

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
- VI. Sixth Amendment
- VII. Other Constitutional Rulings
- VIII. Defenses
- IX. Plea & Sentencing Hearings
- X. Jury Issues
- XI. Probation & Supervised Release
- XII. Appeal
- XIII. Post-Conviction Remedies

FINDING THE CASES

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

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

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

IV. Fourth Amendment

C. Warrant Exceptions

- *Warrant Exception-Exigent Circumstances*
Michigan v. Fisher, 09-91 (12/7/09)

► Officers were called to a home regarding a disturbance. Upon arriving, officers found a vehicle in the driveway that appeared to have been in an accident, damaged fence posts along

the property, and three broken windows. There was blood on the hood of the vehicle and the door to the house. Through a window, officers could see defendant inside screaming and throwing things. Officers observed that defendant had a cut on his hand, and the officers inquired through the window as to whether he needed medical attention. Defendant ignored the question and told the officers to get a warrant. Officers decided to enter the house, and defendant then pointed a gun at the officers. Defendant was charged in state court with assault and he moved to suppress the evidence. The state court granted the motion and the ruling was affirmed on appeal. The state appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the warrantless entry by the officers into the home was justified by exigent circumstances, namely the need to provide emergency aid. Specifically, the Court found that it was objectively reasonable to believe that either another person may be in danger or that defendant would harm himself in his own rage. This finding was supported by the signs of recent injury, the car accident, and defendant's violent acts in his house. Accordingly, the state court's ruling was reversed.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *8 USC § 1101 - Aggravated Felony*
Shaya v. Holder, 08-4619 (11/9/09)
 - ▶ Shaya was a permanent resident alien who was convicted of a Michigan felony offense for assault with intent to do great bodily harm. Shaya was sentenced to an indefinite term of imprisonment of 9 months to 10 years. As a result, immigration authorities moved to deport him from the country based upon the determination that the Michigan assault offense was a "crime of violence" that constituted an aggravated felony under § 1101(a)(43)(F). The

immigration court agreed with the INS interpretation and Shaya appealed.

★ Holding: A "crime of violence" may qualify as an aggravated felony under § 1101(a)(43)(F) if "the term of imprisonment is at least one year." The court first held that the provision requires courts to interpret state law in order to assess what the state deems the "term of imprisonment" to be when an indefinite term has been imposed. Second, the court found that, pursuant to Michigan law, the "term of imprisonment" for a defendant ordered to serve an indefinite term is either the minimum term imposed, or the time actually served in prison, whichever is greater. The court reached this conclusion because of the "peculiar" feature of Michigan law that required sentencing courts to impose the maximum statutory sentence as the top end of the indefinite term. Thus, the court remanded the case to the immigration court for a determination in the first instance as to the amount of time Shaya actually served on the assault charge.

- *18 USC § 1347-Health Care Fraud/Death*
U.S. v. Martinez, 06-3882 (12/1/09)

- ▶ Defendant was charged with health care fraud for submitting fraudulent claims to health care benefit programs. Additionally, defendant was charged, pursuant to § 1347(2), with causing the death of two of his patients as a result. At trial, none of the patients named in the indictment testified, nor did the government identify any patients by name. Instead, the government presented the testimony of an expert who reviewed the patient medical files and concluded that defendant could not have possibly seen the number of patients and performed the quantity of procedures that he alleged. Further, the government presented video tape evidence demonstrating the small quantity of time defendant spent with each patient. Lastly, the government introduced evidence that defendant caused the deaths of

two of his patients. Defendant was convicted and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: In order to establish health care fraud, the government must prove that the defendant (1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the payment of benefits, (2) executed the scheme, and (3) acted with intent to defraud. The court found that the evidence was sufficient to establish that defendant devised a scheme to defraud the medical benefits providers by billing for services that were not performed. Specifically, the court found that individualized testimony by each patient was unnecessary where competent expert testimony established the government's charges. Accordingly, defendant's conviction was affirmed.

Further, the court addressed an open question in the Sixth Circuit as to the causation requirement for the death of a patient under § 1347(2). The court concluded that "proximate cause" was the appropriate standard. Under this standard, a defendant may be held liable for the death of a patient where it "reasonably might or should have been foreseen that his fraudulent conduct would be likely to create a situation which would expose another to the danger of death." The court found that, although it was a close case, sufficient evidence was introduced to prove that defendant was the proximate cause of the death of the two patients based on the length of treatment, their deteriorating health during the time period, and defendant's inadequate monitoring of them. Thus, defendant's conviction was affirmed.

