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:

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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.

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SUPREME COURT DECISIONS

IV. Fourth Amendment

• *Search Warrant - Execution*

Los Angeles Co. v. Rettelle, 06-605 (5/21/07)

‣ Officers obtained a warrant to search the home of three black suspects wanted for an identity theft ring. One of the suspects was the registered owner of a firearm. The search warrant affidavit cited various sources to show that the suspects lived at the residence, including BMV reports, mailing address

listings, an outstanding warrant, and an internet telephone directory. What the officers did not know was that the home had been sold three months prior to Rettelle, who lived there with his wife and 17 year old son, all of whom were white. Officers arrived to execute the search warrant and the 17 year old son answered the door. The officers ordered the son to lie on the floor, and went into Rettelle's bedroom, getting he and his wife out of bed. After a few minutes, officers allowed them to get dressed, and then subsequently realized that they had made a big mistake. The officers apologized and left, the whole incident taking approximately 15 minutes. Rettelle and his family subsequently sued the county under 42 USC § 1983 claiming a violation of their Fourth Amendment rights. Rettelle did not challenge the search warrant, but only that its execution was unreasonable. The district court awarded summary judgment to the county, and the Ninth Circuit reversed, finding that the execution of the warrant was unreasonable. The Supreme Court granted *certiorari*.

⋆ Holding: In executing a valid warrant, officers may take reasonable steps to secure the premises and to ensure the officers' safety and the efficacy of the search. In the case, the Court found that the officers' actions in briefly detaining Rettelle and his family were reasonable given that the officers had a legitimate safety concern because they knew that one of the suspects owned a firearm. Accordingly, the Court held that the execution of the warrant was reasonable and reversed the Ninth Circuit ruling.

• *Vehicle Stops*

Brendlin v. California, 06-8120 (6/18/07)

‣ Defendant was the passenger of a vehicle stopped by police officers. During the ensuing stop, officers discovered items used to manufacture meth. Defendant was charged with possession and manufacture of meth in state court and moved to suppress the evidence on the basis that the initial traffic stop of the vehicle violated the Fourth Amendment. The prosecutor ultimately agreed that there was no legal basis for a stop of the car, but nonetheless argued that the stop of the car did not constitute a seizure of defendant as a passenger. The trial court denied the suppression motion on the ground that the stop of the car did not constitute a stop of defendant, and that defendant was not seized for Fourth Amendment purposes until he was arrested by the police. The California Supreme Court agreed with the trial court, and defendant appealed to the Supreme Court. The Court granted *certiorari*.

⋆ Holding: The Court held that the stop of a vehicle by police officers constitutes a seizure of a passenger in the car for Fourth Amendment purposes. Thus, in the case, the court held that defendant was seized by police from the "moment [the] car came to a halt on the side of the road." Accordingly, the California Court ruling denying the motion to suppress was reversed.

XII. Appeal

• *Time to File Appeal*

Bowles v. Russell, 06-5306 (6/14/07)

‣ Defendant was convicted in state court of murder and sentenced to 15 years to life. Defendant exhausted his state court appeals and then filed a federal *habeas* petition. The district court denied the petition and defendant failed to file a notice of appeal within the required 30 day time period. Defendant then moved to reopen the period in which to file his appeal pursuant to Fed. R. App. P. 4(a)(6) and 28 USC § 2107(c). The district court granted his request, but instead of giving defendant 14 days to file the delayed appeal, the district court extended defendant's time by 17 days. Relying on the district court's order, defendant filed his notice of appeal on the 16th day. On appeal, the court held that defendant's appeal was untimely because it was filed outside the

14-day time limit permitted by Rule 4 and § 2107(c). Defendant's petition for *certiorari* was granted by the Supreme Court.

★ Holding: The Court held that the 14-day time period prescribed in Rule 4 and § 2107 are jurisdictional in nature. Thus, even though the district court's order purported to give defendant 17 days to appeal, the defendant had only 14 days, and his failure to appeal in that time period deprived the court of appeals of jurisdiction to hear the case. Accordingly, the Court affirmed the dismissal of defendant's appeal.

• *Reasonableness of Sentence*
Rita v. U.S., 06-5754 (6/21/07)

‣ Defendant was convicted of perjury and at sentencing his guideline range was calculated to be 33-41 months. Defendant requested a sentence below the recommended guideline range based upon (1) his vulnerability in prison, (2) his military experience, and (3) his poor physical condition. The district court listened to defendant's arguments, briefly summarized them, and denied his request for a below-guideline sentence. The court sentenced defendant to 33 months in prison. The Fourth Circuit applied a presumption of reasonableness to the within-guideline sentence, and affirmed the district court's ruling. The Supreme Court granted *certiorari*.

★ Holding: The Court held that federal appellate courts may apply a presumption of reasonableness to a properly calculated within-guideline sentence. The Court emphasized that such a non-binding presumption did not offend the Sixth Amendment and that it merely reflected the fact that both the sentencing judge and the sentencing commission reached the same conclusion as to the appropriate sentence in a particular case. The Court ruled that this "double determination" significantly increases the likelihood that a sentence is reasonable, and thus justifies the presumption. The Court further held that defendant's sentence was reasonable because the district court had sufficiently expressed its consideration of the relevant factors and the sentence was, in fact, reasonable under the circumstances. Accordingly, the presumption of reasonableness was upheld, and the sentence affirmed.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 USC § 371 - Conspiracy to Defraud*
U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was charged in a conspiracy to defraud the government regarding medicare benefits. Upon his conviction, defendant appealed and argued that the evidence was insufficient to establish the existence of an agreement, that overt acts were committed, and that he intended to defraud the government.

★ Holding: The elements of conspiracy to defraud the government are (1) an agreement to commit a crime against the U.S., (2) one or more overt acts in furtherance of the agreement, and (3) intent to commit the substantive offense. The agreement may be tacit, and it may be proven by circumstantial evidence. In the case, the court held that the conspirators' conduct established at least a tacit agreement between defendant and others to defraud medicare. Further, the court ruled that defendant committed overt acts based upon his prominent managerial role in several of the companies involved. Finally, the court found that defendant's specific intent to defraud was sufficiently established. Thus, the conviction was affirmed.

• *18 USC § 666-Defraud Government Entity*
U.S. v. Hudson, 05-2656 (6/26/07)

‣ Defendant entered into contracts with the school district, as an independent contractor, to help a school develop a television station. As a result of defendant's activities during the course of his performance of the contract, he

was charged with defrauding a government entity that received federal funding under § 666. At the close of the case, defendant moved for judgment of acquittal upon the grounds that the government had not established his agency relationship with the school as required by the statute. The district court denied the motion, defendant was convicted, and he appealed.

⋆ Holding: The elements of a § 666 violation are as follows: (1) defendant must be an agent of the entity receiving the federal funding; (2) defendant must embezzle or steal property; (3) the property must be worth $5,000 or more; (4) the entity must own or control the property; and (5) the entity must receive more than $10,000 in federal funding. Regarding the agency element, the court held that the wording of the contract, *i.e.*, independent contractor, is not necessarily dispositive of the entity question. Instead, the court must look to the substance of the relationship to determine if the accused is authorized to act on behalf of the agency. In the case, the court found that defendant was an agent of the school based upon his authority to enter purchase orders on behalf of the school, set up a television station at the school, train students and district employees, be the contact person for purchases of studio equipment, and negotiate prices for equipment. Further, defendant had an office at school, business cards, and a master key to the school and the district's gym. Accordingly, under the circumstances the court ruled that defendant was properly considered an agent, and the court affirmed defendant's conviction.

