

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:

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FINDING THE CASES

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

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

FEDERAL DEFENDER WEBSITE

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SUPREME COURT DECISIONS

The Supreme Court's 2005 Term ended in June. The 2006 Term does not begin until October, so there are no new decisions for this issue.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

- 8 USC § 1326(b)(2) - *Illegal Reentry*

U.S. v. Zuniga-Guerrera, 05-6457 (8/23/06)

- ▶ In 1995, Defendant committed a drug

conspiracy offense, and in September of 1996 he pled guilty to using a telephone to facilitate the offense. In April of 1996, between the commission of the offense and defendant's guilty plea, the law on deportation of aliens changed with the passage of the AEDPA such that aliens were no longer eligible for discretionary waiver of deportation if they had been convicted of an aggravated felony. As a result, defendant was subsequently deported, but he returned to the U.S. in 2004. He was then arrested and convicted of illegal reentry under § 1326. On appeal, defendant claimed that the AEDPA should not have been applied retroactively to permit his prior deportation and that the use of a telephone to commit a drug offense should not qualify as an aggravated felony.

★ Holding: In *INS v. St. Cyr*, the Supreme Court held that it was improper to apply a law (in that case the IIRIRA) that diminished a defendant's rights to contest deportation based upon a conviction, where the defendant had already pled guilty to the offense before passage of the law. In this case, the court refused to extend the *St. Cyr* holding where defendant did not enter his plea of guilty to the offense until after the new deportation law (the AEDPA) had gone into force. Thus, the AEDPA was properly applied to defendant's prior deportation.

Further, the court held that use of a telephone to commit a drug offense does qualify as an aggravated felony under the AEDPA. Accordingly, defendant's sentence for illegal entry was affirmed.

• *18 USC § 371 - Conspiracy*
U.S. v. Blackwell, 05-4588 (8/29/06)

▶ Defendant was charged with one count of conspiracy to commit insider trading and one count of conspiracy to obstruct justice, both under § 371. Defendant was convicted on both counts and argued on appeal that the evidence was insufficient in both instances to show the

existence of an agreement.

★ Holding: To prove conspiracy, the government must show (1) the existence of an agreement to violate the law, (2) knowledge and intent to join the conspiracy, and (3) an overt act constituting actual participation in the conspiracy. Regarding the insider trading conspiracy, the court found sufficient evidence of an agreement because defendant had agreed with his wife to encourage others to buy stock in his company and gave, or loaned, money to such individuals to buy the stock. Regarding the obstruction conspiracy, the court ruled that sufficient evidence established that defendant and his wife agreed to lie to the SEC and to delete names from documents before turning them over. Accordingly, the convictions were affirmed.

• *18 USC § 922(g) - Felon in Possession*
U.S. v. Coleman, 04-4393 (8/10/06)

▶ Defendant was charged with being a felon in possession of a firearm. The predicate felony was a state drug trafficking conviction for which a federal district court had granted a conditional writ of *habeas corpus*. The writ went into force in 90 days unless the state retried defendant within that time period. The state appealed the grant of the conditional writ and the district court accordingly stayed the issuance of the writ pending appeal. During this stay, defendant was arrested with a firearm and charged with being a felon in possession of a firearm. At the close of the trial, defendant made a Rule 29 motion requesting dismissal because the predicate felony was the subject of the writ. The district court denied the motion and defendant appealed.

★ Holding: The court first held that the law is settled that the subsequent nullification of a predicate felony conviction does not invalidate an already entered conviction for being a felon in possession of a firearm. Second, the court ruled that a conditional writ of *habeas corpus* does not have the effect of nullifying a

conviction unless and until the writ “springs into effect.” Because the execution of the writ was stayed at the time of defendant’s arrest with the firearm, the predicate drug trafficking conviction was still in full effect. Thus, defendant’s conviction for being a felon in possession of a firearm was valid and the district court ruling was affirmed.

- *18 USC § 924(e) - ACCA*

United States v. Jones, 05-5739 (7/20/06)

- ▶ Defendant was convicted of being a felon in possession of a firearm and the district court sentenced defendant as an armed career criminal under § 924(e). The ACCA finding was based upon three prior convictions for armed robberies that occurred on the same day, within two hours of each other. In making the determination, the district court relied on “affidavits of complaint” that were filed pre-indictment in the prior cases that indicated that the offenses involved different victims and separate locations. Defendant appealed the ACCA determination.

- ★ Holding: First, the court held that the district court’s consideration of the “affidavits of complaint” was proper under the Supreme Court’s decisions in *Taylor* and *Shepard*. Second, the court ruled that the three prior convictions were properly considered as separate offenses, even though they occurred in close proximity, because they involved different victims and happened at separate locations. Third, the court noted that the Sixth Circuit has never decided whether the *Taylor/Shepard* requirements actually apply to a determination by the district court as to whether prior offenses occurred on different occasions under the ACCA. The court did not directly answer this question because it found that the *Taylor/Shepard* requirements had been met in the case. Therefore, the sentence was affirmed.

- *18 USC § 924(e) - ACCA*

U.S. v. Caruthers, 05-5307 (8/11/06)

- ▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that defendant qualified as an armed career criminal based upon three prior state burglary convictions from Tennessee. Defendant argued on appeal that the burglary convictions were not violent felonies under the ACCA.

- ★ Holding: Relying on the Supreme Court decision in *Taylor*, the court held that a state burglary conviction only qualifies as a violent felony under the ACCA if it meets the generic definition of burglary. In making the assessment, the court noted that it may consider the state statute under which the defendant was convicted, as well as the charging document, plea agreement, and plea colloquy. In the case, the court found that the Tennessee burglary convictions did qualify as generic burglaries pursuant to *Taylor* and affirmed the sentence.

- *18 USC § 1028(b)(1)(D) - Identity Fraud*

U.S. v. Tudeme, 05-6258 (8/9/06)

- ▶ Defendant was convicted of using another person’s identity to commit a felony offense and at sentencing the district court determined that the statutory maximum for the offense was 15 years, pursuant to § 1028(b)(1)(D). Based upon this determination, the eligible term of supervised release was increased from 2 to 3 years. Defendant objected upon the grounds that § 1028(b)(1)(D) only permits a 15 year maximum sentence where a defendant “obtains anything of value” whose aggregate sum is \$1000 or more. The conduct involved defendant’s attempted purchase of a television with a fraudulent check, but he was caught before he actually obtained the television. The district court overruled defendant’s objection, and he appealed.

- ★ Holding: The court held that, although the language of § 1028(b)(1)(D) indicates that a defendant must “obtain” something valued at

over \$1000, § 1028(f) provides that the same penalties apply to attempts or conspiracies. Thus, the district court ruling was affirmed.

• *18 USC §§ 1341 and 1346 - Mail Fraud*
U.S. v. Turner, 05-6326 (8/31/06)

► Defendant engaged in a pattern of vote buying and deceptive campaign donation practices on behalf of a judicial candidate in a Kentucky state election. The government prosecuted defendant in multiple mail fraud counts under both § 1341 and § 1346. The § 1341 prosecution utilized the theory that defendant's actions were meant to deprive Kentuckians of the salary that was paid to the elected judge, and the § 1346 prosecution alleged that defendant deprived the citizenry of the honest services of a judicial candidate. Defendant was convicted and he appealed.

★ Holding: First, the court held that the § 1341 prosecution was improper. This mail fraud section prohibits fraud by use of the mails that is intended to “deprive a victim of money or property.” The court held that vote buying for a candidate, even if successful, did not deprive the citizenry of money because the salary would be paid to whichever elected official obtained the position. The right to decide who is paid the salary is a political, intangible one that cannot be enforced under § 1341.

Second, the court held that the § 1346 prosecution was likewise improper. This mail fraud section prohibits a scheme to defraud a victim of the “intangible right to honest services.” The court found that, because the candidate that defendant promoted was not in a political office at the time, he had no fiduciary duty that he owed to the public. Thus, the public was not deprived of any “honest services” as that phrase is defined under controlling precedent. Therefore, the convictions on the mail fraud counts were reversed.

• *18 USC § 1951 - Hobbs Act Conspiracy*
U.S. v. Kelley, 05-1361 (8/31/06)

► Defendant was a high ranking public official for Wayne County, Michigan. Defendant and his wife were charged under the Hobbs Act for extorting home repairs, money, and various other financial benefits from a contractor to whom defendant awarded significant and continuing contracts with the county. Defendant was convicted at trial and filed an appeal challenging the sufficiency of the evidence.

