

## PRECEDENTIAL VALUE

Federal Public  
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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

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

##### **U.S. v. Pirosko, 14-3402 (5/21/15)**

The defendant was convicted of child porn offenses and received an enhancement at sentencing for distribution of child porn under USSC § 2G2.2(b)(3) based on the use of a file sharing program. On appeal, the court held that **evidence is sufficient for an enhancement for distribution of child porn when it shows that the defendant had child porn in a shared folder, the defendant knew that others could download it, and another person did, in fact, download it.** The court held that the government's evidence proved that the defendant's child porn was contained in a shared folder in a peer to peer file sharing program, that he knew or should have known that others could access it, and that a government agent did actually download it. Accordingly, application of the enhancement was affirmed.

##### **U.S. v. Abbring, 14-1987 (6/9/15)**

The defendant was convicted of receipt of child pornography for using a file sharing program called Ares to download child porn. Unlike other file sharing programs, Ares does not permit users to disable the sharing feature. Thus, in order to try to avoid sharing the child porn he downloaded, the defendant would transfer child porn files out of the sharing file to another location on his computer once downloaded. Ares would not permit this transfer, however, while the file was downloading, and thus other individuals could receive the child porn from the defendant's file sharing as the file was downloading. As a result of this process, the district court imposed a two level enhancement under USSG § 2G2.2(b)(3) for distribution of child porn. On appeal, the court held that use of the file sharing program constituted distribution. Specifically, the court ruled that the two level enhancement required only the defendant's knowledge, as opposed to specific intent, that the file sharing program permitted others to download the images. **Because the defendant knew that the images were capable of being downloaded while he was receiving them, and because child porn was actually downloaded from the defendant by**

others, the enhancement was applicable. The court also noted that, because the defendant received the two level enhancement for distribution, he was necessarily ineligible for the two level reduction under USSG § 2G2.2(b)(1) for merely receiving or soliciting child porn. As such, the defendant's sentence was affirmed.

### **2G2.2(b)(5) – Child Porn – Pattern of Activity**

#### **U.S. v. Pirosko, 14-3402 (5/21/15)**

The defendant was convicted of child porn offenses and at sentencing he received the five level enhancement under USSG § 2G2.2(b)(5) for engaging in a pattern of activity involving the sexual abuse or exploitation of minors. On appeal, the court held that the enhancement applies if the defendant engaged in any two or more instances of such abuse, regardless of whether or not the instances were part of the instant offense, involved the same minor, or resulted in a conviction. The court found that the enhancement was applicable because the defendant had a prior conviction for sexual abuse and because the defendant's two daughters submitted letters to the court at sentencing detailing the defendant's sexual abuse of them. The court found that the letters were sufficient evidence to support the enhancement and that the defendant had not refuted their accuracy. Accordingly, the five level enhancement was affirmed.

### **2G2.2(b)(7) – Child Porn – Number of Images**

#### **U.S. v. Pirosko, 14-3402 (5/21/15)**

The defendant was convicted of child porn offenses. At sentencing, the district court imposed a five level enhancement under USSG § 2G2.2(b)(7) based, in large part, on child porn images found on the unallocated space on a USB device located in the defendant's hotel room. On appeal, the court held that the government had presented sufficient evidence to support the

enhancement based on an exhibit attached to the government's sentencing memorandum which showed when the various files on the USB device had been created, modified, and accessed. The court ruled that it is common knowledge that a USB drive functions as an external storage device, that drives store files when individuals place those files on the device, and that the drives "do not come pre-loaded with child porn." Accordingly, the court found that the defendant possessed the images and the district court's application of the enhancement was not clear error.

