

# Precedential Value

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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

#### A. 3553(a) factors and issues

##### Substantive Reasonableness

##### U.S. v. Boucher, 18-5683 (9/9/19)

The defendant was a retired surgeon who was the next door neighbor of Senator Rand Paul. After Senator Paul repeatedly placed yard waste in large piles in the area adjoining the defendant's property, the defendant became irritated and tackled Senator Paul from behind. The government charged the defendant with assault and the district court calculated the guidelines to be 21-27 months imprisonment. Given the defendant's distinguished career and otherwise noteworthy life, the district court imposed a sentence of 30 days in jail. The government appealed. The court held that, in reviewing the substantive reasonableness of a sentence significantly outside the guideline range, the court must consider whether the extent of the deviation is justified by sufficiently compelling factors and whether the case falls within the heartland of cases to which the Commission intended for the guidelines to apply. The court found that the defendant's noteworthy life and accomplishments were insufficient to justify the extent of the departure, especially given how injured Senator Paul was from being tackled. Further, the court found that the district court was not permitted to compare the case to a "Fourth

Degree Misdemeanor Assault" under Kentucky law which only carries a 30 day sentence. Instead, the district court was required to consider what other defendants receive for federal assault convictions. Accordingly, the court ruled that the sentence was substantively unreasonable and reversed the district court's sentence.

#### B. Guideline issues

##### 2B2.2(b)(1) – Fraud Loss Amount

##### U.S. v. Ellis, 18-5158 (9/6/19)

The defendant was convicted of wire fraud for submitting false tax returns using others' identities. The district court at sentencing calculated the loss amount under USSG 2B1.1(b)(1) based on the intended loss. This figure represented the total amount of returns submitted using unique identifier numbers for Turbo Tax found in several laptop browser histories at the defendant's residence. The defendant argued on appeal that the intended loss amounts were not proper. The court held that it was proper for the district court to determine the loss amount based on the intended loss from the submitted tax returns. The court found that, although the government could not prove who actually submitted many of the returns, they could trace the returns through browser history and IP addresses to the defendant's laptops and residence, the defendant's home contained about 400 fake IDs, the defendant received funds from

returns into bank accounts, and identifying information from some of the submitted returns matched records in the defendant's apartment. Accordingly, the court found no error in the intended loss calculation and affirmed the sentence.

#### **2D1.1(b)(1) – Drugs – Firearm Possession**

##### **U.S. v. Barron, 18-5222 (10/15/19)**

The defendant was convicted of participating in a drug conspiracy. At sentencing, the district court imposed a 2 level enhancement under USSG § 2D1.1(b)(1) because a codefendant in the conspiracy possessed a firearm. On appeal, the court upheld the enhancement based on a conspiracy theory. The court found that it was reasonably foreseeable to the defendant that the codefendant would possess a firearm because of the large quantity of drugs involved (6 kilos of cocaine under the defendant's bed) and the fact that ammunition was also found in the room. As such, the sentence was affirmed.

#### **2D1.1(b)(14) – Risk of Harm to Minor**

##### **U.S. v. Owen, 18-5736 (10/10/19)**

The defendant was arrested traveling in a car with a methamphetamine manufacturing kit and a minor. Upon his conviction for attempting to manufacture meth, the district court applied an enhancement for causing a substantial risk of harm to a minor. On appeal, the court held that two factors are relevant to determining whether the enhancement was applicable, the likelihood of harm and the potential seriousness of the injury. The court found that the risk of harm in the case was low. The materials included a “one-pot” which had been used to manufacture meth, and likely still contained hazardous chemicals such as lighter fluid. Although there was a low likelihood that the materials could explode or cause a fire, there was nonetheless a “distinct possibility.” The court further found, however, that the potential injury that could be caused was very serious, including chemical burns which could “eat your skin.” The court determined that

it was a close case, but ultimately found that the district court did not err in imposing the enhancement, and thus the sentence was affirmed.

