

## PRECEDENTIAL VALUE

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Deborah L. Williams, Federal Public Defender  
Editors Richard Monahan, Kevin Schad & Jacob Cairns  
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This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. 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 Unreasonableness

##### **U.S. v. Fleming, 17-3954 (6/29/18)**

The defendant was convicted of trafficking over 900 grams of cocaine. The PSR recommended a sentence of 5 years, and the government agreed with this recommendation. At sentencing, the district court, without prior notice, provided copies of an article regarding the problem in the community with overdose deaths from opioids. The district court then imposed a 5 year upward variance from the guidelines based on the article and the defendant appealed. The court held that, **although a district court is not required to provide advance notice of a potential upward variance, remand was nonetheless warranted because the district court relied on information that was not provided in advance to either party and the information was its sole basis for a significant upward variance.** Further, the article upon which the district court relied was potentially improper because it dealt with opioid overdose deaths and the defendant was dealing cocaine. Thus, the sentence was vacated. The

court declined to require a different district judge for sentencing because the sentencing judge had not done anything to suggest that he had a predisposition against the defendant. Moreover, the district court had expressly disavowed its initial belief that the defendant may have been a career offender and specifically stated on the record that it was not relying on that potential in determining the sentence. Accordingly, the case was remanded to the same district judge for resentencing.

##### Substantive Unreasonableness

##### **U.S. v. Robinson, 17-4018 (6/7/18)**

The defendant pled guilty to possession of fentanyl with intent to distribute and his guideline range at sentencing was 63-78 months. The district court upwardly varied from the guideline range to a sentence of 118 months based on the defendant's extensive criminal record, his repeated use of drugs, his history of failed probationary terms, and several articles regarding the severity of the opioid epidemic in the community. On appeal, the court held that the upward variance was appropriate. The court ruled that **not all of the factors under 18 USC § 3553(a) are important in every sentencing.** The

court found that the district court's emphasis on the defendant's terrible criminal record, his failed probationary terms, and the seriousness of the opioid epidemic were appropriate in the case. Further, the court held that the severity of these issues warranted the degree of the upward variance. Finally, the court ruled that the district court had given appropriate consideration to the fact that the defendant had a drug addiction problem. Accordingly, the sentence was affirmed.

**U.S. v. Sexton, 17-1781 (5/1/18)**

The defendant pled guilty to committing a bank robbery and the PSR provided a guideline range of 63-78 months. Based on the defendant's extensive criminal history, the district court imposed an upward departure based on USSG § 4A1.3 (inadequacy of criminal history category) to a sentence of 96 months. On appeal, the court held that the sentence was substantively reasonable. The court ruled that a district court is not required to explain specifically why each incremental level of upward departure is warranted so long as the court explains its reason for imposing the sentence. The district court grounded the upward departure on the fact that the defendant had started committing crime at age 11 and had accumulated 32 criminal history points (19 more than required for Criminal History Category VI). As such, the district court determined that the defendant's criminal history was significantly more serious than his criminal history category reflected and did not capture his true likelihood of recidivism. The court found this rationale sufficient to support the 18 month upward departure, and the defendant's sentence was affirmed.

**B. Guideline issues**

**2G2.1(b)(5) – Parent or Custodian**

**U.S. v. Sweeney, 17-3768 (5/25/18)**

The defendant was convicted of production and receipt of child pornography. At sentencing, the district court applied a two level enhancement because the defendant was the victim's father. The defendant argued that the enhancement was inapplicable because his parental rights had been court terminated years prior. On appeal, the court held that the two level enhancement was proper. Whether or not the defendant could still be legally considered the victim's father, the court held that the defendant had reconnected with his daughter and taken on a father-like role before sexually abusing her. Accordingly, the enhancement was proper.

**2X1.1(b)(2) – Conspiracy**

**U.S. v. Susany, 17-4093 (6/22/18)**

The defendant pled guilty to participating in a conspiracy to receive and transport explosive materials under 18 USC §§ 371 and 842. At sentencing, the defendant requested that he be given a 3 level reduction under USSG § 2X1.1(b)(2) because he did not complete all the acts necessary to complete the offense. Namely, the defendant and his associates were caught robbing a jewelry store, but the plan was to use the proceeds of the robbery to fund the purchase of explosives to rob more jewelry stores. The district court refused to award the reduction, but then imposed a downward variance to a lower guideline range. On appeal, the court first held that the district court erred in declining to impose the three level reduction. Under § 2X1.1(b)(2), a defendant is entitled to a 3 level reduction in the offense level for a conspiracy charge unless the defendant completed all the acts necessary to commit the charged offense but for law enforcement intervention. The court noted that

the underlying offense was the transportation of explosives. Because the defendants still would have had to fence the jewelry and then arrange for the purchase of explosives before completing the offense, the court found that the 3 level reduction was applicable. The court nonetheless found that the error was harmless because the district court imposed a downward variance to an even lower guideline range to give the defendant what he asked for “in a different way.” As such, the court found that reversal was not warranted.

