

Precedential Value

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

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CONTENT AND FORMAT

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

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

FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to www.supremecourtus.gov for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to www.ca6.uscourts.gov and enter the docket

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

COMBINED OUTLINE

Trying to find a case that you have read about in a past issue of Precedential Value? Need research on a specific legal topic? Check out the Combined Outline on our website. The Combined Outline is a culmination of all cases previously published in P.V., compiled in an outline format, with topic headings that make your legal research easy and accessible. The Combined Outline may be accessed at www.fpd-ohs.org.

SUPREME COURT DECISIONS

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

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *18 USC § 545-Importation Contrary to Law U.S. v. The*, 06-2371 (7/31/08)
 - ▶ Defendant was caught bringing counterfeit

DVDs of movies in his luggage on a flight into the U.S. Defendant was charged with importing merchandise contrary to law, in violation of § 545. Defendant was convicted after a bench trial and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: The elements of § 545 are that defendant (1) fraudulently or knowing (2) imported or brought into the U.S. (3) any merchandise, (4) contrary to law. In the case, the “contrary to law” element was an alleged violation of copyright law, namely 18 U.S.C. § 2318. A violation of § 2318 is established where anyone (1) knowingly (2) traffics (3) in a counterfeit label (4) affixed to or accompanying a copy of a motion picture (5) within the U.S. The court held that defendant’s knowledge was established by his conduct and his prior receipt of counterfeit DVDs, that his trafficking was established by his importation, and the counterfeit nature of the DVDs was confirmed by the testimony of a representative from the Motion Picture Association of America. Accordingly, the evidence was sufficient to support the verdict and the conviction was affirmed.

• *18 USC § 922(g) - Constructive Possession*
U.S. v. Mayberry, 06-2239 (8/21/08)

► Defendant was charged with being a felon in possession of a firearm based on two firearms found in the trunk of a rental car he was driving. At trial, an informant testified that defendant attempted to get him to join in committing robberies, and that defendant rented a car to commit the robberies. Defendant was convicted and argued on appeal that the evidence was insufficient to support the conviction.

★ Holding: In order to prove constructive possession of a firearm, the government must show that defendant had “the power and intention at a given time to exercise dominion and control” over the firearm. Mere proximity

to a firearm, with nothing more, is insufficient. The court held that the evidence was sufficient to establish constructive possession of the firearm based upon the fact that the guns were in the trunk and the testimony of the informant. Accordingly, the court affirmed the conviction.

• *18 USC § 924(o) - Conspiracy*
U.S. v. Fowler, 04-4472 (8/1/08)

► Defendant was convicted, pursuant to § 924(o), of conspiring to violate 18 USC § 924(c), and of RICO violations. At sentencing, the district court imposed a mandatory 10-year consecutive sentence for the § 924(o) conviction. Defendant appealed.

★ Holding: The court held that a 10-year consecutive sentence is not mandated for a § 924(o) conspiracy, even though such a sentence is required for a violation of § 924(c)(1)(D)(ii). Therefore, the court vacated defendant’s sentence on all counts so that the district court could resentence defendant anew, without the 10 year mandatory consecutive sentence.

• *18 USC § 1512(b) - Witness Tampering*
U.S. v. Miller, 06-4583 (7/1/08)

► During the course of his investigation for wire fraud, defendant told a witness that if she talked to the FBI about him, he would sue her for defamation. Defendant was charged with witness tampering and convicted at trial. Defendant argued on appeal that the threat to sue someone for defamation could not support a witness tampering conviction.

★ Holding: Section 1512(b) prohibits attempting to influence a witness’ testimony by intimidation, physical force, threats, or corrupt persuasion. The court held that defendant’s threats to sue the witness for defamation were not protected by the First Amendment because defendant’s threatened law suit would have been frivolous. Defendant would only have a cause of action against the witness if she made false statements to the FBI about him. Thus, the court found that defendant’s actions

amounted to a threat to the witness that, if she cooperated with the FBI, “negative pecuniary effects” would occur. Accordingly, defendant’s conviction was affirmed.

- *18 USC § 1584 - Involuntary Servitude*
U.S. v. Djoumessi, 07-1740 (8/20/08)

- ▶ Defendant brought a 14 year old girl illegally into the country to work for he and his wife. The girl was promised an education and a good place to live in return for keeping house and caring for defendant’s children. Instead, the girl was placed in deplorable living conditions in the basement, received physical and sexual abuse, and was threatened that if she left she would be forced to return to her home country. Defendant was charged in the district court with involuntary servitude in violation of § 1584. Upon his conviction, defendant appealed and argued that the evidence was insufficient to support the conviction.

- ★ Holding: In order to sustain a conviction under § 1584, the government must show that the defendant knowingly and wilfully held another person in involuntary servitude for any term. Involuntary servitude may be proven in one of three ways: (1) physical restraint or force; (2) legal coercion; or (3) threats of physical force or legal coercion. In the case, the court held that defendant’s acts of physically and sexually abusing the girl, and threatening her physically and legally, amounted to involuntary servitude. The court noted that it was of no consequence that the girl may have voluntarily stayed for some of the time, because involuntary servitude only requires proof that it occurred for some period of time. Accordingly, defendant’s conviction was affirmed.

- *18 USC § 1962 - RICO*
U.S. v. Fowler, 04-4472 (8/1/08)

- ▶ Defendant was a member of the Outlaws Motorcycle Gang who was charged with RICO

violations based on allegations of drug trafficking and interstate travel to commit extortion and murder. Defendant was convicted after trial and argued on appeal that the evidence was insufficient to support the verdict.

- ★ Holding: In order to establish a substantive violation of RICO, the government must prove the following: (1) the existence of an enterprise which affects interstate commerce; (2) the defendant’s association with the enterprise; (3) the defendant’s participation in the conduct of the enterprise’s affairs; and (4) that the participation was through “a pattern of racketeering activity.” The court ruled that the first two elements were met through defendant’s confessed involvement in a murder in another state at the behest of his motorcycle gang. Regarding the third element, the court held that the government must show that defendant was involved in the “operation or management” of the enterprise, meaning that defendant had “some part in directing the enterprise’s affairs.” The court found that the evidence demonstrated that defendant participated in the “operation” of the enterprise.

- Regarding the fourth element, the court ruled that the government must prove at least two predicate acts and satisfy the “continuity plus relationship” test. Under this standard, the government must establish (1) a relationship between the predicate acts, and (2) the threat of continued activity. The court found that the relationship between the predicate acts was established because the acts were related to the activities of the enterprise, and the threat of continued activity was satisfied by defendant’s long-term association with the enterprise. Accordingly, defendant’s conviction was affirmed.

- *18 USC § 1962 - RICO/Conspiracy*
U.S. v. Driver, 04-4470 (8/1/08)

- ▶ Defendant was charged with RICO violations and a conspiracy based on

allegations of drug trafficking and traveling in interstate commerce to promote an unlawful activity. The jury convicted defendant of both the RICO and conspiracy violations based on its finding that defendant committed overt acts relating to drug trafficking and a Travel Act violation. Defendant appealed and argued that the evidence was insufficient to support the overt acts.

★ Holding: In order to sustain a conviction for a substantive § 1962 RICO violation, the government must show a “pattern of racketeering activity.” This means that the government must establish at least two acts of racketeering. In the case, the court found that the government adequately established the drug trafficking overt act. Regarding a Travel Act violation, the government must prove that the defendant (1) traveled in interstate commerce, (2) with intent to promote any unlawful activity, and (3) that the defendant thereafter performed an act of promotion or carrying on of any unlawful activity. The court ruled that there was no evidence that defendant traveled in interstate commerce with the purpose of promoting unlawful activity. Accordingly, the substantive RICO conviction was reversed.

Regarding the RICO conspiracy charge, the court held that it is not necessary for the government to prove that a defendant committed two predicate acts or agreed to commit two predicate acts. A RICO conspiracy may be sustained if the defendant joined the conspiracy and agreed that someone would commit two predicate acts. In the case, the court held that the evidence was not sufficient to establish that defendant agreed that anyone would commit a Travel Act violation. Thus, defendant’s conspiracy conviction was vacated.

- *18 USC § 2119 - Carjacking*
U.S. v. Fekete, 07-5616 (8/5/08)

- ▶ Defendant approached an idling truck,

pointed a gun at the stomach of the 14-year-old boy waiting in the truck, told him to get out, and stole the truck. Defendant was convicted of carjacking, and he argued on appeal that the government failed to establish sufficient evidence that he intended to cause death or serious bodily harm.

★ Holding: The elements of carjacking under § 2119 are that defendant, (1) with intent to cause death or serious bodily injury, (2) took a vehicle, (3) that had been transported in interstate commerce, (4) from the person of another (5) by force, violence, or intimidation. The government may establish the *mens rea* by showing that defendant had the conditional intent to cause injury if the victim resisted. In a case involving a firearm, the government may show this conditional intent by direct proof that defendant brandished a loaded gun, or by establishing “brandishing-plus.” The latter standard permits the government to utilize circumstantial evidence that the gun was loaded, or that the defendant’s acts or statements suggested that he had the requisite intent. In the case, the court held that defendant’s intent was established by the following: (1) circumstantial evidence that the gun was loaded; (2) defendant knew that the truck was occupied; (3) defendant brandished the gun and pointed it at the victim’s stomach; and (4) a codefendant’s testimony that defendant would “probably” use the gun. Accordingly, under the totality of the circumstances, the court held that the *mens rea* element was established, and defendant’s conviction was affirmed.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2B1.1 - Loss Amount*

U.S. v. Erpenbeck, 06-4247 (7/2/08)

- ▶ Defendant was a homebuilder who defrauded construction lenders. Defendant was convicted of bank fraud and at sentencing the district court determined that defendant was

responsible for 7.9 million in loss to eight different construction lenders. On appeal, defendant argued that the loss was one million dollars too high because the amount should have been reduced based upon collateral received by one of the lenders.

