

PRECEDENTIAL VALUE

Federal Public
Defender's
Office Southern
District of Ohio

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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 may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website.

Editor's Note: Congratulations to Kevin Schad, Appellate Director in our office, for obtaining four appellate victories for our clients in the March-April time period.

I. Sentencing Issues

B. Guideline issues

2K1.1(b)(5) – Trafficking Enhancement

[U.S. v. Henry, 15-5578 \(4/8/16\)](#)

The defendant was convicted of selling a pistol to a CI. As part of the relevant conduct, the district court determined that the defendant also sold a rifle to an undercover officer who had been referred by the CI. As a result, the district court held that the 4 level enhancement under USSG § 2K1.1(b)(5) for trafficking in firearms was applicable. On appeal, the court, deciding an open question in the Sixth Circuit, held that **the 4 level trafficking enhancement only applies where the defendant sold multiple firearms to the same person**. The language of the guideline states that the enhancement should be imposed where the defendant sold “two or more firearms to another individual.” Applying this language literally, the court ruled that the enhancement should not apply to the defendant because he sold one gun to the CI and one gun to the undercover agent. Accordingly, the application of the 4 level enhancement was reversed.

2K2.1(b)(6) – Connection with Another Felony

[U.S. v. Henry, 15-5578 \(4/8/16\)](#)

The defendant was indicted and convicted for the sale of a pistol to a C.I., who was working with an undercover officer. Within two weeks of that sale, the defendant also sold a rifle and some drugs to the undercover officer, who was referred by the CI. At the defendant's sentencing, the district court applied a four level enhancement under USSG § 2K2.1(b)(6) because the defendant possessed a firearm in relation to the drug sale. On appeal, the defendant argued that he was not convicted for the rifle and therefore its possession in relation to the drug sale was not relevant conduct to his conviction for the pistol. The court held first that the rifle was relevant conduct to the pistol. In order to count as relevant conduct under USSG § 1B1.3, the activity in question must be part of the same course of conduct or common scheme or plan. The court found that **the pistol and rifle were sold within two weeks of each other by the defendant to the CI and agent, who were working together**. The sale prices were negotiated close in time. Further, the drug price was negotiated at the same time. Under these circumstances, the court found that the sales of the two guns were relevant conduct to each other.

Second, the court held that the rifle was possessed by the defendant in connection with the sale of the drugs. The price for the rifle and the price for the drugs were negotiated in close proximity to each other and the defendant actually sold both to the agent on the same day. Accordingly, application of the four level enhancement was affirmed.

3C1.1 – Obstruction of Justice

U.S. v. Henry, 15-5578 (4/8/16)

The defendant was convicted of unlawful sale of a firearm and he failed to appear for sentencing. A warrant was issued and the defendant was not arrested until a year later, during which time he was out of contact with his pretrial officer. The amended PSR at the sentencing hearing suggested that the defendant may have been locked up on a 13 day sentence in Tennessee at the time of his first sentencing, but the district court failed to make any factual finding regarding this point. The district court applied a 2 level enhancement for obstruction of justice based on his failure to appear for the first sentencing hearing and the defendant appealed. The court held that a willful failure to appear for sentencing can constitute grounds for obstruction of justice. The court noted that the district court should have resolved the factual dispute about whether the defendant was in fact locked up in Tennessee at the time of his first sentencing. The court decided that since it was already remanding the case for resentencing based on a separate guidelines issue, the district court should make specific findings regarding the defendant's willfulness.

4A1.1(d) – Probation or parole status

U.S. v. DeJournett, 14-4204 (3/30/16)

The defendant was convicted of drug and money laundering offenses. At sentencing, the district court determined that the defendant should receive two additional criminal history points for

being on “probation” at the time he committed the offense. Specifically, the defendant had a prior DUI conviction for which the sentence stated that his 180 jail sentence was suspended on the condition that he “obey laws for 2 years.” The defendant argued on appeal that this sentence did not count as a probationary sentence. The court held that the sentence as imposed was the “functional equivalent” of unsupervised probation, which had been found by the court previously to count as a term of probation under USSG § 4A1.1(d). Accordingly, the sentence was affirmed.

C. Procedural matters

Calculation of Guideline Range

U.S. v. Fowler, 14-2412 (4/7/16)

The defendants were convicted of several conspiracy counts related to fraudulent prescriptions. At sentencing, the district court declined to actually calculate the correct guideline range, but instead relied on the fact that the parties agreed that 108 months was the appropriate starting point to calculate the sentence. The defendants received sentences of 108 months and 72 months and they appealed. The court held that a district court must first correctly calculate the guideline range before determining a sentence. The court ruled that this was true even though the parties stipulated 108 months as a starting point. Accordingly, the case was remanded for resentencing.

