
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

The Supreme Court has ruled that a defendant's prior felony conviction for DUI is not a "violent felony" under the ACCA. The Court's holding may be useful to defense attorneys in regard to other types of their clients' prior convictions. In its ruling, the Court noted that, even assuming that a DUI offense involves conduct that "presents a serious potential risk of physical injury to another" under the clause of the ACCA defining the term "violent felony," the offense falls outside the clause's scope because it is unlike the clause's example crimes, which all involve purposeful, violent, and aggressive conduct. See *Begay v. United States*, at p. 6.

The Fourth Circuit has ruled that an anonymous tip failed to provide reasonable suspicion for a traffic stop of the defendant's vehicle. Even though the anonymous caller made a nearly contemporaneous report of her observation of the driver's participation in a transaction involving a big sandwich bag and a handgun, the tip failed because the caller did not predict the defendant's future movements and insisted on remaining anonymous. See *United States v. Reeves*, at p. 16.

The Fourth Circuit has ruled that, by requiring an apartment resident to open his door so that they could see him, police officers conducted a search under the Fourth Amendment, because the officers gained visual access to the interior of the dwelling even though they did not physically enter it. The court also found that no exigent circumstances existed so as to eliminate the need for the officers to obtain a search warrant before knocking and demanding visual access into the apartment, which was the subject of a complaint of loud music and marijuana odor. The officers were aware of the marijuana in the apartment before they decided to alert the occupant of their presence, and, by not opting to first obtain a warrant, they created their own exigency by setting up the wholly foreseeable risk that the occupant would seek to destroy evidence of the crime. See *United States v. Mowatt*, at p. 16.

NOTES FROM THE DEFENDER

CJA Panel Training

Our next CJA Panel Training is scheduled for November 7, 2008 at the Greenbelt Courthouse in the Jury Assembly Room. Registration begins at 8:30am and the program runs to about 1:00pm. Our training topics will include the "Use of Forensic Evidence" and "Deconstructing the Guidelines." The Jury Assembly Room in Greenbelt is a great space for us. As they did last year, Tim Sullivan and Bill Brennan have generously agreed to host a post-training lunch for everyone at their offices. I look forward to seeing everyone at the training and then at the luncheon.

New CJA Members

The CJA Committee approved the following new members to our panel: Michael DeMartin; Stephanie Gallagher; Gregory Gilchrist; Steven Levin; Christopher Purpura; Gregory Smith; Jenifer Wicks; Steven Wrobel; and Jonathan Zuckerman.

FPD - CJA Holiday Party

We would also like to invite everyone to our second annual FPD - CJA Holiday Party. All CJA attorneys are invited to join us on December 12, 2008 at 4:00pm. Last year's party was a lot of fun. I think about one-third of the panel joined us. We hope to build on that tradition this year.

I am not sure that doing indigent defense work in this District has ever been harder. Even more reason to get together and toast the holidays. I know we are all juggling a great deal, but it would be great to see everyone.

Departures and Arrivals

The Federal Defender Office has recently lost two extraordinary lawyers and members of the FPD family. Jeff Risberg has only moved across the street. Jeff recently joined the Clerk's Office of the United States District Court of Maryland as the Chief Deputy Clerk under Felicia Cannon. Jeff will use his years of experience as a "customer" of the Court to help better serve all lawyers. Jeff is off to a good start and has particularly been involved with what seems to have been a smooth transition to Electronic Case Filing (ECF).

Assistant Federal Public Defender Denise Barrett has become our national program's third Sentencing Resource Counsel. In this role, Denise will present the defense point of view to the United States Sentencing Commission and also develop materials and training programs that will assist all of us in our sentencing work. This is a wonderful opportunity for Denise.

While we have not yet hired a replacement for Denise, Malik Edwards has joined us to fill in for Jeff. Malik graduated from Morehouse College and Yale Law School. Malik was an associate at Sullivan and Cromwell in New York before becoming a public defender in Saipan through the Lawyers Without Borders Program.

Maryland Correctional Adjustment Center (MCAC)

The Marshals have recently entered into a contract that will double the number of detainees held at MCAC (Supermax). We are optimistic that this is going to cut down on the number of detainees at extraordinarily remote facilities in Ohio and Virginia. While this should reduce travel for many of us, we remain concerned about the facility's ability to handle the increase in the number of detainees. We are already hearing a growing number of complaints from our clients about the worsening of conditions, including access to healthcare and counseling.

Donna Shearer and I, along with Ted Stoler of the United States Marshals Service, met with the new MCAC (Supermax) Warden Robert Koppel to discuss some of these issues. The Warden acknowledged that there had been some glitches during the transition. Warden Koppel advised that there has been an increase in violence in some of the pods which has led to a restriction in detainees time out of cells. Although historically institutions see an increase in violence due to overcrowding and staff shortages, Warden Koppel maintains that the increase at MCAC is not due to the increase in population or staff reductions.

The Warden expressed a strong commitment to improve access to counsel. They are adding two new attorney-client visitors booths that will be devoted to CJA and FPD attorney visits. Donna and I were shown these booths. It will be very helpful to have visiting booths for the exclusive use of federal detainees and their lawyers. But the sound-proofing was inadequate and there was very little privacy between the booths. We have asked the Warden to make improvements. In the meantime, please be careful when speaking with your clients.

In addition, the Warden advised they were working hard to limit the waiting time for attorneys to be taken up to see their clients. The Warden advised that we should contact the Shift Commander or the Security Chief for assistance after waiting for fifteen minutes to see our clients. I am not sure I have ever waited less than fifteen minutes for a visit. But, the Warden has set that as the goal.

RECENT CASE LAW

SUPREME COURT

Substantive Federal Law

Court Issues Two Rulings Interpreting Money Laundering Statute

The Supreme Court has ruled that the portion of the money laundering statute that prohibits the international transportation of proceeds of unlawful activity, 18 U.S.C. § 1956(a)(2)(B)(I), requires proof that the funds were not only concealed and transported, but also that those actions were taken, at least in

part, for the purpose of concealing or disguising their nature, location, source, ownership or control. *Cuellar v. United States*, 128 S. Ct. 1994 (2008).

A divided Supreme Court affirmed the judgment of the Seventh Circuit, which had upheld the grant of a post-conviction motion on the ground that the word "proceeds" as used in 18 U.S.C. §§ 1956(a)(1)(A)(I) and (h) applies only to criminal "profits" and not to criminal "receipts." According to Justice Scalia, because both "profits" and "receipts" are ordinary definitions of the term "proceeds," and because neither definition would render the statute incoherent, redundant or utterly absurd, the rule of lenity dictates that the Court choose the definition that is "always more defendant-friendly." *United States v. Santos*, 128 S. Ct. 2020 (2008).

Court Upholds Child Pornography Statute

The Supreme Court reversed the Eleventh Circuit and held that 18 U.S.C. § 2252A(a)(3)(B), which criminalizes the pandering or solicitation of child pornography, is neither overbroad under the First Amendment nor impermissibly vague under the Due Process Clause. *United States v. Williams*, 128 S. Ct. 1830 (2008).

