

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

Published by the Federal Public Defender's Office

Southern District of Ohio

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<http://www.fpd-ohs.org/>

Issue #1	Editor: Richard Smith-Monahan	March-April 2005
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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 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.

SUPREME COURT DECISIONS

I. Specific Offenses

- *18 U.S.C. § 922(g) - Felon in Possession*
Small v. U.S., 03-705 (4/26/05)

▶ Defendant was convicted in the district court of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) based upon a prior felony conviction from Japan. Defendant challenged his § 922(g) prosecution upon the grounds that his prior foreign conviction fell outside the scope of § 922(g).

★ **Holding:** The Court held that a foreign conviction could not qualify as a prior felony for purposes of § 922(g). The Court reasoned that laws are presumed to have only domestic application, and that foreign convictions do not necessarily carry the same element of fairness as domestic convictions. Thus, defendant's § 922(g) conviction was reversed.

• *18 U.S.C § 924(e) - ACCA*
Shepard v. U.S., 03-9168 (3/7/05)

► Defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). At sentencing, the court concluded that three prior burglaries on his record qualified as violent offenses and sentenced him under the mandatory 15 year to life provision of § 922(g) (ACCA). Defendant challenged the sentencing enhancement upon the grounds that the district court had improperly considered underlying police reports to discern whether the prior burglary convictions actually qualified as violent offenses.

★ Holding: A plurality of the Supreme Court held that application of the ACCA to defendant was improper. Relying on *Taylor v. U.S.*, four Justices ruled that, in determining whether a prior offense based upon a guilty plea was “violent” under the ACCA, courts may only consider the statutory definition of the crime, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented. The district court may not consider a police report or other evidence in determining whether a prior offense qualifies as “violent” under the ACCA. Justice Thomas concurred in the result, and held that the ACCA could not be applied to the defendant at all because the defendant was not charged with the ACCA provision in the indictment.

• *18 U.S.C. § 1343 - Wire Fraud*
Pasquantino v. U.S., 03-725 (4/26/05)

► Defendant was convicted of wire fraud for using the wires to arrange the smuggling of liquor from the U.S. into Canada without paying Canada’s excise taxes. Defendant challenged his conviction primarily upon two grounds: (1) Canada’s right to collect the taxes was not “property” under the wire fraud statute; and (2) enforcement of the wire fraud statute in

regard to Canada’s collection of taxes violated the common-law revenue rule.

★ Holding: The Court first held that the right to tax revenue was “property” in Canada’s hands. Second, the Court ruled that the common-law revenue rule did not bar the prosecution. The common-law revenue rule barred the U.S. courts from executing the penal laws of another country. In this case, the Court held that such a rule was inapplicable because the U.S. court was not enforcing a Canadian law, but instead enforcing the U.S. wire fraud statute based upon conduct that happened in the U.S. The Court found the link between the U.S. prosecution and the Canadian tax collection to be incidental. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

• *Search Warrant - Detention of Occupants*
Muehler v. Mena, 03-1423 (3/22/05)

► Mena was an occupant of a home that was the subject of a search warrant for evidence of a drive-by shooting, including deadly weapons and evidence of gang membership. During the 2-3 hour execution of the search, Mena was detained in handcuffs in a converted garage. While being detained, Mena was questioned about her immigration status. After the search was concluded, Mena was released and never charged with any crime. Mena then sued pursuant to 42 U.S.C. § 1983 for a violation of her Fourth Amendment rights based upon an unlawful detention. The jury and the Ninth Circuit ruled in Mena’s favor.

★ Relying on *Michigan v. Summers*, the Court held that officers may detain persons found on the premises during the execution of a lawful search warrant. The Court ruled that Mena’s detention in the garage in handcuffs was neither unreasonable in its scope nor its duration in light of the serious nature of the crime being investigated and the potential danger to the officers. Further, the Court held that questioning Mena about her immigration

status was not a Fourth Amendment violation because she was lawfully detained at the time, and mere police questioning does not constitute a further seizure. Under the circumstances, the officers did not need reasonable suspicion to ask about immigration status. Accordingly, the Ninth Circuit decision was reversed.

VII. Other Constitutional Rulings

• *Eighth Amendment - Death Penalty*

Roper v. Simmons, 03-633 (3/1/05)

► Defendant, a 17 year old, committed murder and was sentenced to death by a Missouri jury. Defendant challenged his execution in a postconviction relief petition in state court, and the Missouri Supreme Court found that the death penalty, as applied to a person under the age of 18, violated the Eighth Amendment.

★ Holding: The U.S. Supreme Court held in a 5-4 decision that the death penalty violated the Eighth Amendment when applied to a person under the age of 18.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *8 U.S.C. § 1324(a) - Transporting Aliens*

U.S. v. Stonefish, 03-2538 (3/30/05)

► Defendant was observed late at night by INS agents pulling into a parking lot at the Canadian border on multiple occasions and flashing his headlights. Later, the agents observed Chinese nationals get off of a boat, and wait in the shadows until defendant again returned and picked them up in his car. Defendant then took a “circuitous “ route to the freeway, where he was stopped by the agents. Defendant was indicted for transporting illegal aliens, and was convicted after trial. Defendant’s defense at trial, and later on appeal, was that he did not know the passengers were illegal, but that he was just being a humanitarian.

