

2010 FOURTH CIRCUIT CASELAW

A regularly updated, topically organized compilation of case summaries circulated to members of the Office of the Federal Defender for the District of Maryland. This document is not inclusive of all decisions issued by the 4th Circuit. Some cases may appear multiple times due to the topical organization.

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PRETRIAL AND TRIAL

FOURTH AMENDMENT

United States v. Day, 591 F.3d 679 (4th Cir. 2010)

The Fourth Circuit has ruled that the government did not know of and acquiesce in the challenged conduct of armed security officers who arrested and interrogated a defendant, as would justify a finding that the officers acted as government agents for purposes of the Fourth and Fifth Amendments, when Virginia's scheme for regulating armed security officers merely permitted such officers to arrest and interrogate the defendant but did not require or even encourage it, and the government never gave the security officers any directives concerning their work.

United States v. Kelly, 592 F.3d 586 (4th Cir. 2010)

The Fourth Circuit ruled that police officers who were executing an arrest warrant for a defendant at his residence had probable cause to search both the passenger compartment and the trunk of a car parked at the residence, when a drug detection dog alerted positive at the driver's door of the car; the officers had found another man at the residence who met a description of the defendant's suspected cocaine supplier; and, although the defendant did not distinguish between the three vehicles parked at the residence, he nodded "yes" when asked if the vehicles contained cocaine.

United States v. Rooks, 596 F.3d 204 (4th Cir. 2010)

The Fourth Circuit has found that a police officer who has reasonable suspicion to believe that a vehicle contains illegal drugs may order its occupants out of the vehicle and pat them down for weapons without violating the Fourth Amendment. The court also ruled that, under the facts of the case, a police officer had such reasonable suspicion when he detected a strong odor of marijuana emanating from the vehicle and found a cigarette containing marijuana in the vehicle ashtray.

United States v. Johnson, 599 F.3d 339 (4th Cir. 2010)

According to the Fourth Circuit, a police officer had an objective basis to think a defendant was selling drugs, as required to establish the reasonable, articulable suspicion necessary for the officer to enter a restaurant and ask the defendant to show his hands, when the officer witnessed the defendant making similar hand-to-hand contact with multiple people for whom he appeared to be waiting, after which the individuals hurried away; the defendant was located on a street well known for drug-dealing; and one of the suspected buyers veered away at the sight of the police.

United States v. Williams, 592 F.3d 511 (4th Cir. 2010)

The police's seizure of child pornography fell within the scope of a warrant authorizing a search for the instrumentalities of computer harassment, the Fourth Circuit has ruled. The court found that the pornographic images were the instrumentalities of the harassment charge, because the warrant was obtained in the context of investigating threatening e-mails discussing the

molestation of students, and the images were relevant to demonstrating the authorship and purpose of the e-mails.

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010)

The Fourth Circuit has ruled, in a child pornography prosecution, that a defendant did not have a legitimate privacy interest in his subscriber information, when he voluntarily conveyed his name, email address, telephone number and physical address to his internet and phone companies; deliberately chose a screen name derived from his first name; and voluntarily posted his photo, location, gender and age on his profile page.

United States v. Young, 609 F.3d 348 (4th Cir. 2010)

Held that 20 seconds is a sufficient amount of time for officers to wait after knocking and announcing – at least in the context of a small townhouse in which the agents had just observed the defendant "promptly" answer the door to let someone else in.

United States v. Stitt, 382 Fed. Appx. 253 (4th Cir. 2010)

The latest from the Fourth Circuit on inventory searches. Not really worth going into much detail since it was a fairly strong government case, but I would take a look if you have an inventory search issue.

United States v. Richardson, 607 F.3d 357 (4th Cir. 2010)

Routine search by America Online (AOL), resulting in the discovery of child porn by one of its users, did not constitute a search on behalf of the government, thus no search warrant was required. No evidence existed to support an agency relationship as alleged by defendant, despite reporting requirement set forth in 42 U.S.C. § 13032(b)(1) (requires that an ISP such as AOL report to the Cyber Tip Line at NCMEC in the event it "obtain[ed] knowledge of facts or circumstances from which a violation of section . . . 2252A . . . involving child pornography . . . [wa]s apparent."). The Fourth Circuit distinguished the reporting requirement in 13032(b)(1) from the drug testing and reporting scheme examined in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989), which was detailed enough to bring testing done per that scheme within the Fourth Amendment's protections.

United States v. Mayle, 382 Fed. Appx. 329 (4th Cir. 2010)

"Not so great" opinion in which the Fourth Circuit held that although the search warrant was "not so great," it was good enough to pass muster under Leon. Take a look at this case if you have a warrant relying heavily on confidential informant information.

United States v. Davis, 383 Fed. Appx. 269 (4th Cir. 2010)

Really bad Terry stop case. Take a look next time you have a case in which officers order your client out of the car at gunpoint with minimal RS. Opinion contains blatant boot strapping, "They could have reasonably believed that Davis was dangerous, had a gun at the ready (as indeed he did)." There is also a bad inevitable discovery ruling in a footnote (discovery of contraband in a trunk is apparently always inevitable when contraband is discovered in the passenger compartment of a car).

United States v. Rendon, 607 F.3d 982 (4th Cir. 2010)

Held that defendant did not have a reasonable expectation of privacy in the MP3 player that was examined as part of the standard intake procedure of the army unit to which he had been transferred (child porn was found on the MP3). Good discussion of the limits to the Fourth Amendment rights of military personnel. Essentially, a "valid military inspection," carried out for the "good order and discipline" of the unit is okay, while a search based on suspicion of unlawful conduct is not.

United States v. Scott, Slip Copy, 2010 WL 2711280 (4th Cir. 2010)

Search seizure case in the CP context. Very short, unpublished opinion with too few facts to really grasp what was going on, but from what I saw, it was bad. Essentially, the fact that a computer technician opened a file containing child porn in the presence of an investigator did not turn the search into government action, implicating the Fourth Amendment, because the record did not suggest that the investigator instructed the technician to open the file.

United States v. Mitchell, Slip Copy, 2010 WL 2851760 (4th Cir. 2010)

This case is a useful read if you have an anonymous or identified tip case, as it discusses the distinctions between the two. Here, while the police believed they had an anonymous tip at the time they searched the defendant, the caller had actually identified herself to the 911 dispatcher and had stayed on the line through the time of the search. This made the caller more reliable than an anonymous tipster. So, the fact that this hybrid anonymous/non-anonymous tip had "some corroborative elements," establishing its reliability was sufficient to rely on it in conducting a Terry stop & frisk. Of course, "some," according to the Fourth Circuit meant the defendant appeared nervous and uninterested in talking to the police. Essentially, the case is a further gutting of *Florida v. JL*.

United States v. Allison, Slip Copy, 2010 WL 4137513 (4th Cir. 2010)

Held that the defendant had no standing to contest the search of a car under the following factual scenario: defendant was the passenger in a car that was followed by the police until it pulled into a driveway and parked. The police pulled in behind the car, blocking its exit. Defendant and his driver got out and then noticed the police getting out of their car. The police approached the defendant and the driver, was refused consent to search the car by the driver, and then searched it anyway. Defendant testified at the hearing that he had intended to enter the house at the time he and the driver pulled into the driveway and exited their car. The Fourth Circuit held that despite having blocked the car's exit from the driveway, at the time the police approached the defendant, he was already out of his car with the intent of entering the house. Thus, the standing issue was analyzed as if the defendant was a pedestrian, not a passenger in a traffic stop. Had he been a passenger in a traffic stop, he would have been seized in the car and the unlawful search would have flowed from that stop, thus he would have had standing. Since he was simply a pedestrian and free to leave, no standing to contest the search of the car.

United States v. Brown, Slip Copy, 2010 WL 4137516 (4th Cir. 2010)

Court found reasonable suspicion to stop and frisk where the defendant was standing with two other men in a high crime area and the two other men were observed engaging in a hand to hand transaction. As the police approached, the defendant walked away, and when they attempted to

talk to him he became belligerent and non responsive to their questions re: where he lived. In the Fourth Circuit is words, presence in high crime area, proximity to a suspected drug transaction, and evasive and belligerent conduct was sufficient to stop and frisk.

United States v. Taylor, --- F.3d ---, 2010 WL 4455178 (4th Cir. 2010)

All challenges to asserted 4th Amendment violations upheld under the exigent circumstances and community caretaker exceptions given the following, hard to believe, fact pattern. Four year old girl is found wandering alone on the street; she tells the officer she was waiting for her day care bus and then leads him to a house that she says she lives in. They go inside the open door when no one answers and wander around saying hello until a male voice is heard from the back bedroom. Man, who is half-asleep, says the girl is his daughter and gets mad at her because she should have known not to wait outside for the day care bus because she had been suspended from day care. Officer is uncomfortable leaving the girl given that the man is angry and there is a bag of bullets on the bedside table, the man doesn't know the address of the house that this was all taking place in, and the man has no identification. Officer runs the man's name but can't find any matches. Decides to do a protective sweep and finds a gun under the mattress. Minutes later, while the officer is borrowing the man's cell phone the phone rings and the officer sees that the caller id says, "baby's mama." Baby's mama proceeds to give the officer the guy's correct name and of course he has open warrants and prior felony convictions.

United States v. Ross, Slip Copy, 2010 WL 4386882 (4th Cir. 2010)

In a Franks hearing, without deciding whether the false statements contained in a search warrant affidavit were recklessly or intentionally made, court agreed that probable cause existed after their exclusion. This left the following facts as the basis for probable cause to search the home of the brother of the victim of an assault: Victim shows up drunk and bloody at a woman's home, appearing to have been the victim of a knife attack. Police are called and after getting only obviously false answers from the guy re: what happened to him, they go to his brother's house, which they are told is nearby. At brother's house they find a bunch of drunk and belligerent men and overhear someone saying that "the people involved better leave." The false statement was that the bloody guy told the police he had been attacked at the brother's house.

United States v. Hargrove, --- F.3d ----, 2010 WL 4676980 (4th Cir. 2010)

Held that defendant was not in custody for Miranda purposes when he was interviewed in his home during the execution of a search warrant. This was a highly fact intensive analysis in which the court distinguished the facts from those found in *United States v. Colonna*, 511 F.3d 431 (4th Cir. 2007), another home interrogation case in which the defendant was held to be in custody. Perhaps the most important distinction to note is that in *Colonna*, the agents told the defendant that he was not under arrest, and this was insufficient to permit a reasonable person to believe that he was free to leave, given the other surrounding circumstances. Here, the court made a big deal of the fact that the defendant was told he was not under arrest AND that he was free to leave. Other facts pointed to by the court were: the defendant was not handcuffed at the time of the interview, the agents did not draw their weapons at the time of the interview (though they had been drawn prior) and the conversation was "amicable and non-threatening in tone." In addition, evidence in the record supported the conclusion that the defendant was permitted to move about his house, the defendant never asked for the interview to end, never objected to any

of the questions, and remained "polite" and "cooperative" throughout the period. The court disregarded the defendant's focus on a few instances in which he was not permitted to move freely about, the fact that the agents were armed, and the fact that one agent stood in the doorway of the room that the interview was conducted in (appearing to block the exit).

United States v. Arriaza, Slip Copy, 2010 WL 4813775 (4th Cir. 2010)

Rejected the defendant's attempt to argue that *Arizona v. Gant* (narrowing the application of the search incident to arrest doctrine as it applies to automobiles) undermines the 4th Cir's jurisprudence re: other types of warrantless searches of automobiles. Found that the exception to the warrant requirement for automobiles is still intact post-*Gant*.

United States v. Hernandez-Mendez, --- F.3d ----, 2010 WL 4823276 (4th Cir. 2010)

Sad, but expected resulted in a case I argued in District Court and in front of the 4th Circuit (Lauren did the amazing briefing). Good case to keep in mind if you want to see how terrible the 4th Cir. can be on reasonable suspicion to stop and frisk. The language that is most harmful for future defendants on the reasonable suspicion to stop issue involves the attribution of suspicious conduct by a group that my client was loosely associated with, to my client. The frisk part of the opinion clarifies that the subjective intent of an officer in conducting a terry frisk is irrelevant, as long as the frisk was objectively reasonable. Here, the officer testified that he intended to open my client's purse to look for ID, something he had no right to do, and as he was grabbing the purse to do this, he felt a gun. Despite the absence of any testimony that the officer felt he needed to search for officer safety, the 4th Cir. found that it would have been objectively reasonable to have searched for this purpose. The most disturbing part of this analysis was the 4th Circuit's agreement with J. Chasanow that we are all lucky the officer happened to feel the gun before he opened the purse to look inside. Otherwise, my 18 year old girl would have walked away from her criminal case on a legal technicality before being deported to El Salvador.

United States v. Walker, Slip Copy, 2010 WL 4949618 (4th Cir. 2010)

Was a fairly serious drug and gun case in which someone was shot. The court found that there was probable cause to support the issuance of a warrant to search the defendant's car where the alleged shooter drove a dark colored SUV to the crime scene, the defendant was identified as the shooter who emerged from the SUV, the defendant was seen driving a black Lincoln Navigator SUV, and the murder weapon had not been recovered. While the court found legal error in including CDS as one of the items to be sought during the search given the above-described facts, which have nothing to do with CDS, it concluded that the error was harmless because there was no bad faith in its inclusion, and the drugs that were ultimately found were with the gun, which was lawfully seized.

Next, without saying exactly how far from the car the defendant was when he was arrested, the court also upheld the search of the defendant's car as a valid search incident to arrest where he had fled from the car and then was apprehended by the police, who had him under their control at the time they performed the search. The opinion is very unclear, but something about the fact that the police "didn't get a chance," to apprehend him in his car because he fled made this search okay despite *Gant*.