#### **4A1.1(d) – Criminal Justice Sentence**

##### **U.S. v. Barcus, 17-5646 (4/25/18)**

The defendant was convicted of failing to register as a sex offender. At the time of the offense, he was on “community supervision” for life in Tennessee based on a prior sex offense. As such, the district court imposed a two level enhancement under USSG § 4A1.1(d) because the defendant was under a criminal justice sentence at the time of the offense. On appeal, the court held that the “community supervision” was properly considered to be criminal justice sentence even though it was automatic for sex offenders in Tennessee and it lasted for life. The “community supervision” worked the same as parole under Tennessee law and the court held that no active supervision is actually required for the enhancement under § 4A1.1(d). Accordingly, the application of the enhancement was affirmed.

#### **D. Recidivism enhancements**

##### **18 USC § 924(e) – ACCA**

##### **U.S. v. Malone, 17-5727 (5/8/18)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that he was an armed career criminal based, in part, on his prior Kentucky conviction for second degree burglary. On appeal, the court held that the Kentucky

second degree burglary offense was a violent felony under the ACCA because burglary is an enumerated offense under the ACCA and the Kentucky statute defined a burglary in the generic sense. Specifically, the statute’s reference to breaking into a “dwelling” complied with the common law concept of a building that was someone’s residence. Thus, the Kentucky statute defined a generic burglary and was accordingly sufficient to qualify as a violent felony for purposes of the ACCA. The defendant’s sentence was affirmed.

##### **Cradler v. U.S., 17-5046 (6/5/18)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant was an armed career criminal based, in part, on a prior Tennessee conviction for third degree burglary. Following recent Supreme Court decisions, the defendant filed a habeas petition claiming that the burglary offense was no longer a violent felony under the ACCA. The district court denied the petition and the defendant appealed. The court held that the Tennessee third degree burglary offense was not a crime of violence. The court found that the statute was divisible and that the provision under which the defendant was convicted was not a generic form of burglary. Specifically, the court ruled that the Tennessee burglary could apply to a defendant who committed the conduct after already being lawfully inside a structure. Thus, the burglary offense was not a generic burglary and the defendant’s sentence was vacated.

##### **Richardson v. U.S., 17-5517 (5/15/18)**

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that he was an armed career criminal based on three prior Georgia burglary convictions. After the Supreme Court’s decision in Johnson, the defendant filed a habeas

petition challenging whether the convictions counted as violent felonies under the ACCA. The district court denied the habeas petition and the defendant appealed. The court first held that the Georgia burglary statute was divisible as to the types of locations that could be burglarized, and thus the court applied the modified categorical approach to the analysis. After referring to the indictment in the case, the court determined that the Georgia burglary offense required an unlawful entry into a dwelling or building with the intent to commit a crime therein. The court found that these elements substantially conformed to the generic definition of burglary as defined by the Supreme Court and that the crimes were properly considered violent felonies under the ACCA. As such the district court's ruling was affirmed.

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

### **Restitution**

#### **Lagos v. United States, 16-1519 (5/29/18)** **Supreme Court**

The Mandatory Victim Restitution Act does not allow recovery to the victim of a crime for the costs of private investigation of crime. Thus, GE's internal fraud investigation was not compensable as part of the federal sentencing process.

