

Sixth Circuit and Supreme Court Update

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Evidence

U.S. v. Asher, 17-6251 (12/12/18) – 404b

The defendant was a jailor who allegedly participated in a severe beating of an inmate and then lied in reports to cover it up. As a result, he was charged with depriving the inmate of his civil rights and falsifying a report to impede a federal investigation. In the district court, the government sought to introduce a 2 1/2 year old incident where the defendant beat up an inmate and lied to cover it up. The government argued that the evidence proved that the defendant acted purposefully in the charged offense. In response, the defendant offered to stipulate intent if the jury first found at trial that he participated in committing the beating. The district court admitted the prior beating under FRE 404(b), the defendant was convicted, and he appealed. The court held that the prior beating was not properly admitted to show intent because of the highly prejudicial nature of the prior act evidence. **The court considered the temporal proximity of the evidence, the availability of other means of proof, and the nature of the offense itself, and determined that the defendant's intent at the time of the offense was not a compelling enough reason to admit the prior act evidence. In this regard, the court found that the real issue in the case was whether the defendant was the one who committed the assault, not his intent. As such, the court ruled that the "entire issue of intent was subsumed by the conduct."** Thus, the court found that the prior act evidence was unnecessary and unduly prejudicial, and vacated the defendant's conviction.

U.S. v. Daneshvar, 18-1101 (4/29/2019) - 803(6)

The defendant was a doctor for Mobile Doctors, a business that was fraudulently billing Medicare for in home medical services. At his trial for Medicare fraud, the defendant sought to introduce an email between the president and branch manager of the company wherein they discussed keeping their doctors in the dark about the company's fraudulent billing practices. The district court excluded the evidence as hearsay. On appeal, the court held that, although the evidence was relevant, it was not properly considered a business record of Mobile Doctors. The court found that an email is not a business record merely because it is sent between two employees in a company or even because employees regularly conduct business through emails. The court ruled that **such evidence is insufficient to establish the requirements that the records are kept as "a regular practice" and that they are kept "in the course of regularly conducted business activity."** Further, the court held that the records were not admissible under the residual clause of FRE 807 because the defendant had plentiful other evidence that the doctors were kept in the dark regarding Mobile Doctors' fraudulent business practices. Finally, the defendant could not admit the evidence under the coconspirator exception because that rule is only available to admit evidence "against" a party, not for a party. Accordingly, exclusion of the evidence was affirmed.

Rehaif v. US, 17-9560 (6/2/2019)

18 USC § 922(g) requires that a defendant (1) be in possession of a firearm and (2) under some disability to possess the firearm (such as being a felon, or an alien, etc.). The firearm also needed to, at some point, travel in interstate commerce. At question in *Rehaif* was whether the defendant needed to “knowingly” be under the disability. The Court answered in the affirmative: “the word ‘knowingly’ applies both to the defendant’s conduct and to the defendant’s status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” The fact that the weapon traveled in interstate commerce, however, need not be known to the defendant, as it is merely a jurisdictional matter

U.S. v. Chaney, 17-6167 (4/11/19)

The defendants ran a pain clinic and were charged with unlawfully distributing pain pills outside of the course of professional medical practice. During the government’s case at trial, it presented an expert who testified that only two of the defendant’s patients did not have an underlying medical condition that would justify the prescribing of pain pills. As such, the defendant argued that the evidence was insufficient to support the verdict. On appeal, the court held that three elements must be proven under 21 USC § 841 against a physician: (1) the defendant distributed a controlled substance; (2) the defendant acted intentionally or knowingly; and (3) the defendant prescribed the drug “without a legitimate medical purpose and outside the course of professional practice.” The court held that, although a patient’s underlying medical condition is a consideration, the central question is whether the doctor’s purpose was the legitimate medical treatment of the condition or some other reason. In the case, the court found ample evidence that the clinic was issuing prescriptions without proper examinations, issuing prescriptions that were signed in blank, and encouraging patients to take more pills than needed and to sell the excess. Further, the court held that, while expert testimony may be helpful to prove the government’s case, it is not required. Accordingly, the court found the evidence sufficient to support the jury’s verdict convicting the defendants.

