

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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FINDING THE CASES

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

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

SUPREME COURT DECISIONS

VIII. Defenses

- *Fed. R. Crim. P. 33 - New Trial Motion*
Eberhart v. U.S., 04-9949 (10/31/05)

▶ Defendant was convicted of a drug conspiracy and filed a motion for new trial pursuant to Rule 33 within the seven day time limit. In the motion, defendant raised only one ground to support his request for a new trial. Defendant subsequently filed a memorandum, outside the seven day time limit, raising two additional grounds for a new trial. The government opposed the new trial request on the merits, but did not raise the Rule 33 timeliness issue. The district court granted defendant's motion and stated that the totality of all three grounds cited by defendant required a new trial. The government appealed, and the Seventh Circuit reversed. The court held that the Rule 33 timeliness issue is jurisdictional and thus, the government was permitted to

raise it for the first time on appeal. Defendant appealed to the Supreme Court and *certiorari* was granted.

★ Holding: The Court held that Rule 33 is not a rule governing the district court's subject-matter jurisdiction, but instead is an "inflexible claim-processing rule." Because the rule is not jurisdictional, it may be waived if not raised before the district court. Accordingly, the government waived the timeliness of defendant's new trial motion by failing to raise it in the district court, and the Court reversed the Seventh Circuit's decision, thus affirming the district court's ruling granting a new trial.

SIXTH CIRCUIT DECISIONS

I. Specific Offenses

• *18 USC § 1956 & 57 - Money Laundering U.S. v. Jamieson*, 02-3403 (10/28/05)

▸ Defendant defrauded numerous investors by selling fraudulent insurance policies and making misrepresentations regarding escrow accounts. Defendant was charged with numerous federal offenses, including multiple counts of money laundering under both § 1956 and § 1957. After jury trial and sentence, defendant appealed challenging the sufficiency of the evidence to support the convictions because the laundered money could not be traced to specific unlawful activity.

★ Holding: The court held that, in proving § 1956 money laundering charges, the government was not required to trace the origin of all funds to determine which funds came from which investor transaction. It was sufficient in the case for the government to prove that defendant fraudulently obtained investor monies, put them into an account in which other funds were commingled, and then laundered money from the account. Regarding the § 1957 money laundering charges, the court noted that it is an open question in the Sixth Circuit as to the tracing of funds requirements. The court held that it did not have to decide the

issue because, in any event, it found that the government had sufficiently traced the funds. At trial, the government proved that all of the investors had been convinced to invest based upon fraud, and that all of the money charged in the § 1957 transactions came from those investor funds. Accordingly, the court found that the charges were adequately supported by the evidence and affirmed the conviction.

II. Sentencing Guidelines

• § 2L1.2(b)(1)(A) - *Downward Departure U.S. v. Ibarra-Hernandez*, 04-2502 (10/14/05)

▸ Defendant was convicted for illegally reentering the U.S. after being deported and at sentencing the district court enhanced defendant's offense level by 16 levels based upon a prior conviction for attempted burglary, a crime of violence under § 2L1.2(b)(1)(A). Defendant requested a downward departure from the guideline range because the conduct underlying the attempted burglary conviction was not serious, involving only the breaking of a window. The district court decided that it did not have the discretion to depart under § 2L1.2(b)(1)(A), and declined defendant's request. Defendant appealed, and while the case was pending on appeal, *Booker* was decided.

★ Holding: The court ruled that, under § 2L1.2(b)(1)(A), the district court had correctly determined that it had no discretion to grant a downward departure. Because the guidelines provide for a 16 level enhancement for a crime of violence (with attempted burglary being specifically listed), as opposed to merely an 8 level enhancement for other aggravated felonies, a district judge has no discretion to depart downward because of the nature of the prior attempted burglary conviction under § 2L1.2(b)(1)(A). Accordingly, the court found that the district court did not err. The case was remanded, however, for resentencing consistent with *Booker*.

