

# *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:

- I. Sentencing Issues**
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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**

**We have now added hyperlinked text. Just click on the case name, and you will be taken to the full opinion (assuming you are connected to the internet).** Or you can go to [www.supremecourtus.gov](http://www.supremecourtus.gov) for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to [www.ca6.uscourts.gov](http://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.

## SUPREME COURT DECISIONS

### I. Sentencing Issues

#### Abbott v. United States, No. 09-479 (11.15.10)

The defendant Abbott was convicted of both a felon in possession of a firearm offense (18 U.S.C. § 922(g)), as well as a charge under 18 U.S.C. § 924(c) for using, carrying or possession a deadly weapon in relation with a crime of violence. Abbott received 15 years on the § 922(g) count, and a consecutive 5 year term on the § 924(c) count. On appeal, Abbott argued that the sentencing court was not permitted to impose a consecutive sentence for the § 924(c) count, as the statutory language indicated that a consecutive sentence was to be imposed [e]xcept to the extent that a greater minimum sentence is otherwise provided by [§924(c) itself] or by any other provision of law.”

The Supreme Court disagreed. The Court found that the issue hinged on Congressional intent, and that the clear intent of Congress was contrary to what would be a verbatim reading of the statute. The Court reviewed Congressional history of 18 U.S.C. § 924(c), and found that the most recent amendments to the statute indicated a Congressional intent to increase sentences for those that possessed or used weapons. The reading suggested by Abbott, according to the Court, would have the effect of lessening sentences for those who committed greater offenses. The Court held, therefore, that the “except” clause applied only to other subsections of § 924(c), and required a consecutive sentence in all other matters.

### XII. Post-Conviction Remedies

#### Wilson v. Corcoran, No. 10-91 (11.8.10)

The defendant was convicted of murder in Indiana state court and sentenced to death. Under Indiana law, non-statutory aggravating factors may not be considered in imposing a death sentence. On appeal from resentencing, the Indiana Supreme Court held that the trial court did not rely on any non-statutory aggravating factors in sentencing the defendant to death, and accordingly upheld the sentence. In subsequent federal habeas corpus proceedings, the Seventh Circuit held that the state trial court did, in fact, rely on non-statutory aggravating factors in imposing the death sentence, and that the Indiana Supreme Court's conclusion to the contrary represented an objectively unreasonable factual determination. As a result, the Seventh Circuit found that the defendant was entitled to habeas corpus relief under 28 U.S.C. § 2254(d)(2).

The United States Supreme Court reversed. Under 28 U.S.C. § 2254(a), habeas corpus relief may only granted if the prisoner's custody violates federal law. In *Wainwright v. Goode*, 464 U.S. 78, 86-87 (1983), the Supreme Court held that relying upon a non-statutory aggravating factor in violation of state law when imposing a death sentence generally will not result in a violation of the Eighth Amendment. Accordingly, the Supreme Court held that habeas corpus relief was not available on this ground, irrespective of whether or not the Indiana Supreme Court's factual determination was unreasonable.

## SIXTH CIRCUIT DECISIONS

### I. Sentencing Issues

#### A. § 3553(a) factors and issues

##### United States v. Curb, No. 07-5286 (11.18.10)

The defendant on appeal argued that he was entitled to resentencing, as the court did not consider its discretion to disagree with the 100:1 crack cocaine sentencing ratio. The defendant was sentenced prior to *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*. 129 S. Ct. 840 (2009). The Government argued that there was nothing in the record which would indicate the district court's disagreement with the ratio, so as to warrant a remand. The Court found, however, that because the argument was never raised at sentencing, the record was unclear as to the sentencing court's understanding of its discretion; therefore, a remand for resentencing was appropriate.

#### B. Guidelines Issues

##### United States v. Battaglia, No. 08-4275 (11.5.10)

Pursuant to **U.S.S.G. § 2G2.2**, a defendant's sentence can be enhanced by 5 levels if the defendant distributed child pornography "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain". A defendant's base offense level is initially set at 22, based upon the conviction for distribution of child pornography. The defendant argued that such enhancements amount to impermissible double counting, as it punished the same conduct twice in increasing the base offense level. The Court, however, found that each enhancement was different: the base offense level is set based upon distribution, while the 5 level enhancement is imposed based upon trading. As such, "[b]ecause the sentence punishes distinct aspects of his conduct, no double counting occurred. Battaglia has therefore failed to demonstrate that his sentence

is procedurally unreasonable.”

