

# 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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- IX. Plea & Sentencing Hearings
- X. Jury Issues
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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](http://www.supremecourtus.gov) for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov) and enter the docket

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

## FEDERAL DEFENDER WEBSITE

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## SUPREME COURT DECISIONS

### **I. Specific Offenses**

- *8 USC § 1101 - Aggravated Felony Lopez v. Gonzales, 05-547 (12/5/06)*
  - Lopez was a permanent resident alien who was convicted of a state felony offense for drug possession. As a result, INS moved to deport him from the country based upon its determination that the state drug possession offense constituted an aggravated felony under § 1101(a)(43)(B). The immigration court

agreed with the INS interpretation and the circuit court of appeals affirmed. Upon defendant's petition, the Supreme Court granted *certiorari*.

★ Holding: The Court held that a prior state conviction for felony drug possession only qualifies as an "aggravated felony" under § 1101(a)(43)(B) if the prior offense could have been charged as a felony under the federal Controlled Substances Act (CSA). Because defendant's prior state offense would not have been a felony under the CSA, and because it did not involve drug trafficking, the Court ruled that the offense did not qualify as an aggravated felony. Accordingly, the Court reversed the immigration court's ruling. Editor's Note: The same term, "aggravated felony," is utilized in the federal criminal code at 8 USC § 1326(b)(2) (illegal reentry by a deported alien) and the corresponding guideline, USSG § 2L1.2(b)(1)(C). Thus, the Court's decision is arguably applicable in the criminal context as well as the deportation context.

## **SIXTH CIRCUIT DECISIONS**

### **I. Specific Offenses**

• *18 USC § 666 - Theft by Official*  
U.S. v. Hynes, 05-2036 (11/7/06)

▶ Defendant was charged with stealing narcotics from the Detroit Police Department property room while he was employed as a police officer. A charge under § 666 requires proof that the property stolen has a value of more than \$5,000. During the trial, the district court instructed the jury that it could consider the market value of the property stolen, even if it was illegal to sell. Defendant was convicted and argued on appeal that the district court should not have instructed the jury that it could consider the "thieves' market" value of the drugs.

★ Holding: Interpreting the term "value" consistently with the use of the term in other

federal theft statutes, the court held that "value" in § 666 could mean the value in the "thieves' market." Accordingly, the conviction was affirmed.

• *18 USC § 924(e) - ACCA*

U.S. v. Sanders, 05-4238 (12/15/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that he was an armed career criminal pursuant to § 924(e). Defendant challenged two of the underlying convictions for the ACCA determination, an aggravated robbery and a robbery conviction. The district court overruled defendant's objections and he appealed.

★ Holding: A prior conviction is a violent felony under the ACCA if it involves force, is one of several enumerated offenses, or otherwise involves "conduct that presents a serious potential risk of physical injury to another." First, the court held that a conviction under Ohio's aggravated robbery statute always constitutes conduct that presents a serious risk of injury. This was true even though the offense could be accomplished merely by committing a theft while carrying a firearm. Accordingly, defendant's Ohio aggravated robbery was a violent felony under the ACCA.

Second, the court held that the district court properly determined that defendant also had a robbery conviction on his record. The state court indictment and guilty plea in the prior case referenced robbery, but the journal entry mentioned burglary. The court ruled that the district court did not err in reaching the conclusion that the offense was, in fact, a robbery, and accordingly, a violent felony under the ACCA. Further, the court noted that the categorical approach mandated by the Supreme Court decisions in *Taylor* and *Shepard* does not apply to the initial factual question of determining the particular prior offense of which a defendant was convicted. This comment was arguably *dicta*, however,

because the court found that the district court did not actually rely on any documents prohibited by *Taylor/Shepard*. Finally, the court opined that, in applying the categorical approach, a district court should not rely on abstracts of a prior judgment that are signed by the clerk and not the court. Accordingly, the sentence was affirmed.

• *18 USC § 1001 - False Statements*  
U.S. v. Ahmed, 05-2319 (11/29/06)

► During defendant's tenure in the Air Force, he began to make statements that were decidedly pro-terrorist and anti-U.S. After the September 11 attacks, he made additional comments displaying satisfaction at the results. Accordingly, the Air Force terminated defendant's access to classified information and, shortly thereafter, agreed with defendant to an early honorable discharge. Defendant subsequently applied for a position with the Transportation Security Administration to screen bags at the Detroit airport. On defendant's security questionnaire, he reported that he never left a job under "unfavorable circumstances" and that he never had a clearance suspended or revoked. Defendant was subsequently prosecuted for two counts of false statements under § 1001. Defendant was convicted at trial and appealed.

★ Holding: Generally, a § 1001 false statement prosecution may not be premised on a statement "which on its face is not false." The court held, however, that defendant did not demonstrate that his statements were facially true. Specifically, the court found no merit to defendant's arguments that (1) an honorable discharge could not be considered "unfavorable circumstances" and that (2) an "administrative downgrade" in security clearance could not be considered a suspension or revocation. Thus, the conviction was affirmed.

• *18 USC § 1623 - False Declaration*  
U.S. v. Hynes, 05-2036 (11/7/06)

► Defendant was charged with making a false declaration before the grand jury. At trial, the government introduced evidence to show that defendant had falsely responded to a question regarding his knowledge about a check used to purchase a barber shop. Defendant was convicted and, on appeal, he argued that the evidence was insufficient to show that he knew the answer he gave was false, because the question was ambiguous.

★ Holding: A question that is truly ambiguous or misleading can never be the basis for a finding of perjury. In assessing whether a defendant understood a question, the court may consider the language of the question itself and the context in which it is made. The court held that the question itself to the defendant was not ambiguous and that the context in which it was made clearly indicated that it was a question about the source of the check. Accordingly, the conviction was affirmed.

• *18 USC § 2113 - Bank Robbery*  
U.S. v. Sandles, 02-2466 (11/27/06)

► At defendant's trial for bank robbery, the only competent evidence introduced to establish the bank's FDIC status was the testimony of a bank security investigator who had seen FDIC stickers at the teller windows. Defendant was convicted and filed an appeal challenging the sufficiency of the evidence regarding the FDIC insurance.

★ Holding: The court held that the testimony regarding the FDIC stickers was, in and of itself, insufficient to establish that the bank was federally insured. Because the court found that other evidence regarding the FDIC insurance was improperly admitted (*see infra*, III. Evidence, and VI. Confrontation Clause), the court held that the conviction had to be reversed. Relying on the Supreme Court's decision in *Lockhart v. Nelson*, the court found that the Double Jeopardy Clause did not

preclude remanding the case for retrial.

• *21 USC § 841 - Drug Trafficking*  
U.S. v. Garrido, 05-6304 (11/9/06)

► Defendant was stopped driving a tractor-trailer with drugs hidden in it. Also found in the truck were digital scales in a duffle bag in the cab, an airline ticket stub in defendant's name, and a newspaper article discussing Colombian drug trafficking with portions underlined. Further, at trial officers testified that defendant became irate and belligerent when the officers brought in a drug dog and began to search. Defendant ultimately was charged with possession of narcotics with the intent to distribute, was convicted, and argued on appeal that the evidence was insufficient to show his knowledge that the drugs were in the truck and that he intended to distribute them.

★ Holding: Although mere proximity to drugs is not sufficient, in and of itself, to establish possession with the intent to distribute, it may be inferred from the surrounding circumstances. In the case, the court held that the presence of the drugs in addition to the other items found in the cab of the truck, together with the testimony about defendant's demeanor, provided sufficient evidence to support the conviction.

• *21 USC § 841(b)(1)(B) - Drug Quantity*  
U.S. v. Jackson, 05-6338 (11/30/06)

► Defendant was charged with trafficking in crack cocaine in an amount in excess of five grams. Defendant challenged both at trial and at sentencing that the government failed to reliably establish that the weight of the crack was over five grams. During the trial, the government presented an expert who testified that she weighed six of the eighteen bags of crack that were found, and, using a "statistically accurate mathematical formula," she extrapolated the total weight of the crack to be 5.6 grams. The jury convicted defendant and at sentencing the district court used the 5.6

gram amount to determine defendant's sentencing guideline range. Defendant appealed and challenged the sufficiency of the evidence.

★ Holding: The court held that the drug weight testimony was sufficient to support the jury verdict where (1) a proper random testing method was employed, (2) the chemical testing method conformed with accepted methodology, (3) the tested and untested samples were sufficiently similar in size, and (4) all of the samples were contemporaneously seized at the search scene. Accordingly, the court affirmed the jury verdict and found that the sentencing determination was supported by sufficient indicia of reliability.

