

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

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 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.

I. Sentencing Issues

A. § 3553(a) factors and issues

Supreme Court Pepper v. United States, No. 09-6822 (3.2.11)

A district court can consider, upon remand for resentencing, a defendant's post-sentence rehabilitation while incarcerated. The Court found that the historical broad discretion allowed sentencing courts to consider information about the offense and the offender, and the statutory requirements under 18 U.S.C. § 3661, made it clear that "[a] categorical bar on the consideration of post sentencing rehabilitation evidence would directly contravene Congress' expressed intent in §3661."

United States v. Brooks, 09-3833 (1.6.11)

The defendant argued, in a child solicitation case, that the district court erred in not rejecting the Guidelines for his offense as a matter of course, as they were not promulgated based upon empirical data. The Court found that "the fact that a district court may disagree with a Guideline for policy reasons and may reject the Guidelines range because of that disagreement does not mean that the court must disagree with that Guideline or that it must reject the Guidelines range if it disagrees." The court found under the circumstances, the district court's imposition of a Guidelines sentence was neither procedurally or substantively unreasonable.

United States v. Lanning, 09-1675 (2.2.11)

It is not improper for a district court to deny an upward departure under the Guidelines (such as under U.S.S.G. § 4A1.3), but then use the facts relating to that matter to make an upward variance from the Guidelines range. Further, "even if a district court would be justified in imposing a § 4A1.3(a) upward departure based on the defendant's criminal history, the court may still determine that an upward variance based on § 3553(a)'s broader goals is the more appropriate course of action."

United States v. Woodward, 09-1802 (4.21.11)

Although it was improper for a district court to consider a defendant's actions comprising the offense of conviction in departing upward under the Guidelines for inadequate prior criminal history, the court was not prohibited from using such information to base an upward variance. Thus, the district court's upward variance, based in part on use of a straw man to purchase real estate, was not unreasonable.

B. Guidelines Issues

United States v. Sweet, No. 10-3348 (1.4.11)

A defendant's position as a bank teller who also did cash audits of other tellers' drawers did not have indicia of a managerial discretion or responsibility so as to allow an enhancement under **U.S.S.G. § 3B1.3** for abuse of position of trust. The court found that "the critical question is whether Sweet was given **substantial** professional or managerial discretion in his position."

United States v. Hall, 08-4368 (1.18.11)

When imposing a concurrent, partially concurrent, or consecutive sentence utilizing **U.S.S.G. § 5G1.3**, a court must consider whether the conduct for which the defendant is already serving a term of imprisonment has been used to calculate the base offense level in the instant federal conviction. If, however, there is more than one prior count of conviction, then the task becomes more complicated. The Court held that under such circumstances, the convictions must be treated separately, and § 5G1.3(b) can only come into play if both offenses were calculated in the base offense level. The Court found that "Hall's conduct in Queen's murder resulted in two state convictions: aggravated murder and the unlawful possession of a firearm. The district court used only one of these convictions-murder-to enhance Hall's base offense level. [] As a result, because it used only 'part' of Hall's state offense as relevant conduct to enhance the base offense level under the Guidelines, the district court was free to use its discretion in setting Hall's federal sentence to run consecutively to his undischarged state sentences."

United States v. Bowman, 09-1068 (2.7.11)

A court, in imposing a consecutive sentence pursuant to **U.S.S.G. § 5G1.3**, must understand its discretion to impose a concurrent or partially concurrent sentence, despite the language of the statute. The district court in this case indicated that it "must" impose a consecutive sentence - this indicated to the Court a lack of understanding on the part of the district court, requiring resentencing.

United States v. Douglas, 07-1695 (2.10.11)

The Government appealed a sentencing court's decision to not apply **U.S.S.G. § 2B3.2**, the Guidelines for blackmail or extortion, in a case where union heads refused to end a strike until two non-qualified persons were given jobs. The district court at sentencing instead applied **U.S.S.G. § 2B3.3** to the defendants' conduct. On appeal, the Court found "The district court erred in applying section 2B3.3 and should have applied section 2B3.2. The difference between the two sections is the

type of action threatened. Section 2B3.3 contemplates blackmail, which is defined as threatening to reveal a violation of federal law unless money or some other item of value is given, and similar threats. These types of threats involve making public an established fact; revealing that which already exists. In a sense, the victim of blackmail created the possibility for his injury. Quite differently, section 2B3.2 contemplates extortion by force or threat of injury or serious damage. These types of threats involve attacks upon more 'innocent' victims who have in no way brought upon themselves any harm. Furthermore, both sections contemplate that a threat is covered by one or the other, not both."

United States v. McNerny, 09-4011 (3.1.11)

In sentencing a defendant for possession of child pornography, a sentencing court should enhance a defendant's base offense level under **U.S.S.G. § 2G2.2(b)(7)** by counting multiple copies of the same image as separate images. The Court found persuasive (1) that Congress has sought to increase penalties for these type of offenses, and (2) that the language of the Guideline makes no differentiation between unique and copied images, but rather just discusses images as "any visual depiction". Therefore, "duplicate digital images, like duplicate hard copy images, should be counted separately for purposes of calculating a sentence enhancement pursuant to § 2G2.2(b)(7)."

