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.

I. Sentencing Issues

A. 3553(a) factors and issues

Procedural Reasonableness

U.S. v. Bass, 14-1387 (4/15/15)

The defendant was convicted of credit card fraud and at sentencing the district court determined that his guideline range was 110 to 137 months. The district court imposed an upward variance to a sentence of 264 months imprisonment. On appeal, the court held that the district court properly considered objections to the guideline calculations, the defendant's argument as to why an upward departure was inappropriate, and the factors under § 3553. Further, the district court provided a methodical discussion about the defendant's 13 prior convictions for dishonesty, fraud, and deceit, and properly concluded that the defendant had absolutely no respect for the law and would continue to be a real threat to society. Accordingly, the sentence was affirmed.

Substantive Reasonableness

U.S. v. Solano-Rosales, 13-2692 (3/23/15)

The defendant was convicted of illegally reentering the U.S. after deportation and the district upwardly varied from a guideline range of 8-14 months to sentence of 18 months. The district court based the variance on the specific need for deterrence because of his repeated illegal reentries and his three prior domestic violence convictions, one of which was a felony. The district court also cited the need for punishment because of the defendant's conduct in reentering the country. On appeal, the court held that the sentence was substantively reasonable based on the factors cited by the district court. The court noted, however, that illegal reentry is a "malum prohibitum" crime which does not ordinarily encompass morally culpable intent. As such, the court commented that an upward variance would not normally be justified on retributive grounds. Because the variance was small in the case, the district court's comment about punishment was isolated, and the variance was otherwise justified by the § 3553 factors, the sentence was affirmed.

B. Guidelines issues

2B1.1 – Fraud Loss

U.S. v. Kerley, 13-5821 (4/23/15)

The defendant was convicted of mortgage fraud. Prior to sentencing, the lenders purchased the properties at issue through "credit bids" at foreclosure sales, and then resold the properties in "Real Estate Owned" (REO) sales. At sentencing, the district court utilized the REO sales amounts as a basis to calculate the lenders' losses. On appeal, the court held that a district court must offset mortgage fraud loss against the amount recovered by the lender. According to Comment 3 to § 2B1.1, the offset is based on "the amount the victim has recovered at the time of sentencing from the disposition of the collateral." Thus, the court ruled that the district court properly utilized the REO sales as the offset amount because they reflected the amount of money that was actually recovered by the lenders. Accordingly, the judgment was affirmed.

3A1.4 – Terrorism Enhancement

U.S. v. Stafford, 13-4188 (4/10/15)

The defendant was convicted of conspiring to blow up a bridge. At sentencing, the district court applied the 12 level enhancement under § 3A1.4 for committing a felony that involved a federal crime of terrorism. On appeal, the court held that, in order to apply the enhancement, a court must find (1) that the offense was calculated to "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and (2) proof of the defendant's specific intent. The court ruled that application of the enhancement was proper because the defendant targeted government infrastructure, i.e., the bridge, he intended the bombing as a "revolutionary act," and he expected the bombing would be perceived as an "act of terrorism." Under these circumstances, the court affirmed application of the 12 level enhancement.

III. Evidence

A. Article IV – Relevancy

404(b) – Intent

U.S. v. Carter, 14-5276 (3/6/15)

The defendant was charged with conspiracy to manufacture meth. At trial, the government was permitted to introduce evidence under FRE 404(b) that the defendant previously distributed an unrelated drug called suboxone. The defendant was convicted and on appeal the court found that the evidence relating to the defendant's prior distribution of suboxone was not proper under FRE 404(b). Specifically, the court rejected the government's argument that the evidence showed the defendant's intent because the intent to distribute suboxone in an entirely unrelated venture was simply not probative of an intent to join a conspiracy to manufacture meth. Accordingly, the defendant's conviction was reversed.

B. Articles VI-VII - Witness and Expert

701/702 – Expert and Lay Witness Testimony

U.S. v. Kerley, 13-5821 (4/23/15)

The defendants were charged with mortgage fraud for making misrepresentations in closing documents that the buyers for the transactions were using their own money to pay the down payments. At trial, the government presented the testimony of employees of the lender who were neither expert witnesses nor personally involved in the actual loans. The witnesses testified that, based on their business experience with the lenders, the loans would not have been approved if the lenders had been aware of the false statements regarding the source of the buyers'

funds. On appeal, the defendant argued that the district court's admission of this testimony was error. The court held that a witness may give lay opinion testimony under FRE 701 about a business' policies or practices based on after-the-fact review of records where the witness' knowledge is gained through participation in the day-to-day business affairs of the company. Accordingly, the defendants' convictions were affirmed.

