
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

Published by
THE OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF MARYLAND
WEBSITE ADDRESS: WWW.MD-FD.ORG

April 2007

HIGHLIGHTS IN THIS ISSUE

We are waiting for a Supreme Court decision that will be important in determining a district judge's sentencing discretion under the post-*Booker* advisory Guidelines. There is currently a circuit split regarding the question of whether the advisory Guidelines are entitled to a "presumption of reasonableness" with the Fourth Circuit being one of the courts that have adopted such a presumption. The Court will soon decide that issue. See *United States v. Claiborne*, and *United States v. Rita*, at p. 6.

The Fourth Circuit has held that a defendant's decision to go to trial on a firearms charge did not necessarily preclude a reduction of offense level based on acceptance of responsibility in regard to drug offenses to which he pleaded guilty. See *United States v. Hargrove*, at p. 12.

The Fourth Circuit has found that a fraud defendant's 144-month sentence, which represented a 480% increase over the high end of the applicable Guidelines range, was an unreasonable upward variance. See *United States v. Tucker*, at p. 13.

The Fourth Circuit has found that the evidence was insufficient to support a defendant's convictions for drug conspiracy and use of a firearm in relation to a drug trafficking crime, because the only proof of his involvement was his own statement to law enforcement officers without sufficient corroboration. See *United States v. Stephens*, at p. 10.

The Fourth Circuit has recognized that in some crack cases a Sentence of probation would be appropriate even though the Guidelines call for imprisonment. See *United States v. Pyles*, at p. 15.

NOTES FROM THE DEFENDER

CJA Training

Our next felony panel training is scheduled for May 4, 2007, in the Ceremonial Courtroom, 1A, in the Baltimore Courthouse. Breakfast and registration begin at 8:30 am. Topics for the program will include: Making the Most of Demonstrative Evidence; BOP Treatment of Defendants With Health Problems and; Investigating a White Collar Case & Using a Forensic Accountant. The program will conclude with the presentation of the John Adams Award followed by lunch at the Wharf Rat. I look forward to seeing everyone.

Dan Goldstein

CJA Panel Attorney Dan Goldstein has been admitted into the American College of Trial Lawyers. Congratulations to Dan! This is more evidence of what a distinguished group our CJA panel has attracted over the years. Dan joins fellow CJA members Andy Graham, Marty Himeles, Dale Kelberman, Gerry Martin, Joshua Treem, Jim Ulwick, Bob Bonsib,

Paul Kemp, Paula Junghans, Frank Gorman, Andy Levy, Bill Brennan, and Harry Trainor, as members of the College.

Waivers

The District of Maryland United States Attorney's Office continues to flex its muscle in plea negotiations and insist on a growing number of waivers of rights in plea agreements. The primary justification for such waivers seems to be to allow AUSA's to work less.

Waivers have always been a part of our practice. We have long grown too accustomed to the ubiquitous appeal waivers in plea agreements. In light of *Blakely* and *Booker*, no defense attorney can feel confident that such waivers by our clients are informed and intelligent. Furthermore, these waivers frustrate Congress' intent in the Sentencing Reform Act to encourage transparency and eliminate unwarranted sentencing disparity through appellate review.

The recent waivers from the United States Attorney's Office range from the audacious to the silly. The nominee for the most audacious is the provision in routine discovery agreements that threatens to oppose a reduction for acceptance of responsibility if the defense has the temerity to file a motion. The silliest is the language in the appeal waivers that requires defense counsel to write to the prosecutor within 10 days of sentencing advising that the client has "chosen" not to appeal – when other plea agreement language waives most appeal rights.

While almost all such waivers evidence a deep distrust of the criminal justice process, nothing is more offensive

than the government's "policy" that any defendant wishing to enter a plea agreement must waive any arguments under § 3553 for a variance. This is not a Department of Justice policy. Rather, this is a pernicious local tactic that first appeared in Greenbelt a number of months ago and seems to have spread to the Northern Division. Even the push a few years ago for § 2255 waivers had the appearance of a principle ("finality") in support of it. This is a power grab to take back the modest amount of discretion returned by the Supreme Court to sentencing judges and insure that the District of Maryland is the only District in the nation where *Booker* does not apply.

Indeed, at a recent Fourth Circuit Judicial Workshop, a United States District Court Judge from the Eastern District of Virginia reported that (even?) the Eastern District Bench refuses to accept such waivers. A survey of Fourth Circuit Defenders reports that in no other District in the Circuit are such waivers a part of the practice.

Every time we sign one of these waivers, the government uses it as a precedent to argue that the defense tolerates such waivers. This inference strikes me as even more dangerous – systemically – than the appeal waivers.

We represent individuals. It is always difficult for defense counsel to make decisions based upon "principles" or the interests of other clients. But, in cases where the government is pushing for § 3553 waivers – along with all the other waivers in the "standard" plea agreement – we need to resist them through trials, pleas without plea agreements or even "C" pleas, where appropriate.

I know some practitioners have had success taking the position that signing plea agreements with such waivers does not limit your ability to make § 3553 arguments because of the standard plea agreement clause that requires counsel to bring all relevant factual and legal arguments to the attention of the Court. That seems a little risky and likely to lead to accusations of violating plea agreements.

