

## PRECEDENTIAL VALUE

Federal Public  
Defender's  
Office Southern  
District of Ohio

Deborah L. Williams, Federal Public Defender  
Editors Richard Smith-Monahan, Kevin Schad & Jacob Cairns  
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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

##### **2B1.1(b) – Money Laundering Loss Amount**

##### ***U.S. v. Randolph, 13-5477 (7/24/15)***

The defendant was convicted at trial of conspiracy to commit money laundering and the PSR recommended a loss amount of over \$200,000. In ruling on the defendant's objection, the district court merely stated that "the testimony of [a coconspirator], among others, established that the money laundering was easily in excess of \$200,000." On appeal, the court held that the district court failed to make adequate factual findings to support the enhanced loss amount. The court found that, **although the district court may have relied on the fact the defendant was convicted of conspiracy and the coconspirators also laundered funds, the district court failed to adequately explain its reasoning in this regard.** Accordingly, the sentence was vacated and the case remanded for resentencing.

##### **2D1.1(d)(1)–Drugs – Murder Cross Reference**

##### ***U.S. v. Anderson, 14-5741 (8/4/15)***

The defendant pled guilty to participating in drug and money laundering conspiracies. At sentencing, the district court applied the cross reference at USSG § 2D1.1(d)(1) for the defendant's involvement in a murder committed by a codefendant. This resulted in a 9 level increase to the defendant's offense level under the guidelines. The district court based the enhancement on the fact that the defendant had actual knowledge of the codefendant's plan to commit the murder. The defendant argued on appeal that proof of specific intent was required in order to apply the murder cross reference, while the government claimed that reasonable foreseeability was sufficient. **The court opted not to decide which mens rea standard was required for the murder cross reference because the district court properly found that the defendant had actual knowledge of the codefendant's plan to commit murder.** The defendant was at the scene of the murder and in fact drove the codefendant away from the scene after he shot the victim. Further, the defendant was aware of the codefendant's violent tendencies. Accordingly, application of

the enhancement was appropriate and the sentence was affirmed.

### **3B1.1 – Aggravating Role**

#### **U.S. v. Anderson, 14-5741 (8/4/15)**

The defendant was convicted of participating in a drug conspiracy and the district court imposed a three level enhancement at sentencing for the defendant's managerial role in the conspiracy. On appeal, the court held that the enhancement was appropriate. Although there was other evidence suggesting leadership, the court ruled that **it was legally sufficient to support the enhancement that there was undisputed evidence in the record that the defendant monitored the activities of two juvenile drug couriers on a trip to Las Vegas and retrieved money from them to turn over to the defendant's drug-dealer boyfriend.** Accordingly, application of the enhancement was affirmed.

### **3B1.2 – Minor/Minimal Role**

#### **U.S. v. Randolph, 13-5477 (7/24/15)**

The defendant was convicted of conspiracy to commit money laundering for his involvement in laundering drug proceeds for a drug dealer. At sentencing, the defendant argued that he was entitled to a minimal role adjustment because his conduct was limited to passive receipt of funds. The district court rejected the defendant's argument and he appealed. The court held that the minimal role adjustment was improper. The court ruled that the minimal role enhancement should be applied "infrequently" and that it is reserved for the least culpable of defendants. The court found that **the defendant knew that his associate was a drug dealer who had never been employed, yet the defendant continued to receive money from him on a regular basis and hide it.** Accordingly, a minimal role adjustment was not warranted and the defendant's sentence was affirmed.

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

#### **U.S. v. Collins, 12-6263 (8/24/15)**

The defendant was charged with participating in a conspiracy to manufacture meth and he testified at trial that he did not travel to Indiana, as charged, for the purpose of obtaining a meth precursor. The jury acquitted him of the charge related to that trip. At sentencing, the district court determined that the evidence at trial demonstrated that the trip did in fact occur and accordingly enhanced the defendant's sentence by two levels for lying under oath about it. On appeal, the Sixth Circuit held that application of the enhancement was proper. **Even though the jury failed to find that the defendant committed the conduct beyond a reasonable doubt, the burden of proof for sentencing enhancements remains a preponderance of the evidence.** Because sufficient evidence supported this standard, the court upheld the district court's application of the enhancement.

### **C. Procedural matters**

#### **Procedural Reasonableness**

#### **U.S. v. Taylor, 14-6048 (8/25/15)**

The defendant was convicted after trial of firearm offenses and the district court determined that he was an armed career criminal. At the sentencing, the defendant made a passing reference to a request for a downward variance based on the defendant's age and lower recidivism rates at higher ages. The district court declined to grant a downward variance but made no reference to the defendant's age argument. When the district court asked whether there was any factor the court failed to consider, as required by Bostic, defense counsel said only "we just reiterate our earlier objections." On appeal, the court found counsel's response to the Bostic question to be insufficient to preserve error on the district court's failure to address the age argument. Thus, the

court applied plain error review. Because counsel had addressed the age argument in such a perfunctory fashion with no real argument, the court held that no plain error occurred.

#### D. Recidivism enhancements

##### 4B1.1 – Career Offender

###### U.S. v. Ozier, 14-6439 (8/5/15)

The defendant pled guilty to bank robbery and at sentencing the district court determined that he was a career offender. This determination was based on the defendant's prior Tennessee aggravated burglary convictions. The defendant argued on appeal that the convictions were not crimes of violence for career offender purposes. Under the career offender provision at USSG § 4B1.1, prior burglary convictions count as crimes of violence if they constitute a "burglary of a dwelling." In the case, the court held that the Tennessee aggravated burglary statute is divisible, in that it described offenses which are burglary of a dwelling and offenses that are not. Because of the divisibility of the statute, the court ruled that inquiry into the indictment and transcript of plea colloquy in state court were appropriate to determine if the burglary did, in fact, involve a dwelling. The district court had properly considered these documents and determined that the offenses involved a dwelling, and the court affirmed this determination. Further, the court ruled that, given its decision that the crimes counted as burglary of a dwelling, it need not reach the issue in a published decision as to whether the Supreme Court's decision in Johnson v. U.S. regarding the residual clause in the ACCA applied to career offender cases under the guidelines. Accordingly, the defendant's sentence was affirmed.

