

## 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.

## I. Sentencing Issues

### B. Guideline issues

#### 2D1.1 – Drug Amount

##### [U.S. v. House, 16-1691 \(6/14/17\)](#)

The defendant entered into a plea agreement whereby he agreed that he participated in a conspiracy to distribute drugs from 2013 to 2014. A government informant provided information that the conspiracy had been ongoing since at least 2011. At sentencing, the district court adopted this earlier date based on the findings in the PSR and attributed additional drug amounts from this time period. On appeal, the court held that the district court was free to determine the length of the conspiracy under the relevant conduct provisions of the guidelines in spite of the agreement of the parties in the plea agreement. Because the defendant offered no evidence to the contrary at sentencing and did nothing to challenge the reliability of the informant's information, the district court's reliance on the PSR was proper. Accordingly, the sentence was affirmed.

#### 2G2.2(b)(3) – Distribution of Child Porn

##### [U.S. v. Dunning, 16-5164 \(5/18/17\)](#)

The defendant was convicted of receipt of child pornography and at sentencing the district court applied a two level enhancement for distribution. The distribution was based on the defendant's use of a file sharing program. Although the defendant transferred the images out of the file sharing program after they were downloaded, the images were nonetheless available for sharing while they were downloading. On appeal, the court held that, although there was no actual evidence that the defendant knew the images could be shared with others while they were downloading, the defendant could have known this to be a fact based on his voluntary use of a file sharing program. Absent affirmative evidence that the defendant was ignorant of the fact that files were available for sharing while downloading, application of the distribution enhancement was proper.

### **3B1.1 – Leadership Enhancement**

#### **U.S. v. House, 16-1691 (6/14/17)**

The defendant was convicted of participating in a conspiracy to distribute oxycodone. At sentencing, the district court determined that the defendant was a leader in a conspiracy involving five or more participants and applied an enhancement under USSG § 3B1.1. One of the five participants included the government's informant. On appeal, the court held that ordinarily an informant cannot count as a participant in a criminal enterprise for purposes of the leadership enhancement. The court ruled, however, that **where the informant was already involved in the conspiracy as a coconspirator prior to becoming a government informant, then the informant is countable as a participant under § 3B1.1.** As such, the sentence was affirmed.

### **3C1.1 – Obstruction of Justice**

#### **U.S. v. Brown, 16-6291 (5/15/17)**

The defendant was convicted of wire fraud and extortion. At sentencing, the district court determined that an enhancement applied pursuant to USSG § 3C1.1 for obstruction of justice because he originally told investigators that two other men had access to his computer and may have sent the extortionate emails. Further, prior to trial, the defense attorney sent over a list of eight individuals who had access to the defendant's computer. On appeal, the court held that making a false statement to a law enforcement officer generally does not amount to obstruction of justice unless it significantly obstructs an official investigation. The court found **that the statements did not significantly obstruct the government's case because the government was able to interview the possible witnesses and that they testified at trial that they did not send the emails, thus bolstering the government's case.** Accordingly, there was no

significant obstruction of the investigation and the application of the enhancement was reversed.

### **D. Recidivism enhancements**

#### **18 USC§ 924(e)–ACCA**

#### **U.S. v. Southers, 15-6395 (5/8/17)**

The defendant was convicted of being a felon in possession of a firearm and the district court determined that he qualified for the enhancement under the ACCA. On appeal, the defendant argued that he was not an armed career criminal because (1) his Tennessee robberies did not count as violent felonies and (2) they did not count as separate felonies under the ACCA. First, the court held that the Tennessee robberies were violent felonies under the ACCA. **The robbery statute required that the defendant commit a theft “by violence or putting the person in fear.”** The Tennessee Supreme Court required that “putting the person in fear” means “physical force unlawfully exercised so as to cause injury, damage or abuse.” Under this standard, **the crime was clearly violent under the force clause of the ACCA.** Further, the fact that two Tennessee intermediate appellate courts read “fear” more broadly was irrelevant because they were contradicted by the decision of the Tennessee Supreme Court. Second, the court held that **the robberies were considered separate offenses because the indictments for the two robberies made clear that they occurred at two different businesses.** Accordingly, the defendant's sentence was affirmed.

