

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
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- IV. Fourth Amendment
- V. Fifth Amendment
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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.

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.

SUPREME COURT DECISIONS

IV. Fourth Amendment

- *Search Warrants - Anticipatory Warrants*

U.S. v. Grubbs, 04-1414 (3/21/06)

► Defendant ordered child porn on-line from a site that was actually run by law enforcement. The government then obtained an anticipatory warrant, requesting to enter and search defendant's home only if someone at his residence accepted delivery of the child porn

package. Defendant's wife accepted delivery of the package and the government executed the search warrant, seizing the child porn and other evidence. Defendant was charged in a child porn case and moved to suppress the evidence. The district court denied the motion, defendant appealed, and the Supreme Court ultimately granted *certiorari*.

★ Holding: Anticipatory warrants are constitutionally permissible if two requirements are met. First, the government must establish probable cause to believe that contraband or evidence will be found at the place to be searched if the triggering condition occurs. Second, the government must demonstrate probable cause to believe that the triggering condition will occur. The Court held that the government had met both of these requirements, and found that the anticipatory warrant was proper.

• *Search Warrants - Particularity*
U.S. v. Grubbs, 04-1414 (3/21/06)

▶ The government obtained an anticipatory warrant to search defendant's home. The triggering condition to execution of the warrant was that someone at defendant's residence accept delivery of a package containing child pornography. The triggering condition was not listed on the face of the warrant, nor was it incorporated by reference. The triggering condition was instead listed in a supporting affidavit. Defendant challenged the validity of the warrant in the district court and the court denied defendant's motion. Defendant appealed, and the Supreme Court ultimately granted *certiorari*.

★ Holding: The Court held that the particularity requirement of the Fourth Amendment does not require that a triggering condition to an anticipatory warrant be listed, or incorporated by reference, into the face of the warrant. The face of the warrant need only describe, with particularity, the place to be searched and the persons or things to be seized.

The Court also noted that a warrant need not be presented to the property owner at the time of the search. Accordingly, the district court ruling upholding the warrant was affirmed.

• *Search - Consent*

Georgia v. Randolph, 04-1067 (3/22/06)

▶ Defendant and his wife were estranged, and his wife had returned to the residence. The wife summoned the police and advised them that defendant was a drug user and had drug paraphernalia in the house. The wife consented to a search, but the husband arrived and objected to the search. The police conducted the search and found cocaine. The state charged defendant in a drug case, and defendant moved to suppress the evidence. The district court denied the motion and defendant appealed. The Supreme Court eventually granted *certiorari*.

★ Holding: The Court held that police may not rely on consent to search where one tenant consents to a search, but a co-tenant is present and objects to the search. Thus, the court held that admission of the evidence was improper.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 USC § 924(c) - Firearm Enhancement*
U.S. v. Van Hoosier, 04-6297 (4/5/06)

▶ Defendant was charged with narcotics offenses and a firearm enhancement under § 924(c). The indictment charged defendant with aiding and abetting a codefendant's possession of an assault rifle, a gun that triggered the ten year consecutive sentence under § 924(c)(1)(B)(I). The indictment indicated the type of gun that was possessed, but did not specifically reference the statutory subsection that contained the 10 year enhancement. Defendant pled guilty to the 10 year § 924(c) charge and at sentencing argued that the 10 year mandatory penalty should not apply to him because the codefendant was not convicted of

possession of the firearm in question. The district court agreed with defendant, and sentenced him below the ten year mandatory minimum. The government appealed.

★ Holding: The court first reaffirmed circuit precedent that the enhancement provisions of § 924(c) pertaining to the type of firearm are elements of the offense rather than sentencing enhancements. Thus, a defendant may not be sentenced based upon such an enhancement unless the type of firearm is admitted by the defendant or charged in the indictment and proven beyond a reasonable doubt. The court held that because the type of gun was charged in the indictment and defendant had admitted to the type of gun during the plea hearing, the mandatory ten year sentence of § 924(c)(1)(B)(I) applied. The court further found no error in the government's decision to convict defendant of the ten year offense on an aiding and abetting theory where the codefendant, who actually possessed the gun, was not convicted of such offense. Accordingly, the district court ruling was reversed and the case remanded for imposition of the ten year mandatory sentence.

• *18 USC § 924(e) - ACCA*
U.S. v. Hill, 04-6206 (3/1/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court concluded that defendant's record contained three prior violent offenses. Accordingly, the district court applied the ACCA enhancement (§ 924(e)). Two of defendant's prior convictions were for burglaries that occurred on the same day. In the burglaries, defendant had first entered an abandoned business and stolen bolt cutters, then went across the street to another property and used the bolt cutters to steal a boat motor. At the second location, defendant also stole a weed eater and fishing equipment, for which he did not use the bolt cutter. Defendant appealed application of the ACCA enhancement upon

two grounds: (1) the two burglaries should count only as one offense, and (2) the ACCA could not be applied because it was not charged in the indictment.

★ Holding: Prior convictions are counted separately for purposes of the ACCA if they were "committed on occasions different from one another." After conducting a careful analysis of the precedent in the Sixth Circuit, the court articulated three indicators as to when offenses should be counted separately under the ACCA. First, offenses may be separate if it is possible to discern the point at which the first offense is completed and a subsequent point at which the second offense began. Second, offenses may be separate if the offender could have ceased her criminal conduct after the first offense, and withdrew without committing the second. Third, offenses may be separate if they occurred in different residences or business locations. In the case, the court found that all three indicia suggested that the two burglaries were separate. Therefore, the district court ruling was affirmed.