★ Holding: In discerning a defendant’s intent in transporting aliens, courts may consider

whether the defendant was compensated, what efforts defendant took to conceal or harbor the aliens, and whether the aliens were friends, co-workers or companions, or merely human cargo. Under the circumstances, the court held that there was sufficient evidence to infer that defendant knew the aliens were illegal, and affirmed the jury’s verdict.

• *18 U.S.C. § 924(e) - ACCA*

U.S. v. Sanders, 04-3181 (4/20/05)

► Defendant was convicted of being a felon in possession of a firearm, and was sentenced by the district court pursuant to § 924(e) (ACCA). The district court indicated on the record that the ACCA status was based upon three prior violent felonies on defendant’s record, two for robbery and one for burglary. The district court did not indicate on the record the basis for its conclusion that the offenses qualified defendant for the ACCA enhancement. Likewise, the PSR was unclear as to the exact nature of the prior offenses. Defendant did not object at sentencing to the ACCA enhancement. During the pendency of the appeal, the Supreme Court rendered its decision in *Shepard v. U.S.* (*see supra*).

★ Holding: Based upon *Shepard*, the court concluded that the district court had not properly developed the record as to the propriety of the ACCA enhancement. The court directed the district court on remand to either explain its reasons for concluding that the prior convictions qualified defendant for the ACCA enhancement, or to resentence defendant anew.

II. Sentencing Guidelines

• *§2A3.2(b)(2)(B) - Sex Acts with Minors*

U.S. v. Chriswell, 04-5020 (3/18/05)

► Defendant was convicted of attempting to induce a minor, via the internet, to engage in sexual activity. At sentencing, the district court imposed a two-level enhancement pursuant to U.S.S.G. § 2A3.2(b)(2)(B)(2003) for unduly

influencing the victim to engage in prohibited sexual conduct. The “victim” was actually an undercover officer posing as a fourteen year old. Defendant objected upon the grounds that the two-level enhancement was inapplicable because there was no real “victim” to be “unduly influenced.”

★ Holding: The Sixth Circuit held that §2A3.2(b)(2)(B) is inapplicable in a case where the victim is not a real person, but instead an undercover officer. The court emphasized that the focus of the enhancement was the influence on the victim, and thus, could not be logically applied where the victim was an undercover officer. Accordingly, the case was reversed and remanded for resentencing in light of *Booker*.

• § 2B1.1(b)(2) - *Amount of Victims*
U.S. v. Yager, 04-5151 (4/18/05)

► Defendant was convicted of mail theft for stealing checks and bank account information, fraudulently depositing the checks into various accounts, and withdrawing portions of the deposited amounts. The individuals whose checks and account information were stolen were only temporarily out money, because they were all promptly reimbursed by the five banks that were involved. At sentencing, the district court imposed a two-level increase pursuant to U.S.S.G. § 2B1.1(b)(2)(A) (more than ten victims) based upon the alleged losses of some of the account holders. Defendant appealed the two-level enhancement, and the government cross appealed claiming that the court should have applied a four-level enhancement for more than fifty victims pursuant to § 2B1.1(b)(2)(B).

★ Holding: The court held that the term “victim” for purposes of § 2B1.1(b)(2) does not include individuals who are fully reimbursed for their temporary losses by a third party. In this case, the individuals who had their checks and/or account information stolen only suffered a short-lived monetary loss, and were

immediately reimbursed by the banks. Accordingly, the only “victims” were the five banks, and thus no enhancement was appropriate. The case was reversed and remanded for resentencing in light of *Booker*.

• § 2K2.1(b)(4) - *Firearms - Stolen*
U.S. v. Jackson, 03-2493 (3/24/05)

► Defendant was convicted of being a felon in possession of a firearm, and at sentencing the district court imposed a two-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(4) because it determined that the firearm was stolen. Defendant contended that he had not stolen the firearm, but merely taken it from his father’s car without permission for the purpose of committing suicide. Defendant assumed that the gun would eventually be returned to his father.

★ Holding: The court determined that defendant’s act of taking the gun without his father’s permission qualified the gun as “stolen” for purposes of the guideline. The court declined to apply a common law larceny type of definition to the term “stolen,” which would require an intent to deprive the owner permanently of the property. Instead, the court relied on a more contemporary definition of “stolen,” meaning “taking dishonestly or secretly.” Accordingly, the two-level enhancement was affirmed. The case was nonetheless remanded for resentencing in light of *Booker*.

• § 3A1.1(b)(1) - *Vulnerable Victim*
U.S. v. Madden, 04-5150 (4/4/05)

► Defendant was convicted of illegally buying three votes in an election. At sentencing, the district court applied a two-level enhancement under U.S.S.G. § 3A1.1(b)(1) because the persons from whom defendant bought the votes were mentally ill, and thus vulnerable. Defendant challenged the sentence on appeal.

★ Holding: The court held that the district

court erred in applying the vulnerable victim enhancement. The persons from whom defendant bought the votes could not properly be considered “victims.” The persons were vote sellers who were compensated \$50.00 each for their votes, and thus were simply “individuals who value money more highly than their right to vote.” Accordingly, the case was reversed and remanded for resentencing in light of *Booker*.

- § 3E1.1 - *Acceptance of Responsibility*
U.S. v. Forrest, 03-5672 (3/30/05)

- ▶ Defendant went to trial and was convicted of a Hobbs Act robbery and of brandishing a firearm in relation to a crime of violence. At trial, defendant challenged his factual guilt. For the first time during the presentence investigation process, defendant admitted his guilt to the probation officer, who then recommended that defendant receive a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court agreed with the probation officer, and the government appealed.

