

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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- VIII. Defenses
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- XI. Probation & Supervised Release
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- 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 for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit, go to www.ca6.uscourts.gov and enter the docket

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

NEW COMBINED OUTLINE

Trying to find a case that you have read about in a past issue of Precedential Value? Need research on a specific legal topic? Check out the Combined Outline on our website. The Combined Outline is a culmination of all cases previously published in P.V., compiled in an outline format, with topic headings that make your legal research easy and accessible. The Combined Outline may be accessed at www.fpd-ohs.org.

SUPREME COURT DECISIONS

XII. Appeal

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

Moore v. U.S., 07-10689 (10/14/08)

► Defendant was convicted of possession of crack with intent to distribute. At sentencing, defendant requested a below-guideline sentence based on the crack-powder disparity.

The district court rejected defendant's argument and stated that "it isn't the judges" but Congress that "looks at the guidelines and decides whether or not they should be put in force." Defendant appealed and the Eighth Circuit affirmed. The Supreme Court vacated the judgment and ordered the Eighth Circuit to reconsider the Court's ruling in light of *Kimbrough* (See P.V., Issue # 17), which held that courts may consider the crack-powder disparity in determining a sentence. On remand, the Eighth Circuit concluded that the district court realized its discretion, and affirmed the sentence. The Supreme Court again granted *certiorari*.

★ Holding: The Court held that the district court's statement regarding Congress and the guidelines clearly demonstrated that it did not recognize its discretion to consider the crack-powder disparity, which was later confirmed by *Kimbrough*. Accordingly, the case was again remanded for resentencing.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 USC § 922(g) - Constructive Possession U.S. v. Castano, 06-1720 (10/7/08)*

▶ Based on a tip from an informant, defendant was caught transporting marijuana in a truck. Officers found a firearm in the console of the truck next to defendant. Defendant was charged with drug trafficking and being a felon in possession of a firearm. At trial, the truck owner testified that defendant borrowed the truck from him and that the gun was not in the truck when he let defendant borrow it. An officer testified that defendant was evasive and misleading to the officers upon his arrest, and that drug traffickers often carry firearms to protect their drugs and money. Defendant presented evidence that the gun belonged to someone else. Defendant was convicted and argued on appeal that the evidence was insufficient to support the verdict for the

firearm charge.

★ Holding: The court held that the evidence was sufficient to support defendant's conviction on the theory of constructive possession. Although a defendant may not be convicted based on mere proximity to a firearm, the court found sufficient additional evidence to support the conviction. Specifically, the conviction was supported by the testimony of the officers regarding (1) defendant's possession of marijuana with intent to distribute, (2) the fact that drug traffickers carry firearms, and (3) defendant's evasive statements upon arrest. Thus, defendant's conviction was affirmed.

• *18 USC § 924(c) - Firearm Enhancement U.S. v. Castano, 06-1720 (10/7/08)*

▶ Defendant was charged with possessing marijuana with intent to distribute, and carrying a firearm during and in relation to a drug trafficking crime, in violation of § 924(c). During trial, the district court instructed the jury that defendant could be convicted if he "possessed the firearm during a drug trafficking crime." The verdict form contained the same language. After the jury returned a verdict of guilty, the district court entered an order that defendant was convicted of possession of a firearm in furtherance of a drug trafficking crime. Defendant did not object to the jury instructions or verdict form at trial, but argued on appeal that the district court erred.

★ Holding: The court held that the jury instructions provided by the district court and the verdict form created a substantial likelihood that defendant was convicted of a non-existent offense. The instructed offense – possession of a firearm during a drug crime – conflated the elements of the two different offenses described in § 924(c). Under the circumstances, the court found plain error and reversed defendant's conviction.

• *18 USC § 924(c) - Firearm Enhancement*
U.S. v. Kuehne, 06-3668 (10/28/08)

▶ Defendant repeatedly traded stolen firearms for drug. As result, defendant was charged with, among other offenses, using a firearm in relation to a drug trafficking crime. Defendant was convicted and argued on appeal that he did not “use” the firearm under § 924(c).

★ Holding: In *Watson v. U.S.* (See P.V., Issue # 17), the Supreme Court held that if a defendant barter drugs for a gun, she does not “use” the gun as required in § 924(c). The court held, however, that *Watson* did not alter prior precedent that defines “use,” under § 924(c), to include a situation where the defendant trades a gun for drugs. Accordingly, defendant’s conviction was affirmed.

