

# Precedential Value

An Outline of the Recent, Important Supreme Court and Sixth Circuit Decisions  
for Attorneys Practicing Criminal Law in the Courts of the Sixth Circuit

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## CONTENT AND FORMAT

This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases are arranged in an outline format under the following headings:

- I. Specific Offenses
- II. Sentencing Guidelines
- III. Evidence
- IV. Fourth Amendment
- V. Fifth Amendment
- VI. Sixth Amendment
- VII. Other Constitutional Rulings
- VIII. Defenses
- IX. Plea & Sentencing Hearings
- X. Jury Issues
- XI. Probation & Supervised Release
- XII. Appeal
- XIII. Post-Conviction Remedies

## FINDING THE CASES

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

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

## FEDERAL DEFENDER WEBSITE

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## SUPREME COURT DECISIONS

### **I. Specific Offenses**

- *18 USC § 924(e) - ACCA*

*James v. U.S.*, 05-9264 (4/18/07)

▶ 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 under § 924(e) (ACCA). One of the predicate offenses for the ACCA enhancement was an attempted burglary conviction from Florida. On appeal, defendant

argued that the attempted burglary conviction was not a violent felony for ACCA purposes. The circuit court rejected defendant's argument and the Supreme Court granted *certiorari*.

★ Holding: The Court held that an attempted burglary under Florida law qualified as an offense that "creates a serious potential risk of physical injury to another" under the ACCA. Under Florida law, as interpreted by the Florida Supreme Court, attempted burglary required proof of an overt act directed toward the entering or remaining in a structure. Based upon this requirement, the Court ruled that attempted burglary was, categorically, an offense that created a serious potential risk of physical injury because of the likelihood of encountering an innocent person or police officer during its commission. Accordingly, the district court ruling was affirmed.

## **SIXTH CIRCUIT DECISIONS**

### **I. Specific Offenses**

• *18 USC § 924(e) - ACCA*

U.S. v. Nance, 05-6036 (4/6/07)

▶ Defendant was convicted of being a felon in possession of a firearm and at sentencing the district court determined that defendant qualified for the armed career criminal enhancement under the ACCA. This determination was based, in part, upon one prior Tennessee conviction for aggravated burglary and one prior Tennessee conviction for facilitation of armed robbery. Defendant appealed.

★ Holding: First, the court held that the Tennessee aggravated burglary statute defined a "generic burglary" pursuant to the Supreme Court decision in *Crawford*, and that it accordingly was a violent felony under the ACCA. Second, the court held that facilitation of armed robbery was a violent felony under the ACCA because Tennessee courts require that the government prove, as an element of the facilitation offense, that the underlying felony

actually occurred. Thus, the sentence was affirmed.

### **II. Sentencing Guidelines**

• *2B3.1(b)(2) - Firearm Otherwise Used*

U.S. v. Bolden, 05-5407 (3/15/07)

▶ Defendant was convicted of a Hobbs Act robbery for masterminding the robbery of an armored car at a mall. During the robbery, two codefendants pointed guns at security guards and threatened them. Defendant argued at his sentencing hearing that he should receive only a five-level enhancement, under USSG § 2B3.1(b), because the firearms were "brandished or possessed." Instead, the district court imposed a six-level enhancement under § 2B3.1(b), finding that the guns were "otherwise used." Defendant appealed.

★ Holding: The court held that the codefendants' actions of pointing the guns at the security guards and verbally threatening them constituted more than merely "brandishing" firearms. Focusing on the immediacy of the threat, the court ruled that when a defendant points a gun at someone and makes a demand, he communicates an implicit threat that he will shoot if the person does not comply. In the court's view, this was more serious conduct than merely brandishing a firearm, which implies the intent to commit a future act with the gun and expresses the defendant's capability to use it. The court emphasized that the application note to § 2B3.1(b) was amended in 2000 to illustrate this distinction. Accordingly, the court held that the five-level enhancement for "otherwise us[ing]" the firearm was appropriate.

