

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

C. Procedural matters

Illegal Sentences

[U.S. v. Mitchell, 17-5904 \(10/10/18\)](#)

The defendant was convicted of being a felon in possession of a firearm and sentenced as an armed career offender. Based on the Supreme Court's subsequent decisions in [Johnson](#) and [Welch](#), the defendant's prior conviction for Tennessee burglary no longer counted as a violent felony and this holding was applied retroactively to the defendant on habeas review. Thus, the district court granted a habeas petition and found that the defendant's statutory maximum sentence was reduced to 10 years. Because the defendant had already served 17 years in prison, the district court simply imposed a sentence of time served. On appeal, the court held that the district court imposed an illegal sentence. Relying on its recent ruling in [U.S. v. Nichols](#), the court held that a sentence of time served is technically an illegal sentence where the defendant has already served a longer sentence than the statutory maximum. Accordingly, the

case was remanded for the district court to impose a definite term within the statutory parameters.

D. Recidivism enhancements

USSG § 2K2.1 – Firearms

[U.S. v. Havis, 17-5772 \(10/22/18\)](#)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court enhanced the defendant's sentence under USSG § 2K2.1 based on its conclusion that the defendant's prior conviction for "selling or transferring" cocaine qualified as a controlled substance offense. On appeal, the court held that its determination of the issue was controlled by the court's earlier decision in [U.S. v. Evans](#). In [Evans](#), the Sixth Circuit held that the definition of controlled substance offenses in USSG § 4B1.2 included "attempts" because of the language in the application note. The court opined that [Evans](#) may have been wrongly decided because an application note to a guideline may not expand the reach of the guideline beyond its text. Nonetheless, the court ruled that only the en banc court could overrule the holding in [Evans](#) and the defendant's sentence was thus affirmed.

USSG § 4B1.1 – Career Offender

U.S. v. Camp, 17-1879 (9/7/18)

The defendant was convicted of Hobbs Act robbery and using a firearm during a crime of violence under 18 USC § 924(c). At sentencing, the district court determined that the Hobbs Act robbery counted as a crime of violence for purposes of applying the § 924(c) enhancement. Further, the district court held that the Hobbs Act conviction counted as a crime of violence under the sentencing guidelines, thus qualifying the defendant for the career offender enhancement (because he has two prior crimes of violence on his record). On appeal, the court first ruled that the Hobbs Act robbery was properly a crime of violence for purposes of the § 924(c) definition of a crime of violence based on the court's prior precedent in U.S. v. Gooch. Second, the court held the Hobbs Act robbery was not a crime of violence based on the sentencing guidelines definition of the term. **The distinction turned on the fact that the guidelines definition of the use of force and the generic definition of a "robbery" both require that the force be used against the person. In contrast, the Hobbs Act robbery can be accomplished through force against person or property. Thus, because the Hobbs Act force provision was broader, it did not qualify as a crime of violence under the sentencing guidelines and the defendant was not a career offender.** As such, the defendant's sentence was vacated and the case remanded.

II. Plea Matters

A. Agreements

Plea Agreements – Appeal Waivers

U.S. v. Boucher, 18-5683 (9/26/18)

The defendant was a retired surgeon who was the next door neighbor of Senator Rand Paul. After Senator Paul repeatedly placed yard waste in

large piles in the area adjoining the defendant's property, the defendant became irritated and tackled Senator Paul from behind. As a result, the government prosecuted the defendant for assault. At sentencing, the government sought a 21 month sentence for the defendant. The district court rejected this request and instead imposed a sentence of 30 days in jail. The plea agreement specifically prohibited the defendant from appealing the sentence, but was silent regarding the government's ability to appeal. Upon the government's appeal, the defendant moved to dismiss the appeal based on the appeal waiver. The court held that the government has a right to appeal a sentence under 18 USC § 3742(b) and that its right may only be waived through specific language in a plea agreement. **Because the plea agreement was silent as to the government's right to appeal, the court held that its appellate rights were not waived.** Further, the court refused to consider information related to the oral promises by the government not to appeal. The written agreement contained an incorporation clause which indicated there were no agreements other than those contained in the written plea agreement. Accordingly, the defendant's motion to dismiss the appeal was denied.

