M E M O R A N D U M

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

FROM: **Neil H. Jaffee**

SUBJECT: **March/April 2008 Case Summaries**

DATE: **May 14, 2008**

SUPREME COURT

Boulware v. United States, 128 S.Ct. 1168 (2008). Tax evasion defendant not required to show that either he or corporation that distributed funds to him intended capital return when distribution occurred, for purpose of defeating tax deficiency element of tax evasion offense.

Snyder v. Louisiana 128 S.Ct. 1203 (2008). Trial judge clearly erred in rejecting capital defendant's Batson objection to prosecutor's peremptory strike of black prospective juror where government's race-neutral reasons for striking juror – his nervousness and his concern that he not miss time from his student teaching obligations – were implausible and gave rise to inference of discriminatory intent.

Medellin v. Texas, 128 S.Ct. 1346 (2008). Decision by the International Court of Justice ("ICJ") that United States had violated Vienna Convention by failing to inform a number of Mexican nationals, including petitioner, of their rights under the Convention to review and reconsideration of their convictions in this country regardless of their failure to comply with state rules governing challenges to criminal convictions, was not directly enforceable domestic federal law that preempted state limitations on filing of successive habeas petitions; President's Memorandum to United States Attorney General, that United States would discharge its international obligations under ICJ's decision by having state courts give affect to that decision, did not independently require states to provide reconsideration and review of named Mexican nationals' claims without regard to state procedural default rules.

Burgess v. United States, 128 S.Ct. 1572 (2008). For purposes of enhancement provision in 21 U.S.C. § 841(b)(1)(A), which doubles mandatory minimum sentence for certain drug offenses if defendant was previously convicted of a "felony drug offense," a state drug offense punishable by more than one year in prison qualifies as a "felony drug offense" even though it is classified as a misdemeanor under state law.

Baze v. Reese, 128 S.Ct 1520 (2008). State's three-drug lethal injection method of capital punishment did not constitute cruel and unusual punishment under Eighth Amendment.

Begay v. United States, 128 S.Ct. 1581 (2008). Felony offense of driving under influence of alcohol is not a "violent felony" within meaning of ACCA as even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another" under 18 U.S.C. § 924(e)(2)(B)(ii), it is not sufficiently similar to examples of other crimes contained in that clause, each of which typically involves purposeful violent and aggressive conduct, to be included within that clause's scope.

Virginia v. Moore, No. 06-1082, 2008 WL 1805745 (Apr. 23, 2008). Police did not violate Fourth Amendment by arresting motorist whom they had probable cause to believe had violated Virginia law by driving with suspended license, even though, as matter of Virginia law, misdemeanor offense of driving with suspended license was one for which, under particular circumstances of this case, officers should have issued summons rather than made custodial arrest; Fourth Amendment did not require exclusion of evidence obtained as result of search incident to motorist's arrest.

NOTEWORTHY CERT. GRANTS

Melendez-Diaz v. Massachusetts, No. 07-591, 2008 WL 695627 (Mar. 17, 2008) (whether certificate of drug analysis prepared for use in criminal prosecution is "testimonial" evidence subject to the requirements of the Confrontation Clause as set forth in Crawford).

Oregon v. Ice, No. 07-901, 2008 WL 112170 (Mar. 17, 2008) (whether Sixth Amendment requires that facts (other than prior convictions) necessary for imposition of consecutive sentences be found by jury or admitted by defendant).

Jimenez v. Quarterman, No. 07-6984, 2008 WL 695626 (Mar. 17, 2008) (whether an out-of-time appeal obtained through state post-conviction procedures should constitute "direct review" for purposes of applying AEDPA's one-year federal habeas limitations period).

Waddington v. Sarausad, No. 07-772, 2008 WL 695629 (Mar. 17, 2008) (whether, in reviewing due process challenge to state jury instructions, federal habeas court must accept state court determination that instructions fully and correctly set out state law governing accomplice liability; whether it was unreasonable application of clearly established federal law for state court to conclude there was no reasonable likelihood that jury misapplied arguably ambiguous accomplice liability instruction so as to relieve prosecution of burden of proving all elements of charged crime).

United States v. Hayes, No. 07-608, 2008 WL 754339 (Mar. 24, 2008) (whether statute that makes it crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm, 18 U.S.C. § 922(g)(9), requires that predicate offense have as element domestic relationship between offender and victim).

