

Precedential Value

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

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CONTENT AND FORMAT

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

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

FINDING THE CASES

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

There are no Supreme Court decisions to report for this issue.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *15 USC § 78/18 USC § 371-Insider Trading*
U.S. v. Hughes, 06-3024 (10/26/07)
 - ▶ Defendants were a husband and wife who

received an insider tip about the buyout of a small company. Shortly before the buyout occurred, defendants purchased a large amount of stock in the company, and then sold it at a substantial profit immediately after the buyout. Defendants were charged, among other offenses, with insider trading under 15 USC § 78 and conspiracy under 18 USC § 371. At trial, defendants and the tipster all testified that no insider information was shared with defendants. The government introduced circumstantial evidence which showed that defendants met with the tipster prior to the buyout, and that they bought and sold large amounts of stock surrounding the buyout. Defendants were convicted and appealed, challenging the sufficiency of the evidence.

★ Holding: In order to prove conspiracy, the government must show (1) the existence of an agreement to violate the law, (2) knowledge and intent; and (3) an overt act. To prove insider trading, the government must prove (1) a scheme to defraud in connection with the purchase or sale of stock, (2) intent to defraud, and (3) use of a means of interstate commerce in connection with the purchase or sale. Additionally, in regard to defendants who are tippees, the government must show that they (1) received material, confidential information (2) knowledge that the tipster violated a fiduciary duty, and (3) knowing and wilful purchase of stock based on the information. In the case, the court found that the circumstantial evidence was sufficient to show that defendants participated in the conspiracy and that they committed insider trading. Accordingly, the conviction was affirmed.

• *18 USC § 922(g) - Constructive Possession*
U.S. v. Grubbs, 04-5403 (10/17/07)

► Defendant was visiting his mother's home when agents executed a search warrant regarding stolen cars. During the search, officers found various firearms and ammunition, including a handgun under the

pillow in a bedroom. Defendant's brother admitted that the gun was his, and evidence showed that, when defendant visited his mother, he slept on the couch in the living room. Defendant was charged with multiple offenses regarding stolen cars and firearms. Defendant pled guilty to the stolen vehicle charges, but proceeded to trial on the firearm offenses. At trial, a neighbor testified that he saw defendant with a gun very similar to the handgun found under the pillow. Defendant was convicted for the handgun, but acquitted of the remaining firearm charges. Defendant appealed and argued that the evidence was insufficient to support the government's constructive possession theory.

★ Holding: The court held that constructive possession is proven where a defendant has both the "power and the intention at a given time" to exercise control or dominion over a gun. Presence near a gun, in and of itself, is not sufficient. In the case, the court held that the government failed to establish that defendant constructively possessed the gun. Defendant did not live in the house, and no evidence tied him to the bedroom where the gun was found. Further, the court found unpersuasive the witness' testimony about seeing defendant previously with a similar gun. The court found that the witness' description of the gun was too generic to make the necessary link to prove that it was same gun. Accordingly, defendant's conviction was reversed.

• *18 USC § 1344 - Bank Fraud*
U.S. v. Ross, 05-4469 (9/21/07)

► Defendant was charged with bank fraud based upon counterfeit checks that were deposited into his bank account. Defendant argued at trial that he did not know that the checks were counterfeit at the time they were deposited. Defendant was convicted and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: The court found sufficient evidence to believe that defendant knew that the checks were counterfeit. Defendant's knowledge could be inferred from the fact that he previously received checks from the same source that turned out to be counterfeit. Based on these prior checks, defendant did research on "Nigerian check schemes" and had decided not to accept any more checks from this source. Additionally, defendant was in dire financial trouble and had filed personal bankruptcy, thus demonstrating his desperate need for the money. Although the court called it a close case, the court found that the evidence supported defendant's knowledge and sustained the verdict.

• *18 USC § 1951 - Hobbs Act Conspiracy*
U.S. v. Brock, 05-6621 (9/6/07)

► Defendant was convicted of conspiracy to commit extortion under the Hobbs Act. At trial, the government proved that defendant's bail bonding business repeatedly bribed an employee of the clerk of court to remove bond forfeiture hearings from the state court's docket. Defendant argued on appeal that a § 1951 conspiracy could not be applied to the facts of his case.

★ Holding: The court held that defendant could be guilty of the § 1951 violation only if he conspired to obtain property from "another," with that person's consent, under "color of official right." The court found that the statute would only have applied in the circumstances of defendant's case if the clerk of court had extorted money from defendant. Instead, defendant bribed the clerk to remove cases from the docket. Thus, there was no property obtained from "another." The only money that changed hands was defendant's money, and he could not be guilty of conspiring to obtain his own money. The court accordingly ruled that the Hobbs Act simply did not fit the circumstances of the case. Further, the court held that, to the extent that the statute was

ambiguous, the rule of lenity required that it be construed in defendant's favor. Finally, the court noted that the principle of federalism supported its ruling. Congress specifically chose not to punish the giving of bribes to state officials, but instead left that matter to the states. Thus, the court found no reason to construe the Hobbs Act to cover such conduct. Accordingly, defendant's conviction was reversed.

• *18 USC 2252A-Prior Offense Enhancement*
U.S. v. McGrattan, 06-3043 (10/10/07)

► Defendant was convicted of child pornography and using a computer to induce a minor to engage in sexual activity. At sentencing, the district court determined that defendant had a prior state conviction for misdemeanor child pornography, under the Ohio Statute R.C. § 2907.323(A)(3). The district court concluded that the conviction qualified as a prior child pornography offense under § 2252A(b)(1), and accordingly increased the mandatory minimum penalty from 5 to 15 years. Defendant appealed.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the categorical approach (previously utilized under the ACCA and career offender guideline provision) applied to consideration of prior convictions in the context of § 2252A. Thus, defendant's state conviction could qualify as a prior child pornography offense if it satisfied the mandates of the Supreme Court's decisions in *Taylor/Shepard*. (See P.V., Issue #1). Utilizing this standard, the court held that the state offense did not qualify as a prior child pornography conviction, under § 2252A(b)(1), because the offense, as charged, did not necessarily involve the "lascivious exhibition of the genitals or public area." Further, the court held that the government's reliance on an affidavit, attached to a search warrant in the prior state case, to prove the facts supporting the enhancement was prohibited under

Shepard. Accordingly, defendant's sentence was vacated and the case remanded for resentencing.

- *Constructive Possession of a Firearm*
Parker v. Renico, 06-2419 (10/17/07)

- ▶ Defendant was charged in Michigan state court with conspiracy to commit murder, assault, and two counts involving the possession of a firearm. The charges were based upon a drive-up shooting incident where defendant was a back seat passenger in the get-away car. The police apprehended the occupants of the car after a high speed chase and accident, and a gun was found in close proximity to where defendant was sitting in the back seat. At trial, the jury acquitted defendant of all but the possession of firearm charges. Defendant lost his state court appeals, and then filed a federal *habeas* petition wherein he argued that no reasonable juror could have found beyond a reasonable doubt that he constructively possessed the firearm. The district court agreed and granted defendant's petition. The state appealed.

- ★ Holding: Under both Michigan and federal law, constructive possession of a firearm may not be proven by mere proximity to the firearm. The prosecution must also prove indicia of control on the part of the defendant, which means that defendant must have both the "power" and "intention" to exercise control over the gun. In the case, the court found that, although the gun was within defendant's view and in close proximity to him, the circumstances provided no indicia of control on defendant's part. Thus, the conviction was reversed.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2D1.1 (b) - Firearm Enhancement*
U.S. v. Ward, 06-5136 (10/23/07)

- ▶ Defendant was convicted of a substantive drug trafficking offense. At sentencing, the

district court applied a two-level enhancement to defendant's guideline range based upon a co-defendant's possession of a firearm during the drug transaction. Defendant argued on appeal that he could not be held responsible for a co-defendant's possession of firearm, pursuant to USSG § 2D1.1(b), where defendant was not charged with or convicted of a conspiracy.