C. Hearings

Rule 11(b)(3) – Factual Basis for Plea

U.S. v. Doggart, 17-5813 (10/18/18)

The defendant was charged with making a threat in interstate commerce, pursuant to 18 USC § 875(c). The charge was based on a statement the defendant made to an informant that he planned to burn down buildings and kill Muslims in Islamberg, New York. The defendant entered a plea agreement with the government that limited his sentencing exposure to five years for the charge. At the plea hearing, the district court rejected the defendant's plea because it found that the statement the defendant made to the

informant did not constitute a “threat” under the statute. As a result, the plea was withdrawn, and the government ultimately prosecuted the defendant for more serious offenses. After trial, the defendant was sentenced to almost 20 years in prison and he argued on appeal that the district court should not have rejected his plea agreement. The court held that the district court improperly rejected the plea agreement. The court found that the plea provided a sufficient factual basis under Fed. R. Crim. P. 11(b)(3) based on the defendant’s statement that he planned to burn buildings and kill Muslims. The court emphasized that § 875(c) requires only “an expression of an intent to inflict loss or harm.” The court held that the defendant need not communicate the threat to the victim. Accordingly, the case was remanded to the district court in order for it to consider accepting the original plea agreement given that the defendant’s communication was in fact a threat for purposes of the statute.

III. Evidence

A. Article IV – Relevancy

403 – Undue Prejudice

U.S. v. Cleveland, 17-3993 (10/19/18)

The defendant was charged with participating in a drug conspiracy. At trial, even though no firearm was charged in the indictment, the government introduced evidence that a firearm was found in a house used by the conspiracy and that the firearm had been previously used in a burglary. The district court admitted the firearm evidence and the defendant appealed. The court held that admission of the firearm was proper under FRE 403. The government elicited testimony from an agent that firearms are tools of the drug trade. The Court held that “firearms, as tools of the drug-trafficking trade, are probative in drug prosecutions.” Further, although the court “expressed concern” about the mention that

the firearm was used in a burglary, the court found that the evidence was not unduly prejudicial because there was no evidence that the gun actually belonged to the defendant or that he knew of its prior use. Accordingly, admission of the evidence was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Veh. Stops

U.S. v. Pyles, 17-6334 (9/17/18)

Officers ran a license tag check on a vehicle and learned that the owner of the vehicle, a female, had an open warrant. The officers could see that three occupants were in the car, but could not tell the gender of the back seat passenger. Accordingly, a car stop was executed. The passengers were all male, but when officers approached they noticed the smell of marijuana. A search revealed marijuana and methamphetamine. In the subsequent prosecution, the district court denied a motion to suppress the evidence seized from the vehicle stop and the defendant appealed. The court found that the officers had reasonable suspicion to stop the car based on the open warrant. The court ruled that officers may infer that the registered owner of a vehicle is in the vehicle if no evidence exists to the contrary. The court noted that the officer testified that he could not tell the gender of the back seat passenger nor could he tell if a fourth passenger was in the car until after the car was stopped. Although there was some discrepancy in the record regarding this evidence, construing the evidence in the light most favorable to the government, the court ruled that there was nothing in the record to defeat the inference that the owner was in the car at the time of the stop. Accordingly, the district court ruling was affirmed.

E. Search Warrants

Execution of Warrant

U.S. v. Cleveland, 17-3993 (10/19/18)

The government executed a search warrant at a residence based on a drug investigation and seized the defendant's cell phone. The government then obtained a second warrant to search the phone. The second warrant provided that it had to be executed by a date certain, and although the phone was transferred to the lab for testing by the date indicated, the phone data was not actually extracted until thereafter. The district court denied the defendant's motion to suppress based on the timeliness of the data extraction, and the defendant appealed. **The court held that, while Fed. R. Crim. P. 41(e)(2) requires timely execution of a warrant, the fact that the phone was transferred to the lab in the allotted time frame satisfied the requirements of the rule. Thus, the later extraction of data at the lab did not violate the requirements of Rule 41 or the Fourth Amendment.** Thus, the district court's ruling was affirmed.

