

Fifth Circuit and Supreme Court Updates

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Supreme Court Updates

October 2014 Term

Carroll v. Carman, __ U.S. __, 135 S.Ct. 348
(2014)

- 42 U.S.C. Sec. 1983 action
- “Knock and Talk”
- Police knocked at the back door accessed through the back yard rather than the front door
- Not clearly established law that the officer must go to the front door first
- So, qualified immunity

Heien v. North Carolina, __U.S.__, 135 S.Ct. 530 (2014)

- Pulled over because only one working tail light
- Consent to search given and cocaine was found
- North Carolina statute only required one tail light, but had never been interpreted by North Carolina appellate courts
- An officer's reasonable mistake of law may supply the reasonable suspicion required for a traffic stop
- *But see United States v. Alvarado Zarza*, 782 F.3d 246 (5th Cir. 2015).

Grady v. North Carolina, __U.S.__, 135 S.Ct. 1368 (2015)

- North Carolina civil proceeding subsection sex offender to post-conviction satellite-based monitoring
- Grady argued it was a search under *United States v. Jones*, 565 U.S. __, 132 S.Ct. 945 (2012)
- North Carolina emphasized it was a civil action and dismissed Grady's appeal
- The Supreme Court found that the program was a Fourth Amendment search

Rodriguez v. United States, __U.S.__, 135 S.Ct. 1609 (2015)

- Traffic stop was completed when officer asked for permission to walk his drug dog around the car. Driver said no.
- Officer had requested back up and did not consider Rodriguez free to leave even though traffic stop was completed.
- Seven to eight minutes after issuing the warning ticket, the dog hit and meth was found after a search of the vehicle.
- “[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”

City of Los Angeles v. Patel, __U.S.__, 135 S.Ct. 2443 (2015)

- City ordinance required hotel's to keep specific information on guests and to make those records available for inspection by any Los Angeles PD officer on demand.
- Failure to make the records available was a misdemeanor
- The Supreme Court found facial challenges to statutes can be brought under the Fourth Amendment
- The ordinance in question was facially unconstitutional because it penalized the owners for failing to turn over the records without an opportunity for pre-compliance review.

Ohio v. Clark, __U.S.__, 135 S. Ct. 2173 (2015)

- Pimp beats his girlfriend's children while in his care.
- One child reports it to his/her pre-school teacher, another teacher and a supervisor.
- All were mandatory reporters under state law.
- The one child's statements to teachers were introduced at trial but the child did not testify.
- "Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial."

Warger v. Shauers, __U.S.__, 135 S. Ct. 521 (2014)

- Civil trial of a motorcycle wreck.
- During deliberations the jury foreperson essentially admits to have lied during *voir dire*.
- After a verdict for the defendant, plaintiff sought a new trial on the basis of an affidavit from another juror that the foreperson had deliberately lied during *voir dire*.
- Supreme Court held that FRE 606(b) (bars evidence of statements made during deliberation) precluded the affidavit.
- *Abrogating Maldonado v. Missouri P.R. Co.*, 798 F.2d 764, 770 (5th Cir. 1986).

Johnson v. United States, ___U.S.___, 135 S. Ct. 2551
(2015)

- Talk to Greg Park!!

Glossip v. Gross, __U.S.__, 135 S. Ct. 2726 (2015)

- Oklahoma death penalty prisoners challenging the use of midazolam and seeking an injunction.
- Supreme Court denies
- Breyer (in dissent) – “I believe it highly likely that the death penalty violates the Eighth Amendment.”
- Scalia, Rhodes College 9/22/15, and University of MN School of Law, 10/20/2015, appearances – “It wouldn’t surprise me if it did” fall.

Henderson v. United States, __U.S.__, 135 S. Ct.
1780 (2015)

- Convicted felon sought return of firearms from FBI that had been surrendered as a condition of his bail.
- Requested that the FBI transfer them to a friend.
- Court held that 922(g) does not bar transfer unless it would allow the felon to later control the guns for either his use or direct their use.

