

# Precedential Value

An Outline of the Recent, Important Supreme Court and Sixth Circuit Decisions  
for Attorneys Practicing Criminal Law in the Courts of the Sixth Circuit

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## CONTENT AND FORMAT

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 are arranged in an outline format under the following headings:

- I. Specific Offenses
- II. Sentencing Guidelines
- III. Evidence
- IV. Fourth Amendment
- V. Fifth Amendment
- VI. Sixth Amendment
- VII. Other Constitutional Rulings
- VIII. Defenses
- IX. Plea & Sentencing Hearings
- X. Jury Issues
- XI. Probation & Supervised Release
- XII. Appeal
- XIII. Post-Conviction Remedies

## FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to [www.supremecourtus.gov](http://www.supremecourtus.gov) for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov) and enter the docket

number in the opinion search feature. Opinions may also be found in Lexis or Westlaw by entering the docket number in a terms and connectors search in the Supreme Court or Sixth Circuit database.

## FEDERAL DEFENDER WEBSITE

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## SUPREME COURT DECISIONS

### **I. Specific Offenses**

• *8 USC § 1101 - Removal of Alien - Theft*  
*Gonzales v. Duenas-Alvarez, 05-1629 (1/17/07)*

▶ Defendant was convicted in a California state court of aiding and abetting a theft offense. Subsequently, the government sought to remove defendant from the U.S. pursuant to 8 USC §§ 1101 and 1227(a). These sections permit removal of aliens who have been convicted of, among other things, a felony

“theft offense.” Defendant opposed the removal upon the grounds that aiding and abetting under the California statute did not constitute a generic theft offense as anticipated by § 1101. Defendant was ordered removed, but the Ninth Circuit reversed. The government appealed and the Supreme Court granted *certiorari*.

★ Holding: Relying on the Court’s prior decision in *Taylor v. U.S.*, the Court held that a defendant’s conviction would only be considered a “theft offense” under § 1101 if the crime for which the defendant was convicted met the generic definition of theft, as it was understood at common law. The Court concluded that aiding and abetting a theft under the California statute met the generic definition of a theft. The Court emphasized that, in order to prove that a state statute creates an offense outside the generic definition of a listed crime in a federal statute, a defendant’s claim requires more than “the application of legal imagination to the state statute’s language.” Instead, the defendant must show a realistic probability that the state would apply its statute to conduct that falls outside the generic definition. One way to meet this requirement would be to find cases where the state court did, in fact, apply the statute in such a non-generic manner. Finding that defendant had not made such a showing, the Court upheld defendant’s removal.

• *8 USC § 1326 - Attempted Illegal Reentry U.S. v. Resendiz-Ponce*, 05-998 (1/9/07)

► Defendant was charged with attempting to illegally reenter the U.S. after being deported. The indictment charged simply that defendant “attempted to enter the U.S.,” and specified a location and date. Defendant moved to dismiss the indictment, claiming that it did not charge an offense because it did not list an overt act in furtherance of the attempt. The district court denied the motion and defendant was convicted at trial. The Ninth Circuit reversed and held

that the indictment was defective for failing to state an overt act, and that such a failure can never be harmless error. The Supreme Court granted *certiorari*.

★ Holding: Although the Court granted *certiorari* in order to decide the issue of whether failure to allege an element of the offense could be harmless error, the Court instead determined that the indictment was not defective. The Court ruled that the language “attempted to enter the U.S.,” where a date and location were specified, was sufficient to satisfy the overt act element. The Court found that the word “attempt” covered both the overt act and the intent elements of the statute. Accordingly, the indictment sufficiently charged the offense, and defendant’s conviction was affirmed.

## VI. Sixth Amendment

• *Right to Jury Trial - Apprendi/Blakely Cunningham v. California*, 05-6551 (2/22/07)

► Defendant was convicted in California state court of continuous sexual abuse of a minor under the age of 14. California’s sentencing scheme for this offense required the trial judge to impose a middle term sentence of 12 years, unless the judge found (1) sufficient aggravating factors, in which case the required sentence was 16 years, or (2) sufficient mitigating factors, in which case the required sentence was 6 years. The aggravating or mitigating factors included facts about the defendant, facts about the offense, and any other fact reasonably related to the decision being made. In defendant’s case, the judge found sufficient aggravating facts by a preponderance of the evidence and sentenced defendant to 16 years. Defendant lost his appeals in state court, and the Supreme Court granted *certiorari*.

★ Holding: Relying on *Apprendi* and *Blakely*, the Court held that California’s sentencing system violated defendant’s right to trial by jury. Under the California system, the

trial court was required to make findings of fact that increased defendant's middle term limit, without the facts being submitted to a jury and proven beyond a reasonable doubt. This system was violative of defendant's Sixth Amendment rights, and accordingly, the Court struck down the California sentencing scheme and vacated defendant's sentence.

- *Confrontation Clause*

Whorton v. Bockting, 05-595 (2/28/07)

- ▶ Defendant was charged in state court with sexual assault on a six year old and during his trial the hearsay statements of the child were admitted. Defendant lost his state court appeals and then filed a federal *habeas* petition challenging the admission of the child's statements based upon the Confrontation Clause. The district court denied his petition, and while the case was pending in the circuit court, the Supreme Court decided *Crawford*. Defendant then argued that *Crawford* should apply retroactively to his case, thus requiring exclusion of the hearsay statements. The Supreme Court granted *certiorari*.

- ★ Holding: In assessing whether a rule announced in a Supreme Court decision applies retroactively, the Court first assesses whether it is an old or new rule. Old rules apply both to cases on direct and collateral review. New rules apply to cases on direct review, but only apply retroactively to cases on collateral review if (1) the rule is substantive, or (2) the rule is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." In the case, the Court first held that a new rule is a rule that was not dictated by prior precedent existing at the time of the defendant's conviction. In this regard, the Court ruled that *Crawford* announced a new rule regarding the Confrontation Clause. Further, the Court held that the rule of *Crawford* was indisputably procedural, not substantive.