• *26 USC § 7206(1)-Tax-Good Faith/Wilfulness*
U.S. v. Aaron, 08-2185 (12/28/09)

▶ Defendant was charged with making and subscribing false documents based on his repeatedly providing false social security numbers on his IRS Currency Transaction

Reports at casinos. At trial, defendant testified that he knew that he was required by law to provide his social security number, but that he provided a fake number in order to avoid the risk of identity theft. Defendant requested a jury instruction on good faith which the district court rejected. Defendant was convicted and argued on appeal that the district court should have provided a good faith instruction. Defendant further claimed, for the first time on appeal, that the district court erred by failing to define the term "wilfulness."

★ Holding: A defendant in a tax prosecution may be entitled to an instruction regarding the good-faith defense where the defendant has demonstrated a good faith belief that he or she was not violating the law. The court held that the good faith defense does not extend to a good faith motive for violating the law. It was clear in the case that defendant understood the law and its requirements, but that he chose to violate it based on a good faith motive. Accordingly, no good faith instruction was required.

Additionally, the court held that, although "it is good practice to include a definition of wilfulness when the word is included in the statute or elements of the offense," the court found no plain error in the district court's failure to provide such an instruction. The court found that defendant could not show how the error affected his fundamental rights. Thus, defendant's conviction was affirmed.

II. Sentencing Guidelines

B. Chapter Three - Adjustments

- *3B1.2 - Minor role*

U.S. v. Gabbard, 08-5445 (11/25/09)

▶ Defendant was convicted of conspiracy to manufacture marijuana. Defendant played a small role in assisting a codefendant who manufactured and sold numerous marijuana plants. During one point in the conspiracy, defendant told an informant that he was a

“partner” with the codefendant, and he tried to negotiate prices with the informant. At sentencing, the district court rejected defendant’s request for a minor role reduction, and defendant appealed.

★ Holding: In order to qualify for a minor role reduction under USSG § 3B1.2, the defendant bears the burden of proving that he or she is substantially less culpable than the average participant. The court found that defendant’s acts of claiming to be a partner and trying to negotiate prices justified the district court’s finding. Further, the court noted that two other participants in the conspiracy played smaller roles than defendant. Thus, the court ruled that, although it may have found defendant’s role to be minor on “an independent review” of the record, the court found no error given the “substantial deference” owed to the district court’s fact finding.

C. Chapter Four - Criminal History

• 4A1.1(e) - Prior Juvenile Conviction

U.S. v. Thompson, 08-3760 (10/13/09)

► Defendant was convicted of distribution of crack. At sentencing, the district order imposed a two-level increase to defendant’s criminal history, pursuant to USSG § 4A1.1(e), because he had been released from incarceration for a juvenile conviction within two years of his commission of the instant offense. Defendant appealed.

★ Holding: The court held that a juvenile court sentence to incarceration counted as “imprisonment” for purposes of § 4A1.1(e). Therefore, defendant’s sentence was properly enhanced by two levels and the district court’s ruling was affirmed.

D. Miscellaneous Guidelines

• 5K1.1/§ 3553(e) - Downward Departures

U.S. v. Gabbard, 08-5445 (11/25/09)

► Defendant was convicted of conspiracy to manufacture more than 100 marijuana plants

and at sentencing the district court determined that, although the sentencing guidelines called for a lower sentence, a 10 year mandatory penalty was applicable under the statute. The government moved for a sentence reduction under 18 USC § 3553(e) and USSG § 5K1.1 based on defendant’s cooperation. The district court granted the motion but did not specify whether it was reducing defendant’s sentence under § 3553(e) or § 5K1.1. The court imposed a sentence of 87 months, defendant did not object to the district court’s failure to delineate between the two provisions, and defendant appealed.

★ Holding: First, the court held that, where a statutory mandatory minimum is applicable, a motion pursuant to § 3553(e) is necessary in order for the district court to impose a sentence below the minimum. Second, the court held that, in such a situation, a motion under § 5K1.1 is superfluous. Finally, the court found no plain error in the district court’s failure to delineate between the two motions in awarding the downward departure. Accordingly, defendant’s sentence was affirmed.

