

## 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).

### I. Sentencing Issues

#### B. Guideline issues

##### **2K2.1(b)(6)(B) – Another felony offense**

##### **U.S. v. Jackson, 16-2415(12/5/17)**

The defendant sold drugs to an informant and after the sale was completed the informant inquired about buying a gun from the defendant. After some negotiations, the defendant then sold a firearm to the informant approximately two days later. The defendant was charged with being a felon in possession of a firearm and distribution of drugs, and at sentencing the district court applied a four-level enhancement for possessing drugs in relation to the firearm under USSG § 2K2.1(b)(6)(B). On appeal, the court held that the four level enhancement was inapplicable. The court found that, **given that the sales occurred on separate days and the defendant did not actually possess a firearm at the same time as the drugs, the drugs were not technically sold in relation to the possession of the firearm.** Accordingly, the defendant's sentence was vacated and the case remanded for resentencing.

### D. Recidivism enhancements

#### **18 USC § 924(e) – ACCA**

##### **U.S. v. Patterson, 17-3706 (12/20/17)**

The defendant was convicted of being a felon in possession of a firearm. In a previous appeal to the Sixth Circuit, the court held that the defendant qualified as an armed career criminal because he had three prior aggravated robbery convictions. Upon remand to the district court, the defendant raised for the first time the argument that the convictions could not be counted separately from one another. The district court disagreed and the defendant appealed. The court held first that the original remand was limited and did not permit the defendant to raise this issue on remand to the district court. Nonetheless, the court ruled on the merits and found that **the record was clear from the plea hearing in state court that the original indictment, which listed that the offenses had occurred on different dates, had not been amended by the plea agreement.** Thus, the district court was permitted to rely on the terms of the original indictment in state court which reflected separate dates of commission of the robbery offenses. Accordingly the court found that the offenses did occur on occasions different from

one another and the defendant's sentence was affirmed.

### USSG § 2K2.1 – Crime of Violence

#### U.S. v. Harper, 17-5037 (11/9/17)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the government argued that the defendant's prior Tennessee conviction for reckless assault should be considered a crime of violence, thus increasing the defendant's sentence under USSG 2K2.1. The district court disagreed and the government appealed. The court held that it was bound by the court's recent decision in U.S. v. Verwiebe which held that **reckless assault is sufficient to qualify as a crime of violence under the force clause of the guidelines**. Although the court indicated its disagreement with the logic of Verwiebe, the court nonetheless reversed the district court's decision.

#### Williams v. U.S., 17-3211 (11/15/17)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court enhanced his sentence because he had a prior conviction under Ohio law for felonious assault. The defendant subsequently filed a § 2255 petition arguing that the felonious assault should no longer count as a crime of violence after the Supreme Court's opinion in Johnson. In a plurality decision, the Court held that **it was bound by its prior precedent in U.S. v. Anderson, which held that an Ohio felonious assault is a crime of violence. Two of the judges on the panel opined that Anderson should be reversed, however, the court held that Anderson could only be overruled by the Sixth Circuit *en banc* or the Supreme Court**. Accordingly, based on existing precedent, the defendant's sentence was affirmed.

## II. Plea Matters

### A. Agreements

#### Appeal waivers – Waiver of 3582 motions

#### U.S. v. Clardy, 17-5094 (12/5/17)

The defendant was convicted and sentenced for distributing crack cocaine. Years later the sentencing commission reduced the penalties under the sentencing guidelines for drug crimes. The defendant moved to reduce his sentence under 18 USC § 3582(c). The government responded that the defendant had signed a waiver of appeal and any future motion under § 3582(c) in his plea agreement. The district court denied the motion and the defendant appealed. **The court held for the first time in a published opinion that a clear and unambiguous waiver of a future motion under § 3582(c) is enforceable**. Accordingly, the defendant's motion was properly denied and the district court's ruling was affirmed.

