

MEMORANDUM

TO: FPD Staff Attorneys & CJA Panel Attorneys
FROM: Neil H. Jaffee
SUBJECT: September/October 2007 Case Summaries
DATE: November 7, 2007

SUPREME COURT

NOTEWORTHY CERT. GRANTS

[Virginia v. Moore](#), No. 06-1082 (whether Fourth Amendment requires suppression of evidence obtained incident to arrest based on probable cause where arrest violates state law).

[Begay v. United States](#), No. 06-11543 (whether felony drunk driving is "violent felony" within ACCA's residual clause).

[United States v. Rodriguez](#), No. 06-1646 (whether state drug-trafficking offense for which state law authorized ten-year sentence because defendant was recidivist, qualifies as predicate "serious drug offense" under ACCA).

[Gonzalez v. United States](#), No. 06-11612 (whether federal criminal defendant must explicitly and personally waive right to have Article III judge preside over voir dire and whether court of appeals erred in reviewing defendant's argument on appeal for plain error).

[Boulware v. United States](#), No. 06-1509 (whether a defendant in a tax evasion prosecution is entitled to present defense that monies he took from corporation were non-taxable return of capital, rather than income).

[Cuellar v. United States](#), No. 06-1456 (whether merely hiding funds with no design to create appearance of legitimate wealth is sufficient to support money laundering conviction).

[Baze v. Rees](#), No. 07-5439 (whether lethal injection method of execution violates Eighth Amendment's ban on cruel and unusual punishment).

D.C. CIRCUIT

[United States v. Powell](#), No. 05-3202, 2007 WL 2907260 (October 5, 2007). Drug expert's identification as crack cocaine of photograph depicting seized drugs, combined with testimony of arresting officers that drugs consisted of white, yellowish rocklike substance, which based upon their extensive experience, was crack cocaine, was sufficient to establish that defendant possessed with intent to distribute crack cocaine; government failed to prove school located at intersection where defendant was arrested with drugs in car qualified as type of school covered by 21 U.S.C. § 860(a).

[United States v. Mathis](#), No. 05-3129, 2007 WL 2915184 (D.C. Cir. Oct. 9, 2007). Although defense attorney's failure to properly calculate defendant's guideline criminal history score prior to advising defendant to reject plea offer was deficient, defendant did not suffer prejudice because government would not have extended more favorable offer even if district court had found that defendant's criminal history category was less than counsel had advised; to overcome failure to raise perjured testimony claim on direct appeal, defendant must show cause and prejudice to raise it in his § 2255 motion, and here, defendant was unable to show either cause or prejudice because claim lacked evidentiary support.

[United States v. Holmes](#), No. 05-3171, 2007 WL 3071629 (D.C. Cir. Oct. 23, 2007). Police seizure of keys, which included car keys, from defendant's pants pocket exceeded scope of permissible Terry frisk and but for illegal seizure, officers likely would not have determined that defendant possessed car keys, which then enabled police to confront defendant and obtain admission that he drove car to area and to use remote opener on key chain to locate and unlock car, which led to discovery of gun and ammunition; government failed to meet burden to prove that car inevitably would have been discovered without unlawful seizure of keys or that defendant's subsequent consent to search car purged taint of illegal seizure.

[United States v. Brown](#), No. 06-3053, 2007 WL 3071622 (D.C. Cir. Oct. 23, 2007). In prosecution in which indictment charged possession of firearm and ammunition by felon, in violation of 18 U.S.C. § 922(g)(1), district court did not constructively amend indictment by instructing jury that it could find defendant guilty if it found that he possessed either firearm or ammunition even though evidence established that charged ammunition was located within charged firearm; jury's verdict finding defendant not guilty of possession of firearm and guilty of possession of ammunition was supported by evidence where jurors might have doubted whether pistol entered into evidence was same one seized due to confusion in police testimony as to caliber of charged gun.

OTHER COURTS

[United States v. Cirilo-Munoz](#), No. 05-2469, 2007 WL 2845562 (1st Cir. Oct. 2, 2007). At resentencing of defendant convicted of aiding and abetting murder, district court erred in imposing sentence that was 59 percent higher than sentence of actual murderer where judge simply read various sentencing factors, made factual errors and unsupported assumptions about defendant's culpability, made sarcastic statement regarding reduction of sentence, and summarily responded without explanation to request from variance for guidelines sentence.

