

CASE UPDATE 2010

by J. Anderson

Supreme Court

Fifth Amendment - Interrogation

Maryland v. Shatzer, ___ U.S. ___, 130 S.Ct. 1213, 78 USLW 4159 (February 2010) -

The “break in custody” exception to the Fifth Amendment established by the Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which forbids police officers from questioning a suspect who has previously invoked his right to counsel, is not interminable. Establishing a bright-line rule, the Court held that a fourteen-day break in custody is sufficient to overcome the Edwards presumption of involuntariness for a statement or confession. The two years and six months between the defendant’s request for counsel and incriminating statements subsequently made to a law enforcement officer was sufficient to render the petitioner’s statements voluntary. The Court explained that “[t]he Edwards presumption of involuntariness is justified only in circumstances where the coercive pressures have increased so much that suspects’ waivers of Miranda rights are likely involuntary most of the time.” Justice Stevens concurred that protection under Edwards is not perpetual, but refused to endorse a strict 14-day break-in-custody rule for all cases.

Fifth Amendment - Interrogation - Miranda warnings

Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (June 2010) -

In a 5 to 4 decision, a majority of the Court held that a suspect must unambiguously invoke his Fifth Amendment right to silence during an interrogation. Although Thompkins had refused to answer questions for the first two hours and 45 minutes of a three-hour interrogation, his uncoerced response to an interrogating officer’s question effectively waived his Constitutional right under Miranda. The majority explained that Thompkins could have easily signaled his desire to end questioning by telling officers that he wished to remain silent or that he didn’t want to talk. When Miranda warnings have been given and understood, “an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.” Dissenting, Justice Sotomayor opined that the majority’s decision contradicted long-standing precedent holding that a valid waiver of the right to remain silent may not be presumed merely from the fact that a confession was eventually obtained. According to Sotomayor, even if the defendant failed to ambiguously invoke his right to silence, the State of Michigan failed to establish a knowing and voluntary waiver on the defendant’s part.

Fifth Amendment - Interrogation

Florida v. Powell, ___ U.S. ___, 130 S.Ct. 1195, 78 USLW 4145 (February 2010) -

Police officers’ advice that petitioner had the right to talk to a lawyer before answering any of their questions and that he could invoke that right during the interview adequately informed him of his Sixth Amendment rights under Miranda. In dissent, Justice Stevens maintained that the warning failed to convey to the petitioner that he was entitled to the presence of counsel throughout the duration of the questioning and therefore satisfied neither Miranda nor the Florida Constitution. Stevens assessed that this is “the first time the Court has approved a warning which, if given its natural reading, entirely omitted an essential element of a suspect’s rights.”

Firearms - 18 U.S.C. § 924(c)(1)

United States v. O'Brien, ___ U.S. ___, 130 S.Ct. 2169, 176 L.Ed.2d 979 (May 2010) -

Pursuant to 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm in relation to a crime of violence or drug trafficking crime, the type of firearm used or carried is an element of the offense which must be charged in the indictment and proved to a jury beyond a reasonable doubt. Concurring with the judgment, Justice Stevens wrote separately to emphasize his belief that the Court's prior decisions in Harris and McMillan were effectively overruled by Apprendi and its progeny. "McMillan and Harris should be overruled," he wrote, "at least to the extent that they authorize judicial factfinding on a preponderance of the evidence standard of facts that 'expos[e] a defendant to [a] greater punishment than what is otherwise legally prescribed ...' Harris, 536 U.S., at 579, 122 S.Ct. 2406 (THOMAS, J., dissenting). Any such fact is the functional equivalent of an element of the offense." Stevens advised that "[i]n my view, the simplest, and most correct, solution to the case before [the Court] would be to recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense. The unanimity of our decision today does not imply that McMillan is safe from a direct challenge to its foundation."

Fourth Amendment - "Emergency Aid Exception"

Michigan v. Fisher, ___ U.S. ___, 130 S.Ct. 546, 175 L.Ed.2d 410 (December 2009) -

Police officers' warrantless entry into the defendant's residence was justified under the "emergency aid exception" to the warrant requirement. The Court found there was a reasonable basis for officers to enter the residence after they discovered broken glass and blood on the hood of the defendant's vehicle and observed the defendant inside his home screaming and throwing things. Justice Stevens dissented contending that the State had failed to meet its burden of demonstrating the presence of exigent circumstances in this case. Stevens resolved that a few blood drops on the hood of the vehicle did not necessarily indicate a life-threatening injury which would support the unauthorized entry into the defendant's home, particularly when the defendant had expressly denied police entry.

