

# 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

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

<b>Issue #30</b>	<b>Editor: Richard Smith-Monahan</b>	<b>Jan.-Feb. 2010</b>
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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.

## COMBINED OUTLINE

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

## SUPREME COURT DECISIONS

### **V. Fifth Amendment**

#### **C. Confessions and Testimonial Rights**

- *Miranda*

Florida v. Powell, 08-1175 (2/23/10)

► Officers took defendant into custody and questioned him regarding a firearm found in his bedroom. Prior to questioning, the officers advised defendant of his *Miranda* rights. As

part of the recitation, the officers stated that defendant had a right to “talk to a lawyer before answering any of the questions.” Further, the officers advised defendant that he could invoke his rights “at any time during the interview.” Defendant confessed to possessing the gun and was prosecuted. Defendant moved to suppress the firearm, and argued that the officers did not adequately advise him that he could consult with a lawyer and have a lawyer present during the interview. The state court denied the motion and defendant was convicted. The state appellate court reversed defendant’s conviction and ruled that defendant was not properly advised of his right to counsel. The state appealed to the Supreme Court.

★ Holding: Pursuant to *Miranda*, officers must advise a defendant of (1) the right to remain silent, (2) that anything said can be used against the defendant, (3) the right to have an attorney present, and (4) the right to appointed counsel prior to questioning. The Court held that the officers did not “entirely omit” any of the *Miranda* requirements. Further, the Court found that the advisements that defendant (1) had a right to talk to a lawyer prior to questioning, and (2) that he could invoke his rights at any time during the questioning, sufficiently apprised defendant his right to have a lawyer present during questioning. Accordingly, defendant’s conviction was affirmed.

- *Miranda - Reinitiation/Custody*

Maryland v. Shatzer, 08-680 (2/24/10)

► Defendant was serving a sentence in state prison when he was approached by an officer who attempted to question him about the alleged sex abuse of defendant’s son. Defendant asserted his right to counsel. Two and a half years later, the state obtained new evidence against defendant in regard to the sex abuse allegations, and went to question defendant, who was still in state custody at a

different prison. The officer read defendant his *Miranda* rights, which defendant waived, and defendant made incriminating statements. In his subsequent state court prosecution, defendant moved to suppress the statements. The trial court denied defendant’s motion and he was convicted. The state court of appeals reversed defendant’s conviction and found that the lapse of time did not vitiate defendant’s rights under *Edwards*. The Supreme Court granted *certiorari*.

★ Holding: Under *Edwards*, police may not question a defendant who has invoked his or her right to counsel, unless the defendant reinitiates contact. In the present case, the Court found an exception to *Edwards* where there is a 14 day break in custody. Under this newly established rule, if there has been a 14 day break in custody since the time of the initial police contact, officers may reapproach a defendant and again seek a *Miranda* waiver.

Additionally, the Court held that “custody,” for *Miranda* purposes, did not include a defendant’s imprisonment for a sentence in an unrelated case. Thus, because defendant was returned to general population in the prison after he was questioned the first time, there was a sufficient break in “custody” prior to the second questioning. Accordingly, defendant’s conviction was affirmed.

## VI. Sixth Amendment

### F. Miscellaneous Sixth Amendment

- *Right to Public Trial*

Presley v. Georgia, 09-5270 (1/19/10)

► Defendant was charged in state court with drug trafficking and the trial court excluded the public from *voir dire* based on the space available in the court room. Defendant objected to the procedure and demonstrated for the record that sufficient room could be had in court to accommodate the public (including defendant’s uncle). The trial court denied defendant’s request, the jury was empaneled, and defendant was convicted. Defendant lost

his state court appeal, and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the Sixth Amendment right to public trial extends to the *voir dire*. The Court ruled that the closing of a courtroom to the public should be a rare occasion and that, prior to excluding the public, the party seeking the closure must advance an overriding interest that may be prejudiced, the closure must be no broader than necessary to protect the interest, and the trial court must consider reasonable alternatives to the closure and make adequate findings on the record. The Court held that the trial court had not considered any reasonable alternatives to the closure of the courtroom during *voir dire* and accordingly defendant's conviction was reversed.

## X. Jury Issues

### D. *Batson*

- *Batson*

Thaler v. Haynes, 09-273 (2/22/10)

► Defendant was charged in state court with murder. At trial, the prosecutor sought to strike a black juror. Defendant raised a *Batson* challenge, and the prosecutor replied that the juror's demeanor was "not serious" and that she seemed predisposed against the death penalty. The judge presiding over the challenges was not the same judge who presided over the *voir dire*, so the court did not observe the juror's demeanor. The court denied the *Batson* challenge and the juror was seated. Defendant was convicted and he lost his state court appeal. Defendant filed a federal *habeas* petition and the district court denied the petition. On appeal, the Fifth Circuit reversed defendant's conviction and held that a trial court must reject a proponent's demeanor-based strike of a juror unless the judge personally observes and recalls the juror's demeanor. The Supreme Court granted *certiorari*.

★ Holding: The Court held that, for the

purpose of *habeas* review of a state conviction, no clearly established federal law requires a trial court to reject a demeanor-based strike of a juror where the court either did not observe or cannot remember the juror's demeanor. Instead, the trial court must decide the *Batson* challenge based on what it can recall of the juror and the other evidence available in the record. Accordingly, the Fifth Circuit's decision was reversed and the case was remanded for the court to analyze the strike and the *Batson* challenge under the proper federal *habeas* standards.