• § 3C1.1 - *Obstruction of Justice*
U.S. v. Jamieson, 02-3403 (10/28/05)

▶ Defendant was charged in an insurance fraud scheme. Prior to learning that an investigation had begun against him, defendant shredded numerous documents from his company investor files. At sentencing, the district court enhanced defendant's offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Defendant appealed.

★ Holding: A defendant's sentence may be enhanced for obstruction of justice based upon shredding documents if an investigation has begun against him, or if he knew that an investigation was imminent. The enhancement is not applicable if a defendant destroyed documents in anticipation of a possible future investigation. The court found that the government's evidence was equivocal as to the date defendant destroyed documents and thus, the government had not established the basis for the enhancement. Accordingly, the obstruction of justice enhancement was improper and the case was remanded for resentencing consistent with *Booker*.

III. Evidence

• *FRE 1006 - Summaries*
U.S. v. Jamieson, 02-3403 (10/28/05)

▶ Defendant was charged in a complex fraud scheme and at trial the government utilized several summaries because of the enormous amount of documentary evidence. Defendant challenged the use of the summaries on appeal.

★ Holding: To be admissible, a summary must meet five requirements: (1) the underlying documents must be voluminous, (2) the documents must be made available for inspection at a reasonable time and place, (3) the underlying documents must be themselves admissible, (4) the summary must be accurate and non-prejudicial, and (5) the summary must be introduced through a witness who supervised its preparation. Defendant challenged the timeliness of the production of

the documents and their independent admissibility, and the court held that the records had been timely produced given their quantity, and that the records were admissible under the business records exception.

IV. Fourth Amendment

• *Vehicle Stop/Probable Cause*
U.S. v. Puckett, 04-5988 (9/6/05)

▶ Defendant was stopped by police for speeding. The officer "paced" defendant's car and determined that defendant was traveling 45 in a 30 m.p.h. zone. The officer subsequently found contraband, and defendant was charged with weapons and narcotics offenses. At the suppression hearing, defendant presented an expert who testified that defendant was probably traveling between 36 and 38 miles per hour at the time he was stopped. Defendant also claimed that speeding was not the true motivation for the stop. The district court denied the motion to suppress, and defendant appealed.

★ Holding: Probable cause turns on what an officer knows at the time of a stop, regardless of what other motivations the officer may have. The court concluded that the officer reasonably believed at the time that he stopped the car that defendant was speeding. Even if defendant's expert was to be believed, defendant was, nonetheless, speeding at the time of the stop. Thus, the stop was reasonable and the district court's order was affirmed.

• *Search Warrant - Sufficiency*
U.S.v. Frazier, 04-5719 (9/6/05)

▶ The government obtained multiple search warrants, one of which was for defendant's residence. The affidavit supporting the warrant was based upon information provided by two confidential sources. The affidavit did not establish either of the informants' reliability, and it did not contain any corroboration of their statements. Further, the affidavit included information that was provided to the federal

agent by a state police officer who was told by an informant that he had purchased drugs from defendant on multiple occasions. Defendant moved to suppress drugs seized at his home pursuant to the search warrant. The district court concluded that the affidavit was not supported by probable cause, but that the search was saved by the good faith exception. Defendant appealed.

★ Holding: In considering whether a warrant, based upon an affidavit, is supported by probable cause, the court may consider only the four corners of the affidavit. Where the affidavit is supported by information from an informant, the court must consider the veracity, reliability, and basis of knowledge for the informant's information. Where there is no indicia of the informant's reliability in the affidavit, the court insists on substantial independent police corroboration. In the case, the court concluded that the affidavit contained neither indicia of the informants' reliability, nor evidence of corroboration by the police. Further, the court ruled that, although there was information about defendant's drug dealing, there was nothing to tie the drug dealing to defendant's residence. Lastly, the court noted that the information provided by the state police officer contained multiple levels of hearsay, and was not particularly reliable. Accordingly, the court found no probable cause to support the warrant. Nonetheless, the court found that good faith saved the subsequent search. (*See, infra*).

