

# Precedential Value

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

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## CONTENT AND FORMAT

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

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

## FINDING THE CASES

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

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

## 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

### **I. Specific Offenses**

- *8 USC § 1101 - Aggravated Felony*  
Carachuri-Rosendo v. Holder, 09-60 (6/14/10)
  - ▶ Defendant was a lawful permanent resident of the U.S. and he obtained two Texas misdemeanor drug convictions (marijuana and prescription pills). Although the state could have charged a recidivist enhancement in the

second drug case, it chose not to do so. Defendant subsequently faced deportation proceedings and the government took the position that defendant was an “aggravated felon” under § 1101 (and thus automatically deportable) because his second state drug conviction could have been charged as a felony under federal law, pursuant to 21 USC § 844. The immigration court agreed and the court of appeals affirmed. The Supreme Court granted *certiorari*.

★ Holding: The Court first held that a defendant is an “aggravated felon” if his or her prior state drug conviction was punishable as a felony under federal law. Further, the Court found that, under 21 USC § 844, simple possession of drugs (other than crack) can only be a felony if the defendant has a final prior conviction for drugs. In the case, the Court held that, even though defendant had a prior drug conviction, the second drug conviction would have only been a federal felony if the prosecutor had filed a notice of sentencing enhancement, pursuant to 21 USC § 851. Thus, the Court concluded that the second drug offense was not automatically punishable as a felony. The Court reasoned that, because Texas did not file its recidivist enhancement based on defendant’s prior drug conviction, there had been no judicial finding that a recidivist enhancement applied. Accordingly, the second drug conviction was not punishable as a felony under federal law. Therefore, defendant was not an “aggravated felon” and the case was remanded to the immigration court.

- *18 USC § 924(c) - Firearm Enhancement U.S. v. O’Brien*, 08-1569 (5/24/10)

- ▶ In relation to the attempted robbery of an armored car, defendant was charged with brandishing a firearm during a crime of violence. Defendant pled guilty to the firearm charge and at sentencing the government argued that the firearm was a machine gun,

thus subjecting defendant to a mandatory 30 year consecutive sentence under § 924(c). The district court held that the machine gun enhancement was an element of the offense, as opposed to a sentencing factor. Because the machine gun enhancement was not charged in the indictment to which defendant pled, the court declined to impose the 30 year penalty, instead sentencing defendant to the 7 year sentence for brandishing. The First Circuit affirmed the sentence and the government appealed to the Supreme Court.

★ Holding: The Court held that five factors must be considered in determining whether a statutory provision is an element of the offense or a sentencing factor: (1) language and structure; (2) tradition; (3) risk of unfairness; (4) severity of the sentence; and (5) legislative history. The Court concluded that the factors supported the argument that the machine gun provision is an element of the offense. Accordingly, the Court ruled that the fact that the firearm is a machine gun must be pled in the indictment and proven beyond a reasonable doubt. As such, the district court’s ruling was affirmed.

- *18 USC § 1346 - Honest Services Fraud Skilling v. U.S.*, 08-1394 (6/24/10)

- ▶ Defendant was president and CEO of Enron, and was charged with conspiracy to commit securities and wire fraud, pursuant to § 1346, in relation to his deprivation of Enron and its shareholders of the intangible right to his honest services. Further, defendant was indicted for numerous substantive counts of securities fraud, wire fraud, and making false representations. Defendant was convicted of these counts after trial. On appeal, he argued that § 1346 is unconstitutionally vague. The Fifth Circuit affirmed defendant’s conviction and he appealed to the Supreme Court.

★ Holding: The Court determined that, in order to avoid the constitutional issue, the statute should be construed to reach only

honest services prosecutions that involved bribery or a kickback scheme. The Court held that this interpretation avoided a vagueness problem for § 1346, and was consistent with the historical application of the honest services doctrine in the courts of appeals. As such, the Court held that defendant's conspiracy conviction under § 1346 had to be vacated because the government did not allege or prove that defendant received a bribe or kickback from any third party in depriving Enron of his honest services. On remand, the Court directed that the lower court would have to determine the extent to which the conspiracy conviction relied on the deprivation of honest services argument to support the jury's verdict and whether the error was harmless, and the extent to which the Court's ruling may affect the findings of guilt on the other counts of conviction.

- *18 USC § 2250 - SORNA*  
Carr v. U.S., 08-1301 (6/1/10)

▶ Defendant was convicted of a sex offense and traveled to a different state prior to the enactment of SORNA. After SORNA was enacted, defendant did not register in his new state of residence. Defendant was indicted under § 2250 and argued that SORNA was not applicable to him because his interstate travel occurred before SORNA was enacted. Defendant was convicted and the Seventh Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The Court held that SORNA did not apply to a defendant whose interstate travel occurred prior to SORNA's enactment. As such, defendant's prosecution was improper and his conviction was reversed.

## V. Fifth Amendment

### C. Confessions and Testimonial Rights

- *Miranda*  
Berghuis v. Thompkins, 08-1470 (6/1/10)

▶ Defendant was arrested as a suspect in a

murder. Officers provided defendant a written version of his *Miranda* rights which he refused to sign. The officers then engaged in two hours and forty five minutes of questioning, during which defendant was almost entirely non-communicative. He made eye contact only a few times and generally was unresponsive to the officers' lengthy monologue. Finally, the officers appealed to defendant's religious beliefs, and defendant admitted that he prayed for forgiveness for the murder. Upon defendant's murder prosecution, he moved to suppress the confession. The state court denied the motion, defendant was convicted, and he lost his state court appeal. Defendant filed a federal *habeas* petition, and the district court denied the petition. The Sixth Circuit reversed and found that defendant did not waive his *Miranda* rights. The state appealed to the Supreme Court.

