

# 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> 1Dayton Centre, Ste. 490 1South Main St. 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](http://www.supremecourtus.gov) for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov) and enter the docket

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

## 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](http://www.fpd-ohs.org).

## SUPREME COURT DECISIONS

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

## SIXTH CIRCUIT DECISIONS

### **I. Specific Offenses**

• *18 USC § 241 - Conspiracy - Civil Rights*  
U.S. v. Conaster, 06-5694 (2/4/08)

► Defendant was a jail guard who was charged with conspiracy to violate the rights of detainees and prisoners of the county jail. At trial, the government proved defendant's involvement largely through the testimony of three cooperating defendants. Upon his conviction, defendant appealed and challenged the sufficiency of the evidence that he participated in the conspiracy.

★ Holding: In order to establish a conspiracy, no proof of a formal agreement is required; a "tacit or mutual understanding" is all that is necessary. The court found ample evidence that defendant participated in the conspiracy. The codefendants testified that defendant was present during inmate beatings, falsified incident reports, and participated in conversations with others about inmate beatings. Defendant's argument that the cooperating-defendant testimony was not believable was not a proper challenge to the sufficiency of the evidence, but instead an attack on the credibility of the witnesses. Further, the court held that defendant's acquittal on substantive counts did not require reversal of his conviction for conspiracy. In a § 241 conspiracy case, the government need not prove that defendant himself committed any of the overt acts, only that some member of the conspiracy committed the overt acts. Thus, defendant's conviction was affirmed.

• *18 USC § 924(c) - Firearm enhancement*  
U.S. v. Bailey, 06-5576 (1/9/08)

► Defendant was charged with drug trafficking and possession of a firearm in furtherance of drug trafficking. The narcotics in question were found in defendant's pocket and the firearm was found underneath his car seat. Defendant was convicted after trial on

both charges and appealed the sufficiency of the evidence for the firearm charge.

★ Holding: The court held that in order for a firearm to be possessed in furtherance of a drug trafficking offense, it must be "strategically located so that it is quickly and easily available for use." In making this determination, the court must consider the following: (1) whether the gun was loaded; (2) the type of gun; (3) the drug activity conducted; and (4) the circumstances under which the gun was found. In the case the court found that defendant had a loaded .357 magnum under the seat, it was quickly and easily accessible, the vehicle in which it was found was stolen, and defendant's girlfriend testified that defendant put the gun under the seat. Based upon these facts, the court ruled that the evidence was sufficient to support the verdict.

• *21 USC § 841(a) - Drug Trafficking*  
U.S. v. Gonzalez, 05-4230 (1/9/08)

► Defendant was charged with possession of cocaine with intent to distribute. At trial, the government proved that defendant was the driver and sole occupant of a van containing seven kilos of cocaine. Defendant had three cell phones and a screwdriver, which would have allowed access to the secret compartment where the drugs were stored. Defendant gave inconsistent explanations about the reason for the rental of the van and his hurried travel between Chicago and Buffalo. Defendant was convicted and appealed, arguing that the evidence was insufficient.

★ Holding: Construing the evidence in the light most favorable to the government, the court found sufficient evidence to support the verdict. Defendant's knowledge of the cocaine could be inferred from his possession of the cell phones and screwdriver (tools of the drug trade), the fact of the vehicle rental (used by drug dealers to avoid forfeiture of their own vehicles), the fact that Chicago was a source city for drugs, and defendant's inconsistent

explanation for his travel. Accordingly, the conviction was affirmed.

• *21 USC § 841(a)(1) - Drug Trafficking*  
U.S. v. Bailey, 06-5576 (1/9/08)

► Defendant was charged with possession of crack cocaine with intent to distribute. At trial the government presented evidence that officers found 15 grams of crack in defendant's pocket (in two separate bags), and two cell phones. An officer also testified that the drug amount was consistent with drug traffickers in the area, who typically sold units of .1 to .2 grams. Further, the officer testified that drug dealers often carry two cell phones. Defendant was convicted and appealed the sufficiency of the evidence.

★ Holding: In order to convict a defendant for possession of crack with intent to distribute, the government must prove that (1) the defendant knowingly (2) possessed a controlled substance (3) with the intent to distribute. The court first found that defendant knowingly possessed the crack. Any inconsistency in the officers' testimony at trial regarding who found the drugs on defendant dealt only with the officers' credibility, an issue for which the court defers to the trier of fact. Further, the court held that intent to distribute was established by the testimony that the drug amount was consistent with drug trafficking, and the possession of two cell phones. Accordingly, defendant's conviction was affirmed.

• *21 USC § 841(b) - Sentence Enhancement*  
U.S. v. Gonzalez, 05-4230 (1/9/08)

► Defendant was charged with possession of seven kilograms of cocaine with intent to distribute. At sentencing, the district court imposed a mandatory life sentence, pursuant to § 841(b)(1)(A), based upon defendant's two prior drug offenses. Defendant argued on appeal that the two prior offenses should not have counted separately for purposes of the

sentence enhancement.

★ Holding: For purposes of § 841(b), the determination of whether two prior offenses count separately is based on whether "they represent multiple criminal episodes that were distinct in time, as opposed to multiple convictions arising out of a single criminal episode." An "episode" is "an incident that is part of a series, but forms a separate unit within the whole," and is "a punctuated occurrence with limited duration." In the case, the court held that defendant's two prior drug convictions rose out of events separated by several days, that they involved selling cocaine to different individuals, and that, although they were part of a larger related course of events, they were punctuated single occurrences with limited duration. Further, the sentencing court on the prior offenses treated the two offenses separately. Thus, the prior offenses were properly treated as separate qualifying offenses, and defendant's sentence was affirmed.

• *21 USC § 841/§ 851 - Notice of Enhancement*  
U.S. v. Gonzalez, 05-4230 (1/9/08)

► Defendant was charged with possession of seven kilograms of cocaine with intent to distribute. On several occasions during pretrial proceedings, defendant received actual notice from the government that it intended to seek a mandatory life sentence because defendant had two prior drug offenses on his record. The government did not actually file the § 851 notice, however, until the second day of jury selection, but before the jury was impaneled. Defendant was convicted and the district court imposed the mandatory life sentence. Defendant failed to object to the belated § 851 notice, but raised the issue on appeal.

★ Holding: Applying plain error review, the court held that any error in the belated filing of the § 851 notice was remedied by the fact that defendant received actual notice of the sentence enhancement months before trial. The court noted that it would have so ruled even

had it applied *de novo* review to the case. To hold otherwise, the court stated, would be to “exalt form over substance.” Thus, the sentence was affirmed.

• *21 USC § 841/§ 851-Notice of Enhancement*  
U.S. v. Odeneal, 06-5885 (2/22/08)

► Defendant was charged with drug trafficking offenses and prior to trial the government filed a document, pursuant to § 851, notifying defendant that it intended to enhance defendant’s sentence to mandatory life based upon his two prior drug offenses. One of the offenses occurred during the time period of the drug conspiracy involved in the federal charge. Defendant was convicted and appealed his mandatory life sentence, raising multiple issues regarding the § 851 notice.

★ Holding: First, the court found no error in the fact that the § 851 notice was not titled an “information,” as required by the statute. Second, the court held that both of defendants prior convictions counted as “prior” felonies for purposes of § 851, even though one occurred during the course of the charged conspiracy. The court found that the drug conviction in question constituted a “separate criminal episode” within the confines of the conspiracy period. The court ruled: “the events underlying the . . . conviction took place more than three years before the conclusion of the conspiracy, and the conviction was entered more than one year before the conclusion of the conspiracy. [Defendant] had an opportunity after each conviction to cease his criminal activity, but he chose to continue.” Accordingly, the court ruled that the prior convictions could count toward the mandatory life enhancement.

• *21 USC § 846 - Conspiracy*  
U.S. v. Wheaton, 06-4080 (2/19/08)

► Defendant was charged in a drug conspiracy and convicted after a jury trial. Defendant argued on appeal that the evidence

was insufficient to support the verdict.

★ Holding: First, the court held that defendant’s attacks on the believability of two codefendants’ testimony were not proper grounds for reversal. “Attacks on witness credibility are simple challenges to the quality of the government’s evidence and not the sufficiency of the evidence.” Second, the court held that there was sufficient evidence to prove that defendant was the California drug supplier for the conspiracy. The government made a sufficient connection to show that he was “Kev,” the man with whom the codefendants dealt, and that defendant was a participant in the conspiracy. The court emphasized that proof in a conspiracy case requires only that two or more people agreed to violate narcotics laws and that defendant knowingly joined the conspiracy. No proof is required that defendant himself sold cocaine. Accordingly, defendant’s conviction was affirmed.

## II. Sentencing Guidelines

### A. Chapter Two - Offense Conduct

• *2A1.2 - Second Degree Murder*  
U.S. v. Conatser, 06-5694 (2/4/08)

► Defendant was a jail guard who was convicted of conspiracy to violate the civil rights of inmate, and six substantive charges of violating inmate civil rights, including a count of denying necessary medical treatment that resulted in the inmate’s death. At sentencing, the district judge determined that the applicable guideline was USSG § 2A1.2 (second degree murder). Based upon this determination, the recommended guideline range was life in prison, and the district court imposed life. Defendant appealed and argued that the district court should have applied USSG § 2A1.4 for involuntary manslaughter.

★ Holding: Pursuant to 18 USC §§ 1111(a) and 1112(a), a critical difference between murder and manslaughter is that murder requires proof of “malice aforethought.” This *mens rea* may be inferred where a defendant

“grossly deviates from the standard of care to such an extent that a jury could conclude that he must have been aware of a serious risk of death or serious bodily injury.” In the case, the court found that “malice aforethought” was proven on defendant’s part where he (1) beat the inmate twice in the head, (2) directed another guard to “take care of” the inmate, knowing that the guard likely beat the inmate in the head, (3) knew the inmate was unconscious as a result, (4) knew the inmate had brain surgery in the past two years, and (5) failed to get medical treatment for the inmate. The court rejected defendant’s claim that the inmate’s condition may have been due to his intoxication. Accordingly, the court found that application of § 2A1.2, for second degree murder, was appropriate.

• *2B1.1(b)(12) - Serious Risk of Injury*  
U.S. v. Moon, 06-5581 (1/16/08)

► Defendant was a doctor who, in treating her cancer patients, provided partial doses of chemotherapy medicine but billed the federally funded health benefit program for full doses. Defendant was convicted of health care fraud and at sentencing the district court applied the two-level enhancement, pursuant to USSG § 2B1.1(b)(12), because the offense involved the serious risk of death or bodily injury. Defendant appealed.

★ Holding: The court held that the two-level enhancement was appropriate. The government presented an expert witness who established that administration of the partial doses created “a higher risk for having their cancer progress or return and potentially die from that.” Based upon this testimony, the enhancement was proper and the district court ruling was affirmed.

• *2B1.5(b)(1) - Value of Items Taken*  
U.S. v. Allen, 06-5077 (2/5/08)

► Defendants were convicted of the robbery of cultural heritage resources from a library.

During the robbery, defendants absconded with several rare books, but dropped a couple of books in the library’s stairwell. At sentencing, the government argued that the value of the dropped books should be included in the calculation of the loss amount because (1) the loss under USSG § 2B1.5 included “intended loss” as defined in § 2B1.1, and, alternatively, (2) the books dropped in the stairwell were actually “taken.” The district court refused to apply the enhancement and the government appealed.