**United States v. Holcomb, No. 08-6520 (11.8.10)**

The defendant was arrested for escape from a federal prison. At sentencing, he argued that he was entitled to a 7 level reduction pursuant to **U.S.S.G. § 2P1.1(b)**, as the prison camp was an non-secure facility, and he voluntary returned. The Court found that, in order for this reduction to apply, a defendant must return voluntarily; that is, not in response to an imminent arrest. In this case, the defendant only “voluntarily” returned after he was stopped by a local sheriff. As such, his return was not voluntary.

**United States v. Aguilar-Diaz, No. 10-3808 (12.2.10)**

Prior convictions may not be challenged in a federal sentencing proceeding on the grounds that they are “void” under state law; and thus such convictions are still countable under **U.S.S.G. § 4A1.1**. The defendant argued that, due to a procedural problem under Ohio law, several of his prior Ohio sentences were considered “void”. However, the defendant did not challenge his convictions in state court; rather, he objected to them in federal court at sentencing under the Guidelines, arguing that they could not be considered “prior offenses”. The Court found that “Regardless of the merits of his jurisdiction argument, Aguilar-Diaz misreads *Custis* and this court’s precedent by stating that *Custis* permits non-statutory collateral attacks beyond right-to-counsel claims. This court has interpreted *Custis* as recognizing right-to-counsel violations as the sole non-statutory grounds on which a collateral attack may be entertained at sentencing.” Thus, the proper procedure would be to “pursue that claim through state channels for seeking postconviction relief. [] If successful, he could then petition the district court to review his sentence in light of the state court judgment.”

**United States v. Coleman, No. 09-5052 (12.10.10)**

The Court considered the four level enhancement under **U.S.S.G. § 2K2.1(b)(6)** for possession of ammunition “in connection with another felony offense”. The defendant argued that although he did possess ammunition in proximity to his drug trafficking, the ammunition could not have been related. The Court held that the enhancement qualified if the ammunition facilitated the offense. “Thus, for U.S.S.G. § 2K2.1(b)(6) to apply, Coleman’s possession of the ammunition in close proximity to the drugs must make drug trafficking easier or less difficult or have the potential to make drug trafficking easier or less difficult.” The Court found that the “fortress theory” applied to this enhancement, thus “the ammunition emboldened Coleman in the knowledge that he was one step closer to having a

fully-loaded firearm to protect himself and his illegal drugs, and the ammunition potentially served notice to potential buyers that Coleman was a step closer to having a fully-loaded firearm”, thus, the enhancement applied.

**United States v. Warshak, No. 08-3997 et al (12.14.10)**

A sentencing court has the duty to determine, as precisely as possible, the amount of loss under **U.S.S.G. § 2B1.1**. In the defendant’s case, the court imposed loss in excess of \$400 million for at least two defendants without providing the method of loss, or the evidence relied upon to make that determination. The Court, in remanding the case for resentencing, found “the district court did little to explain how it arrived at \$411 million as the amount of loss, other than to suggest that the figure represented Berkeley’s net sales. Further complicating matters is the fact that the district court originally stated that it would place the amount of gain at \$100 million. Because the amount of loss was a contested issue, the district court should have engaged in a more thorough explication of its calculation, and it also should have explicitly referenced the evidence upon which it relied.”

**United States v. McCarty, No. 09-3398 (12.28.10)**

The Court considered and decided the standard for certain Guidelines enhancements under **U.S.S.G. § 2B1.5**, which applies to offenses involving the theft of cultural heritage objects. Among the matters outlined by the Court were the standard for whether the objects were stolen “for pecuniary gain”, and whether there was a “pattern of misconduct involving cultural heritage resources”.

**C. Procedural Matters**

**United States v. Peebles, No. 09-1986 (11.4.10)**

Where a defendant is sentenced for a supervised release violation, a district court must calculate and address the Guidelines in imposing a sentence. As found by the Court: “Here, the transcript of the sentencing hearing does not reflect that the district court addressed the Guidelines range at all. The applicable Guidelines range was not discussed during the hearing by either attorney or by the judge. Therefore, it is impossible to determine with certainty what sentencing range the district court relied on, and whether the district court meant to impose a sentence within or above that range. Because the district court did not calculate the appropriate Guidelines range, Peebles’s sentence is procedurally unreasonable. Thus, we vacate Peebles’s sentence and remand the case to the district court for resentencing.”

