

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

Published by the Federal Public Defender's Office

Southern District of Ohio

Steven S. Nolder

Federal Public Defender

www.fpd-ohs.org

Issue #20	Editor: Richard Smith-Monahan	May-June 2008
<i>Columbus Office</i> One Columbus 10 W. Broad St., Ste. 1020 Columbus, OH 43125 (614) 469-2999 (614) 469-5999 (Fax)	<i>Cincinnati Office</i> 2000 URS Center 36 East 7th Street Cincinnati, OH 45202 (513) 929-4834 (513) 929-4842 (Fax)	<i>Dayton Office</i> 1 Dayton Centre, Ste. 490 1 South Main St. Dayton, OH 45402 (937) 225-7687 (937) 225-7688 (Fax)

CONTENT AND FORMAT

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

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

FINDING THE CASES

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

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

NEW COMBINED OUTLINE

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

SUPREME COURT DECISIONS

I. Specific Offenses

- *18 USC § 844(h) - Explosives*
U.S. v. Ressay, 07-455 (5/19/08)
 - Defendant entered the U.S. from Canada and made false statements on his customs declarations form. During the border search, customs officers found explosives in

defendant's trunk. Defendant was charged with making a false statement to a customs official and carrying an explosive during the commission of the felony false statement offense. Defendant was convicted after trial and argued on appeal that he did not carry the explosive "during" his commission of the false statement offense. The Ninth Circuit agreed and set aside the explosives conviction. The Supreme Court granted *certiorari*.

★ Holding: The Court held that the term "during," as used in § 844(h), did not require proof that the explosives were carried "in relation to" the underlying felony. Instead, the term "during" denotes only a temporal link. Thus, because defendant carried the explosives contemporaneously with his felony false statement violation, he was properly convicted of § 884(h). Therefore, defendant's conviction was affirmed.

- *18 USC § 924(e) - ACCA*
U.S. v. Rodriguez, 06-1646 (5/19/08)

- ▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that the armed career criminal enhancement was applicable. The enhancement was based, in part, on a prior Washington drug trafficking conviction. In Washington, the drug trafficking conviction carried a maximum penalty of five years for a first offense, but the statutory maximum increased to ten years if the defendant had a prior drug trafficking offense on his record. Because defendant had previously been convicted of drug trafficking, his maximum statutory penalty for the Washington drug trafficking conviction was ten years. Accordingly, the district court determined that the offense was a "serious drug offense" under the ACCA and sentenced defendant as an armed career criminal. Defendant appealed and the Ninth Circuit reversed. The government appealed to the Supreme Court.

- ★ Holding: Under the ACCA, a prior drug

offense may be considered a "serious drug offense" if it was punishable by ten years or more in prison. The Court held that, in determining whether a prior offense is punishable by more than ten years in prison, a court may consider recidivist provisions. Thus, the Court found that the district court properly concluded that defendant's prior Washington drug trafficking conviction was punishable by ten years or more in prison, and the ACCA enhancement was affirmed.

- *18 USC § 1956(a)(1) - Money Laundering*
U.S. v. Santos, 06-1005 (6/2/08)

- ▶ Defendant was charged with conspiracy, running an illegal gambling operation, and money laundering. The alleged money laundering involved the payment by defendant of commissions to runners, salaries to collectors, and winnings to the betters. Defendant was convicted at trial in the district court and lost his appeal. Defendant then filed a *habeas* petition challenging his money laundering conviction based upon a Seventh Circuit decision which held that the term "proceeds" in the money laundering statute refers only to "profits" of criminal activity, not gross "receipts." The district court granted the petition, the Seventh Circuit affirmed, and the government appealed to the Supreme Court.

- ★ Holding: The money laundering statute, § 1956(a)(1), prohibits numerous financial activities that involve "proceeds" of illegal activities. The Court found that the term "proceeds" is not defined in the statute. Further, the Court concluded that the dictionary does not provide a clear definition of the term "proceeds" in relation to "receipts" versus "profits." Accordingly, relying on the rule of lenity, a plurality of the Court held that, where there is no legislative history to the contrary, the term "proceeds" in the money laundering statute refers to "profits" of a crime, not gross "receipts." Thus, defendant's payments of commissions, salaries, and winnings were not

transactions involving “proceeds” of criminal activities. Thus, the district court’s opinion was affirmed and defendant’s money laundering conviction was vacated.

• *18 USC § 1956(a)(2)(B)(i) - Money Laundering Cuellar v. U.S.*, 06-1456 (6/2/08)

► Defendant was stopped by officers near the Mexican border with a large sum of cash hidden in a compartment in the car he was driving. The government learned that the money was proceeds of drug activity in the U.S., and charged defendant with attempting to transport illicit proceeds across the Mexican border “knowing that such transportation was designed in whole or in part to conceal and disguise the nature, location, source, ownership, or control” of the funds. Defendant was convicted after trial and he argued on appeal that the evidence was insufficient to establish that the purpose of the transportation was to conceal a listed attribute of the money. A Fifth Circuit panel reversed defendant’s conviction, but the *en banc* court affirmed the conviction. The Supreme Court granted *certiorari*.

