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2022 CJA Training: Sixth Circuit Case Law Updates

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October 2021:

1. ***United States v. Grant***, No. 20-4078 (10/1/21)
   Double Jeopardy, Firearms

   Grant was convicted of one count of felon in possession of a firearm and one count of being a misdemeanor domestic violence possession of a firearm. Both counts were from the same gun and the same date of possession. Grant was sentenced to two concurrent terms of 10 years on each count. On appeal, the court held that the imposition of 10 years on each count violates the Double Jeopardy Clause. Congress did not specifically authorize separate punishments for violating different provisions of 18 U.S.C. § 922 (g) based on a single possession. Case was remanded to the district court to merge the convictions.

2. ***United States v. Nicolescu***, No 19-4247 (10/5/21)
   Guideline Issues: 2B1.1 (b)(4) – Selling Stolen Property & 2B1.1(b)(11)(B)(i) – Trafficking Access Device; Agg. Identity Theft

   The defendants were involved in an elaborate wire fraud scheme to defraud users of Ebay and steal credit card and confidential information. They created a computer virus which extracted credit car numbers which were then sold to a third party on the dark web. At sentencing for wire fraud, the district court applied a 2 level enhancement under USSG § 2B1.1(b)(4) based on a finding that the defendants were in the business of receiving and selling stolen property. An additional 2 level enhancement was applied for trafficking an unauthorized access device.

   On appeal, they challenged the sufficiency of the evidence. The court held that it was sufficient proof that a defendant "used" a victim's ID for §1028A where the defendant tested the credit card number to determine if it was active, even where no money was obtained.

Regarding the guidelines on appeal, the court found that the selling-stolen-property enhances was inapplicable as 2B1.1(b)(4) applies only to " fences" who sell goods that are stolen by others. It is inapplicable to those who steal and then sell items themselves. The sentence was vacated.

The court held however that the trafficking enhancement was properly applied. Further, the court held it was not double counting to impose a 2 year sentence for a conviction of aggravated identity theft under 18 USC § 1028A and a 2 level enhancement under § 2B1.1(b)(11)(B)(i) as the two provisions punished different conduct. §1028A offense punished merely "transferring" the stolen credit card numbers while § 2B1.1(b)(11)(B)(i) punished "trafficking" which includes a "commercial aspect" that is not encompassed in merely transferring. The 2 level enhancement for trafficking was affirmed.

3. ***United States v. Prigmore***, No. 20-3989 (10/12/21)
Competency/NGRI

Prigmore was charged with being a felon in possession of a firearm. He underwent three psychological evaluations for competency and was represented throughout his case by three different lawyers. Each doctor found that while he had Antisocial Personality Disorder, he was competent. Multiple times, it was stated on the record by the district court judge, the prosecutor and each defense attorney, that the defendant may not be able to assist in his own defense. But each doctor confirmed that he was "capable" of cooperating. After a jury trial, he was sentenced to the statutory maximum sentence of 10 years in prison.

On appeal, the court held that the district court did not err in finding the defendant competent as the court could reasonably rely on the opinions of the three psychologists. "Competency requires only the ability to consult with one's attorney; it does not require the defendant to do so in every instance." Conviction and sentenced were affirmed.

4. ***Middlebrooks v. Parker***, No. 20-5419 (10/15/21)
Post-Conviction Remedies

Plaintiff was convicted of felony murder and other offenses in Tennessee state court and sentenced to death. He filed a suit under 42 USC § 1983 alleging that Tennessee's lethal injection protocol was facially unconstitutional and unconstitutional as applied to him. The district court granted the defendant's motion to dismiss for failure to state a claim, concluding that the plaintiff's cause of action was barred by *res judicata* in light of the Tennessee Supreme Court's previous rejection of a similar claim that the plaintiff raised in state court. The Sixth Circuit affirmed as to the plaintiff's as-applied challenged, but reversed with respect to the planintiff's facial challenge, finding that the plaintiff had alleged intervening factual changes following the earlier state court litigation that were sufficient to overcome the *res judicata* bar. Specifically, the court found that the plaintiff made plausible allegations that pentobarbital had subsequently become available for use in

Tennessee executions. The judgment of the district court was accordingly reversed and the case was remanded for further proceedings.

