

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
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- 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

I. Specific Offenses

- *18 USC § 924(e) - ACCA*

Johnson v. U.S., 08-6925 (3/2/10)

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

conviction for simple battery. The Florida battery statute required proof that the defendant either “intentionally caused bodily harm,” to the victim, “intentionally struck” the victim, or “intentionally touched” the victim. Defendant appealed the district court’s ruling and the Eleventh Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: First, the Court found that no evidence established the precise subdivision under which defendant was convicted. As such, the Court could consider only the least culpable of the acts articulated, namely the “intentionally touched” provision. Second, the Court held that a battery statute prohibiting intentional touching did not constitute a violent felony under the first provision of the ACCA, which defines a violent felony to include an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The Court ruled that the phrase “physical force” in the ACCA provision did not encompass intentional touching. Third, the Court held that the government waived the argument that the battery conviction could be a violent felony under the “otherwise” clause of the ACCA because the argument was not raised in the district court. Accordingly, defendant’s sentence was vacated.

VII. Other Constitutional Rulings

C. First Amendment

• *First Amendment*

U.S. v. Stevens, 08-769 (4/20/10)

► Defendant was charged with the sale of depictions of animal cruelty for commercial gain, pursuant to 18 USC § 48. Defendant moved to dismiss the indictment based on the right to free speech under the First Amendment. The district court denied the motion and defendant was convicted. On appeal, the Third Circuit found § 48 to be facially invalid as a content based restriction on free speech. The government appealed to the

Supreme Court.

★ Holding: In assessing a First Amendment facial attack to a statute, a defendant may proceed on one of two theories: (1) no set of circumstances exists under which the statute would be valid, or that it lacks any “plainly legitimate sweep;” or (2) a substantial number of the applications of the statute are unconstitutional, judged in relation to the statute’s plainly legitimate sweep. In the case, the Court held that § 48 was facially invalid under the second theory because the majority of the speech affected by the statute was protected free speech. Specifically, the Court ruled that, although the statute purportedly targeted “snuff” videos and animal fighting cases, many hunting videos would arguably be encompassed within its prohibition. As such, the Court found that the statute encompassed a significant amount of free speech. Additionally, the Court rejected the government’s argument that all animal cruelty, similar to child porn, was completely outside First Amendment protection. Further, the Court rejected the government’s argument that § 48 was saved from a facial challenge because the government would not, and had not, prosecuted anyone for making hunting videos. The Court emphasized that it could not uphold a statute “merely because the government promised to use it responsibly.” Accordingly, the Court struck down § 48 as facially invalid, and defendant’s conviction was reversed.

VIII. Defenses

J. Speedy Trial Act/IAD

• *Speedy Trial Act*

Bloate v. U.S., 08-728 (3/8/10)

► Defendant was charged with being a felon in possession of a firearm and drug trafficking. Defendant filed a pretrial motion requesting additional time to prepare pretrial motions, which the district court granted. After several continuances and a change of counsel, defendant moved to dismiss the indictment

based on a violation of the Speedy Trial Act and the district court denied the motion. Defendant was convicted after trial and he appealed. The Eighth Circuit affirmed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that, pursuant to 18 USC § 3161(h)(1)(D), the filing of a motion tolls the speedy trial clock until a prompt disposition of the motion by the district court. This tolling is automatic, and requires no finding by the district court that the time is excludable. The Court further ruled, however, that the additional time granted to defendant to file pretrial motions would only be excludable under 18 USC § 3161(h)(7), which permits the district court to toll the speedy trial clock where a delay is necessary to satisfy the ends of justice. Thus, because the district court did not make the ends of justice finding under subsection (h)(7), the speedy trial clock was not tolled during the additional time period granted to defendant to file his pretrial motions. Accordingly, the district court's ruling was reversed and the case remanded.

X. Jury Issues

C. Voir Dire - Fair and Impartial Jury

- *Impartial Jury - Fair Cross-Section*

Berghuis v. Smith, 08-1402 (3/30/10)

▸ Defendant was charged with murder and felony possession of a firearm in Michigan state court. At trial, defendant challenged the *venire* as not being a fair cross-section of the community in that it excluded African Americans. The trial court rejected defendant's challenge and he was convicted. Defendant lost his state court appeal and filed a federal *habeas* petition. The district court denied the petition, but the Sixth Circuit reversed. The state appealed and the Supreme Court granted *certiorari*.

★ Holding: In a fair cross-section claim, a defendant must first make a *prima facie* showing that (1) the excluded group is distinctive, (2) the underrepresentation of the

group is unreasonable in relation to number of such persons in the community, and (3) the underrepresentation is due to systematic exclusion. If a *prima facie* case is established, the government must show that a significant state interest is advanced by the selection process as it exists. In the case, the Court held that no clearly established precedent required reversal of defendant's conviction based on a fair cross-section claim. Specifically, the Court found that defendant's evidence was insufficient to establish that any underrepresentation of African Americans was due to systematic exclusion. Accordingly, the Sixth Circuit's decision was reversed and defendant's conviction was affirmed.

XIII. Post-Conviction Remedies

- *Ineffective Assistance - Immigration Law*
Padilla v. Kentucky, 08-651 (3/31/10)

▸ Defendant pled guilty in state court to drug trafficking. Defendant was a native of Honduras who had been a lawful permanent resident for years. Defendant's counsel advised him that he would not be deported as a result of his conviction because he had been in the U.S. for so long. After defendant's sentencing, he moved the state court for post-conviction relief because his attorney misadvised him as to the immigration consequences of his plea. The trial court denied the motion without a hearing and the state supreme court affirmed. The United States Supreme Court granted *certiorari*.

