

# Precedential Value

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This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. 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), under the Precedential Value tab.

### I. Sentencing Issues

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

##### Procedural Reasonableness

##### U.S. v. Hatcher, 18-4092 (1/13/20)

At the defendant's sentencing for escape and being a felon in possession of a firearm, the district court considered information that the gun the defendant possessed was used in a shooting three days prior. There was no evidence linking the defendant to the use of the firearm three days prior, nor did the government even allege that he was the shooter. Further, this information was not contained in the PSR. As a result, the district court imposed an upward variance of 21 months from the top end of the guideline range. The defendant did not challenge this information in his Bostic objection, and he appealed. The court held that the district court committed procedural error in considering the prior shooting information. First, the court ruled that the defendant did not receive sufficient notice that the information would be used at sentencing because it was not in the PSR, nor in the district court's notice of potential upward variance. Second, the court found that the district court's reliance on the information was improper because there was not a preponderance of the evidence that the defendant was involved in the prior shooting. Accordingly, the court found plain error in the district court's reliance on the

information, and remanded the case for resentencing.

##### Substantive Reasonableness

##### U.S. v. Demma, 18-4143 (1/24/20)

The defendant was a five year Iraq war veteran with two tours of duty, who was charged with possession of child pornography. At sentencing, two psychologists opined that his offense was the result of the Iraq war trauma and his PTSD. The district court found that the child porn guideline, USSG § 2G2.2, was artificially high because the enhancements apply to most offenders, and also determined that a downward variance was warranted due to the defendant's history. As such, the district court imposed a non-custodial sentence where the guideline range had called for 78-97 months imprisonment. On the government's appeal, the court held that the sentence was substantively unreasonable. The court first ruled that the district judge erred in disregarding the child porn guideline. The court found that the district court made insufficient particularized findings regarding its policy disagreement with the guideline, specifically related to the issue of adequate punishment. Further, the court noted that the policy disagreement with the guideline certainly could not justify a non-custodial sentence. Second, the court held that the district court gave unreasonable weight to the defendant's history

and need for treatment, and did not adequately consider the seriousness of the offense, the quantity and types of images involved, and general deterrence. Finally, the court found that the defendant's military service and PTSD were insufficient to support a non-custodial sentence. Accordingly, the sentence was vacated.

**Holguin-Hernandez v. U.S., 18-7739 (2/26/20)**  
**Supreme Court**

The defendant was on supervised release and was convicted in a new drug trafficking case. At sentencing, the defendant argued that the sentence on the supervised release violation should not run consecutively to the sentence on the new charge, or alternatively that he should receive a lower sentence called for by the guidelines for the SRV violation. The district court imposed a guideline sentence for the SRV and ran it consecutively to the sentence on the new charge. The defendant did not object after the court imposed the sentence. The Fifth Circuit subsequently held that plain error review was appropriate because of the defendant's failure to object to the sentence. On *certiorari*, the Supreme Court held that a defendant need not make an objection after a district court imposes sentence in order to preserve an appeal of substantive reasonableness. Because the defendant properly argued for a lower sentence on the SRV in the district court before sentence was imposed, any potential error was preserved for appeal. Accordingly, the Fifth Circuit's ruling was reversed.

**B. Guideline issues**

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

**U.S. v. Libbey-Tipton, 18-4067 (1/23/20)**

At the defendant's sentencing for accessing and possessing child pornography, the district court imposed a 5 level enhancement because the defendant accessed or possessed more than 600 images. This calculation was based on images the defendant possessed, images in the unallocated space on the defendant's computer, and images

the defendant accessed on a website. On appeal, the court held that a defendant must knowingly access or possess child pornography in order for the enhancement to apply. The court found that the defendant's knowing access of images on the website was sufficiently established through tracking of his IP address to the site and the evidence of the images found on his computer hard-drive. Combining the images accessed with the images he knowingly possessed, the amount was in excess of 600. Thus, the court did not need to decide whether the images in the unallocated space on the computer were knowingly possessed by the defendant. Therefore, the sentence was affirmed.