Finally, the Court held that, in order for

a rule to be considered "watershed" it must be necessary to prevent an "impermissibly large risk" of an inaccurate conviction, and it must alter a fundamental understanding of "bedrock procedural elements" of the proceeding. Noting that the only prior case to ever meet the "watershed" test was *Gideon* (right to appointed counsel), the Court held that *Crawford* did not create the kind of profound procedural rule that required its retroactive application. Accordingly, the Court ruled that *Crawford* does not apply retroactively to cases on collateral review, and defendant's conviction was affirmed.

## SIXTH CIRCUIT DECISIONS

### **I. Specific Offenses**

- *18 USC § 924(e) - ACCA*

U.S. v. Wells, 0-6263 (1/9/07)

- ▶ Defendant was convicted of being a felon in possession of a firearm and the government argued at sentencing that defendant should qualify as an armed career criminal. At issue was the question of whether either of two prior juvenile convictions (attempted robbery or aggravated assault) qualified as violent felonies under the ACCA. The district court held that neither of the two juvenile convictions were violent felonies and accordingly refused to apply the enhancement for the ACCA. The government appealed.

- ★ Holding: Under the ACCA, a prior juvenile conviction may qualify as a violent felony if the offense meets the definition of a violent felony for an adult offense and it involved the use or carrying of a firearm, knife, or destructive device. Answering an open question in the Sixth Circuit, the court held that the *Taylor/Shepard* categorical approach applies to the determination of whether a juvenile conviction counts as a violent felony. Applying the categorical approach to the case, the court first found that the attempted robbery was not a violent felony because, although the

petition referenced a gun, defendant was not convicted of the offense charged in the petition (aggravated robbery), but was instead convicted of the lesser offense of attempted robbery. The offense of attempted robbery did not necessarily involve a gun under the statute. Thus, the district court was correct that the attempted robbery did not qualify under the ACCA.

Second, the court held that the aggravated assault was likewise not a violent felony. The petition charging the offenses stated that defendant “did intentionally attempt to strike officer C.J. Sramek of the K.P.D. with the vehicle he was driving during a robbery and a shooting.” The court found that the conviction for the aggravated assault did not necessarily involve the “robbery” and “shooting” that were also mentioned in the petition. The court emphasized that defendant did not enter a plea to the alleged robbery and shooting that preceded the aggravated assault, and thus, under the categorical approach, the offense did not necessarily involve a firearm. Accordingly, the district court’s ruling was affirmed.

• *18 USC § 924(e) - ACCA*  
U.S. v. Flores, 06-1152 (2/23/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the government argued that defendant should be sentenced under the ACCA. Defendant had a prior conviction for carrying a concealed weapon (CCW) from Michigan and the government argued that it should count as a prior “violent felony” under the ACCA. The district court disagreed and refused to sentence defendant as an armed career criminal. The government appealed.

★ Holding: For the first time in a published opinion, the court held that a prior state conviction for CCW is not properly considered a “violent felony” under the ACCA. Accordingly, the district court ruling was

affirmed.

• *18 USC § 1344 - Bank Fraud*  
U.S. v. Winkle, 04-4196 (2/21/07)

► Defendant was a car dealer who was involved in a scheme with another dealer to kite checks between their bank accounts by conducting fake vehicle trades between the dealerships. Defendant was charged with bank fraud for the check kiting activity and argued at trial that he did not have the intent to defraud, but instead that he was duped by the other dealer and that he was merely in an overdraft situation. Defendant was convicted and he argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: Intent to defraud may be proven entirely by circumstantial evidence and such evidence need not remove every reasonable hypothesis other than guilt. The defendant’s intent may be inferred from examining the scheme itself if it was reasonably calculated to deceive persons of ordinary prudence. In the case, the court found that defendant’s statements that he knew that certain checks he wrote would not clear his bank, in addition to the circumstances of the fake vehicle trades, provided a sufficient basis to show his intent to defraud. Thus, the conviction was affirmed.

## II. Sentencing Guidelines

• *2D1.1(b) - Meth - Risk of Harm to Minor*  
U.S. v. Whited, 05-5959 (1/9/07)

► Defendant was arrested in a motel room with a 17 year old girl, finished meth, and an operational meth lab. Further, the room smelled of meth chemicals. Defendant pled guilty to manufacturing meth and at sentencing the district court applied a 6 level enhancement under USSG § 2D1.1(b) for causing a substantial risk of harm to the life of a minor. Defendant appealed.

★ Holding: The court held that four factors must be evaluated in assessing whether the risk of harm enhancement is applicable: (1) the

quantity of hazardous materials and manner in which stored; (2) the manner of disposal of materials and likelihood of release into the environment; (3) the duration of the offense and the extent of the manufacturing operation; and (4) the location of the lab. In considering the factors, the court held that defendant had placed the juvenile at substantial risk. The court found defendant's claim that he did not know the age of the girl to be irrelevant for purposes of the guideline. Accordingly, the sentence was affirmed.

### III. Evidence

- *401/403 - Relevance/Confusion of Issues*  
U.S. v. Winkle, 04-4196 (2/21/07)

- ▶ Defendant was charged with bank fraud for check kiting activities and sought at trial to introduce an FDIC report that detailed the failure of the bank to detect the embezzlement activities of an employee, which allegedly delayed discovery of defendant's check kiting. The district court refused to admit the report and, upon his conviction, defendant appealed.

- ★ Holding: First, the court held that the FDIC report was not relevant to a fact in issue because the report focused on the bank employee's embezzlement and the failure of the regulators to catch the embezzlement. Second, the court held that, even if the report had some minimal relevance, its probative value was substantially outweighed by the danger of confusing the issues and misleading the jury. Accordingly, the exclusion of the evidence was affirmed.

- *404(b)/403 - Intrinsic Acts*  
U.S. v. Jackson, 05-6014 (1/12/07)

- ▶ Defendant was charged in a drug conspiracy and at trial the government introduced evidence of a drug sale that was the subject of a separate state prosecution. The drug sale occurred during the time period alleged in the federal conspiracy charge and in the same location. Upon defendant's

conviction, he appealed and argued that the evidence was improperly admitted.

