2017 CJA Seminar – Sixth Circuit and Supreme Court Update

Evidentiary and Constitutional Issues

Fourth Amendment:

U.S. v. Abernathy, 16-5314 (12/8/16)

Officers did a trash pull at the defendant's residence and found "several" marijuana roaches and some baggies with marijuana residue. In an affidavit, the officers attested that they were aware of drug trafficking activities by the defendant and provided the details of the trash pull. The search warrant was issued and the officers found evidence of drug trafficking in the residence. During the hearing on the motion to suppress, the district court found that the officers lied about being aware of drug trafficking activity by the defendant, but nonetheless found that trash pull alone was sufficient to support probable cause for the warrant. On appeal, the court held that the trash pull was insufficient without further evidence to support probable cause to search the house. The court found that the "small quantity of marijuana" found in the trash was too logically attenuated from the residence to create a fair probably that there were more drugs in the residence. The court emphasized that it was impossible to tell if the drugs had ever been in the residence, and if so, how recently. Additionally, the court held that, due to the fact that the officers had lied in the affidavit about the defendant's drug trafficking activities, the government could not rely on good faith to save the warrant. Accordingly, the district court's ruling was reversed and the evidence was suppressed.

U.S. v. Lewis, 16-5181 (8/25/17)

Officers were summoned to a Walmart on a report of an intoxicated woman causing a disturbance. Upon arriving, they located a female who appeared to be under the influence and who reported that she had been taking pain pills. The officers inquired whether she had a ride home, and she identified her boyfriend, the defendant, who was sitting in the truck. The officers went out with her to confirm that the defendant could drive her home, and saw through the window that he was asleep in the vehicle. An officer opened the car door to speak with him, and noticed the defendant attempt to conceal a bag of drugs by tossing it into the back seat. In the subsequent prosecution, the district court denied the defendant's motion to suppress the evidence and he appealed. The court held that the community care taker exception to the warrant requirement applied in the case. The court found that the officers were not performing any form of criminal investigation when they opened the car door to speak with the defendant, but were instead merely inquiring as to whether the defendant could drive his intoxicated girlfriend home so they did not have to arrest her. At that point, probable cause to search was established because the bag of drugs was in plain view. Accordingly, no warrant was required for the officers' actions and the conviction was affirmed.

U.S. v. Riley, 16-6149 (6/5/17)

A warrant issued for the defendant's arrest for a robbery. In attempting to locate the defendant, law enforcement obtained a court order for AT&T to produce GPS location data for the defendant's cell phone in an attempt to locate him. Based on the information returned by AT&T, the officers were able to track the defendant to a hotel. The front desk at the hotel identified the defendant's room and he was arrested. He had a firearm at the time, and he was subsequently charged with being a felon in possession of a firearm. The defendant moved to suppress the evidence upon the grounds that the government had violated his Fourth Amendment rights by obtaining his cell phone location without a search warrant. On appeal, the

court held that the defendant had no reasonable expectation of privacy in his physical location which was open and observable by the public. Because the GPS location provided no information to the officers that could not have been viewed publicly about the defendant's location, the Fourth Amendment was not implicated. The court suggested that a problem would have potentially arisen had the GPS identified the specific room within the hotel wherein the defendant was staying. Accordingly, the conviction was affirmed.

Fifth and Sixth Amendment Right to Counsel/Self-Representation:

Schreane v. Ebbert, 15-6141 (7.20.17)

The petitioner was convicted of murder in Tennessee state court and sentenced to life in prison. The homicide in the case went unsolved for eight years, but the petitioner contacted police while he was incarcerated on unrelated charges and claimed to have information about the murder. The petitioner subsequently confessed after being transferred to speak with detectives. The petitioner alleged that his rights under Miranda v. Arizona, 384 U.S. 436 (1966), were violated because questioning persisted after he requested an attorney, and because the police questioned him for an extended length of time before reading him his Miranda rights. Under Edwards v. Arizona, 451 U.S. 477 (1981), suspect-initiated contact with the police is not custody for Miranda purposes. The state courts concluded that the petitioner was not "in custody" within the meaning of Miranda and denied relief. The Sixth Circuit concluded that the state court's rejection of the petitioner's claim was entitled to deference under 28 U.S.C. § 2254(d), and as a result the denial of habeas corpus relief was affirmed.

