

# 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](http://www.supremecourtus.gov) for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov) and enter the docket

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

## NEW COMBINED OUTLINE

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

## SUPREME COURT DECISIONS

### **I. Specific Offenses**

- 18 USC § 924(e) - ACCA

Begay v. U.S., 06-11543 (4/16/08)

▸ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that defendant was an armed career criminal based upon three prior

New Mexico convictions for felony DUI. Defendant argued on appeal that felony DUI did not constitute a “violent felony” under the ACCA, but the Tenth Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The phrase “violent felony” is defined under the ACCA as a crime punishable by more than one year in prison that (1) includes the use, or attempted or threatened use, of force, or (2) is “burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The Court held that the articulation of the enumerated offenses in the statute indicated that Congress intended for the “otherwise” clause to apply only to those offenses that are “similar, in kind as well as in degree of risk posed,” to the enumerated offenses. Thus, the “otherwise” clause is intended to apply only to offenses that are “violent and aggressive crimes committed intentionally,” such as those enumerated in the statute. Accordingly, the Court ruled that felony DUI, a form of strict liability offense, was not the kind of offense that should be considered a violent felony for ACCA purposes. Defendant’s sentence was accordingly vacated.

• *21 USC § 841(a)-Prior Felony Drug Offense*  
Burgess v. U.S., 06-11429 (4/16/08)

► Defendant was charged with conspiracy to possess 50 grams or more of cocaine with intent to distribute. The government enhanced defendant’s sentence from a mandatory minimum 10 years to a mandatory 20 years based on the fact that defendant had a prior “felony” drug offense from South Carolina. Defendant argued that the enhancement was inapplicable because, although the South Carolina drug offense was punishable by up to two years incarceration, the state classified it as a misdemeanor. The district court agreed with the government, defendant appealed, and the

Fourth Circuit affirmed. Defendant appealed to the Supreme Court.

★ Holding: The Court held that the phrase “felony drug offense,” as used in 21 USC § 841(a)(1)(A), is defined in 21 USC § 802(44). This section defines a “felony drug offense” as a drug offense that “is punishable by imprisonment for more than one year under any law of the United States or of a State.” Based upon this definition, the Court concluded that an offense is a “felony drug offense” if it is punishable under state law by more than a year in prison, even if the state does not classify the offense as a felony. The Court ruled that its holding was not affected by § 802(13) which defines the term “felony” to mean an offense classified by federal or state law as a felony. Accordingly, defendant’s prior state misdemeanor drug conviction, that was punishable by up to two years in prison, was properly considered a “felony drug offense.” Thus, the district court’s application of the enhancement was affirmed.

• *26 USC § 7201 - Tax Evasion*

Boulware v. U.S., 06-1509 (3/3/08)

► Defendant was charged with tax evasion for diverting millions of dollars from a closely held corporation, for which he was the president and controlling shareholder. Defendant claimed at trial that the diverted funds were distributions of property that were returns of capital to him, up to his basis in his stock, and thus were non-taxable. Relying on Ninth Circuit precedent, the district court granted the government’s motion *in limine* to exclude defendant’s return-of-capital evidence because defendant could not show any proof that the corporation intended the funds to be return of capital. Upon defendant’s conviction he appealed, and the Ninth Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The elements of tax evasion under § 7201 are willfulness, the existence of a tax deficiency, and an affirmative act

constituting evasion. The question of whether a tax deficiency exists turns on whether the payment of funds was a “dividend” or a “distribution of capital.” If the payment is a “distribution of capital,” then the payment is non-taxable to the shareholder up to his or her basis in the stock. In the case, the Court held that the determination of whether a payment is a “distribution of capital” turns not on the intent or purpose of the corporation, but instead on the economic substance of the transaction, a question that involves whether the corporation had “earnings and profits” to distribute. Accordingly, the court ruled that the Ninth Circuit’s holding, which required a defendant to show corporate intent in order to present a return-of-capital defense, was erroneous, and defendant’s conviction was vacated.

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

##### **F. Arrest Related Issues**

###### *• Authority to Arrest*

Virginia v. Moore, 06-1082 (4/23/08)

► Defendant was stopped by Virginia police for driving with a suspended license. Virginia law generally prohibited officers from arresting a driver for such an offense, but the officers nonetheless arrested defendant. They subsequently searched defendant incident to the arrest and found cocaine. In the state prosecution, defendant moved to suppress the cocaine because the officers arrested him in contravention of Virginia law. The trial court denied the motion, but the Virginia Supreme Court reversed. The state appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that when officers have probable cause to believe that a crime has been committed in their presence, they may arrest a defendant regardless of whether the applicable state law requires that officers issue only a citation for the particular offense. Further, the Court ruled that the Fourth Amendment permitted officers to

conduct a search incident to an arrest under the circumstances. Accordingly, the defendant’s conviction was affirmed.

#### **X. Jury Issues**

##### **D. Batson**

###### *• Batson*

Snyder v. Louisiana, 06-10119 (3/19/08)

► Defendant was charged with murder and during the *voir dire* process at trial, the state exercised peremptory challenges against all five black jurors from a 36-juror pool. Defendant raised *Batson* challenges, and in regard to one of the jurors in particular, the state proffered two explanations for the strike. First, the state claimed that the black male juror appeared nervous, and second that he had student-teaching obligations at his college that may cause him to seek a quick compromise verdict. The trial court confirmed with the college that it would not be a problem for the juror to miss teaching during the week of trial. Defendant objected that the state’s reasons for the strike were pretextual, but the state court ultimately overruled defendant’s *Batson* objection. Defendant lost his state court appeals, and his federal *habeas* action, and the Supreme Court granted *certiorari*.

★ Holding: *Batson* provides a three-step process for analyzing a claim that a peremptory challenge was based on race: (1) defendant must make a *prima facie* showing that the challenge was exercised on the basis of race; (2) the prosecutor then must offer a race-neutral explanation for the strike; and (3) in light of the parties’ submissions, the court must determine whether defendant has shown purposeful discrimination. In the case, the Court found that the prosecutor’s two reasons for striking the black juror were unconvincing. First, the nervousness of the juror was not considered by the trial court. Thus, the Court concluded that the trial court either did not recall the demeanor of the juror or instead decided to rely on the prosecutor’s second

reason in upholding the strike. Second, the Court held that the prosecutor's concern regarding the juror's obligation to the college was undermined by the fact that the trial court confirmed that missing a week would not be a problem for the juror. Further, the prosecutor declined to strike several white jurors who had potentially more serious scheduling issues. Accordingly, the Court ruled that purposeful discrimination was proven and defendant's conviction was reversed.

## **SIXTH CIRCUIT DECISIONS**

### **I. Specific Offenses**

• *18 USC § 371 - Conspiracy*  
U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was a doctor who was charged with conspiracy to commit health care fraud. For defendant's part in the conspiracy, he misrepresented that he had seen patients and determined that carotid artery ultrasound testing was medically necessary. The codefendant would then perform the testing and bill the insurance company or medicare for the services. Defendant was convicted at trial and he appealed.

★ Holding: In order to establish a conspiracy under § 371, the government must prove an agreement between two or more people to act together in committing an offense, and the commission of an overt act in furtherance of the offense. The agreement may be "a tacit or mutual understanding among the parties." In the case, the court found that, although there was no formal agreement, sufficient evidence supported a tacit agreement between defendant and the codefendant to defraud medicare and private insurance. Defendant knew that the misrepresentations that he made were being used by the codefendant to submit for insurance benefits. Defendant often signed the orders for treatment after the tests had already been performed, and he was paid by the codefendant for each order he signed.

Accordingly, defendant's conviction was affirmed.

• *18 USC § 844(i) - Arson - Personal Injury*  
U.S. v. Gibney, 06-5909 (3/7/08)

► Defendant pled guilty to committing an arson that caused personal injury to a public safety officer, pursuant to § 844(i). At sentencing, defendant argued that no personal injury occurred because the phrase "personal injury" in the statute should be construed to require some serious or significant injury. The district court ruled against defendant and he appealed.

