CRIMINAL PROCEDURE

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This Article summarizes Fifth Circuit cases that addressed significant criminal issues during the survey period of July 1, 2013, to June 30, 2014. For convenience of the reader, the cases are organized by overarching subject area and by topics within that subject area. Most of the summaries contain a brief factual background and the legal reasoning used to arrive at the Fifth

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Circuit's conclusion. Additionally, each summary explains the significance of the case's reasoning and how the reasoning may impact the relevant area of law going forward. This Article is intended as a reference, and the reader is encouraged to review each case in its entirety to fully comprehend the precedent, the substantive issues, and the Fifth Circuit's underlying analysis.

I. FOURTH AMENDMENT DEVELOPMENTS

The Fourth Amendment aims to prevent unreasonable searches and seizures by the United States government. This past term, the Fifth Circuit issued multiple opinions that further clarify the impact of the Fourth Amendment in an ever-changing world. First, as technology continues to rapidly evolve, the Fifth Circuit discussed the application of the Fourth Amendment in light of the Stored Communications Act and an increase in electronic surveillance.[1] Second, the Fifth Circuit further clarified the limits that the Fourth Amendment places on warrantless searches, *Terry* stops, and the scope of a search.[2] Third, the Fifth Circuit addressed how an officer's deception can impact a defendant's consent in the midst of an interrogation.[3] Fourth, the Fifth Circuit discussed the Foreign Intelligence Surveillance Act and its impact on the searches of "agents of a foreign power."[4] Finally, the Fifth Circuit analyzed the extraterritorial application of the Fourth Amendment.[5]

A. Electronic Surveillance

The two most notable Fourth Amendment cases of the reporting period dealt with electronic surveillance. In the first case, *In re United States for Historical Cell Site Data*, the Fifth Circuit considered whether a provision of the Stored Communications Act (SCA), which allows the Government to obtain historical cell phone location information based upon a showing of "specific and articulable facts," violated the Fourth Amendment.[6] The specific and articulable facts standard in the SCA entails a lesser showing than the probable cause standard that the Fourth Amendment requires.[7] Historical cell site location data is not as precise as GPS location data and is only collected by cell phone companies when a call is actually made.[8]

In urging the Fifth Circuit to find that the SCA's historical cell site provision violated the Fourth Amendment, the American Civil Liberties

1. *See* discussion *infra* Part I.A.
2. *See* discussion *infra* Part I.B–C.
3. *See* discussion *infra* Part I.D.
4. United States v. El-Mezain, 664 F.3d 467, 566 (5th Cir. 2011); *see* discussion *infra* Part I.E.
5. *See* discussion *infra* Part I.F.
6. *In re* United States for Historical Cell Site Data, 724 F.3d 600, 606 (5th Cir. July 2013).
7. *Id.*
8. *Id.* at 609.

Union cited *United States v. Jones*, which held that GPS monitoring of a vehicle could constitute a search under the Fourth Amendment.[9] Finding that the holding in *Jones* did not apply, the Fifth Circuit focused on the fact that phone companies—and not the Government—were initially recording the cell site data, and that the Government was only requesting that the phone companies provide it with business records.[10] The court noted that the Government was not requiring the phone companies to do anything.[11] Thus, the practice of collecting business data from phone companies did not "transform" that practice "into a Fourth Amendment search or seizure"; therefore, the SCA's provision conformed to "existing Supreme Court Fourth Amendment precedent."[12] Recently, the Eleventh Circuit joined the Third Circuit in finding that the historical cell site provision of the SCA ran afoul of the Fourth Amendment.[13] Look for the Supreme Court to clarify this circuit split in the next few years.

In the second electronic surveillance case, *United States v. North*, the Fifth Circuit had occasion to forever alter the way government agencies conduct wiretap investigations, but elected not to consider whether a federal court lacked territorial jurisdiction to authorize a wiretap.[14] In *North*, agents from the Drug Enforcement Administration obtained a court-authorized wiretap for the defendant's phone.[15] A federal judge in Mississippi signed the wiretap order; however, the defendant's phone was located in Texas and the wiretap listening post in Louisiana.[16] During the course of the wiretap, agents intercepted narcotics-related calls on the defendant's phone, which indicated that the defendant had a distributable amount of cocaine in his vehicle.[17] Based on this information, officers conducted a traffic stop of the defendant's vehicle and searched it but did not discover cocaine.[18] Following the traffic stop, the defendant called a "female friend."[19] For the first fifty minutes of that conversation, the defendant discussed attending a recent concert and how he had been racially profiled during the traffic stop.[20] Approximately one hour into the call, the defendant revealed that he had

9. *Id.* at 608–09 (citing United States v. Jones, 132 S. Ct. 945, 957 (2012)).
10. *Id.* at 610–14.
11. *Id.*
12. *Id.* at 614–15.
13. *See* United States v. Davis, 754 F.3d 1205, 1217 (11th Cir.), *vacated*, 573 F. App'x 925 (11th Cir. 2014) (distinguishing *Historical Cell Site* and holding that "cell site location information is within the subscriber's reasonable expectation of privacy"); *In re* United States for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304, 317 (3d Cir. 2010) (reasoning that the SCA provision violated the Fourth Amendment because "[a] cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way").
14. *See* United States v. North, 735 F.3d 212, 215–16 (5th Cir. Oct. 2013) (per curiam).
15. *Id.* at 214.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

cocaine in his vehicle, which led to his arrest for possession of cocaine.[21] The district court denied the defendant's motion to suppress the wiretap.[22]

On appeal, the defendant argued that the federal "court in Mississippi lacked territorial jurisdiction to authorize the [wiretap because the] phone was located in Texas and the listening post was located in Louisiana," and because the Government did not adhere to the wiretap order's minimization requirements.[23] As for the minimization argument, the Fifth Circuit concluded that the agents failed to conduct electronic surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception."[24] In other words, the Government failed to turn off the wiretap recording when the conversation did not appear to be "criminal in nature."[25] Thus, the Fifth Circuit reversed the district court's denial of the motion to suppress and remanded the matter for further proceedings.[26] Although, in doing so, the Fifth Circuit declined to entertain the defendant's territorial jurisdiction argument.[27] Judge DeMoss, however, issued a concurring opinion in which he set forth his reasoning as to why the federal court in Mississippi lacked jurisdiction to authorize the interception of the wiretap when the phone was located in Texas and the listening post in Louisiana.[28]

*B. Warrantless Search/*Terry *Stop*

In *United States v. Hill*, the Fifth Circuit considered whether the Government satisfied its burden, under *Terry v. Ohio*, of proving reasonable suspicion of criminal activity to conduct a *Terry* stop of the defendant.[29] The court's ruling in *Hill* will likely provide good suppression ammunition for defendants who are the subject of *Terry* stops in government-labeled "high-crime" areas. In *Hill*, police officers were patrolling an apartment complex in Prentiss, Mississippi, which they contended was a "hotspot" for crime.[30] There, the police observed the defendant sitting in his car with his girlfriend.[31] After parking next to the defendant's vehicle, police observed the defendant's girlfriend exit the vehicle and walk "briskly" towards the apartment building.[32] Police officers then immediately approached the

21. *Id.*
22. *Id.* at 215.
23. *Id.*
24. *Id.* (quoting United States v. Brown, 303 F.3d 582, 604 (5th Cir. 2002)).
25. *Id.* at 216.
26. *Id.*
27. *See id.* at 215.
28. *Id.* at 216–19 (DeMoss, J., concurring).
29. United States v. Hill, 752 F.3d 1029, 1032–33 (5th Cir. May 2014) (citing Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).
30. *Id.* at 1031.
31. *Id.* at 1031–32.
32. *Id.* at 1030–31.

defendant's vehicle and asked: "Where's your gun?"[33] After learning that the defendant did not have a driver's license, the officer ordered the defendant out of the car and conducted a frisk of the defendant, during which the officer discovered a firearm.[34]

In finding that the *Terry* stop violated the Fourth Amendment, the Fifth Circuit first debunked the Government's high-crime area argument, noting that the factor was a "relevant contextual consideration," but ultimately concluding that it carried little weight in this case because the high-crime area evidence proffered by the Government was vague, and the officers were not responding to a report of criminal activity.[35] The Fifth Circuit focused next on the girlfriend's exit of the vehicle and concluded that the girlfriend's conduct did not cast reasonable suspicion on the defendant, especially because "only a matter of seconds passed" between the girlfriend's exit from the vehicle and when the officers approached the defendant.[36] Finally, the court reviewed the defendant's answers to the officers' questions and opined that "[w]e do not see how any of Hill's three answers . . . support a reasonable suspicion that Hill was engaged in a drug crime."[37] Based on the totality of the circumstances, the court ultimately found that "[r]easonable officers in such circumstances would have very little cause to suspect criminal activity rather than, say, a couple who just arrived home on a weekend night and were preparing to go inside."[38] Thus, the Fifth Circuit suppressed the firearm seized from the defendant.[39]

It is interesting to contrast *Hill* with *United States v. Powell*—another case involving a *Terry* stop. In *Powell*, the Fifth Circuit upheld the district court's denial of a motion to suppress. The defendant argued that the *Terry* stop of his vehicle, which resulted in the seizure of narcotics, was not supported by reasonable suspicion.[40] Unlike in *Hill*, the *Terry* stop of the defendants in *Powell* was not based on suspicious activity observed in a high-crime area but instead on a tip from a confidential informant.[41] The confidential informant told officers that a man called "Little Book" and a woman had just left his home in Lubbock after purchasing a distributable amount of crack cocaine and were headed to Midland.[42] The informant was able to give the make, color, and model of Little Book's vehicle, along with

33. *Id.* at 1032.
34. *Id.*
35. *Id.* at 1034–35.
36. *Id.* at 1037.
37. *Id.* at 1038.
38. *Id.*
39. *Id.*
40. United States v. Powell, 732 F.3d 361, 366 (5th Cir. Oct. 2013), *cert. denied*, 134 S. Ct. 1326 (2014).
41. *Id.* at 369–70.
42. *Id.* at 366.

the first three letters of the license plate.[43] The officer who received the information claimed that it was reliable, even though the informant had recently lied to the officer about cooking crack cocaine and dealing drugs while serving as an informant.[44] After acting on the tip and seizing crack cocaine from the defendant's vehicle, officers discovered that the crack cocaine seized from the defendant was sold to him by the same informant who provided the tip.[45]

In finding that the *Terry* stop was supported by reasonable suspicion and that the subsequent warrantless search of the defendant's vehicle was supported by probable cause, the Fifth Circuit focused on the informant's information, concluding that the specificity, predictive value, and recency of the informant's tip were sufficiently strong to balance the flaws in the informant's personal credibility and reliability.[46] As support for its conclusion, the Fifth Circuit cited *Alabama v. White*, in which the Supreme Court found that a *Terry* stop was permissible on the basis of an anonymous tip informing officers that a defendant would be in possession of cocaine.[47] The Fifth Circuit reasoned that the informant's tip in *Powell* was stronger than in *White* because the tip in *White* was based only on anonymous information.[48] Such reasoning, however, seems susceptible to attack because the police in *White* had no reason to question the veracity of the anonymous tipster.[49] After all, the informant in *Powell* lied to his controlling officer about a very important thing: cooking crack cocaine and dealing drugs while he was under the officer's supervision.[50] In any event, the decision in *Powell* will make it difficult for defendants to challenge traffic stops that are based on information from an informant whose history for truth telling is less than exemplary.

