# M E M O R A N D U M

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

**FROM:** **Neil H. Jaffee**

**SUBJECT:** **May/June 2008 Case Summaries**

**DATE:** **July 3, 2008**

## SUPREME COURT

**Gonzalez v. United States**, 128 S.Ct. 1765 (2008). Express consent by defense counsel, acting without indication of particular consent from defendant, is sufficient to permit federal magistrate judge to preside over jury selection in felony trial, pursuant to Federal Magistrates Act, 28 U.S.C. § 636(b)(3).

**United States v. Rodriquez**, 128 S.Ct. 1783 (2008). For purposes of Armed Career Criminal Act's provision that state drug conviction qualifies as "serious drug offense" if maximum term of imprisonment is ten years or more, such maximum term must be determined with reference to state recidivist enhancements.

**United States v. Williams**, 128 S.Ct. 1830 (2008). PROTECT ACT provision prohibiting offers to provide, and requests to obtain, child pornography, 18 U.S.C. § 2252A(a)(3)(B), is not overbroad under First Amendment or impermissibly vague under Due Process Clause.

**United States v. Ressam**, 128 S.Ct. 1858 (2008). Offense of carrying explosives during commission of any felony under 18 U.S.C. § 844(h)(2), does not require government to prove defendant carried explosives in relation to underlying felony.

**Cuellar v. United States**, 128 S.Ct. 1994 (2008). Evidence that defendant was traveling by car from Texas toward Mexico with $81,000 bundled in plastic bags and covered in secret compartment under rear floorboard insufficient to prove that transportation was designed to conceal or disguise funds' nature, location, source, ownership, or control, as required for violation of federal money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(I).

**United States v. Santos**, 128 S.Ct. 2020 (2008). The term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956, which prohibits the use of proceeds of criminal activities for various purposes, applies only to transactions involving criminal profits, not criminal receipts; here, government failed to prove transactions on which defendants' money laundering convictions were based involved lottery profits rather than merely lottery receipts (plurality opinion); revenue that gambling business uses to pay central operating expenses does not constitute proceeds under § 1956 (concurring opinion).

**Boumediene v. Bush**, 128 S.Ct. 2229 (2008). Aliens designated as enemy combatants and detained at Guantanamo Bay after being captured in Afghanistan or elsewhere abroad have constitutional privilege of habeas corpus and procedures for review of detainees' status provided by Detainee Treatment Act of 2005 are not adequate and effective substitute for habeas corpus; section 7 of Military Commissions Act of 2006 operates as unconstitutional suspension of habeas writ.

**Munaf v. Geren**, 128 S.Ct. 2207 (2008). United States courts have jurisdiction over habeas petitions filed on behalf of American citizens held overseas in detainee camp operated by Multinational Force-Iraq but federal district courts may not exercise habeas jurisdiction to enjoin United States from transferring individuals alleged to have committed crimes and detained within territory of foreign sovereign to that sovereign for criminal prosecution.

**Irizarry v. United States**, 128 S.Ct. 2198 (2008). Fed. R. Crim. P. 32(b), which requires notice that sentencing court is contemplating departure from recommended guidelines sentencing range on ground not identified for departure either in presentence report or in parties' pre-sentencing submission, does not apply when sentencing court is contemplating variance from recommended guideline range.

**Indiana v. Edwards**, 128 S.Ct. 2379 (2008). Consistent with Constitution, states can require representation by counsel for defendants sufficiently competent to stand trial but who suffer from several mental illness so that they are not competent to conduct trial proceedings themselves.

**Greenlaw v. United States,** No. 07-330, 2008 WL 2484861 (2008). Absent government cross-appeal, sentencing court cannot order sua sponte increase in defendant's sentence, even where sentence imposed was less than mandatory minimum sentence required by statute.

**Rothgery v. Gillespie County, Texas**, No. 07-440, 2008 WL 2484864 (June 23, 2008). Right to counsel guaranteed by Sixth Amendment applies at first appearance before judicial officer when defendant is informed of formal accusation against him and restrictions are imposed on his liberty; attachment of right to counsel does not require that prosecutor, as distinct from police officer, be aware of initial proceeding or involved in its conduct.

