

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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Steven S. Nolder

Federal Public Defender

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<i>Columbus Office</i> One Columbus 10 W. Broad St., Ste. 1020 Columbus, OH 43125 (614) 469-2999 (614) 469-5999 (Fax)	<i>Cincinnati Office</i> 2000 URS Center 36 East 7th Street Cincinnati, OH 45202 (513) 929-4834 (513) 929-4842 (Fax)	<i>Dayton Office</i> 130 West 2nd Street Suite 820 Dayton, OH 45402 (937) 225-7687 (937) 225-7688 (Fax)

CONTENT AND FORMAT

This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases are arranged in an outline format under the following headings:

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

FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to www.supremecourtus.gov 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.

NEW COMBINED OUTLINE

The Combined Outline is a culmination of all cases previously published in P.V. In an effort to provide a more useful research tool, the Combined Outline has been updated to include subheadings for many of the thirteen general categories listed above. Users may now conduct research by going to the appropriate heading in the outline, then clicking on the specified subheading to find recent cases on most any legal topic. The Combined Outline may be accessed at www.fpd-ohs.org.

SUPREME COURT DECISIONS

I. Specific Offenses

- *18 USC § 924(c) - Firearm Enhancement*
Watson v. U.S., 06-571 (12/10/07)
 - ▶ Defendant traded drugs for a firearm and was arrested. The government charged defendant with using a firearm in relation to drug trafficking under § 924(c). Defendant

pled guilty to the offense, but reserved the right to appeal the question of whether bartering drugs for a gun amounted to “use” under § 924(c). The Fifth Circuit affirmed defendant’s conviction and defendant appealed to the Supreme Court.

★Holding: Pursuant to the Court’s earlier holding in *Smith v. U.S.*, a defendant who trades a firearm for drugs “uses” the firearm within the meaning of § 924(c). In the present case, the Court ruled that the converse is not true. Thus, the Court held that a defendant does not “use” a firearm, under § 924(c), where the defendant trades drugs for a firearm. The Court noted that defendant was charged for “using” the firearm “in relation” to drug trafficking, not for “possession” of the firearm “in furtherance” of drug trafficking. The Court specifically reserved ruling on whether trading drugs for a gun would qualify as “possession” under the statute. Accordingly, defendant’s conviction was reversed.

• *18 USC § 924(e) - ACCA*

Logan v. U.S., 06-6911 (12/4/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified for the armed career criminal enhancement. The predicate convictions for the enhancement were three misdemeanor battery convictions from Wisconsin. Although the prior offenses were misdemeanors under state law, they carried a possible punishment of up to three years in prison. Because the misdemeanor offenses did not require a revocation of defendant’s civil rights, he argued that the convictions fell within § 921(a)(20)’s “civil rights restored” exemption from the ACCA. The district court disagreed, defendant lost his appeal in the Seventh Circuit, and the Supreme Court granted *certiorari*.

★ Holding: Pursuant to § 921(a)(20), the ACCA enhancement does not apply if a prior conviction was expunged or set aside, or if the

offender “has been pardoned or has had civil rights restored.” The Court held that this provision does not apply to a defendant who, as a result of the convictions in question, never lost his state civil rights in the first place. Instead, by its very terms, the exemption works only in favor of defendants who have lost their civil rights, and had them restored by subsequent state action. Accordingly, defendant’s sentence was affirmed.

XII. Appeal

C. Reasonableness of Sentence

• *Reasonableness of Sentence*

Gall v. U.S., 06-7949 (12/10/07)

► During a period of seven months, and while in college, defendant engaged in a conspiracy to distribute ecstasy. Defendant then voluntarily withdrew from the conspiracy, stopped all drug use and involvement, graduated college, moved to a new state, and eventually obtained work as a master carpenter earning \$18 per hour. Three-and-a-half years after defendant withdrew from the conspiracy, he was indicted. Defendant pled guilty and the district court calculated his guideline range to be 30-37 months in prison. The court awarded a downward variance from the guideline range and placed defendant on probation based upon (1) his voluntary withdrawal from the conspiracy, (2) his rehabilitation, (3) the fact that he obtained a college degree, (4) the start of his own successful business, (5) his young age at the time of the offense, (6) his lack of a criminal history, and (7) his support from family and friends. The government appealed and the Eighth Circuit reversed. In so holding, the Eighth Circuit applied proportionality review, requiring the justification for the variance to be proportionate to the extent of the departure. Defendant appealed to the Supreme Court.

★ Holding: The Court held that the standard of review for all sentences, regardless of the extent of departure from the guideline range, is

the deferential abuse-of-discretion standard. The extent of the departure is a factor that the courts may consider in determining the overall reasonableness of the sentence. The Court outlined the district court's duty in fashioning a sentence. The guidelines must be considered first as a "starting point." The district court must then consider all of the § 3553(a) factors. In this regard, the Court emphasized that the district court may not presume that the guideline range is reasonable. If the district court determines that an outside-guideline sentence is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling.

In reviewing sentences, the Court held that courts must review under the abuse-of-discretion standard. This requires courts to first review for significant procedural error, such as improperly calculating the guidelines, treating the guidelines as mandatory, failing to consider the § 3553 factors, utilizing erroneous facts, or failing to adequately explain the sentence. Second, reviewing courts must determine that the sentence is substantively reasonable.

In the case, the Court first held that the district court made no procedural error. In this regard, the Court found that the district court adequately considered the § 3553 factors, and addressed the issues raised by the parties. Further, the Court ruled that the sentence of probation was substantively reasonable based upon the factors outlined by the district court that supported the downward variance. The Court noted that a sentence of probation is not necessarily a sentence of leniency. Instead, sentences of probation are a "substantial restriction of freedom." Accordingly, the Eighth Circuit ruling was reversed and the sentence imposed by the district court was affirmed.

