

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. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at www.fpd-ohs.org, under the Precedential Value tab.

I. Sentencing Issues

B. Guideline issues

2A6.1(b)(4) – Substantial Gov. Expenditure

U.S. v. Bourquin, 19-1465 (7/17/20)

The defendant was convicted of maliciously making false claims in violation of 18 USC § 844(e). The charge related to the defendant's false report that a BOP inmate had called a hit on a federal prosecutor. Over a 24 hour period, the government conducted significant investigation of the matter, provided protection for the prosecutor, and segregated the BOP inmate. The defendant admitted his lie after a failed polygraph. At sentencing, the government sought a four level enhancement under USSG § 2A6.1(b)(4) by claiming that the defendant's actions caused a "substantial expenditure" of government funds. The district court imposed the enhancement and the defendant appealed. The court held that the government failed to establish a "substantial expenditure of funds" related to the investigation. The court noted that the entire investigation took only 24 hours, and while the government did quite a bit of investigative work during that time frame, it failed entirely to provide any accounting of "funds" expended in the efforts, or to show that any expenditure was "substantial" compared to an ordinary investigation. Without any accounting of funds, the court found an abuse of discretion in

imposition of the enhancement. Notably, the court held that the government should not be able to introduce further evidence at sentencing related to the enhancement. The defense had properly objected to application of the enhancement at sentencing, and thus the government was on notice that it must produce evidence to carry its burden. Because it failed to do so, the court would not permit a "second bite at the apple." Accordingly, the sentence was vacated.

2B1.1(b)(1) – Loss Amount

U.S. v. Igboba, 19-1116 (7/2/20)

The defendant was involved in a scheme to obtain personal information and file fraudulent tax returns. As a result, he was convicted of conspiracy to defraud the U.S. At sentencing, the district court determined that the loss amount was \$4.2 million. The defendant argued on appeal that he was not responsible for the loss caused by the entire conspiracy. The court held that, under the relevant conduct provisions of USSG § 1B1.3, in order to hold a defendant liable for loss caused by others in a conspiracy, the defendant must have been involved in jointly undertaken activity with them. The court found, however, that all of the \$4.2 million loss was directly attributable to loss caused by the defendant himself, so the additional finding was unnecessary. In this regard, the court ruled that

the defendant actually participated in either obtaining the personal information, filing the returns, or directing others to file the returns. Also, the emails used all linked back to the defendant. Accordingly, the court found that the loss amount was supported by a preponderance of the evidence and the sentence was affirmed.

U.S. v. Kozerski, 19-3949 (8/6/20)

The defendant owned a construction company and concocted a scheme to pretend that a disabled veteran owned the company in order to obtain VA construction contracts. At his sentencing for wire fraud, the district calculated the loss amount based on the value of the contract minus the next lowest bid from a contractor for the contract. The government appealed. The court held that the district court loss valuation under USSG § 2B1.1(b)(1) was proper. The court found that in calculating loss, the district court must credit against the loss the value the victim received on the construction contracts. Thus, the court determined that the loss was properly attributed to be only the difference between the cost of the contract with the defendant and what the government would have paid the next lowest bidder to perform the work. Accordingly, the district court's ruling was affirmed.

2B1.1(b)(10) – Sophisticated Means

U.S. v. Igboba, 19-1116 (7/2/20)

The defendant was convicted of participating in a conspiracy to defraud the government by filing false tax returns. The district court determined that the scheme involved sophisticated means under USSG § 2B1.1(b)(10) and imposed a two level enhancement. On appeal, the court ruled that application of the enhancement was proper. In obtaining many victims personal identifiers and filing the false tax returns, the defendant “used a VPN, the Tor browser, the dark web, multiple bank accounts, and multiple email aliases.” The court also noted “the difficulty of acquiring the taxpayer identifying information used to file the fraudulent tax returns.” Accordingly, the court held that the sophisticated

means enhancement was supported by the record and affirmed the sentence.

2D1.1 – Drug Amount

U.S. v. McReynolds, 18-1672 (7/9/20)

The defendant went to trial on charges of participating in a drug conspiracy. The jury convicted the defendant and held him responsible for less than 100 grams of heroin and less than 500 grams of cocaine. At sentencing, however, the district court found significantly higher quantities based on the amount of drugs involved in the whole conspiracy. This finding doubled the defendant's sentencing range. On appeal, the court held that a defendant's liability for drug amounts under the relevant conduct provisions of USSG § 1B1.3 are “significantly narrower” than general conspiracy liability, which is the standard for conviction. Pursuant to § 1B1.3, the district court must find by a preponderance of the evidence that the drug amounts were “within the scope of the defendant's agreement” and were reasonably foreseeable to the defendant. The court found that the district court failed to apply this standard in holding the defendant responsible for the broader conspiracy drug amounts. Accordingly, the case was remanded for resentencing.

