

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, under the Precedential Value tab.

I. Sentencing Issues

A. 3553(a) factors and issues

Procedural Reasonableness

U.S. v. Thomas-Mathews, 21-1824 (8/25/23)

The defendant was convicted of possession of crack cocaine with the intent to distribute and two firearm convictions under 18 USC § 924(c). At sentencing, the defendant requested that the district court consider a downward variance from the crack guideline based on: (1) a policy disagreement with the 18:1 crack to powder ratio (with which the government agreed); (2) application of the crack guideline based on the circumstances of the case; and (3) the defendant's history and characteristics. The district court rejected the downward variance and the defendant appealed. The court held that the district court's sentence was procedurally unreasonable. First, the court held that the district court appeared to treat the 18:1 ratio as mandatory based on its repeated assertions that Congress set that amount, and had at least two opportunities to change it, but did not. As such, this was error. Second, the court found that the district court failed entirely to consider the defendant's argument that the 18:1 ratio created unwarranted disparity in relation to the specifics of his case. Third, the court ruled that the district court did not adequately address his arguments for a downward variance based on his history and

characteristics. The court found the district court's assessment of the § 3553 factors to be "terse" and considered only the defendant's criminal history. The court concluded: "Thus, while something less than a factor-by-factor recitation is acceptable, something more than a simple and conclusory judicial assertion that the court has considered 'the nature and circumstances of the offense and the history and characteristics of the defendant' is essential." As such, the case was remanded. The court declined to refer the case to a different district judge for resentencing.

B. Guideline issues

2A1.1 – Attempted Murder

U.S. v. Miller, 22-5624 (7/12/23)

During a traffic stop, the defendant indicated that she did not want to go back to jail, refused to unlock and open her car door, and shot the officer in the shoulder with her firearm. She was subsequently convicted of being a felon in possession of a firearm. At sentencing, the district court imposed a cross reference under the sentencing guidelines to USSG § 2A1.1, for attempted murder of the officer. On appeal, the court held that the cross reference was proper. Even though the defendant claimed that she meant only to scare the officer, the court found that the district court made sufficient findings to

support that the defendant shot the officer with the intent to kill. Specifically, the defendant's actions, as described above, combined with the fact that she shot the officer at point blank range, provided sufficiently plausible support for specific intent to commit murder. As such, the application of the cross reference and the sentence were affirmed.

2B1.1 – Fraud Loss

U.S. v. Smith, 22-1506 (8/23/23)

The defendants were convicted of participating in a bank fraud scheme that involved a number of banks. At sentencing, the district court imposed a sentence based on a loss amount that included the acts of coconspirators at different banks. Further, the district court added intended loss to the calculation. On appeal, the court held that these loss computations were correct. Pursuant to USSG § 2B1.1, a defendant is liable for loss that the defendant personally causes as well as any relevant conduct loss under §1B1.3. Relevant conduct loss includes actions of coconspirators that were within the scope of the jointly undertaken activity, in furtherance of the criminal plan, and reasonably foreseeable. The court found that the fraud committed by the coconspirators at different banks was properly attributable to the defendants as relevant conduct because (1) a single scheme existed among all conspirators to steal money from people's bank accounts; (2) they used identical *modus operandi*; (3) they "shared the stolen information, shared the account information for depositing the stolen funds, and used the same specific script when spoofing the bank's phone number"; and (4) all the defendants knew each other, knew the scope of the scheme, and communicated with each other. As such, the court "easily" found that the total fraud loss for the whole conspiracy was attributable to the defendants as relevant conduct.

Regarding the intended loss figures, the court held, relying on its recent decision in U.S. v. You (see below), that "intended loss" is properly considered as part of "loss" under § 2B1.1, even

though the intended loss concept is contained only in the application note, not the body of the guideline. The court elaborated that the term "loss" in the text of § 2B1.1 is ambiguous as to meaning, and that the "intended loss" definition in the application note merely explains, but does not expand, the concept of loss. As such, the court ruled that intended loss is appropriately considered in determining loss under § 2B1.1 and the sentence was affirmed.

U.S. v. You, 22-5442 (7/11/23)

The defendant was convicted of stealing trade secrets from her former employer. At sentencing, the district court applied an estimate of loss, for purposes of USSG §2B1.1, based on the defendant's intended loss in the case. The defendant challenged the intended loss amount on appeal. First, the court held that intended loss is a proper measure of loss for purposes of § 2B1.1. This is true even though the term intended loss appears only in the application note to the guideline, but not the body of the guideline itself. The court found, however, that the district court's estimation of intended loss was not reasonable. Because there was no actual loss, the district court attempted to determine "loss" based on potential gain to the defendant. The court emphasized that the district court failed to delineate between projected profits that the defendant would have made by selling trade secrets, as opposed to retail sales numbers. In so doing, the district court failed to project any business cost that would have been incurred in the making the projected sales. Under the guidelines, the costs would have to be offset in determining the any actual profit the defendant would have made. Given this failure, the court found the loss determination to be entirely speculative. Therefore, the case was remanded to the district court for resentencing.

