M E M O R A N D U M

TO: **FPD Staff Attorneys & CJA Panel Attorneys**

FROM: **Neil H. Jaffee**

SUBJECT: **January/February 2008 Case Summaries**

DATE: **March 11, 2008**

SUPREME COURT

Wright v.Van Patten, 128 S.Ct. 743 (2008). State court's opinion that defendant was not denied effective assistance of counsel where his attorney was not physically present at plea hearing but was linked to courtroom by speaker phone was not unreasonable application of clearly established federal law and therefore defendant was not entitled to relief under 28 U.S.C. § 2254.

Ali v. Federal Bureau of Prisons, 128 S.Ct. 831 (2008). BOP officers who allegedly lost inmate's personal property during transfer to another prison qualified as "law enforcement officers" under the Federal Tort Claims Act and therefore were entitled to sovereign immunity for claims relating to the detention of any property under the Act.

Danforth v. Minnesota, 128 S.Ct. 1029 (2008). Teague rule that non-watershed, new constitutional rules of criminal procedure do not apply retroactively to cases on federal habeas review does not constrain state courts' authority to give broader effect to new criminal procedure rules than is permitted by Teague in federal habeas context.

NOTEWORTHY CERT. GRANTS

Irizarry v. United States, 128 S.Ct. 828 (2008) (whether, after Booker, sentencing court must provide reasonable notice to parties that it is contemplating non-guidelines sentence on ground not identified in PSR or by parties).

Greenlaw v. United States, 128 S.Ct. 829 (2008) (whether federal court of appeals may increase sentence sua sponte and in absence of government cross-appeal).

Kennedy v. Louisiana, 128 S.Ct. 829 (2008) (whether Eighth Amendment's Cruel and Unusual Punishment Clause permits state to punish with death penalty crime of rape of child).

Giles v. California, 128 S.Ct. 976 (2008) (whether defendant forfeits right to object to admission of out-of-court statements of witness whose unavailability defendant caused).

Herring v. United States, No. 07-513, 2008 WL 423538 (Feb. 19, 2008) (whether Fourth Amendment requires evidence discovered during search incident to arrest be suppressed when arresting officer conducted arrest and search in sole reliance upon facially credible but erroneous information negligently provided by law enforcement agent from another jurisdiction).

Chrones v. Pulido, No. 07-544, 2008 WL 482035 (Feb. 25, 2008) (whether court of appeals' ruling that erroneous jury instruction on one of two alternative theories of guilt in state case constitutes structural error requiring reversal because jury might have relied on it, conflicts with clearly established Supreme Court law).

Arizona v. Gant, No. 07-542, 2008 WL 482034 (Feb. 25, 2008) (whether Fourth Amendment requires law enforcement officers to demonstrate threat to safety or need to preserve evidence related to crime of arrest to justify warrantless search of vehicle incident to arrest conducted after vehicle's recent occupants had been arrested and secured).

D.C. CIRCUIT

United States v. Lacey, 511 F.3d 212 (D.C. Cir. 2008). Evidence that defendant received $5,000 during undercover drug transaction conducted in undercover officer's car and then exited car with officer to obtain remainder of money out of trunk sufficient to support conviction for theft under D.C. Code even if asportation is element under that statute; defendant's conviction for distribution of crack reversed because government failed to prove substance was smokable or crack, as required by Brisbane, but evidence sufficient for lesser included offense of distribution of cocaine powder.

United States v. Ginyard, 511 F.3d 203 (D.C. Cir. 2008). Court of appeals has jurisdiction to hear interlocutory appeal from denial of motion to dismiss single count of multi-count indictment on double jeopardy grounds; double jeopardy does not bar retrial on lesser included offense of possession with intent to distribute 5 or more grams or detectible amount of crack where jury in first trial found defendant guilty on that count but crossed out on verdict form originally-charged "50 grams," left blank questions of whether amount proven was at least 50-150 grams, and checked as proven whether amount was at least 20 grams (defendant's conviction had been reversed on direct appeal on trial error grounds); court of appeals lacks jurisdiction to reach merits of co-defendant's interlocutory appeal from denial of motion to preclude government from retrying him on theory that he aided and abetted defendant's possession with intent to distribute cocaine base as exception to final judgment rule for interlocutory appeals on double jeopardy grounds, which protects against twice being tried for same offense but does not extend to bar retrial on particular theory of liability.

