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

Jury Polling

U.S. v. Collins, 15-3263 (6/29/16)

The defendant went to trial on charges of distribution, receipt, and possession of child pornography. After the guilty verdict, the district court polled the jury on what it thought would be a fair sentence. The jurors gave suggestions between 0 and 5 years, with the average being about 14 months. At sentencing, the guideline range was 262-327 months imprisonment, with a statutory mandatory minimum of 5 years. After consideration of the 18 USC § 3553 factors and the jury poll, the district court imposed a sentence of 5 years and the government appealed. The court held that consideration of the jury poll was not error given that the district court had otherwise properly considered the statutory sentencing factors. Accordingly, the court found no error and affirmed the sentence.

Reversed Convictions

U.S. v. Mullet, 15-3212 (5/4/16)

The defendants were Amish individuals who were charged with conspiracy to commit hate crimes and hide evidence in a scheme to forcibly cut the beards and hair of other Amish persons. In their first appeal, the court reversed the hate crime portion of the offense but let the conspiracy for hiding evidence stand. In the resentencing, the district court cross referenced from the conspiracy guideline (USSG 2X1.1) to the kidnapping guideline (USSG 2A4.1) based on its conclusion that the defendants had in fact committed the hate crime and unlawfully restrained the victims. The defendants again appealed. The court held that even though the hate crime and related kidnapping convictions were reversed in the first appeal based on legal error, the district court was not precluded from finding by a preponderance of the evidence that the defendants committed kidnappings and applying the applicable cross reference. The court found that the law supported guideline enhancements based on acquitted conduct, therefore it was not improper to impose such enhancements based on convictions reversed

based on legal error. Thus, the sentences were affirmed.

B. Guideline issues

2D1.1 – Drug Amount

U.S. v. Jones, 15-5324 (7/14/16)

The defendant was convicted of several drug sales after trial. At sentencing, the government advocated for a significantly higher guideline range based on uncharged sales to the informant over a period of time. The district court held that the government met the preponderance of the evidence standard to establish the increased drug amount, but not the clear and convincing standard as advocated by the defense. Nonetheless, the district court imposed the enhancement and sentenced the defendant to the top end of the guideline range. On appeal, the court held that the preponderance of the evidence standard remains the proper burden of proof for sentencing enhancements, even after the Supreme Court's decision in Alleyne v. U.S. Accordingly, the defendant's sentence was affirmed.

2K2.1(b)(5) – Trafficking in Firearms

U.S. v. Pawlak, 15-3566 (5/13/16)

The defendant sold some firearms to an informant and an undercover officer on multiple occasions. At sentencing, the district court applied a four level enhancement under USSG 2K2.1(b)(5) because it found that the defendant knew or had reason to know that the firearms would be transferred to a person whose possession would be unlawful. The defendant argued on appeal that the government was required to prove that the informant or agent's possession would actually have been unlawful. The court held that the guideline only requires that a defendant have reason to believe that the possession would be unlawful. The court found that this could be inferred from the surreptitious nature of the sales, the quantity and quality of guns, the price which was double their value, and the agent's comment that his car was parked running in case he needed to "dash for it." Accordingly, application of the enhancement was affirmed.

3A1.1 - Vulnerable Victim

U.S. v. Mullet, 15-3212 (5/4/16)

The defendants were Amish individuals who restrained and cut the hair of other Amish. Some of the victims were elderly and infirm members of the defendants' extended families. The defendants claimed that they did not know the victims' ages and did not target them because of their infirmities. The district court applied the vulnerable victim enhancement. On appeal, the court held that a defendant does not have to target the victim because of their age or infirmity in order to be eligible for the enhancement. The defendant need only know of the vulnerability. The court found that the familial relations provided sufficient evidence that the defendants knew of the victims' ages and infirmities and thus the sentences were affirmed.

3E1.1(a) – Acceptance of Responsibility

U.S. v. Hollis, 15-5246 (5/25/16)

The defendant was charged with participating in a conspiracy to distribute firearms, drug trafficking, and being a felon in possession of a firearm. The charges were severed into two trials and the defendant moved to plead guilty in both cases after the district court's scheduled cut-off day for pleas, but well before either trial date. As a result, the district court denied the defendant any reduction for acceptance of responsibility. On appeal, the court held that the two-level reduction for acceptance of responsibility under USSG § 3E1.1(a) relates only to whether the defendant has truthfully admitted the conduct comprising the offense, not to the timeliness of

the plea. Timeliness specifically relates to the "third point" for acceptance under § 3E1.1(b). Thus, it was improper for the district court to deny the two point reduction based solely on the timing of the plea. Accordingly, the case was remanded for resentencing.

4A1.2(b) – Suspended Sentences

U.S. v. Barnes, 15-5237 (5/16/16)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that his prior Tennessee conviction for drug trafficking counted against his criminal history under the guidelines because the defendant received a 2 year sentence and it had occurred in the past 15 years. The defendant argued for the first time on appeal that the Tennessee conviction was not countable because the state statute called for the automatic suspension of all but 7 months of the sentence. The court held that a sentence is only considered to be "suspended" for guideline purposes when the suspension is imposed by the sentencing judge, not when it is by act of government or statute. Accordingly, the court found no plain error and the sentence was affirmed.

D. Recidivism enhancements

2K2.1 – Firearms – Crime of Violence

U.S. v. Pawlak, 15-3566 (5/13/16)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that his prior Ohio sentence for third degree burglary qualified as a crime of violence and applied an enhancement under USSG 2K2.1. On appeal, the court held for the first time in a published decision that Johnson applies to the guidelines. Thus, Ohio third degree burglary could no longer be considered a crime of violence under the residual clause. As such, the defendant's sentence was vacated.