## **II. Plea Matters**

### **A. Agreements**

#### **Rule 11(c)(1)(C) – Binding Plea Agreements**

##### **U.S. v. Cota-Luna, 17-3692 (6/4/18)**

The defendant was a minor player in a drug trafficking case and the parties agreed to a sentence below the 10 year mandatory minimum under Fed.R.Crim.P. 11(c)(1)(C). The plea was based in part on the agreements of the parties that

the defendant qualified for the safety valve and minor role reductions. The district court rejected the agreement at the plea hearing but provided no basis for the rejection. The parties then agreed to the same sentence in a non-binding plea agreement. At sentencing, the district court rejected the parties' recommendation and imposed the mandatory 10 year sentence. It based this decision on its determination that the safety valve could not apply because the defendant did not meet in person with the government to provide cooperation and because the court believed the defendant did not qualify for minor role. On appeal, the court held that rejection of the Rule 11(c)(1)(C) plea was improper. A district court must provide a basis for rejecting an agreed plea. Because the district court failed to provide any basis at all to reject the 11(c)(1)(C) agreement at the plea hearing, the case had to be remanded. Further, the court ruled that the case needed to be reassigned to a different district judge on remand because the district court appeared to have preconceived notions about the case that were improper. Namely, the court held that the safety valve provision does not require a defendant to meet personally with the government to obtain the reduction, and the district court misapplied the requirements for the minor role reduction. Accordingly, the sentence was vacated and the case assigned to a new district judge.

## **III. Evidence**

### **C. Article VIII – Hearsay**

#### **801(d)(2)(E) – Conspirator Statements**

##### **U.S. v. Christian, 17-1799 (6/26/18)**

The defendant was charged with drug and firearm offenses and at trial the government offered the statement of an alleged coconspirator in an uncharged obstruction of justice conspiracy. The call was made from the jail by the conspirator to his girlfriend, wherein they discussed that the

defendant had removed guns and drugs from a residence after the coconspirator's arrest. The defendant argued on appeal that the recording was inadmissible hearsay. The court held that three requirements are necessary to satisfy the conspirator exception to the hearsay rule under FRE 802(d)(2)(E): (1) a conspiracy existed; (2) the defendant was a member; and (3) the statement was made in the course and in furtherance of the conspiracy. The court found that the district court made findings related to the first two factors but failed to address the third. In reviewing the record, the court determined that the evidence was insufficient to establish that the statements were made in the course and in furtherance of the conspiracy. Specifically, the court ruled that the conversation dealt with the fact that the object of the conspiracy – hiding the drugs and gun – had been completed. Accordingly, the district court erred in admitting the evidence and the case was remanded.

#### **803(6) – Business Records**

##### **U.S. v. Buendia, 17-1666 (5/15/18)**

The defendant was a school principal charged with federal programs bribery. At trial, she attempted to introduce receipts from the school in order to show that she used some of the bribery proceeds to benefit the school. The district court held that the school secretary's testimony was not sufficient to establish the receipts as business records under the hearsay exception at FRE 803(6). On appeal, the court held that the school secretary was neither the custodian of the records nor a “qualified witness” under FRE 803(6). At most, she gathered the receipts and put them into a binder for the defendant's trial. She did not, however, know the source of the receipts or whether the defendant actually reimbursed for the expenses. Accordingly, the district court's ruling was affirmed.

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

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

##### **Byrd v. United States, 16–1371 (5/14/18)** **Supreme Court**

The defendant was driving a rented car. He was the sole occupant. Police pulled him over for a traffic infraction. When they found out that the defendant was not an authorized driver, they searched the car without his permission. The Supreme Court held that a driver of a vehicle may have a privacy right, even if they are not “authorized” by the rental agency, if they had permission to use the vehicle. The Court remanded for further factual development of this issue. “The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government’s arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event.”

##### **E. Search Warrants**

##### **Probable Cause**

##### **U.S. v. Christian, 17-1799 (6/26/18)**

Officers obtained a search warrant for the defendant’s residence based on the following: (1) an individual walked away “from the area” of the defendant’s residence and was later stopped in possession of heroin; (2) tips from unidentified informants over the previous four months that the defendant was a drug dealer; (3) an informant bought drugs from the defendant’s residence eight months prior; (4) the defendant had four

prior drug convictions, the most recent being four years prior, and included a search warrant at his residence. The district court denied a motion to suppress the evidence seized in execution of the search warrant and the defendant appealed. The court held that the totality of the circumstances did not support probable cause for the search warrant. Specifically, the court found that the individual walking away “from the area” was too vague to support probable cause, and that the remaining evidence was either uncorroborated or stale. As such, the court found no probable cause and an insufficient link to the residence to support the search. Additionally, the court held that the warrant was bare bones and thus could not be saved by the good faith exception. In this regard, the court found that, although it was a close case, there were not sufficient particularized facts connecting the residence to recent drug activity such that a reasonable officer could believe it was supported by probable cause. Accordingly, the court reversed the district court’s ruling and suppressed the evidence.