Molina-Martinez v. U.S., 14-8913 (4/20/16) **Supreme Court**

The defendant was convicted of illegal reentry and assigned criminal history category VI. Both his trial and appellate counsel missed an error in the guideline computation related to the defendant's criminal history score. Specifically, the defendant had five prior burglary offenses that were sentenced on the same day and thus

should not have been counted separately for criminal history points. This error meant that the defendant should have been sentenced in a guideline range of 70-87 months instead of 77-96, the range determined by the district court. The defendant caught the error himself while on appeal, and filed a pro se brief. The Fifth Circuit ruled that the defendant was correct but held that there was no plain error because the district court's sentence of 77 months was within both the correct and incorrect guideline range. The Supreme Court granted certiorari. The Court found that **it was plain error for the district court to have sentenced the defendant based on an incorrect guideline range, even though the sentence also fell within the correct guideline range.** The Court emphasized: "Nothing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, guidelines range set the wrong framework for the sentencing proceedings." The Court noted that there may be rare instances where the record in the district court makes clear that the district court would have provided the same sentence regardless of the guideline error, but this was not such a case. Accordingly, the case was remanded for resentencing and application of the correct guideline calculation.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

Braden v. U.S., 14-6395 (3/10/16)

The defendant was convicted of being a felon in possession of a firearm and the district court determined that the defendant qualified as an armed career offender based, in part, on two Tennessee convictions for aggravated assault. On appeal, the court held that the Tennessee

statute was divisible, in that there was more than one possible method of violating the statute. The court found, however, that the indictment and guilty plea in the cases made clear that the defendant pled guilty to the (a)(1)(b) provision which prohibited **"intentionally or knowingly committing an assault while using or displaying a deadly weapon."** The court ruled that **this provision of the Tennessee statute constituted a violent felony under the "force" clause of the ACCA.** [Notably, this is the first published decision where the court addressed a Johnson claim on an appeal from a 2255 where the issue was not raised in the district court.] Accordingly, the defendant's conviction was affirmed.

U.S. v. Smith, 15-3311 (4/8/16)

The defendant was convicted of being a felon in possession of a firearm and the district court determined that he was an armed career criminal. On appeal, the defendant argued that the enumerated offense clause of the ACCA was unconstitutionally vague based on Johnson. Answering an open question in the Sixth Circuit, the court held that **the enumerated offense clause of the ACCA is not unconstitutionally vague.** The court emphasized that the same considerations underlying the striking of the residual clause were not present when analyzing whether a crime was enumerated under the ACCA. Thus, the defendant's conviction was affirmed.

Welch v. U.S., 15-6418 (4/18/16)

Supreme Court

The defendant was convicted of being a felon in possession of a firearm and sentenced under the ACCA. After Johnson was decided, the defendant sought retroactive application of Johnson to his case through the filing of a petition under 28 USC § 2255. The Supreme Court held that **Johnson applies retroactively to cases which**

have already become final. Accordingly, the defendant's sentence was vacated.

18 USC § 2252(b)(2) – Prior Sex Offense

Lockhart v. U.S., 14-8358 (3/1/16) **Supreme Court**

The defendant was convicted of possessing child pornography and the district court determined that he faced a 10 year mandatory minimum sentence based on his prior conviction for first degree sexual abuse of his adult girlfriend. With a child porn conviction, a defendant receives an enhanced sentence if the defendant has a prior conviction “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” The defendant argued on appeal that the phrase “involving a minor or ward” applied to all three listed crimes, and thus his sexual abuse of an adult was not a qualifying crime. Applying the rule of the last antecedent, the Court held that the phrase “involving a minor or ward” applies only to the third listed crime, namely abusive sexual contact. Accordingly, the defendant's sentence was affirmed.

4B1.2(a) – Career Offender

U.S. v. Binford, 14-1635 (3/31/16)

The defendant was convicted of drug trafficking and at sentencing the district court determined, in part, that his Ohio conviction for second degree burglary constituted a crime of violence under the residual clause. While the appeal was pending, the Supreme Court decided Johnson. The court held that **the Johnson decision, striking down the residual clause in the ACCA, applied with equal force to the residual clause under the career offender provision of the guidelines.** Accordingly, the case was remanded to the district court for a determination of whether the

career offender enhancement was applicable under any other provision.

E. Fine/Restitution/ Forfeiture

Forfeiture

U.S. v. Honeycutt, 14-5790 (3/4/16)

The defendant was convicted of participating in a conspiracy to unlawfully distribute iodine to know meth manufacturers. At sentencing, the government invoked 21 USC § 853 to request the mandatory forfeiture of proceeds from the defendant. The district court declined to order the forfeiture, relying mostly on the fact that the defendant was a salaried employee of the store and did not directly benefit from the conspiracy. On appeal, the court held that **joint and several liability applies to the forfeiture of assets under § 853.** Thus, where the conspiracy received significant proceeds from the sale of the iodine, the district court should have ordered a forfeiture against the defendant even though he only was a salaried employee of the business. As such, the district court's order was reversed.

Restitution

U.S. v. Fowler, 14-2412 (4/7/16)

The defendant was convicted of multiple conspiracy counts related to fraudulent prescriptions. At sentencing, the district court determined that the defendant was required to pay restitution in an amount that was 50% of his total medical practice for prescriptions, as proposed by the government. The only evidence related to this amount came from trial testimony which indicated that only 20% of the prescriptions the defendant wrote were illegitimate. On appeal, the court held that **a preponderance of the evidence did not support the district court's restitution amount as it contradicted the trial testimony and was unsupported by any other evidence.** Further, the court noted that the defendant did not even

join the conspiracy until the second year of its existence, and could not be ordered to pay restitution for amounts that were obtained prior to his involvement. Accordingly, the case was remanded for resentencing.

