SIGNIFICANT DECISIONS OF THE U.S. SUPREME COURT & THE 5TH CIRCUIT COURT OF APPEALS
Criminal Justice Section Program

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“SIGNIFICANT DECISIONS OF THE
UNITED STATES SUPREME COURT”
[The First 13 Cases of the 2009 – 2010 Term]

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I. Introduction

A. The Challenge of Preparing this Paper

The Supreme Court has not finished its term. Cases continue to be handed down and I know that more will be decided between the time that I turn this paper in and the day the Rusty Duncan course begins. Before setting out the cases that have already been decided by the Court, I have left two pages of lines for you to be able to take notes on the cases that are decided after May 3, 2010.

B. Beware Of

- Padilla v. Kentucky, 130 S.Ct. 1473 (March 31, 2010): Every lawyer who represents non-citizens in criminal cases now has a burden placed upon him or her to advise the client of the immigration consequences of entering a plea of guilty in a criminal case. Never before has such a burden been placed on the defense bar as to a collateral matter.

- Maryland v. Shatzer, 130 S.Ct. 1213 (February 24, 2010): Law enforcement officers may now return and question a suspect who is in custody and who has invoked his rights under Miranda if the suspect is returned to custody and at least 14 days have passed since the suspect invoked his right to remain silent.

- Renico v. Lett, 559 U.S. ___ (2010) [Slip Opinion May 3, 2010]: A plea of double jeopardy following the court’s granting of a mistrial may have even less of a chance of success after this opinion.

- Bloate v. United States, 130 S.Ct. 1345 (March 8, 2010): The Speedy Trial Act is alive and well. A 360 month sentence was set aside because the Government did not comply with the Speedy Trial Act.

- Presley v. Georgia, 130 S.Ct. 721 (January 19, 2010): The Sixth Amendment to the Constitution prohibits a trial judge from excluding the public from the voir dire examination of prospective jurors. This opinion could create havoc for judges with small courtrooms.

- McDaniel v. Brown, 130 S.Ct. 665 (February 25, 2010): A district court, in considering a Jackson v. Virginia claim may, not rely upon evidence outside the trial record that goes to the reliability of the trial evidence in deciding the issue.

D. The Rest of the Cases

The Court has decided other cases which were important to the litigants but which are limited to the facts of the particular case and will have much less of an impact on us.

E. What’s Still Pending Before the Court?

I don’t know. I have called the clerk’s office at the Supreme Court and have been told that there is no website which shows the cases that are awaiting an opinion. It is possible to go in to the Court’s calendar – if you should choose to – and look up each case in which an oral argument has been given; however, you cannot tell from the calendar whether many of the cases are civil or criminal.

II. The Cases

A. Double Jeopardy


   (ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined as to Parts I and II.)

   THE OFFENSE: First Degree Murder

   [Michigan Statute]

   THE FACTS FROM THE SYLLABUS: “From jury selection to jury instructions in a Michigan court, respondent Lett’s first trial for, inter alia, first-degree murder took less than nine hours. During approximately four hours of deliberations, the jury sent the trial court seven notes, including one asking what would happen if the jury could not agree. The judge called the jury and the attorneys into the courtroom and questioned the foreperson, who said that the jury was unable to reach a unanimous verdict. The judge then declared a mistrial, dismissed the jury, and scheduled a new trial. At Lett’s second trial, after deliberating for only 3 hours and 15 minutes, a new jury found him guilty of second-degree murder. On appeal, Lett argued that because the judge in his first trial had announced a mistrial without any manifest necessity to do so, the Double Jeopardy Clause barred the State from trying him a second time. Agreeing, the Michigan Court of Appeals reversed the conviction. The Michigan Supreme Court reversed. It concluded that, under United States v. Perez, 9 Wheat. 579, 580, a
The defendant may be retried following the discharge of a deadlocked jury so long as the trial court exercised its “sound discretion” in concluding that the jury was deadlocked and thus that there was a “manifest necessity” for a mistrial; and that, under Arizona v. Washington, 434 U. S. 497, 506–510, an appellate court must generally defer to a trial judge’s determination that a deadlock has been reached. It then found that the judge at Lett’s first trial had not abused her discretion in declaring the mistrial, observing that the jury had deliberated a sufficient amount of time following a short, noncomplex trial; that the jury had sent several notes, including one appearing to indicate heated discussions; and that the foreperson had stated that the jury could not reach a verdict. In Lett’s federal habeas petition, he contended that the Michigan Supreme Court’s rejection of his double jeopardy claim was ‘an unreasonable application of . . . clearly established Federal law,’ 28 U. S. C. §2254(d)(1), and thus that he was not barred by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) from obtaining federal habeas relief. The District Court granted the writ, and the Sixth Circuit affirmed.

**THE ISSUE:** The question under AEDPA is . . . whether the determination of the Michigan Supreme Court that there was no abuse of discretion was “an unreasonable application of . . . clearly established Federal law.” §2254(d)(1)?

**THE HOLDING:** Because the Michigan Supreme Court’s decision in this case was not unreasonable under AEDPA, the Sixth Circuit erred in granting Lett habeas relief.

**FROM THE OPINION:** “The ‘clearly established Federal law’ in this area is largely undisputed. In Perez, we held that when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar anew trial for the defendant before a new jury. 9 Wheat., at 579–580. We explained that trial judges may declare a mistrial ‘whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity’ for doing so. Id., at 580. The decision to declare a mistrial is left to the ‘sound discretion’ of the judge, but ‘the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.’” Ibid.

Since Perez, we have clarified that the ‘manifest necessity’ standard ‘cannot be interpreted literally,’ and that a mistrial is appropriate when there is a “‘high degree’” of necessity. Washington, supra, at 506. The decision whether to grant a mistrial is reserved to the ‘broad discretion’ of the trial judge, a point that ‘has been consistently reiterated in decisions of this Court.’ Illinois v. Somerville, 410 U. S. 458, 462 (1973). See also Gori v. United States, 367 U. S. 364, 368 (1961).

In particular, “[t]he trial judge’s decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court.” Washington, 434 U. S., at 510. A ‘mistrial premised upon the trial judge’s belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.’ Id., at 509; see also Downum v. United States, 372 U. S. 734, 736 (1963) (deadlocked jury is the ‘classic example’ of when the State may try the same defendant twice).”

**THE RESULT:** The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

**[Defendant loses.]**

**MY THOUGHTS:** Just when you think that the defendant is going to win, the Court refers to the AEDPA – and you know that the defendant is going to lose. “Manifest necessity” is not what I thought it was.

**B. The Constitutionality of 18 U.S.C. § 48**


(ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion.)

**THE OFFENSE:** 18 U.S.C. § 48

**THE FACTS:** This case … involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia … and has been restricted by federal law since 1976. … Respondent Robert J. Stevens ran a business, ‘Dogs of Velvet and Steel,’ and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960’s and 1970’s. A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a ‘gruesome’ scene of a pit bull attacking a domestic farm pig. 533 F.3d 218, 221 (C.A.3 2008) (en banc). On the basis of these videos, Stevens was indicted on three counts of violating § 48.
C. Confessions

1. Maryland v. Shatzer, 130 S.Ct. 1213 (February 24, 2010)

(SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which THOMAS, J., joined as to Part III. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed an opinion concurring in part and concurring in the judgment.)

THE OFFENSE: Sexual Abuse of a Child [Maryland Statute]

THE FACTS (FROM THE SYLLABUS): “In 2003, a police detective tried to question respondent Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his Miranda right to have counsel present during interrogation, so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his Miranda rights and made inculpatory statements. The trial court refused to suppress those statements, reasoning that Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, did not apply because Shatzer had experienced a break in Miranda custody prior to the 2006 interrogation. Shatzer was convicted of sexual child abuse. The Court of Appeals of Maryland reversed, holding that the mere passage of time does not end the Edwards protections, and that, assuming, arguendo, a break-in-custody exception to Edwards existed, Shatzer's release back into the general prison population did not constitute such a break.”


THE HOLDING: The Edwards rule, under which a suspect who has invoked his right to the presence of counsel during custodial interrogation is not subject to further interrogation until either counsel has been made available or the suspect himself further initiates exchanges with the police, does not apply if a break in custody lasting 14 days has occurred.

FROM THE OPINION: “…Miranda announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. Id., at 444, 86 S.Ct. 1602. After the warnings are given, subsequent interrogation if he had previously

[When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights…. [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.’ 451 U.S., at 484-485, 101 S.Ct. 1880.

The rationale of Edwards is that once a suspect indicates that ‘he is not capable of undergoing [custodial] questioning without advice of counsel,’ ‘any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the “inherently compelling pressures” and not the purely voluntary choice of the suspect.” Arizona v. Roberson, 486 U.S. 675, 681, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Under this rule, a voluntary Miranda waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police’s persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated-pressure likely to ‘increase as custody is prolonged…’

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We have frequently emphasized that the Edwards rule is not a constitutional mandate, but judicially prescribed prophylaxis.

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Because Edwards is ‘our rule, not a constitutional command,’ ‘it is our obligation to justify its expansion.’ Roberson, supra, at 688, 108 S.Ct. 2093 (KENNEDY, J., dissenting). Lower courts have uniformly held that a break in custody ends the Edwards presumption, see, e.g., People v. Storm, 28 Cal.4th 1007, 1023-1024, and n. 6, 124 Cal.Rptr.2d 110, 52 P.3d 52, 61-62, and n. 6 (2002) (collecting state and federal cases), but we have previously addressed the issue only in dicta, see McNeil, supra, at 177, 111 S.Ct. 2204 (Edwards applies ‘assuming there has been no break in custody’).

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If Shatzer’s return to the general prison population qualified as a break in custody (a question we address in Part III, infra), there is no doubt that it lasted long enough (2 ½ years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard-of. In County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), we specified 48 hours as the time within which the police must comply with the requirement of Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

Like McLaughlin, this is a case in which the requisite police action (here, presentation to a magistrate; here, abstention from further interrogation) has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the Edwards presumption ‘will not reach the correct result most of the time.’ Coleman, supra, at 737, 111 S.Ct. 2546. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”

THE RESULT: Judgment of the Court of Appeals of Maryland is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

[Defendant loses.]

MY THOUGHTS: Why 14 days? And, does this mean law enforcement officers can return every 15 days – forever – to question an inmate/suspect? Unusual facts can result in bad

2. Florida v. Powell, 130 S.Ct. 1195 (February 23, 2010)

(GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and Scalia, KENNEDY, THOMAS, ALITO, and SOTOMAYOR, JJ., joined, and in which BREYER,
J., joined as to Part II. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined as to Part II.)

THE OFFENSE: Felon in Possession of a Firearm [Florida Statute]

THE FACTS (FROM THE SYLLABUS): “After arresting respondent Powell, but before questioning him, Tampa Police read him their standard Miranda form, stating, inter alia: ‘You have the right to talk to a lawyer before answering any of our questions’ and ‘[y]ou have the right to use any of these rights at any time you want during this interview.’ Powell then admitted he owned a handgun found in a police search. He was charged with possession of a weapon by a convicted felon in violation of Florida law. The trial court denied Powell’s motion to suppress his inculpatory statements, which was based on the contention that the Miranda warnings he received did not adequately convey his right to the presence of an attorney during questioning. Powell was convicted of the gun-possession charge, but the intermediate appellate court held that the trial court should have suppressed the statements. The Florida Supreme Court agreed. It noted that both Miranda and the State Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. The advice Powell received was misleading, the court believed, because it suggested that he could consult with an attorney only before the police started to question him and did not convey his entitlement to counsel’s presence throughout the interrogation.”

THE ISSUES: Whether advice that a suspect has the “right to talk to a lawyer before answering any of the [the law enforcement officers’] questions,” and that he can invoke this right “at any time … during the interview,” satisfies Miranda.

THE HOLDING: The warning given by the officer prior to the taking of the confession of the defendant satisfied Miranda.

FROM THE OPINION: “Considering the issue to be ‘one of great public importance,’ the court certified the following question to the Florida Supreme Court:

‘Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate Miranda warnings which advise of both (A) the right to talk to a lawyer “before questioning” and (B) the “right to use” the right to consult a lawyer “at any time” during questioning?’ Id., at 1067-1068 (some capitalization omitted).

Surveying decisions of this Court as well as Florida precedent, the Florida Supreme Court answered the certified question in the affirmative.

998 So.2d 531, 532 (2008). ‘Both Miranda and article I, section 9 of the Florida Constitution,’ the Florida High Court noted, ‘require that a suspect be clearly informed of the right to have a lawyer present during questioning.’ Id., at 542. The court found that the advice Powell received was misleading because it suggested that Powell could ‘only consult with an attorney before questioning’ and did not convey Powell’s entitlement to counsel’s presence throughout the interrogation. Id., at 541. Nor, in the court’s view, did the final catchall warning—‘[y]ou have the right to use any of these rights at any time you want during this interview’—cure the defect the court perceived in the right-to-counsel advice: ‘The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning,’ the court stated, for ‘a right that has never been expressed cannot be reiterated.

To give force to the Constitution’s protection against compelled self-incrimination, the Court established in Miranda ‘certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.’ Duckworth v. Eagan, 492 U.S. 195, 201, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). Intent on ‘giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow,’ 384 U.S., at 441-442, 86 S.Ct. 1602, Miranda prescribed the following four now-familiar warnings:

‘[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’ Id., at 479, 86 S.Ct. 1602.

Miranda’s third warning—the only one at issue here-addresses our particular concern that ‘[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators.’ Id., at 469, 86 S.Ct. 1602. Responsive to that concern, we stated, as ‘an absolute prerequisite to interrogation,’ that an individual held for questioning ‘must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.’ Id., at 471, 86 S.Ct. 1602. The question before us is whether the warnings Powell received satisfied this requirement.

The four warnings Miranda requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed.
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In determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the words employed ‘as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘convey[y] to [a suspect] his rights as required by Miranda.’” Duckworth, 492 U.S., at 203, 109 S.Ct. 2875 (quoting Prysock, 453 U.S., at 361, 101 S.Ct. 2806).

Our decisions in Prysock and Duckworth inform our judgment here. Both concerned a suspect's entitlement to adequate notification of the right to appointed counsel. In Prysock, an officer informed the suspect of, inter alia, his right to a lawyer's presence during questioning and his right to counsel appointed at no cost. 453 U.S., at 356-357, 101 S.Ct. 2806.

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‘[N]othing in the warnings,’ we observed, ‘suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect is] questioned, ... while [he is] being questioned, and all during the questioning.’ Id., at 360-361, 101 S.Ct. 2806 (internal quotation marks omitted).

Similarly, in Duckworth, we upheld advice that, in relevant part, communicated the right to have an attorney present during the interrogation and the right to an appointed attorney, but also informed the suspect that the lawyer would be appointed ‘if and when [the suspect goes] to court.’ 492 U.S., at 198, 109 S.Ct. 2875 (emphasis deleted; internal quotation marks omitted). ‘The Court of Appeals thought th[e] “if and when you go to court” language suggested that only those accused who can afford an attorney have the right to have one present before answering any questions.’ Id., at 203, 109 S.Ct. 2875

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Under the relevant state law, we noted, ‘counsel is appointed at [a] defendant's initial appearance in court.’ Id., at 204, 109 S.Ct. 2875. The ‘if and when you go to court’ advice, we said, ‘simply anticipate[d]’ a question the suspect might be expected to ask after receiving Miranda warnings, i.e., ‘when [will he] obtain counsel.’ 492 U.S., at 204, 109 S.Ct. 2875. Reading the ‘if and when’ language together with the other information conveyed, we held that the warnings, ‘in their totality, satisfied Miranda.’ Id., at 205, 109 S.Ct. 2875.

We reach the same conclusion in this case. The Tampa officers did not ‘entirely omit[,]’ post, at 1210 - 1211, any information Miranda required them to impart. They informed Powell that he had ‘the right to talk to a lawyer before answering any of [their] questions’ and ‘the right to use any of [his] rights at any time [he] want[ed] during th[e] interview,’ App. 3. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times.”

THE RESULT: Judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[ Defendant loses.]

MY THOUGHTS: Another bad Miranda case. For almost 44 years, officers have been paraphrasing Miranda. I thought that the Florida Supreme Court had it right – it was a bad warning that didn’t comply with Miranda.

D. The Right to a Public Trial


(Per Curiam) (Judge Thomas, with whom Judge Scalia joins, dissenting.)

THE OFFENSE: Cocaine trafficking (Georgia Statute)

THE FACTS (Quoting from the opinion): “Before selecting a jury in Presley's trial, the trial court noticed a lone courtroom observer. Id., at 270-271, 674 S.E.2d, at 910. The court explained that prospective jurors were about to enter and instructed the man that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. Id., at 271, 674 S.E.2d, at 910. The court then questioned the man and learned he was Presley's uncle. Ibid. The court reiterated its instruction:

‘ “Well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we ... complete selecting the jury this afternoon. But, otherwise, you would have to leave the sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.”’ Ibid.

Presley's counsel objected to ‘ “the exclusion of the public from the courtroom,” ’ but the court explained, ‘ “[i]here just isn't space for them to sit in
the Court considered a Sixth Amendment. Later in the same Term as the Sixth Amendment right extends to jury voir dire that this Court may proceed by summary disposition. The point is well settled under Press-Enterprise I and Waller. The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. “Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.” Gannett Co. v. DePasquale, 443 U.S. 368, 380, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit. That rationale suffices to resolve the instant matter. The Supreme Court of Georgia was correct in assuming that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors.

While the accused does have a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule. “[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information.” Waller, 467 U.S., at 45, 104 S.Ct. 2210. “Such circumstances will be rare, however, and the balance of interests must be struck with special care.” Ibid. Waller provided standards for courts to apply before excluding the public from any stage of a criminal trial:

’T he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.’ Id., at 48, 104 S.Ct. 2210.

In upholding exclusion of the public at juror voir dire in the instant case, the Supreme Court of Georgia concluded, despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives. While the Supreme Court of Georgia concluded this was an open question under this Court's precedents, the statement in Waller that ‘the trial court must consider reasonable alternatives to closing the proceeding’ settles the point. Ibid. If that statement leaves any room for doubt, the Court was more explicit in Press-Enterprise I:

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’T he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.’ Id., at 48, 104 S.Ct. 2210.