Habeas Corpus - Filing Deadline - equitable tolling

Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 177 L.Ed.2d 130 (June 2010) -

The one-year limitations period for filing a federal habeas corpus petition pursuant to 28 U.S.C. § 2244(d) may be equitably tolled in an appropriate case. Petitioner Holland had been convicted of murder and sentenced to death in Florida. His counsel's failure to file for federal habeas relief pursuant to Holland's wishes created extraordinary circumstances which the court could consider in tolling the limitations period in this case. On remand, the Court of Appeals would conduct an evidentiary hearing to determine whether counsel's gross negligence warranted equitable tolling in this case.

Sex Offender Registration Requirements

Carr v. United States, ___ U.S. ___, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (June 2010) -

Title 18 § 2250(a) of the Sex Offender Registration and Notification Act which imposes criminal liability on sex offenders who travel in interstate or foreign commerce and knowingly fail to register or update their registration upon reaching their destination, does not apply to sex offenders whose

interstate travel was completed prior to enactment of the Act in 2006. Application of § 2250(a) to Petitioner Carr's case violated the Ex Post Facto Clause because his relocation from Alabama to Indiana occurred prior to SORNA's effective date.

Resentencing - Crack Cocaine Amendment

Dillon v. United States, ___ U.S. ___, 130 S.Ct. 2603, 177 L.Ed.2d 771 (June 2010) -

In response to the question of whether the policy statement in U.S.S.G. § 1B1.10 which prohibits a reduction in sentence below the amended guidelines range is, after Booker, merely advisory, a 7 to 1 majority of the Court curiously responded in the negative. Lone dissenting Justice Stevens noted that, after Booker, the Guidelines themselves are advisory and yet the Court's decision is based upon a "mere policy statement" which carries even less authority than the now-advisory guidelines. In so ruling, Stevens opined, "[t]he Court has turned a blind eye to the fundamental sea-change that was our decision in Booker."

Sentencing - Eighth Amendment

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (May 2010) -

The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the imposition of a life sentence without the possibility of parole on a juvenile offender convicted of a nonhomicide crime.

Sexually Dangerous Federal Prisoner - Civil Commitment

United States v. Comstock, ___ U.S. ___, 130 S.Ct. 1949, 176 L.Ed.2d 878 (May 2010) -

Congress did not exceed its authority under the Necessary and Proper Clause of the United States Constitution in enacting 18 U.S.C. § 4248 which provides a federal district court with authority to order the civil commitment of a mentally ill, sexually dangerous offender beyond his release date in order to protect the public.

Sixth Amendment - Assistance of Counsel

Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (March 2010) -

A non-citizen defendant facing the possibility of deportation must be advised that a conviction may result in removal, and the failure to so advise constitutes ineffective assistance of counsel. Counsel with an alien defendant may wish to follow the advice of Justice Alito in his concurring opinion that, "[a]n alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on the subject."

Sentencing - Restitution

Dolan v. United States, ___ U.S. ___, 130 S.Ct. 2533, 177 L.Ed.2d 108 (June 2010) -

The 90-day time limit for the Mandatory Victims Restitution Act is not jurisdictional and the district court's failure to meet the deadline did not deprive the court of authority to order restitution.

Sentencing - Calculation of Good Time Credits

Barber v. Thomas, ___ U.S. ___, 130 S.Ct. 2499, 177 L.Ed.2d 1 (June 2010) -

In response to a challenge by federal prisoners to 18 U.S.C. § 3624(b), a majority of the Court determined that the Bureau of Prisons' method for calculating good time credit under the statute is lawful and appropriately tracks the language of the statute. Finding no "grievous ambiguity or uncertainty" in the statutory provision, the Court declined to apply the rule of lenity to the statute. Justice Kennedy, joined in dissent by Justices Stevens and Ginsburg, observed that the majority's decision will "disadvantage[] nearly 200,000 federal prisoners, will cost taxpayers millions of dollars, and will be devastating to prisoners who have behaved their best, and will undermine the purpose of the statute."