Turner v. U.S., 15-6060 (2/15/2017)

The defendant was charged in state court with aggravated robbery and his attorney was approached by the federal prosecutor who also intended to charge the defendant over the same conduct. The federal prosecutor and the defendant's state attorney engaged in negotiations which led to a plea offer that the defendant ultimately rejected. The defendant was subsequently prosecuted federally and received a sentence 10 years higher than the original plea offer. The defendant filed a habeas petition claiming that he was denied the effective assistance of counsel in the plea negotiations, and the district court denied the petition. On appeal, the court held that the Sixth Amendment right to counsel does not attach before the filing of formal charges. Thus, because the indictment was not filed at the time of the plea negotiations with the federal prosecutor, the right to counsel had not attached related to the federal charges. The court suggested that this bright line rule was out of step with modern criminal practice, but that the court was nonetheless bound by prior precedent of the court. Accordingly, the district court ruling was affirmed.

Phillips v. White, 15-5629 (3.15.17)

The petitioner was convicted of capital first-degree murder in Kentucky state court and was eligible for the death penalty. At the penalty phase of trial, the petitioner's trial attorney stated on the record that he did not have any experience in capital litigation. Trial counsel did not present an opening statement at the penalty phase, and did not call any witnesses; trial counsel's closing argument was two sentences long. The petitioner was subsequently sentenced to life in prison with parole eligibility after 25 years. In federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel at the penalty phase of trial and subsequent judicial sentencing, notwithstanding the fact that he did not receive the death penalty. The Sixth Circuit agreed, and found

that the petitioner was entitled to a presumption of prejudice under United States v. Cronic, 466 U.S. 648 (1984), based on trial counsel's virtual abandonment of the petitioner at the penalty phase and sentencing. The Sixth Circuit further concluded that the petitioner could demonstrate actual prejudice under Strickland v. Washington, 466 U.S. 668 (1984), based on the availability of less severe sentences under Kentucky law.

U.S. v. Gooch, 15-4360 (3/2/17)

The defendant was charged with multiple robberies and he was found incompetent to stand trial. Subsequently, multiple evaluations found him competent. After the district court determined his competency, the defendant later moved to represent himself. The court engaged in the standard colloquy regarding self-representation and allowed the defendant to proceed *pro se* with standby counsel. The defendant was convicted and he argued on appeal that the district court erred in permitting him to self-represent. The court held that the "competency standard for standing trial is identical to the standard for self-representation." Thus, the court found that the district court was not required to "review defendant's competency with a specific eye toward self-representation." Accordingly, because the court found the defendant competent to stand trial and later conducted a proper colloquy regarding self-representation, the district court did not err in permitting the defendant to proceed *pro se*.

First Amendment:

Packingham v. NC, 15-1194 (6/19/17)
Supreme Court

North Carolina had a law which prohibited registered sex offenders from accessing websites or pages where minors could be found. It was punishable as a felony. The Supreme Court held that the law violated the First Amendment. The Court held that the internet, and social media sites such as Facebook, are the new "public square," and as such, "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." The Court therefore invalidated the law on First Amendment grounds.

