# OFFICE OF THE FEDERAL PUBLIC DEFENDER
# EASTERN DISTRICT OF NORTH CAROLINA
## U.S. SUPREME COURT CRIMINAL LAW UPDATE

**Criminal Cases Decided Between May 1 and September 28, 2009, and Granted Review for the October 2009-10 Term**

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## I. INTRODUCTION

This outline summarizes United States Supreme Court decisions published between May 1 and September 28, 2009, and those cases pending review. For up-to-date summaries of all decided cases and cases pending review, see the *United States Supreme Court Review-Preview-Overview*, updated weekly by Paul M. Rashkind, Chief of the Appellate Division, Office of the Federal Public Defender, S.D. Fla., and available at: http://www.rashkind.com, or the U.S. Supreme Court Blog at http://ussc.blogspot.com/. Please direct any email questions about this outline to Jay_Todd@fd.org.

## II. SPECIFIC OFFENSES

### A. Decided Cases

***Flores-Figueroa v. United States***, 129 S.Ct. 1886 (2009); decision below at 274 Fed. App'x 501 (8th Cir. 2008); 18 U.S.C. § 1028A, Aggravated Identity Theft.

Facts: Eighth Circuit upheld Aggravated Identity Theft conviction of defendant who presented employer with counterfeit Social Security and Immigration documents in defendant's name but containing numbers belonging to a real person, holding § 1028A did not require defendant's knowledge that those documents belonged to a real person.

Issue: Whether Aggravated Identity Theft, 18 U.S.C. 1028A, requires proof defendant knew identity documents he/she used belonged to an actual person.

Held: Yes. As used in § 1028A, the word "knowingly" applies to the phrase "of another person."

***Boyle v. United States***, 129 S.Ct. 2237 (2009); decision below at 283 Fed. App'x 825 (2d Cir. 2007); 18 U.S.C. 1962(c), RICO.

Facts: Second Circuit affirmed guilty verdicts for bank burglaries and racketeering charges, where defendant, along with others, participated in several break-ins of overnight deposit boxes over several years. Defendant had sought and was denied a jury instruction on the "enterprise" element of the racketeering charge that required proof of an underlying organizational structure, to include an established hierarchy and chain-of-command.

Issue: Whether an association-in-fact enterprise under RICO, 18 U.S.C. § 1962(c), must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages."

Held: No. The requisite organizational structure of an association-in-fact RICO enterprise need only have a purpose, relationship among the associates, and a temporal duration sufficient to accomplish the purpose of the RICO enterprise.

***Dean v. United States***, 129 S.Ct. 1849 (Apr. 29, 2009); decision below at 517 F.3d 1224 (11th Cir. 2008); Use of Firearm During/Related to Crime of Violence, 18 U.S.C. § 924(c).

Facts: Defendant accidentally discharged a firearm during a bank robbery, was sentenced to 10 years for discharge of a weapon during a crime of violence. Eleventh Circuit affirmed sentence, concluding the § 924(c) sentencing enhancement for discharge of a firearm applied regardless of whether the discharge was intentional or accidental.

Issue: Whether 18 U.S.C. § 924(c)'s sentencing enhancement for discharge of a firearm requires a separate proof of intent.

Held: No. Use of the phrases "is brandished" and "is discharged" clearly indicates no separate proof of intent is required to sustain a § 924(c) sentencing enhancement.

***Abuelhawa v. United States***, 129 S.Ct. 2102 (2009); decision below at 523 F.3d 415 (4th Cir. 2008); Facilitation of Drug Felony, 21 U.S.C. § 843(b).

Facts: Wiretaps of defendant making 1 gram cocaine transactions over the phone introduced as proof of charge that defendant committed felony offense of facilitating felony drug distribution.

Issue: Whether using the telephone to make misdemeanor drug purchases "facilitates" felony drug distribution, in violation of 21 U.S.C. § 843.

Held: No. Use of a telephone to make a misdemeanor drug purchase is not use of a communications facility to cause or facilitate another's commission of a drug felony.

B. Specific Offenses, Cases Pending Review

***United States v. Stevens***, 129 S.Ct. 1984 (cert. granted Apr. 20, 2009); decision below at 533 F.3d 218 (3rd Cir. 2008); Creation/Possession of Depiction of Animal Cruelty, 18 U.S.C. § 48.

Issue: Whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment.

***Black v. United States***, 129 S.Ct. 2379 (cert. granted May 18, 2009); decision below at 530 F.3d 596 (7th Cir. 2008); Mail Fraud, 18 U.S.C. § 1346.

Issue: Whether § 1346's proscription of schemes which "deprive another of the intangible right of honest services" applies to purely private conduct where the scheme does not risk any foreseeable economic harm to the supposed victim.

***United States v. Comstock, et al.***, 129 S.Ct. 2828 (cert. granted June 22, 2009); decision below at 551 F.3d 274 (4th Cir. 2009); 18 U.S.C. § 4248, a part of the Adam Walsh Act (civil commitment program for individuals in BOP custody).

Issue: Whether Congress had the power under Article I of the Constitution to enact 18 U.S.C. § 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

## III. FOURTH AMENDMENT

A. Decided Cases

***Herring v. United States***, 129 S.Ct. 695 (2009); decision below at 492 F.3d 1212 (11th Cir. 2008); Good Faith Exception to Exclusionary Rule.

