# PRECEDENTIAL VALUE

Federal Public Defender's Office Southern 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. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at www.fpd-ohs.org.

## I. Sentencing Issues

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

**3553(a) factors**

**U.S. v. Daneshvar, 18-1101 (4/29/2019)**

At the defendant's sentencing hearing, the district court declined to consider a variance from the guidelines because the defendant had gone to trial and failed to show remorse. The defendant argued on appeal that the district court improperly punished him for exercising his Sixth Amendment right to trial. The court held that, while a district court may not punish a defendant for going to trial, it may consider issues such as "acceptance of guilt" in determining a sentence. The court found that the district court's comments, particularly where it recognized that it could not denigrate the right to trial, did not cross the line into the impermissible. Thus, the sentence was affirmed.

**Substantive Reasonableness**

**U.S. v. Lynde, 18-3725 (6/7/19)**

The defendant was convicted of receipt and possession of child pornography. At sentencing, the district court awarded a downward variance from a range of 151-188 months to 97 months imprisonment. The defendant argued on appeal that the sentence was unreasonable because the guideline enhancements of USSG § 2G2.1 were not based on empirical research by the Sentencing Commission and because the enhancements apply in most every case. The court held that a district court may choose to reject or disregard guidelines based on policy disagreements with them, but it is not required to do so. Thus, the court would not substitute its judgment for the district court's discretion in this regard. The court found that the district court chose not to apply the use of a computer enhancement (because of its frequency of application) and provided a downward variance because of the defendant's family circumstances and particularly exemplary life. The court ruled that this was within the district court's discretion and was not an abuse of its discretion, nor arbitrary. Accordingly, the sentence was affirmed.

## B. Guideline issues

### 2G1.3(b)(2)(B) – Undue influence over minor

**U.S. v. Davis, 18-3031 (5/22/19)**

A minor was engaged in prostitution for money to obtain drugs and she contacted the defendant to see if he was interested. He used her several times over several days. Upon his prosecution for sex trafficking a minor, the district court applied a two level enhancement for unduly influencing a minor to engage in a sex act. On appeal, the court held that the district court did not make sufficient factual findings to support the enhancement. Under § 2G1.3(b)(2)(B), a rebuttable presumption arises that undue influence occurred where the defendant is more than 10 years older than the minor. However, a district court must nonetheless carefully consider the facts of the case to determine if this presumption has been rebutted. The court found that the district court relied solely on the presumption, and failed to consider the evidence, which the court characterized as "significant," that the minor was not unduly influenced. Accordingly, the case was remanded for reconsideration of the issue.

### 2G2.2(b)(5) – Pattern of sex abuse

**U.S. v. Doutt, 18-3750 (6/4/19)**

The defendant was convicted of receiving child pornography. During a polygraph exam, the defendant admitted that when he was 16 he had sex multiple times with an 11-12 year old. As a result, the district court applied an enhancement to the defendant's sentence under USSG § 2G2.2(b)(5) for engaging in a pattern of activity involving the sex abuse of a minor. On appeal, the court held that the district court utilized the incorrect standard in applying the enhancement. A defendant may receive the enhancement for sexual activity with a minor between the ages of 12 and 16 if the defendant "was at least four years older than" the minor. It was insufficient, however, for the district court merely to compare the defendant's age of 16 with the estimated minor's age of 11-12. The court found that the defendant could have been one day past his sixteenth birthday and the minor could have been one day shy of her thirteenth birthday, which would not establish the required 4 year spread. Accordingly, the case was remanded for appropriate fact finding regarding the issue.

### 2K2.1(b)(6)(B) – Firearms – Another Felony

**U.S. v. Shanklin, 18-5289 (5/24/19)**

The defendant was convicted of being a felon in possession of a firearm. The gun in the case was found in the defendant's bedroom next to a digital scale and a magazine about marijuana growing. The defendant had a large number of marijuana plants that he was growing in another part of the house. At sentencing, the district court imposed a 4 level enhancement under USSG § 2K2.1(b)(6)(B) for possessing the firearm in connection with the drug trafficking activity. On appeal, the court held that the enhancement was supported by the facts. Under the fortress theory, the court found that the proximity of the gun to digital scales and a marijuana growing magazine, the small size of the house, the large marijuana grow operation, and the fact that the gun was loaded, all justified the district court's finding. As such, the sentence was affirmed.