Evidence and Miscellaneous Criminal Rules:

U.S. v. King, 16-4039 (8/4/17)

The defendant was an attorney who approached a confidential informant who was posing as a drug dealer in a strip club and offered to launder his drug proceeds for him. The attorney proposed to do it through a method he learned from watching the T.V. show Breaking Bad. The informant agreed and recorded the conversations for the government. In the recorded conversations, the informant indicated that he had shipments of drugs arriving in the near future and that he would have about $30,000 to launder. The defendant agreed to launder the proceeds and accepted marked government funds from the informant. At trial, the government introduced the recorded conversations but did not call the informant as a witness. The defendant argued that the recorded statements were improper hearsay evidence and violated the Confrontation Clause. On appeal, the court held that the statements were not hearsay because they were not offered for the truth of the matter asserted. There was no actual truth to the informant's assertions that

he had drug shipments arriving or that the funds he received were drug proceeds. The statements were offered merely for the purpose of showing that the informant made those assertions and that they were believed by the defendant. Further, the court held that it did not matter in the Confrontation Clause analysis that the statements happened to prove elements of the offense. Accordingly, the admission of the evidence was affirmed.

Additionally, during the defendant's testimony, the government cross examined him about a misdemeanor conviction he had for drug possession. The government mistakenly believed that the conviction was in 2004 and was the reason he left the prosecutor's office. The conviction in fact occurred in 2007. The defendant argued on appeal that admission of this evidence violated FRE 404(b). The court agreed that admission of the evidence was improper. The admission of the evidence served no purpose other than to suggest that the defendant had a propensity to commit crimes. Further, the evidence was not proper to show that the defendant left the prosecutor's office on bad terms because it was not, in fact, related to why he left the prosecutor's office. Likewise, he had not claimed that he left on good terms during his testimony. Nonetheless, the court held that admission of the evidence was harmless because the defendant had put his own drug use at issue in order to garner jury sympathy and because the evidence of the defendant's guilt of money laundering was otherwise overwhelming. As such, the conviction was affirmed.

U.S. v. Monie, 16-6244 (6/9/17)

The defendant pled guilty to being a felon in possession of a firearm, among other offenses. At the plea hearing, the district court advised the defendant that the maximum possible penalty for the firearm charge was 10 years. At sentencing, however, the district court determined that the defendant qualified as an armed career criminal and enhanced his sentence to a mandatory 15 years. On appeal, the court found plain error in the district court's misadvisement about the correct statutory minimum and maximum penalties. Because the record did not otherwise reflect that the defendant was aware of the enhanced penalty under the ACCA, the court held that Fed. R. Crim. P. 11 had been violated and the defendant was entitled to withdraw his guilty plea. Thus, the defendant's conviction was vacated.

U.S. v. Andrews, 16-3130 (5/23/17)

The defendant was indicted for drug, robbery, and gun charges and entered into a binding plea agreement, pursuant to Fed. R. Crim. P. 11(c)(1)(C). At the plea hearing, the district court stated that it would "normally" accept the plea at the plea hearing, but since it was a "recommended sentence," the court would refer it to the probation department and that it would "go ahead from there" at the sentencing hearing. The defendant moved to withdraw his plea prior to sentencing, and the district court denied the motion because the defendant could show no just reason for the withdrawal. On appeal, the court held that, under Fed. R. Crim. P. 11(d)(1), a defendant has "an absolute right to withdraw an unaccepted guilty plea for any reason or no reason." The court found that, where a district court explicitly defers any acceptance of a guilty plea to a later point in time, the plea has not been accepted by the district court for purposes of Rule 11(d). Because the district court's statement indicated that the plea was not accepted at the time of the plea hearing, the defendant should have been able to withdraw his plea prior to sentencing. Accordingly, the defendant's conviction was vacated.

Manrique v. US, 15-7250 (4/19/17)
Supreme Court

The defendant was sentenced, but the district court deferred a finding on restitution for 90 days. The defendant filed a notice of appeal at the time sentence was imposed, but did not file a second, separate notice of appeal from the restitution decision. The Court held that "a defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order. Because

petitioner failed to do so, and the government objected, the court of appeals properly declined to consider his challenge to the amount of restitution imposed."