**2K2.1(b)(4)(B) – Obliterated Serial Number**

**U.S. v. Sands, 17-2420 (1/24/20)**

The defendant was found in possession of a firearm with a scratch mark through all three locations where the serial number appeared on the gun. The serial number, however, was readable to the naked eye. Upon the defendant's sentencing for being a felon in possession of a firearm, the district court applied the 4 level enhancement for an altered or obliterated serial number, pursuant to USSG § 2K2.1(b)(4)(B). On appeal, the court held that a firearm's serial number is altered or obliterated for purposes of the guideline when it is "materially changed in a way that makes accurate information less accessible." The court found, however, that when a serial number is defaced, but "still visible to the naked eye," it is not altered or obliterated. Thus, the court ruled that the 4 level enhancement was not applicable and vacated the defendant's sentence.

**4B1.5(b) – Repeat Sex Offender**

**U.S. v. Hollon, 19-5277 (1/30/20)**

The defendant was convicted of engaging in a child exploitation enterprise in violation of 18 USC § 2252A(g). The offense was based on the fact that the defendant engaged in three or more separate felonies involving distributing and

receiving child pornography, that he acted in concert with at least 10 others, and more than one minor victim was involved. At sentencing, the district court determined that a 5 level enhancement was applicable under USSG § 4B1.5(b) because the defendant had also sexually abused his nephew over a period of years. On appeal, the defendant challenged whether his count of conviction for engaging in a child exploitation enterprise was a “covered offense” for purposes of the 5 level guideline enhancement. The court held that the § 4B1.5(b) enhancement was appropriate. Under that provision, the offenses of distributing and receiving child pornography are excluded from being counted as covered offenses. The court found that, even though his § 2252A(g) conviction was premised upon a child porn distribution ring, the conviction was nonetheless a covered offense because (1) it was not specifically excluded under the guideline, and (2) the offense required more than just distribution – the offense also involved more than 10 coconspirators and multiple victims. Accordingly, the court held that § 2252A(g) is a covered offense and the 5 level enhancement under § 4B1.5(b) was affirmed.

### **5G1.3 – Concurrent/Consecutive to State Case**

#### **U.S. v. Potts, 18-1961 (1/8/20)**

The defendant was sentenced in state court to a 1-5 year term, with parole eligibility, for a domestic violence conviction. Upon his federal conviction for access device fraud and aggravated identity theft, the district court, without referencing USSG § 5G1.3, ran his federal sentence consecutive to his state sentence. On appeal, the court held that a district court is not required to specifically reference the § 5G1.3 (Application Note 4(A)) factors as long as the record reflects that it considered them in substance. The court found that the district court adequately considered (1) the § 3553(a) sentencing factors, (2) the type and length of the state sentence, (3) the time served on the state sentence, (4) the procedural posture of the state sentence, and (5)

any other relevant circumstance. Thus, the consecutive sentence was affirmed.

### **D. Recidivism enhancements**

#### **18 USC § 924(e) – ACCA**

#### **Scholar v. U.S., 18-6662 (1/21/20)** **Supreme Court**

The defendant was charged with being a felon in possession of a firearm and at the time he had 5 prior Florida convictions for selling a controlled substance. As a result, the district court determined that the defendant qualified as an armed career criminal. The 11th Circuit affirmed the sentence, and the defendant argued in the Supreme Court that the prior offenses were not “generic” drug trafficking offenses and thus could not count as ACCA predicates. The Court held that the ACCA’s delineated offenses for controlled substance offenses did not describe specific offenses, but rather “types of conduct.” In this regard, the Court interpreted the phrase in the ACCA “an offense involving manufacturing, distributing, or possessing with intent to manufacture or distribute” to not invoke any generic offense, but instead to refer to conduct involving one of those types of crimes. Thus, a prior state offense can qualify if the elements of that offense involve distributing a narcotic, or possessing with intent to distribute, as the case may be, without regard to whether the state offense constitutes a drug trafficking offense in the generic sense. Accordingly, the defendant’s sentence was affirmed.

#### **USSG § 4B1.1 – Career Offender**

#### **U.S. v. Cavazos, 19-5141 (2/12/20)**

The defendant was convicted of drug trafficking. At sentencing, the district court determined that he was a career offender based, in part, on his prior Texas conviction for delivering or possessing with intent to deliver a controlled substance. The defendant did not object in the district court, but argued on appeal that the Texas conviction was not an ACCA predicate. The

court found that the Texas statute defined the term “deliver” to include “offering to sell a controlled substance.” As such, the court held that its decision in U.S. v. Havis dictated that the Texas offense did not qualify as a prior “controlled substance offense” for purposes of the career offender provision. Specifically, the court in Havis held that an attempt was not included in the definition of a “controlled substance offense”; thus, an “offer to sell” was likewise not covered. As such, the court found plain error in the district court’s determination, and vacated the sentence.

