

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

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Steven S. Nolder

Federal Public Defender

www.fpd-ohs.org

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<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> Chiquita Center 250 E. 5th Street, Suite 350 Cincinnati, OH 45202 (513) 929-4834 (513) 929-4842 (Fax)	<i>Dayton Office</i> 1 Dayton Centre, Ste. 490 1 South Main St. 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:

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- II. Sentencing Guidelines
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- IV. Fourth Amendment
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- 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.

NEW COMBINED OUTLINE

Trying to find a case that you have read about in a past issue of Precedential Value? Need research on a specific legal topic? Check out the Combined Outline on our website. The Combined Outline is a culmination of all cases previously published in P.V., compiled in an outline format, with topic headings that make your legal research easy and accessible. The Combined Outline may be accessed at www.fpd-ohs.org.

SUPREME COURT DECISIONS

X. Jury Issues

A. Jury Instructions

- *Jury Instructions - Harmless Error*
Hedgpeth v. Pulido, 07-544 (12/2/08)
 - ▶ Defendant went to trial in state court for felony murder. While instructing the jury, the trial court provided alternative theories regarding the *mens rea* element, one of which

was an incorrect statement of the law. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court granted the petition. The Ninth Circuit affirmed, and held that the improper alternative jury instruction was structural error, requiring reversal. The Supreme Court granted *certiorari*.

★ Holding: The Court held that, where a jury receives alternative theory jury instructions, one of which is improper, the error is not structural but is instead subject to harmless error analysis. Accordingly, the case was remanded to the district court for a determination as to whether the jury instruction error was harmless.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 USC § 641 - Theft of Gov. Property*
U.S. v. Hall, 07-5918 (12/10/08)

▶ Defendant had a sub-contract to provide information and engineering services to the government. Defendant received monthly advance payments from the government to cover defendant's expenses in fulfilling the contract. Defendant was required to return any funds advanced that were not used toward expenses. The government required defendant to track expenses each month through an accounting program, subjected defendant to audits, and required that the advances be used only for reasonable expenses that were actually incurred. During several fiscal years, defendant conspired with others to submit false invoices for fictitious expenses, thus allowing defendant to fraudulently retain the unspent advances. Defendant was charged with theft of government property and argued at trial that the money was not the property of the government at the time he stole it. Defendant was convicted and he appealed.

★ Holding: Where government money passes to private hands, the government must

retain sufficient control over the funds in order for them to remain federal property. In the case, the court held that the funds retained their identity as government property based on the government's requirements that (1) the unused advances be returned, (2) defendant maintain an accounting system and submit to audits, and (3) advances could be used only for reasonable expenses. Thus, defendant's misappropriation of the funds constituted theft of government property and his conviction was affirmed.

• *18 USC § 922(g) - Felon in Possession*
U.S. v. Campbell, 06-6094 (12/2/08)

▶ Defendant was charged with being a felon in possession of a firearm based on a gun that was found in a car under the seat in which he was sitting. During trial, the driver of the car testified that she saw someone hand defendant a gun while sitting in the same passenger seat earlier in the day, that defendant told her someone had shot at his car, and that defendant told her to say that the gun found under the seat was hers. Additionally, evidence was adduced that, when the officers stopped the car, defendant was bending over as if to hide something. Defendant was convicted and he appealed the sufficiency of the evidence.

★ Holding: While mere proximity to a gun is not sufficient to establish possession, the court held that significant additional evidence supported defendant's conviction. Defendant's possession of a gun earlier in the day, his statements to the driver, and his actions upon the stop all indicated that defendant was in possession of the firearm. Accordingly, the conviction was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. McCauley, 07-3935 (11/25/08)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that defendant was an armed career criminal. This determination was based, in part, on the court's determination that

two robbery convictions from 1987 were separately countable offenses. Defendant appealed and argued that the offenses could not be counted separately for ACCA purposes where they were consolidated for sentencing.

★ Holding: Under the ACCA, prior offenses count separately if they were “committed on occasions different from one another.” The court held that, for ACCA purposes, it was irrelevant whether the offenses were consolidated for sentencing; instead, the only pertinent consideration was that the offenses were committed on separate occasions. Accordingly, the district court ruling was affirmed.