Whitfield v. United States, __U.S.__, 135 S. Ct.
785 (2015)

- Fleeing a botched bank robbery Whitfield entered Mary Parnell's home and guided her from a hallway to a room a few feet away where she suffered a fatal heart attack.
- Prosecuted for several charges including on that established enhanced penalties for any person committing or fleeing a bank robbery to force another to accompany them. 18 U.S.C. Sec. 2113(e).
- Scalia held that a bank robber “forces [a] a person to accompany him” even if done so entirely within a single building or over a short distance.

Yates v. United States, __U.S.__, 135 S. Ct. 1074 (2015)

- Fisherman caught with undersized fish and told to preserve them till he gets back to shore.
- Of course, he threw them overboard and caught more, legal, fish.
- Prosecuted under 18 U.S.C. Sec. 1519 which makes it illegal to destroy or do other acts to “any record, document, or tangible object.”
- This particular statute originated from the Sarbanes-Oxley Act of 2002 in response to Enron.
- The Court held that for purposes of section 1519, a “tangible object” must be one used to record or preserve information.

Elonis v. United States, __U.S.__, 135 S. Ct. 2001 (2015)

- “Tone Dougie” posted graphically violent “rap” lyrics and imagery concerning his wife, co-workers, a kindergarten class and law enforcement on Facebook.
- Charged and convicted of transmitting threats in interstate commerce. 18 U.S.C. Sec. 875(c).
- Jury instruction at trial only required the government to show that a “reasonable person” would regard what he communicated as a threat. A mere negligence standard.
- The Court found that there is a presumption in favor of a scienter requirement when an element criminalizes otherwise innocent conduct. Threaten or know that it’s going to be taken as a threat.

Supreme Court Update

October 2015 Term

Maryland v. Kulbicki, __U.S.__, 136 S. Ct. 2, 2015

- First one of the new term!!!
- Defendant shot his mistress in 1993 and was convicted in 1995 based, in part, on Comparative Bullet Lead Analysis (CBLA). A procedure that has since been discredited but that was widely accepted at that time.
- Maryland found trial counsel ineffective for not finding a 1991 report (in 1995) that “presaged the flaws in CBLA evidence.” (BEFORE COMPUTERS?!?!?)
- The Supreme Court reversed the Maryland court stating that Maryland should have “judge[d] the reasonableness of counsel’s challenged conduct . . . viewed as of the time of counsel’s conduct.”

Ocasio v. United States
Docket No. 14-361

- Issue: Whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy.
- Argued October 6, 2015.
- Someday, this case will be a law school exam.

Kansas v. Carr and *Kansas v. Gleason*

Docket Nos. 14-449 and 14-450, 14-452

- Argued October 7, 2015.
- Issue No. 1 – Does the Eighth Amendment require a capital-sentencing jury to be affirmatively instructed that mitigating circumstances do not have to be proven beyond a reasonable doubt or, as the Kansas Court held, is the Eighth Amendment satisfied by instructions, taken in context, make clear that each juror must individually weigh and assess any mitigating circumstances? (All three cases)
- Issue No. 2 – Did the decision not to sever the sentencings violate the Eighth Amendment right to individualized sentencing and, if it did, was it harmless error in any event? (Carr brothers only)

Hurst v. Florida

Docket No. 14-7505

- Argued October 13, 2015.
- Issue – Does Florida’s death sentencing scheme violate the Sixth Amendment or the Eight Amendment in light of the US Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002)?
- Jury is advisory only and does not have to be unanimous in deciding to kill the defendant.
- Regardless, the judge can still kill the defendant

Montgomery v. Louisiana

Docket No. 14-280

- Argued October 13, 2015
- Issue no.1 – Whether *Miller v. Alabama* adopted a new substantive rule that applies retroactively on collateral review?
- Issue no. 2 – Does the Supreme Court have jurisdiction to decide whether Louisiana correctly refused to give retroactive effect?
- Montgomery was given a mandatory life-without-parole sentence in 1963 for a murder, when he was about two weeks past his seventeenth birthday.