United States v. Mason, -- F.3d ----, 2010 WL 4977817 (4th Cir. 2010)

Affirmed the DC's ruling that there was reasonable suspicion to detain the defendant during the course of a traffic stop so that a drug dog could be brought to the scene. Highly fact intensive analysis, but nothing out of the ordinary (strong air fresheners, sweating driver, inconsistent stories between occupants, overreaching by the cop, etc.). As part of the analysis, the 4th Cir. held that all questioning before the dog was called took place within the time necessary to effectuate the traffic stop. J. Gregory dissented on this issue - finding that the stop was unnecessarily prolonged. The 4th also rejected the defendant's argument that allowing the dog to jump through the window into the car was a full search requiring PC. Found as a matter of fact that the dog had alerted outside the car before it entered and that the alert constituted PC.

United States v. Hampton, --- F.3d ----, 2010 WL 5116895 (4th Cir. 2010)

Brief 4th Amendment ruling and a lengthier sentencing ruling (see below). Held, again (echoing *US v. Rumley*, 588 F. 3d 202), that *Gant* does not undermine the holding in *Wilson* that officers may order passengers out of the car during the course of a traffic stop. Held, further, that the defendant's act of shoving one of the officers after exiting the car gave the officer probable cause to chase and arrest him for assault.

MISCELLANEOUS CRIMINAL PROCEDURE

United States v. Sherif, 382 Fed. Appx. 272 (4th Cir. 2010)

This is a brief opinion explaining the limits of conditional guilty pleas. For those of us who did not know this or if you would like a refresher, here's the basic rule: "a conditional plea is not valid if it purports to preserve for appeal an issue that is not case-dispositive. An issue is case-dispositive if (1) an appellate ruling in the defendant's favor would require dismissal of the charges or suppression of essential evidence, or (2) an appellate ruling in the government's favor would require an affirmance of the judgment of conviction. If a conditional plea is invalid, we must vacate the judgment of conviction and remand the case to the district court to allow the defendant to determine whether to enter into a new plea agreement or proceed to trial." In the instant case, the defendant preserved his right to appeal the denial of his motion to disclose electronic surveillance and the government asserted that if the denial were reversed, it would dismiss the case rather than disclose the surveillance evidence. The Fourth Circuit held that because the reversal wouldn't *require* dismissal, it was not a valid conditional plea.

United States v. Claridy, 601 F.3d 276 (4th Cir. 2010)

Rejected an argument that evidence should be suppressed because a "federally deputized Baltimore City police officer" who was part of a joint task force obtained the warrant from a state judge without first trying to obtain one from a federal magistrate judge, in violation of Rule 41(b) of the Rules of Criminal Procedure. The court began by noting that it had never clarified the application of Rule 41 to joint state/federal investigations, as opposed to purely federal ones. The trigger for Rule 41 to control is not whether the "investigation" is a federal one, but rather whether the "proceeding" was federal, as the rule applies only to "proceedings." A proceeding does not become federal, however, simply because federal officers are involved in the investigation. Nothing in the text of the Rule, moreover, suggests that joint state/federal task

forces are limited to utilizing only federal resources. In this case, the application for a search warrant by a state police officer from a state judge alleging violations of state law was not a federal "proceeding" to which Rule 41 applied. Alternately, even if the Rule applied and was violated, suppression would not be appropriate, as the violation was "nonconstitutional and nonprejudicial." Chief Judge Traxler concurred, emphasizing the fact that the facts upon which the warrant was based came from state officers.

United States v. Patlan, 383 Fed. Appx. 299 (4th Cir. 2010)

Interesting little opinion re: the application of the Speedy Trial Act to cases in which our clients are in ICE custody prior to being indicted federally. Explains that admin custody is not included in the ST computation, but explains that it is included if the exclusive or primary purpose of the civil detention was to hold a person for criminal prosecution. Here, the defendant argued that the clock started on the date that ICE referred his case for federal prosecution, but the Fourth Circuit rejected this argument because there was no evidence of collusion between ICE and US Attn and because the ICE admin process continued after the criminal referral.

United States v. Jennette, Slip Copy, 2010 WL 2725591 (4th Cir. 2010)

Reverses the district court's denial of a motion for the substitution of counsel. In case you did not know, the factors a court looks at in reviewing such a motion are: the "[t]imeliness of the motion; [the] adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in a total lack of communication preventing an adequate defense." *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988).

United States v. Powell, Slip Copy, 2010 WL 3010365 (4th Cir. 2010)

With no analysis, the Fourth Circuit joined the 1st, Seventh, Eighth, and Tenth Circuits in holding that the government does not need to re-file an 851 notice after filing a superseding indictment.

United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010)

The Fourth Circuit found that a district court did not abuse its discretion in determining that a defendant was competent to proceed with his guilty plea and that further evaluations were unnecessary, when the court had the benefit of multiple reports of evaluating and consulting mental health specialists regarding the defendant's competency to proceed over the years, and had extensive personal interactions with the defendant over the years leading up to his plea, most of which occurred while the defendant was representing and speaking for himself. The Fourth Circuit further ruled that the defendant failed to demonstrate that his waiver of the purported right to *Brady* material prior to pleading guilty was not made knowingly and intelligently, when the defendant was well aware that there was exculpatory evidence yet to be produced to him personally under the Classified Information Procedures Act but nonetheless chose to plead guilty.

In re Grand Jury Subpoena, 597 F.3d 189 (4th Cir. 2010)

According to the Fourth Circuit, a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that might contravene a constitutional privilege.

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010)

The Fourth Circuit has ruled that a defendant's state court guilty plea was not constitutionally invalid simply because he was not informed of the possibility that the plea might be used against him in a subsequent federal prosecution, even though state officials were aware of a pending federal investigation.

United States v. Ashley, 606 F.3d 135 (4th Cir. 2010)

The Fourth Circuit found that a district court did not constructively amend an indictment by giving a *Pinkerton* instruction (stating that a person is liable for a substantive offense committed by a co-conspirator when the commission of the offense is reasonably foreseeable and in furtherance of the conspiracy), even though *Pinkerton* liability had not been charged by the grand jury.

United States v. Richardson, 607 F.3d 357 (4th Cir. 2010)

Upheld the District court's grant of AOL's motion to quash the defendant's subpoena of all records related to AOL's relationship with several government agencies re: the investigation of child pornography as an overly broad fishing expedition.

United States v. Green, 599 F.3d 360 (4th Cir. 2010)

The Fourth Circuit has found that the rule of *Batson v. Kentucky* does not apply to peremptory strikes that have a discriminatory effect, when the defendant does not establish that, in exercising those strikes, the government engaged in intentional discrimination.

United States v. Baptiste, 596 F.3d 214 (4th Cir. 2010)

Affirmed, under plain error review, district court's error in failing to conduct individual juror voir dire after allegations of juror intimidation. Jurors claimed that attendees at the trial were "staring them down," in the hallway during breaks in the trial. Judge told all attendees that they could no longer stand in the hallway, but needed to remain in the courtroom or the first floor lobby. Defendant did not request voir dire, alleged prejudices, or preserve the argument in any way.

United States v. Manigan, 592 F.3d 621 (4th Cir. 2010)

The Fourth Circuit ruled that a defendant's waiver of his appellate rights was unenforceable when, during the guilty plea colloquy, the district court never specifically mentioned the waiver provision contained in the plea agreement or questioned the defendant on it, but instead, contrary to the plea agreement, advised the defendant that he would be able to appeal his sentence.

United States v. Robinson, --- F.3d ----, 2010 WL 4869770 (4th Cir. 2010)

Addressed D's argument that charging both methods of 924(c) (use of a firearm during and in relation with a drug transaction and use of a firearm in furtherance of a drug transaction) in a single, conjunctively worded count charges is duplicitous as it charges him with two different crimes. Under a plain error standard of review, the court assumed the count was duplicitous (though noted in a footnote that this assumption is debatable) and then found that the defendant could not prove he was prejudiced by the error.

United States v. Walker, Slip Copy, 2010 WL 4949618 (4th Cir. 2010)

Found joinder of separate drug offenses to be proper where the joined counts were for three separate arrests in a one year period - all involved the discovery of distributable amounts of drugs, packaged and found in the defendant's car, and two of the three involving guns.

United States v. Juvenile Male, Slip Copy, 2010 WL 5158562 (4th Cir. 2010)

Decent review of the law governing transfer from juvenile to adult status. Of note, the 4th Cir appeared to rule that a "substantial federal interest," always exists in 924(c) prosecutions (substantial federal interest being one requirement for the feds to exercise jurisdiction in a juvi matter).

United States v. Medrano-Sorto, 12/20/2010 (citation not currently available)

Held that the "ruse exception," to the Speedy Trial Act's rule did not apply in this case. The defendant argued that his time in ICE custody prior to being detained in his criminal case should have been counted towards the ST calculation. Normally, admin custody doesn't count in the calculation, unless the "ruse exception" applies -- that is, the defendant can prove that the purpose of the admin detention was to hold him for criminal prosecution. Here, the defendant argued that his ST clock should have started on the date that ICE issued his order of removal, since the purposes of the admin proceedings had been fulfilled. The 4th Cir rejected this logic, reasoning that the defendant could not prove that all work on his immigration case had ceased at this point.

EVIDENCE

United States v. Baptiste, 596 F.3d 214 (4th Cir. 2010)

Approved of the methodology used by a detective testifying as an expert witness re: the meaning of code language in a drug case. Held that the methodology employed by the detective, that is, using context and repetition to determine the meaning of certain words, is exactly what is contemplated by the commentary to Rule 702 for a narcotics officer interpreting coded language and is comparable to the methodology approved by this court in *United States v. Wilson*, 484 F.3d 267, 273 (4th Cir. 2007). Approved, for the first time, of allowing a witness to testify, simultaneously, as both a fact and expert witness. Applied the test from other circuits that the testimony is admissible as long as the court implements adequate safeguards to prevent juror confusion or jurors giving undue weight to the lay testimony. Cited to the Seventh Circuit case of *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008) and the Sixth Circuit case of *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006) as illustrative of the lines that courts have drawn regarding adequate safeguards – *Farmer* demonstrating what is acceptable, *Lopez-Medina* demonstrating what is not. Found that the safeguards employed here fell between those in *Farmer* and *Lopez-Medina*, and thus found them to be inadequate. However, did not find that the inadequacy rose to the level of plain error.

Fourth Circuit also found that remarks by the prosecutor, made in closing argument, were not improper, and that even if they were, would not rise to the level of plain error. Prosecutor posed a hypothetical situation in which the defendant sold cocaine to someone else and that person used the cocaine proceeds to fund a terrorist organization, unbeknownst to the defendant. The

government gave that as an example of something the defendant could not have foreseen. It then contrasted it with something that it alleged Baptiste could have foreseen – that someone would use powder cocaine to make crack.

United States v. Monroe, Slip Copy, 2010 WL 3721524 (4th Cir. 2010)

There's no confrontation clause violation in prohibiting cross-examination re: a witness's juvenile priors. No analysis, just a cite to *United States v. Ayala*, 601 F. 3d 256 (4th Cir.) decided earlier this year, and not entirely on point.

United States v. Castellon, 382 Fed. Appx. 326 (4th Cir. 2010)

With no analysis, concurs with other circuits in determining that an FBI agent's "Significant Activity Reports" are not subject to mandatory disclosure under the Jencks Act.

United States v. Roe, 606 F.3d 180 (4th Cir. 2010)

In a trial for impersonating a federal officer, trial court was correct to permit a police officer who was in charge of the unit that issues handgun carry permits, as well as security guard and private detective certifications in Maryland to testify as a lay witness, as opposed to an expert witness, as to the requirements for getting such permits and certifications and to state what possessing those permits permitted an individual to do based on his personal knowledge acquired in that capacity.

United States v. Smith, 383 Fed. Appx. 355 (4th Cir. 2010)

This contains a pretty bad 404(b) ruling in a drug conspiracy case. Take a look if you're brave enough to try to keep out a prior PWID in a PWID conspiracy case. An example of one of the several reiterations of the Fourth Circuit's approach to 404(b) is this gem, "by pleading not guilty, Smith placed his state of mind at issue, making his prior similar acts both relevant and necessary to the Government's effort to prove a conspiracy."

United States v. Henley, Slip Copy, 2010 WL 2706276 (4th Cir. 2010)

Upheld the following rulings of significance: the district court admitted a threat by the defendant to kill the investigating officer in a robbery case. Specifically, during a phone call from the jail, defendant's sister asked him who the investigating officer was. Defendant told sister the officer's name and then said, "I hate that bitch, I'll kill that bitch." The Fourth Circuit said the statement was made in relation to the offense and thus was admissible to show consciousness of guilt. The second ruling was that two witnesses could testify to admissions the defendant made about other bad acts he committed. The Fourth Circuit agreed with the district court's conclusion that the fact that the statements were made was probative of the defendant's close and confidential relationship with these witnesses (I guess, meaning that he wouldn't have made the statements had he not trusted them). Prejudice was lessened by a cautionary instruction immediately after the testimony.

United States v. Griffin, Slip Copy, 2010 WL 3070014 (4th Cir. 2010)

Probably good to read this light of the recent Brady/Giglio issues we've been having. The Fourth Circuit affirmed the district court's denial of a motion for a new trial and refusal to conduct an evidentiary hearing based on the prosecutor's post-trial provision of Brady/Giglio material. This was a carjacking, 924(c), 922(g) case in which the victim testified at trial that gloves recovered

from his car by the police looked like the ones the gunman wore. A few days after the verdict, the prosecutor sent a letter to defense counsel saying that he neglected to disclose the substance of a victim/witness prep session in which the victim described the gloves worn by the gunman and the description did not match that of the gloves ID'd at trial. The Fourth Circuit held that the district court did not abuse its discretion in refusing to hold a hearing given that it issued its order/refusal within 13 days of the close of trial, and the court had just heard all of the evidence in the case, so was able to determine the materiality of the information without holding a hearing. Second, the Fourth Circuit agreed that the evidence was favorable to the defendant and that it should have been disclosed, but determined that it was not material because of the weight of the remainder of the evidence at trial.