In upholding exclusion of the public at juror voir dire in the instant case, the Supreme Court of Georgia concluded, despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives. While the Supreme Court of Georgia concluded this was an open question under this Court's precedents, the statement in Waller that ‘the trial court must consider reasonable alternatives to closing the proceeding’ settles the point. Ibid. If that statement leaves any room for doubt, the Court was more explicit in Press-Enterprise I:
Even with findings adequate to support closure, the trial court's orders denying access to voir dire testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire. 464 U.S., at 511, 104 S.Ct. 819.

***

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.

***

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

THE RESULT: The Supreme Court of Georgia’s judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Defendant wins.]

MY THOUGHTS: This case is going to cause problems for judges with small courtrooms. The next issue will be as to what measure a judge is required to take to accommodate the public at criminal trials; i.e., what does “every reasonable measure” mean?

E. The Speedy Trial Act

   (THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion, in which BREYER, J., joined) THE OFFENSE: 18 U.S.C. § 922(g)(1) and 21 U.S.C. § 841(a)(1)
   THE FACTS (FROM THE SYLLABUS): “The Speedy Trial Act of 1974 (Act) requires a criminal defendant's trial to commence within 70 days of his indictment or initial appearance, 18 U.S.C. § 3161(c)(1), and entitles him to dismissal of the charges if that deadline is not met, § 3162(a)(2). As relevant here, the Act automatically excludes from the 70-day period ‘delay resulting from ... proceedings concerning the defendant,’ 18 U.S.C.A. § 3161(h)(1) (hereinafter subsection (h)(1)), and separately permits a district court to exclude ‘delay resulting from a continuance’ it grants, provided the court makes findings required by § 3161(h)(7) (hereinafter subsection (h)(7)). Petitioner's indictment on federal firearm and drug possession charges started the 70-day clock on August 24, 2006. After petitioner's arraignment, the Magistrate Judge ordered the parties to file pretrial motions by September 13. On September 7, the court granted petitioner's motion to extend that deadline, but on the new due date, September 25, petitioner waived his right to file pretrial motions. On October 4, the Magistrate Judge found the waiver voluntary and intelligent. Over the next three months, petitioner's trial was delayed several times, often at petitioner's instigation. On February 19, 2007-179 days after he was indicted—he moved to dismiss the indictment, claiming that the Act's 70-day limit had elapsed. In denying the motion, the District Court excluded the time from September 7 through October 4 as pretrial motion preparation time. At trial, petitioner was found guilty on both counts and sentenced to concurrent prison terms. The Eighth Circuit affirmed the denial of the motion to dismiss, holding that the period from September 7 through October 4 was automatically excludable from the 70-day limit under subsection (h)(1).”

THE ISSUES: Whether time granted to a party to prepare pre-trial motions is automatically excludable from the Speedy Trial Act 70-day limit under the subsection (h)(1) or whether such time may be excluded only if a court makes case-specific findings under subsection (h)(7).

THE HOLDING: The 28-day period from September 7th through October 4th, which includes the additional time granted by the District Court is not automatically excludable under subsection (h)(1). FROM THE OPINION: “Although the District Court did not identify which provision of the Act supported this exclusion, the Court of Appeals held that ‘pretrial motion preparation time’ is automatically excludable under subsection (h)(1)-which covers ‘delay resulting from other proceedings concerning the defendant’-as long as ‘the [district] court specifically grants time for that purpose.’ 534 F.3d, at 897. In reaching this conclusion, the Eighth Circuit joined seven other Courts of Appeals that
interpret subsection (h)(1) the same way. Two Courts of Appeals, the Fourth and Sixth Circuits, interpret subsection (h)(1) differently, holding that time for preparing pretrial motions is outside subsection (h)(1)'s scope. We granted certiorari to resolve this conflict.

As noted, the Speedy Trial Act requires that a criminal defendant's trial commence within 70 days of a defendant's initial appearance or indictment, but excludes from the 70-day period days lost to certain types of delay. Section 3161(h) specifies the types of delays that are excludable from the calculation. Some of these delays are excludable only if the district court makes certain findings enumerated in the statute. See § 3161(h)(7). Other delays are automatically excludable, i.e., they may be excluded without district court findings. As relevant here, subsection (h)(1) requires the automatic exclusion of ‘[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to’ periods of delay resulting from eight enumerated subcategories of proceedings. The Government contends that the time the District Court granted petitioner to prepare his pretrial motions is automatically excludable under subsection (h)(1).

We disagree, and conclude that such time may be excluded only when a district court enters appropriate findings under subsection (h)(7).

The eight subparagraphs in subsection (h)(1) address the automatic excludability of delay generated for certain enumerated purposes. Thus, we first consider whether the delay at issue in this case is governed by one of these subparagraphs. It is.

The delay at issue was granted to allow petitioner sufficient time to file pretrial motions. Subsection (h)(1)(D) (hereinafter subparagraph (D)) renders automatically excludable ‘delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.’ Read, as it must be, in the context of subsection (h), this text governs the automatic excludability of delays ‘resulting’ from a specific category of ‘proceedings concerning the defendant,’ namely, proceedings involving pretrial motions. Because the delay at issue here results from a decision granting time to prepare pretrial motions, if not from a pretrial motion itself (the defendant's request for additional time), it is governed by subparagraph (D). But that does not make the delay at issue here automatically excludable.

Subparagraph (D) does not subject all pretrial motion-related delay to automatic exclusion. Instead, it renders automatically excludable only the delay that occurs ‘from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of’ the motion. (Emphasis added.) In so doing, the provision communicates Congress' judgment that delay resulting from pretrial motions is automatically excludable, i.e., excludable without district court findings, only from the time a motion is filed through the hearing or disposition point specified in the subparagraph, and that other periods of pretrial motion-related delay are excludable only when accompanied by district court findings.”

THE RESULT: The judgment of the Court of Appeals for the Eight Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

[Defendant wins.]

**MY THOUGHTS:** Speedy trial issues are usually afterthoughts; yet, occasionally, defendants win on the issue. Pity the defense lawyer who prepares the order granting a continuance that doesn’t comply with the Speedy Trial Act and leads the trial court into error.

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F. Resolution of a Jackson v. Virginia Issue


   (PER CURIAM opinion; Justice Thomas, with whom Justice Scalia joins, concurring)

   THE OFFENSE: Sexual Assault Involving Significant Bodily Injury [Nevada Statute]. Brown was convicted in Nevada state court of the assault.

   THE FACTS: At Brown’s trial, DNA evidence was offered by the State. After his conviction was affirmed on direct appeal, he sought state habeas relief claiming that his lawyer was ineffective for failing to object to the admission of DNA evidence. After his petition was denied, Brown sought federal habeas relief. In the federal district court, Brown submitted a report prepared by Laurence Mueller, a professor in ecology and evolutionary biology (Mueller Report) which challenged the reliability of the DNA evidence offered in the trial court. The district court supplemented the record with the Mueller Report even though it was not presented to any state court because “the thesis of the report was argued during post-conviction.”

   Relying on the Mueller report, the district court set aside the “unreliable DNA testimony” and held that without the DNA evidence “a reasonable doubt would exist in the mind of any rational trier of fact.” The district court granted habeas relief on Brown’s Jackson claim and the Ninth Circuit affirmed the judgment of the district court.

   THE ISSUES: What is the proper standard of review for a Jackson claim; and, whether such a claim may rely upon evidence outside the trial
record that goes to the reliability of trial evidence?

THE HOLDING: The district court should not have admitted the new report of Brown's DNA expert to evaluate his Jackson v. Virginia claim. Brown forfeits his new claim because he raised his issue for the first time in his brief to the Supreme Court.

FROM THE OPINION: “Although we granted certiorari to review respondent's Jackson claim, the parties now agree that the Court of Appeals' resolution of his claim under Jackson was in error.

***

Although both petitioners and respondent are now aligned on the same side of the questions presented for our review, the case is not moot because ‘the parties continue to seek different relief’ from this Court.

***

Respondent primarily argues that we affirm on his proposed alternative ground or remand to the Ninth Circuit for analysis of his due process claim under the standard for harmless error of Ninth Circuit for analysis of his due process claim. Respondent has forfeited this claim, which he presents for our review, the case is not moot because ‘the parties continue to seek different relief’ from this Court.

***

Respondent no longer argues it was proper for the District Court to admit the Mueller Report for the purpose of evaluating his Jackson claim, Brief for Respondent 35, and concedes the ‘purpose of a Jackson analysis is to determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process,’ id., at 2. There has been no suggestion that the evidence adduced at trial was insufficient to convict unless some of it was excluded. Respondent's concession thus disposes of his Jackson claim.

***

Resolution of the Jackson claim does not end our consideration of this case because respondent asks us to affirm on an alternative ground. He contends the two errors ‘in describing the statistical meaning’ of the DNA evidence rendered his trial fundamentally unfair and denied him due process of law. Brief for Respondent 4. Because the Ninth Circuit held that ‘the admission of Romero's unreliable and misleading testimony violated [respondent's] due process rights,’ 525 F.3d, at 797, and in respondent's view merely applied Jackson (erroneously) to determine whether that error was harmless, he asks us to affirm the judgment below on the basis of what he calls his ‘DNA due process’ claim, Brief for Respondent 35.

***

Respondent has forfeited this claim, which he makes for the very first time in his brief on the merits in this Court. Respondent did not present his new ‘DNA due process’ claim in his federal habeas petition, but instead consistently argued that Romero's testimony should be excluded from the Jackson analysis simply because it was ‘unreliable’ and that the due process violation occurred because the remaining evidence was insufficient to convict.

***

Recognizing that his Jackson claim cannot prevail, respondent tries to rewrite his federal habeas petition. His attempt comes too late, however, and he cannot now start over.”

THE RESULT: Because the Court of Appeals did not consider, however, the ineffective-assistance claims on which the District Court also granted respondent habeas relief. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.”

[Defendant loses this round.]

G. Ineffective Assistance of Counsel

(STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C.J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.)

THE OFFENSE: Drug Distribution (Kentucky Statute)

THE FACTS (FROM THE SYLLABUS): “Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had
lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment's effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a ‘collateral’ consequence of a conviction.”

THE ISSUE: As a matter of federal law, did Padilla's counsel have an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country?

THE HOLDING: Counsel must inform his or her client whether the client’s plea of guilty carries a risk of deportation.

FROM THE OPINION: “Before deciding whether to plead guilty, a defendant is entitled to ‘the effective assistance of competent counsel.’

***

The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court.

***

In its view, ‘collateral consequences are outside the scope of representation required by the Sixth Amendment,' and, therefore, the ‘failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.’ 253 S.W.3d, at 483. The Kentucky high court is far from alone in this view.

***

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe ‘penalty,’ … but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, … deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, supra, at ---- - ----. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context. United States v. Russell, 686 F.2d 35, 38 (C.A.D.C.1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See St. Cyr, 533 U.S., at 322, 121 S.Ct. 2271 (‘There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions’).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. Hill, 474 U.S., at 57, 106 S.Ct. 366; see also Richardson, 397 U.S., at 770-771, 90 S.Ct. 1441. The severity of deportation—'the equivalent of banishment or exile,' Delgadillo v. Carmichael, 332 U.S. 388, 390-391, 68 S.Ct. 10, 92 L.Ed. 17 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

***

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.”

THE RESULT: The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Defendant wins.]

[FROM THE CONCURRING OPINION: In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment
right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.] (Emphasis added)

MY THOUGHTS: This case will change the way we practice law in those cases in which our client is a non-citizen is in this county – legally or illegally. Our contract of employment; our advice to the client before any plea or sentencing hearing; and, our allocation at those hearings will have to address the deportation/removal/not subject to re-entry issues. My question for Judge Alito: Is your suggested admonition/advice adequate?


*PER CURIAM; Judge Alito concurring*

THE OFFENSE: Aggravated Murder and Aggravated Robbery (Ohio Statute)

THE FACTS: Van Hook was prosecuted in an Ohio state court for aggravated murder and aggravated robbery. He waived his right to a jury trial and a three-judge panel found him guilty of both charges. At the sentencing hearing, his lawyer called eight mitigation witnesses and Van Hook himself gave an unsworn statement. After weighing the aggravating and mitigating circumstances, the three judge panel imposed the death penalty.

Van Hook’s conviction was affirmed on direct appeal and he was denied state habeas relief. In 1995, Van Hook filed his petition in the district court seeking habeas relief. His case bounced back and forth between the district court and the United States Court of Appeals for the Sixth Circuit. In its third opinion, a panel of the Circuit – relying on guidelines published by the American Bar Association in 2003 – granted habeas relief on the sole ground that his lawyers performed deficiently in investigating and presenting mitigating evidence.

THE ISSUE: Was it appropriate for the Court of Appeals to rely on the American Bar Associations’ Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases which were announced 18 years after petitioner’s trial?

THE HOLDING: It was not appropriate for the Court of Appeals to rely on the American Bar Associations’ guidelines; and Van Hook’s lawyer did not perform deficiently.

FROM THE OPINION: “The Sixth Amendment entitles criminal defendants to the ‘effective assistance of counsel’-that is, representation that does not fall ‘below an objective standard of reasonableness’ in light of ‘prevailing professional norms.’ ***

That standard is necessarily a general one. ‘No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.’ 466 U.S., at 688-689, 104 S.Ct. 2052. Restatements of professional standards, we have recognized, can be useful as ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. Id., at 688, 104 S.Ct. 2052.

The Sixth Circuit ignored this limiting principle, relying on ABA guidelines announced 18 years after Van Hook went to trial. See 560 F.3d, at 526-528 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7, comment, pp. 81-83 (rev. ed.2003)). The ABA standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms: ‘It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.’ 1 ABA Standards for Criminal Justice 4-4.1, p. 4-53 (2d ed.1980). The accompanying two-page commentary noted that defense counsel have ‘a substantial and important role to perform in raising mitigating factors,’ and that ‘[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself.’ Id., at 4-55.

Quite different are the ABA’s 131-page ‘Guidelines’ for capital defense counsel, published in 2003, on which the Sixth Circuit relied. Those directives expanded what had been (in the 1980 Standards) a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants. They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. See ABA Guidelines 10.7, comment., at 80-85. They include, for example, the requirement that counsel's investigation cover every period of the defendant's life from ‘the moment of conception,’ id., at 81, and that counsel contact ‘virtually everyone ... who knew [the defendant] and his family’ and obtain records...
What is more, even if Van Hook's counsel performed deficiently by failing to dig deeper, he suffered no prejudice as a result."

THE RESULT: The petition for certiorari and the motion for leave to proceed in forma pauperis are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Defendant loses.]

### MY THOUGHTS:
This is an old case that was tried long before the ABA Guidelines were adopted. For counsel in capital cases now, don’t discount them. They give a great roadmap for the preparation and trial of a capital case.

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(SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined.)

**THE OFFENSE:** 18 U.S.C. § 922(g)(1); § 924(e) and § 924(g)

**THE FACTS (FROM THE SYLLABUS):**
“Petitioner Johnson pleaded guilty to possession of ammunition by a convicted felon. 18 U.S.C. § 922(g)(1). The Government sought sentencing under the Armed Career Criminal Act, which authorizes an enhanced penalty for a person who violates § 922(g) and who ‘has three previous convictions’ for ‘a violent felony,’ § 924(e)(1), defined as, inter alia, an offense that ‘has as an element the use ... of physical force against the person of another,’” § 924(e)(2)(B)(i). Among the three prior felony convictions the Government proffered was Johnson's 2003 Florida conviction for simple battery, which ordinarily is a first-degree misdemeanor, Fla. Stat. § 784.03(1)(b), but was a felony conviction for Johnson because he had previously been convicted of another battery, Fla. Stat. § 784.03(2). Under Florida law, a battery occurs when a person either ‘[a]ctually and intentionally touches or strikes another person against [his] will,’ or ‘[i]ntentionally causes bodily harm to another person.’ § 784.03(1)(a). Nothing in the record permitted the District Court to conclude that Johnson's 2003 conviction rested upon the ‘strik[ing]’ or ‘[i]ntentionally caus[ing]’ bodily harm’ elements of the offense. Accordingly, his conviction was a predicate conviction for a ‘violent felony’ under the Armed Career Criminal Act only if ‘[a]ctually and intentionally touch[ing]’ another constitutes the use of ‘physical force’ under § 924(e)(2)(B)(i). Concluding it does, the District Court enhanced Johnson's sentence under §
924(e)(1), sentencing him to a term of 15 years and 5 months. The Eleventh Circuit affirmed.”

THE ISSUE: Does the Florida felony offense of battery by “[a]ctually and intentionally touch[ing]” another person, Fla. Stat. § 784.03(1)(a), (2) (2003), “has as an element the use … of physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), constitute a “violent felony” under the Armed Career Criminal Act, § 924(e)(1)?

THE HOLDING: The Florida felony offense of battery by “[a]ctually and intentionally touch[ing]” another person does not have “as an element the use … of physical force against the person of another,” § 924(e)(2)(B)(i), and thus does not constitute a “violent felony” under § 924(e)(1).

FROM THE OPINION: “Johnson argues that in deciding whether any unwanted physical touching constitutes ‘physical force’ under 18 U.S.C. § 924(e)(2)(B)(i), we are bound by the Florida Supreme Court's conclusion in Hearns that it does not constitute ‘physical force.’ That is not so. The meaning of ‘physical force’ in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court's interpretation of a similar-or even identical-state statute.

We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2). See Johnson v. Fankell, 520 U.S. 911, 916, 117 S.Ct. 1800, 136 L.Ed.2d 271 (2004), the Florida Supreme Court has held that the element of ‘actually and intentionally touching’ under Florida's battery law is satisfied by any intentional physical contact, ‘no matter how slight.’ Hearns, 961 So.2d, at 218. The most ‘nominal contact,’ such as a ‘tap ... on the shoulder without consent,’ id., at 219, establishes a violation. We apply ‘th[is] substantive element[i] of the criminal offense,’ Jackson v. Virginia, 443 U.S. 307, 324, n. 16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of ‘violent felony’ in 18 U.S.C. § 924(e)(2)(B)(i).

***

The adjective ‘physical’ is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force.

***

There is, however, a more specialized legal usage of the word ‘force’: its use in describing one of the elements of the common-law crime of battery, which consisted of the intentional application of unlawful force against the person of another.

***

The question is whether the term ‘force’ in 18 U.S.C. § 924(e)(2)(B)(i) has the specialized meaning that it bore in the common-law definition of battery. The Government asserts that it does. We disagree.