• *21 USC § 841/§ 851 - Enhancement*  
U.S. v. Watford, 05-6184 (11/14/06)

► Prior to defendant's trial for drug trafficking, the government filed a notice, pursuant to §§ 841 and 851, enhancing defendant's sentence from a mandatory 10 years to a mandatory 20 years based upon his prior conviction for a drug offense. On appeal, defendant argued that the enhancement provision constituted an unconstitutional separation of powers because it allowed the Executive Branch (U.S. Attorney) to perform a legislative function by defining the sentence that defendant would face for a crime.

★ Holding: Relying on prior precedent, the court held that the § 851 enhancement does not unconstitutionally vest legislative power in the U.S. Attorney.

• *21 USC § 844 - Conspiracy*  
U.S. v. Caver, 05-3295 (12/4/06)

► Defendants were charged in a narcotics conspiracy. At trial, the government presented numerous witnesses to show that defendants were involved in a "chain" conspiracy where they would sell large quantities of drugs to individuals who would then resell the drugs to others. Defendants were convicted and

appealed.

★ Holding: In order to establish a § 844 conspiracy, the government must prove (1) an agreement to violate the drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy. The agreement need not be express, but may be a tacit or mutual understanding. Once the existence of the conspiracy is established, the evidence linking an individual defendant to the conspiracy need only be slight. A mere buyer-seller arrangement is insufficient to establish a conspiracy. In the case, the court held that adequate evidence had been introduced to show a chain conspiracy whereby defendants would sell large quantities of drugs on repeated occasions with the understanding that the drugs were being redistributed in the community. Further, sufficient evidence was presented to show each defendant's participation in the conspiracy. Thus, the conviction was affirmed.

## II. Sentencing Guidelines

### • 2B1.1 - Loss Amount

U.S. v. Triana, 05-3173 (11/2/06)

▶ Defendant was a doctor who was convicted of medicare fraud. As a result, his conditions of supervised release required that he not participate in a company that received medicare reimbursements and that he report to his probation officer any interest that he obtained in a company that received such reimbursements. Defendant subsequently secretly ran two businesses that submitted substantial claims to medicare and defendant siphoned the money out of the businesses through sophisticated means. Consequently, defendant was charged and convicted for conspiring to defraud medicare and making false statements to the federal probation department. Defendant claimed at sentencing that no loss resulted from the case because all of the money paid by medicare was paid based upon legitimate treatment to qualifying medicare patients. The district court disagreed

and sentenced defendant based upon the entire amount that defendant's companies received from medicare. Defendant appealed.

★ Holding: The court held that it was irrelevant for loss calculation purposes that legitimate services were provided to qualifying medicare patients. The recipients of the medicare funds were defendant's companies, and defendant was specifically prohibited by court order from receiving medicare funds. Thus, defendant's companies were ineligible for the receipt of any medicare funds, regardless of the services they provided to patients. Accordingly, the district court loss calculation was affirmed.

### • 2K2.1(a)(4) - Prior Crime of Violence

U.S. v. Armstead, 05-6480 (11/6/06)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court enhanced his sentence under USSG § 2K2.1(a)(4) because it found that defendant's Tennessee conviction for attempted child abuse was a crime of violence. In the prior Tennessee case, defendant was indicted for aggravated child abuse, but pled guilty to attempted child abuse. Defendant appealed.

★ Holding: Applying the *Taylor/Shepard* categorical approach established by the Supreme Court, the court held that the record was insufficient to prove that defendant's attempted child abuse conviction was violent. Specifically, the court found error with the district court's sole reliance on the Tennessee indictment to conclude that the offense was violent, because defendant was not convicted of the offense charged in the indictment. Accordingly, the court remanded the case to the district court with instructions to permit the government to supplement the record with any materials that were cognizable under *Taylor/Shepard* in order for the district court to ascertain whether the offense was, in fact, a crime of violence.

• *2L1.2-Illegal Reentry-Aggravated Felony*  
U.S. v. Portela, 05-6354 (11/21/06)

► Defendant was convicted of illegal reentry by a deported alien and a drug trafficking offense and at sentencing the district court concluded that he qualified for a 16 level enhancement under USSG § 2L1.2. The basis for the enhancement was a prior Tennessee conviction for vehicular assault that the district court concluded was a crime of violence under § 2L1.2. Defendant appealed.

★ Holding: Pursuant to § 2L1.2, a prior offense qualifies as a crime of violence if it is one of several specifically enumerated offenses, or it is an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” In *Leocal v. Ashcroft*, the Supreme Court held that the term “use” in § 2L1.2 implied a more culpable mental state than mere negligence or accident, and thus held that a Florida DUI was not a crime of violence. Relying on the rationale of *Leocal*, the court held that the Tennessee crime of vehicular assault was likewise not a crime of violence under § 2L1.2 because it required only “recklessness” as the *mens rea*. Accordingly, the case was remanded for resentencing.

• *2X1.1 - Attempt*  
U.S. v. Gale, 05-4204 (11/20/06)

► Defendant fraudulently obtained a loan to purchase two classic cars by misrepresenting the value of the cars and that he had another person participating in the financing. The bank discovered the fraud after the loan money was dispersed, but before defendant received the cars. The bank obtained the cars and sold them to repay a portion of the money loaned. Defendant was convicted of wire fraud and at sentencing he argued that he should receive a three-level reduction from his offense level under the attempt guideline, USSG § 2X1.1. Defendant claimed that his conduct qualified as an attempt because he never actually received

the cars. The district court rejected defendant’s argument and he appealed.

★ Holding: Under the attempt guideline at § 2X1.1, a defendant may receive a three-level reduction for an attempt unless the defendant completed all the acts necessary for the successful completion of the substantive offense. The court held that, under the wire fraud statute (18 USC § 1343), success of the scheme is not an element of the crime. Thus, because defendant completed all elements of the crime as set out in the indictment, he did not qualify for the three-level reduction pursuant to § 2X1.1. The sentence was accordingly affirmed.

• *3A1.2 - Official Victim - Double Counting*  
U.S. v. Cousins, 05-3228 (11/30/06)

► Defendant was convicted of threatening the President of the U.S. and his family. At sentencing, the district court applied USSG § 2A6.1, which is the guideline for making threatening or harassing communications. Additionally, the district court applied a 3 level enhancement, pursuant to USSG § 3A1.1, because the President was an official victim. Defendant appealed and argued that application of § 3A1.1 constituted impermissible double counting.

★ Holding: The court held that no double counting occurs where a court applies the official victim enhancement, and the guideline applicable to the offense – as opposed to the statute establishing criminal liability – does not take the victim’s status into account. Thus, the court ruled that, even though the criminal charge was threatening the President, because § 2A6.1 does not take the victim’s status into account, the district court did not err in also applying the official victim enhancement of § 3A1.1.

• *4A1.2 - Relatedness of Convictions*  
U.S. v. Gale, 05-4204 (11/20/06)

► Defendant was convicted of wire fraud and

at sentencing the district court increased defendant's criminal history score based upon four state criminal offenses. On appeal, defendant argued that the prior state offenses should not have counted separately because they were "related" under USSG § 4A1.2(a)(2).

★ Holding: Prior offenses may not be considered related for purposes of § 4A1.2(a)(2) if they were separated by an intervening arrest. Because each of defendant's prior offenses were separated by an intervening arrest, the court held that they were not related, and the sentence was affirmed.

• *4A1.2 - Relatedness of Convictions*

U.S. v. Carson, 05-4015 (11/27/06)

► Defendant was convicted of possession of heroin with intent to distribute and at sentencing the district court concluded that he was a career offender. This conclusion was based upon the determination that defendant had two prior state convictions for drug trafficking. In relation to the prior offenses, defendant had committed a drug trafficking offense and was under investigation for it when he committed, and was arrested for, a second drug trafficking offense. Defendant was charged in state court under two separate docket numbers for the offenses, but the cases were heard together by the same judge on the same day and defendant received consecutive sentences for the two offenses. Defendant argued before the district court that the offenses should be considered "related" under USSG § 4A1.2, and accordingly should not count separately for career offender purposes. The district court ruled against defendant, and he appealed.

★ Holding: Pursuant to § 4A1.2, prior convictions are "related" if, among other reasons, they were consolidated for trial or sentencing. Even where no formal order of consolidation has been entered, the court may consider convictions to be "functionally consolidated" where they are factually related

and the trial court provided some "explicit indication" that it intended to consolidate the cases. In the case, the court found that defendant's two prior drug trafficking convictions were not factually related because (1) defendant showed nothing more than that he was a drug user who sometimes sold drugs to support his habit and (2) the conduct underlying the first drug transaction occurred one year before the second drug transaction. Further, the court held that there was no evidence that the state court intended to consolidate the cases. Thus, the district court ruling was affirmed.