★ Holding: First, the court held that § 2B1.5 (theft of cultural heritage resources) does not include in its definition of “value” the language from § 2B1.1 referring to “intended loss.” Thus, defendants could not be held accountable for intended loss under § 2B1.5. Second, the court held that, even though defendants dropped the books in question in the stairwell of the library, the books were nonetheless “taken,” and accordingly should be considered in determining the value of the stolen items under § 2B1.5(b)(1). Borrowing on robbery concepts from USSG § 2B3.1 (robbery), the court held that a robber “takes” an object when the robber “exercises dominion or control over that object.” Accordingly, the court found that defendants had “taken” the books in question when they removed them from their cabinets, even though they subsequently dropped them in the stairwell. Thus, the district court ruling was reversed and the case remanded for resentencing with instructions to include the value of the books dropped in the stairwell in the loss calculation.

• *2B1.5(b)(6) - Dangerous Weapon*  
U.S. v. Allen, 06-5077 (2/5/08)

► Defendants were convicted of conspiracy and the robbery of cultural heritage resources from a library. At sentencing, the district court imposed a two-level enhancement for using a dangerous weapon, pursuant to USSG § 2B1.5(b)(6), because defendants used a “stun

pen” on one of the librarians. While using the “stun pen” and trying to physically subdue the librarian, defendants told her that if she continued to struggle, “it would only hurt more.” The librarian expressed that she felt a tingle from the stun pen, that it left a small bruise, and that she feared being zapped. Defendants presented an expert witness at sentencing who testified that the pen could not cause serious injury to a person. Defendants appealed the two-level enhancement.

★ Holding: A weapon is a dangerous weapon, even if it is not capable of inflicting serious bodily injury, if it closely resembles such a weapon or if the defendant used it in a manner to create the impression that it was such a weapon. In the case, the court held that the facts supported the conclusion that the defendants acted as if the weapon could inflict serious injury and the victim believed their representations. Accordingly, the two-level enhancement was affirmed.

• *2D1.1(a)(1) - Prior Similar Drug Offense*  
U.S. v. King, 07-1012 (2/14/08)

▶ Defendant was convicted of distributing narcotics resulting in a person’s death. At sentencing, the district court enhanced defendant’s sentence five levels under USSG § 2D1.1(a)(1) because defendant had a “prior conviction for a similar offense.” Defendant argued on appeal that the prior conviction should not count because it was outside the applicable time periods of chapter 4 of the guidelines.

★ Holding: Answering an open question in the Sixth Circuit, the court held that the time periods on counting prior convictions from chapter 4 of the guidelines do not apply to § 2D1.1(a)(1). The court emphasized that § 2D1.1(a)(1) did not reference chapter 4 in this regard, and that there was no authority for the proposition that the chapter 4 time period operated as a default time period for the guidelines generally. Accordingly, defendant’s

sentence was affirmed.

• *2D1.1(b)(1) - Firearm Enhancement*  
U.S. v. Wheaton, 06-4080 (2/19/08)

▶ Defendant was convicted of a drug conspiracy and at sentencing the district court applied a two-level enhancement under USSG § 2D1.1(b)(1) for possession of a firearm. The gun in question was found in a couch in one of the houses associated with the conspiracy. Defendant appealed application of the two-level enhancement.

★ Holding: The firearm enhancement under § 2D1.1(b)(1) applies if a defendant actually or constructively possessed a firearm. If the government proves possession, the burden shifts to the defendant to prove that it was clearly improbable that the firearm was connected to drug trafficking. In the case, the court found sufficient evidence of constructive possession. The residence was connected to the drug conspiracy, defendant admitted that he had lived in the home at one point, and, although no drugs were found by the government in the home, evidence established that it was used for drug sales. Accordingly, the application of the enhancement was affirmed.

• *2K2.1/1B1.3 - Relevant Conduct Firearms*  
U.S. v. Phillips, 06-6191 (2/19/08)

▶ Defendant was convicted of being a felon in possession of four firearms. At sentencing, the district court found that defendant was also responsible, pursuant to USSG § 1B1.3, for several additional firearms that he possessed two years before the offense, and for a gun he possessed while he was out on bond for the charged offense. As a result, defendant’s sentence was increased by four levels under § 2K2.1. Defendant appealed.

★ Holding: Pursuant to § 1B1.3(a)(2), conduct may be considered “relevant conduct” to the offense of conviction if it was “part of the same course of conduct or common scheme

or plan.” In this regard, offenses must be substantially connected by at least one common factor, such as common victims, accomplices, purpose or *modus operandi*. In determining whether the sufficient connection exists, the court considers the similarity, regularity, and time interval between the offenses. A sliding scale approach is utilized by the court, meaning that where one factor is weak, a stronger presence of another factor is required. In the case, the court found that although two years separated defendant’s possession of the firearms, the strength of the other factors were sufficient, such as the common purpose (to protect himself), the regularity of the conduct, and the fact that he continued to possess guns while on bond. Accordingly, the sentence was affirmed.

- *2L2.1-Trafficking Immigration Documents*  
U.S. v. Rivera, 06-5573 (2/20/08)

- ▶ Defendant was convicted of transporting illegal aliens from New Jersey to Tennessee in order to obtain “certificates for driving.” At sentencing, the district court applied USSG § 2L2.1 based upon its conclusion that the “certificates for driving” were “related” to immigration. Defendant argued that § 2L2.1 was inapplicable and that the general fraud guideline at § 2B1.1 should apply. Defendant appealed.

- ★ Holding: The court held that § 2L2.1 was inapplicable to the case for three reasons. First, the “certificates for driving” could not be used as legal identification pursuant to Tennessee law. Second, because they were not legal identification, they could not be used to gain the benefits of legal status. In fact, Tennessee created the “certificates for driving” specifically for use by illegal aliens driving in the state. Third, none of the “certificates for driving” obtained by defendant were actually used to obtain legal status. Therefore, the “certificates of driving” did not, and could not, relate to immigration, and the case was

remanded for resentencing.

## **B. Chapter Three - Adjustments**

- *3A1.1(b)(1) - Vulnerable Victims*  
U.S. v. Moon, 06-5581 (1/16/08)

- ▶ Defendant was a doctor who, in treating her cancer patients, provided partial doses of chemotherapy medicine but billed the federally funded health benefit program for full doses. Defendant was convicted of health care fraud and at sentencing the district court applied the vulnerable victim enhancement. Defendant argued on appeal that her patients were not “victims” of the health care fraud, and that the enhancement was improperly applied.

- ★ Holding: Pursuant to USSG § 3A1.1(b), a “vulnerable victim” is one who is harmed by the offense of conviction or any relevant conduct to the offense of conviction. In the case, the court found that defendant’s acts of depriving her patients of the opportunity to receive the full benefit of the treatment without any medical justification qualified as “harm” to the patients within the meaning of the enhancement, and that this “harm” occurred in the course of the scheme to defraud the health care program. Accordingly, application of the vulnerable victim enhancement was proper and defendant’s sentence was affirmed.

- *3A1.2 - Assaulting an Officer*  
U.S. v. Thompson, 06-6233 (2/11/08)

- ▶ Defendant and five codefendants were convicted of conspiracy to distribute cocaine and defendant was also convicted of carrying a firearm in relation to drug trafficking. During a controlled sale of cocaine to defendant by an informant and an undercover officer, defendant and his partner attempted to rob them. When police burst in, defendant’s partner shot at the officers multiple times in their attempt to escape. At sentencing, the district court applied a six-level enhancement under USSG § 3A1.2 for assaulting a law enforcement officer. Defendant argued on appeal that the

enhancement was inapplicable and that it constituted impermissible double counting.

★ Holding: A defendant is accountable under § 3A1.2 for assaulting an officer if the defendant, or a person for whose conduct defendant is accountable, creates a substantial risk of harm to an officer, knowing that the person is an officer. In the case, the court held that defendant knew that the officers who burst in during the robbery were law enforcement because they were wearing police vests. Further, the court found that defendant was responsible for his partner's actions in shooting at the officers because they were in a conspiracy together and defendant was clearly directing his partner's actions during the drug sale and the ensuing shoot out. Thus, the six-level enhancement was proper.

Further, the court held that the enhancement did not constitute impermissible double counting as the result of the conviction for the offense under 18 USC § 924(c). The assault on the law enforcement officer guideline enhancement and the statutory penalty for carrying a firearm in relation to a drug trafficking crime punished distinct aspects of defendant's conduct. Accordingly, defendant's sentence in this regard was affirmed.

• *3B1.1 - Leadership Role*

U.S. v. Thompson, 06-6233 (2/11/08)

► Defendant and five codefendants were convicted of conspiracy to distribute cocaine and defendant was also convicted of carrying a firearm in relation to drug trafficking. At sentencing, the district court applied a four-level enhancement under USSG § 3B1.1 for his leadership in the conspiracy. Defendant appealed the application of the enhancement.

★ Holding: The court held that the following facts indicated defendant's leadership in the conspiracy: (1) defendant originally negotiated the deal with the informant and was the negotiator during the transaction; (2) defendant

was the man doing all the talking and wanted to see the cocaine; (3) defendant is the one who went out and brought back his partner with extra money to complete the deal; and (4) defendant gave directions to the partner during their flight from officers. The court noted that defendant's partner may also have played a leadership role in the conspiracy, but that this fact did not preclude defendant from also receiving a leadership role enhancement. Thus, this aspect of defendant's sentence was affirmed.

• *3B1.2 - Minor Role*

U.S. v. Allen, 06-5077 (2/5/08)

► Defendant was convicted, along with three others, of conspiracy and various substantive offenses in relation to his robbery of rare books from a library. At sentencing, defendant requested a reduction for playing a minor or minimal role in the offense, pursuant to USSG § 3B1.2. The district court denied the request and defendant appealed.

★ Holding: The court held that defendant's role included the following: (1) visiting the library prior to the robbery to gather intelligence; (2) conducting a stake-out of the robbery to gather intelligence; (3) developing the escape route; (4) obtaining and driving the getaway vehicle; (5) arranging hotel accommodations in New York, where they intended to sell the stolen items; (6) helping to finance the operation; and (7) storing the stolen items and helping to transport the stolen items to and from New York. Based upon these facts, the court held that defendant had not played a minor or minimal role under § 3B1.2.

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

U.S. v. Sedore, 06-2259 (1/16/08)

► Defendant was convicted of identity theft and making false claims to IRS. At sentencing, the district court imposed a two-level enhancement for abuse of a position of trust. The enhancement was based upon the fact that

defendant prepared a tax return for an individual, and then used the individual's children's social security numbers to make false claims to IRS. Defendant appealed.

★ Holding: In the Sixth Circuit, a defendant's sentence may be enhanced under USSG § 3B1.3 where the defendant abused a position of trust with the victim of the charged conduct. In the case, the court found that defendant clearly held a position of trust in relation to father, for whom he prepared the tax return. Further, the court ruled that defendant's trust relationship between he and the father extended to the children. The court noted that it did not matter that the children suffered no pecuniary loss as a result of the offense, because such is not required for the abuse of position of trust enhancement. Accordingly, the sentence was affirmed.

• *3B1.3 - Abuse of Trust - Double Counting*  
U.S. v. Smith, 06-1218 (2/19/08)

► Defendant was convicted of fraud-related offenses in relation to her embezzlement of Red Cross donations while she was the director. At sentencing, the district court applied enhancements both for abusing a position of trust (USSG § 3B1.3) and for misrepresenting that her actions were on behalf of a charitable organization (USSG § 2B1.1(b)(8)(A)). Defendant contended on appeal that applying both enhancements constituted impermissible double counting.

