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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Issue #5 **Editor: Richard Smith-Monahan** **Nov.-Dec. 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:

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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, go to www.ca6.uscourts.gov and enter the docket number in the opinion search feature. Opinions may also be found in Lexis or Westlaw by entering the docket number in a terms and connectors search in the Supreme Court or Sixth Circuit database.

NEW FEDERAL DEFENDER WEBSITE

The Federal Public Defender's Office for the Southern District of Ohio has created a new website for use by attorneys, judges, and the general public. Each issue of Precedential Value will appear on the website along with a Combined Outline of all cases previously published in P.V. since its inception in March of 2005. The address for the website is www.fpd-ohs.org.

SUPREME COURT DECISIONS

There are no Supreme Court decisions to report for this issue.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 U.S.C. § 922(g) - Felon in Possession*

U.S. v. Arnold, 04-5384 (11/23/05)

‣ 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. The Sixth Circuit found the evidence insufficient to support the conviction, and held that defendant's Sixth Amendment right to confrontation had been violated by admission of the unavailable witness' statements. (*See* P.V., Issue 2). The government requested rehearing *en banc*, and the original three judge panel issued an amended decision.

⋆ Holding: In an amended opinion, the two-judge majority found that the evidence was insufficient to support the § 922(g) conviction. The court ruled that possession is not established by the mere fact that a gun is found under the passenger seat where the passenger is merely an occupant of the car. Further, the court held that the hearsay statements of the witness were insufficient as corroboration that defendant possessed the gun because (1) there was no evidence to establish when the witness had allegedly seen defendant with the gun, and (2) the witness' description of the gun was so generic that it could not support an inference that it was the same gun that was under the seat. Accordingly, the conviction was reversed. Because the court decided the case based upon the sufficiency of the evidence, it withdrew its prior opinion regarding the Confrontation Clause issue. (*See infra*, VI. Sixth Amendment).

• *18 U.S.C. § 922(g) - Felon in Possession*
U.S. v. Hadley, 03-5838 (12/6/05)

▸ Police officers arrived at defendant's home pursuant to a 911 call and defendant's wife came out of the house yelling that defendant had threatened her with a gun. Based upon information from the wife, the officers eventually found a handgun in a dresser in defendant's and his wife's bedroom. While the case was pending, the government obtained a tape recording from the jail wherein defendant told his wife to claim that he didn't have a gun. During the trial, the wife's hearsay statements about defendant threatening her with the gun were admitted into evidence, and defendant was convicted. Defendant appealed.

⋆ Holding: The court found that defendant had at least constructively possessed the firearm. Defendant challenged on appeal that his rights under the Confrontation Clause were violated when his wife's hearsay statements were admitted, but a two-judge majority avoided the constitutional issue by concluding that, even without the wife's statements, the jury had sufficient evidence to convict defendant of constructive possession. In order to prove constructive possession of a firearm, the government must show that the defendant has power and intention to exercise dominion and control over the gun, either directly or through others. In the case, based upon the location of the gun and the statements that defendant made to his wife on the phone from the jail, the court concluded that constructive possession of the firearm was proven. Thus, the conviction was affirmed.

• *18 U.S.C. § 924(c) - Firearm Enhancement*
U.S. v. Savoires, 04-2140 (11/30/05)

▸ Defendant was charged with drug trafficking and a violation of § 924(c). In regard to the § 924(c) charge, the indictment stated that defendant had carried, "used and possessed a firearm during and in relation to and in furtherance of a drug trafficking crime." Defendant argued on appeal that the indictment was duplicitous.

⋆ Holding: The court held that § 924(c) contains two distinct offenses: (1) using or carrying a firearm during and in relation to a crime of violence or drug trafficking; and (2)

possession of a firearm in furtherance of a crime of violence or drug trafficking. The court found that the indictment in the case was duplicitous because it unlawfully charged both of the distinct § 924(c) offenses in one count of the indictment. Further, the court held that the error in the indictment was not cured by the instructions given to the jury which also improperly combined the elements of the two distinct offenses. Accordingly, the conviction was reversed.

• *18 U.S.C. § 1962 - RICO*
U.S. v. Johnson, 04-5110 (11/30/05)

‣ Defendants ran a business wherein they would purchase homes, burn them down, and collect insurance proceeds. Defendants were convicted after trial for violations of the RICO statute. On appeal, defendants challenged the sufficiency of the evidence and claimed that the government had not proven that an enterprise existed and that the enterprise affected interstate commerce.