• *Search Warrant - Good Faith*
U.S. v. Frazier, 04-5719 (9/6/05)

► The government obtained multiple search warrants, one of which was for defendant's residence. The affidavit regarding defendant's residence averred that information had been obtained from several informants, but the affidavits did not provide any basis for assessing the reliability of the informants, nor did it contain any evidence of police

corroboration. The police actually had tape recorded two sales of narcotics by defendant to the informants, and that information was told to the issuing magistrate, and included in other affidavits, but not in the affidavit for defendant's home. The district court denied a motion to suppress evidence found at defendant's residence based upon the good faith exception to the warrant requirement, and defendant appealed.

★ Holding: The court first held that the affidavit for defendant's residence was insufficient because it did not establish probable cause for the search. (*See, supra*). The court then held that a defective warrant is saved if the officers acted in good faith in executing it. The good faith exception does not apply if (1) the affidavit contained a knowing or reckless falsity, (2) the magistrate abandoned her judicial role, (3) the affidavit is bare bones such that reliance on it was objectively unreasonable, or (4) the officers' reliance on the affidavit was not in good faith or objectively reasonable. Defendant challenged the application of the good faith rule based on the second and third exceptions. The court ruled that the magistrate did not abandon his judicial role in issuing the warrant, and that the affidavit was not so "bare bones" that the officers' reliance on it was objectively unreasonable.

Notably, with regard to the "bare bones" issue, the court held that it was permitted to consider the fact that the government had tape recorded two drug sales by defendant to the informants, even though such information was not included in the affidavit. Distinguishing the prior Sixth Circuit decision *U.S. v. Laughton* (*See P.V.*, Issue 2), the court held that it may consider information that was actually conveyed to the magistrate, but not included in the affidavit, in determining whether the officers exercised good faith.

• *Seizure - Consent*

Myers v. Potter, 04-6022 (9/7/05)

► Myers was a fourteen year old boy whose father was being investigated for a murder. Police questioned him at his home with his mother present, and then persuaded his mother to allow him to go with the police to the station. The police lied to Myers and his mother, saying that they would have him back in an hour. They did not, in fact, return him for several weeks. During the ensuing interrogation, Myers repeatedly requested to leave and/or have his mother present. After Myers' father was prosecuted for murder, Myers sued the police, under 42 U.S.C. § 1983, based upon an unlawful seizure in violation of his Fourth Amendment rights. The police claimed that Myers and his mother had consented to the seizure. The district court granted summary judgment to the police, and Myers appealed.

★ Holding: Police have not conducted a Fourth Amendment seizure if a suspect has voluntarily consented to accompany the officers. In the case, the court held that neither Myers nor his mother could be considered as having given voluntary consent where the police had lied about the purpose and duration of the seizure. Further, the court did not find consent based upon a *Miranda* waiver signed by Myers. The *Miranda* waiver dealt only with voluntarily giving a statement, not voluntarily accompanying the police. Further, defendant had asked repeatedly to leave and/or see his mother, all of which were denied. Accordingly, the court found that summary judgment in favor of the officers was not proper, and reversed the district court's ruling.

• *Reasonable Expectation of Privacy*

U.S. v. Waller, 04-5204 (10/24/05)

► Defendant stored his personal effects in a luggage bag at his friend's apartment. The bag was zipped, closed, and stored in a bedroom closet. Defendant did not stay the night at the

apartment, but sometimes showered and changed clothes there. Acting on a tip that defendant had guns, the police obtained consent from the friend to search the apartment, found defendant's bag, opened it, and found two guns. Defendant was charged with being a felon in possession of a firearm, and he moved to suppress the firearms in the district court. The court denied the motion, holding that defendant did not have a reasonable expectation of privacy in the bag, and defendant appealed.

★ Holding: In assessing whether a defendant maintains a reasonable expectation of privacy in property, the court considers (1) whether the defendant has exhibited an actual, subjective expectation of privacy, and (2) whether the defendant's expectation is one that society recognizes as reasonable. The court held that defendant's act of zipping, closing and storing his bag in a closet at his friend's house, without disclosing to his friend the contents of the bag, sufficed to establish both a subjective and objective expectation of privacy in the bag. Accordingly, the court reversed the district court's determination.