***

Here we are interpreting the phrase ‘physical force’ as used in defining not the crime of battery, but rather the statutory category of ‘violent felony’ as defined in 18 U.S.C. § 16(a). We stated: ‘In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term “crime of violence.” The ordinary meaning of this term, combined with § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes....’ 543 U.S. at 11, 125 S.Ct. 377.

Just so here. We think it clear that in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.

It may well be true, as the Government contends, that in many cases state and local records from battery convictions will be incomplete. But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well.”

THE RESULT: We reverse the judgment of the Eleventh Circuit, set aside Johnson’s sentence, and remand the case for further proceedings consistent with this opinion.

[Defendant wins.]

MY THOUGHTS: This is yet another case in which the court determines that an offense is – or is not – a “violent felony” under 18 U.S.C. § 924(e)(1). Every case is a role of the dice. In this one, the defendant was lucky.


(Per Curiam)

THE OFFENSE: First Degree Murder (Florida State Statute)
THE FACTS (QUOTED FROM THE OPINION): “Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988.

In this federal postconviction proceeding, the District Court held that Porter's lawyer's failure to adduce that evidence violated his Sixth Amendment right to counsel and granted his application for a writ of habeas corpus. The Court of Appeals for the Eleventh Circuit reversed, on the ground that the Florida Supreme Court's determination that Porter was not prejudiced by any deficient performance by his counsel was a reasonable application of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

THE ISSUES: Was Porter's counsel deficient in failing to obtain any of Porter's school, medical or military service records or to interview any members of his family; and, was the Florida Supreme Court's decision that Porter was not prejudiced by such failure an unreasonable application of federal law?

THE HOLDING: Counsel’s failure to uncover and present any mitigating evidence and the decision not to investigate did not reflect reasonable professional judgment. The Florida Supreme Court’s decision that the defendant was not prejudiced by his counsel’s failure to investigate and uncover mitigating evidence was an unreasonable application of federal law.

FROM THE OPINION: “Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend, Evelyn Williams, and her boyfriend Walter Burrows. He was sentenced to death on the first count but not the second.

In 1995, Porter filed a petition for postconviction relief in state court, claiming his penalty-phase counsel had been ineffective. It first determined that counsel's performance had been deficient because ‘penalty-phase counsel did little, if any investigation ... and failed to effectively advocate on behalf of his client before the jury.’ Porter v. Crosby, No. 6:03-cv-1465-Orl-31KRS, 2007 WL 1747316, (M.D.Fla., June 18, 2007). It then determined that counsel's deficient performance was prejudicial, finding that the state court's decision was contrary to clearly established law in part because the state court failed to consider the entirety of the evidence when reweighing the evidence in mitigation, including the trial evidence suggesting that “this was a crime of passion, that [Porter] was drinking heavily just hours before the murders, or that [Porter] had a good relationship with his son.” Id.

The Eleventh Circuit reversed. It held the District Court had failed to appropriately defer to the state court's factual findings with respect to Porter's alcohol abuse and his mental health. 552 F.3d 1260, 1274, 1275 (2008) (per curiam). The Court of Appeals then separately considered each category of mitigating evidence and held it was not unreasonable for the state court to discount each category as it did. Id., at 1274. Porter petitioned for a writ of certiorari.
We grant the petition and reverse with respect to the Court of Appeals' disposition of Porter's ineffective-assistance claim.

***

Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim de novo. Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The investigation conducted by Porter's counsel clearly did not satisfy those norms.

Although Porter had initially elected to represent himself, his standby counsel became his counsel for the penalty phase a little over a month prior to the sentencing proceeding before the jury. It was the first time this lawyer had represented a defendant during a penalty-phase proceeding. At the postconviction hearing, he testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family.

Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment. Wiggins, supra, at 534, 123 S.Ct. 2527. Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct some sort of mitigation investigation. See Rompilla, supra, at 381-382, 125 S.Ct. 2456.

Because we find Porter's counsel deficient, we must determine whether the Florida Supreme Court unreasonably applied Strickland in holding Porter was not prejudiced by that deficiency.

***

This is not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.'

***

Had Porter's counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.' Wiggins, supra, at 535, 123 S.Ct. 2527. They would have heard about (1) Porter's heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.

***

The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough-or even cursory-investigation is unreasonable.

THE RESULT: The petition for certiorari is granted in part, and the motion for leave to proceed in forma pauperis is granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Defendant wins.]


(BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined, and in which STEVENS, J., joined as to Part III. STEVENS, J., filed an opinion concurring in part and concurring in the judgment.)

THE OFFENSE: Three murders and two attempted murders (Ohio State Court)

THE FACTS (FROM THE SYLLABUS): “After the Ohio courts sentenced respondent Spisak to death and denied his claims on direct appeal and collateral review, he filed a federal habeas petition claiming that, at his trial's penalty phase, (1) the instructions and verdict forms unconstitutionally required the jury to consider in mitigation only those factors that it unanimously found to be mitigating, see Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384, and (2) his counsel's inadequate closing argument deprived him of effective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. The District Court denied the petition, but the Sixth Circuit accepted both arguments and ordered relief.”

THE ISSUES: Did the trial court's jury instructions at the penalty phase unconstitutionally require the jury to consider in mitigation only those factors that the jury unanimously found to be mitigating; and, did the defendant suffer significant harm as a result of
his counsel’s inadequate closing argument at the penalty phase of the proceeding?

THE HOLDING: The state court's decision upholding these forms and instructions was not “contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” in Mills. 28 U.S.C. § 2254(d)(1). The assumed deficiencies in defense counsel's closing argument did not raise “a reasonable probability that,” but for the deficient closing, “the result of the proceeding would have been different.” Strickland, 466 U.S., at 694, 104 S.Ct. 2052. We therefore cannot find the Ohio Supreme Court's decision rejecting Spisak's ineffective-assistance-of-counsel claim to be an “unreasonable application” of the law “clearly established” in Strickland. § 2254(d)(1).

FROM THE OPINION: “Since the parties do not dispute that the Ohio courts ‘adjudicated’ this claim, i.e., they considered and rejected it ‘on the merits,’ the law permits a federal court to reach a contrary decision only if the state-court decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” 28 U.S.C. § 2254(d)(1).

The instructions and forms made clear that, to recommend a death sentence, the jury had to find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigating circumstances. But the instructions did not say that the jury must determine the existence of
each individual mitigating factor unanimously. Neither the instructions nor the forms said anything about how or even whether the jury should make individual determinations that each particular mitigating circumstance existed. They focused only on the overall balancing question. And the instructions repeatedly told the jury to ‘consider all of the relevant evidence.’ Id., at 2974. In our view the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the circumstance that Mills found critical, namely,

‘a substantial possibility that reasonable jurors, upon receiving the judge’s instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.’ 486 U.S., at 384, 108 S.Ct. 1860.”

Spisak’s second claim is that his counsel’s closing argument at the sentencing phase of his trial was so inadequate as to violate the Sixth Amendment.

The Court of Appeals … held that counsel’s closing argument, measured by ‘“an objective standard of reasonableness,”’ was inadequate, and it asserted that ‘a reasonable probability exists’ that adequate representation would have led to a different result. 465 F.3d, at 703, 706 (quoting Strickland, supra, at 688, 104 S. Ct. 2052).

In his closing argument at the penalty phase, Spisak’s counsel described Spisak’s killings in some detail. He acknowledged that Spisak’s admiration for Hitler inspired his crimes. He portrayed Spisak as ‘sick,’ ‘twisted,’ and ‘demented.’ 8 Tr. 2896 (July 19, 1983). And he said that Spisak was ‘never going to be any different.’ Ibid. He then pointed out that all the experts had testified that Spisak suffered from some degree of mental illness. And, after a fairly lengthy and rambling disquisition about his own decisions about calling expert witnesses and preparing them, counsel argued that, even if Spisak was not legally insane so as to warrant a verdict of not guilty by reason of insanity, he nonetheless was sufficiently mentally ill to lessen his culpability to the point where he should not be executed. Counsel also told the jury that, when weighing Spisak’s mental illness against the ‘substantial’ aggravating factors present in the case, id., at 2924, the jurors should draw on their own sense of ‘pride’ for living in ‘a humane society’ made up of ‘a humane people,’ id., at 2897-2900, 2926-2928. That humanity, he said, required the jury to weigh the evidence ‘fairly’ and to be ‘loyal to that oath’ the jurors had taken to uphold the law. Id., at 2926.

We assume for present purposes that Spisak is correct that the closing argument was inadequate. We nevertheless find no “reasonable probability” that a better closing argument without these defects would have made a significant difference.”

THE RESULT: The judgment of the Court of Appeals for the Sixth Circuit is reversed.


(PER CURIAM; Justice Stevens concurring)

THE OFFENSE: Capital Murder (California State Statute)

THE FACTS: In the course of committing burglary, Belmontes bludgeoned Stacy McCollum to death striking her in the head 15 to 20 times with a steel dumbbell. Belmontes was convicted of murder and sentenced to death in state court. His case was affirmed on direct appeal and he was denied state habeas relief.

Belmontes sought federal habeas relief which the district court denied. Court of Appeals for the Ninth Circuit reversed, finding instructional error but the Supreme Court overruled that decision. On remand, the Court of Appeals again ruled for Belmontes, this time finding that Belmontes suffered ineffective assistance of counsel during the sentencing phase of trial.

THE ISSUE: Was Belmontes’ trial counsel deficient in his representation of him during the penalty phase of trial?

THE HOLDING: Belmontes was not deprived of effective assistance of counsel during the penalty phase of his capital murder trial.

FROM THE OPINION: “Belmontes argues that his counsel was constitutionally ineffective for failing to investigate and present sufficient mitigating evidence during the penalty phase of his trial.”

The challenge confronting Belmontes’ lawyer, John Schick, was very specific. Substantial evidence indicated that Belmontes had committed a prior
murder, and the prosecution was eager to introduce that evidence during the penalty phase of the McConnell trial.  ***

The evidence, furthermore, was potentially devastating.  ***

Schick understood the gravity of this aggravating evidence, and he built his mitigation strategy around the overriding need to exclude it. California evidentiary rules, Schick knew, offered him an argument to exclude the evidence, but those same rules made clear that the evidence would come in for rebuttal if Schick opened the door. Record 2256; see also People v. Rodriguez, 42 Cal.3d 730, 791-792, 230 Cal.Rptr. 667, 726 P.2d 113, 153 (1986); People v. Harris, 28 Cal.3d 935, 960-962, 171 Cal.Rptr. 679, 623 P.2d 240, 254 (1981). Schick thus had ‘grave concerns’ that, even if he succeeded initially in excluding the prior murder evidence, it would still be admitted if his mitigation case swept too broadly. Accordingly, Schick decided to proceed cautiously, structuring his mitigation arguments and witnesses to limit that possibility. Deposition of John Schick 301, 309-310; see Strickland, supra, at 699, 104 S.Ct. 2052 (‘Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in.’)

As Schick expected, the prosecution was ready to admit this evidence during the sentencing phase. Schick moved to exclude the evidence, arguing that the State should be allowed to tell the jury only that Belmontes had been convicted of being an accessory after the fact to voluntary manslaughter-nothing more. Record 2240-2254. Schick succeeded in keeping the prosecution from presenting the damaging evidence in its sentencing case in chief, but his client remained at risk: The trial court struck the testimony. Record 2256; see also People v. Rodriguez, supra, at 699, 104 S.Ct. 2052 (‘Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in.’)

This was not an empty threat. In one instance, Schick elicited testimony that Belmontes was not a violent person. The State objected and, out of earshot of the jury, argued that it should be able to rebut the testimony with the Howard murder evidence. Id., at 2332-2334. The Court warned Schick that it was ‘going to have to allow [the prosecution] to go into the whole background’ if Schick continued his line of questioning. Id., at 2334. Schick acquiesced, and the court struck the testimony. Ibid.

The Court's warning reinforced Schick's understanding that he would have to tailor his mitigation case carefully to preserve his success in excluding the Howard murder evidence. With that cautionary note in mind, Schick put on nine witnesses he thought could advance a case for mitigation, without opening the door to the prior murder evidence.  ***

We begin with the mitigating evidence Schick did present during the sentencing phase. That evidence was substantial.  ***

All told, Schick put nine witnesses on the stand over a span of two days, and elicited a range of testimony on Belmontes' behalf. A number of those witnesses highlighted Belmontes' ‘terrible’ childhood.  ***

Family members also testified that, despite these difficulties, Belmontes maintained strong relationships with his grandfather, grandmother, mother, and sister.  ***

And Belmontes' best friend offered the insights of a close friend and confidant. Id., at 2329-2332. Schick also called witnesses who detailed Belmontes' religious conversion while in state custody on the accessory charge. These witnesses told stories about Belmontes' efforts advising other inmates in his detention center's religious program, to illustrate that he could live a productive and meaningful life in prison. They described his success working as part of a firefighting crew, detailing his rise from lowest man on the team to second in command. Belmontes' assistant chaplain even said that he would use Belmontes as a regular part of his prison counseling program if the jury handed down a life sentence.

Belmontes himself bolstered these accounts by testifying about his childhood and religious conversion, both at sentencing and during allocution. Belmontes described his childhood as ‘pretty hard,’ but took responsibility for his actions, telling the jury that he did not want to use his background ‘as a crutch[,] to say I am in a situation now ... because of that.’ Id., at 2343.  ***

We agree with the state court's characterization of the murder, and simply cannot comprehend the assertion by the Court of Appeals that this case did not involve ‘needless suffering.’ The jury saw autopsy photographs showing Steacy McConnell's mangled head, her skull crushed by 15 to 20 blows from a steel dumbbell bar the jury found to have been wielded by Belmontes. McConnell's corpse showed numerous ‘defensive bruises and contusions on [her] hands, arms, and feet,’ id., at 839, which ‘plainly evidenced a desperate struggle for life at
[Belmontes’] hands,’ *Belmontes*, 248 Cal.Rptr. 126, 755 P.2d, at 354. Belmontes left McConnell to die, but officers found her still fighting for her life before ultimately succumbing to the injuries caused by the blows from Belmontes. Record 3. The jury also heard that this savage murder was committed solely to prevent interference with a burglary that netted Belmontes $100 he used to buy beer and drugs for the night. McConnell suffered, and it was clearly needless.

***

It is hard to imagine expert testimony and additional facts about Belmontes’ difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Belmontes had committed another murder—the most powerful imaginable aggravating evidence,’ as Judge Levi put it, *Belmontes*, S-89-0736, App. to Pet. for Cert. 183a-is added to the mix. Schick's mitigation strategy failed, but the notion that the result could have been different if only Schick had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful.”

THE RESULT: The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Defendant loses.]

**MY THOUGHTS:** The defendant’s lawyer obviously did a great job of walking through a mine field during the penalty phase of trial. I still do not understand how the Ninth Circuit could have found the lawyer to be ineffective.

III. Conclusion

It has been an honor to speak at this convention. I hope that this paper will be of some help to you during the coming year. If I can ever help you in Tyler, please don’t hesitate to call.

Buck
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“SIGNIFICANT DECISIONS OF THE
FIFTH CIRCUIT COURT OF APPEALS
[August 1, 2009 to May 1, 2010]

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STATE BAR OF TEXAS ANNUAL MEETING
June 10 – 11, 2010
Fort Worth, Texas
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SIGNIFICANT DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS
F. R. (BUCK) FILES, JR.

I. Introduction
During 2009, the United Courts of Appeals for the Fifth Circuit averaged handing down 10+ cases per month that were designated for publication. For the first four months of 2010, the Court averaged 12+ cases per month for publication.

I have chosen 57 of those cases that were designated for publication to be included in this paper. In selecting these cases, I had three criteria:

- To include cases that will be helpful to those Texas judges and lawyers who will never, ever venture into a federal court.
- To include cases that will be helpful to lawyers who try cases in the United States District Courts and/or appear before the United States Court of Appeals for the Fifth Circuit.
- To include cases that will give a fair overview of what the law is for those folks who are taking the specialization examination in criminal law.

This is not intended to be a scholarly treatise; rather, it should be a ready resource for the lawyer who needs to know – right then – what the Court has done over the past nine months.

A. The Composition of the Court
Judge Edith Jones continues as the Chief Judge of the Circuit. One vacancy exists since the retirement of Judge Barksdale in 2009.

B. The Attitude of the Judges of the Fifth Circuit Toward Visiting Judges
For many years, it was common for respected district judges of the Circuit and for Circuit Judges of other Circuits to come to New Orleans, eat good food, hear oral arguments, eat good food and, on occasion, author opinions. That changed several years ago. In 2009, there were only seven district judges who were permitted to sit by designation. So far this year, only one such judge has been permitted to sit by designation.

C. The Collegiality of the Court
For many years, there were philosophical splits which resulted in numerous dissenting opinions. On occasion, the Court would be evenly divided. That just doesn’t happen anymore. In 2009, there were only five dissenting opinions. In 2010, there have only been three.

D. The Hot Topics
This year, there have been no remarkable decisions handed down by the Court. Confrontation continues to be a hot topic. New this year are: Old Chief Stipulations, Restitution in Child Pornography Cases and Plea Negotiations and Plea Agreements.

E. The Voice Articles
Ten times a year, I write a column (“The Federal Corner”) for the VOICE for the Defense. Two of the cases that I mentioned in my column are included in this year’s paper:

- United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009); and,
- United States v. Self, 596 F.3d 245 (5th Cir. 2010).

F. What’s Not in This Year’s Paper
The cases which have very common or very obscure issues. I have chosen only a few of the Guidelines cases and have chosen not to include any death penalty cases.

G. The Form of the Paper
This year, I have continued to use a format that includes the following:

- The style of the case;
- The panel of the Court which considered the case with the judges (except, of course, in per curiam cases);
- The background of the case;
- The holding in the case;
- Excerpts from the opinion – some shorter; some longer [Note: This is simply to give a flavor of a case]; and,
- Whether the defendant won or lost.

H. I Like Icons
This year, I have continued to use the following icons:

- A skull and crossbones for danger.
- An atomic bomb for the biggest cases of the year.
- A bomb for the very important cases.
- A Texas flag for the Texas lawyers and judges who never go to a federal court.
- A skunk for a really bad decision.
- The shaft for the defendant about whom nobody cared.
II. The Search and Seizure Cases
   A. Appellate Review of Contradictory Testimony
      1. United States v. Hughes, ___ F.3d ___, 2010 WL 1268084 (5th Cir. 2010)
         (Panel: King, Jolly and Stewart, Circuit Judges)

         BACKGROUND: Defendant was convicted in the United States District Court for the Southern District of Mississippi, Tom S. Lee, J., of being felon in possession of firearm, and he appealed.