- ★ Holding: The court found error in the district court’s award of acceptance of responsibility. The court noted that it is extremely rare that a defendant who goes to trial may get a reduction for acceptance of responsibility. Where a defendant challenges her factual guilt at trial, such an award is not proper. Accordingly, the case was reversed and remanded for resentencing in light of *Booker*.

- § 4A1.1(d) - *Criminal History*
U.S. v. Trammel, 03-6652 (4/8/05)

- ▶ Defendant was convicted of drug and weapon charges, and at sentencing the district court imposed a three-point increase to defendant’s criminal history score because of a prior contempt conviction. Defendant received one point for the contempt conviction itself, and two additional points because he was on “conditional discharge” status for the contempt

at the time he committed the federal offense. Defendant appealed and claimed that the contempt conviction was not authorized under the state law, and that the conditional discharge was not a criminal justice sentence under the guidelines.

- ★ Holding: The court found that the three point increase was appropriate. First, the court held that a defendant may not collaterally attack a state conviction at sentencing on a federal charge except for a claim based upon the denial of counsel. Thus, the one point for the contempt conviction was proper. Second, the court held that a sentence including a conditional discharge is properly considered a term of probation, and accordingly, the two-point increase under U.S.S.G. § 4A1.1(d) was warranted.

III. Evidence

- 402/403 - *Relevance/Prejudice*
U.S. v. Sanders, 04-3181 (4/20/05)

- ▶ Defendant was observed by an officer fleeing from a car, and a gun fell out of his pocket. The officer retrieved the gun, but the defendant was not apprehended until later. At trial, the government introduced a backpack that contained common burglary tools that were found in the car. The government also introduced the testimony of a witness who stated that she sold the car in question to the defendant. Defendant did not object to the admission of evidence at trial, but challenged it on appeal.

- ★ Holding: The court first held that the burglary tools and the witness’ testimony were relevant under FRE 402. The court ruled that the burglary tools were relevant to show defendant’s “knowing possession of the firearm and ammunition” because of the “recognized connection between firearms and items consistent with burglary tools.” The witness’ testimony about selling the car to the defendant was relevant to identify defendant as the person the officer saw drop the gun. The court further

found that none of the evidence was unduly prejudicial. Thus, the admission of the evidence was affirmed.

- 404(b)

U.S. v. Garcia-Meza, 03-2485 (4/5/05)

- ▶ Defendant was tried and convicted of first degree murder of his wife. At trial, the government introduced evidence that the defendant had assaulted his wife five months prior to the murder. Defendant argued on appeal that the prior assault was inadmissible under FRE 404(b).

- ★ Holding: The court found that the prior assault was admissible to show motive. The government established that both the murder and the prior assault were committed based upon defendant's jealousy of his wife's actions with other men. Thus, the prior assault was admissible to show defendant's motive to commit the murder. The court further found that the probative value of the evidence substantially outweighed its prejudicial effect. Thus, the admission of the evidence was affirmed.

- 404(b)

U.S. v. Jones, 03-6239 (4/15/05)

- ▶ Defendant was charged in a meth conspiracy, and at trial, defendant's friend testified that defendant had taught him to make meth three years earlier, and that he had seen defendant make meth several times. The court admitted the testimony to show intent pursuant to FRE 404(b). Defendant argued that the prior meth activities were too old to be probative.

- ★ Holding: The court found no abuse of discretion in the admission of the testimony. There is no absolute rule on the age of prior acts regarding their admissibility. The court concluded that three year old meth manufacturing conduct was sufficiently probative to be admitted to show intent under 404(b). Thus, the admission of the evidence was affirmed.

IV. Fourth Amendment

- *Search Warrant - Particularity*

Baranski v. 15 Agents, 03-5582 (3/14/05)

- ▶ Baranski's warehouse was searched based upon an ATF search warrant seeking to locate 425 illegal machine guns. The warrant itself did not specifically list the items to be seized (the 425 machine guns) but instead referenced the affidavit and incorporated it by reference. The affidavit, however, was sealed by the issuing magistrate, and was not presented to the warehouse manager with the warrant at the time of the execution of the search. After Baranski's conviction and loss on appeal, he filed an action pursuant to 42 U.S.C. §1983 against the ATF agents involved in the execution of the search warrant based upon a violation of his Fourth Amendment rights. The district court found no Fourth Amendment violation.

- ★ Holding: The court held that, pursuant to the Supreme Court's decision in *Groh v. Ramirez*, a warrant must state with particularity, on the face of the warrant, the items to be seized in a search. The warrant may incorporate such information from an affidavit, but the affidavit must accompany the search warrant. In the present case, although the warrant did incorporate the affidavit, the warrant was nonetheless invalid because the affidavit was under seal and did not accompany the warrant at the time of execution. Thus, the Sixth Circuit found a Fourth Amendment violation and reversed the district court's determination.

- *Search Warrant - Sufficiency/Good Faith*

U.S. v. McCraven, 03-6311 (3/17/05)

- ▶ Officers obtained a search warrant for defendant's home based upon an affidavit that indicated that an informant, who had previously given reliable information, saw defendant selling cocaine and marijuana inside his house within the five days prior. The officers obtained no corroboration of the

information prior to executing the search warrant. In the subsequent prosecution for drugs and firearms, defendant moved to suppress the evidence based upon the insufficiency of the affidavit, and the district court denied the motion.