Sentencing - Armed Career Criminal Act - prior convictions

Johnson v. United States, ___ U.S. ___, 130 S.Ct. 1265, 176 L.Ed.2d 1 (March 2010) -

The defendant's prior Florida conviction for battery by "[a]ctually and intentionally touching another person," which can be committed by even the slightest intentional contact, is not categorically a violent felony under the Armed Career Criminal Act. The term "physical force" under 18 U.S.C. § 924(e)(2)(B)(i) refers to conduct involving the "violent force" associated with offenses such as murder, manslaughter, sexual battery, carjacking, aggravated assault, etc., and the Florida felony offense of battery, as defined, does not have "as an element the use ... of physical force against the person of another." 18 U.S.C. § 924(c)(e)(1). Dissenting Justices Alito and Thomas concluded to the contrary finding that "the crime of battery as traditionally defined, falls squarely within the plain language of Armed Career Criminal Act."

Sixth Circuit

Appeals - Waiver

United States v. Almanay, 598 F.3d 238 (6th Cir. 2010), *pet. for cert. filed*, 78 USLW 3745 (Jun 08, 2010) (NO. 09-1497) -

The appellate waiver provision of the defendant's plea agreement was invalid where the court failed to ascertain that the defendant understood the waiver and the court had mistakenly informed the defendant that he had a right to appeal. The federal firearms statute prohibits a district court from sentencing a criminal defendant under both the mandatory minimum sentence in 18 U.S.C. § 924(c)(1)(A), and another, greater mandatory minimum sentence under any other provision of law. Accordingly, the district court erred by sentencing the defendant to both a five-year mandatory minimum sentence for possession of the firearm in furtherance of a drug trafficking crime and the ten-year mandatory minimum sentence for conspiracy to distribute and possession with intent to distribute more than five kilograms of cocaine under 21 U.S.C. § 841(b)(1)(A). The Court of Appeals remanded the case for the district court to resentence the defendant under the other, greater mandatory minimum sentence provided for under the federal drug statute.

Child Pornography

United States v. Bowers, 594 F.3d 522 (6th Cir. 2010), *cert. denied*, ___ S.Ct. ___, 2010 WL 3074248 (U.S. Oct 04, 2010) (NO. 10-5737) -

The discovery of child pornography in the defendant's photo album by the defendant's roommate

and her boyfriend was the result of a private search and did not implicate the defendant's Fourth Amendment rights. Application of the child pornography statute to the defendant's wholly personal and intrastate production and possession of child pornography was not unconstitutional. The production and possession of child pornography falls within Congressional power to regulate purely local activities that have a substantial effect on interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). *See also United States v. Chambers*, 441 F.3d 438, at 455 (6th Cir. 2006) ("Congress has a rational basis for believing that homegrown child pornography can feed the national market and stimulate demand....").

DNA - Collection of Samples - retroactive application

United States v. Coccia, 598 F.3d 293 (6th Cir. 2010) -

Upon finding that the defendant had violated the terms of his supervised release, the district court properly required the defendant to submit a sample of his DNA as a condition of his supervised release although his original offense had occurred prior to the passage of the DNA Act, 42 U.S.C. § 14135a(a)(2). The plain language of the statute makes clear that it applies to all individuals who are, *or ha[ve] been* convicted of a qualifying Federal offense.

Drug Distribution - Drug-Related Premises

United States v. Russell, 595 F.3d 633 (6th Cir. 2010), *cert. denied*, ___ S.Ct. ___, 2010 WL 2102243 (U.S. Oct 04, 2010) (NO. 09-110002) -

Rejecting the defendant's multiple claims of error during his trial for various drug and firearms offenses, the Court of Appeals affirmed the district court's determination that 37% of the \$11,375 cash found on the defendant's person at the time of his arrest was properly converted into an equivalent amount of cocaine base pursuant to U.S.S.G. § 2D1.1. Evidence at trial indicated that the majority of the defendant's income came from cocaine sales.

Evidence - Financial Affidavit for Appointed Counsel

United States v. Aguirre, ___ F.3d ___, 2010 WL 1948206 (6th Cir. 2010) -

The district court's admission of the financial affidavit submitted by the defendant to qualify for appointment of counsel during the defendant's trial for possession with intent to distribute cocaine and possession of a firearm in furtherance of a drug trafficking offense, although erroneous, was not plain error which required a reversal of the defendant's conviction. Evidence of the defendant's guilt was overwhelming and the error did not affect the outcome of the case.