★ Holding: To prove a conspiracy to commit a Hobbs Act extortion, two available means are the “color of official right” and “fear of economic harm” theories. Under the first theory, the official obtains payments to which he is not entitled in return for official acts. A private citizen may be convicted under this theory for aiding and abetting the public official. Under the second theory, a public official receives payment because the victim believes that the defendant can exercise his power to the victim's economic detriment. A private citizen can also be convicted under this theory. In the case, the court found that the government had established sufficient evidence to convict defendants under both theories, and accordingly, the conviction was affirmed.

• *21 USC § 846 - Drug Conspiracy*
U.S. v. Lopez-Medina, 05-5891 (8/25/06)

► Defendant was charged with drug conspiracy and convicted after jury trial. At the close of the government's case, defendant moved for dismissal pursuant to Fed. R. Crim. P. 29. The district court denied the motion and defendant appealed, challenging the sufficiency of the evidence.

★ Holding: In order to establish a drug conspiracy under § 846, the government must show (1) an agreement regarding the distribution of a specific narcotic, (2) the defendant's knowledge and intent to join the conspiracy, and (3) defendant's participation in

the conspiracy. In the case, the court found that sufficient circumstantial evidence of drug activity was obtained from defendant's residence at the time of the search by DEA agents. Accordingly, even though the case was reversed based upon evidentiary issues (*See infra*), the court found that the district court's denial of the Rule 29 motion was proper.

II. Sentencing Guidelines

• 2B1.1 - Loss Amount

U.S. v. Mickens, 05-3377 (7/3/06)

► Defendant was convicted of credit card fraud. In the presentence report, the probation officer recommended that defendant be held responsible for about \$15,000 in actual loss and over \$110,000 in intended loss. The intended loss figure was based upon the fact that the government found 32 additional credit cards in defendant's hotel room, and the probation officer estimated that defendant intended to charge \$3,500 per credit card. The district court sentenced defendant accordingly, and defendant appealed.

★ Holding: The court held that the amount attributed to defendant was a reasonable estimation of the actual and intended loss in the case. Because \$3,500 was the average amount that defendant had charged on the credit cards that he did use, it was reasonable to assume that he would charge a like amount on the additional credit cards. Thus, the guideline calculation was correct. The court additionally affirmed the sentence after finding it was reasonable.

• 2B1.1 - Loss Amount

U.S. v. Blackwell, 05-4588 (8/29/06)

► Defendant was convicted of conspiracy to commit insider trading and the district court determined the loss amount at sentencing to be \$908,853. This figure included relevant conduct loss amounts attributable to persons acquitted of insider trading and to conduct not charged in the indictment. Defendant appealed

the loss calculation.

★ Holding: Reaffirming pre-*Booker* precedent, the court held that the preponderance of the evidence standard applies to the loss calculation under § 2B1.1 and that district courts may consider acquitted or uncharged conduct at sentencing. Thus, the loss calculation was affirmed.

• 2D1.1 - Drug Amount

U.S. v. Salas, 05-5547 (8/1/06)

► Defendant was convicted of possession with intent to distribute cocaine. The conviction was based upon the fact that defendant was found driving from Kentucky to Florida with 3 kilos of cocaine and \$20,000 in a cooler in the trunk. At sentencing, an agent testified that cocaine sold for about \$20,000 per kilo in Kentucky and \$18,000 per kilo in Florida, and that it appeared from the circumstances that the \$20,000 was proceeds from the sale of 1 kilo of cocaine. Based upon this testimony, the district court held defendant responsible for 4 kilos of cocaine. Defendant appealed.

★ Holding: The commentary to USSG § 2D1.1 provides that where a drug seizure does not reflect the scale of the offense, the district court may approximate the quantity of the substance. Money may be converted to drug amounts as long as the government proves by a preponderance of the evidence the conversion ratio and the amount of money attributable to the drug activity. Distinguishing the prior Sixth Circuit case of *U.S. v. Sandridge*, the court found that the government had sufficiently shown that the money was probably proceeds from a drug sale and had established the conversion ratio. Accordingly, the court affirmed the district court's determination that defendant was responsible for 4 kilos of cocaine.

• *2D1.1(b)(1)-Drugs-Firearm Enhancement*
U.S. v. Galvan, 04-1741 (7/13/06)

► Defendant was convicted of a drug conspiracy and at sentencing the district court assessed a two-level enhancement under USSG § 2D1.1(b)(1) for possession of a firearm. A coconspirator testified that defendant told him to bring a gun to the drug transaction, and the coconspirator then told another individual to bring the gun, which he did. The district court found defendant liable for the gun under the theory of constructive possession. Defendant appealed.

★ Holding: For purposes of § 2D1.1(b)(1), a defendant may be held responsible for constructively possessing a gun if she knows about the gun and has ownership, dominion, or control over the firearm, or dominion over the premises where the firearm is located. If the firearm is part of a conspiracy, the court need only find that it was reasonably foreseeable to the defendant that the gun was possessed by a member of the conspiracy. The court held that the facts of the case established that it was reasonably foreseeable to the defendant that the gun was present at the drug transaction and that he constructively possessed the gun. Therefore, the sentence was affirmed.

• *2F1.1 - Loss Amount*
U.S. v. Tudeme, 05-6258 (8/9/06)

► Defendant was convicted of using another person's identity to commit a felony and at sentencing the district court held defendant responsible for in excess of \$120,000 in loss. The district court justified the loss amount in two ways. First, the court found that defendant opened a bank account with a fake I.D. and then another person deposited a \$155,000 counterfeit check into the account. Second, defendant testified that the purpose of the account was to receive illegal immigrant paychecks. Based upon this testimony, the court concluded that multiple paychecks at "\$20 to 30,000 a whack" would have been

deposited into the account, thus easily accumulating more than \$120,000 in loss. Defendant appealed.

★ Holding: First, the court held that the \$155,000 fraudulent check did not support the loss amount. Defendant testified at the sentencing hearing that the check was deposited by another individual and that he did not know anything about the check or that it had been deposited. Given that the purpose of the account was to deposit illegal alien paychecks, the court held that it was not reasonably foreseeable to defendant, pursuant to the relevant conduct provisions of § 1B1.3, that an insufficient funds check far exceeding a normal payroll check would be deposited. Second, the court held that the estimated amount of the illegal alien payroll checks did not support the loss figure determined by the district court. Specifically, the court ruled that the conclusion that the payroll checks would be "\$20 to 30,000 a whack" was completely unsupported by the record. Accordingly, the sentence was vacated.

• *2K2.1(b)(5) - Another Felony Offense*
U.S. v. Huffman, 05-2058 (8/30/06)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court imposed a four-level enhancement under USSG § 2K2.1(b)(5) because defendant possessed the firearm in connection with another felony offense. Specifically, the district court found that defendant had possessed the gun in relation to running a "dope house." Defendant appealed.

★ Holding: The court found that the four-level enhancement was appropriate under the "fortress theory." This theory applies where a defendant used a firearm to protect drugs, facilitate a drug transaction, or embolden himself while participating in felonious conduct. The court ruled that defendant possessed the gun to protect himself and the operations of the "dope house" in which he was

staying. Accordingly, the sentence was affirmed.

• *2L1.2 - Illegal Reentry*

U.S. v. Hernandez-Fierros, 05-2206 (7/3/06)

▶ Defendant was convicted of illegal reentry and at sentencing argued for a below-guideline sentence based upon a claim that USSG § 2L1.2 impermissibly double counted his prior drug trafficking conviction both against his offense level and his criminal history score. Defendant also claimed that a below-guideline sentence was warranted to avoid sentencing disparity with districts that have fast-track programs for illegal immigration cases. The district court rejected defendant's claims and sentenced him to the bottom of the guideline range. Defendant appealed.

★ Holding: First, the court held that, because the commentary to § 2L1.2 specifically indicated that a prior conviction may count both against the offense level and the criminal history score, no impermissible double counting occurred. Second, the court held that the disparity in sentences with fast-track programs did not run counter to 18 USC § 3553(a)'s mandate to avoid unnecessary sentencing disparities. The court held that the disparity for fast-track programs is valid because it is "necessary for particular districts to run effectively" and is not based on "treating individual defendants disparately because of their individual differences." Accordingly, the sentence was affirmed.

