

# 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
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- V. Fifth Amendment
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- IX. Plea & Sentencing Hearings
- X. Jury Issues
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- XIII. Post-Conviction Remedies

## FINDING THE CASES

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

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

## NEW FEDERAL DEFENDER WEBSITE

The Federal Public Defender's Office for the Southern District of Ohio has created a new website for use by attorneys, judges, and the general public. Each issue of Precedential Value will appear on the website along with a Combined Outline of all cases previously published in P.V. since its inception in March of 2005. The address for the website is [www.fpd-ohs.org](http://www.fpd-ohs.org).

## SUPREME COURT DECISIONS

### **I. Specific Offenses**

- *18 U.S.C. § 1951(a) - Hobbs Act*

Scheidler v. N.O.W., 04-1244 (2/28/06)

► NOW sued certain anti-abortion groups for violations of RICO. The lawsuit focused on certain activities of the groups, often violent in nature, that were aimed at preventing doctors from performing, and women from obtaining, abortions. Several of the predicate acts for the

RICO violations were based upon the Hobbs Act, § 1951(a). Specifically, NOW claimed that the groups had committed violent conduct for the purpose of affecting interstate commerce. The suit proceeded to trial and a verdict was obtained for NOW. The anti-abortion groups argued on appeal that the Hobbs Act only covers violent conduct committed for the purpose affecting interstate commerce through robbery or extortion, neither of which was proven in the case. The Supreme Court granted *certiorari*.

★ Holding: The Hobbs Act makes it a crime if an individual “obstructs, delays, or affects commerce” by “robbery,” “extortion,” or “commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.” In construing the meaning of the “in furtherance of” clause, the Court held that committing or threatening physical violence could only violate the Hobbs Act if it was done for the purpose of robbery or extortion. Thus, it was insufficient if physical violence merely affected interstate commerce but did not have as its purpose robbery or extortion. Accordingly, because there was no proof at trial that the anti-abortion groups committed violent conduct for the purpose of robbery or extortion, no Hobbs Act violation was proven.

• *21 U.S.C. § 841 - Controlled Substances Act Gonzales v. Centro Espiraita*, 04-1084 (2/21/06)

▶ An Amazon Rainforest religious sect operating a church in the U.S. was caught by the government importing a Schedule 1 Controlled Substance into the U.S. for its religious practices. The church sued the government and requested an injunction against enforcement of the Controlled Substances Act (CSA) against them based upon the Religious Freedom Restoration Act (RFRA). The district court granted the injunction and the Tenth Circuit affirmed. On appeal to the Supreme

Court, the government argued that the CSA permitted no exceptions in reference to Schedule 1 substances, and accordingly, the Court should not enforce the RFRA. The Supreme Court granted *certiorari*.

★ Holding: Under the RFRA, the government may not substantially burden a person’s exercise of religion unless the government proves that the burden on religion is the least restrictive means of advancing a compelling government interest. The Court held that the government’s general assertions that enforcement of the CSA would be unduly hindered by the injunction amounted to nothing more than “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.” Accordingly, the Court found that the government had articulated no sufficiently compelling interest, at least in the preliminary stages of the case, to justify reversal of the injunction. Accordingly, the district court ruling was affirmed.

## **SIXTH CIRCUIT DECISIONS**

### **I. Specific Offenses**

• *18 U.S.C. § 513(a) - Counterfeit Securities U.S. v. Blood*, 04-5101 (1/24/06)

▶ Defendants were convicted for possession of counterfeit securities with intent to deceive another, pursuant to § 513(a). The statute provides: “Whoever . . . possesses a counterfeited security of a State or political subdivision thereof or of an organization . . . with intent to deceive another person, organization, or government” shall be punished as stated. Defendants argued on appeal that, because the government had proven only that defendants intended to deceive the entities that purportedly issued the counterfeit securities, the government had not proven that defendants had intended to deceive “another.”

★ Holding: Deciding an open question in the Sixth Circuit, the court held that the “intent to

deceive another” element of § 513(a) includes the intent to deceive the purported issuer of the counterfeit securities. Thus, defendant’s possession of a counterfeit security from Union Bank, with the intent to deceive Union Bank, was sufficient for conviction. The court further held that proof of an “intent to deceive” requires only that the government prove that a defendant intended to mislead another into believing something that was not true. The court distinguished “intent to deceive” from “intent to defraud,” which requires proof of the intent to “deprive of some right, interest or property by deceit.” Accordingly, the court affirmed the conviction.

• *18 U.S.C. § 844(i) - Arson*  
Logan v. U.S., 04-5325 (1/19/06)

► Defendant was convicted of conspiracy and arson of a hotel. At sentencing the district court increased the statutory maximum to life under § 844(i) because four people died in the fire. The district court then sentenced defendant to life. Defendant did not challenge the judicial fact finding either in the trial court or on direct appeal. Defendant then filed a *habeas* petition arguing that the issue of whether death resulted should have been submitted to the jury and proven beyond a reasonable doubt. The district court found that defendant had procedurally defaulted the argument by not raising it during the trial or direct appeal. Defendant appealed.

★ Holding: Relying on the Supreme Court’s decision in *Jones v. U.S.*, the court held that the issue of whether death resulted from arson – thus triggering an increase in the maximum penalty to life – is an element of the offense and must be submitted to the jury at trial. The court ruled, however, that because defendant had failed to preserve the issue at trial or on direct appeal, the issue was waived. Accordingly, the court affirmed the district court’s ruling denying the petition.

• *18 U.S.C. § 922(g) - Felon in Possession*  
U.S. v. Coffee, 04-1758 (1/20/06)

► Firearms were found in a house that defendant rented, inside the pockets of shirts that bore defendant’s name. Although others had sporadic access to the house, defendant’s name was on the lease and some evidence was introduced to show that defendant lived at the house. Defendant was charged with being a felon in possession of a firearm and was convicted after trial. Defendant appealed.

★ Holding: Constructive possession of a firearm may be proven by showing that a defendant has dominion over the premises where a firearm is located. The government need not remove every reasonable hypothesis except that of guilt. In the case, the court found that the evidence established that defendant exercised dominion over the residence and that the jury could reasonably have concluded that he constructively possessed the firearms based upon where they were found. Accordingly, the court affirmed the conviction.

• *18 U.S.C. § 924(c) - Firearm Enhancement*  
U.S. v. Perry, 04-4506 (2/24/06)

► Defendant was charged with bank robbery and a § 924(c) count. The indictment charged defendant under § 924(c)(1)(A)(ii), which carries a 7 year mandatory consecutive sentence for brandishing a firearm. By the time of sentencing, defendant had been convicted and sentenced for a separate bank robbery and § 924(c) charge. Thus, the district court imposed a 25 year consecutive sentence pursuant to § 924(c)(1)(c). Defendant challenged on appeal the application of the 25 year mandatory consecutive sentence because it had not been charged in the indictment.

★ Holding: The court found that application of the 25 year consecutive sentence was proper. Because the enhancement from 7 years to 25 years was based upon defendant’s prior conviction, *Apprendi* permitted the

enhancement without the necessity of it being charged in the indictment. Thus, the 25 year enhancement was proper. Further, even though the court remanded the case, pursuant to *Booker*, for resentencing on the bank robbery conviction, the court specifically held that resentencing was not appropriate regarding the 25 year term because it was a mandatory statutory penalty.