## D. Recidivism Enhancements

### United States v. Soto-Sanchez, No. 08-3541 (10.5.10)

Pursuant to U.S.S.G. § 2L1.2, Michigan's kidnapping statute (§ 750.349 (1999)), falls within the generic definition of kidnapping, for crime of violence purposes, for 5 of the 6 subsections. Further, the remaining subsection requires the use of force; therefore, any of the subsections categorically are crimes of violence for purposes of the Guidelines. The Court also defined the generic version of kidnapping as "restraint plus the presence of some aggravating factor, such as circumstances that create a risk of physical harm to the victim, or movement of the victim from one place to another."

### United States v. Curb, No. 07-5286 (11.18.10)

The defendant argued that because his prior conviction was for an offense committed while he was a juvenile, it was not countable for Career Offender purposes. The defendant noted that under Tennessee law, juvenile offenders were not "arrested", but were "taken into custody". Thus, according to the defendant, there could be no intervening "arrest", and his prior convictions would count as one offense. The Court disagreed, finding that state law definitions do not control Guidelines terms, and that custody of a juvenile is an arrest, for Guidelines purposes.

### United States v. Gibbs, No. 09-2031 (11.24.10)

Under Michigan law, second degree home invasion is akin to burglary of a dwelling, and therefore is categorically a crime of violence, for purposes of Career Offender provisions of the Guidelines. However, a conviction under Michigan law for resisting or obstructing a police officer is not categorically countable, as the offense may contain conduct that does not qualify. In defendant's case, the offense conduct was not a crime of violence; therefore, the defendant was entitled to a remand for resentencing, even under a plain error standard of review.

### United States v. Ruvalcaba, No. 09-3782 (12.22.10)

Ohio's statute prohibiting the firing of a firearm into an occupied structure is categorically a crime of violence for purposes of the Career Offender guidelines. The Court found that the statute was both similar in nature to the enumerated crimes listed under U.S.S.G. § 4B1.1, and that the offense presented a serious risk of physical injury.

### III. Evidence

#### A. Article IV - Relevancy

##### United States v. Reid, Nos. 09-5142/5144 (11.30.10)

It was not error to limit cross examination of an adulterous relationship between two Government witnesses, when the jury did hear that the relationship existed, thus providing the basis for bias. The defense desired to introduce additional facts; however, the Court found “Further inquiry into the details of the sexual relationship was collateral to the issues of bias and credibility, and the record shows that the defendants were able to elicit enough information about the adultery and divorce to argue in closing that adultery is devastating to relationships and that being removed from the Children’s Home may have motivated Hoskins to seek revenge against the Reids.”

#### B. Articles VI-VII - Witness and Expert

##### United States v. Warshak, No. 08-3997 et al (12.14.10)

Pursuant to FRE 704, an expert witness is not permitted to testify as to the mental capacity of a defendant to commit an offense. In *Warshak*, a case involving mail fraud and bank fraud related to the sale of male enhancement products, the Government’s expert witness testified that the defendants committed conduct “done with an intent to conceal the true nature and disposition of the funds” and that the defendants engaged in “multi-layered transactions that, in [his] opinion, were designed to conceal the true source and application of the funds”. The Court found that this testimony violated FRE 704(b). The Court held “a witness may permissibly testify that the effect of a transaction is to conceal [], but that is not what Simpson did when he stated that the intent of the transactions was to mask the source or nature of the funds at issue. Thus, it appears that the district court abused its discretion in admitting certain portions of Simpson’s testimony.” The Court held, however, that the admission of the evidence was harmless error.

#### C. Article VIII - Hearsay

##### United States v. Henderson, No. 08-3439 (11.19.10)

Where the defendant killed two past federal witnesses, but did not do so in order

to prevent their testimony at the trial in question, the “forfeiture by wrongdoing” exception to the hearsay rule does not apply, and statements by the decedents are inadmissible if they are offered for their truth. The Court found that the defendant had killed two witnesses in retaliation for their testimony in a prior federal proceeding. However, because the murders were not to prevent their testimony in the instant case, but instead as retaliation for prior testimony, the Confrontation Clause applied to render the statements inadmissible. However, the Court found that in light of the other evidence presented, the admission was harmless error.