Court Interprets 18 U.S.C. § 844

Reversing the Ninth Circuit, the Supreme Court has found that 18 U.S.C. § 844(h)(2), which prohibits the carrying of an explosive "during the commission of any felony," does not require that the explosive be carried in relation to the underlying felony. *United States v. Ressaam*, 128 S. Ct. 1858 (2008).

Court Issues Defense-Favorable Ruling In Tax Evasion Case

Vacating a decision of the Ninth Circuit, the Supreme Court has ruled that, under provisions of the Internal Revenue Code setting the conditions for treating certain corporate distributions as returns of capital, nontaxable to the recipient, a distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that either he or the corporation intended a capital return when the distribution occurred. *Boulware v. United States*, 128 S. Ct. 1168 (2008).

Defense Counsel May Consent To Magistrate Judge Presiding Over Jury Selection

The Supreme Court held that the express consent of defense counsel suffices to permit a federal magistrate judge to preside over jury selection in a felony trial. *Gonzalez v. United States*, 128 S. Ct. 1765 (2008).

Court Strikes Down D.C. Ban On Handguns

The Supreme Court has held that the District of Columbia's ban on handguns in the home violates an individual's Second Amendment right to keep and bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

Constitutional Criminal Procedure

Right To Counsel Attaches At Initial Appearance Even If Prosecutor Is Not Involved In Proceeding

The Supreme Court has ruled that the Sixth Amendment right to counsel attaches at a defendant's initial

appearance before the magistrate judge where he learns the charges against him and is subject to a potential loss of liberty, even if the proceeding is so preliminary that the prosecutor is unaware of it and uninvolved in it. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

States May Insist Upon Counsel For Those Who Are Competent To Stand Trial But Not Competent To Conduct Trial Proceedings

The Supreme Court held that United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

Police's Violation Of State Law Not Relevant When Determining Whether Action Was Reasonable Under Fourth Amendment

The Supreme Court has ruled that police officers did not violate the Fourth Amendment by arresting a motorist whom they had probable cause to believe had violated Virginia law by driving with a suspended license, even though, as a matter of state law, the misdemeanor offense of driving with a suspended license was one for which, under the particular circumstances of the motorist's case, the officers should have issued a summons rather than make an arrest. In so ruling the Court stated that the officers' violation of state law in making the arrest did not affect its reasonableness for Fourth Amendment purposes. *Virginia v. Moore*, 128 S. Ct. 1598 (2008).

Court Rejects “Forfeiture By Wrongdoing” Exception To Confrontation Clause

The Supreme Court held that a criminal defendant does not forfeit his or her Sixth Amendment Confrontation Clause claim upon a showing that the defendant caused the unavailability of the witness or that the defendant’s actions were undertaken specifically to prevent the witness from testifying. The Court found that the state court’s theory of “forfeiture by wrongdoing” was not an exception to the Sixth Amendment’s confrontation requirement because it was not established at the time of the founding of the Bill of Rights or in American jurisprudence since that time. *Giles v. California*, 128 S. Ct. 2678 (2008).

Court Finds Prosecutor Violated Batson

The Supreme Court has found that a prosecutor’s proffered reasons for striking a prospective black juror in a capital murder trial – that the prospective juror was nervous during voir dire and that he might have been motivated to find the defendant guilty of a lesser included offense to obviate the need for a penalty phase and thereby minimize the student teaching hours he would miss – were merely a pretext for racial discrimination. The Court emphasized that the prospective juror, after being informed during voir dire that the court had contacted his dean, who informed the court that he would work with the prospective juror to see that he was able to make up any student-teaching time that he missed due to jury service, did not express any further concern about serving on the jury; the prosecutor had anticipated on the record during voir dire that the trial would be brief; the trial and

penalty phase were completed two days after the prospective juror was struck; and the prosecutor accepted white jurors who disclosed conflicting obligations that were at least as serious as those of the prospective black juror. *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

Sentencing

Appellate Court May Not Sua Sponte Increase Defendant’s Sentence

The Supreme Court has held that, absent a government appeal or cross-appeal, a court of appeals does not have the power to *sua sponte* raise a defendant’s sentence, even if it is to correct a plain error. *Greenlaw v. United States*, 128 S. Ct. 2559 (2008).

District Court Need Not Provide Notice Of Its Intention To Impose Upward Variance Under Advisory Guidelines

The Supreme Court has decided that Rule 32(h) of the Federal Rules of Criminal Procedure does not require a district court to provide notice when it is contemplating imposing a variance from the advisory Guidelines on a ground not identified either in the pre-sentence report or a pre-sentencing submission. *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

“Maximum Term Of Imprisonment” Under ACCA Includes Recidivist Enhancements

The Supreme Court has ruled that the “maximum term of imprisonment,” for purposes of determining whether a prior offense qualified as a serious drug offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is to be

determined with reference to the applicable recidivist enhancements for the prior offense. *United States v. Rodriguez*, 128 S. Ct. 1783 (2008).

Court Interprets Restoration Of Civil Rights Exception Under ACCA

The ACCA excludes as predicate offenses those prior convictions for which the defendant “has had civil rights restored.” The Supreme Court has ruled that this provision does not include prior convictions for offenses that were sufficiently minor that state law never suspended the offender’s civil rights in the first place. The Court noted that such prior convictions do not result in the deprivation of the defendant’s civil rights, and, therefore, since the defendant never lost his civil rights, he did not have his civil rights “restored” within the meaning of the exemption. *Logan v. United States*, 128 S. Ct. 475 (2008).

Kentucky’s Lethal Injection Protocol Does Not Violate Eighth Amendment

The Supreme Court has ruled that Kentucky’s three-drug lethal injection protocol does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment. *Baze v. Rees*, 128 S. Ct. 1520 (2008).

Eighth Amendment Bars Capital Punishment When Crime Does Not Result In Death Of Victim

The Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

Misdemeanor Drug Crime Punishable By More Than Year In Prison Constitutes Felony Drug Offense Under 18 U.S.C. § 841(b)

Under 18 U.S.C. § 841(b)(1)(A), a mandatory minimum penalty of 10 years imprisonment for specified federal drug offenses increases to 20 years if the defendant has previously been convicted of a “felony drug offense.” According to the Supreme Court, a state drug offense that is classified as a misdemeanor, but which is punishable by more than one year in prison, constitutes a felony drug offense under this statute. *Burgess v. United States*, 128 S. Ct. 1572 (2008).

DUI Not “Violent Felony” Under ACCA

The Supreme Court has ruled that a defendant’s prior felony conviction for driving while intoxicated (DUI) is not a “violent felony” for purposes of the Armed Career Criminal Act. In so ruling, the Court noted that, even assuming that a DUI offense involves conduct that “presents a serious potential risk of physical injury to another” under the clause of the ACCA defining the term “violent felony,” the offense falls outside the clause’s scope because it is unlike the clause’s example crimes, which all involve purposeful, violent, and aggressive conduct. *Begay v. United States*, 128 S. Ct. 1581 (2008).

