

MEMORANDUM

TO: FPD Staff Attorneys & CJA Panel Attorneys
FROM: Neil H. Jaffee
SUBJECT: January/February 2006 Case Summaries
DATE: March 7, 2006

SUPREME COURT

[Evans v. Chavis](#), 126 S.Ct. 846 (2006). Time that application for state postconviction review is "pending" within meaning of AEDPA, so as to toll one-year limitations period for filing federal habeas petition, includes interval between lower court's adverse determination and petitioner's timely filing of notice of appeal.

[Brown v. Sanders](#), 126 S.Ct. 884 (2006). Invalidation of two of four eligibility factors found by capital jury, any one of which would have rendered defendant eligible for death penalty, did not affect constitutionality of death sentence ultimately imposed, where all of aggravating facts and circumstances that invalidated eligibility factors permitted jury to consider were also open to proper consideration under state's "circumstances of the crime" sentencing factor.

[Rice v. Collins](#), 126 S.Ct. 969 (2006). State trial judge's decision to credit prosecutor's race-neutral explanation for peremptory strike of African-American juror, based on juror's youthful age and lack of community ties, in response to defendant's [Batson](#) challenge, does not constitute unreasonable determination of facts in light of evidence presented in state court, thereby precluding federal habeas relief under AEDPA.

[United States v. Georgia](#), 126 S.Ct. 877 (2006). Disabled state prison inmate may sue state for money damages under American Disabilities Act, which abrogates state sovereign immunity for conduct that actually violates Fourteenth Amendment.

[Oregon v. Guzek](#), No. 04-928, 2006 WL 397856 (Feb. 22, 2006). Neither Eighth nor Fourteenth Amendments provided capital murder defendant with right to present at resentencing evidence designed to cast "residual doubt" on his guilt, here, new alibi evidence, as mitigating evidence.

NOTEWORTHY CERT. GRANTS

[United States v. Gonzalez-Lopez](#), 126 S.Ct. 979 (2006) (whether district court's denial of defendant's right to be represented by counsel of choice by refusing to grant attorney pro hac vice admission constitutes structural error requiring automatic reversal of conviction).

[Zedner v. United States](#), 126 S.Ct. 978 (2006) (whether requirements of Speedy Trial Act can be waived only in limited circumstances set forth in statute and whether violation of Act's 70-day time limit is subject to harmless error analysis).

[Brigham City v. Stuart](#), 126 S.Ct. 979 (2006) (whether police officers' warrantless entry into private residence was justified under emergency aid doctrine or exigent circumstances where police entered home to stop physical altercation between four adults and juvenile).

[Dixon v. United States](#), 126 S.Ct. 1139 (2006) (whether with respect to duress defense, burden is on government to prove beyond reasonable doubt that defendant was not under duress or upon defendant to prove duress by preponderance of evidence).

[Hill v. Crosby](#), 236 S.Ct. 1189 (2006) (whether § 1983 complaint brought by death-sentenced prisoner, who seeks to stay execution to pursue Eighth Amendment challenge to chemicals used in carrying out lethal injection execution, was properly recharacterized as habeas petition).

[Cunningham v. California](#), No. 05-6551, 2006 WL 386377 (Feb. 21, 2006) (whether imposition of sentence in upper term of authorized punishments for given crime under state determinate sentencing scheme, based on aggravating factors not found by jury or admitted by defendant, violated defendant's Sixth Amendment rights under Blakely).

D.C. CIRCUIT

[United States v. Godines](#), 433 F.3d 68 (D.C. Cir. 2006). District court's announcement of alternative sentence identical to guidelines sentence, using guidelines as advisory only and taking into consideration requisite § 3553(a) factors, rendered harmless any Booker error in applying guidelines as mandatory.

[Fletcher v. Reilly](#), 433 F.3d 867 (D.C. Cir. 2006). Retroactive application of United States Parole Commission regulations during petitioner's reparole hearing violated ex post facto because, unlike displaced District of Columbia Parole Board regulations in effect at time petitioner's parole was revoked, regulations failed to consider post-incarceration conduct, including rehabilitation accomplishments.

[In re: Zambrano](#), 433 F.3d 886 (D.C. Cir. 2006). Leave to file second § 2255 motion raising Booker claim denied because Supreme Court has not made Booker retroactive to cases on collateral review.