★ Holding: The court found that defendant had a total of 6.9 million in loans from the construction lender in question, 3.7 million of which defendant fraudulently failed to repay. The court ruled that the collateral received by the construction lender should not be offset against only the 3.7 million in construction loans fraudulently withheld from the lender by defendant, but instead the collateral had to be prorated over the total 6.9 million dollar loan held by the lender. Thus, the collateral clearly did not cover the entire loss to the lender.

Additionally, the court held that the district court mistakenly calculated the loss amount in defendant's favor at sentencing. The district court reduced the construction lender's loss based on a settlement that the lender entered into with a third-party bank. The court ruled that a defendant's loss amount should not be reduced by money paid to the victim by a third-party source. Thus, the court found that defendant actually received a lower loss calculation than was warranted by the facts, and the sentence was affirmed.

- *2B1.1 - Loss Amount*

U.S. v. Simpson, 07-5840 (8/18/08)

► Defendant was convicted of mail fraud for defrauding a worker's compensation insurance company out of insurance premiums by under-reporting the amount of people that he employed. At sentencing, defendant claimed that the loss was zero because the insurance company never had to pay unemployment compensation for any of the employees. The district court disagreed, and calculated the loss based on the insurance premiums that should have been paid. Defendant appealed.

★ Holding: The court held that the correct

measure of loss for USSG § 2B1.1 purposes was the amount of insurance premiums that were withheld from the insurance company. The court found no consequence to the fact that the insurance company never had to pay on any claims. The insurance premiums pay for coverage, and the failure to pay the premiums constituted loss to the carriers in the amount of the fair market value of the premiums at the time defendant should have made the payments. Accordingly, the district court ruling was affirmed.

- *2B1.1(b)(2) - Amount of Victims*

U.S. v. Erpenbeck, 06-4247 (7/2/08)

► Defendant was a homebuilder who defrauded construction lenders out of millions of dollars. As a result, many homebuyers received liens against their homes. The liens were eventually released by a third-party bank as a result of a class-action lawsuit and settlement. At sentencing, the district court concluded that the homebuyers were not "victims" of the offense under USSG § 2B1.1(b)(2) because their losses were recouped. The government appealed the district court's determination, but agreed to forgo the issue on appeal if the court rejected defendant's arguments on appeal.

★ Holding: A "victim" under § 2B1.1(b)(2) is a person who sustains "any part" of the actual loss from the offense. Distinguishing the case from *U.S. v. Yager* (See P.V., Issue #1), the court held that the homebuyers were "victims" for purposes of calculating the guideline loss amount. In contrast to *Yager*, the court found that the victims had no contractual relationship with the third-party bank which required the bank to recoup the loss, and the loss was not short-lived. To the contrary, the court held that the homebuyers were saddled with thousands of dollars of debt for an extended period, and were only able to recoup their losses as the result of a class-action law suit. Accordingly, the court ruled

that district court erred in its loss computation. Nonetheless, the district court's ruling was not reversed because the government agreed to forego the issue when defendant lost his sentencing appeal issues.

- *2B1.1(b)(12)(B) - Jeopardize Bank*
U.S. v. Erpenbeck, 06-4247 (7/2/08)

- ▶ Defendant was a homebuilder who defrauded construction lenders out of millions of dollars. Defendant was convicted of bank fraud and at sentencing the district court determined that defendant substantially jeopardized the soundness of a bank, pursuant to USSG § 2B1.1(b)(12)(B). Accordingly, the district court imposed a four-level sentencing enhancement. Defendant appealed.

- ★ Holding: The court held that the four-level enhancement was appropriate. Defendant substantially jeopardized the soundness of the bank by causing millions of dollars of loss to the bank, and as a result, the bank was forced to merge with another bank in order to avoid insolvency. Accordingly, the sentence was affirmed.

- *2D1.1 - Drug Amount - Marijuana Plants*
U.S. v. Olsen, 07-1706 (8/14/08)

- ▶ Defendant was convicted of possession of marijuana with intent to distribute based upon 168 live plants, and 137 harvested plants found at her residence. At sentencing, the district court attributed 100 grams per plant, pursuant to Application Note 3 to USSG § 2D1.1, for purposes of determining the drug weight. Defendant argued that the actual weight of the harvested plants was only 557.8 grams total, and that the 1-to-100 ratio should not apply to the harvested plants. The district court rejected defendant's argument and she appealed.

- ★ Holding: The court held that the 1-to-100 ratio applies to harvested marijuana plants only where defendant is convicted of manufacturing marijuana. Where defendant is convicted,

however, of a distribution or possession offense, the 1-to-100 ratio applies only to live plants, not harvested plants. Accordingly, the court reversed the district court's ruling and remanded the case for resentencing.

- *2D1.1(b)(1) - Firearm Enhancement*
U.S. v. Driver, 04-4470 (8/1/08)

- ▶ Defendant was convicted in a drug conspiracy and at sentencing the government requested that defendant's sentence be increased by two levels, pursuant to USSG § 2D1.1(b)(1), for possessing a firearm during the drug conspiracy. The government based its argument on a witness' trial testimony that he rode in a vehicle with defendant during the course of the conspiracy and, at the time, defendant had drugs and a gun in the vehicle. The district court declined to apply the enhancement and the government appealed.

- ★ Holding: The court held that the trial testimony established, by a preponderance of the evidence, that defendant possessed a firearm during the drug conspiracy, and while transporting drugs. Accordingly, the district court's ruling was reversed.

- *2G2.2(b)(4) - Child Porn - Sadistic Images*
U.S. v. Duane, 06-6536 (7/17/08)

- ▶ Defendant was convicted of receiving and possessing child pornography and at sentencing the district court imposed an enhancement for sadistic images. Defendant argued on appeal that the enhancement should not apply where a very small number of the total images (15 out of 4,000) portrayed sadistic conduct, thus reflecting that defendant did not intend to possess the sadistic images.

- ★ Holding: First, the court held that it is irrelevant whether defendant intended to possess sadistic images or not. Further, the court held that the guideline enhancement applied regardless of the number of sadistic images. Accordingly, the sentence was affirmed.

C. Chapter Four - Criminal History

- *4B1.5(b) - Pattern of Sex Abuse*

U.S. v. Brattain, 07-1594 (8/25/08)

► Defendant was convicted of aggravated sexual abuse of a minor and the presentence report recommended a five-level enhancement because the defendant engaged in a “pattern of activity involving prohibited sexual conduct.” The district court found that, although defendant sexually abused his daughter over a period of seven years, the enhancement was meant to apply only to defendants who abuse more than one victim. Thus, the court declined to apply the enhancement. The government appealed.

★ Holding: The court held that the five-level enhancement under USSG § 4B1.5(b) applies where a defendant abused only one minor. The court relied on Application Note 4 to § 4B1.5(b) which provides that a “pattern of activity” includes abuse of “a minor” on at least two separate occasions. Emphasizing that Note 4 refers to a minor in the singular, the court concluded that defendant’s conduct fell with the enhancement. The court also noted that this construction of the guideline was consistent with the legislative history. Accordingly, the sentence was vacated.

D. Miscellaneous Guidelines

- *4A1.3(a) - Departure - Criminal History*

U.S. v. Griffin, 07-3109 (7/7/08)

► Defendant pled guilty to uttering forged securities and identity theft. As part of his plea agreement, defendant agreed to testify against a codefendant. Defendant testified, but minimized the codefendant’s responsibility to the extent that she was acquitted of the counts about which defendant testified. At defendant’s sentencing, the district court declined to award defendant a reduction for acceptance of responsibility, and imposed an upward departure in defendant’s offense level from 14 to 20, based on the fact that defendant had 29 criminal history points. Defendant

appealed the reasonableness of the upward departure.

★ Holding: Pursuant to USSG § 4A1.3(a), an upward departure from the applicable guideline range may be warranted where the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood of recidivism. The court held that the extent of an upward departure from the guideline range is reviewed for reasonableness. The court found that the six-level upward departure from the applicable guideline range was reasonable given the fact that defendant had a lengthy criminal history, scored 29 criminal history points, and defendant committed perjury during his testimony at the codefendant’s trial. Accordingly, defendant’s sentence was affirmed.

- *5C1.2 - Safety Valve - Booker*

U.S. v. Branch, 06-5393 (8/12/08)

► Defendant was convicted of drug trafficking. At sentencing, the district court determined that the correct guideline calculation placed defendant in criminal history category II. The court concluded, however, that category II overstated defendant’s criminal history because it found that defendant’s prior marijuana conviction was non-serious. Accordingly, the court reduced defendant to criminal history category I, and applied the safety valve provisions of USSG § 5C1.2 and 18 USC § 3553(f). Under these provisions, the court departed below the statutory mandatory minimum of 5 years, and placed defendant on probation. The government filed a motion, pursuant to Fed. R. Crim. P. 35, to correct the sentence based upon the Sixth Circuit’s decision in *U.S. v. Penn*, which held that a district court may not apply the safety valve based upon a downward departure to criminal history category I. The district court agreed, and amended its judgment to sentence defendant to the mandatory 5 years in prison.

Defendant appealed.

