

PRECEDENTIAL VALUE

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This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at www.fpd-ohs.org.

I. Sentencing Issues

B. Guideline issues

2D1.1–Drug amount/2D1.1(b)(12)-Stash house

U.S. v. Hernandez, 17-5448 (1/17/18)

The defendant was a marijuana dealer who was owed money by his distributor. In return, the distributor agreed to provide 2 kilos of a 28 kilo shipment of cocaine to the defendant. The 28 kilo shipment never arrived, and the defendant then agreed to try to find out what happened to the shipment via internet research and by having his subordinates look into the matter. The shipment had been seized by DEA, and the defendant was ultimately charged federally. At sentencing, the district court determined that the defendant was responsible for the full 28 kilos of cocaine based on the defendant's efforts to track down the shipment. Further, the district court imposed an enhancement for maintaining a stash house because the defendant maintained a warehouse to receive three marijuana shipments. He also expected to receive the cocaine at this location. On appeal, the court held that sentencing based on the full 28 kilos of cocaine was proper. The court found that **the defendant's actions in**

attempting to locate the shipment through internet research about the seizure and in ordering his subordinates to track down the shipment was sufficient to bring the full 28 kilos into the scope of his agreement under USSG § 1B1.3, the relevant conduct guideline. Additionally, the court held that stash house enhancement under § 2D1.1(b)(12) was proper. **Although the government must show more than mere distribution from a location in order to sustain the enhancement, the court found that the evidence sufficiently demonstrated that the defendant secured the warehouse, maintained control over it, and had received large shipments at the warehouse on multiple occasions to his own substantial financial benefit.** The court found this evidence sufficient to sustain the enhancement. Thus, the district court's sentence was affirmed in all respects.

C. Procedural matters

Date of Sentencing

Downs v. U.S., 16-5368 (1/8/18)

The defendant was convicted of participating in a conspiracy to distribute 50 grams or more of crack. He was sentenced to the mandatory

minimum 10 year sentence the day before the Fair Sentencing Act was passed which reduced the mandatory minimum sentence for his crime to 5 years. The written judgement was not issued by the district court until after the passage of the FSA. Two years later the Supreme Court decided in Dorsey v. U.S. that the FSA could apply to pre-Act offenders who were sentenced after the FSA was passed. The defendant filed a habeas petition arguing that he was sentenced after passage of the FSA because of the later issued written judgment. He also argued that his counsel was ineffective for failing to delay the sentencing hearing. The district court denied the petition and the defendant appealed. The court held that **the date of sentencing is the date that the sentencing hearing is held and the district court orally pronounces sentence. Thus, the defendant was not actually sentenced after passage of the FSA and was not entitled to relief under Dorsey.** Further, the court held that the defendant's counsel had not been ineffective for failing to continue the sentencing hearing until after passage of the act. Thus, the defendant's sentence was affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

Higdon v. U.S., 17-5027 (2/12/18)

The defendant was convicted of being a felon in possession of a firearm and sentenced as an armed career offender based, in part, on his North Carolina conviction for firing a gun into a habitation. When the Supreme Court issued its decision in Johnson, the defendant filed a habeas petition arguing that his North Carolina conviction no longer counted as a crime of violence. The district court denied the petition and the defendant appealed. The court held that the North Carolina offense did not qualify as a violent felony under the ACCA. Specifically, the court found that the crime did not contain an

element requiring the use of force “against the person of another.” **At most, the North Carolina offense required that the defendant fire into a habitation “while it is occupied.” The court found that this force against a habitation requirement did not satisfy the ACCA’s requirement of force or threat of force “against the person of another.”** Thus, the defendant’s sentence was vacated.

4B1.1 – Career Offender

U.S. v. Smith, 16-6720 (2/7/18)

The defendant was convicted of Hobbs Act robbery and the district court determined that he was a career offender under USSG § 4B1.1 of the sentencing guidelines. This determination was based in part on the defendant’s prior North Carolina robbery conviction, which prohibited taking money or property from another “by means of violence or fear.” The district court based its finding on the residual clause of the career offender guideline. During the appellate proceedings, the Supreme Court decided Johnson and Beckles. As such, the district court at resentencing again determined that the defendant was a career offender. On appeal, the court held that **the residual clause of the career offender guideline applied post Johnson and Beckles, and that the court was required to apply the guideline that was in effect at the time of the defendant's original sentencing. Accordingly, because the court held in a previous decision that the North Carolina robbery statute was a crime of violence under the residual clause, the defendant's sentence was affirmed.**