### 3D1.2 – Grouping – Sex Offenses

**U.S. v. Faulkner, 18-5867 (6/7/19)**

The defendant was convicted of producing child pornography and attempting to produce child pornography on separate days. At sentencing, the district court determined that the counts should be separated into two groups because they involved distinct harms, thus increasing the defendant's offense level. On appeal, the court held that the application of the grouping rules was proper. Under USSG § 3D1.2(b), offenses may be

combined into a single group when they involve substantially the same harm and victim, and are connected by a common criminal objective. The court found that separate instances of production of child pornography, even where the victim was unaware of the photos being taken, still constituted separate harms which required separate groups under § 3D1.2(b). This was true even where the second offense was only attempted production of child porn. Thus, the sentence was affirmed.

**U.S. v. Davis, 18-3031 (5/22/19)**

The defendant was convicted of multiple counts of sex trafficking a minor over several days. The minor was a prostitute who was selling sex for drugs. At sentencing, the district court applied the grouping rule under USSG § 3D1.2 and determined that the sex acts with the same minor on consecutive days constituted three separate groups under the guidelines. As such, the defendant's offense level was increased by 3 levels. On appeal, the court held that separation into three groups was proper. Although the offenses involved the same victim and the same criminal objective, the sex acts each constituted separates harms to the victim, even though the acts were close in time. Thus, the district court properly counted each sex offense as a separate group for purposes of § 3D1.2.

**D. Recidivism enhancements**

**18 USC § 924(e) – ACCA**

**U.S. v. Mayes, 18-5902 (6/27/19)**

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 offender based on his prior Kentucky offenses for trafficking in cocaine. The defendant argued on appeal that his prior offenses should not count as predicates under the ACCA because Kentucky reduced the penalties for the offenses from 10 years to 5 years after he had been sentenced. The court held that a prior serious drug offense only is countable under the ACCA if it is punishable by 10 years or more in prison. Pursuant to the Supreme Court's decision in McNeill v. U.S., however, the determination of the potential sentence for the prior offense is made as of the time the defendant was sentenced for the offense. Subsequent changes by a state to its penalty structure do not affect this equation unless the State made the changes retroactive to cases that had already been sentenced. The court found that the Kentucky statute reducing the sentence for trafficking was not specifically made retroactive and thus the defendant's prior Kentucky trafficking cases were properly considered to be ACCA predicates.

**U.S. v. Myers, 18-5099 (6/3/19)**

The defendant was convicted of being a felon in possession of a firearm and was determined to be an armed career offender. This determination was based, in part, on two prior Tennessee convictions for "initiation of a process intended to result in the manufacture of methamphetamine." On appeal, the court held that these prior offenses qualified as serious drug offenses under the ACCA because they constituted offenses "involving manufacturing a controlled substance." The court found that initiation under the Tennessee statute meant beginning the extraction, modification, or combination of a meth precursor from a commercial product, with the intent to make meth. The court found that this definition was consistent with the meaning of manufacturing a controlled substance under the ACCA and accordingly the defendant's sentence was affirmed.

**Quarles v. United States, 17-778 (6/10/2019)**
**Supreme Court**

Defendant Quarles was determined to be an armed career criminal due in part to a prior offense under Michigan law for third degree home invasion. At issue in *Quarles* was whether this Michigan offense was within the generic term of burglary, as it did not require a defendant to form an intent to commit another crime until the defendant was in the dwelling. The defendant argued that, to be generic burglary, the defendant was required to have intent to commit a crime when entering the dwelling. The Court held that "[b]ecause the actus reus is a continuous event, the mens rea matches the actus reus so long as the burglar forms the intent to commit a crime at any time while unlawfully present in the building or structure."

**2K2.1 – Firearms – Controlled Substance Off.**

**U.S. v. Havis, 17-5772 (6/6/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant's offense level should be increased because the defendant had on his record a prior conviction under Tennessee law for "sale or delivery" of cocaine. The district court determined that this crime counted as a controlled substance offense under USSG § 2K2.1(a)(4). The Sixth Circuit panel held that it was bound by circuit precedent and affirmed the sentence. The unanimous *en banc* court reversed, however, and found that the Tennessee conviction was not a controlled substance offense under the guideline. Specifically, the court ruled that Tennessee's definition of the term delivery included an "attempted transfer" of drugs. The court noted that the word attempt does not appear in the body of the sentencing guideline (§ 4B1.2(b)) defining a controlled substance offense, but instead only appears in the application note (comment n.1). Because application notes to sentencing guidelines can only interpret, but not expand, the reach of a sentencing guideline, the court ruled that the guideline definition of a controlled substance offense could not include an attempt. Therefore, the defendant's Tennessee conviction for attempted delivery of drugs was not a controlled substance offense and the district court's ruling was reversed.