         HOLDING: The Court of Appeals, E. Grady Jolly, Circuit Judge held that finding that the police officers obtained search warrant before seizing rifle from suspect’s vehicle was not in clear error.

         FROM THE OPINION: “Hughes's argument is essentially a fact challenge. The Government contends that after seeing a rifle in plain view in Hughes's car and having Hughes deny them permission to search, officers obtained a search warrant to seize the weapon. Hughes says that the officers actually seized the weapon before obtaining a warrant and lied about not having seized it when seeking a warrant.

         ***

         In the case of contradictory testimony, the district court is entitled to decide whom to believe when both present ‘reasonable views of the evidence.’”

         [Defendant loses.]

      B. Border Searches
         1. United States v. Rangel-Portillo, 586 F.3d 376 (5th Cir. 2009)
            (Panel: King, Davis and Benavides, Circuit Judges)

            BACKGROUND: Following denial of his motion to suppress evidence obtained as the result of an allegedly unconstitutional stop by a United States Border Patrol agent, as well as his motion for reconsideration, defendant entered a conditional plea of guilty in the United States District Court for the Southern District of Texas, Randy Crane, J., to the charge that he unlawfully transported undocumented aliens. Defendant appealed.

            HOLDING: The Court of Appeals, Benavides, Circuit Judge held that finding that the police officers obtained search warrant before seizing rifle from suspect’s vehicle was not in clear error.

            FROM THE OPINION: “Hughes's argument is essentially a fact challenge. The Government contends that after seeing a rifle in plain view in Hughes's car and having Hughes deny them permission to search, officers obtained a search warrant to seize the weapon. Hughes says that the officers actually seized the weapon before obtaining a warrant and lied about not having seized it when seeking a warrant.

            ***

            In the case of contradictory testimony, the district court is entitled to decide whom to believe when both present ‘reasonable views of the evidence.’”

            [Defendant loses.]

         2. United States v. Pickett, 598 F.3d 231 (5th Cir. 2010)
            (PER CURIAM, Clement concurring in judgment, only)

            BACKGROUND: Defendant was convicted of possession of child pornography, following entry of guilty plea in the United States District Court for the Eastern District of Louisiana, Mary Ann Vial Lemmon, J. Defendant appealed.

            HOLDING: The Court of Appeals held that search of defendant's belongings was justified under border search exception.

            FROM THE OPINION: “Pickett argues that because ICE agents knew he was returning to shore from a ‘federal enclave,’ the border search exception was inapplicable to the search of his belongings at the dock. We reject this argument as foreclosed by our decision in Stone. 659 F.2d 569. In Stone we held that the ‘critical fact’ we must look to in determining whether the border search exception applies is ‘whether or not a border crossing has occurred,’-not the point of origin of the defendant's journey. 659 F.2d at 573.”
C. Exigent Circumstances

1. **United States v. Menchaca-Castruita**, 587 F.3d 283 (5th Cir. 2009)

(Panel: Reavley, Jolly and Wiener, Circuit Judges)

**BACKGROUND:** Defendant was convicted following a bench trial in the United States District Court for the Southern District of Texas, Randy Crane, J., on one count of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana and one count of possession with intent to distribute the same. Defendant appealed, challenging denial of his motion to suppress evidence recovered from his residence during a warrantless search.

**HOLDING:** The Court of Appeals, Wiener, Circuit Judge, held that warrantless entry into residence was not justified by exigent circumstances.

**FROM THE OPINION:** “Because it is essentially a factual determination, there is no set formula for determining when exigent circumstances may justify a warrantless entry.” As a general rule, exigent circumstances exist when there is a genuine risk that officers or innocent bystanders will be endangered, that suspects will escape, or that evidence will be destroyed if entry is delayed until a warrant can be obtained. In evaluating whether exigent circumstances are present, we have often referred to the following non-exhaustive list of factors:

1. the degree of urgency involved and amount of time necessary to obtain a warrant;
2. the reasonable belief that contraband is about to be removed;
3. the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought;
4. information indicating the possessors of the contraband are aware that the police are on their trail; and
5. the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.

“In evaluating exigency, it must be borne in mind that [courts] should consider the appearance of the scene of the search in the circumstances presented as it would appear to reasonable and prudent men standing in the shoes of the officers.”

[D][e][f][e][n][d][a][n][t][ l][o][s][e][s][.][ ]

**D. Inevitable Discovery**

1. **United States v. Jackson**, 596 F.3d 236 (5th Cir. 2010)

(Panel: Garza, DeMoss and Clement, Circuit Judges)

**BACKGROUND:** Defendants were convicted in the United States District Court for the Western District of Louisiana, Dee D. Drell, J., of conspiracy to manufacture and distribute methamphetamine and other offenses. Defendants appealed.

**HOLDING:** The Court of Appeals, Emilio M. Garza, Circuit Judge, held that evidence from the search of defendant’s home and the surrounding areas was admissible under the inevitable discovery doctrine.

**FROM THE OPINION:** “The inevitable discovery rule applies if the Government demonstrates by a preponderance of the evidence that (1) there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct and (2) the Government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. *United States v. Lamas*, 930 F.2d 1099, 1102 (5th Cir.1991).”

[D][e][f][e][n][d][a][n][t][ l][o][s][e][s][.][ ]

**E. Protective Sweeps**

1. **United States v. Rodriguez**, ___ F.3d ___, 2010 WL 1032635 (5th Cir. 2010)

(Panel: Higginbotham, Garza and Prado, Circuit Judges)

**BACKGROUND:** Following denial of motion to suppress firearm that was seized from trailer home by police officers responding to domestic disturbance 911 call, defendant was convicted in the United States District Court for the Western District of Texas, Lee Yeakel, J., of possessing an unregistered sawed-off shotgun with an obliterated serial number, and he appealed.

**HOLDINGS:** The Court of Appeals, Emilio M. Garza, Circuit Judge, held that:

- under the circumstances, it was reasonable for the officers to conduct a protective sweep beyond the living room area of the trailer home, even though they had not specifically been told that there were other people in the residence, and
- the temporary seizure of the shotgun was permissible under the plain-view doctrine, even though it was not immediately apparent that the shotgun was illegal.

[D][e][f][e][n][d][a][n][t][ w][i][n][s][.][ ]
FROM THE OPINION: “The protective sweep doctrine allows government agents, without a warrant, to conduct a quick and limited search of premises for the safety of the agents and others present at the scene.’ United States v. Mendez, 431 F.3d 420, 428 (5th Cir.2005). To be constitutionally valid, (1) ‘the police must not have entered (or remained in) the home illegally and their presence within it must be for a legitimate law enforcement purpose;’ (2) ‘the protective sweep must be supported by a reasonable, articulable suspicion ... that the area to be swept harbors an individual posing a danger to those on the scene;’ (3) ‘the legitimate protective sweep may not be a full search but may be no more than a cursory inspection of those spaces where a person may be found;’ and (4) the protective sweep ‘may last[] ... no longer than is necessary to dispel the reasonable suspicion of danger, and ... no longer than the police are justified in remaining on the premises.’ United States v. Gould, 364 F.3d 578, 587 (5th Cir.2004) (en banc) (alterations in original) (citations and internal quotation marks omitted). We consider the ‘totality of the circumstances surrounding the officers' actions’ in determining whether an officer had a reasonable, articulable suspicion sufficient to justify a protective sweep. United States v. Maldonado, 472 F.3d 388, 395 (5th Cir.2006).”

[Defendant loses.]

F. Consent to Search
1. United States v. Scroggins, 599 F.3d 433 (5th Cir. 2010)
   (Opinion Benavides, Dennis and Elrod, Circuit Judges)

BACKGROUND: Defendant was convicted of being felon in possession of firearm in the United States District Court for the Northern District of Texas, David C. Godbey, J., and he appealed based, inter alia, on lower court's alleged error in denying his motion to suppress.

HOLDINGS: The Court of Appeals, Jennifer Walker Elrod, Circuit Judge, held that:
   • district court did not clearly err in finding that defendant's fiancee implicitly consented to police officers' warrantless entry into defendant's home when, after being arrested outside the home and asking that she be allowed to reenter to obtain clothing which was less revealing, and after being informed she could not reenter unless officers accompanied her, she nonetheless proceeded to reenter in company of arresting officers;
   • police officers, following their consensual entry, had articulable reasons to suspect that another person might be present in home who might pose danger to them, and could conduct cursory sweep of residence;
   • once officers' protective sweep for potentially dangerous individuals actually located such an individual, they were entitled to detain and frisk and, if necessary, temporarily handcuff or otherwise reasonably immobilize him;
   • officers were justified in conducting further sweep of home, and in seizing firearms that they observed in plain sight, after discovering ammunition clip in defendant's pocket;

FROM THE OPINION: “‘[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.’ Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). In order to satisfy the consent exception, the government must demonstrate that there was (1) effective consent, (2) given voluntarily, (3) by a party with actual or apparent authority. United States v. Gonzalez, 121 F.3d 928, 938 (5th Cir.1997).”

[Defendant loses.]

2. United States v. Garcia, __ F.3d ___, 2010 WL 1463488 (5th Cir. 2010)
   (Panel: Garwood, Smith and Clement, Circuit Judges)

BACKGROUND: Following a bench trial, defendant was convicted in the United States District Court for the Southern District of Texas, John D. Rainey, J., of possessing with intent to distribute more than five kilograms of cocaine. Defendant appealed.

HOLDING: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that officers' search of commercial truck during weigh station inspection, in which they removed cover of stereo speakers in cab of truck and found cocaine, was reasonable..

FROM THE OPINION: “When conducting a warrantless search of a vehicle based on consent, officers have no more authority to search than it appears was given by the consent. Mendoza-Gonzalez, 318 F.3d at 666-67. The scope of consent is determined by objective reasonableness-what a reasonable person would have understood from the exchange between the officer and searched party-and not the subjective intent of the parties. Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); Mendoza-Gonzalez, 318 F.3d at 667.

The scope of a consensual search may be limited by the expressed object of the search.
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Jimeno, 500 U.S. at 251, 111 S.Ct. 1801. But where, as here, an officer does not express the object of the search, the searched party, who knows the contents of the vehicle, has the responsibility explicitly to limit the scope of the search. Mendoza-Gonzalez, 318 F.3d at 667. Otherwise, an affirmative response to a general request is evidence of general consent to search. Id. Garcia did not qualify his consent to the officers, who therefore had general consent to search the truck.”

[Defendant loses.]

III. Confrontation

A. Recorded Statements

1. Jones v. Cain, 600 F.3d 527 (5th Cir. 2010)

(Pannel: Reavley, Clement and Southwick, Circuit Judges)

BACKGROUND: State prisoner petitioned for writ of habeas corpus after he had been convicted of second-degree murder and state appellate court denied post-conviction relief to him, 841 So.2d 965. The United States District Court for the Eastern District of Louisiana, Helen Ginger Berrigan, J., 601 F.Supp.2d 769, granted petition. State appealed.

HOLDINGS: The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

- district court had independent duty, regardless of how state court applied state evidence rules, to determine whether state court's application of state evidence rules violated prisoner's rights under Confrontation Clause;
- recorded statements had been used to prove truth of matters they had asserted;
- facts surrounding recorded statements did not establish particularized guarantee of trustworthiness;
- admission of recorded statements violated prisoner's Sixth Amendment right to confront witnesses against him.

FROM THE OPINION: “The State argues that the district court went beyond the permissible scope of federal habeas review by finding, contrary to the Louisiana courts, that Artberry's statements were hearsay. The State contends that the district court should have deferred to the state courts' evidentiary rulings.

The State is correct that federal courts sitting in habeas do not review state courts' application of state evidence law. See Castillo v. Johnson, 141 F.3d 218, 222 (5th Cir.1998); Mercado v. Massey, 536 F.2d 107, 108 (5th Cir.1976). Here, though, the district court made clear that it was not reviewing the state evidentiary rulings themselves. Jones III, 601 F.Supp.2d at 787. Instead, it correctly asked whether the state court's application of state evidence rules violated Jones's constitutional rights. Regardless of how a state court applies state evidence rules, a federal habeas court has an independent duty to determine whether that application violates the Constitution.

***

The district court did not err by ruling on the Confrontation Clause issue raised by the state trial court's application of Louisiana evidence law.”

[Defendant wins the first round.]

B. Lab Reports

1. United States v. Rose, 587 F.3d 695 (5th Cir. 2009)

(PER CURIAM)

BACKGROUND: Defendant was convicted following a bench trial in the United States District Court for the Northern District of Texas, Jorge A. Solis, J., of one count of possession of crack cocaine with intent to distribute, one count of possession of a firearm in furtherance of a drug trafficking offense, and two counts of possession of a firearm by a convicted felon. Defendant appealed.

HOLDING: The Court of Appeals held that any error resulting from admission of laboratory report was not plain error, despite alleged Confrontation Clause violation.

FROM THE OPINION: “In Melendez-Diaz, the Court considered whether the defendant's Confrontation Clause rights were violated when three certificates of analysis were admitted into evidence without the live testimony of any witnesses regarding how the tests were performed, what equipment was used, or what methodology was followed.

***

We agree that the SWIFS lab report, like the certificates of analysis in Melendez-Diaz, is a testimonial statement for purposes of the Confrontation Clause. However, we conclude that, on this record, any error that may have resulted from admitting the SWIFS lab report was not plain. As an initial matter, Lopez's testimony does not precisely delineate whether she did or did not have personal knowledge of the tests performed or the results of the report. These are matters that should have been brought out either on direct examination or on cross-examination, but Rose's failure to object to her testimony or to the report left the issue unclear.

***

We clarify here that we do not hold that the prosecution may avoid confrontation issues through the in-court testimony of any witness who signed a
lab report without regard to that witness's role in conducting tests or preparing the report. Instead, we refer to the above language from Melendez-Diaz to illustrate that any error that may have arisen from the facts of this case-another issue on which we reserve judgment-was not plain as required by our standard of review under Rule 52(b).”

[Defendant loses.]

C. Statements during Medical Treatment
1. United States v. Santos, 589 F.3d 759 (5th Cir. 2009)
   (Panel: Higginbotham, Garza and Prado, Circuit Judge)

   BACKGROUND: Defendant was convicted of assault resulting in serious bodily injury, following jury trial in the United States District Court for the Western District of Louisiana, Dee D. Drell, J. Defendant appealed.

   HOLDINGS: The Court of Appeals, Prado, Circuit Judge, held that:
   • admission of alleged victim's statements to prison nurse did not violate defendant's Confrontation Clause rights;
   • such statements were admissible under hearsay exception for statements made for purposes of medical diagnosis or treatment.

   FROM THE OPINION: “The Confrontation Clause prohibits admission of ‘testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’

   ***

   We have not previously addressed whether out-of-court statements made during medical treatment are testimonial, but the Supreme Court has noted in dicta that ‘medical reports created for treatment purposes ... would not be testimonial.’

   ***

   We do not doubt that some statements made to a prison nurse would be testimonial due to the nurse's dual role in providing treatment and gathering information regarding the incident, but we believe that district courts are equipped to distinguish the point after which ‘statements in response to questions become testimonial.’

   Cazeau made the statement that his pain was a nine out of ten for medical treatment to ‘meet an ongoing emergency.’ See id. Dallas was not interrogating Cazeau to gather evidence for trial or prison disciplinary proceedings. Dallas asked Cazeau the question to determine whether he needed pain medication. This interpretation is bolstered by the fact that Dallas, after administering the medication, again asked Cazeau about his level of pain. Even if Cazeau lied about his level of pain to receive medication, this does not render his statements testimonial. Any witness would have concluded that Cazeau was in pain and wanted pain medication, but would not have anticipated that Cazeau's statements regarding his level of pain would be used against Appellant at a later trial. We therefore hold that statements made for the purposes of obtaining medical treatment during an ongoing emergency are not testimonial under Crawford.”

[Defendant loses.]

D. Certificate of Non-Existence of Record
1. United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010)
   (PER CURIAM)

   BACKGROUND: Defendant was convicted in the United States District Court for the Southern District of Texas, George P. Kazen, J., of illegal reentry into the United States. Defendant appealed.

   HOLDINGS: The Court of Appeals held that:
   • admission of certificate of nonexistence of record (CNR), which indicated that defendant had not received consent to reenter, violated defendant's Sixth Amendment rights, overruling United States v. Rueda-Rivera, 396 F.3d 678, but
   • district court's Sixth Amendment error did not affect defendant's substantial rights.

   FROM THE OPINION: “The Sixth Amendment guarantees a criminal defendant the right ‘to be confronted with the witnesses against him.’

   ***

   The Court left ‘for another day any effort to spell out a comprehensive definition of “testimonial,” ’ id. at 68, 124 S.Ct. 1354, so the circuits necessarily developed their own interpretation of what is a ‘testimonial statement’ for Sixth Amendment purposes. This issue gained particular importance in prosecutions under 8 U.S.C. § 1326, because defendants claimed that the introduction of CNR's without the testimony of the preparers violated the Sixth Amendment. Before Melendez-Diaz, we held that a CNR is akin to an ordinary business record and therefore does not qualify as a testimonial statement subject to the Confrontation Clause. A majority of our sister circuits that considered the question reached the same conclusion.

   The decision in Melendez-Diaz v. Massachusetts, --- U.S. ----, 129 S.Ct. 2527, 174
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L.Ed.2d 314 (2009), however, calls those cases into doubt.

***

Because our holding in Rueda-Rivera that CNR's are not testimonial statements cannot survive Melendez-Diaz, Rueda-Rivera is overruled.”

[Defendant loses.]

IV. Confessions
A. Invocation of Right to Counsel
1. United States v. Montes, ___ F.3d ___, 2010 WL 1137483 (5th Cir. 2010)
   (Panel: Reavley, Davis and Stewart, Circuit Judges)

BACKGROUND: Defendants were convicted in the United States District Court for the Northern District of Texas, David C. Godbey, J., of bank robbery, conspiring to commit bank robbery, and possessing firearm in furtherance of crime of violence. Defendants appealed.