★ Holding: The Court first held that an assertion of rights by a defendant under *Miranda* must be clear and unambiguous. As such, defendant's silence could not constitute an assertion of his right to remain silent. Second, the Court ruled that defendant was read his *Miranda* rights and understood them. Under these circumstances, the Court held that police are not required to forgo questioning unless the defendant invokes his or her rights. The Court found that, when defendant decided after 2 hours and 45 minutes to answer the officers' questions about the murder, defendant effectively waived his *Miranda* rights. The Court specifically ruled that officers are not required to obtain a waiver of *Miranda* before questioning begins as long as the defendant is given his or her rights and understands them. Accordingly, the Sixth Circuit's decision was reversed and defendant's conviction affirmed.

## VII. Other Constitutional Rulings

### D. Eighth Amendment

- *Eighth Amendment*

Graham v. Florida, 08-7412 (5/17/10)

▶ Defendant was a juvenile convicted in state court of armed burglary and given a sentence of probation and a withheld adjudication. Defendant violated his probation, and the state court imposed a life sentence, without the possibility of parole. Defendant lost his state court appeal and the Supreme Court granted *certiorari*.

★ Holding: The Court held that it violated the Eighth Amendment's prohibition on cruel and unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole for a non-capital offense. Accordingly, the case was remanded for resentencing.

### E. Miscellaneous Constitution Rulings

- *Art. I, §8, cl. 18 - Necessary and Proper U.S. v. Graydon*, 08-1224 (5/17/10)

▶ Defendants were inmates of the Federal Bureau of Prisons based on sex offenses, and the government instituted civil commitment proceedings against them, pursuant to 18 USC § 4248, based on determinations that they were sexually dangerous if released. Defendants moved to dismiss the proceedings based, in part, on the claim that § 4248 exceeded Congress' power under the Necessary and Proper Clause. The district court granted defendants' motion and the Fourth Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The Court held that § 4248 did not exceed the Legislature's power based on five considerations: (1) the breadth of the Necessary and Proper Clause; (2) the long history of federal involvement in the area in question; (3) the sound legislative policy for the statute and the federal interest in protecting society from those in federal custody; (4) the statute's accommodation of state interests; and (5) the statute's narrow scope. Accordingly,

the district court's ruling was reversed.

- *Second Amendment*

McDonald v. Chicago, 08-1521 (6/28/10)

▶ Petitioners were gun owners in Chicago who challenged a ban on handguns in the city limits based on the Second Amendment right to bear arms. The district court held that the Second Amendment did not apply to the states and the Seventh Circuit affirmed. Petitioners appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to bear arms that was recognized by the Court's decision in *Heller* (see P.V. Issue #20). The Court based its decision on the principal that any provision of the Bill of Rights that is "fundamental from an American perspective applies equally to the Federal Government and the States. Accordingly, the decisions of the lower courts were reversed.

## IX. Plea & Sentencing Hearings

### B. Sentencing

- *Sentencing - Restitution*

Dolan v. U.S., 09-367 (6/14/10)

▶ Defendant was convicted of assault resulting in serious bodily injury. At the time of sentencing, the amount of restitution to the victim was not yet determined so the district court noted that restitution was mandatory under 18 USC § 3664 and that it would be ordered. The court delayed determining the proper amount until the probation department could submit the final computation. Although the amount was submitted to the district court within 90 days, the court did not hold a hearing on the matter for six months. At that time, the court ordered \$105,000 in restitution. The court of appeals affirmed the restitution order, and defendant appealed to the Supreme Court.

★ Holding: Pursuant to § 3664(d)(5), the amount of restitution must be ordered within

90 days of sentencing. The Court held that the failure to comply with the 90 day rule, at least where the district court ruled at sentencing that restitution would be ordered, did not deprive the district court of the authority to set the restitution amount. Accordingly, the restitution award was affirmed.

## **X. Jury Issues**

### **A. Jury Instructions**

- *Jury Instructions - Special Interrogatories*  
Black v. U.S., 08-876 (6/24/10)

- ▶ Defendants were charged with three counts of mail fraud. The counts alleged two theories of fraud: (1) money-or-property fraud; and (2) honest-services fraud. At trial, the defendants objected to jury instructions on the honest-services fraud, and claimed that such a fraud could not properly form the basis for a conviction. In response, the government requested special interrogatories for the jury to respond as to whether it found defendant guilty of the money-or-property fraud, or the honest-services fraud portion of the mail fraud counts. Defendants objected to the interrogatories, and the district court ended up instructing the jury on the honest-services fraud and providing the jury general verdict forms. Defendants were convicted of the mail fraud counts and they appealed. The Seventh Circuit held that defendants waived the objection to the honest-services fraud instruction by failing to agree to the special interrogatories. The Supreme Court granted *certiorari*.

- ★ Holding: First, the Court held that, pursuant to its decision in *Skilling* (*see supra*), the honest-services fraud instruction and conviction were improper. Second, the Court ruled that defendants did not waive their objection to the jury instruction by objecting to the special interrogatories. The Court found that special interrogatories are not authorized anywhere in the Federal Rules of Criminal Procedure. While the Court stopped short of ruling that special interrogatories are never

appropriate, the Court held that defendants could not be deemed to have waived their objection to a jury instruction based on their failure to agree to such interrogatories where they are not warranted under the rules. Relying on Fed. R. Crim. P. 57(b), the Court held that a defendant may not be sanctioned or disadvantaged by his or her non-compliance with any requirement that is not in the federal law or rules unless the defendant is given actual notice of the requirement before the noncompliance. Accordingly, the Seventh Circuit's decision, and defendants' convictions for mail fraud, were reversed.