• *5C1.2/18 USC § 3553(f) - Safety Valve*

U.S. v. Haynes, 05-5889 (11/6/06)

► Defendant was convicted of aiding and abetting a drug conspiracy and at sentencing the district court refused to apply the safety valve provision of USSG § 5C1.2 and 18 USC § 3553(f). Defendant appealed.

★ Holding: The court held that defendant met the first four requirements of the safety valve, but that she failed to satisfy the fifth prerequisite which required that she fully disclose to the government all information that she had regarding the offense, and all relevant conduct. The court noted that the defendant has the burden of proving that she is entitled to the safety valve by a preponderance of the evidence. The court found no clear error in the district court's conclusion that defendant did not disclose all information she knew about the drug conspiracy. Thus, the conviction was affirmed.

### **III. Evidence**

• *602 - Personal Knowledge*

U.S. v. Sandles, 02-2466 (11/27/06)

► During defendant's trial on a bank robbery charge, the bank security investigator testified that the bank was FDIC insured based upon the following: (1) she knew that the bank had been FDIC insured for 23 years, (2) she had seen

FDIC stickers at the bank, and (3) she was not certain as to the meaning of the FDIC certificate that was dated 1987 (13 years before the robbery). Defendant objected that the witness lacked personal knowledge under FRE 602 to attest to the bank's FDIC status. Upon defendant's conviction, he appealed.

★ Holding: The court concluded that the government failed to establish that the witness' testimony that the bank was FDIC insured at the time of the robbery was based upon the witness' personal knowledge under FRE 602. First, generally working at the bank for 23 years and believing that it was FDIC insured was insufficient to establish personal knowledge. Second, seeing the FDIC stickers, in and of itself, was insufficient to establish that the bank was actually FDIC insured. Third, the witness' admission that she was unsure of the meaning of the FDIC certificate confirmed that she did not have the requisite personal knowledge. Accordingly, the court ruled that the district court erred in permitting the witness to testify about the bank's FDIC insurance.

• *701 - Lay Opinion Testimony*  
U.S. v. Ahmed, 05-2319 (12/29/06)

► Defendant was charged with making false statements on his application for employment with the Transportation Security Administration (TSA). During trial, an assistant security director testified that she reviewed defendant's application and determined that the statements were false, and that such determination influenced the TSA's employment suitability determination. Defendant was convicted and argued on appeal that the witness' testimony was not proper lay opinion testimony under FRE 701.

★ Holding: Under FRE 701(a), lay opinion testimony is permissible where it is (1) rationally based on the witness' perception, (2) helpful to an understanding of a fact in issue, and (3) not properly the subject of expert

testimony. The court found the testimony proper because (1) the witness was involved in the review of the application, (2) materiality of the statements was at issue in the case and the witness' testimony showed why the statements were important to the TSA, and (3) the testimony was not in the realm of expert testimony. The court acknowledged that the use of lay witness testimony to provide a legal conclusion is disfavored in the Sixth Circuit. Nonetheless, even though falsity is an element of a false statement prosecution and the witness characterized defendant's statements as "false," the court held that the witness' testimony was nothing more than a "non-technical expression of her informed opinion" and was not improper. Further, the court noted that no limiting instruction was requested by the defense. Accordingly, the admission of the testimony was affirmed.

• *FRE702/Fed.R.Crim.P 16-Expert Testimony*  
U.S. v. Ganier, 05-6350 (11/15/06)

► On the first day of defendant's trial for obstruction of justice charges, the government notified defendant and the court of its intent to present expert testimony regarding a forensic search of defendant's computer. Defendant moved to exclude the testimony because it was expert testimony under FRE 702 and it was not provided in advance of trial pursuant to Fed. R. Crim. P. 16. The district court excluded the evidence and the government filed an interlocutory appeal.

★ Holding: First, the court held that the proposed testimony was, in fact, expert testimony under FRE 702. The testimony would have identified the results of a forensic examination of defendant's computer that revealed different searches defendant had conducted on his computer for terms that were related to the government's subpoenas. The court found that this forensic examination required knowledge "well beyond that of the average layperson," and thus was expert

testimony. Second, the court concluded that the government had violated Fed. R. Crim. P. 16 by failing to provide an advance written summary of the testimony to the defense. Third, the court ruled that exclusion of the evidence was not the appropriate remedy. In assessing whether exclusion is appropriate, the court must consider (1) the reasons for the government's delay and whether it was intentional or in bad faith, (2) any prejudice to the defendant, and (3) whether the prejudice can be cured with a less severe sanction. In the case, the court ruled that the district court had not considered whether less severe sanctions would be appropriate, and thus, the court remanded the issue for reconsideration.

- *801 - Hearsay - Background Information*  
U.S. v. Caver, 05-3295 (12/4/06)

- ▶ Defendant was charged with a drug conspiracy and at trial an officer testified that he had been debriefed by another officer that defendant was responsible for dealing a lot of drugs in the area. Defendant objected that the testimony was hearsay and the district court overruled the objection. Upon defendant's conviction, he appealed.

- ★ Holding: Background information does not qualify as hearsay if it is admitted "to show the effect of hearing that information upon the testifying witness, who subsequently, as a result of the background information, acquires the knowledge that provides the foundation for the witness's testimony." In the case, the court held that the hearsay information was not properly background information because the testifying officer did not actually rely on the information in making his arrest of defendant. At the time the officer arrested defendant, he was not aware that the person he was arresting was the same person that he was told was a drug dealer. Thus, the court found that the testimony was inadmissible hearsay. The court nonetheless found the error harmless because the evidence of defendant's drug dealing was

otherwise overwhelming.

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

- *Traffic Stops - Probable Cause*  
U.S. v. Garrido, 05-6304 (11/9/06)

- ▶ Defendant was driving a tractor-trailer when he was stopped by Kentucky Department of Vehicle Enforcement officers. Although the officers later gave different reasons for stopping defendant, the officers ultimately testified that they stopped the vehicle because it was following too closely, in violation of Kentucky law. Officers subsequently found narcotics and defendant was charged with drug trafficking. Defendant moved to suppress the narcotics based upon an unlawful stop and the district court denied the motion. Defendant appealed.

- ★ Holding: Regardless of an officer's subjective motivation, a vehicle may be stopped if the officer establishes probable cause to believe that the driver has committed a traffic violation. In the case, the court held that, although the officers had given conflicting statements about the reason for the stop, the district court had found credible their testimony that defendant violated Kentucky traffic law. Thus, whatever the officers subjectively intended was irrelevant, and the court found no clear error in the district court's ruling that defendant violated traffic law. Thus, the district court ruling was affirmed.

- *Vehicle Stops - Regulated Industries*  
U.S. v. Garrido, 05-6304 (11/9/06)

- ▶ Officers from the Kentucky Department of Vehicle Enforcement (KVE) stopped defendant's tractor-trailer based upon a traffic violation, and conducted an hour long "safety inspection" of the vehicle. As a result, officers recovered a large amount of narcotics and defendant was charged with drug trafficking. Defendant moved to suppress the narcotics based upon an illegal search and the district court denied the motion. Defendant appealed.

★ Holding: The court has recognized the right of police officers to search vehicles in the absence of a warrant where they are doing so in the context of a “closely or pervasively regulated industry.” In past decisions, the court has upheld the inspection of commercial trucks based upon a “reasonable belief” that a safety violation was occurring. In the case, the Kentucky law authorizing the KVE officers to conduct “safety inspections” allowed such searches at “any time or place,” and imposed no “reasonable belief” requirement. The court nonetheless found that the search did not violate the Fourth Amendment because the KVE officers decision to search defendant’s truck was supported by a “reasonable belief” that a safety violation was occurring. Specifically, the court found potential safety issues with the “fifth wheel” area of the truck and the name decal on the side of the truck. Accordingly, the district court ruling was affirmed.

• *Reasonable Suspicion*

U.S. v. Garrido, 05-6304 (11/9/06)

► Defendant’s tractor-trailer was stopped and a “safety inspection” conducted. At the conclusion of the safety inspection, defendant was briefly detained for questioning by officers. The further detention was based upon the facts that (1) defendant’s log book showed substantial down time, (2) defendant’s lease with the trucking company was largely blank, (3) defendant was “hazy” about where he was going, and (4) the trucking company defendant claimed to be working with told the officers that the company did not know defendant. After the additional period of detention, the officers obtained defendant’s consent to search the truck and utilized a drug detection dog that alerted on the truck. In a subsequent search, officers located narcotics, and defendant was charged with drug trafficking. The district court denied defendant’s motion to suppress the drug evidence, and defendant argued on

appeal that reasonable suspicion did not support the continued detention after the completion of the safety inspection.