4B1.1 – Career Offender

U.S. v. McBride, 15-3759 (6/10/16)

The defendant was convicted of several bank robberies and at sentencing the district court determined that the defendant was a career offender based on prior bank robbery convictions on his record. The defendant conceded the point at sentencing. On appeal, the defendant argued that his prior bank robberies were no longer crimes of violence under the guidelines based on Johnson. The court held that, because the defendant conceded that his prior bank robberies fell under the "force, violence, or intimidation" provision of the bank robbery statute (18 U.S.C. § 2113(a)), the conviction qualified as crime of violence under the guidelines. In this regard, the court found that force, violence, and intimidation all were equivalent to the "threatened use of physical force" under the career offender definition for a crime of violence. Thus, the court held that the prior bank robberies were properly considered crimes of violence and the district court's determination that the defendant was a career offender was affirmed.

U.S. v. Doxey, 14-2600 (8/18/16)

The defendant was convicted of possession of heroin with intent to distribute. The district court determined that he was a career offender under the guidelines based on two prior drug trafficking offenses. In one of the priors, the defendant had committed the offense as a juvenile, but Michigan bound him over as an adult. On appeal, the court held that the Michigan offense counted for career offender purposes pursuant to USSG § 4B1.2 cmt. n.1 because it was bound over as an adult conviction. The court discounted the defendant's argument that the juvenile offense would not have been bound over to adult court if it occurred in a different state because the guideline itself

provides that the classification is based on "the laws of the jurisdiction in which the defendant was convicted." Accordingly, the career offender designation was affirmed.

18 USC § 922(e) – ACCA

Mathis v. U.S., 15-6092 (6/23/16)
Supreme Court

The Armed Career Criminal Act lists certain "enumerated offenses" which qualify as violent felonies for enhancement purposes. Previously, the Supreme Court had recognized that various states defined these convictions differently. Therefore, only the "generic form" of these offenses qualified for enhancement. The question posed by *Mathis* was: what if the state statute for burglary provides different ways to commit the crime, some which qualify as the generic form of the offense, some of which do not? The district court and court of appeals, in deciding this issue, looked beyond the statute, reviewed the operative facts of Mathis's prior offense, and determined that he committed the generic form of the offense (this is known as the modified categorical approach). The Supreme Court determined that where a state statute provides different means of committing an offense (or an element of the offense), and some of those means do not qualify, the offense is not generic, and cannot be used for enhancement.

III. Evidence

A. Article IV – Relevancy

403 – Undue Prejudice

U.S. v. Rios, 14-2495 (7/21/16)

At the defendant's trial for gang related RICO violations, the government introduced evidence of the defendant's tattoos. One if his tattoos was an image of a scale with drugs, guns, and money on one side outweighing Christian values on the other. The government argued in closing that the tattoo showed the defendant's intent to be involved in the drug trade as a kind of an admission. On appeal, the court held that the tattoo evidence was substantially more prejudicial than probative and its admission thus violated FRE 403. Nonetheless, the court found that the evidence of the defendant's guilt was otherwise overwhelming and ruled that the error was harmless.

404(b) - Intent

U.S. v. Barnes, 15-5237 (5/16/16)

The defendant was charged with possession of prescription pills with the intent to distribute. While in jail awaiting trial, the defendant made recorded jailhouse calls instructing a friend to distribute pills for him. The district court admitted this evidence and the defendant challenged that ruling on appeal under FRE 404(b). The court first held that sufficient evidence existed that the defendant instructed the distribution of the pills. The court noted that the government was not required to prove that the act constituted a crime for it to be admissible. Second, the court found that the evidence was properly admitted under 404(b) to show intent. Even though the defendant's conversations occurred 6 months after the defendant was charged, the court held that they were probative of the defendant's intent to distribute pills and the evidence was not unduly prejudicial. Accordingly, the conviction was affirmed.

B. Articles VI-VII - Witness and Expert

702 – Expert Testimony

U.S. v. Rios, 14-2495 (7/21/16)

The defendants were charged with RICO violations for gang activity related to drugs and violence. At trial, the government presented law enforcement officers who testified both as fact and expert witnesses. Further, the officers were permitted to testify to hearsay information provided to them by other witnesses. On appeal, the court held that the government may use expert witnesses who also testify as fact witnesses in RICO prosecutions so long as the district court is careful to explain to the jury the dual role and the testimony is clearly demarcated. The court found that one of the officer's testimony intermingled the expert and fact testimony in such a way that it likely was unclear to the jury and constituted error. Nonetheless, the court found the error harmless because the factual evidence presented by the expert was also properly introduced through other witnesses. Additionally, the court held that the expert impermissibly testified to a hearsay conversation about a specific instance of a gang related beating which was couched as expert testimony. Although the court found that this testimony violated the Confrontation Clause, the court also found the error harmless because the same evidence was properly introduced through another source. Accordingly, admission of the evidence was affirmed.

D. Discovery/Miscellaneous

Disclosure of Informant Identity

U.S. v. Doxey, 14-2600 (8/18/16)

The defendant was charged with possession of heroin with intent to distribute based on drugs found in his buttocks by officers. The search of the defendant was due, in part, to a tip which originated from an informant. The informant was not a part of the crime itself and did not testify at trial. Nonetheless, the defense moved for disclosure of the informant's identity. The district court denied the motion and the defendant appealed. The court held that when disclosure of an informant's identity is relevant and helpful to the defense, and essential a fair trial, the district court may order disclosure. The court rarely should order disclosure where the informant is not a participant in the crime, but merely a tipster who does not testify at trial. The court found that the defendant failed to show how disclosure of the informant's identity would have been helpful to the defense or essential to a fair trial. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

Birchfield v. North Dakota,14-1468 (6/23/16)
Supreme Court

The defendant challenged the forced use of blood alcohol tests in DUI offenses. In North Dakota, the refusal to allow such a test was a criminal offense itself. The Supreme Court held that taking blood from an individual without their consent was a search, and as such, must be supported by a warrant. The Court did find, however, that a breath test did not suffer from the same intrusion problems, and therefore a breath test could be administered without consent or a warrant.