##### 4B1.1 Career Offender

###### U.S. v. Powell, 14-3932 (8/19/15)

The defendant was convicted of drug and firearm charges and at sentencing the district court determined that he was a career offender. This determination was based on two prior assault convictions that were counted separately because they were separated by an intervening citation (the defendant received a citation for the first assault before he committed the second assault). The defendant appealed the determination. Ordinarily, prior convictions are counted separately under USSG § 4A1.2(a)(2) if they are separated by an intervening arrest. The court held, however, that an intervening citation is not the same thing as an intervening arrest under § 4A1.1(a)(2). Accordingly, the convictions should not have been counted separately because they were sentenced on the same day before the same judge. Thus, the defendant was not properly considered a career offender and his sentence was vacated.

#### E. Fine/Restitution

###### U.S. v. Kilpatrick, 13-2500 (8/14/15)

The defendant was the mayor of Detroit who was charged with conspiracy and extortion for his part in using his own companies for city contracts. At sentencing, the district court assessed restitution to the city based on the gain that the defendant derived from the offense, because the city's actual loss was hard to ascertain. Further, the district court imposed an award of restitution to the IRS for the defendant's unpaid taxes. On appeal, the court first held that a defendant's gain is not a substitute for a victim's loss in terms of determining the proper restitution amount. Thus, the matter was remanded for the district court to hold a hearing on restitution wherein it could request the government to submit additional evidence on the victim's loss and/or hold an evidentiary hearing. Second, the court held that,

although restitution to the IRS for unpaid taxes was not authorized under the restitution statute, the district court could nonetheless order it as a condition of supervised release under 18 U.S.C. § 3583. Thus, this part of the restitution order was affirmed.

### III. Evidence

#### A. Article IV – Relevancy

##### 401 – Relevance

###### U.S. v. Collins, 12-6263 (8/24/15)

The defendant was charged with participating in a conspiracy to manufacture meth. At trial, the government introduced evidence of purchases of precursor chemicals that were made during a time period before the defendant joined the conspiracy and while he was incarcerated. The defendant argued on appeal that the evidence was irrelevant and should have been excluded. The court held that, in a drug conspiracy case, the government may offer evidence of the conspiracy's existence and its activities before the defendant joined the conspiracy in order to establish "the existence and nature of the conspiracy." Accordingly, admission of the evidence was affirmed.

##### 404(b)/403 – Other Acts Evidence

###### U.S. v. Gibbs, 14-6344 (8/14/15)

The defendant was charged with being a felon in possession of ammunition based on his involvement in a drive by shooting at a car wash. At trial, the government introduced the following: (1) pictures of the defendant holding an AK-47 that matched the gun describing by the witnesses as being used by the defendant, and (2) testimony that the defendant was involved in a second drive-by shooting one month after the car wash incident. The defendant was convicted and he appealed. The court of appeals first held that

the pictures of the defendant holding the AK-47 were properly admitted. The court found that the fact that the defendant was depicted holding a firearm matching the description of the firearm he used in the shooting was sufficiently probative of his possession of the firearm to outweigh any potential prejudice under FRE 403. Second, the court ruled that the district court erred in admitting the evidence of the second drive by shooting which occurred a month after the charged incident. The court held that the second-shooting evidence was not properly admitted as res gestae (also known as background evidence). The court found that the evidence of the later shooting was not background evidence related to the crime of being a felon in possession of ammunition, it did not establish a nexus between individuals, nor did it complete the story of the charged offense. Instead, the evidence merely demonstrated the defendant's "high disregard for human life" and was accordingly inadmissible under FRE 404(b) and 403. Nonetheless, the court found that the error was harmless because the evidence of the defendant's guilt at trial was overwhelming. Thus, the defendant's conviction was affirmed.

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

##### 608(b) – Character for Truthfulness

###### U.S. v. Richardson, 13-2655 (7/13/15)

At the defendant's robbery trial, he attempted to cross examine a police officer regarding a judge's determination in a prior unrelated case that the officer's testimony in the case was not credible. Specifically, the judge in the prior case commented that the officer's testimony about the manner in which the defendant in that case was "urinating in public" was hard to believe. The district court refused to allow the cross

examination about the prior judicial finding under FRE 608(b) and 403. The defendant was convicted and he appealed. The court held that the district court properly determined that extrinsic evidence of this sort was the kind intended to be excluded under FRE 608. Further, the court held that **limiting the cross examination on this point under FRE 608(b) was proper because it was not clearly probative of the officer's character for truthfulness and would have led to jury confusion.** The court found that the prior judicial ruling was generalized and not probative of his general character for truthfulness. Additionally, the matter would have required the jury to be presented with "detailed testimony" on a collateral matter, which is exactly the type of evidence FRE 608(b) was designed to exclude. Thus, the district court properly determined that the evidence was also excludable under FRE 403 because the likelihood of jury confusion substantially outweighed any probative value. Accordingly, the defendant's conviction was affirmed.