2G1.1(a)(1) – Promoting Commercial Sex Acts

U.S. v. Pennington, 22-5181 (8/21/23)

The defendant was charged with human trafficking under 18 USC § 1591. While the case was pending, the defendant threatened witnesses

and, as a result, was charged with witness tampering in violation of 18 USC § 1512(b)(1). The defendant pled guilty to the witness tampering charge in return for dismissal of the human trafficking offense. At sentencing, the district court applied a cross reference from the witness tampering guideline (USSG § 2J1.2). This cross reference, by way of reference to § 2X3.1, led the court to application of the guideline for the “underlying offense,” USSG § 2G1.1(a)(1), promoting a commercial sex act. Under this latter guideline, the district court started at a base offense level of 34. The district court then applied reductions, and sentenced the defendant to 29 months in prison, which was the result of a downward departure. The defendant appealed the application of the cross reference and base offense level of 34. The court held that, pursuant to the plain language of § 2G1.1(a)(1), a defendant is only subject to the base offense level of 34 where the defendant was convicted of human trafficking under 18 USC § 1591; otherwise, the base offense level is 14. The court found that, although the defendant was charged under § 1591, he pled guilty only to witness tampering, pursuant to § 1512(b). Thus, because the defendant was not convicted of human trafficking, he could not be sentenced under the higher base offense level. As such, the case was remanded for application of the lower base offense level of 14. Because the defendant had already served his sentence by the time the appeal was decided, the court directed the district court to consider an appropriate term of supervised release under the circumstances.

2K2.1(b)(6)(B) – Firearms – Another Felony

U.S. v. Wilson, 22-3799 (7/28/23)

The defendant was involved in a shootout. As a result, he was convicted of being a felon in possession of a firearm. At sentencing, the district court applied a 4-level enhancement for possessing the firearm in relation to another felony, namely felonious assault. The defense attorney argued the enhancement was inapplicable because the defendant fired the gun

in self-defense. The district court refused to entertain the argument, repeatedly telling counsel to “take your seat,” that the court “did not care,” and other similar statements. On appeal, the court held that the case had to be remanded. Under Ohio law, self-defense is a valid defense to felonious assault. The defendant bears the burden of proving it as an affirmative defense. Thus, the proper procedure for the district court was as follows: (1) the government must prove by a preponderance of the evidence that the defendant committed felonious assault; (2) the burden of production then shifts to the defendant to establish the elements of self-defense; and (3) the government would then be required to disapprove one of the elements of self-defense by a preponderance of the evidence. Because the district court ignored the law and made none of these findings, the case was reversed and remanded for resentencing.

2T1.1 – Tax Loss

U.S. v. Chappelle, 22-1969 (8/15/23)

The defendant repeatedly changed the names of his various companies in a continuing effort to avoid withholding and paying income, social security, and Medicare taxes. As a result, he was convicted of tax evasion. The defendant objected to the tax loss figure determined by the district court. He argued that the tax loss had been attributed to the wrong company due to a misidentification of the company’s employer identification number. At sentencing, the district court corrected the mistake and attributed the loss to the correct company of the defendant, but still counted it as overall tax loss caused by the defendant. On appeal, the defendant argued that attributing the loss for the corrected company was error. The court held that the defendant had not properly preserved the issue for appeal. In order to preserve an objection to loss, the defendant must state the precise grounds for the objection and provide supporting evidence as necessary. In the district court, the defendant merely objected that the loss was attributed to the wrong company. The defendant failed, however, to provide a basis

as to why that loss should not be included in the total tax loss in the case. As such, the court applied plain error. Under this standard, the court found that the defendant used a number of companies in this fashion all with a goal of avoiding taxes. As such, the tax loss was all properly countable to the defendant himself as loss under § 2T1.1, and the sentence was affirmed.

2X1.1 – Conspiracy

U.S. v. Velasquez, 21-4106 (8/28/23)

The defendant was convicted of participating in a conspiracy to use interstate commerce to commit murder-for-hire, in violation of 18 USC § 1958(a). At sentencing, the district court applied the cross reference in USSG § 2E1.4, which refers to the guideline applicable to the “underlying conduct.” The district court determined that the underlying conduct was conspiracy to commit murder, and accordingly referred to the conspiracy guideline at § 2X1.1. Under this guideline, a defendant found guilty of conspiracy receives a 3 level reduction in offense level, unless the defendant completed all the acts necessary for the substantive offense, which in this case was conspiracy to commit murder. The district court denied the 3 level reduction and the defendant appealed. The court held that § 2X1.1 was not applicable at all to the guideline calculation in the case. Pursuant to its terms, § 2X1.1(c) provides: “when an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.” The court found that the guideline applicable to the underlying offense was § 2A1.5, which provides a base offense level of 33 for a conspiracy to commit murder. Because § 2A1.5 specifically covers conspiracy, no reference to § 2X1.1 is required. Therefore, the district court was correct in declining to apply a 3 level reduction under that section and the sentence was affirmed.

