

## PRECEDENTIAL VALUE

Federal Public  
Defender's  
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District of Ohio

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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.

### III. Evidence

#### A. Article IV – Relevancy

##### 402 – Relevance – Repayment Negotiations

###### [U.S. v. White, 15-2234 \(1/13/17\)](#)

The defendant was a travel agent who was charged with wire fraud and aggravated identity theft for submitting false claims to airlines representing that her customers were military personnel, in order to obtain discounts. At trial, she attempted to introduce evidence of repayment negotiations she had with the airlines after her fraud scheme had already been discovered. The district court excluded the evidence and she appealed. The court held that **the defendant's intention to repay the victims of fraud is no defense once the fraud has been discovered. As such, the evidence is not relevant to any issue in the case and is properly excludable.** Accordingly, the conviction was affirmed.

##### 403 – Undue Prejudice

###### [U.S. v. Young, 14-6081 \(1/26/17\)](#)

The defendant was charged with drug trafficking and at trial the government elicited testimony

from the agent regarding the background circumstances leading to the wiretap of a codefendant's phone. The defendant failed to object at trial but argued on appeal that admission of the evidence was unduly prejudicial. The court found no plain error in admission of the evidence under FRE 403. The court held that **such evidence could violate FRE 403 because the discussion of the wiretap process and its approval by a supervisory prosecutor and a judge could unduly bolster the government's case. Nonetheless, because the wiretap was on a codefendant's phone and because the defendant did not object at trial, the admission of the evidence was not plain error and the conviction was affirmed.**

##### 404(b)/413 – Sex Offenses

###### [U.S. v. LaVictor, 15-1580 \(2/3/17\)](#)

The defendant was charged with sexually abusing his girlfriend. When the girlfriend recanted, the government sought to introduce evidence that the defendant had sexually assaulted other women, arguing that it was relevant to absence of mistake and intent under FREs 404(b) and 413. The district court admitted the evidence and the defendant appealed. First, the court held that,

under 404(b), the evidence was relevant to prove that the defendant was not mistaken in believing that the victim consented to “rough sex.” Even though the defendant did not ultimately raise this defense, it was “certainly conceivable” that he would given pretrial indications by the defense. Second, the court found that the testimony was relevant to prove intent, although it was a close case. The court ruled that **intent evidence may be introduced, even where not put at issue by the defense, in any specific intent crime.** Further, the court found that the prior sex offenses were “substantially similar and reasonably near in time, thus relevant to prove the defendant’s specific intent in the case at bar.” Finally, the court held that the testimony was not unduly prejudicial given that the victim recanted before trial and the government had scarce evidence otherwise of the defendant’s intent. Regarding FRE 413, the court held that, in order to admit such evidence, **the government must first prove that a reasonable jury could find by a preponderance of the evidence that the acts occurred.** Second, the court found that the district court had properly weighed the relevancy of the evidence and determined that the prior acts were sufficiently similar to the present offense and were not too remote in time. Accordingly, admission of the evidence was affirmed.

## **B. Articles VI-VII – Witness/Expert**

### **702 – Expert Testimony**

#### **U.S. v. Young, 14-6081 (1/26/17)**

The defendant was charged with participating in a drug conspiracy and at trial the government presented agents who testified both as experts and fact witnesses. The district court provided no cautionary instruction about the witnesses’ dual roles and there was no clear demarcation in the testimony between the expert and fact portions. The defendant failed to object at trial and raised the issue for the first time on appeal. The court

held that **it was error for the district court to fail to provide a cautionary instruction to the dual nature of the testimony.** Where there is no clear demarcation between the expert and fact testimony, a district court is required to provide a **cautionary instruction to the jury.** Nonetheless, the court found that the error did not affect the defendant’s substantial rights because the defendant did not object at the time and the trial was otherwise free from evidentiary errors.