• *21 USC § 846 - Drug Conspiracy*
U.S. v. Davis, 05-2465 (11/13/08)

▶ A third party arranged through defendant’s cousin to purchase crack from defendant. The cousin handled almost all of the communication between the third party and defendant as far as negotiating the deal and arranging the meeting. The cousin was paid \$50 by the third party for arranging the transaction. Defendant was convicted for a drug conspiracy and argued on appeal that the evidence was insufficient to support the conviction.

★ Holding: In order to establish a drug conspiracy, the government must prove (1) an agreement to distribute drugs, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy. The court held that the evidence was sufficient for the jury to infer that the cousin was participating in a conspiracy with defendant, as opposed to being “merely associated” with the drug sale. The cousin was the person primarily responsible for arranging the transaction, and he did so with some expectation of remuneration. Accordingly, the court held that the evidence was sufficient to support the verdict.

• *21 USC § 846 - Drug Conspiracy*
U.S. v. Robinson, 07-5474 (11/25/08)

▶ Defendant was charged with participating in a conspiracy involving 5 or more kilograms of cocaine. During trial, the district court instructed the jury that it could find defendant guilty if it believed that defendant knowingly participated in the conspiracy, and the conspiracy (as opposed to defendant) was responsible for distributing five or more kilograms of cocaine. Defendant was convicted and, because he had two prior drug felonies on his record, was sentenced to mandatory life in prison. Defendant appealed.

★ Holding: The court held that, for purposes of the threshold drug amounts for a conspiracy conviction under § 846, a defendant is responsible not only for the amounts he or she personally distributed, but is also attributable for the amount distributed by the whole conspiracy, as charged in the indictment. Thus, the district court properly instructed the jury that the drug amount attributable to defendant was the amount distributed by the conspiracy. Accordingly, defendant’s sentence was affirmed.

II. Sentencing Guidelines

B. Chapter Three - Adjustments

• *3C1.1 - Obstruction of Justice*
U.S. v. Gilpatrick, 07-5653 (11/26/08)

▶ Defendant was a jailer who was convicted of violating an inmate’s civil rights by encouraging two other inmates to assault the victim inmate. At sentencing, the district court determined that defendant obstructed justice by obtaining a letter from the offending inmates indicating that they assaulted the victim because he provoked them. Defendant argued on appeal that the enhancement could not be applied unless the district court determined that he acted wilfully.

★ Holding: The court held that the “wilfulness” requirement only applied to cases where the enhancement was based on

defendant's commission of perjury. The court found that the district court properly weighed the evidence and determined that defendant had solicited the inmates to write the letter, that the letter was false, and that defendant submitted the letter to the court. As such, the obstruction of justice enhancement was appropriate.

C. Chapter Four - Criminal History

- *4A1.2(f) - Diversionary Dispositions*
U.S. v. Shor, 07-2334 (12/16/08)

- ▶ Defendant was convicted of participating in a narcotics conspiracy. At sentencing, the district court assessed one criminal history point based on defendant's prior conviction for assault, for which he received a two-year probationary sentence under the Michigan's Youthful Trainee Act. As a consequence, defendant's guideline sentencing range was increased. Defendant argued on appeal that the prior offense was not countable under the guidelines.

- ★ Holding: USSG § 4A1.2(f) makes diversionary dispositions in criminal cases countable against a defendant's criminal history score if a finding of guilt was entered against the defendant. Once the finding of guilt is entered, the conviction is countable unless it is later expunged, as described in USSG § 4A1.2(j). Because a finding of guilt was entered against defendant, and no expungement was obtained, the Michigan assault conviction was countable. Accordingly, defendant's sentence was affirmed.

- *4B1.1 - Career Offender - Prior Offenses*
U.S. v. Smith, 07-5377 (12/2/08)

- ▶ Defendant was convicted of possession of crack with intent to distribute. At sentencing, the district court determined that defendant was a career offender based on two prior drug trafficking offenses on his record. The offenses were separated by an intervening arrest, but the cases were consolidated for sentencing on the same day. The district court

sentenced defendant to 20 years imprisonment and he appealed.