### **3E1.1 – Acceptance of Responsibility**

#### **U.S. v. Reed, 14-2071 (6/5/15)**

The defendant was convicted of wire fraud for bilking investors out of a million dollars based on a fraudulent scheme to find gold buried in the Philippines. The defendant pled guilty, but during the sentencing proceedings he minimized his culpability and continued to insist that the scheme was legitimate and that "there was gold in those hills." As a result, the district court denied the defendant's reduction for acceptance of responsibility under USSG § 3E1.1(a). On appeal, the court held that a defendant must clearly demonstrate acceptance of responsibility and may not falsely deny or frivolously contest relevant conduct. The court found that the district court properly determined that the defendant minimized his role in the offense and that the reduction for acceptance of responsibility was not warranted. Thus, the defendant's sentence was affirmed.

## II. Plea matters

### A. Agreements

#### District Court Involvement

##### U.S. v. Ushery, 14-5046 (5/6/15)

The defendant was charged with distribution of crack cocaine and appeared before the district court for a guilty plea hearing. The defendant expressed discontent with the plea agreement and the district court oversaw plea discussions between the government and the defense, including the striking of an appeal waiver provision and forfeiture language, and discussing with the defendant the career offender provision and the third point for acceptance of responsibility. Ultimately, the defendant decided to plead guilty at the hearing. He did not object to the district court's involvement in the plea negotiations at any point in the district court, but raised the issue for the first time on appeal. **The court found that the district court did not follow "best practices" under Fed. R. Crim. P. 11 for plea discussions. Nonetheless, the court ruled that no plain error occurred because the defendant would have entered into the plea agreement even without the district court's involvement.** Accordingly, the conviction was affirmed.

### B. Breach of plea

##### U.S. v. Reed, 14-2071 (6/5/15)

The defendant was charged with wire fraud for misrepresenting to investors that he had a line on a secret dig site in the Philippines where the Japanese Army had buried gold during WWII. The government agreed in a plea agreement to make a non-binding recommendation to the district court that the defendant receive a three year sentence in return for the defendant's plea of guilty. Prior to sentencing, the government filed a sentencing memorandum and did not mention the three year recommendation. Further, at

sentencing, the government argued how untrustworthy the defendant was and how he injured so many people. At the end of the sentencing hearing, the defendant objected because the government had not recommended the 3 year sentence. At that point, the government recommended that the court impose a three year sentence. The district court then imposed a sentence of over seven years in prison. On appeal, the court held that the prosecutor did not violate the plea agreement in belatedly making the recommendation for the 3 year sentence. **The court found that the plea agreement only required the prosecutor to make the recommendation; he was not required to make it enthusiastically.** Accordingly, the defendant's sentence was affirmed.

## III. Evidence

### A. Article IV – Relevancy

#### 404(b)

##### U.S. v. English, 14-1255 (5/4/15)

The defendant was the CEO of a medical clinic who was charged with medicare fraud. At trial, **the government introduced two prior instances of medicare fraud involving the defendant under FRE 404(b).** On appeal, the court held that the prior instances of Medicare fraud were properly admitted to show intent, knowledge, and absence of mistake. The Medicare fraud statute requires that the defendant act "knowingly and willfully," and **during the trial the defendant's intent was the central issue in the case.** Further, the court found that the district court gave a proper limiting instruction regarding the jury's use of the evidence. Finally, the court ruled that the evidence of the defendant's guilt was otherwise overwhelming and thus any error was harmless. Accordingly, the conviction was affirmed.

## B. Articles VI-VII - Witness and Expert

### 701/901(b)(2) – Handwriting

#### U.S. v. Harris, 14-1288 (5/13/15)

The defendant was charged with writing a threatening letter to a congresswoman. At trial, the district court permitted the testimony of three witnesses, one of whom was the case agent, identifying the handwriting on the letter as belonging to the defendant. On appeal, the court held that the testimony was admissible under both FRE 701 and 902. First, the court found that the evidence was admissible under FRE 701 because each of the witnesses had personal knowledge of the defendant's handwriting based on their knowledge of other correspondence that was written by the defendant. Further, the testimony was helpful to the jury in that the witnesses each had more time to evaluate the handwriting than the jury at trial, the jury had the handwriting samples to compare themselves, and the witnesses were subject to cross examination about their testimony. Second, the court found that the evidence was admissible under FRE 901(b)(2) because the witnesses each had sufficient familiarity with the defendant's handwriting, and that familiarity was not obtained "for the purposes of the litigation." Specifically in this regard, the court ruled that the case agent obtained his familiarity with the defendant's handwriting "in his capacity as a law enforcement officer attempting to solve a crime," even though it was the very investigation that led to the defendant's prosecution. Thus, the admission of the evidence was affirmed.