#### **U.S. v. LaVictor, 15-1580 (2/3/17)**

The defendant was charged with sexually abusing his girlfriend. At trial, his girlfriend testified that he did not abuse her. As a result, the government offered expert testimony on witness recantation and battered woman syndrome. The district court admitted the testimony, the defendant was convicted, and he appealed. The court held that the testimony was admissible under FRE 702 and **Daubert.** Specifically, the court ruled that **the evidence was relevant because the government had offered sufficient evidence that the witness was in fact a domestic violence victim.** Further, the court found that the testimony was reliable because, although it was not supported by significant statistical evidence, **the expert was qualified based on her education, and her body of work had been widely published and subjected to substantial peer review.** The court also noted that **courts consistently allow expert witnesses on domestic violence.** Finally, the court held that the evidence was not unduly prejudicial. **The expert’s testimony was highly helpful to the jury in analyzing the witness’ recantation and contradictory actions on the witness stand, and any prejudice was addressed through a jury instruction.** Accordingly, admission of the expert testimony was affirmed.

### C. Article VIII – Hearsay

#### 801(d)(1) – Prior Inconsistent Testimony

##### U.S. v. LaVictor, 15-1580 (2/3/17)

During the defendant’s trial for sexually abusing his girlfriend, the victim recanted her testimony and the government introduced a transcript of her grand jury testimony. The defendant failed to object at trial and he was convicted. On appeal, the court held that **the grand jury testimony was inconsistent with the witness’ trial testimony and thus was admissible under FRE 801(d)(1)**. The court held that the rules of evidence permit a party to impeach its own witness and that the evidence admitted was sufficiently reliable because it was the witness’ own grand jury testimony. The court ruled that **it was error for the district court to admit the transcript of the testimony as opposed to having it read to the jury, however, the error did not amount to plain error in the case**. Thus, the defendant’s conviction was affirmed.

### IV. Fourth Amendment

#### E. Search Warrants

##### Good Faith/Franks

##### U.S. v. Powell, 14-2506 (2/6/17)

The defendant was being investigated for being involved in a major drug conspiracy and the government obtained a search warrant to get real time location information on his cell phone. Further, the government placed a GPS tracking device on the defendant’s car without obtaining a warrant. Regarding the search warrant for the cell phone data, the district court found insufficient information in the warrant to establish probable cause. The defendant argued that good faith could not save the warrant because he was entitled to a Franks hearing based on false statements in the affidavit. The false statements pertained to the argument that the agent averred

in other affidavits that drug dealers often use multiple phone to conduct their personal and business dealings and get phones in the names of others. The district court found the warrant was saved by good faith, and the defendant appealed. The court held that **the alleged false statements regarding regular habits of drug dealers were not material to the district court’s probable cause determination. Whether the defendant had other cell phones, or cell phones in others’ names, would not undermine a probable cause finding**. Accordingly, the purported false statements were immaterial and the district court ruling was affirmed related to the search warrant. Regarding the warrantless GPS tracking, the court held that **the officers relied in good faith on pre-existing law that a warrant was not required for GPS tracking**. Thus, the district court’s ruling was affirmed.

### V. Fifth Amendment

#### A. Prosecutor Conduct

##### Prosecutorial Vindictiveness

##### U.S. v. Young, 14-6081 (1/26/17)

Numerous defendants were charged with participating in a drug conspiracy and only three decided to go to trial. Immediately before the trial, the government filed enhancements increasing the statutory penalties based on 21 USC § 851 for the three defendants and a few others who did not go to trial. The three defendants received mandatory life sentences based on the § 851 enhancements. On appeal, the defendants argued that the filing of the § 851 enhancements constituted prosecutorial vindictiveness. The court held that **prosecutors may permissibly hinge enhanced penalties on whether a defendant pleads or goes to trial**. The court found that there was nothing in the record to suggest that the prosecutor had acted unreasonably in filing the § 851 enhancement and that the prosecutor had filed § 851 enhancements

against other defendants, not just the three who went to trial. The court commented that “an inference of prosecutorial vindictiveness may have been suggested” had the government only filed the § 851 against the three who went to trial. Accordingly, the sentences were affirmed.

## VI. Sixth Amendment

### D. Right to Counsel/Self Represent

#### Right to Counsel

##### U.S. v. Powell, 14-2506 (2/6/17)

Two defendants were charged in a drug conspiracy. Defendant Powell sought to represent himself shortly before trial because his attorney refused to file entirely meritless documents for the defendant. Defendant Proge sought to have his two private attorneys withdrawn a month before trial because they claimed that they were not paid to represent him at trial and were unprepared to proceed to trial. The district court denied both requests. On appeal, the court held that Defendant Powell was not entitled to represent himself. The court agreed with the district court’s assessment that Defendant Powell’s request for new counsel was a ruse to try to continue the trial because he had otherwise been happy with counsel for the preceding two years. Regarding Defendant Proge, the court found that the district court erred in denying his request for the withdrawal of counsel. The court held that the failure of the attorneys to be prepared for trial and insistence that the defendant plead guilty amounted to a complete breakdown of the attorney client relationship. The court found that the request was timely, given that it was made one month before trial, and accordingly the failure to substitute counsel for Defendant Proge violated his Sixth Amendment rights. Thus, his conviction was reversed.