#### **609(b) – Impeachment – Prior Conviction**

##### **U.S. v. Collins, 12-6263 (8/24/15)**

The defendant was charged with participating in a drug conspiracy and he testified at trial. The district court permitted the government to impeach the defendant with a 15 year old misdemeanor conviction for giving a false name to a police officer. Specifically, the district court applied the FRE 403 balancing test and determined that the conviction was admissible. The defendant was convicted and the court held on appeal that the district court erred in applying 403 balancing and in admitting the conviction for impeachment. **Where a prior conviction is more than 10 years old, the conviction should be rarely**

**admitted and only if the court finds that the probative value substantially outweighs the prejudicial effect. In making this assessment, the court must consider the following: (1) the impeachment value; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the crime and the current charge; (4) the importance of the witness' testimony; and (5) the centrality of the credibility issue.** The court held that the district court completely failed to consider the appropriate factors and applied the wrong legal standard. The court found nonetheless that the evidentiary error was harmless because the defendant was obviously and overwhelmingly guilty. Accordingly, the conviction was affirmed.

#### **613(b) – Impeachment – Extrinsic Evidence**

##### **U.S. v. Richardson, 13-2655 (7/13/15)**

At the defendant's robbery trial, he attempted to introduce letters written by two government witnesses which contradicted their statements at trial that the defendant was involved. The witnesses both admitted to making the prior inconsistent statements in the letters and the defendant's attorney was permitted to read the letters into evidence. The district court, however, denied admission of the actual letters. On appeal, the court noted that **it is an open question in the Sixth Circuit as to whether a defendant may introduce extrinsic evidence of a prior inconsistent statement under FRE 613(b) where the witness admits to making the prior inconsistent statement.** The court held that it need not decide the issue because any error in excluding the letters was harmless given that the attorney was permitted to read them into the record and effectively impeach the witnesses. Thus, the conviction was affirmed.



## 701 – Lay Witness Testimony

### U.S. v. Kilpatrick, 13-2500 (8/14/15)

The defendant was the former mayor of Detroit who was charged with conspiracy and extortion related to his use of his own companies for city contracts. The trial was lengthy and extremely complex, and the district court allowed the government to present case agents to explain and summarize large portions of the evidence, including text messages sent by the defendant. Upon his conviction, the defendant argued on appeal that the agents' testimony was beyond the scope of lay witness testimony under FRE 701. First, the court held that **the agents' testimony was based on personal knowledge of the evidence they had obtained through investigation, and not their cumulative experience as federal agents. Further, the agents did not merely argue the government's case through their testimony.** Second, the court held that agents were free to testify as to what information records do not contain; the absence of evidence does not implicate FRE 701. Third, the court ruled that, **in a complicated trial, agents may make short "framing" references to evidence that was admitted previously in order to tie evidence together.** Fourth, the court held that summarizing voluminous writings was proper under FRE 1006. Fifth, the agents were permitted to make identifications of individuals who were only mentioned by nickname as long as there was no showing that the identification was "faulty or debatable," or the "answer was prejudicial." Finally, the court held that any of the testimony that was arguably straying into expert testimony was actually based on the agents' lay interpretations of legal terms and requirements that were contained in the documents that they reviewed. Accordingly, no evidentiary error

occurred and the defendant's conviction was affirmed.

## C. Article VIII – Hearsay

### 801 - Hearsay

#### U.S. v. Kilpatrick, 13-2500 (8/14/15)

During the defendant's trial for conspiracy and extortion, the government introduced testimony from victims as to statements made to them that induced fear on their part. The defendant argued on appeal that the statements made to the victims were inadmissible hearsay under FRE 801. The court held that **the statements made to the victims about extortion were not offered for the truth of the matter asserted, but rather were offered for the effect on the listeners/victims. Since fear on the victims' part is an element of extortion, the evidence was relevant at trial.** Thus, the defendant's conviction was affirmed.

### 803(6) – Hearsay – Business Records

#### U.S. v. Collins, 12-6263 (8/24/15)

The defendant was charged with participating in a meth conspiracy and at trial the government introduced "MethCheck records," which were federally mandated pharmacy records that documented the purchases of drugs that are meth precursors. First, a vice president of the company responsible for MethCheck testified as to how records are created and maintained, however, none of the actual records were identified or introduced through him. Second, two agents who had been able to retrieve the MethCheck records from the system testified about the records they had obtained and the records were introduced through these agents. The defendant was convicted and he argued on appeal that the agents were not authorized witnesses to introduce the

documents as business records. The court held that the combination of the vice president and the agents satisfied the business records exception. The proper business records foundation was laid by the vice president, and the court found that it was permissible for law enforcement with knowledge of the process and who personally obtained the records to identify the documents and admit them. Further, the court ruled that MethCheck records were not testimonial in nature because they “were not made to prove the guilt or innocence of any particular individual, nor were they created solely for evidentiary purposes.” Thus their admission did not violate the Confrontation Clause. Accordingly, admission of the evidence was affirmed.

#### **D. Discovery/Miscellaneous**

##### **Fed. R. Crim. P. 16(a)(1)(G) – Experts**

###### **U.S. v. Collins, 12-6263 (8/24/15)**

The defendant was charged with participating in a drug conspiracy. Five days before trial, the government gave notice of three expert witnesses related to drug quantities. The defendant moved to exclude the witnesses based on the extremely late disclosure date. The district court denied the motion, but afforded the defense additional time before the witnesses testified and offered the defense the opportunity to request additional time if needed. The defendant was convicted and he appealed. The court held that exclusion of evidence is an extreme remedy for a discovery violation and that the district court is required to consider less drastic options. Three factors are relevant in deciding the appropriate remedy: (1) the reasons for the delay and whether the government acted intentionally or in bad faith; (2) the degree of prejudice to the defendant; and (3) whether the prejudice can be cured with a less severe course of action. Given that the witnesses’ testimony related to drug weight - something the

defendant certainly could have expected in a drug case - and given the district court’s offered remedies in affording the defendant more time, the court ruled that exclusion of the testimony was not the proper remedy and the defendant’s motion was appropriately denied.