Habeas Corpus

Court Upholds Habeas Rights For American Citizens Being Held Overseas And Guantanamo Detainees

A unanimous Supreme Court ruled that the habeas statute extends to American citizens being held overseas by American forces operating subject to an American chain of command, even when those forces are part of a multinational coalition. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

The Supreme Court has ruled that aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba, have a constitutional privilege of habeas corpus that cannot be withdrawn except in conformance with the Suspension Clause, art. I, § 9, cl. 2. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Supreme Court Upholds State Court's Ruling On Right To Counsel Under Deferential Habeas Standard

The Supreme Court held that a state appellate court's determination that the defendant's right to counsel was not violated when defense counsel appeared via speaker phone at a plea hearing was not contrary to, or an unreasonable application of, clearly established federal law. *Wright v. Van Patten*, 128 S. Ct. 743 (2008).

Teague Does Not Apply To State Courts

Under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule of criminal procedure announced by the Supreme Court may be

applied in federal habeas proceedings only if it constitutes a "watershed" rule of criminal procedure. The Court has ruled that *Teague* does not apply a similar constraint on state courts, and therefore does not prohibit the application in state post-conviction proceedings of new constitutional rules of criminal procedure that do not qualify as "watershed" rules. *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008).

States Not Bound By Decision Of International Court Of Justice

The Supreme Court held that the International Court of Justice's decision that the United States had violated the Vienna Convention by failing to inform 51 named Mexican nationals, including the petitioner, of their Vienna Convention rights was not directly enforceable domestic federal law that preempted state limitations on the filing of successive habeas petitions, and that the President's directive to the Attorney General that the United States would honor the ICJ decision did not independently require states to provide reconsideration and review of the named Mexican nationals' claims without regard to state procedural default rules. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

Certiorari Granted

Court To Decide Whether Escape Is Violent Felony Under ACCA

The Supreme Court will decide whether a failure to report for imprisonment that results in a conviction for escape "involves conduct that presents a serious potential risk of physical injury to another," and thus constitutes a "violent felony" under the Armed Career Criminal Act. *Chambers v.*

United States, 128 S. Ct. 2046 (April 21, 2008).

Court Will Decide Procedural Rules In Habeas Cases

The Supreme Court will decide whether a federal habeas claim is procedurally defaulted if it is presented twice to state courts and whether a federal court has the power to recognize that a state court erred in holding that its law precluded it from reviewing a claim. The petitioner argues that the state violated *Brady* by suppressing exculpatory evidence that went directly to his mental state, the sole issue in the case. *Cone v. Bell*, 128 S. Ct. 2961 (June 23, 2008).

Jury Instructions, State Law, And Habeas Review

The Supreme Court will decide whether, on federal habeas review, courts must accept state court determinations that jury instructions fully and correctly set out state law with regard to accomplice liability. *Waddington v. Sarausad*, 128 S. Ct. 1650 (March 17, 2008).

Habeas Review And One-Year Limitations Period

The Supreme Court also will decide if the Fifth Circuit erred in refusing to issue a certificate of appealability to consider the issue of whether, pursuant to 28 U.S.C. § 2244(d)(1)(A), when, through no fault of the petitioner he was unable to obtain a direct review and the highest state court granted post-conviction relief to place him back to his original position on direct review, the one-year limitations period should begin to run after he has completed that direct review. *Jimenez v.*

Quarterman, 128 S. Ct. 1646 (March 17, 2008).

Whether Fourth Circuit Erred In Applying Deferential Standard Of Review In Habeas Case

The Supreme Court will decide whether the Fourth Circuit erred when, in conflict with decisions by two other circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims “adjudicated on the merits” in state court, to evaluate a petitioner’s Sixth Amendment claim of ineffective assistance of counsel that was predicated on evidence of prejudice that the state court refused to consider and that was properly received for the first time at the federal evidentiary hearing. *Bell v. Kelly*, 128 S. Ct. 2108 (May 12, 2008).

Whether Ninth Circuit Failed To Sufficiently Defer To State Court Ruling In Habeas Case

The Supreme Court will decide whether the Ninth Circuit exceeded its authority under 28 U.S.C. § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the petitioner’s claim was “unreasonable” under “clearly established federal law” based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point. *Knowles v. Mirzayance*, 128 S. Ct. 2996 (June 27, 2008).

Federally-Funded Counsel In State Capital Proceedings

The Supreme Court has agreed to decide whether 18 U.S.C. § 3599(a)(2) &

(e) permits federally-funded habeas counsel to represent a condemned inmate in state proceedings when the state has denied state-funded counsel for that purpose, and whether a certificate of appealability is required to appeal a denial of federally-funded counsel for that purpose. *Harbison v. Bell*, 128 S. Ct. 2959 (June 23, 2008).

Pat-Down Search During Traffic Stop For Minor Infraction

The Supreme Court will determine whether, during a traffic stop for a minor infraction, the police can conduct a pat-down search of a passenger when they have an articulable basis to believe that the passenger might be armed and presently dangerous, but no reasonable ground to believe that the person is committing or has committed a criminal offense. *Arizona v. Johnson*, 128 S. Ct. 2961 (June 23, 2008).

What Constitutes “Misdemeanor Crime Of Domestic Violence” Under § 922(g)(9)

Granting certiorari, the Supreme Court has agreed to decide whether 18 U.S.C. § 922(g)(9), which makes it illegal for a person convicted of a “misdemeanor crime of domestic violence” to possess a firearm, requires that the predicate offense have as an element a domestic relationship between the offender and the victim. *United States v. Hayes*, 128 S. Ct. 1702 (March 24, 2008).

Scope Of Vehicular Search Incident To Arrest

The Supreme Court will decide whether the Fourth Amendment requires the police to demonstrate a threat to their safety or a need to preserve evidence

related to the crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured. *Arizona v. Gant*, 128 S. Ct. 1443 (February 25, 2008).

Fact-Finding That Triggers Consecutive Sentences Under The Sixth Amendment

The Supreme Court has granted certiorari to determine whether the Sixth Amendment requires that facts (other than prior convictions) necessary for the imposition of consecutive sentences be found by the jury or admitted by the defendant. *Oregon v. Ice*, 128 S. Ct. 1657 (March 17, 2008).

Forensic Lab Report And Confrontation Clause

The Supreme Court will decide whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is “testimonial” evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*. *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (March 17, 2008).

Exclusionary Rule And Police Negligence

The Supreme Court will determine whether the exclusionary rule should apply to evidence seized incident to an arrest that is unlawful under the Fourth Amendment due to erroneous information negligently provided by another law enforcement agency. *Herring v. United States*, 128 S. Ct. 1221 (February 19, 2008).

Erroneous Jury Instruction As Structural Error

The Supreme Court has agreed to decide whether, on habeas review, the Ninth Circuit erred in granting relief to the petitioner after finding that an erroneous jury instruction constituted structural error requiring reversal because the jury may have relied upon it. *Chronos v. Pulido*, 128 S. Ct. 1444 (February 25, 2008).

“Consent Once Removed” Exception To Fourth Amendment

The Supreme Court will decide whether the “consent once removed” exception to the Fourth Amendment’s warrant requirement authorizes the police to enter a home without a warrant immediately after undercover informants buy drugs inside. *Pearson v. Callahan*, 128 S. Ct. 1702 (March 24, 2008).

