

## PRECEDENTIAL VALUE

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

### I. Sentencing Issues

#### B. Guideline issues

##### 2K2.1(b)(1) – Number of Firearms

##### **U.S. v. Houston, 14-5800 (2/8/16)**

The defendant was charged with being a felon in possession of 25 firearms that were seized from his brother's residence. The district court found that the defendant was at least in constructive possession of the firearms and imposed a six level increase under USSG § 2K2.1(b)(1). On appeal, the court held that a defendant is in constructive possession of firearms when the defendant has "the power and intention to exercise dominion and control" over the firearms. The court found that the defendant used firearms together with brother, he came and went freely from the trailer where guns were found, and his son claimed possession of some of the guns. Based on these factors, the court ruled that the defendant had unfettered access to the guns and was in constructive possession of them. Further, the fact that the brother was in actual possession of three of the guns at the time of arrest did not vitiate the defendant's constructive possession of the

firearms. Accordingly, application of the guideline enhancement was affirmed.

##### 3C1.1 – Obstruction of Justice

##### **U.S. v Robinson, 14-6164 (2/8/16)**

The defendant was charged with vote buying and participating in a conspiracy to violate civil rights. During the court proceedings, the defendant encountered three government witnesses outside the courthouse. He made a noise to get their attention, and then stared at them menacingly and puffed out his chest. Based on these actions, the district court imposed a two level enhancement for obstruction of justice under USSG § 3C1.1. On appeal, the court held that a defendant may receive an obstruction of justice enhancement if the defendant commits conduct that can reasonably be construed as a threat to a witness. The court found that the defendant's actions outside the courthouse toward known government witnesses were reasonably considered to be threatening in nature, and thus the enhancement was affirmed.

### **3D1.2(b) – Grouping of Offenses**

#### **U.S. v. Bivens, 15-3375 (1/29/16)**

The defendant was convicted of multiple counts of child sex crimes including causing the victim to produce child porn pictures of herself, crossing state lines to have sex with her, video taping sex acts with her, and transporting her across state lines for more sex acts. At sentencing, the district court declined to combine the offenses into a single group, but instead counted each offense as distinct under the grouping rules. On appeal, the court held that the district court correctly determined that the counts should not combine into a single group, even though they all involved the same victim over a several month time period. Specifically, the court found that **USSG § 3D1.2(b) did not require the offenses to be combined into one group because each offense constituted a separate and distinct harm to the victim.** Thus, the defendant's sentence of 30 years imprisonment was affirmed.

#### **C. Procedural matters**

##### **Procedural Reasonableness**

#### **U.S. v. Cabrera, 14-5572 (1/22/16)**

The defendant was charged with being a felon in possession of a firearm and raised claims pretrial that the government's audio recordings had been altered. The defendant did not testify at trial and he was convicted. At sentencing, the district court gave the defendant the top end of the guideline range because he raised fantastical claims about the recording and failed to testify at trial in support. The defendant did not object to these considerations but argued for the first time on appeal that they were improper. The court first held that consideration of the defendant's failure to testify violated his Fifth Amendment rights. The court found that **it was plain error for the district court to consider the defendant's failure to testify in any way in determining the**

**sentence because the defendant had the right to remain silent.** Further, the court ruled that the district court's choice to impose a higher sentence based on its bald conclusion that the defendant had attempted to raise a fantastical claim that the audio recordings were doctored violated the defendant's Sixth Amendment right to challenge the government's case and present a defense. Accordingly, the sentence was vacated and the case remanded for resentencing.

#### **U.S. v. Alsante, 15-5343 (2/5/16)**

The defendant was convicted of failure to register as a sex offender (SORNA). At sentencing, the government presented the testimony of a child victim, who the defendant sexually abused, and her mother. The sex abuse conduct was the subject of pending state charges at the time. Based on this evidence, the district court imposed a significant upward variance from the guideline range, finding that the public needed to be protected from future crimes of the defendant. The defendant argued on appeal that introducing evidence at sentencing of matters that were the subject of state court charges violated his due process rights and his right against self incrimination. The court first held that the Due Process Clause requires only that a defendant's sentencing be "fundamentally fair" and that the sentence be based on "reliable information." **The court found that the defendant was able to cross examine both of the witnesses, present his own witness, and make lengthy argument. These safeguards were sufficient to protect his due process rights, and the fact of the pending state court charges did not render the proceeding unfair.** Further, the court ruled that the defendant's right against self incrimination was not violated. **The defendant was offered the opportunity for allocution but was in no way pressured to speak, and the district court did not hold his silence against him.** Accordingly, the court found no Fifth Amendment violations in the case.

