

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
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- XII. Appeal
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FINDING THE CASES

Because of their recency, the cases are cited to their docket numbers. To find the actual opinions, go to www.supremecourtus.gov for Supreme Court opinions and look in the recent slip opinion section. For Sixth Circuit cases, 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. § 1512(b) - Corrupt Persuasion*
Arthur Andersen v. U.S., 04-368 (5/31/05)
 - Defendant was the accounting firm handling Enron during its collapse. With a federal investigation looming, defendant destroyed numerous documents pertaining to Enron pursuant to its “document retention policies.” The government charged defendant with corruptly persuading its employees to shred documents in violation of § 1512(b). Defendant was convicted, the conviction was affirmed by the Fifth Circuit, and the Supreme Court granted *certiorari*.

- ★ Holding: The Court held that § 1512(b) requires that the government prove that the defendant “knowingly corruptly persuaded” its employees to shred documents. The “knowingly corruptly” portion requires proof that a defendant knows that her actions are

wrongful or illegal. Because the jury instructions failed to inform the jury of the “knowledge of wrongdoing” component, the conviction was reversed. Further, the Court held that § 1512(b) requires that the jury find a specific nexus between the persuasion and some “official proceeding.” The court ruled that the district court failed to instruct the jury on this element. Accordingly, the case was reversed and remanded for retrial.

V. Fifth Amendment

• *Due Process - Shackling*

Deck v. Missouri, 04-5293 (5/23/05)

► The Missouri Supreme Court affirmed defendant’s conviction for murder, but set aside the death sentence. At the resentencing proceeding, defendant was shackled before the jury throughout the proceeding. The new jury again sentenced defendant to death. Defendant appealed the shackling issue through the Missouri courts and *certiorari* was granted.

★ Holding: The Court first confirmed the rule that shackling a defendant before a jury during the guilt phase of a trial is a violation of due process, unless there is a specific state interest that justifies the restraint. State interests may include security problems and the risk of escape. The Court then held that the same considerations applied during the sentencing phase of a death penalty case. The Court ruled that, in order for a trial court to shackle a defendant during the sentencing phase of a death penalty case, the court must make case specific findings on the record showing the need for the shackling. The Court noted that shackling a defendant without good cause was a due process error for which the courts will presume prejudice.

• *Batson Challenges*

Johnson v. California, 04-6964 (6/13/05)

► Defendant was charged with second-degree murder, and during jury selection, the prosecutor struck the only three African

Americans in the jury pool. Defendant raised a *Batson* challenge, but the trial court did not require the prosecutor to respond to the challenge. The court relied on California law which states that “the objector must show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.” The trial court found that defendant had not met this burden, and overruled the *Batson* challenge. The California Supreme Court affirmed, and the Supreme Court granted *certiorari*.

★ Holding: In order to determine whether a *Batson* violation has occurred in the exercise of peremptory challenges, the court must conduct a three-step process: (1) the objector must make out a *prima facie* case of discrimination; (2) the burden then shifts to the government to offer a race-neutral explanation for the challenge; and (3) the court must decide whether purposeful discrimination occurred. The Supreme Court found that California’s “more likely than not” standard was at odds with the first *Batson* step, whether the objector has made a *prima facie* case for discrimination. The Court ruled that, in order to make a *prima facie* case, an objector is only required to produce evidence “sufficient to permit the trial judge to draw an inference that discrimination has occurred.” Accordingly, the conviction was reversed.

• *Batson Challenges*

Miller-El v. Dretke, 03-9659 (6/13/05)

► In defendant’s capital murder trial, the State of Texas peremptorily struck ten of eleven remaining African-American jurors from the venire. Defendant objected to the state’s peremptory challenges, but the trial court permitted the ten jurors to be stricken. Defendant was convicted, and appealed through the Texas court system. Defendant then pursued a *habeas corpus* petition in federal court, eventually obtaining *certiorari* review in the Supreme Court.

★ Holding: The Supreme Court held that the state had unconstitutionally exercised peremptory challenges in violation of *Batson*. The Court found that the state had questioned black jurors differently than white jurors during voir dire, had failed to strike similarly situated white jurors, had established a pattern of striking black jurors, and had a history in the prosecutor's office of striking jurors based upon race. Accordingly, the Court found purposeful discrimination in exercising peremptory challenges and reversed defendant's conviction.

VI. Sixth Amendment

• *Ineffective Assistance of Counsel*
Rompilla v. Beard, 04-5462 (6/20/05)

▶ Defendant was convicted of capital murder, and prior to the sentencing hearing, the state notified the defense attorney that it intended to read extensively from defendant's prior rape conviction file, and to utilize it as an aggravating factor for the death penalty. In spite of the state's notification, the defense attorney neglected to review the prior file. Defendant was sentenced to death, and appealed through the state court system. Defendant then filed for federal habeas relief based upon defense counsel's ineffectiveness.

★ Holding: Applying *Strickland*, the Supreme Court found that defense counsel was ineffective for failing to review the prior rape conviction file. Given the fact that the state had notified the defense of its intent to use the file and the defense's ready access to the file, the Court held that defense counsel's performance fell below an objectively reasonable standard of representation. Further, the Court ruled that defendant suffered prejudice as a result because, had counsel reviewed the file, he would have discovered significant mitigating evidence that was not otherwise revealed by the defense investigation.

VII. Other Constitutional Rulings

• *Commerce Clause*

Gonzales v. Raich, 03-1454

▶ California residents grew marijuana for personal consumption pursuant to California law and a prescription from a doctor. The residents challenged the federal government's enforcement of the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, (CSA) against them as a violation of the Commerce Clause. The district court denied a request for a preliminary injunction against the federal government, but the Ninth Circuit reversed and issued the injunction. The Supreme Court granted *certiorari*.

★ Holding: The Court found that enforcement of the CSA against the California residents was appropriate under the Commerce Clause. The regulation of the marijuana growing activities falls under Congress' authority to regulate "activities that substantially effect interstate commerce." The Court found that home grown marijuana has a "substantial effect on supply and demand in the national market for that commodity." Accordingly, the Court ruled that the Commerce Clause permitted enforcement of the CSA even though the marijuana was grown and used entirely intrastate, and in spite of the state law permitting its medicinal use.

IX. Plea & Sentencing Hearings

• *Plea Hearing - Knowing Plea*

Bradshaw v. Stumpf, 04-637 (6/13/05)

▶ Defendant and another man entered a home and shot the husband and wife who lived there. The wife died as a result of the shooting, but the husband lived. Defendant pled guilty to aggravated murder, and was sentenced to death. The state's theory of the case at sentencing was that defendant had pulled the trigger killing the wife. In a subsequent prosecution of the co-defendant, the state advanced the theory that the co-defendant pulled the trigger killing the wife. Defendant then filed for post-conviction

relief requesting to withdraw his guilty plea and vacate his death sentence. The state courts denied defendant's request and defendant filed for federal habeas relief. The district court denied the petition, but the Sixth Circuit agreed with defendant and reversed his conviction. The Supreme Court granted *certiorari*.

