

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

Procedural Reasonableness

U.S. v. Parrish, 18-1178 (2/12/19)

The defendant was convicted of possession of contraband (a cellphone) in prison, a misdemeanor offense. The defendant claimed that he only used the cellphone to contact family and as such he should receive a downward variance to a sentence of time served. The district court rejected this argument because the defendant had also texted a woman who had reported the defendant's cell phone to the prison and stated that she did not wish to be contacted by the defendant. The district court thus imposed a sentence of 6 months consecutive to the sentence the defendant was serving. On appeal, the defendant argued that the sentence was substantively unreasonable because the district court's decision was "based on bare speculation without basis in fact." The court first held that the defendant's appeal raised procedural, not substantive, reasonableness. The court ruled that, where an appeal raises an argument that a sentence was "based on clearly erroneous facts"

or that the district court considered "an impermissible factor," the appeal sounds in procedural reasonableness. Second, the court held that the sentence was not procedurally unreasonable. The court found that the district court made reasonable inferences about the evidence in concluding that the woman did not wish to have contact with the defendant and that she was not part of his family. Accordingly, the sentence was affirmed.

B. Guideline issues

2B1.1 – Fraud loss

U.S. v. Maddux, 16-6368 (2/26/19)

The defendants were charged with conspiracy to commit mail and wire fraud for selling cigarettes without reporting the sales to the government taxing authority. At sentencing, the district court held the defendants responsible for the total taxes that were not paid to the government as a result of the defendants' fraud. The defendants argued on appeal that there was an insufficient causal connection between their crime and the loss amount. The court held that a defendant may be held liable for actual losses under USSG § 2B1.1 if the losses are reasonably foreseeable based on

the defendant's conduct. The court found that the defendants failed to report cigarette sales to the government as required by federal statute. As a result, the defendants' customers did not pay taxes on the purchases. Thus, the court determined that it was reasonably foreseeable to the defendants that all of the taxes not paid by the customers would result in the tax loss figures to the government. Further, the court held that the defendants were properly be held liable for the taxes under the reasonable foreseeability standard even though it was the customers' obligation pay the taxes. Accordingly, the defendants sentences were affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

Stokeling v. U.S., 17-5554 (1/15/2019)

Supreme Court

The defendant was convicted of being a felon in possession of a firearm. The district court declined to apply the ACCA to the defendant based on its conclusion that the defendant's prior Florida conviction for robbery did not qualify as a violent felony. On appeal, the Eleventh Circuit reversed the district court's ruling and the Supreme Court granted *certiorari*. The Court held that, because robbery is not an enumerated offense under the ACCA, it must be analyzed under the "force clause," which requires that a prior offense have "as an element the use, attempted use, or threatened use of physical force." At issue in Stokeling was the quantum of "physical force" necessary to meet this standard. The Court first determined that the terms "force" and "violence" were historically used interchangeably. Next, the Court determined that, under Florida's definition of the offense of robbery, there must be "resistance [from the victim], however slight." As such, the Court found that the ACCA's force clause requirements were satisfied: "Robbery that must overpower a

victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself "capable of causing physical pain or injury." Finding that Florida's robbery statute met this standard, the Court remanded for resentencing.

USSG § 4B1.1. - Career Offender

U.S. v. Burris, 16-3855 (1/3/19)

En Banc

The defendant was convicted of participating in a drug conspiracy and distributing heroin. At sentencing, the district court determined that he was a career offender based, in part, on his prior Ohio conviction for felonious assault. On appeal, the Sixth Circuit panel agreed that the assault conviction was a crime of violence based on the court's prior decision in U.S. v. Anderson. The court agreed to rehear the case *en banc*. The court held that the Ohio felonious assault statute (ORC § 2903.11) is a divisible statute, describing two different crimes. First, subsection (A)(1) proscribes assault where the defendant "causes serious physical harm to another." In reversing Anderson, the court held that the (A)(1) provision does not equate to a crime of violence under the force clause of the sentencing guidelines because Ohio defines "physical harm" to include mental or emotional harm. The (A)(2) provision of Ohio assault, however, includes the additional feature that the defendant used a "deadly weapon or dangerous ordinance." The court held that the use of a weapon to commit assault was sufficient to constitute a crime of violence under the force clause of the guidelines. Because the Shepard documents in the case made clear that the defendant's Ohio conviction was under the (A)(2) provision, the *en banc* court held that the defendant was properly determined to be a career offender. Accordingly, the defendant's sentence