★ Holding: The court first ruled that defendant waived the right to argue no personal injury through his guilty plea to the offense. (*See infra*, IX. Plea & Sentencing Hearings). Alternatively, the court held that § 844(i), under a plain reading of the statute, contained no requirement that a "personal injury" be serious or significant. Accordingly, defendant's sentence was affirmed.

• *18 USC § 922(g) - Felon in Possession*  
U.S. v. Martin, 06-5605 (3/31/08)

► Defendant was charged with being a felon in possession of a firearm and various drug trafficking offenses. Defendant was convicted after trial and challenged the sufficiency of the evidence for the firearm charge on appeal.

★ Holding: The court ruled that the evidence was sufficient to support the verdict where the firearm was found beside the bed in the master bedroom of defendant's girlfriend's apartment, men's clothing was in the bedroom closet, and a pill bottle and phone bill in defendant's name were in the apartment. The court was unpersuaded by the facts that defendant's fingerprints were not found on the gun, and defendant's girlfriend testified that she owned the gun. Accordingly, the conviction was affirmed.

• *18 USC § 924(e) - ACCA*

U.S. v. Goodman, 06-5513 (3/17/08)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified for the armed career criminal enhancement. One of the predicate offenses was an escape conviction from Tennessee. Defendant argued that the escape should not qualify as a violent felony because defendant “escaped” from house arrest, and Tennessee courts would no longer consider a violation of house arrest to be an offense under the escape statute. The district court disagreed, and defendant appealed.

★ Holding: Relying on prior Sixth Circuit precedent, the court held that escape under the Tennessee statute is categorically a violent felony for ACCA purposes. Further, the court held that a defendant may not mount a collateral attack to a prior state conviction at sentencing before the district court. Defendant’s only remedy would be to seek to set aside the conviction in Tennessee state court. Accordingly, the district court ruling was affirmed.

• *18 USC § 1347 - Health Care Fraud*

U.S. v. Hunt, 06-6300 (4/11/08)

▶ Defendant was a doctor who participated in a scheme to commit health care fraud. For defendant’s part, he misrepresented that he had seen patients and determined that a carotid artery ultrasound test was medically necessary. The misrepresentations were then used to obtain insurance and medicaid benefits for the testing. Defendant was convicted after jury trial and he argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: Pursuant to § 1347, the government must prove the following to sustain a conviction for health care fraud: (1) defendant knowingly devised a scheme or artifice to defraud a health care program in connection with the delivery of health benefits;

(2) execution or attempted execution of the scheme or artifice; and (3) defendant’s intent to defraud. In the case, the court found ample evidence to believe that defendant knowingly submitted false statements claiming that he had “consultations” with patients. Further, the court ruled that there was sufficient evidence to establish that defendant did not mistakenly believe that a nurse, allegedly hired by a codefendant, was seeing the patients in defendant’s stead. Accordingly, defendant’s conviction was affirmed.

• *18 USC § 1951 - Hobbs Act Conspiracy*

U.S. v. Gray, 05-4482 (4/2/08)

▶ Defendant was charged with multiple counts of Hobbs Act conspiracy for his role in obtaining government contracts from city officials for his corporate clients. The indictment alleged that defendant conspired to extort money under color of right. Defendant was convicted after a jury trial. On appeal, defendant argued that the Hobbs Act did not apply to his conduct.

★ Holding: Relying on the Sixth Circuit’s ruling in *U.S. v. Brock* (See P.V., Issue #7), the court held that in order for a private individual to be convicted in a conspiracy to extort money “from another with his consent” under a color of right, pursuant to the Hobbs Act, the individual must conspire with or assist a public official in extorting money from a third party. In reviewing defendant’s various convictions in the case, the court held that only those convictions could stand in which the public official was paid money that was obtained from a third party, not from defendant. Thus, in situations where defendant merely bribed a public official to provide government contracts to defendant’s clients, the conviction was reversed. However, where the money paid to the public official was traceable to defendant’s client, and thus defendant and the official worked together to obtain the money from the third party, the conspiracy conviction was

affirmed. Accordingly, defendant's convictions were reversed in part, and affirmed in part.

• *26 USC § 7206(2) - Aid False Tax Returns U.S. v. Goosby, 07-5229 (4/24/08)*

► Defendant was charged with 30 counts of aiding in the preparation of false tax returns. At trial, the government presented evidence to show that defendant ran a business whereby he would prepare tax returns for numerous tax payers, and claim false deductions on their behalf and without their knowledge. Defendant was convicted after trial and he argued on appeal that the evidence was insufficient to support the conviction.

★ Holding: An offense under § 7206(2) has three elements: (1) defendant aided in the preparation and presentation of a tax return; (2) the return was fraudulent or false as to a material matter; and (3) defendant acted willfully. In the case, the court held that the false deductions claimed in the returns were material because numerous taxpayers testified that they were audited as a result of the returns and had to pay thousands of dollars in back taxes. Further, the court found that the evidence of willfulness was supported by taxpayer testimony showing that defendant assisted in preparing tax returns, the deductions claimed were false and without the taxpayers' knowledge, and there was a high degree of similarity in the false deductions claimed by the defendant on the various returns. Accordingly, the court ruled that sufficient evidence supported the convictions.

• *29 USC § 186 - Prohibited Payments U.S. v. Mabry, 06-2324 (3/3/08)*

► Defendants were executive officers of the carpenters' union and they contracted with union employees to perform work on a home. Defendants refused to pay the full invoice price, but instead negotiated a reduced price with the employees that was below the employees' cost in performing the work.

Defendants were subsequently prosecuted, pursuant to § 186, for soliciting and obtaining a discount from a union contractor. Upon being convicted, defendants argued on appeal that (1) the negotiated price constituted a "settlement," which provided an exemption to criminal liability, and (2) the evidence that defendants received a reduction in price was insufficient to support the verdict.

★ Holding: First, the court held that the reduced price did not constitute a "settlement" under § 186. Pursuant to § 186(c)(2), payments between employers and union officials are exempt from criminal prosecution if the payments are in "settlement" of a dispute. The court ruled that, considering the language of the statute and the purpose of the statutory scheme, the term "settlement" could not be construed so broadly as to include the "informal resolution" reached between defendants and the employees. Accordingly, the exemption did not apply.

Second, the court held that the evidence was sufficient to support the verdict. Although defendants offered expert testimony regarding the prevailing market rates for the services performed by the employees, the evidence showed that the price ultimately paid by defendants was below the union employees' costs for the services. Thus, a jury could reasonably find that a contractor would not perform work for less than its cost. Accordingly, defendant's conviction was affirmed.

## **II. Sentencing Guidelines**

### **A. Chapter Two - Offense Conduct**

• *2D1.1 - Drug Amount*

U.S. v. Wittingen, 06-4281 (3/27/08)

► Defendant was convicted of distributing meth to an informant. In the plea agreement, the parties agreed that defendant was responsible for between 2.5 and 5 grams of meth which, with other enhancements and reductions, yielded a sentencing guideline

range of 12-18 months incarceration. The PSR concurred in the recommendation from the plea agreement. The plea agreement acknowledged that the government could have proven other distribution by defendant. At sentencing, the district court determined that defendant was responsible for at least 180 grams of meth, based upon statements that defendant made to the officers upon his arrest, which he did not dispute. Thus, the court adjusted defendant's guideline range up to 57-71 months, and imposed a sentence at the bottom end of the range. Defendant appealed.

★ Holding: The court held that the district court did not err in its drug quantity calculation. The district court was not bound by the amount of drugs stipulated in the plea agreement, and defendant was advised of this fact at his guilty plea hearing. The district court's calculation was based upon defendant's admission, and there was no countervailing evidence or argument. Accordingly, defendant's sentence was affirmed.

• *2D1.1 - Drug Amount*

U.S. v. Jeross, 06-2257 (4/4/08)

▶ Defendant was convicted of conspiracy to distribute ecstasy. At sentencing, the district court determined that defendant was responsible for 100,000 pills. The district court also determined the total weight of the pills by determining the actual average weight of the 2,499 pills recovered by the DEA, and multiplying it by 100,000 pills. Defendant appealed.

