

Precedential Value

An Outline of the Recent, Important Supreme Court and Sixth Circuit Decisions
for Attorneys Practicing Criminal Law in the Courts of the Sixth Circuit

Published by the Federal Public Defender's Office

Southern District of Ohio

Steven S. Nolder

Federal Public Defender

www.fpd-ohs.org

Issue #10	Editor: Richard Smith-Monahan	Sept.-Oct. 2006
<i>Columbus Office</i> One Columbus 10 W. Broad St., Ste. 1020 Columbus, OH 43125 (614) 469-2999 (614) 469-5999 (Fax)	<i>Cincinnati Office</i> 2000 URS Center 36 East 7th Street Cincinnati, OH 45202 (513) 929-4834 (513) 929-4842 (Fax)	<i>Dayton Office</i> 130 West 2nd Street Suite 820 Dayton, OH 45402 (937) 225-7687 (937) 225-7688 (Fax)

CONTENT AND FORMAT

This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases are arranged in an outline format under the following headings:

- I. Specific Offenses
- II. Sentencing Guidelines
- III. Evidence
- IV. Fourth Amendment
- V. Fifth Amendment
- VI. Sixth Amendment
- VII. Other Constitutional Rulings
- VIII. Defenses
- IX. Plea & Sentencing Hearings
- X. Jury Issues
- XI. Probation & Supervised Release
- XII. Appeal
- XIII. Post-Conviction Remedies

FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to www.supremecourtus.gov for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to www.ca6.uscourts.gov and enter the docket

number in the opinion search feature. Opinions may also be found in Lexis or Westlaw by entering the docket number in a terms and connectors search in the Supreme Court or Sixth Circuit database.

FEDERAL DEFENDER WEBSITE

The Federal Public Defender's Office for the Southern District of Ohio has a website for use by attorneys, judges, and the general public. Each issue of Precedential Value appears on the website along with a Combined Outline of all cases previously published in P.V. since its inception in March of 2005. The address for the website is www.fpd-ohs.org.

SUPREME COURT DECISIONS

There are no Supreme Court decisions to report for this issue.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *18 USC § 921(a)(24)-Possession of Silencer*
U.S. v. Carter, 04-4304 (10/17/06)
 - ▶ Defendant was indicted for possession of an unregistered silencer. At trial, the

government established that the device defendant possessed was intended to be used as a silencer, but did not show that it was operable. Defendant was convicted and appealed.

★ Holding: The court held that, under § 921(a)(24), the government need not prove that a silencer is operable, only that the device is intended for the purpose of silencing a weapon. Thus, the conviction was affirmed.

• *18 USC § 924(c) - Firearm Enhancement*
U.S. v. Lloyd, 04-4014 (9/1/06)

► Defendant was charged with bank robbery and a § 924(c) count. For the § 924(c) charge, the indictment listed that defendant carried the firearm in relation to a crime of violence and that he possessed the firearm in furtherance of a crime of violence. Defendant proceeded to jury trial and the district court instructed the jury that it could convict defendant for either the carrying or the possession offense, but it did not indicate that the jury must unanimously pick only one theory. Defendant did not challenge the indictment's duplicity in the trial court, but raised it for the first time on appeal.

★ Holding: An indictment is impermissibly duplicitous if it charges more than one offense in a single count, but the error may be cured by proper jury instructions. In the case, the court held that the indictment was duplicitous because it charged two separate § 924(c) offenses in one count. Further, the court held that the jury instructions did not cure the error because, although the district court properly explained the alternative theories of guilt, it did not require that the jury reach unanimity on one offense. Nonetheless, because defendant did not raise the issue of duplicity in the district court, the court applied the plain error standard and found that defendant's substantial rights had not been affected. Accordingly, the conviction was affirmed.

• *18 USC § 1962 - RICO Conspiracy*
U.S. v. Gardiner, 05-1247 (9/12/06)

► Defendant was a school superintendent who was charged with a RICO conspiracy for awarding building contracts in return for financial kickbacks. Defendant was convicted after jury trial and argued on appeal that the evidence was insufficient to establish that a conspiracy existed or that the conspiracy affected interstate commerce.

★ Holding: First, the court held that the evidence was sufficient to establish that a conspiracy existed and that defendant was a member. The court noted that a defendant's agreement to participate may be inferred from her conduct. In the case, the court ruled that the conspiracy was amply demonstrated by defendant's acceptance of numerous gifts from a contractor during the time period that defendant utilized his position to continuously award multi-million dollar projects to the contractor. Second, the court held that, in a RICO conspiracy, the government need only prove a *de minimis* effect on interstate commerce. The court found that the necessary interstate connection was shown by the following: (1) heaters had been installed in the schools by the contractor that were manufactured out of state; and (2) defendant had sponsored out of state trips for members of the conspiracy. Accordingly, the conviction was affirmed.