HOLDINGS: The Court of Appeals, Carl E. Steward, Circuit Judge, held that:
   • defendant's statement was not a clear invocation of his right to counsel;
   • defendant understood his right to counsel, even though he had a learning disability.

FROM THE OPINION: “It is black letter law that when a suspect who is subject to custodial interrogation exercises his right to counsel, law enforcement officers must cease questioning until counsel is made available to him, unless the accused himself initiates further communication, exchanges or conversations with the officers. Edwards v. Arizona, 451 U.S. 477, 485-86, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Generally, an invocation by a suspect of his right to counsel that is ignored by law enforcement officers requires that the suspect's statements made after the request be excluded by the trial court. Id. If a suspect, however, makes an ambiguous or equivocal reference to an attorney there is no requirement that law enforcement cease questioning.

***

Further, the investigator conducting the questioning has no obligation to attempt to clarify the ambiguous comment of the accused.

***

Thus, ‘law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.’”

[Defendant loses.]

V. Plea Negotiations, Plea Agreements and Pleas of Guilty
A. Statements Made during Plea Negotiations
1. United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009)
   (Panel: Higginbotham, Smith and Southwick, Circuit Judges)

BACKGROUND: Defendant was convicted in the United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., of murder and cocaine trafficking conspiracy. Defendant appealed.

HOLDING: The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that in a matter of first impression, prosecution could use defendant's statements made in the course of plea negotiations in its case-in-chief, when the defendant knowingly and voluntarily waived all rights to object to such use.

FROM THE OPINION: “Sylvester's appeal presents an issue of first impression in this court: whether the government may use a defendant's statements made in the course of plea negotiations in its case-in-chief, when the defendant, as a condition to engaging in negotiations with the government, knowingly and voluntarily waived all rights to object to such use.

***

In the seminal case of United States v. Mezzanatto, seven members of the Supreme Court held that a criminal defendant can waive protection and make otherwise excludable plea statements admissible at trial ‘absent some affirmative indication that the agreement was entered into unknowingly or involuntarily.’ Notwithstanding this broad pronouncement, the Court in Mezzanatto upheld a more limited waiver than Sylvester's, one that allowed the government to use statements made in plea negotiations to impeach the defendant if he testified at trial, and five justices expressed doubt as to whether a waiver could be used to admit the defendant's statements in the government's case-in-chief.

***

Now presented with a case-in-chief waiver, however, we can find no convincing reason for not extending Mezzanatto's rationale to this case.”

[Defendant loses.]

B. 11(c)(1)(C) Plea Agreements
1. United States v. Self, 596 F.3d 245 (5th Cir. 2010)
   (Panel: Garza, DeMoss and Clement, Circuit Judges)
BACKGROUND: Defendant was convicted in the United States District Court for the Eastern District of Texas, Thad Heartfield, J., of bank robbery and carrying a firearm during a crime of violence, and was sentenced to 272 months' imprisonment, and he appealed.

HOLDINGS: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that:

- district court constructively rejected the entire plea agreement, and
- court’s failure to inform defendant that court’s rejection of agreed-to sentence effected constructive rejection of plea agreement was plain error affecting defendant’s substantial rights.

FROM THE OPINION: “Although we have found no case in our Circuit that explicitly addresses whether a plea agreement may be accepted or rejected on a piecemeal basis, based on the language of Rule 11, we conclude that it cannot. See Fed.R.Crim.P. 11(e)(3)(A) (finding that ‘the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report’ (emphasis added)).

***

It was within the district court's discretion to reject the plea agreement. See Smith, 417 F.3d at 487 (‘A district court may properly reject a plea agreement based on the court's belief that the defendant would receive too light of a sentence.’). However, the district court was not permitted to reject the plea agreement and then re-impose it on the parties with terms that it found acceptable.”

[Defendant wins.]

C. Guilty Pleas before Magistrate Judges

1. United States v. Underwood, 597 F.3d 661 (5th Cir. 2010)

   (Panel: Jolly, Wiener and Barksdale, Circuit Judges)

   BACKGROUND: Defendant moved to vacate, set aside, or correct his sentence. The United States District Court for the Western District of Louisiana, Robert G. James, Chief Judge, 2008 WL 4628254, denied motion but granted certificate of appealability (COA). Defendant appealed.

   HOLDINGS: The Court of Appeals, Rhesa H. Barksdale, Circuit Judge, held that:

   - magistrate judge has authority to conduct a plea allocation;
   - consent for magistrate judge to conduct plea allocation could be inferred by defendant's failure to object;
   - stringent warnings that magistrate judge, rather than Article III judge, would conduct plea allocation were not necessary to hold that defendant had impliedly consented to that arrangement;
   - defendant's personal right to have Article III judge conduct his plea proceeding had been waived if neither he nor his attorney raised objection before magistrate judge; and
   - Article III requirement for district court to have exclusive domain over conduct of felony trial had not been violated by having magistrate judge preside over plea allocation based on defendant’s implied consent.

   FROM THE OPINION: “A threshold question is our jurisdiction to consider the implied-consent issue.

   ***

   The provision at issue is found in 28 U.S.C. § 636(b)(3), which is part of the Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107 (1968) (as amended). Subpart (b)(3) provides: ‘A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.’ In a very comprehensive opinion in United States v. Dees, 125 F.3d 261 (5th Cir.1997), our court considered whether ‘such additional duties’ include conducting plea proceedings. Dees provided the test for whether a magistrate judge's activity is statutorily authorized under § 636(b)(3): when it ‘bears some relationship to the duties that the [Federal Magistrates] Act expressly assigns to magistrate judges.’

   ***

   Applying this test, Dees held plea proceedings were sufficiently related to pre-trial hearings on the voluntariness of pleas, which, under United States v. Rojas, 898 F.2d 40 (5th Cir.1990), are specifically authorized under § 636(b)(1). Dees, 125 F.3d at 265. In other words, pursuant to Dees, the magistrate judge had the authority under § 636(b)(3) to conduct Underwood's plea allocation.

   Dees, however, was silent on whether consent is necessary for a magistrate judge's conducting a plea proceeding to be authorized under § 636(b)(3).

   ***

   It logically follows that the parties should be warned of the rights they are giving up if, as under § 636(c)(1), the magistrate judge steps fully into the district court's shoes. On the other hand, where, as here, the magistrate judge must still pass muster with the district court, such stringent warnings are unnecessary for holding a party has impliedly consented.”
In sum, Article III's structural protections are not violated by allowing implied consent in this instance.”

[Defendant loses.]

VI. Pre-trial Issues
A. Failure to Comply with Local Rules
1. United States v. Rios-Espinoza, 591 F.3d 758 (5th Cir. 2009)
   (Panel: Garza, Clement and Owen, Circuit Judges)

BACKGROUND: Narcotics offender was convicted, on his guilty plea, of conspiring to possess with intent to distribute more than 1,000 kilograms of marijuana, more than 5 kilograms of cocaine, and more than 50 grams of methamphetamine, and of firearms offense, in the United States District Court for the Southern District of Texas, Randy Crane, J., and he appealed from sentence imposed and from denial of his motion to strike, for noncompliance with local rule, the government's notice of its intent to seek enhanced sentence based on his prior narcotics conviction.

HOLDING: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that district court did not abuse its discretion in declining to strike, for noncompliance with local rule, the government's notice of its intent to seek enhanced sentence for drug offender based on his prior narcotics conviction.

FROM THE OPINION: “We review a district court's ‘administrative handling of a case, including its enforcement of the local rules ... for abuse of discretion.’

***

Local Rule 11.4, the ‘sanctions’ paragraph for the ‘signing of pleadings’ section, provides that ‘[a] paper that does not conform to the local or federal rules or that is otherwise objectionable may be struck on the motion of a party or by the Court.’ S.D. Tex. Local Rule 11.4 (emphasis added). Thus, the rules specifically invest the district court with discretion as to the enforcement of the very local rules in question. Under these circumstances, we find no abuse of discretion in the district court's refusal to strike the non-complaint notice. See United States v. Rivas, 493 F.3d 131, 141-42 (3d Cir.2007).”

[Defendant loses.]

B. Venue
1. United States v. Garza, 593 F.3d 385 (5th Cir. 2010)
   (Panel: Higginbotham, Garza and Prado, Circuit Judges)

BACKGROUND: Defendants were convicted, following intradistrict transfer of venue, of crimes relating to embezzlement of hundreds of thousands of dollars belonging to Indian tribe in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., Chief Judge. They appealed.

HOLDING: The Court of Appeals, Prado, Circuit Judge, held that district court's decision, sua sponte transferring venue of case to another court in that judicial district that was more than 300 miles from defendants' home and place where alleged criminal misconduct occurred, and that necessitated change in counsel due to hardship on defendants' original attorneys of requiring them to travel to this distant forum that significantly delayed trial of case, was abuse of discretion.

FROM THE OPINION: “Defendants argue that the Del Rio Judge abused her discretion when she sua sponte transferred Defendants' case from Del Rio to Waco. Federal Rule of Criminal Procedure 18 states:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

The Del Rio Judge gave no reason for her sua sponte transfer of Defendants' case from Del Rio to Waco. Given her denial of Defendants' disqualification motions and their original motion to transfer the case to San Antonio, we can do little more than speculate as to the motivation for the transfer.

***

Our weighing of the ‘convenience of the [D]efendant[s]’ against the ‘prompt administration of justice’ advises against transfer to Waco. See id. In assessing convenience, we consider: (1) the distance from the defendant's home, Lipscomb, 299 F.3d at 340; Dupoint v. United States, 388 F.2d 39, 44 (5th Cir.1967); (2) the location of the defendant's witnesses, Lipscomb, 299 F.3d at 340; United States v. Stanko, 528 F.3d 581, 586 (8th Cir.2008); and (3) the ability of the defendant's family and friends to attend the trial. Stanko, 528 F.3d at 586. We have also acknowledged that the burden on a defendant increases when a transfer forces the defendant's counsel to try a case far from his or her practice. See
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*Lipscomb*, 299 F.3d at 340 (noting the location of the defense attorney's practice when considering convenience).

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We rarely see a case in which the convenience factor weighs so heavily against transfer.

***

In this case, however, the Del Rio Judge has provided no rationale that would allow us to conduct the type of review necessary to affirm such an inconvenient *sua sponte* transfer. Because of this lack of reasoning, we have no choice but to find that the Del Rio Judge abused her discretion, and to vacate Defendants' convictions.”

[ Defendant wins.]

C. The *Ex Post Facto Clause*

1. *United States v. Young*, 585 F.3d 199 (5th Cir. 2009)

*(PER CURIAM)*

BACKGROUND: Defendant, a convicted sex offender, pleaded guilty in the United States District Court for the Western District of Texas, Robert A. Junell, J., to traveling in interstate commerce and then knowingly failing to update his registration information as required by the Sex Offender Registration and Notification Act (SORNA). He appealed.

HOLDING: The Court of Appeals held that as a matter of first impression in the circuit, SORNA did not violate the ex post facto clause.

FROM THE OPINION: “Norman Lamar Young is a sex offender. Indeed, on November 29, 2001, he pleaded guilty in Texas state court to one count of Indecency with a Child by Contact. After his release from prison in 2004, Young made his way to Florida.

Some three years later-in March of 2007-Young provided registration information to officials in Jacksonville in order to comply with SORNA. But, on August 7, 2007, Young boarded a Greyhound bus and traveled to Texas. Law enforcement officers later arrested Young in Midland-on August 22, 2007; on December 27, 2007; and again on January 29, 2008. Young claims to have been working at a Cheddar's restaurant during his time back in Texas. At no point after traveling from Florida to Texas did Young update his SORNA information.

The United States Government charged Young in a superseding indictment under 18 U.S.C. § 2250(a) for violating the SORNA requirements. Young filed a motion to dismiss, based in part on his idea that SORNA provides for ex post facto punishment.

***

Turning to the statute at hand, we now hold-in line with all of our sister Circuits to have considered the issue -that SORNA is a civil regulation and, thus, does not run afoul of the Constitution's ex post facto prohibitions.”

[ Defendant loses.]

2. *United States v. Thomas*, 600 F.3d 387 (5th Cir. 2010)

*(PER CURIAM)*

BACKGROUND: Defendant, convicted of possession of a firearm by a convicted felon, appealed sentence imposed by the United States District Court for the Western District of Louisiana, Tucker L. Melancon, J., following the second revocation of his supervised release.

HOLDING: The Court of Appeals held that imposition of further term of imprisonment was an Ex Post Facto Clause violation.

FROM THE OPINION: “Thomas argues that the district court violated the Ex Post Facto Clause by applying the PROTECT Act amendment to 18 U.S.C. § 3583(e)(3) in his case because his initial offense, conviction, and sentence all occurred before the enactment of the PROTECT Act. See PROTECT Act, Pub.L. No. 108-21 § 101, 117 Stat. 650, 651. He maintains that under the pre-PROTECT Act version of § 3583(e)(3), he could only be sentenced to a cumulative total of 24 months of imprisonment on all revocations of his supervised release because his original conviction was for a Class C felony. Due to the prior sentence of 24 months of imprisonment that he served upon the first revocation of his supervised release, he maintains that the present sentence of 24 months of imprisonment exceeds the statutory maximum.

***

Although this court has not considered whether the PROTECT Act amendments to § 3583(e)(3) apply retroactively, see *United States v. Vera*, 542 F.3d 457, 461 n. 2 (5th Cir. 2008), the First Circuit has held that nothing in the PROTECT Act “as it concerns § 3583(e)(3) suggests an effort to apply this amendment retroactively.” *United States v. Tapia-Escalera*, 356 F.3d 181, 188 (1st Cir. 2004). Furthermore, the Eight Circuit has also refused to apply the PROTECT Act amendment to § 3583(e)(3) retroactively. *United States v. Hergott*, 562 F.3d 968, 970 (8th Cir. 2009).

***

The reasoning in the decisions of our sister circuits appears sound, and, accordingly, we accept the Government's concession that the PROTECT Act amendment to § 3583(e)(3) does not apply retroactively.”
D. Delay in Prosecution
1. **United States v. Seale**, 600 F.3d 473 (5th Cir. 2010)
   (Panel: Davis, Smith and DeMoss, Circuit Judges)

   BACKGROUND: Following denial of motion to dismiss indictment, defendant was convicted in the United States District Court for the Southern District of Mississippi, Henry T. Wingate, Chief Judge, of kidnapping and conspiracy to commit kidnapping. Defendant appealed. After initial panel's affirmation, 542 F.3d 1033, rehearing en banc was granted, 550 F.3d 377, and, by reason of an equally divided 9-9 vote, the en banc court, without opinion, nominally affirmed the district court's denial of the motion to dismiss, 570 F.3d 650, and the appeal was returned to the original panel. The Court of Appeals, 577 F.3d 566, certified a question to the United States Supreme Court. The United States Supreme Court, 130 S.Ct. 12, dismissed the certified question.

   HOLDING: The Court of Appeals, W. Eugene Davis, Circuit Judge, held that 40-year delay between date of alleged kidnapping and indictment did not violate defendant's due process rights.

   FROM THE OPINION: “Seale contends first that the district court erred by denying his motion to dismiss based on the Government's delay in seeking an indictment.

   ***

   Although more than forty years elapsed from the date of the alleged crime to Seale's indictment, this fact alone does not establish a due process violation. The mere passage of time is insufficient to support a due process claim, even if the time lapse prejudiced the defense. *Dickerson v. Guste*, 932 F.2d 1142, 1144 (5th Cir.1991). To show an unconstitutional pre-indictment delay, a party must establish two elements: 1) the Government intended to delay obtaining an indictment for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose, and 2) that the improper delay caused actual, substantial prejudice to his defense. *United States v. Crouch*, 84 F.3d 1497, 1523 (5th Cir.1996) (en banc). The burden is on the defendant to establish both prongs. *United States v. Jimenez*, 256 F.3d 330, 345 (5th Cir.2001).

   ***

   Since the defendant bears the burden to show both the Government's bad faith and prejudice to the defendant in order to establish a due process violation based on undue delay, it is not necessary to inquire whether the prosecution's delay caused actual, substantial prejudice to Seale's defense.”

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E. Speedy Trial
1. **United States v. Clark**, 577 F.3d 273 (5th Cir. 2009)
   (Panel: Higginbotham, Garza and Prado, Circuit Judges)

   BACKGROUND: Defendant pleaded guilty, in the United States District Court for the Northern District of Texas, Sam R. Cummings, J., to escaping from federal custody. He appealed.

   HOLDINGS: The Court of Appeals, Prado, Circuit Judge, held that:
   - the district court did not abuse its discretion in dismissing defendant's original indictment, without prejudice, for violation of the Speedy Trial Act;
   - the evidence was sufficient to sustain defendant's convictions; and
   - the district court did not abuse its discretion in admitting evidence of the Internal Revenue Service's (IRS's) taxpayer audits and the taxpayers' subsequent amended returns and/or agreed deficiencies.

   FROM THE OPINION: “The Speedy Trial Act provides that if a defendant who enters a plea of 'not guilty' is not brought to trial within seventy days from the filing date of his indictment, the indictment shall be dismissed on the defendant's motion. 18 U.S.C. §§ 3161(c)(1), 3162(a)(2). Such dismissal may be with or without prejudice; '[a] district court is not required to dismiss an indictment with prejudice for every violation of the Speedy Trial Act;'

   - the decision whether to dismiss a complaint under the Speedy Trial Act with or without prejudice is “entrusted to the sound discretion of the district judge and ... no preference is accorded to either kind of dismissal.” *United States v. Melguizo*, 824 F.2d 1265, 1267 (5th Cir.1986)) (omission in *Melguizo*). We have explained that '[a]lthough not as harsh a sanction as dismissal with prejudice, dismissal without prejudice is meaningful because it, inter alia, forces the Government to obtain a new indictment if it decides to reprosecute as well as exposes the prosecution to dismissal on statute of limitations grounds.' *Blevins*, 142 F.3d at 225.

   'In determining whether a dismissal of an indictment for noncompliance with the Speedy Trial Act should be with or without prejudice, the district court at least must consider (1) the seriousness of the offense, (2) the facts and circumstances of the case which led to the dismissal, and (3) the impact of a reprosecution on the administration of the Speedy
Trial Act and on the administration of justice.’ *Id.* (citing 18 U.S.C. § 3162(a)(2)).”

[Defendant loses.]

