PRECEDENTIAL VALUE

Federal Public Defender's Office Southern District of Ohio

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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. Musgrave, 13-3872 (7.31.14)

Defendant's sentence of 1 day incarceration, which was imposed based upon an advisory Guidelines range of 57-71 months, was substantively unreasonable. The defendant was sentenced for wire and bank fraud charges in which $1.7 million in restitution was owed. "Impermissible considerations permeated the district court's justification for Musgrave's sentence. In imposing a sentence of one day with credit for the day of processing, the district court relied heavily on the fact that Musgrave had already 'been punished extraordinarily' by four years of legal proceedings, legal fees, the likely loss of his CPA license, and felony convictions that would follow him for the rest of his life. '[N]one of these things are [his] sentence. Nor are they consequences of his sentence'; a diminished sentence based on these considerations does not reflect the seriousness of his offense or effect just punishment."

United States v. Krul, 13-2451 (12.18.14)

The defendant was charged with being a felon in possession of a firearm and at sentencing he requested that he be given the opportunity to participate in rehabilitative programing while in prison. After analyzing the factors under 18 U.S.C. § 3553, the district court stated that it would impose a sentence at the top end of the guideline range. The court then commented that the sentence would allow the defendant to get rehabilitative programming while incarcerated. The defendant appealed his sentence and argued that the district court impermissible increased his sentence based on the need for rehabilitation. The Sixth Circuit held that, while increasing a sentence for rehabilitation is improper, the district court did not err. The court found that it did not appear that the district court had, in fact, increased his sentence based on rehabilitation. To the contrary, the court was merely responding to the defendant's request to get rehabilitative programming while locked up. Accordingly, the defendant's sentence was affirmed.

B. Guidelines issues

United States v. Garrett, 12-2546 (7.14.14)

The defendant entered into an 11(c)(1)(C) plea agreement and was sentenced to the low end of the Guidelines. At the original sentencing, the court disagreed with the crack cocaine sentencing Guidelines, calculated the Guidelines range using a 1:1 ratio, but then provided an upward variance to account for the parties (c)(1)(C) agreement. 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 under Supreme Court precedent, when an 11(c)(1)(C) agreement is involved, the district court's decision making process at the original sentencing is irrelevant. Rather, so long as the sentencing range in the agreement is "based on" the then applicable Guidelines, § 3582 relief is available. The Court therefore remanded for resentencing.

United States v. Webb, 13-5697 (7.28.14)

Where a district court varied downward from Career Offender Guidelines because the career offender provisions were too harsh, the Guidelines were not "based on" the crack cocaine sentencing guidelines such that the defendant would be able to obtain relief under 18 U.S.C. § 3582. The Court found that the defendant was not entitled to relief even though, at the original sentencing, the district court used an erroneous statutory minimum range, and imposed a sentence at that erroneous minimum range.

United States v. Mabee, 13-2496 (9.3.14)

The defendant argued on appeal that a 5 level enhancement for trading pornography was improper under U.S.S.G. 2.2(b)(3)(B). The Government argued that the issue was precluded from appellate review, as defendant agreed, as part of his plea agreement, that defendant distributed child porn, and that the defendant did not object at sentencing. The Court held that because there was no explicit waiver of an objection to the enhancement, that plain error review applied.

United States v. Bell, 13-2055 (9.12.14)

An enhancement under U.S.S.G. § 2D1.1(b)(12) for maintaining a drug premises was proper. The defendant used his kitchen to cook crack, and the kitchen contained police scanners, a digital scale, and drug packaging. "We assess the primary or principal use of the home, or some part of it, by comparing the frequency of lawful to unlawful use." The fact that the defendant lived in his home and used the kitchen for food preparation did not undermine the enhancement.