Foster v. Chatman
Docket No. 14-8349

- Argued November 2, 2015.
- *Batson* challenge
- 5 African-Americans on the venire – 1 struck for cause, the other 4 struck by the state of Georgia

Lockhart v. United States

Docket No. 14-8358

- Argued November 3, 2015.
- “Series qualifier” v. “last antecedent” – Battle of the Canons! (of statutory interpretation)
- 18 U.S.C. Sec. 2252(b)(2) – “under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”
- Changes the penalty from a max of 10 years to a mandatory minimum 10 years, max of 20 years.
- Lockhart’s prior conviction of attempted rape of his adult girlfriend used to enhance his sentence in this child pornography conviction.

Torres v. Lynch

Docket No. 14-1096

- Argued November 3, 2015.
- Does a state offense constitute an aggravated felony under 8 U.S.C. Sec. 1101(a)(43) on the ground that the state offense “described in” a specified federal statute, where the federal statute includes an interstate commerce element that the state lacks?
- Torres is arguing that his NY arson conviction doesn’t require the property to have been used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce, like the federal arson statute requires, so the state case is not “described in” the federal statute.

Luis v. United States
Docket No. 14-419

- Argued November 10, 2015.
- Issue – Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets needed to retain counsel of choice violates the Fifth and Sixth Amendments.

Musacchio v. United States
Docket No. 14-1095

- Argued November 30, 2015.
- Issue no. 1 – Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions that make it harder for the government to prove you guilty or the statute.
- Issue no. 2 – Whether a statute of limitations defense not raised before or at trial is reviewable on appeal.

Molina-Martinez v. United States

Docket No. 14-8913

- Argument scheduled for January 12, 2016.
- Issue – Whether, where an error in the application of the Guidelines results in the application of the wrong Guideline to the defendant, an appellate court should presume, for purposes of plain error review under Fed. R. Crim. Pro. 52(b), that the error effected the defendant’s substantial rights.
- At sentencing the defendant’s offense level was calculated at 21 with a criminal history category of VI (18 points) and he was sentenced under these calculations without objection.
- Defendant appeals, under plain error review, that his offense category was correct but, under the “single sentence” rule, his criminal history category should have been a V.
- You know how this went at the Fifth Circuit.

Utah v. Strieff

Docket No. 14-1373

- Not scheduled for argument, yet.
- Issue – Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful.
- Agent watching a house for drug activity “saw some ‘short term traffic’ at the home.’
- Sees Strieff leave the house, though never saw him go in, walking to the 7-11. The agent follows him, asks for id, runs a check and finds a warrant. During search incident to arrest the agent finds meth, a glass pipe and a small plastic scale with white residue.

Taylor v. United States

Docket No. 14-6166

- Not scheduled for argument, yet.
- Issue – Whether, in a prosecution under the Hobbs Act, the government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense.
- 4 robberies of alleged drug dealers. Motion in Limine by the government to prevent defendant from introducing evidence that “in state” marijuana grown dealers would have no effect on interstate commerce.
- Fourth Circuit had held that drug dealing is an inherently economic enterprise that affects interstate commerce.

Voisine v. United States

Docket No. 14-10154

- No argument scheduled yet.
- Issue no. 1 – Whether a misdemeanor crime with the mens rea of recklessness qualifies as a misdemeanor crime of domestic violence as defined under 922(a)(33)(A) and 922(g)(9).
- Issue no. 2 – Whether those statutes are unconstitutional under the Second, Fifth and Sixth Amendments and the Ex Post Facto Clause of the US Constitution.
- Cert granted on issue number 1 only.
- Recklessness is an open question after *Castleman* and *Leocal*.
- See *United States v. Stokes*, 41 F. Supp. 525 (N.D. Miss. 2014) and *United States v. Smith*, 41 F. Supp. 530 (N.D. Miss. 2014).

