CASE LAW UPDATE – 2021

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THE UNITED STATES SUPREME COURT

a. *Borden v. United States*, 2021 WL 2367312 (June 10, 2021)

In *Borden*, the Supreme Court held that an "offense[] criminalizing reckless conduct" does not qualify as a "violent felony" under the Armed Career Criminal Act's elements clause. *Borden v. United States*, 2021 WL 2367312, at *5 (June 10, 2021). That clause defines the term "violent felony" to include a prior felony conviction that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In *Voisine v. United States*, the Supreme Court considered a similar definition but one that omitted the words, "against the person of another." *Borden*, 2021 WL 2367312, at *5 (citing 18 U.S.C. § 921(a)(33)(A)). There, it focused on the word "use," which requires only "active employment" of force and is "'indifferent' to whether an actor choosing to employ force had a mental state of recklessness, knowledge, or purpose." *Id.* at *5 (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016)). It reached a different result in *Borden* based on the difference in statutory text. "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* "Reckless conduct is not aimed in that prescribed manner." *Id.* Recklessness "instead involve[s] insufficient concern with a risk of injury." *Id.* at *4. Mr. Borden received an ACCA sentence due in part to an aggravated-assault conviction defined to include the reckless causation of bodily injury. *Id.* at *3 (citing TENN. CODE ANN. §§ 39-13-101(a)(1), -102(a)(2)). The Supreme Court reversed Mr. Borden's enhanced sentence and remanded for further proceedings. *Id.* at *12.

Borden has immense implications for defense practice in the Fifth Circuit and Northern District of Texas. For one, it changes the law. In *United States v. Burris*, the Fifth Circuit held that "reckless conduct constitutes the 'use' of physical force under the ACCA." 920 F.3d 942, 952 (5th

Cir. 2019). The Supreme Court citied *Burris* in *Borden* as a circuit-court opinion on the wrong side of a circuit split and then sided with the circuit courts of appeals on the other side of the issue. *See Borden*, 2021 WL 2367312, at *4 n.1 (citing *Burris*, 920 F.3d at 951). In *Borden*, the Supreme Court also cited a pair of cases involving Texas crimes. In one, "a police officer was convicted of a reckless assault for speeding to a crime scene without his siren on and hitting another patrol car." *Id.* at *10 (citing *Seaton v. State*, 385 S.W.3d 85, 88-89 (Tex. Ct. App. 2012)). The second case involved a robbery-by-injury offense where "[a] shoplifter jump[ed] off a mall's second floor balcony while fleeing security only to land on a customer." *Id.* (citing *Craver v. State*, 2015 WL 3918057, at *2 (Tex. Ct. App. June 25, 2015)). Although the defendants in both cases "acted recklessly" and "hurt other people," "few would say their convictions were for 'violent felonies.'" *Id.*

Borden will apply in other sentencing contexts. The Guidelines Manual uses an identical elements clause to define the term "crime of violence." U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4B1.2(a)(1) (Nov. 1, 2018). Other sections of the Guidelines Manual then incorporate that definition into their offense-level, *see, e.g.*, USSG § 2K2.1 cmt. n.1, and criminal-history calculations, *see* USSG § 4A1.1 cmt. n.5.

THE FIFTH CIRCUIT COURT OF APPEALS

a. ***Criminal Procedure***

i. *United States v. Morton*, 984 F.3d 421 (5th Cir. 2021), *vacated*, 996 F.3d 754 (5th Cir. 2021)

A police officer stopped Mr. Morton for speeding, smelled marijuana, and then searched his van. *United States v. Morton*, 984 F.3d 421, 424 (5th Cir. 2021). The search turned up "sixteen ecstasy pills, one small bag of marijuana, and a glass pipe." *Id.* The officer also found "children's school supplies, a lollipop, 14 sex toys, and 100 pairs of women's underwear in the vehicle," and from that evidence, suspected that Mr. Morton may be a pedophile. *Id.* The officer sought a search warrant to

review Mr. Morton's phones for "more evidence of Morton's criminal drug activity," but the affidavits submitted to support the warrant left out the pedophilia concerns. *Id.* A judge issued the warrant, and while searching Mr. Morton's phone, a police officer "came across sexually explicit images of children." *Id.* "The officer[] then sought and received another set of warrants to further search the phones for child pornography, ultimately finding 19,270 images of sexually exploited minors." *Id.*