D. Consent Searches and Seizures

U.S. v. Doxey, 14-2600 (8/18/16)

Officers received a tip from an informant that the defendant was a drug dealer, had possessed drugs within the past 24 hours, and was driving a certain vehicle. Officers observed the defendant driving the vehicle and engaging in a hand to hand drug transaction. Further, the defendant was driving

without a license and was on parole. The defendant was taken to the station and the officers learned that a condition of parole allowed them to search based on reasonable cause. Also, the officers claimed that the defendant consented to a search of his person at the station. The officers believed that the defendant was secreting drugs in his anus, and asked him to squat and reveal that part of his body. During this process, the officers observed part of a baggie protruding from his buttocks. An officer was able to "flick" it out and retrieve the drugs. The defendant moved to suppress the drugs and the district court denied the motion. On appeal, the defendant argued for the first time that the search was too intrusive and unreasonable under the circumstances. The court first held that the search of the defendant did not violate the Fourth Amendment as it was based on a valid parole condition and the defendant's consent. Second, the court held that the search of the defendant's rectum was not overly intrusive, thus requiring enhanced Fourth Amendment protection, because the officers were able to get the baggie "without any intrusion into his anal cavity, without any injuries, harm, or pain to the defendant, and in a private environment." As such, the court found no plain error in the denial of the motion to suppress.

E. Search Warrants

Search Warrants – Probable Cause

U.S. v. Church, 15-5362 (5/17/16)

Officers arrived at the defendant's home to arrest him for a probation violation. Upon entering, they smelled marijuana and they learned that the defendant had a small amount of marijuana at the house and that he was smoking there regularly. As a result, the officers sought and obtained a search warrant authorizing a search for marijuana at the home based on an investigation for "RICO, money laundering, and drug trafficking." The officers then found guns and drugs, and the defendant was charged with drug trafficking. The defendant moved to suppress the evidence on the theory that the warrant sought to search based on an investigation of significantly more serious crimes than was supported by the facts. The district court denied the motion and the defendant appealed. The court held that the warrant was supported by probable cause to search for marijuana in the house. Regarding the issue of the wrong crimes being listed in the search warrant, the court stated: "For purposes of this warrant, therefore, it did not matter whether the police suspected that Church possessed marijuana, dealt marijuana, or committed some other crime. What mattered was that there was a 'fair probability' that marijuana was in the house." Accordingly, the conviction was affirmed.

U.S. v. Brown, 13-1761 (6/27/16)

DEA agents were investigating a known heroin dealer and, in making an arrest, discovered the defendant present in a vehicle with the dealer. At the time, the dealer was transporting 1/2 kilo of heroin, and 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 originally issued an opinion affirming the district court, however, nine months later the court sua sponte issued an amended opinion reversing the district court. The court held that there was no sufficient nexus between the reported drug dealing activities and the defendant's home. The court noted that there was

no evidence that the defendant distributed drugs from his home, stored narcotics there, or that any suspicious activitiy had taken place there. Further, the evidence did not establish that the defendant was a known drug dealer such that it was reasonable to infer that he would store drugs at his house. Accordingly, the warrant for the home was not supported by probable cause. The court further found that the warrant was not saved by good faith because the affidavit provided no plausible connection between drug trafficking and the residence such that official belief in the existence of probable case was reasonable. Thus, the decision of the district court was reversed.

Search Warrants – Particularity

U.S. v. Crumpton, 15-1299 (6/2/16)

Officers obtained a warrant to search the defendant's residence. The warrant indicated that the residence was "in the vicinity of the property lot at 761 South Sloan Street." The correct address was actually 735. Further, the warrant failed to identify that the property was divided into two separate residences. The district court denied the defendant's motion to suppress and he appealed. The court first held that the error in the address was not fatal to the warrant because 735 was the only house on that side of the street, the warrant included a picture of the correct home, and the affiant officer was present at the search. Second, the court found that the issue of the separate residences did not invalidate the search because they were not clearly delineated such that the officers could reasonably know that the home actually contained two separate residences. Further, the defendant had items in both residences. Accordingly, the warrant was sufficiently particular and the conviction was affirmed.

Search Warrants – Fed.R. Crim. P. 41

U.S. v. Crumpton, 15-1299 (6/2/16)

Officers searched the defendant's residence and the evidence was ambiguous as to whether the officers left a copy of the warrant at the residence as required by Fed.R.Crim.P 41. On appeal, the court held that a technical violation of Rule 41 does not constitute a Fourth Amendment violation unless the defendant can show prejudice. Finding none, the court affirmed the conviction.

F. Arrest Related Issues

Utah v. Strieff, 14-1373 (6/20/16)
Supreme Court

Defendant Strieff was detained based on an improper stop while he was walking outside a building. During the illegal detention, the officer found that Strieff had an outstanding warrant. Strieff was searched, and meth was found on his person. The Supreme Court determined that even though the stop of Strieff was unconstitutional under the Fourth Amendment, the discovery of the warrant served to remedy the illegal stop under a theory of attenuation. The Court found compelling that "the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff." Thus, the search was lawful.

V. Fifth Amendment

A. Prosecutor Conduct

U.S. v. Crumpton, 15-1299 (6/2/16)

At the defendant's trial, his mother testified that ammunition found at the house was not the defendant's. The government cross examined the

mother on the fact that she failed to mention this information when she testified on the subject at a pretrial hearing. The defense relied on the mother's testimony in closing argument. The government responded that the defense failed to bring the issue to the government's attention prior to trial and that the government would not charge someone who was innocent. The defense failed to object to the prosecutor's comments. On appeal, the court first held that the comment about the defense's failure to raise the issue before trial was fairly supported by the evidence and the mother's failure to mention it during her pretrial testimony. Second, the court held that the government's comment about not charging someone who was innocent was improper because it suggested that the defendant was guilty merely because he was indicted. Nonetheless, because the defendant failed to object at trial, the court found no plain error in the prosecutor's isolated comment.

