

PRECEDENTIAL VALUE

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This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website.

I. Sentencing Issues

A. 3553(a) factors and issues

United States v. Payton, 13-1242 (6.12.14)

A sentence of 540 months, which was more than double the Guidelines, was unreasonable. The defendant was sentenced for bank robbery, his third set of convictions for this type of offense. His advisory Guidelines range was 210-262 months. The Government advocated for a 300 month sentence. The district court, citing the defendant's recidivism and danger to the public, imposed a 540 month term. The Court, in reversing this sentence, found "A sentence that more than doubles the Guidelines recommendation, stacks twenty years on to the government's request, and keeps the defendant in prison until he is ninety one years old requires explanation about why such a sentence is 'sufficient, but not greater than necessary' to achieve the goals of sentencing." The Court found that the district court had not adequately explained or considered the defense's argument that at an advanced age, the likelihood of recidivism would decrease. "[A]n empty record allows one to draw the opposite inference as well—that the judge made his decision without adequately considering the personal and individualized circumstances that determine when a sentence is sufficient but not greater than necessary. This is why we require the sentencing judge to explain his or her reasoning, on the record thoroughly addressing all relevant issues, to facilitate our review." The Court therefore remanded for resentencing.

B. Guidelines issues

United States v. Kamper, 12-5167 (4.9.14)

The defendant pled guilty to possession with the intent to distribute MDMA. At sentencing, the defendant argued that the MDMA to marijuana conversion ratios contained in the Guidelines overrepresented the seriousness of the defendant's offense and urged the district court to ignore them. The Court of Appeals found that a district court was free to, on policy grounds, disagree with the conversion ratios. The Court cautioned, however, that "a district court must base any decision not to replace the Sentencing Commission's ratio on reasoned policy arguments, not on its lack of authority or institutional competence, separation-of-powers concerns, or any other grounds that suggest the district court cannot or should not reject an aspect of the Guidelines. That is, a district court confronted with an argument that the MDMA Guidelines range is flawed must confront the

merits of any scientific or policy-based arguments and articulate its reasons for rejecting such arguments.”

United States v. Taylor, 12-3730 (4.18.14)

The defendant was subject to a 20 year mandatory minimum, but received a cooperation departure motion which resulted in the defendant receiving a 151 month sentence. After the Fair Sentencing Act of 2010 was enacted and the Guidelines modified accordingly, the defendant filed for a sentencing reduction under 18 U.S.C. § 3582. The Court found that even though the mandatory minimum had been set aside by the cooperation departure, it still applied to the defendant’s Guidelines range. Therefore, “if a defendant received a sentence below his statutory minimum based on his substantial assistance and is still subject to the same statutory minimum that set the floor of his ‘applicable guideline range’ at the time of his original sentencing, it cannot be said that a subsequent amendment to the sentencing guidelines has had the effect of lowering his ‘applicable guideline range.’” The Court therefore denied relief under § 3582.

United States v. Jackson, 12-4220 (5.5.14)

The Court held that a district court is without authority to impose a sentence lower than the amended Guidelines range under 18 U.S.C. § 3582. The defendant in this case had his sentencing range calculated initially at 188-235 months, based upon a career offender adjustment. Under the FSA, his range did not lower. The defendant also received, at his original sentencing hearing, a reduction in sentence to 150 months. The Court held that because the Guidelines FSA amendments would not have the effect of lowering the Guidelines range below what the defendant already received, the district court was without authority to lower the sentence further.

United States v. Babcock, 13-3958 (5.23.14)

The defendant’s sentence was enhanced under U.S.S.G. § 4A1.5 for being a repeat sex offender. The defendant argued that because the prior offense was too old to count under Chapter 4A1.2 of the Guidelines as a “prior sentence”, it could not be utilized under 4A1.5. The Court disagreed, finding “[t]he Guidelines’ plain language, context, and intent all point to a single conclusion—an adult sex offense conviction can trigger the § 4B1.5(a) enhancement regardless of when it occurred.”

United States v. Kilgore, 13-5623 (4.15.14)

The defendant stole some firearms from a police department. As he was a felon, he was convicted under 18 U.S.C. § 922(g). At sentencing, the court imposed a two level enhancement for the firearms being stolen, and a four level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for the firearms being connected to another felony offense, i.e. the theft. On appeal, the Court reversed the four level enhancement, finding that the enhancement would amount to improper double counting for the same conduct. The Court rejected the Government’s argument that the weapons could have been used for a violent offense (thus supporting the enhancement), finding “[t]he ‘in connection with another felony offense’ language of the guideline should not be measured by the limits of the prosecutor’s imagination. Obviously, the felon could go on a rampage with his firearm,

but the guideline language means a real offense, not a prosecutor's imagined, hypothetical offense."

