**MEMORANDUM**

TO: FPD Staff Attorneys & CJA Panel Attorneys
FR: Neil Jaffee
RE: May-June 2011 Case Summaries

## SUPREME COURT

*Bobby v. Mitts*, 131 S.Ct. 1762 (2011) (per curiam). On federal habeas review of state capital murder conviction, jury instruction in penalty phase that required jury to first decide whether to "acquit" defendant of death, that is, to first determine whether the state proved beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances before considering some form of life imprisonment, was not contrary to clearly established federal law under AEDPA.

*Kentucky v. King*, 131 S.Ct. 1849 (2011). Pursuant to the exigent circumstances exception, police may enter residence without a warrant to prevent destruction of evidence where the police did not create the exigency by engaging or threatening to engage in conduct that violates Fourth Amendment.

*Fowler v. United States*, 131 S.Ct. 2045 (2011). To prove a violation of the federal witness tampering statute, 18 U.S.C. § 1512(a)(1)(C), which makes it a crime "to kill another person" with intent to ... prevent the communication by any person to a [federal] law enforcement officer" of "information relating to the ... possible commission of a Federal offense," government must establish there was a reasonable likelihood that a relevant communication would have been made to a federal officer.

*United States v. Tinklenberg*, 131 S.Ct. 2007 (2011). The filing of the pretrial motion automatically stops the Speedy Trial Act's clock from running irrespective of whether the motion actually causes, or was expected to cause, delay of the trial; the Act's exclusion from the 70-day trial calculation for delay resulting from transportation of a defendant to and from places of examination, except anytime consumed in excess of 10 days is presumed unreasonable, includes weekends and holidays in 10-day period.

*McNeill v. United States*, 131 S.Ct. 2218 (2011). A federal sentencing court must determine for ACCA purposes whether "an offense under State law" is a "serious drug offense" by consulting the "maximum term of imprisonment" applicable to a defendant's prior state drug offense at the time of the defendant's conviction for that offense.

*Sykes v. United States*, 131 S.Ct. 2267 (2011). Felony vehicle flight, as proscribed by Indiana law, constitutes a violent felony under ACCA's residual clause because as a categorical matter, that offense presents a serious potential risk of serious injury to another.

*DePierre v. United States*, 131 S.Ct. 2225 (2011). The term "cocaine base," as used in 21 U.S.C. § 841(b)(1), means not only "crack cocaine," but cocaine in its chemically basic form.

*Tapia v. United States*, 131 S.Ct. 2382 (2011). A provision of the Sentencing Reform Act, 18 U.S.C. § 3582(a), precludes sentencing courts from imposing or lengthening a prison term to promote a defendant's rehabilitation.

*J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011). When known or knowable to a law enforcement officer conducting questioning of a juvenile suspect, the age of the juvenile (here, a 13-year-old 7th grade student) is relevant to the *Miranda* custody analysis.

*Bond v. United States*, 131 S.Ct. 2355 (2011). Defendant, charged with possession or use of a dangerous chemical where not intended for a "peaceful purpose," in violation of 18 U.S.C. § 229, has standing to challenge on Tenth Amendment grounds the validity of federal statute as interfering with the powers reserved to States.

*Davis v. United States*, 131 S.Ct. 2419 (2011). Police searches conducted in objectively reasonable reliance on binding judicial precedent that is subsequently overturned falls within good faith exception to the exclusionary rule.

*Turner v. Rogers*, No. 10-10, 2011 WL 2437010 (June 20, 2011). The Fourteenth Amendment's due process clause does not require the State to provide counsel at a civil contempt hearing to an indigent person potentially facing incarceration.

*Freeman v. United States*, No. 09-10245, 2011 WL 2472797 (June 23, 2011). Defendants who enter guilty pleas pursuant to Fed. R. Crim. P. 11(c)(1)(C) are not categorically barred from seeking sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) based upon retroactive guideline amendment; plurality finds all such defendants eligible for a reduction as original sentence based on guidelines, notwithstanding (c)(1) plea, while concurring opinion would permit sentence reduction only to those defendants whose plea agreement expressly uses a guidelines range to establish recommended term of imprisonment and that range is subsequently lowered by Sentencing Commission.

