, Agent Garcia handed it back to Escamilla because, in Agent Garcia's words, he was "done with it." Escamilla then consented to a patrol dog sniff of the vehicle. The handler reported that the dog "alerted, but nothing solid." At this point Escamilla had been detained for about twenty-four minutes. The agents then learned that the F-250 had rammed a gate at the ranch and driven through deer-proof fences before crashing. The driver had fled, leaving marijuana and black tar heroin behind. The agents arrested Escamilla based on his connection to the F-250.

The agents drove Escamilla to a nearby Border Patrol station where they met DEA Agent Antonelli. The agents took Escamilla's personal property and handed it over to the DEA. Agent Antonelli reported that Agent Freed told him that Escamilla had verbally consented to a search of his phone. Agent Antonelli also was given a second phone, which had been recovered from the F-250. The second phone was broken in half but otherwise identical to the one taken from Escamilla. Agent Antonelli looked through both phones to find their contact numbers. When Escamilla was asked to claim his personal property before going to jail, he claimed some items but not the phone that the agents had taken from him, saying that it was not his. The following day, Agent Antonelli used the contact numbers from both phones to subpoena records from AT&T. The records revealed, among other things, 196 calls and 29 texts between the two phones in the two weeks prior to Escamilla's arrest. A few days later, Agent Antonelli used a forensic examination program called "Cellebrite" to download information from both phones. The Cellebrite program confirmed the contact numbers retrieved by Agent Antonelli from his earlier manual search. Agent Antonelli did not obtain a warrant for either the manual search or the Cellebrite search, relying instead on the consent given by Escamilla to Agent Garcia.

Escamilla was charged with conspiring to possess and possessing with the intent to distribute marijuana and heroin. He moved to suppress the phone that the agents recovered from him and the information retrieved from it. The District Court determined that Escamilla was lawfully stopped; that he voluntarily consented to a search of the phone; that Agent Antonelli's manual search of the phone was encompassed by Escamilla's consent; and that Escamilla abandoned any expectation of privacy once he disclaimed ownership of the phone, so that the subsequent Cellebrite search was justified. A jury found Escamilla guilty on all counts. He appealed.

On appeal, the Fifth Circuit determined first that the District Court did not err in concluding that the Border Patrol Agents' stop of defendant was justified. All of the factors to consider when a roving Border Patrol agent stops a vehicle in a "border area" weighed in favor of the government. The Court also rejected Escamilla's argument that the agents unreasonably prolonged the stop and should have let him leave as soon as the Border Patrol dog found "nothing solid." After they stopped Escamilla, the agents continued to amass suspicion that he was involved in smuggling, and the dog sniff did not dispel suspicion because the dog alerted in way that led the agents to believe that the F-150 had recently carried or been near contraband.

Turning to the searches of the phone, the Court concluded that Escamilla voluntarily consented to the initial search of the phone by Agent Garcia during the stop. However, the Court found that the District Court erred in concluding that this consent carried over to Agent Antonelli's manual search of the phone after Escamilla was arrested. The District Court was under the misapprehension that Agent Garcia had retained possession of the phone after he manually searched it when, in fact, Agent Garcia had handed the phone back to Escamilla because Agent Garcia was "done with it." Agent Garcia's directly handing the phone back to Escamilla ended the search. The second search of the phone, by Agent Antonelli, was distinct and required a warrant, its own consent, or some other exception to the warrant requirement. Because no exception applied, Agent Antonelli's manual search was unconstitutional. As to the Cellebrite search, the Court agreed with the District Court's conclusion that Escamilla could not challenge that search because it occurred after he abandoned any privacy interest in the phone by disclaiming ownership of it.

Finally, the Court considered whether the Government's reliance at trial on evidence from the Agent Antonelli's unconstitutional manual search of the phone was harmless. The Court concluded that it was. Escamilla had not challenged the manual search of the phone retrieved from the F-250. Further, the Cellebrite search also revealed the phone's contact number. Thus, the unconstitutionally obtained evidence was duplicative of other evidence in the trial record. In addition, the Government relied at trial on evidence other than the phone records to connect defendant to the F-250.

***United States v. Monsivais*, 15-10357**

Before STEWART, Chief Judge, JONES, and **DENNIS**, Circuit Judges.