Mr. Morton entered a conditional guilty plea to child-pornography charges after the district court denied his motion to suppress. "He argued that the affidavits in support of the first set of warrants failed to establish probable cause to search for his additional criminal drug activity." *Id.* The government disagreed, and putting aside probable cause, asked the district court to apply the good-faith exception. *Id.* "The district court ruled in favor of the government." *Id.*

On appeal, the Fifth Circuit reached a compromise position on the question of probable cause. "The affidavits," it held, "successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession." *Id.* at 427. After all, "[t]o possess drugs, one must have purchased them; contacts, call records, and text messages could all easily harbor proof of this purchase." *Id.* The Fifth Circuit nevertheless found that the affidavit lacked probable cause to search Mr. Morton's photos. The affidavit laid out claims about the use of photographs by drug dealers. *Id.* at 428. The facts, however, merely established that Mr. Morton possessed user-quantities of marijuana and ecstasy. *Id.* Since the affidavit failed to establish Mr. Morton as a dealer, there was no probable cause to search his photographs. *Id.*

The Fifth Circuit then reversed Mr. Morton's conviction and rejected the good-faith exception.

> The facts here lead to the sensible conclusion that Morton was a consumer of drugs; the facts do not lead to a sensible conclusion that Morton was a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval. Consequently, the search here does not receive the protection of the good faith exception to the exclusionary rule.

Id. at 430. For the same reason, the Fifth Circuit held "that the magistrate did not have a substantial basis for determining that probable cause existed to extend the search to the photographs on the cellphones." *Id.* at 431. It then reversed the district court's contrary findings and vacated Mr. Morton's conviction. *Id.*

The Fifth Circuit has since vacated the panel opinion and set the case for *en banc* rehearing. *United States v. Morton*, 996 F.3d 754, 755 (5th Cir. 2021). In its petition for rehearing, the government faulted the panel's compromise position and argued that probable cause to search the phone extends to all information therein. *See* Petition of the United States for Rehearing En Banc at 11-12, *United States v. Morton*, No. 19-10842 (March 11, 2021). The government also faulted the compromise position as unworkable. "The forensic tools that the government uses to best ensure the integrity and completeness of data obtained from cell-phones during the execution of warrants," it explained, "do not enable searching their contents by 'place' or application." *Id.* at 14.

ii. *United States v. Brune*, 991 F.3d 652 (5th Cir. 2021)

Here, the Fifth Circuit considered the relationship between the Double Jeopardy Clause and a defendant's guilty plea. Mr. Brune pleaded guilty to an information charging him with conspiracy "to possess with intent to distribute a mixture and substance containing more than 50 grams of

methamphetamine." *United States v. Brune*, 991 F.3d 652, 656 (5th Cir. 2021). 21 U.S.C. § 841(b)(1)(B) "criminalizes possession of a substance containing more than 50 grams of meth" and sets the penalty range at five to forty years. *Id.* The information, however, cited 21 U.S.C. § 841(b)(1)(C), which sets "the baseline statutory penalty for *any quantity* of methamphetamine," *id.* (quoting *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000)), and puts the statutory sentencing range at "20 years of less." *Id.* Mr. Brune's factual resume cited § 841(b)(1)(B), and he referenced the subsection nine times at the guilty-plea hearing. *Id.* The magistrate who took the plea nevertheless "copied the information's erroneous citation" in its recommendation to the district court, and the district court "adopted that recommendation, accepted the plea, and adjudged Brune guilty." *Id.* The government objected after the presentence report set out § 841(b)(1)(C)'s statutory sentencing range, but Mr. Brune argued "that modification of the court's order accepting his plea would violate the prohibition against double jeopardy." *Id.* The district court rejected this argument, and he pursued the same claim on appeal. *Id.* at 656-57.

