

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
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- X. Jury Issues
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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 for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to 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

The Supreme Court's 2006 Term ended in June. The 2007 Term does not begin until October, so there are no new decisions for this issue.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- 18 USC § 242 - Excessive Force

U.S. v. Budd, 05-4098 (8/13/07)

- ▶ Defendant was a county sheriff who was

charged with multiple counts of using excessive force against pretrial detainees and sentenced inmates in violation of the prisoners' Fourteenth and Eighth Amendments rights. After being convicted at trial, defendant appealed and argued that the evidence was insufficient to sustain the verdicts.

★ Holding: In order to sustain a conviction for a § 242 violation, the government must show excessive force against a prisoner that amounts to punishment, in violation of the Fourteenth Amendment for pretrial detainees, or in violation of the Eighth Amendment in regard to sentenced inmates. In the absence of an "expressed intent to punish," the issue of defendant's guilt turns on whether the practice is "reasonably related to a legitimate government objective." Further, a prisoner's injuries must be more than *de minimis* in order to support a constitutional violation. In regard to the two counts at issue, the court found that credible evidence supported the facts that defendant had slammed a prisoner's head into doors, a table, and a wall. Further, defendant slammed a prisoner into a steel window frame and stood on his back. Both inmates suffered scratching and bruising. The court found these circumstances sufficient to support the jury verdicts, and accordingly defendant's convictions were affirmed.

• *18 USC § 844(i) - Arson*
U.S. v. Rayborn, 05-6894 (7/26/07)

► Defendant was a pastor who was charged with arson for burning down his own church. The evidence at trial was entirely circumstantial. Two ATF experts testified that, based upon the existence of gasoline and diesel fuel pour patterns found on the floors of multiple rooms, they believed that the fire was intentionally set. Defendant's experts did not dispel this conclusion. Further, defendant told the investigators that he was the only person in the church within the relevant time period, and that all of the doors were locked. Finally,

evidence was adduced that the church was insured and defendant filed a claim on behalf of the church for \$800,000. Defendant had access to and control over such funds. Defendant was convicted after jury trial and he appealed, challenging the sufficiency of the evidence.

★ Holding: The court held that the government was required to prove that defendant maliciously damaged or destroyed the church and that the church was used in interstate commerce. The only element at issue was whether defendant caused fire. The court ruled that circumstantial evidence may be sufficient to support a jury verdict if the evidence is substantial and competent. The court found that the evidence was sufficient to support the verdict because an accelerant was used, defendant was the sole person with access to the church at the time, and he had motive to collect the insurance proceeds. Accordingly, the conviction was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Collier, 06-1395 (7/12/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court found that he qualified as an armed career criminal. One of the predicate offenses for the ACCA enhancement was a prior Michigan conviction for escape. On appeal, defendant argued that the escape conviction was not a "violent felony" for ACCA purposes.

★ Holding: Under the ACCA, an offense qualifies as a "violent felony" if it is an enumerated crime, involves the use or attempted use of force, or "otherwise involves conduct that presents a serious potential risk of physical injury to another." In the case, the court held that escape is not an enumerated offense, nor does it contain an element involving the use or attempted use of force. Further, defendant's escape conviction did not qualify as a violent felony under the "otherwise

clause” for two reasons. First, the Michigan escape statute included not only breaking out of jail, but also escape from custody while outside the confines of the jail. Second, Michigan law did not define escape as a continuing offense. Thus, any risk of injury in the subsequent apprehension of a defendant was not, under Michigan law, a part of the offense of escape. The court found insignificant the fact that the PSR indicated that defendant fled and possessed a firearm when he was eventually apprehended for the escape. Thus, the district court ruling was reversed and the case remanded for resentencing.

• *18 USC § 924(e) - ACCA*
U.S. v. Amos, 06-5032 (8/9/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the government argued that defendant qualified for the armed career criminal enhancement. One of the predicate offenses that the government claimed supported the enhancement was a prior Tennessee conviction for possession of a sawed-off shotgun. The district court held that the prior shotgun possession did not constitute a “violent felony” under the ACCA, and accordingly declined to impose the enhancement. The government appealed.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the mere possession of a sawed-off shotgun does not constitute a “violent felony” under the ACCA. The court reasoned that simply possessing such a firearm was not conduct that presented a “serious potential risk of physical injury to another.” Accordingly, the district court ruling was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Lancaster, 06-5668 (8/31/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court found that he qualified as an armed career criminal. One of the predicate

offenses for the ACCA enhancement was a prior Kentucky conviction for second-degree escape. On appeal, defendant argued that the escape conviction was not a “violent felony” for ACCA purposes.

★ Holding: Distinguishing the court’s recent decision in *Collier* (*see supra*), the court held that Kentucky’s second-degree escape provision qualified as a “violent felony” for ACCA purposes. Similar to the Michigan statute in *Collier*, the Kentucky escape statute encompassed conduct that constituted “walk away escapes” from non-jail settings. Unlike the Michigan state courts in *Collier*, however, Kentucky state courts had consistently defined escape as a continuing offense. This distinction between Michigan and Kentucky law was sufficient for the court to distinguish the case from *Collier* and find that the Kentucky escape provision constituted a “violent felony.” This conclusion was based on the risk of physical harm inherent in recapturing an escapee. Accordingly, defendant’s sentence was affirmed.

• *18 USC § 1957 - Money Laundering*
U.S. v. Rayborn, 05-6742 (7/2/07)

► Defendant was charged with conspiracy, mail and wire fraud, and money laundering pertaining to a scheme wherein defendant mailed fraudulent documents to a bank for purposes of obtaining a home loan. Based on the documents, the bank approved the loan, and subsequently wired the funds to the closing agent for the purpose of defendant’s acquisition of the home. The government alleged at trial that the money laundering offense consisted of the wire of the funds by the bank to the closing agent at defendant’s direction. Defendant was convicted and he argued on appeal that the evidence was insufficient because he never obtained or controlled the funds until after the bank wired them.

★ Holding: The elements of a § 1957 money laundering charge are as follows: (1) defendant

engaged in a monetary transaction; (2) defendant knew that the money was criminally derived; (3) the value was greater than \$10,000; (4) the property was derived from a violation of a federal criminal statute (in this case mail fraud); and (5) the transaction occurred in the U.S. In the case, the court found that the funds wired by the lender to the closing agent for the purpose of defendant's purchase of the home were criminally derived proceeds of mail fraud. The court ruled that the mail fraud was completed when defendant mailed the fraudulent documents to the lender. When the lender approved the loan, the proceeds were controlled by defendant, even though he was not in physical possession of them. Accordingly, the money laundering conviction was affirmed.

• *21 USC § 841 - § 851 Enhancement*
U.S. v. Pritchett, 06-3359 (8/13/07)

► Defendant entered into an agreement with the government wherein he agreed to plead guilty to several counts of distribution of cocaine base. In the plea agreement, defendant agreed that his sentencing range would be increased, pursuant to § 851, from 5-40 years to 10 years-life in prison because of a prior drug conviction. Defendant acknowledged the agreement at the plea hearing, and stated that he understood that he could not get less than 10 years because of the enhancement. After the plea hearing was concluded, later the same day, the government filed the required Information under § 851. Defendant argued at sentencing that the 10 year mandatory sentence should not apply because the government had not filed the § 851 enhancement prior to the entry of the guilty plea, as required by the statute. The district court rejected defendant's argument and sentenced defendant to 10 years. Defendant appealed and argued that the § 851 enhancement was jurisdictional, and that it could not be applied.

★ Holding: Answering an open question in

the Sixth Circuit, the court first held that the requirement of filing an Information before a plea or trial was not a jurisdictional requirement in § 851. Second, the court held that the government had satisfied the notice requirements of the statute. Given that defendant had actual notice that the § 851 enhancement would be imposed, as shown by the plea agreement and plea colloquy, the filing of the Information shortly after the plea hearing satisfied § 851. Thus, the sentence was affirmed.

• *21 USC § 841/846 - § 851 Enhancement*
U.S. v. Craft, 04-4129 (7/20/07)

► Defendant was charged with participating in a conspiracy to distribute crack cocaine and prior to trial the government filed notice of a sentencing enhancement based upon § 851. Defendant was convicted after trial and at the sentencing hearing the district court failed to engage in the colloquy required by § 851(b) to determine if defendant contested the conviction underlying the enhancement. Defendant was then sentenced to the mandatory 20 years required by the enhancement. Defendant appealed.

★ Holding: Because defendant did not object to the failure of the district court to conduct the colloquy, the court applied plain error analysis. The court held that, even though no § 851(b) colloquy was conducted, defendant was afforded adequate opportunity to object to the conviction during the PSI and sentencing process. Further, because the prior conviction was over five years old, § 851(e) precluded defendant from challenging the validity of the conviction. Accordingly, the court found no plain error and affirmed defendant's sentence.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

• *2D1.1/1B1.3 - Drugs - Relevant Conduct*
U.S. v. Gonzalez, 06-3303 (8/30/07)

► Defendant was charged with possession of

cocaine with intent to distribute. At trial, the parties stipulated that defendant drove a car that contained about a kilogram of cocaine in a secret compartment. Defendant claimed that he did not know about the drugs in the car. In response, the government offered evidence that defendant knowingly engaged in two prior transactions involving about 50 grams each. The jury returned a special verdict of guilty, finding that defendant was responsible for less than 500 grams of cocaine. At sentencing, the district court reasoned that the only way to reconcile the jury verdict was that the jury believed defendant was guilty of transporting the kilogram of cocaine, but that defendant only “knew” that the amount would be about 50 grams, based on the prior two transactions. Thus, applying the “reasonable foreseeability” test of USSG § 1B1.3, the district court held that defendant was responsible only for about 50 grams, and sentenced him accordingly. The government appealed.

★ Holding: First, the court noted that §1B1.3(a)(1)(A) holds a defendant responsible for “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by defendant.” The court then compared this provision with § 1B1.3(a)(1)(B), which provides that “in a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), a defendant is responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” The court held that the import of the provisions is that a defendant is responsible for actions that he personally undertakes, aides, or abets. No reasonable foreseeability requirement applies in such a case. Thus, the court found that defendant was responsible for the amount of drugs that he transported, regardless of whether he knew the actual amount of drugs, or whether the amount was

reasonably foreseeable to him. The reasonable foreseeability requirement only comes into play when a defendant’s liability for the offense relies on a “jointly undertaken criminal activity” theory. Accordingly, the court found that the district court erred and remanded the case for resentencing. The court held that, on remand, the district court was bound by the 5 year statutory mandatory minimum sentence for a drug amount in excess of 500 grams, pursuant to 18 USC § 841(b).