★ Holding: If the exact amount of drugs is undetermined, an estimate by the district court will suffice as long as a preponderance of the evidence supports the estimate. The court held that the district court's estimate as to the drug amount was supported by the fact that a coconspirator testified in detail at the sentencing hearing that he delivered at least 100,000 pills to defendant's residence over a period of time. Additionally, the defendant's

own records, and an agent's estimate based upon the cash defendant received, further supported the pill amount. Finally, the court found unpersuasive the sworn affidavit of a codefendant (defendant's boyfriend) that defendant was involved with far less than 100,000 pills.

Additionally, the court held that utilizing the actual weight of the 2,499 pills, then multiplying that weight by the full 100,000 pills, was a reasonable method of determining drug weight. Further, the court ruled that the applicable guideline for ecstasy required that the district court consider the weight of the entire pill, not the "pure" weight (only the actual amount of controlled substance in the pill). Accordingly, the sentence was affirmed.

**B. Chapter Three - Adjustments**

• *3B1.1 - Leadership Role*

U.S. v. Jeross, 06-2257 (4/4/08)

▶ Defendant was convicted of conspiracy to distribute ecstasy. At sentencing, the district court determined that a three-level enhancement was applicable for defendant's leadership role in the offense. This determination was based on a codefendant's testimony that defendant was a mid-level distributor of ecstasy. Defendant appealed.

★ Holding: The court held that defendant exercised control over four to five lower-level distributors of ecstasy. The court found that the pills arrived at defendant's home from Canada, defendant oversaw them being broken down and packaged, and she managed the distributors in selling them. Accordingly, the three-level enhancement was appropriate.

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

U.S. v. Tatum, 07-5733 (3/5/08)

▶ Defendant was the office manager for a family run business and during her tenure she wrote company checks to herself and forged her boss' name. Defendant subsequently pled

guilty to bank fraud and at sentencing the district court applied a two-level enhancement, pursuant to USSG § 3B1.3. The court found that defendant abused a position of private trust, and that she utilized a special skill. Defendant appealed.

★ Holding: The court held first that defendant did not hold a position of trust. The court ruled that a position of trust typically involves considerable discretion and authority, or those in a fiduciary-type relationship with the victim. The court found that defendant's position as office manager, where she had no discretion to exercise "judgment or assert control over the finances," did not place her in a position of trust. Second, the court held that the skills that defendant possessed as office manager were not "special skills" as anticipated by § 3B1.3. Accordingly, the court ruled that the district court erred in imposing the two-level enhancement, and the sentence was vacated.

• *3C1.2 - Reckless Endangerment*  
U.S. v. Dial, 06-5519 (4/9/08)

► Officers were investigating defendant for drug trafficking and received information from a confidential informant that defendant was returning home with a substantial amount of meth. An officer set up his undercover car in a location so that defendant could see the police lights flashing, and the officer stood outside his car, with a police vest on, and attempted to stop defendant's car as he approached. Instead of stopping, defendant went up an embankment and tried to get around the car. Defendant hit the officer's car and caused the officer to believe that his own car may run into him. Defendant then fled. A month later defendant was arrested and charged with drug and firearm offenses. Defendant pled guilty, and at his sentencing the district court imposed an enhancement under USSG § 3C1.2 for reckless endangerment during flight. Defendant appealed.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the government must prove a nexus between the offense conduct and the reckless endangerment in order for the enhancement to apply. In making this assessment, the court will consider evidence of the defendant's state of mind including the "temporal and geographic proximity" of the reckless endangerment to the offense of conviction. In the case, the court found that defendant clearly tried to evade the officer in order to avoid being arrested for drug trafficking. Further, the flight occurred during the time period of the conspiracy and on a day when an informant indicated that defendant was transporting meth. Accordingly, the application of the enhancement was affirmed.

• *3E1.1 - Acceptance of Responsibility*  
U.S. v. Jeross, 06-2257 (4/4/08)

► Defendant was convicted of conspiracy to distribute ecstasy. At sentencing, the district court determined that defendant obstructed justice by making several threats to a codefendant who agreed to be a government witness. As a result, the district court refused to award defendant any reduction for acceptance of responsibility. Defendant appealed.

★ Holding: Pursuant to USSG § 3E1.1, where a defendant obstructs justice, ordinarily the defendant will not receive a reduction for acceptance of responsibility. The court found that the following considerations demonstrated that defendant's case was not extraordinary, such that he should receive the reduction under § 3E1.1: (1) some of defendant's obstructive conduct occurred after he pled guilty; (2) all of his obstructive conduct occurred post indictment; (3) he denied his responsibility for the offense for four months after indictment; (4) he challenged the drug amount and his role in the offense; and (5) he did not cooperate with the government until after his offense level in the PSR was increased based upon his

obstructive conduct. Thus, the application of the enhancement was affirmed.

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

- *4B1.4(b)(3)(A) - ACCA*

U.S. v. Goodman, 06-5513 (3/17/08)

► Defendant pled guilty to being a felon in possession of a firearm. The gun was a firearm that was carried by a murder victim, and defendant picked the gun up after the victim was killed and brought it inside the house, hiding it in a couch. The statement of facts read at defendant's plea hearing indicated that a witness would have testified that defendant and the victim went out to sell crack cocaine in the park, and that one of them was carrying the gun in question. Defendant did not agree that he possessed the gun during the crack sale. At sentencing, the district court determined that defendant was an armed career criminal, and imposed an additional one-level enhancement based upon its finding that defendant possessed the firearm in connection with a controlled substance offense, pursuant to USSG § 4B1.4(b)(3)(A). Defendant appealed.

★ Holding: In order to apply the one-level enhancement, the government must establish a "clear connection" between the gun and the controlled substance offense. In the case, the court held that the government had not introduced sufficient evidence to make the connection that defendant possessed the gun during the drug sale in the park. In this regard, the court found significant "factual gaps" in the evidence, and accordingly ruled that the enhancement was not supported by the evidence. Additionally, the court held that, even though the guideline ranges overlapped, and the sentence imposed by the district court fell within both the higher and lower range, the case nonetheless had to be remanded. Relying on the Supreme Court's decision in *Gall v. U.S.*, the court concluded that failing to properly calculate the guideline range was a procedural error requiring remand. Thus, the

case was remanded for resentencing.

### **D. Miscellaneous Guidelines**

- *Applicable Guideline Manual*

U.S. v. Jeross, 06-2257 (4/4/08)

► Defendant was convicted of conspiracy to distribute ecstasy. Defendant argued at sentencing that the 2001 version of the guidelines should apply because, at the time, the guidelines attributed each ecstasy pill as .1 grams in weight. In the 2002 guideline manual, however, each ecstasy pill counted .25 grams. The district court applied the 2002 guideline manual, and determined that the applicable guideline range was 360 months to life in prison. The statutory maximum for the offense was 240 months, so the court imposed a 240-month sentence. Defendant appealed.

★ Holding: The court first noted that, pursuant to the Ex Post Facto Clause, the district court should have applied the 2001 guideline manual if it would have "led to a more favorable result" in defendant's sentence. The court held, however, that the even under the 2001 manual, defendant's guideline range would have been 292-365, which was well above the statutory maximum of 240 months. Thus, even had the district court applied the correct manual, the sentence would have been the same. Accordingly, defendant's sentence was affirmed.

## **III. Evidence**

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

- *702 - Expert Testimony*

U.S. v. Martin, 06-5605 (3/31/08)

► Defendant was charged with multiple counts of distributing crack, being a felon in possession of a firearm, and possessing a firearm in furtherance of drug trafficking. At trial, the government presented the testimony of a police officer who testified both as a fact witness and an expert. The expert portion of the testimony entailed describing the tools of the drug trade, providing an opinion that the

amount of drugs involved in the case was a distribution amount, and detailing how firearms are often used in the drug trade. Defendant failed to object to the dual nature of the testimony or request a cautionary instruction. Defendant was convicted of all counts except for possession of the firearm in furtherance of drug trafficking. Defendant appealed.

