No. 12-2338 and 12-2339

In the
United States Court of Appeals
for the Sixth Circuit

United States of America,

Plaintiff-Appellee,

v.

Gerald Duval, Jr. and Jeremy Duval,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 11-20594

Brief for the United States

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Waiver of Oral Argument

Defendants raise two issues, neither preserved for appeal. The waiver arguments are uncomplicated, so oral argument is probably unnecessary to assist the Court in deciding the case.

Issues Presented

I. Did defendants waive their new argument that the search warrant affidavit was invalid because it failed to state that the Duvals were in compliance with Michigan medical marijuana laws?

II. Must an indictment alleging violations of federal drug laws assert the absence of an affirmative defense under the Michigan medical marijuana law?

Statement of the Case

Defendants appeal their convictions for conspiracy to manufacture and manufacturing 100 or more marijuana plants, in violation of 21 U.S.C. §§ 841(a) and 846; and maintaining a drug premises, in violation of 21 U.S.C. § 856(a)(1). The jury returned its verdicts in April 2012, after a 9-day trial that included firearms charges of which defendants were acquitted. (R. 111: Tr. 9, Page ID 3645–47). The district court sentenced both defendants on October 1, 2012, and each received concurrent sentences on all four counts. Jeremy Duval's sentence was 60 months, but Gerald Duval's sentence was 120 months because he had previously been convicted in federal court of possession with intent to distribute cocaine. (R. 92: Judgment as to Gerald Duval, Page ID

1093; R. 93: Judgment as to Jeremy Duval, Page ID 1100; R. 39: Information with notice of penalty enhancement, Page ID 300-01). The judgments were entered on October 9 (Gerald) and October 12 (Jeremy), 2012; both defendants filed timely notices of appeal on October 15, 2012. (R. 96: Notice of Appeal as to Gerald Duval, Page ID 1254; R. 97: Notice of Appeal as to Jeremy Duval, Page ID 1256).

Statement of Facts

In early May of 2011, a citizen called DEA to report a large marijuana-growing operation in rural Monroe County, Michigan. (R. 104: Tr., Page ID 1974–75). The DEA office in Toledo, Ohio, supervised a task force of local, state, and federal officers that investigated drug dealing in southeast Michigan and northwest Ohio. Monroe County Deputy Sheriff Ian Glick, who had joined the DEA task force in January of 2011, was assigned to investigate this tip. (R. 104: Tr., Page ID 1969).

Glick interviewed the caller at home. (R. 104: Tr., Page ID 1974, 1976). The informant told Glick that Gerald Duval had built a large greenhouse and started building a second greenhouse on his property on Ida Center Road; that there was an 8-foot-high chain-link fence topped with barbed wire surrounding the greenhouses, with dogs roaming inside the fence; that Gerald Duval had been bragging to

people that he was growing and selling medical marijuana, making enough money to pay for a new custom pick-up truck; and that the sound of semi-automatic rifle fire could be heard from Duval's property two or three times a week. (R. 28: Gov't Response to Mot. to Suppress, Ex. A, Page ID 164). Glick checked property records to confirm that Gerald Duval was the owner of the property the informant described. (*Id.* at Page ID 163). He also discovered that Gerald Duval had a prior federal conviction for possession with intent to distribute cocaine, making him ineligible to grow marijuana for others under Michigan's medical marijuana law. (R. 104: Tr., Page ID 1976; R. 28: Page ID 164).

On June 13, 2011, Glick and another officer went to Gerald Duval's home on Ida Center Road, where they saw two very large greenhouses surrounded by a high chain-link fence topped by barbed wire. They saw plants in the greenhouses that appeared to be marijuana. (R. 104: Tr., Page ID 1977). Using what he learned from the informant and what he had confirmed or discovered through his own investigation, Glick prepared a search warrant affidavit and presented it to a Monroe County magistrate. (R. 28: Response, Ex. A, Page ID 163–65). She signed the warrant on June 15, 2011. (*Id.* at Page ID 162).

