M E M O R A N D U M

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

FROM: **Neil H. Jaffee**

SUBJECT: **May/June 2006 Case Summaries**

DATE: **July 7, 2006**

SUPREME COURT

Brigham City v. Stuart, 126 S.Ct. 1943 (2006). Police may make warrantless entry into home when they have objectively reasonable basis for believing occupant was seriously injured or imminently threatened with injury.

Zedner v. United States, 126 S.Ct. 1976 (2006). Defendant's unlimited waiver of speedy trial ineffective because defendant cannot prospectively waive application of Speedy Trial Act; district court must make on-the-record findings to support exclusion under Act; harmless error review not applicable to court's error in failing to make record findings in support of end-of-justice continuance under 18 U.S.C. § 3161(h)(8); indictment dismissed and case remanded to district court to determine whether dismissal is with or without prejudice.

Hill v. McDonough, 126 S.Ct. 2096 (2006). Defendant can challenge constitutionality of lethal injection execution procedure under 42 U.S.C. § 1983.

House v. Bell, 126 S.Ct. 2064 (2006). Federal habeas petitioner asserting innocence as gateway to raising defaulted claims must demonstrate that it is more likely than not, in light of new evidence, no reasonable juror would find him guilty beyond reasonable doubt; because petitioner here made stringent showing required by actual innocence exception, his federal habeas action may proceed.

Hudson v. Michigan, 126 S.Ct. 2159 (2006). Violation of knock-and-announce rule does not require suppression of evidence seized at subsequent search of home.

Youngblood v. West Virginia, 126 S.Ct. 2188 (2006) (per curiam). Certiorari granted, judgment vacated, and case remanded for state appellate court to consider, in first instance, defendant's claim that state trooper's destruction of exculpatory note apparently written by women whom defendant convicted of abducting and sexually assaulting, constituted Brady violation.

Samson v. California, 126 S.Ct. 2193 (2006). Police officer's suspicionless search of parolee's person, pursuant to state statute, does not violate Fourth Amendment.

Davis v. Washington, 126 S.Ct. 2266 (2006). Statements made by complaining witness in 911 call identifying defendant as the assailant were not testimonial and therefore admissible at trial in absence of complaining witness's testimony; in consolidated case, statements made by domestic battery complaining witness to officers responding to report of domestic disturbance at witness's home were testimonial and therefore inadmissible at trial in absence of witness's testimony.

Woodford v. Ngo, No. 05-416, 2006 WL 1698937 (June 22, 2006). Prisoner must properly and timely exhaust administrative remedies to satisfy Prison Litigation Reform Act's exhaustion requirement under 42 U.S.C. § 1997e(a).

Dixon v. United States, No. 05-7053, 2006 WL 1698998 (June 22, 2006). Defendant bears burden of proving duress defense to charges of receiving firearm while under indictment and making false statements in connection with acquisition of firearm, which require that defendant acted "knowingly" or "willfully," by preponderance of evidence and placing burden on defendant does not violate due process because duress evidence does not tend to disprove any element of offenses.

Kansas v. Marsh, No. 04-1170, 2006 WL 1725515 (June 26, 2006). State statute directing imposition of death penalty when aggravating and mitigating circumstances are in equipoise does not violate Eighth or Fourteenth Amendments.

Washington v. Recuenco, No. 05-83, 2006 WL 1725561 (June 26, 2006). Sentencing court's failure to submit to jury sentencing factor that increased maximum sentence, in violation of Blakely, is subject to harmless error analysis.

United States v. Gonzalez-Lopez, No. 05-352, 2006 WL 1725573 (June 26, 2006). Trial court's erroneous deprivation of defendant's choice of retained counsel by denying counsel's application for admission pro hac vice on ground that counsel had violated professional rule of conduct violated defendant's Sixth Amendment right to retain counsel of choice without any showing of prejudice required; violation constituted structural error not subject to harmless error review.

Beard v. Pennsylvania, No. 04-1739, 2006 WL 1749604 (June 28, 2006). Prison policy forbidding inmates any access to newspapers, magazines, and photographs does not violate First Amendment and is reasonably related to legitimate penal interest in denying privileges as incentive to inmate growth.