- *Reasonableness of Sentence*

Kimbrough v. U.S., 06-6330 (12/10/07)

- ▶ Defendant was convicted of conspiracy to distribute powder and crack cocaine, and possession of a firearm in furtherance of a drug trafficking offense. At sentencing, defendant faced a statutory mandatory 10 years for the crack and 5 years for the gun. The district court determined that defendant's guideline range was 168-210 months for the crack, plus 60 months for the gun. Based, in part, on the disparity in sentences between crack and powder cocaine, the district court varied downward from the recommended guideline range, and imposed the mandatory 10 years for the crack, plus 5 years for the gun. The government appealed and the Fourth Circuit vacated the sentence based upon circuit precedent that a below-guideline sentence is *per se* unreasonable if based upon the crack/powder disparity. The Supreme Court granted *certiorari*.

- ★ **Holding:** The Court held that the crack/powder disparity is an appropriate consideration for a district court in determining a sentence under 18 USC § 3553(a). The Court grounded its finding on the fact that the Sentencing Commission did not establish the 100:1 ratio between crack and powder punishments based on empirical data, as it did with other guideline provisions, but instead adopted the ratio based on the statutory, weight-driven, mandatory minimum and maximum sentences. Further, after the establishment of the 100:1 ratio, the Sentencing Commission repeatedly reported on its inequities, and encouraged Congress to act to change it. Thus, the Court concluded that a district court may consider any "unwarranted disparity created by the crack/powder ratio itself" in fashioning an appropriate sentence based upon the § 3553 factors.

In the case, the Court held that the district court imposed a reasonable sentence. The district court properly considered the

following factors: defendant had no prior felony convictions; he served in combat during Operation Desert Storm and received an honorable discharge; he had a steady employment history; and the crack/powder disparity “drove the offense level to a point higher than [was] necessary to do justice.” Under these circumstances, the Court ruled that the district court’s downward variance to a sentence of 15 years (4.5 years below the guideline range) was not an abuse of discretion. Accordingly, the Fourth Circuit’s ruling was reversed, and defendant’s sentence was affirmed.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *18 USC § 924(e) - ACCA*

U.S. v. Vanhook, 06-6497 (12/14/07)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified for the sentencing enhancement under the ACCA. This conclusion was based, in part, on a prior Tennessee conviction for facilitation of a burglary. Defendant appealed and argued that the facilitation of a burglary conviction did not qualify as a prior violent felony for ACCA purposes.

★ Holding: The court first held that facilitation of a burglary was not the same thing as “burglary,” an enumerated offense under the definition of a violent felony in the ACCA. Facilitation of a burglary does not require proof of intent to commit the underlying burglary; thus, facilitation of a burglary does not meet the generic definition of “burglary,” pursuant to the Supreme Court’s decision in *Taylor*. Second, the court held that facilitation of a burglary was an offense that caused a serious potential risk of injury to another under the “otherwise clause” of the ACCA. In this regard, the court held that it was irrelevant whether the burglary was in

relation to a business or a dwelling. The court ruled that either type of burglary presents a serious potential risk of injury to another, and thus the offense of facilitation of a burglary under Tennessee law is always a violent felony for ACCA purposes. Therefore, the sentence was affirmed.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2G2.2(b)(1) - Reduction for Possession*

U.S. v. Fore, 06-5518 (11/8/07)

► Defendant was arrested in Kentucky, while in transit from Florida to Ohio. Upon his arrest, officers found child pornography in his vehicle. Defendant was subsequently convicted of interstate transportation of child pornography and possession of child pornography. At sentencing, defendant argued that he should receive a two-level reduction under USSG § 2G2.2(b)(1) because he did not intend to distribute the child pornography. The district court declined to apply the reduction, and defendant appealed.

★ Holding: Pursuant to § 2G2.2(b)(1), a defendant may receive a two-level reduction if (1) the base offense level is 22, (2) the defendant’s conduct was “limited to the receipt or solicitation” of child pornography, and (3) the defendant did not intend to “traffic in, or distribute, such material.” Deciding an issue of first impression in the Sixth Circuit, the court held that defendant failed to meet the second prong of the subsection where he not only possessed the child pornography, but committed the separate offense of transporting the pornography in interstate commerce. Under these circumstances, defendant’s conduct was not “limited to the receipt or solicitation” of child pornography, and the two-level reduction was appropriately denied.

- *2K2.1(b)(6) - Another Felony Offense*
- U.S. v. Richardson, 07-5035 (12/20/07)

► Defendant was arrested in a hotel room in

possession of a firearm and a small amount of marijuana. In the hotel room, officers also discovered a large amount of marijuana in his girlfriend's purse, and digital scales. Defendant was charged with being a felon in possession of a firearm. At sentencing, the district court applied a four-level enhancement, pursuant to USSG § 2K2.1(b)(6), for possessing the firearm "in connection with another felony offense," namely possession of marijuana with intent to distribute. Defendant appealed.

★ Holding: In cases involving a firearm and drugs found at a residence, the court has adopted the fortress theory. Under this principle, a defendant is responsible for possessing the firearm "in connection with" drug trafficking where it reasonably appears that the firearm was possessed by defendant on the premises in order to protect the drugs or otherwise facilitate the drug transaction. In the case, the court ruled that defendant was in actual possession of the gun, and that he constructively possessed the drugs that were in his girlfriend's purse. This conclusion was based on the facts that defendant and his girlfriend were in a small hotel room, defendant had marijuana on his person, they both were smoking marijuana, the girlfriend stated that the marijuana belonged to defendant, and defendant had other convictions for marijuana trafficking. Thus, the court ruled that defendant constructively possessed the drugs in his girlfriend's purse and that the gun was used to protect the drugs. Accordingly, the four-level enhancement was affirmed.

• *2T1.4 - Tax Loss*

U.S. v. Maken, 05-4572 (12/26/07)

► Defendant was convicted of failure to file tax returns and tax evasion. At sentencing, the district court determined defendant's total loss under USSG § 2T1.4 based upon both the federal tax loss and the state tax loss. Defendant appealed and argued that state tax

loss cannot be included as relevant conduct.