In *United States v. Abdo*, law enforcement officers conducted a *Terry* stop based on suspicious information that was far more reliable than the information possessed by officers in *Hill* and *Powell*.[51] In *Abdo*, law enforcement officers received information that the defendant recently made a suspicious purchase: six pounds of smokeless gunpowder without any bullets or primers.[52] The next day, the officers also learned that the defendant purchased a combat uniform utilized by soldiers at nearby Fort Hood.[53]

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43. *Id.*
44. *Id.*
45. *Id.* at 368.
46. *Id.* at 371.
47. *Id.*; *see* Alabama v. White, 496 U.S. 325, 331 (1990).
48. *Powell*, 732 F.3d at 371.
49. *Cf. White*, 496 U.S. at 329 (stating that officers can seldom measure the veracity of the caller with an anonymous tip).
50. *Powell*, 732 F.3d at 366.
51. *See* United States v. Abdo, 733 F.3d 562, 564 (5th Cir. Aug. 2013), *cert. denied*, 134 S. Ct. 1760 (2014).
52. *Id.*
53. *Id.*

These purchases concerned the officers because they believed that the defendant might have been planning to attack Fort Hood with an improvised explosive device.[54] Officers then encountered the defendant at a motel.[55] The defendant was seen wearing a large, overstuffed backpack, which one of the officers believed contained explosives.[56] Upon seeing the defendant, the officers drew their weapons, separated the defendant from the backpack, placed the defendant in handcuffs, and then had the defendant wait in an air-conditioned squad car.[57] After being in the squad car for fifteen minutes, officers learned that the defendant had an outstanding warrant for his arrest.[58] The defendant subsequently waived his *Miranda* rights and admitted that he was planning to attack soldiers at Fort Hood.[59] In the defendant's backpack, officers found, among other things, wiring, batteries, two clocks, and an article entitled "How to Build a Bomb in the Kitchen of Your Mom."[60]

In affirming the district court's denial of the defendant's motion to suppress, the Fifth Circuit concluded that, based on the totality of the circumstances, the investigatory stop was supported by reasonable suspicion.[61] The Fifth Circuit also concluded that the circumstances surrounding the defendant's detention did not constitute an arrest (requiring probable cause), but rather only an investigatory stop (requiring reasonable suspicion).[62] The court noted that a fifteen-minute-long investigatory stop was not unreasonable in length and that placing the defendant in the squad car did not "increase the intrusiveness of the stop and transform the detention into an arrest."[63] The Fifth Circuit also found that the officers' drawing their weapons and placing the defendant in handcuffs did not convert the detention of the defendant into an arrest.[64] According to the court, "[t]he police here reasonably believed that Abdo was armed and dangerous," and thus, during a *Terry* stop of the defendant, the police were entitled to take such swift actions to "ensure their own safety, as well as the safety of the public."[65]

In two other cases worthy of a passing note, the Fifth Circuit found, after evaluating the factors enumerated by the Supreme Court in *United States v. Brignoni-Ponce*, that *Terry* stops made by Border Patrol agents of vehicles in close proximity to the United States–Mexico border did not violate the

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 564–65.
61. *Id.* at 565–66.
62. *Id.*
63. *Id.* at 566.
64. *Id.* at 565.
65. *Id.*

Fourth Amendment.[66] First, in *United States v. Garza*, the Fifth Circuit determined that a *Terry* stop that resulted in the discovery of aliens being smuggled was justified based on the following factors: (1) the agent knew that the area the stop was conducted in had a reputation as a smuggling route; (2) the area was in close proximity to the border—only five miles away; (3) the vehicle was unfamiliar to the agent; (4) the vehicle was carrying plywood, a common method used to conceal illegal aliens; and (5) the defendant appeared nervous and hurriedly exited the gas station once he spotted the agent.[67] Second, in *United States v. Antu*, the Fifth Circuit determined that a *Terry* stop that resulted in the discovery of more than 100 kilograms of marijuana was justified based on the following factors: (1) the agent knew that the area the stop was conducted in had a reputation as a smuggling route; (2) the defendant was towing a horse trailer—something rare for that area; and (3) the road the agent encountered the defendant on was forty miles longer than an alternative route, and it bypassed two immigration checkpoints.[68]

C. Scope of Search

Defendants may use the holding in *United States v. Cotton* to bolster a suppression argument that an officer's search exceeded the scope of the authority given. In *Cotton*, the defendant was stopped for a traffic violation on I-10 in East Texas and was asked by the officer if a search of the vehicle could be conducted.[69] While the defendant's response to the officer's initial question was disputed, the officer asked two follow-up questions regarding the search.[70] In response to both of these questions, the defendant told the officer that he could search "[his] luggage."[71] Well after searching the defendant's luggage, the officer noticed tool markings on a door panel and then discovered crack cocaine in that same door panel.[72] In concluding that the search of the vehicle exceeded the scope of the defendant's consent, the Fifth Circuit reasoned that even if the defendant had initially consented to the search of the vehicle, the defendant's unambiguous answers to the two clarifying questions "would not permit [the officer] to throw caution aside and interpret 'search my luggage' as an expansion of the scope of consent rather than a limitation to it."[73] In addition, in defeating the Government's

66. United States v. Antu, 569 F. App'x 204, 205–06 (5th Cir. May 2014) (per curiam); United States v. Garza, 727 F.3d 436, 440–42 (5th Cir. Aug. 2013), *cert. denied*, 134 S. Ct. 1346 (2014); *see* United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975).

67. *Garza*, 727 F.3d at 440–42.

68. *Antu*, 569 F. App'x at 205–06.

69. United States v. Cotton, 722 F.3d 271, 274 (5th Cir. July 2013).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 277 (emphasis omitted).

argument that the officer discovered the door panel compartment in plain view, the court held that the officer "did not discover the hidden compartment in plain view while permissibly seeking luggage to search for drugs, but while searching for other places inside the car that he speculated might conceal drugs."[74] Thus, the Fifth Circuit ultimately found that the officer's "extensive search of Cotton's car violated the Fourth Amendment" and therefore decided, under the fruit of the poisonous tree doctrine, that the defendant's inculpatory statements should be suppressed.[75]

D. Deceptive Statements Made by Officer During a Consent Search

In another case related to a consent to search and the automobile exception, the Fifth Circuit reversed the district court's denial of a defendant's suppression motion, but remanded the matter for further proceedings. *United States v. Guzman* may also give defendants hope in attempting to defeat a consent to search, especially if that consent is given to an officer on the basis of a "false claim of lawful authority."[76] In *Guzman*, an officer approached the defendant who was sitting in his vehicle, which was parked in the driveway of a Dallas home that was associated with drug trafficking.[77] During the initial encounter with the officer, the defendant informed the officer that he had a firearm in his vehicle; a subsequent search by the officer revealed that the defendant, a felon, did indeed have a handgun in his vehicle.[78] At the suppression hearing, however, conflicting testimony was presented as to whether the officer ever asked to search the defendant's vehicle and whether, before the defendant informed the officer about the firearm, the officer falsely informed the defendant that he had the authority to search his vehicle.[79] In denying the motion to suppress, the district court focused on the automobile exception, without deciding whether the defendant consented to the search, and assumed that the defendant's confession regarding the gun was the result of permissible "trickery" by the officer.[80]

In reversing, the Fifth Circuit explained that "[a]n inadmissible statement cannot constitute probable cause to support an otherwise illegal search," and concluded that the officer's statement that "he was 'going to search the car,' could constitute a false claim of lawful authority affecting the validity of Guzman's consent and the admissibility of his subsequent statements."[81]

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74. *Id.* at 276 (emphasis omitted).
75. *Id.* at 278.
76. United States v. Guzman, 739 F.3d 241, 247 (5th Cir. Jan. 2014).
77. *Id.* at 243.
78. *Id.*
79. *Id.*
80. *Id.* at 245.
81. *Id.* at 247 (emphasis omitted).

The Fifth Circuit noted it would normally affirm even in the absence of specific findings so long as any reasonable view of the evidence supports the district court's ruling.[82] In this case, however, the Fifth Circuit determined that it could not find that a reasonable view of the evidence supported the district court's ruling because it could not assume that the district court (1) asked the correct legal questions in making its ruling, and (2) actually weighed the evidence bearing on the facts it needed to answer such questions.[83] As such, the Fifth Circuit vacated the defendant's firearm conviction and remanded the case for further findings.[84]

E. Foreign Intelligence Surveillance Act (FISA)

For the sake of completeness, it is worth mentioning *United States v. Aldawsari*. Aldawsari was convicted of the attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(2), and sentenced to life in prison.[85] During the investigation of the defendant, the FBI conducted searches of the defendant's apartment and computer pursuant to the Foreign Intelligence Surveillance Act (FISA).[86] These searches were authorized by the Foreign Intelligence Surveillance Court (FISC) based on an ex parte showing of probable cause to believe that the defendant was "an agent of a foreign power."[87] On appeal, the defendant argued that the district court erred in denying his motion to suppress the FISA evidence because there was insufficient probable cause to establish that the defendant was an agent of a foreign power.[88] After conducting its own in camera review of classified information presented to the FISC, the Fifth Circuit concluded that "[t]he FISC's authorization of these searches was indeed justified by a showing of probable cause to believe that [the defendant] satisfied one of the definitions of 'an agent of a foreign power.'"[89] The Fifth Circuit also concluded that there was no constitutional bar to the admission of the evidence collected because the objective of the searches was not solely for the criminal prosecution of the defendant, but also for the "protection of the nation against terrorist threats."[90] In its second reported case in which it examined a FISA search, the Fifth Circuit ultimately found that the "searches were properly

