

CASE UPDATE
by Julie Anderson

Supreme Court

Sentencing - Possession of Firearm in Furtherance of Drug Trafficking Crime

Abbott v. United States, ___ U.S. ___, 131 S.Ct. 18, 178 L.Ed.2d 348 (November 2010) -

In a unanimous decision delivered by Justice Ginsburg, the Supreme Court held that a defendant is subject to a mandatory, consecutive sentence for possession of a firearm in furtherance of a drug trafficking crime regardless of whether the other counts of conviction carry a higher mandatory minimum sentence. In so deciding the Court declined the petitioners' invitation to apply the rule of lenity to the statute.

Sixth Circuit

Child Pornography - Sentencing - enhancement for trading is not double counting

United States v. Battaglia, 624 F.3d 348 (6th Cir. 2010) -

In sentencing the defendant for knowingly receiving and distributing child pornography, the application of a five-level sentencing enhancement for trading child pornography did not result in impermissible double counting. The enhancement under U.S.S.G. § 2G2.2(b)(3)(B) applies to cases where the defendant distributed child pornography because he or she has received child pornography or expects to receive child pornography in return for distributing it.

Civil Rights - Warrantless Entry Resulting in Shooting Death - emergency-aid exception

Johnson v. City of Memphis, 617 F.3d 864 (6th Cir. 2010) - cert. denied, ___ S.Ct. ___, 2011 WL 588979, 79 USLW 3344, USLW 3467 (US Feb 22, 2011) -

There was no error in the district court's grant of the motion for summary judgment in a § 1983 claim arising from police officers' warrantless entry into a private residence during which the plaintiff's husband was shot and killed. The officers were dispatched to the residence following a report of a 911 hang-up call, and entered after no one responded to their calls. Exigent circumstances in the form of the emergency-aid exception to the warrant requirement justified their warrantless entry. The district court properly denied the plaintiff's motion to amend her complaint to include a claim of negligence based on the dispatcher's failure to inform the officers that her husband was bipolar and off his medication. The City was entitled to sovereign immunity under the civil rights' exception to the Tennessee Governmental Tort Liability Act.

Drugs - Conspiracy to Distribute marijuana - evidence insufficient

United States v. Sliwo, 620 F.3d 630 (6th Cir. 2010) -

Evidence failed to support the defendant's convictions for conspiracy to distribute, and aiding and abetting the possession with intent to distribute 100 kilograms or more of marijuana. Reversing and remanding, the Court of Appeals concluded that although the government had demonstrated the existence of a conspiracy, it had failed to provide evidence linking the defendant to the marijuana, "the essential object of the conspiracy." Although the evidence presented might have been sufficient to show that Defendant had knowingly decided to work with his alleged coconspirators, it fell short

of proving that he knew that the ultimate purpose of the conspiracy was possession of marijuana. Court precedent has “repeatedly held that participation in a scheme whose ultimate purpose a defendant does not know is insufficient to sustain a conspiracy conviction under 21 U.S.C. § 846.” The defendant’s conviction for aiding and abetting was also reversed because 18 U.S.C. § 2 requires that “the defendant must have knowledge of the general scope and nature of the illegal [activity] and awareness of the general facts concerning the venture.” District Judge Katz dissented, concluding that circumstantial evidence demonstrated that the defendant knowingly participated in a drug conspiracy, going well beyond “mere association” with the other conspirators.

Expungement - District Court Lacked Jurisdiction Over Defendant’s Motion

United States v. Lucido, 612 F.3d 871 (6th Cir. 2010), rehearing and rehearing en banc denied (Oct 04, 2010) -

Following his acquittal on charges of money laundering, the defendant filed a motion to expunge all records of the proceedings that were in possession of the Federal Bureau of Investigation claiming that the maintenance and publication of the records caused harm to his reputation and business. The district court denied the motion on the merits and the defendant appealed. Vacating the district court’s order, the Court of Appeals remanded for the district court to dismiss for lack of jurisdiction. The appellate court concluded that the ancillary power of the federal court does not “stretch” that “far” to allow it to consider expungement motions for records held by the executive branch.