★ Holding: Because defendant failed to object in the district court, the court applied plain error review. Relying on the court's decision in *U.S. v. Lopez-Medina* (See P.V., Issue # 9), the court held that a cautionary instruction is required where a fact witness also testifies as an expert. The court found no plain error, however, because defendant's substantial rights were not violated. Distinguishing the case from *Lopez-Medina*, the court ruled that no other error was committed during the course of the trial, strong evidence other than the officer's testimony supported defendant's convictions, and the jury actually chose not to credit some of the expert testimony in acquitting defendant for possession of a firearm in furtherance of drug trafficking. Accordingly, the convictions were affirmed.

### C. Article VIII - Hearsay

• *801 - Hearsay - Background Evidence*  
U.S. v. Goosby, 07-5229 (4/24/08)

► Defendant was charged with 30 counts of aiding the preparation of false tax returns. At trial, an IRS agent testified that he began his investigation by utilizing an IRS program that allowed him to review returns submitted by tax preparers, and to compare the ratio of gross income to deductions. Defendant's returns contained a high ratio, which was an indicator of potential fraud. Defendant objected to presentation of the testimony in a pretrial motion, but the district court overruled. Upon defendant's conviction, he appealed.

★ Holding: The court held that the testimony regarding the program used by the IRS agent

was not offered for the truth of the matter asserted, but merely as background evidence and to establish a basis for the "constructing the sequence of events" in the investigation. The court ruled that the testimony did not "directly implicate defendant in criminal activity." Thus, the evidence was not excludable hearsay. Further, the court noted that admission of the evidence did not violate the Confrontation Clause because the agent did not make statements that could be characterized as testimonial hearsay. Accordingly, the conviction was affirmed.

• *804(b)(1) - Prior Testimony Exception*  
U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was charged with health care fraud and at trial he attempted to introduce the hearsay statement of a codefendant. The statement was in the form of an affidavit that was sworn before government agents during their interview of him. The district court excluded the prior statement, defendant was convicted, and he appealed.

★ Holding: FRE 804(b)(1) permits the admission of a hearsay statement where the witness is unavailable, the statement was prior testimony at either a hearing or deposition, and the opposing party had an opportunity and similar motive to develop the testimony at the prior hearing or deposition. In the case, the court first held that the affidavit taken by the government agents did not qualify as testimony from a hearing or deposition. Second, the court ruled that the government agents interviewing the codefendant would not have the same motive as the prosecutor at trial. Accordingly, the hearsay exception was not applicable and the district court ruling was affirmed.

• *806 - Impeachment of Hearsay Evidence*  
U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was charged with health care fraud based upon his misrepresentation on health care forms that he had seen patients and

determined that carotid artery ultrasound tests were medically necessary. At trial, defendant attempted to introduce the hearsay statement of a codefendant. In the statement, the codefendant admitted that defendant did not know that he falsely represented his nurse (who saw some of the patients) to be a physician's assistant (PA). Defendant argued that the statement should be admitted to impeach the codefendant's statement on an undercover video. The district court excluded the evidence, defendant was convicted, and he appealed.

★ Holding: FRE 806 permits a party to impeach hearsay evidence in any manner that would be allowed if the hearsay declarant had testified at trial. In the case, the court found that the hearsay statement was not inconsistent with the comments on the undercover video. In the video, the codefendant stated that defendant sometimes examined patients himself, and at other times sent a PA under this license. The court ruled that it was "entirely possible" that defendant sent a PA under his license and was unaware that the codefendant represented his nurse to be a PA. Accordingly, exclusion of the evidence was affirmed.

• *807 - Residual Hearsay Exception*  
U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was charged with health care fraud. At trial, defendant offered a hearsay statement of a codefendant in which the codefendant indicated that defendant had done nothing wrong, and that defendant did not know about misrepresentations that were made by the codefendant. Defendant argued that the statement should be admitted under the residual hearsay exception. The district court excluded the evidence, defendant was convicted, and he appealed.

★ Holding: Pursuant to FRE 807, hearsay evidence that is not covered by FRE 803 or 804 is admissible if it meets the following requirements: (1) it has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact; (3) it is more probative on the point than any other evidence that could reasonably be procured; and (4) its admission would serve the general purposes of the rules and the interests of justice. In the case, the court held that the hearsay evidence lacked the kind of guarantees of trustworthiness that would make it admissible. Although the statements were made by a codefendant who implicated himself in the same statement, there were no corroborating circumstances indicating its trustworthiness. Accordingly, the district court ruling was affirmed.

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

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

• *Reasonable Suspicion - Vehicle Stops*

U.S. v. Urrieta, 07-5431 (3/20/08)

► Defendant was driving a Lincoln Navigator and towing a Honda, both packed with personal belongings, and was stopped by police on the interstate in Tennessee. Defendant was traveling with his girlfriend and her sixteen year old son. The vehicle was stopped based upon a lane violation, broken taillight, and expired registration. During the stop the officers determined that defendant possessed a Mexican driver's license, and they mistakenly believed that defendant could not drive in Tennessee on this basis. After writing the citations for the traffic violations, officers continued to detain and question defendant and the occupants, and eventually obtained defendant's consent to search the vehicles. The officers found firearms and false identification documents. Defendant was subsequently charged with being an illegal alien in possession of firearms and for possession of unlawful identification documents, and he moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: In order to detain a motorist any longer than is reasonably necessary to issue a

traffic citation, officers must have reasonable suspicion to believe that the motorist has engaged in more extensive criminal conduct. The court ruled that the traffic stop ended when the officer had written the citation for the traffic violations. The court found no articulable facts to support the officers' detention of defendant beyond that point. In this regard, the court first held that Tennessee law permitted driving in the state based upon a Mexican license, thus detention on this basis was improper. Second, the court found that the government contention that defendant met a "drug courier profile" was too general to support reasonable suspicion in the case. Third, the court found that the passengers' nervousness was not sufficient for reasonable suspicion. Specifically, the court noted that the Sixth Circuit has found that nervousness on the part of passengers in a traffic stop is "inherently unsuspecting." Finally, the court ruled that the fact that the extended stop was "relatively brief" did not justify the detention: "even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity." Accordingly, the district court's ruling was reversed.

• *Reasonable Suspicion/Vehicle Stops*  
U.S. v. Simpson, 07-5486 (4/3/08)

▶ Defendant's vehicle was stopped in Tennessee because the officer could not read the expiration date on the Ohio temporary tag due to the deteriorated nature of the tag. Tennessee law required that license tags be clearly legible, while Ohio law required only that a tag not be obstructed. After stopping the car, the officer determined that the tag was not expired, but in talking to the driver, he noticed the smell of marijuana. The officer's drug dog then alerted on the car, the officer searched, and he found cocaine. Defendant was charged with possession of cocaine with intent to distribute. Defendant moved to suppress the cocaine, the district court denied the motion,

and defendant appealed.

★ Holding: First, the court held that Tennessee law governed the requirements for license tags on Tennessee highways. Although Tennessee had a reciprocity statute permitting out-of-state drivers to operate vehicles on Tennessee roadways, the motor vehicle code required that "every registration plate" be "clearly legible." Applying standards of statutory construction, the court determined that the language of the code clearly meant that all license tags, regardless of their state of origin, must be clearly legible.

Second, the court addressed the open question in the Sixth Circuit as to whether the standard for a stop based on a traffic violation is probable cause or reasonable suspicion. The earliest Sixth Circuit case to deal with the subject was *U.S. v. Freeman*, which suggested that the standard was probable cause. In distinguishing *Freeman*, the court noted that the traffic offense in defendant's case involved an "ongoing" violation of the law – a license tag that was not "clearly legible." In contrast, in *Freeman* the court dealt with a "completed" violation of the law – the car veered over the center line one time. This distinction was sufficient for the court to determine that, for an "ongoing" traffic violation, officers need only establish reasonable suspicion before making an investigative stop.