The Fifth Circuit began its analysis by reciting the double-jeopardy rules applicable at trial. "To violate" the Double Jeopardy Clause, "the initial prosecution must have 'put [the defendant] in jeopardy.'" *Id.* at 657 (quoting U.S. CONST. amend. V). In a trial, jeopardy attaches "when the jury is empaneled and sworn," *id.* (quoting *Crist v. Bretz*, 437 U.S. 28, 38 (1978)), and terminates only after "criminal proceedings against an accused have . . . run their full course," *id.* (quoting *Justs. of Bos. Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984)). "[A] mistrial for a deadlocked jury," for example, "does not terminate jeopardy." *Id.* (citing *Richardson v. United States*, 468 U.S. 317, 323-24 (1984)). "[A]n acquittal," by contrast, "does." *Id.* (citing *Lydon*, 466 U.S. at 308).

The Fifth Circuit then turned to guilty pleas. There the law is less settled. "Where a guilty plea gets derailed, the Supreme Court has neither identified a precise moment of attachment nor

applied the concept of termination." *Id.* In *Ohio v. Johnson*, however, the Supreme Court considered a situation similar and rejected a double-jeopardy challenge. In *Johnson*, the defendant faced multiple charges, pleaded guilty to a lesser-included offense, and "then moved to dismiss the greater offenses on double-jeopardy grounds." *Id.* at 658 (citing *Ohio v. Johnson*, 467 U.S. 493, 494 (1984)). The Supreme Court rejected the challenge and "concluded that no double-jeopardy interest 'is implicated' in the 'acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending.'" *Id.* (quoting *Johnson*, 467 U.S. at 501).

From there, the Fifth Circuit decided that *Johnson* abrogated its earlier authority on the matter. Before *Johnson*, it analogized "the acceptance of a guilty plea" to a conviction following trial and held that jeopardy attached at that point. *Id.* (quoting *United States v. Sanchez*, 609 F.3d 761, 762 (5th Cir. 1980)). In *Brune*, the Fifth Circuit declared that holding to be inconsistent with *Johnson* and decided to abandon it. *Id.* at 663-64.

The Fifth Circuit then announced a new rule and applied it to Mr. Brune's case. "*Johnson*," it explained, "provided a framework . . . for determining whether jeopardy attaches when a defendant pleads guilty." *Id.* at 665 (quoting *United States v. Patterson*, 406 F.3d 1095, 1097 (9th Cir. 2005) (Kozinski, J., dissenting from denial of rehearing en banc)). "Courts must examine 'the twin aims of the Double Jeopardy Clause: protecting a defendant's finality interests and preventing prosecutorial overreaching.'" *Id.* (quoting *Patterson*, 406 F.3d at 1097 (Kozinski, J., dissenting from denial of rehearing en banc)). The Fifth Circuit considered Mr. Brune's finality interests and found them to be slight. "[T]he mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict." *Id.* (quoting *United States v. Soto*, 825 F.2d 616, 620 (5th Cir. 1987)). "Moreover, given a court's ability to correct errors, an erroneous citation in an order accepting a plea does not imply an acquittal." *Id.* (citing FED. R. CRIM. P. 36). The Fifth Circuit

likewise found no "prosecutorial overreach." *Id.* at 666. "The government did not bring new charges against Brune." *Id.* "Nor did it dupe him with a plea agreement." *Id.* And since Mr. Brune had not proceeded to trial, the government did not have "one *full* opportunity to convict him" for violating § 841(b)(1)(B). *Id.* "Because Brune's finality interest is low, and there is no evidence of prosecutorial overreach, jeopardy did not attach upon the court's acceptance of Brune's guilty plea," and there was "no double-jeopardy violation." *Id.*

iii. *United States v. Staggers*, 961 F.3d 745 (5th Cir. 2020)

In *Staggers*, the Fifth Circuit remanded for additional findings on a motion to suppress. The district court found that the defendant's girlfriend "gave implied consent for two law-enforcement officers . . . to enter her residence," but in doing so, failed to resolve an evidentiary dispute. *See United States v. Staggers*, 961 F.3d 745, 758 (5th Cir. 2020).