Fifth Amendment - Confession Not Involuntary

United States v. Montgomery, 621 F.3d 568 (6th Cir. 2010) -

Officers were called to the residence of Defendant McCellon Montgomery in response to a 911 call that the defendant had been shot by someone hiding in the trees behind his house. The defendant was taken to the hospital for treatment while the officers investigated the scene. Suspecting that the assailant had fired on the defendant when he interrupted the shooter’s attempt to break into the defendant’s shed, the officers met with Montgomery at the hospital to obtain his consent to search the property. The defendant agreed, and the search led to the discovery of a substantial marijuana grow operation in the shed and basement. Following his indictment for growing 100 or more marijuana plants, Montgomery filed a motion to suppress evidence discovered pursuant to the search on the basis that his consent was involuntary due to drug-induced impairment. The officers and the defendant’s nurse testified that although the defendant had been given morphine for the birdshot or buckshot wounds he suffered, he remained alert and oriented before, during, and after police questioning. The district court’s conclusion that the defendant was not impaired at the time he granted consent to the search was supported by the evidence, and there was no indication of “coercive police activity” that would render his consent involuntary.

Fourth Amendment - Exclusionary Rule Applied to Evidence Tainted by Illegal Stop

United States v. Gross, 624 F.3d 309 (6th Cir. 2010) -

The defendant was seated in the passenger seat of a running vehicle which was parked in the lot of a public housing area known for high crime when the police officer arrived on the scene. Although a records check of the vehicle’s plate turned up nothing untoward, the officer parked his cruiser directly behind the car and turned on the cruiser’s spotlights. At the officer’s request, Gross identified himself and the officer discovered an outstanding warrant for carrying a concealed

weapon. The defendant was arrested and taken to the sheriff's department. At the sheriff's department, Gross was permitted to visit the restroom. A firearm was discovered near the toilet he had used after he exited the bathroom. The defendant initially denied possession of the firearm and a warrant was issued the following day for a sample of his DNA. The evidence indicated that the defendant had, in fact, been in possession of the firearm at some time. Two months later, while still in custody, Gross confessed to possession of the firearm. The defendant subsequently pled guilty to being a felon in possession and reserved the right to appeal his motion to suppress and to challenge the use of his prior conviction for escape as a predicate offense for sentencing under the Armed Career Criminal Act. The Court of Appeals concluded that by blocking the vehicle in the parking lot, the officer had effectuated an investigative detention without reasonable suspicion to believe that the occupants of the car had committed any criminal offense. The officer's intrusion violated the defendant's Fourth Amendment rights and the firearm discovered at the sheriff's department should have been suppressed as fruit of the illegal seizure. However, the DNA swab and the defendant's subsequent confession to possession of the firearm were sufficiently attenuated from the initial illegal seizure to be admissible against the defendant. Affirming the defendant's conviction, the appellate court remanded the case for the district court to establish the nature of a prior conviction for failure to report where the government had failed to meet its burden of demonstrating that it was a crime of violence for purposes of sentencing the defendant as an Armed Career Criminal.

Fourth Amendment - Expectation of Privacy in E-Mail
United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) -

Individuals have a reasonable expectation of privacy in e-mail communications saved, stored, or received through an Internet Service Provider (ISP), and an ISP may not be compelled to turn over e-mail records in the absence of a warrant supported by probable cause. The court reasoned that “[g]iven the fundamental similarities between e-mail and traditional forms of communication, it would defy common sense to afford e-mails lesser Fourth Amendment protection.” However, because the agents relied in good faith on provisions of the Stored Communications Act, 18 U.S.C. §§ 2701 et seq., the court would not apply the exclusionary rule to the evidence in this case. The court further held that to the extent that the SCA purports to permit the government to obtain such e-mails warrantlessly, the SCA is unconstitutional.

Fourth Amendment - Expectation of Privacy in Hotel Room
United States v. Domenech, 623 F.3d 325 (6th Cir. 2010) -

Exigent circumstances did not exist to legitimize police officers' warrantless entry into the defendants' hotel room where the officers did not have a reasonable belief that the occupants of the room would destroy evidence of illegal activity. The defendants had a reasonable expectation of privacy in the room to support their Fourth Amendment challenge to the officers' actions even though a third party had rented the room on their behalf and had registered under an alias. Despite evidence that the defendants were using the room to conduct illegal activity, the warrantless entry violated their constitutional rights.

Fourth Amendment - Terry Investigative Stop - no reasonable suspicion

United States v. Johnson (Maurice), 620 F.3d 685 (6th Cir. 2010) -

Police officers responding to a telephone report that some individuals were “walking around” outside the caller’s apartment did not have reasonable suspicion for an investigative stop of the defendant as he walked towards his car and refused to stop at their command. The court determined that the defendant was effectively seized under the Fourth Amendment when “after being ordered to stop by [the officers], he stopped and stood at the passenger-side door of the white car.” When Johnson failed to obey an order to raise his hands, the officers drew their weapons and patted him down. Money and contraband were discovered on the defendant’s person and he was indicted on gun and drug charges. On appeal, the court held that since the officers’ stop of the defendant was not supported by specific and articulable facts indicating that he had committed or was committing any criminal offense, the evidence seized pursuant to the illegal stop must be suppressed. Although it was early in the morning, the 911 call failed to allege any illegal activity or suspicious behavior by the individuals in question and the officers observed nothing consistent with illegal conduct prior to detaining the defendant. The officers’ vague hunch of illegal activity simply would not support the detention and patdown of the defendant in this case.