D. Discovery/Miscellaneous

1006 – Summaries

U.S. v. Kerley, 13-5821 (4/23/15)

The defendants were prosecuted for mortgage fraud and at trial the government presented an IRS agent who provided "secondary-evidence summaries" for the purpose of explaining the numerous complex documents to the jury. On appeal, the defendants argued that the evidence was not properly admitted as summary evidence because it merely constituted a reiteration of the government's interpretation of the evidence and argument about the defendants' guilt. The court held that "secondary-evidence summaries" may be admitted in addition to the documents they summarize where the summaries "accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence." Thus, the court found that the summaries were properly admitted and the convictions were affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

Reasonable Suspicion

U.S. v. Winters, 13-6349 (3/31/15)

The defendant was a passenger in a vehicle stopped for speeding and after the officer issued a warning citation, he detained the vehicle an extra four minutes to conduct a dog sniff. The dog detected narcotics, a search ensued, and drugs were found. In his prosecution, the defendant moved to suppress the evidence claiming that the officer had no basis to extend the stop beyond the issuance of the citation. The district court denied the motion and the defendant appealed. The court held that reasonable suspicion supported the stop of the vehicle. The court found that the driver of the vehicle was nervous, the defendant and the driver provided inconsistent stories about their travel plans, and the car was rented in the name of a third party who was not present. Thus, the court ruled that the officer was justified in detaining the defendant beyond the issuance of the citation in order to conduct a dog sniff. Further, the court found that the use of the drug dog was "reasonably related in scope" to the officer's suspicions. Accordingly, the officer's actions were reasonable and the defendant's conviction was affirmed.

The court also noted that the Supreme Court's decision in Florida v. Jardines did not alter the analysis of a drug sniff case related to traffic stops. The court distinguished Jardines as involving a dog sniff related to a residence, which requires probable cause to conduct. By contrast, the court ruled that reasonable suspicion remains the standard for conducting a dog sniff for traffic stops.

Rodriguez v. U.S., 13-9972 (4/21/15)
Supreme Court

An officer observed the defendant swerve onto the shoulder for a few seconds while driving on the interstate. The officer executed a traffic stop and issued the defendant a warning. The officer then detained the defendant for an additional seven to eight minutes to conduct a dog sniff of the vehicle, which turned up meth. In his prosecution, the defendant moved to suppress the

evidence and the district court denied the motion. The Eighth Circuit affirmed and the Supreme Court granted certiorari. The Court held that a traffic stop cannot be extended beyond the time necessary to reasonably effectuate the purposes of the stop without a finding of reasonable suspicion to justify the further detention. Thus, the detention beyond the issuance of the warning for the purpose of conducting the dog sniff violated the Fourth Amendment. Accordingly, the case was remanded for a determination by the lower courts as to whether reasonable suspicion justified the continued detention.

***Family Serv. Ass'n ex rel. James W. Coil, II v. Wells Twp., et al.*, 14-4020 (4/16/15)**

The plaintiff alleged that he and a friend were sitting on a guardrail where they had stopped to rest while walking home. A police officer approached, inquired if anything was wrong, and asked for their names. The plaintiff claimed that when the two declined to provide their names and began walking away, the police officer began yelling at them and eventually slammed the plaintiff to the ground. The Sixth Circuit determined that the police officer was not entitled to qualified immunity on the plaintiff's Fourth Amendment claim. Refusal to cooperate, without more, does not provide the minimum level of justification required for a detention or seizure, and walking away from the police does not by itself create reasonable suspicion. Because a jury could reasonably conclude that the police officer's actions violated the Fourth Amendment, the denial of qualified immunity was affirmed.

