CHAPTER THREE

Legal Issues

Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This chapter addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 2005. The most important decision for federal sentencing was the landmark decision in *United States v. Booker*,[2] which was decided January 12, 2005, and is discussed in the section below.

United States Supreme Court Decisions on Sentencing Issues

Decisions

In *United States v. Booker*,[3] the Supreme Court considered whether the holding in *Blakely v. Washington*,[4] applied to the federal sentencing guidelines. The case presented the Court with two issues for resolution. The first was whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. The second asked the Court to devise a remedy if it were found that the Sixth Amendment applies to the federal sentencing guidelines.

In an opinion authored by Justice Stevens, the Court[5] held that the Sixth Amendment, as construed in *Blakely*, does apply to the federal sentencing guidelines.[6] In so holding, the Court reaffirmed the holding in *Apprendi v. New Jersey*,[7] rephrasing it as "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts

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[2] 543 U.S. 220 (2005).

[3] *Id.*

[4] 542 U.S. 296 (2004).

[5] The *Blakely* majority (Justices Stevens, Scalia, Souter, Thomas and Ginsburg) formed the majority in this portion of the court's opinion.

[6] 543 U.S. at 243.

[7] 530 U.S. 466 (2000).

established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[8]

The question of the appropriate remedy for the constitutional violation was answered by a different majority of the Court in an opinion authored by Justice Breyer.[9] After considering the legislative intent underlying the Sentencing Reform Act (the "Act"), the Court concluded that the Sixth Amendment requirement that a jury find certain sentencing facts was incompatible with components of the Act. The Court concluded that the severability question must be answered by excising from the Act those provisions that made the sentencing guidelines mandatory.

In devising the remedy, the Court targeted only two provisions of the Act. The Court excised 18 U.S.C. § 3553(b)(1), which required the court to impose a sentence as determined by the sentencing guidelines unless "the court finds there exists an aggravating or mitigating circumstance of the kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." The Court determined that "the existence of [this section] is a necessary condition of the constitutional violation."[10] The Court also excised 18 U.S.C. § 3742(e), which provided for a *de novo* standard of review for departures from the guidelines, and replaced it with "reasonableness." It left intact all other provisions of the Act, explicitly mentioning 18 U.S.C. § 3553(a), relating to considerations when imposing a sentence, and 18 U.S.C. § 3742(a) and (b), relating to the right of appeal of sentencing decisions. The Court identified as problematic only those provisions making the sentencing guidelines mandatory.[11]

By severing these provisions, the Court rendered the sentencing guidelines "effectively advisory." Although the Court recognized that Congress expected the guideline system to be mandatory, it reasoned that Congress would prefer a system in which the guidelines were considered in every case.[12] The Court theorized that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives."[13] For example, "[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process."[14]

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[8] 543 U.S. at 244.

[9] Along with Justice Breyer, Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg formed the majority that fashioned the remedy.

[10] *Id*. at 259.

[11] *Id*. at 258-61. The remaining portions of the Act require a sentencing court to consider guidelines ranges but permit a court to tailor the sentence in light of other statutory concerns. *See* 18 U.S.C. § 3553(a).

[12] 543 U.S. at 248-49.

[13] *Id*. at 264.

[14] *Id.* at 263.

In *Leocal v. Ashcroft,*[15] the Supreme Court considered whether an alien's conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Florida law, was a "crime of violence" and therefore an "aggravated felony" warranting deportation. The petitioner, a Haitian citizen and a lawful permanent resident of the United States, was ordered deported after his conviction was classified as a "crime of violence" under 18 U.S.C. § 16 and therefore deemed an "aggravated felony" under the Immigration and Nationality Act (INA).