United States v. Stafford, 09-5749 (4.27.11)

An enhancement under **U.S.S.G. § 2B1.1** for sophisticated means was proper where the defendant, in a mortgage fraud scheme "instructed [co-defendants] to submit applications for stated income, owner-occupied loans; told straw buyers to purchase all of their houses in the same month before the purchases appeared on their credit reports; directed Allied to apply for loans from different lenders; supplied Nwani with falsified tax returns; and otherwise misused his specialized knowledge of the mortgage industry to create and sustain this conspiracy."

United States v. Swafford, 08-6462 (4.28.11)

In a prosecution for sale of iodine to persons, knowing it would be used in the manufacture of methamphetamine, it was proper under **U.S.S.G. § 2D1.11** to cross reference to § 2D1.1, and apply those Guidelines to the sentence. The Court found that "[t]he cross reference applies only when the defendant is 'involved' in the manufacture of methamphetamine." Further, the Court ruled that the Government established the predicate for the cross reference under this standard.

United States v. Jones, 09-3664 (4.12.11)

In calculating an amount of loss under **U.S.S.G. § 2B1.1** in a healthcare fraud case, a district court may extrapolate loss using a statistical analysis from representative files. However, the Court held that the sample used for the extrapolation must accurately represent the total files. In this case, the “United States’s statistician identified a representative statistical sample encompassing 357 bills contained throughout 264 patient files, but the United States found only 210 of those files. The United States did not present evidence that the 210 patient files still formed a representative sample of bills without the missing fifty-four files. Furthermore, it does not appear that the district court even realized that the fifty-four files were missing and it definitely did not make a finding as to whether they were fraudulent. Therefore, the accuracy of the extrapolation method is called into question.” On this basis, the Court remanded for resentencing.

C. Procedural matters

United States v. Jackson, 09-1630 (3.24.11)

In the defendant’s PSR, an enhancement was given for possession of a firearm based upon admissions made by the defendant. The defendant argued that he had made these statements under the terms of his plea agreement, which protected their use. The Court nonetheless upheld the sentence, finding that because the AUSA at sentencing provided an independent basis for the information (testimony from an FBI agent), that there was no harm in the use of the statement.

D. Recidivism enhancements

United States v. Paige, 09-6067 (3.15.11)

The Court re-affirmed, in light of the Supreme Court’s decision in *Begay v. United States*, 553 U.S. 137 (2008), that under the Armed Career Criminal Act, prior offenses are considered to have been committed on different occasions if “(1) ‘it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins’; (2) ‘it would have been possible for the offender to cease his criminal conduct after the first offense, and withdraw without committing the second offense’; or (3) ‘the offenses are committed in different residences or business locations.’ (Internal citation omitted) The Court found that *Begay* did not change this analysis, as *Begay* did not address this particular issue, and there is nothing in the Supreme Court’s language that would cause the Court concern that this rule is no longer valid.

United States v. Mosley, 09-2359 (3.29.11)

Under career offender provisions of the Sentencing Guidelines, a Michigan conviction for using pepper spray (except in self defense) is categorically a crime of violence. The Court analyzed the statute under the residual clause, and found that “the use of pepper spray, a device chosen for self-defense precisely because it injures and incapacitates attackers, ‘presents a serious potential risk of physical injury to another’ when used offensively.”

United States v. Vanhook, 09-5778 (4.18.11)

The defendant had a prior conviction under Tennessee law for “facilitation of the burglary of a building.” This offense was utilized to enhance the defendant’s sentence under the ACCA. On appeal, the Court found that this was not a proper qualifying offense. First, the Court found “the Tennessee offense of facilitation of the burglary of a building does not have as one of its elements the use, attempted use, or threatened use of physical force against another.” The Court then analyzed the offense under the “otherwise” clause, and determined that: (1) the offense contained the possibility of a significant risk of physical injury, however (2) the Tennessee statute, although requiring a “knowing” scienter, defines the act as being committed “without the intent required for criminal responsibility for the ultimate criminal act”, and thus, was not purposeful conduct.

E. Fines/Restitution

United States v. Batti, 09-2050 (1.12.11)

It was not error to order, as part of the restitution order, expenses incurred by the corporation/victim in hiring a private security firm to investigate the defendant’s conduct. The court found that the defendant bore the burden of proving that such expenditures were “unnecessary and excessive.” The defendant’s failure to meet this burden, and the record established by the sentencing court, allowed for affirmance of the restitution order.

United States v. Freeman, 09-4158 (4.4.11)

It was improper to order restitution for the value of 34 firearms stolen, when the offenses of conviction to which the defendant plead guilty only named 12 firearms, all of which were recovered by police. Restitution is limited to the offense of conviction, and does not include relevant conduct. “The district court’s restitution order that was based on the burglary of all of the firearms from the Arcade must therefore be reversed. On remand, the district court should determine the proper

amount of restitution based on only the 12 firearms involved in Count 1 of the indictment, minus the value of any of the firearms that are recovered.”