★ Holding: Applying the standard of *Strickland*, the Court held that defense counsel's performance was deficient. The Court found that the law was clear that defendant's conviction would result in deportation because it was a drug trafficking offense. The Court noted that immigration law is often complex, and that defense counsel's role is more limited when "the deportation consequences of a particular plea are unclear or uncertain." When such ambiguity exists, an

attorney “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” However, in defendant’s case, the drug trafficking conviction clearly required defendant’s deportation. Thus, counsel’s performance was objectively deficient. Accordingly, the Court remanded the case to the trial court for a determination in the first instance as to whether defendant was prejudiced by his counsel’s deficient performance.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *18 USC § 2 - Aiding and Abetting*
U.S. v. Bronzino, 08-1532 (3/16/10)

▶ Defendant owed an illegal gambling debt and paid the creditor with casino chips. The creditor was reluctant to take payment in such a fashion, and defendant urged him to take the chips and instructed the creditor on how to refund the chips at the casino and avoid the currency reporting requirements for transactions involving more than \$10,000. The creditor was eventually prosecuted for money laundering and defendant was charged as an aider and abettor. Defendant argued at trial that his actions did not constitute aiding and abetting, and that he did not have the intent that money laundering be committed. Defendant was convicted and he appealed.

★ Holding: First, the court held that defendant was properly considered an aider and abettor. The court found that defendant’s actions were the catalyst behind the creditor structuring the transactions to avoid the currency reporting requirements. The court noted that defendant’s actions were akin to a “teacher-student” relationship in this regard. Second, the court held that, although defendant and the creditor did not have the same motive for laundering the illegal proceeds at the casino, both acted with the same purpose to

evade the currency reporting requirements. The court thus found that defendant’s intent to aid and abet money laundering was established. Accordingly, defendant’s conviction was affirmed.

- *18 USC § 924(c) - Firearm Enhancement*
U.S. v. Almany, 08-6027 (3/10/10)

▶ Defendant was charged with a 10-life cocaine offense, pursuant to 18 USC § 841(a) and (b)(1)(A), and possession of a firearm in furtherance of drug trafficking. At sentencing, the district court imposed a 10 year sentence for the cocaine and a consecutive 5 year sentence for the gun. Defendant appealed and his appellate attorney filed an *Anders* brief. Defendant filed a *pro se* brief arguing that the § 924(c) conviction did not have to run consecutively to the drug conviction. The Sixth Circuit directed the attorney to brief the issue, and defendant’s counsel filed a brief arguing that defendant was incorrect in his interpretation of the law.

★ Holding: The court held that the sentence for the § 924(c) conviction was not required to run consecutively to the cocaine sentence. The court relied on the language in § 924(c) that provided that the sentence was to run consecutively “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law.” The court found that, because defendant’s cocaine offense required a mandatory 10 year sentence, the sentence for the § 924(c) conviction was not required to run consecutively. Accordingly, the court vacated defendant’s sentence.

- *18 USC § 1001 - False Statement*
U.S. v. Algee, 08-3196 (3/24/10)

▶ Defendant was a postal employee who was caught in a sting operation in which marked money was placed in a postage stamp machine. Upon being questioned by agents, defendant stated that he only got \$76 dollars

out of the machine (when the marked amount missing was \$186) and that he put all of the money he took from the machine into a white bag in the post office safe. The remaining marked money was discovered in the safe in different locations, intermingled with other money. Defendant was charged, among other things, with making two false statements to the agents. Defendant argued at trial that he was confused when he put the money in the safe and must have put some of it in the bag and some at other places in the safe. Defendant was convicted and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: The elements of a § 1001 prosecution are as follows: (1) the defendant made a statement; (2) the statement was false; (3) the defendant knew of its falsity; (4) the statement was relevant to the function of a federal agency; and (5) the statement was material. The only element at issue was defendant's knowledge, and the court held that sufficient circumstantial evidence was presented. Defendant's statement to the agents was made within an hour of defendant putting the money in the safe, the money in the white bag was significantly less than what was in the machine, and the other marked bills were interspersed with other money in the safe in a manner that suggested intentional mixing. Accordingly, defendant's conviction was affirmed.

- *18 USC § 1621 - Perjury - Materiality*

U.S. v. Wallace, 07-2230 (3/16/10)

- ▶ Defendant was charged with perjury, participating in a drug conspiracy, and using a communications facility to receive drug proceeds. At trial, the government presented evidence that defendant testified at her first trial that she went by the name "Jean," and thus did not use a fake name when she mailed a package, using the name "Jean," that turned out to contain drugs. The government presented

evidence at the perjury trial that no one who knew defendant called her by the name "Jean." Further, defendant testified at her first trial that she was not handed a \$500 Western Union money order, but that it was instead handed to a codefendant. At the perjury trial, she stated that she could not remember who the \$500 was handed to, but that it ended up with the codefendant. The jury convicted defendant of both counts of perjury. Defendant appealed and argued that the two false statements were not material.

★ Holding: The court held that a false statement may be considered material if "a truthful statement" on the subject "might have assisted or influenced the jury in its investigation." The court found that defendant's false testimony that she went by the name "Jean" was material because she was caught mailing a package with drugs in it and using that name. Defendant's use of a false name assisted the government in proving that defendant was trying to disassociate herself from the package, thus inferring her guilty knowledge. As such, the issue was material. Further, the court held that it was material whether defendant herself was handed the \$500 Western Union money order because she was charged with using a communication facility to receive drug proceeds. Thus, it was relevant whether she "intentionally cashed and received money from Western Union or unknowingly aided" the codefendant. Accordingly, defendant's perjury convictions were affirmed.

- *18 USC § 1956 - Money Laundering*

U.S. v. Smith, 08-2345 (4/7/10)

- ▶ Defendant was charged with participating in a drug conspiracy and money laundering. Although defendant did not object to the jury instructions at trial, defendant argued on appeal that the district court should have instructed the jury that the "proceeds" that he laundered were the "profits" from the drug enterprise as opposed to the "receipts."