## III. Evidence

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

#### 702 – Expert testimony

#### U.S. v. Pembroke, 16-1650 (11/15/17)

At the defendants' trial for Hobbs Act robbery, the government produced expert testimony that the defendants' cell phones were in close proximity to relevant locations during the robberies, using cell site data. The defendant objected that such evidence was unreliable under Daubert. On appeal, the court held that the use of such evidence was reliable in this case. The court noted that the evidence showed that the defendant's cell phones (the defendant lived in Philadelphia) were used on or about the time of the robberies in close proximity to the robberies in Grand Rapids and Detroit. The Court further held that **"Pembroke's argument that Hess's**

expert testimony was improper because cell-site analysis is unproven and unreliable under Daubert and FRE 702(c) unravels before it begins because the particular form of cell-site analysis and corresponding testimony used here was reliable. . . . Because the cell-site analysis and associated testimony presented here was reliable, the absence of a Daubert hearing or 702(c) inquiry does nothing to undermine the court's ruling.”

### C. Article VIII – Hearsay

#### 801(d)(2)(E) – Coconspirator exception

##### U.S. v. Odum, 15-2280 (11/30/17)

The defendant was charged with participating in a conspiracy to commit violent crimes in aid of racketeering, committing violent crimes, and weapons offenses. He was acquitted of the conspiracy count, but convicted of crimes of violence and weapons offenses. During the trial the government introduced hearsay statements under the co-conspirator exception, FRE 801(d)(2)(E). Upon his conviction, the defendant argued on appeal that the hearsay statements should not have been admitted because he was acquitted of the conspiracy count. The court held that the co-conspirator hearsay exception does not require the government to prove that the defendant was guilty of the charged RICO conspiracy, only that the defendant participated in some conspiracy to violate the law. The court found ample evidence that the defendant was involved in a conspiracy with co-defendants to violate federal law, and accordingly the hearsay statements were properly admitted. Thus, the defendant's conviction was affirmed.

### V. Fifth Amendment

#### B. Brady

##### U.S. v. Folad, 17-5538 (12/11/17)

The defendants reprogrammed ATM machines to register that they were dispensing \$1s when in fact they were dispensing \$20s. The defendants then made a large number of repeated withdrawals, totalling over \$600,000 in losses to the ATM company. During the period of investigation, the ATM company replaced the ATMs pursuant to a new government regulation requiring that they be handicap accessible. Upon being charged, the defendants argued that their rights under Brady were violated by the destruction of the ATM machines, which contained potentially exculpatory evidence. The district court found no Brady violation and the defendants appealed. The court held that Brady could not be violated by the actions of a purely private party. Because the government had no part in the destruction of the ATM evidence, no Brady claim was proper. The court further ruled that there was no evidence that there was potentially exculpatory information in the ATMs, or that the company had exercised any bad faith in replacing them. As such, no Brady claim was cognizable even if there was government involvement. Thus, the defendant's conviction was affirmed.

##### U.S. v. Odum, 15-2280 (11/30/17)

The defendant was charged with participating in a conspiracy to commit crimes of the violence in aid of racketeering, crimes of violence, and weapons offenses. Prior to trial, the defense was notified through the production of grand jury testimony that the government was in possession of a shell casing and spent bullet from the scene of the shooting. The defendant did not request to obtain these items until the trial had begun, and during the trial the defendant was able to have the items tested by an expert. The defense chose not

to present any evidence related to the items during the trial. The defendant was convicted and he argued on appeal that his Brady rights had been violated by the failure of the government to turn the items over sooner. The court held that any Brady violation was remedied by the fact that the defendant did in fact obtain the items and have them tested by an expert. The defendant chose not to use this evidence at trial. Thus, the court found that the defendant had been given access to the evidence, it was not suppressed by the government because the defendant knew of the evidence before trial, and there was no indication in the record that earlier access to the evidence would have assisted the defense and presenting the case at trial. Accordingly the defendant's conviction was affirmed.