### III. Evidence

#### A. Article IV – Relevancy

##### 404(b) – Conduct part of the offense

###### U.S. v. Houston, 14-5800 (2/8/16)

The defendant was charged in one count with being a felon in possession of a number of firearms “on or about January 11, 2013,” based on a seizure of firearms from the a residence on that date. At trial, the government introduced video footage of the defendant possessing a number of firearms outside the residence during the weeks leading up to January 11. On appeal, the defendant argued that the video violated FRE 404(b) and 403 because some of the guns on the footage could not be matched up to guns that were seized from the residence. The court held that **because the indictment charged that the defendant possessed the firearms “on or about” the date of seizure, the defendant’s possession of these firearms was directly relevant to proving the element of the offense that the defendant possessed firearms on January 11.** As such, the evidence did not implicate 404(b) at all and was not unduly prejudicial. As such, the defendant’s conviction was affirmed.

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

##### 701 – Lay Witness Testimony

###### U.S. v. Houston, 14-5800 (2/8/16)

At the defendant’s trial for being a felon in possession of firearms, an ATF agent was permitted (1) to testify that it was the defendant who appeared in video footage holding guns, and (2) to identify the specific firearm types that were being held by the defendant. On appeal, the court first held that a lay witness may identify a person in a photograph “when the witness is more likely than the jury to identify the individual,” considering the following factors: (1) whether

the witness is familiar with the defendant, (2) the witness’ familiarity at the time the photo was taken, (3) whether the person disguised his or her appearance, (4) whether the person has since altered his or her appearance, (5) whether the photo is of poor quality, and (6) whether the photo shows only a partial view. **Based on these factors, the court found that the agent was sufficiently familiar with the defendant and the images were of such poor quality that the testimony was admissible. Second, the court held that the agent’s established familiarity with firearms permitted his testimony about the types of guns depicted.** Accordingly, the conviction was affirmed.

### IV. Fourth Amendment

#### A. Reasonable Expectation of Privacy

###### U.S. v. Houston, 14-5800 (2/8/16)

During surveillance of the defendant’s home in a firearms investigation, agents used a hidden camera attached to a utility pole to monitor the defendant’s property and captured images of the defendant possessing firearms. The agent testified that the view from the pole camera was the same view of the defendant’s property that could be viewed from the public roadway. The defendant moved to suppress the pole camera footage as violative of the Fourth Amendment and the district court denied the motion. On appeal, the court held that **the defendant had no reasonable expectation of privacy in footage shot of his property from the public road. The court further ruled that the fact that agents used a pole camera over an extended period of time did not alter the analysis under the Fourth Amendment.** Accordingly, the defendant’s conviction was affirmed.

## G. Miscellaneous Fourth Amendment

### Probation Searches

#### U.S. v. Tessier, 15-5284 (2/18/16)

The defendant was on state probation and signed a condition of probation that allowed his probation officer to search his residence “without a warrant” at any time. Upon a search by his probation officer, child porn was found and he was charged federally. The defendant moved to suppress the evidence claiming that a probation search requires at least reasonable suspicion and the district court denied the motion. On appeal, the court, answering an open question in the Sixth Circuit, held that **reasonable suspicion is not required for a probation search where the agreed terms of probation do not require reasonable suspicion prior to making a search**. Thus, where the defendant agrees to a search of his residence without limitation, the probation officer may do so. The court opined that, if the defendant challenged that the search had no legitimate law enforcement or probationary purpose – such as a search merely to harass the defendant – then the result may have been different. Accordingly, the defendant’s conviction was affirmed.

## VI. Sixth Amendment

### E. Indictment - Variance/Duplicity

#### Constructive Amendment/Variance

#### U.S. v. Mize, 13-6558 (2/18/16)

The defendants were charged with participating in a conspiracy to distribute oxycodone obtained from pharmacies. At trial, the government introduced evidence of a much larger conspiracy in which the defendants played a small part before forming their own conspiracy. The district court found that no constructive amendment or variance of the indictment occurred and the defendants appealed. The court held that a

constructive amendment requires proof that evidence at trial was such that it altered the terms of the indictment and the jury instruction supported conviction for charges not included in the indictment. To require reversal for a variance, the defendant must show that, while the terms of the indictment were unchanged, there was evidence introduced at trial that materially varied from the indictment and the defendant’s substantial rights were affected. The court first found that a constructive amendment did not occur in the case because, while the evidence was substantially different from the indictment, the jury instructions properly informed the jury that it could only convict based on the charges actually contained in the indictment. Second, the court found, however, that **a fatal variance occurred in the case. The government introduced significantly more evidence than it should have about the uncharged larger conspiracy, and the defendant’s case was substantially prejudiced by the “guilty transference” based on the evidence from the larger conspiracy**. Accordingly, the court reversed the defendants’ convictions and remanded for a retrial. The court noted that it was reversing all three defendants’ convictions, even though two of the three defendants did not raise the variance issue on appeal, in order to avoid a miscarriage of justice.