*Bullcoming v. New Mexico*, No. 09-10876, 2011 WL 2472799 (June 23, 2011). Confrontation Clause bars prosecution from introducing forensic lab report containing a testimonial certification through in-court testimony of witness who did not sign certification or perform/observe the test recorded in the certification.

## NOTEWORTHY CERT. GRANTS

*Perry v. New Hampshire*, No. 10-8974, 2011 WL 531943 (May 31, 2011) (whether due process protections against unreliable identification evidence apply to identifications made under suggestive circumstances generally or only when law enforcement officers orchestrate such procedures).

*Setser v. United States*, No. 10-7387, 2011 WL 2297806 (June 13, 2011) (whether district court erred by directing that federal sentence be served consecutively to state sentence that had not yet been imposed).

*Smith v. Louisiana*, No. 10-8145, 2011 WL 2297807 (June 13, 2011) (whether cumulative effect of *Brady*, *Giglio*, and *Napue* errors violated capital defendant's due process rights).

*Gonzalez v. Thaler*, No. 10-895, 2011 WL 89378 (June 13, 2011) (whether, under AEDPA, which establishes a one-year statute of limitations for state prisoners to file habeas petitions, that runs from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review," the conclusion of direct review occurs upon issuance of an intermediate appellate court's mandate, expiration of the time for seeking discretionary review in the state's highest court, or issuance of the intermediate appellate court's decision; and whether "expiration of the time for seeking [direct] review" includes the 90-day period for filing a certiorari petition with the Supreme Court even when the defendant forwent discretionary review in the state's highest court).

*United States v. Jones*, No. 10-1259, 2011 WL 1456728 (June 27, 2011) (whether warrantless use of GPS device to monitor defendant's vehicle's movements on public streets violated Fourth Amendment; and whether defendant's Fourth Amendment rights were violated by installation of GPS tracking device on his vehicle without valid warrant and without consent).

*Williams v. Illinois*, No. 10-8505, 2011 WL 2535081 (June 28, 2011) (whether government expert's testimony about forensic report violated defendant's Sixth Amendment confrontation rights).

## D.C. CIRCUIT

*United States v. Safavian*, No. 09-3112, 2011 WL 1812348 (D.C. Cir. May 13, 2011). Defendant's false statements to the FBI were material within the meaning of 18 U.S.C. § 1001(a)(1) because even though agents who interviewed defendant knew that the statements were false, the statements were capable of influencing the course of the FBI's investigation; prosecutor's argument that adding a charge after defendant's successful appeal was merely a change in trial strategy based on appellate court's findings was sufficient to overcome presumption of vindictiveness.

*United States v. Bisong*, No. 08-3014, 2011 WL 1900736 (D.C. Cir. May 20, 2011). District court did not err in determining that defendant's waiver of right to counsel was voluntary, knowing, and intelligent where at ascertainment-of-counsel hearing, defendant reaffirmed that he wanted to represent himself, as stated in previous letter to the court, despite district court's admonishment against that decision; in preparing pro se defense, defendant was not prejudiced by denial of access to business records seized by law enforcement where defendant failed to identify records that might produce exculpatory evidence; district court's determination that defendant had been "leader" for purposes of sentencing enhancement with respect to conviction on bank fraud charge was clearly erroneous where evidence showed that defendant's office manager received telephone calls from

clients complaining about withdrawals from their bank accounts, that second employee resigned upon learning what defendant was doing, and that paralegal concluded that defendant was violating federal law, but "leader" determination was not clearly erroneous with respect to conviction on immigration fraud charge where evidence showed that defendant's employees had completed immigration applications knowing that sponsoring companies were fictious and signed names of defendant's clients knowing that signatures were unauthorized; district court did not err in finding that fraud loss exceeded $200,000, that defendant had defrauded 50 or more victims, that defendant had violated prior, specific administrative order, and that defendant's fraud had involved sophisticated means.

*United States v. Bruns*, 641 F.3d 555 (D.C. Cir. 2011). Defendant's prior guilty plea to Michigan child pornography felony, which resulted in his assignment to youthful trainee status without entering judgment of conviction and which did not constitute a conviction under Michigan law, qualified as a "prior conviction ... under the laws of any State relating to ... child pornography," requiring a 10-year mandatory minimum sentence for possession of child pornography conviction under 18 U.S.C. § 2252(A)(a)(5)(B), where another provision of Michigan law treats a youthful trainee assignment as a conviction for purposes of calculating defendant's criminal history under state sentencing guidelines when a defendant is sentenced for committing a subsequent state offense.