★ Holding: The court held that state tax loss is properly attributable as relevant conduct to federal tax loss as long as the state tax loss is part of the same course of conduct or common scheme or plan. In the case, the court found that the state tax loss was relevant conduct to the federal tax loss based upon the temporal proximity, similarity, and regularity of the conduct. Accordingly, defendant's sentence was affirmed.

B. Chapter Three - Adjustments

• *3B1.1(c) - Leadership Role*

U.S. v. Lalonde, 06-4536 (12/12/07)

► Defendant was convicted of wire fraud and income tax evasion and at sentencing the district court determined that defendant qualified for a two-level enhancement for playing a leadership role. Specifically, defendant represented himself to be a financial planner and bilked several individuals and companies out of large sums of money. In so doing, defendant directed two coconspirators' actions and kept for himself the largest share of the proceeds. Defendant appealed the application of the enhancement.

★ Holding: Pursuant to USSG § 3B1.1(c), a defendant may receive a two-level enhancement if the defendant was an "organizer, leader, manager, or supervisor in any criminal activity." A defendant must have exerted control over at least one individual for the enhancement to apply, and merely playing an essential role in the offense is not, in and of itself, sufficient. In the case, the court held that the fact that defendant directed two coconspirators and kept the largest share of the proceeds for himself was sufficient to support the leadership enhancement. Thus, the sentence was affirmed.

• *3C1.1 - Obstruction of Justice*

U.S. v. Carter, 07-5551 (12/17/07)

► Defendant was convicted of filing false tax

returns. At sentencing, the district court applied a two-level enhancement, pursuant to USSG § 3C1.1, for obstruction of justice. The obstructive conduct entailed defendant's lies to investigators regarding whether he filed the returns, and defendant's failure to appear pursuant to a summons to provide fingerprints and handwriting exemplars. Defendant appealed the application of the obstruction of justice enhancement.

★ Holding: The court ruled that the defendant's false statements, combined with the failure to appear for the summons, provided a sufficient basis for the enhancement. Specifically, the court held that defendant's lies and his failure to appear for the summons caused delay in the government's investigation, which ultimately allowed the statute of limitations to run on some of defendant's criminal conduct. Further, the court found unavailing defendant's argument that the conduct was not obstructive because the government was able to obtain the fingerprints and handwriting from another source. In this regard, the court ruled that defendant's attempt to obstruct was sufficient for the enhancement. Accordingly, the sentence was affirmed.

C. Chapter Four - Criminal History

• 4A1.1(a) - Criminal History

U.S. v. Lalonde, 06-4536 (12/12/07)

► Defendant was convicted of mail fraud and tax evasion and at sentencing the district court enhanced his criminal history category based upon a prior Kentucky theft conviction. Defendant challenged the validity of the prior conviction because the guilty plea was entered by defendant's counsel, but defendant was not present. Defendant proved that the conviction was invalid under Kentucky law because a plea may not be entered *in absentia*. The district court rejected defendant's argument and he appealed.

★ Holding: Relying on the Supreme Court's decision in *Curtis v. U.S.*, the court held that

the only basis upon which a defendant may collaterally attack a prior state conviction is for the violation of the right to counsel. Thus, even though the prior conviction was clearly invalid under Kentucky law, defendant's only remedy was to petition the Kentucky state court to invalidate the conviction prior to his federal sentencing. Accordingly, the sentence was affirmed.

III. Evidence

A. Article IV - Relevancy

• 402 - Relevance

U.S. v. Vasilakos, 05-3166 (11/21/07)

► Defendant was a manager for a company, and was charged with conspiracy and mail fraud for defrauding the company of large sums of money. At trial, defendant offered evidence to show that corporate officers of the company condoned defendant's actions and that they also defrauded the company. The district court refused to admit the evidence and defendant challenged the district court ruling on appeal.

★ Holding: The court held that defendant's proffered evidence was not relevant under FRE 402 because it had no tendency to show that it was less probable that defendant acted with intent to defraud. Even if certain executives approved of defendant's conduct, and committed fraud themselves, this evidence could not negate defendant's intent to defraud the company. Accordingly, the district court's ruling was affirmed.

• 403 - Undue Prejudice

U.S. v. Stout, 06-6353 (12/20/07)

► Defendant was charged with receipt and possession of child pornography. Prior to trial, the government notified defendant that it intended to introduce defendant's prior convictions for surreptitiously videotaping a friend's fourteen year old daughter taking a shower. Defendant moved *in limine* to exclude the prior conviction, claiming that it was

substantially more prejudicial than probative. The district court granted the motion and the government filed an interlocutory appeal.

★ Holding: In analyzing evidence under FRE 403, the court must weigh the probative value of, and the need for, the evidence against the harm likely to result from its admission. In the case, the court found that, although the government's need for the evidence was strong (because it had little other evidence of intent or knowledge), the probative value of the evidence was relatively weak. In contrast, the court ruled that the prejudicial effect was high because the evidence was both inflammatory and distracting. In the district court's words, the prior conviction evidence was "more lurid and frankly more interesting than the evidence surrounding the actual charges," and "frankly, creepier." Accordingly, the court found no abuse of discretion in the district court's decision to exclude the evidence in the government's case in chief, and affirmed the district court's ruling.

C. Article VIII - Hearsay

• *801(d)(2)(A) - Statement of Party Opponent*
U.S. v Vasilakos, 05-3166 (11/21/07)

► Defendant was a manager for a company, and was charged with conspiracy and mail fraud for defrauding the company out of large sums of money. In order to support his good faith defense at trial, defendant offered hearsay statements of company officials about the goals and policies of the company. The district court refused to admit the statements, defendant was convicted, and he appealed.

★ Holding: Pursuant to FRE 801(d)(2)(A), a statement is not hearsay if it is "offered against a party" and is the party's own statement. In the case, the court held that the company was not a party to the criminal prosecution of defendant. Thus, the statement was not admissible as a party admission, and the district court ruling was affirmed.

