

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

A. 3553(a) factors and issues

U.S. v. Rayyan, 17-1447 (3/19/18)

The defendant was convicted of making false statements on a firearm application and being a regular drug user in possession of a firearm. During the investigation, the government discovered that the defendant made a number of social media posts related to ISIS, had taken pictures of himself holding guns, and had indicated to an undercover informant and his brother that he intended to commit acts of violence. As a result of this uncharged conduct, the district court held three days of hearings and issued a 33 page opinion upwardly varying from the guideline range of 15-21 months up to 60 months. On appeal, the court found that the sentence was both procedurally and substantively reasonable. The court found that **the district court had properly calculated the guideline range, considered the statutory sentencing factors, and had sufficiently justified the significant increase based on the substantial risk the defendant posed to the community.** Accordingly, the sentence was affirmed.

B. Guideline issues

2K2.1 – Firearms – Prior firearm possession

U.S. v. Amerson, 17-1713 (3/27/2018)

The defendant was convicted of being a felon in possession of two firearms. Three and a half months prior, the defendant was in possession of another firearm that was involved in a shootout, but he was not prosecuted for the gun. At sentencing, the district court applied an enhancement under USSG § 2K2.1 for the uncharged firearm because the district court found that it was part of the relevant conduct for the offense. On appeal, the court held that, in order to be relevant conduct under USSG § 1B1.3(a), a prior firearm possession must be “part of the same course of conduct or common scheme or plan.” In analyzing whether offenses are part of the same course of conduct, three factors are considered: (1) the degree of similarity; (2) the regularity of offenses; and (3) the time between offenses. The court noted that weakness in one of the factors requires a stronger connection in the other factors. The court found that **the degree of similarity was weak because there was**

insufficient evidence that the defendant had used both sets of guns in shootouts. Further, the court found that the government did not establish evidence of regularity of gun possession, but instead offered only the two instances, which occurred three and a half months apart. Third, the court held that, although the time between possessions was not lengthy, without evidence of regularity the three and a half month time period was too remote. Accordingly, the court ruled that the offenses were not properly considered relevant conduct and the sentence was vacated.

3C1.1 – Obstruction of justice

U.S. v. Amerson, 17-1713 (3/27/2018)

The defendant was charged with being a felon in possession of a firearm. While the case was pending, the defendant spoke to his girlfriend three times from the jail and asked her to claim ownership of the gun in order to exonerate him. Ultimately, she refused to do so. At sentencing, the district court imposed an obstruction of justice enhancement and the defendant appealed. The court held that the defendant committed a substantial step toward obstructing justice by asking his girlfriend to lie for him about the gun on multiple occasions. Even though the girlfriend ultimately refused to do it, the defendant's substantial step was sufficient to justify the enhancement under USSG § 3C1.1.

D. Recidivism enhancements

4B1.1 – Career Offender

U.S. v. Morris, 16-1349 (3/15/18)

The defendant was convicted of drug trafficking and at sentencing the district court determined that he was a career offender based on two prior Michigan offenses for domestic assault. On appeal, the court first held that the domestic assault convictions did not qualify as crimes of violence under the force clause of the career

offender guideline. The court found that the Michigan assault crime was not divisible and thus the court was only permitted to determine whether the offense was categorically a crime of violence based on the statute. The court ruled that the Michigan statute required only that a defendant commit a “harmful or offensive touching of the person of another, or of something closely connected with the person.” The court found that this type of “force” did not constitute “violent force,” as required by the guidelines. Thus, Michigan assault was not a crime of violence under the force clause. Nonetheless, the court held that the offenses qualified as crimes of violence under the residual clause. The defendant was sentenced prior to the guideline amendment removing the residual clause; thus the court determined that, under the clause, the “face-to-face incident of domestic violence” that is defined in the statute constitutes a situation posing a serious risk of physical injury. Accordingly, the court found that the prior offense qualified as a crime of violence and affirmed the defendant’s sentence.