**Giles v. California**, No. 07-6053, 2008 WL 2511298 (June 25, 2008). Confrontation Clause does not permit on theory of forfeiture by wrongdoing admission of statements that murder victim made to police responding to domestic violence call without showing that defendant engaged in conduct designed to prevent victim from testifying.

**Kennedy v. Louisiana**, No. 07-343, 2008 WL 2511282 (June 25, 2008). Imposition of death sentence for rape of child where crime did not result, and was not intended to result, in victim's death constitutes cruel and unusual punishment, in violation of Eighth Amendment.

**District of Columbia v. Heller**, No. 07-290, 2008 WL 2520816 (June 26, 2008). The District of Columbia's prohibition on possession of handguns in home violates Second Amendment.

## NOTEWORTHY CERT. GRANTS

**Bell v. Kelly**, 128 S.Ct. 2108 (2008) (whether court of appeals erred in applying highly deferential standard of AEDPA, which is reserved for decisions "on the merits," to prejudice prong of death-sentenced habeas petitioner's ineffective assistance claim in case in which petitioner had not received full and fair evidentiary hearing on claim in state courts).

**Arizona v. Johnson**, No. 07-1122, 2008 WL 593768 (June 23, 2008) (whether, in context of stop of vehicle for minor traffic infraction, police officer may conduct pat-down search of passenger when officer has articulable basis to believe passenger might be armed and dangerous, but has no reasonable grounds to believe passenger is committing, or has committed, criminal offense).

**Cone v. Bell**, No. 07-1114, 2008 WL 533541 (June 24, 2008) (whether habeas claim is procedurally defaulted because it had been presented twice to state courts and whether federal habeas court has power to recognize that state court erred in holding that state law precluded review of claim).

**Harbison v. Bell**, No. 07-8521, 2008 WL 2484732 (June 25, 2008) (whether federal statute governing appointment of federal habeas counsel for indigent capital defendants authorizes appointment of federal public defender to represent defendant in state clemency proceedings).

## D.C. CIRCUIT

**United States v. Brodie**, 524 F.3d 259 (D.C. Cir. 2008). District court did not abuse discretion in refusing to permit defense closing argument that 5-year lapse of time between indictment and trial impugned government witness's credibility where there was no record evidence to support that contention and record showed that defendant caused delay by changing attorneys four times; court's curative instruction following defense attorney's improper argument did not imply that government witness's testimony was credible; district court properly denied defendant's new trial motion based upon government's failure to disclose that accomplice witness had been involved previously in fraudulent loan application where undisclosed evidence was cumulative of other impeachment evidence that witness had prepared numerous false appraisals as part of charged fraudulent scheme; evidence that defendant recruited individuals with specialized skills to facilitate his fraudulent scheme, coordinated group's efforts, and directed individuals in performing their tasks, supported district court's finding that defendant was organizer/leader under U.S.S.G. § 3B1.1; district court's finding that defendant was leader of scheme involving five participants not clearly erroneous where evidence established that fifth person prepared false financial statements at defendant's direction and therefore was criminally responsible for commission of offense as required by § 3B1.1; defense counsel not ineffective for failing to

request Smith downward departure because sentencing court made clear it would not have departed on that ground.

**United States v. Day**, 524 F.3d 1361 (D.C. Cir. 2008). District court did not abuse discretion in excluding under Fed. R. Evid. 702 and Daubert expert testimony proffered by defendant to supplement defense that his severe physical and emotional conditions resulting from depression, dementia, and three strokes precluded him from forming specific intent to commit charged fraud and embezzlement offenses, where experts' conclusions found to be unreliable because not supported by any medical record or psychiatric evidence and did not illuminate defendant's condition during earlier years of defendant's alleged scheme, some 10 years prior to experts' examinations of defendant; district court did not abuse discretion in excluding expert testimony under Fed. R. Crim. P. 16(b)(1)(C)(ii) where expert's report provided to government as written summary of testimony as required by rule, was insufficient because it failed to state expert's conclusions or contain clinical diagnosis of defendant's mental conditions; sentencing court did not err in finding defendant responsible for loss substantially less than total loss of alleged indictment where portion of loss properly based upon court's relevant conduct findings; court properly enhanced defendant's sentence for obstruction of justice based upon evidence that he hid income and assets, for abuse of trust where evidence established he operated as fiduciary of employee benefit plan from which he embezzled, and because there were more than ten victims of embezzlement when relevant conduct was considered; criminal forfeiture appropriate sanction for violation of mail/wire fraud statutes.