**U.S. v. Pembroke, 16-1650 (11/15/17)**

The defendant proceeded to trial on Hobbs Act robbery charges. After trial, the defendant argued that the government violated Brady by failing to turn over an inmate witness' state prison disciplinary records which the defendant claimed he could have used for impeachment. On appeal, the court held that the government had no obligation to obtain state prison disciplinary records, that were not already in its possession, just to turn them over to the defense. Further, the court found that the defense had not shown how the records were relevant to impeachment for truthfulness at trial. Accordingly, the conviction was affirmed.

**C. Confessions/Testimonial Rights**

**Miranda**

**U.S. v. Elliott, 16-6474 (11/30/17)**

The defendant was a medical practitioner who worked at a pain clinic and was charged with participating in a drug conspiracy. During the investigation the agents executed a search warrant at the clinic and the defendant and others

were restrained from moving about the clinic during the search warrant, however they were free to leave at any time. During the period of the search, each of the employees was brought into a room by investigators and questioned. No Miranda rights were provided prior to the questioning. At trial, the defendant moved to suppress statements she made during the interview as being in violation of Miranda. The district court denied the motion and the defendant appealed. The court held that Miranda had not been violated by the questioning because the defendant was not in custody at the time of the interview. The interviews were conducted at the place of business where the employees were familiar with the setting, the interviews were short in time, the interviews were non-coercive, and the defendants were free to leave at any time. Accordingly, the court found that the defendant was not in custody at the time of the interview and that Miranda was not violated.

**E. Miscellaneous Fifth Amendment**

**Due Process – Identification testimony**

**U.S. v. Pembroke, 16-1650 (11/15/17)**

The defendant was charged with several Hobbs Act robberies and firearm charges. One of the eyewitnesses was shown video surveillance of the robbery prior to making an identification from a photo lineup prepared by police. The officer testified during a suppression hearing that he did not show the surveillance footage to the witness nor did he coach her in any way. Nonetheless, the defense moved the district court to compel production of Brady materials related to the alleged witness tampering. On appeal, the court held that the photo identification was not unduly suggestive. The fact that the witness saw the surveillance video prior to meeting with police did not make the identification improper and there was no evidence that the police did anything to make the lineup suggestive. Thus, there was

no Brady material that could arguably be produced to the defense. As such, the district court's ruling was affirmed.

## VI. Sixth Amendment

### B. Confrontation Clause

#### Bruton

##### U.S. v. Pembroke, 16-1650 (11/15/17)

The defendant was charged with several Hobbs Act robberies. At trial, the government presented a jail house informant who testified about statements made to him by a codefendant that implicated the defendant. The defendant raised a Bruton challenge to the evidence which the district court denied. On appeal, the court held that Bruton only applies to testimonial out of court statements. Because statements from one inmate to another are not testimonial, Bruton did not apply and the Confrontation Clause was not implicated.

### F. Miscellaneous Sixth Amendment

#### Right to Present a Defense

##### U.S. v. Odum, 15-2280 (11/30/17)

The defendant was charged with participating in a conspiracy to commit violent crime in aid of racketeering, with violent crimes, and with weapons offenses. The victim identified the assailant as a race different from that of the defendant. Prior to trial the government first notified the defense that it did not intend to call the victim, however, shortly before trial the government listed this witness on its intended witness list. On the eve of trial, the government again removed this witness from its list. The defense attempted to find and call the witness, however, despite the district court's assistance, the witness could not be located. The district court permitted the defendant to introduce a recorded statement of the witness that indicated

that the shooter was a different race than the defendant. Upon his conviction, the defendant argued on appeal that his right to present a defense had been violated by the government's failure to call the witness. The court held that the government was under no obligation to call the victim of the shooting as a witness, and that the defendant had ample opportunity before trial to issue a subpoena for the witness, but chose not to. Further any harm to the defense was remedied by the district court permitting the defendant to play a recording of the victim's statement. As such, the court found no violation of the defendant's right to present a defense and his conviction was affirmed.

