

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

IV. Fourth Amendment

• *Warrant Exception - Exigent Circumstances*
Brigham City, Utah v. Stuart, 05-502 (5/22/06)

► The police arrived at a home in response to a 3:00 a.m. call about a loud party. Upon arriving, the police heard a loud fight going on inside, and went to the back of the house. Through a screen door, the officers observed several adults trying to restrain a juvenile, who then broke free and punched one of the adults,

giving him a bloody mouth. One officer then opened the screen door and announced his presence. No one responded, so he stepped into the kitchen and again announced his presence. The fight then stopped and defendants were arrested and charged with minor offenses in state court. Defendants moved to suppress all evidence obtained by the police after the entry into the home, and the state court granted the motion. The prosecution appealed through the state court system and the Supreme Court granted *certiorari*.

★ Holding: The Court held that a warrantless entry into a home by police may be justified in order to protect or preserve life or avoid serious injury. The officer's subjective motivation for the entry is irrelevant as long as her actions are objectively reasonable. In the case, the Court found that the need to protect the occupants of the home from the ongoing altercation justified the officers' entry. The Court also held that the officers acted reasonably in opening the screen door to announce their presence because a knock on the door would not likely have been heard by the occupants. Accordingly, the state court's suppression of the evidence was reversed.

• *Warrant Requirement-Knock and Announce*
Hudson v. Michigan, 04-1360 (6/15/06)

► Officers obtained a warrant to search defendant's home for narcotics and guns. The officers failed to sufficiently knock and announce their presence prior to entering defendant's home to execute the warrant. The state court in Michigan held that, although the knock-and-announce rule had been violated, exclusion of the evidence seized was not required. Defendant was convicted, lost his appeals in the state courts, and *certiorari* was granted in the Supreme Court.

★ Holding: The Court held that suppression of evidence is not an appropriate remedy for a violation of the knock-and-announce rule. A

defendant's only remedy in such a situation is a civil law suit. Thus, defendant's conviction was affirmed.

• *Search - Parole Searches*

Samson v. California, 04-9728 (6/19/06)

► California has a law through which any law enforcement officer may, without a warrant or any cause, search a person who is on state parole. Pursuant to this law, defendant was searched by a police officer who found narcotics. Upon his subsequent prosecution for a state narcotics offense, defendant challenged the search as a violation of the Fourth and Fourteenth Amendments. The state courts found the search to be constitutional, and the Supreme Court granted *certiorari*.

★ Holding: Relying on the diminished expectation of privacy of a parolee, the Court found that the California search condition did not violate the Fourth Amendment. The Court ruled that defendant had sufficient notice of the existence of the search provision as a condition of parole, and that the state's interest in conducting such searches was substantial given the state's "overwhelming" interest in ensuring that parolees do not commit further crimes. Accordingly, the conviction was affirmed.

V. Fifth Amendment

• *Due Process - Right to Present Defense*

Holmes v. South Carolina, 04-1327 (5/1/06)

► Defendant was charged with the rape and murder of an elderly woman and the state mustered significant forensic evidence against him. At trial, defendant intended to present evidence that another man had committed the crime and defendant offered to present substantial evidence to support the theory. The state court ruled that defendant was prohibited from presenting the defense based upon a state evidentiary rule barring evidence of third-party guilt where the prosecution presents strong forensic evidence of defendant's guilt. Defendant appealed through the state court

system, and the Supreme Court granted *certiorari*.

★ Holding: Under the Due Process Clause, a defendant enjoys the right to a meaningful opportunity to present a complete defense. This right is abridged where evidence rules infringe upon a “weighty” right of a defendant and are “disproportionate to the purposes they are designed to serve.” In the case, the Court held that the state evidentiary rule violated defendant’s right to present his defense. The Court emphasized that the rule allowed consideration only of the strength of the prosecution’s case, but did not allow for analysis of a defendant’s challenges to the case in determining whether evidence of third party guilt would be admitted. Under these circumstances, the Court held that the state court rule was not rationally related to any legitimate purpose, and accordingly, the conviction was reversed.