Third, the court held that reasonable suspicion supported the stop of defendant's car because the expiration date on the tag was not legible until the car was stopped and the officer looked at the tag up close. The further detention of the car was justified by the smell of marijuana, and the search was justified by the canine sniff, which provided probable cause. Accordingly, the district court ruling was affirmed.

• *Reasonable Suspicion/Vehicle Stops*  
U.S. v. Luqman, 06-3943 (4/8/08)

► Officers were patrolling an area known for prostitution when they observed two women on the corner. One approached defendant's car, but then ran back to the corner as the officers' car approached. Defendant started to pull his vehicle away but was stopped by the officers. They asked if he was soliciting prostitution, to which he said "no." Officers then discovered that defendant had a suspended license and arrested him. During an impound search, officers found a gun. In defendant's subsequent prosecution for being a felon in possession of a firearm, he moved to suppress the gun and the district court denied the motion. Defendant appealed.

★ Holding: The court applies a two-step test in analyzing a stop. First, the court determines whether specific and articulable facts provided reasonable suspicion for the stop. Second, the court considers whether the degree of intrusion was reasonably related in scope to the situation at hand. The court found that the stop was supported by the facts that the area was known for prostitution, the officers were experienced in vice and prostitution, and the actions of the woman and defendant supported the inference that solicitation of prostitution may be occurring. Further, the court held that the inquiry into defendant's purpose for being there and the investigation of his driver's license were reasonable under the circumstances. Accordingly, the district court's ruling was affirmed.

**E. Search Warrants**

• *Search Warrant-Probable Cause/Good Faith*  
U.S. v. West, 06-6109 (3/26/08)

► Defendant was a suspect in a murder investigation. Officers obtained a warrant to search his home and his van. In the warrant, the officers averred that defendant was the last person seen with the victim, that defendant was previously convicted of murder, and that

information was received that defendant dealt drugs. Subsequently, officers obtained a second search warrant for the van. In the second warrant, officers averred that an inmate told the officers that defendant confessed that he killed the victim and dumped the body in a well. The officers failed to disclose in the warrant that they investigated the inmate's story and were unable to corroborate it in any fashion. The officers then searched defendant's van and found ammunition. Defendant was charged with being a felon in possession of ammunition, and moved to suppress the evidence. The district court found that the warrants were supported by probable cause and denied the motion. Defendant appealed.

★ Holding: Regarding the first warrant, the court held that it was "bare bones," and did not support probable cause for its issuance. Specifically, the court found that the information that defendant had a prior murder conviction was false. Further, the hearsay evidence that defendant was the last person seen with the victim, and that defendant sold drugs, was unreliable and not sufficiently specific to justify the warrant. The court likewise ruled that the second warrant was "bare bones," and that it contained recklessly false information. The evidence regarding defendant's confession was "weak and sparse," and the officers failed to disclose that their independent investigation undermined the reliability of the confession. Thus, the court held that neither warrant was supported by probable cause. Further, the court found that the good-faith exception did not save the warrants because both were "bare bones." Accordingly, the district court ruling was reversed.

• *Search Warrant - Probable Cause*  
U.S. v. Terry, 07-3757 (4/15/08)

► The government obtained a child porn image that was sent in two separate e-mails.

The government learned that the e-mail account belonged to defendant's father and, five months later, obtained a search warrant for the father's home. Upon executing the warrant, the father informed the government that defendant used the e-mail from his residence. Thus, the government obtained second warrant to search defendant's home, and discovered numerous items of child pornography. In the district court, defendant moved to suppress the evidence based on the grounds that the search warrant was not supported by probable cause. The district court denied the motion, and defendant appealed.

★ Holding: The court held that the search warrant was supported by probable cause. Specifically, the court ruled that a sufficient link was established between the illegal conduct and defendant's residence by the following facts: (1) two e-mails were sent from the e-mail account, at 2:30 a.m., containing a known child porn image; (2) defendant was the registered owner of the screen name; (3) defendant lived at his address at the time the e-mails were sent; and (4) defendant had a computer at the address and accessed the e-mail account through that computer. The court noted that it was troubled by the fact that the government had not preserved the content of the e-mails, and thus it was impossible to know the context in which they were sent, but the court nonetheless found that the information in the warrant supported a finding of probable cause. Accordingly, the district court's ruling was affirmed.

## **V. Fifth Amendment**

### **A. Prosecutor Conduct**

#### *• Prosecutorial Misconduct*

U.S. v. Martin, 06-5605 (3/31/08)

► Defendant was charged with multiple drug and firearm offenses and the case proceeded to trial. Defendant was convicted and argued on appeal that the prosecutor committed misconduct in closing argument by misstating

evidence, denigrating defense counsel, and urging the jury to convict based upon improper considerations.

★ Holding: The court found no misconduct on the part of the prosecutor. First, defendant's claim that the prosecutor misstated evidence was incorrect. During closing, the prosecutor read a rap song written by defendant, and the rap song was, in fact, admitted into evidence. Second, the prosecutor did not denigrate defense counsel, but instead responded to defense arguments regarding the lack of fingerprints, videos, or audiotapes. Finally, the prosecutor did not urge conviction on an improper basis such as the need to protect the community from drug dealers. Instead, the prosecutor simply urged the jury to convict defendant for his own crimes. Thus, the conviction was affirmed.

#### *• Prosecutorial Misconduct*

U.S. v. Rose, 06-1642 (4/8/08)

► Defendant was charged with selling a firearm to a known felon in violation of 18 USC § 922(d)(1). During opening statements at trial, the prosecutor indicated that defendant had been in prison with the person to whom he sold the firearm. Defendant did not object to the statement, and he was convicted by the jury. Defendant argued on appeal that the comment in opening statement constituted prosecutorial misconduct.

★ Holding: The court held that the prosecutor's comment was not improper. In a prosecution for § 922(d)(1), the government must prove that defendant knew that the person buying the gun was a convicted felon. The court ruled that the fact that defendant was previously in prison with the purchaser of the firearm showed defendant's knowledge that the purchaser may be a convicted felon. Accordingly, the evidence would be relevant in the case, and not unduly prejudicial under FRE 403. Therefore, the court found no plain error in the prosecutor's comment in opening

statement.

- *Prosecutorial Misconduct*

Johnson v. Bell, 04-5377 (4/29/08)

▶ Defendant was charged with murder during a store robbery. During the prosecutor's closing argument at trial, he told the jury that one of the victims in the case went to school with his daughter, and suggested to the jury that it could have been his daughter, or any one of the jurors who happened to be in the store, and consequently killed, by defendant. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: If a prosecutor's comment in closing argument is improper, the court must determine if it is "flagrant" by considering the following factors: (1) the likelihood that the remarks mislead the jury or prejudiced defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberate or accidental; and (4) the total strength of the case against the defendant. If the comments are not "flagrant," the court will only reverse the conviction if the proof against the defendant was not overwhelming, opposing counsel objected to the conduct, and the district court failed to give a curative instruction. In the case, the court held that the comments of the prosecutor were clearly improper. The court found, however, that the comments were not "flagrant," because, although they were clearly intentional, they did not tend to mislead the jury, they were made in the context of a correct recitation of the facts of the case, and the comments were isolated. Finally, the court ruled that reversal was not warranted because the evidence against defendant was substantial, defendant did not object in the trial court to the comments, and the trial court provided an appropriate curative instruction. Thus, the district court ruling denying the petition was affirmed.

- *Due Process - Selective Prosecution*

Keene v. Mitchell, 05-3538 (4/25/08)

▶ Defendant was convicted in state court for multiple homicides, and was sentenced to death. Defendant argued in the state court that the prosecution violated his right to equal protection by pursuing the death penalty against him based upon his race. First, defendant introduced statistics that 17% of the county's population was black, but that 64% of capital defendants were black. Further, Defendant pointed to white individuals, including his codefendant, who were prosecuted for murder, but the death penalty was not sought or imposed. Defendant lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: In order to establish an equal protection violation, a defendant must show purposeful discrimination, which requires that the defendant establish a discriminatory purpose, and discriminatory effect. First, the court held that the statistical evidence introduced by defendant was insufficient to establish that "racial considerations played a part in his sentence." Second, the court ruled that the white defendants who were not prosecuted were not similarly situated to defendant in terms of culpability, and thus, defendant did not show adequate discriminatory effect. Accordingly, the district court ruling was affirmed.