Good Faith

U.S. v. McCoy, 17-4245 (9/20/18)

Defendants lived at a residence and worked at two stores nearby. The government learned from an informant and through police investigation the following: (1) the defendants sold marijuana from the stores and had records indicative of drug trafficking; (2) one defendant was arrested at the store with two bags of marijuana; (3) a search of the stores revealed scales, drug packaging materials, and handgun accessories; (4) the informant observed marijuana, cash and handguns inside the residence; and (5) one defendant's car was observed parked in the driveway of the residence. This information was included in a warrant affidavit and a warrant was issued for the residence. The defendants moved

to suppress the evidence found in the search, and the district court granted the motion, finding an insufficient nexus between drug activity and the home. On the government's appeal, the court held that good faith saved the warrant. The court found that the above facts provided the officers with a reasonable basis to rely in good faith on the warrant. **The defendants clearly were involved in drug trafficking based on their actions at the store and their prior criminal records for trafficking. They had an observed connection to the residence and the informant, albeit an anonymous informant, had observed drugs and guns at the residence. The court found that the informant's information had been sufficiently corroborated in other respects to deem it reliable.** As such, the court held that a reasonable officer could rely on the warrant as being valid, and the court reversed the district court's ruling.

V. Fifth Amendment

A. Prosecutor Conduct

Prosecutorial Misconduct

U.S. v. Cleveland, 17-3993 (10/19/18)

During closing argument at the defendant's drug conspiracy trial, the prosecutor stated as follows: "This is a serious day for the Defendant and a serious day for the U.S. because 10 kilograms of cocaine is sitting here in bricks. But if this had gotten into the community, lives would have been at stake." The district court denied an objection to the statement and the defendant appealed. The court held that a prosecutor may not "appeal to jurors to act as a conscience for the community," or to send a message to all criminals with the verdict. **The court found that the prosecutor's statement stopped short of requesting the jury to send a message or combat a problem, but instead was referencing a "common fact that drugs are a community problem."** Accordingly, the statement was not improper and the conviction was affirmed.

VI. Sixth Amendment

D. Right to Counsel/Self Represent

Ineffective Assistance of Counsel

Rodriguez-Penton v. U.S., 15-6306 (10/2/18)

The petitioner was a Cuban citizen and a lawful permanent resident of the United States who was charged with a federal drug offense. The petitioner entered an open guilty plea and was sentenced to prison. The petitioner subsequently filed a motion to vacate under 28 USC § 2255 in which he alleged that his lawyer failed to advise him that a conviction could result in deportation. At an evidentiary hearing, the attorney testified that he believed that the government would not deport anyone to Cuba, and that he did not recall telling the petitioner that deportation would be a possibility. The district court concluded that the petitioner could not demonstrate prejudice under Hill v. Lockhart, 474 U.S. 52 (1985), because there was no reasonable probability that the petitioner would have insisted on going to trial even if he had been aware of the possibility of deportation. The Sixth Circuit concluded that the district court applied a prejudice standard that was too restrictive, and should have also considered whether the petitioner “would have bargained for a more favorable plea” if he had “known about the risk of adverse immigration consequences.” The case was accordingly remanded for further proceedings.

IX. Jury Issues

D. Batson

U.S. v. Cleveland, 17-3993 (10/19/18)

During the defendant’s trial for participating in a drug conspiracy, the government struck a potential alternate juror who was black. The defendant raised a Batson challenge and the government argued that the juror gave an

unsatisfactory explanation as to why he left law enforcement and that he seemed ambivalent about jury service. The district court found that the government’s stated reason was race-neutral and the defendant offered no further argument or evidence to show that the striking of the juror was purposeful discrimination. The juror was not seated, and the defendant later appealed. The court held that three steps are required for a Batson challenge: (1) the defendant must make a prima facie showing of racial bias; (2) the government must then proffer a race neutral explanation; and (3) the defendant must then show that it was nonetheless purposeful discrimination. The court found that the defendant failed to proffer any evidence of purposeful discrimination after the government offered a race neutral explanation for the strike. Thus, the plain error standard applied, and the defendant could show no plain error. Accordingly, the conviction was affirmed.