#### **2K2.1(b)(1)(A) – Number of Firearms**

##### **U.S. v. Bowens, 18-5636 (9/12/19)**

The defendant was convicted of being an unlawful user of marijuana in possession of a firearm. At sentencing, the district court enhanced the defendant's sentence under USSG § 2K2.1(b)(1)(A) because the defendant possessed three firearms: two at the time of arrest, and one four months prior at his mother's house under a pillow on his bed. On appeal, the court held that separate possessions of firearms may only be relevant conduct to each under USSG § 1B1.3, and thus countable under § 2K2.1(b)(1)(A), where there is sufficient regularity, similarity, and timing of the possessions. The court found that two possessions on two different dates was insufficiently regular, that the instances of two guns in the car with marijuana and one gun under a pillow at his mother's house was not similar, and that the four month spread between possessions was too remote under the circumstances. Accordingly, the court held that the separate possessions were not relevant conduct to each other and not countable under § 2K2.1(b)(1)(A). Thus, the case was remanded for resentencing.

#### **3B1.3 – Use of Special Skill**

##### **U.S. v. Tucci-Jarraf, 18-5752 (9/24/19)**

The defendant was a former lawyer who assisted a codefendant to defraud the government and banks. In her part, the lawyer provided the codefendant with legal looking paperwork and also contacted banks on his behalf and pretended to be his lawyer. These actions assisted in banks continuing to permit the fraudulent activity for a period of time before discovery. At sentencing, the district court applied a two level enhancement under USSG § 3B1.3 for using a special skill as

an attorney. On appeal, the court held that the special skill enhancement was appropriate. Even though all of the defendant's "legal" actions were clearly frivolous and not based in law, the court focused on the defendant's intent to employ a special skill in furtherance of the crime, even though those actions were ultimately unsuccessful. Accordingly, the application of the enhancement was affirmed.

### **5C1.2 – Safety Valve**

#### **U.S. v. Barron, 18-5222 (10/15/19)**

The defendant was convicted of participating in a drug conspiracy. At the time of his arrest, he provided details about his involvement, explained how he was paid to pick up cocaine for the principal, and identified the individual he obtained the cocaine from. At sentencing, the defendant argued that he was eligible for the safety valve under USSG § 5C1.2. The district court found him ineligible because of a codefendant's possession of a firearm and because the government argued that he had not been truthful. On appeal, the court held that the safety valve reduction was proper in the case. The court first held that a defendant is not ineligible for the safety valve merely because a coconspirator possesses a firearm. Rather, a defendant is only precluded if the defendant possesses the gun or aids and abets in its possession. Second, regarding the defendant's cooperation, the court ruled that a defendant need only provide a truthful proffer of all of the information the defendant knows about the offense. The information does not necessarily have to be helpful to the government's investigation, as long as it is truthful. The court found that the defendant had made a sufficient truthful proffer of information about his involvement, and the government had demonstrated no material falsehoods or omissions in his statement. Accordingly, the district court's ruling regarding the safety valve was reversed.

### **D. Recidivism enhancements**

#### **18 USC § 924(e) – ACCA**

#### **Greer v. U.S., 16-4755 (9/12/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that he was an armed career criminal based on prior Ohio convictions for aggravated burglary. After an unsuccessful appeal and denial of his habeas petition, the defendant argued on appeal that the aggravated burglaries were not violent felonies based on the Sixth Circuit's decision in Stitt. While the appeal was pending, the Supreme Court reversed the Sixth Circuit's decision in Stitt and held that a prior Tennessee burglary was a violent felony. As a result, the court in Greer decided that Ohio's previous aggravated burglary statute (ORC § 2911.11(A)(3)) is also a violent felony under the ACCA. The court found that because the provision at issue required that the "occupied structure" be the "permanent or temporary habitation of any person, in which at the time any person is present or likely to be present," the statute was sufficiently similar to the Tennessee statute involved in Stitt, and accordingly Stitt controlled. Accordingly, the defendant's conviction was affirmed.

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

#### **Restitution**

#### **U.S. v. Ellis, 18-5158 (9/6/19)**

The defendant was convicted of wire fraud for submitting false tax returns using others' identities. The government sought restitution for tax returns that were not included in the indictment and that were outside the statute of limitations period. The district court ordered the restitution and the defendant appealed. The court held that the statute of limitations had not actually run on the prior returns because they were part of the same scheme or artifice to defraud as the indicted wire fraud counts. The court ruled that, when the government charges a scheme in a wire

fraud case, restitution may be ordered for any loss that was caused by the scheme, even if it was uncharged and would have been outside the limitations period. Thus, the sentence was affirmed.

