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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

United States Supreme Court – [Tapia v. United States](#), 10–5400 (6.16.11)

Pursuant to 18 U.S.C. § 3582(a), a district court cannot choose imprisonment as defendant’s sentence or lengthen the sentence based upon rehabilitation opportunities in the Bureau of Prisons; however, once a sentence is chosen, the court can consider the type of imprisonment based upon those concerns. “[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.”

[United States v. Priester](#), 08–2391 (7.22.11)

Where a defendant argued at sentencing that the district court could disagree with the Guidelines 100:1 crack cocaine sentencing ratio, and where it was not clear from the record that the court understood its inherent authority to vary on a categorical disagreement, a remand for resentencing was required. The Court noted that sentencing in this case occurred before the Supreme Court’s decision in *Spears v. United States*, 555 U.S. 261 (2009); however, this did not change the analysis of the error.

[United States v. Walker](#), 09–6498 (8.11.11)

Where a district court increased the sentence based upon the perceived need for treatment in the Bureau of Prisons, resentencing was required.

[United States v. Judge](#), 09–2624 (8.15.11)

Where a court considers a defendant’s cooperation under § 3553(a) factors (when no Government U.S.S.G. § 5K1.1 motion is made), a court may not consider any future cooperation in its analysis.

B. Guidelines issues

United States Supreme Court – [DePierre v. United States](#), 09–1533 (6.9.11)

The term “cocaine base” for purposes of 21 U.S.C. § 841 et al refers not only to “crack”, but all forms of cocaine in its chemically base form.

[United States v. Galaviz](#), 07–2518 (5.6.11)

U.S.S.G. § 4A1.2(e)(1) requires a court to calculate in the criminal history score prior sentences where parole was revoked, and the revocation resulted in incarceration within a 15 year time period of the offense of conviction. Under Michigan law, a defendant can serve time without having his parole officially revoked. The Court found that in order for this provision to apply, the prior sentence must involve “actual revocation of parole and resulting incarceration within the 15–year period in order for a sentence served outside the period to be counted for the purpose of computing criminal history points.”

[United States v. Taylor](#), 09–1961 (6.7.11)

Despite the Supreme Court’s holding in *Pepper v. United States*, --- U.S. ---, 131 S. Ct. 1229 (2011), which invalidated 18 U.S.C. § 3742(g)(2) on Sixth Amendment grounds, § 3742(g)(1) did not suffer from the same constitutional problem, and was therefore valid. Accordingly, the rule that upon resentencing, the district court must use the Guidelines in place at the time of the original sentencing was still binding on district courts.

The Court did remand for resentencing; however, holding that a district court can on remand consider subsequent amendments to the Guidelines in its 18 U.S.C. § 3553(a) analysis.

[United States v. Mackety](#), 09–2148 (6.17.11)

A district court policy, which sets a time limitation for a plea conditioned upon receiving an additional one point reduction under U.S.S.G. § 3E1.1(b), improperly usurps the power of the United States Attorney’s office, as the Guidelines place sole discretion to move for this additional point with the US Attorneys.

[United States v. Ramirez–Perez](#), 10–1270 (6.23.11)

When determining the length of a prior conviction where probation was revoked, “Credit for time served should not be subtracted from a defendant’s probation revocation sentence, even if the face of the state court record reflects the defendant received credit for time served on the original offense.”

C. Procedural matters

[United States v. Garcia–Robles](#), 09–1980 (5.10.11)

When the Court provides a general remand for resentencing, a defendant is required to be present, and have an opportunity for allocution. Further, the district court is required to state in open court the basis for the sentence imposed.

[United States v. Hunter](#), 09–4085 (5.25.11)

On a limited remand, where the court vacates one of the counts of conviction and the United States makes a decision not to pursue, there is no basis for a new sentencing proceeding, and therefore, the defendant does not have the opportunity to be present or for allocution.

[United States v. Williams](#), 09–5256 (5.11.11)

The Court held (1) that a defendant may not be sentenced without his physical presence in the courtroom (the court used video conferencing), and (2) that the court could not sentence without a presentence investigation report without a sufficient waiver and statement regarding the lack of need for a report. Accordingly, the case was remanded for resentencing.

[United States v. Chiolo](#), 09–3918 (6.30.11)

Despite the district court’s failure to address every non-frivolous argument on the record at sentencing, the Court upheld the sentence as procedurally reasonable, as the sum of the sentencing record provided sufficient information such that the Court understood the sentencing decision. The Court cautioned, however, that “whenever a district court requires us to infer its bases for rejecting arguments, the district court greatly increases the risk of a remand. The better practice is to give explicit reasons for rejecting all non-frivolous arguments.”

[United States v. Denny](#), 09–6029 (8.10.11)

When reviewing whether a district court imposed a non-Guidelines sentence under variance standards or departure standards, the language used during the oral proceeding should control, unless it is unclear. The use of the “statement of reasons”, which is merely to be used for record keeping, and not legal findings, is inappropriate, especially when the district court’s intent can be gleaned from the sentencing hearing itself.

[United States v. Hanna](#), 09–1425 (8.12.11)

The Court in this case found that the district court utilized the wrong Guideline, and that the use of this Guideline increased the advisory range from 97–121 months to 188–235 months. However, the Court found that it could not correct this error, as defense counsel urged application of the incorrect Guideline at the sentencing proceeding; thus, any error was “invited error”, and not subject to correction.

