

## PRECEDENTIAL VALUE

Federal Public  
Defender's  
Office Southern  
District of Ohio

Deborah L. Williams, Federal Public Defender  
Editors Richard Monahan & Jacob Cairns

Issue 73 July-August 2019



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. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at [www.fpd-ohs.org](http://www.fpd-ohs.org).

### I. Sentencing Issues

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

##### Procedural and Substantive Reasonableness

##### **U.S. v. Johnson, 18-3720 (8/13/19)**

The defendant was convicted of possessing a firearm with an obliterated serial number. At sentencing the district court imposed a 14 month upward variance to the 5 year statutory maximum. On appeal, the court held that the upward variance was procedurally and substantively reasonable. The court ruled that the district court had properly considered that the defendant had four prior firearm convictions, that the defendant repeatedly carrying firearms created an increased risk of violence, and that his prior lenient state court sentences had not deterred him. Further, the court found that the sentence was not unreasonably long, even though it was the statutory maximum, and that the fact that the particular district judge was imposing more upward departures than other judges in the district did not alter that formulation. The court emphasized that “[r]easoned judgments about the appropriate length of a sentence are largely for

trial courts, not appellate courts.” Thus, the sentence was affirmed.

#### B. Guideline issues

##### **2D1.1(b)(1) – Possession of Firearm**

##### **U.S. v. McCloud, 18-2428 (8/20/19)**

The defendant was convicted of participating in a methamphetamine conspiracy. During the conspiracy time period, law enforcement also found cocaine and marijuana at the defendant's residence. At sentencing, the district court imposed a 2 level enhancement under USSG § 2D1.1(b)(1) because the defendant possessed a firearm during a trip to Detroit to purchase marijuana. On appeal, the court held that the 2 level increase was appropriate because, although the defendant was only charged with meth, the marijuana purchase was relevant conduct to the offense, under USSG § 1B1.3. The court found that the marijuana purchase was part of the same common scheme or plan as the meth conspiracy. Specifically, the court ruled that the marijuana purchase involved the same accomplices, the same *modus operandi*, and was in the same time period of the actions involved in the meth conspiracy. Further, the court noted that

marijuana had also been found at the defendant's residence. Accordingly, the 2 point enhancement for firearm possession was affirmed.

### **2D1.1(b)(2) – Use of Violence in Drug Case**

#### **U.S. v. Pineda-Duarte, 18-6118 (7/31/19)**

The defendant was caught tilling a marijuana field. When officers approached, he swung the shovel, almost hitting an officer, and then ran. At sentencing, the district court imposed a 2 level enhancement under USSG § 2D1.1(b)(2) for using violence in the course of a drug case. On appeal, the court held that the 2 level enhancement applies where a defendant (1) used violence, (2) made a credible threat of violence, or (3) directed the use of violence. The court first found that swinging the shovel was not a threat of violence. The court ruled, however, that swinging the shovel could constitute a use of violence depending on the defendant's intention. The government claimed that the defendant intended to hit the officer, but the defendant claimed that he swung the shovel because he was surprised by the officers. The court found that the district court needed to decide this issue of intent in the first instance, so the case was remanded in order to determine the defendant's intent in swinging the shovel.

### **2D1.1(b)(16) – Livelihood Enhancement**

#### **U.S. v. Buchanan, 18-3667 (7/31/19)**

The defendant was convicted of participating in a marijuana conspiracy. At sentencing, the district court applied a 2 level enhancement under USSG § 2D1.1(b)(16) for engaging in drug trafficking as a criminal livelihood. On appeal, the court held that two elements are required to establish the enhancement: (1) the defendant acquired income in a 12 month period that was 2000 times the then existing hourly minimum wage; and (2) the criminal conduct was the defendant's primary occupation during that 12 month period. The

court found that the district court considered only the first factor of the analysis, but did not adequately consider the second. The defendant had a long term job working in trucking, and the district court failed to make the required finding whether the drug trafficking was the defendant's primary occupation. Further, the court found that, even though the district court ultimately imposed a sentence that was 13 months below the guideline range, the district court may have imposed a lower sentence without the 2 level enhancement. Accordingly, the case was remanded for resentencing.