B. Brady

U.S. v. Rafidi, 15-4095 (7/11/16)

The defendant was charged with assaulting a federal officer with a firearm. Prior to trial, the government provided a report which, on page 8 of 9, disclosed that the agents had performed a 360 degree FARO scan of the defendant's residence. The defendant did not receive the scan and at trial the agent testified that it had been conducted. Upon his conviction, the defendant received a copy of the scan and claimed in a new trial motion that it contained exculpatory evidence. The district court denied the motion and the defendant appealed. The court found no Brady violation because the defendant was aware of the existence of the FARO scan based on its disclosure on page 8 of the report produced by the government in discovery. The court held that this disclosure "sufficiently informed [the defendant] as to the existence and availability of the scan." Thus, the conviction was affirmed.

C. Confessions and Testimonial Rights

Miranda

U.S. v. Crumpton, 15-1299 (6/2/16)

Officers arrived at the defendant's residence to execute a search warrant. In advising the defendant of his Miranda rights, the conversation was slightly ambiguous regarding whether any statements the defendant made would be used against him "in court." The defendant did not raise the Miranda issue until mid-trial, and when he did, the district court found a Miranda violation and ended up granting a new trial. Upon the government's appeal, the court first held that the Miranda decision does not technically require law enforcement to notify a defendant that his or her statements may be used "in court"; all that is required is that the defendant be fairly informed that any statements may be used against him or her. Further, the court found that the officers had not misled the defendant about the nature of his rights. Thus, the district court ruling was reversed.

D. Double Jeopardy

Puerto Rico v. Valle, 15-108 (6/9/16)
Supreme Court

Federal courts and the Commonwealth of Puerto Rico are not separate sovereigns, as Puerto Rico is a territory. Thus, separate convictions for the same offense violate Double Jeopardy.

VI. Sixth Amendment

C. Speedy Trial

Betterman v. Montana, 14-1457 (5/19/16)
Supreme Court

There is no Sixth Amendment speedy trial right to a speedy sentencing. Thus, the 14 month gap

between the defendant's conviction and sentencing did not violate the federal speedy trial clause. The Court noted that this "does not mean, however, that defendants lack any protection against undue delay at this stage. The primary safeguard comes from statutes and rules. The federal rule on point directs the court to 'impose sentence without unnecessary delay.' Fed. R. Crim. P. 32(b)(1). Many States have provisions to the same effect, and some States prescribe numerical time limits. Further, as at the prearrest stage, due process serves as a backstop against exorbitant delay." As the defendant never argued that due process was violated, no relief could be granted.

D. Right to Counsel/Self Representation

Ineffective Assistance

U.S. v. Arny, 15-6130 (8/1/2016)

The defendant was a doctor who was hired by a pain care clinic to take over the practice of a doctor who had left. The government subsequently indicted the owners of the pain clinic and the defendant for participating in a drug conspiracy for wrongfully prescribing pain pills. At trial, the defendant was represented by two attorneys who refused to call the previous doctor of the clinic and several patients of the defendant as witnesses. Upon the defendant's conviction, he obtained new counsel and moved for a new trial based on the ineffective assistance of his two trial attorneys. The district court granted the motion and the government appealed. The court held that trial counsel was constitutionally ineffective for (1) misrepresenting to the defendant that the previous doctor was unavailable to testify because she either had a plea deal or would soon be indicted, (2) failing to interview or call the previous doctor as a witness, and (3) failing to investigate or interview any of the defendant's patients at the clinic. Accordingly, the district court's grant of a new trial was affirmed.

U.S. v. Hendrickson, 15-1446 (5/3/16)

The defendant chose to represent herself at trial for contempt of court related to her actions in civil tax proceedings. During trial, the defendant testified in her own defense and she allowed standby counsel to ask her scripted questions during direct examination. Counsel failed to ask certain questions on the script. The defendant did not object, request a side bar, ask to retake the stand, or address the omitted issues during her closing argument. When she raised the issue after trial, the district court denied her request. On appeal, the court held that the defendant's acquiescence in the process of trial counsel's questioning of her on direct and her failure to object or protest to the omitted questions in any fashion convinced the court that the defendant was not denied the fair chance to present her case or to effective representation. Further, the court ruled that any error was not structural. The court held that "a defendant does not have a constitutional right to choreograph special appearances by counsel." Thus, her conviction was affirmed.

Lee v. U.S., 14-5369 (6/8/2016)

The defendant was charged with drug trafficking and his attorney wrongly advised him that a plea to the offense would not result in his deportation. When ICE moved to deport him after his conviction, the defendant filed a habeas petition claiming that his attorney had provided ineffective assistance, and requested to withdraw his guilty plea. The district court denied the petition and the defendant appealed. The court held that, although the attorney's advice was wrong, the defendant could not show prejudice because of the overwhelming evidence that he was guilty. The court found that no rational juror would have acquitted him on the evidence, and

thus the district court's decision was correct. The court noted a significant circuit split regarding the issue of whether the court may consider the strength of the government's evidence regarding the prejudice analysis, but the court was bound by prior Sixth Circuit precedent.

