

## 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

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

#### Substantive Reasonableness of Sentence

##### [U.S. v. Robinson, 13-2308 \(2/18/15\)](#)

The defendant was convicted of possession of child pornography and his sentencing guideline range was determined to be 78-97 months. At his first sentencing, the district court varied downward and imposed one day in jail. On appeal by the government, the court reversed based on substantive reasonableness. On remand, the district court again imposed one day in jail, extended the term of supervised release, and added additional conditions of supervised release. The government again appealed. The court held that the sentence was still substantively unreasonable because the district court failed to adequately take into account the seriousness of the offense of possessing child pornography, the need for deterrence, and unwarranted sentencing disparities. Accordingly, the sentence was again reversed and remanded to a different district court judge for resentencing.

## B. Sentencing Guidelines

### 2G2.2(b)(2)

##### [U.S. v. Walters, 14-3097 \(1/2/15\)](#)

The defendant was convicted of distribution and receipt of child pornography and he received a two level enhancement under USSG 2G2.2(b)(2) for using a peer to peer (P2P) network to distribute the images. On appeal, the defendant argued that the enhancement constituted impermissible double counting because his conviction was for distribution. The court held that the enhancement punished a distinct aspect of defendant's conduct - using a P2P to distribute images - and thus application of the enhancement was proper.

### 2G2.2(b)(4)

##### [U.S. v. Walters, 14-3097 \(1/2/15\)](#)

The defendant was convicted of distribution and receipt of child pornography and he received a two level enhancement under USSG 2G2.2(b)(4) for possessing sadistic or masochistic images. The defendant argued that application of the

enhancement constituted impermissible double counting because all child porn involves sadistic or masochistic conduct. The court rejected this argument and held that the enhancement typically required "the infliction of pain." Because not all child porn meets this requirement, the enhancement was affirmed.

### **2K2.1(b)(5) & (6) – Double Counting**

#### **U.S. v. Sweet, 14-1226, (1/29/15)**

The defendant sold stolen firearms to a drug dealer for drugs and cash. In the firearms prosecution, the district court applied a sentence enhancement under USSG 2K2.1(b)(5) for trafficking in firearms and a second enhancement under 2K2.1(b)(6) for using a firearm in connection with another felony offense. On appeal, the court held that application of both enhancements did not constitute impermissible double counting because the two guidelines punished distinct aspects of the defendant's conduct. Specifically, the trafficking enhancement punished the defendant for selling the guns to someone who could not lawfully possess them (a drug dealer) while the second enhancement punished him for using the firearms to facilitate the trafficking in drugs. As such, the defendant's sentence was affirmed.

### **C. Procedural matters**

#### **Fed.R.Crim.P. 32- Sentencing Procedures**

#### **U.S. v. Coppenger, 13-3863 (1/7/15)**

The defendant was convicted of mortgage fraud and at sentencing the district court imposed an upward variance from the guideline range based on information contained in codefendants' presentence reports. The defendant did not object to use of the information by the district court or to the court's failure to permit him access to the

information. On appeal, the court held that Fed.R.Crim.P. 32(i)(1)(B) requires a district court to utilize appropriate procedures at sentencing that allow a defendant a "reasonable opportunity to respond" to information not contained in the defendant's presentence report. The court ruled that this procedure must preclude the possibility of "prejudicial surprise" to the defendant regarding the information utilized by the court. In the case, the court found that the district court had clearly used information of which the defendant was unaware at the time of the sentencing hearing and that the district court had not taken any steps to make the defendant aware of the nature of the information such that he had a reasonable opportunity to respond before the upward departure was imposed. Accordingly, the court found plain error and remanded the case for resentencing.

### **D. Recidivism enhancements**

#### **18 U.S.C. § 924(e) - ACCA**

#### **United States v. Gatson, 14-3227 (1/15/15)**

The defendant was convicted of being a felon in possession of a firearm and the district court sentenced him as an armed career criminal, under 18 USC § 924(e), based on a conviction for arson and two convictions for domestic violence. On appeal, the court held that all of the convictions were predicates for the armed career criminal enhancement. The court found that the Ohio arson statute under which the defendant was convicted qualified as "generic" arson even though it encompassed only physical harm to property, not persons. Thus, his arson conviction categorically counted as an enumerated violent felony under the ACCA. Further, the court held that both of the defendant's Ohio felony domestic violence convictions qualified because they each contained an element of physical force against another. Thus, the sentence was affirmed.