• *18 USC § 844 - Arson*
U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was convicted of using fire to commit another felony, namely mail fraud, under § 844(h)(1). Defendant argued on appeal that he had not "used" fire "to commit mail fraud" under the statutory meaning of the term "used."

⋆ Holding: The court held that the ordinary meaning of the word "use" is to "employ" or to avail oneself of something. Under the circumstances, defendant had clearly employed a fire in order to commit mail fraud in so much as he burned down his own house in order to falsely claim insurance proceeds. Accordingly, the conviction was affirmed.

• *18 USC § 922(g) - Felon in Possession*
U.S. v. Arnold, 04-5384 (5/18/07)

‣ A witness called 911 and indicated that defendant threatened her with a gun. When police arrived, the witness reiterated the same story, and while police were there, defendant arrived in a car with his mother. The police found a gun underneath defendant's seat. The witness failed to appear for trial, but her statements to the police were admitted into evidence. Defendant was convicted of being a felon in possession of a firearm, and he appealed. The original panel found the evidence insufficient to support the verdict and reversed defendant's conviction. The court granted *en banc* review.

⋆ Holding: The *en banc* court held that the evidence was sufficient to support the verdict. Specifically, the court ruled that the evidence provided by the witness about defendant possessing the gun, combined with the fact that the gun was found under the seat in which defendant was sitting and that the gun generally matched the generic description provided by the witness, afforded an adequate basis to affirm the conviction.

• *18 USC § 922(g) - Aiding and Abetting*
U.S. v. Gardner, 05-6272 (5/25/07)

‣ Defendant was convicted at trial of, among other offenses, aiding and abetting a codefendant's possession of a firearm having been convicted of a felony. Defendant argued on appeal that the evidence was insufficient to support the verdict.

⋆ Holding: In order to convict a defendant of aiding and abetting in regard to a felon-in-

possession charge, the government must prove that defendant (1) committed an act that contributed to the commission of the crime, and (2) intended to aid in the commission of the crime. Regarding the first element, the court found that defendant committed an act that contributed to the commission of the crime by transporting the firearm that the codefendant possessed. Regarding the second element, and answering an open question in the Sixth Circuit, the court held that the government must prove that the defendant knew or had cause to know that the codefendant/principal was a convicted felon. The court held that the evidence was insufficient on this point, and accordingly reversed defendant's conviction.

• *18 USC § 922(g) - Felon in Possession*
U.S. v. Crowell, 06-5902 (6/26/07)

‣ Defendant was charged with being a felon in possession of a firearm after he was observed by two officers fleeing from a car, and dropping a gun in the bushes. Defendant was convicted after jury trial and challenged the sufficiency of the evidence on appeal.

⋆ Holding: The court found the evidence sufficient to support the conviction. Specifically, the court credited the "unwavering" testimony of the two officers who saw defendant drop the gun, and well as one officer's testimony that defendant indicated after his arrest that the gun was a "nice nine millimeter." The court discounted defendant's testimony that he did not have the gun and a witness' statements that another person, not defendant, dropped the gun. Accordingly, the conviction was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Crowell, 06-5902 (6/26/07)

‣ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified as an armed career criminal. One of the qualifying offenses for the ACCA enhancement was a juvenile conviction for aggravated robbery. Defendant argued on appeal that the evidence was insufficient to support the existence of the conviction and that applying the ACCA enhancement to a juvenile conviction violated his due process rights.

⋆ Holding: First, the court held that the evidence was sufficient to support the existence of the prior juvenile conviction. At the sentencing hearing, the government introduced the juvenile court complaint that was signed by defendant, a decree note regarding his juvenile court hearing, and a juvenile court order reflecting that defendant pled guilty and was adjudicated delinquent. Further, defendant's fingerprints were matched up with his prints from the arrest on the juvenile case. Thus, even though defendant introduced into evidence a juvenile court computer-generated document that showed that he had no juvenile convictions, the court found sufficient evidence to support the existence of the conviction.

Second, the court held, deciding an open question in the Sixth Circuit, that a juvenile court adjudication may serve as a basis for the ACCA enhancement, consistent with the Due Process Clause, as long as it is procedurally sound. Thus, where the state courts protect a juvenile's right to notice, right to counsel, privilege against self incrimination, right to confront and cross examine witnesses, and right to a finding of guilt beyond a reasonable doubt, a defendant's due process rights are sufficiently protected. This is true even though juvenile defendants are not ordinarily afforded the right to a jury trial. Accordingly, the ACCA enhancement was affirmed.

• *18 USC § 1347 - Medicare Fraud*
U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was charged with executing a scheme to defraud medicare by submitting inflated contracts to medicare and failing to disclose the related nature of defendant's

various companies. Defendant was convicted and argued on appeal that the evidence was insufficient to support his intent and his knowledge that his companies were "related parties" under the medicare rules.

⋆ Holding: In order to establish medicare fraud, the government must prove that defendant (1) knowingly devised a scheme to defraud medicare in relation to the payment of benefits, (2) executed the scheme, and (3) acted with specific intent to deceive or defraud. In the case, the court held that a reasonable jury could have concluded, based on the evidence, that defendant intended to deceive medicare and that he knew that the medicare "related party" rule applied to the transactions between the companies that he controlled. Thus, defendant's conviction was affirmed.

• *18 USC § 1347 - Medicare Fraud*
U.S. v. Davis, 06-5073 (6/22/07)

‣ Defendant was charged with medicare fraud for falsifying claim forms for medicare benefits for mine workers obtaining oxygen equipment to combat black lung disease. At trial, the district court excluded certain defense evidence which showed that, even though the claim forms may have been falsified, the mine workers actually had the medical need for the oxygen equipment. Upon her conviction, defendant appealed.

⋆ Holding: Medicare fraud under § 1347 may be committed through two different means. First, § 1347(1) defines the offense as a scheme to defraud any health care benefit program. Second, § 1347(2) defines the offense as a scheme to obtain health care program monies by means of "false or fraudulent pretenses, representations or promises." In the case, the court held that the second section does not require that the materiality of the false statements be established in order for criminal liability to attach. It is enough under the second section that false statements are made in an effort to obtain benefits. The court emphasized that to hold otherwise would essentially write § 1347(2) out of the statute. Accordingly, the court ruled that the exclusion of the medical-need evidence was proper and the conviction was affirmed.

• *18 USC § 1956/57 - Money Laundering*
U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was charged with medicare fraud, conspiracy, and money laundering in regard to his receipt of medicare payments through his various companies. Defendant was convicted and on appeal he argued that the evidence was insufficient to support his convictions for money laundering and conspiracy.

⋆ Holding: The elements of money laundering under § 1956(a)(1)(A)(i) are that defendant (1) conducted a financial transaction that involved illegal proceeds, (2) knew the illegal nature of the proceeds, and (3) intended to promote the illegal activity. Similarly, the elements of money laundering under § 1957(a) are that defendant (1) engaged in a financial transaction that involved illegal proceeds, (2) knew the illegal nature of the proceeds, and (3) the proceeds exceeded $10,000.00. The elements of a money laundering conspiracy under § 1956(h) are (1) an agreement to commit money laundering, (2) an overt act in furtherance of the agreement, and (3) defendant's knowing participation in the conspiracy. In the case, the court held that the evidence clearly established the elements of each of the offenses. In particular, defendant used the illegal proceeds to further unlawful activities and not to pay legitimate business expenses. The court found that defendant received medicare payments through fraud, and then directed the transfer of those funds to organizations which subsequently engaged in further fraud. Thus, defendant's convictions were affirmed.