#### **IV. Fourth Amendment**

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

###### **U.S. v. Bah, 14-5178 (7/24/15)**

Officers seized numerous credit cards during a traffic stop and ran them through a skimmer to read the magnetic strips on the card. The magnetic strips provide the same information about the card that is available on the front of the card itself: account number, bank ID number, expiration, three digit CSC code, and cardholder’s first and last name. Upon running the cards through the skimmer, the officers determined that cards had been fraudulently re-encoded. The defendant argued in the district court and on appeal that the use of the skimmer on the card constituted an unlawful search without a warrant. The court held that the defendants had no reasonable expectation of privacy in the magnetic strips on the credit cards. The court found that the information derived from the skimmer was information that would be readily available on the face of the card and that the magnetic strips on the card were routinely read by cashiers every time the card is used. Thus, the court ruled that the search did not involve physical intrusions into constitutionally protected spaces. Accordingly, the defendant’s conviction was affirmed.

## B. Reasonable Suspicion/Vehicle Stops

### Vehicle Stops

#### U.S. v. Bah, 14-5178 (7/24/15)

The defendant was a passenger in a rental vehicle stopped for speeding. The driver was arrested for having a suspended license and the defendant was not a listed driver on the rental car. The police decided to impound the vehicle and during the process observed the defendant hiding something in the glove compartment. The defendant was removed from the car, and the car was searched. Officers found numerous fraudulent credit cards. In his prosecution, the defendant moved to suppress the credit card evidence seized. The district court denied the motion and the defendant appealed. The court held first that the car was validly stopped for speeding. Second, the court ruled that the car was properly searched as an inventory search. Third, the court found that **the defendant had no standing to challenge the search of the car since he was merely a passenger with no possessory interest in the vehicle.** Fourth, the court held that the defendant's detention was not unlawful because the officers had reasonable suspicion to detain him based on his actions in hiding something in the glove compartment. Further, the court found that **the discovery of the credit cards in the car was not the fruit of the defendant's detention.** Accordingly, the vehicle stop and search were lawful and the district court's ruling was affirmed.

## D. Consent Searches and Seizures

### Consent Search

#### U.S. v. Lee, 14-3929 (7/15/15)

The defendant's parole officer received hearsay information that the defendant may have been involved with firearms. As a result, the parole officer visited the defendant's residence with two police officers. After knocking for about 5

minutes, the defendant's girlfriend arrived and admitted the officers to the residence. The defendant was inside, and the officers cuffed and patted him down. The officers then asked the defendant if he had anything illegal in the apartment. He told them that he did not and that they could go ahead and look. Upon the search, the officers found a gun. In his subsequent prosecution, the defendant moved to suppress the firearm and the district court ruled that the search was based on a valid consent. On appeal, the court first held that the officers' entry into the apartment was justified by the girlfriend's consent. Second, the court held that the defendant made a voluntary consent to the search of the apartment. The court ruled that **the fact that the defendant was handcuffed at the time he consented to the search did not render his consent involuntary.** Further, the court held that **the defendant's statement that the officers could go ahead and look was sufficient to provide consent for the search.** Accordingly, the defendant's conviction was affirmed.

## E. Search Warrants

#### U.S. v. Bah, 14-5178 (7/24/15)

The defendant was stopped for speeding and during the search of his rental vehicle officers found numerous cell phones and fraudulent credit cards. Prior to obtaining a search warrant, the officers looked at a Blackberry phone and saw some incriminating evidence. Officers subsequently sought a warrant to search the cell phones, but made no reference in the search warrant affidavit to the illegally observed evidence in the Blackberry. The district court denied the defendant's motion to suppress and the defendant appealed. The court held that, **although the search of the Blackberry was unlawful, the evidence derived from the search of the cell phones did not have to be suppressed**



because the unlawfully obtained evidence was not utilized to obtain the search warrant. The court commented that it was “troubled” by the failure of the officers to disclose to the issuing judge that they had unlawfully searched the Blackberry, but because the officers had exercised “good faith” and it did not appear to be a standard practice for the officers to conduct such unlawful searches, the court upheld the search.

## V. Fifth Amendment

### A. Prosecutor Conduct

#### Prosecutorial Misconduct

##### U.S. v. Collins, 12-6263 (8/24/15)

The defendant was charged with participating in a meth conspiracy and at trial the government presented a cooperating witness who testified that he dealt drugs with the defendant throughout 2009. The defense objected to the testimony and pointed out that the defendant had been incarcerated the whole year of 2009. The prosecutor responded that he (incorrectly) believed that the defendant was only locked up part of the year. The district court overruled the objection. The defense pointed out in cross examination that the defendant was incarcerated during the time period the witness claimed to be dealing with the defendant and otherwise effectively cross examined the witness. Upon his conviction, the defendant argued on appeal that the prosecutor committed misconduct. In order to establish prosecutorial misconduct by false testimony, the defense must prove (1) the testimony was false, (2) the testimony was material, and (3) the prosecution knew it was false. Although the court found that the testimony was false and the prosecutor should have known it was, the court ruled that it was not material because the defense effectively cross examined the witness on the point. Thus, although the prosecutor’s conduct was “highly

troublesome,” it did not amount to a denial of due process and the defendant’s conviction was affirmed.