Fifth Circuit Case Law Update

Selected cases from the last year

United States v. Wright, 777 F.3d 769, (5th Cir. 2015)

- Search warrant for child pornography.
- Six officers on the “entry” team with guns drawn and six on the “perimeter” team to prohibit occupants from leaving. 17-19 officers in all.
- Defendant allowed to change out of pajamas in front of three officers.
- Taken to unmarked police car and placed in front seat with an officer behind him and one beside him with a tape recorder.
- Told he was “free to leave” during the “lengthy interview” which included advising him of his *Miranda* rights.
- Three times he mentioned the possibility of talking to a lawyer.
- Not a problem says the Fifth Circuit.

United States v. Ortiz, 781 F.3d 221 (5th Cir. 2015)

- Agents received a tip regarding “straw-buyers.”
- Followed the car for over an hour seeing “several dangerous lane changes, several U-turns.”
- Approached car while stopped at a gas station with guns drawn, but only for “a matter of ‘minutes.’”
- Frisked, handcuffed for 5-10 minutes.
- Afterwards asked to sit in a police car with two other officers where he gave a written confession.
- Fifth Circuit – not in custody so no problem.

United States v. Lewis, 774 F.3d 837 (5th Cir. 2014)

- Securities fraud and conspiracy to commit securities fraud case.
- Brought to trial in August 2013.
- Based on consulting firm started in 2003, involving conduct from 2004 – 2006, approximately.
- Did not raise statute of limitations defense until after conviction.
- As a matter of first impression in the Circuit, a statute of limitations defense is an affirmative defense that must be raised at trial to preserve the issue for appeal.

United States v. Tavaréz-Levario, 788 F.3d 433 (5th Cir. 2015)

- Convicted of knowing use of a counterfeit green card and social security card.
- Stopped by law enforcement on March 20, 2014, in his employer's commercial vehicle and admitted he did not have docs allowing him to be in the USA.
- Indicted on March 26 for use of the cards on February 2, 2009, in obtaining his employment.
- As a matter of first impression in the Circuit, the “use” of a “forged, counterfeited, altered or falsely made” immigration document, or one obtained by fraud or illegally, is not a “continuing” one.
- You use it when you use it.
- Reversed and remanded because the indictment was outside the five year statute of limitations.

United States v. Lewis, 796 F.3d 543 (5th Cir. 2015)

- Convicted of transporting minors across state lines in order to have sexual relations.
- Government filed motion to introduce evidence under FRE 413 of other sexual assaults against minors.
- Lewis argued inadmissible under FRE 403 because that particular conduct was intrastate rather than interstate and that it would confuse the jury. He did not specifically argue probative versus prejudicial.
- Therefore plain error review applied and the district court did not err.

United States v. Ceballos, 789 F.3d 607 (5th Cir. 2015)

- Alien smuggling case.
- At trial the alien smuggled was not called.
- Defense counsel was asked by the court if he had “any major evidentiary issues” with the government’s exhibit list, which included a sworn statement by the alien. He had none conditioned on the opportunity to cross-examine their proponents.
- At trial an agent testified as to what the alien said at apprehension and then recited his sworn testimony. Ceballos did not object.
- Unclear if the defendant even knew and assented to her counsel’s “stipulation”, regardless she did not object and, therefore, “waived her right of confrontation.”

United States v. Cessa, 785 F.3d 165 (5th Cir. 2015)

- Money laundering case involving the Los Zetas cartel.
- 19 defendants, 54 witnesses, three week trial.
- One defendant had his conviction on sufficiency of the evidence.
- One defendant had his conviction vacated based on abuse of discretion in instructing the jury on comingling funds.
- The district court instructed the jury that commingling illegal proceeds with legitimate **is** evidence of intent to conceal or disguise.
- Jury instructions must make clear that the inference sought is permissive rather than mandatory.
- Harmless error as to two defendants but not a third.