• *21 USC § 841 - Drug Amount*
U.S. v. Garner, 05-4215 (6/20/07)

‣ Defendant was convicted of participating in a cocaine conspiracy and the jury verdict forms contained both a general verdict and a special verdict form for defendant and each codefendant. On defendant's special verdict form, the jury indicated that more than 500 grams, but less than 5 kilograms were involved. Because the cocaine amount was more than 500 grams and the government filed an enhancement under § 851, defendant was sentenced to a mandatory ten years. The case was affirmed on appeal, but remanded to the district court for resentencing by the Supreme Court after *Booker*. On remand, the district court imposed a sentence of 96 months and both defendant and the government appealed.

⋆ Holding: The court held that the district court was required to impose the ten year mandatory sentence. Even though the language of the special jury verdict form for defendant said that the jury found that the "amount of cocaine involved **in the conspiracy** was 500 grams but less than 5 kilograms," the court held that the fact that there was a separate special jury verdict for each defendant clearly demonstrated that the jury found that defendant himself was responsible for conspiring to distribute this amount. Thus, the ten year sentence was required by the jury verdict, and the case was accordingly remanded for resentencing.

II. Sentencing Guidelines

• *2A4.2 - Demanding Ransom Money*
U.S. v. Brika, 05-4537 (5/23/07)

‣ Defendant was convicted of using a telephone to extort money in exchange for the release of a kidnaped person. At sentencing, the district court determined that USSG § 2A4.2 applied to the offense, but it utilized a cross-reference provision to the kidnaping guideline at § 2A4.1. Defendant argued on appeal that the cross reference was improper.

⋆ Holding: The court first held that the cross reference to the kidnaping guideline was proper because a preponderance of the evidence supported the finding that defendant was, in fact, responsible for the underlying kidnaping. Second, the court held that the district court's finding that the cross reference was proper did not amount to a *per se* rule the cross reference to the kidnaping guideline would apply in every demand-for-ransom conviction. The court found several situations where an individual might not be involved in the hostage taking activities, but could be convicted of demand for ransom and sentenced under § 2A4.2. Thus, the sentence was affirmed.

• *2D1.8 - Maintaining a Drug Establishment*
U.S. v. Hunt, 06-5690 (6/7/07)

‣ Defendant was convicted of establishment of a drug distribution operation under 21 USC § 856. At sentencing, he argued that his offense level should be reduced to level 26 because, pursuant to USSG § 2D1.8(a)(2), he "had no participation in the underlying controlled substance offense other than allowing use of the premises." The district court rejected defendant's argument and defendant appealed.

⋆ Holding: The court held that defendant was not entitled to the reduction for merely allowing the use of the premises because the evidence established that he was guilty of the underlying drug trafficking. Although cooperating witness' testimony must be viewed with greater suspicion, two separate witnesses indicated that defendant was involved in the drug trafficking. Further, the physical evidence found at the apartment suggested that defendant was involved. Thus, the sentence was affirmed.

•*2D1.10 - Drug Manufacturing*
U.S. v. Eversole, 06-5215 (5/31/07)

‣Defendant was convicted of endangering human life while manufacturing meth. At

sentencing, the district court applied USSG § 2D1.10 which required a base offense level determined by the drug quantity table at § 2D1.1, and a three-level increase because the drug involved was meth. Defendant appealed and argued that the application of the three-level increase constituted impermissible double counting.

★ Holding: The court found that no impermissible double counting occurred. Admittedly, § 2D1.10 does consider the fact that the drug involved was meth in more than one way. First, the base offense level is calculated on the drug quantity table based on the type and quantity of drug involved – in this case meth. Second, an additional three-level increase is imposed if the drug is meth. Thus, the fact that the drug is meth is a part of the calculus for the base offense level, and is the basis for a three-level additional enhancement. Nonetheless, the court ruled that because "the enhancement addresses a conceptually distinct harm not necessarily taken into account by the base offense level, and the enhancement is specifically authorized by the Sentencing Commission following a congressional directive," no impermissible double counting occurred. Thus, the sentence was affirmed.

• *2F1.1 - Loss Amount*

U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was convicted of medicare fraud and at sentencing the district court determined the loss based on figures that were derived from the total amount of medicare payments received by defendant's companies. On appeal, defendant argued that the loss amount should be calculated instead based on the medicare payments that were improperly paid to his companies.

★ Holding: The court agreed with defendant that the medicare fraud loss should be determined based only on medicare payments that were unlawfully paid to defendant's companies. In the case, this meant the amount of the medicare payments that were in violation of the "related party" rules that were the subject of defendant's prosecution. Accordingly, the sentence was vacated and the case remanded for resentencing.

• *3B1.1 - Leadership Role*

U.S. v. Brika, 05-4537 (5/23/07)

‣ Defendant was convicted of demanding ransom money for a kidnap victim and at sentencing the district court imposed a four-level enhancement for defendant's leadership role in an offense involving five or more people. The ruling was based on the fact that three women and four men in Morocco were involved with the kidnaping. Defendant specifically challenged the credibility of the evidence regarding the women's involvement because neither they, nor the person who took their confessions, appeared as witnesses in the case. Defendant appealed.

★ Holding: Because neither the rules of evidence nor the Confrontation Clause apply at sentencing, when challenging hearsay evidence on appeal, a defendant must show that the evidence is materially false or unreliable and that the false information actually served as the basis for the district court's sentence. In the case, the court held that defendant had not established the falsity of the statements. To the contrary, several items pointed to the reliability of the women's statements including (1) their confessions were statements against penal interest, which bear indicia of reliability, (2) the women were prosecuted in Morocco for their involvement, and (3) their involvement was corroborated by other evidence. Thus, the court found the hearsay to be reliable and affirmed the sentence.

• *3B1.2 - Minor Role*

U.S. v. Bailey, 05-6218 (6/15/07)

‣ Defendant was convicted of participating in a drug conspiracy and at sentencing he argued that he should receive a reduction for

playing a minor role. The district court refused to award a minor role reduction and defendant appealed.

⋆ Holding: A defendant in a drug conspiracy case is required to prove her entitlement to a minor role reduction by a preponderance of the evidence and she may not receive such a reduction where she is only held accountable for the quantities of drugs that are actually attributable to her. In the case, the court found that defendant had only been held attributable for the drugs pertaining to the transaction in which defendant was actually involved. Accordingly, the minor role reduction was not appropriate and the sentence was affirmed.

• *3B1.3 - Abuse of Position of Trust*

U.S. v. Hudson, 05-2656 (6/26/07)

‣ Defendant entered into contracts with the school district as an independent contractor to help a school develop a television station. As a result of defendant's activities during the course of his performance of the contract, he was charged with defrauding a government entity that received federal funding under § 666. At sentencing, the district court determined that a two-level enhancement for abuse of position of trust was appropriate. Defendant appealed.

⋆ Holding: A position of trust for purposes of USSG § 3B1.3 is one of professional or managerial discretion. The level of discretion enjoyed by the employee is the "decisive factor" in determining whether the enhancement applies. Further, the position of trust must contribute in a significant way to facilitating the commission of the offense. In the case, the court held that defendant's employment with the school system amounted to a position of trust because he had authority to develop a television station, purchase expensive equipment, assist students and staff in using the studio, and advise the school district on matters involving the studio. Further, the court held that the abuse of position of trust enhancement was not "an aspect of and included in" the § 666 conviction. Thus, the two-level enhancement was affirmed.

• *3E1.1 - Acceptance of Responsibility*

U.S. v. Kathman, 06-5669 (6/20/07)

‣ Defendant was driving drunk in a national park and wrecked his car, killing his two passengers. Due to defendant's injuries, he suffered from amnesia regarding the incident. Defendant was subsequently charged with involuntary manslaugher, and entered into an *Alford* plea. At sentencing, the district court awarded a two-level reduction for acceptance of responsibility. The government appealed this determination.