### **C. Voir Dire - Fair and Impartial Jury**

- *Fair and Impartial Jury-Pretrial Publicity*  
Skilling v. U.S., 08-1394 (6/24/10)

- ▶ Defendant was president and CEO of Enron and was charged with various fraud related offenses after its collapse. During the jury selection process, defendant moved to change the trial location due to pretrial publicity and argued juror bias during the jury selection process. The district court utilized a process whereby jurors were sent lengthy and detailed questionnaires probing their bias against the Enron scandal. Further, the court individually questioned jurors at side bar regarding their opinions. Defendant was convicted after trial and he appealed. The Fifth Circuit affirmed regarding the fair trial issue and the Supreme Court granted *certiorari*.

- ★ Holding: First, the Court held that the level of pretrial publicity did not result in a presumption of juror prejudice. Compared with prior cases where the Court found such a presumption, the Court held that the pretrial publicity in defendant's case did not rise to the level of media frenzy found in other cases, nor was the subject matter involved so compelling that prejudice must be presumed. Second, the Court held that defendant could not establish actual prejudice. The district court utilized a thorough and fair process of selecting jurors

and seeking to root out individual biases. Defendant could not show that any of the jurors were unable to set aside any concerns they had about Enron and be fair and impartial. Accordingly, the Court affirmed the lower courts' rulings.

## **XII. Appeal**

### **B. Standard of Review**

- *Standard of Review - Plain Error*

U.S. v. Marcus, 08-1341 (5/24/10)

► Defendant was charged with engaging in unlawful forced labor and sex trafficking, pursuant to 18 USC §§ 1589 and 1591(a). The time period charged in the indictment included conduct that occurred before the enactment of statute. Defendant did not assert any *ex post facto* claim in the district court, but instead raised the argument for the first time on appeal. The Second Circuit found plain error because it was possible that the jury convicted defendant based solely on conduct that occurred before the statute was enacted. The government appealed and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the Second Circuit incorrectly applied the plain error standard of Fed. R. Crim. P. 52(b). Under Rule 52, a court may correct an error not raised in the district court when the appellant shows the following: (1) there is an error; (2) the error is “clear or obvious;” (3) the error affected “substantial rights,” which means that it likely affected the outcome in the district court; and (4) the error seriously affected the fairness or integrity of the judicial proceedings. The Court held that the Second Circuit erred in its application of the third and fourth factors. Under the standard applied by the Second Circuit, a case would be reversed for plain error if there was “any possibility, no matter how unlikely” that the jury verdict was affected by the error. The Court emphasized that the proper inquiry is whether there was a “reasonable probability that the error affected

the outcome of the trial.” Further, the Court held that the *ex post facto* argument raised was not a structural error requiring automatic reversal. Accordingly, the case was remanded for a determination of plain error applying the appropriate standard.

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

- *Reasonableness - Crack Amendment*

Dillon v. U.S., 09-6338 (6/17/10)

► Defendant was convicted of participating in a crack and powder cocaine conspiracy, and using a firearm in relation to drug trafficking. After defendant's sentencing, the crack amendment to the sentencing guidelines was enacted, and defendant moved pursuant to 18 USC § 3582 for a reduced sentence. Defendant argued in the motion that, after *Booker*, the district court could choose to reduce defendant's sentence by more than the two-levels authorized by the guideline amendment. The district court disagreed and awarded defendant the two-level reduction. Defendant appealed and the Third Circuit affirmed. The Supreme Court granted *certiorari*.

★ Holding: The Court held that *Booker* was not applicable in the context of a § 3582 motion to reduce a defendant's sentence based on the crack amendment. Accordingly, defendant's sentence was affirmed.

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

- *18 USC § 3624(b) - Good Time Credit*

Barber v. Thomas, 09-5201 (6/7/10)

► Petitioners were federal inmates who challenged the Federal Bureau of Prisons (BOP) policies for awarding good time credit. Defendants argued that the good time award should be based on the sentence imposed by the district court, not the time actually served by the inmate (considering the reduction each year for good time credit). The district courts agreed that the good time was correctly computed by the BOP, and the Ninth Circuit affirmed. The Supreme Court granted

*certiorari.*

★ Holding: Pursuant to § 3624(b), the BOP may award good time credit to an inmate based on good behavior in prison. The time awarded may be up to 54 days per year, and the time is to be awarded at the end of each year of good behavior. Further, the statute requires that the last year of the sentence be prorated and the good time credit be awarded during the last six weeks of the sentence. Based on the statutory language, the Court concluded that the BOP was correctly awarding good time at the end of each year of a defendant's sentence, and that the award was properly based on the time the defendant actually served, as opposed to the time imposed by the district court. Thus, the Ninth Circuit's ruling was affirmed.

## **SIXTH CIRCUIT DECISIONS**

### **I. Specific Offenses**

• *18 USC § 2251(a) - Production*

U.S. v. Humphrey, 08-5850 (6/11/10)

► Defendant was charged with production of child porn for filming sex acts with a 15 year old girl. Prior to trial, the government moved *in limine* to prevent defendant from introducing a mistake of age defense. The district court granted the motion, defendant was convicted, and he appealed.

★ Holding: Answering an open question in the Sixth Circuit, the court held that mistake of age is not a defense to a production of child porn charge under § 2251(a). Thus, the defendant's knowledge of the victim's age is neither an element of the offense, nor an affirmative defense to the charge. Further, the court ruled that the First Amendment is not violated by such a holding. Accordingly, defendant's conviction was affirmed.

• *26 USC § 5861(d) - Unregistered Firearms*

U.S. v. Springer, 08-6381 (6/29/10)

► Defendant was a soldier in the Army who brought home a live rocket and left it in his

garage for over four years. He was subsequently prosecuted for possession of an unregistered firearm and argued at trial that he could not be convicted because he possessed the rocket as an agent of the Army. Defendant was convicted and he appealed.