F. Substantial Assistance

United States v. Grant, 07-3831 (1.11.11) EN BANC

When considering a motion to reduce a sentence under Rule 35, a district court must: (1) “initially decide whether the defendant did in fact render substantial assistance”; if so, then (2) the court must independently determine the extent of such departure, considering such factors as “the defendant's activities on behalf of the government and how much his assistance helped in the investigation or prosecution of another.” The court, once it determines the extent of departure based upon the cooperation, can then consider other factors, such as co-defendant’s sentences, prior criminal history, etc., in determining whether to give the full extent of the departure. However, the court should not provide a larger departure than is warranted by the cooperation for these reasons.

II. Plea matters

A. Agreements

United States v. Dyson, 08-3944 (4.20.11)

It was improper for a district court to threaten to vacate a plea, after the plea agreement was accepted and after sentencing, in order to obtain consent from the defendant to forfeit additional items not contained in the plea agreement. In this case, the Government sought forfeiture of the defendant’s vehicle and other items after sentencing. When the defendant expressed hesitation, the district court stated “I’ll tell you what I am going to do. I am going to continue this thing until a quarter of 2 this afternoon. You work it out. And if it isn’t worked out, we’ll vacate everything and start over again with the not guilty plea and set this case for trial. Either get this worked out by quarter of 2 this afternoon or that’s what is going to happen.” Despite this impropriety, it was not necessary to vacate the conviction or grant other relief, as the defendant could not prove that, but for the error, there would have been a different result.

C. Hearings

United States v. Szymanski, 09-3524 (2.7.11)

Failure to comply with Rule 11(b)(1)(G), which “requires the district court, addressing the defendant in open court, to”inform the defendant of, and determine that the

defendant understands ... the nature of each charge to which the defendant is pleading,” cannot be found to be harmless error, even where the defendant is sophisticated. In this case, the defendant’s plea was overturned based upon the district court’s failure to review with the defendant the scienter requirement of 18 U.S.C. § 22523(a)(2), which requires not only that the defendant knowingly receive the items, but also that at the time he received, he or she knew that the items were child pornography.

III. Evidence

B. Articles VI-VII - Witness and Expert

United States v. Ham, 09-5730 (1.7.11)

The prosecution may properly admit expert testimony from an agent regarding: (1) the use of cellular phones in drug trafficking, (2) whether quantities of drugs are consistent with “personal use” amounts, and (3) methods of drug distribution. Such testimony was proper because the witness “was not offered to provide percipient testimony directly demonstrating Defendant’s actions. Instead, he was providing an opinion, based on extensive training and experience, about the items recovered from the residence and the reasons that they were consistent with drug trafficking.” The court found that a limiting instruction on the use of such testimony was appropriate.

C. Article VIII - Hearsay

United States v. Boyd, 08-6402 (4.7.11)

“Statements offered to prove the listener’s knowledge are not hearsay.” In a prosecution for being an accessory after the fact for a carjacking, statements made by a co-defendant, which proved that the defendant had knowledge of the carjacking, were therefore not hearsay.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

United States v. Lanier, 09-1788 (4.14.11)

A person retains no reasonable expectation of privacy in his hotel room after check out time. Here, the defendant was not in the room after checkout time; however, he had a “do not disturb” sign on his door, and still had personal belongings in the room. Further, the hotel in question had a “grace period” policy, in which the hotel could give, in its discretion, additional time to a guest. This was not requested or received,

however, in this case. The Court held under such circumstances, even if the defendant had a subjective expectation of privacy, it was not an objective one, and the police officer's entry into the room did not violate the Fourth Amendment.

E. Search Warrants

United States v. Eillison, 09-6078 (2.11.11)

A search warrant need not describe the person or name the owner of the property to be searched, as search warrants are directed towards places and things, not persons. Thus, a search warrant application that connected illegal activity to a particular house was sufficient.

F. Arrest Related Issues

United States v. Buford, 09-5737 (2.10.11)

The Supreme Court's rule in *Arizona v. Gant* 129 S.Ct. 1710 (2009) applies to cases in which the search occurred before announcement of the rule, but the matter was still pending at the announcement of the rule. Thus, the officer's actions in this case of searching the defendant's vehicle incident to arrest violated the Fourth Amendment. However, the search could be upheld on the good faith doctrine. As officers at the time of the search were acting "in compliance with the well-settled law of this circuit" at the time of the search, the purposes of the exclusionary rule (deterrence of police misconduct) would not be served by suppression of the evidence.

V. Fifth Amendment

A. Prosecutor Conduct

United States v. Boyd, 08-6402 (4.7.11)

A prosecutor's closing argument, in a carjacking case in which death resulted, in which he argued the victims "are lying peacefully in their respective graves today, cool winds blowing above them. They cannot hear my plea to you for their families to see justice," was deemed by the Court to be improper argument, designed to appeal to the passions of the jurors. The Court found, however, that such arguments did not amount to reversible error.