Members of the DEA task force executed the warrant the next day. (R. 104: Tr., Page ID 1984). They searched the house, a large pole barn, and the two greenhouses. (R. 104: Tr., Page ID 1988–89). At least 140 marijuana plants were growing in the greenhouses. (R. 107: Stipulation, Page ID 2598–99). There were plant lights and other materials for starting or growing marijuana indoors, both in the house and in a separate structure built within the pole barn. The pole barn contained 30 to 40 drying mature plants, bags of harvested and prepared marijuana, discarded or leftover parts of marijuana plants, a triple-beam scale, baggies in two sizes, and a poster listing different strains or varieties of marijuana. (R. 104: Tr., Page ID 2044–50; R. 107: Tr., Page ID 2480). In a kitchen cupboard, above the refrigerator, there were more than a dozen pill bottles containing marijuana seeds, with hand-written labels marking the strain. Several matched the labels on a starter tray in the basement that contained 30 dead marijuana plants. (R. 104: Tr., Page ID 1993–98). Some of the pill bottles were from vitamins or over-the-counter medication, but others had prescription labels with Gerald Duval's name on them. In the same cupboard, officers found a notebook with handwritten entries recording marijuana sales. (R. 104: Tr., Page ID 2468–69).

The officers also downloaded photographs from the computer in Gerald Duval's home office and seized documents from that room and from a safe in the basement. One photograph, dated September 2010, showed a crop of marijuana growing outdoors near Gerald Duval's pole barn. (R. 104: Tr., Page ID 2067–69). Another photograph showed a four-wheeler pulling a red farm wagon loaded with harvested marijuana. (R. 104: Tr., Page ID 2071).

Gerald Duval had personally ordered the greenhouses in March of 2011 and paid almost $68,000 in cash for them. (R. 105: Tr., Page ID 2102; R. 107: Tr., Page ID 2576–77; G. Ex. 241). When the work crew came to build the second greenhouse, marijuana was already growing in the first one. (R. 107: Tr., Page ID 2578). Gerald Duval also arranged for construction of the fence in April 2011, paying more than $14,000 in cash. (R. 105: Tr. Page ID 2106; R. 107: Tr., Page ID 2590-92; G. Ex. 242.4).

The officers who executed the search warrant on June 16, 2011, uprooted all of the live marijuana plants and removed all of the marijuana, weapons, and evidence they found. Nevertheless, just over a month later, on July 18, 2011, the citizen who had first tipped off DEA about Duval's operation contacted Deputy Glick to tell him that

marijuana had been replanted in those greenhouses. (R. 28: Response, Ex. D, Page ID 193). After going out to a neighbor's land from which he and another officer could see the marijuana for themselves, Glick obtained a second search warrant for Gerald Duval's property. A federal magistrate judge signed that warrant on August 9, 2011, and it was executed the same day. (R. 28: Response, Ex. D, Page ID 195). Sixty-seven more live marijuana plants were seized from the greenhouses. (R. 107: Stipulation, Page ID 2598–99).

At trial, Gerald Duval and Jeremy Duval both testified. They also called Gerald's daughter, Ashley Duval; his wife, Tracey Duval; his ex-wife, Marilyn Hunt; his brother, his housekeeper; and several other witnesses. Their defense was that Jeremy Duval and Ashley Duval were growing marijuana for medical use under Michigan law; that Jeremy and Ashley were each registered "caregivers" permitted to grow up to 12 plants for up to 6 "patients"; and that Gerald Duval had nothing to do with the business except that he "fronted" the money to construct the greenhouses and build the fences, and he allowed them to use his property for their business.

Adam Zimmerman, a City of Monroe police officer, visited the Duval property in the fall of 2010, after helicopters working with a state

police task force had spotted marijuana growing outdoors. (R. 108: Tr., Page ID 2817–19, 2823–24, 2827–28). Officer Zimmerman and his partner, a state police sergeant, walked up to the deck where Gerald Duval was watching the helicopters with his housekeeper, Carrie Shimp. From there, Zimmerman could see a garden with approximately 40 plants, each two to three feet high. (R. 108: Tr., Page ID 2833–34). Gerald Duval showed Zimmerman paperwork for himself and for three or four other people, indicating they had applied for licenses to be medical marijuana patients or caregivers. (R. 108: Tr., Page ID 2826, 2831, 2835). Zimmerman told Gerald Duval that in order to comply with Michigan law about growing medical marijuana, the crop needed to be secured so that only the person who had a license to grow it could have access to it. (R. 108: Tr., Page ID 2835–37).

