

PRECEDENTIAL VALUE

Federal Public
Defender's
Office Southern
District of Ohio

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Issue 51 Sept.-Oct. 2015



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

B. Guideline issues

2G2.2(b)(1) – Conduct Limited to Receipt

U.S. v. Hodge, 14-5256 (10/20/15)

The defendant was convicted of receipt of child porn. The PSR recommended that the defendant receive a reduction under USSG § 2G2.2(b)(1) because his conduct was limited to the passive receipt of child porn. At sentencing, the government opposed the reduction because the defendant also surreptitiously recorded his step-daughter getting in and out of the shower and dressing in her bedroom. The district court agreed with the government, and the defendant argued on appeal that the surreptitious recording was not “relevant conduct” to the receipt of child porn on the internet, and thus not a proper basis to deny the two point reduction. The court held that, in order to qualify as “relevant conduct” under the guidelines, conduct must constitute a criminal offense and it must bear a logical relationship to the offense of conviction. The court found that **the surreptitious recording of the step-daughter could be considered attempted production of child porn under federal law and**

voyeurism under state law in Kentucky. Further, the court held that the recording of the step-daughter was logically connected to the offense because he did it during the same time period that he was receiving and possessing the child pornography. Accordingly, the sentence was affirmed.

2G2.2(b)(4) – Sadistic or Masochistic Conduct

U.S. v. Cover, 14-3641 (9/1/15)

The defendant was convicted of child porn offenses. At sentencing, the defendant objected to a guideline sentence enhancement based on USSG § 2G2.2(b)(4) for sadistic or masochistic conduct. The enhancement was based on the statement in the PSR that a video found on the defendant's computer “depicted an 11 to 13 year old female engaging in oral to genital intercourse with a male.” On appeal, the court held that the enhancement was not supported by the record. In order to apply the four level enhancement under § 2G2.2(b)(4), **the evidence must show one of the following:** (1) the image depicted sexual penetration of a prepubescent child; or (2) the image depicted “violence or the infliction of pain, either mental or physical.” The court found that because an 11-13 year old is not clearly

prepubescent and there was no actual evidence that the child was in pain or the image involved violence, the application of the enhancement was improper.

3B1.1 – Leadership Enhancement

U.S. v. Christian, 13-6530 (10/30/15)

The defendant participated in a theft ring stealing semi-trucks and tires. At his sentencing hearing, the government argued that the defendant qualified for a two level upward adjustment under USSG § 3B1.1 because the defendant was an organizer or manager of others in the ring. The district court found that the defendant had control over assets of the ring through his maintenance of a storage unit in which the stolen tires were stored, but the district court was equivocal as to whether the defendant actually managed others in the ring. Nonetheless, the district court applied a two level upward adjustment under the guidelines because the defendant managed less than five persons in the ring. On appeal, the court held that **a defendant may not get a two level adjustment under § 3B1.1 for merely managing the assets of a conspiracy** where the defendant has no actual leadership role over other individuals. The court ruled that the evidence was insufficient to support a finding that the defendant actually managed another person. The court noted that the application notes to § 3B1.1 allow for an upward departure in the guideline sentence for a defendant who merely manages assets in a scheme, however neither the district court nor the government relied on this provision to support the increase sentence. Accordingly, the defendant's sentence was vacated and the case remanded for resentencing.

C. Procedural matters

Findings of Fact – Preponderance Standard

U.S. v. Shannon, 14-1727 (9/1/15)

The defendant was convicted at trial of Medicare fraud. At sentencing the government attempted to increase the amount of loss above and beyond what defendant was convicted for at trial based on loss amounts that were attributable to two other related schemes in which the defendant was involved. To this end, the government produced charts that had been used in another case to support the increased amount. Over the defendant's objection, the district court increased the defendant's relevant conduct loss amount without any further explanation. On appeal, the court held that the district court's sentence was procedurally unreasonable. **Although a district court may engage in judicial fact finding to increase a loss amount beyond what is proven at trial, the court nonetheless must state its fact finding on the record and make findings that the evidence satisfies the preponderance of the evidence standard.** Because the district court failed to adhere to these minimum requirements, the sentence was reversed and the case remanded.

PSR Objections

U.S. v. Cover, 14-3641 (9/1/15)

The defendant was convicted of child porn offenses and the probation department included a number of guideline enhancements in the PSR for distribution of child porn through file sharing, prepubescent minors, and engaging in pattern of activity of child abuse. The defendant objected to the enhancements but provided no supporting information other than his bald objections. On appeal, the court held that, in order to challenge findings in a PSR, the defendant must create a factual dispute. **This burden of production requires that the defendant produce some evidence that calls the reliability or correctness of**

the alleged facts into question. A mere denial of the factual allegations is insufficient to require the district court to look beyond the findings in the PSR. Because the defendant failed to bring forth evidence beyond a bare denial, his objections were properly overruled based on the findings in the PSR.