The events leading to the arrest and conviction of Marcelo Monsivais occurred on the side of Interstate 20 roughly midway between Abilene and Fort Worth, in Palo Pinto County, Texas. On September 22, 2014, during daylight hours, law enforcement officers were on patrol in a marked sheriff's car traveling east on I-20 when they saw Monsivais walking east on the opposite side of the Interstate away from an apparently disabled truck. Officers drove their squad car across the median and headed back toward Monsivais to offer him roadside assistance, or as they put it, to do a "welfare check." They stopped the squad car on the side of the highway facing Monsivais as he approached and activated the car's emergency lights as a traffic safety precaution. Monsivais, however, did not stop but continued walking past the squad car in his eastbound direction. About the time Monsivais passed the back of the squad car, the officers exited and began asking Monsivais questions. One officer could not remember exactly what he said but thought his questions were about where Monsivais was headed, where he had been, and if he needed any help. The officers testified that Monsivais said he was heading to Fort Worth; that he appeared nervous and jittery, but was polite in responding to the questions; and that he repeatedly put his hands in his pockets, but took them out each time at the officer's request. An officer testified that after approximately four minutes, he told Monsivais that he was going to pat Monsivais down for weapons "because of his behavior" and "for officer safety reasons." After being so informed, Monsivais told the officers that he had a firearm in his waistband. An officer grabbed Monsivais's right hand, bent his arm behind him, and seized the firearm. Both officers then restrained and handcuffed Monsivais. When asked for identification, Monsivais directed the officers to his wallet in his pocket, where they found an expired Mexican passport. Their continued searches of his clothing revealed a pipe and two small

baggies of methamphetamine. Monsivais was arrested and later charged with possession of a firearm while being unlawfully present in the United States.

Monsivais filed a motion to suppress the evidence obtained as a result of the seizure and the searches. After a hearing at which the officers testified (but Monsivais did not), the District Court denied the motion to suppress, stating only that the "consensual encounter was transformed into a lawful *Terry* frisk due to the Defendant's demeanor, remarks, and for officer-safety reasons." Monsivais pleaded guilty but reserved his right to appeal the denial of his motion to suppress. He appealed, arguing that the District Court Judge erred in failing to exclude the firearm and other evidence because the officers did not have reason to suspect him of a crime as a basis for an investigatory detention, or reason to suspect him of being armed and dangerous as a basis for a protective frisk for weapons.

A panel majority of the Fifth Circuit agreed that the District Court's failure to exclude the firearm and other evidence was in error because the officers lacked a basis to reasonably suspect him of a criminal act before seizing him. In the majority's judgment, the Government failed to satisfy its burden under *Terry* of pointing to specific and articulable facts warranting reasonable suspicion that Monsivais had committed, was committing or was about to commit a criminal act prior to his seizure. Looking at the totality of the circumstances without sacrificing the rational inferences that *Terry* demands, the majority could see no objectively logical process that justified interpreting the range of Monsivais's behavior as reasonably suspected criminal conduct. Based on that finding, the majority saw no need to determine whether the officers also lacked reasonable suspicion that Monsivais was armed and dangerous. Therefore, the majority concluded that the seizure violated his rights under the Fourth Amendment, and the evidence obtained therefrom had to be suppressed. For those reasons, the majority reversed the District Court's denial of the motion to suppress the evidence, and vacated Monsivais's conviction and sentence.

Judge JONES dissented. Whereas the question the majority decided was whether officers formed a sufficient "reasonable suspicion" to attempt patting down a suspect walking away from an apparently broken down truck beside a major highway, Judge JONES explained that unusual facts imbued this police-suspect encounter, which, in her opinion, should have warranted a narrow, fact-bound decision. Instead, the majority "chose[] to engage in a broad analysis that departed from established Fifth Circuit authority and even from *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), the interpretive root of Fourth Amendment precedent." Disavowing the majority's reasoning and result, Judge JONES opined that Monsivais's conviction should be upheld "and, more importantly, the right of peace officers to act for their own safety on facts that would raise suspicion in the minds of any reasonable observer (including judges) should also be vindicated."

***United States v. Jarman*, 16-30468**

Before **JOLLY**, SMITH, and PRADO, Circuit Judges.