United States v. Snelling, 12-4288 (9.22.14)

In a Ponzi scheme, a sentencing court should subtract from the amount of loss those amounts which were returned to initial investors on their "investment", even though the amounts may have been returned to further the scheme. The Court found that the plain language of Guideline § 2B1.1 Application Note 3 states in part that "[l]oss shall be reduced by . . . [t]he money returned, and the fair market value of the property returned, and the services rendered, by the defendant . . . to the

victim before the offense was detected." This applies to those amounts returned to investors. Thus, resentencing was required.

United States v. Sierra-Villegas, 13-2513 (12.23.14)

The defendant was convicted of participating in a drug conspiracy and the district court applied a four level leadership enhancement under USSG § 3B1.1. The defendant argued that he could not be considered a leader because he did not initiate the conspiracy. The Sixth Circuit held that the four level enhancement was proper where the defendant provided the vehicle to transport the meth, directed the delivery, and had the sole connection to the drug distributer in Arizona. Accordingly, the leadership enhancement was affirmed.

Additionally, at sentencing the district court applied a two level enhancement under USSG § 2D1.1(b)(1) for possessing a firearm during the conspiracy. On appeal, the Sixth Circuit found that there was sufficient evidence that the defendant possessed the guns because he had dominion and control over the home in which the guns were found, and because the guns were located in the master bedroom, a location over which he had sole control. Further, the court ruled that it was not clearly improbable that the guns were connected to the conspiracy because the defendant had stayed at the home for two days during the conspiracy and there was significant other evidence of drug trafficking found in the home. Thus, application of the enhancement was affirmed.

Finally, the district court imposed at two level enhancement for obstruction of justice under USSG § because the defendant falsely testified at trial. The Sixth Circuit upheld the enhancement. The court found that the district court correctly determined by a preponderance of the evidence that defendant had perjured himself because his testimony "directly contradicted essential predicates of the jury's guilty verdict." Specifically, the court held that the defendant lied in testifying that he had business reasons to travel to Michigan when instead that he went to Michigan for drug trafficking. As such, the court affirmed the obstruction of justice enhancement.

C. Procedural matters

United States v. Dado, 13-1578 (7.10.14)

The Government need not prove, in a drug conspiracy, that the defendant knew that the conspiracy involved 1000 or more marijuana plants in order to be subject to the mandatory minimum penalty provision under 21 U.S.C. § 841(b). The Court determined that despite the Supreme Court's holding in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the drug quantity element of the offense remained a "strict liability" element, subjecting the defendant to increased mandatory minimum penalties regardless of knowledge. Judge Merritt authored a dissent in which he outlined the *mens rea* for the other elements of this offense, and questioned why the *mens rea* would apply to some elements and not others.

United States v. Ford, et al., 11-1917 (8.5.14)

It was not error to impose consecutive sentences under 18 U.S.C. § 924(c), despite the fact that each § 924(c) count was tied to the conspiracy charge. The Court found that since each count

referenced both the conspiracy and a substantive Hobbs Act charge, no Double Jeopardy violation occurred.

United States v. Hackett, 12-442 (8.7.14)

The defendant was indicted for using or possessing a firearm under 18 U.S.C. § 924(c). But at sentencing, the district court imposed a 10 year sentence, finding that the evidence at trial clearly proved that the defendant discharged the weapon. On appeal, the Government conceded that this was error under *Alleyne v. United States*, but argued that it was harmless, as the jury would have found discharge under the facts presented. The Court found, however, that to allow such an argument on appeal would be to approve a constructive amendment of the indictment. "[W]e would ourselves effect a constructive amendment of the indictment if, by means of a harmless-error analysis, we allowed Hackett to be convicted of a discharge offense when the indictment charged him only with a use-or-carry one. And constructive amendments are never harmless error. [] We therefore vacate Hackett's sentence on this count and remand for resentencing."