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

##### **Forfeiture – Drug Proceeds**

###### **U.S. v. Tolliver, 18-6034 (1/29/20)**

At sentencing for the defendant’s money laundering conviction, the district court ordered that the defendant had to forfeit gambling winnings. On appeal, the court held that gambling winnings are properly forfeitable under 21 USC § 853(a) if they are derived from money gained from illegal activity. Thus, because the government proved by a preponderance of the evidence that the money the defendant used to gamble was drug proceeds, the winnings were also forfeitable.

#### **III. Evidence**

##### **A. Article IV – Relevancy**

###### **403 – Undue Prejudice**

###### **U.S. v. Chalhoub, 18-6180 (1/7/20)**

The defendant was a doctor who was charged with health care benefit fraud for installing pace makers in patients with no medical necessity. At trial, the government introduced evidence related to the significant income and lavish expenses the defendant had during the relevant time period. On appeal, the defendant argued that this evidence was unduly prejudicial under FRE 403. The court found that (1) there was other credible evidence in the case that the defendant was

involved in improperly installing pacemakers and fraudulently billing medicare, (2) the money he received and spent was thus not from a legitimate source, and (3) the defendant’s accumulation and expenditure of the moneys coincided with the period of illegal activity. Although the court ruled that it was a “close case,” the court found that the wealth-related evidence was not improper under FRE 403, and the conviction was affirmed.

##### **414 – Prior Sexual Molestation**

###### **U.S. v. Libbey-Tipton, 18-4067 (1/23/20)**

At the defendant’s trial for accessing and possessing child pornography, the district court admitted evidence that the defendant had a prior gross sexual imposition conviction for sexually molesting a minor. The defendant argued on appeal that the prior conviction was inadmissible under FRE 414 and 403. The court held that the conviction was properly admitted. The court found that FRE 414 specifically permits admission of evidence of “any other child molestation” in a trial for child molestation. FRE 414 defines “child molestation” to include “receipt of child pornography.” Further, the court found that the defendant’s prior child molestation actually occurred during the same time period charged in the indictment that the defendant was possessing child porn. Finally, the court ruled that the defendant’s child molestation activity was similar in character to the child porn images he was viewing. Accordingly, the court held that, although the prior conduct was prejudicial, its effect did not substantially outweigh the probative value of the evidence, which was to prove that the defendant was the person accessing and viewing the child porn. As such, the conviction was affirmed.

##### **C. Article VIII – Hearsay**

###### **801/802 – Hearsay**

###### **U.S. v. Chavez, 19-5016 (2/21/20)**

During the defendant’s trial for healthcare fraud, the government introduced notes that were found

in a notebook. One set of notes was written by a codefendant and it displayed the numbers of visits certain patients made to the clinic. The second set mentioned the defendant by his nickname, but were otherwise cryptic as to their meaning. Upon his conviction, the defendant argued on appeal that the notes were improperly admitted hearsay. The court held that the first set of notes were not offered for the truth of the matter asserted. The government's purpose in introducing the notes was merely to show that a codefendant had written them and that he was keeping track of patient visits. Whether the notes were truthful about the number of patients visits was not the purpose of the evidence, and thus it was not properly considered hearsay. Regarding the second set of notes mentioning the defendant's nickname, the court held that the use of someone's name without a frame of reference is not a "statement" for purposes of the hearsay rules, and thus could not be hearsay. The court further found that to the extent that the cryptic notes beneath the defendant's name could be construed to tie the defendant to the healthcare fraud, the error in its admission was harmless because the evidence was otherwise overwhelming. Accordingly, the conviction was affirmed.