U.S. v. Coleman, 15-5844 (8/31/2016)

The defendant was charged with violating his supervised release for using drugs. Prior to the revocation hearing, the defendant wrote a letter to the district court expressing his desire for new counsel. The court held a hearing, removed the first attorney, and appointed a second attorney who was present at the hearing. The new attorney was given a copy of the SRV report and the defendant's presentence investigation report, and he then met with the defendant for 12 minutes. At the ensuing hearing, the defendant and his new counsel both agreed to proceed with the violation hearing instead of waiting until the following week. The new attorney made a one sentence mitigation statement, the defendant provided an allocution, and the court sentenced him to 30 months in prison, which was three months above the guideline range. On appeal, the defendant argued that he was constructively denied counsel based on the circumstances. The court held that, under the Supreme Court's decision in U.S. v. Cronic, a presumption of prejudice may attach to an attorney's representation in three circumstances: (1) complete denial of counsel at a critical stage; (2) counsel completely fails to subject the prosecution's case to adversarial testing; or (3) the circumstances create a situation wherein even fully competent counsel could not provide effective assistance. Under the third scenario, the court must consider the time afforded for preparation, the experience of counsel, the gravity of the charge, the complexity of defenses, and the accessibility of witnesses. The court found that, given the experience of the attorney involved, the limited mitigation necessary for an SRV hearing, the relative simplicity of the issues, and the experience of the defendant with the system, no constructive denial of counsel occurred. The court noted that it definitely was not the "wiser course" to appoint counsel in this fashion, however, the court ruled that the issue of whether counsel was ineffective based on the Strickland standard would have to be litigated in a subsequent habeas petition. Accordingly, the defendant's sentence was affirmed.

VIII. Defenses

L. Miscellaneous Defenses

Competency

U.S. v. Dubrule, 14-6290 (5/6/16)

The defendant was a doctor charged with illegally distributing pain pills at his clinic. Although he exhibited some strange and paranoid beliefs pretrial, he represented himself during the trial proceedings, in which he was convicted. Prior to sentencing, the district court appointed counsel who moved for a competency evaluation. Two doctors found the defendant incompetent to proceed and one found him competent. The district court credited the doctor who found the defendant competent and proceeded with sentencing. On appeal, the defendant argued that the district court erred in finding him competent and in failing to raise the issue sua sponte before trial. The court first noted that the question of which side bears the burden of proof regarding competence is an open question in the circuit, however, answering the question was unnecessary on the facts. The court found that the evidence supported the defendant's competence given the opinion of the single doctor who was very experienced in the field, the defendant's general ability to represent himself although imperfectly, and the district court's observations of the defendant's demeanor throughout the proceedings. Thus, the court affirmed the conviction.

IX. Jury Issues

A. Jury Instructions

Specific Anonymity

U.S. v. Hendrickson, 15-1446 (5/3/16)

The defendant was a tax protestor who the government pursued in a civil action. The district court in that proceeding issued an injunction ordering the defendant to file corrected returns for tax years 2003 and 2004 and not to make any further false claims based on his belief system. In response, the defendant failed to file the 2003 and 2004 returns and filed a 2008 tax return with the same false claims. The defendant was charged with one count of criminal contempt under 18 USC § 401(3) and he argued at trial that a specific unanimity instruction was required because the single count charged different violations related to the different tax years. The district court refused to provide the instruction. On appeal, the court held that the question of whether a specific unanimity instruction is required is dependent on three factors: (1) whether the evidence is complex or the "alternative specifications are contradictory or only marginally related to each other;" (2) whether there is a variance between the indictment and the evidence at trial; and (3) whether there is jury confusion. The court found that the different violations of the contempt order that related to different tax years were "related enough to avoid a risk of serious unfairness," particularly given the lack of complexity in the case. Further, the court held that any error in this regard was harmless given that the defendant raised no factual dispute regarding guilt. Accordingly, the conviction was affirmed.

XII. Specific Offenses

18 USC § 401(3) – Contempt

U.S. v. Hendrickson, 15-1446 (5/3/16)

The defendant was a tax protestor who the government pursued in a civil action. The district court in that proceeding issued an injunction ordering the defendant to file corrected returns for two tax years and not to make any further false claims based on his belief system. The defendant violated both parts if the injunction and, as a result, the defendant was convicted of criminal contempt. On appeal, the defendant argued that the lawfulness of the district court's injunction was a defense at trial and that the district court erred in instructing the jury that it was not. The court held that the collateral bar rule prohibited the defendant from challenging the lawfulness of the injunction in the criminal contempt proceedings. The only exceptions to the collateral bar rule exist where there was no avenue for meaningful appellate review of the prior injunction order, the district court lacked jurisdiction to issue the order, or the order requires and "irretrievable surrender of conditional guarantees." Finding none of the exceptions applicable, the court affirmed the defendant's conviction.

18 USC § 922(g)(9) – Firearm – Prior D.V.

Voisine v. U.S., 14-10154 (6/27/16)
Supreme Court

The defendant was convicted of being a felon in possession of a firearm based on his prior misdemeanor conviction from Maine for domestic violence, pursuant to 18 U.S.C. § 922(g)(9). The defendant argued that because his prior offense allowed for conviction under a reckless mens rea, that this prior conviction did not prohibit him from possessing a firearm. The Supreme Court disagreed, finding

"Congress defined that phrase to include crimes that necessarily involve the 'use . . . of physical force.' § 921(a)(33)(A). Reckless assaults, no less than the knowing or intentional ones we addressed in Castleman, satisfy that definition." Further, Congress enacted §922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing §922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design

18 USC § 924(c) – Firearm Enhancement

U.S. v. Barnes, 15-5237 (5/16/16)

The defendant was charged with distribution of oxycodone and possession of a firearm in furtherance of drug trafficking. The charges were based on drugs found at the defendant's residence and two firearms found under the waterbed mattress where the defendant slept, and upon which he was sitting when the agents entered. The defendant was convicted at trial and he argued on appeal that the evidence was insufficient to support the verdict on the 924(c) charge. The court held that, in order to convict on a 924(c) charge for firearms found in a residence, the government must show that the firearm was strategically located so that it is quickly and easily available for use, considering the following factors: whether the gun was loaded and the type of gun, the legality of its possession, the type of drug activity involved, and the circumstances under which the firearm was found. The court found that the two guns were located under the water bed mattress where the defendant slept, bullets for the guns were ready at hand, narcotic pills were also on the bed or in the defendant's pocket, and the defendant was sitting on the bed upon the agents' arrival. Accordingly, the court ruled that the evidence was sufficient to sustain the 924(c) conviction.