Concluding that DUI is not a crime of violence, the Court stated, "Many States have enacted similar statutes, criminalizing DUI causing serious bodily injury or death without requiring proof of any mental state, or, in some States, appearing to require only proof that the person acted negligently in operating the vehicle . . . .[16] The critical aspect of §16(a) is that a crime of violence is one involving the 'use . . . of physical force *against the person or property of another* . . . .[17] The key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct."[18] Moreover, the language in section 16(b) also requires a higher *mens rea* than merely the accidental or negligent conduct involved in a DUI offense.[19] Because the petitioner's DUI offense, a third-degree felony, did not require proof of any particular mental state, the Court held that it did not qualify as a "crime of violence" under section 16(a) or (b).[20]

In *Shepard v. United States*,[21] the Supreme Court considered whether a sentencing court could look to a police report or complaint application to determine whether an earlier guilty plea necessarily admitted and supported a conviction for generic burglary relied upon to impose a 15-year mandatory minimum sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act. The Armed Career Criminal Act makes burglary a violent offense only if committed in a building or enclosed space ("generic burglary"), not in a boat or motor vehicle. In *Taylor v. United States*,[22] the Court had held that a sentencing court could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction was for generic burglary. In *Shepard,* the government argued for a more inclusive standard of competent evidence from which to determine whether a prior conviction constituted generic burglary. The Court rejected the government's position, holding that a court may not look to police reports or complaint applications

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[15] 543 U.S. 1 (2004).

[16] *Id.* at 8.

[17] *Id.* at 9.

[18] *Id.*

[19] *Id.* at 11.

[20] *Id.*

[21] 544 U.S. 13 (2005).

[22] 495 U.S. 575 (1990).

to make such a determination.[23] Rather, "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented."[24]

Petition for Certiorari Filed

In *Cunningham v. California*,[25] the defendant filed a petition for *certiorari* to challenge "whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments." The petition for *certiorari* sought Supreme Court review to resolve a split of authority after *Blakely* and *Booker* regarding the application of those cases to sentencing schemes like California's Determinate Sentencing Law.[26]

In *Cunningham*, the jury convicted the defendant of continuous sexual abuse of a child under 14. The defendant was sentenced to the upper-term sentence of 16 years for that offense. The court relied upon six aggravating factors[27] when it decided to impose the upper-term sentence over the 12-year middle-term sentence. On appeal, the defendant argued that the sentence violated his right to jury trial and due process because, in imposing the upper term, the trial court, and not the jury, made the findings on aggravating factors.[28] The California Court of Appeal upheld Cunningham's conviction and, in a divided opinion, affirmed his sentence.[29]

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[23] 544 U.S. at 16.

[24] *Id*.

[25] Petition for Writ of Certiorari, *Cunningham v. California*, 2005 WL 3785203 (Sept. 17, 2005) (No. 05-6551).

[26] 2005 WL 3785203 at *10.

[27] *Id.* at *5. Specifically, after considering the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation, and letters from the victim and his mother, the court found the following aggravating factors: (1) the crime involved great violence, viciousness and callousness, (2) the victim was particularly vulnerable, (3) the defendant coerced the victim to recant his testimony, (4) the defendant took advantage of a position of trust, (5) the defendant posed a serious danger to the community, and (6) the defendant was a police officer, violating his duty to serve the community. The court found that the aggravating factors outweighed the sole mitigating factor (lack of a prior criminal record).

[28] No. A103501, 2005 WL 880983, at *1 (Cal. App. 1 Dist. Apr. 18, 2005).

[29] On May 4, 2005, the California Court of Appeal issued a one-page order denying a rehearing and modifying its opinion. On May 19, 2005, Cunningham filed a petition for rehearing with the California Supreme Court. On June 20, 2005, the California Supreme Court issued a decision in *People v. Black*, 113 P.3d 534 (Cal. 2005) wherein it held that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper-term sentence under the California's Determinate Sentencing Law. On June 29, 2005, the California Supreme Court issued a one-page order denying

Decisions of the United States Courts of Appeals

Post-Booker Decisions

Sentencing after *Booker*, like sentencing under the mandatory guideline regime, begins with consideration of the sentencing guidelines. For example, the Fourth Circuit has stated: "In any given case after *Booker*, a district court will calculate, consult, and take into account *the exact same guideline range* that it would have applied under the pre-*Booker* mandatory guidelines regime."[30] Thus, the "guideline range remains the starting point for the sentencing decision. And, if the district court decides to impose a sentence outside that range, it should explain its reasons for doing so."[31] Indeed, courts have opined that "while [] the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range."[32]

Few circuits have provided guidance about the amount of weight to be given to the guidelines after *Booker*.[33]

Several circuits addressed the issue of the appropriate standard of review after *Booker* as applied to cases on direct review. All circuits agreed that plain error applies to an unpreserved *Booker*

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discretionary review of Cunningham's Petition for Review without prejudice to any relief to which defendant might be entitled upon finality of *Black*. The decision in *Black* has become final with no change in the opinion and a Petition for Writ of *Certiorari* is pending in the United States Supreme Court.

