Sixth Circuit Update

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Fourth Amendment

United States v. Castro, 881 F.3d 961 (6th Cir. 2018)

- Cell phone search warrant is sufficiently particular where it gives authority to search for evidence of "a crime" and "any other files, deleted or not involved in this or any other unlawful activity" because it could be logically inferred that "a crime" was limited to the robberies at issue
- Federal law enforcement was allowed to conduct their own search based on the state law enforcement warrant, as long as probable cause still existed

United States v. Gardner, 887 F.3d 780 (6th Cir. 2018)

- Minor can consent to a law enforcement search of his or her phone where there is custody and control, as well as use of the phone and knowledge of its passcode – had actual authority

United States v. Tagg, 886 F.3d 579 (6th Cir. 2018)

- A search warrant of the defendant's home is supported by probable cause where defendant surfed a child pornography website.
- It does not matter whether the defendant actually viewed child pornography when the investigation is into access with intent to view child pornography.

United States v. Perkins, 887 F.3d 272 (6th Cir. 2018)

- Anticipatory search warrant issued to search residence of defendant after package known to contain meth was delivered.
- Delivery was made to a female and not the defendant.
- Sixth Circuit upheld suppression because the defendant was the target of the investigation and delivery to him was the triggering condition for the warrant.

UPS DELIVERY- DOOR TO DOOR

Pleas

United States v. Clardy, 877 F.3d 228 (6th Cir. 2017)

- Defendant can waive right to file future motion to reduce sentence under 18 U.S.C. § 3582(c)
- Clardy's waiver in plea agreement was unambiguous, so court enforces it

United States v. Boucher, No. 18-5683 (6th Cir. 2018)

- Defendant's waiver of right to appeal sentence doesn't imply that the government also waives its right to appeal

Rodriguez-Penton v. U.S., No. 15-6306 (6th Cir. 2018)

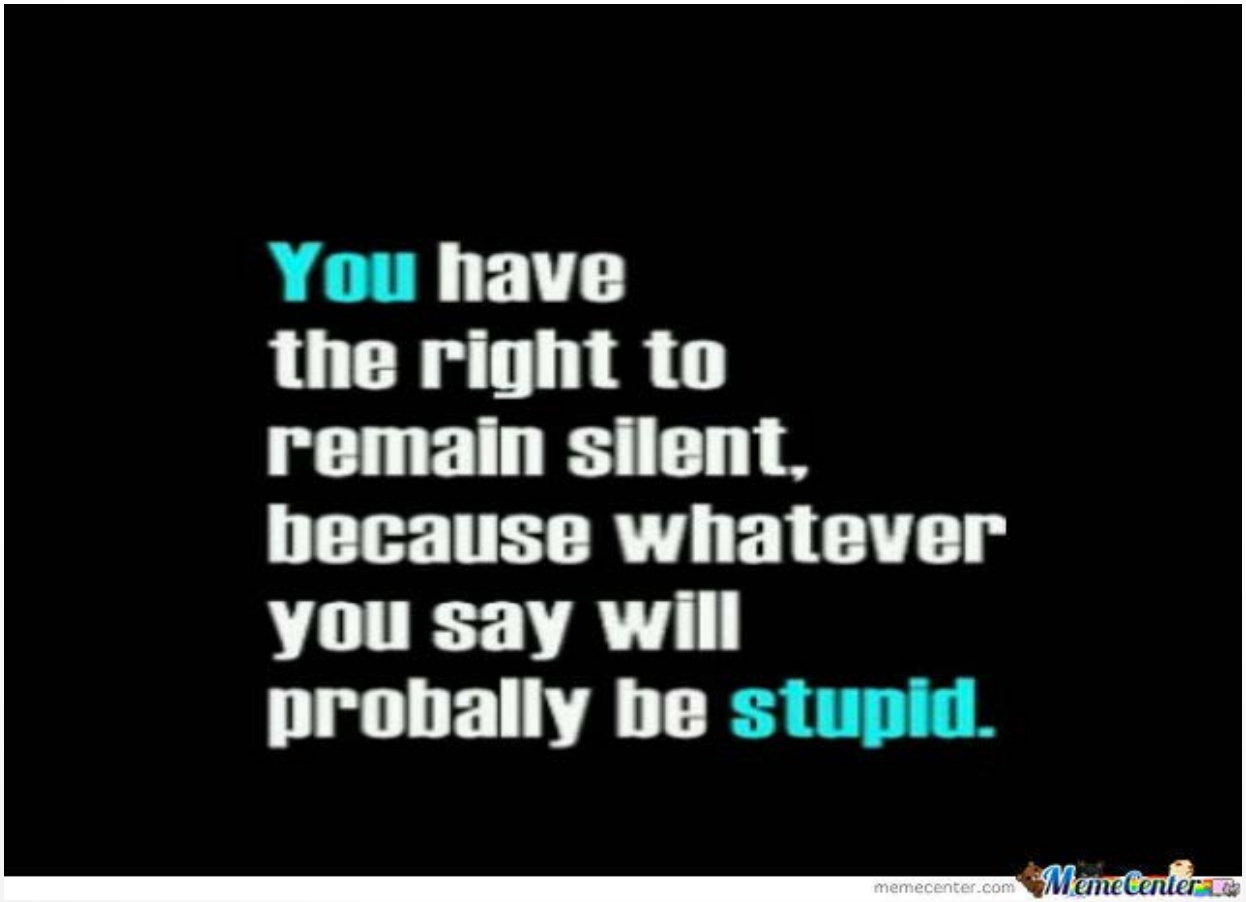
- To establish prejudice from bad advice about immigration consequences of plea, enough to show that defendant would have tried to negotiate a different plea

