M E M O R A N D U M

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

FROM: **Neil H. Jaffee**

SUBJECT: **November/December 2006 Case Summaries**

DATE: **January 22, 2007**

SUPREME COURT

Lopez v. Gonzales, 127 S.Ct. 625 (2006). Drug offense made a felony under state law but a misdemeanor under federal drug statute does not constitute a "felony punishable under the Controlled Substances Act," 18 U.S.C. § 924(c)(2), and therefore is not an "aggravated felony" under Immigration and Naturalization Act, as would disqualify alien from discretionary cancellation of removal.

Carey v. Musladin, 127 S.Ct. 649 (2006). Determination by state appellate court that habeas petitioner was not inherently prejudiced when spectators at defendant's first-degree murder trial wore buttons depicting murder victim, was not contrary to or unreasonable application of clearly established federal law and therefore grant of habeas relief was improper.

NOTEWORTHY CERT. GRANTS

Bowles v. Russell, 127 S.Ct. 763 (2006) (whether a habeas petitioner's notice of appeal, filed outside the 14-day period authorized by Fed. R. App. P. 4(a)(6) for appeals that have been reopened, but within the 17-day period erroneously granted by the district court for filing the notice of appeal, was untimely).

Fry v. Pliler, 127 S.Ct. 763 (2006) (whether the appropriate harmless error standard for assessing prejudice when constitutional error in a state trial proceeding is not recognized until the case reaches federal court on a habeas petition is whether the error is harmless beyond a reasonable doubt or whether the error is harmless unless it has a substantial and injurious effect on the verdict; also, if the latter standard applies, whether the defendant or the state bears the burden of persuasion on the question of prejudice).

Roper v. Weaver, 127 S.Ct. 763 (2006) (whether federal court exceeded its authority under AEDPA in overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory," in violation of due process).

D.C. CIRCUIT AND DISTRICT COURT

United States v. Lawrence, 471 F.3d 135 (D.C. Cir. 2006). Evidence that substance in question consisted of a large white rock, contained cocaine base, and its sale followed conventional practices for sale of crack cocaine, sufficient to prove substance was crack; court of appeals may not consider co-defendant's inculpatory testimony in reviewing and ruling upon defendant's motion for judgment of acquittal made after government's case-in-chief even where defendant presents evidence that was not compelled by co-defendant's testimony; evidence that drugs found in co-defendant's apartment, together with men's clothing, photos of defendant, mail with defendant's name on envelopes, and health identification card bearing defendant's name, insufficient to prove defendant constructively possessed drugs found in apartment.

United States v. Gurr, 471 F.3d 144 (D.C. Cir. 2006). U.S. Customs' search of defendant's luggage upon his arrival in the United States after nonstop flight from outside country was valid as functional equivalent of border search notwithstanding FBI's involvement in search resulting from its request to Customs to retain certain financial documents seized from luggage; admission of statements in report prepared by National Credit Union Administration examiner that former employee provided information demonstrating that manager's list of family members' accounts was incomplete, and that former employees allegedly committed fraud, was harmless error in prosecution for defrauding federal credit union managed by defendant where, even if statements constituted double hearsay, defense counsel published some of statements to jury during cross-examination of examiner and employee witnesses testified at trial and were subject to cross-examination; evidence that defendant was manager of credit union, that credit union member signed blank voucher at defendant's direction, that defendant gave voucher to credit union teller and told her to withdraw $5,000 from member's account and that member never received withdrawn money, sufficient to support defendant's conviction for embezzlement from credit union member; evidence that defendant attempted to persuade witness to sign affidavit falsely stating she had authorized money to be transferred from her credit union account, in order to influence her testimony at defendant's trial for defrauding federal credit union, was sufficient to support conviction for witness tampering.

United States v. Lewis, 471 F.3d 155 (D.C. Cir. 2006). Court of appeals reaffirms its earlier decision in United States v. Thomas, 361 F.3d 653 (D.C. Cir. 2004), that escape from halfway house qualifies as "crime of violence" for career offender enhancement under Sentencing Guidelines.

United States v. Singletary, 471 F.3d 193 (D.C. Cir. 2006). Government did not forfeit its objection to timeliness of defendant's appeal (defendant filed notice of appeal approximately 4 months after it was due) by failing to file motion to dismiss appeal and raising objection for first time in its appellate brief.

United States v. Olivares, No. 05-3058, 2006 WL 3716597 (D.C. Cir. Dec. 19, 2006). District court did not err in denying 4-level minimal role downward adjustment under U.S.S.G. § 3B1.2 where evidence established that defendant, who pled guilty to conspiracy to commit armed bank robbery, sold guns to robbers and stashed their gear and money from robberies in his apartment; district court's denial of Smith departure not reviewable where court understood its authority to depart; defendant's sentence was reasonable where it fell in middle of Guidelines range and defendant received three-fourths of requested downward adjustment for limited participation in conspiratorial scheme.