> The district court acknowledged that "[t]he officers testified that Jupiter initially opened the door about half way and then opened it wider and stepped aside for them to enter" while Jupiter "testified that she opened the door a little and stood between the door and the frame, but that she did not open it wider and step aside to allow the officers in." The district court did not decide to credit one version of events over the other; instead, it reasoned that Jupiter gave implied consent because "testimony of all parties indicates that there was no forced entry nor antagonistic response" and "Jupiter did not testify that the officers physically moved her out of the way."

Id. "This reasoning," the Fifth Circuit explained, "is faulty." *Id.* For one, "[t]he officers did not testify—nor did the district court find—that they asked Jupiter for permission to enter, so her failure to object does not constitute implied consent." *Id.* "Thus, Jupiter implicitly consented to the officers' entry, if at all, by opening the door wider and stepping aside, a gesture that could be understood as communicating consent depending on the surrounding circumstances." *Id.* The district court had not resolved the conflicting testimony on that subject and thereby neglected to

"make a necessary finding." *Id.* at 758-59. The Fifth Circuit remanded "for further proceedings." *Id.* at 759.

b. ***Crimes & Defenses***

i. *United States v. Barnes*, 979 F.3d 283 (5th Cir. 2020)

To unlawfully obstruct a federal audit, the defendant must, "with intent to deceive or defraud the United States, endeavor[] to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of $100,000, directly or indirectly, from the United States in any [one-year] period under a contract or subcontract, grant, or cooperative agreement." 18 U.S.C. § 1516. The defendant, on trial for his role in a fraudulent health-care scheme, argued that the government was required to show that "*he* received 'in excess of $100,000 . . . from the United States.'" *United States v. Barnes*, 979 F.3d 283, 297 (5th Cir. 2020) (quoting 18 U.S.C. § 1516). The Fifth Circuit rejected this interpretation and instead held the statute's jurisdictional element to require evidence that the "person, entity, or program" involved in the offense "receiv[ed] in excess of $100,000." *Id.* (quoting 18 U.S.C. § 1516). The evidence at trial established that the defendant obstructed an audit related to Medicare, "a 'program receiving in excess of $100,000 . . . from the United States'" and affirmed his conviction on that basis. *Id.* (quoting 18 U.S.C. § 1516). To support its analysis, the Fifth Circuit relied on the statute terms and its underlying policy. *Id.* at 297-98. "Under" the defendant's "interpretation, the amount of money received by an alleged violator would often be the statute's limiting criterion, but that "result would inherently thwart Congress's intentions when it comes to enforcing the statute." *Id.* at 298.

ii. *United States v. Penn*, 969 F.3d 450 (5th Cir. 2020)

In *Penn*, the Fifth Circuit addressed the application of the justification defense in a felon-in-possession case. The defendant's aunt handed him a gun during a fight, which eventually erupted into a shootout. *United States v. Penn*, 969 F.3d 450, 453 (5th Cir. 2020). The defendant fled in his girlfriend's car and took the gun with him. *Id.* at 454. He later attempted to evade an officer responding to the shootout. *Id.* By his own admission, the defendant did not pull over because "he was a convicted felon with a gun in the car." *Id.* He ultimately crashed and fled the scene with the firearm before ditching it in a field. *Id.* The government later charged the defendant with unlawfully possessing the handgun, and Mr. Penn "went to trial primarily to raise an affirmative defense: he argued that he was justified in briefly possessing the gun to defend himself." *Id.* "[T]he district court," however, "didn't allow Penn to present that defense because Penn held on to the gun longer than necessary," and on appeal, the Fifth Circuit affirmed. *Id.* at 454-57. "[T]he defense," the Fifth Circuit explained, "protects a defendant 'only for possession during the time' that the emergency exists." *Id.* at 456 (quoting *United States v. Panter*, 688 F.3d 268, 272 (5th Cir. 1982)). Mr. Penn held onto the gun after the shootout ended and "passed up several chances to give" it "up." *Id.* at 457. He could have, for example, pulled over and explained the situation to the pursuing officer. *Id.* He also could have left the gun with the wrecked vehicle. *Id.* He did neither, and as a result, the Fifth Circuit reached the following conclusion: "[N]o reasonable jury could find that Penn possessed the firearm 'only . . . during the time he was endangered.'" *Id.* (*Panter*, 688 F.3d at 272).