5. ***United States v. Latimer,*** No. 20-3861 (10/18/21)
Constructive Possession and Firearms

A parole officer discovered firearms, cash, and drugs in the residence where the defendant and his girlfriend had recently moved into. As a result, the defendant was convicted of possession of drugs with intent to distribute and being a felon in possession of a firearm. The defendant challenged the sufficiency of the evidence on appeal.

On appeal, the court held that where a defendant resides with another occupant at a residence, the government must establish some additional evidence beyond the mere presence of the contraband in the home in order to prove constructive possession. The court found that standard easily met in the case because there were pictures in the defendant's phone of drugs and scales; text messages regarding carrying a gun and larges amounts of cash in his room as well as a gun in plain view when his parole officer entered the residence. The conviction was affirmed on appeal.

6. ***United States v. Augustin***, No. 20-5454 (10/20/21)
Post-Conviction Remedies

The defendant was convicted of murder for hire which included a firearm conviction under 18 USC § 924(c). In a subsequent habeas petition, the district court vacated the § 924 (c) conviction based on a change in law, but declined to conduct a full resentencing. The defendant appealed. The court held that upon granting a habeas petition, the district court may choose to resentence the defendant or merely correct a sentencing error as appropriate. The court found that, at the time of the original sentencing, "circuit precedent required the district court to set an appropriate sentence for each underlying conviction without considering the sentencing effects of his § 924(c) conviction." Thus, the court found that the sentence for the § 924(c) conviction could not have affected the remaining sentence in the case and the district court's ruling was affirmed.

November 2021:

1. ***United States v. Traylor***, No. 21-1565 (11/1/21)
Post-Conviction Remedies, Compassionate Release, COVID

Traylor moved for compassionate release based on her significant health issues and her concerning of catching COVID while incarcerated in prison. The district court denied her motion for compassionate release. On appeal, the court held that, where a defendant has received the COVID vaccination while in prison, a district court does not abuse its discretion to deny compassionate release based on increased risk of COVID due to medical conditions. District Court ruling was affirmed.

2. ***United States v. Bass***, No. 21-1094 (11/3/21)
Post-Conviction Remedies, Compassionate Release, COVID

The defendant received two life sentences for conspiracy to distribute drugs and committing murder during the course of a drug conspiracy. After 22 years of incarceration, the defendant sought compassionate release based on the high COVID rate at his prison and his post offense rehabilitation. The district court granted the motion and the Government subsequently appealed. During the court of appeal, the Sixth Circuit learned that the COIVD infection rate at the prison had significantly decreased, most inmates and staff had received a vaccination, and the defendant was offered and refused to be vaccinated.

The court held the grant of a compassionate release was improper and ordered the case remanded for the district court to determine whether the vaccination rate at the prison and the defendant's refusal warranted denial of the petition. The court further held that the district court improperly balanced the factors under 18 USC § 3553 in weighing the seriousness of the offense against other considerations. The district court's ruling granting a compassionate release was vacated and the case was remanded for further proceedings.

3. ***United States v. Howell***, No. 20-5858 (11/8/21)
Guidelines – Firearm cross reference; 2K2.1(c)(1)(A)

During a bank robbery, the defendant discharged a firearm at an employee through a glass door. The employee was not hit. The defendant was charged with robbery and felon in possession of a firearm. At sentencing, the district court applied a cross reference to USSG § 2k2.1(c)(1)(A) to the attempted first degree murder guideline at §2A2.1(a)(1) and increasing the defendant's base offense level to 33.

On appeal, the court held that the application of the cross reference was proper. The court ruled that the defendant need not be charged with the cross reference offense in order for the guideline to apply. The court held that the facts supported the requisite intent to kill through the defendant's actions in pointing the gun at the employee, demanding that the employee open the door, and then firing the gun directly at the employee. The court held there was a preponderance of evidence to support that the defendant had attempted to commit a first degree murder and thus the application of the cross reference was affirmed.

4. ***Wesson v. Shoop,*** No. 20-3613 (11/9/21)
Post-Conviction Remedies; Confession, Miranda

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In his state court proceedings, the petitioner alleged that his confession should have been suppressed under Miranda v. Arizona, because he was intoxicated at the time he executed his Miranda waiver. The Ohio Supreme Court rejected the petitioner's claim, finding that the record demonstrated that he did not appear intoxicated at the time of the waiver. The state court found no police

coercion. The Sixth Circuit concluded the state court decision was entitled to deference under 28 U.S.C § 2254 (d) and affirmed the denial of relief.