United States v. Foster, 11-6414 (8.28.14)

The defendant was convicted on four drug trafficking counts and two 18 U.S.C. § 924(c) counts. On appeal, the Government conceded that one of the drug trafficking counts, and the corresponding § 924(c) count should be vacated. They then asked to remand to increase the sentences on the remaining counts. The Court found that the sentence imposed was not affected by the two counts, and that, despite the Government's arguments to the contrary, on remand new enhancements available would not be able to be added to the sentence to make a meaningful difference. Therefore, resentencing was not required.

D. Recidivism enhancements

United States v. Nagy, 13-4151 (7.24.14)

A defendant's sentence may be enhanced under the ACCA without the issue of qualifying prior convictions being submitted to a jury. The Supreme Court's decision in *Alleyne v. United States* did not alter prior Supreme Court precedent which exempted proof of prior convictions from Sixth Amendment jury trial determinations. "Alleyne did not disturb the holding in Almendarez-Torres. Accordingly, Nagy's Sixth Amendment rights were not violated because the government was not required to submit Nagy's prior convictions to the jury."

United States v. Mateen, 12-4481 (8.26.14) ***en banc***

The defendant was convicted under 18 U.S.C. § 2252(a). That statute requires an increase in the statutory range from 0 to 10 years to 10 to 20 years if the defendant has a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward". The en banc Court held that the phrase "involving a minor or ward" only modified the third type of offense, that being "abusive sexual conduct". Thus, if the defendant had convictions for aggravated sexual abuse or sexual abuse of an adult, the enhancement was appropriate. The Court remanded for determination of the appropriate category for the defendant's Ohio GSI conviction.

United States v. Prater, 13-5039 (9.2.14)

The defendant's sentence was enhanced under the ACCA based in part on prior convictions under New York law for third degree burglary and attempted third degree burglary. First, the New York statute did not have, as an element of the offense, use, attempted use, or threatened use of physical force against another. Second, the New York offenses are not enumerated offenses despite being a "burglary", as they do not meet the generic definition of the term. Third, there was no proof as to which subsection under which the defendant was convicted; therefore, under a modified categorical approach, the offenses did not qualify. Finally, the convictions did not fit under the residual clause, as "even a single alternative set of elements in a statute that does not fall within the residual clause prevents a prior conviction from serving as a predicate", which the New York statute has. Accordingly, the case was remanded for further proceedings.

United States v. Jenkins, 13-6506 (10.27.14)

The defendant's sentence was enhanced under the ACCA based in part on prior robberies of nine different homes. Although the robberies were part of one "spree", the Court found that they occurred "on occasions different from one another" for purposes of the ACCA. The Court concluded that "crimes committed one to two miles apart in nine different homes over the course of less than twenty-four hours amount to distinct felonies."

United States v. Ball, 14-5048 (11.17.14)

A prior conviction under Kentucky law for first degree fleeing or evading police did qualify as a crime of violence for purposes of the ACCA. "Ball's conviction qualifies as a violent felony for two reasons. First, we have previously indicated that the act of fleeing police in a motor vehicle is so inherently risky that felony convictions for this behavior will always qualify as 'violent' under the ACCA's residual clause. [] Second, even if this were not the case, one element of Ball's conviction was that his vehicle flight created 'a substantial risk of serious physical injury to another person.' This element tracks the language of the residual clause and renders his conviction a violent felony."

United States v. Welch, 13-4386 (12.5.14)

The defendant's sentence was enhanced under the ACCA based in part on a prior Ohio conviction for attempted failure to comply with an order or signal of a police officer. Although the Court had previously held that Ohio's failure to comply statute was a qualifying offense under the ACCA, the defendant argued that an attempt did not go so far. The Court disagreed, finding "[b]ecause an individual may violate the statute only if he receives a signal to stop his motor vehicle, it necessarily follows that the motor vehicle must have been in motion. This is true for an attempt as well as the completed offense."

II. Plea matters

A. Agreements

United States v. Johnson, 13-1626 (8.29.14)

A district court has the authority to dismiss a federal indictment based upon ineffective assistance of counsel received during state plea proceedings if the federal prosecutor was "involved in the state plea process". In this case, however, it was an FBI agent assigned to a state/federal task force who was involved in the state proceedings. The Court held that because the FBI agent could not bind the federal prosecutor, there was no basis to dismiss the federal indictment, irrespective of any ineffective assistance claim.