• *801(d)(2)(E) - Coconspirator Exception*
U.S. v. Conrad, 05-5319 (11/9/07)

► Defendant was charged with conspiracy and possession of meth with intent to distribute. At trial, the government argued that defendant participated in the conspiracy by allowing others to use her home to store and distribute drugs. Part of the government's evidence included the hearsay testimony of a coconspirator that he gave defendant money to allow the use of defendant's home. The district court admitted the hearsay evidence, defendant was convicted, and she appealed.

★ Holding: In order to admit hearsay evidence under FRE 801(d)(2)(E), the government must prove by a preponderance of the evidence that the defendant was a member of the conspiracy and that the statement was made in furtherance of the conspiracy. The court first held that the government provided sufficient evidence that defendant was a member of the conspiracy. The court found, however, that the district court did not properly determine whether the statement was made in furtherance of the conspiracy. Specifically, the district court failed to establish when the statement was made, thus it was not clear whether the statement was made during the conspiracy. Additionally, the district court found that the government made a "*prima facie*" showing of conspiracy, instead of the required preponderance of the evidence standard. The court ruled that these errors were not harmless because the evidence against defendant was not otherwise strong, and the government relied heavily on the hearsay statement to obtain defendant's conviction. Accordingly, the case was remanded for a proper determination as to whether the hearsay statement was made during the conspiracy. The court instructed the district court that if it found that the hearsay statement was made during and in the course of the conspiracy, the conviction would stand. If, however, the statement was improperly admitted, defendant

was entitled to a new trial.

D. Miscellaneous Evidence

• *Summary Witnesses*

U.S. v. Vasilakos, 05-3166 (11/21/07)

► Defendant was charged with conspiracy and mail fraud. At trial, the government utilized an IRS agent as both an expert witness and a summary witness. Defendant did not request, and the district court did not provide, a jury instruction that the summary testimony was only an aid to the jury, not evidence. Defendant was convicted and he appealed.

★ Holding: Because defendant did not request a limiting instruction, the court applied plain error review. First, the court held that the district court's failure to provide a limiting instruction to the jury regarding use of the summary testimony was error. The court ruled, however, that the error did not affect defendant's substantial rights because the evidence against defendant was otherwise overwhelming. Accordingly, the court found no plain error, and defendant's conviction was affirmed.

IV. Fourth Amendment

C. Warrant Exceptions

• *Automobile Exception*

U.S. v. Smith, 06-2525 (12/26/07)

► Based upon a drug investigation, officers obtained a valid warrant to search defendant's home and any vehicles on the premises. Defendant's Pontiac was parked on the premises early in the day, but was moved to the street by the time the search was executed. After searching the home and finding numerous items indicative of drug trafficking, the officers searched defendant's Pontiac. In the car, officers found large amounts of cocaine and crack. Upon being charged with drug offenses, defendant moved to suppress the evidence found in the Pontiac. The district court concluded that the search of the Pontiac was justified by the automobile exception to

the warrant requirement and denied the motion. Defendant appealed.

★ Holding: Pursuant to the automobile exception, officers may search a car if they have probable cause to believe that it contains evidence of a crime. In the case, the court found the following facts supported probable cause: (1) the car was previously seen on the premises; (2) the keys to the car were in defendant's residence; (3) defendant was a co-owner of the car; (4) defendant was known to transport drugs and sell them out of cars; (5) a large amount of cash and several guns were found in defendant's residence; (6) there was a history of drug dealing on the premises; (7) residue was found in baggies in trash pulls from the residence; and (8) evidence of a "drug lifestyle" was found in the residence. Accordingly, the district court ruling was affirmed.

• *Vehicle Inventory Search*

U.S. v. Smith, 06-2525 (12/26/07)

► Officers searched defendant's residence, pursuant to a search warrant, and discovered large sums of cash and numerous items indicative of drug trafficking. Officer's then searched defendant's car, which was parked in front of the residence. Defendant was subsequently charged with drug trafficking offenses and moved to suppress evidence found in the car. The district court denied defendant's motion and concluded that the vehicle was searched pursuant to a valid inventory search procedure. Defendant appealed.

★ Holding: The court first held that the vehicle was properly searched pursuant to the automobile exception. (*See supra*). Alternatively, the court found that the search was proper pursuant to the inventory exception to the warrant requirement. An inventory search may be conducted if police have lawfully taken custody of a vehicle, and the inventory is conducted pursuant to standard

police procedures. The court ruled that the police lawfully seized the car because they had probable cause to believe that it was used in a drug trafficking enterprise, (*See supra*) and therefore the car was forfeitable under federal law. Further, the court held that the officers conducted the inventory search pursuant to a “standard operating procedure.” In this regard, the court held that the police department need not maintain a written policy regarding inventory searches as long as testimony establishes the existence and contours of the policy. Accordingly, the district court ruling was affirmed.

E. Search Warrants

• *Search Warrants - Reckless Falsity*
U.S. v. Stuart, 06-2279 (11/7/07)

▸ Defendant was charged with drug trafficking and possession of a firearm in furtherance of drug trafficking. Defendant filed a motion to suppress evidence obtained during the execution of a search warrant and claimed that the search warrant affidavit contained false information. The defendant based this claim on the fact that the police officer relied, almost entirely, on statements made by an informant who had been arrested and was trying to extricate himself from trouble. The district court refused to hold a *Franks* hearing, and defendant was subsequently convicted. Defendant appealed.

★ Holding: In order to obtain a *Franks* hearing to challenge the falsity of an affidavit, a defendant must make more than conclusory allegations, and must allege deliberate or reckless falsity on the part of the affiant. In the case, the court held that the mere use of an informant’s statements, where the informant may have a motive to lie, was insufficient to require a *Franks* hearing. Thus, the court found that the officer was not unduly reckless in relying on the informant’s statements, and the district court ruling was affirmed.