was affirmed. The court also held that Ohio's aggravated assault statute (ORC § 2903.12(A)(1)&(2)) uses the exact same definitional language as the felonious assault statute and thus, it is likewise divisible and subject to the same analysis. Finally, the court held that, although the case arose under the guidelines, the analysis would be the same under the ACCA.

II. Plea Matters

A. Agreements

Appeal Waivers

Garza v. Idaho, 17-1026 (2/27/19)

Supreme Court

What do you do when your client asks you to file a notice of appeal after sentencing, but the client has a full appellate waiver in the plea agreement? The answer is simple, says the Supreme Court – file the notice of appeal. If you don't, you have rendered *per se* ineffective assistance of counsel. The Court determined that an appellate waiver provision waives some, but not all avenues of relief on appeal. Even the most robust appellate waivers do not preclude an argument that the waiver itself is invalid. Further, the government may forego reliance on the waiver. Therefore, regardless of the appellate waiver provision in the plea agreement, defense counsel must file a notice of appeal upon request.

IV. Fourth Amendment

E. Search Warrants

Good Faith

U.S. v. Moorehead, 18-5216 (1/9/19)

The defendant was charged with child porn offenses related to evidence that was found on his

computer pursuant to a search warrant. The search warrant was issued out of the Eastern District of Virginia based on a government investigation into a website known as Playpen. The Playpen website operated on the dark web, also known as the TOR, and as such any users of the site were able to remain anonymous. The government seized the Playpen website and began operating it from Virginia in order to try to catch users who were accessing child pornography. Because of the anonymous nature of the TOR however, the government utilized a network investigative technique (NIT) in order to require users' computers to identify themselves to the government. In order for the government to deploy the NIT, it sought a search warrant from the court in the EDVA. The warrant permitted the search of computers anywhere in the United States. The defendant challenged the issuance of this warrant under Rule 41 of the Federal Rules of Criminal Procedure because the rule at the time did not authorize the issuance of an extraterritorial search warrant. The district court denied the motion and the defendant appealed. The court held that although Rule 41 may have been violated, the warrant was saved by good faith. The court found that law enforcement were acting on a good faith belief that Rule 41 authorized the warrant. The court emphasized that **Rule 41 was subsequently amended after the issuance of the warrant in this case, and the amendment specifically permitted extraterritorial warrants such as those issued in this case. As such, any need to deter future law enforcement misconduct was greatly diminished.** Thus, the court found that the Fourth amendment did not require suppression of the evidence.

V. Fifth Amendment

A. Prosecutor Conduct

Monea v. U.S., 16-4250 (2/22/19)

The defendant was charged with money laundering. At trial the undercover agent testified that he sent three separate wires to the defendant of \$100,000 each (instead of \$300,000 at one time) because he “did not have enough funding at the time to send it all at once.” After trial, a witness presented an affidavit stating that the witness overheard the undercover officer saying that he had sent the money in three installments in order to make sure that the government could bring three separate charges against the defendant. Upon learning this information, the defendant filed a habeas petition claiming that the prosecutor had engaged in misconduct in knowingly presenting perjured testimony from the agent. The district court denied the petition and the defendant appealed. The court held that **in order to find prosecutorial misconduct based on perjured testimony, it must be clear that the testimony provided was actually false. The court held that the testimony provided by the undercover agent at trial was not necessarily inconsistent with the statements overheard by the defendant's witness.** The court found that the agent may have had dual motives in sending the payments in three installments. The court noted that the agent was not actually asked at trial about his motivation regarding the filing of three separate charges. Under the circumstances, the court was unwilling to find that the testimony at trial was necessarily false and accordingly found no prosecutorial misconduct. Thus the defendant's conviction was affirmed.