#### **U.S. v. Monie, 16-6244 (6/9/17)**

The defendant pled guilty to being a felon in possession of a firearm, among other offenses. At the plea hearing, the district court advised the defendant that the maximum possible penalty for the firearm charge was 10 years. At sentencing, however, the district court determined that the defendant qualified as an armed career criminal

and enhanced his sentence to a mandatory 15 years. On appeal, the court found plain error in the district court's misadvisement about the correct statutory minimum and maximum penalties. Because the record did not otherwise reflect that the defendant was aware of the enhanced penalty under the ACCA, the court held that Fed. R. Crim. P. 11 had been violated and the defendant was entitled to withdraw his guilty plea. Thus, the defendant's conviction was vacated.

**U.S. v. Stitt, 14-6158 (6/27/17)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant was an armed career criminal based, in part, on his prior Tennessee convictions for aggravated burglary. Relying on prior circuit precedent, the district court and the Sixth Circuit panel held that the burglary convictions were violent felonies under the ACCA. The court agreed to rehear the case *en banc*. The full court held that the prior burglaries were not violent felonies because Tennessee defined a "habitation" in the burglary statute to include tents, vehicles, and similar "structures." The court found that the Supreme Court, in defining a generic burglary, repeatedly excluded vehicles and other movable structures from its definition of a habitation. Further, the court was not persuaded by the fact that Tennessee law required that the "structure" be "habitable" to fall under the burglary statute. The court determined that the generic form of burglary focused more on the "form and nature" of the structure rather than its purpose. Accordingly, the sentence was vacated and the case remanded.

**4B1.1 – Career Offender**

**U.S. v. House, 16-1691 (6/14/17)**

The defendant pled guilty to participating in a drug conspiracy and the district court determined

that he was a career offender. The defendant argued for the first time on appeal that his prior Michigan drug trafficking conviction did not count as a predicate for the career offender designation under the guidelines. The court found that Michigan's drug trafficking offense required, at a minimum, that the government prove that the defendant possessed drugs with the intent to deliver. The court ruled that possession with intent to deliver fit within the USSG § 4B1.2 definition of a controlled substance offense which included possession with intent to "distribute or dispense." Thus, the court found no plain error and the sentence was affirmed.

**E. Fine/Restitution/Forfeiture**

**Forfeiture**

**Honeycutt v. U.S., 16-142 (6/5/17)**

**Supreme Court**

18 U.S.C. § 853(a)(1) allows for the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug crimes. At issue was whether this provision could be used to create joint and several liability amongst various conspirators and co-defendants. The Court found that "Section 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of §853(a)(1), foreclose joint and several liability for co-conspirators."

**II. Plea Matters**

**B. Breach/Withdrawal of Plea**

**Withdrawal of Plea**

**U.S. v. Andrews, 16-3130 (5/23/17)**

The defendant was indicted for drug, robbery, and gun charges and entered into a binding plea agreement, pursuant to Fed. R. Crim. P.

11(c)(1)(C). At the plea hearing, the district court stated that it would “normally” accept the plea at the plea hearing, but since it was a “recommended sentence,” the court would refer it to the probation department and that it would “go ahead from there” at the sentencing hearing. The defendant moved to withdraw his plea prior to sentencing, and the district court denied the motion because the defendant could show no just reason for the withdrawal. On appeal, the court held that, under Fed. R. Crim. P. 11(d)(1), a defendant has “an absolute right to withdraw an unaccepted guilty plea for any reason or no reason.” The court found that, where a district court explicitly defers any acceptance of a guilty plea to a later point in time, the plea has not been accepted by the district court for purposes of Rule 11(d). Because the district court’s statement indicated that the plea was not accepted at the time of the plea hearing, the defendant should have been able to withdraw his plea prior to sentencing. Accordingly, the defendant’s conviction was vacated.

### III. Evidence

#### A. Article IV – Relevancy

##### 414 – Prior child sex acts

##### U.S. v. Underwood, 16-3548 (6/13/17)

The defendant was charged with transporting his step-granddaughter across state lines for the purpose of sex acts. At trial, his adult daughter testified that he had sexually abused her 20 years prior. The district court admitted the testimony under FRE 414 over the defendant’s objection. On appeal, the court found that admission of the testimony was proper. The court ruled that there is no time limit under FRE 414, thus the 20 year old evidence could be admitted. Further, the court ruled that the offenses were sufficiently similar that its probative value was not substantially outweighed by its prejudicial effect. Both offenses involved juveniles, between 10 and

12, both involved penile penetration, both had a family relationship, and both occurred while the defendant was able to isolate the child alone at a time of vulnerability. Thus, the conviction was affirmed.