##### Turner v. U.S., 15-6060 (2/15/2017)

The defendant was charged in state court with aggravated robbery and his attorney was approached by the federal prosecutor who also intended to charge the defendant over the same conduct. The federal prosecutor and the defendant’s state attorney engaged in negotiations which led to a plea offer that the defendant ultimately rejected. The defendant was subsequently prosecuted federally and received a sentence 10 years higher than the original plea offer. The defendant filed a habeas petition claiming that he was denied the effective assistance of counsel in the plea negotiations, and the district court denied the petition. On appeal, the court held that the Sixth Amendment right to counsel does not attach before the filing of formal charges. Thus, because the indictment was not filed at the time of the plea negotiations with the federal prosecutor, the right to counsel had not attached related to the federal charges. The court suggested that this bright line rule was out of step with modern criminal practice, but that the court was nonetheless bound by prior precedent of the court. Accordingly, the district court ruling was affirmed.

## VIII. Defenses

### K. Title III - Wire Tap

##### U.S. v. Young, 14-6081 (1/26/17)

The defendant was charged with participating in a drug conspiracy based, in part, on evidence obtained in a wiretap of his phone. The defendant argued on appeal that the use of the wiretap was improper. The court held that, in order to obtain a wiretap under 18 USC § 2518, the wiretap application must establish probable cause to believe that evidence will be uncovered and the wiretap must be necessary for the investigation. The court found that probable cause supported the application because it established that the defendant’s phone was in contact with others in

the drug trafficking organization and drug sales were discussed. Further, the court found that the wiretap was necessary because the application provided that other investigative techniques such as informants, toll records and pen register data, undercover agents, and physical surveillance had been tried and were unsuccessful. Accordingly, the defendant's conviction was affirmed.

## X. Probation/ Supervised Release

### Supervised Release Violation

#### U.S. v. Cross, 15-5641 (1/18/17)

The defendant's supervised release was revoked based on his commission of a new drug possession offense and he was sentenced to eight months in jail and 24 more months of supervised release. After the defendant had completed his jail term and during his subsequent supervised release term, the district court found out that the defendant had also committed a theft offense prior to his first violation. As a result, the court again revoked the defendant's supervised release, sentenced him to one day in jail, and a new term of five years of supervised release. On appeal, the court held that the district court had jurisdiction and authority to revoke a defendant's supervised release based on conduct that occurred during a prior term of supervised release that was not discovered until later. The court ruled that the "revocation" of supervised release "revokes only the release part," and thus the district court's authority over the defendant continues until the supervision terminates or expires. Accordingly, the district court's ruling was affirmed.

## XII. Specific Offenses

### 21 USC § 846/851 – Drug Conspiracy

#### U.S. v. Young, 14-6081 (1/26/17)

The defendant was convicted after trial of participating in a drug conspiracy involving

numerous individuals. The jury convicted the defendant and several others, and determined that the drug amount involved in the whole conspiracy was more than 280 grams of crack, which triggered the 10 year mandatory minimum. The government filed an enhancement under 18 USC § 851, which increased the defendant's sentence to mandatory life. On appeal, the defendant argued that jury finding that the conspiracy involved more than 280 grams of crack was insufficient, and that he could not be sentenced to the increased penalty without a finding that he personally was responsible for that amount. The court held that the law in the Sixth Circuit is not clear on this point. One line of authority suggests that a defendant is responsible for the amount of drugs attributable to the whole conspiracy. A second line of authority indicates that a defendant is only responsible for the drugs personally distributed plus any drugs that were part of the defendant's jointly undertaken activity that were reasonably foreseeable to the defendant. The court held, however, that it did not need to resolve the conflict because the defendant was personally responsible for more than 280 grams. Further, the court held that the disparity between the crime and the sentence was not so extreme as to raise constitutional concerns under the Eighth Amendment. Accordingly, the sentence was affirmed.