18 USC § 16(b) – Aggravated Felonies Supreme Court

Sessions v. Dimaya, 15-1498 (4/17/18)

18 U.S.C. § 16 requires deportation of immigrants convicted of an “aggravated felony.” The phrase “aggravated felony” includes certain prior crimes of violence. As relevant to this case, a “crime of violence” is a prior conviction for a “felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (known as the “residual clause”). The defendant was an illegal alien who argued that he was not an aggravated felon under the residual clause because, based on the Supreme Court’s decision in Johnson, the residual clause was void for vagueness. On *certiorari*, the Supreme Court agreed. The Court

held that “§16(b) has the same [t]wo features’ that ‘conspire[d] to make [ACCA’s residual clause] unconstitutionally vague. . . . It too requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently large degree of risk. The result is that §16(b) produces, just as ACCA’s residual clause did, more unpredictability and arbitrariness than the Due Process Clause tolerates.”

Editor’s Note: The language in 16(b) is almost identical to that contained in 18 U.S.C. § 924(c)(3)(b)’s residual clause (which defines a crime of violence for § 924(c) offenses)(as noted in Chief Justice Robert’s dissent).

18 USC § 924(e) – ACCA

Potter v. U.S., 16-6628 (4/17/18)

The defendant filed a habeas petition after the Supreme Court’s decision in Johnson, arguing that his sentence was no longer valid, as he did not have 3 qualifying prior convictions. His prior convictions were: a Georgia conviction for burglary, a Georgia conviction for obstruction of an officer, and a Tennessee conviction for aggravated assault. But the record was not clear whether the original sentencing court considered these prior convictions under the defunct residual clause or rather under the force clause of the ACCA. **The Court held that, in a habeas petition, the defendant has the burden of production to show that the original sentencing court relied on the residual clause in imposing sentence. As the defendant could not meet this burden, he was not entitled to habeas relief.**

Also, the defendant argued that, in any event, his Georgia burglary conviction was no longer valid pursuant to the Supreme Court’s decision in Mathis. But the Court determined that the defendant could not rely on Mathis, **as this was his second habeas petition, and Mathis “involved**

an old rule of statutory law, not a new rule of constitutional law. It thus does not open the door for a second collateral attack.”

Perez v. U.S., 17-3419 (3/26/18)

The defendant was convicted of being a felon in possession of a firearm and the district court determined that the defendant was an Armed Career Criminal. This determination was based in part on a prior New York conviction for second degree robbery. On the appeal of a subsequent habeas petition, the court held that the New York robbery conviction was properly considered to be a violent felony under the ACCA’s force clause. Specifically, the court ruled that **the New York law required that a defendant “use or threaten the use of immediate physical force upon another person.”** In reviewing the New York law, the court found that state appellate court decisions generally required that the force be violent force, and not the type that was “akin to pickpocketing, or the crime of jostling.” As such, the case was distinguishable from the court’s decision in U.S. v. Yates, which found that Ohio robbery was not a crime of violence where violent force was not required to commit the offense. Thus, the New York robbery offense was properly considered a violent felony under the ACCA. The court noted that the government had conceded that other priors of the defendant were not violent felonies including Ohio burglary and Ohio attempted intimidation.

II. Plea Matters

C. Hearings

Fed.R.Crim.P. 11(b)(1)(O) – Denaturalization

U.S. v. Ataya, 16-2611 (3/2/18)

The defendant was a native of Syria and was a naturalized American citizen. He was also a medical doctor, and was charged with healthcare fraud. The defendant entered a plea of guilty, but

at the plea hearing the district court failed to inform him, as required by Fed. R. Crim. P. 11(b)(1)(O), that his fraud conviction could result in his denaturalization. The defendant did not object to the issue in the district court, but argued on appeal that his plea was involuntary. The government moved to dismiss the appeal based on the appeal waiver in the plea agreement. The court held that **an appeal waiver is not enforceable if the defendant did not knowingly and intelligently enter into the plea agreement.** The court found that it was plain error for the district court to fail to inform the defendant of the potential immigration consequences of his plea and that this error affected the defendant's substantial rights. Because of the district court's failure, the court found that the plea was not voluntarily entered, the appeal waiver was unenforceable, and the conviction had to be vacated.