United States v. Lighty, 616 F.3d 321 (4th Cir. 2010)

See Death Penalty cases below.

United States v. Johnson, 617 F.3d 286 (4th Cir. 2010)

Two good rulings here – first one concerning law enforcement testimony re: interpreting drug code – second one re: admissibility of prior drug dealing under 404(b):

1) Opinion testimony of a law enforcement agent re: the meaning of code words in a monitored phone call were not admissible as lay opinion under 701 – he did not directly observe the surveillance or listen to all the calls, and instead kept referring to his experience and expertise. Because he was never proffered as an expert in interpreting drug code, the testimony should not have been admitted. Also ruled that the evidence was insufficient to hold, post-hoc, that the agent would have qualified as an expert because, while he repeatedly indicated that he had the expertise to testify regarding drug jargon and the drug trade generally, he provided virtually no methodology or guiding principles that would enable him to decode the wiretapped phone calls in this case. Given the credibility issues of the remaining three witnesses against the defendant (all convicted drug dealers) admitting the agent's testimony was not harmless error.

2) Testimony of a witness claiming to have bought drugs from the defendant five years prior to the acts alleged in the instant case, that did not link the defendant to any of his current co-conspirators or resemble the manner in which he was alleged to have dealt drugs in the instant case, were not admissible to prove intent or knowledge under 404(b). Admission was not harmless error given the overall weakness in the case against the defendant and the fact that the defendant himself testified at trial and called several witnesses on his behalf.

United States v. Nixon, Slip Copy, 2010 WL 3869159 (4th Cir. 2010)

This opinion is worth noting because it characterizes the court's holding in the recent Lucky/Wilson death penalty decision out of our southern division re: the admission of 404(b) evidence as a new statement of law. Specifically, the court wrote, "We have also recently recognized that "[e]vidence is inextricably intertwined with the evidence regarding the charged offense if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *United States v. Wilson*, --- F.3d ---, 2010 WL 3495876, *6 (4th Cir. Sept. 8, 2010). In Lucky/Wilson, the admission of an unrelated shooting by the defendant was inadmissible (though the court found harmless error),

while in this case, the fact that the defendant was interviewed by the police about the charged offense, while in custody for another offense, was "inextricably intertwined with the evidence regarding the charged offense."

United States v. Smith, Slip Copy, 2010 WL 4127669 (4th Cir. 2010)

First, held that admission of evidence of a non-testifying co-defendant's guilty plea without a curative instruction, where such instruction was not requested, was harmless error in light of the overwhelming evidence of guilt. Second, cited a couple of other circuits, and *Kyles v. Whitley*, 514 U.S. 419, 438 (1995), in holding that prosecutors in one federal district are not responsible for knowing about and disclosing Brady material in the possession of prosecutors in another district (here the alleged Brady material was the fact that the AUSA in Georgia was planning to indict someone who the defendants in North Carolina blamed for the unlawful conduct in their case).

United States v. Brown, Slip Copy, 2010 WL 4244589 (4th Cir. 2010)

Applies the rule from several other circuits that evidence of prior gun possession is admissible to prove knowledge and intent in a constructive possession firearm case where a limiting instruction is given. The facts are extremely sparse in this unpublished opinion, but evidence of firearm possession from 1996 and 1997 was held to be admissible to show constructive possession in this case in which the defendant argued that the gun belonged to someone else. Lapse of time between prior possessions and current alleged possession was of no concern to the court – date of current possession is not apparent from the opinion.

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010)

Holds that a government analyst with experience identifying CP can be qualified as an expert to testify that images depict child porn, analogizing to the drug cases in which officers testify as experts re: drug dealing; cites several appellate courts that have assumed that the testimony of experienced forensic or medical professionals establishing the authenticity of alleged child pornography constitutes appropriate expert testimony. See, , e.g., *Rodriguez-Pacheco*, 475 F.3d at 437-39; *United States v. Anderton*, 136 F.3d 747, 750 (11th Cir.1998); *United States v. Broyles*, 37 F.3d 1314, 1317-18 (8th Cir.1994). "Even the Supreme Court has noted the use of experts in this context." See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254, 122 S. Ct. 1389, 152 L. Ed.2d 403 (2002).

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010)

The Fourth Circuit has found that the testimony of government expert witnesses was admissible under the Confrontation Clause in the trial of two defendants for various crimes arising from their participation in a violent street gang, even though the experts relied in part on interviews with unnamed declarants, because the experts offered their independent judgments, most of which related to the gang's general nature as a violent organization and were not about the defendants in particular; these judgments resulted from many years of observing the gang, studying its methods, and speaking with its members; and each expert was subject to cross-examination.

United States v. Anwari, Slip Copy, 2010 WL 3262224 (4th Cir. 2010)

In a drug distribution case, the Fourth Circuit held that it was not plain error for the prosecutor, on cross-examination of the defendant, to note that the defendant swore his oath on the bible, ask if he was Christian, and elicit the predictable response that he was Muslim. The government argued that it was checking to see if the defendant was taking his oath seriously.

United States v. Sharp, Slip Copy, 2010 WL 4386884 (4th Cir. 2010)

In a Medicaid fraud case, first, approved of the testimony at trial by a statistician, extrapolating the loss to Medicaid by taking a statistically significant sample of the 15,000 claims submitted. Rejected all Daubert-related arguments, found that it was not overly prejudicial under R. 403, and, while acknowledging that such testimony is usually reserved for the sentencing phase, found no problem with having it introduced at trial. Analogized to the introduction of expert testimony re: drug quantity, which, it held, can either be introduced at sentencing or trial. under R. 403. Second, approved of the testimony at trial by a medical billing/coding expert as to whether the defendant's documentation supported the bills he submitted. Rejected defendant's argument that the gov needed the testimony of a physician to prove its case because neither the standard of care nor clinical decisions were at issue, the issue was whether the defendant used the proper billing codes considering the treatment he rendered. Third, held that instructing a witness to answer questions in the form of only "yes," or "no," does not constitute improperly eliciting false testimony.

United States v. Kilgore, Slip Copy, 2010 WL 4683711 (4th Cir. 2010)

Several rulings in a drug conspiracy case. Of note are the following: upheld admission, under 404(b), of statements of the defendants re: murdering a co-conspirator and evidence of one defendant's involvement in the conspiracy past the date alleged in the indictment. No real analysis provided. Also rejected the defendant's claim that introducing evidence of participation in the conspiracy beyond the date alleged in the indictment constituted a constructive amendment. Decent (as in detailed, not good) language here re: what does and does not constitute a constructive amendment, if you are interested.

United States v. Robinson, --- F.3d ----, 2010 WL 4869770 (4th Cir. 2010)

Affirmed the denial of a new trial under Rule 33 when it was discovered, after trial, that the four officers involved in the case against the defendant had all been found to have committed various acts of misconduct unrelated to the defendant's case. Held that the newly discovered evidence would have been no more than impeachment evidence which, under the test established in *US v. Custis*, 988 F. 2d 1355, does not entitle a defendant to a new trial. In addition to relying on *Custis*, the court relied on the old "trial within a trial," waste of resources of a new trial, etc. line of reasoning. The Court also relied on the "less-important" role of the corrupt officers, as compared with other officers, in the defendant's case, as well as the overwhelming evidence against him from other, independent sources. Finally, the court rejected the defendant's attempt to cast the failure to disclose the evidence of misconduct as a Brady violation. Held that relying on Brady for evidence that was actually newly discovered by the prosecution in these types of cases would undermine Rule 33 and turn every instance of newly discovered evidence into a Brady violation.

United States v. Newby, Slip Copy, 2010 WL 4948970 (4th Cir. 2010)

Upheld the DC's refusal to compel the disclosure of internal affairs records of the testifying officers. The 4th Circuit said as follows, "The IA investigation did not relate to the investigation of Newby and thus had no bearing on his guilt or innocence. Moreover, the documents were not significantly probative of the officers' character for truthfulness such that the information therein would have materially undercut their credibility and affected the outcome of the trial." Bad language! Unfortunately, we'd have to look at the briefs to see what exactly the court was talking about because the opinion is so brief. In a related, also sparse ruling, the court upheld the DC's refusal to allow the defendant to cross-examine one of the investigating officers about his suspension and department rules and procedures. In so ruling, rejected the defendant's claim that the officer's testimony was "essentially the key to convicting" him, pointing to several other key witnesses.

United States v. Palacios-Herrera, Slip Copy, 2010 WL 4950000 (4th Cir. 2010)

In an appeal of an illegal re-entry conviction, the 4th Cir. rejected both of the defendant's creative attempts to exclude the warrant of deportation at trial. First, held that the warrant is non-testimonial and therefore "not subject to the requirements of the Confrontation Clause," under *Crawford*. Next, held that the warrant is admissible under Rule 803(8)(B), which creates an exception to the hearsay rule for public records and reports setting forth "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." Fed. R. Evid. 803(8)(B). Held that the warrant did not fall within the exception to R. 803.

SUBSTANTIVE OFFENSES

PWID:

United States v. Herder, 594 F.3d 352 (4th Cir. 2010)

In a constructive possession of drugs case, the Fourth Circuit affirms the district court's refusal to give a "mere proximity" instruction, backing away from its opinion in *Blue*, Rejects sufficiency challenge as well – defendant was the driver and sole occupant (though no evidence he was the owner) of a car in which drugs were found.

United States v. Hall, Slip Copy, 2010 WL 4009203 (4th Cir. 2010)

This case is worth noting because it questions the court's previous holding in *United States v. Wright*, 131 F.3d 1111, 1115-16 (4th Cir. 1997) that a defendant is entitled to an instruction on simple possession in a PWID case only when he offers "considerable affirmative evidence unrelated to drug quantity from which the jur[y] could have reasonably inferred that the defendant possessed the drugs solely for personal use." While acknowledging that the court has cited *Wright* in a number of unpublished opinions, this opinion recognizes that *Wright* is a panel decision that appears to directly contradict earlier panel decisions re: the showing necessary to get a simple possession instruction. Because only an en banc decision can overrule a previous panel decision, "technically," the court acknowledged that it should go with the pre-*Wright* law. However, the court avoided doing so here by finding that the presence of a digital scale provided

"strong and uncontested," evidence of distribution, so the District court's refusal to give the lesser included instruction here was not an abuse of discretion. So, keep this in mind if the government argues *Wright* when you request a lesser-included possession instruction at trial.

United States v. Hickman, --- F.3d ----, 2010 WL 4823366 (4th Cir. 2010)

Really good opinion re: the burden of proof necessary to determine drug quantities at trial. Vacated the defendant's conviction for conspiracy to distribute at least one kilo of heroin, finding that the DC was wrong to deny the MJOA on that count because the evidence was insufficient as to the quantity. Directed the DC to impose judgment on the lesser included offense of conspiracy to distribute 100 gms or more of heroin. In so holding, rejected a number of inferences that the government asked the jury to draw from the evidence. First, rejected the argument that the conspirators' seeming familiarity with the drug trade indicated that this conspiracy concerned some greater amount of heroin than was otherwise proved at trial - criticized the gov for statements in closing re: the four month period of the conspiracy merely being "a window," into the defendants' drug distribution activities and found it improper to suggest that had they not been caught, future crimes would have been committed. Second, rejected the inference that the defendants would have diluted the heroin they had purchased to the degree necessary to achieve the weight needed to prove the intent to distribute more than one kilo - the gov relied heavily on an agent's testimony re: the dilution process and what resultant quantities are, but the 4th Circuit found it was not possible to infer that the defendants would have actually diluted to the degree necessary under the scenario described by the agent, despite evidence that some amount of dilution was intended. Third, rejected a link between the sale of drug paraphernalia and actual drug quantities - specifically, refused to hold the conspirators liable for the *potential* amount of heroin that could have been contained in all the empty vials sold by one of the co-conspirators to random other drug dealers.

Identification Fraud:

United States v. Berry, 369 Fed. Appx. 500 (4th Cir. 2010)

Fourth Circuit held that the Supreme Court's holding in *Flores-Figuerosa* (a prosecution under 1028A(a)(1) "requires the government to show that the defendant knew that the means of identification [stolen] belonged to another person"), applied with equal force to prosecutions under 1028(a)(7). The court stated that although the opinion in *Flores-Figuerosa* did not address the knowledge necessary for a 1028(a)(7) conviction, "it [was] appropriate to presume that Congress intended that text to have the same meaning in both statutes" because the wording of both statutes was virtually identical, both statutes criminalized identity theft, and 1028A was passed shortly after 1028(a)(7).

United States v. Luke, --- F.3d ----, 2010 WL 4970225 9 (4th Cir. 2010)

Concerns the breadth of the identification fraud statute - specifically, sections 1028(a)(2) and (a)(4) - and found that they were broad enough to encompass the defendant's conduct in this case. Specifically, the defendant argued that he could not have been guilty of attempting to obtain a passport produced without lawful authority (1028(a)(2)) because the passport was, in fact, produced by US passport employees who were acting lawfully - they believed the passport was

valid at the time it was issued. The 4th Circuit rejected this argument, refusing to allow that the statute would permit someone to use fraud to convince a passport agency employee to produce a passport "lawfully." Also rejected the defendant's argument that the passport he attempted to obtain could not, itself, be the "identification document," referenced in 1028(a)(2). Instead, he argued (unsuccessfully) that the identification document language references those id docs used to procure the passport. Next, interpreting 1028(a)(4), the court rejected D's argument that the gov couldn't prove he intended to defraud the US with the false passport. The court refused to require proof of intent to deprive the US of money and then held that the info provided in the false passport applications - that the applicants needed the passports to travel outside the US - was sufficient to support the intent to defraud. Finally, the court held that the SS card used to get the passport was another ID doc that the defendant possessed with the intent to defraud the US.