The FBI began investigating George Jarman when Jason Collins, the co-owner of a computer repair store, called FBI Special Agent ("SA") Larry Jones in November 2007. Collins told SA Jones that he suspected one of his customers had child pornography on his hard drive. He said that the customer

had purchased a new computer and asked him to transfer the data from an old computer's hard drive onto it and to wipe the old hard drive clean. Collins's part-time employee, Charlie Wilson, performed the transfer at the customer's home. During the transfer, Wilson, who could see the file names, but not the actual files being copied, noticed file names which appeared to indicate child pornography. Wilson told Collins what he had seen, and Collins asked Wilson to bring the old hard drive back to the store. Collins inspected that hard drive, finding several file names suggestive of child pornography that he could not open and a video file in the root directory depicting a male performing anal sex on a prepubescent male child. Collins did not tell SA Jones the names of any of the alleged child pornography computer files. But he told SA Jones that he did not believe that the video file had been transferred to the new computer because it was on the hard drive's root directory. At the end of the interview, SA Jones asked Collins to keep the customer's hard drive until the FBI contacted him.

SA Jones requested that an investigation be opened into the allegations, and SA Thomas Tedder was assigned the case. Shortly thereafter, SA Tedder began collaborating with Department of Justice ("DOJ") attorneys on the case. In January 2008, SA Tedder re-interviewed Collins. Collins gave SA Tedder the customer's hard drive and told him generally the same story he told SA Jones. This time, however, Collins identified the customer as Jarman. Notably, Collins now claimed that he believed that Wilson copied all of the old data – including the possible child pornography – to Jarman's new computer, even though he had previously stated that the video file containing possible child pornography was not transferred to the new computer. SA Tedder testified that he asked Collins about this inconsistency and that Collins stood by his new conclusion. In December 2008, SA Tedder submitted a search-warrant affidavit for Jarman's home. A Magistrate Judge signed the search warrant on December 5th. Three days later, the FBI executed the warrant, seizing several hard drives and computers from Jarman's home. The Computer Analysis Response Team ("CART") began its forensic examination. CART completed its examination on November 5, 2010, and reported that it found "sexually explicit images and videos of minors on the computer hardware."

A grand jury subsequently charged Jarman with, among other things, the receipt and attempted receipt of child pornography. In September 2013, Jarman moved to suppress the fruits of the search of his home and for a *Franks* hearing, arguing that SA Tedder's affidavit did not establish probable cause, omitted material information, and contained misrepresentations and unreliable information. Importantly, SA Tedder testified that he did not have any direct knowledge that Jarman actually downloaded files from child pornography sites when drafting the search-warrant affidavit. The District Court held a *Franks* hearing in April 2014. Jarman then sought, and was granted, additional discovery because, the Court found, there were material inconsistencies between SA Tedder's testimony and his draft affidavits. In October 2014, the District Court denied Jarman's motion to suppress. Because of the effect of the passage of time on one's memory, the District Court found, SA Tedder's incorrect statements at the *Franks* hearing were not deliberate. Moreover, the Government's actions did not give rise to a reckless disregard for the truth. Consequently, the District Court held that, although the "investigation may have been less than ideal," "the good faith exception [to the exclusionary rule] applies." Jarman promptly moved for reconsideration and for a second *Franks* hearing. The Court granted a second *Franks* hearing in May 2015. Although it "remain[ed] uncomfortable with the [G]overnment's conduct," the Court still did "not believe that Jarman ha[d] established that [SA] Tedder's conduct was in bad faith." Jarman then conditionally pleaded guilty to the receipt and attempted receipt of child pornography, reserving the right to appeal the denial of his motions to suppress the evidence found in the search of his home. Jarman

appealed, asserting that the District Court erred by denying his motions to suppress and for reconsideration because: (1) the good faith exception was inapplicable; (2) SA Tedder's affidavit did not establish probable cause; and (3) the Government's delay in searching the data from his home violated the Fourth Amendment and Federal Rule of Criminal Procedure 41.