• *26 USC § 5845(b) - Machine Guns*
U.S. v. Carter, 04-4304 (10/17/06)

► Defendant was charged with possession of the receiver of a machine gun and parts designed to convert a weapon into a machine gun. The indictment did not allege that defendant possessed a trigger mechanism for the machine gun, and defendant accordingly moved to dismiss the indictment for failure to state an offense. At the motion hearing, an expert testified that the receiver could be fired as a machine gun by using his finger as the

trigger mechanism. The district court denied the motion, defendant was convicted at trial, and defendant appealed.

★ Holding: The court found that the indictment was sufficient to state an offense as required by Fed. R. Crim. P. 7(c)(1). In so holding, the court ruled that § 5845(b) actually contains four separate definitions of a machine gun. The court held that the second definition, a frame or receiver with parts designed to convert to a machine gun, did not require proof of the possession of a trigger. Thus, the indictment was sufficient to allege an offense. Further, the court found that the statutory definition was not unconstitutionally vague. Accordingly, the conviction was affirmed.

II. Sentencing Guidelines

• 2K2.1 - Firearms - Double Counting U.S. v. Duckro, 05-3379 (9/18/06)

► Defendant pled guilty to one count of theft of firearms (18 USC § 922(u)) and one count of using a firearm in relation to a drug trafficking offense (18 USC § 924(c)). At sentencing, the district court applied a 10 level enhancement to defendant's sentence, under USSG § 2K2.1(b)(1), because the offense involved more than 200 firearms. The court also enhanced defendant's sentence by 2 levels under § 2K2.1(b)(4) because the firearms were stolen. Defendant objected to the 10 level enhancement as being impermissible double counting because he was also sentenced to a mandatory 5 year sentence for the § 924(c) charge. Defendant also objected to the 2 level enhancement as double counting because he was also convicted of theft of the firearms. The district court overruled defendant's objections and he appealed.

★ Holding: Impermissible double counting occurs where two offenses in question are for the same criminal act, and an enhancement for one count is applied even though the basis for the enhancement is the same as the basis for the accompanying count. In the case, the court

first held that, regarding the 10 level enhancement, no double counting occurred because the enhancement under § 2K2.1 applied to the theft of the firearms, while the 5 year consecutive sentence under § 924(c) was for the trading of firearms for narcotics. Thus, there was clearly a "separation of time and conduct" between the two offenses and the 10 level enhancement was affirmed.

Second, the court held that application of the 2 level enhancement constituted impermissible double counting. The district court applied the 2 level enhancement for stolen firearms to defendant's guideline calculation for his conviction for theft of firearms. The court concluded that the 2 level enhancement was for the same conduct as the theft of firearms conviction, and thus, would double count the same conduct. The court also noted that Note 9 to § 2K2.1 specifically prohibited applying the 2 level enhancement to a theft of firearm conviction. Finally, the court found that the error was not harmless because, even though the district court awarded a substantial downward departure in defendant's sentence, the district court may have given an even lower sentence had the guideline been calculated correctly. Thus, the case was remanded for resentencing.

• 3D1.2/3D1.3 - Grouping of Counts U.S. v. Gardiner, 05-1247 (9/12/06)

► Defendant was convicted of a RICO conspiracy and a conspiracy to commit bribery. The presentence report recommended that the two offenses should group, pursuant to USSG § 3D1.2. Because the bribery guideline specified a higher offense level, § 3D1.3 required that it be used to determine defendant's offense level. Thus, the report recommended a sentencing range of 57-71 months. At sentencing, *Booker* had just been decided, and the district court misinterpreted *Booker* to stand for the proposition that no enhancements could be imposed unless proven

to a jury beyond a reasonable doubt. Thus, the district court refused to apply the enhancements calculated by the probation department in the bribery guideline. Instead, the court found that the RICO guideline should apply and sentenced defendant in a range of 37-46 months. In so doing, however, the court improperly calculated the RICO guideline by applying a two-level enhancement that was clearly not appropriate. Defendant appealed.

★ Holding: The court agreed with the defendant that the district court improperly applied a two-level enhancement in calculating the RICO guideline. However, the court also found that the district court misunderstood *Booker* in refusing to apply enhancements to the bribery guideline. Thus, the court held that the bribery guideline range of 57-71 months, based upon the grouping rules, was proper. Accordingly, the court remanded the case to the district court for resentencing.

• *4A1.1 - Criminal History*
U.S. v. Duckro, 05-3379 (10/18/06)

▶ Defendant was convicted of firearm offenses and at sentencing, the district court increased defendant's criminal history score based upon a prior, uncounseled misdemeanor conviction for drug abuse. Defendant appealed.

★ Holding: Relying on the Supreme Court's decision in *Nichols v. U.S.*, the court held that a defendant's criminal history category may be enhanced based upon prior uncounseled misdemeanor convictions.

• *4A1.2(c) - Criminal History*
U.S. v. Duckro, 05-3379 (10/18/06)

▶ During defendant's sentencing for firearms offenses, the district court increased defendant's criminal history score based upon a prior Ohio misdemeanor conviction for obstruction of official business. Defendant appealed.

