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

Criminal Cases Decided Between September 1, 2010 and March 31, 2011 and Granted Review for the October 2010 - 2011 Terms

Prepared by Laura S. Wasco & Vidalia V. Patterson, Research & Writing Attorneys; Nicholas Simon & LyTia Blackmon, 2011 FPD Externs
Office of the Federal Public Defender for the Eastern District of North Carolina

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I. INTRODUCTION

This outline summarizes United States Supreme Court decisions published between September 1, 2010 and March 31, 2011, 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. Cases Granted Review

***DePierre v. United States*, 131 S. Ct. 458 (cert. granted Oct. 12, 2010); decision below at 599 F. 3d 25 (1st Cir. 2010); Definition of cocaine base.**

Issue: Whether the term "cocaine base"encompasses every form of cocaine that is classified chemically as a base - which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum - or whether the term "cocaine base" is limited to "crack" cocaine.

***Sykes v. United States*, 131 S. Ct. 63 (cert. granted Sept. 28, 2010); decision below at 598 F.3d 334 (7th Cir. 2010); Definition of "violent felony"under the ACCA.**

Issue: Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

***McNeill v. United States*, 131 S. Ct. 856 (cert. granted Jan. 7, 2011); decision below at 598 F.3d 161 (4th Cir. 2010); Definition of "serious drug offense" under the ACCA.**

Issue: Whether the plain meaning of the phrase "is prescribed by law," which the Armed Career Criminal Act uses to define a predicate "serious drug offense," requires a federal sentencing court to look to the maximum penalty prescribed by current state law for a drug offense at the time of the instant federal offense, regardless of whether the state has made that current sentencing law retroactive.

***Fowler v. United States*, 131 S. Ct. 598 (cert. granted Nov. 15, 2010); decision below at 603 F. 3d 883 (11th Cir. 2010); Federal witness tampering statute.**

Issue: Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges.

B. Decided Case

***Pepper v. United States*, ___ U.S. ___ , 131 S. Ct. 1229 (2011); 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) 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.

Held: (1) When a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range. (2) The "law of the case" doctrine does not require the resentencing court to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at defendant's prior sentencing.

III. FOURTH AMENDMENT

A. Cases Granted Review

***Davis v. United States*, 131 S. Ct. 502 (cert. granted Nov. 1, 2010); decision below at 598 F.3d 1259 (11th Cir. 2010); Good-faith exemption to the exclusionary rule.**

Issue: The good-faith exemption to the exclusionary rule allows evidence collected in violation of the Fourth Amendment to be admitted at trial if the police officers conducting the search acted in good faith. Does the good-faith exception to the exclusionary rule apply to a search that was authorized by precedent at the time of the search but is subsequently ruled unconstitutional?

***Kentucky v. King*, 131 S. Ct. 61 (cert. granted Sept. 28, 2010); decision below at 302 S.W.3d 649 (Ky. 2010); Warrantless Entry.**

Issues: (1) When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist? (2) Does the hot pursuit exception to the

warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

***Howes v. Fields*, 131 S. Ct. 1047 (cert. granted Jan. 24, 2011); decision below at 617 F.3d 813 (6th Cir. 2010**); ***Miranda* in Prisons.**

Issue: Whether this Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of *Miranda* any time a prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison, regardless of the surrounding circumstances.

IV. FIFTH AND SIXTH AMENDMENTS

A. Cases Granted Review

***United States v. Tinklenberg*, 131 S. Ct. 62 (cert. granted Sept. 28, 2010); decision below at 579 F.3d 589 (6th Cir. 2009); Speedy Trial Act.**

Issue: Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161(h)(I)(D) (Supp. II 2008), or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

***Bullcoming v. New Mexico*, 131 S. Ct. 62 (cert. granted Sept. 28, 2010); decision below at 226 P.3d 1 (N.M. 2010); Confrontation Clause.**

Issue: Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

J.D.B. v. North Carolina*, 131 S. Ct. 502 (cert. granted Nov. 1, 2010); decision below at 686 S.E.2d 135 (N.C. 2009); Age and *Miranda.

Issue: Whether a court may consider a juvenile's age in a *Miranda* custody analysis in evaluating the totality of the circumstances and determining whether a reasonable person in the juvenile's position would have felt he was not free to terminate police questioning and leave?

B. Decided Case

***Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 (2011); Confrontation Clause and *Crawford*.**

Issue: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are non-testimonial because they were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.

Held: When the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial, and therefore, statements made in the course of such an interrogation are non-testimonial, and not within the scope of the confrontation clause.

V. SENTENCING

A. Cases Granted Review

***Freeman v. United States*, 131 S. Ct. 61 (cert. granted Sept. 29, 2010); decision below *United States v. Goins*, 355 Fed. Appx 1 (6th Cir. 2009); Effect of plea agreement with a binding sentencing range on the ability to lower sentence based on subsequent changes by the Sentencing Commission.**

Issue: Whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) solely because the district court accepted a Rule 11(c)(1)(C) plea agreement.

***Tapia v. United States*, 131 S. Ct. 817 (cert. granted Dec. 10, 2010); decision below 376 Fed. Appx 707 (9th Cir. 2010); Sentencing.**

Issue: May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the Second, Third, Eleventh, and D.C. Circuits have held?

B. Decided Case

***Abbott v. United States*, ____ U.S. ____, 131 S. Ct. 18 (2011); Consecutive Mandatory Minimums with § 924(c).**

Issue: *Abbott v. United States* and *Gould v. United States* were consolidated to determine whether 18 U.S.C. § 924(c)(1)(A)'s prefatory phrase "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this section or by any other provision of law" encompasses the underlying drug trafficking offense or crime of violence, and if not, whether it includes another offense for possessing the firearm in the same transaction.

Held: The "except" provision in § 924(c)(1)(A) requires a mandatory minimum of at least five years for firearm possession during the commission of a crime to be served consecutively. Possession of a firearm in the same transaction is a separate offense.

VI. MISCELLANEOUS

A. Cases Granted Review

***Missouri v. Frye*, 131 S. Ct. 856 (cert. granted Jan. 7, 2011); decision below at 311 S.W.3d 350 (Mo. App. Ct. 2010); Ineffective Assistance of Counsel.**

Issue: Can a defendant who validly pleads guilty assert a claim of ineffective assistance of counsel by alleging that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

***Bond v. United States*, 131 S. Ct. 455 (cert. granted Oct. 12, 2010); decision below at 581 F.3d 128 (3rd Cir. 2009)**; **Tenth Amendment Standing.**

Issue: Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.