

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
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- XI. Probation & Supervised Release
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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

I. Specific Offenses

- *8 USC § 1101-Aggravated Felony - Fraud Nijahwan v. Holder*, 08-495 (6/15/09)
 - ▶ Defendant was an immigrant who was convicted in a fraud conspiracy, and the government later sought his deportation. The government alleged that defendant's fraud conviction constituted an aggravated felony,

pursuant to § 1101(a)(43)(M)(i), because the loss in the case exceeded \$10,000. In proving the loss amount, the government relied on a stipulation from defendant's sentencing that the loss amount in the case exceeded \$100 million. The immigration court agreed and ordered defendant deported. The Third Circuit affirmed and the Supreme Court granted *certiorari*.

★ Holding: A defendant is an aggravated felon, pursuant to subdivision (M)(i), where the defendant has been convicted of "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." The Court held that the fraud offense described in subdivision (M)(i) is not a "generic" offense, similar to those analyzed by the Court in *Taylor*, *Crawford*, and *Chambers*. Accordingly, the Court ruled that the government is not bound by the categorical approach mandated by those cases in proving the circumstances of the prior conviction. Instead, the Court applied a "circumstance-specific" approach, thus allowing the trial court to conduct an inquiry into the underlying facts in order to determine whether the fraud involved more than \$10,000. As such, the immigration court's ruling was affirmed. The Court noted that its holding applied to the deportation context, and commented that, in the context of a criminal prosecution for illegal reentry, the government "stated in its brief and at oral argument that the later jury, during the illegal reentry trial, would have to find loss amount beyond a reasonable doubt" before the aggravated felony enhancement could be applied.

• *18 USC § 1028A(a)(1) - Agg. I.D. Theft Flores-Figueroa v. U.S.*, 08-108 (5/4/09)

▶ Defendant proceeded to bench trial on an aggravated identity theft charge, and argued to the district court that the government was required to prove that he knew that the false identity he used was actually the identity of

another person. The district court disagreed and found defendant guilty. The Eighth Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: Section 1028A(a)(1) makes it a crime if an offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The Court held that the government must prove that the defendant knew that the identity used actually belonged to another individual. The Court relied primarily on a plain reading of the statute in ruling that the word "knowingly" clearly modified not only the transitive verbs in the sentence, but also the object of such verbs, i.e., identity of another. Accordingly, defendant's conviction was reversed.

• *18 USC § 1962 - RICO - Enterprise Boyle v. U.S.*, 07-1309 (6/8/09)

▶ Defendant was charged with conspiracy, a substantive RICO violation, and various other offenses. Defendant argued at trial that the government was required to prove that the enterprise had "an ascertainable structure beyond that inherent in the pattern of racketeering activity." The district court disagreed, and instructed the jury that it could find the existence of an enterprise based on "an association of individuals, without structural hierarchy, formed solely for the purpose of carrying out a pattern of racketeering acts." Defendant was convicted and he appealed.

★ Holding: The Court held that, in order to prove an "association in fact enterprise" engaged in racketeering activity, the government need not prove additional structural attributes beyond that inherent in the pattern of racketeering. Thus, the government need only show that the enterprise has a purpose, relationships among those associated, and longevity sufficient to allow the associates to pursue the purpose. Further, the Court ruled that a district court has "considerable discretion in choosing the language of an instruction so

long as the substance of the relevant point is adequately expressed.” The Court found that the jury instructions provided by the district court were clear and appropriate. Accordingly, defendant’s conviction was affirmed.

- *21 USC § 843(b) - Use of Phone for Drugs*
Abuelhawa v. U.S., 08-192 (3/4/09)

- ▶ Defendant called a drug dealer on multiple occasions to arrange the purchase of drugs for personal use. The government charged defendant with six counts under § 843 for using the phone to “facilitate” the drug dealer’s extensive drug trafficking activities. Defendant proceeded to trial, and argued on his motion for acquittal that he was only guilty of misdemeanor purchases of drugs for personal use. The district court disagreed, defendant was convicted, and the Fourth Circuit affirmed. Defendant appealed to the Supreme Court.

- ★ Holding: The Court held that the term “facilitate” in § 843 could not be construed so broadly as to include defendant’s arrangement by phone to buy drugs for personal use. The Court emphasized the traditional law that “where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action of the other would upend the calibration of punishment set by the legislature.” Accordingly, defendant’s conviction was reversed.

V. Fifth Amendment

D. Double Jeopardy

- *Double Jeopardy - Mistrial*
Yeager v. U.S., 08-67 (6/18/09)

- ▶ In relation to the Enron collapse, defendant was charged with six fraud related counts and numerous insider trading counts. At trial, the jury acquitted defendant of the six fraud counts, and the district court entered a mistrial on the remaining counts because the jury could not reach a verdict. The government returned a superceding indictment charging

only insider trading counts. Defendant moved to dismiss the indictment on double jeopardy grounds, claiming that the jury’s verdict regarding the fraud counts in the first trial necessarily decided that defendant had not engaged in the insider trading described in the superceding indictment. The district court denied the motion, and the Fifth Circuit affirmed. The court found that the jury verdicts were inconsistent, and this inconsistency in the verdict barred application of the Double Jeopardy Clause in the case. The Supreme Court granted *certiorari*.