III. Evidence

B. Articles VI-VII – Witness/Expert

613(b) – Prior Inconsistent Statement

U.S. v. Harris, 17-3087 (2/5/18)

The defendant was charged with obstruction of justice and security fraud related offenses. The obstruction charge was based on a codefendant's testimony that the defendant had suggested that he lie about the source of income related to the fraud. At trial, the district court refused to allow a defense investigator to testify that the codefendant had told him that the defendant merely encouraged the codefendant to tell the truth about what happened. The defendant was convicted on the obstruction charge and the other fraud counts. On appeal, the court held that the prior inconsistent statement was admissible under FRE 613(b). The court found that **the statement of the witness to the investigator and the trial testimony of the witness were irreconcilably at odds. Accordingly, the court found that FRE 613 permitted the introduction of extrinsic evidence, the testimony of the investigator, in order to prove the witness' prior inconsistent statement.** Because there was scarce little evidence of the defendant's guilt of the obstruction charge, the court found that the error was not harmless and reversed the defendant's conviction on this count.

IV. Fourth Amendment

C. Warrant Exceptions

D.C. v. Wesby, 15-1485 (1/22/18)

Supreme Court

Officers responded to reports of an out of control party. Neighbors told police that the place was vacant, however, it clearly was not. Someone opened the door, and the house looked trashed. Officers smelled marijuana and saw beer bottles everywhere. So officers, without invitation,

entered the house. Many partygoers were arrested for trespassing, but eventually, all the charges were dropped. Some of the persons then filed a § 1983 action against the police for false arrest, arguing that the police violated the Fourth Amendment by entering the home and arresting them without probable cause. Ultimately, the Supreme Court held that the police entry into the home without a warrant was supported by the community caretaker exception to the warrant requirement. **The Court employed a “totality of the circumstances” approach, and determined that “the officers made an entirely reasonable inference that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party.”** The Court held **that the appellate court's decision to view each fact in isolation to determine probable cause was in error.** **“This kind of divide-and-conquer approach is improper.** A factor viewed in isolation is often more ‘readily susceptible to an innocent explanation’ than one viewed as part of a totality.” Accordingly, the officers' actions were justified and the § 1983 action was dismissed.

E. Search Warrants

Particularity

U.S. v. Castro, 17-1590 (2/7/18)

Agents were investigating defendants on a string of home invasions and seized cell phones from each of the defendants. The agents obtained state warrants to search the cell phones for evidence related to aggravated robberies. The warrant also stated that officers could search for evidence of “a crime” and that they could look for “any other files, deleted or not involved in this or any other unlawful activities.” Further, months after the state agents searched the phones, federal agents also searched the phones for evidence of other aggravated robberies. The district court suppressed the evidence seized from the phones

because it found that the warrants were overbroad. On appeal, the court held that the warrants were sufficiently particularized to be valid. Specifically, the court found that the warrant's authorization to search for evidence of "a crime" was logically limited to aggravated robberies, because those were the crimes described in the warrant. Further, the court found that, although the language related to a search of phones for "any other unlawful activities" was overbroad, the agents had neither searched for nor found evidence beyond the aggravated robberies. Thus, the court held that this portion of the warrant could be properly severed and the rest enforced as valid. Finally, the court held that the fact that the federal agents searched the phone months later for different aggravated robberies did not invalidate the warrant or the searches. Federal agents may rely on state search warrants as long as the probable cause for the warrants supports the separate searches, there has been no break in the custodial status of the evidence, and the search relates to the same offenses described in the warrant (aggravated robberies). Accordingly, the district court's ruling suppressing the evidence was reversed.

IX. Jury Issues

B. Juror Bias/Misconduct

Juror Misconduct

U.S. v. Harris, 17-3087 (2/5/18)

The defendant was charged with obstruction of justice and security fraud related offenses. After his conviction at trial, the defendant learned that one of the jurors had communicated the defendant's name to his girlfriend, who ran a google search and potentially communicated inadmissible and prejudicial information about the defendant to the juror. The defendant moved the district court for a Remmer hearing, which the district court denied. On appeal, the court found that the defendant made a "colorable claim of

extraneous influence" on the juror. Thus, the court held that the district court erred in failing to hold a Remmer hearing in order to determine what, if any, prejudice had ensued to the defendant. Accordingly, the conviction was vacated and the case remanded to the district court.