III. Evidence

A. Article IV – Relevancy

401/403 – Relevance/Unfair prejudice

U.S. v. Gardner, 17-1672 (4/16/18)

The defendant was charged with trafficking a minor for sex. At trial, the government introduced pictures that the minor had viewed that depicted the defendant brandishing guns and displaying his membership in a violent street gang. Upon his conviction, the defendant argued on appeal that the pictures were irrelevant and unfairly prejudicial. The court held that the pictures were relevant to the extent they were seen by the minor. **An element of the offense required the government to prove that the defendant coerced the minor by threatening her with serious harm.** The pictures tended to show the minor that the defendant was the kind of person capable of committing serious harm. Further, the court found that the pictures were not unfairly prejudicial. The court noted that the jury

saw significantly more shocking evidence in the sex videos that the defendant created of the minor. Accordingly, the admission of the evidence was affirmed.

404(b) – Knowledge/Intent/Identity

U.S. v. Ramer, 15-6014 (2/26/18)

The defendant was convicted of securities fraud and upon completion of his sentence engaged in a nearly identical fraud scheme involving spurious oil and gas drilling projects. Upon his subsequent mail fraud prosecution, the government introduced the defendant's prior conviction for securities fraud, including the fact that he used the same aliases in the prior case. The defendant was convicted and argued on appeal that the prior conduct evidence was prohibited under FRE 404(b). The court held that the evidence was admissible to show knowledge and intent. **The defendant knew that he should have disclosed the prior fraudulent conduct to the investors, who likely would not have invested had they known this information.** The evidence also refuted the defendant's claims that they were surprised that the promises they made to investors were actually false. Further, the court held that prior acts evidence showed identity. The defendant used the exact same false identities in his previous fraud case. **The use of the same aliases in both offenses was distinctive enough to qualify as a "signature" for purposes of FRE 404(b).** Finally, the court held that the prior acts evidence was not unduly prejudicial under FRE 403, and accordingly admission of the evidence was affirmed.

404(b) – Res Gestae/Background Evidence

U.S. v. Brown, 17-5718 (4/25/2018)

The defendant was charged with being a felon in possession of a firearm. At trial, the district court admitted 911 calls in which the defendant's girlfriend reported that he was outside her home

and that he had shot out a glass door with a gun. She also reported to the 911 operator that the defendant committed domestic violence in the past. The district court admitted these latter statements under the *res gestae* or background evidence exception to FRE 404(b). On appeal, the court held that the statements regarding domestic violence were not properly admitted. The court ruled that background evidence must have a “causal, temporal, or spatial connection with the charged offense” such that it is “probative of, or completes the story of, the charged offense.” The court found that the information about domestic violence had no causal or temporal connection to the defendant’s firearm possession, and that it was unnecessary to complete the story of the event. As such, the court held that it was error for the district court to admit the evidence. Nonetheless, the court found that the error was harmless because the reference to domestic violence was isolated and the evidence of the defendant’s guilt was otherwise overwhelming. Accordingly, the defendant’s conviction was affirmed.

C. Article VIII – Hearsay

U.S. v. Ramer, 15-6014 (2/26/18)

The defendant was charged with mail fraud for running a fraudulent oil and gas securities scheme. At trial, the government introduced voluminous bank records from accounts at various banks. Instead of presenting the records through a records custodian, the government offered the testimony of the government investigator who had subpoenaed and accumulated all of the records. Upon his conviction, the defendant argued on appeal that the government agent was not a proper witness to authenticate the business records under FRE 803(6). The court held that business records need not be authenticated by an employee of the business if the witness establishes sufficient familiarity with the record keeping process and

the business practices of the company. The court found that the government agent had engaged in a “painstaking process” of examining checks, records, and accounts, and had successfully built the “entire picture” of how the business process worked. Based on the investigator’s “strong understanding of the records at issue,” the court found that the investigator was a qualified witness for purposes of the business records exception of FRE 803(6). Thus, the admission of the evidence was affirmed.

IV. Fourth Amendment

D. Consent Searches and Seizures

U.S. v. Gardner, 17-1672 (4/16/18)

The defendant sent a minor to have sex with a “date,” but the date turned out to be an undercover officer. As a result, the defendant was charged with trafficking a minor for sex and production of child pornography. The minor had the defendant’s cell phone with her at the time of the incident, and the police obtained her consent to search the phone, finding inculpatory evidence. The district court denied a motion to suppress phone evidence and the defendant appealed. The court held that the minor had actual authority to consent to the search. She had the phone in her possession at the time, she knew the passcode, she used the phone to speak to the “date,” she used it throughout the day, and she gave it to the officers. At a minimum, she had at least joint access or control over the phone, which was sufficient for consent. The court noted that the defendant argued only that the minor had no apparent authority to give consent; the court ruled that a defendant must first show no actual authority before arguing the doctrine of apparent authority. Accordingly, the defendant’s conviction was affirmed.