III. Evidence

B. Articles VI-VII - Witness and Expert

• 702 - Expert Testimony

U.S. v. Martinez, 06-3882 (12/1/09)

► Defendant was charged with health care fraud which resulted in the death of two patients. At trial, the government presented an expert who testified that the victims’ overdoses resulted from the medication prescribed by defendant. This opinion was based on the doctor’s review of the toxicology reports and the patients’ medical files. Defendant objected to the expert testimony, he was convicted, and he appealed.

★ Holding: The court held that, in admitting expert testimony under FRE 702, the court must focus “solely on principles and methodology, not on the conclusions that they generate,” and the court must confirm that the

“factual underpinnings of the expert’s opinions were sound.” The court found that the expert’s testimony was properly admitted because it was based on a proper review of the pertinent records for each patient. Further, the court held that any error in the admission of the testimony was harmless because other evidence established that defendant’s entire course of treatment, not simply the oral prescriptions, cause the patients’ deaths. Accordingly, defendant’s conviction was affirmed.

C. Article VIII - Hearsay

- *801-Hearsay - Statements/Truth of Matter*
U.S. v. Martinez, 06-3882 (12/1/09)

- ▶ Defendant was a doctor charged with unlawful distribution of controlled substances and health care fraud. Prior to trial, the government contacted an expert who prepared a video showing how to properly perform medical techniques that defendant was charged with improperly performing. The video was played at trial during the testimony of a second expert witness, who used the video to explain how defendant’s activities were improper. Defendant objected to the video on hearsay grounds, the district court admitted the evidence, and defendant was convicted. Defendant appealed.

- ★ Holding: First, the court held that both the verbal and nonverbal portions of the video were statements for purposes of FRE 801(a). The court ruled that nonverbal conduct may be a statement where it is “intended by the person as an assertion.” The court found that the expert was requested by the government to make the video for the purpose of demonstrating proper performance of medical procedures. As such, the court concluded that the video was intended to be an assertion. Second, the court held that the video was offered for the truth of the matter asserted. Although the government argued that the video was just used as an aid for the testifying expert, the court found that both the government’s

opening and closing, as well as the testimony of the expert, demonstrated that the video was used to show the jury the proper method of performing the procedures and to show that defendant’s methods were improper. Thus, the video was offered for its truth. Accordingly, the court found that the video was hearsay. Nonetheless, the court ruled that admission of the tape was harmless given the strength of the testimony provided by the live expert and the other evidence in the case. Therefore, defendant’s conviction was affirmed.

- *803(18) - Learned Treatise*
U.S. v. Martinez, 06-3882 (12/1/09)

- ▶ Defendant was a doctor charged with unlawful distribution of controlled substances and health care fraud. Prior to trial, the government contacted an expert who prepared a video showing how to properly perform medical techniques that defendant was charged with improperly performing. The video was played at trial during the testimony of a second expert witness, who used the video to explain how defendant’s activities were improper. Defendant objected to the video on hearsay grounds, and the government argued that the video was a learned treatise under FRE 803(18). The district court admitted the evidence, defendant was convicted, and he appealed.

- ★ Holding: FRE 803(18) provides a hearsay exception for a published treatise that is established as a reliable authority by testimony or otherwise. The court held that the video did not qualify as a learned treatise because it was prepared specifically for the government at trial, was not subjected to peer review or scrutiny, and was not made primarily for professionals in the field, with the reputation of the video’s creator at stake. Thus, the court found that the video did not have the “sufficient assurances of trustworthiness” required to be a learned treatise. Accordingly, the court held that the video did not meet the

learned treatise exception. Nonetheless, the court found that admission of the video was harmless error (*see supra*) and defendant's conviction was affirmed.

IV. Fourth Amendment

C. Warrant Exceptions

- *Protective Sweep*

U.S. v. Archibald, 08-5703 (12/15/09)

▶ Officers had an arrest warrant for defendant and determined from a risk assessment of defendant's arrest history that he was a high risk offender. Officers went to defendant's home and, after ten minutes of knocking, summoned and arrested defendant at his front door. Officers conducted a "protective sweep" of the residence and located narcotics in the kitchen in plain view. Officers subsequently obtained a search warrant, and found a firearm in the residence. Defendant was prosecuted for being a felon in possession of a firearm and he moved to suppress the evidence based on the warrantless search during the "protective sweep." The district court denied the motion and defendant appealed.