• *18 U.S.C. § 1344 - Bank Fraud*  
U.S. v. Abboud, 04-3942 (2/17/06)

► Defendant was charged in a bank fraud scheme and in the indictment the government charged each illegal transaction as a separate count. Defendant argued on appeal that the indictment was multiplicitous.

★ Holding: The court held, for the first time in a published opinion, that § 1344 permits the government to charge each execution or attempted execution of bank fraud as a separate count. Thus, in a check kiting scheme, each check may be charged as a separate count in the indictment. Defendant's conviction was accordingly affirmed. The court's opinion is arguably dicta because the court first found that defendant had waived the multiplicity argument by not properly preserving it in the district court. (*See infra*, VIII. Defenses.)

• *21 U.S.C. § 841(b)(1)(A) - Penalties*  
U.S. v. Miller, 04-5834 (1/11/06)

► Defendant was convicted of drug trafficking and prior to sentencing the government filed notice, pursuant to 21 U.S.C. § 851, that it intended to enhance defendant's statutory mandatory minimum from 10 years to 20 years under § 841(b)(1)(A). The enhancement was based upon a prior drug possession offense from Georgia wherein defendant received a sentence of two years probation as a first time drug offender. Under such a sentence, if defendant completed probation successfully, the defendant would be discharged without an adjudication of guilt.

The district court found the Georgia case to be a "prior conviction that had become final" and reluctantly imposed the mandatory 20 year sentence. Defendant appealed.

★ Holding: The court held that a prior conviction has become final for purposes of § 841(b)(1)(A) at the point at which the conviction is no longer appealable. Because Georgia law required that an appeal be filed within thirty days of the first time drug offender adjudication, the court held that defendant's conviction had "become final" at that time. Accordingly, the Georgia case was properly considered a prior sentence that had become final, and the sentence enhancement was appropriate.

## II. Sentencing Guidelines

• *§ 2A3.1(b)(2)(A) - Victim Enhancement*  
U.S. v. DeCarlo, 04-5813 (1/17/06)

► Defendant was convicted of interstate travel with intent to engage in sexual conduct with a minor and at sentencing the district court enhanced defendant's sentence by four levels, pursuant to U.S.S.G. § 2A3.1(b)(2)(A), because the intended victim was under 12. The "victim" was actually an undercover agent, and defendant objected to the enhancement. The district court overruled defendant's objection and defendant appealed.

★ Holding: The court held that the four-level enhancement for a victim under 12 applies to a defendant even if the "victim" is an undercover agent. Notably, the offense occurred in 2003, and the Sentencing Commission amended the commentary to § 2A3.1 in 2004 to clarify that the enhancement applied where the "victim" was an agent. The court held that, because the amendment was merely a clarification as opposed to a substantive change, the enhancement should apply to defendant. Accordingly, application of the enhancement was appropriate. The case was nonetheless remanded for reconsideration under *Booker*.

• § 2D1.1 - Methamphetamine  
U.S. v. Martin, 04-6428 (2/21/06)

► Defendant was convicted in a meth case. The defendant possessed pseudoephedrine, a precursor to making meth. According to the conversion table in U.S.S.G. § 2D1.1, two grams of pseudoephedrine is considered to be one gram of meth for guideline calculation purposes. The Sentencing Commission developed this conversion rate based upon a statutory directive from Congress to consider “scientific, law enforcement, and other data” found by the Commission to be appropriate. Defendant challenged the 50% conversion rate as being developed in contravention of Congress’ directive because, defendant claimed, the Commission considered only law enforcement data in formulating the rate.

★ Holding: First, the court held that Congress’ directive did require the Commission to consider both scientific and law enforcement data. Second, the court held that the record presented by defendant did not establish that the Commission considered only law enforcement data. The court relied upon a presumption of correctness that accompanies findings of the Commission and held that defendant had not established that the Commission failed to consider scientific data. Finally, the court ruled that the Commission’s adoption of the 50% conversion rate was not arbitrary or capricious.

• § 2K2.1(a)(4)(A) - Prior Crime of Violence  
U.S. v. Foreman, 04-2450 (2/8/06)

► Defendant was convicted of being a felon in possession of a firearm and the district court determined at sentencing that defendant’s prior Michigan conviction for fleeing and eluding in the fourth degree qualified as a crime of violence. Defendant’s offense level was thus increased from level 14 to level 20. Defendant appealed.

★ Holding: In *United States v. Martin*, the Sixth Circuit determined that the Michigan

offense of fleeing and eluding in the third degree was a crime of violence for purposes of § 2K2.1. This case presented the same statutory section, but involved the fourth degree offense, a question specifically left open by the court in *Martin*. In order to be a crime of violence, an offense must either contain an element of force, be a specifically delineated offense, or otherwise involve a “serious potential risk of physical injury to another” (the “otherwise” clause). In applying the “otherwise” clause to the case, the court held that the fourth degree offense did not create a “serious” potential risk of physical injury under Michigan’s statutory definition of the crime. Thus, under the categorical approach mandated by the Supreme Court in *Taylor* and *Shepard*, fleeing and eluding in the fourth degree was not a violent offense. Nonetheless, the court remanded the case for the district court to consider whether, pursuant to *Shepard*, the charging document, plea agreement, plea colloquy, or any explicit factual findings by the trial judge to which the defendant assented in the Michigan case indicated that the crime was violent, and to sentence defendant pursuant to the mandates of *Booker*.

• § 2K2.1(b)(5) - Another Felony Offense  
U.S. v. Alford, 04-6117 (2/10/06)

► Defendant was convicted of being a felon in possession of a firearm. In the plea agreement, defendant agreed that he had pointed the firearm at another and discharged it. At sentencing, the district court applied the four-level enhancement from U.S.S.G. § 2K2.1(b)(5) for using the firearm in relation to another felony offense. Defendant appealed.

★ Holding: The court held that, by admitting in the plea agreement to the use of the firearm, defendant had admitted to conduct that would constitute an aggravated assault under Tennessee law. Accordingly, defendant had admitted to using the firearm in relation to another felony offense, and the guideline

application was affirmed.

• § 4A1.2(a)(2) - Relatedness of Convictions  
U.S. v. Alford, 04-6117 (2/10/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court increased defendant's offense level based upon two prior violent offenses. The prior offenses occurred on the same day, one being for robbery, and one for assault. During the prior offenses, defendant had robbed individuals entering a drug house and then fled. During his flight, he encountered a drug user about 300 feet away and assaulted and robbed him. Defendant argued in the district court that the two offenses should be considered related under U.S.S.G. § 4A1.2(a)(2) and thus should only count as one prior offense. The district court disagreed and imposed the enhanced offense level. Defendant appealed.

★ Holding: The court first held that a determination of whether prior offenses were related is a proper decision for the district court, and that *Booker* does not require the issue to be submitted to a jury. The court then found that defendant's two prior offenses were not related. Offenses may be related under § 4A1.2(a)(2) if, among other reasons, they are "part of a common scheme or plan." The court held that defendant had planned the robbery of the individuals outside the drug house, but that the assault of the drug user was unplanned, at a different location, and was not required as a result of the first offense. Accordingly, the guideline enhancement was affirmed.

• § 4A1.2(a)(2) - Relatedness of Convictions  
U.S. v. Martin, 04-6428 (2/21/06)

▶ Defendant was convicted in a meth case and at sentencing the district court enhanced his criminal history category based upon four prior convictions for car thefts over a twenty-three-day time period in the year 2000. Defendant argued on appeal that the prior

convictions should not have counted separately against his criminal history score because they were "related" under U.S.S.G. § 4A1.2(a)(2).