⋆ Holding: In order to establish an "enterprise," the evidence must show that a group of persons associated together for a common purpose through proof of an ongoing organization that functions as a continuing unit. The court held that the group had a structural hierarchy, that the common purpose of the group was to make money through insurance and bank fraud, that the members considered themselves to be a business, and that the business had substantial continuity. Regarding interstate commerce, the court held that only a minimal impact on interstate commerce is required to support a RICO conviction. The court found that the interstate nexus element was established by the following: (1) one of the houses purchased and burned down was purchased in an interstate transaction; (2) several of the burned down houses were insured out of state; and (3) various interstate phone calls, faxes, and mailings were conducted. Accordingly, the conviction was affirmed.

• *21 U.S.C. § 846 - Drug Conspiracy*
U.S. v. Martinez, 03-3833 (11/17/05)

‣ Defendants were convicted of a drug conspiracy and on appeal challenged the sufficiency of the evidence to establish that they actually participated in the conspiracy.

⋆ Holding: To establish a drug conspiracy, the government must prove (1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy. In a drug distribution "chain" conspiracy, the government need only prove that a defendant realized that she was participating in a joint venture, even if she did not know the identities of all the members and was not involved in all activities. In the case, the court found that the defendants were not merely in buyer-seller relationships with conspirators, but were knowing participants in the conspiracy. Further, the court noted that the district court had correctly instructed the jury that a mere buyer-seller relationship was insufficient for a conspiracy conviction. Accordingly, the convictions were affirmed.

II. Sentencing Guidelines

• *§ 3E1.1(b) - Super Acceptance*
U.S. v. Smith, 04-5669 (11/23/05)

‣ Defendant decided to plead guilty to weapons offenses two days before a trial date. As a result, the government refused to file the motion for the third point of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b)("super acceptance"). The district court rejected defendant's request to award the third point, and defendant appealed.

⋆ Holding: The court held that, even after *Booker*, the district court had no discretion to award the third "acceptance of responsibility" point unless the government files a motion under § 3E1.1(b). The only exception to this requirement is where the government fails to file the motion based upon some

unconstitutional motive such as race or religion. Accordingly, denial of the third point was proper. The case was nonetheless remanded for reconsideration under *Booker*.

• *§ 4B1.4(b)(3)(A) - Armed Career Criminal*
U.S. v. Hadley, 03-5838 (12/6/05)

‣ Defendant was convicted as an armed career criminal. At sentencing, the district court increased defendant's offense level, pursuant to U.S.S.G. § 4B1.4(b)(3)(A), from 33 to 34 based upon a finding that defendant had possessed the gun in relation to a crime of violence. The police officers had obtained an oral and written statement from defendant's girlfriend, and she had testified before the grand jury, that defendant held the gun to her head and threatened to kill her. At sentencing, however, the girlfriend testified that defendant had not held the gun to her head. The district court chose to believe the girlfriend's earlier statements, and held that the enhancement was appropriate because defendant had possessed the gun in relation to committing an aggravated assault upon his girlfriend. Defendant appealed.

⋆ Holding: The government must prove sentencing enhancements by a preponderance of the evidence at sentencing, and the district court may rely on hearsay information if it bears some minimal indicia of reliability. The court found no abuse of discretion in the district court's decision to credit the girlfriend's earlier statements, as opposed to her testimony at the sentencing hearing, and accordingly affirmed the sentence.

III. Evidence

• *404(b) - Background Evidence*
U.S. v. Martinez, 03-3833 (11/17/05)

‣ Defendant was charged in a drug conspiracy and at trial the government introduced the fact that defendant was previously convicted in state court for three crack sales. The crack sales at issue were a small part of the drug conspiracy charged in the indictment and were listed as overt acts in the conspiracy. Defendant argued on appeal that admission of the convictions was improper under FRE 404(b).

⋆ Holding: The court held that background or *res gestae* evidence does not implicate 404(b) if it is evidence that is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness' testimony, or completes the story of the charged offense. In the case, the court ruled that the defendant's prior crack sales were inextricably intertwined with the charged conspiracy, and were accordingly not excludable under 404(b).

• *801(d)(2)(E) - Coconspirator Exception*
U.S. v. Martinez, 03-3833 (11/17/05)

‣ Defendants were charged in a drug conspiracy and at trial the government introduced an anonymous letter warning the conspirators as to who was cooperating with the government and to be careful in their dealings. Defendants challenged admission of the letter on appeal.

⋆ Holding: Under FRE 801(d)(2)(E), an anonymous letter may be admitted if the proponent proves by a preponderance of the evidence that a conspiracy existed between the author and the defendant, and that the statement was made in the course of the conspiracy. The court found that the letter itself established that it was written by a member of the conspiracy, and that, even though it was clearly written by a conspirator who was already in jail, it furthered the conspiracy's objectives by warning the continuing participants to avoid the cooperating defendants in conducting their enterprise. Accordingly, admission of the evidence was proper.