## **B. *Brady***

- *Brady*

Johnson v. Bell, 04-5377 (4/29/08)

▶ Defendant was convicted of murder and subsequently discovered statements made by several witnesses to police that defendant could have used for impeachment of the witnesses at trial. After exhausting state court remedies in regard to his claim that the state violated *Brady*, defendant 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 that (1) the evidence was favorable, (2) it was suppressed by the government, and (3) the defendant suffered prejudice. The issue of prejudice requires the defendant to show that the evidence was material. In the case, the court held that although the witness statements may have tended to assist the defense in impeaching some of the eyewitnesses to the murder, given the quantity of evidence against defendant, their usefulness would have been minimal and did not undermine the court's confidence in the jury verdict. Accordingly, defendant's conviction was affirmed.

### C. Confessions and Testimonial Rights

#### • Right Against Self-Incrimination

U.S. v. Highgate, 06-1447 (4/7/08)

▶ Defendant was charged with drug and firearm offenses and at trial he desired to present the testimony of a codefendant. The district court permitted the codefendant, who had already been sentenced for his involvement, to assert a blanket Fifth Amendment right. Upon defendant's conviction, he appealed.

★ Holding: A witness' right against self-incrimination under the Fifth Amendment must be weighed against a defendant's right to compulsory process under the Sixth Amendment. In striking this balance, the court generally requires a witness to assert the right against self-incrimination on a question-by-question basis, and will not permit a witness to merely assert a blanket Fifth Amendment right. In the case, the court held that the district court erred by allowing the witness to assert a blanket Fifth Amendment right, and by failing to inquire into how the witness could actually implicate himself after he had already been sentenced. Nonetheless, the court found that the error was harmless because the witness would only have contradicted a fact to which

six separate officers testified, and the witness' testimony would not have related to any element of an offense with which defendant was charged. Thus, defendant's conviction was affirmed.

### D. Double Jeopardy

#### • Double Jeopardy

Fulton v. Moore, 07-3434 (4/1/08)

▶ Defendant was charged with rape and gross sexual imposition regarding a minor. On the morning of trial, and after the jury was impaneled, the prosecutor moved to amend the indictment to change a date that the offense may have occurred by approximately one year. The trial court permitted the amendment over defendant's objection, but granted a mistrial based upon the fact that defendant would need a significant amount of time in order to investigate and prepare, given the change in dates. The case went to trial approximately six months later and defendant was convicted. Defendant lost his state court appeal, and filed a federal *habeas* petition arguing that the second trial was barred by the Double Jeopardy Clause. The district court denied the petition and defendant appealed.

★ Holding: In a jury trial, jeopardy attaches when the jury is impaneled and sworn. Thus, the court first found that jeopardy attached in defendant's case. In order to determine whether reprosecution after the grant of a mistrial violates double jeopardy, the court must determine whether the trial court exercised "sound discretion in granting the mistrial." This determination turns on three factors: (1) whether the trial judge heard the parties' opinions regarding the propriety of a mistrial; (2) whether the court considered alternatives to a mistrial; and (3) whether the judge acted deliberately, as opposed to abruptly. The court ruled that the trial court adequately heard the parties' arguments, implicitly considered alternatives, and acted deliberately in granting the mistrial. The court

also noted that the retrial was not until six months later, that it was tried to the bench instead of a jury, that the state had not acted in bad faith, and that defendant alleged no prejudice as a result of the mistrial. Accordingly, defendant's conviction was affirmed.

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

##### **• Due Process - Identification Testimony**

Keene v. Mitchell, 05-3538 (4/25/08)

▶ Defendant was charged with multiple murders. At trial, defendant objected to testimony from a witness who identified him from a photo lineup. The witness described the robber to police as having "box, squared hair," and defendant was the only person in the lineup with such a hair cut. The state court admitted the testimony and defendant was convicted. Defendant lost his state court appeals, and filed a federal *habeas* petition, which was denied by the district court. Defendant appealed.

★ Holding: If a photo lineup is unnecessarily suggestive, the court must consider the reliability of the identification, and weigh the following factors: (1) the witness' opportunity to observe the suspect; (2) the witness' degree of attention; (3) the accuracy of the witness' description of the suspect; (4) the level of certainty of the witness; and (5) the time between the observation and the lineup. In the case, the court held that the witness had ample opportunity to observe the suspect, that she was particularly attentive, that her description was accurate although not detailed, that she was highly certain of the identification, and that she saw the photo lineup shortly after the incident. Thus, even if the lineup was unduly suggestive, the identification was nonetheless reliable. Further, any error was harmless because the evidence of defendant's guilt was otherwise overwhelming and the identification did not directly bare on defendant's guilt. Accordingly, the district court ruling was affirmed.

## **VI. Sixth Amendment**

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

#### **• Booker/Apprendi**

U.S. v. Mabry, 06-2324 (3/3/08)

▶ Defendant was an executive officer of the carpenter's union who was charged with soliciting and obtaining improper discounts from union contractors for services in violation of 29 USC § 186. The statute provides a one-year statutory maximum sentence if the violation does not exceed \$1,000. Defendant went to trial, and during the charge conference with the district court, defendant's counsel stipulated that "if the jury returned a verdict of guilty, it would be presumed that [defendant] received a thing of value of at least one thousand dollars." Defendant was convicted, but the jury made no specific finding about the dollar amount involved. The district court sentenced defendant to two years in prison. Defendant appealed and argued that the sentence violated *Booker* and *Apprendi* because he was sentenced above the statutory maximum of one year and the jury did not make the necessary finding that the loss amount was above \$1,000.

★ Holding: The court held that *Booker* and *Apprendi* prohibit a district court from sentencing a defendant above a statutory maximum where the relevant facts warranting the higher sentence are neither found by a jury or admitted by the defendant. The court found, however, that defendant's stipulation at the charge conference that a guilty verdict would mean that the violation of § 186 exceeded \$1,000 was sufficient to support the increased sentence. Accordingly, defendant's sentence was affirmed.

### **B. Confrontation Clause**

#### **• Confrontation Clause-Defendant's Presence**

Gray v. Moore, 06-3547 (3/26/08)

▶ Defendant was charged in state court with aggravated murder and kidnaping. During trial, a witness testified that defendant put a gun to

her head, after defendant shot his own brother, and forced her to accompany him to the front of the house. In the middle of this testimony, defendant blurted several times out that the witness was lying. As a result, the judge removed defendant from the courtroom for the remainder of the witness' testimony. Defendant was subsequently convicted for both the aggravated murder of his brother and the kidnaping of the witness. Defendant lost his state court appeal and filed a federal *habeas* petition claiming that the trial judge violated his right to confrontation by excluding him from the courtroom without first giving him a warning. The district court denied the petition and defendant appealed.

★ Holding: Pursuant to the Supreme Court's decision in *Illinois v. Allen*, a trial court must first warn a defendant that continued disruptive behavior will result in his or her removal from the courtroom before the defendant may in fact be removed. Thus, the trial court violated defendant's right to confrontation by removing him without first providing warning. Additionally, the court held that the removal violated a substantial right of defendant in regard to the kidnaping conviction, because the witness was the only evidence regarding the kidnaping charge. The court held, however, that reversal was not required for the aggravated murder conviction because there was substantial evidence of defendant's guilt that was introduced other than the witness in question.