• *3B1.1 - Leadership Role*

U.S. v. Gates, 05-1818 (8/24/06)

▶ Defendant was convicted of bank fraud and at sentencing the district court applied a three level sentence enhancement because defendant was a manager in a scheme that involved 5 or more participants under USSG § 3B1.1. Defendant appealed.

★ Holding: The court held that the application of the three level enhancement was proper because defendant admitted to recruiting other individuals to cash counterfeit checks, driving them to banks to cash the checks, and sharing in the proceeds of the endeavor. Accordingly, the sentence was affirmed.

• *3B1.1(b) - Leadership Role*

U.S. v. Galvan, 04-1741 (7/13/06)

▶ Defendant was convicted of a drug conspiracy and a codefendant testified that defendant had directed him to bring a gun and 2 kilos of cocaine to a drug transaction. Based upon this evidence, the district court found that defendant played a leadership role and enhanced defendant's sentence pursuant to USSG § 3B1.1(b). Defendant appealed.

★ Holding: The court found that the evidence supported the conclusion that defendant has exercised leadership authority over at least one person in a conspiracy that involved five or more people. Thus, the sentence was affirmed.

• *3B1.2 - Mitigating Role*

U.S. v. Salas, 05-5547 (8/1/06)

▶ Defendant was convicted of possession with intent to distribute cocaine because he transported cocaine and cash from Kentucky to Florida on one occasion. At sentencing, defendant requested a two-level guideline reduction under USSG § 3B1.2 for playing a minor role. The district court refused to grant the reduction and defendant appealed.

★ Holding: The court held that defendant played an indispensable role in transporting the cash and cocaine, that he knew that he was transporting drugs and drug proceeds, that he rented a car for the purpose of carrying out his role, and that he attempted to mask the smell of the cocaine in order to avoid detection. Accordingly, the court affirmed the district court's decision denying the minor role reduction.

• *3C1.1 - Obstruction of Justice*
U.S. v. Paulette, 05-5549 (8/10/06)

► Defendant was charged with narcotics and firearm offenses and at trial he testified in his own behalf. Defendant testified about where he was living and, in an attempt to impeach defendant, the prosecutor introduced the testimony of defendant's mother and tape recordings of defendant's conversations. At sentencing, the district court applied a two-level enhancement to defendant's sentence for obstruction of justice, pursuant to USSG § 3C1.1. The basis for enhancement was the district court's belief that defendant had committed perjury in testifying about his residence, but it made no specific findings as to which parts of defendant's testimony were actually false. Defendant appealed.

★ Holding: The court held that, in order to enhance a defendant's sentence under § 3C1.1 based upon perjury, the district court must (1) identify those portions of the testimony that it considers perjurious, and (2) either make a specific finding for each element of perjury or make a finding that encompasses all the factual predicates for a finding of perjury. The court ruled that the district court had not complied with either part of the test, and remanded for resentencing.

• *4A1.2(k)(1) - Criminal History*
U.S. v. Galvan, 04-1741 (7/13/06)

► Defendant was convicted of a drug conspiracy and at sentencing the district court attributed three criminal history points for a prior state conviction. Defendant originally received probation for the state conviction, but then twice violated the probation, receiving a 65 day and a then one year sentence. At his federal sentencing, the district court concluded that, under USSG § 4A1.2(k)(1), the two separate sentences imposed on the probation violations should be aggregated in order to calculate the criminal history points. Because the total aggregated sentence was over 13

months, 3 points were attributable to the prior state conviction. Defendant appealed.

★ Holding: The court held that, under § 4A1.2(k)(1), the district court properly aggregated the prior probation violations for purposes of calculating criminal history points. The court found no consequence to the fact that the state court had not called the first probation violation a "revocation" because, for guideline purposes, the state court had in effect revoked defendant's probation. Thus, the criminal history calculation was affirmed, but the case remanded for resentencing consistent with *Booker*.

• *4B1.1 - Career Offender*
U.S. v. Veach, 05-6268 (8/1/06)

► Defendant was convicted of threatening a federal official and at sentencing the district court concluded that he qualified as a career offender under USSG § 4B1.1. One of defendant's qualifying convictions for career criminal status was a felony Kentucky DUI conviction. On appeal, defendant argued that the DUI conviction did not constitute a crime of violence under § 4B1.1.

★ Holding: A prior conviction may be a crime of violence under § 4B1.1 if, among other reasons, the conduct underlying the conviction presented a serious potential risk of physical injury to another. The court found that driving under the influence presents the kind of serious potential risk of physical injury anticipated by § 4B1.1 and held that defendant's prior felony DUI was a crime of violence that qualified him as a career offender.

III. Evidence

• *401/403 - Relevance/Undue Prejudice*
U.S. v. Whittington, 05-2247 (7/28/06)

► Defendant was charged with conspiracy to distribute crack cocaine. Before trial, he filed a motion to exclude evidence of his possession of \$500 and \$600, and a cell phone. The district court ruled that the evidence was

relevant and not unduly prejudicial and denied the motion. After conviction, defendant appealed.

★ Holding: The court first found that the money and cell phone evidence were relevant because the government also offered testimony that defendant was unemployed, and that drug dealers often carry cash and cell phones. Second, the court held that the cell phone and the cash were “neutral items” that were unlikely to unduly inflame the jury. Further, the court noted that the evidence of the cash did not lead the jury to convict defendant of a greater amount of crack, as claimed by defendant, because the jury convicted defendant only of the conspiracy and not the substantive distribution count. Had the jury believed the money was from the sale of crack, it presumably would have convicted him of the distribution count. Thus, the conviction was affirmed.

• *401/403 - Relevance/Undue Prejudice*
U.S. v. Lopez-Medina, 05-5891 (8/25/06)

▶ Defendant was charged with a drug conspiracy and at trial the government introduced the record, presentence report, and mug shots of two acquaintances of defendant. Upon defendant’s conviction, he appealed.

★ Holding: The court held that the information regarding defendant’s acquaintances was “guilt by association” evidence that was not relevant to a determination of defendant’s guilt or innocence. Based upon this error, and the other evidentiary errors (*See infra*), the court held that defendant’s case had been prejudiced such that reversal of the conviction was warranted.

• *401 - Relevance - Limits on Cross Exam*
U.S. v. Veach, 05-6268 (8/1/06)

▶ Defendant was charged with threatening federal officers and during the trial defendant attempted to cross examine an officer about her reaction to defendant the day after defendant

had allegedly threatened to inflict harm to her. The district court prohibited the line of questioning and defendant appealed.

★ Holding: The court found that the line of questioning proposed by defendant was relevant because defendant’s threats to the officer had been threats of future harm. Therefore, the officer’s reaction to the defendant the day after the threats were made was relevant to show whether the officer’s alleged fear was reasonable. The court accordingly held that the district court erred in limiting defendant’s cross examination but that the error was harmless. Nevertheless, because the court was remanding for retrial on other grounds, the court instructed the district court to reconsider its ruling during the retrial.

• *401 - Relevance*

U.S. v. Blackwell, 05-4588 (8/29/06)

▶ Defendant was charged with conspiracy to commit insider trading based upon the fact that numerous friends and family bought stock in his company shortly before a buyout by a larger company. At trial, defendant introduced expert testimony to show that “leakage” of information does occur during the time period prior to a buyout through sophisticated non-insiders’ observations of a company’s activities. Defendant also attempted to introduce additional testimony that other members of the board of directors of defendant’s company had family and friends who bought stock shortly before the buyout. The district court excluded the latter evidence and defendant appealed.

★ Holding: The court held that the evidence about the activities of other board members’ families was not relevant to defendant’s guilt. The court ruled that the evidence was not relevant because defendant was not able to show the likelihood that the trading surrounding the other board members was due to “leakage.” The court found that it was equally likely that the other board members

also tipped family members, but were simply not prosecuted. Accordingly, the court affirmed the district court's exclusion of the evidence.

- *702 - Expert Testimony*

U.S. v. Lopez-Medina, 05-5891 (8/25/06)

- ▶ Defendant was charged with a drug conspiracy and at trial the government presented the testimony of two DEA agents who testified both as fact and expert witnesses. The expert testimony explained use of counter surveillance measures and details about how drug dealers conduct their business. Defendant did not request, nor did the district court provide, any limiting instructions on the dual role of the DEA witnesses or on the use of expert testimony. Defendant was convicted and he appealed.