★ Holding: Offenses may be related under § 4A1.2(a)(2) if, among other reasons, they are "part of a common scheme or plan." In order to establish a common scheme or plan, a defendant must show that the offenses were either jointly planned or that the commission of one entailed the other. The court ruled that it is not enough to show that the crimes happened within close proximity of each other, that they used the same *modus operandi*, or that they are part of a single crime spree. A defendant must offer affirmative evidence that the crimes were planned together or that commission of one entailed the other. The court found such evidence lacking and affirmed the application of the guideline enhancement. Judge Martin noted, in a highly amusing concurrence, that the court was bound to follow prior precedent but that he personally disagreed with the very narrow construction of § 4A1.2(a)(2) adopted by the Sixth Circuit.

• § 4B1.1 - Career Offender  
U.S. v. Galloway, 04-5981 (2/27/06)

▶ Defendant was convicted of possession of crack cocaine with intent to distribute. Defendant had two prior convictions on his record, one for drug trafficking, and the other for "attempt to commit a felony" under Tennessee law. The attempt offense was originally indicted as drug trafficking, but pursuant to a plea agreement, it was reduced to attempt. During the plea colloquy for the attempt charge in state court, defendant and his attorney admitted that defendant had possessed narcotics with intent to distribute. In the district court, the probation officer recommended that defendant be sentenced as a career offender under U.S.S.G. § 4B1.1 because both of defendant's prior convictions counted as drug trafficking offenses. The district court refused to apply the career

offender guideline. The government appealed.

★ Holding: The court held that the categorical approach applied by the Supreme Court in *Shepard v. U.S.* in the context of the A.C.C.A. should also be applied to the career offender provisions of § 4B1.1. Thus, in assessing whether a prior conviction qualifies a defendant for the career offender enhancement, the court may consider not only the statute and the indictment, but the plea agreement and plea colloquy in the prior proceeding. Because defendant admitted in his state court plea hearing that he had possessed narcotics with intent to distribute, the court held that the prior offense was properly categorized as a drug trafficking offense, and thus qualified defendant for the career offender enhancement. Accordingly, the district court ruling was vacated and the case remanded for resentencing.

• *Downward Departures*

U.S. v. Williams, 04-4152 (1/5/06)

▶ Defendant was convicted of being a felon in possession of a firearm and his sentencing guideline range was calculated to be 46-57 months. At sentencing, the district court downwardly departed, and imposed a sentence of 24 months. The departure was based upon a two point offense level reduction and a two level criminal history category reduction. The government appealed.

★ Holding: The court held that the sentence reduction was appropriate. First, the court ruled that the two point offense level reduction was proper because defendant was outside the heartland of the typical felon in possession case. Defendant had been charged with no serious criminal conduct in the previous ten years, and had possessed the gun based upon extenuating circumstances where he feared retaliation from others seeking revenge upon him. The court noted that U.S.S.G. § 5K2.11 (avoiding a perceived greater harm) supported a departure under such circumstances. Second,

the court found the two-level criminal history category reduction appropriate because most of defendant's criminal history points stemmed from conduct that had occurred ten years earlier. The court found that the departure was justified based upon U.S.S.G. § 4A1.3 because defendant's criminal history was substantially overstated by criminal history category V. Finally, the court determined that the sentence was reasonable under *Booker*. Accordingly, the sentence was affirmed.

**III. Evidence**

• *FRE 402/403 - Relevance/Undue Prejudice*  
U.S. v. Till, 04-2128 (1/20/06)

▶ Defendant was charged with being a felon in possession of a firearm. During trial, the district court admitted evidence that defendant, at the time of his arrest, was in possession of small amounts of marijuana and crack cocaine. Defendant appealed admission of the drug evidence.

★ Holding: The court found that the marijuana and crack cocaine were relevant evidence because of "the propensity of people involved with drugs to carry weapons." Further, the court found that the probative value of the evidence was not substantially outweighed by its prejudicial effect because of the "causal, temporal and spatial connection" of the drugs with the firearm. According to the court, the possession of the drugs by defendant was inextricably intertwined with the firearm possession and thus was *res gestae*. As such, drug evidence would help to prove defendant's motive to possess the firearm. Therefore, the court affirmed the district court's decision admitting the evidence. Further, the court found that a limiting instruction about the drug evidence was unnecessary given the brief mention of the drug evidence at trial, the weight of the evidence against defendant, and the lack of precedent requiring such an instruction.

• *404(b) - Absence of Mistake/Motive*  
U.S. v. Abboud, 04-3942 (2/24/06)

► Defendant was charged with bank fraud and tax crimes and at trial the government introduced evidence that defendant had paid employees “under the table.” Defendant argued on appeal that the evidence was inadmissible pursuant to FRE 404(b).

★ Holding: Four factors must be met before evidence is admissible under Rule 404(b): (1) the proponent must identify the specific purpose for the evidence; (2) the court must decide whether the identified purpose is at issue in the case; (3) the court must weigh the probative value against undue prejudice; and (4) the court must instruct the jury as to the limited use of the evidence. First, the court found that the “under the table” payments were admissible to show lack of mistake for the tax violations. Defendant had claimed that the failure to file taxes was due to inadvertence. The court found that the secret payments properly attacked defendant’s good faith in failing to file the returns. Further, the court held that the secret payments were admissible to show motive in the bank fraud charges. Defendant had engaged in check kiting, and the “under the table” payments showed that defendant had cash flow problems, and thus a motive to commit check kiting. Finally, the court found that the district court had provided a proper limiting instruction. Accordingly, the admission of the evidence was affirmed.

• *404(b) - Identity/Modus Operandi*  
U.S. v. Perry, 04-4506 (2/24/06)

► Defendant was charged with bank robbery and at trial the government sought to introduce another bank robbery, which happened one month after the charged bank robbery, for which defendant had already been convicted. In both of the robberies, defendant had entered the bank carrying a gun in a bookbag, sought change for \$50, sought to purchase money orders, then pulled out his gun and robbed the

bank. Defendant argued that the robbery conviction was inadmissible under FRE 404(b), but the district court disagreed and admitted the evidence to show identity and *modus operandi*. Defendant appealed.

★ Holding: The court held that because the identity of the perpetrator was the central issue in the case, admission of the bank robbery conviction was appropriate under Rule 404(b). The court found that the circumstances of the two robberies were unique such that they created a “signature” for the crime. The court emphasized that two robberies need not be “identical in every detail” in order to be admitted as *modus operandi* under Rule 404(b). Finally, the court ruled that the probative value of the evidence was not substantially outweighed by its prejudicial effect. The court noted that the district court gave an appropriate limiting instruction to the jury on multiple occasions regarding its use of the evidence. Accordingly, the conviction was affirmed.

• *701 - Lay Person Opinion Testimony*  
U.S. v. Perry, 04-4506 (2/24/06)

► Defendant was charged with bank robbery and at trial the government presented testimony of three of defendant’s friends who identified defendant in a bank surveillance photo. Defendant argued on appeal that the testimony was improper.

★ Holding: Pursuant to FRE 701, opinion testimony from a lay person is admissible if it (1) is rationally based on the perception of the witness and (2) is helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue. The court found that the bank surveillance photo did not, by itself, identify defendant as the robber. Accordingly, the court found that the testimony of the defendant’s friends aided the jury in determining whether defendant was the robber. Thus, the testimony was proper.