A number of judges have indicated that they will not accept such waivers. This has probably been the most helpful development in resolving this growing conflict. Until we get more guidance from the District Court, we have to resist these waivers and share information about which judges are refusing to accept them.

Northeast Ohio Correctional Center

The Northeast Ohio Correctional Center (NEOCC) continues to be a dangerous place for our clients. This is the privately run facility that houses our clients after their sentencing and while they await designation and transportation to a BOP facility. The median stay at NEOCC is approximately 4-6 weeks. The Marshals rationalize the facility's overcrowded conditions because our clients' stay there is short-term. Thus, NEOCC is permitted to triple-cell clients and have them sleep on the floor, as part of the Marshals contract, because of the relatively short time they will reside there. It turns out clients are continuing to fall through the cracks of the District of Maryland's e-designation system and stay there much longer before they are "found."

Far more dangerous than the overcrowding issues is the inadequate medical care. The Marshals have

promised not to send clients with serious medical conditions to NEOCC because of the pervasive problems with the delivery of medical care. But, we continue to have clients with HIV/AIDS and serious mental illnesses sent to Ohio where they endure long delays in getting their medications. For clients with serious mental health issues, the overcrowded conditions and untreated mental illness seems like a tinderbox for violence. For the HIV/AIDS clients, the absence of treatment alone may be life-threatening. For all of us, the public health implications when clients have their medications for HIV/AIDS interrupted, may be profound. *i.e.* when these viruses become resistant to treatment because of interruptions in medications.

When you have a client with a serious medical issue, I would recommend that you request an Order from the Court that the Marshals NOT send your client to NEOCC. If you have a client who does get sent to NEOCC and who is encountering problems, AFPD Carrie Corcoran visited NEOCC and has become our "expert" in dealing with the Marshals and the administration at NEOCC over these issues. Please contact Carrie if you need some guidance.

ECF In Criminal Cases

The District of Maryland is again revisiting electronic case filing (ECF) in criminal cases. Our Court has been very concerned about the potential for ECF to exacerbate the very real security problems for cooperators. But, we are one of the last Districts in the nation without electronic filing in criminal cases. Although we continue to work on effective security safeguards, it now seems only a matter of time before ECF is in place for

criminal cases. AFD Jeff Risberg and CJA Panel Representatives Tim Sullivan and Bill Purpura are the defense representatives on the Court's Committee addressing ECF and the related security issues. Judge Motz, who is leading the process, has set a timetable for implementation on January 1, 2008. When ECF goes into effect, we will assist counsel with training.

RECENT CASE LAW

SUPREME COURT

Substantive Federal Law

"Theft Offense" Under Immigration Statute Includes Aiding And Abetting

The Supreme Court has held that, for removal purposes under federal immigration law, a "theft offense" under 8 U.S.C. 1101(a)(43)(G) includes the crime of aiding and abetting such a theft offense. *Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

Aiding And Abetting Cocaine Possession Not Aggravated Felony Under Immigration Statute

The Supreme Court found that, although South Carolina treats an alien's conviction for aiding and abetting another person's possession of cocaine as a felony, the offense is a misdemeanor under the Controlled Substances Act, and thus not an "aggravated felony" under immigration law as would disqualify the alien from discretionary cancellation of removal. *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006).

Indictment Need Not Allege Specific Overt Act To Properly Charge Attempt Offense

An indictment charging attempted illegal reentry into the United States was not defective when it pointed to the relevant statute and alleged that on or about a certain date the defendant "attempted to enter the United States of America at or near San Luis in the District of Arizona. . . ." The Supreme Court found that the indictment was not insufficient even though it did not specifically allege a particular overt act on the part of the defendant; rather, the use of the word "attempt" coupled with the time and place of the alleged attempted reentry was adequate. *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007).

Evidence

Crawford Does Not Apply Retroactively

The Supreme Court has decided that its decision in *Crawford v. Washington* does not apply retroactively to cases on collateral review. In *Crawford*, the Court held that out-of-court statements by a witness which are testimonial in nature may not be admitted under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statements are found to be reliable by the trial court. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

Sentencing

Court Finds California Sentencing System Unconstitutional

The Supreme Court has struck down California's determinate sentencing law as unconstitutional. Under California's determinate sentencing system, the offense of conviction was punishable by one of three prison terms: (a) a lower term of six years; (b) a middle term of 12 years; and (3) an upper term of 16 years. The trial judge was obligated to sentence the defendant to the middle term unless the judge found various aggravating circumstances by a preponderance of the evidence at a sentencing hearing. Finding such circumstances, the judge imposed a 16-year sentence, which was affirmed on appeal. The Supreme Court subsequently reversed, and in doing so struck down California's determinate sentencing system, emphasizing its mandatory nature. The Court compared that system with the federal guidelines, noting that, in *Booker*, it made the federal system advisory and, in so doing, saved its constitutionality. *Cunningham v. California*, 127 S. Ct. 586 (2007).

Attempted Burglary Is Predicate Offense Under ACCA

The Supreme Court has affirmed the Eleventh Circuit's holding that a conviction in Florida for attempted burglary qualifies as a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *James v. United States*, 127 S. Ct. 1586 (2007).