★ Holding: The court held that the case presented a very close call as to whether the affidavit was sufficient to support probable cause. The court decided not to resolve the question, however, because it found that the officers' execution of the warrant was proper under the good-faith exception of *U.S. v. Leon*.

• *Search Warrant - Knock and Announce*
U.S. v. McCraven, 03-6311 (3/17/05)

► Officers went to defendant's home armed with a search warrant for cocaine and marijuana. Officers arrived in the daytime, knocked on the door, announced their presence, and then waited between 6 and 12 seconds before entering the home. In the district court, defendant challenged the subsequent search and seizure of drugs and a firearm based upon an insufficient knock and announce. The district court denied the motion to suppress.

★ Holding: The court found the knock and announce to be reasonable under the circumstances. The court held that, because the search occurred during the day, and because the nature of the evidence (drugs) was that it was easily destroyed, 6 to 12 seconds was a reasonable period to wait before entry. Accordingly, the district court ruling was affirmed.

• *Probable Cause - Reckless falsity*
U.S. v. Moncivais, 02-6457 (3/24/05)

► Officers prepared an affidavit that was attached to a criminal complaint charging drug trafficking. In the affidavit, the officers summarized a taped conversation wherein defendant was recorded discussing drugs. Defendant challenged his arrest upon the grounds that the officers' assertions in the

affidavit regarding the taped conversation were recklessly false about what was actually said on the tape. The district court denied the motion to suppress.

★ Holding: A defendant must make a substantial showing that an affidavit is deliberately or recklessly false. In the present case, the court held that, although the affidavit did not contain a literal translation of the tape, and did contain some interpretative license as to what was actually said, the affidavit was not so far off the mark as to render it recklessly false. Accordingly, the court found the affidavit was supported by probable cause.

• *Reasonable Suspicion to Stop*
U.S. v. Hudson, 04-5096 (4/22/05)

► Officers had an arrest warrant for defendant that was a year old when they received an anonymous tip about defendant's girlfriend working at a certain store. The tip gave specific information about the girlfriend, but there was a dispute about whether the tip included information about defendant. The officer testified at the suppression hearing that the tip indicated that defendant would be with the girlfriend. The district court noted, however, that the officer's report did not indicate that the tip mentioned defendant. The officers staked out the store, and when the girlfriend arrived with two black men in the car, the officers immediately executed a felony approach with guns drawn and conducted a *Terry* stop and frisk of defendant, finding drugs in his pocket. The district court refused to suppress the drugs and defendant appealed.

★ Holding: The court held that the *Terry* stop and frisk of defendant were not supported by reasonable suspicion. The officers did not know defendant by sight, and the tip provided insufficient information to reasonably believe that defendant was one of the two black males in the car. Accordingly, the drugs in defendant's pocket were suppressed.

V. Fifth Amendment

- *Selective Prosecution*

U.S. v. Jones, 03-6016 (3/3/05)

► Defendant moved to dismiss a narcotics indictment based upon selective prosecution where officers in the department had engaged in widespread, racially offensive conduct, wore t-shirts with the defendant's picture the day they arrested him, and sent a taunting postcard to the defendant with a black woman on the front holding bananas.

★ Holding: To prove selective prosecution, the defendant must establish both discriminatory intent, and discriminatory effect. The court found plenty of evidence of discriminatory intent on the part of the officers, but held that discriminatory effect was lacking. The defendant was unable to show that similarly situated individuals of a different race were not similarly federally prosecuted. Therefore, the conviction was affirmed.

- *Due Process - Right to Fair Trial*

Ruimveld v. Birkett, 04-1826 (4/21/05)

► Defendant was charged in state court with poisoning a prison guard while he was an inmate. At trial, defendant was kept in shackles throughout the entire trial, in front of the jury, even though defendant posed no special risk of flight or violence. Defendant was convicted, and appealed through the state court system, and then filed a habeas petition in federal court. The district court granted the writ, and the state appealed.

★ Holding: The court first held that shackling a defendant during an entire trial was a constitutional violation of a defendant's right to a fair trial. Next, the court held that review of such an error was subject to harmless error analysis. Finally, the court ruled that the error was not harmless because there was no good reason for the shackling, the case was close and based on purely circumstantial evidence, and the State had not "alluded to any evidence that would in any way remove [the] case from the

Supreme Court's clear conclusion that indicia of guilt can result in significant prejudice when such indicia are not warranted by the security concerns of the trial court." Thus, the conviction was reversed, and the case returned to the trial court for a new trial.

- *Due Process - Identification Testimony*

Howard v. Bouchard, 03-1850 (4/28/05)

► Defendant was charged with second degree murder for shooting a man who was trying to repossess a vehicle. Three witnesses saw the shooting. Two of the witnesses were shown a photo array including defendant soon after the shooting, and both witnesses failed to pick out defendant. The third witness was not interviewed by police until two months after the shooting. Prior to trial, all three witnesses saw defendant in court at a preliminary hearing on two occasions. After viewing defendant in court, all three witnesses picked defendant out of a line-up. Defendant was convicted at trial, and lost on appeal in state court. He then filed a habeas petition in federal court challenging his identification by the three witnesses, and the district court denied the petition.