★ Holding: In conducting a search for other individuals who may cause harm to officers or others, the law permits two types of warrantless protective sweeps. First, officers may look in "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." This type of search requires no probable cause or reasonable suspicion. Second, officers may go "beyond" immediately adjoining areas based on reasonable suspicion that the area to be swept harbors an individual posing a danger to those at the arrest scene. In the case, the court found that the arrest occurred outside defendant's front door. Therefore, the "protective sweep" of the kitchen (two rooms over from the front door) was not justified without first establishing reasonable suspicion. Further, the court held that reasonable suspicion did not

justify the extended search because the officers lacked any articulable facts to establish a belief that someone other than defendant was in the residence. The court noted that defendant's prior arrests for violent offenses were irrelevant to the reasonable suspicion inquiry. Accordingly, the district court's ruling was reversed and the evidence was ordered suppressed.

V. Fifth Amendment

D. Double Jeopardy

- *Double Jeopardy*

White v. Howes, 08-1458 (11/20/09)

▶ Defendant was convicted of the two separate Michigan offenses of "felon in possession of a firearm" and "possession of a firearm while being a felon in possession of a firearm." Defendant was sentenced to consecutive terms for the two offenses, and he argued on appeal that his double jeopardy rights were violated. Defendant lost his state court appeal and filed a federal *habeas* petition. The district court granted the petition, and the state appealed.

★ Holding: First, the court determined that the two state statutes punished the same offense twice. Second, the court held, however, that clear state law indicated the state legislature intended to impose multiple punishments for the same offense. Thus, the court held that no double jeopardy violation exists where a legislature has expressed an intent to punish the same offense multiple times. Accordingly, defendant's convictions and sentence were affirmed.

E. Miscellaneous Fifth Amendment

- *Due Process - Pre-indictment Delay*

U.S. v. Schaffer, 09-3053 (11/12/09)

▶ Defendant was charged with conspiracy to commit computer fraud based on conduct that occurred five years prior. Defendant moved to dismiss the indictment based on pre-indictment delay and claimed that his memory had faded

over the years, thus hindering his defense. Further, defendant argued that prejudice should be presumed for lengthy delays, as it is in the Sixth Amendment context. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: In order to establish that dismissal is appropriate based on pre-indictment delay, the defendant must show substantial prejudice to her right to a fair trial and that the delay was an intentional device on the part of the government to obtain a tactical advantage. In the case, the court found no evidence of actual prejudice to defendant's defense. Defendant's loss of memory of the events did not amount to a showing that he was unable to assist in his own defense or that specific evidence had been lost or destroyed. Additionally, the court declined to apply the presumption of prejudice applicable to lengthy delays in the Sixth Amendment context. Accordingly, the district court's ruling was affirmed.

VI. Sixth Amendment

A. Right to Jury Trial/*Booker*

- *Right to Jury Trial/Apprendi*

Chontos v. Berghuis, 08-1031 (11/10/09)

► Defendant was convicted in state court for first degree criminal sexual conduct and, as a result, faced the possibility of life in prison. The state court imposed a sentence of 225 months to 40 years imprisonment. Defendant argued on appeal that the trial court violated his right to jury trial by finding facts at sentencing that increased his mandatory minimum sentence. Defendant lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: The court held that, pursuant to *Apprendi*, a defendant's right to jury trial is only violated if judge-found facts at sentencing increase the statutory maximum penalty. Further, the court confirmed that the sentencing

court may rely on acquitted conduct in making its sentencing determinations. Accordingly, the district court's ruling was affirmed.

B. Confrontation Clause

- *Confrontation Clause*

Jensen v. Romanowski, 08-1758 (12/9/09)

► Defendant was charged in state court with criminal sexual conduct with an eleven year old. At trial, an officer testified about defendant's sexual conduct underlying a prior conviction for criminal sexual conduct. The prosecutor referenced the officer's testimony in his *voir dire*, opening statement, during the trial, and in closing argument. Defendant was convicted, lost his state court appeals, and filed a federal *habeas* petition. The district court granted the petition, finding a violation of the Confrontation Clause. The state appealed.

