Supreme Court and Sixth Circuit Review

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1. Fourth Amendment cases

Utah v. Strieff, 136 S. Ct. 2056 (2016).

- If an officer does an unlawful stop-and-frisk, finds contraband on the suspect, and then later discovers an outstanding arrest warrant for the suspect, the fruits of the unlawful stop-and-frisk are generally admissible.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)

- The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.

United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016)

- The Stored Communications Act lets the government get cell-site data from a carrier upon showing "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation."

United States v. Brown, __ F.3d __, 2016 U.S. App. LEXIS 11739 (6th Cir. June 27, 2016)

- "If the [search warrant] affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable it cannot be inferred that drugs will be found in the defendant's home – even if the defendant is a known drug dealer."

2. Ex Post Facto Clause and Sex Offender Registries

Doe v. Snyder, __ F.3d __, 2016 U.S. App. LEXIS 15669 (6th Cir. Aug. 25, 2016)

- Michigan's sex offender registry scheme, which was enacted as a nominally "civil" measure and applied retroactively to previously convicted sex offenders, was so punitive in its actual effect that the Sixth Circuit struck it down as violating the Ex Post Facto Clause.

3. Eighth Amendent's prohibition against cruel and unusual punishment

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

- *Miller*'s new prohibition on mandatory life without parole for juvenile offenders is substantive and applies retroactively.

Starks v. Easterling, 2016 U.S. App. LEXIS 15744 (6th Cir. Aug. 23, 2016)

- Concurring, Judge White opined that although a Tennessee sentence may be called "life *with* parole," it was functionally equivalent to the sentence in *Miller* because it denied parole eligibility for 51 years. Such a sentence would violate *Miller*.

4. Federal sentencing

Molina-Martinez v. United States, 136 S. Ct. 1338 (2016)

- "Where the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights."
- If the district court has said "I'd give the same sentence regardless the range," consider using *United States v. Christmon*, 607 F.3d 1110 (6th Cir. 2010) or *United States v. Aleo*, 681 F.3d 290 (6th Cir. 2012).

United States v. Fowler, 819 F.3d 298 (6th Cir. 2016)

- Even when the defendant agrees to a starting-point guideline range and gets a downward variance from that range, he can get a remand for a new sentencing if the district court failed to actually determine that the chosen guideline range was accurate.

United States v. Collins, __ F.3d __, 2016 U.S. App. LEXIS 11879 (6th Cir. June 29, 2016)

- After a jury trial, the district court can poll the jurors for their opinions as to the appropriate sentence, and then the court can use that information to guide its selection of a sentence.

United States v. Christian, 806 F.3d 819 (6th Cir. 2015)

- A defendant cannot get a two-level enhancement under § 3B1.1 for merely managing the assets of a conspiracy as long as the defendant has no actual leadership role over other individuals.

United States v. Henry, 819 F.3d 856 (6th Cir. 2016)

- The four-level trafficking enhancement under USSG § 2K2.1(b)(5) applies only where the defendant sold multiple firearms to the same person. So it did not apply where the defendant sold one gun to an informant and another to an undercover officer.

5. Agent testifying as both fact witness and expert

United States v. Rios, __ F.3d __, 2016 U.S. App. LEXIS 13303 (6th Cir. July 21, 2016)

- Since the agent testified as both a gang expert and fact witness about the local gang's activities, the district court erred by failing to: (1) distinguish for the jury which parts of the agent's testimony were given as an expert and which as a fact witness; and (2) tell the jury his status as a key fact witness could be considered when deciding if he was credible as an expert. The district court needed to instruct the jury about these things both in the midst of the trial and at the end.

6. Child pornography statute

Nichols v. United States, 136 S. Ct. 1113 (2016)

- SORNA, before it was amended in 2016, did not require a sex offender to notify his jurisdiction before leaving the United States. This does not apply to post-amendment charges.