• *2D1.1(b)(1) - Firearm Enhancement*
U.S. v. Catalan, 06-5259 (8/22/07)

► Defendant traveled from Texas to Tennessee to deliver a kilogram of cocaine to a coconspirator at his residence. Through use of a confidential informant, the government obtained a warrant to search the residence, and upon executing the warrant, found defendant in the master bedroom. Also in the bedroom was a gun. The gun belonged to the coconspirator. Defendant was subsequently convicted of conspiracy and distribution of cocaine and at the sentencing hearing the district court applied a two-level enhancement under USSG § 2D1.1(b)(1) for possession of a firearm. Defendant challenged application of the firearm enhancement on appeal.

★ Holding: In order to impose the two-level firearm enhancement, the government must prove by a preponderance of the evidence that (1) the defendant actually or constructively possessed the firearm, and (2) the possession was during the commission of the offense. If the government makes this showing, the burden shifts to the defendant to prove that it was clearly improbable that the gun was connected to the offense. The court held that one coconspirator is responsible for a gun possessed by another coconspirator during a transaction if such possession was reasonably foreseeable. In the case, the court held that it was reasonably foreseeable to defendant that the coconspirator would have a gun during the

drug transaction because of the amount of cocaine involved and its value, and the fact that the gun was found in the room where defendant was arrested. Thus, the enhancement was affirmed.

- *2K2.1(b)(2)-Possession of Gun as Collector*
U.S. v. Baker, 06-5984 (8/29/07)

- ▶ Defendant was convicted of possessing a firearm after being convicted of a misdemeanor crime of domestic violence. At sentencing, he argued that he should receive a reduction, pursuant to USSG § 2K2.1(b)(2), because he possessed the gun solely for collection purposes. Defendant claimed that the gun, an old shotgun, had been in his family for generations and that he was keeping it to give to his son. The district court denied the request for the reduction and defendant appealed.

- ★ Holding: In determining whether a defendant has possessed a gun solely for collection purposes, the court must consider the relevant surrounding circumstances including “the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of defendant’s criminal history, and the extent to which possession was restricted by local law.” A defendant bears the burden of proving the grounds for the reduction by a preponderance of the evidence. In the case, the court found little support for defendant’s argument that the gun was kept solely for collection. The court noted that the gun was neither a classic gun nor valuable, that it was not stored in a manner consistent with an item of value or treasure, and it was not polished or treated as one would treat something that was part of a collection. Accordingly, the court held that the district court’s ruling was proper and affirmed defendant’s sentence.

- *2K2.1(b)(6) - Another Felony Offense*
U.S. v. Burns, 06-5398 (8/16/07)

- ▶ Defendant was convicted of being a felon

in possession of a firearm. At sentencing, the district court imposed a four-level enhancement because defendant possessed the firearm in connection with another felony offense, namely drug trafficking. The court found that the officers had conducted a controlled buy of crack cocaine and subsequently executed a search warrant on defendant’s residence. During the search, officers found a gun, crack, \$1,100 in cash, and various drug paraphernalia. Defendant objected to the enhancement, the district court overruled the objection, and defendant appealed.

- ★ Holding: The court held that application of the four-level enhancement was proper. Although mere proof that drugs and a gun are present in the same room does not necessarily support the enhancement under § 2K2.1, the “fortress theory” may support the increase where a defendant used a firearm to protect drugs, facilitate a transaction, or embolden herself during a transaction. In the case, the court found sufficient evidence to show that defendant had possessed the gun in the residence in connection with the distribution of crack, and the sentence was affirmed.

B. Chapter Three - Adjustments

- *3B1.1 - Leadership Role*

- U.S. v. Moncivais, 05-6689 (7/10/07)

- ▶ Defendant was convicted of participating in a drug conspiracy and at sentencing the district court enhanced his sentence by four levels for being a leader or organizer of a criminal activity involving five or more participants. Defendant appealed.

- ★ Holding: In determining whether the four-level enhancement is appropriate, a court must consider “the exercise of decision making authority, the nature of participation in the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature

and scope of the illegal activity, and the degree of control and authority exercised over others.” Further, it is sufficient if defendant supervised only one person in an activity that involved five or more participants. A “participant” is someone who is criminally responsible for the offense. In the case, the court held that defendant (1) exhibited control over at least one person (as evidenced by a taped phone call), (2) supplied the drugs in an extremely large quantity, (3) demonstrated a significant degree of planning and participation, and (4) had a large stake in the profitability of the enterprise. Further, the court found that at least five other participants were involved in transporting the drugs. Thus, the four-level enhancement was affirmed.

• *3B1.3 - Abuse of a Position of Trust*
U.S. v. Kaminski, 05-3823 (8/31/07)

► Defendant was convicted of introducing unapproved and misbranded drugs into interstate commerce, and holding adulterated drugs for sale. During the course of her criminal conduct, defendant sold egg yolks of hyperimmunized chickens to consumers and falsely represented to the consumers that she was a medical doctor. At sentencing, the district court imposed the enhancement under USSG § 3B1.3 for abuse of a position of trust. Defendant appealed and argued that the enhancement did not apply to strict liability offenses.

★ Holding: Answering an open question, the court held that the § 3B1.3 enhancement may apply to qualifying conduct regardless of whether the underlying offense requires proof of *mens rea*. Further, the court found that the enhancement was appropriate under the facts of the case because defendant had, in fact, falsely told consumers she was a doctor and the consumers had relied on this representation. Thus, defendant’s sentence was affirmed.

• *3C1.1 - Obstruction of Justice*
U.S. v. Kaminski, 05-3823 (8/31/07)

► Defendant was convicted of introducing unapproved and misbranded drugs into interstate commerce, and holding adulterated drugs for sale. At sentencing, the district court applied a two-level enhancement for obstruction of justice based upon (1) defendant’s participation in petitions that were sent to the FDA, the Secretary of Health and Human Services, and a congresswoman in an attempt to derail the FDA investigation, and (2) a letter defendant sent to the Office of Internal Affairs (OIA) of the FDA, indicating that the FDA agent investigating him was corrupt. Defendant appealed the application of the enhancement.

★ Holding: First, the court held that no evidence existed in the record to support the conclusion that defendant had participated in the petitions sent to the FDA, Secretary, and congresswoman. Second, the court held that the letter defendant sent to the OIA did not constitute obstruction of justice. Under § 3C1.1, an unsworn statement to a law enforcement officer can only constitute an obstruction of justice if it “significantly obstructs or impedes the investigation or prosecution of the offense.” At the sentencing hearing, the investigating FDA agent testified that defendant’s letter to the OIA had absolutely no impact on the investigation of defendant. Accordingly, the obstruction-of-justice enhancement was not appropriate, and the case was remanded for resentencing.

C. Chapter Four - Criminal History

• *4A1.2(e) - Applicable Time Period*
U.S. v. McGee, 06-1554 (7/11/07)

► Defendant was arrested by police in possession of cocaine and two firearms. At the time of his arrest, he admitted to the officers that he had owned one of the guns for five or six years. Defendant was subsequently convicted of cocaine trafficking, being a felon

in possession of a firearm, and carrying a firearm in relation to a drug trafficking crime. At sentencing, the district court determined that defendant's possession of the firearm began five or six years earlier, in 1999 or 2000. Because of this conclusion, defendant's prior felony drug conviction in 1992 fell within the applicable ten-year time period of USSG § 4A1.2(e), thus making it countable against defendant's criminal history category. Accordingly, defendant was sentenced in criminal history category II instead of I. Defendant appealed.

★ Holding: The offense of being a felon in possession of a firearm is a continuing crime as long as the defendant remains in possession of the gun. Thus, based on defendant's admission to the officers that he owned the gun for five or six years, it was proper for the district court to conclude that defendant's prior drug conviction fell within the applicable ten year time period (§ 4A1.2(e)). Further, the court held that the rule of lenity did not require a lower sentence. The only evidence in the record was defendant's statement to the officers. Defendant offered no evidence during the sentencing process to rebut the length of his possession of the gun, but instead relied on the argument of his counsel. Since his attorney's statements were not "evidence," there was no ambiguity in the proof regarding possession and the rule of lenity did not require imposition of a lower sentence. Thus, defendant's sentence was affirmed.

III. Evidence

A. Article IV - Relevancy

• 401/403 - *Relevance/Prejudice*

U.S. v. Cody, 06-6003 (8/16/07)

▸ Defendant was arrested for several robberies and during his interrogation by the police he stated that he "couldn't live in prison, so he was going to kill himself." The tape of the statement was played for the jury, and defendant objected. The district court

overruled the objection and indicated that the statement was an admission. Defendant appealed.

★ Holding: The court held that defendant's suicidal statement was analogous to evidence of a defendant's flight from the scene of a crime. Thus, the court applied the four-step analysis used for flight evidence. In order to admit flight evidence, four inferences must be drawn: (1) from defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt for the charged offense; and (4) from consciousness of guilt of the charged offense to actual guilt of the charged offense. Under the circumstances of the case, the court held that the inferences supported the belief that defendant's suicidal statements were indicative of his guilt, and thus, the district court's evidentiary ruling was affirmed.

• 404(b) - *Motive*

U.S. v. Rayborn, 05-6894 (7/26/07)

▸ Defendant was a pastor who was charged with arson and mail fraud for burning his church and filing for the insurance proceeds. At trial, the government offered evidence to show defendant's exercise of control over church finances, including proof of using church funds for personal expenditures. Defendant argued that the evidence was inadmissible under FRE 404(b). The district court admitted the evidence, defendant was convicted, and he appealed.

★ Holding: The court applies a three part test in order to determine if evidence is admissible under FRE 404(b): (1) whether the evidence was sufficient to prove that the prior acts occurred; (2) whether the evidence was admitted for a proper purpose under 404(b); and (3) whether the probative value of the evidence was substantially outweighed by its prejudicial effect. In the case, the court held that there was no dispute as to whether defendant exercised control over the church

finances. Second, the court found that the evidence was properly admitted to show defendant's motive use the insurance proceeds to his own benefit. Third, the court ruled that the probative value was not outweighed by the prejudicial effect because motive was a highly relevant issue in the case. Thus, the conviction was affirmed.

- *404(b) - Motive*

U.S. v. Cody, 06-6003 (8/16/07)

Defendant was charged with two armed robberies. At trial, defendant's wife and son testified that defendant and his family had a crack cocaine problem and that defendant's motive to rob banks was to pay off drug debts, and to buy more crack. Defendant was convicted and appealed the admission of his family's testimony.

★ Holding: The court held that the crack cocaine evidence was relevant to show defendant's motive, and that it was not unduly prejudicial because it was inextricably intertwined with the robberies. Thus, the admission of the evidence was affirmed.