[United States v. Judge](#), 09–2624 (8.15.11)

Under a plain error standard of review, where a district court considers the “core thrust” of each of the defendant’s arguments in mitigation at sentencing, no reversible error will occur, despite the fact that the district court could have been more explicit in

its explanation of each issue.

D. Recidivism enhancements

United States Supreme Court – [McNeil v. United States](#), 10–5258 (6.6.11)

In determining whether or not a prior drug offense was a “serious drug offense” under the ACCA, the statutory range the defendant faced at the time of the earlier conviction, and not any amended statutory range the state may have later changed, applies. This is because “The plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant’s previous drug offense at the time of his conviction for that offense. The statute requires the court to determine whether a “previous conviction” was for a serious drug offense. The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.”

United States Supreme Court – [Sykes v. United States](#), 09–11311 (6.9.11)

A prior offense for knowingly or intentionally fleeing from a police officer under Indiana law is categorically a violent felony for purposes of the ACCA. The Court found that the offense, in its generic form, presented a serious potential risk of physical injury to another. “When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense.” The Court also noted that its decision in *Begay* did not mandate that crimes be purposeful, violent and aggressive; rather, the standard to be used is the percentage of risk level that an offense will present a serious risk of physical injury to another.

[United States v. Benton](#) 09–6322 (5.17.11)

Defendant’s prior conviction for solicitation to commit an aggravated assault under Tennessee law was a violent felony, for purposes of the ACCA. The Court first found that the statute did not require the use or threat of force; however, “While solicitation to commit aggravated assault may not directly cause physical injury, it does create a heightened and serious potential risk of the occurrence of physical injury.” The Court also found that the offense involves purposeful conduct, which encourages violence. On that basis, the offense qualified as a violent felony under the ACCA.

[United States v. Moore](#), 09–5935 (6.1.11)

The imposition of a 15 year mandatory minimum term under the Armed Career Criminal Act does not violate the Eighth Amendment’s cruel and unusual punishment standard. Because the sentence was for a term of years, a proportionality review is not necessary. The Court reviewed the offense versus the sentence, and found “Because a ‘threshold comparison’ of the gravity of Moore’s offense and the severity of his sentence does not reveal an inference of gross disproportionality, we need not engage in the second step of the proportionality analysis by comparing his sentence with those

of offenders in this and other jurisdictions.”

[United States v. McMurray](#), 09–5806 (8.4.11)

Defendant’s Tennessee conviction for aggravated assault was not categorically a violent felony, as the statute encompassed both qualifying and non-qualifying conduct. The Court further analyzed the statute under the “use of physical force” clause of the ACCA, and found that it did not qualify. The Court rejected a finding in *Benton* (see above) as dicta. The Court then reviewed the Shepard documents in the present case, and determined that it could not be determined whether the prior offense qualified under the “otherwise” clause; therefore, the enhancement under the ACCA was improper.

[United States v. Gardner](#), 07–5947 (8.12.11)

Upon a violation under 18 U.S.C. § 2252 for possession or receipt of child pornography, if the defendant has a prior conviction for “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” the statutory minimum sentence is increased to 15 years. In *Gardner*, the Court upheld the district court’s decision not to increase the sentence on this basis, finding that (1) the statute on which the defendant was previously convicted did not require that a minor be involved in the offense, and (2) that no proper Shepard document was presented so as to allow such a finding. Use of a state PSR would have been inappropriate. Therefore, no enhancement was proper under the circumstances.

[United States v. Coleman](#), 10–3205 (8.24.11)

A prior conviction for third degree burglary (or attempt) under Ohio R.C. 2911.12(A)(3) is categorically violent under the otherwise clause, and therefore is always a qualifying conviction for purposes of the ACCA. “Under the categorical approach, it suffices that ‘in the ordinary case,’ a trespass (or attempted trespass) in an occupied structure creates the potential for a violent confrontation that is similar to the risk posed by generic burglary.”

II. Plea matters

C. Hearings

[United States v. Mendez–Santana](#), 09–2073 (5.20.11)

“[W]e hold that the plain text of Rule 11(d)(1) grants a defendant an absolute right to withdraw an unaccepted guilty plea and the district court lacks discretion to deny such a motion.”

III. Evidence

A. Article IV – Relevancy

United States v. Hardy, 08–5991 (5.19.11)

The Court held that it was proper to present, under FRE 404(b), evidence of other uncharged drug sales to prove intent to engage in drug possession involved in the offense of conviction. The Court held that admission of such evidence was proper. The Court also called into question the recent decision in *United States v. Bell*, 516 F.3d 432 (6th C. 2008), in which the Court had held that “to be probative of a defendant’s present intent to possess and distribute, his prior convictions for drug distribution must be related in some way to the present crime for which the defendant is on trial.” The Court in effect overruled Bell, finding “Bell is inconsistent with prior precedent and is therefore not controlling.”

United States v. Hanna, 09–1425 (8.12.11)

Testimony of an unrelated company, that they were duped by co-conspirators in a manner similar to the defense theory, was arguably relevant in a prosecution for shipping equipment to a prohibited country. However, the exclusion of such testimony was not reversible error, as the evidence was only marginally relevant, and would not have changed the outcome, given the other evidence presented.