C. Confessions and Testimonial Rights

United States v. Ramirez, 09-6544 (2.14.11)

Under the corroboration rule, the Government may not convict a defendant of a federal offense based solely upon his or her admission. Rather, the Government must corroborate the confession through some other evidence. In this case, the Court determined that a defendant's confessions were sufficiently corroborated by other evidence so as to support the convictions. The Court noted that "[t]hrough a statement may not be involuntary within the meaning of the exclusionary rule, its reliability may still be suspect if it is extracted from a person under the pressure of police investigation because his or her words may reflect the strain and confusion of the situation, rather than a clear reflection of the past." In this case, however, the Government presented other evidence to corroborate the truth of the defendant's confessions. The Court further noted that the Government need not corroborate each element of the offense, but rather can rely on partial corroboration.

As to one of the offenses of conviction, it appears that the Court found no corroboration. However, as to that count, the defendant made in court admissions which supported the jury's verdict. The Court noted "[f]urther corroboration of this conclusion is unnecessary because, as noted above, Ramirez's statement that she knew the documents to be 'poor fakes' but still certified the applications was an in-court admission."

VI. Sixth Amendment

D. Right to Counsel/Self Representation

United States v. Goddard, 09-5120 (2.10.11)

There was no requirement, in a hearing to decide a motion to withdraw a guilty plea, for the district court to replace counsel with new counsel. This despite the fact that the defendant requested counsel to file a motion to withdraw, which counsel did prior to the hearing. The Court found that when a defendant wants new counsel for a plea withdrawal hearing, the defendant should first motion for counsel to withdraw, and then indicate to the court, via letter, the wish to have newly appointed counsel file and argue a motion to withdraw. The Court surmised that by asking counsel to file both a motion to withdraw from representation and a motion to withdraw the plea, that the defendant clearly indicated a desire to have counsel litigate the motion to withdraw the plea prior to withdrawing as counsel.

E. Indictment - Variance/Duplicity

United States v. Locklear, 08-1180 (1.28.11)

It was improper to join in one indictment and prosecution a defendant's bank robbery charges with a felon in possession count occurring on a different date. The Court held that "the offenses described in these counts are not 'of the same or similar character,' or 'based on the same act or transaction,' or "connected with or constitute parts of a common scheme or plan." Fed.R.Crim.P. 8(a). One offense occurred on December 23, 2004 and did not involve the possession of guns. The other occurred nearly three weeks later and involved nothing but the possession of guns. The indictment otherwise alleges nothing to show that the two offenses were part of a common plan. Their joinder fails the face-of-the-indictment test." The Court found, however, that such joinder was harmless in light of the evidence of guilt on both counts.

United States v. Boyd, 08-6402 (4.7.11)

An indictment which charged a defendant with being an accessory after the fact to "carjacking which resulted in death and serious bodily injury." Although the charge names two results in the conjunctive, the Court found that the indictment was not duplicitous, because "being an accessory after the fact 'is itself the crime.' [] Being an accessory after the fact under 18 U.S.C. § 3 'is not the commission of the crime which it contemplates, and neither violates nor arises under' the carjacking statute at 18 U.S.C. § 2119. [] The same reasoning can be applied to misprision of the carjacking. Accordingly, the indictment is not duplicitous."

F. Miscellaneous Sixth Amendment

Tibbetts v. Bradshaw, 06-3886 (2.15.11)

The defendant was convicted of aggravated murder in Ohio state court and sentenced to death. The defendant subsequently alleged that his trial attorneys had been ineffective at the penalty phase because they failed to investigate and present mitigation evidence. The Ohio courts denied the defendant's claims in this regard, and the district court declined to grant habeas corpus relief.

The Sixth Circuit affirmed. The record demonstrated that defense counsel engaged in an investigation of the defendant's family history, psychological background and various other areas of mitigation. While the investigation could have been more thorough, that does not necessarily mean that it was constitutionally inadequate. Much of the mitigating information obtained after trial had been revealed to some extent through expert testimony that was presented during the penalty phase. Declining to corroborate the expert testimony by using family members and

friends as witnesses did not necessarily fall outside the range of professional competence. In any event, the defendant did not demonstrate that the state courts' denial of the claim was objectively unreasonable. As a result, the denial of habeas corpus relief was affirmed.

Goodwin v. Johnson, 06-3571/3572 (1.21.11)

The defendant was convicted of aggravated murder in Ohio state court and sentenced to death. After the state courts denied his claim for relief, the defendant sought federal habeas corpus relief alleging, among other things, that his attorneys had been ineffective at the penalty phase of his capital trial. The district court granted relief as to the defendant's death sentence, and the Warden appealed.

The Sixth Circuit affirmed. The defendant's counsel presented no mitigating evidence at the penalty phase of the defendant's trial. Instead, counsel relied upon a theory of residual doubt, notwithstanding the fact that the defendant had confessed to the offense. Furthermore, counsel failed to conduct any meaningful investigation into the defendant's social history. Had they done so, they would have discovered a great deal of mitigating evidence. Because defense counsel have a constitutional obligation to conduct a thorough investigation into the defendant's history when formulating a penalty phase strategy, their performance was deficient. Furthermore, given the substantial amount of mitigation evidence that was available, there was a reasonable probability that the defendant would not have received a death sentence if he had been represented by competent counsel. The determination of the Ohio Court of Appeals to the contrary was objectively unreasonable, and as a result habeas corpus relief was warranted under the "unreasonable application" clause of 28 U.S.C. § 2254(d).