## SIXTH CIRCUIT DECISIONS

### I. Specific Offenses

- 18 USC § 922(g)-Constructive Possession  
U.S. v. Jenkins, 08-5203 (2/9/10)

► Defendant was arrested outside his father's house during the execution of a search warrant. Inside the home, officers found firearms and narcotics. Defendant was charged with being a felon in possession of a firearm and narcotics offenses and argued at trial that he was not in possession of the guns or drugs. Defendant was convicted and he appealed the sufficiency of the evidence.

★ Holding: Constructive possession may be proven where a defendant "knowingly has the power and the intention at a given time to exercise dominion and control over an object." The court found sufficient evidence of constructive possession based on the following facts: (1) defendant was present at the residence; (2) he had unlimited access to the house; (3) he lived in the house part time; (4) he repeatedly restored electrical service to the house; (5) he stored personal property at the home; and (6) a gun, scales, and baggies of marijuana were found with his license and personal papers in the only bedroom. Accordingly, the evidence was not insufficient to support the verdict.

• *18 USC § 922(g) - Felon in Possession*  
U.S. v. Morrison, 08-6203 (2/12/10)

▶ Defendant was driving a car with an unknown passenger when he was stopped for running a stop sign. When the officers got defendant out for field sobriety testing, they noticed a gun between the driver's seat and center console. Defendant was charged with being a felon in possession of a firearm and at trial the evidence established that the gun was in plain view and "probably was rubbing [defendant's] side." Defendant was convicted and he appealed the sufficiency of the evidence.

★ Holding: The court held that the evidence was sufficient to establish defendant's actual possession of the firearm. The court found that the combination of the gun being in plain view and rubbing defendant's side as he sat in the car were sufficient to prove defendant had "immediate possession or control" over the firearm. The court further distinguished the case from prior precedent holding that "mere proximity" is insufficient for possession based on three grounds: (1) "mere proximity" applies to constructive possession cases, not actual possession; (2) defendant's firearm was actually touching his body; and (3) "mere proximity" cases deal with situations where the defendant may not even know that the gun is present, whereas defendant's gun was in plain view. Accordingly, defendant's conviction was affirmed.

• *18 USC § 1955-Illegal Gambling Business*  
U.S. v. Frazier, 08-5211 (2/12/10)

▶ Defendant was charged with running an illegal gambling business, based on his conduct in maintaining a cock fighting ring at his home. Defendant did not personally bet on the fights, however, he charged admission and entry fees, and rented a concession booth. At trial, defendant moved for judgment of acquittal at the end of the government's case in chief, but did not renew the motion at the close of the

evidence. Defendant was convicted and argued on appeal that the evidence was insufficient to support the verdict.

★ Holding: Because defendant failed to renew his motion for judgment of acquittal at the close of evidence, the court applied the "manifest miscarriage of justice" standard and found reversal unwarranted. A § 1955 prosecution requires the government to prove that defendant conducted an illegal gambling business which is defined as follows: (1) violates state gambling laws; (2) involves five or more persons; (3) is in continuous operation for 30 days or has gross revenue of \$2000 in a single day. Under Tennessee law, illegal gambling required proof that defendant derived "economic benefit other than personal winnings from the gambling." In the case, the court held that defendant did derive "economic benefit" from the gambling based on the fees charged for admission and entry. The court reasoned that the gambling at the cock fights caused more people to attend, thus providing more admission and entry fees for defendant than he otherwise would have obtained. Accordingly, the court found no manifest miscarriage of justice and affirmed defendant's conviction.

• *21 USC § 856(a) - Maintain Drug House*  
U.S. v. Russell, 07-2354 (2/19/10)

▶ Defendant was charged with various drug and firearm offenses, including maintaining a drug-involved premises. At trial, defendant argued that the government was required to prove that defendant's residence was "primarily or principally" used for drug trafficking. The district court declined this interpretation, and instructed the jury that it could find defendant guilty if drug trafficking was a "significant or important" purpose in maintaining the residence. Defendant was convicted and he appealed.

★ Holding: In order to prove a violation of § 856(a), the government must prove that the

defendant did “knowingly open, lease, rent, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.” The court held that the “purpose” element of the statute was satisfied if the drug-related purpose was a “significant or important” reason for maintaining the premises. Accordingly, the district court’s ruling was affirmed.

## II. Sentencing Guidelines

### A. Chapter Two - Offense Conduct

- *2D1.1 - Drug Amount*

U.S. v. Russell, 07-2354 (2/19/10)

- ▶ Defendant was convicted of drug and firearm offenses. At sentencing, the district court converted the \$11,375 seized to crack cocaine, and sentenced defendant accordingly. Defendant argued that the money was attributable to other activities such as the sale of marijuana and methadone, and to managing prostitutes. The district court reasoned that the guideline range – 150-500 grams of crack – would be the same if the full \$11,375 were converted to crack, or only \$4,700 worth of the money. Accordingly, the district court determined that defendant distributed at 150 grams of crack. Defendant appealed.

- ★ Holding: Pursuant to Application Note 12 to USSG § 2D1.1, where the amount of drugs seized does not reflect the scale of the offense, a district court may approximate the quantity of drugs based on “the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.” Given the evidence of defendant’s extensive trafficking in crack cocaine, the court held that it was reasonable for the district court to estimate that at least \$4,700 (37%) of defendant’s cash was the proceeds from crack sales. Accordingly, defendant’s sentence was affirmed.