★ Holding: In the Supreme Court’s decision in *Santos* (See P.V. Issue #20), the Court held that the term “proceeds” in a § 1956 prosecution referred only to “profits” from an illegal activity, not the “gross receipts,” at least when the underlying offense was illegal gambling. In the present case, the court ruled that the plurality decision in *Santos* did not dictate the meaning of the term “proceeds” in defendant’s case because his underlying offense was a drug conspiracy, not illegal gambling as in *Santos*. Because the drug conspiracy carried higher statutory maximum penalties than money laundering, the concerns underpinning *Santos* were not present, and the court found that it was free to construe the term “proceeds” consistently with precedent established prior to *Santos*. Accordingly, the court held that the term “proceeds” in a § 1956 prosecution referred to the “gross receipts” from the criminal activity, at least where the underlying offense was a drug conspiracy. Thus, defendant’s conviction was affirmed.

- *18 USC § 2250(a) - SORNA*

U.S. v. Utesch, 08-5828 (3/2/10)

- ▶ Defendant was charged with failing to register as a sex offender from September 1, 2006 to November 12, 2007. The sex offense requiring defendant to register occurred in 1997. Defendant moved to dismiss the indictment and argued that no valid regulation required his registration as of the latest date in his indictment, namely November 12, 2007. The district court denied the motion, defendant entered a conditional plea, and he appealed.

★ Holding: When SORNA was enacted, it took immediate effect with regard to anyone convicted of a sex offense after its effective date. With regard to sex offenders convicted prior to SORNA’s enactment, it permitted the Attorney General to promulgate regulations regarding its applicability. On February 28, 2007, the Attorney General issued an interim regulation specifying that SORNA applied

retroactively, but did not comply with the notice and comment publication requirements of the Administrative Procedure Act (APA). The Attorney General indicated in the regulation that it would take comment until April 30, 2007. The court held, however, that the Attorney General never provided any indication that the notice-and-process period was actually carried out. Thus, the court ruled that the interim regulation never became effective.

On May 30, 2007, the Attorney General issued the preliminary SMART guidelines which promulgated regulations regarding the applicability of the retroactivity provision of SORNA, and stated that comments would be accepted until August 1, 2007. The Attorney General did not actually issue the final SMART guidelines, however, until July 2, 2008, with an effective date of August 1, 2008. As such, the court held that August 1, 2008 was the first date that the retroactivity component of SORNA could be enforced against a defendant.

Accordingly, in the case, the court found that the Attorney General’s regulations were not effective against defendant because the latest date in his indictment was November 12, 2007, which was over eight months before the retroactivity provision of SORNA became effective. Thus, the regulation was invalid against defendant and his conviction was reversed.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2D1.1(b)(1) - Firearm Enhancement*

U.S. v. Woods, 07-5463 (4/27/10)

- ▶ Defendant was convicted of being involved in a meth conspiracy. At sentencing, the district court determined that a two-level enhancement was appropriate because defendant possessed two firearms during the course of conspiracy. The enhancement was based on two guns that were possessed in a duffle bag by a coconspirator. There was no

evidence that defendant himself possessed the guns, or that defendant had actual knowledge that the guns were possessed by the conspirator. In applying the enhancement, the district judge found that it was reasonably foreseeable to defendant that someone would possess a firearm because drug dealers tend to possess guns to protect themselves. Defendant appealed.

★ Holding: The court held that a firearm's presence is not always foreseeable in a drug conspiracy. When there are not "huge quantities" of drugs involved in the conspiracy, additional evidence of a defendant's expectation of a firearm must be presented. Because the offense involved only 53.64 grams of pseudoephedrine (precursor to meth), the court ruled that additional evidence was necessary before defendant could be held responsible for the firearms. Finding no such evidence in the record, the court vacated defendant's sentence.

B. Chapter Three - Adjustments

- *3C1.2 - Reckless Endangerment*

U.S. v. Woods, 07-5463 (4/27/10)

► Defendant was convicted for participating in a drug conspiracy. At sentencing, the district court applied a two level enhancement for reckless endangerment during flight. The court found that two unmarked cars attempted to pull defendant over and that defendant took off in his vehicle, eventually ramming another car. Defendant appealed.

★ Holding: In order to establish the propriety of an enhancement under USSG § 3C1.2, the government must prove that the defendant (1) recklessly (2) created a substantial risk of serious injury (3) to another (4) in the course of fleeing from law enforcement (5) during the commission of the offense, in preparation for the offense, or while attempted to avoid detection for the offense. In the case, the court held that defendant did cause a risk of serious injury during flight from the

offense by ramming another vehicle. Further, the court found that defendant knew that the unmarked cars were law enforcement based on the flashing strobe lights in the cars and the fact that defendant originally pulled over but then took off. Accordingly, the application of the enhancement was affirmed.

C. Chapter Four - Criminal History

- *4B1.1 - Career Offender*

U.S. v. Anglin, 08-5018 (4/7/10)

► Defendant was convicted of bank robbery. At sentencing, the district court determined that defendant was a career offender based, in part, on defendant's prior federal conviction for escape. Defendant argued on appeal that the Supreme Court's recent decision in *Chambers* (See P.V. Issue # 24) mandated that the escape offense was not a crime of violence.

★ Holding: The court held that the federal escape statute, 18 USC § 751, contains at least three distinct crimes: (1) failure to report; (2) walkaway escapes; and (3) escapes from secure facilities, including offenses involving the use of force. The court ruled that, after *Chambers*, escape could no longer categorically be defined as a crime of violence. Thus, because the escape statute included both violent and non-violent offenses, reference to the indictment and other appropriate documents was mandated. Accordingly, the court remanded the case to the district court for proper consideration of these documents in the first instance.

D. Miscellaneous Guidelines

- *5C1.2(a) - Safety Valve*

U.S. v. Pena, 09-3073 (3/18/10)

► Defendant was convicted of participating in a marijuana conspiracy and at sentencing requested that the district court apply the safety valve provision. The government agreed that defendant met four of the five criteria, however, argued that defendant had not disclosed information that he possessed

regarding the drug supplier. Defendant asserted that the district court should nonetheless grant the safety value reduction because defendant was in fear for his safety if he disclosed the information and the government already had information about the supplier from another source. The district court rejected defendant's argument, and he appealed.