#### C. Article VIII – Hearsay

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

##### U.S. v. Underwood, 16-3548 (6/13/17)

The defendant was charged with sexually abusing a minor. At trial, the government presented the testimony of the nurse who treated the minor. The nurse testified that the minor told her that the defendant sexually abused her and described how it happened in his truck, how they went bowling, and how they were parked near a CVS. The district court admitted the hearsay under FRE 803(4) as statements for the purpose of medical diagnosis and treatment. On appeal, the court held that the statements were properly admitted. The court found that, while identification of the perpetrator is not ordinarily relevant to treatment, it was nonetheless admissible because the nurse “may have wanted to ensure that the perpetrator was not present in the room so that she could get a truthful evaluation without the child’s fearing future retaliation.” Further, the information about bowling and the truck being near a CVS was potentially relevant to allow the nurse to assess “the distance it took [defendant] to walk and get the morning after pill . . . as it provides a timeframe between the sexual assault and the subsequent medication that [the minor] took.” Accordingly, the admission of the evidence was affirmed.

#### D. Discovery/Miscellaneous

##### Turner v. US, 16-1503 (6/22/17)

##### Supreme Court

Long after the defendant’s trial, evidence was discovered which was in the possession of the

government, but was not disclosed. The government admitted they had the evidence, and that it was favorable to the defense. But the government argued that the defense could not prove that the evidence was material, i.e., that it would have made a difference. The Supreme Court agreed, finding that the evidence would not have likely altered the defense strategy, and was somewhat cumulative of other evidence presented.

#### IV. Fourth Amendment

##### A. Reasonable Expectation of Privacy

###### U.S. v. Riley, 16-6149 (6/5/17)

A warrant issued for the defendant's arrest for a robbery. In attempting to locate the defendant, law enforcement obtained a court order for AT&T to produce GPS location data for the defendant's cell phone in an attempt to locate him. Based on the information returned by AT&T, the officers were able to track the defendant to a hotel. The front desk at the hotel identified the defendant's room and he was arrested. He had a firearm at the time, and he was subsequently charged with being a felon in possession of a firearm. The defendant moved to suppress the evidence upon the grounds that the government had violated his Fourth Amendment rights by obtaining his cell phone location without a search warrant. On appeal, the court held that **the defendant had no reasonable expectation of privacy in his physical location which was open and observable by the public. Because the GPS location provided no information to the officers that could not have been viewed publicly about the defendant's location, the Fourth Amendment was not implicated.** The court suggested that a problem would have potentially arisen had the GPS identified the specific room within the hotel wherein the defendant was staying. Accordingly, the conviction was affirmed.

##### E. Search Warrants

###### Probable Cause

###### U.S. v. Dunning, 16-5164 (5/18/17)

The defendant was charged with receipt and possession of child pornography. In investigating the case, law enforcement utilized a program called "Nordic Mule," which is part of a larger software package known as the Child Protection System (CPS). The program is used by law enforcement to search for IP addresses that had recently shared child pornography on a peer-to-peer file sharing network. Use of "Nordic Mule" identified the defendant's IP address as receiving child porn and a search warrant ensued. Upon indictment, the defense requested in discovery a copy of the source code from the program, and the government responded that it did not have it because the program was owned by a non-profit organization and it was proprietary. Accordingly, the defendant moved to suppress the evidence seized based on the search warrant because the reliability of "Nordic Mule" could not be established. The district court denied the motion and the defendant appealed. The court held that the search warrant established that **the officer was trained to use and had experience using "Nordic Mule," and that he identified and confirmed that the files the defendant received were in fact child pornography. The court found that the reliability of the program was not required to be further established because all the program did was gather information that was located on public peer-to-peer networks, essentially automating what law enforcement could otherwise have done manually in real time. As such, without evidence of actual error in the program's operation, the warrant was supported by probable cause.**