**United States v. Fallins, 14-5153 (1/22/15)**

The defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified for the enhancement under the ACCA, in part, based on a prior Tennessee conviction for attempted aggravated arson. On appeal, the court held that attempted aggravated arson is a predicate felony for the ACCA. Specifically, the court found that, although not an enumerated felony, **attempted aggravated arson created a substantial potential risk of physical injury under the residual clause of the ACCA and it was sufficiently similar to arson, which was an enumerated offense.** Accordingly, the defendant's sentence was affirmed.

**IV. Fourth Amendment****B. Reasonable Suspicion/Vehicle Stops****Reasonable Suspicion****United States v. Gatson, 14-3227 (1/15/15)**

Officers received a tip from a school bus driver that a man was approaching young girls. Upon investigation, officers observed the defendant, who matched the description given by the bus driver, sitting in a vehicle that also matched that described in the tip. Officers approached the defendant who appeared to have been drinking. The defendant gave conflicting stories about what he was doing, admitted to talking to young girls, and appeared to push something between the seat and console. Officers removed defendant from the car and an officer observed the handle of a gun protruding from the area between the seat and console. Defendant moved to suppress the firearm and the court ultimately held that **the above facts supported reasonable suspicion for the officers' actions.** Further, the court found no clear error in the district court's choice to credit the officers' testimony over the defendant's as to

the circumstances of the stop. Accordingly, the conviction was affirmed.

**Brown v. Lewis, 14-1392 (2/26/2015)**

The plaintiff was a Michigan driver who alleged that she was stopped by police, ordered out of her car at gunpoint, thrown to the ground, handcuffed, and detained in handcuffs for approximately ten minutes. The stop was based on a 911 call made from a residential address. The 911 dispatcher overheard an intoxicated man at the residence make a statement that could arguably be construed as a threat, and other statements about hiding from the police. The police alleged that they believed the intoxicated man was in the car that was pulled over, although the 911 dispatcher was aware that the intoxicated man was still in the residence. The plaintiff sued under 42 U.S.C. § 1983, alleging a violation of her Fourth Amendment rights. The District Court denied the police officers' motion for summary judgment based on qualified immunity, and they appealed.

The Sixth Circuit affirmed, concluding that the officers were not entitled to qualified immunity. Although the officers were unaware that the intoxicated man was still at the home when the initial stop was made, **any reasonable suspicion that they did have was eliminated once they determined that the sole occupant of the vehicle was a woman.** The information available to the officers provided no basis to believe that a woman from the residence had engaged in any type of criminal activity. Furthermore, the nature of the investigatory stop was significantly intrusive, and it turned into an arrest without probable cause when the plaintiff was thrown to the ground and handcuffed. In addition, the plaintiff's version of events supported a claim of excessive force under the Fourth Amendment. Finally, the law was clear at the time of the arrest that the police conduct described by the plaintiff

constituted a Fourth Amendment violation. Accordingly, the decision of the District Court denying qualified immunity was affirmed.

## E. Search Warrants

### Probable Cause/Staleness

#### United States v. Burney, 14-3526 (2/19/15)

Law enforcement officers were investigating a male and female for drug trafficking over an eight month period. The male used stash houses to store and distribute drugs, and the houses and vehicles were kept in the name of the female. Shortly before law enforcement obtained a warrant for a believed stash house, the defendant moved into the house. Although there was no apparent connection between the defendant and the drug dealer, the defendant had a history of drug convictions and was on parole for a drug case. Further, the house remained in the name of the female even though the defendant was living there. The warrant was executed, and drugs and a firearm were found. In his subsequent prosecution, the defendant moved to suppress the evidence because of the lack of connection between himself and the drug trafficking. The court held that a search warrant must only establish probable cause to believe that evidence of a crime will be found at a residence. The fact that the defendant had moved in did not vitiate the likelihood that drugs would be found given the recent connection of the male and female, and their drug activities, to the house. Further, the court held that the evidence of drug trafficking related to the house was not stale. Accordingly, the search warrant was upheld.