## V. Fifth Amendment

### C. Confessions/Testimonial Rights

#### Miranda

##### U.S. v. Ramamoorthy, 19-1033 (2/7/20)

The defendant was being investigated for sexually abusing a woman on an airplane. He was provided a written Miranda waiver, discussed it with agents, asked questions about its meaning, and signed and initialed it. He then confessed to sexually abusing the woman. The district court declined to suppress the confession and the defendant argued on appeal that he misunderstood the meaning of the Miranda waiver because of his impressions from the Indian legal system. On appeal, the court held that the defendant's firm grasp on the English

language, his intelligent questions to the agents about the Miranda form, and his non-verbal signaling that he understood, all indicated that his waiver of his rights was voluntary. Further, the court emphasized that the focus in the Miranda inquiry was whether the agents "had any reason to believe that the defendant misunderstood his Miranda rights." Finding none, the court affirmed the conviction.

### E. Miscellaneous Fifth Amendment

#### Due Process – Right to Present a Defense

##### U.S. v. Chalhoub, 18-6180 (1/7/20)

The defendant was a doctor who was charged with health care benefit fraud for installing pace makers in patients with no medical necessity. The government presented an expert witness who treated 20 of the defendant's patients and testified that the pacemakers were unnecessary. The expert, however, could not remember any of the patients' names. The defendant argued in the district court that this testimony violated his due process rights to present a defense. On appeal, the court first noted that the defendant may have had a right to a bill of particulars demanding the patients' names, but he did not pursue this argument on appeal. Second, the court held that the defendant's due process rights were not violated. Apart from the evidence related to the 20 unnamed patients, the evidence was otherwise overwhelming that the defendant committed healthcare fraud related to 27 other named patients. Further, the defendant was provided ample opportunity to cross examine the government's expert about his treatment of the 20 unnamed patients and his inability to remember their names. As such, the court found that the defendant could not show that the expert's testimony was "unconstitutionally arbitrary or disproportionately infringed upon a weighty interest," as required for a due process violation. Accordingly, the conviction was affirmed.

## **VI. Sixth Amendment**

### **F. Miscellaneous Sixth Amendment**

#### **Right to Public Trial**

##### **U.S. v. Hendricks, 19-3232 (2/19/20)**

During the defendant's terrorism trial, the district court permitted the government to disguise the identity of an investigating undercover FBI agent who had continuing active investigations of terrorism ongoing. This required the public to be in a different room with live audio feed but no video or images of the witness. The defendant argued on appeal, that his right to a public trial was violated. The court held that although the limitation of a public trial should be rare, the defendant's rights were not violated. The court found that the government made a substantial showing that it would be prejudiced if the agent's identity were disclosed to the public, the district court's closure was narrowly tailored, the court considered reasonable alternatives, and the court made adequate findings regarding the need for closure. As such, the district court's ruling was affirmed.

## **IX. Jury Issues**

### **A. Jury Instructions**

#### **Aiding and Abetting**

##### **U.S. v. Chavez, 19-5016 (2/21/20)**

The defendant was convicted of aiding and abetting aggravated identity theft under 18 USC § 1028A(a)(1) related to a healthcare fraud scheme. The defendant argued on appeal that the jury instructions were inadequate because they did not require the jury to find that the defendant intended to assist others in committing aggravated identity theft specifically, instead of just the broader healthcare fraud. The court held that jury instructions for aiding and abetting must require proof that the defendant had advance knowledge of and intended to assist the identity theft, not just the underlying offense (healthcare fraud). However, the court found that the jury

instructions taken as a whole met this requirement by providing that the jury must find that the defendant "intended to help commit the crime" of identity theft, and that he "did something to help or encourage the crime." Accordingly, the conviction was affirmed.

## **X. Probation/ Supervised Release**

### **Supervised Release**

##### **U.S. v. Faber, 19-1575 (2/19/20)**

As a condition of supervised release, the district court ordered the defendant to have no contact with his spouse, who he had married under the Wicca religion. The defendant did not appeal or file a Rule 35 motion within 14 days, but instead waited until he completed his prison term before challenging the condition. The defendant filed a motion under 18 USC § 3583(e)(2) to remove the no contact order as an unlawful sentencing condition. The district court denied the motion and the defendant appealed. The court held that the district court had no jurisdiction to entertain the motion. A defendant must either appeal, or file a habeas petition or Rule 35 motion to correct sentence, in order to challenge a condition of supervised release as being unlawful. The court ruled that a defendant may only utilize § 3583(e)(2) to "adjust supervised release conditions to account for new or unforeseen circumstances." Accordingly, the district court's ruling was affirmed.