[United States v. Azubike](#), No. 06-2255, 2007 WL 2745011 (1st Cir. Sept. 21, 2007). Prosecutor's misstatement at end of rebuttal closing argument indicating that in taped telephone conversation with confidential informant, defendant referred to leader of drug conspiracy – offered to show defendant's role in organization and knowledge that it involved drug trafficking – went to heart of no-knowledge defense and constituted reversible error.

[United States v. Newbert](#), No. 07-1387, 2007 WL 2949299 (1st Cir. Oct. 11, 2007). Defendant's successful motion to withdraw guilty plea, based on post-plea evidence of actual innocence, did not constitute breach of plea agreement and therefore government not entitled to admit into evidence withdrawn guilty plea or statements defendant made in course of plea proceedings.

[United States v. Rosa](#), No. 05-3621, 2007 WL 3146045 (2d Cir. Oct. 30, 2007). State PSR prepared for defendant's prior robbery conviction could not be used to establish that conviction qualified as violent felony under ACCA where PSR's descriptions of statements by victim and witness regarding presence of handgun during robbery were drawn from police reports rather than independent investigation.

[United States v. Razmilovic](#), No. 06-4195, 2007 WL 3011042 (2d Cir. Oct. 17, 2007). There was no manifest necessity to declare a mistrial in securities fraud prosecution in response to jury's deadlock note after three days of deliberations where trial, which lasted three weeks, was complex, trial judge failed to discuss note with jury, poll jury to determine whether it had reached verdict on any count, instruct jury about possibility of reaching partial verdict, and parties were not given opportunity to discuss mistrial issue or present arguments; retrial barred under Double Jeopardy Clause.

[United States v. Brutus](#), No. 06-2710, 2007 WL 2828690 (2d Cir. Oct. 2, 2007). Interested-witness instruction regarding defendant's testimony, which stated that defendant had "deep personal interest" in case possessed by no other witness and which created "a motive to testify falsely," impermissibly undermined presumption of innocence by presupposing defendant's guilt; in cases in which defendant testifies, instruction should advise jury to evaluate defendant's testimony in same way it judges testimony of other witnesses.

United States v. Cavera, No. 05-4591, 2007 WL 2965407 (2d Cir. Oct. 11, 2007). Above-guideline range sentence for conspiracy to deal in and transport firearms, based on district court's policy judgment that trafficking firearms in heavily populated urban environments threatened greater harm than trafficking in less densely populated areas, rather than on circumstances particular to defendant and his offense, was unreasonable.

United States v. Lafferty, No. 06-1901, 2007 WL 2811062 (3d Cir. Sept. 28, 2007). Joint interrogation of defendant and alleged accomplice after defendant had invoked right to remain silent in earlier interview without accomplice present, violated defendant's Fifth Amendment rights where more than two hours passed between interrogations, defendant did not join in accomplice's request for joint interrogation, and defendant did not waive privilege before or during joint interrogation.

United States v. Hollis, No. 06-50784, 2007 WL 3151700 (5th Cir. Oct. 30, 2007). Defendant's stipulation to fact that he had previously been convicted of felony for purposes of trial on § 922(g)(1) charge did not constitute waiver of right to argue that prior conviction could not be used to support sentencing as armed career offender under ACCA; government failed to establish that defendant was represented by counsel when he was convicted of prior felony, as required for conviction to be used as basis for sentencing defendant under ACCA where prosecutive summary of prior proceedings did not reflect that defendant was represented by counsel when convicted or that he validly waived right to counsel.

Ruize v. Quarterman, No. 07-70025, 2007 WL 2955723 (5th Cir. Oct. 11, 2007). Petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) from district court's denial of habeas petition was not successive petition subject to AEDPA restrictions where court denied habeas relief on procedural grounds and did not address substantive claim of ineffective assistance of trial counsel.