- ★ Holding: The court held that prior offenses count separately for purposes of USSG § 4A1.2(a), and accordingly the career offender provision, if they are separated by an intervening arrest. This is true regardless of whether the sentencing for the offenses occurred on the same day. The case arose under the prior version of § 4A1.2(a), which was later amended on 11/1/07, but the court opined that the result would be the same under either version of the guideline. Accordingly, the sentence was affirmed.

III. Evidence

A. Article IV - Relevancy

- *404(b) - Preparation/Identity/Intent*
United States v. Davis, 05-2465 (11/13/08)

- ▶ Defendant was charged with conspiracy and distribution of drugs. At trial, the government introduced evidence to show that defendant utilized his cousin to act as an intermediary to sell crack to a third party. Over defendant's objection, the government also introduced evidence to show that defendant and his cousin sold marijuana on a prior occasion using a similar arrangement. At the government's request, the district court admitted the prior sale, pursuant to FRE 404(b), to prove preparation and identity. The court provided a limiting instruction to the jury on both theories. Defendant was convicted of both conspiracy and distribution, and he appealed.

- ★ Holding: First, the court held that preparation was not at issue in the case because the government theory of the case made no suggestion that the prior marijuana transaction was a preliminary step to the overall success of the conspiracy, or that the marijuana sale was a necessary precursor to the crack sale. Second, the court held that identity was not at issue in the case because there was no question that defendant was the person who sold the

crack. Lastly, the court held that the evidence may have been properly admissible to show intent because both charges were specific intent crimes. The district court, however, did not provide a limiting instruction to the jury regarding intent, and thus, it was not a proper basis to admit the evidence. Accordingly, the court held that the district court erred in admitting the prior act evidence. The court found that the error was harmless in relation to the distribution count (for which the evidence was overwhelming), but not harmless in relation to the conspiracy count. Thus, the court reversed defendant's conviction for conspiracy.

- *404(b) - Intent*

U.S. v. Stephens, 07-1907 (11/25/08)

- ▶ Defendant was charged with two counts of drug trafficking. At trial, the government sought to introduce defendant's prior conviction for drug trafficking in order to show defendant's intent to sell the drugs he was carrying at the time of his arrest. The district court admitted the prior conviction, defendant was convicted, and he appealed.

- ★ Holding: Regarding intent, the court held that, generally, prior drug-distribution convictions may not be used to demonstrate the intent to distribute drugs in a later case. However, the court ruled that, even if the district court erred, the error was harmless because the evidence supporting defendant's guilt was overwhelming. Accordingly, the district court's ruling was affirmed.

B. Articles VI-VII - Witness and Expert

- *609 - Impeachment by Prior Conviction*

U.S. v. Kemp, 07-5837 (11/14/08)

- ▶ Defendant was charged with being a felon in possession of a firearm. At trial, defendant testified that he possessed the gun out of necessity. In response, the government cross examined defendant regarding his prior felony convictions for taking indecent liberties with a

minor. Defendant's only objection to the impeachment was the age of the prior convictions. The district court admitted the evidence and defendant was convicted. Defendant argued on appeal that the probative value of the convictions was outweighed by their prejudicial effect.

- ★ Holding: First, the court noted that defendant and the government entered into an *Old Chief* stipulation at trial, thus the nature of the prior convictions was not admissible to prove the prior-conviction element of the charge. Second, the court found that the district court provided no justification as to why the high prejudicial effect of the prior convictions did not outweigh the probative impeachment value. Nonetheless, the court ruled that, because defendant did not lodge an objection regarding the prejudicial effect of the evidence, plain error review applied. As such, the court found that under the "exceedingly deferential" standard of review, it could not conclude that the admission of the convictions was "manifestly incorrect." Thus, defendant's conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Reasonable Suspicion*

U.S. v. McCauley, 07-3935 (11/25/08)

- ▶ A woman reported to an officer that she had just been threatened by a black man with a gun, driving small black SUV. She reported that the suspect lived on Riverside Drive. A second officer subsequently saw a small black SUV driving down Riverside Drive, and when the officer chased the vehicle it pulled into a garage and closed the door. Before the door shut, the officer saw a black man, defendant, exit the vehicle and he ordered defendant to stop. Instead, defendant ran inside. When the garage door reopened, a woman was exiting the SUV, and she said that defendant was her husband. Defendant came out of the house and he was detained by police. A firearm was

subsequently found in the vehicle. Defendant was charged with being a felon in possession of a firearm and he moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: The court held that defendant was not stopped, under *Terry*, until he came back out of the house and submitted to the officer's authority. The court ruled that the combination of the tip from the woman and defendant's actions in fleeing the officer provided reasonable suspicion for the *Terry* stop. Accordingly, the district court ruling was affirmed.