- ★ Holding: Answering an open question in the Sixth Circuit, the Court held that a defendant need not be charged with a conspiracy in order to be held responsible for a co-defendant's firearm possession under § 2D1.1(b). The court reasoned that, pursuant to the relevant conduct rules of § 1B1.3, a defendant is liable for reasonably foreseeable actions of others if they are engaged in a jointly undertaken criminal activity, regardless of whether a conspiracy is charged. Accordingly, the court held that application of the two-level enhancement was proper and defendant's sentence was affirmed.

- *2G2.4(b) - Child Porn - Amount of Images*
U.S. v. Geerken, 06-3987 (10/22/07)

- ▶ Defendant was convicted in 2006 of possession of child pornography, but the offense occurred in 2003. At sentencing, the district court applied the 2003 guidelines in order to avoid *ex post facto* considerations. In determining defendant's sentence, however, the district court relied on an application note to USSG § 2G2.4 that was added in 2004. The note indicated that, for videos of child pornography, each video or movie counts as 75 images. Based upon this consideration, the court determined that defendant possessed more than 600 images and enhanced defendant's sentence accordingly. Defendant failed to object to the enhancement in the district court, but argued on appeal that use of the 2004 application note was improper.

- ★ Holding: According to USSG § 1B1.11(b)(2), where a district court applies an earlier version of a guideline manual, it must

apply that edition in its entirety. The only caveat to this rule is that a court may consider subsequent guideline amendments if they are clarifying, rather than substantive. In order to determine whether an amendment is clarifying, the court must consider (1) how the Sentencing Commission characterized the amendment, (2) whether the change is to a guideline or only the commentary, and (3) whether the amendment resolves ambiguity in the original wording of the guideline. In the case, the court held that the Commission characterized the 2004 amendment to the application note as “guidance” and “an instruction,” both terms indicating that the amendment was clarifying. Further, the court noted that the amendment was only to the commentary, and that it cleared up ambiguity in the 2003 version of the guideline which failed to define the term “images.” Thus, the court ruled that the 2004 amendment to the application note was clarifying, and accordingly found no plain error in the district court’s use of the amended version.

B. Chapter Three - Adjustments

• *3B1.1 - Leadership Enhancement*
U.S. v. Robinson, 06-5787 (9/26/07)

▸ Defendant was convicted for being involved in a marijuana and cocaine conspiracy. At sentencing, the district court determined that defendant was a manager or leader in the conspiracy and that it involved five or more participants. The court accordingly imposed a four-level enhancement pursuant to USSG § 3B1.1. Defendant appealed.

★ Holding: Under § 3B1.1, a defendant need not supervise five or more people in order to qualify for the four-level enhancement. The section requires only that defendant supervise one person in a criminal activity that involves five or more participants. In the case, the court held that the district court properly determined that defendant supervised one person, and that

the drug conspiracy involved at least five participants. Accordingly, the four point enhancement was affirmed.

• *3B1.1 - Leadership Enhancement*
U.S. v. Ward, 06-5136 (10/23/07)

▸ Defendant was convicted of drug trafficking and at sentencing the district court determined that defendant qualified for a two-level enhancement for being a leader or organizer. The enhancement was based upon the fact that defendant directed a codefendant to deliver crack cocaine for him on 20 separate occasions over the course of many years. Defendant appealed.

★ Holding: The court held that defendant obviously exercised a degree of control over the codefendant due to the length of time and number of occasions during which he delivered cocaine for defendant. Further, the court held that, even if application of the enhancement was error, the error was harmless because the district court indicated that it would have imposed the same sentence even if it concluded that the leadership enhancement was not proper. Accordingly, defendant’s sentence was affirmed.

C. Chapter Four - Criminal History

• *4A1.2(e)(2) - Applicable Time Period*
U.S. v. Brogdon, 06-5548 (9/27/07)

▸ Defendant was convicted of being a felon in possession of a firearm in 2005. During the presentence process, defendant admitted to possession the firearm in question since childhood, and that he possessed the gun at the time of his prior felony conviction in 1989. Based upon these admissions, the district court concluded that defendant began commission of the instant offense in 1989 when he possessed the gun after his felony conviction. Accordingly, the court determined, pursuant to USSG § 4A1.2(e)(2), that defendant’s convictions from before 1989 should count against his criminal history score. Defendant

appealed.

★ Holding: Under § 4A1.2(e)(2), prior offenses committed within ten years of the instant federal offense are countable against a defendant's criminal history. In determining when the instant federal offense began, the application notes indicate that relevant conduct, under § 1B1.3(a)(1), is to be considered. In the case, the court held that the district court properly determined that defendant's offense of being a felon in possession of a firearm began when he possessed the gun after his felony conviction in 1989. This conduct was relevant conduct to defendant's possession of the gun in 2005. Utilizing 1989 as the date the offense began, the court ruled that defendant's convictions from the 1980's were within the ten year applicable time period. Accordingly, the district court's guideline calculation was affirmed.

• *4B1.1 - Career Offender*

U.S. v. Ward, 06-5136 (10/23/07)

▶ Defendant was convicted of drug trafficking and at sentencing the district court determined that he was a career offender. This conclusion was based, in part, upon defendant's prior conviction for selling crack cocaine in 2002. Defendant argued that the prior conviction should not count as a qualifying offense for the career offender provision because it was "related" to the instant drug trafficking offense, pursuant to USSG § 4A1.2(a)(2). The district court rejected defendant's argument, and he appealed.

★ Holding: First, the court held that defendant's argument was a "common misconception" about the phrase "related cases." The court held that "related cases" in § 4A1.2(a)(2) refers only to the relationship between prior offenses, not the relationship between a prior offense and the instant offense. Second, the court held that, to the extent that defendant's argument could be construed to mean that his prior conviction for selling crack

from 2002 was not countable because it was a part of the instant offense under § 4A1.2(a)(1), the argument still failed. The court found that the prior crack sale occurred years before any of the overt acts listed in the indictment, and involved people that were not charged as co-conspirators in the indictment. Thus, the prior crack offense was a severable instance of unlawful conduct, and was properly considered a qualifying offense for the career offender provision.

III. Evidence

B. Articles VI-VII - Witness and Expert

• *607 - Attacking Credibility*

U.S. v. Ross, 05-4469 (9/21/07)

▶ Defendant was charged with two counts of bank fraud for depositing counterfeit checks into his bank account and withdrawing the funds. At trial, he testified regarding a personal bankruptcy that he filed and indicated that the counterfeits checks drove he and people he owed into bankruptcy. He also testified that he listed all of his personal creditors, including friends and family, on his bankruptcy petition. On cross examination, the government asked him about several creditors who were left off of his bankruptcy petition. Defendant objected to the line of questioning, claiming that it was evidence of prior bad acts, prohibited by FRE 404(b). The district court permitted the cross examination, defendant was convicted, and he appealed.

★ Holding: Pursuant to FRE 607, the credibility of a witness may be attacked by any party. The court held that defendant opened the door to the prosecutor's line of questioning by discussing the creditors listed in his bankruptcy petition. Thus, the cross examination was a proper attack on the credibility of defendant's testimony, pursuant to FRE 607. Thus, the district court's ruling was affirmed.