United States v. Kamper, 12-5167 (4.9.14)

The defendant pled guilty to possession with the intent to distribute MDMA. Prior to sentencing, while incarcerated in a local jail, he "outed" a co-defendant as a snitch to other jail mates, which caused problems for the co-defendant. At sentencing, the district court imposed an obstruction of justice enhancement under U.S.S.G. § 3C1.1 based upon this conduct. The Court of Appeals upheld this enhancement, finding "Kamper's decision to inform other inmates that St. Onge was cooperating with the government can be reasonably construed as an indirect threat, and the district court did not err in applying the sentencing enhancement."

D. Recidivism enhancements

United States v. Pritchett, et al, 11-6489 (4.9.14)

A defendant's prior charge that resulted in probation and was ultimately dismissed under a diversion program can still be used to enhance a sentence under 21 U.S.C. § 851. Defendant Coffelt had a prior drug charge in Tennessee court for felony possession of methamphetamine. Coffelt entered a guilty plea to the charge, but entered a diversion program that required that he complete probation. He did, and the case was dismissed. Under Tennessee law, the charge was not considered a conviction. The Court found that that "Coffelt's successful completion of his probationary sentence and the expungement of his record does not amount to a determination that the crime never occurred or that he was in fact innocent." Therefore, "Based on the language of § 841, the manner in which diversionary dispositions are treated under the sentencing guidelines, and the policies behind diversionary programs, we join with the other circuits in concluding that a guilty plea under a state first-offender diversionary program qualifies as a prior conviction for purposes of a sentence enhancement under § 841."

United States v. Barbour, 13-5653 (4.18.14)

The defendant pled guilty to possession of ammunition by a convicted felon, and the district court increased his sentence under the ACCA based in part on two convictions for robbery of a motorist and a convenience store which occurred one after the other. The Court of Appeals held that the Government failed to prove that these two offenses were committed "on occasions different from one another", as the defendant robbed the motorist at the time of the convenience store robbery. The Government failed to present evidence as to the timing of these two events; thus, there was not sufficient evidence to prove that the offense occurred on occasions different from one another. The Court also determined that the Government bore the burden to prove that the events occurred on occasions different from one another in order for the prior convictions to be counted separately under the ACCA.

United States v. Phillips, 13-5344 (5.27.14)

The defendant was previously convicted of a third degree felony burglary of a structure in Florida. At sentencing for an 18 U.S.C. § 922(g) offense, the Government utilized this prior Florida

conviction as a predicate under the ACCA. The Court held that even though the Florida statute required that the structure be unoccupied, there was still a significant risk of injury to passersby, such that the offense was a “violent felony”.

United States v. Williams, 12-2108 (6.2.14)

The defendant was convicted of two counts of possession with the intent to distribute cocaine. At sentencing he was found to be a career offender under U.S.S.G. § 4B1.1 based in part on a prior conviction in Michigan for fourth degree fleeing an eluding. On appeal, the defendant argued that because his prior Michigan offense was sentenced on the same day as other state offenses, which only resulted in one set of points under U.S.S.G. § 4A1.2, it could not count for career offender purposes. A case can only count for Career Offender purposes if it is “counted separately under the provisions of § 4A1.1(a), (b), or (c)”. The problem in this case is that technically, the Michigan fleeing and eluding did not itself result in points, as one of the other offenses for which he was sentenced on that day was a higher term of imprisonment; thus the points for criminal history were for that other offense.

The Court ultimately rejected this argument, finding that allowing this reading of the Guidelines would benefit those who committed multiple offenses. Further, if independent, the fleeing and eluding offense would generate points under § 4A1.1(a), (b), or (c), therefore, it was properly countable as a qualifying conviction for Career Offender purposes.

United States v. Elliott, 13-5427 (5.23.14)

The defendant’s prior conviction for “facilitation to robbery” under Kentucky law was a violent felony for purposes of the ACCA. The Court admitted that Kentucky’s facilitation statute allowed for conduct which was non-violent; however, the Court determined that in order to be convicted of facilitation of robbery, the completed underlying robbery must be proven. Therefore, because robbery was a violent offense, and because force or threatened use of force must be proven to prove the defendant’s facilitation offense, the Kentucky offense was countable under the ACCA.

United States v. Davis, 13-3456 (5.28.14)

The defendant had a prior conviction for attempted pandering in Ohio. The district court used this conviction to enhance the defendant’s statutory range (for a possession of child pornography offense) from 0 to 10 years to 10 to 20 years under 18 U.S.C. § 2252(b). On appeal, the Court held that the Ohio pandering statute was a divisible one, which contained qualifying and non-qualifying conduct. The Court therefore reviewed pertinent *Shepard* documents, and found that the documents did not delineate to which subsection the defendant pled; therefore, it could not qualify. Of note, the Court found that even though the Ohio judgment listed the ages of the victims as 9 and 11, these were facts and not elements of the offense; therefore they could not be considered in the modified categorical analysis.