★ Holding: A claim that identification testimony is improper is analyzed as a violation of Due Process, and requires consideration of two factors. First, the court analyzes whether the identification was unnecessarily suggestive, and second, the court determines whether the identification was nonetheless reliable. In the case, the court first concluded that the identification of defendant was only minimally suggestive. All three witnesses did view the defendant in the courtroom before the line-up, but they only saw him briefly and mostly from behind. Further, even though the other individuals in the line-up were shorter than defendant and had different haircuts, the court did not find the line-up unduly suggestive. Second, the court found that the witnesses' identifications were otherwise reliable. Even though two of the witnesses failed to pick the

defendant out of a photo line-up within hours of the shooting, the court nonetheless concluded that the witnesses had a sufficient independent basis to identify defendant based upon their observations at the shooting, and accordingly their identifications were reliable. Thus, the conviction was affirmed.

VI. Sixth Amendment

- *Booker*

U.S. v. Jones, 03-6016 (3/3/05)

▶ Defendant was charged in a drug indictment that only listed 2.7 grams of crack. Defendant was sentenced after trial, however, based on a judicially determined 18.3 grams of crack. Defendant challenged the sentence based upon the increased drug amount where such amount was not pled and proven to the jury.

★ Holding: Case remanded for resentencing based upon Supreme Court decision in *Booker*.

- *Booker*

U.S. v. Hamm, 03-5658 (3/8/05)

▶ Defendant was charged with using the internet to induce a minor to travel across state lines for purposes of sexual activity. Defendant's sentencing guideline range was 33-41 months, and the court imposed a 33 month sentence. Defendant did not raise *Booker* issues at sentencing, but did request a downward departure.

★ Holding: Court found plain error based upon *Booker*. The court held that, given that the district court had imposed the low end of the guideline range and that it had shown apparent sympathy for the defendant at the sentencing hearing, the district court may have given a lower sentence if it knew that the sentencing guidelines were non-mandatory. Thus, the case was remanded for resentencing.

- *Booker*

U.S. v. McCraven, 03-6311 (3/17/05)

▶ Defendant was convicted of drug and weapons charges, and his guideline range at

sentencing was 84-105 months. This calculation included a two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing the firearm in relation to the narcotics. Defendant agreed at the plea hearing that he had possessed the firearm. Defendant did not challenge the guideline calculation at sentencing, but he did request a downward departure. The district court granted the departure and sentenced defendant to 72 months. During the pendency of the appeal, the Supreme Court decided *Booker*.

★ Holding: The court determined that the case should be remanded for resentencing even though there was no Sixth Amendment violation in the sentence. The two-level enhancement for the gun did not violate *Booker* because the defendant had admitted to the gun at the plea hearing. Nonetheless, the court held that remand was appropriate so that the district court could reconsider the sentence in light of the fact that the guidelines are now advisory.

- *Booker*

U.S. v. Jackson, 03-2493 (3/24/05)

▶ Defendant was sentenced for being a felon in possession of a firearm and received a two-level enhancement under the guidelines because the firearm was stolen. Defendant had not admitted at the plea hearing that the gun was stolen. Defendant was sentenced to 108 months, which was the middle of the guideline range. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court found plain error based upon *Booker*. Even though defendant was sentenced to the middle of the guideline range, the court found a remand was necessary because the district judge commented that "the guidelines were a failure and that he could not depart from them even if he wanted to."

- *Booker*

U.S. v. Moncivais, 02-6457 (3/24/05)

▶ Defendant's guideline range was increased

at sentencing from a range of 235-293 months to a range of 360-life based upon relevant conduct drug amounts and a leadership-role enhancement. The district court sentenced defendant to 360 months, and while the case was pending on appeal, *Booker* was decided.

★ Holding: The court found plain error because the relevant conduct and leadership-role enhancements violated the Sixth Amendment pursuant to *Booker*. Thus, the case was remanded for resentencing under the non-mandatory guideline scheme.

• *Booker*

U.S. v. Forrest, 03-5672 (3/30/05)

▶ Defendant was convicted of a Hobbs Act robbery and of brandishing a firearm during the commission of a crime of violence. The district court granted defendant a downward departure at sentencing based upon the fact that the government had indicted defendant federally only because he refused to plead guilty to the robbery charge in state court and because the government did not normally prosecute Hobbs Act robberies except in cases involving organized crime, gang activity, or wide-ranging schemes. The government appealed, and during the pendency of the case on appeal, *Booker* was decided.

★ Holding: The court held that even after *Booker*, district courts must consider the appropriate sentencing guideline range. Thus, even though judges are no longer bound by the guidelines, the district court must first consider the proper guideline range, and must consider “what the guidelines say about departing from the guidelines sentencing range.” After determining the guideline range, and whether a departure is appropriate, the district court may then consider whether it will follow the guidelines or not, and state its reasons therefore. In defendant’s case, the court thus analyzed the appropriateness of the downward departure and found that the district court erred in holding that the departure was appropriate.

A district court may not focus on whether the government’s decision to prosecute someone was abnormal, but only on whether the defendant’s conduct was outside the heartland. In defendant’s case, his conduct was clearly within the heartland of robberies punishable by the Hobbs Act, and accordingly, no departure was appropriate. The sentence was thus reversed and the case remanded for consideration in light of *Booker*.