Additionally, the court held, pursuant to *Apprendi*, that the ACCA provision need not be charged in the indictment in order to be applicable. The court noted that Justice Thomas opined in *Shepard* that the Supreme Court might, if the issue were raised in the appropriate context, decide that the Sixth Amendment requires that the ACCA enhancement be pled in the indictment and proven to the jury. (*See P.V., Issue #1*). The court held that it would not make such a finding, however, without a more definitive ruling from the Supreme Court. Thus, the ACCA enhancement was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Beasley, 04-6468 (4/3/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that defendant qualified as an ACCA. One of the prior

convictions supporting the ACCA enhancement was a state court conviction for “CA:M2.” Based upon the fact that the underlying state indictment was for “Criminal Attempt, First Degree Murder,” the district court concluded that “CA:M2” meant a conviction for “Criminal Attempt, Second Degree Murder,” which would be a violent offense under the ACCA. Defendant appealed.

★ Holding: In the *Taylor* and *Shepard* decisions, the Supreme Court held that courts are bound to follow a categorical approach to determining whether a prior conviction is violent for ACCA purposes. (*See P.V., Issue #1*). In this case, the court first held that the categorical approach does not apply to a determination of *what* state court offense was actually committed, but only to whether such offense was violent. In determining what the offense actually is, the court may consider any evidence having a “minimal indicia of reliability.” Therefore, the district court was not constrained by *Taylor* and *Shepard* in its determination that defendant was in fact convicted of criminal attempt, second degree murder. Second, the court held that, even if the categorical approach did apply to such a determination, the district court had not erred. The district court analyzed only the indictment and the judgment entry, both of which are permissible considerations under *Taylor/Shepard*. Accordingly, the ACCA determination was affirmed.

• *18 USC § 924(e) - ACCA*
U.S. v. Mahon, 04-4317 (4/21/06)

► Defendant was convicted of being a felon in possession of a firearm and with making false statements on a firearm application. At sentencing, the district court determined that defendant had four qualifying convictions and sentenced him under the ACCA. On appeal, defendant argued that two prior burglaries on his record were not violent felonies under the ACCA.

★ Holding: Applying *Taylor* and *Shepard*, the court held that the two prior burglaries were violent offenses under the ACCA. The court ruled that the district court had properly reviewed the indictments from the underlying burglary charges and ascertained that, even though the indictments did not specifically list the subsection of the burglary statute, the language in the indictments tracked the language of the Ohio statute ORC § 2911.13(A). The court had previously held in *U.S. v. Bentley* that § 2911.13(A) described a generic burglary, which constitutes a violent offense. The court found that the *Bentley* analysis was consistent with the Supreme Court’s categorical approach applied in *Shepard*. Thus, application of the ACCA was affirmed, but the case was nonetheless remanded for resentencing consistent with *Booker*. Judge Merritt stated in concurrence that he found a “serious due process” problem with the application of the ACCA’s mandatory minimum sentence to such an undeserving defendant, and that the court was sanctioning a “gross injustice.” Because no due process issue was raised, however, Judge Merritt reluctantly concurred in the decision.

• *18 USC § 2252(a)(1) - Child Pornography*
U.S. v. Chambers, 02-5865 (3/23/06)

► Defendant was charged with distributing child pornography and was convicted after jury trial. On appeal, defendant argued that he did not knowingly send the images in interstate commerce.

★ Holding: The elements of distribution of child pornography are that (1) defendant knowingly transported or shipped, (2) in interstate or foreign commerce, (3) any visual depiction involving the use of a minor engaging in sexually explicit conduct. The court held that the *scienter* element “knowingly” extends to the transportation element, the sexually explicit nature of the material element, and the age of the

performers, but not to the interstate nexus requirement. Thus, the court ruled that the government need not prove that defendant knew that the depictions actually traveled in interstate or foreign commerce, and the conviction was affirmed.

- *26 USC § 5845(b) - Machine Guns*
U.S. v. One TRW, M-14, 04-5082 (3/20/06)

- ▶ Alverson owned a firearm that was marketed as the MKS M-14, a gun made from cut-up M-14 receivers. ATF seized the gun upon the belief that it qualified as a machine gun under § 5845(b) and because Alverson had failed to register it as such. ATF instigated forfeiture proceedings against the gun, which Alverson opposed. The district court granted summary judgment to the government, and Alverson appealed.

- ★ Holding: Pursuant to § 5845(b), a gun qualifies as a machine gun if it is designed to shoot automatically, or could be “readily restored to shoot” automatically. In considering whether a gun could be “readily restored” for automatic fire, the court must consider the following: (1) time to restore; (2) ease; (3) expertise required; (4) necessary equipment; (5) availability of parts; (6) expense; (7) scope of change of firearm; and (8) feasibility of restoration. The court noted that Alverson’s expert and the government’s expert differed in the amount of time and difficulty that would be required to restore the weapon, but even under Alverson’s theory, the gun would only require six hours of work in order for it to shoot automatically. Under these circumstances, the court found that the gun was properly characterized as a machine gun and the summary judgment was affirmed.