- *404(b) - Intent/Identity*

U.S. v. Ayoub, 06-1610 (8/16/07)

► Defendant was charged with being a felon in possession of a firearm, and possession of marijuana with intent to distribute. The charges were based on a gun and drug trafficking evidence that were found in defendant's residence. At trial, the government introduced evidence to show that an informant purchased marijuana from defendant on four occasions before the government executed a search warrant on the home. Defendant objected to the evidence under FRE 404(b). The district court admitted the evidence, defendant was convicted, and he appealed.

★ Holding: First, the court held that the evidence was properly admitted to show both intent and identity. The prior sales were probative of defendant's intent to sell the

marijuana found in the home, and they were also probative to show defendant's identity as the possessor of the marijuana found in the home. Further, the court ruled that the probative value of the evidence outweighed any prejudicial effect that the evidence had. Finally, the court found unavailing defendant's argument that the prior-sales evidence was unnecessary because the case against defendant was overwhelming. The court remarked that this fact only tended to prove that any error in the admission of the prior-sales evidence was harmless error. Accordingly, the admission of the evidence was affirmed.

- *404(b) - Intrinsic Acts*

U.S. v. Gonzalez, 06-3303 (8/30/07)

► Defendant was charged with possession of cocaine with intent to distribute. On the day of trial, the government disclosed that it intended to introduce evidence to show that a coconspirator trained defendant in the drug trade and that defendant accompanied the coconspirator on two prior smaller transactions before the charged conduct occurred. Defendant argued for the first time on appeal that the government had not provided the required notice of the 404(b) evidence before trial.

★ Holding: Because defendant failed to object at trial, the court applied plain error review. The court held that the evidence regarding the coconspirator's training of defendant in the drug trade and the two prior transactions were "intrinsic" evidence to the charged transaction, and thus were not properly deemed 404(b) evidence. Although the court deemed the matter a close case, the testimony of the coconspirator established "evidence of an ongoing drug conspiracy" and a "continuing pattern of illegal activity" that was "intrinsic" to the charged offense. Further, the court found that, even if the evidence properly fell under 404(b), defendant's substantial rights were not affected by the government's failure

to provide notice. Accordingly, the court found no plain error and the district court ruling was affirmed.

B. Articles VI-VII - Witnesses and Experts

• *611(a)/607 - Rebuttal Witnesses*

U.S. v. Rayborn, 05-6894 (7/26/07)

▶ Defendant was charged with arson for setting fire to his church and with mail fraud for claiming the insurance proceeds. At trial, the government offered a rebuttal witness who ended up being hostile to the government. The government then called a second rebuttal witness to impeach the credibility of the first rebuttal witness. Defendant objected to the calling of the second witness, but the district court permitted the testimony. Upon his conviction, defendant appealed.

★ Holding: FRE 611(a) gives the district court discretion in exercising control over the presentation of witnesses. FRE 607 permits a party to impeach its own witness. In the case, the court held that the district court had the discretion, but was not required, to limit the scope of the government's rebuttal testimony only to that which was directed at rebutting new evidence offered by the defense in its case in chief. In the end, the court found no abuse of discretion in permitting the government to call the rebuttal witnesses.

C. Article VIII - Hearsay

• *801(d)(2)(E) - Coconspirator Exception*

U.S. v. Gonzalez, 06-3303 (8/30/07)

▶ Defendant was charged with possession of cocaine with intent to distribute. Defendant drove a car that contained a kilogram of cocaine in a secret compartment to a drug transaction. Defendant's trial defense was that he did not know the drugs were in the car. In response, the government offered (1) testimony that defendant had accompanied a coconspirator on several occasions to other drug transactions, and (2) hearsay statements from the drug supplier (defendant's uncle)

indicating that defendant would act as a Spanish translator for the drug transaction, and requesting that the coconspirator introduce defendant to the drug trade. Defendant objected to the hearsay statements of the drug supplier, the district court admitted the statements, and defendant appealed.

★ Holding: Before coconspirator statements are admissible under FRE 801(d)(2)(E), the court must find by a preponderance of the evidence that a conspiracy existed, defendant was a participant, and the statements were made in the course of the conspiracy. The hearsay statements themselves may be used as proof of the conspiracy, but they are not sufficient in and of themselves to establish the existence of the conspiracy. In the case, the court held that the conspiracy was proven by the hearsay statements themselves and the other evidence offered by the testifying coconspirator that defendant participated in additional drug transactions. Further, the court found sufficient evidence that the statements were made in furtherance of the conspiracy. Thus, the district court ruling was affirmed.

• *804(b)(3) - Statement Against Interest*

U.S. v. Rayborn, 05-6742 (7/2/07)

▶ Defendant and his accountant were indicted for various fraud offenses. When they were being processed upon their arrest, the accountant said to defendant's wife, "I'm sorry I got y'all down here." At trial, defendant moved to introduce the accountant's hearsay statement to his wife, under FRE 804(b)(3) as a statement against penal interest. The district court excluded the hearsay evidence and, upon his conviction, defendant appealed.

★ Holding: The court held that any error in the exclusion of the evidence was harmless. The court found that (1) there was substantial evidence of defendant's guilt, (2) defendant had ample opportunity at trial to point the finger at his accountant, (3) defendant's wife did testify in his defense, and the jury evidently

did not believe her testimony, and (4) the hearsay statement itself was vague and not a “slam dunk” admission of guilt. Accordingly, the district court’s exclusion of the evidence was affirmed.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

• Reasonable Expectation of Privacy

U.S. v. Gooch, 06-5914 (8/21/07)

► Pursuant to complaints of crime, police officers began monitoring the parking lot outside a nightclub. The parking lot was shared among various businesses and was not owned by the nightclub. Nonetheless, during its hours of operation, the nightclub provided a service in the parking lot whereby patrons could pay a fee to a valet for a parking spot in front of the club. The police officers would routinely walk through the lot, including the valet area, shining flashlights in cars and generally looking for evidence of crime. One night officers spotted a gun beneath the driver’s seat of a car, ran the car tag, and found out that the car belonged to defendant, a convicted felon. Officers obtained defendant’s picture, and upon seeing him leave the club and get into the car, they arrested him. Defendant was charged and defendant moved to suppress the gun. The district court denied the motion and defendant appealed.

★ Holding: The court held that defendant had no reasonable expectation of privacy in parking his car in the special valet section at the nightclub. The circumstances of the case indicated that pedestrians routinely walked through the parking lot and valet area, the nightclub owner and security guard knew that the police were monitoring the parking lot and checking vehicles, and bar patrons were generally aware that police officers conducted security sweeps in the parking lot. Further, the parking area was an open-air lot with no walls or barriers enclosing it. Thus, the court found that defendant could not reasonably expect that

anyone, including police officers, would not be looking into his car when parked in the parking lot. Accordingly, the district court ruling was affirmed.

B. Reasonable Suspicion/Vehicle Stops

• Reasonable Suspicion - Scope of Detention U.S. v. Ellis, 05-4576 (8/7/07)

► Defendant was a passenger in a vehicle when the driver was stopped by an officer for weaving. During the first thirteen minutes of the stop, the officer determined that the driver had a valid driver’s license and registration and that he was not impaired. Defendant denied having any I.D., and gave a name and date of birth (which were false) that the officer could not verify through his dispatcher and computer. The officer then detained defendant and the driver for an additional nine minutes, during which time the driver consented to a search of the vehicle, and the officer found crack under defendant’s seat. Defendant was charged with a drug offense and the district court granted his motion to suppress, finding that the length and scope of the detention were unreasonable. The government appealed.

★ Holding: The court held that the first thirteen minutes of the stop were justified by reasonable suspicion for the officer to verify the driver’s ability to safely operate the vehicle and to identify the passenger – defendant. The court further held that the additional nine minutes of the traffic stop were justified based upon the following: (1) the officer’s inability to confirm defendant’s false alias; (2) the driver’s response that he did not know of any drugs in the vehicle; (3) the driver did not know defendant’s name; (4) the driver did not know the address of the location to which he had taken defendant in Cleveland; (5) defendant did not know his own social security number; and (6) the driver said that defendant paid him \$40 to drive him to Cleveland, while defendant said he paid the driver \$50. The court held that these facts would not have justified a

prolonged detention, but that nine minutes was a reasonable amount of time given the circumstances. Accordingly, the district court ruling was reversed.

• *Reasonable Suspicion-Inevitable Discovery*
U.S. v. Garcia, 03-2152 (8/8/07)

► Officers obtained information that established reasonable suspicion to believe that defendant and his associates were trafficking in narcotics and firearms. Upon stopping the vehicle in which defendant was a passenger, the officers frisked defendant and found a pager. Defendant was later arrested and the vehicle searched. During the search, the officers found evidence of drug trafficking. Defendant was indicted for conspiracy to distribute narcotics and moved to suppress the pager. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that the pager was not properly seized as the result of the *Terry* frisk. During a *Terry* frisk, officers with reasonable suspicion that a defendant is armed and dangerous may pat down the outer clothing for weapons. Only objects that are weapons and items that are plainly illegal contraband may be seized during a *Terry* frisk. Because the pager was neither a weapon nor plainly illegal contraband, it was not properly seized during the *Terry* frisk. Nonetheless, the court relied on the doctrine of inevitable discovery in holding that the officers would have found the pager during defendant's subsequent, lawful arrest. Thus, the pager did not have to be excluded at trial. Further, the court held that admission of the pager at trial was harmless because the evidence against defendant was overwhelming, and it was unlikely that the pager contributed to the jury verdict of guilt. Therefore, the conviction was affirmed.

• *Reasonable Suspicion - Probation Search*
U.S. v. Herndon, 06-5522 (8/31/07)

► Defendant was sentenced in state court for sexual exploitation of a minor. A condition of his probation required that he consent to his probation officer checking his "computer and any software" to insure that he did not have internet capability. During his period of probation, defendant advised his probation officer that he had searched for employment on the internet. As a result, the probation officer checked defendant's laptop computer and observed what appeared to be pornography. The probation officer subsequently connected the computer to defendant's external hard drive and found thumbnail images of child pornography. The probation officer contacted the local police who, upon their arrival, viewed the images and seized defendant's computer and hard drive. Defendant was subsequently prosecuted federally for receipt and possession of child pornography and moved to suppress the evidence found on his computer. The district court denied the motion and defendant appealed.

★ Holding: Two distinct lines of authority have developed from the Supreme Court which may permit search of a probationer's personal effects. First, in *Griffin v. Wisconsin*, the Court authorized the search of a probationer based upon the "special needs exception," a two-pronged inquiry that calls for "(1) an examination of the validity of the relevant provision authorizing a search and (2) a determination of whether the search complied with the applicable provision." Second, the Court in *United States v. Knights*, authorized the search of a probationer based upon a broader totality of the circumstances approach which weighs the degree to which the probation condition weighs upon the individual's privacy against the degree to which it is needed to promote a legitimate governmental interest. Applying the analysis from *Knights*, the court concluded that

defendant had a significantly reduced expectation of privacy due to his status on probation and his notice of the probation condition regarding internet use, and that the state had substantial interest in preventing recidivism on the part of defendant. In weighing these factors, the court concluded that the search by the probation officer was justified as long as it was supported by reasonable suspicion. Based upon defendant's admission to internet use (which was prohibited by the probation condition), the court found the requisite reasonable suspicion for the probation officer's search. Further, the court held that the subsequent seizure of the computer by police officers was justified by the plain view exception. Accordingly, the district court ruling was affirmed.