## D. Discovery/Miscellaneous

### Motions to Compel Discovery

#### U.S. v. Pirosko, 14-3402 (5/21/15)

The government utilized a law enforcement computer software surveillance system called

ShareazaLE to monitor and investigate the defendant's use of a file sharing program to receive and distribute child porn. Through use of this software, the government was able to download shared child porn files from the defendant on numerous occasions. Prior to trial, the Defendant moved to compel production of a copy of the government software used to conduct the investigation in order to assess whether it had the ability to manipulate computer settings and override shared file settings, and to determine the error rate of the software. The district court ruled that the government had a privilege in its proprietary software and that the defendant had not shown the materiality for his request. On appeal, the court held that, in assessing a privilege claim related to discovery of proprietary software, the court must balance the government's concerns against the needs of the defendant. In this regard, the court found that the government's needs to protect the integrity of its surveillance system were high and the defendant provided absolutely no evidence of government error or wrongdoing in the investigation. Thus, the court found that the denial of the motion to compel on this basis was proper. Further, the court held that the defendant had not shown that the evidence was material to his defense at trial because he was charged with receipt or distribution of child porn, and the requested evidence would have done nothing to refute receipt charge. Moreover, the evidence was clear that the defendant had distributed child porn through the file sharing program. Thus, the conviction was affirmed.

## IV. Fourth Amendment

### A. Reasonable Expectation of Privacy

#### U.S. v. Pirosko, 14-3402 (5/21/15)

The defendant was charged with child porn offenses and he raised for the first time on appeal that the government violated his Fourth

Amendment rights by monitoring his peer to peer (P2P) file sharing program, which contained child porn. The court first held that the issue was likely waived by failing to raise it in the district court. Nonetheless, the court decided on the merits that **the defendant had no reasonable expectation of privacy in child porn contained in a file sharing program.** Accordingly, his conviction was affirmed.

### C. Warrant Exceptions

#### Private Search

##### U.S. v. Lichtenberger, 14-3540 (5/20/15)

The defendant was arrested at his girlfriend's house for failing to register as a sex offender. After his arrest, his girlfriend opened his laptop computer, hacked his password, and searched it, finding child porn. She then called the police. When the police arrived, she explained what she had found. The officer asked her to open the laptop and display what she had seen. She showed the officer four or five pictures of child porn, but neither she nor the officer were sure that they were the same pictures that she had viewed previously that day. The defendant was prosecuted for the child porn images, the district court suppressed the evidence, and the government appealed. The court held that the Fourth Amendment allows officers to view evidence that was first found by private individuals as long as there was no government involvement in the private search and the government does not exceed the scope of the private search. In assessing whether the government exceeded the scope of the private search, the court must also consider "how much evidence the government stands to gain when it re-examines the evidence and, relatedly, how

certain it is regarding what it will find." The court found that **the officers exceeded the scope of the private search because it could not be ascertained exactly which images the girlfriend had viewed and whether the officers actually viewed different or additional images.** Further, the court ruled that the situation lacked the risks that support an immediate search of the laptop because the defendant had already been arrested, the images were not in danger of erasure, deterioration, or contamination, and the laptop presented no immediate, cognizable threat to any person. Accordingly, suppression of the evidence was affirmed.