E. Fine/Restitution

Restitution

U.S. v. Churn, 14-5720 (9/10/15)

The defendant was convicted of bank fraud and at sentencing the district court imposed a restitution order that included losses from acquitted and dismissed counts. The defendant argued on appeal that his right to jury trial on these issues had been violated pursuant to Apprendi and that he could not be held liable for the additional restitution amounts. The court held that Apprendi is inapplicable in the context of restitution determinations and that the restitution statute (18 USC § 3663A) has no “statutory maximum” that was being exceeded by the district court’s restitution order. Accordingly, the sentence was affirmed.

II. Plea matters

A. Agreements

Proffer Agreements

U.S. v. Shannon, 14-1727 (9/1/15)

The defendant was charged with Medicare fraud. He entered into a proffer agreement whereby he agreed to provide information against his codefendants with the hope of receiving a sentence reduction in return. The defendant made inculpatory statements to the government during the proffer regarding his participation in the Medicare scheme and payments of kickbacks to patients for participating in the fraud. After the proffer, the defendant decided not to plead guilty

and instead went to trial. During the trial, his attorney cross examined a government cooperating witness as to whether the witness had actually seen the defendant paying any kickbacks to patients. As a result of this cross examination, the government sought to introduce statements made during the defendant’s proffer that he had, in fact, made payments to patients. Upon his conviction, the defendant argued that the statements in the proffer should not have been admitted. The court held that proffer agreements are considered contracts and that they are governed by their terms. The agreement stated that the government could use any of the defendant’s statements made in the proffer to “rebut any evidence offered” by the defendant that was inconsistent with his proffer statements. The court ruled that cross examination of the witness amounted to an “offer of evidence” by the defense, which triggered the provision in the agreement allowing the government to use the statements in rebuttal. Accordingly, the defendant’s conviction was affirmed.

B. Breach of plea

Withdrawal of Plea

U.S. v. Giorgio, 14-4193 (9/25/15)

The defendant pled guilty to violating federal campaign finance laws by using straw donors to exceed the maximum per-donor limit. A coconspirator and the defendant’s company were also indicted for the crime. The company agreed to pay for legal counsel for all three defendants. As part of the defendant’s plea agreement, he testified against the coconspirator and company at trial and they were both acquitted. The defendant then moved to withdraw his plea, the district court denied the motion, and he was sentenced to 27 months in prison. On appeal, the court applied the seven factor test in order determine whether the defendant should have been permitted to withdraw his plea. In short, the

court determined that the defendant had waited too long to try to withdraw his plea, that he never actually indicated that he was innocent, and that there was no conflict of interest by his company paying for his counsel when his company was a codefendant. On the latter point, the court found that the potential conflict did not actually impair the defendant's interests because the attorney was clearly independent, he prepared a vigorous defense for the defendant, and he gave the defendant competent and practical advice in whether to plead guilty. Further, the defendant made not showing that he would not have pled guilty but for the potential conflict. Finally, the court concluded that the government did not violate the defendant's plea agreement by failing to reduce the defendant's sentence based on substantial assistance. The defendant's testimony against his coconspirators was "equivocal" and justifiably showed a lack of substantial assistance. Accordingly, the conviction was affirmed.

III. Evidence

A. Article IV – Relevancy

403 – Undue Prejudice

U.S. v. Ray, 14-2159 (9/23/15)

The defendant was charged with being a felon in possession of a firearm and drug offenses. At trial, he argued that the court or government should not refer to him as a felon because of the undue prejudice associated with the term, although he failed to object when it was used several times. On appeal, the court found no abuse of discretion in the district court permitting the defendant to be referred to as a felon given its limited use at trial and the defendant's failure to object during its use. The court went on to acknowledge, however, that a district court could very well determine that the use of the term felon to describe a defendant creates unfair prejudice under FRE 403 in a given case and the court

opined that such a determination would be upheld by the court. The defendant's conviction was thus affirmed.

404(b) – *Res Gestae* Evidence

U.S. v. Churn, 14-5720 (9/10/15)

The defendant was charged with bank fraud for obtaining bank loans to complete construction projects, but doing none of the work on the projects. At trial, a witness was permitted to testify about a similar deal that the defendant did which was not part of the indictment. The district court admitted the evidence as *res gestae*. On appeal, the court held that *res gestae* evidence, otherwise known as background or intrinsic evidence, is admissible under FRE 404(b) if it is inextricably intertwined with the charged offense in terms of having a causal, temporal, and spatial connection with indicted crimes. The court found that the unindicted deal was closely related to the charged offense in terms of the timing, the participants, and nature of the transaction, such that it qualified as *res gestae*, and thus was not excluded by FRE 404(b). Further, the court ruled that the probative value was not substantially outweighed by the prejudicial impact. Accordingly, the defendant's conviction was affirmed.