Facts: Officers received information from another jurisdiction that defendant had pending arrest warrant. Officers arrested defendant and discovered contraband during search incident to arrest. Later it was discovered arrest warrant information was erroneous, and that the reporting jurisdiction had recalled the warrant but failed to update the jurisdiction's database. Eleventh Circuit upheld denial of defendant's motion to suppress the contraband.

Issue: Does the Fourth Amendment require suppression of physical evidence obtained as a result an arrest based on police negligence.

Held: No. Though warrantless arrest resulting from negligent police error violates the Fourth Amendment, the Exclusionary Rule does not bar introduction of evidence obtained as a result of that arrest, so long as the error was due to negligence, and not a reckless disregard for constitutional obligations or systemic error.

## IV. FIFTH AND SIXTH AMENDMENTS; CONFESSIONS; RIGHT TO COUNSEL

### A. Decided Cases

***Kansas v. Ventris***, 129 S.Ct. 1841 (2009); decision below at 176 F.3d 920 (Kan. 2008); Confessions and Right to Counsel.

Facts: Defendant facing murder charges made inculpatory statements to cell-mate, whom the state had planted as informant. State courts precluded introduction of these statements at trial both during state's in case-in-chief, and to impeach defendant's trial testimony.

Issue: Whether voluntary statement obtained in the absence of a knowing and intelligent waiver or right to counsel is admissible for impeachment purposes.

Held: Yes. Need to prevent perjury maintain integrity of the judicial process overcomes purposes served by exclusion of statements.

***Montejo v. Louisiana***, 129 S.Ct. 2079 (2009); decision below at 974 So. 2d 1238 (La. 2008); Invocation of Right to Counsel.

Facts: State court appointed counsel at defendant's initial appearance on capital murder charge, but defendant did not affirmatively invoke his right to counsel. After initial, but before meeting with court-appointed counsel, defendant waived his *Miranda* rights and made inculpatory statements. State trial court denied suppression motion, and state supreme court upheld that denial.

Issue: Whether appointment of counsel necessarily triggers protections of *Michigan v. Jackson*, 475 U.S. 625 (1986), which precludes police from initiating interrogation of defendant who has asserted his/her Sixth Amendment Right to Counsel and requires a presumption that any uncounseled waiver of right to counsel is invalid.

Held: No. Defendant must affirmatively invoke right to counsel to trigger Sixth Amendment protections from uncounseled interrogations, over-ruling *Michigan v. Jackson*.

### B. Sixth Amendment Cases Pending Review

***Padilla v. Kentucky***, 129 S.Ct. 1317 (cert. granted Feb. 23, 2009); decision below at 253 S.W.3d 482 (Ky. 2008); Right to Effective Assistance of Counsel.

Issue: Whether failure to correctly inform client of guilty plea's immigration consequences constitutes ineffective assistance of counsel.

***Florida v. Powell***, 129 S.Ct. 2827 (cert. granted June 22, 2009); decision below at 998 So. 2d 531 (Fl. 2008); Sufficiency of *Miranda's* advice of right to presence of counsel.

Issue: Whether prior to questioning a person, the interrogating officer must expressly advise him/her of the rights to consult with counsel prior to questioning and at any time during questioning.

***Maryland v. Shatzer***, 129 S.Ct. 1043 (cert. granted Jan. 26, 2009); decision below at 954 A.2d 1118 (Md. 2008); Questioning Following Invocation of Right to Counsel.

Issue: Can an extended passage of time between a person's invocation of the right to counsel and officer's subsequent attempts to question that person nullify the proscription against further police-initiated questioning.

## V. TRIAL

A. Cases Decided

***Melendez-Diaz v. Massachusetts***, 129 S.Ct. 2527 (2009); decision below at 870 N.E.2d 676 (Mass. 2007); Lab Reports and *Crawford*.

Facts: State court admitted affidavits which asserted drug weight and identified type of drug from state laboratory analysts during defendant's drug conspiracy trial, over defendant's Sixth Amendment Crawford objection.

Issue: Whether drug lab report is "testimonial," subject to Crawford's application of the Sixth Amendment's Confrontation Clause.

Held: Yes. Lab reports prepared for use in a criminal prosecution are "testimonial" evidence subject to the Confrontation Clause. To introduce lab reports, prosecution must call lab analyst.

***Yeager v. United States***, 129 S.Ct. 2360 (2009); decision below at 521 F.3d 367 (5th Cir. 2008); Double Jeopardy and Collateral Estoppel.

Facts: Jury acquitted defendant on fraud counts, and could not reach a verdict on insider trading count. The government re-indicted defendant on the hung count, and defendant moved to dismiss on double jeopardy grounds.

Issue: Whether collateral estoppel bars retrial on hung counts, where jury acquittal on other counts was necessarily based on determination of common elements (with hung counts).

Held: Yes. Where an acquittal necessarily decides a critical issue of ultimate fact for the hung counts, Double Jeopardy bars re-trial of those hung counts.

## VI. SENTENCING

A. Cases Pending Review

***Johnson v. United States***, 129 S.Ct.1315 (cert. granted Feb. 23, 2009); decision below at 528 F.3d 1318 (11th Cir. 2008); 18 U.S.C. § 924(e), Armed Career Criminal Act.

Issues: Whether a simple battery conviction involving merely *de minimis* physical contact categorically meets ACCA's "violent felony" definition.

Whether a state's highest court holding that predicate state conviction does not have as an element the use or threatened use of physical force against another is binding on federal court applying ACCA.