

# The Bar Association of The Fifth Federal Circuit 2022 Appellate Advocacy Seminar

October 4, 2022

## APPELLATE ADVOCACY



**Hon. Brian A. Jackson**  
*U.S. District Judge*  
*Middle District of Louisiana*

**Hon. Richard B. Farrer**  
*U.S. Magistrate Judge*  
*Western District of Texas*



# Cases Decided

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# by the U.S. Supreme Court

# *Hemphill v. New York*

142 S. Ct. 681 (2022)

January 20, 2022



**Issue:** Whether the **admission of a plea allocution of an unavailable witness** violated Hemphill's Sixth Amendment right to confront the witnesses against him at trial.

**Holding:** Yes. **A Defendant's 6<sup>th</sup> Amendment Confrontation Clause right is violated** when a trial court admits the transcript of a plea allocution of an unavailable witness where the statement was not subject to cross-examination.

# *Brown v. Davenport*

142 S. Ct. 1510 (2022)

April 21, 2022



**Issue:** Whether a federal court **can grant habeas relief** if a Defendant can show that a trial court's error had a "substantial" effect on the trial's outcome (the ***Brecht v. Abrahamson*** test), or must it also consider the provisions of the **AEDPA**, which limits federal review of certain state convictions .

**Holding: No.** When a state court has ruled on the merits of a state prisoner's claim, a **federal court cannot grant habeas relief without applying both** the *Brecht* test and AEDPA.



# *Shinn v. Ramirez*

142 S. Ct. 1718 (2022)

May 23, 2022



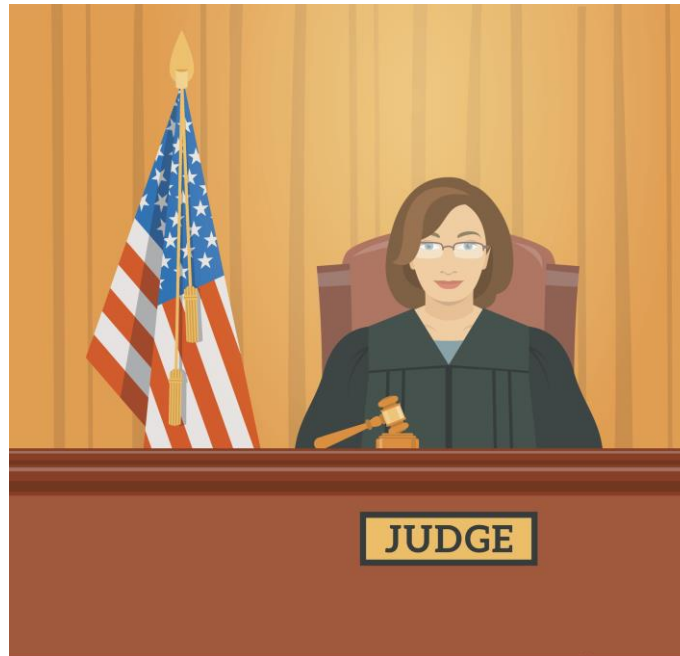
**Issue:** Whether **28 U.S.C. § 2254(e)(2)** permits a federal court to order **evidentiary development** because **postconviction counsel** is alleged to have negligently failed to develop the state court record.

**Holding:** **No.** A federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the **state court record** based on the **ineffective assistance of state postconviction counsel**.

# *Kemp v. United States*

142 S. Ct. 1856 (2022)

June 13, 2022



**Issue:** Whether the term “**mistake**,” as featured in **FRCP 60(b)(1)**, includes a **judge’s errors of law** and thus is subject to **FRCP 60(c)’s 1-year limitation period**.

**Holding: Yes.** The term “mistake” in **FRCP 60(b)(1)**—allowing **relief from a final judgment** on grounds of mistake, inadvertence, surprise, or excusable neglect, even if the error is not an obvious legal mistake—**includes a judge’s errors of law**.

# *Johnson v. Arteaga-Martinez*

142 S. Ct. 1827 (2022)

June 13, 2022



**Issue:** Whether the Government is **required** by 8 U.S.C. § 1231(a)(6) to provide noncitizens who have been ordered removed with a bond hearing after they **have been detained for six months**.