404(b) – Knowledge and Intent

U.S. v. Olive, 13-6174 (9/22/15)

The defendant was charged with wire fraud for, in part, misrepresenting to investors that his company had tax exempt status. At trial, the government sought to introduce cease and desist orders from various states which notified the defendant that his tax exempt status was in question and that he was to stop doing business. The district court admitted the evidence with the limitation that it was not offered to prove whether the defendant did, in fact, have tax exempt status, but only to show his knowledge and intent, and

his failure to disclose the potential problem to investors. Upon his conviction, the court on appeal held that **the cease and desist orders were properly admitted under FRE 404(b) to show knowledge and intent. The court found that the orders were relevant to prove that the defendant knew that his tax exempt status was in doubt and that he intentionally failed to disclose the issue to his investors.** Further, the court ruled that, with the district court's limitation of the evidence, the probative value was not outweighed by the prejudicial impact. Accordingly, admission of the evidence was affirmed.

404(b) – Prior Conviction

U.S. v. Johnson, 15-1076 (9/30/15)

The defendant was charged with being a felon in possession of a firearm. At trial, he refused to enter an Old Chief stipulation, but then argued that FRE 404(b) prevented the government from introducing the name of his prior conviction, which was for robbery with a gun. On appeal, the court held that Old Chief requires the government to stipulate that the defendant has a prior felony conviction upon the defendant's request, but where the defendant refuses an Old Chief stipulation, the government is free to introduce the name of the conviction. FRE 404(b) does not exclude the evidence, even where it is another firearm offense. Further, the court ruled that it was of no consequence that defendant's prior conviction was based on a no contest plea. Accordingly, the defendant's conviction was affirmed.

B. Articles VI-VII - Witness and Expert

601 – Witness Competency

U.S. v. Callahan, 14-3772 (9/9/15)

The defendant was charged with violations of the forced labor statute and the government claimed that the victim suffered from a cognitive

disability. As a result, the defendant moved pretrial to have her competency assessed by a psychologist. The district court denied the request, the victim testified for three days at trial, the defendant was convicted, and he appealed. The court held that everyone is presumed competent to testify under FRE 601, and **district courts do not have the authority to order the psychological evaluation of a non-party witness. The most a court can do is “condition such witness’s testimony on a prior examination,” but this power should be exercised sparingly. Instead, the capacity of the witnesses is for the jury as one of weight and credibility.** Accordingly, the district court's ruling was affirmed.

C. Article VIII – Hearsay

801 – Hearsay – Effect on Listener

U.S. v. Churn, 14-5720 (9/10/15)

The defendant was charged with bank fraud for obtaining construction loans from a bank and then making false representations about the progress of the work. During trial, the government introduced two pieces of evidence that were challenged by the defendant. First, the government presented an email wherein a representative from the bank indicated that she had spoken with one of the defendant's alleged vendors who contradicted the defendant's claims that he was getting modular homes from the vendor. Second, a witness testified that, based on her personal knowledge, the defendant had completed none of the work he was supposed to do. She added, however, that “through verification with the county, the permit was never pulled.” Upon his conviction, the defendant argued on appeal that the evidence was inadmissible hearsay. First, the court held that the district court properly determined that the email was **not offered for the truth of the matter asserted, but instead was admitted to show the**

effect on the bank representative. As a result of learning this information from the vendor, the bank representative became suspicious of the defendant and began requiring verifications from him. This information was relevant to refute the defendant's claim that it was the bank's actions that obstructed his relationship with the vendor and hindered him from completing his projects. Second, the court ruled that the reference to information the witness learned from the county was clearly hearsay and inadmissible. Because the defendant did not object to the testimony, however, the court found no plain error because this small piece of evidence did not likely affect the trial outcome. Accordingly, admission of the evidence was affirmed.

801 – Hearsay – Truth of the Matter Asserted

United States v. Brown, 13-1761 (9/11/15)

The defendant was charged with drug trafficking and at trial the government introduced a “drug ledger” that was recovered from the defendant's home. Upon his conviction, the defendant argued on appeal that the ledger was inadmissible hearsay. The court held that the drug ledger was properly admitted as a “tool of the trade” to prove that the defendant was involved in drug trafficking. The court found that, as such, the ledger was not admitted for the truth of the matter asserted and thus was not hearsay under FRE 801. Accordingly, admission of the evidence was affirmed.