XI. Appeal

Class v. U.S., 16-424 (2/21/18)

Supreme Court

Does a guilty plea, in and of itself, waive a challenge to the constitutionality of the statute to which the defendant pleads guilty? In this case, the defendant pled guilty to possession of a firearm on the grounds of the US Capital. His plea agreement contained a fairly expansive appellate waiver provision. Nonetheless, the defendant appealed, arguing that the statute itself was void for vagueness under the Due Process Clause. The DC Circuit held that the plea agreement waived any such claim. The Supreme Court reversed, finding that the defendant's challenge to the statute was consistent with the defendant's knowing, voluntary, and intelligent admission that he did what the indictment alleged. Thus, "the claims at issue here do not fall within any of the categories of claims that the defendant's plea agreement forbids him to raise on direct appeal. They challenge the government's power to criminalize the defendant's (admitted) conduct. They thereby call into question the Government's power to constitutionally prosecute him. . . . A guilty plea does not bar a direct appeal in these circumstances."

XII. Specific Offenses

18 USC § 1028A – Aggravated Identity Theft

U.S. v. Michael, 17-1526 (2/20/18)

The defendant was a pharmacist who used the identifying information of a doctor and patient to create a fraudulent prescription. He was subsequently prosecuted for health care fraud and aggravated identity theft under 18 USC 1028A. The defendant moved to dismiss the indictment arguing that the aggravated identity theft charge was improper because he did not assume either the doctor or patient's identity. The district court agreed and dismissed the charge. On appeal, the court held that **the statute did not require the government to prove that the defendant actually assumed the identity of another. Instead, a defendant is guilty of aggravated identity theft if the defendant "used" the identity during and in relation to the underlying fraud.** Thus, because the defendant used the identities of the doctor and patient in order to fraudulently obtain the prescription, the indictment properly charged an offense. Accordingly, the district court ruling was affirmed.

XIII. Post-Conviction Remedies

Tharpe v. Sellers, 17-6075 (1/18/18) Supreme Court

The petitioner was convicted of murder in Georgia state court and sentenced to death. In federal habeas corpus proceedings, the petitioner alleged that his death sentence was invalid because one of the jurors at his trial was a racist. After the initial denial of relief, the petitioner filed a motion for relief from judgment under Fed.R.Civ.Pro. 60(b)(6), and supported it with an affidavit from the juror in question. The affidavit indicated that the juror had relied on the petitioner's race as a reason to sentence him to death. The district court denied the motion, concluding that the claim was defaulted; the court

further determined that the default could not be excused because the petitioner could not overcome the state court's factual finding that the juror's decision to impose the death penalty was not based on race. The court of appeals denied a certificate of appealability. The Supreme Court remanded the case for further consideration. **Although a state court's factual findings are presumed to be correct under 28 USC § 2254(e)(1) and must be rebutted by clear and convincing evidence, the juror's affidavit provided a strong basis for finding that the state court's conclusion was incorrect.** The case was accordingly remanded to the court of appeals with instructions to reconsider the petitioner's motion for a certificate of appealability.

Caudill v. Conover, 14-5418 (2/2/18)

The petitioner was convicted of murder in Kentucky state court and sentenced to death. At trial, the defense raised a claim under Batson v. Kentucky, 476 U.S. 79 (1986), alleging that the prosecution had used its peremptory challenges to discriminate against white males in jury selection. The trial court denied the claim based on the race-neutral explanations for the challenges provided by the prosecution, and the Kentucky Supreme Court affirmed. **The Sixth Circuit concluded that the state court's rejection of the claim was entitled to deference under 28 USC § 2254(d), and as a result the denial of relief was affirmed.**

Caudill v. Conover, 14-5418 (2/2/18)

The petitioner was convicted of murder in Kentucky state court and sentenced to death. Following trial, the petitioner alleged that she had been deprived of the effective assistance of counsel because her attorneys failed to provide her with competent representation at the penalty phase. **The state courts denied relief, but did not consider the question of prejudice under**

Strickland v. Washington, 466 U.S. 668 (1984), on the merits. As a result, review in federal court on that issue was not subject to the deferential standards set out in 28 USC § 2254(d). The Sixth Circuit nevertheless concluded that there was no reasonable probability that the petitioner would have received a lesser sentence even if she had been provided with better representation. The denial of habeas corpus relief was therefore affirmed.