FOURTH CIRCUIT

Substantive Criminal Law

District Court Committed Plain Error In Accepting Guilty Plea Without Factual Basis For Defendant’s Criminal Intent

The Fourth Circuit ruled that a district court committed plain error in accepting a guilty plea to conspiracy to distribute methamphetamine, absent a factual basis in the record to establish the defendant’s mens rea. At the Rule 11 proceeding, the defendant refused to admit the factual basis despite questioning by the court, he consistently stated that the alleged co-conspirators asked him to help carry groceries but that he did not know the grocery bags contained drugs, the drug agent’s affidavit did not indicate the

defendant’s knowing participation in the drug transaction, the district court did not engage the defendant in any discussion about an *Alford* plea, and the record indicated that the defendant, who was a Cuban refugee and did not understand English, mistakenly believed he could be imprisoned for his unwitting participation in the conspiracy. *United States v. Mastrapa*, 509 F.3d 652 (4th Cir. 2007).

University Of Virginia Could Be Considered “Person” For Purposes Of Extortion Statute

In interpreting 18 U.S.C. § 876, which makes it illegal to mail a communication containing a threat to kidnap or injure with intent to extort from any person any money or other thing of value, the Fourth Circuit held that the statutory term “person” is not limited to living and breathing persons, and that the University of Virginia was a “person” for purposes of the statute. *United States v. Bly*, 510 F.3d 453 (4th Cir. 2007).

Court Finds Proper Venue For Filing Fraudulent Document With SEC

In a criminal prosecution for causing the filing of a false and fraudulent document with the Securities and Exchange Commission, the Fourth Circuit found that causing the electronic transmission of fraudulent information to a SEC computer server in the Eastern District of Virginia was sufficient to sustain venue in that district. *United States v. Johnson*, 510 F.3d 521 (4th Cir. 2007).

Court Upholds Validity Of Statute Criminalizing Material Support To Terrorist Organizations

The Fourth Circuit has upheld the constitutionality of 18 U.S.C. § 2339B, which prohibits the provision of material support or resources to a designated foreign terrorist organization, finding that the statute does not impermissibly restrict a defendant's First Amendment right to free association. The court further found that, even if certain terms related to the definition of a terrorist organization were vague, the statute was not unconstitutionally vague as applied to the defendant in this case. *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008).

District Court's Acceptance Of Waiver Of Jury Trial Was Not Clearly Erroneous

The Fourth Circuit has ruled that the Sixth Amendment did not require the district court to question a defendant about his waiver of the right to a jury trial before accepting the waiver, where the defendant, through counsel, had filed a written motion to waive a trial by jury. The court further found that the district judge did not clearly err in finding that the waiver was knowing and voluntary, when there was no evidence that defense counsel had filed the motion to waive a jury trial without the defendant's consent, the defendant never indicated surprise or protest that he was being tried by the court, and he neither testified nor offered any evidence contradicting his counsel concerning the waiver. *United States v. Boynes*, 515 F.3d 284 (4th Cir. 2008).

Fourth Circuit Issues Numerous Rulings In Regard To Mann Act And Money Laundering

Prosecution Of Motel Prostitution Ring

The Fourth Circuit has issued a number of rulings in a case in which two defendants and a motel corporation were prosecuted for violating the Mann Act and for money laundering based on the operation of a prostitution ring. Among those rulings was that the prostitutes' receipt of money from customers completed the prostitution offense, such that the prostitute's payment of a portion of the money to the defendant motel managers could serve as criminally derived proceeds of a completed offense under the money laundering statute, 18 U.S.C. § 1956, and that evidence that the defendant motel managers occasionally required members of the prostitution ring to fill out room registration forms, and that the completed forms contained the prostitute's out-of-state addresses, was sufficient to show the managers' actual knowledge of the interstate component of the ring's prostitution operation as required under the Mann Act, 18 U.S.C.A. § 371. *United States v. Singh*, 518 F.3d 236 (4th Cir. 2008).

Trial Court's Did Not Abuse Discretion By Failing To Provide Immediate Curative Instruction Or Declare Mistrial Upon Violation of In Limine Agreement

In a defendant's prosecution for drug distribution and firearm possession, the Fourth Circuit has found that the district court's failure to provide an immediate curative instruction or declare a mistrial following the government's violation of an *in limine* agreement not to mention any details surrounding a domestic violence incident involving the defendant was not an abuse of discretion. In so ruling, the appellate court emphasized that there

was no evidence that the statement by the officer was purposefully elicited by the government, the defendant did not ask the court for an immediate curative instruction but instead waited for the first break, and the trial court's jury instructions clearly required the jury to disregard the portion of the testimony that violated the agreement. *United States v. Wallace*, 515 F.3d 327 (4th Cir. 2008).

Acquittal Did Not Bar Retrial On Drug Conspiracy Charge

According to the Fourth Circuit, a defendant's retrial on a charge of conspiracy to distribute 50 grams or more of cocaine base did not violate his rights under the Double Jeopardy Clause of the Fifth Amendment despite his earlier acquittal on a charge of distribution as a principal or as an aider and abettor of 50 grams or more of cocaine base, since the second trial did not require relitigation of any issue of ultimate fact that already had been determined in the first trial. In particular the court found that the element of "knowingly and voluntarily" having become a part of the conspiracy had not been determined when the jury earlier acquitted the defendant, since aiding and abetting involved participation in the criminal act itself and conspiracy involved participation in an agreement to perform that act. *United States v. Yearwood*, 518 F.3d 220 (4th Cir. 2008).

Prior Acquittal Did Not Bar Subsequent Prosecution For Providing False Statements To Grand Jury And FBI

A defendant's acquittal in a bench trial for providing material support to terrorists, based on his attending a jihadist training camp in Afghanistan, did not preclude, under the doctrines of collateral estoppel

or double jeopardy, his subsequent prosecution for falsely denying to the grand jury and the FBI that he attended such a camp in Pakistan or Afghanistan, the Fourth Circuit has ruled. The court emphasized that the trial judge explained that the reason for the acquittal in the first trial was the lack of evidence showing that the jihadist training camp was in Afghanistan, not any doubt that the defendant had attended such a camp somewhere, the questions posed by the government to the defendant about his attendance at the camp which formed the basis of the later prosecution were part of a valid and ongoing criminal investigation, and the issue of ultimate fact in the two prosecutions was distinct. *United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008).

Defendant's Use Of False Driver's License Did Not Constitute Identity Theft

The Fourth Circuit has ruled that for purposes of aggravated identity theft under 18 U.S.C. §§ 1028 & 1028A, the phrase "means of identification of another person" refers simply to a means of identification, an identifier or combination of identifiers, that may be used to identify a specific individual. The court noted that the use of another person's name, by itself, does not necessarily constitute the use of a "means of identification of another person" under these statutes. The court further found that a false Georgia driver's license offered as identification by the defendant in passing counterfeit checks at a retail store could not be used to identify a specific individual, and thus the government had failed to establish that the defendant used a means of identification of another person, as required to convict him of aggravated identity theft. *United States v. Mitchell*, 518 F.3d 230 (4th Cir. 2008).