## XII. Specific Offenses

### 18 USC § 1519 – Destruction of Records

#### Yates v. United States, 13-7451 (2/25/15) Supreme Court

The defendant was a commercial fisherman who was caught with undersized red grouper in federal waters in the Gulf of Mexico. Investigators ordered him to retain the undersized fish until returning to shore, but instead the defendant had the questionable fish thrown overboard. The defendant was prosecuted under 18 USC § 1519 for the destruction of the fish. As relevant to the case, this statute prohibited the destruction of “any record, document, or tangible object” to obstruct an investigation. The district court and Eleventh Circuit ruled that “tangible object” could include a fish. On certiorari, the Supreme Court held that the phrase “tangible object” should not be interpreted in the abstract, but instead had to be read in context with the other statutory terms, the heading of the statute, and the statutory purpose (which was to prevent corporate fraud). Accordingly, the Court ruled that a “tangible object” under the statute included only objects used to record or preserve information. Thus, the defendant’s conviction was reversed.

### 18 USC § 2113(e) – Bank Robbery

#### Whitfield v. U.S., 13-9026 (1/13/15) Supreme Court

The defendant robbed a bank and, while in flight, entered the home of an elderly woman. The defendant moved her by force from one room to another, where she had a heart attack and died. The defendant was indicted for bank robbery and the government charged him with an enhancement under 18 USC § 2113(e) for forcing the victim “to accompany him” in fleeing from the robbery. The defendant argued on appeal that

the statute required substantial movement of the victim. The Supreme Court held that accompaniment occurs under the statute even if the movement is within the same building or over a short distance. Accordingly, the defendant's conviction was affirmed.

### XIII. Post-Conviction Remedies

#### Jennings v. Stephens, 13-7211 (1/14/15)

Supreme Court

The petitioner was convicted of capital murder in Texas and sentenced to death. In his federal habeas corpus proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel at the penalty phase of his trial because his lawyer failed to present evidence of his disadvantaged background, failed to present evidence of his low intelligence and organic brain damage, and conceded that death would be an appropriate sentence during closing argument. The District Court concluded that the petitioner was entitled to relief on his allegations regarding the failure to investigate and present mitigating evidence, but that relief was not warranted with respect to trial counsel's closing argument. The Fifth Circuit reversed, concluding that the petitioner's claims regarding mitigating evidence did not warrant relief. The Fifth Circuit further held that the petitioner had waived his allegations regarding trial counsel's closing argument because he failed to file a cross-appeal or a motion for a certificate of appealability.

The Supreme Court reversed and remanded with instructions to consider the petitioner's allegations regarding trial counsel's closing argument. The Court concluded that a petitioner who obtains relief in district court may argue any preserved basis for affirmance on appeal, so long as the alternative argument would neither enlarge the petitioner's rights under the lower court's judgment nor lessen the respondent's. Furthermore, a petitioner is not required to file a

notice of a cross-appeal or obtain a certificate of appealability to rely on an alternative basis for affirmance that has otherwise been preserved.

#### Christeson v. Roper, 14-6873 (1/20/15)

Supreme Court

The petitioner was convicted of capital murder in Missouri and sentenced to death. After review of the petitioner's claims had concluded in state court, counsel were appointed under 18 U. S. C. § 3599 to represent the petitioner in his federal habeas corpus proceedings. Appointed counsel miscalculated the statute of limitations, and the petition was dismissed as untimely. Nearly seven years later, appointed counsel contacted outside counsel seeking advice. Outside counsel determined that the case could possibly be reopened based on a theory of equitable tolling due to abandonment, but that new counsel would be required to raise the issues due to appointed counsel's obvious conflict of interest. Appointed counsel refused to agree to a substitution of counsel, and outside counsel then attempted to intervene in the proceedings. The District Court and Eighth Circuit both concluded that a substitution of counsel was not warranted.

The Supreme Court reversed and remanded with instructions to grant the motion to substitute counsel. Although 18 U. S. C. § 3599 does not give a petitioner a right to counsel of their choice, a motion for a substitution of counsel should be granted if it would be in the interests of justice. In light of appointed counsel's severe conflict of interest and the absence of any evidence of abusive conduct or deliberate delay by outside counsel, the Supreme Court concluded that the interests of justice would be served by a substitution of counsel.

*Tanner v. Yukins*, 12-2114 (1/20/15)

The petitioner was convicted of felony murder in Michigan. After the conclusion of state court review, the petitioner filed a habeas corpus petition in federal court. The petition was denied and the petitioner attempted to appeal, but the notice of appeal was filed one day late and the appeal was dismissed. The petitioner subsequently filed suit under 42 U.S.C. § 1983, alleging that the prison guards had actively prevented her from filing a timely notice of appeal from the denial of her petition. The jury returned a verdict in the petitioner's favor and she was awarded \$27,000 in damages.