Summary of the Argument

The district court properly denied the defendants' motion to suppress the fruits of the search because there were no intentional false statements in the affidavit. Defendants' new argument—that the affidavit intentionally omitted information that Jeremy and Ashley Duval had complied with Michigan law concerning growing medical marijuana—is waived because it is raised for the first time on appeal. It is also not supported by the record or the law defendants cite.

Nor will this Court entertain the defendants' challenge to the indictment for the first time unless they show lack of jurisdiction. The prosecutor is not required to negate affirmative defenses in an indictment, so there is no jurisdictional defect.

Argument

I. The defendants waived their suppression argument, and the argument fails as a matter of law.

Defendants moved to suppress the evidence seized pursuant to search warrants for Gerald Duval's property on Ida Center Road, but on different grounds from those they argue on appeal. In the district court, defendants argued that the affidavits contained a material false statement—that Deputy Glick and another officer saw marijuana growing in Duval's greenhouses in June 2011. (R. 22: Mot. to Suppress, Page ID 83–88). The district court granted a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to resolve defendant's allegation that Deputy Glick could not have seen into the greenhouses. (*See* R. 40: Supp. Tr., Page ID 306–307; R. 101: Tr., 1522). At the end of the hearing, the district court denied the motion, finding that defendants failed to demonstrate that the assertion was false. (R. 101: Tr., Page ID 1532).

On appeal, defendants are making a new *Franks* argument. They assert that the search warrant affidavit "flagrantly" omitted "the fact that law enforcement officers from OMNI had come onto their property nine months before the search"; learned that "Jeremy and Ashley Duval

had permission under Michigan law" to grow marijuana; and "gave the Duvals advice on how to comply with the MMMA." Def. Br. 21.

Even though the Duvals moved to suppress the results of the search warrant under Federal Rule of Criminal Procedure 12(e), their failure to raise this specific issue resulted in a waiver. *United States v. Bonds*, 12 F.3d 540, 569 (6th Cir. 1994). Rule 12(e) permits the Court to grant relief from the waiver for good cause, but the Duvals have not even attempted to show good cause. *United States v. Harper*, 488 F. App'x 63, 66 (6th Cir. 2012). And they cannot show good cause because this argument was available to them when they litigated the suppression issue in the district court.

The suggestion in their brief that they tried to raise this issue and that the district court rejected it as "immaterial to probable cause" is incorrect. Def. Br. 25. The defendants refer to the pages in the transcript where the district court refused to reopen and adjourn the suppression hearing. (R. 101: Tr., Page ID 1468–69). The "offer of proof" to which the court referred was the Duvals' offer to prove that Glick knew that police officers had observed marijuana on the Duval property in September of 2010. When the court asked how that evidence would be relevant to the motion to suppress, defense counsel said it would

show that Glick "went out there with a mindset." (R. 100: Tr., Page ID 1465). That is, he expected to find marijuana, so he was going to say he found marijuana whether he saw it or not. (R. 100: Tr., Page ID 1466).[1] The court observed: "I'm not sure that even accepting the offer of proof as true that it would be particularly useful in terms of whether the Defendant can meet its ultimate burden of showing that the statements contained in the affidavit were willfully false or made with reckless disregard of the truth." (R. 101: Tr., Page ID 1468–69).