5. ***United States v. Elmore***, No. 21-5121 (11/12/21)
Fourth Amendment, Search Warrants, Fruits of the Poisonous Tree

Elmore was on supervised release for a child pornography offense when his supervision was revoked for passion of additional child pornography. While incarcerated, a fellow inmate notified authorities that the defendant was bragging about abusing a minor and taking pictures of it, the pictures being hidden in the defendant's vehicle. Officers retrieved the key fob from the defendant's mother, and searched the vehicle. No child pornography was found. The defendant was released from prison two months later and his mother informed him of the search. The defendant then "suspiciously" inquired whether had given the officers any other key fobs. His mother than located two other key fobs which she turned over to the officers.

They obtained a search warrant and then search the fobs locating child pornography on one of the key fobs. The defendant moved to suppress the evidence which was denied.

On appeal, the court first held that the search warrant for the key fob was not the fruit of the poisonous tree from the first searches of the key fob and car. The court found that two months separated the searches so they were attenuated. The court ruled that the defendant's "suspicious" inquiry of his mother was an "independent action" that was the " product of the defendant's free will," and thus not the fruit of unlawful searches. The second search for the key fobs was not tainted by the original search and that the search warrant was supported by probable cause. The court affirmed the district court's denial of the motion to suppress.

6. ***United States v. Presley,*** No. 20-5213 (11/23/21)
Plea Agreements, Appeal Waivers

The defendant plead guilty to participating in a conspiracy to burglarize pharmacies and to a related assault of a police officer. In the defendant's plea agreement was the following appellate waiver: "In exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by 18 U.S.C. § 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range that the court establishes at sentencing." The parties also agreed to an offense level and allowed either party withdraw from the plea agreement if the district court rejected the offense level determination. The language specified, "it is the intention of the parties that the Court may accept or reject these stipulations immediately or after having an opportunity to review the presentence report, but may not modify them. If the Court rejects these stipulations either party may withdraw from the agreement."

At his plea hearing, the defendant was asked twice by the Court and confirmed twice that he understood his appeal waiver. At sentencing, the district court then went on to imposed a sentence based on an offense level that was higher than the number agreed by the parties. The defendant neither tried to withdraw his plea nor objected to the appeal waiver provisions.

On appeal, the court applied plain error review and held that the appeal waiver was enforceable. The court found no basis to believe that the defendant's plea was not knowing and voluntary. Further, the court ruled that there was no evidence introduced nor objections made to indicated that the defendant did not understand that the district court could sentence beyond the stipulated range in the plea agreement. At the hearing, the defense had actually argued in objection to the presentence report for an offense level higher than what was stipulated in the plea agreement.

The court found no plain error and dismissed the appeal based on the appeal waiver.

December 2021:

1. ***Harris v. United States***, No. 21-5040 (12/1/21)
Firearm Enhancements, 924(c)

The defendant was convicted of aiding and abetting second-degree murder, aiding and abetting attempted robbery and aiding and abetting using or carrying a firearm during a crime of violence. After the Supreme Court's decision in U.S. v. Davis, the defendant filed a habeas petition arguing that the district court relied on the invalidated residual clause of § 924 (c) to improperly enhance his sentence based on the firearm. The district court denied the petition. The defendant appealed. The court determined that the district court sentencing record was silent on the determination of which provision the district court relied on in finding that the robbery was a crime of violence. However, the court held nonetheless that the offense of aiding and abetting attempted robbery under § 2111 was a crime of violence for purpose of § 924(c) based on the elements clause. The attempted robbery offense "has, as an essential element, the use, attempted use, or threatened use of physical force against the person or property of another." The district court ruling was affirmed.

2. ***United States v. Hymes***, No. 20-5905 (12/3/21)
Sentencing Issues, 3553(a) factors

The defendant plead guilty to possessing crack cocaine with the intent to distribute. He was originally sentenced as a career offender and to 188 months. While his appeal was pending, the Sixth Circuit had decided *U.S. v. Havis,* which cast doubt over the district court's reading of the Sentencing Guidelines in Hymes. The court vacated the sentence and remanded for resentencing in light of Havis.

On remand the district court imposed a sentence within the guideline range for the offense and based on the drug amount. The defendant appealed. The court found the within guideline sentence to be appropriate. The court held the district court' had sufficiently addressed the defendant's various arguments for downward departures or variances based on lack of seriousness of his criminal history, likelihood of recidivism, post-offense rehabilitation and national sentencing disparities.