• *21 USC § 841/851(a) - Notice of Enhancement*
U.S. v. Pruitt, 06-6002 (10/21/08)

▶ Defendant was charged with manufacturing marijuana. At his plea hearing, defendant was presented with an information containing a notice of sentence enhancement, pursuant to 21 USC § 851(a). Defendant pled guilty, but the information was not actually filed until later the same day. At sentencing, the district court applied the § 851 enhancement, and increased defendant’s statutory sentencing range to 10 years to life. Defendant argued on appeal that the § 851 enhancement should not apply to his sentence because it was not “filed” before he pled guilty.

★ Holding: Section 851(a) requires that an information enhancing a defendant’s sentence be filed before entry of plea of guilty or trial. The court found that defendant had actual notice of the § 851 enhancement prior to entering his plea of guilty and thus had “reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence.” Accordingly, the court held that it was immaterial that the information was not actually filed by the clerk until after the plea

hearing.

II. Sentencing Guidelines

C. Chapter Four - Criminal History

• *4B1.1(a) - Career Offender*

U.S. v. Alexander, 07-1758 (10/7/08)

▶ Defendant was convicted of drug trafficking and at sentencing the district court determined that defendant was a career offender. This determination was based, in part, on a prior conviction under Michigan law for assault. To prove the fact of the conviction, the government relied on Michigan’s Department of Correction’s website and the Michigan State Police’s website. Defendant did not dispute the career offender finding in the district court, but challenged the issue on appeal.

★ Holding: The court found no plain error in the determination that defendant was a career offender. Although the presentence report was slightly ambiguous as to the offense for which defendant was convicted, the information on the two websites provided that defendant was convicted of assault under Michigan law, which required proof that defendant’s actions “caused a bodily injury requiring medical attention.” Accordingly, the sentence was affirmed.

• *4B1.1(a) - Career Offender*

U.S. v. Pruitt, 06-6002 (10/21/08)

▶ Defendant was convicted of manufacturing marijuana and being a felon in possession of firearms. At sentencing, the district court determined that defendant was a career offender based on two prior drug trafficking offenses from North Carolina. Under North Carolina sentencing law, the maximum sentence that a defendant faced for a drug trafficking offense was contingent upon defendant’s “prior record level.” For purposes of defendant’s sentencing, the district court assumed that defendant’s “prior record level” was the maximum under North Carolina law,

which would mean that each of defendant's drug trafficking offenses carried a maximum of 15 months in prison. Defendant appealed and argued that the career offender enhancement was inapplicable. Further, defendant argued that he did not receive sufficient notice of the applicability of the career offender provision.

★ Holding: Relying on the Supreme Court's recent decision in *Rodriguez* (See P.V., Issue #20), the court held that the district court erred in assuming that defendant would be the maximum "prior record level" under North Carolina law. The court noted that, if defendant's "prior record level" was lower than what was attributed, the maximum possible penalty for the prior drug trafficking offenses would be one year or less. Under these circumstances, the prior offenses would not count as felonies under USSG § 4B1.1(a), and defendant would not be a career offender. Thus, the court remanded the case for a determination by the district court as to defendant's "prior record level" at the time of the drug trafficking offenses pursuant to North Carolina law.

Regarding the notice requirement, the court held that the government was not required to provide pre-plea notice of the career offender provision to a defendant. Additionally, the court noted that the plea agreement notified defendant that his sentence would be determined based on his criminal history and the factors under 18 USC § 3553(a). Further, the career offender enhancement was detailed in the presentence report. Defendant had, and would have again on remand, the opportunity to contest the enhancement at sentencing.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

- *Vehicle Stop - Reasonable Suspicion*
U.S. v. Shank, 07-3544 (9/19/08)
- ▶ Officers stopped a car in a high crime area based upon window tinting that appeared to be

darker than permitted by Ohio law. During the course of the traffic stop, officers learned the following regarding defendant: (1) he was driving the car but did not own the car; (2) he was not wearing a seatbelt; (3) he had no valid driver's license or other form of identification; (4) he had a prior record for drug trafficking; and (5) he became increasingly nervous and agitated as the stop progressed. Based on the officers' experience that drug dealers often carry guns, one of the officers checked the "lunge" area of the car and found a gun in the glove box and crack in the console. Defendant subsequently moved to suppress the evidence and the district court denied the motion. Defendant appealed.