★ Holding: The Court held that the elements of a violation of § 1956(a)(2)(B)(i) are as follows: (1) the defendant attempted to transport funds across the border; (2) the defendant knew the funds were proceeds of an illegal activity; and (3) the defendant knew that such transportation was designed to “conceal or disguise the nature, the location, the source, the ownership, or the control” of the funds. The Court ruled that the third element requires that the government prove more than the fact that the funds were concealed during transportation over the border. Instead, the government must show that the concealment of a listed attribute of the funds was the purpose of the transportation. In this regard, the Court found the government’s evidence entirely lacking, and defendant’s conviction was reversed.

VI. Sixth Amendment

B. Confrontation Clause

• *Confrontation Clause - Forfeiture Giles v. Crawford*, 07-6053 (6/25/08)

► Defendant was charged with murder of his ex-girlfriend and he claimed self-defense. At trial, the prosecutor sought to introduce the ex-girlfriend’s hearsay statement that several weeks before the murder defendant had physically abused and threatened her. The trial court admitted the statements, and the California Court of Appeal and Supreme Court both affirmed the conviction, finding that defendant had forfeited his confrontation right by his own wrongdoing. Defendant appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the doctrine of forfeiture by wrongdoing is a common-law exception to a defendant’s confrontation right. Nonetheless, the Court ruled that the doctrine only applies where the defendant procured the witness’ death with the “design” to keep the witness from testifying against defendant at trial. The Court found that, although defendant killed his ex-girlfriend, he did not do so with the purpose to prohibit her from testifying. Accordingly, the Court held that introduction of the ex-girlfriend’s statement violated the Confrontation Clause. Thus, defendant’s conviction was reversed.

D. Right to Counsel/Self Representation

• *Right to Self-Representation - Competency Indiana v. Edwards*, 07-208 (6/19/08)

► Defendant was charged in Indiana state court with attempted murder, battery, criminal recklessness, and theft. During pretrial proceedings, he was found incompetent and restored to competency on three occasions. Prior to trial, defendant requested to represent himself. The trial court denied defendant’s request, finding that, although he was competent to stand trial, he was not competent to represent himself. The jury hung on the attempted murder and battery charges but

convicted defendant on the other counts. Prior to defendant's retrial, he again requested to represent himself and the trial court denied his request. Defendant was then convicted of the more serious charges. On appeal, the Indiana court reversed defendant's convictions, finding that he was denied his right of self-representation. The state appealed to the Supreme Court.

★ Holding: The Court held that the Sixth Amendment does not prohibit a trial judge from inquiring into a defendant's mental competency to represent himself at trial. Particularly, a trial court may insist upon representation by counsel for defendants who, even though competent to stand trial, "still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Accordingly, defendant's convictions were affirmed.

• *Right to Counsel*

Rothgery v. Gillespie County, 07-440 (6/23/08)

► Defendant was arrested in possession of a firearm based on the officers' erroneous belief that he was a felon. Pursuant to procedural rules in Texas state courts, defendant was brought, without counsel, by the arresting officers before a magistrate, formally presented with the charge against him, and held in jail until he could post bond. As was the practice, no prosecutor participated in or was aware of this proceeding. Defendant was subsequently indicted and again detained on the charge. When he was finally appointed counsel, defendant was able to prove that he was not a felon, the charge was dismissed, and defendant sued the county, pursuant to 42 USC § 1983, based on the denial of counsel at the initial appearance before the magistrate. The district court granted summary judgment to the county, finding that defendant had no right to counsel at the initial proceeding, and the Fifth Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The Court held that defendant's right to counsel attached when he appeared before a judicial officer and learned of the pending charge, and his liberty was subject to restriction. The Court ruled that it was of no consequence that no prosecutor was involved in the proceeding because the initial appearance was clearly the start of the adversarial judicial process. Accordingly, the district court's grant of summary judgment was reversed.

VII. Other Constitutional Rulings

C. First Amendment

• *Overbreadth - Pandering Child Porn*
U.S. v. Williams, 06-694 (5/19/08)

► Defendant was charged with one count of pandering child pornography, pursuant to 18 USC § 2252A(a)(3)(B), for posting a message in an internet chat room that he could provide uplinks to child pornography, and including an uplink to seven child pornography images. Defendant entered a conditional plea of guilty, but reserved his right to challenge the statute for overbreadth and vagueness. The Eleventh Circuit reversed defendant's conviction and the government appealed. The Supreme Court granted *certiorari*.

★ Holding: In analyzing whether § 2252A(a)(3)(B) is overbroad or vague, the Court first examined the definition and elements of the offense. The Court held that the scienter requirement – knowingly – applies to each of the elements of the offense. Further, the Court ruled that the operative verbs in the statute – whoever “advertises, promotes, presents, distributes, or solicits” – all have a transactional connotation, thus only reaching speech that accompanies or seeks to induce the transfer of child pornography. Finally, the Court held that, in order to violate the statute, the defendant must do either of the following: (1) subjectively believe that the material is real child pornography and objectively manifest that belief to another; or (2) “intend” that the

listener believe that the material is real child pornography and select a method of conveying that message to another in a manner that the defendant subjectively thinks will engender that belief.

Given its interpretation of the statutory elements, the Court held that the pandering statute did not reach a substantial amount of protected speech, and was accordingly not overbroad. Further, the Court found that the pandering statute was not void for vagueness pursuant to the Fifth Amendment's Due Process Clause. Thus, defendant's conviction was affirmed.