- ★ Holding: The Court held that counts upon which a jury is hung are non-events, and are not relevant to a determination of whether the Double Jeopardy Clause is applicable to a subsequent prosecution. Thus, the only appropriate inquiry for the lower courts was whether the superceding indictment presented any issue that was “necessarily decided” by the jury’s acquittal on the six fraud counts in the prior trial. In making this assessment, the lower courts may “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Accordingly, the Court reversed the lower courts’ rulings, and remanded the case for a proper determination in the first instance as to whether the acquittals on the fraud counts necessarily precluded the charges in the superceding indictment.

VI. Sixth Amendment

B. Confrontation Clause

- *Confrontation Clause*

- Melendez-Diaz v. Mass., 07-591 (6/25/09)

- ▶ Defendant was charged in Massachusetts with drug offenses. At trial, the state introduced “certificates of analysis” which showed the results of the lab testing of the

drugs, in compliance with state law. Defendant objected based on the Confrontation Clause. Defendant was convicted, lost his state court appeal, and filed an appeal to the Supreme Court.

★ Holding: The Court held that the “certificates of analysis” were testimonial evidence, and thus their admission violated the Confrontation Clause because defendant was denied his right to confront and cross examine their authors. The Court emphasized that the “certificates of analysis” did not qualify as “business records” or “public records” under the hearsay rules because they were prepared for use in court. Further, even if the records had qualified as business or public records, their authors would be subject to cross examination under the Confrontation Clause. The Court reasoned that the same was true with a clerk’s certification about the absence of a public record under the hearsay rules. In such a situation, the clerk must be subjected to cross examination under the Confrontation Clause. Accordingly, defendant’s conviction was reversed.

D. Right to Counsel/Self Representation

• Right to Counsel

Montejo v. Louisiana

▸ Defendant was charged with robbery and murder and began speaking with the police after his arrest. He was then brought before a judge, pursuant to Louisiana law, and appointed counsel. The record was not clear as to whether defendant actually requested counsel. Thereafter, the officers approached defendant at the jail, they obtained a *Miranda* waiver, and defendant continued to cooperate. Defendant subsequently went to trial, and the state sought to introduce defendant’s statements made after he was appointed counsel by the court. The trial court admitted the statements, defendant was convicted, and the conviction was affirmed on appeal. The Supreme Court granted *certiorari*.

★ Holding: The Supreme Court in *Michigan v. Jackson* held that police may not interrogate a defendant once he or she has requested counsel at an arraignment or similar proceeding. The Court held that the rule of *Jackson* was improvidently decided and overruled it. Instead, the Court held that the protections of *Miranda* and *Edwards* were sufficient to protect a defendant’s rights in this context. Accordingly, the case was remanded for the courts to analyze (1) whether defendant’s rights were violated under *Miranda-Edwards*, and (2) whether defendant’s Sixth Amendment waiver “was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer.”

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• 18 USC § 922(g)(3)-Possession-Drug Use U.S. v. Roberge, 06-5704 (5/20/09)

▸ Defendant was charged with being an unlawful user of controlled substances in possession of a firearm. At trial, defendant’s daughter testified that defendant was buying chemicals to make meth, that he was a meth user, and that he had firearms. When agents executed a search warrant, they found defendant asleep with a gun, and precursor chemicals in the basement. Defendant was convicted and failed to renew his Rule 29 motion at the close of the evidence. Defendant appealed.

★ Holding: In a prosecution under § 922(g)(3), where the government alleges that the defendant committed the crime “on or about” the date alleged, the government need not prove the exact date of the possession and drug use. The date need be only “reasonably near” the named date, and the court ruled that “one to two months is reasonably near.” The court found sufficient evidence to show that

defendant was using meth during the time period he was in possession of the firearms. Because defendant waived the sufficiency of the evidence argument by failing to renew his Rule 29 motion, the court reviewed for “miscarriage of justice,” and found that the record was not “devoid of evidence” supporting the conviction.

- *18 USC § 924(e) - ACCA - Violent Felony U.S. v. LaCasse, 06-2212 (6/4/09)*

- ▶ Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that defendant was an armed career criminal based, in part, on his prior Michigan conviction for fleeing and eluding a police officer in the third degree. Relying on the Sixth Circuit’s decision in *U.S. v. Martin*, the district court held that the Michigan conviction constituted a “violent felony” under the ACCA. Defendant appealed and the Sixth Circuit affirmed. The Supreme Court remanded the case for reconsideration in light of the recently decided *Begay* (*See P.V. Issue # 19*) and *Chambers* (*See P.V. Issue #25*).

- ★ Holding: On remand, the court concluded again that Michigan’s third degree fleeing and eluding constitutes a violent felony under the ACCA. The court found that fleeing and eluding was an offense akin to an attempt to escape. Thus, in contrast to the felony DUI addressed in *Begay*, the court held that the fleeing and eluding offense was the kind of “purposeful, violent, and aggressive” conduct that the Supreme Court intended to encompass within the statute. Accordingly, the court affirmed defendant’s sentence.