• *803(2) - Excited Utterance*
U.S. v. Hadley, 03-5838 (12/6/05)

‣ During defendant's trial for being a felon in possession of a firearm, the government introduced hearsay statements of a witness, made at the scene of the crime, that defendant was going to shoot her with a gun. Defendant objected to the statements, but the district court admitted them as excited utterances pursuant to FRE 803(2). Defendant appealed.

⋆ Holding: A court must consider three factors in determining whether a statement is an excited utterance: (1) there must be an event startling enough to cause nervous excitement; (2) the statement must be made before there is time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of the excitement. The court held that given the quickness of the response time of the officers to the 911 call, the apparent distress of the witness at the scene, and the seriousness of the domestic dispute, the court found that the witness' statements were properly characterized as excited utterances, and thus admissible.

• *Bias*
U.S. v. Davis, 03-1451 (11/22/05)

‣ At trial on defendant's drug charges, he attempted to cross examine a cooperating government witness about the government's failure to turn the witness over to state authorities on an outstanding warrant. Defendant claimed that the evidence was offered to show the witness' bias in favor of the government, but the prosecutor indicated that the government knew nothing about the warrant. The district court refused to let defendant cross examine the witness on the topic, and defendant appealed.

⋆ Holding: A defendant may cross examine a witness based upon bias; however, in this case the court found no abuse of discretion in the district court's refusal to permit the cross examination. The court held that the line of questioning was marginally relevant to show bias because defendant could not establish a link between the witness' testimony and the failure to turn the witness over to local authorities.

IV. Fourth Amendment

• *Open Fields Doctrine*
Widgren v. Maple Grove, 04-2189 (11/17/05)

‣ Widgren owned twenty acres of undeveloped land, on which he built a house. The house was not visible from the road, and Widgren placed a gate and no trespassing signs at end of the dirt driveway. Around the perimeter of the house, Widgren cleared an area which he regularly mowed, and kept a fire pit, pruned trees, and a picnic table. Both a zoning administrator and a property tax assessor came onto Widgren's property to investigate violations of zoning laws and to do a tax assessment. Widgren sued the township under 42 U.S.C. § 1983 for violations of his Fourth Amendment rights. The district court granted summary judgment to the township, and Widgren appealed.

⋆ Holding: Government officials may enter "open fields" on a person's property without offending the Fourth Amendment. An "open field" includes any unoccupied or undeveloped area outside of the curtilage of a home. Four factors are relevant to determine whether an area is within the curtilage of a home: (1) proximity to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature of the uses of the area; and (4) the steps taken by the owner to protect the area from observation. The court found that the zoning administrator had not violated the home's curtilage, and thus had not violated defendant's Fourth Amendment rights. The court further held that the intrusion by the tax assessor into the cleared area around the home constituted a violation of the home's curtilage, and thus the tax assessor was not protected by the open fields doctrine. Nonetheless, the court

ruled that the intrusion was minimal because the tax assessor only looked at the outside of the house, did not use any special equipment, did not touch, enter or look into the house, and did not conduct any criminal investigation. Accordingly, the court found no Fourth Amendment violation.

• *Reasonable Suspicion - Probation Search*
U.S. v. Henry, 04-6382 (11/22/05)

‣ Defendant was on probation in Kentucky and his probation officer became suspicious that he was not living where he claimed based upon the following: (1) Defendant was not at the home during three unannounced visits, (2) defendant was unemployed and received SSI, (3) probationers often lie about their residences, and (4) defendant appeared nervous when the probation officer told him that two officers were going to accompany him home to confirm his residence. Kentucky has a regulation that allows probation officers to search if they establish reasonable suspicion that a probationer has violated a condition of probation. Two probation officers went into defendant's home, went to his bedroom, opened a duffle bag, and found ammunition. Defendant was charged with being a felon in possession of ammunition, and he moved to suppress the ammunition. The district court denied the motion and defendant appealed.

⋆ Holding: A probation officer may conduct a search of a probationer pursuant to a regulation if (1) the regulation is reasonable under the Fourth Amendment, and (2) the search satisfies the regulation's requirements. First, the court held that the Kentucky regulation was reasonable. Second, the court found that the search did not satisfy the regulation's requirements because it was not supported by reasonable suspicion. The court analyzed the four considerations relied on by the probation officer to conclude that defendant was not residing at the home, and found such factors insufficient to establish reasonable suspicion that defendant was not living at the residence. Accordingly, the court held that the search violated the Fourth Amendment and reversed the district court ruling.