### **2J1.2(c)(1) – Obstruction – Cross reference**

#### **U.S. v. Bailey, 18-2388 (7/26/19)**

The defendant's boyfriend went to trial on sex offense charges and, after the jury verdict, the defendant threatened the minor victim and her family. The defendant was then charged with witness retaliation, pursuant to 18 USC § 1513(b). At sentencing, the district court applied a cross reference provision under USSG § 2J1.2(c)(1), which requires a sentence 6 levels lower than the offense that was obstructed. This resulted in a significant increase to the defendant's sentence, and she appealed. The court held that the application of the cross reference was appropriate. First, the court ruled that the cross reference applies to attempted obstruction, even when the obstruction is not successful. Second, the court found that the cross reference could apply to obstructive conduct that occurred after a jury verdict but before sentencing. Finally, the court held that the cross reference may apply where the defendant had no role in the underlying offense. Accordingly, the sentence was affirmed.

**2K2.1(b)(4)(B) – Obliterated Serial Number****U.S. v. Fuller-Ragland, 18-1773 (6/7/19)**

The defendant was convicted of being a felon in possession of a firearm and at sentencing the district court applied a 4 level enhancement for an obliterated serial number. The defendant failed to object at the sentencing hearing but raised on appeal that the serial number was only partially obliterated. Applying the plain error standard, the court ruled that a partially obliterated serial number can qualify for the enhancement, even where law enforcement ultimately is able to discern the gun's serial number. It can be sufficient for the enhancement where only some of the numbers in a serial number are altered. Thus, the court found no plain error in the district court's ruling and affirmed the defendant's sentence.

**3A1.2 – Official Victim****U.S. v. Sulik, 18-5978 (7/3/19)**

The defendant was convicted of sending threatening communications to a U.S. Senator who had been critical of a U.S. General. At sentencing, the district court applied a 6 level enhancement for official victim, pursuant to USSG § 3A1.2. On appeal, the court held that the official victim enhancement was appropriate. While the court acknowledged that more was required for the enhancement than the defendant's mere knowledge of the official status of the victim, the court held that there was sufficient additional evidence in the case. The defendant commented in one of the threats that the Senator was a "low-life, parasite politician," and he sent the threats to the Senator's official email. Although the court found that the evidence was "barely sufficient" for the enhancement, the court nonetheless affirmed the sentence.

**3C1.1 – Obstruction of Justice****U.S. v. Thomas, 18-1592 (8/6/19)**

The defendant was convicted of bank fraud. During the presentence investigation interview, the defendant lied to the probation officer about his leadership of others, his recruiting of others, and his involvement with a codefendant. As a result, the district court applied a 2 level enhancement for obstruction of justice under USSG § 3C1.1. The district court further denied acceptance of responsibility based on the obstruction and varied upward from the guideline range. On appeal, the court held that the sentence was proper. The court found that lying to a probation officer or the district court during the sentencing portion of the case about a material matter is appropriate grounds for an obstruction of justice enhancement. This is true even if the lies did not actually affect the guideline range. Given the propriety of the obstruction enhancement, the court further held that that denying acceptance of responsibility was proper and the upward variance was reasonable. Accordingly, the sentence was affirmed.

**5G1.2 – Conviction for Multiple Offenses****U.S. v. Buchanan, 18-3667 (7/31/19)**

The defendant was convicted of participating in a marijuana conspiracy and for distributing marijuana. Each offense carried a 5 year maximum. At sentencing, the district court determined his guideline range to be 63-78 months, which was higher than the statutory maximum for each count. The district court imposed a sentence of 50 months on each count to run concurrently. The defendant argued on appeal that the court incorrectly calculated the guidelines because the guideline range should have been the statutory maximum of 60 months. The court held that, pursuant to USSG § 5G1.2, a court may impose statutory consecutive sentences on multiple counts of conviction in

order to achieve the total punishment called for by the guidelines. Thus, the district court's consideration of the 63-78 month range in deciding an appropriate sentence was not improper.

### **5K2.2 – Significant Physical Injury**

#### **U.S. v. Gillispie, 18-5894 (7/10/19)**

The defendant was convicted of distributing fentanyl. At sentencing, the district court imposed a 6 level upward departure under USSG § 5K2.2 (to a sentence of 51 months) because a person who received the fentanyl suffered an overdose and was in a coma for several weeks. On appeal, the court held that the upward departure to 51 months was appropriate. Under § 5K2.2, the court must consider the extent to which the injury was “knowingly risked” in determining the extent of the departure. The court held that this referred to knowing risk by the defendant, not the victim. Accordingly, the court found the 51 month sentence reasonable and affirmed the conviction.