Affirming, the Fifth Circuit held that the District Court did not err in denying suppression of the evidence the Government seized from Jarman's home because: (1) Jarman failed to carry his burden to show that the good faith exception did not apply; and (2) Jarman was not entitled to suppression based on the Government's delay in completing its search of the evidence because: (a) Jarman waived the claim that the Government violated Rule 41; and (b) the Government did not violate the Fourth Amendment because it acted reasonably under the circumstances. The Court emphasized that the District Court heard all of the evidence and received extensive briefing before finding that Jarman failed to satisfy the requirements for attacking the good faith exception. The Court stressed that the District Court specifically determined that the Government and SA Tedder did not act in bad faith and the statements and omissions that Jarman called material knowing or reckless falsehoods and omissions were neither deliberate nor made in reckless disregard for the truth. Mindful that that the District Court had the opportunity to observe witnesses, and recalling that evidence must be "viewed in the light most favorable to the" Government, the Court upheld the application of the good faith exception to any defects alleged by Jarman.

***United States v. Sealed Search Warrants*, 16-20562**

Before JOLLY and ELROD, Circuit Judges, and **RODRIGUEZ**, District Judge.

On the basis of sealed probable cause affidavits, the Government obtained and executed three pre-indictment search warrants of Justin Smith's home, business, and storage unit in March and April of 2016. Smith filed motions in the District Court seeking to unseal the affidavits supporting these warrants. The Magistrate Judge initially granted the motion in part, requiring the Government to submit proposed redacted versions of the affidavits to be unsealed. The Government objected but nevertheless complied. The Magistrate Judge found that the Government redacted too much from the affidavits and submitted its own redacted versions that would be unsealed after fourteen days if the Government failed to object. The Government filed its objections with the District Court, which reversed the Magistrate Judge. The District Court reasoned that unsealing the affidavits would compromise the Government's ongoing investigation. Smith, who appealed, still has not been indicted.

The Government argued that there was no jurisdiction under 28 U.S.C. § 1291, which gives Circuit Courts jurisdiction over "appeals from all final decisions of the district courts of the United States." The Government's assertion was that the District Court's rulings on Smith's motions were interlocutory and not final because orders "granting or denying a pre-indictment motion to suppress do[ ] not fall within any class of independent proceedings otherwise recognized by [the Supreme Court]." *Di Bella v. United States*, 369 U.S. 121, 129 (1962). Under *Di Bella*, the Government argued that Smith's motions were functionally pre-indictment motions to suppress, and the suppression issue was interlocutory because it was subsumed by the overarching possibility of a forthcoming criminal trial. The Fifth Circuit recalled that the general rule of *Di Bella* – that orders granting or

denying pre-indictment motions to suppress are not a part of independent, immediately appealable proceedings – is not absolute: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *Id.* at 131–32. Under the exception of *Di Bella*, the Fifth Circuit resolved that it had jurisdiction. The Court reasoned that a warrant issued pre-indictment is, by definition, issued before criminal charges are filed – there were no criminal charges pending against Smith when he filed his initial motions, when the District Court denied his motions, when he appealed these motions, and at present. Furthermore, Smith expressly was not seeking the suppression of evidence. Nor could he since no prosecution presently exists in which he could seek suppression (even a year after the initial execution of the warrants). For those reasons, the Court held the exception of *Di Bella* applied and jurisdiction existed.

As for the merits of his appeal, Smith argued that he enjoyed a common law right to access the affidavits supporting the pre-indictment warrants. Notable to the Court was that he did not argue that the First Amendment granted him a right of access to the documents, which has been an issue frequently litigated in similar cases. *See, e.g., Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64–66 (4th Cir. 1989) (finding that a newspaper publisher seeking to unseal pre-indictment search warrant affidavits could not invoke the qualified First Amendment right of access but recognizing the publisher's common law right of access).

The Fifth Circuit held that the qualified common law right of access can extend to an individual seeking to access pre-indictment search warrant materials, and the decision of whether access should be granted must be left to the discretion of the District Court, upon the Court's consideration of "the relevant facts and circumstances of the particular case." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978). In *Nixon*, the Supreme Court recognized that the public has a right "to inspect and copy public records and documents, including judicial records and documents" which "is not absolute." Further, "[a]lthough the common law right of access to judicial records is not absolute, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'" *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993) (quoting *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)). Here, though the District Court purported to conduct this case-specific analysis, the Fifth Circuit determined that its findings evaded meaningful appellate review because they were too conclusory and lacked detail as both it and other Circuits have required in similar situations. Because the District Court abused its discretion by finding that the pre-indictment warrant materials here should remain sealed without making sufficient factual findings, the Court vacated its judgment. Without more detailed findings from the District Court regarding the reasons for keeping the warrant materials sealed, the Fifth Circuit could not properly assess those materials and the impact of unsealing them. Thus, the Fifth Circuit remanded the matter for the District Court to conduct the required balancing test and to provide a detailed factual assessment.