★ Holding: Pursuant to USSG § 5C1.2(a), in order to obtain a reduction a defendant must "truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The court held that there was no public safety exception where a defendant was concerned for the safety of himself or his family. Further, the court ruled that the guideline required a defendant to provide the information even if the government obtained it from another source. Accordingly, defendant's sentence was affirmed.

III. Evidence

A. Article IV - Relevancy

- 404(b) - Background Evidence

U.S. v. Algee, 08-3196 (3/24/10)

► Defendant was charged with theft and making false statements in relation to his taking of money from a postage stamp machine during a sting operation. At trial, defendant moved to exclude evidence that he was the target of the sting operation because of prior shortages in the machine. The district court ruled that the government was permitted only to present evidence that there had been monetary discrepancies in the past. During cross examination, however, defendant elicited from the inspector that the discrepancies included overages as well as shortages. In response, the government then introduced evidence that defendant was the target of the investigation because he was the only one with access to the machine. Defendant was

convicted and appealed.

★ Holding: The court held that the general evidence about discrepancies in the past was admissible as background evidence to show why the government placed marked bills in the machine and were conducting surveillance. Further, the court found that defendant's cross examination did not necessarily open the door to the government's additional evidence that defendant was the target of the investigation. Nonetheless, the court found no error in the admission of the latter evidence because the jury already knew that there were shortages in the machine and that defendant was the only person with access to it. Thus, defendant suffered no prejudice by the specific evidence that he was the target because the jury could have inferred that information anyway. Accordingly, defendant's conviction was affirmed.

B. Articles VI-VII - Witness and Expert

- 702 - Expert Testimony

U.S. v. Smith, 08-2345 (4/7/10)

► Defendant was charged for being a driver in a drug conspiracy. At trial, the government presented summary expert testimony from an agent that (1) described the structure of the drug conspiracy, and (2) identified defendant as a driver. The district court admitted the evidence, but failed to provide the jury with any form of instruction about the difference between fact and expert testimony, or the limited purpose of summary evidence. Defendant was convicted, and he appealed.

★ Holding: The court first held that the summary expert testimony about the structure of the conspiracy was proper. The court found that the structure of a drug conspiracy is not within the knowledge of the average juror and that the expert's testimony was relevant in the case. Second, the court held that the expert's identification of defendant as a driver, as part of his summary testimony, was appropriate. The court ruled that there was no dispute that

the drug organization existed, distributed large amounts of drugs, and laundered money. The testimony identifying defendant as a driver was cumulative of other credible evidence, but did not serve to improperly bolster the other evidence in the case. Third, the court held that it was error for the district court to fail to provide jury instructions regarding the use of the expert summary testimony. Nonetheless, because defendant did not object to the lack of proper jury instructions, the court reviewed for plain error and found that defendant's substantial rights were not violated. Accordingly, defendant's conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Reasonable Suspicion-Length of Detention*
U.S. v. Everett, 09-5111 (4/6/10)

- ▶ Defendant was stopped by an officer for speeding. During the course of the stop, the officer smelled alcohol but determined that defendant was not legally drunk. At the conclusion of the stop, the officer asked defendant if he had "any weapons or narcotics." Defendant replied that he had a gun and an open container in the car. In defendant's subsequent prosecution, he moved to suppress the evidence and argued that the question about weapons and narcotics unlawfully prolonged the stop. The district court denied the motion and defendant appealed.

- ★ Holding: In *Johnson* (See P.V. Issue #24), the Supreme Court held that questions by officers that are unrelated to a traffic stop are permissible so long as they do not "measurably extend" the stop. In this case, the court held that *Johnson* does not require a bright-line "no prolongation" rule. Instead, the court ruled that it must assess the questioning at issue based on concepts of reasonableness and the totality of the circumstances. The court found that the officer asked only a single question at the end

of a traffic stop, and that the question pertained to whether defendant had any weapons, thus relating to officer safety. As such, the court found that the additional question from the officer did not violate the rule of *Johnson*. Additionally, the court noted that the question was consensual in nature, and not "sufficiently coercive" that it independently triggered the Fourth Amendment. Accordingly, the district court's ruling was affirmed.

- *Reasonable Suspicion-Length of Detention*
U.S. v. Smith, 08-2345 (4/7/10)

- ▶ Defendant and a passenger were stopped for speeding. During the course of issuing the ticket, officers obtained the following information: (1) the car was traveling in a "known drug corridor;" (2) the car was owned by a non-present third party; (3) the passenger told police an implausible story about their destination; (4) the passenger contradicted herself about the friend she was traveling to visit; and (5) defendant's identification came back as a false number. As a result, officers held the passenger in the police car and continued to question defendant separately. Defendant contradicted the passenger's story about their destination, and the officers asked defendant for permission to search the car. Defendant granted permission and, in the search, the officers found a secret compartment which led to a second compartment containing drug money. In his subsequent prosecution for participating in a drug conspiracy, defendant moved to suppress the evidence. The district court denied the motion and defendant appealed.

- ★ Holding: The court held that the five factors listed by the officers were sufficient for reasonable suspicion to extend the stop beyond the issuance of the speeding ticket. Further, the court held that defendant's inconsistent answer about his destination gave the officers additional suspicion to justify the subsequent

question to search the car. The search itself was valid based on defendant's consent. Accordingly, the district court's ruling was affirmed.