Child Pornography:

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010)

Joins other circuits in holding that, "pornographic images themselves are sufficient to prove the depiction of actual minors." *United States v. Salcido*, 506 F.3d 729, 734 (9th Cir.2007) (per curiam) (collecting cases). In other words, the Government need not present any extrinsic evidence as to this issue, so long as the jury has had an opportunity-as it did here-to view the relevant images. *See, e.g., United States v. Rodriguez-Pacheco*, 475 F.3d 434, 440-41 (1st Cir.2007). Though, in this case, the government did present additional information to support the actual minors element.

Forfeiture:

United States v. Jalaram, Inc., 599 F.3d 347 (4th Cir. 2010)

Reversed the district court's ruling that a forfeiture award of \$300k+ violated the Eighth Amendment's Excessive Fines clause in a Mann Act/prostitution case against a motel. Agreed that the clause applied, but found that the amount was not grossly disproportional to the gravity of the offense. Specifically, the criminal activity here generated hundreds of thousands of dollars in illicit revenues, the criminal activity here spanned several months, and the crimes charged against Jalaram-prostitution and money laundering-were connected with other offenses.

United States v. Claridy, 373 Fed. Appx. 417 (4th Cir. 2010)

Surprising defense win in a forfeiture case; court finds that government's notice of intention to declare forfeiture of seized property was inadequate. Government sent a certified letter to Wicomico County Detention Center where the d undisputedly was and "someone" at the facility signed for it. Court holds that Government "submitted no evidence to show that the signatory was a prison official . . . "

Impersonating a Police Officer:

United States v. Roe, 606 F.3d 180 (4th Cir. 2010)

Found the evidence sufficient to support a conviction for impersonating a federal police officer despite the fact that the defendant was a contracted "security police officer" with the authority to make arrests in emergency situations on NASA Goddard property. Here, he identified himself as a federal police officer when pulled over on the Pkwy for suspicion of impersonating an officer by trying to pull over someone else. Also rejected the defendant's argument that the district court constructively amended the indictment by instructing the jury that the law prohibited the impersonation of a "federal police officer," instead of prohibiting the impersonation of a "federal officer." Held that the District court narrowed, rather than broadened the bases for a conviction, thus any change did not create a constructive amendment.

False Claim of Citizenship:

United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. 2010)

Rejects defendant's creative sufficiency of the evidence argument in a false claim of citizenship case. Defendant several times falsely claimed citizenship or legal residency on I-9 (employment) forms, but claimed that the sole purpose of the I-9 Form is to verify that an applicant is authorized to work in the United States, and misstatements of immigration status are therefore material only when they disguise an applicant's lack of work authorization. Since he had TPS work authorization, he argued, his claims were not material. The Fourth Circuit held that the defendant's misstatements were capable of influencing agency action (the test for materiality) in a number of ways, and by a number of agencies, so they were material.

Willfully Failing to Pay Child Support:

United States v. Novak, 607 F.3d 968 (4th Cir. 2010)

Reviewed the jury instructions regarding the venue element of willfully failing to pay child support, in violation of 18 U.S.C. § 228. Approved of the district court's definition of "resided" as "the act or fact of living in a given place permanently or for an extended period of time," and rejected the defendant's assertion that the government needed to prove an intent to permanently live in the given place

SORNA:

United States v. Talada, 380 Fed. Appx. 255 (4th Cir. 2010)

A SORNA case clarifying that under *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009), SORNA does not violate either the APA or the Commerce Clause. The case expands on *Gould's* Commerce Clause analysis a bit and also holds that SORNA does not infringe on a sex offender's right to travel. In addition, the Fourth Circuit rejected the defendant's claim that polygraph exams as a condition of supervised release are per se invalid if the condition does not include a ban on making the results public. It did suggest that were the results to be disseminated and harm resulted to the supervisee, there could be a Fifth Amendment claim in the future.

False Statement:

United States v. Jackson, 608 F.3d 193 (4th Cir. 2010)

Upholds several convictions of 18 U.S.C. § 1001 (false statement in any matter within the jurisdiction of the United States) based on the following facts: defendant falsified the timesheets he submitted to his employer for work he performed for that employer at the NSA. The employer was a subcontractor for a general contractor that held a contract with NSA for the work the defendant was performing. NSA reimbursed the contractor for the defendant's time based on the false information on the timesheets. NSA also granted the defendant a security clearance to do his work. Question was whether the timesheets fell within the jurisdiction of the United States – specifically, of the executive branch – where the defendant did not work directly for the government agency. The Fourth Circuit held that they did based on the NSA's general authority to safeguard federal funds and to revoke the defendant's employment by terminating his security clearance.

924(c):

United States v. Lighty, 616 F.3d 321 (4th Cir. 2010)

See Death Penalty Cases below.

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010)

Ayala argued that his 924(c) conviction was improper as the underlying RICO conspiracy was not a "crime of violence," as argued by the Government at trial. The court disagreed, noting that "[t]o determine whether the objectives of this conspiracy were violent crimes . . . is intrinsic to the indictment itself" which set forth a pattern of violent racketeering activities including murder, kidnapping, and robbery.

United States v. Miller, Slip Copy, 2010 WL 4780650 (4th Cir. 2010)

In a very brief opinion, 4th Circuit upheld convictions for Hobbs Act robberies and 924(c)s in a case in which no guns were recovered or introduced into evidence. Use of a firearm capable of expelling a projectile by explosive action was provable simply by eyewitness testimony and video-stills depicting the men holding the guns.

United States v. Robinson, --- F.3d ----, 2010 WL 4869770 (4th Cir. 2010)

The court refused to vacate the defendant's 924(c) convictions because the jury was instructed that the defendant's alleged trading of firearms for drugs constituted "use of firearms during and in relation to a drug transaction." While acknowledging that trading drugs for guns can no longer create liability under the "use," prong of 924(c) after *Watson v. U.S.*, 522 U.S. 74 (2007), the 4th Cir. applied a plain error analysis because *Watson* was decided between the time of trial and appeal. In so doing, the court found that the jury instruction was clearly erroneous, but the defendant could not prove that the instruction actually prejudiced him because his trading activities could easily have been proven under the "use of a firearm in furtherance of a drug trafficking offense," prong of 924(c), which he was also indicted on. The court held that because the jury had to have found that the defendant traded guns for drugs to have convicted him under

the improperly instructed method of committing a 924(c), there was sufficient evidence to have convicted him of what would have been the properly instructed method. Thus, he could not prove that his conviction resulted from the erroneous jury instruction. In holding that trading guns for drugs satisfies the "in furtherance," type of 924(c), the 4th Circuit joined every other circuit to address the issue post-Watson (which did not address that prong).

Adam Walsh Act

United States v. Joshua, 607 F.3d 379 (4th Cir. 2010)

The Fourth Circuit has ruled that the term "custody" within the meaning of the Adam Walsh Act, 18 U.S.C. § 4248, which subjects sexually dangerous persons in the custody of the BOP to civil commitment, refers to legal custody, or legal authority over the detention, rather than physical custody, so as to require the BOP to have ultimate legal authority over the person's detention. The court further found that the Army, and not the BOP, had legal custody over a defendant convicted of court-martial, even though he was housed within a BOP facility.

United States v. Comstock, -- F.3d ----, 2010 WL 4925389 (4th Cir. 2010)

Rejects the due process challenge to the civil commitment provision of the Adam Walsh Act (this was a remand after the Supreme Court reversed the 4th's decision to find the provision unconstitutional under the necessary and proper clause). The Act authorizes civil commitment only if a court finds by "clear and convincing evidence" that a person "has engaged or attempted to engage in sexual violence or child molestation" and is "sexually dangerous to others." The district court held that the Due Process Clause requires the Government to establish the first of these findings by proof beyond a reasonable doubt, rendering unconstitutional the less rigorous "clear and convincing evidence" standard set forth in the Act. The 4th Circuit disagreed. First, it rejected the contention that the reasonable doubt standard must apply because the Act requires a finding of a prior criminal act (the sexual violence or molestation). Instead, it held that the Act's regulatory definitions encompass, but are not limited to, criminal conduct and thus could include unlawful, tortious conduct. Second, the court relied on *Addington v. Texas*, 441 U.S. 418, 427-31 (1979) (the case holding civil commitment of the mentally ill based on a C&CE standard to be constitutional) and held that even if the Act required the finding of a prior criminal act, the RD standard was not required because the "purpose and structure of the commitment process render it unlike any criminal prosecution." Cited *Addington* further for the proposition that that "civil commitment simply does not impose either the stigma attendant to criminal culpability or the loss of liberty associated with a criminal sentence, and therefore does not require the criminal law burden of proof." Nor (citing *Addington* again), does it involve the narrow factual question of whether someone committed a criminal act, thus distinguishing it from juvenile proceedings where the RD standard is required. The 4th also analogized the Adam Walsh Act to the civil commitment act upheld in *Addington* in that it contains the same sort of professional review and opportunity for correction of an erroneous commitment, similarly reducing the need for the rigorous reasonable doubt standard. And, the court found that the appellees argument ignored SC precedent which has endorsed civil commitment statutes that use proof of past conduct—even past *criminal conduct*—for legitimate evidentiary purposes.

Possession of a Firearm After a Conviction for a Misdemeanor Domestic Violence Crime
(922(g)(9))

United States v. White, 606 F.3d 144 (2010)

The Fourth Circuit reversed a defendant's conviction under 18 U.S.C. § 922(g)(9) finding that the defendant's prior Virginia conviction for misdemeanor assault and battery against a family member was not, on its face, a misdemeanor crime of domestic violence because the crime did not have as an element the use or attempted use of physical force. The court also noted that nothing in the record indicated that the conviction involved the use of physical force..

United States v. Chester, 367 Fed. Appx. 392 (4th Cir. 2010)

Fourth Circuit vacated and remanded this case challenging the conviction as an infringement of defendant's Second Amendment rights under *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Noted that the district court did not address whether *Heller* required the Government to justify individual laws that restrict Second Amendment rights. Instead, the district court dismissed the defendant's claim in reliance on *Heller*'s much-noted language as to "presumptively lawful" gun regulations-notably, the felon-dispossession laws. Held that the district court erred when it failed to scrutinize § 922(g)(9) apart from the language in *Heller*. Agreed with the Seventh Circuit decision in *United States v. Skoien*, 587 F.3d 803, 808 (7th Cir.2009), insofar as it held that challenges to firearms regulations under the Second Amendment must be individually analyzed because such regulations restrict the exercise of a constitutional entitlement.

Possession of a Firearm by a Drug Addict

United States v. Sterling, Slip Copy, 2010 WL 4561386 (4th Cir. 2010)

4th Circuit reversed the denial of an MJOA on sufficiency of the evidence grounds for a conviction of possession of a firearm by someone who is an unlawful user of or addicted to a controlled substance. First, approved of the giving of a jury instruction based on "persuasive" 9th Cir. case law that, the drug use must be "sufficiently consistent, 'prolonged,' and close in time to his gun possession to put him on notice that he qualified as an unlawful user" under the terms of the statute. *United States v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001). Then, focused on the need to corroborate admissions or confessions. Found that the defendant's own statements re: drug use (admitted to the officers that he had used both marijuana and cocaine within a couple months of his arrest and acknowledged that he had tried to stop using drugs but "continued to use them on and off") were not sufficiently corroborated by independent evidence (his parents said he used drugs as a teenager and a drug dog alerted to his car, though no drugs were found) to meet the standard set forth by the 9th Cir.

Tax Fraud:

United States v. Mehta, 594 F.3d 277 (4th Cir. 2010)

Affirms denial of a Rule 29 on the tax fraud count. Rejected fatal variance argument on the wire fraud count. Specifically, the fact that the indictment said the unlawful transfer of funds

originated in Michigan, while the evidence said it originated in North Carolina, did not prejudice the defendant.

United States v. Lord, Slip Copy, 2010 WL 5129152 (4th Cir. 2010)

This case is worth looking at if you have a failure to file/failure to pay tax case as it involves proof of the "willfulness" element. Here it was failure to pay withheld employment taxes. The only ruling of note outside the tax context was that the court was incorrect to order restitution based on loss from conduct other than the conduct that formed the basis for the conviction. Here, the court also relied on conduct that was simply relevant to the government's proof at trial. On appeal, the government agreed that the DC erred and the restitution award was cut in half.

Maiming/Assault:

United States v. Ganeous, Slip Copy, 2010 WL 4459581 (4th Cir. 2010)

Held that assault with a deadly weapon is not a lesser included offense of maiming, thus rejecting the defendant's multiplicitous/double jeopardy argument based on convictions for both offenses, arising out of the same conduct.

Carjacking:

United States v. Moore, Slip Copy, 2010 WL 5129863 (4th Cir. 2010)

Interesting and detailed discussion re: sufficiency of the evidence in a carjacking case. The focus was specifically on whether the defendant had the intent to kill or cause serious bodily harm to the victim, as required by the statute. Also contains a fact-specific discussion about the application of the bodily injury enhancement to the carjacking guideline.