2G2.1/2G2.2 – Child Porn – Double Counting

U.S. v. Fleischer, 19-3719 (8/20/20)

The defendant was convicted of sexual exploitation of a minor and distribution of child porn. At sentencing, the district court applied enhancements for both exploiting a second minor under USSG § 2G2.1(d)(1) and for a pattern of abusive activity under USSG § 2G2.2(b)(5). The defendant argued on appeal that applying both provisions constituted impermissible double counting under the guidelines. The court held that application of both guidelines was proper. First, § 2G2.1(d)(1) applies in a sexual exploitation of a minor case where the defendant exploits an additional child, even where the defendant is not convicted for the conduct. The

guideline requires the district court to increase the defendant's sentence under the grouping rules in Chapter 3 of the guidelines as if the defendant had been convicted of a count related to the conduct (called a pseudo count). Further, § 2G2.2(b)(5) requires the court to impose a 5 level enhancement where the defendant engaged in a pattern (2 or more instances) of child abuse. The court ruled as follows: "[T]he Guidelines separately punish defendants who sexually exploit multiple victims, and child pornography offenders who have a history of more than one instance of sexually abusing or exploiting a child. These enhancements are therefore not premised on the same type of harm." Accordingly, the court found no impermissible double counting and the sentence was affirmed.

2K2.1 – Trafficking Enhancements

U.S. v. Fugate, 19-6163 (7/10/20)

The defendant sold a large number of stolen firearms to drug dealers and pled guilty to being a felon in possession of firearms. At sentencing, the district court applied both an enhancement for trafficking in firearms under USSG § 2K2.1(b)(5) and an enhancement for transferring the stolen firearms to another knowing they would be used for drug trafficking under §2K2.1(b)(6)(B). The defendant raised a double counting argument on appeal. The court held that applying both enhancements impermissibly double counted the same conduct. The court found that both enhancements punished the defendant's transfer of the stolen firearms to another and thus the sentence was improper. Accordingly, the court remanded the case for resentencing and imposition of only one of the 4 level enhancements.

3A1.2(c)(1) – Assaulting Law Enforcement

U.S. v. Abdalla, 19-5967 (8/27/20)

At the defendant's sentencing for being a felon in possession of a firearm, the district court imposed a 6 level increase under USSG § 3A1.2(c)(1) for assaulting a law enforcement officer. The

defendant argued that he was too high on fentanyl and meth to understand what he was doing and thought instead that he was in a video game. Further, the defendant pointed out that the first district judge on the case found that he was too high at the time to knowingly waive his Miranda rights. On appeal, the court agreed with the district court's application of the guideline enhancement. The court first held that the district court was free to credit the officers' statements that the defendant was coherent at the time over the defendant's claims that he believed he was in a video game. Further, the court ruled that the Miranda waivers and the *mens rea* for the guideline enhancement are "distinct legal issues." The court held that "although both *mens rea* requirements contain a knowing requirement, knowingly assaulting an officer differs from a defendant comprehending and voluntarily waiving his Miranda rights." Accordingly, the sentence was affirmed.

4B1.5(b)(1) – Repeat Sex Offenders

U.S. v. Paauwe, 19-2071 (8/4/20)

The defendant was convicted of coercion and enticement and at sentencing the district court imposed at 5 level enhancement for the defendant's repeated acts of abuse of a minor over the internet. The defendant argued on appeal that USSG § 4B1.5 applies only to defendants who abuse multiple victims because the guideline refers to minors in the plural. The court held that §4B1.5 is applicable where the defendant commits repeated abuse of only a single minor. The court found that the text of the guideline supported this interpretation. Further, the court noted that Application Note 4 specifically stated that the guideline applies when there is only one victim. Because the Application Note was consistent with the plain language of the guideline and did not expand on it, the court ruled that the district court's interpretation was correct and the sentence was affirmed.

C. Procedural matters

Harmless Error in Sentencing

U.S. v. Montgomery, 19-6038 (8/5/20)

In the original appeal in this case, the court held that the district court had committed guideline error, but found the error harmless because the district court stated for the record: “If the guideline calculation is determined to have been wrong, the Court would have imposed the same sentence under Section 3553(a) considering those factors as a whole.” In the defendant’s petition for rehearing, he raised the issue that this language from the district court is in its standard colloquy, even in cases where there is no guideline objection at sentencing. The court held that because the defendant raised this issue for the first time in a petition for rehearing, the court could not entertain it. However, the court provided that it may not find harmless error in the future in such a case: “We see no reason why we should give any weight to boiler-plate language designed to thwart a deserved resentencing.”

D. Recidivism enhancements

USSG § 2K2.1 – Felon in Possession

U.S. v. Raymore, 19-3703 (7/13/20)

At the defendant’s sentencing for being a felon in possession of a firearm, the district court determined that the defendant’s prior Ohio convictions for assault and aggravated robbery qualified as crimes of violence. Thus, the district court increased the defendant’s guideline range under USSG § 2K2.1. On appeal, the court held that binding precedent from the circuit required that both assault under ORC § 2903.13(A) and aggravated robbery under ORC § 2911.01(A)(1) qualify as crimes of violence under the guidelines. Thus, the sentence was affirmed.