#### **G. Misc. Fourth Amendment**

##### **Probation/Parole Searches**

###### **U.S. v. Sweeney, 17-3768 (5/25/18)**

The defendant was on parole for raping his niece when federal agents discovered that he was messaging his biological daughter (for whom he had lost all parental rights), sharing naked pictures, and planning sex acts. The agents contacted the defendant’s parole officer, who interviewed the defendant and learned that he had a cell phone at the homeless shelter at which he was staying. The agents and parole officer seized the cell phone, obtained a warrant to search it, and found child porn. In his subsequent federal prosecution, the defendant moved to suppress the evidence on the phone, and claimed that the agents used the parole officer as a “stalking horse” in the unlawful seizure of his phone. The

district court denied the motion, the defendant was convicted, and he appealed. The court held first held that the government may not rely on the conditions of a defendant’s parole (known as the “special needs” doctrine) to justify a search where the officers are merely using the parole officer as a “stalking horse” to justify the search by law enforcement. The court found, however, that the seizure of the defendant’s phone was justified as a valid parole search because the parole officer learned of the defendant’s activities and the seizure of the phone was related to legitimate parole concerns, i.e., the defendant was engaged in child porn. Moreover, the court found that the search was justified based on the Supreme Court’s decision in Samson v. California, which permitted a warrantless search of a parolee based on the “lower expectation of privacy enjoyed by probationers weighed against the promotion of legitimate governmental interests to determine whether the search was reasonable under the totality of the circumstances.” The court held that this totality of the circumstances approach supported the reasonableness of the agents’ actions in seizing the phone. Accordingly, the conviction was affirmed.

#### **VIII. Defenses**

##### **J. Speedy Trial Act/IAD**

###### **Speedy Trial Act**

###### **U.S. v. Satterwhite, 17-3424 (6/22/18)**

The defendant was charged in a criminal complaint with Hobbs Act and firearm charges. The parties agreed to several extensions of the 30 day time period to indict, but ultimately the government did not file the information and plea agreement within the extension period. Thus, the filing was outside the 30 day time period to indict under the Speedy Trial Act. The defendant, however, did not raise the speedy trial issue in the district court, but instead argued for the first time

on appeal that the 30 day time limit under 18 USC § 3161(b) is jurisdictional and cannot be waived. Answering an open question in the Sixth Circuit, the court held that the 30 day requirement of § 3161(b) is not jurisdictional and may be waived by a defendant who fails to timely raise it in the district court. Thus, the court found that the defendant had waived this issue by his guilty plea and the defendant's conviction was affirmed.

## **K. Wire Tap/Stored Communications**

### **Wire Tap**

#### **U.S. v. Cooper, 17-5475 (6/22/18)**

The government, while investigating the defendant for drug trafficking, sought and obtained wiretaps for two phones under 18 USC § 2518, based on a single wiretap application. The defendant moved to suppress the evidence recovered from the wiretaps upon the grounds that use of only one wiretap application for wiretaps of two phones was improper and the wiretap recordings were not sealed "immediately" as required by the statute. The district court denied the motion and the defendant appealed. The court held first that the wiretap statute permits the government to use a single application to wiretap multiple phones so long as the other requirements of the statute are met. Second, the court ruled that the sealing of the wiretap recordings within two days satisfied the "immediately" requirement of the statute. Accordingly, the district court's ruling was affirmed.

#### **Dahda v. United States, 17-43 (5/14/18)**

##### **Supreme Court**

The defendant challenged wiretaps that authorized agents to obtain evidence from outside the territorial jurisdiction of the issuing court. The Supreme Court determined that, because none of the evidence actually introduced at trial

was from outside the issuing court's jurisdiction, there was no "adverse impact" on the defendants. The wiretap was not insufficient on its face because, other than allowing capture of extrajudicial communications, it was otherwise sufficient. The Court did note, however, that "[a] judge's authorizing authority normally extends only within statutorily defined bounds."

### **Stored Communications Act**

#### **Carpenter v. United States, 16-402 (6/22/18)** **Supreme Court**

The defendant was arrested as part of a robbery ring. During the investigation, police obtained the defendant's cellular phone records, which were then used at trial to prove his relative position during the time of the robberies. Officers did not get a warrant for these records; rather, they used the Stored Communications Act to obtain them. The defendant argued that he had a privacy right in these records; the Government countered that, in addition to the SCA, the record were in the possession of a third party and thus there was no privacy right. The Government also claimed that they were merely "business records." The Supreme Court rejected all of these claims. The Court found that there was indeed a privacy right to this information, as cell phones track every movement. Further, "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." "[W]e also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records."