Hill v. Anderson, 99-4317/14-3718 (2/2/18)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner subsequently alleged that he was intellectually disabled and therefore ineligible for execution under Atkins v. Virginia, 536 U.S. 304 (2002). The state courts concluded that although the petitioner demonstrated significant deficits in intellectual functioning, he failed to show significant adaptive skill deficits, as required by Atkins; the state courts further found that the petitioner failed to satisfy Atkins's requirement of onset before the age of eighteen. The Sixth Circuit determined that the state court rejection of the petitioner's claim was not entitled to deference under 28 USC § 2254(d). The state court's findings regarding adaptive deficits improperly focused on the petitioner's adaptive strengths and prison adjustment, and amounted to an unreasonable application of Atkins under § 2254(d)(1). Furthermore, the state court finding that the petitioner failed to demonstrate onset before the age of eighteen amounted to an unreasonable factual determination under § 2254(d)(2). The judgment of the district court denying relief was accordingly reversed.

In re Black, 17-2147 (1/31/18)

The petitioner was convicted of federal drug offenses and sentenced to life in prison. The judgment was affirmed on direct review, and the

petitioner's motion to vacate under 28 USC § 2255 was denied. The petitioner subsequently filed a motion for relief from judgment under Fed.R.Civ.Pro. 60(b) seeking to reopen his § 2255 proceedings. The district court determined that some of the claims raised in the motion amounted to unauthorized second or successive petitions under 28 USC § 2244 and transferred the case to the Sixth Circuit. The court of appeals found that to the extent that the petitioner was attempting to reopen claims that had already been denied on the merits, his motion was second or successive under Gonzalez v. Crosby, 545 U.S. 524 (2005). Furthermore, although the petitioner raised an allegation of fraud by government counsel, his arguments related to the integrity of the trial itself, rather than to the integrity of his habeas corpus proceedings. As a result, the petitioner did not allege the type of fraud that would be the proper basis for a Rule 60(b) motion. Because the petitioner did not meet the requirements for authorization of a second or successive petition under § 2244, the case was dismissed.

In re Lee, 17-6038 (1/17/18)

The petitioner pleaded guilty to state crimes in Tennessee. He filed a habeas corpus petition under 28 USC § 2254, but it was denied. The petitioner was subsequently released from custody in 1998 after serving his sentence. Following his release, the petitioner was convicted of federal crimes and incarcerated again. The petitioner then filed a motion with the Sixth Circuit requesting authorization to file a second or successive habeas corpus petition attacking his earlier state court convictions. The Sixth Circuit denied the request due to lack of jurisdiction. Under 28 USC § 2254(a), federal jurisdiction is limited to state prisoners who are "in custody pursuant to the judgment of a State court." Although the petitioner was in federal custody, he was "no longer in custody pursuant to

the state judgment he seeks to attack because the sentences for his state convictions expired in 1998, including any term of parole or supervised release those convictions imposed.” The request for authorization was accordingly dismissed.

Miller v. Mays, 14-6445 (1/9/18)

The petitioner was convicted of murder in Tennessee state court and sentenced to death. After the denial of his federal habeas corpus petition was affirmed, the petitioner filed a motion for relief from judgment under Fed.R.Civ.Pro. 60(b)(6), alleging that the intervening decisions in Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013), would permit consideration of a claim of ineffective assistance of trial counsel that had previously been found to be defaulted. The district court determined that the petitioner failed to demonstrate extraordinary circumstances as required by Rule 60(b)(6) and denied the motion. The Sixth Circuit concluded that the district court did not abuse its discretion and affirmed. The petitioner waited for more than sixteen months after Martinez was decided before filing his motion, and was therefore not diligent in seeking relief. Furthermore, the state had a compelling interest in the finality of the judgment, notwithstanding the fact that the petitioner’s claim had never been considered on the merits. Finally, although the petitioner’s lawyer was most likely deficient at the penalty phase of trial, it was not clear that the petitioner could establish prejudice. As a result, the district court did not abuse its discretion, and the denial of relief was affirmed.

In re Ohio Execution Protocol Litigation, 17-4221 (1/25/18)

Numerous death row inmates challenged Ohio’s lethal injection protocol in proceedings under 42 USC § 1983. Two inmates with impending

execution dates moved for preliminary injunctions, alleging that the use of the protocol would constitute cruel and unusual punishment under Glossip v. Gross, 135 S.Ct. 2726 (2015). The injunctions were denied. On appeal, the inmates alleged that the district court erred in discounting evidence of psychological pain that would take place in conjunction with physical pain if the execution protocol resulted in inadequate sedation before death. The Sixth Circuit affirmed, finding that the inmates failed to demonstrate that a constitutionally unacceptable risk of inadequate sedation was present. As a result, the inmates’ allegations regarding psychological pain were immaterial, and the denial of relief was affirmed.