U.S. v. Rafidi, 15-4095 (7/11/16)

The defendant was convicted of assaulting a federal officer and brandishing a firearm in relation to a crime of violence. The defendant argued on appeal that the assault conviction did not constitute a crime of violence under 18 USC 924(c) such that the statutory enhancement was applicable. The court held that the subsection of the assault statute under which the defendant was convicted, 18 USC 111(b), required proof that the defendant forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer. Further, the government had to show that the defendant either inflicted bodily injury or used a deadly weapon. The court found that the combination of a forcible offense with either bodily injury or use of a deadly weapon was sufficient to categorically qualify as a crime of violence for purposes of 924(c). Thus, the application of the enhancement was affirmed.

18 USC § 1349 – Honest Services Fraud

McDonnell v. U.S., 15-474 (6/27/16)
Supreme Court

The former Governor of Virginia was charged under the federal honest services fraud statute (18 U.S.C. § 1349) and Hobbs Act for his actions in accepting money and other benefits from a businessman in exchange for influence in obtaining government backing for research at a state university. The Supreme Court held that the term "official act" is limited to "a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing." Thus, "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" McDonell's convictions were vacated, due to the jury

instructions which more broadly defined the term.

18 USC § 1951 – Hobbs Act Robbery

Taylor v. U.S., 14-6166 (6/22/16)
Supreme Court

Robbery can become a federal Hobbs Act violation where interstate commerce was affected. In Taylor, the defendant robbed drug dealers. At trial, he wanted to present evidence that the drug dealers only grew their marijuana locally and sold it locally, so as to prove that interstate commerce was not affected. The Supreme Court held that if the person robbing the drug dealer attempted to rob their drugs or their drug proceeds, the interstate commerce element was met.

Ocasio v. U.S., 14-361 (5/2/16)
Supreme Court

Defendant Ocasio was a Baltimore police officer that took kickbacks from auto repair shops in exchange for directing citizens who got into wrecks to those shops. He was eventually charged under the Hobbs Act and 18 U.S.C. § 371 for conspiracy to extort money under color of official right. Osacio argued that because the shop owners were part of the conspiracy, the money he took could not be "the property of another" as required by the statute. The Supreme Court held that "a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit", and therefore, even though the money was from the shopowners, they could be part of the conspiracy and qualify as "another", at least as to Osacio. Therefore, the conviction was upheld.

XIII. Post-Conviction Remedies

Foster v. Chatman, 14-8349 (5/23/16)
Supreme Court

The petitioner was convicted of capital murder and sentenced to death in Georgia state court. During state collateral proceedings, the petitioner obtained prosecution notes from voir dire which demonstrated that the prosecution had deliberately used peremptory challenges to remove African-Americans from the venire. Under *Batson v. Kentucky*, 476 U. S. 79 (1986), prosecutors may not use peremptory challenges to remove prospective jurors on the basis of their race. The state habeas court nevertheless denied relief, and the Georgia Supreme Court refused to grant the petitioner a certificate of probable cause to appeal. The Supreme Court reversed, concluding that the petitioner was entitled to relief under *Batson*.

Johnson v. Lee, 15-789 (5/31/16)
Supreme Court

The petitioner was convicted of murder in California state court and sentenced to life without parole. Following direct appeal, the petitioner filed a federal habeas corpus petition raising a number of unexhausted claims. The district court stayed federal proceedings to permit the petitioner to exhaust her claims in state court. The petitioner then filed a state habeas corpus petition in the California Supreme Court, which the state court denied in a summary order citing its ruling in *In re Dixon*, 264 P. 2d 513 (Cal. 1953). *Dixon* held that claims raised for the first time in a post-conviction proceeding are defaulted if they could have been raised on direct review. The Ninth Circuit held that California's *Dixon* rule was not an adequate and independent state ground to bar federal review because the California Supreme Court had cited *Dixon* inconsistently when issuing summary denials. The United States Supreme Court reversed,

concluding that any perceived inconsistency in the California Supreme Court's citation of *Dixon* in its summary denials was insufficient to show that the rule was not adequate and independent.

Kernan v. Hinojosa, 15-833 (5/16/16)
Supreme Court

The petitioner filed a state habeas petition in California alleging that a new state law relating to good-time credits for prisoners violated the Ex Post Facto Clause. The state habeas court denied the petition on the ground that the petitioner had filed it in the wrong county. Rather than refiling the petition in the correct county, the petitioner filed it directly with the state court of appeals, which summarily denied it. The petitioner then refiled the petition as an original matter with the California Supreme Court, and the petition was once again summarily denied. The Ninth Circuit subsequently concluded that the state courts had not decided the petitioner's claim "on the merits" under 28 U.S.C. § 2254(d), reasoning that the California Supreme Court and the intermediate state appellate court were presumed to have adopted the state habeas court's determination that venue had been improper. The United States Supreme Court reversed. *Ylst v. Nunnemaker*, 501 U. S. 797 (1991), held that where "the last reasoned opinion on the claim explicitly imposes a procedural default, [federal courts] will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." However, the *Ylst* presumption can be rebutted. The Supreme Court concluded it had been rebutted in the petitioner's case because "Improper venue could not possibly have been a ground for the high court's summary denial of Hinojosa's claim. There is only one Supreme Court of California—and thus only one venue in which Hinojosa could have sought an original writ of habeas corpus in that court." As a result, the California Supreme Court's denial of the petitioner's claim was on the merits, and AEDPA was therefore applicable.

