

4th Amendment

United States v. Burney, 14-3526 (2/19/15)

Law enforcement officers were investigating a male and female for drug trafficking over an eight month period. The male used stash houses to store and distribute drugs, and the houses and vehicles were kept in the name of the female. Shortly before law enforcement obtained a warrant for a believed stash house, the defendant moved into the house. Although there was no apparent connection between the defendant and the drug dealer, the defendant had a history of drug convictions and was on parole for a drug case. Further, the house remained in the name of the female even though the defendant was living there. The warrant was executed, and drugs and a firearm were found. In his subsequent prosecution, the defendant moved to suppress the evidence because of the lack of connection between himself and the drug trafficking. The court held that **a search warrant must only establish probable cause to believe that evidence of a crime will be found at a residence. The fact that the defendant had moved in did not vitiate the likelihood that drugs would be found given the recent connection of the male and female, and their drug activities, to the house.** Further, the court held that the evidence of drug trafficking related to the house was not stale. Accordingly, the search warrant was upheld.

United States v. Brown, 13-1761 (9/11/15)

DEA agents were investigating a known heroin dealer and in making an arrest discovered the defendant present in a vehicle with the dealer, transporting 1/2 kilo of heroin. At the time, the defendant was in possession of \$4800 in currency and a cell phone which contained a text suggestive of a drug pricing discussion. In conducting a search of the drug dealer's home, the agents discovered a vehicle registered to the defendant in the driveway and a drug dog alerted on the vehicle. The defendant had a prior record for narcotics. Based on these facts, the agents obtained a search warrant twenty-two days later for the defendant's home, wherein they found drugs, firearms, and cash. The defendant moved to suppress the evidence and the district court denied the motion. On appeal, the court held that it was a very close case regarding whether a sufficient nexus was established between illegal activity and the defendant's home. Nonetheless, the court held that **probable cause supported the warrant based on the recent (22 days earlier) drug involvement with the defendant and the half kilo, his possession of a large amount of cash, association with a known drug dealer, prior record, and the drug dog alert on his vehicle. These facts permitted the determination that the defendant was a drug dealer, which supported a search of his home based on the warrant.** Accordingly, the warrant was valid and his conviction was affirmed.

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.

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.

Brown v. Lewis, 14-1392 (2/26/2015)

The plaintiff was a Michigan driver who alleged that she was stopped by police, ordered out of her car at gunpoint, thrown to the ground, handcuffed, and detained in handcuffs for approximately ten minutes. The stop was based on a 911 call made from a residential address. The 911 dispatcher overheard an intoxicated man at the residence make a statement that could arguably be construed as a threat, and other statements about hiding from the police. The police alleged that they believed the intoxicated man was in the car that was pulled over, although the 911 dispatcher was aware that the intoxicated man was still in the residence. The plaintiff sued under 42 U.S.C. § 1983, alleging a violation of her Fourth Amendment rights. The District Court denied the police officers' motion for summary judgment based on qualified immunity, and they appealed.

The Sixth Circuit affirmed, concluding that the officers were not entitled to qualified immunity. Although the officers were unaware that the intoxicated man was still at the home when the initial stop was made, **any reasonable suspicion that they did have was eliminated once they determined that the sole occupant of the vehicle was a woman**. The information available to the officers provided no basis to believe that a woman from the residence had engaged in any type of criminal activity. Furthermore, the nature of the investigatory stop was significantly intrusive, and it turned into an arrest without probable cause when the plaintiff was thrown to the ground and handcuffed. In addition, the plaintiff's version of events supported a claim of excessive force under the Fourth Amendment. Finally, the law was clear at the time of the arrest that the police conduct described by the plaintiff constituted a Fourth Amendment violation. Accordingly, the decision of the District Court denying qualified immunity was affirmed.

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.

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.