United States v. McCants, 434 F.3d 557 (D.C. Cir. 2006). District court's adoption of PSR without resolving factual disputes relating to PSR's guidelines calculations requires remand for resentencing.

United States v. Boyd, 435 F.3d 316 (D.C. Cir. 2006). Error in admitting evidence of negative results of defendant's PSA drug test, offered by government to rebut defense that defendant possessed charged drugs for personal use rather than distribution, harmless where other evidence showed police officers observed defendant engaged in hand-to-hand drug transaction and found on his person 53 rocks of crack packaged for distribution and a loaded gun.

United States v. Alston-Graves, 435 F.3d 331 (D.C. Cir. Jan. 27, 2006). Error in giving deliberate ignorance jury instruction in wire fraud and conspiracy to commit wire fraud prosecution, which was not supported by any factual predicate, harmless where evidence of defendant's active participation in fraud scheme was overwhelming; imposition of post-Blakely/pre-Booker discretionary sentence that included enhancements based on facts not found by jury or admitted by defendant -- consistent with subsequent Booker remedy -- did not violate ex post facto as existence of statutory penalties at time defendant committed offenses was sufficient warning of potential punishment.

United States v. Fonseca, 435 F.3d 369 (D.C. Cir. 2006). Exclusionary period under Speedy Trial Act from filing a pretrial motion through its disposition begins immediately on day motion was filed, rather than on first day after motion was filed; here, government motion was filed on 70th day after mistrial tolled speedy trial clock; trial court did not abuse discretion in precluding cross-examination of government witness that she possessed crack pipe when she was previously arrested, which would have impeached her direct testimony that she was not using drugs at that time, where matter was collateral and cumulative as trial court permitted other cross-examination concerning witness's drug use.

United States v. Booker, 436 F.3d 238 (D.C. Cir. 2006). Evidence that loaded gun was found lying on ground inches away from defendant's drug stash, that defendant was never more than 50 feet to 80 feet from stash, and that defendant made gesture indicating control over gun, combined with drug expert's testimony that drug dealers possessed guns to protect themselves and their stashes, was sufficient to prove defendant's constructive possession of gun under § 924(c); remand for resentencing under Booker where sentence imposed under mandatory guidelines and parties agreed error was prejudicial where district court also announced lower alternative sentence.

United States v. Gillespie, 436 F.3d 272 (D.C. Cir. 2006). District court's announcement of discretionary alternative sentence identical to guidelines sentence rendered Booker error harmless.

United States v. Tabron, No. 03-3156, 2006 WL 305495 (D.C. Cir. Feb. 10, 2006). Two-level gun bump based on district court's conclusion that drug defendant must have known co-conspirators regularly used guns in course of drug conspiracy vacated where court made no explicit finding as to scope of defendant's conspiratorial agreement.

United States v. Johnson, No. 04-3144, 2006 WL 305500 (D.C. Cir. Feb. 10, 2006). Evidence almost one year old linking drug dealer to defendant's residence was not stale so as to negate any probable cause for search warrant of residence where police had fresh information that dealer's business was still active; search warrant's misspecification of city quadrant in which residence located did not undermine probable cause where warrant affidavit contained references to physical description and correct address of building to be searched and evidence established that searching officers were familiar with address and knew they were searching correct location; district court's conclusion that drugs at issue were crack cocaine not plain error where evidence established purity and rocklike character of drugs and nature of equipment and packaging seized but there was no evidence that drugs were smokable.

United States v. Valdes, No. 03-3066, 2006 WL 435409(D.C. Cir. Feb. 24, 2006). Police detective's conduct in searching police databases to provide information about fictitious individuals in return for reward from FBI undercover informant acting as judge did not violate illegal gratuity statute, 18 U.S.C. § 201(c)(1)(B), because government failed to show that acts for which defendant received compensation were official acts within meaning of statute.

OTHER COURTS

United States v. Pho, 433 F.3d 53 (1st Cir. Jan. 5, 2006). Post-Booker sentencing court may not impose sentence outside guideline range based solely on categorical rejection of guidelines' disparate treatment of offenses involving crack cocaine and powder cocaine. (See also United States v. Aura, No. 05-4437, 2006 WL 440099 (4th Cir. Feb. 24, 2006) (same)).