Pearson v. Callahan, No. 07-751, 2008 WL 754340 (Mar. 24, 2008) (whether police officers violated Fourth Amendment by entering defendant's home based on invitation of confidential informant and without warrant, direct consent, or other exigent circumstances).

Van de Kamp v. Goldstein, No. 07-854, 2008 WL 1699467 (Apr. 14, 2008) (whether prosecutors are entitled to absolute immunity in § 1983 due process action alleging failure to institute within prosecutor's office a system of information-sharing regarding jailhouse informants, which resulted in Brady/Gigilo violation at defendant's trial, in which jailhouse informant falsely testified that he had not received any benefits for testifying for prosecution).

Chambers v. United States, No. 06-11206, 2008 WL 1775023 (Apr. 21, 2008) (whether defendant's prior conviction under state law for escape, arising from failure to report for imprisonment, constitutes conviction for "crime of violence" for purposes of sentencing under ACCA).

D.C. CIRCUIT

United States v. Johnson, 519 F.3d 478 (D.C. Cir. 2008). Officers had reasonable suspicion to stop defendant where police, after receiving report about a car "driving crazy" in high crime area, observed defendant quickly drive by in car described in report, double-park, leave car idling, cross street, enter unoccupied car, reach under dashboard, and then try to dart out of car as police approached; district court erred in admitting under Fed. R. Evid. 404(b) evidence of defendant's prior CPWOL conviction to prove defendant's knowledge of gun found in his waistband but error harmless where evidence established without contradiction that defendant attempted to conceal gun from police and then when police discovered gun, explained purpose in carrying gun for self-defense; evidence sufficient to prove seized cocaine base was crack cocaine where police testified drugs were "white' and "rock like," identified drugs as "crack" based upon officers' experience, and drug expert testified that drugs appeared to be street-level crack based upon packaging; court did not abuse discretion in denying new trial motion based on recently-obtained affidavit from eyewitness who contradicted police testimony, where defendant failed to show he had diligently attempted to obtain witness's testimony for trial and new testimony was unlikely to produce acquittal; court properly denied new trial motion based on alleged Gigilo violation where government's failure to disclose evidence that one of officers had been reprimanded for conduct in another case was immaterial.

United States v. Abdus-Price, 518 F.3d 926 (D.C. Cir. 2008). MPD radio look-out implicating in armed robbery two occupants of Ford Crown Victoria with tan on side and black on top, gave police reasonable suspicion to stop Crown Victoria that was dark blue with white driver's side rear door and contained two occupants; protective frisk of occupants justified because look-out was for armed robbery suspects, descriptions of robbers in look-out roughly matched occupants, and car was stopped within two blocks of robbery, albeit forty minutes after robbery occurred.

United States v. Reed, No. 06-3048, 2008 WL 927701 (D.C. Cir. Apr. 8, 2008). Prosecutor's closing argument comments contrasting bank robbery defendant with Jesse James and Billy the Kid did not constitute plain error where comments were not prejudicial because evidence against defendant was overwhelming; within-guideline range sentence not unreasonable where district court considered relevant mitigating evidence but concluded evidence did not outweigh serious nature of defendant's armed bank robbery offenses.

United States v. E. Gold Ltd., et al., 521 F.3d 411 (D.C. Cir. 2008). Post-indictment, pretrial seizure warrant and restraining order allowing seizure of assets alleged to be subject to forfeiture, and district court's order refusing to vacate seizure and restraining orders, were immediately appealable under statute permitting interlocutory appeal of orders refusing to dissolve or modify injunctions, 28 U.S.C. § 1292(a)(1); seizure of defendant's assets without evidentiary hearing violates due process where defendant demonstrated inability to retain counsel without access to seized assets.

United States v. Rawlings, No. 06-3087, 2008 WL 1722093 (D.C. Cir. Apr. 15, 2008). Trial judge's practice of permitting jurors to submit written questions for judge to ask witnesses within court's discretion, provided court take specific precautionary procedures, including reviewing submitted questions with counsel outside jury's presence to evaluate any objections and permitting counsel to re-question witness after witness responds to jurors' questions, considering on case-by-case basis whether and to what extent jury questions are appropriate, and balancing potential benefits and dangers; any error in prosecutor's closing argument comments that bolstered credibility of government witnesses not prejudicial where evidence against defendant was strong and judge instructed jury that attorney's arguments were not evidence and that jury was sole judge of witnesses' credibility; prosecutor's comment that there was not evidence contradicting police testimony not plain error where court gave proper burden of proof instruction.