Sanchez-Llamas v. Oregon, No. 04-10566, 2006 WL 1749688 (June 28, 2006). Exclusionary rule does not apply to violation of right to consular notification after detention of foreign national under Article 36 of Geneva Convention and therefore incriminating statements made by defendant while being detained without advice of right to consular notification would not be suppressed; states may subject Article 36 habeas claims to same procedural default rules that apply generally to other federal-law claims.

Clark v. Arizona, No. 05-5966, 2006 WL 1764372 (June 29, 2006). State's use of insanity test that is limited to defendant's capacity to tell whether act charged as crime is right or wrong and does not include any cognitive capacity requirement, that is, whether mental defect left defendant unable to understand what he was doing, does not violate due process; state's restriction of defense evidence of mental illness and incapacity to its bearing on insanity claim, thus excluding such evidence to negate mental element of crime, does not violate due process.

Hamdan v. Rumsfeld, No. 05-184, 2006 WL 1764793 (June 29, 2006). Military commission convened by President lacks power to try defendant, a Yemeni national captured during United States invasion of Afghanistan, because commission is not authorized by Congressional act and structure and procedures of commission violate Uniform Code of Military Justice and Geneva Conventions.

NOTEWORTHY CERT. GRANTS

James v. United States, No. 05-9264, 2006 WL 394993 (June 12, 2006) (whether Florida conviction for attempted burglary qualifies as violent felony for purposes of sentencing under Armed Career Criminal Act, 18 U.S.C. § 924(e)).

Burton v. Waddington, 126 S.Ct. 2352 (2006) (whether Blakely rule requiring that facts resulting in enhanced maximum sentence be proved beyond reasonable doubt applies retroactively to cases on collateral review).

D.C. CIRCUIT AND DISTRICT COURT

In re: Sealed Case, 449 F.3d 118 (D.C. Cir. 2006). Court of appeals has jurisdiction under 18 U.S.C. § 3742(a)(1) to hear appeal from sentence imposed pursuant to substantial assistance departure, which defendant claims was "imposed in violation of law" in that sentence violated his rights under Booker and due process; filing substantial assistance departure motion does not preclude prosecutor from addressing, or district court from considering, relevant § 3553(a) factors, including defendant's future dangerousness; district court's failure to consider all of § 5K1.1 factors in determining extent of substantial assistance departure did not violate defendant's rights under Booker; defendant's due process rights not violated by prosecutor's sentencing comments that defendant had not been truthful about money received from drug trafficking where nothing in record indicates prosecutor's statements were false or that district court relied on them in imposing sentence.

United States v. Brown, 449 F.3d 154 (D.C. Cir. 2006). Accidental discharge of weapon does not trigger 10-year mandatory minimum sentence for discharging weapon under 18 U.S.C. § 924(c) as statute implicitly contains intent requirement; Booker error in sentencing under mandatory guidelines not harmless where district court imposed sentence at top of guideline range and commented that sentence could have been even longer without guidelines but also acknowledged multiple potential mitigating factors, which were mostly precluded under guidelines.

United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006). Procurement of presence of defendants in United States by informal cooperation between United States and Panama, pursuant to which DEA agents took defendants into custody in Panama and transferred them to the United States without extradition proceedings, did not deprive United States of jurisdiction over defendants where United States-Panama extradition treaty did not contain provision against procuring individuals outside terms of treaty; government not required to produce to defendants tapes and transcripts of alleged co-conspirator's trial in Costa Rica; defendants not entitled to bill of particulars where superseding indictment set forth object of alleged conspiracy and government not required to include in indictment or to prove for 21 U.S.C. § 963 violation any overt acts; expert testimony of Costa Rican drug inspector regarding coded phrases in defendants' wiretapped conversations complied with Fed. R. Evid. 702 where witness's expertise established through testimony that he learned drug dealers' lexicon by listening to and analyzing thousands of coded conversations in drug investigations; drug expert's testimony that drug organizations know when drugs transported are ultimately destined to be imported into United States did not violate Fed. R. Evid. 704(b) where record was clear that witness had no knowledge of defendants' intent to import in this case; admission into evidence of co-defendant's post-arrest statement implying fear of defendant not plain error under Bruton; ineffective assistance of counsel claim raised on appeal remanded for evidentiary hearing where claim had been previously raised in new trial motion but district court denied it as untimely without evidentiary hearing; district court did not err in refusing to order disclosure of classified information arguably discoverable under Fed. R. Crim. P. 16 where court of appeals concluded after in camera review that information fell far short of threshold showing needed to overcome privilege that information would be helpful to defense.

