M E M O R A N D U M

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

FROM: **Neil H. Jaffee**

SUBJECT: **March/April 2006 Case Summaries**

DATE: **May 25, 2006**

SUPREME COURT

United States v. Grubbs, 126 S.Ct. 1494 (2006). Fourth Amendment did not require that triggering condition for anticipatory search warrant be set forth in warrant itself; anticipatory warrant authorizing search of defendant's residence on basis of affidavit stating that warrant would be executed upon delivery of videotape containing child pornography was supported by probable cause where there was a fair probability that contraband would be found in residence at some future time; anticipatory search warrants do not violate the Fourth Amendment's probable cause requirement.

Georgia v. Randolph, 126 S.Ct. 1515 (2006). A warrantless entry and search of premises with consent of one occupant but over the refusal of a physically present co-occupant is unreasonable and violates the non-consenting co-occupant's Fourth Amendment rights.

Salinas v. United States, 126 S.Ct. 1675 (2006) (per curiam). Defendant's prior conviction for simple possession of controlled substance did not constitute a "controlled substance offense" within meaning of career offender sentencing guidelines.

Day v. McDonough, 126 S.Ct. 1675 (2006). In absence of state's deliberate waiver of one-year limitation period for filing state prisoner's federal habeas petition, district court has discretion, on its own initiative, to dismiss untimely petition after state has filed answer to petition without contesting its timeliness.

Holmes v. South Carolina, 126 S.Ct. 1727 (2006). State evidentiary rule excluding evidence of third-party guilt if prosecution has introduced forensic evidence that, if believed, strongly supports guilty verdict, violates defendant's constitutional right to present complete defense.

NOTEWORTHY CERT. GRANTS

Jones v. Bock, 126 S.Ct. 1462 (2006) (whether PLRA's exhaustion requirement is prerequisite to prisoner's federal civil rights suit such that prisoner must allege in complaint how administrative remedies were exhausted or attach proof of exhaustion to complaint or, instead, whether non-exhaustion is affirmative defense that must be pleaded and proven by prison officials; whether PLRA proscribes "total exhaustion" rule that requires district court to dismiss prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite presence of other exhausted claims).

Williams v. Overton, 126 S.Ct. 1463 (2006) (whether PLRA requires prisoner to name particular defendant in administrative grievance to exhaust administrative remedies as to that defendant to preserve right to sue that defendant).

Lawrence v. Florida, 126 S.Ct. 1625 (2006) (whether AEDPA's one-year limitations period on filing federal habeas petition is tolled while petition for certiorari is pending in Supreme Court from state court's denial of post-conviction relief to death-sentenced prisoner).

Lopez v. Gonzales, 126 S.Ct. 1651 (2006) (whether state court conviction for drug crime that is felony under state law but only misdemeanor under federal law constitutes "aggravated felony" for purposes of determining eligibility for removal under federal immigration laws).

United States v. Toldo-Flores, 126 S.Ct. 1652 (2006) (whether state court conviction for drug crime that is felony under state law but only misdemeanor under federal law constitutes aggravated felony) for purposes of enhancement under sentencing guidelines of sentence for improper entry by alien).

United States v. Resendiz-Ponce, 126 S.Ct. 1776 (2006) (whether omission of element of criminal offense from federal indictment can constitute harmless error).

Tarey v. Musladen, 126 S.Ct. 1769 (2006) (whether federal appellate court exceeded authority on habeas review when it overturned state prisoner's murder conviction on ground that courtroom spectators included three family members of victim who wore button depicting deceased).

Ornaski v. Balmontes, No. 05-493, 2006 WL 1131826 (May 1, 2006) (whether trial judge's refusal to instruct capital sentencing jury that mitigating evidence of defendant's background and character could be used not only to assess culpability for crime but also to draw favorable inferences about his probable future conduct, specifically his ability to adjust to prison life and make positive contributions to others if granted sentence of life without possibility of parole, violated defendant's Eight Amendment rights.

Whorton v. Bockting, No. 05-595, 2006 WL 1310697 (May 16, 2006) (whether Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), which restricted use of testimonial hearsay evidence, applies retroactively to cases on collateral review.

D.C. CIRCUIT

Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006). Requirement under DNA Analysis Backlog Elimination Act of 2000 that probationer convicted in Superior Court of District of Columbia of unarmed robbery submit DNA sample for inclusion in Combined DNA Index System did not violate probationer's Fourth Amendment rights or the Ex Post Facto Clause.

Martinez v. Bureau of Prisons, 440 F.3d 620 (D.C. Cir. 2006) (per curiam). District court properly dismissed federal prisoner's complaint seeking correction of certain information in his PSR where records showed that BOP provided reasonable explanation for its refusal to correct records and confirmed that the information in PSR was accurate.

United States v. Ginyard, 444 F.3d 648 (D.C. Cir. 2006). District court abused discretion in dismissing, pursuant to Fed.R.Crim.P. 23(b), holdout juror without conducting adequate inquiry about juror's continuing availability in light of uncertainty of risk of loss of juror's job if deliberations continued into following week.