## X. Probation/ Supervised Release

### Supervised Release Violations

#### U.S. v. Montgomery, 17-6082 (6/28/18)

The defendant was on supervised release and he possessed a small amount of marijuana. As a result, his supervised release was violated and the probation officer determined that his conduct constituted a grade B violation under USSG § 7B1.1. This determination was based on the fact that the defendant had a prior drug offense on his record which would have made the possession of marijuana a felony under the recidivist provision of 21 USC § 844(a) had it been charged by the federal government. The district court agreed and sentenced the defendant based on a grade B violation. On appeal, the court held that the defendant was properly categorized under grade B. The court found that, *even though the marijuana offense was only punishable as a misdemeanor under state law, because the federal government could theoretically have charged the defendant with a felony under § 844(a), the offense was punishable by more than one year in prison under § 7B1.1 and it qualified as grade B.* The court ruled that it was of no consequence that the government would have had to file an enhancement under 21 USC § 851 in order to increase the offense to a felony under federal law because supervised release violations focus on conduct, not charges. Accordingly, the defendant's sentence was affirmed.

## XI. Appeal

### Plain Error Review

#### Rosales-Mirales v. U.S., 16-9493 (6/18/18) Supreme Court

At sentencing, no one caught that probation scored a prior conviction twice. This led to a higher criminal history score, and a higher advisory guidelines range for the defendant.

On appeal, the defendant raised the issue under a plain error standard of review. The Fifth Circuit determined that unless the error “would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge,” it would not meet a plain error standard. The Supreme Court rejected this reading of plain error, and instead held that “*The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error* because of the role the district court plays in calculating the range and the relative ease of correcting the error.” The Court then found as follows: “In the ordinary case, as here, the failure to correct a plain guidelines error that affects a defendant’s substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings.”

## XII. Specific Offenses

### 18 USC § 666 – Federal Program Bribery

#### U.S. v. Buendia, 17-1666 (5/15/18)

The defendant was charged with federal programs bribery under 18 USC § 666 for taking kickbacks from a contractor while she was an elementary school principal. At trial, she attempted to introduce testimony and records showing that she used some of the kickback money to benefit the school. The evidence was excluded by the district court. On appeal, the court held that exclusion of the evidence was proper. *Although the government was required to prove that the defendant “corruptly solicited” the kickbacks, her use of the money once received was irrelevant to the charge. The court held that expenditure of ill-gotten gains on a commendable purpose is not a defense to bribery.* Further, the



court held that the government did not open the door to the defendant's inadmissible evidence by introducing some evidence that the defendant used bribery proceeds for massages. This evidence was admissible to link the defendant to the bribery proceeds. Thus, the court ruled that inadmissible evidence could not be offered to rebut evidence that was lawfully admitted. Accordingly, the defendant's conviction was affirmed.

### **18 USC § 1035 – Health Care Fraud**

#### **U.S. v. Paulus, 17-5410 (6/25/18)**

The defendant was a doctor who was charged with performing unnecessary medical procedures on patients' hearts, based on his reading of the extent of blockage shown in angiograms. Upon his conviction, he argued for a dismissal under Fed. R. Crim. P. 29 on the basis that the reading of angiograms was a subjective medical opinion that was incapable of confirmation or contradiction, and thus not potential the subject of a fraud prosecution under 18 USC § 1035. The district court agreed, granted the motion for dismissal, and the government appealed. The court held that **the degree of blockage of vessels to the heart is a fact that is capable of proof or disproof, even though the results are subject to some degree of interpretive differences. Thus, in order to sustain a conviction for making false statements related to health care, the government must show that the factual assertion (the degree of blockage) was untrue and that the defendant knowingly made a false statement about it.** The court found that the government had sufficiently met this burden through the testimony of several doctors who significantly contradicted the defendant's findings related to heart blockage in a large number of patients. Accordingly, the district court's ruling was reversed and the conviction reinstated.