United States v. Baugham, 449 F.3d 167 (D.C. Cir. 2006). Evidence was sufficient to establish buyer-seller drug conspiracy where sellers fronted drugs to buyer with knowledge that buyer intended to distribute them; any variance between conspiracy charged in indictment and smaller buyer-seller conspiracy proved at trial harmless; i.e., error did not influence verdict where evidence against each convicted defendant would have been admissible even in absence of acquitted defendants and no danger of spillover prejudice because government presented audio and video recordings of each defendant and indictment provided reasonable notice of buyer-seller conspiracy; evidence that drugs were white rock substance and witness's references to drugs sold by defendants as "crack" sufficient to prove substance was crack cocaine.

United States v. Carter, 449 F.3d 1287 (D.C. Cir. 2006). Affidavit in support of application for wiretap of defendant's cell phone adequately described drug operation under investigation and explained why other non-wiretapping investigations would be insufficient to reveal full scope of drug conspiracy; fact that only 27 percent of non-pertinent phone calls were minimized does not demonstrate that government failed to comply with statutory minimization requirement where defendant failed to identify specific conversations that should not have been intercepted; remand for hearing on ineffective assistance of counsel claim not required where defendant failed to establish reasonable probability district court would have found government's minimization efforts unreasonable had counsel properly pursued such claims; instruction that jury could only hold defendant responsible for drug quantity both foreseeable to him and in furtherance of conspiracy not plain error because instruction would not have led jury to attribute to defendant co-conspirators' actions falling outside scope of defendant's conspiratorial agreement; district court failed to make sufficient findings that quantity of drugs sold by co-conspirators, which supported life sentence under guidelines, was attributable to defendant as within scope of his conspiratorial agreement; district court's findings that defendant was "point of contact" for heroin for several people and that he had "persons delegated to him" insufficient to support organizer/leader guideline enhancement.

United States v. Powell, No. 05-3047, 2006 WL 1715683 (D.C. Cir. June 23, 2006). Search of nearby car on probable cause that defendant, found urinating a few feet from parked car, had committed misdemeanor in officers' presence but before defendant placed under custodial arrest or his movement restrained consistent with arrest, not justified as search incident to arrest under Belton exception.

United States v. Sullivan, No. 05-3161, 2006 WL 1735889 (D.C. Cir. June 27, 2006). Congress has authority under Commerce Clause to criminalize intrastate possession of child pornography transmitted through several states via the Internet as regulation of activity that substantially affects interstate commerce; district court's failure to provide defendant with notice of intent to impose special conditions of supervised release not plain error and imposition of conditions restricting defendant's computer use, contacts with minors, possession of sexually stimulating materials, videocameras, and recording devices, not plain error.

United States v. Green, Cr. No. 06-0031 (JR), 2006 WL 1667804 (D.D.C. June 5, 2006). Tinted window violation is not arrestable offense and does not justify search of driver's person or vehicle without additional evidence establishing probable cause; police lacked probable cause to arrest driver of vehicle for open container of alcohol where officers' testimony that they smelled alcohol in cup was not credible in light of defendant's detailed testimony about how he had spent the day prior to arrest, where he bought the tea he claimed was in the cup, how the empty bottom of Remy Martin came to be in his back seat, and his aversion for medical reasons to using alcohol, and where police failed to retain liquid in cup or even cup itself.

OTHER COURTS

United States v. Davenport, 445 F.3d 366 (4th Cir. 2006). Imposition of ten-year sentence for defendant's offense of fraudulent use of access device, which was more than three times top of advisory guidelines range, was unreasonable where sentencing court did not explain how nonguidelines sentence better served competing interests of § 3553(a) sentencing factors.