★ Holding: The Court found that, in spite of the state's contrary positions regarding who pulled the trigger, defendant could not properly withdraw his guilty plea. The Court ruled that a trial court may, during a plea hearing, rely on an attorney's representation to the court that she has explained the elements of the offense to the defendant. Thus, the court could assume that defendant was aware that "specific intent" was an element of the offense. The state's theory that the co-defendant pulled the trigger was not inconsistent with the plea because defendant could still have had specific intent to murder as an aider and abettor. Finally, the Court indicated that an unfavorable deal in a plea bargain can only be grounds for reversal if the defendant made the decision to plead based upon constitutionally defective advice or he could not have understood the terms of the plea. Accordingly, the Sixth Circuit decision was reversed and the conviction reinstated. The Court remanded the case for reconsideration at the sentencing phase as to the effect of the state's change of position regarding the identity of the shooter on the defendant's death sentence.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 U.S.C. § 922(g) - Felon in Possession*
U.S. v. Arnold, 04-5384 (6/21/05)

▶ A witness called 911 and indicated that defendant had threatened her with a gun. When police arrived, the witness reiterated the same story, and while the police were there, defendant arrived in a car with his mother. The police found a gun underneath defendant's seat.

The witness failed to appear for trial, but her statements to the police were admitted into evidence. Defendant was convicted of being a felon in possession of a firearm, and he appealed.

★ Holding: The court held that, in a prosecution under § 922(g), the government may prove constructive or actual possession of the firearm. Regarding constructive possession, the court noted that the gun was found in the car, defendant did not admit that the gun was his, he was not driving the car, the car was not registered in his name, and defendant's fingerprints were not on the gun. The court ruled that defendant's proximity to the gun, in and of itself, was insufficient to establish constructive possession. Regarding actual possession, the court ruled that hearsay statements of the unavailable witness were insufficiently corroborated to establish defendant's actual possession of the gun. The court emphasized that defendant should not be convicted on the basis of unsworn testimony alone. Thus, the conviction was reversed and the case remanded for a judgment of acquittal.

• *18 U.S.C. § 924(c)*

U.S. v. Frederick, 03-1895 (5/5/05)

▶ Defendant was charged with possessing a firearm in relation to drug trafficking under § 924(c), and the district court instructed the jury that defendant could be convicted if it found that he bought the gun in exchange for drugs. Defendant argued on appeal that purchasing a gun for drugs did not support a § 924(c) conviction.

★ Holding: The court ruled that the acquisition of a firearm in return for drugs established a sufficient specific nexus between the firearm and the drugs to support a conviction under § 924(c). Specifically, the court indicated that, under the circumstances, the possession of the firearm was "in furtherance" of the drug sale as required by the statute. Thus, the conviction was affirmed.

• *18 U.S.C. § 924(e) - ACCA*
U.S. v. Sawyers, 02-5835 (6/13/05)

► Defendant was convicted of being a felon in possession of a firearm, and at sentencing the district court determined that defendant qualified for the ACCA enhancement. On appeal, among other issues, defendant argued that two of the prior convictions - facilitation of an aggravated burglary and statutory rape - were not properly considered predicate offenses for the ACCA.

★ Holding: Regarding the facilitation of an aggravated burglary, the court held that such a prior offense was a violent felony for ACCA purposes under the definitional section that includes “conduct that presents a serious potential risk of physical injury to another,” known as the “otherwise clause.” The court ruled that, under the otherwise clause, no *mens rea* element was required, just that defendant was responsible for the conduct that caused the risk of injury. Thus, even though facilitation of an aggravated burglary did not require any specific intent on the part of defendant, because it did require proof that the aggravated burglary actually occurred, it could properly be considered a violent felony for ACCA purposes.

Regarding the statutory rape, the court concluded that the case had to be remanded. The court held that statutory rape statutes that include more mature victims, and do not contain statutory aggravating factors, do not necessarily automatically fall into the “otherwise clause.” Thus, the court remanded the case for the district court to consider, pursuant to *Shepard*, whether the offense could be deemed violent considering the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”

• *18 U.S.C. § 1001(a) - Falsify Material Fact*
U.S.v. Gibson, 03-6592 (5/24/05)

► Defendants operated a coal mine and were indicted for concealing material facts from federal mine safety inspectors in violation of § 1001. The material facts concealed were the existence of mine safety violations in the mine. Defendants concealed the violations by alerting mine personnel prior to the inspectors arrival, thus allowing the cover up of the safety violations. After a jury convicted defendants, the district court arrested judgment on the charge, finding that the indictment did not charge an offense. The government appealed.

★ Holding: The court affirmed the district court’s ruling and held that § 1001 is only violated in this context where a defendant has a legal duty to disclose the existence of the material fact that is concealed. The federal law on mine safety does not require mine operators to disclose the existence of safety violations. It does, however, require the disclosure of “hazardous conditions” in the mine. Because the indictment charged defendants only in terms of failing to disclose the existence of safety violations, which defendants had no affirmative duty to disclose, the court agreed that the count of the indictment did not charge an offense.

• *18 U.S.C. § 2113(a) - Bank Robbery*
U.S. v. Wesley, 04-1626 (5/18/05)

► Defendant was charged with attempted bank robbery for planning to rob a bank, and casing the bank. Defendant was convicted after jury trial, and appealed arguing that “actual intimidation” was an element of the offense of attempted bank robbery. Defendant also challenged that he had not taken a “substantial step” toward committing the bank robbery as required for an attempt.

★ Holding: First, the court held that “actual intimidation” is not an element of attempted bank robbery. All that is criminalized is the “attempted taking by force, violence, or

intimidation,” not that actual intimidation occur. This was an open question in the Sixth Circuit and the court’s ruling on the issue is arguably *dicta* because the court found that defendant had waived the argument by not raising it in his Rule 29 motion (*See infra*, VIII. Defenses). Second, the court held that, in determining whether a defendant has taken a substantial step toward committing a crime such that he may be convicted of an attempt, a court must consider whether the defendant’s actions “corroborate a clear criminal intent.” In the case, the court considered that defendant had made some substantial planning, including casing the bank, but that he was equivocal as to the time when he might commit the robbery. In the end, the court decided that the case was a very close one and did not rule on the issue because it reversed on an evidentiary issue. (*See infra*, III. Evidence).

• *18 U.S.C. § 2232 - Destruction of Property*
U.S. v. Playcak, 03-6256 (6/6/05)

▶ INS agents received a tip from an informant that Defendant was destroying documents relevant to an investigation for alien smuggling. The agents did not have a warrant to search Defendant or the residence, but did have warrants for other locations. The agents dispatched the local police to the residence and the police arrested Defendant. Defendant was charged with destroying property to prevent seizure under § 2232(a). Prior to trial, Defendant moved to dismiss the charge upon the grounds that the government did not have a warrant at the time that he destroyed the documents. The district court granted the motion and the government appealed.

▶ Holding: The language at issue in § 2232(a) stated that, in order to sustain a conviction, the destruction of property must be in relation to a seizure of evidence by “any person authorized to make searches and seizures.” The government claimed that any law enforcement officer would meet this

definition. Defendant argued that only a law enforcement officer with a warrant could meet the definition. The court took a stance between the parties’ positions, and held that “any person authorized to make searches and seizures” means any law enforcement officer with a warrant, or with a valid exception to the warrant requirement, *i.e.*, exigent circumstances. The court ruled that exigent circumstances justified the seizure in the case (*see infra*, IV. Fourth Amendment), and reversed the district court’s dismissal.

