CRIMINAL PROCEDURE

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This Article summarizes both reported and unreported Fifth Circuit cases that addressed significant criminal procedural issues during the survey period of July 1, 2011, to June 30, 2012. For convenience of the reader, the cases are organized by subject area and, if applicable, by rule of procedure, with earlier rules summarized first. Most of the summaries contain a brief factual background and the legal reasoning used to arrive at the Fifth Circuit's conclusion. This Article is intended as a reference, and the reader is encouraged to review the entire case in order to fully comprehend the precedent, the substantive issues, and the Fifth Circuit's underlying analysis.

I. FOURTH AMENDMENT DEVELOPMENTS

Regarding the constitutional limits of searches and seizures under the Fourth Amendment, there were several noteworthy Fifth Circuit opinions issued during the relevant time period. First, some note must be paid to the Fifth Circuit's decision in *United States v. Hernandez*, which dealt with the use of global positioning devices (GPS) to track the location of defendants.[1] This Article addresses what remains of *Hernandez* after the Supreme Court's decision in *United States v. Jones*.[2] Second, the Fifth Circuit issued two opinions affecting the search and seizure of cell phones, which is a hot topic in courts across the country.[3] The first, *United States v. Aguirre*, related to the seizure of information on cell phones pursuant to drug warrants, and the second, *United States v. Ochoa*, applied the inevitable discovery doctrine to the search of a cell phone in a seized vehicle.[4] As a third area to consider, in *United States v. Cooke*, the Fifth Circuit provided additional guidance, albeit

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1. United States v. Hernandez, 647 F.3d 216 (5th Cir. July 2011).

2. United States v. Jones, 132 S. Ct. 945 (2012).

3. United States v. Aguirre, 664 F.3d 606 (5th Cir. Dec. 2011); United States v. Ochoa, 667 F.3d 643 (5th Cir. Jan. 2012).

4. *Aguirre*, 664 F.3d at 608-10; *Ochoa*, 667 F.3d at 650.

case specific, on what constitutes the curtilage of a residence.[5] Fourth, the Fifth Circuit issued *United States v. Gray*, which dealt with the medical search of body cavities and was recently vacated by the Supreme Court.[6] *Gray* analyzed the constitutionality of a warrant allowing medical technicians to take various steps to search the body cavity of a suspected drug dealer, with the Fifth Circuit finding that the warrant was unreasonable but that the good faith exception allowed for no remedy under the circumstances.[7] Fifth, several Fifth Circuit cases addressed the reasonable suspicion standard if stopped by law enforcement, including the duration of the stop and the scope of questions that may be asked by law enforcement during the stop.[8] Lastly, a couple of cases offer some insight into how long municipalities may detain a prisoner before they must offer a probable cause hearing.[9]

Initially, a passing word should be spent on *United States v. Hernandez*, which was issued by the Fifth Circuit in the summer of 2011.[10] In *Hernandez*, the Fifth Circuit held that the use of a GPS device was not a search, likening the device at issue to a "more efficient beeper" of the sort that had been previously upheld by multiple cases.[11] These cases included the Fifth Circuit's prior decision in *United States v. Michael*, which held that the tracking of a suspect via the use of a beeper attached to a rented van did not constitute a search for Fourth Amendment purposes, and the Supreme Court's decision in *United States v. Knotts*, which held that the use of a beeper in a drum container that was later placed into a vehicle was not a search.[12] In *Hernandez*, the Fifth Circuit focused on the intermittent use of the GPS, analogizing it to the use of a beeper that would infrequently track the location of a suspect.[13] Of course, in early 2012, the Supreme Court issued additional guidance on the use of GPS devices with its decision in *United States v. Jones*.[14] *Jones* held that the placement of a GPS device upon a vehicle was a search for Fourth Amendment purposes.[15] A majority opinion of four justices (Justice Scalia (writing), Chief Justice Roberts, Justice Thomas, Justice Kennedy, and Justice Sotomayor) focused on the trespass nature of attaching the device to the vehicle.[16] Given

5. United States v. Cooke, 674 F.3d 491, 493-96 (5th Cir. Mar. 2012).

6. United States v. Gray, 669 F.3d 556, 559 (5th Cir. Feb. 2012), *vacated*, 133 S. Ct. 151 (2012).

7. *Id.*

8. *See* United States v. Zamora, 661 F.3d 200 (5th Cir. Oct. 2011); United States v. Macias, 658 F.3d 509 (5th Cir. Oct. 2011); United States v. Soto, 649 F.3d 406 (5th Cir. Aug. 2011).

9. *See* Jones v. Lowndes Cnty., 678 F.3d 344 (5th Cir. Apr. 2012); Brown v. Sudduth, 675 F.3d 472 (5th Cir. Mar. 2012).

10. United States v. Hernandez, 647 F.3d 216 (5th Cir. July 2011).

11. *Id.* at 221.

12. United States v. Michael, 645 F.2d 252, 257-59 (5th Cir. 1981); United States v. Knotts, 460 U.S. 276, 285 (1983).

13. *Hernandez*, 647 F.3d at 220-21.

14. *See* United States v. Jones, 132 S. Ct. 945 (2012).

15. *Id.* at 949.