Money Laundering:

United States v. Johnson, Slip Copy, 2010 WL 5394842 (4th Cir. 2010)

Analyzes the Supreme Court's decision in *U.S. v. Santos*, 553 U.S. 507 (2008), re: the definition of "proceeds," in the money laundering statute. Holds that while *Santos* defines "proceeds," as "profits," of unlawful activities and not "gross receipts," of unlawful activities, this definition applies only in the context of unlawful gambling activities, and does not apply in the case at hand, which involved fraudulent financial transactions. Points out that this holding is only necessary because the defendant's conduct took place prior to Congress's legislative fix to *Santos* in 2009, in which it defined proceeds for all money laundering activities as including "gross receipts," not just "profits."

Defenses:

United States v. Gore, 592 F.3d 489 (4th Cir. 2010)

The Fourth Circuit ruled that an inmate may claim self-defense against a charge that he forcibly assaulted or resisted a correctional officer, but that to prevail on such a claim, the inmate must

demonstrate that he was responding to an unlawful and present threat of death or serious bodily injury.

SENTENCING

PROCEDURAL REASONABLENESS

United States v. Engle, 592 F.3d 495 (4th Cir. 2010)

The Fourth Circuit found that a district court's explanation of its decision to impose a significantly below-Guidelines sentence upon a defendant who pled guilty to tax evasion was insufficient to permit meaningful appellate review, when the district court neither mentioned the Sentencing Commission's specific policy statements regarding tax evasion nor more broadly acknowledged the general principles underlying the Guidelines' approach to sentencing for serious economic crimes.

United States v. Lynn, 592 F.3d 572 (4th Cir. 2010)

The Fourth Circuit vacated the sentences imposed upon two defendants, finding them to be procedurally unreasonable. First held that the defendant's arguments in the district court for a different sentence than the one he received preserved his claim of procedural sentencing error on appeal and that these arguments "sufficiently alert[ed] the district court of its responsibility to render an individualized explanation addressing those arguments." Then found one sentence procedurally unreasonable because the sentencing judge provided no individualized explanation for its substantial departure from the Sentencing Guidelines range of 51 to 63 months, and failed to address the defendant's non-frivolous reasons for imposing a lower sentence. The other sentence was procedurally unreasonable, when, although the sentence was within the guidelines range, the sentencing judge failed to address any of the defendant's arguments, including the fact that he was only a courier, that he was paid only a small amount for the charged crime, and that a lengthy sentence would not achieve specific deterrence or protection of the public.

United States v. Herder, 594 F.3d 352 (4th Cir. 2010)

The Fourth Circuit found the sentence procedurally unreasonable where the district court refused to impose a sentence below the Guidelines for a defendant convicted of a crack offense because the court failed to understand its authority to sentence below the applicable guideline range based on the crack/powder disparity (court said that Congress has decided that 67/1 was an appropriate ratio to establish).

United States v. Morace, 594 F.3d 340 (4th Cir. 2010)

The imposition of a five-year probation sentence was procedurally unreasonable for a defendant convicted of possession of child pornography, when the applicable range under the Sentencing Guidelines was 41-51 months in prison. The sentencing court failed to identify specific reasons to support the degree of the variance; failed to consider the Congressional view that child pornography crimes were serious offenses deserving serious sanctions, and failed to explain its reasons for not following Congress's or the Sentencing Commission's policy statements.

United States v. Mendoza-Mendoza, 597 F.3d 212 (4th Cir. 2010)

The Fourth Circuit found that a district court's statements declaring that it was "obligated" to impose a Guidelines sentence "unless I find a reason for a departure from those guidelines, or a variance based on" statutory sentencing factors, and the court's pronouncement of a Guidelines

sentence even though it had "not agreed with" the range recommended by the Guidelines, suggested that the court improperly accorded the Sentencing Guidelines a quasi-mandatory effect, requiring that the defendant's sentence be vacated and the case remanded for resentencing.

United States v. Thompson, 595 F.3d 544 (4th Cir. 2010)

The 18-month sentence imposed upon revocation of defendant's supervised release, which was within applicable sentencing guidelines range of 12 to 18 months, was plainly unreasonable because district court failed to provide adequate explanation for its chosen sentence; in imposing sentence, court stated only that it was the judgment of the court that the defendant be committed to the custody of the Federal Bureau of Prisons for a term of 18 months, and although court later commented on the possibility that defendant was a flight risk or a danger to the community, those statements did not explain the sentence, but instead came in response to defense counsel's request that defendant be allowed to self-report to prison, and explained court's reasons for not allowing voluntary surrender.

United States v. Scott, 379 Fed. Appx. 290 (4th Cir. 2010)

Held a sentence to be procedurally unreasonable where the district court failed to explain why it imposed sex offender treatment as a condition of the defendant's supervised release. The error was not harmless because the district court's lack of explanation for imposing this condition resulted in "a record insufficient to permit even routine review for substantive reasonableness." (Citing *Lynn*)

United States v. Jefferson, 379 Fed. Appx. 292 (4th Cir. 2010)

Held that the court procedurally erred when it sentenced Jefferson to 108 months in prison without stating in open court the particular reasons supporting the sentence. Not only did the district court fail to respond to the arguments Jefferson raised at the sentencing hearing, the district court also failed to indicate that it even considered Jefferson's arguments in rendering the sentence or that it considered the § 3553(a) factors.

United States v. Caste-Lopez, 379 Fed. Appx. 286 (4th Cir. 2010)

Other than stating that it "considered the policies and statements in revocation contained in Chapter 7 of the U.S. Sentencing Guidelines," the district court provided no explanation for its eighteen-month sentence. Moreover, the court made no mention of the applicable § 3553(a) factors and did not discuss Caste-Lopez's personal history, his argument in favor of a concurrent sentence, or the Government's argument in favor of a consecutive sentence.

United States v. Martinez, Slip Copy, 2010 WL 2465250 (4th Cir. 2010)

Another procedural unreasonableness win in an Anders brief-sentencing where the court did not address the defendant's "non-frivolous" reasons for a below-guideline sentence and by requesting a below-guideline sentence, defendant adequately preserved the issue.

United States v. Bobo, Slip Copy, 2010 WL 2465253 (4th Cir. 2010)

Another procedural unreasonableness win in an Anders brief-sentencing but here, the defendant did not preserve the procedural reasonableness issue because he received the sentence he asked for – the low end of the guideline range.

United States v. Ford, Slip Copy, 2010 WL 2545981 (4th Cir. 2010)

Good procedural unreasonableness case in the supervised release context. Pretty egregious facts but worth citing to if you are appealing a supervised release revocation sentence. Also worth citing to for the prop that a sentence can be procedurally unreasonable even if it is below the Guideline range – court still has to make findings if the sentence is higher than that requested by the defendant.

United States v. Pacheco Mayen, 383 Fed. Appx. 352 (4th Cir. 2010)

The Fourth Circuit remanded because the sentencing court, "merely stated that it took into account the § 3553(a) sentencing factors and the Guidelines range. It did not address the mitigating factors raised by Mayen, nor provide any other reason for choosing the sentence imposed."

United States v. Artist, 381 Fed. Appx. 276 (4th Cir. 2010)

In order to survive plain error despite a lack of sufficient findings by the District court, you have to at least ask for a lower sentence than the one you ultimately received.

United States v. Ludwig, Slip Copy, 2010 WL 2414922 (4th Cir. 2010)

Merely stating that the court "considered the advisory sentencing guidelines and . . . the relevant statutory factors," is insufficient and constituted plain error where the defendant requested a below-guideline sentence.

United States v. Ross, 380 Fed. Appx. 275 (4th Cir. 2010)

In reviewing an Anders brief questioning the reasonableness of the sentence, the Fourth Circuit found that the sentence was procedurally unreasonable because the district court did not provide "an individualized explanation for its sentence." However, the issue was not preserved below and the court held that there was no plain error because the defendant received the sentence he asked for – the low end of the guideline range.

United States v. Franklin, 380 Fed. Appx. 263 (4th Cir. 2010)

Anders brief in which the Fourth Circuit noted the procedural unreasonableness resulting from the district court's failure "to provide an individualized assessment" of the defendant's case at sentencing. However, with no analysis or explanation, the Fourth Circuit said that this error did not affect the defendant's substantial rights.

United States v. Johnson, 380 Fed. Appx. 265 (4th Cir. 2010)

Revocation of Supervised Release sentence held procedurally unreasonable where the court provided no explanation for its sentence other than stating that it imposed the sentence "[p]ursuant to the factors in 3553(a) and considering the Sentencing Guidelines." This failed to satisfy the more relaxed requirements for sentencing in the SR context to such an extent that plain error was found. In contrast to *Ross*, defendant received a longer sentence than he requested.

United States v. Olislager, 383 Fed.Appx. 314 (4th Cir. 2010)

Reiterates the holding in *United States v. Lynn* that as long as a defendant draws arguments from 3553(a) in asking for a sentence below the guidelines, he has alerted the court to its duty to render an individualized explanation addressing those arguments and thus preserving his claim. Remanded here because the District court said only that the defendant had a prior conviction and that the offense was not passive – failed to address the defendant's many arguments in favor of a below-guideline sentence.

United States v. Clark, 383 Fed.Appx. 310 (4th Cir. 2010)

Defendant asked for a below-guideline sentence solely because of the disparity between the crack and powder guidelines. The District court imposed a guideline sentence without explaining why. The Fourth Circuit reiterated that "because the defendant argued for a sentence different from the one ultimately imposed, the district court had a responsibility to render an individualized explanation addressing his arguments."

United States v. Verve-Rodriguez, Slip Copy, 2010 WL 2994048 (4th Cir. 2010)

An example of the Fourth Circuit back-tracking a bit on procedural unreasonableness, or at least setting some limits to its generosity. Used and cited language justifying a broader approach to sentencing, especially in "straightforward" cases and excused the district court's failure to mention the particular issues raised by D because he did not ask for a sentence outside of, or even at the low end of the guideline range. In doing so, they cited to *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) ("Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence than that set forth in the advisory Guidelines, a district judge should address the party's arguments and explain why he has rejected those arguments." emphasis added). This does not appear to be about whether to review for plain error or abuse of discretion – you preserve the issue for appeal by asking for a sentence that is lower than the one you received – *see Lynn* – but instead, the Fourth Circuit appears to be articulating a new rule, almost as a counter to the rule set for in *Carter* – unless you ask for a sentence outside of the range, the District court does not have to address your arguments. This is insane, but fortunately, it is a minor, unpublished case (and doesn't seem to have been followed, as subsequent cases reveal).

United States v. Black, Slip Copy, 2010 WL 2994042 (4th Cir. 2010)

Here's a good procedural unreasonableness case (different panel from *Verve-Rodriguez*). The issue was preserved because counsel requested a sentence at the "lower end" of the Guideline range (and I assume the sentence he received was higher than that, though the opinion does not so state). The sentence was vacated because the district court failed to explain why it imposed the sentence it did. An example of how short these opinions tend to be – and they so rarely cite to the sentencing transcripts – so it is difficult to tell what the Fourth Circuit means when it says the court "failed to explain."

United States v. Aguilar-Rivera, Slip Copy, 2010 WL 3245806 (4th Cir. 2010)

An Anders brief was filed in which procedural reasonableness was not mentioned at all. Nevertheless, the Fourth Circuit reached out and held that the sentence was unreasonable because the district court provided no explanation for the sentence imposed other than to state that it was

imposing sentence "[p]ursuant to the Sentencing Reform Act of 1984" and *United States v. Booker*, 543 U.S. 220 (2005). Unfortunately, because the defendant received a within guideline sentence and counsel had not requested anything lower, or otherwise preserved the issue, the error was found to be harmless.

United States v. Rumbo-Bustos, Slip Copy, 2010 WL 3330420 (4th Cir. 2010)

One of the rare VOSR sentences held to be procedurally unreasonable. The District court did not address any of the several arguments made by either the defendant or the government and simply said that "it was revealing that he did not see the consequences of violating his supervised release," and that while there was poverty in Mexico (it was an illegal re-entry case), "the law is the law." The District court also failed to discuss, calculate, or adopt the sentencing guidelines recommended by the probation officer.

United States v. White, Slip Copy, 2010 WL 3866930 (4th Cir. 2010)

Worth filing away as an example of a case in which the government conceded that the court's explanation for its sentence was insufficient, rendering the sentence procedurally unreasonable – in case you are making a pitch to a prosecutor on appeal.

United States v. Norman, Slip Copy, 2010 WL 4127631 (4th Cir. 2010)

The district court's sentence was upheld as procedurally reasonable despite the fact that the court did not discuss the 3553(a) factors or explain why it was imposing the sentence it imposed. This omission was held to be harmless error because the court did address and reject the one specific argument that the defendant made in support of a below-guideline sentence: that he was a minor participant in the crime. Thus, the fact that the district court rejected this one argument for going below the Guideline range rendered harmless its failure to otherwise explain why it imposed a sentence within the guideline range.

United States v. Lovin, Slip Copy, 2010 WL 3512536 (4th Cir. 2010)

Holds that a failure to explain the reasons for a sentence at the time of the formal pronouncement of sentence is okay, as long as the court of appeals can tell from other statements made throughout the sentencing hearing that the district court considered all of the 3553(a) factors. The Fourth Circuit also relied on the reasons given in the statement of reasons in the Judgment. Evidently, the formal explanation provided by the court was so minimal that the government filed a motion to remove the case from the oral argument calendar and remand it for re-sentencing, given the recent developments in jurisprudence re: procedural reasonableness.

United States v. Cornette, Slip Copy, 2010 WL 3681241 (4th Cir. 2010)

A procedural unreasonableness remand in an Anders brief appeal. District Court did not explain its sentence, other than to say that it had considered the 3553(a) factors. Because the defendant had requested a sentence below the one imposed by the court, the issue was preserved.