Lynch v. Arizona, 15-8366 (5/31/16)
Supreme Court

The defendant was convicted of first degree murder in Arizona state court. Prior the penalty phase proceeding, the trial court granted the prosecution's motion to prohibit defense counsel from informing the jury that the defendant would not be eligible for parole if the death penalty was not imposed. The prosecution then argued at trial that the defendant would pose a future threat if he was not sentenced to death. Under *Simmons v. South Carolina*, 512 U. S. 154 (1994), if future dangerousness is at issue, the defendant has a right to inform the jury that he is not eligible for parole. The Arizona Supreme Court nevertheless concluded that no *Simmons* violation had taken place. The United States Supreme Court reversed, concluding that the defendant's rights under *Simmons* had been violated.

Williams v. Pennsylvania, 15-5040 (6/9/16)
Supreme Court

The petitioner was convicted of murder in Pennsylvania state court and sentenced to death. Following an initial round of review in state court and federal habeas corpus proceedings, the petitioner filed a successive petition for post-conviction relief in state court, which the trial court granted. The prosecution then sought review in the Pennsylvania Supreme Court, and the petitioner requested that the Pennsylvania Chief Justice recuse himself from the proceeding because he had also served as the district attorney who initially authorized the prosecution to seek the death penalty against the petitioner. The request for recusal was denied, and the Pennsylvania Supreme Court reversed the trial court's grant of relief. The United States Supreme Court vacated and remanded the case for further proceedings, concluding that the

refusal of the Pennsylvania Chief Justice to recuse himself violated the Due Process Clause: "Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." The Court further concluded that the violation amounted to a structural defect which did not require a showing of prejudice.

Adams v. Bradshaw, 07-3688 (6/13/16)

The Sixth Circuit amended its earlier decision in *Adams v. Bradshaw*, 817 F.3d 284 (6th Cir. 2016), to modify the language that was used in rejecting the petitioner's lethal injection claim. The denial of relief was unchanged.

Eggers v. Warden, 15-3961 (6/21/16)

The petitioner pled guilty to felony murder in Ohio state court. During allocution, the petitioner addressed his family and stated "You know I didn't do this. I didn't do this." The petitioner subsequently alleged on direct appeal that the trial court was required to hold a hearing to determine if his plea was voluntary under *North Carolina v. Alford*, 400 U.S. 25 (1970). The state court of appeals rejected the petitioner's claim, concluding that *Alford* was inapplicable under the circumstances. The Sixth Circuit concluded that the state court decision was entitled to deference under 28 U.S.C. § 2254(d), and as a result the district court's denial of relief was affirmed.

Giles v. Beckstrom, 14-6494 (6/15/16)

The petitioner was convicted of manslaughter in Kentucky state court and filed a federal habeas petition after exhausting his state court remedies. The Warden moved to dismiss the petition as barred by the statute of limitations. Under 28 U.S.C. § 2254(d)(1)(A), the one-year statute of limitations for filing a federal habeas petition begins to run from the latest of four dates, one of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The petitioner alleged that his petition was timely based on the Kentucky Supreme Court's method of processing cases on direct review. Under Kentucky law, a judgment of the Kentucky Supreme Court does not become "final" until 21 days after the court has issued its opinion. The petitioner, who did not seek direct review in the United States Supreme Court, argued that this was the relevant date for calculating his limitations period. The Sixth Circuit disagreed, and concluded that the date of the Kentucky Supreme Court's opinion was controlling. As a result, the petition was dismissed as untimely.

Lee v. United States, 14-5369 (6/8/16)

The petitioner, a South Korean citizen who had been a legal resident of the United States since 1982, pled guilty to possession of ecstasy after his lawyer assured him that he would not be deported. After discovering that he would be deported, the petitioner filed a motion to vacate under 28 U.S.C. § 2255, alleging that his attorney had been ineffective. Under *Hill v. Lockhart*, 474 U.S. 52 (1985), a petitioner who pleads guilty can prevail on a claim of ineffective assistance of counsel by demonstrating "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." However, the petitioner must further demonstrate that the decision to proceed to trial would have been objectively rational under the circumstances. Because the evidence against the petitioner was overwhelming, and he would still have been deported following a jury conviction, the Sixth Circuit concluded that going to trial would not have been objectively rational, and as a result the denial of the motion to vacate was affirmed.

Brinkley v. Houk, 12-3011 (7/25/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner alleged that his trial attorneys had been ineffective because they failed to conduct an adequate mitigation investigation, and that as a result the jury did not hear evidence relating to his traumatic childhood, personality disorder, and history of substance abuse. The Sixth Circuit concluded that the petitioner failed to demonstrate that his trial attorneys performed deficiently, and that he could not demonstrate prejudice even if they had. The denial of habeas corpus relief was therefore affirmed.

Carter v. Mitchell, 13-3996 (7/13/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following an earlier remand by the Sixth Circuit, the petitioner requested that the district court stay the proceedings and hold them in abeyance under *Rhines v. Weber*, 544 U.S. 269 (2005), so that he could exhaust new evidence in support of claims that had previously been denied on the merits in state court. Under *Cullen v. Pinholster*, 563 U.S. 170 (2011), review under 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court when the claim was denied on the merits. The petitioner argued that he could overcome *Pinholster's* evidentiary restrictions by providing the state courts with an opportunity to reconsider his claims in light of the new evidence that had been developed in the federal proceedings. The Sixth Circuit determined that the petitioner failed to demonstrate that the facts of his case supported an expansion of *Rhines* to encompass "unexhausted evidence," as opposed to unexhausted claims, and as a result the decision of the district court denying a stay and abeyance was affirmed.

Christopher v. United States, 15-2027 (8/1/16)

The petitioner was convicted of federal drug charges following a jury trial. The petitioner subsequently alleged in proceedings under 28 U.S.C. § 2255 that his lawyer's ineffective assistance caused him to reject a plea offer that would have resulted in a more favorable sentence. At an evidentiary hearing, the petitioner testified that he and his lawyer had routinely used cocaine together during the course of his representation, and that this had caused his lawyer to unreasonably advise him to reject the plea offer. The lawyer testified and denied the petitioner's allegations. The Sixth Circuit affirmed the denial of relief, concluding that, based on the record before it, the district court was entitled to find the lawyer's testimony more credible. "In he-said, he-said cases like this one . . . the factfinder does not clearly err in picking one 'he' over the other so long as there is support for each account."