Fourth Amendment - Search Warrant - probable cause

United States v. Thomas, 605 F.3d 351 (6th Cir. 2010) -

Information from a confidential informant that the defendant was involved in a marijuana growing operation at his home, although eight months old, was updated by current electricity usage records indicating continued activity at the defendant's residence and therefore provided probable cause to issue a search warrant for the property. The defendant effectively waived any right to appeal his sentence in the plea agreement.

Drugs and Guns - Misc. Issues

United States v. Jenkins, 593 F.3d 480 (6th Cir. 2010) -

The district court's admission of evidence of the defendant's prior conviction for possession of marijuana with intent to distribute during his trial for various drug and gun offenses was unfairly prejudicial and resulted in reversible error. Although the government had sufficient evidence of knowledge, evidence related to the defendant's constructive possession of the contraband was not overwhelming. The defendant lived at the house only part-time and several individuals had access to the residence.

Fourth Amendment - Consent to Search

United States v. Taylor, 600 F.3d 678 (6th Cir. 2010) -

The apartment tenant did not have apparent authority to consent to the search of a shoebox found in the closet of a spare bedroom and the firearm and ammunition discovered therein were properly suppressed by the district court. Although the officers had a warrant for the defendant's arrest, they had neither a search warrant for the property nor consent to search the defendant's belongings. As an overnight guest, the defendant had an expectation of privacy in items stored at the apartment and the evidence indicated that the shoebox belonged to the defendant. The Court of Appeals concluded that "[t]he facts of the case demonstrated that there was ambiguity as to whether the apartment's owner had mutual use or control of the shoebox found in the closet and the officers' failure to resolve that ambiguity required suppression of the gun and ammunition found therein."

Fourth Amendment - Protective Sweep

United States v. Archibald, 589 F.3d 289 (6th Cir. 2009) -

Apprehended by police officers just inside the doorway to his apartment, the defendant was pulled out the door and off the porch where he was cuffed, frisked, and taken into custody pursuant to an outstanding warrant. The appellate court concluded that the arrest itself had taken place outside of the apartment and that the officers' subsequent search of the defendant's home could not be justified as a protective sweep. Pursuant to the Supreme Court's holding in Maryland v. Buie, a protective search of the residence required "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area to be swept harbors an individual possessing a danger to those on the arrest scene." Such facts were noticeably absent from this case and the fact that the defendant had previously been arrested for violent crimes was not relevant to this determination.

Fourth Amendment - Traffic Stop - scope of questioning

United States v. Everett, 601 F.3d 484 (6th Cir. 2010) -

In a matter of first impression, the Court of Appeals held that the officer's questions about the presence of weapons and drugs or anything illegal in the defendant's vehicle, although unrelated to the purpose of the traffic stop, did not violate the defendant's constitutional rights under the Fourth Amendment. In light of recent Supreme Court decisions in Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) and Arizona v. Johnson, ___ U.S. ___, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), the court held that there is no categorical ban on suspicionless unrelated questioning that only minimally extends the duration of the stop. In particular, questions related to officer safety are within the permissible scope of a valid traffic stop.

Habeas Corpus - Brady - impeachment evidence

Robinson v. Mills, 592 F.3d 730 (6th Cir. 2010) -

The district court did not err by conditionally granting the petitioner's request for federal habeas relief after his conviction for first degree murder was affirmed by the Tennessee Supreme Court. The district court concluded that the State had improperly withheld material evidence that could have been used to impeach the prosecution's only witness to the murder. The fact that the witness was a confidential informant for police could have been used to assail her credibility and to demonstrate bias.

Mail Fraud

United States v. Lashawn Wilson, 614 F.3d 219 (6th Cir. 2010) -

The district court committed plain error in sentencing the defendant when it concluded that the defendant had stolen 1000 money orders and 500 cashier's checks. Since there was irrefutable evidence that the codefendant had actually purloined the items, "[t]hese assertions are conspicuously false," and required a remand for resentencing.

Resentencing - Failure to Pay Restitution

United States v. Johnston, 595 F.3d 292 (6th Cir. 2010) -

The district court did not err in finding that the defendant wilfully failed to pay court-ordered restitution in the amount of \$1,000,000 following his conviction for conduct related to a fraudulent insurance scheme which also resulted in a 25-month prison sentence. The defendant was properly resentenced to 51 months in prison and ordered to pay full restitution in the amount of \$6,600,000 jointly and severally with his two codefendants. Pay now, or pay more later.