### V. Fifth Amendment

#### E. Miscellaneous Fifth Amendment

##### Due Process – Defendant's Presence

##### U.S. v. Ushery, 14-5046 (5/6/15)

The defendant was charged with drug trafficking and the district court held a pretrial conference with counsel, but without the defendant, to discuss how the case was going to proceed and for the scheduling of a plea hearing. The defendant later argued on appeal that his rights to due process were violated based on him being excluded from the pretrial conference. The court held that under the Due Process Clause and Fed. R. Crim. P. 43 a defendant has a right to be present at critical stages of the case including (1) initial appearance, arraignment, and plea hearing, (2) every trial stage including jury empanelment and return of the verdict, and (3) sentencing. **The court found no error in the defendant's exclusion from the pretrial conference under the Due Process Clause or Rule 43, and thus the conviction was affirmed.**

## Due Process – Outrageous Gov Conduct

### U.S. v. Napier, 14-3492 (5/20/15)

The defendant was charged with child porn offenses and arrested by the FBI. He promptly asserted his right to counsel, and was appointed a federal public defender. The federal prosecutor then encouraged state authorities to initiate a state prosecution of the defendant for crimes related to the same criminal conduct. The prosecutor had the defendant transferred by the U.S. Marshals to a different county jail to be interrogated by the state investigators. The defendant asserted his right to counsel 17 times during the state interrogation, his requests were ignored, and he ultimately confessed to the crimes. The defendant moved to dismiss the federal charges based on outrageous government conduct for the prosecutor's intentional violation of his Sixth Amendment right to counsel, and the district court denied the motion. On appeal, the court held that **the prosecutor's conduct, while inappropriate, did not rise to the level that it shocked the conscience of the court such that dismissal of the indictment was warranted.** The court ruled that the district court's determination that the defendant's confession should be suppressed for all purposes was proper and a sufficient remedy for the violation of the defendant's rights. Accordingly, the conviction was affirmed.

## VI. Sixth Amendment

### B. Confrontation Clause

#### Ohio v. Clark, 13-1352 (6/18/15) Supreme Court

The defendant was charged with child abuse offenses and at trial the state introduced the hearsay testimony of a three year old identifying

the defendant as the person who caused the injuries. The testimony was introduced through a teacher who had asked the child about injuries in an effort to determine who had injured him and whether he was currently in danger. The state appellate courts reversed the conviction finding that the hearsay testimony admitted through the teacher violated the Confrontation Clause and the Supreme Court granted certiorari. The Court first ruled that statements to non-law enforcement officers, such as teachers, did not carry the same concerns under the Confrontation Clause analysis and were generally not likely to be considered testimonial in nature due to the informality of the situation. As related to the facts of the case, the Court found that **the statements to the teacher were not made for the primary purpose of testimony, but instead were to deal with a potential ongoing emergency and to protect the child.** Additionally, the Court ruled that it was unlikely that the statements of a three year old child would ever be considered testimonial because such statements were not considered to be testimonial under the common law. Accordingly, the testimony was properly admitted at trial, and the defendant's conviction was reinstated.

## VII. Other Constitutional Rulings

### A. Commerce Clause

#### U.S. v. Maliki, 14-3386 (5/27/15)

The defendant was charged with sexually abusing his two children during a trip to Iraq, pursuant to 18 USC § 2423(c). The indictment charged that the defendant (1) traveled in foreign commerce, and (2) engaged in illicit sexual conduct. Upon his conviction, the defendant raised for the first time on appeal that the statute was beyond Congress' power to regulate foreign commerce under the Commerce Clause. The Sixth Circuit held that, **because the statute regulated non-economic activity, it would have found a**

constitutional violation had the defendant preserved the issue in the district court. The court found that the statute merely attempted to regulate purely intracountry conduct after the lawful traveling in commerce had ended, and thus it was neither a proper regulation on the means or channels of interstate commerce. The court emphasized that there can't be a "generalized federal crime for traveling in interstate commerce with no illicit purpose and then, after a few months, committing illicit sexual conduct with a minor." The court ruled, however, that the error was not plain because the statute had not previously been found unconstitutional by a court. Thus, since the defendant did not raise the objection in the district court, his conviction was affirmed.