• *Reasonable Suspicion*
U.S. v. Davis, 03-1451 (11/22/05)

‣ Defendant was seen with a codefendant, and the codefendant had been previously observed in drug transactions. Defendant and the codefendant merely had a conversation in a residential driveway. The only indication of any wrong doing was the presence of laundry detergent boxes in which the codefendant was believed to transport drugs. Defendant was followed, stopped for speeding, and detained for thirty minutes while a drug dog was summoned. Upon arrival, the drug dog failed to alert on the car. The police then held defendant for another hour while a second drug dog was obtained. The second drug dog alerted on the car. The officers then got a warrant, found $700,000.00, and subsequently obtained multiple additional warrants. Defendant was charged with drug-related offenses and moved to suppress all evidence obtained after the stop of his car. The district court denied the motion and defendant appealed.

⋆ Holding: The court found that the initial stop of defendant's car and the 30 minute detention while awaiting the first drug dog were justified by reasonable suspicion that defendant was engaged in drug trafficking. The court held, however, that when the first dog failed to alert on the car, the officers' suspicions were dispelled, and the further detention was unlawful. The court emphasized that a stop must be sufficiently limited in time and the investigative means must be the most minimally intrusive means available. After the first drug dog failed to alert, the continued detention served no legitimate investigative purpose. Accordingly, the detention and subsequent search of the vehicle violated the Fourth Amendment. The court remanded the

case to the district court to determine whether the subsequently obtained search warrants were the fruits of the poisonous tree of the unlawful detention.

• *Consent to Search*
U.S. v. Henry, 04-6382 (11/22/05)

‣ Defendant was on probation in Kentucky and his probation officer conducted a search of his residence. The reason for the search was solely because the officer suspected that defendant did not live there. Defendant's probationary conditions contained agreements to home visits and to searches if the officer had reason to believe that defendant had "illegal drugs, alcohol, volatile substance, or other contraband on his person or property." During the search, the officer found ammunition in a duffle bag and defendant was charged with being a felon in possession of ammunition. The district court denied defendant's motion to suppress and defendant appealed.

⋆ Holding: First, the court held that defendant had not consented to a search of the duffle bag as a result of agreeing to the conditions of his probation. The probationary conditions authorized a search only if the probation officer suspected illegal substances. Thus, defendant had not consented to a search to determine if he lived there. Second, the court found that defendant had not consented to the search by his conduct in permitting the officers into his home to establish whether he lived there. In rejecting the "expressed-object" approach to determining consent in this context, the court relied instead on an objective reasonableness standard. The court held that a reasonable person would not have understood the consent given by defendant to include a general search of the premises. Accordingly, the court ruled that the search of the premises was beyond the scope of defendant's consent. Notably, the government argued that the case should be remanded for an evidentiary hearing because the district court had not reached the consent issue. The court rejected this request and ruled that defendant had raised the issue of lack of consent in his motion and that the government had failed to meet its burden to prove consent by "clear and positive testimony." Accordingly, the district court ruling was reversed and the evidence suppressed.

• *Constructive Entry Into Home*
U.S. v. Thomas, 04-6148 (12/1/05)

‣ Defendant was suspected of stealing chemicals to make methamphetamine. Five police officers in four cars arrived at his home, officers going to both the front and back doors. Officers knocked on the back door, which was the primary entrance to the home, and defendant opened the door. Officers told defendant that they wanted to talk to him, and asked him to come outside. Defendant complied and he was arrested. In the district court, defendant moved to suppress the evidence found after his arrest because the officers had constructively entered the home. The district court agreed and suppressed the evidence, and the government appealed.

⋆ Holding: A consensual encounter at the doorstep to a house may evolve into an unlawful constructive entry into the home if officers use overbearing tactics that essentially force an individual out of her home. In the case, however, the court held that the officers' tactics were not so forceful as to constitute a constructive entry. Accordingly, the district court suppression order was reversed.

• *Warrant Exception-Exigent Circumstances*
U.S. v. McClain, 04-5887 (12/2/05)

‣ Police received a call that lights were on at a vacated home and upon investigating found a door ajar and lights on. Suspecting a burglary, officers entered and discovered the beginnings of a marijuana grow operation, but no occupants. The officers subsequently set up surveillance and eventually obtained warrants

for several locations at which defendants were growing marijuana. Defendants were charged with conspiracy and marijuana trafficking offenses, and the district court suppressed the evidence seized against them because it was the fruit of the warrantless entry into defendant's home. The government appealed.