Carr v. United States, 2016 U.S. App. LEXIS 15208 (6th Cir. Aug. 16, 2016).

- Carr was charged with failing to update his registration after moving to Mexico. He pled guilty to this charge in 2010. When he later filed a § 2255 motion, the parties agreed that, in light of *Nichols*, "SORNA did not criminalize his failure to register with . . . authorities once he moved to Mexico." So "his guilty plea could not have been knowingly and intelligently made" and it must be set aside.

Lockhart v. United States, 136 S. Ct. 958 (2016)

- The Court questionably relied on the Rule of the Last Antecedent to interpret the statutory definition of prior convictions that will trigger an enhanced mandatory minimum for child pornography offenses.

7. Other statutory construction cases

Ocasio v. United States, 136 S. Ct. 1423 (2016)

- Hobbs Act extortion. As dissenting Judge Thomas put it: "It is illogical and wrong to say that two people conspired to extort one of themselves." But that is what the Court said.

McDonnell v. United States, 136 S. Ct. 2355 (2016)

- Case of "honest services" fraud. An "official act" is a decision or action on a question, matter, cause, suit, proceeding or controversy. That matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may be law be brought" before a public official. Simply setting up a meeting, talking to another official, or organizing an event doesn't suffice.

United States v. Vitchitvongsa, 819 F.3d 260 (6th Cir. 2016)

- Useful case for arguing multiplicity issues. The Court held that § 924(c) supports only one charge when a defendant has used a gun to rob drug dealers so he can traffic the stolen drugs.

8. Sixth Amendment right to counsel and the right to present a defense

Luis v. United States, 136 S. Ct. 1083 (2016)

- Although 18 U.S.C. § 1345 allows the government to seize a defendant's untainted funds upon a showing of probable cause that those funds will be needed to pay restitution or a fine, such funds cannot be seized if the defendant wants to use them to hire a lawyer to defend against the charges.

United States v. Odeh, 815 F.3d 968 (6th Cir. 2016)

- The defendant was entitled to a new trial because denied the chance to present proof that PTSD made her forget that she had been charged, convicted, and imprisoned for bombing a supermarket in Israel before coming to the United States.

Maryland v. Kulbicki, 136 S. Ct. 2 (2015)

- The defendant was not entitled to a new trial even though he was convicted based in part on testimony about "comparative bullet-lead analysis," which is a "science" that was subsequently debunked and abandoned. Under *Strickland*, his lawyer's failure to challenge the CBLA testimony was not defective performance since, at the time of trial, the movement to debunk CBLA was just starting.

United States v. Coleman, __ F.3d __, 2016 WL 45337373 (6th Cir. Aug. 31, 2016)

- Defense counsel at a revocation hearing was not ineffective under *Cronic* because he had the case for twelve minutes and spoke a single sentence in his client's behalf.

Lee v. United States, __ F.3d __, 2016 U.S. App. LEXIS 10337 (6th Cir. June 8, 2016)

- Deepening a circuit split, the Court held that, even when defense counsel fails to tell his legal-permanent-resident client that his guilty plea will trigger virtually mandatory deportation, there is no *Strickland* violation absent proof of a viable defense at trial.

9. *Batson*

Foster v. Chatman, 136 S. Ct. 1737 (2016)

- Favorably applying this rule: Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination.

United States v. Mahbub, 818 F.3d 213 (6th Cir. 2016)

- The Court remanded because the district court erred by requiring the defendant, in making a *Batson* challenge, to show that she was a member of a cognizable racial group and also erred by failing to recognize that the government's use of contrasting voir dire questions could raise an inference of discrimination.

10. *Brady*

Weary v. Cain, 136 S. Ct. 1002 (2016)

- The Court held that additional impeachment material against an already impeached witness could satisfy *Brady*'s materiality requirement.
- It also indicated that the prosecution must disclose not only proof of a deal to grant leniency in light of testimony, but also proof that the witness has merely requested leniency but gotten no deal.