Failure To Advise Defendant At Rule 11 Proceeding Of His Potential Sentencing Exposure Under ACCA Constituted Reversible Error

A district court committed reversible error when, in accepting a defendant's guilty plea to multiple felon-in-possession charges and numerous other charges relating to drugs and guns, it failed to inform the defendant that he faced a mandatory minimum sentence of 15 years if he qualified as an armed career criminal under 18 U.S.C. § 924(e). The error was not harmless, where the triggering of the mandatory minimum penalty on those offenses completely changed the sentencing calculus, under which the best-case scenario had been that the defendant would be imprisoned for 30 years, but which was altered to a 45-year minimum once sentencing was required under the ACCA. In addition, the defendant's statements on the record clearly indicated that he had been willing to plead guilty to charges that exposed him to a minimum sentence of 30 years, and that he would not have pleaded guilty if he had known he faced a 45-year minimum because of the unlikelihood that he would live to be released and see his children. The court concluded that the proper remedy for the error was to vacate all of the defendant's guilty pleas and convictions and allow him to plead anew. *United States v. Hairston*, 522 F.3d 336 (4th Cir. 2008).

Speedy Trial Act Did Not Apply To Time Period In ICE Detention

The Fourth Circuit has ruled that the Speedy Trial Act, 18 U.S.C. § 3161(b), did not apply to the time period during which a defendant was detained by the United States Immigration and Customs

Enforcement (ICE) on administrative charges pending his removal (the defendant was indicted and later convicted of illegal reentry following removal subsequent to his ICE detention). The court emphasized that there was no collusion between ICE and criminal authorities, the deportation officer had no knowledge of the defendant's outstanding criminal arrest warrant for illegal reentry, and the ICE agent was unaware that the defendant had been transferred from state custody to ICE custody. *United States v. Rodriguez-Amaya*, 521 F.3d 437 (4th Cir. 2008).

Sentencing Defendant For Arson, Use Of Fire To Commit Mail Fraud, And Mail Fraud Did Not Violate Double Jeopardy

According to the Fourth Circuit, sentencing a defendant for arson, use of fire to commit mail fraud, and mail fraud did not violate double jeopardy, because the crimes were separate offenses under *Blockburger v. United States*, 284 U.S. 299 (1932), since each offense contained an element not found in either of the other offenses. *United States v. Martin*, 523 F.3d 281 (4th Cir. 2008).

Guilt for Conspiring To Distribute More Than 50 Grams Of Cocaine Base Not Dependent Upon Jury Determination Regarding Amount Or Type of Drug Distributed

The Fourth Circuit has ruled that a district court committed plain error by instructing a jury that it could convict the defendant for conspiracy to distribute more than 50 grams of cocaine base only if it found that the drug conspiracy involved the specified quantities of crack, emphasizing that circuit law clearly states that a jury finding as to drug quantity is

not required to support a conviction for conspiracy to distribute 50 grams of cocaine base. *United States v. Reid*, 523 F.3d 310 (4th Cir. 2008).

Defendant Can Be Convicted For Using Cell Phone To Facilitate Distribution Of Cocaine For His Own Personal Use

To support a conviction under 21 U.S.C. § 843(b) for knowingly or intentionally using a communication facility to commit or facilitate a drug distribution felony, it is sufficient that the defendant's use of his cell phone facilitated the distribution of cocaine for his own personal use, the Fourth Circuit has ruled. The court noted that the statute does not specify whose drug distribution has to be facilitated, and the defendant's use of his phone to arrange a purchase from a drug dealer undoubtedly made the dealer's distribution easier. *United States v. Abuelhawa*, 523 F.3d 415 (4th Cir. 2008).

District Court Did Not Plainly Err In Allowing Magistrate Judge To Preside Over Guilty Plea Proceeding

The Fourth Circuit has found that, even if a district court erred in allowing a magistrate judge to accept the defendant's plea of guilty, it did not warrant reversal under the plain error standard of review, when there was no question as to the defendant's guilt, the district court reviewed de novo all of the defendant's claims concerning his plea proceedings, and the defendant consented to the magistrate judge presiding over his plea. *United States v. Benton*, 523 F.3d 424 (4th Cir. 2008).

Fourth Circuit Issues Numerous Rulings Relating To ERISA Offenses

In upholding two defendants' convictions for false statement and theft offenses under the Employee Retirement Income Security Act (ERISA), the Fourth Circuit issued a number of rulings, including that (1) unpaid employer contributions were assets of a pension plan within the meaning of ERISA theft offenses; (2) executives do not have to be fiduciaries of a pension plan to be criminally liable for ERISA theft; and (3) in any event, a chief executive became a fiduciary when he assumed plan responsibilities and exercised control over whether employer contributions were made. *United States v. Jackson*, 524 F.3d 532 (4th Cir. 2008).

Evidence Sufficient To Establish Retail Value Of Bootleg DVDs Exceeded \$2,500, As Required Under Statute

The Fourth Circuit found that the evidence was sufficient to establish the total retail value of 100 bootleg DVDs of movies not yet released on DVD that the defendant sold to an undercover agent exceeded \$2,500, as required to establish the element of felony copyright infringement for private financial gain by reproduction or distribution of copyrighted works having total retail value exceeding \$2,500 under 18 U.S.C. § 2319(b)(1). The court emphasized that, although the defendant sold the DVDs for \$5 each, witnesses testified that motion picture copies sold during pre-release stage to hotels and airlines cost at least \$1,000; a piracy investigator opined that a good argument could be made that the DVDs the defendant sold had a retail value of \$1,000 each, although the price might be

reduced for quality deficiencies; and there was testimony that the average retail price of the movies the defendant sold would exceed \$19 when they were released on DVD. *United States v. Armstead*, 524 F.3d 442 (4th Cir. 2008).

Jury Not Judge Must Decide Drug Quantity Attributable To Defendant In Conspiracy For Purposes Of Statutory Minimum And Maximum Penalties

The Fourth Circuit has ruled that it was for the jury, not the district judge, to determine the amount of drugs individually attributable to a defendant in carrying out a drug conspiracy, for purposes of establishing the statutory sentencing minimum and maximum penalties under 21 U.S.C. §§ 841(b) & 846, and that the judge erred in failing to instruct the jury to make that determination. The court further held that the error was not harmless with respect to the defendant sentenced in excess of the authorized statutory maximum simply because his sentence was imposed to run consecutive to five concurrent state terms of life imprisonment, absent a showing that the defendant would not be paroled and thus would never serve his federal sentence. *United States v. Brooks*, 524 F.3d 549 (4th Cir. 2008).

Court Upholds Convictions Arising From Scheme To Defraud INSCOM

The Fourth Circuit affirmed two defendants' convictions for honest services wire fraud and bribery arising from a scheme in which one co-defendant engineered the award of a U.S. Army Intelligence and Security Command (INSCOM) contract to the other co-defendant's company in exchange for a

series of payments and later employment with the company, finding that the defendants were involved in a scheme to defraud, concealed material facts from INSCOM, and had the specific intent to defraud INSCOM, as necessary for the honest services wire fraud conviction, and had acted with corrupt intent, as necessary for the bribery conviction. *United States v. Harvey*, 532 F.3d 326 (4th Cir. 2008).

Constitutional Criminal Procedure

Fourth Circuit Reverses Conviction Based On *Miranda* Violation

The Fourth Circuit has reversed a defendant's conviction after finding that his statements should have been suppressed because he was subjected to custodial interrogation without *Miranda* warnings. The court found that the defendant, who was questioned for almost three hours by FBI agents in an FBI vehicle, was in custody, although the agents told the defendant that he was not under arrest and did not arrest him until almost two years later, given that a reasonable person would not have felt free to decline the agents' request to talk and would have felt that his or her freedom was curtailed to the degree associated with formal arrest due to coercive pressures in a police-dominated environment. The defendant's house was inundated with 24 FBI agents who awakened him at gun point, guarded him at all times, and never told him that he was free to leave or that he did not have to respond to questions. *United States v. Colonna*, 511 F.3d 431 (4th Cir. 2007).

