Precedential Value

An Outline of the Recent, Important Supreme Court and Sixth Circuit Decisions for Attorneys Practicing Criminal Law in the Courts of the Sixth Circuit

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CONTENT AND FORMAT

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 are arranged in an outline format under the following headings:

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If there is a heading or sub heading missing, this means that there are no cases relevant to the issue for the covered time period.

FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to www.supremecourtus.gov for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to www.ca6.uscourts.gov and enter the docket number in the opinion search feature. Opinions may also be found in Lexis or Westlaw by entering the docket number in a terms and connectors search in the Supreme Court or Sixth Circuit database.

SIXTH CIRCUIT DECISIONS

I. Sentencing Issues

A. § 3553(a) factors and issues

United States v. Gunter, 08-1733 (9.8.10)

The court determined that in reviewing a sentence for procedural reasonableness, the Sixth Circuit need not make a hyper -technical review to determine that a district court has matched, word for word, each argument raised for or against a party. Rather, "[t]he court must conduct a meaningful sentencing hearing and truly consider the defendant's arguments. [] On appeal, we must determine whether, based on the entirety of the sentencing transcript and written opinion, if any, we are satisfied that the district court fulfilled this obligation. We are to focus less on what the transcript reveals that the court said and more on what the transcript reveals that the court did."

United States v. Wettstain, 08-5707 (8.30.10)

Even where a district court imposes a life sentence under one count of the indictment, the court must still review 3553(a) factors, and make findings, as to other counts of conviction. The court in *Wettstain* remanded for resentencing on counts 2-4, despite upholding the conviction and life sentence under Count 1 of the indictment.

United States v. Franklin, 08-2195 (9.23.10)

Despite the Supreme Court case of *Kimbrough v. United States,* 552 U.S. 85 (2007), a sentencing court cannot disregard a mandatory minimum sentence required under 21 U.S.C. § 841 that utilizes a 100:1 crack cocaine sentencing ratio.

United States v. Camacho-Arellano, 07-5427 (7.16.10)

A district court, at sentencing, may now consider the lack of a "fast track" program for illegal immigrants in determining the length of sentence. The court found " Because our precedents at the time of sentencing prohibited district court judges from granting a variance based on a disagreement with a guidelines policy, and because *Kimbrough* put that theory to rest, we remand the case to the district court for resentencing. Camacho-Arellano sufficiently preserved a *Kimbrough*-like argument with respect to the fast-track guidelines. [] But the district court could not have been aware of its discretion to sentence Camacho-Arellano based on its disagreement with fast-track policies or the disparities a fast-track sentencing regime creates." The Court therefore remanded for resentencing.

B. Guidelines Issues

United States v. Webb, 09-5719 (8.16.10)

USSG § 2B1.5(b)(2)(A) provides for a two level enhancement where the defendant "manufactured or produced any counterfeit obligation or security of the United States." However, the application notes suggest that no such enhancement will lie where the items were "obviously counterfeit". The court adopted a 5 factor test to determine the applicability of this enhancement: "(1) physical inspection during the trial or at the sentencing hearing; (2) whether the counterfeit notes were successfully passed; (3) the number of counterfeit notes successfully passed; (4) the proportion of the number of counterfeit notes successfully passed to the number of notes attempted to be passed; and (5) the testimony of a lay witness who accepted one or more of the counterfeit notes or an expert witness who testifies as to the quality of the counterfeit notes."

United States v. Payton, 09-3930 (8.25.10)

The fact that a defendant is sentenced as a career offender under USSG § 4B1.1, but receives a downward departure under USSG § 5K1.1 does not provide a basis to adjust his sentence under 18 U.S.C. § 3582 based upon the new crack cocaine Guidelines, as the original sentence was not "based upon" the crack cocaine Guidelines.