⋆ Holding: When a search is conducted without a warrant, the government may justify the search based upon probable cause and exigent circumstances. The court held that the simple fact of a light being on at a vacated home and a door being ajar did not provide the officers with probable cause to believe that a burglary was in progress. Further, the court held that officers testified that there was no real emergency requiring them to immediately enter the home. Accordingly, the court found that the warrantless search violated the Fourth Amendment. The court ultimately decided, however, that the later execution of the search warrants were saved by the good faith exception. (*See infra*).

• *Search Warrant - Good Faith Exception*
U.S. v. McClain, 04-5887 (12/2/05)

‣ Officers conducted an illegal warrantless search of a home based upon suspicion of a burglary. (*See supra*, Exigent Circumstances). During the illegal search, officers discovered the beginnings of a marijuana grow operation. The officers subsequently conducted surveillance on defendants which led to multiple search warrants. Defendants moved to suppress the evidence obtained as a result of the execution of the search warrants because such searches were the fruit of the poisonous tree from the warrantless search. The district court agreed and suppressed the evidence and the government appealed.

⋆ Holding: Ordinarily, the fruit of an illegal search must be suppressed unless circumstances support one of three narrow exceptions: (1) the government also learned of the evidence from an independent source; (2) the connection with the unlawful search becomes so attenuated as to dissipate the taint; or (3) the evidence would have inevitably been discovered. In the case, the court found that none of these traditional exceptions applied. Instead, the court determined that the search warrants could be saved under the good faith exception of *Leon*. The court found that the officers who executed the search warrants were different officers from the ones who conducted the illegal search. Further, the court held that the facts of the illegal search were fully disclosed in the affidavit to the magistrate who issued the warrants. Thus, the officers executing the warrants had no reason to believe that the warrants may be invalid and clearly were acting in good faith in their execution. Finally, and most importantly, the court held that the unlawful warrantless search was "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable." Accordingly, the court held that the good faith exception barred application of the exclusionary rule, in spite of the earlier Fourth Amendment violation, and reversed the district court ruling.

V. Fifth Amendment

• *Privilege Against Self Incrimination*
Davis v. Straub, 03-2262 (12/1/05)

‣ Defendant was charged with murder in the state of Michigan. At trial, defendant attempted to introduce the testimony of a witness who was present at the scene of the murder. The witness had made multiple statements to police that defendant was not involved in the murder, but that the codefendant did it alone. Prior to the witness testifying, the prosecutor requested that the witness be given counsel, and advised of his Fifth Amendment rights. The court obtained counsel for the witness, and he subsequently decided to invoke his Fifth Amendment privilege. The court permitted the witness to assert a blanket Fifth Amendment privilege

against all questions, and he did not testify. Defendant was convicted of murder, appealed through the Michigan court system, and then filed a federal *habeas* petition which the district court denied. The Sixth Circuit originally ruled that the district court erred in denying the petition because the trial court should have required the witness to take the stand and assert the Fifth Amendment on a question-by-question basis. (*See* P.V., Issue 4). The panel subsequently reconsidered its opinion.

★ Holding: In an amended opinion, the court vacated its previous decision and upheld dismissal of the *habeas* petition. First, the court held that no clearly established Supreme Court precedent required a trial court to make a witness take the stand to invoke the Fifth Amendment privilege on a question-by-question basis. Thus, the trial court did not err in allowing the witness to invoke a blanket privilege.

In the court's original opinion, it had alternatively held that defendant's trial counsel was ineffective for failing to introduce the witness' prior statements into evidence under the hearsay exception for statements against penal interest. In the amended opinion, the court reversed that conclusion and held that, because the Michigan state courts had held that the prior statements were not admissible under the hearsay exception as a matter of state law, the federal court could not find trial counsel ineffective for failing to introduce the statements. Accordingly, the prior opinion was vacated and the defendant's conviction was affirmed.

• *Due Process - Shackling of Defendant*
Lakin v. Stine, 05-1388 (12/19/05)

‣ At defendant's state court trial for escape and related offenses, defendant was shackled in leg irons throughout his trial, during which he represented himself. Defendant appealed through the state court system, and then filed a federal habeas petition. The district court found that defendant's due process rights were violated, but held that the error was harmless and denied defendant's petition. Defendant appealed.