• *Search Warrants - Probable Cause*
U.S. v. Smith, 06-2525 (12/26/07)

▸ Through the use of a confidential informant, officers investigated defendant and his home in regard to drug trafficking. The investigation culminated in an application and affidavit for a search warrant for defendant’s residence. The affidavit did not identify the informant, but it did provide information about his past reliability. The affidavit also indicated that the informant observed an individual go into defendant’s residence on two occasions and return with narcotics. Further, the officers received an anonymous tip that defendant was dealing drugs from his residence. Finally, the officers confirmed that defendant lived at the residence and that he had two prior cocaine convictions. Based upon this information, the officers obtained a warrant, executed it, and found evidence of drug trafficking. Upon being charged with drug trafficking offenses, defendant moved to suppress the evidence. The district court found that the warrant was supported by probable cause and denied defendant’s motion. Defendant appealed.

★ Holding: In reviewing a search pursuant to a warrant, the court must consider whether there was a “substantial basis” for the issuing judge to find probable cause, considering the totality of the circumstances. First, the court found that the failure to identify the informant was not fatal because the informant’s reliability was well documented. Further, the court ruled that the officers’ failure to corroborate the informant’s information and the fact that the informant did not have personal knowledge of the drug dealing did not invalidate the warrant. In the end, the informant’s reliability, the anonymous tip, and the confirmation that defendant had prior cocaine convictions all supported the finding of probable cause. Accordingly, the district court ruling was affirmed.

V. Fifth Amendment

B. Brady

• *Brady*

U.S. v. Garner, 06-3288 (11/7/07)

▶ Defendant was charged with car jacking and using a firearm during a crime of violence. On the day of trial, the government disclosed cell phone records from the victim's phone, which had been used by the robbers during the car jacking. Defendant moved for a continuance to investigate the records, and the district court denied the request. Defendant was convicted and he appealed.

★ Holding: Pursuant to *Brady*, due process is violated where the government suppresses evidence favorable to an accused and the evidence is material to guilt or punishment, regardless of bad faith. A *Brady* violation is material if there is a reasonable probability that the trial result would have been different if the evidence was timely disclosed. In the case, the court held that the cell phone records were favorable to the defendant and were material to defendant's guilt. The court found that the only evidence linking defendant to the crime came from witnesses with questionable motives – the codefendant and his girlfriend. The cell phone records, with a proper amount of time to investigate, would have shown a phone call from the victim's phone to the codefendant's girlfriend, evidence that would have impeached the girlfriend's testimony at trial. Because the evidence against defendant was relatively weak and the testimony of the girlfriend was central to the government's case, the conviction was reversed and a retrial ordered.

D. Double Jeopardy

• *Double Jeopardy*

U.S. v. Koubriti, 06-1937 (12/12/07)

▶ Defendant was convicted of conspiracy to provide material support to terrorists, but after trial the government admitted to improprieties in the prosecution which led to a dismissal of

the case without prejudice. The government subsequently indicted defendant for conspiracy to commit mail fraud for staging a car accident in an attempt to claim insurance benefits. Defendant moved to dismiss on double jeopardy grounds, the district court denied the motion, and defendant appealed.

★ Holding: The court held that the Double Jeopardy Clause is not implicated where a defendant is retried after the first trial ended in a mistrial because of a defect in the proceedings. The narrow exception to this rule is where the government goads a defendant into requesting a mistrial by committing intentional misconduct. In the case, the court ruled that the Double Jeopardy Clause was not violated because the first trial resulted in a dismissal without prejudice and there was no evidence that the government intentionally goaded defendant into requesting the mistrial. Accordingly, defendant's conviction was affirmed.

E. Miscellaneous Fifth Amendment

• *Due Process - Exclusion of Evidence*

U.S. v. Stuart, 06-2279 (11/7/07)

▶ Defendant was charged with drug trafficking and possessing a firearm in furtherance of drug trafficking. Defendant argued in a pretrial motion to suppress that the search warrant to search his residence was invalid because it was actually issued two days after the search. The government countered that the date mix-up on the warrant was due to a computer error and it offered substantial evidence to show that the warrant was issued the same day as the search. The district court denied defendant's motion. At trial, defendant attempted to argue the issue to the jury, and requested a jury instruction on the subject. The district court declined to provide the instruction and, upon his conviction, defendant appealed.

★ Holding: The court held that a district court is not required to present juries with factual questions bearing on the admissibility

of evidence obtained during a criminal investigation. Long-standing precedent clearly requires that the court, not the jury, decide such issues. Accordingly, the district court ruling was affirmed.

- *Due Process - Denial of Continuance*
U.S. v. Garner, 06-3288 (11/7/07)

- ▶ Defendant was charged with car jacking and using a firearm during a crime of violence. On the day of trial, the government disclosed to defendant the cell phone records from the victim's phone, which had been used by the robbers during the car jacking. Defendant moved for a continuance to investigate the records, and the district court denied the request. Defendant was convicted and he appealed.

- ★ Holding: In order to establish a due process violation in the denial of a continuance, a defendant must show actual prejudice to the defense. Actual prejudice may be demonstrated where a continuance would have made "relevant witnesses available or added something to the defense." In the case, the court held that defendant and his attorney could not have possibly investigated the cell phone records and effectively handled the one day trial at the same time. The government admitted that it had difficulty tracking down the names that went with the cell phone numbers on the records, and the government had the records for a week before trial. Further, the continuance would have added something to the defense because investigation into the records would have provided critical impeachment evidence in order to cross examine a key government witness. Accordingly, the court held that the district court's denial of the continuance amounted to a due process violation warranting a reversal of the conviction and a new trial.

VI. Sixth Amendment

B. Confrontation Clause

- *Confrontation Clause - Bruton*

U.S. v. Vasilakos, 05-3166 (11/21/07)

- ▶ Defendant and several others were charged with conspiracy, mail fraud, and money laundering. At trial, the government introduced confessions of the codefendants, that also implicated defendant. In order to protect defendant's confrontation rights, the government redacted the confessions by taking out defendant's name and replacing it with "another person." Further, the district court instructed the jury to consider the confessions only in relation to the co-defendant who made the statement. Defendant was convicted and he appealed.