D. Consent Searches and Seizures

• Search - Consent

U.S. v. Ayoub, 06-1610 (8/16/07)

▸ Agents received a tip from defendant's half brother that defendant was engaged in drug trafficking out of his parents' home while they were away. Agents conducted surveillance on the home, and eventually stopped defendant in his vehicle while leaving the home. The agents found nothing in a search of defendant and the vehicle, and they let him go. The agents were told by the half brother that defendant's half sister was the caretaker of the parents' home while they were gone, and that the half sister had a key. The agents went to the half sister's home, obtained her consent to search the parents' home, and got the key. Agents found evidence of drug trafficking and a firearm. Defendant was subsequently indicted and moved to suppress the evidence found in the consent search. The district court denied the motion and defendant appealed.

★ Holding: Common authority to consent to a search rests on mutual use of property by persons having joint access or control for most purposes. Even if a third party does not have

actual common authority to consent to a search, the search may be still justified if the officers reasonably believed that the person had apparent authority. In the case, the court held that the half sister had common authority to consent to a search of the parents' home because (1) the half brother said she did, (2) the half sister herself said that she did, and (3) she had a key. The court nonetheless expressed concern that defendant appeared to have a greater possessory interest in the home than the half sister, and the officer did not ever request defendant's consent to search the home, going instead to the half sister. Relying on the recent Supreme Court case *Georgia v. Randolph* (*See*, P.V., Issue # ___), the court held that because defendant had not actually denied a request to search, and the agents did not "remove" defendant from the home to "avoid his possible objection," the half sister's consent was sufficient. Accordingly, the district court ruling was affirmed.

E. Search Warrants

• Search Warrant - Scope - Plain View

U.S. v. Garcia, 03-2152 (8/8/07)

▸ Police officers stopped a vehicle in which defendant was a passenger and, based upon evidence acquired in the search, obtained a state warrant to search defendant's residence. The state warrant permitted a search of the residence only for cocaine. During the execution of the search, officers were accompanied by several DEA agents, who seized over a hundred documents. During defendant's prosecution for conspiracy, he moved to suppress the documents as being outside the scope of the warrant. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that the seizure of the documents was clearly not covered by the warrant, which authorized only the seizure of cocaine. Second, the court found that the plain view doctrine did not justify the

seizure. In order to justify a plain view seizure, (1) the object must be in plain view, (2) the officer must be legally present, (3) the incriminating nature of the object must be immediately apparent, and (4) the officer must have a right of access to the object.

Regarding the second element (officers legally present), the court held that federal officers may not assist in the execution of a state search warrant if (a) the federal officers have probable cause to obtain separate warrant, (b) they have an opportunity but fail to obtain a separate warrant, and (c) the federal officers are searching for items different than those authorized in the state warrant. In the case, the court found that the DEA agents were searching for the same thing as the state officers – drugs – and thus the DEA agents were legally present at the search.

Regarding the third element, the court found that the incriminating nature of the documents was not immediately apparent. Because the district court made the factual finding that the agents had to read and examine the documents before determining that they were incriminating, the court held that the plain view exception did not apply. Thus, the seizure of the documents violated defendant's Fourth Amendment rights.

Nonetheless, the court held that admission of the documents at trial constituted harmless error. The court found that the evidence against defendant was otherwise overwhelming, and thus, defendant's conviction was affirmed.

- *Search Warrant-Particularity-Good Faith U.S. v. Watson*, 06-6021 (8/15/07)

- ▶ Officers obtained a search warrant based upon an affidavit that described a residence and four suspects. The warrant, however, requested only a search of the individuals and not the residence itself. Officers arrived at the location and searched the residence and the individuals, finding evidence of firearm possession and

drug trafficking. Defendant was one of the four suspects searched, and upon being charged with narcotics and weapons violations, defendant moved to suppress the evidence found in the search of the residence. The district court denied the motion, defendant entered a conditional plea of guilty, and he appealed.

- ★ **Holding:** The court presumed that the warrant was defective for failing to list the residence in the warrant and proceeded to the issue of the officers' good faith in executing the warrant. Generally, evidence obtained from an invalid warrant is nonetheless admissible if the executing officer's reliance on the warrant is objectively reasonable. A recognized exception to the good faith rule is where "the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient." Distinguishing the case from the Supreme Court decision in *Groh v. Ramirez*, the court found that the warrant was not facially deficient. The warrant in all respects was clearly geared toward a search of the residence. The warrant provided extensive detail regarding the description of the residence. In the section indicating the place to be searched, it merely omitted the residence and listed only the individuals expected to be in the residence. The court found that the officer's and issuing judge's failure to notice this "minor deviation" did not evince an absence of good faith. Accordingly, the district court ruling was affirmed.

F. Arrest Related Issues

- *Arrest - Probable Cause*

- ▶ *Logsdon v. Hains*, 06-4085 (7/6/07)

- ▶ Logsdon was an abortion protestor who attempted to "counsel" women who were entering abortion clinics for services. On two separate occasions, a police officer was called to the scene by a clinic representative because Logsdon had allegedly entered clinic property.

On both occasions, the officer chose to ignore offered statements by eyewitnesses and instead to arrest Logsdon for trespass. The trespass cases were subsequently dismissed by the municipal court. Logsdon sued the officers involved under 42 USC § 1983 for wrongful arrests. The district court dismissed Logsdon's complaint and he appealed.

★ Holding: Once an officer determines that probable cause exists to make an arrest, the officer has no further duty to investigate or search for exculpatory evidence. The court held, however, that an officer must consider the totality of the circumstances, including both the inculpatory and exculpatory evidence known to the officer. In the case, the court found that, in both instances where Logsdon was arrested, the officer ignored eye witnesses who would have told officers either that Logsdon had not actually trespassed or had been privileged to enter the premises. Under these circumstances, the court ruled that the officers had reasonably failed to formulate probable cause. Accordingly, the district court's ruling dismissing Logsdon's complaint was reversed.

• *Arrest - Exclusionary Rule*

U.S. v. Garcia, 03-2152 (8/8/07)

► Based upon a tip from a hotel employee, officers began surveillance of defendant and his associates. The officers concluded that defendant was engaged in trafficking in drugs and executed a "felony stop" of the vehicle in which defendant was a passenger. Defendant was arrested, and a drug dog obtained. The dog alerted and the officers obtained a warrant to search the vehicle. As a result, officers searched defendant's luggage, which was inside the vehicle, and found \$5000 in cash. Upon being charged with drug trafficking, defendant moved to suppress the cash as being the fruit of his unlawful arrest. The district court denied the motion, and defendant appealed.

★ Holding: In order to suppress evidence

obtained from a properly executed search warrant, a defendant must show that the warrant was obtained as the result of a prior illegality. In the case, the court found that the search warrant was not obtained as the result of defendant's arrest. The warrant was obtained instead as a result of the stop of the vehicle and the drug-dog sniff. Thus, the warrant and search were not the "fruit" of the arrest. Because the court found that the stop of the vehicle was supported by reasonable suspicion and the scope of the drug-dog sniff did not exceed the bounds of a reasonable *Terry* stop, the court upheld the search of defendant's luggage.

V. Fifth Amendment

B. Brady

• *Due Process - Brady*

U.S. v. Heriot, 06-3824 (7/26/07)

► Defendant was convicted of several counts of selling crack to an undercover informant. After the trial, the government disclosed that the informant had engaged in some illegal conduct related to drugs after he had worked as an informant against defendant. Defendant moved for a new trial and the district court denied the motion, reasoning that the *Brady* violation did not affect the trial result because defendant had already conducted very effective impeachment of the informant at trial. Defendant appealed.

★ Holding: First, the court noted conflict within the circuit as to the proper standard of review for a new trial based on a *Brady* violation. Some cases have found that the abuse of discretion standard applies, while others have ruled that the *de novo* standard applies. The court chose not to resolve the conflict, because defendant could not prevail under either standard.

In order to obtain a new trial based upon a *Brady* violation, a defendant must show that (1) the evidence was exculpatory or impeaching, (2) it was suppressed by the

government wilfully or inadvertently, and (3) prejudice ensued. In the case, the court found that defendant had suffered no prejudice because he effectively demonstrated to the jury at trial that the informant was “an admitted crack cocaine dealer, admitted drug dealer, admitted drug defendant, [and] admitted person who is here to gain something from his testimony.” Further, the district court instructed the jury to assess the informant’s testimony with “more caution.” Under these circumstances, the court found that the trial result would not likely have changed with the new evidence, and the conviction was affirmed.

• *Due Process - Brady*

United States v. Cody, 06-6003 (8/16/07)

► Defendant was charged with two armed robberies. During the investigation the government determined that dye stained bank money was passed at a convenience store. The police obtained two videotapes from the store surveillance camera in order to determine if the robber’s image was caught on tape. The police subsequently learned that the dye-stained money from the convenience store did not match the money taken in defendant’s bank robbery. As a result, the officers never watched the tapes and they were lost before trial. Defendant moved for dismissal of the indictment and claimed that *Brady* had been violated by the officers’ destruction of potentially exculpatory evidence. The district court denied the motion and defendant appealed.

★ Holding: Where evidence is destroyed and its exculpatory value is unknown, the Supreme Court in *Arizona v. Youngblood* held that the defendant must show bad faith on the part of the government in failing to preserve the evidence. In the case, the court found that the government had acted on a good-faith belief that the videotapes would not produce evidence relevant to the investigation, and thus their destruction of the tapes did not violate

defendant’s due process rights. Accordingly, the district court’s ruling was affirmed.

• *Due Process - Brady*

O’Hara v. Brigano, 06-3455 (8/21/07)

► Defendant was charged with rape in state court and during the trial defendant learned that the victim made a prior written statement that contradicted her trial testimony about when the offense occurred. Defendant was provided with a copy of the written statement and the trial judge permitted defendant the opportunity to recall the witness, which he declined to do. Defendant was convicted, lost his state appeal, and filed a federal *habeas* petition. Finding no *Brady* violation, the district court denied the petition and defendant appealed.