- *Aiding and Abetting*
Brown v. Palmer, 05-1320 (3/14/06)

- ▶ Three men were at a gas station when they observed a man walk out of the store and get into a car with defendant. Defendant then

pulled the car up to a gas pump and the man got out, took out a gun, and stole the three men’s car at gun point. The three men then attacked defendant, took his car and drove it to the police station for help. Defendant was charged in state court with aiding and abetting a robbery and he claimed that he did not know the gunman until moments before the robbery. At trial, the state proved that defendant did the following: (1) was present during the robbery, (2) was in the car with the perpetrator, (3) stared at the victims during the robbery, (4) never got gas when he pulled up to the pump, (5) attempted to flee when the robber took off in the stolen car, and (6) failed to contact the police to get his own car back after it was taken by the three men. Defendant was convicted, appealed through the state system, and then filed a federal *habeas* petition. The district court found insufficient evidence for the conviction and granted the petition. The state appealed.

- ★ Holding: The court held that the evidence was insufficient to prove that defendant had aided and abetted the robber under Michigan law. There was no affirmative evidence that defendant did anything to encourage the robbery and the court ruled that merely being present with the perpetrator was insufficient. The court emphasized that defendant’s actions during and after the robbery were consistent with defendant’s desire to avoid confrontation. Thus, the district court ruling reversing the conviction was affirmed.

II. Sentencing Guidelines

- *§ 2A3.1 - Criminal Sex Abuse of Minors*
U.S. v. Hochschild, 05-3159 (3/31/06)

- ▶ Defendant was charged with traveling across state lines to engage in sex with a child under the age of 12. The “child” was an undercover agent, and defendant was arrested upon arrival. The district court sentenced defendant under USSG § 2A3.1 (2002 Edition), and increased defendant’s offense level by 4

because the victim was under 12. Defendant appealed.

★ Holding: The court first held that no guideline specifically covered interstate travel to engage in a sex act, but that § 2A3.1 most closely resembled the offense. (In 11/04, § 2G1.3(c)(3) was added which now covers such acts). The court then affirmed prior precedent that a four-level enhancement for a victim under 12 is appropriate, even though there was no actual victim. Finally, the court concluded that applying the four-level enhancement based upon the victim's age was not double counting, even though the victim's age was the factor that made § 2A3.1 applicable in the first place. Accordingly, application of the four-level enhancement was proper.

• § 4B1.1 - Career Offender

U.S. v. Montanez, 04-4543 (3/23/06)

► Defendant was convicted of a drug offense and at sentencing the district court determined that defendant was a career offender. The district court based its determination, in part, upon defendant's prior conviction for "drug trafficking," under ORC § 2925.03(A)(6) and (9). The Ohio law at the time prohibited possessing a bulk amount of a narcotic, but did not contain any distribution, or intended distribution, element. Defendant appealed the district court's determination that he was a career offender.

★ Holding: Resolving disagreement among prior unpublished decisions in the Sixth Circuit, the court held that possession of bulk amounts of drugs under ORC § 2925.03(A)(6) and (9), where the statute contains no distribution or intended distribution element, does not constitute a "controlled substance offense" for career offender purposes. Accordingly, the court vacated defendant's sentence and remanded for resentencing in accordance with *Booker*.

III. Evidence

• 404(b) - Knowledge/Intent

U.S. v. Matthews, 04-6398 (3/14/06)

► Defendant was indicted for drug and weapon charges and at trial claimed that he had found crack cocaine on the ground and picked it up, not knowing what it was. During rebuttal, the government presented an informant who had purchased drugs from defendant approximately eight years earlier. The witness was someone uncertain about the exact time period, but was "emphatic" that he had purchased the drugs from defendant. Defendant appealed and argued that the testimony of the informant was improper under FRE 404(b).

★ Holding: In assessing the admission of prior acts evidence under Rule 404(b), the court must consider three issues: (1) whether sufficient evidence existed that the prior act occurred; (2) whether the evidence was admissible for a proper purpose under Rule 404(b); and (3) whether the evidence was admissible under Rule 403. In the case, the court first found no clear error in the district court's conclusion that the prior drug sale occurred. Second, the court held that the evidence was admissible to show intent and knowledge. Defendant had put his knowledge of the bag's contents at issue by his cross examination of the police officer. Because possession of crack with intent to distribute is a specific intent crime, the court found that Rule 404(b) permitted the admission of the testimony. Third, even though the prior drug sale was eight years old, the court found no abuse of discretion in the Rule 403 analysis because, as the court stated, "even eight-year-old drug sales were probative as to whether [defendant] could identify the contents of the bag as cocaine." Thus, the conviction was affirmed.

• *405(a) - Cross Examination/Specific Acts*
U.S. v. Matthews, 04-6398

► At his trial on drug and weapon charges, defendant presented a witness who testified that defendant was a good person and that she had never known him to get into trouble. During cross examination, the prosecutor asked the witness if she was aware of “defendant’s prior drug trafficking activities in 1995 and 1997.” Defendant challenged on appeal that the prosecutor’s use of defendant’s prior drug trafficking during cross examination was improper.