2. United States v. Molina-Solorio, 577 F.3d 300 (5th Cir. 2009)

   (Panel: King, Stewart and Southwick, Circuit Judges [King, dissenting])

   BACKGROUND: Defendant pleaded guilty, in the United States District Court for the Northern District of Texas, Sam R. Cummings, J., to escaping from federal custody. He appealed.

   HOLDINGS: The Court of Appeals, Carl E. Stewart, Circuit Judge, held that:

   • fact that nearly ten years passed between defendant's indictment and his trial, the last eight of which occurred after he had been back in state and federal custody, weighed heavily in favor of finding length of the delay presumptively prejudicial;
   • delay was largely due to authorities' negligence, weighing heavily in favor of finding presumptive prejudice;
   • defendant's motion to dismiss was a sufficient assertion of his speedy trial right to weigh in favor of finding a violation; and
   • factors warranted a presumption of prejudice and relieved defendant of burden of demonstrating actual prejudice.

   FROM THE OPINION: “The Sixth Amendment states that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.’ U.S. Const. amend. VI. The only remedy for a violation of the right is dismissal of the indictment. *Barker*, 407 U.S. at 522, 92 S.Ct. 2182. A court evaluates a claimed violation of the constitutional right to a speedy trial by application of a four-factor balancing test: (1) ‘length of delay,’ (2) ‘the reason for the delay,’ (3) ‘the defendant's assertion of his right,’ and (4) ‘prejudice to the defendant.’ *Id.* at 530, 92 S.Ct. 2182. A court evaluates a claimed violation of the constitutional right to a speedy trial by application of a four-factor balancing test: (1) ‘length of delay,’ (2) ‘the reason for the delay,’ (3) ‘the defendant's assertion of his right,’ and (4) ‘prejudice to the defendant.’ *Id.* at 530, 92 S.Ct. 2182. A court evaluates a claimed violation of the constitutional right to a speedy trial by application of a four-factor balancing test: (1) ‘length of delay,’ (2) ‘the reason for the delay,’ (3) ‘the defendant's assertion of his right,’ and (4) ‘prejudice to the defendant.’ *Id.* at 530, 92 S.Ct. 2182. The court balances the factors by ‘weigh[ing] the first three Barker factors ... against any prejudice suffered by the defendant due to the delay in prosecution. Obviously, in this balancing, the less prejudice a defendant experiences, the less likely it is that a denial of a speedy trial right will be found.’ *United States v. Serna-Villarreal*, 352 F.3d 225, 230-31 (5th Cir.2003).

   When more than one year has passed between indictment and trial, ‘this court undertakes a full Barker analysis, looking to the first three factors to decide whether prejudice will be presumed.’ *Parker*, 505 F.3d at 328 (internal citations omitted). The delay of nearly ten years in the present case unquestionably triggers this court's review of the remaining *Barker* factors. Molina-Solorio argues that the lengthy delay, combined with the Government's negligence and his timely assertion of his rights, warrants a finding of presumed prejudice. We agree.”

   [Defendant wins.]

F. Self Representation

1. United States v. Long, 597 F.3d 720 (5th Cir. 2010)

   (Panel: Garwood, Wiener and Benavides, Circuit Judges)

   BACKGROUND: Defendant was convicted in the United States District Court for the Northern District of Texas, Sam R. Cummings, J., on four counts of willfully failing to file income tax returns. Defendant appealed.

   HOLDINGS: The Court of Appeals, Garwood, Circuit Judge, held that:

   • defendant's repeated statements that he wished to fire his public defender attorney did not clearly and unequivocally waive his right to counsel and assert his right to self-representation;
   • even if he had asserted such right, defendant's subsequent disruptive and obstructionist conduct waived it; and
   • defendant's assertion of right to self-representation at sentencing stage was untimely.

   FROM THE OPINION: “A defendant has a right to represent himself at trial. *Faretta*, 95 S.Ct. at 2532. An impermissible denial of self-representation cannot be harmless. *United States v. Cano*, 519 F.3d 512, 516 (5th Cir.2008). The defendant must knowingly and intelligently forego his right to counsel, and must clearly and unequivocally request to proceed pro se. *Id.* If the right to counsel is to be waived, the trial court must conduct a *Faretta* hearing, cautioning the defendant about the dangers of self-representation and establishing, on the record, that the defendant makes a knowing and voluntary choice. *Id.* Nevertheless, the defendant may waive his right to self-representation through subsequent conduct indicating an abandonment of the request. *Id.* There is no constitutional right to hybrid representations whereby the defendant and his attorney act as co-counsel.”

   [Defendant loses.]

G. Conflict of Interest

1. Bostick v. Quarterman, 580 F.3d 303 (5th Cir. 2009)
(Panel: Higginbotham, Smith and Southwick, Circuit Judges)

BACKGROUND: Petitioner, who had been convicted of aggravated robbery upon his plea of guilty, petitioned for writ of habeas corpus. The United States District Court for the Southern District of Texas, Melinda Harmon, J., 2008 WL 238576, denied relief. Petitioner appealed.

HOLDING: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that potential conflict did not adversely affect counsel's representation.

FROM THE OPINION: “Multiple representation does not always create an impermissible conflict. United States v. Culverhouse, 507 F.3d 888, 892 (5th Cir.2007). ‘[S]omething more than a speculative or potential conflict’ must be shown. Id. ‘[A] conflict will exist only when counsel is “compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client.” ’ Id. (quoting United States v. Garcia-Jasso, 472 F.3d 239, 243 (5th Cir.2006)).”

[Defendant loses.]

H. Marital Communications Privilege
1. United States v. Miller, 588 F.3d 897 (5th Cir. 2009)
   (Panel: Chief Judge Jones, Garza and Stewart, Circuit Judges)

BACKGROUND: Defendant was convicted in the United States District Court for the Western District of Louisiana, S. Maurice Hicks, Jr., J., of tax evasion. Defendant appealed.

HOLDING: The Court of Appeals, Carl E. Stewart, Circuit Judge, held that trial testimony by defendant's ex-wife was not protected by confidential marital communications privilege.

FROM THE OPINION: “The marital privilege encompasses two distinct privileges. The first permits a married witness to refuse to testify adversely against his or her spouse. The witness may neither be compelled to testify nor foreclosed from testifying. Trammel v. United States, 445 U.S. 40, 53, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). The second bars one spouse from testifying as to the confidential marital communications between the spouses. United States v. Ramirez, 145 F.3d 345, 355 (5th Cir.1998). The confidential communications privilege survives the marriage and may be asserted by either spouse with respect to communications that occurred during the marriage even after the marriage has terminated. See United States v. Entrekin, 624 F.2d 597, 598 (5th Cir.1980). The privilege applies only to communications; it does not apply to acts. United States v. Koehler, 790 F.2d 1256, 1258 (5th Cir.1986).

We have recognized an exception to the confidential marital communications privilege for those ‘conversations between husband and wife about crimes in which they are jointly participating ....’ Ramirez, 145 F.3d at 355 (internal quotation omitted); United States v. Chagra, 754 F.2d 1181, 1182 (5th Cir.1985). The testifying spouse need not be charged with a crime, so long as the testimony conveys joint criminal activity. Ramirez, 145 F.3d at 355.”

[Defendant loses.]

VII. Trial Issues
A. Defendant in Shackles
1. United States v. Banegas, 600 F.3d 342 (5th Cir 2010)
   (Panel: Davis, Wiener and Southwick, Circuit Judges)

BACKGROUND: Pro se defendant was convicted after jury trial in the United States District Court for the Northern District of Texas, Jane J. Boyle, J., of conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, and he appealed his conviction and the jury's special verdict of forfeiture.

HOLDINGS: The Court of Appeals, Wiener, Circuit Judge, held that:
   • the district court, which stated that, in that court, every incarcerated pro se defendant was shackled, did not adequately articulate specific reasons for shackling defendant;
   • the government had the burden of proving whether defendant's leg irons were visible to the jury;

FROM THE OPINION: “Turning to the merits of the issue, the threshold question in our inquiry is whether the district court adequately articulated specific reasons for shackling Banegas.

***

Here, the government has the burden of proving whether the leg irons were visible because, under these facts, placing the burden of proof of this question on the defendant would contravene the Supreme Court's reasoning in Deck. As the Court noted, the record is often devoid of any discussion of shackling.

***

Accordingly, we must assume that the leg irons were visible to the jury.”

[Defendant wins.]
B. Opening Statement

1. United States v. Valencia, 600 F.3d 389 (5th Cir. 2010)  
   (Panel: Jolly, DeMoss and Prado, Circuit Judges)

   BACKGROUND: Defendants, both natural gas traders, were convicted after jury trial in the United States District Court for the Southern District of Texas, Nancy F. Atlas, J., of wire fraud, in connection with their alleged efforts to manipulate natural gas markets, and their post-verdict motions for judgment of acquittal and for a new trial were denied, 2006 WL 3716657. Defendants appealed.

   HOLDING: The Court of Appeals, Wiener, Circuit Judge, held that the government acted improperly in reading the whistle-blower letter aloud during opening statements, but, even assuming that the decision to read the letter in its entirety was “error,” it was not so prejudicial to first defendant as to require a new trial;

   FROM THE OPINION: “Following voir dire, the government represented to the court that it would not use any trial exhibits during its opening statement. For the most part, the government's hour-long opening statement complied with this representation.

   ***

   With approximately fifteen minutes left in his allotted time for an opening statement … Mr. Lewis told the jury… ‘what I’m going to do is read from an exhibit that will, I believe, come into evidence and it’s Exhibit 668.’

   ***

   Valencia concedes that she failed to timely object to references to Hornback's letter. We therefore review for plain error.

   ***

   ‘This court applies a two-step analysis when reviewing claims of prosecutorial misconduct. The court must first decide whether the prosecutor made an improper remark. The court evaluates the remark in light of the context in which it is made.’

   ***

   To determine whether improper statements require a new trial, we ask whether the prosecutor's remarks ‘prejudiced the defendant's substantive rights,’ and ‘cast[ ] serious doubt on the correctness of the jury's verdict.’

   ***

   We must weigh: ‘(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting conviction.’

   ***

   We also presume that a jury can and will follow an instruction that attorneys' statements are not evidence, ‘unless there is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect is devastating.’

   [Defendant loses.]

C. Daubert

1. United States v. John, 597 F.3d 263 (5th Cir. 2010)  
   (Panel: Smith, Owen and Haynes, Circuit Judges)

   BACKGROUND: Defendant was convicted of conspiracy to commit access device fraud, fraud in connection with an access device and aiding and abetting, and exceeding authorized access to a protected computer, following jury trial in the United States District Court for the Northern District of Texas, Jorge A. Solis, J. Defendant appealed.

   HOLDING: The Court of Appeals, Owen, Circuit Judge, held that the District Court was not required to hold Daubert hearing prior to determining admissibility of expert witness testimony concerning fingerprints.

   FROM THE OPINION: “At trial, the Government presented testimony from an expert witness who opined that John's fingerprints were on Citigroup documents that were found in Riley's possession.

   ***

   The admission of expert evidence is reviewed for abuse of discretion; however, evidentiary rulings are subjected to heightened scrutiny in criminal cases. Federal Rule of Evidence 702 provides that testimony by a qualified expert is admissible if (1) it will assist the trier of fact; (2) it is based upon sufficient facts or data; (3) the testimony is a product of reliable methods; and (4) the witness has applied those principles reliably to the facts. It is the gatekeeping responsibility of the trial judge to ensure that any admitted scientific testimony or evidence is both relevant and reliable.

   ***

   John's threshold argument is that the district court ‘abdicated its gatekeeping function’ by failing to hold a Daubert hearing on the matter. However, we agree with a number of our sister circuits that have expressly held that in the context of fingerprint evidence, a Daubert hearing is not always required.”

   [Defendant loses.]

2. United States v. Cooks, 589 F.3d 173 (5th Cir. 2009)
Significant Decisions of the Fifth Circuit Court of Appeals

D. Leading Questions of a Child Witness

1. United States v. Carey, 589 F.3d 187 (5th Cir. 2009)

(Panel: Wiener, Garza and Elrod, Circuit Judges)

BACKGROUND: Defendant was convicted in the United States District Court for the Southern District of Mississippi, Tom S. Lee, J., of four counts of aggravated sexual abuse of a minor younger than the age of 12, and was sentenced to four life imprisonment terms. Defendant appealed.

HOLDING: The Court of Appeals, Jennifer W. Elrod, Circuit Judge, held that admission of child victim's testimony in response to prosecutor's leading questions was warranted.

FROM THE OPINION: “Second, Carey challenges his conviction by arguing that the prosecutor employed impermissible leading questions during DJ's testimony. Federal Rule of Evidence 611(c) prohibits leading questions ‘except as may be necessary to develop the witness' testimony.’

***

With an objection, we review a district court's decision to allow leading questions for an abuse of discretion. E.g., United States v. Cisneros-Gutierrez, 517 F.3d 751, 762 (5th Cir.2008). Carey argues that these questions impermissibly led DJ, while the government argues that the circumstances of the testimony—particularly DJ's age and the nature of the crime—justified the leading.

Carey's Rule 611 challenge fails because our circuit has held that a victim-witness's youth and nervousness can satisfy Rule 611's necessity requirement. See Rotolo v. United States, 404 F.2d 316, 317 (5th Cir.1968) (allowing the government to lead a fifteen-year-old witness who appeared ‘reluctant,’ ‘nervous,’ and ‘upset’). Here, the indictment concerned a sex crime, the witness was twelve, and the record reveals several times where DJ appeared nervous. For example, DJ testified ‘I don't want to be here right now,’ and when asked by the prosecutor whether she ‘remember[ed] my telling you that you were going to have to talk about some things that you didn't want to,’ she answered ‘[y]es.’ In light of this context and our precedent, Carey fails to demonstrate that the district court abused its discretion in allowing the government to lead DJ's testimony.”

[Defendant loses.]
BACKGROUND: Defendant was convicted by jury in the United States District Court for the Western District of Texas, Frank Montalvo, J., of one count of knowing possession of materials transported in interstate commerce involving the sexual exploitation of minors, and one count of knowing receipt of such materials, and he appealed.

HOLDINGS: The Court of Appeals, Garwood, Circuit Judge, held that:

- trial court did not abuse its discretion when it allowed jury to view short excerpts from three of seventeen different videos of child pornography found on defendant's computer;
- trial court did not abuse its discretion when it allowed jury to view excerpt of adult bestiality video that had just completed downloading on defendant's computer when federal agents entered his home;
- any error from allowing jury to see brief portion of adult pornography video that was downloaded on defendant's computer weeks prior to his arrest was harmless given evidence, abuse of discretion standard, and limiting instruction

FROM THE OPINION: “Old Chief addresses the admissibility under Rule 403 of additional relevant evidence in light of a stipulation.

Unlike Old Chief, child pornography is graphic evidence that has force beyond simple linear schemes of reasoning. It comes together with the remaining evidence to form a narrative to gain momentum to support jurors’ inferences regarding the defendant's guilt. It provides the flesh and blood for the jury to see the exploitation of children. The general, conclusory language of the stipulation that the videos “contain visual depictions of minors under the age of eighteen, engaging in sexually explicit conduct” does not have the same evidentiary value as actually seeing the particular explicit conduct of the specific minors. Jurors have expectations as to the narrative that will unfold in the courtroom. Id. at 654. If those expectations are not met, jurors may very well punish the party who disappoints by drawing a negative inference. Id. For example, jurors expect to see a gun in the case of a person charged with using a firearm to commit a crime. Id. Likewise, the actual videos exploiting children in a child pornography case form the narrative that falls within the general rule stated in Old Chief. Moreover, the specific videos published-one of which the evidence showed was opened and previewed the morning of the search-reflected how likely it was that the defendant knew that the video depicted child pornography (which knowledge the stipulation did not mention). We cannot say the trial court abused its discretion when it showed the jury three short excerpts from three of the seventeen different videos of child pornography on defendant's computer.

During the trial, the Government also introduced five adult pornography videos over the defendant's Rule 403 objection. The trial court allowed the Government to show excerpts from two of these videos to the jury. First, the Government showed the jury a 20 second excerpt from the video that the defendant's computer was downloading as agents entered his home. The full length version of this video lasted 14 minutes and 49 seconds, and involved adult bestiality. At the defendant's request, the court gave this limiting instruction:

Ladies and gentlemen of the jury, the government wants to show a 20-second clip of the film that was being downloaded at the time the Department of the Army criminal investigation agent showed up at the quarters of Mr. Caldwell. It is being shown for a very limited purpose. To summarize, the limited purpose is this: It is shown because the government wants to establish that there was no mistake or unintentional aspect to the downloading of the pornographic films.

Mr. Caldwell is not being charged with downloading obscene adult pornography. So this item of evidence is not being shown to you to show that he had done anything illegal by possessing that kind of pornography. It is simply being shown for the government to establish that he deliberately and intentionally downloaded that type. In other words, that he knew how to use the LimeWire to do that as shown by the fact that this was happening as the agents came.

Do you understand that? If any one of you doesn't understand that, please raise your hand, because this limiting ... instruction is important just to-out of an overabundance of caution. Every other item of evidence that is admitted into evidence, you can use for any purpose. In other words, you can use ... for what it shows and for any reasonable inference you can draw from it, you see.

But this one, I am telling you, specifically, what is the narrow purpose that I am allowing the government to show the 20-second clip,’ ”

[Defendant loses.]

F. Extraneous Offenses (F.R.E. 404(b))

1. United States v. York, 600 F.3d 347 (5th Cir. 2010)
BACKGROUND: Defendant was convicted in the United States District Court for the Eastern District of Texas, Richard A. Schell, J., of arson, carrying a destructive device in relation to a crime of violence, and possession of an unregistered firearm, and he appealed.

HOLDING: The Court of Appeals, Garwood, Circuit Judge, held that court did not abuse its discretion in admitting defendant's former girlfriend's testimony that defendant had assaulted her.

FROM THE OPINION: “Government witness Brenda Finch, former girlfriend of York, testified on direct examination that York had told her that he had tried to bomb the courthouse with a Molotov cocktail he threw at the courthouse basement door. On cross-examination, defense counsel pointed out that when she gave her statement to law enforcement in April 2006 it did not include those words, but rather said something about his having ‘tried to blow up the courthouse.’ Finch was subsequently recalled by the Government, and on further direct examination she testified that when orally interviewed by law enforcement a couple of days before her April 25, 2006 written statement she did not ‘mention to them that Mr. York had told you that he had thrown a Molotov cocktail at the basement of the courthouse.’ She further testified that she did not then tell law enforcement that ‘cause I was scared’ because York had ‘made threats before with me and my son;’ ‘ when asked ‘what specific threats he had made,’ she responded ‘he told me that he would kill me and he would kill my son ... he would kill my son and then kill me ... he would make me watch.’ She further stated that that was also the reason her signed statement to law enforcement did not contain the information that York had shown her how to make a Molotov cocktail.