### E. Miscellaneous Fifth Amendment

#### Due Process – Destruction of Evidence

##### U.S. v. Collins, 12-6263 (8/24/15)

The defendant was charged with participating in a conspiracy to manufacture meth. He moved to dismiss the indictment on the grounds that the government had destroyed meth making equipment, based on “public safety” concerns, without testing the equipment to see if the defendant’s, or another individual’s, fingerprints were on the equipment. On appeal, the court held that two different legal standards may apply to a motion to dismiss based on destruction of evidence. Where the government has failed to preserve “material exculpatory evidence,” the defendant may prevail if it can be proven that the evidence possessed “an exculpatory value that was apparent before the evidence was destroyed” and was “of such a nature that the defendant would not be unable to obtain comparable evidence by other reasonably available means.” If, however, the “exculpatory value is indeterminate and only potentially useful,” the defendant must also show bad faith on the part of the government in the destruction of the evidence. The court found that the case fell into the latter category because the defendant could not show that the evidence would have been exculpatory. Further, the court ruled that the defendant had made no effort to establish bad faith on the part of the government. Accordingly, the conviction was affirmed.

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## VI. Sixth Amendment

### C. Speedy Trial

#### U.S. v. Richardson, 13-2655 (7/13/15)

The defendant was charged in two separate indictments related to armed robberies and there was a nearly two year delay between the second indictment and the jury trial. The district court denied the defendant's motion to dismiss based on his speedy trial rights and he appealed. There are four factors relevant to a Sixth Amendment Speedy Trial claim: (1) length of the delay; (2) reason for the delay; (3) the timeliness of the defendant's assertion of the right; and (4) prejudice. **First, the court held that two year delay was presumptively unreasonable. Second, the court ruled that the reason for the delay was mostly at the fault of the defendant because of his dissatisfaction with attorneys and pretrial motions. The only period attributable to government-caused delay coincided with a time frame that the defendant was in the custody of state authorities. The court found this period excusable. Third, the court ruled that the fact that the defendant waited seventeen months after indictment to raise the claim weighed against him. Fourth, the court held that the defendant did not establish prejudice.** Although the defendant showed that two potential witnesses had died during the pretrial process, he was unable to convince the district court that their testimony would have been exculpatory. Accordingly, his conviction was affirmed.

### D. Right to Counsel/Self Representation

#### Ineffective Assistance of Counsel

#### U.S. v. Kilpatrick, 13-2500 (8/14/15)

The defendant was the former mayor of Detroit who was charged with conspiracy and extortion related to his use of his own companies for city contracts. During the course of the case, the defendant's attorneys took on an "of counsel" relationship with the firm who was representing the plaintiff suing the defendant over matters that involved the same subject matter as the criminal case. The district court appointed the defendant a separate attorney to cross examine any witnesses related to these issues, the trial proceeded, and the defendant was convicted. On appeal, the court held that the defendant's attorneys did not render ineffective assistance. **First, the court found that the "of counsel" relationship did not create an actual conflict. The attorneys maintained separate law offices, separate electronic filing systems, and they had no financial relationship to the litigation that involved the defendant. Second, the court held that the appointment of separate counsel to cross examine witnesses related to the issue alleviated any potential conflict. Finally, the court found that there was nothing in the attorneys' representation at trial that was deficient. Accordingly, the defendant's conviction was affirmed.**

### F. Miscellaneous Sixth Amendment

#### Right to Public Trial

#### U.S. v. Simmons, 13-6273 (8/14/15)

At the defendant's trial for drug conspiracy, the district court excluded three codefendants from the courtroom during the testimony of a witness because of concerns from the government that the witness might be intimidated by their presence. On appeal, the Sixth Circuit held that the

defendant's right to a public trial had been violated. The test to be applied to a partial closure of a courtroom during a portion of the trial requires the district court to consider the following: (1) whether there is a substantial reason for the closure that is likely to be prejudiced if no closure occurs; (2) the closure must be narrowly tailored; (3) the court must consider reasonable alternatives; and (4) the court must make adequate findings to support the closure. The court found that the record did not support the first and fourth factors of the test. Although the prosecutor did indicate concerns about the witness feeling intimidated, there was nothing specific on the record about why the three codefendants were a concern. Under these circumstances, no potential prejudice was shown if they were to remain in the courtroom. The court further ruled that a violation of the right to a public trial is a structural error and thus not subject to harmless error review. Accordingly, the defendant's conviction was reversed.

## VIII. Defenses

### B. Fed. R. Crim. P. 12 - Pretrial Motions

#### Time to File

##### U.S. v. Soto, 13-2300 (7/24/15)

The defendant was convicted of kidnapping, drug trafficking, and firearm counts, and he argued for the first time on appeal that the kidnapping should have been severed from the drug trafficking counts. The court originally issued an opinion on March 11, 2015 (P.V. Issue 48) holding that plain error applied to its review. The government petitioned for rehearing on this point, and the court issued an amended opinion. The court held that a motion to sever, or other motion under Fed. R. Crim. P. 12(b)(3), must be filed within the time frame set by the district court for such motions. If untimely filed in the district court, the court

may permit the late filing based on good cause shown. If a defendant fails entirely to raise a Rule 12(b)(3) motion in the district court and instead raises it for the first time on appeal, the court reviews for plain error. As such, the court rejected the government's contention that revisions to Rule 12 altered the plain error analysis. The court held, as it did in its original ruling, that there was no plain error in the joinder of the offenses. Accordingly, the defendant's conviction was affirmed.