E. Fine/Restitution

Robers v. United States, 12-9012 (5.5.14) **United States Supreme Court**

When calculating the amount of restitution in a mortgage fraud case under 18 U.S.C. § 3663, a court should not discount from the amount of loss the fair market value of the real property at the time it is titled back into the bank's possession. Under the statute, 'property' is the money lent, not the collateral; therefore, it is only the amounts that the banks receive upon resale of the real property that can be deducted from the amount of restitution.

Paroline v. United States, 12-8561 (4.23.14) **United States Supreme Court**

When calculating the amount of restitution in a child pornography case under 18 U.S.C. § 2259, a district court must find that there is proximate cause between the offense and the injury. Further, in determining the amount of restitution, "where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying §2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."

United States v. Kumar, 13-3970 (4.22.14)

The defendant was convicted under 14 U.S.C. § 88(c) for making a false report of a boat in distress. The false report resulted in both the US Coast Guard and the Canadian Navy performing a substantial search. As a result, after the defendant's guilty plea, the court imposed restitution for the entire amount of the search cost, including the cost to the Canadian government. On appeal, the defendant argued that the federal statute did not permit restitution to a foreign government. The Court disagreed, finding that because Canada was a "victim", they had right to compensation.

II. Plea matters

No relevant opinions this period

III. Evidence

C. Article VIII - Hearsay

United States v. Dimora, 12-4004 (4.30.14)

In a public corruption case, refusing to allow the defense to admit year end statements of gift disclosures was error. The statements of the public official, which would have shown that he disclosed many of the alleged bribes as gifts, were admissible to show that he made the disclosures. Nonetheless, the erroneous exclusion of this evidence was harmless error, given the overwhelming other evidence presented in the case.

IV. Fourth Amendment

No relevant opinions this period

V. Fifth Amendment

No relevant opinions this period

VI. Sixth Amendment

D. Right to Counsel/Self Representation

Kennedy v. United States, 13-3820 (6.24.14)

Prior to indictment, defendant Kennedy was offered the opportunity to plead guilty to an information. The defendant had counsel negotiating the terms of the plea, but sought advice from a second attorney, who indicated that the case against him was weak and beatable. He therefore declined the plea offer, got indicted, was ultimately convicted, and received a 180 month sentence. He then filed a 28 U.S.C. § 2255 petition, alleging that his second counsel provided erroneous advice. The Court held that there is no Sixth Amendment right to counsel pre-indictment; therefore, there can be no ineffective assistance of counsel claim for that conduct. The Court therefore denied relief.

E. Indictment - Variance/Duplicity

United States v. Smith, 10-6136 (4.15.14)

The defendants were convicted of a fraud scheme as a result of their operation of an oil well drilling business. The defendants argued on appeal that a fatal variance occurred at trial when the Government introduced evidence relating to operations of the Kentucky-Indiana Oil Company, when the indictment alleged that Target Oil was the company used for the fraudulent conduct. The Court held that no variance occurred, finding that the fact that the Kentucky-Indiana company was owned by one of the co-defendants, that the wells were marketed using Target Oil employees, and that the same type of fraudulent conduct occurred in both companies was sufficient to overcome any variance issue. "The overlap of personnel and common goals between Target Oil and Kentucky-Indiana thus shows that the government's evidence did not vary from the indictment."

VII. Other Constitutional Rulings

No relevant opinions this period

VIII. Defenses

J. Speedy Trial Act/IAD

United States v. Williams, 12-2108 (6.2.14)

The defendant's failure to sign a continuance form did not result in a Speedy Trial Act violation when the court granted a continuance. In defendant's case, there were several extensions of time granted due to disagreements and replacing of counsel. Further, final counsel for the defendant requested extensions for preparation of a trial defense. The defendant indicated in court during several pre-trial hearings that he did not want to plead guilty but wanted to proceed to trial. He did not sign a continuance form. Nonetheless, the Court found that "[a]ll that the court knew when it granted the continuance was that Williams wanted to go to trial, that he had expressed some concern about the length of the continuance, and that Dunn required the continuance in order to adequately prepare for trial. Under these circumstances, it was not an abuse of discretion for the court to conclude that the ends of justice merited the granting of the continuance."

IX. Jury Issues

B. Voir Dire/Jury Empanelment

United States v. Reid, 13-5765 (5.20.14)

During jury selection, the defense received 9 preemptory challenges instead of 10, as the district court miscounted a challenge for cause as a preemptory challenge. The Court held that such error violated FRCP Rule 24, but held in this case, the error was harmless, because the defense only exercised 8 of their preemptory challenges.