C. Warrant Exceptions

Emergency Aid Exception

***Goodwin v. City of Painesville*, 14-3120 (3/19/2015)**

The plaintiffs alleged that they were entertaining guests at their apartment in the late evening. The police were dispatched to the scene to investigate noise complaints. When the police arrived, they asked the plaintiffs to keep the noise down and then remained nearby to monitor the situation. Another guest left the apartment and told the police that one of the plaintiffs had threatened to kill everyone inside. The police went to the door and asked the plaintiff to step outside, which he refused to do. The police then entered the apartment and tasered the plaintiff, notwithstanding the fact that all of the guests were in the living room and did not appear to be in need of assistance The Sixth Circuit concluded that the police were not entitled to qualified immunity on the plaintiffs' Fourth Amendment claim relating to the warrantless entry into the apartment. For the emergency aid exception to the warrant requirement to apply, the police must have an objectively reasonable basis for believing that a person within the house is in need of immediate aid. Because a jury could reasonably find that none existed at the time of the warrantless entry, the denial of qualified immunity was affirmed.

E. Search Warrants

Good Faith

U.S. v. Soto, 13-2300 (3/11/2015)

The defendant was indicted on drug, kidnapping, and firearms charges. After he was convicted at trial, the defendant moved for a new trial based on his trial counsel's ineffectiveness in failing to move to suppress evidence obtained from search warrants on two residences. The district court found that the warrants were lacking in probable cause, but saved by good faith. On appeal, the court held that the warrants were not so lacking in probable cause as to render the officers' reliance on them unreasonable. Specifically, the affidavit for one residence indicated that the informant observed the defendant at the home with a sawed-off shotgun, which he stored under the bed. For the second residence, the affidavit indicated that the informant observed the defendant with a large bag of cocaine and that he sold the informant some of it. Thus, the affidavits were not bare bones and were saved by the good faith exception. As such, the defendant's conviction was affirmed.

Search Warrant – Probable Cause

U.S. v. Bass, 14-1387 (4/15/15)

The defendant was charged in a credit card fraud scheme. During the investigation, officers seized a cell phone that the defendant was using at the time of his arrest and obtained a warrant to search it. The search warrant provided that the defendant and his coconspirators frequently used cell phones to text and call each other during the times that the fraudulent activities were taking place. The defendant moved to suppress the search of his phone and the district court denied the motion. On appeal, the court held that (1) the search warrant was sufficiently supported by probable cause given the statement that the conspirators frequently used cell phones to communicate, (2) the warrant provided a sufficient nexus to the defendant's phone given that he was using it at the time of arrest, and (3) the warrant was not overbroad in failing to delineate what information could be searched within the phone. Thus, the defendant's conviction was affirmed.

G. Miscellaneous Fourth Amendment

GPS Monitoring

Grady v. North Carolina, 14-593 (3/30/15)
Supreme Court

The defendant received a second sex offense conviction and the state court determined that he should be required to wear a satellite based monitoring device for the rest of his life. The defendant challenged the decision as being an unauthorized search. The state courts held that the use of the device did not constitute a search and the Supreme Court granted certiorari. The Court held that the use of the device constituted a search of the defendant's person. Thus, the state court's decision was reversed and the case was remanded for a determination in the first instance as to whether the search complied with Fourth Amendment requirements.

V. Fifth Amendment

A. Prosecutor Conduct

Prosecutorial Misconduct

U.S. v. Eaton, 13-6125 (4/20/15)

The defendant was a sheriff charged with witness tampering and at trial he presented an expert witness regarding the use of excessive force, During closing argument, the prosecutor questioned why the defense presented the expert testimony on use of force if none of the officers "came forward" and said that they had used any force at all. The defendant objected to the

statement as impinging on the defendant's right to remain silent and the prosecutor clarified that the reference related only to the defendant's statement to the authorities. The defendant was convicted and he appealed. The court held that, in order to establish prosecutorial misconduct, the defendant must show first that the comment was improper, and second that it was flagrant. The court found that, even assuming the comment was improper, it was not flagrant in the context of the trial given the strong evidence of the defendant's guilt, the prosecutor's clarification, and the proper jury instructions that the defendant had a right to remain silent. Thus, the conviction was affirmed.

E. Miscellaneous Fifth Amendment

Due Process – Right to Present a Defense

U.S. v. Kerley, 13-5821 (4/23/15)

The defendant, along with an attorney codefendant, were charged with mortgage fraud. At trial, the defendant moved to sever his case because he made pretrial statements to agents exculpating himself and indicating that he acted on the advice of the attorney codefendant in involving himself in the charged conduct. The district court denied the motion and held that the defendant's pretrial statements would not be admissible under the hearsay rules, or the rule of completeness. On appeal, the defendant argued that his right to present a defense was violated because the district court's evidentiary rulings denied him the right to argue his advice-of-counsel defense. The court held that a defendant's constitutional right to present a defense does not allow a defendant to admit into evidence statements that were otherwise inadmissible under the rules of evidence. The court found that the district court properly excluded the defendant's pretrial statements as self-serving hearsay. Further, the court noted that the defendant testified at trial and chose not to rely on the advice-of-counsel defense, instead blaming the crime on another conspirator. Accordingly, the defendant's conviction was affirmed.