• *801(d)(2)(e) - Coconspirator Exception*  
U.S. v. Payne, 05-1280 (2/13/06)

► Defendant was a store clerk who agreed to accept counterfeit bills for the sale of merchandise. Defendant was subsequently indicted for counterfeiting. At trial, a cooperating witness testified about out of court statements made by a codefendant who had planned the passing of the counterfeit bills with defendant. Defendant challenged on appeal that the statements should have been excluded as hearsay.

★ Holding: The court found that the statements of the codefendant were properly admitted under FRE 801(d)(2)(e), the coconspirator exception. Under such section, the proponent of the statement must prove that a conspiracy existed, that defendant was a member, and that the statements were made in furtherance of the conspiracy. To establish the elements, the district court may rely on the statements themselves, but the statements must be supported by corroborating evidence. In the case, the court first found that the conspiracy existed and that defendant was a participant. This finding was based upon the fact that the codefendant discussed his “contact” at the store who would accept the bills. The statements were corroborated by the fact that defendant was at the store, the codefendant talked to him, and defendant accepted obviously counterfeit bills. The court further found that the statements were made in furtherance of the conspiracy. The court noted that statements “in furtherance” of a conspiracy include statements made to conceal an ongoing conspiracy. Accordingly, the admission of the statements was affirmed.

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

• *Search Warrant - Particularity*  
U.S. v. Tran, 04-1801 (1/5/06)

► Defendant’s place of business was searched for evidence of arson. The search warrant listed the wrong street address for

defendant’s business, but otherwise described the name of the business and the details of the building accurately. After the warrant was issued by the judge, the police officer corrected the address on the warrant. Defendant moved to suppress the evidence seized based upon the defect in the warrant and the district court denied the motion. Defendant appealed.

★ Holding: A search warrant is sufficient with regard to description of place if it (1) describes the location with sufficient particularity as to enable the officers to locate and identify the premises with reasonable effort, and (2) there is no reasonable probability that the wrong place will be mistakenly searched. The court held that, because the business was otherwise correctly identified, the mixing up of one number on the address did not invalidate the warrant. Further, the court held that, although it was improper for the officer to alter the warrant after issuance by the judge, the alteration did not invalidate the warrant because there was no “bad faith, deception, or prejudice as a result.” Accordingly, the district court ruling was affirmed.

• *Search Warrant - Particularity*  
U.S. v. Abboud, 04-3942 (2/17/06)

► The government obtained a warrant to search defendant’s business. On its face, the warrant requested to search for property that constituted evidence of bank fraud, in violation of 18 U.S.C. § 1344. The affidavit attached to the warrant listed additional crimes including numerous tax and money laundering offenses. The warrant specifically incorporated the affidavit only for purposes of a description of probable cause, but did not incorporate the affidavit for purposes of the additional offenses. On appeal, defendant challenged the validity of the warrant.

★ Holding: The court held that an applicant for a warrant must either list the violations of law for which the warrant is requested on the

face of the warrant, or, if incorporating an affidavit, the applicant must make clear with the incorporation clause that the affidavit contains the relevant violations. Thus, the court ruled that the warrant only authorized the seizure of records relevant to bank fraud, not the seizure of any other documents.

- *Search Warrant - Probable Cause*

Armstrong v. Melvindale, 04-2192 (1/6/06)

- ▶ Police obtained a warrant to search a business for the purpose of seizing inventory and assets in regard to a forfeiture action in a drug case. While at the business, Armstrong appeared and claimed ownership of the computers that the officers were seizing, but he failed to produce any ownership documents. The police subsequently obtained a warrant to search Armstrong's business for documents that would substantiate his ownership in the computers. Upon searching Armstrong's business, the police found no documents, but did find marijuana. After state court proceedings were dismissed, Armstrong filed an action against the city under 42 U.S.C. § 1983 for a wrongful search of his business in violation of the Fourth Amendment. The district court refused to grant summary for the city judgment on the issue, and the city appealed.

- ★ Holding: The Fourth Amendment permits the issuance of a search warrant solely for the purpose of seeking evidence of a crime. The court held that because the search warrant issued for Armstrong's business was not for the purpose of seeking evidence of a crime, but only for evidence of ownership of computers, the warrant was invalid and the search violated the Fourth Amendment. For purposes of the § 1983 action, however, the court found that the officer's mistake was not beyond the scope of "reasonable professional judgment" and thus they were entitled to qualified immunity for their actions, in spite of the Fourth Amendment violation.

- *Search Warrant - Probable Cause*  
U.S. v. Tran, 04-1801 (1/5/06)

- ▶ Defendant's residence was searched for evidence of arson. The affidavit attached to the search warrant provided an adequate description as to why defendant was suspected of arson, but failed to link defendant to her residence. The officer testified, however, under oath to the judge at the time the warrant was issued and provided the necessary link. Defendant moved to suppress the evidence found in the search, and the district court overruled the motion. Defendant appealed.

- ★ Holding: The court held that probable cause for a search warrant may be established by an affidavit and supporting sworn testimony to the issuing judge, even if the testimony is not recorded. Accordingly, the district court ruling was affirmed.

- *Search Warrant - Probable Cause*  
U.S. v. Coffee, 04-1758 (1/20/06)

- ▶ Officers learned from an informant that he had purchased drugs from defendant at a rental residence on several occasions. The officers set up a controlled purchase where they observed the informant enter the residence and return with drugs that he had purchased. Based upon this information, officers obtained a search warrant for the residence and found narcotics and firearms. In the search warrant affidavit, the officers did not indicate who the informant was, nor did they list anything upon which to assess the informant's reliability. Defendant was subsequently charged with narcotics and firearm offenses and moved to suppress the evidence found in the search. The district court denied the motion and defendant appealed.

- ★ Holding: Where the information in an affidavit comes mostly from a confidential source, the court must consider the veracity, reliability, and basis of knowledge for the informant's information. If the reliability of the information is lacking, probable cause may

still be established under the totality of the circumstances by sufficient corroborating information. The court held that, even though no information was provided in the affidavit about the informant's identity or reliability, the warrant was justified based upon the "substantial independent police corroboration" of the informant's information. Accordingly, the district court's ruling was affirmed.

• *Search Warrant - Probable Cause*  
U.S. v. Abboud, 04-3942 (2/17/06)

▶ The government obtained a warrant to search defendant's business for evidence of bank fraud. The probable cause for the warrant was based upon a three month time period in 1999 wherein the FBI analyzed defendant's check kiting activities. In its request to seize records subsequent to 1999, the warrant relied upon several vague statements regarding suspicious activities that were reported by bank officials. Defendant challenged the warrant on appeal.

★ Holding: The court found that the warrant was supported by probable cause pertaining to the year 1999. The court held, however, that the warrant was not supported by probable for check kiting activities for the subsequent years. The court ruled that the evidence provided in the affidavit was merely a recitation of a third party's suspicion of criminal activity. The court therefore held that the issuing magistrate erred in permitting a search for records after 1999. The court ruled that the error was harmless because the government only charged defendant with bank fraud for the 1999 activities and his defense was not prejudiced by admission of the records from subsequent years.

• *Search Warrant - Staleness*  
U.S. v. Abboud, 04-3942 (2/17/06)

▶ The government obtained warrants to search defendant's business and home in 2002 based upon a bank fraud investigation. In the

affidavit, the last illegal act for which probable cause was established occurred in 1999. Defendant moved to suppress the evidence seized upon execution of the warrants, and the district court denied the motion. Defendant challenged on appeal that the search warrant information was stale as of the time of execution of the search warrant in 2002.