• *2B3.1(b) - Robbery Loss Amount*

U.S. v. Bolden, 05-5407 (3/15/07)

▶ Defendant was convicted of a Hobbs Act robbery for masterminding a robbery of an armored truck at a mall. During the course of the robbery, the defendants obtained \$926,570 including cash and checks. Pursuant to USSG

§ 2B3.1(b), the district court enhanced defendant's offense level by four points for a loss of more than \$800,000. Defendant argued on appeal that the checks should not have counted against the loss because the bank could easily prevent any loss from the stolen checks and there was no effort made to negotiate the checks.

★ Holding: The court held that it did not have to decide the question of whether the face value of the unnegotiated checks would count toward the loss amount because it found that the loss amount was above \$800,000, the minimum for the four-level enhancement, even without including the checks in question. Thus, the sentence was affirmed.

• *2K2.1(b) - Another Felony Offense*  
United States v. Howse, 06-5017 (3/6/07)

▶ Defendant was convicted of being a felon in possession of a firearm. At the time of his arrest he was in possession of a .38 caliber handgun. The day before defendant's arrest, his girlfriend called the police and indicated that he assaulted her and her daughter with a .45 caliber handgun. At sentencing, the district court imposed a four-level enhancement for possessing the firearm in relation to another felony offense, namely the assault of the girlfriend. Defendant appealed.

★ Holding: Under USSG § 2K2.1(b), a four-level enhancement is applicable if the defendant possessed "any firearm . . . in connection with" another felony. In the case, the court held that if the firearm possessed in relation to the other felony was a different gun than the one possessed by defendant in reference to the charged offense, the enhancement is only applicable if there is a "clear connection" between the firearms. The court found that the government failed to establish a "clear connection" between the .38 and the .45 caliber guns in defendant's case and accordingly remanded for resentencing. The court ordered that the government will be

permitted on remand to attempt to establish the requisite connection between the firearms.

• *3C1.1 - Obstruction of Justice*  
U.S. v. Davist, 06-1224 (3/29/07)

▶ Defendant was convicted of conspiracy to defraud the U.S., eighteen counts of making false claims against the U.S., and two counts of making false statements to IRS agents. At sentencing, the district court applied a two-level enhancement for obstruction of justice, under USSG § 3C1.1, because defendant lied to IRS agents during the course of their investigation. Defendant appealed.

★ Holding: The court held that application of the two-level obstruction of justice enhancement was appropriate. Specifically, the court relied upon the application notes to § 3C1.1 which indicate that the enhancement is appropriate where a defendant commits obstructive conduct during the course of the investigation of the offense and the defendant receives a separate count of conviction for such conduct. Accordingly, the sentence was affirmed.

• *3E1.1 - Acceptance of Responsibility*  
U.S. v. Bolden, 05-5407 (3/15/07)

▶ Defendant was convicted of a Hobbs Acts robbery and at sentencing the district court refused to award defendant the two-level reduction for acceptance of responsibility, pursuant to USSG § 3E1.1. The court based this determination on the fact that defendant waited until the last minute to plead and because he refused to tell the authorities where the stolen money was hidden. Defendant appealed.

★ Holding: The court ruled that the district court's consideration of the timeliness of the plea and the failure to turn over the loot were proper. Specifically, both the timeliness of defendant's acceptance of responsibility and whether defendant voluntarily assisted authorities in recovering fruits and

instrumentalities are outlined in the application notes to § 3E1.1 as appropriate considerations in determining whether the reduction is appropriate. Further, the court found that the district court's ruling did not implicate defendant's Fifth Amendment rights because disclosing the location of the loot would not subject defendant to increased penalty or additional charges. Thus, the sentence was affirmed.

• *4B1.1 - Career Offender - Relatedness*  
U.S. v. Esteppe, 05-6610 (4/23/07)

► Defendant was convicted of bank robbery and at sentencing the district court concluded that he was a career offender. This determination was based on a prior escape conviction, and two burglary convictions in two different states that all occurred within a one-week time period. Defendant argued that the escape and burglaries should count as one offense because they were "related." The district court disagreed, and defendant appealed.