★ Holding: In order to establish a *Brady* violation, a defendant must show that (1) the evidence was either exculpatory or impeaching, (2) the evidence was suppressed by the state either wilfully or inadvertently, and (3) prejudice ensued. First, the court held that the evidence in question was impeaching. Second, the court found that the state had at least inadvertently suppressed the evidence until mid-trial. In this regard the court held that ordinarily the government has the “obligation to learn of any favorable evidence known to others acting on the government’s behalf in the case, including police officers.” Thus, the prosecution could not effectively claim that it did not know about the statement when it was in the possession of the police officers. Third, the court found no prejudice. Defendant was provided adequate opportunity to utilize the impeachment evidence once disclosed, and did not request a continuance to afford more time to prepare. Further, the court held that the impeachment evidence itself was unlikely to have an effect on the trial outcome. Thus, defendant’s conviction was affirmed.

C. Confessions and Testimonial Rights

• *Voluntariness of Confession*

U.S. v. Craft, 04-4129 (7/20/07)

► Defendant confessed to drug trafficking based upon what he believed to be an implicit promise from a joint state/federal drug task force agent that he would not be charged with a drug offense. Six months later, defendant again met with the same agent and federal agents. After being read his *Miranda* warnings, defendant again confessed. Upon defendant's subsequent federal drug trafficking prosecution, he moved to suppress the statements. The district court found that the agent's implicit promise not to charge defendant was not made until the conclusion of the first interview with defendant, and that accordingly, defendant's confession was not coerced. The district court thus denied the motion and defendant appealed.

★ Holding: An implicit promise not to prosecute by a joint task force agent may serve as the basis to find a statement involuntary in an appropriate case. In the case, however, the court credited the district court's finding that the agent did not make the implicit promise until after defendant had already confessed at the first meeting. Thus, the court held that the promise was not coercive because defendant could not have possibly relied on it in tendering his confession. Further, the court held that the passage of six months and the reading of *Miranda* warnings prior to the second confession cured any potential coercive effect of the implicit promise. Thus, the district court ruling was affirmed.

E. Miscellaneous Fifth Amendment

• *Due Process - Identification Testimony*

Haliym v. Mitchell, 04-3207 (7/13/07)

► Defendant was charged with murder in state court and a seven year old witness identified him from a photo line-up as the murderer. In the line-up, defendant was pictured with five other individuals, but he was

the only person in jail garb and with bandages on his head. Upon defendant's conviction and loss in his state court appeal, he filed a federal *habeas* petition challenging the photo line-up identification. The district court denied the petition and defendant appealed.

★ Holding: In analyzing whether an identification violates the Due Process Clause, the court must first consider whether the identification was "unnecessarily suggestive," and then second, whether the evidence was nevertheless reliable. In considering the reliability, the court must evaluate the following factors: (1) the witness' opportunity to view the suspect; (2) the witness' degree of attention; (3) the accuracy; (4) the level of certainty demonstrated by the witness; and (5) the time between the crime and the identification. In the case, the court first held that the line-up was unnecessarily suggestive of defendant because of the bandages on his head and that fact that he was the only person in jail garb. Second, the court found that the identification was nonetheless reliable because the witness had adequate opportunity to view defendant, his awareness was enhanced because the victims were his parents, there was no uncertainty in the identification, and the witness knew defendant from prior contacts. Accordingly, the district court ruling was affirmed.

• *Identification Testimony - In-Court I.D.*

U.S. v. Cody, 06-6003 (8/16/07)

► Defendant was charged with bank robbery and during cross examination of a witness, defendant elicited from a teller that she had originally described the robber as having a medium build. On redirect examination, the prosecutor had the defendant stand up in court and the witness described defendant as being "medium." Defendant objected to the testimony, the district court overruled the objection, defendant was convicted, and he appealed.

★ Holding: The court held that the in-court identification was proper because the defense had invited the line of questioning by its cross examination. Further, the court found that it was proper given that the jury had the chance to view the robber on the bank surveillance tape, and because the evidence was otherwise substantial against defendant. Thus, the conviction was affirmed.

• *Due Process - Pre-Indictment Delay*
U.S. v. Brown, 06-1556 (8/16/07)

▶ Defendant was being investigated for kidnaping and transporting a minor across state lines for the purpose of sexual activity. The government did not arrest and indict defendant until three years after the offense occurred. Defendant was convicted and argued on appeal that his Fifth Amendment right to due process was violated by the pre-indictment delay.

★ Holding: The court first held that the primary guarantee against stale criminal charges is the statute of limitations, which in this case, was ten years. Nonetheless, pre-indictment delay may violate a defendant's due process rights if he can show that the delay was an intentional device on the part of the government to gain a tactical advantage, and that defendant suffered substantial prejudice as a result. In the case, the court held that defendant had offered no proof that the government intentionally delayed his prosecution. Further, the court found that defendant's claims that (1) a witness (who was not present during any of the alleged crimes) had died, and (2) that the delay caused defendant to forget what happened, were insufficient to show substantial prejudice. Thus, the conviction was affirmed.

• *Proof Beyond a Reasonable Doubt*
U.S. v. Ayoub, 06-1610 (8/16/07)

▶ Defendant was charged with being a felon in possession of a firearm and with possession of marijuana with intent to distribute. Prior to

trial, defendant entered written stipulations with the government indicating that defendant had a prior felony conviction on his record, that the firearm had traveled in interstate commerce, and that the drugs were, in fact, marijuana. At the close of the trial, the district judge did not enter the stipulations into evidence. The court did, however, instruct the jury regarding the prior-felony and interstate-commerce stipulations. Upon defendant's conviction, he appealed and argued that neither of the offenses could have been proven beyond a reasonable doubt due to the failure to introduce the stipulations into evidence.

★ Holding: The court held that, where parties enter written stipulations regarding an element of an offense, the government is relieved of its burden of proving that element. Answering an open question in the Sixth Circuit, the court held that where a district court instructs a jury as to the existence of a stipulation between the parties, the element is considered to be proven beyond a reasonable doubt, regardless of whether the stipulation is actually provided to the jury. Thus, conviction for being a felon in possession was affirmed. Regarding the marijuana charge, the court found that other evidence established that the drug was marijuana, so the failure to enter the stipulation or instruct the jury about it did not affect the trial outcome. Defendant's convictions were accordingly affirmed.

VI. Sixth Amendment

A. Right to Jury Trial/*Booker*

• *Booker - Retroactive Application*
Nichols v. U.S., 05-6452 (8/16/07)

▶ Defendant was convicted of bank robbery. At the sentencing hearing, which occurred after the Supreme Court's decision in *Apprendi*, the district court applied several guideline sentencing enhancements that were based purely on judge-found facts. Defendant objected to the enhancements, but did not argue that the guideline enhancements would violate

the Sixth Amendment because they were not submitted to the jury. The district court overruled the objections and sentenced defendant to 405 months in prison, a sentence within the then-mandatory guideline range. Defendant filed an appeal, but raised no issue regarding the guideline enhancements. After *Booker* was decided, defendant then filed a *habeas* petition claiming that his counsel was ineffective at sentencing for failing to anticipate *Booker* based upon the Supreme Court's decision in *Apprendi*, and accordingly objected to his guideline sentence enhancements on Sixth Amendment grounds. The district court denied the petition and defendant appealed.

★ Holding: The court held, for the first time in this type of case in the Sixth Circuit, that defendant's counsel was ineffective for failing to raise a *Booker*-type Sixth Amendment challenge to the judge-found guideline enhancements to defendant's sentence. The court ruled that "any counsel whose performance satisfied an objective standard of reasonableness would have at least been cognizant of possible extensions of *Apprendi* to challenge the Federal Sentencing Guidelines and the necessity of preserving those challenges in case the Supreme Court struck down the Guidelines while defendant's case was pending on direct appeal." Further, the court held that defendant was prejudiced by counsel's errors because a codefendant in the case actually did preserve the issue long enough on appeal that he eventually received a *Booker* remand and a lower sentence. Thus, the court vacated defendant's sentence and remanded the case for resentencing consistent with *Booker*.

• *Booker - Acquitted Conduct*
U.S. v. Mendez, 05-6777 (8/15/07)

► Defendant went to trial on a charge of conspiracy to distribute 500 grams or more of meth. The jury found defendant guilty of

conspiracy, but held in a special verdict that defendant was responsible for more than 50, but less than 500 grams of meth. At sentencing, applying the preponderance standard, the court held that defendant was responsible under the sentencing guidelines for 2.95 kilograms of meth. Accordingly, the district court increased defendant's sentence from a range of 63-78 months to a sentence of 151 months. The sentencing occurred pre-*Booker* and the Sixth Circuit subsequently remanded the case for resentencing in light of *Booker*. At the resentencing the district court imposed the same sentence. Defendant appealed.

★ Holding: The court held that, after *Booker*, the court may enhance a defendant's sentence under the sentencing guidelines based upon acquitted conduct if the court finds by a preponderance of the evidence that the conduct occurred. All that *Booker* requires is that the district court apply the guidelines as advisory and non-binding. Thus, the sentence was affirmed.

B. Confrontation Clause

• *Confrontation Clause - Competency*
Haliym v. Mitchell, 04-3207 (7/13/07)

► Defendant was charged in state court with two murders and at trial a seven year old eyewitness testified against him. Defendant challenged the witness' testimony as a violation of his right to confrontation because the witness was incompetent. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: The Confrontation Clause guarantees the opportunity for cross examination, but not cross examination that is "effective in whatever way, and to whatever extent, the defense might wish." In the case, the court held that defendant's right to confrontation was not violated by admission of the seven year old witness' testimony. The

court found that the witness understood that he should tell the truth and that there would be punishment if he lied. Further, defendant did cross examine the witness and he was generally responsive to the cross examination. Accordingly, the district court ruling was affirmed.

C. Right to Speedy Trial

• Right to Speedy Trial

U.S. v. Brown, 06-1556 (8/16/07)

▸ Defendant was arrested on charges of kidnaping and transporting a minor across state lines for the purpose of committing sex acts. Defendant was not brought to trial on the charges until 10 months after his arrest. Upon his conviction, defendant argued that his Sixth Amendment right to a speedy trial had been violated.

★ Holding: In *Barker v. Wingo*, the Supreme Court established four factors that a court must consider in determining whether a defendant's Sixth Amendment right to a speedy trial has been violated: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his or her right; and (4) prejudice to the defendant. No one factor must necessarily be met, but instead they must be considered in totality. In the case, the court held that the ten-month delay was right at the line for triggering presumptively prejudicial delay. Second, the court found that much of delay was attributable to defendant bringing in new counsel and needing more time, and that the case was otherwise complex. Third, defendant never raised the speedy trial issue until the appeal. Fourth, defendant could establish no prejudice other than stress from pretrial incarceration. The court noted, however, that he would have already been incarcerated on state cases from two other jurisdictions. Accordingly, defendant's speedy trial rights were not violated.