Habeas Corpus

Tolling Of Habeas Limitations Period

The Supreme Court has ruled that the one-year limitations period on habeas petitions is not tolled while a petition for certiorari is pending in the Court from a state's denial of post-conviction relief. *Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

Court Upholds State Capital Sentencing Instruction

In a 5-4 decision, the Supreme Court has upheld an inmate's death sentence. The Court found that there was no reasonable likelihood that jurors interpreted a California catchall jury instruction, under which a capital jury is instructed to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," to preclude the petitioner's forward looking mitigation evidence, namely proof that he would lead a constructive life if incarcerated rather than executed, and so the instruction was consistent with the constitutional right to present mitigating evidence in a death penalty case. *Ayers v. Belmontes*, 127 S. Ct. 469 (2006).

Supreme Court Invalidates Three Texas Death Sentences

In three separate habeas cases, the Supreme Court vacated death sentences imposed by Texas courts.

In one case, the Court had earlier reversed the death sentence after finding that jurors were not allowed to give full consideration to mitigating evidence. On remand, the court reimposed the death

sentence under harmless error analysis. The Supreme Court has now ruled that the Texas court, by requiring that the defendant show egregious harm to merit reversal of his murder conviction, misunderstood the federal right that was being asserted. *Smith v. Texas*, ___ S. Ct. ___, 2007 WL 1201586 (2007).

The Supreme Court also granted habeas relief to two death-row inmates, finding that Texas' "special issue" capital sentencing instructions – which require a jury to consider whether the conduct of the defendant was committed deliberately and with the reasonable expectation that death would result, and whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society – did not permit the jury's adequate consideration of mitigating evidence. In each case, the defendant had sought specific instructions relating to mitigation evidence, and in each was denied. *Abdul-Kabir v. Quarterman*, ___ S. Ct. ___, 2007 WL 1201582 (2007); *Brewer v. Quarterman*, ___ S. Ct. ___, 2007 WL 1201609 (2007).

Certiorari Granted

Court Will Decide Whether It Violates *Booker* To Accord A Guidelines Sentence A Presumption Of Reasonableness

The Supreme Court will decide an issue that lies at the heart of a district court's sentencing discretion under the advisory Guidelines system the Court established in *United States v. Booker*. Following *Booker*, the federal appellate courts have differed on whether the United States Sentencing Guidelines, while advisory, are nonetheless entitled to a "presumption of reasonableness." The

Fourth Circuit is one of the courts that have adopted such a presumption. The Court has heard oral argument and will decide two cases that present this issue. In one case, *Claiborne*, the Eighth Circuit held that the sentencing range under the Guidelines enjoyed a presumption of reasonableness and that a sentence substantially at variance from the range could be upheld only if the district court identified extraordinary circumstances justifying the variance. In the other case, *Rita*, the Fourth Circuit upheld a sentence imposed within the Guidelines range in reliance on the presumption of reasonableness. *United States v. Claiborne*, 127 S. Ct. 551 (2006); *United States v. Rita*, 127 S. Ct. 551 (2006).

Application Of Proper Standard In Habeas Review

The Supreme Court has granted certiorari and will decide (1) whether, in light of the deferential standard of habeas review, the Ninth Circuit erred in finding that a state court unreasonably determined that the petitioner had instructed his attorney not to present any mitigating evidence at a sentencing hearing, and (2) whether the Ninth Circuit erred in ruling that the state court was unreasonable in assessing the petitioner's ineffective assistance of counsel claim in regard to his waiver of the presentment of mitigation. *Schriro v. Landrigan*, 127 S. Ct. 35 (2006).

"Use" Of A Firearm Under 18 U.S.C. § 924(c)

The Supreme Court will decide whether receipt of an unloaded firearm as payment for drugs constitutes "use" of a firearm during and in relation to a drug trafficking offense for purposes of 18

U.S.C. § 924(c). *Watson v. United States*, 127 S. Ct. 1371 (2007).

Predicate Convictions Under 18 U.S.C. § 924(e)

The Supreme Court will review the Seventh Circuit's decision that a defendant's three prior state convictions for misdemeanor battery were predicates under the Armed Career Criminal Act, even though they did not result in deprivation of the defendant's civil rights. *Logan v. United States*, 127 S. Ct. 1251 (2007).

Texas' "Special Issue" Capital Sentencing Instruction As Vehicle For Giving Effect To Mitigating Evidence

The Supreme Court has consolidated and will review two habeas cases upholding Texas' "special issue" capital sentencing instructions, which require a jury to consider whether the conduct of the defendant was committed deliberately and with the reasonable expectation that the death of the victim or another would result. The Court will decide whether the instructions permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 432 (2006).

Use Of Harmless Error On Remand Of Decision Finding Jurors Were Not Allowed To Fully Consider Mitigating Evidence

The Supreme Court has granted certiorari in a capital case in which a Texas court used harmless error analysis to deny relief upon remand after the Supreme Court found that the jurors were

not allowed to give full consideration to mitigating evidence. The petitioner alleges that the Texas court evaded compliance with the Supreme Court's mandate. *Smith v. Texas*, 127 S. Ct. 377 (2006).

Whether Passenger Is Detained During Traffic Stop

The Supreme Court will decide whether a passenger in a vehicle that is subjected to a traffic stop is detained for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the stop. *Brendlin v. California*, 127 S. Ct. 1145 (2007).