★ Holding: The court held that its prior decision in *Penn* was not affected by *Booker* and its progeny. Thus, a district court may not reduce a correctly calculated criminal history category for the purpose of applying the safety valve to a defendant's sentence. Further, the court held that the district court was correct in determining that it made "clear error" under Rule 35, and accordingly, its correction of its sentence was proper. Thus, the sentence was affirmed.

- *5K2.3 - Departure - Psychological Harm*
U.S. v. Erpenbeck, 06-4247 (7/2/08)

▶ Defendant was a home builder who was convicted of bank fraud. At sentencing, the district court determined that the only "victims" of the offenses for purposes of the loss calculation (USSG § 2B1.1) were the construction lenders. The court held that the homebuyers were not victims because their losses were eventually recouped by the banks. Nonetheless, the court determined that an upward departure was warranted based upon extreme psychological harm suffered by the "victim" homebuyers, pursuant to USSG § 5K2.3. Defendant appealed.

★ Holding: An upward departure may be warranted under § 5K2.3 where a "victim" of the offense suffers severe psychological injury. The court held that the term "victim" in § 5K2.3 must be interpreted consistently with that terms use throughout the guidelines. Thus, the court found that it was error for the district court to conclude that the homebuyers were not "victims" for purposes of § 2B1.1, but were "victims" for purposes of § 5K2.3. The court ruled, however, that the error was harmless because it concluded that the district court erred in determining that the homebuyers were not "victims" for purposes of § 2B1.1. (*See supra*). Therefore, defendant's sentence was affirmed.

- *5K2.5 - Departure - Property loss*
U.S. v. Erpenbeck, 06-4247 (7/2/08)

▶ Defendant was a home builder who was convicted of bank fraud. At sentencing, the district court found that defendant's fraudulent acts caused financial loss to several hundred people, caused many of the subdivisions to go into disrepair, and left many homeowners with acrid waterways and unpaved streets instead of the promised nice neighborhoods. Accordingly, the district court imposed a 65 month upward departure from the guideline range, pursuant to USSG § 5K2.5. Defendant appealed.

★ Holding: Section 5K2.5 allows the district court to depart upward from a guideline range where the offense caused property damage or loss not taken into account by the guidelines. A court may take into consideration whether the defendant intended to cause the harm and whether the harm is more serious than "other harm caused or risked by the conduct relevant to the offense of conviction." In the case, the court held that the district court did not err in concluding that the extreme financial loss caused by defendant warranted the upward departure. Thus, the sentence was affirmed.

III. Evidence

A. Article IV - Relevancy

- *401/403 - Relevance/Undue Prejudice*
U.S. v. Lawson, 04-4480 (8/1/08)

▶ Defendant was charged with several other individuals with RICO violations. One of the predicate acts was the murder of a man by defendant. At trial, defendant challenged the relevance and prejudicial effect of three pieces of evidence: (1) the murder of the victim; (2) video tape showing the murder; and (3) use of defendant's nickname "Psycho." The district court admitted the evidence, defendant was convicted, and he appealed.

★ Holding: First, the court held that the evidence pertaining to the murder of the victim

was directly relevant to prove a required predicate act for the RICO conviction. Thus, it could not be unduly prejudicial. Second, defendant's complaint about the video tape was actually that it showed what looked to be someone else committing the murder. The court found that exculpatory evidence would clearly be relevant and admissible. Third, the nickname "Psycho" was not used to either identify defendant or connect him to the charge, and thus, it was improperly admitted. The court nonetheless held that the error was harmless because of the weight of the evidence against defendant. Accordingly, defendant's conviction was affirmed.

C. Article VIII - Hearsay

- *801 - Hearsay*

U.S. v. Childs, 07-1495 (8/29/08)

- ▶ Defendant was charged with conspiracy to commit murder for hire. At trial, a witness testified that a codefendant asked her, in defendant's presence, if she knew anyone who would commit a murder. Defendant objected to the testimony as hearsay, but the district court admitted the evidence. Defendant appealed.

- ★ Holding: The court held that the inquiry made by the codefendant was not hearsay under FRE 801, but instead was a verbal act. The extension of the invitation to commit a murder is not a "statement" under the hearsay rule because it is not an "assertion." It is the fact that the invitation was made, not the truth of the declaration, that was relevant. Accordingly, the codefendant's invitation was not hearsay, and the district court's ruling was affirmed.

- *801(d)(1) - Prior Inconsistent Testimony*

U.S. v. Mayberry, 06-2239 (8/21/08)

- ▶ Defendant was charged with being a felon in possession of a firearm. At trial, the government presented the testimony of an informant who claimed loss of memory

regarding defendant's activities. In response, the government introduced excerpts from the witness' grand jury testimony, pursuant to FRE 801(d)(1). Defendant was convicted and he appealed.

- ★ Holding: FRE 801(d)(1) permits a party to introduce a prior sworn statement if it is inconsistent with the declarant's testimony at trial. The court held that "limited and vague recall of events, equivocation, and claims of memory loss" can constitute prior inconsistent statements. In the case, the court found that the government's use of the grand jury statements fell squarely within FRE 801(d)(1). Further, the court ruled that the prior statements did not violate the Confrontation Clause because the witness was subjected to cross examination at trial. Thus, defendant's conviction was affirmed.

D. Miscellaneous Evidence

- *105 - Limiting Instruction*

U.S. v. Fowler, 04-4472 (8/1/08)

- ▶ Defendant was tried with several other individuals for RICO violations. During trial, the government introduced testimony against a codefendant to establish that he was involved in two murders and receipt of marijuana. The evidence was not admissible against defendant, so he requested a limiting instruction from the district court regarding the evidence. The district court refused to provide the instruction, defendant was convicted, and he appealed.

- ★ Holding: Fed. R. Crim. P. 105 requires a district court to provide an appropriate limiting instruction where evidence is admissible as to one party, but not another. The court held that the district court erred in failing to provide a limiting instruction regarding the evidence. The court found, however, that the error was harmless because of the otherwise compelling evidence of defendant's guilt. Thus, defendant's conviction was affirmed.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

- *Reasonable Expectation of Privacy*

U.S. v. Mastromatteo, 06-2349 (8/19/08)

► Officers obtained a warrant and searched a building that officers suspected was being used for meth manufacturing. During the search, officers found a meth lab, and defendant was charged in a meth conspiracy. Defendant moved to suppress the evidence found pursuant to the search warrant, but failed to offer evidence regarding his standing to challenge the search prior to the district court's ruling. Defendant was convicted and he appealed.

★ Holding: In order to challenge a search, a defendant must be able to establish that she has a reasonable expectation of privacy in the location searched or the items seized. The defendant bears the burden of establishing standing in the district court. In the case, the court held that defendant made no assertions regarding standing until long after the district court decided the standing issue, and thus, failed to carry the burden. Accordingly, the district court ruling was affirmed.

B. Reasonable Suspicion/Vehicle Stops

- *Reasonable Suspicion*

U.S. v. Pearce, 07-3146 (7/3/08)

► An officer was conducting a sweep of a high-crime area that had received recent complaints about drug activity. Upon seeing defendant's vehicle stopped in the area, the officer parked his car and walked up the street approaching the vehicle. Defendant got out of his car and, upon seeing the officer, started backing away from him with his hand reaching around to his back waistband. The officer believed that defendant may be reaching for a gun, and the officer drew his firearm and ordered defendant to show his hands. Upon the subsequent frisk of defendant, the officer found bags of marijuana on his person and two guns in the car. Defendant was charged with being

a felon in possession of a firearm, and he moved to suppress the firearms as being the result of an illegal stop. The district court denied the motion and defendant appealed.

★ Holding: The court held that reasonable suspicion supported the stop and frisk of defendant. The combination of the bad neighborhood, the complaints about drug activity, and defendant's actions all warranted a reasonable belief that defendant may be armed and dangerous. Thus, the stop and frisk of defendant were lawful. The court noted that, even if the stop violated the Fourth Amendment, the discovery of the guns in the car was not necessarily precipitated by the stop and frisk of defendant. A second officer spotted, through the window, a firearm magazine laying on the floor of the car. This separate observation led to the discovery of the guns for which defendant was prosecuted. Accordingly, the district court ruling was affirmed.

- *Reasonable Expectation of Privacy/Ripeness*
Warshak v. U.S., 06-4092 (7/11/08)

► The government sought and obtained federal court orders under the Stored Communications Act (SCA) to obtain Warshak's e-mails from two Internet Service Providers (ISPs) in relation to the government's investigation of Warshak for fraud-related offenses. The court order required the ISPs to produce the e-mails based upon the government's showing of "reasonable grounds" to believe that the information sought was relevant to its criminal investigation. In violation of the SCA and the court order, the government did not disclose to Warshak that it had sought to obtain his e-mails until a year later. Upon learning of the government's actions, Warshak filed a complaint claiming violations of his Fourth Amendment rights and seeking an injunction against further seizures of e-mails. The district court granted a preliminary injunction to Warshak of any

further e-mail seizures without notice and the opportunity to be heard. The government appealed the preliminary injunction. The Sixth Circuit affirmed the district court ruling, but the court granted *en banc* review. While the case was pending, Warshak was convicted of numerous fraud related offenses.

★ Holding: The *en banc* court held that the issues involved were not ripe for review. Because Warshak had already been convicted for the fraud offenses that the government was investigating, there was no realistic possibility that the government would seek to seize more of Warshak's e-mails. Thus, the court found that Warshak's claim was no longer ripe for review. Accordingly, the court's panel decision was vacated, and the district court's ruling granting the injunction was reversed.