- ★ Holding: FRE 404(b) excludes evidence of prior bad acts of a defendant that are used to show her propensity to commit a crime. Where other acts, however, are "inextricably intertwined" with the evidence of the crime charged in the indictment, FRE 404(b) is not implicated. In the case, the court found that the prior drug sale was "inextricably intertwined" with the conspiracy charge, and accordingly, the evidence was properly admissible. Further, the court noted that, because the evidence was properly introduced to prove the conspiracy charge, its admission was not prohibited by FRE 403.

- *702/704 - Expert Testimony*  
U.S. v. Winkle, 04-4196 (2/21/07)

- ▶ Defendant was charged with bank fraud for a check kiting scheme wherein he and another car dealer created numerous fake vehicle trades between their dealerships. At trial, the government introduced the testimony of an expert who discussed the nature of defendant's transactions, explained the mechanics of a check kiting scheme, and provided his opinion that defendant had kited checks. Defendant was convicted and argued on appeal that the expert testimony should not have been admitted.

- ★ Holding: First, the court held that, pursuant to FRE 702, the witness was properly qualified by training and experience, even though he was not a CPA. Second, the court found that his explanation of check kiting was proper under FRE 702 because it was helpful to assist the jury to understand the complexities of check kiting. Third, the court ruled that the expert testimony about the ultimate issue – whether check kiting actually occurred – was proper under FRE 704(a) because the witness did not testify as to defendant's state of mind or guilt, but only that the activity constituted check kiting. Accordingly, admission of the

testimony was affirmed.

- *Flight Evidence*

U.S. v. Atchley, 04-6521 (1/23/07)

► Defendant was charged in state court with manufacturing meth and absconded while the case was pending. Defendant was subsequently charged federally and arrested. While defendant was on the lam, he was also charged with murder in another state. During the proceedings before the district court, defendant moved to exclude evidence of his flight. Defendant argued that his flight was actually as a result of the pending murder charge, but that he could not argue this point to the jury because of the substantial prejudice that would ensue. The district court withheld ruling on the motion until trial, but then defendant failed to object at trial to the flight evidence and accompanying jury instruction. Defendant appealed.

★ Holding: The probative value of flight evidence depends on the degree of certainty with which the following four inferences may be drawn: “(1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.” Although the court intimated that the admission of the flight evidence may have been error, because defendant failed to object to the evidence at trial, the court applied the plain error standard. As such, the court found that defendant’s substantial rights had not been affected because the evidence against defendant was overwhelming.

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

- *Reasonable Suspicion*

U.S. v. Atchley, 04-6521 (1/23/07)

► Officers received an anonymous tip which indicated that three or four people were making

meth in a certain hotel room and provided a description of the suspects’ vehicle. Officers arrived at the hotel and saw four people near the hotel room, standing outside of a vehicle that matched the description provided by the informant. The officers approached the suspects, requested I.D., and asked whether they were staying in the hotel room. Defendant provided his I.D. and said that he was not staying in the hotel room. The officers then confirmed with the hotel that defendant was the registered guest in the hotel room and confronted defendant with the contradiction. Defendant became nervous and nonresponsive, and the officers decided to handcuff him for safety. Defendant then resisted arrest, but was subdued. The officers subsequently discovered incriminating evidence and defendant was charged with manufacturing meth. The district court denied defendant’s motion to suppress and, upon defendant conviction, he appealed.

★ Holding: The court first held that the anonymous tip and the initial observations of the officers were insufficient for reasonable suspicion to stop defendant. The court ruled, however, that the questioning of defendant for I.D. did not constitute a “stop” under *Terry*, but was instead a consensual encounter. The court further found that defendant’s untruthful answer about not staying in the hotel room, combined with his nervousness upon being confronted, provided the officers with reasonable suspicion to stop him based upon the totality of the circumstances. Accordingly, the district court ruling was affirmed.

- *Warrant Exception-Search Incident to Arrest*  
U.S. v. Williams, 05-5460 (1/9/07)

► Officers went to a boarding house to execute a warrant for defendant for aggravated rape and robbery. The officers were told that defendant lived in a room on the second floor. The officers knocked on the door and defendant answered. During the course of the ensuing interaction, the officers asked

defendant if he had any guns in the house. Defendant responded that he had a gun under the mattress of the bed. The officers searched and found the gun, and defendant was charged with being a felon in possession of a firearm. Defendant moved to suppress the firearm based upon the Fourth Amendment and the district court granted the motion. The government appealed.

★ Holding: When officers conduct a lawful arrest, they may, without a warrant, search a defendant's person and the area within her immediate control. Under this search incident to arrest exception, an item is subject to search and seizure if it was under defendant's immediate control at, or near, the time of her arrest. In the case, the court found that the district court made inadequate factual findings about the layout of the room and defendant's proximity to the mattress and gun in order to assess the search incident to arrest exception. Accordingly, the district court ruling was vacated and the case remanded.

• *Warrant Exception - Protective Sweep/  
Plain View/Exigent Circumstances*  
U.S. v. Atchley, 04-6521 (1/23/07)

► Officers arrived at a hotel, based upon an anonymous tip, and established reasonable suspicion that defendant and his three cohorts were involved in manufacturing meth in a hotel room. (*See supra*). At the time, defendant and his partners were about 20-30 feet outside the room. After securing defendant in handcuffs, the officers entered the open door of the hotel room and performed a protective sweep. They found a gun in plain view and other evidence of meth manufacturing in plain view, as well as in drawers and other hidden areas. Defendant was charged with manufacturing meth and the district court denied defendant's motion to suppress the evidence. Defendant appealed.

★ Holding: A protective sweep of a residence or hotel room is justified if officers have a reasonable fear, based upon specific and

articulable facts, that the area may harbor a person who presents a risk to officer safety. Officers must, however, limit the search to areas that in which a person may hide. In the case, the court found that the circumstances warranted a protective sweep of the hotel room. Additionally, the court ruled that, once inside the hotel room, the officers were justified in seizing the gun and evidence of meth manufacturing that were in plain view. Finally, the court held that the evidence taken from drawers and other hidden compartments was lawfully seized under the exigent circumstances exception. In this regard, the court held that the making of meth and the storing of chemicals associated therewith in the hotel room posed an imminent danger to the hotel and its other patrons. Accordingly, the district court ruling was affirmed.