## IX. Jury Issues

### A. Jury Instructions

#### 18 USC § 922(g) – Constructive Possession

##### U.S. v. Taylor, 14-6048 (8/25/15)

The defendant was charged with being in possession of a stolen firearm and being a felon in possession of a firearm. At trial, the evidence showed that the defendant retrieved a shotgun from a house and brought it out to a car to sell to an informant. When the police approached, the gun was lying on the floor near the defendant. The defense at trial was that the defendant did not know the gun was stolen. Over the defendant's objection, the district court provided both an actual and constructive possession instruction. The defendant argued on appeal that providing the jury with an unsupported constructive possession instruction was error. The court agreed and held that it was error for the district court to give a constructive possession instruction where such was clearly not supported by the evidence. The court found, however, that the error was harmless because the facts in evidence could not have led the jury to discard an actual possession theory and render a guilty verdict based on an unsupported constructive possession theory. Therefore the conviction was affirmed.

## 21 USC § 846 – Drug Conspiracy

### U.S. v. Randolph, 13-5477 (7/24/15)

The defendant was charged with participating in a drug conspiracy. At trial, the district court provided the jury with special interrogatories regarding the amount of drugs “involved in” the conspiracy. In entering a guilty finding, the jury checked the box indicating “none” for the amount of drugs involved. On appeal, the defendant argued that the verdict was logically inconsistent. The court held that **the jury’s verdict on the drug conspiracy count was inconsistent in that it purported to find the defendant guilty of a conspiracy, yet found that the conspiracy involved no drugs. The court found that drugs being involved in the offense was, in fact, an essential element of the offense of conspiracy to distribute drugs.** Accordingly, the court held that the jury’s verdict amounted to an acquittal of the conspiracy charge, and as such the defendant’s conviction was reversed.

## X. Probation/ Supervised Release

### Supervised Release Violations

#### U.S. v. Detloff, 14-2001 (7/24/15)

The defendant was convicted of mail theft and a supervised release violation. At the violation hearing, the court determined that the defendant’s new Michigan conviction for resisting a police officer was a violent offense under USSG § 7B1.1, and thus that his violation conduct constituted a Grade A violation of supervised release. The defendant’s counsel, over the defendant’s objection, actually agreed with the district court on this point. On appeal, the court held that **resisting a police officer under Michigan law contained both violent and non-violent conduct. Accordingly, the case was remanded for resentencing.** The court afforded the government the opportunity to present any appropriate

Shepard documents to establish whether the offense qualified as violent under the guidelines.

## XI. Appeal

### Appeal Waivers

#### U.S. v. Detloff, 14-2001 (7/24/15)

The defendant was charged with mail theft and entered into a plea agreement whereby he agreed to waive any appeal unless he received a sentence above an agreed upon range of 57 to 71 months imprisonment. At the plea hearing, the district court mistakenly informed the defendant that he could also appeal two disputed guideline issues. At sentencing, the district court denied the defendant’s objections to the guideline enhancements and imposed a sentence of 60 months. On appeal, the court held that the appeal waiver was enforceable. The court found that, **although the district court improperly instructed the defendant regarding his appeal waiver, the improper instruction related only to the guideline enhancements, and the defendant did not appeal the district court’s ruling related to those enhancements.** Accordingly, the appeal related to the 60 month sentence was dismissed.

## XII. Specific Offenses

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

#### U.S. v. Houston, 14-5295 (7/9/2015)

The defendant was charged with making threatening communications to his prior lawyer over the phone. At trial, the district court instructed the jury that a statement is a threat under § 875(c) “if it was made under such circumstances that a reasonable person hearing the statement would understand it as a serious expression of intent to inflict injury.” On appeal, the court relied on the recent Supreme Court decision in Elonis to find that the jury instruction is improper. **A threat under the statute requires a**

more culpable mental state than negligence. Accordingly, the case was reversed and remanded. The court left the question of the appropriate mental state for a determination in the first instance in the district court.

### **18 USC § 924(c) – Aiding and Abetting**

#### **U.S. v. Richardson, 13-2655 (7/13/15)**

The defendant was charged with 924(c) counts related to five robberies. The indictment did not specifically charge the defendant with aiding and abetting but that was the government's theory at trial. The district court instructed the jury on the aiding and abetting theory and stated that the jury could convict the defendant if it found that the defendant "intended to help commit the crime." The defendant was convicted on all five counts and he appealed. The court held first that aiding and abetting need not be charged in an indictment. It is inherent in every federal crime. Second, the court ruled, relying on the Supreme Court's decision in Rosemond v. U.S., that the jury instruction was error in that it failed to adequately inform the jury of the knowledge element of aiding and abetting. In order to be guilty of aiding and abetting a 924(c) charge, a defendant must know that one of the codefendants will carry a gun. Nonetheless, the court found that the error was harmless because it was clear beyond a reasonable doubt that the defendant knew that guns were involved in the robberies. Therefore, the conviction was affirmed.

### **18 USC § 924(c) – Aiding and Abetting**

#### **U.S. v. Henry, 14-1887 (8/14/15)**

The defendant was indicted for, among other crimes, aiding and abetting two § 924 charges for brandishing firearms during bank robberies. The

district court instructed the jury that it could convict the defendant on the aiding and abetting theory if he "intended to help commit or to encourage the crime." The defendant was convicted after trial, and on appeal the court held that the instruction was error. Relying on Rosemond, the court ruled that a defendant must have "advance knowledge" that a firearm will be used in connection with the crime in order to be guilty of aiding and abetting a § 924(c) charge. The court found that, on the facts of the case, there was no "reasonable probability" that the jury could have inferred the defendant's advance knowledge of the firearm based on the evidence presented at trial. Accordingly, the defendant's conviction was vacated on these counts and remanded.