## VIII. Defenses

### E. Venue/Jurisdiction

#### Venue

##### U.S. v. Elliott, 16-6474 (11/30/17)

The defendants were Florida pain clinic workers who were charged with participating in a conspiracy to distribute pain pills. The charges were brought in a district court in Kentucky because a substantial amount of the patients lived in Kentucky and brought the pain pills back to Kentucky to distribute. The defendant challenged venue in Kentucky and the district court denied the motion. On appeal, the court held that venue was proper in Kentucky. Venue may be proper in any state where the crime was "begun, continued, or ended." As such, even though none of the patients were charged as coconspirators, venue was proper in Kentucky because the pills were purchased for the purpose of distribution in Kentucky and the defendants were well aware of this fact. Accordingly, the convictions were affirmed.

## K. Wire Taps/Stored Communications

### U.S. v. Pembroke, 16-1650 (11/15/17)

After two jewelry store robberies, the government used the Stored Communications Act (18 USC 2703) to obtain all cell phone hits on certain cell towers close to the robbery locations. From this information, the government obtained phone numbers that had been used in both locations, and sought further location data. In the subsequent Hobbs Act prosecution, the defendants moved to suppress the evidence because the government did not obtain a search warrant and because it did not meet the Act's requirement of showing reasonable grounds to need the cell data evidence. The district court denied the motion and the defendant appealed. The court first held that the no established Supreme Court or Sixth Circuit precedent currently requires officers to get a warrant for such information. Thus, the officers acted in good faith in relying on the Act. Further, the court ruled that the Act does not require suppression of evidence if its terms have not been satisfied, but even if it did, the court found that the government had established reasonable grounds to need the cell site data. Thus, the district court's ruling was affirmed.

## XII. Specific Offenses

### 8 USC § 1326 – Illegal Reentry

#### U.S. v. Estrada, 17-5081 (12/4/17)

The defendant was charged with illegally re-entering the U.S. after being deported. During the case, the defendant moved to collaterally attack his prior deportation based on the grounds that his immigration attorney was ineffective for failing to request discretionary relief from deportation. This collateral attack was denied, the defendant was convicted, and he appealed. The court held that a defendant has no constitutional right to discretionary relief from

deportation. Thus, his attorney could not be ineffective for failing to assert this defense. As such, the defendant's conviction was affirmed.

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

#### U.S. v. Pembroke, 16-1650 (11/15/17)

The defendant was convicted of aiding and abetting the robbery of a jewelry store and with participating in a conspiracy to rob that jewelry store and another. He was also convicted of a firearm enhancement under 18 USC § 924(c) related to each count. On appeal, he argued that the § 924(c) charges were duplicative in that they unlawfully charged the same conduct, in violation of the Due Process Clause. The court held that the aiding and abetting count charged a distinct aspect of the defendant's assistance in the robbery that was separate and apart from the conspiracy count. Further, the court found that the conspiracy charged a broader range of conduct, including the robberies. Accordingly, the two counts punished different conduct, and the separate § 924(c) counts were proper.

### 18 USC § 1951 – Hobbs Act robbery

#### U.S. v. Pembroke, 16-1650 (11/15/17)

Three defendants were charged with Hobbs Act violations for the robbery of two jewelry stores. Although there was no credible eye witness identification of the defendants, they were linked to the robberies based on similarity of outfits to the robbers, size and build, connections with cell phone records, and association with vehicles involved in the robberies. On appeal, the defendants challenged the sufficiency of the evidence. The court held that the combination of the circumstantial evidence against each defendant was sufficient to support the jury verdict, and thus their convictions were affirmed.