## **XI. Appeal**

### **Jurisdiction - Supervised Release**

##### **U.S. v. Marshall, 18-2267 (2/4/20)**

The defendant moved in the district court to terminate his supervised release early. The district court denied the motion. On appeal, the court held that it had no jurisdiction to review the denial of an early termination of supervised release. Accordingly, the appeal was dismissed.

## **XII. Specific Offenses**

### **18 USC § 373 – Soliciting Crimes of Violence**

#### **U.S. v. Doggart, 17-5813 (1/15/20)**

Under 18 USC § 373, a defendant may receive an enhanced penalty for a substantive offense if the underlying offense has “as an element the use, attempted use, or threatened use of physical force against property or against the person of another.” The defendant was convicted of the § 373 enhancement based on his underlying charge of destroying religious property, pursuant to 18 USC § 247(d)(3). Under this section, the defendant was convicted of destroying religious property “through the use, attempted use, or threatened use of a dangerous weapon, explosive or fire.” On appeal, the court held that the § 247(d)(3) offense qualified as a crime of violence for purposes of § 373. The court found that use of a dangerous weapon, explosive, or fire all constituted a sufficient use of physical force against property to satisfy the crime of violence definition in § 373. Accordingly, the conviction was affirmed.

### **18 USC § 844(i) - Arson**

#### **U.S. v. Doggart, 17-5813 (1/15/20)**

The defendant was convicted after trial of, among other things, solicitation to commit federal arson for his plans to burn down a mosque. The defendant argued on appeal that he could not be convicted of federal arson because the mosque was not “used in interstate commerce or in any activity affecting interstate commerce,” as required by the statute. The court held that the 200 person local mosque that was involved in the case was in no way used in or affecting interstate commerce. The court ruled that a building must be in active employment for commercial purposes; a passive connection to commerce is insufficient. Relying on its prior precedent in Jones v. U.S., which held that a private residence did not meet the commerce requirement, the court ruled that the local mosque likewise did not satisfy the accepted meaning of commerce.

Accordingly, the defendant’s conviction on this count was reversed.

### **18 USC § 875(c) - Threats**

#### **U.S. v. Howard, 18-4213 (1/21/20)**

After the defendant left a voicemail threatening to murder former Attorney General Eric Holder, he was charged with and convicted of transmitting a threat in interstate commerce under 18 USC § 875(c). The defendant argued for the first time on appeal that the indictment did not sufficiently charge the mens rea element and that the jury instruction regarding this element was insufficient. The court held that, based on the Supreme Court’s decision in Elonis v. U.S., the government must allege and prove that the defendant intended the communication to be a threat. The indictment in the case charged that the defendant “knowingly and willingly” transmitted a threat in interstate commerce. The court ruled that this language was sufficient, at least under plain error, to properly charge the intent element. Further, the court found that the instruction, which required the jury to find that the defendant had the “purpose of issuing a true threat” or at least “knowledge that the communication would be understood as a true threat,” was sufficient to apprise the jury of the intent element, at least under a plain error standard. Accordingly, the defendant’s conviction was affirmed.

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

#### **Manners v. U.S., 17-1171 (1/13/20)**

The defendant was convicted of using a firearm during and in relation to a crime of violence, based on an assault with a dangerous weapon in aid of racketeering, under 18 USC § 1959(a)(3). After denial of his habeas petition, the Supreme Court remanded the case based on its decision in Sessions v. Dimaya because it found the residual clause of § 924(c) unconstitutionally vague. On remand, the court held that the § 1959 offense qualified as crime of violence for § 924(c) purposes based on the elements clause. The court

found that the defendant was convicted under the § 1959(a)(3) provision which required proof that he committed assault through use of a dangerous weapon. This constituted the type of violent force anticipated by the elements clause of § 924(c), and thus the conviction was affirmed.

**U.S. v. Richardson, 17-2157 (1/27/20)**

After several appeals and remands from the Supreme Court, the defendant challenged whether his 5 convictions for aiding and abetting a Hobbs Act robbery in violation of 18 USC § 1951 qualified as crimes of violence for purposes of 18 USC § 924(c). Further, the defendant argued that the First Step Act should apply retroactively to his sentence. The court held first that aiding and abetting a Hobbs Act robbery is a crime of violence under the elements clause for purposes of a § 924(c) conviction. Second, the court ruled that the First Step Act would not apply to the defendant who was sentenced more than one year before its passage. Accordingly, the defendant's sentence was affirmed.