## Franks Hearing

### U.S. v. Brown, 16-6291 (5/15/17)

The defendant attempted to extort an accounting firm by claiming that he had hacked its computer system and stolen the tax records of Mitt Romney. In carrying out the extortion, the defendant sent thumb drives which purportedly contained the encrypted tax records. During the investigation, however, the government discovered that the thumb drives had been used previously by the defendant and, in the unallocated space, had (1) references to knightmb, which the defendant had repeatedly used in his various email addresses, (2) references to Kathryn, which was the defendant's wife's name, and (3) pictures of the defendant's neighbor's cats. Further, the defendant's initials were M.B., and he lived in Franklin, TN, which was where the extortion letters all arrived. Finally, knightmb had posted online about successfully using the encryption software "7-zip," which was the same encryption used for the purported Romney tax returns on the thumb drives. The defendant alleged that the government violated Franks by misrepresenting the date he took a polygraph in a prior investigation, evidence of when the incriminating information was placed on the thumb drives, and that the cats were not pictured at the defendant's home. The district court rejected a Franks hearing and the defendant appealed. The court held that, *even if the defendant's asserted items were corrected in the search warrant, probable cause still existed to support the warrant. The court found that the evidence in the unallocated space on the thumb drives combined with the other evidence pointing to the defendant established a "fair probability" that evidence of the crime would be found at the defendant's residence.* Accordingly, the conviction was affirmed.

## VI. Sixth Amendment

### D. Right to Counsel/Self Represent

#### Ineffective Assistance of Counsel

### Lee v. United States, 16-327 (6/23/17)

#### Supreme Court

The petitioner, a citizen of South Korea who had lived in the United States for 35 years, pled guilty to drug offenses in federal court and was ordered deported. The petitioner subsequently moved for relief under 28 U.S.C § 2255, alleging that his attorney had been ineffective in advising him that he would not be subject to deportation if he entered a guilty plea. In reality, deportation was mandatory for the offenses in question. The Sixth Circuit concluded that counsel had performed deficiently, but found that the petitioner had not been prejudiced because he would not have had any realistic defense if he had gone to trial. The Supreme Court reversed. *Under Hill v. Lockhart, 474 U.S. 52 (1985), a petitioner who claims ineffective assistance of counsel based on the advice to enter a guilty plea must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."* The fact that a defendant would almost certainly be convicted at trial is not dispositive of the inquiry. The petitioner demonstrated that avoiding deportation was his primary objective in resolving the charges against him, and the fact that his odds at trial might be slim did not alter his entitlement to relief. Because the petitioner established both deficient performance and a reasonable probability that he would have proceeded to trial, the decision of the Sixth Circuit was reversed.

## VII. Other Constitutional Rulings

### C. First Amendment

#### Packingham v. NC, 15-1194 (6/19/17) Supreme Court

North Carolina had a law which prohibited registered sex offenders from accessing websites or pages where minors could be found. It was punishable as a felony. The Supreme Court held that the law violated the First Amendment. The Court held that **the internet, and social media sites such as Facebook, are the new “public square,”** and as such, **“to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”** The Court therefore invalidated the law on First Amendment grounds.

## VIII. Defenses

### F. Privileges

#### Spousal Privilege

#### U.S. v. Underwood, 16-3548 (6/13/17)

The defendant was charged with sexually abusing his wife’s granddaughter. At trial, his wife testified as to inculpatory statements the defendant made to her. The defendant raised spousal privilege. On appeal, **the court held for the first time in the Sixth Circuit that there is a child abuse exception to the spousal privilege. Applying what it called a case-by-case analysis, the court held that because the child was the granddaughter of the defendant’s wife, the familial relationship was sufficient to make the spousal privilege inapplicable.** Thus, the defendant’s wife was free to choose to disclose his statements about the abuse. Accordingly, admission of the testimony was affirmed.

## IX. Jury Issues

### E. Miscellaneous Jury Issues

#### Jury Questions

#### U.S. v. Brown, 16-6291 (5/15/17)

The defendant was charged with wire fraud and extortion. At trial, the district court permitted the jury to ask questions of witnesses. The defendant did not object to the procedure, but argued on appeal that it was error. The court held that a district court’s allowance of juror questioning should be a **“rare practice”** and reserved for complex cases. **If a district decides to allow juror questions, it must (1) alert counsel as early as practicable, (2) instruct the jury to reserve questions for important points and that the jury should not draw inferences from the court’s choice not to ask questions, (3) provide a prophylactic instruction in the final charge, and (4) require questions to be in writing and allow the attorneys to object first at sidebar.** The court found no plain error in the district court’s procedure and affirmed the conviction.