E. Search Warrants

Probable Cause

U.S. v. Tagg, 17-1777 (3/27/18)

The defendant visited a child pornography website known as Playpen, which could only be accessed through a secret web browser known as the TOR. When the government seized the Playpen website, it was able through software to identify users of the website and the IP addresses utilized by the users. As a result, the government was able to determine that the defendant registered for an account on the Playpen website, spent about 5 hours browsing the site, and navigated to multiple forums that were clearly devoted to child pornography. This information was included in a search warrant for the defendant's residence, which was based on an investigation of a violation of 18 USC § 2252A(a)(5)(B), access with intent to view child pornography. The defendant moved to suppress the evidence seized from his residence and claimed that the warrant was not supported by probable cause. The district court agreed and suppressed the evidence, finding that there was not sufficient evidence to support probable cause to believe that the defendant actually viewed child pornography. On appeal, the court ruled that the warrant was supported by probable cause. The court found that **the offense of access with intent to view child porn does not actually require the viewing of child porn, but merely access and intent. Thus, the court held that the defendant did clearly access the website and that there was sufficient evidence for probable cause to believe that he did so with the intent to view child porn, given the length of time he spent on the site and the forums he visited.** Accordingly, the district court's ruling was reversed and the court held that no Fourth Amendment violation had occurred.

Probable Cause/Good Faith

U.S. v. Hines, 17-5893 (3/22/18)

Officers learned from an informant that the defendant was selling large amounts of heroin from his mother's home. Several months later, the informant notified the police that he/she had seen heroin at the residence that day. A second informant provided information that the defendant had contacted him/her that day about meeting at a club to discuss heroin. This second informant also advised that he/she had purchased heroin from the defendant at the residence a number of times. Officers surveilled the defendant and observed him travel to the club, driving in a manner consistent with trying to avoid being tailed. Finally, officers learned that the defendant had a history of drug trafficking. Based on this information, the officers obtained a warrant, searched the residence, and found narcotics. The district court granted a subsequent suppression motion, finding the affidavit lacking in sufficient indicia of the informant's reliability. On appeal, the court disagreed. The court held that, **although the affidavit was lacking in indicia of informant reliability, the totality of the circumstances clearly supported probable cause because the informants' basis of knowledge was well established, the police corroborated parts of the story, and the defendant had a history of drug trafficking.** Thus, the warrant was supported by probable cause. Further, the court found that the good faith exception would likewise apply because the warrant was clearly not bare bones. Accordingly, the district court's ruling was reversed and the validity of the warrant upheld.

Anticipatory Warrants

U.S. v. Perkins, 17-5908 (4/4/18)

A package that was addressed to the defendant at his residence was intercepted by law enforcement and determined through a drug dog sniff to

contain methamphetamine. As a result, law enforcement obtained an anticipatory warrant to search the defendant's residence. The warrant specifically indicated that it could be executed once the package was received by the defendant at the residence. The officer executing the warrant, however, failed to read the warrant and delivered the package to a female at the residence. Officers then executed the search warrant and discovered contraband. In his subsequent prosecution, the defendant moved to suppress the evidence found at the residence because the triggering condition in the anticipatory warrant - delivery to the defendant - had not occurred. The district court agreed and suppressed the evidence. Upon the government's appeal, the court held that the Fourth Amendment had been violated where the specific condition requiring the defendant to receive the package had not occurred. **While courts do not always require strict compliance with the terms of a warrant, the court found that the defendant was the target of the investigation and that the delivery to him, as required by the triggering condition in the warrant, was an important part of the anticipatory warrant.** Accordingly, the court was unwilling to excuse the officer's failure to satisfy this condition. Thus, the district court's ruling was affirmed and the evidence found in the search was suppressed.