82. *Id.*
83. *See id.* at 247–48.
84. *Id.* at 249.
85. United States v. Aldawsari, 740 F.3d 1015, 1017–18 (5th Cir. Jan.), *cert. denied*, 135 S. Ct. 160 (2014).
86. *Id.* at 1017.
87. *Id.*
88. *Id.* at 1018.
89. *Id.* at 1019.
90. *Id.* at 1018–19.

authorized and that the evidence collected during the FISA searches was properly admitted."[91]

F. Extraterritorial Application of the Fourth Amendment

Finally, although this case appeared in the civil context, criminal practitioners in border regions will want to take notice of the Fifth Circuit's decision in *Hernandez v. United States*. In *Hernandez*, the parents of Sergio Hernandez brought a *Bivens* action against a Border Patrol agent for violating Hernandez's Fourth Amendment rights through the use of "excessive, deadly force."[92] Hernandez was shot and killed by a Border Patrol agent while he was in a culvert separating the United States and Mexico.[93] Just before he was shot, Hernandez was playing a game with his friends that involved running up the incline of the culvert, touching the fence separating Mexico and the United States, and then running back down the incline of the culvert.[94] Hernandez's parents argued that even though he was not a United States citizen and had "no interest in entering the United States," the Fourth Amendment applied extraterritorially.[95] In rejecting Hernandez's arguments, the Fifth Circuit looked to the Supreme Court's opinion in *United States v. Verdugo–Urquidez*, which held that in the case of non-citizens, the Fourth Amendment only applies extraterritorially to a person with sufficient "voluntary" connections to the United States.[96] The Fifth Circuit concluded that "Hernandez lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment."[97]

The Fifth Circuit's analysis, however, did not stop with evaluating Hernandez's connections to the United States. The Fifth Circuit explained that its "reluctance to extend the Fourth Amendment on these facts reflect[ed] a number of practical considerations."[98] Those practical considerations included noting that the Department of Homeland Security uses advanced technologies to monitor the border region, which "might carry with them a host of implications for the Fourth Amendment."[99] The Fifth Circuit explained that "application of the Fourth Amendment 'to [these] circumstances could significantly disrupt the ability of the political branches to respond to [a] foreign situation involving our national interest'" and could also plunge Border Patrol agents "into a sea of uncertainty as to what might

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91. *Id.*
92. Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. June), *reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014).
93. *Id.*
94. *Id.*
95. *Id.* at 266.
96. *Id.* (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265, 268–75 (1990)).
97. *Id.*
98. *Id.*
99. *Id.* at 267.

be reasonable in the way of searches and seizures conducted abroad."[100] Border practitioners will want to take notice of the Fifth Circuit's strong indication that the use of advanced technologies to monitor activities along the border does not run afoul of the Fourth Amendment. Such language indicates, for example, that the United States government is permitted to use such intrusive technologies to gather evidence against non-citizens without voluntary connections to the United States so long as they were in the area along the Mexican border.[101]

II. FIFTH AMENDMENT DEVELOPMENTS

Throughout the past year, the Fifth Circuit issued several significant decisions that clarify the Fifth Amendment's prohibition of double jeopardy and protection against self-incrimination. Some of the most interesting cases addressing double jeopardy, and the related issue of multiplicity, arose in the instances of conspiracies and possession of a firearm.[102] The Fifth Circuit also reminded defendants that courts certainly have the right to consider prior convictions when sentencing.[103] Additionally, the Fifth Circuit explained how courts should handle situations when a party wants to ask a witness questions so that the witness is required to "plead the Fifth" in front of the jury.[104] Further, the court explained when and how the government can address post-arrest silence and statements made during a custodial interrogation.[105] The court also expressed its concern with state programs that essentially require defendants to engage in polygraph testing or else face a conviction.[106] Finally, the Fifth Circuit addressed the extraterritorial application of the Fifth Amendment and, as a matter of first impression, explained how a *Bivens* action can be pursued when a non-citizen alleges that his Fifth Amendment rights have been violated outside of the United States.[107]

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100. *Id.* at 264.

101. *Id.* at 270.

102. *See* United States v. Njoku, 737 F.3d 55, 60 (5th Cir. Dec. 2013), *cert. denied*, 134 S. Ct. 2319 (2014); United States v. Abdo, 733 F.3d 562, 566 (5th Cir. Aug. 2013), *cert. denied*, 134 S. Ct. 1760 (2014).

103. *See* United States v. Turner, 569 F. App'x 225, 225 (5th Cir. May 2014) (per curiam).

104. *See* United States v. Kinchen, 729 F.3d 466, 474 (5th Cir. Sept. 2013).

105. *See* United States v. Andaverde-Tiñoco, 741 F.3d 509, 520–21 (5th Cir. Dec. 2013), *cert. denied*, 134 S. Ct. 1912 (2014).

106. *See* Day v. Seiler, 560 F. App'x 316, 320 (5th Cir. Mar. 2014) (per curiam) (citing Bohannan v. Doe, 527 F. App'x 283, 296 (5th Cir. June 2013) (per curiam)).

107. *See* Hernandez v. United States, 757 F.3d 249, 277 (5th Cir. June), *reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014).

A. Double Jeopardy/Multiplicity in Conspiracy Context

In *United States v. Njoku*, the Fifth Circuit applied its step-by-step double jeopardy and multiplicity analysis in the context of a healthcare fraud conspiracy.[108] After an eleven-day trial in the Southern District of Texas, Caroline Njoku was found guilty of (1) conspiracy to commit healthcare fraud and (2) conspiracy to receive or pay healthcare kickbacks.[109] Additionally, Mary Ellis was found guilty of (1) conspiracy to commit healthcare fraud, (2) conspiracy to receive or pay healthcare kickbacks, (3) receipt or payment of healthcare kickbacks, and (4) "making false statements for use in determining rights for benefit and payment by Medicare."[110]

Njoku appealed and argued that her two conspiracy convictions were multiplicitous.[111] The Fifth Circuit explained that since she did not previously object to her *indictment* as multiplicitous, her convictions could not be raised on appeal and they, therefore, remained.[112] She could, however, challenge her imposed *sentences* on the grounds of her indictments being multiplicitous.[113] The Fifth Circuit construed her argument as asserting that while "she was charged with violating two different statutes, one of the violations could be [a] lesser included offense of the other."[114] The court stated that it had to "consider whether 'each offense require[d] proof of an element that the other [did] not.'"[115] The court explained that Njoku's convictions involved two conspiracies (one under 18 U.S.C. § 1349 and one under 18 U.S.C. § 371) and that 18 U.S.C. § 1349—conspiracy to commit fraud—"require[s] proof of a conspiracy to commit an offense of fraud *and* that such fraud is the object of the conspiracy," while 18 U.S.C. § 371—conspiracy to commit offense or defraud the United States—prohibits two or more persons from conspiring to commit an offense *against the United States* and requires an overt act.[116] The court also looked at the jury charge and determined that each offense required proof of an element that the other did

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108. *See* United States v. Njoku, 737 F.3d 55, 67–72 (5th Cir. Dec. 2013), *cert. denied*, 134 S. Ct. 2319 (2014).

109. *Id.* at 62.

110. *Id.*

111. *Id.* at 67. It is first important to note the difference between double jeopardy and multiplicity. Double jeopardy occurs when a defendant has already been tried on a specific charge and is then tried again on the same charge. *See* BLACK'S LAW DICTIONARY 225 (9th ed. 2009). In other words, a judgment has already been entered as to the first charge. Multiplicity involves a defendant being charged multiple times for the same alleged crime simultaneously. *See id.* at 471.

112. *Njoku*, 737 F.3d at 67 (citing United States v. Dixon, 273 F.3d 636, 642 (5th Cir. 2001)).

113. *Id.*

114. *Id.*

115. *Id.* (quoting United States v. Woerner, 709 F.3d 527, 539 (5th Cir. 2013)).

116. *Id.* at 67–68 (citing United States v. Grant, 683 F.3d 639, 643 (5th Cir. 2012)).

not and, therefore, held that Njoku had not shown plain error as to her multiplicity claim.[117]

Ellis contended that her conviction on count 1 (conspiracy to commit healthcare fraud) violated the Fifth Amendment's Double Jeopardy Clause because she was acquitted of conspiracy to commit healthcare fraud in a previous 2009 prosecution.[118] She was found not guilty.[119] In October 2010 (the present case), she was charged with conspiracy under the same statute.[120] This time she was found guilty.[121] The court stated that "[t]he Fifth Amendment 'protects against a second prosecution for the same offense after acquittal'"[122] and clarified that the issue "is whether there was one agreement and one conspiracy or more than one agreement and more than one conspiracy."[123] If the court found the latter, then her conviction in the underlying case did not violate the Double Jeopardy Clause.[124]

The court stated that Ellis first must establish a prima facie, nonfrivolous double jeopardy claim and held that she had indeed done that.[125] Second, the Government had "the burden to prove 'by a preponderance of the evidence that [Ellis was] charged in *separate* conspiracies.'"[126] The court explained that it applies five factors in these situations: (1) time, (2) "persons acting as co-conspirators," (3) "the statutory offenses charged in the indictments," (4) "the overt acts charged by the government or any other description of the offense charged that indicates the nature and scope of the activity that the government sought to punish," and (5) places where the conspiracy took place.[127] Since the two conspiracies overlapped in time, the court found that the "time" factor weighed in favor of only one conspiracy existing (and therefore, a violation of the Double Jeopardy Clause).[128] When analyzing the individuals serving as co-conspirators, the court held that the two men Ellis identified as the two key personnel served in different functions and capacities in each scheme.[129] Additionally, the court held that while *some* characters were "interwoven into both schemes," the overlap did not convincingly support the finding that a single conspiracy existed.[130] The court easily found that there were two different statutory offenses charged;

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117. *Id.* at 68.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (quoting United States v. Levy, 803 F.2d 1390, 1393 (5th Cir. 1986)).
123. *Id.* at 69 (quoting United States v. El-Mezain, 664 F.3d 467, 546 (5th Cir. 2011)).
124. *See id.* at 72.
125. *Id.* at 69.
126. *Id.* (emphasis added) (quoting United States v. Rabhan, 628 F.3d 200, 204 (5th Cir. 2010)).
127. *Id.* (citing *El-Mezain*, 664 F.3d at 546).
128. *Id.*
129. *Id.* at 69–70.
130. *Id.* at 70.