VII. Other Constitutional Rulings

D. Eighth Amendment

United States v. Hughes, 09-5787 (1.24.11)

Imposition of a 10 year mandatory minimum sentence under 18 U.S.C. § 2422(b) for attempting to entice a minor to engage in criminal sexual conduct does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

VIII. Defenses

E. Venue/Jurisdiction

United States v. Canal Barge Co., et al., 09-5388 (1.7.11)

The defendants were charged with violations of the Clean Water Act and failing to immediately notify the Coast Guard of a hazardous condition, pursuant to 33 USC § 1232. The defendants operated a barge on the Mississippi River. The barge sprung a leak, and the defendants attempted to fix the leak with an epoxy. The patch failed a few days later; by that time, a new crew was aboard, and the Coast Guard was notified.

The defendants argued that venue was improper in the Western District of Kentucky, as the leak (and failure to report) initially occurred near St. Louis, Missouri. The Court found, however, that “The defendants’ failure to immediately report a hazardous condition aboard the barge was a continuing offense because the duty to report continued from the time the leak was discovered on June 16 until the Coast Guard was notified on June 20. Because the barge continued moving until the unreported hazardous condition was in the Western District of Kentucky, the PWSA violation occurred in part in the Western District of Kentucky. Venue was therefore proper in that district under 18 U.S.C. § 3237(a).”

United States v. Ford, 08-6169 (4.14.11)

The defendant, a state senator from Tennessee, was prosecuted under 18 U.S.C. § 1001 for failing to disclose his financial relationships with certain companies. On appeal, the defendant argued that the United States did not have jurisdiction over his case, because any duty he had to disclose these relationships was solely to a state organization, and as such was not subject to federal jurisdiction. The Court agreed, finding “Ford's failures to disclose financial interests were related to functions of the state government of Tennessee—the senate's and election registry's reporting requirements. The senate and election registry likely could have exercised authority in this situation.[] They could have reprimanded Ford or exacted some equitable remedy, but no federal entity had similar authority in this situation. Furthermore, the United States presented no evidence that the senate or election registry operate on federal funds.” As such, the convictions were vacated.

H. Sufficiency of Evidence Generally

United States v. Stokes, 08-6451 (2.7.11)

When evaluating a sufficiency of the evidence claim, the claim must be “analyzed by

examining all of the evidence admitted, regardless of the merits of any challenges to the admission raised in the same appeal. [] If this court finds that the admitted evidence was sufficient to support a conviction, the court will then proceed to examine any claims that might lead to a remand for retrial. [] Therefore, even if Stokes's confession were improperly admitted, we would still consider it in evaluating his sufficiency of the evidence claim.”

United States v. Clark, 08-6174 (3.24.11)

The defendant was in the business of robbing drug dealers. Among other charges, the Government indicted him on charges of possession with the intent to distribute the drugs he and others stole. On appeal, the defendant argued that the evidence was insufficient to prove his intent to distribute. The Court denied this claim, finding as follows “We hold that the United States introduced sufficient evidence from which the jury could conclude that Clark intended to distribute the drugs that he stole in the robberies. First, the jury could have found that Clark intended to sell the drugs to others. The evidence that Clark had previously robbed drug dealers and sold the drugs he stole supports the inference that he intended to do the same here. And, during at least one of the charged robberies, Clark expected to steal a large amount of drugs.”

L. Miscellaneous Defenses

United States v. Svoboda, 10-3794 (2.3.11)

A good faith defense is unavailable to a defendant where his or her argument is that the laws of the United States are inapplicable to the defendant.

IX. Jury Issues

A. Jury Instructions

United States v. Hart, 09-6554 (3.29.11)

In a prosecution for knowingly “using interstate commerce to persuade, induce, entice, or coerce any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense”, a jury need not be instructed on the unanimity of the underlying state offense. As found by the Court: “[b]ecause 18 U.S.C. § 2422(b) criminalizes persuasion and the attempt to persuade, the government is not required to prove that the defendant completed or attempted to complete any specific chargeable offense. The government need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been

chargeable as a crime if it had been completed.”

X. Probation/ Supervised Release

United States v. Phillips, 09-4201 (4.7.11)

The defendant in this case violated the terms of his supervised release, and was given the opportunity to self surrender. He failed to appear, and was subsequently charged under 18 U.S.C. § 3146. At sentencing of that matter, the issue was which “statutory maximum” applied to the sentence: the maximum possible charge under the supervised release violation, or the maximum charge under the original offense of conviction (from which the supervised release term flowed)? The Court found that because a supervised release term was not a separate “offense” or “felony,” that the statute could not refer to the statutory maximum for a supervised release violation. In addition, the sentencing on the supervised release violation was a sentencing on the original offense. Therefore, the statutory maximum for the original offense applied.