D. Eighth Amendment

• *Eighth Amendment - Death Penalty*
Kennedy v. Louisiana, 07-343 (6/25/08)

► Defendant was convicted in Louisiana state court of the rape his eight year old daughter. Pursuant to a Louisiana statute, the court imposed the death penalty for the offense. The Louisiana Supreme Court affirmed the conviction and defendant appealed to the Supreme Court.

★ Holding: The Supreme Court held in a 5-4 decision that the death penalty violated the Eighth Amendment when applied to a child rape conviction.

E. Miscellaneous Constitution Rulings

• *Second Amendment*
D.C. v. Heller, 07-290 (6/26/08)

► Heller filed a lawsuit in the district court challenging District of Columbia laws that banned the possession of firearms in the home unless the handguns were disassembled so as not to be functional. The district court dismissed the petition, but the D.C. Circuit reversed, finding that the ban violated the Second Amendment. The Supreme Court granted *certiorari*.

★ Holding: The Court held that the District of Columbia's ban on handgun possession in the home violates the Second Amendment right

to bear arms. Accordingly, the D.C. Circuit ruling was affirmed.

IX. Plea & Sentencing Hearings

B. Sentencing

• *Fed. R. Crim. P. 32(h)-Notice of Variance*
Irizarry v. U.S., 06-7517 (6/12/08)

► Defendant was convicted of making a threatening interstate communication. Based on evidence adduced at the sentencing hearing, the district court imposed an upward variance of nine months from the top end of the guideline range, sentencing defendant to 60 months in prison. Defendant argued that he received no notice, pursuant to Rule 32(h), of the potential upward variance in the presentence report or otherwise. The Eleventh Circuit affirmed the upward variance, and defendant appealed to the Supreme Court.

★ Holding: The Court held that Fed. R. Crim. P. 32(h), although it requires notice of an upward departure under the guidelines, does not require that a defendant receive any form of notice before the district court imposes an upward variance from the guideline range. The Court stated that a district court should consider granting a continuance of a sentencing hearing only where a "party has a legitimate basis for claiming" that a variance creates a "surprise" to the party that is "prejudicial." Finding no such legitimate prejudice in the case, the Court affirmed defendant's conviction.

X. Jury Issues

E. Miscellaneous Jury Issues

• *28 USC § 636(b)(3) - Magistrates*
Gonzalez v. U.S., 06-11612 (5/12/08)

► Defendant was charged with drug offenses and at the onset of the trial, defendant's counsel consented that the jury selection may be conducted by a magistrate. Defendant was not consulted, but he did not object to the process. Defendant was convicted, and he argued on appeal that the court erred in

permitting a magistrate to preside over *voir dire* without obtaining his personal consent. The Fifth Circuit affirmed, and defendant appealed to the Supreme Court.

★ Holding: Pursuant to § 636(b)(3), magistrates may be assigned to duties that are “not inconsistent with the Constitution and laws of the United States.” The Court held that magistrates may be assigned to preside over jury selection, and that consent of counsel for a defendant was sufficient to permit the delegation. Accordingly, defendant’s conviction was affirmed.

XII. Appeal

A. Preserving Error

- *Cross Appeals*

Greenlaw v. U.S., (6/23/08)

▶ Defendant was convicted after trial of drug trafficking and two violations of 18 USC § 924(c). The district court committed error at the sentencing hearing by failing to sentence defendant to the mandatory, consecutive 25 year sentence for the second § 924(c) conviction, instead sentencing defendant to only a 10 year consecutive sentence for such conviction. Defendant appealed his sentence, claiming that it was unreasonably long, and the government did not cross appeal. The Eight Circuit ruled against defendant on his appellate arguments, but the court, *sua sponte*, increased defendant’s sentence by 15 years based on the district court’s error regarding the second § 924(c) charge. The Supreme Court granted *certiorari*.

★ Holding: The Court held that a court of appeals may not increase a defendant’s sentence based upon a perceived error, plain or otherwise, if no cross appeal has been filed by the government. Accordingly, the Eighth Circuit’s ruling increasing defendant’s sentence was reversed.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- *8 USC § 1101 - Aggravated Felony*

Rashid v. Mukasey, 06-4270 (6/26/08)

▶ Defendant was a legal permanent resident who was convicted of a misdemeanor marijuana offense. Five years later, he was convicted of another misdemeanor marijuana offense. As a result, the government initiated removal proceedings. The immigration court determined that defendant was an aggravated felon as a result of his two prior misdemeanor drug offenses and ordered his removal. Defendant appealed.

★ Holding: Pursuant to the Supreme Court’s decision in *Lopez* (*See PV*, Issue 11), a second state misdemeanor drug offense may be considered an “aggravated felony” if the offense could hypothetically be punished under federal law as a felony. In the case, the court noted that 21 USC § 844 makes the simple possession of marijuana a felony if the government proves that defendant has a prior drug conviction that has become final. The court ruled, however, that defendant’s second misdemeanor conviction could not be considered an “aggravated felony” at the time of the deportation proceedings because the second misdemeanor conviction did not require proof of the existence of the first misdemeanor conviction as an element of the offense. Accordingly, the second misdemeanor conviction was not an “aggravated felony” and the immigration court’s ruling was reversed.

- *18 USC § 2 - Aiding and Abetting*

U.S. v. McGee, 06-2158 (6/24/08)

▶ Defendant was charged with one count of possession of crack with intent to distribute. The indictment did not allege or make reference to aiding and abetting or § 2. Upon his conviction after trial, defendant argued on appeal that the government proved only aiding and abetting, but aiding and abetting was not

alleged in the indictment.