Sentencing – Crimes of Violence and Violent Felonies

U.S. v. Beckles, 15-2238 (3/6/17)
Supreme Court

In Johnson, the Supreme Court held that the "residual clause" of the ACCA was void for vagueness. At issue in Beckles was whether the identically worded residual clause under USSG § 4B1.1 was similarly constitutionally infirm. The Court held that, because the sentencing guidelines were advisory and therefore did not affix statutory minimum and maximum ranges, the void for vagueness doctrine did not apply. Therefore, the residual clause of the sentencing guidelines was upheld as constitutional.

Raybon v. U.S., 16-2522 (8/14/17)

The defendant was convicted of distributing cocaine. At sentencing, the district court determined that the defendant was a career offender based, in part, on its conclusion that his Michigan conviction for assault with intent to do great bodily harm constituted a crime of violence under USSG § 4B1.1. On appeal, the court held that the Michigan offense is a crime of violence under the force clause of the guideline. The court found that Michigan courts required either (1) a threat of force or violence to do corporal harm to another, or (2) an intent to great bodily harm less than murder. Even though Michigan law did not require that an injury actually occur, the court held that Michigan's definitions of the offense satisfied the Supreme Court's requirement of "violent force." Accordingly, the sentence was affirmed.

U.S. v. Stitt, 14-6158 (6/27/17)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant was an armed career criminal based, in part, on his prior Tennessee convictions for aggravated burglary. Relying on prior circuit precedent, the district court and the Sixth Circuit panel held that the burglary convictions were violent felonies under the ACCA. The court agreed to rehear the case *en banc*. The full court held that the prior burglaries were not violent felonies because Tennessee defined a "habitation" in the burglary statute to include tents, vehicles, and similar "structures." The court found that the Supreme Court, in defining a generic burglary, repeatedly excluded vehicles and other movable structures from its definition of a habitation. Further, the court was not persuaded by the fact that Tennessee law required that the "structure" be "habitable" to fall under the burglary statute. The court determined that the generic form of burglary focused more on the "form and nature" of the structure rather than its purpose. Accordingly, the sentence was vacated and the case remanded.

U.S. v. Ferguson, 15-6303 (8/22/17)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant's 8 prior burglary convictions from Tennessee qualified him as an armed career criminal. On appeal, the court first held that 5 of the defendant's convictions for aggravated burglary were not violent felonies under the ACCA based on the court's recent decision in U.S. v. Stitt, which held that Tennessee's aggravated burglary statute did not fit the generic definition of burglary. Second, the court held that Tennessee's burglary statute does define a generic burglary and thus the offense qualifies as a

violent felony under the ACCA. Specifically, the court found that generic burglary required "an unlawful or unprivileged entry into, a building or other structure, with intent to commit a crime." The court ruled that each of the provisions of the burglary statute met this definition. Accordingly, the district court's sentence was affirmed.

U.S. v. Patterson, 15-4112 (4/3/17)

The defendant was convicted of being a felon in possession of a firearm and the government argued that he qualified as an armed career criminal based on prior Ohio convictions for armed robbery. The district court held that Ohio aggravated robbery was not a violent felony under the ACCA after the Supreme Court's decision in Johnson. Upon the government's appeal, the court held that the prior aggravated robbery conviction was a violent felony under the ACCA. Specifically, the court found that the defendant was convicted under ORC § 2911.01(A)(1) which prohibited committing or attempting a theft offense while displaying, brandishing, indicating possession, or using a firearm. The court ruled that this language suggested at a minimum that the defendant had threatened physical harm and this was sufficient under the ACCA to be a violent felony under the force clause. Further, the court held that the state statute need not require any specific *mens rea* for the force or intimidation element in order for the crime to be considered a violent felony under the force clause of the ACCA. Thus, where the state statute has no explicit *mens rea* requirement related to the force or intimidation element of the robbery statute, the state conviction may nonetheless qualify under the force clause of the ACCA. Accordingly, the court determined that application of the ACCA was appropriate and the district court's ruling was reversed.