United States v. Hameed, 09-3259 (7.26.10)

Hameed plead guilty to an offense requiring a mandatory minimum 10 year sentence. His calculated Guidelines range was 78-97 months, but the statutory range of 120 months trumped the Guidelines. Prior to sentencing, the Government moved for a downward departure based upon substantial assistance. The court granted this request, and imposed sentence of 70 months. The court utilized the 78-97 month initial range in making its sentencing determination.

The defendant subsequently moved for a further adjustment under 18 U.S.C. § 3582, based upon the crack cocaine Guidelines revision of 2007. The court found that the court certainly considered the 78-97 month range, based upon crack cocaine Guidelines, and his sentence was imposed "based upon" those Guidelines. However, the court found that reduction would not be consistent with Guidelines policy statements. The court noted that "Amendment 706 did not lower an 'applicable' guideline range as required by USSG § 1B1.10(a)(2)(B). Thus, a sentence reduction would not be 'consistent with applicable policy statements issued by the Sentencing Commission' and is unavailable under 18 U.S.C. § 3582(c)(2)."

United States v. Horn, 09-5090 (7.26.10)

A district court lacks authority to re-sentence a defendant upon a Guidelines amendment or modification unless the Commission explicitly makes the amendment retroactive. In Horn, the defendant requested, and received, a sentence reduction under 18 U.S.C. § 3582 under Amendment 709, which altered the way prior offenses were considered related. However, this amendment is not listed in those made retroactive under USSG § 1B1.10. The court found that because the authority of the court under § 3582 is limited by the Commission pursuant to statute, there was no statutory authority to re-open and re-impose a sentence.

C. Procedural Matters

United States v. Wilson, 08-1963 (7.19.10)

Where a district court erroneously calculates the amount of loss, but there is no objection at sentencing, the erroneous calculation only constitutes plain error if "there is a reasonable probability that the clearly erroneous facts contributed to the length of the sentence." Here, the court found that the calculation was plain error, and remanded for further proceedings. In a concurrence, Judge Martin espoused a concern about the district court's practice of going into the sentencing proceeding with an already written opinion. Judge Martin commented " the practice of a sentencing judge coming on the bench with an opinion already drafted should not be tolerated. When a judge takes the bench with an opinion in hand, the obvious conclusion is that his mind is already made up, that nothing the defendant or his attorney say will make any difference, and that sentencing is just another step in a largely automated, impersonal process."

United States v. Carradine 08-3220 (9.20.10)

The Fair Sentencing Act of 2010 does not apply to defendants whose conduct occurred before August 3, 2010. "The new law at issue here, the Fair Sentencing Act of 2010, contains no express statement that it is retroactive nor can we infer any such express intent from its plain language. Consequently, we must apply the penalty provision in place at the time Carradine committed the crime in question."

United States v. Bacon, 09-1793 (8.19.10)

Although a district court's erroneous calculation of a Guidelines range is procedural error, where that error has no effect on the sentence ultimately imposed, no remand for resentencing is necessary. In *Bacon*, the court disallowed a reduction under USSG § 3E1.1, but forgot to take back out, from the Guidelines calculation, the additional level originally granted under § 3E1.1(b). The court held that "the error in the Guidelines calculation was marginal because Bacon's sentence is within the properly calculated Guidelines range as well as within the erroneously calculated range. We therefore

conclude that this error was harmless."

D. Recidivism Enhancements

Adams v. United States 09-1176 (9.30.10)

A prior adjudication under Michigan's Youthful Trainee Act, which did not result in a "conviction" but rather was a withheld adjudication, nonetheless qualified as a prior conviction for purposes of criminal history calculations. The Court held "we hold that plea of guilty to a felony drug offense qualifies as a prior conviction for federal sentencing purposes when the defendant is assigned as a youthful trainee pursuant to the YTA."