• *Due Process - Insanity Evidence*

Clark v. Arizona, 05-5966 (6/29/06)

► An officer stopped defendant while he was driving around a residential area with his stereo blaring. Upon being pulled over, defendant shot and killed the officer, fled on foot, and was arrested later in the day with the murder weapon hidden nearby. At trial on the state of Arizona murder charge, defendant pursued the defense of insanity. Arizona allows an insanity defense only where a defendant can show that he did not know right from wrong. Defendant also pursued the defense that his mental illness kept him from forming the specific intent to commit the crime. Arizona courts have ruled that insanity evidence is not admissible to nullify *mens rea*. Defendant was convicted and appealed the restriction of the insanity test and the limitation on insanity evidence regarding *mens rea*. The Supreme Court granted *certiorari*.

★ Holding: Under the common law insanity defense, a defendant could establish insanity by

showing either that his insanity prohibited him from knowing what he was doing, or that his insanity prohibited him from knowing that what he was doing was wrong. In the case, the Court held that Arizona’s choice to permit only the “knowing right from wrong” insanity defense did not abridge defendant’s due process rights.

Regarding the *mens rea* issue, the Court found that the Arizona rule excluded only “mental-disease evidence” and “capacity evidence” from being admitted by a defendant. These types of evidence generally appear in the form of opinion and are used to show that the defendant suffered from mental illness and that the illness affected the defendant’s capacity for cognition. The Court ruled that a state’s decision to exclude this evidence in relation to *mens rea* did not violate the defendant’s due process rights. The Court emphasized, however, that the state had not attempted to exclude “observation evidence.” This category of evidence includes testimony (either expert or lay witness) of those who observe what a defendant does and says in daily life, and may give indications about the way the defendant thinks and behaves. Accordingly, the Court found no due process violation in the application of the Arizona rule and affirmed the conviction.

VI. Sixth Amendment

• *Confrontation Clause*

Davis v. Washington, 05-5224 (6/19/06)

► Defendant Davis was charged with a violation of a protective order after his girlfriend called 911 and detailed the abuse that he was inflicting as it was happening. The girlfriend failed to appear at trial and the state used the 911 tape as evidence to prove the assault. Defendant was convicted, and appealed based upon an alleged Confrontation Clause violation.

In a companion case, Defendant Hammon was charged with domestic battery

after police interviewed both he and his girlfriend at their residence after a domestic dispute had occurred. The girlfriend reported to police that Hammon had hit her and thrown her down, and then she signed an affidavit to that effect. The girlfriend failed to appear for trial, and the officer testified as to her statement. The Supreme Court granted *certiorari* for both Davis and Hammon.

★ Holding: In *Crawford*, the Supreme Court held that the Confrontation Clause bars admission of testimonial statements of a witness who does not appear for trial unless the witness is unavailable and the defendant had a prior opportunity for cross examination. In this case, the Court defined the delineation between “testimonial” and “nontestimonial” statements to police officers: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an on-going emergency.” Thus, in *Davis*, the Court held that the statements made by the girlfriend to the 911 operator were for the primary purpose of providing police assistance in an on-going emergency, and therefore, the statements did not violate the Confrontation Clause. In *Hammon*, the Court ruled that the reason for the girlfriend’s statements to the officers was to convey the facts of past events. Thus, the statements primarily served an investigative purpose. Accordingly, the statements in *Hammon* violated the Confrontation Clause and the conviction was reversed.

• *Right to Counsel of Choice*

U.S. v. Gonzalez-Lopez, 05-352 (6/26/06)

► Defendant was charged in a drug conspiracy and the district court wrongfully forced him to go forward with trial without the hired counsel of his choice. Defendant was convicted and the conviction was reversed in the Eighth Circuit. The government appealed

and the Supreme Court granted *certiorari*.

★ Holding: The Court held that the denial of a defendant’s right to hire the counsel of his choice is a structural error for which harmless error analysis does not apply. Thus, whenever a defendant is wrongfully denied the right to hire the counsel of his own choosing, reversal is required. The Court qualified the statement by emphasizing that the ruling applied only to situations where the defendant’s right to hire the counsel of his choice was wrongfully denied; the ruling did not limit a court’s ability to define which attorneys may practice before it or to exclude an attorney based upon scheduling issues. Further, the court indicated that its decision did not apply to appointed counsel, only to privately retained attorneys. Accordingly, the conviction was reversed.

• *Blakely - Harmless Error*

Washington v. Recuenco, 05-83 (6/26/06)

► Defendant was charged under Washington law with assault in the second degree. At trial, the judge provided a special verdict form wherein the jury could find that defendant committed the offense with a “deadly weapon.” The jury found defendant guilty and also found that he used a deadly weapon. At sentencing, instead of imposing a one year enhancement for the “deadly weapon” finding, the court imposed a three year enhancement for the use of a firearm. Defendant appealed and won in the state court, which found that *Blakely* error is structural and required automatic reversal. The state appealed and the Supreme Court granted *certiorari*.