• *Warrant Exception - Protective Sweep*  
U.S. v. Stover, 05-3562 (1/30/07)

► Officers arrived at defendant's home, a duplex, to execute an arrest warrant and upon arrival found a car parked in the driveway of the duplex that belonged to a known criminal. The officers entered defendant's home and arrested him. They then conducted a protective sweep for the other individual and found a marijuana grow operation in a crawlspace in an attached garage and a gun upstairs. Upon being charged in a drug conspiracy, defendant moved to suppress the evidence seized from his home. The district court denied the motion and defendant appealed.

★ Holding: During a search incident to arrest, officers may make a protective sweep of the areas "immediately adjoining" the place of arrest from which an attack could "immediately be launched." No probable cause or reasonable suspicion is necessary to make such a sweep. Officers may also conduct a more pervasive protective sweep when officers have articulable facts which would lead a reasonable officer to believe that the area to be swept harbors a

person posing a danger to others. In the case, the court found that a reasonable officer may have believed that a known criminal was in the home because of the car parked in the driveway to the duplex. Accordingly, even though the crawlspace (where the marijuana was found) and the upstairs area (where the gun was found) were not immediately adjoining the place of defendant's arrest, the officers had articulable facts to believe there may be another person in the home who posed a danger to them. Thus, the denial of defendant's motion to suppress was affirmed.

• *Traffic Stop - Probable Cause*

U.S. v. Sanford, 05-6489 (2/6/07)

► An officer observed defendant's vehicle approach a slow moving truck on the freeway and attempt to pass. Due, however, to a van in the left lane of the freeway, defendant was unable to get over to pass, and had to brake rapidly. Defendant's vehicle briefly came within ten feet of the truck before slowing down. Consequently, the officer stopped defendant's vehicle based on a violation of a Tennessee traffic law for following more closely than was "reasonable and prudent." In the ensuing stop, the officer discovered narcotics and defendant was charged accordingly. Defendant moved to suppress the drugs, the district court denied the motion, and defendant appealed.

★ Holding: First, the court noted the conflict within the circuit as to whether reasonable suspicion or probable cause is required prior to making a stop for a traffic violation. The court chose not to resolve the conflict because it found that either standard was satisfied. Second, the court held that probable cause supported the stop of defendant's vehicle based on the violation of the Tennessee traffic law. Thus, the district court ruling was affirmed.

## V. Fifth Amendment

• *Due Process - Brady*

U.S. v. Mooneyham, 04-5189 (1/9/07)

► Defendant went to trial on a drug conspiracy case and a codefendant testified against him. The government refused to turn over the codefendant's sealed plea agreement to defendant for impeachment purposes. Defendant learned, however, of the codefendant's plea deal from a Rule 35 motion filed by the government. Thus, defendant was able to cross examine the codefendant on the witness stand about the benefit he received for testifying. Upon being convicted, defendant appealed.

★ Holding: The court found that the information derived by defendant from the Rule 35 motion provided him with sufficient information to effectively cross examine the codefendant. Defendant was unable to show with specificity that he was deprived of impeachment material based upon the actual contents of the plea agreement. Thus, the court found that, even if the failure to disclose the plea agreement was error, the error was harmless.

• *Due Process - Prosecutorial Misconduct*

U.S. v. Jackson, 05-6014 (1/12/07)

► Defendant was charged in a drug conspiracy and during the prosecutor's closing argument he repeatedly indicated that government witnesses were "telling the truth," or "being truthful." Defendant did not object to the statements and he was convicted. Defendant appealed.

★ Holding: In assessing a claim of prosecutorial misconduct, the court considers first whether the remarks were improper, then whether the impropriety amounted to reversible error considering prejudice to the defendant, the isolated or extensive nature of the remarks, the deliberateness of the remarks, and the strength of the evidence against the accused. First, the court found that the prosecutor's

remarks were repeated and improper. Second, the court ruled that the remarks did not require reversal because the prosecutor had at least tried, although ineptly, to tie the comments to the evidence, the testimony of the witnesses was corroborated, and the evidence against defendant was otherwise “undeniably strong.” Thus, applying the plain error standard, the court affirmed defendant’s conviction.

• *Due Process - Preindictment Delay*  
U.S. v. Atchley, 04-6521 (1/23/07)

▶ Defendant was charged with manufacturing meth and, shortly before the trial date, the government obtained a second superseding indictment. The new indictment resulted in a delay of the trial date. One week before the new trial date, the government discovered a lab report regarding the meth which it promptly turned over to the defense. Defendant moved to exclude the lab report for failure to disclose it earlier and the district court denied the motion. Upon defendant’s conviction, he appealed and raised for the first time that the delay in obtaining the second superseding indictment required dismissal of his case.

★ Holding: In order to obtain a dismissal based upon preindictment (or pre-superseding indictment) delay, a defendant must prove (1) prejudice to her right to a fair trial and (2) that the delay was intentionally caused by the government in order to gain a tactical advantage. The court found no clear error in the district court’s conclusion that the government did not find the lab report until several weeks after the superseding indictment was issued. Thus, the court held that the government did not intentionally withhold the report and cause delay to gain tactical advantage. Accordingly, the court found no plain error and affirmed defendant’s conviction.

• *Double Jeopardy*  
U.S. v. Jackson, 05-6014 (1/12/07)

▶ Defendant was charged with a drug conspiracy and the government introduced evidence at trial of a drug transaction that had been the subject of a separate state conviction of defendant. On appeal, defendant contended that admission of the drug transaction underlying the state conviction violated the Double Jeopardy Clause.

★ Holding: Pursuant to the “dual-sovereigns doctrine,” the court held that the Double Jeopardy Clause does not prohibit criminal suits for the same offense by separate sovereigns. Accordingly, the conviction was affirmed.