### 18 USC § 1028A – Aggravated Identity Theft

#### U.S. v. White, 15-2234 (1/13/17)

The defendant was a travel agent who falsely represented to airlines that many of her customers were military employees in order to get discounts. When questioned about it, she generated fake military identifications and submitted them to the airlines. She was convicted for fraud and for aggravated identity theft. She argued on appeal that the manufacture of the fake identifications did not constitute the "use" of the identification of another under § 1028. The court held that,

when the defendant took the extra step of actually generating fake identifications and sending them to the airlines to hide her fraud, she “used” the identification information of another in violation of the statute. Accordingly, her conviction was affirmed.

### XIII. Post-Conviction Remedies

#### **Buck v. Davis, 15-8049 (2.22.17)**

##### **Supreme Court**

The petitioner was charged with capital murder in Texas state court. At the penalty phase of the trial, the petitioner’s own defense attorney introduced expert testimony that African-Americans are statistically more likely to commit acts of violence. The petitioner, who was African-American, was subsequently sentenced to death based on the jury’s finding of future dangerousness. The petitioner’s state post-conviction counsel failed to raise a claim of ineffective assistance of trial counsel based on the introduction of the testimony, and the federal courts subsequently found that the claim had been procedurally defaulted. After the petitioner’s federal habeas corpus proceedings had concluded, he moved for relief from judgment under Fed.R.Civ.P. 60(b)(6), alleging that under the intervening decisions in Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), the ineffective assistance of his state post-conviction counsel provided cause to excuse the default of his claim. Relying on various factors, the Supreme Court concluded that the petitioner had established extraordinary circumstances that warranted reopening the proceedings under Rule 60(b)(6), and further concluded that the petitioner’s claim of ineffective assistance of trial counsel was meritorious.

#### **Brown v. Romanowski, 15-1823 (1.9.17)**

The petitioner was convicted of drug offenses in Michigan state court. The petitioner raised a speedy trial claim in his state post-conviction proceedings, but the state courts did not address the claim in denying relief. Under Johnson v. Williams, 133 S. Ct. 1088 (2013), there is a rebuttable presumption that a state court has considered a petitioner’s claim “on the merits” for the purposes of 28 U.S.C. § 2254(d), even where the state court opinion did not expressly address the claim. The Sixth Circuit assumed that the petitioner successfully rebutted the Johnson presumption by showing that his speedy trial claim had been inadvertently overlooked by the state courts, but nevertheless concluded that the claim failed even under de novo review. As a result, the district court’s denial of relief was affirmed.

#### **Kelly v. Lazaroff, 15-3959 (1.20.17)**

The petitioner was convicted of felony murder and related offenses in Ohio state court. The petitioner raised various allegations of ineffective assistance of trial counsel on direct appeal, but his direct appeal counsel was also the wife and business partner of his trial lawyer. The Ohio Court of Appeals refused to consider the claim on direct review due to the obvious conflict of interest. The same conflicted lawyer also filed a post-conviction petition that did not raise any allegations of ineffective assistance of trial counsel. A public defender then filed a motion to reopen the direct appeal based on a separate allegation of ineffective assistance of appellate counsel, arguing that the conflict prevented appellate counsel from raising a meritorious claim that trial counsel had been ineffective in failing to request a lesser included offense instruction. The Ohio Court of Appeals denied the motion to reopen. In federal habeas corpus proceedings, the petitioner raised a freestanding

claim that trial counsel had been ineffective in failing to request the lesser included offense instruction, and argued that the ineffective assistance of his appellate counsel provided cause to excuse the default of the claim in state court. The Sixth Circuit concluded that **the petitioner could not demonstrate that trial counsel had been ineffective in failing to raise the issue, and as a result appellate counsel could not have been ineffective in failing to raise it as a ground for relief.** As a result, the claim was defaulted, and the denial of habeas corpus relief was affirmed.