★ Holding: Impermissible double counting occurs when the "precisely the same aspect of a defendant's conduct factors into [her] sentence in two separate ways." The court held that application of the two enhancements did not constitute double counting because the abuse of trust enhancement applied because of defendant's exploitation of her role as director, and the misrepresentation about her actions as being charitable accounted for her deceptions in misleading contributors. Thus, the sentence was affirmed.

• *3C1.1 - Obstruction - Double Counting*  
U.S. v. Moon, 06-5581 (1/16/08)

► Defendant was convicted on three counts of health care fraud and one count of making false statements to government agents. At sentencing, the district court applied a two-level enhancement for obstruction of justice based upon defendant's false statements to the agents. Defendant argued on appeal that application of the obstruction of justice enhancement was impermissible double counting because he was also convicted of false statements.

★ Holding: Impermissible double counting occurs when "precisely the same aspect of defendant's conduct factors into his sentence in two separate ways." In the case, the court held that no impermissible double counting occurred because the obstruction of justice enhancement was applied to the sentencing guideline calculation for the health care fraud counts, not the false statement count. The obstruction of justice conduct was not duplicative of the factual allegations regarding the health care counts, and thus did not constitute impermissible double counting. Accordingly, defendant's sentence was affirmed.

### **C. Chapter Four - Criminal History**

• *4A1.1(e) - Within Two Years of Jail Term*  
U.S. v. Wheaton, 06-4080 (2/19/08)

► Defendant was convicted of a drug conspiracy. At sentencing, the district court determined that defendant should receive two criminal history points, pursuant to USSG § 4A1.1(e), because he participated in the conspiracy within two years of his release from prison. This conclusion was based solely upon the testimony of a codefendant who testified at trial that she transported drugs from California for defendant during the relevant time period. Defendant appealed.

★ Holding: Although the codefendant's testimony was somewhat ambiguous as to time

period, the court concluded that the testimony was sufficient to satisfy the requirements for the two-point criminal history enhancement. The codefendant's testimony established that, pursuant to an agreement with defendant, she probably transported drugs from California within two years of defendant's incarceration. The court noted that the case presented an extremely close factual question, but relied on the clear error standard to affirm the district court ruling.

• *4B1.1 - Career Offender*

U.S. v. Bailey, 06-5576 (1/9/08)

▸ Defendant was convicted of drug trafficking and possessing a firearm in furtherance of drug trafficking. At sentencing, the district court determined that defendant was a career offender based, in part, on a prior Kentucky conviction for second degree escape. Defendant argued on appeal that the escape conviction was not a qualifying offense for purposes of USSG § 4B1.1.

★ Holding: Relying on the categorical approach applied by the Supreme Court in *Taylor*, the court held that second degree escape under Kentucky law qualifies as a "crime of violence," and thus, is a predicate offense for the career offender guideline. The court emphasized that it had already held that escape under Kentucky law was a "violent felony" under the Armed Career Criminal Act, and it found that the "operative language" of the ACCA is identical to the career offender guideline. Thus, defendant's sentence was affirmed. Two judges opined in concurrence that the thirty year sentence imposed by the district court may have been unreasonable based upon the facts of the case, but that defendant's appellate counsel did not raise the issue of reasonableness in his brief.

### III. Evidence

#### A. Article IV - Relevancy

• *401/403 - Relevance/Undue Prejudice*

U.S. v. Wheaton, 06-4080 (2/19/08)

▸ Defendant was charged in a drug conspiracy. At trial the government introduced a picture of a gun that was found in a home owned by a codefendant, which defendant frequently used to sell drugs. Upon defendant's conviction, he appealed and argued that the picture of the gun was not properly admitted.

★ Holding: First, the court held that the picture of the gun was relevant because, although no firearm was charged, the court found that firearms, "as tools of the drug-trafficking trade, are probative evidence in drug prosecutions." Further, the court ruled that a sufficient connection was made between defendant and the residence where the firearm was found. Second, the court held that any prejudice was cured by the district court's instruction that the jury should not consider the picture of the gun as proof of defendant's bad character. Accordingly, admission of the evidence was affirmed.

• *404(b) - Absence of Mistake/Intent*

U.S. v. Bell, 06-6248 (2/14/08)

▸ Defendant was charged with possession of large amounts of marijuana and crack with intent to distribute based upon narcotics that were found in his girlfriend's residence. During the trial, defendant denied knowing the drugs were there or that they were his. The district court permitted the government to introduce four prior state drug distribution convictions in order to show absence of mistake or accident, and intent. Upon his conviction, defendant appealed.

★ Holding: The court held that the prior convictions were not properly admitted to show either absence of mistake, or intent. Regarding absence of mistake, the court held that defendant had raised that defense at trial. To

the contrary, his defense was that he did not know the drugs were there and they were not his. Thus, absence of mistake or accident was not at issue in the case. Regarding intent, although the issue of intent was an element that the government was required to prove, the prior convictions were not sufficiently similar temporally or in terms of *modus operandi* in order to support their admissibility. Therefore, the convictions were not admissible to prove intent. The court further held that the probative value of the evidence was substantially outweighed by its prejudicial effect under FRE 403, and that the admission of the evidence was not harmless. Accordingly, defendant's conviction was reversed.

#### **B. Articles VI-VII - Witness and Expert**

• *Fed. R. Crim. P. 16(a)(1)(G) - Discovery*  
U.S. v. Davis, 06-5883 (1/30/08)

► Defendant was charged with two counts of drug trafficking and the government notified defendant that it intended to introduce expert chemist testimony to establish the weight of the drug, and that the drug was crack cocaine. Defendant specifically requested, pursuant to Rule 16(a)(1)(G), reports and results showing the tests and examinations conducted by the expert. Prior to trial, the government provided a letter to defendant which stated only that the chemist's testimony would be based upon his training, experience and numerous tests conducted. At trial, defendant objected to the expert testimony upon the basis that the government did not comply with Rule 16. At that time, the government obtained from the expert the notes which reflected the tests conducted and turned them over to defendant. Defendant moved to exclude the expert, and declined the district court's invitation for a continuance to prepare. The district court denied defendant's motion, defendant was convicted, and he appealed.

★ Holding: The court first held that the government violated Fed. R. Crim. P.

16(a)(1)(G) by failing to obtain and produce the "bases and reasons" for the expert opinions prior to trial. Second, the court held that a district court must consider several factors in determining whether to suppress evidence as the result of a discovery violation: (1) the reasons for the delay in production and whether the government acted intentionally or in bad faith; (2) the degree of prejudice to defendant; and (3) whether the prejudice could be cured by granting a continuance, or some other less severe sanction. The court found that defendant's act of declining a continuance was tantamount to an agreement that the verdict would not have been different had the government timely complied with Rule 16. Further, the court noted that defendant offered no other reasonable alternative to suppression of the evidence. Thus, the conviction was affirmed.

#### **C. Article VIII - Hearsay**

• *803(6) - Business Records Exception*  
U.S. v. Moon, 06-5581 (1/16/08)

► Defendant was charged with health care fraud in relation to her practice of providing patients with partial doses of cancer medicine, but billing the federal health care program for full doses. During trial, the government introduced computer generated records of various drug companies to establish defendant's purchases of the drugs. Defendant objected to the evidence as improper summary evidence, but the district court admitted the records under the business records exception. Upon defendant's conviction, she appealed.

★ Holding: The court held that a general business ledger showing sales of drugs constituted a business record for purposes of FRE 803(6), even though it was computer generated. The court noted that FRE 803(6) permits admission of a "date compilation" in any form. Thus, the records were properly considered business records, as opposed to "summary evidence" under FRE 1006.

Accordingly, the district court's ruling was affirmed.

#### **D. Miscellaneous Evidence**

##### *• 1006 - Summary Evidence*

U.S. v. Moon, 06-5581 (1/16/08)

▸ Defendant was charged with health care fraud in relation to her practice of providing patients with partial doses of cancer medicine, but billing the federal health care program for full doses. During trial, the government introduced charts that were prepared by a government agent which showed (1) a comparison of the drugs defendant purchased with the amount she claimed to administer, and (2) an estimate of the profits alleged to have resulted from defendant's billing practices. Defendant was convicted and argued on appeal that the evidence was improper summary evidence.

★ Holding: Five requirements must be met in order to introduce summary evidence under FRE 1006: (1) the underlying documents are so voluminous that they cannot be conveniently examined in court; (2) the underlying documents must be made available to the opposing party at a reasonable time and place; (3) the underlying documents must be admissible in evidence; (4) the summary must be accurate and non-prejudicial; and (5) the summary must be introduced through a witness who supervised its preparation. In the case, the court held that all five requirements were satisfied and the summary was properly admitted.

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

##### **B. Reasonable Suspicion/Vehicle Stops**

##### *• Reasonable Suspicion*

U.S. v. Davis, 06-5883 (1/30/08)

▸ Defendant was stopped by police on two occasions. The first stop resulted from a reliable tip that defendant was selling narcotics on a street corner. One of the officers knew defendant from prior contacts but mistakenly

believed he had a different last name. Upon the officers arrival, they observed defendant stay on the corner for twenty minutes, then get into a car and drive to the store. The officers ran defendant's license and, based upon the incorrect last name, found that he had no license. Upon stopping defendant he indicated that his license was suspended and the officers noticed marijuana on his pants. Defendant was arrested and drugs were found in the search incident to arrest.

As a result of the first incident, defendant agreed to cooperate with law enforcement, but the officers subsequently received a tip that defendant was again selling drugs and that he was at a certain location smoking marijuana. Upon the officers' arrival, they observed defendant smoking marijuana while in the presence of two minors and defendant appeared to be conducting a transaction with one of the minors. The officers believed that defendant had not obtained his driver's license, so they stopped the vehicle he was driving and again found narcotics. Defendant was prosecuted for two counts of possession of crack with intent to distribute and he moved to suppress the evidence found during both stops. The district court denied the motion and defendant appealed.

★ Holding: The court found that both stops of defendant were justified by reasonable suspicion. Regarding the first stop, the court held that reasonable suspicion was justified by (1) the reliable information that defendant was selling drugs and the officers' corroborating observations, (2) defendant was found in a high crime area, and (3) the check of defendant's last name, although mistaken, revealed that defendant had no driver's license. The court further found that the stop was reasonably limited in scope and duration. Regarding the second stop, the court held that reasonable suspicion was justified by (1) the reliable tip that defendant was smoking marijuana and

selling drugs, (2) the officers' beliefs that defendant had not obtained his driver's license, and (3) the officers' observations of what appeared to be an exchange of drugs between defendant and a minor. Accordingly, the district court ruling was affirmed.

### **C. Warrant Exceptions**

- *Search Incident to Arrest*

U.S. v. Nichols, 06-5862 (1/15/08)

► Defendant's vehicle was stopped by police and he was arrested based on an open warrant. Incident to defendant's arrest, the officers searched the locked glove compartment of his car and found a gun. In his prosecution for being a felon in possession of a firearm, defendant moved to suppress the gun. The district court denied the motion and defendant appealed.

★ Holding: Pursuant to *New York v. Belton*, officers may search containers inside the passenger compartment of a car incident to an arrest of the defendant. In the case, the court held that the rule of *Belton* applies to a locked glove compartment. Accordingly, the district court's ruling was affirmed.

### **D. Consent Searches and Seizures**

- *Consent Search - Damage to Vehicle*

U.S. v. Gonzalez, 05-4230 (1/9/08)

► Defendant was stopped for a traffic infraction and consented to a search of the vehicle. During the search, the officer noticed a piece of molding that was out of place. When the officer touched the molding, it fell off and revealed a hole. The officer looked through the hole and noticed bags of cocaine. Defendant was arrested and the officer obtained a search warrant for the car. In defendant's subsequent drug prosecution, he moved to suppress the drug evidence, and the district court denied the motion. Defendant appealed.