*United States v. Marshall*, No. 09-3140 (D.C. Cir. June 9, 2011). Counsel was ineffective in failing to challenge district court's exclusion of time under Speedy Trial Act for government's filing indicating its intent to introduce at trial Fed. R. Evid. 404(b) evidence, which is treated as a notice that in contrast to a defendant's objection to admissibility of such evidence, requires no district court action and therefore does not toll Speedy Trial clock.

*United States v. Brice*, No. 10-3079, 2011 WL 2507852 (D.C. Cir. June 24, 2011). District court did not err in refusing to unseal material witness proceedings involving alleged victims of sexual abuse offenses of which defendant was convicted where although court referred at sentencing to the sealed proceedings, the proceedings contained sensitive personal information relating to two witnesses who were minors and given that defendant knew identities of the minors, redaction would not have protected their compelling privacy interest.

*United States v. Stubblefield*, No. 09-2099, 2011 WL 2535597 (D.C. Cir. June 28, 2011). Thirty-one day delay between complaint and indictment did not violate Speedy Trial Act where date on which magistrate judge held detention hearing on government's motion was excluded under 18 U.S.C. § 3161(h)(1)(D); district court did not abuse discretion in barring defense attorney from arguing in closing that police failed to engage in "best practices" when showing witnesses photo arrays and that DNA evidence was more trustworthy than fingerprint or photographic evidence, where defendant did not present any evidence to support either contention; even if introduction of evidence of uncharged bank robbery was error, it was harmless in light of strong evidence as to six charged bank robberies and court gave proper limiting instruction.

*United States v. Jones*, No. 09-3132, 2011 WL 2535599 (D.C. Cir. June 28, 2011). District court did not abuse discretion in denying defendant's pre-sentence motion to withdraw guilty plea where both written plea agreement and judge during Rule 11 proceeding adequately explained drug conspiracy charge to which defendant pled guilty and defendant failed to assert viable claim of innocence; court did not err in denying plea withdrawal motion without first holding competency hearing where defendant refused to participate in forensic screening by court psychologist and over course of six court appearances, judge had sufficient opportunity to observe defendant and reasonably concluded that defendant was being obstinate and did not suffer from any mental disease or defect rendering him mentally incompetent.

## OTHER COURTS

*United States v. Douglas*, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011). The Fair Sentencing Act applies to crack sentencing that occurred after Act's effective date and after date that corresponding sentencing guidelines to Act took effect, even where crime occurred and guilty plea entered before effective date of Act.

*United States v. Meises*, No. 09-2235, 2011 WL 1817855 (1st Cir. May 13, 2011). Lay opinion testimony by federal drug task force member identifying role of defendants as buyers in drug deal was inadmissible where task force member lacked personal knowledge of defendant's interaction with informant, his testimony usurped jury's fact-finding function, and testimony improperly endorsed government's theory of case; task force member's testimony that targets of drug conspiracy investigation changed after he spoke with co-conspirator violated defendant's confrontation rights where reasonable jury necessarily inferred from testimony that co-conspirator had identified defendants as participants in drug deal.

*United States v. D'Andrea*, No. 08-2455, 2011 WL 1760207 (1st Cir. May 10, 2011). District court erred in denying defendants' suppression motions without evidentiary hearing, which was required to determine whether private search doctrine exception to warrant requirement applied to State Department of Social Services agent's accessing website and downloading and printing pictures of child pornography where issues to be determined included circumstances under which tipster obtained account access information, whether search of website exceeded scope of tipster's search, whether agents expected to discover something other than child pornography, and whether tipster hacked website second time with active assistance from authorities.

*United States v. McGhee*, No. 09-1322, 2011 WL 2465452 (1st Cir. June 22, 2011). Massachusetts youthful offender adjudication for armed robbery could not be counted as predicate crime for sentencing guidelines career offender purposes where youthful offender adjudication was not "classified" as adult conviction under Massachusetts law and treatment accorded to defendant under state law was significantly different then that given adult offenders.