C. Article VIII - Hearsay

- *801 - Hearsay - Background Evidence*

U.S. v. Gibbs, 06-1916 (10/29/07)

► Defendant was charged with being a felon in possession of a firearm, based on a handgun that was found in his bedroom. At trial, the government introduced the testimony of a parole officer who indicated that a witness told him that defendant had “long guns, shotguns and/or rifles” hidden in his bedroom. The parole officer testified that this tip from the witness caused him to search defendant’s bedroom, thus finding the handgun. Defendant was convicted and argued on appeal that the parole officer’s testimony regarding the tip should have been excluded as hearsay, and as a violation of the Confrontation Clause.

★ Holding: The court held that the testimony of the parole officer as to the tip he received was offered only as background evidence to show the reason for his search of defendant’s bedroom. Thus, the testimony was not offered for the truth of the matter asserted, and it was accordingly not hearsay under FRE 801. Further, because the testimony was not offered for the truth of the matter asserted, the court ruled that it did not violate the Confrontation Clause. Finally, the court found that any error in admitting the testimony was harmless because the evidence against defendant was otherwise compelling. Accordingly, defendant’s conviction was affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Border Searches/Reasonable Suspicion*

U.S. v. McGinnis, 06-5782 (9/7/07)

► Defendant and her codefendant, U.S. contractors returning from Iraq and Kuwait, arrived in Memphis on a flight from Amsterdam. Customs officials let defendant through the checkpoint, but arrested a codefendant for smuggling in excess of \$10,000 without declaring it. The codefendant requested that the customs officials give his

luggage to defendant, so they found her in the airport. Upon being told that the codefendant was arrested, defendant appeared nervous, flush, and sweaty. Defendant told the officials that she thought that she would be taxed on money in excess of \$10,000 if she reported it. Defendant’s luggage was subsequently searched and found to contain \$17,358. Defendant was charged with smuggling bulk money into the U.S. and moved to suppress the money. The district court granted the motion and the government appealed.

★ Holding: Applying for the first time in the Sixth Circuit what is known as the “extended border search doctrine,” the court held that an extended border search may reasonably be based upon consideration of three circumstances: (1) did the defendant cross the border; (2) did agents stop the individual and her luggage soon enough after crossing as to be reasonably confident that the conditions of her and her luggage did not change after crossing; and (3) does reasonable suspicion support the search. First, the court held that defendant definitely crossed the border and that she was stopped sufficiently quickly thereafter. Further, the court found that reasonable suspicion supported the search based upon the facts that defendant’s traveling companion was arrested, they were contractors returning from Kuwait and Iraq, defendant was clearly nervous, and defendant admitted that she thought she would be taxed if she reported in excess of \$10,000. Accordingly, the district court’s ruling was reversed.

- *Reasonable Suspicion*

U.S. v. Wilson, 06-6339 (10/29/07)

► Defendant was a passenger in a car that was stopped by police because of a seatbelt violation. The officers learned that neither the driver nor defendant owned the car, that the driver’s license was issued from another state, and that they had no registration or insurance on the vehicle. Both the driver and defendant

were extremely nervous, and the driver indicated that he had served jail time on a gun charge. Finally, the driver was on his cell phone during the stop and the officers overheard him tell defendant, "They're coming." Based upon this information, the officers requested and were granted permission to search the car by the driver. Upon getting defendant out of the vehicle, the officers started to pat him down, and a bag of cocaine fell from his pants. Defendant was subsequently charged and he moved to suppress the cocaine based upon a lack of reasonable suspicion to conduct a frisk. The district court granted the motion and the government appealed.

★ Holding: Officers may conduct a frisk for weapons if a reasonably prudent officer would believe that the suspect is armed and dangerous such that the safety of the officers or others is in danger. In the case, the court found the totality of the circumstances did not support a reasonable suspicion that defendant was armed and dangerous. First, the words and actions of the driver, while suspicious, did not alone justify a search of defendant, the passenger. Second, the fact that defendant did not own the vehicle did nothing to increase the suspicion about him. Third, the court ruled that defendant's extreme nervousness was not uncommon in individuals stopped for a traffic violation and was not enough to tip the scales in favor a reasonable suspicion that defendant was armed and dangerous. Accordingly, the district court's ruling suppressing the evidence was affirmed.

E. Search Warrants

• *Search Warrants - Probable Cause*
U.S. v. Kenny, 05-2195 (10/10/07)

► Officers executed a search warrant and located a meth lab in a pole barn. Defendant was also found in the pole barn. Further, the officers had information from an informant that defendant was associated with the informant's meth supplier. Based upon this information,

officers obtained a search warrant for defendant's residence. Upon execution of the search warrant, officers found firearms and meth paraphernalia. Defendant was charged with being a felon in possession of a firearm and moved to suppress the guns found in the search of his residence. The district court denied the motion and defendant appealed.

★ Holding: The court held that the warrant to search defendant's residence was supported by probable cause to believe that evidence of a crime would be found. The court ruled that the fact that defendant was present and apparently in charge at a meth lab upon his arrest, combined with the fact that an informant indicated that defendant was associated with a meth supplier, provided sufficient information for the officers to believe that defendant was a manufacturer of meth. Given this conclusion, it was reasonable to believe that defendant's residence would contain evidence relating to the manufacture of meth. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

• *Prosecutorial Misconduct*

Girts v. Yanai, 05-4023 (9/5/07)

► Defendant was charged with murdering his wife. Defendant did not testify at trial, and during closing arguments the prosecutor commented on three separate occasions about defendant's failure to testify or present evidence. Defendant's trial counsel failed to object to the prosecutor's comments. Defendant was convicted and lost his state court appeals. Defendant filed a federal *habeas* petition claiming that the prosecutor's comments violated his Fifth Amendment rights and that his attorney was ineffective for failing to object to the comments. The district court denied the petition and defendant appealed.

★ Holding: In order to prove prosecutorial misconduct, a defendant must first show that the comments were improper. Second, the

defendant must prove that the remarks were sufficiently flagrant to warrant reversal, considering the following four factors: (1) whether they misled the jury or prejudiced defendant; (2) whether they were isolated or extensive; (3) whether they were deliberate or accidental; and (4) whether the evidence against the defendant was strong. In the case, the court found that the prosecutor's comments were both prejudicial and misleading to the jury about defendant's right to remain silent, that the comments were not isolated, that they were deliberately made, and that the evidence against defendant was not overwhelming. Accordingly, defendant's conviction was reversed.

- *Prosecutorial Misconduct*

U.S. v. Roach, 06-6266 (9/11/07)

- ▶ Defendant was a police officer charged with violating two Hispanic men's civil rights. During trial, evidence was adduced that the first person to ask the victims about their cellular phone was the defense investigator. The prosecutor argued in closing that the only way the defense investigator could have known about the victims having a cell phone was if the defendant told him. Further, the prosecutor commented that the Ten Commandments do not say only that "thou shalt not steal from white people." Defendant was convicted and appealed.

- ★ Holding: Applying the circuit law on prosecutorial misconduct, the court found that neither of the prosecutor's comments warranted reversal of the conviction. Specifically, the court ruled that the statements about the cellular phone were a reasonable inference based upon the evidence and thus were not improper. Further, the court found that the statements did not impinge on defendant's Fifth Amendment right not to testify. Additionally, the court held that the racial comment about the Ten Commandments was properly made in response to improper racial

comments by the defense. The court ruled that the defense attorney's closing argument, which suggested that Hispanics "know how to work the system," was part of a pattern of "racial baiting," and that the prosecutor's comment was simply a response to the defense's inappropriate statement. Thus, defendant's conviction was affirmed.