In sum, the Court extended the case-by-case approach that it had previously used for assessing the common law qualified right of access to judicial records to situations involving an individual's request to access pre-indictment warrant materials such as the affidavits in this case. In cases involving a request to unseal affidavits in support of pre-indictment search warrants, the Court instructed that District Courts should exercise their discretion by balancing the public's right to access judicial documents against interests favoring nondisclosure.

***United States v. Nesmith*, 16-40196**

Calvin Nesmith pleaded guilty to the sexual exploitation of a minor after investigators found an explicit image of Nesmith and the fourteen-year-old daughter of his girlfriend. In calculating Nesmith's Guidelines sentencing range, the District Court applied a four-level enhancement because the image purportedly depicted sadistic conduct. Nesmith appealed the District Court's application of the sadism enhancement.

Jane Doe, the child depicted in the explicit image, testified that she had been asleep when the picture was taken and "had no idea the picture [existed] until court." After being told about the content of the picture, Doe said she felt embarrassed, humiliated, and worried because she didn't "know who's seen it or if it will ever get out and how it will affect [her] later." Based on Doe's testimony, the Government reurged application of the enhancement. Nesmith objected, arguing that the image did not portray sadistic or masochistic conduct because it did not depict anyone inflicting or receiving pain. The District Court overruled Nesmith's objection, and sentenced him to 360 months' imprisonment.

On appeal, Nesmith contended that the sadism enhancement should apply only where an image portrays conduct that contemporaneously inflicts either physical or emotional pain on the victim. Because Doe was asleep in the image at issue and was thus unaware that the image was taken, Nesmith reasoned that his conduct did not inflict contemporaneous pain on Doe.

Addressing the merits, the Court explained that the parties disagreed on two primary issues: (1) whether the test for application of the sadism enhancement is subjective or objective; and (2) whether an image must depict conduct that would contemporaneously inflict physical or emotional pain on a victim to qualify as sadistic. In line with the text of § 2G2.1(b)(4), the six other Circuits to consider this issue have held that the determination of whether the sadism enhancement applies is an objective inquiry. Concluding that Nesmith had not provided a compelling reason to create a Circuit split, the Fifth Circuit likewise held that an objective standard governs the assessment of whether an image portrays sadistic conduct under § 2G2.1(b)(4). This Court had never faced application of the sadism enhancement in a scenario like this one – where the minor victim is completely unconscious and unaware of the sexual exploitation occurring at his or her expense. But in all the cases where the Court has found the sadism enhancement appropriate, the infliction of emotional or physical pain that was the basis for the enhancement has been contemporaneous with the creation of the image. But even aside from the guidance provided by its case law, the Court alluded to the fact that it would be unwise to expand the sadism enhancement to apply in all situations where it is reasonably foreseeable that the conduct depicted in the image will later manifest itself in pain. In closing, the Court wrote: "Given the plain text of the Guidelines, our case law, and the strong policy reasons in favor of such an approach, we conclude that a contemporaneity requirement is appropriate. Accordingly, we hold that an image portrays sadistic conduct where it depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation. Because the victim in this case was asleep when the image was taken, no objective observer would conclude that the image portrayed sadistic conduct – namely, the defendant obtaining sexual release through the infliction of physical or emotional pain on another."

***United States v. Ramos-Gonzales*, 16-41353**

Before STEWART, Chief Judge, JONES, and OWEN, Circuit Judges.
(PER CURIAM).

The dispute in this case arose from the District Court's decision on remand to re-impose a special condition of supervised release on Laura Ramos-Gonzales. Ramos-Gonzales pleaded guilty to transporting an undocumented alien into the United States. At sentencing, the District Court imposed two special conditions of supervised release – a nighttime restriction and drug surveillance. Ramos-Gonzales appealed those conditions to the Fifth Circuit. By prior opinion, the Fifth Circuit remanded for resentencing on the grounds that the District Court committed plain error in failing to explain the basis for the special conditions. At the subsequent sentencing hearing, the District Court re-imposed the drug surveillance condition based on Ramos-Gonzales's 2012 conviction for marijuana possession. In this, Ramos-Gonzales's second appeal, she challenged the District Court's second judgment.