U.S. v. Lichtenberger, 14-3540 (5/20/15)

The defendant was arrested at his girlfriend's house for failing to register as a sex offender. After his arrest, his girlfriend opened his laptop computer, hacked his password, and searched it, finding child porn. She then called the police. When the police arrived, she explained what she had found. The officer asked her to open the laptop and display what she had seen. She showed the officer four or five pictures of child porn, but neither she nor the officer were sure that they were the same pictures that she had viewed previously that day. The defendant was prosecuted for the child porn images, the district court suppressed the evidence, and the government appealed. The court held that the Fourth Amendment allows officers to view evidence that was first found by private individuals as long as there was no government involvement in the private search and the government does not exceed the scope of the private search. In assessing whether the government exceeded the scope of the private search, the court must also consider "how much evidence the government stands to gain when it re-examines the evidence and, relatedly, how certain it is regarding what it will find." The court found that **the officers exceeded the scope of the private search because it could not be ascertained exactly which images the girlfriend had viewed and whether the officers actually viewed different or additional images**. Further, the court ruled that **the situation lacked the risks that support an immediate search of the laptop because the defendant had already been arrested, the images were not in danger of erasure, deterioration, or contamination, and the laptop presented no immediate, cognizable threat to any person**. Accordingly, suppression of the evidence was affirmed.

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.

Heien v. North Carolina 574 U.S. --- (2014)

An officer pulled over a vehicle for a broken tail light, which he understood to be a violation of State law. In fact it was not. During the stop, the officer observed evidence that was suspicious and asked for permission to search the vehicle. The officer found cocaine. The Supreme Court held that even though there was no valid basis for the traffic stop, as no violation of the law had occurred, the officer's "good faith mistake of law" was reasonable, and therefore, despite the Fourth Amendment violation, did not require suppression of the evidence under the exclusionary rule.

Sentencing

U.S. v. Taylor, 14-6048 (8/25/15)

The defendant was convicted after trial of firearm offenses and the district court determined that he was an armed career criminal. At the sentencing, the defendant made a passing reference to a request for a downward variance based on the defendant's age and lower recidivism rates at higher ages. The district court declined to grant a downward variance but made no reference to the defendant's age argument. When the district court asked whether there was any factor the court failed to consider, as required by Bostic, defense counsel said only "we just reiterate our earlier objections." On appeal, the court found counsel's response to the Bostic question to be insufficient to preserve error on the district court's failure to address the age argument. Thus, the court applied plain error review. Because counsel had addressed the age argument in such a perfunctory fashion with no real argument, the court held that no plain error occurred.

U.S. v. Cover, 14-3641 (9/1/15)

The defendant was convicted of child porn offenses. At sentencing, the defendant objected to a guideline sentence enhancement based on USSG § 2G2.2(b)(4) for sadistic or masochistic conduct. The enhancement was based on the statement in the PSR that a video found on the defendant's computer "depicted an 11 to 13 year old female engaging in oral to genital intercourse with a male." On appeal, the court held that the enhancement was not supported by the record. In order to apply the four level enhancement under § 2G2.2(b)(4), the evidence must show one of the following: (1) the image depicted sexual penetration of a prepubescent child; or (2) the image depicted "violence or the infliction of pain, either mental or physical." The court found that because an 11-13 year old is not clearly prepubescent and there was no actual evidence that the child was in pain or the image involved violence, the application of the enhancement was improper. The case was remanded for reconsideration of the issue in the district court by applying the proper legal standard.

U.S. v. Detloff, 14-2001 (7/24/15)

The defendant was convicted of mail theft and a supervised release violation. At the violation hearing, the court determined that the defendant's new Michigan conviction for resisting a police officer was a violent offense under USSG § 7B1.1, and thus that his violation conduct constituted a Grade A violation of supervised release. The defendant's counsel, over the defendant's objection, actually agreed with the district court on this point. On appeal, the court held that resisting a police officer under Michigan law contained both violent and non-violent conduct. Accordingly, the case was remanded for resentencing. The court afforded the government the opportunity to present any appropriate Shepard documents to establish whether the offense qualified as violent under the guidelines.