Court To Review Habeas Decision Relating To Removal Of A Juror

The Supreme Court will decide whether the Ninth Circuit erred by not deferring to the trial judge and by not applying the statutory presumption of correctness in ruling that a state court decision to remove a juror was contrary to clearly established federal law. *Uttecht v. Brown*, 127 S. Ct. 1055 (2007).

Court To Determine Whether Execution Of Prisoner Who Has Severe Mental Illness Violates Eighth Amendment

The Supreme Court will decide whether the Eighth Amendment permits execution of a death-row inmate who has factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him and thus does not appreciate that the execution is intended to seek retribution for his capital crime. *Panetti v. Quarterman*, 127 S. Ct. 852 (2007).

Court To Decide Constitutionality Of 2003 Child Pornography Law

The Supreme Court has agreed to rule on the constitutionality of the Protect Act's pandering provision, which criminalizes the promotion or solicitation of material "in a manner that reflects the belief, or that is intended to cause another to believe" that the material contains illegal child pornography. The Eighth Circuit found the provision overbroad and unconstitutionally vague. *United States v. Williams*, ___ S. Ct. ___, 2007 WL 879579 (2007).

Meaning Of "Proceeds" Under Money Laundering Statute

The Supreme Court will decide whether, under the federal money laundering statute, 18 U.S.C. § 1956(a)(1), "proceeds" means the gross receipts from the unlawful activities or only the profits, i.e., gross receipts less expenses. *United States v. Santos*, ___ S. Ct. ___, 2007 WL 173657 (2007).

Arrestee's Rights Under Vienna Convention

Granting certiorari for the second time in a death penalty case involving a Mexican national, the Supreme Court has agreed to decide whether a Texas court erred in refusing to reconsider a petitioner's claim that his rights under Article 36 of the Vienna Convention were violated because he was not advised of his right to contact the Mexican consular office when he was arrested. *Medellin v. Texas*, ___ S. Ct. ___, 2007 WL 120779 (2007).

FOURTH CIRCUIT

Substantive Criminal Law

Section 841 Criminalizes All Forms Of Cocaine Base

The Fourth Circuit ruled that 21 U.S.C. § 841(b)(1)(A)(iii), which makes it illegal to traffic in "cocaine base," relates to all forms of cocaine base, including crack cocaine, and therefore the government is not required to prove that the substance involved is crack to secure a conviction. *United States v. Ramos*, 462 F.3d 329 (4th Cir. 2006).

Instructions Did Not Allow Jury To Convict Under Civil Standard

At a trial of a physician for the unlawful distribution of a controlled substance, the trial court did not, by referring to "norms of professional practice" in the jury instructions, improperly allow the jury to convict under a civil rather than a criminal standard of proof, the Fourth Circuit has ruled, because the instructions also required that the doctor act "for other than a legitimate medical purpose" and thus set forth the proper threshold for conviction. *United States v. McIver*, 470 F.3d 550 (4th Cir. 2006).

Prosecutor's Closing Argument Did Not Improperly Refer To Defendant's Failure To Testify

The Fourth Circuit ruled that a prosecutor's comments during closing argument that if the defense had any evidence "don't you think they would have presented it to you" did not improperly refer to the defendant's decision not to testify but instead to the alternative scenario presented by defense counsel in

closing argument. *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006).

Road Leading To Naval Base Was Highway Under Virginia Law

In a prosecution under the Assimilated Crimes Act for offenses relating to driving on a Virginia highway, a judge did not err at a bench trial in finding that a stretch of road leading to the United States Naval Base gate was completely open to public access, and thus constituted a highway under Virginia law. In so ruling the Fourth Circuit noted that a police officer who had served at the base for six years testified that vehicles were allowed to proceed without restriction down the road to the check point at the gate and turn around, and that, to his knowledge, there was never a barrier or restriction to turning on the road during his tenure at the base, and no public sign restricted the public use of the road. *United States v. Hill*, 473 F.3d 112 (4th Cir. 2007).

Fourth Circuit Finds Actual Conflict Of Interest

The Fourth Circuit reversed a district judge's denial of a motion to vacate a sentence based on the defendant's claim that his attorney had an actual conflict of interest and provided ineffective assistance at sentencing due to the fact that the attorney represented both the defendant and a person who threatened to kill him. The court found that the attorney's simultaneous representation of these two individuals constituted an actual conflict because, in order to seek a downward departure for the defendant based on self-defense and necessity, the attorney had to accuse his other client of uncharged criminal conduct, and because the attorney had never informed the defendant of his representation of the

other person. The court then remanded the case because factual issues existed regarding whether the actual conflict adversely affected the attorney's performance at sentencing. *United States v. Nicholson*, 475 F.3d 241 (4th Cir. 2007).

Court Upholds Quashing Of Grand Jury's Subpoena For Records Relating To Police Department's Internal Investigation of Excessive Force Claim

The Fourth Circuit ruled that a district court did not abuse its discretion in quashing a grand jury's subpoena for documents relating to a city police department's internal investigation of an excessive force claim, in a civil rights investigation undertaken by the U.S. Attorney's Office. The Fourth Circuit found that the city had an interest in maintaining the police department's ability to conduct an internal investigation while preserving confidentiality, and the United States repeatedly suggested that the information it sought was of negligible value. *In re: Grand Jury*, 478 F.3d 581 (4th Cir. 2007).