Ramos-Gonzales argued that re-imposition of the drug surveillance condition was improper because the condition was not reasonably related to the relevant statutory factors that govern the imposition of conditions of supervised release, and because the condition was not consistent with the Sentencing Commission's pertinent policy statements. The Government responded that imposition of the drug surveillance condition based on the previous drug conviction addressed the sentencing factors of Ramos-Gonzales's "history and characteristics" as well as "protecting the public and adequately deterring the defendant from committing future criminal conduct." 18 U.S.C. § 3553(a). The Fifth Circuit, agreeing with Ramos-Gonzales, held that, on the facts of this case, any reasonable relationship between the drug surveillance special condition and the 2012 drug-related conviction would require evidence that Ramos-Gonzales actually used drugs. The Court went on to say that it viewed the more general connection between Ramos-Gonzales's prior conviction and the special condition imposed – that is, the fact that both have something to do with drugs – as too superficial to justify imposition of the special condition. And while the Government now attempted to defend the position that the drug surveillance condition was reasonably related to the history and characteristics of Ramos-Gonzales and the nature and circumstances of her prior conviction, the Court explained that this contention contradicted its concession at the first appeal that "[a]lthough Ramos has a 2012 conviction for possession of 44 pounds of marijuana and last smoked marijuana 25 years ago, no indication in the record exists that she has an illicit drug problem to warrant drug surveillance requiring periodic urine and/or breath, saliva, and skin tests to detect drug abuse." Summing up, the Court stated, "where there is no relevant evidence of drug use, the essential characteristic of a defendant that makes surveillance for drug use reasonable and appropriate is absent." Accordingly, the Court concluded that the District Court abused its discretion in imposing the special drug surveillance condition on Ramos-Gonzales. Although the Court held that the drug surveillance special condition was not supported by the District Court's reasons for its imposition in this case, no remand was necessary because Ramos-Gonzales will be required to undergo drug testing as a mandatory condition of supervised release regardless. 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(4). Therefore, the Court vacated the special condition of supervised release.

In a footnote, the Court also observed that the sentencing hearing following its remand in the first appeal was conducted by telephone, without the physical presence of the defendant. Despite the Court's recognition that the defendant registered no objection to this procedure, it was constrained

to note that no authority for such a procedure had been presented, nor was the Court able to locate any. *See* Fed. R. Crim. Pro. 43. The Court seized the opportunity to remind District Courts of the solemnity of the criminal proceeding and of the contribution that the physical presence of all parties makes to the fairness, integrity, and public function of that proceeding. Accordingly, the Court advised against conducting future sentencing hearings by telephone.

Judge JONES concurred in the opinion and drew attention to its sixth footnote which stated that there is no authority for the District Court's conducting the resentencing hearing by telephone conference. From what the Court learned at oral argument, a Federal Public Defender was present in District Court for the defendant, the Judge herself only by telephone, the defendant "participated" from a halfway house somewhere, and appellate counsel was unsure where the AUSA was during the resentencing "hearing." There was no indication that the defendant consented to this procedure. Judge JONES made plain: "That no one objected, and all the professional parties to the proceeding found this process convenient does not make it proper." Adverting to the possibility that this measure was viewed as a simple extension of the practice of conducting sentencing by videoconferences, Judge JONES explained that "sentencing by telephonic conferencing goes far beyond videoconferencing in its lack of dignity and detachment from the moral drama of the criminal justice system." Reiterating that "practical excuses [do not] override the symbolic significance of procedural formality by all participants and the physical proximity of the defendant to her counsel," Judge JONES's concurrence forcefully concluded: "Conducting resentencing, to say nothing of initial sentencing, by telephonic conference reflects poorly on the dignity and integrity of federal court proceedings."

***United States v. Barber*, No. 16-41354**

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.
(PER CURIAM).

Jermaine Barber pleaded guilty to one count of possession of 100 kilograms or more of marijuana with intent to distribute and received a below-guidelines sentence of twelve months and one day in prison as well as a three-year term of supervised release. On appeal, Barber challenged the substance-abuse treatment special condition of his supervised release. At the sentencing hearing, the District Court imposed a special condition of release requiring Barber to "participate in a drug and/or alcohol treatment program as deemed necessary and approved by the Probation Office." Barber did not object. The written judgment included the following provision regarding drug and alcohol treatment:

> The defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addiction, dependency or abuse which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the Program Director with the approval of the probation officer. The defendant shall further submit to such drug-detection techniques, in addition to

> those performed by the treatment agency, as directed by the probation officer. The defendant will incur costs associated with such drug/alcohol detection and treatment, based on ability to pay as determined by the probation officer.