### **D. Recidivism enhancements**

#### **18 USC § 924(e) – ACCA**

#### **U.S. v. Hennessee, 18-5786 (7/30/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court declined to impose the ACCA sentencing enhancement because the court concluded that it could not consider “non-elemental” facts in deciding whether the defendant's two prior robberies were committed on occasions different from one another. On appeal, the court held that a district court may consider “non-elemental” facts in deciding whether offenses count separately. The court ruled that a district court is limited to consider documents from the prior case that are permissible under the Supreme Court's Shepard

decision, but that the court is not limited to only facts that go to the element of the offense. Thus, the district court could properly consider the plea hearing transcript from the prior conviction, which demonstrated that the defendant committed the robberies against two different victims in two different locations. Accordingly, the district court decision was reversed and the ACCA enhancement was proper.

### **USSG § 2K2.1 – Crime of Violence**

#### **U.S. v. Johnson, 18-3002 (8/5/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant should receive two sentence enhancements under USSG § 2K2.1 because the defendant's Ohio convictions for robbery and complicity to commit aggravated robbery were crimes of violence. On appeal, the court first held that the prior Ohio robbery conviction under ORC § 2911.02(A)(2) was a crime of violence. In this regard, the court found that the robbery offense had as an element the “use, attempted use, or threatened use of physical force.” The court held that “physical force” under Ohio law was sufficient to meet the force requirement for a crime of violence under the guideline definition. Second, the court held that the Ohio complicity to commit aggravated robbery under ORC § 2911.01(A)(1) was likewise a crime of violence. The Sixth Circuit previously decided in U.S. v. Patterson that the (A)(1) provision of aggravated robbery is a crime of violence. Thus, the court ruled that complicity to commit that offense, which merely means aiding and abetting another, also qualifies as a crime of violence. As such, the defendant's sentence was affirmed.

#### **U.S. v. Fuller-Ragland, 18-1773 (6/7/19)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court applied an enhancement under

USSG § 2K2.1 because it determined that the defendant's prior Michigan conviction for unarmed robbery was a crime of violence. On appeal, the court held that the Michigan robbery offense qualified as a crime of violence under the elements clause. The court found that the offense had, as an element, the use or threatened use of force against another. Specifically, the court ruled that the Michigan robbery offense required, at a minimum, that the defendant had "put in fear" the victim of the offense. Michigan courts had interpreted this requirement to mean "putting in fear of physical injury." The court held that this was sufficient to constitute the threatened use of force to "overcome a victim's resistance," as required by the Supreme Court. Accordingly, the sentence was affirmed.

#### **21 USC § 851/841(b)(1)(C) – Enhancements**

##### **U.S. v. Wiseman, 18-3904 (7/26/19)**

The defendant was charged with possession of drugs with intent to distribute. Prior to trial, the government filed an enhancement under 18 USC § 851 to increase the defendant's sentencing range under 18 USC § 841(b)(1)(C) from 0-20 years to 0-30 years. After his conviction and sentence, the defendant appealed and the First Step Act (FSA) was enacted during the pendency of the appeal. The court held that the FSA does not apply retroactively to defendants who were sentenced before its enactment. Further, the court ruled that, even if it, did the defendant was not entitled to relief. The FSA did not change the statutory requirements for a § 851 enhancements for defendants charged in drug cases under the 0-20 penalty provision of § 841(b)(1)(C). Instead, the FSA only altered the statutory requirements for drug cases under the 5-40 and 10-life penalty provisions of §§ 841(b)(1)(A) and (B). Accordingly, the defendant's sentence was affirmed.

#### **E. Fine/Restitution/Forfeiture**

##### **Restitution**

##### **U.S. v. Rankin, 18-3345 (7/12/19)**

The defendant was convicted of tax offenses and ordered to pay restitution to the IRS. The defendant argued on appeal that the district court's sentencing order required him to pay restitution while in prison. The court held that the obligation to pay restitution in a tax case may not begin until the defendant is on probation or supervised release. The court ruled that, to the extent that the district court order was ambiguous, it was amended to reflect that the obligation to pay restitution would not begin until the defendant finished his prison term and was placed on supervised release.