III. Evidence

A. Article IV – Relevancy

404(b) - Res Gestae or Background evidence

U.S. v. Edmond, 14-2426 (3/3/16)

The defendant was charged with carjacking and firearm offenses. At trial, a codefendant testified that the defendant fired a gun at another vehicle while a passenger in one of the car jacked cars. This conduct was not charged in the indictment and the defendant objected to its admission under FRE 404(b). On appeal, the court held that evidence of this sort is variously known as background evidence, res gestae, intrinsic acts, and intrinsic evidence. Such evidence is not excludable under 404(b) if it (1) is a prelude to the charged offense, (2) is directly probative of the charged offense, (3) arises from the same events as the charged offense, (4) forms an integral part of a witness' story, or (5) completes the story of the charged offense. The court found that the defendant was riding in a carjacked car and using a gun that would later that day be used in another carjacking. Thus, the court ruled that the shooting was a prelude to, was evidence of, and completed the story of the carjacking conspiracy. Accordingly, the admission of the evidence was affirmed.

B. Articles VI-VII - Witness and Expert

612/613 – Refreshing Recollection/Statements

U.S. v. Carpenter, 14-1572 (4/13/16)

The defendant was charged with Hobbs Act robberies. At trial he attempted to refresh the recollection of a witness with the government

agent's report regarding the witness' statement. The witness testified that he told the agent something different, but did not claim to have any memory problem about what was said. The district court refused to allow the defendant to refresh recollection and declined the admission of the report as a prior inconsistent statement. On appeal, the court held that a document may be used to refresh recollection under the Rules of Evidence only after the witness' memory has been "exhausted." Where the witness has no trouble remembering the event, then a document may not be used to refresh their recollection. Further, the court held that the report was not admissible as a prior inconsistent statement because it was written by the agent, not the witness, and the declarant had not attested to the report's accuracy. Accordingly, the exclusion of the evidence was affirmed.

D. Discovery/Miscellaneous

Fed. R. Crim. P. 16(b)(1)(C) – Experts

U.S. v. Pittman, 15-5085 (3/11/16)

The defendant attempted to offer a handwriting expert at trial without first giving the government notice as required by Rule 16. The district court excluded the expert. On appeal, the court held that Rule 16 gives a district court four options for dealing with violations of the discovery rules, one of which is excluding the evidence. The court found no abuse of discretion in the district court's decision because there had already been significant delay of the trial because of the defendant's repeated changes of counsel, the defendant offered no good explanation for the failure to provide notice, the defendant could offer other evidence to challenge the handwriting, and the expert evidence he intended to offer was inconclusive on the issue. Therefore, the district court's ruling was affirmed.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

U.S. v. Carpenter, 14-1572 (4/13/16)

The government was investigating the defendants for Hobbs Act robberies and obtained court orders under the Stored Communications Act for cell site data from the defendants' cell phones. The defendants moved to exclude this evidence at trial claiming that the Act violated the Fourth Amendment by allowing the records to be obtained without a showing of probable cause and a warrant. The district court denied the motion and the defendants appealed. The court held that **the defendants had no reasonable expectation of privacy in the cell site data**. The court analogized that such information was similar to phone numbers, mail addresses, and IP addresses, **all of which are unprotected by the Fourth Amendment**. Accordingly, the defendants' convictions were affirmed.

B. Reasonable Suspicion/Vehicle Stops

Vehicle Stops

U.S. v. Collazo, 15-5806 (3/29/2016)

An officer stopped the defendant for following too closely behind a truck on the interstate. Upon stopping the vehicle, the officer noted the following: a jar of urine in the front seat, the passenger seemed extremely nervous, and the defendant and passenger gave slightly conflicting stories about travelling to visit the passenger's father. A second officer arrived, and while the first officer was issuing a warning ticket to the driver, the passenger admitted to the second officer that she had illegal prescription pills in her purse. A subsequent search of the car revealed cocaine. The defendant moved to suppress the evidence, the district court denied the motion, and the defendant appealed. The court held that officers must establish probable cause for making

a stop for a civil infraction of the traffic law, and reasonable suspicion for an ongoing crime in order to make a stop. The court noted that **there is some confusion in the circuit between when each standard applies, but nonetheless ruled that the stop was justified by the more stringent probable cause standard**. The court found that **the officer's testimony and the dash cam video established probable cause to believe that the defendant was following too close**. Further, the court held that the stop was not unlawfully prolonged in the issuance of the warning citation, and that the length of the stop was justified by reasonable suspicion based on the urine jar, the conflicting stories about travel plans, and the passenger's nervousness. Finally, the court found that the illegal prescriptions pills, combined with the other factors, supported probable cause for a search of the car. Accordingly, the conviction was affirmed.