XI. Appeal

Scope of Remand

U.S. v. Richardson, 17-2157 (10/11/18)

The defendant was convicted of multiple counts of aiding and abetting Hobbs Act robberies and multiple separate firearm counts under § 924(c). During the appellate process, the Supreme Court decided Johnson. As a result, the Sixth Circuit remanded for a determination as to whether the Johnson decision applied to § 924(c). In its remand, the court provided: “Because any Johnson-based challenges to his sentence that Richardson may have are entirely novel, it is appropriate to allow the district court to consider those challenges in the first instance.” On remand, however, the defendant attempted to raise issues related to his guilt at trial and the jury instructions. The district court declined to address these arguments and the defendant appealed. The court held that, although remands

are presumptively general in nature, the court of appeals may limit the scope of a remand where it does so with clear and “unmistakable” language. The court found that the language remanding the case for resentencing made clear that the sole purpose of the remand was to consider the effect of Johnson on the sentence, and not to reopen the case for general challenges to the conviction. Accordingly, the district court’s ruling was affirmed.

XII. Specific Offenses

18 USC § 342 – Operate Airplane Intoxicated

U.S. v. Fitzgerald, 17-2285 (10/15/18)

The defendant was a pilot who showed up for his flight intoxicated. Although he never started or moved the plane, he did the following before he was stopped and arrested: calibrated altimeter, programmed the flight management system, turned on auxiliary power unit, and requested flight clearance from air-traffic control. The district court instructed the jury that it could find that the defendant “operated” the plane if he “ran or controlled the function of the plane” and that this activity “was directly and proximately linked to actual operational or functional requirements of the flight.” Upon his conviction, the defendant appealed. The court held that the term “operate” was sufficiently described in the jury instruction. Relying on the dictionary definition, the Court found that “operate” in this context did not necessarily mean that the defendant had to drive or move the plane, but merely use it for a central function. Accordingly, the court found the jury instruction proper and the evidence sufficient to support the conviction.

18 USC § 924(c) – Crime of Violence

U.S. v. Richardson, 17-2157 (10/11/18)

The defendant was convicted of multiple counts of aiding and abetting Hobbs Act robberies and

multiple separate firearm counts under § 924(c). During the appellate process, the Supreme Court decided Johnson. As a result, the case was ultimately remanded for a determination as to whether the Johnson decision applied to § 924(c). The district court held that it did not, and reinstated the same sentence. On appeal, the court ruled that the defendant’s Hobbs Act robberies counted as crimes of violence under § 924(c)’s force clause. The court based this holding on its prior decision in U.S. v. Gooch which held that a Hobbs Act robbery counted as a crime of violence for purposes of the force clause of § 924(c). Consequently, the court found that aiding and abetting a Hobbs Act robbery also qualified as a crime of violence under the force clause because there is no distinction under federal law between aiding and abetting and the substantive offense. Because the court based its ruling on the force clause, the court held that it did not need to decide the issue of whether the residual clause of § 924(c) was unconstitutionally vague pursuant to Johnson. Accordingly, the defendant’s sentence was affirmed.

XIII. Post-Conviction Remedies

In re Wogenstahl, 18-3287 (9/4/18)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following the conclusion of his first round of federal habeas corpus proceedings, the petitioner moved for authorization to file a second or successive petition. The petitioner alleged, among other things, that the prosecution violated Brady. In support of his claim, the petitioner relied on investigative material that was obtained from police files, along with a letter from the Department of Justice acknowledging that expert testimony that was presented at trial was scientifically unsound. Under 28 USC § 2244(b)(3)(C), a petitioner who wishes to file a second or successive petition must make a prima facie showing that he or she satisfies the statutory

requirements for habeas corpus relief. The court concluded that the petitioner met this standard with respect to § 2244(b)(2)(B) by making a prima facie showing that: 1. the factual predicates for the Brady claim could not have been discovered previously through the exercise of due diligence; 2. the Brady claim was meritorious, and; 3. the facts supporting the Brady claim, if proven, would demonstrate actual innocence by clear and convincing evidence. The petitioner's motion for authorization was accordingly granted.