iii. *United States v. Coffman*, 969 F.3d 186 (5th Cir. 2020)

Here, the Fifth Circuit clarified the elements of a statute criminalizing the theft of public funds. 18 U.S.C. § 641 makes it a crime to "embezzle[,] steal[,] purloin[,]" knowingly convert[,]" or "without authority, sell[,] convey[,] or dispose[] of any record, voucher, money, or thing of value of

the United States or of any department or agency thereof." The indictment tracked the statute's language, and in its instructions, the district court did not require the jury to agree unanimously on "whether" the defendant "engaged in embezzling or stealing." *United States v. Coffman*, 969 F.3d 186, 191 (5th Cir. 2020). The defendant argued that these alternatives were distinct elements, each of which corresponded to a separate crime, and "[t]he Constitution requires that jurors unanimously agree that the Government proved all the elements of an offense." *Id.* (citing *Richardson v. United States*, 526 U.S. 813, 816-17 (1999)). The Fifth Circuit rejected the claim and affirmed the conviction. Given their similarity to one another and inclusion within a single paragraph, the Fifth Circuit held that the "alternative verbs" at issue "are means of committing" a single "offense," not distinct "elements." *Id.* at 192. It also contrasted those verbs with another list contained in the statute's second paragraph. *Id.* at 191. The distinct nature of the various acts outlawed in the two paragraphs meant the paragraphs defined distinct crimes. *Id.* (citing *United States v. Fairley*, 880 F.3d 198, 205 (5th Cir. 2018)). "That structural point" led the Fifth Circuit to the following conclusion: "[T]here are two separate crimes, not seven in the first paragraph alone." *Id.*

c. ***Guilty Pleas & Plea Agreements***

i. *United States v. Kim*, 988 F.3d 803 (5th Cir. 2021)

The Fifth Circuit allowed the defendant to challenge a restitution order on appeal despite an appeal waiver. In the plea agreement, Mr. Kim waived his right "to appeal any aspect of the conviction or sentence." *United States v. Kim*, 988 F.3d 803, 806 (5th Cir. 2021). He later argued that the district court miscalculated his restitution obligation by including losses he did not proximately cause. *See id.* at 809. The government invoked the appeal waiver to preclude relief, but the Fifth Circuit ruled in Mr. Kim's favor. "[N]o appeal waiver serves as an absolute bar to all appellate claims," and as the Fifth Circuit had previously recognized, a claim "that a sentence . . . exceeds the

statutory maximum" is "unwaiveable." *Id.* at 810 (quoting *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019)). "[A] district court imposes a sentence expressly foreclosed by statute when it orders restitution . . . for losses not proximately caused by the defendant," and Mr. Kim raised that exact claim on appeal. *See id.* (quoting *Leal*, 933 F.3d at 431). His challenge thus survived the appeal waiver, and the Fifth Circuit proceeded to the merits. *Id.* at 811.

ii. *United States v. Napper*, 978 F.3d 118 (5th Cir. 2020)

This opinion deals with the relationship between the statutory maximum sentences listed in a plea agreement and a series of revocation sentences imposed later on. According to Mr. Napper's plea agreement, the district court "could impose 'a term of supervised release of not more than 5 years.'" *United States v. Napper*, 978 F.3d 118, 122-23 (5th Cir. 2020). The plea agreement also warned Mr. Napper that a violation could result in imprisonment "for the entire term of supervised release." *Id.* at 122-23. The district court revoked Mr. Napper twice, and on both occasions, imposed a 37-month term of imprisonment. *Id.* at 123. Mr. Napper appealed following the second revocation and argued that the aggregate revocation sentences—74 months—exceeded the statutory maximum described in his plea agreement—60 months. *Id.* The Fifth Circuit disagreed. "The plain language of the plea agreement makes clear that the words, 'a term of supervised release' . . . means the initial term of supervised release imposed by the district court for Napper's plea of guilty to the [original] drug-trafficking crime." *Id.* at 123. "The district court imposed the maximum term of supervised release, five years, and upon later determining that Napper violated the conditions of that supervision, the district court imprisoned Napper for less than five years—37 months." *Id.* at 124. Given these facts, the Fifth Circuit held that his second revocation sentence did not result in a breach of the plea agreement. *Id.*

iii. *United States v. Valdez*, 973 F.3d 396 (5th Cir. 2020)