V. Fifth Amendment

B. Brady

U.S. v. Ramer, 15-6014 (2/26/18)

The defendant was convicted of mail fraud based on his involvement in a fraudulent oil and gas securities scheme. After trial, he learned that his codefendant, who testified against him at trial, was being investigated for a separate and similar fraud scheme to the one charged at trial. The defendant filed a motion for new trial based Brady, which the district court denied. On appeal, the court held that any Brady violation did

not affect the defendant's right to a fair trial. **Although the defendant's principle defense at trial was that the codefendant was the person who had committed the fraud and that the defendant was naïve to it, the court nonetheless found that there was plenty of evidence introduced regarding the codefendant's credibility and his fraudulent conduct. Further, the evidence of the defendant's knowledge and guilt was otherwise overwhelming.** According, the conviction was affirmed.

VI. Sixth Amendment

B. Confrontation Clause

U.S. v. Porter, 17-5064 (3/27/18)

The defendant was a mayor charged with soliciting bribes. At trial, the government presented (1) hearsay testimony of a witness who had lied to a government examiner and (2) deposition testimony of a witness who was extremely sick with cancer. Upon his conviction, the defendant argued that the admission of the out of court statements of the two witnesses violated the Confrontation Clause. The court first held that the hearsay testimony of the witness who lied was admissible. The Confrontation Clause only prohibits hearsay testimony that is offered for the truth of the matter asserted. **Because the testimony was not offered for its truth, but instead to show that the witness had lied to the investigator, it was not prohibited by the Confrontation Clause.** Second, the court ruled that the sick witness' deposition testimony was admissible. The court found that **the witness was unavailable, due to a doctor's note documenting her severe cancer, and that the defense had the prior opportunity to cross examine the witness during the deposition.** Thus, the deposition testimony satisfied the requirements of the Confrontation Clause and the defendant's conviction was affirmed.

D. Right to Counsel/Self Represent

Turner v. U.S., 15-6060 (3/23/18)

The defendant was charged in state court with aggravated robbery and his attorney was approached by the federal prosecutor who also intended to charge the defendant over the same conduct. The federal prosecutor and the defendant's state attorney engaged in negotiations which led to a plea offer that the defendant ultimately rejected. The defendant was subsequently prosecuted federally and received a sentence 10 years higher than the original plea offer. The defendant filed a habeas petition claiming that he was denied the effective assistance of counsel in the plea negotiations, and the district court denied the petition. The original Sixth Circuit panel affirmed the district court's ruling and the court agreed to rehear the matter *en banc*. The *en banc* court held that the Sixth Amendment right to counsel does not attach before the filing of formal charges. Thus, because the federal indictment was not filed at the time of the plea negotiations with the federal prosecutor, the right to counsel had not attached related to the federal charges. Further, the court held that the state court indictment did not trigger the right to counsel related to the federal charges. Borrowing from Supreme Court jurisprudence in the context of the Double Jeopardy Clause, the court held that the federal and state authorities were different sovereigns and that the state indictment, even if based on the same criminal transaction, could not trigger the defendant's right to counsel related to an uncharged federal criminal offense. Accordingly, the district court ruling was affirmed.

VIII. Defenses

L. Miscellaneous Defenses

Competency

U.S. v. Bergrin, 16-4240 (3/16/18)

The defendant was charged with threatening a federal agent. Prior to trial, his competency was evaluated two times with conflicting results. Throughout the proceedings, however, the defendant went through numerous attorneys (nearly one per month), sent inexplicable letters to the court, and repeatedly asserted that his lawyers were working against him and for the government. As a result, the district court found the defendant incompetent to stand trial and dismissed the charges. On appeal, the court held that the district court's incompetency finding was proper. Although the latest psychological evaluation found that the defendant was competent to proceed to trial, a district court may consider its "on-the-scene" observations when deciding a defendant's competence and consider all of the defendant's conduct throughout the case. Given the district court's two years of observations of the defendant, the court held that the district court was well situated to assess the defendant's competency and that its finding should not be disturbed despite the latest doctor's contrary opinion. Accordingly, the district court's incompetency finding was affirmed.