★ Holding: Under USSG § 4A1.2(c), certain

offenses, such as "false information to a police officer," are not countable against the criminal history score unless the defendant received 30 days or more in jail or the prior offense was similar to the instant federal charge. The court found that defendant's prior misdemeanor obstruction conviction was not the same as "false information to a police officer" under § 4A1.2(c) because Ohio courts had construed the obstruction of justice offense to require some act more than simply making a false statement to an officer. Accordingly, the court held that the obstruction offense was properly countable against defendant's criminal history.

• *Applicable Version of Guidelines*
U.S. v. Gardiner, 05-1247 (9/12/06)

▶ Defendant was convicted of a RICO conspiracy and he claimed at sentencing that an earlier version of the sentencing guideline manual should apply because no conduct occurred in furtherance of the conspiracy after the year 2000. The district court disagreed and applied the later version of the guidelines because it believed that a meeting that defendant held with a coconspirator in 2002 to discuss concealing the conspiracy was an act in furtherance of the conspiracy. Defendant appealed.

★ Holding: A district court must apply the guideline manual in effect at the time of sentencing unless the version in effect at the time of the commission of the offense provides for a lower sentence. In a conspiracy case, a district court may consider the last act committed in furtherance of the conspiracy as being the date applicable in determining which guideline manual to utilize. Acts of concealment committed after the main objectives of the conspiracy have been reached are not considered to be in furtherance of the conspiracy. In the case, the court found that defendant failed to demonstrate his withdrawal from the conspiracy; moreover, the meeting in 2002 suggested a continuity of purpose and

continued performance of acts in the conspiracy. Accordingly, the court ruled that the 2002 meeting was an act in furtherance of the conspiracy and that the district court had correctly applied the 2002 guideline manual.

III. Evidence

- *403 - Undue Prejudice*

U.S. v. Lloyd, 04-4014 (9/1/06)

- ▶ Defendant was charged with bank robbery and at trial the government introduced 911 tapes from the bank tellers in which the tellers provided the same information about the robber as they did during their testimony at trial. Further, the government presented expert testimony that a shoe print left at the bank was of the same length and tread design as defendant's shoe. Defendant challenged the evidence on appeal as being unduly prejudicial under FRE 403.

- ★ Holding: First, the court held that admission of the 911 tape was not unduly prejudicial. The only difference between the 911 tape and the witness testimony at trial was the apparent emotion of the voices in the 911 tape. The court found that any prejudice resulting from emotions on the tape was minimal. Second, the court ruled that admission of the expert testimony was not unfairly prejudicial. Defendant was found within a short proximity to the bank right after the robbery and he was wearing the shoe in question. The court held that, even though the expert could not make an exact match, the evidence carried enough probative weight that it did not violate FRE 403. Finally, the court ruled that any evidentiary error was harmless in light of the strong evidence of defendant's guilt.

- *405 - Reputation or Opinion Evidence*

U.S. v. Seymour, 05-1643 (10/27/06)

- ▶ Defendant was charged with sexual assault on federal property and at trial he attempted to introduce the testimony of a witness to show

that he and the victim were intimate with each two years after the alleged sexual assault. The district court excluded the testimony and defendant appealed, arguing that it should have been admitted under FRE 405.

- ★ Holding: The court held that FRE 405 only permits the use of specific instances of a person's conduct when inquired into on cross examination (Rule 405(a)), or where the pertinent character trait is "an essential element of a charge, claim, or defense" (Rule 405(b)). First, the court found that defendant failed to inquire about the victim's intimate conduct with defendant during cross examination of the victim. Second, the court held that the extrinsic evidence, through testimony of a third party witness, was not proper because the victim's character was not "an essential element of a charge, claim, or defense." Thus, the district court ruling was affirmed.

- *413/414 - Prior Sexual Assault Evidence*

U.S. v. Seymour, 05-1643 (10/27/06)

- ▶ Defendant was charged with sex offenses, against both a minor and an adult, on federal property. During trial, the government introduced, pursuant to FRE 413, evidence of two prior uncharged sexual assaults defendant had committed against two other adult women. Defendant appealed and argued that, in a prosecution for sexual molestation of a child, FRE 414 prohibited the introduction of a prior sexual assault of an adult.

- ★ Holding: FRE 413 permits introduction of a prior sexual assault in a prosecution for sexual assault. FRE 414 permits introduction of a prior sexual molestation of a child in a prosecution for sexual molestation of a child. In the case, the court held that FRE 414 did not prohibit the introduction of a prior sexual assault of an adult in a prosecution for molestation of a child where the evidence was otherwise admissible under FRE 413. Because the court found that defendant's two prior sexual assaults were admissible under FRE 413

and were not unduly prejudicial under FRE 403, the court affirmed the district court's ruling.