★ Holding: The court held that the theory of aiding and abetting is embodied in every federal indictment, and that it need not be specifically charged or referenced. Accordingly, defendant conviction was affirmed.

• *18 USC § 286-Conspiracy to Defraud U.S. v. Dedman*, 06-6124 (5/29/08)

► Defendant was charged with conspiracy to defraud the government for arranging a sham marriage between her adoptive father and her adopted daughter in order to obtain her adoptive father's military pension benefits. The marriage occurred in Arkansas and it turned out that Arkansas law prohibited a marriage between a grandfather and his adopted granddaughter. Defendant was convicted after jury trial and she appealed the sufficiency of the evidence.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the elements of a § 286 conspiracy are as follows: (1) defendant entered a conspiracy regarding a claim against the U.S.; (2) the claim was false; (3) defendant knew or was deliberately ignorant of the claim's falsity; (4) defendant knew of the conspiracy and intended to join it; and (5) the defendant voluntarily participated in the conspiracy. In the case, the only element seriously at issue was whether defendant knew that the marriage was unlawful. Although the court found that the evidence was close regarding knowledge, the court concluded that the facts established that defendant was at least deliberately ignorant that the marriage was illegal. Accordingly, defendant's conviction was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Martin, 06-5002 (5/23/08)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he qualified for

the enhancement under the ACCA. As predicate offenses for the enhancement, defendant had four prior felony drug trafficking convictions that all occurred in the month of March 1994. All four offenses were charged in the same indictment, were handled in a consolidated plea agreement, and were sentenced concurrently with each other. Defendant argued on appeal that the offenses should not count separately for purposes of the ACCA.

★ Holding: Prior convictions are counted separately for ACCA purposes if they are "committed on occasions different from one another." The court held that offenses are separate if it is possible to discern the point where one offense begins and the other ends. The court ruled that it is irrelevant whether the offenses are charged in the same document or consolidated for trial or sentencing. Thus, because defendant's prior drug offenses occurred on different days throughout the month of March, they were separate for ACCA purposes. Accordingly, defendant's sentence was affirmed.

• *18 USC § 1001 - False Statements*
U.S. v. Dedman, 06-6124 (5/29/08)

► Defendant was charged with conspiracy to defraud the government for arranging a sham marriage between her adoptive father and her adopted daughter in order to obtain her adoptive father's military pension benefits. During her investigation by federal agents, defendant made misstatements about the location of her adopted daughter, about her adopted daughter's disability, and about when she first learned of the marriage. Defendant was convicted by the jury and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: The elements of § 1001 are as follows: (1) defendant made a statement; (2) the statement was false; (3) the statement was material; (4) the statement was made

knowingly and wilfully; (5) the statement pertained to activity within the jurisdiction of a federal agency. The court held that arguably the statement about the daughter's location was not material, and the statement about the daughter's disability was not false. However, the court found that the evidence was sufficient to prove the falsity of the statement regarding defendant's knowledge of the marriage. The court ruled that it must assume that the jury convicted defendant upon the statement for which the evidence was sufficient, and accordingly defendant's conviction was affirmed.

- *21 USC § 841(a) - Drug Trafficking*
U.S. v. McGee, 06-2158 (6/24/08)

- ▶ Officers arranged a drug purchase with defendant through a confidential informant. Defendant arrived at the location in a vehicle with another person, and upon the officers' approach of the car, defendant made a furtive gesture toward the car's console. Officers found crack in the console and, while defendant was being arrested, his cell phone rang and the confidential informant started speaking to him over the speaker phone. Defendant was convicted after trial for possession of crack with intent to distribute, and he appealed the sufficiency of the evidence.

- ★ Holding: The elements of the offense are that defendant (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute. The court held that the evidence was sufficient to establish defendant's possession with intent to distribute based upon his phone calls with the informant, his arrival at the scene, his furtive gesture toward the location where the crack was found, and the incoming call from the informant. Thus, defendant's conviction was affirmed.

II. Sentencing Guidelines

A. Chapter Two - Offense Conduct

- *2B1.1 - Loss Amount*

- U.S. v. Dedman, 06-6124 (5/29/08)

- ▶ Defendant was convicted of conspiracy to defraud the government of military pension benefits. At sentencing, the district court determined the loss amount based on the amount of benefits actually paid to defendant, and the amount of taxes withheld by the government on the benefits. Defendant appealed.

- ★ Holding: Answering a question of first impression, the court held that the loss amount in a conspiracy to defraud the government may include the taxes that the government withheld on the wrongly paid benefits. In analyzing § 2B1.1, the court reasoned that the true measure of loss was based on the "value" defendant received, and this "value" was best measured by the amount of defendant's claim against the government, not the amount that actually went into defendant's bank account. Accordingly, the sentence was affirmed.

- *2K2.1(a) - Prior Crime of Violence*

- U.S. v. Barte, 07-1522 (6/10/08)

- ▶ Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that defendant's prior Michigan conviction for attempted criminal sexual conduct in the second degree constituted a crime of violence, thus increasing his guideline range. Defendant appealed.