U.S. v. Shanklin, 18-5289 (5/24/19)

During the defendant’s trial on drug and weapon charges, the government failed to have any witness actually identify the defendant in court as the person who committed the crimes. The defendant argued on appeal that the evidence was accordingly insufficient to support the verdict. The court held that an in-court identification of the defendant as the perpetrator is not necessarily required where the circumstantial evidence supports that the defendant is the correct, named person. The court found that the defendant had the same name as the perpetrator, defense counsel referred to the defendant by name and as the defendant, and no witness stated that the person in court was not the named defendant. Accordingly, the court found that the evidence was sufficient to support the verdict.

Constitutional Issues and Other Defenses

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

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.**

Logan v. U.S., 17-1996 (12/13/18)

The defendant was charged with participating in a drug conspiracy in Michigan and was appointed an attorney. The attorney negotiated a plea agreement for the defendant that limited his sentencing exposure to 10 years. The attorney advised the defendant that it was a good plea offer and encouraged him to take it. The defendant signed the plea, but prior to the plea hearing consulted with an attorney hired by his family from California who told the defendant not to take the plea and that he could “beat the case.” As a result, the defendant chose to withdraw from the plea agreement. The defendant was subsequently represented by the California attorney and pled guilty without a sentencing cap. The district court imposed a sentence of 35 years imprisonment. The defendant filed a habeas petition claiming ineffective assistance of counsel, which the district court denied. On appeal, the court first held that the hired California attorney had provided deficient representation. Nonetheless, the court ruled that **because the defendant received effective representation from his appointed attorney regarding the plea decisions, the defendant did not have a cognizable ineffective assistance of counsel claim: “Because [appointed counsel] adequately assisted Logan at the plea-bargain stage, Logan received his Sixth Amendment right to effective assistance of counsel, regardless of [the California attorney’s] subsequent, contradictory advice.”** Accordingly, the sentence was affirmed.

U.S. v. Gandy, 17-2020 (6/7/19)

Shortly before their fraud trial, the defendants’ moved for new appointed counsel because their attorneys refused to litigate speedy trial motions which had already been denied. When the district judge refused to appoint new counsel, the defendants filed state bar grievances against their attorneys. This prompted the attorneys to move to withdraw, claiming that their feelings were hurt by the grievances and they couldn't represent their clients with the “passion” that was required. The district court denied the motions and upon their convictions the defendants appealed. The court held that **the state bar grievances did not require a finding that the attorneys were ineffective and could not represent the defendants. The court emphasized that the grievances were frivolous, they were filed shortly before trial, and the attorneys’ hurt feelings was not sufficient grounds to create a conflict of interest. Further, the court held that to find a conflict under these circumstances would encourage defendants to “habitually abuse the rule.”**

Accordingly, the court found no ineffective assistance of counsel based on the bar grievances and the convictions were affirmed.

U.S. v. Acosta, 18-5207 (5/15/19)

The defendants were charged with meth, cocaine, marijuana, and firearms offenses. Before trial, the defendants pled guilty to all but the meth charges. At trial, the defendants presented evidence that the meth belonged to another defendant (who happened to be a cellmate) who had sublet the apartment from the defendants. The government during cross examination and closing argument repeatedly bolstered the truthfulness of the investigating agent, attacked the credibility of the defendants' witness, and questioned the defendants' religious beliefs. The defendant was convicted and raised for the first time on appeal that the prosecutor's comments were improper. The court held that the prosecutor's actions constituted flagrant misconduct requiring reversal. Specifically, the court found that **the prosecutor had improperly bolstered the agent's testimony by repeatedly referring to him as a fine young man who remembered everything he did. Further, the prosecutor repeatedly called the defendant's witness a liar and that the jury should not believe anything he says. Finally, the prosecutor repeatedly attacked the defendant's religious beliefs and referenced the Ten Commandments during closing argument. The court found that the prosecutor's actions constituted repeated and flagrant misconduct.** Although the court found that there was sufficient evidence to convict the defendants at trial, the evidence was by no means overwhelming and the court accordingly ruled that the defendants had established plain error in the prosecutor's actions. Thus, the conviction was vacated and the case remanded for a new trial.