★ Holding: In assessing the issue of staleness of a warrant, the court must consider the following: (1) the character of the crime;(2) the criminal; (3) the nature of the things to be seized; and (4) the places to be searched. First, the court found that the crime included repeated acts of bank fraud over a several month period in 1999, suggesting ongoing criminal activity. Second, the court held that defendant was entrenched in the area, owning several businesses and a home, thus increasing the likelihood that the evidence would still be available. Third, the court ruled that the things to be seized were business records, which, by their nature, tend to be kept for long periods of time. Fourth, the court found that the places to be searched were defendant's long standing places of business and his home, not places that were mere "criminal forums of convenience." Accordingly, the court found that the search warrants were not stale.

• *Search - Consent*  
U.S. v. Buckingham, 05-5014 (1/11/06)

▶ Defendant was charged with being a felon in possession of a firearm and moved to suppress evidence found in his car at a traffic stop. Defendant first gave oral consent to search the car, but then refused to sign a written consent form. Upon his refusal to sign, officers requested a drug sniffing dog. Before the arrival of the dog, defendant signed the consent form. The district court denied the motion based upon defendant's original oral consent, without addressing whether the consent was later withdrawn or whether the written consent was valid. Defendant

appealed.

★ Holding: Consent once given may be withdrawn by a defendant at any time. In the case, the court found support in the record that defendant had withdrawn his oral consent by failing to sign the written waiver form. Thus, the court found that the district court erred in failing to address the withdrawal of consent issue. The court determined that the appropriate course of action was to remand the case for the district court to consider the withdrawal of consent issue and make appropriate findings. Likewise, the court found support in the record for the argument that defendant's subsequent written consent may not have been voluntary and unequivocal. Accordingly, the court further instructed the district court to consider the issue and make findings on remand.

• *Search - Consent - Apparent Authority*  
U.S. v. Morgan, 04-5283 (1/26/06)

▶ Defendant's wife became suspicious that he was viewing child pornography and installed spy ware on their home computer. She then notified the police about her suspicions. When the police arrived, she advised the officers that she and her husband both had access to the computer, that she occasionally used it, and that she had captured child pornography images on the spy ware. The police searched the hard drive, found images of children, and defendant was charged with possession of child pornography. Defendant moved to suppress the evidence found on the computer and the district court denied the motion, finding consent for the search. Defendant appealed.

★ Holding: Police may rely on third-party consent for a search if they rely in good faith on the third party's apparent authority to consent to a search. Apparent authority is judged by an objective standard, considering only whether the officers could reasonably conclude that the third party had authority to give consent. In the case, the court found that

the computer was in a common area, that the wife said that she had access to the computer, and that she had installed spy ware. Under these circumstances, the court found apparent authority. The court noted that the apparent authority was not dissipated by the fact that there was another computer in the house (a fact not disclosed to the police) or that defendant had installed an eraser program in the computer. Accordingly, the district court order was affirmed.

• *Reasonable Expectation of Privacy*  
U.S. v. Dillard, 04-4191 (2/27/06)

▶ Defendant lived in a duplex which contained a common hallway and stairway. Typically, the front door to the duplex was locked. After arresting defendant for selling crack to an undercover officer, the police went to the duplex, found the front door ajar, went through the hallway and up the stairs to defendant's residence. The police knocked on the door to defendant's residence and obtained consent from defendant's girlfriend to search, finding more crack cocaine and marijuana. Defendant was charged with distribution of narcotics and moved to suppress the evidence found at his residence. The district court denied the motion and defendant challenged on appeal that the officers violated his rights by entering the common area of the duplex without authorization.

★ Holding: A person has a protected expectation of privacy if she has a subjective expectation of privacy in the premises, and that expectation is one that society is prepared to recognize as objectively reasonable. The court found that defendant did not possess a reasonable expectation of privacy in the common area on the day the officers searched because the common area door was ajar, there was no way to alert tenants of the duplex of a visitor's arrival other than entering the common area, and the hallway and stairway in the common area were areas typically used by

people other than tenants. Accordingly, the district court ruling was affirmed.

## V. Fifth Amendment

### • *Double Jeopardy*

U.S. v. DeCarlo, 04-5813 (1/17/06)

► Defendant was charged with traveling in interstate commerce to engage in a sexual act with a minor. The government charged defendant under two different statutes for the same conduct: 18 U.S.C. § 2241(c), and 18 U.S.C. § 2423(b). Defendant was convicted at trial of both counts and the district court imposed concurrent sentences for the two counts. Defendant appealed based upon double jeopardy grounds.

★ Holding: Where a single act gives rise to more than one conviction under separate statutes, the court must conduct a two-part inquiry under the Double Jeopardy Clause. First, the court must consider whether Congress intended to punish each statutory violation separately. If congressional intent cannot be discerned, then the court must apply the *Blockburger* test to determine whether each offense requires an element that the other does not. The court should consider only the elements that apply to the case at hand, and not alternative elements in the statute that do not apply to the facts of the case. The court found that the only difference between the elements of the two statutes was that § 2241(c) required proof that the child was under 12, and § 2423(b) required proof that the child was under 18. The court concluded that the § 2423(b) offense was a lesser-included offense of § 2241(c). Thus, defendant could not be properly convicted of both offenses under the Double Jeopardy Clause, and the court vacated the lesser offense.

### • *Due Process - Brady*

U.S. v. Blood, 04-5101 (1/24/06)

► Defendant was charged with possession of counterfeit securities with intent to deceive

another and during the trial defendant learned that the government's informant had assisted and testified for the FBI in several other fraud cases. Defendant argued on appeal that the failure to disclose this information pretrial constituted a violation of *Brady* and *Giglio*.

★ Holding: Pursuant to *Brady* and *Giglio*, the government is required to disclose evidence favorable to a defendant, including impeachment evidence. The court held that delay in disclosing *Brady/Giglio* material only is cause for reversal when the delay itself causes prejudice. Because defendant could not establish any prejudice as a result of the delay in producing the information, the court found no *Brady/Giglio* violation.

### • *Due Process - Prosecutorial Misconduct*

U.S. v. Abboud, 04-3942 (2/17/06)

► Defendant was charged with bank fraud and tax violations and during closing arguments before the jury the prosecutor made reference to defendant's lavish lifestyle and juxtaposed it with defendant's failure to pay taxes. Defendant did not object to the prosecutor's comments at trial, but argued on appeal that they were improper.

★ Holding: Courts utilize a two-step inquiry in assessing whether prosecutor misconduct requires reversal of a conviction. First, the court considers whether the statements were improper. Second, the court determines whether the comments were flagrant by examining four factors: (1) whether the remarks were misleading or prejudicial, (2) whether they were isolated or extensive, (3) whether they were deliberate or accidental, and (4) the strength of the evidence. In the case, the court first found that the prosecutor's comments were improper. The prosecutor had not argued that defendant had a motive to commit the tax violations in order to support his lavish lifestyle, (a permissible inference) but instead had juxtaposed the fact that defendant was wealthy with the fact that he did

not file taxes and “left the jury to use its imagination.” The court held, however, that the comments were not flagrant. Even though the court ruled that the purpose of the remarks was to prejudice defendant and that the remarks were intentional, the court found no flagrancy because the comments were isolated and defendant’s defense was extremely weak. Accordingly, the court found no plain error and the conviction was affirmed.