• *18 U.S.C. § 3593(e) - Death Penalty Act*
U.S. v. Ostrander, 04-1157 (6/10/05)

▶ Defendant was convicted of murder with a firearm during the commission of a drug trafficking offense pursuant to 18 U.S.C. § 924(j). During sentencing, the jury recommended life in prison, and the district judge imposed a life sentence. Defendant contended on appeal that the court should have rejected the jury recommendation, and imposed a lower sentence in years.

★ Holding: Pursuant to 18 U.S.C. §§ 3593(e) and 3594, a jury’s “recommendation” for a sentence is mandatory on the district court. Thus, the court has no discretion to impose a lower sentence in years when the jury recommends a life sentence.

• *42 U.S.C. § 1973i - Vote Buying*
U.S. v. Slone, 03-6427 (6/3/05)

▶ Defendant was convicted of illegal vote buying under § 1973i for paying seven voters fifty dollars each to buy their votes in a local election. A candidate for United States Senate was on the same ballot, although no votes were purchased regarding the senate race. On appeal, defendant challenged the conviction upon the grounds that a defendant cannot be convicted under the vote buying statute where the votes bought were for local, not federal, candidates.

★ Holding: The court held that the term

“election” in the vote buying statute refers to the casting of a whole ballot, regardless of how many individual races are included. Thus, if federal candidates are on the same ballot as local candidates, the election is covered by § 1973i, even if no votes are actually purchased for the federal candidates. Thus, the conviction was affirmed.

II. Sentencing Guidelines

- § 2D1.1(b)(5) - *Substantial Risk of Harm*
U.S. v. Davidson, 03-6544 (5/18/05)

- ▶ Defendants were convicted of meth manufacturing and at sentencing, they both received three-level enhancements for creating a substantial risk of harm pursuant to U.S.S.G. § 2D1.1(b)(5)(B). The district court based this conclusion upon the facts that Defendants had no plan for disposal of the hazardous substances, and because, although the lab was in a remote location, the pad lock on the door to the barn would prevent those locked inside from getting out in an emergency, and those locked outside from getting in to provide assistance. Defendants appealed, and during the pendency of the appeal *Booker* was decided.

- ★ Holding: Pursuant to application note 20 to § 2D1.1, in determining whether the substantial risk of harm enhancement applies, courts must consider (1) the quantity of hazardous materials and the manner in which stored, (2) manner of disposal and likelihood of release, (3) duration and extent of operation, and (4) location and number of lives at risk. The court held that the district court’s reasons did not support the enhancement because the absence of plans for disposal, in and of itself, is not sufficient to support the second factor, and because it felt that the padlock on the barn door actually decreased the risk of harm to others. Accordingly, the court held that the meth lab did not pose a substantial risk of harm and ruled that the three-level enhancement was not proper. The case was remanded for

resentencing in light of *Booker*.

- § 2G2.2/2G2.4 - *Child Pornography*
U.S. v. Williams, 04-6191 (6/9/05)

- ▶ Defendant was convicted of two counts of possession of child pornography in violation of 18 U.S.C. § 2252. At sentencing, the district court applied the 2001 version of the guidelines, and applied § 2G2.2, which covers “trafficking” in child pornography. On appeal, defendant argued that the court should have applied § 2G2.4 of the guidelines for “possession,” which yields a lower offense level. During the pendency of the appeal, *Booker* was decided.

- ★ Holding: The court held that, pursuant to the 2001 version of the guidelines, where a defendant merely possesses child pornography, but does not transmit it, the proper guideline is § 2G2.4, and not § 2G2.2. Accordingly, the case was reversed and remanded for resentencing in light of *Booker*. The child pornography guidelines have since been amended, and § 2G2.4 has been deleted.

- § 2N2.1 - *Regulatory Offenses*
U.S. v. Gibson, 03-6592 (5/24/05)

- ▶ Several defendants were convicted of violating federal regulations regarding coal mine health and safety standards, and at sentencing, the district court applied U.S.S.G. § 2N2.1 to determine the sentence. Defendants appealed application of the guideline to the case, instead advocating for application of the fraud guideline at § 2B1.1.

- ★ Holding: The court held that, where no guideline specifically covers an offense, the district court must choose the most analogous guideline, and that the court’s determination would only be reversed if unreasonable. The court held that, even though § 2N2.1 by its terms deals with regulations regarding food and drugs, it is the most analogous guideline for violation of federal coal mine safety standards. Accordingly, application of the guideline was

appropriate.

• § 2S1.2 - Money Laundering
U.S. v. Harmon, 03-1925 (5/12/05)

▶ Defendant was charged with multiple counts of wire fraud and two counts of money laundering, but worked out a plea agreement for one count of money laundering pursuant to 18 U.S.C. § 1957. At sentencing, the district court applied U.S.S.G. § 2S1.2 and concluded that defendant was responsible not only for the dollar amount of the money laundering, but also the entire dollar amount involved in the wire fraud counts, pursuant to the relevant conduct provisions of §1B1.3. The district court then sentenced defendant to serve 37 months in prison. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that, where a defendant is convicted of money laundering, it is not proper to group the loss from dismissed wire fraud counts with the loss for the money laundering conviction. The court reasoned that, under the relevant conduct guideline, the harm being measured in the money laundering guideline is different in kind than the harm being measured in the fraud guideline (§ 2B1.1). Thus, defendant's sentence should have been calculated based solely on the loss from his money laundering activities, not the wire fraud loss. Accordingly, defendant's sentence was reversed and the case remanded for resentencing in light of *Booker*. The court noted that it was applying the 1998 version of § 2S1.2. The court indicated that the section was amended effective November 1, 2001, and that the court's holding would be "highly dubious" under the amended version of the section because a new application note to the section suggests that grouping of such counts may be appropriate.

• § 2X1.1(a) - Conspiracy
U.S. v. Gibson, 03-6592 (5/24/05)

▶ Several defendants were convicted of

conspiracy to make false statements based upon misrepresentations made during a federal coal mine safety investigation. The district court applied U.S.S.G. § 2X1.1(a) to the conspiracy conviction, and by cross-reference, applied the fraud guideline at § 2B1.1. The government contended that, pursuant to § 2B1.1(b)(11), the court should apply a sentence enhancement because defendants created a risk of death or serious bodily injury to the mine employees. The district court refused to apply the enhancement, finding that defendants did not intend to put the employees at risk. The government appealed, claiming that it did not have to prove intent.

★ Holding: The court held that, pursuant to § 2X1.1(a), enhancements from cross-referenced sections, *i.e.*, § 2B1.1(b)(11), can only be applied to a defendant for "any intended offense conduct that can be established with reasonable certainty." Thus, § 2X1.1 requires that the government prove intent in order to establish the risk of injury enhancement found in § 2B1.1(b)(11). The court agreed with the district court that the facts did not establish defendants' intent, and accordingly affirmed the district court's decision.