- ★ Holding: Applying the plain error standard, the court found that the district court's failure to provide any form of cautionary instruction regarding the witnesses' dual role or on the use of expert testimony was error. Further, the court emphasized that the presentation of the testimony of the DEA agents was such that there was no demarcation between the fact and expert portions of the testimony. Based upon this error, and other evidentiary errors (*See supra*), the court held that defendant's case had been prejudiced such that reversal of the conviction was warranted.

- *801 - Hearsay*

U.S. v. Blackwell, 05-4588 (8/29/06)

- ▶ Defendant was charged with conspiracy to commit insider trading and at trial he attempted to present evidence that two witnesses had heard rumors in the community and on the internet about a buyout of defendant's company. The district court excluded the evidence and defendant appealed.

- ★ Holding: The court found that the testimony of the witnesses constituted hearsay because it recounted statements made outside

the courtroom that rumors existed about a buyout. The court refuted defendant's argument that the statements were not made to show the truth of the matter asserted, because the court found that the "matter asserted" was that rumors existed, not that the buyout was going to occur. The court noted that if the evidence were offered to show the truth of the buyout, it would actually be "double hearsay." Accordingly, the district court ruling was affirmed.

- *801(d)(2)(E) - Coconspirator Exception*

U.S. v. Lopez-Medina, 05-5891 (8/25/06)

- ▶ Defendant was charged with a drug conspiracy and at trial the government introduced "drug ledgers" that were found in defendant's residence. The district court held that the ledgers were admissible as coconspirator statements under FRE 801(d)(2)(E). Defendant was convicted and appealed.

- ★ Holding: Pursuant to the court's prior holding in *Enright*, the government must prove three elements in order to introduce coconspirator statements under FRE 801(d)(2)(E): (1) a conspiracy existed; (2) defendant was a member; (3) the statements were made during the course of the conspiracy. Applying the plain error standard, the court first held that evidence established that a conspiracy existed based upon the numerous opened drug wrappings, digital scales, and heat-sealing equipment found in the residence, combined with the suspicious visits of two individuals to the residence. Second, the court ruled that defendant was involved in the conspiracy based upon the fact that the drug ledgers and other items were found in his residence. Third, the court found that the statements in the ledger were obviously made during the course of a drug conspiracy. Accordingly, admission of the evidence was affirmed.

- *803(6) - Business Records*

U.S. v. Baker, 05-3336 (8/15/06)

► Defendant was charged with multiple conspiracy and mail fraud counts and at trial the government introduced postal records, through the testimony of a postal inspector, to show that defendant used the post office boxes in question. The district court admitted the records under FRE 803(6) and defendant appealed, claiming that the postal inspector was not qualified to introduce the records.

★ Holding: In order to admit records under the business records exception of FRE 803(6), the proponent must present the testimony of the custodian or “other qualified witness.” The court held that the postal inspector, although not the custodian of the records, met the requirements of a “qualified witness.” He had been a postal inspector for 14 years, knew the inner workings of the post office, and testified to his familiarity with the various details of the postal records in question. Thus, the court affirmed the district court ruling admitting the records.

IV. Fourth Amendment

- *Search Warrant - Particularity*

Baranski v. 15 Agents, 03-5582 (7/13/06)

► Baranski’s warehouse was searched based upon an ATF search warrant seeking to locate 425 illegal machine guns. The warrant itself did not specifically list the items to be seized (the 425 machine guns) but instead referenced the affidavit and incorporated it by reference. The affidavit, however, was sealed by the issuing magistrate, and was not presented to the warehouse manager with the warrant at the time of the execution of the search. After Baranski’s conviction and loss on appeal, he filed an action pursuant to 42 USC § 1983 against the ATF agents involved in the execution of the search warrant based upon a violation of his Fourth Amendment rights. The district court found no Fourth Amendment violation, but the Sixth Circuit reversed on

appeal finding the warrant invalid because the sealed affidavit (containing the description of the items to be seized) did not accompany the warrant upon execution. (*See P.V.*, Issue #1). The Sixth Circuit granted rehearing *en banc*.

★ Holding: Reversing the decision of the original panel, the *en banc* court held that the Fourth Amendment does not require a *per se* rule that an affidavit must accompany a warrant upon execution of the search. If a warrant is valid upon its issuance, then the Warrant Clause of the Fourth Amendment is satisfied. The only remaining question is whether the execution of the warrant is reasonable. In this regard, the court found that, although the affidavit describing the items to be seized did not accompany the warrant, the agents told the warehouse manager orally what was authorized to be seized, the agents had a clear plan on conducting the search, the agents seized only things allowed by the warrant, no breach of the peace occurred or was threatened, and the agents otherwise acted reasonably. Accordingly, the court held that the failure to produce the affidavit did not render the search unreasonable, and the court ruled, reversing the panel decision, that the Baranski’s Fourth Amendment rights had not been violated.

- *Search Warrant - Good Faith*

U.S. v. Pruitt, 05-3577 (8/11/06)

► Officers obtained a search warrant to search a residence from which they believed defendant was selling drugs. The search warrant affidavit was accidentally left blank in the section where the officer was supposed to list the facts establishing probable cause. The officer did provide sworn testimony to the magistrate to establish probable cause, but the testimony was not recorded or transcribed. After defendant’s arrest, he moved to suppress the evidence seized, but the district court denied the motion. On appeal, defendant argued that the affidavit was invalid on its face, and that it was not saved by good faith.

★ Holding: The court held that the affidavit did not provide probable cause to justify the warrant because it did not list any facts to support the search. Further, the sworn testimony provided to the magistrate was insufficient because it was not recorded or transcribed as required by Fed. R. Crim. P. 41(2)(d)(B)-(C). Finally, the court ruled that the warrant was not saved by good faith because it was “bare bones,” and pursuant to the Supreme Court decision in *Leon*, a bare bones affidavit will not support a finding of good faith on the part of officers. Thus, the search warrant was invalid. The court nonetheless affirmed the search on other grounds. *See infra*.

• *Warrant Exception-Exigent Circumstances*
U.S. v. Huffman, 05-2058 (8/30/06)

► Officers received a 911 call for shots fired at a residence. Upon arrival, officers found glass broken and bullet holes on the walls consistent with automatic weapon fire. Officers knocked and announced their presence and checked with a neighbor before entering the apartment. The officer who testified in court claimed that he did not know that the shots had been fired about 8 hours earlier. Upon entering the home, officers found defendant with a gun and ammunition. Defendant was charged with being a felon in possession of a firearm and moved to suppress the evidence. The district court denied the motion and defendant appealed.

★ Holding: The court held that exigent circumstances justified the entry into the home. Specifically, the court found that the risk of harm to others warranted the entry. The court noted prior precedent that courts may mutually impute the knowledge of all officers working together or in communication with each other, but nonetheless found that there was no evidence that the officers knew at the time of the entry into the home that the shots had been fired 8 hours earlier. Accordingly, the court

affirmed the district court ruling.

• *Searches - Supervised Release*
U.S. v. Conley, 05-5900 (7/7/06)

► Defendant was convicted of bank fraud and the district court ordered that she submit to DNA testing as a condition of supervised release. Defendant objected to the condition, and then challenged it on appeal as a violation of the Fourth Amendment.

★ Holding: The court held that DNA testing as a condition of supervised release did not violate defendant’s Fourth Amendment rights. First, the court ruled that no individualized suspicion was required before imposing the condition. Second, the court held that the government’s special needs in supervising probationers outweighed defendant’s privacy interests. Finally, the court found that, under the totality of the circumstances, the supervised release condition requiring DNA testing was reasonable. Accordingly, the sentence was affirmed.

• *Searches - Authority to Enter Home*
U.S. v. Harness, 05-5835 (7/17/06)

► Defendant was lawfully arrested outside his home by police officers. After arresting him, the officers accompanied defendant into his home so that he could obtain his wallet and keys. Upon entry, the officers observed several firearms. Defendant was charged with being a felon in possession of a firearm and moved to suppress the firearms claiming that the officers had unlawfully entered his home without either a warrant or consent. The district court denied the motion and defendant appealed.

★ Holding: The court held that, once officers have arrested a defendant, they may accompany the defendant into his house when he desires to obtain personal items prior to being taken away. The court emphasized that the officers’ right to enter the home did not rely on defendant’s consent, but instead the officers inherent authority to guard an arrested

defendant. Accordingly, the district court ruling was affirmed.