- *Reasonable Suspicion*

U.S. v. Campbell, 06-6094 (12/2/08)

▶ Defendant was in the passenger's seat of a car, the engine and lights were off, and there was a woman in the driver's seat. The car was under an overpass, and was in an area with no traffic. The area was a high crime neighborhood. An officer queried the car's license tag and it came back as possibly being stolen. The officer approached in her vehicle, and the driver started the car and tried to drive off. The officer activated her lights and siren and the car stopped. Upon questioning by the officer, defendant and the driver gave differing stories about what they were doing. Defendant indicated that he had no I.D. and he was bending over in his seat as if to conceal something. Defendant was taken from the car and frisked, and the officer found marijuana. The officer also discovered a gun under defendant's seat. Defendant was charged with being a felon in possession of a firearm and possession of marijuana with intent to distribute, and he moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: The court held that the facts known to the officer provided reasonable suspicion to stop the car. Further, the court found that defendant's and the driver's

differing answers about what they were doing, combined with defendant's furtive movements, justified defendant's detention and frisk. Finally, the marijuana found during the pat down was justified by the plain-feel doctrine, and the gun was observed in plain view. Accordingly, the district court ruling was affirmed.

- *Vehicle Stops - Probable Cause*

U.S. v. Gross, 07-5971 (12/22/08)

▶ Officers stopped defendant's car on the freeway for "straddling" two lanes during a lane change. Tennessee law required that a vehicle be "driven as nearly as practicable entirely within a single lane." Officers found cocaine in the vehicle. Defendant was charged with transporting cocaine and he moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: The court held that the stop of defendant's vehicle was not supported by probable cause. According to the court, defendant's "straddling" of two lanes amounted to a lane change, while on a steep incline, that took approximately three seconds. The court held that this conduct did not violate the Tennessee statute, and accordingly the stop violated the Fourth Amendment. Thus, the district court ruling was reversed.

C. Warrant Exceptions

- *Search Incident to Arrest*

U.S. v. Smith, 07-5377 (12/2/08)

▶ Defendant sold drugs to an informant during a controlled buy. One month later, the informant notified the officers that defendant was transporting drugs to a certain location. Officers staked out the location, and a second informant identified defendant's car when he arrived. Upon stopping the car, the drug dog failed to alert, but it did show a "change of demeanor" when sniffing defendant's crotch. A passenger in the car told the officers that defendant was carrying drugs in his crotch, and

the officers observed that defendant's pants were unzipped and he was "tugging and pulling" in that area. Officers handcuffed defendant, took him to the station, and detained him while they obtained a search warrant. About an hour and a half later, defendant was searched pursuant to the warrant and crack was found in his crotch. Upon his prosecution, defendant moved to suppress the evidence and the district court denied the motion. The court held that the search warrant did not provide probable cause, but that the search was saved by good faith. Defendant appealed.

★ Holding: The court held that the search of defendant was valid as a search incident to arrest. The court found that the tip and the evidence derived at the scene of the stop provided sufficient information for probable cause to arrest. Even though the officers did not state that they were placing defendant under arrest, the fact that they handcuffed him and took him to the station for several hours was sufficient to constitute an arrest. Thus, the search eventually performed constituted a valid search incident to arrest. The court noted that the invalid search warrant did not compromise the lawfulness of the search. Accordingly, defendant's conviction was affirmed.