III. Evidence

A. Article IV - Relevancy

United States v. Ford, et al., 11-1917 (8.5.14)

Evidence of gang affiliation was admissible to prove that the co-defendants were associated with one another. The defendants argued that because their association was not at issue at trial, the evidence was irrelevant and therefore prejudicial. The Court found, however, that "the evidence furthered the Government's theory that the co-conspirators were a distinct subset of the many people involved in the Fallen Angels record label and that the bond between the subset was their involvement in the Vice Lords."

B. Articles VI-VII - Witness and Expert

United States v. Miner, 13-5790 (12.12.14)

The defendant was charged under 18 U.S.C. § 7212 (a) for impeding the due administration of the IRS laws. At trial, and over the defendant's objection, an IRS agent was permitted to testify that letters the defendant had submitted to IRS on behalf of taxpayers were written with the intent to impede the IRS rather than to seek legitimate relief from the IRS. Defendant was convicted and he appealed. The Court held that the admission of the agent's testimony was error under FRE 704(b) because the agent's opinions about the ultimate issue of intent in the case invaded the province of the jury. Nonetheless, the court held that the error was harmless because the evidence of the defendant's intent to impede the IRS was otherwise overwhelming. Accordingly, the defendant's conviction was affirmed.

D. Discovery/miscellaneous Evidentiary matters

United States v. Sierra-Villegas, 13-2513 (12.23.14)

The defendant was charged in a drug conspiracy based, in part, on the efforts of an informant. The informant did not testify at trial, however, the government did play an audio recording of a discussion between the defendant and the informant. The defendant learned of the informant's identity as a result of the audio recording and sought to either issue a subpoena for the informant

or compel the government to produce him as a witness at trial. The district court quashed the subpoena and declined to require the government to produce him as a witness, citing the "informant privilege." The defendant was convicted and he appealed. The Court held that the district court's refusal to permit public disclosure of the informant was proper. First, the court ruled that, even though the defendant had already learned the informant's identity, protection from public disclosure of the informant's identity was nonetheless proper because it was "plausible" that the informant could face retribution for being a government informant in a large drug deal. Second, the court found that the defendant had not provided a legitimate reason that the informant's testimony would be relevant, other than general impeachment, which was insufficient to overcome the "informant privilege." Accordingly, the defendant's conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

United States v. Noble, 13-6056 (8.8.14)

Officers did not have reasonable suspicion to frisk the defendant, who was a passenger of a stopped vehicle. Even though the vehicle was stopped because of its involvement in drug trafficking related activity, officers did not have reasonable suspicion as to the defendant to warrant a frisk. Neither the fact that defendant was in a drug related vehicle, or that in the officer's experience, those involved in drug trafficking are armed, nor that the defendant was 'extremely nervous' provided a basis for the frisk.

Heine v. North Carolina, 13-604 (12.15.14) – Supreme Court

Officers stopped a vehicle for a broken tail light. During the stop, officers determined that the defendant, who was a passenger in the vehicle, was in possession of cocaine. The defendant was prosecuted in state court for the drugs and he moved to suppress the evidence. Ultimately the state courts determined that a vehicle was only required to have one functioning tail light under North Carolina law. Nonetheless, the courts determined that the stop of the vehicle did not violate the Fourth Amendment because the officers reasonably misconstrued the state law in stopping the vehicle. The defendant appealed to the Supreme Court, and the Court held that a mistake of law by an officer could support reasonable suspicion to make a vehicle stop. The Court concluded that as long as an officer's mistake was objectively reasonable given the statute and existing law, a mistake of law did not preclude a finding of reasonable suspicion. Accordingly, the defendant's conviction was affirmed.