★ Holding: Generally, a consent to search is not reasonably understood to confer permission

to damage the vehicle in conducting the search. The court held, however, that the officer did not damage the vehicle by making the "slightest exploratory touch" of the molding. Thus, the search was reasonable based on defendant's consent and the subsequently obtained warrant. Accordingly, the district court ruling was affirmed.

- *Consent - Voluntariness*

U.S. v. Moon, 06-5581 (1/16/08)

► Defendant was a doctor who was being investigated by agents for health care fraud. The agents went to the doctor's office and requested to review certain medical records for the purpose of their investigation. Defendant indicated that it would be "fine" and that the agents "could scan whatever they need to." Defendant further indicated that she would need to continue to see patients while the agents conducted their review. Defendant was subsequently prosecuted for health care fraud and she moved to suppress the records obtained by the agents. The district court denied the motion and defendant appealed.

★ Holding: The government bears the burden of proving the voluntariness of a defendant's consent to a search by "clear and positive testimony." Consent is voluntary when it is "unequivocal, specific and intelligently given, uncontaminated by any duress or coercion." In the case, the court held that defendant's consent was voluntary, and was not a mere expression of futility to the authority of the agents. Specifically, the court found that the agents did not misrepresent that they had a warrant, and defendant's statements clearly reflected that she did not feel powerless to prohibit the search. Accordingly, the district court ruling was affirmed.

- *Consent - Common Authority*

U.S. v. Caldwell, 06-5640 (2/26/08)

► Defendant and his girlfriend checked into hotel room and both were listed as guests.

Upon smelling marijuana emanating from the room, the manager called the police, who determined that defendant had an open felony warrant. Officers arrived and defendant was arrested. According to the officers, the girlfriend consented to a search of the room while defendant said nothing. Upon defendant's subsequent prosecution for the narcotics found in the room, he moved to suppress the evidence. The district court denied the motion based upon the girlfriend's consent and defendant appealed.

★ Holding: The court held that the girlfriend had common authority over the hotel room even though it was not clear that she had a key in her possession. She checked in with defendant, had luggage in the room, and intended to stay the night. Further, the court found no error in the search of two "containers" in the room, namely a paper bag and a partially unzipped C.D. case. Defendant disavowed ownership of anything in the hotel room and the girlfriend gave clear consent to search anything of hers in the room. Thus, the search of the containers was reasonable. Accordingly, the district court ruling was affirmed.

## V. Fifth Amendment

### A. Prosecutor Conduct

• *Due Process - Prosecutorial Misconduct*  
U.S. v. Gonzalez, 05-4230 (1/9/08)

▶ Defendant was charged with drug trafficking after he was caught traveling from Buffalo to Chicago and back with cocaine. Defendant told police, and his attorney stated in opening at trial, that defendant was traveling for the purpose of his cell phone and jewelry business. During closing, the prosecutor argued briefly that defendant produced no evidence to support his defense that he was traveling in relation to his cell phone and jewelry business. Defendant did not object to the comments, but argued on appeal that they amounted to prosecutorial misconduct.

★ Holding: In determining whether a prosecutor's remarks are improper, the court must consider them within the context of the trial as a whole, and whether the comments were invited by defense counsel's comments. The court must also consider four factors: (1) whether the comments were meant to reflect on the accused's silence; (2) whether they were isolated or extensive; (3) whether the evidence of guilt was overwhelming; and (4) whether a curative instruction was given. In the case, the court found that the prosecutor's comments were not improper at all but were instead invited by the defense and statements of defense counsel. Further, the prosecutor's comments were isolated, and were not calculated to mislead the jury. No curative instruction was given because defendant did not object to the comments. Accordingly, the court found no plain error and affirmed the conviction.

• *Due Process - Prosecutorial Misconduct*  
U.S. v. Coker, 06-6504 (1/24/08)

▶ Defendant was convicted for an illegal conflict of interest for her role in defrauding the federal government while employed by the VA outpatient pharmacy. At sentencing, the government pursued a loss amount that was higher than the amount stipulated with a codefendant. Defendant argued on appeal that the prosecutor committed misconduct by arguing different loss amounts for defendant and her codefendant.

★ Holding: The court ruled that the differences in the loss amounts could not be prosecutorial misconduct because the government is not necessarily under any obligation to stipulate identical loss amounts with coconspirators. Specifically, the court found that the differing loss amounts were justified in the case because the prosecutor chose to credit the codefendant for taxes he paid as money returned to the victim (the government). This "credit" reduced the

defendant's loss amount under the guidelines. Although the applicability of the "credit" was questionable as a reduction under the guidelines, the court held that the agreement to it by the prosecutor certainly did not amount to prosecutorial misconduct. Accordingly, the sentence was affirmed.

• *Due Process - Prosecutorial Misconduct*  
U.S. v. Davis, 06-5883 (1/30/08)

▶ Defendant was charged with drug trafficking based, in part, on crack cocaine that was found on a juvenile with defendant at the time of his arrest. During cross examination at trial, defendant's counsel asked the officer multiple times whether the juvenile was prosecuted, and the prosecutor eventually objected and stated, "We don't prosecute innocent people." Defendant immediately moved for a mistrial, and the district court denied the motion, but gave a curative instruction to the jury. During closing argument, the prosecutor insinuated her personal beliefs about the case, called the defense attorney's arguments "offensive," and referred to defendant as a "predator" for using a minor in the offense. Defendant failed to object to the statements in closing. On appeal, defendant claimed prosecutorial misconduct required reversal of his conviction.

★ Holding: In assessing a claim of prosecutorial misconduct, the court must determine whether the comments were improper and flagrant. In examining flagrancy, the court must consider the following: (1) the likelihood that the remarks tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberate or accidental; and (4) the total strength of the evidence. Regarding the first comment, to which defendant objected at trial, the court held that the prosecutor's remark was improper. The statement that he did not prosecute "innocent people" tended to establish the

credibility of the juvenile/witness and to improperly suggest that defendant was guilty. However, the court found that the remark was isolated, and unintentional, and that a proper curative instruction was given.

Regarding the comments during closing argument, the court applied plain error analysis. The court ruled that none of the prosecutor's comments were so egregious as to affect the "fairness, integrity or public reputation of the proceedings." Accordingly, defendant's conviction was affirmed.

• *Due Process - Prosecutorial Vindictiveness*  
U.S. v. Moon, 06-5581 (1/16/08)

▶ Defendant was charged with three counts of health care fraud and moved to dismiss the indictment based upon the failure to allege an interstate nexus. The district court granted the motion, and the government obtained a superseding indictment. Defendant again moved to dismiss based upon interstate nexus, and again the district court granted the motion. In obtaining a second superseding indictment, the government added a count of making false statements to a government official. Defendant moved to dismiss the additional count based upon prosecutorial vindictiveness. The district court denied the motion, defendant was convicted after trial, and she appealed.

★ Holding: In order to prove prosecutorial vindictiveness in charging decisions, a defendant must show that the prosecutor had a "stake" in deterring the exercise of defendant's rights, and that the prosecutor's conduct was unreasonable. In the case, the court held that the fact that the prosecutor had to repeat prosecutorial efforts, in the form of a second and third superseding indictment, did not rise to the level of vindictiveness. The minimal burden on the prosecutor in having to seek a new indictment at the pretrial stage did not establish that the government had a "stake" in deterring defendant's exercise of her rights. Further, the court ruled that the government's

conduct was not unreasonable. The court found credible the government's assertion that it did not bring the false statement charge in the earlier indictments because "it did not want to delay the trial start date." Accordingly, the conviction was affirmed.

## **B. *Brady***

### • *Brady*

Bell v. Bell, 04-5523 (1/4/08)

► Defendant was charged with murder in state court and at trial the prosecution utilized a witness who was a cell mate with defendant. The witness testified that defendant confessed to the murder. Defendant was convicted and he learned after trial of three items that were not disclosed by the prosecution prior to trial: (1) Notes of the prosecutor which showed that the witness sought consideration for his testimony against defendant; (2) sentencing records from the witness' state court proceedings where he obtained favorable treatment from a different state prosecutor; and (3) evidence of an implied agreement between the prosecutor and the witness to seek favorable treatment for the witness from the parole board. Defendant lost his state court appeal and filed a federal *habeas* petition alleging a *Brady* violation. The district court denied defendant's petition, but the original Sixth Circuit panel reversed, finding that *Brady* was violated. (See P.V., Issue # 9). The court granted the government's request for rehearing *en banc*.

★ Holding: In order to establish a *Brady* violation, a defendant must prove that the evidence was favorable, that it was suppressed by the government, and that prejudice ensued. First, the court held that the prosecutor's suppression of his notes caused no prejudice to the defense. Although the notes would have been useful for impeachment of the witness, the defense was otherwise able to effectively argue that the witness was testifying to obtain a benefit for himself, and the notes would have added little to this argument. Second, the court

found that the sentencing records of the witness should have been turned over as impeachment materials, but that the records were public and should have been discovered by the defense. Defendant was put on notice in the case that the witness had pending criminal charges, and in fact the witness mentioned them during his trial testimony. Therefore, no *Brady* violation occurred because the defense knew about the records, but failed to obtain them.

Third, the court held that the evidence in the case was insufficient to establish an implied agreement between the prosecutor and the witness. The court noted that either an express or an implied agreement to confer a benefit on a witness must be disclosed to the defense under *Brady*. Nonetheless, the court found that the facts that the witness sought favorable treatment, and that the prosecutor submitted a letter to the parole board on the witness' behalf after defendant's conviction, were insufficient to establish a tacit agreement. The prosecutor testified at the hearing before the district court and flatly denied that any agreement existed, and the court chose to credit that testimony. The court emphasized that, "if the government chooses to provide assistance to a witness following trial, a court [does not have to] necessarily infer a preexisting deal subject to disclosure under *Brady*. Accordingly, the original panel decision was vacated and the district court ruling affirmed.

### • *Brady*

U.S. v. Coker, 06-6504 (1/24/08)

► Defendant was convicted for an illegal conflict of interest for her role in defrauding the federal government while employed by the VA outpatient pharmacy. After sentencing, defendant learned that the government stipulated with her codefendant to a lower loss figure based upon the codefendant's payment of taxes as a reduction against his loss amount. On appeal, defendant argued that the government violated *Brady* by failing to

disclose (1) the codefendant's payment of taxes as restitution, (2) that the guidelines might permit defendant to reduce her own loss amount by paying taxes, and (3) the government's stipulation with the codefendant to a lower loss amount.

★ Holding: In order to establish a *Brady* violation at sentencing, the defendant must show that the evidence was favorable in terms of guilt or punishment, it was suppressed by the government, and prejudice ensued. First, the court found that defendant already knew that the codefendant was paying taxes as restitution because defendant had the codefendant's plea agreement prior to sentencing. Second, the court held that the government was under no obligation to disclose that the guidelines might permit a reduction in the loss amount because this item was not a "fact," but a legal argument. Third, the defendant could not prove that the stipulation with the government and the codefendant existed prior to defendant's sentencing, thus it could not have possibly been disclosed. Accordingly, the sentence was affirmed.