★ Holding: Offenses are considered "related" under the guidelines if they are part of a "common scheme or plan." In order to satisfy this requirement, the defendant must show either that the commission of one offense entailed the other, or that the offenses were jointly planned. In the case, the court held that the only evidence of joint planning between the escape and the burglaries was defendant's own testimony. The district court found that defendant's testimony was not credible and that there was no evidence to corroborate defendant's joint planning argument. Further, by defendant's own admission, although he had generally planned to escape, steal cars, and obtain a new identity, the burglaries of the homes came about because of unforeseen circumstances. Defendant stated in his testimony that he had not specifically planned the burglaries in advance. Accordingly, the court found no joint planning, and thus, that the

prior escape and burglary convictions were not related.

• *5H1.6-Departure for Family Circumstances*  
U.S. v. Husein, 05-2548 (3/2/07)

► Defendant was convicted of conspiracy to distribute ecstasy and at sentencing the district court granted a downward departure in her sentence from a range of 37-46 months to a non-incarceration sentence. The basis for the departure was defendant's family circumstances because she and her mother were the only viable caregivers for her father, who required around-the-clock care. The government appealed.

★ Holding: A downward departure for family circumstances may only be awarded if the circumstances are exceptional based upon the following four considerations: (1) service of a guideline sentence will cause a "substantial, direct, and specific loss of essential caretaking, or essential financial support, to defendant's family;" (2) such loss substantially exceeds the harm ordinarily incident to incarceration; (3) the loss is one for which no remedial program is readily available, such that defendant is irreplaceable; and (4) a departure will effectively address the loss. In the case, the government challenged only the third factor, and the court held that the district court did not abuse its discretion in determining that defendant was irreplaceable in the care of her father. Accordingly, the downward departure was appropriate. The court further found the sentence was reasonable. (*See infra*).

### III. Evidence

• *403 - Undue Prejudice*  
U.S. v. Franco, 99-2194 (4/11/07)

► Defendant was charged with possession of cocaine with intent to distribute and at trial the defendant pursued an entrapment defense. In response, the government presented testimony regarding defendant's prior drug trafficking

activities. After his conviction, defendant argued on appeal that the evidence of his prior drug trafficking should have been excluded under FRE 403.

★ Holding: When a district court rules on the admissibility of evidence, it should expressly weigh the probative value of the evidence and its prejudicial effect pursuant to FRE 403. In the case, the court found that the district court did not make an explicit finding under FRE 403. The court nonetheless held that a reversal was unwarranted because (1) defendant had not requested a 403 analysis in the district court and (2) the probative value of the evidence in rebutting defendant's entrapment defense was not substantially outweighed by its prejudicial effect. Accordingly, the conviction was affirmed.

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

##### *• Traffic Stop - Probable Cause*

U.S. v. Graham, 05-4566 (4/12/07)

► Defendant was sitting in the driver's side of a car that was parked in a marked no parking zone. Officers approached defendant regarding the parking violation and eventually discovered a gun under the driver's seat. Defendant was charged with being a felon in possession of a firearm and moved to suppress the gun. At the suppression hearing, the officers testified that a sign on the street indicated that parking was not permitted, and the officers issued a parking citation for the vehicle. The district court denied the motion and defendant appealed.

★ Holding: The court found that the stop of defendant was supported by probable cause that the car was illegally parked. The court held that it did not matter that the officer did not cite a specific parking law that had been violated during the suppression hearing where (1) a sign indicated "no parking," (2) the officers issued a citation, and (3) a city ordinance (brought to the court's attention on appeal) indicated that defendant's car was illegally parked. Accordingly, the court held that the stop was

supported by probable cause.