United States v. Cota-Luna, 891 F.3d 639 (6th Cir. 2018)

United States v. Doggart, No. 17-5813 (6th Cir. 2018)

- District court must give a reason to reject a plea agreement
- Getting the law wrong isn't a good reason

Fifth and Sixth Amendments

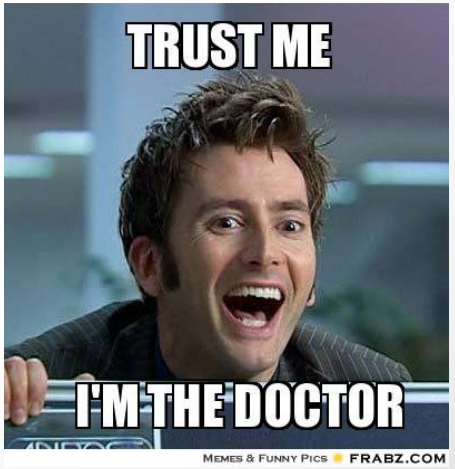


Turner v. United States, 885 F.3d 949 (6th Cir. 2018), en banc

- The Sixth Amendment right to counsel does not attach before the filing of formal charges
- A state court indictment does not trigger the right to counsel on related federal charges.
- Because of dual sovereignty, the Sixth Amendment is not triggered in one based on the other.

United States v. Elliott, 876 F.3d 855 (6th Cir. 2017)

- No *Miranda* warnings required during execution of a search warrant and related interviews of employees at a pain clinic where:
  - Employees were free to leave
  - Setting was place of business and was familiar to employees
  - Interviews were not coercive
  - Interviews were short in time



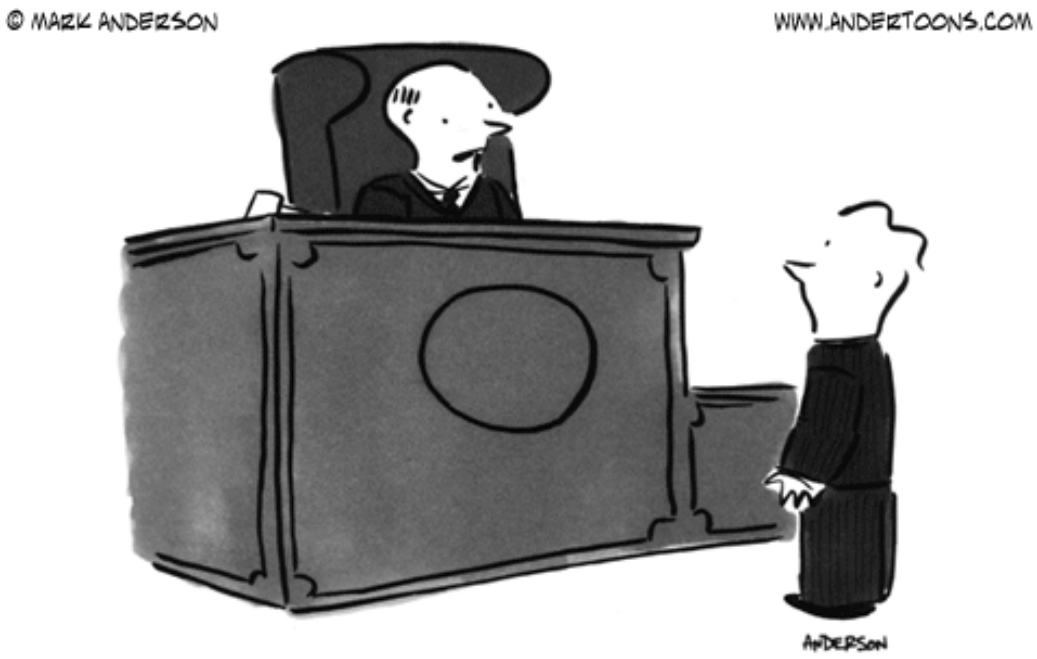
United States v. Pembrook, 876 F.3d 812 (6th Cir. 2017)