U.S. v. Pirosko, 14-3402 (5/21/15)

The defendant was convicted of child porn offenses and received an enhancement at sentencing for distribution of child porn under USSC § 2G2.2(b)(3) based on the use of a file sharing program. On appeal, the court held that evidence is sufficient for an enhancement for distribution of child porn when it shows that the defendant had child porn in a shared folder, the defendant knew that others could download it, and another person did, in fact, download it. The court held that the government's evidence proved that the defendant's child porn was contained in a shared folder in a pier to pier file sharing program, that he knew or should have known that others could access it, and that a government agent did actually download it. Accordingly, application of the enhancement was affirmed.

U.S. v. Abbring, 14-1987 (6/9/15)

The defendant was convicted of receipt of child pornography for using a file sharing program called Ares to download child porn. Unlike other file sharing programs, Ares does not permit users to disable the sharing feature. Thus, in order to try to avoid sharing the child porn he downloaded, the defendant would transfer child porn files out of the sharing file to another location on his computer once downloaded. Ares would not permit this transfer, however, while the file was downloading, and thus other individuals could

receive the child porn from the defendant's file sharing as the file was downloading. As a result of this process, the district court imposed a two level enhancement under USSG § 2G2.2(b)(3) for distribution of child porn. On appeal, the court held that use of the file sharing program constituted distribution. Specifically, the court ruled that the two level enhancement required only the defendant's knowledge, as opposed to specific intent, that the file sharing program permitted others to download the images. **Because the defendant knew that the images were capable of being downloaded while he was receiving them, and because child porn was actually downloaded from the defendant by others, the enhancement was applicable.**

Other Constitutional, Evidentiary, and Statutory Decisions

U.S. v. Ushery, 14-5046 (5/6/15)

The defendant was charged with distribution of crack cocaine and appeared before the district court for a guilty plea hearing. The defendant expressed discontent with the plea agreement and the district court oversaw plea discussions between the government and the defense, including the striking of an appeal waiver provision and forfeiture language, and discussing with the defendant the career offender provision and the third point for acceptance of responsibility. Ultimately, the defendant decided to plead guilty at the hearing. He did not object to the district court's involvement in the plea negotiations at any point in the district court, but raised the issue for the first time on appeal. **The court found that the district court did not follow "best practices" under Fed. R. Crim. P. 11 for plea discussions. Nonetheless, the court ruled that no plain error occurred because the defendant would have entered into the plea agreement even without the district court's involvement.** Accordingly, the conviction was affirmed.

Barton v. Warden, 12-4003 (5/15/15)

The petitioner was convicted of involuntary manslaughter and aggravated burglary in Ohio state court. The sole witness against the petitioner was a career criminal who alleged that the petitioner hired another criminal to stage a burglary at his home; the witness claimed that the petitioner's wife interrupted the staged burglary and was shot when the hired criminal and another accomplice panicked. Following trial, the petitioner raised a claim under Brady v. Maryland, 373 U.S. 83 (1963), alleging that the police suppressed evidence that could have impeached the government's witness. **The last reasoned decision of the state courts concluded that the claim was procedurally defaulted and refused to consider it on the merits, and as a result the Sixth Circuit found that the deferential standards of 28 U.S.C. § 2254(d) did not apply.** The Sixth Circuit further concluded that the Brady claim was meritorious. The petitioner's procedural default was accordingly excused, and habeas corpus relief was granted.

U.S. v. Ray, 14-2159 (9/23/15)

Miranda

The defendant was arrested in his home, wherein drugs and guns were found. The defendant alleged in the district court that an officer threatened him at his home that his wife would be arrested, thus making his child a ward of the state, if the defendant did not accept responsibility for the drugs and guns. The defendant claimed that, as a result, he confessed at his home without being Mirandized. The defendant was then taken to the station, Mirandized, and he provided a confession. The officers testified that the first interview at the home and the threat did not occur. The district court made no factual findings regarding the two versions of events, and denied the defendant's motion to suppress without analyzing whether his Miranda waiver at the station was voluntary. On appeal, the court held that the district court failed to apply the correct legal standard and failed to make sufficient factual findings. Deciding an open question in the Sixth Circuit, the court held that **the proper standard was whether a reasonable person would believe that the later questioning was a "new and distinct" experience and whether the Miranda warnings presented a "genuine choice whether to follow up on the earlier admission."** Five factors are relevant to this inquiry: (1) the

completeness and detail involved in the first confession; (2) the overlapping content of the two statements; (3) the timing and setting of the two interrogations; (4) the continuity of police personnel; and (5) the degree to which the questioning treated the second round as continuous with the first. Accordingly, the case was remanded for fact finding as to whether the threat and the first round of questioning occurred, and for proper application of the law to the facts.