- *Prosecutorial Vindictiveness*

U.S. v. Roach, 06-6266 (9/11/07)

- ▶ Defendant was a police officer charged with conspiracy and violation of a person's civil rights. The first trial ended in a mistrial and the government then obtained a superceding indictment, adding a charge of being an accessory after the fact. Defendant moved to dismiss the charge, claiming prosecutorial vindictiveness. The district court denied the motion, defendant was convicted, and he appealed.

- ★ Holding: Prosecutorial vindictiveness may be evidenced by "actual" vindictiveness or by a "realistic likelihood" of vindictiveness. Actual vindictiveness is shown by objective evidence that a prosecutor punished a defendant based on an exercise of the defendant's legal rights. The "realistic likelihood" of vindictiveness standard considers the prosecutor's stake in deterring a protected right and the reasonableness of the prosecutor's actions. In the case, the court held that the following factors showed a lack of vindictiveness: (1) the government claimed that it made a "reasoned re-evaluation of the evidence" after the first trial; (2) the accessory after the fact charge was a less severe charge than the others in the indictment; (3) the grand jury found probable cause for the new charge; and (4) the evidence presented at trial supported the new charge. Accordingly, the conviction was affirmed.

C. Confessions and Testimonial Rights

- *Miranda - Knowing Waiver of Rights*

Garner v. Mitchell, 02-3552 (9/11/07)

► Police officers executed a search warrant at defendant's residence based upon an investigation for murder, arson, and burglary. Defendant was arrested and read his *Miranda* rights. Defendant acknowledged an understanding of his rights, and then fully confessed to the offenses. Upon being charged in state court, defendant moved to suppress the statements upon the grounds that he had not knowingly and intelligently waived his *Miranda* rights. The state court denied the motion, defendant was convicted, and he lost his state court appeal. During post-conviction proceedings, defendant obtained a doctor's report that indicated that defendant did not have the mental capacity to understand *Miranda* warnings. Defendant filed a federal *habeas* petition, the district court denied the petition, and defendant appealed.

★ Holding: A two-judge majority held that defendant had not knowingly and intelligently waived his *Miranda* rights. The court held that the "unrebutted" testimony of the doctor indicated that defendant did not understand his *Miranda* warnings due to his limited intellectual functioning. The court found the doctor's testing to be valid even though (1) it had occurred almost seven years after his confession, (2) it did not test defendant based on the same language as the actual *Miranda* waiver read to defendant, (3) it contradicted portions of other doctors' reports regarding defendant, and (4) defendant affirmatively stated that he understood his rights at the time of his confession. Further, the prosecution failed to raise whether the error was harmless, so the court refused to consider the issue. Accordingly, the court ruled that defendant's confession should have been suppressed, and his conviction was reversed.

E. Miscellaneous Fifth Amendment

- *Due Process - Judicial Bias*

U.S. v. Roach, 06-6266 (9/11/07)

► Defendant was a police officer charged, along with his partner, with violating a defendant's civil rights during a traffic stop. Defendant's argument at trial was that he was not involved in the stop at all, but that it was potentially another officer. During cross examination of the police chief, defendant's counsel questioned him about the department's shift log at the time of the traffic stop. In response to questions from the district court, the chief testified that the "other" officer referenced by the defense was driving in a car that did not match the description given by the victim and that the officer had no partner with him at the time. During the next break, defendant's counsel objected at side bar to the district court's questions. Defendant was convicted and he appealed.

★ Holding: In evaluating a claim of judicial bias, the court considers three factors: (1) the nature of the issues, including length of trial and complexity, to determine if judicial intervention was needed to clarify what was going on; (2) the conduct of counsel for lack of preparation or obstreperousness; and (3) the conduct of witnesses. In the case, the court held that the district court's questions were brief, that they revealed no bias, that the court did not express its opinion, and that the questions clarified issues about which the witness gave conflicting answers. Thus, the court found no error in the district court's questioning of the witness.

- *Due Process - Judicial Bias/Fair Trial*

U.S. v. Powers, 06-1684 (9/12/07)

► Defendant was charged with drug trafficking. At trial, the district court interrupted defense counsel twenty-six times during cross examination, largely for the purpose of getting the defense to stop asking repetitive and irrelevant questions. Defendant

was convicted and he argued on appeal that the district court had violated his right to fair trial through its constant interruptions of his cross examination.

★ Holding: In considering whether a district court's interference with a trial constitutes a violation of a defendant's right to a fair trial, the court must consider the following: (1) the length and complexity of the trial; (2) whether counsel are "unprepared or obstreperous" such that the facts are muddled; and (3) the conduct of the witnesses. In dealing with problems during the trial, the district court must always "act in a neutral, unbiased demeanor." In the case, the court stated repeatedly that the district court's conduct during the trial was "less than ideal," "not the model of decorum," and "not exemplary." Nonetheless, the court ruled that the district court's interruptions fell within the range of reasonable judicial intervention where defendant's counsel had asked a wide variety of irrelevant and repetitive questions. Further, the court found that the district court had not exhibited judicial bias toward defendant's counsel because the court had displayed equal impatience with both the defense and the government, and had given a proper jury instruction that his comments should not affect the verdict. Thus, defendant's conviction was affirmed.

• *Due Process-Sentencing-Confidential Info.*
Stewart v. Erwin, 05-4635 (10/9/07)

► Defendant was convicted in state court of two counts of sexual battery. At sentencing, the state court considered victim impact statements that were not shared with defendant. Defendant argued on his state appeal that he was denied due process by the court's refusal to provide him with the victim impact statements. Upon losing his state court appeal, defendant filed a federal *habeas* petition. The district court denied defendant's petition, but ordered that the state court produce the victim impact statements under seal for federal court review.

The state court refused to produce the statements. Defendant appealed the denial of his petition.

★ Holding: In a *habeas* petition, the federal court may only reverse a state court ruling if it is contrary to clearly established federal law constitutional law. In the case, the court first held that no federal appeals court had ever held that the Due Process Clause requires that all materials relied upon by a trial court in sentencing a defendant be turned over to the defendant. The only Supreme Court precedent on the subject requires the production of derogatory sentencing information relied upon by the trial judge where such information was shown to be materially false. While the court found defendant's argument for a broader due process requirement appealing, the court was constrained, in the context of *habeas* review, to determine that no clearly established federal case law required such a broad interpretation.

Second, the court held that the state court's failure to produce, under seal, the documents in question, left the court unable to effectively review defendant's additional claim that the state court may have relied on materially false information. Defendant pointed to facts utilized by the state court at sentencing, such as the number of victims and the length of defendant's activities, that were not supported by the documents that were disclosed by the state court during *habeas* review. Thus, the court concluded that there was at least a possibility that the state court relied on false information, in violation of Supreme Court precedent. Accordingly, the court remanded the case to the district court with instructions to grant the *habeas* petition unless the state court produced the ordered victim impact statements within 45 days.

VI. Sixth Amendment

A. Right to Jury Trial/*Booker*

• *Booker - Acquitted Conduct*

U.S. v. White, 05-6596 (10/5/07)

► At sentencing, defendant received a 14-year upward adjustment to his sentencing guideline range based upon conduct upon which defendant was acquitted after trial. Defendant appealed.

★ Holding: In a brief *per curiam* opinion, the court held that it was bound to follow the recent decision *U.S. v. Mendez* (See P.V., Issue #15) which ruled that acquitted conduct may be the basis for guideline increases after *Booker*. Thus, defendant's sentence was affirmed. The court, however, strongly urged defendant to request rehearing *en banc* regarding the issue.

B. Confrontation Clause

• *Confrontation Clause*

U.S. v. Hearn, 06-5854 (9/11/07)

► Defendant was charged with drug trafficking and possessing a firearm in relation to drug trafficking. At trial, the government introduced the hearsay statements of a confidential informant which indicated that defendant possessed the narcotics in question and that he intended to distribute them at a party. The prosecutor claimed that the statements were introduced for the non-hearsay purpose of showing the reasons for the police officer's subsequent actions. The district court admitted the evidence, defendant was convicted, and he appealed.