Supreme Court Swarthout v. Cooke, 10-333 (1.24.11)

When a state creates a liberty interest, the Due Process Clause requires fair procedures for its vindication. However, in the context of parole, the Constitution's procedural due process requirements are minimal. If a state makes parole available, a defendant is entitled to an opportunity to be heard and a statement of reasons as to why parole was denied. These requirements were satisfied in each case, and as a result neither prisoner was deprived of procedural due process. To the extent that the California courts may have misapplied the "some evidence" rule, the denial of parole amounted to an error in the application of state law, and errors of state law are not cognizable in federal habeas corpus proceedings. As a result, the decision of the Ninth Circuit was reversed.

XI. Appeal

United States v. Ashraf, 09-4002 (1.12.11)

Appeal was not moot, despite defendant's deportation, as defendant's conviction had collateral consequences. The court found the fact that the defendant was convicted of a serious crime, and that this could affect his ability to re-enter the United States, rendered the appeal justiciable.

United States v. Bowman, 09-1068 (2.7.11)

An appellate waiver provision in a defendant's plea agreement, which precluded the

defendant from appealing “any sentence which is at or below the maximum of the guideline range as determined by the Court,” did not prevent the defendant from appealing the imposition of a consecutive sentence.

United States v. Freeman, 09-4158 (4.4.11)

An appellate waiver provision in a plea agreement, which “limited his right of appeal to sentences that are above the statutory maximum penalty or that are above the maximum Guidelines range”. The Court found that this waiver language did not preclude a challenge to the restitution order, based upon an argument that restitution went beyond the offense of conviction.

XII. Specific Offenses

United States v. Roth, No. 09-5805 (1.5.11)

Arms Export Control Act - 22 U.S.C. § 2778 In a conviction for trading in “defense article and defense services” on the United States Munitions List without a license, the Court considered for the first time what the mens rea required for the offense. The court held that “we hold that section 2778(c) does not require a defendant to know that the items being exported are on the Munitions List. Rather, it only requires knowledge that the underlying action is unlawful.”

United States v. Ashraf, 09-4002 (1.12.11)

Willful Failure to Sign Travel Documents - 8 U.S.C. § 1253 The “good faith” exception to prosecution under this statute does not apply to a defendant who wilfully violates the statute. In this case, Ashraf’s failure to sign required documents was not an attempt to challenge his deportation, but was a clear violation of the statute. Ashraf’s “attempts to have his removal reversed do not excuse him from his statutory obligation to make a good-faith effort to obtain travel documents at the request of the ICE agents.”

United States v. Batti, 09-2050 (1.14.11)

Intentional Accessing of a Protected Computer - 18 U.S.C. § 1030(a) In order to obtain a conviction under this statute, the Government must prove that the value of the information obtained as a result of accessing such a computer exceeded \$5,000. Defendant Batti argued that the Government failed to meet this element, as the company could show no loss: although Batti did copy the information, he gave it back directly to the company to show weaknesses in the IT system. The court found, however, that “loss” was not the correct measuring stick, but rather, value of the information/items seized. The plain language of the statute required “only a

determination of the ‘value of the information obtained,’ not whether that value decreased.” Therefore, evidence that the company paid in excess of \$5,000 for the information copied was sufficient to prove this element of the offense.

United States v. Douglas, 07-1695 (2.10.11)

Labor Management Relations Act - **29 U.S.C. § 186** - In proving a conviction for demanding an improper “thing of value” in exchange for ending a strike, the defendants argued that because they only asked management to hire two individuals, that this did not constitute a “thing of value” required under the statute. The Court held that “[t]he statute's scope is not limited to only monetary items. Truly, of all the things in this world widely regarded as valuable, money and the like comprise only a small percentage. . . . The value of a job, especially one that pays \$150,000 per year, is undeniable. In this case, the jobs demanded were things of value.”

United States v. Cosgrove, 08-4650 (3.18.11)

Money Laundering (promotion) - **18 U.S.C. § 1956** - The defendant was charged with a conspiracy to commit promotion money laundering, and also wire and mail fraud charges. At trial, the district court did not instruct the jury that proceeds were profits, but rather, that proceeds were receipts. The Court analyzed the evidence presented at trial, and found “it was error to submit the money laundering conspiracy charge to the jury when there had been no showing of profit-based transactions.” The Court further found that although the defendant had not raised this issue in the trial court (or until the reply brief on appeal), that the Court still had the ability to notice and rectify the error.

United States v. Hart, 09-6554 (3.29.11)

Attempting to persuade a minor to engage in unlawful sexual activity - **18 U.S.C. § 2242** - the Court deflected many constitutional challenges to this statute, including claims that the statute was unconstitutionally vague and overbroad; that the use of mandatory minimums violated the Eighth Amendment; and that the jury was required to find which state offense was underlying the defendant’s actions.