• *Miranda - Public Safety Exception*  
U.S. v. Williams, 05-5460 (1/9/07)

▶ Officers went to a boarding house to execute a warrant for defendant for aggravated rape and robbery. The officers were told that defendant lived in a room on the second floor. The officers knocked on the door and defendant answered. During the course of the ensuing interaction, the officers asked defendant if he had any guns in the house. Defendant responded that he had a gun under the mattress of the bed. Defendant was charged with being a felon in possession of a firearm and he moved to suppress his statement about the gun on the grounds that it was taken in violation of *Miranda*. The district court granted the motion and the government appealed.

★ Holding: A statement taken by police after a defendant is in custody and without advising the defendant of her *Miranda* rights may nonetheless be admissible based upon the public safety exception. Such exception applies where the officers’ questions are necessary to secure the officers’ safety, as opposed to questions designed to elicit testimonial evidence. In order to satisfy the public safety exception, the government must

prove that the officers had an objectively reasonable belief that (1) defendant might have, or recently has had, a weapon, and (2) that someone other than police might gain access to the weapon and inflict harm with it. In the case, the court found that the district court made inadequate factual findings about the contested series of events that transpired after defendant answered the door in order to assess the public safety exception. Accordingly, the district court ruling was vacated and the case remanded.

- *Right to Testify*

U.S. v. Stover, 05-3562 (1/30/07)

- ▶ Defendant was charged with drug trafficking and he did not testify at trial. Upon his conviction, defendant argued on appeal that his right to testify had been violated.

- ★ Holding: The court held that a district court is not required, *sua sponte*, to address a silent defendant and inquire whether he knowingly and intelligently waived the right to testify, or to ensure that he has waived the right on the record. A defendant's waiver of the right to testify may be presumed from his failure to testify or notify the district court of his intention to do so. Accordingly, defendant's conviction was affirmed.

- *Due Process - Ex Parte Communications*

U.S. v. Barnwell, 04-2143 (2/27/07)

- ▶ Defendant was charged with conspiracy and embezzlement of union assets and went to trial. During the jury deliberations, the government learned through a wiretap on an unrelated matter that one of the jurors was the sister of the target of the unrelated investigation. As a result, the government believed that the juror may be tainted and thereafter engaged in a long series of *ex parte* communications with the district judge. During the process of these lengthy *ex parte* communications, defense counsel was kept completely in the dark and made decisions

about how to answer juror questions, whether to agree to an *Allen* charge, and other jury related matters. Also during the process, the district judge met *in camera* with the jury-foreperson, misstated on the record the reasons behind certain decisions, declared a mistrial, and refused to poll the jury in open court. The case resulted in a hung jury. Defendant was subsequently retried and convicted, and six months after the conviction, the defense learned of all of the *ex parte* communications from the first trial. Defendant appealed and alleged a violation of his due process rights.

- ★ Holding: Under the Due Process Clause, a defendant has the right to be present at all critical stages of a trial where his absence may frustrate the fairness of the proceedings. Likewise, under the Sixth Amendment a defendant has a right to be present at all critical stages, the right to the effective assistance of counsel, and the right to be tried by a fair and impartial judge and jury. In the case, the court held that all of these constitutional rights had been violated. The court found that the *ex parte* communications, and the *in camera* conversations with the jury all served to completely deprive defendant of any semblance of fair deliberations. Because the defense was not advised of even the existence of the *ex parte* communications until after his conviction in his second trial, the court ruled that the appropriate remedy was to reverse defendant's conviction and remand the case for retrial.

## VI. Sixth Amendment

- *Confrontation Clause*

U.S. v. Mooneyham, 04-5189 (1/9/07)

- ▶ Defendant was charged with drug trafficking and at trial the government introduced, through an agent, the testimony of a codefendant who implicated defendant in drug trafficking activities. The statement made by the codefendant was made during discussions with an undercover officer about the drug trade. The district court admitted the

statement and defendant was convicted. Defendant appealed and argued that admission of the statement violated the Confrontation Clause.

★ Holding: The court first held that, under *Crawford*, the statement was not testimonial because the codefendant did not know at the time he made the statement that he was talking to an undercover officer. Thus, he could not possibly anticipate that his statement would be used against defendant to prosecute a crime. Second, the court analyzed the statement under the traditional Confrontation Clause framework and held that, because the statement fit within a firmly rooted hearsay exception (co-conspirator statements - FRE 801(d)(2)(E)), its admission did not violate defendant's right to confrontation. Thus, the conviction was affirmed.

• *Confrontation Clause*

Hamilton v. Morgan, 05-5614 (1/24/07)

► Defendant was charged in state court with armed robbery and evading arrest. By the time of trial, the victim was stationed overseas in the military, and for each of three scheduled trial dates the prosecution sought to have the victim declared unavailable and to introduce the transcript of his testimony from the preliminary hearing. At the time of the third trial date, the victim actually was available to come to the trial, but flight arrangements could not be made and then the victim could not be reached as the trial date finally arrived. At the trial, the transcript was admitted by the trial court and defendant was convicted. After exhausting his state court appeals, defendant filed a *habeas* petition in the district court and claimed that his right to confrontation was violated because the victim was available. The district court denied the petition and defendant appealed.

★ Holding: The unavailability exception to the Confrontation Clause contains two requirements: (1) the witness' testimony was given at a prior judicial proceeding and was

subject to cross examination by the defendant; and (2) the government made a good faith effort to obtain the witness' presence for the trial. In the case, the court first found that the victim had given prior testimony at a preliminary hearing and that defendant had the opportunity to cross examine him. Second, the court held that the state prosecutor had no available legal mechanism to bring the victim before the trial court for testimony. Further, the state made a good faith effort to try to obtain the victim's voluntary presence, but it could not be reasonably procured. Accordingly, the court found that the witness was unavailable and admission of the transcript was proper.

• *Confrontation Clause*

U.S. v. Stover, 05-3562 (1/30/07)

► During defendant's trial on drug conspiracy charges, the government played tape recordings of conversations between defendant and a coconspirator that were intercepted by the government. Defendant was convicted and appealed, arguing that admission of the tape recordings violated the Confrontation Clause.

★ Holding: Pursuant to *Crawford*, testimonial statements may not be admitted into evidence unless the defendant is afforded the opportunity for cross examination. In the case, the court held that the statements on the tape recordings by the coconspirator were not testimonial because they were made during the course of the drug conspiracy, and not knowingly made to police officers. Further, the statements fell within a firmly rooted hearsay exception – the coconspirator exception. Accordingly, the admission of the statements was affirmed.