United States v. Gewin, 471 F.3d 197 (D.C. Cir. 2006). Defendant's waiver of right to trial counsel was knowing and intelligent where trial court conducted waiver hearing in which it engaged in wide-ranging colloquy with defendant and explained risks of proceeding pro se and defendant repeatedly indicated he understood risks and did not want a lawyer; in prosecution for conspiracy to commit securities fraud and related offenses, district court properly admitted under Fed. R. Evid. 801(d)(2)(E) out-of-court statements by alleged co-conspirators based upon finding that group had engaged in common enterprise of stock promotion and court was not required to find existence of unlawful conspiracy; record supported sentencing court's finding that defendant was or would become able to pay $500,000 fine where defendant claimed significant assets although there was a dispute between defendant and a co-defendant over some assets, and co-defendants were jointly and severally liable for almost $2 million restitution order.

OTHER COURTS

United States v. Castillo, 460 F.3d 337 (2d Cir. 2006). Following Booker, district court may impose non-Guidelines sentence on defendant found eligible for safety valve relief despite language in safety valve statute requiring imposition of Guidelines sentence. Accord United States v. Cardenas-Juarez, 469 F.3d 1331 (9th Cir. 2006).

United States v. Hecht, 470 F.3d 177 (4th Cir. 2006). On review of conviction for possession of child pornography, remand for resentencing necessary where PROTECT Act provision, 18 U.S.C. § 3553(b)(2), that includes mandatory application of Sentencing Guidelines in imposing sentence for certain child and sexual offenses, including possession of child pornography, violates rationale of Booker and mandatory language in statute must be excised and severed and replaced with advisory Guidelines regime under which sentences are reviewed for reasonableness.

United States v. Nolen, No. 05-40859, 2006 WL 3598522 (5th Cir. Dec. 12, 2006). District court abused its discretion in revoking attorney's pro hac vice admission for violating state disciplinary rule prohibiting false statements concerning qualifications or integrity of judge where court failed to demonstrate it conducted proper balancing of defendant's Sixth Amendment rights against interest underlying rules governing attorney conduct.

Lyell v. Renico, 470 F.3d 1177 (6th Cir. 2006). Trial judge's conduct, which included numerous interruptions of defense counsel during voir dire of jury and cross-examination of witnesses, as well as insulting comments directed against defense counsel, violated defendant's due process right to fair trial before unbiased judge where interruptions were made with derogatory tone, continued throughout trial, and judge clearly indicated disapproval of defense counsel by calling him "an actor, a child, silly, and a smart aleck," and issued contempt order against him in front of jury.

United States v. Cousins, 469 F.3d 572 (6th Cir. 2006). District court's failure to provide notice to defendant that it was considering imposing sentence outside Guidelines range on ground that had not previously been identified was plain error.

United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006). Police officer's affidavit was insufficient to establish probable cause for issuance of warrant to search defendant's home where defendant was arrested outside home for non-drug offense and crack cocaine was found on his person but there was no evidence that defendant was drug dealer.

Carrington v. United States, 470 F.3d 920 (9th Cir. 2006). Extraordinary circumstances existed to justify recall of mandates in two cases where defendant sentenced to 360 and 324 months' imprisonment, respectively, for drug offenses where at both sentencing hearings, district judge expressed frustration with lack of discretion afforded by Guidelines and made sua sponte requests for court of appeals to recall mandate in both cases to give district court opportunity to resentence defendants.

United States v. Luong, 470 F.3d 898 (9th Cir. 2006). Warrant affidavit was so lacking in indica of probable cause that official belief in its existence was objectively unreasonable and therefore good faith exception to exclusionary rule did not apply where affidavit stated that DEA identified chemist as suspect in drug operation, that suspect took plane into Los Angeles and subsequently went to store with defendant to purchase adapter fitting hose used with vacuum pump, commonly used for production of methamphetamine, and that suspect went to defendant's house, but there was no indication that suspect was chemist identified by DEA, that any officer saw pump at defendant's residence, or that adapter was ever taken into premises; alleged evidence of probable cause that police officer orally conveyed to magistrate who issued invalid warrant to search defendant's home would not be considered by appellate court in determining whether good faith exception to exclusionary rule applied where same information was not included in affidavit.

United States v. Sandoval-Mendoza, No. 04-10118, 2006 WL 3783435 (9th Cir. Dec. 27, 2006). District court violated defendant's Sixth Amendment right to counsel by prohibiting defendant and counsel from discussing defendant's testimony, which stretched out over three days, during overnight recess.