C. Warrant Exceptions

- *Warrant Exception-Exigent Circumstances*
Schreiber v. Grand Rapids, 09-1337 (3/4/10)

- ▶ Officers received an anonymous 911 call reporting that a teenage girl was possibly being beaten at a residence. The caller was on the phone with the minor when the minor's father was heard shouting violently at her, and the call abruptly ended. An officer arrived at the home and heard a male voice shouting. The officer knocked on the door and it was opened by a young boy. The officer could see the father inside yelling at someone. The father then came to the door and shouted obscenities at the officer. The officer entered the residence and observed the teenage girl in an extremely distraught state. The father continued to yell at the girl and the officer. At one point during the altercation, a social worker talked on the phone to the officer and requested that the girl go to a shelter for her safety. After further altercations, the father was arrested, and received significant injuries during his arrest. The father later sued the officer and police department, pursuant to 42 USC § 1983, for unlawful entry without a warrant and excessive force. The district court granted summary judgment to the officer and the father appealed.

- ★ Holding: The court held that the officer's entry into the father's home was justified under the exigent circumstances warrant exception for rendering emergency aid or protection of an occupant. The court found that the anonymous 911 call combined with the officer's observations at the scene warranted the officer's intrusion to ensure that the teenage girl was safe. Further, the court held that the officer's continued presence in the home after the initial intrusion was justified by the father's continued antics and the call received from the

social worker. Accordingly, the court held that the district court's ruling regarding the warrantless entry was affirmed.

D. Consent Searches and Seizures

- *Consent Search - Apparent Authority*
U.S. v. Taylor, 09-3019 (4/13/10)

- ▶ Officers went to an apartment to arrest defendant on a warrant. Defendant was located in his underwear in a bedroom of the apartment and he was arrested. The officers asked the female tenant of the apartment for permission to search. She granted permission, and the officers searched a separate bedroom wherein they found only men's clothing and some children's items. In a closet of the bedroom they found a closed shoe box with a piece of men's clothing partially covering it. The officers opened the shoe box, admittedly hoping to find contraband belonging to defendant, and found a firearm. Defendant was prosecuted for being a felon in possession of a firearm and the district court granted the motion. The government appealed. The government conceded on appeal that the tenant had no actual authority to consent to a search of the shoe box, but argued that the search was justified by the doctrine of apparent authority.

- ★ Holding: The court held that the ownership of the shoe box was, at best, ambiguous. The court found that only men's clothing was in the room and the shoe box, although not an item that "historically commands a high degree of privacy," was something often used to store private items. Further, defendant took precautions to preserve its privacy by placing it in a corner of a closet in a little-used room and partially covering it with clothing. Finally, the court noted that the district court found that the officers would not likely have opened the box if they thought it did not belong to defendant. Accordingly, the court found no apparent authority for the officers' actions in opening the shoe box, and affirmed the district court's ruling.

V. Fifth Amendment

D. Double Jeopardy

- *Double Jeopardy*

Colvin v. Sheets, 08-4353 (3/12/10)

▶ Defendant was charged in state court with attempted murder and felonious assault. His first trial ended in a hung jury and a mistrial. Prior to the second trial, the parties and the trial court agreed that no one would mention the fact of the first trial or the hung jury. Nonetheless, during the defense closing argument, counsel stated that the case was “tried before,” and that “they couldn’t convince the jury then and they can’t do it now.” After hearing argument about the comment, and considering possible limiting instructions for the jury, the trial court declared a mistrial. Defendant was re-prosecuted and he moved for dismissal based on double jeopardy. The court denied the motion, defendant was convicted, he lost his state court appeal, and he filed a federal *habeas* petition. The district court granted the petition and reversed defendant’s conviction. The state appealed.

★ Holding: Once jeopardy attaches, a retrial of a defendant after the granting of a mistrial is barred unless there is a manifest necessity for the mistrial, or the defendant either requests or consents to a mistrial. The court held that there was a manifest necessity for the mistrial because the defense “aired improper and prejudicial statements designed to influence the jury’s verdict that could not be cured.” Accordingly, the district court’s ruling was reversed, and defendant’s conviction was affirmed.

- *Double Jeopardy*

U.S. v. Mardis, 09-5696 (3/31/10)

▶ Defendant was investigated by the federal grand jury for murdering a county codes enforcement officer. The grand jury did not initially indict, and the government held its investigation in abeyance. In the meantime, defendant was indicted in state court and

negotiated a plea agreement for second degree murder. In return, defendant agreed to help state authorities locate the missing dead body. Subsequently, the government indicted defendant for a civil rights murder. Defendant moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion and defendant appealed.

★ Holding: Under the dual sovereignty doctrine, a defendant may be subjected to prosecutions for the same offense by separate sovereigns. The court recognized that a very narrow exception exists to the doctrine where the state prosecution is merely a tool of the federal authorities, such that it is a sham prosecution. The court noted that no court has found that the sham prosecution exception has been met, and ruled that it was not properly applied to defendant’s case. Although state and federal agents cooperated in the investigation and timing of their prosecutions, the state prosecution was not merely a tool of the federal government.

Additionally, the court held that the *Petite* policy, which internally requires the government obtain the permission of the Assistant Attorney General prior to prosecuting a defendant for the same offense prosecuted in state court, is not enforceable by a defendant in federal court. Accordingly, defendant’s conviction was affirmed.

E. Miscellaneous Fifth Amendment

- *Due Process - Right to Present a Defense*
Miller v. Brunsman, 09-3151 (3/24/10)

▶ Defendant was charged with murder and offered to present a defense at trial that another man committed the murder. Defendant proffered evidence that the other man had a motive to kill for money, a drug addiction, was present in the same city as the murder, possessed a knife (the victim was murdered with a knife), and had the intent to kill someone. The state court found that there was an insufficient nexus between the victim and

the other man, and excluded all of defendant's evidence under the state evidence rule equivalent of 403. The state court ruled that the evidence had minimal probative value and would likely lead to juror confusion. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed. Defendant argued on appeal that the state court's evidentiary ruling violated his right to present a defense.

★ Holding: Applying the Supreme Court's decision in *Holmes* (See P.V. Issue #8), the court held that defendant's right to present a defense was not violated. The court determined that the state court properly applied Rule 403 and determined that there was an insufficient connection between the victim and the other man who defendant claimed was the murderer. Accordingly, defendant's conviction was affirmed.