Anonymous Tip Did Not Provide Sufficient Basis For Traffic Stop

The Fourth Circuit has ruled that an anonymous tip was not sufficiently reliable to provide reasonable suspicion for a traffic stop of the defendant's vehicle. The court noted that, although the anonymous caller made a nearly contemporaneous report of her observation of the driver's participation in a transaction involving a big sandwich bag and a handgun, and the caller stayed on the line with the operator while following the defendant's vehicle for several blocks and reported the defendant's direction of travel, the caller did not predict the defendant's future movements, which might have indicated that she had inside information about his illegal activities, and she also insisted on remaining anonymous, which meant that she could not be held accountable for her tip. *United States v. Reaves*, 512 F.3d 123 (4th Cir. 2007).

Officer Had Adequate Basis For Stop And Frisk In Drug Investigation

Reversing the district court, the Fourth Circuit found that a police officer had reasonable suspicion to conduct an investigative stop and frisk of a drug trafficking suspect after observing a sequence of events in which the suspect while in his car met with a truck driver at a retail parking lot known as a frequent site for drug deals; the suspect's and the truck driver's vehicles relocated at the same time to a second lot also known as a frequent drug-dealing site; neither the suspect nor the truck driver entered either store; the suspect entered the cab of the truck and then exited it after about one minute; the truck performed no towing services and began to leave before the

officer reached the suspect; and, when the officer whistled for the truck driver to stop after exiting the lot, the truck driver responded by driving away at a high rate of speed. *United States v. McCoy*, 513 F.3d 405 (4th Cir. 2008).

By Requiring Apartment Resident To Open Door, Police Conducted Warrantless Search By Gaining Visual Access To Dwelling, Even Though They Never Physically Entered

By requiring an apartment resident to open his door so that they could see him, police officers conducted a search under the Fourth Amendment, because the officers gained visual access to the interior of the dwelling even though they did not physically enter it, the Fourth Circuit has ruled. The court found that no exigent circumstances existed so as to obviate the need for the officers to obtain a search warrant before knocking and demanding visual access into the apartment, which was the subject of a complaint of loud music and marijuana odor. The officers were aware of the marijuana in the apartment before they decided to alert the occupant of their presence, and, by not opting to leave the probable cause determination to a magistrate judge, they set up the wholly foreseeable risk that the occupant would seek to destroy evidence of the crime. Finally, the court ruled that weapons and "ecstasy" pills seized in a warranted search of the apartment that followed the illegal warrantless entry into that same apartment were not rendered admissible under the independent source doctrine, because the government made no contention that the officers would have sought the warrant absent their observation of the weapons and the ecstasy pills during the earlier entry.

United States v. Mowatt, 513 F.3d 395 (4th Cir. 2008).

Government Recording Of Defendant's Conversations Did Not Violate His Sixth Amendment Rights

According to the Fourth Circuit, recorded conversations that two government witnesses initiated with a defendant indicted for immigration fraud at the government's behest did not violate the defendant's Sixth Amendment right to counsel, where the conversations were part of the government's investigation into possible witness tampering, and the defendant's right to counsel had attached only with regard to the indicted charges for immigration fraud. *United States v. Mir*, 525 F.3d 351 (4th Cir. 2008).

Government Did Not Violate Defendant's Rights Under Sixth Amendment Or CJA By Interviewing Him Without First Contacting Appointed Counsel

The Fourth Circuit found that the government did not violate a defendant's Sixth Amendment right to counsel by interviewing him without first contacting his court-appointed attorney, although the defendant had invoked his right to counsel at his initial appearance by requesting court-appointed counsel at that time, where the defendant initiated contact with law enforcement agents by requesting to speak with them both prior to his initial appearance and the day after his initial appearance, and he executed a waiver of his right to counsel. The court further held that the Criminal Justice Act, 18 U.S.C. § 3006A, which allows for appointment of counsel for indigent defendants, in no way circumscribes a defendant's ability to voluntarily initiate

contact with law enforcement officers and speak with them about the charges that he faces. *United States v. Cain*, 524 F.3d 477 (4th Cir. 2008).

District Court Erred In Denying Defendant Franks Hearing

The Fourth Circuit has ruled that a district court committed reversible error in denying a defendant an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). The court found that the defendant had made a substantial preliminary showing that a police officer knowingly and intentionally, or with reckless disregard for the truth, omitted from his search warrant affidavit for the defendant's residence material facts about the location of the garbage bags that the officer had searched, thus entitling the defendant to an evidentiary hearing under *Franks* regarding the integrity of the affidavit. Although the affidavit stated that the garbage was "easily accessible from the rear yard," the defendant had submitted evidence showing that the officer obtained the trash bags by entering a fenced area in the yard that was secured with a locked gate, and that the trash bags had not been abandoned for trash pick-up, as required for the garbage search to be constitutional. Moreover, the evidence the officer found from the trash investigation was essential to a finding of probable cause to search the residence. *United States v. Tate*, 524 F.3d 449 (4th Cir. 2008).

Officer's Failure To Disclose Certain Facts In Warrant Affidavit Did Not Defeat Probable Cause

According to the Fourth Circuit, a police officer's failure to state in his affidavit for a warrant to search the

defendant's residence that trash cans that were both marked and unmarked with the house number were present directly behind the defendant's residence, and that the trash bags the officer had removed were from two cans, rather than from the trash can marked with the defendant's house number, did not defeat probable cause and void the warrant. The court stated that, while it was possible that the trash in the cans behind the residence was not generated by the defendant, the most likely scenario was that trash cans placed directly behind a home were used by those who lived there. The court further held that the officer's failure to state in the affidavit that a letter addressed to the defendant's house number that he found in the trash bags behind the residence was actually addressed to someone other than the defendant also did not defeat the magistrate's finding of probable cause, because the letter suggested at least one occupant of the subject house number was selling heroin. *United States v. Gary*, 528 F.3d 324 (4th Cir. 2008).

Police Had Reasonable Suspicion To Conduct Investigative Stop And Pat-Down Search

The Fourth Circuit ruled that a police officer had reasonable suspicion that the defendant had a firearm concealed in his pocket in violation of state law so as to justify an investigative stop and a pat-down search of the defendant. The court noted that the officer encountered the defendant in a high-crime area that the officer knew to be the locus of drug-related and firearm-related activity; the defendant had his hand awkwardly inserted halfway into his pocket, cupped as if grasping an object; the defendant hesitated to remove his hand from his pocket in response to the officer's

request; after the defendant did remove his hand, the officer saw a bulge along the bottom of the defendant's pocket that was six to eight inches long and appeared to have a flat side; and the defendant said first that he had nothing in the pocket, then said it was money and identification, before putting his hand back in the pocket. *United States v. Black*, 525 F.3d 359 (4th Cir. 2008).