E. Indictment - Variance/Duplicity

• Fair Notice - Variance from Indictment

U.S. v. Budd, 05-4098 (8/13/07)

▸ Defendant was a county sheriff charged with using excessive force against an inmate in violation of 18 U.S.C. § 242. Specifically, the indictment charged that defendant denied the inmate his Fourteenth Amendment right to be free from excessive force. During the trial, however, the district court instructed the jury that the government must prove that defendant denied the inmate of his Eighth Amendment right to be free from excessive force. Defendant argued on appeal that the indictment had been constructively amended by the evidence and jury instructions, and that reversal of his conviction was warranted.

★ Holding: An indictment may be the subject of an actual amendment, a constructive amendment, or a variance. An actual amendment occurs when the government actually changes the text of the indictment. A constructive amendment occurs where a combination of the evidence at trial and the jury instructions so modify the charge that there is a substantial likelihood that defendant was convicted of a different offense than the one charged. Both actual and constructive amendments are *per se* prejudicial. A variance occurs where the evidence at trial proves facts materially different from the indictment. In order for a variance to require reversal, it must affect some substantial right of the defendant. In the case, the court held that a variance had occurred between the charge in the indictment (violation of Fourteenth Amendment) and the jury instructions (violation of Eighth Amendment). The court ruled, however, that the variance did not affect defendant's substantial rights because the Fourteenth Amendment and Eighth Amendment excessive force standards merely describe "two alternative methods by which one crime could be committed, rather than two crimes." Accordingly, defendant's conviction was

affirmed.

• *Fair Notice - Variance from Indictment*
U.S. v. Budd, 05-4098 (8/13/07)

► Defendant was a county sheriff charged with conspiracy and several substantive violations of an inmate's civil rights under 18 U.S.C. § 242. At defendant's first trial, he was convicted of conspiracy, but the jury deadlocked on the substantive counts. The government retried defendant on the substantive counts, and during the jury instructions, the district court instructed the jury on coconspirator liability under *Pinkerton*. On appeal, defendant argued that instructing the jury on *Pinkerton* liability constituted a constructive amendment of the indictment.

★ Holding: Under the theory of *Pinkerton* liability, a defendant is accountable for coconspirators' crimes if they are foreseeably committed in furtherance of the conspiracy. Answering an open question in the Sixth Circuit, the court held that a district court may properly provide a *Pinkerton* jury instruction regarding a substantive offense, even where the defendant is not charged with a conspiracy. Thus, the court found no constructive amendment and affirmed defendant's conviction.

VII. Other Constitutional Rulings

B. Art. I, § 10 - *Ex Post Facto*

• *Art. I, § 10 - Ex Post Facto*
Michael v. Ghee, 06-3595 (8/10/07)

► In 1996, the State of Ohio abolished its parole system in favor of a revised sentencing scheme. In 1998, the parole authority adopted guidelines for dealing with persons still on parole under the old system. Defendant inmates subsequently brought an action under 42 USC § 1983 claiming that implementation of the 1998 guidelines violated the *Ex Post Facto* Clause. The district court granted summary judgment to the parole authority. Defendants appealed.

★ Holding: The court held that, after the Supreme Court decision in *Garner v. Jones*, the standard to be applied in the Sixth Circuit in order to determine whether retroactive application of a law or guideline violated *ex post facto* is whether the new law or guideline creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes." The court ruled that this standard may be met in one of two ways: (1) the guidelines, on their face, show a significant risk of increased incarceration; or (2) application of the guideline, based upon the practical implication of it, will result in a longer period of incarceration than under the earlier guideline. In the case, the court held that the defendant inmates had not shown a sufficient risk that the 1998 parole guidelines, either on their face or in application, would increase their punishment. Accordingly, the district court ruling was affirmed.

VIII. Defenses

A. Severance of Counts/Defendants

• *Severance of Counts in Indictment*
U.S. v. Cody, 06-6003 (8/16/07)

► Defendant was charged with two armed robberies and an armed escape from custody. Defendant filed a pretrial motion to sever the escape charge from the armed robbery charges. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: Fed. R. Crim. P. 8 permits joinder of offenses where they are of the same or similar character, are based on the same transaction, or are part of a common scheme. Rule 8 is construed in favor of joinder, but if none of the requirements of the Rule are satisfied, the offenses must be severed. In addition to Rule 8, Rule 14 permits severance of charges if a party would be prejudiced by the joinder. In the case, the court held that even if joinder of the offenses was improper, any error was harmless because the district court provided a satisfactory limiting instruction

indicating that the jury must consider each charge separately. Further, the jury acquitted defendant of one of the robberies, so it was clear that the jury was able to compartmentalize the offenses. Thus, the district court ruling was affirmed.

L. Miscellaneous Defenses

- *Competency - 18 USC § 4241*

U.S. v. Jones, 06-5328 (7/23/07)

► Defendant was charged with being a felon in possession of a firearm and entered an agreement to plea guilty. Defendant was practically deaf since age two, and he utilized realtime reporting during the plea hearing. Nonetheless, the district court concluded that defendant could not understand the plea hearing because he expressed an inability to comprehend the question, “Are there any other understandings that you have with the United States regarding your case that are not set out in that plea agreement?” The government requested that the district court hold a formal competency hearing, but the district court declined to hold a hearing, found defendant incompetent, and permanently removed the case from its trial calendar. The government appealed.

★ Holding: The competency statute, § 4241(a), requires that, where a district court finds reasonable cause to believe that a defendant may be incompetent, the court “shall” hold a competency hearing upon the request of a party. In the case, the court held that § 4241(a) is a mandatory requirement. Accordingly, the court found an abuse of discretion in the district court’s failure to hold a formal competency hearing when requested by the government. Thus, the case was remanded.

X. Jury Issues

A. Jury Instructions

- *Jury Instructions - Knowledge of Writing*
U.S. v. Rayborn, 05-6742 (7/2/07)

► Defendant was charged with various fraud offenses based upon his use of false tax returns to obtain a loan. At trial, the district court instructed the jury that it may infer defendant’s knowledge of the information on the tax returns if it found that defendant signed the returns. Defendant was convicted and he appealed.

★ Holding: The Internal Revenue Code at 26 USC § 6064 provides that, where a person’s name is signed to a tax return, this constitutes *prima facie* evidence that the person actually signed the return. The court held that this statutory section did not support the district court’s instruction to the jury, and that the instruction may thus constitute error. Nonetheless, even if the instruction was error, the court found it to be harmless because the instruction did not require the jury to make the inference, and because the jury was likely, based upon the evidence, to have made such an inference without the instruction. Therefore, defendant’s conviction was affirmed.

- *Jury Instructions - Deliberate Ignorance*
U.S. v. Rayborn, 05-6742 (7/2/07)

► Defendant was charged with various fraud offenses based upon his submission of false tax returns to obtain a loan. At trial, the district court provided a “deliberate ignorance” instruction to the jury. Defendant argued on appeal that the instruction was improper because the evidence did not support the theory that he deliberately avoided obtaining knowledge of the contents of the tax returns.

★ Holding: The court found that there was sufficient evidence to support the theory that defendant may have been “deliberately ignorant” of the contents of the tax returns. Further, the court held that any error in providing the instruction was harmless. Thus,

the conviction was affirmed.

IX. Plea & Sentencing Hearings

A. Plea Agreements/Plea Hearings

• Plea Agreements

U.S. v. Moncivais, 05-6689 (7/10/07)

▸ Defendant was charged with participating in a drug conspiracy and entered into a plea agreement that contained the following language: “The government agrees that it will not recommend or request a sentencing enhancement for the defendant’s role in the offense (§ 3B1.1) during the preparation of the PSR.” During the presentence process, the government provided information to the probation office that led the probation department to recommend a leadership-role enhancement in the PSR. At sentencing, the government argued that the leadership enhancement should apply. The district court imposed the leadership enhancement and defendant appealed. Defendant argued on appeal that the government had breached the plea agreement provision.

★ Holding: First, the court held that the government did not breach the plea agreement by arguing for the leadership-role enhancement before the district court. The language of the plea agreement only prohibited the government from requesting the enhancement during the preparation of the PSR. Second, the court ruled that the government had not violated the plea agreement by providing information to the probation department that led to imposition of the enhancement. The plea agreement prohibited only “recommending or requesting” an enhancement, but it did not prohibit the government from providing information. Thus, the court held that the government did not violate the plea agreement and the sentence was affirmed.

B. Sentencing

• Sentencing - Indicia of Reliability

U.S. v. Moncivais, 05-6689 (7/10/07)

▸ Defendant was convicted of a cocaine conspiracy and at sentencing the district court relied on the hearsay statement of a codefendant in determining the drug amount for which defendant was responsible. On appeal, defendant argued that the hearsay statement did not bear a minimum indicia of reliability, as required by the guidelines.

★ Holding: Before a district court may rely on hearsay information at sentencing, it must find that it bears at least a minimum indicia of reliability. This standard requires at least “some evidentiary basis beyond mere allegation in an indictment,” and is mandated by both the guidelines and the Due Process Clause. The court found sufficient indicia of reliability in the codefendant’s hearsay statement because the district court held that the statement was “richly detailed,” and was “both internally and externally consistent.” Accordingly, the district court’s reliance on the hearsay statement was affirmed.

• Sentencing - Disputed Factual Findings

U.S. v. Lanesky, 05-2228 (7/11/07)

▸ Defendant was convicted of conspiracy to commit bank fraud and money laundering and at sentencing she disputed the amount of loss and the applicability of the money laundering guideline. The district court adopted the findings in the PSR and failed to rule on the issues defendant disputed. In the end, the court determined a sentence that it deemed appropriate under the factors in 18 USC § 3553 without ruling on the appropriate guideline range. Defendant appealed.

★ Holding: Pursuant to Fed. R. Crim. P. 32, a district court must rule on any disputed issue that is necessary to the sentencing determination. In the case, the court found that the district court had erred in failing to resolve the issues disputed by defendant and to

determine the applicable guideline range. Further, the court held that the error was not harmless because a sentence cannot be considered reasonable where the district court has not first calculated the applicable guideline range. Thus, the case was remanded for resentencing.

• *Sentencing - Rule 32 - Confidential Info.*
U.S. v. Hamad, 05-4196 (7/19/07)

► Defendant was convicted of being a felon in possession of a firearm and failing to register a sawed-off shotgun. During the presentence process, the district court received a number of confidential documents that reflected poorly on defendant's character. In order to preserve confidentiality, the district court summarized the information to defendant, explaining that the documents described defendant as abusive to his wife and others, as a dangerous person, and someone likely to recidivate. The court provided no information to defendant that would permit him to identify the sources of the information. At sentencing, the district court imposed a sentence near the upper end of the recommended guideline range, but indicated that it had considered and relied on the confidential information in fashioning the sentence. Defendant appealed.