D. Discovery/Miscellaneous

901(a) – Authentication

United States v. Brown, 13-1761 (9/11/15)

At the defendant's trial for drug trafficking, the government introduced a drug ledger that was found in the defendant's home. Although the government did not attempt to verify that the defendant wrote the drug ledger, it offered

testimony of an agent to establish that the document was, in fact, a drug ledger. Upon his conviction, the defendant argued on appeal that the ledger was not sufficiently authenticated. The court held that ledger was sufficiently authenticated under FRE 901(a). An agent established it was a drug ledger, that it was found in the defendant's bedroom, names on the ledger matched contacts in the defendant's cell phone, and it was found in close proximity to drugs and a gun. Under the circumstances, the ledger was admissible and no handwriting analysis was required. Accordingly, the conviction was affirmed.

Discovery – Informant Identity

U.S. v. Ray, 14-2159 (9/23/15)

Police officers obtained a warrant to search the defendant's home based on information provided by an informant who bought drugs from the defendant at his front door. The informant did not testify against the defendant at trial, nor was he charged with the alleged transaction that happened at this front door. The defendant moved pretrial for disclosure of the informant's identity. The district court denied the motion and, upon his conviction, the defendant appealed. The court held that the government has a “limited privilege” to not disclose the identity of an informant. When an informant's identity or the contents of the informant's communications are “relevant and helpful” to the defense, or are “essential to a fair determination of the cause,” the privilege must give way. Ultimately, the court must balance the “public interest in protecting the flow of information” against the defendant's “right to prepare his defense.” In the case, the court found that the defendant had not made a sufficient showing that the informant's identity was relevant to his defense given that the informant was not a witness nor was the defendant charged over the transaction with the informant. The court noted that “it was

conceivable” the defendant could have successfully argued that disclosure of the informant’s identity was proper based on his challenge of the search warrant that was obtained based on the informant’s information, but the defendant had not done so in the case.

IV. Fourth Amendment

E. Search Warrants

Search Warrant – Probable Cause

United States v. Brown, 13-1761 (9/11/15)

DEA agents were investigating a known heroin dealer and, in making an arrest, discovered the defendant present in a vehicle with the dealer, who was transporting 1/2 kilo of heroin. At the time, the defendant was in possession of \$4800 in currency and a cell phone which contained a text suggestive of a drug pricing discussion. In conducting a search of the drug dealer’s home, the agents discovered a vehicle registered to the defendant in the driveway and a drug dog alerted on the vehicle. The defendant had a prior record for narcotics. Based on these facts, the agents obtained a search warrant twenty-two days later for the defendant’s home, wherein they found drugs, firearms, and cash. The defendant moved to suppress the evidence and the district court denied the motion. On appeal, the court held that it was a very close case regarding whether a sufficient nexus was established between illegal activity and the defendant’s home. Nonetheless, the court held that probable cause supported the warrant based on the recent (22 days earlier) drug involvement with the defendant and the half kilo, his possession of a large amount of cash, association with a known drug dealer, prior record, and the drug dog alert on his vehicle. These facts permitted the determination that the defendant was a drug dealer, which supported a search of his home based on the warrant. Accordingly, the warrant was valid and his conviction was affirmed.

V. Fifth Amendment

C. Confessions and Testimonial Rights

Miranda – Voluntariness of Waiver

U.S. v. Ray, 14-2159 (9/23/15)

The defendant was arrested in his home, wherein drugs and guns were found. The defendant alleged in the district court that an officer threatened him at his home that his wife would be arrested, thus making his child a ward of the state, if the defendant did not accept responsibility for the drugs and guns. The defendant claimed that, as a result, he confessed at his home without being Mirandized. The defendant was then taken to the station, Mirandized, and he provided a confession. The officers testified that the first interview at the home and the threat did not occur. The district court made no factual findings regarding the two versions of events, and denied the defendant’s motion to suppress without analyzing whether his Miranda waiver at the station was voluntary. On appeal, the court held that the district court failed to apply the correct legal standard and failed to make sufficient factual findings. Deciding an open question in the Sixth Circuit, the court held that the proper standard was whether a reasonable person would believe that the later questioning was a “new and distinct” experience and whether the Miranda warnings presented a “genuine choice whether to follow up on the earlier admission.” Five factors are relevant to this inquiry: (1) the completeness and detail involved in the first confession; (2) the overlapping content of the two statements; (3) the timing and setting of the two interrogations; (4) the continuity of police personnel; and (5) the degree to which the questioning treated the second round as continuous with the first. Accordingly, the case was remanded for fact finding as to whether the threat and the first round of questioning occurred, and for proper application of the law to the facts.