## VI. Sixth Amendment

### • *Right to Counsel*

King v. Bobby, 04-3844 (1/10/06)

► Defendant was charged in state court with multiple fraud and tax related counts and during the course of proceedings before the state court, defendant continuously promised that he would hire counsel, and when he finally did hire counsel, the attorney moved to withdraw multiple times, with defendant eventually firing him right before the trial date. The trial court informed defendant that it believed that he was intentionally trying to delay the proceedings through his antics with attorneys and that defendant would either have to keep his current attorney, hire a new one, or represent himself, but there would be no more continuances. Defendant ended up representing himself, signed waiver of counsel forms, and took a plea bargain. Defendant appealed through the state court system, then filed a *habeas* petition in the district court claiming that he was denied counsel. The district court denied the petition and defendant appealed.

★ Holding: In order for a defendant to proceed *pro se*, the record must establish that defendant was aware of the risks associated with self-representation, and that the defendant knowingly, intelligently, and voluntarily waived his right to counsel. Finding the case to be atypical, the court ruled that defendant had necessarily chosen self-representation by rejecting all of his options except for self-

representation. In the end, the court held that the totality of the record established that defendant understood the risks associated with representing himself and made the knowing and voluntary decision to proceed *pro se*. Accordingly, the district court decision was affirmed.

### • *Booker*

U.S. v. McBride, 04-4347 (1/17/06)

► Defendant was convicted of obstruction of justice, internal revenue laws, and bankruptcy fraud. On resentencing after appeal, defendant argued that a downward departure was appropriate based upon the “economic reality principle,” which allows for downward departures where the amount of intended loss is substantially higher than the actual loss, and seriously overstates the severity of the offense. The district court rejected the departure, sentenced defendant within the guideline range, and provided an alternative sentence of the exact same amount in the event that the guidelines were later found unconstitutional. Defendant appealed, and *Booker* was decided during the pendency of the appeal.

★ Holding: Clarifying its prior holding in *Puckett* (*See P.V.*, Issue 4), the court first held that the denial of downward departures are generally not reviewable. Nonetheless, the court is required after *Booker* to consider whether a sentence is reasonable. The court further held that the reasonableness inquiry involves both a procedural and a substantive consideration. The procedural inquiry requires the court to consider whether the district court properly developed a record based upon the factors enumerated in 18 U.S.C. § 3553. The substantive inquiry involves consideration of whether the sentence is actually reasonable in light of the listed factors. In the case, the court found the district court’s development of the record adequate and the sentence to be reasonable. Accordingly, the sentence was affirmed.

• *Booker*

U.S. v. Till, 04-2128 (1/20/06)

▶ Defendant was convicted being a felon in possession of a firearm. The district court calculated the sentencing guideline range to be 151 to 188 months, but the charge carried a statutory cap of 120 months. Thus, the court sentenced defendant to 120 months. The district court then, pursuant to *Blakely*, issued an alternative sentence of 120 months in case the guidelines were found to be unconstitutional. Defendant appealed and *Booker* was decided during the pendency of the appeal.

★ Holding: The court held that the case did not need to be remanded in light of the alternative sentence issued by the district court. In so holding, the court ruled that, during the post-*Blakely*, pre-*Booker* era, district courts were not required to cite the factors pursuant to 18 U.S.C. § 3553, nor were the courts required to make an extensive record of its reasoning in order to enable reasonableness review, as required by post-*Booker* case law. All that is required to affirm an alternative sentence where an objection is raised solely on the *Blakely* grounds is for the court of appeals to review the sentence to determine if it is reasonable. The court found defendant's sentence of 120 months reasonable under the circumstances, and affirmed the sentence.

• *Booker*

U.S. v. Alford, 04-6117 (2/10/06)

▶ Defendant was convicted of being a felon in possession of a firearm and the district court sentenced defendant, under the then mandatory guideline scheme, to 120 months, the statutory maximum. Defendant appealed.

★ Holding: Because defendant preserved the *Booker* issue in the district court, the court reviewed for harmless error. The court found that although the district court applied the guidelines as mandatory, any error in the sentencing was harmless. Defendant's

guideline range at sentencing was 110-120 months. The district court provided a scathing review of defendant's record, concluded that he was a danger to society, and determined that the statutory maximum sentence was necessary to protect the public from future crimes of defendant. The court held that it was convinced by the district court's "actions and explanation" that it would not give a more lenient sentence on remand, and therefore affirmed the sentence.

• *Confrontation Clause-Recross Examination*  
U.S. v. Payne, 05-1280 (2/13/06)

▶ Defendant was charged with counterfeiting and at trial the district court prohibited defendant from conducting recross examination of a particular witness. Defendant appealed claiming that his right to confrontation had been violated.

★ Holding: The court held that a defendant enjoys a right under the Confrontation Clause to conduct recross examination of a witness if the government elicits new matters on redirect that were not previously covered. In the case, the court found that the government had not presented any new information during redirect examination, and thus, the district court did not err in denying defendant's request to conduct recross examination of the witness.

• *Confrontation Clause*

U.S. v. Katzopoulos, 04-6501 (2/15/06)

▶ Defendant was convicted of multiple counts of mail fraud and conspiracy and at sentencing, the district court admitted into evidence hearsay statements to establish the loss amount and the number of victims. Defendant argued on appeal that the Confrontation Clause, as applied in the post-*Crawford* and *Booker* world, should apply at sentencing.

★ Holding: Following a long line of precedent, the court held that the Confrontation Clause does not apply at sentencing. The court

acknowledged that this was a question that the Supreme Court may revisit, but under current law, the court chose to adhere to the long-standing rule. Thus, the sentence was affirmed.

## VII. Other Constitutional Rulings

### • *Commerce Clause*

U.S. v. Tran, 04-1801 (1/5/06)

► Defendant was convicted at trial on two counts of arson for burning two of her businesses. At trial, the government presented evidence that defendant leased both of the buildings that were burned. Defendant moved for judgment of acquittal upon the grounds that the government had not proven the interstate nexus requirement of the arson statute (18 U.S.C. § 844(i)). The district court denied the motion and defendant appealed.

★ Holding: Relying on the prior Supreme Court decision of *Russell v. U.S.*, the court held that the rental of real estate is unquestionably an activity that affects interstate commerce because local rentals are merely an element of a much broader commercial market in rental properties. The court noted that the recent Supreme Court ruling in *Jones v. U.S.* did not alter the holding from *Russell*. Thus, the court found that defendant's rental of the buildings that were burned established a sufficient interstate nexus, and accordingly affirmed the conviction.

## VIII. Defenses

### • *Severance of Counts in Indictment*

U.S. v. Tran, 04-1801 (1/5/06)

► Defendant was convicted of two counts of aiding and abetting arson of two of defendant's businesses. Prior to trial, defendant moved for a severance of the two counts into separate trials. The district court denied the motion, and defendant appealed.

★ Holding: First, the court held that joinder of the two offenses was proper under Fed. R. Crim. P. 8(a), which permits offenses to be joined where they are of the same or similar

character, are based on the same act or transaction, or are part of a common scheme. The court found that the businesses burned were both owned by defendant, were burned within 18 months of each other, and were located in neighboring communities. Further, the court noted that both fires were caused by flammable liquids with acetone being the accelerant, defendant filed an insurance claim after each fire, and there was significant overlap of witnesses for each charge. As such, joinder was proper. Second, the court held that severance was not required under Rule 14, which requires severance if defendant will be unduly prejudiced by a joinder of offenses. The court found that defendant could show no evidence of prejudice as a result of the joinder. Accordingly, the conviction was affirmed.