United States v. Eubanks, 09-1254 (8.3.10)

Michigan has a statute which provides that when a person becomes 30 years old, "the court must destroy the files and records pertaining to a persons juvenile offenses". The defendant's sentence in *Eubanks* was enhanced under the ACCA, due in part to a prior Michigan juvenile offense which records should have, but were not, destroyed under this Michigan rule. The court held that there was no error in relying on the records to enhance the sentence. The court found (1) that even though Michigan law called for the records to be destroyed, it explicitly allowed for the fact of conviction to continue to be utilized for recidivism purposes, and (2) that the mere fact that the record were supposed to have been destroyed does not qualify as an "expunction" of the conviction, pursuant to 18 U.S.C. § 921.

United States v. Graham, 08-5993 (9.21.10)

A district court may use a prior offense the defendant committed as a juvenile, which resulted in an adult conviction, to enhance a sentence under 21 U.S.C. § 851. The court found that the term "felony drug offense" does not differentiate between acts committed before or after the age of majority. The court found "Nothing in § 841(b)(1)(A) indicates that a defendant's age at the time of his or her prior conviction is relevant to the application of § 841, but to the extent that it is, age would appear to matter if it was related to the process in which a defendant's prior conviction was obtained." The court also rejected an Eighth Amendment challenge to the use of this conviction, finding that Graham v. Florida, --- U.S. ----, 130 S.Ct. 2011 (2010) did not mandate vacation of the sentence imposed.

E. Fine/Restitution

United States v. Blanchard, 09-1284 (8.30.10)

The amount of restitution in a failure to pay taxes case involving a corporation cannot include amounts under FICA which are solely owed by the corporation.

United States v. Williams, 09-3521 (7.15.10)

Even where the Government makes mistakes in both calculating restitution, and not timely providing information on restitution, it is not estopped from requesting proper restitution at sentencing. This is because the MVRA makes mandatory an obligation on the court to impose restitution in certain cases.

II. Plea Matters

C. Hearings

United States v. Vasquez-Martinez, 08-5977 (8.13.10)

A district court is not required to affirmatively inform the defendant about specific defenses he is waiving during a plea hearing, including the fact that by not specifically reserving it, he is waiving his right to appeal a suppression decision. The court therefore dismissed the appeal of the denial of the motion to suppress.

United States v. Mobley, 08-4641 (8.3.10)

The court provided some guidance as to how district courts were to handle plea proceedings, in relation to finding an adequate factual basis for the plea. Citing an earlier case (*United States v. Tunning*, 69 F.3d 107 (6th C. 1995)), the court held "The ideal means to establish the factual basis for a guilty plea is for the district court to ask the defendant to state, in the defendant's own words, what the defendant did that he believes constitutes the crime to which he is pleading guilty. So long as the district court ensures that the defendant's statement includes conduct-and mental state if necessary-that satisfy every element of the offense, there should be no question concerning the sufficiency of the factual basis for the guilty plea." The court then found that although this method was not utilized, there was sufficient evidence to be gleaned from the record to find an adequate factual basis.

III. Evidence

D. Discovery/Miscellaneous Evidentiary Matters

United States v. Geisen 08-3655 (7.15.10)

The court determined that it was not an abuse of discretion for the district court to exclude from evidence a proposed immunity agreement. The defense wanted to introduce the agreement, and his denial of said agreement, as evidence that his state of mind, prior to trial, that he was innocent. The court found that because the denial of an immunity agreement could mean many other things than just innocence, its prejudicial effect outweighed its probative value. Without determining whether such evidence could ever be admissible, the court found, under the facts of the case, failure to admit the evidence was not an abuse of discretion.

United States v. Prince, 08-6547 (8.26.10)

The prosecution is not required by Rule 16 to provide a copy of its exhibit book prior to trial, or identify which exhibits it plans to introduce. In *Prince*, the discovery was provided to the defense, and consisted of over 70,000 pages of material. Prior to trial, on a date specific, the Government offered to allow for inspection (but not copying) the trial notebooks. "When that time came, however, defense counsel was unavailable on the date proposed, and the government was unwilling to make the notebooks available on the date defense counsel requested." The court found this was not a violation of Rule 16, which only permits disclosure of the discovery materials, and not disclosure of the exhibit lists.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

United States v. Clint Walker, 08-4680 (8.12.10)

The defendant was approached by authorities investigating a bank robbery. The defendant was near (and admitted to driving) a vehicle matching the description of the vehicle used in the robbery. The defendant was carrying a black bag, officers removed the bag from the vicinity of the defendant, and placed it on the hood of their vehicle. They then opened the bag to search it for weapons, and found incriminating evidence of the bank robbery. The court held that officers were not restrained, under *Terry*, to merely feeling the outside of the bag, but could open and make a cursory search of the bag for weapons when officer safety was at issue.