★ Holding: Deciding an issue of first impression in the Sixth Circuit, the court held that possession of a firearm by the U.S. government is not a crime under § 5861(d). However, the court held that defendant's possession of the rocket was not in the course of his agency as a soldier for the Army. Defendant admitted during his testimony at trial that he knew he was not authorized to bring the rocket home and that his failure to return it was the "ultimate procrastination on his part." Accordingly, defendant did not qualify for the exception under § 5861(d) for possession by the federal government, and his conviction was affirmed.

### **II. Sentencing Guidelines**

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

• *2G2.2(b)(6) - Computer - Double Counting*

U.S. v. Lewis, 09-1162 (5/19/10)

► Defendant was convicted of transporting a visual depiction of a minor engaged in sexually explicit conduct, pursuant to 18 USC § 2252(a)(1). At sentencing, the district court applied a two-level enhancement under USSG § 2G2.2(b)(6) because defendant used a computer. Defendant appealed and argued that the two-level enhancement constituted double counting.

★ Holding: The court held that the two-level enhancement for using a computer was not double counting. Even though the use of a computer was one means through which § 2252(a)(1) could be violated, the statute actually prohibited transporting an image through any means. Thus, because the elements of the offense of § 2252 did not necessarily involve use of a computer, the two-level enhancement did not constitute

impermissible double counting.

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

#### **• 4A1.1(c) - Criminal History**

U.S. v. Jimenez, 08-6435 (5/20/10)

▶ Defendant was convicted of illegally reentering the country after deportation. At sentencing, defendant objected to the inclusion of two criminal history points, pursuant to U.S.S.G. § 4A1.1(c), based on her two prior convictions for petty theft and spousal battery. The basis for the objection was that the court records were no longer available for the convictions, and the district court relied on certified records from the California Department of Justice to prove the existence of the convictions. Defendant argued that consideration of the records was precluded by the Supreme Court's decisions in *Taylor* and *Shepard*. The district court denied defendant's objections and she appealed.

★ Holding: The court held that the *Taylor/Shepard* categorical approach is inapplicable to a determination of the "fact" of a prior conviction, as opposed to the "nature" of the conviction. The only restraint on a district court's consideration of evidence supporting the "fact" of a prior conviction is a defendant's due process rights, which require that the evidence not be materially false or unreliable, and that the defendant be afforded the opportunity to rebut the evidence. Defendant was unable to show that the certified records were false or unreliable, or that she did not have adequate opportunity to rebut them. Accordingly, the court found that a preponderance of the evidence supported the increase in the criminal history score and defendant's sentence was affirmed.

#### **• 4A1.2(e) - Age of Prior Convictions**

U.S. v. Jimenez, 08-6435 (5/20/10)

▶ Defendant was convicted of illegally reentering the country in March 2008 after deportation. At sentencing, the district court

determined that defendant had actually reentered the country and remained continuously since December 1997. This determination was based on the fact that defendant was arrested in the U.S. in December 1997 and had several contacts with law enforcement over the next ten years in the U.S. Because defendant was continuously in the country since 1997, the court used 1997 as the starting date of the offense in order to determine the countability of prior convictions under U.S.S.G. § 4A1.2(e). As such, two of defendant's convictions from 1994 and 1995 were countable. Defendant appealed.

★ Holding: The district court held that, although it was possible that defendant had returned to Mexico in between her contacts with law enforcement over the ten year period, no evidence in the record supported this suggestion. Accordingly, the court found that defendant's argument that she had returned to Mexico was mere speculation. Because the findings of the district court regarding defendant's continuing presence in the U.S. were not "materially contested," the court held that the preponderance of the evidence supported the district court's ruling and defendant's sentence was affirmed.

## **IV. Fourth Amendment**

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

#### **• Vehicle Stops - Probable Cause**

U.S. v. Hughes, 08-6008 (5/27/10)

▶ An officer observed defendant stop at an intersection in a deserted, high crime area and sit in his car for several minutes. The officer decided to execute a stop of the car based on the suspicious activity and to make sure the driver was not lost. After stopping the vehicle, the officer found drugs and a firearm during a consent search. In the subsequent prosecution, defendant moved to suppress the firearm based on the invalidity of the stop. In addition to the reasons articulated by the officer for the stop, the government also argued that the stop was

justified by three possible traffic violations. The district court granted the motion and held that the officer did not intend to stop the vehicle based on a traffic violation, and thus it could not be used as a justification for the stop. The government appealed.

★ Holding: The court held that the permissibility of a traffic stop turns not on the officer's subjective intent in making the stop, but instead is based on the objective facts of the stop. In this regard, the court held that, in order to stop a vehicle based on a completed traffic offense, an officer must be objectively aware of the facts constituting the traffic offense, and know or reasonably believe that those facts actually give rise to probable cause that the specific traffic offense was committed. In the case, the court first held that the district court erred in relying on the subjective intention of the officer. Second, the court held that one of the three possible traffic violations would not be considered by the court on appeal because the government first raised the issue on appeal. Third, the court held that the case needed to be remanded in order to determine (1) whether the officer had an objective belief that defendant had committed acts in violation of the traffic laws, and (2) whether the officer had probable cause to believe that those acts violated a specific traffic law. Accordingly, the district court's decision was reversed and the case remanded.

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

##### *• Consent Searches*

U.S. v. Hinjosa, 08-1393 (6/9/10)

► Officers obtained information that defendant sent images of child pornography to undercover agents in Canada. In investigating the case, the officers discovered what they believed was an open arrest warrant for defendant. Accordingly, they went to defendant's home and were admitted by his wife. Agents followed defendant's wife to his bedroom, saw incriminating evidence, and

questioned defendant. The arrest warrant turned out to be for someone other than defendant. In his subsequent prosecution for child porn, defendant moved to suppress the evidence obtained from him and the residence based on lack of consent to search. The district court denied the motion and defendant appealed.