★ Holding: Shackling of a defendant at trial is prohibited by the Due Process Clause unless it is justified by an essential state interest such as courtroom security. In order to determine whether an essential state interest justifies the use of visible shackles, the court must consider (1) the defendant's record, her temperament, and the desperateness of the situation, (2) the state of the courtroom and courthouse, (3) the defendant's physical condition, and (4) whether there is a less prejudicial, but adequate, means of providing security. In the case, the court found that the trial court had done nothing more than ask the corrections officer whether he wanted defendant shackled, to which the officer replied that he did. The court held that the trial court's consideration of the issue was inadequate, and ruled that the shackling of the defendant was error. Nonetheless, the court held that the error was harmless because the evidence of defendant's guilt was overwhelming. Thus, the conviction was affirmed.

• *Due Process - Brady*
U.S. v. Sullivan, 03-6329 (12/20/05)

‣ Defendant was convicted at trial of multiple bank robberies and on appeal claimed that the government had violated *Brady* by failing to disclose hair samples and fiber from the robber's bandana, and suspect description forms completed by eyewitnesses.

★ Holding: To establish a due process violation under *Brady*, a defendant must establish that (1) the evidence at issue is favorable to her, either because it is exculpatory or impeaching, (2) the evidence was suppressed by the government, wilfully or inadvertently, and (3) prejudice ensued such that there is a reasonable probability that the

trial result would have been different with the evidence. Regarding the hair samples, there were no root bulbs attached, so DNA sampling was impossible. Regarding the witness forms, defendant failed to show anything exculpatory in the missing forms. Thus, because defendant could show no prejudice to his case and the evidence was otherwise overwhelming, the court found any error to be harmless and affirmed the conviction.

VI. Sixth Amendment

• *Confrontation Clause*

U.S. v. Martinez, 03-3833 (11/17/05)

‣ Defendants were charged with a drug conspiracy and at trial the government introduced an anonymous letter that had warned the conspirators as to who was cooperating with the government and to be careful in their dealings. Defendants challenged admission of the letter on appeal as a violation of the Confrontation Clause.

⋆ Holding: The court held that the anonymous letter was not "testimonial" pursuant to the Supreme Court decision in *Crawford*. The court concluded that, because the statement qualified under the coconspirator hearsay exception, (*See* III. Evidence, *supra*), the statement was necessarily not testimonial. Therefore, the court analyzed it under traditional Confrontation Clause analysis and held that the coconspirator exception (FRE 801(d)(2)(E)) is a firmly-rooted exception to the hearsay rules, and accordingly, admission of the letter did not offend the Confrontation Clause.

• *Confrontation Clause*

U.S. v. Arnold, 04-5384 (11/23/05)

‣ 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. The Sixth Circuit found that defendant's confrontation rights had been violated and reversed the conviction. (*See* P.V., Issue 2). The government requested rehearing *en banc*, and the original panel issued an amended opinion.

⋆ Holding: In an amended opinion, the court withdrew its prior decision regarding the Confrontation Clause. The court acknowledged that the issue of whether 911 calls are testimonial is currently pending on *certiorari* to the Supreme Court. The court instead decided the case based upon the sufficiency of the evidence and reversed defendant's conviction. (*See supra*, I. Specific Offenses).

• *Confrontation Clause*

U.S. v. Saviores, 04-2140 (11/30/05)

‣ Defendant was charged with drug trafficking and firearms offenses and at trial an officer testified about receiving information from an informant that led to the execution of a search warrant at defendant's residence. Defendant moved for production of the informant's identity and challenged the testimony as a violation of the Confrontation Clause. The district court denied the motion, and defendant appealed.

⋆ Holding: Ordinarily, hearsay testimony about an informant's statements do not implicate the Confrontation Clause if offered solely as background evidence and not as substantive evidence of guilt. The court held, however, that the government had not used the evidence provided by the informant solely as background evidence, but instead utilized the evidence in closing argument as substantive evidence of defendant's guilt. Nonetheless, the court found that the evidence of defendant's guilt was otherwise overwhelming and held that the error was harmless.

• *Confrontation Clause*

U.S. v. Johnson, 04-5110 (11/30/05)

‣ During the course of a RICO investigation, codefendant Hardin agreed to cooperate with the government. Hardin taped numerous conversations that he had with codefendant Stone, during which Stone implicated defendant. Defendant was subsequently charged with RICO violations, and the taped statements were admitted against defendant at trial. Defendant challenged the statements on appeal as violations of the Confrontation Clause.