Even if the Duvals could make a showing of good cause, their new argument fails as a matter of law. Where an affidavit is alleged to have material omissions, rather than affirmative false statements, the defendant must make a substantial preliminary showing that the omission amounted to a deliberate falsehood or reckless disregard for the truth, and that a finding of probable cause would not be supported if the omitted information were included in the affidavit. *United States v. Fowler*, 535 F.3d 408, 415 (6th Cir. 2008). Moreover, "there is a higher bar" for obtaining a *Franks* hearing on the basis of an omission than on

[1] Deputy Glick did expect to find marijuana—not because he knew about the Operation HEMP visit the previous fall, but because a citizen had reported that Gerald Duval was growing a large amount of marijuana.

a false statement. *Id*. And since the motion to suppress was denied, this Court must view the evidence in the light most favorable to the government. *United States v. Stubblefield*, 682 F.3d 502, 505 (6th Cir. 2012). Deputy Glick did not know, at the time he executed the affidavit, that police officers had visited the Duvals the previous fall, much less that they had given Gerald Duval advice about growing marijuana. And even if the information that was developed at trial had been included in the affidavit, it would not have destroyed probable cause.

Monroe city police officer Adam Zimmerman testified that he participated in Operation HEMP once a month for three months in the fall of 2010. (R. 108: Tr., Page ID 2817–19, 2823). Operation HEMP [Help Eradicate Marijuana Planting] was described on a Michigan State Police website as a marijuana eradication and suppression program by state, county, and local law enforcement, with funding from a DEA grant. (R. 110: Tr., Page ID 3402–3403). Zimmerman remembered going to the Duval farm and talking with Gerald Duval in the fall of 2010. (R. 108: Tr., Page ID 2824–27). State Police Sgt. Jeff Hart accompanied Zimmerman, but did not participate in the conversation. (R. 108: Tr., Page ID 2827–28; R. 110: Tr., Page ID 3437–39, 3446–50). Deputy Glick was not present. (R. 106: Tr., Page ID 2388; R. 110: Tr., Page ID 3439).

In fact, Glick was not working on September 9, 2010. (R. 110: Tr., Page ID 3420, 3425).

Zimmerman did not speak with Glick after he visited the Duval house in 2010. (*Id*. at Page ID 2859). Zimmerman did not learn that Glick had any interest in the Duvals until Glick showed him a picture of the property after the search warrants had been executed. (R. 108: Tr., Page ID 2832). Defendants rely on Hart's testimony that he saw Glick almost every day "when we were working in the unit in the same building." (R. 110: Tr., Page ID 3444). But Hart and Glick had worked in the same building sometime between 2004 and 2007. (R. 110: Tr., Page ID 3440–41).

Since Glick did not know that Zimmerman had given Gerald Duval advice about medical marijuana the previous year, his failure to include that advice in his affidavit could not have been a deliberate omission. The Duvals invoke the concept of "collective knowledge" and argue that the knowledge of "other OMNI team members" should be attributed to Glick. Def. Br. 23. But Glick was not a member of OMNI in June 2011, when he executed the affidavit; he had been assigned to a DEA task force since January 2011. (R. 104: Tr., Page ID 1969). And although he had once been a member of OMNI [the Office of Monroe

Narcotics Investigations], it was from 2004 to 2007. (R. 104: Tr., Page ID 1971). From March 2007 to January 2011, Glick was assigned to road patrol. (R. 104: Tr., Page ID 1969–70). Nor did either Zimmerman or Hart testify that they were members of OMNI. Defendants seem to be confusing Operation HEMP, run under the auspices of the Michigan State Police, with OMNI, a local Monroe County group that apparently no longer exists. (*See* R. 110: Tr., Page ID 3428).

Even if Glick had known what Zimmerman told Gerald Duval in September 2010, Glick would not have been required to include it in his affidavit; it was not material. The Duvals' brief asserts that "OMNI officials" gave them instructions on how to comply with Michigan law. Def. Br. 28. But Officer Zimmerman was the only official who ever gave any of the Duvals advice about the Michigan medical marijuana law (MMMA). And the only advice Zimmerman gave Gerald Duval was that each person who was growing marijuana should keep his or her plants separate and inaccessible to others, and that it would be helpful if they posted their marijuana licenses on the fence or gate. (R. 108: Tr., Page ID 2835–38, 2842). And, of course, when Zimmerman talked to Gerald Duval, he did not know that Gerald Duval had a prior drug felony conviction; that Gerald Duval was planning to build two huge

greenhouses rather than grow marijuana in the modest garden plot the officers saw that day; that Gerald and Jeremy Duval were making a living selling marijuana; or that Gerald Duval's home had a loaded weapon in almost every room. Nor did Zimmerman hold himself out as an expert in Michigan marijuana law or assure Gerald Duval that if he followed the advice to have each caregiver's plants secured separately he would be "in compliance with the MMMA." *See* Def. Br. at 28.

