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

Criminal Cases Decided Between April 1, 2010 and August 31, 2010 and Granted Review for the October 2010 Term

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I. INTRODUCTION

This outline summarizes United States Supreme Court decisions published between April 1, 2010 and August 31, 2010, 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 or the websites listed above to laura_wasco@fd.org.

II. SPECIFIC OFFENSES

A. Case Granted Review

***Pepper v. United States*, 130 S. Ct. 3499 (cert. granted June 28, 2010); decision below at 570 F.3d 958 (8th Cir. 2009); Effect of post-sentencing rehabilitation on downward sentencing variance; 18 U.S.C. § 3553(a) and the doctrine of the "law of the case."**

Issues: (1) Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a downward sentencing variance under 18 U.S.C. § 3553(a). (2) Whether post-sentencing rehabilitation should be treated the same as post-offense rehabilitation as a sentencing consideration under 18 U.S.C. § 3553(a). (3) When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal.

B. Decided Cases

***United States v. Stephens*, 559 U.S. ___ (2010); Images of Animal Cruelty, 18 U.S.C. § 48.**

Issue: Whether the statute proscribing creation, sale, or possession of depiction of cruel treatment of alive animal where depiction lacks any serious artistic, religious, political or educational, or journalistic value violates the First Amendment.

Held: Yes, § 48 is unconstitutionally overbroad and creates "a criminal prohibition of alarming breadth."

***Skilling v. United States*; 561 U.S. __ (2010); Honest Services Fraud; 18 U.S.C. § 1346.**

Issues: (1) Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether

§ 1346 is unconstitutionally vague. (2) When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

Held: (1) No. The mail fraud law is not unconstitutionally vague because the majority opinion limited the reach of the honest services prong of mail fraud statute to cases involving bribery and kickback schemes. (2) No. Pre-trial publicity and community prejudice did not prevent Skilling from having a fair trial.

***Holder v. Humanitarian Law Project*, 561 U.S. __ (2010); Material Assistance to Terrorist Organization; 18 U.S.C. § 2339B(a)(1).**

Issue: Whether 18 U.S.C. § 2339B(a)(1), which prohibits the knowing provision of "any *** service, *** training, [or] expert advice or assistance," 18 U.S.C. § 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.

Held: No. The material-support statute is constitutional as applied to the particular activities plaintiffs argued they wanted to pursue, to wit: providing support for the humanitarian and political activities of two of organizations in the form of monetary contributions, other tangible aid, legal training, and political advocacy. The Court did not address the resolution of more difficult cases that may arise under the statute in the future.

***Carr v. United States*, 560 U.S. __ (2010); Sex Offender Registration and Notification Act ("SORNA"); 18 U.S.C. § 2250(a).**

Issues: (1) Whether 18 U.S.C. § 2250(a), which imposes criminal penalties on certain sex offenders who travel in interstate commerce and knowingly fail to register or update a registration as required by SORNA, 42 U.S.C. § 16901, et seq., applies to petitioner, whose interstate travel occurred after his conviction for a sex offense that triggers a registration requirement, but before SORNA's enactment. (2) Whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and interstate travel predated SORNA's enactment, but whose failure to register occurred well after SORNA's requirements became applicable to him.

Held: No. Side stepping the *Ex Post Facto* question, the Court held as a matter of statutory construction that section 2250 does not apply to sex offenders whose interstate travel occurred before SORNA's effective date. The Court based this

decision on the fact that the statute's words are written in the present tense, not the past or present perfect tense.

***Robertson v. United States, ex Rel. Watson*, 560 U.S. __ (2010); Criminal Contempt; D.C. Code 1981, § 16-1005(f).**

Issue: Whether, consistent with this Court's cases and the Due Process Clause of the Fifth Amendment to the United States Constitution, an action for criminal contempt in a congressionally created court may be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

Held: No. The force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government. Modern criminal contempts are crimes as previously decided by the Court. With the entire criminal justice system being premised on the notion that a criminal prosecution pits the government against the governed and not one private citizen against another, crimes such as criminal contempt are to be brought in the name and pursuant to the powers of the United States.

III. SECOND AMENDMENT

A. Decided Case

***McDonald v. City of Chicago*, 130 S.Ct. 48 (cert. granted Sep. 30, 2009); decision below at 2008 WL 5111112 (N.D. Ill. 2008); Second Amendment.**

Issue: Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

Held: Yes. The Fourteenth Amendment incorporates the Second Amendment right of citizens to keep and bear arms for self-defense, limiting laws that regulate gun possession.

IV. FOURTH AMENDMENT & EXPECTATION OF PRIVACY

A. Case Granted Review

***Minnesota v. Russell*, 130 S.Ct. 2094 (cert. granted April 19, 2010); decision below at 2009 WL 2151098 (case not reported in N.W. 2d); Suppressability of Identity.**

Issue: Under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and the exclusionary rule, is police knowledge of a suspect's identity suppressible if the knowledge came from an illegal stop?