• § 3B1.1 - Leadership - Double Counting
U.S. v. Gibson, 03-6592 (5/24/05)

▶ Defendants were convicted under the Mine Safety and Health Act (MSHA) for violations of coal mine safety regulations. At sentencing, the government advocated for a four-level sentence enhancement based upon defendants' leadership (U.S.S.G. § 3B1.1) in the mine activities. The district court refused to apply the enhancement because the MSHA punishes only mine operators and thus, the leadership is assumed in the offense. To apply the enhancement for leadership would be impermissible double counting. The government appealed.

★ Holding: Double counting occurs where

“precisely the same aspect of a defendant’s conduct factors into his sentence in two separate ways.” The court agreed that only mine operators can be charged under the MSHA. Therefore, the court concluded that defendants’ leadership roles at the mine were factored into the base offense level for the offense. Accordingly, applying the leadership role enhancement of § 3B1.1 would constitute impermissible double counting.

• § 3C1.1 - *Obstruction of Justice*
U.S. v. Gibson, 03-6592 (5/24/05)

► Defendant corporation was convicted of violating mine safety regulations and at sentencing, the government argued for a two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1. The government claimed that defendant had warned its employees of the pending inspection, falsified its internal reports, and lied to the federal inspectors. The district court refused to apply the enhancement because it believed that such conduct did not occur during the investigation of the offense. The government appealed.

★ Holding: The court found that the district court’s reasoning was flawed because obstruction of justice may apply where a defendant acts with intent to impede an investigation that eventually results in the defendant’s conviction. Nonetheless, the court found that the obstructive conduct was not sufficiently egregious to warrant the enhancement. The court noted that Application Note 5 to § 3C1.1 indicated that avoiding arrest, providing misleading information, or even making false statements to federal officers does not warrant application of the enhancement. The court found that defendant’s conduct was analogous to the conduct mentioned in the note, and accordingly affirmed the district court’s decision.

III. Evidence

• 403 - *Unfair Prejudice*

U.S. v. Wesley, 04-1626 (5/18/05)

► Defendant was charged with attempted bank robbery, and at trial the government introduced a tape recording of defendant wherein, during the course of planning the robbery, he talked about a prior conviction and prison sentence he had served. Defendant was convicted and challenged the admission of the statement on appeal.

★ Holding: The court first noted that the evidence was proper under FRE 404(b) as background evidence that was part of the *res gestae* of the offense. The court then held that the evidence should have been excluded under FRE 403 because the unfair prejudice substantially outweighed the probative value. The court noted that the statement was relevant to show defendant’s intent to commit bank robbery, but that it was “hardly the only or the strongest evidence in that regard.” The court also commented that the case was very close on the sufficiency of the evidence. Accordingly, the case was reversed and remanded for a new trial.

• 403 - *Unfair Prejudice*

U.S. v. Dixon, 04-5670 (6/27/05)

► Defendant was charged with bank extortion. Defendant allegedly confessed to a man named Duke. Duke told a woman named Weems about defendant’s confession and Weems confronted defendant about it. When Weems confronted defendant, he lost all the color in his face. The government proposed to present the testimony of Weems at trial to say that defendant lost all the color in his face when she told him that Duke had claimed that he confessed. The district court ruled pretrial that the testimony of Weems was inadmissible, and the government appealed.

★ Holding: The court held that Weems’ testimony was inadmissible under FRE 403. The probative value of the loss of color in

defendant's face was low, given that it could have been due to any number of factors other than guilt. The prejudicial value was extremely high given that a jury would likely go beyond the basis for which the testimony was offered and consider the substantive content of defendant's alleged confession to Duke. This was particularly unfair where Duke was not going to testify as a witness because, at the time of trial, he did not recall the confession ever occurring. Thus, the district court's ruling was affirmed.

- *404(b) - Background Evidence*

U.S. v. Frederick, 03-1895 (5/5/05)

- ▶ Defendant was charged with being a felon in possession of a firearm, distributing marijuana, and a § 924(c) charge. At trial, a witness testified that he had sold defendant the gun in question, that the gun was purchased by defendant to protect himself from drug dealers who were after him, and that the witness and defendant had dealt drugs and guns previously. Defendant appealed and argued that the testimony should have been excluded pursuant to FRE 404(b).

- ★ Holding: Evidence of other acts of a defendant may be admitted as *res gestae* or "background" evidence. Under such a rule, the prior acts must be "inextricably intertwined" with the charged offense. The court found the prior dealings the witness had with defendant fell within the background evidence exception and were properly admitted to complete the story of the sale of the gun to defendant. Thus, the conviction was affirmed.

- *701 - Lay Witness Identification Testimony*
U.S. v. Dixon, 04-5670 (6/27/05)

- ▶ Surveillance photos captured pictures of a bank extortionist. Defendant was charged with attempted bank extortion, and the government proposed to present the testimony of three witnesses who knew defendant and would say that it was defendant in the bank surveillance

photos. The district court ruled pretrial that the three witnesses' testimony identifying defendant was not admissible, and the government appealed.

- ★ Holding: Pursuant to FRE 701(b), lay witness testimony identifying a suspect in a picture is only admissible if "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." The court considers four factors: (1) the witness' familiarity with the defendant's appearance; (2) such familiarity at the time the photo was taken; (3) whether the defendant disguised her appearance at the time of the photo; and (4) whether defendant changed appearance prior to trial. Regarding two of the witnesses, the court held that neither of the witnesses were familiar with defendant at the time the picture was taken, that the picture of the robber was a clear shot from the waist up, and that defendant had not altered his appearance prior to trial. Thus, the testimony of the two witnesses was inadmissible.

Regarding the third witness, the testimony was properly excluded because substantial questions of bias regarding the witness could not be explored by defendant because of the potential prejudicial effect on defendant's case. In order to effectively cross examine the witness' bias, defendant would have to bring up issues of spousal abuse and nonpayment of child support. Thus, the court affirmed the district court's ruling excluding all of the testimony.

- *803(2) - Excited Utterance*

U.S. v. Arnold, 04-5384 (6/21/05)

- ▶ Defendant was charged with being a felon in possession of a firearm. The charge was based in part upon the statements of a witness who failed to appear for trial. The district court admitted into evidence three hearsay statements of the witness claiming that defendant pointed a gun at her. The statements were (1) a 911

call, (2) the witness' statement to police when the police arrived, and (3) the witness' statement to police when defendant arrived. All three statements were admitted pursuant to FRE 803(2) as excited utterances. Defendant challenged the admission of these statements on appeal.

★ Holding: Regarding the first two statements, (the 911 call and the witness' statement to police when the police arrived), the court held that they were not properly admissible as excited utterances because there was absolutely no evidence in the record as to the time period between when defendant allegedly pointed the gun at the witness and when the witness made the statements. The court ruled that the timing of a statement in relation to the event is a "critical - if not the most important - factor" in analyzing whether a statement is an excited utterance. Regarding the third statement, (the witness' statement to police when defendant arrived) the court concluded that it could be an excited utterance, because defendant's arrival could have been a sufficiently startling event, but the court decided not to reach the question because it found a Confrontation Clause violation. (*See infra*, VI. Sixth Amendment).