- *608(b) - Specific Instances of Conduct*
U.S. v. Seymour, 05-1643 (10/27/06)

- ▶ Defendant was charged with sexual assault on federal property and at trial he attempted to introduce the testimony of a witness to show that he and the victim were intimate with each two years after the alleged sexual assault. The district court excluded the testimony based, in part, upon FRE 608(b). Defendant appealed.

- ★ Holding: FRE 608(b) bars the admission of extrinsic evidence of specific instances of conduct intended to attack a witness' character for truthfulness. The court held that the extrinsic evidence of the victim's intimacy with defendant was offered to attack the victim's truthfulness and was accordingly properly excluded under FRE 608(b). The court noted that defendant may have offered the evidence under FRE 412 to show consent by the victim, but that defendant had not met the pretrial notice requirements of the rule.

IV. Fourth Amendment

- *Search-Curtilage/Exigent Circumstances*
Hardesty v. Hamburg Twp, 05-1346 (9/1/06)

- ▶ Officers received information from a minor stopped for DUI that she had received alcohol from Hardesty's home. Officers then went to the home and observed lights being extinguished inside the home. The officers repeatedly knocked on the front door and received no answer, so they went around to the back door of the house, which required the officers to go onto the deck. Upon reaching the back door, officers observed a person on the couch with blood on his hands. The officers knocked and shined flashlights in the person's face in an attempt to rouse him, but were unsuccessful. The officers eventually entered the home through the garage and found

Hardesty and his underage friends unlawfully consuming alcohol. Officers learned that the person on the couch was not having a medical emergency. State charges against Hardesty and the others were eventually dropped and Hardesty then sued the police under 42 USC § 1983. The district court granted summary judgment to the officers and Hardesty appealed.

- ★ Holding: The court first concluded that when the officers went around the house and to the back deck of the home, they breached the curtilage of the home. Second, the court held that, under the "knock and talk" rule, police may lawfully approach the front door of a home to conduct a police investigation. Answering an open question in the Sixth Circuit, the court then ruled that, when the circumstances indicate that someone is home, and knocking on the front door proves insufficient to initiate conversation, police may take reasonable steps to speak with the person being sought, including going to the back door. Finally, the court held that exigent circumstances justified the officers' ultimate entry into the home because of the perceived medical emergency. Accordingly, the district court ruling was affirmed.

- *Reasonable Expectation of Privacy*
U.S. v. Ellison, 04-1925 (9/5/06)

- ▶ Defendant's van was allegedly sitting in a no parking zone and officers ran the license tag through the Law Enforcement Information Network computer. As a result, the officers learned that defendant had an open warrant. Officers subsequently stopped the van, arrested defendant, and found two firearms. Defendant was charged with being a felon in possession of a firearm and he moved to suppress the evidence. The district court granted the motion and the government appealed.

- ★ Holding: The court held that individuals do not have a reasonable expectation of privacy in car license plates. Thus, unless a defendant

can show that the plate was checked in an intentionally discriminatory manner, the Fourth Amendment is not implicated. Accordingly, the district court ruling was reversed.

• *Search Warrant- Probable Cause/Staleness*
U.S. v. Gardiner, 05-1247 (9/12/06)

► During the investigation of defendant on a RICO conspiracy, the government obtained a search warrant for defendant's residence. The warrant was based upon information from several witnesses that defendant had been engaged in an ongoing criminal conspiracy over the course of several years. In the two years leading up to the issuance of the search warrant, however, the only acts of defendant were a meeting with a coconspirator to discuss concealing the conspiracy and a denial of criminal involvement by defendant to investigators. Upon being charged with conspiracy, defendant moved to suppress evidence found at his residence claiming that probable cause did not support the warrant and that the information was stale. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that the affidavit was clearly supported by probable cause because it listed information provided by several witnesses that defendant repeatedly received illegal payments and free services from contractors to whom contracts were awarded. Second, the court held that the information in the warrant was not stale. In analyzing staleness, the court considered (1) the defendant's course of conduct, (2) the nature and duration of the crime, (3) the nature of the relevant evidence, and (4) any corroboration of the older and more recent information. The court found that, even though several years had passed before the search warrant was obtained, defendant had been engaged in an extensive and ongoing conspiracy involving numerous individuals. Further, three months before execution of the

warrant, defendant had taken actions to continue to conceal the conspiracy. Under these circumstances, the court found that the probable cause to support the warrant had not grown stale, and accordingly affirmed the district court ruling.

• *Reasonable Suspicion*
U.S. v. Long, 05-5692 (10/2/06)

► A neighbor called 911 and reported that a house on his street was being burglarized. The neighbor gave the dispatcher only his address, not his name. The neighbor reported that drug dealers were removing items from the home to pay a drug debt, that the neighbor had spoken with an owner of the home who was out of town, and that the owner had asked the neighbor to call the police. The neighbor described the two vehicles being driven by the burglars and the route they were traveling to haul items out of the home. The police responded and spotted a pick-up truck that (1) was traveling the described route, (2) matched the description given by the neighbor, and (3) had household items visible in the back. The vehicle was stopped, defendant was the driver, and the police ultimately found a firearm and narcotics. Upon being charged, defendant moved to suppress the contraband seized claiming that the stop was not supported by reasonable suspicion. The district court denied the motion and defendant appealed.