XI. Appeal

18 USC § 3742(a) – Jurisdiction

U.S. v. Reid, 17-5451 (4/23/2018)

The defendant was eligible for a two level reduction in his sentencing guideline range based on a retroactive amendment to the guidelines, and he filed a petition under 18 USC § 3582 for a reduction in sentence. The district court acknowledged that the new guidelines applied,

but determined that, because of the defendant's disciplinary record while incarcerated, the court would not reduce the sentence. The defendant appealed, arguing that the district court failed to provide a reasoned basis for the denial and misapplied the law. **The court held that it had no jurisdiction to hear the appeal because the basis of the appeal was not covered under 18 USC § 3742(a). As such, the appeal was dismissed.**

28 USC § 1291 – Right to appeal

U.S. v. Bergrin, 16-4240 (3/16/18)

The defendant was charged with threatening a federal agent. The district court found the defendant incompetent to stand trial and dismissed the charge without prejudice. The defendant insisted that he was competent to stand trial, and appealed the district court's finding and dismissal of the charge. The court held that **the defendant had the legal right to appeal the district court's dismissal of the charge under 28 USC § 1291 because of the potential collateral consequences of the incompetency finding.** Specifically, the court found that an incompetency finding could affect the defendant's right to vote, serve on a jury, obtain a driver's license, and own a gun. Accordingly, the court ruled that the defendant had the right to appeal the dismissal of the charge and the court proceeded to the merits. (*See supra*).

XII. Specific Offenses

18 USC § 641 – Theft of Government Property

U.S. v. Osborne, 16-6760 (3/29/18)

The government funded a program which paid money to a private entity named Docupak, who in turn could award fees to individuals that contracted as recruiting assistants. Whenever a recruiting assistant successfully referred a person to a recruiter who joined the military, the recruiting assistant would be paid a fee by

Docupak out of the money funded by the government. The defendant was a recruiting assistant who committed fraud through false claims about individuals who were referred. As a result, the government charged him with theft of government funds under 18 USC § 641. The defendant was convicted at trial and he appealed. On appeal, the court found that the evidence was insufficient to support the verdict because the government was unable to prove that the funds that were paid by Docupak to the defendant were the "property of the United States" as required by § 641. The court found that **the following factors supported the defendant's theory that the funds were not properly considered government property once turned over to Docupak for disbursement: (1) the government did not retain a reversionary interest in the funds; (2) the government placed few restrictions on the use of the funds; (3) the government did not impose significant internal controls on the funds; (4) the government retained no right to conduct audits; (5) there were no federal regulations governing the program; (6) there was no explicit right for the government to terminate the contract; and (7) the contract worked in a largely non-governmental manner.** Accordingly, the court ruled that the funds paid by Docupak to the defendant did not retain their identity as government funds, and accordingly the defendant's conviction was reversed.

18 USC § 666(a)(1)(B) – Bribery

U.S. v. Porter, 17-5064 (3/27/2018)

The defendant was the mayor of a Kentucky town charged with bribery under 18 USC § 666(a)(1)(B). The defendant argued that the government was required to prove that he solicited a bribe in a *quid pro quo* arrangement in return for the performance of an official act. On appeal, the court held that there is no such requirement. **Instead, the statute merely requires that the defendant solicit anything of value with**

the intent to be influenced or rewarded. Thus, while a *quid pro quo* arrangement could prove a violation of the statute, it is not required. As such, the defendant's conviction was affirmed.

18 USC 1341 – Mail Fraud

U.S. v. Ramer, 15-6014 (2/26/18)

The defendant was convicted of mail fraud for his involvement in a fraudulent oil and gas securities scheme. The defendant argued that mailings forming the basis of the charges were not sufficient to support the conviction because they were not conducted by him, and related to lawful business dealings of a codefendant's oil and gas company. On appeal, the court held that a defendant need not conduct the actual mailings in order to be liable for mail fraud. Further, the court found that the mailings, while not unlawful when viewed in isolation, were clearly made in furtherance of the scheme because the defendant used the codefendant's company to provide an appearance of legitimacy to the fraudulent scheme. Accordingly, the defendant's conviction was affirmed.

