

# 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.

## I. Sentencing Issues

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

[United States v. Elmore](#), 12-6418 (2.28.14)

The district court did not arbitrarily impose a 51 month sentence, despite the fact that the court espoused seemingly inconsistent and contradictory comments during the sentencing proceeding. "Engaging with this tension is not a sign of judicial arbitrariness; rather, it is part and parcel of the basic sentencing inquiry. The record indicates that the district judge did not strike an unreasonable or arbitrary balance between these competing factors in Elmore's case."

### B. Guidelines issues

[United States v. Seymour](#), 12-4313 (1.15.14)

It was improper to enhance defendant's Guidelines range under U.S.S.G. § 2K2.1(b)(6) for possession of a firearm in connection with another felony. Defendant's possession of a small amount of narcotics, without any evidence that defendant was in fact trafficking, would not support a finding that the enhancement was proper.

[United States v. Wright et al](#), 12-4445 (3.28.14)

A terrorism enhancement under U.S.S.G. § 3A1.4 was proper, even though conspirators were targeting the "1 percent" (corporate America). The Court determined that "A defendant has the requisite intent if he or she acted with the purpose of influencing or affecting government conduct and planned his or her actions with this objective in mind. [] Long-term planning, however, is not required. [] Nor is it necessary that influencing the government be the defendant's ultimate or sole aim." The Court found that because the conspirators understood that their actions would implicate government interests, the enhancement was proper.

[United States v. Reichert](#), 13-3479 (3.28.14)

The defendant was charged with violations of copyright laws for adding in chips to game systems which allowed users to bypass copyright restrictions. The Court found that defendant could be given a "special skills" enhancement under U.S.S.G. § 3B1.3, even though the defendant was a

truck driver with a high school diploma. The defendant's actions in self-teaching, requiring the skills necessary to make modifications to game systems so as to bypass copyright protections, fell within the Guideline.

**C. Procedural matters**

**United States v. Cooper**, 12-6522/13-5535 (1.7.14)

The Supreme Court's pronouncement in *Alleyne v. United States*, 133 S.Ct. 2151 (2013)(that facts that increase the mandatory minimum sentence must be proven to a jury beyond a reasonable doubt) does not apply to enhancements under the Sentencing Guidelines.

**D. Recidivism enhancements**

**United States v. Cooper**, 12-6522/13-5535 (1.7.14)

A prior Tennessee conviction for aggravated assault was not categorically a crime of violence for purposes of the Career Offender Guidelines, as it was a divisible statute which captured conduct broader than the generic form of the offense. However, analysis of *Shepard* documentation showed that the defendant plead guilty to a form of the offense that met the generic standard; therefore, it was countable under the Guideline.

**United States v. Mateen**, 12-4481 (1.7.14)

For purposes of increasing the statutory minimum and maximum sentences under 18 U.S.C. § 2252(b)(2), the term "involving a minor or ward" applies to all prior offenses that are aggravated sexual abuse, sexual abuse, or abusive sexual conduct. Therefore, unless the prior offense required as an element that a minor be involved, it could not be used for enhancement. Thus, the defendant's prior Gross Sexual Imposition conviction under Ohio law was not a proper qualifying prior conviction.

**United States v. Black**, 12-2373 (1.15.14)

The defendant argued that because one of the weapons he possessed, a Draco 7.62 caliber pistol, was originally a "pistol" within the meaning of 26 U.S.C. § 5845(e), that it could not be used to enhance his sentence under the ACCA, despite the fact that the weapon had been altered from its original state. The Court rejected this reading of the statute, finding "In this case, a pistol was actually altered in such a way that it became a weapon subject to the sentencing enhancement within the catchall provision of § 5845(e). We are unable to divine any reason why Congress would exclude such altered pistols from the definition of weapons triggering the sentencing enhancement."

**Howard v. United States**, 13-1602 (2.20.14)

Defendant's prior juvenile adjudication for unarmed robbery and retail fraud, for which he was originally placed on probation but later sent to a boy's school, could count as a "sentence of confinement", so as to qualify for criminal history points under U.S.S.G. § 4A1.2. The defendant argued that the prior adjudication was not a sentence of confinement, nor was he "placed" in a

facility. The Court found that “[t]he focus of our attention must be on whether a child’s confinement is the direct legal consequence, as determined by a judicial body, of wrongdoing”, and that under this standard, the prior adjudication was properly counted.