The court further held that the remand for resentencing was limited to the *Havis* issue, but even if it wasn't, post-offense rehabilitation does not warrant a downward variance when it is because "he had no write ups while incarcerated and he participated in prison programming." Additionally, a district court is not required to consider national sentencing statistics issued by the Sentencing Commission in deciding whether to depart from a guideline range. If the district court chooses to do so, it should "measure the data with extreme care." The sentence was affirmed.

3. ***United States v. Hruby***, No. 19-6363 (12/8/21)
Relevancy, FRE 414(a) – Prior Child Molestation

In most criminal cases, the prosecution cannot argue that a defendant is guilty of the charged offense because he committed similar acts in the past. But child-molestation cases are different. Here the defendant engaged with an undercover agent online and made arrangements to have sex with the agent's fictional children. After crossing state lines to meet ht children, the defense was arrested and he confessed to sexually abusing another child. At his trial, the government introduced the defendant's statements about abusing another child pursuant to FRE 414(a). He was convicted and appeal. The court held the admission of the defendant's statements under FRE 414
(a) was proper.

FRE 414(a) permits the government in a child molestation case to present evidence of prior instances of molestation of children. The court found that the district court had properly determined the conditional relevancy of the evidence under FRE 104(b) and ruled that a jury could reasonably find a preponderance of the evidence to believe the prior molestation had occurred. The court held that the defendant's confession alone was sufficient to support the admission of the evidence and that no corroborating evidence was needed.
The admission of the evidence and conviction was affirmed.

4. ***United States v. Hall***, No. 20-4128 (12/16/21)
Expert Witness Testimony, FRE 702

The defendant was convicted by a jury for engaging in a drug trafficking conspiracy. At his trial, the government presented two agents who testified both as experts and fact witnesses regarding drug trafficking lingo and identification of the defendant by his voice. He appealed the admissibility of the testimony.

The court held that the agents were properly qualified through experience as having an understanding of the drug trade and the associated terminology. The agents' interpretation of lingo used in the recorded calls was not simply based on the investigation as a whole (which had been prohibited in other cases but rather was based strictly on the agents' personal knowledge of the calls themselves, and was helpful to the jury in interpreting the meaning of the "slang and jargon" involved.

Regarding the identification of the defendant's voice, the court held that the agents were familiar with the defendant's voice from the course of the investigation, and properly listened to and identified his voice in jail calls relating to drugs.

It was not error to fail to clearly demarcate the difference between expert and lay opinion portions of the testimony where the district court provided a limiting jury instruction about the differences in testimony types. Conviction was affirmed.

5. ***United States v. McCall***, No. 21-3400 (12/17/21)
Post-Conviction Remedies, Compassionate Release

The defendant plead guilty to conspiracy to possess and distribute heroin in 2015 and sentenced to 235 months. Had he not been a career offender his guidelines would have been 77-96 months. He subsequently moved for compassionate release from prison based on three factors: (1) he would not have been a career offender based on the subsequently decided Sixth circuit case of *U.S. v. Havis*; (2) the COVID conditions in the prison and his susceptibility to getting covid; and (3)his post offense rehabilitation. The district court held it could not consider a non-retroactive change in the law in deciding compassionate release and denied the motion.

On appeal, the court held that the district court erred in failing to consider the petition for compassionate release on its merits. Non-retroactive changes in the law that would affect the defendant's original sentencing determination may be considered as one of the several factors in deciding whether a defendant has shown extraordinary and compelling circumstances to justify compassionate release. The district court's ruling was reversed.

January 2022:

1. ***Cunningham v. Shoop***, No. 11-2005, 20-3429 (1/10/22)
Post-Conviction Remedies, Juror Bias

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The jury foreperson at the trial worked as an investigator for the local children's services agency and was also a counselor for a victims' service agency.

In state post-conviction proceedings, the petition alleged the foreperson had received prejudicial information about the petitioner and her colleagues. The state court denied the claim without discovery or an evidentiary hearing, reasoning that the petitioner had failed to demonstrate that the foreperson was aware of the prejudicial information at the time of their jury service. The petitioner also raised a second juror bias claim following discovery in his federal habeas corpus proceedings and returned to state court to exhaust it. The claim was dismissed as procedurally defaulted.

The Sixth Circuit concluded that the federal courts were not limited by the states courts as the refusal to grant an evidentiary hearing in state court was unreasonable. The Sixth Circuit remained the case to the district court for evidentiary hearings on both claims of juror bias.