★ Holding: The court held that the officers' initial entry into the residence was supported by the wife's consent. Further, the court found that the wife either consented or did not object to the officers' entry into the bedroom area where defendant was located. The officers testified that they requested consent from the wife to follow her and that she did not object. The wife testified that she did not remember the officers asking for consent. The court held that the district court did not clearly err in determining that consent was given. Additionally, because the wife consented to the officers accompanying her to the bedroom, their observations of evidence in the home was justified by the plain view exception. Accordingly, the district court's ruling was affirmed.

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

##### *• Search Warrants - Probable Cause*

U.S. v. Lazar, 08-5653 (5/4/10)

► The government obtained a warrant to search defendant's medical offices for health care fraud. The basis for the search of the offices was the case agent's two year investigation, visits to defendant's offices, photographs of each location, defendant's billing data and hospital records, and interviews of defendant's employees, former medical partners and insurance company representatives. The district court held that the warrant was not supported by probable cause to believe that defendant's medical records would be found in his medical offices. The government appealed.

★ Holding: The court held that, where a

defendant is a physician, probable cause exists that the defendant's medical records will be found at his or her medical office. In the case, the court found sufficient information in the warrant to establish the location of defendant's medical offices and that his medical records would be located therein. Accordingly, the district court's ruling in this regard was reversed.

• *Search Warrants - Probable Cause*  
U.S. v. Thomas, 08-5239 (5/13/10)

► Officers obtained a warrant to search defendant's home based on the following: (1) an informant's eight month old tip that defendant had a marijuana grow operation at his residence, and a specific tip that defendant had a reputation in the community as a marijuana grower; (2) information establishing the past reliability of the informant; (3) police corroboration that defendant lived at the residence; and (4) recent utility records that established defendant's electric usage was much more than a comparably sized property in the same area. Upon defendant's subsequent prosecution, he moved to suppress the evidence and the district court denied the motion. Defendant argued on appeal that the warrant was not supported by probable cause, and that the informant's tip was stale.

★ Holding: Although the court found that the justification for the warrant was "relatively thin," the totality of the circumstances supported the probable cause finding. The court ruled that the tip, informant's reliability, and police corroboration supported the probable cause finding. Further, the court held that the tip was not stale because it was "sufficiently refreshed" by the utility records from defendant's residence for the six months leading up to the search. Finally, the court noted that the warrant would have been saved by the good faith exception even if probable cause were lacking. Accordingly, the district court's ruling was affirmed.

• *Search Warrants - Probable Cause*  
U.S. v. Hinojosa, 08-1393 (6/9/10)

► Officers obtained information that defendant sent images of child pornography to undercover agents in Canada. This intelligence included information that images were transferred using an IP address that was registered to defendant at his home. The officers went to defendant's home and were admitted by his wife. They followed defendant's wife to his bedroom, saw incriminating evidence, and questioned defendant. As a result, the officers obtained a search warrant for the residence and found additional evidence of child porn. Upon his prosecution, defendant moved to suppress the evidence seized in the execution of the warrant. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that the evidence obtained by officers in the consent search of the home and from their interview of defendant were properly admitted and contained in the search warrant affidavit. (*See supra*). The court further held that, even if such evidence were not considered, the warrant was nonetheless supported by probable cause. The transfer of the images combined with the IP address and the confirmation of defendant's residence were sufficient evidence to support the warrant. Accordingly, the district court's ruling was affirmed.

• *Search Warrants - Particularity*  
U.S. v. Lazar, 08-5653 (5/4/10)

► The government obtained a warrant to search defendant's medical offices for health care fraud. The search warrant sought patient files and other records generally. The warrant referred to attached patient lists, but the government was unable to establish at the hearing the exact patient lists that were attached to the warrant, and the district court denied the government the additional opportunity to locate and present the lists. The

district court found that the warrant was not sufficiently particular and suppressed the evidence seized. The government appealed.

★ Holding: First, the court held that the incorporation clause in the warrant was sufficient. The clause referred to the “below listed patients,” and the “following patients.” The court ruled that incorporation need not be by express reference, and that this language was sufficient to incorporate attached patient lists into the warrant.

Second, the court held that the district court was correct in ordering suppression of any patient records that were not included in the patient lists. However, the court found that the district court erred in failing to permit the government sufficient opportunity to locate the patient lists that were presented to the issuing magistrate. Accordingly, remand was appropriate.

Third, the court held that suppression of the general, non-patient related records was proper. In this regard, the government’s failure to limit the terms of the search by relevant dates, patients, transactions, or other descriptors rendered this portion of the warrant overbroad. Accordingly, any non-patient records were properly suppressed.

## V. Fifth Amendment

### C. Confessions and Testimonial Rights

• *Right to Testify - Advisement of Rights*  
U.S. v. Yono, 09-1548 (5/28/10)

► Defendant was charged with fraud related offenses and chose to testify in his own defense at trial. Defendant was convicted and he argued on appeal that the district court erred in failing to establish that he voluntarily waived his right not to testify.

★ Holding: Deciding an issue of first impression in the Sixth Circuit, the court held that a district court is not required to assess the voluntariness of a defendant’s decision to testify at trial when he or she chooses to do so. The court found that such a requirement would

actually infringe on a defendant’s constitutional right to testify. Thus, the court ruled that, not only was such a colloquy not required, it was not advisable. Accordingly, defendant’s conviction was affirmed.

• *Miranda - Custody*

U.S. v. Hinojosa, 08-1393 (6/9/10)

► Officers obtained information that defendant sent images of child pornography to undercover agents in Canada. The officers went to defendant’s home and were admitted by his wife. Agents followed defendant’s wife to his bedroom and questioned him briefly. Defendant partially confessed and was taken into custody. Defendant then made additional incriminating statements after being read his *Miranda* rights. In his subsequent prosecution, defendant moved to suppress all of his statements and the district court denied the motion. Defendant appealed.