16. *See id.* at 953. Justice Sotomayor accepted the trespass theory as adequate to resolve the case but wrote separately to discuss how an expectation of privacy theory might ultimately better suit the digital age. *Id.* at 957 (Sotomayor, J., concurring).

this emphasis on the initial placement, not the type of tracking involved, it is unlikely that either the limited GPS in *Hernandez* or the beeper in *Michael*, both of which involved physically attaching a device to a vehicle, would survive under the majority opinion.[17] In fact, the reasoning of the Fifth Circuit in *Hernandez* lines up with the reasoning of the concurrence by Justice Alito (joined by Justice Ginsburg, Justice Breyer, and Justice Kagan), which analyzed the extent to which the device was used to track the whereabouts of a suspect and not its placement on the vehicle.[18]

In *United States v. Aguirre*, the Fifth Circuit held that a drug-sale-search case could include seizure of a cell phone even if the search warrant did not specifically list cell phones among the items to be seized.[19] In *Aguirre*, the police conducted a "knock and talk" of a suspected drug dealer's home after finding drugs in his vehicle.[20] After receiving no response, the police saw an occupant of the house look at them through a window and then retreat.[21] They heard "scuffling" movement, which made them believe that drugs and other evidence was being destroyed.[22] The police then entered the home under exigent circumstances.[23] After securing the home and occupants, the police sought a warrant, which listed "correspondence," "address books," and "telephone directories," but did not specifically list cell phones as an item to be seized.[24] Nonetheless, the cell phone of Sherry Aguirre, a visitor in the home, was seized, and she subsequently pled guilty to use of a communications device to facilitate drug trafficking.[25] Prior to her plea, Aguirre argued that the warrant did not particularly describe cell phones as items to be seized and any information obtained from the phone should have been suppressed.[26] The district court disagreed, and the Fifth Circuit upheld the trial court's ruling on appeal, noting that "the cellular text messages, directory and call logs of Aguirre's cell phone searched by law enforcement officers can fairly be characterized as the functional equivalents of several [other] items listed."[27] The court also pointed to the fact that agents testified at the suppression hearing that cell phones are "highly significant" to drug transactions, which provided the probable cause supporting the warrant.[28]

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17. *See id.* at 952 (majority opinion). The *Knotts* case, by contrast, involved putting the beeper in a drum with the permission of the drum's owner. *Knotts*, 460 U.S. at 278. The drum was then moved to the vehicle of the eventual defendant, and the signal was used to track the vehicle. *Id.*

18. *Jones*, 132 S. Ct. at 958 (Alito, J., concurring).

19. United States v. Aguirre, 664 F.3d 606, 612-15 (5th Cir. Dec. 2011).

20. *Id.* at 609.

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at 614.

25. *Id.* at 609-10.

26. *See id.* at 614.

27. *Id.*

28. *Id.*

In *United States v. Ochoa*, meanwhile, the Fifth Circuit held that there was no need to determine if a cell phone left within a vehicle following the arrest of the driver was searched improperly because the inevitable discovery rule applied given that an inventory search would have been conducted.[29] What is perhaps most interesting is the implication for inventory searches of electronic containers, such as a cell phone or computer. The court based its ruling on the inventory being made "pursuant to standardized regulations and procedures that are consistent with (1) protecting the property of the vehicle's owner, (2) protecting the police against claims or disputes over lost or stolen property, and (3) protecting the police from danger."[30] It is not clear, however, how examining the call log for recent activity and looking at the contacts list satisfied any objective of an inventory search, much less whether standard inventory procedures called for this.[31] Other courts have found that searches were overbroad and done for investigative purposes in similar situations.[32]

In *United States v. Cooke*, the Fifth Circuit issued guidance regarding what constitutes the curtilage of a residence for Fourth Amendment purposes and, also, the effect of consent when a non-present tenant refuses to allow the search.[33] The case provides insight into how the court may approach unusual structures, and it is the Fifth Circuit's first foray into whether a non-present tenant-defendant's objection vitiates the consent of a physically present cotenant.[34] After a search of Steven Cooke's hotel room revealed two firearms, drugs, and digital camera photos of him holding other firearms, law enforcement agents visited his residence to conduct a knock and talk while he was in jail.[35] In order to knock on the interior "door" of Cooke's residence, law enforcement had to enter the structure through a set of sliding "barn doors," one of which was open and another of which was damaged.[36] Upon knocking on the interior door to the living quarters, law enforcement was met by the defendant's mother.[37] The mother opened the door, allowing law enforcement

29. United States v. Ochoa, 667 F.3d 643, 650 (5th Cir. Jan. 2012).

30. *Id.* (quoting United States v. Hope, 102 F.3d 114, 116 (5th Cir. 1996)) (internal quotation marks omitted).

31. *See* United States v. Andrews, 22 F.3d 1328, 1336 (5th Cir. 1994) (finding that the search of a notebook fell under the inventory search exception because it protected "the city from claims for lost property" that might have been contained within the notebook).

32. *See, e.g.*, United States v. Davis, 787 F. Supp. 2d 1165, 1170 (D. Or. 2011) ("[A] lawful inventory search does not authorize an officer to examine the contents of a cell phone."); United States v. Chappell, Crim. No. 09-139 (JNE/JJK), 2010 WL 1131474, at *15 (D. Minn. Jan. 12, 2010) (noting similar decisions and finding that "the search of the cellular phone seized from Defendant's person and conducted during his June 20, 2007 booking was nothing more than a general rummaging and the asserted inventory justification for that warrantless search is a pretext"); *see also* Somini Sengupta, *Courts Divided over Searches of Cellphones*, N.Y. TIMES (Nov. 25, 2012), http://www.nytimes.com/2012/11/26/technology/legality-of-warrantless-cellphone-searches-goes-to-courts-and-legislatures.html?hpw&_r=2&.