- ★ Holding: Pursuant to the Sixth Amendment and *Bruton*, the government may not introduce the confession of a co-defendant if it implicates the defendant. In the case, the court found that the redacted confession did not clearly implicate defendant because the government was prosecuting multiple defendants, the statement referred only to "another person," and the district court provided an appropriate limiting instruction. Accordingly, *Bruton* was not violated and defendant's conviction was affirmed.

F. Miscellaneous Sixth Amendment

- *Right to Present a Defense*

U.S. v. Vasilakos, 05-3166 (11/21/07)

- ▶ Defendant was charged with conspiracy and mail fraud for defrauding large sums of money from the company for which he worked. At trial, defendant offered hearsay testimony regarding goals and policies of the company in order to support his good faith defense. The district court excluded the hearsay statements. (*See supra*, III. Evidence). Defendant was convicted and argued on appeal that his right to present a defense under the Sixth Amendment was violated.

- ★ Holding: In rare instances, exclusion of

testimony pursuant to the evidence rules may violate a defendant's right to present a defense. In order to find such a violation, the ruling must "implicate a sufficiently weighty interest of the defendant," and "serve no legitimate purpose." In the case, the court held that the hearsay rules are deeply rooted and well settled, that they advance numerous important interests, and that their application did not violate defendant's right to present a defense. Thus, the district court ruling was affirmed.

VII. Other Constitutional Rulings

A. Commerce Clause

• Commerce Clause

U.S. v. Watkins, 05-4551 (12/14/07)

► Defendant was charged with three Hobbs Act robberies under 18 USC § 1951. The charges involved defendant's armed robbery of three check-cashing businesses. The case proceeded to trial, defendant was convicted, and he argued for the first time on appeal that the government had not proven the interstate nexus requirement.

★ Holding: Where a Hobbs Act robbery involves a business, the government need only prove a *de minimus* effect on interstate commerce in order to satisfy the interstate nexus requirement. The court found that the government had proven that one of the three check-cashing businesses drew checks on nationwide, federally insured banks. The court found this connection sufficient to meet the *de minimus* standard and also held that "a reasonable inference can be drawn that the other two" businesses drew checks on such banks as well. Although the court noted that the evidence was "slim," it found that the interstate nexus requirement was established.

B. Art. 1, § 10, Ex Post Facto Clause

• Ex Post Facto

Doe v. Bredesen, 06-6393 (11/16/07)

► Defendant was convicted in Tennessee state court of attempted kidnaping and sexual

battery. The Tennessee Legislature subsequently passed a new sex offender act which reclassified defendant as a "violent sexual offender" and subjected him to lifetime supervision and GPS tracking. Defendant filed a civil action in the district court alleging that application of the law to him violated the *Ex Post Facto* Clause. The district court dismissed the complaint and defendant appealed.

★ Holding: The *Ex Post Facto* Clause is violated where a new law punishes a defendant for acts committed before the effective date. A law is not considered to be punishment where it produces an "ambiguous sort of disadvantage"; rather, the law must either alter the definition of criminal conduct or increase the penalty for a crime. In determining whether a law imposes punishment, the court looks first to legislative intent. In the case, the court found that the legislature specifically stated that the new sex offender act was non-punitive, and not intended to inflict retribution or additional punishment.

After considering legislative intent, the court must also analyze the practical effect of the law. This requires consideration of the following factors: (1) whether the regulatory scheme has traditionally been regarded as punishment; (2) whether the law imposes an affirmative disability or restraint; (3) whether it promotes the traditional aims of punishment; (4) whether it has a rational connection to a non-punitive purpose; and (5) whether it is excessive with regard to purpose. In considering the factors, the court ruled that the practical effect of the law was not to impose punishment upon a defendant. Accordingly, the court found no *ex post facto* violation and the district court ruling was affirmed.

D. Eighth Amendment

• Cruel and Unusual Punishment

U.S. v. Watkins, 05-4551 (12/14/07)

► Defendant was convicted of six armed

robberies and six counts of brandishing a firearm during the robberies. At sentencing, the district court imposed a combined sentence of 1,772 months incarceration. Defendant appealed and argued that the sentence amounted to cruel and unusual punishment given his lack of criminal history.

★ Holding: Relying on prior precedent, the court held that the imposition of mandatory consecutive 25 year sentences under 18 USC § 924(c) for carrying firearms during violent robbery offenses did not violate the Eighth Amendment's ban on cruel and unusual punishment. Accordingly, defendant's conviction was affirmed.

VIII. Defenses

G. Estoppel Defenses

• *Res Judicata/Collateral Estoppel*
U.S. v. Vasilakos, 05-3166 (11/21/07)

▶ Defendant was charged with conspiracy, mail fraud, and money laundering over his scheme to steal money from his employer. Defendant argued in the district court that the prosecution should be precluded because defendant won an earlier civil law suit brought by the employer. The district court disagreed and defendant appealed.

★ Holding: The doctrine of *res judicata* bars future claims where there is (1) a final decision on the merits by a court, (2) privity between the parties, (3) an issue in the subsequent litigation that was, or should have been, litigated in the prior action, and (4) identity of the causes of action. Collateral estoppel precludes re-litigating issues between parties or their privies. The court held that a party in "privity" is one who is a successor in interest to a party, one who controlled the prior action, or one whose interests were adequately represented. In the case, the court ruled that the government was not in privity with the employer who brought the civil law suit against defendant, and accordingly neither *res judicata* nor collateral estoppel precluded the prosecution.

L. Miscellaneous Defenses

• *18 USC § 3142 - Bond Restrictions*
U.S. v. Vasilakos, 05-3166 (11/21/07)

▶ Defendant was charged with conspiracy and mail fraud. While the case was pending, defendant was ordered by the district court to have no contact with potential government witnesses, although defendant's counsel was permitted to have contact with them. Upon his conviction, defendant argued on appeal that the bond condition deprived him of the right to prepare his defense.