- *18 USC § 3559(e)-Child Porn-Life Sentence U.S. v. Moore, 08-5291 (5/27/09)*

- ▶ Defendant was convicted of distribution of child porn. At sentencing, the district court determined that defendant had multiple prior sex offenses involving minors. Defendant argued that he should be sentenced to a

mandatory 35 years under § 2251(e), instead of the mandatory life provision of § 3559(e), because the statutes were in conflict with each other. The district court disagreed and sentenced defendant to life imprisonment. Defendant appealed.

- ★ Holding: Section 2251(e) requires a sentence of 35 years where a defendant is convicted of a “sexual exploitation” offense under § 2251 and the defendant has two prior “convictions” related to the “sexual exploitation of children.” In contrast, § 3559(e) requires a sentence of life where the defendant is convicted of a “federal sex offense” and the defendant has been previously “convicted and sentenced” for a “prior sex offense” against a minor. Thus, the court found that the two statutes technically punished different conduct and were not inconsistent. The court held alternatively that, although the two statutes were passed at the same time, § 3559(e) was the last enacted statute, and thus “the last in order of arrangement controls.” Accordingly, defendant’s sentence was affirmed.

- *21 USC § 843(a)(6) - Precursor to Meth U.S. v. Roberge, 06-5704 (5/20/09)*

- ▶ Defendant was charged with intentionally possessing equipment and chemicals that could be used to make meth. At trial, the government introduced (1) testimony from defendant’s daughter that suggested he was making meth, (2) defendant’s confession to a cell mate that he made meth, and (3) evidence that equipment and chemicals that were found in defendant’s basement. Defendant was convicted and failed to renew his Rule 29 at the close of the evidence. Defendant appealed.

- ★ Holding: The court held that the evidence was sufficient to support the verdict. The court ruled that the government need not prove that a defendant possessed all of the necessary equipment and chemicals for meth production, just that the defendant possessed any such

equipment or chemicals with the intent to manufacture. Accordingly, the court found no manifest miscarriage of justice and affirmed the conviction.

• *21 USC § 846 - Conspiracy - Drug Amount*
U.S. v. Cox, 07-3886 (5/21/09)

► Defendant was charged with conspiracy to distribute cocaine based on his efforts to collect a drug debt from a drug dealer's girlfriend, who was working as an informant. Defendant's case was severed from the drug dealer's and defendant proceeded to a bench trial. The evidence adduced at trial showed that defendant met the informant at a parking lot and got into the car with her. When the informant asked why the drug dealer had not shown up himself to collect the debt, defendant said it would be okay, and handed her the phone to talk to the drug dealer. The agents moved in and arrested defendant, and the drug dealer called his phone five additional times. Defendant was convicted. At sentencing, the district court found that defendant was only responsible for two kilos, the amount pertaining to the drug debt, and not the entire five kilos listed in the conspiracy count in the indictment. Nonetheless, the court indicated that it was constrained by the five kilo listed in the indictment, and accordingly sentenced defendant to a mandatory 20 years. Defendant appealed.

★ Holding: The court found that the evidence was sufficient to support the verdict. Defendant's actions in arriving to collect the debt, and speaking with the drug dealer on the phone were adequate evidence of defendant's involvement in the conspiracy. Accordingly, defendant's conviction was affirmed.

Additionally, the court held that the district court was not required to impose the 20 year sentence. The court ruled that the penalty provisions of § 841(b) are not elements of the offense that must be pled and proven to the jury. Thus, "it is unnecessary for the

government to allege drug quantity in an indictment, and even when the government does so, the quantity alleged does not dictate the mandatory minimum." The only *caveat* to this rule is where the drug quantity would increase the penalty for the crime beyond the prescribed statutory maximum. In such a case, the drug amount must be submitted and proven to the jury. Accordingly, defendant's sentence was vacated.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

• *2K2.1(a)-Firearm-Prior Crime of Violence*
U.S. v. Mosley, 08-1783 (6/5/09)

► Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that defendant's prior Michigan conviction for resisting and obstructing a police officer was a "crime of violence" and increased defendant's offense level accordingly. Defendant appealed.

★ Holding: Under Michigan law, the resisting and obstructing offense was defined as applying to anyone who "assaults, batters, wounds, resists, obstructs, opposes, or endangers" a police officer. The court held that the offense contained at least two categories of crimes: one that involved assaulting, battering, or wounding an officer, and a second that covered obstructing an officer. Relying on the Supreme Court's recent decisions in *Begay* (See P.V. Issue # 19) and *Chambers* (See P.V. Issue #25), the court held that the obstruction category of offenses under the Michigan statute did not qualify as a "crime of violence" under the "otherwise clause" of the sentencing guideline. Specifically, the court ruled that obstruction of an officer is not necessarily "purposeful, violent, and aggressive" conduct, nor is it similar in degree of risk to the offenses enumerated under the "crime of violence" definitional section in the guidelines. Accordingly, defendant's sentence was vacated. The court permitted the government

on remand to present the indictment, plea agreement, plea colloquy, or other appropriate record from the Michigan conviction in seeking the enhancement.