United States v. Byfield, No. 06-3182, 2008 WL 1722092 (D.C. Cir. Apr. 15, 2008). District court's denial of motion to reduce sentence pursuant to crack amendment was subject to ten-day time limit for filing notice of appeal in criminal cases; defendant failed to file notice of appeal within time limits of Fed. R. App. P. 4(b) and government's objection to timeliness of appeal raised for first time in its initial appellate brief did not waive its right to challenge appeal on timeliness grounds.

United States v. Bryant, No. 06-3129, 2008 WL 1838385 (D.C. Cir. Apr. 25, 2008). Evidence of defendant's proximity to gun discarded by fleeing codefendant and gun found in SUV in which both defendants had been riding, coupled with defendant's suspicious attire (ski mask and bulky weather jacket on relatively mild night), evasive conduct toward police, and evidence that defendant was acting in concert with codefendant, who was actually carrying gun on person, was sufficient to prove defendant constructively possessed both guns; defendant's conviction on one count reversed for Speedy Trial Act violation where government's filing for admission of defendant's prior conviction under Fed. R. Evid. 609 only tolled speedy trial clock for 30 days while filing, which did not require a hearing, was "under advisement" by district court and court continued trial date to accommodate parties but failed to make explicit interest of justice findings required by Supreme Court's Zedner decision; defendant failed to show systematic exclusion of blacks from jury venire, in violation of Jury Selection and Service Act, 28 U.S.C. § 1861 et seq.

OTHER COURTS

United States v. Lara-Ramirez, 519 F.3d 76 (1st Cir. 2008). District court's inquiry after receiving report of Bible in jury room was inadequate to support finding that mistrial was manifestly necessary, and therefore retrial was barred under Double Jeopardy Clause where court questioned only court reporter and jury foreperson, investigation revealed only that Bible had been brought into jury room by juror who wanted other jurors to consider Bible during deliberations, but it was not known whether deliberating jurors read Bible or discussed it.

United States v. Sanchez, 517 F.3d 651 (2d Cir. 2008). Statute instructing Sentencing Commission to assure that guidelines specify sentence at or near statutory maximum for career offenders (28 U.S.C. § 994(h)) does not deprive district court of authority to impose prison term that is not near statutory maximum because there is no statute instructing courts to sentence career offenders at or near maximum and Congress consciously rejected proposal that would have mandated sentencing judges to impose such sentences and instead instructed Commission to issue guidelines to "recommend" high sentences for career offenders.

United States v. Frias, 521 F.3d 229 (2d Cir. 2008). Time limits on criminal appeals pursuant to Fed. R. App. P. 4(b) are not jurisdictional and can be waived or forfeited by government.

United States v. Hawes, 06-3334, 2008 WL 1799678 (3d Cir. Apr. 22, 2008). In sentencing financial advisor convicted of mail fraud, district court erred in applying guidelines' identity theft enhancement to defendant's act of changing addresses to which clients' account statements were mailed in order to facilitate concealment of theft of money from those accounts; address or mail matter did not constitute unique "means of identification" within meaning of U.S.S.G. § 2B1.1(b)(10)(C)(I), financial institution defendant represented identified its clients by account number rather than address, and defendant did not use changes of address to "breed" new identification numbers.

United States v. Alvarado-Valdez, 521 F.3d 337 (5th Cir. 2008). Introduction at trial of unavailable co-defendant's out-of-court statement made during police interrogation violated defendant's confrontation rights under Crawford since statement was testimonial in that it was offered to prove that co-defendant and defendant conspired with others to transport cocaine.

United States v. Gracia, No. 07-40245, 2008 WL 836696 (5th Cir. Mar. 31, 2008). During rebuttal closing argument, prosecutor improperly bolstered credibility of key witnesses by offering personal assurances to jury that witnesses were telling the truth and by telling jury that witnesses should be believed because they were doing their job.

United States v. Highgate, 521 F.3d 590 (6th Cir. 2008). District court plainly erred in pitting applicable sentencing guidelines range against relevant § 3553(a) factors and reluctantly imposing guidelines sentence out of misplaced sense of obligation and apparent misunderstanding of full sentencing discretion.

United States v. West, No. 06-6109, 2008 WL 782463 (6th Cir. Mar. 26, 2008). "Bare bones" affidavit presented to support issuance of warrant to search defendant's apartment and van, which stated that state police officers were investigating victim's disappearance and that defendant was last person to have contact with her, that defendant had been convicted and served time for murder and attempted murder, and that unknown sources indicated that defendant dealt marijuana, failed to provide sufficient factual information for finding of probable cause to believe that evidence of any crime was likely to be found at either defendant's residence or van; Leon good faith exception did not apply where affidavit was based on unsubstantiated conclusions and unreliable hearsay and was so bare bones as to preclude any reasonable belief of validity of warrant that affidavit supported; moreover, affiant purposely withheld exculpatory information concerning source of information.