Fourth Amendment - No Reasonable Suspicion for Investigatory Stop

United States v. Williams, 615 F.3d 657 (6th Cir. 2010) -

The defendant’s presence on the sidewalk in front of a low-income housing community failed to provide officers with a reasonable belief that he was trespassing. The defendant’s inculpatory statements made immediately after the officer accused him of trespassing and detained him, were the direct product of illegal police action. In so holding, the court noted that a criminal accusation by law enforcement is a factor indicating that an individual is seized. *See Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Fourth Amendment - Search of Vehicle Incident to Arrest - post-Gant

United States v. Buford, ___ F.3d ___, 2011 WL 447048 (6th Cir. 2011) -

In a matter of first impression, the Sixth Circuit joined the Fifth, Tenth, and Eleventh Circuit Courts in holding that the good faith exception applied to police officers’ search of the defendant’s vehicle incident to his arrest for a probation violation where officers relied on established circuit precedent which was later overruled in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Ninth Circuit reached a contrary decision in *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009), holding that application of the good-faith exception to a case with similar facts would conflict with the Supreme Court’s retroactivity decisions, in particular *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (even decisions constituting a “clear break” with past precedent have retroactive application). The court assessed that “[s]uppression of the fruits of the search of Buford’s vehicle in light of a subsequent change in the law would not serve the purpose of the exclusionary rule, which is ‘to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.’ *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 698, 172 L.Ed.2d 496 (2009).”

Fourth Amendment - Search Warrant

United States v. Master, 614 F.3d 236 (6th Cir. 2010) -

A general sessions/juvenile court judge in Franklin County, Tennessee, lacked legal authority to issue a search warrant for the defendant's property, which was located in Coffee County, Tennessee, and the warrant was therefore void *ab initio*. Concluding, however, that suppression of the evidence seized pursuant to that warrant might not be an appropriate remedy, the Court of Appeals remanded the case for the district court to consider the actions of all of the police officers involved, not merely the investigator who reported that the defendant lived in Franklin County. The court noted that, after the Supreme Court's decision in Herring v. United States, ___ U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), "the decision to exclude evidence is divorced from whether a Fourth Amendment violation occurred," 129 S.Ct. at 700. The district court must weigh the relevant facts and circumstances and "the crucial finding needed to suppress evidence is whether 'police [mis]conduct [is] sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system.' Herring, at 702."

Fourth Amendment - Terry Stop - reasonable suspicion

United States v. Johnson (Andre), 627 F.3d 578 (6th Cir. 2010) -

Evidence was sufficient to support an investigative detention of the vehicle in which Defendant Andre Johnson was a passenger after an undercover officer observed the defendant engage in a hand-to-hand transaction in a high-crime area known for drug activity. The vehicle was stopped shortly after the transaction occurred, and the defendant fled when he was asked to submit to a pat-down. A weapon was found in the defendant's waistband and his pockets contained both crack and powder cocaine. Johnson was indicted as a felon in possession and for using a firearm in connection with a drug trafficking offense. Since the defendant did not admit to possessing the gun until the closing argument of his trial, he was not entitled to a reduction in his base offense for acceptance of responsibility. The court's reminder to the defendant that his prior convictions would be admissible before the jury should he choose to testify, did not impermissibly chill Johnson's right to testify on his own behalf.

Guilty Plea - Factual Basis

United States v. Taylor, 627 F.3d 1012 (6th Cir. 2010) -

Following his guilty plea to carjacking, brandishing a firearm during a crime of violence, and robbery of United States property, the defendant challenged the sufficiency of the factual basis for his plea on the carjacking count. The appellate court rejected the defendant's contention that the evidence failed to demonstrate his intent to cause serious bodily injury or death, finding it clear from the colloquy that the defendant understood that intent was an element of the statute and that he wished to plead guilty to the charges. The colloquy established that Taylor had brandished a weapon while taking the victim's car, that he had threatened the victim with the weapon, and that the victim feared death or serious bodily injury if she did not comply with his demands. Taylor answered affirmatively that it was his intent to put the victim in that frame of mind during the commission of the offense. The Court of Appeals noted that "[t]he indictment was detailed and specific, and Taylor's response was unequivocal. Under these facts, we find Taylor's admission to all of the conduct charged in the indictment sufficient to establish a factual basis for his guilty pleas." Even if the colloquy failed to

establish the requisite intent to commit the offenses, Taylor failed to demonstrate that there is a reasonable probability that, but for the error, he would not have entered the plea.