VI. Sixth Amendment

A. Right to Jury Trial

18 USC § 924(c) - Second or Subsequent Gun

U.S. v. Soto, 13-2300 (3/11/2015)

The defendant was indicted for two § 924(c) charges related to separate offenses for possessing drugs with the intent to distribute and kidnapping. The firearm offenses, however, related to the same guns possessed in the same time period. At trial, the jury was not required to determine whether the possession of the firearms for one offense (drug trafficking) was "second or subsequent" to the possession related to the other offense (kidnapping), as required by § 924(c). The defendant was convicted of both § 924(c) charges and he was sentenced to seven years for the first firearm conviction and 25 years consecutively for the second firearm conviction. On appeal, the court held that, pursuant to the Supreme Court's decision in Alleyne v. United States, facts that increase a mandatory minimum sentence must be proven to the jury beyond a reasonable doubt. The court ruled that it did not need to address the Sixth Amendment issue because any failure to submit the issue to the jury was harmless. The court found that the possession of drugs with intent to distribute occurred on one date, and the kidnapping occurred on a separate date. Thus, it was clear from the record that the possession of the firearms related to those two offenses occurred on different occasions. As such, there was no dispute that one firearm offense was "second or subsequent" to another, and the defendant's conviction was affirmed.

D. Right to Counsel/Self Representation

Self Representation

U.S. v. Stafford, 13-4188 (4/10/15)

The defendant was charged with conspiracy to bomb a bridge along with several coconspirators. The defendant's competency was assessed by two different doctors. The district court held a hearing and determined that the defendant was competent to stand trial. The defendant requested to represent himself and the district court held two additional hearings before concluding that the defendant was competent to represent himself at trial, appointing an attorney as stand-by counsel. Upon his conviction, the defendant argued on appeal that the district court erred in permitting him to represent himself. The court held that, based on the Supreme Court's decision in Indiana v. Edwards, a district court is permitted, but not required, to insist on counsel for a defendant who is mentally ill but otherwise competent to stand trial. The court found that the district court had properly inquired into the defendant's ability to represent himself on multiple occasions, his counsel had indicated that he was competent to represent himself, and the district court had appointed stand-by counsel who assisted him at trial. Under the circumstances, the court found no error in the district court's determination.

E. Indictment - Variance/Duplicity

Duplicity

U.S. v. Singer, 13-2562 (3/23/15)

The defendant was charged, among other counts, with mail fraud under 18 USC § 1341. The indictment listed, in one count, numerous acts of mail fraud, including many separate mailings over a period of time. The defendant was convicted and argued for the first time on appeal that charging multiple instances of mail fraud in a single count was duplicitous. The court found no plain error in the charging decision. The court held that acts which could be considered separate counts in a mail fraud indictment may be charged in a single count if those acts can be characterized as part of a single continuing scheme. The court ruled that this avoided "unnecessarily complex and confusing allegations" that may occur with charging numerous separate counts. Further, the court found no prejudice to the defendant. Accordingly, the conviction was affirmed.

U.S. v. Eaton, 13-6125 (4/20/15)

The defendant was a sheriff who was charged with witness tampering under 18 USC § 1512(b)(3) for causing his deputies to file false reports during an FBI investigation. The FBI investigation related to whether excessive force was used against an arrestee and whether the arrestee pulled a knife. The defendant was convicted and argued on appeal that the indictment was duplicitous because it charged more than one offense for tampering with the investigation by both using excessive force and planting evidence. Thus, he claimed that the jury should have been given a specific unanimity instruction. The court held that the witness tampering statute required only that the government prove that the defendant tampered with evidence "relating to the commission or possible commission of a federal offense." The court ruled that the indictment was not duplicitous because it did not charge more than one offense in a single count, but instead just listed different means of committing the crime. Accordingly, no specific unanimity instruction was required and the defendant's conviction was affirmed.