B. Articles VI–VII – Witness and Expert

United States v. Marrero, 08–2075 (7.6.11)

The district court did not err in allowing the Government, pursuant to **FRE Rule 612**, to refresh a witness’s recollection with a document they did not prepare. The Government in this case sought to refresh the recollection of a police officer with a report prepared by another officer. The Court found that “By its terms, Rule 612 does not limit the type of writings that might be used as refreshers, and ‘[t]he propriety of permitting a witness to refresh his memory from a writing prepared by another largely lies within the sound discretion of the trial court.’”

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

United States v. Galaviz, 07–2518 (5.6.11)

Where an officer has a bulletin that a white car driven by a black male on a certain street was involved in criminal activity, the officer had a basis to pull over defendant’s vehicle. However, once the officer determined that the defendant was Hispanic, “the reasonableness of the suspicion was undermined”. The Court found, however, that evidence seized as a result of the stop was not required to be suppressed, as it was found in plain view.

[United States v. Gross](#), 08–4051 (6.15.11)

Finding a vehicle with its engine running in a parking lot in early morning hours, apparently without a driver or passenger, did not provide a basis for a Terry stop of the vehicle. Although the officer could have approached the vehicle without any cause to investigate, his actions of blocking in the vehicle under such circumstances amounted to a Fourth Amendment violation. Further, the fact that the officer learned of a warrant during the stop did not right any illegal seizure. The Court noted that “where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive.”

[United States v. Mays](#), 08–5374 (6.29.11)

Officers had reasonable suspicion to detain and frisk a defendant based upon the following facts: “1) the detention and search occurred at a location where officers had been recently informed that a black man was selling drugs; 2) defendant initially approached the officers in a calm way, but his demeanor subsequently changed once he realized they were police; 3) defendant acted nervously, ‘like a deer at headlights’; 4) defendant turned away from the officers as if to leave; and 5) defendant frantically dug his hands into his pockets and would not remove them.”

[United States v. Clariot](#), 09–5783 (8.25.11)

Even though the district court found that it was improper for police to seize defendants to check their identification and request a consent, information and testimony resulting from the stop was not required to be suppressed. The Court held that “In view of the failure to establish any causative link between the alleged misconduct and the evidentiary discovery, it follows that the deterrent value of suppressing this evidence is small. As suggested above, the government gained no unfair advantage by its conduct, and the evidence suggests no reason why the defendants would have responded any differently had the officers asked to search the plane before, rather than after, the seizure.” Thus, the district court’s decision to suppress was reversed.

[Hennessey v. Bagley](#), 07–4479 (07.06.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In federal habeas corpus proceedings, the petitioner alleged that his trial attorneys had been ineffective in failing to suppress the fruits of an illegal stop and arrest. An unidentified individual had approached the arresting officer and described a person who had just threatened to shoot him. When the officer proceeded in the direction of the alleged incident, he observed the petitioner wearing distinctive clothes identical to those described by the witness. The officer stopped the petitioner, patted him down, found a knife in his coat pocket, and arrested him.

The Court held that the arrest did not violate the Fourth Amendment. Although

anonymous telephone tips will frequently fail to satisfy the requirements of *Terry v. Ohio*, 392 U.S. 1 (1968), a face-to-face tip permits the officer to observe the informant's demeanor and credibility. Furthermore, a witness who gives information to police in person risks being held accountable if the information is false. Additionally, a witness' proximity in time and place to the event can indicate first-hand knowledge of the reported information. As a result, the *Terry* stop did not violate the Fourth Amendment, and the petitioner could not prevail on his claim of ineffective assistance of counsel.

C. Warrant Exceptions

United States Supreme Court – [Kentucky v. King](#), 09-1272 (5.16.11)

A Fourth Amendment exception exists where there are exigent circumstances. The Supreme Court ruled that “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” “Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.” Therefore, so long as officers do not take action to violate the Fourth Amendment, their actions will not “create” an exigency which cannot be acted upon.

United States Supreme Court – [Davis v. United States](#), 09-11328 (6.16.11)

Where officers made a vehicle search incident to arrest, relying on prior precedent which was later overturned by *Arizona v. Gant*, using the exclusionary rule to suppress evidence would not serve the protections afforded by the rule. Thus, the officers justifiable reliance on what was, at the time of the search, good law prevented the evidence from being suppressed.

D. Consent Searches and Seizures

[United States v. Lucas](#), 09-6035 (5.11.11)

The phrase “what do I have to sign?” made in conjunction with a consent to search form was not a gesture of futility in response to police authority. The Court reviewed the circumstances, including the defendant's education, the fact that the defendant was informed of his right to refuse, and the fact that the consent was inside the defendant's home, all as indicative of a voluntary consent.

[United States v. Johnson](#), 09-6461 (8.29.11)

Where two persons with possessory interest in a residence are asked to consent to a

search, and one consents and the other does not, the search is unreasonable as to the person who did not consent. “In this case, there is no serious dispute that the Defendant had a reasonable expectation of privacy in the bedroom, which he shared with his wife and which he used to store personal belongings. [] The district court found that the Defendant was present when the police arrived and that he expressly objected to the search. Accordingly, the search of the bedroom was unreasonable as to the Defendant.” The Court found it was not proper to weigh who had a “superior” interest in the property, when both persons had a privacy interest.

G. Miscellaneous Fourth Amendment

United States v. Lucas, 09-6035 (5.11.11)

The search of a laptop computer, including a thumb drive, was within the scope of consent given to police where police were looking to uncover evidence of a marijuana grow operation. Officers testified they were looking for pictures of the marijuana grow, as well as excel spreadsheets indicative of the operation. The Court cautioned, however, that “ Our decision to uphold Lainhart’s entry into Lucas’s electronic files based on the facts of this case should not be read as a grant of broad authority to the police to open a suspect’s non-secured computer and examine at will all of the electronic files stored there.”