⋆ Holding: The court held that the entry of an *Alford* plea is not necessarily inconsistent with acceptance of responsibility under USSG § 3E1.1. The court found that the district court properly determined that defendant had amnesia regarding the incident, but accepted responsibility as best he could under the circumstances. Accordingly, the district court's award of a two-level reduction for acceptance of responsibility was affirmed.

III. Evidence

• *701 - Lay Witness Testimony*

U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was charged with medicare fraud and at trial the government introduced the testimony of several "Fiscal Intermediary Witnesses" who provided testimony about the structure and procedures inherent in the medicare program, as well as their understanding of various terms that were relevant to the prosecution. The witnesses also were fact witnesses to defendant's fraudulent activities. Because the government did not provide Fed. R. Crim. P. 16 notice of the witnesses as experts, defendant objected to their testimony at trial as being improper lay

witness testimony. The district court overruled defendant's objections, defendant was convicted, and he appealed.

⋆ Holding: FRE 701 permits lay witness testimony in the form of opinion as long as the testimony is (1) rationally based on the perception of the witness, (2) helpful to a clear understanding of the witness' testimony or a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge within the scope of FRE 702. In the case, the court found that the witnesses' testimony regarding the structure and procedures of the medicare program and their explanation of the meaning of certain terms was specialized knowledge acquired over years of experience and was more properly considered expert testimony. Thus, the court held that the district court erred in admitting the testimony as lay opinion under FRE 701.

Nonetheless, the court noted that errors in evidentiary rulings only constitute reversible error where they were likely to have a substantial effect on the jury verdict. Here, the court found that the error did not affect defendant's substantial rights. The court reached this conclusion by considering three factors: (1) the relation of the wrongful evidence to the critical question for the jury; (2) the importance of the evidence; and (3) the closeness of the case. In the case, the court found that the witness' testimony largely related to background issues and that the other evidence in the case was overwhelming against defendant. Accordingly, even though the government failed to provide proper notice of the expert testimony, the error was harmless and the conviction was affirmed.

• *702 - Expert Testimony*
U.S. v. Johnson, 05-4277 (5/25/07)

‣ Defendant was charged with drug trafficking and firearms offenses and at trial the government offered the testimony of an officer who was qualified as an expert in "street-level narcotics transactions and the behaviors that accompany that activity." Defendant's counsel did not object to the qualification of the expert nor the district court's indication to the jury that the witness was so qualified. The witness then testified that, from his observations, defendant had been engaged in drug trafficking activities on the front porch of a home and that defendant was the man in charge. Upon defendant's conviction, he appealed.

⋆ Holding: The court found no plain error in the witness' qualification as an expert or the witness' opinion that what he observed appeared to be drug-trafficking activities. The court noted, however, that there are limitations on an expert testifying about the ultimate issue in a case, including FRE 701 and 702 requirements that the opinion must be helpful to the trier of fact, and FRE 403 requirements that the evidence not be unduly confusing, wasteful of time, or unduly prejudicial. The trial attorney, however, had not objected on any of these grounds and because the expert had not testified as to his opinion about defendant's guilt or the credibility of other witnesses, the court found no plain error. Finally, the court emphasized that a district court should not declare before the jury its opinion that a witness is qualified as an expert. Again, defendant did not object to the procedure and the court found no plain error. Thus, defendant's conviction was affirmed.

• *704 - Opinion Testimony*
U.S. v. Safa, 06-1187 (5/11/07)

‣ Defendant was charged with perjury for lying to the grand jury. At trial, an Assistant Untied States Attorney (AUSA) testified about defendant's grand jury testimony and indicated that defendant's testimony, if false, would have impeded the grand jury investigation. The district court then sustained defendant's objection when the AUSA was asked to define "materiality" in relation to statements to a grand jury. Defendant was convicted and

argued on appeal that the AUSA's testimony about the potential effect on the grand jury was improper lay opinion testimony on the ultimate issue.

⋆ Holding: When providing lay opinion testimony under FRE 704, a witness is not precluded from talking about the ultimate issue to be decided by the jury. The witness may not, however, provide "opinions phrased in terms of inadequately explored legal criteria." In the case, the court held that the district court had properly prevented the AUSA from testifying as to the legal definition of materiality. Further, the court found that permitting the AUSA to discuss the factual basis and potential effect the false statements would have on the grand jury was proper because, without the testimony, the jury would have had no basis for the relevance of the false grand jury testimony in respect to the government's investigation. Thus, the district court's ruling was affirmed.

• *803(2) - Excited Utterance*
U.S. v. Arnold, 04-5384 (5/18/07)

‣ Defendant was charged with being a felon in possession of a firearm. The charge was based, in part, on the statements of a witness who failed to appear for trial. The district court admitted three hearsay statements of the witness wherein she claimed that defendant pointed a gun at her. The statements were (1) a 911 call, (2) the witness' statement to police when the police arrived, and (3) the witness' statement to police when defendant arrived. All three statements were admitted pursuant to FRE 803(2) as excited utterances. Defendant challenged the admission of these statements on appeal. The original panel held that the statements were not excited utterances and reversed the district court ruling. The government requested rehearing *en banc*.

⋆ Holding: The *en banc* court held that each of the three statements qualified as excited utterances. To satisfy the excited utterance exception, three requirements must be met: (1) an event startling enough to cause nervous excitement; (2) the statement must be made before there is time to contrive; and (3) the statement must be made while the person is still under the stress of the event. The court found that each of the witness' three statements met the requirements for excited utterance and accordingly affirmed the district court's ruling.

• *806 - Impeachment of Hearsay Declarant*
U.S. v. Arnold, 04-5384 (5/18/07)

‣ Defendant was convicted of being a felon in possession of a firearm based on the statements of an unavailable witness who claimed that defendant threatened her with a gun. Before the trial, defendant's investigator interviewed the witness and, according to the investigator, the witness recanted the story about defendant having the gun. The investigator also prepared an affidavit that was signed by the witness, but the affidavit did not specifically state that the witness recanted the part of the story about the gun. At trial, defendant attempted to offer both the affidavit and the testimony of the investigator. The district court excluded the evidence as hearsay, and defendant's counsel never argued the admissibility of the evidence as impeachment, under FRE 806. Upon his conviction, defendant appealed.

⋆ Holding: Because defendant did not offer the evidence as impeachment under FRE 806, the court applied plain error analysis. Although the court acknowledged that the evidence would have been admissible for impeachment of an unavailable hearsay witness, the court found no plain error because the exclusion of the evidence did not seriously affect the fairness of the proceeding. The court found that the credibility of the witness' alleged recantation was questionable because of the discrepancy between the investigator's proposed testimony and the witness' affidavit (which was prepared by the same investigator).

Thus, the court found no plain error and affirmed the district court's exclusion of the evidence.

IV. Fourth Amendment

• *Warrant Exception-Exigent Circumstances*

U.S. v. Buckmaster, 06-3954 (5/7/07)

‣ Firefighters responded to defendant's home and were able to extinguish a fire that was in a second floor bedroom. During the course of the fire fighting efforts, defendant's waterbed burst and drained water from the second floor to the first floor and basement. As a result, firefighters went to the basement to spread tarps to avoid water damage and to address concerns about electrical sparks from the water seepage. Firefighters also claimed that they went to the basement to check for carbon monoxide levels. While in the basement, firefighters found illegal fireworks and defendant was subsequently charged with unlawful possession of explosives. Defendant moved to suppress the firework evidence and the district court denied the motion. Defendant appealed.