★ Holding: The court held that the officer's testimony constituted hearsay, and because the state had not offered testimony from the victim of the prior offense or an eyewitness, the officer's testimony violated the Confrontation Clause. Further, the court found that the error was not harmless because the state utilized the hearsay testimony throughout its case, and the evidence against defendant, while strong, was not overwhelming. Accordingly, the district court's decision was affirmed.

- *Confrontation Clause*

Earhart v. Konteh, 07-4127 (12/18/09)

► Defendant was charged with gross sexual imposition in state court, among other offenses. Prior to trial, the state obtained a video-taped deposition of the victim, during which defendant was able to cross examine the victim. At the time of trial, the victim was on vacation, and the state made no effort to obtain her presence. Instead, the state moved to admit the video deposition. Defendant objected based on the Confrontation Clause, but the trial court admitted the evidence. Defendant was convicted, lost his state court appeal, and filed

a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: First, the court held that defendant did not waive his right to confrontation through participation in the video deposition. The court held that such a waiver would require an affirmative agreement by defendant that the deposition would be admissible at trial. Finding no such evidence in the record, the court held that defendant did not waive his right to confrontation. Second, the court ruled that the victim was not “constitutionally unavailable” for Confrontation Clause purposes. The court found that the state did not even attempt to secure the witness’ appearance through compulsory process, and thus make a “good-faith effort to obtain [the victim’s] presence.” Finally, the court ruled that the Confrontation Clause violation was not harmless error because, without the victim’s testimony, the state was left with conflicting accounts from other eyewitnesses. Accordingly, defendant’s conviction on the gross sexual imposition count was reversed.

F. Miscellaneous Sixth Amendment

- *Right to Public Trial*

Johnson v. Sherry, 08-1322 (11/13/09)

▸ Defendant was charged with murder and related charges in state court. During the trial, the prosecutor requested that the court close the court room during the testimony of three key state witnesses because two witnesses had been killed during the case under “suspicious circumstances.” Defendant’s attorney agreed to the closure of the court room and the court excluded members of defendant’s family during the testimony. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: The denial of a public trial is a structural error for which prejudice is presumed. As such, a courtroom may only be

closed over objection of a defendant where (1) the party seeking closure advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to the closure, and (4) the court makes findings adequate to support the closure. In the case, the court found that there was clearly insufficient evidence in the record to support the closure, however, because defendant failed to object, he was required to show “cause and prejudice,” in order to prevail in a *habeas* petition. The court determined that defense counsel’s ineffectiveness may be sufficient cause for the failure, and remanded the case for a full evidentiary hearing on the matter.

- *Right to Compulsory Process*

U.S. v. Hardy, 08-5421 (11/20/09)

▸ Defendant was charged with bank fraud and tax evasion for stealing money from her employer. One week prior to trial, defendant provided her counsel with check stubs to support her defense that she was taking money from the company to repay a loan she made to the company. Defendant’s counsel issued a subpoena *duces tecum* to the company for originals of the checks, and the company responded on the day of trial that the records were either lost or destroyed. Thus, defendant’s counsel sought to introduce the check stubs, which had not been turned over to the government in advance. The district court excluded the check stubs under Fed. R. Crim. P. 16 and defendant was convicted. Defendant argued on appeal that her right to compulsory process had been violated.

★ Holding: First, the court held that the district court’s ruling was proper under Rule 16. (*See infra*). Regarding the compulsory process issue, the court held that a defendant’s Sixth Amendment rights must be weighed against “countervailing public interests” such as (1) the integrity of the adversarial process,

(2) the interests of justice, and (3) potential prejudice to the truth-finding process. The court found that defendant's counsel admitted at trial that the origin of the check stubs was unclear, which was why counsel sought to subpoena the records from the company. Thus, the interests of justice weighed in favor of excluding the evidence. Further, defendant and her counsel intentionally withheld the evidence from the government until the day of trial, and accordingly, the integrity of the judicial process weighed in favor of exclusion of the evidence. The actions of the defense left the court with the opinion that it had acted to try to gain a tactical advantage by withholding the evidence. Therefore, the court held that exclusion of the evidence was appropriate and affirmed defendant's conviction.