**18 USC § 1028A – Aggravated ID Theft**

**U.S. v. Potts, 18-1961 (1/8/20)**

The defendant was charged with unauthorized access device fraud and two counts of aggravated identity theft, pursuant to 18 USC § 1028A. At sentencing, the district court imposed the 2 year mandatory sentences on the identity theft counts to run consecutively to each other. The defendant challenged the consecutive nature of the sentences on appeal. The court held that Application Note 2(B) to USSG § 5G1.2 requires a district court to consider certain factors in determining whether to run multiple aggravated identify theft convictions consecutive to each other. Answering an open question, the court held that it would take a “functional approach” to considering whether the district court had properly considered the factors. Under this approach, the district court is not required to specifically delineate the factors as long as it considers the substance of the guideline considerations. The court found that the district

court had adequately considered the nature and seriousness of the offenses, the groupability of the counts under § 3D1.2, and whether the purposes of sentencing in 18 USC 3553(a)(2) would be better achieved with a concurrent or consecutive sentence. Therefore, the court affirmed the consecutive sentence.

**18 USC § 1956 – Money Laundering**

**U.S. v. Tolliver, 18-6034 (1/29/20)**

The defendant was convicted of promotional money laundering for his use of proceeds from marijuana sales. The defendant challenged the sufficiency of the evidence on appeal. The court first held that the use of drug proceeds to purchase additional drugs can constitute promotional money laundering under 18 USC § 1956. Further, the court found that the government's proof was sufficiently demonstrated that the defendant made financial transactions with money from marijuana sales, the defendant knew the money was from marijuana sales based on his close relationship with the supply ringleader, and the defendant promoted the conspiracy as “the financial transactions freed up money to buy more drugs.” Accordingly, the conviction was affirmed.

**U.S. v. Chavez, 19-5016 (2/21/20)**

The defendant was convicted of concealment money laundering for putting proceeds from his healthcare fraud scheme into a separate bank account. In the scheme, the defendant set up duplicate business accounts so that he could hide the proceeds from the falsely submitted claims from the chiropractors who were working for him. The defendant argued on appeal that the evidence was insufficient to support concealment money laundering under 18 USC § 1956(a)(1). The court first held that the fact that the duplicate business bank account was set up in the defendant's own name did not preclude a conviction for concealing the funds. The defendant was concealing the accounts from the chiropractors, which was essential to the scheme. Second, the court held that the funds deposited

into the duplicate accounts were in fact proceeds of the healthcare fraud offense. The court found that health fraud “prohibits the scheme to defraud,” not the completed fraud. Thus, the court held that the fraud was committed “the moment the defendant submitted false claims for payment.” Accordingly, the deposit of the checks from the insurance company into the duplicate bank accounts could properly be considered laundering the proceeds of the healthcare fraud. As such, the conviction was affirmed.

### **18 USC § 2339B – Material Support**

#### **U.S. v. Hendricks, 19-3232 (2/19/20)**

The defendant attempted to form an ISIS cell in the U.S. As a result, he was convicted of conspiring to provide material support to a foreign terrorist organization, pursuant to 18 USC § 2339B. On appeal, the defendant argued that the evidence was insufficient because the government failed to prove that he had direct contact with an ISIS member. The court held that, while it is true that a defendant may not be convicted if the defendant truly acted independently, there was sufficient circumstantial evidence that the defendant was connected with ISIS members. The evidence supported that the defendant took direction from ISIS members, that he viewed himself and his recruits as agents of ISIS, and that he “acted in a manner consistent with someone who was operating or seeking to operate on behalf of ISIS.” Thus, the conviction was affirmed.

### **18 USC § 2422(b) – Enticement of Minors**

#### **U.S. v. Vinton, 18-2354 (1/2/20)**

The defendant chatted online with an undercover agent who was pretending to be a mother of a 12 year old daughter. As a result of the chats, the defendant arrived to have sex with the minor, but was instead arrested. During his prosecution for enticement of a minor under 18 USC § 2422(b) the defendant moved to dismiss the indictment on the grounds that the undisputed facts could not make out his intent to solicit the minor for sex.