VI. Sixth Amendment

D. Right to Counsel/Self Represent

Ineffective Assistance of Counsel

Monea v. U.S., 16-4250 (2/22/19)

The defendant was charged with money laundering for agreeing to launder drug funds in an FBI sting operation. The defendant claimed that the undercover FBI agent threatened the defendant in order to get him to participate in the sting. When the audio recordings of the undercover conversations did not support the defendant's claim, the defendant averred that the recordings had been altered. The defendant's attorney was skeptical of this allegation, and did not raise it with the district court until after the close of the evidence at trial. The district court permitted the defense to raise post-trial motions on the issue, took testimony from witnesses, and considered expert affidavits. The district court denied the post-trial motions, the defendant lost his direct appeal, and he filed a habeas petition claiming ineffective assistance of counsel. The district court denied the petition and the defendant appealed. The court held that **the defendant could show no prejudice to his defense from the lack of timeliness of his counsel's actions. In spite of the fact that the issue was not addressed at trial, the district court held an extensive hearing on the issue and considered a second round of motions and affidavits. In his habeas filing, the defendant did not raise any new evidence that was not considered by the district court in the first instance.** Thus, the court could find no prejudice to the defense and accordingly the conviction was affirmed.

VII. Other Constitutional Rulings

D. Eighth Amendment

Excessive Fines Clause

Timbs v. Indiana, 17-1091 (2/20/2019)

Supreme Court

Timbs pled guilty to state charges of conspiracy to commit theft and distributing drugs. As part of the process, the State sought to forfeit Timbs' new \$42,000 vehicle. Timbs showed that he bought the vehicle from insurance proceeds; however, the State sought civil forfeiture, claiming that the vehicle was used to distribute the drugs, and therefore was an instrument of the offense. The state court refused to allow the forfeiture noting that, under state law, the maximum criminal fine would have been \$10,000, and therefore the forfeiture was excessive. The State appealed, and the Indiana Supreme Court held that the federal constitution's Eighth Amendment Excessive Fines Clause did not apply to the states. The Supreme Court reversed, holding that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." Accordingly, the Court remanded for further proceedings.

IX. Jury Issues

A. Jury Instructions

18 USC 1349 – Conspiracy – Mail/Wire Fraud

U.S. v. Maddux, 16-6368 (2/26/19)

The defendants were charged with conspiracy to commit mail and wire fraud for selling cigarettes and failing to pay taxes. The government's theory at trial was that federal statutes required the defendants to file reports with the government regarding sales of cigarettes and the defendant's failure to do so constituted mail and wire fraud. During trial, the district court advised the jury regarding materiality as follows: "A material omission, such as a failure to file required reports, may constitute a misrepresentation or concealment under the mail and wire fraud statutes." The defendant did not object at trial to the instruction but argued on appeal that it was error. The court held that the district court erred in providing this instruction to the jury because it directed the jury to find that the failure to file reports was in fact material. The court found that this instruction "put a thumb on the scale" in favor of the government's materiality argument. However, because the defendants failed to object to the instruction at trial, the court found no plain error because the evidence at trial against the defendant was overwhelming. Accordingly, the conviction was affirmed.