United States v. Mix, 791 F.3d 603 (5th Cir. 2015)

- Trial of BP engineer for obstruction of justice based on him deleting a text message exchange between him and his boss.
- A juror (the foreperson) overheard in a courthouse elevator that other BP employees were being prosecuted.
- During deadlocked deliberations the juror told the other members “she overheard something that increased her confidence in voting guilty.”
- To be entitled to a new trial based on extrinsic influence the “defendant must first show that the extrinsic influence likely caused prejudice. The government then bears the burden of proving lack of prejudice.”
- Affirmed the district court’s grant of a new trial.

United States v. Fernandez, 776 F.3d 344 (5th Cir. 2015)

- Special conditions of supervised release for a failure to register.
- Life time supervised release that, as a condition, required him to install and maintain, at his cost, filtering software on any computer he owns to monitor/block access to sexually oriented websites.
- None of his underlying crimes or failure to register had anything to do with computers.
- Abuse of the district court to put this condition on him.

United States v. Sealed Juvenile
781 F.3d 747 (5th Cir. 2015)

- 15 year old adjudicated guilty of a lesser charge of abusive sexual contact with a minor under 12.
- In part of the PSR the parents indicated that, within the last year, he had become obsessed with sex and looking up sexual material on the internet.
- Several conditions of TSR including requirements that he get his probation officer's written approval prior to any computer or internet use.
- The Circuit found the condition unnecessarily restrictive in light of another restriction that prohibited him from viewing or possessing any sexually explicit material.

United States v. Duke, 788 F.3d 392 (5th Cir. 2015)

- Convicted of child pornography.
- Life time supervised release conditions prohibiting access to any computer capable of internet access and prohibiting any contact with minors.
- Conditions of supervision should be narrowly tailored to avoid imposing a greater deprivation of liberty than was reasonably necessary.
- Life time ban on internet would preclude defendant from “meaningfully participating in a modern society for the rest of his life.”
- Defendant did not have a history of direct sexual abuse of a child.
- Abuse of discretion.

United States v. Clay, 787 F.3d 328 (5th Cir. 2015)

- Northern District of MS case.
- Normal guideline range would have been 30 to 37 months but because Clay was a career offender it became 151 to 188 months.
- At sentencing defendant asked for a downward departure based on 3553(a) factors.
- The sentencing judge was “troubled” by the result but imposed a sentence at the low end of the CA guideline because there was no “Fifth Circuit Guidance” on the matter. The judge stated that had there been “Fifth Circuit authority” to vary, the sentence likely “would have been different.”
- *Booker* made the guidelines advisory.
- “[A] district court’s sentencing discretion is no more burdened when a defendant is characterized as a career offender under [Sec.] 4B1.1 than it would be in other sentencing decisions.”

United States v. Torres-Perez, 777 F.3d 764 (5th Cir. 2015)

- Consolidated appeal on refusal of the government to give the third level for acceptance of responsibility because the defendants refused to waive their appellate rights.
- Both defendants sentenced after November 1, 2013.
- Prior to that date Fifth Circuit case law allowed refusal of the third level if the defendant refused to sign an appeal waiver. However, the case law upholding the refusal was overturned in 2014.
- The sentencing judges refused to give variances because one didn't believe the Sentencing Commission was controlling, the other because there was no authority to the contrary.
- "Unquestionably clear" that under Fifth Circuit precedent, it is procedural error to not give the third level in these type cases.