V. Fifth Amendment

C. Confessions and Testimonial Rights

- *Miranda/Voluntariness*

Davis v. Mitchell, 03-4293 (11/12/08)

► Defendant was arrested as a suspect in multiple murders and, during the course of several hours, officers questioned him on multiple occasions. Each time the officers *Mirandized* defendant, and each time defendant refused to discuss the case, but he never requested counsel. Finally, defendant requested to see the detective, and asked the detective questions about a news report and some information provided by an informant. The ensuing conversation led to defendant's confession. Defendant was prosecuted for

murder and moved to suppress his confession. The state court denied defendant's motion, he was convicted, and lost his state court appeal. Defendant filed a federal *habeas* petition and the district court denied the petition. Defendant appealed.

★ Holding: Where a defendant asserts the right to remain silent, officers must "scrupulously honor" the request, unless the defendant initiates contact. An initiation occurs where, "without influence by the authorities, the suspect shows a willingness and desire to talk generally" about the circumstances. In the case, the court held that defendant initiated contact with the officers by requesting to speak with a detective before making his confession. Further, the court noted that defendant was read his *Miranda* rights before each series of questioning, and that the periods of questioning were sufficiently far apart in time that defendant's confession was not rendered involuntary. Accordingly, defendant's conviction was affirmed.

- *Miranda - Waiver*

Thompkins v. Berghuis, 06-2435 (11/19/08)

► Defendant was arrested as a suspect in a murder. Officers provided defendant a written version of his *Miranda* rights which he refused to sign. The officers then engaged in two hours and forty five minutes of questioning, during which defendant was almost entirely non-communicative. He made eye contact only a few times and generally was unresponsive to the officers' lengthy monologue. Finally, the officers appealed to defendant's religious beliefs, and defendant admitted that he prayed for forgiveness for the murder. Upon defendant's murder prosecution, he moved to suppress the confession. The state court denied the motion, defendant was convicted, and he lost his state court appeal. Defendant filed a federal *habeas* petition, and the district court denied the petition. Defendant appealed.

★ Holding: Relying on the Supreme Court’s decision in *Miranda*, the court held that trial courts must presume that a defendant did not waive her *Miranda* rights, and that the government bears a heavy burden in proving waiver. Further, a valid waiver may not be assumed simply from the silence of the accused or from the fact that a confession is eventually obtained. In the case, the court held that defendant’s two hours and forty five minutes of silence before his confession could not be construed as an implied waiver of his *Miranda* rights. Thus, the court found that the state court unreasonably applied federal law in finding a *Miranda* waiver. Accordingly, the district court’s ruling was reversed and defendant’s conviction was vacated.

D. Double Jeopardy

- *Double Jeopardy*

Klein v. Leis, 06-3949 (11/25/08)

► Defendant was charged in state court with burglary and other offenses, and he represented himself at trial. During his opening statement, defendant repeatedly made inappropriate statements regarding the court, the prosecutor, and the burden of proof. Further, defendant suggested that he could get the death penalty, even though the case was non-capital, and he showed the jury the stun-belt he was forced to wear because of his escape attempts. After repeated warnings, the state judge declared a mistrial. Defendant moved to bar a second trial based on double jeopardy grounds, and the court denied the motion. Defendant filed a federal *habeas* petition to block the second trial, and the district court denied the petition. Defendant appealed.

★ Holding: A trial court’s decision to grant a mistrial is entitled to “special respect,” and a retrial will not offend the Double Jeopardy Clause as long as the trial court exercised “sound discretion.” In reviewing a trial court’s decision, the court of appeals must consider whether the trial court (1) heard the opinions of

the parties regarding the mistrial, (2) considered the alternatives, and (3) acted deliberately instead of abruptly. In the case, the court held that the state court clearly considered other options and acted deliberately as exhibited through its repeated warnings to defendant prior to granting the mistrial. The court noted that the trial court did not permit defendant to argue against the mistrial, but nonetheless affirmed the trial court decision because of the “open and obvious prejudice” presented by defendant’s comments to the jury.

- *Double Jeopardy*

U.S. v. Simpson, 07-5193 (11/4/08)

► Defendant was sentenced to prison for a drug offense and he escaped. As a result, the Federal Bureau of Prisons administratively charged defendant with escape, and imposed a sentence of 60 days segregation, 40 days disallowance of good time credit, and 6 months loss of visitation. Defendant was subsequently indicted for escape, and he moved to dismiss the charge on double jeopardy grounds. The district court denied defendant’s motion and he appealed.