X. Probation/ Supervised Release

Supervised Release Violations

U.S. v. King, 18-3416 (2/1/19)

The defendant was on supervised release and was charged with new drug and firearm offenses. At sentencing, the district court imposed a sentence of 30 months for the new conviction, which was within the guidelines, and a sentence of 6 months consecutive for the supervised release violation,

which was below the guidelines. The defendant argued on appeal that the district court failed to adequately consider the guidelines and provide its reasons for a consecutive sentence. The court held that the plain error standard applied because the defendant failed to object to the consecutive sentence in the district court. Applying this standard, the court found that the district court adequately considered the policy statements of the sentencing guidelines. The guidelines suggest that the sentence on a supervised release violation should run consecutively to a sentence for an offense committed while on supervised release. The court found that the district court voiced its consideration of this factor based on the district court's repeated comments that the sentence was recommended to be "on top of" the sentence for the new law violation. Additionally, the court held that the district court appropriately explained the reason for the consecutive sentence by adequately addressing the statutory factors under 18 USC § 3553, explaining how it reached the 36 months total sentence, and providing that the sentence was sufficient to encompass the new law violation and the violation of supervised release. Thus, the sentence was affirmed.

XII. Specific Offenses

18 USC § 111 – Assault Federal Officer

U.S. v. Bedford, 18-5627 (1/23/19)

While driving on the interstate, the defendant fired two gun shots at a delivery truck. The truck was owned by a private company that was operating under a contract with the United States Postal Service (USPS) to deliver U.S. mail. As a result, the defendant was charged in federal court with violating 18 USC § 111 for assaulting a federal officer. The defendant filed a motion challenging federal jurisdiction, the district court denied the motion, and the defendant appealed. Deciding an open question in the Sixth Circuit, the court held that § 111 covers a private courier

under contract with the USPS to deliver mail. Specifically, § 111 incorporates by reference the definition of federal employees from 18 USC § 1114, which includes "any person assisting [a federal] officer or employee in the performance of [official] duties." The court found that a company under contract to deliver U.S. mail clearly fit this definition. Further, the court held that it was irrelevant if the defendant knew that the truck driver was delivering U.S. mail. The intent element of § 111 requires only an intent to assault, not an intent to assault a federal employee or contract employee. Accordingly, the defendant's conviction was affirmed.

18 USC 1349 – Conspiracy – Mail/Wire Fraud

U.S. v. Maddux, 16-6368 (2/26/19)

The defendants were charged with conspiracy to commit mail and wire fraud for selling cigarettes without reporting the sales to the government taxing authority, pursuant to 18 USC § 1349. The defendants' scheme involved the use of false company names and representations to credit card companies that they were selling other products. The defendants argued that they made no false statements to the government and that they did not deprive the government of any property. The defendants were convicted and they appealed. The court first held that a false statement is not required for a mail or wire fraud prosecution. A fraudulent scheme may also be established where the defendant had a duty to report and intentionally failed to file the reports. The court found that the federal statutes imposed a duty on the defendants to report cigarette sales to the government, and the defendants' intentional scheme to avoid reporting constituted a scheme to defraud under the statute. Second, the court held that the deprivation of tax dollars to the government constituted a taking of government property under the statute. Accordingly, the defendants' convictions were affirmed.

XIII. Post-Conviction Remedies

Moore v. Texas, 18–443 (2.19.19) **Supreme Court**

The petitioner was convicted of capital murder in Texas state court and sentenced to death. In 2017, the Supreme Court concluded that the Texas Court of Criminal Appeals violated the Eighth Amendment by rejecting the petitioner’s intellectual disability claim without giving adequate consideration to contemporary medical standards. Moore v. Texas, 137 S.Ct. 1039 (2017). On remand, the state court once again rejected the petitioner’s claim, finding that he failed to establish intellectual disability even when contemporary medical standards were properly applied. The Supreme Court reversed, concluding that the state court essentially committed the same types of errors that had invalidated its earlier decision. **Specifically, the state court emphasized adaptive strengths without giving adequate consideration to adaptive deficits, placed excessive reliance on adaptive strengths developed in prison, blamed adaptive deficits on “emotional problems” without an adequate basis for doing so, and implicitly relied on various unscientific factors that the Supreme Court rejected in its previous decision. The state court decision was accordingly reversed.**