★ Holding: The court ruled that reasonable suspicion supported the brief detention after the conclusion of the safety inspection. The court noted that the stop would have become unlawful if the officers’ questions had unduly extended the duration of the stop or if defendant had not voluntarily consented to the search just minutes later. But under the totality of the circumstances, the court found the length of detention reasonable and affirmed the district court ruling.

• *Search Warrant - Probable Cause*

U.S. v. McPhearson, 05-5534 (11/27/06)

► Officers went to defendant’s home to arrest him on a warrant for minor assault. Upon arrival, defendant answered the door and the officers arrested him. After placing defendant in the patrol car, the officers discovered 6.5 grams of crack in his pocket. When defendant refused consent to search the house, the officers prepared a search warrant. In the affidavit accompanying the warrant, the officers indicated only that they had arrested defendant on a minor assault warrant, that defendant had crack in his pocket, and that the residence was defendant’s. The warrant was issued by a state court judge, and upon its execution, officers discovered “distribution” amounts of drugs and a firearm. Upon being charged in federal court, defendant moved to suppress the evidence and the district court granted the motion. The government appealed.

★ Holding: The court held that the warrant was not supported by probable cause because it did not establish a sufficient nexus between the place to be searched and the items sought to be seized. The court emphasized that a suspect’s mere presence at a residence is an insufficient connection to the residence to support probable cause for a search. Some other evidence was necessary in order to provide the necessary

nexus, such as evidence of known drug trafficking activities by defendant. Because no such other evidence was provided in the affidavit, the court affirmed the district court ruling.

- *Search Warrant - Probable Cause*

U.S. v. Jackson, 05-6338 (11/30/06)

- ▶ The government obtained a warrant to search defendant's residence. The warrant was based upon an affidavit that detailed a monitored purchase of drugs from defendant at the residence by a confidential informant. The affidavit said nothing about the informant's reliability. Upon being charged with drug and firearm offenses, defendant moved to suppress the evidence seized from his residence. The district court denied the motion and defendant appealed.

- ★ Holding: Where a search warrant affidavit contains little or no indication about an informant's reliability, it must provide "substantial independent police corroboration" in order to establish probable cause. In the case, the court found that the detailed explanation about the monitored purchase of drugs from defendant at the residence three days before the warrant issued provided sufficient corroboration to justify probable cause to support the warrant. Accordingly, the district court's ruling was affirmed.

- *Search Warrant - Good Faith*

U.S. v. McPhearson, 05-5534 (11/27/06)

- ▶ Officers obtained a warrant to search defendant's residence based solely on the fact that defendant was arrested at the residence on a minor assault warrant, defendant had 6.5 grams of crack in his pocket when arrested, and defendant lived at the residence. Upon searching the residence, the officers found drugs and a firearm, and defendant was charged accordingly. The district court held that the warrant was not supported by probable cause, and that the execution of the warrant was not

saved by the good faith exception. The government appealed.

- ★ Holding: An otherwise invalid warrant may be saved based upon its good faith execution by police officers unless (1) the warrant affidavit is knowingly or recklessly false, (2) the issuing magistrate wholly abandoned her judicial role, (3) the affidavit is "bare bones," or completely lacking in probable cause, or (4) the warrant is obviously facially deficient. In the case, the court found that the warrant was based upon a "bare bones" affidavit and thus was not saved by the good faith rule. The court emphasized that there was simply no evidence in the affidavit to raise the inference that drug evidence would be found in the home. The court ruled that the information in the affidavit connecting the crime to the residence was "so vague as to be conclusory or meaningless." Accordingly, the district court's ruling was affirmed.

## V. Fifth Amendment

- *Due Process - Judicial Bias*

U.S. v. Hynes, 05-2036 (11/7/06)

- ▶ Defendant went to trial on a drug conspiracy case and, several times during the course of the trial, the district court interrupted defense counsel to ask him to clarify questions, and instructed him to avoid an argumentative tone, to move on to another topic, and to seek a stipulation of undisputed facts. Defendant was convicted and argued on appeal that the district court's conduct violated his due process right to a fair trial.

- ★ Holding: Three factors are important to consideration of whether a district judge oversteps her bounds during the course of a trial: (1) the nature of the issues at trial; (2) the conduct of counsel; and (3) the conduct of witnesses. The court found that the district court's actions did not render the trial unfair because the trial was lengthy and at times required clarification of issues, the court did not show favoritism to either side, it generally

permitted the defense to pursue its cross examination strategies, and it gave a proper instruction that nothing it said should give the jury the impression as to how the case should be decided. Thus, the conviction was affirmed.

- *Due Process - Judicial Bias*

Lyell v. Renico, 04-1106 (12/1/06)

- ▶ Defendant was charged in state court with assault with intent to commit murder. During the course of the trial, the judge repeatedly interrupted defense counsel *sua sponte* in a way that seriously undermined his case, only interrupted the prosecutor to assist his case, stated or implied disapproval of defendant's case, outwardly expressed disapproval of defense counsel, and inexplicably held defense counsel in contempt in front of the jury. Defendant was convicted and lost his appeals in state court. Defendant filed a federal *habeas* petition which the district court denied, and defendant appealed.

- ★ Holding: Judicial misconduct may only be characterized as bias or prejudice requiring reversal if it is "so extreme as to display clear inability to render a fair judgment." In the case, the court held that the trial judge's actions, taken in the context of the entire trial, rendered a fair trial for defendant entirely impossible. Accordingly, the court reversed the district court's ruling and vacated defendant's conviction.

- *Due Process - Brady*

Joseph v. Coyle, 05-3111 (11/9/06)

- ▶ Defendant was charged with murder and during the course of the jury trial the state disclosed evidence that would serve to impeach a key witness that the state had already presented. The trial court gave the defense several days to review the belatedly disclosed documents, to depose the witness, and to recall the witness to the stand. Defendant chose to not recall the witness, and he was convicted. After losing his state court

appeals, defendant filed a federal *habeas* petition claiming that the state had violated *Brady*. The district court denied the petition on this issue and defendant appealed.

- ★ Holding: In analyzing an alleged *Brady* violation, the court considers whether (1) the evidence was favorable to the accused, (2) the evidence was suppressed by the prosecutor, and (3) the defendant can prove prejudice as a result. The court found that the impeachment evidence in question was favorable to defendant and that it was suppressed by the state. The court held, however, that defendant was not prejudiced by the belated disclosure because the trial court afforded defendant an adequate opportunity to investigate and present the evidence. Thus, the conviction was affirmed.

- *Due Process - Prosecutorial Misconduct*

Joseph v. Coyle, 05-3111 (11/9/06)

- ▶ During defendant's state trial for kidnaping and murder, the prosecutor made the following comments in closing argument: (1) the evidence was uncontroverted regarding the kidnaping; (2) that there was no evidence that defendant did not commit the crime; and (3) repeatedly used the phrases "I think" and "I believe." Defendant was convicted and argued on appeal that the prosecutor's improper comments violated his due process right to a fair trial. Defendant lost his state court appeals and filed a federal *habeas* petition, which the district court denied. Defendant appealed.

- ★ Holding: In determining whether prosecutorial misconduct requires reversal of a conviction, the court considers whether the comments were improper, and if so, whether they were so flagrant as to render the trial fundamentally unfair. First, the court held that the prosecutor's statement that the evidence was uncontroverted was not an improper comment on defendant's failure to testify. Second, the court ruled that the prosecutor's statement about the lack of evidence that

defendant didn't commit the crime might have been improper as it impinged on the burden of proof. The court found, however, that the trial was not rendered unfair because the trial judge sustained an objection to the statement, instructed the jury to disregard it, and properly instructed the jury on the burden of proof. Third, the court held that the prosecutor's statements that were prefaced with "I think" and "I believe" were more of a nervous habit than an attempt to express personal opinion. Further, the trial court repeatedly chastised the prosecutor for the comments and instructed the jury to disregard them. Thus, the district court ruling was affirmed.

• *Due Process - Selective Prosecution*  
U.S. v. Thorpe, 05-2220 (12/27/06)

► Defendant was charged with being a felon in possession of a firearm and moved to dismiss the indictment by claiming that he was selectively prosecuted because he was black. Defendant presented evidence to show that the federal gun initiative under which he was prosecuted targeted counties with a varied percentage of black populations, but that 88% of the defendants represented by the local Federal Public Defender Office in the E.D. of Michigan for firearm charges were black. The district court ordered the government to produce discovery pertaining to the parameters and statistics involved with the federal gun initiative. The government complied only partly with the district court's discovery order and, as a result, the district court dismissed the indictment. The government appealed.