★ Holding: In *Blakely*, the Supreme Court held that a trial court may not increase a statutory maximum sentence beyond what is mandated by the facts found in a jury verdict. In this case, the Court held that *Blakely* error is subject to harmless error review. Thus, even though the jury did not specifically make a finding that defendant used a firearm (as opposed to a dangerous weapon), the Court

held that such an error was harmless and affirmed the enhanced sentence.

VIII. Defenses

- *18 U.S.C. §3161 - Speedy Trial Act*

Zedner v. U.S., 05-5992 (6/5/06)

▸ Defendant was charged with bank fraud and during the pretrial proceedings, and at the district court's suggestion, he signed a waiver of his speedy trial rights "for all time." Upon the signing of such waiver, the district court failed to make any finding regarding whether the ends of justice supported the continuance. Defendant eventually moved to dismiss the indictment based upon the Speedy Trial Act and the district court denied the motion. Defendant appealed and *certiorari* was eventually granted.

★ Holding: The Court first held that a defendant may not prospectively waive the application of the Speedy Trial Act. Second, the Court ruled that a district court must make findings sufficient to support an "ends of justice" continuance (18 U.S.C. § 3161(h)(8)(A) on the record at or before ruling on a defendant's motion to dismiss. The Court noted that the preferable time for making such a ruling is at the time the continuance is granted. Further, the Court held that, due to the clear and mandatory nature of the wording of the Speedy Trial Act, the failure to make "ends of justice" findings are not subject to harmless error review. Finally, the Court held that the doctrine of judicial estoppel did not prevent defendant from raising the speedy trial issue. Under such doctrine, a defendant is prohibited from taking a position in a litigation where the court has relied on the defendant's earlier inconsistent position. The Court found the doctrine inapplicable because it would be inconsistent with the purposes of the Speedy Trial Act and because the district court itself had suggested the prospective waiver of speedy trial rights. Accordingly, the conviction was reversed, the indictment dismissed, and the

case remanded for a determination as to whether the dismissal should be with or without prejudice.

- *Duress*

Dixon v. U.S., 05-7053 (6/22/06)

▸ Defendant was charged with buying firearms while under felony indictment and with making false statements on firearm applications. Defendant admitted at trial that she knew she was under indictment and that she was committing a crime. Her defense was that her boyfriend forced her to do it under threat of death. The district court instructed the jury that defendant must prove duress by a preponderance of the evidence. Defendant was convicted, lost on appeal, and the Supreme Court granted *certiorari*.

★ Holding: The Court held that, unless Congress otherwise defines the duress defense, it is the defendant's burden to prove duress by a preponderance of the evidence. Thus, the conviction was affirmed.

- *Vienna Convention-Consular Notification*
Sanchez Llamas v. Oregon, 04-10566 (6/28/06)

▸ Defendants in two different cases claimed that authorities violated their rights by failing to notify them that they had a right to have the consular from their home countries notified of their arrest in the United States. Defendant Sanchez-Llamas claimed that statements he made to authorities after his arrest should be suppressed because they failed to first notify him of his right to consular notification. Defendant Bustillo claimed, for the first time in a post-conviction petition after his murder trial, that his conviction must be reversed because he was not informed of his right to consular notification. The state court found that the claim was procedurally defaulted because it was not raised until the post-conviction petition. Both defendants lost their state court appeals, and the Supreme Court granted *certiorari* in both cases.

★ Holding: The Court held that the consular notification requirement of the Vienna Convention does not require suppression, in a state court proceeding, of statements made by a defendant to authorities where the authorities did not first advise the defendant of his right to the notification. Additionally, the Court held that state procedural default rules apply to claims under the Vienna Convention, and therefore Bustillo's claim had been defaulted. Accordingly, both defendants' convictions were affirmed.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 U.S.C. § 922(g) - Felon in Possession*
U.S. v. Newsom, 05-5030 (6/29/06)

▶ Defendant was pulled over by police for running a stop sign and he bent over as if putting something under the seat. The police found a gun under the seat, with bullets in plain view on the floor. Defendant made two separate statements suggesting that the gun was his. After his conviction, defendant challenged the sufficiency of the evidence on appeal.