★ Holding: The court held that the introduction of the confidential informant's statements violated defendant's Sixth Amendment right to confrontation. An informant's hearsay statements may be admitted as "background evidence" without violating the Confrontation Clause, however, the court found that the government exceeded the bounds of permissible background evidence based on the following: (1) the repeated nature of the questioning regarding the

statements, (2) the "excessive" detail provided by the witness, and (3) the prosecutor's reference to the hearsay statements in closing. Further, the court ruled that the error was not harmless because of the lack of other proof against defendant regarding the intent to distribute. Accordingly, defendant's conviction was reversed and the case remanded for a new trial.

• *Confrontation Clause*

U.S. v. Powers, 06-1684 (9/12/07)

► Defendant was charged with drug trafficking. At trial, the government introduced, through the testimony of police officers, the hearsay statements of a confidential informant. The hearsay testimony established three points: (1) the informant knew that defendant was a major cocaine supplier; (2) the informant's identification of defendant's vehicle during a controlled drug purchase; and (3) the informant's identification of defendant himself during the drug transaction. The district court admitted all of the hearsay testimony and defendant appealed.

★ Holding: The court held that the admission of the hearsay evidence violated defendant's rights under the Confrontation Clause. First, the information about defendant being a major drug supplier was not properly considered "background evidence" that was offered only to show proper context for the undercover sting operation by the police. The court emphasized that the government could have merely offered evidence to show that the police set up a sting operation in which the informant was to purchase narcotics from defendant. The additional information that defendant was a major cocaine supplier crossed the line of "background evidence," and was instead improper testimonial hearsay.

Regarding the informant's identification of defendant's vehicle and defendant, the court ruled that such testimony was likewise improper. Pursuant to the

Supreme Court's decision in *Davis* (See P.V., Issue # 8), hearsay evidence is testimonial if the statements were made primarily for an investigative purpose. Because the identification of defendant and his vehicle was primarily investigative, the statements were testimonial hearsay, and violative of the Sixth Amendment. Therefore, all three pieces of hearsay evidence were admitted in violation of the Confrontation Clause. Nonetheless, the court held that the evidence of defendant's guilt was overwhelming and the admission of the hearsay evidence constituted harmless error. Accordingly, defendant's conviction was affirmed.

D. Right to Counsel/Self Representation

• Right to Counsel

Daniels v. Lafler, 05-1846 (9/5/07)

► Defendant and three others were charged in state court with murder for burning down a house, thus killing three people. At a pretrial motion hearing, defendant's appointed attorney appeared, but had not timely filed an intended motion to suppress evidence. None of the codefendants' attorneys appeared for the hearing. The trial judge decided to remove all four attorneys from the case, and appoint attorneys who could be ready to try the case on the court's schedule. Defendant's subsequently appointed attorney pursued four motions in defendant's behalf and represented him at trial. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition claiming that his Sixth Amendment right to counsel was violated. The district court denied the petition and defendant appealed.

★ Holding: The Sixth Amendment provides two essential rights regarding attorney representation: the right to effective counsel, and the right to choose one's own counsel. In the case, defendant did not claim any prejudice as a result of the replacement of his first attorney, therefore his right to effective counsel was not implicated. Regarding the right to

choose one's attorney, the court held that such a right applies only to privately retained counsel, not to appointed counsel. Thus, defendant could not challenge the replacement of his court appointed attorney unless he could show that the new attorney provided ineffective representation. Accordingly, defendant's conviction was affirmed.

• Right to Counsel

U.S. v. Brock, 05-6621 (9/6/07)

► Defendant was charged with a Hobbs Act conspiracy and illegally distributing information about an incendiary device. Prior to trial, the government notified the court that defendant's retained counsel represented both defendant and a codefendant, and that the government suspected that one of the two may desire to plead guilty and testify against the other. In spite of defendant and the codefendant both indicating that they were aware of no conflict and that they waived any conflict that existed, the district court disqualified counsel from representing defendant and the codefendant. Defendant was convicted after trial, and argued on appeal that his Sixth Amendment right to counsel of his own choosing had been violated.

★ Holding: The court held that a defendant's right to counsel of his own choosing is limited by Fed. R. Crim. P. 44(c)(2), which provides "substantial latitude" to the district court in determining whether a conflict of interest warrants separate counsel for codefendants. The court found that the district court did not abuse its latitude under Rule 44 in determining that a conflict of interest existed where the attorney was representing codefendants charged with conspiring in a common scheme. Further, the court held that defendant's waiver of the conflict may not have been knowing and intelligent because defendant indicated that he was not aware of any conflict, actual or potential, in his attorney's representation of he and the codefendant. This disregard for the

potential conflict may have shown a complete lack of understanding by defendant of the dangers posed by joint representation, and thus he could not knowingly waive the conflict. Thus, the disqualification of counsel was affirmed.

E. Indictment - Variance/Duplicity

• Indictment - Variance

U.S. v. Hughes, 06-3024 (10/26/07)

► Defendants (wife and husband) were charged with numerous counts involving a conspiracy to commit insider trading of stock in a small company that was being purchased by Kelloggs. The indictment alleged that a tipster provided insider information about the buyout to several individuals, who then bought stock in the company and subsequently sold it for a substantial profit. Upon their conviction after trial, defendants appealed and argued that a fatal variance occurred between the indictment, which alleged one conspiracy, and the proof at trial, which showed several conspiracies.

★ Holding: In order to obtain a reversal based upon a variance between the indictment and proof at trial, the defendant must show that the variance affected a substantial right. To make this showing, the defendant must prove that the variance prejudiced her ability to defend herself, or prejudiced the overall fairness of the trial. In assessing whether the evidence proved multiple conspiracies, a court must consider the existence of a common goal, the nature of the scheme, and the overlapping participants. In the case, the court first held that a variance existed between the indictment and the proof at trial. The indictment alleged a single conspiracy between the tipster, defendants, and the various other individuals who bought and sold the stock. At trial, however, the government did not present evidence to establish any sort of agreement between defendants and the other stock traders; to the contrary, defendants had no idea the

others were also trading the stock. Thus, the indictment alleged a single conspiracy, but the evidence proved multiple conspiracies.

Nonetheless, the court held that defendants suffered no substantial prejudice. In a multiple conspiracy case, the court must consider three factors in determining whether the defendant was prejudiced: (1) the number of conspiracies involved; (2) the number of non-conspirator co-defendant's tried with the defendant; and (3) the size of the conspiracy alleged in the indictment. Considering the factors, the court ruled that defendants were not unduly prejudiced by the variance. Further, the court held that the district court provided adequate jury instructions to protect defendants from "guilt transference." Accordingly, defendants convictions were affirmed.

F. Miscellaneous Sixth Amendment

• Right to Present Witnesses/Defense

Ferensic v. Birkett

► Defendant was charged in state court with armed robbery and home invasion. At trial, the only testimonial evidence of defendant's guilt came from the two elderly eyewitnesses/homeowners. Defendant proposed to offer the testimony of an expert on eyewitness identification, and an eyewitness who had seen the robber before he entered the home. The trial court excluded the defense expert because the defense failed to provide the expert's report to the prosecution two months before trial, as required by the court's pretrial order. Instead, defendant provided the report 11 days before trial (the same day the defense received the report). Further, the trial court excluded defendant's eyewitness testimony because the witness was not present at the time set for the defense case-in-chief. Defendant was convicted and lost his state court appeal. Defendant filed a federal *habeas* petition, and claimed that his Sixth Amendment right to present witnesses had been abridged. The district court granted the petition, and the state

appealed.

