

# Precedential Value

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## Issue #89 March – April 2022

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 may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at [www.fpd-ohs.org](http://www.fpd-ohs.org), under the Precedential Value tab.

### I. Sentencing Issues

#### B. Guideline issues

##### 2C1.1 – Bribery – Loss Amount

###### U.S. v. Hills, 19-3372 (3/3/22)

Defendants were doctors who were involved in a racketeering and bribery scheme. The scheme permitted certain doctors to work a “flex” schedule wherein they worked 4-day work weeks but were paid for 5-day work weeks. The district court applied the bribery guideline at USSG § 2C1.1 and determined that the loss amount was in excess of \$600,000 based on the extra salaries paid to the doctors for less than full time work. On appeal, the court found the loss calculation to be correct. The court held that, by reference to the loss calculation guidelines at § 2B1.1, the district court properly attributed the loss based on the 20% more salary that the hospital paid the doctors for less than full time work. Further, the court held that this amount should not be offset by the overall profits that the doctors generated for the hospital during this time period. Thus, the loss was “the difference reflecting the pay for work that was not performed [with] no offset for gross profits generated from the work they did perform.” Accordingly, the sentence was affirmed.

##### 2G1.3(c)(1) - Child Porn – Cross Reference

###### U.S. v. Gould, 20-5284 (4/7/22)

The defendant engaged with an individual online and received child pornography depicting the individual's daughter, via Facetime. The defendant was convicted under 18 U.S.C. § 2422(b) for enticing a minor to engage in sexually explicit conduct. At sentencing, the district court applied a cross reference, pursuant to USSG § 2G1.3(c)(1), from the enticement guideline to § 2G2.2. This cross reference was based on the district court's conclusion that the offense “involved causing, transporting, permitting, or offering or seeking by notice or advertisement a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.” This resulted in a significantly higher guideline calculation. On appeal, the court found the cross reference appropriate. Specifically, deciding an open question in the circuit, the court held that the phrase “visual depiction” as used in the cross reference included a Facetime video, even though no permanent record of the transmission was retained after the transmission. Additionally, the court held that the defendant's offense “involved” “seeking by notice or advertisement.” The court found that the term “involved” is very broad, and covers a situation where the defendant merely responds to an advertisement. Accordingly, the application

of the cross reference and the sentence were affirmed.

### **2G2.1(b)(1) – Conduct Limited to Receipt**

#### **U.S. v. Meek, 21-3588 (4/26/22)**

The defendant admitted to agents during an investigation that he was “using LimeWire at one point to download child pornography during the ten-year period charged in the indictment.” Based on this admission, the district court concluded that the defendant was not eligible for the two-level reduction under USSG § 2G2.1(b)(1) for “conduct limited to the receipt of child pornography.” On appeal, the court held that a defendant must establish three elements by a preponderance of the evidence to be entitled to the two-level reduction: (1) The offense level must be 22, based on a conviction for possession; (2) the conduct must have been limited to “receipt or solicitation of material involving the sexual exploitation of a minor;” and (3) the defendant must not have intended to traffic in or distribute the child porn. The court found that the defendant’s admission that he had used Limewire, a program that gave him the “opportunity” to share child pornography, was sufficient to reject the defendant’s argument. The court stated: “That admission alone customarily is sufficient to support the denial of a § 2G2.2(b)(1) reduction.” Accordingly, the sentence was affirmed.

### **2K2.1(b)(6)/3A1.2(c) – Double Counting**

#### **U.S. v. Nunley, 21-5471 (4/1/22)**

During flight, the defendant shot at police officers in an attempt to escape. Upon his conviction for being a felon in possession of a firearm, the district court imposed both a 4 level increase under USSG § 2K2.1(b)(6) for using the firearm in relation to another felony, and a 6 level enhancement under § 3A1.2(c) for targeting an official victim. The defendant challenged these enhancements on appeal as double counting. The court found the application of both enhancements appropriate. The court ruled that separate

guideline enhancements may be applied to the same act as long as they punish different aspects of the defendant’s conduct. The court ruled that the § 2K2.1 enhancement punished the defendant’s use of a firearm in the commission of an assault, and the § 3C1.1 enhancement was directed to the fact that the victims of the assault were police officers. As such, each enhancement focused on distinct harms. Thus, application of both enhancements was proper and the sentence was affirmed.