U.S. v. Yates, 16-3997 (8/9/17)

The defendant was convicted of drug trafficking and at sentencing the district court determined that he was a career offender based, in part, on his prior Ohio conviction for robbery. On appeal, the court held that the robbery conviction was not a crime of violence under USSG § 4B1.1. Specifically, the court found that the defendant was convicted under ORC § 2911.02(A)(3) which prohibited committing a theft offense and using or threatening the use of physical force against another. The court ruled that this offense was categorically not a crime of violence because Ohio courts did not define force to require "violent force," as required by the Supreme Court. Instead, the court found that Ohio law requires as little as a bump to constitute the use of force. As such, the robbery offense could not count as a crime of violence under the force clause. Additionally, the court held that the robbery offense did not qualify as a generic robbery under the newly amended guideline which enumerated robbery as a crime of violence. The court held that the generic definition of robbery required that the victim be placed in "immediate danger" from the offense. The court found that Ohio's definition of robbery could not satisfy this immediate danger requirement. Accordingly, the defendant's robbery conviction was not a crime of violence and his sentence was vacated.

U.S. v. King, 15-4192 (3/30/17)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant was an armed career criminal based on three prior convictions for robbery and kidnapping that occurred on the same day. In making this determination, the district court relied on the bill of particulars that was filed in the case which provided that the three offenses happened at different locations at different times. The defendant appealed. Reversing prior circuit precedent, the court held that the categorical approach laid out by the Supreme Court in Taylor and Shepard is to be applied to the determination of whether offenses "occurred on occasions different from one another" under the ACCA. Thus, a district court may consider only the statute of conviction, the charging document, and any facts to which the defendant necessarily admitted at a plea hearing or were found by a jury at trial. Under this approach, the bill of particulars would not qualify because it was not clear from the record that the

defendant admitted these additional facts at the time of this plea. Accordingly, the case was remanded for resentencing.

Miscellaneous Sentencing Issues

U.S. v. Brown, 16-6291 (5/15/17)

The defendant was convicted of wire fraud and extortion. At sentencing, the district court determined that an enhancement applied pursuant to USSG § 3C1.1 for obstruction of justice because he originally told investigators that two other men had access to his computer and may have sent the extortionate emails. Further, prior to trial, the defense attorney sent over a list of eight individuals who had access to the defendant's computer. On appeal, the court held that making a false statement to a law enforcement officer generally does not amount to obstruction of justice unless it significantly obstructs an official investigation. The court found that the statements did not significantly obstruct the government's case because the government was able to interview the possible witnesses and that they testified at trial that they did not send the emails, thus bolstering the government's case. Accordingly, there was no significant obstruction of the investigation and the application of the enhancement was reversed.

U.S. v. Duke, 16-2128 (8/29/17)

At a hearing before the district court, the defendant physically assaulted the prosecutor by slamming the prosecutor's head against a courtroom table repeatedly. As a result, the defendant was convicted of assaulting a government official. At sentencing, the district court applied an enhancement under USSG § 2A2.2(b)(2) based on its conclusion that the courtroom table qualified as a dangerous weapon. Further, the district court applied a number of enhancements that arguably double counted the defendant's conduct. On appeal, the court, applying a "functional approach," concluded that a table is in fact a dangerous weapon. Considering the circumstances under which the table was used, it's capability to inflict serious bodily harm, its size and density, and the actual injuries suffered by the prosecutor, the court found that the table qualified as dangerous weapon as used by the defendant. Further, the court upheld the double counting of enhancements. First, the court held that it was proper for the district court to count the defendant's use of a dangerous weapon (the table) in the determination of his offense level and as a specific offense characteristic. Because the guideline specifically provided in the commentary to an amendment that the Sentencing Commission intended for a dangerous weapon to be double counted in this fashion, the court held that it was permissible. Second, the court ruled that double counting the infliction of bodily harm was also proper where each provision punished distinct aspects of the defendant's conduct. Thus, § 2A2.2(b)(3)(a) punished the infliction of bodily injury, and § 2A2.2(b)(7) punished infliction of bodily injury on a government employee. This distinction was sufficient to allow the double counting. Finally, the court held that the increase to the base offense level under § 2A2.2 and the increase under § 3A1.2, both because the defendant was a government employee, was permissible double counting. The court found that the guidelines specifically authorized an increase under both sections. Accordingly, the defendant's sentence was affirmed in all respects.