★ Holding: The Double Jeopardy Clause prohibits a defendant from being subjected to multiple criminal punishments through application of either a criminal prosecution or a facially punitive statute. The court held that, in order to determine if an administrative statute is facially punitive, courts must consider two factors. First, a court must inquire as to whether the legislature indicated whether the statute was punitive or civil, in terms of its sanction. If the legislature intended to impose a civil sanction, then the court must consider whether the scheme is so punitive as to transform the civil remedy into a criminal penalty. In the case, the court held that the administrative remedies under the statute were clearly civil, and that there was no clear proof that the prison disciplinary measures were punitive in effect. Accordingly, the district

court ruling was affirmed.

VI. Sixth Amendment

A. Right to Jury Trial/*Booker*

- *Booker - Acquitted Conduct*

U.S. v. White, 05-6596 (12/24/08)

► At sentencing, defendant received a 14-year upward adjustment to his sentencing guideline range based upon conduct for which defendant was acquitted after trial. Defendant appealed and the original Sixth Circuit panel affirmed. The court granted *en banc* review.

★ Holding: The *en banc* court held that a district court may increase a defendant's sentence based on acquitted conduct as long as the conduct is proven by a preponderance of the evidence and the sentence is not above the statutory maximum based on the jury verdict. Accordingly, defendant's sentence was affirmed.

E. Indictment - Variance/Duplicity

- *Variance - Drug Conspiracy*

U.S. v. Robinson, 07-5474 (11/24/08)

► Defendant was charged with others in a drug conspiracy. At trial, the evidence showed that defendant participated with the drug distributor to acquire drugs, develop customers, and distribute drugs to downstream sellers. Upon defendant's conviction, he appealed and argued that the indictment alleged a single conspiracy, but the evidence at trial proved multiple conspiracies.

★ Holding: In order to prove a single conspiracy, the government need only prove that each conspirator had knowledge of and agreed to participate in a collective venture. In a "chain" conspiracy, drugs are sold and resold numerous times before they reach the ultimate consumer. In such a conspiracy, each member need not know the identities of all of the participants, so long as the member is aware that she is participating in a joint enterprise. In the case, the court held that no variance occurred between the indictment and the proof

as the evidence reasonably supported the theory of only one "chain" conspiracy. Accordingly, defendant's conviction was affirmed.

VIII. Defenses

C. Necessity/Duress

- *Necessity/Justification Defense*

U.S. v. Kemp, 07-5837 (11/14/08)

► Defendant was charged with being a felon in possession of a firearm. Defendant provided two differing stories to the police regarding why he possessed the gun. At trial, defendant told a third story regarding the gun, testifying that he took it away from his drunk girlfriend. The district court refused to provide an instruction on justification, defendant was convicted, and he appealed.

★ Holding: In order to establish justification or necessity, a defendant must prove the following: (1) defendant was under an unlawful, imminent threat of death or serious bodily injury; (2) defendant had not negligently gotten into the situation; (3) defendant had no reasonable legal alternative; (4) a direct causal relationship between the criminal action and avoidance of the harm; and (5) defendant maintained the illegal conduct no longer than necessary. Before a court must provide an instruction regarding justification, defendant must prove each element by a preponderance of the evidence. The court held that defendant failed to establish four of the five factors, and accordingly the district court ruling was affirmed.

IX. Plea & Sentencing Hearings

B. Sentencing

- *Sentencing - Waiver of PSR*

U.S. v. Brown, 07-5465 (11/19/08)

► Defendant was charged with possession of crack and powder with intent to distribute, being a felon in possession of a firearm, and possession of a firearm in furtherance of drug trafficking. Defendant entered into a binding plea agreement with the government, pursuant

to Fed. R. Crim. P. 11(c)(1)(C), wherein he agreed to plead to all counts in return for an agreed sentence of 144 months incarceration. Defendant agreed at the plea hearing that a PSR was unnecessary and the district court sentenced defendant without a PSR. Defendant argued on appeal that the district court erred in failing to order a PSR.