• *Reasonable Suspicion-Length of Detention*
U.S. v. Torres-Ramos, 06-3580 (8/7/08)

▶ Defendants were passengers in a van stopped for speeding in Shelby County, Ohio. The van's owner was not present, and the driver told officers that they had flown from California, picked up the van in Washington, and were driving to Dayton, Ohio. The driver was nervous, could not give the owner's last name (even though it was her aunt), and could give no detail about her alleged flight from California to Washington. The officers called for a drug dog and put the driver in the back of the patrol car. The officers returned to the car and questioned defendants, and they gave an entirely different story about their travel. Also, the officers smelled the strong odor of air freshener, which they knew was often used to hide the smell of narcotics. Officers detained defendants until the drug dog arrived, the dog alerted, and the officers searched the car, finding cocaine. Upon defendants' subsequent prosecution, they moved to suppress the drugs based upon the unreasonable length of their detention after the traffic stop was completed. The district court denied the motion,

defendants were convicted, and they appealed.

★ Holding: The court first held that defendants had standing to challenge the search of the car. Although passengers do not normally have a reasonable expectation of privacy in relation to a search of someone else's car, the court held that the defendant could challenge the search as the fruit of their continued detention. Accordingly, the court ruled that defendants had standing to challenge a search of the car.

Second, the court found that the traffic stop ended when the officers put the driver in the back of the police cruiser. The court held, however, that the officers had reasonable suspicion to detain defendants at that point for further questioning based on the fact that the owner of the van was not present and her last name was unknown, the driver's nervousness, and the driver's inability to provide details about their travel information. The court further ruled that the inconsistent travel information provided by defendants and the air freshener smell justified the continued detention for the arrival of the drug dog. Accordingly, the length of the detention was not unreasonable, and the district court ruling was affirmed.

• *Reasonable Suspicion - Postal Packages*
U.S. v. Alexander, 07-3219 (8/18/08)

▶ An officer intercepted an express mail package at an airport mail facility that was signed with an X, the package seemed dense, the label was handwritten even though it came from a business, it was addressed to and from known drug cities, and the return address was fictitious. The officer detained the package for 20 minutes, and had it sniffed by a drug dog. The drug dog alerted, and cocaine was found inside the package. The package was delivered to defendant, he was arrested and charged, and he moved to suppress the evidence. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: A package may be briefly detained for further investigation, such as a dog sniff, if the officers establish reasonable suspicion that the package contains contraband. The court held that the observations made by the officer regarding the package established reasonable suspicion, and that the 20 minute delay for the drug dog sniff was not unreasonable. Accordingly, the district court's ruling was affirmed.

C. Warrant Exceptions

- *Automobile Exception - Drug Dogs*

U.S. v. Torres-Ramos, 06-3580 (8/7/08)

▶ Defendants were passengers of a van stopped for speeding. Based on defendants' inconsistent answers regarding their travel, officers obtained a dog to perform a drug sniff of the vehicle. The dog alerted, the officers searched the van, and cocaine was found. Defendants' moved to suppress the evidence based on the unreliability of the drug dog. At the suppression hearing, the government presented testimony that the drug dog was certified under two state and one national standard, and that it had worked with its trainer in over 100 training sessions. Defendant introduced expert testimony that the dog's training was insufficient in certifying residual odors. The district court denied the motion and defendant appealed.

★ Holding: Ordinarily, a reliable drug dog's positive alert on a vehicle is sufficient to establish probable cause to search the car. The court held that the drug dog's reliability was sufficiently proven by the government's evidence. Accordingly, the district court's ruling was affirmed.

D. Consent Searches and Seizures

- *Consent to Search*

U.S. v. Hardin, 06-6277 (8/25/08)

▶ Officers had an arrest warrant for defendant and received a tip that he was in a certain apartment. The officers approached the

landlord of the apartment, advised him of the situation, and requested that the landlord enter the apartment on the ruse of a water leak. The landlord went to the apartment and requested to enter to check on the water leak. Defendant was present and agreed to the landlord entering. Based on information provided by the landlord, officers then entered the apartment, arrested defendant, and found crack and firearms. Defendant was prosecuted and he moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: The court first held that the landlord was acting as an agent of the officers by going to the apartment. (*See infra*). Second, the court ruled that any consent obtained by the landlord was based upon a ruse regarding the non-existent water leak. Under these circumstances, the court ruled that defendant felt he had no choice but to let the landlord in. Accordingly, the court held that the consent was invalid.

E. Search Warrants

- *Search Warrants - Franks Hearing*

U.S. v. Fowler, 04-4472 (8/1/08)

▶ Agents obtained a warrant to search defendant's home based on information provided by a confidential informant. The search warrant affidavit stated that the informant sold meth to defendant, that defendant had meth in his car, and that defendant had firearms in his home. Defendant was subsequently charged with RICO violations and a drug conspiracy, and he moved to suppress the evidence found in his home during the execution of the search warrant. Defendant requested a *Franks* hearing based upon his claim that the affidavit failed to disclose that the confidential informant was engaged in ongoing criminal activity. The district court refused to hold a *Franks* hearing, and denied defendant's motion to suppress. Defendant appealed.

★ Holding: In order to obtain a *Franks* hearing based on a challenge to the veracity of a search warrant affidavit, the defendant must (1) make a substantial preliminary showing that the affiant engaged in either a deliberate falsehood or a reckless disregard for the truth in omitting information, and (2) prove that the affidavit would not be supported by probable cause if the information were properly included. The bar for obtaining a *Franks* hearing is significantly higher for a defendant claiming a material omission, as opposed to an affirmative misstatement. In the case, the court held that defendant was not entitled to a *Franks* hearing. The affidavit apprised the issuing magistrate that the informant sold meth to defendant, thus alerting the magistrate that the informant was engaged in illegal activity. Even if this information was not included, however, the court held that this omission would not have negated probable cause. The court noted that “it is often people involved in criminal activities themselves that have the most knowledge of other criminal activities,” and thus, it is no surprise that an informant may be engaged in crime. Accordingly, the district court ruling was affirmed.

- *Search Warrants - Franks Hearing*

U.S. v. Mastromatteo, 06-2349 (8/19/08)

► Officers obtained a warrant to search a building in regards to a meth lab. Defendant subsequently challenged the search upon the grounds that the warrant contained false statements and he requested a *Franks* hearing. Defendant alleged that the warrant contained the following falsehoods: (1) information that a suspect truck was registered to defendant; (2) inaccurate allegations about items defendant purchased; and (3) misstatements about smells emanating from the building in question. The district court refused to hold a *Franks* hearing, and defendant appealed.

★ Holding: The court held that the warrant would be supported by probable cause even if

all of the allegedly false information were stricken. The warrant otherwise contained substantial information regarding meth manufacturing and distribution activities, and thus, the district court’s ruling denying a *Franks* hearing was affirmed.

F. Arrest Related Issues

- *Arrest - Probable Cause*

U.S. v. Torres-Ramos, 06-3580 (8/7/08)

► Officers stopped a van that was transporting cocaine, and the suspects agreed to cooperate with the officers in making a controlled delivery. The suspects told the officers where the cocaine was being delivered, gave a description of defendant’s car, and described defendant and provided his nickname (Cricket). Upon arrival at the location, defendant’s car was observed entering the parking lot, and defendant and a codefendant got out and went into Arby’s. A third codefendant came out of the hotel, met with defendant in the Arby’s, and examined the van carrying the cocaine. Defendant also examined the van twice, but then started to drive away. Defendant was immediately arrested by officers. A search of defendant’s car revealed evidence tying him to prior transactions with the cooperating suspects. Defendant was charged with drug trafficking and moved to suppress the evidence found in his car as the fruit of an illegal arrest. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: The court held that probable cause supported defendant’s arrest for drug trafficking. The court found that the combination of the description given of defendant and his car, combined with defendant’s activities at the delivery location provided sufficient indicia that defendant was involved in the offense. Accordingly, the district court ruling was affirmed.

• *Arrest Warrant - Authority to Enter Home*
U.S. v. Hardin, 06-6277 (8/25/08)

▶ Officers had an arrest warrant for defendant, and received a tip from an informant that defendant may be at an apartment building staying with an unnamed woman, and the informant generally described the type of car defendant may be driving. Based on this information, officers confirmed that a car matching the description was at the building and that a woman rented the apartment in question. Officers entered the apartment, arrested defendant, and found crack and firearms. Upon defendant's prosecution, he moved to suppress the evidence on the grounds that the officers had no right to enter the apartment. The district court denied the motion and defendant appealed.

★ Holding: A two judge majority first held that it is still an open question in the Sixth Circuit as to whether the probable cause or the "reasonable belief" standard of proof must be met before police may enter a residence to arrest a defendant pursuant to a warrant. In so holding, the court ruled that the Sixth Circuit's prior decision in *Pruitt* (See P.V., Issue #9), which appeared to adopt the "reasonable belief" standard, was not binding on the court because that portion of the opinion was dicta.

Second, the court declined to decide the issue as to which standard applied because the officers had no authority to enter the apartment under either the probable cause or "reasonable belief" standard. The court found that the information from the informant was limited, and was neither first hand nor recent. Thus, the officers entry into the apartment was unlawful, and the district court ruling was accordingly reversed.