- *2T1.1 - Tax Loss*

U.S. v. May, 07-3465 (6/9/09)

- ▶ Defendant was convicted of tax evasion (26 USC § 7201) and failure to withhold and pay over employee payroll taxes to the IRS (§ 7202). At sentencing, the district court determined that defendant had reported to IRS that his taxes were deducted from his income by his company, when in fact, no such money was deducted or paid to IRS. The district court counted this taxable income two times for loss purposes: once based on defendant's failure to withhold and pay the taxes to IRS as an employer, and a second time for defendant's personal tax evasion for failing pay taxes as a tax payer. Defendant appealed.

- ★ Holding: The court held that the district court tax computation constituted impermissible double counting. Clearly, the funds on which defendant failed to pay taxes were only subject to taxation once. Thus, defendant could have paid the taxes as either payroll taxes or on his individual income tax. Accordingly, the tax could only be counted once for purposes of USSG § 2T1.1. Based on this finding, the court also adjusted the restitution amount owed. The sentence was vacated and the case remanded.

- *2T1.1(b)(2) - Sophisticated Means*

U.S. v. May, 07-3465 (6/9/09)

- ▶ Defendant was convicted of tax evasion and failure to withhold and pay over income taxes. At sentencing, the district court applied a two-level enhancement for sophisticated means based on defendant's activities in attempting to hide his illegal activities. Defendant appealed.

- ★ Holding: The court held that the sophisticated means enhancement of USSG §

2T1.1(b)(2) was appropriate where defendant closed his company and opened a new company under a different name, disguising his ownership of the second company. Further, defendant established an S-Corporation and trust to funnel money to his wife in order to disguise profits from his companies. Accordingly, application of the two-level enhancement was affirmed.

B. Chapter Three - Adjustments

- *3B1.3 - Abuse of a Position of Trust*

U.S. v. May, 07-3465 (6/9/09)

- ▶ Defendant was convicted of tax evasion (26 USC § 7201) and failure to withhold and pay over employee payroll taxes to the IRS (§ 7202). At sentencing the district court determined that the defendant qualified for the abuse of a position of trust enhancement under USSG § 3B1.3. Defendant appealed.

- ★ Holding: The court held that the only victim of defendant's offense was the IRS, not the employees. Further, the court held that defendant did not hold a position of trust, pursuant to § 3B1.3, in relation to the IRS. Accordingly, the district court's ruling was reversed.

D. Miscellaneous Guidelines

- *4A1.3(a) - Departure - Criminal History*

U.S. v. O'Georgia, 05-2598 (6/24/09)

- ▶ Defendant was convicted of failure to appear for sentencing, making false claims of citizenship, obstruction of justice for lying to probation, and making false statements to judicial officials. At sentencing, the district court imposed a one-level upward departure in defendant's criminal history category based on civil judgments against defendant, his prior unlawful marriage to two women, his extended unlawful presence in the U.S., and his unpaid child support. Defendant appealed.

- ★ Holding: The court held that an upward departure in criminal history may be appropriate based on prior misconduct that was

established by “a civil adjudication or by a failure to comply with an administrative order.” The court found that defendant’s past wrongdoings were of a sufficient degree to justify the one-level upward departure in criminal history category. Accordingly, the district court’s ruling was affirmed.

- *5K2.0 - Upward Departure - Obstruction*
U.S. v. O’Georgia, 05-2598 (6/24/09)

- ▶ Defendant was convicted of failure to appear for sentencing, making false claims of citizenship, obstruction of justice for lying to probation, and making false statements to judicial officials. At sentencing, in addition to applying an enhancement for obstruction of justice (based on defendant’s perjury at trial) the district court imposed a two-level upward departure based on USSG § 5K2.0. The court found that defendant, acting outside the advice of his counsel, filed numerous frivolous motions and appeals, and refused to accept documents provided by his attorney. Additionally, the court applied a second two-level enhancement under the subsection for defendant’s relocation to Arizona, in violation of the conditions of his bond. Finally, the court applied a one-level departure pursuant to the subsection for defendant’s extensive planning in using a fake identity for 20 years to remain in United States. Defendant appealed.

- ★ Holding: First, the court held that the two-level upward departure for his *pro se* court filings was improper. Pursuant to § 5K2.0, departures may be appropriate where either the conduct is different than that taken into account in the guideline, or the conduct is present to an unusual degree. The court found that the case fell into the first category, but that defendant’s conduct was not of the type that warranted a departure. The court ruled that defendant’s conduct amounted to “abysmal lawyering” on his own behalf and, while such conduct was undoubtedly annoying, it was not the type of obstructive conduct upon which an upward

departure was warranted.