**United States v. Wheeler**, 525 F.3d 1254 (D.C. Cir. 2008). Evidence that police seized loaded gun from glove compartment of defendant's car, which he was driving, as well as 83 bags of crack cocaine between front seats, sufficient to prove that defendant carried gun during and in relation to drug trafficking offense (or possessed it in furtherance of that offense), in violation of 18 U.S.C. § 924(c), where drug expert testified that drugs were packaged for distribution and that handgun is drug dealers' weapon of choice for protecting themselves and their drugs; erroneous jury instruction that presence of firearm to protect drugs could be deemed a "use" in relation to drug offense did not affect defendant's substantial rights and therefore was not plain error because jury necessarily found that defendant also "carried" firearm since jury convicted defendant of felon in possession count and only gun involved was one seized from car's glove compartment.

**United States v. McCarson**, 527 F.3d 170 (D.C. Cir. 2008). Gun and drugs seized by police in plain view while executing arrest warrant for defendant in girlfriend's residence admissible as evidence against defendant; evidence of defendant's two prior gun convictions and two prior drug convictions admissible under Fed. R. Evid. 404(b)/403 to prove his constructive possession of gun and drugs in apartment.

**In re: Sealed Case No. 02-3008**, 527 F.3d 174 (D.C. Cir. 2008). Defense counsel's failure to file notice of appeal from defendant's sentencing did not constitute ineffective assistance where attorney's brief conversation with defendant regarding right to appeal, which was held in lock-up immediately after sentencing, did not constitute adequate consultation under Roe v. Flores-Ortega, 528 U.S. 470 (2000), but counsel did not have constitutional duty to consult with defendant about appeal because there were no nonfrivolous grounds for appeal.

**In re: Sealed Case No. 07-3132**, 527 F.3d 188 (D.C. Cir. 2008). District court plainly erred in failing to provide statement of reasons for above-guidelines supervised release revocation sentence.

**In re: Grand Jury (Attorney-Client Privilege)**, 527 F.3d 200 (D.C. Cir. 2008). District court properly denied motion to quash grand jury subpoena for production of originals of patient records of psychiatrist under investigation for Medicaid fraud, which psychiatrist had given to his counsel, who then provided copies to prosecutor and F.B.I. agent investigating case; sharing psychiatrist's records with government destroyed any attorney-client privilege that might have attached to them.

**United States v. Law**, No. 05-3091, 2008 WL 2388650 (D.C. Cir. June 13, 2008). Evidence insufficient to sustain conviction for conspiracy to launder drug trafficking proceeds by using proceeds to pay mortgage on building owned by defendant's former girlfriend, where evidence showed that rather than paying mortgage to conceal drug funds, defendant profited from excess rental income derived from building, which he had taken over and used to further his drug trafficking; any error in admission of IRS records certifying that defendant had not filed tax returns for certain years to rebut defendant's contention that he had legitimate income not from drug trafficking, was harmless where evidence of drug trafficking overwhelming; district court did not abuse discretion in permitting government to use binders of transcripts of recorded conversations between defendant and unknown males, who were identified by tabs on binders as "Source #1" and "Source #2," where court instructed jury that only tapes and not transcripts were considered as evidence of recorded conversations; district court properly denied suppression motion without conducting evidentiary hearing or allowing defendant to be present because denial based only on determination of legal question whether FBI agents reasonably believed landlord had authority to consent to search apartment, which landlord represented was unleased and vacant; defendant not entitled to entrapment instruction where he failed to present sufficient evidence of government inducement to sale drugs; sentencing court did not plainly err by aggregating quantity of drugs involved in conspiracy in imposing mandatory life sentence and evidence was sufficient to support finding that defendant participated in conspiracy involving aggregated drug quantity; defendant waived challenge to court's determination that defendant's three prior drug convictions were "felony drug offenses" under 21 U.S.C. § 841(b) where defendant failed to raise objection in response to government's filing of § 851 Information identifying prior convictions; evidence that defendant went to particular apartment occasionally to conduct drug transactions but did not own, lease, or otherwise have control over premises, insufficient to support conviction for maintaining drug residence, in violation of 21 U.S.C. § 856(a)(1); prior conviction set aside under Federal Youth Corrections Act counts as "felony drug offense" for enhancement under § 841(b); admission of drug expert's testimony, which was based on his experience as drug investigator and did not relate statements of out-of-court declarants, did

not violate defendant's confrontation rights under Crawford; forensic chemist's testimony that evidence recovered from trash contained residue of controlled substances was sufficiently reliable under Daubert.