Defendant's Rights Not Violated When He Was Arrested And Interrogated By Saudi Government

A defendant who subsequently was tried on terrorism-related charges in the United States did not have a Fourth Amendment or a statutory right to be promptly presented before a neutral judicial officer, such as a United States federal magistrate, to determine that probable cause supported his detention in Saudi Arabia by Saudi Arabian officials, the Fourth Circuit has ruled, where the Saudi government arrested the defendant based on its own information and interest in interrogating him and the Saudis otherwise did not hold, or continue to hold, him so that United States officials could evade their responsibilities. The court further held that, because United States officials did not actively or substantially participate in the Saudis' interrogation of the defendant, he was not entitled to *Miranda* warnings during that time based on the joint venture, since United States lacked investigative control and authority. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

Evidence

Admission Of Defendant's Prior Conviction For Attempted Rape Of Minor Was Proper

According to the Fourth Circuit, the admission of the defendant's prior conviction for the attempted rape of a 12-year-old child was warranted in a prosecution for traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a 12-year-old child. In so ruling, the court emphasized that, although the prior offense occurred 22 years earlier, it was relevant under Rule 414 to show the defendant's propensity to commit another sexual offense against a child, and its probative value was not outweighed by the danger of unfair prejudice, as the prior conviction was strikingly similar to the charged offense, and the government did not elicit inflammatory testimony about the prior offense, but only presented the official conviction record. *United States v. Kelly*, 510 F.3d 433 (4th Cir. 2007).

In Tax Prosecution, District Judge Properly Excluded Testimony From Other Participants In Trust Scheme

The Fourth Circuit ruled that proffered testimony from other participants in a tax consultant's trust scheme was not relevant in the defendants' tax evasion prosecution under 26 U.S.C.A. § 7201, even though the defendants offered a defense of good-faith/reasonable reliance, because the other participants were not parties to the same presentations made by the tax consultant and the defendants had no contemporaneous knowledge that other participants acted on the consultant's advice. *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007).

Statements Recorded At Government's Behest Were Not Testimonial Under Crawford

According to the Fourth Circuit, statements by the defendant's husband in which he admitted to smuggling the victim into the United States illegally, admitted to hitting the victim, asked the victim whether she told the police that she had been beaten, and asked the victim whether the police were looking for him, were not testimonial, and thus were not excludable under the Confrontation Clause pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), in a trial for conspiracy to hold another in involuntary servitude and harboring a juvenile alien. The court ruled that, even though the statements were recorded by the victim at the government's behest, a reasonable person in the husband's position would not have expected the statements to be used at trial. *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008).

Telephone Calls Between Lawyer And Inmate Admissible Under Crime-Fraud Exception To Attorney-Client Privilege

The Fourth Circuit has ruled that the crime-fraud exception to the attorney-client privilege permitted the government's use of the defendant's recorded telephone conversations from jail with his attorney that were made to acquire information about the reliability of a fellow inmate for the purpose of furthering the defendant's nascent plot to hire a hit man through that inmate to murder prosecution witnesses in his upcoming trial, notwithstanding the fact that the attorney advised the defendant to extricate himself from the situation and cease contact with the inmate. *United*

States v. Lentz, 524 F.3d 501 (4th Cir. 2008).

Sentencing

In Calculating Loss In Tax Evasion Case, Judge Did Not Need To Subtract Deductions Defendants Could Have Claimed

The Fourth Circuit held that, in calculating tax loss for the purposes of sentencing defendants for tax evasion under 26 U.S.C.A. § 7201, the district court was not required to subtract from the loss amount any deductions the defendants could have claimed had they filed tax returns in the years in question. *United States v. Delfino*, 510 F.3d 468 (4th Cir. 2007).

Court Affirms 36-Month Downward Deviation From Advisory Guidelines

The Fourth Circuit ruled that a district court did not abuse its discretion in applying a 36-month downward variance from the Guidelines under 18 U.S.C. § 3553(a) when sentencing a defendant convicted of possessing child pornography. The defendant had been approached by a minor who sought to be paid for taking nude photographs of herself, the minor's face did not appear in any of the photographs, no other child pornography was found in the defendant's home, and the defendant was deeply remorseful about the incidents at issue. *United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007).

District Court's Failure To Provide Notice Of Its Intent To Impose Upward Variance Prejudiced Defendant

The Fourth Circuit found that a district court erroneously failed to give the parties advance notice that it was considering imposing a sentence that varied upward from that recommended by the Sentencing Guidelines. Although the pre-sentence report identified possible grounds for a variance sentence, the government did not seek a departure or a variance but was instead content with a sentence within the Guidelines range, and the possibility of a variance sentence was raised first by the district court in the course of pronouncing sentence. The error was not harmless, because the lack of requisite notice deprived defense counsel of the opportunity to present testimony that may have alleviated the court's concern that the defendant could not be rehabilitated. *United States v. Fancher*, 513 F.3d 424 (4th Cir. 2008).

Sentencing Court Failed To Make Factual Findings Necessary To Support 12-Level Enhancement

The Fourth Circuit ruled that a sentencing court failed to make the requisite factual finding as to whether the defendant, who had been convicted of three counts of providing material support to terrorists or terrorist organizations, had acted with the intent to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct, as was necessary to support a 12-level terrorism enhancement to the defendant's sentence. *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008).

Abduction Enhancement Under Robbery Guideline Applicable Even Though Victims Remained Within Confines Of Single Building

According to the Fourth Circuit, a defendant moved victims “to a different location,” as is required to impose a four-level abduction enhancement under the robbery guideline, U.S.S.G. § 2B3.1(b)(4)(A), even though the defendant and the victims remained inside the store during the events in question, because the defendant forced the victims to move with him from the pharmacy section of the store through the pharmacy’s secured door across the store to the store’s front door. *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008).

Sentence At Bottom Of Range Was Reasonable

The Fourth Circuit found that a defendant’s 188-month sentence for conspiracy to distribute methamphetamine, which was within the sentencing guidelines range of 188 months to 235 months, was reasonable, noting that the district court correctly calculated the guidelines range, and then considered the statutory sentencing factors and gave due consideration to whether there were any circumstances in the defendant’s case that would warrant imposing a sentence below the guidelines range. *United States v. Go*, 517 F.3d 216 (4th Cir. 2008).

Defendant Seeking Relief Based On Retroactive Crack Amendments To Guidelines Must File Motion In District Court

The Fourth Circuit has ruled that the proper procedure for a defendant convicted of distributing more than five

grams of crack cocaine, who was seeking resentencing in accordance with retroactive amendments to the Sentencing Guidelines that allow for the reduction of sentences pertaining to crack, was a motion to the district court, rather than a remand from the court of appeals. *United States v. Brewer*, 520 F.3d 367 (4th Cir. 2008).

Defendant’s Prior Conviction For Cocaine Possession Was Not Aggravated Felony For Purposes Of Sentencing Under Illegal Reentry Statute, 8 U.S.C. § 1326

The Fourth Circuit has ruled that a defendant’s prior conviction for possession of cocaine, although deemed a felony under state law, was not punishable as a felony under federal law, and thus neither that conviction, nor the defendant’s prior conviction for illegal reentry following the drug conviction, constituted an aggravated felony conviction, for purposes of enhancing the defendant’s Guidelines offense level in his sentencing for illegal reentry into the United States after removal. *United States v. Matamoros-Modesta*, 523 F.3d 260 (4th Cir. 2008).