G. Miscellaneous Fourth Amendment

• *State Action*

U.S. v. Hardin, 06-6277 (8/25/08)

▶ Officers had an arrest warrant for defendant and received a tip that he was in a

certain apartment. The officers approached the landlord of the apartment, advised him of the situation, and requested that the landlord enter the apartment on the ruse of a water leak. The landlord agreed and upon entering, saw defendant in the apartment. Officers then entered the apartment, arrested defendant, and found crack and firearms. During defendant's subsequent prosecution, he filed a motion to suppress the evidence and claimed that the landlord was acting as an agent for the police. The district court denied the motion and defendant appealed.

★ Holding: In assessing whether a third party was acting as an agent of the government, the court considers two factors: (1) the government's knowledge or acquiescence in the action; and (2) the intent of the third party performing the action. The court held that the landlord acted at the request of the officers, and that the landlord's intent was only to determine if defendant was in the apartment. Thus, the court ruled that the landlord was acting as an agent of the police. The court noted that it was not persuaded by the government's argument that Tennessee tort law required a landlord to investigate complaints of illegal activity on the premises. Accordingly, the court reversed the district court's ruling.

V. Fifth Amendment

B. *Brady*

• *Due Process - Destruction of Evidence*
U.S. v. Branch, 06-5393 (8/12/08)

▶ Defendant was stopped by officers for speeding, and the traffic stop eventually led to the discovery of cocaine. At the completion of the stop, the officer discovered that the video recorder on his car recorded video, but no audio of the stop. The officer therefore sent the tape back to the station for recirculation, believing that it had no evidentiary value. Defendant moved to dismiss the indictment based upon the destruction of evidence. The district court denied the motion and defendant

appealed.

★ Holding: A defendant's due process rights are violated where the government destroys material exculpatory evidence, regardless of whether the government acted in bad faith. However, where the destroyed evidence is only shown to be "potentially useful" to the defense, the defendant must show that the government acted in bad faith and that comparable evidence was not available through other reasonable means. In the case, the court held that the officer's failure to preserve the video tape, while potentially grossly negligent, did not amount to bad faith. Thus, the district court's ruling was affirmed.

• *Brady*

Jells v. Mitchell, 02-3505 (8/18/08)

► Defendant was charged with kidnaping and murder. At trial, several witnesses testified to seeing an incident where a man in a white van grabbed a woman and child, dragged them into a van, and drove away. The woman was later found dead. The state's theory at trial was that defendant randomly kidnaped the victim from the street for an illicit purpose. After defendant was convicted at trial, he learned that the state withheld several documents which tended to show that the victim was willingly with defendant throughout the evening leading up to the supposed abduction. Defendant lost his state court appeal and post-conviction proceedings, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: In order to establish a *Brady* violation, a defendant must show (1) the withheld evidence was favorable, (2) the evidence was suppressed, and (3) prejudice ensued. The court held that the evidence suppressed by the state was favorable to defendant and that it would have served to significantly impeach witnesses and establish that the kidnaping portion of the case may not have occurred. Accordingly, the court ruled

that defendant's death sentence must be vacated because the trial court may not have determined the murder occurred during the course of a kidnaping had the *Brady* material not been suppressed.

C. Confessions and Testimonial Rights

• *Miranda*

Coomer v. Yukins, 06-1235 (7/22/08)

► Defendant was being investigated for murder. Defendant voluntarily let officers into her home, and made an oral confession to participating with her boyfriend in the murder. After making the oral confession, officers had defendant commit the confession to writing. Defendant then agreed to go to the police station with the officers, she was *Mirandized*, and she provided another complete oral confession. Defendant was prosecuted for murder and kidnaping, and moved to suppress both of her oral, and written statements. The trial court denied her motion with respect to the oral statements, but granted her motion regarding the written statement. The trial court reasoned that a reasonable person would have understood that she was in custody for murder at the time of the written statement, but that she was not *Mirandized*. Defendant was convicted at trial and lost her state court appeal. Defendant filed a federal *habeas* petition, the district court denied her petition, and defendant appealed.

★ Holding: In determining whether a reasonable person would feel that they were in custody during police questioning, the court considers four factors: (1) the purpose of the questioning; (2) whether the place of questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was advised that the questioning was voluntary and whether she was free to leave, whether the suspect enjoyed freedom of movement during questioning, and whether the suspect initiated contact or voluntarily admitted officers and

acquiesced to requests to answer questions. In the case, the court found that the totality of the circumstances supported the conclusion that defendant was not in custody considering that she was at her own home, a friend was present, she had freedom of movement, she voluntarily admitted the officers, and the questioning was relatively short. Thus, the first oral statement was properly admitted.

Regarding the oral statement at the police station, the court held that the taint from the improper written confession was sufficiently removed in order to permit its admission. In assessing whether the subsequent use of *Miranda* warnings can remove the taint from a prior unlawful confession, the Court considers the following factors: (1) the time between the confessions; (2) change in the place of interrogations; (3) change in identity of interrogators; (4) completeness and detail in the first round of interrogation; (5) overlapping content in the two statements; and (6) the degree to which the interrogator treats the second round as continuous with the first. The court held that the state court's determination was not an unreasonable application of the federal law. Several hours passed between the first and second interrogation, the location changed, and defendant was given *Miranda* warnings in between. Accordingly, the state court's ruling was affirmed.

- *Miranda - Inevitable Discovery*
U.S. v. Alexander, 07-3219 (8/18/08)

- ▶ Officers obtained an anticipatory warrant to search a home after the controlled delivery of a package containing cocaine. Defendant's wife accepted delivery of the package, and upon execution of the search warrant, defendant was arrested. Officers could not locate the cocaine from the package, and questioned defendant about the location of the cocaine without first reading his *Miranda* rights. Defendant claimed that the officers also

beat him up trying to locate the cocaine. Defendant eventually led the officers to the cocaine in the basement. Defendant was charged in a cocaine conspiracy. He moved to suppress the cocaine based upon *Miranda*, and argued that the inevitable discovery rule should not apply due to the officers' beating of him. The district court denied the motion and defendant appealed.

- ★ Holding: Where a defendant's *Miranda* rights have been violated, the government may nonetheless use subsequently discovered evidence where it can demonstrate either the "existence of an independent, untainted investigation that inevitably would have uncovered the same evidence," or other compelling facts showing that the evidence would have been discovered. In the case, it held that the officers' alleged actions were of no consequence to the determination of whether the inevitable discovery doctrine applied, and thus, the court concluded that the officers would have discovered the hidden cocaine even without defendant's un-*Mirandized* statements. Therefore, the district court's ruling was affirmed.

- *Privilege Against Compelled Testimony*
U.S. v. Childs, 07-1495 (8/29/08)

- ▶ Defendant was charged with conspiracy to commit murder for hire and, a few weeks prior to his trial, the government granted him use and derivative use immunity, pursuant to 18 USC § 6002. As a result, defendant was compelled to testify at the trial of his coconspirator-accomplice. Defendant was subsequently tried and convicted. Defendant appealed.

- ★ Holding: Pursuant to § 6002, the government may grant use and derivative use immunity to a defendant to compel his testimony, even though he is under indictment. The court held that, if the defendant is subsequently brought to trial, the defendant need only "show that he testified under a grant

of immunity in order to shift to the government the heavy burden of proving that all evidence it proposes to use was derived from legitimate independent sources.” In the case, the court found that defendant made no such claim at his trial, and that the government made no use or derivative use of his prior testimony. Accordingly, defendant’s Fifth Amendment rights were not violated.

- *Right to Remain Silent*

U.S. v. Childs, 07-1495 (8/29/08)

- ▶ Defendant was charged with conspiracy to commit murder for hire and testified at trial. During his testimony, defendant explained that his fingerprints may have been on the victim’s window sill because he was there a day or two before the murder spying on the victim to see if she was cheating with a codefendant’s husband. The prosecutor asked defendant on cross examination why he originally told investigators that he spied on the victim a month before the murder, and why he did not correct this original story to investigators. Defendant objected to the prosecutor’s question and claimed that it infringed on his right to remain silent. The district court overruled the objection, defendant was convicted, and he appealed.

- ★ Holding: The court held that, where a defendant elects to make post-arrest statements, the prosecutor may cross examine the defendant about subsequent statements that are inconsistent with the post-arrest statements. The court ruled that this questioning does not draw a negative inference from defendant’s decision to remain silent, but instead from defendant’s prior inconsistent statement. Accordingly, the district court’s ruling was affirmed.

D. Double Jeopardy

- *Double Jeopardy*

U.S. v. Wheeler, 05-3140 (8/1/08)

- ▶ Defendant was the leader of the Outlaw

Motorcycle Club and he was indicted in the Northern District of Ohio for a RICO conspiracy, a substantive RICO violation, and a drug conspiracy. Defendant moved to dismiss the charges based upon the Double Jeopardy Clause because he was previously charged in the Middle District of Florida for drug and RICO violations. The district court denied the motion, defendant was convicted, and he appealed.

- ★ Holding: In the context of successive RICO and drug prosecutions, the court applies a five factor totality of the circumstances test in order to determine if the Double Jeopardy Clause has been violated, considering the following: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictment; (4) the overt acts charged by the government; and (5) places where the events alleged as part of the offense occurred. Regarding the RICO violations, the court found substantial overlap between time, participants, acts, and places, and accordingly held that double jeopardy prohibited the Northern District of Ohio RICO prosecution. Regarding the drug conspiracy charges, the court ruled that the drug conspiracy alleged in Ohio was a conspiracy separate and apart from the one charged in Florida. Thus, defendant’s conviction on the drug conspiracy was affirmed, and his RICO convictions were vacated.