[30] *United States v. White,* 405 F.3d 208, 219 (4th Cir. 2005) (citing *Booker*, 543 U.S. at 264); *See United States v. Hughes II,* 401 F.3d 540, 546 (4th Cir. 2005).

[31] *White,* 405 F.3d at 219 (internal citations omitted). *See also United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005) (stating that in order to fulfill the duty to "consider" the guidelines, a sentencing judge will have to determine the applicable guideline range in the same manner as before *Booker*); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005) (stating that ordinarily the sentencing judge must determine the applicable guidelines range in the same manner as before *Booker*; this process includes finding all facts relevant to sentencing using a preponderance of the evidence standard); *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005) (stating that although the guidelines are no longer mandatory, a sentencing court must still begin its analysis by considering them).

[32] *United States v. White,* 405 F.3d at 219. *See also United States v. Mykytiuk,* 415 F.3d 606, 607 (7th Cir. 2005) ("When the Supreme Court directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines").

[33] See, however, *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005). Immediately after *Booker* was decided, two district courts issued disparate opinions regarding the impact of the *Booker* decision. In *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005), the court concluded that "considerable weight should be given to the Guidelines in determining what sentence to impose." The court explained that the guidelines provided "the only uniform standard" to guide sentencing. In *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005), however, the court held that judges "may no longer uncritically apply the Guidelines" and must instead consider all of the factors in 18 U.S.C. § 3553(a), including "the history and characteristics of the defendant," the need to rehabilitate the defendant, and the importance of obtaining restitution.

error and that harmless error review applies to a preserved *Booker* issue.[34] The circuit courts that have addressed the standard of review for a preserved *Booker* issue agree that a defendant who preserves his argument is entitled to harmless error review.[35]

Relevant conduct considerations continue to play an integral part of post-*Booker* sentencing.[36] Calculation of the guideline range continues to include factfinding by the court to resolve disputed issues. Although defendants have argued that the sentencing judge is now prohibited from resolving disputed facts during sentencing, those courts considering the issue have rejected this argument. These courts reason that *Booker* does not prohibit any and all judicial factfinding.[37] Instead, the circuits have held that *Booker* proscribes only judicial factfinding that increases a sentence beyond the maximum authorized by the jury verdict or supported by the defendant's admissions. Likewise, arguments that the burden of proof for judicial factfinding is now beyond a reasonable doubt have proved unavailing. Several circuits have held that the district court may resolve factual disputes using a preponderance of the evidence burden of proof.[38]

Furthermore, since *Booker*, the appellate courts have held that sentencing courts may still consider reliable hearsay in fashioning a sentence in the advisory guidelines scheme.[39] A few circuits

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[34] *See United States v. Heldeman*, 402 F.3d 220 (1st Cir. 2005)(recognizing that unpreserved *Booker* error must be reviewed for plain error); *Crosby*, 397 F.3d 103 (same); *United States v. Davis,* 407 F.3d 162 (3d Cir. 2005) (same); *United States v. Washington*, 398 F.3d 306 (4th Cir. 2005)(same); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005)(same); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005)(same); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005); *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005)(same); *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)(*en banc*)(same); *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. 2005)(same); *United States v. Camacho-Ibarquen*, 410 F.3d 1307 (11th Cir. 2005); and *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005) (same).

[35] *See United States v. Hill*, 411 F.3d 425 (3d Cir. 2005) (where a district court clearly indicates that an alternative sentence would be identical to the sentence imposed under the guidelines, any error that may attach to a defendant's sentence under *Booker* is harmless); *United States v. Jones*, 399 F.3d 640 (6th Cir. 2005)(stating that where the defendant preserves his issue, the court reviews constitutional *Booker* error *de novo*); *United States v. Burke*, 425 F.3d 400 (7th Cir. 2005) (where the defendant properly preserves his *Booker* claim, the court reviews for harmless error); *United States v. Haidley*, 400 F.3d 642 (8th Cir. 2005)(same); *United States v. Lang*, 405 F.3d 1060 (10th Cir. 2005)(same); *United States v. Mathenia*, 409 F.3d 1289 (11th Cir. 2005) (same); *United States v. Coumaris*, 399 F.3d 343 (D.C. Cir. 2005)(same).