Government Investigator's Relationship With Codefendant Did Not Warrant Dismissal Of Charges

The Fourth Circuit has ruled that the lead government investigator's romantic involvement with a codefendant did not warrant dismissal of the defendant's charges, nor did the investigator's inducement of the codefendant to commit perjury at the defendant's sentencing both as to the amount of drugs the codefendant personally observed and the creation of demonstrative exhibits. *United States v. Dyess*, 478 F.3d 224 (4th Cir. 2007).

Insufficient Corroboration Of Defendant's Statements To Support Convictions

The Fourth Circuit found the evidence was insufficient to support the defendant's convictions for drug conspiracy and use of a firearm in relation to a drug trafficking crime, because the only proof of his involvement in these crimes was his own statement to law enforcement officers. The police saw the defendant fire a gun and, when they arrested him, he stated that a dealer named "Red" fronted him some cocaine, and that, when he was unable to repay the dealer, Red ordered that he be killed and had his associates fire a shot at him. The defendant stated that as a result he obtained a gun and fired shots at Red's vehicle, a white Mazda. He repeated these statements in a proffer two months after his initial statements. At trial the agents testified about these events, and also testified that they had been unable to trace the gun to its registered owner. The agents also testified that they were aware of a suspected drug dealer named Red who drove a white Mazda. The defendant testified that he had lied to the agents following his arrest and in his proffer and provided an alternative explanation for his possession and use of the gun.

The Fourth Circuit found there was insufficient corroboration of the defendant's statements and that the evidence was therefore inadequate to establish his involvement in the drug trade. *United States v. Stephens*, ___ F.3d ___, 2007 WL 968902 (4th Cir. 2007).

Under 18 U.S.C. § 922(g)(9), Prior Crime Of Domestic Violence Must Have As Element Domestic Relationship Between Offender And Victim

Under 18 U.S.C. § 922(g)(9), it is unlawful for a person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm. The Fourth Circuit has ruled that, to qualify as a predicate offense under § 922(g)(9), the prior offense must have as an element a domestic relationship between the offender and the victim. *United States v. Hayes*, ___ F.3d ___, 2007 WL 1112797 (4th Cir. 2007).

Constitutional Criminal Procedure

Post-Arrest Statements To Police Were Not Involuntary

A defendant's statements to police following his arrest regarding his involvement with a violent gang were not involuntary, according to the Fourth Circuit, because the defendant spoke willingly and candidly in an attempt to avoid certain deportation by becoming a confidential informant. *United States v. Hernandez-Villanueva*, 473 F.3d 118 (4th Cir. 2007).

Wife Did Not Have Actual Authority To Consent To Computer Search, But Had Apparent Authority

A defendant's wife did not have actual authority to consent to a search of her husband's password-protected computer files, because she did not share mutual use, general access, or common authority over those files. The Fourth Circuit further held, however, that the wife had apparent authority to consent, and thus evidence seized as a result of that

consent need not be suppressed, because the computer was leased in her name, was in a common area of the home, and was turned on when the police arrived even though the defendant was not present. *United States v. Buckner*, 473 F.3d 551 (4th Cir. 2007).

Defendant's Response To Mother's Questioning Not Product Of Official Interrogation

The Fourth Circuit held that a defendant's post-arrest, pre-*Miranda* statement in response to questioning by his mother was not the product of official interrogation and was admissible. *United States v. Kimbrough*, 477 F.3d 144 (4th Cir. 2007).

Court Upholds Statute Authorizing Warrantless Searches By Probation Officer

The Fourth Circuit has upheld North Carolina's probation statute, which requires a probationer to submit to warrantless searches by the probation officer that are conducted at a reasonable time and related to the reasons for probation supervision. The court also found that the probation officer had reasonable suspicion that the probationer possessed firearms, and thus a warrantless search was justified. *United States v. Midgette*, 478 F.3d 616 (4th Cir. 2007).

Anonymous Tip Provided Reasonable Suspicion

The Fourth Circuit has ruled that an anonymous 911 call provided police with reasonable suspicion to make an investigative stop. The caller stated that a highly intoxicated driver was leaving her home in a housing project, provided the

driver's name, noted that he had recently been released from a jail sentence imposed for assaulting the mother of his child, and described him, the clothes he was wearing, and the vehicle. The caller stated that the man was in possession of a handgun and ammunition that he had threatened to "let[] them off in somebody." The Fourth Circuit upheld the subsequent stop of the defendant, finding that the caller had provided "a wealth of detail" about the defendant's appearance, vehicle, weapon, behavior, and state of mind, and that by stating that the defendant had just left her home in the housing project, allowed the authorities to later identify her. The court also emphasized that the caller had reported "an imminent threat to public safety," and found the imminence of the threat carried substantial weight in assessing the reasonableness of the police's actions. *United States v. Elston*, 479 F.3d 314 (4th Cir. 2007).