### **18 USC § 2250 – SORNA**

#### **U.S. v. Barcus, 17-5646 (4/25/18)**

The defendant was convicted of failing to register as a sex offender. At sentencing, the district court determined that the defendant was a Tier III offender because he had a prior Tennessee conviction for attempted aggravated sexual battery. The defendant failed to object to the increase in his sentence in the district court, but argued on appeal that he was improperly categorized in Tier III. The court found plain error in the district court's determination. The court first held that it would **apply the categorical approach to the determination of whether a defendant's prior conviction qualifies as a Tier III offense. Thus, the court determined that it could only consider the statutory elements of the offense for the defendant's prior conviction.** In order to qualify as a Tier III offender, the defendant's prior conviction must be comparable to aggravated sex abuse or abusive sexual conduct as defined under federal statute. The court found that **the prior state conviction was not comparable to the federal crimes because the state offense did not require that the defendant acted with the specific intent to cause sexual gratification. Because the intent element was missing from the state statute, the offense could not be considered comparable to the federal crimes, and therefore the defendant could not qualify as a Tier III offender.** Accordingly the defendant's sentence was vacated and the case remanded.

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

#### **McCoy v. Louisiana, 16-8255 (5/14/18)**

##### **Supreme Court**

The defendant was convicted of murder in Louisiana state court and sentenced to death. At trial, the defendant demanded that his lawyer argue that he was innocent, but counsel instead

conceded that the defendant was guilty and focused on trying to avoid the death penalty. In a motion for a new trial, the defendant argued that his Sixth Amendment rights were violated when his attorney conceded guilt notwithstanding the defendant's express instructions to the contrary. The Louisiana Supreme Court concluded that no constitutional error occurred. **The United States Supreme Court reversed, finding that the decision to concede guilt at trial is personal to the defendant and may not be overridden by defense counsel. The Court further held that the error was structural, and that no showing of prejudice was required to obtain relief.**

**Sexton v. Beaudreaux, 17-1106 (6/28/18)**  
**Supreme Court**

The petitioner was convicted of murder in California state court and sentenced to 50 years to life in prison. The petitioner moved for habeas relief in the state court of appeals and alleged that his trial attorney had been ineffective in failing to file a motion to suppress an identification. The petition was summarily denied, and the California Supreme Court denied the petitioner's request for discretionary review. The Ninth Circuit Court of Appeals subsequently granted habeas corpus relief, but the United States Supreme Court reversed. **Under Harrington v. Richter, 562 U.S. 86 (2011), a summary denial of relief on the merits by a state court is entitled to deference under 28 USC § 2254(d) unless there was no reasonable basis for the state court to reject the petitioner's claim. The Supreme Court concluded that the state court had a reasonable basis for rejecting the petitioner's claim because defense counsel could have reasonably believed that a motion to suppress would not have been successful. As a result, the grant of habeas corpus relief was reversed.**

**Chavez-Mesa v. U.S., 17-5639 (6/18/18)**  
**Supreme Court**

The defendant was originally sentenced to 135 months, the bottom of his advisory guidelines range. Later, the defendant filed a motion to reduce his sentence under 18 U.S.C. § 3582 based on amendments to the guidelines. The district court granted the motion, which made the new guidelines range 108 to 135 months. The court imposed a 114 month sentence. The court used a standard form to make this adjustment, checking off boxes that said that the court had "considered" the motion and had "taken into account" 18 USC § 3553(a) factors. The defendant appealed, claiming that this record was not sufficient to provide an explanation of why a lesser sentence at the bottom of the new Guidelines range was not appropriate. **The Supreme Court found that each case is different, and that what requires a detailed explanation of a sentence in one case may not require a detailed explanation in another.** Here, "given the simplicity of this case, the judge's awareness of the arguments, his consideration of the relevant sentencing factors, and the intuitive reason why he picked a sentence above the very bottom of the new range, the judge's explanation (minimal as it was) fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge."

**Koons v. U.S., 17-5716 (6/4/18)**  
**Supreme Court**

Where a defendant's guideline range is trumped by a mandatory minimum term, a court may decrease the sentence solely based upon a defendant's cooperation (and the appropriate filing of a motion by the Government). Once this is done, the court may sentence a defendant below the minimum term; however, that new sentence is not "based on" the Guidelines, but based on a cooperation determination. Thus, **defendants are not eligible for reductions under 18 USC § 3582**

when new Guidelines changes occur, because their original sentences are not “based on” a guideline range that has subsequently been lowered.