The petitioner then returned to her federal habeas proceedings and filed a motion under Fed.R.Civ.P. 60(b)(6), alleging that the favorable verdict in the § 1983 case established extraordinary circumstances warranting relief from judgment. The District Court denied the motion, concluding that under *Bowles v. Russell*, 551 U.S. 205 (2007), it lacked jurisdiction to use Rule 60(b) to reinstate the deadline for filing the notice of appeal. The court concluded in the alternative that the petition failed to demonstrate extraordinary circumstances as required by the rule. **The Sixth Circuit reversed, concluding that the District Court's jurisdictional determination was incorrect, and that the District Court erred in concluding that extraordinary circumstances were not present.**

*Wheeler v. Simpson*, 11-5707 (2/20/2015)

The petitioner was convicted of intentional murder in Kentucky and sentenced to death. At trial, one member of the venire stated that he had not formed an opinion one way or the other about the death penalty, and that he did not have any beliefs that would preclude him from imposing a death sentence. The prosecution nevertheless moved to exclude the juror for cause based on

allegedly inconsistent answers given by the juror about his ability to consider a death sentence. The trial judge granted the motion the following day, but in doing so misstated the juror's answers about his ability to impose a death sentence. The Kentucky Supreme Court summarily rejected the petitioner's claim that the juror had been improperly excused.

The Sixth Circuit concluded that habeas corpus relief was warranted with respect to the petitioner's death sentence. Under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), an otherwise-eligible juror may not be excused simply because he or she is personally opposed to the death penalty. Instead, **a juror may only be excused if their views would prevent or substantially impair their ability to follow the court's instructions.** In the petitioner's case, the juror's statements clearly did not support a finding that the juror was ineligible to serve based on a bias against the death penalty. The determination of the Kentucky Supreme Court to the contrary was objectively unreasonable, and as a result no deference under AEDPA was warranted. Furthermore, violations of *Witherspoon* and *Witt* are structural defects, and it was therefore unnecessary for the petitioner to demonstrate prejudice.

The petitioner also raised several challenges to his convictions, but the Sixth Circuit concluded that relief was properly denied on these claims. The petitioner argued that the admission of evidence of the victim's pregnancy at the time of the murder was so inflammatory as to amount to a due process violation, but the Sixth Circuit concluded that the evidence did not render the trial fundamentally unfair. The petitioner also alleged that he had been deprived of the effective assistance of trial counsel on several grounds, including trial counsel's failure to present lay and expert testimony on various matters. The Sixth

Circuit found that these allegations were either procedurally defaulted or lacking in merit. Similarly, the petitioner's allegations relating to prosecutorial misconduct and improper jury instructions did not warrant habeas relief under the AEDPA standards of review. Accordingly, the denial of relief with respect to the guilt phase of trial was affirmed.

**Blackston v. Rapelje, 12-2668 (12/17/15)**

The Sixth Circuit previously granted habeas corpus relief in this case based on a Confrontation Clause violation. *Blackston v. Rapelje*, 769 F.3d 411 (6th Cir. 2014). The respondent filed a petition for rehearing and rehearing en banc, and in response an amended opinion was issued by the panel. The outcome of the case did not change.

**Pola v. United States, 14-5214 (2/19/2015)**

The defendant was a Canadian citizen who was charged with drug offenses in federal court. The defendant entered an *Alford* plea and subsequently filed a pro se notice of appeal two months later. After the appeal was dismissed, the defendant filed a motion to vacate under 28 U.S.C. § 2255. The defendant alleged that he had instructed his attorney to file a notice of appeal, but the attorney failed to do so in violation of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The District Court ordered an evidentiary hearing, but withdrew the order and denied the motion after determining that the defendant had already been released from federal prison, and had stipulated to his removability to Canada in a proceeding before Immigration and Customs Enforcement.

The Sixth Circuit reversed and remanded for an evidentiary hearing. Although the defendant had already served his sentence, the federal courts retained jurisdiction over the § 2255 motion because it had been filed while the defendant was

still in prison, and the effect of the conviction on the defendant's immigration status was a severe collateral consequence that satisfied the case-or-controversy requirement. Furthermore, the defendant's stipulation to removability would not necessarily remain valid if he obtained a reversal of his conviction. In addition, the defendant satisfied the requirements for an evidentiary hearing under § 2255 because his factual narrative was not inherently incredible, and there was nothing in the record that conclusively demonstrated that counsel's performance was not deficient.