• *Booker*

U.S. v. Webb, 03-6110 (4/6/05)

▶ Defendant pled guilty to one count of possession of a machine gun and in the plea agreement stipulated to the appropriate sentencing guideline range. At sentencing, the district court followed the recommendation in the plea agreement and sentenced defendant to the top end of the guideline range. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that no plain error occurred in the sentencing of defendant because he was not prejudiced by being sentenced under the then mandatory guidelines scheme. The court acknowledged that, pursuant to its prior holding in *U.S. v. Barnett*, prejudice to a defendant is presumed where a district court sentences a defendant under the previously mandatory guidelines scheme. Nonetheless, the court found that the presumption was overcome under the facts of defendant’s case because (1) defendant agreed to the sentencing range in the plea agreement, (2) the district court considered an upward departure at sentencing and said that the defendant was a menace, and (3) the district court imposed a sentence at the top end of the guideline range.

The court then determined, pursuant to *Booker*, that the sentence was not unreasonable. The court declined to impose a rigid test for evaluating reasonableness, but based its determination upon the fact that the district court had appropriately considered the

guidelines and the other factors in 18 U.S.C. § 3553(a) in fashioning the sentence. The court, in footnotes, commented on two lingering questions after *Booker*: (1) the court specifically declined to address whether a district court must always calculate the “precise appropriate guideline range” in order to comply with *Booker*; and (2) the court noted that a sentence within the applicable guideline range is not per-se reasonable.

- *Booker*

U.S. v. Trammel, 03-6652 (4/8/05)

- Defendant was convicted of drug and weapon charges, and the district court sentenced him to the bottom end of the guideline range. During the pendency of the appeal, *Booker* was decided.

- ★ Holding: Although no other error occurred in the sentencing process, the court remanded the case for resentencing under *Booker*. Pursuant to the court’s prior holding in *U.S. v. Barnett*, the court will presume prejudice where a district court sentences a defendant under the then-existing mandatory guideline scheme. In defendant’s case, the court found nothing in the record to rebut the presumption of prejudice, particularly where the district court had sentenced defendant to the bottom end of the guideline range and had stated at the sentencing that the low end was appropriate because of the defendant’s 10-year old son at home.

- *Booker*

U.S. v. Jones, 03-6239 (4/15/05)

- Defendant was convicted after trial for a meth conspiracy, and was sentenced to 262 months in prison. The sentence was based upon amounts of ephedrine located at defendant’s home, but such amounts were not found by the jury. Defendant did not object to the drug amount, nor did he challenge the application of the guidelines at sentencing. During the pendency of the appeal, the

Supreme Court decided *Booker*.

- ★ Holding: The court found plain error in the application of the sentencing guidelines to the case and in the calculation of a sentence based upon drug amounts not found by a jury. Accordingly, the court remanded the case for resentencing pursuant to *Booker*.

- *Booker*

U.S. v. Hudson, 04-5096 (4/22/05)

- Defendant was convicted of being a felon in possession of a firearm and his sentencing guideline range was 46-57 months. The district court imposed a sentence of 53 months, the middle of the guideline range. During the pendency of the appeal, *Booker* was decided.

- ★ Holding: Relying on the prior Sixth Circuit decision in *Barnett*, the court held that, even though there was no Sixth Amendment violation, the case had to be remanded because the district court had sentenced based upon a mandatory guideline scheme. The court noted that *Barnett* requires the court to presume prejudice where a court mistakenly applies the guidelines as mandatory. The court found no clear and specific evidence to rebut the presumption and accordingly remanded the case for resentencing consistent with *Booker*.

- *Booker*

United States v. Smith, 04-5359 (4/22/05)

- Defendant was charged with being a felon in possession of a firearm. At trial, testimony was elicited that defendant had actually been involved in a robbery, but the testimony was equivocal. Defendant was convicted, but at sentencing, the district court sentenced him based upon the alleged robbery. This increased sentence was based upon a cross reference in the gun guideline (§ 2K2.1) that allows a district court to sentence a defendant for conduct that is proven by a preponderance of the evidence, i.e., the robbery. Accordingly, defendant’s sentencing range was increased from 37-46 months for the gun, to 110-137

months for the robbery. Defendant was sentenced to 120 months. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that application of the cross reference to the robbery guideline violated defendant's Sixth Amendment rights pursuant to *Booker* because defendant was sentenced based upon conduct that was neither pled in the indictment nor proven to the jury beyond a reasonable doubt. Accordingly, the court remanded the case for resentencing under the non-mandatory guideline scheme established by *Booker*.

- *Booker*

U.S. v. Alva, 03-5175 (4/29/05)

► Defendant was convicted of cocaine distribution. At sentencing, the district court determined that defendant qualified for a two-level enhancement for relevant conduct drug amounts, and a two-level enhancement for obstruction of justice. Based upon the enhancements, defendant's sentencing range was increased from 121-151 months to 188-235 months. The court sentenced defendant to 188 months and commented that the sentence seemed extraordinary in light of defendant's criminal history category of I. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that application of the two sentencing enhancements violated defendant's Sixth Amendment rights. Further, even absent a Sixth Amendment violation, the court presumes prejudice where a defendant is sentenced under a mandatory guideline regime. Thus, the case was remanded for resentencing in light of *Booker*.

- *Confrontation Clause*

U.S. v. Garcia-Meza, 03-2485 (4/5/05)

► Defendant was tried and convicted for first degree murder of his wife. At trial, the government introduced the hearsay statement of defendant's deceased wife that he had beaten her up several months before the murder

because she had talked to her ex-boyfriend. Defendant challenged the statement on appeal claiming that he was denied the right to confrontation under *Crawford v. Washington* because the statement was testimonial in that it was made to police officers.