U.S. v. Petlechkov, 18-5991 (5/1/19)

The defendant was prosecuted for multiple counts of mail fraud based on misrepresentations he made to FedEx, which caused a number of packages to be sent at a discounted rate. At trial, the government introduced evidence demonstrating that FedEx had a hub in the Western District of Tennessee where the charges were brought. Upon the defendant's conviction he appealed and argued that venue was improper. The court held that venue had not been properly established for all of the mail fraud counts. **The government charged each mailing of a package as a separate mail fraud count, and thus the court ruled that the government was required to establish venue for each package. The court found that a number of the packages were neither mailed from nor received in the district. The court held that, for these packages, the government's evidence that FedEx had a hub in the district was insufficient to establish venue.** The government must prove by a preponderance of the evidence that the offense had some connection to the district, and this evidence clearly fell short. Accordingly, the court held that the case had to be remanded. The court ruled that venue is not an element of the offense and as such the Double Jeopardy Clause did not apply to the venue determination. Therefore, the government could choose to retry the defendant for the counts in question.

U.S. v. White, 16-1009 (4/10/19)

The defendant was charged with drug and firearm offenses in a criminal complaint. The parties engaged in plea negotiations pre-indictment and agreed to extend the 30-day period to indict under

18 USC § 3161(b), the Speedy Trial Act. The defendant ultimately moved to dismiss the case because the government did not indict him within the 30-day time period. Following Sixth Circuit precedent, the district court and Sixth Circuit held that the time for plea negotiations was automatically tolled. The Supreme Court remanded the case for consideration in light of its decision in Bloate v. U.S. On remand, the court held that Bloate compelled the finding that the Speedy Trial Act is not automatically tolled whenever the parties engage in plea negotiations. Under § 3161(h)(1)(G), the speedy trial clock is only tolled when a plea agreement is actually under consideration by the district court. Thus, plea negotiations themselves, which necessarily come before a plea agreement is submitted to the district court, cannot automatically toll the speedy trial clock. Nonetheless, the court found that because the defendant agreed to waive speedy trial pre-indictment, and the district court made an ends of justice finding under § 3161(h)(7)(A), the speedy trial clock was properly tolled under that alternative basis. The court held that the parties' request to toll the speedy trial clock to have additional time to resolve a case pre-indictment was a proper basis for an ends of justice exclusion of time under the Speedy Trial Act. Accordingly, the defendant's conviction was affirmed.

U.S. v. Johnson, 18-1675 (8/7/19) –

The defendant was wanted for a State of Florida parole violation. Federal authorities executing the state arrest warrant in Michigan discovered that the defendant had a firearm. Accordingly, the federal government first prosecuted the defendant and sentenced the defendant before turning him over to the state authorities. On a subsequent appeal, the defendant argued that the federal court jurisdiction was invalid because the state had primary jurisdiction over him. The court first held that a defendant does have Article III standing under the Constitution to raise the issue of primary jurisdiction between the federal government and another sovereign. However, where the federal court has already exercised its jurisdiction and sentenced a defendant, the court will not find that the district court lacked subject matter jurisdiction to have heard the case. The federal court's jurisdiction is not extinguished because it violated a state's right to primary jurisdiction. Accordingly, the sentence was affirmed.

4th Amendment

U.S. v. Christian, 17-1799 (5/31/2019)

Officers obtained a search warrant for the defendant's residence based on the following: (1) an individual walked away "from the area" of the defendant's residence and was later stopped in possession of heroin; (2) tips from unidentified informants over the previous four months that the defendant was a drug dealer; (3) an informant bought drugs from the defendant's residence eight months prior; (4) the defendant had four prior drug convictions, the most recent being four years prior, and included a search warrant at his residence. The district court denied a motion to suppress the evidence seized in execution of the search warrant and the defendant appealed. The Sixth Circuit panel reversed and held that the warrant was not supported by probable cause. Rehearing *en banc* was granted. The *en banc* court held that the totality of the circumstances supported probable cause for the search warrant. Specifically, the court found that the individual walking away "from the area" was sufficient to tie the home to current drug activity. This was particularly true when combined with the informant tips and the defendant's past record, specifically his past

record involving drug sales from the very same house. Accordingly, the panel's decision was reversed and the district court's ruling denying the motion to suppress was reinstated.