VII. Other Constitutional Rulings

B. Art. 1, § 10, *Ex Post Facto* Clause

- *Ex Post Facto*

U.S. v. Coccia, 08-1915 (3/19/10)

▶ Defendant was charged with violating the conditions of his supervised release. The district court revoked defendant's supervised release, and ordered as a condition of his new term that he submit a DNA sample to the probation officer. Defendant submitted the sample, but appealed the district court's ruling. Defendant argued on appeal that the taking of his DNA violated the *Ex Post Facto* Clause because the DNA Act did not require defendant to submit DNA at the time of his underlying conviction for being a felon in possession of a firearm.

★ Holding: The court first held that the matter was reviewable on appeal because, even though defendant had already submitted the sample, he requested removal of his DNA from the federal database. Second the court held that the order to take defendant's DNA did not

violate the *Ex Post Facto* Clause. The court found that the DNA Act was civil and non-punitive on its face, and thus could only violate *ex post facto* if it was clearly punitive in effect based on a consideration of the following 7 factors: (1) whether it involves an affirmative disability or restraint; (2) whether it has historically been considered punishment; (3) whether a finding of scienter is required; (4) whether its operation promotes the traditional aims of punishment, retribution, and deterrence; (5) whether the conduct to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it is excessive in relation to the alternative purpose assigned. Considering the 7 factors, the court determined that the taking of the DNA sample was non-punitive and accordingly affirmed the district court's order.

VIII. Defenses

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

- *Pretrial Motions*

U.S. v. Turner, 07-3481 (3/19/10)

▶ Defendant was charged with numerous firearm and narcotics offenses. Defendant moved to withdraw his first attorney, and then had disagreements with his second attorney. The district court declined to withdraw defendant's second attorney, so defendant filed his own *pro se* motion to dismiss the case. The motion was filed after the deadline set by the district court for the filing of motions, and the court accordingly denied the *pro se* filing. Defendant was convicted at trial and he appealed. Defendant argued on appeal that certain evidence should have been suppressed based on his motion to dismiss.

★ Holding: Pursuant to Fed. R. Crim. P. 12(e), a party waives any motion to suppress that is not filed by the deadline set by the district court. The court held that because defendant's motion was filed 9 days after the deadline set by the district court, defendant had

waived the suppression issue. Accordingly, defendant's assignment of error was denied.

I. Mistrial

- *Mistrial*

U.S. v. Smith, 08-2345 (4/7/10)

▶ During defendant's trial on drug conspiracy charges, the government presented testimony to show that defendant had not filed tax returns during the time period involved. Defendant objected to the testimony and requested a mistrial. The district court sustained defendant's objection, however denied the mistrial. Defendant was convicted and he appealed.

★ Holding: In assessing whether a mistrial is required, the court must consider whether "the question asked was so clearly improper and prejudicial to the defendant that the harm could not be erased by any instruction which the court might give." The court held that the evidence of defendant's failure to file tax returns was at least arguably relevant to defendant's claim at trial that he was legitimately employed. Further, the court ruled that the tax return evidence was only marginally prejudicial. Thus, the court found that the denial of the mistrial request was proper and defendant's conviction was affirmed.

J. Speedy Trial Act/IAD

- *Speedy Trial Act*

U.S. v. Turner, 07-3481 (3/19/10)

▶ Defendant was charged in a criminal complaint with being a felon in possession of a firearm and ammunition. The court ordered defendant to be transported to a Bureau of Prisons facility for a psychiatric evaluation. After a lengthy delay in transportation, defendant was evaluated and returned to the district court. Defendant was indicted on the two counts listed in the complaint and eight additional narcotics and firearms counts. Defendant moved to dismiss the indictment

based on a violation of the Speedy Trial Act for the failure to indict him with 30 days of his arrest, pursuant to 18 USC § 3161(b). The district court denied the motion and held that all of the time between its order for the evaluation and defendant's return was tolled under the Speedy Trial Act. Defendant was convicted after a trial and he appealed.

★ Holding: Relying on the court's recent decision in *Tinklenberg* (See P.V., Issue #22), the court held that, pursuant to § 3161(h)(1)(F), any delay beyond 10 days between the order to transport a defendant for an evaluation and the defendant's arrival at the facility was presumed unreasonable. Because the court found that the district court issued its order to transport defendant on June 8, and defendant did not arrive at the facility until August 12, the delay beyond ten days was presumed unreasonable. The government offered no evidence to rebut that presumption. Thus, the court found a violation of the 30 day speedy trial clock. The court ruled that the violation applied only to the two charges listed in the criminal complaint, not the remaining eight charges in the indictment. Accordingly, the case was remanded to the district court for a determination as to whether the dismissal should be with or without prejudice.

L. Miscellaneous Defenses

- *18 USC § 3006A - Appointed Counsel*

U.S. v. Wilson, 08-6229 (3/1/10)

▶ Defendant was charged with conspiracy to commit wire fraud and false statements on tax returns. At the time of arraignment, defendant was incarcerated on other charges, and thus qualified as indigent. Defendant was appointed counsel and proceeded to trial. During the proceedings before the district court, defendant was released from prison and began to make substantial income. Defendant was acquitted at trial, but the district court held a hearing to determine defendant's financial ability to pay for counsel. The court determined that

defendant made \$134,000 in income while being represented by appointed counsel, and lived a lavish lifestyle. The court ordered defendant to reimburse \$52,305 for the services of his appointed counsel, pursuant to § 3006A, and that defendant repay the money in “reasonable monthly payments.” Defendant appealed.

