

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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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
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- VIII. Defenses
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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.

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

I. Specific Offenses

• *18 USC § 922(g)(9)-Prior Domestic Violence*
U.S. v. Hayes, 07-608 (2/24/09)

► Defendant was charged with possession of a firearm after being convicted for misdemeanor domestic violence. The prior misdemeanor conviction was for battery under West Virginia law. The battery offense did not

contain an element requiring proof of a domestic relationship, however, the state indictment indicated that the victim was defendant's spouse. Defendant moved to dismiss the indictment on the ground that the prior conviction was not for domestic violence. The district court denied the motion and defendant entered a conditional plea. The Fourth Circuit affirmed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that § 922(g)(9) does not mandate that a defendant's prior misdemeanor conviction contain an element requiring proof of a domestic relationship. The Court ruled that a defendant may be convicted under § 922(g)(9) if the government can prove the existence of the domestic relationship beyond a reasonable doubt during trial in the district court. Accordingly, defendant's conviction was affirmed.

• *18 USC § 924(e) - ACCA*
Chambers v. U.S., No. 06-11206 (1/13/09)

▶ Defendant was convicted of being a felon in possession of a firearm and the district court determined at sentencing that the 15 year mandatory minimum term under the ACCA was applicable. This determination was based, in part, on the court's conclusion that defendant's prior Illinois conviction for escape constituted a violent felony. The court of appeals agreed with the district court, and defendant argued in the Supreme Court that the escape conviction was not a violent felony because his prior conviction was only for failure to report for a sentence.

★ Holding: The Court held that failure to report for a sentence was not a violent felony under the ACCA. Specifically, the Court found that the offense of failure to report was a "crime of inaction," which was "a far cry from the purposeful, violent, and aggressive conduct" constituting a violent felony under the ACCA. Accordingly, the district court's ruling was reversed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

• *Vehicle Stop - Detention of Occupants*
Arizona v. Johnson, 07-1122 (1/26/09)

▶ Defendant was a passenger in a vehicle stopped for a traffic violation. During the stop, an officer noticed that defendant was wearing gang colors, and began to ask defendant questions through the passenger window. Eventually, the officer asked defendant to get out of the car and frisked him. The officer found a gun, and defendant was charged in state court with unlawful firearm possession. Defendant moved to suppress the evidence and the trial court denied the motion. The Arizona court of appeals reversed the district court's ruling and held that the officer had no right to remove defendant from the car, and that defendant's detention had "evolved into a separate, consensual encounter stemming from an unrelated investigation" by the officer. The state appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the stop of a vehicle constitutes a seizure of the vehicle's occupants. This temporary seizure continues and remains reasonable for the duration of the traffic stop. The Court ruled that, during the time period of the stop, the officers may inquire into matters unrelated to the stop, and request the occupants to get out of the car, so long as those inquiries do not "measurably extend the duration of the stop." Thus, the Court found that the officer's actions in questioning defendant and asking him to get out of the car were reasonable. The Court noted that the issue of reasonable suspicion for the frisk was not presented in the appeal. Accordingly, the Arizona court of appeals decision was reversed.

F. Arrest Related Issues

• *Arrest Warrants - Good Faith*
Herring v. U.S., 07-513 (1/14/09)

▶ A police officer observed defendant, who was known to him, and contacted the county

warrant clerk to see if defendant had any open warrants. He had none, but a check of a neighboring county revealed an open warrant for failure to appear. The warrant clerk advised the officer of the warrant and requested the neighboring county to fax a copy of the warrant for verification. The officer arrested defendant based on the information about the warrant, and found a firearm and meth. Shortly thereafter, the neighboring county advised that the warrant had actually been recalled by the court, but through clerical error, the recall had not been entered in the system. Defendant was charged with illegal possession of the gun and drugs, and he moved to suppress the evidence. The district court denied the motion, the Eleventh Circuit affirmed, and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the exclusionary rule did not apply to the evidence obtained by the officers because the officers acted in good faith in executing the arrest warrant. The Court indicated that not all record-keeping errors are immune from the exclusionary rule, but that the officers' conduct in the case was "not so objectively culpable as to require exclusion." The Court suggested that recklessness or knowing false entries in maintaining a record system could justify exclusion of evidence, but the facts of the case amounted to only negligence. Accordingly, the Court held that exclusion of the evidence was not warranted, and affirmed defendant's conviction.

VI. Sixth Amendment

A. Right to Jury Trial/*Booker*

- *Right to Jury Trial/Apprendi*
Oregon v. Ice, 07-901 (1/14/09)

▶ Defendant was convicted in state court for two burglaries and four sex crimes. At sentencing, pursuant to Oregon's sentencing statutes, the trial court made factual findings that permitted the court to run the sentences consecutively. Defendant argued on appeal

that *Apprendi* prohibited the court, as opposed to the jury, from making factual findings that permitted the imposition of consecutive sentences. Defendant lost his state court appeals, and the Supreme Court granted *certiorari*.

★ Holding: The Court held that *Apprendi* does not require that a jury make findings regarding factual issues related to whether sentences are imposed consecutively or concurrently. The Court found that such issues were historically within the province of the judge, not the jury, and that *Apprendi* did not alter this longstanding precedent. Accordingly, defendant sentence was affirmed.

XII. Appeal

C. Reasonableness of Sentence

- *Reasonableness of Sentence-Crack Disparity*
Spears v. U.S., 08-5721 (1/21/09)

▶ Defendant was convicted of conspiracy to distribute crack and powder cocaine and at sentencing the district court reduced defendant's sentence from 324 months to the statutory mandatory minimum of 240 months, based solely on the crack-powder cocaine disparity. The Eighth Circuit reversed, but the Supreme Court remanded to the Eighth Circuit for reconsideration in light of *Kimbrough*. On remand, the Eighth Circuit again reversed defendant's sentence and held that the district court could not categorically reject the crack sentencing guideline and replace the crack-powder ratio with its own. The Supreme Court granted *certiorari*.