VI. Sixth Amendment

B. Confrontation Clause

McCarley v. Kelly, 12-3825 (9/10/15)

Officers were investigating the murder of a child's mother and attempted to interview the three and a half year old. The boy was not able to provide much information, so the officers referred him to a child psychologist and asked that she provide any information obtained back to the officers. The child made multiple statements implicating the defendant in the murder. The psychologist's reports about the boy's statements were admitted into evidence over the defendant's objections at trial. The defendant was convicted, he lost his state court appeals, and he filed a federal habeas petition, which the district court granted. The state appealed. The court held that the statements by the child to the psychologist were testimonial under the Confrontation Clause because the interview by the psychologist was at the behest of police and all information obtained was conveyed back to them. Further, the court found that the admission of the statements was not harmless error because the statements were a central part of the state's case at trial. Accordingly, the defendant's conviction was vacated.

VIII. Defenses

B. Fed. R. Crim. P. 12 - Pretrial Motions

Sufficiency of the Indictment

U.S. v. Olive, 13-6174 (9/22/15)

The defendant was convicted at trial of wire fraud for making false representations that his investment company was a non-profit, and various other misstatements about the company's assets, length of existence, and ability to pay returns. On appeal, the defendant argued that the indictment was insufficient to state an offense

under Fed. R. Crim. P. 12 and 34(a) because the defendant did actually have an application pending with IRS for non-profit status, and thus his representations about his non-profit status were not false. The court first held that, where sufficiency of the indictment is raised for the first time on appeal, the court construes the indictment "liberally in favor of its sufficiency." The court found that the question of whether the defendant properly had non-proper status was a question for the jury as factfinder, and was not properly raised as a challenge to the sufficiency of the indictment. The court further held that the indictment contained numerous other allegations claiming that the defendant made false representations. Thus, even without the allegation about the defendant's tax exempt status, the indictment sufficiently charged the offense of wire fraud. Accordingly, the defendant's conviction was affirmed.

XI. Appeal

U.S. v. Johnson, 15-1076 (9/30/15)

The defendant was convicted of two counts of being a felon in possession of a firearm. The district court imposed a 60 month concurrent sentence on both counts. On appeal, the government agreed that insufficient evidence supported one of the counts, and accordingly the conviction was vacated. The court held that the case had to be remanded for resentencing on the remaining count. The court ruled that, where "some but not all of a defendant's convictions stand and the sentences for the multiple counts are interdependent," the case may be remanded for resentencing. The court found that the two counts grouped at sentencing, but that because the defendant received an enhancement for the dismissed count in the guideline calculation, remand was appropriate.

XII. Specific Offenses

18 USC § 922(g) – Restoration of Rights

Walker v. U.S., 14-5703 (9/1/15)

The defendant was convicted of federal felony offenses and subsequently had his civil rights restored by the State of Tennessee. He then attempted to purchase a firearm and was denied because of his federal felony convictions. The defendant filed suit for declaratory judgment and the district court granted summary judgment to the government. On appeal, the court first held that a state restoration of rights does not qualify under the law as a restoration of federal rights; rights can only be restored by the convicting jurisdiction. Nonetheless, the court assessed whether the restoration of the defendant's rights under state law effected a restoration of his federal rights, which are the right to sit on a jury, the right to hold public office, and the right to vote. **The court concluded that the defendant's right to sit on a jury was restored by the state restoration of rights. However, his right to hold public office was not "restored" because it was never lost by the conviction. Further, his right to vote was not restored. As such, because only one federal right (singular) was restored, the defendant did not have a restoration of rights (plural) as required by statute.** Accordingly, the defendant was not lawfully entitled to possess a firearm under federal law and his petition for declaratory judgment was properly denied.

18 USC § 922(g) – Possession

U.S. v. Johnson, 15-1076 (9/30/15)

The defendant was charged with being a felon in possession of a firearm. At trial, the government introduced hearsay testimony from the defendant's girlfriend that the defendant had a gun in the car, and that it was kept in their bedroom on his side of the bed. Further, the gun was found by police under the seat of the car the

defendant was driving and the defendant told police that the gun was there. On appeal, the government conceded that the girlfriend's hearsay testimony was improper. Nonetheless, the court held that **the fact that the defendant knew the gun was in the car and it was "located conspicuously within arm's length" was sufficient for conviction for possession.** Further, the court noted that the lack of fingerprints on the gun did not render the evidence insufficient as "no precedent requires a defendant's fingerprints to be on a firearm in order to support a conviction." Accordingly, the conviction was affirmed.