★ Holding: To prove constructive possession of a firearm, the government must show that the defendant had the power and the intention at a given time to exercise dominion and control over it, either directly or through others. In the case, the court found sufficient evidence, both from defendant's actions and statements, to conclude that he had constructively possessed the gun. Accordingly, the conviction was affirmed.

III. Evidence

• *401 - Relevance*
U.S. v. Newsom, 05-5030 (6/29/06)

▶ Defendant was charged with being a felon in possession of a firearm and at trial a defense witness testified that she did not see defendant with a gun. On cross examination, the government asked the witness whether she had

seen defendant's tattoos of guns on his body. Defendant objected to the relevance of the evidence and the district court permitted the question in order to impeach the witness' credibility. Defendant appealed this evidentiary ruling.

★ Holding: The court held that, pursuant to FRE 401, the question regarding defendant's tattoos had no relevance in the case. First, the question did not serve as direct evidence that defendant possessed a firearm as charged in the indictment. Second, the court held that the question of whether the witness had seen pictures of tattoos on defendant's body had no effect on her credibility as to whether she had seen defendant with an actual gun. Nonetheless, because the reference to the tattoos was only a single question, the error was harmless.

• *403 - Unfair Prejudice*
U.S. v. Newsom, 05-5030 (6/29/06)

▶ During defendant's trial for being a felon in possession of a firearm, the district court permitted the government to ask a witness about tattoos of guns on defendant's body. The defense then asked another witness about the tattoos, which prompted the government to ask multiple witnesses in detail about defendant's numerous tattoos depicting guns and violence. Defendant did not object to the latter series of government questioning. On appeal, defendant challenged the tattoo evidence under FRE 403.

★ Holding: First, the court held that the probative value of the evidence was substantially outweighed by its prejudicial effect. The tattoo evidence had no probative value at all in the case, and the prejudicial effect of the jury hearing that defendant had guns and violent sayings tattooed on his body was high. Because defendant did not object, however, the court applied plain error analysis. The court found that the error was plain, but that it did not deprive him of a fair trial. Accordingly, the conviction was affirmed.

• *404(b) - Intent*

United States v. Fraser, 05-1423 (6/1/06)

► Defendant was charged with a counterfeit check scheme. At trial, defense counsel claimed in opening statement that defendant had been “duped” into being involved in the scheme by another individual. The district court then permitted the government to introduce portions of a book defendant had written called “The Birth of a Criminal” wherein defendant described the same kind of check scheme that was charged in the case. Defendant appealed and challenged the admission of the quotes from his book under FRE 404(b).

★ Holding: Before admitting “other acts” evidence under FRE 404(b), the court must determine whether (1) there is sufficient evidence that the “other act” occurred, (2) the “other act” is admissible for a proper purpose, and (3) the evidence is admissible under FRE 403. First, the court held that there was sufficient evidence that defendant wrote the book because his picture was on the cover, and it was found on his website. Second, the court held that the quotes from the book were admissible to show defendant’s intent. The court found that the book was relevant to prove that defendant had not been tricked into participating in the check scheme. Third, the court ruled that the evidence had a very high probative value and that defendant suffered no substantial undue prejudice. The court also emphasized that the district court had given a limiting instruction regarding the jury’s use of the evidence. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

• *Warrant Exception-Exigent Circumstances*

United States v. Brown, 05-5437 (5/31/06)

► The burglar alarm at defendant’s residence was set off and, while the police were in transit, it was set off again. Upon arrival at the home, the police found no cars in the driveway,

and were directed to the basement door by a neighbor. The basement door was ajar, so the police entered to investigate whether a burglary was in progress. Once inside, the police found a second door that was ajar, and upon opening it, discovered defendant’s marijuana grow operation. Defendant was charged with marijuana production and moved in the district court to suppress the evidence found in his home. The district court denied the motion and defendant appealed.

★ Holding: The court held that the circumstances of the case provided probable cause for the police to believe that a burglary was in progress at defendant’s home, and thus, the entry was justified by exigent circumstances. Additionally, the court held that the police did not exceed the scope of a permissible search by opening the second door inside the basement. Officers are permitted to perform a protective sweep for persons when entering a home based upon exigent circumstances, and the search behind the second door was well within the realm of a permissible protective sweep. Accordingly, the district court’s order was affirmed.