The defendant in *Valdez* raised an ineffective-assistance claim challenging his attorney's pre-plea miscalculation of the advisory sentencing range. In short, his attorney "underestimated" the "Guidelines range by failing to consider the cross-reference provision of section 2K2.1(c)(1)." *United States v. Valdez*, 973 F.3d 396, 403 (5th Cir. 2020). According to Mr. Valdez, his "counsel's performance" thereby "fell below an objective standard of reasonableness." *Id.* at 402 (quoting *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004)). The panel majority disagreed. "[M]issing a single cross-reference in the" Guidelines Manual, it explained, is not "*so* deficient that it is *constitutionally* deficient." *Id.* at 405 n.4. After all, the panel majority reasoned, the Guidelines Manual "contains so many cross-references that *all* involved in the calculation frequently miss them." *Id.* The panel majority also ruled against Mr. Valdez on the question of prejudice. "In the context of a guilty plea," a defendant alleging ineffective assistance must establish prejudice by showing "a reasonable probability that the defendant 'would not have pleaded guilty and would have insisted on going to trial'" absent the attorney's error. *Id.* at 402-03 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Mr. Valdez's decision to plead guilty, however, coincided with an adverse ruling on a potential defense, and the panel majority interpreted his decision to forgo trial as primarily based on that ruling, not the underestimated sentencing range. *Id.* at 405. Judge Weiner dissented. He characterized the attorney's mistake as one rooted in "ignorance of basic Guidelines provisions," and on that basis, would find deficient performance. *Id.* at 410 (Wiener, J., dissenting). Judge Weiner also found the error prejudicial. The correct range effectively nullified the acceptance-of-responsibility adjustment, and in light of that fact, Judge Weiner concluded that Mr. Valdez would not have pleaded guilty had he been aware of the correct sentencing range. *Id.* at 411 (Wiener, J., dissenting).

d. ***Trial***

i. *United States v. Nora*, 988 F.3d 823 (5th Cir. 2021)

In *Nora*, the Fifth Circuit reversed a series of fraud convictions for insufficient evidence. The defendant worked as an office manager for a medical practice engaged in a fraud and kickback scheme. *Id.* at 825. Mr. Nora "coordinated new patient intake and admissions." *Id.* at 826. He "was [also] responsible for scheduling home nursing visits for the patients and processing the visit notes." *Id.* at 827. "There is," the Fifth Circuit explained, "no dispute that Nora worked at" the company" while fraud and kickback schemes occurred," *id.* at 829, but the government's "evidence did not prove that Nora understood" his employer's "various practices and schemes to be fraudulent or unlawful," *id.* at 831. To support the jury's verdict, the government pointed to Mr. Nora's compliance training to prove knowledge of the scheme, but the Fifth Circuit rejected this evidence as speculative. The government had presented no information to the jury about the training's content. *Id.* The government also pointed to evidence establishing Mr. Nora's attendance at weekly staff meetings, but again, there was no specific "evidence about what regulations were discussed at these meetings." *Id.* "A juror would have to make a speculative leap about the content of these trainings and meetings" in order to convict, but "[a] rational juror would need more to conclude that Nora acted 'willfully,'" as required by statute. *Id.* The Fifth Circuit concluded with a similar point about Mr. Nora's "proximity" to the fraudulent scheme. That evidence was "devoid of specifics" and would not allow the jury to infer that Mr. Nora "directly observed, or deliberately closed his eyes to, fraudulent behavior" committed by his colleagues. *Id.* at 834.

ii. *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020)

Here, the defendants—high-ranking members of a motorcycle gang—challenged the district court's decision to empanel an anonymous jury. The district court's "order (1) prohibited jurors

from revealing 'their names, addresses, or places of employment to the parties'; (2) required all jurors to be 'kept together during recesses' and accompanied by the United States Marshals Service during lunch; and (3) ordered the United States Marshals to provide off-site parking and transportation for jurors to and from the courthouse." *United States v. Portillo*, 969 F.3d 144, 162 (5th Cir. 2020). The Fifth Circuit previously identified five factors that "may justify jury protection by anonymity":