**United States v. Hurt**, 527 F.3d 1347 (D.C. Cir. 2008). Trial court erred in refusing to give theory of defense instruction explaining that defendant could not be convicted of theft of government property if he had good faith but erroneous belief that he was entitled to Department of Veterans Affairs' check, which had been erroneously sent to him, but error harmless where other instructions stressed to jury that theft offense was specific intent crime and therefore government must prove defendant stole money with knowledge that it was not his and with intent to deprive owner of use/benefit of money; given difficulty in determining whether the two ways defendant could have committed theft of government property – stealing the check or converting the funds – are separate means of committing a single offense or separate offenses, district court did not plainly err in failing to give special unanimity instruction and defense attorney was not ineffective in failing to request instruction, to which defendant may not have been entitled.

**United States v. Safavian**, No. 06-3139, 2008 WL 2415911 (D.C. Cir. June 17, 2008). Convictions under 18 U.S.C. § 1001 of defendant, who was GSA chief of staff, for concealing material information from GSA ethics officers, from whom defendant sought ethics opinion as to whether he could accept from lobbyist air transportation for golfing trip as gift, reversed on ground that defendant was not under any legal duty to disclose all relevant information in seeking ethical advice; district court abused discretion in excluding defense expert testimony that among government contracting professionals, an individual is not considered doing business with GSA until a contract is awarded, which would have bolstered defendant's contention that he had this meaning in mind when he told GSA ethics official and Senate Committee that lobbyist from whom defendant accepted gift and who had obtained information from GSA concerning possible use of GSA properties but never secured any GSA contract, had no business with GSA or at time of golfing trip; exclusion of expert testimony not harmless because literal truth would have been complete defense to false statement charges and although not complete defense to obstruction of justice charge, convincing jury of truth of defendant's statements would have helped to persuade jury defendant had not obstructed justice.

**United States v. Askew**, No. 04-3092, 2008 WL 2468501 (D.C. Cir. June 20, 2008) (en banc). Partial unzipping of defendant's outer jacket to facilitate show-up identification procedure during initial Terry stop constituted illegal evidentiary search (5-judge plurality); even assuming that unzipping to facilitate show-up may be permissible under some circumstances, police actions here unjustified because no reasonable grounds for believing unzipping would establish or negate defendant's identification as robber in question (6-judge majority); unzipping of jacket was not objectively reasonable continuation of initial Terry frisk (6-judge majority).

**United States v. Settles**, No. 06-3090, 2008 WL 2549841 (D.C. Cir. June 27, 2008). District court's reliance on acquitted conduct in determining appropriate sentence did not violate defendant's Fifth or Sixth Amendment rights; sentencing court did not apply presumption of reasonableness to within-guidelines sentence but properly calculated advisory guidelines range and then considered relevant § 3553(a) sentencing factors.

## OTHER COURTS

**United States v. Boardman**, 528 F.3d 86 (1st Cir. 2008). District court has discretion to impose below-guidelines sentence on career offender on ground that career offender range was too harsh given that one of defendant's predicate convictions was for a nonresidential burglary.

**United States v. Godin**, 522 F.3d 133 (1st Cir. 2008). Case remanded for sentencing judge to reconsider defendant's career offender sentence in light of intervening proposed guideline amendment for determining when multiple crimes are counted as one for criminal history purposes if imposed on same day; although original guideline range remained applicable because proposed amendment was non-retroactive, judge had discretion to consider amendment in determining whether to impose non-guideline sentence.