##### *• Reasonable Suspicion*

U.S. v. Graham, 05-4566 (4/12/07)

► Defendant was stopped for a parking violation and upon approaching the car, the officers observed defendant lean down as if putting something under the seat. When the officers obtained defendant's name, they realized that they had received an earlier radio broadcast, based upon an anonymous tip, that defendant was armed and intending to shoot someone at a certain address. Given that defendant's car was stopped at the location in question, the officers removed defendant from the car and tried to frisk him. Defendant resisted, was cuffed, and was placed in the back of the police cruiser. The officers then looked beneath the seat and found a firearm. Defendant was charged with being a felon in possession of a firearm and moved to suppress the gun. The district court denied the motion and defendant appealed.

★ Holding: The court first dispensed with the government's argument that the anonymous tip was made reliable because the officers had already stopped defendant when they realized that the tip applied to him. The court held that, because the stop was for a parking violation and was clearly unrelated to the subject matter of the tip, the tip did not suddenly become reliable because the officers had already stopped defendant when they realized that the tip applied to him.

Nonetheless, the court found that the totality of the circumstances supported reasonable suspicion for the frisk of defendant and the search of his car. Specifically, the court held that the tip was corroborated by the fact that defendant was at the location described in the tip, and that he made a furtive gesture of hiding something under the seat when the officers approached. Where officers have reasonable suspicion that a subject is armed and dangerous, they may conduct a frisk

of the outer clothing, and may conduct a protective search of the car in which the defendant was a passenger.

Finally, the court ruled that the fact that defendant was already cuffed and in the back of the police cruiser at the time the car was searched did not invalidate the search. At that time, defendant was not arrested but merely detained. Thus, it was “well within reason to believe that, after [his] release at the conclusion of the stop, [defendant] would have access to the interior of [the] car.” Accordingly, the district court ruling was affirmed.

- *Reasonable Suspicion*

U.S. v. Cohen, 06-5594 (4/13/07)

- Police received a 911 call at 4:52 a.m. in which the caller hung up without saying anything. Police were dispatched within a few minutes and observed a car leaving the cul-de-sac that contained the home from which the 911 call originated. The police stopped the car, defendant was the driver, and ultimately a gun was found in the car. Defendant was charged with being a felon in possession of a firearm and he moved to suppress the gun. The district court granted the motion and the government appealed.

- ★ Holding: The court held that the totality of the circumstances did not provide reasonable suspicion to support the stop of defendant’s car. Analogizing to an anonymous tip, the court found that the silent 911 call did not provide the officers with sufficient information upon which to stop defendant’s car, even though they arrived within a few minutes of the call. Accordingly, the district court ruling suppressing the gun was affirmed.

## V. Fifth Amendment

- *Due Process - Pretrial Publicity*

Foley v. Parker, 04-5746 (3/22/07)

- Defendant was charged in state court with six murders and on the eve of trial his attorney moved for a change of venue based upon

prejudicial pretrial publicity. The state court denied the motion and defendant was convicted of two murders and sentenced to death. Defendant lost his state court appeals and then filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

- ★ Holding: If pretrial publicity would prejudice a defendant’s right to a fair trial, a change of venue is appropriate. The prejudice ensuing from pretrial publicity may be either presumptive or actual. Presumptive prejudice arises from pretrial publicity where “an inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community.” Actual prejudice is determined by a “searching *voir dire* of prospective jurors” and is established where there is a “community-wide sentiment . . . against the defendant.” In the case, the court found neither presumptive nor actual prejudice to defendant as a result of pretrial publicity. Specifically, although many of the 98 prospective jurors had heard about the case, some of whom had opinions about defendant’s guilt, the court found that the jury expressed its views that it could set aside what they had heard and decide the case based upon the evidence. Accordingly, the trial court ruling was affirmed.

- *Right to Indictment - Amendment/Variance*

U.S. v. Nance, 05-6036 (4/6/07)

- Defendant was charged with being a felon in possession of a firearm. The indictment alleged defendant’s constructive possession of the firearm in a safe, for which he had the key. At trial, the government introduced evidence that defendant had possessed the firearm four days earlier and had placed it in the safe. Defendant was convicted at trial and argued on appeal that the evidence admitted at trial had unlawfully amended the indictment.