- ★ Holding: Relying on the Supreme Court's recent decision in *Begay* (See P.V. Issue #19), the court held that attempted criminal sexual conduct under Michigan law was not properly classified as a crime of violence. The offense did not contain an element of force, it was not an offense enumerated in the definition of a crime of violence, and it did not otherwise involve conduct creating a serious potential risk of injury. Specifically, the court found that, utilizing the required categorical

approach, neither the charging statute nor the charging document explicitly stated that the victim was a minor. As such, the court ruled that the offense of attempted criminal sexual conduct was not “similar, in kind as well as in degree of risk posed” to the offenses that are enumerated in the definition of a crime of violence, and thus, the offense could not be counted under the guidelines. Accordingly, defendant’s sentence was vacated.

- *2K2.1(b)(6) - Another Felony Offense*
U.S. v. Bullock, 07-5632 (5/22/08)

- ▶ Officers went to investigate defendant based on evidence that he called and threatened a U.S. Congressman. Upon arriving at defendant’s home, he was found to be in possession of a firearm. Defendant was convicted of being in possession of a firearm while subject to a domestic violence order. At sentencing, the district court applied a four-level enhancement to defendant’s offense level under USSG § 2K2.1(b)(6) because of defendant’s possession of the firearm in relation to the threat. Defendant appealed.

- ★ Holding: Pursuant to § 2K2.1(b)(6), a defendant’s sentence may be enhanced four levels if he possesses the firearm in connection with another felony offense. The court held that the district court properly applied the enhancement based upon defendant’s threat to the Congressman because such conduct would constitute a felony under federal law. Accordingly, defendant’s sentence was affirmed.

- *2S1.1(a)(1) - Money Laundering*
U.S. v. Anderson, 07-5037 (5/27/08)

- ▶ Defendant was convicted of money laundering the proceeds of her son’s drug trafficking conspiracy. At sentencing, the district court applied USSG § 2S1.1(a)(1) because it determined that defendant was responsible for the underlying drug conspiracy. Accordingly, the court determined defendant’s

base offense level under § 2D1.1, however the district court refused to consider a reduction under the safety valve provision of § 2D1.1(b)(7). Defendant appealed.

- ★ Holding: Section 2S1.1(a)(1) may only apply to a defendant’s money laundering conviction if two conditions are met: (1) the defendant must be responsible for the underlying offense, either because she committed it or it is relevant conduct; and (2) the base offense level for the underlying offense must be determinable. In the case, the court first held that the district court properly determined that defendant was responsible for the underlying drug conspiracy because she was aware of her son’s activities, brought money to him in order to purchase drugs, and transported drug proceeds. Second, the court held that the underlying offense level was determinable based upon the testifying agent’s conversion of drug proceeds into a drug amount and making a conservative estimate of the amount defendant was likely involved with. Thus, application of § 2S1.1(a)(1) was affirmed.

The court further held that, because § 2S1.1(a)(1) required application of the guideline for the underlying offense (§ 2D1.1), the district court was also required to apply the “specific offense characteristics” of that section. Thus, the case was remanded for the district court to consider whether the safety valve reduction (§ 2D1.1(b)(7)) was applicable to defendant.

B. Chapter Three - Adjustments

- *3B1.2(a) - Minimal Role*

- U.S. v. Anderson, 07-5037 (5/27/08)

- ▶ Defendant was convicted of money laundering the proceeds of her son’s drug trafficking conspiracy. At sentencing, the district court applied a four-level minimal role reduction to defendant’s sentence. The government appealed.

- ★ Holding: A defendant may only receive a

reduction for her role in the offense if she is “substantially less culpable than the average participant.” Because defendant was the only person who took steps to conceal her son’s drug proceeds, she could not receive a minimal role reduction for her money laundering conviction. Therefore, the sentence was vacated and the case remanded for resentencing.

C. Chapter Four - Criminal History

- *4A1.2(c)(1) - Criminal History*

U.S. v. Hall, 07-1883 (6/24/08)

- ▶ Defendant was convicted of being a felon in possession of a firearm. Defendant had prior misdemeanor convictions for driving under a suspended license and for hindering a police officer, and in each case, defendant was given a sentence crediting him for time that he had already served on unrelated probation violations. At sentencing, the district court assessed one criminal history point for each of the prior misdemeanor convictions, pursuant to USSG § 4A1.2(c)(1), concluding that defendant had served more than 30 days in jail on each of the offenses. Defendant appealed.

- ★ Holding: Answering an open question in the Sixth Circuit, the court held that, where a defendant “receives full credit for time served on an entirely separate conviction,” the defendant does not “actually serve any time for the offense in question.” Thus, because defendant sentence on the two misdemeanor convictions merely credited him for time he had already served on other cases, defendant did not “actually serve” any time for the misdemeanors, and they were not properly countable under § 4A1.2(c)(1). Accordingly, the sentence was vacated.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

- *Search-Community Confinement Detainees*

U.S. v. Smith, 07-1375 (5/22/08)

- ▶ Defendant was a State of Michigan

prisoner who was transferred to a “community residential program” where he was allowed to live at home on an electronic monitoring program. Defendant was notified when entering the program that he was to be treated as if he were still in the prison facility and that he would permit visits and searches as if he were still in his jail cell. State authorities received a tip that defendant had guns in his home, and they forcibly entered and found firearms in defendant’s room. Defendant was prosecuted for being a felon in possession of a firearm and he moved to suppress the guns. The district court denied the motion and defendant appealed.