★ Holding: The court first held that the 911 call was not the equivalent of an anonymous tip because, although he did not give his name, the neighbor provided his address to the 911 dispatcher and a police cruiser actually arrived outside the neighbor's home while the neighbor was still on the line with the police. The court found that reasonable suspicion supported the stop of defendant's vehicle because the 911 call was reliable and corroborated by the observations of the officer prior to making the stop. Thus, the district court ruling was affirmed.

• *Arrest - Probable Cause*

U.S. v. Abdi, 05-4199 (9/22/06)

► ICE and the FBI were investigating defendant based upon the threat of terrorism. As a result of the investigation, ICE decided to take Abdi into custody because he was a threat to national security and an escape risk. Although ICE began the process of obtaining an administrative immigration warrant, it ultimately decided to arrest defendant before such a warrant was obtained, as required by 8 USC § 1357(a). Defendant was subsequently charged with providing material support to terrorists (18 USC § 2339B) and moved to suppress all statements he made and evidence seized as a result of his arrest. The district court granted the motion and the government filed an interlocutory appeal.

★ Holding: The court first held that an agent's subjective intent in arresting a defendant is irrelevant to the determination of probable cause. Thus, even though the ICE agents arrested defendant administratively for being a threat to national security under § 1357(a), the court could still find the arrest valid if it was supported by probable cause that defendant was committing a crime. The court then held that the agents had probable cause, at the time of defendant's arrest, to believe that defendant had violated § 2339B for providing material support to terrorists. Probable cause was supported by the following facts: (1) defendant told an informant that he intended to "shoot up" a mall; (2) defendant sent e-mails regarding surveillance equipment that could be purchased; (3) defendant's confirmed relationships with known terrorists; and (4) defendant's telephone activity with 40 numbers connected with terrorism cases. Accordingly, probable cause supported defendant's arrest and the district court ruling was reversed.

• *Arrest - Probable Cause*

U.S. v. Long, 05-5692 (10/2/06)

► A 911 caller reported that a home on his

street was being burglarized by drug dealers collecting on a drug debt. When police arrived on the scene, they observed a pick-up truck matching the description given by the 911 caller leaving the vicinity. The truck contained household items in the back and defendant was the driver. Upon stopping the truck, the officers confirmed that household items were in the rear and defendant responded that he had just come from "Kenilworth," the street where the reported burglary had occurred. The officer then removed defendant from the truck, handcuffed him, and found drugs and a firearm. Upon being subsequently charged with narcotic and firearm offenses, defendant moved to suppress the evidence based upon an unlawful arrest and search. The district court denied the motion and defendant appealed.

★ Holding: The court first held that reasonable suspicion justified the stop of defendant's truck. (*See supra*). The court then ruled that the arrest of defendant was supported by probable cause. The court found that probable cause was justified because defendant's truck matched the description of the vehicle used in the burglary, household items were located in the back of defendant's truck, and defendant admitted to coming from the street where the burglary occurred. Accordingly, the district court ruling was affirmed.

• *Arrest-Probable Cause-Dissipation of Taint*
U.S. v. Shaw, 05-6110 (9/26/06)

► The mother of a three-year-old boy went to the army base hospital and reported that the boy had said that defendant inappropriately touched him when defendant was babysitting him. The hospital examined the boy and found no evidence of abuse. Nonetheless, military police went to defendant's residence and brought him, in handcuffs, to the criminal investigation division at the army base. After approximately 20 hours of questioning in three separate rounds, defendant confessed to

molesting a couple of children. Defendant was charged with ten counts of child sexual abuse and moved to suppress his confession upon the grounds that he was unlawfully arrested without probable cause. The district court denied the motion, and defendant appealed.

★ Holding: First, the court held that, when the officers took defendant to the criminal investigation division in handcuffs, the officers effectuated an arrest for Fourth Amendment purposes. The court dismissed the government's contention that, because defendant did not express unwillingness to go with the officers, defendant had voluntarily accompanied the officers.

Second, the court held that the arrest of defendant was not supported by probable cause. The court found that the only evidence the officers had at the time of the arrest was the uncorroborated statement of the three-year-old boy, which itself was a hearsay statement from the boy's mother. The officers never actually talked directly to the boy. The court found this evidence insufficient to support probable cause to arrest defendant.