⋆ Holding: The court held that the firefighters' entry into the basement was justified by exigent circumstances. Specifically, the court found that the concerns regarding water seepage and electrical shorts provided a sufficient exigency under the circumstances to justify the firefighters going into the basement. The court noted that the firefighters' concerns over the carbon monoxide levels would not have provided a sufficient exigency. Accordingly, the district court ruling was affirmed.

•*Warrant Exception - Inventory Search*

U.S. v. Tackett, 06-5182 (5/22/07)

‣ Defendant was involved in a car accident and received substantial injuries. After the accident, he was in and out of consciousness. As a result, officers conducted an inventory search of defendant's car and bags. During the search, the officers found illegal silencers and a short barrel rifle. Defendant was subsequently charged and he moved to suppress the weaponry based upon an invalid inventory search. The district court denied the motion and defendant appealed.

⋆ Holding: Rejecting each of defendant's arguments, the court found that the inventory search was valid. First, the court held that an inventory search must be pursuant to an established policy, but that no written policy is required. The policy may be proved by testimony. Second, the court held that defendant did not have a greater privacy interest in the bags that outweighed the officers' interest in the inventory search. A greater privacy interest may be established by a defendant's actions in asserting an interest in the item to be searched or by the fact that the item is a "repository of personal effects," such as a purse. Neither interest was established by defendant. Third, the court held that, even if the inventory search violated state law, the remedy was not suppression, but a civil law suit in state court. Accordingly, the district court ruling was affirmed.

• *Warrant Exception - Hot Pursuit - Knock and Announce*

U.S. v. Johnson, 05-4277 (5/25/07)

‣ Defendant was observed by an officer engaged in activity that appeared to be drug trafficking on the front porch of a house. Upon the officers approach, defendant ran inside the home. The officers chased defendant into the house and found him in an bedroom closet. Defendant was subsequently charged with drug trafficking and firearms offenses. Defendant moved to suppress the evidence based upon a violation of the knock-and-announce rule and the district court denied the motion. Defendant appealed.

⋆ Holding: The court declined to decide whether the abrogation of the knock-and-announce rule by the Supreme Court in *Hudson*

v. Michigan (*See* P.V., Issue #8) applied to an entry of a home where the officers did not have a warrant. Instead, the court held that the officers' failure to knock and announce was justified by the hot-pursuit doctrine. The court found that the officers had a reasonable suspicion that the drug evidence would likely be destroyed if they stopped to knock and announce their presence before chasing defendant into the home. Under the circumstances of the case, knocking would have been futile. Thus, the district court ruling was affirmed.

• *Seizure - Consensual Encounter*
U.S. v. Campbell, 06-3321 (5/24/07)

‣ Defendant parked his car in the parking lot of a closed business and walked across the street to another closed business. An officer observing this conduct approached defendant and asked if he needed help. Defendant responded that he had gotten lost going to pick up his girlfriend and was on his cell phone trying to get directions. The officer got directions for defendant from the dispatcher and then told defendant that he would "like" to get defendant's ID just to log the encounter. Defendant said he had no ID and then gave the officer a false name and birth date. The officer ran the information through dispatch and found no such person. Defendant subsequently consented to a frisk, then a search of his pockets, which revealed marijuana. The officer arrested defendant and found a gun during the search of defendant's car. Defendant was charged with being a felon in possession of a firearm and moved to suppress the evidence. The district court granted defendant's motion and the government appealed.

⋆ Holding: First, the court held that the officer's first contact with defendant, including the initial request for ID, amounted to a consensual police encounter that did not implicate the Fourth Amendment. Specifically, the court found that the officer's statement that he would "like" defendant's ID, just to log the encounter, proved that a reasonable person would have felt free to leave at that time. Second, the ensuing search and arrest was justified because, once the officer determined that defendant had no driver's license, the officer had probable cause to arrest for defendant's driving without a license. Thus, the ensuing searches were justified by the search incident to arrest doctrine. Accordingly, the district court ruling suppressing the evidence was reversed.

• *Reasonable Expectation of Privacy*
Warshak v. U.S., 06-4092 (6/18/07)

‣ The government sought and obtained federal court orders under the Stored Communications Act (SCA) to obtain Warshak's e-mails from two Internet Service Providers (ISPs) in relation to the government's investigation of Warshak for fraud-related offenses. The court order required the ISPs to produce the e-mails based upon the government's showing of "reasonable grounds" to believe that the information sought was relevant to its criminal investigation. In violation of the SCA and the court order, the government did not disclose to Warshak that it had sought to obtain his e-mails until a year later. Upon learning of the government's actions, Warshak filed a complaint claiming violations of his Fourth Amendment rights and seeking an injunction against further seizures of e-mails. The district court granted a preliminary injunction to Warshak of any further e-mail seizures without notice and the opportunity to be heard. The government appealed the preliminary injunction.

⋆ Holding: The court held that e-mail users have a reasonable expectation of privacy, protected by the Fourth Amendment, in relation to e-mails *vis a vis* an ISP. In so holding, the court analogized to telephone calls or letters sent by mail, where the speaker or sender expects that the phone company or post office

will not be dipping in on the substance of the communications. Similarly, e-mail users reasonably expect that an ISP will not be viewing the content of their e-mails in its regular course of business. As such, the court found that the SCA was facially invalid to the extent that it allowed seizure of e-mails from an ISP based on nothing more than the legal requirements for a subpoena. Instead, the court held that the government may not seize e-mails under the SCA unless it meets one of the following three circumstances: (1) the government obtains a search warrant based on probable cause; (2) the government provides notice and the opportunity for judicial review before seeking an SCA order from the court; or (3) the government can show that the ISP involved has complete access to the content of e-mails and that it uses such access in the normal course of its business. Accordingly, the district court injunction was affirmed.

V. Fifth Amendment

• *Miranda - Reinitiation of Contact*

Van Hook v. Anderson, 03-4207 (5/24/07)

‣ Defendant was arrested in Florida for a murder in Cincinnati. He invoked his *Miranda* right to counsel with the Florida detectives, who ceased questioning him. The Cincinnati detectives then arrived and, knowing that defendant had invoked his right to counsel, engaged him in a conversation saying that they had "talked to his mother" and that the officers believed that he may want to talk. Defendant confirmed his desire to talk and later made a full confession to the murder. Upon defendant's prosecution in state court, he moved to suppress the confession under *Miranda*, but the state court denied the motion. Defendant lost his state court appeals and then filed a federal *habeas* petition. The district court denied the petition, but the original Sixth Circuit panel reversed, finding that the officers had violated *Miranda* by reinitiating contact with defendant after he asserted his right to counsel. The state moved for *en banc* review.

⋆ Holding: Reversing the original panel's decision, the *en banc* court held that an accused who has invoked his or her right to counsel may reinitiate contact with the police through a third party. Further, the court found that the state court record established that defendant had, in fact, reinitiated contact through his mother and that the Cincinnati detectives were thus justified in approaching defendant in order to determine whether he desired to talk. Accordingly, the district court's ruling denying the *habeas* petition was affirmed.

• *Double Jeopardy*

U.S. v. Jones, 06-5551 (6/5/07)

‣ Defendant was convicted of eight counts of possessing crack with intent to distribute in violation of 21 USC § 841(a) and eight counts of distributing crack in a school zone in violation of § 860. Each of the eight counts pertained to the same conduct on the same occasions. Defendant was sentenced to concurrent sentences for each of the charges with mandatory $50.00 special assessments for each charge. Defendant appealed and argued that the convictions and sentences violated the Double Jeopardy Clause.

