

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Terrance C. Kimbrough v. United States of America

No. 21-6208, United States Court of Appeals for the Sixth Circuit (June 22, 2023)

SUMMARY

Terrance Kimbrough v. United States, 6th Cir. 2023: The Sixth Circuit held that counsel did not provide ineffective assistance by advising a guilty plea to murder with a firearm during a crime of violence (18 U.S.C. § 924(j)) based on attempted Hobbs Act robbery, because the later Supreme Court decision in United States v. Taylor (holding attempted Hobbs Act robbery is not a crime of violence) was not "clearly foreshadowed" at the time of the plea, and counsel reasonably secured a plea avoiding a mandatory life sentence. The court also ruled that Kimbrough failed to show Strickland prejudice, as no rational defendant would have rejected the favorable plea and risked trial, and rejected his request to expand the certificate of appealability due to procedural default and failure to establish actual innocence. Key topics: ineffective assistance of counsel, crime of violence definition, attempted Hobbs Act robbery, § 924(j), Strickland prejudice, clearly foreshadowed legal change, procedural default, actual innocence.

CASE DETAILS

COURT	United States Court of Appeals for the Sixth Circuit
WRITING FOR THE COURT	Sutton; Larsen; Murphy
JURISDICTION	Federal
DECIDED	June 22, 2023
DOCKET	21-6208
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from denial of 28 U.S.C. § 2255 motion to vacate sentence
STANDARD OF REVIEW	Strickland v. Washington two-prong test for ineffective assistance of counsel
PRECEDENTIAL VALUE	published
PARTIES	Terrance C. Kimbrough v. United States of America

TOPICS

- criminal procedure
- ineffective assistance
- plea bargaining
- habeas corpus
- sentencing
- sixth amendment

PRACTICE AREAS

Criminal Law

Habeas Corpus

Ineffective Assistance of Counsel

QUESTIONS PRESENTED

1. Whether Kimbrough's counsel performed deficiently by advising him to plead guilty to a §924(j) count predicated on attempted Hobbs Act robbery when later case law held that offense is not a crime of violence.
2. Whether Kimbrough suffered prejudice from any alleged deficient performance.

HOLDINGS

1. Counsel did not perform deficiently because the change in law was not clearly foreshadowed at the time of the plea, and counsel acted reasonably by securing a favorable plea deal that avoided a mandatory life sentence.
2. Kimbrough failed to show a reasonable probability that he would have rejected the plea and insisted on trial, or that he would have obtained a more favorable plea, because the evidence against him was overwhelming and he faced a mandatory life sentence on other charges.
3. The request is denied because it was raised for the first time in the reply brief and thus forfeited, and also fails on the merits because Kimbrough cannot show cause or actual innocence to overcome procedural default.

KEY QUOTATIONS

“counsel is not ineffective for failing to predict the development of the law” (at 4)

“If Taylor was 'clearly foreshadowed,' we have a good many attorneys who failed to see the writing on the wall.” (at 5)

“the Sixth Amendment guarantees a competent attorney, not a clairvoyant one.” (at 5)

“Kimbrough to this day does not claim innocence or offer a 'realistic defense'” (at 7)

FACTUAL BACKGROUND

Kimbrough, a gang member, murdered a rival drug dealer (Brendon Leggs) and later murdered a witness (Monte Watson) to prevent cooperation with law enforcement. He also engaged in other violent acts. He was charged with 18 offenses. His attorneys negotiated a plea deal where he pleaded guilty to 7 charges including two §924(j) counts, with a binding sentencing range of 480-520 months, in exchange for dismissal of other charges including a murder of a federal witness charge that carried a mandatory life sentence. The district court imposed 504 months.

PROCEDURAL HISTORY

Kimbrough pleaded guilty to multiple charges including two counts of murder with a firearm during a crime of violence under 18 U.S.C. § 924(j). He did not appeal. He later moved to vacate under §2255, arguing ineffective

assistance of counsel because his attorneys advised him to plead guilty to a §924(j) count predicated on attempted Hobbs Act robbery, which he argued was not a crime of violence. The district court agreed that attempted Hobbs Act robbery is not a crime of violence but denied relief for lack of prejudice. The Sixth Circuit issued a certificate of appealability limited to the ineffective assistance claim.

DISPOSITION

affirmed

CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Thompson v. Warden, 598 F.3d 281 (6th Cir. 2010)
- Nagi v. United States, 90 F.3d 130 (6th Cir. 1996)
- Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999)
- Chase v. MaCauley, 971 F.3d 582 (6th Cir. 2020)
- Johnson v. United States, 576 U.S. 591 (2015)
- Sessions v. Dimaya, 138 S. Ct. 1204 (2018)
- United States v. Davis, 139 S. Ct. 2319 (2019)
- United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018)
- Bullard v. United States, 937 F.3d 654 (6th Cir. 2019)
- Benning v. Warden, 345 F. App'x 149 (6th Cir. 2009)
- United States v. Ingram, 947 F.3d 1021 (7th Cir. 2020)
- United States v. Dominguez, 954 F.3d 1251 (9th Cir. 2020)
- United States v. Smith, 957 F.3d 590 (5th Cir. 2020)
- United States v. Walker, 990 F.3d 316 (3d Cir. 2021)
- United States v. Taylor, 979 F.3d 203 (4th Cir. 2020)
- United States v. Taylor, 142 S. Ct. 2015 (2022)
- Premo v. Moore, 562 U.S. 115 (2011)
- United States v. Bradley, 400 F.3d 459 (6th Cir. 2005)
- Shimel v. Warren, 838 F.3d 685 (6th Cir. 2016)
- Hill v. Lockhart, 474 U.S. 52 (1985)
- Gilbert v. United States, 64 F.4th 763 (6th Cir. 2023)
- Pilla v. United States, 668 F.3d 368 (6th Cir. 2012)
- Padilla v. Kentucky, 559 U.S. 356 (2010)
- Lee v. United States, 582 U.S. 357 (2017)
- United States v. McKinney, 60 F.4th 188 (4th Cir. 2023)
- Bousley v. United States, 523 U.S. 614 (1998)
- Gatewood v. United States, 979 F.3d 391 (6th Cir. 2020)

- *Peveler v. United States*, 269 F.3d 693 (6th Cir. 2001)
- *United States v. Mullet*, 822 F.3d 842 (6th Cir. 2016)
- *Strong v. Nagy*, 825 F. App'x 239 (6th Cir. 2020)

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