★ Holding: The court first held that the traffic stop was supported by reasonable suspicion. Ohio law prohibits window tinting that keeps more than 50% of the light out. The court found that the officer's testimony regarding window tinting provided reasonable suspicion for the stop.

Second, the court held that the search of the "lunge" area of the car was justified. Pursuant to the Supreme Court's decision in *Michigan v. Long*, officers may search an area within a car that may be reached by lunging, if the officers establish reasonable suspicion to believe that defendant may be armed and dangerous. The court found that the above-enumerated facts provided a sufficient basis for the officers to believe that defendant may be carrying a firearm. Accordingly, the search of the car was justified and the district court's ruling was affirmed.

E. Search Warrants

- *Search Warrants - Good Faith*
U.S. v. Hodson, 07-5504 (9/19/08)
- ▶ Defendant solicited sex via an internet chat from a person he believed to be a 12-year-old boy. Defendant mentioned in the chat that he had previously molested his young nephew. The "boy" was actually a police officer, and

three months later the officer obtained a warrant to search defendant's home. Although the warrant did not make any connection between child molestation and child pornography, the warrant sought approval to search defendant's home for evidence of child pornography. Officers executed the warrant, found child pornography, and defendant moved to suppress the evidence. The district court held that warrant was lacking in probable cause, but that it was saved by the good faith exception. Defendant appealed.

★ Holding: The court held that the warrant was not saved by good faith because it was "so lacking in probable cause as to render official belief in its existence unreasonable." Specifically, the court found that it was unreasonable for the officer executing the warrant to believe that probable cause existed to search defendant's home and computer for child pornography based solely on a suspicion that defendant solicited, and engaged in, child molestation. Accordingly, the warrant was not saved by good faith, and defendant's conviction was reversed.

• *Search Warrants - Probable Cause*
U.S. v. Williams, 06-2018 (10/16/08)

► Officers obtained information from two informants and through other sources that, over the course of a few weeks, defendant stole two firearms, used one of the firearms during a robbery, was arrested carrying a gun, and was arrested on a separate occasion in a stolen vehicle with one of the stolen firearms. Officers determined the location of defendant's residence and obtained a search warrant. Upon the search, officers found crack cocaine and a firearm. Defendant moved to suppress the evidence on the grounds that the search warrant did not establish probable cause to believe that firearms would be found at his residence. The district court denied the motion and defendant appealed.

★ Holding: The court held that the warrant

was supported by probable cause. The information from the two informants, which was corroborated by officers, was sufficient to establish that defendant may be in possession of firearms based upon the theft of the guns, the robbery, and the two arrests of defendant while carrying guns. Further, the continued nature of defendant's conduct involving firearms provided a sufficient inference that defendant would keep the firearms at his residence. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

• *Prosecutorial Misconduct*

U.S. v. Henry, 05-2084 (10/17/08)

► Defendant went to trial and was convicted on drug trafficking charges. Defendant appealed and argued for the first time on appeal that, during closing argument, the prosecutor misstated evidence, improperly vouched for witnesses, and shifted the burden of proof to defendant.

★ Holding: A two-step inquiry is utilized by the court in assessing a claim of prosecutorial misconduct: (1) Was the statement improper, and if so, (2) was the statement so flagrant as to warrant reversal. In evaluating flagrancy, the court considers whether the remarks were intended to mislead the jury or prejudice defendant, whether the remarks were isolated or extensive, whether the remarks were intentional, and the overall strength of the evidence. First, the court held that the prosecutor did not misstate the evidence. All of the prosecutor's comments were reasonably based on inferences from the evidence presented.

Second, the court found no personal vouching for witnesses. Improper vouching occurs where the prosecutor either (1) bluntly states a personal belief in a witness' credibility, or (2) implies that the testimony is corroborated by evidence unknown to the jury. The only

problematic statement by the prosecutor occurred when the prosecutor stated that a witness was “highly credible.” The court ruled that the statement was isolated and unlikely to mislead the jury.