26 USC § 7212 – Obstructing the IRS Supreme Court

Marinello v. U.S., 16-1144 (3/21/18)

The defendant was convicted of obstructing the IRS either "corruptly or by force" when he destroyed business records, hid income, and paid employees with cash. Marinello was prosecuted under the "omnibus clause" of § 7212. At his trial, the district court refused to instruct the jury that, in order to convict, the defendant had to have known that he was under investigation and that the defendant intended to obstruct that investigation. The Supreme Court made an analysis of the language of the statute, and determined that the language tying the obstructive behavior to "an officer or employee of the United States" clearly indicated Congress's

intent to require knowledge of an investigation. Therefore, "to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a nexus between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action." Accordingly, the defendant's conviction was reversed.

XIII. Post-Conviction Remedies

Ayestas v. Davis, 16-6795 (3/21/18) Supreme Court

The petitioner was convicted of capital murder in Texas state court and sentenced to death. In federal habeas corpus proceedings, the petitioner sought investigative funding under 18 USC § 3599(f) to support a claim that his trial attorneys had been ineffective, along with an allegation that his state post-conviction counsel had been ineffective in defaulting the claim. The district court rejected the request, and the Fifth Circuit affirmed, concluding that the petitioner failed to show an entitlement to funding because his underlying claim of ineffective assistance of trial counsel was procedurally barred. The Supreme Court found that the Fifth Circuit's application of § 3599(f) was too restrictive, particularly in light of Trevino v. Thaler, 569 U.S. 413 (2013). Although the likelihood that the petitioner will eventually obtain relief is a valid consideration in determining if funding under § 3599(f) is warranted, Trevino held that the ineffective assistance of state post-conviction counsel can provide cause to reach the merits of a defaulted claim of ineffective assistance of trial counsel, at least in states where Trevino applies. "In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." The case was accordingly remanded for further consideration.

Wilson v. Sellers, 16-6855 (4/17/18)
Supreme Court

The petitioner was convicted of murder in Georgia state court and sentenced to death. The petitioner raised a claim of ineffective assistance of counsel in state post-conviction proceedings, but the state habeas court denied relief on the merits in a detailed opinion. The Georgia Supreme Court summarily affirmed without providing an explanation of its reasoning. In federal habeas corpus proceedings, the Eleventh Circuit concluded that Harrington v. Richter, 562 U.S. 86 (2011), required it to disregard the analysis employed by the state habeas court, and to instead determine if any conceivable justification could support the Georgia Supreme Court's unexplained decision denying relief. The United States Supreme Court reversed, concluding that **federal habeas courts should "look through" an unexplained summary affirmance and presume that the reviewing state court adopted the same rationale as the lower state court in denying relief. The state can rebut the presumption, however, "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed."**

Bikham v. Winn, 16-2174 (4/23/18)

The petitioner was convicted of second degree murder and other offenses in Michigan state court. At trial, some members of the public were excluded from the courtroom to make room for prospective jurors. Trial counsel objected based on the petitioner's right to a public trial, and the trial court stated that it would allow the public to reenter once the prospective jurors had been seated together in the courtroom. Bailiffs continued to exclude some members of the public

even after the jury had been seated, however. Trial counsel again objected, but did not do so until a time when it was too late for the trial court to take any corrective action. The state courts concluded that the petitioner's public trial claim was defaulted based on trial counsel's failure to raise a contemporaneous objection. The Sixth Circuit found that the claim was procedurally defaulted and that consideration of the claim in federal court was barred. **"A habeas petitioner procedurally defaults a claim if: (1) the petitioner failed to comply with a state rule; (2) the state enforced the rule against the petitioner; and (3) the rule is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim."** Because all three elements were satisfied, and because the petitioner made no attempt to establish cause and prejudice or a miscarriage of justice, the claim was procedurally defaulted.

Hautzenroeder v. DeWine, 17-3395 (4/11/18)

The petitioner was convicted of sexual battery in Ohio state court. In addition to being sentenced to prison and community control, the petitioner was also classified as a Tier III sex offender and given lifetime reporting requirements. After her release from prison and discharge from community control, the petitioner filed an application for habeas corpus relief under 28 USC § 2254 alleging that insufficient evidence supported her conviction. The Sixth Circuit concluded that **the petitioner was not "in custody" as required by § 2254(a), notwithstanding her status as a Tier III sex offender and associated lifetime reporting requirements.** The dismissal of the petition was therefore affirmed.