33. United States v. Cooke, 674 F.3d 491 (5th Cir. Mar. 2012).

34. *See id.* at 497.

35. *Id.* at 492.

36. *Id.* at 492-93.

37. *Id.* at 493.

to see a firearm in the home, and following this, the mother consented to a search of the home.[38]

The initial question was whether the police had unreasonably searched the home by entering past the set of barn doors.[39] In considering whether the area behind the barn doors was part of the curtilage of the home, the court noted that the area had a dirt floor, was not part of the living quarters, and was used for storage but shared a roof with the home and had walls.[40] The court also noted that the only way to knock on the door to the home was to first enter through the barn doors.[41] Finding the structure *sui generis*, the Fifth Circuit accepted the district court's analogy that the barn doors structure was similar to a "covered porch" and not part of the curtilage.[42] Moreover, the court found that any "technical" violation was cured by the consent of the defendant's mother, who allowed the search.[43] Turning to the question of consent, the Fifth Circuit noted that, in *Georgia v. Randolph*, the Supreme Court held a cotenant cannot consent to a search when another objecting cotenant is present.[44] What the Court left unclear, however, was whether this rule also applied when a previously objecting cotenant was not physically present. Observing that there is a current circuit split between the Seventh (finding no violation),[45] Eighth (finding no violation),[46] and Ninth (finding a violation)[47] Circuits, the Fifth Circuit held that when a previously objecting cotenant is not present (even if due to arrest), the other cotenant may consent to a search.[48]

In *United States v. Gray*, the Fifth Circuit had occasion to consider the extensive efforts that the police undertook to recover a small bag of crack cocaine from the anal cavity of a defendant.[49] The case represents an extension

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38. *Id.*

39. *Id.*

40. *Id.* at 493-94.

41. *Id.* at 494.

42. *Id.* at 495.

43. *Id.*

44. *Id.* at 496; *see* Georgia v. Randolph, 547 U.S. 103, 114 (2006) (finding that a warrantless search was invalid when an estranged wife gave consent to search the marital home even though the defendant was also present at the door and refused to consent).

45. *See* United States v. Reed, 539 F.3d 595, 598-99 (7th Cir. 2008) (refusing to extend *Randolph* when the objecting cotenant was not present); United States v. Henderson, 536 F.3d 776, 777 (7th Cir. 2008) (refusing to extend *Randolph* even when the police ordered the objecting cotenant to leave the home).

46. *See* United States v. Hudspeth, 518 F.3d 954, 960 (8th Cir. 2008) (en banc) (refusing to extend *Randolph* when the objecting cotenant was not present).

47. United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008) (finding that the holding of *Randolph* applied when an objecting cotenant who was not physically present had been allowed to live in storage units).

48. *Cooke*, 674 F.3d at 497-99. Given that the Fifth Circuit cited *Henderson* as an analogous case, it is likely that, even if the objecting cotenant is arrested cotemporaneous to the request for consent, *Randolph* would not apply. *See id.* at 498. Assuming that a search incident to an arrest does not present separate grounds, a defense attorney still should have grounds to raise the argument, however, and may make hay of an argument that the arrest is a pretext to justify searching the home.

49. United States v. Gray, 669 F.3d 556, 559 (5th Cir. Feb. 2012), *vacated*, 133 S. Ct. 151 (2012). The case also involved a question of whether the defendant's trial was prejudiced by the court's decision to allow into evidence photos showing him holding firearms. *Id.* at 566.

of a long line of cases derived from *Rochin v. California*, *Schmerber v. California*, and *Winston v. Lee*, which collectively dealt with the extent to which an invasive, forceful search of the body is permissible, even if a warrant is issued.[50] In *Gray*, the defendant was arrested after a confidential informant provided a tip that he was in possession of and selling crack cocaine.[51] Another passenger in the vehicle informed the police that, just prior to the arrest, the defendant had attempted to get her to hide a small bag of what she believed was crack cocaine.[52] A post-arrest search of the defendant and the vehicle did not uncover the bag.[53] A K-9 dog alerted to the center console of the vehicle, but again, no drugs were found.[54] The defendant was strip-searched twice after he was booked into the jail, with the second search being an extensive examination that required him to bend over and cough.[55] The defendant was described as somewhat uncooperative—only "slightly" bending and giving a "faint cough."[56] After the defendant was examined and no drugs were found, the area of the jail where the defendant had been held was searched, and strip searches were conducted of all prisoners who had been in the holding cell with him.[57] All of this was to no avail.[58]

The police then sought a warrant to try and uncover the drugs because "training" and a process of elimination led them to believe that any drugs must be in the defendant's rectum.[59] Approximately seven hours later, a warrant was returned, which ordered a "qualified medical technician to examine [the defendant] for the concealment of controlled substances and to remove said controlled substances from his body in accordance with recognized accepted medical procedure as described in [Hethcock's] affidavit."[60] As no medical procedure was described in the affidavit, the only limit on the warrant was the phrase "in accordance with recognized medical procedures."[61] Subsequently, the defendant was taken to a hospital for the search.[62] Initially, several x-rays were attempted, but after the results proved inconclusive, a staff physician performed a digital rectal exam during which the defendant appeared "evasive

50. Winston v. Lee, 470 U.S. 753, 755 (1985) (holding that a compelled surgical procedure violates the Fourth Amendment, even if it is likely to recover evidence); Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that a blood test of a driver suspected of intoxication did not violate the Fourth Amendment); Rochin v. California, 342 U.S. 165, 172 (1952) (holding that a Fourth Amendment violation occurred when deputies, without a warrant, took a suspect to the hospital where he was strapped down and a tube was inserted into his throat to make him vomit up two morphine pills).