therefore, the third factor weighed in favor of two conspiracies.[131] Fourth, the court held that the Government sought to punish different activities in the two cases and that the possible overlap only involved a portion of the activity in both cases.[132] Finally, the court found that since both conspiracies involved the same location, the fifth factor weighed in favor of a single conspiracy.[133] Weighing all of the factors, the court held that "two agreements and two conspiracies existed because of the separate functions that central co-conspirators provided in each scheme and the distinctive activity that the Government sought to punish in each case."[134] Accordingly, the court determined that, as it related to the first count, Ellis's conviction did not violate the Double Jeopardy Clause, and the Fifth Circuit affirmed the district court's conviction.[135]

Ellis also contended that her convictions under counts 2 through 5 in the underlying case violated the Double Jeopardy Clause. In criminal cases, the Double Jeopardy Clause "bar[s] subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution."[136] Ellis argued that, in the first trial, the jury found that she did not know her paid referrals were illegal.[137] She then had "the burden to demonstrate that whether she knew her conduct was unlawful was a fact that the jury . . . *had* to decide" in the underlying case as well.[138] The court reviewed the record to determine "whether a rational jury could have grounded its verdict upon an issue *other than* that which [Ellis sought] to foreclose from consideration."[139] The court held that jurors: (1) could have believed the testimony that Ellis did not know her actions were illegal, (2) could have found that she knew her referrals were unlawful but did not know about fraud claims submitted, or (3) could have found that Ellis did not intend to further the unlawful purpose.[140] Because there were multiple options, Ellis failed to show the Double Jeopardy Clause was violated because it was not clear that the jury in the first trial had to find that she did not know her conduct was illegal when it acquitted her.[141]

Njoku provides an excellent framework for how the Fifth Circuit tackles these double jeopardy and multiplicity issues and identifies each individual step in the analysis. The court's analysis also demonstrates how similar the convictions must be in order to be considered multiplicitous, or to fall under

131. *Id.*
132. *Id.* at 71.
133. *Id.*
134. *Id.* at 72 (citing United States v. El-Mezain, 664 F.3d 467, 551 (5th Cir. 2011)).
135. *Id.*
136. *Id.* (citing United States v. Sarabia, 661 F.3d 225, 229 (5th Cir. 2011)).
137. *Id.*
138. *Id.* (emphasis added).
139. *Id.* (emphasis added) (quoting *Sarabia*, 661 F.3d at 230).
140. *Id.* at 73.
141. *Id.*

a Double Jeopardy Clause violation.[142] In *United States v. Jones*, the court engaged in a very similar analysis, further demonstrating the difficulty for a defendant to prove multiplicity or a Double Jeopardy Clause violation.[143] Henry Jones was indicted in three separate cases: *United States v. Ngari*, *United States v. Jones*, and *United States v. McKenzie*.[144] Jones argued that the district court erred when it failed to dismiss his charges in the *McKenzie* case because the Government was charging him for the same conduct for which he had already been convicted in the *Ngari* case.[145] The court then applied the same burden-shifting analysis and five-factor test in *Jones* as it did in *Njoku*.[146]

When analyzing the first factor—time—the court stated that the conspiracy in the *Ngari* case occurred from December 2003 to March 2009.[147] The conspiracy in *McKenzie* occurred from October 2004 to October 2010.[148] While the dates appear to overlap, the court explained that Jones's involvement in the *McKenzie* conspiracy did not begin until January 2010, thus demonstrating that no overlap existed.[149] When analyzing the second factor—co-conspirators—the court explained that "[i]f the central figures of the cases are different, or if they serve different functions for purposes of the conspiracies, it is less likely that there is a single agreement."[150] The court then noted that the statutory conspiracy charges in the *McKenzie* case were the same as the charges in the *Ngari* case, and therefore, factor three weighed in favor of a single conspiracy.[151]

The court then moved to the fourth factor—the nature and scope of the activity that the Government sought to punish.[152] Jones asked the court to focus on the common "goal" of both conspiracies and argued that the common goal in both conspiracies was "obtaining prescriptions for medically unnecessary DME by paying kickbacks to recruiters and physicians in order to bill Medicare for that equipment."[153] The court, however, construed the goals extremely narrowly, further demonstrating the difficulty in winning a double jeopardy argument—specifically in the conspiracy context.[154] The court stated that the goal in the *Ngari* case was to enrich those associated with one entity, while the goal in the *McKenzie* case was to enrich those associated

142. *Id.* at 71.

143. *See generally* United States v. Jones, 733 F.3d 574 (5th Cir. Oct. 2013) (indicating that Jones failed to prove his double jeopardy claim because only two of the five factors weighed in his favor).

144. *Id.* at 577–79.

145. *Id.* at 579.

146. *Id.* at 580–81.

147. *Id.* at 578.

148. *Id.* at 579.

149. *Id.* at 581.

150. *Id.* at 582 (quoting United States v. El-Mezain, 664 F.3d 467, 547 (5th Cir. 2011)).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 583–84.

with another entity.[155] While the overarching "goal" or "purpose" may have been the same in both cases, the Fifth Circuit decided to narrow the goal by focusing on the entities that the goals would benefit. The court stated: "Whether we focus on the goals of the conspirators or the conduct the government was targeting . . . both analyses reach the same result."[156] The court weighed the factors and found that two separate conspiracies existed and that no double jeopardy violation occurred.[157]

Jones made one final argument: the Government violated the prohibition on multiplicity by charging him for two separate conspiracies.[158] Similar to the court's analysis in *Njoku*, the Fifth Circuit found that each conspiracy statute contained an element that was not contained in the other statute and, therefore, found no multiplicity violation.[159]

B. Multiplicity in the Context of Possession of a Firearm

The issue of multiplicity also arose in the context of possession of firearms given that 18 U.S.C. § 924(c)(1) prevents multiple convictions for a single use of a single firearm.[160] As discussed above in the Fourth Amendment analysis, *Abdo* involved a defendant who was convicted of (1) attempted use of a weapon of mass destruction, (2) "attempted murder of officers or employees of the United States," and (3) "possession of a weapon in furtherance of a federal crime of violence."[161] The Fifth Circuit provided a very significant analysis on whether the stop in this case was a full arrest or just an investigatory stop, which is fully discussed above.[162] The court also analyzed Abdo's challenges to his convictions on counts 3 and 5 "for possession of a firearm in furtherance of a crime of violence."[163]

Count 3 charged Abdo with the crime of possession of a firearm in furtherance of attempted use of a weapon of mass destruction.[164] Count 5 charged Abdo with possession of the same pistol in furtherance of the attempted murder of United States officers or employees.[165] Abdo contended that one of these counts must be vacated because 18 U.S.C. § 924(c)(1) does not allow "multiple convictions for a single use of a single firearm based on multiple predicate offenses."[166] In other words, he believed that he was

155. *Id.* at 582–83.
156. *Id.* at 583.
157. *Id.* at 583–84.
158. *Id.* at 584.
159. *Id.* (citing Albernaz v. United States, 450 U.S. 333, 337–38 (1981)); *see supra* Part II.A.
160. *See* United States v. Abdo, 733 F.3d 562, 564–67 (5th Cir. Aug. 2013) (citing 18 U.S.C. § 924 (c)(1) (2013)), *cert. denied*, 134 S. Ct. 1760 (2014).
161. *Id.* at 564.
162. *Id.* at 565.
163. *Id.* at 566.
164. *Id.*
165. *Id.*
166. *Id.*

convicted for two offenses based on his attempt to use a single pistol on a single occasion.[167]

The Fifth Circuit acknowledged that 18 U.S.C. § 924(c)(1) does not "authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses."[168] This instance, however, was not a situation, where Abdo was "convicted of possessing [a] firearm on a single occasion in furtherance of simultaneous dual criminal purposes."[169] Instead, this case was a situation where Abdo had two separate and distinct possessions of a firearm. First, Abdo admitted his intention to set off explosives at a restaurant and shoot any surviving soldiers.[170] The possession of the firearm in this instance "was therefore in furtherance of the offense of attempted murder of officers or employees of the United States."[171] Additionally, Abdo admitted that on the day he was arrested, when he had the firearm in his backpack, "he intended to conduct reconnaissance in advance of carrying out the attack."[172] Abdo also had his backpack containing his firearm the day before his arrest when he purchased the bomb ingredients.[173] The court, therefore, inferred that he had the firearm for personal protection while he assembled the bomb, which would be considered a separate and distinct possession of a firearm that furthered the offense of attempted use of a weapon of mass destruction.[174] The court pointed out that a defendant's "separate use or possession of firearms in conjunction with distinct offenses might support multiple convictions."[175] The court decided that the evidence allowed for an "inference of two different possessions and purposes for the firearm" and, therefore, held that there was no multiplicity violation.[176]

C. Sentencing and Double Jeopardy

The authors of this Article analyzed the application of the Double Jeopardy Clause above in the context of two conspiracy convictions. This past year, the Fifth Circuit also discussed the Double Jeopardy Clause in the context of sentencing. In *United States v. Turner*, Wayne Anthony Turner was convicted for possession of "forged securities and aiding and abetting the possession of forged securities."[177] Turner was then sentenced to 120

167. *Id.*
168. *Id.* at 567 (quoting United States v. Phipps, 319 F.3d 177, 189 (5th Cir. 2003)).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.*
174. *Id.*
175. *See id.* (citing United States v. Phipps, 319 F.3d 177, 188–89 (5th Cir. 2003)).
176. *Id.* at 567–68.
177. United States v. Turner, 569 F. App'x 225, 225 (5th Cir. May 2014) (per curiam).

months, which was above the sentencing guidelines' range.[178] Turner appealed the imposed sentence on the grounds that the district court relied on prior convictions involving minor offenses and that this reliance subjected him to double jeopardy.[179] The Fifth Circuit quickly dismissed Turner's appeal and affirmed the imposed sentence, explaining that the district court is allowed to consider Turner's prior convictions and numerous re-offenses following light sentences when imposing a sentence above the guideline's range.[180] The court held that "consideration of such prior criminal conduct does not implicate the Double Jeopardy Clause."[181] In fact, when calculating the criminal sentencing guidelines, it is imperative to consider a defendant's prior convictions because the "criminal history category" affects the ultimate sentencing guideline.[182]

D. Witness Invoking Fifth Amendment in the Presence of a Jury

In addition to prohibiting double jeopardy, the Fifth Amendment also protects individuals from self-incrimination. In *United States v. Kinchen*, Joshua Kinchen was convicted of knowingly distributing at least fifty grams of cocaine.[183] The facts of this case involve a confidential informant who contacted Roger Brooks (the head of a drug operation) to purchase cocaine.[184] The confidential informant spoke with Brooks on the phone as she pulled into a gas station.[185] When she pulled into the gas station, she saw a man who identified himself as "Lil' Maine."[186] The confidential informant then handed her phone to Lil' Maine.[187] Brooks recognized Lil' Maine as the seller.[188] Later, the confidential informant picked Kinchen out of a lineup and identified him as the seller.[189] Kinchen went to trial and was subsequently convicted for knowingly distributing cocaine. Kinchen appealed and contended that the district court erred in refusing to allow a witness (his brother, Nathaniel) to invoke the Fifth Amendment in the presence of the jury.[190] Kinchen contended that the man who identified himself as Lil' Maine was his brother, not him.[191]

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178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 225–26.
182. *See id.*
183. United States v. Kinchen, 729 F.3d 466, 469 (5th Cir. Sept. 2013).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 474–75.
191. *Id.* at 470.