Habeas Corpus - Miranda - involuntary confession

***Fields v. Howes*, 617 F.3d 813 (6th Cir. 2010), cert. granted 131 S.Ct. 1047, 79 ULSW 3330, 79 USLW 3434 (US Jan 24, 2011) (NO. 10-680) -**

The district court properly concluded that the Michigan state court's decision regarding the voluntariness of inculpatory statements given to law enforcement personnel was contrary to clearly established federal law and warranted federal habeas relief. Petitioner Randall Fields was incarcerated on another offense when he gave inculpatory statements to police regarding his alleged sexual relationship with a minor. The interrogation was clearly custodial, lasted seven hours, and the petitioner was entitled to Miranda warnings prior to questioning. Affirming the district court's grant of Fields' petition, the Court of Appeals found it significant that the victim had recanted his testimony on several occasions. Since Petitioner's confession was the most decisive evidence against him and likely weighed heavily in favor of the jury's determination of guilt, admission of the confession was not harmless error.

Habeas Corpus - Miranda - involuntary confession

***Dixon v. Houk*, 627 F.3d 553 (6th Cir. 2010) -**

In this "coerced confession, death penalty case," the district court erroneously denied Petitioner Dixon's petition for federal habeas relief following affirmance of his Ohio State convictions for aggravated murder, kidnapping, aggravated robbery, and forgery. In an opinion by Judge Merritt, the court held that the officers' "question-first" tactic rendered subsequent Miranda warnings superfluous and resulted in a coerced confession which was instrumental in the jury's decision to convict. Dixon was given Miranda warnings following his arrest, and refused to answer questions without an attorney. Five days later he was questioned again, this time for thirty minutes before Miranda warnings were given. Dixon was then informed that his confederate had led investigators to the buried body of the victim and that the first one to cooperate would get a deal. Dixon confessed to a related crime and in a second interrogation four hours later, he confessed to the murder after he had been given Miranda warnings. The Court of Appeals concluded that the interrogators' promise of a deal to avoid the death penalty was a highly coercive tactic which resulted in an involuntary confession and rendered the confession inadmissible. See Mincy v. Arizona, 437 U.S. 385, 396-99, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (positing a per se rule against use of such a coerced confession). The trial court properly suppressed the defendant's statements related to the murder on the basis that "they were obtained as a result of a deliberate, bad faith plan on the part of the police to violate his rights" under Miranda. Judge Cole, concurring, would also grant Petitioner's ineffective assistance of counsel claim. Judge Cole opined that counsel's failure to present evidence of the defendant's "abusive and tragic upbringing" resulted in constitutionally deficient representation. Dissenting, Judge Siler agreed with the finding of the Ohio Supreme Court that Dixon's confession had been made voluntarily after Dixon had been advised of his Miranda rights twice and had signed a waiver-of-rights form.

Habeas Corpus - Sixth Amendment Right to Counsel

Ayers v. Hudson, 623 F.3d 301 (6th Cir. 2010), rehearing and rehearing en banc denied (Dec 28, 2010) -

In an interesting and instructive opinion involving the government's use of a jailhouse informant, the Court of Appeals reversed the district court's denial of the petition for habeas relief and remanded the case for further proceedings. While detained following his arrest for the murder of a 76-year old woman, Petitioner Ayers became acquainted with another inmate who later testified against him at trial. The inmate testified that he came to know Ayers while at the jail, that they talked, and that although Ayers first denied the murder he later changed his story and "broke down" and confessed to the murder. After Ayers inculpated himself in the murder, the informant spoke to the detectives. The informant was then returned to the defendant's jail pod and obtained additional admissions from the defendant including the murder weapon and the amount of money stolen from the victim. Defense counsel moved to suppress the testimony alleging a violation of Petitioner's constitutional rights. The trial court denied the motion without explanation. On appeal, the Sixth Circuit determined that at the time Ayers made the statement to the informant, his Sixth Amendment right to counsel had attached and that the informant had deliberately elicited information from Ayers after meeting with the detectives. The court, in an opinion by Judge Merritt, assessed that the informant's testimony was "both inconsistent and unreliable," and that the circumstances of this case strongly suggested "at a minimum that the police shared information with [the informant]." The appellate panel further noted that the evidence showed that the informant "testified regarding statements and factual errors that could have only come from interactions with the police." There was additional evidence that the charges against the informant were dismissed as a result of his cooperation and the Court of Appeals opined that, in light of the State's cooperation with the informant, the State must have known that the informant was likely to obtain additional incriminating statements from the defendant without the presence of his attorney. "[A] Sixth Amendment violation occurs whenever the State 'intentionally creat[es] a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel,' United States v. Henry, 447 U.S. 264, 274, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), or 'knowing[ly] exploit[s]' a situation in order to obtain incriminating information from a defendant 'without counsel being present[.]' Moulton, 474 U.S. at 176." The state appellate court's determination to the contrary was an unreasonable application of clearly established constitutional law. The error deprived the defendant of his Sixth Amendment right to counsel and the State failed to argue that it was harmless. In a footnote, the court noted that the informant's testimony was the most compelling evidence in the case and that without it the case against the defendant "becomes extremely weak." It is also noted that even *with* the evidence at issue, the jury was deadlocked for a time. Footnote 7 of the opinion lists a number of factors for the court to consider in evaluating the reliability of the informant's testimony.