## VIII. Defenses

### D. Statute of Limitations

#### Failure to Raise in District Court

#### Mussacchio v. U.S., 14-1095 (1/25/16)

#### **Supreme Court**

The defendant was charged with unauthorized access of an email account and he failed to raise the five year statute of limitations defense, pursuant to 18 USC § 3282(a), in the district court. Instead, the defendant raised the issue for the first time on appeal. The Supreme Court held

that a statute of limitations claim is waived if not raised first in the district court. Thus, the conviction was affirmed.

## H. Sufficiency of Evidence Generally

### Erroneous Jury Instruction

#### Mussacchio v. U.S., 14-1095 (1/25/16) **Supreme Court**

The defendant was charged with violating 18 U.S.C. § 1030(a)(2)(C) for unauthorized access of a computer. At trial, the district court incorrectly added an element of the offense, namely that the offense also exceeded authorized access. The jury nonetheless convicted the defendant of the count. The defendant argued on appeal that the sufficiency of the evidence must be weighed to include consideration of the erroneous jury instruction. The Supreme Court held that a sufficiency challenge is assessed only against the correct elements of the offense, not against an “erroneously heightened command” in jury instructions. Accordingly, the defendant’s conviction was affirmed.

### Rule 29 Motions

#### U.S. v Robinson, 14-6164 (2/8/16)

The defendant was charged with vote buying and participating in a conspiracy to violate civil rights. At the close of the government’s evidence at trial, the defendant moved for judgment of acquittal pursuant to Fed.R.Crim.P. 29, and the district court reserved ruling until after the jury verdict of guilty. The district court then granted the Rule 29 related to the conspiracy count, but denied it related to the vote buying count. The defendant argued on appeal that reserving ruling was error. The court held that, pursuant to a 1994 amendment Rule 29, a district court is specifically authorized to reserve ruling on a Rule 29 motion made at the close of the government’s

case. Accordingly, the conviction on the vote buying count was affirmed.

## IX. Jury Issues

### B. Juror Bias/Misconduct

#### Juror Bias

#### U.S. v. Taylor, 09-5517 (2/11/16)

During the defendant’s kidnapping and murder proceedings, he was recorded by the government in a phone call saying that the proposed jurors on his case were “racist rednecks.” This information was released to the media, who published it. As a result, the district court conducted an inquiry of the jurors separately to determine if any had heard the remark and were biased. With regard to one of the jurors, she indicated that she had heard others discussing the remark, was aware of it, and that the jurors mostly took it as a joke. The district court failed to ask the juror whether she could be fair and impartial given her knowledge of the comment, but the court commented that it was apparent to the court that the juror had brushed off the comment and that further questioning about the topic may have actually been detrimental to the defendant. On appeal, the court held that the district court appropriately held a Remmer hearing to establish whether there was any bias generated by the outside influence on the jury. Further, the court found that, while it would have been advisable for the district court to ask whether the juror could remain fair and impartial in light of the defendant’s comment, the failure to ask the question given the district court’s other findings did not amount to reversible error. Accordingly, the defendant’s conviction was affirmed.

## X. Probation/ Supervised Release

### Supervised Release Conditions

#### U.S. v Robinson, 14-6164 (2/8/16)

The defendant was convicted of vote buying and conspiracy. The district court imposed a condition of supervised release that required the defendant to abstain from alcohol. The defendant raised for the first time on appeal that the condition was improper. The court held that a condition of supervised release must be procedurally reasonable, in that the district court must state its reasons for the condition, and substantively reasonable, requiring that the condition be reasonably related to rehabilitation of the defendant and protection of the public. The court found that the district court stated that the defendant had a long substance abuse history, noted that he had a DUI conviction, and determined that the defendant's drinking could lead to problems if left unchecked. Based on these findings, the court held that there was no plain error in imposition of the condition.