★ Holding: To obtain an order for discovery regarding a selective prosecution claim, a defendant must present a credible showing of "discriminatory effect" and "discriminatory intent." First, the court found that defendant had failed to present any evidence to show discriminatory effect because defendant had not demonstrated how similarly situated non-black defendants were not prosecuted by the

government. The court noted that defendant could easily have tried to make this showing by reference to state court records. Second, the court found absolutely no evidence of discriminatory intent. Accordingly, the district court's dismissal of the indictment and its discovery order were reversed and the case remanded.

• *Right to Grand Jury Indictment*  
Short v. U.S., 05-6520 (12/28/06)

► Defendant was charged with conspiracy to distribute 500 grams of cocaine. As part of the plea negotiations, defendant and his counsel agreed that defendant would actually plead guilty to 5000 grams of cocaine, an amount that triggered a 10 year mandatory minimum. At the plea hearing, defendant and his counsel consented to the amendment of the indictment, agreed to the factual predicate establishing that the amount exceeded 5000 grams, and were advised by the district court of the increased penalty. The district court did not advise defendant of his right to be re-indicted by the grand jury. At sentencing, the district court imposed the mandatory 10 year minimum sentence. The sentencing guidelines for the offense would have provided a sentence lower than the mandatory 10 year minimum. Because defendant waived in the plea agreement the right to challenge any aspect of his case other than the effectiveness of his counsel, defendant did not appeal, but instead filed a *habeas* petition claiming that his attorney was ineffective. The district court denied the petition and defendant appealed.

★ Holding: The court held that the question of the attorney's effectiveness essentially turned on whether a defendant can waive his right to require re-indictment by the grand jury and, if so, whether the plea hearing effectively waived that right. First, the court held that, at least in the context of a plea hearing to an amended indictment, a defendant may waive his right to grand jury re-indictment. Second,

the court held that defendant's plea hearing effectively waived his right to re-indictment. The court noted that the district court discussed the amendment to the indictment in open court with defendant and his counsel and neither objected, that the district court advised defendant of the enhanced penalty under the amended indictment, and that defendant admitted to the factual predicate supporting the amendment. Under these circumstances, the court found the waiver sufficient, even though the district court did not specifically advise defendant of his right to re-indictment by the grand jury. Thus, the court held that defendant's counsel was not ineffective and affirmed the conviction and sentence.

## VI. Sixth Amendment

• *Fair Notice - Variance from Indictment*  
U.S. v. Hynes, 05-2036 (11/7/06)

▸ Defendant went to trial on charges of conspiracy to launder money and making a false declaration before a grand jury. During the trial, the government introduced evidence of an overt act regarding the purchase of a piece of real estate that was not listed in the conspiracy count, but the purchase occurred within the time period of the conspiracy. Further, the government stated during closing argument that defendant had made a second false statement before the grand jury (in addition to the one for which he was charged in the indictment.) Defendant was convicted and argued on appeal that the government had constructively amended the indictment by introducing evidence regarding the purchase of the property and the additional false statement.

★ Holding: A variance occurs when evidence offered at trial proves facts materially different from those alleged in an indictment. A variance is fatal only when a defendant shows that her substantial rights were affected. A constructive amendment of an indictment occurs when a combination of both the evidence offered at trial and the instructions

provided to the jury so modify essential elements of the offense charged that there is a substantial likelihood that the defendant was convicted of a different offense. A constructive amendment of the indictment is *per se* prejudicial to the defendant. In the case, the court held that neither the evidence regarding the real estate nor the evidence about the additional false statement constituted a constructive amendment of the indictment. Further, the court found that defendant's substantial rights had not been affected by any variance in the indictment and the proof. Thus, the conviction was affirmed.

• *Fair Notice - Variance from Indictment*  
U.S. v. Caver, 05-3295 (12/4/06)

▸ Defendants were charged with conspiracy to distribute narcotics and at trial the government introduced evidence of a complex "chain" conspiracy. Defendants were convicted and argued on appeal that a fatal variance occurred between the indictment and the evidence at trial because the evidence showed multiple conspiracies.

★ Holding: In the context of a drug conspiracy, a variance from an indictment requires reversal when (1) an indictment alleges one conspiracy, but the evidence at trial can reasonably be construed only as supporting a finding of multiple conspiracies, and (2) defendant demonstrates prejudice. In the case, the court held that the evidence presented at trial did not exclude the possibility of a single "chain" conspiracy in which defendants were involved. Further, defendants were unable to show prejudice, even if the evidence proved multiple conspiracies. Thus, the conviction was affirmed.

• *Confrontation Clause - Recall of Witness*  
Stewart v. Wolfenbarger, 04-2419 (11/9/06)

▸ Defendant went to trial on state murder charges and during the presentation of his case in chief, he requested to recall one of the state's

witnesses in order to conduct further impeachment. The trial court denied the request. After losing his state court appeal, defendant filed a federal *habeas* petition claiming that his right to confrontation had been violated. The district court denied the petition on this point and defendant appealed.

★ Holding: The Confrontation Clause provides a defendant with the right to confront witnesses. The right may not apply, however, where a defendant's ability to cross examine is only partially limited and where the barred questioning would have only elicited facts that were already in evidence. In the case, the court found that defendant had been allowed to cross examine the witness and that the recall of this witness would only have served to rehash evidence that was already in the record. Thus, the court found that the state court had not unreasonably applied federal law and the district court ruling was affirmed.

• *Confrontation Clause*

U.S. v. Sandles, 02-2466 (11/27/06)

► During defendant's bank robbery trial, the government introduced an exhibit containing, among other documents, an affidavit from a bank employee that stated that she researched the bank records and concluded that the bank's FDIC certificate was in effect at the time of the bank robbery. Defendant was representing himself *pro se* and failed to object to the affidavit. No other competent evidence was presented during the trial to establish the bank's FDIC status. Defendant was convicted and appealed.

★ Holding: The court held that the Confrontation Clause does not permit conviction by affidavit. Under *Crawford*, the affidavit was a testimonial statement which could not be admitted without affording defendant the opportunity to cross examine the affiant. Accordingly, the court found plain error in the admission of the affidavit, reversed defendant's conviction, and remanded the case

for retrial.

• *Speedy Trial*

U.S. v. Watford, 05-6184 (11/14/06)

► Defendant was indicted on drug trafficking and weapons violations and, as a result of separate murder charges in another jurisdiction and numerous superceding indictments filed by the government, defendant was not arraigned until 69 months later. Defendant moved to dismiss the indictment based upon a violation of his Sixth Amendment speedy trial rights. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: Typically, the filing of an indictment triggers a defendant's right to a speedy trial under the Sixth Amendment. In analyzing whether a speedy trial violation requires dismissal of an indictment, courts must consider (1) whether the delay was uncommonly long, (2) the reason for the delay, (3) whether defendant asserted his speedy trial right, and (4) any prejudice suffered by defendant. Although the court found that a delay of 69 months was uncommonly long, the court held that the other three factors weighed against defendant because defendant was involved in an Illinois murder case for most of the time period. Accordingly, the conviction was affirmed.

• *Right to Self-Representation*

James v. Brigano, 05-4003 (11/30/06)

► Defendant was charged in state court with narcotic and firearm offenses and on the day of trial his attorney told the trial judge that he had not prepared for trial, and requested a continuance. The attorney was defendant's third different counsel on the case, and the court ordered that the trial would proceed. After making several outbursts during the jury selection process, defendant requested to either fire his attorney or represent himself. The trial court permitted defendant to represent himself and he was convicted. After losing his appeals

in the state court, defendant filed a federal *habeas* action claiming that his waiver of counsel, and request to represent himself, was not made knowingly and voluntarily. The district court agreed and granted the petition. The state appealed.

★ Holding: The court held that defendant's waiver of counsel was not knowing and voluntary. The court emphasized that the trial court failed to explain to defendant the risks and dangers of proceeding *pro se* and made no explicit findings that defendant's waiver was knowing or intelligent. The court specifically found error in the trial court's conclusion that defendant was simply trying to unreasonably delay the trial and engage in dilatory tactics. The court held instead that defendant was merely taking steps to deal with an attorney who was unprepared for trial. Thus, the district court ruling was affirmed and defendant's conviction reversed.

## VII. Other Constitutional Rulings

• *Eighth Amendment-Excessive Fines Clause*  
U.S. v. Ely, 06-5464 (11/16/06)

▶ Defendant was convicted of bulk cash smuggling in violation of 31 USC § 5316 for bringing \$24,000 into the United States and failing to report it to Customs. Pursuant to 31 USC § 5332, the government sought to forfeit the entire amount of money. Defendant raised no constitutional objection to the forfeiture in the district court and the court ordered the money forfeited. Defendant then argued on appeal that forfeiture of the entire amount violated the Excessive Fines Clause of the Eighth Amendment.