⋆ Holding: In order to be considered testimonial pursuant to *Crawford*, the statement must be made with the intention to bear testimony against the accused. The court found that Stone trusted Hardin, and had no idea that Hardin was recording the conversation. The court concluded that the statements were not testimonial, and thus, the court evaluated the statements under traditional Confrontation Clause analysis. Under such standard, a hearsay statement does not violate the Confrontation Clause if the declarant is not available and either the statement falls within a firmly-rooted hearsay exception or it bears particularized guarantees of trustworthiness. In analyzing whether statements bear guarantees of trustworthiness, the court looks not to the extent to which the statements are corroborated by other evidence, but instead to the circumstances surrounding the making of the statements themselves. In the case, the court held that the statements were supported by sufficient guarantees of trustworthiness based upon the length of Stone's and Hardin's relationship (25 years), Stone had no motivation to lie, Stone did not know that Hardin was cooperating, and Stone spoke freely on many subjects to Hardin, only a few of which involved defendant. Accordingly, the admission of the statements was affirmed.

• *Booker*

U.S. v. Adkins, 04-5474 (11/23/05)

‣ Defendant pled guilty to methamphetamine charges and at sentencing the probation department concluded that he was responsible for 9.59 grams of meth. Based upon the drug amount and the fact that the government had filed an enhancement under 21 U.S.C. § 851, defendant was sentenced to a statutory mandatory 10 year term of imprisonment. Defendant did not object to the drug amount or the sentence, but then challenged the sentence on appeal under *Booker*.

⋆ Holding: The court held that defendant's failure to object to the drug amount at sentencing equated to an admission to it. Accordingly, there was no Sixth Amendment violation and the sentence was affirmed. Judge Moore pointed out in a concurrence that the sentence was affirmed because it was a statutory mandatory minimum sentence, as opposed to a guideline sentence.

• *Booker*

U.S. v. Johnson, 04-5110 (11/30/05)

‣ Defendant was charged with RICO violations. The indictment alleged four predicate acts to support the charge, including mail fraud, murder, and two counts of arson. During trial, the district court refused to utilize a special verdict form to require the jury to specifically find which predicate acts were proven beyond a reasonable doubt. Defendant was convicted and at sentencing the district court found by a preponderance of the evidence that the most serious of the predicate acts had been committed (murder) and determined that the proper offense level was accordingly 43. The district court sentenced defendant to the "unadjusted 20-year statutory maximum for RICO convictions." Defendant appealed and *Booker* was decided during the pendency of the appeal.

⋆ Holding: The court held that the district court decision to sentence defendant based

upon the murder predicate violated defendant's Sixth Amendment rights under *Booker*. Because the district court refused to submit a special verdict form to the jury, the court had no way of knowing if the jury found that defendant had committed all or only some of the predicate acts in the indictment beyond a reasonable doubt. As such, the court concluded that the appropriate remedy was to assume that the jury found defendant guilty of only the least culpable of the predicate acts (mail fraud) which yielded an offense level of 24. Accordingly, the court vacated the sentence and remanded the case with instructions that defendant be resentenced at offense level 24.

• *Right to Counsel*

U.S. v. Sullivan, 03-6329 (12/20/05)

‣ Defendant went to trial on multiple bank robbery and firearm counts and, on the fifth day of trial, moved for a new attorney. The district court denied the motion, defendant was convicted, and he appealed.

⋆ Holding: In reviewing a motion for new counsel, the district court must consider (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the matter, (3) the extent of the conflict and whether it resulted in a total lack of communication preventing an adequate defense, and (4) the public's interest in the prompt and efficient administration of justice. The court held that defendant's motion, filed mid-trial, was not timely, that the court had adequately inquired into the matter, that there was no complete breakdown in communication, and that the public's interest would not have been served by a continuance and appointment of new counsel. Accordingly, the conviction was affirmed.

VII. Other Constitutional Rulings

• *Commerce Clause*

U.S. v. Henry, 04-6382 (11/22/05)

‣ Defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)) and challenged on appeal that § 922(g), as applied to his case, violated the Commerce Clause.

⋆ Holding: In *Waucaush v. U.S.*, the Sixth Circuit held that, in a RICO prosecution, where the organization did not engage in economic activity, the government was required to show that the activities of the organization had a substantial effect on interstate commerce in order to satisfy the Commerce Clause. In defendant's case, the court held that *Waucaush* did not effect prosecutions under § 922(g). All the government is required to prove in a § 922(g) case is that the defendant possessed a gun that previously had crossed state lines.

VIII. Defenses

• *Mistrial*

U.S. v. Martinez, 03-3833 (11/17/05)

‣ At defendant's trial for a drug conspiracy, an officer testified that defendant had been arrested several times before for drug dealing. Defendant objected and the trial court sustained, providing an instruction to the jury to disregard the statement. Defendant then moved for a mistrial and the district court denied the motion. Defendant appealed.

