

PRETRIAL MOTIONS CHECKLIST

BY: Thomas J. Wright

1. BILL OF PARTICULARS, Rule 7(f). Must be made within 10 days of arraignment or when otherwise allowed by court.
2. BOND - SEE RELEASE
3. CONTINUANCE / ENLARGEMENT OF TIME, Rule 45(b); 18 USC § 3161(h)(1); (h)(3); (h)(8).
4. DISCLOSE GRAND JURY PROCEEDINGS, Rule 6(e)(3)(c).
5. DISCOVERY, Rules 16 and 12(b)(4)
 - a. Defendants Statements
 - i. Written or recorded.
 - ii. Oral to law enforcement in response to interrogation.
 - b. Prior Record.
 - c. Documents and tangible objects.
 - i. To be used in government case in chief.
 - ii. Material to preparation of defense.
 - d. Reports of exams or tests.
 - i. To be used in government case in chief.
 - ii. Material to preparation of defense.
 - E. Expert Witness testimony summary, Rule 16(a)(1)(E).
 - F. Witness statements. Rule 26.2, 18 USC §3500, Jencks Act.
 - G. Exculpatory evidence and information,
 1. Brady, 373 U.S. 83 (1963) - exculpatory evidence
 2. Giglio, 405 U.S. 150 (1972) - credibility
 3. Bagley, 473 U.S. 667 (1985) - impeachment
 4. Personnel files of testifying officers. U.S. v. Henthorn, 931 F.2d 29 (9th Cir. 1991), cert. denied 112 S.Ct. 1585 (1992); U.S. v. Cadet, 727 F.2d 1453 (9th Cir. 1984).
 - H. Sample of anything which is or should be analyzed - drug, blood, urine, etc.
 - I. Examine objects for fingerprints.
 - J. Subpoena tangible objects or documents from government or third party - Rule 17(c).

- K. Take deposition - Rule 15, 18 USC § 3503.
 - L. Reveal identity of informant, Roviaro v. U.S., 353 U.S. 53 (1957); Jones v. Jago, 575 F.2d 1164 (6th Cir.) cert. denied, 439 U.S. 833 (1978); U.S. v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 457 U.S. 1119 (1982).
6. DISMISSAL, Rule 12(a)
- a. Double Jeopardy - Fifth Amendment.
 - b. Statute of Limitations - 18 USC § 3281 et seq.
 - c. Unconstitutionality of the charged offense or statute.
 - i. Overbreadth
 - ii. Vagueness
 - iii. Infringement of First Amendment Rights
 - iv. Reduces burden of proof or infringes on presumption of innocence.
 - d. Grand jury proceedings defect, Rules 12(b)(1) and 6(b), 28 USC § 1867.
 - e. Prosecutorial Misconduct.
 - i. Violation of Discovery Rules or Orders.
 - ii. Selective prosecution based on class. U.S. v. Sammons, 918 F.2d 592 (6th Cir. 1990)
 - iii. Vindictive prosecution.
 - iv. Loss or destruction of evidence. U.S. v. McLernon, 746 F.2d 1098 (6th Cir. 1984).
 - f. Outrageous government conduct. U.S. v. Brown, 635 F.2d 1207 (6th Cir. 1980); U.S. v. Russell, 411 U.S. 423 (1973).
 - g. Lack of Jurisdiction, see generally Rule 18, 18 USC § 3231.
 - h. Speedy Trial Right Violation
 - i. Statute 18 USC §§ 3161 and 3162.
 - ii. Constitution
 - (1) Sixth Amendment
 - (2) Fifth Amendment
 - (3) D.P. Clause - preaccusatory delay.
 - (4) U.S. v. MacDonald, 456 U.S. 1 (1982)
 - iii. Detainer Act. 18 USC App. III.
 - iv. Rule 48(b)
 - i. Defect in Indictment, Rule 12(b)(2).
 - i. Failure to charge an offense. U.S. v. Superior Growers, No. 92-1087 (6th Cir. 12/11/92).
 - ii. Failure to show jurisdiction
 - iii. Duplicitous (see also "Election")
 - iv. Multiplicitous (see also "Election")