★ Holding: Where a defendant properly preserves an excessive fine argument in the district court, she is entitled to an assessment as to whether the fine is grossly disproportionate to the gravity of the offense considering the following factors: (1) the nature of the offense; (2) the connection to other illegal activities; (3) the source and likely use of the funds; (4)

whether the conduct fit into the class the statute was designed to cover, i.e., money laundering, tax evasion, terrorism, or drug trafficking; and (5) the potential fine under the statute and guidelines. Although the court speculated that defendant's argument may have benefitted from an analysis of the factors in the district court, the court found no plain error in the district court forfeiture order. Thus, the sentence was affirmed.

## VIII. Defenses

• *Entrapment by Estoppel*

U.S. v. Triana, 05-3173 (11/2/06)

▶ Defendant was a doctor who was convicted of medicare fraud. As a result, his conditions of supervised release required that he not participate in a company that received medicare reimbursements and that he report to his probation officer any interest he obtained in a company that received such reimbursements. Defendant subsequently secretly ran two businesses that submitted substantial claims to medicare and he siphoned the money out of the businesses through sophisticated means. Defendant was then charged with conspiring to defraud medicare and making false statements to the federal probation department. At trial, defendant pursued the defense of entrapment by estoppel, claiming that he disclosed the nature of his businesses to the probation department and that the activities were approved. The district court refused to instruct the jury on the defense of entrapment by estoppel, defendant was convicted, and he appealed.

★ Holding: In order to prove an entrapment by estoppel defense, the defendant must show that (1) a government agent announced that the conduct was legal, (2) the defendant relied on the agent's announcement, (3) the reliance was reasonable, and (4) given the reliance, prosecution would be unfair. The court found that defendant could not meet the first element of the test because (a) defendant was repeatedly

advised as to what conduct was illegal for him and he knowingly engaged in illegal conduct, and (b) defendant withheld substantial information from his probation officers and misstated critical facts about the nature of his employment in an effort to conceal the true nature of what he was doing. Accordingly, the court affirmed the district court's refusal to provide the jury instruction.

- *Statute of Limitations*

U.S. v. Watford, 05-6184 (11/14/06)

- Defendant was indicted for possession of crack cocaine, in an unspecified amount, with the intent to distribute. After the statute of limitations expired, the government obtained several superceding indictments in response to *Apprendi* and *Blakely* that increased the quantity of the crack and the penalty provision under Title 21. Defendant moved for dismissal of the charge based upon the statute of limitations and the district court denied the motion. Defendant appealed.

- ★ Holding: For statute of limitation purposes, a superceding indictment relates back to the time of the filing of the original indictment unless the superceding indictment "broadens" the charge in the original indictment. The critical inquiry is whether the original indictment provided notice of the charges such that the defendant can prepare his defense. In the case, the court held that, because the original indictment indicated that defendant faced a mandatory minimum sentence of 10 years, he was on notice from the beginning that the government intended to prove that he possessed more than 50 grams of crack cocaine. Thus, the court found no broadening of the indictment when the government later superceded to add the actual drug amounts. Therefore, the court affirmed the district court ruling.

- *Fed. R. Crim. P. 14(a) - Severance*  
U.S. v. Caver, 05-3295 (12/04/06)

- Defendant was charged in a drug conspiracy and moved to sever his case from that of the codefendants. Defendant claimed that he would suffer prejudice as a result of being joined with the codefendants because they were involved in larger amounts of drugs than defendant, and they had threatened government witnesses. The district court denied the motion, defendant was convicted, and he appealed.

- ★ Holding: Where defendants are indicted together and the charges will be proved by the same evidence and result from the same acts, a strong presumption favors a joint trial. A defendant may overcome the presumption only if there is a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable trial determination. In the case, the court found that the codefendants were involved in only a slightly larger amount of narcotics than defendant and the evidence was sufficiently clear that defendant had no involvement with the violent threats. Thus, the court held that defendant suffered no substantial prejudice as a result of the joint trial and affirmed the conviction.

- *Mistrial - Improper Witness Comments*  
U.S. v. Caver, 05-3295 (12/4/06)

- Defendant was charged with a drug conspiracy and during the trial several witnesses blurted out improper comments about defendant being in jail with them, defendant pouring gasoline on his girlfriend's home, and being afraid that defendant would murder them. Defendant requested a mistrial, the district court rejected the request, and he appealed.

- ★ Holding: A court must evaluate five factors in order to assess whether improper witness statements warrant a mistrial: (1) whether the remark was unsolicited; (2) whether the line of questioning was reasonable;

(3) whether a limiting instruction was immediate and clear; (4) whether the government acted in bad faith; and (5) whether the remark was only a small piece of the evidence against the defendant. In considering the five factors and the various improper statements, the court held that a mistrial was not warranted. Thus, the conviction was affirmed.

## IX. Plea & Sentencing Hearings

### • *Plea Agreements*

U.S. v. Morris, 05-2133 (12/7/06)

► Defendant was charged in state court with firearm and drug related charges and the state prosecutor, after communication and consultation with an Assistant U.S. Attorney (AUSA), offered defendant a plea agreement in state court in order to avoid federal charges. Defendant's state attorney misadvised defendant as to the potential federal jail time exposure and defendant ended up rejecting the state plea offer. Defendant was then indicted in federal court and he moved to "remand" the case to state court. The district court granted the motion, and the government appealed.

★ Holding: The court first held that the district court did not have the jurisdiction to "remand" a federal criminal prosecution to state court. Second, the court found that the district court could dismiss an indictment by enforcing the plea agreement. The court ruled that, because the AUSA had participated in, and made the government a part of the state court plea offer, such offer was enforceable against the government under "traditional principles of contract law." Thus, the district court had the authority to dismiss the federal indictment based upon the plea offer. Because the court found that defendant's state attorney rendered ineffective assistance of counsel by incorrectly advising defendant about the plea offer, (*See infra*, XIII. Post Conviction Remedies), the court affirmed the district court's ruling dismissing the federal

indictment.

### • *Plea Agreements - Booker Waivers*

U.S. v. Magouirk, 05-5960 (11/20/06)

► Defendant was charged with manufacturing meth and in his plea agreement with the government he agreed to be sentenced under the sentencing guidelines, even though *Booker* had been recently decided. At sentencing, the district court imposed a sentence at the bottom end of the applicable guideline range. Defendant appealed and argued that the plea agreement provision should not be enforced.

★ Holding: The court held that *Booker*'s mandate that the guidelines are non-mandatory is a right that may be waived by a defendant. Accordingly, where a defendant knowingly, voluntarily, and intelligently agrees in a plea agreement to waive *Booker* and be sentenced pursuant to the guidelines, the court may enforce that agreement. The court distinguished the prior Sixth Circuit cases *U.S. v. Amiker* and *U.S. v. Puckett* on the grounds that, in those cases, the defendant pled guilty pre-*Booker* and agreed to be bound by the guidelines. Accordingly, defendant's sentence was affirmed.

### • *Plea Agreements - Withdrawal of Plea*

U.S. v. Ellis, 05-6551 (11/29/06)

► Defendant was charged with manufacturing marijuana plants on his farm and he entered into a plea agreement with the government. In the agreement, defendant agreed to forfeit \$12,000 in cash proceeds that were seized by the government and to pay an additional \$200,000 cash forfeiture. Upon payment of the additional funds, the government agreed to release defendant's farm. Six months after the plea agreement was filed, defendant determined that he was unable to obtain the \$200,000 through loans, and the government proceeded with a forfeiture of the farm. Defendant moved to withdraw his plea claiming that his performance of the plea

agreement had become impossible, the plea agreement was ambiguous, and the plea agreement's central purpose (for defendant to keep the farm) had become frustrated. The district court denied the motion, and defendant appealed.

★ Holding: A defendant may withdraw a guilty plea prior to sentencing only for a "fair and just reason." In assessing whether to withdraw a plea, the court must consider seven factors: (1) the time elapsed between the plea and motion to withdraw; (2) the validity of the reason for withdrawal; (3) whether defendant maintained his innocence; (4) the circumstances of the plea; (5) defendant's nature and background; (6) defendant's prior experience with the justice system; and (7) prejudice to the government if the plea was withdrawn.

In the case, the court found that defendant's three reasons for withdrawal of the plea were insufficient. First, the court found that the doctrine of impossibility of performance did not apply because defendant was aware that he did not have sufficient funds to pay the \$200,000 and assumed the risk that he would not be able to borrow the money. Second, the court held that the plea agreement was not ambiguous. Third, the court found that the theory of frustration of purpose did not apply because the record did not establish that the central purpose of the plea agreement was, as defendant claimed, for him to keep the farm. In balancing the seven factors in total, the court held that the district court's ruling was proper and affirmed defendant's conviction.