18 USC § 924(c) – Firearm Enhancement

U.S. v. Ray, 14-2159 (9/23/15)

The defendant was charged with possession of firearms in furtherance of drug trafficking related to three guns that were located in his residence. The first gun was an unloaded sawed off shotgun that was found in his bedroom along with a small amount of marijuana and money. The second was a .22 caliber rifle that was found in another bedroom closet where no drugs were present. The third was a handgun found in a jacket pocket in a closet next to another jacket containing distribution amounts of crack cocaine. The jury convicted the defendant and he appealed. The court held that **possession of a firearm in furtherance of drug trafficking means that the gun must "promote or facilitate the crime,"** considering the following factors: (1) whether the gun was loaded, (2) the type of weapon, (3) the legality of its possession, (4) the type of drug activity conducted, and (5) the time and circumstances under which the firearm is found. The court found that the sawed off shotgun and rifle were not properly considered as being possessed in furtherance of drug trafficking. The shotgun was unloaded and, although in the same room, not in close proximity to the marijuana. The rifle was in a room in which no drugs were

located. The court determined, however, that the handgun was possessed in furtherance of drug trafficking as it was loaded, was found in close proximity to distribution amounts of crack cocaine, and was readily accessible. Accordingly, the 924(c) conviction was affirmed related to the handgun only.

18 USC § 1343 – Wire Fraud

U.S. v. Andrews, 14-2045 (10/16/15)

The defendant was charged with one count of wire fraud for defrauding four of his friends and colleagues out of approximately 1.4 million dollars. The defendant told them each essentially that he needed loans to fund the purchase and rehab of property in Indianapolis and that he would repay them with interest. There was no property in Indianapolis, but instead the defendant lost the money day trading. Some of the loans charged in the single count occurred within the statute of limitations period, and some without. On appeal, the defendant argued that the multiple instances of fraud could not be charged in a single count and that certain of the loans should be dismissed as outside the statute of limitations period. The court held that wire fraud counts may be grouped into a single count if they involve the same scheme to defraud. The court found that **the loans were properly included within the same count because they all involved (1) a common false statement related to the Indiana property, (2) a common group of victims who were the defendant’s friends and colleagues, and (3) a common purpose for the use of the funds, involving the defendant’s day trading.** As such, the loans were all part of the same scheme to defraud and were properly included in one count. Accordingly, since the last loan occurred within the statute of limitations period, the wire fraud scheme was charged timely and the conviction was affirmed.

18 USC § 1589 – Forced Labor Statute

U.S. v. Callahan, 14-3772 (9/9/15)

The defendant was charged with violation of the forced labor statute for kidnapping and forcing a mother and child to live in squalid conditions and perform domestic labor by use of force, threats of force, and threats of abuse of legal process. Upon conviction, the defendant argued that the forced labor statute did not cover the charged conduct because the statute was intended to cover immigrant victims and sex workers. The court held that the statute clearly covered the charged conduct. Although the statute was passed to implement the Thirteenth Amendment’s involuntary servitude provision, the court ruled that **it was broad enough to cover forced domestic labor of the extreme type that existed under the facts of the defendant’s case.** In so holding, the court distinguished its recent decision in U.S. v. Toviave, wherein the court ruled that the forced labor statute could not be applied to parental discipline, which rose to the level of abuse, that was geared toward getting children to do chores and homework. The court held that the Toviave decision was limited to the interplay between parental rights and proper use of federal jurisdiction. Accordingly, the defendant’s conviction was affirmed.

18 U.S.C. § 1957 – Money Laundering

U.S. v. Olive, 13-6174 (9/22/15)

The defendant was charged with money laundering based on his payment of fraudulently obtained investment funds to compensate his highly paid “insurance agents” for their role in the scheme. The defendant argued based on the Supreme Court’s decision in U.S. v. Santos that the fraud “proceeds,” for purposes of the money laundering statute, included only profits from the fraud scheme and not gross receipts. On appeal, the court held that a three factor test is applied in order to determine whether “proceeds” in the

money laundering statute referred only to profits from the fraud in a given case: (1) whether the underlying fraud (mail fraud in this case) and the money laundering merged; (2) if so, whether the merger problem created a dramatic increase in the statutory penalties the defendant was facing; and (3) whether the statutory history “failed to show” that the legislature intended this increase. The court first found that the facts of the case did create a merger problem. The indictment charged that the defendant committed mail fraud by using the highly compensated insurance agents across the country in perpetuating the fraudulent investment scheme. In turn, the money laundering charge pertained to the paying of investment moneys to the highly compensated agents. Thus, court concluded that **the two offenses embraced the same essential conduct, and created a merger problem under Santos**. Nonetheless, the court held that the statutory maximum for mail fraud was 20 years and the maximum for the money laundering was 10 years. The district court imposed a sentence of 31 years, which was within the statutory maximum for the two mail fraud counts. As such, the court ruled that **the merger problem did not create a dramatic increase in the potential statutory penalties**. Accordingly, the money laundering conviction was affirmed.