Search Of Vehicle During Traffic Stop Was Independent Of Prior Illegal Search

The Fourth Circuit found that, even if a police officer's previous search of the defendant's vehicle at an auto dealership which revealed a hidden compartment in the gas tank was unlawful, the officer had probable cause independent of the earlier observation to support the search of the vehicle when the defendant was later stopped for speeding, and therefore the latter search was valid. The court noted that a deputy had told the officer before he went to the dealership that dealership employees had reported the apparent false compartment, and, when the officer stopped the defendant, he smelled the strong odor of air freshener and fabric softener sheets coming from the vehicle, the defendant displayed a thick bundle of

cash when retrieving his license, the defendant seemed nervous, and the officer recognized the defendant's name as the owner of the vehicle at the dealership. *United States v. Seldon*, 479 F.3d 340 (4th Cir. 2007).

Clean Water Act Does Not Require Knowledge As To Jurisdictional Status Of Waters

The Fourth Circuit has found that the evidence was sufficient to support the defendant's convictions for knowingly discharging pollutants into waters of the United States in violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, ruling that the statute does not require proof that the defendant had knowledge as to the jurisdictional status of the waters. *United States v. Cooper*, 2007 WL 914314, ___ F.3d ___ (4th Cir. 2007).

Discrepancies Between Inventory Policy And Search Of Duffle Bags Did Not Require Suppression

The Fourth Circuit has affirmed the denial of a motion to suppress evidence seized during an inventory search of the defendant's two duffle bags that were brought to the police station during an arrest, finding that discrepancies between the written inventory search policy and the search of the bags did not indicate the police used the inventory policy as a pretext for a search designed to gather incriminating evidence. *United States v. Banks*, ___ F.3d ___, 2007 WL 1097954 (4th Cir. 2007).

Sentencing

Court Reverses Downward Variance In Terrorist Case

Several defendants were convicted of numerous offenses flowing from their terrorist conspiracy to wage armed conflict against the United States and their conspiracy to provide services to Taliban forces. At sentencing the judge imposed a variance under 18 U.S.C. § 3553(a) from a defendant's Guidelines range of 97-121 months in prison, imposing a sentence of 52 months instead. The Fourth Circuit reversed, finding the range to be presumptively reasonable and a strongly accurate reflection of the defendant's culpability and the seriousness of the offense. *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006).

Decision To Go To Trial On Gun Charge Did Not Bar Acceptance Of Responsibility On Drug Charge To Which Defendant Pleaded Guilty

The Fourth Circuit sent a case back to district court, ruling that a defendant's decision to go to trial on a firearms charge did not necessarily preclude a reduction of offense level based on acceptance of responsibility in regard to drug offenses to which he pleaded guilty, but that the defendant's guilty plea did not necessarily entitle him to such a reduction. *United States v. Hargrove*, 478 F.3d 195 (4th Cir. 2007).

District Court Could Not Remit Restitution Or Special Assessment

The Fourth Circuit ruled that a district court is without authority to remit either restitution imposed pursuant to the Mandatory Victim Restitution Act, or a

special assessment. *United States v. Roper*, 462 F.3d 336 (4th Cir. 2006).

Downward Variance Unreasonable In Fraud Case

A district judge's imposition of concurrent 12-month sentences for a defendant's convictions on numerous fraud-related counts, which amounted to a 70% variance from the Guidelines range of 41-51 months, was unreasonable, the Fourth Circuit held, ruling that the weight of the evidence contradicted the judge's finding that the defendant did not set out to defraud internet buyers of nonexistent gold coins. The court also noted that the defendant's restitution payments did not support the variance because he did not begin to make them until after he was convicted, and that the defendant maintained his innocence throughout. *United States v. Curry*, 461 F.3d 452 (4th Cir. 2006).

Upward Variance Unreasonable In Fraud Case

The Fourth Circuit vacated a fraud defendant's 144-month sentence, which represented a 480% increase over the high end of the applicable Guidelines range, finding that the district court had acted unreasonably in imposing such a substantial upward variance. The Fourth Circuit emphasized that, even taking into account the uncharged crimes the district court found the defendant had committed, they would not result in enough of a criminal history to place the sentence imposed within the range, and further noted that the amount stolen was at the low end of the range necessary to trigger the eight-level enhancement the defendant had received, and under the Guidelines the defendant would have to had steal almost 1300 times more money

to receive the sentence imposed. *United States v. Tucker*, 473 F.3d 556 (4th Cir. 2007).

Under Terms Of Agreement And Circumstances Of Case, Government Not Required To Move For Third Level For Acceptance

The Fourth Circuit held that the government was not required to move for a third level reduction in the offense level for the defendant's timely acceptance of responsibility based on his plea of guilty, where the plea agreement clearly stated that the defendant's failure to pay a \$100 special mandatory assessment within 40 days of execution of the agreement relieved the government of any obligation to move for a third level, the defendant offered no legal justification for the failure to pay, and the record supported the lower court's finding that the defendant had not cooperated fully. *United States v. Chase*, 466 F.3d 310 (4th Cir. 2006).

Booker Also Applies To 18 U.S.C. § 3553(b)(2)

The Fourth Circuit has found that the rationale of *United States v. Booker*, which held that the Sixth Amendment was violated by 18 U.S.C. § 3553(b)(1) because it mandated use of the applicable Guidelines range even when that was based on judge-found facts at sentencing, applied equally to § 3553(b)(2), which sets out mandatory sentencing provisions for child and sexual offenses involving possession of child pornography, and thus those latter provisions are also now advisory. *United States v. Hecht*, 470 F.3d 177 (4th Cir. 2006).