E. Search Warrants

Detention of Occupants

U.S. v. Binford, 14-1635 (3/31/16)

Officers observed the defendant make two undercover sales to an informant and obtained a search warrant for his residence as a result. Upon executing the warrant, the defendant was taken into a small bathroom in handcuffs and questioned by an officer while the search was taking place. During this 20 minute interview, the defendant confessed. The district court declined to suppress the confession and held that the defendant was not unlawfully detained. On appeal, the court held that officers may detain an occupant of a home during the execution of a search warrant and perform questioning of the occupant so long as the interrogation does not prolong the search. The court found that **the 20 minute bathroom interview did not prolong the search and thus was not an unlawful arrest or detention of the defendant**. The court further

noted that the detention was likely also supported by at least reasonable suspicion based on the prior undercover drug sales. Accordingly, the district court's ruling was affirmed.

Probable Cause

U.S. v. Jones, 15-1791 (4/6/16)

A confidential informant (who had been working with police for two years) told officers that the defendant was selling drugs out of a house. The officers conducted a controlled purchase wherein the officers observed the defendant (who they did not yet know at the time) leave the residence, get into a car registered to a woman who lived at the house, drive to the buy location, and sell cocaine to the informant. Based on this information, the officers obtained a search warrant for the residence. The officers attested in the warrant that those who sell drugs from a residence often keep drugs, guns, and money in the residence. The defendant moved to suppress the evidence found in the ensuing search, the district court granted the motion, and the government appealed. The court held that the combination of the informant's reliability, the information that the defendant was selling drugs from the house, the officers' observations the day of the controlled purchase, and the officers attestation about the habits of drug dealers were sufficient to establish the nexus for probable cause that drugs would be found in the house. Accordingly, the district court's ruling suppressing the evidence was reversed.

V. Fifth Amendment

C. Confessions and Testimonial Rights

Voluntariness of Confession

U.S. v. Binford, 14-1635 (3/31/16)

Police executed a search warrant at the defendant's home, and an officer handcuffed the

defendant and questioned him in a small bathroom. The officer suggested that the defendant could earn some leniency if he wanted to cooperate with police against others. After implicating himself, the defendant was arrested and prosecuted federally for firearms found in the home. The defendant moved to suppress the confession and argued that it was involuntary. The district court denied the motion and the defendant appealed. The court held that the voluntariness of a confession or Miranda waiver is judged based on three factors: (1) whether the police activity was objectively coercive; (2) whether the coercion was sufficient to overbear the defendant's will; and (3) whether the coercion was the critical motivating factor in the defendant confessing. The court ruled that promises of leniency are not coercive unless they are broken or illusory. The court found no illusory promise because the defendant chose not to cooperate against others in the case, and thus the officer broke no promise to the defendant. Accordingly, admission of the confession was affirmed.

D. Double Jeopardy

U.S. v. Vichitvongsa, 14-6013 (4/4/16)

The defendant robbed two drug dealers about two weeks apart. As a result, the defendant was convicted of two separate Hobbs Act conspiracies for the two robberies. The defendant argued on appeal that the robberies were actually part of just one conspiracy, and that his double jeopardy rights were accordingly violated. The court held that, in order to establish a double jeopardy violation related to multiple conspiracies, the defendant must first make a prima facie showing of a single conspiracy. The burden then shifts to the government to show separate conspiracies by a preponderance of the evidence, considering five factors: (1) time; (2) identity of co-conspirators; (3) statutory offenses charged; (4) the nature and scope of the activity involved; and (5) the places where the events took place. The court found that

the events were separated by two weeks, the co-conspirators were different in each robbery, the two robberies were crimes of opportunity without overreaching collaboration, and the robberies occurred in different locations. Thus, the court concluded that the factors weighed in the government's favor that the conspiracies were separate and affirmed the defendant's conviction.

VI. Sixth Amendment

D. Right to Counsel/Self Representation

Right to Counsel – Freezing Assets for Counsel

Luis v. U.S., 14-419 (3/30/16)

Supreme Court

The defendant was charged with health care fraud and the government sought a pretrial order freezing her assets which were not traceable to criminal conduct, pursuant to 18 USC § 1345. The district court froze the assets and the defendant argued on appeal that the freezing of her assets violated her Sixth Amendment right to hire the counsel of her choice. On certiorari, the Court held that the pretrial restraint of “legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.” Accordingly, the district court's ruling was reversed.

Self Representation

U.S. v. Bankston, 14-3723 (4/14/16)

The defendant was charged with a number of fraud related offenses and requested to represent herself at trial. The district court performed a Faretta inquiry, but only asked a portion of the model questions suggested by the Benchbook for District Judges. The district court allowed her to represent herself and she was convicted. On appeal, the court held that a district court inquiry into a defendant's decision to represent herself need only be “substantially similar” to the

suggestions provided in the Benchbook. The court found that the district court substantially covered the “relevant considerations” outlined in the Benchbook, and sufficiently addressed Faretta's concerns that the defendant knew what she was doing and made her choice with eyes open. Accordingly, the conviction was affirmed.

U.S. v. Pittman, 15-5085 (3/11/16)

The defendant was charged with drug and gun possession offenses and he rejected the services of five court appointed attorneys. At that point, the district court decided that he had given up his right to counsel and required him to proceed pro se. On the day of trial, the court provided the defendant with the Faretta inquiry. The defendant was convicted and appealed. The court held that a district court may choose to require the “impecunious defendant” to represent himself or herself instead of maintaining current counsel. Under these circumstances, the court refused to impose any specific requirement on the district court regarding the administration of Faretta warnings. The court found that the district court did provide Faretta warnings, albeit late, and that the district court repeatedly discussed the defendant's decisions regarding counsel throughout the pretrial proceedings. As such, no reversible error occurred.