D. Search Warrants

United States v. Elbe, 13-6571 (11.20.14)

A person was observed by an FBI agent making child porn images available on a pier to pier (P2P) network from a hotel in South Dakota. The same person was observed online several months later at a hotel in Iowa. The FBI compared the guest lists at the hotels and determined that the defendant was the only guest in common. A few months later the defendant was located using the P2P from a home in Kentucky. Agents subsequently observed the defendant on the porch of the

residence with a laptop computer. As a result, the FBI obtained a search warrant for the residence and found child pornography. In his prosecution, the defendant moved to suppress the evidence obtained based on the validity of the search warrant. The district court denied the motion and the defendant appealed. The Court first held that the warrant was supported by probable cause and that the facts outlined above established a sufficient nexus to the residence in Kentucky. Further, the Court ruled that boilerplate language about the characteristics of child pornographers is permissible as long as the warrant also contains particularized facts about the defendant. Finally, the court held that the search warrant information was not stale even though seven months elapsed during the investigation. Accordingly, defendant's conviction was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

Gumm v. Mitchell, 11-3363 (12.22.14)

Deliberately eliciting testimony that the defendant claimed to have engaged in bestiality with a horse constitutes prosecutorial misconduct, where the allegation has no relevance to the issues being litigated at trial and is of questionable validity.

B. Brady

United States v. Fields et al., 13-5150 (8.13.14)

Even though it was improper for the prosecution to fail to disclose significant impeachment evidence of a Government witness until the middle of trial, the error did not require reversal of the convictions. First, the main inconsistency between the witness's testimony and the statement related to an overt act under which the defendants on appeal were not named. Second, there was ample other evidence of guilt to support the jury's verdict. Finally, the defendants did not specifically and sufficiently explain how the statement would have affected trial strategy. "Although the United States committed a serious blunder that we do not easily countenance, we cannot conclude that the delayed disclosure here resulted in a trial unworthy of confidence."

D. Double Jeopardy

United States v. Farah, 13-6147 (9.11.14)

Defendant was charged and sentenced on civil and then criminal contempt of court based upon his failure to testify at a criminal proceeding. The underlying criminal proceeding was split into two related conspiracies, and, after the defendant served his sentence on the contempt, he was brought in to testify as to the second conspiracy. He again refused, and this time, he was charged with willfully disobeying an order requiring his testimony under 18 U.S.C. § 401(3). The Court held that even though the contempt and 401(3) charge did not contain all of the same elements, the successive prosecution violated Double Jeopardy, as *Yates v. United States* did not allow for successive prosecutions for failure to testify as to the same subject matter.

VI. Sixth Amendment

B. Confrontation Clause

McCarly v. Kelly, 12-3825 (7.10.2014)

If the police deliberately use a psychologist to elicit information from a three and a half year old witness, and the statements are not elicited for the purpose of dealing with some type of ongoing emergency, the child's statements to the psychologist will be testimonial within the meaning of the Confrontation Clause.

Blackston v. Rapelje, 12-2668 (10.7.14)

Admitting the prior testimony of two unavailable prosecution witnesses while simultaneously excluding the fact that both of them recanted their testimony violates the Confrontation Clause. Furthermore, it is objectively unreasonable for a state court to conclude that this practice is constitutional, and as a result AEDPA will not pose a bar to relief.

VII. Other Constitutional Rulings

D. Eighth Amendment

United States v. Young, 13-5714 (9.11.14)

The 15 year sentence imposed under the ACCA for a violation of 18 U.S.C. § 922(g) was not cruel and unusual punishment under the Eighth Amendment, despite the mitigating circumstances. Defendant was in possession of 7 shotgun shells, which he had obtained from a neighbor and which he had stored away. His qualifying felonies under the ACCA all occurred over 20 years prior to the instant offense. The Court conceded that "[a] defendant's particular circumstances are relevant to an as-applied Eighth Amendment claim and could render a sentence unconstitutional", however, "[w]hile Young's fifteen-year sentence may be disproportionate to his offense in the abstract, our understanding of this precedent compels us to conclude that it is not grossly disproportionate when taking his recidivism into account."