USSG § 4B1.1 – Career Offender

U.S. v. Garth, 19-5658 (7/14/20)

The defendant pled guilty to drug trafficking and the district court determined at sentencing that he was a career offender. This determination was based, in part, on the defendant’s prior Tennessee conviction for possession of marijuana with intent to deliver. On appeal, the court held that the prior conviction counted as a controlled substance offense under the career offender provision. Specifically, the court found that, even though Tennessee law defined the term “deliver” to include an attempted delivery, because the statute required the actual possession of drugs, it was analogous to the federal crime of possession of drugs with intent to distribute under 21 USC § 841. Accordingly, the court found that the Tennessee offense defined a controlled substance offense under the guidelines and the defendant’s sentence was affirmed.

U.S. v. Thomas, 19-5529 (8/5/20)

Upon the defendant’s conviction for drug trafficking, the district court determined that he was a career offender based on prior Michigan convictions for delivery of heroin and possession of marijuana with intent to deliver. On appeal, the court held that the delivery of heroin conviction constituted a controlled substance offense. Although Michigan defined “delivery” to include “attempted transfer,” the court ruled that this offense qualified. The court found that “attempted transfer” was not the same as “attempted delivery,” which was determined to not be a controlled substance offense in the Sixth Circuit’s decision in Havis. As such, the delivery of heroin conviction was countable. Further, the court held that Michigan’s possession with intent to deliver offense was analogous to the federal offense of possession with intent to distribute. Accordingly, both priors were controlled substance offenses and the sentence was affirmed.

E. Fine/Restitution/Forfeiture

Forfeiture

U.S. v. Bradley, 19-5985 (8/10/20)

At the defendant's sentencing based on his guilty plea to drug trafficking and money laundering, the district court imposed forfeiture of over \$1 million and 5 houses. On appeal, the court held that the forfeiture orders were proper. First, the court found that proceeds of criminal activity under 21 USC § 853 refers to gross receipts, not net profit. Further, the court ruled that the cash forfeiture was justified based on evidence of money deposited into bank accounts and an estimate of the money transported by couriers of the drug proceeds. Finally, the court held that the defendant could not likely have afforded the five properties that were forfeited based on his legitimate income, and thus the finding that they were purchased with the proceeds of drug trafficking was not clear error. Accordingly, the forfeiture order was affirmed.

III. Evidence

A. Article IV – Relevancy

401 & 403 – Relevance/Undue Prejudice

U.S. v. Pritchard, 18-6210 (7/7/20)

The defendant was charged with arson of a home to collect insurance proceeds. At trial, the government offered proof that the defendant's girlfriend took out a protective order against him and expert testimony regarding arsonists' motivations. The defendant argued on appeal that the evidence was irrelevant and unduly prejudicial. The court first held that the evidence related to the protective orders was relevant. Although the protective orders related to incidents where the defendant had threatened his girlfriend with harm, the underlying motivation for the threats was to get the girlfriend to assist him with the arson and cover up. Thus, the protective orders supported the government's theory that the defendant committed the arsons.

Second, the court held that the expert testimony was relevant. The expert testified that arsonists derive excitement and gratification from fires and often take mementos from their actions. The court found this testimony relevant, particularly because the defendant had taken pictures of his house burning and sent the pictures to others. Finally, the court found that the probative value of the evidence was not outweighed by its prejudicial effect. Thus, the conviction was affirmed.

403 – Undue Prejudice

U.S. v. Sherrill, 19-5815 (8/24/20)

During the defendants' trial for Hobbs Act Robbery, the government introduced "gang" pictures of the defendants. The defendants argued on appeal that the pictures were unduly prejudicial. The court first held that the pictures were probative. The court found that the pictures put the defendants together, which tended to show that the defendants knew each other and may have committed the robbery together. Second, the court held that the pictures were not obviously gang pictures. The gang signs the defendants were making with their hands were redacted. Further, the colors they were wearing were not obviously gang related and there was not testimony to this effect. Accordingly, the pictures were not unduly prejudicial and their admission was affirmed.

404(b) – Plan and Preparation

U.S. v. Pritchard, 18-6210 (7/7/20)

At the defendant's trial for arson, the government introduced evidence that the defendant had committed past arsons to collect insurance. The defendant argued on appeal that the evidence was improper propensity evidence under FRE 404(b). The court held that the evidence was properly admitted to show plan and preparation, exceptions under FRE 404(b). In trying to convince his girlfriend to assist in the arson of their home, the defendant bragged to her about his prior successful arsons to collect insurance. The

court thus found that the defendant's reliance on his prior bad acts to assist in committing the charged arson made them part of the planning or preparation for the offense, and thus admissible under FRE 404(b). As such, the conviction was affirmed.

412 – Past Sexual Activity

U.S. v. Kettles, 19-5698 (8/12/20)

At the defendant's trial for conspiracy and sex trafficking a minor, the defendant attempted to cross examine the minor about her past sexual conduct. The defendant argued that the evidence was admissible as impeachment because the minor had lied to the police about her past sexual conduct. The district court excluded the line of questioning based on FRE 412. On appeal, the court held that FRE 412 only excludes evidence of prior sexual conduct of a child victim if offered to prove that the conduct occurred or to prove the victim's predisposition. The court ruled, however, that FRE 412 does not prohibit the use of such evidence to impeach the victim's credibility, such as to show that she lied to the police. As such, the court found that the district court erred in excluding the cross examination. Nonetheless, the court found held that the error was harmless because the evidence of the defendant's guilt was otherwise overwhelming. Thus, the conviction was affirmed.