VII. Other Constitutional Rulings

C. First Amendment

Public Access

U.S. v. DeJournett, 14-4204 (3/30/2016)

After the defendant pled guilty to drug and money laundering offenses, he moved the district court to make his plea agreement publically accessible on PACER. The district court denied the motion based on the standard practice in NDOH of limiting public access to plea agreements to only the parties. On appeal, the court held that this

practice was improper. In assessing a public access claim, the court must consider two complementary considerations: (1) whether the place and process have historically been open to the public; and (2) whether public access plays a significant role in the functioning of the process in question. If such a public access right attaches, it may only be limited if the overriding interest is essential to preserve “higher values” and it is narrowly tailored to serve that interest. Further, the district court must make specific findings on the record justifying the closure. In the case, the court found that **plea agreements are traditionally open to the public and public access to them plays an important role in the integrity of the justice system. Accordingly, the court remanded the case to the district court and required that it make specific findings related to the facts of the defendant’s case justifying the closure instead of relying on a district policy to seal plea agreements.**

VIII. Defenses

G. Estoppel Defenses

Entrapment by Estoppel/Deliberate Ignorance

U.S. v. Honeycutt, 14-5790 (3/4/16)

The defendant was charged with selling large quantities of iodine which the defendant knew were being purchased to make meth. The defendant argued that he was told by the DEA that the sales of iodine were lawful and that he acted on that advice. The district court provided the pattern instruction for entrapment by estoppel, and also instructed the jury on deliberate ignorance. The defendant argued on appeal that the entrapment instruction unconditionally shifted the burden of proof and that the ignorance instruction was improper. The court held that entrapment by estoppel is an affirmative defense that must be proven by a preponderance of the evidence by the defendant and that it contains four elements: (1) a

government agent announced that the conduct was legal; (2) the defendant relied on that information; (3) the reliance was reasonable; and (4) the conviction would be unfair. The court held that **requiring the defendant to prove entrapment by estoppel did not improperly shift the burden of proof where the mens rea for the crime was “knowingly.” Instead, the defense relates to whether the defendant believed his conduct was lawful.** In this regard, the court found no evidence that agents advised that selling large quantities of iodine to meth dealers was lawful or that the defendant could have relied on such. Additionally, the court ruled that the deliberate ignorance instruction was proper. **The court found that the defendant had claimed a lack of guilty knowledge and that there was sufficient evidence that the defendant was choosing to be deliberately ignorant of the law.** Accordingly, the conviction was affirmed.

J. Speedy Trial Act/IAD

Speedy Trial Act

U.S. v. Brown, 14-6543 (3/24/16)

The defendant was charged with distributing narcotics and, after a continuance for new counsel and a psychiatric evaluation, the trial was set for September 8, 2014. Shortly before trial, the government notified the court that it wished to call a probation officer as a witness, but that he had to attend a training the week of September 8. The prosecutor and defense attorney said that they had conflicts the follow week of September 15, but that they would be present if required. After initially continuing the case to September 22 for trial, the defendant objected to the continuance and the district court decided empanel the jury on September 8, and then continue the trial in progress to September 22. The defendant was convicted and argued on appeal that his speedy trial rights had been violated because the 70 days speedy trial clock

ran on September 15. The court first held that the district court's procedure in starting and stopping the trial was improper. In this regard, the court found that the procedure violated the spirit of the Speedy Trial Act because it was merely tailored to avoid its time limitations. Further, the court held that the two week continuance was not properly excludable as an "ends of justice" continuance because neither the probation officer nor the attorneys were truly unavailable. Second, deciding an open question, the court held that the defendant's oral objection to the violation of the Speedy Trial Act was sufficient to protect his rights given that the objection expressed his view that the Act was being violated. The court made this finding even though the defendant's objection was lodged prior to the actual expiration of the speedy trial time period. Accordingly, the case was remanded to the district court for a determination as to whether the case should be dismissed with or without prejudice.

L. Miscellaneous Defenses

18 USC§2703(d)–Stored Communications Act

U.S. v. Carpenter, 14-1572 (4/13/16)

In a Hobbs Act robbery investigation, the government obtained court orders for cell site data from the defendants' cell phones, pursuant to the Stored Communications Act. The defendant moved to suppress the evidence for failure to adhere to the Act's requirement that reasonable grounds exist to believe that the records were relevant to an ongoing criminal investigation. The district court denied the motion. On appeal, the court held that exclusion of evidence is not an available remedy for violation of the Act. Accordingly, the district court ruling was

18 USC § 3006A(e)(1)–Appointment of Expert

U.S. v. Edmond, 14-2426 (3/3/16)

The defendant was charged with carjacking and weapons offenses. In the investigation of the case, a government witness identified the defendant as being involved in the offenses based in part on viewing his driver's license. The defendant claimed that the license was forged and that it was not his picture. The defendant requested the court to appoint a handwriting expert to confirm the forgery. The government agreed not to use the driver's license at trial and the district court accordingly denied the expert request. The defendant argued on appeal that the district court should have appointed the expert because he could have obtained exculpatory evidence that the witness had misidentified him previously. The court held that, in order to establish reversible error in the failure to appoint an expert under the CJA act, the defendant must show (1) the expert was necessary to mount a plausible defense and (2) prejudice. The court found that the expert was not necessary given that the government did not use the license at trial and the witness could identify the defendant in court from having seen him multiple times. Further, the court found no prejudice to the defense. Accordingly, the conviction was affirmed.