Second Amendment - Right to Bear Arms - unregistered firearms

Hamblen v. United States, 591 F.3d 471 (6th Cir. 2009), cert. denied, 130 S.Ct. 2426, 176 L.Ed.2d 939, 78 USLW 3643 (2010) -

The defendant had no constitutional right to the unlicensed possession of unregistered machineguns regardless of his status as a member of the Tennessee State Guard. In fact, possession of the weapons was directly contrary to State Guard policy.

Sentencing - Bank Robbery - career offender

United States v. McFalls, 592 F.3d 707 (6th Cir. 2010) -

Following his plea to bank robbery and to using a gun during the robbery, the defendant appealed the district court's decision to sentence him as a career offender. A remand for resentencing was ordered after the Court of Appeals discovered that the defendant's four prior burglary convictions were not separated by an intervening arrest and were sentenced on the same day and should have been counted as a single sentence. In addition, the defendant's prior conviction for second degree burglary of a building did not qualify as a crime of violence for purposes of determining his status as a career offender. Under the South Carolina statute, burglary included the burglary of buildings, sheds and erections which are within two hundred yards of a dwelling or place of habitation. The Sentencing Commission intended the offense to involve an intrusion into a place of habitation. "Intrusions into uninhabitable structures two hundred yards from the place of habitation thus do not constitute generic burglary of a dwelling." The Court of Appeals determined that "...South Carolina

second degree burglary does not qualify categorically as a crime of violence by involving conduct that ‘presents a serious potential risk of physical injury to another,’ and that “the crime fails to satisfy the residual clause because it does not present the same degree of risk as generic burglary of a dwelling.” The indictments in this case only demonstrate that McFalls was convicted of second degree burglary. Remand was required for the district court to determine whether any documents recognized by Shepard establish that the defendant pleaded guilty to “burglarizing any structures that meet the generic definition of dwelling.” Similarly, South Carolina’s common-law crime of assault and battery of a high and aggravated nature was not categorically a crime of violence because South Carolina courts have upheld ABHAN convictions in cases involving merely reckless conduct. Based on the record there was nothing to demonstrate the defendant’s state of mind during the offense and reckless conduct alone does not constitute a crime of violence. The case was remanded for the district court to determine whether the defendant’s four prior convictions were for crimes of violence under the Guidelines.

Sentencing - Career Offender - prior crime of violence

United States v. Rogers, 594 F.3d 517 (6th Cir. 2010), *pet. for cert. filed (Apr 13, 2010) (NO. 09-10276)* -

The defendant’s prior Tennessee conviction for evading arrest in a motor vehicle qualified as a crime of violence under the Sentencing Guidelines. The defendant’s conduct under the statute involved purposeful, aggressive and violent conduct which posed a serious potential risk of physical injury to another. The Court of Appeals reasoned that “[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create the actual risk of death or injury that would make it a Class D felony under Tennessee law.” The district court did not err by enhancing the defendant’s sentence under U.S.S.G. § 2K2.1(b)(6) for possession of a firearm in connection with another felony offense. The weapon was possessed in connection with the defendant’s illegal chop-shop business and was used to protect the defendant’s stolen property.

Sentencing - Career Offender - prior conviction

United States v. Anglin, 601 F.3d 523 (6th Cir. 2010) -

The defendant was originally sentenced as a career offender, the district court having determined that his prior conviction for leaving a prison camp in Alabama was a crime of violence under the guidelines. The defendant appealed, was resentenced, and appealed again in light of an intervening decision by the Supreme Court in Chambers v. United States, where the Court held that the failure to report is not a violent felony under the Armed Career Criminal Act. Remanding yet again, the Court of Appeals instructed the district court to review appropriate documents under Shepard to determine whether the defendant’s prior escape qualifies as a predicate felony offense for purposes of the career offender enhancement.

Sentencing - Detention Pending Sentencing

United States v. Christman, 596 F.3d 870 (6th Cir. 2010) -

The district court erred by failing to consider whether the defendant presented exceptional reasons under 18 U.S.C. § 3145(c) to support his release pending sentencing.

Habeas Corpus - Sixth Amendment - assistance of counsel

McElrath v. Simpson, 595 F.3d 624 (6th Cir. 2010) -

Counsel's representation of both Petitioner and his codefendant on charges of complicity to murder and complicity to wanton endangerment resulted an actual conflict of interest requiring reversal of the defendant's convictions. The conflict created a presumption of prejudice to support the petitioner's ineffective assistance of counsel claim.