**United States v. Tate**, 524 F.3d 449 (4th Cir. 2008). Defendant entitled to Franks hearing regarding integrity of search warrant affidavit where defendant made substantial showing that police officer knowingly and intentionally, or with reckless disregard for truth, omitted from affidavit material facts about location of garbage bags that he searched; affidavit stated that garbage was "easily accessible from the rear yard," but defendant submitted evidence showing that officer obtained trash bags by entering fenced area in yard, which was secured with locked gate and that trash bags had not been abandoned for trash pick-up; evidence officer found from trash investigation was essential to finding of probable cause to search defendant's residence.

**United States v. Williamson**, No. 07-10602, 2008 WL 2502747 (5th Cir. June 24, 2008). District court erred in overruling defendant's Batson objection to prosecutor's use of peremptory challenges to strike two black venire members, who were subjected to follow-up questions concerning their associations with persons involved with drugs while non-black venire members were not, despite fact that answers to preliminary questions by black venire members differed little from information provided by non-black venire members who described relationships with persons involved with drugs.

**United States v. Gonzalez-Terrazas**, No. 07-50375, 2008 WL 2132833 (5th Cir. May 22, 2008). District court plainly erred in applying 16-level enhancement to base offense level for unlawful reentry of alien after removal based on defendant's prior state conviction for residential burglary, which was not a crime of violence because it did not require showing of unlawful entry and sentencing court could not look to criminal complaint's allegation that defendant willfully and unlawfully entered dwelling to classify offense for sentence enhancement purposes.

**United States v. Davis**, No. 07-10177, 2008 WL 2253024 (5th Cir. June 3, 2008). Public defender's motion to withdraw as counsel pursuant to Anders on grounds that appeal was frivolous denied where motion was based upon public defender's statement that United States Attorney's office had informed Federal Public Defender's office generally that government would enforce appeal waivers in all cases, where motion failed to indicate that government had made case-specific determination concerning appeal waiver in this case.

**United States v. Sanchez**, 527 F.3d 463 (5th Cir. 2008). District court plainly erred in failing to consider proposed guideline for offense of failing to register pursuant to Sex Offender Registration and Notification Act in determining sentencing range where defendant pled guilty to that offense but prior to sentencing, Sentencing Commission had promulgated and submitted to Congress proposed guideline for that offense and after sentencing proposed guideline was approved.

**United States v. Hall**, No. 07-1883, 2008 WL 2492292 (6th Cir. June 24, 2008). Defendant's two prior misdemeanor convictions, each of which resulted in sentence for term of imprisonment of at least 30 days, should not have been counted in calculating his criminal history category because in both cases he was given full credit for time served on earlier unrelated offenses and therefore did not actually serve any time in prison for the two misdemeanors.

**United States v. Pacheco-Lopez**, No. 07-5408, 2008 WL 2520451 (6th Cir. June 26, 2008). Defendant's statements made in response to custodial interrogation and prior to receiving Miranda warnings, and which responded to questions asking where defendant was from and how and when he arrived at house where controlled drug buy was held, did not fall under "booking exception" to Miranda rule as statements could not be described as biographical.

**United States v. Purcell**, 526 F.3d 953 (6th Cir. 2008). Firearm obtained from search of defendant's luggage in hotel room suppressed where no exigent circumstances existed to justify warrantless search of luggage as drug agents suspected there was methamphetamine lab in defendant's room only upon their knowledge that defendant had previously operated methamphetamine labs and they noticed some drug-related items in hotel room.

**United States v. Bartee**, No. 07-1522, 2008 WL 2340224 (6th Cir. June 10, 2008). Defendant's prior state conviction for attempted second-degree criminal sexual contact did not constitute crime of violence that would justify enhanced base offense level in sentencing for possession of firearm by felon where state conviction did not necessarily require sexual contact with minor.

**Harris v. Haeberlin**, No. 05-5591, 2008 WL 2129764 (6th Cir. May 22, 2008). Habeas relief granted on Batson claim where state supreme court failed to remand issue of prosecutor's credibility at Batson hearing to state trial court for review of videotape of prosecutor's private conversation concerning reasons for use of peremptory challenges to strike black prospective jurors.

**United States v. Orsburn**, 525 F.3d 543 (7th Cir. 2008). Sentence of 135 months' imprisonment for defendants' conduct in embezzling township emergency funds, pursuant to guideline governing bribe-payer or bribe-taker rather than that governing embezzlement and other forms of theft, produced unwarranted sentencing disparity as defendants' conduct did not include bribery and was therefore outside scope of bribery guideline.