IX. Jury Issues

C. Voir Dire/Jury Empanelment

Fair Cross Section

U.S. v. Edmond, 14-2426 (3/3/16)

The defendant was charged with carjacking and weapons crimes. After his conviction, he raised for the first time in a motion for new trial that the jury did not contain a fair cross section from the community in that it did not contain enough Detroit residents or African Americans. The

district court denied the challenge as untimely and the defendant appealed. The court first held that, because the defendant failed to timely raise the claim before jury selection began, plain error review applied. In order to sustain a fair cross section challenge, the defendant must show (1) the excluded group is distinctive in the community, (2) the representation of the group in venire is not reasonable in relation to the numbers of such persons in the community, and (3) systemic exclusion of such group in the jury selection process. The court found that **Detroit residents were not distinctive under the Sixth Amendment analysis and that the defendant failed to show that African Americans were underrepresented or that they were systematically excluded.** Thus, the defendant's conviction was affirmed.

D. Batson

U.S. v. Mahbub, 14-1499 (3/29/16)

The defendant was charged with Medicare fraud. During jury selection, the government struck the only South Asian/Muslim in the jury pool. During the questioning, the South Asian juror and a white juror both expressed some concern about convicting a young person who gets caught up in fraud where they work for a company engaged in such practices. The government asked clarification questions to the white juror, but no follow up questions to the South Asian juror. The government then exercised a peremptory against the South Asian juror. The defendant raised a **Batson** challenge, but did not preserve the issue that the government had asked contrasting questions of the two jurors. The district court held that (1) the defendant did not show that she was South Asian or Muslim as was the juror and (2) that the defendant did not establish a prima facie case for discrimination. The defendant was convicted and appealed. The court held first that **the defendant is not required to show that she is of the same race as a stricken juror under Batson.**

This issue alone required remand to the district court to apply the proper legal standard. Second, the court held that **the use of contrasting questions between the two jurors was sufficient, along with the fact that the government struck the only South Asian in the pool, to make out a prima facie case of racial discrimination, even under the plain error standard.** Accordingly, the case was remanded for the district court to apply the proper **Batson** standard.

E. Miscellaneous Jury Issues

X. Probation/ Supervised Release

Conditions of Supervised Release

U.S. v. Henry, 15-5578 (4/8/16)

The defendant was convicted of unlawfully selling firearms. At sentencing, the district court imposed a prison sentence to be followed by supervised release, with a condition that he serve 18 months in a halfway house. The defendant failed to object to the condition in the district court. On appeal, the court found no plain error in the sentence because (1) it was reasonably related to the seriousness of the offense, the defendant's need for treatment of his serious drug addiction, and his failures of drug screens while on pretrial supervision, (2) the court reasonably considered the halfway house placement as an alternative to a longer term of incarceration, and (3) the sentence was not in conflict with guideline policy statements. Thus, the halfway house term was appropriate. Nonetheless, given that the case was being remanded for resentencing on other issues, the district court was free to reconsider the halfway house term in light of the amended guideline range.

Supervised Release Violations

U.S. v. Walker, 14-6490 (4/11/16)

While on supervised release, the defendant attacked his neighbor with a machete over a dispute about his neighbor's dog defecating in his yard. At his supervised release violation hearing, the defendant admitted to committing an assault and the district court sentenced him to the maximum sentence of 5 years in prison. On appeal, the defendant argued that he should have been able to depend on a state court self-defense theory and that the sentence was substantively unreasonable. The court held first that **the defendant could not rely on a state self-defense theory where the defendant admitted the violation and that he committed an assault**. Second, the court held that the sentence was substantively reasonable. Even though the defendant had been a model inmate while incarcerated and a model probationer leading up to the assault because, as the court put it, "being a model citizen for 364 days of the year is not of much use if this is what happens on the 365th day." Thus, the sentence was affirmed.

XII. Specific Offenses

18 USC § 922(g) – Constructive Possession

U.S. v. Vichitvongsa, 14-6013 (4/4/16)

The defendant was charged with being a felon in possession of a firearm for a gun (Smith and Wesson) that was found under his driver's seat during a traffic stop. At trial, the government introduced a recorded jail call by a person named "Nelly" who used the defendant's jail PIN calling number and said that he got pulled over, and was caught with a gun which was his "Smitty" and his "burner." The government also presented two witnesses who testified that the voice on the call was the defendant's, that he went by the nickname "Nelly," and that a "Smitty" referred to a Smith and Wesson. On appeal, the court held

that the evidence was sufficient to support a conviction for at least constructive possession of the firearm. **While proximity alone is not enough to establish constructive possession, the court held that the jailhouse call provided sufficient incriminating evidence to tip the scale of sufficiency.** As such, the conviction was affirmed.