## X. Probation/ Supervised Release

### Conditions of Release

#### U.S. v. Widmer, 13-6283 (5/6/15)

The defendant was convicted of receipt of child porn images. At sentencing, the district court imposed a special condition of supervised release that the defendant have no contact with minor children, including his daughter, without the approval of his probation officer. On appeal, the court held that a condition of supervised release must (1) be reasonably related to a statutory sentencing factor, (2) involve no greater deprivation of liberty than reasonably necessary, and (3) be consistent with any pertinent policy statements in the guidelines. The court found that the district court clearly articulated its belief the defendant was a risk to children because of his receipt and viewing sadistic images of child porn. Further, the court found that the district court's concerns were sufficient to overcome the defendant's constitutional right to familial association and that the condition was narrowly tailored to address those concerns. Accordingly, the sentence was affirmed.

## Supervised Release Violations

#### U.S. v. Givens, 14-5122 (5/15/15)

The defendant was charged with violating his supervised release for trying to run into a victim with his car. The victim testified at the Defendant's violation hearing, and the defendant then sought to introduce a police report and a Secret Service report that called into question the victim's credibility. The district court excluded the reports as hearsay and found the defendant guilty of violating his supervised release. On appeal, the court held that it is not reversible error for a district court to exclude hearsay evidence at a supervised release violation hearing. The court ruled that, while a violation does not carry the same procedural protections as a criminal trial, the district court is permitted, although not required, to exclude hearsay that it finds to be unreliable in a violation hearing. Accordingly, the district court's ruling excluding the evidence and revoking the defendant's supervised release was affirmed.

## XII. Specific Offenses

### 18 USC § 875(c)–Threatening communication

#### Elonis v. U.S., 13-983 (6/1/15)

#### Supreme Court

The defendant was charged with making threatening communications, pursuant to 18 USC § 875(c), for posting rap lyrics under the pseudonym "Tone Dougie" that were threatening toward his ex-wife, police officers, and FBI agents, among others. At trial, the defendant testified that he had no intention to threaten anyone when he posted the lyrics on Facebook, but instead that he was merely imitating the performer Eminem, who expressed fantasies about killing his wife in his lyrics. The district court instructed the jury that the defendant could be convicted if a reasonable person would have perceived the postings as a serious expression of

an intent to inflict bodily harm. The defendant was convicted and lost his appeal, and the Supreme Court granted certiorari. The Court held that, although the statute does not explicitly impose a mental state required for commission of the offense, such a mens rea should be read into Congress' use of the term threat. The Court found that the instruction provided by the district court was improper because it allowed conviction based on an objective view of whether the statement was threatening instead of focusing on the defendant's subjective intent. **The Court thus ruled that the government must prove a culpable mental state for the defendant, but the Court stopped short of defining the precise mental state required. Instead, the Court merely held that negligence was insufficient to satisfy the requirement, and that the issue of the appropriate mental state was left to be determined by the lower courts.** Accordingly, the defendant's conviction was reversed.

#### **18 USC § 924(e) – ACCA – Vagueness**

**Johnson v. U.S., 13-7120 (6/26/2015)**  
**Supreme Court**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that he qualified for the enhancement under the ACCA based, in part, on a prior conviction for possession of a short-barreled shot gun. The sentence was affirmed by the Eighth Circuit and the Supreme Court granted certiorari. The Court held that the “residual clause” of the ACCA was unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The “residual clause” makes a prior conviction a violent felony if it “involves conduct that presents a serious potential risk of physical injury to another.” The Court found that, based on the “indeterminacy of the wide-ranging inquiry” required by this provision, it denied fair notice to criminal defendants and invited arbitrary enforcement by courts. Accordingly,

the “residual clause” provision was stricken by the Court as unconstitutionally vague and the defendant's sentence was vacated.

Editor's Note: The Sixth Circuit recently held in an unpublished decision in **United States v. Darden, No. 14-5537 (6th Cir. 2015)** that **Johnson** applies to the career offender guideline provision as well.