**Hughes v. U.S., 17-155 (6/4/18)**  
**Supreme Court**

The defendant was originally sentenced pursuant to Rule 11(c)(1)(C) to 180 months, which was a little below the advisory guidelines range. The court noted at sentencing the guidelines range, and that the sentence was “compatible” with the guidelines. After sentencing, the guidelines were amended, and the defendant filed a motion under 18 USC § 3582 to reduce his sentence further. The district court held that it could not reduce defendant’s sentence because, due to the (c)(1)(C) agreement, he did not “rely on a guidelines range” in imposing sentence. The Supreme Court reversed, finding that “[a] district court imposes a sentence that is ‘based on’ a guidelines range if the range was a basis for the court’s exercise of discretion in imposing a sentence.” **Because (c)(1)(C) sentences normally consider the guidelines during their formulation, “in the usual case the court’s acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are ‘based on’ the defendant’s Guidelines range.”** The Court therefore remanded for further consideration.

**Carruthers v. Mays, 14-5457 (5/3/18)**

The petitioner was convicted of first degree murder in Tennessee state court and sentenced to death. After various lawyers were granted permission to withdraw from the petitioner’s case based on the petitioner’s threatening conduct toward them, the trial court required the petitioner to defend himself pro se. **On appeal, the petitioner alleged that he had been subjected to a complete denial of counsel when he was forced to represent himself at trial, but the state court found**

**that the petitioner had impliedly waived his right to representation through his abusive conduct. The Sixth Circuit concluded that the state court’s finding of an implied waiver of the right to counsel at trial was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent, and was not based on an unreasonable determination of the facts. As a result, the state court decision was entitled to deference under 28 USC § 2254(d), and the denial of habeas corpus relief was affirmed.**

**Hendrix v. Palmer, 16-2279, 16-2310 (6/26/18)**

The petitioner was convicted of felony murder and related offenses in Michigan state court. After being arrested and jailed, the petitioner invoked his right to counsel while being interrogated by a detective. Two days later, the same detective reinterrogated the petitioner and obtained a number of statements from him, notwithstanding the fact that the petitioner had previously requested an attorney and still had not met with one. The statements were admitted at trial without objection. On direct appeal, the petitioner alleged that the statements were admitted in violation of Miranda v. Arizona, 384 U.S. 436, 471 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981), and that his attorney had been ineffective in failing to challenge their introduction. The state court summarily rejected the petitioner’s claims on the merits. **In federal habeas corpus proceedings, the State conceded that the admission of the statements violated Miranda and Edwards, and the Sixth Circuit concluded that the error was not harmless. The Sixth Circuit further found that trial counsel had been ineffective in failing to move for the suppression of the statements, and that the contrary determination of the state court was not entitled to deference under 28 U.S.C. § 2254(d). The grant of habeas corpus relief was therefore affirmed.**

**Hendrix v. Palmer, 16-2279, 16-2310 (6/26/18)**

The petitioner was convicted of felony murder and related offenses in Michigan state court. After being arrested and jailed, the petitioner invoked his right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966), when he was questioned by a detective. Two days later, the same detective interrogated the petitioner and obtained a number of statements from him before the petitioner again asserted his right to remain silent. During closing arguments at trial, the prosecution urged the jury to consider the defendant's invocation of his right to silence at the second interrogation as evidence of guilt. **The Sixth Circuit concluded that the prosecution's argument violated Doyle v. Ohio, 426 U.S. 610 (1976), notwithstanding the fact that the petitioner had not remained completely silent in response to the detective's questioning. Furthermore, the state court's rejection of the claim was contrary to clearly established United States Supreme Court precedent under 28 U.S.C. § 2254(d)(1). The denial of habeas corpus relief was therefore reversed.**

**In re Stephenson, 18-1037 (5/4/18)**

The petitioner was convicted of murder and related offenses in Michigan state court and sentenced to life in prison. The petitioner filed for habeas corpus relief in the Western District of Michigan, and then filed a second petition in the Eastern District that raised additional claims while the first petition was still pending. The Eastern District dismissed the second petition, but the Sixth Circuit reversed, concluding that the lower court should have transferred the second petition to the Western District where it would have been treated as a motion to amend the original petition. On remand, the Eastern District transferred the second petition to the Western District, which responded by transferring it to the Sixth Circuit as an unauthorized second or

successive petition. **The Sixth Circuit remanded the case, concluding that its prior order had already determined that the petition in question was not second or successive, but should have instead been treated as a motion to amend the initial petition.**