- *2D1.1(b)(1) - Firearm Enhancement*  
U.S. v. Benson, 08-1131 (1/12/10)

- ▶ Defendant was convicted of participating in a drug conspiracy. Firearms were found both at defendant’s residence and at a coconspirator’s residence. As a result, the district court applied a two-level enhancement to defendant’s sentence under USSG § 2D1.1(b)(1) based on its finding that defendant possessed the firearms during the drug conspiracy. Defendant appealed.

- ★ Holding: In order to apply the two-level enhancement under § 2D1.1(b)(1), the government must first show that defendant possessed the firearms during the commission of the drug offense. If this showing is made, the burden shifts to the defendant to prove that it was “clearly improbable” that the guns were connected to the offense. In the case, the court first held that the two-level enhancement was appropriate based on the firearms found in defendant’s residence. At defendant’s home, the government found two guns and drug paraphernalia during the time period of the conspiracy. As defendant made no showing of a clear improbability that the guns were connected to the drug offense, application of the enhancement on this basis was proper.

Additionally, the court held that defendant was also responsible for the firearms found in the codefendant’s home based on the conspiracy theory. A defendant is responsible for firearms possessed by a coconspirator where the possession was in furtherance of the conspiracy and was either known to the defendant or reasonably foreseeable. The court found that it was reasonably foreseeable to defendant that the coconspirator would possess firearms at his residence given that defendant knew that he was a major drug trafficker and kept a significant drug supply and thousands of dollars of currency at his residence. Accordingly, the court found no clear error in the district court’s determinations and affirmed defendant’s sentence.

• *2K2.1(a)(4) - Prior Crime of Violence*  
U.S. v. Rogers, 08-6181 (2/8/10)

▶ Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court increased defendant's offense level because he had a prior conviction on his record for a crime of violence. The conviction at issue was Tennessee offense for evading arrest in a motor vehicle. Defendant appealed his sentence.

★ Holding: Relying on the court's prior decision in *Young* (See P.V., Issue #28), the court held that the Tennessee evading arrest in a motor vehicle conviction constituted a crime of violence under the guidelines. The court found that the evading arrest offense was intentional conduct that was similar in degree of risk posed to the offenses enumerated in the guidelines' definition of a crime of violence. Further, the court ruled that the act of fleeing from an officer in a vehicle always poses a potential risk of harm to the officers, thus constituting a crime of violence under the "otherwise" clause. Accordingly, defendant's sentence was affirmed.

• *2K2.1(b)(6) - Another Felony Offense*  
U.S. v. Rogers, 08-6181 (2/8/10)

▶ Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court imposed a four level enhancement because defendant possessed the firearm in connection with another felony offense. Specifically, defendant was seen leaving his residence with the firearm, and at his residence, defendant was maintaining an illegal chop shop for stolen vehicles. Defendant appealed and argued that the enhancement was improper.

★ Holding: The court held that an enhancement under USSG § 2K2.1(b)(6) is proper where the firearm "facilitated, or had the potential of facilitating," the other felony offense. The court ruled that defendant possessed the weapon at home, where the chop shop was located, and the court found no clear

error in the district court's conclusions that (1) chop shop customers are not likely law abiding, (2) defendant could not call the police if a transaction turned violent, (3) and defendant's gun helped him to protect the operation. Accordingly, defendant's sentence was affirmed.

**C. Chapter Four - Criminal History**

• *4A1.2(a)(2) - Relatedness of Prior Crimes*  
U.S. v. McFalls, 08-5839 (1/28/10)

▶ Defendant was convicted of bank robbery and at sentencing the district court determined that he was a career offender based, in part, on four prior burglary convictions. The four prior burglaries were not separated by an intervening arrest and defendant was sentenced on the same day for them. Defendant's sentencing before the district court occurred on November 1, 2007 (the day the 2007 guidelines became effective) but the district court applied the prior version of the guidelines. Defendant did not object to application of the earlier guideline manual, but argued on appeal that the 2007 version of USSG § 4A1.2(a)(2) should apply and that, under such version, the prior burglaries were not separately countable.

★ Holding: The court first held that the 2007 manual of the guidelines should have applied to defendant because it was the version officially in effect on the day of defendant's sentencing. Second, the court held that, under the amended § 4A1.2(a)(2), defendant's four prior burglaries should have counted as a "single sentence" because there was no intervening arrest between the offenses and the sentencing for all four occurred on the same day. Finally, the court ruled that the error was not harmless because defendant did not otherwise qualify as a career offender. (See *infra*). Accordingly, defendant's sentence was vacated.

- *4B1.1 - Career Offender*

U.S. v. McFalls, 08-5839 (1/28/10)

► Defendant was convicted of bank robbery and at sentencing the district court determined that he was a career offender. This determination was based on the district court's conclusion that defendant's prior South Carolina convictions for second degree burglary of a dwelling and aggravated assault were crimes of violence for career offender purposes. Defendant appealed.

★ Holding: First, the court held that the second degree burglary of a dwelling conviction was not a crime of violence under the guidelines. South Carolina defined the term "dwelling" to including a structure within two hundred feet of a dwelling. The court ruled that this definition did not meet the generic definition of a burglary of a dwelling. Further, the court found that it did not qualify as a crime of violence under the "otherwise" clause of § 4B1.1 because it did not pose a similar degree of risk of harm as the burglary of an actual home. Finally, the court ruled that the indictment from the burglary case did not clarify the matter because it relied on boilerplate language charging burglary of a dwelling, without specifying the kind of "dwelling" under South Carolina law. Accordingly, the burglary conviction was not a crime of violence.