B. Reasonable Suspicion/Vehicle Stops

United States v. Thomas Williams, 09-4630 (8.6.10)

The defendant was standing with friends near private property, but still in the public street. His friends had open containers. The police officers knew the defendant, and had given him a verbal warning for trespass in the past. Officers approached the defendant, accused him of trespassing, and questioned him. Officers found a weapon on the defendant, and charged him for being a felon in possession. The court determined that officers had no reasonable suspicion to approach and detain the defendant, as he was not committing any offense. Further, the *officer's* actions in approaching the defendant, singling him out from the group, and accusing him of a crime were such that a seizure occurred. On this basis, the court upheld suppression of the evidence.

United States v. Johnson, 09-5397 (9.8.10)

In this case, the court determined two questions: (1) is a defendant"seized" where he stops in response to a police order, but does not place his hands on top of a vehicle as ordered? and (2) was there reasonable suspicion to seize the defendant, under the circumstances of the case? The court first found that the act of yielding by stopping resulted in a seizure, even when the defendant did not fully comply with officer's orders. The court noted "if a person stopped and raised his hands at an officer's command but failed to obey a further command to spread his legs or to lie on the ground, we would not say that he had not been seized initially. It is enough to submit to an officer's initial command to stop and to remain stopped."

Second, the court found that there was no reasonable suspicion for the seizure. The court found the following facts were available to officers: "(1) Johnson was in a high drug-trafficking area; (2) it was 4:00 a.m.; (3) the officers were responding to a 911 call; (4) two or three minutes after the 911 call, the officers observed Johnson twenty to thirty yards from the blue Cadillac referenced in the call and near the residence from which the call was made; (5) the officers did not notice anyone else in the area, besides the driver of the white car to which Johnson was headed; (6) Johnson did not stop when called to by the officers and instead continued walking toward the white car; and (7) he was carrying a bag, which he threw into the white car. As we explain, these circumstances were insufficient to allow an officer reasonably to suspect Johnson of criminal activity."

United States v. Street, 08-6242 (7.23.10)

Where an officer observes a traffic violation, he may legitimately stop a vehicle and ask the driver to get out of the vehicle. Further, once the driver/defendant was removed from the vehicle, and the officer saw the driver/defendant reach into his pocket with his hand, he could, pursuant to officer safety concerns, grab the driver's arm to immobilize it, and ask him if there was anything in his pocket.

C. Warrant Exceptions

Johnson v. City of Memphis, 09-5046 (8.24.10)

The court found that where officers received a 911 call in which the person hung up before information could be obtained, combined with an unanswered return call and an open door, officers had an exigent circumstance sufficient to enter a home without a warrant. The court noted "The police's entry must be based on an objectively reasonable belief, given the information available at the time of entry, that a person within the house was in need of immediate aid."

D. Consent Searches and Seizures

United States v. Montgomery, 09-3289 (9.13.10)

A defendant who was shot, then transported to a hospital where morphine was given, was nonetheless competent to give consent to search his premises. The court found "It is no doubt the case that medication or intoxication may diminish the capacity to consent to the extent it undermines an individual's grasp on the reality of what he is doing. When officers seek and obtain consent from a medicated or intoxicated individual, as is sometimes appropriate, they can expect a dispute about the voluntariness of any consent given and what often comes with it: attendance and testimony at a suppression hearing. And in some settings, the influence of drugs, prescribed or otherwise, or the influence of alcohol may tip the balance in favor of finding a lack of capacity to consent to the search." However, under the facts of the particular case, the defendant "remained alert and oriented before, during and after the police questioned him, and that the morphine did not affect Montgomery's ability to answer questions."