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

U.S. v. Abboud, 04-3942 (2/17/06)

► Defendant was charged with bank fraud and in the indictment the government charged each transaction as a separate count. Defendant did not challenge the form of the indictment pretrial. Instead, defendant first raised a challenge to the form of the indictment at the end of the jury trial, during the hearing on the Rule 29 motion. The district court held that the failure to raise the claim pretrial meant that defendant had waived the issue pursuant to Fed. R. Crim. P. 12(b)(2) and (f). Defendant never raised a substantive claim of multiplicity in the district court. Defendant appealed the district court's ruling.

★ Holding: Reconciling two conflicting lines of cases in the Sixth Circuit, the court held that, as applied to claims of multiplicity and duplicity in an indictment, the waiver provision of Rule 12 applies only to challenges to the form of the indictment. Thus, if a defendant does not challenge an indictment pretrial, Rule 12 requires that she has waived such a challenge. In contrast, a substantive challenge that an indictment is multiplicitous, i.e.,

sentencing separately in multiple counts violates double jeopardy, may be raised at any time before sentencing. In the case, the court held that defendant had failed to raise his challenge to the form of the indictment pretrial and therefore, the district court's finding of waiver of the issue was proper. Further, the court ruled that defendant did not raise any substantive challenge to multiplicity in the district court, and thus, he could not argue the issue on appeal.

• *Fed. R. Crim. P. 12 - Pretrial Motions*  
U.S. v. Abboud, 04-3942 (2/17/06)

▸ Defendant was charged with bank fraud and tax violations and at trial attempted to utilize the defense of selective prosecution. The defendant did not raise the issue pretrial, and, pursuant to a government motion *in limine*, the district court prohibited defendant from presenting the defense at trial. Defendant appealed.

★ Holding: The court held that the defense of selective prosecution addresses a matter that is independent of a defendant's guilt or innocence, and thus, it is an issue for the court and not the jury. Therefore, Rule 12 requires that the issue be raised pretrial. The court accordingly held that defendant had waived the issue by failing to raise it in a pretrial motion, and the district court ruling was affirmed.

## **IX. Plea and Sentencing Hearings**

• *Rule 35 - Motion to Correct Sentence*  
U.S. v. Arroyo, 04-4207 (1/17/06)

▸ Defendant was convicted of manufacturing marijuana and at sentencing the government moved to reduce defendant's sentence three levels based upon his substantial assistance to authorities. Defendant was subject to a ten year statutory mandatory minimum sentence; however, instead of utilizing the ten year sentence as the starting point, the court granted the sentence reduction using the offense level recommended in the presentence report (25) as

the starting point, thus sentencing defendant to 41 months. The district court orally pronounced the sentence, but before the written judgment entry was issued, the government moved, pursuant to Fed. R. Crim. P. 35(a) for reconsideration of the sentence, claiming that the district court should have utilized the ten year mandatory minimum as the starting point for granting the sentence reduction. The district court agreed and amended defendant's sentence to 51 months. Defendant appealed.

★ Holding: Rule 35 allows for a district court to amend a sentence to correct an "arithmetical, technical, or other clear error." The court held that the authority conferred by the rule is extremely limited and may not be used to simply reopen issues that were resolved at sentencing. In the case, the court ruled that the issues whether to depart and the extent of a departure are matters that are within the discretion of the district court. Thus, although the district court may not have followed normal practice, the extent of the reduction in defendant's sentence was not an issue that amounted to clear error, and accordingly, was not appropriate for amendment under Rule 35. Therefore, the sentence was vacated and the case remanded for the district court to reimpose the original sentence.

• *Plea Agreements - Appeal Waivers*  
U.S. v. Dillard, 04-4191 (2/27/06)

▸ Defendant was charged with drug distribution and entered into a plea agreement whereby he agreed to waive his right to appeal any issue other than the district court's ruling on his motion to suppress. Defendant did not stipulate in the plea agreement that the sentencing guidelines applied to his case. After sentencing, *Booker* was decided, and defendant raised the *Booker* issue on appeal.

★ Holding: Pursuant to the court's prior decision in *U.S. v. Bradley* (*See P.V.*, Issue 1), the court held that the appeal waiver in the plea agreement effectively waived defendant's right

to appeal, even though *Booker* subsequently made the guidelines advisory. The court found that it was of no consequence that defendant did not, as had the defendant in *Bradley*, agree that the sentencing guidelines would apply to his case. Accordingly, the court found that *Booker* remand was not appropriate.

- *Plea Agreements - Appeal Waivers*

U.S. v. Wilson, 04-6479 (2/27/06)

▸ Defendant was charged with being a felon in possession of a firearm and entered into a plea agreement with the government wherein he waived his right to appeal. At the plea hearing, the district court required that the prosecutor summarize the plea agreement for the record. The district court did not personally address the appeal waiver with defendant. Defendant appealed, and *Booker* was subsequently decided. The government moved to dismiss the appeal based upon the appeal waiver provision in the plea agreement.

★ Holding: Fed. R. Crim. P. 11(b)(1)(N) requires a district court, during the plea colloquy, to specifically ensure that a defendant understands any appeal waiver provision in a plea agreement. In the case, the court held that the prosecutor's explanation of the appeal waiver in the plea agreement summary during the plea hearing was sufficient compliance with Rule 11 such that the waiver was valid. Alternatively, the court held that any error in failing to strictly follow Rule 11 was harmless because the only issue defendant raised on appeal was based upon *Booker*, and the district court had issued an alternative sentence in the event that the guidelines were later found to be advisory. Thus, the appeal was dismissed.

## X. Jury Issues

- *Juror Bias*

Franklin v. Anderson, 03-3636 (1/9/06)

▸ Defendant was tried in state court for capital murder. During *voir dire*, a prospective juror made numerous statements that exhibited

a fundamental misunderstanding of the law pertaining to the burden of proof, the presumption of innocence, and a defendant's right not testify or present any evidence. The juror was ultimately seated, and defendant was convicted and sentenced to death. Defendant exhausted his state court appeals and then filed a federal habeas petition. The district court granted the petition, and the state appealed.

★ Holding: Juror bias may be established by showing that (1) a juror has a predisposition against or in favor of the defendant, or (2) a juror cannot conscientiously apply the law and find the facts. In the case, the court found that the juror in question had made numerous and significant statements that she would require defendant to prove himself innocent, and that she would want to hear him testify as to his innocence. The trial judge had made several attempts to rehabilitate the juror, but in the end, the court held that the juror exhibited such a clear misunderstanding of the presumption of innocence and burden of proof that she could not possibly make a fair assessment of guilt. The court further ruled that the seating of a biased juror is not subject to harmless error analysis. Accordingly, the district court ruling was affirmed, and defendant's conviction was vacated.

- *Jury Instructions - Entrapment by Estoppel*

U.S. v. Blood, 04-5101 (1/24/06)

▸ Defendant was charged with possession of counterfeit securities with intent to deceive another and proceeded to trial based upon a defense of entrapment by estoppel. The district court provided an instruction to the jury on entrapment by estoppel and, in giving the instruction, the court added elements of the entrapment defense. Defendant appealed.

★ Holding: The elements of entrapment by estoppel are as follows: (1) The government announced through an agent or an informant that the charged criminal conduct was legal; (2) defendant relied upon the government's

announcement; (3) defendant's reliance was reasonable; and (4) given defendant's reliance, the prosecution for the charged crime is unfair. The court found that the district court erred in mixing in elements of the entrapment defense, (i.e., that defendant was not predisposed to commit the crime). However, the court held that the error was harmless because there was insufficient evidence in the record to support the entrapment by estoppel defense in the first place. Accordingly, the conviction was affirmed.