Second, the court held that the aggravated assault conviction was not a crime of violence. Under South Carolina law, the offense applied not only to intentional conduct, but to reckless conduct as well. Applying the Supreme Court's holding in *Begay* (See P.V. Issue #19), the court ruled that an assault must be "purposeful" and "intentional" in order to qualify as a crime of violence under § 4B1.1. Accordingly, neither of defendant's prior convictions were for crimes of violence and defendant's sentence was vacated.

### III. Evidence

#### A. Article IV - Relevancy

- *404(b) - Knowledge/Intent*

U.S. v. Jenkins, 08-5203 (2/9/10)

► Defendant was charged with being a felon in possession of a firearm and possession of narcotics with intent to distribute. The only defense at trial was whether defendant constructively possessed the gun and narcotics, which were in plain view in the home in which defendant was living on a part-time basis. At trial, the government introduced defendant's prior conviction for drug trafficking out of the same house that occurred 8 years earlier. Defendant objected to the evidence, but the district court admitted it under FRE 404(b) to show knowledge and intent. Defendant was convicted and he appealed.

★ Holding: First, the court held that the evidence was not properly introduced to prove knowledge. The court found that knowledge was not at issue in the case in any meaningful sense because the drugs were in plain view throughout the house, so no one could have inadvertently possessed them. Accordingly, knowledge was not a proper basis for admission of the evidence.

Second, the court held that, under Sixth Circuit precedent, intent was arguably at issue because the offense was a specific intent crime. The court held, however, that it was a difficult question as to whether defendant's prior conviction was actually probative of intent. The court instead decided the case on the grounds that the evidence was substantially more prejudicial than probative. The court found that whatever "microscopic" probative value the prior conviction had, it was unnecessary in the case given the government's other evidence of knowledge and intent. The court noted that one factor in the 403 analysis is the "availability of other means of proof." The court found that the government had solid proof of knowledge and intent apart from defendant's prior conviction, and that the

government conceded as much in making its argument that the error was harmless. Thus, the court ruled that the prejudicial effect of the evidence substantially outweighed its probative value. Because the court held that the evidence against defendant was not overwhelming, the court found no harmless error and reversed defendant's conviction.

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

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

- *Reasonable Suspicion - Seizures*

U.S. v. Smith, 08-4378 (2/10/10)

▶ At 3:00 a.m., officers received a dispatch for a 911 call at an apartment building. Although no voice was heard on the 911 call, it sounded like a scuffle was ensuing. The officers were not able to gain access to the building until defendant came out of the lobby door with his bicycle. Instead of allowing the three officers to enter the building, defendant tried to push past the officers in the crowded entryway, kept his head down, seemed very agitated, and provided vague answers in response to the officers' questions. Defendant was instructed to stop by the officers and, when he reached for his pocket, was seized by the officers. Upon seizing defendant, officers noticed a gun in his waistband. In his subsequent prosecution, defendant moved to suppress the firearm and the district court denied the motion. Defendant was convicted and he appealed.

★ **Holding:** First, the court held that defendant was not seized during his initial encounter with officers. When the officers attempted to ask defendant identifying-type questions in the lobby, the encounter was consensual in nature. The court found that the fact that the lobby was crowded and three officers were present did not change the nature of the encounter into a stop. The court noted that, even if the encounter was a stop, defendant did not actually submit to the police authority because he continued to try to push

past the officers and did not respond to their questions.

Second, the court ruled that a *Terry* stop occurred at the time the officers instructed defendant to stop. This stop was supported by reasonable suspicion, however, based on the following factors: (1) the emergency 911 call during which a struggle was heard; (2) defendant's actions in pushing past the officers with his head down; (3) defendant's non-responsive and vague answers to questions; (4) the neighborhood was a high-crime area; and (5) the early hour of the morning. Further, the court found that the officers were justified in subsequently grabbing defendant when he suddenly reached into his jacket. The above-referenced factors, plus the close quarters and defendant's sudden movement gave the officers reasonable suspicion to believe that defendant may be armed and dangerous. Accordingly, the officers' actions did not violate the Fourth Amendment and the district court's ruling was affirmed.

##### **E. Search Warrants**

- *Search Warrant - Probable Cause*

U.S. v. Brooks, 08-4280 (2/5/10)

▶ Officers went to defendant's home to arrest him on a warrant. Upon arrival, officers smelled marijuana, saw marijuana seeds in an ashtray, and found \$1000 in cash in defendant's pocket. Officers secured defendant and applied for a search warrant. The warrant detailed the items observed by the officers, and included information about defendant's drug trafficking activities over the previous five years, the most recent incident being six months earlier. Upon execution of the warrant, officers discovered crack cocaine. In his subsequent prosecution, defendant moved to suppress the evidence and the district court granted the motion. The government appealed.

★ **Holding:** The court held that the warrant was supported by probable cause based solely on the observations of the officers at the time

of defendant's arrest. Thus, the court found that the warrant was justified by the smell of marijuana, the marijuana seeds, and the cash in defendant's pocket. The court determined that the prior evidence of drug sales by defendant was stale, but specifically reserved the question for another day as to whether such information was properly considered in issuing the warrant to "add flavor and force to the non-stale information" in the affidavit. Accordingly, the district court's ruling was reversed.