7. ELECTION: To compel government to elect between counts when there is misjoinder or where the indictment is multiplicitous or duplicitous. U.S. v. Universal CIT Credit Corp., 344 U.S. 218, 225 (1952); U.S. v. Robinson, 651 F.2d 1181 (6th Cir. 1981), cert. denied, 454 U.S. 875 (1981).
8. EXPERTS OR OTHER SERVICES AT GOVERNMENT EXPENSE, 18 USC § 3006A(e).
9. MENTAL EVALUATION - COMPETENCY, 18 USC §4241.
10. NOTICE OF ALIBI, Rule 12.1.
11. NOTICE OF INSANITY DEFENSE, Rule 12.2. See also 18 USC § 17.
12. NOTICE OF PUBLIC AUTHORITY DEFENSE, Rule 12.3.
13. PRETRIAL CONFERENCE, Rule 17.1.
14. RECUSAL, 28 USC §§ 144 and 455(b)(1).
15. RELEASE PENDING TRIAL, SENTENCING OR APPEAL.
 - Rule 46(a), 18 USC § 3142 - pending trial
 - Rule 46(b) - during trial
 - Rule 46(c), 18 USC §3143 - sentencing or appeal
 - Rule 46(b) - during trial
16. RETURN OF PROPERTY TAKEN BY SEARCH WARRANT, Rule 41(e)
17. "THE RULE" (sequestration of witnesses) usually made orally at inception of trial but want to make sure court advises witnesses not to discuss their testimony with other witnesses either before or after they testify. FRE 615.
18. SEQUESTRATION OF JURORS
19. SEVERANCE, Rule 12(b)(5)
 - a. From other defendants - Rule 8(b), Rules 14. U.S. v. Saleh, 875 F.2d 535 (6th Cir. 1989); U.S. v. Warner, 690 F.2d 545, 551 (6th Cir. 1982); U.S. v. Reynolds, 489 F.2d 4 (6th Cir. 1973).
 - b. From other counts - Rule 8(a), Rule 14. U.S. v. Harris, 635 F.2d 526 (6th Cir. 1980), cert. denied 451 U.S. 989 (1981).
20. STRIKE (SURPLUSAGE) UNNECESSARY PREJUDICIAL STATEMENTS OR WORDS FROM THE INDICTMENT.
 - a. Rule 7(d), FRCP

- b. U.S. v. McGuire, 744 F.2d 1197 (6th Cir. 1984)
- c. Aliases U.S. v. Dioguardi, 428 F.2d 1033 (2nd Cir.), cert. denied, 400 U.S. 825 (1970).

21. SUBPOENAS

- a. Witnesses at government expense - Rule 17(b).
- b. Documents and tangible objects before trial - Rule 17(c).

22. SUPPRESSION, Rule 12(b)(3)

- a. Evidence seized in violation of Fourth Amendment
 - i. Invalid warrant
 - (1) Lack of probable cause to support
 - (a) Stale information
 - (b) Reliability of informant
 - (c) Foundation for informant's or officer's assertions
 - (2) Lack of particularity, over broad or inaccurate description of premises to be searched or property to be seized.
 - (3) Reckless or intentional false statements/omissions in supporting affidavit. Franks v. Delaware
 - ii. No warrant and no exception to warrant requirement.
 - 3. Pretextual stop of defendant. U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993).
- b. Evidence seized in violation of Knock and Announce Rule (18 USC § 3109). Applies only to federal searches. U.S. v. Marts, 92-1803 (8th Cir. 02/26/93). U.S. v. Mendonsa, 91-30413 (9th Cir. 03/30/93).
- c. Confessions obtained in violation of 5th or 6th Amendments. 18 USC § 3501.
 - i. Coerced in violation of Fifth Amendment. U.S. v. Finch, ___ F.2d ___ (6th Cir. 07/06/93)
 - ii. Obtained without being advised of rights under Miranda.
 - 3. Obtained during period of detention violative of Rule 5(a)'s requirement of prompt presentment before a Judicial Officer. Mallory v. U.S., 354 U.S. 449 (1957); U.S. v. Alvarez-Sanchez, ___ U.S. ___, 55 Cr.L. 2019 (1994).
 - 4. Obtained after assertion of right to counsel in violation of Sixth Amendment.
 - 5. Use by prosecutor of immunized statement. Kastigar
- d. Evidence of other crimes or bad acts, FRE 404(b), and Motion for record of balancing prejudice v. probative value under FRE 403, see, U.S. v. Acosta-Cazares, 878 F.2d 945, 951 (6th Cir 1989).