★ Holding: Fed. R. Crim. P. 32(c)(1)(A)(ii) and USSG § 6A1.1(a)(2) permit a district court to sentence a defendant without a PSR if it finds that “the information in the record enables it to meaningfully exercise its sentencing authority under 18 USC § 3553, and the court explains its finding on the record.” The court held that the district court adequately explained the information it possessed to exercise its sentencing authority, that no facts relevant to sentencing were in dispute, and that defendant’s sentence was actually three years lower than the mandatory minimum for the charges he faced. Accordingly, sentencing without a PSR was appropriate.

• *Fed. R. Crim. P. 32(i)(4)(A) - Allocution*
U.S. v. Haygood, 07-1771 (12/15/08)

► Defendant was convicted of marijuana and firearm offenses and at sentencing the district court advised him of his Fifth Amendment right to remain silent. Defendant indicated that he wished to exercise that right. The district court offered defendant no further opportunity to speak during the hearing, and sentenced defendant to a six month guideline sentence, and a five year mandatory consecutive sentence for a firearm enhancement. Defendant appealed.

★ Holding: The court held that, pursuant to Rule 32(i)(4)(A), a district court must give a defendant an unambiguous personal invitation to speak prior to sentencing. The court found that the district court’s advice regarding defendant’s Fifth Amendment rights did not satisfy this requirement. Accordingly, the case was remanded for resentencing.

D. Miscellaneous Plea & Sentencing

• *Withdrawal of Guilty Plea*

U.S. v. Haygood, 07-1771 (12/15/08)

► Defendant was charged with marijuana and firearm offenses and he proceeded to trial. On the last day of trial, defendant entered into a plea agreement with the government and pled guilty. Four-and-a-half months later at the sentencing hearing, defendant attempted to withdraw his guilty plea on the ground that he wanted to pursue a motion to suppress that was never filed before trial. The district court denied his request and defendant appealed.

★ Holding: In considering whether to allow a defendant to withdraw a guilty plea, the court must determine whether defendant has provided a “fair and just” reason for requesting the withdrawal. The court must consider seven factors: (1) the amount of time elapsed; (2) any valid reason for failing to move for withdrawal earlier in the proceedings; (3) whether defendant maintained his innocence; (4) the circumstances of the guilty plea; (5) the defendant’s nature and background; (6) defendant’s prior experience with the criminal justice system; and (7) any prejudice to the government. In the case, the court held that defendant had no “fair and just” reason because no motion to suppress was filed prior to trial as required by Fed. R. Crim. P. 12(b)(3)(C). Further, defendant waited four-and-a-half months before raising the issue without any good reason. Accordingly, defendant’s conviction was affirmed.

XI. Probation & Supervised Release

• *Conditions of Supervised Release*

U.S. v. Gilpatrick, 07-5653 (11/26/09)

► At defendant’s sentencing for violating the civil rights of another, the district court imposed a condition of supervised release that defendant serve 24 months in a community corrections facility. Defendant did not object in the district court but argued on appeal that the district court lacked authority to imposed

such a sanction as a condition of supervised release.

★ Holding: In 1996, Congress passed the Mandatory Victims Restitution Act and the statute mistakenly left out the community confinement provision as an option for supervised release. Relying on other circuit precedent, the court held that the failure to include community confinement as an option was a “clerical error” on the part of the Legislature, and accordingly found no plain error in the district court’s sentence. The court noted that Congress again amended the statute on October 13, 2008 to include the community confinement option.

XII. Appeal

C. Reasonableness of Sentence

- *Reasonableness - Crack Amendment*

U.S. v. Brown, 07-5465 (11/19/08)

▶ Defendant was convicted of possession with intent to distribute crack and a small amount of marijuana. Defendant appealed his sentence, and during the pendency of defendant’s appeal, the crack amendment to the guidelines was passed.

★ Holding: The court held that the case had to be remanded for resentencing in light of the crack amendment. The court further found that the guidelines treated defendants with multiple drugs unfairly in relation to the crack amendment. Specifically, in defendant’s situation he would not benefit from the two-level reduction under the guidelines because he also possessed a small amount of marijuana. The court held that this anomaly appeared to be arbitrary and that it did not reflect the policy of the Sentencing Commission regarding crack offenses. Accordingly, the case was remanded for resentencing.