3B1.3 – Abuse of Position of Trust

U.S. v. Johnson, 21-3979 (8/18/23)

The defendant was an executive assistant to a Cleveland Councilman (who was also prosecuted) involved in an elaborate fraud scheme. At sentencing, the district court imposed a two-level enhancement in the defendant’s sentence for abuse of a position of trust, pursuant to USSG § 3B1.1. On appeal, the court held that application of the abuse-of-trust enhancement was proper. The court found that, although the level of discretion afforded to executive assistants varied, the defendant had broad discretion to “pay bonuses to family and friends of both himself and [the councilman].” In large part, he had the unsupervised authority to administer the City of Cleveland’s property. He had a high degree of trust to carry out public affairs and was seen to act with the councilman’s authority. As such, the court found that the district court properly determined that the defendant was in a position of trust for purposes of the guideline section and the enhancement was affirmed.

3B1.1 – Leadership

U.S. v. Minter, 22-5600 (8/31/23)

On multiple occasions, the defendant paid two couriers to transport drugs from Detroit and return with drug proceeds. The couriers testified that the supplier in Detroit was the supervisor of the organization, and that the defendant was also a supervisor. Upon the defendant’s conviction for drug trafficking, the district court imposed a two-level enhancement for leadership, under USSG § 3C1.1. On appeal, the court held that the district court properly determined that the defendant was a leader or organizer. In order for the enhancement to apply, the defendant must do more than exercise control over “property, assets, or activities.” As such, the defendant must exercise control over at least one participant in the scheme. Moreover, the court held that a buyer-seller relationship is not sufficient to establish this control. The court found that the defendant told the couriers where and when to

meet him to deliver drugs, where and when to pick up cash to transport to Detroit, and paid them cash for their trips. The money the defendant paid to them was a delivery fee, rather than the value of the drugs. Thus, all factors supported the conclusion that the defendant was a leader in the organization, and that he was not in a buyer-seller relationship with the couriers. As such, the application of the enhancement was affirmed.

5K1.1 - Cooperation

U.S. v. Smith, 22-1909 (7/31/2023)

The defendant was charged with possession with intent to distribute 50 grams or more of methamphetamine. As a repeat offender, he faced a statutory mandatory minimum of 180 months. The defendant cooperated and supplied information to the government. While the defendant believed he earned a 4-level downward departure for his information, the government only requested a 1-level departure pursuant to USSG § 5K1.1 because some of the defendant's testimony was not truthful. The district court decided that a 2-level downward departure was appropriate. The district court determined that the appropriate starting point for this departure was offense level 32, which corresponded to a guidelines range of 168-210 months. The district court chose this range because the 180 month mandatory minimum sentence fell within the middle of this range. Applying the 2-level departure for cooperation, the district court arrived at offense level 30, and a range of 135-168 months. The district court imposed a sentence of 158 months incarceration. The defendant appealed. The court held that the extent of a downward departure based on cooperation is not appealable, however, the defendant may challenge the starting guideline range for the departure. The court determined that, because the statutory mandatory minimum was 180 months, the district court could have chosen a starting range of either 32 (the range chosen) or a 31 (151-188). The court ruled that the district court was well within its discretion to use offense level 32 as the proper starting point

given the statutory mandatory minimum, the defendant's untruthfulness in interviews with the government, and the supporting § 3553(a) factors. Thus, the sentence was affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

U.S. v. Campbell, 22-5567 (8/10/23)

At the defendant's sentencing for being a felon in possession of a firearm, the district court determined that he was an armed career criminal based on prior convictions for robbery and drug trafficking. The defendant argued on appeal that: (1) the Tennessee robbery was not a violent felony under the ACCA; and (2) the drug trafficking crimes from Tennessee and Virginia were not countable as separate offenses. First, the court held that Tennessee robbery, which requires "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," was a violent felony under the elements clause of the ACCA. Further, the court ruled that the robbery offense required at least "knowing or purposeful" conduct, which satisfied the *mens rea* requirement of at least reckless conduct. Second, the court held that the drug trafficking crimes, which occurred months apart and in different locations, were "on occasions different from one another" for purposes of the ACCA. Thus, they were separately countable. Finally, the court ruled that prior Sixth Circuit precedent does not require submission of the separateness of the prior convictions to a jury, however, the court noted that the Supreme Court's decision in Wooden v. U.S. may require as much. Nonetheless, "the defendant admitted that he committed the ACCA predicates on four different dates, each separated by months or years," so the issue was mooted. Thus, the sentence was affirmed.