⋆ Holding: Under the *Blockburger* test, the Double Jeopardy Clause prohibits punishing a defendant for the same act under two statutes unless each statute requires proof of an additional fact that the other does not. In the case, the § 841 counts were all lesser included offenses of the § 860 counts. Thus, the Double Jeopardy Clause prohibited conviction and sentence for both the § 841 and § 860 counts. The court noted that, even though the sentences were run concurrently, double jeopardy was violated by the imposition of multiple $50.00 assessments and the potential collateral consequences of the convictions. Accordingly, the § 841 convictions were vacated.

• *Brady*
U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was convicted of medicare fraud and after trial learned that an expert fraud examiner was touting his successful investigation and assistance to the government in the prosecution of defendant. The government had not disclosed its use of the expert prior to trial. Defendant subsequently requested disclosure of any documents the expert reviewed in helping the government to prepare for trial. Defendant's request was denied by the government and defendant moved for a new trial. The government responded initially that it had not used the expert in preparing for trial. In a subsequent filing, the government admitted that it had used the expert in preparing for trial, but averred that there was nothing exculpatory in the information utilized. Defendant's requests for new trial were denied by the district court and defendant appealed.

⋆ Holding: A defendant's due process rights are violated where the government suppresses favorable evidence to a defendant, regardless of the good or bad faith of the government. In order to obtain a reversal of conviction based upon such a *Brady* violation, a defendant must show that the suppressed evidence is material, that is, the result of the proceeding would likely have been different had the evidence been disclosed. In the case, the court held that defendant's efforts to determine if the information reviewed by the expert contained exculpatory evidence had been frustrated by the government. Not only did the government refuse to disclose the information, but it initially misrepresented to the district court that it had not used the expert pretrial. The court emphasized that the prosecutor's representations that the suppressed evidence contained no exculpatory information carried "considerably" less weight where he made conflicting representations in the district court about the information. Under the circumstances, the court ruled that a remand was necessary for the district court to hold a hearing regarding the withheld documents, reviewing them *in camera* if necessary, in order to determine if exculpatory information was withheld.

• *Right to Indictment - Amendment/Variance*
U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was prosecuted for mail fraud under 18 USC § 1341 and the indictment charged the violations in the conjunctive: "devising a scheme and artifice to defraud, *and* for obtaining money and property by means of false and fraudulent pretenses." The instructions provided to the jury, however, used the disjunctive "or" instead of "and" in describing the offense. Defendant argued on appeal that the indictment was constructively amended by the substitution of the word "or" for "and."

⋆ Holding: Relying on prior precedent, the court held that an offense may be charged conjunctively in an indictment where a statute defines the offense disjunctively. Under these circumstances, it is not error for the district court to instruct the jury in the disjunctive. Thus, because § 1341 defines the mail fraud provisions in the disjunctive, it was not error for the district court to instruct the jury on the disjunctive, even though the indictment described the offenses in the conjunctive.

VI. Sixth Amendment

• *Confrontation Clause - Impeachment*
Vasquez v. Jones, 04-2274 (5/8/07)

‣ Defendant was charged with murder. At trial, a key witness was unavailable and the trial court permitted the prosecution to introduce the witness' prior testimony from the preliminary hearing. In response, defendant offered to impeach the witness' prior testimony with the witness' felony record. Relying on a State of Michigan evidence rule, the trial court disallowed the impeachment because defendant

had not attempted to cross examine the witness regarding the convictions at the preliminary hearing. Defendant was convicted, lost his state court appeals, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

⋆ Holding: Relying on the Supreme Court decisions in *Davis v. Alaska* and *Delaware v. Van Arsdell*, the court held that the trial court unreasonably applied federal law regarding the Confrontation Clause and impeachment of witnesses. The court ruled that defendant could not have reasonably been expected to cross examine the witness regarding his record at the preliminary hearing given the quantity of discovery and complexity of the case. Thus, the court held that the trial court's ruling excluding the witness' prior record unlawfully frustrated defendant's right to impeach the witness under the Confrontation Clause. Further, the court held that the error was not harmless. Accordingly, the district court's ruling was reversed and the writ granted.

• *Confrontation Clause*
U.S. v. Arnold, 04-5384 (5/18/07)

‣ Defendant was convicted of being a felon in possession of a firearm based on the statements of an unavailable witness who claimed that defendant threatened her with a gun. The witness' hearsay statements were admitted at trial, including a 911 call and statements to police officers at the scene. Defendant challenged the hearsay statements on appeal as a violation of his rights under the Confrontation Clause. The original panel ruled that the statements were testimonial and thus a violation of *Crawford*. The government moved for *en banc* review.

⋆ Holding: Relying on the recent Supreme Court decision in *Davis v. Washington* (*See* P.V., Issue # 8), the *en banc* court held that the statements of the witness were not testimonial. A hearsay statement to police is testimonial, and thus violates the Confrontation Clause, if it is made primarily for an investigative purpose. On the other hand, if the statement is made primarily to enable police assistance to meet an on-going emergency, then the statement is not testimonial and its admission does not offend the Confrontation Clause. In the case, the court held that all of the witness' statements were for the primary purpose of assisting with the ongoing emergency, and thus were not testimonial. Accordingly, the admission of the statements was affirmed.

• *Booker*
U.S. v .Brika, 05-4537 (5/23/07)

‣ Defendant was convicted of one count of demanding ransom in regard to a hostage victim, and the jury hung on one count of conspiracy to commit hostage taking. At sentencing, the district court found by a preponderance of the evidence that defendant was responsible for the kidnaping itself. Defendant argued on appeal that the district court's consideration of the kidnaping, upon which the jury hung, violated the Sixth Amendment.

⋆ Holding: Relying on the Supreme Court's decision in *Watts v. U.S.*, the court held that it does not violate the Sixth Amendment for a district court at sentencing to apply a preponderance standard to its consideration of conduct upon which the jury could not reach a verdict. The court ruled that *Booker* did not change the fundamental principle of *Watts* that a court may consider uncharged or acquitted conduct at sentencing. The court noted that any due process concerns raised by application of *Watts* were resolved by the non-mandatory nature of the guidelines and the reasonableness review afforded on appeal. Thus, the sentence was affirmed.

• *Right to Self Representation*
U.S. v. Jones, 06-5551 (6/5/07)

‣ Defendant was convicted of numerous drug-related offenses and during a resentencing

after appeal he requested to represent himself. Instead of ruling on defendant's motion, the district court allowed defendant to make numerous *pro se* motions and arguments during the course of the sentencing proceedings, and also heard and ruled on motions and arguments from defendant's appointed counsel. On appeal, defendant argued that his right to self representation had been violated.

⋆ Holding: The court found no violation of defendant's right to self representation. Although the district court may technically have erred in not ruling on defendant's motion for self representation, because defendant had a full and fair opportunity to present his *pro se* arguments, and none of defendant's arguments were at odds with the presentations made by his attorney, no Sixth Amendment violation occurred.

• *Right to Counsel*

U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was under investigation for arson and mail fraud, and hired an attorney to represent him in regard to the civil proceedings with the insurance company. During this time period, the government made undercover recordings of defendant with coconspirators. Although defendant did not challenge the evidence at trial, he argued on appeal that the tape recordings were made in violation of his right to counsel.

⋆ Holding: The court held that defendant's Sixth Amendment right to counsel did not require exclusion of the recordings for two reasons. First, defendant was not formally charged at the time the recordings were made. The Sixth Amendment right to counsel is not triggered until the initiation of adversarial judicial proceedings. Second, the Sixth Amendment is offense specific. Thus, because defendant's attorney was hired only for civil proceedings, not potential criminal charges, defendant was not represented by counsel for Sixth Amendment purposes.