★ Holding: FRE 405(a) permits a party to cross examine a witness regarding specific incidents of conduct after opinion testimony has been offered on direct. In the case, the court first held that the witness had offered opinion testimony about defendant’s character on direct examination. Second, the court found no error in the form of the prosecutor’s question on cross examination because the prosecutor had a good faith basis to believe that defendant had committed the prior activities. The government had an informant, who testified in rebuttal, about the activities. Third, the court found that the prosecutor had improperly insinuated that there were two prior incidents of drug trafficking by referring to “1995 and 1997” when in fact there was only one prior incident. Because defendant had not specifically objected to the reference to two dates, however, the court applied plain error analysis and concluded that the prosecutor’s error did not likely affect the verdict. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

• *Reasonable Suspicion*

Mitchell v. Boelcke, 04-2219 (3/1/06)

► A man was assaulted by several males who were all wearing white t-shirts. Some of the males were white, some were black. Responding to the police dispatch regarding the incident, an officer approached Culpepper in

the general vicinity of the crime. Culpepper was a black male who was by himself, was not wearing a white t-shirt, and was walking in front of his house. Culpepper denied any knowledge of the assault and his mother attempted to convince the officer that Culpepper had nothing to do with the robbery. When Culpepper refused to get in the police cruiser, the officer ordered him to walk back to the crime scene to be shown to the victim. The victim eventually identified Culpepper and several others as the perpetrators and they were arrested. Charges were eventually dismissed, and Culpepper sued under 42 U.S.C. § 1983, claiming that the officer stopped and detained him without reasonable suspicion. A jury ruled in favor of the officer and Culpepper appealed.

★ Holding: The court found that the stop of Culpepper was not supported by reasonable suspicion. The court held that, to assume that a young man lawfully walking on the sidewalk in front of his home, wearing clothes different from the assailants, stretched the concept of a hunch beyond its breaking point. Accordingly, the verdict was reversed and the case remanded for retrial.

• *Reasonable Suspicion*

U.S. v. Perez, 04-5440 (3/14/06)

► DEA in Tennessee received information from DEA in Texas that defendants were engaged in cocaine trafficking. Tennessee DEA set up surveillance of defendant over the course of two days at a hotel, and observed activities that the agents believed were of a drug trafficking nature, including the transporting of two duffle bags between an Escalade, a Tahoe, and an unoccupied hotel room. The DEA observed defendants drive off in the Escalade, leaving the duffle bags in the Tahoe at the hotel. The DEA stopped and searched the Escalade and detained defendants for a lengthy period while the agents separately searched the Tahoe at the hotel. The DEA found cocaine in the Tahoe after two separate

drug dog sniffs. Defendants were charged with drug trafficking and moved to suppress the cocaine. The district court denied the motion, and defendants appealed.

★ Holding: First, the court found that the DEA had reasonable suspicion to stop the Escalade. The information from the Texas DEA, plus the observations of the Tennessee DEA at the hotel over two days amounted to sufficient reasonable suspicion to make a stop. Second, the court found that the stop was not invalidated by its length or scope. The court found that the second drug dog sniff was justified because the agents testified at the hearing that they had observed the duffle bags being placed into the Tahoe, and that the bags had not been in the vehicle long enough at the time of the first drug dog sniff for the smell to have permeated the vehicle to be detected by a drug dog. In so holding, the court distinguished the recent case of *United States v. Davis* (See P.V., Issue # 5), wherein the court found that the detention of defendants for a second dog sniff was unlawful. Finally, the court held that the cocaine found in the Tahoe was not the “fruit” of the unlawful detention of defendants in the Escalade because the two were independently conducted at separate locations. Thus, even if there were an unlawful detention of defendants, the cocaine in the Tahoe was still admissible. Accordingly, the district court ruling was affirmed.

• *Search - Exigent Circumstances*
Causey v. Bay City, 05-1142 (3/29/06)

► A neighbor called 911 to report gun shots from the back yard of Causey’s house. The police responded and knocked on Causey’s door, but received no response. The police then talked to the neighbor who confirmed hearing one gun shot, followed a few minutes later by five more gun shots. These events transpired on the evening of New Year’s Eve, and the neighbor reported similar occurrences from Causey’s back yard on the previous 4th of

July and New Year’s Eve. The neighbor also said that no one had entered or left the home since the gun shots. Based upon this information, the police entered Causey’s back yard and found shell casings on the ground. The police then learned that a call had been made to 911 earlier in the evening from Causey’s home which was immediately disconnected. A follow-up call stated that a child at the residence accidentally called 911. The neighbor indicated that no children lived at the residence. The police then returned to the front door and continued knocking. Causey and his girlfriend finally came to the window and told the police that they were fine, and did not need assistance. Eventually, however, the police forcibly entered the home. Causey ultimately sued the police under 42 U.S.C. § 1983 for a violation of his Fourth Amendment rights. The district court refused to grant summary judgment to the police, and they appealed.

★ Holding: Exigent circumstances may support a warrantless entry into a home when (1) the police are in hot pursuit of a suspect, (2) a suspect is an immediate danger to the officers or the public, or (3) the entry is necessary to prevent destruction of evidence or escape. Under the safety exception, entry is justified if officers reasonably believe that a person is in need of immediate aid. The court held that the safety exception justified both the entry into Causey’s backyard, and the forced entry into his home. Accordingly, the district court ruling was reversed, and summary judgment awarded to the police.

• *Search Warrant - Good Faith*
U.S. v. Hython, 05-3008 (4/6/06)

► Police obtained a warrant to search a residence based upon a controlled purchase of drugs from the residence. The affidavit failed to identify when the controlled purchase occurred, however, and the affidavit did not identify any other sales that had occurred at the

residence. Defendant challenged the search warrant claiming that the information in the warrant was stale because it contained no date of sale. The district court agreed that the warrant was stale, but nonetheless found that it was saved by good faith. Defendant appealed.