• *Right to Counsel of Choice*

U.S. v. Mooneyham, 04-5189 (1/9/07)

► Defendant was charged in a drug conspiracy and his first trial ended in a mistrial. Four days before defendant's retrial was set to

begin, defendant's appointed counsel moved to withdraw, at defendant's request, because defendant wanted to hire new counsel. Defendant's only complaint with his appointed attorney was that he had not been able to review all of the discovery. The district court denied the request to withdraw the appointed attorney and a request for a continuance. The retrial proceeded, defendant was convicted, and he appealed.

★ Holding: An indigent defendant has no right to have any particular attorney represent him and therefore must demonstrate "good cause" in order to obtain a substitution of counsel. In assessing whether "good cause" has been shown, the court considers the timeliness of the motion, the adequacy of the district court's inquiry into the matter, and whether the conflict rose to the level of a complete lack of communication that would prevent an adequate defense. The court found that defendant filed the motion just four days before the retrial, the district court made an adequate inquiry, and defendant had not shown any actual deficiency on counsel's part. Accordingly, the district court ruling was affirmed.

• *Right to Counsel - Critical Stages*  
Van v. Jones, 04-2277 (1/16/07)

► Defendant was charged in Michigan state court with assault with intent to commit murder. Prior to trial, the state moved to consolidate defendant's case with three codefendants who were charged with various offenses arising out of the same incident. The state court held a "consolidation hearing" at which defendant's counsel did not appear. After hearing argument from the codefendants' attorneys and the prosecutor, the court consolidated the cases. Defendant was subsequently convicted after jury trial. Defendant lost his state court appeals and filed a federal *habeas* petition arguing that his Sixth Amendment right to counsel had been violated

because he had been denied counsel at the "consolidation hearing." The district court denied the petition and defendant appealed.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the "consolidation hearing" under Michigan law was not a critical stage in the proceedings such that the complete denial of counsel at such a proceeding required reversal of the conviction. Accordingly, the district court ruling was affirmed.

• *Speedy Trial*

U.S. v. Jackson, 05-6014 (1/12/07)

► Defendant was indicted for drug trafficking and, at the time, he was serving a sentence in Virginia. The government waited 22 months before bringing defendant to the district court to answer to the indictment. The 22 month delay was mostly attributable to the fact that the government was engaged in arresting other individuals who were indicted in the case. Defendant moved to dismiss the indictment based upon Sixth Amendment speedy trial grounds. The district court denied the motion and defendant appealed.

★ Holding: Four factors must be considered in determining whether to dismiss an indictment based upon a Sixth Amendment speedy trial violation: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right; and (4) any prejudice to defendant. First, the court held that the 22 month delay was presumptively prejudicial. Second, the court found that, although the government's reason for the delay did not show bad faith, it was still delay attributable to the government and weighed in defendant's favor. Third, the court found that defendant had timely asserted his right. Fourth, the court found no prejudice to defendant. Although the court emphasized that prejudice to the defendant is not necessary if there is a sufficiently strong showing of the first three factors, the court held that the facts of the case

did not warrant a dismissal of the indictment. Thus, the district court ruling was affirmed.

- *Booker - Retroactive Application*  
Lang v. U.S., 05-2700 (1/24/07)

- ▶ Defendant was convicted and sentenced for a drug conspiracy, and he appealed. The court of appeals remanded the case for resentencing, and shortly before the new sentencing hearing, *Apprendi* was decided. Although *Booker* was not decided prior to his resentencing, defendant concisely argued the principle of *Booker* at the hearing. Defendant was then resentenced and appealed. After the conclusion of defendant's appeals, *Booker* was decided. Defendant then filed a *habeas* petition in the district court requesting a resentencing and arguing that *Booker* should apply retroactively. The district court denied the petition, and defendant appealed.

- ★ Holding: The court held that, even though defendant succinctly raised the *Booker* issue in a pre-*Booker* sentencing hearing, the court would not apply *Booker* retroactively where defendant had exhausted his appeals before *Booker* was decided. Relying on prior circuit precedent, the court held that *Booker* is a procedural, as opposed to a substantive, rule and, as such, it cannot be applied retroactively, even where a defendant had the foresight to argue its principle before its inception. Thus, the district court ruling was affirmed.

## VII. Other Constitutional Rulings

- *Commerce Clause*  
U.S. v. Davis, 05-6882 (1/17/07)

- ▶ Defendant was a police officer who extorted money from several bars. The bars received some limited shipments of alcohol from out of state, and had patrons who traveled from out of state. Defendant was charged with three counts of extortion under the Hobbs Act, 18 U.S.C. § 1951. After his conviction, defendant argued on appeal that the government failed to prove the requisite effect

on interstate commerce.

- ★ Holding: Where the victim of a Hobbs Act violation is a business (as opposed to an individual), the government need only prove that the defendant's conduct had a *de minimis* effect on interstate commerce. In the case, the court found that the *de minimis* standard was met where the bars received some alcohol and patrons from out of state. Accordingly, the conviction was affirmed.

## VIII. Defenses

- 18 U.S.C. § 3161(j) - *Speedy Trial*  
U.S. v. Jackson, 05-6014 (1/12/07)

- ▶ Defendant was indicted for drug trafficking and, at the time, he was serving a sentence in Virginia. The government waited 22 months before bringing defendant to the district court to answer to the indictment. Defendant moved to dismiss the indictment based upon § 3161(j) and the district court denied the motion. Defendant appealed.

- ★ Holding: Pursuant to § 3161(j), where a defendant has been charged by the government and the defendant is serving time in a penal institution, the government is required to either obtain the defendant for trial or place a detainer on the defendant. In the case, the court found that the government had not met either requirement of § 3161(j). Nonetheless, the court held that, pursuant to its prior precedent in *U.S. v. Robinson* (See P.V., Issue # 9), dismissal of an indictment is not a proper remedy for a violation of § 3161(j). Further, the court noted that Fed. R. Crim. P. 48(b) did not make dismissal an available remedy. Thus, the district court ruling was affirmed.