★ Holding: The court held that, pursuant to § 3006A, a court may order a defendant to pay for an appointed attorney if it finds that “funds are available for payment from or on behalf of a person furnished representation.” The court found that the district court met its obligation to conduct a thorough inquiry into defendant’s finances. Further, the court ruled that the district court properly determined that a defendant may be ordered to pay for counsel on a “going-forward” basis as well as for counsel “already provided on a backward-looking basis.” Finally, the court concluded that the district court did not commit an abuse of discretion in determining that defendant had sufficient funds to pay for counsel given his income, relative lack of expenses, and his lavish lifestyle. Accordingly, the district court’s order was affirmed. The court noted that the district court was required to determine the precise amount of monthly payments defendant would pay and that the district court could take into account defendant’s current financial circumstances on remand in reaching a decision on both the amount of monthly payments and whether the total reimbursement amount should be decreased.

IX. Plea & Sentencing Hearings

A. Plea Agreements/Plea Hearings

• Plea Agreements - Appeal Waivers

U.S. v. Almany, 08-6027 (3/10/10)

► Defendant was charged with narcotics and firearm offenses and entered into a plea agreement that waived his right to appeal. At the plea hearing, the district court informed Defendant as follows: “do you understand that

under some circumstances you or the government may have the right to appeal any sentence that I impose?” The district court did not alert defendant to the appeal waiver or question whether he understood it. After his sentencing, defendant appealed.

★ Holding: Pursuant to Fed. R. Crim. P. 11, a district court must ensure that a defendant understands the terms of the plea agreement when waiving an appeal. The court held that the district court committed plain error by failing to probe defendant’s understanding of the appellate waiver. Accordingly, the court found that the appellate waiver was unenforceable and permitted defendant to proceed with the merits of the appeal. (*See supra*).

B. Sentencing

• Sentencing - Restitution - Victim

In re McNulty, 10-3201 (3/1/10)

► McNulty was an employee of a company who committed antitrust violations by entering unlawful customer allocation agreements in the packaged ice industry. McNulty was fired by the company based on his refusal to participate in the conspiracy, and was blackballed in the industry because he was a cooperating government witness. At the company’s sentencing, McNulty sought restitution under the Crime Victims’ Rights Act (CVRA), 18 USC § 3771. The district court denied McNulty’s request and found that he was not a victim under § 3771. Further, the court held that McNulty was not entitled to restitution as a condition of the company’s probation because the antitrust violation was not an enumerated offense in the restitution statute, 18 USC § 3663(a). McNulty sought a writ of mandamus in the Sixth Circuit.

★ Holding: The court held that McNulty was not a victim under the CVRA. The court held that a victim under the CVRA is one who is “directly and proximately harmed” as a result of the “offense of conviction.” The court

concluded that the harms to McNulty were not criminal in nature, and were not actions “inherent in the crime of conspiracy to violate antitrust laws,” to which the company pled guilty. Further, the court held that the district court did not abuse its discretion in refusing to impose restitution as a condition of probation. Accordingly, the petition for writ of mandamus was denied.

D. Miscellaneous Plea & Sentencing

• *18 USC § 3145 - Bond Pending Sentencing*
U.S. v. Christman, 10-5046 (3/3/10)

▶ Defendant pled guilty to conspiracy to manufacture meth and possession of pseudoephedrine. At the plea hearing, defendant requested that the district court continue his release on bond pending sentencing. The district court denied defendant’s request and held that defendant was subject to mandatory detention under 18 USC § 3143(a)(2). In so holding, the court determined that it could not consider whether defendant established exceptional reasons supporting release under § 3145(c). Defendant filed an interlocutory appeal.

★ Holding: First, the court found that § 3143(a)(2) requires detention of an individual who is convicted of an offense that carries a maximum term of imprisonment of 10 years or more under the Controlled Substances Act. Second, the court ruled that § 3145(c) provides an exception to the mandatory detention rule where a defendant can show “exceptional reasons” warranting his or her release pending sentencing. As such, the court held that the district court erred in determining that it had no discretion to permit defendant to remain free on bond pending sentencing. Thus, the district court’s ruling was reversed and the case remanded for the district court to consider whether defendant provided “exceptional reasons” warranting his release.

X. Jury Issues

A. Jury Instructions

• *Jury Instructions - Specific Unanimity*
U.S. v. Algee, 08-3196 (3/24/10)

▶ Defendant was a postal employee who was caught in a sting operation for taking money from a postage stamp machine. During the investigation, defendant made false statements to various individuals about the money he took. The indictment charged defendant with making false statements under 18 USC § 1001, however, it did not identify any specific statement. At trial, defendant requested a specific unanimity jury instruction which would require the jury to identify the precise statement made by defendant that was false. The district court declined to give the instruction, defendant was convicted, and he appealed.

★ Holding: A jury instruction addressing specific unanimity is only required if (1) the case is “extremely complex,” (2) there is a variance between the proof at trial and indictment, or (3) there is a tangible risk of jury confusion. The court found that the case was not complex and there was no variance. Further, the court ruled that the false statements made by defendant to the various investigators were “materially identical.” Thus, if the jury found one of the statements to be false, it necessarily found all of the statements to be false. Accordingly, there was no potential for juror confusion and defendant’s conviction was affirmed.

E. Miscellaneous Jury Issues

• *Fed. R. Crim. P. 30(b) - Closing Argument*
U.S. v. Algee, 08-3196 (3/24/10)

▶ Defendant was charged with theft and making false statements to inspectors. At trial, the district court provided a copy of the jury instructions to defense counsel just seconds before the government began its closing argument. Defendant had requested a specific unanimity instruction, but it was not included

in the jury instructions. The district court did not indicate to defendant's counsel prior to closing argument why the instruction was denied. After closing was completed, the court informed the defense that the proposed instruction was a correct statement of the law, but that the court did not deem it necessary in the case. Defendant was convicted and he appealed.