Shoop v. Hill, 18–56 (1.7.19) **Supreme Court**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner raised a claim of intellectual disability, but the state courts rejected his allegations on the merits. The Sixth Circuit subsequently found that the petitioner was entitled to relief, and that the state court decisions rejecting his claim contravened and unreasonably applied clearly established Supreme Court precedent under 28 USC § 2254(d)(1). The Sixth

Circuit relied on Moore v. Texas, 137 S.Ct. 1039 (2017), in reaching this conclusion. The Supreme Court reversed, finding that the Sixth Circuit’s reliance on Moore was improper under § 2254(d)(1). State court review of the petitioner’s claim concluded in 2009, long before Moore was decided in 2017. Furthermore, the specific legal requirements set out in Moore were not “clearly established” by the earlier decision in Atkins v. Virginia, 536 U.S. 304 (2002), as mandated by § 2254(d)(1). The Sixth Circuit’s decision was accordingly vacated, and the case was remanded for further proceedings.

Madison v. Alabama, 17–7505 (2.27.19) **Supreme Court**

The petitioner was convicted of capital murder in Alabama state court and sentenced to death. After his death sentence was upheld following state and federal review, the petitioner filed a motion in state court alleging that he was incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007). The petitioner argued that he had developed dementia while on death row and could no longer remember his crime. The state court denied relief, finding that the petitioner’s allegations failed to establish a threshold showing that he was incompetent to be executed. The Supreme Court vacated the decision and remanded for further proceedings. The Court explained that **an inability to remember the offense of conviction, standing by itself, does not render an inmate incompetent to be executed; an inmate who does not remember his or her crime may still have a rational understanding of the reasons for their execution, as required by Panetti. Nevertheless, the fact that an inmate suffers from dementia is a relevant consideration in determining if incompetence has been established. Ford and Panetti are not limited to cases where the inmate is suffering from psychosis or delusions, and in some cases**

dementia may result in the inmate being rendered incompetent. “Psychosis or dementia, delusions or overall cognitive decline are all the same under Panetti, so long as they produce the requisite lack of comprehension.”

Ewing v. Horton, 17-2485 (2.5.19)

The petitioner was convicted of murder in Michigan state court and sentenced to life in prison. Following trial, a juror provided an affidavit alleging that other jurors had used the internet to obtain information that was not presented at trial, and that this was shared with the jury during deliberations. The petitioner relied on the affidavit in moving for new trial based on juror misconduct and exposure to extraneous evidence, and requested an evidentiary hearing. The state courts rejected the petitioner’s juror misconduct claim without providing a hearing, notwithstanding the fact that a hearing was clearly required under Remmer v. United States, 347 U.S. 227 (1954), and subsequent decisions. The district court concluded that the state courts contravened clearly established federal law under 28 USC § 2254(d)(1) by failing to afford the petitioner a hearing, and ordered the state courts to either provide the petitioner with a new trial or release him. On appeal, the Sixth Circuit agreed that the state court decision was not entitled to deference, and that habeas corpus relief was warranted. The Sixth Circuit nevertheless found that the district court applied an incorrect remedy. **Rather than ordering the state courts to provide a new trial, the district court should have instead limited its grant of relief to requiring a state evidentiary hearing where the petitioner would have an opportunity to establish actual bias.** The case was accordingly remanded with instructions to issue an amended order granting habeas corpus relief.

Thomas v. Meko, 17-5824 (2.14.19)

The petitioner was convicted of murder in Kentucky state court and sentenced to 40 years in prison. In federal habeas corpus proceedings, the petitioner alleged that his appellate counsel had been ineffective in failing to raise a constitutional challenge to the mental state required for murder under Kentucky law. Kentucky’s statutory definition of murder provides that it can be committed with either a specific intent to kill or with an extreme indifference to human life. The petitioner argued that penalizing reckless indifference just as severely as specific intent was unconstitutional. **The Sixth Circuit concluded that Kentucky did not violate due process by establishing these alternative mental states for the crime of murder, and as a result the petitioner’s claim of ineffective assistance of appellate counsel failed.** The judgment of the district court was therefore affirmed.