United States v. Urrieta, No. 07-5431, 2008 WL 731224 (6th Cir. Mar. 20, 2008). Even if police had reasonable suspicion that defendant, who had Mexican driver's license and failed to produce passport, had committed immigration violation, extended detention of defendant following traffic stop was unlawful since deputy lacked reasonable suspicion that defendant was transporting drugs; facts that defendant was towing second car while traveling with girlfriend and her son in fully packed cars from California to Atlanta, that he was unable to find passport, that he had an expired registration, and that passengers appeared nervous, were too vague to support reasonable suspicion of drug trafficking.

United States v. Salgado, 519 F.3d 411 (7th Cir. 2008). Defendant's attempt to rob individual thought to be drug purchaser but who turned out to be government informant and who was not carrying any money belonging to United States, did not constitute attempt to rob person having custody of money belonging to United States, in violation of 18 U.S.C. § 2114(a).

United States v. Castellanos, 518 F.3d 965 (8th Cir. 2008). Defendant who permitted police officers to enter his residence did not impliedly consent to officer's entry into his bedroom when he "kind of flipped his hand" in that direction after officer asked him for identification, where defendant initially refused to consent to search when officers told him they did not have warrant; statute permitting immigration service officers to conduct warrantless searches of persons seeking admission to United States did not permit police to conduct warrantless search of defendant's home during drug investigation after defendant admitted he was in country illegally.

United States v. Rojas, No. 07-1287, 2008 WL 819080 (8th Cir. Mar. 28, 2008). Defendant entitled to evidentiary hearing on new trial motion following conviction for aggravated sexual abuse of child where motion based on child victim's purported recantation of trial testimony, which was not corroborated by any physical evidence, purported recantation occurred only days after trial, and defense counsel as well as prosecutor claimed to have heard recantation and her mother's report of recantation on separate occasions.

United States v. Brandon, 521 F.3d 1019 (8th Cir. 2008). District court plainly erred in imposing life sentence without calculating guidelines range, discussing applicable § 3553(a) sentencing factors, or explaining reasons life sentence was chosen.

United States v. Mendoza, 518 F.3d 706 (9th Cir. 2008). Defendant's constitutional speedy trial right was violated by ten-year delay between indictment and arrest.

United States v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008). Defendant's statement, "I'm good for tonight," following reading of Miranda warning, was not unambiguous invocation of defendant's right to silence but officer was under duty to further clarify meaning of ambiguous statement before interrogating defendant.

United States v. Davenport, 519 F.3d 940 (9th Cir. 2008). Possession of child pornography, in violation of 18 U.S.C. § 2252(A)(a)(5)(b), is lesser included offense of receiving child pornography, in violation of § 2252(A)(a)(2), and therefore convictions for both offenses violate double jeopardy when conduct underlying both offenses is same.

United States v. Smart, 518 F.3d 800 (10th Cir. 2008). District court did not abuse discretion in imposing 120-month sentence for inducing minor to engage in sexually explicit conduct for purpose of producing videotapes of such conduct, which was below sentencing guidelines range of 168-210 months, where court relied primarily on defendant's relatively minor role, fact that more culpable codefendant received 120-month sentence, and court found sentence was sufficient to deter future criminal conduct and permit defendant to obtain necessary treatment.

United States v. Tatum, 518 F.3d 769 (10th Cir. 2008). District court erred in imposing six- level enhancement under U.S.S.G. § 2B1.1(b)(10) in sentencing defendant for uttering counterfeit check with intent to deceive organization because defendant's conduct did not involve use or possession of access device-making equipment, nor did it involve trafficking in or producing acts or devices where counterfeit checks and account number printed on those checks did not constitute access devices within meaning of enhancement provision.

United States v. Westry, No. 06-13847, 2008 WL 1735384 (11th Cir. Apr. 16, 2008). Government failed to present sufficient evidence to prove defendant was member of conspiracy at time of death of one of several addicts who purchased drugs from members of conspiracy where only evidence of defendant's membership in conspiracy prior to addict's death was evidence of defendant's presence at scene of drug trafficking and association with one or more of members of conspiracy.