#### **III. Evidence**

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

##### **Motion to Compel Discovery**

##### **U.S. v. Harney, 18-6010 (8/14/19)**

The government seized a child pornography website known as Playpen and employed a Network Investigative Technique (NIT) in order to identify users of the website, which operated on the dark web. The defendant was a user of the site whose computer was identified through use of the NIT. The defendant moved in the district court for disclosure of all components of the NIT in order for his expert to assess whether it was working properly. The district court denied the motion and the defendant appealed. The court held that Fed. R. Crim. P. 16 requires the production of data only to the extent that it is material to preparing a defense. The court found that the government had engaged in no wrongdoing in employing the NIT and that it had provided the defense all non-privileged components of the NIT. Because the defense

could identify no potential errors in the operation of the NIT in the case, the court found that the defendant's request to obtain the full NIT was based on nothing more than conjecture. Accordingly, the court ruled that the motion to compel the additional discovery was properly denied.

#### IV. Fourth Amendment

##### B. Reasonable Suspicion/Veh. Stops

###### U.S. v. Ledbetter, 17-3289 (7/3/19)

Officers were conducting an investigation of the defendant when they watched him leave a known drug house in a high crime area. Upon observing a traffic violation, the officers conducted a traffic stop. The defendant was slow to pull over, and then did not look back at the officers but was instead reaching for the center console. Further, the defendant was sweating profusely, had glassy eyes, and was shaking uncontrollably. As result, the officers patted him down, which led to the discovery of evidence on the defendant and in the car. In his subsequent prosecution, the defendant moved to suppress the evidence and the district court denied the motion. On appeal, the court held that reasonable suspicion supported the frisk of the defendant. The court found that the totality of the circumstances including the defendant's slow stop, his reaching for the center console, his nervousness, and the fact of the high crime area all supported the officers' actions. Accordingly, the district court's ruling was affirmed.

#### V. Fifth Amendment

##### C. Confessions/Testimonial Rights

###### Miranda

###### U.S. v. Clayton, 18-2237 (8/30/19)

Officers were investigating the defendant for child sex offenses. In advising the defendant of his Miranda rights, the officers omitted language

from the department's standard waiver form that advised the defendant that he could have an attorney with him during questioning. The district court denied the defendant's motion to suppress his subsequent confession and he appealed. The court held that, while it is preferable for officers to recite the exact language of the written Miranda form, such is not required by the Miranda decision. Officers must only advise a suspect of the right to remain silent, that anything the suspect says could be used against him/her, that the suspect has the right to counsel, and that counsel will be appointed before questioning if the suspect cannot afford counsel. Because the warning met these minimum requirements, the district court's ruling was affirmed.

#### VII. Other Constitutional Rulings

##### E. Misc. Constitutional Rulings

###### Primary Jurisdiction

###### U.S. v. Johnson, 18-1675 (8/7/19)

The defendant was wanted for a State of Florida parole violation. Federal authorities executing the state arrest warrant in Michigan discovered that the defendant had a firearm. Accordingly, the federal government first prosecuted the defendant and sentenced the defendant before turning him over to the state authorities. On a subsequent appeal, the defendant argued that the federal court jurisdiction was invalid because the state had primary jurisdiction over him. The court first held that a defendant does have Article III standing under the Constitution to raise the issue of primary jurisdiction between the federal government and another sovereign. However, where the federal court has already exercised its jurisdiction and sentenced a defendant, the court will not find that the district court lacked subject matter jurisdiction to have heard the case. The federal court's jurisdiction is not extinguished because it violated a state's right to primary

jurisdiction. Accordingly, the sentence was affirmed.

## VIII. Defenses

### A. Severance of Counts/Defendants

#### Fed. R. Crim. P. 8(b) & 14 – Severance

##### U.S. v. Ledbetter, 17-3289 (7/3/19)

The defendants were charged with participating in a RICO conspiracy and committing murders for hire. The defendants moved for separate trials and the district court denied the motions. On appeal, the court held that the defendants were properly joined. First, under Fed. R. Crim. P. 7(b), the joinder was proper because the defendants were charged in the same racketeering enterprise and many were charged in the same murders. Further, the joinder was not unduly prejudicial under Fed. R. Crim. P. 14. The court found that the defendants were unable to show anything more than generalized allegations that the government's proof may have been greater against a codefendant and that there may have been spillover of inflammatory evidence from other defendants' cases. The court held that this evidence fell short of the "specific, compelling showing of actual prejudice" that is required to prove that joinder is improper. Accordingly, the district court ruling was affirmed.