The Fifth Circuit agreed that the District Court committed clear error by imposing a special condition that was impermissibly ambiguous as to the scope of authority delegated to the probation office. The special condition imposed at the sentencing hearing in this case used substantially the same language that earlier Fifth Circuit cases deemed ambiguous, requiring Barber to undergo substance-abuse treatment "as deemed necessary and approved by the Probation Office." Therefore, it was impermissibly ambiguous. The Government conceded that the special condition orally imposed at sentencing was impermissibly ambiguous, but argued that this error was cured by the written judgment, which, according to the Government, was unambiguous as to the scope of delegation. This was unavailing. To the extent that the written judgment conflicts with the sentence orally pronounced at sentencing, the District Court's oral pronouncement controls. *United States v. Torres-Aguilar*, 352 F.3d 934, 935 (5th Cir. 2003). Accordingly, the written judgment did not obviate the clear error in the orally imposed special condition of release. The error in this case affected Barber's substantial rights because it affected his right to be sentenced by an Article III Judge. Moreover, the Court explained that the exercise of its discretion to correct the erroneously ambiguous delegation in this case was consistent with Fifth Circuit precedent.

Thus, the Court vacated the substance-abuse treatment special condition of release and remanded to the District Court for resentencing, with the clarifying instruction the Court offered in *United States v. Franklin*, 838 F.3d 564, 568 (5th Cir. 2016). (quoting *United States v. Lomas*, 643 F. App'x 319, 325 (5th Cir. 2016)):

> If the district court intends that the [treatment] be mandatory but leaves a variety of details, including the selection of a [treatment] provider and schedule to the probation officer, such a condition of probation may be imposed. If, on the other hand, the court intends to leave the issue of the defendant's participation in [treatment] to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included.

***Wessinger v. Vannoy*, 15-70027**

Before DENNIS, **CLEMENT**, and OWEN, Circuit Judges.

The District Court granted Todd Kelvin Wessinger's second amended petition for habeas corpus as to his claim for ineffective assistance of trial counsel at the penalty phase, vacating his death sentences and remanding the matter to state court for a new penalty phase trial. On November 19, 1995, Wessinger shot and killed Stephanie Guzzardo and David Breakwell while robbing Calendar's Restaurant in Baton Rouge, Louisiana. He also shot David Armentor twice in the back and attempted to shoot Alvin Ricks. Armentor survived his wounds, and Ricks was able to escape after Wessinger's gun would not fire. Wessinger stole approximately $7,000 and then fled the scene. jury convicted Wessinger of two counts of capital murder. During the penalty phase of the trial,

Wessinger's counsel presented multiple character witnesses and two experts. The jury sentenced Wessinger to death. Wessinger appealed his conviction and sentence, but the Louisiana Supreme Court affirmed both on direct appeal. The United States Supreme Court denied certiorari, *Wessinger v. Louisiana*, 528 U.S. 1050 (1999), as well as Wessinger's application for rehearing. *Wessinger v. Louisiana*, 528 U.S. 1145 (2000).

After Wessinger's first pro bono post-conviction counsel withdrew, the Louisiana Supreme Court appointed Soren Gisleson as pro bono post-conviction counsel. Before his formal appointment, Gisleson filed a three-page "shell" petition for post-conviction relief to toll the one-year statute of limitations. The state post-conviction court gave Gisleson a 60-day extension to file an amended petition. Gisleson moved for "funding for any and all types of investigation." The state post-conviction court denied his motion for funds. Gisleson moved to continue the deadline to file the amended petition. Although the state post-conviction court initially denied the motion, it eventually gave him a brief continuance. Gisleson obtained the files of Wessinger's previous counsel, the district attorney, and the police. He spoke with Wessinger's mother and brother "a couple times on the phone." Gisleson also visited and spoke with Wessinger. He determined from the files and from his conversations with Wessinger and his family that Wessinger potentially had a claim for ineffective assistance of trial counsel at the penalty phase.