★ Holding: The court concluded that it did not have to reach the issue of whether the statement of the deceased wife was testimonial, and thus inadmissible under the Confrontation Clause, because the court found that defendant had forfeited his right to confront based upon his wrongdoing. The rule of forfeiture by wrongdoing extinguishes confrontation claims on equitable grounds. Because defendant had caused his wife's death (a fact that he admitted at trial) he was not then able to challenge hearsay statements made by his wife upon confrontation grounds.

VIII. Defenses

- *Illegal Wire Tap - 18 U.S.C. § 2510*

U.S. v. Moncivais, 02-6457 (3/24/05)

► An informant was talking to his drug dealer on a recorded phone call, when the drug dealer offered to call and include his supplier (defendant) in a three-way phone call. Upon calling defendant, the drug dealer told him, "I have my friend [the informant] on the line." Defendant moved to suppress the subsequent recording of the conversation by the informant because he was not "one of the parties to the communication" under the wiretap statute. The district court declined to suppress the recording.

★ Holding: The court held that the wiretap statute had not been violated. Relying on the Supreme Court's decision in *Rathbun v. U.S.*, the court held that a party to a phone conversation knowingly takes a risk that the other party may have an extension telephone and may allow another to overhear the conversation. In the present case, because the drug dealer had notified the defendant that the informant was on the line, there was no

violation of the wiretap statute.

• *Speedy Trial Act - 18 U.S.C. § 3161*
Greenup v. United States, 03-6530 (3/29/05)

► Defendant was charged in a complaint with attempted kidnaping. Defendant signed a waiver of his speedy trial right to be indicted within thirty days, and began cooperating with the government. The cooperation led to the filing of an information and a plea agreement. The information charged defendant with attempted kidnaping and felon in possession of a firearm. Defendant subsequently withdrew his guilty plea, and the government filed a superceding indictment that included the two counts from the information, and seven additional counts for bank larceny and attempted bank robbery, among others. The jury convicted defendant of all counts at trial. After losing on appeal, defendant filed a habeas petition claiming that his trial attorney was ineffective for failing to move to dismiss the indictment on speedy trial grounds. The district court agreed in part and dismissed the attempted kidnaping charge without prejudice, but declined to dismiss the remaining counts in the indictment.

★ Holding: The court held that the district court was correct in dismissing the attempted kidnaping. Even though defendant had signed a waiver of the 30 day requirement in which an indictment must be returned pursuant to 18 U.S.C. § 3161(b), the waiver did not toll the time period because the trial court had failed to make any finding that “the ends of justice [were] served by an acceptance of the defendant’s waiver” as required by § 3161(h)(8)(a). The charge was properly dismissed without prejudice because defendant could not show he was prejudiced by the delay. Regarding the remaining counts in the indictment, the court concluded that such counts need not be dismissed because they were not charged in the original complaint. For violations of the 30 day time period, the speedy

trial act at § 3162(a)(1) “only requires dismissal of the offense charged in the complaint.” Thus, the district court ruling was affirmed.

• *Interstate Agreement on Detainers*
U.S. v. Forrest, 03-5672 (3/30/05)

► Defendant was charged in state court for armed robbery, and then indicted federally for the same conduct. The district court issued a *writ of habeas corpus ad prosequendum* to take defendant out of state custody for his federal court appearance. After his appearance before the district court, defendant was returned to state custody. On appeal, defendant challenged his shuttling back to state custody pursuant to the Interstate Agreement on Detainers (IAD).

★ Holding: The IAD, 18 U.S.C. App. 2, requires a dismissal of a federal charge if the government obtains a defendant from the custody of a state, but fails to try the defendant before returning her to federal custody. The court held, however, that defendant’s case did not have to be dismissed because the IAD only applies to state prisoners who have “begun serving their state sentence and not to state pre-trial detainees.” Because defendant was in pre-trial custody of the state, the IAD was not violated when the district court returned him to state custody.

• *Subject Matter Jurisdiction*
U.S. v. Madden, 04-5150 (4/4/05)

► Defendant was convicted under the federal vote buying statute (42 U.S.C. § 1973i) based upon a plea agreement in which defendant waived his right to “appeal the guilty plea and conviction.” Nonetheless, defendant appealed the conviction upon the grounds that the district court did not have jurisdiction over the case because the statute did not prohibit the buying of non-federal votes and because, even if it did, the statute was unconstitutional.

★ Holding: The court held that the defendant’s challenge was not

“jurisdictional,” as he claimed, and therefore the appeal was governed by the appeal waiver. The court held that the district courts’ jurisdiction is premised upon 18 U.S.C. § 3231, which gives such courts power to hear cases involving offenses against the U.S. A challenge that a statute does not cover certain conduct, or that a statute is unconstitutional because it is beyond Congress’ authority to regulate, does not affect the district court’s jurisdiction to hear the case. Thus, even if defendant was right that the statute was infirm, the district court was not deprived of jurisdiction and the appeal waiver was valid.

IX. Plea and Sentencing Hearings

• Plea Agreements - Appeal Waivers

U.S. v. Bradley, 03-6328 (3/10/05)

► Defendant and the government signed a plea agreement wherein the parties agreed to an appropriate sentencing guideline range and a recommendation for a sentence at the low-end of the range. Further, the agreement contained an appeal waiver for both parties. The district court accepted the recommendation and sentenced the defendant to the bottom end of the guideline range, 188 months. After *Booker*, the defendant challenged his sentence on appeal, arguing that the plea agreement should be set aside and the appeal waiver held to be invalid because the district court was no longer bound to follow the guidelines.