Pointing Camera At Computer Screen Constituted Distribution Of Child Pornography

According to the Fourth Circuit, the act of pointing a camera at child pornography images on the defendant's computer screen to transmit them to an undercover agent via the internet constituted "distribution" for purposes of the two-level sentence enhancement under U.S.S.G. § 2G2.2, because the act related to the transfer of material containing child pornography. *United States v. Hecht*, 470 F.3d 177 (4th Cir. 2006).

Court Invalidates Upward Departure in Pre-Booker Case

In a case involving a pre-*Booker* sentencing, the Fourth Circuit found that a district judge committed prejudicial error by enhancing the defendant's sentence based on facts that were not established by his plea agreement. The court rejected the argument that the judge's upward departure, based on a finding that the defendant's criminal history underrepresented its seriousness, fell within the "prior conviction" exception to *Apprendi*. *United States v. Guyon*, 474 F.3d 114 (4th Cir. 2006).

Court Could Not Order Sentence To Run Consecutive To Any Future Sentence

The Fourth Circuit held that a district judge did not have the authority to run the defendant's sentence consecutively to any future sentence. *United States v. Smith*, 472 F.3d 222 (4th Cir. 2006).

Court Upholds Upward Variance In Fraud Case, But Remands Because Variance Was Not Incremental

The Fourth Circuit upheld a district court's determination that criminal history category VI did not adequately reflect the past criminal conduct or likelihood of recidivism of a defendant who was convicted of credit card fraud, thus warranting imposition of an above-guidelines sentence, where the defendant had been arrested 40 times resulting in 24 convictions and 18 convictions involving fraud, many of the prior arrests and convictions were left unaccounted for in the psr's loss calculation, and the additional 11 arrests and convictions were not assigned criminal history points because they were related to the subject offense. The Fourth Circuit did remand because the district court failed to depart incrementally, thus resulting in a sentence twice the top of the advisory range, without providing more extensive justification. *United States v. Dalton*, 477 F.3d 195 (4th Cir. 2007).

Court Committed Plain Error By Not Allowing Defendant To Allocute At Resentencing Proceeding

After a case was remanded for resentencing under *Booker*, a district court merely reimposed the original sentence pursuant to advisory Guidelines. The Fourth Circuit found that the court committed plain error in not providing the defendant with an opportunity to allocute at the resentencing proceeding, vacated the sentence and again remanded the case. *United States v. Muhammad*, 478 F.3d 247 (4th Cir. 2007).

Sentence Following Revocation Of Probation Will Be Upheld Unless Plainly Unreasonable

The Fourth Circuit has held that the standard of review for a sentence imposed after a term of probation is revoked is whether the sentence was plainly unreasonable. *United States v. Moulden*, 478 F.3d 652 (4th Cir. 2007).

State Misdemeanor Constituted Prior Felony Drug Offense For Recidivist Purposes

The Fourth Circuit has upheld a defendant's 20-year mandatory minimum sentence under 21 U.S.C. § 841, which requires such a sentence if a defendant convicted of cocaine distribution has a prior felony drug conviction, finding that the defendant's South Carolina conviction for cocaine possession qualified as a predicate, even though state law classifies the offense as a misdemeanor, because it was punishable by more than one year imprisonment. *United States v. Burgess*, 478 F.3d 658 (4th Cir. 2007).

Fourth Circuit Recognizes That In Some Crack Cases A Sentence Of Probation Would Be Appropriate

A defendant pleaded guilty to aiding an abetting the distribution of crack cocaine, and faced an advisory Guidelines range of 63-78 months imprisonment. The court granted a downward variance based on the defendant's extraordinary rehabilitation, imposing a sentence of five years probation with six months home confinement. The Fourth Circuit vacated the sentence, finding that probation did not adequately reflect the seriousness of the offense or provide a just punishment. The Court emphasized that it was not

saying a probation sentence is *per se* unreasonable in crack cases or that probation can never be reasonable when the Guidelines call for imprisonment. While recognizing that a sentence of probation may be appropriate "when the quantity of crack cocaine is small," here the case involved a "not insubstantial amount of crack" (26.4 grams). The Fourth Circuit then remanded the case while agreeing that some downward variance was justified due to the defendant's rehabilitation efforts. *United States v. Pyles*, ___ F.3d ___, 2007 WL 1063616 (4th Cir. 2007).

Sentencing Court Erred In Imposing Downward Variance Without Providing Notice To Government

The Fourth Circuit vacated a defendant's sentence because the district court imposed a downward variance from the Guidelines range without providing the government with reasonable notice of its intent to do so. *United States v. Blatstein*, ___ F.3d ___, 2007 WL 1080491 (4th Cir. 2007).

Escape Conviction Qualifies As Predicate Under ACCA

The Fourth Circuit has ruled that an escape conviction qualifies as a "violent felony" under the Armed Career Criminal Act. *United States v. Matthias*, ___ F.3d ___, 2007 WL 1097952 (4th Cir. 2007).

Lack Of Notice As To Upward Variance Did Not Affect Defendant's Substantial Rights

The Fourth Circuit affirmed the 84-month sentence a defendant received after pleading guilty to extortion and filing a false tax return. The court found that

the defendant's substantial rights were not affected when the sentencing judge imposed an upward variance from the Guidelines range without first providing notice of his intention to do so, because the lack of notice neither deprived the defendant of the right to allocute nor prevented him from fully making argument in regard to the relevant sentencing factors under 18 U.S.C. § 3553(a). The court also found that the sentence was reasonable in light of the extortion scheme. *United States v. McClung*, ___ F.3d ___, 2007 WL 1203018 (2007).