*United States v. Fernandez-Hernandez*, No. 09-1285, 2011 WL 2567893 (1st Cir. June 30, 2011). Evidence was insufficient to support verdict that defendant, convicted of being a member of drug conspiracy involving large amounts of crack and powder cocaine, was responsible for elevated drug quantities involved in conspiracy (at least 150 grams of crack and 5 kilograms of powder) where government's theory was that defendant owned a drug distribution point but only evidence presented was a single witness's testimony that his belief that defendant was owner was based upon what somebody had told him and therefore, witness had no competent basis for his testimony.

*United States v. Cedeno*, No. 09-1857, 2011 WL 1632048 (2d Cir. May 2, 2011). District court erred in limiting cross-examination at trial of police witness by precluding defendant from using state court's finding that witness had given false testimony in prior judicial proceeding but error harmless where other officers fully corroborated witness's trial testimony.

*United States v. Orocio*, No. 10-1231, 2011 WL 2557232 (3d Cir. June 29, 2011). The Supreme Court's decision in *Padilla v. Kentucky,* which held that defense counsel was ineffective in failing to advise alien defendant that guilty plea to federal drug charges would result in removal from United States, applies retroactively to cases on collateral review.

*United States v. Garcia-Robles*, 640 F.3d 159 (6th Cir. 2011). When a sentence has been vacated on direct appeal and the court of appeals issues a general remand order, defendant is entitled to plenary resentencing hearing where he may exercise right to be present and allocute, and court is required to state in open court reasons underlying imposed resentence.

*United States v. Ehle*, 640 F.3d 689 (6th Cir. 2011). Separate convictions for receiving child pornography and possessing same pornography violated double jeopardy since offense of receiving child pornography included all elements of lesser-included offense of possessing same pornography and Congress did not explicitly require multiple punishments.

*United States v. Williams*, 641 F.3d 758 (6th Cir. 2011). Conducting sentencing hearing by video conference violated defendant's right to be present during sentencing.

*United States v. Taylor*, No. 09-1961, 2011 WL 2184325 (6th Cir. June 7, 2011). At resentencing, district court can consider, in its discretion under § 3553(a), post-sentencing guidelines amendments for purpose of fashioning appropriate sentence under statutory factors.

*Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011). Supreme Court's decisions in *Begay v. United States* and *Chambers v. United States*, which held that certain offenses did not constitute violent felonies for ACCA purposes, apply retroactively to cases on collateral review and therefore defendant entitled to relief under § 2255 from invalid career offender sentence.

*United States v. Perry*, 640 F.3d 805 (8th Cir. 2011). Cooperation agreement did not permit use of information disclosed during defendant's proffer session in determining his sentencing guideline range where one paragraph of agreement conveyed that statements or information contained in defendant's proffer could not be used in any legal proceeding unless defendant subsequently presented material inconsistent position.

*Reina-Rodriguez v. United States*, No. 08-16676, 2011 WL 2465462 (9th Cir. June 22, 2011). En banc ruling that burglary of dwelling under Utah law does not categorically fit sentencing guidelines' definition of burglary of a dwelling applies retroactively to cases on collateral review because new rule is not constitutional and is substantive rather than procedural.

*Williams v. Cavazos*, No. 07-56127, 2011 WL 1945744 (9th Cir. May 23, 2011). Trial court's determination that lone holdout juror in murder prosecution was concerned with severity of punishment, rather than seriousness of offense charged, and trial court's determination that juror was "lying in court" about what had been discussed during jury deliberations, were contrary to record and failed to amount to good cause for juror's dismissal, in violation of defendant's Sixth Amendment right to fair trial.

*United States v. Vigil*, No. 10-4114, 2011 WL 1798020 (10th Cir. May 12, 2011). Sentencing guidelines enhancement for one "in the business of receiving and selling stolen property" applied only to professional fences that received and sold stolen property, and therefore did not apply to defendant convicted of access device fraud, aggravated identity theft, and possession of stolen mail, where there was no evidence defendant ever sold any stolen property.

*United States v. Harrison*, 639 F.3d 1273 (10th Cir. 2011). Defendant's consent to search his residence was not voluntary where government agents falsely told him that their office had received anonymous phone call that there were drugs and bombs in his apartment, implying that bomb may have been planted there.

*United States v. Friske*, 640 F.3d 1288 (11th Cir. 2011). Conviction for obstructing official proceeding, in violation of 18 U.S.C. § 1512(c)(2), requires proof that defendant knew of, or at least foresaw, the existence of the official proceeding.