### C. Confessions and Testimonial Rights

• *Miranda - Implied Waiver of Rights*  
U.S. v. Nichols, 06-5862 (1/25/08)

► Defendant was arrested based on an open felony warrant and a gun was found in his car. Defendant was advised of his *Miranda* rights and expressed an understanding of them, but did not expressly waive them. In response to officer questioning, he initially lied about his identity, but then told the truth and made inculpatory statements. Upon his prosecution for being a felon in possession of a firearm, defendant moved to suppress his statements. The district court denied the motion and defendant appealed.

★ Holding: Absent an express waiver of *Miranda* rights, a court must presume that a defendant has not waived the right to remain silent. A waiver may be inferred, however,

where a defendant is properly informed of the rights, indicates an understanding of them, and "does nothing to invoke those rights." In the case, the court held that defendant's lies to the officers about his identity did not invoke his rights. Instead, his statements showed his affirmative desire to communicate with the officers to further his own self-interest. Additionally, the court found that the officers did not engage in any coercive conduct in getting defendant to talk. Finally, the court found unpersuasive the fact that the officer checked the "no waiver" box on the *Miranda* form. The court reasoned that this merely indicated that defendant did not expressly waive his rights. Accordingly, the denial of the motion to suppress was affirmed.

### D. Double Jeopardy

• *Double Jeopardy-Multiplicitous Indictment*  
U.S. v Swafford, 06-5878 (1/17/08)

► Defendant was charged with distributing iodine to multiple purchasers, knowing that it was being used in the manufacture of meth. The indictment charged defendant with multiple violations of both 21 USC § 843(a)(6)(possession of certain items with intent of assisting the manufacture of illegal drugs) and 21 USC § 841(c)(2)(distributing a listed chemical knowing that it will be used to manufacture a controlled substance). Defendant was convicted after trial, and argued on appeal that the separate counts in the indictment were multiplicitous because they charged the same offense in more than one count of the indictment in violation of the Double Jeopardy Clause.

★ Holding: An indictment is multiplicitous, and thus violates double jeopardy, where a single offense is charged in more than one count in an indictment, thus punishing a defendant twice for the same crime. In order to test for multiplicity, the court must determine whether Congress intended to punish each statutory violation separately. The general test

for compliance with the double jeopardy standard, known as the *Blockburger* test, is whether each statutory provision requires proof of an element or fact that the other does not. In the case, the court held that the separate violations of § 843 and § 841(c) were multiplicitous because there were no elements of proof of § 843 that were not required elements of proof of § 841(c). Thus, the consecutive sentences imposed by the court for the separate violations were vacated, and the case was remanded with instructions to sentence defendant based solely on the § 841(c) violations.

#### **E. Miscellaneous Fifth Amendment**

##### *• Equal Protection*

U.S. v. Nichols, 06-5862 (1/15/08)

► Officers observed a group of people congregating around a car, and the individuals dispersed upon the officers' arrival. As a result, the officers ran a license check on the car, and then a warrant check for the car owner. The check showed that defendant had an open felony warrant. The officers approached and arrested defendant based upon the open warrant. Upon subsequently finding a gun, defendant was charged with being a felon in possession of a firearm and he moved to suppress the evidence. Defendant claimed that the officer's violated his right to equal protection by running the warrant check upon the sole basis that he was black. The district court denied the motion, and defendant appealed.

★ Holding: In order to establish a violation of the Equal Protection Clause, a defendant must show purposeful discrimination. In making this showing, defendant may rely on inferences from statistical evidence of the disparate impact of a law or government action on a certain race. If defendant makes a *prima facie* showing of discriminatory purpose, the government must identify a race-neutral reason for its actions, or show a compelling

government interest justifying the action. In the case, the court held that defendant had offered no evidence of purposeful discrimination, and that the statistical evidence offered by defendant – one-third of young black men are involved in the justice system – was irrelevant. Thus, no discriminatory purpose was shown. Additionally, the court opined that suppression of evidence would not be the appropriate remedy for an equal protection violation in the running of a license tag and warrant check (actions which do not implicate the Fourth Amendment). Instead, a defendant's remedy would be a civil action under 42 USC § 1983. Accordingly, the district court's ruling was affirmed.

##### *• Due Process - Right to Indictment*

U.S. v. Thompson, 06-6233 (2/11/08)

► Defendant pled guilty to drug trafficking and carrying a firearm in relation to drug trafficking. While defendant's indictment charged him only with "carrying and using" the firearm, the codefendant was charged in a separate count with carrying and discharging a different firearm. At sentencing, the district court imposed the 10 year mandatory minimum sentence to defendant for the codefendant's discharge of the other firearm. Defendant appealed.

★ Holding: The court held that the district court's application of the 10 year mandatory sentence to defendant violated defendant's due process rights to be indicted by the grand jury and his Sixth Amendment right to fair notice of the charge against him. Specifically, because the codefendant was charged with discharging a gun, and defendant was charged only with carrying and using a separate gun, the indictment failed to put defendant on notice that he could be held liable for the codefendant's gun, or that he could be responsible for the discharge of the firearm. The court emphasized that the government could simply have indicted both defendants

with a general charge under 18 § 924(c) in both counts, without reference to a specific gun or a discharge. But because the indictment did make such references, defendant's rights to fair notice were deprived and his sentence was vacated.

## VI. Sixth Amendment

### A. Right to Jury Trial/*Booker*

#### • *Booker/Rita*

United States v. Sexton, 05-6412 (1/11/08)

► Defendants were convicted after trial for drug trafficking. At sentencing, the district court determined the drug amount attributable to each defendant based upon the trial testimony. Defendants argued on appeal that their Sixth Amendment rights had been violated where the district court calculated the drug amounts based upon the preponderance of the evidence standard at sentencing.

★ Holding: First, the court noted that none of the defendants received a sentence higher than the statutory maximum charged in the indictment, and thus neither *Apprendi* nor *Blakely* was implicated. Further, even though the district court and not the jury determined the drug amount, *Booker* and *Rita* were not violated because the district court applied the guidelines as non-binding. Finally, the court held that retroactive application of *Booker*'s remedial holding to defendants' case did not violate defendant's due process rights, or the *Ex Post Facto Clause*. Accordingly, the Court found no constitutional violation in the imposition of sentence, and affirmed the district court's ruling.

#### • *Booker - Dismissed Conduct*

U.S. v. Conway, 06-4083 (1/23/08)

► Defendant was charged with possession of a sawed-off shotgun, felon in possession of a firearm, and felon in possession of ammunition. Pursuant to a plea agreement, defendant pled guilty to the possession of ammunition charge in return for dismissal of

the two charges related to the sawed-off shotgun. At sentencing, the district court imposed a 12 level enhancement for defendant's possession of the sawed-off shotgun. Defendant argued on appeal that the Sixth Amendment right to jury trial prohibits the district court's consideration of dismissed conduct at sentencing.

★ Holding: The court held that the central premise of plea agreements is that they waive a defendant's Sixth Amendment right to a jury trial. Consistent with that premise, the court found that defendant's plea agreement made it clear that the district court would determine defendant's sentence and whether he possessed the shotgun or not. The court emphasized that the plea agreement (1) acknowledged *Booker* and the non-mandatory nature of the guidelines, (2) indicated defendant's awareness that he could receive up to the statutory maximum, and (3) acknowledged that defendant contested that he possessed the shotgun. These provisions indicated that defendant knew that the plea agreement placed the issue of the shotgun possession squarely within the district court's discretion at sentencing. Thus, the sentence was affirmed.

#### • *Booker/Apprendi*

U.S.v. Thompson, 06-6233 (2/11/08)

► Defendant pled guilty to drug trafficking and carrying a firearm in relation to drug trafficking. Although the indictment alleged only that defendant "carried and used" the firearm (which would yield a five year mandatory sentence) the district court applied a ten year mandatory sentence because it concluded that defendant was responsible for a codefendant's discharge of a firearm. Defendant appealed and argued that *Apprendi*, *Blakely* and *Booker* precluded the enhancement of defendant's mandatory minimum.

★ Holding: Relying on the Supreme Court's decision in *Harris*, the court held that the various subparagraphs of 18 USC § 924(c) are

sentencing enhancements, not elements of the offense that must be pled in the indictment. Accordingly, the court found that enhancement of defendant's sentence did not violate the Sixth Amendment and that the court had no authority to conclude that *Blakely* and *Booker* implicitly overruled *Harris*. Thus, the court found no Sixth Amendment violation. The court did, however, find a due process violation in the procedure and reversed the sentence on this basis. (*See supra*, V. Fifth Amendment).

#### **D. Right to Counsel/Self Representation**

##### *• Right to Counsel of Choice*

U.S. v. Swafford, 06-5878 (1/17/08)

▸ Defendant was charged with conspiracy and substantive distribution counts for selling iodine, knowing that it would be used in the manufacture of meth. Prior to trial, the government moved to disqualify defendant's counsel based upon a conflict of interest. One of defendant's proposed defenses was that he acted on the advice of counsel, the advice coming from an attorney with the same firm as the attorney representing defendant at trial. In an effort to avoid disqualification of his counsel, defendant offered to waive the advice-of-counsel defense. The district court nevertheless granted the disqualification, finding that evidence introduced by the government at trial might cause defendant to testify, which, in turn, may implicate the conflict of interest with the law firm. Upon his conviction, defendant appealed.

★ Holding: Defendants enjoy a Sixth Amendment right to hire their own counsel of choice, but this must be balanced against "the court's interest in the integrity of the proceedings and the public's interest in the proper administration of justice." In the case, the court held that the district court properly considered its obligation to serve justice by disqualifying defendant's counsel. The potential that developments could arise during trial that would cause a conflict with

defendant's counsel were sufficient support the disqualification, even if the defense could not foresee those developments prior to trial. Accordingly, defendant's conviction was affirmed.

#### **E. Indictment - Variance/Duplicity**

##### *• Variance*

U.S. v. Swafford, 06-5878 (1/17/08)

▸ Defendant was charged with a drug conspiracy for distributing iodine to numerous buyers, knowing that the buyers were using the iodine to make meth. At trial, the government presented evidence of numerous transactions by defendant with different buyers of iodine. Upon defendant's conviction, he argued for the first time on appeal that a fatal variance occurred because the indictment alleged a single conspiracy, but the evidence at trial proved multiple conspiracies.

★ Holding: A variance occurs where the evidence at trial proves facts materially different from those alleged in the indictment. A variance requires a reversal only where it affects defendant's substantial rights. In the case, the court found that defendant failed to object to the variance in the district court, thus the court applied plain error review. The court held that a variance occurred because the government's evidence showed that defendant was engaged in independent relationships with the individual buyers of iodine, but the government failed to show any connection between the buyers. Although the government claimed that this was a single "hub-and-spoke" conspiracy, the court emphasized that the "wheel" had no "rim," meaning "no common goal or enterprise" between the various buyers. As such, the government's evidence actually proved multiple conspiracies between defendant and the various buyers.

Further, the court held that the variance amounted to plain error because it likely substantially affected the outcome of the proceeding. In this regard, the court reasoned

that defendant suffered from substantial “spillover” in the evidence. Many of the purchases of iodine by the buyers were not obviously related to the manufacture of meth, while other large scale purchases clearly warranted an inference of defendant’s knowledge. Had the indictment been pled properly as involving multiple conspiracies, the jury may very well have concluded that conspiracies existed between defendant and certain customers, but not others. The court concluded that “had the government been required to prove each of the multiple conspiracies, the amount of iodine/methamphetamine – and the attendant guidelines range – may very well have been lower.” Accordingly, defendant’s conviction was reversed.