Carrying Firearm During Drug Trafficking Crime Qualified As Prior Conviction For "Felony Drug Offense" For Purpose Of Enhanced Penalty Under Drug Statute

After a defendant pleaded guilty to cocaine offenses, the district judge imposed a 10-year mandatory minimum penalty under 21 U.S.C. § 841(b)(1)(B), finding that the offenses were committed "after a prior conviction for a felony drug offense." The Fourth Circuit affirmed the sentence, ruling that the defendant's prior conviction under 18 U.S.C. § 924(c) for carrying a firearm during and in relation to a drug trafficking crime qualified as a "felony drug offense" for purposes of § 841(b)(1)(B). Judge Motz filed a dissenting opinion. *United States v. Nelson*, ___ F.3d ___, 2007 WL 1153463 (4th Cir. 2007).

Evidence

Opinion Testimony That Embraced Ultimate Issue Nonetheless Admissible

In a prosecution for depriving an arrestee of his right to be free from

excessive force, the testimony of an eyewitness police officer and an expert on the use of force by police, as to whether there was any law-enforcement reason for the officer's use of force, could have been helpful to the jury and was thus admissible under Rule 704(a), the Fourth Circuit has ruled. The court emphasized that the government's question was phrased so as to avoid the baseline legal conclusion of reasonableness. *United States v. Perkins*, 470 F.3d 150 (4th Cir. 2006).

Expert's Testimony Regarding Physician's Practice Of Treatment Did Not Embrace Legal Conclusions

At a trial of a physician for the unlawful distribution of a controlled substance, an expert's testimony that the physician treated certain patients outside the course of legitimate medical practice did not impermissibly embrace legal conclusions, the Fourth Circuit ruled, because the language employed by the expert fell within the limited vernacular that was available to express whether a doctor acted outside the bounds of professional practice. *United States v. McIver*, 470 F.3d 550 (4th Cir. 2006).

District Court Erred In Admitting Government's Drug Expert, When His Interpretation Of Drug Codes Was Unnecessary And Not Sufficiently Explained

The Fourth Circuit found that, although a police detective was properly qualified as an expert in the field of investigating drug trafficking in the Baltimore metropolitan region, the district judge erred in failing to exclude the detective's testimony when it either interpreted language that needed no interpretation or

when the detective failed to adequately explain his methodology in reaching a questionable interpretation, but found the error did not affect the defendants' substantial rights. *United States v. Wilson*, ___ F.3d ___, 2007 WL 1153465 (4th Cir. 2007).

Habeas Corpus

Short Form Indictment Provided Sufficient Notice In Death Case

Affirming the denial of habeas relief to a death-sentenced inmate, the Fourth Circuit ruled that a short form indictment was sufficient to inform the defendant of the charge of murder by torture. *Stroud v. Polk*, 466 F.3d 291 (4th Cir. 2006).

Court Upholds Death Sentences

The Fourth Circuit has upheld the denial of habeas relief to a death row inmate, finding that the trial court's admission of evidence of an unadjudicated murder at the capital sentencing did not violate clearly established federal law, and that the trial court was not required to instruct the jury that the unadjudicated conduct must be proven beyond a reasonable doubt. The court also rejected the petitioner's *Miranda* claim. *Cummings v. Polk*, 475 F.3d 230 (4th Cir. 2007).

The Fourth Circuit upheld the death sentence in *Emmett v. Kelly*, 474 F.3d 154 (4th Cir. 2007), finding that defense counsel did not render deficient performance in the penalty phase by failing to interview all of the defendant's siblings or to request the record from a court-ordered juvenile counseling. Even though such investigation would have allegedly revealed inadequate childhood living conditions and abuse, the

defendant had told the attorney that he had a good relationship with his mother and stepfather and had suffered no abuse. The court further found that, even if counsel had performed deficiently, he was not prejudiced. Judge Gregory dissented from these rulings. The court also ruled that counsel was not deficient at sentencing by failing to present expert testimony regarding the defendant's alcohol/cocaine intoxication.

The Fourth Circuit also upheld the death sentence in *McNeill v. Polk*, 476 F.3d 206 (4th Cir. 2007), finding that the defendant had procedurally defaulted on several claims and rejecting the rest. In particular, the court found that counsel acted reasonably in deciding to admit his client's guilt as to second-degree murder while arguing that premeditation was lacking due to diminished capacity and absence of intent.

District Court Not Obligated To Conduct New Hearing To Impose Corrected Sentence Following Partial Grant Of Motion To Vacate Sentence

The Fourth Circuit found that a district court did not abuse its discretion when, after partialing granting the defendant's motion to vacate his sentence, the court imposed a corrected sentence without conducting a resentencing hearing. *United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007).

DEFENSE NEWS

is published by the

**Office of the Federal Public Defender
for the District of Maryland
100 S. Charles Street, Tower II
Suite 1100
Baltimore, Maryland 21201-2705
(410) 962-3962
Fax (410) 962-0872**