Second, the court held that the two-level upward departure for relocating to Arizona was inappropriate. The court found nothing extraordinary about defendant’s action in moving to Arizona. Although defendant’s move violated his bond, his wife notified the pretrial services officer of the change of address and defendant was promptly arrested in Arizona. Thus, the departure was unwarranted. Because the district court did not justify either of the first two upward departures alternatively based on the factors under 18 USC § 3553, the case was remanded for resentencing in regard to the first two departures.

Third, the court held that the one-level upward departure for more than minimal planning was appropriate. Under the prior guideline USSG § 2F1.1, a defendant could receive a two-level enhancement if his fraud offense involved more than minimal planning. The court found that the district court did not err in determining that a one-level additional increase was proper given the long-term, extensive nature of defendant’s attempts to take on his invented identity. Accordingly, the one-level departure was affirmed.

- *5K2.7-Disruption of Government Function*
U.S. v. O’Georgia, 05-2598 (6/24/09)

- ▶ Defendant was convicted of failure to appear for sentencing, making false claims of citizenship, obstruction of justice for lying to probation, and making false statements to judicial officials. At sentencing, the district court determined that defendant disrupted a government function by obtaining mental health diagnoses from two doctors, based on false information, in an effort to wrongfully delay his sentencing. Accordingly, the district court imposed a two-level upward departure under USSG § 5K2.7. Defendant appealed.

- ★ Holding: The court held that the defendant’s efforts did not harm or inconvenience the doctors in any way, and that

he only was able to delay his sentencing for one month. Thus, the court found that no unusual circumstances existed such that defendant's sentence should be increased above the sentence defendant was already facing for being convicted for failure to appear for sentencing. Because the district court did not justify the departure alternatively based on the factors under 18 USC § 3553, the case was remanded for resentencing.

- *5K2.9 - Concealing a Prior Crime*
U.S.v. O'Georgia, 05-2598 (6/24/09)

- ▶ Defendant was convicted of failure to appear for sentencing, making false claims of citizenship, obstruction of justice for lying to probation, and making false statements to judicial officials. At sentencing, the district court imposed a two-level upward departure because defendant made false claims of citizenship to the probation department (claiming he was born in Albany, Georgia) in order to conceal his crime for lying about his citizenship status to the district court, and his years of living under a fake identity to avoid deportation. Defendant appealed.

- ★ Holding: The court found that defendant's use of a fake identity for two decades in order to successfully avoid deportation, and his lies to the court, probation department, and others, justified the two-level enhancement under USSG § 5K2.9. Accordingly, the district court's ruling was affirmed.

III. Evidence

C. Article VIII - Hearsay

- *801 - Hearsay*

- U.S. v. Rodriguez-Lopez, 07-6045 (5/6/09)

- ▶ Defendant was caught circling a parking lot in a pick-up truck during a drug transaction. While he was being questioned by officers, he received ten phone calls from persons requesting heroin. Upon his prosecution, defendant moved to suppress the phone calls as

hearsay. The district court granted the motion, and the government filed an interlocutory appeal.

- ★ Holding: The court held that the statements on the phone calls were not offered for the truth of the matter asserted, but were offered only for the fact that the calls were made to defendant. The importance of the calls was not whether the callers had a real desire for heroin or whether they believed defendant could provide heroin, but only that defendant received the calls. The court emphasized that "the fact that out-of-court statements are being used to support a material inference does not by itself make them hearsay; it makes them relevant." Accordingly, the district court's ruling was reversed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Vehicle Stop - Length of Detention*

- U.S. v. Canipe, 08-5534 (6/30/09)

- ▶ An officer received a tip that defendant may be illegally possessing a firearm. The officer located defendant reporting to his probation officer, and as defendant drove away, the officer observed a seatbelt violation. The officer stopped defendant's car and called for back-up officers. The issuance of the ticket for the seatbelt took 10-15 minutes and at the conclusion of the stop, the officer asked defendant if he had anything illegal in the vehicle and whether he could search. Defendant responded that he did not think there was anything illegal in the truck and that the search would not be a problem. Officers found a gun in a box under the seat. In his subsequent prosecution, defendant moved to suppress the firearm and the district court denied the motion. Defendant appealed.

- ★ Holding: The court first held that the stop of the vehicle was justified by the seatbelt violation. Second, the 10-15 minute time period to issue the ticket was normal. Third, the court found that the brief continued

detention of defendant after the issuance of the citation was reasonable. The officer asked two questions of defendant, and defendant did not object to the questioning. Further, defendant's answer to the officer's first question was ambiguous, thus justifying the officer's second question requesting to search. Accordingly, the court found that the totality of the circumstances justified the brief detention and further questioning.

C. Warrant Exceptions

- *Search Incident to Arrest*

U.S. v. Lopez, 07-5768 (6/1/09)

- ▶ Defendant was stopped and arrested for reckless driving. After placing defendant in the back of the police car, the officers searched his car and found drugs and a gun. In his subsequent prosecution, defendant moved to suppress the evidence. The district court denied the motion and defendant appealed.