B. Articles VI-VII – Witness/Expert

702 – Expert Testimony

U.S. v. Davis, 19-3094 (8/14/20)

The defendant was charged with distributing drugs resulting in the death of another. At trial, the government introduced the testimony of a doctor who determined that the cause of death was a fentanyl overdose, but the doctor did not perform an autopsy. The defendant did not object, but argued on appeal that the testimony was unreliable under Daubert. The court held that the reliability of expert testimony may be established through a "differential diagnosis,"

which requires proof of three components: (1) the doctor objectively obtained the nature of the patient's injury; (2) the doctor "rules in" one or more causes of the injury using valid methodology; and (3) the doctor engages in "standard diagnostic techniques" that rule out alternative causes and lead to a diagnosis that is most likely. The court ruled that the testing applied by the doctor survived plain error review. The court found that an autopsy need not necessarily be performed where the doctor's opinion relied on a view of the scene, the body's condition, the police reports, and the lab reports from blood screens. Accordingly, the court found no plain error and affirmed the admission of the evidence.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

U.S. v. Trice, 19-1500 (7/21/20)

Law enforcement affixed a hidden camera in the common area in the defendant's apartment building. The camera recorded the defendant coming and going from the apartment on several occasions, and this information was later used to support a search warrant of the apartment. The defendant challenged the use of the hidden camera in a motion to suppress, which the district court denied. On appeal, the court held that use of the hidden camera was proper. The court first found that the common area to the building was unlocked, and the door was ajar when the officers arrived. Thus, the court ruled that the defendant had no reasonable expectation of privacy in the common area. Second, the court held that the hidden camera did not record anything that officers could not have learned through ordinary visual surveillance. Accordingly, the court found that the defendant's Fourth Amendment rights were not violated and the conviction was affirmed.

E. Search Warrants

Good Faith

U.S. v. Ward, 19-3395 (7/27/20)

Law enforcement obtained a search warrant for the defendant's residence based on the following: (1) text messages suggesting that he sold a fatal dose of drugs six months prior; (2) a trash pull at his residence which found loose marijuana and a baggie containing residue of an unidentified (presumed illegal) substance; (3) two unidentified males were hanging around the defendant's home; and (4) the defendant had prior drug and weapon charges. This information was the basis for a search warrant for the defendant's residence, which led to the discovery of contraband. The district court granted a motion to suppress the evidence finding that there was an insufficient nexus between drug trafficking and the residence, and that the warrant was not saved by good faith. The government appealed and conceded that the warrant was unsupported by probable cause. On appeal, the court held that good faith could not save the warrant. The court found that the warrant was so lacking in indicia of probable cause to support a nexus to the home as to be bare bones. Specifically, the court ruled that the government established neither that the defendant had engaged in any drug trafficking from the home, nor that the defendant was a regular or large quantity trafficker. Thus, no inference was raised that drugs would be found at the residence. Accordingly, the district court's order suppressing the evidence was affirmed.

Testimony Outside Affidavit

U.S. v. Davis, 19-3094 (8/14/20)

During a drug investigation, officers obtained a warrant from a state court magistrate to search the defendant's home in order to locate his cellular phone. The affidavit failed to establish a sufficient nexus between drugs and the defendant's home. As such, the government offered to prove at a hearing that the officer had

provided unrecorded oral statements to the magistrate supporting the connection to the home. The district court denied the motion without a hearing. On appeal, the defendant argued that the warrant was not supported by probable cause, and he claimed for the first time that the state court magistrate was not authorized to issue the warrant. The court held that unrecorded oral testimony provided to a magistrate in addition to an affidavit may support a search warrant if sufficient evidence establishes its substance. As such, the case had to be remanded to afford the government the opportunity to supplement the record with this evidence. Second, the court held that Ohio law is not clear as to whether a state court magistrate may issue a search warrant. Because the defendant failed to raise the issue before the district court, the court found no plain error in the district court's ruling given the ambiguity in Ohio law and lack of any case law on the issue.

Particularity

U.S. v. Abdalla, 19-5967 (8/27/20)

In obtaining a search warrant, officers mistakenly listed the wrong address in the wrong county for the defendant's residence. Two other places in the warrant application and affidavit listed the correct location, however. The district court denied the defendant's motion to suppress on this issue and the defendant appealed. The court held that generally clerical errors in search warrants do not invalidate searches. The court found that this general rule was applicable in the case given that the warrant paperwork did identify the correct address in other places. Further, the court ruled that it was not significant under the circumstances that the incorrect address was in another county over which the issuing judge had no jurisdiction. Thus, the district court's ruling was affirmed.

Cell Site Location Data

U.S. v. Pritchard, 18-6210 (7/7/20)

During its investigation of the defendant for arson, the government issued subpoenas for the

defendant's cell site location data to prove he was in town at the time of the offense. Shortly before trial, the Supreme Court decided Carpenter v. U.S., which held that a search warrant is required to obtain such information. The district court denied the defendant's motion to suppress the cell site evidence and he appealed. The court held that good faith saved the government's actions. The court found that the government reasonably relied on the Stored Communications Act, which at the time did not require a search warrant for cell site location data. Accordingly, the district court ruling was affirmed.