**18 USC § 3559(c) – Three strikes statute**

**U.S. v Ruska, 18-1194 (6/10/19)**

The defendant was convicted of kidnapping and sexual abuse in a national forest. The district court determined that the defendant had two prior serious violent felonies under 18 USC § 3559(c) and sentenced him to life in prison. The defendant argued on appeal that his prior Michigan conviction for assault with intent to do great bodily harm less than murder should not count as a serious violent felony. The court held that the prior Michigan assault conviction qualified as a serious violent felony under the elements (or force) clause. The court found that, similar to the ACCA, the elements clause requires that the force used be "violent force" as required by the Supreme Court in Johnson v. U.S. As such, the court ruled that the Michigan statute met this requirement because assault with intent to do serious bodily injury could clearly be considered as the use of violent force. Thus, the defendant's sentence was affirmed.

**E. Fine/Restitution/Forfeiture**

**Special Assessments – JVTA**

**U.S. v. Shepherd, 18-3993 (5/1/19)**

The defendant was convicted of child pornography offenses. At sentencing, the district court imposed the mandatory $5000 special assessment under 18 USC § 3014 because it found that the defendant was non-indigent based

on his future earning capacity. On appeal, the court held that the district court's finding was appropriate. Pursuant to the § 3014 (the Justice for Victims of Trafficking Act), a district court must impose a $5000 assessment on any "non-indigent" defendant. Answering an open question, the court ruled that the determination of indigency requires a district court to consider the defendant's current financial situation and the defendant's future earning capacity, keeping in mind that the JVTA allows a defendant 20 years after release from incarceration to pay the assessment. Thus, the court found that although the defendant had a negative net worth and would likely come out of prison with about $55,000 in debt, he was still not indigent because he was only 29 years old, had a high school diploma, and an EMT certification. Thus, the district court's ruling was affirmed.

## III. Evidence

### A. Article IV – Relevancy

#### 401 - Relevance

**U.S. v. Daneshvar, 18-1101 (4/29/2019)**

At the defendant's trial for Medicare fraud, he presented evidence that, after he left the fraudulent company that was the subject of the the indictment, he used billing practices that were proper in his next business endeavor. The district court excluded the evidence and the defendant appealed. The court held that evidence of the defendant's subsequent billing practices was not relevant to whether he committed fraud previously. Further, the court ruled that it could not be considered "reverse 404(b)" evidence. Just like evidence of prior bad acts is not admissible to show propensity, future good acts are not admissible to prove a predisposition to not commit crimes. As such, the defendant's conviction was affirmed.

### C. Article VIII – Hearsay

#### 803(4) – Statement for Medical Diagnosis

**U.S. v. Wandahsega, 18-1219 (5/21/19)**

The defendant was charged with sexual abuse of a minor. At trial, the government introduced hearsay statements made to a nurse and doctor at the hospital about the abuse and identifying the defendant as the perpetrator. On appeal, the court held that the statements were properly admitted under FRE 803(4). The nurse testified that the statements were initially made to her as the minor entered the emergency room and that they were important to the triage process in order to determine what types of medical needs the minor may have. Further, the identity of the perpetrator was important because it would "affect their diagnosis and treatment in terms of mental-health or emotional-health concerns." The doctor testified that the statements about what the defendant did to the minor were important to assess whether the minor had suffered physical injuries and may have contracted any STDs. The court found that, even though the minor was accompanied by a police officer, the statements were attributable to medical needs and were accordingly properly admitted.

#### 803(6) – Business Records

**U.S. v. Daneshvar, 18-1101 (4/29/2019)**

The defendant was a doctor for Mobile Doctors, a business that was fraudulently billing Medicare for in home medical services. At his trial for Medicare fraud, the defendant sought to introduce an email between the president and branch manager of the company wherein they discussed keeping their doctors in the dark about the company's fraudulent billing practices. The district court excluded the evidence as hearsay. On appeal, the court held that, although the evidence was relevant, it was not properly considered a business record of Mobile Doctors.

The court found that an email is not a business record merely because it is sent between two employees in a company or even because employees regularly conduct business through emails. The court ruled that such evidence is insufficient to establish the requirements that the records are kept as "a regular practice" and that they are kept "in the course of regularly conducted business activity." Further, the court held that the records were not admissible under the residual clause of FRE 807 because the defendant had plentiful other evidence that the doctors were kept in the dark regarding Mobile Doctors' fraudulent business practices. Finally, the defendant could not admit the evidence under the coconspirator exception because that rule is only available to admit evidence "against" a party, not for a party. Accordingly, exclusion of the evidence was affirmed.