United States v. Pope, No. 04-51008, 2006 WL 1531545 (5th Cir. June 6, 2006). Good faith exception to exclusionary rule did not apply to search warrant issued on basis of the stale evidence where warrant affidavit stated that sole purpose of search was to find evidence of already-concluded, 78-day-old undercover purchase of prescription drugs but omitted fact that actual purpose of search was to find evidence of methamphetamine processing as to which police officer recently had received tip but for which he admittedly lacked probable cause to search.

United States v. Baker, 445 F.3d 987 (7th Cir. 2006). Imposition of 87-month sentence for offense of distributing child pornography, well below advisory guideline range of 108-135 months, was reasonable where district court adequately explained reasons for sentence as premised on statutory sentencing factors.

United States v. Krutsinger, 449 F.3d 827 (8th Cir. 2006). District court did not abuse discretion in imposing sentences of 21 months' and 24 months' imprisonment, respectively, on two defendants even though guideline range was 60-87 months, to avoid sentence disparities with codefendant who already had been sentenced.

United States v. Davis, 449 F.3d 842 (8th Cir. 2006). Probative value of face sheet of search warrant for defendant's residence, which was admitted for limited purpose of demonstrating reason for and lawfulness of search, was outweighed by danger of prejudicial effect of references to officers' affidavits indicating there was probable cause to believe that defendant resided at location and that drugs and weapons would be found there, in § 922(g) prosecution where key issue was whether defendant resided at location of search.

United States v. Evans-Martinez, 448 F.3d 1163 (9th Cir. 2006). District court's failure to provide notice to defendant convicted of sexual abuse of minor and other offenses that court was contemplating sentencing defendant above 10-year prison term under advisory guidelines was plain error where court imposed 15-year sentence and, due to lack of notice, defendant had no opportunity to prepare arguments against higher sentence.

United States v. Thomas, No. 04-30541, 2006 WL 1348578 (9th Cir. May 18, 2006). Unauthorized driver of rental car may have standing to challenge search of car upon showing that driver had permission from authorized renter to drive car.

United States v. Howard, No. 05-10469, 2006 WL 1421172 (9th Cir. May 25, 2006). Warrantless search of residence of parolee's acquaintance violated Fourth Amendment where police lacked probable case to believe that parolee lived at that address.

United States v. Lopez-Solis, No. 03-10059, 2006 WL 1360075 (9th Cir. May 19, 2006). Application of amended guideline, which included statutory rape in definition of "crime of violence," which justified 16-level enhancement for defendant convicted of illegal reentry, violated ex post facto clause where amended guideline was not in effect at time defendant committed statutory rape offense, and under guideline in effect at time of offense, crime of statutory rape did not meet crime of violence definition.

United States v. Staten, 450 F.3d 384 (9th Cir. 2006). District court's failure to consider factors outlined in guideline application note when applying enhancement for creating substantial risk of harm to human life or environment during sentencing for conspiracy to manufacture methamphetamine requires new sentencing; court of appeals will remand for resentencing without reviewing reasonableness of sentence where guideline calculation was materially erroneously.

United States v. Allen, 449 F.3d 1121 (10th Cir. 2006). Insanity defense can be presented to jury in prosecution for being felon in possession of firearm even though § 922(g)(1) is general intent crime.

United States v. Smith, 429 F.Supp. 2d 440 (D. Mass. 2006). Single-photo identification procedure used to achieve ATF agent's identification of § 922(g) defendant, which identification took place two months after a gun transaction at issue, was impermissibly suggestive and unreliable where agent's position in car in which transaction occurred limited his opportunity to observe perpetrator, who was in car for only 45 seconds, agent's attention was fixed on second individual in car who had gun and was negotiating sale, and agent's testimony that he was 100 percent certain of identification was not credible in light of numerous contradictions in his testimony and statements.

United States v. Richins, 429 F.Supp. 2d 1259 (D. Utah 2006). Government cannot withhold third-level acceptance of responsibility reduction on ground that defendant gave inaccurate information to probation office because determination of whether defendant really accepted responsibility for her crime is ultimately reserved to court under U.S.S.G. 3E1.1(a) and government must show failure to file motion certifying that defendant timely notified government of intent to plead guilty, thereby permitting prosecution to avoid preparing for trial, must be rationally related to legitimate government end.