- ★ Holding: A two judge majority found that evidence of defendant’s prior possession of the

firearm constituted neither an amendment to the indictment nor a fatal variance in the evidence. The court ruled that defendant's prior possession of the firearm was relevant to show his "access to the safe and his ability to exercise control" over the gun on the date charged in the indictment. Further, the court held that any variance in the proof was not prejudicial to defendant. Finally, the court noted that it found unavailing the government's argument that the "on or about" language included the actual possession from four days prior. The court emphasized that "on or about" language did not permit conviction for an uncharged offense that occurred in close proximity to the charged offense. Because, however, the court found no amendment of, or variance, from the indictment, the court affirmed the conviction.

• *Due Process - Brady*

U.S. v. Graham, 05-2332 (4/20/07)

► Defendant was charged with conspiracy and various fraud-related offenses. At defendant's trial, his attorney/coconspirator testified against him in return for a plea deal with the government. Three weeks into the trial, the witness turned over fifteen boxes of documents to the defense that related to the alleged fraudulent offenses. The government did not have possession of the documents before they were turned over to the defense by the witness. Defendant moved for a mistrial based upon *Brady*. The district court denied the motion, defendant was convicted, and he appealed.

★ Holding: In order to establish a *Brady* violation, a defendant must show that (1) the government suppressed evidence, (2) the evidence was favorable to the defense, and (3) the suppressed evidence was material. Further *Brady* is not violated if the defendant knew or should have known the information, or it was readily available from another source. The court held that defendant could not establish

the first prong, that the government suppressed evidence. Although the government was aware of the existence of the boxes, it never possessed them. Further, the court found that the cooperating witness did not act as an "agent" of the government because (1) the government had to obtain his attorney's permission before speaking to him, (2) it had to serve a subpoena on him to compel document production, (3) and the witness refused to provide attorney-client protected materials. Finally, the court held that the witness' acts of continuing to work as defendant's attorney even after entering the cooperation agreement with the government did not transform the witness into a government agent. Accordingly, the conviction was affirmed.

**VI. Sixth Amendment**

• *Confrontation Clause*

U.S. v. Franco, 99-2194 (4/11/07)

► Defendant was charged with drug trafficking and at trial attempted to impeach an informant by cross examining him about his previous foreign convictions and his misconduct in a prior case where he was a government informant. The district court limited defendant's cross examination in both areas, defendant was convicted, and he appealed.

★ Holding: First, the court found that the limitation of cross examination regarding prior foreign convictions was proper. The court noted that the district court permitted defendant to elicit from the informant that he lied about the quantity and substance of the prior convictions. Given this circumstance, and the fact that the convictions were more than ten years old and subject to exclusion under FRE 609(b), the court found no error in the limitation of cross examination on the subject. Second, the court ruled that the district court's limitation of cross examination regarding the informant's prior misconduct was also proper. The district court permitted defendant to elicit

the facts regarding the prior misconduct, but prohibited examination pertaining to the fact that the prior government agent concluded that the earlier misconduct amounted to entrapment of the target. The court ruled that, although the prior misconduct evidence was marginally relevant to defendant's entrapment defense, it would have confused the jury and caused it to rely heavily on the opinion of a government agent from a prior, unrelated case. Accordingly, the conviction was affirmed.

- *Duplicitous Indictment*

U.S. v. Kakos, 06-1263 (4/20/07)

- ▶ Defendant was charged with interstate receipt of stolen property (18 USC § 2315) and the indictment alleged in one count that defendant received both a stolen trailer and the stolen meat inside. Defendant was convicted at trial and he argued for the first time on appeal that the one count indictment was duplicitous in that it charged two offenses in one count.