### **D. Recidivism enhancements**

#### **18 USC § 924(e) – ACCA**

#### **Wooden v. U.S., 20-5279 (3/7/22) Supreme Court**

Upon his conviction for being a felon in possession of a firearm, the district court determined that the defendant was an armed career criminal based on ten Georgia burglary convictions. The convictions were based on the burglary of ten storage units in a single building, wherein the defendant busted through drywall to steal from each one. The district court determined that these burglaries were separate offenses under the ACCA, and applied the enhanced penalty. The Sixth Circuit affirmed. On *certiorari*, the Supreme Court reversed. Focusing on the phrase in the ACCA “on occasions different from one another,” the Court held the burglaries of the storage units were a single “occasion” under the law. The Court established several factors for courts to consider in determining whether offenses occurred on a single occasion, including the proximity in time, whether it was an “uninterrupted course of conduct” or whether it was “separated by substantial gaps in time or significant intervening events,” the “proximity of location,” and “the character and relationship of the offenses.” The latter point reflects on the similarity and intertwined nature of the conduct giving rise to the offenses—“the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.” With these factors

in mind, the Court found that the burglaries of multiple storage units in one building constituted a single occasion, and thus the ACCA was inapplicable. Accordingly, the district court and Sixth Circuit were reversed.

#### **E. Fine/Restitution/Forfeiture**

##### **21 USC § 862 – Denial of Federal Benefits**

###### **U.S. v. Gardner, 20-1118 (4/25/22)**

Upon his guilty plea to participating in a drug conspiracy, the district court imposed a lifetime ban on federal benefits because the defendant had two prior drug trafficking offenses. On appeal, the court held that this was improper. In order to deny federal benefits under 21 USC § 862, the defendant must be convicted of the “distribution of a controlled substance.” Because the defendant’s conviction was for conspiracy, § 862 was inapplicable. Accordingly, the denial of benefits was reversed.

#### **II. Plea Matters**

##### **B. Breach/Withdrawal of Plea**

###### **U.S. v. Estrada-Gonzalez, 22-3001 (4/26/22)**

The parties entered into a plea agreement wherein the government agreed that it would not “recommend or suggest in any way that a departure or variance is appropriate.” At sentencing, the government told the district court that “a high end of the sentencing guideline range would be at the least appropriate in this case.” The defendant objected to the statement as violating the plea agreement. The district court held that it did not interpret the government’s statement as anything more than advocating for the top end of the guideline range. The district court then imposed a sentence that was above the guideline range. On appeal, the court held that the government had not violated the plea agreement. Ordinarily, the potential breach of a plea agreement is reviewed *de novo*. However, the court ruled that because the issue was raised in the district court, and it made specific findings

as to its understanding of the government’s statement, the court would consider the district court’s contemporaneous findings under a “deferential clear-error standard.” Under this standard, the court found that the government had not crossed the line in its recommendation. The court held that “the government cannot escape its duties under a plea agreement with a wink and a nod,” but under the facts of the case, “neither a wink nor a nod occurred.” Thus, the sentence was affirmed.

#### **III. Evidence**

##### **B. Article IV – Relevancy**

###### **404(b) – Intrinsic Evidence/Intent/Knowledge**

###### **U.S. v. Hofstetter, 20-6245 (4/11/22)**

The defendant was charged with operating a pill mill. The government introduced evidence at trial that the defendant embezzled money from her former and current medical practices, both of which were operating illegal pill mills. Upon her conviction, the defendant argued on appeal that the embezzlement evidence should have been excluded under FRE 404(b). The court first held that the embezzlement evidence was intrinsic to the unlawful distribution of narcotics through the medical practices and was accordingly admissible. Specifically, the court found that it occurred during the same period of time and in the same place as the defendant’s conspiratorial conduct, it directly related to her involvement in the pain clinics, and it arose from the same events for which the defendant was indicted. Additionally, the court ruled that the embezzlement evidence demonstrated the defendant’s intent to conspire and knowledge of the illegal nature of the pain clinics. Accordingly, admission of the evidence was affirmed.

## V. Fifth Amendment

### E. Miscellaneous Fifth Amendment

#### Due Process – Vagueness

##### U.S. v. Hofstetter, 20-6245 (4/11/22)

Defendants ran a pain clinic that illegally distributed narcotics. Among other offenses, they were charged with maintaining a drug involved premises, under 21 USC § 856(a)(1). Upon conviction, the defendants argued on appeal that the statute was unconstitutionally vague as applied to them because the language of the statute encompassed lawfully maintaining a premises for the purpose of distributing narcotics, such as a legitimate pharmacy. Acknowledging it was an issue of first impression, the court held that the statute was not unconstitutionally vague as applied to the defendants. The court found that, regardless of any facial vagueness in the statute regarding lawful practitioners, as applied to the defendants they were sufficiently on notice that their conduct in illegally distributing narcotics from the clinics was unlawful. Because the indictment and jury instructions made clear that the jury could only have convicted if the defendants' distribution of the controlled substances from the clinics was unlawful, the statute was not vague as applied to the defendants' case. Accordingly, the conviction was affirmed.