VII. Other Constitutional Rulings

E. Miscellaneous Constitution Rulings

- *Second Amendment*

Hamblen v. U.S., 09-5025 (12/30/09)

▶ Defendant was a member of the volunteer Tennessee State Guard. After the 9/11/01 terrorist attacks, defendant believed that the governor may call the volunteer State Guard into service. In violation of State Guard regulations, defendant built nine machine guns. As a result, defendant was prosecuted for possession of unregistered machine guns in violation of 18 USC § 922(o) and 28 USC § 5861(d). Defendant argued in a Rule 29 motion for acquittal that the prosecution violated his Second Amendment rights. Defendant was convicted and he appealed.

★ Holding: The court held that, even after the Supreme Court's decision in *Heller* (See P.V. Issue #20), the Second Amendment provides no constitutional right to possess a machine gun. Accordingly, defendant's conviction was affirmed.

VIII. Defenses

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

• *Rule 12(b)(3) - Failure to State an Offense*
U.S. v. Schaffer, 09-3053 (11/12/09)

▶ Defendant was charged with conspiracy to commit computer fraud in violation of 18 USC § 371 and 18 USC § 1030(a)(4). Defendant pled guilty to the offense, but then argued on appeal that the indictment failed to state an offense.

★ Holding: The court first held that, because the issue of whether an indictment states an offense is jurisdictional, it may be raised at any time. Further, the court ruled that, in order to adequately charge a crime, an indictment must (1) fully and expressly set out all of the elements of the offense and give notice to the defendant of the charges faced, and (2) be sufficiently specific to allow a plea of double jeopardy in a subsequent proceeding if charged with the same facts. In the case, the court found that the indictment sufficiently described the conspiracy and the elements of the offense by indicating that defendant and others conspired to access a computer used by the government contractor in order to fraudulently obtain military secrets. Additionally, the court held that the offense was not a legal impossibility because, although the operation was a sting and there were no real secrets, the offense in a conspiracy charge is the agreement to commit the crime, not the crime itself. Accordingly, defendant's conviction was affirmed.

D. Statute of Limitations

- *Statute of Limitations*

U.S. v. Schaffer, 09-3053 (11/12/09)

▶ Defendant was charged with conspiracy to commit computer fraud based on his agreement to access a government contractor's computer system. Defendant moved to dismiss based on the statute of limitations and claimed that all of the overt acts in furtherance of the conspiracy occurred outside the five year limitations

period. Defendant claimed that his receipt of payment for the stolen information was not in furtherance of the conspiracy. The district court disagreed, and defendant appealed.

★ Holding: The court held that the date of the last overt act in furtherance of a conspiracy begins the five year statute of limitations clock. The court found that defendant's participation in the conspiracy was contingent on him receiving payment for the information he stole because defendant had negotiated the fee for his services. Thus, the act of receiving the money and giving the undercover agents the password to access the information was an act in furtherance of the conspiracy. Because it occurred within five years of indictment, the district court's ruling was affirmed.

L. Miscellaneous Defenses

- *Entrapment*

U.S. v. Schaffer, 09-3053 (11/12/09)

► Defendant was charged with conspiracy to commit computer fraud and moved to dismiss the indictment based on entrapment. The district court denied the motion and held that the issue was one for the jury at trial. Defendant subsequently entered a guilty plea, but argued on appeal that the district court erred in denying the motion.

★ Holding: The court held that it is seldom appropriate to grant a pretrial motion to dismiss based on entrapment. In order to warrant such a dismissal, the court would have to find that defendant was entrapped as a matter of law and the "undisputed evidence must demonstrate a patently clear absence of predisposition." The court ruled that defendant had not made such a showing and accordingly the district court's ruling was affirmed.

- *Rule 16 - Discovery Violations*

U.S. v. Hardy, 08-5421 (11/20/09)

► Defendant was charged with bank fraud and tax evasion for stealing money from her employer. One week prior to trial, defendant

provided her counsel with check stubs to support her defense that she was taking money from the company to repay a loan she made to the company. Defendant's counsel issued a subpoena *duces tecum* to the company for originals of the checks, and the company responded on the day of trial that the records were either lost or destroyed. Thus, defendant's counsel sought to introduce the check stubs, which had not been turned over to the government in advance. The district court excluded the check stubs under Fed. R. Crim. P. 16, defendant was convicted, and she appealed.

