

**WHAT'S RELEVANT CONDUCT FOR SENTENCING: THE
PROSECUTORS ABILITY TO GROUP MULTIPLE CRIMINAL
ACTS INTO ONE "EVENT" FOR PUNISHMENT PURPOSES
UNITED STATES V. RHINE, NO. 08-10502, 2009 WL 3086574
(5TH CIR. SEPT. 29, 2009)**

Highlight

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In *United States v. Rhine*, the appellant, Curtis Oneal Rhine appealed his sentence stemming from convictions for one count of possession with intent to distribute and one count of felon in possession of a firearm.¹ Rhine was riding in the passenger seat of a car that was pulled over in Fort Worth, Texas and admitted to having smoked marijuana earlier that evening.² A finding of multiple outstanding warrants led to his arrest and the discovery of two firearms under the seat in which he sat, as well as 1.89 grams of cocaine base (crack cocaine) hidden in his anal cavity.³ Rhine was indicted for possession with intent to distribute 1.89 grams of cocaine base and possession of a firearm by a felon.⁴ Rhine pleaded guilty to both charges without a plea agreement.⁵

In May 2006, Rhine had been implicated in a large-scale drug operation in Fort Worth known as the "Fish Bowl," but was not charged due to agents' inability to complete a controlled drug purchase.⁶ After Rhine's arrest in the instant case, investigation of Rhine's activity in the Fish Bowl was reopened.⁷ Rhine claimed he had not sold any narcotics nor owned any guns since being released from prison in 2005, and claimed the guns found in the instant case belonged to the driver of the vehicle.⁸ He admitted that he was going to sell \$5 of cocaine to the back seat passenger in the car, whom he had just met at a service station shortly before his arrest.⁹ The probation officer responsible for putting together the Pre-Sentence Report (PSR) concluded that Rhine's participation in the Fish Bowl was relevant for sentencing purposes in

¹ *United States v. Rhine*, No. 08-10502, 2009 WL 3086574, at *1 (5th Cir.

Sept. 29, 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

the instant case.¹⁰ Crediting testimony of the informant of Rhine's activity in the Fish Bowl, the probation officer concluded that Rhine had possessed at least 4.5 kilograms of crack cocaine during the Fish Bowl operations and calculated Rhine's sentence accordingly.¹¹ Rhine timely objected and the court was faced with the question of whether his participation in the Fish Bowl drug-trafficking ring was relevant conduct for the purposes of sentencing on the offense of conviction.¹² The district court held that it was, but the Fifth Circuit reversed and remanded on appeal.¹³

The court rested the argument for relevant conduct on a two step analysis: Whether the acts were part of a (1) "common scheme or plan," or (2) the "same course of conduct."¹⁴ The court stated, "unadjudicated offense[s] may be part of a common scheme or plan-and thus relevant conduct-if it is 'substantially connected to [the offense of conviction] by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.'"¹⁵ Even offenses that are not part of the same scheme or plan may nonetheless be found a part of the same course of conduct based on "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses."¹⁶

The court based its determination that there was plain error based on an analysis finding that the actions taken in the Fish Bowl were not part of a common scheme or plan, or a part of the same course of conduct as the actions bringing rise to this case.¹⁷ The court said because the offenses did not have any common accomplices, involved largely differing amounts of narcotics, and lacked a common purpose there were no indications of a common scheme or plan.¹⁸ And because there was a cessation of proven drug activity for seventeen months, a large difference in the activity, and no proven regularity or repetition of the conduct, they were not shown to be a part of the same course of conduct.¹⁹

While the court does reiterate a precedented barrier to punishment for past criminal drug activity, it actually is enforcing a constitutionally guaranteed right of maintaining innocence until proven guilty. Allowing bootstrapping of prior activity that was previously evidentially improvable would be providing a loophole to escape both constitutional rights and multiple rules of evidence. While criminals may find relief in this standard, it

¹⁰ *Id.* at *2.

¹¹ *Id.* at *2-3.

¹² *Id.* at *3.

¹³ *Id.* at *1.

¹⁴ *Id.* at *4.

¹⁵ *Id.* at *5 (quoting United States Sentencing Guidelines (USSG) § 1B1.3, 18 U.S.C.A.).

¹⁶ *Id.* at *5 (quoting United States Sentencing Guidelines (USSG) § 1B1.3, 18 U.S.C.A.).

¹⁷ *Id.* at *9.

¹⁸ *Id.* at *5.

¹⁹ *Id.* at *9.

additionally provides prosecutors with the necessary elements and guidelines to punishing multiple criminal actions at once.