**Holding:** The Government is **not required** to provide a bond hearing under 8 U.S.C. § 1231(a)(6) to noncitizens detained for six months.

# *Denezpi v. United States*

142 S. Ct. 1838 (2022)

June 13, 2022



**Issue:** Whether a Defendant's prosecution under one federal law offends **the Double Jeopardy Clause** if the Federal Government had earlier prosecuted Defendant and different statute **for the same conduct**.

**Holding:** The Double Jeopardy Clause **does not bar** successive prosecutions of distinct offenses arising from a single act, even if **a single sovereign prosecutes them**.



# *Oklahoma v. Castro-Huerta*

142 S. Ct. 2486 (2022)

June 29, 2022



**Issue:** Whether the Federal Government and the State have **concurrent jurisdiction** to prosecute crimes **committed by non-Indians against Indians in Indian country.**

**Holding:** **Yes**, the Federal Government and the State have concurrent jurisdiction for prosecution of non-Indians who commit crimes against Indians in Indian country. Neither the General Crimes Act nor Public Law 280 preempt state jurisdiction over such crimes, and the Oklahoma Enabling Act did not preempt Oklahoma's authority to prosecute Defendant (a non-Indian) for a crime committed against a member of the Cherokee Tribe while within Indian country.

# Cases Decided

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## by the U.S. Court of Appeals for the Fifth Circuit

# *United States v. Torres*

997 F.3d 624 (5th Cir. 2021)

May 19, 2021



**Issue:** Whether the District Court **violated the *Geders* rule** by prohibiting the Defendant from speaking with his attorney during a **13-hour overnight recess** declared in **the middle of the defendant's direct examination**.

**Holding: Yes.** The **Sixth Amendment** guarantees a **Defendant's right to confer with counsel during an overnight recess** that interrupts the defendant's testimony. "Though discussions during an overnight recess will inevitably include some consideration of the defendant's ongoing testimony, they will encompass matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." **By contrast**, barring discussion with counsel during a short recess is not prohibited. **Even under plain error review, a *Geders* violation requires reversal.**



# *United States v. Sharp*

6 F.4th 573 (5th Cir. 2021)

July 26, 2021



**Issue:** Whether admission of **informant's out-of-court statement** violated the **Confrontation Clause**, where **detective testified** that “another agent ... got a call from a confidential informant saying [defendant] was . . . in possession of a large amount of methamphetamine.”

**Holding: Yes.** Rejecting the Government’s argument that the testimony was offered to explain the course of the investigation, the Fifth Circuit held: “[T]he mere existence of a purported nonhearsay purpose **does not insulate an out-of-court statement from a Confrontation Clause challenge.**” The detective “relayed an out-of-court statement of the most damaging kind—that Sharp was committing the crime—and left Sharp with no opportunity to confront his accuser.” “Backdooring highly inculpatory hearsay via an **explaining-the-investigation rationale is a recurring problem.**” and the Government “must take care to avoid eliciting this kind of unconstitutional testimony.”<sup>12</sup>

# *United States v. Flowers*

6 F.4th 651 (5th Cir. 2021)

July 30, 2021



**Issue:** Whether Defendant was **seized** when officers in separate patrol cars surrounded Defendant's parked car with flashing lights, and whether the officers had **reasonable suspicion** to support that seizure.

**Holding:** Officers had **reasonable suspicion** of criminal activity to justify investigatory detention. The position of the vehicle in a parking lot in a high-crime area was **determinative**.

**Distinguished by:** *United States v. Morris*, 40 F.4th 323, 330–31 (5th Cir. 2022). “The [Flowers] court stated that the defendants’ location at this parking lot was ‘**determinative**,’ . . . because it was at the ‘exact streets’ where the officers had made a series of arrests for ‘recent violent crimes and burglaries.’ . . . Without this ‘**determinative**’ fact, *Flowers* does not control.”