• *Plea Agreements - Defendant Withdrawal*  
U.S. v. Jones, 05-5467 (11/29/06)

▸ Defendant was charged with narcotic and firearm offenses and lost a motion to suppress in the district court. Defendant entered into a conditional plea agreement with the government, cooperated with the FBI for a reduced sentence, received a sentence of 240

months incarceration, and appealed. On appeal, the court reversed the district court's ruling on the motion to suppress and remanded the case. On remand, defendant withdrew from the plea agreement. As a result, the government reinstated two of the dismissed charges from the original indictment, and obtained a superceding indictment adding five new charges. Defendant went to trial and was convicted, and the district court sentenced him to 420 months in prison. Defendant appealed and argued that the government was bound by the original plea agreement and was prohibited from bringing the new charges, and that the government was prohibited from using his cooperation with the FBI against him at trial.

★ Holding: Where a defendant lawfully withdraws from a plea agreement, the government is likewise relieved from its obligations thereunder. The government may then re-indict the defendant based on any lawfully obtained evidence. Accordingly, the court held that the government's choice to reinstate two dismissed charges and to re-indict defendant on new charges was proper. Further, because defendant withdrew from the plea agreement, the government was relieved from its obligation not to use defendant's statements in cooperation with the FBI against him. Likewise, FRE 410 did not protect defendant's statements because the statements were not made in "plea discussions," but instead after and in furtherance of the cooperation plea agreement. Thus, the conviction was affirmed.

• *Fed. R. Crim. P. 32 - Notice of Variance*  
U.S. v. Cousins, 05-3228 (11/30/06)

▸ Defendant was convicted of threatening the President and at sentencing the district court imposed an upward variance of 2 months from the applicable guideline range. The grounds for the variance were not identified in the presentence investigation report, nor in any submission from the parties, but instead were raised by the district court at the sentencing

hearing. Defendant appealed the failure of the court to provide advance notice of the possibility of the upward variance.

★ Holding: Fed. R. Crim. P. 32 requires reasonable notice to the parties before a district court may impose a departure under the guidelines based upon a ground not cited in the presentence report. Answering an open question in the Sixth Circuit, the court held that Rule 32 applies also to variances from the guideline range pursuant to *Booker*. Accordingly, the sentence was vacated and the case remanded for resentencing.

## X. Jury Issues

• *Jury Instructions-Presumption of Innocence*  
U.S. v. Hynes, 05-2036 (11/7/06)

▶ Defendant was charged with a drug conspiracy and prior to conducting *voir dire* the district court told the jury: “Now, a criminal defendant who does not acknowledge his culpability must be tried and found to be guilty or not guilty.” During the course of the trial, however, the district court repeatedly instructed the jury properly regarding the presumption of innocence. Defendant was convicted and argued on appeal that the district court’s comment denied him the presumption of innocence.

★ Holding: The court held that the district court’s statement did not improperly affect the presumption of innocence, and even if it did, the comment was isolated in relation to the numerous other proper instructions regarding the presumption. Accordingly, the conviction was affirmed.

• *Fair and Impartial Jury*  
Stewart v. Wolfenbarger, 04-2419 (11/9/06)

▶ Defendant was charged with murder and prior to trial the jury was subjected to a loud commotion from friends and relatives of the murder victim expressing their belief that defendant was guilty. The trial judge explained to the jury that the friends’ and

family members’ statements were not evidence and asked if what the jury had heard would affect anyone’s ability to be fair and impartial. No juror replied in the affirmative and the trial proceeded. Upon defendant’s conviction, he appealed through the state system, and then filed a federal *habeas* petition. The district court ruled against defendant on the juror impartiality issue and he appealed.

★ Holding: The court found that the state trial court conducted an appropriate inquiry into juror impartiality and that defendant suffered no violation of his right to a fair trial.

• *Batson - Peremptory Challenges*  
U.S. v. Watford, 05-6184 (11/14/06)

▶ Defendant went to trial on drug trafficking and firearm charges and during *voir dire* the government exercised peremptory challenges against the only two African-Americans in the pool. Defendant raised a *Batson* challenge and the prosecutor indicated that one juror had a rap sheet, and that the prosecutor did not realize that the second juror was black. The district court overruled defendant’s *Batson* challenge and defendant appealed.

★ Holding: In order to analyze an alleged *Batson* violation, the district court must conduct a three-step inquiry: (1) the opponent of the strike must make a *prima facie* showing of purposeful discrimination; (2) the burden then shifts to the proponent of the strike to offer a race-neutral explanation; and (3) the district court must consider the totality of the circumstances in order to assess whether discriminatory intent has been proven. In the case, the court found that a *prima facie* case had been made because defendant was black and the two stricken jurors were the only two black jurors in the pool. Second, the court ruled that the prosecutor had provided a race-neutral explanation for striking the jurors. Particularly, the court gave deference to the district court’s conclusion that the prosecutor had made an honest mistake in believing that

the second juror was white. Finally, under all of the circumstances, the court found that purposeful discrimination had not been proven. Thus, the conviction was affirmed.

## **XII. Appeal**

- *Booker - Standard of Review*

U.S. v. Triana, 05-3173 (11/2/06)

- ▶ Defendant was convicted of conspiracy to defraud medicare and the district court sentenced him on the same day that *Booker* was decided. The court and the parties were unaware of the decision at the time, but defendant challenged the guidelines as being “harsh,” mentioned the pendency of *Fanfan* (companion case to *Booker*), and challenged the fraud loss amount calculated by the court. Defendant appealed and the government argued that defendant had not preserved the *Booker* error in the district court.

- ★ Holding: If a defendant properly objects to a constitutional violation in the district court, the court of appeals reviews under a “preserved error” standard, under which the court reviews the case *de novo* and, if error is found, applies “harmless error” analysis. If a defendant has not preserved constitutional error, the appellate court reviews only for “plain error.” Addressing the question for the first time in the Sixth Circuit, the court held that a challenge to the “harshness” of the guidelines, and a challenge to the fraud loss amount calculation were sufficient to preserve potential *Booker* error. Accordingly, the court applied the “preserved error” standard, and remanded the case for resentencing pursuant to the mandates of *Booker*. Arguably, the court’s ruling regarding the standard of review was *dicta* because, as noted in Judge Ryan’s concurrence, the court found that its decision to remand would be the same under either the “preserved” or “plain” error standards.

- *Scope of Remand/Law of Case Doctrine*  
U.S. v. Haynes, 05-5889 (11/6/06)

- ▶ Defendant was convicted after a jury trial of aiding and abetting a conspiracy to distribute more than 100 kilos of marijuana, but was acquitted of conspiracy to distribute marijuana. Although the jury specifically found that the conspiracy that defendant aided and abetted involved more than 100 kilos, defendant argued that the district court erred in failing to require the jury to find that the 100 kilo amount was reasonably foreseeable to defendant. Defendant appealed her conviction and sentence and the Sixth Circuit affirmed. The Supreme Court subsequently remanded the case to the district court for “further consideration in light of *Booker*.” On remand, the district court refused to reconsider defendant’s argument on the jury instruction issue, but imposed a below guideline sentence based upon *Booker*. Defendant appealed.

- ★ Holding: The court held that the scope of a remand for “consideration in light of *Booker*” constrained the district court to simply resentence defendant, and did not permit review of the jury instruction issue. Further, the court held that the law of the case doctrine prohibited reconsideration of the jury instruction issue on appeal because the issue had already been decided by an earlier Sixth Circuit panel. Under the law of the case doctrine, a prior ruling may only be reconsidered where (1) substantially different evidence is raised in a subsequent trial, (2) a contrary view of the law is subsequently decided by the controlling authority, or (3) a decision is clearly erroneous and would work a manifest injustice. Finding that none of the exceptions applied, the court affirmed the district court’s ruling.

- *Preserving Error*

U.S. v. Ganier, 05-6350 (11/15/06)

- ▶ On the first day of defendant’s trial for obstruction of justice, the district court entered

an order excluding certain expert testimony for the government because the government had not provided sufficient advance notice of the expert testimony to the defense. The government filed an interlocutory appeal and defendant argued on appeal that the plain error standard should apply because the government did not make an “offer of proof” to the district court as to what the expert testimony would have been.