## VI. Sixth Amendment

### B. Confrontation Clause

##### U.S. v. Matthews, 20-6156 (4/11/22)

During defendant's drug conspiracy trial, a cooperating witness testified that he moved large amounts of narcotics for the conspiracy. During cross examination, the defendant attempted to impeach the witness with questions regarding whether he paid taxes on the proceeds and whether he was promised immunity regarding tax evasion. The district court permitted the witness to invoke his Fifth Amendment rights regarding

the tax evasion questions, but required him to answer the questions about negotiations with the government to avoid the case being referred to the IRS. The defendant argued on appeal that these limitations violated his right to confrontation. The court held that the Sixth Amendment right to confrontation may be limited in certain situations by a witness' Fifth Amendment rights. The court found that the district court properly permitted the witness to invoke the Fifth Amendment related to questions about the witness' tax evasion problems because these questions would potentially expose him to criminal liability. Moreover, the district court properly required the witness to answer questions about his negotiations with the government to avoid referral to the IRS. Finally, the court held that the witness' invocation of the Fifth Amendment did not require the district court to strike the testimony in its entirety because "the testimony that was limited on cross-examination related only to [the witness'] general credibility, and [the defendant] had ample opportunity to challenge that credibility throughout the rest of the cross-examination." Thus, the district court's ruling was upheld and the conviction affirmed.

### D. Right to Counsel/Self Represent

#### Ineffective Assistance of Counsel

##### U.S. v. Carson, 21-3780 (4/27/22)

The defendant pled guilty to a racketeering conspiracy. Before sentencing, he moved to withdraw his plea and claimed that his counsel was ineffective for improperly advising him that he would only do 17 years on a 30 year sentence, and that he could get the death penalty. After a hearing, the district court denied the motion. On appeal, the court first held that counsel was not ineffective. The court credited the attorney's testimony that he did not misadvise the defendant. Moreover, the court held that "[w]hen an attorney erroneously promises a certain sentencing outcome, a defendant cannot show prejudice if he was accurately advised during the plea colloquy." Because the defendant was

properly advised of the potential penalties by the district court, no error occurred. Additionally, the court held that the district court properly denied the defendant's motion to withdraw his plea. The defendant delayed significantly in raising the issue until shortly before sentencing, he was experienced with the criminal justice system, he was properly advised of the penalties by the district court, and the government would be significantly prejudiced by the withdrawal. Accordingly, the sentence was affirmed.

## VIII. Defenses

### K. Title III - Wire Tap

#### U.S. v. Gardner, 20-1118 (4/25/22)

The government obtained Title III wiretaps for multiple defendants' phone during a drug trafficking conspiracy investigation. Prior to trial on the charges, several of the defendants challenged the use of the wiretaps and the district court denied the motions. On appeal, the court held that three requirements must be met before the government may seek a Title III wiretap of a phone: (1) the wiretap cannot be the initial step of the investigation; (2) the wiretap may not be used where traditional investigative techniques are sufficient to expose the crime; and (3) investigators must provide case specific reasons why such techniques are not likely to be effective. In the case, the court found that the government investigated for a full year using confidential sources, pen registers and GPS devices, physical surveillance, and pole cameras. Nonetheless, the government still lacked critical pieces of the puzzle. With each of these items, the affidavit for the Title III warrant explicitly described how these techniques had failed to sufficiently identify the scope and breadth of the conspiracy and the they were unlikely to do so in the future. Accordingly, the court held that the Title III applications were sufficient and affirmed the district court's ruling.

## IX. Jury Issues

### A. Jury Instructions

#### **21 USC § 841 – Deliberate Ignorance**

#### U.S. v. Matthews, 20-6156 (4/11/22)

The defendant was charged with participating in a drug conspiracy. During trial, the district court instructed the jury that it could find the defendant guilty if it was "convinced that the defendants deliberately ignored a high probability that they were participating in the delivery of controlled substances." Upon conviction, the defendant appealed. The court ruled that the instruction was proper. A deliberate ignorance instruction provided in a drug conspiracy case may be directed to the issue of the defendant's knowledge of the "aim" of the conspiracy. However, it may not address the issue of "intent to join the conspiracy or . . . the existence of a criminal agreement." The court found that the deliberate ignorance instruction as provided was appropriately directed to the issue of the defendant's knowledge of the "aim" of the conspiracy, namely whether the briefcases and suitcases she was assisting to transport contained drugs. As such, the jury instruction was proper and the conviction affirmed.