★ Holding: Regarding the pre-*Miranda* statements, the court held that defendant was not in custody at the time such that *Miranda* warnings were required. In assessing whether a suspect is in custody, the court considers (1) the location of the interview, (2) the length and manner of questioning, (3) any restraint on the individual’s freedom, and (4) whether the individual was told that he or she did not need to answer questions. First, the court held that a defendant’s home is generally considered to be non-coercive. Second, the court found that the length of time was only a few questions. Third, the court found no restraint on defendant’s liberty such as the use of cuffs, weapons, or threats. Finally, the court found that defendant was not told that he did not have to answer questions, but that this factor was not dispositive. As such, defendant was not in custody and *Miranda* was not required.

Regarding the post-*Miranda* statements, the court found that defendant was lawfully arrested at the time and that *Miranda* warnings were properly given. Further, the court held

that the arrest was supported by probable cause, as established by the investigative lead, the evidence observed at defendant's home, and defendant's pre-arrest statements. Accordingly, the district court's ruling was affirmed.

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

- *Due Process - Jail Attire for Trial*

U.S. v. Humphrey, 08-5850 (6/11/10)

► Defendant was charged with production of child porn and move for a continuance of the trial in order to attain clothing to wear instead of his jail attire. Defendant later acquiesced in starting the trial while the court tried to locate clothing for him, and then refused to wear the clothes that were provided. Defendant was convicted and he appealed.

★ Holding: The court held that defendant's rights were not violated because he acquiesced starting the trial and the provision of a curative instruction to the jury. Further, defendant's claim was diminished by his failure to wear the clothes that were provided. Accordingly, the court found that defendant was not "compelled" to stand trial in jail garb and his conviction was affirmed.

### **VI.. Sixth Amendment**

#### **B. Confrontation Clause**

- *Confrontation Clause*

Miller v. Stovall, 08-2267 (6/22/10)

► Defendant was charged with the murder of her husband. At trial, the state introduced defendant's boyfriend's suicide note which indicated that the boyfriend killed the husband and that defendant helped. Defendant objected to the introduction of the suicide note based on the Confrontation Clause. The trial court admitted the evidence, defendant was convicted, and she lost her state court appeal. Defendant filed a federal *habeas* petition and the district court granted the petition. The state appealed.

★ Holding: The court held that introduction

of the suicide note violated the Confrontation Clause. Specifically, the court determined that the note was testimonial. The court reached this conclusion based on its determination that a statement is testimonial when a "reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." The court found that the boyfriend, an ex-police officer, would certainly expect that his suicide note would be used against defendant, particularly where it was the sole evidence the boyfriend left that he killed her husband and that she helped. Thus, the court found that, because the statement was testimonial, its admission violated the Confrontation Clause. The court further ruled that the state waived harmless error analysis by failing to raise it in the district court. Accordingly, the district court's ruling granting defendant's petition was affirmed.

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

- *Right to Appointed Counsel*

U.S. v. Aguirre, 08-5477 (5/17/10)

► Defendant was charged with drug trafficking. At trial, defendant cross examined the investigating officer in a manner suggesting that the large amount of cash found at defendant's residence was obtained through some lawful means. In response, the government sought to introduce defendant's financial affidavit, submitted to obtain appointed counsel, wherein defendant attested to having no job. Defendant did not object. The district court admitted the document, defendant was convicted, and he appealed.

★ Holding: The court held that admission of the financial affidavit was violative of defendant's Sixth Amendment right to counsel. The court found that, if such evidence were permitted, a defendant would be forced to choose between the Fifth Amendment right to remain silent and the Sixth Amendment right to counsel. Accordingly, the court held that

truthful information disclosed in a financial affidavit to obtain counsel cannot be used against a defendant as evidence of guilt at trial. Because defense counsel failed to object, however, the court applied plain error and found that, given the other evidence of defendant's guilt, reversal was not required.

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

##### *• Indictment - Duplicity*

U.S. v. Anderson, 08-6152 (5/19/10)

► Defendant owned a medical facility and was charged with medicaid fraud, pursuant to 42 USC § 1320a-7b(a)(3). The indictment charged that she received medicaid payments over a period of time during which she was not in compliance with a requirement that her facility have a medical director on staff. At the close of the government's case in chief, defendant moved to dismiss the indictment and claimed that it was duplicitous because it charged multiple offenses in one count. Specifically, defendant alleged that each monthly submission for medicaid benefits should be charged as a separate offense. The district court disagreed and held that the offense was continuing. Defendant was convicted and she appealed.

★ Holding: First, the court held that ordinarily a motion to dismiss based on duplicity must be filed by the motion deadline in the case. However, where the error "concerns not a technicality (two offenses charged in one count), but also raises issues involving substantive rights (right to a unanimous jury verdict)," it may be raised during or after trial. The court found that defendant's claim arguably related to whether the jury was unanimous regarding her intent to defraud in relation to each monthly statement, and thus, the claim could be raised during trial.

The court found, however, that the indictment was not duplicitous. The indictment did not claim that defendant's monthly statements were false, but that

defendant was not entitled to any payments because she had no medical director during the time period. The evidence at trial regarding defendant's submission of monthly reports was merely proof of her intent to defraud medicare during the time period she was concealing the absence of a medical director. Accordingly, the offense was continuing, and the district court's ruling was affirmed.

#### **VIII. Defenses**

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

##### *• 12(b)(3)(B) - Failure to State of Offense*

U.S. v. Anderson, 08-6152 (5/19/10)

► Defendant owned a medical facility and was charged with medicaid fraud, pursuant to 42 USC § 1320a-7b(a)(3). After the guilty verdict, defendant filed a motion to dismiss the indictment for failure to state an offense. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that a party may raise an allegation that an indictment does not state an offense at any time, including on appeal. Second, the court held that an indictment is sufficient if it contains the elements of the offense and fairly informs the defendant of the charge. The court found that the indictment tracked the statutory language and thus covered all elements of the offense: (1) defendant had knowledge of an event affecting her right to receive medicaid payments; (2) she concealed the event; and (3) she acted knowingly and willfully with the intent to obtain payments by fraud. Further, the indictment fairly informed defendant of the charge and the relevant time period such that she could plead double jeopardy in a future prosecution. Further, the court noted that the statute under which defendant was charged was not so "technical or obscure" that an individual in the long-term health business could not understand what was prohibited. Accordingly, the district court's ruling was affirmed.