Before the trial began, the court appointed an attorney for Nathaniel and asked both parties to file any questions that they had for him.[192] The court then selected five of those questions.[193] The court also held another hearing to determine whether the defendant wished to invoke his Fifth Amendment right.[194] His attorney said that he would.[195] Kinchen wanted to ask Nathaniel certain questions before the jury so that he would have to invoke his Fifth Amendment right to each individual question.[196] The court said that he could only ask the pre-approved questions.[197] Kinchen contended that this denial prevented him from explaining to the jury why the testimony was limited.[198]

The Fifth Circuit held that it was within the district court's discretion to prevent Kinchen from asking Nathaniel questions that would then require him to invoke his Fifth Amendment rights in the jury's presence.[199] The court further explained that Kinchen did not have a right to benefit from inferences the jury may have drawn from his assertion of the privilege.[200] The court concluded its analysis by stating that the key issue in these types of situations is the *legitimacy* of a witness invoking his Fifth Amendment rights; however, Kinchen did not brief this issue on appeal.[201] Therefore, in future attempts to have a witness plead the Fifth in front of a jury, the defendant should challenge *why* the witness has decided to take advantage of his or her Fifth Amendment right in that situation.

E. Post-Arrest Silence

In addition to possessing the right to invoke one's Fifth Amendment right in court, one may also invoke his Fifth Amendment right post-arrest by remaining silent. In *United States v. Andaverde-Tiñoco*, the Fifth Circuit affirmed the district court's holding that the Government improperly invoked Jose Julian Andaverde-Tiñoco's (the defendant) post-arrest silence in its closing argument and rebuttal.[202] A United States Border Patrol agent noticed four individuals moving north from the Rio Grande River.[203] The agent called for help and three agents collectively handcuffed the defendant and read him his *Miranda* rights.[204] One of the agents then moved the defendant

192. *Id.* at 474.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 475.
199. *Id.*
200. *Id.* (citing United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir. 1974)).
201. *Id.*
202. United States v. Andaverde-Tiñoco, 741 F.3d 509, 522 (5th Cir. Dec. 2013), *cert. denied*, 134 S. Ct. 1912 (2014).
203. *Id.* at 514.
204. *Id.*

to a Border Patrol station and read him his *Miranda* rights again during an interview at the station.[205] During the interview, the defendant admitted that he (1) was a Mexican citizen, (2) entered the United States that day by swimming across the Rio Grande, and (3) had previously been removed from the United States.[206] The defendant signed and approved a written record of the interview.[207]

During his trial, the defendant admitted to the elements of the offense but contended that he re-entered the United States under duress.[208] He argued that a group of armed men stopped him and his friends when they were driving in Mexico and stole his car and money.[209] He contended that the thieves drove them to the river and told them that they either had to cross the river or else they would be shot.[210] The defendant did not explain this part of the story to the agents when he was initially detained but argued that he did tell the agents when he was fingerprinted and interviewed.[211]

The defendant contended that the Government improperly argued to the jury that he remained silent instead of telling his story of duress, and therefore, implied that he was not telling the truth.[212] The defendant stated that the Government's argument violated the holding in *Doyle v. Ohio*, which held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause."[213]

The Fifth Circuit explained that the remarks of a prosecutor or witness "constitute comment on a defendant's silence if the manifest intent was to comment on the defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark."[214] The court stated, however, that the Government *can* use a "defendant's post-*Miranda* silence to challenge a defendant who testifies to an exculpatory version of events and claims to have told the police that version following arrest."[215] In other words, if the defendant "opens the door," the Government may highlight his or her silence to contradict the defendant's story. Once the door is open, the Government may use the defendant's post-arrest silence to impeach the defendant's testimony, but the Government may not ask a jury to infer guilt directly from the post-arrest silence.[216] The court made very

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 514–15.
212. *Id.* at 518.
213. *Id.* at 518, 520 (alterations in original) (quoting Doyle v. Ohio, 426 U.S. 610, 619 (1976)).
214. *Id.* (quoting United States v. Carter, 953 F.2d 1449, 1464 (5th Cir. 1992)).
215. *Id.* (citing *Doyle*, 426 U.S. at 619 n.11).
216. *Id.* at 520 (citing United States v. Rodriguez, 260 F.3d 416, 421 (5th Cir. 2001)).

clear that when the impeachment exception (or the "opening of the door" exception) is not met, essentially any description of the defendant's silence following arrest and *Miranda* warning is not allowed.[217]

In *Andaverde-Tiñoco*, the court held that "the government went beyond 'a permissible attempt to impeach and clarify' once [the defendant] delimited his exact version of post-arrest cooperation to his companions."[218] For example, the defendant's opening statement explained that he immediately informed agents of his exculpatory account of what happened.[219] This opened the door for a narrow impeachment; however, the Government, during its closing argument, argued that the defendant did not say anything about the robbery in the car on the way to the station, *but argued that his friends did*.[220]

The court then had to decide whether the Government's error affected the defendant's substantial rights. The court found that it did.[221] Even though the defendant did open the door to some questions about what he and his friends experienced, the court could not find "that his duress defense presented a frivolous argument that had no chance of success such that the *Doyle* errors did not affect the outcome."[222] Once the court decided that the defendant had shown an error that affected his substantial rights, the court then had the ability to use its own discretion to "correct the error . . . if it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[223] The court held that the error did not rise to that level since: (1) the defendant stated his full account of "collective cooperation"[224] with his friends in his opening argument, (2) the defendant emphasized that same account in a cross examination, (3) the Government's violation was in response to the defendant's acknowledgment that he did not immediately tell officers his side of the story, (4) the defendant attracted attention to the "inconsistency between his post-arrest silence and his duress defense," and (5) the defendant never objected to these violations.[225] Based on the holding of this case, prosecutors should be very wary of commenting on a defendant's post-arrest silence, especially since the court held that the Government committed a *Doyle* violation even though (1) the defendant did not make a *Doyle* objection during trial, (2) the defendant made his duress and cooperation story a central part of his case, and (3) the defendant indirectly

217. *Id.* (citing United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983)).
218. *Id.* at 522.
219. *Id.* at 521.
220. *Id.* at 520–22.
221. *Id.* at 522.
222. *Id.* at 523.
223. *Id.* at 518.
224. *Id.* at 521. "Collective cooperation," in this context, means that the defendant and his friends collectively did not say anything about the robbery. *See id.* at 522.
225. *Id.* at 524.

highlighted the inconsistency between his silence and his duress account.[226] In other words, one would think that if the Government could get away with commenting on a defendant's post-arrest silence, this would be the time. The court's decision to find that the Government did violate *Doyle* but to not correct this error should send a message loud and clear to all prosecutors: Think very hard before drawing attention to a defendant's post-arrest silence and post-*Miranda* warning with the intent of implying guilt.

F. Statements Made During Custodial Interrogation

Defendants often seek to suppress statements made during interrogations based on duress or coercion. In *United States v. Anderson*, Joseph Demont Anderson was convicted of aiding and abetting a bank robbery.[227] While he was in custody, he signed a *Miranda* waiver and cooperated in an interview with a detective and agent.[228] The interview was videotaped.[229] The defendant later moved to suppress all statements made during his arrest and during an interrogation in an interview room.[230] The district court denied the motion to suppress.[231] He then appealed the district court's decision.[232]

The Government had to prove that the defendant was warned of his rights to remain silent and to consult with an attorney.[233] The Fifth Circuit considered the totality of circumstances to determine whether any statement was a "product of the accused's free and rational choice."[234]

First, the defendant stated that he was coerced to make certain statements when he was "roughed-up" at the time he was arrested; however, the Fifth Circuit held that no officer "roughed [him] up."[235] Instead, an officer accidentally landed on him after a foot chase and was not at the interrogation where the defendant made the statements at issue.[236] Further, the court determined that there was zero suggestion during the interview that any further physical contact would occur if the defendant remained silent.[237] Second, the defendant argued that after his arrest, an officer told him that he would go to prison for forty years.[238] The officer denied making this statement, and the district court affirmed the officer's testimony that neither

226. *Id.* at 524–25.
227. United States v. Anderson, 755 F.3d 782, 789 (5th Cir. June 2014).
228. *Id*.
229. *Id.*
230. *Id.* at 789–90.
231. *Id.* at 790.
232. *Id.*
233. *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 471 (1966)).
234. *Id.* (quoting United States v. Bell, 367 F.3d 452, 461 (5th Cir. 2004)).
235. *Id.*
236. *Id.* at 790–91.
237. *Id.* at 791.
238. *Id.*

he nor any other officer made that statement.[239] The Fifth Circuit deferred to the district court for this determination and stated that (1) there was no evidence that this statement was made, and (2) even if the statement was made, it was not made in the context of the interrogation, and discussions regarding potential sentences are usually not considered coercive.[240] Third, the defendant contended that he was overwhelmed by the physical size of the officers who falsely accused him of the crime.[241] The court said that (1) the video showed officers introducing themselves with no weapons, no touching, and no handcuffs throughout the interview; (2) the defendant had substantial contact with law enforcement before his arrest, further demonstrating that his statements were most likely voluntary, as he was not overwhelmingly nervous; and (3) even if the officers were physically large and were accusing the defendant of committing the crime, these factors have not constituted coercion in the past.[242] Accordingly, after considering the totality of the circumstances, the court affirmed the district court's denial of the defendant's motion to suppress because the defendant's statements were knowing and voluntary.[243]