## X. Probation/ Supervised Release

### Supervised Release Violations

#### U.S. v. Sears, 21-3545 (4/26/22)

The defendant's supervised release was revoked and an 8 month period of imprisonment was imposed, with continued supervised release to follow. The defendant again violated his supervised release, and the court imposed a second period of incarceration of 18 months. The defendant argued on appeal that the sentence was improper because the court was required to credit his prior 8 month sentence against the statutory maximum of 24 months (leaving only 16 months on the second violation). The court held that, pursuant to 18 USC § 3583(e), "prior time served

for violations of supervised release cannot be aggregated and does not limit the statutory maximum that a court may impose for subsequent violations of supervised release.” Thus, the district court was not required to credit the prior 8 month sentence in determining the maximum allowable period of incarceration on the second violation. As such, the sentence was affirmed.

## **XII. Specific Offenses**

### **18 USC § 1951 – Hobbs Act Conspiracy**

#### **U.S. v. Hills, 19-3372 (3/3/22)**

The defendant was a doctor who, among other offenses, participated in a Hobbs Act conspiracy for receiving bribes in exchange for favorable treatment at a public hospital. Upon his conviction, the defendant challenged the sufficiency of the evidence. The court first held that bribery of a public official under 18 USC § 1951 does not require the official to be elected. Rather, the defendant as an employee of the county owned hospital and chair of the dental department was sufficient to constitute a public official. Further, there was sufficient evidence that he took bribes in the form of cash, five-star dinners, use of an apartment, airline tickets, and various services. Finally, the evidence proved that the bribes were in return for official acts which included “whether to allow flex-time schedules, make adjustments to incentive bonuses, and/or increase the number of dental residents in the dental department of a public hospital.” Thus, the Hobbs Act conspiracy conviction was affirmed.

## **XIII. Post-Conviction Remedies**

#### **Brown v. Davenport, 20-826 (04/21/22)**

#### **Supreme Court**

The petitioner was convicted of first-degree murder in Michigan state court. The petitioner was shackled at trial, and the Michigan Supreme Court concluded that the petitioner’s rights under Deck v. Missouri, 544 U.S. 622

(2005), had been violated. The state court nevertheless found that the error was harmless beyond a reasonable doubt. The Sixth Circuit concluded that the error had a substantial and injurious effect on the proceedings under Brecht v. Abrahamson, 507 U.S. 619 (1993). Relying on the Supreme Court’s decision in Fry v. Pliler, 551 U.S. 112 (2007), the Sixth Circuit further determined that it was unnecessary to examine whether the Michigan Supreme Court’s finding of harmlessness was entitled to deference under 28 U.S.C. § 2254(d), since a finding of prejudice under Brecht was necessarily dispositive of the less-demanding inquiry under AEDPA. The Supreme Court reversed and held that a habeas petitioner must satisfy both Brecht and § 2254(d) when a state court has determined that a constitutional violation was harmless beyond a reasonable doubt. The Supreme Court further concluded that the petitioner was not entitled to relief.

#### **United States v. Tsarnaev, 20-443 (03/04/22)**

#### **Supreme Court**

The defendant was convicted of various federal offenses and sentenced to death for bombing the Boston Marathon with his brother. At the mitigation phase of trial, the defendant sought to introduce evidence that his brother had previously participated in a triple homicide; the defendant alleged that this evidence would help demonstrate that his brother had been the mastermind of the bombing and had pressured the defendant to participate. The district court declined to admit the evidence but the First Circuit reversed, concluding that the exclusion of the evidence violated the defendant’s rights. The Supreme Court reversed, finding that the Eighth Amendment did not require the admission of the evidence, and that the exclusion of the evidence did violate the Federal Death Penalty Act.

**United States v. Tsarnaev, 20-443 (03/04/22)**  
**Supreme Court**

The defendant was convicted of various federal offenses and sentenced to death for bombing the Boston Marathon with his brother. Prior to trial, the defense requested that the jury questionnaires include a question asking the prospective jurors to describe basically everything they had heard about the case from the media and other sources. The Supreme Court held that the district court's jury selection procedures were adequate and that the failure to include the requested question was not an abuse of discretion.

**Burns v. Mays, 11-5214, 14-6089 (04/13/22)**

The petitioner was convicted of felony murder in Tennessee state court and sentenced to death. The petitioner subsequently alleged that he was deprived of the effective assistance of counsel at the mitigation phase of trial when his attorney failed to introduce evidence of residual doubt. The Sixth Circuit concluded that counsel did not perform deficiently in failing to attempt to present the evidence in question, given that the petitioner had no constitutional right to submit evidence of residual doubt in support of his mitigation case. The denial of habeas corpus relief was accordingly affirmed.