• *Warrant Exception-Consent Once Removed*
U.S. v. Romero, 05-1512 (6/30/06)

► Defendant invited an undercover officer into his hotel room thinking that he was a drug purchaser. Once inside, the officer realized that a second man was in the hotel room and decided to call for back-up. Other officers burst into the room and arrested defendant. After being charged with meth distribution, defendant moved to suppress the evidence upon the ground that the officers had no authority to enter the hotel room. The district court disagreed, but suppressed the evidence on other grounds. Upon the government’s appeal, defendant cross-appealed.

★ Holding: The court found that the officers’ entry into to the hotel room was justified by the doctrine of consent once removed. This

doctrine allows officers to enter where an undercover agent or informant (1) entered at the express invitation of someone with authority to consent, (2) the agent or informant established probable cause to effectuate an arrest or search, and (3) immediately summoned help from back-up officers. Accordingly, the district court ruling was affirmed.

• *Warrant Exception-Search Incident to Arrest*
U.S. v. Romero, 05-1512 (6/30/06)

► Officers arrested defendant in a hotel room for narcotics distribution and at the time, defendant was sitting on a hotel bed. Defendant kept staring at the night stand and, after he was cuffed, officers searched the night stand and found meth. Defendant moved to suppress the meth because officers searched without a warrant. The district court agreed and suppressed the evidence. The government appealed.

★ Holding: The court held that the search of the night stand was a valid search incident to arrest. Even though defendant was handcuffed when the officers searched the night stand, the search was still valid because it was within defendant's reach before he was cuffed. Accordingly, the district court ruling was reversed.

• *Search Warrant - Probable Cause*
U.S. v. Wagers, 05-5296 (6/27/06)

► Agents determined that defendant had subscribed to three websites that exclusively contained child pornography. Additionally, agents found that defendant had a prior conviction for child pornography. Based upon this information, agents obtained search warrants for defendant's law office, his home, and AOL for defendant's account information. Upon being subsequently charged with child pornography, defendant moved to suppress the evidence seized pursuant to the search warrants claiming that the warrants were not supported

by probable cause. The district court denied the motion and defendant appealed.

★ Holding: The court held that the warrants were supported by probable cause. Specifically, the court found that the warrants did sufficiently connect the charged offenses with defendant's home through the reference to billing records. Second, the court ruled that the district court properly relied upon defendant's prior conviction for child pornography as support for probable cause for the warrant. The court held that a prior conviction for the exact same type of conduct that is being investigated is relevant, though not dispositive, to the probable cause determination. Finally, the court found that the intricacies of internet communications and website usage do not require any new standard of evidence for dealing with probable cause inquiries. Accordingly, the conviction was affirmed.

• *Arrest - Probable Cause*
United States v. Romero, 05-1512 (6/30/06)

► Defendant contacted an undercover officer and offered to sell meth. After several phone conversations, a meeting was arranged at a hotel. Officers established that the hotel room was booked in the name Santiago, a confirmed meth dealer. Upon the officer's arrival at the hotel, defendant answered the door, used a prearranged code name, identified himself, and invited the officer into the room. In the room was one other man whom the officer believed was Santiago. Officers immediately burst in and arrested both defendant, and Santiago. Upon being charged with meth distribution, defendants moved to suppress the evidence seized because the officers did not have probable cause to arrest. The district court found probable cause to arrest, but then suppressed the drug evidence on other grounds. Upon the government's appeal, defendant cross appealed the probable cause issue.

★ Holding: The court held that probable cause supported the arrest of both defendants.

The court found that officers had gathered sufficient information to believe that defendant was about to sell meth, and that the other man in the room was Santiago, a known drug dealer. The circumstances supported the belief that both men were involved. Further, Santiago made furtive gestures when the officers entered the room, providing additional support for probable cause to arrest. Thus, the district court ruling on the issue was affirmed.

V. Fifth Amendment

- *Due Process - Delay in Resentencing*

U.S. v. Sanders, 04-4540 (6/29/06)

- ▶ Defendant was originally sentenced to 39 months incarceration for firearms offenses, but after several appeals and a *habeas* action, the Sixth Circuit concluded that defendant was an Armed Career Criminal and held that the district court must resentence defendant to 15 years in prison. The district court did not resentence defendant to the 15 year sentence until 4 years after the Sixth Circuit decision. During this 4 year time period, the government requested a resentencing hearing on three separate occasions. Upon his resentencing, defendant appealed and argued that his due process rights had been violated.