• *901 - Authentication*

U.S. v. Damrah, 04-4216 (5/6/05)

▶ Defendant was indicted for making false statements on a citizenship application regarding his affiliation with certain terrorist-related groups. At trial, the government presented video tapes of defendant engaged in fund raising events for the groups. On appeal, Defendant argued that the tapes had not been properly authenticated.

★ Holding: Relying on an advisory note to FRE 901(b)(4), the court held that video tapes may be self-authenticating by distinctive characteristics. Evidence of how the tapes were made and handled is not required. The court ruled that the tapes may be sufficiently

authenticated if they appear to be what they purport to be and the defense is not able to make any serious challenge to their authenticity. The court also emphasized that the tapes were corroborated by other parts of the government's case. Thus, the admission of the tapes was affirmed.

IV. Fourth Amendment

• *Reasonable Expectation of Privacy*

U.S. v. Hunyady, No. 04-1325 (5/17/05)

▶ Defendant lived with his father without a lease or paying any rent, and upon his father's death, defendant continued to live in the home. The father's will made no provision for defendant, and the personal representative of the estate verbally ordered defendant to move out, and then changed the locks on the doors. Defendant broke in through a basement window, and continued to occasionally stay in the home, while maintaining another residence. One day when the personal representative was in the home to prepare it for sale, he observed two machine guns, which he photographed and reported to the ATF. The ATF agents subsequently searched the home with the consent of the representative, and Defendant was then charged with weapons possession offenses. Defendant moved to suppress the guns, the district court denied the motion, and defendant appealed.

★ Holding: A defendant must satisfy a two-pronged test to show a reasonable expectation of privacy. First, the defendant must manifest a subjective expectation of privacy, and second, such expectation must be reasonable in the eyes of society. In this case, the court found that defendant had neither a subjective nor an objective expectation of privacy. In spite of the parties' agreement to the contrary, the court held that defendant did not qualify as a "tenant by sufferance" because the personal representative had both ordered defendant off the property and changed the locks. Thus, defendant was a trespasser. Further, the court

considered that defendant knew that the representative was constantly at the home getting it ready for sale, and that defendant also maintained a separate residence. Thus, the court held that defendant had no reasonable expectation of privacy in the home, and affirmed the suppression. Alternatively, the court held that it would affirm the suppression upon the grounds that the personal representative had at least “common authority” to consent to a search of the premises.

- *Search Warrant - Good Faith*

U.S. v. Laughton, 03-1202 (5/17/05)

- ▶ Police officers requested a search warrant, and indicated in the affidavit that an informant had purchased drugs from defendant. The officers, however, failed to make a connection between the place to be searched and the drug purchases. The officers knew that the drugs had been purchased from the defendant at his home, but such information was not conveyed in the affidavit. Defendant was charged with distribution of narcotics, and moved to suppress the evidence by alleging that the affidavit did not establish probable cause. The district court agreed that the affidavit did not establish probable cause, but refused to suppress the evidence because the officers acted in good faith. Defendant appealed.

- ★ Holding: An officer may not rely on the good faith exception to the warrant requirement if the affidavit requesting the warrant is “so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable,” also known as a “bare bones” affidavit. The court held that the affidavit was completely lacking in any connection between the place to be searched and the illegal activity. Accordingly, the court ruled that the warrant was not saved by good faith. Notably, the court held that, in considering whether an affidavit is “bare bones” or not, the court may only consider the face of the affidavit itself, and not other information possessed by the

officers. Thus, the case was reversed.

- *Warrant Exception-Exigent Circumstance*
U.S. v. Plavcak, 03-6256 (6/6/05)

- ▶ INS agents received a tip that Defendant was burning documentary evidence pertinent to an alien smuggling investigation. The agents had seen the documents earlier in the day at a residence where the agents were arresting an individual. Based upon the tip, the agents entered the residence identified by the informant, recovered some of the documents, and arrested Defendant after he fled. Defendant challenged whether exigent circumstances validated the warrantless entry into the residence to seize the documents. The district court found no exigent circumstances and the government appealed.

- ★ Holding: The court held that, in evaluating exigent circumstances, consideration must be given to (1) whether delay in obtaining the warrant would be acceptable under the circumstances, (2) the governmental interest being served versus the privacy interest at stake, and (3) whether the defendant’s actions diminished her privacy interest. First, the court ruled that the fact that the agents saw the documents, combined with the informant’s tip about their destruction, demonstrated that delay in obtaining a warrant was unacceptable. Second, the court held that the government interest was compelling because the documents were relevant to a wide-ranging alien smuggling investigation. Third, the court found that Defendant forfeited any reasonable expectation of privacy by taking the documents to the apartment of a third person and burning them. Accordingly, the court found exigent circumstances and reversed the district court ruling.

- *Reasonable Suspicion to Stop*
U.S. v. Marxen, 04-6053 (6/14/05)

- ▶ Defendant’s car was suspected of being used in the commission of a robbery of a

convenience store, but Defendant did not meet the description of the robber. Police conducted surveillance of Defendant for eleven days, but he did nothing suspicious, so police decided to stop him and the car. Defendant later confessed and was charged with several Hobb's Act robberies. The district court suppressed all evidence and statements obtained as a result of the stop of defendant based upon a lack of reasonable suspicion for the stop. The government appealed.

★ Holding: The court held that officers may stop a vehicle if they possess reasonable suspicion that the vehicle may contain evidence of a crime, even if the officers do not believe that the driver committed the crime. The court found that the officers did have reasonable suspicion that the car contained evidence because an eyewitness got the license plate number of the getaway car, and it matched defendant's car. Thus, even though defendant did not match the description of the robbers, the stop was lawful and defendant's subsequent statements were admissible.

V. Fifth Amendment

- *Due Process - Vindictive Prosecution*

U.S. v. Poole, 04-5016 (5/10/05)

▶ Defendant was indicted for being a felon in possession of a firearm and the trial ended in a mistrial due to jury deadlock. The government then returned a superceding indictment adding two additional charges for possession of cocaine with intent to distribute and possession of a firearm in relation to a drug trafficking offense. The additional charges arose out of the same set of facts as the original indictment. Defendant challenged the superceding indictment as being a vindictive prosecution; the district court denied the motion. Defendant was convicted in the second trial of all counts and sentenced to 322 months in prison.

★ Holding: Prosecutorial vindictiveness may be shown through one of two approaches.

Actual vindictiveness may be proven by objective evidence that a prosecutor acted in order to punish defendant for exercising his rights. In the case, there was no evidence of actual vindictiveness. Second, a defendant may show a presumption of vindictiveness by weighing the prosecutor's stake in preventing the assertion of the protected right and the reasonableness of the prosecutor's actions. If a *prima facie* case is made by defendant, the government may rebut the presumption by showing that there was objective information in the record to justify the additional charges. In the case, the court found that the prosecutor did not object to the mistrial, but agreed to it. Further, the court found that the government's decision to add charges in the superceding indictment was based upon the government's desire to introduce evidence about the drug transaction in which defendant was engaged shortly before the officers saw the gun. The drug evidence had been excluded by the district court at the first trial because it was not relevant to the felon in possession of a firearm charge. Accordingly, the court found the prosecutor's actions to be reasonable, and sufficient to rebut any presumption, and the conviction was affirmed.