United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006). In drug conspiracy prosecution, defendant's due process right to fair trial was violated by trial court's issuance of partial directed verdict, indicating that jury would only consider defendant's conduct in connection with smaller conspiracy than one charged in indictment, where court subsequently refused to conform jury instructions to that ruling after defendant had tailored summation and jury instruction request to narrower charge.

United States v. Coles, No. 04-2134, 2006 WL 302243 (3d Cir. Feb. 9, 2006). Warrantless search of hotel room violated Fourth Amendment where police impermissibly created exigency, that is, occupants' efforts to dispose of drugs once officers identified themselves and attempted entry, by entering and searching room before obtaining search warrant where officers could have continued covert surveillance of room and awaited search warrant.

United States v. Cuellar, No. 05-10065, 2006 WL 399581 (5th Cir. Feb. 22, 2006). Evidence was insufficient to support conviction of defendant, caught attempting to transport drug trafficking proceeds into Mexico, for international money laundering where there was no evidence that he was attempting to create appearance of legitimate wealth.

United States v. Arroyo, 434 F.3d 835 (6th Cir. 2006). District court lacked authority under Fed. R. Crim. P. 35(a) to grant government's motion to correct sentence where original sentence was not invalid or clearly erroneous and was imposed pursuant to government's substantial assistance departure motion.

United States v. DeCarlo, 434 F.3d 447 (6th Cir. 2006). Defendant's convictions for interstate travel for purpose of engaging in illicit sexual conduct and for interstate travel with intent to have sex with child younger than 12 years old violated Double Jeopardy Clause where alleged illicit sexual conduct was intended sex act with child less than 12 years old.

United States v. Dawson, 434 F.3d 956 (7th Cir. 2006). Cross-examination about prior judicial determination finding witness not to be credible is not barred by Fed. R. Evid. 608(b)'s proscription of extrinsic evidence to undermine witness's character for truthfulness but, instead, is confided to discretion of trial judge.

VanPatten v. Deptisch, 434 F.3d 1038 (7th Cir. 2006). Defense counsel's appearance at plea hearing through speakerphone rather than in person constituted structural error, which warranted withdrawal of guilty plea.

United States v. Thunder, No. 04-3780, 2006 WL 398609 (8th Cir. Feb. 22, 2006). Closure of courtroom during testimony of allegedly-abused children violated defendant's Sixth Amendment right to public trial.

United States v. Serna, 435 F.3d 1046 (9th Cir. 2006). Defendant's predicate conviction for possession of assault weapon was not crime of violence under career offender guideline.

United States v. Adams, 432 F.3d 1092 (9th Cir. 2006). District court plainly erred in failing to inform defendant who pled guilty to drug offense that he was subject to mandatory minimum fine under guidelines and warranted withdrawal of guilty plea.

Williams v. Runnels, 432 F.3d 1102 (9th Cir. 2006). African-American defendant established inference of racial discrimination under Batson where prosecutor used three of first four peremptory challenges to remove from jury panel African-Americans who comprised only four of first forty-nine potential jurors.

United States v. Angelos, 433 F.3d 738 (10th Cir. 2006). Search of defendant's entire residence exceeded scope of search warrant where warrant explicitly described items to be seized as personal safe located in basement and car trunk.

United States v. Lopez, No. 04-1223, 2006 WL 392083 (10th Cir. Feb. 21, 2006) Murder suspect's confession was involuntary even though he had received Miranda warnings where he confessed only one hour into interview and agents made improper promises of leniency and misrepresented strength of evidence against him; suspect's second confession also was involuntary because coercion producing first confession had not been dissipated, even though second confession came almost twelve hours after first and after night's sleep and meal, but same

agent was primary interrogator during second interview, which took place in same place as earlier interrogation, and suspect had not spoken to attorney or family member during 24 hours since his arrest.

United States v. Edgerton, No. 05-3167, 2006 WL 401834 (10th Cir. Feb. 22, 2006). Police officer's detention of vehicle and occupant after initial traffic stop violated Fourth Amendment where stop was for sole purpose of ensuring validity of temporary registration tag in rear window and once officer observed that tag was valid, purpose of stop was satisfied; officer's further detention to request driver's license and registration and to issue warning ticket exceeded scope of stop's underlying justification.

United States v. Yates, No. 02-13654, 2006 WL 319348 (11th Cir. Feb. 13, 2006). Government's presentation of testimony by means of two-way video teleconference violated defendants' Sixth Amendment confrontation rights.