E. Search Warrants

United States v. Master, 08-6418 (8.31.10)

Where a state magistrate issues a warrant, but lacks authority and jurisdiction to do so under state law, the warrant violates the Fourth Amendment. As found by the court: "A state is allowed to determine when a person is authorized to approve warrants, where that person has the authority to approve warrants, and what type of warrants that person is allowed to approve. To hold otherwise would allow federal courts to completely undermine state determinations of who is an authorized magistrate, and it is beyond question that we determine who is a qualified magistrate by consulting state law." "In this case, Judge Faris' authority to issue warrants stems exclusively from Tennessee law, but that same source of law provides that Judge Faris had no authority to issue a warrant for a search of Defendant's home. The search therefore violated Defendant's Fourth Amendment rights." The court remanded, however, for further proceedings, to allow the district court to weigh whether suppression was the correct remedy for this violation, in light of the Supreme Court's decision in *Herring v. United States*. --- U.S. ----, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

G. Miscellaneous Fourth Amendment

United States v. Howard, 08-6143 (9.14.10)

An indigent defendant is not entitled to an expert witness to attempt to refute or otherwise challenge a drug detecting canine unit; rather, the defense must show some initial basis for the expert advice, such as objective evidence of problems with the dogs

health, certification, training, performance, or unusual circumstances surrounding the alert itself.

V. Fifth Amendment

A. Prosecutor Conduct

United States v. Wettstain, 08-5707 (8.30.10)

Prosecutor's remarks to the jury, that they are the "conscience of the community" whose role it is to solve the drug problem, and further remarks referring to the defendants as "monsters" were improper argument; however, because curative instructions were given, the convictions would be upheld.

United States v. Allen, 08-6363 (8.13.10)

At trial, the defendant challenged introduction of the crack cocaine, as it appeared to be in a different bag than the one originally used, and was not of the same weight. On appeal after admission of the evidence, defendant argued that because the evidence had been tampered with, it was inadmissible. The court denied this argument, finding "Allen presents no actual evidence that tampering occurred. In particular, Allen argues that the original evidence bag was destroyed and replaced with a DEA evidence bag, and that the weight of the crack cocaine diminished over time. However, it does not appear that there was anything improper about Officer Hixon's replacement of the original evidence bag, and Agent Montejo provided several explanations for the decrease in weight. At most, Allen's arguments merely raise the possibility of tampering. Consequently, the district court did not abuse its discretion in admitting the crack cocaine."

C. Confessions and Testimonial Rights

U.S. v. Williams, 08-2070 (7.8.10)

18 U.S.C. § 3501(c), which limits the use of confessions where a defendant is not timely brought before a magistrate or judge, does not apply to defendants whose confessions were given to state authorities while being held on state charges. Thus, the defendant's confession, given after *Miranda* warnings and after 24 hours of incarceration, was not involuntary.

Simpson v. Jackson, 08-3224 (7.13.10)

Where a defendant is in jail for another offense, officers are still required to provide *Miranda* warnings to the defendant. The state had argued because the defendant was not "in custody" for the offenses questioned, no warnings were required. The failure of the officers to do so in this case, however, did violate the defendant's constitutional

rights. The court did uphold, however, another statement made by the defendant, made in part on a promise of release that was false. The court reasoned that because the promise was only limited to pending charges, and not conduct to which he confessed, the fact that the promise was ultimately illusory was not a basis for finding the confession involuntary.

Treesh v. Bagley, 07-3524 (7.13.10)

In a situation where a defendant receives proper *Miranda* warnings, but then receives incomplete warnings prior to a confession, the confession will be held to be voluntary so long as no "circumstances seriously changed between the initial warnings and the interrogation." In *Treesh*, the defendant received proper warnings, and then, 2 hours later, while in lock up, was interrogated with less than full warnings. The Court found the totality of the circumstances indicated a voluntary statements, and therefore denied habeas relief.