VI. Sixth Amendment

- *Confrontation Clause*

U.S. v. Pugh, 03-3241 (5/3/05)

▶ Defendants were charged with bank robbery. At trial, a police officer testified that a witness had told him that defendants were the two bank robbers that were shown in a picture from a bank surveillance tape. Defendants objected to the testimony, but the district court admitted the evidence. Defendants were convicted and challenged the admission of the hearsay statement on appeal.

★ Holding: Pursuant to *Crawford v. Washington*, in analyzing a Confrontation Clause claim the court must consider whether (1) the statement was testimonial, (2) the

statement was hearsay, and (3) any error in admitting the statement was harmless. First, the court concluded that the statement of the witness was testimonial because it was made to a police officer during interrogation, and a reasonable person would have assumed that the police would use the statement against the accused. Second, the court found that the statement was hearsay because it was definitely admitted for the truth of the matter asserted. Third, the court found that the admission of the statement was not harmless because there was no other evidence to place defendants at the scene of the crime and it was “more probable than not” that the evidence “materially affected the verdict.” Accordingly, the conviction was reversed.

- *Confrontation Clause*

U.S. v. Gibson, 03-6592 (5/24/05)

- ▶ During trial for conspiracy, false statement, and violations of federal mine safety law, the government introduced into evidence double hearsay statements that were first made by one defendant, and then repeated by a co-defendant. Defendant challenged the statements on appeal under the Confrontation Clause.

- ★ Holding: The court first held that the statements were non-testimonial and thus, did not implicate the Supreme Court decision in *Crawford v. Washington*. The court then applied the traditional rule for non-testimonial hearsay statements: hearsay statements are admissible under the Confrontation Clause only if the evidence falls within a firmly rooted hearsay exception, or if it contains particularized guarantees of trustworthiness. The court found that the hearsay testimony was particularly trustworthy because it was made between co-defendants and not to the police, and because the declarants were not “attempting to curry favor or shift the blame.” Accordingly, admission of the statements was affirmed.

- *Confrontation Clause*

U.S. v. Arnold, 04-5384 (6/21/05)

- ▶ Defendant was convicted of being a felon in possession of a firearm based upon the statements of an unavailable witness who claimed that defendant threatened her with a gun. The witness’ hearsay statements were admitted at trial including a 911 call and statements to police officers at the scene. Defendant challenged the hearsay statements on appeal as a violation of his rights under the Confrontation Clause.

- ★ Holding: The court found that the statements of the witness during the 911 call and to the police at the scene were testimonial in nature, and thus violated the Confrontation Clause. Relying on its prior decision in *Cromer*, and the Supreme Court ruling in *Crawford*, the court held that statements made to the police describing criminal activity are almost always testimonial. Accordingly, the court ruled that admission of the hearsay statements was reversible error.

- *Confrontation Clause*

Madrigal v. Bagley, 03-4118 (6/27/05)

- ▶ Defendant was charged in state court with aggravated murder and aggravated robbery for killing a clerk during the robbery of a restaurant. There was no physical evidence to tie defendant to the robbery, and the eyewitness accounts were equivocal. A codefendant, however, told police that he was the getaway driver, and that defendant killed the clerk. The codefendant refused to testify at defendant’s trial based upon the Fifth Amendment, and the state then introduced the codefendant’s 79 page statement to the jury. Defendant appealed through the state court system based upon a Confrontation Clause violation. The Ohio Supreme Court found a Confrontation Clause violation, but found the error harmless. Defendant filed a habeas petition in federal district court, and the district court granted habeas relief. The state appealed.

★ Holding: The court first held, pursuant to agreement of the parties, that admission of the codefendant's statements violated the Confrontation Clause. The court then analyzed five factors to determine if the error was harmless: (1) importance of the testimony in the state's case, (2) whether the testimony was cumulative, (3) presence of corroborating or contradicting evidence, (4) extent of cross examination otherwise permitted, and (5) overall strength of prosecution's case. The court ruled that the codefendant's testimony was a key part of the state's case, and that the evidence was otherwise weak. Accordingly, the Sixth Circuit affirmed the district court's ruling vacating defendant's conviction and death sentence.

• *Booker*

U.S. v. Poole, 04-5016 (5/10/05)

► Defendant was convicted of being a felon in possession of a firearm, possession of cocaine with intent to distribute, and possession of a firearm in relation to a drug trafficking crime. At sentencing, the district court imposed a sentence of 322 months in prison. During the pendency of the appeal, *Booker* was decided.

★ Holding: The court found no Sixth Amendment violation in defendant's sentence because any enhancements defendant received at sentencing beyond his convictions were based upon his criminal history. The court held that *Booker's* Sixth Amendment bar does not apply to the fact of a prior conviction. Nonetheless, pursuant to the court's prior decision in *U.S. v. Barnett*, prejudice to a defendant is presumed where the district court sentences under a mandatory guideline scheme. The court found no "clear and specific" evidence to rebut the presumption, and reversed the sentence, remanding the case for resentencing in light of *Booker*.

• *Booker*

U.S. v. Jackson, 04-3074 (5/24/05)

► Defendant pled guilty to being a felon in possession of a firearm, and at sentencing the district court awarded defendant a downward departure from a sentencing range of 27-33 months down to a sentence of probation, with 6 months of house arrest. The court based its departure upon several discouraged and prohibited factors under the guidelines, and provided little reasoning or rationale as to the grounds for departing or the extent of the departure. The government appealed, and during the pendency of the appeal, *Booker* was decided.

★ Holding: The court held that the standard of review for a sentence after *Booker* is reasonableness. The court ruled that, after *Booker*, a district court must articulate its reasons for the sentence imposed based upon its consideration of the sentencing factors listed in 18 U.S.C. § 3553. This includes "acknowledgment of the defendant's applicable guideline range as well as a discussion of the reasonableness of a variation from that range." Further, the court must consider the "advisory provisions of the guidelines" and the other factors identified in § 3553. The court found that the district court had not adequately developed its reasons for the variation from the guidelines, and accordingly reversed the sentence and remanded for resentencing in light of *Booker*.

• *Booker - Forfeiture*

U.S. v. Hall, 04-5047 (5/31/05)

► As part of a bank fraud conviction, defendant was ordered to forfeit the proceeds of the illegal activity. Defendant challenged on appeal that, pursuant to *Booker* and *Apprendi*, the government could not obtain a forfeiture without proving the necessary elements to a jury beyond a reasonable doubt.

★ Holding: The court held that the Sixth Amendment rights of *Booker* and *Apprendi* do

not apply to forfeiture proceedings.

VII. Other Constitutional Rulings

• *Elections/Necessary and Proper Clauses* U.S. v. Slone, 03-6427 (6/3/05)

▶ Defendant was convicted of illegally buying votes, in violation of 42 U.S.C. § 1973i, in a local election wherein a federal candidate was also on the ballot. On appeal, defendant challenged the statute, claiming that it was outside Congress' power under the Elections and the Necessary and Proper Clauses.

★ Holding: The court held that under both the Elections Clause and the Necessary and Proper Clause, Congress has the power to regulate state and local elections in which a federal candidate is on the ballot. Accordingly, the conviction was affirmed.