18 USC § 924(c)–Firearms/Pinkerton Liability

U.S. v. Edmond, 14-2426 (3/3/16)

The defendants were convicted of using firearms in relation to numerous carjacking offenses. Further, the defendant who received the cars and resold them was also convicted under the Pinkerton conspiracy theory of liability. On appeal, the court held that the defendants were guilty based on either (1) their actual carrying of a gun to the carjacking, (2) brandishing a gun during the carjacking, (3) being aware that a codefendant was carrying a gun and continuing to participate in the crime, or (4) Pinkerton conspiracy liability. Regarding the conspiracy liability, the court found that **the defendant who was receiving and reselling the cars was guilty of the offense because he was involved in the carjacking conspiracy and it was reasonably foreseeable to him that the carjackers were carrying guns during the robberies.** Particularly, the court found that he continued to engage in buying and reselling the cars "after becoming aware of the violent nature of the carjackings." As such, the convictions were affirmed.

18 USC § 924(c)–Firearms

U.S. v. Vichitvongsa, 14-6013 (4/4/16)

The defendant committed two robberies of drug dealers. For each robbery, the defendant was charged with both conspiracy to commit a Hobbs Act robbery and conspiracy to possess drugs with the intent to distribute. In addition, the defendant was charged with a firearm charge under § 924(c)

for each count (total of four). The defendant was convicted of all counts and he appealed. The court held that the charging of separate § 924(c) counts for two conspiracy counts related to the same robbery was improper. The court ruled that, **in order for a defendant to be convicted of more than one § 924(c) charge, the defendant must use, carry, or possess a firearm more than once.** Thus, two of the defendant's § 924(c) convictions were vacated.

18 USC § 1001 – False Statements

U.S. v. Bankston, 14-3723 (4/14/16)

During pretrial proceedings in her fraud prosecution, the defendant wrote a letter to the district court complaining about her attorney and indicating that she wanted to put on a defense that the government planted evidence at her house. As a result of the letter, the government added a count in the indictment for making a false statement. The defendant represented herself at trial and was convicted of the count. On appeal, the court held that § 1001 contains a “judicial function exception” which provides an affirmative defense if (1) the defendant was a party to a judicial proceeding, (2) the statements were submitted to a judge, and (3) the statements were made in that proceeding. **The court found that, even though the defendant did not raise the affirmative defense at trial, the indictment so clearly on its face fit within the “judicial function exception” that the court determined that the indictment failed to state an offense.** Accordingly, the defendant's conviction on this count was vacated.

18 USC § 1425(a) – Unlawful Naturalization

U.S. v. Maslenjak, 14-3864 (4/7/16)

The defendant was charged with making false statements on her application for naturalization. At trial, the district court instructed the jury that materiality of the false statement was not an

element of the offense. Further, the district court instructed the jury that it could find the defendant guilty if it determined that she “did not possess good moral character,” meaning that she had given false testimony under oath. The defendant was convicted and she appealed. Answering an open question in the Sixth Circuit, the court held that **materiality is not an element of the offense under 18 USC § 1425(a).** Instead, the only elements of the statute are that the defendant (1) procured her naturalization, (2) contrary to law, and (3) that she did so knowingly. Further, the court held that the instruction regarding the defendant's moral character based on her false testimony was proper to prove the “contrary to law” requirement. The court held that the language was not an unconstitutional criminal punishment on her status and that it was not unconstitutionally vague. Accordingly, the defendant's conviction was affirmed.

18 USC § 2119 – Carjacking

U.S. v. Edmond, 14-2426 (3/3/16)

The defendants were charged with committing numerous carjackings. The defendants argued that the government did not prove their intent to cause bodily harm. Upon their convictions, the defendants appealed. The court held that **the intent to cause death or serious bodily injury in the carjackings was established either by (1) the defendants carrying a gun and physically touching the victim, (2) the defendants carrying a loaded gun during the offense, (3) pointing a gun at the victim's face and demanding conformity with a particular action, or (4) getting into a physical fight with the victim.** Accordingly, the defendant's carjacking convictions were affirmed.

18 USC § 2250(a) – SORNA**Nichols v. U.S., 15-5238 (4/4/16)**
Supreme Court

The defendant was living in Kansas and registering under SORNA when he suddenly moved to the Philippines. He did not update his registration prior to leaving Kansas. As a result, the government charged the defendant with failing to register under SORNA, and he was brought back to Kansas in custody. On appeal, the Supreme Court held that **SORNA does not require a defendant to register in the state from which the defendant has moved**. Specifically, SORNA requires a defendant to update a registration “in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” The Court ruled that this language does not require the defendant to update a registration in the state he or she is leaving. Accordingly, the conviction was reversed.