★ Holding: Fed. R. Crim. P. 32(i)(1)(B) requires a district court to summarize for a defendant any confidential information not disclosed in the presentence report upon which the court relies and to afford the defendant a reasonable opportunity to comment on the information. In choosing to interpret Rule 32(i) in a manner that avoided conflict with the Due Process Clause, the court focused on the portion of the rule that requires the district court to afford the defendant a "reasonable opportunity to comment" on the confidential information. The court held that this phrase means not only notice of the information, time to prepare, and opportunity to be heard, but also the opportunity to meaningfully rebut or

question the accuracy of the information. In the case, the court held that the district court's summary was insufficient to provide defendant with enough information to meaningfully challenge the assertions against him. Accordingly, the court remanded the case to the district court with instructions for the court to resentence defendant without relying on the documents in question. The court left it to the district court's discretion as to whether a new district judge should be assigned to sentence defendant.

• *Sentencing - Right to Remain Silent*
U.S. v. Kennedy, 05-6586 (8/24/07)

► Defendant was convicted of distribution of child pornography and the district court ordered that he complete psychosexual testing, pursuant to 18 USC § 3552, prior to sentencing. Defendant opposed the testing on Fifth Amendment grounds. At the sentencing hearing, the district court stated that it was considering defendant's refusal to submit to the testing in imposing a sentence at the top end of the guideline range and in imposing life-time supervised release. Defendant's counsel agreed that life-time supervised release may be appropriate, but indicated that the court should not consider defendant's failure to cooperate, based on the advice of counsel, in imposing the top end of the range. Defendant appealed.

★ Holding: In *Mitchell v. U.S.*, the Supreme Court held that the Fifth Amendment permitted a defendant to remain silent about the facts and circumstances of the crime, and that a district court could not draw a negative inference from such silence. Distinguishing *Mitchell*, the court held that a psychosexual evaluation did not address the facts of the crime, but instead was focused on "the background, character, and conduct" of the defendant. Defendant's refusal to participate reflected adversely on his likelihood of recidivism and the need to protect the public. Further, the court emphasized that the assessment was authorized by § 3552.

Thus, the court found that the district court did not err in considering defendant's refusal to cooperate in imposing the top end of the range. Further, the court found that the period of life-time supervision was proper. Defendant's counsel waived any challenge to it by agreeing it was proper at the hearing, and, at any rate, such a sentence was reasonable under the circumstances.

• *Fed. R. Crim. P. 32 - Notice of Variance*
U.S. v. Presto, 05-6888 (8/14/07)

▸ Defendant was convicted of being a felon in possession of a firearm and receiving child pornography. At sentencing, the district court determined that it would impose a life-time period of supervised release. Defendant argued for the first time on appeal that he did not receive notice of the possibility of life-time supervised release as required by Rule 32.

★ Holding: Because defendant failed to object in the district court, the court applied plain error review. The court found that defendant received notice of the possibility of life-time supervised release at the plea hearing and in the PSR, and that he admitted at the sentencing that he knew that it was in the district court's discretion to impose life-time supervised release. Thus, although the imposition of life-time supervised release was an upward variance from the recommended guideline range, the court found that the notice defendant received was sufficient under Rule 32 to survive plain error review.

XI. Probation & Supervised Release

• *Violation of Supervised Release*
U.S. v. Lewis, 06-6011 (8/13/07)

▸ Defendant was convicted of a drug trafficking offense. One of the conditions of his supervised release required him to "permit a probation officer to visit him . . . at any time at home or elsewhere and [to] permit confiscation of any contraband observed in plain view of the probation officer." After

defendant started his term of supervised release, he gave his probation officer his home address, but refused to give the officer the address where his daughters resided, even though he spent several nights a week there. As a result, the probation officer filed a supervised release violation. The district court found that defendant violated his supervised release, in part, for failing to allow the probation officer access to his daughters' residence, and sentenced defendant to six months of home confinement and an additional term of supervised release. Defendant appealed.

★ Holding: First, the court held that defendant could not challenge the condition of supervised release itself. A defendant may not attempt to "invalidate his original conviction at a supervised release hearing." Second, the court held that defendant's conduct constituted a violation of his supervised release. The condition required defendant to allow access to his "home or elsewhere." There was nothing unreasonable about probation requesting access to a residence where defendant spent several nights each week. Accordingly, the court affirmed the violation of supervised release.

• *Reasonableness of Sentence*
U.S. v. Lewis, 06-6011 (8/13/07)

▸ Defendant was convicted of drug trafficking. Upon being released from incarceration, he violated his supervised release conditions for failing to notify his probation officer of contact with the police, submit monthly reports, follow instructions of the probation officer, and permit visits by the probation officer. The recommended guideline range for the violations was 5-11 months in prison, but the district court imposed a sentence of 6 months of home incarceration, and 2 more years of supervised release. Defendant appealed the reasonableness of the sentence.

★ Holding: First, the court noted that it is an open question whether the standard of review

for supervised release sentences is “plainly unreasonable,” or the *Booker* standard of reasonableness. The court concluded that it did not have to reach the issue because defendant’s sentence would be affirmed under either standard. Second, the court ruled that it is not reversible error for a district court to consider a factor under 18 USC § 3553(a) that is not specifically referenced under § 3583(e). Specifically, § 3583(e) indicates that, on a supervised release violation, the district court must consider certain § 3553(a) factors. Excluded from the list are the factors listed in § 3553(a)(2)(A), namely the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment. The court ruled that the district court’s specific consideration of those factors in the case did not render the sentence unreasonable or plainly unreasonable. Because the district court took into account appropriate considerations, and in fact sentenced defendant below the recommended guideline range, the sentence was affirmed.

XII. Appeal

B. Standard of Review

• Standard of Review

U.S. v. Moncivais, 05-6689 (7/10/07)

▶ Defendant was convicted of a drug conspiracy and at sentencing the district court determined that defendant qualified for a leadership enhancement under USSG § 3B1.1. Defendant appealed.

★ Holding: Traditionally, the court reviews a district court’s factual findings for clear error and its legal conclusions *de novo*. The court noted, however, that in *Buford v. U.S.*, the Supreme Court held that review under § 4B1.2 should be conducted “deferentially rather than *de novo*.” The court commented that the Sixth Circuit has yet to determine whether the “deferential” standard should apply to review of sentencing enhancements. In the case, the court again refused to decide the issue because

the results of the case would be the same under either standard. (*See supra*, II. Sentencing Guidelines).

• Standard of Review

U.S. v. Baker, 06-5984 (8/29/07)

▶ Defendant was convicted of possessing a firearm after being convicted of a misdemeanor crime of domestic violence and at sentencing he argued that he should receive a reduction, pursuant to USSG § 2K2.1(b)(2), because he possessed the gun solely for collection purposes. The district court disagreed and defendant appealed.

★ Holding: The court held that the standard of review for guideline determinations is as follows: factual findings are reviewed for clear error, legal interpretation of the guidelines is reviewed *de novo*, and application of the facts to the guidelines is a mixed question of law and fact that is reviewed *de novo*. In the case, the court found that the district court had made several factual findings and applied those facts to the guidelines. The parties disagreement on appeal dealt with whether the facts indicated that defendant possessed the gun solely for collection. Thus, the court held that this was a mixed question of law and fact and applied *de novo* review.

D. Miscellaneous Appeal

• Law of the Case Doctrine

U.S. v. Rayborn, 05-6894 (7/26/07)

▶ Defendant was a pastor who was charged with arson for burning his own church. Defendant filed a motion requesting dismissal of the indictment alleging that the interstate nexus requirement was not satisfied because the church was not sufficiently used in interstate commerce. The district court denied the motion and defendant subsequently lost the issue in the Sixth Circuit, however, the case was remanded for retrial on a separate issue. In the second trial, defendant again challenged the interstate nexus requirement and was again

convicted. Defendant appealed.

★ Holding: Applying the law of the case doctrine, the court held that, where a court decides upon a rule of law, that decision governs the same issues in subsequent stages of the same case. There are three exceptional circumstances in which a court will reconsider a previously decided issue of law: (1) substantially different evidence is raised in a subsequent trial; (2) the controlling authority takes a contrary view of the law; or (3) a decision is clearly erroneous and would work a manifest injustice. In the case, the court found that the legal issue regarding the interstate nexus had already been decided and that none of the exceptions applied. Accordingly, the district court ruling was affirmed.

• *Appellate Jurisdiction*

U.S. v. Jones, 06-5328 (7/23/07)

► Defendant was charged with being a felon in possession of a firearm and agreed to enter a plea of guilty to the charge. Defendant was practically deaf since age two. As a result of defendant's hearing disability, the district court found defendant incompetent and "permanently removed the case from its trial calendar." The government appealed the decision.

★ Holding: Pursuant to 18 USC § 3731, the court has jurisdiction to hear appeals by the government where the district court dismisses an indictment, unless the double jeopardy clause is implicated. In the case, the court held that the district court's permanent removal of the case from its trial calendar was the functional equivalent of a dismissal of the indictment, and that the appeal did not violate double jeopardy. Accordingly, the court found that it had jurisdiction to hear the appeal.

A. Preserving Error

• *Issue First Raised on Appeal*

U.S. v. Brown, 06-1556 (8/16/07)

► Defendant was charged with kidnaping and transportation of a minor to engage in sexual

activity. After defendant's conviction, he raised for the first time on appeal that (1) pre-indictment delay violated his Fifth Amendment right to due process, and (2) his rights under the Speedy Trial Act were violated based upon post-indictment delay.

★ Holding: Fed. R. Crim. P.12(b)(3)(A) and (B) require that any motions alleging a defect in instituting a prosecution or in filing an indictment be raised before trial, and Rule 12(e) indicates that a failure to do so constitutes a waiver. The court held that a Fifth Amendment claim regarding pre-indictment delay falls under the mandate of Rule 12, and accordingly, defendant waived his right to make such a challenge by failing to raise it pretrial. Nonetheless, the court also ruled that defendant's claim had no merit. (*See supra*, V. Fifth Amendment).

Second, the court held that a motion to dismiss based upon the Speedy Trial Act must be made prior to trial. The failure to make such a motion pre-trial waives the issue. Thus, defendant's conviction was affirmed.

• *Issue First Raised on Appeal*

U.S. v. Simmons, 06-6173 (8/29/07)

► Defendant was convicted of health care fraud. Defendant was sentenced to 23 months in prison and claimed for the first time on appeal that the district court failed to take into consideration the disparity between his sentence and that of a codefendant, as required by 18 USC § 3553(a)(6).

★ Holding: Ordinarily, where a defendant does not raise an objection to error in the district court, the issue is reviewed on appeal only for plain error. In the Sixth Circuit, however, a district judge is required, after imposing sentence, to ask if there are any objections to the sentence that have not been previously raised. This rule applies only to "objections" to "error" in the district court, and does not apply to requests that could have been made for the district court to exercise

discretion. In the case, the district court failed to ask whether defendant had any objections to the sentence. The court found, however, that the defendant's request for consideration of the disparity with a codefendant's sentence was not an "objection," but instead a request for the district court to exercise discretion. (*See infra*, Reasonableness of Sentence). Accordingly, the court held that defendant's failure to raise the request in the district court constituted a waiver of the issue.