Third, the court found that the taint of the unlawful arrest was not dissipated prior to defendant's confession. In order to purge the taint of an illegal arrest, the district court must first find that the subsequent confession was voluntary. If it was voluntary, then the court must consider (1) the temporal proximity of the illegal conduct to the statements, (2) the presence of any intervening circumstances, and (3) the purpose and flagrancy of the police misconduct. The court first held that the confession was voluntary, due in large part to the signing of two *Miranda* waivers. Second, the court found that (1) the length of detention by the government (20 hours), and the fact that defendant had been interrogated for eleven of those hours, weighed against the government; (2) there were no intervening circumstances to purge the taint; and (3) the "quality of purposefulness" of the officers' actions was

demonstrated by the fact that the officers conducted a series of custodial interrogations, without probable cause, in flagrant disregard for defendant's Fourth Amendment rights. Accordingly, the taint of the illegal arrest was not dissipated, and the court held that the confession must be suppressed.

V. Fifth Amendment

• *Due Process - Prosecutor Misconduct*

United States v. Gardiner, 05-1247 (9/12/06)

► During defendant's trial on RICO conspiracy charges, a witness and a codefendant testified that defendant may have Mafia ties. They based this conclusion upon the people defendant knew and the fact that he was Italian. During closing argument, defense counsel argued that it was ludicrous for the witnesses to believe that defendant was in the Mafia. In rebuttal, the prosecutor outlined the evidence that tended to show that defendant was in the Mafia, but stated that it was not an issue in the case. Defendant was convicted and argued for the first time on appeal that the prosecutor committed misconduct by making the Mafia references.

★ Holding: Applying the plain error rule, the court found no misconduct. The initial Mafia references came from witnesses and not the government. Further, the prosecutor referred to the Mafia in closing only in response to the defense attorney's closing argument, and the prosecutor reminded the jury that it was not an issue in the case. Accordingly, the court found no prejudice to defendant and affirmed the conviction.

VI. Sixth Amendment

• *Confrontation Clause - Lie Detector Test*

U.S. v. Gardiner, 05-1247 (9/12/06)

► Defendant was charged with a RICO conspiracy and during the trial proceedings the government failed to turn over evidence that two of its witnesses failed lie detector tests. Defendant argued on appeal that his right to

confrontation had been violated.

★ Holding: The court held that defendant was not entitled to the polygraph examination results. Under circuit precedent, polygraph examinations are generally inadmissible in criminal proceedings and thus, defendant would not have been able to utilize the results had they been provided. Accordingly, the conviction was affirmed.

VIII. Defenses

• *Collateral Estoppel*

Hardesty v. Hamburg Twp, 05-1346 (9/1/06)

► Officers entered Hardesty and his father's home and discovered Hardesty and other minors had been unlawfully consuming alcohol. Hardesty and the other minors were charged in state court with being minors in possession of alcohol. One of the minors moved to suppress the evidence found by the officers based upon an unlawful entry into the home. The state court agreed and suppressed the evidence. As a result, the state charges were dropped against all of the minors, including Hardesty. Subsequently, Hardesty and his father filed an action against the officers and the police department, pursuant to 42 USC § 1983, claiming that the officers had violated his Fourth Amendment rights and that the doctrine of collateral estoppel required that the district court adhere to the state court decision that an unlawful search had occurred. The district court granted summary judgment to the officers, and Hardesty appealed.

★ Holding: The court held that federal courts must give the same preclusive effect to state court judgments as those judgments would receive in the state court. The court noted that, under Michigan law, collateral estoppel applies when (1) there is an identity of parties across the proceedings, (2) there was a valid final judgment, (3) the same issue was litigated and decided in the first proceeding, and (4) the party against whom it is asserted had a full and fair opportunity to litigate the issue. In the

case, the court found that the first element failed because the police-officer defendants in the § 1983 action were not in privity with the prosecution of the underlying state criminal charge. Thus, collateral estoppel did not apply and the court proceeded to the merits. (*See supra*).

• *Severance of Defendants*

U.S. v. Gardiner, 05-1247 (9/12/06)

► Defendant was charged in a RICO conspiracy and went to trial with a codefendant. Prior to trial, defendant moved to sever his trial from the codefendant's because the evidence against the codefendant was overwhelming and would unduly prejudice defendant. The district court denied the motion and defendant appealed.

★ Holding: In order to prevail on a motion for severance, a defendant must show "compelling, specific, and actual prejudice." The court held that severance is not warranted where the proof is greater against a codefendant. Thus, the conviction was affirmed.

• *8 USC § 1357 - Immigration Warrants*

U.S. v. Abdi, 05-4199 (9/22/06)

► ICE and the FBI were investigating defendant based upon the threat of terrorism. As a result of the investigation, ICE decided to take Abdi into custody because he was a threat to national security and an escape risk. Although ICE began the process of obtaining an administrative immigration warrant, it ultimately decided to arrest defendant before such a warrant was obtained, as required by 8 USC § 1357(a). Defendant was subsequently charged with providing material support to terrorists and moved to suppress all statements he made and evidence seized as a result of his arrest. The district court granted the motion and the government filed an interlocutory appeal.