## XII. Specific Offenses

### 18 USC § 241 – Conspiracy - Civil Rights

#### U.S. v Robinson, 14-6164 (2/8/16)

The defendant was a mayor who was convicted of participating in a conspiracy to violate voters' civil rights under 18 USC § 241. On appeal, the court held that the elements of the offense are that the defendant knowingly agreed with another to violate the civil rights of a third party in the exercise of some right guaranteed under the Constitution and that the defendant specifically intended to commit the crime. The court ruled that the agreement may be inferred from circumstantial evidence and that, once the conspiracy is established, only slight evidence is necessary to implicate the defendant. The court found that the evidence supported that she had

conspired with at least one other defendant to coerce voters to vote for her and to threaten reprisals if they did not. Accordingly, the defendant's conviction was affirmed.

### 18 USC § 922(g) – Felon in Possession

#### U.S. v. Houston, 14-5800 (2/8/16)

The defendant was charged with being a felon in possession of firearms and he argued that he was not a "convicted felon" under federal law because his prior felony conviction was still on appeal in the State of Tennessee. On appeal, the court held that, under § 922(g), what constitutes a "conviction" for purposes of the statute is to be determined by the law of state. The court found that under Tennessee law, a conviction is considered final even if an appeal is pending. Thus, the court held that the defendant was to be considered convicted of a prior felony at the time he possessed the firearm even though an appeal of the conviction was still pending. Therefore, his conviction was affirmed.

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

#### U.S. v. Taylor, 09-5517 (2/11/16)

The defendant was charged with carrying a firearm in relation to kidnapping and carjacking, pursuant to 18 USC § 924(c). The jury determined that the kidnapping and carjacking qualified as "crimes of violence" under the statute and accordingly found the defendant guilty of the § 924 violation. On appeal, the defendant argued that the Supreme Court's decision in Johnson rendered the "crime of violence" definition in § 924(c)(3)(B) unconstitutionally vague. Under § 924(c)(3)(B), an offense is a "crime of violence" if it, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The court held that this provision of § 924(c) is distinctly narrower than the definition of "violent felony" that was stricken by the

Supreme Court in the ACCA, and that § 924(c) has not been subject to the same kind of difficulty in interpretation. Accordingly, the court ruled that the “crime of violence” definition in § 924(c)(3)(B) is not unconstitutionally vague and affirmed the conviction.

### **18 USC § 1425(a) – False Naturalization**

#### **U.S. v. Odeh, 15-1331 (2/25/16)**

The defendant was charged with procuring naturalization in violation of law based on false statements she made on her application that she had never been convicted of a crime. In fact, the defendant had been convicted in Israel of a bombing. At trial, the defendant attempted to introduce the testimony of a psychologist to show that she did not know she was making a false statement because, due to PTSD from torture while in Israeli custody, she had blocked out the memories of the event and conviction. The district court excluded the testimony and the defendant appealed. The court held that the elements of § 1425(a) are that (1) the defendant was naturalized, (2) the defendant made a false statement, (3) the defendant knew the statement was false, (4) the statement was material, and (5) the defendant procured citizenship as a result of the false statement. The court first held that it need not decide the issue of whether § 1425(a) is a specific intent crime. Second, the court ruled that the district court erred in failing to permit the testimony. The court found that the expert’s testimony, if believed, would tend to negate the defendant’s knowledge of the falsity of the statement. Because knowledge is an element of the offense, the court held that the conviction had to be reversed and the case remanded.

### **18 USC § 2119 – Carjacking**

#### **U.S. v. Taylor, 09-5517 (2/11/16)**

The defendant was convicted of carjacking, kidnapping, and murder. On appeal, he argued

that the government did not prove the intent element of the statute. The court held that, in order to convict for carjacking, the government must prove that the defendant (1) with intent to cause death of serious bodily harm, (2) took a car, (3) that had traveled in interstate commerce, (4) from another (5) by force and violence, or intimidation. The court ruled that the intent to cause death or serious bodily injury need not be for the purpose of stealing the car. Thus, as in defendant’s case where the intent was to cause harm was for the purpose of kidnapping the victim, the carjacking statute was still violated. Accordingly, the conviction was affirmed.

### **42 USC § 1973(i)(c) – Vote Buying**

#### **U.S. v Robinson, 14-6164 (2/8/16)**

The defendant was a mayor who was charged with vote buying under 42 USC § 1973(i)(c) (now 52 USC § 10307(c)). The defendant was convicted at trial and argued on appeal that the evidence was insufficient to support the conviction. The court first held that the elements of vote buying are that the defendant paid or offered to pay for a vote in an election that was held solely or in part to elect a candidate for federal office. The court found that, in the election of the defendant for mayor, ballots also included voting for the President of the U.S. Thus, the federal nexus was established. Also, the court held that, at a minimum, the defendant had given \$20 to a person for their vote in the election. Thus, the conviction was affirmed.