- ★ Holding: The court held that in assessing the limited Fourth Amendment rights of parolees and probationers, the court must balance the degree to which the search intrudes upon the individual’s privacy and the degree to which it is needed to promote a legitimate governmental interest. In the case, the court held that, pursuant to Michigan law, defendants in the “community residential program” were still in the custody of the state corrections department and were treated the same as inmates for visitation and search purposes. Defendant was notified of these restrictions upon his placement in the program. Relying on the recent Supreme Court decision in *Samson v. California* (See P.V., Issue #8), the court held that the restrictions on defendant were reasonable. Thus, the search of defendant’s residence, without establishing reasonable suspicion or probable cause, did not violate the Fourth Amendment.

B. Reasonable Suspicion/Vehicle Stops

- *Reasonable Suspicion*

U.S. v. Blair, 06-60336 (5/2/08)

- ▶ Defendant was observed by one officer in a possible drug transaction. Defendant then left the residence. The officer radioed to a second officer that a vehicle was leaving the suspect house, but neither identified the vehicle

nor told the second officer about the possible drug transaction. A few minutes later, the second officer observed a car coming from the area of the suspect residence, and noticed that the license tag light was not functioning properly. Upon stopping the vehicle, the second officer noticed that defendant was nervous, and that he kept reaching under the seat of the car. After completing the traffic stop for the tag light violation, the officer asked for consent to search the car, which defendant declined. The officer then detained defendant while waiting for a drug dog. Upon the drug dog's arrival, defendant was removed from the car and he tried to reach into his pocket. Defendant was then frisked, and narcotics were found on his person. Defendant moved to suppress the drugs and the district court denied the motion. Defendant appealed.

★ Holding: The court first held that the original stop of defendant's car was not justified by reasonable activity that criminal activity was afoot. Specifically, the court found that the second officer, in stopping the car, knew nothing about the possible drug transaction, and was not certain that he was stopping the same car that the first officer observed pull away from the suspect house. The court ruled that the government could not rely on the theory of the officers' collective knowledge of defendant because the officers had not conferred and made a collective decision to stop defendant. Thus, the court ruled that the mere fact that it was 10:30 p.m., and in a bad neighborhood, was insufficient to justify the stop. The court nonetheless assumed that the officer had probable cause to believe a civil traffic infraction occurred, so it held that the stop was justified. (*See infra*).

Second, the court held that the continued detention of defendant beyond the traffic stop was not supported by reasonable suspicion. The court found that the only additional information obtained by the officer after the traffic stop was that defendant was

unusually nervous and was repeatedly reaching under the seats. The court held that nervousness is an "unreliable indicator" in the context of a traffic stop. Thus, defendant's acts of reaching under the seats, without more, was insufficient to justify his continued detention and frisk. Accordingly, the court reversed the district court's ruling.

- *Vehicle Stops - Probable Cause*

U.S. v. Blair, 06-6036 (5/2/08)

- ▶ Defendant was observed by one officer in what may have been a drug transaction. Defendant then left the residence. The officer radioed to a second officer that a vehicle was leaving the suspect house, but neither identified the vehicle nor told the second officer about the possible drug transaction. A few minutes later, the second officer observed a car coming from the area of the suspect residence, and noticed that the license tag light was not functioning properly. He pulled the car over and during the stop, defendant was discovered to be in possession of drugs. Defendant moved to suppress the drugs based upon an invalid stop of the car. The district court denied the motion and defendant appealed.

- ★ Holding: Without acknowledging its recent decision in *U.S. v. Simpson* (*See P.V. Issue #19*), the court held that the standard applicable to a traffic stop based upon a "civil infraction" is probable cause. Although the court found that the officer's testimony regarding the tag light was inconsistent with the police car video recording, the court assumed that probable cause was established for the stop of the car because the court determined that reversal was appropriate based upon the subsequent length of the detention. (*See supra*).

C. Warrant Exceptions

- *Exigent Circumstances*

U.S. v. Purcell, 07-5517 (5/29/08)

- ▶ Officers received information that

defendant, a prison escapee, was staying at a hotel. Officers were also aware that defendant had a history of manufacturing meth. The officers went to the hotel room and arrested defendant. Officers observed some drug-related paraphernalia in the hotel room. Based on alleged concerns for safety if defendant was, in fact, manufacturing meth at the hotel, the officers searched defendant's bag and found a gun. Defendant was charged with being a felon in possession of a firearm and he moved to suppress the firearm. The district court granted suppression of the firearm and the government appealed.

★ Holding: Exigent circumstances may excuse the failure to obtain a warrant if the circumstances fall into one of four general categories: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect's escape; and (4) a risk of danger to police or others. In the case, the court held that there was not sufficient information, other than defendant's history, to indicate that a meth lab may be operating out of the hotel room. Thus, an immediate search of small containers, such as defendant's bag, was unwarranted. Further, the court ruled that the government's claim that the officers truly were concerned about safety was belied by the fact that the officers twice requested consent to search defendant's bag, and that the officers stated that they were searching for a gun in the bag. Therefore, the district court ruling was affirmed.

D. Consent Searches and Seizures

- *Consent Searches*

U.S. v. Purcell, 07-5517 (5/29/08)

► Officers found defendant and his girlfriend in a hotel room. Defendant was arrested because he was an a prison escapee. Defendant's girlfriend claimed that the two bags in the hotel room were hers, said that there was a gun in one of them, and she consented to their search. Upon opening the

first bag, however, officers found only men's clothing, marijuana, and no personal effects of the girlfriend. The officers proceeded to search the second bag, and found a gun. Upon defendant's prosecution, he moved to suppress the firearm. The district court granted the motion and the government appealed.