• *Right to Jury Trial - Forfeiture*

U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was indicted for arson and mail fraud, and the indictment also contained a forfeiture allegation. At the close of the government's case at trial, defendant agreed to deal with the issue of forfeiture at sentencing. The district court imposed the forfeiture at the sentencing hearing. Defendant argued on appeal that his Sixth Amendment right to jury trial had been violated in relation to the forfeiture allegation.

⋆ Holding: The court held the Sixth Amendment does not protect a defendant's right to jury trial in regard to a forfeiture allegation in an indictment. Accordingly, the forfeiture of defendant's property was affirmed.

VII. Other Constitutional Rulings

• *Commerce Clause*

U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was convicted of committing arson to facilitate another felony, namely mail fraud, in violation of 18 USC § 844(h). Defendant argued on appeal that the § 844(h) arson provision violated the Commerce Clause because it did not contain a jurisdictional element that required an effect on commerce.

⋆ Holding: The court held that the jurisdictional nexus for § 844(h), similar to 18 USC § 924(c), is derived from the underlying felony. Thus, because mail fraud contains a jurisdictional element (use of mails), the § 844(h) prosecution satisfies the Commerce Clause.

VIII. Defenses

• *Insufficiency of Indictment*

U.S. v. McAuliffe, 06-3016 (6/22/07)

‣ Defendant was charged with mail fraud in relation to false insurance claims, after he intentionally burned his own home. After his conviction, defendant raised for the first time on appeal that the indictment was insufficient because it did not specifically set forth the

elements of materiality and intent to defraud.

⋆ Holding: An indictment is sufficient if it "fully, directly, and expressly sets forth all the elements necessary to constitute the offense." In order to meet this requirement, the indictment must set out all of the elements of the offense, give notice to the defendant of the charges he faces, and be sufficiently specific that he could plead double jeopardy in a subsequent proceeding if charged over the same facts. Generally, pleading the words of the statute itself is sufficient, if accompanied by a statement of the facts and circumstances to sufficiently inform the accused of the specific charge. In the case, the court ruled that, in addition to tracking the statutory language, the indictment indicated that defendant made false representations to the insurance company that he did not cause the fire, when he, in fact, planned the fire. The court held that this language was more than sufficient to show defendant's intent and that the statements would be material to the insurance company. Accordingly, the court found no plain error and affirmed defendant's conviction.

IX. Plea and Sentencing Hearings

• *Plea Agreements*

U.S. v. McIntosh, 05-2525 (5/1/07)

‣ Defendant entered into a plea agreement with the government whereby he pled guilty to being a felon in possession of a firearm and possession of 5 grams or more of crack with intent to distribute. The crack charge carried a mandatory minimum sentence of five years. The plea agreement indicated that defendant could earn a sentence reduction for his cooperation, based upon USSG § 5K1.1. At the plea hearing, the district court advised defendant two times that his cooperation could result in a sentence below the five year mandatory minimum and the government did not object. At the sentencing hearing, the government requested a one-level sentence reduction, based upon § 5K1.1, but did not request a sentence below the mandatory minimum pursuant to 18 USC § 3553(e). Based upon the government's motion, and the factors under 18 USC § 3553(a), the district court imposed a sentence below the five year mandatory minimum. The government appealed.

⋆ Holding: Ordinarily, before a court may impose a sentence below a statutory mandatory minimum, the government must file a motion pursuant to § 3553(e) requesting such a sentence. The court held, however, that express reference to § 3553(e) is not required if the government otherwise indicates its desire or intent that the court may depart below the mandatory minimum. In the case, the court found that the terms of the plea agreement, as discussed by the district court at the plea hearing, indicated that the government did not oppose a sentence below the mandatory minimum based upon defendant's cooperation. Thus, the court held that the sentence was proper and the district court ruling was affirmed.

• *Plea Agreements*

United States v. Villareal, 05-6838 (6/29/07)

‣ Defendant was charged with distribution of cocaine and entered into a plea agreement with the government that contained the following provision regarding defendant's cooperation: "If, in the sole discretion of the United States, the defendant provides substantial assistance, the United States will make a motion for downward departure pursuant to 5K1.1 of the Sentencing Guidelines." Defendant provided assistance to the government regarding a codefendant, but then testified on behalf of another codefendant who was acquitted. The government declined to file a motion pursuant to § 5K1.1, but indicated at the sentencing hearing that defendant had provided "some assistance." Defendant moved to compel the government to file the § 5K1.1 motion, the district court

denied the motion, and defendant appealed.

⋆ Holding: Ordinarily, where a plea agreement reserves complete discretion to the government to file a § 5K1.1 motion, the refusal to file the motion is only reviewable for unconstitutional motive on the part of the government. However, where the government promises, as it did in this case, that it "will" file a § 5K1.1 motion if it determines that defendant provided substantial assistance, the government is obligated to state affirmatively on the record whether or not such substantial assistance was provided. The court held that the government was ambiguous as to whether substantial assistance had been provided. Accordingly, the court determined that a remand was necessary in order for the government to clearly indicate whether substantial assistance was provided, and if so, the district court was empowered to grant defendant's motion to compel the § 5K1.1 sentence reduction.

• *Sentencing - Disputed Factual Findings*
U.S. v. White, 05-3403 (6/11/07)

‣ Defendant was convicted of medicare fraud and at sentencing he objected to the loss calculation determined in the PSR. Defendant filed a sentencing memorandum disputing the loss amount and argued at the sentencing hearing that the loss amount was not supported by the evidence. The district court adopted a loss amount based upon the PSR and the government's sentencing memorandum, but made no findings of fact as to how it determined the loss amount. Defendant appealed.

⋆ Holding: Fed. R. Crim. P. 32(i)(3)(B) requires a district court to rule on any disputed portion of the PSR. Where a defendant "actively" raises a dispute regarding the PSR, the district court may not merely rely on the findings in the PSR, but must instead affirmatively rule on the matter. In the case, the court held that the district court essentially "blindly embraced the figures set forth in [the] PSR" instead of making the factual findings required by Rule 32. Accordingly, the sentence was vacated and the case remanded for resentencing.

• *Sentencing - Notice of Enhancements*
U.S. v. Hudson, 05-2656 (6/26/07)

‣ Defendant was convicted of defrauding a government agency and at the sentencing hearing the district court imposed a two-level guideline enhancement for abuse of a position of trust, pursuant to USSG § 3B1.3. Defendant received no notice of the possibility of the enhancement in the PSR or otherwise. Defendant argued on appeal that the enhancement could not be applied by the district court without advance notice.

⋆ Holding: The court held that, as opposed to notice of an upward departure or variance, a defendant does not have to receive notice prior to sentencing that the district court may apply enhancements from the sentencing guidelines. Thus, the court found no error in the district court's application of the abuse of a position of trust enhancement to defendant even though the enhancement was not referenced in the PSR. Accordingly, the sentence was affirmed.

X. Jury Issues

• *Juror Bias*
Garcia v. Andrews, 05-3856 (5/17/07)

‣ Defendant was charged with murder and insurance fraud. At trial, a juror sent a note to the judge expressing concerns that he lived and worked in the area near defendant and that he was concerned about future contact with defendant. The state court refused defendant's request for mistrial or to *voir dire* the jury, and defendant was convicted. Defendant lost his state court appeals, and the district court denied defendant's *habeas* petition. Defendant appealed.