[36] *See United States v. Killgo*, 397 F.3d 628, 631, n.5 (8th Cir. 2005) ("Relevant conduct also relates to the 'history and characteristics of the defendant,' § 3553(a)(1), as well as the need to 'protect the public from further crimes of the defendant,' § 3553(a)(2)(C). Using relevant conduct in sentencing a defendant also aids in the 'need to avoid unwarranted sentence disparities.' 18 U.S.C. § 3553(a)(6)").

[37] *United States v. McKinney*, 406 F.3d 744 (5th Cir. 2005); *United States v. Haack*, 403 F.3d 997 (8th Cir. 2005).

[38] *See, e.g., United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005).

[39] *United States v. Luciano*, 414 F.3d 174 (1st Cir. 2005) (Sixth Amendment confrontation rights were not violated by the admission of hearsay at sentencing); *United States v. Martinez*, 413 F.3d 239 (2d Cir. 2005) (post-*Booker*, the Sixth Amendment rights of confrontation do not bar judicial consideration of

have considered whether the district courts can rely on acquitted conduct in sentencing. The general consensus is that the district judge can still consider acquitted conduct in determining the guidelines range because *Booker* did not overrule *United States v. Watts,*[40] wherein the Supreme Court held that considering acquitted conduct in sentencing a defendant under the guidelines is permissible.[41]

In *United States v. Sahlin*,[42] the defendant argued that he should be permitted to withdraw his guilty plea because it was not voluntary, being based on an understanding of a sentencing scheme rendered erroneous by *Booker*. The First Circuit held that *Booker* did not render the defendant's guilty plea involuntary. The defendant was in fact sentenced under the mandatory sentencing scheme that he expected. The court reasoned that the possibility of a favorable change in the law occurring after a plea is one of the normal risks accompanying a guilty plea.[43]

In *United States v. Parsons*,[44] the Eighth Circuit rejected an argument that a defendant who agreed to a guideline range in his plea agreement before *Booker* should be resentenced. Reasoning that the development in the law announced by *Booker* subsequent to the defendant's guilty plea did not invalidate his plea, the court rejected the defendant's arguments that he should be re-sentenced. The defendant agreed as part of his plea agreement that he would be sentenced under the guidelines and agreed to certain guideline calculations. The district court applied the agreed-upon sentencing range so the defendant received what he bargained for.[45]

Firearms

In *United States v. Whitehead*,[46] the defendant pled guilty to being a felon in possession of a firearm. The firearm the defendant was convicted of possessing fell within the definition of

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hearsay at sentencing proceedings); *United States v. Brown*, 430 F.3d 942 (8th Cir. 2005) ("We see nothing in *Booker* that would require the court to determine the sentence in any manner other than the way the sentence would have been determined pre-*Booker*").

[40] 519 U.S. 148 (1997).

[41] *See United States v Price*, 418 F.3d 771 (7th Cir. 2005) (same); *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005) (same); *United States v. Duncan*, 400 F.3d 1297 (11th Cir.) *cert. denied*, 126 S. Ct. 432 (2005) (same).

[42] 399 F.3d 27 (1st Cir. 2005).

[43] *Id.* at 31.

[44] 408 F.3d 519 (8th Cir. 2005).

[45] *Id.* at 521. *See also United States v. Bond,* 414 F.3d 542 (5th Cir. 2005) (holding that *Booker* did not change the plea agreement's meaning of the term "statutory maximum" when there was no indication that the parties meant for the term to be accorded the non-natural definition it assumed in *Booker*).

[46] 425 F.3d 870 (10th Cir. 2005).