**807(a) – Residual Exception**

**U.S. v. Wandahsega, 18-1219 (5/21/19)**

The defendant was charged with sexual abuse of a minor and at trial the district court admitted out of court statements of the minor to his grandmother and a friend about the defendant's abuse of him. The district court found that the statements carried sufficient indicia of trustworthiness under FRE 807(a). On appeal, the court held that the hearsay testimony was sufficiently trustworthy because the statements made by the child about the abuse were spontaneous and not in response to questioning, were consistent with his testimony and what he told others, and were made using terminology that a child his age would not normally use. Further, the hearsay statements expanded on what the child was willing to say during his testimony at trial, so it was the most probative evidence on the topic. Accordingly, admission of the evidence was affirmed.

## D. Discovery/Miscellaneous

**Discovery – Informant identity**

**U.S. v. Shanklin, 18-5289 (5/24/19)**

An informant told law enforcement that he saw marijuana plants inside the defendant's residence. This information led to an eventual search which uncovered marijuana and a firearm. Prior to trial, the defendant moved for disclosure of the informant's identity. The district court denied the motion and the government did not call the informant as a witness at trial. Upon his conviction, the defendant argued on appeal that disclosure of the informant's identity was necessary to investigate his defense that the informant planted the evidence. The court held that disclosure of an informant's identity may be required where it is "relevant and helpful to the defense or is essential to a fair determination of a cause." The court found that disclosure of the informant's identity was unnecessary in the case because the government did not use the informant as a witness at trial and the defendant could not show the necessity for the disclosure. Specifically, the court ruled that there was no evidence presented by the defense to support the theory that the informant may have planted the evidence. Further, the court noted that the informant referenced only the marijuana, not the firearm, in his statement to the police. Finally the court held that disclosure of the informant's identity was not necessary for impeachment because the informant did not testify and none of his out of court statements were admitted at trial. Accordingly, the district court's ruling was affirmed.

## IV. Fourth Amendment

### A. Reasonable Expectation of Privacy

**U.S. v. Coleman, 18-1083 (5/3/19)**

The government obtained a warrant to place a GPS tracker on the defendant's vehicle. In order to install the tracker, the agents went into the defendant's condominium complex, which was marked private property, and onto the defendant's driveway where the car was parked. The defendant moved to suppress the tracker evidence that was obtained based on his claim that the government violated his privacy rights by entering the condo complex and invading the curtilage of his residence. The district court denied the motion and the defendant appealed. The court first held that the agents did not violate the defendant's Fourth Amendment rights by entering the condo complex. Although the complex had a sign marked private property, anyone could drive into the property, no express permission was required to enter, and there were no gates blocking public access. As such, the defendant had no expectation of privacy on the condominium property. Second, the court held that the car parked in his driveway was not within the curtilage of the home. The court found that the car was sitting in front of the residence, was not in any way enclosed, was not covered, was on the path to the front door of the condo, and the driveway in which it was sitting was a shared driveway with another condo. Given these factors, the court found that the car was not within the curtilage of the home and the defendant thus enjoyed no reasonable expectation of privacy. Accordingly, the district court's ruling was affirmed.

**Mitchell v. Wisconsin, 18-6210 (6/27/19)**
**Supreme Court**

It does not violate the Fourth Amendment to administer a blood test on an unconscious defendant. In Mitchell, the officers arrested the defendant for drunk driving. On the way to the police station, the defendant lost consciousness, and could not be revived. The officers then drove him to a hospital, and while there, the officers requested that doctors take a blood sample for testing. The Court noted that "[t]he importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives." Therefore, due to "compelling interests" served by obtaining these test results in an exigent manner, "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment."

### B. Reasonable Suspicion/Veh. Stops

**Reasonable suspicion – vehicle stop**

**U.S. v. Belakhdhar, 18-1884 (5/28/19)**

Officers utilized an informant to determine that a drug dealer would be transporting drugs from Chicago to Detroit. Upon confirming the drug dealer's vehicle and spotting him on the highway, officers observed a second vehicle driving in tandem. The second vehicle was following closely behind and changing lanes at the same time. Officers stopped both vehicles. In this first stop, the officers found no drugs in the tandem vehicle, but they did determine that the defendant/driver was an illegal immigrant. This led to a second stop of the vehicle by an immigration agent which, in turn, led to the discovery of drugs in the trunk. The defendant moved to suppress the evidence, the district court granted the motion, and the government appealed. The court held that the stop of the tandem vehicle was proper under the Fourth

Amendment. Specifically, the court found that, based on the above facts, reasonable suspicion was established to stop a tandem vehicle driving with a known drug transporter. Thus, the district court's ruling to the contrary was vacated.