- ★ Holding: Relying on the Supreme Court's intervening decision in *Gant* (*See P.V.*, Issue #25), the court held that the search of defendant's car was not justified as a search incident to arrest. The court found that defendant was secured in the back of the police car and thus not in reaching distance of his vehicle, and that there was no reason to think that defendant's vehicle would contain evidence of the offense of his arrest – reckless driving. Accordingly, the district court's ruling was reversed.

D. Consent Searches and Seizures

- *Consent Searches - Scope of Consent*

U.S. v. Canipe, 08-5534 (6/30/09)

- ▶ Defendant was stopped by an officer for a traffic violation and at the conclusion of the stop the officer asked defendant if he had anything illegal and requested to "look in" his truck. Defendant stated that he did not think that he had anything illegal and stated that looking in his truck was not a problem. As officers searched defendant's truck, he lodged

no objection. Officers found a gun in an unlocked box that said "Ruger" on the top. Defendant was prosecuted for being a felon in possession of a firearm and moved to suppress the evidence. The district court denied the motion, finding that defendant consented to the search, and defendant appealed.

- ★ Holding: The court held that the government must prove that a defendant's consent was voluntary, unequivocal, specific, and intelligently given by "clear and positive testimony." In making this assessment, the court may consider the accused's characteristics and the details of the interrogation. The court found that defendant's consent was not "mere acquiescence" to police authority, but was instead a knowing, voluntary consent by a defendant who was "no stranger to the police or the criminal justice system." Although the court noted that the officer agreed in testimony that defendant "acquiesced," the court agreed with the district court that defense counsel's questioning on this point was a "semantic trap."

Additionally, the court held that the opening of the closed box by the officer did not exceed the permissible scope of the search. The court ruled that a general consent to search a vehicle ordinarily encompassing the opening of closed, but unlocked, containers within the vehicle. Accordingly, the district court's ruling was affirmed.

E. Search Warrants

- *Search Warrants - Probable Cause*

U.S. v. Berry, 08-1048 (5/14/09)

- ▶ Agents filed a search warrant application for defendant's residence based on the following: (1) defendant had a prior conviction for drug trafficking, was on probation for the conviction, and was arrested outside the residence for a probation violation; (2) defendant had cocaine in his pocket upon his arrest; (3) defendant rented the residence under an alias and paid in cash; (4) an informant

indicated that defendant lived at the residence; and (5) defendant was in violation of his probation by failing to notify his probation officer that he lived at the residence. Upon the search, officers found drugs and firearms. In defendant's subsequent prosecution, he moved to suppress the evidence and the district court denied the motion. Defendant appealed.

★ Holding: Distinguishing the case from its prior decision in *U.S. v. McPherson*, the court held that the affidavit contained sufficient information to establish probable cause to believe that defendant was involved in drug trafficking, and that evidence of such would be found in his residence. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

• *Prosecutorial Misconduct-False Testimony* *Rosencrantz v. Lafler*, 07-1403 (6/9/09)

► Defendant was charged in state court with rape and felonious assault. At trial, the victim identified defendant as the offender, but testified falsely or inconsistently regarding four matters: (1) the time the assault occurred; (2) her level of certainty regarding the identification of defendant; (3) her level of sobriety at the time of the assault; and (4) whether she met with prosecutors pretrial. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition claiming prosecutorial misconduct for knowingly presenting false testimony. The district court denied the petition and defendant appealed.

★ Holding: The knowing presentation of false testimony is analyzed based on a framework outlined in *Brady* and *Giglio*, which requires consideration of three factors: (1) whether the statement was actually false; (2) the materiality of the statement; and (3) the prosecution's knowledge of the statement's falsity. The court held that the materiality standard for a false testimony case is less

stringent than a strict *Brady* violation case; the defendant need only show that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. In the case, the court held that the first three instances were either mere inconsistencies in the victim's testimony, or were not indisputably false. However, the fourth instance, regarding the non-existence of pretrial meetings with the prosecutor, was indisputably false and was material. Specifically, the court ruled that the victim's testimony, and thus credibility, were critical to the state's case, and thus the lies should have been corrected by the prosecutor. Accordingly, the court found constitutional error.

The court held, however, that a *Brady/Giglio* violation for presenting false testimony was subject to harmless error analysis. The court ruled that the error in the case was a "trial error," not the kind of "structural error" that requires automatic reversal of a conviction. As such, the court found that the prosecutorial misconduct constituted harmless error because the evidence against defendant was strong, and the victim's credibility and character had otherwise been thoroughly impugned by the defense. Therefore, the district court's ruling was affirmed.

VIII. Defenses

J. Speedy Trial Act/IAD

• *18 USC § 3161 - Speedy Trial Act* *U.S. v. Sobh*, 07-2318 (5/13/09)

► Defendant was indicted for conspiracy and bank fraud, and was subsequently arrested. At the time of defendant's arraignment, codefendants had already been brought before the court and the case had been continued for several months for trial. During the course of the proceedings, defendant's counsel agreed to an additional continuance of the trial. Defendant personally opposed the continuance and requested to remove his attorney. The

district court granted defendant's motion for new counsel, but ultimately denied defendant's motion for a dismissal based on the Speedy Trial Act. In denying the motion, the district court made findings that the ends of justice had supported the continuance of trial. Defendant was convicted and argued on appeal that his speedy trial rights were violated by (1) the continuance of his trial before his own arraignment, and (2) his attorney's acquiescence to a continuance without his consent.