★ Holding: The Court held that, pursuant to *Kimrough*, "district courts are entitled to reject and vary categorically from the crack cocaine guidelines based on a policy disagreement with those guidelines." Accordingly, the Eight Circuit's decision was reversed.

- *Reasonableness of Sentence*

Nelson v. U.S., 08-5657 (1/26/09)

► Defendant was convicted of conspiracy to distribute crack and the district court imposed a sentence at the bottom end of the guideline range. The district court stated that the guideline sentence was “presumptively reasonable,” and that the guideline sentence was “a reasonable sentence” unless the statutory factors provided a “good reason” for a different sentence. The Fourth Circuit affirmed the sentence, and the Supreme Court remanded for reconsideration based on *Rita*. On remand, the Fourth Circuit again affirmed the sentence, and found that the district court nonetheless understood that the guidelines were only advisory. The Supreme Court granted *certiorari*.

★ Holding: The Court held that the district court impermissibly applied a presumption of reasonableness to the guidelines at the sentencing hearing. The Court reiterated its holding from *Rita*: “The sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” Accordingly, the defendant’s sentence was vacated.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *18 USC § 111 - Simple Assault*

U.S. v. Gagnon, 07-2133 (1/29/09)

► Defendant, in a drunken state, resisted and interfered with immigration officers who were trying to settle him down. As a result, defendant was charged with a misdemeanor violation of § 111 for simple assault. Defendant was convicted in a bench trial before the magistrate, who determined that defendant had forcibly resisted, impeded, or interfered with the officers. Defendant argued on appeal that a misdemeanor conviction under § 111 requires proof that a common law assault was committed.

★ Holding: First, the court held that § 111 describes three separate offenses: (1) “simple assault,” (misdemeanor); (2) violations that include a dangerous weapon or result in bodily injury (aggravated felony); and (3) all other cases (felony). In regard to the simple assault misdemeanor offense, the court rejected defendant’s argument that the phrase “simple assault” meant only common law assault. Instead, the court held that, because the statute enumerated other types of conduct, i.e., resisting, opposing, impeding, intimidating, or interfering, this additional conduct was also included within the misdemeanor offense of “simple assault.” Accordingly, defendant’s conviction for simple assault was affirmed.

- *18 USC §§ 922(g) & 924(c) - Possession*
U.S. v. Bailey, 06-5576 (1/20/09)

► Defendant was charged with drug trafficking, possession of a firearm in furtherance of drug trafficking, and being a felon in possession of a firearm. The narcotics in question were found in defendant’s pocket and the firearm was found underneath his car seat. Defendant was convicted after trial on all charges and appealed the sufficiency of the evidence for the firearm charges. The original panel decision affirmed defendant’s conviction (*see P.V.*, Issue #18), and defendant requested panel rehearing.

★ Holding: In an amended decision, the court held that the government had not proven defendant’s constructive possession of the firearm. In the original panel decision, the court considered the testimony of defendant’s girlfriend, who claimed to have seen defendant put the gun under the seat. However, upon rehearing, the court determined that the girlfriend’s testimony was only admitted at trial for impeachment purposes, not as substantive evidence. Thus, the court found that the only evidence of defendant’s constructive possession of the firearm was his proximity to it under his seat. The court ruled that

constructive possession is a specific intent crime, meaning that the defendant must have knowledge and the specific intent to exercise control over the gun. Given that the car did not belong to defendant, and that others had driven the car recently, the court ruled that the evidence was insufficient to support defendant's constructive possession. Accordingly, defendant's convictions under §§ 922(g) and 924(c) were reversed.

- *18 USC § 1001 - Falsifying Facts to EPA*
U.S. v. Holden, 07-5573 (2/24/09)

- ▶ Defendant supervised activities at a water treatment plant, and was charged with falsifying facts in a matter within the jurisdiction of the EPA. At trial, the government introduced evidence that an employee of the plant falsified records submitted to the EPA, and that defendant knew about, and induced, the filing of the false records. Defendant was convicted and he argued on appeal that the evidence was insufficient to support the verdict.

- ★ Holding: In order to establish a violation of § 1001 for making false statements to the EPA, the government must prove the following: (1) the defendant made a factual representation; (2) it was false or fraudulent; (3) it was material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency. In the case, the court held that the evidence was sufficient to believe that defendant knowingly made false representations to EPA. The court found that defendant, as supervisor, was not only on notice of the false reports, but that he was actively involved in their making. Accordingly, defendant's conviction was affirmed.

- *18 USC 1015(a) - False Statement*
U.S. v. Ali, 07-6446 (2/27/09)

- ▶ Defendant was charged with making a

false statement on a citizenship application. The false statement pertained to defendant's answer of "no" to a question as to whether he had ever been married to more than one person at a time. Defendant filed a pretrial motion to dismiss the indictment on the grounds that his second marriage, while he was still married to his first wife, was void *ab initio* under state anti-bigamy law. Thus, defendant was not married to two women at once because his second marriage was void. The district court denied the motion. At trial, the government moved to exclude evidence of defendant's claim that he did not knowingly make a false statement, because he believed, based on the advice of counsel, that his second marriage was void *ab initio*. The district court granted the government's motion. Defendant was convicted and he appealed.

- ★ Holding: First, the court held that state laws declaring bigamous marriages void *ab initio* did not relieve applicants for citizenship applications from completely and truthfully disclosing their marital relationships. Thus, the court ruled that a person is legally "married" for purposes of the citizenship application questions if the person "participated in a marriage ceremony while still married to another." Thus, the court ruled that the district court correctly denied defendant's motion to dismiss the indictment.

Second, the court held that the district court improperly excluded evidence of defendant's lack of knowledge that he was married at the time of his second marriage. The court held that defendant's claim that he did not know he was legally married was not a "mistake of law" defense, as the district court characterized it, but instead a proper attack on the *mens rea* element of the false statement statute. Accordingly, the district court vacated defendant's conviction.