**United States v. Mitchell**, 13-5288 (2.28.14)

The defendant’s two prior robbery convictions under Tennessee law both were violent felonies for purposes of the ACCA. The Court found that state law was authoritative in determining the meaning of elements of the state offense. After reviewing Tennessee appellate precedent, the Court determined that “the commission of a robbery through fear, which in Tennessee reduces to the fear of bodily injury from physical force offered or impending, directly corresponds to § 924(e)(2)(B)(i)’s ‘use . . . or threatened use of physical force.’ Moreover, it is clear that the harm characterized in the Tennessee statutes is of a physical nature, rather than emotional harm or distress.” The Court found that, in light of the language of the statute, there was no reason to apply the modified categorical approach.

## **II. Plea matters**

### **C. Hearings**

**United States v. Abdulmutallab**, 12-1207 (1.13.14)

The district court was not required to hold a competency hearing prior to taking the defendant’s guilty plea, even though the defendant’s competency had been questioned in the case before (and resolved in favor of competency), and defendant expressed hesitancy about taking a plea or mounting a defense. There was no indication in the record of erratic behavior, and “Abdulmutallab’s apparent waiver between desiring to mount a defense and pleading guilty is not indicative of incompetence, but is indicative of the complicated decision of trial strategy of a defendant proceeding pro se.”

## **III. Evidence**

### **A. Article IV - Relevancy**

**United States v. Willoughby**, 12-3822 (1.30.14)

The district court erred in excluding evidence under FRE Rule 412 that the minor victim in a prostitution case had previously accused another person of rape, only to recant it. The Court found that Rule 412 did not apply, because the evidence was not offered up to prove the victim’s sexual predisposition, but rather prove that she had lied in the past, and was lying again at trial. However, in light of the other evidence presented at trial, the evidentiary ruling was harmless.

## **IV. Fourth Amendment**

### **A. Reasonable Expectation of Privacy**

**United States v. Fisher**, 13-1623 (3.7.14)

Although officer's use of a GPS tracking device violated the Fourth Amendment, their actions did not require suppression of the evidence obtained. At the time of the use of the GPS, prevalent caselaw supported use of the GPS, with the Supreme Court not announcing the rule on GPS use in *United States v. Jones* until after the officers' conduct. Therefore, the good faith exception applied.

## **B. Reasonable Suspicion/Vehicle Stops**

### **United States v. McMullin, 12-2300 (1.21.14)**

Officers had a proper basis to stop and frisk the defendant: officers were responding to a breaking and entering, the defendant was outside the home near the window, and officers indicated that in their experience, burglary suspects were often armed.

## **E. Search Warrants**

### **United States v. Duval, 12-2338 (2.7.14)**

Pursuant to Criminal Rule 41(b), an agent should apply to "a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district" to issue a warrant. The officer who obtained a search warrant was a state officer who was temporarily "attached" to the DEA office in Toledo. He applied directly to a state magistrate, and there was no evidence that a federal magistrate was unavailable. Despite this, the Court found that the officer was a state actor, seeking a state warrant for a violation of state law; therefore, Rule 41 was not violated.

## **V. Fifth Amendment**

No relevant opinions this period

## **VI. Sixth Amendment**

No relevant opinions this period

## **VII. Other Constitutional Rulings**

No relevant opinions this period

## **VIII. Defenses**

No relevant opinions this period

## IX. Jury Issues

### B. Juror Bias/Misconduct

United States v. Shepard, 11-4399 (1.7.14)

Where a juror initially indicated that they could be fair and impartial, but later expressed to the court during trial that they could not view pictures of child pornography (part of the evidence of the case), the court erred in not dismissing the juror for cause. “In light of this evidence of bias and inability to follow the dictates of the oath, we conclude that the district court abused its discretion in denying Shepard’s request to have Juror 29 removed from the jury. In order to preserve the sanctity of the defendant’s Sixth Amendment right to be tried by a fair and impartial jury, it thus becomes necessary to reverse the defendant’s conviction.”

## X. Probation/ Supervised Release

No relevant opinions this period

## XI. Appeal

United States v. Winans, 13-1311 (3.17.14)

An appellate waiver provision in a plea agreement which stated that “If the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant also waives any right he may have to appeal his sentence” served to waive any right to appeal the order of restitution. The Court reasoned that restitution was part of the sentence imposed, and that the waiver provision certainly applied.

## XII. Specific Offenses

Burrage v. United States, 12-7515 (1.27.14) **United States Supreme Court**

In order to enhance a defendant’s mandatory sentencing range under 21 U.S.C. § 841 if “death results”, it must be proven to a jury beyond a reasonable doubt as an element of the offense. Further, the Government must prove “but-for causality” for the enhancement to apply: “We hold that, at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U. S. C. §841(b)(1)(C) unless such use is a but-for cause of the death or injury.”