#### **D. Discovery/Miscellaneous Evidentiary Matters**

##### **United States v. Knowles, No. 09-5646 (10.12.10)**

There was no plain error in admitting and playing to the jury a DVD video which was not the original, but a copy recovered after investigation of the case began. The defendant had destroyed the original tape, and a DVD of that tape, made at a camera shop, was also unplayable. Officers then went to the camera shop, who were able to re-create the DVD from their storage files. The Court found that although use of the reconstructed DVD provided some chain of custody issues, it did not prevent admission of the tape.

##### **United States v. Warshak, No. 08-3997 et al (12.14.10)**

Where the amount of discovery is voluminous, the Government is under no obligation to format the discovery in such a way so as to make it easily searchable. Nor is the Government required to lead the defense to those pieces of evidence which are particularly helpful. In this case, the Government provided in discovery over 17 million documents. The Court found that there was no evidence that the Government included irrelevant documents to increase the size of discovery, nor did the Government deliberately conceal exculpatory evidence. As such, the Government had no further obligation to act.

#### **IV. Fourth Amendment**

##### **A. Reasonable Expectation of Privacy**

##### **United States v. Domenech, No. 08-1220/1221 (10.7.10)**

Two brothers had a reasonable expectation of privacy in their hotel room, despite the fact that they engaged in illegal activity in the room, used an agent to rent the room, and used an alias. The Court found that police officer’s entry of the hotel room without a warrant violated the Fourth Amendment. The Court also found

that exigent circumstances did not allow entry, despite the officers concern that the brothers were destroying evidence. The Court held “[b]ecause the trooper could not see through the frosted window, the district court correctly held that he lacked probable cause to believe that the defendant would destroy evidence of a drug crime. Without probable cause, the officers cannot rely on exigent circumstances to justify this warrantless search.”

**United States v. Warshak, No. 08-3997 et al (12.14.10)**

A defendant has a reasonable expectation of privacy in his emails; thus, the Government’s actions in compelling an email service provider to turn over the emails of a defendant without a warrant violates the Fourth Amendment. The Court found that emails were certainly matters which most persons would not want exposed to the public. Further, society certainly recognizes such a privacy right. “Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection.” Further, to the extent that the Stored Communications Act allowed such warrantless seizures, it was unconstitutional. The Court found, however, that because the Government in good faith relied on the SCA, the evidence need not be suppressed.

**B. Reasonable Suspicion/Vehicle Stops**

**United States v. Gross, No. 08-4051 (10.19.10)**

An officer does not have reasonable suspicion, so as to detain an individual, in circumstances where the individual is in a vehicle, late at night, and slumps in the vehicle. Under these circumstances, a police officer may approach the vehicle for a consensual encounter; however, if the police officer takes actions, such as placing his vehicle in a way as to not allow the defendant to leave, then a seizure has occurred, and reasonable suspicion is required. If such seizure occurs without reasonable suspicion, then even if an officer finds out during the stop that there is a warrant for the defendant’s arrest, the seizure will not be upheld. “Furthermore, holding that the discovery of a warrant after an illegal stop is an intervening circumstance so long as the purpose of the stop is not because the officer believes the suspect has an outstanding warrant would encourage an officer to offer alternative reasons for the stop, such as a police hunch or community-care taking. Essentially, we will have created a system of post-hoc rationalization through which the Fourth Amendment’s prohibition against illegal searches and seizures can be nullified.”

**United States v. Johnson, No. 09-3264 (12.16.10)**

The defendant was observed engaged in what officers thought might be a hand to hand drug transaction. The vehicle that the defendant was riding in was stopped, and the defendant removed from the vehicle. A struggle ensued, and an officer subdued the defendant. When they did, they found that the defendant had a weapon on his person. They arrested him for that offense, and then searched the vehicle, without a warrant. On appeal, the defendant argued that there was no basis for the search. The Court found that “once Johnson had been arrested for possession of a firearm and secured outside of the car, police safety was no longer a valid reason to search the Camry, but the search of the passenger area where Johnson had been sitting was still permissible because ‘circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ [] Police could have reasonably believed that ammunition or additional firearms were in the car or in containers in the car, especially in the passenger area searched by police that was formerly occupied by Johnson.”