United States v. Hardee, Slip Copy, 2010 WL 3623354 (4th Cir. 2010)

This is a case worth separating from some of the other procedural reasonableness cases in that the court heard several witnesses from both sides at sentencing, and entertained extensive argument about why the court should impose the sentence each side requested. Despite

conducting a lengthy hearing, the court still failed to address the arguments made by either party or to explain its reasons for imposing a sentence at the high end of the Guideline range.

United States v. Monroe, Slip Copy, 2010 WL 3721524 (4th Cir. 2010)

The court remanded for resentencing, finding the sentences for all three co-defendants in this case unreasonable. In short, all three defendants made a number of arguments for sentences below their guideline ranges or at the low end of their range. Without addressing any of their arguments, the court imposed the maximum penalty on all three defendants because of the seriousness of the offense, and despite varying Guideline ranges based on their varying criminal histories and varying offense conduct. The court also sentenced all three defendants at the same time, and after explaining his reason for the 1st defendant's sentence, he said for each subsequent defendant that the same reasons apply, without individually addressing each one.

United States v. Williams, Slip Copy, 2010 WL 4561387 (4th Cir. 2010)

Procedural reasonableness case in which the 4th Cir. determined that the court's consideration of unsubstantiated information (specifically, the court's musings that the defendant must have hung out with certain bad people during his tenure as a criminal in the area), and his lack of any further explanation for his sentence, was plain error. However for a variety of reasons, "Williams' own seeming willingness to accept any sentence, defense counsel's failure to ask for an alternative sentence, the government's un rebutted discussion of Williams' violent criminal history and the court having provided Williams with a within guidelines sentence," the court determined that "it would be far too speculative for us to find that the district court's comments prejudicially affected Williams' sentencing."

United States v. Boomer, Slip Copy, 2010 WL 4683560 (4th Cir. 2010)

Vacated and remanded for resentencing where it was not clear from the record that the DC considered the defendant's crack/cocaine disparity argument when it imposed its sentence. Re-emphasized that a court does not have to vary because of this disparity, but that it does have to expressly consider the disparity argument before rejecting it.

United States v. Walker, Slip Copy, 2010 WL 4949618 (4th Cir. 2010)

Vacated the sentence and remanded for resentencing because the judge failed to provide sufficient reasons for imposing its low end (albeit, 480 month) sentence. The 4th Circuit could find reference by the DC to only one of the several arguments made by the defendant at sentencing, and very little else to support the imposition of its sentence.

United States v. Green,

A one page opinion, agreeing with both parties that the DC procedurally erred by failing to recognize its authority to reject the crack/powder disparity in the guidelines.

SUBSTANTIVE REASONABLENESS

United States v. Kalchstein, Slip Copy, 2010 WL 2852683 (4th Cir. 2010)

Good case to cite to your clients in case they are getting cold feet about reporting to serve their sentence. The Fourth Circuit upheld an upward variance of FIVE TIMES the top of the advisory guideline range for the crime of failing to surrender for the service of a sentence.

United States v. Engle, 592 F.3d 495 (4th Cir. 2010) Defendant pled guilty to tax evasion and the Fourth Circuit found that the sentence was substantively unreasonable because the district court's decision to impose probation was driven solely by the defendant's ability to pay restitution.

United States v. Huff, Slip Copy, 2010 WL 3010762 (4th Cir. 2010)

Defendant's variance sentence of fifteen months imprisonment for willfully aiding and assisting in the preparation of false tax returns was substantively reasonable; considering the totality of the circumstances surrounding defendant's crimes and his virtually nonexistent criminal history, the district court properly exercised its discretion to vary downward from the Guidelines range by approximately 29%, and amply justified that variance.

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010)

192-month sentence is substantively reasonable for possession and transportation (from uploading to a Yahoo chat group) of 5000+ CP images and approx 150 CP videos – no other aggravators noted.

United States v. Lopez-Ramirez, Slip Copy, 2010 WL 2414925 (4th Cir. 2010)

Affirmed the substantive reasonableness of a sua sponte upward departure to 59 months from a range of 21-27 months in an illegal re-entry case in which the guy's several prior convictions were not serious enough to get him the type of offense level our clients usually see. However, he had six unlawful entries into the US and two prior convictions for Illegal Re-entry, so the Fourth Circuit found the 59 months to be reasonable.

United States v. Hargrove, --- F.3d ---, 2010 WL 4676980 (4th Cir. 2010)

Rejected argument of substantive unreasonableness as a result of the DC's express consideration of the defendant's decision to go to trial in crafting its sentence. First, addressed the appropriate standard of review where the defendant did not raise the issue below. Disagreed with those circuits that always apply abuse of discretion SOR to substantive reasonableness challenges regardless of the basis for the challenge. Holds instead (along with the 5th, 6th, and 10th Circuits) that if the defendant is claiming there is a legal error in the way the sentence was imposed, instead of simply challenging the length of the sentence, the appropriate standard is plain error. Without addressing whether the court erred, the 4th Cir. then skipped ahead and determined that any error did not affect D's substantial rights because he would have received the same sentence regardless based on a number of statements that the DC made when imposing its sentence. I remain a little confused as to why a substantive unreasonableness argument that raises a legal error in the way in which the sentence is imposed is not just a procedural unreasonableness argument. While I have not taken the time to look at the briefing, the opinion reads as if the defendant raised a general due process violation argument re: being punished for

going to trial and the 4th Circuit concluded that because he did not directly challenge the procedural unreasonableness of the sentence, it would treat the challenge as to the substantive unreasonableness of the sentence. It could be that the 4th was doing an ends-oriented analysis because if it was a procedural unreasonableness challenge, the issue would have been preserved under *Lynn*.

United States v. Pindle, Slip Copy, 2010 WL 4683710 (4th Cir. 2010)

Opinion focuses mostly on sufficiency of the evidence in this Hobbs Act Robbery case, but it is worth noting for the fact that a significant upward variance at sentencing was held to be substantively reasonable where it was based on several counts on which the jury could not reach a verdict. The court found that those counts had been proven by a preponderance and crafted an upward variance accordingly.

GUIDELINE CONSTRUCTION/APPLICATION

United States v. Mehta, 594 F.3d 277 (4th Cir. 2010)

Re: calculation of tax loss under 2T1.1. A complicated decision (and, interestingly, Shedd and Duncan split the decision, so perhaps it was too complicated for them as well), but take a look if you have a tax case in which loss amounts are disputed. The court found error in the district court's calculation, but found the error to be harmless as it landed the defendant in the same guideline range as if the loss had been properly calculated.

United States v. Rooks, 596 F.3d 204 (4th Cir. 2010)

Under plain error review, affirmed a finding that the defendant was a career offender where his two predicate offenses – one a state PWID conviction, the other a federal drug conspiracy conviction – were found to be unrelated. Even assuming that the 2005 guidelines applied (which defendant argued was the case as the 2007 guidelines would definitely have resulted in a career offender sentence and, the defendant argued, would have violated the ex post facto clause), the offenses were not part of a common scheme or plan (the standard for related offenses in 2005). None of the factors typically present applied: directed at a common victim, solved during the course of a single criminal investigation, shared a similar modus operandi, animated by the same motive, and tried and sentenced separately only because of an accident of geography. Rejected Defendant's argument that the cases were related because of their close geographic and temporal proximity, and the fact that the state court imposed a sentence concurrent to the sentence resulting from the Federal Conspiracy Conviction.

United States v. Boulware, 604 F.3d 832

Defendant pleaded guilty to fraudulently making a declaration under penalty of perjury in a bankruptcy case (18 U.S.C. § 152(3)); d argued that the district court erred in using U.S.S.G. § 2J1.3 rather than § 2B1.1, maintaining that her offense was more akin to fraud than to perjury; the Fourth Circuit rejected this argument.

United States v. Carter, 601 F.3d 252 (4th Cir. 2010)

The Fourth Circuit held that a sentencing court properly applied a two-level enhancement upon finding that the defendant recklessly created a substantial risk of serious bodily injury when he entered another person's apartment without permission while fleeing from arresting officers.

United States v. Lewis, 606 F.3d 193 (4th Cir. 2010)

Even though the Guidelines are advisory, application of the version of the Sentencing Guidelines that was in effect at the time of a defendant's sentencing, rather than the version that was in effect at the time the defendant committed the offense, would result in a significant risk of an increased sentence, and therefore would violate the Ex Post Facto Clause. The defendant's sentence under the current Guidelines would have yielded a range of 41-51 months, whereas his sentence under the Guidelines that were in effect at time he committed the offense would yield a range of 21-27 months.

United States v. Knight, 606 F.3d 171 (4th Cir. 2010)

The Fourth Circuit rejected defendant's argument that she was entitled to acceptance points despite her obstruction of justice (absconding) because the obstruction took place prior to her acceptance of a guilty plea. Emphasized the fact intensive nature of the acceptance of responsibility inquiry.

United States v. Ridley, 381 Fed. Appx. 247 (4th Cir. 2010)

Court held that there was insufficient evidence to believe that the defendant possessed his firearm in connection with another felony offense under 2K2.1(b)(6) under the following factual scenario: gun and ammunition found in trunk, very drunk defendant with priors for assault and murder was found at the wheel wearing a ski mask as a hat and in possession of a bulletproof vest, and claiming to be on his way "to get," some guys who had just robbed him.

United States v. Peterson, 607 F.3d 975 (4th Cir. 2010)

Interprets U.S.S.G. 2S1.3(b)(2)'s upward adjustment for the structuring of financial activities as part of a pattern of unlawful activity involving \$100,000 or more within a 12 month period. Holds that the enhancement applies to a situation in which the "pattern," is the defendant making multiple deposits within a 12- month period totaling \$100,000 or more, in an attempt to avoid depositing the full amount at once, in order to avoid the bank's reporting requirements. Rejected the reasoning of a Seventh Circuit case holding that the sentencing court should look at the number of structuring schemes instead of the number of deposits. Held that the pattern of unlawful conduct required for the enhancement to apply can consist solely of conduct that took place during the course of the offense.

United States v. Blankenship, Slip Copy, 2010 WL 2465237 (4th Cir. 2010)

Bad case re: the application of § 2K2.1(b)(6), use or possession of a firearm in connection with another felony offense – a four-level enhancement. Defendant's felony was felony mail theft – stole prescription drugs from the mail and used them during his route as a mail carrier. He had a firearm in his waistband and one in a duffle bag in his mail truck when arrested. He claimed that he always carried a firearm on his mail route for protection because it was a late-night rural route, and that the firearm in his duffle was left there from when he last went to a shooting range. The

Fourth Circuit agreed with the District court that the firearm served to "embolden and protect," his felonious conduct.

United States v. Perez, 609 F.3d 609 (4th Cir. 2010)

Perez, an illegal alien, was on probation in Montgomery County for a 3rd Deg sex offense and was warned by his PO that he was on the verge of violating. When Perez showed up to his next appointment with the PO, he was arrested by ICE agents. Search incident to arrest revealed a loaded firearm in the backpack that Perez brought into his PO's office. Perez admitted prior membership in MS-13. The district court imposed three enhancements and an upward departure. The Fourth Circuit held: (1) conduct of carrying a loaded firearm, w/out a safety on it, in a backpack, at least facilitated or had the potential of facilitating the MD crime of reckless endangerment so court did not err in applying a 4-point enhancement per § 2K2.1(b)(6) (carried firearm in connection with another felony); (2) proper to impose the psychological injury enhancement under § 5K2.3 because the incident caused the PO to wear a bullet-proof vest and request a job transfer; (3) transferring the PO and posting a new sign stating its policy against bringing weapons into the office was a significant enough disruption in the function of the probation office to justify an enhancement under § 5K2.7 (interference with government function); and (4) resulting sentence was reasonable. Concurrence may be worth glancing at as it encourages the court to choose not to rule on guideline issues where the sentencing court made separate 3553(a) findings justifying the final sentence – hopefully our bench isn't reading this – seems to be the way to get around potentially incorrect guideline rulings – which worked in *U.S. v. Knight*.

United States v. Haught, Slip Copy, 2010 WL 2725606 (4th Cir. 2010)

Affirmed the denial of acceptance of responsibility points as a result of the defendant violating his pretrial release by telling his PTRO that he hadn't used marijuana in several months and then testing positive a few days later.

United States v. Scher, Slip Copy, 2010 WL 3002046 (4th Cir. 2010)

The following facts were sufficient for an adjustment for distribution of CP to a minor: screen name was AmyP12, online chat records reveal that AmyP told the defendant she was 12 and sent him pictures of a girl who appeared to be 12 years old. This was not an undercover case and there is no other evidence of who AmyP is or how old she was.

United States v. Nolasco-Ramirez (08/06/10)

Rejected the defendant's policy challenge to the 16 level bump under the illegal re-entry guideline for aggravated felonies that are crimes of violence. The Fourth Circuit does not discuss the specifics of the defendant's arguments, but you might want to take a look at the briefs on this one if you are thinking about deconstructing this guideline adjustment.

United States v. Lovin, Slip Copy, 2010 WL 3512536 (4th Cir. 2010)

This may be worth looking at if you have a leader/organizer enhancement at issue. Bad decision, but still worth looking at.

United States v. Padgett, Slip Copy, 2010 WL 3937981 (4th Cir. 2010)

Very fact-specific case re: the Escape guidelines. Held that the 4 level reduction for escaping from a "non-secure facility," (§ 2P1.1(b)(3)) does not apply where the defendant escaped from his halfway house while US Marshals were at the halfway house, attempting to cuff him, to transfer him back to BOP for various HWH rules violations.

United States v. Chandia, Slip Copy, 2010 WL 3556255 (4th Cir. 2010)

Reversed the district court, for the second time, for failing to appropriately apply the sentencing enhancement for "committing a federal crime of terrorism," under 3A1.4. Despite the defendant's conviction of three counts of providing material support to terrorists, the Fourth Circuit held that the enhancement did not automatically apply. It explained that the definition of "federal crime of terrorism," includes the specific intent to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. Even after remand, this specific intent had not been found by the sentencing court, and the sentencing court had not resolved disputed issues in the PSR that went to this issue of intent. Remanded for further fact finding.