- *Searches - Consent*

U.S. v. Lopez-Medina, 05-5891 (8/25/06)

- ▶ Defendant was charged with a drug conspiracy and he filed a motion to suppress, challenging the search of his home. Specifically, he claimed that the consent form he signed contained an error in the translation to Spanish which gave the impression that he had no choice but to consent. The district court denied the motion and defendant appealed.

- ★ Holding: The court held that the consent form, taken in its totality, accurately conveyed to defendant that the agents were requesting his consent and that he had a right to refuse. Additionally, the court agreed with the district court that defendant's claim that he did not understand English was not credible. Accordingly, the court found defendant's consent to be valid.

- *Arrest Warrants - Authority to Enter Home*
Shreve v. Jessamine County, 05-6271 (7/7/06)

- ▶ Officers had a misdemeanor arrest warrant for Shreve and went to her home to arrest her. After about an hour of trying to gain consensual entry, and seeing Shreve through an upstairs window, the officers forcibly entered, found Shreve in her bedroom closet, and arrested her. Shreve later sued the county under 42 USC § 1983 claiming that the officers violated her Fourth Amendment rights by entering her home based solely upon a misdemeanor warrant. The district court granted summary judgment to the county. Shreve appealed.

- ★ Holding: In *Payton v. New York*, the Supreme Court authorized entry into a person's home to execute a felony warrant. In this case, the court held that the rule also applies to misdemeanor warrants. As long as officers reasonably believe that the person named in the warrant will be found in the residence, forcible

entry is authorized. Accordingly, the court affirmed the district court ruling.

- *Arrest Warrants - Authority to Enter Home*
U.S. v. Pruitt, 05-3577 (8/11/06)

- ▶ Defendant was a parole violator with an open warrant when officers received an anonymous tip that defendant was at a certain residence. Officers subsequently conducted a traffic stop of a man leaving the residence and were told that defendant was in the residence selling drugs. Officers then entered the residence, arrested defendant, and found narcotics and a firearm. Defendant was charged with narcotics and weapons offenses and moved to suppress the evidence claiming that officers unlawfully entered the residence. The district court denied the motion and defendant appealed.

- ★ Holding: The court held that officers with a valid arrest warrant may enter a residence to arrest the individual sought if the officers have a reasonable belief that the individual is in the residence. The court emphasized that the reasonable belief standard is less than probable cause, and is based upon common sense factors and the totality of the circumstances. In the case, the court found that the anonymous tip and the information provided by the man leaving the house established a reasonable belief that defendant was present, thus justifying the entry into the home. Accordingly, the district court ruling was affirmed.

- *Arrest - Probable Cause*
U.S. v. Harness, 05-5838 (7/17/06)

- ▶ Police officers received a report from a juvenile that his father attempted to sexually abuse him. The juvenile's older brother confirmed that the juvenile was at his father's house at the alleged time and that they would have been alone. The officers learned from the juvenile's mother that the father had a prior sex conviction, which the officers confirmed. The

officers could not find defendant in the sex offender registry. Officers went to defendant's house and arrested him on the porch for failing to register as a sex offender. After arresting defendant, the officers accompanied him into his house to get his wallet and keys. Upon entering the house, the officers saw firearms in plain view. Defendant was ultimately charged with being a felon in possession of a firearm, and he moved to suppress the firearms claiming that he was arrested without probable cause. The district court denied the motion and defendant appealed.

★ Holding: First, the court held that an officer's subjective reason for arresting an individual need not be the criminal offense as to which the known facts provide probable cause. Thus, even though the officers had no authority to arrest for the sex offender registry violation, they could nonetheless arrest if they had probable cause based upon the attempted sex offense. The court then found that the officers did have probable cause to arrest based upon the attempted sex abuse of defendant's son. The court held that, normally an eyewitness identification is sufficient probable cause to arrest unless there is an apparent reason to believe that the eyewitness was lying, did not accurately describe the event, or was in some fashion mistaken. Accordingly, the court found that the juvenile's account of his father's attempted rape was sufficient to support probable cause to arrest defendant.

• *Reasonable Suspicion*

U.S. v. Paulette, 05-5549 (8/10/06)

► Defendant was observed by officers conducting activity that the officers believed was consistent with drug sales in a high crime neighborhood. Upon the officers' approach, defendant took the evasive action of placing his hand in his pocket and quickly walking away. The officers stopped defendant, patted him down for weapons, and found drugs. A later search of his residence revealed more drugs

and guns. Defendant moved to suppress the evidence based upon an illegal stop and the district court denied the motion. Defendant appealed, challenging only that the officers had no reasonable suspicion to stop him.

★ Holding: The court held that the fact that the officers observed activity consistent with drug sales in a bad neighborhood, and that defendant took evasive action upon the officers' approach, was sufficient to support reasonable suspicion for the stop of defendant. Accordingly, the district court ruling was affirmed.

• *Reasonable Suspicion*

U.S. v. Caruthers, 05-5307 (8/11/06)

► At 1:15 a.m., an anonymous 911 caller reported that shots had been fired at an apartment building by a male wearing a red shirt and shorts, and that the gun was in his pocket. Police were dispatched to the area and they saw defendant walking away from the area of the apartment building, which the officers described as a high crime area. Upon the officers approach defendant fled in a "semi-running" fashion and was found hunched down beside a building. Defendant was placed in a police cruiser by an officer, who then searched the area where defendant had been hunched and the officer found a gun. Bullets were later discovered on defendant and in the police cruiser. Defendant was charged with being a felon in possession of a firearm, and he moved to suppress the bullets found on his person. The district court denied the motion and defendant appealed.

★ Holding: The court held that, even though the 911 call was anonymous, reasonable suspicion to stop defendant was established when it was combined with the facts that (1) it was a high crime area at 1:15 a.m., (2) defendant generally matched the description, (3) defendant fled in a "semi-running" fashion, and (4) defendant made furtive gestures by hunching down by the wall. Further, the court

held that degree of intrusion was proper. When the officer placed defendant in the patrol car he was alone and had been notified that defendant may have a gun. Thus, it was reasonable for the officer to place defendant in the car while searching the area where defendant had crouched near the building. Once the gun was found, probable cause was established to justify the subsequent search of defendant. Thus, the district court ruling was affirmed.

- *Border Searches/Reasonable Suspicion*
U.S. v. Lawson, 05-6588 (8/24/06)

- Defendant traveled from Paris to Cincinnati airport, paid cash for her ticket the day before the flight, and was known to travel to an address in Memphis that was associated with heroin smuggling. Upon arriving in Cincinnati, she made an inconsistent statement about the purchase of her ticket and became nervous as the customs officials began to investigate her bag. The bag was first x-rayed and upon the custom officials' determination that the handle area was hollowed out and a dense matter placed inside, a drill was used to make a hole in the bag, and heroin was discovered. Defendant was charged, and moved in the district court to suppress the evidence. The district court denied the motion, and defendant appealed.

- ★ Holding: Generally, border searches are not subject to any requirement of reasonable suspicion, probable cause, or warrant. Because Cincinnati, in this case, was a point of entry into the U.S., it qualified as a border search. The court found that the only activity that potentially went beyond a normal border search was the drilling into the suitcase. The court concluded, however, that at that point in time, the officials possessed a reasonable suspicion that defendant was transporting drugs, thus justifying the intrusion. Accordingly, the district court ruling was affirmed.

V. Fifth Amendment

- *Due Process - Right to Present a Defense*
Washington v. Renico, 05-1185 (7/27/06)

- Defendant was charged in state court with murder and at trial utilized the defense that someone else committed the murder and put the body into the trunk of a car. Defendant attempted to offer extrinsic evidence that a government witness made an out-of-court statement that two people would end up in the trunk of a car if they told about an unrelated criminal matter. The state court excluded the evidence, defendant lost all of his state court appeals, and filed a federal *habeas* petition. The district court denied the petition, and defendant appealed.

- ★ Holding: Distinguishing the Supreme Court's decision in *Chambers v. Mississippi*, the court found that defendant's due process rights had not been violated. First, the court held that the out-of-court statement was hearsay and that defendant had not argued any hearsay exception that would permit its admission. Second, the court ruled that the statement had only marginal relevance. Third, the court noted that defendant had not attempted to use the statement at trial for impeachment. The court emphasized that defendant could have simply asked the witness whether he had ever threatened to put someone in a trunk, and if the witness denied making the statement, offered extrinsic evidence of the statement for impeachment, as opposed to substantive purposes. Accordingly, exclusion of the evidence was proper and the conviction was affirmed.