★ Holding: Third party consent to search property may be based on actual or apparent authority. Actual authority is based on mutual use of the property by persons having joint access or control. Apparent authority derives from an officer's objective belief that the consenting party has the apparent right to consent to the search. In the case, the court held that the undisputed evidence adduced at the suppression hearing indicated that the girlfriend had no actual authority over defendant's bag. Further, the court held that, although the officers obtained the girlfriend's apparent authority to search the first bag, they were on notice after searching it that the girlfriend's authority to consent was in question. When the officers found only men's clothing in the first bag, it created ambiguity that needed to be resolved before proceeding to search the second bag. The officers did not ask the girlfriend, who was present, any further questions to try to resolve the ambiguity before conducting the subsequent search. Further, the girlfriend's apparent "intimate relationship" with defendant was not sufficient to provide the necessary apparent authority. Accordingly, apparent authority did not support the search of the second bag, wherein the gun was found, and the district court ruling was thus affirmed.

E. Search Warrants

- *Search Warrants - Probable Cause*

U.S. v. Martin, 06-5002 (5/23/08)

► Officers obtained a warrant to search defendant's home. In the warrant application, the officers attested that they received information from a reliable informant that drugs were being sold from the home. The

information did not identify any specific individuals that were involved, nor did it indicate a time period. The application also indicated that officers checked the trash from the residence and found cocaine residue. Further, the officers attested that defendant was identified as the person living at the address, and that he had prior drug convictions. The officers searched the home and found a firearm. Upon his prosecution, defendant moved to suppress the firearm, and the district court denied the motion. Defendant appealed.

★ Holding: The court held that the totality of the circumstances supported probable cause for the warrant. Although the information provided by the informant was relatively weak and non-detailed, the officer attested to the informant's reliability and the officers found corroborating evidence by way of the cocaine residue in the garbage. Further, defendant had prior convictions for drugs. Accordingly, the district court ruling was affirmed.

V. Fifth Amendment

C. Confessions and Testimonial Rights

- *Miranda - Booking Questions*

U.S. v. Pacheco-Lopez, 07-5408 (6/26/08)

► Officers executed a search warrant at a residence suspected of receiving shipments of cocaine. Defendant was present at the time of the warrant's execution, and the officers, through an interpreter, asked defendant where he was from, how he arrived at the house, and when he arrived. Defendant answered that he drove from Mexico in a white pick-up, and he offered the keys. Defendant was then *Mirandized* in Spanish, and he stated that he transported cocaine. In the white pick-up, the officers found a hollowed out section for the cocaine. Upon his prosecution, defendant moved to suppress his statements based upon *Miranda*. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that the officers' questions about defendant's arrival at

the house were not routine booking questions. The questions were not "reasonably related to the police's administrative concerns," but instead were more like interrogation. Further, the court was influenced by the fact that the questioning occurred on the scene, as opposed to at the police station, and none of the officers took notes or documented defendant's information. Thus, the court held that the pre-*Miranda* statements should have been suppressed.

Second, the court held that the later administration of *Miranda* warnings did not render the statements admissible. Five factors are relevant to whether a midstream *Miranda* warning is effective: (1) the completeness and detail of the first round of questioning; (2) overlapping content before and after the warning; (3) timing and setting; (4) continuity of police personnel; and (5) the degree the second round of questioning is treated as continuous with the first. The court found that all five factors weighed in favor of suppression because the same officers had engaged in continuous questioning of defendant with no break, and the answers from the pre-*Miranda* questions were used in asking the post-*Miranda* questions. The court's conclusion was not altered by the fact that defendant invoked his right to silence after admitting to driving the cocaine. Accordingly, the district court's ruling was reversed.

VI. Sixth Amendment

B. Confrontation Clause

- *Confrontation Clause*

U.S. v. McGee, 06-2158 (6/24/08)

► Defendant was charged with possession of crack with intent to distribute. At trial, the government introduced an officer's testimony about conversations that an informant had with defendant prior to defendant's arrest. Specifically, the officer testified that he asked the informant, after the conversations, to clarify with whom he was speaking, and the informant

stated that he was speaking with defendant. Defendant was convicted and he appealed, arguing that the admission of the informant's hearsay statement violated his right to confrontation.

★ Holding: The court held that the statement of the informant, that he was talking to defendant when arranging the drug purchase, was a testimonial statement. Accordingly, the court ruled that the admission of the informant's statement violated the Confrontation Clause. Nonetheless, the court found that the admission of the statement was harmless because the evidence of defendant's guilt was otherwise overwhelming. Therefore, defendant's conviction was affirmed.

IX. Plea & Sentencing Hearings

C. Rule 35 - Motion to Correct Sentence

• Rule 35 - Motion to Correct Sentence

U.S. v. Houston, 06-6329 (6/2708)

► Defendant was convicted of running an illegal gambling scheme and at sentencing the district court imposed a sentence of 12 months. The district court asked defendant if he had disagreements with the sentence, and he raised no objection. Three days later, defendant moved for reconsideration, based upon the district court's failure to consider the fact that no other defendant from the district had ever been sent to prison for a gambling offense. Defendant represented in the motion that the government did not object. The district court decided that it had not considered disparity with other defendants in the district and decided to grant the motion, reducing defendant's sentence to probation. The government then moved to strike the amended sentence because defendant misrepresented its position. The district court granted the government's motion and reimposed the 12 month sentence. Defendant appealed.