2. ***In re Manning***, No. 21-2682 (1/5/22)
Post-Conviction Remedies, Mandatory life Sentences for Juveniles

The petitioner was convicted of first degree murder in Michigan state court at the age of 18 years old and sentenced to life imprisonment without the possibility of parole. The peititoner moved for authorization to file a second or successive peitition under 28 U.S.C. § 2244(b), alleging that *Miller v. Alabama*, 576 U.S. 460 (2012), which prohibits mandatory life sentences for persons under the age of 18 at the time of their offense should be extended to those who were 18 years old at the time of their offense. The Sixth Circuit denied the motion finding that although *Miller* is retroactive, the petitioner sought to extend the holding and authorization under § 2244(b) is unavailable under that circumstance.

3. ***Mizori v. United States***, No. 19-2433 (1/20/22)
Post-Conviction Remedies; IAC

The petitioner was convicted in a five-person conspiracy to sell drugs and guns. At sentencing, two government witnesses testified that the petitioner was a manager or supervisor within the DTO conspiracy, and this resulted in an increase of his guideline range. Defense counsel did not call any witnesses at trial.

Appearing *pro se*, the petitioner filed a subsequent motion to vacate under 28 U.S.C. § 2255, alleging that his attorney had been ineffective in failing to call witnesses to rebut the government's claim that he was a manager/supervisor in the DTO conspiracy. In his motion he attached affidavits from three co-conspirators claiming that the petitioner did not "have any control, supervision or supervisory authority" in the conspiracy. The district court denied the motion to vacate. The petitioner filed a motion under Fed. R. App. P. 4 (a)(5) to extend the time for appeal, btu the district court rejected it. Petitioner had been under high-security without access to mail or a law library.

The Sixth Circuit held that the petitioner did not need a certificate of appealability to appeal from the denial of his motion to extend the time to file a notice of appeal. The Sixth Circuit further held that the denial of the motion to extend the time to appeal was an abuse of discretion and reversed the district court's order denying the petititoner's motion to extend under Fed. R. App. 4(a)(5).

4. ***United States v. Sadler*****,** No. 19-2217 (1/21/22)
(Attorney-Client privilege; 21 U.S.C. § 846 – Overdose Conspiracy

The defendant was charged in a thirteen co-defendant drug trafficking conspiracy to distribute heroin and crack cocaine. The defendant and one co-defendant proceeded to trial. Both were convicted at trial of conspiracy and causing overdose deaths.

Among other offenses, the defendant was also charged with threatening government witnesses. During trial, the defendant's prior attorney testified that he met with the defendant shortly before threats were made and provided a copy of the witness list and grand jury testimony to the defendant, which identified the cooperating witnesses.

On appeal, the defendant challenged the sufficiency of the evidence for the conspiracy charges and the overdose, challenged the jury instructions and argued that his prior counsel's testimony was protected by the attorney-client privilege.

The court found that the evidence was sufficient for the conspiracy charges as the defendant was connected to the DTO through the leader and was seen with the leader during drug packaging and have fights over the control of the phones used for the drug sales. The defendant was also connected to one of the residences that was used for the DTO.

The court further found the evidence was sufficient to prove that the overdoses were the results of drugs distributed by the conspiracy. The court held that toxicology testing is not a prerequisite for a conviction under § 841(b)(1)(C). Evidence is sufficient where testimony established that victims took drugs sold by the coconspirators and the victims overdosed.

The court held that the attorney's testimony was properly admitted. It did not divulge the contents of any meetings or conversations the attorney had with the defendant beyond the facts that were conveyed to the attorney by the government; i.e. a witness list and grand jury transcript. The court held this testimony was considered unprotected by the attorney-client privilege and thus admissible.

The court did find that the district court erred regarding jury instructions for the overdose counts. When a count is based purely on a *Pinkerton* conspiracy theory of liability for drug overdoses, a district court is required to instruct the jury that the defendant can only be convicted if he or she was in the "chain of distribution" that put the drugs into the victims hands.

The defendant's conviction for the overdose death was vacated and the case remanded for a retrial.