B. Decided Case

***City of Ontario v. Quon*, 560 U.S. __ (2010); Fourth Amendment and Expectation of Privacy.**

Issues: (1) Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers. (2) Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager. (3) Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

Held: No. The city did not violate the Fourth Amendment by reviewing the transcripts because the search satisfied the special needs exception to the general rule that warrantless searches "are per se unreasonable under the Fourth Amendment."

V. SENTENCING

A. Decided Cases

***United States v. O'Brien*, 560 U.S. __ (2010); Mandatory Minimums.**

Issue: Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (viz. using or carrying a firearm during and in relation to an underlying offense, or possessing that firearm in furtherance of that offense) is carried out. The question is whether the sentence enhancement to a 30-year minimum when the firearm is a machine gun is an element of the offense that

must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

Held: Yes. The fact that a firearm was a machine gun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing.

***Barber v. Thomas*, 560 U.S. __ (2010); Good Time Credit.**

Issues: (1) Does "term of imprisonment" in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed? (2) If "term of imprisonment" in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

Held: No. Good time credits are to be computed on the basis of time served. The Court found that the BOP calculation best fit the "natural reading" of the statute.

***United States v. Dolan*, 560 U.S. __ (2010); Timeliness of Order of Restitution.**

Issue: Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

Held: Yes. The deadline for ordering restitution under the Act is not jurisdictional and not a "claims processing" rule, but one that creates a time-related directive that is legally enforceable but does not necessarily deprive the judge of authority to act even when the deadline is missed.

***Dillon v. United States*, 560 U.S. __ (2010); 18 U.S.C. § 3582(c); Guidelines; Crack retro.**

Issues: (1) Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582. (2) Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

Held: (1) Yes. The Sentencing Guidelines and its policy statements cannot be treated as advisory in § 3582(c)(2) proceedings. Thus, a district court must follow the mandate contained in U.S.S.G, § 1B1.10 that it impose a sentence within the amended Guidelines range unless the district court had initially imposed a sentence below the applicable Guidelines range. (2) Yes. in light of the limited

authority granted under § 3582(c)(2), a district court is not to seek to correct any other aspects of the sentence not affected by the retroactive amendment.

***Carachuri-Rosendo v. Holder*, 560 U.S. __ (2010); Federal Misdemeanor as an Aggravated Felony.**

Issue: Whether a person convicted under state law for simple drug possession (a federal misdemeanor) has been "convicted" of an "aggravated felony" on the theory that he could have been prosecuted for recidivist simple possession (a federal felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

Held: No. A second state simple drug possession conviction does not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43) where the state conviction is not based on the fact of a prior conviction. The actual conviction is the focus of the analysis and not what might have or could have been charged.

VI. APPEALS

A. Case Decided

***United States v. Marcus*, 560 U.S. __ (2010); Ex Post Facto Prohibitions and Standard of Review.**

Issue: Whether the Second Circuit departed from the Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an alleged ex post facto violation whether there is any possibility that the defendant could have been convicted based exclusively on conduct that took place before the enactment of the statutes in question.

Held: Yes. The Second Circuit's plain-error standard conflicts with the Supreme Court's interpretation of the plain-error rule. The Supreme Court has previously interpreted this rule such that an appellate court may, in its discretion, correct an error not raised at trial only when the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. The standard the Second Circuit applied is inconsistent with the third and fourth of these criteria.

VII. CIVIL COMMITMENT

A. Case Decided

***United States v. Comstock*, 560 U.S. ___ (2010); 18 U.S.C. § 4248, a part of the Adam Walsh Act (civil commitment program for individuals in BOP custody).**

Issues: 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.

Held: The Necessary and Proper Clause grants Congress constitutional authority to enact § 4248. First, the Court found that the Clause constitutes a "broad" delegation of legislative authority and requires only that a statute be rationally related to the implementation of a constitutionally enumerated power, as shown by the explosion in federal criminal laws and the federal penal system. Second, to the Court, § 4248 represents "a modest addition to a set of prison-related mental-health statutes that have existed for many decades." Third, it was reasonable for Congress to extend its "longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their federal sentence." Fourth, the statute properly accounts for states' interests, apparently because, as the Court sees it, the Necessary and Proper Clause as interpreted here gives Congress "broad authority" to intrude into traditionally state-governed areas. Fifth, the Court found that the link between § 4248 and Article I is "not too attenuated" because what is "necessary and proper" can be based on a series of inferences, and is not "too sweeping" because not that many people have been subjected to it yet. *NOTE: Justice Breyer's majority opinion concluded with this limiting caveat: "We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution."*