## VII. Other Constitutional Rulings

### A. Commerce Clause

#### • *Commerce Clause*

U.S. v. Baylor, 07-3002 (2/26/08)

► Defendant was charged with a Hobbs Act robbery of a Little Caesar’s pizza restaurant. At trial, the government proved that the restaurant received its flour, cheese, and sauce from out of state. Defendant was convicted and argued on appeal that the *de-minimis*-effect-on-interstate-commerce standard is unconstitutional in light of the Supreme Court’s decision in *U.S. v. Morrison*.

★ Holding: The court held that precedent in the Sixth Circuit required adherence to the rule that, in regard to the regulation of economic activity, “if a statute regulates an activity which, through repetition, in the aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.” Thus, the proof by the government that certain food items were obtained by the restaurant from out of state was sufficient to satisfy the requirements of the Commerce Clause. Defendant’s conviction was accordingly

affirmed.

## VIII. Defenses

### C. Necessity/Duress

#### • *Necessity*

U.S. v. Ridner, 06-5822 (1/17/08)

► Defendant was charged with being a felon in possession of ammunition for possessing three shotgun shells upon his arrest on an open warrant. Prior to trial, the government moved *in limine* to prevent defendant from presenting a necessity defense. At the pretrial hearing, defendant testified that he possessed the shells in order to keep his brother from taking them, retrieving his shotgun from the pawnshop, and committing suicide. The district court granted the government’s motion, defendant entered a conditional plea, and he appealed.

★ Holding: In order to establish the defense of necessity, the defendant must show the following: (1) an imminent threat of death or serious bodily injury to the defendant or a third party; (2) that defendant did not negligently place herself in the position; (3) defendant had no reasonable legal alternative to violating the law; (4) a direct causal relationship between the criminal action and avoidance of the threatened harm; and (5) that defendant did not maintain the illegal conduct any longer than necessary. In the case, the court held that defendant failed to meet the first element because there was no imminent threat to the brother. By defendant’s own testimony, he believed that there was no shotgun in his brother’s home, and that his brother would have had to go to the pawn shop to retrieve the shotgun. Further, the court found that defendant did not meet the fifth element because he ran from the police when they arrived instead of immediately giving them the shells that were in his pocket. Accordingly, the district court’s *in limine* ruling was affirmed.

#### **D. Statute of Limitations**

- *18 USC § 3282 - Statute of Limitations*

U.S. v. Grenier, 06-4473 (1/22/08)

▶ Defendant was charged with making false statements to the SEC under 18 USC § 1001. The basis for the prosecution was a letter that defendant both faxed and mailed to the SEC on July 10, 2001. The mailed letter was received by the SEC on the following day, July 11. The government obtained an indictment against defendant on July 11, 2006. Defendant moved to dismiss the indictment on statute of limitation grounds, and the district court granted the motion because the government was outside the five year limitations period by one day. The government appealed.

★ Holding: Pursuant to § 3282, the statute of limitations for a false statement prosecution is five years. The statute of limitations begins to run on the date that all of the elements of the crime charged have occurred. In the case, the court held that the crime of making a false statement occurred on July 11, 2001, the day that defendant mailed and faxed the letter. The court dismissed the government's claim that the SEC did not have "jurisdiction" over the matter, under § 1001, until it received the letter. Further, the court found unpersuasive the government's argument that a false statement offense was not complete until the statement was received by the government. Accordingly, the district court ruling was affirmed.

#### **I. Mistrial**

- *Mistrial*

U.S. v. Caldwell, 06-5640 (2/26/08)

▶ Defendant was charged with possessing narcotics with intent to distribute and possession of a firearm in furtherance of drug trafficking. Prior to trial, the district court granted a defense motion to exclude any reference to the charge (aggravated burglary) underlying an open warrant that officers had for defendant at the time of his arrest. In spite

of the district court's order, the prosecutor mentioned the charge in open statement, and then an officer testified about the charge. Defendant objected both times and requested a mistrial. The district court denied the mistrial, but instead instructed the jury to disregard the comments. Upon his conviction, defendant appealed.

★ Holding: The court held that the district court acted within its discretion in providing a jury instruction instead of granting a mistrial. The court emphasized that the evidence against defendant was otherwise overwhelming and that the prosecutor's and witness' statements did not appear to be intentional or in bad faith. Therefore, the conviction was affirmed.

#### **IX. Plea & Sentencing Hearings**

##### **A. Plea Agreements/Plea Hearings**

- *Plea Agreements - Appeal Waivers*

U.S. v. Coker, 06-6504 (1/24/08)

▶ Defendant was charged with conspiracy to defraud the government, taking bribes, and violating conflict of interest laws. She entered into a plea agreement where she waived her right to appeal the sentence unless the district court "departed upwards" from the sentencing guidelines. At sentencing, the district court applied the relevant conduct provisions of the guidelines to increase defendant's offense level. The court then imposed a sentence at the bottom end of the adjusted guideline range. Defendant appealed.

★ Holding: The court held that defendant's appeal of her sentence was waived by the plea agreement. Specifically, the court held that the district court's enhancement of defendant's sentence was an "adjustment" to the guidelines pursuant to the relevant conduct provisions, as opposed to an "upward departure." Thus, the court found that the plea agreement provision was enforceable and the appeal was waived.

## **B. Sentencing**

### • *Rule 32(f)(1) - Disputed Loss Amount* U.S. v. Coker, 06-6504 (1/24/08)

▶ Defendant was convicted for an illegal conflict of interest for her role in defrauding the federal government while employed by the VA outpatient pharmacy. The PSR calculated the loss caused by defendant to be \$383,620. This amount was based upon the fact that defendant grossly overcharged the government for rolls of tape. The loss amount in the PSR was based upon the amount for which tape could be purchased “by” other vendors. At sentencing, the government arguably pursued a different theory in proving loss by showing the price at which the tape could have been purchased “from” other vendors. In making this proof, the government presented the testimony of the codefendant, who indicated the amount he would have charged the government for the tape, but for the fraudulent scheme. Defendant neither timely objected to the loss amount in the PSR nor challenged the codefendant’s testimony at sentencing. The district court adopted the loss calculation and defendant appealed.

★ Holding: Fed. R. Crim. P. 32(f)(1) requires a party to object in writing to the PSR within 14 days of its disclosure. The court found that defendant never objected to the loss calculation, let alone within 14 days, and accordingly the district court was free to adopt the fact without taking additional evidence. Furthermore, even if defendant had objected timely, the district court did not err in relying on the evidence presented by the government at sentencing. The government is not bound by a PSR to prove the loss amount “only through the particular method identified in the PSR.” Accordingly, the sentence was affirmed.

### • *Rule 32(h) - Notice of Upward Variance* U.S. v. Vowell, 06-5742 (1/29/08)

▶ Defendant was convicted of coercing a minor to engage in sexually explicit conduct

and possession of child pornography. In the PSR, the probation department suggested that an upward departure may be appropriate based upon USSG § 5K2.0. At sentencing, the district court decided to impose an upward variance from the guideline range based upon the factors contained in 18 USC § 3553(a). Defendant did not object to the lack of notice of the upward variance in the district court, but raised the issue on appeal.

★ Holding: Fed. R. Crim. P. 32 requires that a defendant receive notice of the possibility of any upward departure or variance from the recommended guideline range. Because defendant did not object to the lack-of-notice issue in the district court, the court applied plain error review. The court ruled that, although defendant did not technically have notice of the possibility of the upward variance, as opposed to the upward departure referenced in the PSR, defendant was aware of the issues underlying the upward variance – namely, the substantial harm caused to defendant’s daughter. In fact, the court emphasized that defendant presented testimony at the sentencing hearing directly related to the upward variance issue. Thus, the court found no plain error regarding defendant’s notice of the upward variance and affirmed defendant’s conviction.

### • *Rule 32(h) - Notice of Upward Variance* U.S. v. Tate, 06-6529 (2/15/08)

▶ Defendant originally pled guilty to being a felon in possession of a firearm, but later withdrew his plea and was convicted at trial. Both the original and the revised PSR recommended the possibility of an upward departure, pursuant to USSG § 4A1.3, because defendant’s criminal history category did not adequately reflect the seriousness of his past conduct. Additionally, the government filed a sentencing memorandum suggesting an upward departure on this basis, or an above-guideline sentence based upon the factors under 18 USC

§ 3553. The district court imposed an upward variance to the statutory maximum of 10 years, and defendant failed to raise any issue in the district court regarding notice of the upward variance. Defendant appealed

★ Holding: Because defendant failed to object to the notice issue in the district court, the court applied plain error review. The court found no plain error in the notice defendant received in the district court because of the notice in the PSR and the government's sentencing memorandum. Thus, the sentence was affirmed.

• *Rule 32(h) - Notice of Upward Variance*  
U.S. v. Alexander, 06-1867 (2/26/08)

► Defendant was convicted of sexual abuse of a minor. The PSR made no recommendation for an upward departure, and at sentencing defendant requested a sentence that included treatment. The district court imposed an upward variance from the guideline range. At the end of the hearing, the court asked defendant if he had any objection to the sentence, and he said "no." Defendant appealed and argued that the district court provided insufficient notice of the upward variance.

★ Holding: Because defendant failed to object to the lack of notice, the court reviewed for plain error. Relying on its prior ruling in *U.S. v. Cousins* (See P.V., Issue # 11), the court held that the district court committed plain error by failing to provide notice of the upward variance to defendant prior to sentencing. Accordingly, the case was remanded for resentencing.

• *Rule 32(i)(1)(A) - Review of PSR*  
U.S. v. Tate, 06-6529 (2/15/08)

► Defendant originally pled guilty to being a felon in possession of a firearm and a PSR was prepared. The district court permitted defendant to withdraw his guilty plea, he was convicted at trial, and a new PSR was prepared.

The new PSR was identical to the original with the exception that defendant lost his three-point reduction for acceptance of responsibility. At the sentencing hearing, the district court asked defendant whether he reviewed the PSR and discussed it with his counsel. Defendant replied in the negative. Defendant's counsel stated that he provided a copy of the revised PSR to defendant, but that defendant declined to read it or discuss it. Counsel also stated that defendant and he discussed the original PSR at length. Neither defendant nor counsel raised any objection to the PSR, or to proceeding with sentencing. Upon being sentenced to the statutory maximum of 10 years, defendant appealed.

★ Holding: Fed. R. Crim. P. 32(i)(1)(A) requires a district court to verify that a defendant and his counsel have reviewed and discussed the PSR. In the case, the court held that plain error review applied because neither defendant or his counsel objected to proceeding with sentencing even though defendant stated that he had not read the PSR. The court found no plain error because defendant was afforded the opportunity to read the PSR but chose not to do so, and defendant and counsel discussed the original PSR at length and it was substantially the same as the revised PSR. Accordingly, the sentence was affirmed.

• *Breach of Cooperation Agreement*  
U.S. v. Allen, 06-5077 (2/5/08)

► Defendant was charged with conspiracy and various substantive offenses related to his robbery of rare materials from a library. Defendant entered into a cooperation agreement with the government whereby he agreed to provide information to the government in return for its promises that it would seek a sentence reduction if the information were worthy, and that it would not use the information against him. Defendant subsequently entered a guilty plea without a plea agreement, and the government decided

that his information was not worthy of a sentence reduction. The government advised the probation department of the information defendant provided during his interview – some of which was inculpatory – and the information was included in the PSR. Defendant then moved the district court to award a sentence reduction because the government breached the cooperation agreement by turning the information over to probation. The district court responded by striking the information from the PSR, and indicating that it would not use the information in any way in sentencing defendant. Defendant was subsequently sentenced to the bottom end of the applicable guideline range and he appealed.