- e. Identification testimony
 - i. Line-up obtained in violation of defendant's Sixth Amendment right to counsel
 - ii. Line-up unduly suggestive
 - f. As a sanction for prosecutorial misconduct - failing to disclose discoverable or exculpatory evidence. Rule 16(d)(2)
 - G. In limine to exclude evidence which should not be admitted under the Federal Rules of Evidence, see Limine.
 - H. Tape recordings.
 - 1. Inaudibility - U.S. v. Robinson, 707 F.2d 872 (6th Cir. 1983).
 - 2. Wiretaps.
 - a. Minimization
 - b. Sufficiency of supporting affidavits (basically same considerations as search warrant affidavits).
23. VENUE, CHANGE IN, Rule 21. See also, Rule 18 and 18 USC §§ 3235 through 3238 for other venue provisions.

DEFENSES CHECKLIST

Antique Firearm

- It's not a firearm
- Affirmative defense to federal firearm charge
- 18 USC 921(a)(3) and (16)
- U.S. v. Smith, No. 92-3162 (6th Cir. 12/11/92).

Alibi

- I couldn't have done it because I wasn't there

Coercion/Duress

- They made me do it
- Including battered spouse syndrome
- United States v. Solano, CA No. 92-10648 (9th Cir. 12/01/93)

Consent

- They said I could do it

Diminished Capacity

- I didn't really know I was doing it, or my actions were involuntary, but I'm not insane.
- including involuntary intoxication, battered spouse syndrome
- See Modern Penal Code § 2.08; U.S. v. Pholot, 827 F.2d 889 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

Entrapment

- The government made me do it

Good Faith

- I really didn't intend to do it.
- Applies in fraud cases; U.S. v. Dunn, 961 F.2d 648 (7th Cir. 1992).

Impotency

- I couldn't have done it even if I was there
- Other disabilities rendering it doubtful defendant could have committed this particular crime.

Insanity

- I didn't know or don't understand that I did it
- 18 USC § 17
- Modern Penal Code § 4.01.

Mere Presence/Association

- I was just hanging around when they did it.

Mistake of Law or Fact

- I didn't know I couldn't do it or I thought I was doing something else.
- currency transactions U.S. v. Aversa, No. 91-1363 (1st Cir. 01/13/93) (en

banc)

- tax laws. Cheek v. U.S., 498 U.S. 192 (1991).
- remember "conscious avoidance" of knowledge is sufficient for finding knowledge. U.S. v. Jewell, 532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951.
- structuring currency transaction to avoid reporting requirements - knowledge of illegality is required Ratzlaf v. U.S., ____ U.S. ____ (1994).

Necessity

- I had to do it
- choice of evils, justification, U.S. v. Newcomb, 6 F.3d 1129 (6th Cir. 1993); U.S. v. Bailey, 444 U.S. 394 (1980); U.S. v. Singleton, 902 F.2d 471 (6th Cir.) cert. denied 498 U.S. 872 (1990).
- including medical necessity of possessing drugs, e.g., smoking marijuana to relieve otherwise untreatable glaucoma. 20 Cr. L. Rep. 2299, 604 F.2d 1312.

Outrageous or Unconscionable Police Conduct

- Look what they did
- U.S. v. Russell, 411 U.S. 423 (1973); U.S. v. Koller, 956 F.2d 1408 (7th Cir. 1992); U.S. v. Payne, 91-3417 (6th Cir. 02/05/92); U.S. v. Brown, 635 F.2d 1207 (6th Cir. 1980); U.S. v. Twigg, 588 F.2d 373 (3rd Cir. 1978).

Self Defense

- I did it to them because they were gonna do it to me
- including battered spouse syndrome
- defense of others
- and defense of property
- U.S. v. Moses, 220 F.2d 166 (3rd Cir. 1955); U.S. v. Vargas, 1993 WL 41773; Adams v. U.S., 20 F.2d 297 (5th Cir. 1955).

Statute of Limitations

- I did it too long ago