Variance

U.S. v. Soto, 13-2300 (3/11/2015)

At the defendant's trial for charges of participating in a drug conspiracy, the

government introduced evidence related to the discovery of narcotics in a van being driven by two individuals who were not charged in the indictment with the defendant. He did not object to the evidence at trial, but argued for the first time on appeal that this evidence established multiple conspiracies and constituted a fatal variance from the indictment. The court found no plain error in admission of the evidence. The court held that, in conspiracy cases, a variance related to multiple conspiracies does not require reversal unless the defendant can show that the evidence may be construed **only** as supporting a finding of multiple conspiracies. The court ruled that the defendant could not meet this heavy burden and sustained his conviction.

VIII. Defenses

A. Severance of Counts/Defendants

Severance of Counts

U.S. v. Singer, 13-2562 (3/23/15)

The defendant was charged with mail fraud, arson, and tax fraud counts. The tax fraud related to the defendant's claims of loss on his tax returns for buildings he had destroyed through arson and had been fraudulently reimbursed from insurance proceeds. The defendant was convicted and argued for the first time on appeal that the tax fraud counts should have been severed from the remaining counts. The court found no plain error in the joinder of the counts, pursuant to Fed. R. Crim. P. 8(a). The court held that tax counts may be joined with non-tax counts where the tax counts "arose directly" from the other counts charged. Here, the court ruled that the tax counts were part and parcel of the defendant's arson and mail fraud related to his buildings. As such, the defendant's conviction was affirmed.

U.S. v. Soto, 13-2300 (3/11/2015)

The defendant was charged with kidnapping, drug trafficking and firearm counts, and he argued for the first time on appeal that the kidnapping should have been severed from the drug trafficking counts. The court first held that the issue of severance was not waived by the defendant's failure to raise the issue in the district court. Instead, plain error review applied. In analyzing the merits of the severance claim, the court first held that the kidnapping and drug trafficking were properly joined under Fed. R. Crim. P. 8(a) because they were part of a common scheme or plan. Second, the court ruled that the defense was not unduly prejudiced by the joinder under Fed. R. Crim. P. 14. In this regard, the court found that the defendant had offered only "conclusory" statements that his defense for the kidnapping was prejudiced by the drug trafficking evidence and he failed to show that the jury was unable to separately weigh the offenses. Accordingly, the defendant's conviction was affirmed.

D. Statute of Limitations

18 USC § 844(h) – Arson to Commit a Felony

U.S. v. Singer, 13-2562 (3/23/15)

The defendant was charged with arson (setting a fire to commit another felony) based on a building he burned in 1996. The defendant was also charged with mail fraud related to fraudulent insurance claims filed against the building, the latest mailing being in 2003. The government did not return the indictment until 2011. The defendant was convicted and raised for the first time on appeal that the indictment was outside the ten years statute of limitations for arson. The court held that an element of the offense of arson under 18 USC § 844(h) is that the fire is used to commit another felony. Thus, the offense of arson was not completed until the other felony – mail fraud – had been committed. Because the

last act of mail fraud occurred in 2003, the 2011 indictment was within the ten year limitation period. Accordingly, the court found no plain error and affirmed the conviction.

E. Venue/Jurisdiction

U.S. v. Singer, 13-2562 (3/23/15)

The defendant was charged in Michigan for an arson he committed in Indiana. The arson was committed for the purpose of mail fraud (fraudulently collecting insurance proceeds). As part of the mail fraud, the defendant sent a mailing from Michigan to Indiana. Upon his conviction, the defendant raised for the first time on appeal that venue was not proper in Michigan for the arson count. The court held that venue is proper in any district in which an offense was "begun, continued, or completed." Because the commission of the separate felony – mail fraud – was an element of arson under 18 USC § 844(h), the court held that venue was proper in Indiana and thus found no plain error.

L. Miscellaneous Defenses

New Trial – Witness Recantation

U.S. v. Bass, 14-1387 (4/15/15)

After the defendant's conviction for credit card fraud, a codefendant recanted his trial testimony against the defendant. The district court held and hearing and concluding that the recantation was not credible. On appeal, the court ruled that a new trial based on witness recantation depends of three factors: (1) the testimony was material and false; (2) the jury would have reached a different conclusion without the testimony; and (3) the party seeking new trial was surprised by the false testimony and was not aware of its falsity until after trial. The court held that none of the factors were satisfied in the case and accordingly affirmed the conviction.