Illegal Reentry - Enhancement for Prior Conviction of Attempted Kidnapping

United States v. Soto-Sanchez, 623 F.3d 317 (6th Cir. 2010) -

The defendant's prior attempted kidnapping conviction under Michigan law constituted a crime of violence under U.S.S.G. § 2L1.1(b)(1)(A) warranting a 16-level enhancement to his sentence following his plea of guilty to illegal reentry after deportation. The six types of criminal conduct

prohibited under the Michigan kidnapping statute either fell within the generic, contemporary meaning of kidnapping or had an element involving the use of force.

Illegal Reentry - Enhancement for Prior Conviction

United States v. Aguilar-Diaz, 626 F.3d 265 (6th Cir. 2010) -

Defendant Aguilar-Diaz appealed his sentence following entry of a guilty plea to illegal reentry after deportation, objecting to the district court's increase in his base offense level for a prior felony conviction pursuant to U.S.S.G. § 2L1.2(b)(1)(D). The defendant argued that his prior conviction for forgery under Ohio state law should not have been used to enhance his sentence under the guidelines because it failed to comply with the statutory requirements for imposing post-release control and was, therefore, void *ab initio*. Rejecting the defendant's claim as a prohibited collateral attack on a state conviction, the court noted that Supreme Court precedent is clear that the sole non-statutory basis upon which a defendant may launch a collateral attack on a state conviction at sentencing is a denial of the right-to-counsel in the previous proceeding. *See Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

Sentencing - Enhancement for Abuse of Trust

United States v. Jason Sweet, 630 F.3d 477 (6th Cir. 2011) -

Following his guilty plea to embezzlement, the defendant appealed the district court's use of two guideline provisions to enhance his sentence. Defendant Jason Sweet was a teller at a bank with slightly more responsibility than the lower level of tellers because he performed cash audits and random cash audits as part of his duties. However, his lack of "professional or managerial discretion in his position," convinced the Court of Appeals that the district court had erred by including the enhancement for abuse of a position of trust. The sentencing enhancement for obstruction of justice, however, was appropriate in this case. Sweet explained to his probation officer and to the Federal Bureau of Investigation that he had embezzled the money by learning the other tellers' personal vault codes while auditing them and then using the codes to gain access to their drawers and steal money. During sentencing, however, Sweet testified that he obtained the vault codes by simply following other tellers when they entered the vault and watching them enter their codes. The district court concluded that Sweet's testimony was material and clearly made with the intent to minimize his conduct for sentencing purposes, thus warranting the enhancement for obstruction. Remand was required for the district court to sentence Sweet without the abuse of trust enhancement.

Sentencing - Adjudication under Youthful Trainee Act Qualified as Prior Conviction

United States v. Adams, 622 F.3d 608 (6th Cir. 2010) -

The defendant's prior juvenile adjudication under Michigan's Youthful Trainee Act qualified as a prior conviction for purposes of his sentencing under 21 U.S.C. § 841(b)(1)(B). The Act was created so that juvenile offenders could clear their records if they refrained from violating their status as "youthful trainees." Unfortunately, the defendant's violation of probation rendered him ineligible to "wipe the slate clean" and the district court properly considered the prior adjudication to enhance his sentence for conspiracy to distribute cocaine base.