V. Fifth Amendment

E. Miscellaneous Fifth Amendment

Due Process – Identification Testimony

Wingate v. U.S., 18-2381 (8/5/20)

After the defendant's convictions for multiple robberies, the defendant filed a *habeas* petition claiming that his attorney was ineffective for failing to object to in-court identification of the defendant that was based on a photo lineup. The district court denied the petition and the defendant appealed. The court held that counsel had not been ineffective for failing to raise the issue. The court found that, although the defendant's beard in the photo lineup was the biggest, four of the others depicted also had beards, most had similar skin tone, and all were bald and approximately the same age. Further, the court ruled that the defendant's theory that the eyewitness had been fed information that the robber "looked like Rick Ross" was unsupported by the record. Accordingly, the district court ruling was affirmed.

VI. Sixth Amendment

B. Confrontation Clause

Bruton

U.S. v. Sherrill, 19-5815 (8/24/20)

Defendants were charged with Hobbs Act Robbery for attempting to rob a drug dealer. One of the codefendants pled guilty before trial, and the government sought to introduce his confession, which implicated the defendants. The district court denied the defendants' motion to sever, but instead redacted the codefendant's statement to replace the defendants' names with neutral pronouns such as "someone." The defendants failed to renew their motions to sever at the close of the evidence and then argued the issue on appeal. The court held that the failure to renew a motion to sever at the close of the evidence constitutes a waiver of the issue. As such, the court reviewed for plain error. The court found that the district court's redacted version of the codefendant's confession and use of neutral pronouns sufficiently protected the defendant's rights under Bruton. Because there were a number of defendants involved in the case and the use of neutral pronouns did not necessarily implicate any one of them, the district court did not plainly err. Accordingly, the defendants' convictions were affirmed.

IX. Jury Issues

A. Jury Instructions

Proof Beyond A Reasonable Doubt

U.S. v. Ashrafkhan, 17-1918 (7/10/20)

At the defendant's trial for conspiracy to operate a pill mill, the district court provided a reasonable doubt instruction that varied from the pattern Sixth Circuit instruction. The district court advised the jury that reasonable doubt had to be based on the evidence, was a doubt that was "still standing" after considering all the evidence, and was "fair and honest." Upon his conviction, the defendant appealed. The court held that a district

court is not required to follow pattern jury instructions. Rather, a reasonable doubt instruction must sufficiently advise the jury of the government’s high burden of proof in a criminal case. An instruction will be reversed where there is a “reasonable likelihood” that the jury believed it could convict on proof insufficient to meet the constitutional standard. The court found that the district court’s instruction was sufficient in that it focused the jury on the evidence presented and accurately conveyed the concept of reasonable doubt to the jury. Accordingly, the conviction was affirmed.

E. Miscellaneous Jury Issues

Jury Questions

U.S. v. Davis, 19-3094 (8/14/20)

During the defendant’s trial for distribution of fentanyl causing death, the jury asked a question about the time frame for “on or about” in the instruction. The district court had previously agreed to exclude this language from the instruction at the defendant’s request because the evidence all related to a specific sale on the date of death. However, both parties missed that the proposed jury instructions, which were read to the jury, included the “on or about” language. The district responded by informing the jury to consider “on or about” in light of all of the evidence in the case. On appeal, the court held that generally legal questions from the jury should receive a concrete answer from the district court about the law. Questions of fact should generally be answered by referring the jury to its “collective recollection” of the evidence. The court found that the district court’s answer was proper and that it did not prejudice the defendant’s case. Given that the only evidence presented related to the one sale of drugs by the defendant on the date of the death, there was no fear that the jury convicted on improper considerations of other drug sales. Accordingly, the conviction was affirmed.

XII. Specific Offenses

18 USC § 201 – Bribery of Public Official

Dimora v. U.S., 18-4260 (8/31/20)

The defendant was a member of the Board of County Commissioners for Cuyahoga County, Ohio who accepted bribes for various favors. Among a number of other offenses, the defendant was prosecuted under 18 USC § 201 for accepting bribes. He was convicted at trial and lost his first appeal in the Sixth Circuit. Subsequently, the Supreme Court decided McDonnell v. U.S., which narrowly construed what is an “official act” under the bribery statute. As such, the defendant filed a *habeas* petition requesting vacation of his bribery convictions. The district court denied the motion and the defendant appealed. The court held that McDonnell required vacation of the bribery convictions. The court held that informal acts by a public official such as “setting up a meeting, calling another public official, or hosting an event” are no longer official acts after McDonnell. Because most of the defendant’s conduct involved these types of activities, the court determined that the jury instructions to the contrary were in error. The court remanded the case to the district court in order for that court to conduct a proper harmless error analysis.