Sex Offender Registration and Notification Act - no retroactively applicable

United States v. Utesch, 596 F.3d 302 (6th Cir. 2010) -

The registration requirements of the Sex Offender Registration and Notification Act (SORNA) did not apply retroactively to the defendant who had been convicted of a sex offense prior to the statute's enactment.

Sentencing - Modification - crack cocaine guideline

United States v. Bridgewater, 606 F.3d 258 (6th Cir. 2010), *pet. for cert. filed (Sep 27, 2010) (NO. 10-6744)* -

A defendant sentenced as a career offender was not eligible for a sentence reduction under 18 U.S.C. § 3582(c) based on the lowering of the crack cocaine guidelines pursuant to Amendment 706. The career offender guideline, rather than the base offense level for crack cocaine, was the proper guideline for sentencing purposes. In United States v. Perdue, the Court of Appeals held that "Amendment 706 has no effect on the ultimate sentencing range imposed ... under the career-offender Guideline." Id., 572 F.3d 288, 293 (6th Cir. 2009). Thus, "a defendant convicted of crack-related charges but sentenced as a career offender under U.S.S.G. § 4B1.1 is not eligible for a reduction based on Amendment 706." United States v. Curry, 2010 WL 550663, at *2 (6th Cir. Feb. 17, 2010) (citing Perdue, 572 F.3d at 292-93). This is true even where a defendant was granted a downward departure from the career offender Guideline. Perdue, 572 F.3d at 290 (concluding that Amendment 706 had no effect on the sentencing range where there was a downward departure for substantial assistance under U.S.S.G. § 5K1.1).

Courts - Court-Appointed Services

United States v. Wilson (Robert), 597 F.3d 353 (6th Cir. 2010) -

The District Court had authority under the Criminal Justice Act to order the defendant to repay \$52,350 in legal fees for services rendered in his defense by the public defender's office after concluding that the defendant was financially able to pay that amount in monthly installments.

Sentencing - Motion for Reduction - crack cocaine

United States v. Pembroke, 609 F.3d 381 (6th Cir. 2010), *pet. for cert. filed (Sep 08, 2010) (NO. 10-6356)* -

Amendment 706 to the Sentencing Guidelines, which lowered the applicable guideline range for crack cocaine offenses had no effect on the applicable guideline range where the defendant had been sentenced as a career offender.

Child Pornography - Misc. Issues

**United States v. Humphrey, 608 F.3d 955 (6th Cir. 2010),
*reh. and reh. en banc denied (Aug 27 2010) -***

On an issue of first impression, the Sixth Circuit held that a defendant's knowledge of the victim's age is not an element of the crime of producing child pornography and the district court did not err by refusing to consider a mistake-of-age defense to that offense.

Bail

**United States v. Stone, 608 F.3d 939 (6th Cir. 2010), *reh. and reh. en banc denied (Aug 17 2010),
pet. for cert. filed (Sep 17 2010) (NO. 10-65179) -***

The district court erroneously ordered the release, with conditions, of five defendant's charged with conspiracy to levy war or to oppose by force the authority of the United States government and related offenses. Considering the serious nature and circumstances of the charges, as well as the history and characteristics of the defendants, the Court of Appeals concluded that these individuals posed a legitimate threat and that there were no conditions of release that would reasonably assure the safety of the community. The court noted that the defendants evidenced a lack of concern for the safety of civilians and had threatened violence against law enforcement. The order of release was reversed and the case was remanded for further proceedings.

Weapons - Possession of an Unregistered Firearm

United States v. Springer, 609 F.3d 885 (6th Cir. 2010) -

The defendant's possession of a live rocket taken from an Army base and stored in his garage was a violation of federal law and his status as a member of the armed forces did not exempt him from prosecution under 26 U.S.C. § 5861(d) for possession of an unregistered firearm. The defendant was aware that he was not authorized to keep such weapons in his home and admitted that he had never told anyone in his chain of command that he had the rocket.