★ Holding: The court held that the appeal waiver was valid and the plea agreement binding, even though *Booker* had subsequently rendered the sentencing guidelines non-mandatory. The court emphasized that a change in the law did not automatically make a plea involuntary or non-binding.

• Plea Agreements - Appeal Waivers

U.S. v. McGilvery, 04-1013 (4/5/05)

► Defendant was convicted of misprision of felony based upon a plea agreement that contained an appeal waiver. The appeal waiver

contained a provision that defendant could not appeal if his sentence was 24 months or less. Defendant received a sentence of 21 months, and appealed. During the pendency of the appeal, *Booker* was decided, and defendant claimed that *Booker* invalidated the appeal waiver.

★ Holding: Relying on *U.S. v. Bradley* (*see supra*), the court held that the appeal waiver was not invalidated by the later decision in *Booker*. The court noted that the parties had wasted substantial time in briefing the case, and encouraged the government in the future to simply file motions to dismiss appeals where the plea agreement contains an appeal waiver.

X. Jury Issues

• Special Verdict Forms

U.S. v. Stonefish, 03-2538 (3/30/05)

► Defendant was convicted at trial of transporting illegal aliens in violation of 8 U.S.C. § 1324(a). The district court utilized a special verdict form which allowed the jury to find defendant guilty only if it unanimously agreed on one of two theories. The theories were either that defendant knew that the aliens were illegal, or defendant was in reckless disregard of whether the aliens were illegal. Defendant did not object to the special verdict form at trial, but challenged it on appeal.

★ Holding: The court found no plain error in the use of the special verdict form. The court noted that special verdict forms are strongly disfavored in the Sixth Circuit. Nonetheless, the court found that the special verdict form used in defendant’s case had no likelihood of confusing jurors, but simply required the jurors to commit to a single theory if they were going to convict defendant. The court also held that, even though the special verdict form itself did not contain all of the elements of the offense, because the jury instructions as a whole fully apprised the jury of the necessary elements, the special verdict form was proper.

• *Jury Instructions - Lesser Included*
U.S. v. Jones, 03-6239 (4/15/05)

► Defendant was charged with conspiracy to manufacture meth (21 U.S.C. § 841(a)), and at trial requested a jury instruction for conspiracy to possess equipment and chemicals used to manufacture meth (§ 843(a)(6)), as a lesser included offense. The court denied the instruction.

★ Holding: A defendant may receive a lesser-included-offense instruction where (1) a request is made, (2) the elements of the lesser offense are identical to part of the elements of the greater offense, (3) the evidence supports a conviction on the lesser offense, and (4) the proof is sufficiently disputed so that a jury could consistently acquit on the greater, but convict on the lesser. The court held that the fourth element was not satisfied because the defendant was clearly guilty of the greater offense. Defendant was arrested with iodine stain on his hands which was compelling proof that he had actually made the meth, as opposed simply possessing the equipment.

XI. Probation and Supervised Release

• *Booker - Standard of Review*
U.S. v. Johnson, 04-1538 (4/15/05)

► Defendant violated his supervised release by testing positive for THC, failing to attend AA/NA meetings, and falsifying documents to hide his failure to attend the meetings. The recommended sentencing guideline range for his violation was 4-10 months, and the probation officer recommended a sentence of 6 months. The district court imposed a sentence of 18 months incarceration. Defendant appealed, and during the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that, because defendant had failed to object to the 18 month sentence, it would review for plain error. The court found no plain error in the district court's sentence and noted that a court is only required to sentence a defendant in a manner that

reflects consideration of the factors listed in 18 U.S.C. § 3553. Further, the court discussed the issue of whether *Booker* altered the standard of review for supervised release violations. Pre-*Booker*, the court reviewed sentences on supervised release violations to determine whether the sentence was “plainly unreasonable.” Other circuits have held that *Booker* now requires that courts instead apply a new “reasonableness” standard. In the end, the court ruled that it did not have to decide the issue of which standard was appropriate because defendant's sentence was neither unreasonable, nor plainly unreasonable. Thus, the sentence was affirmed.

XIII. Post-Conviction Remedies

• *Ineffective Assistance of Counsel*
U.S. v. Ballard, 03-5117 (3/10/05)

► Defendant was indicted for one count of conspiracy to distribute cocaine, cocaine base, and marijuana. At trial, the jury returned a general verdict finding the defendant guilty of conspiracy. At sentencing, the district court determined that the defendant had distributed cocaine only, and sentenced her accordingly. While the appeal was pending, the Supreme Court decided the case of *Apprendi v. New Jersey*, but appellate counsel did not raise an *Apprendi* issue on appeal. Defendant then filed a habeas petition, claiming that her appellate counsel was ineffective for failing to raise *Apprendi* on direct appeal.

★ Holding: Applying *Strickland v. Washington*, the court held that appellate counsel was ineffective for failing to raise *Apprendi* on direct appeal. Under *Apprendi*, if the government seeks a sentence reflecting culpability for an object of a conspiracy carrying greater than the least grave sentence, it must also seek a special verdict from the jury. Thus, the district court committed plain error in sentencing defendant based upon the cocaine where the jury had not specifically found that the defendant was responsible for

the cocaine in its verdict. Accordingly, appellate counsel was ineffective for not raising an issue that would have resulted in a remand for resentencing.