★ Holding: Pursuant to Rule 16(b), a defendant is required to provide reciprocal discovery when requested by the government. Further, the rule requires a party who discovers additional evidence prior to trial to promptly disclose its existence to the other party or the court. In the case, the court held that exclusion of the check stubs was the proper remedy. Defendant and his counsel were aware of the check stubs at least a week before trial, but failed to disclose their existence until the trial. Defendant provided no logical explanation for the failure to disclose the check stubs when provided to counsel the week before trial. Accordingly, the district court's ruling was affirmed.

X. Jury Issues

C. Voir Dire - Fair and Impartial Jury

- *Fair and Impartial Jury*

Holder v. Palmer, 07-1440 (12/9/09)

► Defendant was charged in state court with sexual penetration of an uninformed person by a person with AIDS. During trial, five jurors responded to *voir dire* questioning that they may be racially biased against interracial relationships. Each of the jurors, however, responded to questions from the court and counsel that they could set aside any biases and be fair and impartial. Counsel for defendant did not challenge any of the five jurors, the

jurors were all empaneled, and defendant was convicted. Defendant lost his state court appeal and filed a federal *habeas* petition claiming that his counsel was ineffective for failing to challenge the jurors. The district court denied the petition and defendant appealed.

★ Holding: In determining whether a juror should be stricken for cause based on impartiality, the relevant question is “did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror’s protestation of impartiality be believed.” On *habeas* review for ineffective assistance of counsel, the court will only reverse a conviction if the defendant can show that the jurors were actually biased. In the case, the court held that each of the jurors stated that they could set aside their beliefs and judge the case fairly. Further, the court found that defendant offered no evidence to the contrary. Accordingly, the court affirmed the district court’s ruling.

XII. Appeal

A. Preserving Error

- *Preserving Error - Bill of Particulars*

U.S. v. Schaffer, 09-3053 (11/12/09)

► Defendant was charged with conspiracy to commit computer fraud and he moved for a bill of particulars and for dismissal of the indictment based on various grounds. The district court denied the motion to dismiss, but never ruled on the request for a bill of particulars before defendant entered his guilty plea. Defendant’s plea was conditional, and preserved his right to appeal the denial of his motion to dismiss. After sentencing, defendant appealed and argued that the bill of particulars should have been granted.

★ Holding: Any non-jurisdictional issue concerning the indictment must be preserved in a plea agreement in order to raise the issue on appeal after a guilty plea. The court held that defendant failed to specifically preserve the bill

of particulars issue in the plea agreement. Further, the court held that the issue was not preserved by defendant’s mention of the pending bill of particulars request in a footnote in the motion to dismiss. The court found that because the bill of particulars argument was not actually presented in the motion to dismiss, and not preserved in the plea agreement, the issue was waived on appeal.

- *Issue First Raised on Appeal*

U.S. v. Archibald, 08-5703 (12/15/09)

► Officers arrested defendant at his front door based on an arrest warrant, and then entered the residence to conduct a “protective sweep.” In defendant’s subsequent prosecution, he moved to suppress evidence and claimed that the “protective sweep” was not authorized. The district court denied the motion and defendant appealed. The government argued for the first time on appeal that the “protective sweep” was authorized because the officers entered the apartment to arrest defendant and the additional evidence was discovered in plain view in an area adjoining where defendant was arrested.

★ Holding: The court first noted that the district court made no factual findings concerning the government’s argument because the argument was not raised in the district court. Thus, the court relied on the long standing rule that issues not raised before the district court are waived on appeal. Further, the court ruled that the failure to raise the issue could not be faulted to defendant because the government bore the burden of proving the constitutionality of the warrantless search of defendant’s residence. Accordingly, the court held that the government’s argument was waived. The court nonetheless ruled alternatively that the government’s argument was lacking in merit. (*See supra*).

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

U.S. v. Rosenbaum, 08-1339 (11/3/09)

▶ Defendant was charged with conspiracy and harboring illegal aliens. After one attempt to flee the country, defendant pled guilty and cooperated with the government. Prior to sentencing, the government moved for a sentence reduction, pursuant to USSG § 5K1.1. Additionally, defendant requested a below-guideline sentence based on his age, poor health, lack of criminal record, mentally disabled son, and cooperation. The district court denied the sentence reduction and sentenced defendant at the statutory maximum, which was within the guideline range. In denying, the § 5K1.1 motion, the court stated that it did not believe that defendant had provided substantial assistance to the government as of the time of sentencing, however, it would consider a Rule 35 motion if further cooperation was provided in the future. Defendant appealed.