V. Fifth Amendment

C. Confessions and Testimonial Rights

United States Supreme Court – JDB v. North Carolina, 09-11121 (6.16.11)

A defendant’s status as a minor is an important aspect of determining whether it is appropriate to provide Miranda warnings. The Court reaffirmed that custodial interrogation is “inherently coercive”, and that minors would be more affected by any police interrogation. Therefore, where an adult might feel free to leave, a minor might feel compelled to answer questions. “[W]e hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test”

United States v. Poulsen, 08-4218 (8.24.11)

The defendant wanted to testify at his own trial as an expert witness on the amount of loss, and why there were losses as to his corporation. The Court held that it was proper to exclude this testimony, as the district court correctly ruled the defendant not to be a qualified expert. Further, the amount of loss was not an element of the offense to be proven.

D. Double Jeopardy

[United States v. Ehle](#), 09-5389 (5.12.11)

The Court held that defendant's convictions for "possessing" child pornography and "receiving" the pornography were a violation of Double Jeopardy. The Court reasoned that "As a matter of plain meaning, one obviously cannot 'receive' an item without then also 'possessing' that item, even if only for a moment." For this reason, the Court remanded for vacation of one of the convictions, and resentencing.

[United States v. Dudak](#), 09-3231 (7.28.11)

Based upon Ehle (above), the Court remanded a case for further proceedings where it was unclear if the defendant's possession and receiving charges were based upon the same images of child pornography. The Court found that upon remand, the district court needed to determine whether the counts were for separate conduct, and "[i]f Dudeck was charged with receipt of any images for which he was not also charged with possession—and viceversa—the two can be punished as separate offenses."

VI. Sixth Amendment

B. Confrontation Clause

United States Supreme Court – [Bullcoming v. New Mexico](#), 09-10876 (6.23.11)

The Confrontation Clause prohibits the prosecution from introducing a forensic lab report that contains testimonial evidence except through live testimony of the author of the report. "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."

C. Speedy Trial

United States Supreme Court – [United States v. Tinklenberg](#), 09-1498 (5.26.11)

Reversing the decision of the Sixth Circuit, the Court held that any pre-trial motion automatically stops the running of the statutory Speedy Trial clock. "We consequently disagree with the Sixth Circuit that the Act's exclusion requires a court to find that the event the exclusion specifically describes, here the filing of the pretrial motion, actually caused or was expected to cause delay of a trial. We hold that the Act contains no such requirement." The Court did hold, however, that under § 3161(h)(1)(F), that the phrase "10 days" indicated calendar days; therefore, under the defendant's alternative argument, the Speedy Trial clock had run. The Court therefore affirmed dismissal of the indictment.

D. Right to Counsel/Self Representation

[United States v. Marrero](#), 08-2075 (7.6.11)

A defendant who asked for new counsel 3 weeks prior to trial was not entitled to substitution of counsel; therefore, the district court's requirement that defendant either continue with appointed counsel or proceed pro se was not a violation of the Sixth Amendment right to counsel. The Court made its analysis of this issue using the 4 point test to determine substitution of counsel.

VII. Other Constitutional Rulings

E. Miscellaneous Constitution Rulings

United States Supreme Court – [Bond v. United States](#), 09-1227 (6.16.11)

A criminal defendant has standing to raise, in a pre-trial motion to dismiss, a Tenth Amendment claim that the Federal Government exceeded its powers by intruding on powers reserved by that amendment to the States.

VIII. Defenses

C. Necessity/Duress

[United States v. Poulsen](#), 08-4218 (8.24.11)

The Court recognized the defense of entrapment where third parties, not direct Government agents cause the conduct. The Court noted that “Although we do not recognize indirect entrapment, we do recognize that entrapment ‘may occur as the result of conduct by third-party agents or as the result of government action through private citizens.’ Inducement for the purpose of entrapment may occur through private citizens acting as government agents upon the instructions of the government . . .”. The Court in Poulsen found the defense to not be supported by evidence in the record.

L. Miscellaneous Defenses

[United States v. Gabrion](#), 02-1386 (8.3.11)

Not all mental illnesses require a finding that a defendant is incompetent to stand trial. “Malingering, faking incompetence, trying to deceive the court, pathological lying and murder are signs of a mental illness that thankfully affects only a small part of the population; but it is not the same as the mental illness that gives rise to ‘incompetence to stand trial.’” Thus, the district court was not required, under the circumstances of the case, to hold a hearing on defendant’s competency.

IX. Jury Issues

A. Jury Instructions

United States Supreme Court– [Bobby v. Mitts](#), 10–1000 (05.02.2011)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The Supreme Court held that *Beck v. Alabama*, 447 U.S. 625 (1980) requires the jury to be instructed on a lesser-included offense in a capital case if the evidence would support a conviction on the lesser offense. The failure to instruct the jury on a lesser included offense in such circumstances is unconstitutional because it encourages arbitrary convictions in capital cases. *Beck* is concerned primarily with the guilt phase of trial, and its holding is not directly applicable to penalty phase instructions. Because the applicability of *Beck* to penalty phase proceedings has not been not clearly established, the Ohio Supreme Court's rejection of the petitioner's claim was entitled to deference under 28 U.S.C. § 2254(d). As a result, the decision of the Sixth Circuit was reversed.