- ★ Holding: In a two judge majority, the court first held, deciding an open question, that the Sixth Amendment *Barker v. Wingo* factors for speedy trial violations do not apply to consideration of a delay in resentencing a defendant. The court then held that the appropriate factors to analyze under the Fifth Amendment are (1) the reasons for the delay, and (2) the prejudice defendant suffered as a result of the delay. In the case, the court found that the government had made reasonable efforts to get defendant resentenced, and thus it was not at fault for the delay. The principle reason for the delay was that the district court did not want to give defendant the higher sentence. Further, the court found that defendant could not establish prejudice as a

result of the delay. To the contrary, the court held that defendant derived some benefit from the delay: “He was able to reunite with his children and provide a strong role model for them; he was able to meet and marry his current wife and form a relationship with her children, and was able to play a more active role in his community.” Accordingly, court found no due process violation and the 15 year sentence was affirmed.

VI. Sixth Amendment

- *Confrontation Clause*

Danner v. Motley, 04-5363 (5/11/06)

- ▶ Defendant was charged in state court with rape and sodomy. At trial, the court permitted the state to present the testimony of the child victim via closed circuit television so that the child did not have to be in the room with defendant. Defendant appealed through the state court system, and then filed a *habeas* petition in federal court. The district court denied the petition and, on appeal, defendant claimed that the closed circuit television procedure violated his rights under the Confrontation Clause.

- ★ Holding: A defendant’s right to face-to-face confrontation of a witness may only be denied where necessary to further an important public policy and where the reliability of the testimony is otherwise assured. Courts have held that two circumstances may justify the use of closed circuit television for a child sex victim: (1) fear of psychological trauma and/or injury to the child; or (2) concern that the child may be so overwhelmed that the truth-finding function of the trial is undermined. The court held that the trial court had made sufficient findings to support its conclusion that the truth finding function would be undermined if the child victim were forced to testify in front of the victim. Accordingly, the conviction was affirmed.

IX. Plea and Sentencing Hearings

• *Notice of Upward Departure*

U.S. v. Matheny, 05-6282 (6/16/06)

► Defendant was convicted of narcotics and firearm offenses. In the presentence investigation report (PSR), the probation officer indicated that defendant's criminal history might warrant an upward departure from the guideline range, but the officer did not recommend an upward departure. At sentencing, the district court imposed an upward departure and sentenced defendant to six months more than the recommended guideline range. Defendant appealed and argued that the district court did not notify defendant prior to sentencing of its intent to upwardly depart from the guideline range.

★ Holding: Rule 32(h) of the Federal Rules of Criminal Procedure requires that a court provide reasonable notice to the parties that it is contemplating an upward departure. In the case, the court held that the notice requirement had been satisfied where the PSR identified defendant's criminal history as a ground for possible upward departure. Thus, the sentence was affirmed.

X. Jury Issues

• *Voir Dire - Impartial Jury*

U.S. v. Guzman, 04-2497 (6/7/06)

► Defendant was charged with drug trafficking and during *voir dire* multiple jurors discussed the outcomes of prior criminal proceedings in which they or family members had some involvement. In 14 of the 15 instances mentioned, the person charged was convicted. Defendant claimed on appeal that permitting the entire jury panel to hear these responses indoctrinated the panel with the belief that criminal defendants are usually guilty.

★ Holding: The court first held that there is no *per se* rule that district courts must follow in conducting *voir dire*. Rather, courts must simply conduct *voir dire* in a manner that

ensures a fair and impartial jury. Second, the court ruled that the process applied by the district court in defendant's case was not improper. Defendant was not able to show any actual prejudice in the *voir dire* process, and the court found that requiring each juror to answer questions about prior involvement with the justice system *in camera* would "cripple" the judicial process. Accordingly, the conviction was affirmed.

• *Jury Instructions - FRE 404(b)*

U.S. v. Newsom, 05-5030 (6/29/06)

► During defendant's trial on a firearm charge, the government introduced uncharged prior acts of defendant under FRE 404(b). The district court instructed the jury that it could consider the uncharged conduct only for "motive, intent identity, and absence of mistake." The court gave no further explanation. Defendant did not object to the jury instruction, but challenged it on appeal.

★ Holding: The court found that three of the four purposes for the 404(b) evidence listed in the jury instruction were improper because they were not in issue. Of the four listed, only "intent" was a proper purpose for the "other acts" evidence. Nonetheless, applying the plain error standard and relying on precedent, the court held that as long as a district court includes at least one permissible purpose in its instruction, the instruction is not plain error. The court lamented the results of the decision, but indicated that it must follow precedent. Thus, the conviction was affirmed.