**18 USC § 1959 – Violence in Racketeering****U.S. v. Odum, 15-2280 (11/30/17)**

The defendant was convicted of participating in violent crimes in aid of racketeering under 18 USC 1959 (VICAR). On appeal, the defendant challenged the sufficiency of the evidence on various grounds. The court held that the elements of a VICAR offense are as follows: (1) the organization was a RICO enterprise; (2) the enterprise was engaged in racketeering activity; (3) the defendant had a position in the enterprise; (4) the defendant committed the alleged crime of violence; and (5) the defendant's purpose was to maintain or increase position in the enterprise. In clarifying the elements of the offense, the court first ruled that the government did not have to prove that the overall purpose of the enterprise was to commit crime. Instead, the government need only show that the enterprise did have a purpose, that there were relationships among those associated with the enterprise, and that the enterprise had sufficient longevity to permit the associates to pursue the purpose. Second, the court held that the government was not required to show that any one act of violence affected commerce. It is sufficient if the government establishes that the enterprise as a whole affected commerce. Third, the court found that the government was not required to prove that the defendant knew that the enterprise was engaged in racketeering activity. And finally, the court held that the government need only prove that the defendant's "animating purpose" in committing the violent act was to maintain or increase his position in the enterprise. Finding each of these elements met, the court held that the evidence was sufficient and the defendant's conviction was affirmed.

**21 USC § 846 – Conspiracy – Pain Clinics****U.S. v. Elliott, 16-6474 (11/30/17)**

The defendants were a security guard and two medical practitioners who were charged with participating in a drug conspiracy for their work at an illicit pain management clinic. Upon their conviction at trial, they challenged the sufficiency of the evidence. On appeal, the court held that the elements of conspiracy under 21 USC § 846 are (1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, (3) and participation in the conspiracy. Regarding the security guard, the Court held that his involvement in the conspiracy was proven by his management of patient disputes in the parking lot, his request for investigators to leave the property, and his shuttling of prescriptions back and forth to patients when the waiting rooms were overcrowded. Regarding the medical practitioners, the court held that the government was not necessarily required to put on expert testimony to prove that the distribution of the drugs was beyond standard medical practice. The court found that although expert testimony is generally required, there are some cases where the lay testimony is so clear that the distribution of drugs was beyond legitimate medical practice, that no such testimony is required. Accordingly the convictions were affirmed.

**XIII. Post-Conviction Remedies****Kernan v. Cuero, 16-1468 (11/6/17)****Supreme Court**

The petitioner pleaded guilty to a criminal complaint that would have resulted in a maximum sentence of fourteen years and four months. After the petitioner entered his guilty plea, the government was permitted to amend the complaint, and this increased the minimum sentence to twenty-five years. The petitioner was

permitted to withdraw his plea, but eventually elected to plead guilty to the amended complaint and was sentenced to twenty-five years to life. The Court held that, although prior Supreme Court precedent allowed for courts to either: (1) allow withdrawal of a guilty plea or (2) specific performance, the trial court did not abuse its discretion in choosing one of the options. Thus, the state courts did not contravene or unreasonably apply clearly established federal law in rejecting the petitioner's request for specific performance, and that 28 USC § 2254(d)(1) therefore precluded the petitioner's requested form of relief.

**Dunn v. Madison, 17–193 (11/6/17)**  
**Supreme Court**

The petitioner was convicted and sentenced to death in Alabama state court. The petitioner alleged that he was incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007), because he had suffered a number of strokes and no longer had any memory of the crimes he had committed. The state courts rejected the petitioner's claim, but the Eleventh Circuit concluded that habeas corpus relief was warranted. **The Supreme Court reversed, finding that the applicability of Ford and Panetti to the facts of the petitioner's case was not "clearly established" within the meaning of 28 USC § 2254(d)(1), and that the state court's rejection of the petitioner's claim was not based on any unreasonable factual determinations under § 2254(d)(2).**

**Dufresne v. Palmer, 17-1340 (11/22/17)**

The petitioner was convicted of sex offenses in Michigan state court. Following state court review, the petitioner sought federal habeas corpus relief. The district court denied the petition and declined to grant a certificate of

appealability. The petitioner appealed. Under 28 USC § 2253(c)(2), a petitioner must make "a substantial showing of the denial of a constitutional right" in order to obtain a certificate of appealability. A petitioner satisfies this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. **The Sixth Circuit explained that even if the procedural issues in the case are reasonably debatable, a petitioner seeking a certificate of appealability must still show that the underlying grounds for relief are arguably meritorious.** Because the petitioner failed to satisfy the requirements of § 2253(c)(2), his request for a certificate of appealability was denied.