924(c) (Second important holding of case)

The defendant was charged with possession of firearms in furtherance of drug trafficking related to three guns that were located in his residence. The first gun was an unloaded sawed off shotgun that was found in his bedroom along with a small amount of marijuana and money. The second was a .22 caliber rifle that was found in another bedroom closet where no drugs were present. The third was a handgun found in a jacket pocket in a closet next to another jacket containing distribution amounts of crack cocaine. The jury convicted the defendant and he appealed. The court held that possession of a firearm in furtherance of drug trafficking means that the gun must “promote or facilitate the crime,” considering the following factors: (1) whether the gun was loaded, (2) the type of weapon, (3) the legality of its possession, (4) the type of drug activity conducted, and (5) the time and circumstances under which the firearm is found. The court found that the sawed off shotgun and rifle were not properly considered as being possessed in furtherance of drug trafficking. The shotgun was unloaded and, although in the same room, not in close proximity to the marijuana. The rifle was in a room in which no drugs were located. The court determined, however, that the handgun was possessed in furtherance of drug trafficking as it was loaded, was found in close proximity to distribution amounts of crack cocaine, and was readily accessible. Accordingly, the 924(c) conviction was affirmed related to the handgun only.

U.S. v. Lowe, 14-5615 (7/28/15)

The defendant was charged with distributing, receiving, and possessing child porn based on images that were found in a file sharing program on one of the computers at his home. His wife and adopted child also had access to the computer. The government’s evidence at trial established that the user name on the computer was the defendant’s and it was the defendant’s computer, but the file sharing was accessible by anyone using the computer and was not password protected. The defendant was convicted and he appealed the sufficiency of the evidence. The court held that the evidence was insufficient to support the verdict. Specifically, the court found that no reasonable juror could infer that no one else used the defendant’s computer to access the child porn and the government expert could not establish from the forensic analysis that it was necessarily the defendant who was using the computer at the time the child porn was being shared. Accordingly, the defendant’s conviction was reversed.

Yates v. United States, 13-7451 (2/25/15)

Supreme Court

The defendant was a commercial fisherman who was caught with undersized red grouper in federal waters in the Gulf of Mexico. Investigators ordered him to retain the undersized fish until returning to shore, but instead the defendant had the questionable fish thrown overboard. The defendant was prosecuted under 18 USC § 1519 for the destruction of the fish. As relevant to the case, this statute prohibited the destruction of “any record, document, or tangible object” to obstruct an investigation. On certiorari, the Supreme Court held that the phrase “tangible object” should not be interpreted in the abstract, but instead had to be read in context with the other statutory terms, the heading of the statute, and the statutory purpose (which was to prevent corporate fraud). Accordingly, the Court ruled that a “tangible object” under the statute included only objects used to record or preserve information.

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 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.

Christeson v. Roper, 14-6873 (1/20/15)

Supreme Court

The petitioner was convicted of capital murder in Missouri and sentenced to death. After review of the petitioner’s claims had concluded in state court, counsel were appointed to represent the petitioner in his federal habeas corpus proceedings. Appointed counsel miscalculated the statute of limitations, and the petition was dismissed as untimely. Nearly seven years later, other counsel determined that the case could possibly be reopened based on a theory of equitable tolling due to abandonment, but that new counsel would be required to raise the issues due to appointed counsel’s obvious conflict of interest. Appointed counsel refused to agree to a substitution of counsel, and outside counsel then attempted to intervene in the proceedings. The District Court and Eighth Circuit both concluded that a substitution of counsel was not warranted. The Supreme Court reversed and remanded with instructions to grant the motion to substitute counsel. Although 18 U. S. C. § 3599 does not give a petitioner a right to counsel of their choice, a motion for a substitution of counsel should be granted if it would be in the interests of justice. In light of appointed counsel’s severe conflict of interest and the absence of any evidence of abusive conduct or deliberate delay by outside counsel, the Supreme Court concluded that the interests of justice would be served by a substitution of counsel.