★ Holding: The court held that the absence of any harm to defendant in the case rendered his claim of a violation of the cooperation agreement non-actionable. The district court struck the proffered information from the PSR and indicated that it would not use the information in any way for sentencing. Further, defendant declined numerous invitations to request that the district judge recuse herself. Accordingly, the district court's ruling was affirmed.

## X. Jury Issues

### B. Juror Bias/Misconduct

#### • *Juror Bias/Misconduct*

U.S. v. Wheaton, 06-4080 (2/19/08)

▶ Defendant was charged in a drug conspiracy and the case proceeded to trial. During jury deliberations, it came to light that a juror utilized his laptop to replay audio and video recordings of admitted evidence for the jury, and that he used it to determine the distance between cities in Ohio. The district court questioned the juror and the whole jury, and determined that the juror used the computer for no other purpose, and that the jury was in no way influenced by the use of the laptop. Defendant was convicted and he filed

a motion for new trial, claiming juror bias. The district court denied the motion and defendant appealed.

★ Holding: The defendant bears the burden of showing juror bias and that the defendant was prejudiced thereby. The court held that the district court took appropriate steps to determine if any juror bias occurred (to which defendant did not object) and properly concluded that the jury was not influenced by the use of the laptop. Accordingly, defendant suffered no identifiable prejudice, and the conviction was affirmed.

### D. *Batson*

#### • *Batson*

U.S. v. Odeneal, 06-5885 (2/22/08)

▶ Defendant was charged with conspiracy to distribute narcotics and during his trial, the prosecutor used peremptory strikes to remove two of the three remaining African-Americans in the *venire*. Defendant challenged one of the strikes under *Batson*, and the government indicated that it struck the juror because she sat on an earlier jury and voted for acquittal, and because she was recently divorced. Defendant countered that a white juror on the panel sat on the same earlier jury, voted for acquittal, and was not removed by the prosecutor. Further, the questionnaire indicating the juror's divorce was over a year old, and the prosecutor did not ask the juror about the divorce during *voir dire*. The district court found no purposeful discrimination and denied defendant's *Batson* challenge. Upon his conviction, defendant appealed.

★ Holding: A three-step analysis is utilized in evaluating a *Batson* challenge: (1) the opponent of the strike must make out a *prima facie* showing of racial discrimination; (2) the burden then shifts to the proponent to come forward with a race-neutral explanation; and (3) the court must decide whether the opponent has proven purposeful racial discrimination considering the totality of the evidence. In the

case, the court found that defendant made a *prima facie* showing and that the prosecutor offered a race-neutral explanation. The court concluded, however, that the strike of the challenged black juror was a pretext for discrimination. Defendant's explanation showed that the prosecution failed to strike a similarly situated white juror who also voted for acquittal in the prior trial. Further, the prosecutor's concern about the divorce was belied by the failure to inquire about the divorce during *voir dire*. Accordingly, the court found that the striking of the black juror by the government was purposeful discrimination, the conviction was reversed, and the case remanded for a new trial.

#### **E. Miscellaneous Jury Issues**

##### • *Racial Composition of Venire*

U.S. v. Odeneal, 06-5885 (2/22/08)

► Defendant was charged in a drug conspiracy and at trial he challenged the racial composition of the *venire*. The district court found that the *venire* constituted a fair cross-section of the community, defendant was convicted, and he appealed.

★ Holding: In order to establish a *prima facie* violation of the fair cross-section requirement of the Sixth Amendment, a defendant must establish the following: (1) the excluded group is "distinctive;" (2) representation of such group is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to "systematic exclusion." In the case, the court first held that African-Americans are a distinctive group. Second, the court found that defendant proved that the county contained 18.9% blacks, but failed to show the racial make-up of the other ten counties of the district, which was much lower. Third, the court ruled that the system in the district – using voter registration to form the jury pool – was mandated by statute and did not result in "systematic exclusion" of blacks.

Thus, the court found no Sixth Amendment violation in the formation of the *venire*.

#### **XI. Probation & Supervised Release**

##### • *Parole Hearings*

Wilkins v. Timmerman, 07-3339 (1/14/08)

► Defendant raped a ten year old while on parole to the State of Ohio. Defendant was convicted of the rape after trial, but the conviction was reversed on appeal. The parole board proceeded with revocation proceedings, and allowed the child victim and several other witnesses to testify by live video conference. Defendant objected to the process as violating his due process and confrontation rights. Defendant's parole was revoked, defendant lost his state court proceedings, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: The minimum due process requirements for a parole revocation hearing are as follows: (1) written notice of the violations; (2) disclosure of the evidence; (3) opportunity to be heard in person and to present evidence; (4) the right to confront and cross examine witnesses, unless good cause requires otherwise; (5) a neutral and detached hearing body; and (6) written findings of fact and reasons for revocation. Relying on the diminished rights retained by parolees, the court held that the live video conference utilized by the parole board was "sufficiently similar" to live testimony to satisfy the minimum due process and confrontation requirements. Accordingly, the district court's ruling was affirmed.

• *Supervised Release Violation - Jurisdiction*  
U.S. v. Madden, 05-4304 (1/15/08)

► A warrant was issued against defendant for a supervised release violation, but the district court did not sentence defendant for the violation until four years after the supervised release period expired. During this four year period, defendant was subject to several

indictments and superceding indictments for various charges, and was in the custody of another jurisdiction for two of the four years. Upon defendant's sentencing for the violation, he appealed.

★ Holding: Pursuant to 18 USC § 3583(i), a district court's power to revoke a term of supervised release extends beyond the expiration of the supervised release term for a period "reasonably necessary for the adjudication of the matters," if a warrant or summons has been issued prior to the expiration of the term. In the case, the court held that the four-year delay was reasonable because during the entire four-year period defendant was either in custody elsewhere or was constantly being brought up on charges. The court noted that the new charges arose out of incidents related to the facts underlying defendant's supervised release violation. Further, the court emphasized that defendant could show no prejudice from the delay. Finally, the court found that the warrant that was entered against defendant for the violation was filed prior to expiration of defendant's term and that it was sufficient. The court noted a split of authority regarding the issue of whether a warrant for a supervised release violation must be sworn and supported by probable cause, but because defendant did not raise the issue in the district court, the court found no plain error. Accordingly, defendant's sentence was affirmed.

• *Supervised Release - Tolling of Period*  
U.S. v. Goins, 07-3341 (2/13/08)

► Defendant was placed on a five year period of supervised release based on a conviction for bank fraud. During the period of supervision, defendant absconded to another state, and was charged with new felony offenses. Defendant was held in pretrial detention on the new offenses for 63 days, then posted bond and absconded again. Defendant was later rearrested and convicted for the new offenses.

Defendant's probation officer filed a petition to violate his supervised release, but did not file until 18 days after defendant's supervised release was originally schedule to expire. At the violation hearing, the district court found that defendant's supervised release period was tolled for 63 days while defendant was incarcerated in pretrial detention on the new felony charges, and thus that the violation petition was timely. Defendant appealed.

★ Holding: Pursuant to 18 USC § 3624(e), a term of supervised release is tolled for any period during which the defendant is "imprisoned in connection with a conviction" for a period 30 days or more. Answering an open question in the Sixth Circuit, the court held that the phrase "imprisoned in connection with a conviction" included pretrial detention when the pretrial detention is later credited as time served in connection with a subsequent conviction. Accordingly, because the 63 days that defendant was in pretrial custody was eventually credited against his sentence on the new felony charges, his supervised release was tolled during that time period, and the violation petition was therefore timely. Thus, defendant's sentence for his supervised release violation was affirmed.

• *Conditions of Release*

Wilson v. Collins, 07-3428 (2/22/08)

► Defendant was convicted in Ohio state court for felonious assault. As a result, defendant was required to submit to DNA testing, pursuant to Ohio law requiring the testing of felons. Defendant filed an action under 42 USC § 1983 challenging the DNA testing of offenders under various provisions of the Fourth and Fifth Amendment. The district court granted summary judgment to the state and defendant appealed.

★ Holding: The court held that DNA testing of convicted felons did not violate the following provisions: (1) Fourth Amendment unreasonable searches and seizures; (2) Fifth

Amendment substantive due process; (3) Fifth Amendment procedural due process; (4) Fifth Amendment privilege against compulsory self-incrimination; and (5) the Equal Protection Clause. Accordingly, the district court ruling was affirmed.

## **XII. Appeal**

### **A. Preserving Error**

#### *• Issue Not Raised in First Appeal*

U.S. v. Sedore, 06-2259 (1/16/08)

► Defendant was convicted of identity theft and making false claims to the IRS. During his sentencing, he agreed to the factual statement that there were 31 victims of the offense. As a result, defendant received an enhancement for the number of victims. Defendant subsequently appealed, and his sentence was vacated on appeal. Defendant did not raise any issue regarding the number of victims in his first appeal. Prior to his resentencing, defendant filed a sentencing memorandum and argued that the number of victims should only be one, the IRS. Defendant did not raise, and the district court did not assess, the issue at sentencing. Defendant appealed.

★ Holding: A defendant is foreclosed from making a sentencing argument in a second appeal where the defendant did not raise the issue in the first. Accordingly, the court deemed the issue waived.

#### *• Preservation of Issue on Appeal*

U.S. v. Grenier, 06-4473 (1/22/08)

► Defendant was charged with making false statements to the SEC and the district court dismissed the indictment on statute of limitation grounds. The government filed a motion to reconsider the district court's ruling, and the district court denied the motion. The government then filed a notice of appeal which referenced only the district court's ruling on the motion for reconsideration. Defendant argued on appeal that the only issue was whether the district court abused its discretion in denying

the motion for reconsideration.

★ Holding: The court held that a notice of appeal that names only a post-judgment order may extend to the judgment itself if it reasonably appears that the intent of appellant was to appeal the final judgment and the appellee has not been misled. The court may rely on briefs and other subsequent filings to infer the intent of the appellant. In the case, the court held that it was apparent from the filings that the government intended to appeal the district court's dismissal of the indictment, and thus, the court proceeded to address the merits of that claim. (*See supra*, VIII. Defenses).

### **C. Reasonableness of Sentence**

#### *• Reasonableness of Sentence*

U.S. v. Sexton, 05-6412 (1/11/08)

► Defendant was convicted of drug trafficking and at sentencing he requested a sentence below the recommended guideline range. Defendant's argument was based on his community standing, as exhibited by the number of people "attending his bond hearing." The district court rejected defendant's argument and sentenced him to 238 months in prison. Defendant appealed.

★ Holding: The court first held that defendant's sentence was procedurally reasonable. The district court calculated the correct guideline range, treated the guidelines as advisory, considered the factors under 18 USC § 3553, explained its sentence, and acknowledged defendant's argument for a lower sentence. Although the court found that the district court could have provided a more thorough explanation of its reason for rejecting defendant's argument, it was not required given that the issue was "conceptually simple," and the record made clear that the court "considered the evidence and arguments." Further, the court found that defendant had not rebutted the presumption that the within-guideline sentence was substantively reasonable. Accordingly, the sentence was

affirmed.

• *Reasonableness of Sentence*

U.S. v. Peters, 05-6101 (1/14/08)

▶ Defendant was convicted of presenting false claims to the IRS and at sentencing he requested a sentence below the recommended guideline range based upon his difficult childhood, his family ties, and “other mitigating factors.” The district court imposed a sentence within the guideline without addressing defendant’s request for a lower sentence. Defendant appealed.