The Duvals assert that since the first warrant was signed by a Michigan magistrate for a violation of Michigan law, Michigan law governs the sufficiency of the affidavit. Assuming they are correct, their reliance on *People v. Brown*, 297 Mich. App. 670, 678 n.5, 825 N.W.2d 91 (2012), is misplaced. Defendants assert that Michigan law requires police to include evidence of compliance with the state's medical marijuana law in a search warrant affidavit "because the inclusion of this information would destroy probable cause." Def. Br. 22. But after noting that manufacturing and delivering marijuana remains illegal in Michigan, *People v. Brown* held that "to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA." 297 Mich. App. at 677. In other

words, if the affidavit establishes probable cause to believe there is evidence of marijuana manufacturing or trafficking in a location, the affiant is not required to state that the property owner does not have an affirmative defense under the Michigan Medical Marijuana Act. *Id*. In a footnote, the court commented that if the police have "clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included" because a warrant would not be justified in that situation. *Id*. at 678 n.5.

Here, Deputy Glick did not have "clear and uncontroverted evidence" that Gerald Duval was "in full compliance with the MMMA." On the contrary, he knew that Gerald Duval had been convicted of cocaine trafficking and therefore was not permitted to grow marijuana for others under state law. And while the defendants quote Glick mockingly as agreeing that he "didn't care" about the Michigan marijuana status of Jeremy or Ashley Duval (R. 106: Tr., Page ID 2290–91), the greenhouses were on Gerald Duval's property and the citizen who called DEA said that it was Gerald Duval who was bragging about how much money he was making growing "medical" marijuana. In these circumstances, there was probable cause to search Gerald Duval's

property regardless of whether his adult children had applied for "caregiver" licenses under the MMMA.

II. There was no jurisdictional defect in the indictment that could be raised for the first time on appeal.

Since the defendants did not challenge the sufficiency of the indictment in the district court, there is no ruling to which a standard of review may be applied.

A challenge to the sufficiency of an indictment may be raised for the first time on appeal if the defect is jurisdictional. *United States v. Schaffer*, 586 F.3d 414, 421 (6th Cir. 2009). Even then, when the claim was not raised in the district court, the indictment must be "liberally construed in favor of its sufficiency." *Id.* A conviction will not be reversed in these circumstances "unless the indictment cannot within reason be construed to charge a crime." *United States v. Hart*, 640 F.2d 856, 857–58 (6th Cir. 1981).

An indictment need only contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Its two main functions are to protect the defendant from double jeopardy and to ensure that the grand jury found probable cause as to each element of the crimes alleged. *Hart*, 640

F.2d at 857. The charges here were straightforward and the Duvals have not suggested that the language of the indictment failed to put them on notice sufficient to prepare their defense or to plead double jeopardy.

Instead, the Duvals claim that the language of this indictment was too simple, containing only "a bare recitation of the statutory language." Def. Br. at 32. And although the Duvals preface their discussion by referring to indictments that allege conduct that is not criminal, they do not argue that the indictment fails to allege violations of the federal laws to which it refers. The indictment alleged that between June and August of 2011, Gerald and Jeremy Duval conspired to manufacture over 100 marijuana plants with intent to distribute; that the defendants manufactured marijuana plants with intent to distribute on June 15, 2011 (count two, also specifying over 100 plants) and August 11, 2011 (count six); and that on or about June 15, 2011, the defendants maintained a place (20277 Ida Center Road) for the purpose of distributing Schedule I controlled substances. (R. 64: Superseding Indictment, Page ID 856–860). Marijuana is a Schedule I substance, reflecting Congress's judgment that it has no legitimate medical use. *Gonzales v. Raich*, 545 U.S. 1, 14 (2012). Because its manufacture,

possession, or distribution is a criminal offense under the Controlled Substances Act, federal courts have jurisdiction under 18 U.S.C. § 3231.