Sentencing - Career Offender Designation

United States v. Curb, 625 F.3d 968 (6th Cir. 2010) -

The defendant was “arrested” when he was taken into custody twice as a juvenile under Tennessee state law for purposes of determining his status as a career offender under the guidelines. The Sixth Circuit has previously equated the phrase, “whenever a juvenile is taken into custody,” with “[w]hen a juvenile is arrested,” and the defendant’s two prior sentences could be considered to compute his criminal history. Remand was necessary, however, for the district court to consider whether it would impose the same sentence in light of subsequent Supreme Court decisions in Kimbrough and Spears which granted sentencing courts discretion to depart from the career offender guidelines.

Sentencing - Career Offender - prior convictions

United States v. Ruvalcaba, 627 F.3d 218 (6th Cir. 2010) -

The defendant’s two prior Ohio convictions for unlawfully discharging a firearm at an occupied structure were crimes of violence within the meaning of the career offender guideline. The statute did not require that the defendant knew a person to be present inside the structure and did not require proof of an intent to harm. A serious risk of physical harm to another was inherent in the use of the firearms and the conduct included under the statute was sufficiently similar to the other offenses enumerated in the Guidelines’ definition of a crime of violence.

Sentencing - Court’s Failure to Address Guideline Range Required a Remand

United States v. Peebles, 624 F.3d 344 (6th Cir. 2010) -

The district court’s failure address the applicable Sentencing Guidelines range in sentencing the defendant for a revocation of supervised release rendered the sentence procedurally unreasonable and necessitated a remand for resentencing.

Sentencing - Crack Cocaine Guideline Amendment - Booker does not render guidelines advisory on motion for reduction

United States v. Turnley, 627 F.3d 103^{2h} Cir. 2010) -

The Supreme Court mandate in United States v. Booker which rendered the Sentencing Guidelines advisory does not apply to sentencing modification proceedings pursuant to 18 U.S.C. § 3582(c)(2). Remand was required for the court to consider whether it had authority to impose a new sentence below the minimum amended guidelines range.

Sentencing - Crack Cocaine Guideline Amendment

United States v. Spencer, 620 F.3d 701 (6th Cir. 2010) -

The district court did not have authority to sentence the defendant, convicted of two counts of possession of crack cocaine, below the amended guidelines range pursuant to a sentence modification under 18 U.S.C. § 3582(c)(2).

Sentencing - Downward Departure for Voluntary Return to Prison Camp was not Warranted

United States v. Holcomb, 625 F.3d 287 (6th Cir. 2010) -

The 10-month sentence of imprisonment imposed on the defendant following his plea to escaping from a federal prison camp was procedurally and substantively reasonable. Evidence showed that

the defendant and three other inmates left a federal prison satellite camp (FPC Ashland) without prior authorization and were driven away from the facility and taken to a motel. Several hours later, the driver of the vehicle took the inmates back to camp. When a patrol car drove up behind the vehicle, none of the prisoners exited the vehicle, so the driver again drove away from the camp. The patrol car followed the vehicle and pulled the driver over at a gas station. The inmates were eventually identified and returned to the camp. There was no error in the court's conclusion that the defendant was not entitled to a seven-level reduction in his base offense level for a voluntary return to the camp.

Sentencing - No Retroactive Application of Fair Sentencing Act

United States v. Carradine, 621 F.3d 575 (6th Cir. 2010), rehearing and rehearing en banc denied (Dec 15, 2010), petition for cert. filed (Feb 10 2011) (NO. 10-8937) -

The Fair Sentencing Act, which increased the threshold for mandatory minimum sentences for crack cocaine from five grams of crack to 28 grams does not apply retroactively to sentencing for offenses committed prior to August 3, 2010, the date of enactment of the legislation.

Sentencing - Recidivist Enhancement Based on Prior Juvenile Conviction

United States v. Graham, 622 F.3d 445 (6th Cir. 2010), rehearing and rehearing en banc denied (Dec. 1, 2010) -