## **II. Plea Matters**

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

#### **Breach of Plea Agreement**

##### **U.S. v. Ligon, 18-4234 (9/11/19)**

The defendant was charged with making a false statement on a firearm application. The plea agreement required the government to recommend a sentence in the range of 21-27 months. The PSR, however, recommended an enhancement unanticipated by the parties for purchasing the firearm knowing it would be used in another felony. At sentencing, the government argued for a sentence in the higher range, which the district court imposed. On appeal, the court found that the government had violated the plea agreement by failing to recommend the sentence promised in the plea agreement. Although the district court stated at sentencing that it was not influenced by the government's recommendation, the court nonetheless held that the sentence had to be vacated. The court remanded the case for resentencing before a different district judge.

### **C. Hearings**

#### **Rule 11(b)(1)(G) – Nature of the Charge**

##### **U.S. v. Williams, 18-4072 (10/23/19)**

The defendant was charged with bank robbery and brandishing a firearm. The codefendant was the one who actually carried the gun in the bank. At the plea hearing, the district court simply advised the defendant of the elements of the bank robbery and firearm enhancement, but did not mention accomplice liability. The defendant argued on appeal that the plea colloquy was insufficient under Fed. R. Crim P. 11(b)(1)(G). The court held that Rule 11 only requires that the defendant be advised of the nature of the charge,

and the defendant must be informed of the essential elements of the offense. The court found that “[b]ecause aiding and abetting is a theory of liability embodied in every federal indictment, whether specifically charged or not, and not a distinct substantive crime, the district court was not required to advise the defendant about accomplice liability to satisfy Rule 11(b)(1)(G).” Accordingly, the conviction was affirmed.

## **III. Evidence**

### **D. Discovery/Miscellaneous**

#### **Discovery – Classified Information**

##### **U.S. v. Asgari, 19-3648 (10/4/19)**

The defendant was charged with theft of trade secrets and the government requested permission from the district court to withhold classified information from the defense. Pursuant to the Classified Information Procedures Act of 1980 (18 USC app. § 1), the district court reviewed the classified information *ex parte*, determined that it was not relevant or helpful to the defense, and denied disclosure of the information. On reconsideration, the district court ordered disclosure of the information to defense counsel who it learned had top security clearance. The government filed an interlocutory appeal of the disclosure order. The court first held that it had jurisdiction to hear the interlocutory appeal because the Act grants such jurisdiction over any “disclosure” order. Second, the court held that the district court’s disclosure order was improper. The Act requires the district court to consider whether (1) the information is relevant, (2) the government’s privilege claim for secrecy is colorable, and (3) the information is helpful to the defense. The court found that the district court properly considered these three factors in originally denying disclosure of the evidence. The court held that the defense counsel’s security clearance was entirely irrelevant to the disclosure formula, and thus should not have been considered by the district court. Accordingly, the

district's court's ruling was reversed and the case remanded.

## **VI. Sixth Amendment**

### **D. Right to Counsel/Self Represent**

#### **Ineffective Assistance of Counsel**

##### **Neill v. U.S., 18-5350 (9/5/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court imposed a sentence of 92 months, which was at the bottom end of the guideline range. The district court also mistakenly indicated that it believed that the defendant would get credit for 13 months he was detained prior to sentencing, time that was credited against a state sentence. In discussing a potential appeal with his attorney, the defendant was not advised that he would not get credit for this 13 month time period or that it was a potential ground for appeal. The defendant later filed a habeas petition claiming that his counsel was ineffective for improperly advising him about appellate issues. The petition was denied and the defendant appealed. The court first held that it was not clear whether the defendant had cognizable habeas relief for improper advice about whether to appeal from counsel. The court chose not to decide this issue because the defendant clearly could show no prejudice. The defendant had filed a Rule 36 motion to correct the sentence before the district court, which the district court denied, and it had ruled that the 13 month credit issue would not have changed the sentence. Further, the defendant had two prior felonies that were mistakenly left out of his PSI, which may have adversely affected his sentence had he appealed and received a remand. Thus, the court held that the defendant could show no prejudice in the failure to appeal, and accordingly affirmed the defendant's sentence.