18 USC § 844(i) – Arson Causing Death

U.S. v. Pritchard, 18-6210 (7/7/20)

The defendant burned down his own home to collect insurance proceeds. A firefighter who arrived had a preexisting heart condition and other medical conditions, and was not taking his prescribed medications. The firefighter died of a heart attack during the fire. The defendant was convicted of committing arson which resulted in death under 18 USC §844(i) and he argued on appeal that the fire was not the proximate cause of the death. The court held that the legal standard of causation for arson resulting in death is proximate cause, which requires proof that the events “are foreseeable and naturally result from”

the arson. The court ruled that although the firefighter had a preexisting heart condition which was untreated at the time, the fire was nonetheless the proximate cause of the death. The court found that the government presented expert evidence to show that firefighting stresses the heart and can cause heart attacks. Given this evidence and the fact that the firefighter suffered a heart attack during the fire, the court held that the fire was a proximate cause for the firefighter's death. The court noted that although other factors may have contributed to the heart attack, proximate cause does not require that the criminal conduct be the only contributing factor in the death. As such, the conviction was affirmed.

18 USC § 922(g) – Felon in Possession

U.S. v. Raymore, 19-3703 (7/13/20)

The defendant went to trial on a charge of being a felon in possession of a firearm. Subsequently, the Supreme Court decided Rehaif, which held that the felon in possession statute requires proof that the defendant knew of his prohibited status. The defendant argued for the first time on appeal that the indictment was insufficient and the government failed to prove this element at trial. The court found that the defendant stipulated his prior felony conviction at trial and that he had two prior convictions for the same conduct – being a felon in possession of a firearm. Thus, the court ruled that the defendant “undoubtedly knew he was a felon in possession” and accordingly the court found no plain error.

18 USC § 924(c) – Firearm Enhancement

U.S. v. Maya, 19-5100 (7/20/20)

The defendant was caught trafficking marijuana, and investigators found a gun hidden in the defendant's bed at home near \$20,000 in cash. At trial, the defendant admitted to drug trafficking and possessing the gun, but denied that he possessed the gun “in furtherance of drug trafficking” as charged under 18 USC § 924(c). The jury convicted the defendant of the § 924(c) charge and he appealed the sufficiency of the

evidence. The court held that the conviction could be sustained on the theory that the defendant possessed the gun in order to protect his drug proceeds. The court found that the gun was easily accessible and near the money, the defendant kept the drug proceeds in his room to avoid detection, and the defendant occasionally carried a gun during a drug transaction. Further, the court found proper an agent's expert testimony that drug dealers often keep guns to protect their drug proceeds. Accordingly, the evidence was sufficient to establish that the defendant possessed the gun in furtherance of drug trafficking and the conviction was affirmed.

U.S. v. Sherrill, 19-5815 (8/24/20)

The defendant was charged with aiding and abetting a Hobbs Act Robbery. Further, he was charged with aiding and abetting the possession of a firearm in furtherance of the robbery, in violation of 18 USC § 924(c). During the robbery, a codefendant discharged a gun and killed the victim. The defendant was convicted at trial and he appealed. The court held that a defendant may be convicted of aiding and abetting a § 924(c) conviction where the codefendant possessed and used the firearm. The court ruled that where “the evidence sufficiently showed that he aided and abetted the attempt to commit Hobbs Act robbery,” this was sufficient to sustain the conviction for the § 924(c) charge. As such, the conviction was affirmed.

Wingate v. U.S., 18-2381 (8/5/20)

The defendant was convicted of robbing a bank and a pharmacy (18 USC §§ 2113(a) and 2118(a)), and of possessing a firearm in furtherance of these crimes (18 USC § 924(c)). He then filed a *habeas* petition claiming that his counsel was ineffective for failing to argue that neither of the robbery offenses constituted crimes of violence to support the § 924(c) conviction. The district court denied the petition. On appeal, the court held that both federal bank robbery and pharmacy robbery constitute crimes of violence for purposes of § 924(c). Both offenses require

at a minimum that the defendant use intimidation, which meets the “threat of physical force” requirement of the elements clause in the statute. Thus, the district court’s ruling was affirmed.

18 USC § 1591 – Sex Trafficking a Minor

U.S. v. Kettles, 19-5698 (8/12/20)

The defendant sex trafficked a 13 year old minor. The defendant argued at trial that the government was required to prove that the defendant knew the age of the minor in order to apply the enhanced 15 year penalty for a child under 14, pursuant to 18 USC § 1591(b)(1). The district court refused to instruct the jury on a *scienter* requirement. On appeal, the court held that application of the 15 years mandatory penalty does not require proof of *mens rea* related to the age requirement. The court ruled that the statutory text does not require it. Further the court held that the presumption for *scienter* in criminal statutes did not apply because the enhancement provision only dealt with the victim’s age, not guilt or innocence, and because sex offenses against minors have been traditionally exempted from *scienter* requirements. As such, the defendant’s conviction was affirmed.

21 USC § 841 – Distribution Causing Death

U.S. v. Davis, 19-3094 (8/14/20)

The defendant sold fentanyl to another individual who then shared it with a third party unknown to the defendant. The third party died as a result of using the fentanyl. The defendant was convicted at trial of drug distribution resulting in the death of another, under 21 U.S.C. § 841. The district court sentenced the defendant to life in prison. On appeal, the court held that but-for causation supported the defendant’s criminal liability. The court found that a defendant does not need to be the direct seller of drugs to an end user. All that is required is that the government prove that the drugs the defendant sold were the same drugs that caused the death. Accordingly, the court upheld the jury verdict in this regard.