Instead, the defendant argued that he just acquiesced in the agent’s offer, but had no intent to persuade the minor to have sex. The district court granted the motion and the government appealed. The court first held that solicitation does not have to be directed to the minor. It is sufficient if the defendant attempts to solicit the adult responsible for the minor. Second, the court ruled that a reasonable juror could have concluded that the defendant intended to solicit a minor for sex. The court found that the defendant first asked during the chat about sex with the minor, the defendant knew that it was a child pornography listing he was responding to, he repeatedly expressed his desire to have sex with the minor, he asked what sex acts the minor could perform, he sent pictures of his genitalia, and showed up for the meeting with \$1400 in cash. Accordingly, the district court’s ruling was reversed and the case remanded for trial.

### **18 USC § 2242(2) – Sexual Abuse**

#### **U.S. v. Ramamoorthy, 19-1033 (2/7/20)**

The defendant sexually abused a woman who was asleep in the seat next to him on an airplane. As a result, he was charged with sexual abuse, pursuant to 18 USC § 2242(2). This section requires proof that the defendant knowingly engaged in a sexual act with another who was unable to consent and caused “the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” The defendant was also charged in the same count with attempt. The defendant argued on appeal that the count was duplicitous in that it charged two separate offenses, sexual abuse and attempt, in one count, and that each required a different mens rea. The court held that the count of sexual abuse was charged as a specific intent crime because the provision requires intent or “bad purpose” on the part of the defendant. Thus, the attempt charge, which also requires specific intent, was a lesser included offense of the completed offense. As such, the jury could not

have convicted the defendant of the sexual abuse without also finding him guilty of the attempt. Thus, the offenses were not duplicitous and the conviction was affirmed.

## **21 USC §§ 841(b) & 851 – Prior Convictions**

### **U.S. v. Cavazos, 19-5141 (2/12/20)**

During the defendant's drug trafficking prosecution, the government filed an enhancement under 21 USC §§ 841(b) and 851 based on the defendant's prior conviction for conspiracy to commit drug trafficking. The defendant argued in the district court that the prior conviction was unconstitutional and could not form the basis for a § 851 enhancement. The court held that § 851 prohibits any challenge to the constitutionality of a prior conviction if "five years have elapsed between the prior conviction and the information alleging such prior conviction." Thus, because the prior conviction was 14 years old at the time, the court ruled that the defendant was prevented from challenging its constitutionality in the district court.

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

#### **U.S. v. Woods, 19-5685 (2/4/20)**

The defendant was sentenced in 2001 on crack cocaine and weapons charges. Subsequently, the Fair Sentencing Act was passed, which reduced crack penalties, and then the First Step Act was enacted, which made the Fair Sentencing Act retroactive. By this time, the defendant had already been released from his sentence, but then returned to serve a second sentence based on a violation of his supervised release. Thus, the defendant moved under the First Step Act to reduce his supervised release violation sentence. The district court denied the motion. On appeal, the court held first that the defendant was eligible for First Step Act relief. The court found that, because post-revocation sentences "relate to original offense," a defendant can challenge a supervised release violation sentence under the First Step Act where the underlying conviction would be an eligible crack offense. The court

further ruled, however, that the district court did not err in exercising its discretion to deny the defendant's motion. The court found that the district court properly considered that the defendant had overserved his original sentence, but that the defendant's repeated and continuing drug and weapon offense while on supervised release warranted a longer sentence. Accordingly, denial of the motion was affirmed.

#### **McKinney v. Arizona, 18-1109 (2.25.20)** **Supreme Court**

The defendant was convicted and sentenced to death in Arizona state court prior to the decisions in Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S.Ct. 616 (2016). In subsequent federal habeas corpus proceedings, the defendant's death sentence was invalidated on the ground that the state courts failed to properly consider mitigating evidence in violation of Eddings v. Oklahoma, 455 U.S. 104 (1982). The case then returned to state court. The Arizona Supreme Court conducted appellate reweighing under Clemons v. Mississippi, 494 U.S. 738 (1990), as a remedy, but characterized the reweighing as a collateral proceeding under state law, rather than part of direct review. The United States Supreme Court granted certiorari directly from the state court ruling and affirmed. Clemons permits appellate reweighing where improperly excluded mitigating evidence is at issue, just as it does in cases where improperly admitted aggravating evidence created a constitutional defect. Furthermore, Ring and Hurst did not abrogate Clemons, and appellate reweighing remains constitutionally permissible. Ring and Hurst also do not apply retroactively on collateral review, and as a result the judicial factfinding the led to the defendant's sentence did not provide a basis for relief.