- *Due Process - Brady*
Bell v. Bell, 04-5523 (8/25/06)

- Defendant was charged with murder, and the prosecution was approached by a jailhouse informant who was motivated to obtain favorable treatment. Although the prosecution and informant reached no express agreement, upon the informant's testimony against

defendant, the informant received 4 dismissals of charges, concurrent sentences on other charges, and a favorable letter to the parole board. None of this information was disclosed to the defense. Defendant was convicted, lost his state court appeals, and filed a federal *habeas* petition claiming a *Brady* violation. The district court denied the petition and defendant appealed.

★ Holding: Answering an open question in the Sixth Circuit, the court held that a tacit agreement between the prosecution and a witness is favorable evidence to a defendant that must be disclosed pursuant to *Brady*. In the case, the court found that the witness had approached the prosecution with the expectation of receiving a benefit, that the prosecution understood this expectation, and that a benefit was bestowed. Under these circumstances, a tacit agreement was proven and the court found a *Brady* violation. Because the court found that the suppressed evidence was material, the conviction was reversed.

• *Due Process - Brady*

U.S. v. Blackwell, 05-4588 (8/29/06)

► Defendant was charged with conspiracy to commit insider trading and the government did not produce several documents to defendant until trial. The documents included the details of an immunity agreement with defendant's ex-wife, and notes of interviews of two witnesses. Defendant was convicted and argued on appeal that the belated disclosure of the documents violated his rights under *Brady* because he would have fashioned his defense in a different manner had he been aware of the documents and their content.

★ Holding: The court first held that *Brady* generally does not require information to be disclosed prior to trial. Second, the court found that the district court had offered defendant sufficient opportunity to cross examine and/or call witnesses based upon the documents. Finally, the court held that defendant likely

should have known the contents of the documents anyway. Thus, the conviction was affirmed.

• *Due Process/Ex Post Facto*

U.S. v. Barton, 05-1229 (8/3/06)

► Defendant was convicted of three bank robberies and *Booker* was decided prior to his sentencing. At the sentencing hearing, the district court exercised its discretion under *Booker* to impose a sentence that was 43 months higher than the top end of the guideline range. On appeal, defendant challenged application of the *Booker* decision at his sentencing based upon the Due Process and *Ex Post Facto* Clauses.

★ Holding: The court held that application of *Booker* to defendant's sentence, where the underlying conduct was committed pre-*Booker*, violated neither the Due Process nor the *Ex Post Facto* Clauses. Additionally, the court found that the above-guideline sentence was reasonable. Accordingly, the court affirmed the sentence.

VI. Sixth Amendment

• *Booker*

U.S. v. Shepherd, 05-5328 (7/10/06)

► Defendant was convicted of distributing child pornography and at sentencing claimed that *Booker* did not apply to the determination of his sentence because all child and sex crimes are governed by 18 USC § 3553(b)(2). Because *Booker* excised only § 3553(b)(1), which covers any other federal offense, defendant argued that the sentencing guidelines are still mandatory for child pornography offenses. In applying the guidelines, defendant then argued that he could only be held accountable for facts admitted by him or proven to a jury. The district court disagreed, and sentenced defendant to the bottom end of the guideline range. Defendant appealed.

★ Holding: The court held that, even though *Booker* technically dealt only with §

3553(b)(1), its holding was equally applicable to child and sex offenses under § 3553(b)(2). Thus, the district court ruling was affirmed.

• *Booker*

U.S. v. Cook, 05-2203 (7/20/06)

▶ Defendant was convicted of various federal offenses and the district court imposed a sentence at the middle of the guideline range. The Sixth Circuit then remanded the case for resentencing based upon *Booker*. On remand, the district court imposed a sentence slightly below the recommended guideline range. Defendant again appealed and claimed that the district court had improperly considered facts that were not found by a jury or admitted by defendant in calculating the guideline range.

★ Holding: The court held that, after *Booker*, a district court may consider facts that were not submitted to a jury or admitted by defendant in calculating the guideline range as long as the district court treats the guidelines as non-binding. Thus, the sentence was affirmed.

• *Speedy Trial*

U.S. v. Robinson, 04-2283 (7/31/06)

▶ Defendant was arrested with crack cocaine and a firearm, but was taken into state custody on an outstanding probation violation. Although the federal government filed a criminal complaint against defendant for the drugs and firearm, he was not indicted and taken into federal custody until a year later. After defendant's initial appearance in federal court, it then took an additional seventeen months before defendant's motion to dismiss was denied and he entered a plea of guilty. On appeal, defendant challenged the delay as a violation of the Sixth Amendment.

★ Holding: In order to determine whether a defendant's speedy trial rights under the Sixth Amendment have been violated, the court must analyze four factors: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted her right to

a speedy trial; and (4) whether prejudice resulted to the defendant. First, the court held that delay approaching one year was presumptively prejudicial. Second, the court held that the delay after the filing of the complaint but before the indictment was, at most, negligence on the part of the government. The seventeen month delay before the plea was entered was mostly attributable to defendant. Third, the court found that defendant knew about the pending criminal complaint as soon as it was filed, but failed to move to dismiss until 15 months later. Fourth, the defendant's claim that he was denied programming at the state prison because of the pendency of the federal charge was not cognizable as prejudice. Further, the court held that defendant failed to show how the delay caused him to not be able to find a witness and that defendant had not shown how the failure to find the witness adversely affected his defense. Accordingly, the court found no speedy trial violation and affirmed the conviction and sentence.

• *Speedy Trial*

U.S. v. Bass, 04-1582 (8/30/06)

▶ Defendant was charged with a drug conspiracy and murder, but was not brought to trial on the charges until over 5 years after his arraignment. Defendant was convicted and argued on appeal that his speedy trial rights had been violated.

★ Holding: Applying the four factors applicable to alleged speedy trial violations, the court found that defendant's rights were not abridged. First, the court held that the delay was presumptively unreasonable. Second, the court found no bad faith on the part of the government and that the delays were mostly attributable to defense motions. Third, the court ruled that defendant had repeatedly and timely asserted his rights to a speedy trial in the district court. Fourth, the court found no prejudice to the defense other than vague allegations about witness unavailability. Thus,

the district court ruling was affirmed.

- *Confrontation Clause*

U.S. v. Baker, 05-3336 (8/15/06)

- ▶ Defendant was charged with conspiracy and mail fraud and at trial the district court admitted postal records under the business records exception, FRE 803(6). On appeal, defendant challenged admission of the records under the Supreme Court decision in *Crawford* and the Confrontation Clause.

- ★ Holding: The court held that, pursuant to *Crawford*, business records are non-testimonial. Thus, the court found *Crawford* inapplicable and affirmed the district court ruling.

VII. Other Constitutional Rulings

- *Art. 1, § 10 - Ex Post Facto*

Dyer v. Bowlen, 04-5478 (8/30/06)

- ▶ Defendant as convicted in 1975 for murder and grand larceny and sentenced to death. His sentence was commuted to life on appeal because Tennessee's death penalty was declared unconstitutional. Prior to defendant's second parole hearing in 1998, Tennessee amended its parole statute to provide discretion to the parole board in denying parole, when certain criteria were met. This amendment changed the language which had previously required the parole commission to grant parole to a defendant when the criteria were met. Defendant filed a federal *habeas* petition arguing that the application of the amended parole statute violated his rights under the *Ex Post Facto* Clause. The district court denied the petition and defendant appealed.

- ★ Holding: In order to prove an *ex post facto* violation, a defendant must show that a law (1) applies to events occurring before its enactment, and (2) disadvantages the defendant. The Supreme Court in *Garner v. Jones* held that retroactive application of a parole provision may violate the *Ex Post Facto*

Clause if such application creates a "sufficient risk" of increasing the measure of punishment. In the case, the court found that the record was insufficiently developed in order to determine whether defendant actually faced a sufficient risk that his parole was denied based upon the amended parole provision. Thus, the court remanded the case with instructions to permit defendant to conduct discovery. Specifically, defendant was permitted to gather data evidencing the practical implementation of the amended parole provisions pertaining to inmates with comparable convictions and sentences.

VIII. Defenses

- *Privileges - Grand Jury Subpoenas*

In re Grand Jury Subpoenas, 05-2274 (7/13/06)

- ▶ Winget was the previous owner and CEO of the company Venture. The government issued a grand jury subpoena under seal to Venture for documents that potentially could contain information protected by attorney-client and work-product privileges in relation to Winget individually. Winget moved to intervene in the grand jury subpoena matter and requested to be able to have his attorneys review certain documents before they were turned over to the government in order to determine if privilege existed. The government opposed this request and submitted that it would have a "taint team" of prosecutors and agents who were unrelated to the case review the documents for privilege. The district court agreed with the government's proposal and defendant appealed.