• *Commerce Clause* U.S. v. Sawyers, 02-5853 (6/13/05)

▶ Defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). On appeal, defendant challenged the conviction based upon a violation of the Commerce Clause because the government had failed to prove a substantial connection to interstate commerce.

★ Holding: The court held that a defendant's possession of a firearm that had previously traveled in interstate commerce was sufficient to establish the interstate commerce connection, and that such rule had not been overruled by the Supreme Court decisions in *Lopez* and *Jones*.

• *First Amendment* Mezibov v. Allen, 03-3973 (6/16/05)

▶ Mezibov is a criminal defense attorney who represented a defendant in Hamilton County Court. After Mezibov's client was convicted, Allen, the Hamilton County Prosecutor, made disparaging comments in the media about Mezibov's performance as an attorney. Mezibov then sued Allen in federal

court pursuant to 42 U.S.C. § 1983 claiming that Allen had uttered defamatory comments in retaliation for Mezibov's exercise of his First Amendment rights "to file motions and raise legitimate defenses" on behalf of his client. The district court dismissed the action, and Mezibov appealed.

★ Holding: The court held that an attorney has no protected First Amendment right in advocating for a client in a courtroom. Further, and alternatively, the court ruled that "a criminal defense attorney of ordinary firmness would not have been chilled" from representing his client as a consequence of Allen's actions. Thus, the district court decision was affirmed.

VIII. Defenses

• *Rule 29 Motions for Acquittal* U.S. v. Wesley, 04-1626 (5/18/05)

▶ Defendant was charged with attempted bank robbery and at the close of the case made a Rule 29 motion, referencing the elements of attempted bank robbery. Defendant was convicted and appealed. Defendant raised on appeal that "actual intimidation" is a required element of bank robbery, although Defendant did not argue during the Rule 29 that it was an element of the offense.

★ Holding: When a defendant makes a Rule 29 motion on specific grounds, all grounds not raised in the motion are waived on appeal when challenging the sufficiency of the evidence. In contrast, a Rule 29 motion that is a "general challenge to the sufficiency of the evidence" allows a defendant to raise any sufficiency of the evidence challenge on appeal. In this case, the court held that because defendant had specifically referenced the elements of attempted bank robbery in the Rule 29 motion, the motion was specific, and not general, in nature. Thus, since the "actual intimidation" issue was not argued in the Rule 29, it was waived on appeal.

• *Duplicitous Indictment*

U.S. v. Damrah, 04-4216 (5/6/05)

► Defendant was indicted for unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a) and (b) for making false statements in a citizenship application. The one count indictment charged Defendant with procuring naturalization both as being “contrary to law” (§ 1425(a)) and “to which [he] was is not entitled” (§ 1425(b)). Defendant challenged the indictment as being duplicitous for charging two different crimes in one count. The district court agreed that the indictment was duplicitous, but found any error harmless and curable by a special verdict form for the jury.

★ Holding: An indictment should be dismissed for duplicity if two distinct crimes are charged in a single count. It is not duplicitous, however, to allege in one count that separate means have been used to commit a single offense. The court concluded that the “contrary to law” and “to which he is not entitled” language of § 1425(a) and (b) were not separate elements of the offense, but were merely different means to satisfy the *mens rea* element of the statute. Accordingly, the court found no duplicity in the indictment.

• *Venue*

U.S. v. Grenoble, 04-3469 (6/29/05)

► Defendant was charged with wire fraud in the Northern District of Ohio (ND Ohio). At trial, defendant moved for a Rule 29 dismissal claiming that the government failed to establish venue in the district. The district court denied the motion, and defendant appealed.

★ Holding: The court first held that venue is ordinarily waived if not raised in a pretrial motion. The exception, however, is where the venue issue is not apparent on the face of the indictment, and defendant does not have notice of the potential defect through other means. The court then held that venue was proper in the ND Ohio because defendant had sent faxes

to victims of the offense in the ND Ohio which induced them to invest their funds with defendant. Thus, the district court ruling was affirmed.

• *18 U.S.C. § 3282 - Statute of Limitations*
U.S. v. Grenoble, 04-3469 (6/29/05)

► Defendant was charged with conspiracy to commit wire fraud, and the indictment alleged that the last overt act occurred in January 1997. In March 2000, the government requested that the five year statute of limitations (SOL) under 18 U.S.C. § 3282 be tolled pursuant to §3292 because the government sought to obtain records from Canada. The government received the records in November 2001, and then indicted defendant in December 2002. At trial, the district court granted the government’s motion to strike the allegation that the last overt act occurred in January 1997, and held that the last overt act had occurred in August 1996. Defendant argued on appeal that the SOL had expired on the conspiracy charge prior to indictment.

★ Holding: The court held that the SOL had not expired. First, the court found that the district court properly ruled that the last overt act occurred in August 1996, the date the last of the funds were obtained from the victims. The January 1997 acts were merely acts of concealment where defendant talked on the phone to victims to try to lull them into the belief that their funds were safe. “Lulling” calls are not normally overt acts that are part of a conspiracy for SOL purposes. Second, the court held that the SOL was effectively tolled by the government’s request for foreign documents. The tolling provision in the statute, §3292(a)(1), allows for tolling of the SOL, but limits the amount of time that can be tolled to six months if the government receives the foreign documents prior to what would have been the expiration date of the SOL.

The court ruled that, because the district court found that the last overt act occurred in

August 1996, the SOL would have expired in August 2001. The government received the foreign documents in November 2001, after the SOL would have expired. Thus, the six month tolling limitation was not applicable and the indictment was timely filed. If, however, January 1997 (as originally alleged in the indictment) was the date of the last overt act, then foreign documents would have been received within the SOL time period, and time could have only been tolled for six months, thus making the indictment untimely. Accordingly, the district court ruling was affirmed.

IX. Plea & Sentencing Hearings

- *Plea Agreements - Binding Agreements*
U.S. v. Davidson, 03-6544 (5/18/05)

- ▶ Defendant was charged in a meth case and he entered into a plea agreement with the government wherein the government “agreed and stipulated” that he should not receive a two-level firearm enhancement pursuant to the sentencing guidelines. In the presentence report, the probation officer recommended imposition of the firearm enhancement, and the district court imposed the enhancement, declining to follow the plea agreement. On appeal, defendant claimed that the plea agreement should have been considered a binding agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C).

- ★ Holding: The court held that the district court was correct in determining that the plea agreement was not binding pursuant to Rule 11(c)(1)(C) for three reasons: (1) Statements in the transcript from the plea hearing indicated that the parties understood that the agreement was not binding; (2) policy statements in the guidelines make clear that courts are not ordinarily bound by fact statements in plea agreements; and (3) Rule 11(c) requires the district court to inform a defendant as to the extent a plea agreement may be binding on the court, and no such statement was in the record.

Notably, two of the three judges on the panel admonished the AUSA on the case for failing to object to the presentence report or actively recommend that the firearm enhancement should not apply, stating that “such acts and omissions fall far below the standard expected of federal prosecutors.”