United States v. Sherer et al, 13-1821 (10/22/14)

A motion to dismiss under the Speedy Trial Act, filed 57 days after indictment, was ineffectual to preserve a Speedy Trial Act claim on appeal. First, the motion was premature. Second, the motion was not refiled or resubmitted on day 71 or after. Third, the motion itself stopped the Speedy Trial clock. Under these circumstances, the defendant’s rights under the Act were waived.

United States v. Shannon, 2015 WL 5103069 (6th Cir. 2015)

After being arrested, the defendant proffered pursuant to a proffer agreement which limited the Government’s use of his statements, but allowed use in trial if the defendant “offered evidence that was inconsistent” with his statements. Plea negotiations broke down, and defendant went to trial. During the

trial, the defendant put on no witnesses; however, he did cross examine Government witnesses, including cross examining a co-defendant. The Government argued that this violated the proffer, and that they could use defendant's statements at trial. The district court agreed. On appeal, the Sixth Circuit held that the cross examination of the co-defendant was "offering evidence"; further, the cross examination attempted to elicit testimony inconsistent with the proffer; therefore, "the district court did not abuse its discretion in admitting Shannon's proffer statements into evidence."

Ohio v. Clark, 13-1352 (6/18/15)

Supreme Court

The defendant was charged with child abuse offenses and at trial the state introduced the hearsay testimony of a three year old identifying the defendant as the person who caused the injuries. The testimony was introduced through a teacher who had asked the child about injuries in an effort to determine who had injured him and whether he was currently in danger. The state appellate courts reversed the conviction finding that the hearsay testimony admitted through the teacher violated the Confrontation Clause and the Supreme Court granted certiorari. The Court first ruled that statements to non-law enforcement officers, such as teachers, did not carry the same concerns under the Confrontation Clause analysis and were generally not likely to be considered testimonial in nature due to the informality of the situation. As related to the facts of the case, the Court found that the statements to the teacher were not made for the primary purpose of testimony, but instead were to deal with a potential ongoing emergency and to protect the child. Accordingly, the testimony was properly admitted at trial, and the defendant's conviction was reinstated.

McCarley v. Kelly, 12-3825 (9/10/15)

Officers were investigating the murder of a child's mother and attempted to interview the three and a half year old. The boy was not able to provide much information, so the officers referred him to a child psychologist and asked that she provide any information obtained back to the officers. The child made multiple statements implicating the defendant in the murder. The psychologist's reports about the boy's statements were admitted into evidence over the defendant's objections at trial. The defendant was convicted, he lost his state court appeals, and he filed a federal habeas petition, which the district court granted. The state appealed. The court held that the statements by the child to the psychologist were testimonial under the Confrontation Clause because the interview by the psychologist was at the behest of police and all information obtained was conveyed back to them. Further, the court found that the admission of the statements was not harmless error because the statements were a central part of the state's case at trial. Accordingly, the defendant's conviction was vacated.

U.S. v. Reed, 14-2071 (6/5/15)

The defendant was charged with wire fraud for misrepresenting information to investors. The government agreed in a plea agreement to make a non-binding recommendation to the district court that the defendant receive a three year sentence in return for the defendant's plea of guilty. Prior to sentencing, the government filed a sentencing memorandum and did not mention the three year recommendation. Further, at sentencing, the government argued how untrustworthy the defendant was and how he injured so many people. At the end of the sentencing hearing, the defendant objected because the government had not recommended the 3 year sentence. At that point, the government recommended that the court impose a three year sentence. The district court then imposed a sentence of over seven years in prison. On appeal, the court held that the prosecutor did not violate the plea agreement in belatedly making the recommendation for the 3 year sentence. The court found that the plea agreement only required the prosecutor to make the recommendation; he was not required to make it enthusiastically. Accordingly, the defendant's sentence was affirmed.