- ★ Holding: The court held that, under the circumstances, Winget's interest in documents protected by attorney-client and work-product privileges outweighed the grand jury's investigative authority and the need for grand jury secrecy. The court emphasized that it was not reaching the question of whether either privilege actually existed in the documents, but

merely the proper procedure to be used in assessing whether the privilege existed. Accordingly, the court reversed the district court ruling and ordered that Winget's attorney would be able to conduct the review for privileged documents. In order to ensure timeliness, the court further ordered the district court to appoint a Special Master who would do a preliminary review of the documents subpoenaed and segregate any documents for Winget to review that contained words on a list provided by Winget.

• *Privileges - IRS Administrative Subpoenas*
U.S. v. Roxworthy, 05-5776 (8/10/06)

▶ The IRS issued an administrative summons for documents pertaining to defendant's business. In particular, the IRS sought two documents that were prepared by an audit and consulting firm for defendant that analyzed the tax consequences of certain transactions. Defendant refused to turn over the two documents claiming the work product privilege and the IRS filed a petition in the district court to enforce the summons. The district court granted the petition and ordered defendant to turn over the documents, and defendant appealed.

★ Holding: For the first time in a published opinion, the court adopted the "because of" test for determining whether documents are work product. Pursuant to such test, the court analyzes whether a document was prepared because of the prospect of litigation. More specifically, the test involves a two-part inquiry through which the court asks (1) whether the document was created based upon the party's subjective anticipation of litigation, as opposed to an ordinary business purpose, and (2) whether that subjective anticipation was objectively reasonable. Under the circumstances of the case, the court found that defendant had prepared the two documents because of a subjective expectation of litigation with IRS, and that the expectation was

objectively reasonable. Accordingly, the district court ruling was reversed and the IRS summons quashed.

• *Diminished Capacity-Voluntary Intoxication*
U.S. v. Veach, 05-6268 (8/1/06)

▶ Defendant was charged with one count of resisting a federal law enforcement officer (18 USC § 111(a)) and two counts of threatening to assault and murder a federal law enforcement officer (18 USC § 115(a)). The government filed a motion *in limine* to prevent defendant from introducing the defense of diminished capacity based upon voluntary intoxication and the district court granted the motion. Defendant was convicted of all counts and appealed.

★ Holding: Diminished capacity as a result of voluntary intoxication is a defense only to a specific intent crime. A specific intent crime requires the defendant to do more than knowingly act in violation of law, while a general intent crime requires only that a defendant intend to do the act that the law prescribes. The court first held that the § 111 violation was a general intent crime because the statute required only that the violator resist a federal officer; no intent need be proven. Second, the court found that the § 115 violation was a specific intent crime because the statute required proof that defendant intended to impede or retaliate against the federal official. Thus, the court ruled that the diminished capacity defense was not available for the § 111 charge, but should have been permitted for the § 115 violation. Accordingly, the case was reversed and remanded for retrial on the § 115 charges.

• *Speedy Trial Act/IAD*
U.S. v. Robinson, 04-2283 (7/31/06)

▶ Defendant was charged in a criminal complaint with being a felon in possession of a firearm and at the time defendant was serving a state court sentence. Although the state

prison notified the U.S. Marshal of defendant's whereabouts, no detainer was ever lodged by the U.S. Attorney's office, and defendant was never notified of his speedy trial rights. Defendant was indicted a year later and brought before the district court. Defendant moved to dismiss the indictment based upon the Speedy Trial Act and the Interstate Agreement on Detainers (IAD), the district court denied the motion, and upon his conviction, defendant appealed.

★ Holding: The Speedy Trial Act at 18 U.S.C. § 3161(j)(1) requires that, when a government prosecutor learns that a person charged is in prison, she must either undertake to obtain the prisoner for trial or lodge a detainer against the person and advise the prisoner of her right to demand a trial. Similarly, the IAD requires the warden of a penal institution to notify a prisoner of a detainer and to her right to a speedy disposition of the charge. In the case, the court held that the failure of the prosecutor and the warden to notify defendant of a charge did not constitute grounds to dismiss an indictment. Accordingly, the district court's ruling was affirmed.

• *Speedy Trial Act*

U.S. v. Bass, 04-1582 (8/30/06)

▶ Defendant was charged with a drug conspiracy and murder, and the case was delayed over a period of years due to the filing of numerous defense motions. Defendant moved to dismiss the indictment based upon 18 USC § 3161, the Speedy Trial Act. The district court denied the motion and defendant appealed.

★ Holding: Relying on the Supreme Court's decision in *Henderson v. U.S.*, the court held that all time between the filing of a motion and the hearing on the motion is tolled under the Speedy Trial Act, and that no reasonableness requirement is imposed on such time period. Therefore, the district court ruling was

affirmed.

IX. Plea & Sentencing Hearings

• *Plea Agreements - Appeal Waivers*

U.S. v. Robinson, 04-2283 (7/31/06)

▶ Defendant was charged with drug and weapon offenses and entered into a plea agreement that contained an appeal waiver provision. Under the provision, defendant could not appeal his sentence if it was 87 months or lower. At the sentencing hearing, the prosecutor summarized the plea agreement, including the appeal waiver provision, and the district court asked defendant generally if he understood the plea agreement. The district court sentenced defendant to 70 months and defendant appealed.

★ Holding: The court first held that the district court substantially complied with Fed. R. Crim. P. 11 because the prosecutor summarized the appeal waiver provision and the district court asked defendant if he understood the plea agreement. Second, the court held that the appeal waiver was not an unlawful adhesion contract because defendant was free to reject the contract and go to trial and because the plea agreement was negotiated between the parties, preserving defendant's right to appeal speedy trial issues. Finally, the court found that the subsequent decision in *Booker* did not nullify the appeal waiver provision. Thus, the sentence was affirmed.

• *Prosecutor Misconduct - Failure to File 5K*
U.S. v. Gates, 05-1818 (8/24/06)

▶ Defendant agreed to plead guilty to bank fraud and in the plea agreement the government indicated that it would file a motion to reduce defendant's sentence, pursuant to USSG § 5K1.1, if, in its sole discretion, the defendant provided substantial assistance. The government did not file a 5K motion, and instead requested an upward departure. Defendant appealed.

★ Holding: The court held that it will not

review a government's failure to file a § 5K motion unless the defendant raised some unconstitutional motive for the failure to file. Bad faith is not enough. Accordingly, the sentence was affirmed.

- *Enhancements - Corroboration Rule*

U.S. v. Huffman, 05-2058 (8/30/06)

- Defendant was convicted of being a felon in possession of a firearm and the district court applied a guideline enhancement for possessing the firearm in relation to another felony offense, based upon defendant's admissions to the police at the time of his arrest. Defendant appealed.

- ★ Holding: Pursuant to the Supreme Court decision *Opper v. U.S.*, a defendant may not be convicted solely upon the basis of statements made to the police. In this case, the court held, for the first time in a published opinion, that *Opper* does not apply in the sentencing context. As long as a defendant's statements are reliable and voluntary, they may be used as the basis for a sentencing enhancement. Thus, the sentence was affirmed.

X. Jury Issues

- *Juror Misconduct*

U.S. v. Kelley, 05-1361 (8/31/06)

- Defendants were convicted of numerous Hobbs Act violations and after the trial, one juror told the newspaper that the juror was struck by the fact that neither defendant testified at trial and that, if they were innocent, they would have done so. Defendant subsequently moved for a new trial and the district court denied the motion. Defendant appealed.

- ★ Holding: FRE 606(b) provides that jurors are incompetent to testify as to any matter occurring during the course of deliberations except for matters pertaining to "extraneous prejudicial information" or improper "outside influence." Because the court found no evidence that the juror's opinion stated in the

newspaper was the product of either "extraneous prejudicial information" or "outside influence," the district court's ruling was affirmed.

XII. Appeal

- *Reasonableness of Sentence*

U.S. v. Worley, 05-5951 (7/10/06)

- Defendant was convicted of a drug conspiracy and was sentenced in the middle of the guideline range. *Booker* was subsequently decided and defendant's case was remanded for resentencing under a non-mandatory guideline range. At the resentencing, defendant submitted evidence to the district court regarding his rehabilitative efforts while incarcerated in the BOP. The district court refused to consider the post-sentencing rehabilitation because it found such evidence to be outside the scope of a *Booker* remand. The district court then reimposed the original sentence and defendant appealed.