### **Right to Self Representation**

##### **U.S. v. Tucci-Jarraf, 18-5752 (9/24/19)**

The defendants were charged with wire fraud for exploiting a deficiency in the Automated Clearing House Network and defrauding the government of millions of dollars. At trial, the defendants sought to represent themselves and expressed a number of strange beliefs related to government conspiracy theories. The district court permitted the self representation and the defendants were convicted. On appeal, the court held that two considerations are important in deciding whether a defendant may self represent: (1) did the defendant knowingly and intelligently waive counsel, and (2) was the defendant competent to do so. Regarding the first issue, the court found that the district court conducted a proper Faretta hearing and determined that the waiver was knowing and voluntary. As to the second issue, the court held that a defendant is not incompetent to self represent merely because the defense presented is unorthodox. Nor is the defendant incompetent because an attorney would have done better. The defendants at trial were able to understand the process, followed basic trial procedure, and were not unduly disruptive of the trial. As such, the court found them competent to self represent and the conviction was affirmed.

## **XII. Specific Offenses**

### **18 USC § 922(g)(3) – Firearms – Drug users**

##### **U.S. v. Bowens, 18-5636 (9/12/19)**

The defendants were charged with being unlawful users of marijuana in possession of firearms, pursuant to 18 USC § 922(g)(3). At trial, the government introduced evidence that the defendants were arrested in a car with two guns and that they had marijuana. Further, the government presented a number of Facebook posts from both defendants from the preceding seven months referencing marijuana use. Upon their conviction, the defendants challenged the sufficiency of the evidence on appeal. The court

held that, in a 922(g)(3) prosecution, the government must prove that the defendant took drugs with regularity over an extended period of time and that the use was contemporaneous with the firearm purchase or possession. The court found the evidence sufficient to meet this standard because the defendants had marijuana and firearms at arrest and the circumstantial evidence from the Facebook posts demonstrated extended use. Further, the court found that the new standard from the Supreme Court's decision in Rehaif was satisfied because it was apparent from the Facebook posts that the defendants knew they were unlawful users of a controlled substance. The court rejected the defendants' argument that the government also had to prove that the defendants knew that they were thus prohibited under federal law. Ignorance of the law is still not a defense even after Rehaif. Accordingly, their convictions were affirmed.

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

#### **Bennett v. Brewer, 17-1574 (10/8/19)**

The petitioner was convicted of aiding and abetting first degree murder in Michigan state court and sentenced to life without parole. At trial, the petitioner's attorney based her defense on an argument that the principal offender was actually innocent, notwithstanding the fact that there was substantial evidence of guilt. The petitioner alleged that her attorney had been constitutionally ineffective, but the state court found that the petitioner could not establish prejudice. The Sixth Circuit concluded that the state court's rejection of the petitioner's claim was entitled to deference under 28 USC § 2254(d), and as a result the denial of relief was affirmed.

#### **Bullard v. United States, 17-3731 (9/4/19)**

The petitioner was convicted of drug and firearm offenses in federal court and was sentenced as a career offender. The petitioner filed a motion to vacate under 28 USC § 2255, alleging that intervening precedent resulted in one of his state

court convictions not qualifying as a "controlled substance offense." The petitioner further alleged that his trial and appellate lawyers had been ineffective in failing to challenge his status as a career offender. The Sixth Circuit concluded that to the extent the petitioner raised a non-constitutional challenge to an advisory guidelines range, the claim was not cognizable under § 2255. Furthermore, the petitioner's lawyers were not ineffective in failing to predict the intervening change in law, and it was unlikely that the sentencing court would have dropped the petitioner's career offender designation even if an objection had been made. The denial of relief was therefore affirmed.

#### **Byrd v. Skipper, 18-2021 (10/8/19)**

The petitioner was convicted of aiding and abetting first degree murder in Michigan state court and sentenced to life without parole. The office that prosecuted the case had an established history of preferring plea agreements to trials, but would not begin negotiations unless they were initiated by defense counsel. The petitioner's trial lawyer never initiated negotiations based on a misunderstanding of the law, and the petitioner was convicted. In federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel at the plea bargaining stage. Because the petitioner's claim was never considered on the merits in state court, review of the petitioner's claim was de novo. The Sixth Circuit concluded that the petitioner's trial attorney performed deficiently in failing to initiate plea negotiations, and that it was reasonably probable that the petitioner would have received and accepted a more favorable plea offer. The judgment of the district court denying habeas corpus relief was accordingly reversed.