U.S. v. Wilkes, 22-1436 (8/11/2023)

The defendant plead guilty to a single charge of being a felon in possession of a firearm. The charge carried a mandatory minimum sentence of

15-years, pursuant to the ACCA, because he had 4 prior felony drug convictions in Michigan for delivery or manufacture of cocaine. The defendant objected on the basis that Michigan law sweeps more broadly than federal law because: (1) federal law excluded [¹²³I] ioflupane at the time of his sentencing while Michigan did not; and (2) Michigan’s schedule of controlled substances at the time of his sentencing included all of cocaine’s stereoisomers, while the federal schedule only included cocaine’s optical and geometric isomers, which he asserts do not include all of cocaine’s stereoisomers. The district court overruled those objections, and the defendant appealed. The court held in abeyance the defendant’s challenge based on the [¹²³I] ioflupane in light of the Supreme Court’s grant of certiorari in Jackson v. U.S., No. 22-6640 (U.S. Jan. 24, 2023), which will consider this issue. Regarding the second issue, however, the court affirmed the district court’s ruling. The court held that as follows: “the federal statutory term—optical and geometric isomers—is coextensive with the Michigan statutory term, stereoisomers. Accordingly, we conclude that Michigan law does not cover more isomers of cocaine than federal law and the district court properly rejected the defendant’s contrary argument.”

2K2.1 – Firearms – Prior Offenses

U.S. v. Jones, 22-1280 (8/29/23)

Upon the defendant’s conviction for being a felon in possession of a firearm, the district court determined that the defendant had one prior conviction that qualified as a controlled substance offense, namely a Michigan conviction for drug trafficking. As such, the defendant’s sentence was enhanced under USSG § 2K2.1. On appeal, the defendant argued that the Michigan definition of a “controlled substance” was broader than federal law, and thus, the Michigan conviction could not qualify for the enhancement. The court held that the definition of the term “controlled substance offense” under USSG § 4B1.2(b)(2) specifically references an offense under “federal or state law.” As such, the court ruled that the

Sentencing Commission intended for state law to provide the definition of a what is a controlled substance for purposes of prior state convictions. Accordingly, application of the enhancement was affirmed.

III. Evidence

A. Article IV – Relevancy

404 & 405 – Character Evidence/Bad Acts

U.S. v. Johnson, 21-3979 (8/18/23)

The defendant was a Cleveland Councilman who was charged with a number of fraud related offenses. At trial, the defendant elicited testimony from a government witness that bolstered the defendant’s reputation for truthfulness. This prompted questions in the government’s redirect examination about instances of lack of truthfulness of the defendant. Further, the defendant testified on direct examination and explained why his name was not on a donation (for which he claimed a tax deduction). This prompted government cross examination about the defendant’s improper use of those funds for other purposes. Upon his conviction, the defendant appealed the admission of this evidence. First, the court held that the government’s redirect of its own witness about the defendant’s lack of truthfulness was proper. Pursuant to FRE 405, a party is permitted to question a character witness about specific instances of the person’s conduct. The court found that once the defendant opened the door with the government witness by asking about his own reputation for truthfulness, the government was permitted to question the witness about specific instances of the defendant’s dishonesty. Moreover, the court noted that FRE 607 specifically permits a party to cross examine its own witness. Second, the court held that the government’s cross examination of the defendant about his improper use of the donation funds for other purposes was proper. Normally, FRE 404(b) precludes the use of prior bad acts. But the court found that in this instance, the defendant opened the door to discussion about his use of the

donation funds for other purposes by testifying on direct examination about the reasons why he left his name off the donation. Thus, the cross examination was proper to impeach the defendant's credibility. Moreover, the prosecutor was appropriately permitted to mention the defendant's dishonesty in closing argument. Accordingly, admission of the evidence was affirmed.

404(b) – Prior Bad Acts

U.S. v. Jaffal, 22-3552 (8/14/23)

After being charged with possessing drugs with the intent to distribute and with firearms offenses, the defendant made phone calls from the jail. He discussed pills laced with fentanyl that he had received from Detroit, and that his associate needed to take care of the "Detroit business." The defendant objected under FRE 404(b) to admission of these phone calls at trial. The district court admitted the calls as evidence of intent, and upon his conviction the defendant appealed. The court first held that there was sufficient evidence to support that the calls occurred. The court noted that the government was not required to prove that the defendant actually received drugs from Detroit, but simply that the defendant made statements on the phone about the drugs. Second, the court ruled that the district court properly admitted the calls as evidence of intent, under FRE 404(b). The court found that the defendant was actually in possession of a fentanyl laced pill at the time of his arrest on the federal charges. Thus, the court concluded that, in the phone call, the defendant "was discussing the same or substantially similar narcotics as those that he was charged with distributing" in the federal indictment. As such, the evidence was probative of his intent. The court also held that the evidence was more probative than prejudicial. Finally, the court ruled that the entire recording was properly admitted because the other caller's statements on the recording simply gave context to the defendant's statements. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Veh. Stops

U.S. v. Smith, 22-1055 (7/24/23)