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

##### **• Right to Counsel**

Benitez v. U.S., 05-2484 (4/9/08)

► Defendant was convicted of conspiracy to distribute marijuana and to commit money laundering. At sentencing, defendant's attorney, who was retained, advised the court that defendant fired him. Additionally, defendant stated that he did not want the attorney to represent him. The district court

made no inquiry into the circumstances of the representation, but proceeded with the hearing with defendant representing himself. The court granted the government's motion to reduce the sentence based upon defendant's cooperation, and proceeded to determine the appropriate sentence. The court again asked defendant if he wished for the attorney to represent him and defendant asked if the court was going to sentence him anyway. The court responded affirmatively, and defendant agreed to let the attorney speak for him. The district court sentenced defendant to 120 months in prison. Defendant did not appeal, but subsequently filed a *habeas* petition claiming that he was denied his Sixth Amendment right to counsel. The district court denied the petition both on the grounds that it was untimely, and on the merits. Defendant appealed.

★ Holding: Where a district court is notified of a defendant's dissatisfaction with counsel, the court is under an "affirmative duty to inquire as to the source and nature of that dissatisfaction." This is true regardless of whether the attorney was appointed or retained. In the case, the court found that defendant's and his attorney's statements to the district court were sufficient to trigger the court's obligation to inquire regarding defendant's dissatisfaction. Because the district court made no inquiry into the source or nature of the problem, defendant's Sixth Amendment right to counsel was violated. Accordingly, the case was remanded for resentencing. Additionally, the court instructed the district court to determine whether the untimeliness of the *habeas* filing was excused by the doctrine of equitable tolling.

#### **F. Miscellaneous Sixth Amendment**

##### **• Due Process - Right to Present Defense**

U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was charged with health care fraud and at trial he attempted to present the testimony of two codefendants. Both

codefendants pled the Fifth Amendment and refused to testify. Defendant was convicted and argued on appeal that the government violated his Sixth Amendment right to present a defense by placing the witnesses in positions where they would assert their rights not to testify.

★ Holding: The court found that the government was not the cause-in-fact for either of the codefendant's refusal to testify. One codefendant did not testify because his sentencing was delayed until after defendant's trial, but the delay was at the request of the codefendant, not the government. The second codefendant did not reach his agreement for pretrial diversion of his case until after defendant's trial, but again that was not because of delay by the government. Thus, the court found no "prosecutorial actions aimed at discouraging defense witnesses from testifying." Accordingly, defendant's conviction was affirmed.

• *Due Process - Right to Present Defense*  
Johnson v. Bell, 04-5377 (4/29/08)

► Defendant was charged with murder. Through investigation, defendant found a favorable witness to testify in his behalf. Prior to trial, the witness was arrested by police on an unrelated charge. While in custody, the witness was interviewed by police and the prosecutor in defendant's case, and the witness chose to testify for the state against defendant. The witness received favorable treatment in relation to his new charge. Defendant was convicted at trial, lost his state court appeals, and filed a federal *habeas* petition claiming that the state's actions denied his right, pursuant to the Sixth Amendment, to present witnesses and a defense. The district court denied the petition and defendant appealed.

★ Holding: The court found no violation of a clearly established federal law in the state's actions. The witness' arrest was for an unrelated charge and was lawful. The witness

chose, of his own initiative, to testify for the state, and consulted with his attorney before he did so. Further, defendant was able to fully cross examine the witness about his earlier statements that exculpated defendant. Thus, the court found no improper state action which would have tended to coerce the witness, and defendant's conviction was affirmed.

## VII. Other Constitutional Rulings

### A. Commerce Clause

• *Commerce Clause*

U.S. v. Rose, 06-1642 (4/8/08)

► Defendant was convicted of selling a firearm to a known felon, pursuant to 18 USC § 922(d)(1). Defendant argued on appeal that his conviction was unconstitutional because Congress exceeded its power under the Commerce Clause by enacting § 922(d)(1).

★ Holding: Congress' power under the Commerce Clause extends to three types of regulation: (1) the use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things traveling in interstate commerce; and (3) activities having a substantial relation to interstate commerce. Relying on the legislative history and findings regarding firearms, the court held that firearms are a fungible commodity for which there is an established interstate market, and thus, the intrastate sale of firearms has a substantial relation to the interstate market for firearms. Accordingly, the court ruled that § 922(d)(1) is a proper exercise of Congress' Commerce Clause power.

### E. Miscellaneous Constitution Rulings

• *Art. I, § 8, cl. 17 - Federal Enclave Clause*  
U.S. v. Gabrion, 02-1386 (3/14/08)

► Defendant was convicted of murder in a national forest, pursuant to 18 USC § 1111, and sentenced to death. The deceased was found in a lake in the Manistee National Forest in Michigan. Defendant argued on appeal that the federal government has no legislative

jurisdiction over the Manistee, and thus federal prosecution was improper.

★ Holding: Prior to 1940, whenever a state consented to cession of its forest land to the federal government, acceptance of the land by the government was presumed. On February 1, 1940, Congress passed 40 USC § 255 which reversed the presumption, and required formal federal acceptance of the land. In 1923, Michigan formally consented to cession of the Manistee to the federal government. Because this cession occurred before 1940, acceptance by the federal government was presumed, and no act of Congress retroceded jurisdiction back to Michigan. In turn, the Federal Enclave Clause provides federal legislative power over lands that have been obtained by the federal government by state cession. This power extends to lands over which the federal government has exclusive jurisdiction, and over lands in which the state has retained concurrent jurisdiction to exercise certain authority. Accordingly, the court held that exercise of federal jurisdiction was proper.

### **VIII. Defenses**

#### **K. Title III - Wire Tap**

##### *• Title III - Wire Tap*

U.S. v. Gray, 05-4482 (4/2/08)

▸ Defendants were charged with numerous violations of RICO, conspiracy, and mail and wire fraud in relation to their illicit schemes to procure government contracts for corporate clients. Defendants moved to suppress evidence obtained by the government pursuant to Title III wire taps upon the grounds that the (1) the wire taps were not approved by an authorized DOJ official, (2) the wire tap applications did not state that they were approved by an authorized DOJ official or provide the official's name, and (3) the applications were not signed under oath. Additionally, defendants requested disclosure of other wire tap evidence that was self-suppressed and sealed by the government

because it was obtained in violation of Title III. The district court denied the motion, and upon their conviction, defendants appealed.

★ Holding: Regarding the issue of suppression, the court first found that the wiretaps were approved by Deputy Assistant Attorney General John Malcolm, an official who was designated by Attorney General John Ashcroft to approved Title III wire taps. Second, the court held that although the government technically violated Title III by failing to indicate in the application that it was approved by Deputy Malcolm, this violation did not require suppression of the wire tap evidence. The court noted that the AUSA notified the issuing district judge that he had approval from DOJ, and actually had the letter of approval with him at the time the order was issued. Third, the court held that, although the application itself was not signed by the district judge as being sworn, the order issuing the wire tap indicated that it was based on the AUSA's sworn statement. Accordingly, the court affirmed the district court's ruling denying defendant's motion to suppress.

Regarding the issue of disclosure of the wire-tap evidence that was self-suppressed by the government, Title III permits disclosure of illegally obtained wire tap evidence only in certain limited circumstances. The court ruled that disclosure of the sealed evidence was not required by the Jencks Act or Fed. R. Crim. P. 16, and that "clean-hands" and impeachment exceptions to the disclosure prohibitions applied only to the government's use of illegally obtained wire tap evidence, not the defendant's use. The court emphasized that the government had no knowledge of the contents of the sealed evidence because it had self-suppressed it; thus, no disclosure was authorized under Title III nor required by any other statute.

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

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

#### *• Plea Agreements - Elements of Offense*

U.S. v. Gibney, 06-5909 (3/7/08)

▶ Defendant pled guilty, among other offenses, to committing arson resulting in personal injury to a public safety officer, pursuant to 18 USC § 844(i). The plea agreement indicated that the government intended to pursue a seven year mandatory minimum sentence based upon the personal injury to the officer, and stated that defendant intended to argue that the seven year mandatory minimum should not apply. At sentencing, the district court applied the seven-year mandatory minimum sentence. Defendant appealed.

★ Holding: The court held that defendant's argument for a sentence below the seven year mandatory minimum was foreclosed by his guilty plea. A plea of guilty is an admission to all of the elements of the substantive offense. The court ruled that because personal injury is an element of the offense of § 844(i), defendant was foreclosed by his guilty plea from arguing that no personal injury occurred. Thus, the sentence was affirmed.