51. *Gray*, 669 F.3d at 559.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 559-60.

56. *Id.* at 560.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

and uncooperative."[63] Doctors then decided to sedate the defendant and perform a proctoscopic exam, even though the court noted that less invasive means, such as an enema, could have accomplished the same result.[64] This exam alerted the medical staff to a possible foreign object in the defendant's rectum, which was then removed by digital means.[65] Throughout the above procedures, no one sought the defendant's consent.[66] The Fifth Circuit found that the performance of the proctoscopy on the defendant, who was "conscious throughout," was of minimal risk and intrusion but that, "[o]n balance . . . [, it was] unreasonable due to the exceeding affront to [the defendant's] dignitary interest and society's diminished interest in that specific procedure in light of other less invasive means."[67] Despite this finding, the court noted that the good faith exception seemed to cover any instance in which "a warrant . . . authorizes a medical procedure search of a specific area of the body,"[68] even one in which the procedure was a violation of the Fourth Amendment.[69] This fact was of "great concern" to the court, but one that precedent allowed no remedy for.[70] Of course, as noted, the Supreme Court has taken up the case and may provide further insight.

In *United States v. Soto*, the Fifth Circuit considered the limits of reasonable suspicion to support a stop based on suspicion of unlawfully transporting an illegal alien even though several *Brignoni-Ponce* factors were missing, including proximity to the border.[71] Over a strong dissent,[72] the Fifth Circuit found that the case was "close" but that reasonable suspicion existed because of the direction of the vehicle, the route the vehicle took (I-35) and, most compelling, the behavior of the vehicle's occupants.[73] While parked during a roving patrol approximately sixty miles from the U.S.-Mexico border, two border patrol agents observed a blue Nissan Maxima with tinted windows.[74] As the Maxima passed by the agents, an individual in the back seat

63. *Id.*

64. *Id.* at 560-61.

65. *Id.* at 561.

66. *Id.*

67. *Id.* at 564-65.

68. *Id.* at 566. The court noted that the exceptions are that the magistrate was misled, that he abandoned his judicial role, or that the warrant was so devoid of probable cause—or so lacking in particularity—that a reasonably well-trained officer would have known the search was illegal. *Id.*

69. *Id.*

70. *Id.* In fact, the court issued a somewhat personal appeal to "urge warrant-issuing magistrates to cabin the search warrant more than the 'recognized medical procedure' language" used in the warrant and, also, to hold a *Winston*-type hearing to allow for careful consideration of the interests at stake. *Id.*

71. United States v. Soto, 649 F.3d 406 (5th Cir. Aug. 2011); *see* United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Several Fifth Circuit cases that followed *Brignoni-Ponce* have noted proximity to the border as a factor to be considered in determining whether a vehicle began its journey there. *See, e.g.*, United States v. Jones, 149 F.3d 364, 368 (5th Cir. 1998) (using fifty miles as a benchmark for proximity to the border).

72. *Soto*, 649 F.3d at 413-17 (Graves, J., dissenting) (characterizing the movement by the rear seat passenger as a "slouch," not ducking, and emphasizing that the factors must be viewed in the context of the distance from the border).

73. *Id.* at 409-10 (majority opinion).

74. *Id.* at 407.

of the car gave a look of surprise and attempted to duck down in the seat.[75] The agents then pulled out and drove parallel to the Maxima for approximately three minutes, noting that the tinted rear windows, which had previously been down, were now up and that the driver was "tapping 'excessively' on the steering wheel."[76] They also noted that the passenger in the rear seat was "ducking down."[77] Ultimately, the agents determined that reasonable suspicion existed to make the stop.[78] The rear passenger admitted to being an illegal alien, and Ricardo Soto, the passenger in the front seat, was arrested and charged with unlawfully transporting an illegal alien.[79] Before the district court, Soto filed a motion to suppress the fruits of the stop, which was denied, and he entered a conditional guilty plea challenging the decision at the suppression hearing.[80] In analyzing whether reasonable suspicion existed for the stop, the Fifth Circuit focused on the behavior of the back seat passenger, for which it could find "no plausible explanation . . . but that he was attempting to hide from law enforcement officers."[81]

In *United States v. Macias*, the Fifth Circuit had occasion to examine what constitutes an illegal extended detention and unrelated questioning after a stop was supported by reasonable suspicion (failure to wear a seatbelt).[82] Ultimately, the Fifth Circuit overturned the conviction for being a felon in possession because the extended detention and unrelated questioning that led to the discovery of the firearm violated the defendant's Fourth Amendment rights.[83] Macias, who was driving a pickup truck, was pulled over by the highway patrol for failure to wear a seatbelt.[84] During an initial two-minute exchange, Macias provided a driver's license but was unable to provide proof of insurance for the vehicle, which he said belonged to his girlfriend.[85] The trooper testified that Macias appeared more "nervous" than would normally be expected at a traffic stop.[86] The trooper spent several minutes questioning Macias and his passenger about their family history, reason for traveling, criminal history, work or employment, and other matters.[87] After running a background check, the trooper returned Macias's license and issued a citation for not wearing a seatbelt but also made a request to ask more questions.[88] In the dialogue that followed, Macias mentioned that he had been arrested for

75. *Id.* at 408.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 410.
82. United States v. Macias, 658 F.3d 509 (5th Cir. Oct. 2011).
83. *Id.* at 512.
84. *Id.* The trooper camera recorded the entire encounter. *Id.*
85. *Id.* at 512-13.
86. *Id.* at 512.
87. *Id.* at 513-14.
88. *Id.* at 514.