Finally, the court found error in an argument made by the prosecutor during rebuttal where, in analyzing reasonable doubt, the prosecutor asked the jury to consider whether they would let a child work for defendant, or whether they would be concerned that he was a drug dealer. The court ruled that the statement had the tendency to invert the burden of proof, suggesting that the jury decide how certain they were that defendant was not a drug dealer. Nonetheless, the court found that the evidence was otherwise overwhelming against defendant, and thus held that the possible inversion did not amount to plain error. Accordingly, defendant’s conviction was affirmed.

C. Confessions and Testimonial Rights

• *Miranda - Invoking Rights*

Franklin v. Bradshaw, 07-3497 (10/21/08)

► After a shooting incident, defendant was questioned by police. The officers advised defendant of his *Miranda* rights, and then asked him whether he wished to tell his side of the story. Defendant said “no” and put his head down. The officers continued to question defendant and he gave a statement denying the shooting. Defendant was charged in state court with murder and moved to suppress his statement. The court denied the motion and, at trial, the state introduced defendant’s statement to show its inconsistencies with other evidence. Defendant was convicted, lost his state court appeals, and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: In order to invoke *Miranda* rights, a suspect must unambiguously indicate a desire to remain silent. If the suspect’s invocation of rights is equivocal, the

questioning by police need not stop. In the case, the court held that defendant’s response of “no,” coupled with putting his head down, was not an unambiguous invocation of his rights. Thus, defendant’s *Miranda* rights were not violated. Further, the court held that any violation was harmless because of the otherwise strong evidence against defendant. Accordingly, the court found that the state court did not unreasonably apply federal law and defendant’s conviction was affirmed.

VI. Sixth Amendment

E. Indictment - Variance/Duplicity

• *Constructive Amendment/Variance*

U.S. v. Kuehne, 06-3668 (10/28/08)

► Defendant was charged with a violation of 18 USC § 924(c) for trading a firearm for drugs, and numerous other firearms violations. Although the indictment stated that defendant “used” the firearm in relation to a drug crime, the jury instructions provided that the jury could convict if it found that defendant “used or carried” the firearm. Further, at trial, the government introduced evidence regarding defendant’s theft and sale of many guns that were not charged in the indictment. Defendant was convicted and argued for the first time on appeal that the proof at trial and jury instructions constituted a constructive amendment and/or variance from the indictment.

★ Holding: A constructive amendment of the indictment occurs where the presentation of evidence and jury instructions effect a material change in the elements of the indictment. A constructive amendment is *per se* prejudicial and requires reversal. A variance occurs where the terms of the indictment are unchanged but the evidence at trial proves materially different facts. A variance only requires reversal if the variance affected a substantial right of the defendant, such as where a defendant can show prejudice to his defense, the general fairness of the trial, or to the indictment’s sufficiency to

bar future prosecutions.

Regarding the § 924(c) charge, the court held that the district court's use of the term "carry" in the jury instructions only offered an alternate theory of committing the same offense. Thus, because defendant's substantial rights were not affected by the instruction, the court found no error. Regarding the proof of uncharged firearms, the court held that such evidence did not adversely impact defendant's ability to defend himself at trial. Accordingly, the court found no plain error and affirmed defendant's convictions.

- *Variance*

U.S. v. Osborne, 07-5572 (10/28/08)

- ▶ Defendant was charged in a conspiracy to commit mail fraud along with two other individuals. At trial, the evidence arguably demonstrated that defendant was involved in a conspiracy with one of the codefendants, and a separate conspiracy existed between the two codefendants. Defendant was convicted and argued on appeal that the evidence introduced at trial constituted a material variance from the indictment.

- ★ Holding: The court held that the evidence may have established two conspiracies, but the indictment only involved three people and the defendants were charged with similarly culpable conduct. Further, the government's cooperating witness was able to carefully specify the interactions that he had with each individual defendant. Thus, the court found that any variance between the indictment and evidence was harmless.

VIII. Defenses

E. Venue

- Venue

U.S. v. Kuehne, 06-3668 (10/28/08)

- ▶ Defendant was charged with numerous firearm offenses. At trial, the government proved that defendant and others stole firearms in the Southern District of Ohio, traveled to

New York to exchange the firearms for drugs, and returned to the Ohio to distribute the drugs. Defendant was convicted and filed a motion for acquittal based on venue. The district court denied the motion and defendant appealed.