United States v. Garcia-Perez
779 F.3d 278 (5th Cir. 2015)

- 16 level enhancement on illegal re-entry for a “crime of violence.”
- Florida manslaughter statute not a crime of violence because it did not meet the “generic” definition of manslaughter since it can be committed with a mens rea less than recklessness.
- Florida – “The killing of a human being by the act, procurement, or culpable negligence of another without lawful justification”
- MS Code Ann. 97-3-47 – “Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law”

United States v. Castillo, 779 F.3d 318 (5th Cir. 2015)

- Defendant objected to the amount of loss in her PSR and sought to litigate the enhancement based on the loss.
- Government sought to refuse the third level for acceptance of responsibility based on that litigation.
- The Fifth Circuit held that it is impermissible to refuse the third level if the defendant has a “good faith dispute” with the PSR.
- Judge Graves dissented from the decision to remand for determination of whether Castillo’s objections were in good faith. In his view a post-plea sentencing objection is not a valid basis for the government to refuse the third level.

United States v. Elashi, 789 F.3d 547 (5th Cir. 2015)

- Government sought to garnish wife's wages to pay off the balance of husband's \$3,500.00 special assessment.
- State law limits on garnishment (controlling under the Fair Debt Collection Practices Act (FDCPA))- do not apply when the government is enforcing a federal criminal debt under the MVRA.
- Under Texas law, wife's wages were her solely managed community property in which her husband had a one half interest.

United States v. Moreno-Torres
768 F.3d 439 (5th Cir. 2014)

- *Anders* briefs.
- You have to supply your non-English speaking client with one in his/her native language.
- Now part of the *Anders* Guidelines on the Fifth Circuit website.

United States v. Preciado-Delacruz
801 F.3d 508 (5th Cir.)

- Sentencing.
- “And for the record, my client respectfully objects to the sentence as substantively unreasonable.”
- Said at the sentencing hearing.
- “Defense counsel’s generic objection to substantive reasonableness does not meet the standard because it failed to cite any of the specific grounds now raised on appeal.”

United States v. Garcia, 797 F.3d 320 (5th Cir. 2015)

- Garcia pled guilty to conspiracy to possess more than 100 kg of marijuana.
- The PSR included a two level enhancement for possession of a firearm, to which Garcia objected.
- At sentencing, the judge relied on testimony from another defendant's trial, in which Garcia did not participate, to uphold the enhancement.
- The Fifth Circuit found that the sentencing judge's "reliance on testimony from a separate criminal trial that was not contained in the PSR to enhance Garcia's sentence-without prior notice and of which Garcia had no actual knowledge-violated the notice requirements of Rule 32 and U.S.S.G [Sec.] 6A1.3."

United States v. Putnam, __F.3d__
2015 WL 7694538 (Nov. 25, 2015)

- Appeal of a 15 year term of supervised release after a guilty plea to failure to register as a sex offender. He failed to object at sentencing.
- The PSR had calculated the failure to register TSR as a sex offense in spite of Fifth Circuit case law that said it wasn't under the guidelines. Amendments to the guidelines went into affect after Putnam's sentencing that also supported failure to register is not a sex offense.
- Under plain error review, a defendant meets his burden of showing the error affected his substantial rights, absent other evidence that the guidelines didn't affect the sentencing, if he shows: (1) court mistakenly calculated his guidelines; (2) the incorrect range is significantly higher than the correct range; and, (3) defendant is sentenced within the incorrect range.

United States v. Jackson, 305 F.3d 200 (5th Cir. 2015)

- Tax evasion and corrupt interference defendant sought to retain counsel who at the time, or previously, represented others on related, similar cases.
- Jackson waived any conflicts under the Sixth Amendment however the government opposed. The district court disqualified counsel.
- After conviction, Jackson appealed.
- “The right to counsel of choice is limited if that counsel has an actual conflict of interest or a serious potential conflict of interest that may arise during trial.”
- “When a defendant’s selection of counsel . . . Gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice.”

United States v. Smith, 804 F.3d 724
(5th Cir. 2015)

- If the court thinks you perjured yourself during trial testimony, you will get a two level enhancement for obstruction of justice.