- The defense argued a *Brady* violation because the government did not turn over an inmate witness' state prison disciplinary records, which could have been used for impeachment.
- The government had no obligation under *Brady* to obtain records it did not already have so that they could be turned over in discovery.
- Defense also failed to show relevancy for impeachment.

United States v. Folad, 877 F.3d 250 (6th Cir. 2017)

- *Brady* is not implicated by the actions of non-state, private third parties.
- A valid *Brady* claim requires government involvement.

Sentencing



"I hereby sentence you to three consecutive life sentences. Two with good behavior."

United States v. Fleming, 894 F.3d 764 (6th Cir. 2018)

- On plain error review, procedurally unreasonable for district court to surprise parties and base sentencing decision on new and potentially inaccurate information
- Note *United States v. Robinson*, 892 F.3d 209 (6th Cir. 2018): not substantively unreasonable to vary upward based in part on same article

United States v. Price, No. 17-2432 (6th Cir. 2018)

- 18 U.S.C. § 3583(h): when a court revokes supervised release and imposes a prison term, length of new supervised release term cannot exceed the max allowed for the underlying offense, "less any term of imprisonment that was imposed upon revocation of supervised release."
- That includes <u>all</u> prison terms imposed upon revocation of supervised release

Armed Career Criminal

Man tries armed robbery with knife in gun store

A 57-year-old Greenfield man was shot in the chest Thursday during an armed robbery attempt at Buckhorn Guns, 2779 W. Ramsey Ave.

Police said the suspect walked into the store and asked to see several handguns just before 3 p.m. Thursday. After handing the pistols back to the store owner, he pulled a 4-inch knife with a serrated edge from the back of his pants and demanded the owner give him one of the guns and some ammunition.

The store owner shot the man once in the chest and called 911. The suspect was taken to Froedtert Memorial Lutheran Hospital, where he was listed in satisfactory condition Monday.

Greenfield Police Department Detective Sgt. Paul Schlecht said a warrant was issued for the suspect's arrest Monday. He will be taken to the Criminal Justice Facility after his discharge from the hospital.

The Observer is not naming the man because he had not been charged in Milwaukee County courts by press deadline.

The district attorney's office is reviewing the shooting, a standard procedure whenever shots are fired during a robbery.

— Eric Decker, Staff

United States v. Farrad, _ F.3d _, 2018 U.S. App. LEXIS 23071 (6th Cir. Aug. 17, 2018)

- Defendant challenged the ACCA based on eight prior drug trafficking convictions by arguing they were a part of the same conspiracy and should be counted as one.
- Because each transaction had a definite beginning and ending point, they were committed on occasions different from one another under the ACCA
- Crimes can still be counted separately, even when they are a part of a single conspiracy

Perez v. United States, 885 F.3d 984 (6th Cir. 2018)

- New York second-degree robbery is a crime of violence, even though some state law decisions found the statute was satisfied by less than violent force
- "To excuse thousands of violent career criminals from ACCA's consequences on account of a few (potentially outlier lower court decisions, or gossamer-thin distinctions between the definitions of two offenses, is not to 'apply the rule to particular cases,' but to erase it."

Slusser v. United States, 895 F.3d 437 (6th Cir. 2018)

- Defendant appealed the dismissal of his second or successive habeas petition challenging his ACCA
- While a certificate of appealability was granted as to whether one of his prior convictions was a violent felony, the defendant waived his right to challenge his ACCA designation by virtue of his plea agreement.
- This was true, even though the defendant argued that the plea was not a waiver of a sentence beyond the statutory maximum.

WARNING
THIS SIGN
IS ONLY A
DISTRACTION

Cradler v. United States, 891 F.3d 659 (6th Cir. 2018)

- ACCA appeal from denial of habeas relief
- On appeal, the government argued for the first time that the motion to vacate under 2255 was untimely
- The Sixth Circuit held that while it can consider a forfeited statute of limitations argument in exceptional circumstances, the government had not demonstrated such circumstances
- Defendant no longer ACCA

United States v. Nichols, 897 F.3d 729 (6th Cir. 2018)

- Defendant was resentenced to time served when his ACCA sentence was vacated after *Johnson*
- A timed-served sentence is unlawful, because it makes the length of actual incarceration served the length of the sentence imposed, even though that amount is beyond the Guideline range and/or applicable statutory maximum

Guidelines

Our sentencing guidelines leave me no choice.