- ★ Holding: Pursuant to Fed. R. Crim. P. 18, venue lies in any district in which the offense was committed. Venue may lie in more than one district. In the case, the court held that defendant's activities of stealing the firearms in the Southern District of Ohio, then returning there to distribute the drugs and proceeds, was sufficient to establish venue in the Southern District of Ohio. Accordingly, the district court ruling was affirmed.

L. Miscellaneous Defenses

- *Fed. R. Crim. P. 33 - New Trial Motion*

U.S. v. Kuehne, 06-3668 (10/28/08)

- ▶ Defendant was convicted of numerous firearms offenses, and five months after his trial he filed a *pro se* motion for new trial. Defendant alleged that his failure to file within seven days of the verdict was due to his trial counsel's ineffectiveness. The district court appointed new counsel and overruled defendant's motion. Defendant appealed.

- ★ Holding: Rule 33 requires that a motion for new trial be filed within seven days of the verdict. The court held that the only exception to this seven-day rule is on the basis of newly discovered evidence. Ineffective assistance of counsel does not excuse the time limitation of the rule. Accordingly, the district court ruling was affirmed.

IX. Plea & Sentencing Hearings

B. Sentencing

- *Sentencing - Notice of Variance*

U.S. v. Obi, 07-1400 (9/5/08)

- ▶ Defendant was convicted of drug trafficking and at sentencing the district court imposed an obstruction of justice enhancement. On appeal, the Sixth Circuit held that the obstruction of justice enhancement should not

apply and remanded the case for resentencing. On remand, the district court conducted a *de novo* resentencing, and considered additional evidence supporting the obstruction enhancement. The court made new findings supporting the obstruction enhancement, and reimposed the same sentence. The court further held that, even if the obstruction enhancement did not apply, it would impose an upward variance and impose the same sentence. Defendant appealed and argued that he received no notice of the possibility of an upward variance.

★ Holding: Relying on the Supreme Court’s decision in Irizarry (*See* P.V., Issue #20), the court held that notice of the upward variance was not required. The court stated that “garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth,” were not the types of variance grounds that require advance notice to the defendant. Because the district court’s basis for upward variance was the egregious nature of the offense conduct, the court found that advance notice was not required. Accordingly, the sentence was affirmed.

X. Jury Issues

A. Jury Instructions

• *Jury Instructions - Omission of Element*
U.S. v. Kuehne, 06-3668 (10/28/08)

▶ Defendant was charged with numerous firearm offenses, including a charge under 18 USC § 924(c) for trading a gun for drugs. Defendant was not charged with a drug offense. At trial, the district court instructed the jury that it could find defendant guilty of the § 924(c) charge if it believed that defendant used the firearm in relation to a drug trafficking crime. The court did not further define a drug trafficking crime, but instead instructed the jury that if it believed that defendant traded the gun for drugs, it could find defendant guilty. Defendant was convicted and he appealed.

★ Holding: A defendant need not be charged with the underlying drug trafficking charge in order to be convicted of a § 924(c) violation, but the district court is nonetheless obligated to instruct the jury as to the elements of a drug trafficking offense as part of its instruction regarding the § 924(c) charge. The court found that the district court invaded the province of the jury with the instruction given, and accordingly, the instruction was error. The court ruled, however, that the error was harmless because uncontroverted evidence supported the predicate drug offense. Thus, defendant’s conviction was affirmed.

C. Voir Dire - Fair and Impartial Jury

• *Impartial Jury - Fair Cross-Section*
Smith v. Berghuis, 06-1463 (9/24/08)

▶ Defendant was charged with murder and felony possession of a firearm in Michigan state court. At trial, defendant challenged the *venire* as not being a fair cross-section of the community in that it excluded African Americans. The trial court rejected defendant’s challenge and he was convicted. Defendant lost his state court appeal and filed a federal *habeas* petition. The district court denied the petition and defendant appealed.

★ Holding: In a fair cross-section claim, a defendant must first make a *prima facie* showing that (1) the excluded group is distinctive, (2) the underrepresentation of the group is unreasonable in relation to number of such persons in the community, and (3) the underrepresentation is due to systematic exclusion. If a *prima facie* case is established, the government must show that a significant state interest is advanced by the selection process as it exists. In the case, the court held that the state’s jury selection process unfairly excluded African Americans and that no significant state interest was served by the process as it existed. Accordingly, defendant’s conviction was reversed.