XIII. Post-Conviction Remedies

U.S. v. Williams, 19-5803 (8/26/20)

In this appeal of the denial of a motion for reduction of sentence under the First Step Act, the court remanded the case for resentencing because the district court entirely failed to articulate its consideration of the defendant’s post offense rehabilitation.

Barr et al. v. Lee et al., 20A8 (7/14/20)

Supreme Court

The plaintiffs were sentenced to death in federal court. The plaintiffs filed a lawsuit after judicial review of their convictions and sentences concluded alleging that their impending executions would violate the Eighth Amendment because pentobarbital would be used to cause their deaths. The district court granted a preliminary injunction. The Supreme Court vacated the injunction on the ground that the plaintiffs failed to establish a likelihood of success on the merits of their claims, explaining that pentobarbital has an established history of being implemented in completed executions, and the courts have repeatedly upheld its use.

Carusone v. Warden, 18-4175 (7/17/20)

The petitioner was convicted of felony murder in Ohio state court and sentenced to 15 years to life in prison. At trial, the prosecution alleged that the petitioner killed the victim by stabbing him in the heart, but suppressed medical records demonstrating that the cause of death had actually been a heart attack resulting from drug and alcohol use. The petitioner subsequently moved for a new trial alleging a violation of Brady v. Maryland, 373 U.S. 83 (1963). Rather than determining if the medical records would have created a reasonable probability of a more favorable result at trial, the Ohio Court of Appeals rejected the petitioner’s claim on the ground that the evidence at trial still would have been sufficient to support a conviction for felony murder even if the medical records had been disclosed. The Sixth Circuit concluded that the

state court's rejection of the claim was not entitled to deference under AEDPA, and reversed the district court's denial of relief.

Chase v. Macauley, 19-1202 (8/20/20)

The petitioner was convicted of various violent offenses in Michigan state court. The trial court relied on judicially found facts to increase the petitioner's sentence in violation of Alleyne v. United States, 570 U.S. 99 (2013). The petitioner procedurally defaulted his claim by failing to raise it in his direct appeal, however. The Sixth Circuit concluded that the petitioner established cause to excuse his default based on the ineffective assistance of his appellate counsel. Furthermore, because the petitioner was raising ineffective assistance of appellate counsel for the purpose of excusing a procedural default, as opposed to a substantive claim for habeas corpus relief, 28 USC 2254(d) was inapplicable, notwithstanding the fact that the petitioner's claim of ineffective assistance of appellate counsel was rejected on the merits in state court. Furthermore, the petitioner was actually prejudiced, and his Alleyne claim was meritorious. The district court's denial of habeas corpus relief was accordingly reversed.

Cooper v. Chapman, 18-1391 (8/17/20)

The petitioner was convicted of first-degree murder in Michigan state court. During a custodial interview, the petitioner clearly and unambiguously invoked his right to remain silent, but detectives persisted in questioning and obtained a confession. In federal habeas corpus proceedings, the government conceded that the admission of the confession was a violation of Miranda v. Arizona, 384 U.S. 436 (1966). The Sixth Circuit nevertheless concluded that the error did not have a substantial and injurious effect on the verdict, and as a result the denial of habeas corpus relief was affirmed.

Dotson v. Kizziah, 19-6372 (7/17/20)

The petitioner was convicted of various federal offenses in Oklahoma while already serving a

state sentence in Kentucky. His federal sentence was ordered to run consecutively to his state sentence, but did not specify if it would run concurrently or consecutively with respect to any state sentences that might be imposed in the future. The petitioner was subsequently convicted of another state crime in Georgia while still serving his Kentucky sentence. The petitioner was paroled from Kentucky to custody in Georgia, and the Bureau of Prisons elected not to count his time in Georgia toward his federal sentence by declining to designate Georgia as his place of federal imprisonment. Following his release from custody in Georgia to federal custody, the petitioner filed under 28 USC § 2241 arguing that his state sentence in Georgia should have run concurrently with his federal sentence. On appeal, the Sixth Circuit explained that if a federal sentence does not specify whether it will run concurrently or consecutively with a state sentence, the statutory default under 18 USC § 3584(a) normally requires the sentences to be served concurrently, but this does not apply to state sentences that have yet to be imposed. In such circumstances, the BOP has the authority under 18 USC § 3621(b) to designate the federal inmate's place of imprisonment. As "long as that decision does not conflict with either § 3584(a)'s default provision or a district court's explicit sentencing designation, the BOP's assignment will effectively resolve whether sentences are served concurrently or consecutively. For where the BOP assigns an inmate to serve his federal sentence in a state prison, that effectively makes the state and federal sentences concurrent." The denial of habeas corpus relief was accordingly affirmed.

England v. Hart, 18-6039 (8/17/20)

The petitioner was convicted of murder in Kentucky state court and sentenced to life in prison without the possibility of parole. During a custodial interrogation prior to trial, the petitioner stated "Well, I mean you know, I guess you'll just have to go on and lock me up then and call my lawyer, cause I don't, I don't know what you're talking about." The Kentucky Supreme Court

found that the statement did not amount to an unambiguous request for counsel requiring suppression of his subsequent confession. The Sixth Circuit concluded that the state court ruling was entitled to deference under 28 USC 2254(d)(1), and the denial of relief was accordingly affirmed.