★ Holding: The exclusion of a defense witness by a trial court violates a defendant's Sixth Amendment right to present witnesses only where the exclusion is "arbitrary" or "disproportionate to the purpose it is designed to serve." In the case, the court held that the exclusion of defendant's two witnesses was disproportionate to any legitimate interest. In regard to the expert, the reason for excluding the evidence was the failure to comply with the pretrial order and the potential prejudice to the state. The court held, however, that the state never even alleged that it would suffer prejudice by the belated notice. Regarding the eyewitness, the only reason for excluding the evidence was because the witness was late and it would delay the trial. The defense, however, only requested a 30 minute delay to obtain the witness' presence. Under these circumstances, the court found that the exclusion of the witnesses was disproportionate to the interests being served. Further, the court found that exclusion of the two witnesses was not harmless error. Accordingly, the district court ruling granting the writ was affirmed.

• *Right to Present Witnesses*

U.S. v. Roach, 06-6266 (9/11/07)

▶ Defendant was a police officer charged with violating the civil rights of a Hispanic man. The defense identified a witness who would testify that defendant was at another location at the time of the offense. Shortly before trial, the prosecutor learned that the witness had a prior federal felony conviction and that the state had nonetheless issued him a gun license. The prosecutor sent a letter to the state agency notifying it of the witness' prior conviction, and the state revoked defendant's license. The government notified the witness that it would not prosecute him for possessing any firearm before revocation of the permit. Defendant moved to dismiss the indictment based upon witness intimidation by the

government, and submitted an affidavit from the witness which indicated that he feared prosecution if he testified. The district court denied the motion. Defendant proceeded to trial and the defense chose not to call the witness. Defendant was convicted and he appealed.

★ Holding: The Sixth Amendment protects a defendant's right to present witnesses at trial, and such right may be violated by actions of the government that wrongfully discourage a witness from testifying. In the case, although the court found the timing of the government's actions in notifying the state authorities to be questionable, the court ultimately concluded that the witness' failure to testify was not caused by government misconduct. The government told the witness that it would not prosecute him for his possession of the firearm prior to revocation of the permit, and the defense chose not to call the witness during trial. Accordingly, the conviction was affirmed.

VII. Other Constitutional Rulings

C. First Amendment

• *Religion Clause*

Varner v. Stovall, 06-1255 (9/11/07)

▶ Defendant was charged in state court with assault with intent to commit murder for hiring someone to kill her boyfriend. At trial, the government introduced journal entries that contained defendant's prayers to God, wherein she also confessed to the crime. Defendant was convicted and lost her state court appeal. Defendant then filed a federal *habeas* petition and claimed that the Michigan law on the clergy-penitent privilege violated her rights under the Religion Clause. Defendant argued that, by protecting only statements made to clergy, the law discriminated against religions who do not use an intermediary to communicate with God. The district court denied the petition and defendant appealed.

★ Holding: First, the court held that the

underlying purpose for the clergy-penitent is to protect against a party subpoenaing the clergy to court to testify as to the content of the communication. This consideration was not implicated with a direct communication to God, who may never be subpoenaed. Further, the court ruled that the privilege did not favor certain religions over others because it does not protect journal entries from practitioners of any faith. Similarly, the privilege did not restrict defendant's ability to practice her faith because journal entries were not the only way she could effectively communicate with God. Accordingly, the court found no First Amendment violation and defendant's conviction was affirmed.

VIII. Defenses

L. Miscellaneous Defenses

- *Extradition Treaty*

U.S. v. Robinson, 06-5787 (9/26/07)

► Defendant was convicted for participating in a drug conspiracy and for a firearms offense. Prior to sentencing, defendant fled to Brazil. Defendant was sentenced *in absentia* and subsequently extradited from Brazil to serve his sentence. Defendant's sentence was subsequently vacated on appeal and at resentencing, defendant challenged application of an enhancement for obstruction of justice. The enhancement was based upon defendant's flight to Brazil. Defendant argued that the terms of his extradition from Brazil included only the drug conviction, and that applying a sentencing enhancement his flight amounted to punishment for an escape, which was outside the terms of the extradition. The district court rejected defendant's argument, and he appealed.

★ Holding: The court held that imposition of an obstruction of justice enhancement did not constitute "punishment" for another offense, which would contravene the extradition treaty with Brazil. Accordingly, the court affirmed the imposition of the enhancement.

IX. Plea & Sentencing Hearings

B. Sentencing

- *Rule 32 - Disputed Factual Findings*

U.S. v. Ross, 05-4469 (9/21/07)

► Defendant was convicted after trial of two counts of bank fraud based upon two counterfeit checks that were deposited into defendant's account. At sentencing, the presentence investigation report (PSR) recommended an intended loss amount of \$634,300, which represented a large portion of the value of the counterfeit checks. Defendant objected to the loss amount, and countered that the loss should be zero. The district court adopted the loss amount stated in the PSR and mentioned that it was supported by the jury verdict. Defendant appealed.

★ Holding: Pursuant to Fed. R. Crim. P. 32(I), a district court must make factual findings concerning any controverted matter at sentencing where it could potentially impact a defendant's sentence. The rule requires the court to "actually find facts," and it must do so by a preponderance of the evidence. In the case, the court found that the district court failed to make any factual findings and simply embraced the figure provided in the PSR. Accordingly, the district court failed to comply with Rule 32 and the case was remanded for resentencing.

- *Rule 32 - Disputed Factual Findings*

U.S. v. Geerken, 06-3987 (10/22/07)

► Defendant was convicted of possession of child pornography. During the presentence process, the probation officer viewed some of the child pornography and recommended enhancements for sadistic or masochistic conduct, and for depictions of minors under 12. Defendant argued that the enhancements should not apply. In response, the district court reviewed some of the child pornography images and concluded that the enhancements were appropriate. Defendant appealed and argued that the district court's factual findings

were arbitrary.

★ Holding: Ordinarily, when a defendant fails to produce any evidence to contradict the facts set forth in the presentence report, a district court may rely on those facts at sentencing. In the case, the court found that defendant “produced no evidence” to challenge the presentence report. Further, the district court independently reviewed the images itself and determined that a factual basis for the enhancements existed. Further, the images were sealed for appellate review, and defendant had not submitted copies of the images to the court on appeal. Thus, the court found no clear error and affirmed the sentence.

• *Sentencing - Rule 16 Discovery*
U.S. v. Robinson, 06-5787 (9/26/07)

▶ Defendant was convicted of participating in a drug conspiracy. At sentencing, defendant argued that his sentence should be reduced based upon the fact that his codefendants received lower sentences. In this regard, defendant filed motions requesting the district court to order the government to produce the codefendants’ presentence reports and other documentation to support his claim. The district court denied the motions and defendant appealed.

★ Holding: First, the court noted that 18 USC § 3553(a)(6), regarding uniformity in sentences, requires only that the district court consider national uniformity in sentences, not the sentences of codefendants. Nonetheless, a district court may choose to consider the sentences of codefendants in fashioning an appropriate sentence. Second, the court held that Fed. R. Crim. P. 16 did not require production of the discovery requested by defendant. Instead, Rule 16 permits discovery from the government of materials that permit a “defendant’s response to the government’s case in chief.” Finally, the court found that Fed. R. Crim. P. 32 did not require production of the discovery. Rule 32 requires the district court,

not the government, to produce to the defense any information that is not in the presentence report upon which the district court relies in fashioning the sentence. Thus, the district court’s ruling was affirmed.