5. ***United States v. Clark,*** No. 20-5722 (1/24/22)
(404(b) Evidence: Consciousness of Guilt)

Defendant moved in limine to exclude evidence of older CP found on computers in his residence while on trial for distribution of CP. D claimed he received the computers after the older CP had already been loaded onto them. Gov established that D submitted fabricated evidence with the motion and used the fabricated evidence at trial. On appeal, the court held that the fabricated evidence was properly admitted under FRE 404 (b) to show "consciousness of guilt" and affirmed the admission of the false evidence

6. ***United States v. Johnson***, 19-2418 (1/31/22)
(*Sixth Amendment: Right to Counsel/Self-Representation)*

Defendant was charged with unlawful imprisonment, assault of a domestic partner by strangulation, interstate domestic violence, witness tampering and assault. After going through numerous attorneys from the FPD to CJA panel, the district court held a hearing wherein the court allowed the defendant to represent himself with standby counsel.

On appeal, the defendant challenged the propriety of the Faretta hearing. The court held a de novo standard applied for review of the appropriateness of the Faretta inquiry. Upon review, the court held the district court's Faretta inquiry was improper. While a district court is not required to literally follow the Supreme Court's requirements from Faretta and the questions established for Faretta hearings in the Bench Book for United States Judges, it must nonetheless be "substantially similar."

Specifically, the district courts shall hold a formal colloquy to inform a defendant "of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open."

The court found that the district court erred in several respects in failing to follow the standard requirements, most notably in failing to advise the defendant of the potential penalties and in fact actively mispresenting to the defendant that he was not facing 50 to 70 years (which were actually less than the maximum penalties that the defendant was facing). After conviction, the defendant was sentenced to 72 years.

The court found the Faretta inquiry insufficient and reversed the defendant's conviction.

February 2022:

1. ***United States v. Hall***, No. 20-4128 (2/2/22)
(Expert/Lay Witness Testimony under FRE 701/702/901)

Government presented an agent who testified as both an expert and lay witness during D's conspiracy trial. Agent interpreted phone conversations, testified about indicia of drug trafficking, and identified the defendant's voice from phone calls.

On appeal, the Court held the agent could testify as both a expert and lay witness as the trial court provided a proper limiting instruction to the jury delineating the testimony.

The court further ruled that the agent was properly qualified as an expert in the drug trade based on his 21 years of experience and that he properly limited his testimony to interpreting the conversations and lingo used by the defendant's on that experience. The agent was also allowed to opine that the drug amount possessed during the stop was a trafficking amount. Lastly, foundation had been properly established under FRE 901 for the agent to identify the defendant's voice in phone calls based on past known recordings of the defendant's voice.

2. ***United States v. Cooper,*** 21-5209 (2/3/22)
(*Fourth Amendment: Consent to Search and Seizure)*

During the arrest of the defendant pursuant to an arrest warrant; officers conducted an unlawful protective sweep of the home uncovering a firearm beneath a mattress. Subsequent to the sweep, the officers gained the defendant's girlfriend's consent to search the home. The defendant was subsequently charged as a felon in possession of a firearm and he moved to suppress the evidence. His motion was denied.

On appeal, the court noted that the parties agreed that the protective sweep, during which the gun was located, was unlawful. Secondly, the court determined that the district court had applied the wrong legal standard to the question of whether the after acquired consent to search from the girlfriend was

valid. The court ruled that "inevitable discovery", as opposed to "attenuation," was the proper legal doctrine. Under the inevitable discovery doctrine, the district court must inquire whether the firearm would inevitably have been discovered based on the girlfriend's consent if the officer has not conducted the unlawful sweep.

The case was remanded back to the trial court with the directive for further proceedings to determine: (1) without the protective sweep, would the officers have sought consent; (2) would the girlfriend have given consent; and (3) would the search have then located the firearm.

3. ***Chinn v. Warden***, No. 20-3982 (2/4/22)
Post-Conviction Remedies, Brady Violations

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. He had presented an alibi defense at trial. In the state post-conviction proceedings, he raised 19 claims in an §2254 petition. The district court issued a certificate of appealability on three claims (1) whether the government suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) whether the trial court improperly admitted irrelevant and prejudicial testimony; and (3) whether the petitioner was denied his right to present mitigating evidence to the sentenced on remand and was sentenced to death without a valid recommendation from the jury. The petitioner did not address this third issue and waived its consideration.

The Petitioner argued that *Brady* was violated where mental health records of a juvenile eyewitness which placed the witnesses IQ at 54 or 48 and "mental retardation" were suppressed at trial. He alleged the records were exculpatory impeachment records that would have undermined the reliability of the witness' identification. After an evidentiary hearing the state court ruled that the petitioner was not prejudiced by the suppression of the records when viewed through both a AEDPA and *Bray* lens and found that the mental health records were immaterial. The Sixth Circuit affirmed the denial of habeas corpus relief.