**King v. Westbrooks, 13-6387 (2.9.17)**

The petitioner was convicted of first degree murder in Tennessee state court and sentenced to death. In his federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel when his attorney failed to present evidence of the petitioner's intoxication at the time of the crime, and also by counsel's failure to investigate the petitioner's mental health and obtain expert assistance. The Sixth Circuit found that **the petitioner could not demonstrate ineffective assistance of counsel even under de novo review, and as a result the denial of relief was affirmed.**

**Leonard v. Warden, 15-3653 (1.23.17)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Prior to trial, the trial court deferred to the local sheriff's policy of requiring all capital defendants to wear a stun belt during the proceedings. The petitioner alleged that requiring him to wear a stun belt without making an individualized determination of necessity violated his right to be tried without visible restraints in violation of Deck v. Missouri, 544 U.S. 622 (2005). The Sixth Circuit concluded that **the state courts reasonably found that the stun belt was not visible**

**to the jury, and as a result relief was precluded under 28 U.S.C. § 2254(d).**

**Moore v. Mitchell, 15-3374 (2.15.17)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After his federal habeas corpus proceedings had concluded, the petitioner moved for relief from judgment under Fed.R.Civ.P. 60(b)(6), arguing that the intervening decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), would permit the federal courts to reach the merits of claims that had previously been found to have been procedurally defaulted. The Sixth Circuit determined that **the claims at issue had actually been denied on the merits in state court, and as a result Martinez and Trevino were inapplicable.**

**Pouncy v. Palmer, 16-1137 (1.13.17)**

The petitioner was convicted of carjacking and related offenses in Michigan state court. On the day of trial, the petitioner repeatedly stated in open court that he did not believe his attorney was prepared to proceed with the case. After his request to obtain new counsel was denied, the petitioner represented himself and was convicted. After his state appeals were rejected, the petitioner alleged in federal habeas corpus proceedings that his waiver of the right to counsel had been involuntary. The Sixth Circuit concluded that **the state court's rejection of the claim was entitled to deference under 28 U.S.C. § 2254(d), and as a result the district court's grant of relief was reversed.**

**Thomas v. Westbrooks, 15-5399 (2.24.17)**

**Thomas v. United States, 15-6200 (2.24.17)**

The petitioner was convicted of murder in Tennessee state court and was sentenced to death. In addition, the petitioner was convicted of

federal charges arising out of the same incident and sentenced to life in prison. Following the federal trial, but before the state prosecution, the federal authorities provided the state prosecution team with evidence showing that one of the key witnesses had been paid by the FBI after the federal trial had concluded. The State failed to disclose this to the defense, and the prosecution subsequently elicited false testimony from the witness that she had not received any reward money. The Sixth Circuit determined that **the petitioner's rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated, and that he was entitled to relief under 28 U.S.C. § 2254 with respect to his state convictions and death sentence.** However, the court also found that no Brady violation had occurred in the federal prosecution, and as a result relief was not warranted under 28 U.S.C. § 2255. The petitioner's federal convictions and life sentence therefore remained in place.

**Watkins v. DeAngelo-Kipp, 15-2445 (1.10.17)**

The petitioner was convicted of second-degree murder in Michigan state court. The petitioner was initially found to be incompetent to stand trial, but was later deemed competent after several weeks of treatment. The petitioner repeatedly made bizarre outbursts during the course of trial, but trial counsel did not seek a renewed competency determination. The petitioner's initial federal habeas corpus petition raised an allegation of ineffective assistance of counsel, but limited the claim to counsel's actions prior to trial. The petitioner subsequently filed an amended petition alleging that counsel had been ineffective in failing to request a renewed competency examination during the course of trial. The Sixth Circuit concluded that **the claim in the amended petition did not relate back to the original filing, and further concluded that equitable tolling was not warranted.** As a result, the claim was time-barred under the AEDPA

statute of limitations, and the district court's grant of relief was therefore reversed.

**Witzke v. Brewer, 15-2437 (2.22.17)**

The petitioner was a Michigan state prisoner who filed a habeas corpus petition under 28 U.S.C. § 2254 after his parole was revoked. The petition challenged only the parole revocation and not the underlying conviction. While the federal case was pending, the petitioner was re-released on parole. The Sixth Circuit concluded that the petitioner's release on parole rendered the challenge to the earlier revocation moot. **Although a released petitioner who challenges an underlying conviction will normally avoid mootness due to the presumption of collateral consequences stemming from the conviction, a released petitioner who challenges only the revocation of parole must make an affirmative showing that collateral consequences are present.** The petitioner failed to do so, and as a result his case was dismissed as moot.