### **18 USC § 924(e) – ACCA**

#### **U.S. v. Taylor, 14-6048 (8/25/15)**

The defendant was convicted of firearm offenses and at sentencing the district court determined that he was an armed career offender. While the case was on appeal, the Supreme Court decided Johnson, which found the residual clause of the ACCA to be unconditional. Thus, the defendant challenged his ACCA enhancement on appeal based on Johnson. The court first held that Johnson applies solely to the residual clause and it had no effect on the remainder of the ACCA provisions. Second, the court held that each of the defendant's priors had already been determined by the Sixth Circuit to be violent felonies under provisions of the ACCA other than the residual clause. Thus, the defendant's prior Tennessee simple robbery convictions and his Kentucky burglary conviction were all qualifying offenses. Accordingly, the defendant's sentence was affirmed.



**18 USC § 2252(a) – Child Porn****U.S. v. Lowe, 14-5615 (7/28/15)**

The defendant was charged with distributing, receiving, and possessing child porn based on images that were found in a file sharing program on one of the computers at his home. His wife and adopted child also had access to the computer. The government's evidence at trial established that the user name on the computer was the defendant's and it was the defendant's computer, but the file sharing was accessible by anyone using the computer and was not password protected. The defendant was convicted and he appealed the sufficiency of the evidence. The court held that the evidence was insufficient to support the verdict. Specifically, the court found that **no reasonable juror could infer that no one else used the defendant's computer to access the child porn and the government expert could not establish from the forensic analysis that it was necessarily the defendant who was using the computer at the time the child porn was being shared.** Accordingly, the defendant's conviction was reversed.

**18 USC § 2422(b) – Coercion and Enticement****U.S. v. Roman, 14-4129 (7/28/15)**

The defendant was charged with coercion and enticement for his attempts to persuade an 11 year old girl to have sex with him through communications with her father. Unfortunately for the defendant, the girl was fictional and the father was a secret service agent. The defendant moved to dismiss the indictment pretrial and argued that the coercion and enticement statute did not cover an attempt to persuade a minor for sex through an adult intermediary. The district court denied the motion, the defendant entered a

conditional plea, and he appealed. **Answering an open question in the Sixth Circuit, the court held that a defendant may be convicted of attempting to coerce and entice a child for sex through an adult intermediary.** Specifically, the court found that the defendant committed an attempt to commit the offense by flattering the father, promising he had no diseases and was sterile, asking what the child liked to do sexually, offering to take her shopping, and buying her flowers and candy. Accordingly, the court affirmed the denial of the defendant's motion to dismiss.

**21 USC § 841(b)(1)(C)–Drugs – Causing Death****U.S. v. Volkman, 12-3212 (8/14/15)**

The defendant was a doctor who ran a pain clinic and fraudulently prescribed pain medications to patients who were not truly in medical need. The jury convicted him of unlawfully distributing drugs and causing the deaths of several patients under § 841(b)(1)(C). The defendant lost his first appeal in 2013, but the Supreme Court remanded the case, based on its ruling in Burrage v. U.S., for a determination whether the defendant's prescribing of illegal narcotics was a "but for" cause of the patients' death. The Sixth Circuit issued an amended decision and at part IV.C. determined that **the district court had properly instructed the jury regarding the causation element and that sufficient evidence of "but for" cause supported the verdict.** Accordingly, the defendant's life sentences were affirmed.

**XIII. Post-Conviction Remedies****Williams v. Mitchell, 03-3626, 12-4269 (7/7/15)**

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

Atkins v. Virginia, 536 U.S. 304 (2002), was decided during the pendency of the petitioner's federal habeas corpus proceedings, and the petitioner returned to state court to raise a claim that he was intellectually disabled and ineligible for execution under Atkins. The state courts denied the petition without conducting an evidentiary hearing, and in the course of doing so refused to consider much of the evidence submitted by the petitioner in support of his claim on the ground that it was not relevant to the petitioner's present mental status. The Sixth Circuit determined that the Ohio Court of Appeals' "wholesale exclusion of past evidence of intellectual disability from its Atkins analysis was contrary to clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1), and as a result no deference under AEDPA was warranted. Furthermore, the state court acted contrary to established precedent because it "ignored the medical community's determination, as adopted by the Supreme Court, that intellectual disability manifests itself before eighteen and remains consistent throughout a person's life." In addition, the state court's evidentiary ruling was arbitrary and disproportionate in violation of United States v. Scheffer, 523 U.S. 303 (1998), and Holmes v. South Carolina, 547 U.S. 319 (2006). As a remedy, the Sixth Circuit granted a conditional writ of habeas corpus prohibiting the petitioner's execution unless the state courts reopened his Atkins proceeding and reconsidered the petitioner's claim under the controlling standards.

**Atkins v. Holloway, 12-6498 (7/8/15)**

The petitioner was convicted in Tennessee state court of murdering his stepfather and sentenced to life in prison. The district court concluded that the petitioner's claims of ineffective assistance of trial counsel were procedurally defaulted, and that the petitioner could not rely on the errors of his post-conviction counsel to establish cause to

excuse the default. The Sixth Circuit remanded the case to the district court to determine if the petitioner could establish cause under the intervening decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), based on ineffective assistance of initial-review post-conviction counsel. However, Martinez and Trevino would not be available to excuse any defaults that were attributable to errors made by appellate post-conviction counsel. Furthermore, Martinez and Trevino would not apply to any underlying defaulted claims that alleged ineffective assistance of counsel during the petitioner's juvenile transfer proceeding to adult court.