X. Jury Issues

A. Jury Instructions

• *Deliberate Ignorance*

U.S. v. Ross, 05-4469 (9/21/07)

▶ Defendant was charged with two counts of bank fraud. During trial, the district court provided a deliberate ignorance instruction to the jury in reference to the second bank fraud count. The evidence adduced at trial relating to the count showed that a \$700,000 counterfeit check was deposited into defendant’s bank account after defendant had received several other counterfeit checks from the same source. Defendant was convicted and he appealed.

★ Holding: A jury instruction must correctly state the law and be supported by the evidence. Even if the instruction is not supported by the evidence, the court will not reverse the conviction if there was evidence introduced that supported a conviction on another theory. In the case, the court first held that instruction given by the district court correctly stated the law because it directly tracked the pattern Sixth Circuit deliberate ignorance instruction. Further, the court held that the evidence did support the instruction. The evidence at trial established that defendant should have known from his prior dealings with the check suppliers that the check was likely counterfeit. Accordingly, the instruction was proper and the conviction was affirmed.

XI. Probation & Supervised Release

• *Reasonableness of Sentence*

U.S. v. Brown, 06-2249 (9/4/07)

▶ Defendant was found guilty of his third probation violation before the district court and the court calculated his sentencing guideline range to be 8-14 months. The court revoked

defendant's supervised release and sentenced him to serve 24 months in prison. Defendant appealed.

★ Holding: The court noted that it is an open question in the Sixth Circuit as to whether the "plainly unreasonable" standard or the *Booker* "reasonableness" standard applies to review of violations of supervised release. The court decided not to answer the question because defendant failed under either standard. First, the court found that the sentence was procedurally reasonable. The district court adequately considered both the sentencing guidelines and the factors under 18 USC § 3553(a). Further, the court ruled that the sentence ten months above the guideline range was substantively reasonable based upon defendant's history and the fact that it was his third supervised release violation. Accordingly, the sentence was affirmed.

• *Conditions of Supervised Release*
U.S. v. Lee, 06-5848 (9/13/07)

▶ Defendant was convicted of traveling across state lines to have sex with a minor. At sentencing, the district court imposed a sentence of 188 months in prison, and lifetime supervised release. As a condition of supervised release, the probation department was given the discretion to require defendant to submit to "penile plethysmograph testing." Defendant appealed the imposition of this condition.

★ Holding: Although ordinarily conditions of supervised release may be challenged on direct appeal, the court held that the "penile plethysmograph testing" was not ripe for review. First, the court found that the supervised release condition was discretionary, and thus, defendant may never be subjected to the condition. Second, the court noted that defendant would be in prison for 15 years. Given the questionable scientific validity of "penile plethysmograph testing," the court held that such testing may not be accepted at the

time defendant was released from prison. Accordingly, the court dismissed the appeal without prejudice, holding that defendant may file a motion to amend his supervised release conditions if he ever were subjected to the testing.

• *Conditions of Supervised Release*
U.S. v. Brogdon, 06-5548 (9/27/07)

▶ Defendant was convicted of being a felon in possession of a firearm. At sentencing, based upon defendant's seven prior sex offense convictions, the district court imposed conditions of release that included participation in a sex offender program, a prohibition on possessing pornography, a no-contact order with children, and an order not to loiter or live near places frequented by children. Defendant appealed.

★ Holding: In assessing the reasonableness of special conditions of supervised release, the court must consider the following: (1) whether the district court adequately stated its rationale for the special conditions; and (2) whether the special condition is reasonably related to the dual goals of rehabilitation of the defendant and the protection of the public. If the district court fails to adequately state its reasons for the condition, the error may be deemed harmless if sufficient supporting reasons are evident from the overall record. In the case, the court held that the district court had not sufficiently justified the special conditions on the record, but that the record nonetheless justified the conditions. Although defendant's most recent conviction for a sex offense was twelve years prior, the quantity of sex offenses (7) and the seriousness of some of them (involving minors and multiple victims) led the court to conclude that the special conditions of supervised release were reasonable. Thus, defendant's sentence was affirmed.

XII. Appeal

C. Reasonableness of Sentence

• Reasonableness of Sentence

U.S. v. Brock, 05-6621 (9/6/07)

▶ Defendant was convicted of illegally distributing information about an incendiary device. At sentencing, the district court calculated defendant's guideline range to be 27-33 months. The district court imposed an upward variance from the guideline range and sentenced defendant to 48 months in prison. Defendant appealed.

★ Holding: First, the court found that the sentence was procedurally reasonable. Defendant failed to object to the district court's consideration of the factors under 18 USC § 3553, and the court found no plain error in their application. Second, the court held that the sentence was substantively reasonable. The court noted that defendant made statements that he was a "criminal," that he had broken a lot of laws, that he admitted to committing arson in the past, and that he attempted to bribe a state official. Accordingly, the court found that a 45% upward variance, which was substantially lower than the 240 month statutory maximum, was reasonable under the circumstances.

• Reasonableness of Sentence

U.S. v. Fink, 06-3436 (9/7/07)

▶ Defendant was convicted of distribution of child pornography and at sentencing the district court calculated his guideline range to be 188-235 months. Applying the factors under 18 USC § 3553, the district court determined that an appropriate sentence was 70 months based upon (1) the fact that defendant did not intend to engage in sexual contact with minors, (2) the fact that defendant was himself molested as a child, and (3) the court's consideration of other similarly situated defendants who received substantially lower sentences. The government appealed.

★ Holding: In reviewing the substantive reasonableness of a downward variance from

the guideline range, the court must apply a form of proportionality review: the greater the departure, the more compelling the justification must be. First, the court found unpersuasive the fact that defendant had not intended to offend against minors because, if he had, he would have been charged with a more serious offense. Second, the court ruled that, although the district court considered that defendant was a prior sex abuse victim, it failed to consider the fact that defendant had previously sexually abused his own daughter. Third, the court held that the other "similarly situated" defendants considered by the district court were either charged with a different offense than defendant, or were sentenced before the passage of the Protect Act, which substantially increased a defendant's jail time exposure for child pornography offenses. Finally, the court held that the 70 month sentence was roughly one-third the recommended guideline sentence and was only ten months above the statutory mandatory minimum. The court found that defendant's case did not warrant a sentence near the mandatory minimum, which should be reserved for the least culpable of defendants. Thus, the case was remanded for resentencing.

• Reasonableness of Sentence

U.S. v. Hairston, 06-4072 (9/10/07)

▶ Defendant was convicted of distributing 38.6 grams of crack, and was at the time, on supervised release for a prior drug offense. The district court calculated defendant's guideline range to be 121-151 months in prison. Primarily relying on defendant's substantial rehabilitative efforts prior to sentencing, the court granted a downward variance in defendant's sentence to 60 months incarceration, the statutory minimum sentence. The government appealed.

★ Holding: The court analyzed prior circuit case law both affirming and vacating substantial downward variances, and concluded that defendant's sentence was reasonable.

Specifically, the court reasoned that the below-guideline sentence was justified by the significant efforts defendant made prior to sentencing to change his life and abandon his drug lifestyle. The court found unpersuasive the government's arguments that the sentence imposed was lower than a defendant would receive under the guidelines if he had no prior criminal record, and that the sentence at the statutory minimum left no room for future panels to provide a lower sentence for more deserving defendants convicted of the same offense. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Baker, 05-6874 (9/17/07)

► Defendant was convicted of possessing an unregistered firearm with a barrel length of less than eighteen inches. Defendant's guideline range for the offense was 27 to 33 months, but the district court imposed a sentence of 5 years probation, with one year of house arrest. The government appealed.