X. Probation/ Supervised Release

Supervised Release – Illegal Reentry Cases

U.S. v. Solano-Rosales, 13-2692 (3/23/15)

The defendant was convicted of illegal reentry and at sentencing the district court imposed a three year term of supervised release to follow the sentence. The district court stated that the three year term was being imposed for specific deterrence given the defendant's repeated illegal reentry into the country and his repeated acts of domestic violence. The court failed, however, to acknowledge USSG § 5D1.1(c) which specifically counsels against imposition of supervised release in illegal reentry cases. On appeal, the court applied plain error review because the defendant failed to object to the term of supervised release in the district court. The court held that the district court erred in failing to at least consider the recommendation of the guideline that no supervised release be imposed. Nonetheless, the court found no plain error because it concluded that the district court would likely have imposed the same sentence even if it had considered the guideline. Thus, the defendant's sentence was affirmed.

Supervised Release Violations

U.S. v. Melton, 13-6649 (4/3/15)

The defendant was charged with violating his supervised release based on his new conviction in state court for drug trafficking. At his violation hearing, the court accepted his admission and sentenced him to 18 months in prison. On appeal, the court first held that the sentence was procedurally reasonable. Specifically, the court rejected the defendant's argument that the district court was required to adhere to the requirements of Fed. R. Crim. P. 11 in accepting the admission. Instead, the court held that a district court need only comply with the requirements of Fed. R. Crim. P. 32.1 and determine that the defendant's

admission is knowing and voluntary. Second, the court held that the sentence was substantively reasonable. The guideline range for the violation was 15-21 months, the 18 month sentence was within the range, and the defendant provided nothing to overcome the presumption of reasonableness for the sentence. Accordingly, the sentence was affirmed.

XI. Appeal

Time to File – Cross Appeal

U.S. v. Burch, 14-6232 (3/20/15)

The defendant was convicted and sentenced on a supervised release violation and missed the 14 day deadline for filing an appeal. The defendant moved the district court to permit him to file an appeal out of time, and the district court issued an order extending the defendant's time to file his appeal. The government did not cross appeal the district court's order, but instead moved to dismiss the appeal in the Sixth Circuit. The court held that the government was required to cross appeal the district court's order allowing the out of time appeal in order to challenge the timeliness of the appeal in the Sixth Circuit. Accordingly, the government's motion to dismiss the appeal was denied.

XII. Specific Offenses

18 USC § 844(h) – Arson to Commit a Felony

U.S. v. Singer, 13-2562 (3/23/15)

The defendant was convicted in a multi-count indictment with one count of mail fraud and three counts of arson to commit another felony (mail fraud). The district court sentenced the defendant to consecutive sentences of 10, 20, and 20 years on the three arson counts. The defendant raised for the first time on appeal that the district court was not required to impose consecutive sentences on the three arson convictions because they were all three tied to the same wire fraud count, instead of three separate wire fraud offenses. The court held that the consecutive sentences were appropriate because, although there was only one wire fraud count in the indictment, each of the arson counts was based on a different fraudulent mailing and the fraudulent mailings were separately delineated within the mail fraud scheme charged in the single count. Accordingly, the defendant's consecutive sentences for each arson count were affirmed.

18 USC § 924(c) – Aiding and Abetting

U.S. v. Soto, 13-2300 (3/11/2015)

The defendants kidnapped two individuals on the premise of a fake drug deal, in order to try to obtain money that was owed. One defendant remained in Chicago to guard the victims while the other defendants went to Detroit. While in Detroit, the other defendants brandished firearms. The defendant was charged with, among other crimes, aiding and abetting the brandishing of the firearms in relation to drug trafficking. Upon appeal of his conviction, the court held that a defendant may only be convicted of aiding and abetting codefendants who have brandished firearms if the defendant took an affirmative act in furtherance of the drug trafficking offense with the intent of facilitating its commission, and the defendant knew that a codefendant would carry a gun. The court found the evidence sufficient to support these elements because the defendant participated in the kidnapping (which was a part of the larger drug conspiracy) and the defendant knew that at least one of his codefendants had a firearm. Thus, the defendant's conviction was affirmed.