★ Holding: Pursuant to Fed. R. Crim. P. 35, a district court may correct a sentence within seven days of judgment in the event of

“arithmetical, technical, or other clear error.” Because defendant did not object to the district court's 12 month sentence at the sentencing hearing, the court applied plain error review. The court held that the failure of the district court to consider sentences of other defendants in the district was not “clear error” under Rule 35, particularly where defendant did not raise the issue at sentencing. Further, 18 USC §3553(a)(6) requires consideration of sentencing disparities on the national level, a consideration that is implicitly taken into account by correctly calculating the guideline range. Accordingly, defendant's 12 month sentence was affirmed.

X. Jury Issues

A. Jury Instructions

• Jury Instructions-State Law-Judicial Notice
U.S. v. Dedman, 06-6124 (5/29/08)

► Defendant was charged with conspiracy to defraud the government for arranging a sham marriage between her adoptive father and her adopted daughter in order to obtain her adoptive father's military pension benefits. The sham marriage occurred in Arkansas. At trial, the district court took judicial notice that Arkansas law prohibited marriage between a grandfather and granddaughter, even if the familial relationship was by adoption. Thus, the court instructed the jury as to Arkansas law, but told the jury that it could accept that “fact” as true, but it was not required to do so. The jury convicted defendant and she appealed.

★ Holding: The court held that judicial notice was not actually the proper mechanism for instructing the jury regarding the Arkansas law. Judicial notice in the modern era is to be used for factual issues; as such, juries may choose to disregard a fact judicially noticed. Issues regarding the applicable law, however, are for the court to determine. Thus, the district court should have instructed the jury, in its jury instructions, as to the applicable law in Arkansas regarding marriage. Nonetheless, the

court found that the court's instruction that the jury could choose to ignore the Arkansas law only stood to inure to defendant's benefit, and, since she was convicted, the error was harmless.

XII. Appeal

A. Preserving Error

- *Issue First Raised on Appeal*

U.S. v. Martin, 06-5002 (5/23/08)

- ▶ Defendant was charged with being a felon in possession of a firearm, pursuant to 18 USC § 922(g), and he entered a conditional plea of guilty, reserving his right to appeal the district court's ruling on his motion to suppress. On appeal, defendant argued that the government did not have sufficient evidence to prove that the gun that defendant possessed traveled in interstate commerce.

- ★ Holding: Pursuant to Fed. R. Crim. P. 11 (a)(2), a defendant must specifically reserve any non-jurisdictional issue for appeal when entering a plea of guilty. Because defendant's challenge really dealt with the sufficiency of an element of the offense, it was waived by defendant's guilty plea. Further, the court held that the interstate nexus requirement of § 922(g) is not jurisdictional in the sense that it affects the district court's subject matter jurisdiction to hear the case. The court ruled that in order to successfully challenge the district court's jurisdiction, defendant would have to show that the indictment did not charge a federal offense. Accordingly, the court held that defendant waived the issue for appeal.

C. Reasonableness of Sentence

- *Reasonableness of Sentence-Harmlessness*

U.S. v. Anderson, 07-5037 (5/27/08)

- ▶ Defendant was convicted of money laundering. At sentencing, the district court improperly calculated the guideline range by failing to credit defendant with a two-level reduction under the safety valve, and by awarding defendant a four-level reduction for

playing a minimal role. The government argued on appeal that any guideline computation errors were harmless because the district court indicated that it would impose the same sentence as recommended by the guidelines based on the factors under 18 USC § 3553.

- ★ Holding: The court held that, after the Supreme Court's decision in *Gall* (See P.V. Issue #17), it will be a rare occasion where the court finds an improper guideline calculation by the district court to be harmless error. A guideline error is a "significant procedural error" which "rarely, if ever" can be considered harmless because the guidelines are the "benchmark" and "starting point" for all sentencing determinations. Accordingly, the court held that the district court's incorrect application of the guidelines was not harmless error, and remanded the case for resentencing.

- *Reasonableness of Sentence*

U.S. v. Penson, 06-3419 (5/27/08)

- ▶ Defendant was convicted of three counts of bank robbery. Each count carried a maximum of 240 months in prison. After a *Booker* remand, the district court orally pronounced a sentence of 310 months on each count, to run concurrently. Thirteen days later, the court issued its written judgment, and imposed sentence as 240 months on two counts, to run concurrently, and 70 months on the third count, to run consecutively. Defendant appealed.

- ★ Holding: First, the court held that the district court's oral pronouncement controlled as the sentence of the court. The written judgment could not qualify as a correction of the sentence under Fed. R. Crim. P. 35 because it occurred more than seven days after sentencing. Further, the written judgment could not be a correction of a clerical error under Rule 36 because the error was not properly classified as clerical. Thus, because the district court imposed a sentence that was

above the statutory maximum, the sentence had to be vacated. Additionally, the court ruled that the district court did not fulfill its procedural reasonableness obligations by permitting defense counsel to adequately advocate for a lower sentence, and the district court did not sufficiently explain its reasons for the sentence. Thus, the case was remanded.