### E. Search Warrants

**U.S. v. Christian, 17-1799 (5/31/2019)**

Officers obtained a search warrant for the defendant's residence based on the following: (1) an individual walked away "from the area" of the defendant's residence and was later stopped in possession of heroin; (2) tips from unidentified informants over the previous four months that the defendant was a drug dealer; (3) an informant bought drugs from the defendant's residence eight months prior; (4) the defendant had four prior drug convictions, the most recent being four years prior, and included a search warrant at his residence. The district court denied a motion to suppress the evidence seized in execution of the search warrant and the defendant appealed. The Sixth Circuit panel reversed and held that the warrant was not supported by probable cause. Rehearing *en* banc was granted. The *en banc* court held that the totality of the circumstances supported probable cause for the search warrant. Specifically, the court found that the individual walking away "from the area" was sufficient to tie the home to current drug activity. This was particularly true when combined with the informant tips and the defendant's past record, specifically his past record involving drug sales from the very same house. Accordingly, the panel's decision was reversed and the district court's ruling denying the motion to suppress was reinstated.

## V. Fifth Amendment

### A. Prosecutor Conduct

**Prosecutorial Misconduct**

**U.S. v. Acosta, 18-5207 (5/15/19)**

The defendants were charged with meth, cocaine, marijuana, and firearms offenses. Before trial, the defendants pled guilty to all but the meth charges. At trial, the defendants presented evidence that the meth belonged to another defendant (who happened to be a cellmate) who had sublet the apartment from the defendants. The government during cross examination and closing argument repeatedly bolstered the truthfulness of the investigating agent, attacked the credibility of the defendants' witness, and questioned the defendants' religious beliefs. The defendant was convicted and raised for the first time on appeal that the prosecutor's comments were improper. The court held that the prosecutor's actions constituted flagrant misconduct requiring reversal. Specifically, the court found that the prosecutor had improperly bolstered the agent's testimony by repeatedly referring to him as a fine young man who remembered everything he did. Further, the prosecutor repeatedly called the defendant's witness a liar and that the jury should not believe anything he says. Finally, the prosecutor repeatedly attacked the defendant's religious beliefs and referenced the Ten Commandments during closing argument. The court found that the prosecutor's actions constituted repeated and flagrant misconduct. Although the court found that there was sufficient evidence to convict the defendants at trial, the evidence was by no means overwhelming and the court accordingly ruled that the defendants had established plain error in the prosecutor's actions. Thus, the conviction were vacated and the case remanded for a new trial.

### C. Confessions/Testimonial Rights

**Miranda – Requests for counsel**

**U.S. v. Potter, 18-5830 (6/11/19)**

The defendant was arrested on drug related charges. The officers advised the defendant of his Miranda rights and he agreed to speak. During questioning, however, he "may have mentioned an attorney and asked if he needed one" on several occasions. The district court found that these assertions did not constitute a request for counsel and denied the defendant's motion to suppress the statements. On appeal, the court held that a request for counsel which triggers a defendant's Fifth Amendment rights must be unambiguous. The court found that the defendant's statements about counsel did not clearly articulate his desire to have an attorney present before questioning and thus did not assert his Fifth Amendment rights. Accordingly, the district court's ruling was affirmed.

### D. Double Jeopardy

**Gamble v. United States, 17-6086 (6/20/2019)**
**Supreme Court**

For 170 years, the "separate soveriegns" doctrine allowed the federal government to prosecute a defendant for federal crimes utilizing the same facts for which he or she was prosecuted and convicted under state law. The Court reviewed and rejected a challenge to that doctrine, holding that nothing in the Double Jeopardy clause of the Constitution prohibited such successive prosecutions. The Court also reviewed extensively English and colonial law, and found no impediment to the dual sovereignty system. Thus, "[e]liminating the dual sovereignty rule would do little to trim the reach of federal criminal law, and it would not even prevent many successive state and federal prosecutions for the same criminal conduct unless we also overruled the long-settled rule that an "offence" for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct."