## L. Miscellaneous Defenses

- *Fed. R. Crim. P. 33 - New Trial*

U.S. v. Munoz, 09-5357 (5/18/10)

▶ Defendant was convicted of drug trafficking after jury trial. Defendant's trial counsel moved to withdraw about two months later, and his new counsel filed a motion for new trial six months after the jury verdict based on ineffective assistance of counsel. The district court granted the motion based on counsel's failure to investigate character witnesses, move for a change of venue, cross examine adequately, and properly impeach a witness. The government appealed.

★ Holding: The court first found that the belated filing of the motion for new trial was permissible based on excusable neglect. In determining whether the seven day requirement for a new trial motion under Rule 33 may be extended based on excusable neglect, the court balances five factors: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its impact on the proceedings; (3) the reason for the delay; (4) whether the delay was in the control of the moving party; and (5) whether the moving party acted in good faith. In the case, the court found no prejudice to the government. Further, the delay was not the fault of defendant himself, but instead his first attorney's failure to file and the second attorney's necessary delay in getting up to speed on the case. Additionally, the court found no evidence of bad faith on defendant's part. Accordingly, the court ruled that the delay in filing the new trial motion was the result of excusable.

Regarding the merits of the ineffectiveness claim, the court first noted that neither party briefed or argued that a new trial could be appropriate based on an "ineffective assistance light," i.e., where the attorney's performance did not fall below the *Strickland* standard, but was nonetheless substandard. Thus, the court declined to consider whether such could be the basis for a new trial motion.

Instead, the court analyzed the case under *Strickland* and held that defendant's counsel's performance was not ineffective. The court noted that (1) counsel had investigated and presented one character witness who was very effective, (2) the failure to file the venue motion was within counsel's sound discretion, (3) counsel did cross examine sufficiently, and (4) while further obvious impeachment of a witness was supported by the facts, counsel did an adequate job. Accordingly, the district court's new trial order was reversed.

- *18 USC § 3142 - Right to Bond*

U.S. v. Stone, 10-1618 (6/22/10)

▶ Defendants were charged with seditious conspiracy, attempt to use weapons of mass destruction, and using firearms in relation to crimes of violence. The charges related to their plot to start a revolution to overthrow the U.S. government. A magistrate judge ordered defendants detained, but the district court conducted *de novo* review and released them on bond. The government appealed.

★ Holding: The court outlined the requirements for release or detention under the Bail Reform Act. First, the court held that a defendant may be detained pending trial only if the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." A finding of dangerousness must be supported by clear and convincing evidence. Thus, the court found that the "default position of the law" is for release. However, certain particularly dangerous defendants face a presumption of detention if probable cause is established to demonstrate one of the criteria set forth in § 3142(e)(3). This presumption creates only a "burden of production" on the defendant to come forward with "some evidence" regarding lack of danger to the community and risk of flight. The defendant's burden in this regard is "not heavy," and the

government always bears the burden of persuasion.

In every case, the district court must also analyze the factors listed in § 3142(g) which include the nature and circumstances of the offense, the weight of the evidence regarding defendant's dangerousness, the defendant's history and characteristics, and the nature and seriousness of the danger to any person or the community. In defendants' cases, the court held that the nature of the offenses and the specific threats to public safety presented in each defendant's case warranted detention. Accordingly, the district court's ruling was reversed and defendants were ordered detained.

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

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

#### *• Plea Agreements - Appeal Waivers*

U.S. v. Thomas, 08-5239 (5/13/10)

► Defendant was convicted of manufacturing marijuana based on a plea agreement. In the agreement, defendant agreed that the statutory mandatory minimum sentence was five years and that the recommended guideline range was the same. Further, defendant waived his right to appeal any sentence within or below the "anticipated guideline range." At sentencing, the district court imposed a sentence of five years, and denied defendant's request for the safety valve. Defendant appealed.

★ Holding: The court held that defendant's appeal was precluded by the appeal waiver provision of the plea agreement. Because defendant's recommended guideline range was tied to the statutory mandatory minimum five years in the plea agreement, the appeal waiver language prohibited defendant from appealing his sentence which was within the "anticipated guideline range." Accordingly, defendant's appeal was dismissed.

#### *• Plea Agreements - Integration Clauses*

U.S. v. Quesada, 08-2183 (6/15/10)

► Defendant was charged with drug trafficking, entered into a proffer agreement with the government, and signed a proffer letter which prohibited the use of defendant's statements against him at trial or sentencing. Defendant's cooperation fell apart and the case was scheduled for trial. Defendant subsequently entered into a plea agreement wherein the government made no promise as to the use of defendant's statements. Further, the plea agreement contained an integration clause stating that there were no other agreements between the parties other than those contained in the plea agreement. At sentencing, defendant objected to enhancements for possessing a weapon, leader/organizer, and using a minor. As a result, the government used defendant's proffer statements against him at sentencing to prove the enhancements. Defendant appealed.

★ Holding: The court held that the use of the integration clause in the plea agreement superceded the proffer letter and any protection afforded therein. As such, defendant had no promises from the government at sentencing as to the use of his proffer statements, and the government was free to present them as evidence to support sentencing enhancements. Accordingly, defendant's sentence was affirmed.