21 USC 841 – Marijuana Trafficking

United States v. Brown, 13-1761 (9/11/15)

The defendant was charged with possession of marijuana with intent to distribute and at trial he attempted to introduce evidence that he had a medical marijuana license. The district court excluded the evidence and, upon his conviction, the defendant appealed. The court held that Supreme Court precedent establishes that **medical use of marijuana is not a defense to a federal drug trafficking charge**. Further, the court found that there was ample evidence that the defendant was possessing the marijuana to

distribute it, and not for medical use. Thus, any error in admission of the evidence was harmless. Accordingly, the defendant’s conviction was affirmed.

21 USC § 843 – Deceptive Drug Acquisition

U.S. v. Callahan, 14-3772 (9/9/15)

The defendant kidnapped a mother and daughter, and forced them into domestic servitude. As part of the servitude, the defendant would cause injuries to the mother, and make her go to the doctor and pharmacy to obtain painkillers, which the defendant would then sell. The defendant was charged with conspiracy and deceptively obtaining drugs under § 843. The defendant argued on appeal that **the statute was regulatory in nature and intended to cover only healthcare professionals**. The court held that **the statute was not to be read so narrowly**. The court found that **because the defendant obtained the prescriptions but never actually gave them to the mother, there was “trickery” in obtaining the drug, which was sufficient under the statute**. Accordingly, the conviction was affirmed.

XIII. Post-Conviction Remedies

Maryland v. Kulbicki, 14-848 (10/5/15) **Supreme Court**

The defendant was convicted of murder in Maryland state court. Eleven years after his conviction, the defendant alleged that he had been deprived of the effective assistance of counsel because his trial lawyers failed to question the legitimacy of comparative bullet lead analysis, which the prosecution had relied on at trial. In later decisions, the Maryland courts determined that this type of evidence was unreliable and inadmissible, but at the time of the defendant’s trial it was frequently used. The Maryland Court of Appeals nevertheless concluded that trial counsel’s failure to challenge the evidence had been constitutionally ineffective. The Supreme

Court reversed, explaining that **counsel's performance must be judged under the standards for representation that existed at the time of trial.** Because the use of comparative bullet lead analysis was widespread and uncontroversial at the time of the defendant's trial, the defendant's lawyers did not perform deficiently by failing to challenge it. The decision of the Maryland Court of Appeals was therefore reversed.

Ambrose v. Booker, 14-1780 (9/4/15)

The petitioner was convicted of armed robbery in Michigan state court. The petitioner subsequently raised a claim that his right to be tried by a fair cross-section of the community had been violated because a computer error had systematically excluded African-Americans from the jury pool. The state courts concluded that the claim had been defaulted. The district court concluded that the petitioner demonstrated cause and actual prejudice to excuse the default because the exclusion of African-Americans resulted in a jury pool that was statistically more likely to convict. The Sixth Circuit reversed, finding that the district court's reliance on statistical evidence regarding the likelihood of African-Americans to acquit was an improper consideration. **Instead, to demonstrate actual prejudice to excuse a defaulted fair cross-section claim, a petitioner must show a reasonable probability that a different jury would have reached a different result.** Furthermore, the "reasonable probability" standard for the purpose of demonstrating actual prejudice mirrors the prejudice standard set out in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Because the evidence against the petitioner at trial was very strong, there was no reasonable probability that a different jury would have reached a different result, and the petitioner therefore failed to demonstrate actual prejudice to excuse his default.

Garcia-Dorantes v. Warren, 13-2439 (9/4/15)

The petitioner was convicted of second degree murder in Michigan state court. Like the petitioner in *Ambrose v. Booker*, the petitioner raised a procedurally defaulted claim that his right to be tried by a fair cross-section of the community had been violated by the systematic exclusion of African-Americans from the jury pool. **Unlike *Ambrose*, the Sixth Circuit concluded that the petitioner demonstrated actual prejudice to excuse his procedural default. The evidence against the petitioner at trial was sufficient to support a conviction, but was not overwhelming.** As a result, there was a reasonable probability that a different jury might have reached a different result at trial, and the petitioner demonstrated sufficient actual prejudice to excuse his procedural default. Furthermore, the petitioner's fair cross-section claim was meritorious, and habeas corpus relief was granted.

Carlson v. Fewins et al., 13-2643 (9/11/15)

The deceased was shot and killed by a police sniper during a barricade situation at the deceased's home. The deceased was home alone and believed to be suicidal. Approximately sixty law enforcement officers converged on the deceased's home for many hours, and fired numerous rounds of tear gas into the residence, along with a surveillance device. The police took the time to order refreshments during the standoff, but never obtained a warrant. The district court granted summary judgment against the estate's subsequent claim under § 42 U.S.C. § 1983. The Sixth Circuit reversed and remanded the case for a jury trial, explaining that the "choice to call for granola bars but not a warrant appears to have been driven by the Sheriff's misunderstanding of the Fourth Amendment," and that the "facts available at summary judgment raise an inference that **the Team had the time—and thus the constitutional obligation—to**

get a warrant from a judge before entering Carlson's house with tear gas and surveillance equipment.”