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Id. (quoting *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995)). The Fifth Circuit affirmed after finding that all five factors supported the district court's decision. "First, the indictment charged both defendants with serving at the highest levels of an organized criminal group, demonstrating that their involvement in organized crime was 'both deeply rooted and far-reaching.'" *Id.* As to the second and third factors, the evidence proved that the gang could harm cooperating witnesses and had done so in the past. *Id.* at 163. "Six of the charges against the defendants carried maximum life sentences," thus satisfying the fourth factor, and "[a]t the time of the district court's order, the case had already received considerable press coverage." *Id.* The district court also provided "a 'neutral explanation' for the anonymity procedures," which "minimiz[ed] the risk of potential prejudice." *Id.* It "explained that the measures were "routine" and intended to ensure jurors' privacy." *Id.*

iii. *United States v. Sanders*, 966 F.3d 397 (5th Cir. 2020)

Keep an eye out for constructive amendments at trial. In short, "[a] constructive amendment" to the indictment's allegations "permits the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory or set of facts than that with which he was charged." *United States v. Sanders*, 966 F.3d 397, 407 (5th Cir. 2020) (quoting *United States v. McMillan*, 600 F.3d 434, 451 (5th Cir. 2010)). In *Sanders*, the government charged the defendant with producing child pornography and alleged that he knew the victims' ages. *Id.* at 405. The statute in question did not require such knowledge, and "the district court" accordingly "instructed the jury that 'the Government does not have to prove that Sanders knew Jane Doe 2 or Jane Doe 4 were under the age of 18 at the time he is alleged to have taken the photographs.'" *See id.* at 405-06 (citing *United States v. Crow*, 164 F.3d 229, 236 (5th Cir. 1999)). Although the instructions correctly stated the law, the Fifth Circuit reversed after finding a constructive amendment. *Id.* at 408. "[B]y instructing the jury that Sanders could be convicted even if he did not know that Jane Does 2 and 4 were minors, the district court permitted Sanders to be convicted under facts different from those charged in the indictment." *Id.* at 407.

e. ***Sentencing***

i. *United States v. Kim*, 988 F.3d 803 (5th Cir. 2021)

Restitution is deceptively complex and a fertile ground for reversal on appeal. In *Kim*, the defendant sold motherboards with "infringing copies of" another company's "gaming software" to illegal game rooms in Odessa, Texas, and eventually pleaded guilty to a single count of criminal copyright infringement. *United States v. Kim*, 988 F.3d 803, 805 (5th Cir. 2021). He "agreed" in his factual resume "that he caused a financial loss to" the copyright holder "of $30,000, which was

calculated by multiplying 24, the number of counterfeit . . . motherboards . . . by the retail value of $1,250 per motherboard." *Id.* at 806. The PSR then added additional restitution based on another bit of evidence. A game-room owner in Odessa told police she owed the defendant $200,000 "for prior purchases of gaming equipment." *Id.* The defendant sold the infringing motherboards at an average cost of $434, so the PSR calculated that $200,000 could have bought 461 motherboards. *Id.* It then multiplied 461 by the cost of a legitimate motherboard—$1,250—and added another $576,250 to the defendant's restitution obligation. *Id.* The Fifth Circuit reversed this additional calculation on appeal. At the outset, the evidence failed to show that the $200,000 bought only infringing motherboards. *Id.* at 812 ("Drebenstedt testified that Muraki told him that she owed Kim $200,000 for the purchase of equipment or supplies *and* motherboards, thus clearly contradicting a conclusion that the entire amount was used to purchase motherboards"). In turn, the defendant had previously sold motherboards from the legitimate copyright holder, and the evidence before the district court did not establish whether the $200,000 paid for infringing products or the real thing. *Id.* The district court also incorrectly calculated the copyright holder's actual loss. "A restitution amount in a case involving infringing or counterfeit goods should be calculated using the 'lost net profit' suffered by the victim of the infringement, rather than the retail value of the goods." *Id.* at 813. "Basing restitution on the retail value of the goods disregards the costs incurred in manufacturing and selling legitimate goods and could therefore result in the victim receiving a windfall amount that exceeds the actual loss caused by the infringement." *Id.*

ii. *United States v. Ochoa*, 977 F.3d 354 (5th Cir. 2020)