## VI. Sixth Amendment

### B. Confrontation Clause

**U.S. v. Wandahsega, 18-1219 (5/21/19)**

The defendant was charged with sexual abuse of a minor and at trial the district court permitted the minor to testify by closed circuit television (CCTV). This decision was based on the testimony of a social worker that the minor was unable to testify in front of the defendant because of fear and because he would suffer emotional trauma if required to do so. The defendant argued on appeal that his rights under the Confrontation Clause were violated by the CCTV procedure. The Supreme Court specifically allowed the use of CCTV in Maryland v. Craig as long as the government makes an adequate showing of necessity. In response to Craig, Congress passed 18 USC § 3509, which permits the use of CCTV where it is necessary to protect the welfare of the child and the child would be traumatized by the defendant's presence. The court noted that Craig was decided before the Supreme Court's decision in Crawford, which prohibited the use of testimonial out of court statement, but ruled that Crawford did not overrule the Craig decision. Thus, because the district court made the required findings of necessity, the Confrontation Clause had not been violated by the CCTV procedure.

### D. Right to Counsel/Self Represent

**Ineffective Assistance of Counsel**

**U.S. v. Gandy, 17-2020 (6/7/19)**

Shortly before their fraud trial, the defendants' moved for new appointed counsel because their attorneys refused to litigate speedy trial motions which had already been denied. When the district

judge refused to appoint new counsel, the defendants filed state bar grievances against their attorneys. This prompted the attorneys to move to withdraw, claiming that their feelings were hurt by the grievances and they couldn't represent their clients with the "passion" that was required. The district court denied the motions and upon their convictions the defendants appealed. The court held that the state bar grievances did not require a finding that the attorneys were ineffective and could not represent the defendants. The court emphasized that the grievances were frivolous, they were filed shortly before trial, and the attorneys' hurt feelings was not sufficient grounds to create a conflict of interest. Further, the court held that to find a conflict under these circumstances would encourage defendants to "habitually abuse the rule." Accordingly, the court found no ineffective assistance of counsel based on the bar grievances and the convictions were affirmed.

### E. Indictment - Variance/Duplicity

**Duplicity**

**U.S. v. Gandy, 17-2020 (6/7/19)**

The defendants were charged with conspiracy and substantive mail and wire fraud counts for participating in a scheme to submit false tax returns. The indictment also charged counts of aggravated identity theft under 18 USC § 1028A. In each identity theft count, the indictment listed two victims and multiple underlying counts in the indictment as predicates. Upon their conviction, the defendants argued on appeal that these counts of the indictment were duplicitous and deprived them of the right to unanimous verdicts. The court first held that no law requires that each victim of identity theft be listed in a separate count in an indictment. Further, the court found that the defendant used the two victims' names on the same fraudulent instruments, so the jurors could not possibly have found that one but not the other was used by the defendants. Finally, the court found that the jury separately convicted the defendants of each of the predicate crimes that were listed in the identity theft counts, so there was no issue with respect to juror unanimity. As such, the convictions were affirmed.

## VIII. Defenses

### H. Sufficiency of Evidence Generally

**Identification of Defendant**

**U.S. v. Shanklin, 18-5289 (5/24/19)**

During the defendant's trial on drug and weapon charges, the government failed to have any witness actually identify the defendant in court as the person who committed the crimes. The defendant argued on appeal that the evidence was accordingly insufficient to support the verdict. The court held that an in-court identification of the defendant as the perpetrator is not necessarily required where the circumstantial evidence supports that the defendant is the correct, named person. The court found that the defendant had the same name as the perpetrator, defense counsel referred to the defendant by name and as the defendant, and no witness stated that the person in court was not the named defendant. Accordingly, the court found that the evidence was sufficient to support the verdict.

### K. Wire Tap/Stored Communications

**U.S. v. Carpenter, 14-1572 (6/11/19)**

During the government's investigation of a robbery ring, it obtained cell site data from the defendant's cell phone, pursuant to the Stored Communications Act. The district court and Sixth Circuit panel held that a search warrant was not required. The Supreme Court reversed this finding and held that cell cite data is protected Fourth Amendment information and a search warrant is required in order to obtain it. On

remand to the Sixth Circuit, the court found that the evidence nonetheless did not have to be suppressed because the government agents had relied in good faith on the SCA in obtaining the cell site information. Thus, the Fourth Amendment did not require suppression of the evidence.

## X. Probation/ Supervised Release

### Supervised Release Violations

**Mont v. United States, 17-8995 (6/3/2019)**
**Supreme Court**

The defendant was on supervised release from a federal conviction, and was arrested on a state charge. He remained in state custody for 10 months, after which time he plead guilty in state court and received a sentence of "time served". In the meantime, without the state incareceration, the time for his supervised release would have run. The Court held that 18 USC §3624(e) allows a federal court to consider the state time spent in pre-trial detention as time served for the state offense, thus tolling federal supervised release. The district court therefore still had jurisdiction to sentence the defendant for a violation of supervised release.