***

We apply the two prong Beechum test to resolve 404(b) issues: (a) the ‘other crimes, wrongs, or acts’ must be relevant to an issue other than the defendant's character; and (b) the evidence's probative value must not be substantially outweighed by its prejudicial effect. Id. (citing United States v. Beechum, 582 F.2d 898, 911 (5th Cir.1978)).

First, this evidence is clearly relevant to an issue other than York's character, namely the credibility of the Government's witness Finch, as the district court ruled.

Second, it can reasonably be concluded that the Federal Rule of Evidence 403 weighing test favors admission of this evidence. The evidence must possess probative value that is not substantially outweighed by its undue prejudice.”

[Defendant loses.]

2. United States v. Watkins, 591 F.3d 780 (5th Cir. 2009)

(PANEL: Jones, Chief Judge; Garza and Stewart, Circuit Judges)

BACKGROUND: Defendant was convicted of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, and possession with intent to distribute five kilograms or more of cocaine, following jury trial in the United States District Court for the Northern District of Texas, Robert A. Junell, J. Defendant appealed.

HOLDING: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that admission of other acts evidence regarding defendant's two prior marijuana runs was not plain error;

FROM THE OPINION: “Watkins contends that the admission of certain bad acts testimony was in violation of Rule 404(b) and denied him a fair trial. Watkins argues that the evidence of his admission to police that he had been involved in two prior drug runs to pick up and deliver marijuana was evidence of “other acts,” not evidence “intrinsic” to the offense of conspiracy to distribute cocaine. Thus, he argues, the district court erred by not treating this evidence as extrinsic.

*** Evidence of bad acts is ‘intrinsic’ to a charged crime when the evidence of the other act and evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.

*** Because of the many similarities between the crime of conviction and the two previous drug runs, we find no error in the district court's determination that the evidence of the previous runs was relevant to establish how the conspiracy was structured and operated, and thus intrinsic.”

[Defendant loses.]

G. Argument of the Government

1. United States v. Vargas, 580 F.3d 274 (5th Cir. 2009)

(PANEL: Higginbotham, Smith and Southwick, Circuit Judges)

BACKGROUND: Defendant was convicted in the United States District Court for the Southern District of Texas, Janis Graham Jack, J., of possession with intent to distribute more than 100 kilograms of marijuana. Defendant appealed.

HOLDING: The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that prosecutor
did not inadmissibly comment on defendant's post-arrest silence;

FROM THE OPINION: “In closing, the defense argued that Garza was the culprit who duped the unwitting Vargas into transporting the marijuana. The prosecution, after reviewing the trial evidence, replied:

And what he chose to tell the Border Patrol, being charged with possession of marijuana, over a million dollars, a million dollars there at the checkpoint, it gets more valuable as it goes north, all he chose to say to them when he was asked some questions is saying, ‘I work for P&M, I've been there for seven or eight months, I picked it up and I was just going to drop it off.’

She continued:

It seems like he wants you to believe just that, that he did pick it up at P&M. Because he didn't say anything differently to the Border Patrol at that time, didn't say he went to Enrique's [Garza], ‘I got it from him.’ He never said that. And:

Everything he did on the night of his arrest says to you the defendant knew, because you never heard, ‘Enrique Garza did it, let me tell you about him.’ Wouldn't that be reasonable? Wouldn't that be the reasonable thing to say at that time?

The defense did not object to this argument. The prosecutor finished, the court read the jury its instructions, and within an hour it returned with a verdict of guilty.

The defense urges prosecutorial misconduct: that the prosecutor's statements so tainted Vargas' trial as to make it unfair.

***

In a case where the single contested issue was Vargas' knowledge, and in which the prosecutor used a motion in limine to have Vargas' exculpatory statement excluded from evidence, the high ground would have been to steer clear of arguments that infer no such statement was made-especially when that argument was made only after the defense had had its last opportunity to exercise the right to introduce the statement should it become relevant. At best, if not ill-advised effort, it was a hazardous undertaking.

Yet, our review is for plain error, the second prong of which asks whether the error was clear or obvious. There are two possible readings of the prosecution's closing. Alone, the argument suggested no exculpatory statement was made, when the government knew it had. But in context of the argument, it answered the defense's theory of the case first raised in its closing. In light of these two possible readings, the remarks do not rise to the level of obvious error, evidenced in part by the absence of an objection by defense counsel whose competence is evident in this record.”

[Defendant loses.]

VIII. Substantive Federal Law
A. 18 U.S.C. § 3600(a) [DNA Testing]

1. United States v. Fasano, 577 F.3d 572 (5th Cir. 2009)

(Panel: Higginbotham, Smith and Southwick, Circuit Judges)

BACKGROUND: Inmate filed motion under the Innocence Protection Act to compel DNA testing of clothing worn by bank robber in attempt to demonstrate that he had been erroneously convicted of this crime. The United States District Court for the Southern District of Mississippi, William H. Barbour, Jr., J., 2008 WL 2954974, denied motion, and inmate appealed.

HOLDINGS: The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that:

• chain of custody requirement of the Innocence Protection Act, which inmate must satisfy in order for inmate to obtain DNA testing of evidence under the Act, looks to whether testing offers a reasonable possibility of securing sound DNA results from material for which usual trial demands for chain of custody can be met;

• fact that clothing which prison inmate sought to subject to DNA testing could not for a time be located, until clothing was discovered, with other physical evidence, in paper bag in closet next to office of retired government prosecutor, might suggest an unwarranted casualness with which evidence was handled, but did not prevent inmate from satisfying chain of custody requirement; and

• strength of evidence of defendant's guilt, including fact that he was identified by eyewitnesses as individual who had robbed bank and that his fingerprints were found on note handed to teller, by no means made it fanciful that there was reasonable probability that house guest of defendant's brother, rather than defendant, was party who robbed bank and that DNA testing of clothing worn by robber might confirm this fact.

FROM THE OPINION: “Section (a)(4) requires demonstration that '[t]he specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.'
This has two components. First there is the requirement of chain of custody. Second there is the requirement that there has been no alteration of evidence material to DNA testing.

***

Fasano urges that the trial standard for admission into evidence is the measure and has been met; that he need only show that the result of testing would be admitted under Fed. R. Evid. 901. And that hurdle is cleared by demonstration that the evidence was continuously in the possession of one or more of the parties and the circumstances of any transfers.

***

There are myriad possibilities of outcomes from testing. We need not puzzle over their range. Nor do we now address the power of the results of testing. These are fact specific cases and Fasano has brought himself within the reach of the Innocence Protection Act and the tests must be ordered.

[Defendant wins.]

B. 18 U.S.C. § 1542 [False Application and Use of Passport]

1. United States v. Nejera Jimenez, 593 F.3d 391 (5th Cir. 2010)

(King, Garza and Haynes, Circuit Judges)

BACKGROUND: Following denial of her motions for acquittal, defendant was convicted after jury trial in the United States District Court for the Western District of Texas, Frank Montalvo, J., of making a false statement in a passport application and making a false statement to a special agent of the Department of State Diplomatic Security Service. Defendant appealed her convictions.

HOLDINGS: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that:

- addressing an issue of apparent first impression in the circuit, the statute prohibiting making false statements in a passport application does not require that the false statement be material;
- the evidence was sufficient to support defendant's conviction for making a false statement in a passport application;

FROM THE OPINION: “This circuit has not previously addressed whether 18 U.S.C. § 1542 contains a materiality element, although other circuits have addressed the question. Most recently, the Second Circuit determined that by its plain terms, 18 U.S.C. § 1542 does not require that the false statement be material. United States v. Hasan, 586 F.3d 161, 2009 WL 3737521 (2d Cir. Nov. 10, 2009). The handful of other circuits to consider the question have also found that materiality is not an element of a § 1542 violation.

***

We find that the evidence is sufficient to uphold Taylor's conviction as to count six. Taylor's false statements made to the MDA were made in a matter within the jurisdiction of a federal agency for purposes of 18 U.S.C. § 1001; thus, the district court properly exercised its jurisdiction over this count.”

[Defendant loses.]


1. United States v. Rudzavice, 586 F.3d 310 (5th Cir. 2010)

(P panel: Higginbotham, Stewart and Owen, Circuit Judges)

BACKGROUND: Defendant was convicted in a bench trial in the United States District Court for the Northern District of Texas, John H. McBryde, J., of knowingly receiving child pornography and of attempting to transfer obscene material to a minor under the age of 16. Defendant appealed.
HOLDING: The Court of Appeals, Owen, Circuit Judge, held that government was not required to prove that victim was under 16 years old to convict on charge of transferring obscene material to minor under the age of 16;

FROM THE OPINION: “The facts stipulated by Rudzavice and the trial testimony of Agent Katherine Smith of the Texas Attorney General's Office established that Agent Smith entered a chat room posing as a 15-year-old girl named Shelly, Agent Smith was in fact 38 years old at the time, and Agent Smith received a chat message from Rudzavice, to whom she identified herself as a 15-year-old girl from El Paso, Texas. Rudzavice contends that these facts cannot support a conviction under § 1470.

***

Rudzavice focuses on the language of § 1470 stating that the actor must transfer images while knowing that such other individual 'has not attained the age of 16 years.' Rudzavice argues that this specific mens rea element requires that the Government prove that the victim was under the age of 16 even when the alleged offense was inchoate. We disagree.”

[Defendant loses.]

E. 18 U.S.C. § 111(a)(1) [Assaulting, Resisting, or Impeding Certain Officers or Employees]

1. United States v. Williams, ___ F.3d ___, 2010 WL 1039454 (5th Cir. 2010)

(Please note: There is a reference to a typographical error in the 18 U.S.C. § 111(a)(1), and it is not meant to be referenced as a citation. This section is intended to be a commentary or a brief reference to the statute.)

BACKGROUND: Defendant was convicted in the United States District Court for the Western District of Texas, David Briones, J., of forcible assault of a federal officer, and she appealed.

HOLDING: In deciding a matter of first impression, the Court of Appeals, Edith Brown Clement, Circuit Judge, held that misdemeanor conviction for forcible assault of a federal officer did not require underlying assaultive conduct.

FROM THE OPINION: “As discussed in cases in other circuits, the statute contains two ambiguities. First, it distinguishes between misdemeanor and felony conduct by use of the undefined term ‘simple assault.’ Second, and central to this case, the statute appears to outlaw several forms of conduct directed against federal officers, only one of which is assault, but then distinguishes between misdemeanors and felonies by reference to the crime of assault. The difficulty that has confronted other courts is whether conviction for the non-assaultive conduct apparently outlawed by the statute (i.e., ‘resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing]’ with a federal officer) requires, at a minimum, conduct that amounts to ‘simple assault.’ To put the question another way, can a defendant be convicted of forcible resistance under this statute without having committed an underlying assault?

***

‘[T]his circuit has interpreted ... § 111 to create three separate offenses: “(1) simple assault; (2) more serious assaults but not involving a dangerous weapon; and (3) assault with a dangerous weapon.” ’

***

By implication, the other two forms of assault are felonies under the statute. However, this court has never ruled on whether the additional conduct proscribed in § 111(a)(1) requires, at a minimum, underlying assaultive conduct.

***

The Sixth Circuit … reasoned that interpreting § 111(a)(1) as requiring an underlying assault for a defendant to be convicted would render meaningless the five forms of non-assaultive conduct that are plainly proscribed by the statute.

***

… the phrase ‘simple assault’ is ‘a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) without the intent to cause physical contact or to commit a serious felony’…”

***

We adopt the Sixth Circuit rule and hold that a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct.”

[Defendant loses.]

2. United States v. Miller, 576 F.3d 528 (5th Cir. 2009)

(PER CURIAM)

BACKGROUND: Defendant was convicted in the United States District Court for the Western District of Texas, Lee Yeakel, J., of two counts of attempted forcible assault against federal officers by use of a dangerous weapon, and was sentenced to 300 months in prison. Defendant appealed.

HOLDING: The Court of Appeals held that defendant’s single action of attempting to run over two law enforcement officers with his motor vehicle could not support two separate convictions.

FROM THE OPINION: “On May 1, 2007, a grand jury in the Western District of Texas returned a two-count superseding indictment of Miller, for two counts of attempted forcible assault against federal officers engaged in their official duties by use of dangerous weapon. ... Miller timely appealed, challenging ... the multiplicitous convictions emerging from a single act of assault.”

***
Miller's sentences should be vacated, and the case should be remanded for resentencing. This is because under settled law, the single action of attempting to run over the officers cannot support two separate convictions. Here, since the erroneous second conviction significantly lengthened Miller's sentence, he was clearly prejudiced by it. This unobjected-to error is subject to plain error analysis, and we choose to exercise our discretion to correct it.”

[Defendant wins.]

1. United States v. Allen, 587 F.3d 246 (5th Cir. 2009)

(PER CURIAM)

BACKGROUND: Following bench trial, defendants were convicted in the United States District Court for the Northern District of Texas, John H. McBryde, J., of criminal contempt. Defendants appealed.

HOLDINGS: The Court of Appeals held that:

- district court erred in its definition of willfulness required to support criminal contempt conviction; but
- district courts error was not plain error; and

FROM THE OPINION: “We have held that the elements of criminal contempt under 18 U.S.C. § 401(3) are: (1) a reasonably specific order; (2) violation of the order; and (3) the willful intent to violate the order.” In this circuit ‘[f]or a criminal contempt conviction to stand, the evidence ... must show both a contemptuous act and a willful, contumacious, or reckless state of mind.’ Mrs. Allen claims that the district court used an erroneous definition of ‘willful.’ When asked by defense counsel to define ‘willful,’ the district court explained:

I don't think that's necessary, but one of the things I obviously took into account is whether it was done-it was a volitional act done by someone who knew or reasonably should have been aware that his or her conduct was wrong.

According to Black's Law Dictionary, ‘reckless’ means ‘a gross deviation from what a reasonable person would do.’ On the other hand, ‘negligence’ is defined as ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.’ Based on the district court's recitation of its definition of willfulness, it seems to have used a standard closer to negligence, rather than recklessness.

We have explained that ‘willfulness’ in the context of the criminal contempt statute at a minimum requires a finding of recklessness, which requires more than a finding that an individual ‘reasonably should have known’ that the relevant conduct was prohibited. Thus, the district court clearly erred.

***

The trial judge's statements clearly indicate that the court found that the Allens acted willfully. There was no plain error.”

[Defendant loses.]

G. 18 U.S.C. § 2320(a)(1) [Trafficking in Counterfeit Goods or Services]
1. United States v. Xu, 599 F.3d 452 (5th Cir. 2010)

(Panel: Smith, Garza and Clement, Circuit Judges)

BACKGROUND: Defendant was convicted of conspiring to traffic in counterfeit pharmaceutical drugs, of introducing into interstate commerce misbranded drugs with intent to defraud and mislead, and of trafficking in counterfeit goods, and he filed post-verdict motion for judgment of acquittal on the latter charge. The United States District Court for the Southern District of Texas, 2008 WL 5122125, Sim Lake, J., granted motion, but as to less than all of pharmaceutical drugs involved, and defendant appealed.

HOLDING: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that, in prosecution of defendant for intentionally trafficking, or attempt to traffic, in pharmaceutical drugs through use of counterfeit mark, government failed to show that the mark allegedly counterfeited was registered on the principal register in the United States Patent and Trademark Office (USPTO), as required by terms of criminal statute.

FROM THE OPINION: “Section 2320 punishes ‘[w]hoever[ ] intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services.’ 18 U.S.C. § 2320(a)(1). To establish a violation, the Government must prove that: (1) the defendant trafficked or attempted to traffic in goods or services; (2) such trafficking, or the attempt to traffic, was intentional; (3) the defendant used a counterfeit mark on or in connection with such goods or services; and (4) the defendant knew that the mark so used was counterfeit.” United States v. Hanafy, 302 F.3d 485, 487 (5th Cir. 2002). Xu challenges only the third element-proof that he used a ‘counterfeit mark.’ Under the statute, a ‘counterfeit mark’ must be ‘identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office ["USPTO"] and in use.’ 18 U.S.C. § 2320(e)(1)(A)(ii). Thus, a rational juror must be able
to conclude beyond a reasonable doubt that the mark at issue was ‘registered on the principal register’ and ‘in use.’

***

Here, the Government did not introduce a certificate of registration for Zyprexa. Xu contends that the Government was, therefore, required to produce evidence from which a jury could reasonably conclude that Zyprexa was a trademark registered on the principal register, but that it failed to do so.

***

The closest the Government came to presenting testimony about the trademark itself was when the Eli Lilly employee was asked about the ‘little symbol that’s next to Zyprexa’ on one of the allegedly counterfeit containers of the medication. The employee stated that it was the ‘registered trademark symbol.’ This too is insufficient.”

[Defendant wins.]

1. United States v. Key, 599 F.3d 469 (5th Cir. 2010)

(Please note:山水未雨，未得判决或相关判决。)

BACKGROUND: Defendant pled guilty in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., Chief Judge, to intoxication manslaughter. Defendant appealed.

HOLDING: The Court of Appeals, Edith H. Jones, Chief Judge, held that Texas offense of intoxication manslaughter was properly assimilated into federal law under the Assimilative Crimes Act.

FROM THE OPINION: “At the request of this court, the parties also briefed an additional issue: whether the Texas offense of Intoxication Manslaughter was properly assimilated into federal law under the Assimilative Crimes Act.

FROM THE OPINION: “At the request of this court, the parties also briefed an additional issue: whether the Texas offense of Intoxication Manslaughter was properly assimilated into federal law under the Assimilative Crimes Act (‘ACA’).

***

The ACA, in relevant portion, provides as follows:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title ... is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13. Section 7 of Title 18 provides, inter alia, that ‘lands reserved or acquired for the use of the United States,’ such as the Fort Hood military reservation, are within the ‘special maritime and territorial jurisdiction of the United States’ and so subject to the ACA.