G. Requirement to Undergo Polygraph Testing

While *Day v. Seiler* is a civil case, the Fifth Circuit's analysis informs the reader of how certain requirements set forth by the State, such as polygraph testing, can violate a defendant's Fifth Amendment rights to avoid self-incrimination.[244] After his involvement in multiple acts of sexual assault, Darryl Day was put on trial to determine whether he should be classified as a sexually violent predator.[245] Ultimately, he was civilly committed as a sexually violent predator and the state intermediate appellate court affirmed this judgment.[246] Day filed a 42 U.S.C. § 1983 claim against a Texas state judge, the attorney general, and a third state official, arguing that the mandatory polygraph tests he had to take violated his Fifth Amendment right against self-incrimination.[247]

According to Day, his refusal to participate in a polygraph examination could have led to a felony prosecution because his refusal could have been construed as: (1) a confession of violations to his treatment or (2) a refusal to take a polygraph test, which is, by itself, a violation.[248] The Fifth Circuit

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *See* Day v. Seiler, 560 F. App'x 316, 319–20 (5th Cir. Mar. 2014) (per curiam).
245. *Id.* at 318.
246. *Id.*
247. *Id.*
248. *Id.*

compared Day's case to one of its recent decisions, *Bohannan v. Doe*, where the plaintiff similarly argued that mandatory written statements and polygraph examinations violated his Fifth Amendment rights since he could not decline and his statements were used against him in trial.[249] The plaintiff in *Bohannan* had the option to either (1) refuse to answer questions and be prosecuted for that refusal, or (2) acknowledge violating the commitment order and be charged accordingly.[250] The court in *Bohannan* found that the plaintiff alleged sufficient facts to raise a plausible claim of relief.[251] Similar to the plaintiff in *Bohannan*, Day explained that sexually violent predators were required to undergo the polygraph examinations or else they would be dismissed from therapy, which is a felony.[252] The court held that Day's situation was very similar to the situation faced in *Bohannan* and remanded for further proceedings.[253] Accordingly, the court has indicated that defendants have the opportunity to "plead the Fifth" not only in the context of an interrogation or in a courtroom, but also when presented with a polygraph examination.[254]

*H. Extraterritorial Application of Fifth Amendment/*Bivens *Action*

The authors of this Article previously discussed *Hernandez v. United States* to illustrate the Fifth Circuit's refusal to apply the Fourth Amendment extraterritorially.[255] Therefore, the authors will not restate the facts of *Hernandez* here. *Hernandez*, however, also discussed the extraterritorial application of the Fifth Amendment and whether a federal agent was liable under *Bivens* for violating a non-citizen's Fifth Amendment rights when the federal agent was inside the United States but the non-citizen was outside the United States.[256] While *Hernandez* was a civil case, it determined that the Fifth Amendment could be applied outside of the United States and held that a *Bivens* action related to a Fifth Amendment violation could be brought when the victim was a non-citizen who was injured outside the United States.[257]

The district court held that Hernandez lacked Fourth and Fifth Amendment protections because he was an alien injured outside of the United States.[258] As discussed above, the Fifth Circuit refused to extend the Fourth

249. *Id.* at 320 (citing Bohannan v. Doe, 527 F. App'x 283, 296 (5th Cir. June 2013) (per curiam)).
250. *Id.* (citing *Bohannan*, 527 F. App'x at 296).
251. *Id.* (citing *Bohannan*, 527 F. App'x at 296).
252. *Id.*
253. *Id.*
254. *See id.*
255. *See supra* Part I.F.
256. Hernandez v. United States, 757 F.3d 249, 260 (5th Cir. June), *reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014).
257. *Id.* at 273.
258. *Id.* at 256; *see supra* Part I.F.

Amendment's protections to these facts.[259] Therefore, Hernandez was allowed to assert his Fifth Amendment rights because when an excessive force claim is not covered by the Fourth Amendment, it may be asserted as a violation of due process.[260]

The Fifth Circuit first discussed whether the Fifth Amendment could be applied extraterritorially. The first relevant factor was the citizenship and status of the claimant.[261] The court held that Hernandez's Mexican citizenship could weigh against extraterritorial application, but that his non-threatening status would not.[262] The second relevant factor was the nature of the site where the violation occurred.[263] The court analyzed the control that the United States had of this site and held that even though it did not have "formal control or de facto sovereignty over the Mexican side of the border," the United States still had a "heavy presence and regular activity of federal agents across a permanent border."[264] Finally, the court considered some of the concerns of extraterritorial application, such as an interest in self-protection and a need for surveillance.[265] The court explained that while those factors carry weight in the Fourth Amendment context, "they do not carry the same weight in the Fifth Amendment context."[266] The Fifth Amendment aims to protect against "arbitrary conduct that shocks the conscience."[267] Recognizing extraterritorial application of the protection against conscience-shocking conduct would not cause agents to alter their conduct since the court has already held that aliens inside our borders are entitled to be "free of gross physical abuse at the hands of state or federal officials."[268] The court, therefore, held that "a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment."[269]

Since it was then determined that Fifth Amendment rights applied to Hernandez, the court turned to "whether an individual should have a *Bivens* remedy arising under the Fifth Amendment against a federal law enforcement agent for his conscience-shocking use of excessive force" across the border.[270] The court first asked whether "any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing

259. *See supra* Part I.F.
260. *Hernandez*, 757 F.3d at 268.
261. *Id.*
262. *Id.* at 268–69.
263. *Id.* at 269.
264. *Id.* at 270.
265. *Id.*
266. *Id.*
267. *Id.* at 271.
268. *Id.* (citing Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)).
269. *Id.* at 272.
270. *Id.* at 272–73.

reason for the Judicial Branch to refrain from providing a new [damages] remedy."[271] The court answered that question negatively.[272] Second, the court asked whether there were any special factors that encourage hesitation given the absence of Congress's affirmative action.[273] The court also answered this question negatively.[274] Therefore, the court formally extended a *Bivens* action where "an individual located abroad asserts a right to be free from gross physical abuse under the Fifth Amendment against federal law enforcement agents located in the United States based on their conscience-shocking, excessive use of force across our nation's borders."[275]

Finally, the court held that Agent Mesa's claim of qualified immunity failed.[276] As the court explained, qualified immunity "shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances."[277] The court held that "[n]o reasonable officer would have understood Agent Mesa's . . . conduct to be lawful."[278] The court subsequently reversed the judgment in favor of Agent Mesa and remanded.[279] Therefore, the Fifth Amendment now applies extraterritorially, and non-citizens in circumstances similar to *Hernandez* may properly bring a *Bivens* action.[280] This decision is particularly significant given the surge of violence currently located at the United States–Mexico border.

III. MISCELLANEOUS CRIMINAL RULES & TRIAL PROCEDURES

Throughout this past year, the Fifth Circuit issued several additional significant opinions that did not relate directly to searches and seizures, double jeopardy, multiplicity, or self-incrimination. For example, the court opined on the role of the jury when the defendant admits his guilt on the stand, the level of involvement a trial court may have in plea discussions, and a defendant's right to be present during specific proceedings.[281] The court also briefly dove into the quagmire of retroactivity.[282] Finally, the

271. *Id.* at 273 (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).
272. *Id.*
273. *Id.* at 274–77.
274. *Id.*
275. *Id.* at 277.
276. *Id.* at 279.
277. *Id.* (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam)) (internal quotation marks omitted).
278. *Id.*
279. *Id.* at 280.
280. *Id.* at 277.
281. *See* United States v. Salazar, 751 F.3d 326, 329 (5th Cir. May 2014); United States v. Hemphill, 748 F.3d 666, 676 (5th Cir. May 2014); United States v. Thomas, 724 F.3d 632, 641 (5th Cir. Aug. 2013), *cert. denied*, 134 S. Ct. 1040 (2014).
282. *See* Panetti v. Stephens, 727 F.3d 398, 414–15 (5th Cir. Aug. 2013), *cert. denied*, 135 S. Ct. 47 (2014).

appropriateness of certain jury instructions and the importance of prompt presentment of a defendant to a magistrate judge became the focus of two Fifth Circuit opinions this term.[283]

A. Sixth Amendment

Is it proper for a district court to instruct the jury to find a defendant guilty when the defendant admits on the witness stand that he is guilty? Intuitively, one might think so, but that was not the answer given to us by the Fifth Circuit in *United States v. Salazar*.[284] At trial, the Government presented overwhelming evidence of guilt.[285] Against his attorney's advice, Salazar took the stand and confessed to all of the crimes charged.[286] At the trial's conclusion, believing no factual issue remained for the jury, the district court instructed the jury to go back to the jury room and find the defendant guilty.[287] Minutes later, the jury did so.[288]

On appeal, the first issue was whether plain-error or invited-error review applied.[289] Plain-error review did not apply because the district court expressly stated that Salazar preserved his right to appeal the directed guilty verdict.[290] The court also addressed the invited-error issue, pointing out that "[a] defendant may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit."[291] "The government argue[d] that defense counsel invited [the] error by lamenting on the futility of closing arguments": "Well, what am I going to argue? That he wasn't there? That he didn't complete the conspiracy?"[292] But, the court explained that offhanded comments defense counsel made could not have caused the defendant to change his plea, acknowledging that it might have been inclined to adopt invited-error review had the defendant actually changed his plea during trial, thereby essentially waiving his right to a jury.[293] Accordingly, the court proceeded under de novo review.[294]

Addressing the merits of Salazar's Sixth Amendment right to jury trial challenge, the court reiterated that "[t]he Sixth Amendment safeguards the accused['s] . . . right to a speedy and public trial[] by an impartial jury, and require[s] criminal convictions to rest upon a jury determination that the

283. *See* United States v. Boche-Perez, 755 F.3d 327, 347 (5th Cir. June 2014); United States v. Aldawsari, 740 F.3d 1015, 1020 (5th Cir. Jan.), *cert. denied*, 135 S. Ct. 160 (2014).
284. *Salazar*, 751 F.3d at 329.
285. *Id.*
286. *Id.*
287. *Id.* at 329–30.
288. *Id.* at 330.
289. *Id.* at 332.
290. *Id.* at 333.
291. *Id.* at 332 (alterations in original) (quoting United States v. Wells, 519 U.S. 482, 487–88 (1997)).
292. *Id.*
293. *Id.* at 332–33.
294. *Id.* at 330.

defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[295] "[T]he Sixth Amendment prohibits the court from directing a guilty verdict. That protection extends even to obviously guilty defendants."[296] To the Fifth Circuit it made "no difference that the court told the jury to do so rather than entering the verdict itself."[297] Finally, the court addressed the Government's suggestion that Salazar's confession amounted to a guilty plea.[298] Finding that a confession did not equate to a guilty plea, it stated that "[t]he Sixth Amendment permits a jury to disregard a defendant's confession and still find him not guilty" and that "[a] defendant's confession merely amounts to more, albeit compelling, evidence against him. But no amount of compelling evidence can override the right to have a jury determine his guilt."[299]

In *Dorsey v. Stephens*, the defendant filed a habeas challenge to his Texas state murder conviction claiming that admission of a soundless video "violated his Sixth Amendment right to confront witnesses against him."[300] Though the procedural history of the case is complex, the underlying facts of Dorsey's Confrontation Clause challenge are not. Simply put, Dorsey claimed that he did not shoot his wife and that his two-and-a-half-year-old son had drawn a pistol "from his mother's purse and accidentally discharged the weapon, killing her."[301] "As part of its evidence to rebut Dorsey's version of the facts, the State offered a videotape" prepared by a sheriff's office detective who had brought the son in to determine if he was physically able to remove the pistol from its holster and pull the trigger.[302] Neither Dorsey nor his counsel were present or notified when the son's interactions were videotaped.[303] While in an interview room, the son unsuccessfully attempted to unhook the strap that held the weapon in its holster.[304] After the detective unhooked the strap, the son was able to draw the revolver from its holster, but he was unable to pull the trigger while the gun was in "double action" mode (i.e., The hammer was not cocked before the trigger was pulled, requiring that one must first cock the hammer before he can fire the weapon. "Double action mode increases the amount of force required to pull the trigger.").[305] Once the detective "manually cocked the hammer on the revolver—putting it in 'single action' mode—[the son] was able to pull the

295. *Id.* at 333 (alterations in original) (citations omitted) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).
296. *Id.* at 333–34.
297. *Id.* at 334.
298. *Id.*
299. *Id.*
300. Dorsey v. Stephens, 720 F.3d 309, 315 (5th Cir. July 2013), *cert. denied*, 134 S. Ct. 1292 (2014).
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*

trigger using two fingers."[306] Importantly, there was no evidence at trial indicating whether the pistol was in single or double action mode at the time of the shooting.[307] Though defense counsel filed an appropriate "motion to suppress the videotape on a number of grounds," the trial court granted the motion only to the extent that the "audio portion of the video could not be played before the jury."[308]

Invoking *Crawford v. Washington*, Dorsey contended that the son's actions were non-verbal responses given in the course of his communications with the detective and were used by the State as statements or assertions that the son could not fire the handgun in double action mode.[309] Because *Crawford* "bars the introduction of 'testimonial statements' of a witness who does not appear at trial 'unless he [is] available to testify, and the defendant had [ ] a prior opportunity for cross examination,'" Dorsey maintained that the son's non-verbal, demonstrative responses to questions were testimonial in nature.[310] Further, the son's "action[] could have meant that he did not want to fire the gun at the time that he was asked to pull the trigger when the weapon was in double action mode."[311]

Had this not been a habeas proceeding, it is possible that the Fifth Circuit might have reached a different result, but it felt compelled to review Dorsey's claim against the well-established habeas standard of whether the "Texas Court of Criminal Appeals' denial of Dorsey's Confrontation Clause claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.'"[312] Noting that it could not find, nor did Dorsey cite, "any decision of the Supreme Court that clearly establishe[d] the contours of the Confrontation Clause when applied to facts even remotely analogous to a soundless video of a child's responses and actions during an interview with law enforcement," the Fifth Circuit denied Dorsey's habeas challenge on this ground.[313] So, while this decision could support the introduction of other soundless videotapes in subsequent court actions, any party proffering such evidence should proceed with the utmost caution, recognizing that the Fifth Circuit has not offered a definitive position on the issue.

B. Court Involvement in Plea Discussions

Anytime a district court begins an inquiry into plea discussions along the lines that it "did not want to get too much involved in this, but you look

306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 317 (citing Crawford v. Washington, 541 U.S. 36, 53–54 (2004)).
310. *Id.* (alterations in original) (quoting *Crawford*, 541 U.S. at 53–54).
311. *Id.*
312. *Id.* at 318 (quoting Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (per curiam)).
313. *Id.*

like a nice young fellow," bells and whistles should go off.[314] That is the clear import of *United States v. Hemphill*, a case reaffirming that the court must not participate in these discussions and that "[t]he prohibition of participation by the district court in plea discussions is a 'bright line rule' and constitutes 'an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process.'"[315]

At a pre-trial docket call, the district court initially asked a number of questions focused on whether Hemphill understood the downside of going to trial.[316] Necessarily, the fact came up that Hemphill had been offered a plea bargain with an agreed-to seven-year sentence. Defense counsel confirmed that it had discussed this plea offer with the defendant.[317] Impliedly, the Fifth Circuit held that all of this was appropriate in keeping with *Lafler v. Cooper*[318] and *Missouri v. Frye*,[319]—two recent cases in which "the Supreme Court held that defendants could have viable claims for ineffective assistance if their counsel fail[ed] to communicate a plea offer and the defendant thereby los[t] the opportunity to plead to less serious charges or to receive a less serious sentence."[320]

But, things went downhill from there when the district court began to tell Hemphill about other defendants who had appeared before the court and rejected a seven-year plea bargain.[321] These defendants were later convicted and sentenced to thirty-five years in prison.[322]

The next week, immediately before trial was set to begin and after the disclosure of newly discovered evidence, the district court judge told Hemphill that he was going to give him additional time to consider a new plea offer with an agreed-to sentence of five years instead of seven.[323] Defense counsel indicated that they were appreciative of the additional time, to which the court responded that the new evidence could be detrimental to the defense.[324] The court reminded Hemphill about the prior defendants who were currently serving thirty-five-year sentences.[325] The judge also told Hemphill about another defendant who "had been facing a 35- or 40-year sentence but eventually 'got with the program' and accepted a ten-year offer

314. *See* United States v. Hemphill, 748 F.3d 666, 668 (5th Cir. May 2014).

315. *Id.* at 672 (quoting FED. R. CRIM. P. 11(c)(1); United States v. Pena, 720 F.3d 561, 570 (5th Cir. June 2013)).

316. *Id.* at 668–69.

317. *Id.* at 669.

318. *See generally* Lafler v. Cooper, 132 S. Ct. 1376 (2012) (finding counsel's ineffective assistance prejudiced the petitioner).

319. Missouri v. Frye, 132 S. Ct. 1399, 1410–11 (2012).

320. *Hemphill*, 748 F.3d at 675, 677 (citing *Cooper*, 132 S. Ct. at 1391; *Frye*, 132 S. Ct. at 1409).

321. *Id.* at 669.

322. *Id.*

323. *Id.* at 670.

324. *Id.*

325. *Id.*

from the Government."[326] The judge called this defendant a success story and handed Hemphill a copy of a newspaper article about the prior defendant, and stating, "Mr. Hemphill can take that back and think about it, think about his life, so forth."[327]

Four days later, Hemphill pleaded guilty.[328] Roughly two months thereafter, Hemphill filed a *pro se* motion to withdraw, arguing, among other things, that he had been under duress and that the judge had violated Rule 11 by improperly participating in plea discussions.[329] Ultimately, the district court denied Hemphill's motion to withdraw his plea.[330]

On appeal, the Fifth Circuit vacated the conviction and remanded the case to a different judge for further proceedings.[331] "Our main concern is with the district court's repeated description of similarly situated defendants and the consequences that befell them when they did not accept plea offers. . . . [The] comments were coercive."[332] Holding that the district court's statements and inquiry violated Rule 11, the Fifth Circuit explained that Rule 11's "blanket prohibition admits of no exceptions and serves several important concerns."[333] The court held,

> First and foremost, [Rule 11] serves to diminish the possibility of judicial coercion of a guilty plea, regardless of whether the coercion would cause an involuntary, unconstitutional plea. Second, any participation by the court "is likely to impair the trial court's impartiality. . . ." Third, participation by the court "creates a misleading impression of the judge's role in the proceedings."[334]

C. Right to Be Present

In *United States v. Thomas*, the Fifth Circuit addressed a criminal defendant's Fifth Amendment right to be present at trial in the context of jury impanelment, questioning, and in-chambers conferences.[335] Specifically, Thomas claimed that she was improperly excluded from critical stages of the trial on four occasions: "(1) exercise of peremptory challenges and jury impanelment; (2) questioning a juror about possible jury intimidation; (3) questioning a juror about a situation happening outside the courthouse;

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326. *Id.*
327. *Id.* (internal quotation marks omitted).
328. *Id.* at 671.
329. *Id.*
330. *Id.*
331. *Id.* at 677.
332. *Id.* at 673.
333. *Id.* at 672–73 (citing United States v. Miles, 10 F.3d 1135, 1139 (5th Cir. 1993)).
334. *Id.* (citations omitted) (internal quotation marks omitted).
335. United States v. Thomas, 724 F.3d 632, 641–42 (5th Cir. Aug. 2013), *cert. denied*, 134 S. Ct. 1040 (2014).

and (4) an in-chambers meeting about how to address a note from the jury."[336] Because Thomas, a Mississippi doctor charged with Medicare and Medicaid fraud, failed to object to her exclusion contemporaneously, the Fifth Circuit reviewed for plain error.[337]

While the Fifth Circuit denied Thomas's "right to be present" challenge, it did so only because she did not make a specific showing of prejudice affecting her substantial rights—the third prong of plain-error analysis.[338] The import of *Thomas*, however, is from the Fifth Circuit's determination that Thomas's exclusion from jury impanelment and questioning did constitute a deviation from her legal rights under the Constitution and Federal Rule of Criminal Procedure 43, which she did not waive, thereby satisfying the first prong of plain-error analysis.[339] "It is a well-settled principle of constitutional law that a criminal defendant has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings . . . [and that] *the impaneling of the jury is one such stage*."[340] Further, Rule 43 codifies the requirement that a criminal defendant must be present at every stage of his trial, "including jury impanelment."[341] "One purpose of the right to presence is to protect the defendant's exercise of his peremptory challenges, which means the defendant should be allowed to obtain as much first hand information as feasible to facilitate his ability to participate in the selection of a jury."[342] Citing its 2011 decision in *United States v. Curtis*, the court noted that it previously recognized that two requirements stem from the right to presence for peremptory challenges:

> (1) the defendant must be present for the substantial majority of the jury-selection process; and (2) the defendant must be present in the courtroom at the moment when the court gives the exercise of peremptory challenges formal effect by reading into the record the list of jurors who were not struck.[343]

Because Thomas was not present when her counsel exercised her peremptory challenges and when the trial court read the list of jurors who were not struck into the record, coupled with the fact that the trial court previously found that Thomas had not waived her right to be present,

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336. *Id.*
337. *Id.* at 642.
338. *Id.* at 645–46.
339. *Id.* at 643.
340. *Id.* at 642 (alterations in original) (quoting Cohen v. Senkowski, 290 F.3d 485, 489 (2d Cir. 2002)) (internal quotation marks omitted).
341. *Id.* (quoting FED. R. CRIM. P. 43).
342. *Id.* at 642–43 (quoting United States v. Curtis, 635 F.3d 704, 715 (5th Cir. 2011)).
343. *Id.* at 643 (emphasis omitted) (quoting *Curtis*, 635 F.3d at 715) (internal quotation marks omitted).