Holbrook v. Curtin, 14-1247 (8/15/16)

The petitioner was convicted of murder in Michigan state court. The petitioner filed a motion for relief from judgment after direct review of his conviction had concluded. The motion was denied, and the Michigan Court of Appeals denied the petitioner's motion for leave to appeal. The petitioner then failed to seek discretionary review in the Michigan Supreme Court until four days after the deadline for doing so had expired. Under 28 U.S.C. § 2244(d)(2), the statute of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending[.]" The district court concluded that the petitioner was not entitled to statutory tolling of the AEDPA statute of limitations for the period of time when he could have filed a timely appeal to the Michigan Supreme Court, and that the limitations period instead began to run when the

Michigan Court of Appeals denied the petitioner's motion for leave to appeal. The Sixth Circuit disagreed, finding that the petitioner's post-conviction action remained "pending" under § 2244(d)(2) during the time when he could have filed a timely appeal to the Michigan Supreme Court, and that he was entitled to statutory tolling, notwithstanding the fact that the appeal he actually did file was untimely.

In re Embry, 16-5447 (7/29/16)

In re Patrick, 16-5353 (8/12/16)

In both of these cases the petitioners moved for authorization to file second or successive motions to vacate under 28 U.S.C. § 2255. The petitioners alleged that their sentences were invalid under *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *United States v. Pawlak*, 822 F.3d 902 (6th Cir. 2016), because the career offender provision set out in U.S.S.G. § 4B1.2(a)(2) was unconstitutionally vague. The Sixth Circuit concluded that each petitioner had made a prima facie showing that he was relying on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as required by 28 U.S.C. § 2255(h)(2), and as a result the motions were transferred to the district court. However, the Sixth Circuit instructed that the cases be held in abeyance pending the Supreme Court's decision in *Beckles v. United States*, No. 15-8544, which is likely to resolve the applicability of the vagueness doctrine to the advisory Guidelines.

In re Stansell, 15-4244 (7/1/2016)

The petitioner was convicted of multiple non-capital felonies in Ohio state court. The state courts affirmed the petitioner's convictions, and the federal courts denied the petitioner's request for habeas corpus relief. After the petitioner's federal habeas corpus proceedings had concluded, the petitioner returned to state court and obtained a new judgment based on the trial court's failure to impose post-release control at the original sentencing. The petitioner then returned to federal court and requested authorization to file a second or successive petition under 28 U.S.C. § 2244. The Sixth Circuit, relying on *Magwood v. Patterson*, 561 U.S. 320 (2010), and *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015), concluded that the petition was not "second or successive" within the meaning of the statute because the petitioner was challenging a new judgment. "When a court alters a sentence to include post-release control, it substantially and substantively changes the terms under which an individual is held 'in custody.' 28 U.S.C. § 2254(a), (b)(1). That means it has created a new judgment for purposes of the second or successive assessment." As a result, the petition was transferred to the district court for further proceedings.

McKinney v. Hoffner, 15-1374 (7/19/16)

The petitioner was convicted of murder in Michigan state court. After his arrest, the petitioner was given his *Miranda* rights and then told that the detective "wanted to talk with [him] today to get [his] side of the story of what happened." The petitioner responded by invoking his right to counsel. The detective then stated, "Well that's fine, but like I said . . . ." The petitioner subsequently confessed. The Michigan Supreme Court found that the detective's second statement did not qualify as an impermissible post-invocation interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The Sixth Circuit concluded that the Michigan Supreme Court's rejection of the petitioner's claim was entitled to deference under § 2254(d)(1), and reversed the decision of the district court to the contrary.

Thomas v. Meko, 14-6227 (7/7/16)

The petitioner was convicted of murder in Kentucky state court. Following direct review, the petitioner filed two successive motions for state collateral relief. The Warden argued that the second motion for collateral relief was not "properly filed" 28 U.S.C. § 2244(d)(2), and that as a result it did not operate to toll the AEDPA statute of limitations. The Sixth Circuit disagreed, finding that the second motion was denied by the state courts "on the merits without ever suggesting that the motion was improperly filed." Statutory tolling under § 2244(d)(2) was therefore applicable.

Foley v. White, 13-5459 (8/26/16)

The petitioner was convicted of murder in Kentucky state court and sentenced to death. Following review in state and federal court, counsel were appointed to represent the petitioner in executive clemency proceedings. Counsel also requested funding for a neuropsychologist, and for a ballistics and crime scene reconstruction expert. The district court denied the request for expert funding as not being "reasonably necessary" under 18 U.S.C. § 3599(f). The Sixth Circuit concluded that, under the circumstances, the denial of expert funding for clemency proceedings was not an abuse of discretion. The petitioner failed to make an adequate preliminary showing of mental impairment that would have justified funding for a neuropsychologist. Furthermore, additional funding for work relating to ballistics and crime scene analysis would likely have been duplicative of the substantial evidence that was already in the petitioner's possession, and the evidence of the petitioner's guilt was overwhelming in any event. The denial of expert funding was therefore approved.

John Does #1-5 v. Snyder, 15-1536/2346/2486 (8/25/16)

Several convicted sex offenders brought a civil rights lawsuit alleging that the retroactive application of recent amendments to Michigan's Sex Offender Registration Act violated numerous constitutional provisions. The Sixth Circuit agreed that the amendments were sufficiently punitive to violate the Ex Post Facto Clause, finding that "SORA brands registrants as moral lepers solely on the basis of a prior conviction." The decision of the district court to the contrary was therefore reversed.