Etherton v. Rivard, 14-1373 (9/2/15)

The petitioner was convicted of drug offenses in Michigan state court. At trial, the prosecution introduced the contents of an anonymous tip that inculpated the petitioner. Trial counsel failed to preserve a Confrontation Clause claim, and appellate counsel failed to raise the issues on appeal. The Michigan state courts rejected the petitioner's claim that his appellate counsel had been ineffective. The Sixth Circuit concluded that the rejection of the petitioner's claim of ineffective assistance of appellate counsel was objectively unreasonable under 28 U.S.C. § 2254(d)(1). The Confrontation Clause violation was egregious enough to qualify as plain error under Michigan's procedural rules, and the related ineffective assistance of trial counsel claim was similarly compelling. The court emphasized that the anonymous tip was referenced by three different officers on the witness stand and was relied upon by the prosecutor during closing argument. As a result, the petitioner was granted habeas corpus relief on his claim of ineffective assistance of appellate counsel.

Jones v. Bell, 14-1014 (9/10/15)

The petitioner was convicted of armed robbery in Michigan state court. On the morning of trial, the petitioner stated that he wished to represent himself because his attorney was unprepared. The trial court denied the request, and appellate counsel failed to raise the issue on appeal. The Sixth Circuit concluded that “[t]he trial court's denial of Jones's morning-of-trial request to represent himself was not an extreme constitutional malfunction; fairminded jurists could disagree on whether the Sixth Amendment right to self-representation—as currently defined

by the Supreme Court—covers it. ‘[T]he right to self-representation is not absolute’; it can be outweighed by other concerns like the timing of the request. . . . No Supreme Court case has filled the gap between requests made weeks before trial and the day of trial, so courts have ‘leeway in reaching outcomes in case-by-case determinations.’” The Sixth Circuit further concluded that the petitioner failed to demonstrate cause and prejudice to excuse the default, and that § 2254(d) would bar relief in any event.

Morris v. Carpenter, 11-6322/6323 (9/23/15)

The petitioner was convicted of first degree murder in Tennessee state court and sentenced to death. In federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel at the penalty phase of trial. The district court granted relief, finding in relevant part that counsel performed deficiently by failing to conduct a reasonable background investigation into mitigating evidence and mental illness, and that the determination of the state courts to the contrary was not entitled to deference under 28 U.S.C. § 2254(d). The Sixth Circuit reversed, noting that counsel had hired a number of experts and that “counsel were entitled to rely upon the assessments performed by mental-health experts in forming their strategy.” Also court found that by not presenting such evidence, they avoided opening the door to more damning evidence by the state on the subject. Because the state courts reasonably concluded that trial counsel's performance at the penalty phase was not deficient, the grant of relief was reversed.

Shelton v. United States, 14-5565 (9/2/15)

The petitioner pleaded guilty to being a felon in possession of a firearm. Four years later, he filed a motion to vacate under 28 U.S.C. § 2255. The district court dismissed the motion as untimely at

the screening stage of review under Rule 4(b) of the Rules Governing Section 2255 Proceedings, but did not provide the petitioner with prior notice and an opportunity to respond to the untimeliness determination. The Sixth Circuit reversed and remanded for further proceedings, concluding that *Day v. McDonough*, 547 U.S. 198 (2006), entitled the petitioner to pre-dismissal notice of the untimeliness determination and an opportunity to respond to it.

not “clearly established” within the meaning of the statute.

Trimble v. Bobby, 13-3381/3455 (10/22/15)

The petitioner was convicted in Ohio state court of murder and sentenced to death. During voir dire, a prospective juror repeatedly made statements indicating that he would automatically vote to impose the death penalty if the defendant was found guilty, but also confirmed that he would follow the trial court’s instructions in deliberations. Under *Morgan v. Illinois*, 504 U.S. 719 (1992), seating a juror who would automatically vote for death renders any resulting sentence invalid. The Sixth Circuit nevertheless concluded that the juror’s assurances that he could follow the law meant that there was no error under *Morgan*, and as a result the district court’s grant of relief was reversed.

Coleman v. Bergh, 14-1459 (10/27/15)

The petitioner was convicted of armed robbery in Michigan state court. In federal habeas corpus proceedings, the district court denied relief. The Sixth Circuit granted a certificate of appealability on the petitioner’s claim that appellate counsel had been ineffective in failing to argue that the petitioner had a federal constitutional right to counsel at his hearing on a motion for a new trial. However, the Sixth Circuit subsequently vacated the certificate of appealability as improvidently granted. The court held that the petitioner’s claim was subject to 28 U.S.C. § 2254(d)(1), and a federal right to counsel at a new trial hearing was