### **G. Miscellaneous Fourth Amendment**

- *State Action*

U.S. v. Bowers, 08-2412 (2/8/10)

- ▶ Defendant's roommate found a photo album containing child porn in defendant's room while he was away. The roommate turned it over to the landlord, who called the FBI. Upon the FBI's arrival, the roommate had the album sitting in the common area of the apartment on the dining room table. The agents reviewed the album, and defendant was subsequently prosecuted. Defendant moved to suppress the evidence, the district court denied the motion, and defendant appealed.

- ★ Holding: In order to assess whether an individual is acting as an agent of the government, the court considers two factors: (1) the government's knowledge or acquiescence in the search; and (2) the intent of the party performing the search. In the case, the court found that the roommate was not acting as an agent of the government because she found the evidence in defendant's bedroom without any knowledge or action on the part of the government. When the agents arrived and viewed the album, they "learned nothing that had not previously been learned during the private search" and they "infringed no legitimate expectation of privacy" of defendant. Accordingly, the district court's ruling was affirmed.

## **V. Fifth Amendment**

### **A. Prosecutor Conduct**

- *Prosecutorial Misconduct*

U.S. v. Benson, 08-1131 (1/12/10)

- ▶ Defendant was charged with being involved in a drug conspiracy. At trial, the government referred to the guilty pleas of codefendants in the case and suggested that the pleas supported the fact that a conspiracy existed. Defendant did not object to the statements, she was convicted, and she appealed.

- ★ Holding: In assessing a claim of prosecutorial misconduct, the court must first determine whether the prosecutor's remarks were improper. If so, the court must assess whether the comments were flagrant considering four factors: (1) whether they tended to mislead the jury or prejudice the defendant; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally made; and (4) the weight of the evidence. In the case, the court held that the prosecutor's remarks "may have been improper." A codefendant's guilty plea may only be used by the government regarding issues of credibility, not as substantive evidence of defendant's guilt. The court found, however, that the comments were isolated, were not intended to inflame the jury, and that the evidence against defendant was strong. Accordingly, the court found no plain error and affirmed defendant's conviction.

- *Prosecutorial Misconduct*

Jaradat v. Williams, 09-3193 (1/14/10)

- ▶ Defendant was charged in state court with five counts of rape, one count of kidnaping, and one count of gross sexual imposition. During trial, the prosecutor elicited testimony from an officer and commented in closing regarding defendant's post-arrest silence and assertion of his right to counsel. Defendant testified at trial that the encounter with the victim was consensual, however, he denied that

a vaginal penetration occurred. This latter statement was contradicted by scientific evidence that defendant's semen was found in the victim's vagina. The jury convicted defendant only of the vaginal penetration rape count and kidnaping. Defendant lost his state court appeal, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: The court held that the prosecutor clearly violated defendant's rights by commenting on his post-arrest silence. Nonetheless, the court held that the error was harmless because the physical evidence regarding the count of conviction was strong and defendant did not claim consent on this count, but instead testified that it did not occur. Accordingly, defendant's conviction was affirmed.

- *Prosecutor Misconduct*

U.S. v. Thornton, 08-3349 (2/12/10)

► Defendant was charged with participating in a drug conspiracy. At trial, the prosecutor elicited testimony from a cooperating codefendant about his plea of guilty to the conspiracy charge and the details of his plea agreement. Defendant did not object to the testimony and, during cross examination, questioned the witness regarding his plea deal in an effort to impeach him. Defendant was convicted and he appealed.

★ Holding: A codefendant's guilty plea may not be used as substance evidence of the defendant's guilt, but may be considered as evidence regarding a witness' credibility. Thus, the prosecutor may use the evidence, under proper instruction, to help the jury assess the credibility of the witness. Further, the prosecutor may introduce the plea before the jury on direct examination of the witness in order to "blunt the defense efforts at impeachment and dispel the suggestion that the government witness has something to hide." In the case, the court found that the government

did not use the witness' plea for an improper purpose, did not mention it in closing argument, the defense cross examined the witness based on the plea agreement, and the district court gave a proper limiting instruction. Accordingly, the court found no plain error in the introduction of the witness' testimony regarding the plea agreement.

**B. *Brady***

- *Brady*

Robinson v. Mills, 09-5243 (1/28/10)

► Defendant was charged in state court with murder and pursued a self-defense theory. The state's only eyewitness was a woman who testified to differing versions of the shooting at the preliminary hearing and at trial. There was no physical evidence to refute defendant's self defense theory, and the testimony established that the victim at least had a gun in the car at the time defendant shot him. After defendant was convicted, he learned about two pieces of evidence that were not disclosed by the state prior to trial: (1) a state witness gave a statement to police that contradicted the state's sole eyewitness' testimony; and (2) the eyewitness was a paid informant for the state on 9 cases, two of which involved suspects who testified against defendant at trial. Defendant filed a federal *habeas* petition claiming *Brady* violations and the district court granted the petition. The state appealed.