The testimony of a coconspirator, corroborated by other witnesses, that the defendant served as a supplier in numerous drug transactions, was sufficient to support Defendant Donald Graham's convictions for conspiracy to distribute cocaine and other offenses. Although a majority of the panel rejected the defendant's challenge to the life sentence imposed for his third qualifying felony under the drug statute, Judge Merritt's dissenting opinion carries more persuasive weight. Graham's "prior convictions for a felony drug offense" under the statute were committed as a juvenile, even though he was sentenced as an adult. Graham pled guilty to two counts of aggravated drug trafficking under Ohio law. Although he was indicted as an adult, Graham was still seventeen when he was sentenced. When he was nineteen, Graham was sentenced to two consecutive six-month terms of imprisonment for two counts of trafficking in cocaine under Ohio law. Noting that the defendant had been prosecuted as an adult on the drug trafficking charges, a majority of the panel held that the district court had properly considered the conviction as a prior felony drug offense for purposes of the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). In a lengthy dissent, Judge Merritt chided the majority for failing to "acknowledge and address the arguments made against the use of a juvenile conviction to send this nonviolent drug offender to prison for life." Judge Merritt noted that "[u]nlike the career criminal section immediately above [the drug statute], the drug enhancement section does not specify the use of juvenile convictions," and concluded that "Congress made the distinction because a pattern of *violent* conduct involving the use of *force* is more culpable than a pattern of nonviolent sales of drugs that may be, as here, relatively minor in nature." (Emphasis in original). Judge Merritt also argued for application of the rule of lenity noting that "[f]rom the face of the statute, there is no reason to think that 'conviction' includes convictions for juvenile conduct; but even if one believes that some ambiguity exists in the language or Congressional intent, 'the tie must go to the defendant.'..." Judge Merritt opined that "the sentencing of the 30-year-old petty drug trafficker to life imprisonment by using a juvenile

conviction as a necessary third strike not only violates clear congressional intent revealed by clear rules of statutory construction but also violates sound principles of penological policy based on the Eighth Amendment values recently outlined by the Supreme Court in Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).”

Sentencing - Rule 35(b)

United States v. Grant, ___ F.3d ___, 2011 WL 71475(6th Cir. 2011) (*en banc*) -

An *en banc* Sixth Circuit Court held that when considering a motion to reduce sentence based on substantial assistance under Rule 35(b), the sentencing court is neither obligated nor authorized to consider the statutory sentencing factors under 18 U.S.C. § 3553(a). The court majority rejected the defendant’s “argument that the resolution of a 35(b) motion requires full Booker-type consideration of the § 3553(a) factors.” Judge Merritt concurred with the opinion noting that while the majority insisted that the court need not reconsider all of the § 3553(a) factors, the opinion gave sufficient leeway for judges to consider “a wide variety of sentences, including ‘consistency with the statutory sentencing factors in order to make sure that the reduced sentence is not unjust.’” Dissenting Judges Clay, Keith, Moore, and Cole found error in the district court’s holding that it was prohibited from considering the § 3553(a) factors. “Now that Rule 35(b) has pierced the mandatory minimum, there is no reason why Petitioner should be deprived of the district court’s consideration of the § 3553(a) factors to guide its discretion and arrive at an appropriate sentence.” The dissent maintained that the proper disposition of this case would be to remand for the district court to consider, in its discretion, whether to apply the § 3553(a) factors along with Grant’s additional arguments for a sentencing reduction.

Sentencing - Theft of “cultural heritage resources”

United States v. McCarty, 628 F.3d 284 (6th Cir. 2010) -

The district court’s conclusion that the defendant stole two cultural heritage objects in the form of antique books from a museum for the purpose of monetary gain supported a ten-level enhancement in the defendant’s base offense level pursuant to U.S.S.G. § 2B1.1(b)(1)(F). The government presented evidence that the defendant bought and sold books, including antique books, on a regular basis and that he ultimately sold the two books at issue. Despite the defendant’s mental health issues, the district court determined that the books were stolen by the defendant with the intent to sell them later.

Speedy Trial Act

United States v. Stewart, 628 F.3d 246 (6th Cir. 2010) -

The facts supported the district court’s grant of a request by defendant’s counsel for a trial continuance despite the fact that the defendant objected to the proposed continuance in a letter he wrote to the court. The defendant failed to demonstrate prejudice from the delay and the continuance was granted in the interests of justice. Evidence supported the defendant’s conviction for armed bank robbery even though the only direct evidence against him came from two cooperating codefendants. The district court’s determination at sentencing that the defendant intended to kill the bank manager was supported by evidence that the defendant fired at close range near her head when she attempted to push the emergency alarm during the robbery. The severe and disfiguring nature

of the bank manager's injuries supported the trial court's upward departure from the robbery guideline to the guideline for assault-with-attempt-to-commit-murder. Disparities between Stewart's sentence and that of his codefendants were easily explained by Stewart's discharge of the shotgun and his failure to accept responsibility for his actions by forcing the government to go to trial.