United States v. Ford, 08-6169 (4.14.11)

Failure to disclose - The defendant, a state senator from Tennessee, was prosecuted under **18 U.S.C. § 1001** for failing to disclose his financial relationships with certain companies. On appeal, the defendant argued that the United States did not have jurisdiction over his case, because any duty he had to disclose these relationships was solely to a state organization, and as such was not subject to federal jurisdiction. The Court agreed, finding “Ford's failures to disclose financial interests were related

to functions of the state government of Tennessee—the senate's and election registry's reporting requirements. The senate and election registry likely could have exercised authority in this situation.[] They could have reprimanded Ford or exacted some equitable remedy, but no federal entity had similar authority in this situation. Furthermore, the United States presented no evidence that the senate or election registry operate on federal funds.” As such, the convictions were vacated.

XIII. Post-Conviction Remedies

A. Supreme Court

Cullen v. Pinholster, 09-1088 (4.04.11)

The petitioner was convicted of first degree murder in California. Following trial, the petitioner filed a state habeas petition. The state petition claimed penalty phase ineffective assistance of counsel based on the failure to investigate and present evidence relating to mental disorders. The court summarily denied the application. The petitioner subsequently filed a federal habeas petition. The federal court held the proceedings in abeyance, and the petitioner submitted a second state habeas petition, supported by additional exhibits relating to counsels' failure to investigate mental disorders. The state court summarily denied the second petition, and the petitioner returned to federal court. The district court granted the petitioner's request for an evidentiary hearing, where new evidence was presented. The district court granted the petition, and the Ninth Circuit affirmed, concluding that the new evidence could be considered in assessing whether the state court's decision was contrary to, or an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d)(1).

The Supreme Court reversed, concluding that if § 2254(d)(1) is applicable to a petitioner's claim for relief in federal court, evidence adduced in a federal evidentiary hearing may not be considered in determining whether or not the state court decision is entitled to deference. Instead, review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.

Harrington v. Richter, 09-587 (1.19.11)

The Supreme Court held that the summary denial of a federal constitutional claim is presumed to be a decision "on the merits" under AEDPA. The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely. When a federal constitutional claim has been denied without explanation, and the petitioner seeks relief under the "unreasonable application" clause of 28 U.S.C. § 2254(d), the burden is on the petitioner to demonstrate that there was no reasonable basis for the state court to deny relief.

The Supreme Court further determined that the Ninth Circuit erred in granting relief. When a petitioner raises a constitutional claim under AEDPA, relief is precluded if fairminded jurists could disagree on the correctness of the state court decision. When a claim of ineffective counsel is raised, the question under § 2254(d) is not whether counsel's performance was reasonable. Instead, the question is whether there is any reasonable argument that counsel satisfied the deferential standards of *Strickland*.

Premo v. Moore, 09-658 (1.19.11)

The defendant filed for postconviction relief in state court, alleging that his attorney had performed deficiently by failing to file a motion to suppress his confession. The state courts denied the claim. The Ninth Circuit granted habeas corpus relief, concluding that the defendant's attorney had been ineffective in failing to move for suppression; the Ninth Circuit further concluded that the state court's rejection of the defendant's claim was contrary to the rule of *Arizona v. Fulminante*, 499 U.S. 279 (1991), as well as an objectively unreasonable application of *Strickland*. The Supreme Court reversed, finding while *Fulminante* did involve the prejudicial impact of confessions, the case did not involve a claim of ineffective assistance of counsel, and as a result the "contrary to" clause of 28 U.S.C. § 2254(d) was not applicable. With respect to the Ninth Circuit's grant of relief under the "unreasonable application" clause of § 2254(d), the Court found that the Ninth Circuit failed to afford adequate deference to counsel's strategic decisions and to the state court's determination that the defendant was adequately represented.

Walker v. Martin, 09-996 (2.23.11)

The defendant was convicted of murder and robbery in California state court and sentenced to life in prison without the possibility of parole. Five years after his conviction and sentence became final, the defendant raised various claims in a successive state habeas petition directed to the California Supreme Court. The defendant did not provide any explanation for the delay, and the court dismissed the petition as untimely. Although California does not have a specific limitations period for habeas petitions, the courts do require them to be filed "as promptly as the circumstances allow." The Ninth Circuit held that the defendant's claims had not been procedurally defaulted because California's indeterminate limitations period was not an adequate and independent state ground to bar federal review.

The Supreme Court reversed. To qualify as an adequate state ground to bar federal review, the procedural rule must be firmly established and regularly followed. The fact that a procedural rule is discretionary rather than mandatory does not mean that it is not adequate. Furthermore, a limitations period is not inadequate merely because it is framed in indeterminate language. Finally, the fact the California Supreme Court dismisses hundreds of habeas petitions as untimely every year

demonstrates that the rule is regularly followed. Accordingly, the decision of the Ninth Circuit was reversed.

Wall v. Kholi, 09-868 (3.07.11)

Following direct review of his conviction, the defendant filed a motion to reduce his sentence pursuant to a state court rule. The defendant subsequently filed a federal habeas corpus petition after his claims for relief were denied in state court. The district court dismissed the defendant's petition as untimely, concluding that the defendant's motion to reduce sentence did not constitute an "application for post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), and therefore did not operate to toll AEDPA's one year statute of limitations. The First Circuit reversed, concluding that the motion to reduce sentence satisfied the tolling provisions of § 2244(d)(2). The Supreme Court affirmed, concluding that any review of the judgment that takes place outside of the direct appeal process constitutes collateral review under § 2244(d)(2). As a result, the defendant's motion to reduce sentence operated to toll the AEDPA statute of limitations, and the defendant's federal habeas corpus petition was timely.