★ Holding: Distinguishing the court's previous decision in *Recla* (*See P.V.*, Issue #25), the court held that the district court did not impermissibly base its decision to deny the § 5K1.1 motion on the possibility of a future Rule 35 motion. The court found that the district court properly considered defendant's level of cooperation and simply concluded that it did not rise to the level of substantial assistance required by § 5K1.1. The court noted, however, that district courts should use an "appropriate level of care when discussing Rule 35, if at all, at sentencing." Further, the court ruled that defendant's sentence was substantively reasonable. Accordingly, the district court's ruling was affirmed.

- *Reasonableness of Sentence*

U.S. v. Simmons, 07-3449 (11/23/09)

▶ Defendant was convicted of possession of crack with intent to distribute and being a felon in possession of a firearm. At sentencing,

defendant requested a downward variance from the sentencing guideline range based on the disparity between crack and powder cocaine. The district court did not specifically address defendant's argument regarding the disparity, and sentenced defendant within the guideline range. The district court asked defendant whether he had any additional objections, to which defendant's counsel responded that defendant objected "on both procedural and substantive grounds." Defendant appealed.

★ Holding: First, the court held that defense counsel's response to the district court's inquiry regarding objections to the sentence was too general to preserve defendant's argument regarding the procedural reasonableness of the sentence. Specifically, the court found that "where a party answers the *Bostic* question in the affirmative, but at such a high degree of generality that the district court has no opportunity to correct its purported error," plain error review applies to a claim of procedural unreasonableness.

Second, the court held that the district court's failure to address defendant's argument regarding the crack-powder disparity was not plain error. The court ruled that the argument was a "conceptually straightforward legal argument" with which "the sentencing judge was no doubt familiar." Because the district court said nothing in the record to suggest that the district court did not understand the argument, and the district court repeatedly acknowledged that the guidelines were advisory, the court found no plain error.

Finally, the court ruled that the district court otherwise adequately addressed the factors under 18 USC § 3553, the district court did not misunderstand its authority to deviate categorically from the guidelines, and the sentence was substantively reasonable. Accordingly, the court found no error in the district court's sentencing determinations. Nonetheless, the court remanded the case for resentencing based on the intervening crack

amendment which lowered defendant's guideline range by two levels.

- *Reasonableness of Sentence*

U.S. v. Petrus, 08-1706 (11/23/09)

► Defendant was convicted of conspiring to distribute meth. At sentencing, defendant advocated for a sentence below the guideline range because he was a first-time offender, would face severe deportation consequences in returning to Iraq, took care of his family from a young age, and was willing to cooperate with the government even though his cooperation was not needed. The district court reviewed defendant's arguments, discussed the factors under 18 USC § 3553, and imposed a sentence at the bottom end of the guideline range. Defendant appealed.

★ Holding: The court first ruled that the best practice for district courts is to "explicitly address all of the nonfrivolous arguments that a defendant raised in support of a lower sentence." The court found that the district court indicated on the record that it considered each of defendant's arguments for a lower sentence, and that the district court adequately considered the factors under § 3553. Thus, although the district court did not elaborate on its reasons for rejecting each of defendant's arguments, its sentencing findings were adequate to support the sentence. Additionally, the court held that the sentence was substantively reasonable. Accordingly, defendant's sentence was affirmed.

- *Reasonableness of Sentence*

U.S. v. Novales, 07-3663 (12/16/09)

► Defendant was convicted of participating in a drug conspiracy, and the parties agreed to a joint recommendation for a 105 month sentence. This recommendation was below the statutory mandatory minimum 10 year sentence and was based on defendant's cooperation. At sentencing, the district court imposed a sentence of 110 months without explanation or

discussing the guideline range. In its written judgment that followed, however, the court imposed a sentence of 100 months, with no further explanation. Defendant appealed and his counsel (who also represented him in the district court) filed an *Anders* brief. The Sixth Circuit ruled that there were colorable issues on appeal, and appointed defendant new counsel.

★ Holding: The court ruled that the sentence imposed by the district court was procedurally unreasonable because the district court failed to adequately determine and discuss the appropriate sentencing guideline range in imposing sentence. Accordingly, the case was remanded for resentencing.