Weapons - Enhancement for Facilitating Another Felony Offense Applied to Possession of Ammunition

United States v. Coleman, 627 F.3d 205 (6th Cir. 2010), rehearing and rehearing en banc denied (Jan 24, 2011) -

In the first published decision on the issue, the Sixth Circuit affirmed the district court's enhancement of the defendant's sentence under U.S.S.G. § 2K2.1(b)(6) for possession of ammunition *but no firearm* during a drug trafficking offense. A majority of the panel concluded that the defendant's easy access to the ammunition, which was found in plain view in the defendant's apartment and in close proximity to a quantity of marijuana, may have emboldened the the defendant in the commission of the offense or have been used to intimidate potential buyers. Noting that the purpose of the guideline is "to address a concern about the increased risk of violence," the majority held that "[t]he presence of ammunition increases the risk of violence because it puts the owner of the ammunition one step closer to having a loaded firearm." The district court's denial of an additional level for acceptance was warranted based upon its belief that the defendant's threatening phone call to a government witness was "inconsistent with acceptance of responsibility." Dissenting Judge Gilman was of the opinion that the mere display of ammunition could cause no harm and did not warrant the enhancement.

Weapons - Prior Convictions - walkaway prison escape as not a crime of violence

United States v. Gibbs, 626 F.3d 344 (6th Cir. 2010) -

This case came before the Court of Appeals on the defendant's appeal of the sentence imposed during a second remand following his conviction for being a felon in possession of a firearm. Although the defendant had conceded during his original sentencing that his prior conviction for second-degree home invasion was properly counted as a "crime of violence," he argued on remand that since the house was vacant, it could not have been an "occupied dwelling" under Michigan law. The Sixth Circuit has previously determined that a conviction for second-degree home invasion under Michigan law "is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a 'crime of violence.'" The defendant also challenged the characterization of his prior conviction for prison escape as a crime of violence. Gibbs contended that his actions in that case essentially amounted to a "walkaway" escape from a community correction center and his plea colloquy indicated that he had left the facility where he was assigned without permission. The government conceded, and the appellate court agreed, that this conviction was not a crime of violence in light of decisions in Chambers v. United States, 555 U.S. 111, 129 S.Ct. 687, 690-92, 172 L.Ed.2d 484 (2009), and United States v. Ford, 560 F.3d 420, 423-25 (6th Cir. 2009). On remand, the government argued that the defendant's prior Michigan conviction for resisting and obstructing an officer, could be counted as a crime of violence. In United States v. Mosley, 575 F.3d 603, 606-07 (6th Cir. 2009), this circuit held that a violation of the statute at issue, is not categorically a crime of violence. Under Supreme Court precedent in Begay, 553 U.S. at 144, 128 S.Ct. 1581, "a typical failure-to-comply obstruction offense would not qualify as a "crime of violence" because it

“does not involve comparable ‘purposeful, violent, and aggressive’ conduct” or create the same degree of risk of physical injury as the enumerated offenses. Mosley, (quoting Begay). Concluding that the defendant’s prior convictions for a “walkaway” prison escape and failure-to-comply obstruction may no longer be considered crimes of violence for purposes of the Sentencing Guidelines, the Court of Appeals vacated the defendant’s sentence and remanded yet again for resentencing.

Weapons - Sufficiency of Evidence - corroboration of defendant’s confession

United States v. Brown, 617 F.3d 857 (6th Cir. 2010) -

The defendant’s confession was corroborated by sufficient independent evidence to support his conviction as a felon in possession of a firearm and the district court’s grant of the defendant’s motion for acquittal was reversible error. The defendant confessed to possession of the firearm on two separate occasions. He also confessed that he had stolen a necklace from the victim’s residence and that he had traded the gun for drugs. The police report corroborated the defendant’s statement that a Glock .40 and a silver necklace were stolen from the victim’s house thus supporting the defendant’s confession that he possessed the gun. Reversed and remanded for further proceedings.

Weapons - Sentencing

United States v. Alman, 626 F.3d 901 (6th Cir. 2010) -

remanded in light of the Supreme Court’s decision in Abbott v. United States

The five-year firearms sentence imposed under 18 U.S.C. § 924(c)(1)(A) is restored in light of the Supreme Court decision in Abbot v. United States, ___ U.S. ___, 131 S.Ct. 18, ___ L.Ed.2d ___ (2010). Judges Merritt and Martin, concurring in the judgment as they must, remain unconvinced that the Higher Court properly construed the language in the firearms statute which expressly states that the five-year sentence should not be imposed at all “to the extent that a greater minimum sentence is otherwise provided ... *by any other provision of law.*” Judges Merritt and Martin would favor construction of the language in favor of the rule of lenity which would prohibit an additional five-year sentence for possession of a firearm during a crime of violence or drug-trafficking crime “where a greater minimum sentence is otherwise provided.” Resorting to the “Equity of the Statute” doctrine, the Supreme Court concluded that Congress intended longer, more severe sentences in such cases and remanded the case to the Sixth Circuit.