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

### **Hurst v. Florida, 14-7505 (01/12/16)**

#### **Supreme Court**

The defendant was convicted of first degree murder in Florida state court and sentenced to death. Under Florida law, the penalty phase of a capital trial is conducted before a jury, which renders an advisory verdict “without specifying

the factual basis of its recommendation.” The trial judge then independently weighs the aggravating and mitigation circumstances to determine if a death sentence was warranted. The Supreme Court concluded that Florida’s capital sentencing framework violated the right to trial by jury under *Ring v. Arizona*, 536 U. S. 584 (2002), because the Florida statute made the defendant eligible for death when the trial court, rather than the jury, made the factual findings necessary to impose a death sentence.

**Kansas v. Carr, 14-449 (01/20/16)**  
**Supreme Court**

Three defendants were convicted of capital murder in Kansas state court and sentenced to death. All three defendants alleged that their death sentences were unconstitutional because the jury had not been instructed that mitigating factors need not be proven beyond a reasonable doubt. Two of the defendants also alleged that their Eighth Amendment rights were violated because they were tried together at a joint penalty phase proceeding. The Kansas Supreme Court accepted the defendants’ arguments and vacated all three death sentences. The United States Supreme Court reversed, concluding that the Eighth Amendment does not require the jury to be instructed that mitigating factors need not be proven beyond a reasonable doubt. The Court further concluded that the joint penalty phase proceeding did not amount to a constitutional violation. The decision of the Kansas Supreme Court was therefore reversed.

**Montgomery v. Louisiana, 14-280 (01/25/16)**  
**Supreme Court**

The defendant was convicted of murder at age seventeen in 1963 and sentenced to a mandatory term of life imprisonment with no possibility of parole. In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Supreme Court held that a mandatory

sentence of life without parole for a juvenile offender violates the Eighth Amendment. Following *Miller*, the defendant filed an application for relief in Louisiana state court, alleging that his sentence was unconstitutional. The Louisiana courts rejected the defendant’s claim, concluding that *Miller* was not fully retroactive on collateral review. The United States Supreme Court reversed, concluding that *Miller* was fully retroactive under the substantive component of *Teague v. Lane*, 489 U. S. 288 (1989). The Court further concluded that *Teague*’s substantive component represents a constitutional requirement that state courts are obligated to apply to their own collateral proceedings.

**Landrum v. Anderson, 14-3591 (02/12/16)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After the petitioner’s federal habeas corpus petition had been denied, the petitioner filed a motion for relief from judgment under Fed.R.Civ.P. 60(b), alleging that the decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), would allow the federal courts to reach the merits of a claim of ineffective assistance of counsel that had previously been dismissed as procedurally defaulted. The Sixth Circuit concluded that the petitioner’s defaulted claim was not substantial, and as a result *Martinez* and *Trevino* did not provide a basis for relief.

**Moreland v. Robinson, 15-3306 (02/11/16)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. While his appeal from the denial of federal habeas corpus relief was pending, the petitioner filed a motion for relief from judgment and a motion for leave to file an amended petition, alleging that *Martinez v. Ryan*, 132 S. Ct. 1309

(2012), allowed him to raise new claims that would have been defaulted under the pre-*Martinez* framework. The district court dismissed the motions for lack of jurisdiction due to the pending appeal. After the Supreme Court declined to review the appeal, the petitioner refiled his motions in district court and added an additional claim to his proposed amended petition. The district court concluded that the petitioner's motions did not constitute second or successive petitions because they had originally been filed before the petitioner's initial federal habeas corpus proceeding became final. The Sixth Circuit disagreed and found that the petitioner's motions qualified as second or successive petitions under 28 U.S.C. § 2244(b). The court further concluded that the petitioner's claims failed to satisfy the gatekeeping requirements of § 2244, and as a result authorization to file a second or successive habeas petition was denied.

**United States v. Asakevich, 15-1013 (01/11/16)**

The defendant pled guilty in federal court to distributing child pornography and attempting to entice a minor via the internet. One day before the limitations period for filing a motion to vacate under 28 U.S.C. § 2255 was set to expire, the defendant filed a motion asking for an extension of time to file his § 2255 motion. The district court denied the motion, concluding that it lacked authority to grant it. The Sixth Circuit affirmed, concluding that the "case or controversy" requirement of Article III would not allow a district court to grant an extension of time for filing a § 2255 motion because doing so would effectively qualify as a prohibited advisory opinion. The court further concluded that even if Article III jurisdiction existed, there was no statutory basis for extending the limitations period for a § 2255 motion. The district court was therefore affirmed.