**Davis v. Carpenter, 14-6205 (8/20/15)**

The petitioner was convicted of murdering an infant in Tennessee state court and sentenced to life in prison. The petitioner alleged that his trial attorney was ineffective because he failed to obtain an expert to demonstrate that the death had been accidental. The state courts found that trial counsel had not been ineffective because he had attempted to find an expert witness to support the petitioner's version of events, but had not been able to locate one. The Sixth Circuit concluded that the decision of the state courts was entitled to deference under 28 U.S.C. § 2254(d), and as a result habeas corpus relief was unavailable.

**Drummond v. Houk, 11-3024, 11-3039 (8/14/15)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In a previous decision in the case, the Sixth Circuit concluded that habeas corpus relief was warranted based on a partial closure of the courtroom during trial. The Supreme Court vacated and remanded for further consideration in light of White v. Woodall, 134 S. Ct. 1697 (2014). On remand, the Sixth Circuit concluded

that habeas corpus relief was not warranted because, at the time of the Ohio Supreme Court's decision rejecting the petitioner's claim, it was not "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1) that a partial courtroom closure would require reversal. As a result, the previous grant of habeas corpus relief was reversed.

**Hill v. Curtin, 12-2528 (7/9/15)**

The petitioner was convicted of armed robbery in Michigan state court. On the first day of trial, the petitioner advised the court that he wished to represent himself. The Michigan Supreme Court concluded that the petitioner's request had been untimely and disruptive, and as a result found that his right to self-representation had not been violated. The Sixth Circuit concluded that the Michigan Supreme Court's decision was entitled to deference under 28 U.S.C. § 2254(d), and as a result habeas corpus relief was not warranted.

**Holland v. Rivard, 14-1553 (8/25/15)**

The petitioner was convicted of numerous violent crimes in separate criminal prosecutions in Michigan state court. During an interview with the police, the petitioner asserted his right to speak with an attorney and the interview ceased. Six days later, the police contacted the petitioner to discuss a separate murder case in which he was going to serve as a prosecution witness. Police became suspicious during the interview, and the petitioner was given a polygraph test during which he confessed to committing the murder himself, along with several other crimes. The petitioner alleged that his confession should have been suppressed on the ground that it was taken in violation of Edwards v. Arizona, 451 U.S. 477 (1981), and Miranda v. Arizona, 384 U.S. 436 (1966). The Sixth Circuit concluded that the petitioner was not "in custody" within the meaning of *Miranda* and *Edwards* when the

polygraph interview was given, and as a result habeas corpus relief was not warranted.

**Jackson v. Sloan, 15-3775 (8/26/15)**

The petitioner filed two federal habeas corpus petitions after his initial petition had been rejected, and the district court transferred them to the Sixth Circuit as second or successive petitions requiring authorization under 28 U.S.C. § 2244. The petitioner then moved for relief from judgment under Fed.R.Civ.P. 60(b) from the transfer orders, and filed an appeal from the district court's denial of the motions. The Sixth Circuit concluded that the district court did not have jurisdiction to consider the Rule 60(b) motions after the case had been transferred, and as a result the case was remanded to the district court with instructions to dismiss the motions.

**Keys v. Booker, 14-1274 (8/19/15)**

The petitioner was convicted of second degree murder in Michigan state court. During voir dire, the petitioner was visibly shackled in front of the venire for 90 minutes. Under Deck v. Missouri, 544 U.S. 622 (2005), visibly shackling the defendant in front of the jury is presumptively prejudicial. The Sixth Circuit nevertheless concluded that the Michigan state courts' rejection of the petitioner's claim was entitled to deference because the applicability of Deck to voir dire, as opposed to the trial itself, was not "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1).

**LaMar v. Houk, 11-3131, 11-3153 (8/18/15)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death based on his participation in a prison riot in which five other inmates were killed. In federal habeas corpus proceedings, the petitioner alleged that the prosecution had violated Brady v. Maryland, 373

U.S. 83 (1963), by suppressing favorable evidence. The Sixth Circuit rejected the petitioner's claims, concluding that **much of the allegedly suppressed evidence had actually been disclosed prior to trial, and that the evidence which arguably had been suppressed was "either consistent with the State's theory or contradicted by strong evidence of LaMar's guilt."** As a result, the evidence failed to satisfy Brady's "reasonable probability" standard, and the denial of habeas corpus relief was affirmed.

**Wright v. Warden, 13-6573 (7/15/15)**

The petitioner was convicted of premeditated murder in Tennessee state court and sentenced to death. After the conclusion of his federal habeas corpus proceedings, the petitioner filed a motion for relief from judgment under Fed.R.Civ.P. 60(b) alleging that the intervening decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013), could provide cause to reach the merits of claims that had previously been found to be procedurally defaulted. The Sixth Circuit concluded that **Martinez and Trevino did not constitute extraordinary circumstances within the meaning of Rule 60(6)(b), especially when considered in conjunction with the weakness of the underlying claim that the petitioner was seeking to revive.** As a result, the judgment of the district court was affirmed.

**ACLU v. Livingston County, 14-1617 (8/11/15)**

The Livingston County Jail required all correspondence to inmates to be on postcards unless the correspondence qualified as "legal mail" under the jail's informal definition of the term. Under the jail's practice, if a letter to an inmate was from an attorney who was not the inmate's attorney of record in an ongoing legal proceeding, the letter would not be delivered to the inmate, and the sender would not be notified

of the non-delivery. The ACLU filed suit, alleging that the practice violated the First and Fourteenth Amendments. The district court granted a preliminary injunction against the practice, and the Sixth Circuit affirmed. **"Attorneys from [a] 'legal assistance organization' like the ACLU (or any other attorney for that matter) must be able to send confidential communication *prior to* initiating a legal action or formally creating an attorney-client relationship."**