- *21 USC § 841(b) - Penalty Provision*
U.S. v. Higgins, 08-5114 (2/26/09)

- ▶ Defendant was charged in an indictment with possession of crack cocaine with intent to distribute, and other narcotic and firearm offenses. The government filed an enhancement subjecting defendant to mandatory life imprisonment. After trial, the jury found defendant guilty of the crack charge, but the special verdict form indicated that defendant “possessed 531.8 grams of cocaine base.” The district court sentenced defendant to life. Defendant appealed and argued that the sentence violated *Apprendi* because the jury verdict did not support the conclusion that the substance was crack cocaine.

- ★ Holding: The court held that, in order to obtain the enhanced penalties for crack cocaine under § 841(b), the government must allege and prove that the drug involved is actually crack cocaine, as opposed to cocaine base. Relying on precedent from the D.C. Circuit, the court ruled that cocaine base and cocaine actually “carry the same chemical meaning,” and thus, the government must specifically show that the substance involved is crack cocaine. In the case, the court held that count 1 of the indictment defined the phrase “cocaine base” to mean “crack cocaine,” and that the jury convicted defendant of count 1. Thus, the court concluded that the jury necessarily found defendant guilty of possessing crack cocaine, even though the special instruction said only cocaine base. Accordingly, defendant’s sentence was affirmed.

- *21 USC § 846 - Drug Conspiracy*
U.S. v. Gunter, 07-5277 (1/8/09)

- ▶ Defendant was charged with a cocaine conspiracy and at trial the government proved that defendant repeatedly purchased large quantities of cocaine from another individual. Defendant argued that he was involved in a buyer-seller relationship, but not a conspiracy. Defendant was convicted and he appealed.

- ★ Holding: In order to prove a drug conspiracy, the government must prove (1) an agreement to violate the drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation. In the case, the court held that the facts demonstrated repeated transactions on defendant’s part, and that the transactions involved a large volume of cocaine. These facts permitted the inference of more than a buyer-seller relationship, and the court accordingly found the evidence sufficient to support the conspiracy conviction.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2G2.3(b)(3)-Sadistic or Masochistic Images*
U.S. v. Groenendal, 07-2430 (2/26/09)

- ▶ Defendant was convicted of possession of child pornography and at sentencing the district court imposed a four-level enhancement because the images portrayed “sadistic or masochistic conduct,” pursuant to USSG § 2G2.3(b)(3). The pictures in question involved “an adult male sexually penetrating a prepubescent female vaginally.” Defendant appealed and argued that the conduct did not constitute “sadistic or masochistic conduct.”

- ★ Holding: The court held that the conduct at issue was “inherently sadistic conduct,” and that the enhancement was accordingly appropriate. The court noted that the image in question was never made a part of the record, but that the finding was appropriate based on the parties’ stipulation as to the contents of the image. Accordingly, the sentence was affirmed.

- *2G2.2(b)(5) - Pattern of Sex Abuse*
U.S. v. Paull, 07-3482 (1/9/09)

- ▶ Defendant was convicted of possession of child pornography and at sentencing the district court applied a five-level guideline enhancement based on its conclusion that defendant engaged in a pattern of sex abuse of a minor. The enhancement was based on the

letter of a victim (the friend of defendant's son) that defendant had sexually abused the victim. The information was corroborated by the victim's family members. Defendant appealed and argued that the district court erred in relying on the hearsay information in the letter, and that the evidence was insufficient to support the enhancement.

★ **Holding:** The court held that hearsay is admissible at sentencing so long as it bears "some minimal indicia of reliability." Further, the court ruled that the Confrontation Clause does not apply at a sentencing hearing. Finally, the court found that the victim's letter, which was corroborated by family members, established the applicability of the enhancement by a preponderance of the evidence. Accordingly, the district court ruling was affirmed.

B. Chapter Three - Adjustments

- *3B1.2 - Minimal/Minor Role*

U.S. v. Groenendal, 07-2430 (2/26/09)

► Defendant was convicted of possession of child pornography based on his uploading of three images to a child porn website. At sentencing, the district court determined that defendant's uploading activities constituted trafficking, however, the court also concluded that defendant was not a minor participant because he was the "only participant in the case." As such, the court denied defendant's request for a minimal or minor role downward adjustment. Defendant appealed.

★ **Holding:** Under USSG § 3B1.2, a defendant may only receive a reduction if there is more than one "participant" in the offense. A "participant" need not be charged, but only must be involved in the relevant conduct to the offense. In the case, the court determined that the district court's ruling regarding defendant's request for a minor role reduction was inconsistent with its finding that defendant was involved in trafficking. The court ruled that trafficking necessarily involves more than one

person, so the district court's conclusion that defendant was the "only participant in the case" was inconsistent with its finding that defendant trafficked in child porn. Accordingly, the case was remanded for the district court to make a proper finding as to whether defendant's role in the offense, including relevant conduct, was minor.

- *3C1.1 - Obstruction of Justice*

U.S. v. Paull, 07-3482 (1/9/09)

► Defendant was charged with possession of child pornography. He moved to suppress his confession, and testified during the suppression hearing that he requested counsel prior to questioning. Defendant's statements were contradicted by the testimony of the agents involved in defendant's questioning. The district court found that defendant lied during his testimony, and accordingly applied an obstruction of justice enhancement at sentencing. Defendant appealed.

★ **Holding:** In order to apply an obstruction of justice enhancement based on perjured testimony, the court must find that (1) the record was sufficiently clear to determine which statements the district court found perjurious, and (2) each element of the crime of perjury is satisfied. The court held that the district court made sufficient findings that defendant's statements were perjurious, and accordingly the application of the enhancement was affirmed.

- *3C1.1 - Obstruction of Justice*

U.S. v. Boring, 07-4363 (2/27/09)

► Defendant was convicted of worker's compensation fraud. At trial, defendant's testimony regarding a conversation with his supervisor directly contradicted the supervisor's trial testimony. Defendant was convicted, and at sentencing the district court imposed a two-level enhancement for obstruction of justice based on defendant's perjured testimony. Defendant appealed.