possession of marijuana and that there might be "a roach" in the truck, but he did not know where it would be.[89] He eventually gave consent for the truck to be searched.[90] Approximately seventeen minutes after the trooper began searching the truck, and forty-seven minutes after initiating the stop, he found an unloaded firearm and ammunition in a bag belonging to Macias.[91] Macias "was arrested approximately one hour and thirty-nine minutes after" first being stopped.[92]

While noting that the initial stop was valid, the Fifth Circuit found that the trooper exceeded the scope of the stop when he began to ask questions about the itinerary and scope of the trip during the roughly eleven minutes between the stop and the time that the trooper ran the background check.[93] The only cure for the extended duration to ask non-pertinent questions would be if the trooper had a reasonable suspicion of criminal activity, but the Fifth Circuit rejected the claim that mere nervousness could support the extended detention.[94] The court distinguished instances in which "articulable facts" supported further suspicions, such as a fuel tank that had been tampered with.[95] Having held that the extended detention exceeded the scope of the search, the court concluded that Macias's consent to the search was also invalid because "the causal chain between the illegal detention and Macias's consent . . . was not broken, and therefore the search was nonconsensual."[96] Accordingly, the court suppressed the evidence of the search, i.e., the firearm, and reversed the conviction.[97]

It is interesting to contrast *Macias* with *United States v. Zamora*, another decision issued by the Fifth Circuit.[98] In *Zamora*, the police tailed a Lincoln Navigator after it stopped at a home where a confidential informant reported suspicion of drug activity.[99] Thereafter, the police stopped the car because it had an expired license plate.[100] A drug-sniffing dog was called and alerted to drugs, but the police found nothing after searching the vehicle.[101] The police then questioned Zamora, who was driving the vehicle, for an additional thirteen minutes at which time he signed a consent to search his residence.[102] The court found that it was reasonable to expand the initial questioning during the initial

89. *Id.* at 515.
90. *See id.* at 516.
91. *Id.*
92. *Id.*
93. *Id.* at 518-19.
94. *Id.* at 520.
95. *Id.* at 521-22.
96. *Id.* at 524.
97. *Id.* at 525.
98. United States v. Zamora, 661 F.3d 200 (5th Cir. Oct. 2011).
99. *Id.* at 204-05. The court also noted that Zamora and his passenger engaged in suspicious activity and attempted to hide their conduct while at the residence. *Id.* at 207.
100. *Id.*
101. *Id.* at 205.
102. *Id.*

traffic stop because the suspicion of drug activity constituted a separate reason to stop the vehicle.[103] Notably, this included the thirteen minutes after the drug-sniffing dog alerted, but a search turned up no other evidence of drugs.[104] *Zamora* contrasts with *Macias* because it finds that additional detention and questioning is reasonable after a stop when the stop was for suspicion of something more than a traffic violation and was supported by additional indications of criminal behavior, i.e., the dog alerting to the vehicle.[105]

Finally, it is worth mentioning two Fourth Amendment detention cases that may be of practical use for municipalities. The Fifth Circuit found that detaining a prisoner beyond forty-eight hours without a probable cause hearing does not constitute an automatic violation of due process under the Fourth Amendment.[106] In *Brown v. Sudduth*, the Fifth Circuit held that detaining a prisoner for a "few hours" beyond forty-eight hours—actually, 66.5 hours—was within the scope of what jurors may find reasonable and that "emergency" or "extraordinary circumstance[s]" can include delay for the purpose of determining whether the crime occurred within the police's jurisdiction.[107] Similarly, in *Jones v. Lowndes County*, the court ruled that even a "general policy . . . to take the detainee to a Judge within 48 hours but no later than 72 hours and as soon as reasonably possible and without any unnecessary delay" could not support a Fourth Amendment violation when the delay was *actually* due to "the lack of available judges."[108] On the whole, based on the *Brown* and *Jones* decisions, the forty-eight hour standard put forth by the Supreme Court[109] should be thought of as only a useful "benchmark" that shifts the burden to the government to show reasonableness.[110]

II. FIFTH AMENDMENT DEVELOPMENTS

Regarding the constitutional privilege against self-incrimination, as expanded and expounded in the *Miranda* line of decisions, the Fifth Circuit issued several interesting cases.[111] First, there was the *Edmonds v. Oktibbeha County* decision, which is noteworthy not only because of the publicity garnered by the case but also because of its analysis of voluntariness for

103. *Id.* at 207-08.

104. *Id.*

105. *Id.*

106. *See* Brown v. Sudduth, 675 F.3d 472, 481 (5th Cir. Mar. 2012); Jones v. Lowndes Cnty., Miss., 678 F.3d 344, 350 (5th Cir. Apr. 2012).

107. *Brown*, 675 F.3d at 481.

108. *Jones*, 678 F.3d at 350.

109. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) ("[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein* [*v. Pugh*, 420 U.S. 103 (1975)]."); *see also* Powell v. Nevada, 511 U.S. 79, 80 (1994) ("'[P]rompt' generally means within 48 hours of the warrantless arrest; absent extraordinary circumstances, a longer delay violates the Fourth Amendment.").

110. *Jones*, 678 F.3d at 349-50.

111. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

juvenile defendants.[112] Second, the Fifth Circuit offered some new insight into when a defendant is in custody for purposes of *Miranda* in *United States v. Cavazos*[113] and *United States v. Melancon*.[114] Third, *United States v. Ashley* and *United States v. Potts* both discuss, but do not ultimately answer, whether a defendant's pre-arrest silence can be used against him or her.[115]

In *Edmonds v. Oktibbeha County*, the long, rather tragic tale of Tyler Edmonds seems to have come to a close with the Fifth Circuit dismissing a § 1983 claim.[116] It deserves mention for its legal reasoning but no less for its status as the first Fifth Circuit case to rely, in part, on a transcript of the *Dr. Phil* television show.[117] In *Edmonds*, the Fifth Circuit considered whether law enforcement officers should be civilly liable when a thirteen-year-old boy was separated from his mother and falsely confessed to a murder.[118] As background, the boy's half sister, Kristi Fulgham, shot her husband shortly before a trip to the Mississippi Gulf Coast.[119] She urged her thirteen-year-old half brother, Edmonds, to take the blame so that she could avoid the death penalty.[120] To further her plans, she also identified him as a suspect to the police.[121] Following his arrest, the boy refused to confess to the crime while present with his mother; however, after police removed his mother and brought in the half sister, Fulgham, Edmonds confessed to the crime.[122] Ultimately, Edmonds was acquitted on retrial and freed, at which time he brought a § 1983 claim related to his prior conviction.[123] He also went on a publicity tour, which included the appearance on the *Dr. Phil* show.[124] *Edmonds* is an unusual case and not one that many defense attorneys are likely to encounter. It does, perhaps, provide some interesting insight into confessions.

First, despite "some circumstances in this case [that] may [have] indicate[d] susceptibility to police coercion," such as Edmonds being only thirteen, his mother being removed from the room, and his lack of any prior experience in the criminal justice system, the confession was found to be voluntary.[125] Supporting factors cited in favor of that finding were his voluntary arrival at the station, his mother's presence for much of the evening (though this would actually seem to cut toward a lack of voluntariness because

112. Edmonds v. Oktibbeha, 675 F.3d 911, 914-16 (5th Cir. Mar. 2012).
113. United States v. Cavazos, 668 F.3d 190, 193-94 (5th Cir. Jan. 2012).
114. United States v. Melancon, 662 F.3d 708, 711-12 (5th Cir. Nov. 2011).
115. United States v. Ashley, 664 F.3d 602, 603-05 (5th Cir. Dec. 2011); United States v. Potts, 644 F.3d 233, 237 (5th Cir. June 2011).
116. *Edmonds*, 675 F.3d at 916.
117. *See id.* at 914.
118. *Id.* at 913.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 914.
123. *Id.* at 913.
124. *See id.* at 914.
125. *Id.* at 915.

he did not confess until his mother was removed from the room), his intelligence, and his two waivers.[126] The court also noted the limited duration of the interview, which was only three hours.[127] Second, and perhaps more central to the case, however, was the emphasis that the court placed on the external motivation of the defendant to confess, i.e., the pressure placed on him by his half sister.[128] It is in this area that *Edmonds* provides some additional insight into the question of voluntariness, given that the court found that the "relevance [of any police actions] pale[d] beside Edmonds's stated desire to help his sister."[129] As the Fifth Circuit noted, Edmonds stated the same on the nationally televised *Dr. Phil* show.[130] It is not hard to take away the sense that, had this fact not been present, the court might well have concluded that the police activity led to an involuntary confession.

In *United States v. Cavazos*, the Fifth Circuit addressed whether a defendant was in custody for purposes of *Miranda*.[131] The defendant was suspected of sending sexually explicit material to a minor female.[132] The police executed a raid on his home at 5:30 in the morning.[133] He was initially handcuffed and separated from his family in the kitchen but was never formally arrested.[134] Ultimately, the defendant made oral and written statements after being questioned for approximately an hour.[135] The district court suppressed the statements because the defendant was never read his *Miranda* rights.[136] Considering the totality of the circumstances, the Fifth Circuit held that, while the defendant was in his own home and free to get something to eat, use the bathroom, and make a telephone call, the in-home/out-of-home distinction was not determinative for deciding whether the defendant was in custody.[137] Moreover, the court applied a layperson understanding to the police use of "non-custodial," which the court concluded a reasonable layperson would not understand to mean that he or she could terminate the interview and leave at any time.[138]

Cavazos is interesting to contrast with *United States v. Melancon*.[139] In *Melancon*, a prosecutor and a government agent visited with the defendant-inmate who served as somewhat of a jailhouse lawyer at the prison.[140] This

126. *Id.*
127. *Id.*
128. *See id.*
129. *Id.*
130. *Id.*
131. United States v. Cavazos, 668 F.3d 190 (5th Cir. Jan. 2012).
132. *Id.* at 192.
133. *Id.* at 191.
134. *Id.*
135. *Id.*
136. *Id.* at 193.
137. *Id.* at 194.
138. *Id.* at 195.
139. United States v. Melancon, 662 F.3d 708 (5th Cir. Nov. 2011).
140. *Id.* at 710.

individual had assisted another prisoner in preparing a statement (executed by the other prisoner) that exculpated the jailhouse lawyer's nephew.[141] During the discussion with the agent and the prosecutor, all of which occurred in the prison, the prosecutor began to suspect that the affidavit was fraudulent and stated to the defendant that he may have committed a crime.[142] The district court denied the defendant's motion to suppress his statements, and the Fifth Circuit upheld the decision on appeal, finding that based on the totality of the circumstances, the defendant was not "in custody" even though he was not in prison.[143] Further, the court found that, even if the defendant was in custody, his words fell into part of the crime at issue.[144]