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

**U.S. v. Medlock, 14-5084 (5/13/15)**

The defendants were ambulance drivers who submitted forms to Medicare claiming that transports of certain patients were medically necessary when in fact they were not. The defendants were convicted for, among other things, aggravated identity theft for fraudulently using the patients' names on the Medicare forms. On appeal, the court held that the use of the patients' names on the forms did not constitute aggravated identity theft as a matter of law. **Because the defendants did, in fact, transport the Medicaid patients (albeit unjustifiably), the insertion of their names on the Medicare forms could not constitute unlawful “use” of the identity of another for purposes of the aggravated identity statute. The court ruled that “use” requires some form of active employment, and requires the defendants’ “reference to a means of identification in his possession for the purpose of committing the crime.”** Accordingly, their convictions on these counts were reversed.

#### **18 USC § 1349 – Conspiracy–Medicare Fraud**

**U.S. v. English, 14-1255 (5/4/2015)**

The defendant was the programs director for a medical clinic who was convicted for conspiracy to commit Medicare fraud. He argued on appeal that the evidence did not support the verdict that he was involved in the conspiracy. The court held that the government could prove a Medicare

fraud conspiracy by showing that the defendant knowingly and voluntarily joined the conspiracy via an explicit agreement or a “tacit or mutual understanding.” The court found that proof established that the defendant was the third ranking officer at the clinic, that he diagnosed patients with mental illness in order to get drugs when they had no mental illness, that he assisted in making false documents, and that he admitted to the FBI that he billed Medicare for treatment that was never provided. Accordingly, the court found the evidence sufficient to support his involvement in the conspiracy and affirmed the conviction.

### **18 USC § 2155(a) – Sabotage Act**

#### **U.S. v. Walli, 14-5220 (5/8/2015)**

The defendants were an 82 year old nun and two other individuals who were nuclear arms protestors. They broke through fences at a uranium storage plant in Tennessee and spray painted, put up banners, and banged hammers on the side of a building. They then waited peacefully to be arrested. They were charged first with trespassing and damaging government property, but when they refused to plead guilty the government charged them with a felony under the Sabotage Act. The defendants were convicted at trial and the district court sentenced them to sentences ranging from 35 to 62 months in prison. On appeal, the court held that the Sabotage Act has two elements: (1) injury to national-defense premises (2) with the intent “to interfere with the national defense.” The court ruled that the second element -- intent to injure the “national defense” -- required the government to prove that the defendants intended to harm the “nation’s capacity to wage war and defend attacks.” Given that the Tennessee uranium storage facility served no function related to waging war or defending against attacks, the court found as a matter of law that the defendants could not be convicted of the Sabotage Act charge.

Accordingly, their convictions on this count were reversed. Thus, the court remanded the case for a full resentencing given that the sentence for the Sabotage Act count may have directed the length of the sentence on the damaging government property count.

### **18 USC 2251 and 2252 – Interstate Commerce**

#### **U.S. v. Napier, 14-3492 (5/20/15)**

The defendant was charged with a number of counts related to production and transportation of child porn. At trial, the government relied on time stamps on emails showing Eastern Time Zone and Pacific Time Zone, which the government claimed showed that the child porn was transported across state lines via email. Further, the government relied on the fact that some of the child porn was sent from a smart phone with a “made in Taiwan” stamp. On appeal, the court held that these methods of proving interstate commerce were sufficient. The court ruled that, given the omnipresent nature of the internet, interstate nexus is not a difficult burden for the government in a child porn case. Accordingly, the conviction was affirmed.

### **21 USC § 841–Controlled Substance Analogue**

#### **McFadden v. U.S., 14-378 (6/18/15)**

#### **Supreme Court**

The defendant was charged with distribution of “bath salts,” which affected users in a similar fashion to cocaine and crystal meth. The district court instructed the jury at trial that it could convict the defendant if “the defendant knowingly and intentionally distributed a mixture or substance that has substantially similar effects on the nervous system as a controlled substance and that the defendant intended for the mixture or substance to be consumed by humans.” The defendant was convicted, the Fourth Circuit affirmed, and the Supreme Court granted certiorari. The Court held that the government

was required to prove, in a § 841 prosecution for a drug analogue, that the defendant knew that the substance was a controlled substance analogue under the CSA or the Analogue Act, or that the defendant knew the specific features of the substance that made it a controlled substance analogue. Accordingly, the Court held that the district court's jury instruction was error and reversed the defendant's conviction.