★ Holding: Rule 30(b) requires a district court to "inform the parties before closing arguments how it intends to rule on the requested instructions." The court found that the rule is based on "basic concepts of fairness" and that it permits "counsel to conform their arguments to the law as it will thereafter be presented by the judge to the jury." The court ruled that the district court erred in failing to provide defense counsel with adequate opportunity to review the jury instructions and prepare the closing argument in accordance with the law. However, the court ruled that, in order to obtain reversal, a defendant must show that he or she was "unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments." The court found potential prejudice in the fact that the district court failed to explain its reasons for denying the specific unanimity instruction until after closing, thus prohibiting counsel from discussing the issue during closing argument. Nonetheless, the court found that the inability to argue the issue caused no real harm to the defense theory of the case. Accordingly, defendant's conviction was affirmed.

XII. Appeal

A. Preserving Error

- *Issue First Raised on Appeal*

U.S. v. Wallace, 07-2230 (3/16/10)

▶ Defendant was charged with participating in a drug conspiracy and she testified at her first trial. The trial ended in a hung jury and a mistrial, and the government added perjury

counts to defendant's indictment for the second trial. Defendant did not move to sever the perjury counts, but instead consented to the joint trial. In the second trial, defendant was convicted of all counts. Defendant appealed and argued on appeal that the court should have severed the perjury counts and that her Fifth Amendment rights were violated.

★ Holding: The court held that defendant waived her arguments on appeal. Rule 12 of the Federal Rules of Criminal Procedure requires a motion to sever to be raised prior to trial and indicates that the objection is waived if not so raised. As such, the court ruled that defendant waived her right to argue that the joinder of the counts was improper or that the joinder impacted her Fifth Amendment rights. Accordingly, defendant's conviction was affirmed.

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

U.S. v. Wallace, 07-2230 (3/16/10)

▶ Defendant was convicted of drug trafficking and perjury. At sentencing, defendant argued for a below guideline sentence primarily because a more culpable codefendant received half of the jail time that defendant was facing. The government argued that the codefendant cooperated and had sickle cell anemia, and that defendant received an obstruction of justice enhancement. The district court did not address the argument and sentenced defendant to twice the sentence of the codefendant. The district court then asked defendant for further objections, and she provided none. Defendant appealed.

★ Holding: First, the court noted that district courts are not required, under 18 USC § 3553(a), to consider disparity between codefendants, only national sentencing disparity. However, courts are required to consider any non-frivolous argument raised by either of the parties. The court found that defendant's argument about disparity with the

codefendant's sentence was non-frivolous. Further, the district court completely failed to acknowledge the argument. Thus, even though the government presented reasons as to why the disparity was proper in the case, the district court provided no evidence that it considered the argument. The court held that the district court's failure to consider defendant's argument rendered the sentence procedurally unreasonable, even under plain error review. Accordingly, defendant's sentence was vacated.

- *Reasonableness of Sentence*

U.S. v. Tristan-Madrigal, 09-1003 (4/20/10)

- ▶ Defendant was convicted of illegally reentering the U.S. after deportation. At sentencing, the district court imposed an upward variance from the guideline range from 15-21 months up to 36 months imprisonment. The court based the variance on defendant's repeated DUIs and illegal reentries into the country, and his need for alcohol treatment while incarcerated. Defendant appealed.

- ★ Holding: First, the court held that the district court's reliance on prior DUIs and illegal reentries was proper. The court ruled that the district court appropriately determined that defendant posed a significant danger to society based on four DUI convictions, the fourth being a felony DUI, and that an upward variance was warranted on that basis, especially in combination with defendant's repeated illegal reentries into the U.S. Further, the court held that the upward variance on this basis was proper even though an upward departure for understatement of criminal history (USSG § 4A1.3) was not.

Second, the court held that the district court's reliance on defendant's need for alcohol treatment was also a proper basis for the variance. Although the court found that it was highly questionable whether defendant, an illegal alien who spoke no English, could even participate in BOP treatment programs,

defendant requested the district court to consider his need for treatment during the sentencing hearing and offered no evidence in the district court to establish the lack of availability of such programming for defendant. Thus, the court held that, on the record before it, the district court's reliance on defendant's need for treatment was not an improper factor. Accordingly, defendant's sentence was affirmed.

D. Miscellaneous Appeal

- *Scope of Remand*

U.S. v. Stout, 08-6025 (3/26/10)

- ▶ Defendant was sentenced for participating in a drug conspiracy. During the appeal, *Booker* was decided. Accordingly, the Sixth Circuit remanded the case for resentencing. The court also determined that the district court improperly determined the relevant conduct drug amount by failing to sufficiently differentiate between crack and powder cocaine amounts. On remand, the district court took additional evidence regarding the drug amount, and sentenced defendant accordingly. Defendant again appealed.

- ★ Holding: A remand is presumed to be general unless the court of appeals specifically limits it to certain issues. The court ruled that its earlier decision did not specifically limit the district court to certain issues and did not prohibit the court from taking additional evidence. Accordingly, the district court's decision was affirmed.

XIII. Post-Conviction Remedies

- *Expungement*

U.S. v. Carey, 09-3399 (4/19/10)

- ▶ Defendant was convicted of a felony for conducting an illegal gambling business. Approximately six years later, defendant moved the district court for expungement of his conviction. The district court denied the motion and defendant appealed. Defendant argued on appeal that the denial of

expungement violated his rights under the Second Amendment and that the district court abused its discretion.

★ Holding: The court first held that the motion for expungement was not a collateral attack on defendant's conviction. Thus, defendant's appeal was not prohibited by the collateral attack waiver in defendant's plea agreement. Second, the court held that the denial of the expungement was not improper based on the Second Amendment. Relying on the Supreme Court's decision in *Heller* (See P.V. Issue #20), the court held that the Second Amendment did not prohibit Congress from regulating a defendant's right to possess a firearm based on a felony conviction. Third, the court recognized, although there is no federal statutory means for expunging a conviction, a district court has equitable jurisdiction to grant an expungement of a defendant's federal conviction. The court found, however, that a defendant has no constitutional or statutory right to a hearing on such a motion. Accordingly, the court ruled that the district court did not abuse its discretion in denying defendant's motion.