E. Miscellaneous Constitution Rulings

United States v. Heard, 13-5649 (8.8.14)

A district court was not required to *sua sponte* hold a competency hearing, when, after an incident of erratic behavior, the court ordered an evaluation which came back (without objection) that the defendant was competent to stand trial. The report did indicate that the defendant was narcissistic, and had antisocial and paranoid characteristics. However, this was not enough to warrant a competency hearing. The Court noted that "[n]arcissists, for example, are relatively prevalent in professions that are unusually respected, including law, medicine, and science, or those that boast celebrity status, such as entertainment, sports, and politics."

VIII. Defenses

J. Speedy Trial Act/IAD

United States v. Sherer et al, 13-1821 (10.22.14)

A motion to dismiss under the Speedy Trial Act, filed 57 days after indictment, was ineffectual to preserve a Speedy Trial Act claim on appeal. First, the motion was premature. Second, the motion was not refiled or resubmitted on day 71 or after. Third, the motion itself stopped the Speedy Trial clock. Under these circumstances, the defendant's rights under the Act were waived.

IX. Jury Issues

D. Batson

United States v. Reid, 13-1769 (8.20.14)

For the first time on appeal, the defendant raised a Batson challenge to the Government's use of for-cause challenges to exclude African-Americans from the jury venire. The Government argued that the late objection constituted a waiver of the issue. The Court agreed, finding "[w]e now hold that a Batson challenge must be raised contemporaneously with the voir dire process or prior to the time that the venire is dismissed. Because Reid did not timely object to the alleged Batson violation, she has waived her right to do so here."

United States v. Tomlinson, 13-5625 (8.20.14)

The defendant raised a Batson challenge to the Government's use of for-cause challenges to exclude African-Americans, but did not do so until after the sixth challenge for cause, long after other potential jurors had left. The Court found that so long as the objection was raised "before the jury is sworn and the trial commences", it is timely. Therefore, the district court's finding that the issue had been waived for failing to timely raise a challenge was erroneous, and the matter was remanded for further proceedings.

XII. Specific Offenses

United States v. Garcia, 13-1344 (7.10.14)

In defendant's prosecution for possession of a firearm under 18 U.S.C. § 922(g), evidence was sufficient to prove actual possession of a firearm found partially buried in snow at a location from which the defendant ran. Although no one testified that they saw the defendant holding a firearm or an item resembling the firearm, the fact that the defendant fled from officers, officers saw an object fall from the defendant, and that there was water on the firearm, indicating that the firearm was warmer than the surrounding snow, were collectively sufficient. The court disagreed that lack of DNA or fingerprint evidence undermined the jury's verdict.

United States v. Toviave, 13-1441 (8.4.14)

The Court overturned the conviction and sentence of defendant Toviave under 18 U.S.C. § 1859, after finding that the conduct committed by the defendant was not a federal offense under the charged statute. The defendant brought young relatives to the United States to live with him, and subjected them to beatings if they did not do chores such as cooking, cleaning, or babysitting. The Court found that "Apart from the abuse, the facts here amount to nothing more than household chores. Toviave made the children clean the house weekly. This included washing the floors, windows, and bathrooms, and doing dishes. Toviave also tasked the children with preparing food and doing laundry. On one occasion, the family moved, and Toviave forced the children to do all of the packing. Finally, Toviave made the children babysit for his friends and relatives. None of this conduct goes beyond what a parent or guardian can expect from his child."

United States v. Miller, 13-3177 (8.27.14)

Defendants' convictions under 18 U.S.C. § 249(a) were required to be overturned. The defendants, who were involved in a scheme to shame their fellow Amish by cutting off the beards of the victims, were charged under the federal hate crime state which prohibits "willfully causing bodily injury to a person . . . . because of the actual or perceived . . . . religion .. of [that] person." Because the jury was not properly instructed that the "'because of' element of a prosecution under the Hate Crimes Act requires the government to establish but-for causation", the convictions were required to be reversed.