- *Sufficiency of Evidence-Inconsistent Verdicts*  
U.S. v. Jackson, 05-6014 (1/12/07)

- ▶ Defendant went to trial on one count of conspiracy to distribute in excess of 5 grams of crack, and one count of conspiracy to distribute in excess of 50 grams of crack. The jury convicted defendant of the conspiracy charge

involving the 5 grams of crack, but acquitted him of the charge involving 50 grams. On appeal, defendant argued that the evidence was insufficient to support the conviction for the 5 grams. Defendant claimed that the verdicts were inconsistent because the jury appeared to discredit the government witnesses who claimed to have sold to defendant amounts far in excess of 50 grams.

★ Holding: The court held that the jury verdicts were not necessarily inconsistent because the jury may have chosen to believe some of the witness' testimony, but discredited other parts of it. Further, the court emphasized that, even if the verdicts were inconsistent, the court would not assume that the inconsistency meant that the jury thought that defendant was innocent. The court found that it was equally possible that the jury was convinced of defendant's guilt on one count, but then through "mistake, compromise, or lenity" arrived at the inconsistent verdict on the other offense. Accordingly, the conviction was affirmed.

• *Fed.R.Crim.P.14(a)-Severance of Counts*  
U.S. v. Atchley, 04-6521 (1/23/07)

► Defendant was charged with two counts of manufacturing meth, one count of using a firearm in relation to drug trafficking (18 U.S.C. § 924(c)), and two counts of being a felon in possession of a firearm (18 U.S.C. § 922(g)). Defendant moved to sever the three firearm charges from the drug counts and the district court denied the motion. Defendant appealed.

★ Holding: Rule 14(a) permits a court to sever counts of an indictment if the defendant would suffer undue prejudice as a result of their joinder. In the case, the court first found that the § 924(c) charge was inextricably intertwined with the meth counts, and thus was properly joined. Second, the court ruled that, although the § 922(g) charges presented a "closer question," they were nonetheless

properly joined because defendant stipulated that he was a convicted felon, thus minimizing potential prejudice, and because the district court gave a proper limiting instruction to the jury regarding its use of the prior conviction only for the § 922(g) counts. Accordingly, the district court ruling was affirmed.

## **IX. Plea and Sentencing Hearings**

• *Plea Hearing - Withdrawal of Plea*

U.S. v. Quinlan, 05-2060 (1/5/07)

► Defendant was charged with conspiracy and making false statements to the SEC, and he entered into a plea agreement with the government. Thirteen months later, and after going through three defense attorneys, defendant moved to withdraw his guilty plea. The district court denied the motion, and granted an upward variance to a sentence of 10 years. Defendant appealed.

★ Holding: In determining whether to permit a defendant to withdraw a guilty plea, the district court must determine whether defendant has offered a fair and just reason, taking into consideration the following: (1) the amount of time between the plea and motion to withdraw; (2) whether the reason for withdrawal is valid; (3) whether the defendant maintained her innocence; (4) the circumstances of the guilty plea; (5) the defendant's nature and background; (6) the defendant's prior experience with the justice system; and (7) prejudice to the government. In considering the factors, the court found that the thirteen month delay was lengthy, defendant offered no valid reason, the guilty plea was lawfully entered, defendant's educational level suggested that he understood the plea and its terms, and the government would be prejudiced by having to try defendant's case separately from a co-defendant. Accordingly, the district court ruling was affirmed.

• *Plea Hearing - Rule 11*

U.S. v. McCreary-Redd, 05-5382 (2/6/07)

► Defendant was charged with being a felon in possession of a firearm, possession of crack with intent to distribute, and carrying a firearm in relation to a drug trafficking crime. Defendant entered into a plea agreement to plead guilty to possession of crack with intent to distribute and carrying a firearm in relation to drug trafficking, in return for dismissal of the felon in possession charge. At the plea hearing, the defendant waived a reading of the indictment, the elements of the offenses were never read into the record, and the district court never mentioned the “intent to distribute” element of the drug offense. The only factual predicate regarding the “intent to distribute” element provided that the 3 grams of crack that defendant possessed “was individually wrapped and packaged for sale.” On appeal, defendant argued, pursuant to Fed. R. Crim. P. 11, that the district court failed to establish that a factual basis supported the plea and that the court failed to determine whether defendant understood the charges to which he pled guilty.

★ Holding: Pursuant to Rule 11(b)(3), in taking a plea the district court must ensure that an adequate factual basis is established for the charge. Further, Rule 11(b)(1)(G) requires the district court to ensure that a defendant understands the nature of the charge to which she is pleading. In the case, the court first held that the statement that the 3 grams of crack was “individually wrapped . . . for resale” did not establish the required factual predicate for the “intent to distribute” element. The court emphasized that such language, given the small amount of crack, could equally suggest that defendant had just purchased the substance for personal use. Thus, the district court did not establish a sufficient factual basis for defendant’s guilty plea to possession of crack with intent to distribute.

Second, the court held that the district court did not adequately determine that

defendant understood the nature of the charge. The indictment was not read in the district court, and the court did not review the elements of the offense. In fact, at no point did anyone in the court mention the “intent to distribute” element of the charge. Accordingly, the court held that the district court’s inquiry was inadequate. Thus, the court found plain error in the district court’s acceptance of the plea, and reversed defendant’s conviction for possession of crack with intent to distribute. Further, the court reversed the conviction for carrying a firearm in relation to drug trafficking because the drug charge was the predicate offense.

• *Sentencing - Commencement of Sentence*

U.S. v. Wells, 05-6263 (1/9/07)

► Defendant was convicted of, and sentenced for, being a felon in possession of a firearm. At the time of sentencing, defendant was in the custody of the state and appeared in federal court pursuant to a writ of *habeas corpus ad prosequendum*. In imposing sentence, the district court ordered that defendant’s federal sentence would commence on the date that he was received by the district court pursuant to the writ. The government appealed.