United States v. Hemphill, et al., No. 06-3088, 2008 WL 341297 (D.C. Cir. Feb. 8, 2008). Government did not violate defendant's voluntary debriefing agreement, pursuant to which government agreed not to use any information provided by defendant "directly" against her, where government agent testified before a grand jury after interviewing defendant and government auditor read interview reports before he prepared summary charts used at trial but neither witness attributed any statement to defendant; government motion for continuance and to exclude time from speedy trial clock gives rise to excludable period of delay under Speedy Trial Act; trial court's error in refusing to give limiting instruction as to admissibility of other crimes evidence relating to defendant's uncharged thefts and embezzlements was harmless where evidence to prove charged embezzlements was overwhelming; district court did not err in admitting summary charts and in permitting government auditor to testify about charts based on documents he reviewed; district court did not err in precluding cross-examination of government witness about his irrelevant gambling proclivity; government's failure to disclose to defendant that government witness had been arrested twice for theft not prejudicial where witness already impeached with same kind of evidence about other thefts, perjury, and falsifying tax returns; any confusion about concealment aspect of money laundering charges caused by prosecutor's closing argument not prejudicial where government presented specific evidence of concealment as to each money laundering count; evidence of defendant's fraudulent transaction involving alleged co-conspirators sufficient to prove defendant's agreement on essential nature of conspiracy plan, which was to steal money from teachers' union; because evidence showed single conspiracy only, district court properly refused to instruct jury on multiple conspiracies; sentencing court made sufficient findings regarding scope of defendant's conspiratorial agreement to hold him responsible for acts found by jury to be reasonably foreseeable crimes in further of conspiracy and connected actual amounts of loss caused by defendant's crimes to evidence before jury; sentencing court adequately discussed § 3553(a) factors in determining sentence not greater than necessary to accomplish sentencing purposes and any disparity between defendant's sentence and co-defendant's sentence was reasonable because co-defendant pled guilty and testified for government.

United States v. Sheehan, 512 F.3d 621 (D.C. Cir. 2008). National Park Service regulation that requires permit for demonstrations involving more than 25 people in all park areas in National Capital Region, including White House sidewalk, is not facially unconstitutional as lacking a mens rea requirement because regulation must be construed to contain such an element and therefore does not establish a strict liability regime, which would be an unconstitutional burden on free expression; trial court erred in failing to require government to prove mens rea element and in excluding evidence of defendant's intent and knowledge; new trial ordered.

United States v. Branham, No. 04-3086, 2008 WL 398458 (D.C. Cir. Feb. 15, 2008). Any error in permitting a non-drug expert postal inspector to testify generally about drug dealers' use of express mail to send narcotic harmless where defense was that defendant did not take possession of express mail package and did not know its contents; evidence sufficient to prove defendant had knowledge that package contained illegal drugs where jury could infer from evidence that defendant had arranged ready access to mailbox to which package sent, that defendant was anticipating arrival of package, that defendant tried to conceal connection to package, and that defendant was involved in drug dealing out of building in which mailbox was located; defendant's knowledge of specific drug type not element of § 841 offenses; remand for Booker resentencing, rather than for Coles review, even though defendant failed to object at original sentencing to Booker error, where original sentencing judge no longer available to preside over remand proceedings.

United States v. Villanueva-Sotelo, No. 07-3055, 2008 WL 398446 (D.C. Cir. Feb. 15, 2008). To obtain conviction under "aggravated identity theft" statute, 18 U.S.C. § 1028(A)(a)(1), which penalizes any person who during commission of enumerated felony "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," government must prove defendant actually knew means of identification at issue belonged to another person.

United States v. Harris, No. 06-3045, 2008 WL 465289 (D.C. Cir. Feb. 22, 2008). Evidence that PCP found in defendant's kitchen sufficient to prove her constructive possession where drugs not hidden and defendant's fingerprint found on one vial of PCP; any Miranda violation harmless where defendant's statement to police as to location of firearms and apartment did not contribute to jury's verdict on drug charges and court granted judgment of acquittal on gun charge; trial court did not abuse discretion in asking prospective jurors compound law enforcement question during voir dire where evidence of defendant's guilt was strong and verdict did not turn on police credibility.

United States v. Lloyd, No. 05-3007, 2008 WL 465287 (D.C. Cir. Feb. 22, 2008). Thomas anti-deadlock instruction given after jury had disclosed numerical split in portion of note that judge did not read was not coercive where jury resumed deliberations and reached verdict on following day; any error in discussing deadlock note with counsel and then giving anti-deadlock instruction to jury, all in defendant's absence, was harmless because instructional issue was complex legally and unlikely that defendant would have been able to contribute much to discussion, his counsel was present and argued for different instruction, and there was no error in anti-deadlock charge itself; police testimony and chemist's report, to which defendant stipulated as accurate, sufficient to prove substance was crack cocaine.