U.S. v. Ledbetter, 17-3289 (7/3/19)

Officers were conducting an investigation of the defendant when they watched him leave a known drug house in a high crime area. Upon observing a traffic violation, the officers conducted a traffic stop. The defendant was slow to pull over, and then did not look back at the officers but was instead reaching for the center console. Further, the defendant was sweating profusely, had glassy eyes, and was shaking uncontrollably. As result, the officers patted him down, which led to the discovery of evidence on the defendant and in the car. In his subsequent prosecution, the defendant moved to suppress the evidence and the district court denied the motion. On appeal, the court held that reasonable suspicion supported the frisk of the defendant. The court found that the totality of the circumstances including the defendant's slow stop, his reaching for the center console, his nervousness, and the fact of the high crime area all supported the officers' actions. Accordingly, the district court's ruling was affirmed.

U.S. v. Ardd, 18-5257 (12/18/18)

The defendant attempted to purchase 250 grams of cocaine from an informant, but was arrested by police. At the time, the defendant was in possession of a firearm. As a result, law enforcement obtained a search warrant for the defendant's residence and found more drugs and another gun. The defendant moved to suppress the evidence seized in during the search of his home, the district court denied the motion, and the defendant appealed. The court held that the search warrant was saved by good faith. The court ruled that only a "minimally sufficient nexus" is required between a defendant's residence and drug trafficking activity in order to survive the good faith standard. The court found that **the fact that the defendant was attempting to purchase 250 grams of cocaine, which the court characterized as "thousands of retail hits of cocaine," clearly demonstrated that the defendant was an ongoing drug dealer and established the necessary inference that drugs would be found in the defendant's residence.** Accordingly, the district court's ruling was affirmed.

Sentencing

U.S. v. Roberts, 17-6512 (3/28/19)

The defendant was convicted of selling stolen military equipment on eBay. At sentencing, the government presented a witness to establish an estimate of the percentage of the equipment that the defendant sold on eBay that was actually stolen. The district court questioned the witness about her valuation method, but she could provide no itemization or supporting documentation to support her testimony. The district court then adopted the government's loss computation. The district court also denied the defendant's requests for CJA funds to hire an accountant to review the findings. On appeal, the court held that **a district court must specifically rule on a defendant's objections to a loss computation and make findings as to how it determines the loss amount. The court ruled that it is not sufficient for a district court to merely adopt the government's loss computation without explanation.** Accordingly, the case was remanded for resentencing. The

court directed the district court to reconsider the defendant's request for CJA funds for an accountant on remand.

U.S. v. Oliver, 18-5465 (3/26/19)

The defendant was convicted of distributing child pornography to an undercover agent. In the online conversation, the defendant sent the child porn in an effort to convince the agent to agree to let him have sex with the agent's (fictitious) child. At sentencing, the district court imposed a 5 level enhancement because it found that the defendant distributed child porn for a thing of value, pursuant to USSG 2G2.2(b)(3)(B). On appeal, the court held for the first time that, in order to apply the 5 level enhancement for distribution of child porn for a thing of value, the government must show the following: (1) the defendant agreed to exchange with another person; (2) knowing distribution of child porn to that person; (3) the exchange was for the specific purpose of obtaining something of value; and (4) the thing of value was obtained from the same person. The court found that although the district court determined that the defendant's purpose in sending child porn to the agent was to convince the agent to agree to the sexual act, the district court did not properly determine in the first instance whether there was an actual agreement – explicit or implicit – for the exchange of child porn. Accordingly, the court remanded the case for consideration based on the proper standard.

U.S. v. Havis, 17-5772 (6/6/19)

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.

U.S. v. Shepherd, 18-3993 (5/1/19)

The defendant was convicted of child pornography offenses. At sentencing, the district court imposed the mandatory \$5000 special assessment under 18 USC § 3014 because it found that the defendant was non-indigent based on his future earning capacity. On appeal, the court held that the district court's finding was appropriate. Pursuant to the § 3014 (the Justice for Victims of Trafficking Act), a district court must impose a \$5000 assessment on any "non-indigent" defendant. Answering an open question, the court ruled that the determination of indigency requires a district court to consider the defendant's current financial situation and the defendant's future earning capacity, keeping in mind that the JVTA allows a defendant 20 years after release from incarceration to pay the assessment. Thus, the court found that although the defendant had a negative net worth and would likely come out of prison with about \$55,000 in debt, he was still

not indigent because he was only 29 years old, had a high school diploma, and an EMT certification. Thus, the district court's ruling was affirmed.