There are a few insights that can be drawn from *Melancon* and *Cavazos*. At the same time, however, the cases show that the totality-of-the-circumstances analysis is not subject to bright-line rules, especially related to location.[145] The knee-jerk reaction would be to assume that a finding of custody is more likely in a prison setting than in a person's home. That may not be the case depending on circumstances, and in fact, the court seemed to focus at times in *Cavazos* on the normal expectation of privacy of the home as a factor that suggested the defendant was in custody.[146] The Fifth Circuit is equally unlikely to accord any particular shibboleth to the word "non-custodial"—particularly when a layperson is involved.[147] There is no pre-*Miranda* statement or assurance that police can provide to create the "objective" belief that a conversation is non-custodial—at least, legalese likely will not do the trick. Second, while a reasonable person standard is at play in a totality-of-the-circumstances analysis of custody,[148] it is worth noting that the court mentioned that the defendant in *Melancon* was a prison counsel and that he stated that he was aware of his rights in his interactions with the prosecutor.[149]

In *United States v. Ashley*, the Fifth Circuit addressed whether the Fifth Amendment prevents a defendant's pre-arrest silence from being used against her at trial.[150] In this case, a postal worker refused to speak to a postal investigator about missing gift cards.[151] The district court allowed the evidence in and the Fifth Circuit ruled that any error, if there was one, was harmless.[152]

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141. *Id.*
142. *Id.* at 711.
143. *Id.* at 712.
144. *Id.*
145. *See* United States v. Cavazos, 668 F.3d 190, 192 (5th Cir. Jan. 2012); *Melancon*, 662 F.3d at 712.
146. *Cavazos*, 668 F.3d at 194.
147. *See id.*; *Melancon*, 662 F.3d at 712.
148. *Cavazos*, 668 F.3d at 193.
149. *Melancon*, 662 F.3d at 710.
150. United States v. Ashley, 664 F.3d 602, 603 (5th Cir. Dec. 2011).
151. *Id.* At the trial, the postal worker's husband, who said nothing when initially questioned, testified that he met a Hispanic man at a chicken fight who sold him the first card. *Id.* Several months later, the man, whom he had not seen since, came up to him in a grocery store parking lot and sold him another gift card. *Id.*
152. *Id.* at 604-05.

In so holding, the court noted that the only defense offered by the postal worker was her husband's testimony that he bought the first gift card from an unnamed Hispanic man at a chicken fight (the same Hispanic man randomly found him in a grocery store parking lot six months later).[153] In *United States v. Potts*, the issue once again came up before the Fifth Circuit, but the court found that the objection had not been properly preserved. [154] The error was not "plain" because it was not a "necessary conclusion" of prior case law[155] that a prosecutor cannot refer to a defendant's pre-arrest silence if that silence was induced by or in response to some action of the government.[156] While failing to firmly place the Fifth Circuit on either side of the circuit split in this area, *Potts* and *Ashley* do show "that a prosecutor's reference to a non-testifying defendant's pre-arrest silence does not violate the privilege against self-incrimination if the defendant's silence is not induced by, or in response to, the actions of a government agent."[157] What the Fifth Circuit has not answered, however, is whether the Fifth Amendment prevents the use of pre-arrest silence that is not induced by or a response to the government.

III. MISCELLANEOUS CRIMINAL RULES & TRIAL PROCEDURES

As a third and final area of consideration, there are a few Fifth Circuit developments related to the Federal Rules of Criminal Procedure, Civil Procedure, and Appellate Procedure that should be addressed, if only briefly. In *United States v. Carreon-Ibarra*, the court held that it was not harmless error when the sentencing court failed to admonish a defendant of the thirty-year mandatory minimum sentence during a guilty plea and, instead, admonished the defendant of a five-year minimum. [158] The Fifth Circuit also received an affirmation of its decision in *United States v. Setser* earlier this year when the Supreme Court held that it is within the discretion of a district court to impose a consecutive federal sentence to a state sentence—even a state sentence that is merely anticipated and not yet imposed.[159] In *United States v. Amer*,

153. *Id.* at 602-05.

154. United States v. Potts, 644 F.3d 233, 236-37 (5th Cir. June 2011).

155. *Id.* at 235-37. As a note, because the rule was still not clear even at the time of appeal, this ruling on plain error would not be affected by the change from *Henderson* to *Escalante-Reyes*. *See infra* notes 164-73 and accompanying text.

156. *Potts*, 644 F.3d at 237 (relying, in part, on United States v. Elashyi, 554 F.3d 480, 506 (5th Cir. 2008)). The following cases found that silence is admissible: *United States v. Quinn*, 359 F.3d 666, 678 (4th Cir. 2004); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc) (per curiam); *United States v. Rivera*, 944 F.2d 1563, 1568 n.12 (11th Cir. 1991). However, the following cases found that silence is not admissible: *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States ex rel. Savoryi v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987).

157. *Elashyi*, 554 F.3d at 506.