C. Reasonableness of Sentence

• Reasonableness of Sentence

U.S. v. McGee, 06-1554 (7/11/07)

► Defendant was convicted of cocaine trafficking, being a felon in possession of a firearm, and carrying a firearm in relation to drug trafficking. Defendant requested a sentence below the guideline range based upon his alleged drug addiction and mental problems. The district court sentenced defendant within the applicable guideline range without addressing defendant's claims for a lower sentence. Defendant appealed.

★ Holding: First, the court noted that its prior decision in *U.S. v. Vonner* (*See P.V.*, Issue # __) was vacated pending rehearing *en banc*. In *Vonner*, the court held that a district court errs when it fails to adequately address a defendant's claim to a downward variance from the guideline range. In the present case, the court found that defendant's claims of mental health and substance abuse problems were completely unsupported by evidence and were amorphous. The court held that a district court does not err in declining to address a defendant's arguments when there is no factual basis for them in the record. Accordingly, defendant's sentence was affirmed.

• Reasonableness of Sentence

U.S. v. Liou, 06-4405 (7/20/07)

► Defendant was convicted of bribing an IRS agent. At sentencing, the district court

calculated his guideline range to be 10-16 months in prison. Defendant requested a downward variance from the guideline range to a sentence of house arrest based upon the fact that his business would fail if he were locked up and that he was the sole source of support for his family. The district court imposed a sentence of 12 months and a day in prison, and the only reference it made to defendant's argument about his family circumstances and business was that the court was giving defendant 60 days to surrender "in light of his family circumstances and in light of his business." Defendant appealed.

★ Holding: The court first held that defendant's sentence was procedurally reasonable because the court adequately considered the factors under 18 USC § 3553(a). The court noted that a district court must consider any non-frivolous argument raised by a defendant in support of a downward variance. In this regard, the court held that the district court had adequately reflected its consideration of defendant's family-circumstances argument by mentioning it in awarding the voluntary surrender. Second, the court found that the sentence was substantively reasonable. Thus, defendant's sentence was affirmed.

• Reasonableness of Sentence

U.S. v. Wilms, 06-1896 (7/23/07)

► Defendant pled guilty to four bank robberies and one attempted bank robbery and at sentencing requested a substantial downward variance from the guideline range. Defendant's request was based upon the fact that the robberies were driven by a gambling addiction that he had overcome, he had engaged in substantial post-offense rehabilitation, and his psychologists recommended that a lengthy prison term would disrupt his rehabilitation. The district court indicated that defendant's argument had not overcome the presumption of reasonableness that adheres to the applicable guideline range, and granted defendant a small

downward variance, instead of the substantial reduction requested by defendant. Defendant appealed.

★ Holding: The court held that after the Supreme Court’s decision in *Rita v. U.S.* (See P.V., Issue # 13), a district court may not rely on the presumption of reasonableness in determining a sentence. The court emphasized language from *Rita* that the presumption of reasonableness “is not binding.” “It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case.” Because the district court had articulated that it did rely on the presumption of reasonableness in determining the sentence, the case was remanded for resentencing.

• *Reasonableness of Sentence*

U.S. v. Poynter, 05-6508 (7/26/07)

► Defendant was convicted of traveling in interstate commerce for the purpose of engaging in sex with two minors. At sentencing, the district court determined that defendant qualified as a “Repeat Dangerous Sex Offender Against Minors” under USSG § 4B1.5(a) because he had a prior state conviction for sodomy against an eleven year old for which he received a 20 year prison term. Thus, the court calculated a guideline range of 188-235 months. The court then imposed an upward variance to the statutory maximum sentence of 60 years. Defendant appealed.

★ Holding: First, the court held that the sentence was procedurally reasonable. The court found that the district court had properly considered the guideline range and the factors under 18 USC § 3553. Second, the court ruled that the sentence was substantively unreasonable. Applying proportionality review, the court concluded that the extreme upward variance – which amounted to a 206% increase above the top of the guideline range –

was not supported by the findings of the district court. The court provided a detailed analysis of the court’s prior rulings on upward and downward variances and concluded that the increase in this case was unreasonable. The court emphasized that the primary considerations upon which the district court relied – defendant unsafe to children, crime is highly recidivistic, defendant can’t control himself – were common to all repeat sex offenders. Thus, the court determined that the level of generality in the district court’s rationale did not support the extraordinary increase. Finally, the court held that the Supreme Court’s decision in *Rita v. U.S.* (See P.V., Issue # 13) did not overrule the circuit precedent for proportionality review of beyond-guideline sentences. Accordingly, the case was remanded for resentencing.

• *Reasonableness of Sentence*

U.S. v. Keller, 05-6562 (8/8/07)

► Defendants were convicted of fraud and money laundering for their scheme to buy and sell fraudulent life insurance policies. Both defendants originally received guideline sentences, but were resentenced after *Booker* and obtained substantially lower sentences. Defendant Sutherlin was 17 at the time he was hired by Defendant Keller to sell the fraudulent policies. Based on Sutherlin’s age and susceptibility at the time he was hired, and his substantial post-offense rehabilitation between his first and second sentencing, the district court reduced his sentence from 151 months to 36 months. Keller’s sentence was reduced from 168 months to 120 months. The government appealed the reasonableness of Sutherlin’s sentence, and Keller appealed the reasonableness of his own sentence.

★ Holding: Regarding Sutherlin, the court held that consideration of his age and susceptibility to Keller’s influence were appropriate considerations post-*Booker*. However, relying on the court’s prior decision

in *Worley* (See P.V., Issue # ___), the court held that post-offense rehabilitation was not an appropriate consideration on a *Booker* remand for resentencing. Instead, the district court may only consider factors that were present at the original sentencing. Accordingly, Sutherlin's case was remanded for resentencing. Regarding Keller, the court held that the district court had properly considered the factors under 18 USC § 3553(a), and that the sentence was substantively reasonable. Accordingly, Keller's sentence was affirmed.

- *Reasonableness of Sentence*

U.S. v. Thomas, 06-1290 (8/10/07)

- ▶ Defendant was convicted of bank robbery and sentenced to 240 months, the statutory maximum. This sentence was within the recommended guideline range. Defendant appealed and the case was remanded for resentencing in light of *Booker*. At the resentencing, defendant requested a lower sentence based upon factors relating to several of the factors under 18 USC § 3553(a). The district court stated that it received defendant's sentencing memorandum, read it, and understood its presentations. The court then imposed the same 240 month sentence. Before concluding the hearing, the court asked whether defendant had "anything more for the record," and defendant entered no objection to the district court's reasoning. Defendant appealed.

- ★ Holding: First, the court determined that plain error review was not appropriate. Under current law, a district court must offer a defendant the opportunity to object to a sentence just imposed. When given this opportunity, a defendant has waived any argument not raised and will face plain error review on appeal. The court found that the district court's question as to whether defendant had "anything more for the record" was not a sufficient inquiry to require plain error review. Second, the court held that the

sentence imposed by the district court was procedurally unreasonable. Distinguishing the case from the recently decided Supreme Court decision in *Rita v. U.S.* (See P.V., Issue # 14), the court found that the district court's statement that it had reviewed the sentencing memorandum and understood it was insufficient to allow reasonable appellate review of the sentence. According to the court, the district court's statement left the court "unsure as to whether the district court adequately considered and rejected" defendant's § 3553 arguments. Thus, the case was remanded for resentencing.

- *Reasonableness of Sentence*

U.S. v. Presto, 05-6888 (8/14/07)

- ▶ Defendant was convicted of being a felon in possession of a firearm and receiving child pornography, and as a part of his sentence he received life-time supervised release. Defendant appealed.

- ★ Holding: First, the court held that the life-time period of supervised release was procedurally reasonable. The court ruled that, in determining an appropriate period of supervised release, the district court must consider 18 USC § 3583(c), which, in turn, requires consideration of many of the factors listed in § 3553(a). The court found that the district court had properly articulated its consideration of the applicable § 3553(a) factors determining the period of incarceration, and that a separate consideration of the factors for purposes of the supervised release term was unnecessary. Second, the court held that the sentence of life-time supervision was substantively reasonable, noting that defendant had not only received numerous images of child pornography, but had also molested a fifteen year old. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Franklin, 05-2539 (8/28/07)

► Defendant was convicted of bank robbery and brandishing a firearm in relation to the bank robbery. Defendant's first appeal resulted in a *Booker* remand. At the resentencing, the district court imposed a downward variance from the guideline range. The basis for the variance was the district court's view that the seven-year mandatory sentence for the firearm, under 18 USC § 924(c), in addition to the guideline range, inflated defendant's sentence beyond what the court perceived as necessary. The government appealed.

★ Holding: The court held that the district court's downward variance in the guideline range based upon the total aggregate sentence defendant was facing was improper. In essence, the district court's variance had the effect of negating the mandatory sentence set by the Legislature. Thus, the court ruled that a district court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence. Accordingly, the case was remanded for resentencing.

• *Reasonableness of Sentence*

U.S. v. Simmons, 06-6173 (8/29/07)

► Defendant was convicted of health care fraud and sentenced to 23 months in prison. On appeal, defendant claimed that the district court had failed to adequately consider 18 U.S.C. § 3553(a)(6), which requires uniformity in sentencing. In particular, defendant claimed that his sentence was disproportionate to his codefendant's sentence, and disparate considering national uniformity.

★ Holding: First, the court held that the § 3553(a)(6) factor refers only to national uniformity, not uniformity with a codefendant on the same case. Thus, a request for a lower sentence based upon the sentence received by a codefendant is not a required consideration under § 3553(a)(6), but may be granted purely

as a matter of district court discretion. Because this issue was not raised before the district court, the court deemed it waived. (*See supra*, Issue First Raised on Appeal).

Second, the court found that the only § 3553(a) factor not specifically addressed by the district court was (a)(6), the national uniformity requirement. Where a defendant does not specifically raise a § 3553(a)(6) factor in the district court, the defendant may only fault a district court's failure to consider it where (1) the factor is particularly relevant, or (2) the district court, in fact, ignored the factor. In the case, defendant had not raised subsection (a)(6) in the district court. The court ruled that defendant had not shown that the factor was particularly relevant, thus the first exception did not apply. Further, the court found that lack of discussion on a topic in the district court does not indicate that the court "ignored" the factor. Because the court adequately considered the guideline range, a range established by the Sentencing Commission based on notions of national uniformity, the court clearly had not ignored the factor. Finally, the court ruled that the sentence, which was below the recommended guideline range, was substantively reasonable. Thus, the district court's sentence was affirmed.