United States v. Pettiford, No. 07-3027, 2008 WL 495602 (D.C. Cir. Feb. 26, 2008). Evidence of defendant's prior drug dealing was admissible under Rule 404(b) to prove his knowledge of drugs hidden in console of car in which he was sole occupant and his intent to distribute those drugs; district court did not err in denying new trial motion based upon newly discovered evidence that defendant's guilty plea in prior drug case, which was admitted as part of other crimes evidence, was subsequently vacated where there was no prospect that new trial would produce acquittal because other crimes evidence would be admissible in form of police testimony, rather than stipulation of guilty plea; police testimony that seized white, rock-like substance was crack cocaine and that quantity and packaging were consistent with wholesale distribution of crack sufficient to prove cocaine base was crack; court of appeals will not remand case to district court so that defendant may file motion, pursuant to 18 U.S.C. § 3582(c)(2), for reduced sentence in light of recent crack amendment, where defendant not eligible to be considered for a reduced sentence prior to effective date of amendment.

United States v. Brown, No. 03-3102, 2008 WL 540236 (D.C. Cir. Feb. 29, 2008). Four-point upward adjustment to defendant's base offense level on basis of his acquitted conduct did not violate Sixth Amendment right where resulting sentence did not exceed maximum authorized by verdict; district court did not plainly err in considering defendant's arrest record in deciding to impose sentence near top of applicable guidelines range.

OTHER COURTS

United States v. DeMott, 513 F.3d 55 (2d Cir. 2008). District court violated defendant's right to be present at resentencing and right to notice that the court intended to impose sentence above guidelines range where court resentenced defendant without providing notice to him or his counsel; reassignment of case to different sentencing judge warranted on remand.

United States v. Smalley, No. 06-4552, 2008 WL 540253 (3d Cir. Feb. 29, 2008). District court erred in applying four-level guidelines enhancement, finding that defendant "otherwise used" dangerous weapon during course of bank robbery where court should have applied only three-level enhancement for "brandish[ing] or possess[ing]" dangerous weapon.

United States v. Cunningham, No. 06-3899, 2008 WL 450654 (3d Cir. Feb. 21, 2008). Evidence that defendant engaged in several drug transactions involving codefendant and that codefendant carried bag containing drugs and gun insufficient to prove defendant constructively possessed gun in bag where evidence did not establish that defendant held or carried bag at any time.

United States v. Langford, No. 06-2774, 2008 WL 466158 (3d Cir. Feb. 22, 2008). District court's error in improperly calculating criminal history score and consequently selecting erroneous guidelines range was not harmless even though that range overlapped with correct range.

United States v. Mowatt, 513 F.3d 395 (4th Cir. 2008). Police officers' conduct in requiring apartment resident to open door so they could see him constituted search under Fourth Amendment; no exigent circumstances existed to obviate need for warrant before police knocked and demanded visual access into apartment that was subject of complaint of loud music and marijuana odor where officers were aware of marijuana in apartment before they approached apartment but failed to apply for search warrant.

United States v. Fancher, 513 F.3d 424 (4th Cir. 2008). District court erred in failing to give parties advance notice it was considering above-guidelines sentence where, although PSR identified possible grounds for variance sentence, government did not seek departure or variance but was content with sentence within guidelines range and possibility of variance sentence was raised for first time by district court in course of pronouncing sentence.

United States v. Reaves, 512 F.3d 123 (4th Cir. 2008). Anonymous tip was not sufficiently reliable to provide reasonable suspicion to stop defendant's vehicle where, although caller made nearly contemporaneous report of her observation of driver's participation in transaction involving bag and handgun and caller stayed on line with operator while following defendant's vehicle for several blocks and reported defendant's direction of travel, caller did not predict defendant's future movements and insisted on remaining anonymous.

United States v. Peters, 512 F.3d 787 (6th Cir. 2008). District court's failure to address defendant's argument for a time-served sentence or the mitigating factors indicating that such sentence would satisfy § 3553(a)'s requirement that sentence be sufficient but not greater than necessary to comply with sentencing purposes set forth in statute, was procedurally unreasonable under Rita and requires resentencing.

United States v. Bell, No. 06-6248, 2008 WL 382665 (6th Cir. Feb. 14, 2008). Defendant's prior drug convictions inadmissible under Rule 404(b) to show intent and absence of mistake at trial on charges of possession of marijuana and cocaine base with intent to distribute and felon in possession of firearm, where defendant did not claim that he was unknowingly dealing in drugs or was unwittingly engaging in unlawful activity and prior drug convictions were not probative of whether defendant intended to possess and distribute drugs in instant case as prior convictions were unconnected to present charges, occurred several years previously, and were not alleged to be part of same drug distribution scheme or to involve similar modus operandi.

United States v. Odeneal, No. 06-5885, 2008 WL 465357 (6th Cir. Feb. 22, 2008). Prosecutor's use of peremptory challenges to remove two of four African-Americans on jury venire constituted Batson violation where prosecutor's proffered race-neutral explanation for strikes was pretextual; district court erred in failing to fully consider evidence of pretext presented by defendants as part of court's duty to consider plausibility and persuasiveness of race-neutral explanations based on totality of circumstances surrounding strikes.