**Lang v. Bobby, 15-3440 (5/11/18)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. During the trial, but prior to deliberations, one of the jurors was removed because she was related by marriage to the victim in the case. Before being removed, the juror confirmed that she had not spoken with any of the other jurors about her relationship to the victim. The other jurors were asked as a group if the juror had discussed her relationship to someone involved in the case with them, and none indicated that she had. **The Ohio Supreme Court concluded that the juror's presence on the panel did not taint the proceedings and that the petitioner's rights were not violated. The Sixth Circuit concluded that the state court's rejection of the petitioner's claim was entitled to deference under 28 U.S.C. § 2254(d), and as a result the denial of habeas corpus relief was affirmed.**

**Levingston v. Warden, 17-3167 (5/30/18)**

The petitioner was convicted of non-capital murder in Ohio state court. An eyewitness to the homicide contacted the police and identified the petitioner. The eyewitness was called as a court's witness at trial and gave equivocal testimony. A detective testified about his interview with the witness, and a recording of their conversation was played for the jury. The trial court instructed the jury that it could consider the witness's out-of-court statements as substantive evidence of guilt. In federal habeas corpus proceedings, the petitioner alleged that his confrontation and due process rights were violated by permitting the

witness's out-of-court statements to be used as substantive evidence. **The Sixth Circuit concluded that the Confrontation Clause was not violated because the witness appeared at trial and was subject to cross-examination. Furthermore, even assuming that the jury instruction was deficient, the error did not rise to the level of a due process violation.** The denial of habeas corpus relief was therefore affirmed.

**Stojetz v. Ishee, 15-3116 (6/5/18)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. At trial, the prosecution alleged that the petitioner was a member of the Aryan Brotherhood and had murdered an African American inmate based on his race. The petitioner subsequently alleged that trial counsel had been ineffective in failing to question prospective jurors about their views on race. The Ohio Supreme Court summarily rejected the petitioner's claim. **The Sixth Circuit concluded that the petitioner failed to establish either deficient performance or prejudice, and that the Ohio Supreme Court's rejection of the claim was entitled to deference under 28 U.S.C. § 2254(d) in any event.** The denial of habeas corpus relief was therefore affirmed.

**Stojetz v. Ishee, 15-3116 (6/5/18)**

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In federal habeas corpus proceedings, the petitioner alleged that his trial attorneys were ineffective because they failed to question jurors about their willingness to impose a life sentence if the petitioner was convicted. The Sixth Circuit rejected the petitioner's claim. **Although Morgan v. Illinois, 504 U.S. 719 (1992), guarantees the right to "life-qualify" jurors upon request, the failure to life-qualify a jury is not per se ineffective assistance of counsel.** The denial of habeas corpus relief was accordingly affirmed.

**Martin v. U.S., 16-3864 (5/14/18)**

The petitioner plead guilty to a scheme to commit murder. After his plea but prior to sentencing, he filed a document in a related civil case which was inconsistent with his plea. This caused the AUSA to argue at sentencing that his acceptance of responsibility adjustment under the Guidelines (USSG § 3E1.1) should be denied. The district court agreed. Petitioner then filed a habeas petition, arguing that he had consulted with counsel prior to filing the document in the civil case, and that counsel's bad advice led to him filing the document, and ultimately to a larger sentence. The defendant filed affidavits with his habeas petition and the AUSA countered with affidavits from former counsel. The district court denied the petition without a hearing, finding petitioner's claims "not credible." **The Sixth Circuit reversed, finding that the district court should not have discounted petitioner's "self serving" affidavit, that the allegations were not inherently incredible, and that the allegations could not be refuted by the record.** Accordingly, the case was remanded for an evidentiary hearing.

**Cradler v. U.S., 17-5046 (6/5/18)**

The petitioner was sentenced under the Armed Career Criminal Act and subsequently filed a motion to vacate under 28 USC § 2255, alleging that he was entitled to relief from his sentence based on intervening decisions from the United States Supreme Court. On appeal, the government argued for the first time that the motion to vacate should have dismissed as untimely under § 2255(f). **Although appellate courts can consider a forfeited statute of limitations defense in exceptional cases, the government failed to demonstrate that such circumstances were present.** "Due to the protracted nature of the litigation in the district court, the United States had ample opportunity to

raise this defense below. In the absence of a timeliness argument from the United States, the district court expended considerable time and energy considering the merits of Cradler's § 2255 motion over a period of 31 months." Accordingly, the government's statute of limitations defense was rejected as having been forfeited. The Sixth Circuit further concluded that the government had similarly forfeited a procedural default defense that was also raised for the first time on appeal.