OTHER COURTS

United States v. Transfiguracion, 442 F.3d 1222 (9th Cir. 2006). Plea agreement pursuant to which defendants pleaded guilty to importing drugs from California to Guam in violation of 21 U.S.C. § 952(a) in return for government's promise not to prosecute defendants for any known nonviolent offenses, could not be rescinded by government where intervening appellate decision holding that smuggling drugs between California and Guam did not constitute importation violation of § 952(a) warranted dismissal of importation charges against defendants.

United States v. Milam, 443 F.3d 382 (4th Cir. 2006). Defendant's failure to object to facts in PSR does not constitute admission for purposes of right to jury trial as interpreted in Apprendi and its progeny.

United States v. Williams, 444 F.3d 1286 (11th Cir. 2006). Provision of PROTECT Act, 18 U.S.C. § 2252(A)(a)(3)(B), which makes it crime for someone to knowingly advertise or promote material child pornography in interstate or foreign commerce, violates First Amendment's protection of free speech.

United States v. Ollie, 442 F.3d 1135 (8th Cir. 2006). Defendant who was directed by parole officer who was to report to police station and speak with police chief concerning ownership of gun removed from apartment defendant shared with girlfriend was "in custody" for Miranda purposes when defendant was questioned by chief in small interrogation room.

United States v. Ingram, No. 05-10866, 2006 WL 1071632 (11th Cir. Apr. 25, 2006). Two-year delay between indictment and trial deprived defendant of Sixth Amendment right to a speedy trial, requiring reversal of conviction and dismissal of indictment.

United States v. Berni, 439 F.3d 990 (8th Cir. 2006). Appellate court can review sentence for reasonableness even though defendant received substantial assistance departure and district court imposed sentence substantially below bottom of guideline range.

United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006). In determining reasonableness of post-Booker sentence, appellate court does not presume that sentence within guidelines range is reasonable but applicable range does serve as point of reference in review of entire record; government motion is no longer prerequisite to district court's imposition of sentence below guidelines range to reward defendant for cooperation in exercise of court's discretion under Booker.

In re: Vasquez-Ramirez v. U.S. District Court, 443 F.3d 692 (9th Cir. 2006). District judge who rejects charge-bargain plea agreement lacks authority to preclude defendant from entering unconditional guilty plea anyway, provided that plea satisfies Fed. R. Crim. P. 11 (b)'s requirements of being knowing, voluntary, and supported by factual basis.

United States v. Miqbel, 444 F.3d 1173 (9th Cir. 2006). District court abused discretion in imposing supervised release revocation sentence exceeding sentence recommended by guidelines on ground that more severe sentence was needed to achieve just punishment for defendant's new offense.

United States v. Laughrin, 438 F.3d 1245 (10th Cir. 2006). Police officer lacked reasonable suspicion to stop vehicle based on his knowledge of driver's history of driving violations or officer's belief, based on stale information, that defendant's license was under suspension.

United States v. Richardson, 439 F.3d 421 (8th Cir. 2006) (en banc). Defendant could not be convicted and sentenced for both being felon in possession of firearm, in violation of 18 U.S.C. § 922(g)(1), and for being drug user and possession of firearm, in violation of 18 U.S.C. § 922(g)(3), based upon a single act of firearm possession.

United States v. Jimenez-Betre, 440 F.3d 514 (1st Cir. 2006) (en banc). Booker's mandate that district courts consider sentencing guidelines range will mean in most cases that court must calculate applicable guideline range including resolution of any factual or legal disputes necessary to that calculation before deciding whether to exercise discretion to impose non-guidelines sentence; in post-Booker sentencing, guidelines continue to be important consideration but guidelines are not "presumptively" controlling and sentence within guidelines range is not "per se" reasonable;" appellate court's emphasis in reviewing reasonableness in sentence below guideline range is on district court's provision of reasoned explanation and plausible outcome and, when those criteria are met, some deference is due to district judge's reasoned judgment.

United States v. Piccolo, No. 04-10577, 2006 WL 846260 (9th Cir. April 3, 2006). Escape from a halfway house does not categorically constitute crime of violence for purposes of application of career offender guidelines provision.

United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006). In post-Booker sentencings, district courts should use guidelines as starting point but cannot consider calculated guidelines sentence as presumptive sentence and place burden on defendant to explain any justification for imposting nonguidelines sentence.

Jonah R. V. Carmona, No. 05-16391, 2006 WL 1148739 (9th Cir. 2006). Contrary to BOP's policy denying juveniles credit for time spent in custody prior to commencement of their sentences, juveniles are entitled to credit for presentence time served under 18 U.S.C. § 3585(b).

United States v. Roe, 445 F.3d 202 (2d Cir. 2006). Defendant entitled to evidentiary hearing on claim that government acted in bad faith in refusing to file substantial assistance departure motion pursuant to cooperation agreement in light of lack of any post-agreement proffer meetings or requests to testify in other cases and possibility, on existing record, that government based refusal on defendant's untruthfulness about certain matters, of which government knew prior to execution of agreement.