United States v. Thompson, No. 06-6233, 2008 WL 351283 (6th Cir. Feb. 11, 2008). Indictment charging that co-conspirator discharged Glock pistol during drug trafficking crime and that defendant carried Ruger pistol during that crime did not give defendant fair notice that he could be held responsible for discharge of Glock and therefore district court impermissibly exceeded scope of indictment by imposing ten-year mandatory minimum sentence on defendant for discharging firearm during and in relation to drug trafficking offense.

United States v. Alexander, No. 06-1867, 2008 WL 495319 (6th Cir. Feb. 7, 2008). District court plainly erred in failing to provide defendant with notice of variance from guidelines range of 18-24 months before sentencing defendant to 42 months' imprisonment for sexual abuse of minor.

Baranski v. United States, No. 06-2203, 2008 WL 141154 (8th Cir. Jan. 16, 2008). Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), which precluded state prisoners from raising Fourth Amendment issues in § 2254 habeas proceedings in federal court, does not bar federal prisoners from raising Fourth Amendment claims in § 2255 motions.

United States v. Tyler, 512 F.3d 405 (7th Cir. 2008). Police officers seized defendant for Fourth Amendment purposes when they stopped him as he was walking on public street with open beer bottle, erroneously advised him that his possession of open bottle violated the law, took his identification from him, and informed him that he could not leave until warrant check was completed; officers' mistake of law that possession of open bottle of beer was illegal could not justify investigative detention; mere fact that defendant had open beer bottle in hand insufficient to establish reasonable suspicion of public intoxication, as was required for officers to conduct investigative stop to insure that state public intoxication statute was not being violated.

United States v. Ryals, 512 F.3d 416 (7th Cir. 2008). District court abused discretion in denying defendant's motion for new counsel, timely filed three weeks prior to sentencing hearing, where court failed to conduct adequate inquiry into dispute between defendant and lawyer, defendant did not appear to be trying to delay sentencing, and request for new counsel was based on genuine disagreement about course of representation.

United States v. Huff, 514 F.3d 818 (8th Cir. 2008). District court abused discretion in denying defendant's request for downward departure or variance based on presumption of reasonableness of applicable guidelines range.

United States v. Greene, 513 F.3d 904 (8th Cir. 2008). Government waived argument on appeal that defendant's plea agreement precluded him from seeking sentence outside of applicable guidelines range, where government failed to make waiver argument at sentencing or in appellate brief but raised it for first time during oral argument on appeal; district court erroneously applied presumption of reasonableness in imposing sentence within applicable guidelines range.

United States v. Hughes, No. 07-2213, 2008 WL 482414 (8th Cir. Feb. 25, 2008). Anonymous trespass complaint did not establish reasonable suspicion for police officer to stop defendant

across street from alleged trespass and protective frisk unjustified because officer possessed no indication there was strong threat to public safety and could have conducted simple consensual encounter with defendant.

United States v. Lehmann, 513 F.3d 805 (8th Cir. 2008). District court's variance from guidelines range of 37-46 months to probationary sentence with community confinement as condition of probation was reasonable where court correctly calculated guidelines range, considered relevant sentencing factors, and gave lengthy explanation of reasons for imposing variance sentence.

United States v. Barsumyan, No. 07-50251, 2008 WL 517031 (9th Cir. Feb. 28, 2008). District court plainly erred in imposing on defendant who pled guilty to possession of device-making equipment under 18 U.S.C. § 1029(a)(4), condition of supervised release prohibiting "access[ing] or possess[ing] any computer or computer-related devices in any manner, or for any purpose."

United States v. Jennings, No. 06-30190, 2008 WL 282366 (9th Cir. Feb. 4, 2008). Prior state conviction for attempting to remove pursuing police vehicle did not constitute "violent felony" under ACCA as offense did not invaluably involve conduct presenting serious potential risk of physical injury to another.

United States v. Lococo, 514 F.3d 860 (9th Cir. 2008). Sentencing court erred in attributing to defendant who pled guilty to cocaine conspiracy amount of crack cocaine distributed by coconspirators, in violation of Apprendi, where defendant did not admit that he knew or reasonably could have foreseen that conspiracy would involve crack cocaine as he denied knowing that coconspirators converted into crack powder cocaine he sold them.

United States v. Hill, 512 F.3d 1277 (10th Cir. 2008). Defendant's prior conviction under state law for firearm possession, which, based on defendant's criminal history, carried presumptive sentencing range of 9-11 months and an upward departure from that range permitted only if prosecution moved for a departure and jury found aggravating factors beyond reasonable doubt, did not constitute crime punishable by imprisonment for term exceeding one year and therefore did not qualify as felony conviction under federal felon in possession of firearm statute.