U.S. v. Haymond, 17-1672 (6/27/2019)

The defendant faced a statutory range of 0 to 10 years based upon his plea to possession of child pornography, plus a term of supervised release. He was sentenced to 38 months incarceration, along with a 10-year term of supervised release. The defendant served his time and was released. He then violated the terms of his release by once again possessing child pornography. This offense kicked in 18 USC § 3583(k), which states that if the court finds, by a preponderance of the evidence, that the defendant has violated the terms of release by once again possessing child pornography, a minimum 5-year term of imprisonment must be imposed. The district court so found, and imposed 5 years. The Supreme Court held that **such judicial findings, which increase the mandatory minimum term, violate the right to jury trial right, and therefore the penalty provisions contained in § 3583(k) are unenforceable.**

U.S. v. Thomas, 18-1592 (8/6/19)

The defendant was convicted of bank fraud. During the presentence investigation interview, the defendant lied to the probation officer about his leadership of others, his recruiting of others, and his involvement with a codefendant. As a result, the district court applied a 2 level enhancement for obstruction of justice under USSG § 3C1.1. The district court further denied acceptance of responsibility based on the obstruction and varied upward from the guideline range. On appeal, the court held that the sentence was proper. The court found that lying to a probation officer or the district court during the sentencing portion of the case about a material matter is appropriate grounds for an obstruction of justice enhancement. This is true even if the lies did not actually affect the guideline range. Given the propriety of the obstruction enhancement, the court further held that that denying acceptance of responsibility was proper and the upward variance was reasonable. Accordingly, the sentence was affirmed.

Lowe v. U.S., 17-5490 (4/4/19)

The defendant was convicted of being a felon in possession of a firearm, and the district court determined that he was an armed career criminal. After an unsuccessful appeal and two habeas petitions, the Sixth Circuit agreed to a certificate of appealability on the issue of whether the defendant's prior Tennessee rape conviction was a violent felony under the ACCA. The court held that it was not. Under Tennessee law at the time, a defendant could be convicted for rape by coercion. Tennessee defined coercion to include "the use of parental, custodial, or official authority over a child less than 15 years of age." The court found that **this offense was not a violent felony under the force clause of the ACCA because it did not contain as an element the use or threatened use of force.** Accordingly, the court held that the rape conviction did not qualify and the defendant's ACCA sentence was vacated.

U.S. v. Stitt, 17-765 (12/10/18) - Supreme Court

The Armed Career Criminal Act does not define the term "burglary." In 1989, the Supreme Court determined that the proper meaning for burglary must derive from the "generic form" of the crime, which was "an unlawful or unprivileged entry into, or remaining in, a building or other structure,

with intent to commit a crime.” In Stitt, the Supreme Court grappled with the terms “building” and “structure.” Under Tennessee law, burglaries could include non-dwellings such as mobile homes, trailers, or tents. The state statute did, however, require that these other structures be “designed or adapted” for overnight accommodations. The Court held that such definitions fell within the generic version of the burglary offense, and thus qualified as prior convictions for the ACCA. The Court noted that “an offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation,” and thus the type of “risk of violence” was present. Accordingly, the Court held that the defendant’s prior conviction for Tennessee burglary was a qualifying offense for the ACCA and his sentence was affirmed.

Stokeling v. U.S., 17-5554 (1/15/19)

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.

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

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.

U.S. v. Davis, 18-431 (6/24/19) – Supreme Court

To convict a defendant pursuant to 18 U.S.C. § 924(c) for possessing, using or carrying a firearm, the underlying offense must be either a "crime of violence" or a "drug trafficking" offense. The statute defines a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Court determined that the latter definition was unconstitutionally vague, based upon the reasoning of Sessions v. Dimaya and Johnson v. United States. The Court further rejected the Government's argument that the categorical approach was an inappropriate standard to determine whether offenses qualified under the statute.