## **X. Jury Issues**

### **A. Jury Instructions**

*• Jury Instructions-Outside Presence of Counsel*  
Phillips v. Bradshaw, 06-4418 (6/1/10)

► Defendant was charged in state court with murder. During deliberations, the jury requested to hear the definition of aggravated murder again. The trial court provided a copy of the written instruction to the jury without notifying or consulting with counsel or defendant. Defendant was convicted, lost his state court appeal, and filed a federal *habeas*

petition, which the district court denied. Defendant appealed.

★ Holding: Because defendant failed to raise the issue in state court, the court applied “cause and prejudice review.” The court held that providing the jury with a copy of a jury instruction that had already been given was not a critical stage of the trial requiring counsel or a defendant’s presence. Accordingly, defendant’s conviction was affirmed.

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

### • *Juror Bias*

Phillips v. Bradshaw, 06-4418 (6/1/10)

▶ Defendant was charged with murder and during the trial, several members of the jury came into contact with a member of the grand jury who was also in the courthouse, and the grand jury made negative comments about defendant’s case. The jurors immediately notified the trial judge who conducted a *Remmer* hearing. The jurors explained the brief comments that were made and indicated that they could set the comments aside and remain impartial. The court found no juror bias, the trial proceeded, and defendant was convicted. 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 four considerations are relevant in reviewing a juror bias claim: (1) the trial court must hold a hearing when defendant alleges unauthorized contact with a juror; (2) no presumption of prejudice arises from such contact; (3) the defendant must prove actual bias; and (4) juror testimony at the *Remmer* hearing is “not inherently suspect.” The court found that the *Remmer* hearing was properly conducted and that defendant had shown no actual bias or prejudice. Accordingly, defendant’s conviction was affirmed.

## **XII. Appeal**

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

#### • *Reasonableness of Sentence*

U.S. v. Jimenez, 08-6435 (5/20/10)

▶ Defendant was convicted of illegally reentering the country after being deported and at sentencing she argued for a sentence below the guideline range. The district court denied the request and sentenced defendant to the bottom end of the guideline range. The court stated that the low end sentence was the “compassionate” thing to do, and that the prison sentence would “afford her medical and mental health treatment.” Defendant appealed and argued that the district court’s sentencing determination was at odds with 18 U.S.C. § 3582(a) which admonishes that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”

★ Holding: Noting that there is a circuit split on the issue, the court held that § 3582(a) applies only to a district court’s determination of whether to impose a prison term or a non-incarceration sentence, but not to the question of the appropriate length of the prison sentence. Thus, the court ruled that a district court may consider the goal of rehabilitation with respect to how long of a prison term to impose, but not relating to the issue of whether to impose a jail term or a non-incarceration sentence. Accordingly, the district court’s ruling was affirmed.

#### • *Reasonableness of Sentence*

U.S. v. Christman, 08-4474 (6/22/10)

▶ Defendant was convicted of possession of child pornography. At his first sentencing, the district court imposed a sentence of 57 months, the bottom end of the guideline range. A few weeks after sentencing, the court convened a hearing and admitted error in the first sentencing proceedings by its consideration of inaccurate information that was not disclosed to the defense. Based on the district court’s professed error, the Sixth Circuit remanded for

resentencing. (*See P.V., Issue #17*). At the second sentencing, the district court decided to impose a downward variance to 5 days in jail, based on defendant's medical condition, his care for his elderly mother, his remorse, his compliance with bond conditions, and the fact that he was a musician and composer. The government appealed.

★ Holding: The court held that the sentence was substantively unreasonable. The court ruled that, although the standard of review is the same no matter the size of the variance, the greater the variance the more compelling the evidence must be. The court found that the evidence was not sufficiently compelling to justify the amended sentence. The court found the following: (1) Defendant's medical condition was presented to the district court at the first sentencing and was found not to be compelling; (2) defendant's mother could go into a nursing home, therefore adequate alternative care was available; and (3) defendant's work as a musician and composer was not extraordinary. Further, the court held that the district court completely failed to consider the 18 USC § 3553 factors of federal deterrence and potential disparity, and the district court did not consider the impact on the victims. Thus, the court vacated the sentence and remanded the case for resentencing before a different district judge.

• *Reasonableness - Consecutive Sentences*  
U.S. v. Harmon, 09-5006 (6/2/10)

▶ Defendant was convicted of being a felon in possession of a firearm. As a result, defendant was also subjected to a state parole violation. Defendant requested at sentencing that the district court impose a concurrent sentence with the sentence on the parole violation. The district court rejected defendant's request and ran the sentences consecutively. In response to the *Bostic* question, defendant's counsel said, "only as to the concurrency." Defendant appealed.

★ Holding: First, the court found that defense counsel's response to the *Bostic* question was too vague to preserve the procedural reasonableness issue. Accordingly, the court applied plain error and found that the district court adequately considered the factors under 18 USC § 3553 and USSG § 5G1.3, governing concurrent sentences. Second, the court held that sentence was substantively reasonable. Accordingly, the sentence was affirmed.

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

• *Fed. R. Crim. P. 41 - Return of Property*  
Savoy v. United States, 08-6240 (5/12/10)

▶ Defendant was a bar owner who was convicted of child pornography offenses. After his conviction, defendant moved for the return of adult sex video tapes that were captured by his bar surveillance camera system. The government argued that the tapes could not properly be returned because they were taken in violation of Tennessee law in that those depicted did not consent to the recording. The district court denied the motion, and defendant appealed.

★ Holding: Pursuant to Rule 41, seized property, other than contraband, must be returned to its rightful owner after criminal proceedings have been terminated. The court need not return, however, property that is obtained unlawfully. In the case, the court held that there was a question under Tennessee law as to whether the adult sex videos were lawfully taken. Accordingly, the court remanded the case to the district court for a determination in the first instance as to whether the persons depicted in the videos had a reasonable expectation of privacy in committing sex acts in the bar.