Fields v. Howes, 09-1215 (8.20.10)

The defendant was a state inmate, incarcerated on charges unrelated to those under investigation. At some point, detectives pulled the defendant from population, placed him in a locked room, and interrogated him for up to 7 hours. Although they told the defendant he was free to leave, they did not read him *Miranda* warnings, and used force (through a corrections officer and by locking the door) to obtain a statement.

The Court held that "Because Fields was removed from the general prison population for interrogation about an offense unrelated to the one for which he was incarcerated, *Mathis* is the applicable law. None of the cited appellate cases, all of which were decided subsequent to *Mathis*, erode its essential holding: *Miranda* warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison." The court called their ruling a bright- line test, requiring - "A *Miranda* warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of the prison."

United States v. Brown, 09-5431 (8.24.10)

The court revisited the "corroboration rule", which requires evidence independent of a defendant's confession in order to uphold a conviction. The court questioned whether, in light of *Miranda* and its progeny, the rule still had continued vitality. The court applied the rule, however, and found that: "(1) when an accused confesses to a crime involving "physical damage to person or property, ' the independent corroborating evidence need only show that the crime occurred" [] (2) when an accused confesses to a crime for which there is no tangible injury and it cannot be shown that [a] crime has been committed without identifying the accused, [] the corroborative evidence must implicate the accused". Further, the evidence need only corroborate part of the confession.

Shaneberger v. Jones, 07-2211 (7.16.10)

The defendant, in custody for a shooting, informed officers that he wanted to talk to his father about whether to obtain an attorney. The investigating officer then left the defendant, but as he was leaving, told the defendant that his co-defendant had already implicated him in the offense. The officer stated that he specifically told the defendant not to say anything in response; however, shortly thereafter, the defendant admitted to another officer his participation. The court held that, as the officer's intent was not to elicit any statement, much less an incriminating one, no interrogation occurred. The court found that although the officer's comments came close to a constitutional problem, the warning given to not respond saved any constitutional reversible error.

VI. Sixth Amendment

F. Miscellaneous Sixth Amendment

United States v. Darma, 08-4540 (9.15.10)

Right to present evidence - The defendant was not denied his right to present a defense, despite the fact that prior to trial, the Government deported a witness. The court found that, in order to obtain a new trial on this basis, the defendant must prove: (1) bad faith on the part of the Government in deporting the witness, and (2) that the evidence would have been material and favorable. Because Darma could not show either factor, no constitutional error occurred.

VII. Other Constitutional Rulings

E. Miscellaneous Constitution Rulings

United States v. Lucido, 09-1410 (7.28.10)

A district court lacks jurisdiction to consider a defendant's motion to expunge records after a final judgment of acquittal has been entered. "The essential effect of entering a final (unappealed) judgment acquitting an individual of charges brought against him is to end the government's and the court's authority over the individual, not to let it linger. The statutory premise for the court's original authority over Lucido thus does not by itself provide a basis for considering Lucido's expungement motions."

VIII. Defenses

H. Sufficiency of Evidence Generally

United States v. Sliwo, 09-1136 (9.8.10)

The court overturned the conspiracy and aiding and abetting convictions of a defendant under a sufficiency of the evidence standard, finding the Government failed to tie the defendant to an agreement. As recounted by the court, "In this case, the government presented evidence tying Defendant to his alleged co-conspirators who personally observed the loading of more than 900 pounds of marijuana into a van. The government, however, provided insufficient evidence that would allow a reasonable jury to find that Defendant had entered into an "an agreement to violate drug laws." The government produced evidence of Defendant arranging the transport of the van before it was loaded with drugs. The government also presented evidence from which a reasonable jury could find that Defendant was serving as a lookout on three separate occasions. The government failed to provide any evidence of any observed conversations between Defendant and his alleged co-conspirators. This Court 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."