## XII. Specific Offenses

### 18 U.S.C. § 1425 – Naturalization Fraud

#### Maslenjak v. US, 16-309 (6/22/17) Supreme Court

The defendant was charged with knowingly procuring naturalization **“contrary to law.”** The government alleged that the defendant made a false statement on her application documentation. The Sixth Circuit had held that the government need not prove that the defendant’s false statements were material to, or influenced, the decision to approve her citizenship application. The Supreme Court reversed, finding that **the false statements must have played a role in the naturalization process.**

**18 USC § 2252 – Receipt/Poss. Child Porn****U.S. v. Dunning, 16-5164 (5/18/17)**

The defendant was charged with both receipt and possession of child pornography. The receipt pertained to images that he downloaded on March 9 and 14, 2013, and the possession related to his possession of those images on April 30, 2013. The defendant pled guilty to receipt, and then argued on appeal that the statute was unconstitutionally vague in distinguishing between receipt and possession and that it allowed arbitrary enforcement of the law. The court held that the receipt and possession provisions both put a defendant on notice and they do not prohibit exactly the same conduct. The court noted that receipt was different from possession, and that a defendant who possessed child pornography because he or she “produced” it would not have also “received” it. Further, the court found that there was no suggestion in the case that the defendant was singled out for a receipt charge based on an improper motive, and that the receipt and possession offense occurred on different dates. Thus, the court held that the statute was not unconstitutionally vague and it had not been arbitrarily enforced in the case.

**XIII. Post-Conviction Remedies****Jenkins v. Hutton, 16-1116 (6/19/17)****Supreme Court**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. At the penalty phase of trial, the jury instructions failed to specify that the jury could only consider the aggravating circumstances that had been proven beyond a reasonable doubt at the guilt phase of trial. The petitioner procedurally defaulted his jury instruction claim in state court, but the Sixth Circuit concluded that the default was excused under Sawyer v. Whitley, 505 U. S. 333 (1992), and granted relief. Under Sawyer, a

petitioner may obtain review of a defaulted claim that challenges a death sentence by demonstrating a miscarriage of justice. This requires clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under state law. The Supreme Court concluded that the Sixth Circuit erred by applying Sawyer to the facts of the petitioner’s case, and as a result the petitioner’s claim could not be reviewed on the merits in federal proceedings. The grant of relief was therefore reversed.

**McWilliams v. Dunn, 16-5294 (6/19/17)****Supreme Court**

The petitioner was convicted of capital murder in Alabama state court and sentenced to death. Prior to trial, the defense requested a psychiatric evaluation. The motion was granted and the petitioner was examined by three psychiatrists at a state hospital who found no evidence that the petitioner had been suffering from mental illness at the time of the offense. The petitioner was subsequently convicted, and the jury recommended a death sentence. Prior to the judicial sentencing hearing, the petitioner was granted an additional mental health examination that was conducted by a state employee; the report of the examination was filed just two days before the hearing and revealed evidence of neuropsychological problems. The day before the hearing, defense counsel received updated mental health records showing that the petitioner was taking psychotropic and antipsychotic medications. Counsel for the petitioner moved for a continuance based on late disclosure of the new evidence, and the need for expert assistance in reviewing it. The request was denied, and the petitioner was sentenced to death. The Alabama Court of Criminal Appeals subsequently denied the petitioner’s claim that the circumstances violated his right to meaningful expert assistance in violation of Ake v. Oklahoma, 470 U. S. 68

(1985). Under Ake, “when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in evaluation, preparation, and presentation of the defense.” The United States Supreme Court determined that the state court’s rejection of the petitioner’s claim was not entitled to deference under 28 U.S.C. § 2254(d) because “Alabama’s provision of mental health assistance fell so dramatically short of what Ake requires,” and remanded the case to the lower federal court to determine if the violation was prejudicial.

**Virginia v. LeBlanc, 16-1117 (6/12/17)**  
Supreme Court

The petitioner was convicted of rape as a juvenile in Virginia state court and sentenced to life in prison. Under Virginia law, traditional parole is not available for life sentences, but older inmates may obtain geriatric release in some circumstances. The petitioner alleged that his sentence violated Graham v. Florida, 560 U. S. 48 (2010), which prohibits a juvenile offender from receiving a sentence of life without parole for non-homicide offenses. The state courts rejected the petitioner’s claim on the ground that the availability of geriatric release satisfied Graham’s requirements. The Fourth Circuit concluded that the petitioner was entitled to habeas corpus relief, finding that the state court’s reliance on the availability of geriatric release was not entitled to deference under 28 U.S.C. § 2254(d). The Supreme Court reversed, concluding that “it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied Graham’s requirement that juveniles convicted of a non-homicide crime have a meaningful opportunity to receive parole.”