# *United States v. Escajeda*

8 F.4th 423 (5th Cir. 2021)

August 11, 2021



**Issue:** Whether the **factual basis** supported defendant's **drug conspiracy conviction**.

**Holding:** **Yes.** But the Fifth Circuit acknowledged **three colorable defenses**. First, **a single buy-sell agreement cannot be a conspiracy** under the “buyer-seller” exception to drug distribution conspiracies. Second, an agreement with a **government informant cannot be the basis for a conspiracy** because the informant **does not share the required criminal intent**. Third, a large quantity of drugs alone **may not be enough to prove a conspiracy**. Here, however, the factual basis was sufficient **because of circumstantial evidence of the defendant's involvement** in a drug distribution ring, which included sizeable amounts of cash, large quantities of drugs, and the presence of weapons.



# *United States v. Sims*

11 F.4th 315 (5th Cir. 2021), *cert. denied* 142 S. Ct. 827 (2022)

August 24, 2021



**Issue:** Whether **explicit rap videos** admitted at trial for **sex trafficking of a minor**, conspiracy to sex traffic, and **sex trafficking by force, fraud, or coercion** were **unfairly prejudicial under Rule 403**.

**Holding: No.** As an issue of first impression in the Fifth Circuit, the Circuit held that **explicit rap videos are probative and outweigh substantial prejudice** when the Defendant performs the song, describes events closely related to the crime charged, and the evidence is not cumulative. Here, the **videos portrayed the Defendant with guns and money** while rapping about drug usage, violence, and pimping. The Court noted that the drug usage and weapons in the videos **were relevant to the charge** that the Defendant had sex trafficked by force, fraud, or coercion.

# *United States v. Contreras-Rojas*

16 F.4th 479 (5th Cir. 2021)  
October 29, 2021



**Issue:** Whether Defendants should **appeal** the issue of **prior convictions** being used for **sentence enhancements** without the fact of the prior conviction being **found by a jury** or **alleged in the indictment** prior to sentencing.

**Holding:** **No.** Such challenges "**are virtually all frivolous** . . . [and] arguments seeking reconsideration of *Almendarez-Torres* will be **viewed with skepticism**." The judges urged "appellants and their counsel not to **damage their credibility** with this court by asserting non-debatable arguments."

# *United States v. Garza-De La Cruz*

16 F.4th 1213 (5th Cir. 2021)  
November 10, 2021



**Issue:** Whether Defendants should **appeal** the issue of **prior convictions** being used for **sentence enhancements** without the fact of the prior conviction being **found by a jury** or **alleged in the indictment** prior to sentencing.

**Holding:** **Yes.** The three-judge panel of Judges Costa, Ho, and King opined that although this issue is foreclosed by *Almendarez-Torres*, **there is nothing wrong** when litigants raise the issue anyways to **preserve their appellate rights**.



# *United States v. Meals*

21 F.4th 903 (5th Cir. 2021)

Dec. 30, 2021



**Issue:** Whether Facebook and the National Center for Missing and Exploited Children (“NCMEC”) acted as “**government agents**” when Facebook forwarded text messages that it discovered between Defendant and a minor to the NCMEC, who then reported the messages to law enforcement.

**Holding:** Facebook was a “**private actor**” when it found messages between Defendant and minor and NCMEC was a private, nonprofit corporation, that **could not act as a “government agent”** that exceeded the scope of the private party’s search. Further NCMEC’s review of the messages was **not a “search”** under the Fourth Amendment.