### 18 USC § 3583(k) – Child Porn SRV

**U.S. v. Haymond, 17-1672 (6/27/2019)**
**Supreme Court**

The defendant faced a statutory range of 0 to 10 years based upon his plea to possession of child pornography, plus a term of supervised release. He was sentenced to 38 months incarceration, along with a 10 year term of supervised release. The defendant served his time and was released. He then violated the terms of his release by once again possessing child pornography. This offense kicked in 18 USC § 3583(k), which states that if the court finds, by a preponderenace of the evidence, that the defendant has violated the terms of release by once again possessing child pornography, a minimum 5 year term of imprisonment must be imposed. The district court so found, and imposed 5 years. The Supreme Court held that such judicial findings, which increase the mandatory minimum term, violate the right to jury trial right, and therefore the penalty provisions contained in § 3583(k) are unenforceable.

## XII. Specific Offenses

### 18 USC § 922(g) – Felon in Poss. of Firearm

**Rehaif v. United States, 17-9560 (6/21/2019)**
**Supreme Court**

18 USC § 922(g) requires that a defendant (1) be in possession of a firearm and (2) under some disability to possess the firearm (such as being a felon, or an alien, etc.). The firearm also needed to, at some point, travel in interstate commerce. At question in *Rehaif* was whether the defendant needed to "knowingly" be under the disability. The Court answered in the affirmative: "the word 'knowingly' applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." The fact that the weapon traveled in interstate commerce, however, need not be known to the defendant, as it is merely a jurisdictional matter.

### 18 USC § 924(c) – Firearm Enhancement

**United States v. Davis, 18-431 (6/24/2019)**
**Supreme Court**

To convict a defendant pursuant to 18 U.S.C. § 924(c) for possessing, using or carrying a firearm, the underlying offense must be either a "crime of violence" or a "drug trafficking" offense. The statute defines a "crime of violence" as an offense that "has as an element the use, attempted use, or

threatened use of physical force against the person or property of another" or an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Court determined that the latter definition was unconstitutionally vague, based upon the reasoning of Sessions v. Dimaya and Johnson v. United States. The Court further rejected the Government's argument that the categorical approach was an inappropriate standard to determine whether offenses qualified under the statute.

**18 USC § 1028A(a)(1) – Agg. Identity Theft**

**U.S. v. Gandy, 17-2020 (6/7/19)**

The defendants were convicted of participating in a scheme to submit fraudulent tax refunds based on trusts they set up in the names of others. The defendants were also convicted under 18 USC § 1028A of aggravated identity theft for using the stolen identities of several individuals. On appeal, the defendant's argued that they did not know that the identities belonged to actual people, and thus the § 1028A conviction was improper. The court held that the circumstantial evidence in the case was sufficient to support the conviction. The defendants' residences contained a large number of stolen identity information. Additionally, the defendants opened bank accounts, purchased PO boxes, and submitted fraudulent tax returns using the identities. The court found that this exhibited confidence on the defendants' part that they were using the names and identifying information of real people. Thus, the court held that the evidence of the defendants' knowledge that the identities were real was sufficiently established and the convictions were affirmed.

**18 USC § 2250 – SORNA**

**Gundy v. United States, 17-6086 (6/20/2019)**
**Supreme Court**

SORNA (Sex Offender Registration and Notification Act) provides that the Attorney General has the authority and duty to promulgate the specific registration rules for "pre-Act offenders" under the Act. The defendant in Gundy argued that such delegation of authority violated the "non delegation doctrine," which prohibits Congress from ceding legislative authority to another branch of government. A four justice plurality held that Congress did not violate the non delegation doctrine, as the authority granted to the Attorney General only covers "feasibility issues." Justice Alito concurred in the decision, but submitted that the Supreme Court has gotten the non delegation doctrine wrong for the last 84 years, and urged reconsideration of it.

**21 USC § 846 – Drug conspiracy**

**U.S. v. Potter, 18-5830 (6/11/19)**

The defendant was charged with participating in a drug conspiracy. At trial, the government proved that he had bought distribution amount of methamphetamine on repeated occasions. The defendant argued on appeal that the government failed to prove that he committed an overt act in furtherance of the conspiracy and that the evidence was insufficient to show more than a buyer-seller relationship. The court first clarified that under Sixth Circuit case law, no overt act need be proven at trial. The court held that the government need only show an agreement to violate drug laws, the defendant's knowledge of the agreement, and that the defendant participated in the conspiracy, meaning merely that he or she "voluntarily joined" it. Further, the court found that the evidence was sufficient to support the verdict. While a buyer-seller relationship is not

sufficient alone to prove a conspiracy, the court ruled that the repeated nature of purchasing distribution amounts of drugs was sufficient to infer that the agreement existed. Additionally, other witnesses testified as to how the defendant agreed to further distribute the methamphetamine. Accordingly, the conviction was affirmed.