A suspect who was possibly driving a silver Chevy Malibu followed, and then shot, another driver. The defendant's silver Chevy Malibu was located in the vicinity based on footage from a nearby traffic camera. Thus, the officers showed the defendant's picture to the victim. The victim identified the defendant as someone he had "a beef" with in the past, and indicated that the victim's girlfriend had an argument with the defendant's child's mother the evening of the shooting. Based on this information, officers entered a Law Enforcement Information Network (LEIN) bulletin to stop the defendant's Malibu. Three days later, the defendant was stopped, and a gun and drugs were found in the Malibu. In his subsequent prosecution, the defendant moved to suppress the evidence, the district court denied the motion, and the defendant appealed. The court held that reasonable suspicion supported the stop and search. The court found that the description of the Malibu and its proximity to the shooting, the victim's identification of the defendant from the prior altercation, and the argument with the victim's girlfriend provided sufficient basis to believe the defendant was the suspect. Thus, reasonable suspicion supported the stop of the vehicle, and the district court's ruling was affirmed.

V. Fifth Amendment

C. Confessions/Testimonial Rights

Right to Remain Silent – Sentencing

U.S. v. Whitson, 22-5462 (8/10/2023)

In 2011, the defendant participated in two Hobbs Act robberies—along with co-conspirators—in an attempt to obtain drugs and cash. After various appeals and motions, the defendant got his 924(c) convictions vacated. In 2022, the defendant was resentenced on his remaining convictions. At his

resentencing, the district court found that because the defendant maintained that he was not guilty of the offenses charged by the government, the court could not deem the defendant to have been rehabilitated. The district court stated the defendant's sentence would be shorter if he admitted guilt. The district court made this statement despite the defendant's other evidence of rehabilitation, i.e., his exemplary record while incarcerated and his specific expression of remorse for the victims of these crimes. The district court proceeded to weigh the rest of the defendant's § 3553(a) factors and imposed a within-guidelines sentence of 360 months. The defendant appealed the procedural and substantive reasonableness of this sentence. The court found the district court plainly erred by using the defendant's exercise of his Fifth Amendment right against self-incrimination as a factor when fashioning his sentence. A district court cannot penalize a defendant for maintaining their innocence by discounting their evidence of rehabilitation and explicitly issuing a longer sentence because they refuse to admit guilt. Thus, the court found the district court plainly erred, and the defendant's sentence was procedurally unreasonable.

E. Miscellaneous Fifth Amendment

Due Process - Right to Fair Trial

U.S. v. You, 22-5442 (7/11/23)

The defendant was a chemical engineer of Chinese origin who was prosecuted for stealing trade secrets from her former employer to sell to the Chinese government. At trial, the government introduced the testimony of an expert and a company CEO (who the defendant tried to partner with) who each testified or provided deposition evidence that the Chinese were not trustworthy, were well known to steal technology, and may approve of stealing trade secrets to advance their economic interests. The defendant argued on appeal that this evidence appealed to racial prejudice against the Chinese, and "invited the jury to distrust the defendant by

invoking an ethnic, national stereotype," in violation of the Fifth Amendment. The court held that the evidence was proper. The court began by noting that appeals to racial or ethnic prejudice may violate a defendant's right to a fair trial under the Fifth Amendment where the evidence "substantially influenced the outcome of a trial." The court found, however, that the evidence in the case properly focused on the defendant's conduct by showing that she intended to benefit the Chinese government, and "that scientists in China generally knew about, and approved of, certain practices of the Chinese government." Any negative commentary about the Chinese was focused primarily on the Chinese government, not any distrust of the defendant as a person of Chinese origin. As such, the court ruled that the evidence otherwise did not "appeal to racial or ethnic stereotypes." Moreover, the court ruled that the district court had taken proper measures with each witness to avoid any racial disparaging. Finally, the court noted that the defendant had actually rejected the district court's suggestion for a limiting instruction related to the potentially prejudicial testimony. Thus, the court found no Fifth Amendment violation and affirmed admission of the evidence.

VI. Sixth Amendment

E. Indictment - Variance/Duplicity

U.S. v. Guerrero, 22-6015 (8/7/23)

The defendant was charged with participating in an 8-defendant conspiracy to launder drug proceeds. At trial, the defendant alleged that he and the other couriers were each involved in a separate conspiracy with the lead defendant, rather than a single conspiracy as alleged in the indictment. As such, the defendant claimed that a fatal variance occurred. On appeal, the court held that a fatal variance occurs when the evidence at trial proves facts that are materially different from what is charged in the indictment, and the defendant's case is prejudiced as result. Jumping straight to the issue of prejudice, the court ruled that the defendant was not adversely

impacted by the evidence. The court found that the defendant was tried alone, which minimized any prejudice. Further, only 4 other couriers were mentioned at trial. Finally, the trial lasted only 3 days, and thus the jury did not have to sort through much confusing evidence. As such, the court held that the defendant was not prejudiced by any error and the conviction was affirmed.