# *United States v. Norbert*

24 F.4th 1016 (5th Cir. 2022) (en banc), *aff'g*, 432 F. Supp. 3d 705 (S.D. Miss. 2020)  
Feb. 4, 2022



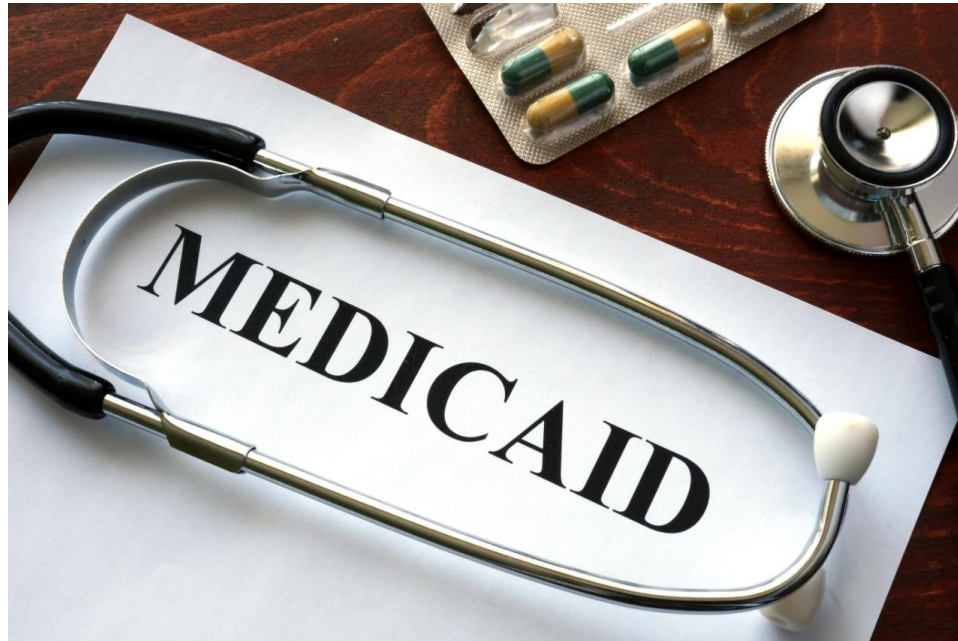
**Issue:** Whether reasonable suspicion was established on the basis of information received from an anonymous tipster.

**Holding:** The **equally divided en banc court** (9-9) affirmed the district court's judgment granting the motion to suppress, which found that the anonymous caller was **lacking in credibility and reliability** and that the verification factor weighed strongly against finding reasonable suspicion, despite the specificity factor weighing in favor of reasonable suspicion.

# *United States v. Dubin*

27 F.4th 1021 (5th Cir. 2022)

March 3, 2022



**Issue:** Whether the two-year **sentence enhancement** set forth in **§ 1028A(a)(1)** applies to Defendant's who have the "**lawful authority**" to use a **means of identification of another person**, but do so to commit fraud.

**Holding:** **Yes**. Although the caption of **§ 1028A(a)(1)** is "aggravated identify theft," the **sentence enhancement still applies** in cases of Defendants who did not "**steal**" the victim's identify *per se* but used it for fraudulent purposes.



# *United States v. Williams*

30 F.4th 263 (5th Cir. 2022)

March 29, 2022



**Issue:** Whether the district court improperly excluded evidence of the defendant's tax history predating the charged tax fraud.

**Holding:** **No.** Even if the evidence **was permissible under 404(b)**, the court **did not clearly abuse its discretion** by **excluding the evidence under 403**. “[T]he district court identified substantial risks from admitting Williams’s tax history. Admitting the evidence gives the jury the chance to decide the case on an improper basis: Williams is guilty because he is the type of person who doesn’t follow the tax laws.” Further, reversal was not warranted because the evidentiary ruling was subject to modification and could be reassessed as evidence develops during trial.

# *United States v. Hamann*

33 F.4th 759 (5th Cir. 2022)

May 12, 2022



**Issue:** Whether the Government's use of a **non-testifying investigator's statements** "to provide context for its investigation" **implicated** defendant's **Confrontation Clause rights**.

**Holding:** **Yes**. The statements of non-testifying investigators were **"testimonial,"** and thus, implicated defendant's Confrontation Clause rights.

# *United States v. Morton*

46 F.4th 331 (5th Cir. 2022) (en banc), *vacating and aff'g*, 46 F.3d 421 (2021)  
Aug. 22, 2022



**Issue:** Whether affidavits in support of search warrants provided probable cause **to search photos** on Defendant's cell phone and **whether the good-faith exception** to the exclusionary rule applied.

**Holding:** Officer's affidavits in support of search warrants for Defendant's cell phones for evidence of drug trafficking **were not "bare bones" affidavits**, and thus the good-faith exception to the exclusionary rule applied. Affidavit **mentioned photos only in general statements** about behaviors of drug traffickers.



**QUESTIONS OR COMMENTS?**