**Carlson v. Jess**, 526 F.3d 1018 (7th Cir. 2008). Trial court's erroneous denial of defendant's motion for substitution of retained counsel and continuance was arbitrary and violated due process, as well as defendant's Sixth Amendment right to counsel of choice in prosecution for sexual assault of child where defendant had already retained new counsel, did not seek lengthy continuance, and clearly was not simply trying to delay trial as he would have remained in custody during delay and nothing suggested that continuance would have harmed or even inconvenienced complainant.

**United States v. Perez**, 526 F.3d 543 (9th Cir. 2008). Defendant has right to cross-examine at supervised release revocation hearing laboratory technician who tested urine sample containing illegal drug where result of urinalysis was critical to finding that defendant had possessed or used illegal drugs.

**United States v. Hinkson**, 526 F.3d 1262 (9th Cir.2008). District court erred in denying motion for new trial on solicitation of murder charge on basis of newly discovered evidence where defendant submitted affidavits that government's star witness, who testified that he was a Korean War combat veteran and that defendant had solicited him to kill three federal officials, had lied about his military record and awards and had proffered forged documents relating to whether he served in combat or received Purple Heart.

**United States v. Grace**, 526 F.3d 499 (9th Cir. 2008) (en banc). District court had authority to issue and enforce pretrial order compelling government to disclose witness list to defense in advance of trial.

**United States v. Chapman**. 524 F.3d 1073 (9th Cir. 2008). District court did not abuse discretion in dismissing indictment based on government's Brady and Giglio discovery violations.

**United States v. Caruto**, No. 07-50041, 2008 WL 2440558 (9th Cir. June 18, 2008). Prosecutor's improper closing arguments regarding defendant's omissions in limited post-arrest statement, resulting only from her invocation of Miranda rights, constituted due process violation under Doyle and required new trial.

**United States v. Tiger**, No. 07-5027, 2008 WL 2498052 (10th Cir. June 24, 2008). Defendant's prior DUI conviction did not constitute crime of violence under career offender guideline provision.

**United States v. Yarborough**, 527 F.3d 1092 (10th Cir. 2008). Trial court erred in excluding defendant's proffered good character evidence of his integrity and status as law-abiding, trusted police officer in prosecution for obstructing official proceeding, as evidence was admissible under Fed. R. Evid. 404(a)(1) and 405 to show that defendant did not have prohibited state of mind.

**United States v. Valadez-Valadez**, 525 F.3d 987 (10th Cir. 2008). Police officer lacked reasonable suspicion to believe defendant was violating state statute prohibiting driving motor vehicle at such slow speed as to impede normal and reasonable movement of traffic where defendant was traveling 45 miles per hour on road with speed limit of 55 miles per hour; driving at speed moderately below speed limit does not, without more, constitute obstructing or impeding traffic and therefore officer's stop of defendant's vehicle violated Fourth Amendment.

**United States v. Hasan**, 526 F.3d 653 (10th Cir. 2008). District court plainly erred in failing to reconsider its decision that defendant did not need interpreter during grand jury proceedings in which alleged perjury occurred where district court found on reconsideration of defendant's motion that interpreter was required at trial under Court Interpreters Act, 28 U.S.C. § 1827.

**United States v. Reeves**, 524 F.3d 1161 (10th Cir. 2008). Defendant was seized inside home without warrant in violation of Fourth Amendment where defendant was inside hotel room that was his residence for several months and he opened door at approximately 3:00 a.m. only as result of police officers' coercive conduct in making numerous phone calls to his room and knocking on door and windows with flashlights while loudly identifying themselves as police officers over a period of at least 20 minutes.

**United States v. Young**, No. 07-13626, 2008 WL 2168957 (11th Cir. May 27, 2008). Government's filing of superseding indictment that added unrelated drug counts to original charge of unlawful possession of unregistered silencer did not reset Speedy Trial Act clock as to weapons offense originally charged; district court erred in denying defendant's motion to dismiss original charge on speedy trial grounds.

**United States v. Archer**, No. 07-11488, 2008 WL 2521969 (11th Cir. June 26, 2008). Defendant's prior conviction for carrying concealed firearm did not constitute crime of violence within meaning of career offender enhancement.