4. ***United States v. Wellman***, 20-5876 (2/11/22)
(Fifth Amendment: Prosecutor Conduct; False statements and Obstruction)

The defendant was a real estate developer who through straw donations, attempted to influence city officials to utilize his firm. He encouraged the straw donors to lie to FBI about the purpose of the donations. However in the grand jury, the donors admitted the defendant was behind the bribes.

During the defendant's trial for obstructing justice and making false statements to the FBI, the government requested at a side bar that a witness be warned of perjury and advised of her Fifth Amendment rights. The witness was represented by counsel, after consultation with counsel, the witness changed her story to make it consistent with her grand jury testimony. He was convicted of aiding and abetting making false statements to the FBI.

On appeal, the defendant argued that the prosecutor had committed misconduct by threatening to change a favorable witness for the defense and that his statements were not material and that jurisdiction was not established for the offense.

The court held that to establish prosecutorial misconduct, a defendant must show that the government "substantially interfered with the witness' free and unhampered determination to testify." The court found that the witness did in fact contradict her grand jury testimony and that the prosecutor was merely pointing out the potential perjury to the district court. Additionally, the witness' own attorney warned her about the potential for perjury, thus "insulating her from direct government coercion."

Additionally, the court held that the false statements were material and whether the defendant's "falsities fell within the realm of information already known to the FBI is irrelevant to the materiality inquiry." All that is required is that the statements are made with the purpose of misdirecting the agents on a material matter. The conviction was affirmed.

5. ***United States v. Russell*****,** 20-3756 (2/16/22)
(Fourth Amendment – Reasonable Expectation of Privacy)

Russell was a passenger in a car that was stopped and searched. Two handguns were found in the vehicle resulting in a 922g charge against Russell. He moved to suppress the firearm. The government failed to raise standing in the district court; however, the district court *sua sponte* held that the defendant lacked standing to challenge the search. On appeal, the defense argued the government forfeited and waived their objection to standing. The court found that the government did not waive the issue of standing in district court and thus can raise the argument for the first time on appeal and prevail if it also satisfies the plain-error inquiry under Fed. R. Crim. P. 52(b).

The court found that it was clear that the defendant, as a passenger in the car, had no standing to challenge the search. The defendant did not claim ownership or possessory interest in the car, nor was he the driver. The court held that the issue of standing affected the government's substantial rights because the suppression of the evidence would mean that the defendant

would go free. Accordingly, the court found the plain error standard was satisfied and affirmed the denial of the suppression motion.

6. ***Johnson v. Bauman***, No. 20-2181 (2/22/22)
Post-Conviction Remedies; IAC and Sixth Amendment

The petitioner pleaded no contest in Michigan state court to three state criminal offense; delivering 50-449 grams of cocaine; delivering less than 50 grams of heroin and one count of possessing marijuana. He subsequently sought state post-conviction relief alleging ineffective assistance of counsel, and also that his sentence violated his Sixth Amendment rights because it was based on facts that had neither been admitted nor proven beyond a reasonable doubt. He sought to withdraw his plea or be resentenced.

The petitioner then sought federal habeas corpus relief while his state petition was still pending, four years later. In the federal petition, he alleged that he was not required to satisfy exhaustion requirements due to the inordinate delay in the state proceedings.

The Sixth Circuit dismissed the federal petition, noting that the state petition proceedings were not idle and they were allowing the petitioner discovery to develop his ineffective assistance of counsel claim. The district court's dismissal for failure to exhaust was affirmed.

7. ***United States v. Johnson***, No. 20-6249 (2/23/22)
Post-Conviction Remedies; Career Offender

The petitioner was originally sentenced to 300 months as a career offender for convictions including distribution of 9 grams of crack cocaine. After a number of appeals, the career offender designation was removed, but the court affirmed the 300 months sentence. After the First Step Act made the reduced crack penalties retroactive, the defendant against sought habeas relief, arguing that his new guideline range was 160-185 months. The district court agreed with the amended guideline range but upheld the 300 months sentence as still appropriate.