Sentencing - Motion for Reduction - crack cocaine

United States v. Williams (Sheldon), 607 F.3d 1123 (6th Cir. 2010), *reh. and reh. en banc denied (Aug 05 2010) -*

Where the defendant's guidelines range was based on the guideline for career offender rather than the guideline for crack cocaine, his sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," as required under 18 U.S.C. § 3582(c), and the district court properly refused to grant his motion for a reduction in sentence. "Because the career offender guidelines controlled his original sentence, the district court lacked jurisdiction to resentence Williams under § 3582(c)(2)."

Plea

United States v. Quesada, 607 F.3d 1128 (6th Cir. 2010) -

The government did not breach the plea agreement by using statements made by the defendant in his proffer to prove the applicability of sentencing enhancements after the defendant opened the door by contradicting his original proffer with statements made in his objections to the presentence report. Information supplied by the defendant in his proffer supported enhancements for possession of a dangerous weapon, for his position as a leader or organizer, and for his use of minors in the offense.

The Sixth Circuit agreed with decisions in other circuits which hold that “a plea agreement that does not incorporate the terms of a proffer agreement supersedes the proffer agreement and renders its terms void.”

Habeas Corpus - Sixth Amendment - Confrontation Clause

Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) -

The Michigan State court violated Petitioner’s Sixth Amendment rights under the Confrontation Clause by admitting her deceased lover’s suicide note which implicated her in the murder of her husband. The note was testimonial in that it was reasonably foreseeable that it would be used against the petitioner in a court of law. The government failed to argue that the admission was harmless error and Petitioner was entitled to federal habeas relief.

Immigration - Sentencing

United States v. Camacho-Arellano, 614 F.3d 244 (6th Cir. 2010) -

Vacating and remanding for resentencing, the Court of Appeals held that the district court had authority to vary from the Sentencing Guidelines on the basis of disparities in sentencing between jurisdictions with “fast track” early disposition programs for illegal aliens convicted of unlawful reentry into the United States after deportation, and jurisdictions such as this one, which do not have such programs.

Child Pornography - Misc. Issues

United States v. Lewis, 605 F.3d 395 (6th Cir. 2010) -

Since the defendant did not need a computer to violate the statute prohibiting the transportation of a visual depiction of a minor engaged in sexually explicit conduct pursuant to 18 U.S.C. § 2252(a)(1), the district court’s application of a two-level sentencing enhancement under U.S.S.G. § 2G2.2(b)(6) for using a computer to transmit illicit images, did not constitute impermissible double-counting.

Sentencing - Procedural Reasonableness

United States v. Wallace, 597 F.3d 794 (6th Cir. 2010) -

The district court’s failure to consider the defendant’s nonfrivolous argument at sentencing that her sentence was more than twice as long as that of her decidedly more culpable codefendant was plain error which warranted a remand for resentencing. The record failed to reflect that the court had even considered the argument and included no mention of the § 3553(a) factors as required for the sentence to be procedurally reasonable. Evidence that Wallace testified untruthfully during her first trial which ended in a mistrial was sufficient to support her conviction for perjury.

Sentencing - Motion for Reduction - crack cocaine

United States v. Robinson, 609 F.3d 868 (6th Cir. 2010) -

Affirming the district court’s resentencing of the defendant upon his motion for a reduced sentence in light of changes in the crack cocaine guideline, the Court of Appeals held that the district court lacked authority to reduce the sentence even further to a point below the amended sentencing guidelines range. Judge Merritt concurred with the result in light of the recent Supreme Court decision in United States v. Dillon, where a 7 to 1 majority of the Court held that in resentencing

pursuant to 18 U.S.C. § 3582(c), the sentencing court could not apply 18 U.S.C. § 3553(a) factors or the sentencing principles espoused in United States v. Booker. In accord with Justice Stevens in his Dillon dissent, Judge Merritt opined that the court on resentencing should consider the “no-greater-than-necessary” principles of § 3553(a). The Dillon majority, he reasoned, had clearly ignored the directive of 18 U.S.C. § 3661 that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive *and consider for the purpose of imposing an appropriate sentence.*” (Emphasis in original).

Plea Agreement - Waiver of Right to Appeal

United States v. Vasquez-Martinez, 616 F.3d 600 (6th Cir. 2010) -

The district court was not required to inform the defendant of his waiver of the right to appeal the court’s denial of his motion to suppress upon acceptance of the defendant’s plea of guilty to conspiracy to distribute methamphetamine and possession of a firearm in furtherance of the drug conspiracy. The defendant failed to secure his right to appeal the suppression issue by neglecting to obtain a conditional plea under the Federal Rules of Criminal Procedure Rule 11(a)(2) which expressly reserves the right to appeal a pre-plea ruling.