VIII. Defenses

E. Venue/Jurisdiction

U.S. v. Guerrero, 22-6015 (8/7/23)

The defendant was charged in the Eastern District of Kentucky with participating in a conspiracy to commit money laundering. The district court based venue on the fact that the defendant, from out of state, made phone calls to an undercover agent in Lexington, Kentucky. On appeal, the court held that venue was proper. Refusing to apply any foreseeability requirement, the court held that the defendant's act of making phone calls to a government agent in Lexington was sufficient to establish venue for the defendant to be prosecuted in the Eastern District of Kentucky. Accordingly, the conviction was affirmed.

M. Miscellaneous Defenses

District court recusal

U.S. v. Liggins, 22-1236 (8/3/23)

The defendant was charged with participating in a drug conspiracy in the Eastern District of Michigan. Initially, the defendant agreed to plead guilty, and requested to transfer a second drug case from the Western District of Kentucky for a joint resolution. Instead of pleading guilty, however, the defendant fired a number of attorneys and continued the case several years in the process. During a hearing related to the removal of one of the attorneys, the district court commented to the defendant as follows: "I'm tired of this case. I'm tired of this defendant. I'm tired of getting the runaround. . . . This guy looks like a criminal to me. This is what criminals do.

This isn't what innocent people, who want a fair trial do." Approximately two years later, the case proceeded to trial. Shortly before trial, the defendant moved for recusal of the district judge, pursuant to 28 USC § 455, based on bias demonstrated at the prior hearing. The court denied the motion, however, it apologized for its mistake and for becoming hostile with the defendant. The defendant was convicted at trial and he appealed. On appeal, the court held that § 455 requires district judges to disqualify themselves from proceedings in any case in which "their impartiality might reasonably be questioned." The court found that the district court had expressed personal bias against the defendant, which demonstrated "a deep-seated antagonism that would make fair judgment impossible." The court noted that the district court did apologize for its behavior related to the comments, but this occurred over two years after the comments were made and only upon the prompting of the defendant in a motion for recusal. Thus, the court held that recusal of the district judge was warranted. As such, the conviction was reversed, and the case remanded for retrial before a different district judge.

IX. Jury Issues

A. Jury Instructions

21 USC § 856(a) – Drug Involved Premises

U.S. v. Hofstetter, 20-6245 (8/29/23)

The defendants were operators of pain clinics who were charged with illegally dispensing controlling substances without authority. At trial, the district court instructed the jury that the question of whether a prescription was made within the usual course of practice was based on an objective standard. Additionally, the district court informed the jury multiple times that it had to find that the defendants knowingly and intentionally maintained a business for the purpose of illegally distributing a controlled substance in order to convict. After the defendants' conviction, the Supreme Court decided Ruan v. U.S., which held that the

government must prove that defendants knew that prescriptions were unauthorized under the law in order to convict for illegally dispensing narcotics. As such, the defendants' case was remanded for consideration in light of Ruan. The court first held that, because the defendants failed to object to the instructions at trial, the plain error standard applied. Considering the instructions given by the district court as a whole, the court found no plain error. The district court properly informed the jury that it had to find that the defendants knowingly maintained the clinic for the purpose of distributing controlled substances illegally. This was sufficient to satisfy Ruan. Moreover, the district court's instruction that the legality of a prescription is based on an objective standard was technically a correct statement of the law. Finally, the court confirmed that, pursuant to its recent decision in U.S. v. Anderson, a deliberate ignorance instruction is sufficient to satisfy the "knowingly" *mens rea* requirement of Ruan. As such, there was no plain error and the conviction was affirmed.

Lesser Included Offense

U.S. v. Jaffal, 22-3552 (8/14/23)

The defendant was charged with possession of narcotics with the intent to distribute. At the arrest scene, there was evidence that the defendant was using the drugs and had overdosed. At trial, an agent testified that the drug amount found would "usually" be inconsistent with personal use. Further, the government admitted recorded jail calls in which the defendant made statements about a fentanyl "business" in Detroit. At the close of trial, the defendant requested a lesser included offense instruction for mere possession of drugs, and the district court declined to provide the instruction. On appeal, the court held that the failure to provide the instruction on the lesser possession offense was error. A lesser included offense instruction must be given when: "(1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a

conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser." In the case, the court found that there was some evidence introduced that the defendant was in fact a drug user as opposed to a drug trafficker. Although the amount of drugs found at the defendant's residence was significant, the government never introduced evidence of its purity. Thus, the agent's testimony that it would take a user 23 days to consume that quantity of drugs, was somewhat questionable. Moreover, the fact that the defendant overdosed on the drugs lent support to his theory. Accordingly, the court found that a jury could reasonably have convicted on the lesser offense and acquitted on the greater had the instruction been given. Therefore, the conviction was reversed, and the case remanded for retrial.

X. Probation/ Supervised Release

Supervised release conditions

U.S. v. Campbell, 22-5567 (8/10/23)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court imposed a condition of supervised release that provided that if the defendant posed "a risk" to "another person," the probation officer could require the defendant to notify the person of the risk. The defendant challenged the condition as unconstitutionally vague. On appeal, the court held that the condition passed constitutional muster. The court ruled that a supervised release condition need not "spell out every one of its applications," but instead only must "fix an ascertainable standard of guilt." The court found that the district court clarified any confusion about the term "risk" in the condition by indicating that the risk referred to the defendant's "past criminal history." The court held that this cabining of the term risk avoided any vagueness problem and affirmed the sentence.