U.S. v. Cross, 15-5641 (1/18/17)

The defendant's supervised release was revoked based on his commission of a new drug possession offense and he was sentenced to eight months in jail and 24 more months of supervised release. After the defendant had completed his jail term and during his subsequent supervised release term, the district court found out that the defendant had also committed a theft offense prior to his first violation. As a result, the court again revoked the defendant's supervised release, sentenced him to one day in jail, and a new term of five years

of supervised release. On appeal, the court held that the district court had jurisdiction and authority to revoke a defendant's supervised release based on conduct that occurred during a prior term of supervised release that was not discovered until later. The court ruled that the "revocation" of supervised release "revokes only the release part," and thus the district court's authority over the defendant continues until the supervision terminates or expires. Accordingly, the district court's ruling was affirmed.

U.S. v. Schock, 16-2503 (7/10/17)

The defendant was convicted of one count of producing child pornography in September 2013. At sentencing, the district court imposed a two level enhancement under USSG § 2G2.1(d)(1) because the defendant also produced child pornography regarding a second minor in August 2014. The court ultimately varied downward from the guideline range and imposed a sentence of 240 months. On appeal, the court held that the multiple count enhancement may only apply if the production of the child pornography counts were relevant conduct to each under USSG § 1B1.3(a)(1). This provision requires that the offense against the second victim occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection of responsibility for that offense." The court found that, because the pictures of the victims were taken in different time periods and there was no evidence that the two were ever photographed together, the offenses were not relevant conduct to each and thus the multiple count enhancement should not have applied. Further, the court held that, even though the ultimate sentence imposed by the district court was lower than the guideline range, the court found no harmless error because the district court did not indicate that it would have imposed the same sentence had the guideline objection been sustained. Accordingly, the sentence was vacated.

Dean v. U.S., 15-9260 (4/3/17)
Supreme Court

The defendant was convicted of a drug count and a firearm enhancement under 18 USC § 924(c) charge. At sentencing, the district court expressed that it would lower the sentence on the drug count to take into account the consecutive five year sentence for the firearm enhancement, but was bound by circuit precedent not to consider it. The Supreme Court held that nothing in the statutes or sentencing guidelines prohibited district courts from taking into consideration the effect of other sentences. The case was therefore remanded for resentencing.

U.S. v. House, 16-1691 (6/14/17)

The defendant entered into a plea agreement whereby he agreed that he participated in a conspiracy to distribute drugs from 2013 to 2014. A government informant provided information that the conspiracy had been ongoing since at least 2011. At sentencing, the district court adopted this earlier date based on the findings in the PSR and attributed additional drug amounts from this time period. On appeal, the court held that the district court was free to determine the length of the conspiracy under the relevant conduct provisions of the guidelines in spite of the agreement of the parties in the plea agreement. Because the defendant offered no evidence to the contrary at sentencing and did nothing to challenge the reliability of the informant's information, the district court's reliance on the PSR was proper. Accordingly, the sentence was affirmed.

Additionally, at sentencing, the district court determined that the defendant was a leader in a conspiracy involving five or more participants and applied an enhancement under USSG § 3B1.1. One of the five participants included the government's informant. On appeal, the court held that ordinarily an informant cannot count as a participant in a criminal enterprise for purposes of the leadership enhancement. The court ruled, however, that where the informant was already involved in the conspiracy as a coconspirator prior to becoming a government informant, then the informant is countable as a participant under § 3B1.1. As such, the sentence was affirmed.