#### **G. Miscellaneous Fourth Amendment**

##### **United States v. Walden, No. 08-5641 (11.17.10)**

The defendant initially plead not guilty, and the court set deadlines for motions, and scheduled a trial date. The defense received an extension on the motions deadline, and filed two motions. Prior to the new motions deadline, the defendant plead guilty. He later moved to withdraw his plea, which the court granted. He then asked for a new motions deadline, which the court denied. On appeal, the defendant argued that such denial was an abuse of discretion. The Court disagreed, finding “Walden did not establish good cause for granting relief from the waiver, and find that the district court did not abuse its discretion by denying the motion. Good cause is a flexible standard heavily dependent on the facts of the particular case as found and weighed by the district court in its equitable discretion. At a minimum, it requires the party seeking a waiver to articulate some legitimate explanation for the failure to timely file. . . . Generally, if the failure to timely file occurred as a result of a lawyer’s conscious decision not to file a pretrial motion before the deadline, the party seeking a waiver will not be able to establish good cause.” The Court found that counsel’s actions in not filing further motions were deliberate, and therefore, no good cause existed.

## V. Fifth Amendment

### A. Prosecutor Conduct

#### United States v. Wells, No. 09-3276 (10.12.10)

A prosecutor's argument, during opening statements, that one of its witnesses would receive a benefit in their sentence came close to being improper argument. The problem outlined by the Court was that the prosecutor informed the jury that one witness told the truth initially, while the other initially lied, and that "prosecutor's statement that this is why she 'will be recommending' a reduced sentence for" the witness who initially told the truth. The Court found that the personal implication by the prosecutor, that the witness was telling the truth and thus would be personally rewarded by that prosecutor "verged upon improper vouching". The Court ultimately found, however, in view of the isolation of the comment, and the significant evidence against the defendant, that there was no reversible error.

The Court also found that it was improper for the prosecutor, during opening statement, to rely on prior consistent statements of the witnesses. The Court noted that at opening, no witness had yet been challenged, and therefore "Although it was reasonable to expect that Defendant would challenge the credibility of the witnesses based on their motive to secure a favorable plea bargain, the admissibility of the prior statements still hinged on whether such an attack was actually made. . . . By prematurely calling attention to prior consistent statements in the opening statement, a prosecutor creates the chance of mistrial and an issue for appeal."

#### Brooks v. Tennessee, No. 07-5415 (11.23.10)

The petitioner was convicted of murder in Tennessee state court and sentenced to life in prison plus 27 years. The state courts rejected his claims for relief. In habeas corpus proceedings, the petitioner alleged, among other things, that the prosecution violated *Napue v. Illinois*, 360 U.S. 264 (1959) by failing to correct the false testimony of a prosecution witness. Specifically, the petitioner alleged that one of the law enforcement agents falsely testified that the petitioner's fingerprints were recovered from two beer cans which were found at the scene; in fact, the petitioner's prints were only found on one of the cans. The Court found that the fingerprint testimony, while factually incorrect, did not create any reasonable likelihood of prejudice. As a result, the petitioner's claim of knowing use of perjured testimony failed on the merits.

#### United States v. Warshak, No. 08-3997 et al (12.14.10)

The Court found that the Government engaged in inappropriate closing argument during this case. During closing arguments, the Government attorney argued (1) that he personally believed the defendants were “weak”, sought “personal gain” , and did it at the expense of others; (2) that he had experience with a famous military officer (not in evidence and irrelevant); (3) that the grand jury decided that “these people committed these crimes”; and (4) that there were thousands or millions of others that could testify against the defendants, that the prosecution chose not to bring in. The Court held that most of these arguments were improper and “out of bounds”, but concluded that because strong curative instructions were given, there was no harmless error.

### **C. Confessions and Testimonial Rights**

#### **Ayers v. Hudson, No. 08-3319 (10.5.10)**

The petitioner was convicted of murder in Ohio state court and sentenced to life in prison. Five days after the jury was sworn, the prosecution disclosed for the first time that it intended to call a jailhouse informant who would testify that the petitioner confessed while he was awaiting trial. After allegedly obtaining the petitioner’s confession, the informant met with two detectives; after the meeting, the informant had another conversation with the petitioner, and subsequently advised the detectives that he had obtained additional details relating to the crime. The petitioner’s motion to suppress the informant’s testimony was denied. In a divided decision, the Ohio Court of Appeals rejected the defendant’s claim that the admission of the testimony violated his rights under *Massiah v. United States*, 377 U.S. 201 (1964), and the district court subsequently refused to grant habeas corpus relief.