United States v. McGrattan, No. 06-3043, 2007 WL 2934939 (6th Cir. Oct. 10, 2007). Search warrant affidavit for defendant's home was inadmissible to establish conduct underlying defendant's prior state conviction for purpose of determining whether that conviction fell within federal definition of child pornography, such that conviction could be used to raise defendant's mandatory minimum sentence for federal child pornography offense from 5 to 15 years, given that affidavit was intended only to establish probable cause for search and did not necessarily describe conduct for which defendant was convicted in state case.

United States v. Story, No. 05-6422, 2007 WL 2819869 (6th Cir. Oct. 1, 2007). In sentencing defendant to 300 months' imprisonment for drug offenses, district court's misstatement of applicable guideline range as 346-405 months, rather than 324-405 months, constituted plain error affecting defendant's substantial rights as had court started with correct range, it might have arrived at sentence less than 300 months.

United States v. Hearn, 500 F.3d 479 (6th Cir. 2007). Admission through police testimony of informants' hearsay statements that defendant had large amount of drugs and was driving to Nashville to sell them, violated defendant's Confrontation Clause rights; although government's stated purpose was to use informants' statements to explain why police initiated stop of defendant that led to discovery of drugs and gun, record clearly showed that prosecutor introduced statements, at least in part, to establish elements of charged drug offenses.

Garner v. Mitchell, No. 02-3552, 2007 WL 2593514 (6th Cir. Sept. 11, 2007). Mentally impaired suspect's Miranda waiver was not shown to be knowing and intelligent where prosecution failed to rebut forensic psychologist's testimony that defendant lacked full comprehension of warnings and of right to remain silent, and given suspect's young age, indeterminate prior experience with legal system and poor education.

United States v. Gibbs, No. 06-1916, 2007 WL 3131667 (6th Cir. Oct. 29, 2007). District court's finding that defendant's federal sentence was required with to run consecutive to state parole revocation sentence to be imposed was plain error because under U.S.S.G. § 5G1.3(c), court had discretion to order federal sentence to run concurrently, partially concurrently, or consecutively to prior undischarged term of imprisonment.

United States v. Wilson, No. 06-6339, 2007 WL 3131682 (6th Cir. Oct. 29, 2007). Police did not have reasonable suspicion that passenger in vehicle was armed and dangerous, as required to support Terry pat-down search during traffic stop, where vehicle was stopped because driver and passenger were not wearing seat belts, driver spontaneously admitted he had served time on federal gun charge, and passenger acted nervously during stop.

Girts v. Yanai, 501 F.3d 743 (6th Cir. 2007). Prosecutor's repeated closing argument comments regarding defendant's failure to testify, which indicated that defendant was only person who could explain wife's death, warranted federal habeas relief from aggravated murder conviction where comments concerned central issue in case, which was how defendant's wife allegedly ingested cyanide, how defendant allegedly obtained cyanide, and what defendant allegedly said about wife's death.

United States v. Grubbs, No. 04-5403, 2007 WL 3010434 (6th Cir. Oct. 17, 2007). Evidence was insufficient to establish defendant constructively possessed charged firearm where handgun was found in mother's house under brother's bed, defendant did not live at house and slept on couch when he visited periodically, brother testified that he owned gun, nothing connected defendant to brother's room, and neighbor's testimony that he observed defendant holding dark-colored automatic gun weeks earlier did not establish it was same gun found in brother's room.

Parker v. Renico, No. 06-2419, 2007 WL 3010436 (6th Cir. Oct. 17, 2007). Evidence insufficient to prove that defendant constructively possessed weapon found in vehicle where defendant was passenger in fleeing vehicle in which two weapons ultimately were found by police, defendant did not resist arrest after vehicle crashed and even protected officers by thwarting codefendant's attempt to reach for gun, driver's door opened during pursuit but not rear door where passenger was seated, and defendant's mere presence near firearms in vehicle did not prove possession.

United States v. Baker, No. 05-6874, 2007 WL 2693818 (6th Cir. Sept. 17, 2007). Sentence of five years' probation upon defendant's guilty plea to possession of unregistered firearm having barrel length less than eighteen inches was reasonable where district court considered statutory factors, court noted that defendant had done "exceedingly well" while under supervision, and incarceration was unnecessary to protect public.