X. Probation/ Supervised Release

No relevant opinions this period

XI. Appeal

No relevant opinions this period

XII. Specific Offenses

Loughrin v. United States, 13-316 (6.23.14) **United States Supreme Court**

The Government need not prove, in a conviction for bank fraud under 18 U.S.C. § 1344(2), that the defendant intended to defraud a financial institution. In this case, the defendant stole checks, used them at a department store, and then returned the goods for cash. The Court found that "Section 1344(2)'s 'by means of' language is satisfied when, as here, the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control." This applies to whether a false instrument is presented directly to a bank, or a third party.

Bond v. United States, 12-158 (6.2.14) **United States Supreme Court**

The international Convention relating to Chemical Weapons does not give the United States jurisdiction over local, intrastate crimes involving chemical weapons.

United States v. Sadler, 12-4450 (4.24.14)

The defendants ran a pain management clinic, and were accused of illegal distribution of narcotics and other offenses. In addition, one of the defendants was found guilty of wire fraud, due to ordering of pills from the pharmaceutical companies which were later distributed. The defendant argued that she could not be convicted of wire fraud, as she did not defraud the pharmaceutical companies, but paid them full price for the pills ordered. The Court agreed, finding that even though the defendant lied to the pharmacies, she did not seek to deprive the pharmacies of property. The Court therefore overturned the conviction.

XIII. Post-Conviction Remedies

White v. Woodall, 12-794 (4.23.14) **United States Supreme Court**

Under *Carter v. Kentucky*, 450 U. S. 288 (1981), a defendant is entitled to a jury instruction stating that the defendant's failure to testify may not be used to draw an inference of guilt. However, clearly established federal law does not entitle a defendant to a similar instruction at the penalty phase of a capital trial.

Hall v. Florida, 12-10882 (5.27.14) **United States Supreme Court**

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the execution of intellectually disabled persons constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. The Florida Supreme Court subsequently determined that any defendant who obtained an I.Q. score of 70 or greater could not be intellectually disabled under Florida law, and that no additional evidence of intellectual disability could be introduced in the state court proceedings. The United States Supreme Court held that the Florida rule was unconstitutional, concluding that the 70-point cutoff was inconsistent with established medical practice and with the national consensus regarding the implementation of *Atkins*.

Cunningham v. Hudson, 11-3005 (6.24.14)

A claim is unexhausted if the petitioner has the ability to raise the claim in a motion for leave to file a delayed motion for a new trial under Ohio Rule of Criminal Procedure 33.

United States v. Field, 13-1538 (6.27.14)

Federal courts have limited, ancillary jurisdiction to expunge records where the defendant "rais[es] constitutional claims or challenging an unconstitutional conviction or an illegal arrest." Here, the defendant won a suppression issue after arrest when the district court found that police had unconstitutionally entered the curtilage of her family's home. This resulted in the case being dismissed. The Court found, however, that this did not indicate that the arrest itself was unconstitutional; therefore, there was no basis to entertain an expungement action.

Dewald v. Wriggelsworth, 12-2076 (4.7.14)

Although federal statutory preemption of a state criminal law could theoretically establish a basis for habeas corpus relief, a petitioner must still satisfy the requirements of 28 U.S.C. § 2254 if his claim was adjudicated on the merits in state court.

Gunner v. Welch, 13-3396 (4.17.14)

Appellate counsel in Ohio have a constitutional obligation to advise their clients of the 180 day statute of limitations for filing a petition for post-conviction relief under O.R.C. § 2953.21, and that the limitations period begins to run when the transcript of proceedings is completed and filed. The failure of appellate counsel to advise the defendant of the limitations period can provide cause to excuse a procedural default in subsequent habeas corpus proceedings.

Harris v. Haerberlin, 09-5858 (5.28.14)

The Sixth Circuit previously remanded this case for a “renewed *Batson* hearing” in the district court on the petitioner’s claim that the prosecution had removed prospective jurors on the basis of their race. *Harris v. Haerberlin*, 526 F.3d 903 (6th Cir. 2008). Following the hearing, the district court denied relief on the merits. The Sixth Circuit affirmed, rejecting various procedural challenges to the propriety of holding a *Batson* hearing in federal court eleven years after the state trial, and also concluding that the district court did not err in rejecting the claim on the merits.

Tyler v. Anderson, 13-4036 (4.15.14)

The petitioner was convicted of aggravated murder in Ohio and sentenced to death. Federal habeas corpus relief was denied in 2002, and the denial was upheld on appeal. The petitioner subsequently moved for relief from judgment in 2013 under Fed.R.Civ.P. 60(b), alleging that the district court had failed to adjudicate two sub-claims when it denied relief, and that former habeas counsel had engaged in inexcusable neglect by failing to inform the district court of the omission. The Sixth Circuit determined that relief under Rule 60(b) was unavailable due to the delay in filing the motion.