The Sixth Circuit reversed. Applying a modified level of deference under AEDPA due to the state court's failure to produce a controlling majority opinion, the Court concluded that the rejection of the petitioner’s *Massiah* claim by the Ohio Court of Appeals constituted an objectively unreasonable result warranting habeas corpus relief. By meeting with the informant and discussing the petitioner’s case after the petitioner’s Sixth Amendment rights had attached, the State intentionally created a situation which was likely to result in a violation of the petitioner’s right to counsel. The record clearly supported a finding that the informant was acting at the direction of law enforcement when he obtained the additional statements attributed to the petitioner, and habeas corpus relief was therefore warranted.

#### **Dixon v. Houk, No. 08-4019 (12.09.10)**

The petitioner was convicted of capital murder in Ohio state court and sentenced to death. Prior to trial, the petitioner moved to suppress his statements to police

as having been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). After initially meeting with detectives at the police station and receiving *Miranda* warnings, the petitioner stated that he would not speak to the police without an attorney present. Five days later, the petitioner was formally arrested and interrogated in two separate interviews. The detectives deliberately failed to issue *Miranda* warnings at the first interview because they believed that the petitioner would invoke his right to counsel if they did. The petitioner confessed to a related crime in the first interview. In the second interview, the petitioner indicated that he had knowledge of the murder; the detectives then issued *Miranda* warnings and had the petitioner give a taped confession. The Ohio Supreme Court, relying upon *Oregon v. Elstad*, 470 U.S. 298 (1985) concluded that the admission of the petitioner's confession did not require reversal. The Sixth Circuit concluded that *Elstad* did not involve the type of deliberate, bad faith police manipulation of the *Miranda* warnings which was present in the petitioner's case, and that the Ohio Supreme Court's application of *Elstad* was therefore objectively unreasonable. In addition, the Ohio Supreme Court acted contrary to United States Supreme Court precedent by placing the burden of proof on the petitioner to demonstrate that his confession was coerced, rather than requiring the prosecution to establish that the petitioner had validly waived his rights. Habeas corpus relief was accordingly granted.

## VI. Sixth Amendment

### C. Speedy Trial

#### [United States v. Stewart, No. 08-4268 \(12.6.10\)](#)

A district court may grant a continuance under the ends of justice provision of the Speedy Trial Act, despite a defendant's objection to such continuance. In this case, defense counsel requested a continuance; however, the defendant filed a letter with the court disagreeing with the request, and indicating that he wanted to press his right to a Speedy Trial. The Court held that "even though Stewart did not provide his consent, the district court acted within its wide range of discretion in deciding to grant the motion for a continuance that was filed by Stewart's attorney."

### D. Right to Counsel/Self Representation

#### [Sanborn v. Parker, Nos. 07-5309, 07-5310 \(12.21.10\)](#)

The petitioner was convicted of murder and related offenses in Kentucky state court and sentenced to death. Prior to trial, the defense notified the prosecution that it would introduce expert witness testimony to demonstrate that the homicide

was precipitated by an extreme emotional disturbance, which would be admissible in Kentucky as mitigating evidence in the penalty phase of a capital murder trial. In response, the prosecution obtained a court order requiring the defendant to be examined by their own expert. The state's expert obtained two differing interviews from the defendant. The defendant explained that the difference in his position was due to the fact that he had met with counsel and planned a defense between the interviews. This information was used against him at the penalty phase. The district court granted relief with respect to the petitioner's death sentence, concluding that the testimony amounted to a government intrusion into the attorney-client relationship in violation of *Weatherford v. Bursey*, 429 U.S. 545 (1977), and that the error was prejudicial. The Sixth Circuit reversed, concluding that the petitioner's case did not involve a governmental intrusion into a privileged conversation, and the questions which were posed by the State's expert during the second interview did not implicate Sixth Amendment concerns.

#### F. Miscellaneous Sixth Amendment

##### Guilmette v. Howes, No. 08-2256 (10.21.10) En Banc

The petitioner was convicted in Michigan state court of first degree home invasion. Following his unsuccessful direct appeal, the petitioner filed an application for state post-conviction relief, arguing for the first time that his trial and appellate attorneys had been constitutionally ineffective. The state trial court denied the petitioner's claims on the merits, and the Michigan Court of Appeals and Michigan Supreme Court both denied leave to appeal. Each of the appellate courts issued summary orders denying the petitioner's request for leave to appeal, citing Michigan Court Rule 6.508(D).