"semiautomatic assault weapon," as that term is defined in 18 U.S.C. § 921(a)(30). Under section 2K2.1(a)(4)(B), an enhanced base offense level applies if the firearm involved was described in section 921(a)(30). Prior to the defendant's sentencing, section 921(a)(30) expired. The Tenth Circuit held on appeal that the fact that section 921(a)(30) expired did not make section 2K2.1(a)(4)(B) inapplicable. The language of section 2K2.1(a)(4)(B) was clearly intended to focus on the circumstances in existence at the time the offense of conviction was committed.[47]

In *United States v. Bothun*,[48] the Seventh Circuit considered the defendant's challenge to the application of the firearm enhancement under section 2D1.1(b)(1). Federal agents found a .22 caliber rifle and ammunition in a child's bedroom at the defendant's house. In the attic above the defendant's workshop the agents found two rifles, a shotgun, and more marijuana, in addition to the drug paraphernalia and marijuana found in the home. The defendant argued that because "the government never offered physical proof that he had touched any of the guns, nor did it introduce testimonial evidence from its informants that he had used the weapons," the government did not prove that he had actual or constructive possession of the weapons.[49] The court held that the government was not required to offer physical proof that the defendant had touched the guns. Rather, the government met its initial burden of showing that the defendant possessed the guns. Once the initial burden was met, the guidelines shifted the burden to the defendant to show that it was clearly improbable that the weapons were connected with the drug offense. Because the defendant failed to introduce any evidence compelling the district court to find that it was clearly improbable that the weapons were used in connection with the offense, the appellate court concluded that the district court correctly applied the enhancement.[50]

Immigration

In *United States v. Martinez-Mata*,[51] the Fifth Circuit considered whether the Texas state offense of retaliation was a crime of violence under section 2L1.2 (Unlawfully Entering or Remaining in the United States). The defendant illegally reentered the United States after deportation, and at sentencing received a 16-level enhancement under section 2L1.2(b)(1)(A)(ii) based on a prior conviction of the Texas crime of retaliation. After examining the Texas statute in question, the Fifth Circuit held that the defendant's retaliation conviction was not a crime of

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[47] *Id.* at 871. *See also United States v. Ray,* 411 F.3d 900, 904-905 (8th Cir. 2005)(holding that statutory exemption from prosecution for possession of semiautomatic weapons manufactured before enactment of Violent Crime Control Act did not exclude enhanced base offense level for offense involving such weapons following defendant's possession of such firearms after misdemeanor conviction for a crime of domestic violence; this was because the Sentencing Commission decided to punish more severely possession of semiautomatic firearms (viewed as likely to be more dangerous weapons) by those who had otherwise lost right to possess firearms).

[48] 424 F.3d 582 (7th Cir. 2005).

[49] *Id.* at 585.

[50] *Id.* at 586.

[51] 393 F.3d 625 (5th Cir. 2004).

violence because the offense did not require physical force, one of the elements of a crime of violence.[52]

In *United States v. Solis-Garcia*,[53] the Fifth Circuit reversed application of an enhancement under section 2L1.1(b)(5) for creating "a substantial risk of death or serious bodily injury." The defendant transported seven illegal aliens in a minivan, four of whom were lying side by side in the minivan's cargo area. The other three aliens were seated in the bucket seats of the minivan, one in the front passenger seat and two in the middle row of seats. The court reasoned that the only dangers associated with riding in the cargo area are generally the same dangers that arise from an individual not wearing a seatbelt in a moving truck. The aliens in the van were protected by the passenger compartment of the vehicle. Thus, the court concluded as a matter of law that transporting four aliens lying in the cargo area of a van, with no aggravating factors, did not constitute an inherently dangerous practice such as to create a substantial risk of death or serious bodily injury to the aliens.[54]

Obstruction of Justice

In *United States v. Crume*,[55] the Eighth Circuit considered a challenge to the application of the adjustment for obstruction of justice to the defendant who threatened his fellow prisoners with harm if they provided information to law enforcement. The defendant argued that the adjustment should not apply because he did not know the fellow prisoners were cooperating witnesses of the government at the time he threatened them.[56] Finding that there was evidence at trial that when he made the threat, the defendant knew that those he threatened intended to provide information to the prosecution and the district court reasonably inferred that that was the reason the defendant threatened them, the Eighth Circuit upheld application of the adjustment for obstruction of justice.[57]

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[52] *Id.* at 626-27.

[53] 420 F.3d 511 (5th Cir. 2005).

[54] *Id.* at 516.

[55] 422 F.3d 728 (8th Cir. 2005).

[56] *Id*. at 732.

[57] *Id. See also United States v. Peterson,* 385 F.3d 127 (2d Cir. 2004) (stating that the district court properly applied an obstruction of justice adjustment based on four letters the defendant sent from jail to his co-defendant, which clearly were intended to improperly influence the recipient's testimony).