The Duvals assert that the indictment was deficient because it did not mention Jeremy or Ashley Duval's "status" as "registered caregivers" under the Michigan marijuana laws. Def. Br. 32-33. But an indictment does not have to mention or negate affirmative defenses in order to be sufficient. *United States v. Sisson*, 399 U.S. 267, 288 (1970); *United States v. Titterington*, 374 F.3d 453, 456 (6th Cir. 2004). Nor would the absence of such language, even if required, amount to a jurisdictional defect—the district court would still have had subject matter jurisdiction under 18 U.S.C. § 3231 over these federal drug crimes. *Titterington*, 374 at 458–59.

Even if Jeremy Duval had acted entirely within the requirements of the Michigan laws as a "caregiver," and could somehow show that he was a "practitioner" excepted from the definition of "manufacture" as he suggests at page 33 of his brief, he would have had only an affirmative defense for which he would have the burden of proof.[2] The possibility of

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[2] We do not concede that Jeremy fit within the exception. The term "manufacture" means the "production, preparation, propagation, compounding, or processing of a drug or other substance," "and includes

such a defense—which was not presented in this case—would not affect the sufficiency of the indictment. And Gerald Duval, who was prohibited from registering as a "caregiver" under Michigan's medical marijuana law because of his prior convictions for possession with intent to distribute cocaine, could not have offered such a defense.

By trying to shift the focus of the discussion to more abstract legal issues—such as the degree to which the federal government may intrude into the regulation of the practice of medicine—or to issues that might have a more favorable resolution—such as whether Ashley Duval was a qualified "caregiver"—defendants avoid addressing the law relevant to the issue they presented. This indictment contained "plain, concise, and definite" allegations that Gerald Duval and Jeremy Duval were conspiring to grow marijuana with the intent to distribute it in violation of federal law; that they possessed more than 100 plants in June 2011 and additional plants in August 2011, intending to distribute

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any packaging or repackaging of such substance or labeling or relabeling of its container," while the exception for "practitioners" only includes the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice." 21 U.S.C. § 802(15). Production and propagation are not included in the exception for "practitioners."

them; and that they "maintained a place" for the purpose of distributing the marijuana in June 2011. (R. 64: Superseding Indictment, Page ID 856–860).

Jeremy Duval relies on *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), for the proposition that the Controlled Substance Act was not meant to regulate the practice of medicine generally. Nothing about 21 U.S.C. § 841(a)(1) purports to regulate the practice of medicine except in the most indirect way. *Gonzales v. Oregon*, by contrast, struck down an interpretation by the Attorney General that allowed him to deprive a physician of the registration required to prescribe Schedule II drugs if the physician participated in assisted suicide.

The DEA issues registrations or licenses to physicians to permit them to write prescriptions for some controlled substances. But as the Supreme Court has explained, Congress decided that certain drugs, including heroin, cocaine, and marijuana, are too dangerous to be prescribed or that they have "no medical benefits worthy of an exception." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489–90 (2001). Federal law forbids anyone to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1),

and Congress itself included marijuana in Schedule I, substances which cannot be prescribed for medical use. *Oakland Cannabis Buyers*, 532 U.S. at 490.

The State of Michigan has no authority to supersede federal law on this point. But this Court need not find that the Michigan marijuana law is superseded by federal law under the supremacy clause because this case does not present any genuine conflict between the state law and the Controlled Substances Act. Gerald Duval was not authorized to grow marijuana for others or to sell it under Michigan law. And although Jeremy Duval was a registered caregiver for some period of time, he conspired to manufacture and did manufacture with intent to distribute marijuana that exceeded the limits of Michigan law or was altogether outside its ambit.

Conclusion

The judgments of conviction should be affirmed.

Respectfully submitted,

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Certificate of Service

I certify that on August 29, 2013, I electronically filed this brief for the United States with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to the following attorney for the defendant:

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Relevant District Court Documents

Appellee, the United States of America, designates as relevant the following documents available electronically in the district court's record, case number 11-cr-20594 in the Eastern District of Michigan:

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