★ Holding: Where a search warrant is found to be defective, evidence seized as a result of the search is not barred from admission where the police acted in reasonable, good-faith reliance on the warrant. This good-faith rule does not apply in four situations: (1) the affidavit is knowingly or recklessly false; (2) the magistrate abandoned her judicial role and acted as a rubber stamp for the police; (3) the affidavit is so lacking in probable cause as to render official belief in its existence entirely unreasonable; and (4) the officer's reliance was not in good faith, such as where the warrant is facially deficient.

In the case, the court found that the third exception to the good faith rule applied because the warrant was entirely lacking in probable cause. The court ruled that any reasonable officer would realize that there was no indication in the affidavit as to when the drug sale had occurred. Further, the court specifically found that the district court erred in justifying the search by assuming that the officer would not have sought the warrant unless the controlled delivery was recent. A district court must consider only the four corners of the affidavit in assessing whether officers acted in good faith. Accordingly, the district court ruling was reversed and the evidence suppressed.

V. Fifth Amendment

• *Right to Testify*

U.S. v. Chambers, 02-5865 (3/23/06)

► Defendant was charged with child pornography and child sex abuse. At trial, defendant decided to make his own opening statement, but later expressed to his counsel that he did not wish to testify. Defendant's

counsel requested that the district court question defendant on the record about his desire not to testify. Defendant's answers to the district court's questions were slightly equivocal, but he appeared to be waiving his right to testify. Defendant was convicted and appealed.

★ Holding: When a defendant does not testify at trial, the defendant is presumed to have waived his right to testify. In order to overcome this presumption, a defendant must affirmatively indicate on the record in the district court that she desires to testify. In the case, the court held that the district court was under no obligation to question defendant about his desire to testify, and that the statements made by defendant on the record did not overcome the presumption of waiver of the privilege. Therefore, the conviction was affirmed.

• *Voluntariness of Confession*

McCalvin v. Yukins, 05-1111(4/5/06)

► Defendant was arrested for running over a woman at her ex-boyfriend's home. After 4 hours of questioning and being held for 8 hours, defendant made a statement implicating herself. Defendant challenged the voluntariness of her confession in the state courts, and then filed a federal *habeas* petition. The district court found the confession involuntary and the state appealed.

★ Holding: In deciding whether a statement is involuntary, a court must consider the totality of the circumstances including age, education, and intelligence of the defendant, whether *Miranda* rights were read, the length of questioning, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as deprivation of food or sleep. Considering all of the factors, the court determined that defendant's confession was voluntary and reversed the district court.

• *Prosecutorial Misconduct*

Carter v. Mitchell, 99-3207 (4/6/06)

► Defendant was charged in state court with a prison murder. At trial, an eyewitness testified during direct examination that he had an agreement with the state to testify. During cross examination, however, the witness denied any such agreement. The state prosecutor did nothing to correct the witness' testimony after cross examination. Defendant appealed through the state court system, and then filed a federal *habeas* petition. The district court denied the petition, and defendant appealed.

★ Holding: Generally, a prosecutor may not deliberately mislead a jury, or allow misleading testimony to go uncorrected, with respect an agreement to testify. In the case, the court held that the witness' false testimony on cross examination did not require reversal of the conviction because the prosecutor had elicited the correct information on direct examination, the prosecutor made no reference to the witness' false testimony in argument, and the witness was not critical to the state's case, there being three other eyewitnesses to the murder. Accordingly, the court affirmed the district court ruling.

• *Prosecutorial Misconduct*

Gillard v. Mitchell, 03-4261 (4/26/06)

► During defendant's state murder trial, the prosecutor occasionally referred to defendant as "Dirty John," questioned him about his membership in motorcycle gangs, claimed that defendant was a "lie" and a "fraud" because he wore a suit during the trial, and displayed crime scene photos during closing argument. Defendant appealed through the state court system and then filed a federal *habeas* petition claiming prosecutorial misconduct. The district court granted the petition based upon the cumulative errors committed during the trial and the state appealed.

★ Holding: The court held that any misconduct that occurred did not prejudice

defendant's case such that a reversal was required. First, the court found that "Dirty John" was defendant's nickname, and an eyewitness had identified "Dirty John" as the shooter; thus, the references were entirely proper. Second, the court held that the reference to the motorcycle gangs was proper because (1) defendant got his nickname "while working on motorcycles during his youth," and (2) the affiliation was elicited on cross examination of defendant and "went to his credibility." Third, the court found that the reference to defendant's clothing had only a "slight tendency to divert the jury." Fourth, any impropriety in showing the pictures to the jury was outweighed by the overwhelming evidence against defendant. In general, the court found that any misconduct was isolated in the context of a six-week trial that contained substantial evidence of defendant's guilt. Accordingly, the district court's decision was reversed and the conviction affirmed.