★ Holding: The exclusionary rule only

applies to a violation of a statutory requirement in two situations: (1) where the evidence in question arises directly out of the statutory violation and the statute itself expressly mandates suppression; or (2) the violation implicates a Fourth or Fifth Amendment interest. The court held that the failure by the government to obtain an administrative warrant may have violated § 1357(a), but the statute did not expressly require suppression of evidence. The court further held that the Fourth Amendment was not violated by defendant's arrest. (*See supra*, IV. Fourth Amendment). Accordingly, the district court ruling was reversed.

IX. Plea and Sentencing Hearings

• Rule 35 - Motion to Correct Sentence

U.S. v. Vicol, 05-2155 (9/6/06)

► Defendant was convicted of kidnaping. At sentencing, the district court determined that his offense level was 24 and orally pronounced sentence accordingly. The next day, the government filed a motion under Fed. R. Crim. P. 35 to correct sentence, arguing that the district court applied the wrong base offense level. The district court withheld issuing its written judgment and set the matter for a hearing twelve days after the sentencing hearing. At the second hearing, the court ruled in favor of the government's motion and increased defendant's sentence. Defendant appealed.

★ Holding: Rule 35 permits a district court to correct a sentence within 7 days after sentencing. The court held that, under Rule 35, if a district court does not correct a sentence within 7 days of the oral pronouncement of sentence, then the court is without jurisdiction to correct the sentence. Thus, because the district court did not resentence defendant until 12 days after the original sentencing, the court lacked jurisdiction to impose the higher sentence. The court thus remanded the case for the district court to impose the original

sentence, and indicated that the parties were free to appeal the reasonableness of that sentence.

• Plea Agreements

U.S. v. Harris, 05-3419 (9/15/06)

► Defendant pled guilty to possession of counterfeit securities. In the plea agreement, defendant promised to provide a statement to the government before his guilty plea regarding all counterfeit securities activity in which he had been involved and to participate in any further debriefings requested by the government. In return, the government agreed not to charge defendant with other counterfeit securities activities about which defendant provided truthful information. The government never requested and defendant never provided any information pursuant to the agreement. Defendant was subsequently investigated by the government in a separate counterfeit securities conspiracy and, as a result, he was indicted. During the course of the new investigation, a Secret Service agent attempted to interview defendant, but he declined. After being indicted on the new charges, defendant moved to dismiss the indictment based upon the language of the plea agreement. The district court denied the motion and defendant appealed.

★ Holding: Plea agreements are generally strictly construed against the government. In construing the agreement, the court held that the government had an obligation to request a debriefing from defendant before his obligation to provide information was triggered. Thus, if the government failed to meet its obligation under the plea agreement in requesting a debriefing, the plea agreement required that the subsequent indictment be dismissed. The court ruled that a remand was necessary in order for the district court to determine if the attempted interview of defendant by the Secret Service agent in conjunction with the subsequent investigation constituted a request for a

debriefing under the plea agreement.

• *Sentencing - Disputed Factual Findings*
U.S. v. Duckro, 05-3379 (10/18/06)

▶ Defendant was convicted of firearm offenses and at sentencing he disputed guideline issues involving the amount of firearms, his role in the offense, and his criminal history points. Defendant based his challenges upon the Sixth Amendment/*Booker* because the underlying facts were not implicated by his guilty plea. The district court overruled defendant's objections based solely on the findings in the presentence investigation report (PSR). Defendant appealed.

★ Holding: Fed. R. Crim. P. 32 requires a district court to make findings of fact regarding material factual disputes. The court held, however, that a defendant must do more than challenge the legal significance of facts before a district court is required to make specific factual findings. The court ruled that a defendant who challenges factual allegations in a PSR has the burden of producing some evidence, beyond a bare denial of the facts, that calls into question the reliability or correctness of the facts. Because defendant had done nothing more than challenge the legal significance of the facts, the district court's reliance on the PSR was proper, and its ruling was affirmed.

X. Jury Issues

• *Juror Misconduct*
U.S. v. Lloyd, 04-4014 (9/1/06)

▶ After defendant's trial for bank robbery, the district court learned that a juror felt coerced by other jurors to vote for defendant's guilt, even though he did not feel that defendant was guilty. Defendant moved the district court to interview the juror, and the court denied the motion. Defendant appealed.

★ Holding: Pursuant to FRE 606(b), a juror is incompetent to testify to a matter concerning deliberations unless it is established that the

juror was subjected to "extraneous prejudicial information" or improper "outside influence." The court held that the record was clear that the juror was influenced only by other jurors, and accordingly, the district court ruling was affirmed.

XI. Probation and Supervised Release

• *Conditions of Release - Sex Offender*
U.S. v. Carter, 05-6129 (9/18/06)

▶ Defendant was convicted and sentenced for being a felon in possession of a firearm. After release from prison and while serving a term of supervised release, the government petitioned the court to impose a special condition that defendant submit to sex offender treatment and polygraph testing. The district court imposed the special condition and defendant appealed.