#### **Bailey v. Wainwright, 18-3581 (2.20.20)**

The petitioner was convicted of murder in Ohio state court. The petitioner filed a federal habeas corpus petition alleging that the Ohio Parole

Board's record of his case contained factual inaccuracies regarding the crime he had committed, and that the Parole Board refused to correct them. The Sixth Circuit concluded that the petitioner's claim was not cognizable under 28 USC § 2254 because even if the refusal to correct the record amounted to a violation of federal law, a corrected record would not necessarily result in his release from custody. As a result, the petitioner's claim was cognizable as a civil rights action under 42 USC § 1983, rather than a habeas corpus proceeding under § 2254.

**Cardin v. United States, 18-5389 (1.9.20)**

The petitioner was convicted of fraud in federal court. The petitioner prepared a motion to vacate under 28 USC § 2255, but was hospitalized two days before the filing deadline and the petitioner's sister signed the motion on his behalf. The petitioner subsequently filed a motion to amend to add his own signature, explaining that he had authorized his sister to file for him because he was unable to do so, and that his sister had been acting in his best interests. The petitioner also included materials documenting his hospitalization. The district court denied the motion to amend and the motion to vacate, concluding that the sister failed to establish that she was entitled to next friend standing. Under the next friend doctrine, a person without standing to file an action for collateral relief can do so on behalf of a person who does if: 1., the next friend provides an adequate explanation for why the real party in interest cannot bring the suit themselves, and; 2., the next friend shows that they are truly dedicated best interests of the person with standing to litigate the action. Whitmore v. Arkansas, 495 U.S. 149, 163 (1990). The Sixth Circuit concluded that the district court erred in denying the petitioner's motions without weighing all of the available evidence, and that next friend standing had been established when all of the information was considered. The district court's judgment was accordingly reversed, and the case was remanded for further proceedings.

**Hueso v. Barnhart, 18-6299 (1.9.20)**

The petitioner was convicted of federal offenses and filed a petition for habeas corpus relief under 28 USC § 2241 after having previously litigated a motion to vacate under 28 USC § 2255. The petitioner alleged that he was entitled to proceed under § 2241 because the savings clause set out in § 2255(e) exempted him from having to satisfy the requirements for a second or successive petition, and that this was due to the fact that he was seeking relief based on intervening circuit court precedent. The Sixth Circuit held that the savings clause cannot be used in this manner because it would completely circumvent the requirements for a second or successive petition. The denial of relief under § 2241 was therefore affirmed.

**Robinson v. Horton, 18-1979 (2.13.20)**

The petitioner was convicted of various violent offenses in Michigan state court. On appeal, the petitioner alleged, among other things, that his rights under Alleyne v. United States, 570 U.S. 99 (2013), had been violated because judicially found facts had been used to increase his mandatory minimum sentence. The petitioner failed to expressly raise this claim in his subsequent for discretionary review in the Michigan Supreme Court, but did file his appeal using an unofficial form that included the pre-printed statement "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." The Sixth Circuit concluded that this was insufficient to fairly present the petitioner's claim so as to exhaust the claim, especially considering that the Michigan courts made an official form available, and it expressly warned pro se parties that if "you do not raise an issue in the Supreme Court by writing it out in the application form, it will not be addressed by the Supreme Court even if it was raised in the Court of Appeals." Because the petitioner still had an available corrective process in state court in which the claim could be

presented, however, the claim was unexhausted rather than procedurally defaulted.

**Williams v. Burt, 18-1461 (2.11.20)**

The petitioner was convicted of murder in Michigan state court and sentenced to life without parole. Improper spectator participation and altercations became an issue while the trial was ongoing, and the trial judge eventually closed the courtroom for a number of days. Defense counsel did not object to the closure. The Sixth Circuit concluded that defense counsel performed deficiently in failing to object to the closure, but found that Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), required the petitioner to demonstrate actual prejudice, notwithstanding the structural nature of the underlying error. Because there was no reasonable probability that the result of the proceedings would have been different absent the closure, the denial of relief was affirmed.