## **XI. Probation & Supervised Release**

• *18 U.S.C. § 3583(e)(3) - Revocation*

U.S. v. VanHoose, 05-3290 (2/7/06)

► Defendant was convicted in February of 1994 of a drug conspiracy. Upon being released on supervised release, defendant was violated and sentenced by the district court to 2 years in prison (the maximum under § 3583(e)(3)) and a new supervised release term of 24 months. Defendant challenged on appeal that the additional supervised release term was not authorized by § 3583(e)(3) where a maximum sentence was imposed.

★ Holding: Relying on the Supreme Court's decision in *Johnson v. U.S.*, the court held that the version of § 3583(e)(3) that was in effect at the time of defendant's original conviction did not prohibit the reimposition of supervised release where a maximum prison term was imposed. Thus, the sentence was affirmed. The court acknowledged that this rule was "odd" given that, if defendant violated the new supervised release term, no jail time could be imposed. The court also noted that the Sixth Circuit case of *U.S. v. Marlow* was likely wrongly decided, although it is still binding precedent in this Circuit. The *Marlow* court held that a district court may, upon revocation of supervised release, impose a period of incarceration plus a new term of supervised release that exceeds the length of the original supervised release term. Finally, the court

noted that § 3583(h), enacted in September 1994, now governs reimposition of supervised release after revocation.

## **XII. Appeal**

• *Preserving Error*

U.S. v. Buckingham, 05-5014 (1/11/06)

► Defendant was charged with being a felon in possession of a firearm and moved to suppress evidence obtained during a search of his car after a traffic stop. Defendant did not raise the invalidity of his consent argument in his written motion, but argued it orally several times during the suppression hearing. The district court found consent for the search, and denied defendant's motion. Defendant appealed and the government argued that defendant had waived the consent issue by not sufficiently raising it in the district court.

★ Holding: The court found that defendant had sufficiently contested the issue of consent by raising it orally during the hearing on the motion to suppress. Accordingly, the court considered the issue. (*See supra, IV. Fourth Amendment*).

• *Preserving Error*

U.S. v. Blood, 04-5101 (1/24/06)

► Defendant was charged with possessing counterfeit securities with intent to deceive another. At trial, the district court decided to provide an instruction to the jury on entrapment by estoppel. Defendant attempted to object to the substance of the instruction at the charge conference. The district judge stated that he felt that defendant's objection was imprecise, and indicated that defendant would be required to state the objection succinctly after the instructions were provided to the jury. Defendant failed to make a specific objection to the entrapment by estoppel instruction after the instructions were provided to the jury, and did not incorporate the codefendant's specific objection to the instruction. Defendant appealed.

★ Holding: Although trial judges do not have unfettered discretion in determining what is required to preserve objections, they are permitted to require a defendant to articulate objections after a charge is given. The court held that the district court's request of defendant in the case was reasonable. The district court gave defendant reasonable notice as to what was required to preserve his objection, and the request was reasonable to insure clarity. Because defendant failed to make a specific objection to the entrapment by estoppel instruction, and did not incorporate the codefendant's specific objection, the court found that defendant had failed to preserve his objection and reviewed the case for plain error. (*See supra*, X. Jury Issues).

• *Issue First Raised on Appeal*

U.S. v. Martin, 04-6428 (2/21/06)

▶ Defendant was convicted in a meth case and attempted to challenge, for the first time on appeal, that the Sentencing Commission acted beyond its statutory authority in promulgating the meth guidelines.

★ Holding: The court held that the general rule that courts of appeals should not address an issue not raised in the district court is prudential, not jurisdictional. The court ruled that it may address such an issue if it raises a purely legal issue, i.e., constitutional or statutory, and has been briefed by the parties. In the case, the court found that the issue regarding the meth guideline had been briefed by the parties, was purely legal, and was likely to recur. Accordingly, the court decided to address the issue. (*See supra*, II. Sentencing Guidelines).

• *Reasonableness of Sentence*

U.S. v. Williams, 05-5416 (1/31/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court, applying the guidelines as advisory, sentenced defendant to 64 months

based upon a guideline range of 57 to 71 months. Defendant appealed claiming that the sentence was unreasonable.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that a sentence imposed within a properly calculated guideline range enjoys a rebuttable presumption of reasonableness. The court further held that a district court need not explicitly evidence its consideration of the factors under 18 U.S.C. § 3553. A district court has satisfied its obligation at sentencing if it articulates its reasoning sufficiently to permit reasonable appellate review. In the case, the court held that the district court had sufficiently considered the § 3553 factors, and that defendant had not rebutted the presumption of reasonableness, therefore the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Foreman, 04-2450 (2/8/06)

▶ Defendant was convicted of being a felon in possession a firearm and sentenced based upon the mandatory sentencing guideline regime. Defendant appealed.

★ Holding: The court remanded the case for reconsideration of a sentencing guideline issue. (*See supra*, II. Sentencing Guidelines). In remanding the case, the court clarified its recent holding in *Williams*. (*See supra*). The court held that *Williams* does not mean that a sentence outside the guideline range is presumptively unreasonable. Further, the court held that *Williams* does not mean that a sentence within the guideline range is reasonable if there is no evidence that the district court followed the mandate to impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of 18 U.S.C. § 3553(a)(2). Finally, the court held that *Williams* did not mean that the appellate court should abdicate any meaningful review; to the contrary, the court held that appellate review is more important under a non-

mandatory guideline regime to insure uniformity and reduce sentence disparities across the board.

- *Reasonableness of Sentence*

U.S. v. Richardson, 05-1260 (2/13/06)

- Defendant was convicted of bank robbery and the district court calculated his sentencing guideline range to be 151-188 months. The court imposed a sentence of 180 months. Defendant appealed the reasonableness of the sentence.

- ★ Holding: The court first confirmed the holding from *Williams* that a sentence within the guideline range is presumptively reasonable. The court further confirmed prior precedent that a district court is not required to specifically recite its consideration of the 18 U.S.C. § 3553 factors, but instead the district court must only sufficiently develop the record to allow “reasonable appellate review.” Finally, the court found the sentence to be reasonable. The court held that the district court had appropriately considered defendant’s history and characteristics, the need to protect the public, and defendant’s need for rehabilitative services. Accordingly, the sentence was affirmed.

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

- *Ineffective Assistance of Appellate Counsel*

Franklin v. Anderson, 03-3636 (1/9/06)

- Defendant was convicted in state court of murder and sentenced to death. Two attorneys were appointed to represent defendant in his appeals, but the attorneys failed in both the court of appeals and the Ohio Supreme Court to raise an obvious issue of juror bias. (*See supra*, VI. Sixth Amendment). Defendant subsequently filed a federal *habeas* petition in which he claimed that he was provided ineffective assistance by his two appellate attorneys. The district court granted the petition, and the state appealed.

- ★ Holding: The court first held that a

criminal defendant is entitled to effective assistance of counsel in his direct appeal. The court then found that defendant’s appellate attorneys were embarrassingly ineffective in representing defendant in his state appeals. Among the many egregious errors by counsel, they refused to answer certain questions from the court of appeals during oral argument, failed to meet with the defendant even one time, engaged in inappropriate laughing and irresponsible representations before the Ohio Supreme Court, and were generally unprepared. More importantly, the court found that the attorneys had failed to raise the issue of juror bias, an obvious error in the case. Accordingly, the court found the attorneys’ representation to be constitutionally deficient.