XII. Appeal

• *Fed. R. App. P. 4 - Time to File*

U.S. v. Dotz, 05-1427 (5/8/06)

► Defendant was convicted in a drug case and, after sentencing, filed a motion seeking permission to file a delayed appeal. Defendant claimed that the delayed filing was the result of excusable neglect because he had turned himself in to the prison and was unfamiliar

with how to contact his attorney in a timely fashion. The district court denied the motion, and defendant appealed.

★ Holding: Fed. R. App. P. 4(b) requires an appeal to be filed within ten days. The time for filing may be extended by the district court for up to thirty days based upon either excusable neglect or good cause. The court held that defendant had not shown excusable neglect because he had eleven days time between the final district court order and the day that he turned himself into the prison in which he could have appealed. Accordingly, the district court ruling was affirmed and the appeal dismissed.

• *Reasonableness of Sentence*

U.S. v. Ward, 05-5822 (5/12/06)

► Defendant was convicted of bank robbery and at sentencing the district court determined that the appropriate guideline range was 188-235 months. The court sentenced defendant to 220 months and defendant appealed the reasonableness of the sentence.

★ Holding: After *Booker*, a district court need not mechanically recite the factors of 18 U.S.C. § 3553(a) in rendering a sentence, but it must only articulate its reasoning in order to permit “reasonable” appellate review. The court held that, although the district court had not specifically mentioned the § 3553(a) factors, it had appropriately articulated its analysis of the relevant considerations in imposing the sentence. The court also noted that a sentence within the applicable guideline range is presumptively reasonable, and that defendant had failed to show how the sentence was unreasonable. Thus, the sentence was affirmed.

• *Reasonableness of Sentence*

U.S. v. Buchanan, 05-5544 (5/26/06)

► Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court imposed a sentence at the bottom

of the recommended guideline range. Defendant appealed.

★ Holding: Relying on the presumption of reasonableness, the court held that the sentence at the bottom of the range was proper. In concurrence, Judge Sutton set forth the reasons why the presumption of reasonableness is the correct standard of appellate review for sentences within a properly calculated guideline range. Further, Judge Sutton emphasized that the presumption of reasonableness standard is not the gauge to be applied by the district court; instead, the district court must impose a sentence that is “sufficient, but not greater than necessary” to meet the statutory purposes of sentencing.

• *Reasonableness of Sentence*

U.S. v. Matheny, 05-6282 (6/16/06)

► Defendant was convicted of narcotics and firearm offenses and at sentencing the district court imposed a sixth month upward departure based upon the seriousness of defendant’s prior record. The district court indicated that it was also considering a prior dismissed charge on defendant’s record, and how defendant “got a break” in that case. Defendant failed to object to the court’s consideration of the dismissed charge. On appeal, defendant claimed that the sentence was unreasonable.

★ Holding: The court first held that the district court properly considered the factors under 18 U.S.C. § 3553 in imposing the upward departure. Second, the court found error in the district court’s consideration of a dismissed charge as part of its justification for the upward departure. Nonetheless, because defendant had not objected in the district court, the court applied plain error review. The court found no plain error because the district court’s upward departure was otherwise supported by the record and because defendant could show no actual prejudice from the district court’s consideration of the dismissed charge. Accordingly, the court found the sentence to be

reasonable.

- *Reasonableness of Sentence*

U.S. v. Vonner, 05-5295 (6/29/06)

- ▶ Defendant was convicted of distributing cocaine and at sentencing made a request for a sentence lower than the guideline range based on his bad childhood, his drug and alcohol dependence, the circumstances of the case, the poor conditions of his pretrial confinement, and his cooperation with the government. The district court rejected defendant's request without specifically addressing the issues defendant had raised, mentioned the § 3553 factors, and sentenced him to the middle of the guideline range. Defendant appealed.

- ★ Holding: The court held that the district court had not satisfactorily articulated its consideration of defendant's arguments for a reduced sentence in imposing the sentence. The court found that the district court's consideration of the § 3553 factors was "perfunctory," and that the district court should have exhibited on the record that it considered the arguments raised by defendant and provided an explanation as to why it rejected those arguments. The court explained that it was not ruling that the sentence was actually unreasonable, just that the district court did not provide sufficient information in order to allow reasonable appellate review. Accordingly, the case was remanded for resentencing.