★ Holding: Pursuant to FRE 103(a), a formal offer of proof, while the preferred method, is not required in order to preserve error. The court held that the rule simply requires that the substance of the evidence be made known to the district court. The court ruled that discussions of counsel, the motion that was filed, and the reports that were provided to the district court sufficiently informed the court of the substance of the proposed expert testimony. Accordingly, the court held that the government had sufficiently preserved the error for appellate review, and declined to apply only plain error review.

• *Reasonableness - Consecutive Sentences*  
U.S. v. Watford, 05-6184 (11/14/06)

► Defendant was convicted of drug trafficking and firearm offenses and at the time of sentencing, he was also facing several life sentences from the State of Illinois. The district court imposed a 240 month sentence to run consecutively to the life sentences. Defendant appealed.

★ Holding: As with the determination of the length of a jail sentence, the decision as to whether a sentence runs concurrently with an undischarged term of imprisonment is in the discretion of the district court and is reviewed for reasonableness. In order to be reasonable, the district court must display on the record its assessment of the relevant guideline and statutory considerations, and must reach a reasonable sentence. In the case, the court found that the district court had considered the

appropriate guideline and statutory provisions and that its decision to run its sentence consecutively to the Illinois sentences was reasonable. Thus, the sentence was affirmed.

• *Reasonableness of Sentence*  
U.S. v. Cousins, 05-3228 (11/30/06)

► Defendant was convicted of threatening the President and at sentencing the district court imposed a 2 month upward variance from the guideline range. Defendant appealed the reasonableness of the sentence.

★ Holding: After *Booker*, a sentence must be both procedurally and substantively reasonable. In the case, the court found that the district court’s sentence was procedurally unreasonable based upon the following: (1) the district court failed to consider defendant’s request for a concurrent sentence with a state term of imprisonment; (2) it failed to acknowledge the applicable guideline range; and (3) the court gave no reason for the variance, and failed to establish how the variance would serve to achieve the statutory purposes of sentencing. Thus, the case was remanded for resentencing.

• *Reasonableness of Sentence*  
U.S. v. Caver, 05-3295 (12/4/06)

► Defendant was convicted of a narcotics conspiracy and at sentencing requested a downward variance based, in part, on the disparate 100:1 crack to cocaine ratio under the guidelines. The district court denied defendant’s request and sentenced him to the bottom end of the applicable guideline range. Defendant appealed.

★ Holding: The court held that the 100:1 crack to cocaine ratio is not *per se* unreasonable under all circumstances. The panel intimated that it may not agree with the rationale for the disparity, but nonetheless found that defendant had not presented any evidence to show that the disparity was unreasonable under the facts of his case.

Accordingly, the court found that the sentence was reasonable and affirmed the district court ruling.

- *Reasonableness of Sentence*

U.S. Ahmed, 05-2319 (12/29/06)

- ▶ Defendant was convicted of making false statements on his application to be a baggage screener with the Transportation Security Administration (TSA). In the application, defendant lied about his prior service in the Air Force wherein he had his security clearance suspended, and ultimately agreed to a discharge, because of his extensive pro-terrorist rhetoric. At sentencing, the district court imposed an upward variance in the guideline range from 0-6 months up to a sentence of 18 months in prison. Defendant appealed.

- ★ Holding: First, the court held that the sentence was procedurally reasonable because the district court had adequately considered the factors under 18 U.S.C. § 3553(a). Second, the court found that the sentence was substantively reasonable given the district court's "clearly articulated, well-reasoned concerns about the seriousness of the crime and the need for deterrence." Thus, the sentence was affirmed.

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

- *Ineffective Assistance of Counsel*

Stewart v. Wolfenbarger, 04-2419 (11/9/06)

- ▶ Johnson was charged with murder and hired counsel. Johnson's case was ultimately dismissed, and the state then charged defendant. Defendant hired the same attorney who had previously represented Johnson. During the trial, defendant's counsel did not call Johnson as a witness, did not file a proper alibi notification as required by state law, and failed to investigate or call a witness to refute the testimony of a key state witness. Defendant was convicted, lost his state court appeal, and filed a federal *habeas* petition alleging that his counsel had a conflict of interest and that his attorney was ineffective. The district court

denied the petition and defendant appealed.

- ★ Holding: First, the court held that defendant's counsel did not operate under a conflict of interest that rendered her ineffective. As a general matter, where an attorney operates under an actual conflict of interest, prejudice is presumed. This presumed prejudice standard applies only in cases of "multiple concurrent representation." Where, however, the potential conflict is due to successive representation, then the normal *Strickland* standard for ineffective assistance is applied. In the case, the court found that defendant's lawyer had engaged in successive representation of he and Johnson, and thus, *Strickland* applied. The court then held that the attorney's failure to call Johnson as a witness to try to shift blame to him was not deficient performance because Johnson would likely have invoked the Fifth Amendment anyway. Thus, the district court ruling was affirmed on this point.

- Second, the court found that the attorney rendered ineffective assistance by failing to file the proper alibi notification and in failing to investigate a key witness. Regarding the alibi, the court held that the failure to file a proper alibi notification pursuant to Michigan law was clearly deficient performance that prejudiced defendant because two of defendant's three alibi witnesses were excluded as a result of the attorney's deficiency. The court found that the alibi witnesses would not have been merely cumulative. Regarding the investigation of the witness, the court found that the attorney's performance was deficient and that the deficiency prejudiced defendant because the witness would have severely undercut the credibility of the state's central witness. Thus, the court concluded that the outcome of the trial would likely have been different but for counsel's errors and accordingly reversed defendant's conviction.

• *Ineffective Assistance of Counsel*

U.S. v. Morris, 05-2133 (12/7/06)

► Defendant was charged in state court with firearm and drug-related offenses and the state prosecutor, after consultation with an Assistant U.S. Attorney (AUSA), offered defendant a plea agreement in state court in order to avoid federal charges. Pursuant to state court practices, defendant was assigned an attorney on the same day the plea offer was made and defendant was expected to make a decision regarding the plea offer that same day, after a brief consultation with the attorney in a non-private setting. Defendant's state attorney misadvised defendant as to the potential federal jail time exposure and defendant ended up rejecting the state plea offer. Defendant was then indicted in federal court and he moved to dismiss the indictment based upon his attorney's ineffective assistance. The district court granted the motion, and the government appealed.

★ Holding: The court first held that the district court possessed the authority to dismiss the federal indictment based upon principles of contract law. (*See supra*, IX. Plea and Sentencing Hearings). Second, the court found that defendant's state attorney had provided ineffective assistance of counsel. Pursuant to the Supreme Court decision *U.S. v. Cronin*, a court may find that a defendant was denied effective assistance of counsel based upon the rule of "constructive absence of counsel." This rule applies to three types of cases: (1) complete denial of counsel; (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) counsel is placed in circumstances where a competent attorney could not likely render assistance. If one of these situations applies, then prejudice to the defendant is presumed. In the case, the court found that the third situation applied and that defendant's counsel was placed in a situation where she could not render effective assistance due to the time constraints and the

lack of privacy.

The court alternatively held that defendant was denied effective assistance of counsel under the standards of the Supreme Court's decisions in *Strickland* and *Hill*. In the plea context, an attorney is ineffective if: (1) she fails to properly inform her client of a plea offer and the potential penalties; and (2) there is a reasonable probability that the defendant would have pled guilty with the proper advice. The court ruled that the attorney's advice about potential federal penalties was so substantially below the actual possible penalties that the advice fell below and objective standard of reasonableness and "severely undermined" defendant's ability to make an intelligent decision regarding the plea offer. Accordingly, the court found that defendant's attorney had rendered ineffective assistance and affirmed the district court decision to dismiss the federal indictment.

• *Ineffective Assistance of Counsel*

Higgins v. Renico, 05-1564 (11/20/06)

► Defendant was charged in state court with murder and during the trial the key prosecution witness failed to appear, so the state introduced the witness' prior testimony from a preliminary hearing. Three days later in the trial, the witness was found and appeared for testimony. After the witness testified on direct examination, defendant's attorney requested additional time before cross examination because he had not reviewed the witness' prior testimony and was unprepared to conduct cross. The trial court denied the request and the attorney refused to conduct any cross examination of the witness. Defendant was convicted, lost his state court appeals, and filed a federal *habeas* petition claiming ineffective assistance of counsel. The district court granted the petition, and the state appealed.

★ Holding: Applying the *Strickland* two-part standard, the court found defendant's counsel to be ineffective. First, the court held that

counsel's performance fell below an objectively reasonable standard and that no sound trial strategy justified the failure to cross examine the government's key, and only, eye witness. Second, the court found that the jury may well have had reasonable doubt about defendant's guilt had his attorney cross examined the key witness, especially given that the witness had provided inconsistent statements and was, himself, a suspect in the murder. Accordingly, the district court's ruling was affirmed and defendant's conviction was vacated.