• *Due Process - Competency*

Filiaggi v. Bagley, 04-3513 (4/14/06)

► Defendant was charged with murder in state court and on the day of trial, the stun belt he was wearing accidentally discharged. Before the trial started, defendant was evaluated by a psychologist who found him competent. The psychologist also suggested that defendant was in no state to go to trial and that further evaluation may be warranted. Nonetheless, the trial court proceeded with the trial, and defendant's two attorneys repeatedly requested additional competency testing. The trial court denied all requests for a further competency evaluation or hearing, and defendant was convicted. Defendant appealed through the state court system and then filed a federal *habeas* petition claiming that he was incompetent during the trial. The district court denied the petition and defendant appealed.

★ Holding: A two judge majority ruled that the state court did not violate clearly

established federal law in holding that a further competency evaluation or hearing was necessary. Although the court found that the evidence regarding defendant's competency was mixed, the court held that the trial court had reasonably relied on its own observations of defendant, the report of the psychologist, and the testimony of a deputy who was guarding defendant. The only evidence showing defendant's incompetency came from defendant's two attorneys (one of whom was also a doctor) and the attorneys provided no specific evidence of his incompetency. Accordingly, the district court's dismissal of the writ was affirmed.

• *Miranda - Reinitiation of Contact*

Van Hook v. Anderson, 03-4207 (4/18/06)

► Defendant was arrested in Florida for a murder in Cincinnati. He invoked his *Miranda* right to counsel with the Florida detectives, who ceased questioning him. The Cincinnati detectives then arrived and, knowing that defendant had invoked his right to counsel, engaged him in conversation saying that they had "talked to his mother" and that they needed to talk. Defendant later made a full confession to the murder. Upon defendant's prosecution in state court, he moved to suppress the confession under *Miranda*, but the state court denied the motion. Defendant appealed through the state court system and then filed a federal *habeas* petition. The district court denied the petition, and defendant appealed.

★ Holding: Where a defendant has unequivocally invoked her right to counsel under *Miranda*, police may not conduct further interrogation of the defendant unless she voluntarily reinitiates conversation with the police. The government bears the burden of proving a waiver of the right to counsel was voluntarily, knowingly, and intelligently made. In the case, the court first held that defendant had asked for an attorney, thus unequivocally invoking his right. Second, the court held that

defendant did not reinitiate conversation with the police. In this regard, the court held that the detectives' conversation with defendant's mother was of no consequence because only defendant himself could reinitiate conversation with the police. Third, the court held that the detectives had, in fact, begun questioning defendant when he confessed. Thus, the court found a clear violation of *Miranda* and held that the confession should have been suppressed. Finally, the court held that the error was not harmless because the confession was "among the most significant evidence marshaled in the case." Accordingly, the conviction was reversed.

VI. Sixth Amendment

• *Booker*

U.S. v. Johnson, 04-5110 (3/15/06)

► Defendant was convicted of RICO violations. Instead of utilizing a special verdict form at trial, the district court made a finding at sentencing as to which predicate acts defendant had committed for the RICO violation, and sentenced defendant to an offense level of 43 based upon a murder predicate. Defendant appealed and in the original panel decision, the Sixth Circuit found a *Booker* violation and remanded for resentencing. In the remand order, the court directed the district court on resentencing to apply the lowest possible guideline range that was supported by the general jury verdict, which would have been a reduction from a level 43 (found by the district court) to a level 24. (*See P.V.*, Issue # 5). The court subsequently issued an amended decision.

★ Holding: In the amended opinion, the court removed all of the language discussing the reduction of the guideline offense level from a 43 to a 24. Instead, the court simply held that the government had agreed that a *Booker* remand was appropriate and remanded the case for resentencing consistent with *Booker*.

- *Booker*

U.S. v. Hochschild, 05-3159 (3/31/06)

▶ Defendant was convicted of interstate travel to commit a sex act and in his plea agreement agreed to waive any constitutional challenge to application of the sentencing guidelines in his case. Defendant appealed and *Booker* was subsequently decided.

★ Holding: The court held that *Booker* provided both constitutional and statutory rights to a defendant. The constitutional rights were based upon the Sixth Amendment, and provided the right to have a jury, and not the judge, decide sentence enhancements. The statutory rights derived from the right to not be sentenced under a mandatory guideline scheme. Thus, the court held that defendant could still obtain a remand for resentencing under *Booker* because he was sentenced under a mandatory guideline regime, even though he had waived constitutional challenges. Thus, the case was remanded for resentencing.

- *Booker*

U.S. v. Brown, 04-6069 (4/14/06)

▶ Defendant was convicted of being a felon in possession of a firearm and qualified as an ACCA. At sentencing, the district court determined that defendant had 53 criminal history points and imposed a four-level upward departure, thus sentencing defendant to 280 months in prison. Defendant appealed and *Booker* was decided during the pendency of the appeal.

★ Holding: Ordinarily, sentences imposed pre-*Booker* are remanded for the district court to reconsider the sentence under an advisory guideline scheme. In the case, the court held that, where the district court imposes an upward departure from the guideline range, the *Booker* error is rendered harmless as long as the sentence is reasonable. The court ruled that, because the district court “considered the applicable guideline range before departing upward,” and “mentioned deterrence,

incapacitation, just punishment, and rehabilitation,” all § 3553 factors, the sentence was reasonable. Therefore, the sentence was affirmed.

- *Right to Counsel*

U.S. v. Chambers, 02-5865 (3/23/06)

▶ Defendant was charged with child pornography and child sex abuse. Prior to trial, defendant moved the district court to appoint him new counsel, citing primarily that his attorney was not providing him access to discovery. The district court denied the request for new counsel and insisted that the trial go forward on schedule. Defendant was convicted of all counts and sentenced to life. Defendant appealed.