• *Search - Consent*

U.S. v. Waller, 04-5204 (10/24/05)

► Defendant stored his personal effects, including two guns, in a closed luggage bag at his friend's apartment. The friend consented to police officer's request to search his apartment, during which the officers found and opened defendant's bag. Defendant was charged with being a felon in possession of a firearm, and challenged the search. The district court held that the search of the bag was justified by the friend's consent. Defendant appealed.

★ Holding: The court held that the friend had neither common nor apparent authority to consent to a search of the bag. Common authority is established by proof that two persons had either mutual use of property, or joint access and control for most purposes.

The court found that defendant and the friend had a general understanding that the bag contained defendant's personal effects and that the friend was not permitted to open it. Thus, the court found no common authority. Apparent authority is established by showing that a reasonable officer would have believed that a person had authority to consent to a search. Because the officers were specifically searching to find defendant's property and had failed to inquire of the friend as to whether he had common authority over the bag, the court found no apparent authority to authorize the search of the bag. Accordingly, the court found no valid consent for the search, and reversed the district court ruling.

V. Fifth Amendment

• *Privilege Against Self Incrimination*

Davis v. Straub, 03-2262 (9/1/05)

► 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. Defendant appealed.

★ Holding: The court held that the state court erred in allowing the witness to invoke a blanket Fifth Amendment privilege. In order to assert a Fifth Amendment privilege, the danger of self incrimination must be "real and

probable," not imaginary and unsubstantial. There is no basis for assertion of the privilege where there can be no further incrimination of a witness, such as where the witness has already made a *Mirandized* statement to the police. The court balanced the witness' Fifth Amendment right against defendant's Sixth Amendment right to present a defense, and concluded that the state court erred in permitting the blanket assertion of the Fifth Amendment right. Where the witness had already told his story three prior times, the trial court should have required him to take the stand and, if he chose to plead the Fifth, to do so on a question-by-question basis. Accordingly, the conviction was reversed.

Alternatively, the court held that defendant's counsel was ineffective for failing to introduce the witness' prior statements exculpating defendant under the hearsay exception for "statements against penal interest." If the trial court concluded that the witness did not have to testify because of a real and probable fear of self incrimination, then the witness' statements were necessarily statements against his penal interest, and thus independently admissible under that hearsay exception. Thus, the court alternatively ruled that the case was reversible based upon ineffective assistance of counsel.

• *Prosecutor Misconduct/Ineffective Assistance* Hodge v. Harley, 03-3166 (10/12/05)

► Defendant was charged with rape of a child, and the only substantial witness against him was his girlfriend who claimed to be an eyewitness to the rape. The medical evidence was inconclusive. During closing argument, the prosecutor made a series of comments stating personal opinions about the witnesses and misrepresenting the evidence. Defendant's counsel failed to object to the comments, and defendant was convicted. Defendant appealed through the state court system, and then filed a federal *habeas* petition claiming that his

attorney was ineffective for failing to object to the prosecutor misconduct. The district court denied the petition, and defendant appealed.

★ Holding: The court held that defendant's counsel was ineffective for failing to object to an "egregiously improper closing argument" by the prosecutor. The prosecutor repeatedly vouched for witnesses' credibility, inserted personal opinion by calling defense witnesses liars, and misrepresented the evidence that had been introduced at trial. Throughout all of the improprieties, defendant's counsel failed to object. Accordingly, the court found defendant's counsel to be ineffective and reversed the district court ruling.

• *Prosecutor Misconduct*

U.S. v. Owens, 04-1655 (10/13/05)

▸ Defendant went to trial on bank robbery charges, and during closing argument the prosecutor argued that a defense witness had an incentive to lie for defendant, and argued that a prosecution witness was truthful. Defendant challenged the statements on appeal as prosecutor misconduct.

★ Holding: First, the court held that a prosecutor may argue that a witness was untruthful, as long as the argument is based upon the evidence and not personal opinion. The court found no misconduct on this point because the prosecutor properly argued that the witness also was under investigation for bank robbery, and might lie for defendant to gain his favorable testimony in the witness' bank robbery case. Second, the court held that a prosecutor may refer to a plea agreement that a witness has with the government, especially where, as in this case, the defense has argued that the witness has a motive to lie based upon the agreement. Accordingly, the conviction was affirmed.