★ Holding: In order to establish a *Brady* violation, a defendant must prove three elements: (1) the evidence in question was favorable; (2) the state suppressed the evidence, purposefully or inadvertently; and (3) the state's actions resulted in prejudice. In the case, the state agreed that the first two elements were met. In regard to the third element, the court held that the defendant's case was prejudiced such that a new trial was warranted. First, the court found that the witness' statement was evidence that defendant could have used for impeachment of the state's

eyewitness, and that it was not merely cumulative of the impeachment evidence defendant introduced at trial. Further, the court noted that the state's eyewitness was the sole witness who refuted defendant's self-defense theory at trial.

Second, the court ruled that the failure to disclose the paid-informant-status of the eyewitness severely limited defendant's ability to explore the witness' bias. Even though the witness was not a paid informant in relation to defendant's case, the court emphasized that a defendant has a constitutional right to impeach a witness with bias evidence, and found that the witness' long term relationship with the state was likely a matter that would have influenced the jury's assessment of the believability of her testimony. Because the other evidence against defendant was not strong, the court found that defendant's case was prejudiced by the state's *Brady* violations, and the district court's ruling was affirmed.

### **C. Confessions and Testimonial Rights**

- *Miranda*

Tolliver v. Sheets, 08-3177 (2/22/10)

- ▶ Police were investigating defendant for the murder of his girlfriend. The officers attempted to read defendant his *Miranda* rights, but defendant kept interrupting and trying to explain to the officers that the death was a suicide. As a result, the officers never read defendant his rights, and many of defendant's tape-recorded statements were admitted against him at trial. The officers asked a few follow up questions to defendant's volunteered statements, and at one point near the end of the conversation, defendant asked to stop the interview until he could talk to an attorney. Officers continued the discussion and defendant made additional statements that were used against him at trial. In his murder prosecution, defendant moved to suppress his taped statement and the state court denied the motion. Defendant was convicted and lost his

state court appeal. Defendant filed a federal *habeas* petition which was denied by the district court. Defendant appealed.

- ★ Holding: The court first found that the officers never properly administered *Miranda* warnings. Nonetheless, the court ruled that most of defendant's statements were volunteered, and thus not in response to police interrogation. Therefore, all of the volunteered statements were properly admissible. The court found that the officers did ask defendant at one point about the wound on the victim's body, and that this question was not reasonably in response to any volunteered statement by defendant. Thus, defendant's response should have been suppressed. Further, the court ruled that defendant asserted his right to counsel near the end of the interview, and that all of his statements thereafter were improperly obtained. The court held, however, that the error in admitting the statements was harmless because the inadmissible portion of defendant's statement was a very small part of the trial, and significant other evidence pointed to his guilt. Accordingly, the district court's ruling was affirmed.

### **VI. Sixth Amendment**

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

- *Right to Jury Trial - Acquitted Conduct*

U.S. v. Benson, 08-1131 (1/12/10)

- ▶ Defendant was convicted of participating in a drug conspiracy. The jury found defendant responsible for less than 5 kilos of powder cocaine, at least 50 grams of crack, and no marijuana. At sentencing, the district court determined by a preponderance of the evidence that defendant was actually responsible for 5.85 kilos of powder, 1 kilo of crack, and 80 pounds of marijuana. Defendant appealed his sentence as being in violation of the Sixth Amendment.

- ★ Holding: Pursuant to the court's *en banc* decision in *White* (See P.V. Issue #23), the court held that a district court may consider acquitted conduct at sentencing so long as it is

proven by a preponderance of the evidence. The court found that the extra drug amounts were supported by the evidence, and accordingly, affirmed defendant's sentence.

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

- *Indictment - Constructive Amendment*

U.S. v. Benson, 08-1131 (1/12/10)

- ▶ Defendant was charged with being involved in a drug conspiracy from "in or about 1999 to at least May 9, 2002." At trial, the government introduced evidence of a seizure of a substantial sum of drug money from defendant in 1998, approximately 11 months prior to the indictment time period. Defendant failed to object to the evidence at trial, but argued on appeal that admission of the evidence constituted a constructive amendment of the indictment.

- ★ Holding: The court held that, where an indictment uses the language "on or about," a constructive amendment does not exist when the conduct proven at trial is "reasonably near" the date alleged in the indictment. The court found that the conspiracy time period alleged in the indictment spanned over three years. Thus, the court reasoned that the currency transaction 11 months prior to the indictment period was "reasonably near" the dates alleged, given the extensive indictment time period. Accordingly, the court found no plain error in the admission of the evidence. Further, the court noted that the currency transaction was admissible as background evidence under FRE 404(b). Thus, defendant's conviction was affirmed.

- *Constructive Amendment/Variance*

U.S. v. Russell, 07-2354 (2/19/10)

- ▶ Defendant was charged with maintaining a drug-related premises, in violation of 18 USC § 856(a)(1). Although the indictment charged only "maintaining" the premises, the district court instructed the jury that it could find guilt if defendant "opened, leased, rented, used, or maintained" a stash house. Defendant did not

object to the instruction and was convicted. Defendant argued on appeal that the jury instruction constituted a constructive amendment of the indictment.

- ★ Holding: First, the court held that the added verbs in the jury instruction did not constitute a constructive amendment of the indictment because the instruction tracked the language of the § 856(a). Thus, the court ruled that the instruction constituted a variance from the indictment. The court found that the variance was not fatal because defendant could not show that the instruction affected his substantial rights. The jury verdict form was limited to "maintaining" a stash house, and the jury foreperson recited only the "maintaining" element when reading the verdict. Given that defendant failed to object to the instruction, the court found no plain error and affirmed defendant's conviction.