★ Holding: In reviewing a district court ruling on a motion to withdraw counsel, the court considers (1) the timeliness of the motion, (2) the adequacy of the district court’s inquiry into the matter, (3) the extent of conflict between attorney and client, and (4) the balancing of the public interest in the prompt and efficient administration of justice. Given that the discovery process had taken over a year, defendant was moving for new counsel shortly before trial, and counsel had provided all discovery to defendant that could legally be provided in the jail, the court found that the denial of new counsel was appropriate. Accordingly the conviction was affirmed.

- *Confrontation Clause*

Stuart v. Wilson, 05-3092 (3/27/06)

▶ Defendant was charged in state court with rape of a young child. At trial, the state court permitted several family members to testify about the child’s out-of-court statements regarding defendant’s activities. The prosecution did not establish that the child was unavailable to testify. Defendant appealed through the state court system, and then filed a federal *habeas* petition. The district court denied the petition, and defendant appealed

challenging admission of the statements under the Confrontation Clause because the witness was not unavailable and because the statements did not contain sufficient guarantees of trustworthiness.

★ Holding: In a *habeas* action from a state court proceeding, a conviction may only be reversed if the trial court violated clearly established federal law. In the case, the court first held that it is not clearly established under federal law that unavailability of a witness is a prerequisite to admissibility under the Confrontation Clause. The only context in which unavailability clearly must be shown is where the hearsay statements were made in the course of a prior judicial proceeding. Thus, the court held that the failure to prove unavailability did not violate federal law.

The court then considered the admissibility of the evidence under traditional Confrontation Clause analysis which provides that a hearsay statement is admissible if it falls within a firmly rooted hearsay exception, or otherwise contains particularized guarantees of trustworthiness. The child's statement had been admitted under Ohio's child rape hearsay exception, Rule 807. The court found that this was not a firmly-rooted hearsay exception. In analyzing the guarantees of trustworthiness for a child rape victim's statements, the court considers five factors: (1) spontaneity; (2) consistent repetition; (3) mental state of declarant; (4) use of non-age appropriate terminology; and (5) lack of a motive to fabricate. Considering the factors in relation to the case, the court concluded that the child's statements were supported by particularized guarantees of trustworthiness and upheld the admission of the testimony. Thus, the conviction was affirmed.

• *Confrontation Clause*

Fulcher v. Motley, 03-6216 (4/18/06)

► Defendant was charged with murder in state court and at trial the state introduced the

hearsay statement of defendant's wife to police after the murder. The trial court admitted the hearsay testimony as a statement against interest and found that defendant's wife was unavailable because she claimed spousal privilege at trial. Defendant appealed through the state courts and then filed a federal *habeas* petition claiming that his right to confrontation was violated. The district court denied the petition and defendant appealed.

★ Holding: The court held that, under the law applicable at the time of defendant's state conviction, hearsay evidence was admissible under the Confrontation Clause only if it either fell within a firmly-rooted hearsay exception, or contained particularized guarantees of trustworthiness. First, the court held that the hearsay exception for statements against interest was not firmly-rooted. Second, the court held that the wife's statement was not particularly trustworthy because it tended to shift blame away from herself, was made while she was in custody, and was made in response to several leading questions. Finally, the court found that the admission of the wife's statement was not harmless because the evidence was otherwise equivocal. The court noted that it did not have to decide whether the Supreme Court's ruling in *Crawford* would apply retroactively to the case because the court found that reversal was warranted based upon pre-*Crawford* law. Judge Clay opined in a concurrence that *Crawford* should apply retroactively.

VII. Other Constitutional Rulings

• *Commerce Clause*

U.S. v. Chambers, 02-5865 (3//23/06)

► Defendant was charged with, among other things, possession of child pornography. Defendant made and possessed the pictures entirely intrastate, but the film that defendant used was manufactured in either another state or a foreign country. Defendant was convicted and appealed, challenging the interstate nexus

requirement.

★ Holding: Relying on the recent Supreme Court decision *Gonzales v. Raich* (See P.V., Issue #2), the court held that purely intrastate possession of child pornography has a substantial effect on interstate commerce because “homegrown pornography can feed the national market and stimulate demand.” Thus, as with marijuana in *Raich*, child pornography is part of an “economic class of activities” that has a substantial effect on interstate commerce and accordingly can be regulated without a showing of a substantial impact on commerce in any individual case. Accordingly, the conviction was affirmed.

IX. Plea and Sentencing Hearings

• *Plea Agreements - Appeal Waivers*

U.S. v. Sharp, 04-4065 (4/5/06)

► Defendant entered into an agreement to plead guilty to a fraud conspiracy. In the agreement, defendant agreed to waive his right to appeal. At the plea hearing, the district court asked defendant if he understood all of the provisions of the plea agreement and had discussed them with his attorney; the court then had the prosecutor summarize the appeal waiver provision. On appeal, defendant claimed that the district court had not properly advised him of the appeal waiver as required by Fed. R. Crim. P. 11(b)(1)(N). The government moved to dismiss the appeal based upon the appeal waiver.

★ Holding: Relying on the court’s decision in *Wilson*, (See P.V., Issue #6), the court held that Fed. R. Crim. P. 11 is satisfied where a prosecutor summarizes an appeal waiver in open court and the defendant acknowledges her understanding of the provision. The court found that it was of no consequence that the district court asked defendant if he understood the plea agreement before the appeal waiver was summarized. Accordingly, the appeal was dismissed.

