

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

**Criminal Cases Decided Between September 29, 2009 and March 31, 2010  
and Granted Review for the October 2010-2011 Term**

**Prepared by Laura S. Wasco and Jay Todd  
Research and Writing Attorneys  
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 29, 2009 and March 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](mailto:laura_wasco@fd.org).

## II. SPECIFIC OFFENSES

### A. Cases Granted Review

***Skilling v. United States*, 130 S.Ct. 393 (cert. granted Oct. 13, 2009); decision below at 554 F.3d 529 (5th Cir. 2009); 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.

***Holder v. Humanitarian Law Project*, 130 S.Ct. 48 (cert. granted Sep. 30, 2009); decision below at 552 F.3d 916 (9th Cir. 2007); 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.

***Carr v. United States*, 130 S. Ct. 47 (cert. granted Sept. 30, 2009); decision below at 551 F.3d 578 (7th Cir. 2009); 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.

***Robertson v. United States, ex Rel. Watson*, 130 S.Ct. 1011 (cert. granted Dec. 14, 2009); decision below at 940 A.2d 1050 (D.C. Cir. 2008); 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.

### III. SECOND AMENDMENT

#### A. Case Granted Review

***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.

### IV. FOURTH AMENDMENT

#### A. Case Granted Review

***City of Ontario v. Quon*, 130 S. Ct. 1011 (cert. granted Dec. 14, 2009); decision below at 529 F.3d 892 (9th Cir. 2009); 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.

## V. FIFTH AND SIXTH AMENDMENTS

### A. Decided Cases

#### ***Maryland v. Shatzer*, 559 U.S. \_\_\_ (2010); Questioning Following Invocation of Right to Counsel.**

Issue: Can an extended passage of time (here two and a half years) 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.

Held: Yes, the rule enunciated in *Edwards v. Arizona* which precludes interrogation following a person's invocation of right to counsel only applies to a period of 14 days after such invocation.

#### ***Florida v. Powell*, 559 U.S. \_\_ (2010); 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.

Held: No, so long as the *Miranda* warning reasonably conveys rights which attach during a custodial interrogation, the warnings need not expressly state that a person has the right to consult with an attorney prior to answering questions and has a related right to consult with counsel in the middle of interrogation. Here, the warning of a "right to talk to a lawyer before answering any questions" along with the right to use this right at any time, sufficed.

#### ***Padilla v. Kentucky*, 559 U.S. \_\_ (2010); Right to Effective Assistance of Counsel.**

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

Held: As a matter of federal law, counsel must inform a client when his or her plea carries a risk of deportation.

### B. Cases Granted Review

***Michigan v. Bryant*, 130 S. Ct. \_\_ (cert. granted March 1, 2010); decision below at 483 Mich. 132 (2009); Confrontation Clause and *Crawford*.**

Issue: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial 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.

## VI. SENTENCING

### A. Decided Case

***Johnson v. United States*, 559 U. S. \_\_ (2010); Armed Career Criminal Act (“ACCA”) Predicates.**

Issues: (1) Whether a simple battery conviction involving merely de minimis physical contact categorically meets ACCA’s “violent felony” definition. (2) 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.

Held: Because the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as an ACCA predicate under § 924(e)(2)(B)(i).

### B. Cases Granted Review

***United States v. O’Brien*, 130 S. Ct. 49 (cert. granted Sept. 30, 2009); decision below at 542 F.3d 921 (1st Cir. 2009); 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.

***Barber v. Thomas*, 130 S. Ct. 737 (cert. granted Nov. 30, 2009); decision below at 533 F.3d 800 (9th Cir. 2008); 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.

***Abbott v. United States*, 130 S. Ct. 1284 (cert. granted Jan. 25, 2010) and *Gould v. United States*, 130 S. Ct. 1283 (cert. granted Jan. 25, 2010); decisions below at 574 F.3d 203 (3rd Cir. 2009) and 329 Fed. Appx. 569 (5th Cir. 2009), respectively; Consecutive Mandatory Minimums with § 924(c).**

Issue: The cases have been 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.

***United States v. Dolan*, 130 S. Ct. 1047 (cert. granted Jan. 8, 2010); decision below at 571 F.3d 10 (10th Cir. 2009); 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).

***Dillon v. United States*, 130 S.Ct. 797 (cert. granted December 7, 2009); decision below at 572 F.3d 146 (3rd Cir. Jun 10, 2009); 18 U.S.C. § 3582(c).**

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.

***Carachuri-Rosendo v. Holder*, 130 S.Ct. 1012 (cert. granted December 14, 2009); decision below at 570 F.3d 263 (5th Cir. 2009); 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.

## VII. APPEALS

### A. Case Granted Review

***United States v. Marcus*, 130 S.Ct. 393 (cert. granted October 13, 2009); decision below at 538 F.3d 97 (2<sup>nd</sup> Cir. 2008); 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.