On appeal, the court held that the district court's First Step Act resentencing was substantively unreasonable as the district court gave little weight to the need to avoid unwarranted sentencing disparities in imposing a 115 month upward variance from the new guideline range and at the same time" unduly weighed the nature of Johnson's offense, his criminal history and characteristics, and the need for the sentence to deter future criminal conduct and protect the public." The court vacated Johnson's sentence and remanded for resentencing.

March 2022:

1. ***United States v. Hills***, No. 19-3372 (3/3/22)
   Guideline Issues, 2C1.1 – Bribery – Loss Amount

   The defendants were doctors involved in a racketeering scheme who committed various fraud and bribery offenses connect to their employment in the Dental Department of a publicly owned hospital.

   The scheme permitted certain doctors to work a "flex" scheduled wherein they worked 4-day work weeks but were paid for 5 day work weeks. He district court applied the bribery guideline at USSG § 2C1.1 and determined that the loss amount was in excess of $600,000 based on the extra salaries paid to the doctors for less than full time work.

   On appeal, the court found the loss calculation to be correct. The court held that, by reference to the loss calculation guidelines at § 2B1.1, the district court had properly attributed the loss based on the 20% more salary that the hospital paid the doctors for less than full time work. The court held that this amount could not be offset by the overall profits that the doctors generated for the hospital during this time period. The sentence was affirmed.

April 2022:

1. ***United States v. Nunley***, No. 21-5471 (4/1/22)
2. ***United States v. Gould***, No. 20-5284 (4/7/22)
3. ***United States v. Hofstetter***, No. 20-6245 (4/11/22)
4. ***United States v. Matthews***, No. 20-6156 (4/11/22)
5. ***Burns v. Mays***, No. 11-5214, 14-6089 (4/13/22)
6. ***United States v. Gardner***, No. 20-1118 (4/25/22)
7. ***United States v. Meeks***, No. 21-3588 (4/26/22)
8. ***United States v. Sears***, No. 21-3545 (4/26/22)
9. ***United States v. Estrada-Gonzalez***, No. 22-3001 (4/26/22)
10. ***United States v. Carson,*** No. 21-3780 (4/27/22)

May 2022:

1. ***United States v. Ramirez-Figueredo***, No. 21-1221 (5/2/22)
2. ***United States v. McKenzie***, No. 21-5295 (5/3/22)
3. ***Portis v. United States***, No. 20-3776 (5/3/22)
4. ***United States v. Rife***, No. 20-5688 (5/5/22)
5. ***United States v. Miller***, No. 21-5598 (5/12/22)
6. ***United States v. Whitley***, No. 21-1955 (5/18/22)
7. ***United States v. Zabel***, No. 21-5766 (5/23/22)
8. ***United States v. Helton***, No. 21-5144 (5/24/22)

June 2022:

1. ***United States v. Maddux***, No. 20-5972 (6/22/22)
2. ***United States v. Bell***, No. 21-5008 (6/24/22)
3. ***United States v. Ziesel***, No. 20-4240 (6/29/22)
4. ***United States v. VanDenmark,*** No. 21-3470 (6/30/22)

July 2022:

1. ***United States v. Williams,*** No. 21-5856 (7/6/22)
2. ***United States v. McCallister***, No. 21-4011 (7/7/22)
3. ***United States v. Inman***, No. 21-1505 (7/7/22)
4. ***United States v. Belcher***, No. 21-5414 (7/12/22)
5. ***United States v. Sharp***, No. 21-3828 (7/22/22)
6. ***United States v. Butts***, No. 21-3783 (7/26/22)

August 2022:

1. ***United States v. Musaibli***, No. 22-1013 (8/2/22)
2. ***Gabrion v. United States***, No. 18-2382 (8/4/22)
3. ***Mitchell v. United States***, No. 20-6031 (8/5/22)
4. ***Wallace v. United States***, No. 20-5764 (8/5/22)
5. ***United States v. Stevenson***¸No. 21-3856 (8/9/22)
6. ***United States v. Fields***, No. 20-5521 (8/10/22)
7. ***United States v. Ozomaro***, No. 21-1329 (8/11/22)
8. ***Mynatt v. United States***, No. 21-5932 (8/12/22)
9. ***United States v. Iossifov***, No. 21-5063, 21-5404 (8/12/22)
10. ***United States v. Brown***, No. 21-5147 (8/12/22)
11. ***United States v. Paulk***, No. 21-2722 (8/17/22)
12. ***United States v. Clark***, No. 21-6038 (8/18/22)
13. ***United States v. Nedelcu***, No. 20-6328 (8/22/22)