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United States v. Havis, No. 17-5772 (6th Cir. 2018)

- § 2K2.1(a)(4)(A): base offense level 20 for felon in possession with a prior crime of violence or controlled substance offense
- Guidelines commentary says controlled substance offense includes attempts
- Majority concludes commentary controls, based on prior decision (*United States v. Evans*)
- Stay tuned . . .

- *U.S. v. Jackson*, 877 F.3d 231 (6th Cir. 2017)
  - § 2K2.1 (+4 for using/possessing firearm "in connection with another felony offense"): doesn't apply where drugs and guns sold separately and possessed in different locations
- *U.S. v. Hernandez*, No. 17-5448 (6th Cir. 2018)
  - § 2D1.1 (drug amount): D was to receive only 2 kilos cocaine from distributor, but responsible for all 28 kilos in shipment because he attempted to track it down when it didn't arrive

- *U.S. v. Amerson*, 886 F.3d 568 (6th Cir. 2018)
  - Relevant conduct: for felon in possession, uncharged firearm from 3 ½ months prior not part of same course of conduct or common scheme/ plan, so not relevant conduct
- *U.S. v. Sweeney*, 891 F.3d 232 (6th Cir. 2018)
  - § 2G2.1(b)(5) (+2 where child porn defendant is victim's parent): even though parental rights terminated, defendant still had parent-like role

- *U.S. v. Susany*, 893 F.3d 364 (6th Cir. 2018)
  - § 2X1.1(b)(2) (-3 where defendant and co-conspirators haven't completed/aren't about to complete all acts necessary for substantive offense): error not to apply, but harmless error because judge varied downward further
- *U.S. v. Sexton*, 894 F.3d 787 (6th Cir. 2018)
  - Criminal history: diversion qualifies for +1, and committing crime while completing diversion qualifies for +2

Crimes of Violence, Career Offender, and § 924(c)

United States v. Camp, _ F.3d _, 2018 U.S. App. LEXIS 25406 (6th Cir. Sept. 7, 2018)

- Hobbs Act robbery is not a crime of violence under either the force clause or the enumerated offense clause of the Sentencing Guidelines § 4B1.2(a)(1)
- Hobbs Act robbery includes threats to property, which makes it categorically overbroad
- But, because 18 U.S.C. § 924(c)(3)(A) includes force against a person or property, Hobbs Act robbery is still a crime of violence under this provision

United States v. Harper, 875 F.3d 329 (6th Cir. 2017)

- Tennessee aggravated assault, which requires mere recklessness, is a crime of violence under the Guidelines
- The Court was bound by its prior decision in *United States v. Verwiebe*, which held that a reckless mens rea is sufficient to satisfy the crime-of-violence definition – even though the *Harper* Court disagreed with *Verwiebe's* reasoning

Evidence

"I object, Your Honor! Hearsay evidence!"

United States v. Brown, 888 F.3d 829 (6th Cir. 2018)

- Res gestae evidence: other acts inextricably intertwined with charged offense or necessary to complete the story of the charged offense
- For felon-in-possession charge, reference in 911 call to prior domestic violence had no connection with charged offense
- But . . . harmless error

United States v. Harris, 881 F.3d 945 (6th Cir. 2018)

- FRE 608(b): "Extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."
- FRE 613(b): May introduce "extrinsic evidence of a witness's prior inconsistent statement . . . if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires."

United States v. Farrad, 895 F.3d 359 (6th Cir. 2018)

- Error to admit Facebook photos as business records
- But . . . harmless error, because photos authenticated by traditional means (distinctive features of Farrad and his apartment)
- Not error to allow expert testimony that gun in photo appeared to be real
- Error to allow "expert" testimony that criminals upload pictures relatively quickly
- But . . . harmless error

United States v. Mallory, No. 17-3500 (6th Cir. 2018)

- Deposition can be introduced at trial if: (1) witness is unavailable; and (2) opposing party has a meaningful opportunity to cross-examine
- Handwriting expert: not abuse of discretion to admit
- Authentication: obtaining document from defendant's proposed exhibits, testimony that secretary "could have" prepared it, and defendant's signature line are sufficient distinctive characteristics

United States v. Ramer, 883 F.3d 659 (6th Cir. 2018)
United States v. Buendia, No. 17-1666 (6th Cir. 2018)

- Not error to admit bank records; testimony from investigator who subpoenaed and examined them sufficient to authenticate as business records
- Not error to exclude receipts for school expenses; testimony from school secretary who gathered them insufficient to authenticate as business records

Appeal

"And don't go whining to some higher court."