- ★ Holding: Where a defendant neither raises the duplicity issue pretrial or during jury instructions, the court reviews for plain error. The court held that defendant was not prejudiced even if the indictment was duplicitous because there was nothing in the record to suggest that defendant could have known the trailer was stolen but not the meat. Thus, there was no risk that the jury verdict was not unanimous and accordingly the court found no plain error in defendant's conviction.

## VIII. Defenses

- *Title III - Wiretaps/Good Faith*

U.S. v. Rice, 06-5245 (3/2/07)

- ▶ During a wiretap, the government intercepted a call between the target of the wiretap and defendant in a discussion regarding a large amount of cocaine. At the time, the government did not know much about defendant, and the government subsequently applied for and obtained a wiretap of defendant's phone, pursuant to Title III. Upon

defendant's prosecution for drug conspiracy, he moved to suppress the evidence obtained as a result of the wiretap. The district court determined that the government had falsely represented in the wiretap application that physical surveillance had been conducted on defendant, and that defendant was known to be armed and dangerous. In retracting the false information from the application, the court found that the application was otherwise insufficient to support the wiretap, and suppressed all evidence seized as a result. The government appealed.

- ★ Holding: An application for a wiretap under Title III must meet the "necessity requirement," which imposes on the government a duty to show that other investigative procedures have been tried or would be reasonably likely to fail if tried. The "necessity requirement" protects against the government using a wiretap as the initial step in any criminal investigation, but it does not require the government to exhaust every other conceivable investigative method prior to using a wiretap. In the case, the court agreed with the district court that the government had made recklessly false statements in the application. After redacting the false statements, the court held that the application was insufficient to meet the "necessity requirement." Additionally, the court held, deciding an open question in the Sixth Circuit, that the good faith exception is inapplicable to wiretap warrants issued under Title III. Accordingly, the district court ruling was affirmed.

- *Severance of Defendants*

U.S. v. Graham, 05-2332 (4/20/07)

- ▶ Defendant was charged along with a codefendant for conspiracy and multiple fraud related counts. Defendant moved to sever his trial from the codefendant's because the overwhelming evidence at trial pertained to the codefendant and because defendant claimed that their defenses were antagonistic. The

district court denied the motion, defendant was convicted, and he appealed.

★ Holding: The severance of defendants is not required simply because proof against one defendant is stronger unless a defendant can show specific, actual, or compelling prejudice. In the case, the court held that defendant was unable to show prejudice and the conviction was affirmed.

## **IX. Plea & Sentencing Hearings**

• *Plea Hearings-Rule 11/Withdrawal of Plea*  
U.S. v. Dixon, 05-6310 (3/8/07)

▶ Defendant was charged with conspiracy to distribute meth, six counts of distribution of meth, and one count of being a felon in possession of a firearm. Through a plea agreement, defendant pled guilty to one count of distribution and the felon-in-possession charge. Two years later, defendant moved to withdraw his guilty pleas, claiming that his attorney wrongly advised him of the possible penalties. The district court held a hearing and defendant's counsel testified that he told defendant that the felon-in-possession charge carried a "flat five year sentence." The attorney subsequently submitted an affidavit denying that he had wrongly advised defendant of the possible penalty. The district court credited the attorney's subsequent affidavit, denied defendant's motion to withdraw his plea, and sentenced him to 46 months in prison. Defendant appealed.

★ Holding: First, the court held that, pursuant to Fed. R. Crim. P. 11, defendant had entered a knowing, intelligent, and voluntary plea. Specifically, the court found no clear error in the district court's conclusion that defendant's counsel had not misadvised defendant about the possible penalties, even though the felon-in-possession charge actually carried up to 10 years in prison. Second, the court held that the denial of defendant's motion to withdraw his plea was proper. In order to withdraw a guilty plea, a defendant must show

a "fair and just reason," taking into account the following: (1) the time period between the plea and the motion to withdraw; (2) the validity of the reason; (3) whether the defendant maintained her innocence; (4) the circumstances of the plea; (5) the defendant's background; (6) the defendant's prior experience with the justice system; and (7) prejudice to the government. Considering the seven factors, and given the court's conclusion that defendant had not been misadvised about the potential penalties, the court held that defendant had not presented a "fair and just reason" to withdraw his plea. Accordingly, the conviction was affirmed.