- *Plea Agreements - Appeal Waivers*
U.S. v. Luebbert, 03-5598 (6/1/05)

- ▶ Defendant entered into a plea agreement with the government wherein he agreed to waive the right to appeal his sentence on any ground other than a sentence imposed “in excess of the statutory maximum,” or any upward departure from the guideline range determined by the district court. Defendant appealed, and the appeal was dismissed by the Sixth Circuit based upon the appeal waiver. The Supreme Court then granted *certiorari* and remanded for reconsideration in light of *Booker*.

- ★ Holding: The court upheld its prior dismissal of the appeal based upon the appeal waiver. Relying on prior circuit precedent, the court held that waiver of appeal provisions in a plea agreement effectively waive *Booker*-type violations. Further, the court held that a *Booker* violation was not excepted by the language of the plea agreement. The court ruled that the phrase excepting sentences “in excess of the statutory maximum” meant only a sentence that was above the maximum sentence mandated by statute for the offense. Thus, the appeal was dismissed. Judge Moore dissented and stated that the plea agreement language was ambiguous because, post-*Booker*, the language “in excess of the statutory maximum” could mean a sentence in excess of the maximum sentence a judge could impose based on the facts found by the jury or to which the defendant admitted in a plea agreement.

• *Sentencing - Victims' Letters to Court*
U.S. v. Meeker, 03-1873 (6/17/05)

▶ Defendant was convicted of fraud offenses, and at sentencing, the district court considered the letters of numerous victims of defendant's fraud. Defendant received only two of the letters, but did not request to see the letters nor object to the district court's consideration of them. On appeal, defendant challenged the district court's use of the letters at sentencing.

★ Holding: The court found no plain error in the district court's consideration of the letters. The court noted that normally Fed. R. Crim. P. 32 requires that a defendant be able to review any information considered by the district court in sentencing. In the case, however, the letters dealt with "heart-wrenching descriptions" of the victims' "emotional distress," which the court found were "essentially irrebuttable." Thus, even if defendant had gotten the letters, it was unlikely the outcome would have been different.

• *Sentencing - Notice of Upward Departure*
U.S. v. Meeker, 03-1873 (6/17/05)

▶ Defendant was convicted of fraud offenses, and the day before sentencing, the district court notified defendant's counsel that it was considering an upward departure from the guideline range. Defendant did not object to the timeliness or content of the notice, but disputed it on appeal.

★ Holding: Pursuant to Fed. R. Crim. P. 32(h), a district court must give "reasonable" notice of any upward departure. The court held that the reasonableness inquiry turns on the complexity of the issues, and the extent to which defendant may have already contemplated the grounds for upward departure. In this case, the court found that the presentence report listed five pages of victim names and the amount of their losses. The district court notified defendant that it was considering a departure based upon an application note to the guidelines that allowed

upward departure based upon harm to the victims. The Sixth Circuit concluded that the departure was reasonably foreseeable to defendant, and that one day was adequate notice of the possibility of departure. The court further held that the extent of the upward departure was reasonable. Nonetheless, the case was remanded for reconsideration in light of *Booker*.

X. Jury Issues

• *Court Comments on Evidence*

U.S. v. Frederick, 03-1895 (5/5/05)

▶ Defendant was charged with drug and weapon offenses, and during the instructions to the jury, the district court commented several times that testimony had proven certain facts pertinent to the elements of the offenses with which defendant was charged. Defendant objected to the court's statements, and the court issued a curative instruction. Defendant challenged the court's comments on appeal.

★ Holding: The court found error in the district court's comments, holding that the district court had suggested that certain factors were uncontested when, in fact, defendant had disputed them. Nonetheless, the court concluded that reversal was not required because the district court had provided an adequate curative instruction upon defendant's request, and the case was not a close one for conviction.

XI. Probation & Supervised Release

• *Parole Revocations*

Vershish v. Commission, 04-5122 (5/2/05)

▶ Defendant was arrested based upon a Parole Commission warrant. Seventeen days after his arrest, defendant was charged with new federal crimes for being a felon in possession of a firearm and possession of false identification. Because of the new charges, the Commission decided to treat the arrest warrant as a detainer, and the Commission declined to provide defendant with a revocation hearing

within 90 days of his arrest, as required by 18 U.S.C. § 4214(c). Defendant subsequently filed a habeas petition claiming that he was denied due process by the failure of the Commission to hold a revocation hearing within 90 days because he was denied the opportunity for a concurrent sentence with his new conviction. The district court denied the petition, and defendant appealed.

★ Holding: The court held that the 90 day rule of § 4212(c) is unequivocal. Once a Commission warrant has been executed, the Commission must comply with the requirements of the rule. Accordingly, the court ordered the district court to grant the writ unless the Commission accorded defendant a revocation hearing, and credited him with all of the time he served in custody since the execution of the warrant.

XII. Appeal

• *Rule 52(b) - Plain Error*

U.S. v. Pugh, 03-3241 (5/3/05)

▶ Defendant and his father were both charged in a bank robbery. At trial, the district court committed reversible error by admitting evidence against both defendants in violation of the Confrontation Clause (*see supra*, VI. Sixth Amendment). Defendant's father raised the confrontation issue on appeal, but defendant failed to raise the issue in his appeal.

★ Holding: Pursuant to Fed. R. Crim. P. 52(b), the court held that it has discretion to raise an issue *sua sponte* for a defendant on appeal in order to correct a plain error. The court held that an obvious error had occurred in the admission of evidence in violation of the Confrontation Clause and to decline to correct the error would deny defendant clear rights guaranteed by the Constitution. Accordingly, the court *sua sponte* raised the issue for defendant and reversed the bank robbery conviction.

• *Suppression Issues First Raised on Appeal* U.S. v. Poole, 04-5016 (5/10/05)

▶ Defendant filed a motion to suppress evidence in the district court challenging police officers' entry into his home to arrest him. The entry was based, in part, upon the officers' observation of a gun in defendant's waistband as he entered the house. On appeal, Defendant raised for the first time that the officers had violated his rights by entering the curtilage of his home unlawfully, and that it was from this vantage point that the officers saw the gun.

★ Holding: The court will not address suppression issues not raised and ruled upon in the district court except in exceptional circumstances or where a plain miscarriage of justice would result. Under the circumstances, the court found no exceptional circumstance or plain miscarriage of justice.

• *18 U.S.C. § 3742(f) &(g) - Law on Remand* U.S. v. Williams, 04-6191 (6/9/05)

▶ Defendant was convicted of child pornography, and at sentencing the district court applied the 2001 version of the sentencing guidelines. While the case was pending on appeal, the child pornography guidelines were amended, deleting the possession of child pornography guideline (§ 2G2.4) and incorporating possession into the trafficking guideline (§ 2G2.2). The Sixth Circuit remanded the case for resentencing and was forced to decide which law should apply on remand.

★ Holding: The court ruled that 18 U.S.C. § 3742(g) requires the district court, upon resentencing pursuant to a remand, to apply the law in effect on the date of the previous sentencing. The court first held that *Booker* did not excise § 3742(g), and thus the provision was still mandatory. The court concluded however, that, pursuant to *Booker*, on remand the district court was required to apply the guidelines that were in effect at the time of the first sentencing (the 2001 version), but to

consider such guidelines as nonmandatory.