### B. Fed. R. Crim. P. 12 – Pretrial motions

#### Failure to State an Offense

##### U.S. v. Rankin, 18-3345 (7/12/19)

The defendant was charged with, among other offenses, corruptly endeavoring to obstruct the administration of the tax laws under 26 USC § 7212(a). He moved pretrial to dismiss this count because it failed to state an offense. The district court denied the motion and, upon his conviction, the defendant appealed. The court held that, in order for an indictment to be sufficient, it must at

a minimum charge the words of the statute and provide sufficient facts as to inform the defendant of the specific offense with which he or she is charged. The court found that the indictment was sufficient because, in addition to providing the wording of the statute, it informed the defendant that he had willfully mislead agents by making false statements and concealing information from those agents who were attempting to ascertain income information from him and his businesses. This language sufficiently charged the offense and duly put the defendant on notice of the statutory elements. Accordingly, the conviction was affirmed.

### C. Necessity/Duress

#### Necessity/Justification Defense

##### U.S. v. Wiseman, 18-3904 (7/26/19)

The defendant shot a man who was trying to burglarize his house. The defendant admitted that, although he disarmed the burglar, he already had a gun in his home before the burglary ever occurred. As a result, the defendant was charged with being a felon in possession of a firearm. At the close of evidence at trial, the defendant requested a jury instruction on the justification defense. The district court declined to provide the instruction to the jury. On appeal, the court held that the defendant was not entitled to the instruction because he had not shown by a preponderance of the evidence that he was under a threat of danger when he first possessed the gun, or that he maintained the gun no longer than absolutely necessary. Given that he had the gun long before the burglary, the court found that the justification defense was clearly inapplicable and affirmed the conviction.

## I. Mistrial

### U.S. v. Ledbetter, 17-3289 (7/3/19)

The defendant was charged with participating in a RICO conspiracy. At trial, two different witnesses suggested that the defendant's counsel had improperly questioned a testifying witness and had provided information which caused another witness to get killed. On both occasions, the district court promptly admonished the jury to disregard the evidence and provided curative instructions. Further, the district court denied the defendant's motion for mistrial. On appeal, the court held that the denial of the mistrial motion was proper. The court found that the remarks were unsolicited by the government, the remarks were not the result of bad faith, the curative instructions were immediate and clear, and the evidence was otherwise strong against the defendant. Accordingly, the denial of the mistrial was affirmed.

## IX. Jury Issues

### A. Jury Instructions

#### **Instruction on Opinion Testimony**

### U.S. v. Buchanan, 18-3667 (7/31/19)

The defendant was charged with participating in a conspiracy to distribute marijuana. At trial, a government agent testified as a fact witness and provided opinion testimony regarding his views that the defendant was trafficking marijuana. Neither party requested a jury instruction on opinion testimony, however the defendant argued on appeal that the failure to provide an instruction was error. The court found no plain error in the failure to provide the jury instruction. The defendant had not disputed that he did sell marijuana, thus the opinion testimony of the agent was largely not on a disputed topic. Further, the government presented overwhelming

evidence that the defendant was in fact trafficking drugs. Accordingly, the conviction was affirmed.

### **Lesser Included Offenses**

### U.S. v. Rankin, 18-3345 (7/12/19)

The defendant was charged with multiple counts of felony willful failure to account for and pay over taxes, in violation of 26 USC § 7202. At trial, the defendant requested a lesser included offense instruction on the misdemeanor offense of willful failure to file return, supply information, or pay tax under 26 USC § 7203. The district court declined to provide the instruction and the defendant appealed. The court held that § 7203 is not properly considered a lesser included offense of § 7202. In order to be lesser included offense, the greater offense must contain an element that is not included in the lesser offense. The court found that § 7202 did not contain any element that was not contained in § 7203. Thus, there was no theory upon which the defendant could be not guilty of the § 7202 violation, but guilty of the § 7203 offense. Thus, the lesser included offense instruction was properly denied.

## XII. Specific Offenses

### **18 USC § 922(g)(5)(A) – Firearms – Aliens**

### U.S. v. Lopez, 18-5042 (7/10/19)

The defendant was an illegal alien charged with possessing a firearm. In the district court, he moved to dismiss the charge because he had received relief under DACA from the previous U.S. administration. The district court granted the motion and found 18 USC § 922(g)(5)(A) unconstitutionally vague. On the government's appeal, the court held that the government's executive decisions in the previous administration to not prosecute certain illegal immigrants could not render the statute vague. The DACA policy did not change the defendant's

status as an illegal alien and thus he was still clearly in violation of § 922(g)(5) for possessing a firearm. Accordingly, the district court's ruling was reversed. The court held that on remand the district court would have to determine whether the defendant "knew of his illegal status," pursuant to the Supreme Court's intervening decision in Rehaif v. U.S..