21 USC § 841(c)(2) & 843(a)(6) – Precursors**U.S. v. Honeycutt, 14-5790 (3/4/16)**

The defendant was an employee at a surplus store owned by his brother that sold large quantities of Polar Pure, a product containing iodine, knowing it was being used by customers to make meth. The defendant was convicted of participating in a conspiracy to possess a listed chemical knowing it would be used to make meth (21 USC 841(c)(2)) and possessing an unlisted chemical knowing it would be used to make meth (21 USC 843(a)(6)). On appeal the defendant argued that the evidence was insufficient to support the verdict, that the counts were multiplicitous, and the issue of whether iodine was a List I Chemical had to be submitted to the jury as an element of the offense. The court held that **the government sufficiently established the defendant's knowledge and participation in the**

conspiracy based on (1) the defendant's and his brother's agreement on a “don't ask don't tell” policy for iodine sales, (2) the defendant's deceptive answers to DEA about the amount of iodine they sold, (3) the fact that they kept the Polar Pure below the counter, out of the sight of normal customers, and (4) the quantity of iodine stocked and sold. Further, because the district court merged the substantive 841(c)(2) and 843(a)(6) counts for sentencing, there was no multiplicity problem. Finally, the court held that, because being a List I Chemical increases the statutory maximum from 10 to 20 years, it should be submitted to the jury. However, the defendant failed to object at trial and the court found no plain error because the evidence at trial clearly supported that iodine was a List I Chemical. Accordingly, the conviction was affirmed.

XIII. Post-Conviction Remedies**Wearry v. Cain, 14-10008 (3/7/16)**
Supreme Court

The petitioner was convicted of capital murder in Louisiana state court and sentenced to death. Following trial, the petitioner moved for post-conviction relief, alleging that the prosecution had violated *Brady v. Maryland*, 373 U. S. 83 (1963). In particular, **the prosecution had suppressed police reports and medical records in the government's possession that would have impeached the State's key witness, along with evidence showing that another witness had sought favorable treatment in exchange for his testimony**. The state courts denied relief, but the Supreme Court summarily reversed, concluding that **the petitioner was entitled to a new trial under *Brady***.

Woods v. Etherton, 15-723 (4/4/16)
Supreme Court

The petitioner was convicted of drug charges in Michigan state court. Following state court

review, the petitioner sought federal habeas corpus relief. The Sixth Circuit concluded that the Michigan state courts unreasonably applied clearly established federal law in rejecting the petitioner's claim of ineffective assistance of appellate counsel, which was based on trial counsel's failure to object to the introduction of an anonymous tip. The Supreme Court reversed, concluding that **the Sixth Circuit failed to properly apply the "doubly deferential" standard of review applicable to claims of ineffective assistance of counsel under 28 U.S.C. § 2254(d).**

Adams v. Bradshaw, 07-3688 (3/15/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In federal habeas corpus proceedings, the petitioner alleged that his rights had been violated because he had been forced to wear a stun belt at trial. The Ohio Supreme Court concluded that the petitioner was not entitled to relief because the stun belt had been worn under the petitioner's clothes. The Sixth Circuit concluded that habeas corpus relief was not warranted because **"the visibility of a physical restraint upon a defendant to a jury was a critical factor to obtaining relief in such circumstances."** Because the petitioner had failed to rebut the Ohio Supreme Court's finding that the stun belt was not visible, the district court's denial of relief was affirmed.

The petitioner further alleged that his execution by lethal injection would violate his constitutional rights. In response, the Warden argued that under *Glossip v. Gross*, 135 S.Ct. 2726 (2015), challenges to lethal injection were not cognizable in habeas corpus and could only be raised under 42 U.S.C. § 1983. The Sixth Circuit rejected the Warden's argument and concluded that **lethal injection claims could be raised in habeas corpus proceedings.** The court nevertheless found that the petitioner's claim failed on the merits.

Braden v. United States, 14-6395 (3/10/16)

The petitioner was convicted of drug and firearms offenses in federal court and sentenced under the Armed Career Criminal Act. The petitioner filed a pro se motion to vacate under 28 U.S.C. § 2255 raising various claims. The District Court subsequently appointed counsel to represent the petitioner. Appointed counsel filed an amended petition raising one claim, but the amended petition expressly stated that it was supplementing, rather than superseding, the original pro se petition that had been filed. The District Court nevertheless found that the amended petition had resulted in a waiver of the additional claims that had been included in the original pro se petition. The Sixth Circuit rejected the District Court's conclusion, explaining that although an amended pleading generally supersedes an original pleading, exceptions exist "where a party evinces an intent for the amended pleading to supplement rather than supersede the original pleading," or where "a party is forced to amend a pleading by court order." In contrast, an amended pleading will supersede an original or former pleading if it "is complete in itself and does not refer to or adopt a former pleading." **Because the amended petition in the petitioner's case was "not complete in itself" and expressly adopted the original petition, the Sixth Circuit concluded that the additional claims in the original petition had not been waived and remanded for the district court to rule on the pro se claims on their merits.**

Smith v. City of Wyoming et al., 15-3336 (4/15/16)

The plaintiff brought suit under 42 U.S.C. § 1983, alleging that police officers violated her Fourth Amendment rights. The police had received a report earlier in the day that the plaintiff may have been intoxicated and unable to care for her children. The plaintiff alleged that when the police arrived at her home hours later in the day,

a friend answered the door and told them that the plaintiff was in the home but not available at the moment. The plaintiff alleged that the police then entered her home without a warrant. The Sixth Circuit concluded that the plaintiff's allegations were sufficient to overcome the officers' qualified immunity defense: "Any reasonable officer would have understood that to enter a private home after being expressly told the occupant could not speak with him, in the course of a routine child welfare check, flies in the face of this clearly established law."