★ Holding: The Bail Reform Act permits a district court to limit a defendant's contact with victims or witnesses if the condition is the "least restrictive" condition that will ensure the defendant's appearance and the safety of others. In determining whether bond conditions are appropriate, the court must consider (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the defendant's history and characteristics, and (4) the nature and seriousness of the danger to another. In the case, the court held that the district court ruling was proper because it was not unduly restrictive and defendant showed no harm resulting from the condition.

• *Fed. R. Crim. P. 10 - Right to Arraignment*
U.S. v. Lalonde, 06-4536 (12/12/07)

▶ Defendant was indicted for wire fraud and tax evasion. At the arraignment, the magistrate judge failed to read or summarize the indictment, or to obtain defendant's waiver of the reading. Defendant did not object to the procedure and he ultimately pled guilty. At defendant's guilty plea hearing, he told the district judge that he received the indictment, that he understood it, and that he and his attorney discussed possible defenses to it. Defendant never objected in the district court to the irregularity at the arraignment, but instead raised the issue for the first time on appeal.

★ Holding: First, the court held that

defendant waived the issue on appeal because it was not raised in the district court. (*See infra*, XII. Appeal). Nonetheless, the court proceeded to the merits of the issue in order to “clarify the law in this area.” The court ruled that the magistrate clearly violated Fed. R. Crim. P. 10(a) by failing to read or explain the indictment to defendant at the arraignment. Because defendant failed to object in the district court, however, the court applied plain error review and determined that the district court error did not affect defendant’s substantial rights. Defendant was represented by counsel at the arraignment and the attorney had a copy of the indictment. Further, defendant pled guilty and explained at the guilty plea hearing that he understood the indictment and discussed it with his attorney. Accordingly, defendant could not show any prejudice from the magistrate’s failure to comply with Rule 10. Thus, defendant’s conviction was affirmed.

IX. Plea & Sentencing Hearings

A. Plea Agreements/Plea Hearings

• *Fed. R. Crim. P. 11 - Plea Hearing*

U.S. v. Lalonde, 06-4536 (12/12/07)

▸ Defendant was charged with wire fraud and pled guilty. After being sentenced, defendant appealed and argued that the district court violated Fed. R. Crim. P. 11 in three ways in taking his guilty plea: (1) failing to adequately inform him of the nature of the charge; (2) failing to ensure that the plea was voluntary; and (3) failing to determine that a factual basis existed for the plea.

★ Holding: First, the court held that a defendant is presumed to know the nature of the charge where the defendant has received and understands the indictment. Further, the court found that the district court adequately covered the elements of the offense in its summary, and through the government’s recitation of the facts. Second, the court found that the district court thoroughly inquired into

the voluntariness of the plea and made specific findings regarding voluntariness. Third, the court held that the district court adequately determined there was a factual basis for the plea through the recitation of the statement of facts, to which defendant agreed. Thus, the court found no violation of Rule 11 and the conviction was affirmed.

B. Sentencing

• *Sentencing - Rule 32*

U.S. v. Christman, 06-3266 (11/20/07)

▸ Defendant was convicted of possession of child pornography. At sentencing, defendant requested a downward variance from the guideline range based upon his health issues and the fact that he cared for his elderly ill mother. The district court denied the request for a variance and sentenced defendant to the bottom end of the guideline range. Three months after sentencing, the district court convened a hearing wherein it stated that it received information prior to sentencing from a probation officer and a pretrial officer that defendant had molested children. The court indicated that the information was contrary to what was reflected in the presentence report, but that the court did not share the information with defendant or the government. Finally, the district court stated that it would have given defendant a “much lower” sentence but for the suspect information. Defendant appealed.

★ Holding: The court held that the district court’s reliance on the information from probation and pretrial violated Fed. R. Crim. P. 32 in two respects. First, Rule 32(i)(1)(C) requires the district court to allow the parties to comment on the probation officer’s determination and other matters related to sentencing. Second, Rule 32(i)(3)(B) requires the district court to either rule on any disputed matters, or determine that the matters will not affect sentencing. The court noted that communications between the district court, probation, and pretrial are not prohibited,

however, the “unique” facts of the case warranted a reversal. The district court clearly relied on an impression of defendant that was unsupported by verifiable facts in the case and contradicted by the record evidence. This impression was not disclosed to the parties and subjected to adversarial testing. The court ruled that the error was not harmless because the district court stated that it would have sentenced defendant below the guidelines but for the *ex parte* information. Accordingly, defendant’s sentence was vacated.

XI. Probation & Supervised Release

• Conditions of Supervised Release

U.S. v. Alexander, 07-1432 (12/7/07)

► After repeated violations of defendant’s supervised release, the district court sentenced defendant to 12 months incarceration and 24 months of supervised release. A condition of release required defendant to live in Grand Rapids instead of his home, Hannahville. Defendant appealed the geographical restriction.

★ Holding: In imposing supervised release, 18 USC §§ 3583(h) and 3563(b)(13) specifically allow a district court to order that a defendant “reside in a specified place or area.” In reviewing a condition of supervised release, the condition must satisfy the following factors: (1) be reasonably related to the circumstances of the offense and defendant’s history, the need to provide deterrence, protect the public, and rehabilitate the defendant; (2) involve no greater deprivation of liberty than is reasonably necessary to deter criminal conduct, protect the public, and rehabilitate the defendant; and (3) be consistent with the policy statements of the Sentencing Commission. In the case, the court held that the condition requiring defendant to live in Grand Rapids was reasonable and necessary to assist defendant’s rehabilitation, protect the public and his family, and respond to defendant’s prior violations of supervised

release. Accordingly, the geographical restriction was affirmed.

• Supervised Release Violation

U.S. v. Bolds, 07-5062 (12/20/07)

► Defendant was charged with a violation of her supervised release for repeatedly missing urine screens and for committing new criminal conduct while her supervised release violation was pending. Defendant then failed to appear for both her supervised release hearing and her underlying state criminal case. Defendant was later arrested and her supervised release revoked. The district court determined that her guideline range was 4-10 months, but instead imposed an upward variance to a sentence of 24 months incarceration, which was 12 months below the statutory maximum. Defendant appealed and argued only that the sentence was procedurally unreasonable.