- *Double Jeopardy*

U.S. v. Djoumessi, 07-1740 (8/20/08)

- ▶ Defendant was prosecuted in state court for, among other charges, kidnaping and conspiracy to kidnap. Defendant was acquitted on the charges, and the federal government then indicted him for involuntary servitude and conspiracy. Defendant moved to dismiss the prosecution based on double jeopardy grounds. The district court denied the motion, defendant was convicted, and he appealed.

- ★ Holding: The Double Jeopardy Clause

does not prohibit parallel state and federal prosecutions. The one exception to this rule is based on the Supreme Court case *Bartkus v. Illinois* where the Court held that double jeopardy would bar a second prosecution if it was a “sham” prosecution by an “ostensibly different sovereign.” The court noted that the *Bartkus* exception was so narrow as to be virtually non-existent. Thus, even though the state had cooperated substantially with the federal government in its subsequent prosecution of defendant, the federal government had not “ceded its prosecutorial discretion” to the state control. Accordingly, the district court ruling was affirmed.

E. Miscellaneous Fifth Amendment

• Due Process - Stun Belt

U.S. v. Miller, 06-4583 (7/1/08)

► Defendant was charged with wire fraud, money laundering, and witness tampering. Prior to trial, defense counsel informed the district court that defendant was acting violently towards him, and that he was concerned about sitting next to defendant during the trial. Based on a recommendation from the marshals, the court ruled that defendant would wear a stun belt throughout the trial. Defendant raised no objection to the use of the stun belt, and he was convicted. Defendant appealed.

★ Holding: The Court held that physical restraints should be used as “rarely as possible” during a trial, and that, before using restraints, a district court must make a determination that the restraints are “justified by a state interest specific to a particular trial.” In the case, the court held that the district court erred in requiring physical restraints without making any findings regarding the need for such measures. Nonetheless, defendant did not object to the use of the stun belt at trial, and thus, applying plain error analysis, the court found no prejudice to defendant’s defense. Accordingly, defendant’s conviction was

affirmed.

• Due Process - Involuntary Medication U.S. v. Green, 06-6186 (7/16/08)

► Defendant was charged with drug trafficking and the district court determined that he was incompetent to stand trial. Defendant was committed to the custody of the Bureau of Prisons to be restored to competency, but refused to participate with the recommended treatment plan which included the administration of medication. The government petitioned the district court to allow the use of forced medication to restore defendant to competency. After holding a hearing, the district court ruled that administration of involuntary medication was appropriate. Defendant filed an interlocutory appeal.

★ Holding: The Supreme Court has held that involuntary medication does not violate due process if the defendant poses a risk of harm to himself or others. Where a defendant does not present such a risk, the proper standard to apply was laid out by the Supreme Court in *Sell*. In such a case, the government must present clear and convincing evidence to show the following: (1) an important governmental interest; (2) that involuntary medication will “significantly further” that interest; (3) that involuntary medication is “necessary;” and (4) that administration of the drugs is “medically appropriate” for the defendant. In the case, the court held that the government interest was important, making reference to the fact that the offenses for which defendant was charged carried a mandatory minimum of 10 years up to life in prison. Further, the court ruled that the medication was necessary and would further the governmental interest, and that it was medically appropriate for defendant. Accordingly, the district court ruling was affirmed.

• *Due Process - Involuntary Medication*
U.S. v. Payne, 07-5592 (8/28/08)

▶ Defendant was charged in an indictment with drug trafficking, firearms violations, and multiple murders. He was found incompetent to stand trial, and involuntarily medicated in order to restore him to competency. Defendant filed a motion requesting an evidentiary hearing to determine whether the government could continue its involuntary medication. The district court determined that continued involuntary medication was appropriate and defendant filed an interlocutory appeal.

★ Holding: In analyzing the four factors outlined in the Sixth Circuit's decision in *Green* (See *supra*), the court found that continued medication was appropriate. Specifically, the court ruled that, although no progress had been made toward defendant's competency through the use of the medication, the doctors treating defendant believed that there was a "substantial probability" that through increased dosages, changing medications, and adjustments to medications defendant would attain competency. Accordingly, the court held that continued involuntary medication did not violate defendant's due process rights and the district court ruling was affirmed.

• *Due Process - Identification Testimony*
Jells v. Mitchell, 02-3505 (8/18/08)

▶ Defendant was charged with kidnaping and murder. A photo line-up was utilized and defendant was by far the youngest person pictured, and he was the only person portrayed in a jail jumpsuit. An eyewitness identified defendant from the line-up. Defendant was convicted at trial, lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: A two-step process is utilized in order to determine if a photo line-up procedure violates Due Process. First, the court inquires

as to whether the line-up was unduly suggestive of the defendant. If the court makes such a finding, it must inquire as to whether the identification was otherwise reliable considering five factors: (1) the opportunity of the witness to view the perpetrator; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty of the witness; and (5) the length of time between the identification and the crime. In the case, the court held that the line-up was impermissibly suggestive. Nonetheless, the court found the identification to be reliable because the witness had a good opportunity to view the suspect, he paid close attention, his prior description was accurate, he was certain of his identification, and only eleven days passed between the offense and the identification. Accordingly, the identification did not violate Due Process.

VI. Sixth Amendment

B. Confrontation Clause

• *Confrontation Clause*

U.S. v. Driver, 04-4470 (8/1/08)

▶ Defendant was charged with numerous other defendants with RICO and drug trafficking violations. At trial, an officer testified as to hearsay statements made by a codefendant that the codefendant participated in two murders and drug trafficking activity. The statements did not mention or reference defendant. Defendant was convicted and argued on appeal that his right to confrontation was violated.

★ Holding: The Confrontation Clause is not violated where a codefendant's confession is introduced against the codefendant, but it in no way implicates the defendant. The court held that even if the codefendant's statement did violate defendant's confrontation right by helping the government to prove the underlying conspiracy, any error was harmless because substantial other evidence proved the drug conspiracy against defendant. Accordingly, the

district court ruling admitting the evidence was affirmed.

D. Right to Counsel/Self Representation

• Right to Self Representation

Moore v. Haviland, 07-3380 (7/15/08)

► Defendant was charged with state offenses and during the course of his trial he notified the trial court that he wanted to represent himself. The court warned defendant that it was a bad idea, and required defendant to put his plan to represent himself in writing. The trial proceeded and the court did not review defendant's letter until after defendant testified. The court took no further action on defendant's request, but instead let defendant's counsel represent him through the end of the trial. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court granted the petition, finding that defendant's right to self representation was violated. The state appealed.

★ Holding: The court found that defendant clearly expressed a desire to represent himself, both orally and in writing to the trial court. Under those circumstances, the trial court should have inquired, as required by *Faretta*, whether defendant's waiver of counsel was knowing, intelligent, and voluntary. The court found that the trial court failed in this regard. Further, the court dismissed the state's contention that defendant's request was untimely, because defendant raised his request as soon as his dissatisfaction with trial counsel's performance arose. Accordingly, the district court's ruling granting the writ was affirmed.

• Right to Counsel - Critical Stages

Hereford v. Warren, 07-1507 (8/7/08)

► Defendant was charged in state court with robbery. At the bench trial, the state called a codefendant to testify against defendant. The codefendant requested to speak to his counsel before testifying, so the court called a recess.

During the break, the prosecutor had an *ex parte* conversation with the court. The prosecutor stated that he and the detective spoke to the codefendant in the hall, and that the codefendant did not understand his rights due to his mental problems. The prosecutor suggested that the codefendant be allowed to talk to his mother, which the court approved. The codefendant subsequently testified, and during cross examination he denied that he had talked to the police leading up to the trial. Defendant was convicted by the trial judge, and he lost his state court appeal. Defendant filed a federal *habeas* petition. The district court granted the petition and held that the *ex parte* conference violated defendant's right to counsel. The state appealed.

★ Holding: Complete denial of counsel at a critical stage in a criminal proceeding is a structural error, pursuant to the Supreme Court's decision in *Cronic*, which requires reversal of a conviction. In order to determine whether a proceeding is a critical stage, the court considers the "likelihood that significant consequences might have resulted from the absence of counsel at the stage of the criminal proceedings." In the case, the court found that the "brief, administrative discussion" between the trial judge and prosecutor was not the type of proceeding that would significantly prejudice defendant. Thus, the court found that the error was not structural, and did not require automatic reversal. Further, the court held that the error was harmless. Accordingly, defendant's conviction was affirmed.

E. Indictment - Variance/Duplicity

• Constructive Amendment of the Indictment

U.S. v. Mayberry, 06-2239 (8/21/08)

► Defendant was charged with two counts of being a felon in possession of a firearm. In regard to one of the counts, the government introduced evidence at trial that the defendant possessed the gun during an armed robbery. The district court provided a limiting

instruction that the evidence could be considered only in relation to whether defendant intended to possess the firearm, not for any other acts. Defendant did not object to the evidence at trial, but argued on appeal that the evidence constructively amended the indictment.

★ Holding: In order to prove a constructive amendment, a defendant must show that the presentation of the evidence and the jury instructions so altered the elements of the charged offense that there is a substantial likelihood that the defendant was convicted of an offense not charged in the indictment. The court held that nothing in the jury instructions served to amend the indictment. Further, the court found that the government was entitled to introduce evidence of the possession of the gun during a robbery. The court noted that prosecutors cannot be prohibited from introducing highly probative evidence merely because it may support conviction of an uncharged offense. Thus, the court found no plain error and affirmed the conviction.