## **X. Jury Issues**

• *Jury Instructions-Firearm-Interstate Nexus*  
U.S. v. Nance, 05-6036 (4/6/07)

▶ Defendant was charged with being a felon in possession of a firearm and at trial he requested that the district court provide an instruction to the jury that it must find that the firearm affected interstate commerce. Instead, the court provided an instruction that the jury must find that the gun traveled across state lines at sometime prior to defendant's possession of it. Defendant appealed.

★ Holding: The court held that a jury is not required to find that a gun had a substantial effect on interstate commerce. Accordingly, the court ruled that the instruction was sufficient and confirmed defendant's conviction.

• *Supplemental Instructions*  
U.S. v. Graham, 05-2332 (4/20/07)

▶ Defendant went to trial on conspiracy and various fraud offenses and after the jury reached a verdict, but before the verdict was received by the district court, the court provided a supplemental instruction to the jury. The instruction, given at the government's request, clarified that the jury must find that an overt act occurred with the statute of

limitations period in order to convict defendant. Defendant objected to the instruction and, upon his conviction, he appealed.

★ Holding: Generally, a district court has the authority to re-charge a jury to correct possible misunderstandings pertaining to the original jury instruction given. In the case, the court held that the fact that the jury informed the district court that it reached a verdict did not render the supplemental instruction improper. Accordingly, defendant's conviction was affirmed.

## **XII. Appeal**

### *• Standard of Review*

U.S. v. Husein, 05-2548 (3/2/07)

► Defendant was convicted of conspiracy to distribute ecstasy and at sentencing the district court imposed a 37 month downward departure. The government appealed and argued that the standard of review on appeal should be *de novo* pursuant to 18 U.S.C. § 3742(e).

★ Holding: Answering an open question in the Sixth Circuit, the court held that *Booker* severed the statutory requirement, under § 3742(e), that a departure from the guideline range be reviewed *de novo*. Accordingly, the court reinstated the abuse of discretion standard. The court held also that the overall sentence is still reviewed for reasonableness.

### *• Reasonableness of Sentence*

U.S. v. Husein, 05-2548 (3/2/07)

► Defendant was convicted of conspiracy to distribute ecstasy and at sentencing the district court imposed a 37 month downward departure based upon the extraordinary family circumstance that she was caring for her dying father. The government appealed.

★ Holding: A sentence must be both procedurally and substantively reasonable. First, the court found the sentence procedurally reasonable. Although the district court did not

specifically mention any of the factors under 18 USC § 3553(a), the court held that the district court adequately considered facts that corresponded to five of the seven § 3553 factors. Second, the court found the sentence to be substantively reasonable. The court emphasized that defendant pled guilty to a drug offense carrying a statutory range of 0-20 years; thus, Congress specifically intended that certain defendants charged with this offense would receive no jail time. Considering the § 3553(a) factors, and in distinguishing the case from the court's recent decision in *U.S. v. Davis* (See P.V., Issue # 9), the court ruled that defendant was among the most "deserving" of defendants for a minimum statutory sentence. Accordingly, the sentence was affirmed.

### *• Reasonableness of Sentence*

U.S. v. Bridgewater, 05-6950 (3/9/07)

► Defendant was convicted of possession of child pornography. Some of the pictures contained in the child pornographic images were of defendant molesting young girls in his care during a time period that he operated a children's home for abused and neglected youth. At sentencing, the district court heard testimony from two character witnesses for defendant, as well as letters from defendant's wife and son. The wife advocated for a sentence of probation, while the son requested that defendant receive the maximum term of imprisonment. The district court imposed the ten year maximum statutory penalty and a life-time term of supervised release. Defendant appealed and argued that the sentence was unreasonable.