United States v. Miner, 13-5790 (12.12.14)

The defendant was charged under 18 U.S.C. § 7212(a) for impeding the due administration of the IRS laws. At trial, the government proved that the defendant aided certain taxpayers who were under investigation by IRS by writing letters to IRS, and by assisting the taxpayers in putting assets into trusts with the intent to avoid paying taxes on the assets. The defendant requested that the court instruct the jury that the government must prove that the defendant was aware of an ongoing IRS action against a taxpayer at the time of the offense. The district court denied the request, the defendant was convicted, and he appealed. The Court held that the district court erred in failing to instruct the jury that the government, in a prosecution under § 7212(a), was required to prove that the defendant was aware of a pending IRS action at the time of the offense. Nonetheless, the court found that the error was harmless because the evidence was overwhelming that the defendant was in fact aware of IRS action against the taxpayers at the time he wrote the letters and assisted to form the trusts. Accordingly, defendant's conviction was affirmed.

United States v. Wright, 13-2735 (12.23.14)

The defendant was a 62 year old man charged with production of child pornography, pursuant to 18 U.S.C. § 2251(a), for photographing his 16 year old boyfriend in the nude. At trial, the defendant argued that he did not "use" the minor to produce child pornography, nor did he "produce" child pornography, as required by the statute. The defendant was convicted and he appealed. Answering an open question in the Sixth Circuit, the court first held that the term "use" of a minor requires only that the government prove that the picture was taken to produce child

pornography. In so holding, the court rejected the defendant's argument that the government must also prove that the defendant caused the minor to engage in the conduct that was photographed.

Additionally, the court held that the defendant "produced" the images. Although there was a question as to whether the defendant actually took some of the photos, the court found that there was sufficient circumstantial evidence that the defendant "participated in the creation of the photos." The defendant was in some of the photos, they were taken in the defendant's' hotel room, the pictures were saved on the defendant's thumb drive, and the defendant admitted to taking some photos of the minor. Accordingly, the defendant's conviction was affirmed.

XIII. Post-Conviction Remedies

Williams v. Johnson, 13-9085 (7.1.14) – **Supreme Court**

The Court held that its previous decision in *Johnson v. Williams*, 133 S.Ct. 1088 (2013), did not preclude the petitioner from arguing on remand that the state court decision at issue was not entitled to deference under 28 U.S.C. § 2254(d).

Glebe v. Frost, 14-95 (11.7.14) – **Supreme Court**

Clearly established federal law does not require impermissible restrictions on closing argument to be treated as a structural defect.

Lopez v. Smith, 13-946 (10.6.14) – **Supreme Court**

Circuit courts of appeal may not rely on their own non-AEDPA precedent in determining if a principle is "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1).

Clark v. United States, 11-6380 (9.4.14)

Where a defendant seeks to amend a petition brought under 28 U.S.C. § 2255 after the district court rules on the petition, the defendant must satisfy Civil Rule 59 standards. The Court also found that because the original 2255 petition was not "final" at the time the motion to amend was made (as no appeal had been decided), the motion was a motion to amend, and not a second or successive petition.

United States v. Waters, 14-1516 (10.31.14)

The defendant could not challenge her guilty plea under a writ of error coram nobis where she pled guilty to a misdemeanor three years prior to the petition, and remained under no continuing civil disability as a result of her conviction.

Batey v. Haas, 13-1692 (7.21.14)

If a state court has rejected a defendant's claim by finding that the alleged constitutional violation was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967), the federal courts do not consider whether the state court's application of *Chapman* was reasonable under 28 U.S.C. § 2254(d). Instead, federal courts apply the test of *Brecht v. Abrahamson*, 507

U.S. 619 (1993), in the first instance, and determine if the error had a substantial and injurious effect on the verdict.