United States v. Fordham, Slip Copy, 2010 WL 4465252 (4th Cir. 2010)

Not much analysis, but affirms the denial of a minor role adjustment and the imposition of a vulnerable victim adjustment in a mortgage fraud case.

United States v. Sutton, Slip Copy, 2010 WL 4683715 (4th Cir. 2010)

Held that the DC did not plainly err in using the 2B3.1 GL (bank robbery) instead of 2B2.1 GL (burglary) where the offense was breaking into and stealing money from ATMs. Primarily held that 2B3.1 was more appropriate because it addresses harm to a financial institution, which 2B2.1 does not. Also rejected the defendant's challenge to the DC's consideration of other uncharged ATM break-ins.

United States v. Garcia, Slip Copy, 2010 WL 4683556 (4th Cir. 2010)

In a child porn case, upheld the DC's refusal to vary downward because of the lack of empirical evidence to support the GL requirement that 1 video = 75 still images.

United States v. Wallace, Slip Copy, 2010 WL 4949234 (4th Cir. 2010)

In an Anders brief case, the 4th Circuit identified a good issue that the defendant missed - he should not have received a 2 level upward adjustment for the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification under § 2B1.1(b)(10)(C)(i) because he was also convicted of 1028A for the possession of the same identification that the probation officer relied on for the upward adjustment.

United States v. Hampton, --- F.3d ----, 2010 WL 5116895 (4th Cir. 2010)

The court held that all guideline adjustments were appropriate: 1) an upward adjustment per sec. 3A1.2(c)(1) for assaulting an officer while resisting arrest applied - specifically, the assault here involved a serious risk of bodily injury where the arresting officer suffered an injury to his rotator cuff that required medical attention and 6 weeks of physical therapy; also involves a lengthy discussion of the definition of "assault," under the guidelines and held that a completed battery constitutes an assault under the guideline provision and that struggling with the officer while

reaching for a gun to attempt to use against the officer, all resulting in an injury to the officer, constituted a completed battery; 2) next, approved of the adjustment under 2k2.1(b)(6) for possession of a firearm in connection with another felony offense based on the assault on the officer - concluded that under S. Carolina law, the defendant committed a felonious assault on the officer and that while the "in connection," element was a closer call, having the firearm close at hand and attempting to use it while committing the assault was sufficient; and 3) rejected the defendant's argument that imposing both of the above adjustments constituted double counting because they furthered the same policy goal (detering and punishing felonious assaults on officers).

CRIMINAL HISTORY

United States v. Martinez-Melgar, 591 F.3d 733 (4th Cir. 2010)

The Fourth Circuit ruled that a defendant's participation in a North Carolina drug court supervision program did not constitute a prior sentence under the Sentencing Guidelines for criminal history purposes, because, to participate in the program, the defendant was not required to admit guilt in a judicial proceeding in open court.

United States v. McNeill, 598 F.3d 161 (4th Cir. 2010)

The Fourth Circuit addressed the issue of whether a prior offense qualifies as an ACCA predicate where the state has subsequently lowered the maximum penalty that made the offense a predicate. The defendant qualified as an ACC based, in part, on 2 North Carolina drug offenses that carried max. sentences of 10 years. After committing the offenses, but prior to sentencing, North Carolina revised the statutes by lowering the max. penalties to 25 months, so that they were no longer "serious drug offenses," within the meaning of the ACCA. At sentencing, the defendant argued that the lower statutory maximum should control; the district court disagreed. On appeal, the Fourth Circuit recognized a circuit split on the issue – decisions from the Sixth and Second Circuits supported McNeil's position; the Fifth Circuit, meanwhile, had held that the sentence that was *in effect at the time the underlying offense was committed* controlled. The Fourth Circuit sided with the Fifth Circuit. The court pointed out that the North Carolina statute specifically provided that the lower sentences would not have applied to offenses committed before the effective date of the revisions.

United States v. Rivers, 595 F.3d 558 (4th Cir. 2010)

The Fourth Circuit ruled that post-*Begay*, a conviction under South Carolina's blue light statute, which was violated when a driver fails to stop after being signaled to do so by a law-enforcement vehicle, did not qualify as a "violent felony" under the Armed Career Criminal Act. The Fourth Circuit applied the strict categorical approach and strictly looked to the elements of the offense in concluding that a prior conviction under the statute could never qualify as a "violent felony." In so doing, the Fourth Circuit reversed prior case law and significantly narrowed the circumstances under which a federal sentencing court can look beyond the elements to *Shepard*-authorized documents under the modified categorical approach. The Court held that in light of recent Supreme Court law, it is now clear that a federal sentencing court can only apply the modified categorical approach when the statute at issue expressly enumerates multiple crimes – both

violent and non-violent. Under this approach, it is not enough that a prior offense can be factually committed in a violent and non-violent manner. Rather, the statute on its face has to be expressly divided into separate crimes – violent and non-violent – in order to trigger the modified categorical approach. Applying this new framework, the Fourth Circuit held that the blue light statute only criminalized one category of a crime – failing to stop for a blue light – which is not a violent felony because it does not have an element requiring intentional failure to respond to the police. The inquiry ended there, and the Court refused to deviate from the strict categorical approach.

United States v. Bethea, F.3d 254 (4th Cir. 2010)

The Fourth Circuit held that post-*Begay* a defendant's prior South Carolina escape conviction was not a "violent felony" under the Armed Career Criminal Act, since the indictment and sentencing sheet did not necessarily show that the defendant engaged in the type of violent conduct contemplated by the ACCA. In this case, the Fourth Circuit held that the modified categorical applied and looked to *Shepard*-authorized documents even though the statute on its face only criminalized escape generally without enumerating separate crimes. At first glance, this ruling appears to contradict the *Rivers* revamped framework of the categorical approach; however, a careful review of the case indicates that *Rivers* can be reconciled with *Bethea* because the Fourth Circuit relied on South Carolina's escape statutory scheme as a whole, which enumerates both violent and non-violent escapes, to conclude that the modified categorical approach was applicable. South Carolina's statutory scheme on its face prohibits more than one category of conduct because one statutory provision criminalizes traditional escape (a violent felony) while another statutory provision criminalizes failure to return to prison (non-violent felony). As a result, the statutory scheme was expressly divisible into violent and non-violent crimes, and therefore, justified the application of the modified categorical approach.

United States v. Dean, 604 F.3d 169 (4th Cir. 2010)

Concerns the docs that a court can rely on in determining that two career offender predicates were separated by an intervening arrest (thus allowing them to serve as two separate predicates). Holds that *Shepard's* limits on the types of documents a court can rely on only applies where the reliance would increase the statutory maximum sentence. In the career offender context, it does not, therefore, *Shepard* does not apply. Rejects the defendant's argument that *Shepard* has previously been applied in advisory Guidelines cases. *E.g.*, *United States v. Maroquin-Bran*, 587 F.3d 214 (4th Cir.2009); *United States v. Farrior*, 535 F.3d 210 (4th Cir.2008) "because those cases do not address the issue of whether *Shepard's* Sixth Amendment limitations apply to advisory Guidelines sentences," focusing instead on *Shepard's* statutory rule. Also re-emphasized that under the 'categorical approach' to assessing prior convictions, a sentencing court is to look to the legal definition of the offense rather than the factual record of the defendant's particular case to ascertain the character of the defendant's conduct," and in doing so, must follow *Shepherd's* rule re: "only by looking to a specified set of 'conclusive records.'" *Shepard*, 544 U.S. at 21, 125 S. Ct. 1254. So – distinguishes between fact finding re: what the date of an arrest was vs. fact finding re the character of a prior offense.

United States v. Knight, 606 F.3d 171 (4th Cir. 2010)

More from the Fourth Circuit on the modified categorical approach to determining what constitutes a crime of violence. Examines whether a Texas conviction for 2nd degree arson is a COV for the 2K2.1 (FIP) guideline. Joins other circuits in determining that the modern, generic form of arson includes arson of real or personal property and that the Texas statute fits the modern, generic form, despite its inclusion of the burning of vegetation as one manner in which a defendant may commit the offense. Thus, court could enhance the defendant's sentence without documents specifying the manner in which she committed the offense.

United States v. Warren, Slip Copy, 2010 WL 2465249 (4th Cir. 2010)

Application of the modified-categorical approach to the crime of violence determination under ACCA for North Carolina's felony vehicular flee to elude statute. Joins the Fifth, Sixth, Seventh, and Tenth Circuits in holding that "vehicular fleeing involves an act of defiance of the law and a likely potential face-to-face confrontation at the conclusion of pursuit and therefore a risk of physical injury similar in degree to the enumerated offenses exists," and then separately holds that in the case of North Carolina's felony vehicular fleeing, the presence of charged aggravators (speed in excess of 15 mpd over the limit and reckless driving) means the offense "involves conduct that is similarly violent and aggressive to burglary, arson, extortion, or crimes that involve the use of explosives," thus making the prior conviction a predicate for ACCA purposes.

United States v. Holmes, Slip Copy, 2010 WL 2545601 (4th Cir. 2010)

Not a particularly interesting case, except for the holding that prior convictions can be used as predicates to enhance a sentence pursuant to 841(b) even if the conduct underlying the convictions was part of the conspiracy that is the subject of the current sentence. This rule applies as long as the conspiracy continued after the prior convictions became final. Not a new statement of law, but thought it was useful for those of us who haven't dealt with this factual scenario before.

United States v. Champion, Slip Copy, 2010 WL 2512325 (4th Cir 2010)

Very short and unclear opinion requiring a lot more digging to fully decipher, but in sum, the Fourth Circuit rejected defendant's argument that North Carolina's unique sentencing scheme (in which the guidelines set the stat max in some confusing way) meant that he was legally innocent of being a felon in possession because his prior North Carolina conviction for PWID marijuana was not punishable for more than one year. Held that *United States v. Rodriguez*, 553 U.S. 377 (2008) ("maximum term of imprisonment prescribed by law," for determining whether a prior offense qualified as a "serious drug offense" under the ACCA, does not mean the top of the Guidelines range, but rather the stat. max), did not undermine *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005) (North Carolina conviction for possession with the intent to distribute marijuana was a "controlled substance offense" under the guidelines despite the fact that only aggravated instances of the offense were punishable by more than one year).

United States v. Perry, Slip Copy, 2010 WL 2512339 (4th Cir. 2010)

Pair of cases rejecting the defendants' arguments that a sentencing court has to look at what the actual stat max was for the actual defendant at issue when determining whether a prior offense is a predicate under 922(g) in one case and the Career Offender guideline in the other case. The Fourth Circuit held that the argument was foreclosed by *United States v. Harp*, 406 F. 3d 242 (a

sentencing court must look at the stat max for the most serious hypothetical defendant, assuming all possible subsequent offender enhancements were applied). Before despairing about this, take a look at *Carachuri-Rosendo v. Holder*, 2010 WL 2346552 – where the Supreme Court recently held in that in determining whether something is an aggravated felony for mandatory minimum law purposes, it doesn't matter that the defendant could have been charged as a subsequent offender, thus subjecting him to a higher stat max, it matters whether the defendant actually was charged as a subsequent offender. A footnote in that case suggests that this reasoning applies in the criminal context for crimes of violence, etc. under the ACCA. I assume these cases were briefed and argued well before the Supreme Court opinion came out.

United States v. Alston, 611 F.3d 219 (4th Cir. 2010)

Alford pleas can no longer be relied on under *Shepard* to prove the nature of a prior conviction. Here, one of the client's 3 ACCA predicates was a Maryland Second Degree Assault – the result of an *Alford* plea in which the defendant did not agree that he performed the acts described in the factual proffer. Ct. held that because he pled pursuant to Alford he admitted to no facts to support a finding that his assault was a crime of violence and because such facts are not inherent in a Maryland conviction for second-degree assault, it could not conclude that Alston's conviction for second-degree assault qualifies as a predicate conviction under ACCA.

United States v. Jarmon, 596 F.3d 228 (4th Cir. 2010)

The Fourth Circuit found that post-*Begay* a defendant's prior North Carolina conviction for larceny from a person was a "crime of violence" within the meaning of the residual clause of the career offender provision. The Court found that larceny from a person, even though typically accomplished by stealth, is similar in kind to enumerated offense of burglary because it is inherently aggressive, purposeful, and creates serious risk of violent confrontation and injury regardless of the fact that the offense itself does not necessarily involve any violence.

United States v. Callihan, Slip Copy, 2010 WL 2961236 (4th Cir. 2010)

Held that North Carolina's crime of "larceny from the person," is a violent felony for ACCA purposes. Cited *United States v. Jarmon* (in which it held that the same crime was a crime of violence for Career Offender purposes). Reasoned that the conduct involved was the type of purposeful, violent, and aggressive conduct that would support an inference that this offender would be more dangerous with a gun and that larceny from the person created a risk similar to, if not greater than, generic burglary.

United States v. Munoz-Barahona, Slip Copy, 2010 WL 3010415 (4th Cir. 2010)

This opinion contains one particularly bad ruling, that will hopefully remain buried. The defendant argued that the district court erred in departing from criminal history category IV to VI without applying an incremental approach – moving first to category V and explaining why this was not sufficient before moving on. The Fourth Circuit said such an approach is not required because *United States v. Dalton*, 477 F.3d 195 (4th Cir. 2007), the case relied upon by the defendant, only requires such an approach when moving upward from category VI. However, Dalton did not limit the rule, it simply involved a case in which the departure was upward from category VI and an earlier case that is still good law, *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992), applies this reasoning to all criminal history category upward departures. Not sure if

they just forgot about *Rusher*, were trying to screw this defendant, or were attempting to limit the rule, but it is a bad opinion. We should still argue *Rusher* if given the opportunity – unlike *Munoz-Barahona*, it is a published opinion.