★ Holding: The court held that the sentence was both procedurally and substantively reasonable. Regarding procedural reasonableness, the court found that the district court adequately expressed its consideration of the factors under 18 USC § 3553. The court noted that the district court was not required to resolve the conflict as to whether defendant used the firearm in a domestic dispute; it was sufficient that the district court noted that the firearm may have been used. Regarding substantive reasonableness, the court held that the substantial variance was supported by defendant's need to be available to care for his son, who had a heart transplant, and because of his remorse for the crime. Thus, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Story, 05-6422 (10/1/07)

► Defendant was convicted of drug

trafficking and sentenced to 360 months incarceration. On appeal, defendant's case was remanded for reconsideration in light of *Booker*. At the resentencing hearing, the district court mistakenly indicated that the applicable guideline range was 346-405 months, when the correct range was 324-405. After considering the misstated range, and the factors under 18 USC § 3553, the court imposed a sentence of 300 months. The downward variance was based upon defendant's extraordinary rehabilitative efforts while in prison and the sentences received by other codefendants. Defendant did not object to the miscalculated guideline range. Defendant appealed.

★ Holding: Because defendant failed to object in the district court to the incorrect guideline range being utilized, the court applied plain error review. The court found that the district court application of the incorrect guideline range in fashioning defendant's sentence amounted to plain error requiring a remand. The court could not determine from the record whether the district court would have further reduced defendant's sentence below the 300-month term if it had realized the correct starting point under the guidelines. Accordingly, the court vacated defendant's sentence and remanded for resentencing.

• *Reasonableness of Sentence*

U.S. v. Kirchof, 06-5203 (10/2/07)

► Defendant was convicted of transporting and receiving child pornography over the internet. At sentencing the district court determined that the applicable guideline range was 210-262 months of incarceration, but instead imposed a downward variance to a sentence of 180 months. The variance was based upon the fact that defendant was a college student with no prior record, a steady work history, and a diagnosis of Obsessive Compulsive Disorder (OCD). The court balanced these factors against its concerns that

the offense conduct tended to “desensitize” people to child pornography and that a significant sentence was important to deter others from committing such conduct. Defendant appealed the substantive reasonableness of the sentence.

★ Holding: The court held that the 14% downward variance was substantively reasonable. The court held that the district court did not place undue weight on certain factors over others and that none of the information offered by defendant was so compelling as to justify a sentence lower than the 14% variance awarded by the district court. Finally, the court ruled that defendant’s sentence was not disproportionate to others sentenced in the same district during that time period. The court pointed out that each defendant is sentenced based upon the “individual facts of their cases.” In contrasting defendant’s case with another defendant sentenced for a similar offense, the court noted that the other defendant had accepted responsibility for his conduct while defendant had blamed his conduct on an “uncontrolled impulse” (referencing his OCD). Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*
U.S. v. Malone, 06-2099 (10/4/07)

► Defendant was charged with possession of marijuana with intent to distribute, being a felon in possession of firearm, and possession of a firearm in furtherance of drug trafficking. Defendant was convicted at trial of the marijuana charge, but acquitted on the two firearms charges. At sentencing, the district court determined that defendant was a career offender and thus qualified for a guideline range of 51-63 months. The court indicated that the firearm charges were likely the reason defendant was charged in federal court in the first place, and that the acquittal on those charges “mooted the reasons for the federal prosecution.” The court accordingly

considered what defendant would have received for the marijuana in state court and sentenced defendant to 24 months in prison. The government appealed.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the district court may not consider what sentence a defendant would have received in state court in fashioning an appropriate federal sentence. The court emphasized that 18 USC § 3553(a)(6), requiring uniformity in sentences, refers only to uniformity between federal sentences, not federal and state sentences. Accordingly, the case was remanded for resentencing.

• *Reasonableness of Sentence*
U.S. v. Smith, 06-5681 (10/11/07)

► Defendant was convicted of bank robbery. At the time he committed the crime, he was on supervised release for two prior felonies. At sentencing, the district court determined that the applicable guideline range was 46-57, but imposed an upward variance to a sentence of 132 months in prison. The upward variance was based largely on defendant’s extensive criminal record. Defendant appealed.

★ Holding: The court first held that the sentence was procedurally reasonable. The district court adequately considered defendant’s arguments for a lower sentence, and sufficiently expressed its consideration of the factors under 18 USC § 3553. Second, the court found that the sentence was substantively reasonable. The court rejected defendant’s claim that a sentence outside the guideline range was presumptively unreasonable, but instead, consistent with circuit precedent, applied proportionality review. Although the court noted that the upward variance was significant, the court ruled that it was supported by the fact that defendant was already on supervised release for two prior federal convictions, defendant had 22 prior state convictions starting at age 17, and during the

instant federal offense defendant robbed a bank, stole a car, fled to Arkansas, and engaged in a high speed chase with police, eventually crashing the car. Accordingly, defendant's sentence was affirmed.

- *Reasonableness - Consecutive Sentences*
U.S. v. Gibbs, 06-1916 (10/29/07)

- ▶ Defendant was convicted of being a felon in possession of a firearm and at the time was facing a revocation of his state parole. At sentencing, the district court indicated that defendant's sentence on the firearm charge "must be consecutive" to the state sentence on the parole violation, and imposed sentence accordingly. Defendant appealed.

- ★ Holding: The court held that USSG § 5G1.3(c) specifically provides discretion to the district court in determining whether a federal sentence should be consecutive to a state parole revocation sentence. The court ruled that, because the district court failed to recognize that it had discretion to impose a concurrent sentence, the case had to be remanded for resentencing. Remand was further necessary because a district court's assumption that any aspect of the sentencing guidelines is mandatory creates a presumption of prejudice to defendant's substantial rights. Accordingly, the sentence was vacated and the case remanded for resentencing.

D. Miscellaneous Appeal

- *18 USC § 3731 - Government Appeals*
U.S. v. McGinnis, 06-5782 (9/7/07)

- ▶ Defendant was charged with smuggling bulk money into the U.S. and the district court granted defendant's motion to suppress. The government appealed within the required 30 day time period, but failed to file the certification required by § 3731 within this time period. Defendant moved to dismiss the government's appeal.

- ★ Holding: Pursuant to § 3731, when appealing a district court decision regarding a

motion to suppress, the government must certify within 30 days that "the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." The court held that, in determining whether to hear an appeal where the government has failed to timely file the certification, it must consider the following: (1) the reason for the delay; (2) whether the government engaged in a conscientious pre-appeal analysis; (3) whether the government takes the certification requirement seriously; (4) any prejudice to defendant; and (5) the interests of justice. Considering the factors, the court determined that dismissal of the appeal was not appropriate and accordingly proceeded to the merits. (*See supra*, IV. Fourth Amendment).

XIII. Post-Conviction Remedies

- *18 USC § 3582(c)(2)-Motion for Reduction*
U.S. v. Carter, 05-5717 (9/11/07)

- ▶ Defendant was sentenced for drug trafficking and carrying a firearm in relation to drug trafficking. Defendant filed no direct appeal, but instead filed and lost a *habeas* petition. *Booker* was subsequently decided and defendant then filed a motion under § 3582(c)(2), claiming that *Booker* had changed his guideline range. The district court denied the motion and defendant appealed.

- ★ Holding: Under § 3582, a defendant who has been sentenced based upon a guideline range that was subsequently lowered by the Sentencing Commission may move the district court to reduce the sentence. In the case, the court held that *Booker* was not a proper basis for a § 3582 motion because § 3582 only applies to situations where the Sentencing Commission reduces the guideline range. To the extent that defendant's motion was properly characterized as a second *habeas* petition, the court held that *Booker* is not retroactively applied to cases on collateral review. Thus, the district court ruling was affirmed.