★ Holding: First, the court held that the time from defendant's arraignment to the extended trial date was properly tolled, pursuant to 18 USC § 3161(h)(7), which allows for tolling during any reasonable period of delay when defendant is joined for trial with a codefendant. The court found that tolling was proper even though defendant was the last-arraigned defendant. Second, the court held that a defendant's consent to a continuance under § 3161(h)(8) is not required as long as the district court makes a finding on the record that the ends of justice outweigh the best interest of the defendant and the public in a speedy trial. The court ruled that the district court's ends of justice finding at the denial of defendant's motion to dismiss was adequate. Lastly, the court ruled that defendant filed extensive pretrial motions which, pursuant to § 3161(h)(1)(F), tolled the speedy trial clock. According, the district court's ruling was affirmed.

IX. Plea & Sentencing Hearings

B. Sentencing

• *Fed. R. Crim.P. 32 - PSR - Disclosure*
U.S. v. Roberge, 06-5704 (5/20/09)

▶ Defendant was convicted of meth and firearm offenses. During the sentencing process, the PSR was not disclosed to defendant until 18 days before sentencing, and the probation officer's responses to objections were not submitted until two days before

sentencing. Defendant requested a continuance of the sentencing hearing, which the district court denied. Defendant appealed.

★ Holding: Rule 32(e)(2) requires that the PSR be disclosed to defendant at least 35 days before sentencing. Further, Rule 32(g) requires that the probation officer's responses to objections must be submitted at least seven days before sentencing. The court held that the district court erred by failing to comply literally with the rule where defendant had not waived the time periods. Nonetheless, the court found that the error was harmless because defendant was unable to show prejudice. Thus, defendant's sentence was affirmed.

XI. Probation & Supervised Release

• *Conditions of Supervised Release*

U.S. v. May, 07-3465 (6/9/09)

▶ Defendant was convicted of tax evasion and failure to collect and pay over employee payroll taxes. During sentencing the district court imposed the following supervised release conditions: (1) file amended tax returns within six months; (2) have no association with the financial services industry in any capacity; (3) pay restitution on a schedule recommended by IRS; and (4) pay a separate legally owed obligation to the Ohio Attorney General. Defendant appealed the reasonableness of the conditions.

★ Holding: First, the court found no abuse of discretion in requiring defendant to file amended tax returns within six months where defendant was convicted of tax evasion. Second, the court ruled that the restriction on working in the financial services industry was reasonable where defendant's convictions established that he "could not be trusted with other people's money." Third, delegation of a repayment schedule to IRS was proper where the district court retained authority to approve or reject the plan. Fourth, the court found that requiring defendant to pay his separate obligations to the Ohio Attorney General

would allow defendant “to develop a habit of paying obligations when they are due,” and was sufficiently related to his underlying conviction. Accordingly, the district court’s supervised release conditions were affirmed.

XII. Appeal

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

U.S. v. Guest, 07-1922 (5/4/09)

- ▶ An undercover agent posed on the internet as a mother willing to allow others to have sex with her minor children. Defendant took the bait and traveled from Indiana to Michigan, where he was arrested by agents. Defendant was convicted and at sentencing he argued sentencing entrapment and sentence manipulation. The district court rejected these arguments, but sentenced defendant to 31 months below the guidelines. Defendant appealed.

- ★ Holding: The court held that the intervening Supreme Court decisions in *Gall* and *Kimbrough* did not overrule the Sixth Circuit’s long standing refusal to recognize either sentencing entrapment or sentencing manipulation as a defense. The court alternatively held that, even if the court did recognize the defenses, they were inapplicable on the facts of defendant’s case. Accordingly, defendant’s sentence was affirmed.

- *Reasonableness of Sentence*

U.S.v.Barahona-Montenegro,08-1345(5/14/09)

- ▶ Defendant was convicted of being a previously deported immigrant in possession of a firearm. At sentencing, defendant pursued an objection that his criminal history category should be one level lower than indicated in the PSR. The district court did not specifically rule on the objection, but instead stated that, whether or not it sustained defendant’s objection, it would consider defendant to be in the higher category because of aggravating factors in the case. The court then imposed a

sentence that was two months higher than the guideline range applicable to the higher criminal history category. Two months later, the district court issued its written judgment, and justified the sentence based on an upward departure. Defendant appealed.

- ★ Holding: The court held that the sentence was procedurally unreasonable. The court ruled that the district court is required to make rulings on objections at the sentencing hearing, and to state any reasons for a sentence above the guideline range on the record. The court found that the district court’s explanation at the sentencing hearing was inadequate, and the statements in its written order, issued two months later, did not sufficiently explain its reasons for the sentence it chose. Accordingly, defendant’s case was remanded for resentencing.