Esparza v. Sheldon, 13-3358 (8.28.14)

The denial of a continuance at trial can form a basis for federal habeas corpus relief. However, the petitioner must show that the denial was arbitrary and that it resulted in actual prejudice to the defense. To show actual prejudice, the petitioner must show that the continuance would have resulted in witnesses being available, or that it would have added something to the defense.

Henness v. Bagley, 13-3934 (9.8.14)

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court held that the ineffective assistance of post-conviction counsel can provide cause to excuse a procedurally defaulted claim of ineffective assistance of trial counsel. However, a petitioner will not be entitled to relief from judgment under Fed.R.Civ.Pro. 60(b) and *Martinez* if he cannot make a substantial showing of prejudice with respect to his underlying claim of ineffective assistance of trial counsel.

Loza v. Mitchell, 11-3453 (9.2.2014)

Clearly established federal law does not require the police to give the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), when an individual has been lawfully detained for an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

McMullan v. Booker, 12-1305 (8.5.14)

Clearly established federal law does not entitle the accused to a lesser included offense instruction in a non-capital murder case. "Federal courts may grant habeas relief only on the basis of federal law that has been clearly established by the Supreme Court. § 2254(d)(1). The Supreme Court, however, has never held that the Due Process Clause requires instructing the jury on a lesser included offense in a non-capital case."

Scott v. Houk, 11-4361 (6.26.14)

Clearly established federal law does not entitle the accused to merger of statutory aggravating factors in a capital case, even if they are each based on the same underlying conduct.

Tran v. Colson, 11-5867 (8.25.14)

Habeas corpus relief will be warranted under *Atkins v. Virginia*, 536 U.S. 304 (2002), if the state court failed to apply the correct standards for determining intellectual disability as defined by state law. Furthermore, intervening state court precedent must be considered in determining if the correct standards were used. If intervening precedent establishes that the state court applied an improper standard, a conditional writ will be granted requiring the state courts to reconsider the *Atkins* claim under the correct standard.

Bies v. Sheldon, 12-3431 (12.22.14)

The restrictions on federal habeas corpus review set out in 28 U.S.C. § 2254(d) only apply if a petitioner's claim has already been adjudicated on the merits in state court. If the Ohio courts refuse to consider a claim on the ground that the petitioner has failed to satisfy the requirements for a successive post-conviction petition under O.R.C. § 2953.23, the claim has not been adjudicated on the merits in state court, and § 2254(d) will not apply in subsequent federal habeas corpus proceedings. Furthermore, the petitioner will be entitled to a merits determination in federal court if he can establish cause and prejudice for the state court procedural default.

Calhoun v. Bergh, 12-2509 (10.2.14)

If a petitioner is granted a stay in district court so that unexhausted claims may be presented to the state courts, the district court can require the petitioner to file his state court claims within a specified period of time, and to return to federal court within a specified period of time following exhaustion. If a petitioner fails to comply with the conditions of the stay, the district court may dismiss the petition.

Clifton v. Carpenter, 13-5402 (12.24.14)

It is unconstitutional for a state to require a petitioner to pay "prior fees, taxes, costs and other expenses" before an application for collateral relief may be filed in state court. Accordingly, a procedural default resulting from a defendant's failure to pay outstanding costs will not be based on an adequate and independent state ground, and the federal courts may consider the merits of the defaulted claim.

Frazier v. Jenkins, 11-4262 (10.27.14)

Intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), qualifies as actual innocence of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992). As a result, a petitioner can obtain relief in federal court on a procedurally defaulted *Atkins* claim by submitting clear and convincing evidence that no reasonable juror would find that the petitioner is not intellectually disabled.

Gillispie v. Warden, 13-3088 (11.13.14)

The federal courts do not have jurisdiction under 28 U.S.C. § 2254 to consider a habeas petition challenging a state court judgment that has already been vacated by the state courts.