VII. Other Constitutional Rulings

B. Art. 1, § 10, *Ex Post Facto* Clause

• *Ex Post Facto - Guideline Amendments*
U.S. v. Duane, 06-6536 (7/17/08)

▶ Defendant was convicted of receiving child pornography (occurring before 11/1/05) and possessing child pornography (occurring after 11/1/05). At sentencing, the district court applied the 11/1/05 guideline manual (which imposed higher penalties) to the guideline calculation for all of the offenses. Defendant appealed and argued that application of the 2005 guideline manual to the receiving offense violated the *Ex Post Factor* Clause.

★ Holding: USSG § 1B1.11(b)(3) requires that, where a defendant is convicted of offenses both before and after a guideline amendment, the guideline amendment is to be applied to both offenses. Thus, the court addressed two issues in its decision: (1) whether a retroactive

change to the guideline could, after *Booker*, affect the *Ex Post Facto* Clause at all; and (2) whether application of § 1B1.11(b)(3) violated the *Ex Post Facto* Clause. Regarding the first issue, the court “assumed *arguendo*” that a retroactive change to the guidelines could implicate the *Ex Post Facto* Clause. This conclusion was based upon its interpretation of Supreme Court precedent that “guidelines that affect discretion, rather than mandate outcomes,” are subject to *ex post facto* scrutiny.

Regarding § 1B1.11(b)(3), the court found no *ex post facto* violation where a defendant is convicted of offenses both before and after a guideline amendment. In the case, the court reasoned that defendant was on notice, pursuant to § 1B1.11(b)(3) and the grouping rules of the guidelines, that his continued possession of child pornography after the 2005 guideline amendment would subject all of his child pornography offenses to such amendment. Thus, application of the 2005 guidelines to all of his offenses did not violate the *ex post facto* clause.

VIII. Defenses

A. Severance of Counts/Defendants

• *Rule 8(b)/14(a) - Severance of Defendants*
U.S. v. Driver, 04-4470 (8/1/08)

▶ Defendant was a member of the Outlaw Motorcycle Club (OMC) who was charged along with numerous other OMC members with RICO and drug conspiracy crimes. Defendant moved to sever his trial from that of his codefendants because they committed acts of violence that would be imputed to him by the jury. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: In order to obtain a severance of defendants who were otherwise properly joined in an indictment, a defendant must show “compelling, specific, and actual prejudice from the court’s refusal to grant the motion to sever.” In the case, the court held that the district court gave an appropriate limiting

instruction to the jury that it should consider the evidence against each defendant separately, and defendant was not able to show specific prejudice as a result of the joint trial. Thus, the district court ruling denying severance was affirmed.

B. Fed. R. Crim. P. 12 - Pretrial Motions

• *Rule 12(b)(3) - Failure to State an Offense*
U.S. v. The, 06-2371 (7/31/08)

▸ Defendant was charged with fraudulently importing merchandise contrary to law, pursuant to 18 USC § 545. The basis for the prosecution was the fact that defendant transported counterfeit DVDs of movies on a plane flight into the U.S. The indictment stated that defendant imported “counterfeit copies of motion pictures in DVD format, in violation of the copyrights of the motion pictures.” Defendant was convicted in a bench trial and argued for the first time on appeal that (1) the indictment did not allege an offense because it did not list the specific statutory copyright provision, and (2) § 545 could not be used to prosecute a copyright offense.

★ Holding: An indictment is sufficient only if it “fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements necessary to constitute the offense.” Generally, an indictment may not provide only that an offense is “contrary to law” without stating which law is violated or alleging facts sufficient to show that some law was violated. In the case, the court first held that the general allegation regarding counterfeit copies in violation of copyright was insufficient to charge an offense. Nonetheless, the court held that, because defendant failed to raise the issue in the district court, plain error review applied. The court found that defendant could establish no prejudice as a result of the defect.

Second, the court held that § 545 could be used to prosecute copyright infringement because there was an identifiable criminal copyright statute which was violated, namely

18 USC § 2318. Thus, § 545 was not being used to criminalize a civil statute. The court noted that §545 carried up to 20 years in prison while § 2318 only carried a maximum of 5 years. The court stated that, had defendant been sentenced to more than 5 years, the government’s use of § 545 would have been “problematic.” Because defendant received a sentence of probation, however, the court found no plain error and defendant’s conviction was affirmed.

L. Miscellaneous Defenses

• *Competency - 18 USC § 4241*
U.S. v. Miller, 06-4583 (7/1/08)

▸ Defendant was charged with wire fraud, money laundering, and witness tampering. During the proceedings, the following occurred: (1) defendant’s counsel expressed difficulties with the attorney-client relationship; (2) the district court commented on defendant’s mental health; and (3) a probation officer suggested that a mental health evaluation may be appropriate based on defendant’s feelings of paranoia. Upon his conviction and sentence, defendant appealed and argued that the district court erred in failing to order, *sua sponte*, a competency hearing.

★ Holding: Pursuant to § 4241, a district court is required to order, *sua sponte*, a competency hearing, where reasonable cause exists to believe that the defendant is mentally incompetent to stand trial. The court held that the bar for incompetency is high. Although the court found some information in the record which indicated that defendant may have mental health issues, defendant demonstrated that he had the ability to assist counsel and that he understood the nature of the proceedings. Thus, the court ruled that no competency hearing was required and defendant’s conviction was affirmed.

IX. Plea & Sentencing Hearings

B. Sentencing

• *Fed. R. Crim. P. 32(h)-Notice of Departure*
U.S. v. Erpenbeck, 06-4247 (7/2/08)

▶ Defendant was convicted of bank fraud and at sentencing the district court imposed a sentence above the recommended guideline range. The district court justified the sentence both in terms of an upward departure and an upward variance from the guidelines. Defendant appealed and argued for the first time that he received no notice of the possibility of the above-guideline sentence.

★ Holding: Relying on the Supreme Court's recent decision in *Irizarry* (See P.V., Issue #20), the court held that Rule 32(h) requires that a defendant receive notice of an upward departure, but not an upward variance based on the factors under 18 USC § 3553(a). The court found that the district court's sentence was properly based upon the § 3553(a) factors and was reasonable, thus there was no plain error in the failure to provide notice to defendant.

• *Rule 32(i)(4)(A)(ii) - Allocution*
U.S. v. Griffin, 07-3109 (7/7/08)

▶ Defendant was convicted of fraud related offenses and at sentencing the district court imposed a sentence, including an upward departure, without offering defendant the opportunity for allocution. Defense counsel objected, the district court admitted the error, and the court afforded defendant the chance to speak. The court engaged in a conversation with defendant about an appropriate sentence and modified its sentence to include drug treatment, but did not alter the period of imprisonment. Defendant appealed.

★ Holding: Fed. R. Crim. P. 32(i)(4)(A)(ii) requires a district court to afford a defendant the right to allocution prior to being sentenced. The court held that the district court erred in failing to permit allocution prior to sentencing defendant. The court found, however, that the district court sufficiently remedied the problem

by allowing defendant the right to allocution after the court acknowledged the error, and by genuinely reconsidering defendant's sentence. Accordingly, the sentence was affirmed.

X. Jury Issues

D. Batson

• *Batson*

U.S. v. Kimbrel, 06-6426 (7/3/08)

▶ Defendant was charged with being a felon in possession of a firearm. During *voir dire*, the government challenged defendant's use of a peremptory strike against a white juror, arguing that it demonstrated a pattern of discrimination. Defendant's counsel indicated that he struck the juror because he "detected a bit of ego" in the juror, and was concerned it would affect her service as a juror. The district court then ruled that defendant had not met his "burden of persuasion" to show a nondiscriminatory purpose for the strike, and disallowed defendant's strike. Defendant was convicted after trial and appealed.

★ Holding: In analyzing a *Batson* challenge, a district court must perform three steps: (1) the party opposing the strike must establish a *prima facie* case of race discrimination; (2) the burden of production then shifts to the proponent of the strike to provide a race-neutral explanation for the strike; and (3) the court must determine whether the opponent has proven purposeful discrimination. In the case, the court held that the district court improperly shifted the burden of persuasion to defendant at step two of the *Batson* analysis. The court emphasized that only the burden of production shifts to the proponent of the strike, but the burden of persuasion always remains with the opponent of the strike. Accordingly, the court reversed defendant's conviction and remanded the case for a new trial.

• *Batson*

U.S. v. Torres-Ramos, 06-3580 (8/7/08)

▶ At defendant's trial for a drug conspiracy,

the government struck a black juror from the venire. Defendant raised a *Batson* challenge, and the government indicated that it struck the juror because his educational level was low. The district court determined that the government struck several white jurors with similar educational levels, and denied defendant's *Batson* challenge. Defendant was convicted and he appealed.

★ Holding: The court held that the district court erred in its analysis of the *Batson* issue by comparing the strike of the black juror with other jurors stricken by the government. Instead, the district court should have compared the black juror with white jurors who were empaneled on the jury. Because this information was not in the record, the court, *sua sponte*, obtained the juror questionnaires from the district court and found that three white jurors who were empaneled had a similar educational background to the black juror. Accordingly, the court remanded the case to the district court for it to analyze whether the government's conduct amounted to purposeful discrimination.

E. Miscellaneous Jury Issues

• *Anonymous Jury*

U.S. v. Lawson, 04-4480 (8/1/08)

▶ Defendant was a member of a violent motorcycle gang who was charged with drug trafficking and RICO violations. The court empaneled an anonymous jury for the trial. Defendant was convicted and he appealed.