Evidence - Admissibility of Prior Act Evidence

United States v. Corsmeier, 617 F.3d 417 (6th Cir. 2010) -

Evidence of the defendant’s prior use of cocaine during her trial for bank fraud, wire fraud, mail fraud and conspiracy to commit money laundering in connection with a mortgage fraud scheme, was minimally probative and highly prejudicial, and the admission of the evidence resulted in reversible error.

Sentencing - Drug Distribution - Sentencing

United States v. Gillis, 592 F.3d 696 (6th Cir. 2009) -

A remand for resentencing was appropriate where the record failed to make clear that the sentencing judge would have imposed the same sentence had he known that the career offender guidelines are advisory.

Sentencing - Enhancement for Reckless Endangerment during Flight

United States v. Woods, 604 F.3d 286 (6th Cir. 2010) -

The government failed to demonstrate that his codefendant’s possession of a firearm was reasonably foreseeable to the defendant and the two-point sentencing enhancement to the defendant’s sentence for possession of a dangerous weapon was not warranted following the defendant’s plea of guilty to manufacturing methamphetamine. There was, however, sufficient evidence to establish the defendant’s knowledge that the vehicles he attempted to evade were law enforcement and an enhancement for reckless endangerment during flight was appropriate.

Sentencing - Safety Valve

United States v. Pena, 598 F.3d 289 (6th Cir. 2010) -

The defendant did not meet his burden of proving his entitlement to a departure under the safety valve provision of the Sentencing Guidelines where he failed to provide the government with full

and complete disclosure of information he had relating to his supplier. His fear of retaliation for providing information on his supplier did not relieve him of his obligation to make full disclosure under the “safety valve” provision. U.S.S.G. § 5C1.2(a)(5).

Speedy Trial Act

United States v. Turner, 602 F.3d 778 (6th Cir. 2010) -

A two-month delay between the district court’s grant of the defendant’s request for a competency evaluation and his arrival at detention center for that evaluation was unreasonable and violated the Speedy Trial Act resulting in the reversal of the defendant’s convictions for violations of 18 U.S.C. § 922(g) for possession of a firearm and ammunition. The defendant’s five other drug-related convictions were affirmed and the case was remanded for resentencing and for the district court to determine whether the § 922(g) charges would be dismissed with prejudice.

Habeas Corpus - Intent to Kill

Krantz v. Lindamood, 594 F.3d 896 (6th Cir. 2010), cert. denied ___ S.Ct. ___, 2010 WL 2345128 (U.S. Oct 4, 2010) (NO. 11236) -

A State of Tennessee prisoner convicted of felony murder and assault was not entitled to federal habeas relief from his conviction for felony murder. Evidence at trial was sufficient to demonstrate the defendant’s intent to kill “a person” and the fact that the defendant did not kill the two persons he specifically threatened to kill did not preclude his conviction for felony murder. The intent to kill a specific individual is not an element of the offense under Tennessee law.

Sentencing - Armed Career Criminal Act - prior conviction

United States v. Eubanks, 617 F.3d 364 (6th Cir. 2010) -

The defendant’s prior juvenile conviction for felonious assault was properly considered a predicate conviction for purposes of sentencing the defendant as an Armed Career Criminal.

Fourth Amendment - Terry Stop and Search

United States v. Walker, 615 F.3d 728 (6th Cir. 2010) -

A Terry search of the defendant’s duffle bag was lawful where the officer approached the defendant in response to a be-on-the-lookout report for robbery suspect seen fleeing the scene in a vehicle similar to the defendant’s and the robber was apparently armed with a semi-automatic pistol. When asked for identification, the defendant reached for his duffle bag and the officer feared the bag might contain a weapon.

Sentencing - Counterfeit Bills

United States v. Webb, 616 F.3d 605 (6th Cir. 2010) -

The district court did not err by imposing a two-point enhancement on the defendant’s sentence following his plea to counterfeiting and passing counterfeit notes for production of counterfeit obligations pursuant to 18 U.S.C. § 2B5.1(b)(2)(A). The exception to the enhancement – where the counterfeit bills are so obviously counterfeit that they were unlikely to be accepted even if subjected to minimal security – did not apply in this case where the bills were successfully passed a number of times and a federal agent testified that the quality of the bill was “decent.”