[United States v. Fisher](#), 09–2460 (7.19.11)

In a prosecution for fraud, it was not improper for a district court to refuse to provide supplemental jury instructions (in response to a jury question) related to attorney/client privilege. The Court recognized that “[w]here there is evidence that the jury is confused over an important legal issue that was not covered by the original jury instructions, a district court abuses its discretion by not clarifying the issue.” The Court found, however, that an exception to this rule exists where the jury question seeks clarification or advice on a collateral matter not relevant to disposition of the case. Under such circumstances, the court need not answer the jury’s question, but can re-focus them on the issues related to the prosecution.

[United States v. Harvey](#), 09–4261 (8.4.11)

A jury instruction that the Government need not present all possible evidence related to the case was an appropriate instruction. The instruction, taken from the Third Circuit’s model instructions, was given in response to a defense argument that the Government was “hiding” evidence, and therefore was appropriate.

[United States v. Demmler](#), 09–3660 (8.23.11)

A jury instruction which defined “corruptly” as “characterized by improper conduct, or persuasion characterized by some morally debased purpose”, in which “improper conduct” was beyond illegal conduct, was improperly given. However, because it was the instruction requested by the defense at trial, such error was invited, and thus unreviewable or correctable by the Court.

E. Miscellaneous Jury Issues

[United States v. Gabrion](#), 02–1386 (8.3.11)

In a death penalty case, it was improper for a district court to not allow the defense to argue to the jury and present evidence, in the mitigation phase, that the state in which the murder occurred had abolished the death penalty. The Court found that the statute's "other factors" in mitigation clause allowed the jury to consider this issue. Thus, the Court remanded for a new penalty phase.

Further, the Court found that a district court must instruct a jury, during the penalty phase, that it needed to weigh aggravating and mitigating factors using a beyond a reasonable doubt measure.

X. Probation/ Supervised Release

[United States v. Johnson](#), 09–4293 (5.11.11)

A sentence is "within the Guidelines" even if it is not within the Guidelines range, so long as the sentence finds support in Guidelines terminology. In Johnson, the court imposed a sentence of 36 months, which was in excess of the advisory Guidelines range of 15–21 months. During the sentencing hearing, the court noted that it was imposing the sentence because it "is within the guidelines". The Court found that this language referred to the possibility that the sentence was supported by a Guidelines departure, and therefore, was not procedurally unreasonable.

[United States v. Brown](#), 10–1410 (5.17.11)

When imposing a sentence for a violation of supervised release, a court must subtract from any additional term of supervised release any time imposed as incarceration. The Court held that where the district court could impose up to 36 months under the statute, it could impose an 8 month term of incarceration; however, the maximum term of additional supervised release, pursuant to 18 U.S.C. § 3583(h), could only be 28 months.

XI. Appeal

[United States v. Gomez–Gomez](#), 10–3283 (5.5.11)

A district court's decision that a defendant is an adult, and thus not subject to the Juvenile Delinquency Act, is not an order subject to an interlocutory appeal, as the issue was not a legal one, but a factual one.

[United States v. Williams](#), 09–5256 (5.11.11)

Where the Government fails to argue, in its responsive brief, that the defendant failed to preserve an issue in the court below, the Court will review a legal claim de novo,

despite the fact that it was not properly preserved or raised.

[United States v. Gaytan-Garza](#), 10-4615 (7.12.11)

A late filed notice of appeal no longer deprives the Court of jurisdiction, and the lateness can be waived by the Government. “Rule 4(b), unlike Rule 4(a), is not established by statute, and it is now clear that Rule 4(b) is not jurisdictional. [] Therefore, we are not required to dismiss late-filed criminal appeals unless the government has raised the issue, which it can do by motion or in its briefing.”

XII. Specific Offenses

[United States v. Thuenick](#), et al, 08-1363 (6.30.11)

False information to obtain otherwise prohibited firearms – 26 U.S.C. §5861 was not unconstitutionally vague as applied, as it put defendants on notice that they could not register firearms to a qualified organization and then personally retain them.

[United States v. Daniels](#), 09-1386 (7.7.11)

In a prosecution for transporting a minor with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a), the Government need not prove that the defendant knew that the victim was a minor at the time of transportation. Rather, the context of the statute indicates that the term “knowingly” in the statute applies to the transportation for prostitution, and knowledge of the age of the victim.

[United States v. Trent](#), 08-4482 (8.5.11)

A defendant who was prosecuted under SORNA (18 U.S.C. § 2250) could not be convicted if his interstate travel occurred before the Attorney General implemented SMART Guidelines on August 1, 2008. This despite the fact that the defendant’s sex offense occurred after enactment of SORNA in July, 2006.

[United States v. Green](#), 09-6108 (8.16.11)

18 U.S.C. § 3261 (MEJA) allows federal prosecution of former military personnel who commit crimes on foreign soil, and who are no longer in the military and subject to court martial. The Court held that MEJA was constitutional, under challenges to the statute under separation of powers, non delegation, equal protection, and due process standards.

United States Supreme Court – [Fowler v. United States](#), 10-5443 (5.26.11)

In a prosecution for killing a witness to prevent communication to a federal law enforcement officer (18 U. S. C. §1512(a)(1)(C)), the defendant need not have knowledge of a specific future communication with a specific officer. Rather, “We

consequently hold that (in a case such as this one where the defendant does not have particular federal law enforcement officers in mind) the Government must show a reasonable likelihood that, had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer. That is to say, where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with federal law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer."