★ Holding: First, the court held that the district court satisfied the reasonableness requirements. The court found that, while the district court's recitation of the factors under 18 USC § 3553 was not "model" or "perfect," the district court nonetheless exhibited an adequate consideration of the relevant factors. Second, the court ruled that the district court

had not improperly perceived its duty as being to impose a “reasonable” sentence. Specifically, the court found that appellate counsel’s assertion that the district court misunderstood its duty in this regard was meritless and completely lacked any support in the record. The court further warned appellate counsel generally that misrepresenting something a district court said in sentencing is potentially sanctionable attorney conduct. Finally, the court noted that, even if the district court used the word “reasonable” in attempting to fashion its sentence, that fact alone would not warrant reversal. The court emphasized that it focuses on the substance of the district court ruling and “not the ritual form of sentencing decisions.” Accordingly, the sentence was affirmed.

- *Reasonableness of Sentence*

U.S. v. Kosinski, 05-2664 (3/22/07)

- Defendant was sentenced for a tax fraud scheme and appealed his sentence. Based on the recently decided *Booker* decision, the Sixth Circuit held that enhancement of defendant’s sentence based upon tax loss that was not proven to the jury violated his Sixth Amendment rights. Upon remand and resentencing, the district court refused to consider any tax loss that was not part of the jury verdict. The court thus sentenced defendant to a term of probation. The government appealed.

- ★ Holding: The court found that the district court erred in refusing to calculate the tax loss under the guidelines. After *Booker*, the district court must first correctly determine the applicable guideline range, applying sentencing enhancements only if proven by a preponderance of the evidence. Once the correct guideline range is determined, the court must then determine an appropriate sentence under 18 USC § 3553(a), treating the guidelines as merely advisory. The court held that the district court’s sentence was

unreasonable because it failed to (1) calculate the guideline range, (2) treat the guidelines as advisory, and (3) consider the § 3553(a) factors. Thus, the case was again remanded for resentencing.

- *Supplemental Record on Appeal*

U.S. v. Husein, 05-2548 (3/2/07)

- Defendant was convicted of conspiracy to distribute ecstasy and at sentencing the district court granted a thirty-seven month downward departure based upon family circumstances. The court found that defendant was an irreplaceable caregiver for her dying father. The government appealed and attempted to supplement the record in the Sixth Circuit to prove that (1) the government learned from “westlaw.com” that, contrary to defendant’s assertion, two other household members had valid driver’s licenses, and (2) defendant’s father died four months after sentencing.

- ★ Holding: Pursuant to Fed. R. App. P. 10(a), the record on appeal may be supplemented to correct an omission or misstatement. The court ruled, however, that Rule 10(a) may not be used to introduce new evidence on a disputed issue. The court specifically found that the failure of the government to present the evidence at sentencing amounted to a lack of diligence. Noting that some circuits have applied the court’s “equitable authority” to supplement a record on appeal, the court further ruled that, even if it applied such a doctrine in defendant’s case, it would still not likely supplement the record because the evidence was unlikely to change the outcome. Finally, the court held that judicial notice was not an appropriate remedy under the circumstances. Accordingly, defendant’s sentence was affirmed.

- *18 USC § 3742(a) - Appellate Jurisdiction*  
U.S. v. Trejo-Martinez, 05-6078 (3/23/07)

- Defendant was convicted of illegal reentry by a deported alien and the district court

sentenced him to the bottom end of the applicable guideline range. Defendant appealed the reasonableness of the sentence and the government argued on appeal that the Sixth Circuit had no jurisdiction, pursuant to § 3742(a), to hear the appeal.

★ Holding: Answering an open question in the Sixth Circuit, the court first held that, after *Booker*, the court of appeals has jurisdiction to review a within-guideline sentence for reasonableness. The court reasoned that, if it determined that a sentence was unreasonable, the sentence would properly be considered “imposed in violation of law” under § 3742(a). Second, the court ruled that the sentence imposed by the district court was reasonable, and affirmed the district court’s ruling.