Issa v. Bradshaw, 15-4147 (9/21/18)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The out-of-court statements of a witness who refused to testify were admitted at trial, and the petitioner alleged on direct review that his rights under the Confrontation Clause had been violated. At the time of the petitioner's direct appeal, the Supreme Court's decision in Ohio v. Roberts represented the governing standard for Confrontation Clause claims based on the admission of out-of-court statements. Roberts (which was subsequently overruled by Crawford v. Washington) allowed out-of-court statements to be admitted if they were supported by particularized guarantees of trustworthiness. The Ohio Supreme Court rejected the petitioner's claim. The Sixth Circuit concluded that the state court's decision was not entitled to deference under 28 USC § 2254(d)(1). Specifically, the Ohio Supreme Court acted contrary to the rule of Roberts and the subsequent decision in Idaho v. Wright by failing to consider the totality of the circumstances surrounding the out-of-court statements. The Sixth Circuit further concluded that habeas corpus relief was warranted, irrespective of whether or not the statements would be admissible at a retrial under the contemporary standards for such claims

established by Crawford. The denial of habeas corpus relief was accordingly reversed.

Zagorski v. Mays, 18-6052 (10/29/18)

The petitioner was convicted of first-degree murder in Tennessee state court and sentenced to death. In his federal habeas corpus proceedings, the petitioner raised various claims that were found to be procedurally defaulted. After his initial round of habeas corpus proceedings, the petitioner filed a motion for relief from judgment under Fed.R.Civ.Pro. 60(b)(6), alleging that he could demonstrate cause to excuse his defaults through the combined holdings of Edwards v. Carpenter and Martinez v. Ryan. Under Edwards, an allegation of ineffective assistance of counsel that is raised as cause to excuse a procedural default can itself be defaulted, but a petitioner can still demonstrate cause for this type of secondary default if there is an available procedural mechanism that will allow him or her to do so. The petitioner argued that he could establish cause for the default of his underlying substantive claims based on the ineffective assistance of his trial counsel, but acknowledged that this claim was itself defaulted under Edwards. Accordingly, the petitioner argued that he could establish cause for the additional default under Martinez based on the ineffective assistance of his post-conviction counsel in failing to raise the claim that trial counsel had been ineffective. The district court denied the motion. The Sixth Circuit affirmed, concluding that allowing Martinez and Edwards to be used in this manner would "detonate" the procedural default doctrine. The court further found that, even though the petitioner was raising ineffective assistance of trial counsel solely as cause to excuse a default and not as a substantive claim, it still qualified as a "new ground for relief" amounting to an unauthorized second or successive petition under Gonzalez v. Crosby. Because Martinez established an equitable, rather

than constitutional, rule, the petitioner could not satisfy the gatekeeping requirements for a second or successive petition under 28 USC § 2244(b)(2)(A). Furthermore, the other equitable factors cited by the petitioner, including the merits of the underlying claims, did not weigh in favor of relief from judgment. The judgment of the district court was therefore affirmed.

United States v. Castano, 17-1458 (10/15/18)

Coram Nobis is an extraordinary remedy that permits a defendant who is no longer in custody to attack their sentence. It is designed to redress “extreme flaws” in the process. Mr. Castano was convicted of drug and firearms offenses in 2006. In 2012, Castano was charged with a new offense. At that time, he also learned that perjured testimony may have been used to obtain his 2006 convictions. He therefore attempted to challenge his 2006 conviction to avoid it being used as an enhancement in his new sentencing proceeding. The Sixth Circuit held that “in order to merit the extraordinary remedy of coram nobis, a petitioner must demonstrate an error of the most fundamental character that, if corrected, probably would have altered the outcome of the trial; the lack of alternative remedy; the existence of an ongoing civil disability; and sound reasons for failure to seek appropriate earlier relief. The ultimate question is whether extraordinary circumstances compel issuance of the writ to achieve justice.” Castano was unable to make this showing and thus the petition was denied.