XIII. Post-Conviction Remedies

United States Supreme Court – [Freeman v. United States](#), 09–10245 (6.23.11)

The defendant was sentenced to a specific term pursuant to a Rule 11(C)(1)(c) agreement. He later filed a motion pursuant to 18 U.S.C. §3582(c) for a sentence reduction, based upon changes to crack cocaine Guidelines amendments. The district court found it did not have authority to modify the sentence, due to the fact it was imposed under Rule (C)(1)(c). “§3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.” Therefore, “the district court has authority to entertain §3582(c)(2) motions when sentences are imposed in light of the Guidelines, even if the defendant enters into an 11(c)(1)(C) agreement.”

[United States v. Howard](#), 09–2468 (5.24.11)

When imposing a reduced sentence under 18 U.S.C. §3582(c), a district court must provide a statement of reasons for the sentence imposed. In this case, the court merely checked boxes on a form used for § 3582 motions – this left the Court without insight as to the basis for the district court’s decision.

[Gibbs v. United States](#), 09–3702 (8.24.11)

A change in Sixth Circuit precedent regarding what constitutes a “controlled substance offense” for purposes of a career offender enhancement does not provide a basis for a Rule 60(b) motion where the claim, if not the precedent, was available to the defendant at the time of appeal or his first § 2255 petition. Further, the Court discussed but did not decide whether a defendant could ever claim “actual innocence” of a sentencing enhancement. The Court opined that actual innocence may not apply to non-capital sentencing issues.

[Bedford v. Bobby](#), 11–3526 (05.18.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to

death. Prior to his scheduled execution date, the petitioner filed a notice of insanity in state court, alleging that he was not competent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986) and Panetti v. Quarterman, 127 S.Ct. 2842 (2007). The state courts denied the petitioner's claim, and the petitioner sought federal habeas corpus relief. The district court granted the petitioner's motion for a stay of execution. The Court vacated the stay, holding that the petitioner waited too long to file his Ford claim in state court, and that he did not make an adequate showing that he was likely to succeed on the merits.

[Hardaway v. Robinson](#), 08-1156 (05.19.11)

The earlier decision of the Court in Hardaway v. Robinson, 637 F.3d 640 (2011) was amended to clarify that, under Harrington v. Richter, 131 S. Ct. 770 (2011), 28 U.S.C. § 2254(d) was applicable to the state court judgment at issue. The outcome of the case was unchanged.

[Carter v. Bradshaw](#), 08-4377 (05.26.11)

State prisoners who are under a sentence of death have a statutory right to be mentally competent during their federal habeas corpus proceedings. A petitioner is incompetent if he or she is unable to understand the nature and consequences of the proceedings, or to properly assist their counsel in the proceedings. If a petitioner is found to be mentally incompetent, a stay of proceedings should be granted with respect to any of the petitioner's claims that cannot be fairly litigated without the petitioner's assistance to counsel, and the stay should continue until the petitioner's competence is restored. If there are claims which can be litigated without the petitioner's assistance, the district court should appoint a next friend to proceed on the petitioner's behalf.

[Apanovich v. Bobby](#), 09-4333 (06.08.11)

The petitioner was convicted in Ohio state court of aggravated murder and sentenced to death. The petitioner subsequently sought federal habeas corpus relief, alleging that his rights under Brady v. Maryland, 373 U.S. 83 (1963) had been violated because the State withheld favorable evidence from the defense at trial. The Court upheld the district court's denial of the writ. Although the evidence was favorable and the prosecution's withholding of it was indefensible, the evidence was not sufficiently material to rise to the level of a Brady violation.

[Sutton v. Bell](#), 03-5058 (06.08.11)

The petitioner was convicted of murdering a fellow inmate and sentenced to death in Tennessee state court. Following trial, the state courts rejected the petitioner's claim his attorney had been ineffective in failing to object to courtroom security measures under Holbrook v. Flynn, 475 U.S. 560 (1986). Ten uniformed guards were in the courtroom during the petitioner's trial. The petitioner alleged that his rights were violated because the presence of the guards gave the jury the impression that he was particularly dangerous or culpable. The district court denied the petitioner's claim for

relief.

The Court affirmed. Under Flynn, placing an increased security force in the courtroom is constitutional unless the circumstances are so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial. The guards in the petitioner's case were spread around the courtroom and were not overly conspicuous. Furthermore, the petitioner was tried with two co-defendants who were also prisoners, and the increased security risk justified the presence of the guards. Because the petitioner's underlying Flynn claim lacked merit, he could not prevail on his claim of ineffective assistance of counsel.

[Matthews v. Parker](#), 09-5464 (06.27.11)

The petitioner was convicted of murder and sentenced to death in Kentucky state court. Under Kentucky law at the time of the petitioner's offense, the absence of extreme emotional disturbance ("EED") was an element of capital murder which had to be proven beyond a reasonable doubt. After the petitioner's trial, the Kentucky Supreme Court overruled its prior holdings requiring the State to prove the absence of EED. The court applied these holdings retroactively to the petitioner's case in order to uphold his conviction and death sentence. The district court denied the defendant's petition for habeas corpus relief.