To receive a concurrent sentence in a pending state prosecution, the defendant must prove that the pending state case is relevant conduct to the federal prosecution. "Section § 5G1.3(c)" of the Guidelines Manual "advises that when 'a state term of imprisonment is anticipated to result from

another offense that is relevant conduct to the instant offense of conviction . . . the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.'" *United States v. Ochoa*, 977 F.3d 354, 356 (5th Cir. 2020) (quoting U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5G1.3(c) (Nov. 1, 2018)). In *Ochoa*, the defendant pleaded guilty to possessing stolen mail, and at sentencing, asked the district court to run the federal sentence concurrently with any future sentence imposed in an Ellis County, Texas, pending case. *Id.* The PSR addendum established the existence of that case but not its connection to the federal prosecution. *Id.* Defense counsel indicated at sentencing that the pending charge stemmed from relevant conduct to the federal offense but put forth no evidence to prove the point. *Id.* at 357. The district court determined that the attorney's proffer was insufficient to trigger the Guideline Manual's provision on concurrent sentences, and the Fifth Circuit agreed. *Id.* Mr. Ochoa neither "present[ed] evidence that the Ellis County offense was 'part of the same course of conduct' as the stolen-mail offense . . . [n]or did he present evidence that the offenses were part of a "common scheme or plan." *Id.* (citing USSG § 1B1.3(a)(2)). "[W]ithout a state offense relevant to Ochoa's federal offense, Section 5G1.3(c) is inapplicable," and the Fifth Circuit affirmed against the defendant's procedural-reasonableness challenge. *Id.*

iii. *United States v. Lima-Rivero*, 971 F.3d 518 (5th Cir. 2020)

When considering safety-valve eligibility, the district court "is not bound by the government's determination of whether a defendant failed to provide truthful information." *United States v. Lima-Rivero*, 971 F.3d 518 (5th Cir. 2020) (citing *United States v. Miller*, 179 F.3d 961, 965, 969 (5th Cir. 1999)). To qualify, the defendant must, "not later than the time of the sentencing hearing," have "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common

scheme or plan." 18 U.S.C. § 3553(f)(5). In *Lima-Rivero*, the district court deferred completely to a prosecutor's assessment of the defendant's cooperation. *Lima-Rivero*, 971 F.3d 518 at 521. The government argued on appeal that the district court had not completely deferred to its assessment, and for support, pointed out the defendant's opportunity to cross-examine its agents at sentencing. *Id.* The panel majority disagreed and found that "allowing Lima-Rivero to question the DEA agent is not enough to correct the district court's repeated misstatements of law." *Id.* The panel majority also addressed the merits and chided the district court for basing its decision "on a case agent's mere speculation." *Id.* It is not enough for an agent to say the defendant was untruthful. The government must instead "proffer[] 'direct' and 'concrete' evidence 'such as statements from the defendant's codefendants' that tended to prove the defendant was lying." *Id.* at 522 (quoting *United States v. Munera-Uribe*, 192 F.3d 126, 1999 WL 683823, at *13-14 (5th Cir. 1999)). Judge Haynes dissented. A government witness testified that his "training and experience," "review of evidence from cell phones," and "talking to other codefendants" led him to the following conclusion: "Lima-Rivero was 'less than truthful regarding many things.'" *Id.* at 524 (Haynes, J., dissenting). This, she contended, was sufficient evidence to support the district court's safety-valve ruling. *Id.* The panel majority disagreed, and in the future, the government must show its work to defeat safety-valve eligibility based on a defendant's purported untruthfulness. *Id.* at 523 ("The agent provided no specifics regarding what was on the cell phone or said by the codefendants that demonstrated Lima-Rivero's untruthfulness, even when directly asked by Lima-Rivero's counsel whether evidence existed.").