18 USC § 1201 – Kidnapping

U.S. v. Soto, 13-2300 (3/11/2015)

The defendant was charged with kidnapping for transporting two individuals across state lines

against their will. The defendant was convicted and argued on appeal that the government failed to prove that the victims were transported across state lines involuntarily. The court held that, in a kidnapping prosecution, the government must establish that the victims were actually transported across state lines and that the transportation was against their will. The court found sufficient evidence to meet these requirements because the victims were taken at gunpoint and, at the time they crossed state lines, their hands were bound. Accordingly, the defendant's conviction was affirmed.

18 USC § 1512(b)(3) – Witness Tampering

U.S. v. Eaton, 13-6125 (4/20/15)

The defendant was a sheriff convicted of witness tampering for instructing two of his deputies to create false reports regarding a federal excessive use of force investigation. On appeal, the defendant argued that the statute required that the government prove the materiality of the false reports in hindering the investigation. The court held that the elements of a § 1512(b)(3) prosecution are (1) that the defendant willfully intimidated or corruptly persuaded another, (2) with intent to prevent communication to a federal official, (3) of information "relating to the commission or possible commission of a federal offense." The court ruled that materiality of the defendant's obstructive efforts was not an element of the crime. Further, the court found that the evidence was sufficient to support the verdict. Accordingly, the conviction was affirmed.

18 USC § 1957 – Money Laundering

U.S. v. Kerley, 13-5821 (4/23/15)

The defendant was convicted of wire fraud (related to a mortgage fraud scheme) and money laundering. Specifically, the wire fraud count charged that the defendant fraudulently procured mortgage loan proceeds in the form of a check. The money laundering count charged that the defendant deposited the check into his bank account. On appeal, the defendant argued that the evidence was insufficient to convict for money laundering because it was not a separate act from the wire fraud. The court held that the predicate offense for wire fraud was completed when he received the check. Thus, the separate act of depositing the check into his account could constitute money laundering under § 1957. Further, the court ruled that because there was no problem with the wire fraud and money laundering offenses merging, the Supreme Court's decision in U.S. v. Santos (holding that "proceeds" means "profits" in a money laundering case) was not implicated. Accordingly, his conviction was affirmed.

21 USC § 841 & 2 – Aiding and Abetting

U.S. v. Soto, 13-2300 (3/11/2015)

Two of the defendants were charged with aiding and abetting the possession of drugs with the intent to distribute. The evidence at trial established that they were given narcotics by their boss to use as bait to rob another drug dealer. After the robbery, the defendants were returning with the drugs in their car when arrested. At trial, the defendants argued that they did not aid in the possession of the drugs with intent to distribute it because they never intended to "transfer" the drugs, meaning effect a change in ownership. On appeal, the court concluded that it did not need to reach the issue of the proper definition of "transfer" because it was clear that the defendants were aiding their boss in possessing the drugs with the intent to eventually sell the drugs to others in the future. Thus, the defendants' convictions were affirmed.

21 USC § 846 – Drug Conspiracy

U.S. v. Soto, 13-2300 (3/11/2015)

The defendant was convicted for participating in a drug conspiracy and he challenged the sufficiency of the evidence on appeal. The court held that in order to prove a conspiracy, the government must a prove (1) an agreement to violate the drug laws, (2) that the defendant had knowledge and intent to join the conspiracy, and (3) that the defendant participated in the conspiracy. The court found that the defendant's involvement was established by the testimony of a single informant who indicated that he had purchased drugs from the defendant about 20 times, and that the defendant was present in a garage to guard the victim during the course of the kidnapping and robbery (which were involved in the drug conspiracy). Further, the court ruled that the testimony of a co-conspirator alone may be sufficient to sustain a conviction and the court found nothing in the record to lead the court to believe that "no reasonable juror could find" the informant was not credible. Accordingly, the defendant's conviction was affirmed.

XIII. Post-Conviction Remedies

***Woods v. Donald*, 14-618 (3/30/15)**
Supreme Court

The petitioner was convicted of felony murder in state court after being tried with two co-defendants. At trial, the petitioner's attorney was briefly absent from the courtroom during testimony that was not related to the petitioner's defense. The state courts determined that a presumption of prejudice was not required under United States v. Cronic, 466 U. S. 648 (1984). The Sixth Circuit concluded that the refusal of the state courts to apply a presumption of prejudice was both contrary to and an unreasonable application of Cronic, and that habeas corpus relief was therefore warranted. The Supreme Court reversed, finding that the applicability of *Cronic* to the circumstances presented was not "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1).