★ Holding: In order to impose an obstruction of justice enhancement based on false testimony, the district court must (1) identify the portions of the testimony that are perjurious, and (2) make a finding that encompasses the factual predicates for a finding of perjury. The court held that the elements of perjury are that the defendant gave false testimony to a material matter, with intent to provide false testimony. The court found that the district court made sufficient findings to support the obstruction enhancement. Further, the court ruled that the jury obviously chose to credit the supervisor's testimony over defendant's, and thus, the jury's verdict supported the ruling. Accordingly, the court affirmed the enhancement.

• *3D1.2(c) - Grouping of Counts*
U.S. v. Woods, 07-4108 (2/4/09)

▶ Defendant was convicted of one count of conspiracy to commit money laundering and four counts of willful failure to file tax returns. Defendant's money laundering pertained to proceeds from a mortgage fraud scheme. At sentencing, defendant argued that the money laundering and tax counts should be grouped into a single count under USSG § 3D1.2(c). The district court disagreed and defendant appealed.

★ Holding: The court found that the conduct relating to the money laundering count was "completely different" from the conduct relating to the tax counts. As such, the court ruled that grouping under § 3D1.2(c) was improper. The court noted that, to hold otherwise, would be to give the same punishment to someone who committed money laundering and someone who committed money laundering and failed to pay taxes. Thus, defendant's sentence was affirmed.

C. Chapter Four - Criminal History

• *4B1.1 - Career Offender*

U.S. v. Skipper, 07-3758 (1/13/09)

▶ Defendant was convicted of a drug offense and at sentencing the district court determined that he was a career offender. This determination was based, in part, on an Ohio fourth degree burglary offense for which defendant had pled guilty but not yet been sentenced. Defendant appealed and argued that the fourth degree burglary should not count as a predicate for the career offender enhancement because he had not yet been sentenced and because it was not a crime of violence.

★ Holding: First, the court held that USSG § 4B1.2(c) requires that a guilty plea counts as a conviction as soon as it is entered. Thus, the fact that defendant had not been sentenced for the burglary was of no consequence. Second, the court held that Ohio's fourth degree burglary was a crime of violence under § 4B1.1 because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." The Ohio statute required that a defendant trespass in a habitation when an innocent person was present or likely to be present. Relying on the Supreme Court's decision in *James* (see P.V., Issue #13), the court held that the burglary offense presented a serious risk of a face-to-face confrontation, and thus was a crime of violence under the "otherwise" clause of § 4B1.1. Accordingly, the sentence was affirmed.

• *4B1.1 - Career Offender*

U.S. v. Hawkins, 08-5138 (2/4/09)

▶ Defendant was convicted of conspiracy to distribute crack and at sentencing the district court determined that he was a career offender under USSG § 4B1.1. One of defendant's predicate offenses was a prior conviction for possession of an unregistered sawed-off shotgun. Defendant appealed and argued that the prior firearm conviction was not a crime of violence under the guidelines.

★ Holding: The court ruled that Application Note 1 to § 4B1.2 specifically defines the phrase “crime of violence” to include the possession of a sawed-off shotgun. The court held that the application note was not a “plainly erroneous” interpretation of the Sentencing Commission’s guideline, and thus, the court upheld application of the career offender enhancement.

D. Miscellaneous Guidelines

• *1B1.2(d) - Conspiracy - Separate Offenses*
U.S. v. Bates, 06-2458 (1/12/09)

▶ Defendant was convicted of a single count of conspiracy which involved multiple bank robberies that were committed by a codefendant. At sentencing, the district court applied USSG § 1B1.2(d), and counted five separate bank robberies against defendant. Accordingly, the court applied the grouping rules of § 3D1.4, and increased defendant’s offense level by 4 levels. Defendant appealed and argued that the district court did not make the necessary factual findings before imposing the increased sentence.

★ Holding: Section 1B1.2(d) provides: “A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” If the jury verdict for a single-count conspiracy does not make clear which offenses were committed, the district court must make a finding beyond a reasonable doubt at sentencing as to which offenses charged in the conspiracy were actually committed. In the case, the court held that the district court’s factual finding need not be explicit in the record, but may instead be implicit in its ruling. The court ruled that the district court implicitly found, beyond a reasonable doubt, that defendant was involved in the five bank robberies for which the codefendant was convicted. Accordingly, application of the enhancement was

appropriate.

III. Evidence

A. Article IV - Relevancy

• *404(b) - Knowledge*

U.S. v. Holden, 07-5573 (2/24/09)

▶ Defendant was charged with falsifying facts in a matter within the jurisdiction of the EPA. Defendant’s trial defense was that one of his employees fabricated test results at defendant’s water treatment without his knowledge. At trial, the government introduced evidence that a civil engineer conducted an evaluation of defendant’s plant eight years earlier, at a time when the employee was not working for defendant, and found the same types of reporting inaccuracies. Defendant was convicted and argued for the first time on appeal that the evidence should have been excluded under FRE 404(b).

★ Holding: The court held that evidence offered for a “non-propensity purpose” may be admitted under Rule 404(b). The court found that the evidence regarding the prior evaluation of the plant was admissible to refute defendant’s claim that he was without knowledge of the fabricated nature of the test results regarding his plant. Accordingly, the court found no plain error and affirmed defendant’s conviction.

B. Articles VI-VII - Witness and Expert

• *608(b)(1) - Character for Truthfulness*

U.S. v. Holden, 07-5573 (2/24/09)

▶ Defendant was charged with falsifying facts in a matter within the jurisdiction of the EPA. At trial, defendant offered evidence of a witness’ drug use and treatment nine years prior. The district court excluded the evidence, defendant was convicted, and he appealed.