The Court reversed. By retroactively eliminating the absence of EED as an element of the offense of capital murder, the Kentucky Supreme Court violated the rule of Bouie v. City of Columbia, 378 U.S. 347 (1964). Furthermore, the prosecution's evidence at trial was insufficient to prove beyond a reasonable doubt that the petitioner did not suffer from EED. As a result, habeas corpus relief was granted with respect to the petitioner's conviction and his death sentence.

[Noling v. Bradshaw](#), 07-3989 et al (06.29.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After the state courts denied the petitioner's claims, he petitioned for a writ of habeas corpus in federal court. The district court denied relief. The Court affirmed, concluding that even though it was entirely possible that the petitioner was completely and totally innocent of the offense of conviction, the limitations imposed on federal review by AEDPA precluded relief.

[Mitchell v. Rees](#), 09-5570 (06.30.11)

A habeas corpus petitioner who makes a claim for an independent action in equity under Rule 60(d)(1) of the Federal Rules of Civil Procedure must establish his or her actual innocence as a prerequisite to obtaining relief.

[Goodell v. Williams](#), 09-4338 (07.11.11)

The petitioner was convicted of rape and other offenses in Ohio state court and sentenced to nine years in prison. The sentence was reversed on procedural grounds on appeal. On remand, the case was assigned to a different judge who determined that the original sentence was inadequate, and the petitioner was sentenced to sixteen years. On appeal, the petitioner challenged the sentence as being unconstitutionally vindictive, but the state court rejected his claim. The petitioner subsequently sought federal habeas corpus relief. The district court concluded that the circumstances of the petitioner's resentencing gave rise to a presumption of vindictiveness which the Warden had failed to rebut, and that the refusal of the Ohio Court of Appeals to grant relief was contrary to clearly established law. The court accordingly granted the petition.

The Court reversed. A presumption of vindictiveness does not arise every time a defendant receives a more severe sentence on remand. If the new sentence has been imposed by a different judge, a presumption of vindictiveness generally will not be warranted unless there are other circumstances present indicating that vindictiveness played a role in imposing the increased sentence. The judge at the petitioner's resentencing carefully explained his rationale for the increased sentence, and there was no indication that it was motivated by vindictiveness. The decision of the district court was therefore reversed.

[Adams v. Bradshaw](#), 10-4281 (07.19.11)

Although challenges to a state's method of execution are cognizable under 42 U.S.C. § 1983, they may also be raised in habeas corpus proceedings under 28 U.S.C. § 2254.

[Cowan v. Stowall](#), 08-2338 (07.19.11)

The petitioner was convicted of felony offenses in Michigan state court after drugs and firearms were found in a residence where she was staying. The petitioner's defense at trial was that she was unaware that the guns and drugs were present. However, the petitioner's attorney failed to interview witnesses who could have corroborated the petitioner's claims. The petitioner filed a timely petition for habeas corpus relief in federal court, and subsequently moved for leave to file an amended petition. Both petitions alleged that her attorney failed to interview witnesses, but the amended petition provided substantially more detail. The district court denied the petitioner's motion for leave to file the amended petition, holding that her claim of ineffective assistance of counsel did not relate back to her original petition and was therefore untimely.

The Court reversed. An amended petition which is filed after the AEDPA statute of limitations has expired can relate back to a timely petition if the new claims share a common core of operative facts with the original petition. The petitioner's original petition expressly alleged that her attorney failed to interview witnesses. The amended petition simply added more specificity to the claim. Under such circumstances, the relation-back doctrine is applicable, and the statute of limitations will not bar the claims which are raised in the amended petition. The case was accordingly remanded to the

district court for further proceedings.

[Muniz v. Smith](#), 09-2324 (07.29.11)

The petitioner was convicted of felony offenses in Michigan state court. While the petitioner was being cross-examined by the prosecution, his attorney fell asleep. After the state courts rejected his claims, the petitioner sought relief in federal court. The petitioner alleged that his attorney had been ineffective as a matter of law under *United States v. Cronin*, 466 U.S. 648 (1984), and that the state courts had acted contrary to clearly established federal law by requiring him to demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The district court denied the petitioner's claim for relief, and the Court affirmed. Cronin is only applicable if an attorney sleeps through a substantial portion of the trial, and the trial transcript demonstrated that the petitioner's attorney was not asleep during the entire cross-examination, which was itself relatively short. Because the petitioner could not establish prejudice under Strickland, the decision of the district court was affirmed.

[Akins v. Easterling](#), 08-6161 (08.05.11)

The petitioner, who was a minor at the time of the charged offense, was convicted of robbery in Tennessee state court after being tried as an adult. Prior to trial, the petitioner invoked his right to self-representation and was permitted to act as his own attorney. Following his conviction, the petitioner alleged that he should not have been permitted to represent himself because his waiver of counsel was not knowing, intelligent and voluntary. In addition, the petitioner alleged that the prosecutors at his trial had violated *Batson v. Kentucky*, 476 U.S. 79 (1986) by removing prospective jurors on the basis of their race. The Court concluded that the state court decisions rejecting the petitioner's claims were entitled to deference under AEDPA, and accordingly upheld the denial of relief.

[Stumpf v. Houk](#), 01-3613 (08.11.11)

The petitioner was convicted of aggravated murder in Ohio state court by a three judge panel. In sentencing the petitioner to death, the panel found that the petitioner had personally killed the victim. In a subsequent prosecution of a second defendant who had also participated in the offense, the prosecution alleged that the second defendant had personally killed the victim. The State continued to defend the death penalty that had been imposed on the petitioner, notwithstanding the fact that its arguments in support of the petitioner's death sentence were in direct conflict with the evidence that had been utilized in the prosecution of the second defendant.