United States v. Ross, 501 F.3d 851 (7th Cir. 2007). District court erred in presuming within-guideline range sentence was appropriate unless defendant could present "good reason" for court to impose sentence below range.

United States v. Vasquez-Luiz, No. 06-2180, 2007 WL 2695639 (7th Cir. Sept. 17, 2007). Government failed to rebut presumption that defendant was prejudiced by someone other than juror in question having written "Guilty" in notebook that juror was using to take notes during trial since it was not clear whether word was written by another juror or someone outside jury.

United States v. Mosley, No. 06-3149, 2007 WL 2963747 (8th Cir. Oct. 12, 2007). By arguing at sentencing that defendant obstructed justice by lying to investigator shortly after arrest and during proffer interview with government and therefore was not entitled to acceptance of responsibility reduction because of obstruction enhancement, government breached plea agreement provision prohibiting prosecution from arguing at sentencing that defendant failed to accept responsibility based on her admittedly misleading pre-plea statements.

United States v. Yah, 500 F.3d 698 (8th Cir. 2007). Defendant's arrest on new charges after pleading guilty but before sentencing did not violate plea agreement or preclude court from granting agreed-upon acceptance of responsibility reduction; government breached plea agreement by refusing to recommend low end of applicable guideline range as required by agreement, where government argued defendant had breached by failing to accept responsibility for new criminal conduct; defendant entitled to specific performance of plea agreement and resentencing by different judge or opportunity to withdraw guilty plea.

United States v. Rolon-Ramos, No. 07-1066, 2007 WL 2820288 (8th Cir. Oct. 1, 2007).

Evidence insufficient to connect defendant to conspiracy to distribute 500 grams or more of methamphetamine where government failed to prove that actual methamphetamine amounts were discussed by co-conspirator and cooperating witness in defendant's presence and even if defendant was present during some conversations, conversations were conducted in English and there was no evidence in record that defendant, who used Spanish interpreter at trial, could speak or understand English.

United States v. Hernandez-Vasquez, No. 06-50198, 2007 WL 3171422 (9th Cir. Oct. 31, 2007).

Prior to conducting inquiry to determine whether involuntary medication to restore competency is appropriate, district court should make specific determination on record that no other basis for forcibly administering medication – such as inmate's dangerousness to himself or others – is reasonably available; involuntary medication order must identify specific medication or range of medications that treating physicians are committed to use in treatment of defendant, maximum dosages that may be administered, and duration of time that involuntary treatment may continue before physicians must report back to court on defendant's mental condition and progress.

United States v. Richard, No. 06-10377, 2007 WL 2964366 (9th Cir. Oct. 12, 2007). District court abused discretion in replaying for jury selected portions of audiotape of government witness's testimony without taking appropriate measures to ensure jury did not unduly emphasize selected testimony.

United States v. Schaefer, 501 F.3d 1197 (10th Cir. 2007). Evidence concerning defendant's use of Internet, standing alone, was insufficient to establish that child-pornography images at issue moved across state lines, as required to sustain conviction for receipt and possession of images involving sexual exploitation of minors.

United States v. Conlan, 500 F.3d 1167 (10th Cir. 2007). District court erred in applying presumption that sentence within guideline range was reasonable where defendant was sentenced at very bottom of range and probation office recommended term of probation rather than advisory guideline sentence.

United States v. Jones, No. 06-15203, 2007 WL 3052782 (11th Cir. Oct. 22, 2007). Instructions given by trial judge in response to jury's deadlock announcement were impermissibly coercive where judge instructed jury to return next day to continue deliberations, stating "[w]e will do this until you reach a verdict," and following day, told jury that "there [wa]s no need of sending [to court] any notes that [the jury] can't agree, because you are going to stay here for a long time."

United States v. Mazarky, 499 F.3d 1246 (11th Cir. 2007). Under statute governing imposition of new term of supervised release following revocation of prior term (18 U.S.C. § 3583(h)), maximum allowable supervised release term following multiple revocations must be reduced by aggregate length of any terms of imprisonment imposed upon earlier revocations.