According to the Supreme Court, the words of this statute are not to be taken literally; that is, the fact that conduct could be charged under some federal statute does not necessarily prevent assimilation of a state offense. Lewis, 523 U.S. at 159-60, 118 S.Ct. at 1139 (1998).

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There is also no evidence that Congress intended for an offense such as Key's to be within the exclusive purview of the federal involuntary manslaughter offense. The statute was derived from the common law by the first Congress and has not been altered in words for at least a century.

***

The second subsection of the ACA contemplates assimilation of state offenses for “operating a motor vehicle under the influence of a drug or alcohol,” clarifying the application of penalties under state law 18 U.S.C. § 13(b)(1). The statute also contemplates the assimilation of such offenses that result in the ‘serious bodily injury’ or death of a minor. 18 U.S.C. § 13(b)(2). Further, the ACA imposes additional penalties in DWI cases, when a minor is present or the victim is a minor, if the state offense does not provide for an additional term of imprisonment. 18 U.S.C. § 13(b)(2)(ii). This demonstrates that Congress intended the assimilation of state criminal offenses concerning driving while intoxicated and that its intention extends to cases in which death results.”

[Defendant loses.]

1. 21 U.S.C. § 841(a)(1) and (b)(1)(C) [Prohibited Acts A]

1. United States v. Santillana, ___ F.3d ___, 2010 WL 1484780 (5th Cir. 2010)

(Please note:山水未雨，未得判决或相关判决。)

BACKGROUND: Defendant was convicted by jury in the United States District Court for the Western District of Texas, Robert A. Junell, J., of distributing methadone resulting in death. Defendant appealed.

HOLDINGS: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that:

- evidence was sufficient to link methadone defendant admitted selling to buyer to methadone present in buyer's body at time of his admission to hospital, and
- evidence was sufficient for jury to conclude that methadone buyer's death “resulted” from methadone in his system.
FROM THE OPINION: “The jury heard evidence from Hail, the only expert witness certified in toxicology, that methadone was more than a mere contributing cause to Moore's death; in Hail's opinion, methadone was the determinative cause of death, either in combination with Xanax or by its own effect. The jury was free to weigh the relative persuasiveness of Hail's testimony against that of Peerwani and Rohr, neither of whom gave a detailed explanation of his disagreement with Hail's reasoning.”

[Defendant loses.]

IX. The Guidelines
A. U.S.S.G. 2K2.1(b)(6)
1. United States v. Jeffries, 587 F.3d 690 (5th Cir. 2009)
   (Panel: King, Stewart and Haynes Circuit Judges)

   BACKGROUND: Defendant pled guilty in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., Chief Judge, to being a felon in possession of a firearm. Defendant appealed.

   Holding: The Court of Appeals, Haynes, Circuit Judge, held that discovery of firearm and single rock of crack cocaine during search of vehicle did not support imposition of four-level enhancement for possessing firearm in connection with another felony offense.

   FROM THE OPINION: “Section 2K2.1(b)(6) of the Sentencing Guidelines provides for a four-level enhancement to a sentence for a conviction under § 922(g)(1) where ‘the defendant used or possessed any firearm ... in connection with another felony offense.’ In 2006, the Sentencing Commission issued a new Application Note to that section to provide definition to the phrase ‘in connection with’ in order to resolve 'a circuit conflict pertaining to the application of [then] § 2K2.1(b)(5) [now § 2K2.1(b)(6)] ... specifically with respect to the use of a firearm “in connection with” burglary and drug offenses.’ U.S.S.G. app. C. supp., amd. 691, at 177. The Application Notes now provide that ‘in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia’ the enhancement automatically applies because the Sentencing Commission has concluded that ‘the presence of the firearm has the potential of facilitating’ these types of offenses. § 2K2.1 cmt. n. 14(B)(ii) (emphasis supplied).

   ***

   The facts here are too sparse to support the conclusion that Mr. Jeffries's possession of a gun ‘emboldened’ him to engage in the crime of cocaine possession, see, e.g., Jenkins, 566 F.3d at 164; Smith, 535 F.3d at 886, or that it served to ‘protect’ such a small amount of drugs, see, e.g., Jenkins, 566 F.3d at 164; United States v. Angel, 576 F.3d 318, 322 (6th Cir.2009); United States v. Gambino-Zavala, 539 F.3d 1221, 1230 (10th Cir.2008). While this court and other courts may well frequently reach those conclusions where there is evidence to support them, the evidence that would allow us to draw those conclusions must be something more than the simultaneous possession of a small quantity of drugs and a gun in the same vehicle standing alone; otherwise, the limitation of Application Note 14(B)(ii) to drug trafficking has no effect. We find no such evidence in the record here.”

[Defendant wins.]

B. U.S.S.G. § 4B1.4(b)(3), (c)(2)
1. United States v. Neal, 578 F.3d 270 (5th Cir. 2009)
   (Panel: Wiener, Garza and Elrod, Circuit Judges)

   BACKGROUND: Defendant was convicted in the United States District Court for the Western District of Louisiana, Patricia H. Minnalli, J., of being felon in possession of firearms, and he appealed.

   HOLDING: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that defendant's simple possession of narcotics was not “controlled substance offense,” for purposes of Guidelines enhancements for armed career criminals.

   FROM THE OPINION: “A defendant is subject to the enhancements in § 4B1.4(b)(3) & (c)(2) if he possesses firearms in connection with a ‘controlled substance offense,’ which the Guidelines define as a crime involving ‘the manufacture, import, export, distribution, or dispensing of a controlled substance ... or the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense.’ U.S.S.G. § 4B1.2(b). Mere possession of illegal drugs, without more, is not a ‘controlled substance offense’ for these purposes. Salinas v. United States, 547 U.S. 188, 188, 126 S.Ct. 1675, 164 L.Ed.2d 364 (2006).

   Here, Neal was found with ‘undetermined’ amounts of illegal drugs in his home. The district court did not make a finding that Neal possessed the drugs ‘with intent to manufacture, import, export, distribute, or dispense.’ See § 4B1.2(b). Indeed, the government concedes that there is no evidence in the record to support such a finding. Accordingly, Neal
did not possess the firearms in connection with a ‘controlled substance offense,’ and application of the enhancements in § 4B1.4(b)(3) & (c)(2) was erroneous.”

[Defendant wins.]

C. U.S.S.G. § 2L1.2; 5K2.0
1. United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009)
   (Panel: King, Higginbotham and Clement, Circuit Judges)
   BACKGROUND: Defendant pleaded guilty in the United States District Court for the Southern District of Texas, Gray Miller, J., to charge of being in the United States following deportation. Defendant appealed.
   HOLDING: The Court of Appeals, Patrick E. Higginbotham, Senior Circuit Judge, held that district court could not look to police report, as document that it could not consider under enhancement guideline applicable to offense of unlawfully entering or remaining in United States, to determine that defendant's prior state drug conviction, if indictment had described defendant's conduct in detail, involved actual sale of cocaine.
   FROM THE OPINION: “The district court also cited § 5K2.0 as a ground for departure. To justify this guideline departure, the court looked to Gutierrez's 2003 Texas state conviction for delivery of a controlled substance. The district court recognized that the offense did not qualify for the felony drug trafficking enhancement in § 2L1.2 as this Court has directly held that, without more detail in the indictment or other Shepard-approved document, the Texas delivery offense does not qualify for the enhancement: ‘The statutory definition of delivery of a controlled substance in Texas ... encompasses activity that does not fall within section 2L1.2's definition of “drug trafficking offense.” ’ For the departure, the district court looked to the police report-a document it could not consider under the § 2L1.2 enhancement-to determine that Gutierrez's conduct involved an actual sale of cocaine, activity within the federal definition of a drug trafficking offense, and not merely an offer to sell, which is outside the definition. It determined that Gutierrez's conduct would have triggered the enhancement if the indictment had described Gutierrez's conduct in detail. It therefore applied the § 5K2.0 departure.
   A district court cannot escape Taylor and Shepard by looking to a police report-which it could not earlier use to determine whether a prior conviction was a drug trafficking offense-to later justify a departure on the basis that the enhancement should have applied.”

[Defendant wins.]

D. U.S.S.G. § 4B1.1(a)
1. United States v. Daniels, 588 F.3d 835 (5th Cir. 2009)
   (PER CURIAM)
   BACKGROUND: Following plea of guilty to conspiring to possess with intent to distribute marijuana defendant moved to vacate his sentence. The United States District Court for the Western District of Louisiana, Tom Stagg, J., 2008 WL 953695, denied the motion. Defendant appealed.
   HOLDING: The Court of Appeals held that defendant's prior Texas conviction for which he received deferred adjudication counted toward his status as a career offender.
   FROM THE OPINION: “Daniels pleaded guilty in Texas court to aggravated assault with a deadly weapon, for which he received deferred adjudication. This deferred adjudication was dismissed almost as a matter of course-and for reasons having nothing to do with ‘innocence or errors of law.’ Daniels presents no evidence to the contrary. The law thus requires that Daniels—a recidivist offender—may not doubly benefit from the fortune of a lenient disposition in the Texas courts—a disposition subsequent to which he committed a serious federal crime. Notwithstanding its procedural dismissal, his Texas guilty plea may count toward Daniels's status as a career offender under the sentencing guidelines.”

[Defendant loses.]

X. Sentencing
A. Allocution
1. United States v. Avila-Cortez, 582 F.3d 602 (5th Cir. 2009)
   (Panel: Jolly, DeMoss and Prado, Circuit Judges)
   BACKGROUND: Defendant appealed sentence imposed upon his conviction in the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., for being an alien unlawfully found in the United States after having been previously denied admission, excluded, deported, or removed.
   HOLDING: The Court of Appeals, Prado, Circuit Judge, held that district court plainly erred in failing to give defendant an opportunity to allocute before imposing sentence.
   FROM THE OPINION: “The district court did not address Avila-Cortez personally. In fact, the only time Avila-Cortez spoke was when he twice said
Avila-Cortez explains in his brief what he would have said to the district court had he been given the chance: that he had a specific strategy to address his problem with alcohol and that he was making plans to return permanently to Mexico with his wife. Although Avila-Cortez's counsel summarily referred to this mitigating evidence in his argument, he did not give the detail, expression, or expansion that Avila-Cortez says he would have provided. That is, Avila-Cortez's lawyer did not present to the court the same quantity or quality of mitigating evidence that Avila-Cortez would have given had he been able to allocute. As Justice Frankfurter explained in his plurality opinion in Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), 'The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.'

[Defendant wins.]

B. Vindictive Sentencing

1. United States v. Rodriguez, ___ F.3d ___, 2010 WL 1080935 (5th Cir. 2010)

(Please Note: The text beyond this point is not provided in the image.)

[Defendant loses.]
Significant Decisions of the Fifth Circuit Court of Appeals

District of Mississippi, Sharion Aycock, J., to conspiracy to traffic and transfer firearms and to making false statements in connection with the purchase of a firearm. Defendant appealed her sentence.

HOLDING: The Court of Appeals, Edith Brown Clement, Circuit Judge, held that defendant could not collaterally attack prior state conviction used to enhance her sentence;

FROM THE OPINION: “…in Custis, the Court held that the Constitution requires collateral review of a defendant's prior conviction used to enhance a federal sentence only when the defendant alleges that the conviction was obtained in violation of her Sixth Amendment right to counsel.

***

In a number of unpublished decisions following Custis, this court has refused to entertain collateral attacks on prior state convictions made during federal sentencing proceedings when, as here, the defendant does not allege that the prior conviction was un counsel ed.”

[Defendant loses.]

XI. Restitution

A. Child Pornography Cases

1. In re: Amy, 591 F.3d 792 (5th Cir. 2009)

(PANEL: Davis, Smith and Dennis, Circuit Judges [Dennis, dissenting opinion])

BACKGROUND: Following conviction of defendant for possession of material involving sexual exploitation of children, one of the victims sought restitution. The United States District Court for the Eastern District of Texas, Leonard E. Davis, J., 2009 WL 4572786, denied request. Victim sought writ of mandamus.

HOLDING: The Court of Appeals, W. Eugene Davis, Circuit Judge, held that district court's decision was not indisputably wrong.

FROM THE OPINION: “We agree with the district court that

[If] the Court were to adopt Amy's reading of section 2259 and find that there is no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

The crux of Amy's petition is the legal argument that 18 U.S.C. § 2259 permits a victim to receive mandatory restitution irrespective of whether the victim's harm was proximately cause by the defendant. The government agreed with the district court that Section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. Courts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259. United States v. Crandon, 173 F.3d 122, 126 (3d Cir.1999); United States v. Searle, 65 Fed.Appx. 343, 346 (2d Cir.2003); United States v. Doe, 488 F.3d 1154, 1160 (9th Cir.2007); United States v. Estep, 378 F.Supp.2d 763, 770-72 (E.D.Ky.2005); United States v. Raplinger, No. 05-CR-49-LRR, 2007 WL 3285802 (N.D.Iowa Oct. 9, 2007). Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct.

The district court permitted extensive briefing and conducted two evidentiary hearings on the issue of restitution, giving Amy a full opportunity to be heard through her able representative. The court's Memorandum Opinion and Order reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography. Despite the government's contrary position to the court's ultimate factual finding on proximate causation, the district court did not ‘so clearly and indisputably abuse[ ] its discretion as to compel prompt intervention by the appellate court.’ In re United States, 397 F.3d 274, 282 (5th Cir.2005).

We, therefore, DENY the petition for writ of mandamus.”

[Defendant wins.]

XII. Reduction of Sentence (Crack Cocaine Case)

A. A Consideration of Post-conviction Conduct

1. United States v. Smith, 595 F.3d 1322 (5th Cir. 2010)

(PANEL: Garza, DeMoss and Clement, Circuit Judges)

BACKGROUND: Federal prisoner, who had been convicted of attempting to possess with intent to distribute cocaine base, moved for a reduction in his sentence based on amendments to the Sentencing Guidelines concerning crack cocaine. The United States District Court for the Southern District of Mississippi, Tom S. Lee, J., 2008 WL 4602316, declined to reduce prisoner's sentence based on his record of 19 prison disciplinary violations, and subsequently denied reconsideration. Prisoner appealed.
HOLDING: The Court of Appeals, Emilio M. Garza, Circuit Judge, held that the district court did not abuse its discretion in considering prisoner's post-conviction disciplinary record in determining whether to grant his request for a sentencing reduction.

FROM THE OPINION: “We decline to hold that a district court cannot consider post-conviction conduct in determining whether to grant a sentencing reduction under § 3582(c)(2). To do so would fly in the face of plain language that ‘the court may consider post-sentencing conduct ... in determining ... [w]hether a reduction ... is warranted ... and the extent of such reduction.’ U.S.S.G. § 1B1.10 cmt. n. 1(B)(iii); see also 18 U.S.C. § 3582(c)(2).”

[Defendant loses.]

2. United States v. Martin, 596 F.3d 284 (5th Cir. 2010)

(P panel: Jolly and Dennis, Circuit Judges; Jordan, District Judge, Southern District of Mississippi, Sitting by Designation)

BACKGROUND: During pendency of defendant's appeal from sentence imposed upon his conviction for possession of crack cocaine with intent to distribute, he moved for reduction of sentence pursuant to Sentencing Guidelines amendment which reduced the disparity between cocaine and crack cocaine sentences. Before case was set for oral argument, the United States District Court for the Western District of Louisiana, Robert G. James, Chief Judge, reduced defendant's sentence on its own motion under § 3582(c)(2). Before the case was set for oral argument, the district court reduced Martin's sentence on its own motion under § 3582(c)(2).

Martin argues that he is entitled to remand for full resentencing, because his first sentence is unreasonable in the light of the revised guidelines. He made no objection at the time of sentencing, so we review for plain error. United States v. Anderson, 559 F.3d 348, 358 (5th Cir.), cert. denied, --- U.S. ---, 129 S.Ct. 2814, 174 L.Ed.2d 308 (2009). As the district court is to sentence under the guidelines in effect at the time of sentencing, 18 U.S.C. § 3553(a)(4)(A)(ii), we find no error, much less plain error...”

[Defendant loses.]

XIII. Revocation of Supervised Release

A. Consecutive Sentences

1. United States v. Whitelaw, 580 F.3d 256 (5th Cir. 2009)

(P panel: Davis, Owen and Haynes, Circuit Judges)

BACKGROUND: Government moved for revocation of defendant's supervised release. The United States District Court for the Western District of Texas, Xavier Rodriguez, J., granted the motion and imposed sentence, and defendant appealed.

HOLDING: The Court of Appeals, W. Eugene Davis, Circuit Judge, held that:

- district court had discretion to order that sentence imposed upon the revocation of defendant's supervised release run consecutively to other sentences;
- district court's failure to state specific reasons for imposing a sentence different than that described in the Sentencing Guidelines range was error that was clear or obvious.

FROM THE OPINION: “Whitelaw argues first that the sentence was unreasonable because the district court ordered it to run consecutively to any other sentence.

The district court has the discretion to order that a sentence imposed upon the revocation of supervised release run concurrently with or consecutively to other sentences.”

[Defendant loses.]

B. Reliance on an Incorrect Guideline Range

1. United States v. Davis, ___ F.3d ___, 2010 WL 1254634 (5th Cir. 2010)

(P panel: King, Jolly and Stewart, Circuit Judges)

BACKGROUND: After defendant was convicted of armed robbery and sentenced to supervised release, and after he was indicted while on supervised release for being a felon in possession
of a firearm, the United States District Court for the Northern District of Texas, Jorge A. Solis, J., revoked his supervised release. Defendant appealed.

HOLDING: The Court of Appeals, King, Circuit Judge, held that Court of Appeals, under plain error review, would not exercise its discretion to remedy district court's consideration of incorrect advisory range.

FROM THE OPINION: “At the revocation hearing, Davis's counsel represented that the 15 to 21 month advisory range was correct and requested that Davis receive a sentence within that range. After hearing Davis's allocution, the district court imposed 24 months of imprisonment to be followed by two years of supervised release.

***

The correct advisory range was therefore only 6 to 12 months.

***

Because Davis did not object to the 15 to 21 month advisory range in the district court, however, we review under a more deferential standard for plain error. United States v. Davis, 487 F.3d 282, 284 (5th Cir. 2007).”

[Defendant loses.]

XIV. Conclusion

It has been an honor to speak at this convention. I hope that this paper will be of some help to you during the coming year. If I can ever help you in Tyler, please don’t hesitate to call.

Buck
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