★ Holding: FRE 608(b)(1) allows a witness’ credibility to be attacked on cross examination though specific instances of conduct, if related to untruthfulness. The court held that prior drug use generally is not

relevant to a witness' character for truthfulness. Instead, such evidence may be relevant to a witness' ability to "perceive the underlying events and testify lucidly at trial." In the case, the court found that the prior drug use, and corresponding memory loss, were from nine years prior to the events at issue in the trial. As such, the court held that the evidence was too "remote in time and laden with potential unfair prejudice" to be admissible. Accordingly, the district court ruling was affirmed.

- *609 - Impeachment by Prior Conviction*
U.S. v. Gunter, 07-5277 (1/8/09)

- ▶ Defendant was charged with participating in a drug conspiracy and moved to exclude his prior theft conviction. The district court denied the motion and ruled that the theft conviction was admissible under FRE 609 if defendant testified. Defendant did not testify at trial and he was convicted. Defendant appealed and argued that the district court's pretrial ruling was error.

- ★ Holding: The court held that defendant waived his right to appeal the pretrial ruling because he did not testify at trial. The court found that the pretrial ruling did not prevent defendant from testifying, and accordingly his failure to do so waived the issue. Thus, defendant's conviction was affirmed.

C. Article VIII - Hearsay

- *801(d)(2)(E) - Coconspirator Exception*
U.S. v. Young, 07-5600 (1/30/09)

- ▶ Defendant was charged with participating in a marijuana conspiracy and at trial the government presented hearsay statements of conspirators who collected drug debts for defendant. The district court admitted the testimony under the coconspirator exception, defendant was convicted, and he appealed. Defendant argued on appeal that the "coconspirators" were actually in a buyer-seller relationship and that the hearsay exception was inapplicable.

- ★ Holding: In order to admit evidence under the coconspirator exception, the proponent of the evidence must prove by a preponderance of the evidence that (1) the conspiracy existed, (2) the defendant was a member, and (3) the statements were made in furtherance of the conspiracy. Although noting it was a close question, the court held that the evidence established more than a buyer-seller relationship between defendant and the coconspirators. The transactions involved large amounts of marijuana, and defendant had "fronted" cocaine to them. This evidence indicated that they were, in fact, involved in a conspiracy together. Further, the court found that any error was harmless because the evidence against defendant was strong. Accordingly, defendant's conviction was affirmed.

D. Miscellaneous Evidence

- *106 - Rule of Completeness*
U.S. v. Holden, 07-5573 (2/24/09)

- ▶ Defendant was charged with falsifying facts in a matter within the jurisdiction of the EPA. At trial, a government agent testified about oral statements made by defendant. During cross examination of the agent, defendant attempted to elicit other statements that defendant made to the agent during the same interview under the rule of completeness. The district court determined that defendant had waived the rule by failing to invoke it at the time the defendant's statements were introduced during direct examination. Defendant was convicted and he appealed.

- ★ Holding: Deciding an open question in the Sixth Circuit, the court first held that the waiver rule is not applicable to the rule of completeness. Thus, a defendant may wait until a later point in the case to invoke the rule and admit the evidence. Second, the court held that the rule of completeness of FRE 106 has been expanded to include oral statements through application of FRE 611(a). Third, the

court ruled that the confines of the rule of completeness permit a party to introduce additional portions of a statement where necessary to put the admitted portions in proper context. Finally, the court found that the district court erred in refusing to permit defendant to introduce the omitted portions of his statement. The court nonetheless ruled that the error was harmless because the statements defendant attempted to introduce were equivocal and were hearsay. The court noted that the rule of completeness is not meant to “make something admissible that should be excluded.” Accordingly, defendant’s conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Vehicle Stop - Length of Detention*

U.S. v. Bell, 06-4413 (2/17/09)

- ▶ Defendant was stopped for speeding and claimed that he was driving a rental car from Detroit to Cleveland to bring his aunt back for a funeral. Officers became suspicious because defendant’s answers to their questions sounded “rehearsed,” so the officers requested a drug dog while they were checking defendant’s license in the computer. The drug dog arrived and the officers decided to issue defendant a warning citation for speeding. Defendant was removed from his vehicle for the issuance of the warning citation, and in the mean time, the drug dog sniffed the car. The dog alerted, and crack cocaine was subsequently found. Upon defendant’s prosecution, he moved to suppress the evidence and the district court denied the motion. Defendant appealed.

- ★ **Holding:** Although the court found no reasonable suspicion to believe that defendant was involved in drug activity prior to the dog sniff, the court held that the officers’ actions were reasonable. The use of the drug dog did not extend the stop beyond what was reasonably necessary for the officers to conduct the speeding investigation and issue a warning

citation to defendant. The court emphasized that officers may choose to remove a defendant from the car in order to issue a citation or warning, and the use of the drug dog does not violate a defendant’s Fourth Amendment rights, so long as it doesn’t unreasonably extend the stop. Accordingly, the district court ruling was affirmed.

E. Search Warrants

- *Search Warrants - Probable Cause*

U.S. v. Gunter, 07-5277 (1/8/09)

- ▶ Officers utilized an informant who made numerous recorded phone calls and transactions with a target. During the course of the calls, the target indicated that he was repeatedly selling large quantities of cocaine to defendant. The officers subsequently obtained a warrant and searched defendant’s residence. Upon his prosecution, defendant moved to suppress the fruits of the search. The district court denied the motion, and defendant argued on appeal that the warrant was lacking in probable cause and that it did not provide a sufficient nexus to his residence.

- ★ **Holding:** The court held that the warrant provided sufficient information to establish probable cause for the search. The officers attested to the informant’s reliability in the affidavit. Further, the information provided by the target was reliable because he “had nothing to gain by implicating [defendant] in the context of a drug deal that was surreptitiously recorded and that implicated [the target] as well.” Additionally, the court held that the nexus to defendant’s residence was established by the fact that defendant was engaged in repeated purchases of large amounts of cocaine. The court concluded that, given the evidence on ongoing drug trafficking, it was “reasonable to infer” that drugs would be found at defendant’s home. Accordingly, the district court ruling was affirmed.