Hill v. Anderson, 99-4317, 14-3718 (7/15/20)

The Sixth Circuit's earlier decision in Hill v. Anderson, 960 F.3d 260 (6th Cir. 2020), was vacated for rehearing *en banc*.

Hugueley v Mays, 17-6024 (7/1/20)

The petitioner was convicted of first-degree murder in Tennessee state court and sentenced to death. The petitioner subsequently moved to withdraw his state post-conviction petition, but his appointed counsel raised concerns about his competency to do so. The state court granted the motion to withdraw the petition following an evidentiary hearing. The petitioner later filed a federal habeas corpus petition raising, among other things, a claim of ineffective assistance of trial counsel. The district court concluded that the claim was procedurally defaulted based on the withdrawal of the state post-conviction petition. The Sixth Circuit affirmed, finding that the state court procedures for determining the petitioner's competency were adequate, and that the petitioner failed to demonstrate that his post-conviction counsel was ineffective in failing to prevent the withdrawal from taking place.

Nassiri v. Mackie, 19-1025 (7/27/20)

The petitioner was convicted of second-degree murder in Michigan state court. Acting through counsel, the petitioner filed a federal habeas corpus petition; it was dismissed as barred by the statute of limitations due to counsel's miscalculation of the filing deadline, however. The same attorney who filed the petition late also litigated the issue of timeliness in the district court proceedings, and conceded her own negligence in miscalculating the limitations period. New counsel represented the petitioner

on appeal, and alleged that the petitioner's former counsel had minimized her own misconduct. The Sixth Circuit vacated the district court's judgment, and remanded the case so that conflict-free counsel could litigate the question of equitable tolling.

Pirkel v. Burton, 19-1349 (8/14/20)

The petitioner was convicted of multiple violent offenses in Michigan state court following a no contest plea. Prior to sentencing, the petitioner wrote to the court and stated that he had been coerced into entering the plea and did not understand it. The sentencing court refused to permit the petitioner to withdraw his plea. New counsel was appointed for appeal, but the attorney moved to withdraw on the ground that there were no colorable issues for review. At a hearing on the motion to withdraw the petitioner again raised the issue of ineffective assistance of counsel, but the state trial court granted the motion. The petitioner appealed *pro se* and argued, among other things, that his appointed appellate counsel had been ineffective, but the claim was rejected. The Sixth Circuit concluded that the state court ruling was not entitled to deference under 28 USC 2254(d)(1) because, among other things, the motion to withdraw was decided by the trial court, rather than the state court of appeals. Furthermore, the petitioner's claim that he was deprived of his constitutional right to appellate counsel was meritorious. The judgment of the district court was accordingly reversed.

Sexton v. Wainwright, 19-3370 (8/4/20)

The petitioner pleaded guilty to aggravated murder in Ohio state court and was sentenced to life in prison. Close to 20 years later, the petitioner filed a motion for leave to file a delayed appeal, which was denied. The petitioner filed a federal habeas corpus petition alleging that the denial of his motion for leave to file a delayed appeal was a constitutional violation. The district court dismissed the petition as untimely. The Sixth Circuit reversed. Under 28 USC §

2244(d)(1)(D), the statute of limitations can run from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Because the petitioner filed his motion within a year of the state court’s denial of his motion for leave to file a delayed appeal, and the denial itself was the factual predicate for the constitutional claim, the petition was timely.

Stewart v. O’Bell, 18-1204 (7/27/20)

The petitioner was convicted of murder in Michigan state court and sentenced to life without parole. At trial, an accomplice gave testimony that arguably could have been construed as a statement that the petitioner would pose a threat to the jury if they convicted him. The petitioner’s request for a mistrial was denied, and the state court of appeals rejected the petitioner’s claim that the testimony violated his due process rights. The Sixth Circuit concluded that the state court decision was entitled to deference under 28 USC § 2254(d), and as a result the denial of relief was affirmed.

Taylor v. Simpson, 14-6508 (8/25/20)

The petitioner was convicted of murder and other offenses in Kentucky state court and sentenced to death. At trial, counsel objected to the prosecution’s use of peremptory challenges to remove African-American jurors. Batson v. Kentucky, 476 U.S. 79 (1986), and Griffith v. Kentucky, 479 U.S. 314 (1987), were subsequently decided while the petitioner’s case was pending on direct review, and as a result Batson was fully retroactive at the time of the petitioner’s state court appeal. The Kentucky Supreme Court nevertheless summarily denied relief without explanation. The Sixth Circuit concluded that the state court decision was entitled to deference under 28 USC § 2254(d), and affirmed the denial of relief.

Woffard v. Woods, 18-2367 (8/13/20)

The petitioner was convicted of murder in Michigan state court. During jury deliberations,

a juror who was holding out for acquittal hired an attorney to address the trial court regarding ongoing tensions in the jury room. The trial court responded by removing the juror for violating the court’s orders not to discuss the case with anyone. The state court rejected the petitioner’s claim that his Sixth Amendment rights were violated. The Sixth Circuit concluded that the state court’s rejection of the petitioner’s claim was entitled to deference under 28 USC § 2254(d), and as a result the district court’s grant of habeas corpus relief was reversed.