★ Holding: A court should not empanel an anonymous jury unless there is a strong reason to believe the jury needs protection, and the court takes reasonable steps to minimize the prejudicial effect on the defendant and to ensure that the defendant's fundamental rights are protected. The court identified three situations that may warrant an anonymous jury: (1) very dangerous defendants who are involved in large-scale organized crime, mob-style killings, and attempted jury tampering; (2)

defendants with serious criminal records and histories of jury tampering; and (3) allegations of dangerous and unscrupulous conduct by defendants coupled with extensive pretrial publicity. In the case, the court held that both the first and third situations were present in defendant's case, and thus there was a need for an anonymous jury. Further, the court found that the district court took proper precautions to protect defendant's rights by allowing defendant to have certain information about each juror, permitting three days for *voir dire*, and avoiding implying to the jury that anonymity was required. Accordingly, defendant's conviction was affirmed.

• *Reading Indictment to Jury*

U.S. v. Lawson, 04-4480 (8/1/08)

▶ Defendant was a member of a violent motorcycle gang who was charged with drug trafficking and RICO violations. During *voir dire*, the district court read the indictment to the prospective jurors. Defendant was convicted and appealed.

★ Holding: The court held that the district court has the discretion to submit the indictment to the jury as long as a limiting instruction is provided that the indictment is not evidence of the defendant's guilt. In the case, the court found that the district court provided a proper limiting instruction to the jury. Accordingly, the conviction was affirmed.

XII. Appeal

A. Preserving Error

• *Objections to Magistrate Decision*

U.S. v. Branch, 06-5393 (8/12/08)

▶ Defendant was charged with drug trafficking and moved to suppress cocaine found on his person. The suppression hearing was held before a magistrate, and the magistrate recommended denial of the motion. Defendant did not object to the magistrate's decision. Defendant entered a conditional plea

of guilty, and appealed.

★ Holding: The court held that defendant forfeited his right to appeal the district court's ruling on the motion to suppress by failing to object to the magistrate's decision. Accordingly, his appeal on this issue was waived.

- *Preserving Error - Conditional Pleas*
U.S. v. Alexander, 07-3219 (8/18/08)

- ▶ During defendant's prosecution for a drug conspiracy, defendant moved to compel discovery to try to uncover evidence of police misconduct. The district court denied the motion. Defendant entered a conditional plea reserving his right to appeal the district court's ruling on his motion to suppress, but did not specifically reserve his right to appeal the court's ruling on the motion to compel. Defendant appealed.

★ Holding: The court held that Fed. R. Crim. P. 11(a)(2) provides that a plea waives any pretrial issues not specifically reserved in the plea. Accordingly, the court found that defendant's motion to compel discovery was not preserved for appeal.

- *Preserving Error - Conditional Pleas*
U.S. v. Mastromatteo, 06-2349 (8/19/08)

- ▶ Defendant was charged with meth distribution and he moved to suppress evidence obtained pursuant to a search warrant. The district court denied the motion and defendant entered a plea without a written plea agreement. At the plea hearing, defendant stated that he was reserving his right to appeal the suppression issue, and the government agreed. The district court approved the arrangement and accepted the plea. Defendant appealed the suppression issue.

★ Holding: Fed. R. Crim. P. 11(a)(2) requires that, in pleading guilty, a defendant must reserve the right to appeal an issue in writing. The court held that the requirement of preserving an appeal in writing was not

jurisdictional, and thus may be waived by the government. Accordingly, the court proceeded to the merits of the suppression issue. (*See supra*).

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

- U.S. v. Erpenbeck, 06-4247 (7/2/08)

- ▶ Defendant was convicted of bank fraud and sentenced to 360 months in prison. On appeal, the court remanded the case due to the decision in *Booker*. At the resentencing hearing before a different judge, the district court recalculated the guidelines in a fashion more favorable to defendant, and instead imposed a sentence of 300 months. The district court declined to reduce the loss amount further based upon alleged collateral received by the victim lender banks since the time of defendant's original sentencing. Defendant appealed.

★ Holding: Relying on the court's prior decision in *U.S. v. Worley* (*See P.V.*, Issue #9), the court held that a *Booker* remand requires the court to impose sentence based on the facts determined at the original sentencing, not on subsequently developed facts. Accordingly, defendant's sentence was affirmed.

- *Reasonableness of Sentence*

- U.S. v. Funk, 05-3708 (7/22/08)

- ▶ Defendant was convicted of drug trafficking and at sentencing the district court determined that he was a career offender. Based on its disagreement with the length of sentence provided by the career offender guideline, the district court reduced defendant's sentence from a guideline range of 262-327 to 150 months imprisonment. The government appealed and the original Sixth Circuit panel held that the sentence was unreasonable because (1) the disagreement with the guideline range was an impermissible sentencing consideration, and (2) the 40% downward

variance did not comport with the court's then prevailing proportionality review. (See P.V., Issue #12). The Supreme Court remanded the case for reconsideration in light of *Gall* and *Kimbrough*.

★ Holding: First, the court held that its reasoning in its prior decision was no longer valid after *Gall* and *Kimbrough*. Nonetheless, the court ruled that defendant's sentence was unreasonable. The court determined that, in assessing a sentence that is outside the guideline range, the court must first determine if the case is an atypical case that is outside the "heartland" of cases, or whether it is a "mine-run" case. If the case is atypical, then the court must afford the "greatest respect" to the district court's sentencing determination. If, however, the case is "mine-run," the court must apply a "closer review" of the sentence. In either case, the court must question whether the district court abused its discretion.

Applying this criteria, the court first determined that the case was "mine-run." There was nothing extraordinary about defendant or the facts of the case, such as in *Gall*, that took it out of the "heartland" of drug offenses. Further, there was nothing about the career offender guideline which indicated that the Sentencing Commission had acted outside its "characteristic institutional role," such as in *Kimbrough*, in enacting the guideline.

Second, the court determined that the sentence imposed by the district court could not survive "closer review." The court determined that the district court's decision boiled down to a conclusion that it did not want to sentence defendant as a career offender. Without any further principled reasoning that a reduction from the guideline was appropriate, the court held that the district court abused its discretion. Accordingly, the court held that the sentence was substantively unreasonable.

- *Reasonableness of Sentence*
U.S. v. Curry, 07-6459 (8/5/08)

- ▶ Defendant was convicted of participated in a drug conspiracy and at sentencing the district court determined that his guideline range was 324-405 months. The government filed a motion to reduce defendant's sentence below the recommended guideline range based upon his cooperation, and the court imposed a sentence of 240 months. Defendant appealed, and his appellate counsel moved to withdraw and filed an *Anders* brief.

★ Holding: The court determined that the withdrawal of counsel was appropriate because it found no merit to defendant's appeal. The court held that a court of appeals may apply a "more demanding" standard than the "presumption of reasonableness" to a defendant's appeal where the defendant received a below guideline sentence. Applying this "more demanding" standard, the court ruled that defendant's sentence was reasonable and affirmed the sentence.

- *Reasonableness of Sentence*
U.S. v. Davis, 05-3784 (8/12/08)

- ▶ Defendant was convicted of bank fraud and his first sentence was vacated on appeal due to the intervening decision in *Booker* and an incorrect guideline computation. At the second sentencing, the district court granted a downward variance from the guideline range of 30-37 months to a sentence of one day in jail. The Sixth Circuit vacated this sentence because the 99.89% variance did not comport with the court's then prevailing proportionality review. (See P.V., Issue #9). At the third sentencing, the district court again imposed a sentence of one day in jail, concluding that the downward variance was warranted by the fact that it had been 14 years since defendant committed the offense, and he was 70 years old. The government appealed.

★ Holding: The court held that the district court's reliance on the time period between the

commission of the offense and the sentencing was improper. The court ruled that a delay in sentencing will not favor a variance unless there has been a finding of government misconduct or prejudice to the defendant. Thus, the court determined that the case had to again be remanded in order for the district court to determine whether the defendant's age, combined with any other permissible factors, warranted the substantial downward variance. The court noted that, although age is a discouraged factor under the guidelines, it "may well be an appropriate factor in choosing to grant a downward variance." Nonetheless, the court determined that it was not "self-evident" that defendant's age alone justified a sentence of one day in a case involving a \$900,000 fraud loss. Accordingly, the case was remanded for resentencing.

D. Miscellaneous Appeal

• *Interlocutory Appeal - Collateral Order*
U.S. v. Green, 06-6186 (7/16/08)

► Defendant was charged with drug trafficking and found to be incompetent to stand trial. The district court ordered that defendant be involuntarily medicated in order to restore him to competency. Defendant filed an interlocutory appeal of the district court's ruling.

★ Holding: Under the "collateral order" doctrine, a party may appeal an interim order of the district court if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment. The court held that appellate review of an order that a defendant be forcibly medicated is "ineffective" because the "harm that he seeks to avoid cannot be undone even if he is acquitted." Thus, the court granted interlocutory review and proceeded to the merits of the appeal. (*See supra*).

• *18 USC § 3582(c)(2) - Crack Amendment*
U.S. v. Poole, 07-3694 (8/21/08)

► Defendant was convicted of conspiracy and distribution of crack and sentenced. Subsequent to defendant's sentencing, the Sentencing Commission amended the guideline for crack, and reduced the penalties by two offenses levels. Defendant argued on appeal that his sentence should be vacated and the case remanded for resentencing based upon the crack amendment.

★ Holding: The court held that the proper course for a court of appeals in relation to a retroactive guideline amendment was to affirm defendant's sentence and remand the case to the district court for it to consider a motion for reduction of sentence pursuant to 18 USC § 3582(c)(2).