• *Search Warrant-Probable Cause/Good Faith*
U.S. v. Higgins, 08-5114 (2/26/09)

▶ Officers conducted a traffic stop and found a large amount of narcotics. The driver of the car told the officers that he purchased the drugs earlier in the day from defendant at his residence. The other two passengers in the car confirmed the information. The officers took the driver to defendant's house, and he identified the house. Further, officers identified a motorcycle in front of the home as belonging to defendant, and they confirmed that defendant had prior convictions for drug trafficking. The officers prepared a warrant application with the above facts, and provided the name of the driver to the issuing magistrate. Officers subsequently searched defendant's residence and found narcotics. Upon defendant's prosecution, he moved to suppress the evidence based on a claim that the warrant was not supported by probable cause. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: First, the court held that the warrant was not supported by probable cause. The court found that the warrant provided no basis for the reliability of the informant, and that the police had obtained insufficient corroboration of the informant's information. Further, the warrant did not establish a sufficient nexus between drugs and defendant's home because the informant had not been inside defendant's home, nor seen any narcotics there. Accordingly, the warrant was not supported by probable cause.

Second, the court held that, even though the parties had not raised the issue, the good-faith exception applied. The court found that there was no false information in the affidavit, the magistrate did not act as a rubber stamp, the affidavit was not bare bones, and the warrant was not so facially deficient as to make the officers reliance on it objectively unreasonable. Accordingly, the district court's ruling was affirmed.

• *Search Warrant - Staleness/Overbreadth*
U.S. v. Paull, 07-3482 (1/9/00)

▶ Agents obtained a search warrant for defendant's home based on his subscription to child porn websites over a two year period. The agents waited thirteen months after defendant's last subscription to a child porn website, however, before obtaining the warrant. Upon execution of the warrant, agents found numerous child porn images in defendant's garage. Defendant moved to suppress the evidence based upon the staleness and overbreadth of the warrant. The district court denied the motion, and defendant appealed.

★ Holding: The court held that the 13 month delay did not render the search warrant stale because of the nature of child porn and the fair probability of on-going criminal activity on defendant's part. Further, the court held that the search warrant was not overbroad in authorizing a search of defendant's garage because, "where the evidence sought includes images that the defendant likely wants to keep secret, even from his wife, and can easily be concealed in storage in a garage or basement, a reasonable search includes those areas." Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

B. *Brady*

• *Brady*

Harris v. Lafler, 05-2104 (1/30/09)

▶ Defendant was charged in state court with murder. At his preliminary hearing, a codefendant testified that he drove the vehicle involved, and that defendant was the shooter. The witness denied multiple times during cross examination that he was made any promises for his testimony. At defendant's trial, the codefendant took the Fifth Amendment, so the state introduced his preliminary hearing testimony. The state had no other direct evidence of defendant's involvement in the shooting. Defendant was convicted.

Defendant subsequently learned of three pieces of evidence that were withheld by the state: (1) the codefendant was promised that his girlfriend would be released if he agreed to make a statement; (2) the codefendant gave two different descriptions of the shooting, and he was promised bond if he testified consistently with his second statement; and (3) the codefendant was told not to disclose the promises that were made to him. Defendant lost his state court appeal and postconviction proceeding, and filed a federal *habeas* petition. The district court granted the petition based on *Brady* violations, and the state appealed.

★ Holding: In order to prove a *Brady* violation, the defendant must establish three things: (1) the government suppressed relevant evidence; (2) the evidence was favorable to the defendant; and (3) there is a reasonable probability that the trial outcome would have been different had the evidence been disclosed. First, the court held that the state suppressed the evidence, even though the promises were made by police without the prosecutor's knowledge. Second, the court held that the information suppressed was impeachment evidence, and thus favorable to defendant. Third, the court held that evidence went to the credibility of the key state witness. Because the state had no other eyewitnesses and no scientific evidence to tie defendant to the crime, and because defendant presented a credible alibi defense, the court held that the failure to disclose the impeachment evidence may have affected the trial outcome. Accordingly, the district court ruling granting the petition was affirmed.

C. Confessions and Testimonial Rights

• *Miranda - Custody*

U.S. v. Panak, 07-4476 (1/9/09)

► During the course of an investigation for a hydrocodone distribution conspiracy, defendant was interviewed at her home for 45-60 minutes by DEA agents. Defendant

confessed to her involvement in the conspiracy. Upon her prosecution, defendant moved to suppress her confession based upon *Miranda*. The district court granted the motion and the government appealed.

★ Holding: *Miranda* only requires law enforcement officers to provide warnings to a defendant who is in custody. In order to assess whether a defendant is in custody, the court must consider whether a reasonable person would have felt that her freedom of action was restrained considering the following four factors: (1) the location of the interview; (2) the length and manner of the questioning; (3) whether the defendant possessed unrestrained freedom of movement; and (4) whether the defendant was told she was free not to answer questions. In the case, the court held that defendant was not in custody during the interview, and thus, *Miranda* warnings were not required. Although the defendant was not advised that she did not have to answer questions, the other factors weighed heavily against a finding that she was in custody. Specifically, the interview occurred in her home, was not overly long, and the agents acted appropriately throughout. Accordingly, the district court's ruling was reversed.

• *Privilege Against Self Incrimination*

U.S. v. Bates, 06-2458 (1/12/09)

► Defendant was charged with conspiracy to commit several bank robberies. One of defendant's accomplices testified against him at trial. Defendant attempted to present the testimony of a witness who was indicted for separate bank robberies with the accomplice. The witness refused to testify based on his Fifth Amendment right, and the district court did not require the witness to take the stand in order to assert his right on a question-by-question basis. Defendant was convicted and he appealed.