158. United States v. Carreon-Ibarra, 673 F.3d 358, 361-67 (5th Cir Feb. 2012).

159. United States v. Setser, 132 S. Ct. 1463, 1468-69 (2012), *aff'g* 607 F.3d 128, 130-31 (5th Cir. 2010).

meanwhile, the Fifth Circuit held that the rule announced by the Supreme Court in *Padilla v. Kentucky* was a new rule under a *Teague* analysis and, therefore, cannot serve as a basis for a habeas petition alleging ineffective assistance of counsel.[160] In *Padilla*, the Supreme Court held that "the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea."[161] It is worth noting, for the everyday practitioner, that Texas state courts have disagreed.[162] Given that the issue is on appeal to the Supreme Court, it is likely to be resolved in short order.[163]

A couple of decisions worth mentioning addressed issues of error preservation. Foremost of the two is *United States v. Henderson*, which discussed the application of Rule 35(a) to error preservation and the effect of subsequent case law developments on plain error review.[164] In *Henderson*, the defendant appealed an upward sentencing departure taken to qualify him for rehabilitative services, noting that 18 U.S.C. § 3582(a) advises "that imprisonment is not an appropriate means of promoting correction and rehabilitation."[165] The defendant did not object contemporaneously but had filed a motion to correct the sentence with the district court under Federal Rule of Criminal Procedure 35(a).[166] The Fifth Circuit held that the error was not preserved, concluding that Rule 35(a) only applies to preserve an error if it is "arithmetical, technical, or other clear error."[167] The plain error issue in *Henderson* arose because, while the law was not clear at the time of the error at trial, the Supreme Court had subsequently found in *Tapia v. United States* that it is a reversible error for a sentencing court to impose a lengthier sentence to allow access to rehabilitative programs.[168] In *Henderson*, the Fifth Circuit held, however, that this error could not be "plain" because this legal principle was not "clear under current law *at the time of trial*" and only became clear at the time of the direct appeal.[169] An en banc petition of *Henderson* was denied.[170] This briefly placed the Fifth Circuit on one side of a circuit split as to the timing

160. Padilla v. Kentucky, 130 S. Ct. 1473, 1486-87 (2010); *see* United States v. Amer, 681 F.3d 211, 212 (5th Cir. May 2012). Several other circuits have already held the same. *See* United States v. Chang Hong, 671 F.3d 1147, 1155 (10th Cir. 2011); Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 2101 (2012); United States v. Orocio, 645 F.3d 630, 641 (3d Cir. 2011).

161. *Amer*, 681 F.3d at 212.

162. *See* Aguilar v. State, 375 S.W.3d 518, 522-24 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that the rule does apply retroactively).

163. *Chaidez*, 655 F.3d at 694.

164. United States v. Henderson, 646 F.3d 223, 224-25 (5th Cir. July 2011), *rev'd*, 131 S. Ct. 1121 (2013).

165. *Id.* at 224 (quoting 18 U.S.C. § 3582(a) (2006)) (internal quotation marks omitted).

166. *Id.*

167. *Id.* at 225 (quoting FED. R. CRIM. P. 35(a)) (internal quotation marks omitted).

168. Tapia v. United States, 131 S. Ct. 2382, 2393 (2011).

169. *Henderson*, 646 F.3d at 225 (quoting United States v. Jackson, 549 F.3d 963, 977 (5th Cir. 2008)) (internal quotation marks omitted).

170. United States v. Henderson, 665 F.3d 160, 160 (5th Cir. Dec. 2011) (per curiam).

of review for plain error.[171] *Henderson* has since gone up on appeal to the Supreme Court,[172] and in any event, the Fifth Circuit recently reversed its own position regarding plain error in *United States v. Escalante-Reyes*, in which it held that the law as it stands at the time of appeal, not at the time of the trial, is the appropriate measure of whether the error is plain.[173] It remains to be seen which side the Supreme Court will come down on or whether it will address the Rule 35(a) issue as well.[174]

Finally, in *United States v. Mudekunye*, the majority panel of the Fifth Circuit court addressed plain error in the context of a sentencing error.[175] In *Mudekunye*, the majority held, over a lengthy dissent that called for en banc review, that a defendant's substantial rights were affected by a sentencing error that resulted in a sentence nineteen months over the proper Sentencing Guidelines calculation.[176] The court noted, however, that the case before it was different from cases in which the sentence imposed overlapped the correct and incorrect guideline ranges and, further, distinguished the case from those in which the "court stated explicitly and unequivocally that the imposed sentence was the correct sentence regardless of the applicable Guideline ranges."[177]

171. *See, e.g.*, United States v. Mouling, 557 F.3d 658, 664 (D.C. Cir. 2009); United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997). These two circuits, the Ninth and the District of Columbia, have held that the error is evaluated based on the law as it existed at the time of trial even if it becomes clear on direct appeal. The First, Second, Tenth, and Eleventh Circuits have all held that if the law becomes clear by the time of appeal, then the plain error is reviewed by that time. *See, e.g.*, United States v. Cordery, 656 F.3d 1103, 1106-07 (10th Cir. 2011); United States v. Garcia, 587 F.3d 509, 520 (2d Cir. 2009); United States v. Ziskind, 491 F.3d 10, 14 (1st Cir. 2007); United States v. Underwood, 446 F.3d 1340, 1343 (11th Cir. 2006).

172. Henderson v. United States, 133 S. Ct. 27, 27-28 (2012).

173. United States v. Escalante-Reyes, 689 F.3d 415, 423 (5th Cir. July 2012).

174. *Henderson*, 133 S. Ct. at 27-28. Were the Court to address the Rule 35(a) issue and find that the motion preserved the defendant's objection, it could avoid the "plain" error issue; but, there is a high likelihood that the Court intends to address the circuit split.

175. United States v. Mudekunye, 646 F.3d 281 (5th Cir. July 2011).

176. *Id.* at 290-91.

177. *Id.* at 290 (citing United States v. Bonilla, 524 F.3d 647, 656 (5th Cir. 2008), and United States v. Lemus-Gonzalez, 563 F.3d 88, 94 (5th Cir. 2009)).