⋆ Holding: The court held that a trial court is required to hold a hearing regarding potential

juror bias – called a *Remmer* hearing – only where the potential exists for an improper extraneous influence on the jury. In the case, because the only influence came from the concerns of a juror, no *Remmer* hearing was required and the conviction was affirmed.

XI. Probation & Supervised Release

• *Tolling of Supervised Release*

U.S. v. Ossa-Gallegos, 05-5824 (6/21/07)

‣ Defendant was convicted of illegal reentry by a deported alien and as a condition of defendant's supervised release, the district court held that defendant's supervised release would be tolled as long as defendant was out of the country after being deported. Defendant raised on appeal the district court's authority to toll the supervised release period on this basis. The original panel affirmed the district court's sentence and defendant requested rehearing *en banc*.

⋆ Holding: The *en banc* court held that a district court may not toll supervised release while defendant is out of the country after being deported. This finding was based upon the court's conclusions that tolling of supervised release is not properly considered a "condition" of supervised release under 18 USC § 3583(d) and that tolling of supervised release is not consistent with legislative intent. Accordingly, the tolling provision was vacated and the case remanded for resentencing.

XII. Appeal

• *Reasonableness of Sentence*

U.S. v. Cherry, 06-5579 (5/11/07)

‣ Defendant pled guilty to four counts of distributing child pornography, nine counts of receiving child pornography, and one count of possessing child pornography. At sentencing, the district court determined that the applicable range under the sentencing guidelines was 210 to 262 months, but that, based upon the sentencing factors in 18 USC § 3553(a), a below-guideline sentence of 120 months was appropriate. The government appealed.

⋆ Holding: The court held that the sentence imposed by the district court was reasonable. The district court properly considered all of the factors under § 3553(a) and appropriately based its downward adjustment from the recommended guideline range on defendant's low likelihood of recidivism, the fact that the sentence imposed (120 months) was two times the five year mandatory minimum, the need for treatment, and the seriousness of the offense. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Borho, 06-5288 (5/15/07)

‣ Defendant was convicted of three counts of possession of child pornography and at sentencing the district court reduced defendant's sentence from 210-262 months to 72 months incarceration based on the factors under 18 USC § 3553(a). The district court relied on the facts that (1) having over 5000 images is not uncommon in the internet age, (2) although images were sadistic, all sex with adults and minors is sadistic, (3) defendant had no criminal record, (4) defendant was a decorated war veteran with a stable employment history, (5) defendant had diabetes, depression, and a back injury, and (6) defendant was a low risk to children and had committed the offense in the least "personally engaged" way possible. The government appealed.

⋆ Holding: In assessing the reasonableness of a variance from the guideline range, the court applies a form of proportionality review: the greater the departure, the more compelling the justification must be. In the case, the court held that the extremely low sentence imposed by the district court was not justified by the factors the court considered. First, regarding the amount of images and the sadistic nature of the images, the court held that these were matters that the Sentencing Commission considered and determined were appropriate

factors for guideline enhancements. Thus, the district court erred in discounting the importance of these issues in determining the sentence. Second, the court found that the fact that defendant had no criminal history was a consideration already taken into account by defendant's criminal history category of I. Third, the court held that defendant's health issues were discouraged factors under the guidelines at USSG § 5H1.4. Lastly, the court ruled that the fact that defendant had not offended against children was not a proper consideration because, if he had, he would have been charged under a more serious statute and guideline. In sum, the court found that the district court's justifications, taken in the aggregate, did not provide the extraordinary circumstances required to support the variance. Thus, the case was remanded for resentencing.

• *Reasonableness of Sentence*
U.S. v Johnson, 05-4277 (5/25/07)

‣ Defendant was convicted after trial of drug trafficking and at sentencing the district court determined that defendant was a career offender. Defendant objected to the guideline range, but ultimately conceded that he qualified as a career offender. The district court imposed a sentence at the bottom end of the guideline range, but provided no discussion at all regarding its reason for the sentence it chose or its analysis of the 18 USC § 3553(a) factors. Defendant appealed the reasonableness of the sentence.

★ Holding: The court held that the sentence was procedurally unreasonable because the district court had articulated no basis for the court to review the sentence. Accordingly, the sentence was vacated and the case remanded for resentencing.

• *Reasonableness of Sentence*
U.S. v. Bailey, 05-6218 (6/15/07)

‣ Defendant was convicted of participating in a drug conspiracy and he was sentenced to 70 months incarceration, the middle of the guideline range. At the sentencing hearing, the district court did not mention that the guidelines were advisory. Defendant appealed.

★ Holding: The court held that a district court is not required to specifically state that the sentencing guidelines are advisory during the course of the sentencing hearing, as long as it is clear from the record that the district court has not applied them as mandatory. Further, the court held that defendant's sentence was both procedurally and substantively reasonable. Finally, the court noted that defendant did not object to the sentence imposed by the district court, and thus, the sentence was subject to plain error review. Finding no plain error, the court affirmed the sentence.

• *Reasonableness of Sentence*
U.S. v. Kathman, 06-5669 (6/20/07)

‣ Defendant was convicted of involuntary manslaughter for driving while intoxicated in a national park and wrecking his car, causing the deaths of two passengers. At sentencing, the district court granted a downward variance in the guideline range from 41 to 51 months to 20 months incarceration. The government appealed.

★ Holding: In analyzing a variance from the recommended guideline range, the court applies a form of proportionality review: the greater the deviation from the range, the greater the justification required. In the case, the court ruled that the district court had properly considered (1) the degree of recklessness involved in defendant's conduct, which was comparatively low, (2) defendant's lack of a criminal record, (3) defendant's good character, as evidenced by numerous letters from friends and family, (4) the fact that incarceration would not provide defendant with needed training or treatment, and (5) defendant's relatively good work and academic history. The court also noted that the district court had imposed 250 hours of community service related to alcohol

awareness, and restitution. Under these circumstances, the court found that the variance was reasonable and affirmed the sentence.

XIII. Post-Conviction Remedies

• *Ineffective Assistance of Counsel*

Ramonez v. Berghuis, 06-1852 (6/18/07)

‣ Defendant was charged in state court with home invasion, assault, and stalking. At trial, defendant's ex-girlfriend testified that defendant came to her apartment, pushed his way inside, and assaulted her. During the trial, defendant complained that he had requested that his attorney interview three witnesses who were present, but outside, during the alleged altercation. The attorney admitted that he had not interviewed the witnesses based upon his trial strategy to focus on what occurred inside the apartment. Defendant then testified in his own behalf and was convicted. During post-conviction proceedings, defendant presented the testimony of the three witnesses and they provided some corroboration of defendant's version of events, and testified that they were able to see the events transpire in the apartment. Defendant lost his state court appeals and filed a federal *habeas* petition, which was denied by the district court. Defendant appealed and argued that his state court attorney was ineffective for failing to interview and present the witnesses at trial.

⋆ Holding: Applying the *Strickland* standard, the court first held that the attorney's performance at trial was deficient. While an attorney may make tactical decisions that are generally not subject to attack on *habeas* review, the investigation leading to the tactical decisions must be reasonable. The court found that defense counsel's decision to not interview the witnesses was deficient performance under the circumstances, given defendant's request for him to do so months before trial. Further, the court ruled that defendant was prejudiced by his attorney's deficiency. The witnesses would have provided some substantial contradictions to the testimony of the girlfriend, and would have corroborated some of defendant's claims during his testimony. Given that the trial amounted to the girlfriend's testimony against defendant's, the jury may very well have been influenced to reach a different conclusion had the three witnesses been presented. Accordingly, the district court ruling was reversed and the case remanded to the state court for retrial.