⋆ Holding: A court must consider five factors in assessing whether a mistrial is appropriate based upon an improper reference to an unrelated arrest: (1) whether the remark was unsolicited; (2) whether the government's line of questioning was reasonable; (3) whether the court's instruction was immediate, clear, and forceful; (4) whether the government exhibited bad faith; and (5) whether the remark was only a small part of the evidence against the defendant. The court found that all of the factors weighed against the defendant, and affirmed the denial of the mistrial.

IX. Plea and Sentencing Hearings

• *Plea Agreements - Oral Promises*

U.S. v. Smith, 04-5669 (11/23/05)

‣ At defendant's sentencing for weapons offenses, the government refused to file a motion for the third "acceptance of responsibility" point. In spite of an integration clause in the plea agreement, defendant claimed that the government had orally promised to file the motion for the third point. The government flatly denied the existence of the oral promise, and defendant failed to introduce any evidence to establish its existence. The district court refused to enforce the alleged oral promise, and defendant appealed.

★ Holding: The court held that the existence of an integration clause in a written plea agreement will not always preclude consideration of oral promises. Where, however, the government denies that the promise was made and defendant offers no evidence on the subject, the court will enforce the integration provision.

• *Sentencing - Crawford*

U.S. v. Stone, 04-6184 (12/23/05)

‣ Defendant was convicted of tax conspiracy charges and at sentencing an IRS agent testified as to loss amounts based upon hearsay information. Defendant challenged on appeal that the *Crawford* right of confrontation should apply to sentencing hearings.

★ Holding: Deciding an open question in the Sixth Circuit, the court held that *Crawford* did not change the long-standing precedent that hearsay is admissible at a sentencing hearing and that the right to confrontation, pursuant to the Sixth Amendment, is inapplicable.

XII. Appeal

• *Issue First Raised on Appeal*

U.S. v. Henry, 04-6382 (11/22/05)

‣ Defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)) and, during his appeal, a case was decided that arguably raised questions as to the constitutionality of § 922(g). Defendant then argued the issue on appeal.

★ Holding: As a general rule, appeals courts will not consider an issue not raised in the district court. The circuit court has the discretion, however, to address such an issue in "an exceptional case or particular circumstance" or when declining to do so would create a "plain miscarriage of justice." The court found exceptional circumstances in the case because the issue was not decided until after the district court judgment, the issue was purely legal, and the parties had fully briefed the issue. Thus, the court exercised its discretion to consider the issue. The court ultimately ruled against defendant on the merits. (*See supra*, VII. Other Constitutional Rulings).

• *Issue First Raised on Appeal*

U.S. v. Savoires, 04-2140 (11/30/05)

‣ Defendant was convicted of drug trafficking and possessing a firearm in relation to drug trafficking. Defendant did not object to the indictment before or during trial, and agreed to the provision of erroneous instructions to the jury. On appeal, defendant challenged for the first time that the indictment was duplicitous.

★ Holding: The failure to raise an error in the district court ordinarily waives the issue on appeal, particularly where the defendant invites the error by agreeing with the government to submit erroneous jury instructions. In the case, however, the court held that, because the defendant's "substantial rights" were affected by the duplicitous indictment, and because the government was as much at fault as defendant for the jury instructions, the "interests of justice" were not served by strictly applying the waiver rule. Accordingly, the court entertained the appeal and reversed the firearm conviction. (*See supra*, I. Specific Offenses).

• *Standard of Review - Insufficient Evidence*
U.S. v. Arnold, 04-5384 (11/23/05)

‣ Defendant was convicted of being a felon in possession of a firearm, and on appeal defendant challenged the sufficiency of the evidence, and several evidentiary rulings.

⋆ Holding: The court held that, in reviewing the sufficiency of the evidence, the appeals court must consider all of the evidence introduced before the trial court, even if it was improperly admitted. In so doing, the court must treat its review from the perspective of the trial court considering a motion for judgment of acquittal at the close of the evidence. The court ultimately ruled for defendant on the merits. (*See supra*, I. Specific Offenses).

• *Preserving Error - Magistrate Decisions*
U.S. v. Sullivan, 03-6329 (12/20/05)

‣ During defendant's prosecution for bank robberies, defendant challenged eyewitness identifications in a pretrial motion before a magistrate. The magistrate denied defendant's motion, and defendant failed to object to the magistrate's decision. After conviction in the district court, defendant appealed.

⋆ Holding: Pursuant to 28 U.S.C. § 636(b), if a defendant fails to object to a magistrate's decision regarding the admission of identification evidence, she has waived her right to appeal. The court of appeals may only excuse the default if the district court's error is so egregious that the failure to permit appellate review would work a miscarriage of justice. In the case, the court found no such egregious error and affirmed the lower court's decision admitting the eyewitness identifications.