#### **18 USC § 924(c) – Firearm Enhancement**

##### **Knight v. U.S., 17-6370 (8/27/19)**

The defendant was convicted of using a firearm during and in relation to a crime of violence based on an assault and robbery of a postal employee under 18 USC § 2114(a). After the Johnson decision in the Supreme Court, the defendant filed a habeas petition arguing that the assault and robbery offense under § 2114(a) was not a crime of violence that would support the § 924(c) conviction. After the district court denied the petition, the Sixth Circuit held that assault and robbery under § 2114(a) is a crime of violence for purposes of the § 924(c) firearm enhancement. Specifically, the court found that the assault and robbery statute requires, at a minimum, that the defendant wounded the victim through use of a dangerous weapon. The court ruled that this requirement qualified as the kind of violent force necessary for the elements clause of § 924(c). Thus, the defendant's § 924(c) conviction was affirmed.

#### **18 USC § 1344 – Bank Fraud**

##### **U.S. v. Banyan, 17-6410 (8/5/19)**

The defendants were convicted after trial of bank fraud for defrauding mortgage companies. The defendants argued on appeal that the mortgage companies were not FDIC insured and the convictions thus could not stand. The court held that, pursuant to § 1344, the government must prove that a financial institution is federally insured in order to sustain a bank fraud

conviction. Because the government did not establish that the mortgage companies were federally insured or that their parent banks (who were federally insured) funded the mortgages their own funds, the conviction could not stand. Accordingly, the defendant's convictions were reversed.

#### **18 USC § 1959(a)(1) – RICO Murder**

##### **U.S. v. Ledbetter, 17-3289 (7/3/19)**

The defendant was one of a number of defendants charged with murder in aid of racketeering. In the particular murder in question, the defendant was supposed to be meeting the victim to sell him drugs and the victim turned up dead. Upon his conviction, the defendant argued on appeal that the government did not prove that the murder was in aid of the RICO conspiracy. The court held that, in order to prove murder in aid of racketeering under 18 USC § 1959(a)(1), the government must show that the murder was committed either for pecuniary gain from the enterprise or to improve position within the enterprise. The court found that neither prong of this statutory requirement had been met. At most, the defendant acted alone in killing the victim and without any expectation of gain from the RICO conspiracy. Accordingly, the defendant's conviction on this count was reversed.

#### **XIII. Post-Conviction Remedies**

##### **Clark v. Lindsey, 18-1640 (8/23/19)**

The petitioner was convicted of sexual assault and domestic violence in Michigan state court. The petitioner was evaluated prior to a competency hearing and was found competent to stand trial. The petitioner and his lawyers agreed that he would not challenge his competency, and the trial judge was notified of this decision. Neither of the petitioner's attorneys attended the competency hearing due to a misunderstanding, and the petitioner was unrepresented. The

Michigan state courts rejected the petitioner's claim that he had been subjected to a complete denial of counsel at a critical stage of the proceedings in violation of United States v. Cronin, 466 U.S. 648 (1984). The Sixth Circuit concluded that the state court decision was entitled to deference under 28 USC § 2254(d), and as a result the denial of habeas corpus relief was affirmed.

**Clark v. Nagy, 18-1885 (8/12/19)**

The petitioner was found guilty of murder in Michigan state court. Following his initial round of federal habeas corpus proceedings, the petitioner was granted authorization to file a second petition under 28 USC § 2244 raising a claim under Brady v. Maryland, 373 U.S. 83 (1963). The Brady claim was based on an exculpatory affidavit from an eyewitness to the crime who was also the daughter of a city detective; the witness alleged that her father instructed her not to report what she had seen. In addition, the state's sole eyewitness at trial recanted her testimony at a codefendant's subsequent trial, and the petitioner alleged that this additional evidence enabled him to satisfy the actual innocence requirement set out in 28 USC 2244(b)(2)(B). The district court granted the second petition without conducting an evidentiary hearing. The Sixth Circuit determined that an evidentiary hearing was necessary to determine whether the petitioner's Brady claim was meritorious, and whether the petitioner could satisfy the actual innocence requirement to obtain relief on a second or successive petition. The case was accordingly remanded to district court.