#### *• Plea Agreements - Appeal Waiver*

U.S. v. Gibney, 06-5909 (3/7/08)

▶ Defendant was convicted of arson and his plea agreement contained a provision waiving his right to appeal his "conviction and the resulting sentence." At sentencing, the district court sentenced defendant to pay about \$1.1 million in restitution. Defendant appealed and the government moved to dismiss the appeal based upon the appeal waiver.

★ Holding: The court held that defendant's appeal of the restitution order was prohibited by the waiver provision in the plea agreement. The court ruled that restitution is a part of a defendant's sentence under the statutory scheme and that defendant waived his right to appeal his sentence. Accordingly, the issue was waived.

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

U.S. v. Page, 06-3800 (4/3/08)

▶ Defendant was charged with conspiracy to import cocaine and marijuana and to possess cocaine and marijuana with intent to distribute. Pursuant to a plea agreement, defendant pled guilty to the importation conspiracy. At the plea hearing, the district court did not specifically review the elements of the offense, but it did insure that defendant read and understood the indictment and it required the government to recite the facts that it would prove if the case went to trial. The district court sentenced defendant to 204 months in prison. Defendant appealed and argued that his guilty plea was invalid because he was not made aware of the nature of the charge to which he pled.

★ Holding: Because defendant failed to object at the plea hearing, the court applied plain error review. The court held that Rule 11(b)(1)(G) requires a district court to ensure that a defendant understands the elements of the offense to which he pled guilty. The court found that, although the plea colloquy was "less than a model of clarity," the district court determined that defendant read and understood the indictment and established a factual basis on the record for the plea. Under these circumstances, the court found no plain error in defendant's plea hearing procedure. Accordingly, the conviction was affirmed.

### **B. Sentencing**

#### *• Sentencing - Right to Allocation*

U.S. v. Jeross, 06-2257 (4/4/08)

▶ Defendant was convicted of conspiracy to distribute ecstasy. Defendant's original sentence was remanded for resentencing based upon *Booker*, and the district court imposed the same sentence. At the resentencing, the district court did not offer defendant the right to allocation, and defendant did not object. Defendant appealed.

★ Holding: Because the district court

provided defendant a right to object to the sentence at the conclusion of the hearing, and he did not do so, the court applied plain error review. Relying on Sixth Circuit precedent, the court held that allocution is required only at an original sentencing, not a resentencing upon remand. The court nonetheless held that, pursuant to Fed. R. Crim. P. 32(i)(4)(A)(ii), the best practice is for a district court to always allow allocution at any sentencing hearing. The court found no error in the present case, however, because the right to allocution was protected at the original sentencing, no new arguments were raised at the resentencing, and defendant received the same sentence. Therefore, defendant's sentence was affirmed.

• *Sentencing - PSR - Court Inquiry*  
U.S. v. Jeross, 06-2257 (4/4/08)

► Defendant was convicted of a conspiracy to distribute ecstasy. Defendant's original sentence was remanded based upon *Booker*, and at the resentencing hearing, the district court failed to inquire, pursuant to Fed. R. Crim. P. 32(i)(1)(A), as to whether defendant and his attorney read and discussed the PSR. Defendant appealed.

★ Holding: A sentence will not be reversed based upon a district court's failure to literally comply with Rule 32(i)(1)(A) if the district court was able to "somehow determine" that defendant and his counsel read and discussed the PSR. The court held that it was evident from the discussions on the record at both the original and the resentencing that defendant and his attorney were intimately familiar with the details of the PSR. Accordingly, defendant's sentence was affirmed.

• *Sentencing - Restitution Orders*  
U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was a doctor who was convicted of health care fraud. The scheme involved fraudulent claims that were submitted to insurance companies by defendant and his

codefendant. At sentencing, defendant made the following arguments: (1) that he should only be ordered to pay restitution for insurance proceeds that were actually paid to him; (2) that he could not be ordered to pay \$50,000 of the restitution within 60 days; and (3) that he should not be ordered to pay restitution jointly and severally. The district court disagreed with each of defendant's arguments, and defendant appealed.

★ Holding: First, the court held that, pursuant to 18 USC § 3664(f)(1)(A), district courts are required to order restitution in full for each victim's loss, not simply those losses that ended up in defendant's pocket. Second, the court held that the district court acted within its discretion, pursuant to § 3664(f)(2), in requiring defendant to pay \$50,000 within 60 days, given that he had the resources to do so. Third, the court held that § 3664(h) explicitly provides district courts with discretion to impose joint and several liability for restitution. Accordingly, the restitution order was affirmed.

## **X. Jury Issues**

### **A. Jury Instructions**

• *Jury Instructions - Unregistered Silencer*  
U.S. v. Rose, 06-1642 (4/8/08)

► Defendant was charged with possession of an unregistered firearm silencer. During trial, the district court instructed the jury that it could convict defendant if "he intended it to function as a firearm silencer . . . even if it did not actually work to silence a firearm." Defendant objected to the instruction and subsequently argued on appeal that the instruction was a misstatement of the law.

★ Holding: A jury instruction is improper if it fails to accurately reflect the law, however the court should only reverse a conviction if the instructions, viewed as a whole, were "confusing, misleading or prejudicial." In the case, the court held that the district court's instructions, taken as a whole, accurately stated

the law regarding possession of an unregistered silencer. The court noted that a defendant may be convicted of possessing a non-functional silencer as long as the defendant intended it to operate as a silencer. Accordingly, the conviction was affirmed.

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

##### *• Jury Review of Evidence*

U.S. v. Rose, 06-1642 (4/8/08)

► Defendant was charged with firearms offenses and at trial the government introduced undercover recordings of defendant in regard to the purchase of firearms. The recordings were preserved on a lap top computer, and the district court admitted them in that format. During deliberations, the jury was only able to review the recordings with the assistance of the court, so the recordings were transferred from the laptop to CDs. Defense counsel was able to review the CDs before they were submitted to the jury for their continued deliberations. Defendant was convicted and argued on appeal that the submission of the CDs to the jury was improper.

★ Holding: The court held that the change in formatting for the recordings during deliberations did not constitute plain error. The content of the recordings had already been admitted by the district court, and the content was not changed when the recordings were transferred from the laptop to the CDs. Even if it was error for the district court to permit the jury to have the CDs, the court found that the error was harmless. The CDs qualified as “duplicates” under FRE 1001(4), and thus would have been admissible since defendant raised no issue regarding the authenticity of the original recordings. Therefore, the substitution of the CDs did not constitute reversible error.

## **XII. Appeal**

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

#### *• Reasonableness of Sentence*

U.S. v. Highgate, 06-1447 (4/7/08)

► Defendant was convicted after trial of drug and firearm offenses and at sentencing the district court determined that the applicable guideline range was 360 months to life in prison. The court stated several times on the record that the guidelines “commanded” the sentence, that the sentence did not reflect “where justice or equity or morality would end us up,” and that the sentence was too “heavy,” but it was “the law.” After receiving a sentence of 360 months, defendant appealed.

★ Holding: The court held that, given the district court’s comments, it was not clear that the court understood that the sentencing guidelines were not binding in the case. Accordingly, the case was remanded for resentencing.

#### *• Reasonableness of Sentence*

U.S. v. Hunt, 06-6300 (4/11/08)

► Defendant was a doctor who was convicted of health care fraud. At sentencing, the district court reduced defendant’s sentence from a guideline range of 27-33 months incarceration to a sentence of probation. The court’s decision was based, in part, on its conclusion that defendant may not have had the requisite intent to defraud. The government appealed.

★ Holding: The court held that a district court may not rely on a consideration in sentencing that is contrary to a fact found by the jury beyond a reasonable doubt. Thus, because the jury necessarily determined that defendant acted with the intent to defraud, the district court could not reduce defendant’s sentence based on its belief that defendant did not intend to defraud the insurance companies. This was true even though the district court articulated other reasons for the lower sentence. Accordingly, defendant’s case was remanded for resentencing.