United States v. Bergrin, 885 F.3d 416 (6th Cir. 2018)

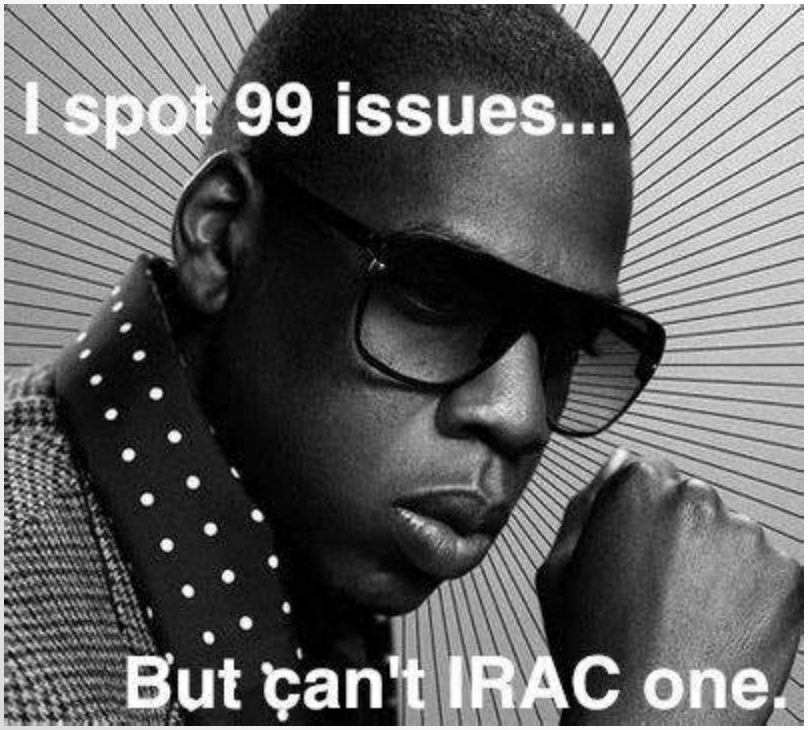
- Defendant has a legal right to appeal the district court's dismissal of charges based on an incompetency finding, because of the collateral consequences of being found incompetent.
- Sixth Circuit specifically said finding could implicate:
  - right to vote
  - Jury service
  - Obtaining a driver's license
  - Firearm ownership

It's time to go

DEEP

APPELLATE

NERD



United States v. Castano, _ F.3d _, 2018 U.S. App. LEXIS 28932 (6th Cir Oct. 15, 2018)

- Defendant filed a writ of *coram nobis* to challenge a prior firearm conviction, so that it would not be used to enhance his sentence
- *Coram Nobis* is an extraordinary writ used to collaterally attack a conviction where the defendant is no longer in custody and, therefore, cannot seek habeas relief
- A prisoner in custody cannot seek coram nobis relief generally, and specifically cannot seek it to address a prior conviction in another case

Specific Offenses

United States v. Osborne, 886 F.3d 604 (6th Cir. 2018)

- 18 U.S.C. § 641 (theft of government property): can commit crime by stealing property where federal government passed it to private hands but retains sufficient control
- Insufficient evidence that funds given to private corporation to run Guard Recruiting Assistance Program are federal property; government didn't retain reversionary interest and imposed few restrictions

United States v. Porter, 886 F.3d 562 (6th Cir. 2018)

- 18 U.S.C. § 666 (bribery concerning programs receiving federal funds): defendant "corruptly solicits" "anything of value" with "intent to be influenced or rewarded in connection" with a transaction worth $500 or more
- Don't need quid pro quo or official act to violate section 666

Lobbins v. United States, 900 F.3d 799 (6th Cir. 2018)

- 18 U.S.C. § 1512(a)(2) (witness tampering): government must show a "reasonable likelihood" that victim would have communicated with a federal law enforcement officer
- Jury instructed it was sufficient to show victim "might" have spoken to a federal officer
- Ineffective assistance for not requesting accurate instruction
- But . . . two life sentences for murder unaffected

United States v. Fitzgerald, No. 17-2285 (6th Cir. 2018)

- 18 U.S.C. § 342 (operating a common carrier while intoxicated): does not criminalize attempts

Questions?

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