• *Prosecutor Misconduct*

U.S. v. Jamieson, 02-3403 (10/28/05)

▸ Defendant was charged in an insurance

fraud scheme and he challenged on appeal several statements the prosecutor made during the closing arguments at trial.

★ Holding: In assessing a claim of prosecutor misconduct, the court considers (1) whether the comments were improper, and (2) whether the comments were flagrant enough to warrant reversal. Non-flagrant comments can lead to reversal if the proof against the defendant is not overwhelming, defendant objected at trial, and the court failed to cure the impropriety with an instruction to the jury. In the case, the court found that the prosecutor had not improperly characterized evidence or misstated evidence as suggested by defendant. The court noted that the prosecutor made an improper statement in closing argument by referring to defendant's attorney's use of the same expert in three other cases. Because defendant failed to object, however, and because it was an isolated comment, it did not warrant reversal.

VI. Sixth Amendment

• *Booker*

U.S. v. Puckett, 04-5988 (9/6/05)

▸ Defendant was convicted of narcotics and weapons charges and at sentencing he requested a downward departure from the sentencing guidelines range. The district court denied the downward departure request, and defendant appealed. After defendant filed his proof brief in the Sixth Circuit, the Supreme Court decided *Booker*. Defendant then requested a remand pursuant to *Booker* in his reply brief.

★ Holding: The court held that, even after *Booker*, the Sixth Circuit does not have jurisdiction to review the denial of a downward departure unless it is clear from the record that district court did not believe it had the discretion to depart. In the case, the record was clear that the district court knew it had the discretion to depart, but chose not to do so. Thus, the court concluded that it had no

jurisdiction to consider the issue, and affirmed the sentence. Judge Rogers dissented and indicated that, although he agreed with the court's decision on the departure issue, he would have remanded for resentencing under *Booker*. Judge Rogers stated that raising the *Booker* issue in the reply brief was sufficient to preserve the issue for appeal because *Booker* was not decided until part way through the briefing process.

- *Speedy Trial*

Maples v. Stegall, 04-1880 (10/25/05)

- Defendant was charged in state court with a drug case. Based on various reasons, defendant's case did not go to trial until 25 months after his arrest. After raising the speedy trial issue several times *pro se*, defendant pled guilty on the date of his trial. Defendant filed a *habeas* petition in federal court alleging that his attorney was ineffective for advising him that his guilty plea would preserve his right to appeal the speedy trial issue. The district court denied the petition, but the Sixth Circuit reversed and held that trial counsel was ineffective. The court remanded the case to the district court to ascertain whether defendant's speedy trial rights were violated. The district court found no speedy trial violation, and defendant again appealed.

- ★ Holding: A court must analyze four factors in order to determine whether a defendant's Sixth Amendment speedy trial rights have been violated: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether defendant asserted his speedy trial right; and (4) whether defendant was prejudiced by the delay. The court found that the delay of 25 months was uncommonly long and that at least 22 of the months were attributable to the state. Further, the court held that defendant had repeatedly asserted his speedy trial rights and that he was prejudiced by the delay because two favorable witnesses could not be located by the time of trial.

Accordingly, the court held that defendant's speedy trial rights were violated and reversed the conviction.

- *Right to Hire Counsel of Choice*

U.S. v. Jamieson, 02-3403 (10/28/05)

- Defendant was charged in an insurance fraud scheme and the government obtained a restraining order under 21 U.S.C. § 853(e)(1) to prevent defendant from spending approximately \$104 million in assets. Defendant challenged the freezing of the assets on appeal because it prohibited him from hiring counsel of his choice.

