

Fifth Circuit Update

Issue Spotting & Summaries

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4th Amendment

- Still work to be done on these “totality of the circumstances stops”
 - Look for impermissible factors (i.e. employment status or refusal to consent)
- Look to the length of any stop, and what reasonable suspicion police had at that moment. Once suspicions are dispelled, the stop should have ended
- Think about *Carpenter*, and the impacts of technology on privacy (what reveals the “intimate details of life”)
- Do you have a right to privacy?
 - SCOTUS has been expanding (e.g. rental cars)

5th Amendment

- If raising *Brady* or *Youngblood*—i.e. the government destroyed evidence—devote enough time to prejudice
 - Get evidence regarding prejudice (might need an expert)

6th Amendment & Confrontation

- Present a complete defense
 - Start raising whenever your evidence is excluded
 - Make a showing of prejudice in the district court
 - Tie prejudice to an element of the offense
- Confrontation Rights
 - Apply at suppression hearings
 - Limited in some cases, but always object
 - Look to who is speaking—agents cannot “pass through testimony” of other individuals (i.e. confidential informants)

Pereira & 1326(d)

- Focus on the prejudice showing
 - Make a record in the district court about what would have happened
 - Even if it wasn’t before the IJ, try to get it in front of the district court
 - Show how your client would have met those standards
- File cert petitions
 - de facto circuit split on the prejudice standard?

Competency

- Object when detention becomes “indefinite” or exceeds the purpose of detention (restoring competency for trial)
 - Hold the government to this standard, including the BOP psychologists and psychiatrists
 - For example: ask “Will the client regain competency in the next four months?”

Guilt Issues

- Always look to what the indictment actually charged

- Object to any debatable constructive amendments
- Consider bills of particulars, or motions regarding duplicative or multiplicitous indictments to narrow down the indictment
- Gun Cases
 - Did the person know their prohibited status? (*Rehaif*)
 - Did the person have their rights restored or are they really a “prohibited person”?
 - The Fifth Circuit is willing to entertain 2nd amendment arguments
- Rule 29
 - Careful with only addressing one element and waiving the rest on appeal
- Prejudice & unpreserved errors
 - Plain error includes whether the “failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings”

Sentencing & Guideline Issues

- Always check what guideline was in effect during the offense, and compare with the current one
- Object and make a record of *Tapia* errors (court cannot impose higher sentence for medical or rehabilitative reasons)
 - Object in your compassionate release cases too
- Preserve loss of one-point acceptance reduction for filing suppression motions (circuit split)
- Factual PSR errors
 - Show implausibility via objective facts
 - Docket or present some type of evidence to rebut
- Raise all possible § 3553(a) issues to preserve appeals (don’t rely on general statements)
- Object to mandatory incarceration supervised-release revocations after *United States v. Haymond*

Appeals

- Never assume an appeal is moot
 - Deportation does not moot a sentencing appeal, for example
- Waiver is a very strict thing in the Fifth Circuit
- Always brief important issues thoroughly
 - Cite the record
 - Don’t footnote important things

Post-Conviction

- Watch out for § 2255 waivers in plea agreements (especially with pending litigation)
 - Preserve the issue of circuit split if the government enforces waiver
- First Step Act reductions = very discretionary sentencing standard
 - First Step Act does not allow plenary resentencing regarding retroactive drug reduction (still object as litigation is ongoing)
- Compassionate release is also a very discretionary standard

Categorical Approach

- Always look to the force clause in § 924(c) cases
 - Case law might not be intuitive (e.g. kidnapping not a crime of violence “COV”)
 - Attempted COV = COV
 - Conspiratorial COV ≠ COV
- Preserve all recklessness COV cases (i.e. Texas assault) given the cert grant

In short, recognize the issues and object anyway!