Felkner v. Jackson, 10-797 (3.21.11)

The defendant was convicted of sex offenses in California. At trial, the defendant raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). The state courts rejected the *Batson* claim, concluding that the defendant failed to demonstrate purposeful discrimination. The Ninth Circuit subsequently granted the defendant's request for federal habeas corpus relief. The Supreme Court reversed, concluding that the Ninth Circuit failed to give adequate deference to the state court's factual findings, as required by AEDPA.

B. Sixth Circuit

United States v. Doyle, 09-3003 (2.9.11)

A district court lacks jurisdiction to set aside a sentence or conviction under 28 U.S.C. § 2255 where no Constitutional or other violation occurred. In this case, the defendant argued that his counsel was ineffective at sentencing for failing to file a notice of appeal upon request. The district court found that counsel's conduct was not ineffective; however, it still allowed relief in the defendant's case, granting him the right to a direct appeal. The Court held that "The district court had no basis upon which to set aside Doyle's sentence," and therefore vacated the district court's decision granting relief under § 2255. The Court found that to grant relief under § 2255, the district court must find: "(1) an error of constitutional magnitude; (2) a

sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.”

In re Salem, 09-1819 (2.01.11)

Where a claim is filed in a first habeas petition, but is unripe and not ruled upon in the first petition, a defendant need not file a motion for a successive petition when later bringing the claim.

Couch v. Booker, 09-2230 (2.03.11)

The defendant claimed his counsel was ineffective in failing to pursue a causation defense in a murder case, where medical evidence showed that the victim suffered from a chronic thickening of the heart muscle. The Court found that causation was an obvious issue in the case, and trial counsel’s failure to investigate causation as a potential defense was ineffective. A lawyer cannot make a protected strategic decision without investigating the potential bases for it. Furthermore, additional evidence was available which would have substantially supported a causation defense, and as a result there was a reasonable probability that the defendant would have obtained a more favorable result at trial if he had been competently represented. The determination of the state courts to the contrary was objectively unreasonable, and as a result the decision of the district court was affirmed.

Smith v. Anderson, 09-3284 (2.11.11)

The defendant entered into a written plea agreement in Ohio state court. The defense and the prosecution made an oral agreement that the prosecution would not object to the defendant's release when he became eligible for parole; however, this was not included in the written agreement. The trial court was unaware of the agreement at the time the plea was entered. When the defendant eventually became eligible for parole, the prosecution objected to his release, notwithstanding the oral agreement that had been made at the time of the guilty plea. The defendant then moved the trial court for specific performance of the plea agreement, or for leave to withdraw the plea, which was denied. The Court determined that the only enforceable terms of a plea agreement are those which are revealed in open court. Therefore, the defendant was not entitled to relief under the oral agreement.

Hardaway v. Robinson, 08-1156 (4.14.11)

Although the constitutional equivalent of a new direct appeal could theoretically cure a violation of the right to effective assistance of appellate counsel, the proceeding which is utilized as a substitute for a direct appeal must be constitutionally adequate. The procedure utilized by the Michigan court in the defendant's case was not

constitutionally adequate. In Michigan, appeals from the denial of collateral relief are purely discretionary, there is no opportunity for oral argument, and there is no right to counsel. As a result, the procedure was not sufficient to qualify as a substitute for a direct appeal. The denial of habeas corpus relief was therefore reversed.

Cowans v. Bagley, 08-4393 (4.21.11)

Under 28 U.S.C. § 2254(d), federal habeas corpus relief may only be granted if the petitioner's claim is based on the clearly established precedent of the United States Supreme Court. Because the Supreme Court has never held that the Eighth Amendment or any other constitutional provision requires the presentation of mitigating evidence in capital sentencing, the denial of defendant's claim that the Eighth Amendment prohibits a defendant from waiving his right to present mitigating evidence in a capital sentencing proceeding was proper.

Stone v. Moore, 08-4460 (4.29.11)

Under Ohio law, motions for leave to file a delayed appeal are governed by Ohio Rule of Appellate Procedure 5(A). Under *Beard v. Kindler*, 130 S. Ct. 612 (2009) and *Walker v. Martin*, 131 S. Ct. 1120 (2011), a wholly discretionary state procedural rule can constitute an adequate and independent state ground for the purposes of foreclosing federal review. Although the Sixth Circuit had previously held in *Deitz v. Money*, 391 F.3d 804 (6th Cir. 2004) that Rule 5(A) was not firmly established and regularly followed, the holding of *Deitz* could not survive the subsequent decisions in *Beard* and *Walker*. As a result, the court found that Ohio Rule of Appellate Procedure 5(A) constitutes an adequate and independent state ground for the purposes of procedural default.