★ Holding: The court first determined that the standard of review for supervised release violation sentences should be the *Gall* reasonableness standard. (*See* XII. Appeal). Second, the court held that defendant’s sentence was procedurally reasonable. The court found that the district court accurately determined the appropriate guideline range, considered the factors under 18 USC § 3553, analyzed defendant’s arguments for a lower sentence, and adequately explained its reasons for a higher sentence. The court noted that defendant did not challenge the substantive reasonableness of the sentence but opined that the sentence was substantively reasonable. Accordingly, defendant’s sentence was affirmed.

XII. Appeal

A. Preserving Error

• Issue First Raised on Appeal

U.S. v. Lalonde, 06-4536 (12/12/07)

► Defendant was indicted for wire fraud and tax evasion. At the arraignment, the magistrate judge failed to read or summarize the

indictment or to obtain defendant's waiver of the reading. Defendant did not object to the procedure and ultimately pled guilty and was sentenced. Defendant then argued for the first time on appeal that the district court violated Fed. R. Crim. P. 10 by failing to read the indictment.

★ Holding: The court held that a defendant waives his right to appeal a constitutional violation occurring prior to a plea of guilty once the defendant enters the plea. Further, a challenge regarding improper arraignment is waived if the defendant fails to object prior to appeal. In the case, the court held that defendant's failure to object to the improper procedure, followed by defendant's guilty plea, waived the issue for appeal purposes.

B. Standard of Review

• Supervised Release Violations

U.S. v. Bolds, 07-5062 (12/20/07)

► Defendant was found guilty of violating her supervised release and the district court imposed an upward departure from the recommended guideline range (4-10 months) to a sentence of 24 months. Defendant appealed the procedural reasonableness of the sentence.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the *Gall* standard of "deferential abuse of discretion standard for reasonableness" applied to review of supervised release sentences as opposed to the "plainly unreasonable" standard that was previously mandated by statute. The court reasoned that the two standards worked exactly the same in practice, but that the *Gall* standard was mandated by the Supreme Court. Accordingly, the court reviewed defendant's sentence for reasonableness. (*See supra*, XI. Probation & Supervised Release).

C. Reasonableness of Sentence

• Reasonableness of Sentence

U.S. v. Carter, 07-5551 (12/17/07)

► Defendant was convicted after jury trial of

filing false tax returns. At sentencing, the district court imposed a sentence of 15 months incarceration, the bottom end of the guideline range. On appeal, defendant argued that the sentence was unreasonable because the court failed to award a downward variance based upon his family circumstances and the disparity with the sentence of a codefendant.

★ Holding: First, the court held that the sentence was procedurally reasonable. The district court correctly computed the guideline range, treated the guidelines as advisory, considered the factors under 18 USC § 3553, did not rely on erroneous facts, and adequately explained its sentence. Second, the court ruled that the sentence was substantively reasonable. The court found that the district court considered defendant's family circumstances and that defendant's family, given their medical conditions, would not be unduly harmed by the 15 month sentence. Further, the court ruled that the codefendant's circumstances were sufficiently distinguishable to justify the difference in sentences. The codefendant received a sentence of probation, but she pled guilty (defendant went to trial), had no criminal record (defendant was criminal history category IV), and the codefendant was not the "prime mover" in the criminal enterprise, but instead acted based on defendant's suggestions. Thus, defendant's sentence was substantively reasonable and his sentence was affirmed.

• Reasonableness of Sentence

U.S. v. Smith, 06-6458 (12/17/07)

► Defendant was convicted after trial of armed bank robbery and bank robbery by forced accompaniment for his role in the kidnaping of a bank manager and her family, and the robbing of the manager's bank. The district court calculated the guideline range to be 324-405 months incarceration, and sentenced defendant to 396 months. Defendant appealed and argued that the district court erred

by (1) failing to consider defendant's argument that the government wrongfully dropped a charge under 18 USC § 924(c) in order to pursue a six-level guideline enhancement, and (2) failing to grant a downward variance based upon disparity with a sentence received by another defendant in a different district.

★ Holding: First, the court held that a district court is not required to address arguments made by a defendant at sentencing where the arguments are clearly lacking in merit. The court ruled that a prosecutor has broad discretion in deciding whether to pursue a substantive charge or a sentence enhancement, and there was no merit to defendant's argument that the prosecutor's choice in his case was somehow unconstitutional. Second, the court held that defendant's disparity argument with respect to a defendant from a separate district was unavailing. The court emphasized that "a sample size of two defendants" was not sufficient to show the kind of disparity warranting a reversal, particularly where the defendants were sentenced in different districts. Accordingly, defendant's sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Lane, 07-5129 (12/20/07)

► Defendant was sentenced to 51 months in prison for a wire fraud scheme. The government subsequently learned that defendant had engaged in additional, but related, wire fraud conduct with another conspirator. The government brought a new wire fraud indictment against defendant. At the sentencing on the new indictment, the district court determined that defendant's guideline range was 41-51 months, but decided that a sentence of 68 months was appropriate based on defendant's criminal history. The court imposed the sentence to run concurrently with defendant's 51 month sentence. During the hearing, the probation officer pointed out to the court that defendant had already served

nine months on the prior sentence, and that the court should reduce the 68 month sentence for the time defendant had already served, pursuant to USSG § 5G1.3. The court declined to make the reduction. Defendant appealed and his sole argument on appeal was that the court erred in failing to grant the nine month reduction for the time defendant already served.

★ Holding: The court held that defendant's sentence was reasonable. The court found that the district court correctly determined the applicable guideline range and considered the possibility that it could give defendant credit for the time already served. Based upon its analysis of the factors under 18 USC § 3553, the court concluded, however, that the 68 month term was the appropriate sentence. The court ruled that the district court's approach violated neither 18 USC § 3742(f)(requiring a remand if the district court incorrectly applies the sentencing guidelines), nor *Booker*. Therefore, defendant's sentence was affirmed.