XI. Probation & Supervised Release

- *Reasonableness of Sentence*

U.S. v. Polihonki, 07-2106 (9/24/08)

- ▶ Defendant was convicted of being involved in a drug conspiracy, and sentenced to 18 months in prison and 3 years of supervised release. The first term of supervision was violated and defendant was sentenced to 6 months incarceration and 30 months of supervised release. Defendant again violated his supervised release and the district court calculated his guideline range to be 5-11 months. Based on defendant's repeated violations of supervised release and his problems with alcohol, the district court imposed a sentence of 13 months in prison and 22 months of supervised release. Defendant did not object to the sentence when invited to do so by the district court. Defendant appealed and argued that the sentence was both procedurally and substantively unreasonable.

- ★ Holding: Because defendant failed to object to the sentence, the court imposed plain error review. First, the court held that, even though the district court did not specifically reference the guideline range at the violation hearing, it was apparent from the record that the court considered the violation report (which contained the range) and the parties' arguments. The court ruled that a district court is not required to provide a "ritual incantation" of the statutory factors in rendering a sentence but must only adequately explain its reasons for the reviewing court. The court found no plain error in the district court's consideration of the factors under 18 USC § 3553.

Additionally, the court held that the sentence was substantively reasonable. The court found that the sentence, which was two months above the guideline range, was justified to end defendant's cycle of self-destructive behavior. Accordingly, the sentence was affirmed.

XII. Appeal

C. Reasonableness of Sentence

- *Reasonableness of Sentence*

U.S. v. Obi, 07-1400 (9/5/08)

- ▶ Defendant was convicted of drug trafficking and at sentencing the district court imposed an obstruction of justice enhancement. On appeal, the Sixth Circuit held that the obstruction of justice enhancement should not apply and remanded the case for resentencing. On remand, the district court conducted a *de novo* resentencing, and considered additional evidence supporting the obstruction enhancement. The court made new findings supporting the obstruction enhancement, and reimposed the same sentence. The court further held that it would impose the same sentence, even absent the obstruction enhancement, based on its assessment of the factors under 18 USC § 3553. Defendant appealed.

- ★ Holding: The court held that, even if the district court erred by imposing the obstruction of justice enhancement on remand, the error was harmless. The district court clearly stated on the record that, even without the obstruction enhancement, it would have imposed an upward variance under § 3553 and sentenced defendant to the same sentence. Thus, the court found that the error did not affect the district court's selection of the sentence imposed. Accordingly, the sentence was affirmed.

- *Reasonableness of Sentence*

U.S. v. Alexander, 07-1758 (10/7/08)

- ▶ Defendant was convicted of trafficking crack cocaine, and he committed another drug offense while awaiting sentencing. Defendant argued at sentencing that he was entitled to a below-guideline sentence based upon the fact that his record was relatively non-serious, his serious health problems, and the crack-powder cocaine disparity. The district court determined that defendant was a career

offender, declined to award acceptance of responsibility, and sentenced defendant to 360 months in prison. Defendant appealed the reasonableness of the sentence.

★ Holding: The court held that defendant's sentence was both procedurally and substantively reasonable. The court found that the district court adequately considered defendant's arguments, and analyzed the factors under 18 USC § 3553. Further, the court noted that the district court sentenced defendant to the bottom end of the guideline range. Additionally, the court ruled that the crack guideline amendment, which reduced the penalty for crack cocaine by two-levels, would not affect defendant's sentence because he was sentenced as a career offender. Accordingly, defendant's sentence was affirmed.

• *18USC § 3742(a) - Appeal by Defendant*
U.S. v. Parker, 06-4506 (10/3/08)

▶ Defendant was convicted of drug trafficking and sentenced to the mandatory minimum 10 years in prison. The government subsequently filed a motion to reduce defendant's sentence based on his substantial cooperation pursuant to Rule 35(b). The district court accordingly reduced defendant's sentence to 5 years. Defendant appealed the reasonableness of the sentence.