- ★ Holding: A district court may freeze assets prior to trial as long as they are restrained based upon a finding of probable cause that the assets are subject to forfeiture. Answering an open question in the Sixth Circuit, the court held that the district court may rely solely on the allegations in a forfeiture count in an indictment (reflecting a grand jury finding of probable cause) unless the defendant can (1) demonstrate that she has no assets, and (2) make a *prima facie* showing that the grand jury erred in concluding that the assets were proceeds traceable to the commission of the offense. If the defendant can make such a showing, then the district court must hold a hearing wherein it requires the government to establish probable cause that the restrained assets are traceable to the underlying offense. The court found that these procedures had been met in the case, and affirmed the district court ruling.

- *CJA Funding for Defense Investigation*

U.S. v. Jamieson, 02-3403 (10/28/05)

- Defendant was charged in an insurance fraud scheme and requested \$500,000.00 under the C.J.A., 18 U.S.C. § 3006A, for defense investigation. The district court denied the request because defendant failed to provide a budget or breakdown for a utilization of the funds. The district court later approved

\$100,000.00 for the defense, and defendant hired three experts who testified at trial, and utilized the assistance of a retired FBI agent throughout trial. Further, defendant requested the purchase of “extraordinarily expensive software” to retrieve deleted files and file fragments that were seized by the government from his business computers. The district court denied this request, and defendant appealed.

★ Holding: District courts must authorize services under the CJA where a defendant shows that (1) such services are necessary to mount a plausible defense, and (2) the defendant’s case would be prejudiced without such services. The court found that \$100,000.00 allowed defendant to sufficiently investigate and prepare his defense. Further, the court found that the extra software requested was unnecessary where the government made no use of the deleted files in preparing its case, and where defendant did not show how such files were necessary to mount a plausible defense. Accordingly, the district court rulings were affirmed.

VII. Other Constitutional Rulings

• *First Amendment*

Rendon v. TSA, 04-4229 (9/22/05)

▸ Rendon went through a security checkpoint at the airport in Cleveland, and set off the alarm. In a hurry to catch his flight, Rendon began cursing at the screener, eventually causing the screener to close his line and call in a supervisor. Rendon persisted in his belligerent tone and was ultimately removed from the line by the police officer on duty. The Transportation and Security Administration (TSA) fined Rendon \$700.00 for his behavior pursuant to 49 C.F.R. § 1540.109, which prohibits interfering with an airport screener in the performance of her duties. An Administrative Law Judge found that Rendon had violated the regulation, and upheld the civil penalty. Rendon appealed, claiming that his First Amendment rights were

violated.

★ Holding: The court first found that the regulation did not violate Rendon’s right to free speech because it was content-neutral. Where a content-neutral regulation has an incidental effect on speech, it may be upheld where it is narrowly tailored to advance a substantial government interest. The court found the government interest in preventing interference with airport screeners to be substantial. Further, the court found that the regulation was narrowly tailored to regulate speech only in the context of when it actually interfered with the performance of a screener’s duty. Second, the court found that the regulation was not overbroad because, by use of the term “interfere,” the regulation was insured to catch only conduct and speech that hindered the accomplishment of a specific task. Finally, the court found that the regulation was not unconstitutionally vague. In this regard, the court held that the regulation did not reach a “substantial amount of constitutionally protected conduct.” Therefore, the civil penalty was upheld.

VIII. Defenses

• *28 USC § 455 - District Judge Recusal*

U.S. v. Jamieson, 02-3403 (10/28/05)

▸ Defendant was charged with conspiracy and money laundering in relation to an insurance fraud scheme. The district judge hearing defendant’s criminal case also presided over a civil case against defendant to recover the fraudulently obtained proceeds. Defendant moved for the district judge’s recusal and the court declined. Defendant appealed.

★ Holding: Pursuant to § 455, a judge is required to recuse herself if she has prejudice or bias against a defendant which is of a “personal or extrajudicial” nature. Because the alleged bias in the case came only from the judge’s judicial involvement with defendant’s civil case, the court found no grounds for recusal.

- *Venue*

U.S. v. Jamieson, 02-3403 (10/28/05)

- ▶ Defendant was charged in a high profile insurance fraud case, and moved for a change of venue. The district court denied the motion and defendant appealed.