- *Reasonableness of Sentence*

U.S. v. Grams, 08-1697 (5/29/09)

- ▶ Defendant was convicted of bank robbery and the probation officer determined that defendant’s guideline range was 46-57 months. The probation officer recommended either an upward departure under the guidelines or an upward variance pursuant to the factors under 18 USC § 3553, both of which would have yielded a guideline range of 57-71 months. At sentencing, the district court made reference to an upward departure based on the criteria listed by the probation officer, but imposed a sentence of 72 months. The government pointed out that the sentence was one month higher than the suggested range, but the district court indicated that “one month is negligible.” In its written order, the court justified the sentence as an upward variance under the § 3553 factors. Defendant appealed.

- ★ Holding: The court found that the sentence was procedurally unreasonable. The court emphasized that a district court is required to state its reasons for sentence in open court, and state with specificity its

reasons for going outside a suggested guideline range. Further, the court noted that any amount of jail time, even one month, has constitutional significance. The court ruled that, given the district court's statement about the additional one month, and its failure to accurately account for how it reached its sentencing determination (departure vs. variance), the case had to be remanded for resentencing.

- *Reasonableness - Consecutive Sentences*
U.S. v. Berry, 08-1048 (5/14/09)

- ▶ Defendant was convicted after trial for narcotics and firearm offenses. At sentencing, the district court determined that the applicable guideline range was 360-life, and the mandatory minimum sentence was 15 years. Based on his age, lack of serious criminal record, and low culpability, defendant moved for a downward variance and requested that the sentence run concurrent to his state probation violation. The district court imposed a sentence of 360 months to be served consecutively to the state sentence. Defendant appealed.

- ★ Holding: The court held that the sentence was both procedurally and substantively reasonable. Specifically, in relation to the consecutive nature of the sentence, the court ruled that a district court must consider the following: (1) the factors under 18 USC § 3553; (2) the type and length of the prior undischarged sentence; (3) the time served and the time remaining on the prior sentence; (4) the fact that the prior sentence may have been imposed in state rather than federal court, or at a different time before another federal court; and (5) any other relevant factor. In the case, the court held that the district court adequately expressed its consideration of factors relevant to the inquiry, and that the determination for a consecutive sentence was reasonable. Accordingly, defendant's sentence was affirmed.

- *Reasonableness of Sentence-Rule 35 Motion*
U.S. v. Grant, 07-3831 (6/9/09)

- ▶ Defendant was convicted of narcotics and firearm offenses and was sentenced to a statutory mandatory minimum 25 year sentence. After sentencing, defendant provided cooperation to the government which resulted in a motion for a sentence reduction pursuant to Fed. R. Crim. P. 35. At the hearing on the Rule 35 motion, defendant advocated that the district court should consider the factors under 18 USC § 3553 in addition to his cooperation because such factors were not considered at the original sentencing due to the mandatory minimum 25 year sentence. The district court declined to consider defendant's arguments, and imposed the 16 year sentence recommended by the government. Defendant appealed.

- ★ Holding: The court held that, where the district court had not been able to consider the § 3553 factors at the original sentencing due to a mandatory minimum sentence, it was appropriate for the district court to consider such factors at a Rule 35 hearing. Accordingly, the case was remanded for resentencing. The court did not decide the question of whether the district court was required to consider § 3553 factors, although it opined that consideration such factors may be mandatory based on the language of §§ 3553 and 3742.

D. Miscellaneous Appeal

- *18 USC § 3582(c) - Crack Amendment*
U.S. v. Johnson, 08-5667 (5/5/09)

- ▶ Defendant was convicted of drug trafficking and subjected to a mandatory 20 year sentence. At sentencing, the district court granted the government's sentence reduction motion, pursuant to USSG § 5K1.1, and reduced defendant's sentence to 108 months. After the crack amendment was passed, defendant moved to reduce his sentence based on the amendment. The district court denied the motion and defendant appealed.

- ★ Holding: The court held that the sentence

reduction based on the crack amendment was not appropriate because defendant's original sentence was based on the 20 year mandatory minimum, not the guidelines. Accordingly, the district court ruling was affirmed.

- *Mootness of Appeal - Release from Prison*
U.S. v. May, 07-3465 (6/9/09)

- ▶ Defendant was sentenced for several tax offenses and raised on appeal issues related to the computation of the sentencing guidelines. Defendant's case was remanded by the Sixth Circuit for reconsideration in light of *Booker*. On remand, the district court imposed the same sentence. Defendant again appealed and completed his term of imprisonment while the appeal was pending. The government argued that the guideline issues were mooted by defendant's release.

- ★ **Holding:** The court held that a defendant's release from prison does not moot the appeal if the issue raised "potentially implicates" the length of the defendant's supervised release term. The court found that the guidelines permitted the district court to impose 2-3 years of supervised release, and that the court imposed 3 years. Thus, "on any remand, the district court would be free to reduce [defendant's] term of supervised release from 3 to 2 years." Accordingly, the court found that none of defendant's issues were moot, and proceeded to the merits. (*See supra*).