**Weaver v. Massachusetts, 16-240 (6/22/17)**  
Supreme Court

The petitioner was convicted of murder in Massachusetts state court and sentenced to life in prison. During jury selection, the venire was so large that all members of the public who were not potential jurors were excluded from the courtroom, including the petitioner’s mother and her minister. Trial counsel did not raise an objection that the jury selection proceedings violated the petitioner’s right to a public trial, and the issue was not raised on direct appeal. The petitioner subsequently filed a motion for a new trial, alleging that he had been deprived of the effective assistance of counsel due to the failure to object to the closed courtroom. The state courts concluded that the petitioner was required to demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984), notwithstanding the fact that the underlying error was a structural defect that would normally require automatic reversal. The United States Supreme Court affirmed. In order to obtain relief on a claim of ineffective assistance of counsel based on a public trial violation, a petitioner who demonstrates deficient performance must also show a reasonable probability of a different result if the violation had not occurred. The Court left open the question of whether relief might be available in the absence of traditional Strickland prejudice where the error rendered the proceedings fundamentally unfair, but concluded that the petitioner had not shown fundamental unfairness in any event. The denial of relief was therefore affirmed.

**Turner v. United States, 15-1503 (6/22/17)**  
Supreme Court

Seven petitioners were convicted of a single murder in the District of Columbia. The government’s theory at trial was that the victim had been killed in an attack by a large group of

people, and the petitioners had been part of the group. In post-conviction proceedings, the petitioners alleged that the government had violated Brady v. Maryland, 373 U. S. 83 (1963), by withholding evidence that would have supported a defense theory that the victim had actually been killed by a single individual or possibly two people. **The United States Supreme Court concluded that the withheld evidence was not material under Brady.** The government presented numerous eyewitnesses at trial who testified that the victim had been attacked and killed by a large group, and the new evidence, while favorable to the defense, did little to undercut the government's case. Because there was no reasonable probability that the disclosure would have led to a different result at trial, the denial of relief was affirmed.

**Davila v. Davis, 16-6219 (6/26/17)**  
**Supreme Court**

The petitioner was convicted of capital murder in Texas state court and sentenced to death. During the guilt phase of trial, trial counsel objected to a supplemental transferred intent instruction that was given in response to a question from the jury during deliberations. The objection was overruled, and appellate counsel did not raise the issue on direct review. State post-conviction counsel did not raise an allegation that appellate counsel had been ineffective in failing to raise the issue on direct review. In federal habeas corpus proceedings, the petitioner alleged for the first time that appellate counsel had been ineffective in failing to raise the jury instruction claim. Although the claim was procedurally defaulted, the petitioner alleged that the ineffective assistance of his state post-conviction counsel could provide cause to excuse the default under Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013). **The Supreme Court rejected the petitioner's argument, and concluded that Martinez and Trevino do not**

**apply to defaulted claims of ineffective assistance of appellate counsel.**

**In re: Ohio Execution Protocol Litigation, 17-3076 (6/28/17)**

Numerous Ohio death row inmates filed suit under 28 U.S.C. § 1983 challenging Ohio's execution protocol for conducting lethal injections. The District Court granted the plaintiffs' motion for a preliminary injunction and stayed the inmates' executions, finding that the use of midazolam as the first drug in the protocol created an unacceptable risk that the inmates would be subjected to cruel and unusual punishment in violation of the Eighth Amendment. The Sixth Circuit reversed in an *en banc* decision. Under Glossip v. Gross, 135 S.Ct. 2726 (2015), an inmate who challenges a state's method of execution must show that it is "sure or very likely" that he or she will suffer serious pain and needless suffering. The Court found that although the plaintiffs had "shown some risk that Ohio's execution protocol may cause some degree of pain, at least in some people," the plaintiffs had failed to satisfy Glossip's requirement that they show that the protocol was sure or very likely to cause serious pain. As a result, the preliminary injunction was reversed.