#### **VII. Other Constitutional Rulings**

##### **A. Commerce Clause**

- *Commerce Clause*

U.S. v. Bowers, 08-2412 (2/8/10)

- ▶ Defendant was charged with sexual exploitation of a child in the manufacture of child pornography and possession of child pornography. The child porn at issue was made by defendant wholly intrastate, but the film used was manufactured out of state. Defendant filed a motion to dismiss based on the Commerce Clause, and the district court denied the motion. Defendant appealed.

- ★ Holding: Relying on the Supreme Court's decision in *Gonzales v. Raich* (See P.V., Issue #2), and the Sixth Circuit's decision in *Chambers* (See P.V., Issue #7), the court held that child pornography is part of an "economic class of activities" that has a substantial effect on interstate commerce. Accordingly, it can be regulated without a showing of a substantial impact on commerce in any individual case. In so holding, the court overruled its prior decision in *U.S. v. Corp.* Accordingly,

defendant's conviction was affirmed.

## VIII. Defenses

### L. Miscellaneous Defenses

- *Rule 43(a)(2) - Defendant's Presence*  
U.S. v. Thornton, 08-3349 (2/12/10)

▶ Defendant was charged with drug and firearm offenses and he was not permitted to participate in the charge conference with the district court. Instead, defendant's counsel and the prosecutor worked out the jury instructions with the court. Defendant was convicted and he appealed.

★ Holding: Fed. R. Crim. P. 43(a)(2) requires that a defendant be present at "every trial stage," however subsection (b)(3) excludes a "conference or hearing on a question of law." The court noted that all other circuits to address the issue have held that Rule 43 does not require a defendant's presence at a charge conference, but that it is sufficient if defendant's counsel is present. The court determined that it did not have to decide the issue because defendant had not alleged that the conference resulted in any erroneous jury instructions, nor was there any indication that counsel was not capable of fully representing defendant at the conference. Accordingly, defendant's conviction was affirmed.

## IX. Plea & Sentencing Hearings

### B. Sentencing

- *18 USC § 3614 - Restitution - Wilfulness*  
U.S. v. Johnston, 06-6397 (2/11/10)

▶ Defendant was convicted of mail fraud and agreed in his plea agreement to pay 1 million in restitution. The district court sentenced defendant to 25 months imprisonment and ordered the agreed restitution, which was less than the full amount caused by the scheme. Thereafter, defendant failed to pay the restitution and the government moved for resentencing. The district court held a hearing and determined that defendant's failure to pay was wilful. Accordingly, the

court resentenced defendant to 51 months in prison and ordered him to pay the full restitution amount of 6.6 million. Defendant appealed.

★ Holding: Pursuant to § 3614(a), a district court may resentence a defendant where the court finds that defendant "wilfully refused or failed to make sufficient bona fide efforts legal to acquire resources to pay" a restitution obligation. The court held that defendant's actions were clearly wilful where the district court found that defendant submitted a false document at the time of the original sentencing about the pendency of a loan to make repayment, and that defendant intentionally delayed selling his businesses until a time when their value was greatly diminished. Accordingly, the district court's amended sentence was affirmed.

- *Sentencing - Restitution - Victim Rights*  
In re Acker, 10-3159 (2/22/10)

▶ Defendant was convicted of an antitrust violation. After defendant's sentencing, indirect victims of defendant's offense petitioned for mandamus and alleged that they should have been included in the restitution order from the district court. The victims sought to set aside defendant's plea and sentence, and to be afforded the opportunity to participate in the plea negotiations in order to make restitution a part of defendant's plea agreement.

★ Holding: First, the court held that mandamus was the appropriate vehicle for the claim under 18 USC § 3771(d)(3). Second, the court found that the victims had appropriately been able to attend and participate at defendant's arraignment, plea hearing, and sentencing. Third, the court held that the district court did not abuse its discretion in declining to impose the requested restitution. The court ruled that the district court considered all appropriate factors and properly concluded that "the difficulty of determining

the losses claimed would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process.” Accordingly, the writ for mandamus was denied.

## **X. Jury Issues**

### **A. Jury Instructions**

• *Jury Instructions-Codefendant Guilty Pleas*  
U.S. v. Benson, 08-1131 (1/12/10)

► Defendant was charged with participating in a drug conspiracy and evidence was introduced at trial regarding the guilty pleas of testifying codefendants. At the close of the case, the district court provided a jury instruction indicating that the jury could not consider the codefendants’ guilty pleas as any evidence of defendant’s guilt. Defendant did not object to the testimony or the court’s instruction. Defendant was convicted and argued on appeal that the curative instruction at the end of trial was insufficient and untimely.

★ Holding: The court found no error in the district court’s instruction. Although a codefendant’s guilty plea is not admissible at trial as substantive evidence of the defendant’s guilt, the district court properly limited the use of the guilty pleas to issues of credibility. Additionally, the court found no error in the timing of the instruction. Accordingly, defendant’s conviction was affirmed.

• *Jury Instructions - Felon in Possession*  
U.S. v. Morrison, 08-6203 (2/12/10)

► Defendant was charged with being a felon in possession of a firearm. During trial, the district court instructed the jury that possession “does not necessarily mean that the defendant must hold the weapon physically, that is, have actual possession of it.” The court then told the jury that it must find that defendant had “actual possession of the firearm.” Defendant did not object to the jury instructions and he was convicted. Defendant appealed.