### XIII. Post-Conviction Remedies

#### Davis v. Ayala, 13-1428 (6/18/15)

##### Supreme Court

The petitioner was convicted of murder in California state court and sentenced to death. During jury selection, the defense raised objections under Batson v. Kentucky, 476 U.S. 79 (1986), alleging that the prosecution's peremptory challenges were racially motivated. The trial court then permitted the prosecution to explain the basis for the challenges outside the presence of defense counsel. The California Supreme Court concluded that even if the petitioner's federal rights had been violated by the exclusion of defense counsel, any error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). The Ninth Circuit subsequently concluded that the *ex parte* nature of the hearing qualified as a federal constitutional violation, and that it was not harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). The Supreme Court reversed, concluding that even if the exclusion of defense counsel did constitute a federal error, it was harmless under Brecht, and that the California Supreme Court's application of Chapman was entitled to deference under 28 U.S.C. § 2254(d).

#### Brumfield v. Cain, 13-1433 (6/18/15)

##### Supreme Court

The petitioner was convicted of murder in Louisiana state court and sentenced to death. The

petitioner subsequently raised a claim of intellectual disability under Atkins v. Virginia, 536 U.S. 304 (2002), in state post-conviction proceedings. The state trial court dismissed the claim without a hearing, concluding that the petitioner failed to make a threshold showing of intellectual disability under Atkins. The district court concluded that the state court ruling was not entitled to deference under 28 U.S.C. § 2254(d) and granted relief, but the Fifth Circuit reversed. The Supreme Court reversed, concluding that the state court's finding that the petitioner failed to make a preliminary showing of intellectual disability constituted an unreasonable determination of the facts within the meaning of § 2254(d)(2), and as a result AEDPA did not preclude relief.

#### Glossip v. Gross, 14-7955 (6/29/15)

##### Supreme Court

Several Oklahoma state prisoners filed suit under 42 U.S.C. § 1983, alleging that Oklahoma's use of midazolam as a sedative in its lethal injection protocol violated the Eighth Amendment because it would not prevent them from feeling extreme pain associated with the other protocol drugs. The Supreme Court found that the plaintiffs were not entitled to a preliminary injunction for two reasons. First, the plaintiffs "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims." Second, the evidence in the record did not establish that the use of midazolam would create a demonstrated and substantial risk of severe pain, as required by Baze v. Rees, 553 U.S. 35 (2008).

#### Bales v. Bell, 13-2404 (6/10/15)

The petitioner was convicted of criminal sexual conduct in Michigan state court. Following trial, the petitioner raised a claim under Brady v.

Maryland, 373 U.S. 83 (1963), alleging that the government failed to disclose information that could have been used to impeach a prosecution witness. However, where “the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.” The petitioner’s trial attorney cross-examined the prosecution witness extensively and impeached her with her testimony from a prior trial, and the new evidence did not undermine confidence in the verdict. As a result, the Sixth Circuit concluded that the impeachment evidence did not provide a basis for habeas corpus relief.

**Barton v. Warden, 12-4003 (5/15/15)**

The petitioner was convicted of involuntary manslaughter and aggravated burglary in Ohio state court. The sole witness against the petitioner was a career criminal who alleged that the petitioner hired another criminal to stage a burglary at his home; the witness claimed that the petitioner’s wife interrupted the staged burglary and was shot when the hired criminal and another accomplice panicked. Following trial, the petitioner raised a claim under Brady v. Maryland, 373 U.S. 83 (1963), alleging that the police suppressed evidence that could have impeached the government’s witness. The last reasoned decision of the state courts concluded that the claim was procedurally defaulted and refused to consider it on the merits, and as a result the Sixth Circuit found that the deferential standards of 28 U.S.C. § 2254(d) did not apply. The Sixth Circuit further concluded that the Brady claim was meritorious. The petitioner’s procedural default was accordingly excused, and habeas corpus relief was granted.