Prior Conviction For Attempted Child Molestation Was Crime Of Violence Triggering 16-Level Enhancement Under Illegal Reentry Guideline

According to the Fourth Circuit, a defendant’s prior conviction under Georgia law for felony attempted child molestation categorically constituted the “sexual abuse of a minor,” and thus was a “crime of violence” that warranted a 16-level enhancement for the defendant, who was convicted of illegal reentry following deportation, since every

violation of the Georgia statute necessarily involved the defendant's commission of an immoral or indecent act in a child's presence with the intent to arouse either the defendant or the child. *United States v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008).

Sentence Below Guidelines Range Was Reasonable

The Fourth Circuit found that a defendant's 36-month sentence for mail fraud and wire fraud was reasonable, where the district court examined all the facts and decided that the only factor that warranted a departure from the guidelines under the statutory sentencing factors was the defendant's restitution efforts, which were rewarded with a sentence five months less than the minimum recommended guidelines range. The fact that the district judge in sentencing the defendant following vacation by the Fourth Circuit of the defendant's original 12-month sentence acknowledged that he was constrained by the court of appeals' previous opinion in the case, and that he would likely be reversed if he sentenced the defendant to 29 months of home confinement, had no impact on the Fourth Circuit's inquiry into whether the actual sentence imposed was reasonable. *United States v. Curry*, 523 F.3d 436 (4th Cir. 2008).

300 % Deviation From Guidelines Range Was Not Abuse Of Discretion

The Fourth Circuit ruled that a district court's imposition of an 125-month sentence on a defendant who pled guilty to possessing and uttering a forged security, committing identity fraud, and possessing stolen mail – a sentence that reflected more than a 300 % deviation

from the Guidelines range – was not an abuse of discretion. In sentencing the defendant, the district court considered the statutory sentencing factors under 18 U.S.C. § 3553(a), including the vast extent of the defendant's prior criminal activity and the victims' account of the substantial harm the defendant caused them, and also took into account the fact that the defendant had served relatively little jail time despite his repeated criminal conduct, that the defendant had not been deterred by prior imprisonment, and that over time the defendant's schemes had advanced to more sophisticated fraud. *United States v. Evans*, 526 F.3d 155 (4th Cir. 2008).

Sentencing Court Properly Aggregated Prior Sentences In Applying Enhancement

The Fourth Circuit found that a 64-month sentence imposed on a defendant who had been convicted of illegal reentry after deportation following an aggravated felony was based on a proper calculation of the guidelines range, when the district court aggregated three prior sentences for state felony drug convictions to arrive at a 16-level enhancement. *United States v. Martinez-Varela*, 531 F.3d 298 (4th Cir. 2008).

27-Month Sentence For Driving While Intoxicated Was Reasonable

The Fourth Circuit found that a defendant's 27-month sentence for the assimilated offense of driving while under the influence of alcohol was not unreasonable, when the district court considered the recommended sentence for driving while intoxicated under state guidelines, the court noted that state sentences the defendant had received in the past had been suspended, that the

defendant had not served any time until he violated the terms of his probation, that a six-month sentence did not deter him because he was again convicted of driving under the influence of alcohol, and the sentence imposed was within the state-prescribed sentencing range for the offense. *United States v. Finley*, 531 F.3d 288 (4th Cir. 2008).

Requiring Intramuscular Injections of Antipsychotic Medications As Condition Of Release Did Not Violate Due Process

According to the Fourth Circuit, the requirement of intramuscular injections of antipsychotic medications as a special condition of supervised release significantly furthered, and was clearly necessary to further, the government's interests in protecting the defendant and the public, and thus did not violate the defendant's right to due process. The court noted that the defendant had several episodes of violent behavior while in prison and had threatened prison staffers and threatened to commit suicide, all during periods when he refused to take his medication, and, when the defendant first quit taking his medication and vanished after his release from prison, he was found disoriented, disheveled, and partially catatonic. The record also established that involuntary medication was medically appropriate. *United States v. Holman*, 532 F.3d 284 (4th Cir. 2008).

Conviction For Second-Degree Rape Qualified As Crime Of Violence For Purposes Of 16-Level Enhancement Under Illegal Reentry Guideline

The Fourth Circuit has ruled that a conviction under Maryland law for second-degree rape by engaging in

vaginal intercourse with another by force or threat of force against the will and without the consent of the other person constituted a conviction for a crime of violence, for purposes of imposing a 16-level increase under U.S.S.G. § 2L1.2(b)(1)(A)(ii) of a defendant's sentencing guidelines offense level in his sentencing for illegal reentry. *United States v. Chacon*, 533 F.3d 250 (4th Cir. 2008).

Habeas Corpus

Fourth Circuit Affirms Death Sentence, Finding Defense Counsel Adequately Prepared Mitigation Evidence

In affirming the death sentence of a South Carolina defendant, the Fourth Circuit rejected a number of the defendant's claims, including his argument that defense counsel performed deficiently in preparing mitigation evidence for the penalty phase of the case. While recognizing that expert testimony concerning the defendant's mental state could have been presented in a more compelling form, the Fourth Circuit found that defense counsel were burdened by an uncooperative client but nonetheless made significant efforts to develop and present mitigation evidence, including traveling to the defendant's home in another state to obtain family information. *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007).

Defense Counsel's Deficient Performance In Capital Case Did Not Prejudice Defendant

In a capital murder prosecution featuring an African-American defendant and a white victim, the Fourth Circuit found that defense counsel performed

deficiently by acquiescing to the admission of a codefendant's inflammatory pretrial statements to police that depicted the defendant as having a racial motivation for the crime. However, the court found that counsel's error did not prejudice the defendant, thereby precluding a finding of ineffective assistance, because there was abundant and damaging evidence presented at trial, including overwhelming evidence of kidnapping, repeated rapes, sodomy, torture, and rampant disregard for human life, and thus there was no showing of any reasonable probability that the jury would have issued a more lenient sentence. *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007).

Post-Conviction Motion For
Discovery Could Not Be
Recharacterized As Motion To
Vacate Without Notice To
Defendant

The Fourth Circuit ruled that a district court erred when, without notice to the defendant, it recharacterized the defendant's post-conviction motion for discovery as motion to vacate his sentence. Accordingly, the Fourth Circuit found that the motion to vacate sentence filed by the defendant after dismissal of the purportedly recharacterized discovery motion could not be dismissed as a successive motion under 28 U.S.C. § 2255. *United States v. Blackstock*, 513 F.3d 128 (4th Cir. 2008).

Extraterritorial Writ Of Habeas
Corpus Ad Testificandum Did Not
Change Prisoner's "Immediate
Custodian" Under 28 U.S.C. § 2241

The Fourth Circuit ruled that an extraterritorial writ of habeas corpus ad testificandum, which temporarily

transferred a federal prisoner out of a Kentucky federal district and into a Maryland federal district, did not change the identify of the prisoner's "immediate custodian" so as to render jurisdiction proper in federal court in Maryland as to the prisoner's habeas petition challenging his physical custody under 28 U.S.C.A. § 2241. *United States v. Poole*, 531 F.3d 263 (4th Cir. 2008).

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