XI. Appeal

Scope of Remand

U.S. v. Pembroke, 21-1503 (8/21/2023)

The defendants, Pembroke and Johnson, were convicted of robbing two jewelry stores at gunpoint. At sentencing, the district court calculated guidelines ranges for the robbery, conspiracy, and felon-in-possession counts as amounting to 88-97 months for Pembroke, and 92-115 months for Johnson. However, both defendants were also charged with two-counts of § 924(c), which carried a combined 32-year additional mandatory minimum sentence. Thus, the district court granted a downward variance, and sentenced each defendant to 33 years. After the Supreme Court’s decision in U.S. v. Davis, which held § 924(c)(3)(B) was unconstitutionally vague, the defendants’ sentences were vacated and remanded. At resentencing, the government sought a 5-level enhancement for brandishing a firearm and a two-level enhancement for physical restraint of victims, neither of which they sought at the initial sentencing. The district court applied these enhancements in their sentencing calculations, which raised the defendant’s respective advisory ranges: 108-135 months for Pembroke (rather than 87-108); and 121-151 months for Johnson (rather than 100-125). The defendants appealed the district court’s application at resentencing of enhancements that were not sought or applied at the initial sentencing. The court found that when a district court conducts a de novo resentencing on a general remand, it may do the following: redo the entire sentencing process; revisit other findings related to the previous sentencing proceedings; reverse its prior findings; consider new objections to the PSR; take evidence and hear arguments it could have considered at the initial sentencing; and allow parties to raise issues which otherwise may have been waived. Further, the court found that appellate forfeiture applies only to sentencing issues raised and forfeited on appeal, not at sentencing and de novo resentencing. Thus, the government did not forfeit requesting these

enhancements simply because they did not seek them at the initial sentencing. Thus, the court affirmed the defendants’ sentences.

XII. Specific Offenses

18 USC § 924(c) – Firearm Enhancement

Nicholson v. U.S., 21-1768 (7/20/2023)

The defendants were charged with one count of conspiracy and one count of aiding-and-abetting assault under the Violent Crimes in Aid of Racketeering (“VICAR”) statute. At trial, the district court instructed the jury that either of those offenses qualified as a predicate offense for carrying a firearm in relation to a crime of violence under § 924(c). A jury convicted the defendants on these three counts (among others) and the convictions were affirmed on appeal. In a subsequent *habeas* petition, the defendants argued that the § 924(c) conviction was improper. The district court denied the petition and the defendant appealed. First, the court considered whether the VICAR statute suffices as a predicate crime of violence for the purposes of § 924(c). Using the categorical approach, the court found that VICAR conspiracy does not constitute a crime of violence, but that VICAR aiding-and-abetting assault with a dangerous weapon does. Second, the court considered whether the defendant’s § 924(c) convictions should be vacated, because the jury did not specify which VICAR offense they considered as the predicate crime of violence. The court found that since both convictions arose out of the same scheme, any error caused by the district court instructing the jury that both VICAR offenses counted as predicate crimes of violence for § 924(c) was harmless.

49 USC § 46306(b)(7) – Unauthorized Flying

U.S. v. Stewart, 22-3682 (7/10/23)

The defendant was a pilot who had his pilot’s airman certificate suspended by the FAA for misdeeds. The defendant never actually surrendered his certificate and continued to fly.

As a result, he was ultimately convicted of “knowingly and willfully serving as an airman without an airman’s certificate authorizing the individual to serve in that capacity,” pursuant to 49 U.S.C. § 46306(b)(7). On appeal, the defendant argued that the statute did not reach his conduct because he physically still possessed his certificate, thus he was not “without” it. The court held that the term “authorizing” in the statute required that the airman’s certificate actually be valid. Thus, the defendant’s conduct was in fact criminal and the conviction was affirmed.

XIII. Post-Conviction Remedies

Davis v. Jenkins, 21-3404 (8/16/23)

The petitioner was convicted of aggravated murder by a three-judge panel in Ohio state court and sentenced to death. The Sixth Circuit subsequently granted habeas corpus relief with respect to the petitioner’s death sentence, and the case returned to state court. A different three-judge panel sentenced the petitioner to death, notwithstanding the fact that the petitioner’s written jury waiver expressly required the case to be heard by the original panel of judges; the state courts nevertheless upheld the death sentence on direct review and in post-conviction proceedings. In his second round of federal habeas corpus proceedings, the petitioner alleged that his constitutional rights had been violated when the state courts enforced his 1984 jury waiver at his 2009 resentencing notwithstanding the unavailability of the original panel of judges. The Sixth Circuit agreed, and further concluded that 28 U.S.C. § 2254(d) did not preclude relief on the petitioner’s claim. The denial of habeas corpus relief was accordingly reversed.