## XIII. Post-Conviction Remedies

**Johnson v. Genovese, 18-5330 (5/28/19)**

The petitioner was convicted of various felonies in Tennessee state court and sentenced to 54 years in prison. The petitioner alleged following trial that his attorney had been ineffective in pretrial plea negotiations. Specifically, the petitioner alleged that his trial lawyer never advised him that the state had offered a 20 year sentence in exchange for a guilty plea. The petitioner's trial attorney testified that he did relay the offer but the petitioner refused it. The Tennessee Court of Criminal Appeals concluded that trial counsel performed deficiently by failing to advise the petitioner of his full potential sentencing range, but nevertheless found that the petitioner could not demonstrate prejudice because he would have rejected the plea offer in any event. The Sixth Circuit concluded that habeas corpus relief was not warranted. Under Lafler v. Cooper, 566 U.S. 156 (2012), a defendant has a right to the effective assistance of counsel in pretrial plea negotiations, and this includes the right to competent advice relating to a plea offer. The Sixth Circuit found that the state court's application of Lafler was entitled to deference under 28 USC § 2254(d), and the denial of habeas corpus relief was therefore affirmed.

**Williams v. United States, 17-3211 (6/11/19)**

The petitioner pled guilty to being a felon in possession of a firearm in federal court and was sentenced under the Armed Career Criminal Act. One of the petitioner's predicate felonies was an attempted felonious assault conviction from Ohio state court. The petitioner filed a successive habeas petition in which he alleged that his sentence was invalid because the ACCA's residual clause was unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551 (2015), and his Ohio conviction did not qualify as a predicate under the ACCA's elements clause. Following a grant of authorization, the District Court and Sixth Circuit rejected the petitioner's claim on the merits, but the en banc court vacated the ruling and remanded the case to the panel for further consideration.

The Sixth Circuit concluded that although the petitioner had raised the same claim in an earlier application for relief, the claim was not barred under 28 USC 2244(b)(1) because that provision only applies to state prisoners proceeding under 28 USC § 2254. In addition, the certification requirements set out in 28 USC § 2255(h) are not jurisdictional, and the government forfeited the issue by failing to raise it in a timely manner. The petitioner was also entitled to raise a second or successive petition because he demonstrated that it was more likely than not that the district judge relied on the residual clause in imposing the petitioner's sentence. Finally, the petitioner was entitled to relief on the merits. The residual clause is unconstitutional and could not support the petitioner's sentence, and the petitioner's Ohio attempted felonious assault conviction did not qualify as a predicate offence under the elements clause. The case was accordingly remanded for resentencing.

**Winkler v. Parris, 18-5301 (6/18/19)**

The petitioner was convicted of attempted first degree murder and attempted aggravated arson in Tennessee state court. The petitioner alleged that he was deprived of the effective assistance of appellate counsel when his lawyer failed to

ensure that the record on appeal was complete, and that a presumption of prejudice was required under Entsminger v. Iowa, 386 U.S. 748 (1967). The state courts rejected the petitioner's claim on the merits, concluding that a showing of actual prejudice was required and that the petitioner failed to meet his burden. The Sixth Circuit concluded that habeas corpus relief was not warranted. Prejudice from appellate counsel's deficient performance can be presumed in limited circumstances where it effectively deprives the petitioner of an appeal altogether. Appellate counsel in the petitioner's case filed a record that was almost fully complete, and as a result the failure to submit the limited material that was excluded did not preclude meaningful appellate review. Furthermore, the petitioner failed to establish actual prejudice, and the denial of habeas corpus relief was therefore affirmed.

**Dennis v. Terris, 18-2081 (6/21/19)**

The petitioner was convicted of various federal drug offenses and sentenced to life in prison. President Obama subsequently commuted the petitioner's sentence to 30 years. The petitioner filed an application for relief under 28 USC § 2241, alleging that the maximum sentence he should have been exposed to at the time of his original sentencing was a 20 year mandatory minimum. The Sixth Circuit concluded a presidential commutation does not necessarily bar any subsequent application for judicial relief, but that the petition failed on the merits in any event.