★ Holding: The court held that the sentence was procedurally unreasonable. Where a defendant raises non-frivolous reasons for imposing a below-guideline sentence, the district court must address the arguments and explain why it has rejected those arguments. Accordingly, the case was remanded for resentencing.

• *Reasonableness of Sentence*

U.S. v. Klups, 06-1931 (1/10/08)

▶ Defendant was convicted of traveling with the intent to engage in criminal sexual activity. At sentencing, the district court heard testimony of the child victim and the victim’s counselor, and reviewed the PSR which reflected that defendant repeatedly abused the victim for years. Based on this information, the district court imposed an upward variance from a guideline range of 24-30 month to a sentence of 60 months in prison. Defendant appealed.

★ Holding: First, the court held that the sentence was procedurally reasonable. The district court adequately considered the factors under 18 USC § 3553 and articulated its reasons for the sentence. Further, the court found that the sentence was substantively reasonable. Applying the abuse of discretion standard mandated by the Supreme Court in *Gall*, the court ruled that the 30 month variance was reasonable given the seriousness of the

offense and the extreme psychological injury suffered by the victim. The court found proper the district judge’s apparent reliance on defendant’s repeated abuse of the victim over a period of time because, even though the district court did not specifically make the finding, the truth of the allegations was proven by a preponderance of the evidence at sentencing. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Moon, 06-5581 (1/16/08)

▶ Defendant was a doctor who was convicted for health care fraud and making false statements to government agents. The health care fraud was based upon defendant’s scheme to provide partial doses of cancer treatment to patients, but bill the federal health program for full doses. At sentencing, the district court heard testimony from family members of defendant’s cancer patients who died. The district court imposed a sentence of 188 months in prison, which was within the guideline range. Defendant appealed the reasonableness of the sentence and argued that it was improper for the court to hear the testimony from deceased patient family members.

★ Holding: The court held that consideration of the statements of the deceased patients family members was relevant to the “nature and circumstances of the offense,” (18 USC § 3553(a)(1)), and the need to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” (§ 3553(a)(2)(A)). The court emphasized that the treatment provided to defendant’s patients was “part and parcel” to the health care fraud. Thus, the proximity of the patient care to the fraud was an appropriate consideration in sentencing. Accordingly, defendant’s sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Grossman, 06-2310 (1/18/08)

► Defendant was convicted of possession of child pornography. At sentencing, the district court determined that the applicable guideline range was 135-168, but that the statutory maximum was 120 months. After considering the factors under 18 USC § 3553, the court imposed a sentence of 66 months incarceration and 10 years of supervised release. The government appealed.

★ Holding: First, the court found that the sentence was procedurally reasonable. The district court correctly calculated the guideline range, treated the guidelines as advisory, considered the § 3553 factors, and adequately explained the basis for the downward variance. Second, the court held that the sentence was substantively reasonable. Specifically, the court ruled that the district court's decision to award a downward variance was supported by (1) the district court's findings that defendant was an "educated man" who was amenable to rehabilitation, (2) defendant appreciated the magnitude of his offense and showed empathy for the child victims of offense, (3) the need to deter further criminal conduct and protect the public, which weighed in favor of a substantial reduction, and (4) the ten year period of supervised release, with continued psychological counseling, would provide adequate correctional treatment. Finally, the court dismissed the government's claims that the district court merely disagreed with the guidelines in relation to the offense because the court found that the district court adequately grounded its consideration of an appropriate sentence in the § 3553 factors. Thus, defendant's sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Vicol, 06-2605 (1/24/08)

► Defendant was convicted of kidnapping and at sentencing the district court mistakenly believed that an earlier version of the

guidelines applied. Accordingly, the court sentenced defendant to 188 months incarceration instead of the applicable guideline range of 360-life. After sentencing, the government filed a motion to correct the sentence. The district court granted the motion and increased defendant's sentence to 360 months. Defendant appealed and the Sixth Circuit vacated the sentence because the district court had not corrected the sentence within seven days as required by Fed. R. Crim. P. 35. On remand, the district court reimposed the 188 month sentence, and the government appealed.

★ Holding: The court held that the district court's sentence was procedurally unreasonable because it relied on the wrong version of the guideline manual in determining the applicable guideline range. The court found that the error was not harmless because the district court would have imposed a 360 month sentence under the correct guideline range. Thus, the sentence was again vacated. Acknowledging the "terrible judicial inefficiency" of the case, the court indicated that the proper course of action for the government when the seven days expired under Rule 35 was to petition the court of appeals "seeking an immediate remand to the district court so that the mistake could be corrected."

• *Reasonableness of Sentence*

U.S. v. Madden, 05-4304 (1/25/08)

► Defendant was convicted for a drug conspiracy and she absconded from pretrial supervision for a year before being sentenced. At sentencing, defendant requested a below-guideline sentence based upon her mental conditions, family responsibilities, aberrant behavior, and minimal role in the offense. The district court touched upon some of these issues, discussed the factors under 18 USC § 3553, and during the course of the hearing exhibited a general familiarity with defendant's circumstances, but ultimately sentenced

defendant within the applicable guideline range. Defendant appealed.

★ Holding: The court first found defendant's sentence to be procedurally reasonable. Although the district court did not specifically discuss and reject each of defendant's arguments for a below-guideline sentence, the court did provide a fairly detailed analysis and touched on the factors under 18 USC § 3553 that were underlying each of defendant's arguments for a variance. Regarding substantive reasonableness, the court held that defendant failed to overcome the presumption of reasonableness for a within-guideline sentence. The court noted the facts that defendant rejected mental health treatment for herself and was an absconder from pretrial supervision for a year as factors weighing against the appropriateness of a downward variance. Therefore, defendant's sentence was affirmed.

• *Reasonableness of Sentence*  
U.S. v. Vowell, 06-5742 (1/29/08)

► Defendants Pratt and Vowell were a mother and her boyfriend who were convicted of (1) coercing a minor (Pratt's daughter) to engage in sexually explicit conduct and (2) possession of child pornography. Defendants Pratt and Vowell received sentences of 20 years and 45 years respectively. Both defendants' sentences were above the recommended guideline range, and both defendants appealed the reasonableness of their sentence.

★ Holding: The court first held that the sentences were procedurally reasonable. The court ruled that the district court properly calculated and considered the guideline range, considered the factors under 18 USC § 3553(a), and adequately explained its reasoning. Second, the court found that the sentences were substantively reasonable by applying the *Gall* abuse of discretion standard. Regarding Pratt, the court held that the sentence was reasonable

because Pratt completely disregarded her parental responsibility to protect her daughter, and substantially impacted her daughter's mental health over the long term. The court found unpersuasive defendant's arguments that she had limited intelligence and was particularly susceptible to Vowell's influence. Regarding Vowell, the court held that the sentence was reasonable based upon the continuing nature and egregiousness of the abuse, and the fact that defendant had a prior conviction for rape. The court was unpersuaded by defendant's argument that the guidelines called for a lower sentence than the statutory maximum, and that Pratt received a substantially lower sentence than the 45 year sentence that Vowell received. Accordingly, the sentences were affirmed.

• *Reasonableness of Sentence*  
U.S. v. Conatser, 06-5694 (2/4/08)

► Defendants Conaster and Marlowe were jail guards who participated in a conspiracy to violate the rights of inmates, one of whom died. Defendant Conaster was convicted only of the conspiracy count and received 70 months in prison, and Defendant Marlowe was convicted of conspiracy and six substantive counts, including denying medical attention that resulted in the inmate's death, and received a life sentence. Defendants both appealed the reasonableness of their sentences.

★ Holding: Because both defendants' sentences were within a correctly calculated guideline range, the court held that both sentences were presumed reasonable. Further, the court found that the district court met the procedural reasonableness requirements for imposing both sentences. Regarding Conaster, the court held that his sentence was substantively reasonable because the district court adequately considered that he had no criminal record, had 135 letters indicating his good character, and that he was a pillar in his community, and concluded that these factors

did not warrant a below-guideline sentence. Further, any disparity between defendant's sentence and that of other codefendants was justified because (1) district courts are not required to consider disparity among codefendants, but only "national disparity," and (2) the sentencing disparity with codefendants was justified based upon the fact that the codefendants pled guilty, were sentenced for lesser offenses, and they received reductions for cooperating and testifying against Conaster at trial. Thus, Conaster's 70 month sentence was justified.

Regarding Marlowe, the court found his sentence to be substantively reasonable because the district court properly balanced defendant's youth, his lack of training, and the overcrowded nature of the jail against the seriousness of the offense and loss to the victims' families, in fashioning the life sentence. The court noted that the district court extensively elaborated on the difficulty of the determination to impose a life sentence, and held that the court adequately considered all of the relevant factors. Finally, the court found that the sentencing disparity with a codefendant, who received 108 months in prison but was arguably more culpable than Marlowe, was justified because of the codefendant's decision to plead guilty to a lesser offense, cooperate with the government, and testify against defendant at trial. Accordingly, defendant's sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Vonner, 05-5295 (2/7/08)

▶ Defendant was convicted of drug trafficking and at sentencing the district court determined that the applicable guideline range was 108-135 months. Defendant requested a downward variance from the range based upon his neglected and abusive childhood, his 14-month presentence confinement, his assistance to the government, and the mitigating

circumstances surrounding his cocaine sales. The district court denied the request without much explanation, and sentenced defendant to 117 months. Before adjourning, the court asked defendant's counsel if he had any objection to the sentence pronounced, and counsel replied in the negative. Defendant appealed. The original Sixth Circuit panel found that the sentence was procedurally unreasonable because the district court failed to adequately respond to defendant's requests for a downward variance. Upon the government's request, the court agreed to rehear the case *en banc*.

★ **Holding:** Relying on the court's prior ruling in *United States v. Bostic*, the *en banc* court held that defendant's failure to object to the district court's refusal to consider his arguments for a downward variance, when afforded the opportunity to do so by the district court, subjected defendant's appeal to plain error review. Applying plain error review, the court held that, although the district court's sentencing findings were not "ideal," the court committed no plain error in its determinations. The court found that the district court did not specifically address each of defendant's requests for a downward variance, but it did mention the factors under 18 USC § 3553(a) generally and showed that it "understood" defendant's arguments. As such, the district court's sentencing procedure did not constitute plain error requiring reversal of the sentence.

Additionally, because the sentence fell within a correctly computed guideline range, the court applied the presumption of reasonableness and concluded that defendant's sentence was not unreasonably long. The court found that the record offered ample reasons to establish that defendant's case was a "typical" one and thus deserving the sentence imposed by the district court. Therefore, the original panel ruling was vacated, and defendant's sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Phillips, 06-6191 (2/19/08)

▸ Defendant was convicted of being a felon in possession of a firearm and at sentencing he requested a downward variance from the recommended guideline range based upon the facts that (1) he possessed guns in self defense and (2) his mother was in poor health. In response, the district court specifically ruled that defendant was more of an aggressor with guns, as opposed to one acting in defense, and the court discussed the factors under 18 USC § 3553 generally. The court did not specifically mention defendant's mother's ill health. The court sentenced defendant to the top end of the guideline range. At the end of the sentencing hearing, the court asked if defendant had any objections not previously raised, and defendant answered in the negative. Defendant appealed and challenged the procedural reasonableness of the sentence.

★ Holding: The court held that, pursuant to *Vonner*, defendant subjected his procedural reasonableness argument to plain error by failing to raise an objection to the district court's sentencing procedure. The court found no plain error because the district court addressed defendant's self-defense argument, and dealt with the considerations underlying defendant's mother in its general analysis of the § 3553 factors. Accordingly, the sentence was affirmed.