- ★ Holding: A district court must transfer a case to another venue if the defendant would be so prejudiced that she cannot obtain a fair and impartial trial in the transferring district. In the case, the court held that most of the pretrial publicity had been a year before the trial and that the articles portraying the events were fair and balanced. Further, the court found that the district court had conducted extensive *voir dire* to ensure that no jurors were biased by the pretrial publicity. Accordingly, the conviction was affirmed.

X. Jury Issues

- *18 U.S.C. § 3593(b) - Death Penalty Jury*

U.S. v. Young, 05-5846 (9/29/05)

- ▶ Defendant was charged with capital murder and, before trial, the district court decided, pursuant to § 3593(b), to empanel separate juries to hear the guilt and penalty phases of trial. The government filed an interlocutory appeal of the district court's order.

- ★ Holding: The court held that a district court may not decide, pretrial, to empanel separate guilt and penalty phase juries in a death penalty case under § 3593(b). The only time that a district court may decide to empanel a separate penalty phase jury under such section is after the guilty verdict has been rendered, and based upon a showing of "good cause." Further, the court held that the unitary jury requirement cannot be waived by a defendant. Accordingly, the district court order was vacated.

- *Juror Bias*

Johnson v. Luoma, 04-1518 (10/12/05)

- ▶ Defendant was convicted in state court of

kidnaping and domestic violence, and subsequently learned that a juror had a pending domestic violence complaint against her boyfriend that had not been disclosed during *voir dire*. Defendant appealed through the state court system, and then filed a *habeas* petition in federal court claiming juror bias. The district court denied the petition and defendant appealed.

- ★ Holding: In order to obtain a new trial based upon juror responses to *voir dire* questions, a defendant must show that the juror failed to answer honestly a material question and that a correct response would have provided a valid basis for a challenge for cause. First, the court held that the juror had not technically given a false answer. The juror stated that she had been assaulted in the past, without stating how many times or the nature of the assault. Second, the court held that the fact of the domestic violence complaint would not have supported a challenge for cause. The court noted that bias may be shown by actual or implied bias. The court found that no actual bias was established, and that implied bias was only applicable in certain extreme situations, such as where the juror is an employee of the prosecutor's office, is a close relative of a party, or was involved in the criminal transaction at issue. The court found no implied bias in the case, and noted that the doctrine of implied bias is of questionable viability after the Supreme Court's decision in *Smith v. Phillips*. Thus, the district court's decision was affirmed.

- *Juror Bias*

U.S. v. Owens, 04-1655 (10/13/05)

- ▶ During defendant's trial for multiple bank robberies, a juror passed a note to the district court articulating her discomfort that defendant was staring at her, and asking if defendant was a danger to her. The defense requested that the court question the juror about possible bias, but instead, the court sent a note back stating that

defendant did not pose a security risk to anyone. After his conviction, defendant appealed.

★ Holding: Pursuant to the Supreme Court case *Remmer v. U.S.*, a district court must hold a hearing to assess potential juror bias where the defense makes a “colorable claim of extraneous influence.” The court held that a defendant staring at a juror was not an extraneous influence such that a *Remmer* hearing was required. Accordingly, the court found no abuse of discretion, and affirmed the district court’s decision.

• *Jury Instructions - Mail Fraud*
U.S. v. Jamieson, 02-3403 (10/28/05)

▶ Defendant was charged in an insurance fraud scheme and requested the district court to provide the jury with two instructions regarding misrepresentations. First, defendant requested the court to instruct the jury that he had no “duty of disclosure” to the investors in the insurance scheme. Second, defendant asked the court to instruct the jury that it must find that the misrepresentations were “reasonably calculated to deceive persons of average prudence.” The district court refused to provide the instructions and defendant appealed.

★ Holding: Failure of a court to provide a requested jury instruction is reversible error only if the instruction is (1) a correct statement of the law, (2) not substantially covered by the charge, and (3) concerns such an important point that failure to provide the instruction substantially impairs the defense. In regard to both of the proposed instructions, the court held that the topics were substantially covered by the charge actually given in the case. The court acknowledged that the better practice would have been for the district court to provide the second instruction (“reasonably calculated to deceive persons of average prudence”) because it is a well-established requirement in the Sixth Circuit. Nonetheless,

the court found that in light of all the instructions provided to the jury, the omission did not warrant reversal.