L. Miscellaneous Defenses

Daoud v. Davis, 08-1673 (8.25.10)

Once defense counsel makes an adequate investigation into an insanity defense, the decision of whether or not to present such a defense is a strategic choice, unassailable in a habeas petition.

IX. Jury Issues

A. Jury Instructions

McGuire v. Ohio, 07-3991 (8.31.10)

In a death penalty case, during the penalty phase, the jury was not instructed on the theory of a "catch all" mitigating factor that they could rely upon in making their determination. The court held, however, that state appellate court review cured any error. "[T]he independent reweighing of the aggravating circumstances and mitigating factors by the Supreme Court of Ohio cured any error, assuming there was constitutional error, involving omission of a catch-all mitigation factor from the jury instructions at sentencing and McGuire's counsel's failure to challenge that omission before the Court of Appeals of Ohio. If a jury recommends the death penalty partially based on improper aggravating factors, independent appellate reweighing of proper aggravating and mitigating evidence cures the error."

United States v. Darma, 08-4540 (9.15.10)

A defendant is entitled to a specific unanimity instruction only when "(1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity." In *Darma*, none of these factors warranted such an instruction despite the fact that the Government pursued the conviction on multiple theories of guilt.

C. Voir Dire - Fair and Impartial Jury

United States v. Lanham, 08-6504/6506 (8.24.10)

A district court has a duty to ensure that each juror called will be fair and impartial, and equivocal statements from potential jurors must either be explored, or the juror removed for cause. The jurors in question made statements such as"Right now I'm obviously not totally neutral. But I can certainly try". The court found "the noncommittal statements made by Jurors 56 and 143 were not a sufficient basis for finding impartiality, and the district court's failure to allow a for-cause challenge to these jurors was an abuse of discretion. Neither juror promised to remain impartial, and both seemed affected by the news accounts that they had read. The trial court abused its discretion by denying Defendants' motion to strike these jurors for cause." The court found, however, that because the jurors were removed from the jury by preemptory challenges, that no reversible error occurred.

D. Batson

United States v. Cecil, 08-5080 (8.10.10)

The court found that when a district court reviews a *Batson* challenge, it need only make a "comparative juror analysis" where it is requested by the parties. Where no such analysis is requested, a defendant can only obtain relief if he or she can prove, from the record, the other similarly situated jurors were not excluded (on the basis espoused by the party), and that such inconsistent use of strikes showed purposeful discrimination.

XI. Appeal

Treesh v. Bagley, 07-3524 (7.13.10)

When appellate counsel raises an issue in a "perfunctory" manner, the issue is deemed waived for appeal. Treesh's counsel raised an issue regarding the knowing waiver of his *Miranda* rights, but did so in summary fashion, without developing an argument or

citing to caselaw. Under these circumstances, the Court considered the issue waived.

United States v. Bowers, 08-5595 (8.12.10)

The Sixth Circuit is without jurisdiction to hear an appeal challenging the length of sentence imposed under Fed.R.Crim.P. 35(b) on *Booker* reasonableness grounds. The court reviewed the statutory basis for appeal, and concluded that "a defendant's allegation of *Booker* unreasonableness in a § 3582(c)(2) proceeding does not state a cognizable "violation of law" that § 3742(a)(1) would authorize us to address on appeal." Accordingly, the court dismissed the appeal on jurisdictional grounds.

United States v. Franklin, 08-2195 (9.23.10)

Where the court allows for a limited remand, based upon a specific sentencing error, a district court is not permitted to consider a defendant's post- incarceration rehabilitation.