★ Holding: Ordinarily, a witness must take the stand and answer individualized questions

in order to invoke the Fifth Amendment. When a witness has a “clear entitlement” to the privilege, however, the witness is not required to take the stand. In the case, the court held that putting the witness on the stand was futile because it was clear that defendant intended to question him about the facts underlying the bank robberies with which he was charged. Thus, the district court’s refusal to require the witness to take the stand was not error.

- *Voluntariness*

U.S. v. Rutherford, 07-2312 (2/4/09)

- ▶ Defendant was being investigated by the civil division of IRS. During the course of its investigation, the IRS agents negligently failed to turn the case over to the criminal division when the agents found a “firm indication” of fraud. Instead, the agents interviewed defendant under the continuing civil investigation, and defendant made incriminating statements. Upon defendant’s tax prosecution, he moved to suppress the statements. The district court granted the motion, and suppressed the statements based on a violation of defendant’s due process rights. The government appealed.

- ★ **Holding:** Answering an open question in the Sixth Circuit, the court held that the mere failure to follow the IRS procedure regarding referral of a civil case to the criminal division did not amount to a due process violation. Instead, the court held that a defendant is required to show that the confession was involuntary. The court ruled that this requires an evaluation of the totality of the circumstances considering three factors: (1) whether the police activity was objectively coercive; (2) whether the coercion was sufficient to overbear the defendant’s will; and (3) whether the misconduct was the “crucial motivating factor” in the defendant’s confession. In the case, although the agents violated the IRS policy, there was no evidence of coercion or that defendant’s will was

overborne. Accordingly, the district court ruling was reversed.

E. Miscellaneous Fifth Amendment

- *Due Process - Overbreadth/Vagueness*

U.S. v. Paull, 07-3482 (1/9/09)

- ▶ Defendant was charged with possession of child pornography and filed pretrial motions challenging the statute on overbreadth and vagueness grounds. Defendant claimed that he could not defend his case because asking any expert to view the images would necessarily violate the prohibition on possessing child porn images, and further that the statute was vague because defendant “lacked the capacity to know whether the charged items contain actual minors.” The district court denied the motion, defendant entered a conditional plea, and he appealed.

- ★ **Holding:** The court held first that defendant made no showing that he was unable to obtain an expert or defend his case as a result of the fear of prosecution for viewing the child porn images. Thus, defendant’s claim had no merit. Second, the court held that the statute was not unconstitutionally vague. The court ruled that the vagueness doctrine requires that a person be able to read a statute and determine what is illegal. In contrast, the court found that defendant’s vagueness claim was that, knowing what was illegal, he could not “distinguish between the prohibited and the permitted.” This question, the court stated, is addressed “not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.” Thus, defendant’s conviction was affirmed.

VIII. Defenses

B. Fed. R. Crim. P. 12 - Pretrial Motions

- *12(b)(3)(B) - Failure to State an Offense*

U.S. v. Ali, 07-6446 (2/27/09)

- ▶ Defendant was charged with making a false statement on a citizenship application. The false statement pertained to defendant’s

answer of “no” to a question as to whether he had ever been married to more than one person at a time. Defendant filed a pretrial motion to dismiss the indictment on the grounds that his second marriage, while he was still married to his first wife, was void *ad initio* under state anti-bigamy law. Thus, defendant was not married to two women at once because his second marriage was void. The district court denied the motion and defendant appealed. The government argued on appeal that the issue was not cognizable as a motion to dismiss under Rule 12.

★ Holding: First, the court held that the government had waived its argument by not raising it in the district court. (*See infra*). Alternatively, the court held that the issue was properly raised as a motion to dismiss for failure to state an offense. The court ruled that defendant’s Rule 12 motion amounted to a claim that the undisputed facts did not give rise to the offense in the indictment. The court held that this issue raised a “purely legal question about whether the indictment stated an offense,” and was thus properly alleged in a Rule 12 motion. Accordingly, the court proceeded to the merits of defendant’s claim. (*See supra*).

X. Jury Issues

A. Jury Instructions

- *Jury Instructions - Drug Conspiracy*

U.S. v. Gunter, 07-5277 (1/8/09)

► Defendant was charged with participating in a drug conspiracy involving more than 500 grams of cocaine. During the trial, the district court instructed the jury that it must find that “the overall scope of the conspiracy involved at least 500 grams” of cocaine, but did not require the jury to find that defendant agreed or intended to be involved with any specific amount of cocaine. Defendant was convicted and he appealed.

★ Holding: The court held that, in a conspiracy prosecution under 21 USC § 846,

the government is not required to prove *mens rea* as to the type and quantity of drugs involved in the conspiracy. All that is required by *Apprendi* is that the jury find that the overall conspiracy involved the requisite type and quantity of drugs. Accordingly, defendant’s conviction was affirmed.

E. Miscellaneous Jury Issues

- *Inconsistent Jury Verdicts*

U.S. v. Lawrence, 06-4105 (2/11/09)

► Defendant was convicted of multiple bank robbery and gun charges. Two of the charges were death eligible because defendant killed a police officer during one of the bank robberies. During the penalty phase, the jury imposed life imprisonment for the death-eligible bank robbery, but imposed the death penalty for the corresponding firearm charge under 18 U.S.C. § 924(c) and (j)(1). Defendant subsequently moved for a new trial alleging that the verdicts were inconsistent on the two counts. The district court granted the motion and ordered a new sentencing before a new jury. The government filed an interlocutory appeal.

★ Holding: Ordinarily, inconsistent verdicts in a criminal case are not reviewable. The court held, however, that inconsistent verdicts may be reviewed if they are shown to be arbitrary or irrational in that the jury either did not follow the court’s instructions or did not speak its real conclusions. In the case, the court found that the verdicts were not inconsistent because the jury clearly did follow the district court’s instructions and its verdicts on both counts were unanimous. Accordingly, the district court ruling granting a new sentencing was vacated.