★ Holding: Applying the plain error

standard, the court found that reversal was not warranted. Taking the jury instructions given by the district court as a whole, the court found that they conveyed to the jury the necessary elements of the charge, namely that possession requires control of the firearm, that the possession was knowing, and that the firearm was possessed purposefully and voluntarily and not by accident or mistake. Although the instructions given by the district court conflicted to a degree, the instructions as a whole did not constitute plain error.

### **B. Juror Bias/Misconduct**

• *Juror Bias*

U.S. v. Russell, 07-2354 (2/19/10)

► Defendant was charged with drug and firearm offenses. During *voir dire*, a juror indicated that she worked for a tribal prosecutor’s office that was unrelated to defendant’s charge. The juror indicated that she could be fair and weigh the evidence as required by the rules. Defendant moved to strike the juror for cause, the district court denied the strike, and the juror was seated. Defendant was convicted and he appealed.

★ Holding: Where a defendant can show no actual bias on the part of a juror, bias may nonetheless be presumed on a theory of implied bias. A court may only imply bias on the part of a juror in exceptional cases where the juror’s relationship to the litigation or parties is such that “it is highly unlikely that the average person could remain impartial in deliberations,” such as where the juror is an actual employee of the prosecutor’s office, a close relative of one of the participants, or was a witness or involved in the criminal transaction. The court noted that the doctrine of implied bias is on questionable footing legally, but determined that it was inapplicable under the facts of defendant’s case where the juror worked for a prosecutor’s office that was unrelated to defendant’s case. Accordingly, defendant’s conviction was affirmed.

## **XII. Appeal**

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

- *Reasonableness of Sentence*

U.S. v. Camiscione, 08-4294 (1/13/10)

▶ Defendant was convicted of possession of child pornography and at sentencing the district court determined that the applicable guideline range was 27-33 months. Based on the fact that defendant acknowledged having a problem, had no prior record, had not ever abused a child, had made efforts to rehabilitate, and received a good prognosis from his doctor, the district court imposed a downward variance to one day in jail, three years of supervised release, and 180 hours of community service. On appeal, the Sixth Circuit reversed the sentence because the district court had not adequately considered the factors under 18 USC § 3553. On remand, the district court expanded on the record, and imposed the same sentence. The government appealed.

★ Holding: The court again found the district court's sentence to be substantively unreasonable. Specifically, the court held that the district court failed to consider "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to avoid unwarranted sentence disparities." The court noted that, although the district court did consider many appropriate factors, the court failed to address the above-listed factors and also considered an improper sentencing consideration, namely defendant's vulnerability "to what happens to people accused of these kinds of criminal matters in the general population" in prison. Additionally, in distinguishing two prior cases where the court upheld more significant downward variances, the court noted that the district court did not impose house arrest, a lengthy period of supervised release, or a significant fine. Finally, the court indicated that it was

influenced by the fact that, after defendant's conviction, Congress increased the penalty for receipt of child pornography to a mandatory five years. Although this increased penalty did not apply to defendant, the court stated that it had "serious questions about the reasonableness of the district court's sentence," given the large discrepancy. Accordingly, defendant's sentence was again vacated.

- *Reasonableness of Sentence*

U.S. v. Gillis, 07-3754 (1/19/10)

▶ Defendant was convicted of possession of crack with intent to distribute in a school zone. At sentencing, the district court determined that defendant was a career offender. Relying on the then-prevailing law in the Sixth Circuit, the district court indicated that it did not have the discretion to reject Congress' intent behind the career offender provision and impose a lower sentence. Defendant appealed, and the government confessed error on appeal, but argued that the error was harmless because the district court would have imposed the same sentence. Additionally, defendant appealed the district court's denial of his subsequent motion, pursuant to 18 USC § 3582, for reduction of sentence based on the crack amendment.

★ Holding: The court first held that a district may impose a downward variance from the guideline range based on a categorical policy disagreement with the career offender provision. Second, the court held that the error was not harmless. The court found that, although the district court impliedly indicated that it may have imposed the same sentence even if it believed it could categorically depart, the district court imposed a sentence at the bottom end of the guideline range. Thus, the court ruled that the district court may have imposed a lower sentence had it realized its error. Accordingly, defendant's sentence was vacated.

Additionally, the court held that the district court's denial of defendant's § 3582

motion was proper because defendant was a career offender. Accordingly, the denial of the § 3582 motion was affirmed.

### **XIII. Post-Conviction Remedies**

- *Ineffective Assistance of Counsel*

McElrath v. Simpson, 07-5505 (2/12/10)

- ▶ Defendant and a codefendant were charged in state court with murder. The same attorney represented both defendants at trial. Instead of pursuing the potentially stronger defense that the codefendant was the murderer and not defendant, the attorney pursued a defense that neither defendant was involved in the shooting, but instead the murder was committed by a third party who was already inside the house. This defense was largely contradicted by the ballistics and physical evidence. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition claiming that his attorney acted under an actual conflict of interest. The district court denied the petition and defendant appealed.

- ★ Holding: Where a defendant can prove that an attorney “actively represented conflicting interests,” prejudice is presumed to the defendant’s case and reversal of the conviction is warranted. The court found that defendant’s counsel forewent an obvious and stronger defense because he was representing both defendants, and that the joint defense presented was implausible and actually harmful to defendant’s case. Thus, the court held that the attorney acted under an actual conflict of interest in representing both defendants and reversed defendant’s conviction.