XII. Post-Conviction Remedies

Cjijetinovic v. Eberlin, 08-3629 (8.23.10)

The court ruled that, as to claims that a defendant is excused from procedurally preserving a habeas claim due to "futility", that doctrine is very limited in scope. In *Cvijetinovic*, the defendant had argued that he was excused from raising an *Apprendi* claim on direct review, as the state courts had consistently held that *Apprendi* did not apply to Ohio sentencing schemes. The Court, in rejecting this claim, addressed the futility doctrine to excuse procedural default. The Court noted that "the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it." The Court recognized that, in holding in this fashion, it was inviting, and possibly requiring, counsel to raise all issues, in all cases, no matter how frivolous they may seem at the time in light of then existing law. The Court admitted "this rule could, under certain circumstances, lead to some potentially undesirable results. One jurist predicted that 'defense counsel will have no choice but to file one 'kitchen sink' brief after another, raising even the most fanciful defenses that could be imagined based on long-term logical implications from existing precedents.' United States v. Smith, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J., dissenting from denial of rehearing en banc). However, '[u]nless and until the Supreme Court overrules its decisions that futility cannot be cause, laments about those decisions forcing defense counsel to file 'kitchen sink' briefs in order to avoid procedural bars are beside the point.'"

Middlebrooks v. Bell, 05-5904 (9.1.10)

In order to preserve a claim, a defendant must do more than simply make a list of claims in a brief. In this case, the defense filed a brief in state court, and then, in an addendum to that brief, made a list of arguments, not citing to any caselaw or otherwise arguing from the record. The state court held such claims defaulted for the

failure to properly present them, and the court upheld the procedural default.

Post v. Bradshaw, 03-4085 (9.13.10)

Counsel did not render ineffective assistance where he counseled the defendant to enter a no contest plea, and allow his death penalty determination to go before a three judge panel, as opposed to a jury. Counsel reasonably believed that by not going through a trial on the merits, some of the damaging evidence could be averted. Further, although the ABA Rules indicate that allowing a defendant to plead guilty under such circumstances is *per se* ineffective assistance, "ABA Guidelines are not 'inexorable commands'; rather, they are 'only guides' to what reasonableness means, not its definition'". Thus, no constitutional error occurred under the facts of this case.

Awkal v. Mitchell, 01-4278 (7.23.10)

In a capital case where the defense was not guilty by reason of insanity, defense counsel was not ineffective in presenting three expert witnesses, each of which had issues that were subject to effective cross-examination by the state. Despite the fact that one of the witnesses actually testified that the defendant was not insane, it was reasonable to conclude that the state would call the expert in rebuttal, therefore, counsel strategically decided to call the witness to blunt the effect of the testimony.

XIII. Specific Offenses

United States v. Lay, 08-3892 (7.14.10)

Investor advisement fraud – 15 U.S.C. § 80b-6 A hedge fund advisor can be found to have a fiduciary relationship with a specific investor in the fund, thus supporting a conviction under 15 U.S.C. § 80b-6, thus, it was proper for the district court to instruct the jury that it could find that the defendant owed the client a fiduciary duty.

United States v. Blanchard, 09-1284 (8.30.10)

Failure to pay taxes – 26 U.S.C. § 7202 an inability to pay taxes is not a defense for wilfully failing to pay taxes. The court held that although certainly an inability to pay bears upon the wilfulness requirement, it is neither a defense or an affirmative element the Government need disprove – therefore, no jury instruction was required.

United States v. Faulkenberry, 08-4233 (7.28.10)

Money Laundering – concealment 18 U.S.C. § 1956(a)(1)(B)(I) Where a defendant is charged under subsection 1956(a)(1)(B)(I) with concealment money laundering, the Government must prove that the concealment was designed to disguise the nature of the proceeds. The court reviewed recent Supreme Court precedent, and found "To

prove a violation of that subsection, therefore, it is not enough for the government to prove merely that a transaction had a concealing effect. Nor is it enough that the transaction was structured to conceal the nature of illicit funds. Concealment–even deliberate concealment–as mere facilitation of some other purpose, is not enough to convict. [] What is required, rather, is that concealment be an animating purpose of the transaction." On this basis, the court found insufficient evidence to uphold the money laundering convictions.