★ Holding: Pursuant to 18 USC § 3742(a), a defendant may only appeal a sentence if it (1) was imposed in violation of law, (2) was imposed as the result of an incorrect application of the sentencing guidelines, (3) was greater than the applicable guideline range, or (4) was imposed for an offense for which there is no guideline range and was plainly unreasonable. The court held that *Booker* did not abrogate the requirements of § 3742(a). Since defendant's appeal of the Rule 35(b) motion did not meet any of the requirements of § 3742(a), the appeal was properly dismissed.

• *Reasonableness of Sentence*

U.S. v. Henry, 05-2084 (10/17/08)

▶ Defendant went to trial and was convicted of drug trafficking. Defendant was proven to be a leader in a large scale cocaine enterprise that distributed 800 kilograms of cocaine. At sentencing, the district court determined that the proper guideline range was 324-405 months, but sentenced defendant to 180 months in prison. Both the government and defendant appealed.

★ Holding: The court held that the sentence was procedurally unreasonable. Although defendant argued that a lower sentence was warranted based on his exemplary life, family circumstances, and the disparity with the codefendants' sentences, the court found that the only information discussed by the district court that was "specific" to defendant was defendant's "leadership role in the conspiracy, his decision not to plead guilty, and his strong family and community support." In the end, this analysis by the district court did not provide the "substantial reasons" necessary to justify such a "substantial variance." Accordingly, the case was remanded for resentencing.

D. Miscellaneous Appeal

• *Type of Remand*

U.S. v. Obi, 07-1400 (9/5/08)

▶ Defendant was convicted of drug trafficking and at sentencing the district court imposed an obstruction of justice enhancement. On appeal, the Sixth Circuit held that the obstruction of justice enhancement should not apply and remanded the case for resentencing. In issuing the remand, the court stated: "because the court considered an improperly calculated guideline range, the defendant's sentence is vacated and the case remanded to the district court for resentencing, consistent with this opinion." On remand, the district court conducted a *de novo* resentencing, and considered additional evidence supporting the

obstruction enhancement. The court made new findings supporting the obstruction enhancement, and reimposed the same sentence. The court further held that it would impose the same sentence even absent the obstruction enhancement. Defendant appealed.

★ Holding: A limited remand explicitly outlines the issues for a district court to address on remand and prescribes a narrow framework for the district court. In contrast, a general remand provides broad discretion to the district court to address all matters as long as the court remains consistent with the remand. In the case, the court held that, although the Sixth Circuit's original decision focused exclusively on the obstruction enhancement, the language of the mandate did not limit review to that particular issue. Further, the court held that the language "consistent with this opinion" was boilerplate and did not create a limited remand. Accordingly, the court held that the district court properly conducted *de novo* resentencing.

XIII. Post-Conviction Remedies

- *Ineffective Assistance of Counsel*

Boykin v. Webb, 06-5775 (9/4/08)

► Defendant was charged in state court with complicity to commit murder and he and his codefendant were represented by the same counsel. The state court inquired of defendant's counsel regarding a potential conflict, and counsel indicated that there was none. During trial, an eyewitness changed his story from an earlier statement to police, and testified that defendant, not the codefendant, was the shooter. Defendant's counsel did not cross examine the witness about his prior statement. Further, counsel did not introduce other evidence to show that the codefendant committed the murder, and that defendant was in another state at the time. Defendant was convicted, lost his state court appeal and post-conviction petition, and filed a federal *habeas* petition claiming ineffective assistance of counsel. The district court denied the petition

and defendant appealed.

★ Holding: First, the court held that the trial court did not violate its duty to inquire into the potential conflict. Although the trial court failed to follow the state rule governing inquiry into an attorney's conflict of interest, such error did not violate Sixth Amendment jurisprudence. Under current Supreme Court law, a trial court is only required to make detailed inquiry into a potential conflict if the defendant objects in the trial court. Defendant made no such objection in state court, thus no further requirement was imposed on the court.

Second, the court held that defendant's counsel provided ineffective representation. In analyzing an ineffective assistance claim, the court will presume prejudice if the defendant can show that counsel actively represented conflicting interests and the conflict adversely affected the lawyer's performance. In the case, the court held that the attorney's failure to cross examine the witness regarding the prior statement implicating the codefendant, and the omission in presenting the alibi defense, demonstrated that the attorney was acting under a conflict which adversely affected his performance. Further, because the same attorney represented defendant on appeal, defendant suffered from the same conflict. Thus, defendant's conviction was reversed.