**Magnum Reign v. Gidley, 18-1086 (7/10/19)**

The petitioner was convicted of armed robbery in Michigan state court. The petitioner was sentenced under a mandatory guidelines framework that the Michigan Supreme Court

subsequently found to be unconstitutional under Alleyne v. United States, 570 U.S. 99 (2013). The Michigan Supreme Court remedied the error by making the guidelines advisory. The petitioner filed a motion for resentencing. The sentencing court determined that its reasoning would have been the same even under the advisory guidelines and denied the petitioner's request. The Sixth Circuit concluded that the sentencing court's actions did not contravene or unreasonably apply clearly established federal law, and as a result habeas corpus relief was foreclosed under 28 USC § 2254(d).

**Mitchell v. MacLaren, 17-2444 (8/1/19)**

The petitioner was convicted of first degree murder and other offenses in Michigan state court. After being arrested, the petitioner was interrogated at least once without being given Miranda warnings. The petitioner was then given Miranda warnings and gave a video-recorded statement. The petitioner alleged that his statement was inadmissible because the detective gave an impermissible two-step Miranda warning in violation of Missouri v. Seibert, 542 U.S. 600 (2004), and also because the detective made ambiguous statements regarding the petitioner's right to have an attorney present during questioning. The state court rejected the petitioner's Seibert claim because he did not actually confess during the initial interrogation. The state court further found that the written Miranda form provided the petitioner with an adequate explanation of his right to an attorney during questioning. The Sixth Circuit concluded that the state court's rejection of the petitioner's claims was entitled to deference under 28 U.S.C. § 2254(d), and as a result the denial of habeas corpus relief was affirmed.

**O'Neal v. Balcarcel, 18-2201 (8/7/19)**

The petitioner was convicted of second degree murder in Michigan state court. At trial, two out-

of-court exculpatory statements were excluded in violation of Chambers v. Mississippi, 410 U.S. 284 (1973). Specifically, the trial court excluded the jailhouse confession of an alternate suspect, along with the victim's identification of the same suspect before the victim died. The state appellate court concluded that one exclusion was not error and that the other was harmless. In federal habeas corpus proceedings, the warden conceded that the exclusion of both statements violated Chambers, but nevertheless argued that the exclusion was harmless error. The Sixth Circuit concluded that each of the errors had a substantial and injurious effect on the proceedings under Brecht v. Abrahamson, 507 U.S. 619 (1993). As a result, the district court's grant of habeas corpus relief was affirmed.

**Owens v. Warden, 17-5488 (7/30/19)**

The petitioner was convicted of second degree murder in Tennessee state court. The trial judge increased the petitioner's sentence above the statutory maximum based on a factual finding that the offense was committed with exceptional cruelty. The finding was never made by the jury. The Tennessee Court of Criminal Appeals determined that no Sixth Amendment violation occurred, notwithstanding the fact that the state court considered the issue on direct review after Blakely v. Washington, 542 U.S. 296 (2004), had already been decided. The Sixth Circuit agreed that the state court decision was not entitled to deference under 28 USC 2254(d)(1). The Sixth Circuit nevertheless concluded that the error was harmless, and reversed the decision of the district court that had granted relief.

**Saulsberry v. Lee, 17-6157 (8/30/19)**

The petitioner was charged with premeditated murder in Tennessee state court, with felony murder as a lesser-included offense. The jury convicted the petitioner of premeditated murder; the jury did not return a verdict on the felony

murder counts as they had been instructed not to do so if they returned a conviction on the premeditated murder charge. The state appellate court reversed the premeditated murder conviction with prejudice based on insufficient evidence, and remanded for retrial on the felony murder charges. The petitioner then filed for habeas corpus relief under 28 U.S.C. § 2254, seeking to bar his second trial on double jeopardy grounds. The petitioner was retried and convicted while the petition was pending. The Sixth Circuit concluded that the petition should have been converted to an application for relief under 28 U.S.C. § 2241 when it was initially filed because the petitioner was a pretrial detainee, rather than a state prisoner seeking relief from a judgment of conviction. However, the petitioner's subsequent conviction while the federal habeas corpus proceedings were ongoing would have required conversion back to § 2254 in any event, and as a result the petitioner was required to overcome § 2254(d). The Sixth Circuit further concluded that the state court's rejection of the petitioner's double jeopardy claim was entitled to deference under AEDPA, and as a result the denial of relief was affirmed.