**McGowan v. Burt, 14-2186 (6/8/15)**

The petitioner was convicted of drug and firearms offenses in Michigan state court. Prior to trial, the petitioner was offered a plea bargain in which the prosecution would agree to recommend a seven year sentence. The petitioner nevertheless went to trial and received a sentence of 195 to 480 months. The petitioner then filed a motion for a new trial alleging that his attorney had been ineffective because he had admittedly failed to provide an accurate assessment of the sentencing risk if the case proceeded to trial. The state courts rejected the petitioner’s claim, but the district court granted relief. The Sixth Circuit reversed, concluding that the Michigan courts reasonably found that trial counsel’s flawed performance was nevertheless constitutionally adequate, and that the petitioner failed to demonstrate prejudice.

**Northrup v. City of Toledo Police Department, 14-4050 (5/13/15)**

The plaintiff was taking an evening neighborhood walk in Ohio with family members while wearing a holstered handgun in plain view. A police officer confronted the plaintiff after a complaint was received from a passing motorist. The plaintiff provided his driver’s license, but was handcuffed and placed in the squad car when he failed to provide a concealed weapons permit. After determining that the plaintiff had a valid permit, the police detained him for another half an hour and charged him with failing to disclose personal information. The charge was later dropped. The plaintiff then filed suit under 42 U.S.C. § 1983, alleging that his arrest and detention violated the Fourth Amendment. The Sixth Circuit concluded that qualified immunity did not provide a defense to the plaintiff’s Fourth Amendment claim. The State of Ohio has “made open carry of a firearm legal,” and “it also does not require gun owners to produce or even carry their licenses for inquiring officers.”

Furthermore, “If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes.” As a result, the police officer’s defense of qualified immunity was rejected.

**Wade v. Timmerman-Cooper, 12-4229 (5/8/15)**

After his first trial in Ohio state court, the petitioner was convicted of multiple offenses, but acquitted of aggravated robbery and all firearm specifications. The petitioner’s convictions were reversed on direct appeal, and the case was remanded for retrial. At the second trial, the prosecution reintroduced evidence suggesting that the petitioner possessed a firearm during the crime. The state courts rejected the petitioner’s claim that reintroducing the evidence amounted to a collateral estoppel violation under the Double Jeopardy Clause. Under Ashe v. Swenson, 397 U.S. 436, 443 (1970), the Double Jeopardy Clause encompasses the collateral estoppel doctrine, which provides “that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties.” The Sixth Circuit found that the state court’s rejection of the petitioner’s collateral estoppel claim was entitled to deference under 28 U.S.C. § 2254(d), however, and as a result habeas corpus relief was denied.

**West v. Carpenter, 13-6358 (6/25/15)**

The petitioner was convicted in Tennessee state court and sentenced to death. After his federal habeas corpus proceedings had concluded, the petitioner filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The petitioner alleged that under Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), he could establish cause to excuse the procedural default of one of his

claims that had previously been dismissed. The petitioner alleged that cause could be established based on the fact that he had been deprived of the effective assistance of counsel on his appeal from the denial of post-conviction relief. The Sixth Circuit rejected the petitioner’s arguments because Martinez and Trevino only permit a finding of cause based on the ineffective assistance of initial-review post-conviction counsel, and they do not apply to errors made by counsel on appeal from the denial of post-conviction relief.

**Woolbright v. Crews, 13-6115 (6/29/15)**

The petitioner was found guilty of various offenses in Kentucky state court. In his federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of trial counsel. The district court found that the petitioner’s allegations had been procedurally defaulted. The Sixth Circuit concluded that Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), apply to Kentucky’s framework for post-conviction review, and as a result the case was remanded to determine if the petitioner could demonstrate cause for his procedural defaults based on the ineffective assistance of initial-review post-conviction counsel.