XI. Probation & Supervised Release

- *Supervised Release*

U.S. v. Booth, 07-5476 (1/12/09)

► Defendant was convicted in the district court in Florida for drug offenses, and sentenced to 55 years in prison, and 5 years of

supervised release. The government subsequently filed a Rule 35 motion to reduce defendant's jail term to 212 months based upon defendant's cooperation with the government. The district court granted the motion. The court's order stated simply that the motion was granted, that defendant's offense level was reduced, and that defendant was sentenced to 212 months. The order did not mention the original 5 year term of supervised release that was imposed. Upon defendant's release from prison, the district court in Florida transferred defendant's supervised release to Tennessee. Defendant subsequently violated his supervised release, and argued that the district court in Tennessee had no jurisdiction over him because the district court in Florida did not reimpose supervised release in its Rule 35 order. The court rejected defendant's argument, and he appealed.

★ Holding: In construing a district court's order, the court may consider the language of the motion that was granted. The court held that the Rule 35 motion requested a reduction of defendant's jail term, but did not address the term of supervised release. Further, the order itself simply granted the motion and reduced the prison term. The order did not indicate that defendant was being resentenced. Finally, the district court in Florida made clear its intention that defendant was to serve the 5 year term of supervised release by its subsequent order transferring the supervision to Tennessee. Therefore, the court held that the supervised release term was a part of defendant's sentence. Accordingly, the district court ruling was affirmed.

• *Violation of Conditions/Reasonableness*
U.S. v. Kontrol, 08-1185 (2/12/09)

▶ Defendant was placed on supervised release after serving a sentence for interstate travel in aid of drug-related racketeering. A condition of his release required that he report changes in employment, and that he do

community service if he remained unemployed for more than 60 consecutive days. During his supervision, defendant began part-time work for a mortgage foreclosure prevention company, and did not report it to the probation department. When probation officers attempted to question defendant about the employment, he made veiled threats to them. As a result, the probation department filed a supervised release violation against defendant. Defendant argued that he was not required to report his "employment" with the company because he had a good faith belief that he was an independent contractor, not an employee. The district court ruled that defendant violated his supervision by failing to report the change in employment, and based on the veiled threats, imposed a sentence of 15 months incarceration, which was five months above the recommended guideline range. Defendant appealed.

★ Holding: The court first held that the determination that defendant violated his supervised release was proper. Although the court stated that an independent contractor defense "might work in some circumstances," the court ruled that defendant did not, in fact, believe that he was an independent contractor because he himself admitted that he had "part-time employment," and because he belatedly did tell the probation officer about his "work" at the company. Additionally, the court held that the 15-month sentence was reasonable. The veiled threat made by defendant was a proper consideration under 18 USC § 3553 because it had bearing on "the circumstances of the underlying offense, [defendant's] recalcitrance, the need to protect . . . the probation staff from [defendant] and the prospect of deterring other defendants from going down a similar path." Accordingly, the sentence was affirmed.

XII. Appeal

A. Preserving Error

- *Issue First Raised on Appeal*

U.S. v. Ali, 07-6446 (2/27/09)

▶ Defendant was charged with making a false statement on his citizenship application and he moved to dismiss the indictment. The district court denied the motion and defendant appealed. The government argued for the first time on appeal that defendant's pretrial motion was a claim of "actual innocence" which could not be raised in a pretrial motion.

★ Holding: Where a party fails to raise an issue before the district court, the issue is ordinarily waived on appeal except in "exceptional cases or particular circumstances, or when the rule would produce a plain miscarriage of justice." The court ruled that no exceptional circumstances were present in the case, and accordingly, the government waived the issue.

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

U.S. v. Johnson, 07-2447 (1/26/09)

▶ Defendant was convicted of conspiracy and distribution of crack. At sentencing, defendant argued for a downward variance from the guideline range based on numerous factors. The district court reduced defendant's offense level by two levels based on the crack amendment, which had become effective a few weeks before sentencing, but denied defendant's request for a downward departure. Defendant appealed and during the pendency of the appeal, the Supreme Court rendered its decision in *Spears v. U.S.* (*See supra*).

★ Holding: Relying on *Spears*, the court held that the case had to be remanded for the district court to consider in the first instance whether it would choose to categorically vary downward from the crack sentencing guideline. Accordingly, the case was remanded for resentencing.

D. Miscellaneous Appeal

- *Appeal from Magistrate Decision*

U.S. v. Gagnon, 07-2133 (1/29/09)

▶ Defendant was charged with a misdemeanor assault and the case was tried to a magistrate. Upon defendant's conviction, he appealed to the district court, who affirmed. Defendant appealed to the Sixth Circuit.

★ Holding: Pursuant to 18 USC §3402 and Fed. R. Crim. P. 58(g)(2), a defendant may not appeal directly to the court of appeals from a magistrate's decision, but instead must appeal to the district court. The court noted that there is no specific provision of law that permits an appeal from a district court's decision affirming a conviction by the magistrate. Nonetheless, the court held that a defendant may appeal from such a ruling in the district court, pursuant to 18 USC § 1291, which permits the court of appeals to hear appeals from "all final decisions of the district courts." Accordingly, defendant's appeal was properly brought, and the court proceeded to the merits. (*See supra*).

- *Appellate Jurisdiction*

U.S. v. Lawrence, 06-4105 (2/11/09)

▶ Defendant was convicted of multiple bank robbery and gun charges. Two of the charges were death eligible because defendant killed a police officer during one of the bank robberies. During the penalty phase, the jury imposed life imprisonment for the death-eligible bank robbery, but imposed the death penalty for the corresponding firearm charge under 18 U.S.C. § 924(c) and (j)(1). Defendant subsequently moved for a new trial alleging that the verdicts were inconsistent on the two counts. The district court granted the motion and ordered a new sentencing before a new jury. The government filed an interlocutory appeal.

★ Holding: Pursuant to 18 U.S.C. § 3731, the government may appeal an order "granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof." The

court held that this provision permitted the government to proceed with an interlocutory appeal of the district court's order granting a new sentencing regarding the death-eligible counts. Accordingly, the court proceeded to the merits of the issue. (*See supra*).