XII. Appeal

• *Booker - Motion to Recall Mandate*

U.S. v. Saikaly, 01-4001 (9/28/05)

▶ Defendant was convicted of a drug trafficking conspiracy, was sentenced to 360 months in prison, and lost on appeal. Defendant then filed a *habeas* petition, and successfully obtained a resentencing, at which he received a reduced sentence of 240 months. Defendant again appealed, and the court remanded the case for reconsideration of the amount of cocaine attributable to defendant. While the case was pending on remand, *Apprendi* was decided. Defendant argued that *Apprendi* required a reversal of his conviction because the judge, not the jury, had decided the drug amount. The district court rejected defendant’s argument and the Sixth Circuit affirmed, holding that *Apprendi* was inapplicable because the 240 month sentence was within the statutory maximum for defendant’s conspiracy conviction. Defendant did not file a petition for *certiorari*. The Supreme Court subsequently decided *Booker* and defendant moved to recall the Sixth Circuit’s mandate on his last appeal because the court was “patently wrong” in rejecting his *Apprendi* argument.

★ Holding: A mandate may only be recalled as a last resort against “grave, unforeseen contingencies.” Thus, a party may only obtain such a remedy upon a showing of exceptional circumstances. In the case, the court held that the change in the law after *Booker* did not warrant a recall of the mandate. The court noted that it had already decided in *Humphress v. U.S.* that *Booker* was not retroactive. Thus, *Booker* issues must be raised on direct appeal, and cannot be raised in a *habeas* petition. Based upon *Humphress*, the court therefore concluded that a motion to recall the mandate

was likewise not a proper context in which to raise a *Booker* challenge.

• *Interlocutory Appeal*

U.S. v. Young, 05-5846 (9/29/05)

▸ Defendant was charged with capital murder and, before trial, the district court decided to empanel separate juries to hear the guilt and penalty phases of the trial. The government filed an interlocutory appeal of the district court's order.

★ Holding: The court held that the interlocutory appeal procedure was proper under two theories. First, the court held that the "collateral review doctrine" (28 U.S.C. § 1291) provided jurisdiction for the court to review the matter. Under such doctrine, the court may review a non-final order if it "(1) conclusively determines (2) an important legal issue completely separate from the merits of the action, which is (3) effectively unreviewable on appeal."

Second, the court held that it had jurisdiction to review the interlocutory order as a petition for writ of mandamus. A court may issue mandamus only in extraordinary cases after weighing five factors: (1) whether there are no other adequate means to attain relief; (2) whether the petitioner will be prejudiced in a way that is not correctable on appeal; (3) whether the district court order is clearly erroneous; (4) whether the issue is an oft repeated error; and (5) whether the issue is one of first impression. Thus, the court found review under both theories appropriate, and proceeded to address the merits of the appeal. (*See, supra*, X. Jury Issues).

XIII. Post-Conviction Remedies

• *Attorney-Client Privilege*

In re: Lott, 05-3532 (9/9/05)

▸ Defendant was convicted in state court of murder, and after unsuccessful appeals and a federal *habeas* petition, defendant filed a second *habeas* petition raising a claim of actual

innocence. The district court ruled that, by claiming actual innocence, defendant had implicitly waived his attorney-client privilege, thus allowing the state to depose his attorney to explore any statements made by defendant to his counsel, or other evidence, that was inconsistent with his innocence. Defendant petitioned the Sixth Circuit for mandamus relief from the district court's order.

★ Holding: The court held that a claim of actual innocence does not implicitly waive the attorney-client privilege. Generally, the privilege may be waived by voluntary disclosure of private communications to a third party, by conduct of the client that implies a waiver of the privilege or consent to disclosure, or by claiming ineffective assistance of counsel. The court found, however, no authority for waiving the privilege in the context of an actual innocence claim in a *habeas* petition. Accordingly, the court issued the writ of mandamus and vacated the district court's order.