The Court concluded that the petitioner was entitled to relief from his death sentence. The panel that imposed the death penalty placed a great deal of weight on its finding that the petitioner was the principal offender in the homicide. By continuing to defend the petitioner's death sentence after obtaining a separate conviction which directly contradicted the factual basis for the penalty, the prosecution violated the petitioner's due process rights.

[Otte v. Houk](#), 08–3247 (08.12.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following trial, the petitioner alleged that his jury waiver was invalid because he was under the effect of anti-psychotic medication at the time the waiver was made. The Ohio Court of Appeals found that the jury waiver was valid. The Court upheld the subsequent denial of federal habeas corpus relief, concluding that the state court decision was entitled to deference under AEDPA.

[Taylor v. McKee](#), 09–1433 (08.12.11)

The petitioner was convicted of felony-murder Michigan state court. In his federal habeas corpus proceedings, the petitioner alleged that his due process rights had been violated because the jury had seen him in shackles, and that the ineffective assistance of his trial attorney provide cause and prejudice for the federal courts to reach the merits of his claim. The district court held the petition in abeyance so that the petitioner could present his claim of ineffective assistance of trial counsel to the state courts. The petitioner then filed his claim state court; however, after the motion was denied, the petitioner did not appeal, but instead returned to federal court. The Court held that the petitioner's shackling claim was procedurally defaulted. Under *Edwards v. Carpenter*, 529 U.S. 446 (2000), a claim of cause and prejudice for a procedural default can itself be procedurally defaulted. By failing to exhaust his ineffective assistance of counsel claim in state court, the petitioner procedurally defaulted his claim of cause and prejudice. As a result, federal review of the petitioner's shackling claim was barred.

[Abdur'Rahman v. Colson](#), 09–5307 (08.17.11)

The petitioner was convicted of capital murder in Tennessee state court and sentenced to death. After the petitioner was initially denied relief in his federal habeas corpus proceedings, he filed a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure, alleging that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing evidence relating to a religious-paramilitary group's involvement in the crime, and also by suppressing other evidence that would have supported the petitioner's claim of mental illness. The Court held that the petitioner could not establish a Brady violation with respect to the first claim because the defense had been aware of the information in question at the time of trial. The court further found that the petitioner could not demonstrate materiality with respect to the second claim. The denial of the petitioner's Rule 60(b) motion was accordingly affirmed.

[McKinney v. Ludwick](#), 10–1669 (08.19.11)

The petitioner was convicted of felony-murder in Michigan state court and sentenced to life imprisonment. Prior to trial, the petitioner sought to suppress his statements to police on the ground that they had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). During his first interrogation, the petitioner invoked his right to counsel. Although the police ceased their questioning, they advised the petitioner that he could face the death penalty if he was prosecuted by the federal government. The next day, the petitioner indicated that

he wished to speak with the police, signed a waiver of his Miranda rights, and gave an incriminating statement. The state courts refused to suppress the statement, and the district court denied the petitioner's request for habeas corpus relief. The Court affirmed, concluding that even if the statements to the petitioner regarding the death penalty violated Edwards, the state court's conclusion that the petitioner had validly initiated the second interrogation was not unreasonable, and AEDPA therefore barred relief.

[Montgomery v. Bobby](#), 07-3882 (08.22.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following trial, the petitioner alleged that the prosecution had violated Brady v. Maryland, 373 U.S. 83 (1963) by suppressing the statements of witnesses who claimed to have seen the victim alive after the day on which her murder was alleged to have taken place. The state courts rejected the petitioner's Brady claim, but the district court granted his petition for habeas corpus relief.

The Court reversed, concluding that the Ohio Court of Appeals' rejection of the claim was entitled to deference under AEDPA. The evidence against the petitioner at trial was strong. Furthermore, the petitioner led the police to the victim's body on the same day that the witnesses claimed to have seen her alive. To the extent that the report had impeachment value, it would merely have been cumulative of other impeachment evidence which was presented at trial. Accordingly, the state court's conclusion that the petitioner had not been prejudiced by the suppression of the report was not unreasonable, and as a result AEDPA barred relief.

[Foust v. Houk](#), 08-4100 (08.25.11)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following trial, the petitioner alleged in post-conviction proceedings that his trial attorneys had been ineffective because they failed to discover and present substantial evidence relating to the petitioner's extremely abusive and traumatic childhood. The state courts denied relief, and the district dismissed the petitioner's application for habeas corpus relief.

The Court reversed, concluding that the state court rejection of the petitioner's claim was objectively unreasonable. The petitioner's attorneys failed to interview witnesses and obtain records which would have demonstrated the horrific nature of the petitioner's childhood. There was no conceivable tactical basis for failing to conduct a more thorough investigation, and the determination of the state courts to the contrary was objectively unreasonable. Furthermore, it was unreasonable for the state courts to determine that the petitioner had not been prejudiced. The district court's denial of relief was therefore reversed.

[D'Ambrosio v. Bagley](#), 10-3247 (08.29.11)

If the State fails to comply with the terms of a conditional writ of habeas corpus, the federal courts have jurisdiction to grant an unconditional writ of habeas corpus barring further criminal prosecution in state court.