The petitioner subsequently sought federal habeas corpus relief, which was granted by the district court. On appeal to the Sixth Circuit, the state alleged that the petitioner had procedurally defaulted his ineffective assistance of counsel claims by failing to raise them in his direct appeal. The Sixth Circuit, sitting *en banc*, rejected the state's arguments. The state trial court denied the petitioner's claims on the merits, and the appellate courts' citations to Rule 6.508(D) did not constitute the enforcement of a state procedural bar; as a result, the claims were properly preserved for federal habeas corpus review. Furthermore, the state limited its arguments before the Sixth Circuit to the question of whether the petitioner had defaulted his federal claims. Because the state failed to challenge the underlying merits of the petitioner's ineffective assistance of counsel claims, the Sixth Circuit declined to consider whether or not the district court was correct in granting relief.

**United States v. Johnson, No. 09-3264 (12.16.10)**

During trial, the court addressed the defendant and informed him of the benefits and dangers of testifying. The court also informed the defendant that, as to a dispute he had with his counsel, his status as a felon made him less credible. The Court held that although the district court's comments on the defendant's credibility were unnecessary, they did not rise to the level of coercion so as to deny the right to testify.

**United States v. Henderson, No. 08-3439 (11.19.10)**

The trial court was not required to substitute counsel for defendant, despite counsel's concern for her safety around the defendant, when the court inquired into the conflict, and was assured by counsel that she could proceed and do her job. The Court found that "Reassured that both attorney and client understood their roles in the relationship, the court told them the issue would be revisited if communication became a problem during the trial. [] Neither Henderson nor Menashe requested substitution of counsel and it appears no further question regarding the integrity of the attorney-client relationship arose during the remainder of the trial." Under those circumstances, no violation of the right to counsel occurred.

**VIII. Defenses**

**L. Miscellaneous Defenses**

**United States v. Gross, No. 08-2362 (11.10.10)**

The defendant was charged and convicted for attempting to evade or defeat tax, three counts of making and subscribing to a false tax return, and one count of presenting a fictitious financial instrument. As part of his defense, he claimed that because IRS forms did not comply with the Paperwork Reduction Act (44 U.S.C. § 3501), that he was under no obligation to file a return. The Court held that "We take this opportunity to reaffirm *Wunder* and hold that a defendant charged with either attempting to evade tax or failing to file a tax return cannot rely on 44 U.S.C. § 3512 as a defense."

## XI. Appeal

### United States v. Gibbs, No. 09-2031 (11.24.10)

This case was a second appeal from a remand for resentencing. The court, at resentencing, believed the remand to be a limited one, and therefore refused to hear additional arguments not addressed in the Sixth Circuit's remand order. The Court, however, on second appeal, held that the remand was a general one. The Court held "In this case, although we identified a discrete sentencing issue that required remand, our opinion did not articulate a framework for the proceedings on remand or otherwise limit the district court's inquiry to that issue in unmistakable terms. Rather, we vacated the sentence and remanded 'for resentencing consistent with this opinion.' *Gibbs*, 506 F.3d at 488. Thus, our remand was general and did not preclude the district court from revisiting the Guidelines calculation."

### United States v. Turnley, No. 09-5498 (12.20.10)

When the Government appeals a sentence or other ruling, it must obtain permission from the Attorney General or Solicitor General. 18 U.S.C. § 3742(b) In *Turnley*, the defendant argued that because the AUSA who initiated the appeal did not have written permission at the time he filed his notice of appeal, the appeal should be dismissed. The Court disagreed, finding that "we conclude that because the statutory deadline for obtaining this approval was extended, Smith's requirement that the approval be submitted in writing should accordingly incorporate the new statutory timeline for obtaining that approval."

## XII. Post-Conviction Remedies

### Landrum v. Mitchell, Nos. 06-4194, 06-4251 (11.4.10)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The Court concluded that the district court had erred in granting relief on the claim of ineffective assistance of counsel at the guilt phase of the petitioner's capital trial. The petitioner alleged that his trial attorney failed to call a witness who would have testified that the petitioner's accomplice had confessed to being the actual killer. However, the petitioner failed to raise this claim on direct appeal, notwithstanding the fact that the trial record provided an evidentiary basis for asserting the claim; furthermore, the petitioner subsequently failed to comply with Ohio's 90 day deadline for asserting claims of ineffective assistance of appellate counsel. Because a claim of cause and prejudice for a procedural default can itself be procedurally defaulted, and because Ohio's 90 day

deadline for asserting claims of ineffective assistance of appellate counsel constituted an adequate and independent state ground at the time of the state court proceedings, the petitioner's claim of ineffective assistance of trial counsel was defaulted.