Davis v. Jenkins, 21-3404 (8/16/23)

The petitioner was resentenced to death by a three-judge panel in Ohio state court after

previously obtaining federal habeas corpus relief with respect to his death sentence. One of the judges on the panel had previously sought a death sentence against the petitioner’s nephew while serving as a prosecutor. Furthermore, the nephew’s mother was one of the petitioner’s mitigation witnesses at his resentencing. As a result, much of the mitigation evidence that was presented at the petitioner’s resentencing had been at issue when the judge had prosecuted the petitioner’s nephew. The petitioner’s counsel nevertheless failed to move for the judge’s recusal. The Ohio state courts found that that the petitioner’s lawyer had made a reasonable tactical decision, and rejected his claim of ineffective assistance of counsel. The Sixth Circuit concluded that the judge’s previous involvement with the capital prosecution of the petitioner’s nephew created an impermissible appearance of bias, and further found that the petitioner’s trial lawyers had been ineffective in failing to seek the judge’s recusal. Furthermore, 28 U.S.C. § 2254(d) did not preclude relief. The denial of habeas corpus relief was accordingly reversed.

In re Hill, 20-3863 (8/25/23)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After litigation of his initial federal habeas corpus proceedings had fully concluded, the petitioner filed a second habeas corpus petition in district court. The petitioner argued that his petition was not “second or successive” requiring authorization from the Sixth Circuit, but rather “second in time” because it relied on a factual predicate that did not exist at the time his initial petition was being litigated. Specifically, the petitioner relied on new scientific reports questioning the reliability of bitemark evidence. The Sixth Circuit, sitting en banc, concluded that the petition was second or successive because the actual factual predicate for the claim was the

introduction of the bitemark testimony at trial, rather than the new scientific reports. The case was accordingly remanded to the panel to determine if the petitioner could satisfy the requirements for authorization under 28 U.S.C. § 2244(b)(2)(B).

Kares v. Morrison, 21-2845 (8/8/23)

The petitioner was convicted of criminal sexual conduct in Michigan state court. The petitioner subsequently filed a federal habeas corpus petition, which was dismissed as untimely. The Sixth Circuit reversed the district court's dismissal on timeliness grounds, concluding that the petitioner's motion for DNA testing in state court was a properly filed application for collateral review sufficient to toll the AEDPA statute limitations under 28 U.S.C. § 2244(d)(2). The petitioner's claim was nevertheless procedurally defaulted, and as a result the denial of relief was affirmed.

Keith v. Hill, 21-3948 (8/15/23)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After the petitioner's death sentence was commuted, the petitioner received authorization from the Sixth Circuit to file a successive federal habeas corpus petition raising a claim under Brady v. Maryland, 373 U.S. 83 (1963). The district court concluded that the petitioner failed to satisfy the gatekeeping requirements of 28 U.S.C. § 2244(b)(2)(B) and denied the petition. The Sixth Circuit affirmed, holding that the petitioner failed to make a sufficient showing of actual innocence to have his Brady claim heard on the merits.

McBride v. Skipper, 21-1042 (8/4/23)

The petitioner was convicted of murder in Michigan state court. The petitioner subsequently filed a mixed federal habeas

corpus petition containing an unexhausted claim; the district court dismissed the petition without prejudice. The petitioner filed a motion for reconsideration under Fed.R.Civ.Pro. 59(e) and argued for the first time that his federal habeas corpus proceedings should have been stayed and held in abeyance under Rhines v. Weber, 544 U.S. 269 (2005); the district court denied the motion, and by that time the AEDPA statute of limitations had run. The petitioner argued on appeal that the district court should have considered alternatives to dismissal on a sua sponte basis, but the Sixth Circuit disagreed and found no abuse of discretion in the district court's denial of the petitioner's Rule 59(e) motion. The judgment of the district court was accordingly affirmed.

Soto v. Siefker, 21-4229 (8/21/23)

The petitioner entered a guilty plea to child endangerment in Ohio state court in exchange for the dismissal of a manslaughter charge arising out of the same incident, which was the death of his two year old son. After serving a prison sentence for the child endangerment conviction, the petitioner confessed to police that he had actually beaten his son to death and staged the crime scene to make it look like an accident. The petitioner was subsequently charged with aggravated murder and related offenses as the result of his confession. The petitioner moved to dismiss the charges on double jeopardy grounds, but the state courts denied relief. The petitioner then filed a federal habeas corpus petition as a pretrial detainee under 28 U.S.C. § 2241. The district court rejected the petitioner's double jeopardy claim, and the Sixth Circuit affirmed. Although manslaughter is a lesser included offense of aggravated murder, the petitioner had never been in jeopardy with respect to the manslaughter charge because no jury had ever been impaneled and sworn on that count and he had never entered a guilty plea to manslaughter.

As a result, prosecuting the petitioner on the aggravated murder charge would not violate the Double Jeopardy Clause.