- *Reasonableness of Sentence*

U.S. v. Blackie, 07-2002 (11/21/08)

▶ Defendant was convicted of possession of child porn. At sentencing, the district court

determined that certain guideline enhancements would not apply as recommended in the PSR. The district court then imposed a sentence without stating the reduced guideline range that it was applying. The sentence turned out to be one month higher than the adjusted guideline range. In the district court’s written judgment it acknowledged that the sentence was above the guideline range. Defendant appealed.

★ Holding: Because defendant failed to object to the above-guideline sentence, the court applied plain error. The court found plain error where the district court failed, at the sentencing hearing, to provide any acknowledgment of the guideline range it was applying or any explanation for the one month upward variance. Accordingly, the case was remanded for resentencing.

- *Reasonableness of Sentence*

U.S. v. Presley, 07-1147 (11/24/08)

▶ Defendant and his codefendant were convicted of a large scale drug trafficking conspiracy. On appeal, both cases were remanded for resentencing in light of *Booker*. The codefendant’s case was also reversed based upon a suppression issue. On remand, the government determined that its case against the codefendant was weakened, and it decided to work out a plea agreement with the codefendant, reducing his original sentence from 360 months to 96 months incarceration. The government, however, pursued the same 360 month sentence against defendant. The district court, relying on the disparity between defendants, reduced defendant’s sentence to 120 months, the mandatory minimum. The government appealed.

★ Holding: The court held that defendant’s reduced sentence was reasonable. Although 18 USC § 3553(a)(6) is concerned with national sentencing disparities, a district court may choose to consider disparities among codefendants in fashioning an appropriate sentence. The court held that the district court

properly considered the two defendants criminal history categories and their relative culpability in the offense in assessing an appropriate downward variance in defendant's sentence. Accordingly, the sentence was affirmed.

- *Reasonableness of Sentence*

U.S. v. Stephens, 07-1907 (11/25/08)

- ▶ Defendant was convicted of drug offenses and at sentencing the district court determined that he was a career offender. Defendant requested a downward "departure" from the guideline range based upon the age and minor nature of his prior convictions, his lack of parental support, and his mental and emotional condition. The district court denied the downward "departure," briefly acknowledged defendant's lack of parental guidance and his family responsibilities, and sentenced him to 270 months incarceration. Defendant appealed.

- ★ Holding: The court held that the sentence was procedurally unreasonable. Although both defendant and the district court referred only to a downward "departure," the district court was nonetheless required to justify its sentence based on the factors under 18 USC § 3553(a), particularly where the guideline range exceeded 24 months. The court found that the district court's lack of analysis of the § 3553(a) factors required a remand for resentencing.

XIII. Post-Conviction Remedies

- *Ineffective Assistance of Counsel*

Avery v. Prelesnik, 07-2522 (11/25/08)

- ▶ Defendant was charged in state court with murder. Defendant advised his attorney that he was 30 minutes away from the crime scene, with his friend, at the time of the murder. The attorney sent his investigator to interview the friend's brother, who confirmed that defendant was with the friend, but the investigator never interviewed the friend himself. Defendant proceeded to trial, his attorney presented no alibi defense, and defendant was convicted.

After losing his state court appeal and post-conviction proceedings, defendant filed a federal *habeas* petition. The district court granted the petition based on the attorney's ineffective representation. The state appealed.

- ★ Holding: Applying the *Strickland* standard for ineffective assistance of counsel, the court first held that the attorney's failure to adequately investigate the friend fell below an objective standard of reasonableness. The attorney and the investigator could reasonably have located the friend, and he was willing to testify as to an alibi for defendant. Second, the court held that the attorney's neglect caused defendant prejudice. Although the trial court ruled in a post-conviction proceeding that the alibi witness was not credible, the court nonetheless found that defendant deserved the opportunity for the jury to hear the evidence. This was particularly true where the state's case was based on the testimony of one eye witness, whose testimony was somewhat equivocal. Accordingly, the district court's ruling granting the petition was affirmed.