In addition, while the petitioner also raised an allegation of ineffective assistance of counsel in his state application for post-conviction relief, he did not fairly present the claim relating to the accomplice's confession to the state courts. Although one of the affidavits attached to the state post-conviction petition asserted that the petitioner's trial counsel had been ineffective in failing to present evidence regarding the confession, the petition itself could only be fairly read as challenging his attorney's performance at the penalty phase of trial, as opposed to the guilt phase. Accordingly, the petitioner's claim that his attorney had been ineffective in failing to present the testimony at the guilt phase of trial was defaulted.

Furthermore, while the petitioner properly preserved several other ineffective assistance of counsel claims relating to the guilt phase of his trial, he failed to demonstrate that any of the alleged errors by his trial counsel resulted in prejudice.

#### **Robertson v. Simpson, No. 07-6191 (11.12.10)**

The petitioner was convicted of murder in Kentucky, and both his direct appeal and collateral attack on his conviction in state court were unsuccessful. The petitioner then retained an attorney to represent him federal habeas corpus proceedings. The habeas attorney was using cocaine, and was indicted on drug charges during the same month that the statute of limitations for initiating federal habeas corpus proceedings expired. The petitioner then obtained a new attorney, who filed a habeas petition approximately one month beyond the statute of limitations. In addition to demonstrating that his former attorney had been using cocaine, the petitioner also alleged that he had misadvised him of the correct date of the expiration of the statute of limitations. The district court concluded that an attorney's miscalculation of the expiration of the statute of limitations could not provide a basis for equitable tolling, and dismissed the petition as untimely. The Sixth Circuit reversed and remanded the case to the district court for further proceedings on the question of equitable tolling. An attorney's violation of the professional standards of conduct can constitute extraordinary circumstances warranting the application of equitable tolling, and abusing cocaine clearly amounts to a violation of the professional standards for lawyers. Furthermore, the attorney's drug use may have impaired his mental competence to handle the petitioner's case, which could also support a finding of extraordinary circumstances.

### XIII. Specific Offenses

#### United States v. Taylor, No. 09-1086 (12.14.10)

Carjacking - **18 U.S.C. § 2119** The subjective belief of a victim, that he or she was in imminent fear of bodily injury or death, is not an element of the offense of carjacking. Rather, it is the defendant's intent to kill or seriously harm his victims at the time of the offense that controls. The defendant in *Taylor* argued that the district court failed to ensure that he agreed with this element; however, the Court found that, over the course of three plea hearings, the issue was directly addressed and conceded by the defendant; thus, the plea was voluntary.

#### United States v. Henderson, No. 08-3439 (11.19.10)

Murder in retaliation for federal testimony - **18 U.S.C. § 1513** The statute does not require that the Government prove, with direct evidence, that the defendant have actual knowledge that the victim was cooperating with federal officials. Rather, because the statute requires "retaliation", knowledge that the victim is cooperating is assumed. Therefore, the district court did not err in failing to give an instruction on the specific knowledge of the defendant of the victim's cooperation.

#### United States v. Warshak, No. 08-3997 et al (12.14.10)

Mail Fraud - **18 U.S.C. § 1341** In a conviction for engaging in a fraudulent scheme in sales practices of a male enhancement product, the defendants were charged with, among other counts, mail fraud. On appeal, the defendants argued they shouldn't be convicted of individual mail fraud counts where the Government did not prove that the mailings in those cases were fraudulent. The Court disagreed, finding "Whether the individual consumers named in the mail-fraud counts were actually deceived is immaterial; the success of the scheme is not an essential element of mail fraud. [] All that matters is that the customers were the targets of an intentional scheme to defraud, and there is certainly sufficient evidence for a reasonable juror to conclude that they were."

Bank Fraud - **18 U.S.C. § 1344** The defendants in *Warshak* were also convicted of bank fraud. On appeal, they argued that since any fraudulent scheme was directed at a credit card company, and not an FDIC insured bank, the Government could not prove bank fraud. The Court found that the bank fraud statute was more inclusive, and that "a defendant may be convicted of bank fraud if he intends to defraud someone and implements a fraudulent scheme that either causes a federally insured financial institution to transfer funds or exposes that institution to some degree of risk."