Thomas's challenge based on her absence from jury impanelment satisfied the first prong of the plain-error test.[344]

Notably, Thomas's right-to-presence challenge based on in-chambers conferences did not fare as well.[345] The other instances in which Thomas claimed she was excluded included "two instances where a juror was brought in for an in-chambers conference with the judge and counsel and a discussion about how to answer a question in a note from the jury."[346] The Fifth Circuit found that neither of these instances were "critical stages" of the trial at which she had a right to be present under either the Fifth Amendment or Rule 43.[347]

D. Retroactivity

In the deep, unfriendly quagmire known as "*Teague* retroactivity," the Fifth Circuit provided some limited clarity in relation to claims under the Supreme Court's 2008 decision in *Indiana v. Edwards*[348]—a decision clarifying that "a state court has discretion to 'insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness.'"[349]

Teague v. Lane prescribes that "a federal habeas court can apply a new rule of constitutional law retroactively only if the rule (i) 'places a class of private conduct beyond the power of the State to proscribe' or (ii) is a 'watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'"[350] In *Panetti v. Stephens*, only the "watershed" exception was at issue, which applied "only if it (i) '[is] necessary to prevent an impermissibly large risk of an inaccurate conviction' and (ii) 'alter[s the court's] understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[351] The *Panetti* court found that the defendant's *Edwards* challenge met the first element given that "the *Edwards* court itself cautioned that 'insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.'"[352] The *Panetti* court, however, was unwilling to equate *Edwards* with a previously unrecognized bedrock

344. *Id.* at 644.
345. *Id.*
346. *Id.*
347. *Id.* at 644–45.
348. Indiana v. Edwards, 554 U.S. 164 (2008).
349. Panetti v. Stephens, 727 F.3d 398, 407 (5th Cir. Aug. 2013) (quoting *Edwards*, 554 U.S. at 174–75), *cert. denied*, 135 S. Ct. 47 (2014); *see* Dusky v. United States, 362 U.S. 402, 402–03 (1960) (per curiam).
350. *Panetti*, 727 F.3d at 413 (alteration in original) (quoting Teague v. Lane, 489 U.S. 288, 290 (1989)).
351. *Id.* (alterations in original).
352. *Id.* at 413–14 (quoting *Edwards*, 554 U.S. at 176–77)).

constitutional principle given that it did not affect a sea of change in criminal procedure comparable to that of *Gideon v. Wainwright*.[353] "The Supreme Court 'ha[s] not hesitated to hold that less sweeping and fundamental rules' do not qualify, emphasizing that the second *Teague* exception is 'extremely narrow' and that it is 'unlikely' that new procedural rules will emerge that fall within it."[354] Accordingly, the Fifth Circuit concluded that *Edwards* was not retroactively applicable on collateral review.[355]

E. Jury Instructions

Aldawsari—a case involving a conviction for "attempting" to use a weapon of mass destruction in connection with possible targets that included the Dallas residence of former President George Bush, the Cotton Bowl, and various Dallas festivals—is instructive in so far as the Fifth Circuit reiterated that jury instructions are reviewed for abuse of discretion: "considering 'whether the instruction, taken as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.'"[356] Aldawsari challenged a jury instruction for the crime of attempt and a single sentence therein which stated that "some preparations, when taken together with intent, may amount to an attempt."[357] Aldawsari argued that the instruction allowed him "to be convicted even though he had only performed 'mere preparations,' and had never completed a substantial step toward committing the offense of using a weapon of mass destruction."[358] Acknowledging that the single sentence "might seem misleading when considered by itself and stripped of context," when "taken as a whole," the Fifth Circuit determined that "the district court's jury instruction correctly described the 'preparation-attempt continuum,'" and under an abuse of discretion standard, provided no basis for reversal of the defendant's conviction.[359] "In particular, this instruction was faithful to our analysis in *United States v. Mandujano*, where we concluded that 'some preparations may amount to an attempt' so long as this conduct is 'more than remote preparation' and is 'strongly corroborative of the firmness of the defendant's criminal intent.'"[360]

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353. *Id.* at 414; *see* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

354. *Panetti*, 727 F.3d at 414 (alterations in original) (citations omitted) (quoting Whorton v. Bockting, 549 U.S. 406, 417–18 (2007)).

355. *Id.* at 414–15.

356. United States v. Aldawsari, 740 F.3d 1015, 1019 (5th Cir. Jan.) (quoting United States v. Richardson, 676 F.3d 491, 506 (5th Cir. 2012)), *cert. denied*, 135 S. Ct. 160 (2014).

357. *Id.*

358. *Id.*

359. *Id.* at 1019–20.

360. *Id.* (quoting United States v. Mandujano, 499 F.2d 370, 375 (5th Cir. 1974)).

F. Effect of Delay on Confession

In *United States v. Boche-Perez*, the defendant, Carmen de Jesus Boche-Perez, was convicted of knowingly possessing child pornography.[361] He appealed the denial of his motion to suppress his confessions.[362] The Fifth Circuit held that the Government's delay in presenting the defendant to a magistrate judge was not unreasonable and that the delay did not affect the voluntariness of the defendant's confessions.[363]

The defendant was apprehended when he entered the United States in Laredo, Texas, on October 27, 2010.[364] He was a lawful permanent resident, but he was stopped because he was flagged as a suspected narcotics smuggler due to his criminal history.[365] Agents then searched his bag and found child pornography.[366] The agents contacted Immigration and Customs Enforcement (ICE).[367] The defendant was read his *Miranda* rights.[368] The defendant waived his *Miranda* rights and denied any knowledge about the child pornography DVDs.[369] He was then arrested.[370] The defendant was later interviewed a second time where he waived his *Miranda* rights again and subsequently confessed to possessing child pornography and admitted to knowing the content of the DVDs.[371] An ICE agent then questioned him for a third time, and the defendant made statements regarding his possession of additional child pornography at his home.[372] The defendant spent two nights in jail and appeared before a magistrate judge on October 29, 2010.[373]

The Fifth Circuit began its analysis by explaining that Federal Rule of Criminal Procedure 5 requires a person making an arrest to take the defendant before a magistrate judge without unnecessary delay.[374] This idea of "prompt presentment" is also present in United States Supreme Court case law.[375] If the prompt-presentment requirement is violated, any confession obtained during a period of unreasonable delay would be suppressed.[376] Further, in

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361. United States v. Boche-Perez, 755 F.3d 327, 331 (5th Cir. June 2014).
362. *Id.*
363. *Id.* at 338–43.
364. *Id.* at 331.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 332.
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 333 (citing FED. R. CRIM. P. 5).
375. *See* Corley v. United States, 556 U.S. 303, 303 (2009); Mallory v. United States, 354 U.S. 449, 453 (1957), *superseded by statute*, 18 U.S.C. § 3501 (1968), *as recognized in Corley*, 556 U.S. at 322–23; McNabb v. United States, 318 U.S. 332, 342 (1943), *superseded by statute*, 18 U.S.C. § 3501 (1968), *as recognized in Corley*, 556 U.S. at 322–23.
376. *Boche-Perez*, 755 F.3d at 333.

1968, Congress passed 18 U.S.C. § 3501, which states "that a court may not suppress a confession made during a six-hour safe-harbor period solely due to a delay in presentment if the confession was made voluntarily."[377]

Before the *Corley* decision, the Fifth Circuit treated a delayed presentment as just one of the factors to be considered in a totality-of-the-circumstances evaluation of whether the confession was voluntary.[378] *Corley* disagreed with this notion and held that even a voluntary confession could be suppressed if it occurred during an unreasonable delay.[379] Now, if a confession occurs before presentment and beyond six hours from the time of the arrest, the court must decide whether the delay was unreasonable and unnecessary pursuant to *McNabb v. United States* and *Mallory v. United States*.[380] Under *McNabb* and *Mallory*, the court first determines the length of delay lapsing from the confession to when the defendant is taken before the magistrate judge.[381] Then, if the delay is longer than six hours, the court must determine whether the delay was justifiable.[382]

The court held that the defendant's first confession did occur outside of the six-hour safe-harbor period; however, the court determined that there was no evidence that the delay was for the purpose of extracting a confession and was mainly due to routing administrative processing and search procedures.[383] The court also explained that "[e]ven if [the court] assume[d] *arguendo* that the delay became unreasonable at some point before [the defendant] was presented to the magistrate, any subsequent illegality 'does not retroactively change the circumstances under which' [the defendant] confessed."[384] The court also analyzed the defendant's confessions under 18 U.S.C. § 3501(b) and, after considering the totality of circumstances, held that the defendant's statements were voluntary.[385] The takeaway from the court's analysis in *Boche-Perez* is that agents should take all necessary steps to ensure that a defendant is presented to a magistrate judge within six hours of an arrest.[386] Agents should absolutely not delay presentment for the purposes of inducing a defendant to confess.[387] If, however, six hours have passed and the defendant decides to confess, that confession will not necessarily be suppressed if the delay was reasonable and justified.[388]

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377. *Id.* (citing *Corley*, 556 U.S. at 322).
378. *Id.* at 334.
379. *Id.*
380. *Id.*
381. *Id.* at 336.
382. *Id.*
383. *Id.* at 338–39.
384. *Id.* at 341–42 (quoting United States v. Mitchell, 322 U.S. 65, 70 (1944)).
385. *Id.* at 342–43.
386. *Id.* at 338–39.
387. *Id.*
388. *Id.* at 342–43.