#### **Gerth v. Warden, 17-4091 (9/16/19)**

The petitioner was convicted of various offenses in Ohio state court after he stole an SUV and engaged in a high-speed chase resulting in deaths. The petitioner filed a motion to proceed pro se,

but the trial court denied it. Appellate counsel failed to raise the issue on direct review. The petitioner filed a timely motion to reopen his appeal and raised the denial of self-representation as one ground for relief, but then failed to brief the issue after his appeal was reopened. He then filed a second motion to reopen his appeal and alleged that his new appellate counsel had been ineffective in his reopened appeal by failing to brief the self-representation claim. The state appellate court rejected the claim on the ground that, among other things, it was procedurally barred under Ohio's *res judicata* doctrine. The Sixth Circuit held that the petitioner had no constitutional right to counsel in his reopened appeal, and as a result he could not establish cause to overcome the default.

**In re: Ohio Execution Protocol Litigation, 19-3064 (9/11/19)**

The plaintiff was convicted and sentenced to death in Ohio state court. The plaintiff joined a civil lawsuit in federal court alleging, among other things, that Ohio's lethal injection protocol violated the Eighth Amendment. Under Glossip v. Gross, 135 S. Ct. 2726 (2015), a plaintiff challenging a method of execution must show that it would cause an unconstitutional level of suffering and that an alternative method is feasible and can be readily implemented. The Sixth Circuit found that the plaintiff failed to make either showing, and that a preliminary injunction against his execution was unwarranted.

**Richardson v. Palmer, 18-1434 (10/24/19)**

The petitioner was convicted of first-degree murder in Michigan state court and sentenced to life without parole. The petitioner alleged that numerous instances of prosecutorial misconduct at trial violated his right to due process. The Sixth Circuit concluded that, despite "numerous incidents in which the prosecutor ill-advisedly chose to editorialize, to make irrelevant observations, and to use imprudent language," the

state court's rejection of the claim was entitled to deference under 28 USC § 2254(d).

**Richardson v. Palmer, 18-1434 (10/24/19)**

The petitioner was convicted of first-degree murder in Michigan state court and sentenced to life without parole. The petitioner alleged that his trial and appellate lawyers had been ineffective in failing to argue that a witness's testimony had been obtained through a Fourth Amendment violation. The Sixth Circuit concluded that not raising the argument at the time of trial was reasonable, even though subsequent case law could have supported it, and further found that the petitioner could not establish prejudice in any event. Furthermore, the claim was rejected on the merits in state court, and the petitioner could not overcome 28 USC § 2254(d).

**White v. Warden, 18-3277 (10/8/19)**

The petitioner was convicted of aggravated murder and other offenses in Ohio state court and sentenced to life without parole. The petitioner alleged that he had been deprived of the effective assistance of counsel because his trial attorney was under indictment for numerous offenses at the time of trial. The state court refused to consider the claim on direct appeal because the record was inadequate. By the time the court issued its ruling, however, the deadline for filing a post-conviction petition had already passed, and the petitioner's pro se petition was dismissed as untimely. Under Martinez v. Ryan, 566 U.S. 1 (2012), the denial of effective counsel in an initial review collateral proceeding can establish cause for a procedurally defaulted claim of ineffective assistance of trial counsel, if the initial review collateral proceeding represents the first opportunity to raise the claim. Under Trevino v. Thaler, 569 U.S. 413 (2013), Martinez will apply if a state's procedural framework prevents a defendant from having a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. The Sixth Circuit concluded that the petitioner had no meaningful opportunity to raise his claim on direct review,

and as a result Trevino was applicable. The Sixth Circuit further concluded that the petitioner satisfied Martinez's remaining requirements because his claim was substantial and he was not provided with counsel for his post-conviction proceedings. As a result, the petitioner established cause and his default was excused. The case was accordingly remanded for further proceedings.

**Wright v. Spaulding, 17-4257 (9/19/19)**

The petitioner filed a motion to vacate under 28 USC § 2255 in federal court in Maryland, where he had been sentenced. The motion was denied. The petitioner subsequently filed a habeas corpus petition under 28 USC § 2241 in the Northern District of Ohio, where he was imprisoned, arguing that intervening precedent rendered him actually innocent, and that as a result his § 2241 petition was permissible under the savings clause. The Sixth Circuit held that “a federal prisoner cannot bring a claim of actual innocence in a § 2241 petition through the saving clause without showing that he had no prior reasonable opportunity to bring his argument for relief.” The Sixth Circuit further concluded that the petitioner had other opportunities to raise his claim, and as a result he could not rely on the savings clause. The dismissal of the petition was therefore affirmed.