X. Jury Issues

• *Jury Instructions - FRE 404(b)*

U.S. v. Matthews, 04-6398 (3/14/06)

► Defendant went to trial on drug and weapons offenses and the government introduced evidence, under FRE 404(b), that defendant had previously engaged in drug trafficking activities. (See *supra*, III. Evidence). The district court did not provide an instruction to the jury on the limited use of the evidence at the time it was admitted, but instead gave the standard Sixth Circuit pattern instruction on Rule 404(b) evidence at the end of the case. Defendant did not object in the trial court, but raised the issue of the timeliness and appropriateness of the instruction on appeal.

★ Holding: Applying the plain error rule, the court held that the failure to give a contemporaneous instruction regarding Rule 404(b) evidence did not require reversal where the district court provides a proper instruction before the jury deliberates. The court found that the district court did give a proper instruction to the jury, in accordance with the pattern instruction, with one exception. The district court omitted the words “if you find the defendant did those acts” from the instruction, a requirement that the jury conclude that defendant actually committed the acts alleged. The court nonetheless found this omission harmless because the district court repeatedly emphasized to the jury the limited purposes of the evidence, and the defendant could not show how the omission changed the outcome of the proceedings. Accordingly, the conviction was affirmed.

XII. Appeals

• *Reasonableness of Sentence*

U.S. v. Jones, 05-5657 (4/17/06)

► Defendant was convicted of bank fraud and identity theft and at sentencing he requested a below-guideline sentence based upon the fact that he had already served a state

sentence for some of the conduct charged in the federal case. The district court sentenced defendant within the guideline range without specifically addressing defendant's argument. Defendant appealed.

★ Holding: Under USSG § 5K2.23, a district court may impose a downward departure from the guideline range based upon a state sentence that defendant served for a conviction that is relevant conduct to the federal offense. The court held, however, that the denial of downward departure is not reviewable on appeal, and thus, defendant's sentence was reviewable only for reasonableness. The court ruled that the district court had appropriately considered the factors under 18 USC § 3553 and that the sentence it imposed was reasonable. The court noted that the district court's failure to specifically rule on defendant's below-guideline-sentence request did not render the sentence unreasonable given that the court had otherwise appropriately considered the § 3553 factors. Accordingly, the sentence was affirmed.

XIII. Post Conviction Remedies

• Ineffective Assistance of Counsel

Pough v. U.S., 04-3863 (3/31/06)

► Defendant was convicted in federal court of drug charges and in state court for murder. During the pendency of the case in federal court, defendant's counsel advised him not to cooperate with state authorities in their investigation until his state attorney was able to negotiate a plea deal, or until the government in the federal case made a plea bargain that would give him a benefit for his cooperation. After defendant's sentencing in federal and state courts, and a loss in his direct federal appeal, defendant pursued a federal *habeas* petition. Therein, defendant claimed that his attorney's advice to not cooperate with state authorities resulted in less favorable sentencing determinations. The district court denied the petition and defendant appealed. On appeal,

defendant claimed that his appointed appellate attorney was ineffective for failing to independently research and write the brief.

★ Holding: Applying the Strickland standard, the court first held that defendant's trial counsel was not ineffective. The court held that the attorney's advice to forego cooperating until plea agreements could be reached was not unreasonable. Regarding the appellate counsel's performance, the court, in a two-judge majority, held that the attorney's decision to sign and file a brief that was mostly written by defendant himself was not unreasonable. The court found that, given defendant's insistent need to control his own case, the attorney's actions did not constitute deficient representation. Additionally, the court found that defendant was not prejudiced because all pertinent issues were addressed in the brief with appropriate citations to authorities. Accordingly, the district court ruling was affirmed.

• Ineffective Assistance of Counsel

Gillard v. Mitchell, 03-4261 (4/26/06)

► The attorney representing defendant on state murder charges also represented defendant's brother on the same charges. The brother was investigated, but not prosecuted. At the murder trial, the attorney presented the brother as a witness for defendant, and the state objected to the potential conflict of interest. The attorney assured the court that no conflict existed, but the court nonetheless appointed the brother an attorney to advise the brother during his testimony. Defendant appealed through the state courts and then filed a federal *habeas* petition claiming that his attorney operated under an actual conflict of interest and was ineffective for failing to present the defense that his brother committed the murder, not defendant. The district court granted the petition and the state appealed.

★ Holding: Where an attorney labors under an actual conflict of interest, ineffectiveness is

established and prejudice to the defendant's case is presumed. In the case, however, the court found no actual conflict of interest in the attorney's representation of defendant because the attorney was no longer representing the brother at the time that the attorney cross examined him. In so holding, the court emphasized the difference between simultaneous versus successive representation. In successive representation, the attorney "is no longer beholden to the former client," and thus, the court ruled that no actual conflict exists. Further, the court found no error in the trial court's failure to hold an evidentiary hearing regarding the conflict. The trial court appropriately inquired into the matter and appointed a separate attorney for the brother. Under these circumstances, the trial court had no further obligation to conduct an evidentiary hearing into the conflict issue, particularly where the defense attorney represented to the trial court that no conflict existed. Accordingly, the district court ruling was reversed and the conviction affirmed.