★ Holding: Pursuant to 18 USC § 3585(a), only the Bureau of Prisons may determine when a sentence is deemed to commence. Thus, the court held that the district court was without the statutory authority to provide a date certain for commencement of defendant’s sentence. Accordingly, the case was remanded to the district court with instructions to strike the language in the judgment pertaining to the commencement of the sentence.

• *Sentencing Hearing - Fed. R. Crim. P. 25*

U.S. v. Winkle, 04-4196 (2/21/07)

► Defendant was charged with bank fraud and assigned to a district judge for trial. Shortly before the trial, the case was transferred to a different district judge. After defendant’s

conviction, the case was returned to the original judge for sentencing. The same judge also sentenced a codefendant and a bank employee who was charged with embezzlement in a related matter. Defendant did not object at the time of sentencing, but argued on appeal that Fed. R. Crim. P. 25 was violated because the judge that presided over the trial was not the sentencing judge.

★ Holding: Pursuant to Rule 25, a successor judge may sentence a defendant after trial if the trial judge cannot perform her duties because of “absence, death, sickness, or other disability.” In the case, the court found that the record was unclear as to why the trial judge did not preside over sentencing. Nonetheless, the court held that no reversible error occurred because (1) defendant failed to object to the procedure, (2) by the time of appeal, the trial judge had retired and it was thus impossible for him to preside over a resentencing if the case were remanded, and (3) the successor judge appeared to be sufficiently familiar with the case to proceed with sentencing. In regard to the third point, the court emphasized that a district court need not affirmatively state her familiarity with a case prior to sentencing as long as it is apparent from the record. Thus, the sentence was affirmed.

## **XII. Appeal**

### *• Reasonableness of Sentence*

U.S. v. Wells, 05-6263 (1/9/07)

► Defendant was convicted of being a felon in possession of a firearm and being a felon in possession of ammunition based upon two separate shooting incidents. At sentencing, the district court imposed an upward variance in defendant’s guideline range from 175 to 200 months in prison. Defendant appealed.

★ Holding: The court held that a 200 month sentence was reasonable given that defendant, in separate incidents, had shot and wounded one person at a night club, and had engaged in a shoot out with the police. Further, the court

noted that defendant had a lengthy history of escalating violence on his record. Accordingly, the sentence was affirmed.

### *• Reasonableness of Sentence*

U.S. v. Smith, 05-4425 (1/26/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court imposed an upward departure in defendant’s sentencing range based upon the severity of defendant’s prior record. The court determined that criminal history category VI did not adequately reflect the seriousness of defendant’s record, and accordingly increased the range from 30-37 up to 46-57 months. Defendant appealed.

★ Holding: In reviewing a sentence that is outside the recommended guideline range, the court applies a form of proportionality review: the greater the variance from the range, the more compelling its justification must be. The court held that, whether the district court chose to “depart” from the range under the guidelines or grant a “variance” from the range pursuant to § 3553, the appellate court’s analysis should be the same and reach the same result. Thus, the court applied the familiar framework of considering first procedural, then substantive, reasonableness. The court found that the district court had clearly articulated its reasons for the upward departure and that those reasons were factually supported in the record. Further, the court held that the sentence was substantively reasonable given defendant’s record and his likelihood of recidivism. Lastly, the court noted that defendant’s argument that he should receive a lower sentence because he would not be eligible (as a result of the firearm charge) for the residential drug treatment program was without merit. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*  
U.S. v. Funk, 05-3708 (2/22/07)

▶ Defendant was convicted of marijuana trafficking and was sentenced as a career offender. During his appeal, *Booker* was decided and the case was remanded for resentencing. At the second sentencing hearing, the district court granted defendant a downward variance from a sentence of 262 months, to a sentence of 150 months. The court's stated that its reasons for the reduction were its belief that the career offender guideline was too harsh for defendant because the offense involved neither firearms nor cocaine, and because defendant was 50 years old and the 262 month would amount to a life sentence. The government appealed.

★ Holding: The court held that the sentence imposed was substantively unreasonable. First, the court held that the district court's reliance on no firearms being involved was improper because defendant's guideline range would actually have been higher had firearms been involved. Thus, the properly calculated guideline range had already taken into account the absence of firearms. Second, the court held that the court's conclusion that the career offender guideline was excessive was essentially a disagreement the district court had with Congress' directive regarding career offenders. The court found that the district court had relied on an impermissible sentencing factor in this regard. Third, the court held that age may be a proper consideration for a downward variance in an appropriate case, but that defendant's age did not warrant the 40% downward variance granted in the case. Accordingly, the case was remanded for resentencing.

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

• *Ineffective Assistance of Counsel*  
Harrison v. Motley, 04-6157 (2/23/07)

▶ Defendant was charged with murder and his two attorneys decided to pursue an alibi

defense. The attorneys told the jury during opening statement that defendant was not present at the crime scene at the time of the murder. Immediately prior to trial, one of the two alibi witnesses recanted their story, and during the trial, the other did the same. The witness problems created a rift between defendant's two attorneys and they both moved separately to withdraw during the trial, claiming that their continued representation would violate the state ethics rules. The trial court denied the motions. After consultation with his two attorneys, defendant decided to not present any witnesses to support the alibi defense and he chose not to testify. Defendant was convicted, exhausted his state appeals, and filed a federal *habeas* petition claiming that his attorneys were ineffective. The district court denied the petition and defendant appealed.

★ Holding: In *United States v. Cronin*, the Supreme Court identified two instances where courts may presume that counsel was ineffective: (1) where the accused is denied counsel entirely at a critical stage of trial; and (2) where counsel entirely fails to subject the prosecution's case to adversarial testing. In the case, the court held that neither the failure of the attorneys to put on a defense, nor the conflicting advice defendant received from his attorneys amounted to a violation of *Cronic*. Further, the court held that the attorney's representation was not ineffective under the *Strickland* standard. The court found that neither the attorneys' ethical concerns nor the dispute among the two attorneys amounted to a conflict of interest, and that the decision not to present witnesses for the defense was made by defendant himself, not his counsel. Likewise, the court found that the attorneys' failure to fulfill the promise in opening statement about an alibi defense was not unreasonable given the witnesses' recantations and other witness inconsistencies. Thus, the court affirmed defendant's conviction.