Gisleson then moved in the Louisiana Supreme Court to withdraw from representing Wessinger. Because the Louisiana Supreme Court did not respond to Gisleson's motion before the filing deadline set by the state post-conviction court, Gisleson drafted and filed Wessinger's first amended petition for post-conviction relief. The first amended petition was 136 pages, not including any attachments. Gisleson modelled the first amended petition on a form template he received from the Louisiana Crisis Assistance Center, and he included "a couple of discrete facts" from "the file or from general conversations with [Wessinger's] mother" as well as from the state court trial record. Gisleson included in Wessinger's first amended petition a claim for ineffective assistance of trial counsel at the penalty phase, among other claims. The State opposed Wessinger's petition, and Gisleson realized that the Louisiana Supreme Court denied his motion to withdraw. The state post-conviction court referred the matter to a commissioner. The commissioner's report recommended that the state post-conviction court deny Wessinger's first amended petition. Gisleson then filed a second amended petition for post-conviction relief, which was 100 pages long and reflected "[a]ny and all assistance [he] would have received from GRAC, [and] any perceived factual development they would have created and would have assisted and sent to [him]." Among other things, the second amended petition "added some discrete allegations concerning mitigation and [ineffective assistance of counsel] in the [penalty] phase."

The state post-conviction court dismissed Wessinger's first amended petition as procedurally barred and his second amended petition on the merits. The Louisiana Supreme Court affirmed without reasons the state post-conviction court's denial of relief. Gisleson then filed an application for a writ of habeas corpus in Federal Court on behalf of Wessinger, asserting a claim for ineffective assistance of trial counsel at the penalty phase of trial, among other claims. The District Court initially denied all claims. Wessinger then moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The District Court granted Wessinger's motion as to Wessinger's claim for ineffective assistance of trial counsel at the penalty phase and subsequently granted habeas relief, holding that penalty phase counsel was ineffective and that Gisleson was ineffective on initial

review. The State appealed, arguing that the District Court erred in determining that Gisleson's initial-review representation of Wessinger was ineffective.

A divided panel of the Fifth Circuit reversed the District Court's grant of habeas relief. The majority, applying the familiar *Strickland* test, concluded that the District Court erroneously determined that Gisleson's initial-review representation of Wessinger was deficient. Whereas the District Court found that Gisleson's "performance fell below an 'objective standard of reasonableness' by failing to conduct any mitigation investigation, particularly when the underlying claim is one of ineffective assistance of trial counsel at the penalty phase," the majority, in consideration of all the circumstances and evaluating the conduct from Gisleson's perspective at the time, concluded that his performance in raising and developing Wessinger's claim for ineffective assistance of trial counsel at the penalty phase was not deficient. While Wessinger argued that his initial-review counsel was deficient because he "fail[ed] to raise the claim of ineffective assistance of trial counsel at the penalty phase [] [that was] raised by Wessinger in federal habeas," the majority found it clear that Gisleson raised Wessinger's claim for ineffective assistance of trial counsel at the penalty phase during the state post-conviction proceedings. Gisleson's performance in raising and developing Wessinger's claim for ineffective assistance of trial counsel at the penalty phase was not deficient. Furthermore, the majority explained that Wessinger failed to satisfy the prejudice inquiry, as he could not show Gisleson's particular unreasonable errors, rather than decisions by the state post-conviction court, "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Thus, the majority decided that the District Court erred in concluding that Wessinger's initial-review counsel was ineffective.

In dissent, Judge DENNIS declared that if Todd Wessinger's state habeas counsel had performed in the way that the majority opinion described, he would have joined in reversing the judgment of the District Court. But what the majority opinion failed to acknowledge, and was crucially significant to Judge DENNIS, was "that *eighteen months* elapsed before counsel was informed that his motion had been denied and that during those eighteen months counsel never bothered to determine the status of his motion: inexplicably assuming that his duties had ended the moment he filed his motion with the Louisiana Supreme Court, counsel walked away from Wessinger's case and did not look back." Although the dissent agreed with the majority opinion that some of counsel's omissions were the result of the state post-conviction court's decisions, it found that "these omissions were necessarily exacerbated by his total abandonment of the case for eighteen months." In the dissent's judgment, "counsel's abandonment of his client's case for eighteen months rendered his performance constitutionally deficient."