- ★ Holding: The court held that the district court correctly determined that post-sentence rehabilitation was outside the scope of a *Booker* remand. The purpose of *Booker* remands are for the district court to determine whether it would have imposed a different sentence under a non-mandatory guideline scheme at the time of sentencing. Accordingly, the district court ruling was affirmed.

- *Reasonableness of Sentence*

U.S. v. Yopp, 05-1807 (7/19/06)

- Defendant pled guilty to a violation of his supervised release and the district court sentenced him to serve a 24 month period of incarceration. The basis for the 24 month sentence was the district court's conclusion that defendant needed to participate in the 500 hour residential drug program while in prison and the probation officer's recommendation that it would take three months to get into the program and nine months to complete it. Defendant appealed.

★ Holding: Prior to *Booker*, the standard of review for supervised release violation sentences was “plainly unreasonable.” The court opined that *Booker* may have changed the standard to reasonableness, but held that it was not deciding the issue because the court found the sentence to be both unreasonable and plainly unreasonable. The court found that the district court had not properly exhibited its consideration of the policy statements of Chapter Seven of the guidelines and the factors under 18 USC § 3553. Thus, the district court had not met the procedural reasonableness requirement. Further, the court held that the 24 month sentence was substantively unreasonable because it was “greater than necessary” to comply with the statutory purposes. In remanding the case, however, the court stated that the district court may impose the same 24 month sentence if it provided an articulated basis as to why such a sentence was necessary given the guideline and statutory purposes of sentencing.

• *Reasonableness of Sentence*
U.S. v. Caswell, 04-2280 (8/7/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court imposed an upward departure in the guideline range based upon the fact that defendant scored 29 criminal history points, more than twice the required amount for criminal history category VI. The court also issued an alternative sentence of the same amount in the event that the guidelines were found to be advisory. Defendant appealed and *Booker* was subsequently decided.

★ Holding: The court first found no error in the sentence because the district court issued an alternative sentence (thus accounting for *Booker*) and had satisfactorily articulated its consideration of the 18 USC § 3553 factors. Further, the court found that the district court’s consideration of the circumstances of defendant’s prior convictions was proper. In

the Supreme Court cases of *Taylor* and *Shepard*, the Court held that a district court must utilize a categorical approach to analyzing prior convictions in order to determine if a defendant qualifies as an Armed Career Criminal under the statute and guidelines. Distinguishing those cases, the court held that a district court may consider the facts of prior offenses where no ACCA determination is involved and the court is making no specific factual finding about the prior offenses. Accordingly, the upward departure based upon defendant’s prior convictions was appropriate.

• *Reasonableness of Sentence*
U.S. v. Ferguson, 05-3998 (8/9/06)

▶ Defendant was convicted of transporting a stolen motor vehicle across state lines and at sentencing the district court imposed a sentence that was 6 months above the guideline range of 0-6 months. Defendant appealed.

★ Holding: First, the court held that the sentence met the procedural reasonableness requirements because the district court had properly considered the 18 USC § 3553 factors. Second, the court found that the sentence was substantively reasonable because the court properly considered that defendant abused a position of trust in the Air Force Museum in stealing the car and the particular car stolen was an irreplaceable item. Finally, the court noted that the district court had not improperly considered defendant’s socio-economic status in imposing sentence. Defendant requested no jail time at sentencing based, in large part, on his educational and employment history. The court held that the district court’s comments about defendant’s status and affluence were meant to emphasize that socio-economic status was not grounds for a lower sentence. Thus, the sentence was affirmed.

• *Reasonableness of Sentence*
U.S. v. Davis, 05-3784 (8/14/06)

▶ Defendant was convicted of bank fraud

and at sentencing the district court determined the guideline range to be 33-41 months. The court sentenced defendant to 33 months and defendant appealed. On appeal, the Sixth Circuit found that the district court applied the incorrect version of the guideline manual and remanded the case. *Booker* had been decided during the course of the appeal, and the court also directed the district court to impose a sentence consistent with *Booker*. By the time of the resentencing, 14 years had passed since the commission of the crime, and defendant was seventy years old. Based upon these considerations, and a careful analysis of the 18 USC §3553(a), the court determined that a downward variance from the corrected guideline range of 30-37 months, down to one day in jail was appropriate. The government appealed.

★ Holding: The court first found that the district court had met the procedural reasonableness requirements based upon its careful consideration of the § 3553 factors. Second, the court held that the district court's sentence was substantively reasonable. The court emphasized that the variance granted by the district court amounted to a 99.89% reduction from the guideline range and that such a variance should be reserved only for the most deserving of defendants. Given that defendant had never accepted responsibility for the crime, had shown no evidence of rehabilitation, and had not even repaid the loss, such an extraordinary variance was unwarranted. Accordingly, the district court ruling was vacated and the case remanded for resentencing.

• *Reasonableness of Sentence*
U.S. v. Cruz, 05-6746 (8/25/06)

▶ Defendant was convicted of interstate domestic violence and kidnaping, and the district court imposed a sentence at the middle of the applicable guideline range. During the course of the sentencing hearing, the district

court mentioned a couple of times that it was trying to impose a reasonable sentence. Defendant appealed.

★ Holding: Technically, a district court's function is not to impose a "reasonable" sentence, but instead one that is "sufficient, but not greater than necessary" to meet the statutory purposes of sentencing. "Reasonableness" is the standard of review in the court of appeals. Nonetheless, it is not reversible error for the district court to mention reasonableness during the sentencing hearing. The court found that the district court had otherwise complied with § 3553 and *Booker*. Accordingly, the sentence was affirmed.

• *Reasonableness of Sentence*
U.S. v. Collington, 05-4054 (8/31/06)

▶ Defendant was convicted of possession with intent to distribute in excess of 50 grams of crack, being a felon in possession of a firearm, and possession of a machine gun. At sentencing, the district court determined that the proper guideline range was 188-235 months, but imposed a downward variance from the range to a sentence of 120 months. The government appealed.

★ Holding: The court held that the sentence was both procedurally and substantively reasonable. The court ruled that the district court appropriately considered all of the § 3553 factors and addressed both parties' arguments at the time of sentencing. Further, the court held that the district court had properly relied on the fact that, although defendant was in criminal history category IV, he had never served a substantial jail sentence and was potentially amenable to rehabilitation. Additionally, the court found that the district court's consideration of the murder of defendant's father and the loss of his mother to cancer were appropriate. Finally, the court criticized the dissent for relying on the fact that the variance was a "36%" reduction from the recommended range. The court held that

appellate review was not properly reduced to “such cold calculations.” Accordingly, the sentence was affirmed.

defendant’s appeal. The court then proceeded to address the merits of the claim. (*See supra*, III. Evidence).

• *Rule 4(b) - Time to File Appeal*

U.S. v. Dotz, 05-1427 (8/3/06)

► Defendant was convicted of drug distribution and after his sentencing filed a Rule 35 motion to correct his sentence. The district court ultimately treated the motion as a motion for reconsideration of sentence, and denied the motion. Defendant failed to file an appeal within the ten day time period prescribed by Rule 4(b) of the Federal Rules of Appellate Procedure, but later requested to file a delayed appeal arguing that the Rule 35/reconsideration motion tolled the period in which to file his appeal. The original Sixth Circuit panel held that defendant failed to show excusable neglect in filing a delayed appeal and found his appeal untimely. (*See P.V.* , Issue # 8). The court then issued an amended opinion.

★ Holding: In an amended opinion, the court retracted its holding regarding the failure to show excusable neglect, and instead ruled that a motion to reconsider an otherwise final sentence is not cognizable in federal court. Thus, such a motion would not toll the time for filing an appeal. Likewise, a Rule 35 motion does not suspend the time for filing an appeal. Accordingly, the appeal was not timely filed and the sentence was affirmed.

• *Preserving Error*

U.S. v. Baker, 05-3336 (8/15/06)

► Defendant was charged with conspiracy and mail fraud, and at trial the government introduced postal records under the business records exception of FRE 803(6). Defendant did not object to the proffered evidence, but a codefendant did. After defendant’s conviction, he raised the evidentiary issue on appeal.

★ Holding: The court held that because the codefendant had raised an objection to the business records, the error was preserved for