★ Holding: Imposition of a special condition of supervised release is reviewed both procedurally and substantively. Procedural review involves a determination as to whether the district court properly stated its reasons for imposing the special condition. Substantive review involves analysis of three requirements: (1) the condition must be reasonably related to the offense and defendant's history, the need to deter criminal conduct and protect the public, and the need to provide defendant with appropriate training or treatment; (2) the condition must constitute no greater deprivation of liberty than required; and (3) the condition must be consistent with the policy statements issued by the Sentencing Commission.

First, the court found that the district court met its procedural requirements by stating its reasons for the condition on the record. Second, the court found that condition was not substantively proper. Defendant's federal conviction involved a firearm and his only sex related convictions occurred seventeen years prior. The only evidence possibly supporting the condition involved a stalking

conviction that defendant received shortly before the condition was imposed, but the court found that the record was insufficiently developed to show that the stalking conviction involved sex. Accordingly, the condition was vacated and the case remanded for the district court to determine whether the stalking conviction supported the sex offender treatment and lie detector testing condition.

XII. Appeal

• Issue First Raised on Appeal

U.S. v. Ellison, 04-1925 (9/5/06)

► Officers ran the license plate on defendant's van and determined that he had an open warrant. As a result, officers stopped defendant's van, arrested defendant, and found two firearms. Defendant was charged with being a felon in possession of a firearm and moved to suppress the evidence. The government did not argue in the district court that defendant had no reasonable expectation of privacy in his license plate, but instead tried to justify the stop of defendant's van based upon an alleged parking violation. The district court granted defendant's motion and suppressed the evidence. The government appealed.

★ Holding: Generally, the court of appeals will not consider an issue that was not first raised in the district court except in "exceptional cases" or if a "plain miscarriage of justice" would otherwise occur. In the case, because the issue of whether defendant had a reasonable expectation of privacy in the license plate was purely a legal one, the parties had fully briefed the issue, and the district court was clearly in error, the court held that a plain miscarriage of justice would occur if it did not address the issue. Accordingly, the court proceeded to the merits of the government's argument. (*See supra*, IV. Fourth Amendment).

• Reasonableness of Sentence

U.S. v. Seymour, 05-1643 (10/27/06)

► Defendant was convicted of sexual assault and at sentencing the district court imposed the top end of the applicable guideline range. Defendant appealed and argued that the district court had failed to consider his "painful history and emotional problems" in determining a sentence.

★ Holding: The court held that the district court had appropriately considered defendant's psychological impairments because it recommended him for "mental health sex offender treatment" and the intensive substance abuse program. Further, the court noted that "mental health issues, drugs, and an underprivileged upbringing" are not ordinarily relevant factors for a below-guideline sentence pursuant to the guidelines. Accordingly, the sentence was reasonable and the district court ruling was affirmed.

• Reasonableness of Sentence

U.S. v. Johnson, 05-6309 (10/31/06)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing defendant challenged his criminal history category based upon an alleged error in a prior state court judgment of conviction. Defendant requested a continuance in order to attempt to correct the state court error. The district court denied the request, stating that the sentence that it was imposing, 30 months, fell within the guideline range corresponding to both the lower and higher criminal history categories. The district court made no reference to the factors under 18 USC § 3553. Defendant appealed.

★ Holding: The court held that the district court's consideration of only the sentencing guideline range, and its complete failure to indicate on the record its evaluation of the § 3553 factors, rendered the sentence procedurally unreasonable. Further, the court ruled that the error was not harmless because

the district court provided the court with no basis to determine whether the district court's sentence would be the same had it properly considered the § 3553 factors. Finally, even though defendant did not either argue the § 3553 factors at sentencing or object to the district court's failure to consider them, the court refused to apply the plain error standard because the district court did not afford the parties an opportunity to object to the sentence it pronounced, as required by Sixth Circuit precedent. Accordingly, the case was remanded for resentencing.

Defendant did not file his motion for a delayed appeal until five months after learning of the decision. Accordingly, the court found no prejudice and affirmed the district court ruling.

XIII. Post-Conviction Remedies

- *Ineffective Assistance of Appellate Counsel*
Smith v. State of Ohio, 04-4280 (9/8/06)

- ▶ Defendant was convicted in state court of robbery and weapons violations and lost his appeal in the state appellate court. Defendant's attorney failed to notify him of the appellate court decision until the time to appeal to the Ohio Supreme Court had almost run. Defendant waited until five months after the deadline to file a motion for a delayed appeal to the Ohio Supreme Court, and the court denied the motion. Defendant then filed a federal *habeas* petition alleging errors in his state court trial. The district court denied the petition because defendant had not properly appealed to the Ohio Supreme Court before filing the *habeas* action. Defendant appealed and claimed that his state appellate attorney was ineffective for failing to notify him of the court of appeals' decision.

- ★ Holding: Applying the *Strickland* standard, the court held that the appellate attorney rendered ineffective assistance of counsel in failing to timely notify defendant of the state appellate court's decision. The court ruled, however, that defendant was not prejudiced by his attorney's deficient performance because defendant did not make a showing that he would have timely appealed even had he known about the decision.