United States v. Romero-Caspeta, 12-2690 (2.28.14)

The defendant’s removal from the United States specified that if he attempted to re-enter the United States within 5 years, he needed to obtain the express approval of the Attorney General. The defendant waited until after the 5 year period, and then re-entered. He was charged under 8 U.S.C. § 1326(a), and claimed as his defense the fact that he need not obtain permission. The Court held that “Section 1182 does not give a previously removed alien carte blanche to reenter

the United States at his leisure five years or more after he has been removed without the express consent of the Attorney General”, and therefore, this was not a legal defense to the charge.

**Rosemond v. United States, 12-895 (3.5.14) United States Supreme Court**

A defendant aids or abets using or carrying a firearm under 18 U.S.C. § 924(c) when the defendant actively participated in the underlying drug trafficking crime and knew that his co-conspirator would use or carry a firearm. The Court determined that this must be advanced, actual knowledge that a firearm will be involved. “[W]hen an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.”

### XIII. Post-Conviction Remedies

#### United States Supreme Court decisions:

**Hinton v. Alabama, 13-6440 (2.24.14)**

Knowingly using an unqualified expert constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), where trial counsel could have obtained adequate funding for a qualified expert under state law, but failed to do so.

#### Sixth Circuit decisions:

**Abby v. Howe, 12-1437 (1.30.14)**

A state court does not act contrary to or unreasonably apply clearly established federal law by denying a continuance and forcing a defendant to proceed to trial with only one of his two retained attorneys. Although the erroneous denial of retained counsel of choice is a structural defect under *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), “the discretion that trial courts hold over their calendars remains vast.” If the denial of the requested continuance was reasonable under the circumstances, habeas corpus relief will not be warranted.

**Christian v. Wellington, 12-3718 (1.7.14)**

The defendant was charged with multiple counts of felonious assault and complicity to felonious assault in Ohio state court. The jury acquitted the defendant of the felonious assault charges, but could not reach a verdict with respect to complicity to felonious assault. The prosecution sought to retry the defendant on the complicity charges, and the defendant moved to bar reprosecution on double jeopardy grounds. Under *Blockburger v. United States*, 284 U.S. 299 (1932), statutory offenses are separate crimes for the purposes of the Double Jeopardy Clause if each offense requires proof of a fact that the other does not. The Court concluded that felonious assault under Ohio Revised Code § 2903.11(A) and complicity to felonious assault under O.R.C. § 2923.03(A) did not constitute the same offense under *Blockburger*. As a result, the Double Jeopardy Clause did not preclude a second prosecution on the charges of complicity to felonious assault. The

defendant's collateral estoppel claim under *Ashe v. Swenson*, 397 U.S. 436 (1970), was also rejected.

**Jackson v. Smith**, 11-4146 (3.7.14)

The Double Jeopardy Clause prohibits multiple punishments for the same criminal act unless multiple punishments have been authorized by the state legislature. Furthermore, the test set out in *Blockburger v. United States*, 284 U.S. 299 (1932), does not apply in this context unless the state legislature has elected to adopt it. "What determines whether the constitutional prohibition against multiple punishments has been violated is the state legislature's intent concerning punishment." Ohio's allied offense statute, O.R.C. § 2941.25, sets out the Ohio General Assembly's intent regarding multiple punishments, and as a result it controls double jeopardy claims of that nature.

**King v. Berghuis**, 12-1486 (2.20.14)

Federal habeas corpus petitioners are normally required to exhaust their claims in state court before they can be considered in federal court. Under 28 U.S.C. § 2254(b)(3), the State can waive exhaustion. However, the State's past conduct will not ordinarily amount to a prospective waiver of a newly raised claim.

**Miller v. Stovall**, 12-2171 (2.11.14)

The Court previously granted relief in this case after concluding that the admission of a suicide note violated the defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). See *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010). The Supreme Court subsequently vacated and remanded for further consideration in light of *Greene v. Fisher*, 132 S.Ct. 38 (2011). Following a remand to the district court, the Court concluded that *Greene* required the petitioner's claim to be analyzed under the pre-*Crawford* Confrontation Clause framework set out in *Ohio v. Roberts*, 448 U.S. 56 (1980). The Court further concluded that the state court's disposition of the claim did not contravene or unreasonably apply the *Roberts* framework, and that habeas corpus relief was therefore unwarranted.

**Sutton v. Carpenter**, 12-6310 (3.19.14)

*Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), apply to Tennessee's post-conviction framework. As a result, the ineffective assistance of state post-conviction counsel can provide cause to excuse a procedural default in federal habeas corpus cases that originated in Tennessee.