United States v. Mason, Slip Copy, 2010 WL 3297254 (4th Cir. 2010)

Disagreed with the district court's finding that conspiracy to discharge a firearm into an occupied building is not a crime of violence for Career Offender purposes. Cited the Guidelines' statement that crimes of violence include conspiracies to commit such offenses. Also cited to it is own previous rejection of an argument that under ACCA, you need an overt act in furtherance of the conspiracy in order for conspiracy to commit a COV to constitute an ACCA predicate – *United States v. White*, 571 F.3d 365 (2009). Also found that under North Carolina law, the defendant and his co-conspirator had to have specifically intended for the object of the conspiracy to have been carried out, in order to have been convicted.

United States v. Vann, 620 F.3d 431 (4th Cir. 2010) (VACATED BY EN BANC OPINION)

In light of *Begay*, the Fourth Circuit rejected the government's argument that North Carolina's crime of taking indecent liberties with a child was categorically a violent felony, somewhat overturning it is own precedent in *United States v. Pierce* 278 F.3d 282 (4th Cir. 2002) (holding that North Carolina's offense of taking indecent liberties with a child was a crime of violence for purposes of the career offender enhancement). However, under the modified categorical approach, found that the crime was committed in this case by willfully committing a lewd or lascivious act upon the body of a child under the age of 16 and that, as so formulated, the conviction was a violent felony.

The disturbing part of the opinion is how the court determined that, in this case, the offense was committed in the violent felony manner. The court relied on the presentence report (holding that this was sufficient because the defendant did not object to its contents and its contents were said to have come from the charging documents), and then requested that *the defendant* provide the actual charging document during the course of the appeal, which he did. Because the charging document recited the text of the statute itself, which sets forth the two ways of committing the offense in the conjunctive the court was comfortable concluding that the defendant admitted having committed a lewd or lascivious act upon the body of a child. The court reasoned that, in a guilty plea, the defendant decides what he admits, and he chose to admit the entire offense, by admitting the crime as stated in the statute, which is in the conjunctive. The court contrasted this with a jury verdict, where we might not know which manner of committing the offense the jury had in mind when it returned its guilty verdict. BTW, J. King dissented – thought the categorical approach should have been taken and that the offense is categorically not a COV, and disagreed with the majority's reliance on the conjunctive language in the charging document as proof of what the defendant admitted.

United States v. Brown, Slip Copy, 2010 WL 4137516 (4th Cir. 2010)

Rejects the argument that under *Begay*, burglary of a commercial building is not a crime of violence. Holds that *Taylor* continues to control the definition of burglary for ACCA purposes – an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime – which includes breaking and entering of a commercial structure.

United States v. Wright, 594 F.3d 259 (4th Cir. 2010)

Held that a defendant's prior South Carolina juvenile adjudications for three burglaries involving the use or carrying of a firearm could be counted as predicate violent felonies under the Armed Career Criminal Act, 18 U.S.C. § 924(e), even though the family courts that rendered those adjudications did not employ juries, when the defendant received many other procedural safeguards, including the right to appropriate notice, to counsel, to confrontation, and to cross-examination.

United States v. Byrd, Slip Copy, 2010 WL 4386875 (4th Cir. 2010)

This opinion gives a nice example of how the court is applying the categorical approach post-Begay. Initially concludes that South Carolina's offense of pointing and presenting a firearm at another person, in violation of S.C. Code Ann. § 16-23-410 (2003), was NOT a crime of violence (for guideline purposes). Reasoned that given the following definition of the offense: a person violates § 16-23-410 if he: (I) points or presents; (ii) a loaded or unloaded firearm; (iii) at another person. *State v. Burton*, 589 S.E.2d 6, 8 (S.C. 2003), it is simply not an articulated element of the offense that physical force be used, attempted or threatened before a violation will occur. However, the court then recognized that the South Carolina Supreme Court recently held that a violation of the statute will occur so long as an individual "intend[s] to specifically threaten" another individual. *In re Spencer R.*, 692 S.E.2d 569, 572 (S.C. Ct. App. 2010). Given that clarification, the court ultimately ruled that the offense is a COV under § 2K2.1(a)(2).

United States v. Turner, Slip Copy, 2010 WL 4643334 (4th Cir. 2010)

Holds, with no analysis, that the Supreme Court's decision in *Johnson v. United States*, 130 S. Ct. 1265 (2010) does not call into question the 4th Cir's holding in *United States v. Jarmon*, 596 F.3d 228, 230-33 (4th Cir. 2010) that Larceny from the Person is a violent felony.

United States v. Clay, --- F.3d ----, 2010 WL 4970223 (4th Cir. 2010)

Held that the defendant's conviction for Georgia felony escape is not a crime of violence under the guidelines (2K1.1). The government conceded that because the statute does not have the use of force as an element, if escape is a COV, it must be so under the "otherwise," clause. Parties agreed that the modified categorical approach applied because Georgia's escape statute enumerates three different ways of violating it - the traditional "break out" escape, which carries a serious risk of potential injury to another, and failure to return to custody and walk away from an unsecured facility, neither of which, the parties agreed, would be a COV under Chambers. The court first held that the parties were correct in agreeing that walking away from an unsecured facility is not a COV under the otherwise clause - joining five other circuits in so holding. Next, the court considered the facts of the defendant's case and held that it could not conclude that the defendant committed the "break out" type of escape as opposed from the "walk away," type of escape because of the following: the only docs submitted to prove the priors were the charging documents and court papers issued with D's guilty plea and judgment. The docs stated only that he was charged with and convicted of escape - they did not detail in what manner he had committed it. The court (this is the amazing part) then held that the fact that the defendant was also convicted of damaging government property: to wit, leg irons and shackles, on the same day that he committed the escape, did not "necessarily show," that he did anything other than walk away from an unsecured facility.

United States v. Hood, --- F.3d ----, 2010 WL 5383895 (4th Cir. 2010)

Holds that the North Carolina crime of possession of a weapon of mass death and destruction, namely a sawed-off shotgun, constitutes a crime of violence for Career Offender purposes. Analyzed the offense under the otherwise clause - "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," asking, post - Begay, whether the crime "involve[s] purposeful, violent, and aggressive conduct." Held that *United States v. Haste*, 292 F. App'x.249 (4th Cir. 2008), which held that the same offense was not a violent felony under the ACCA was not controlling here because because of a fundamental difference between the ACCA and the Guidelines with respect to their treatment of sawed-off shotguns - specifically, that the ACCA is silent as to whether Congress wanted sawed off shotguns to be considered violent felonies, while the Sentencing Commission expressly said it did in the commentary accompanying U.S.S.G. § 4B1.2. Given that Begay focuses on the intent of the drafter, the court held that this clear expression of intent by the Commission meant the offense was a crime of violence.

MISCELLANEOUS SENTENCING ISSUES

United States v. Mendoza-Mendoza, 597 F.3d 212 (4th Cir. 2010)

The Fourth Circuit vacated and remanded the district court's imposition of a low-end guideline sentence because the district court "accorded the Guidelines a quasi-mandatory effect." The Fourth Circuit made clear that this was a rarity, that it was not passing judgment on the substantive reasonableness of the sentence, and that it felt compelled to remand only because the district court stated at the outset of sentencing that it was "obligated" to give the defendant a guideline sentence unless "a reason for a departure . . . or a variance" was present.

United States v. Young, 609 F.3d 348 (4th Cir. 2010)

Granted the government's cross appeal on the basis that the district court was wrong to conclude that in sentencing the defendant, he was bound by the drug quantities determined by the jury at trial. Government essentially decided to save itself time at trial by trying a smaller case quantity-wise, while saving its evidence of the larger quantities for sentencing. The Fourth Circuit said this was fine since it did not affect the stat max. Also, rejected defendant's argument that requiring sentencing courts to consider the factors under 3553(a) creates a mandatory sentencing scheme similar to that struck down in *Booker*.

United States v. Lomas, Slip Copy, 2010 WL 303408 (4th Cir. 2010)

I would take a look at this opinion if you have a case in which you are attempting to narrow the number of victims for purposes of restitution. In this lengthy, though unpublished opinion, the court applied case law interpreting the Victim Witness Protection Act ("VWPA") to the Mandatory Victim Restitution Act ("MVRA") (one allows the order of restitution based on the defendant's ability to pay, one mandates it in full for certain crimes) to hold that where a defendant pleads guilty to one count of an indictment, involving only one victim, but that count involved the employment of a scheme, the defendant is responsible for restitution for all victims who suffered harm as a result of the scheme at issue in the count of conviction. Here, the defendant was charged in a multi-count indictment involving over 1000 victims. However, the

plea agreement did not mention any victims other than the one involved in the count of conviction – it simply said that he would pay restitution to "all victims." The Fourth Circuit said that the scheme in the count of conviction was the same as that employed in all of the other counts and that the agreement did not narrow the scope of that scheme to the one victim. The court also relied heavily on the fact that the count of conviction, as pled in the indictment, incorporated all other facts alleged in the indictment. Defendant was ordered to pay over \$45 million dollars.

United States v. Lively, Slip Copy, 2010 WL 3069762 (4th Cir. 2010)

Fourth Circuit reiterated its earlier statement in *United States v. Allen*, 450 F.3d 565 (2006), that the government must move under 3553(e) in order to get below a mandatory minimum. Here, the district court gave a Child Porn defendant, with a mandatory minimum of 5 years, a sentence of 1 day and probation. At sentencing, the government conceded that while the defendant rendered outstanding cooperation, the government could only move under 5K1.1 because the guidelines were so far above the mandatory minimum (after the 2 levels the low end was 168 months). However, the government insinuated that if the court thought the cooperation was "worth it," it could go below the 5 years on its own.

The Fourth Circuit held that neither the plea agreement, in which the government agreed to move under both 5K1.1 and 3553(e), nor the government's mistaken belief that the court could go below the mandatory minimum just on a 5K1.1 motion, empowered the court to go below the mandatory minimum in the absence of an express motion under 3553(e) ("there are no implied 3553(e) motions, the government either makes the motion or it doesn't). However, the Fourth Circuit agreed that the government probably violated its plea agreement, and remanded for the district court to make findings on that issue.

They went on to say that the court was incorrect to use the 3553(a) factors to justify a below mandatory minimum sentence, and quoted *United States v. Hood*, 556 F. 3d 226, in holding that where the court goes below a mandatory minimum because of 3553(e), the ONLY factor it can consider in determining how low to go is the extent of the defendant's cooperation.

United States v. Smith, Slip Copy, 2010 WL 4127669 (4th Cir. 2010)

Held that the district court erred by not awarding restitution to the IRS in this tax fraud case, rejecting the district court's reasoning that it wanted to wait to see how much money the IRS recouped from the taxpayers before awarding restitution. Cited to the Mandatory Victims Restitution Act for the rule that restitution shall be ordered regardless of any money the victim stands to gain from other sources, and that the restitution amount can be reduced in the future if the victim does receive money from another source.

United States v. Rucker, Slip Copy, 2010 WL 3623553 (4th Cir. 2010)

Found plain error where the district court did not give the defendant the opportunity to allocute at sentencing. The Fourth Circuit recited a number of mitigating factors about the defendant in holding that had he been permitted to allocute, he might have received a lower sentence. Thus, the plain error affected his substantial rights.

United States v. Knight, 606 F.3d 171 (4th Cir. 2010)

Includes a bad ruling on the "affecting substantial rights," prong of the plain error analysis as applied in the context of a sentence review. Court found plain error in the calculation of the Guideline Range, but decided that the variance sentence the defendant received was intentionally crafted and would have been imposed regardless of the lower guideline range that the District court should have started with.

United States v. Ridley, 381 Fed. Appx. 247 (4th Cir. 2010)

Court held that it would not consider arguments made by the government in support of a sentencing enhancement when there was no evidence on the record that the court considered those arguments in imposing the enhancement.

United States v. Starkes, Slip Copy, 2010 WL 4367120 (4th Cir. 2010)

Affirmed the imposition of a restriction on employment as a condition of probation. Nothing too exciting, but does review the case law on this issue and is worth looking at if this issue comes up.

United States v. Nelson, Slip Copy, 2010 WL 4367067 (4th Cir. 2010)

Citing *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003), 4th Cir. upheld a requirement that a convicted sex offender submit to polygraph examinations as a condition of supervised release. Rejected the defendant's argument that the absence of a limitation on the disclosure of the results created a 5th Amendment infringement that was not present in *Dotson*, where there was some limitation placed on the disclosure of the results. Said that any infringement on the defendant's 5th Amendment rights was purely speculative at this juncture, esp. given that the district court indicated at sentencing that the purpose of the condition was for treatment and monitoring compliance.

United States v. McCullers, Slip Copy, 2010 WL 3623568 (4th Cir. 2010)

This opinion contains a terrible statement re: a sentencing court's ability to depart downward on the guideline drug sentence that accompanies a 924(c) mandatory minimum. The Fourth Circuit holds that "under § 924(c), a defendant is first sentenced for the underlying drug trafficking offense, without consideration for the applicable consecutive sentences related to the firearm violations. A court may not effectively convert these sentences into concurrent sentences by shrinking the sentence that it would otherwise impose for the predicate offenses for the § 924(c) violation." There is no analysis at all, just a cite to a 2nd Circuit case, *United States v. Chavez*, 549 F.3d 119 (2d Cir. 2008). The case is written as if this has always been the law in our Circuit (despite the cite to a 2nd Cir. case), and perhaps it has been, and I just missed it. I looked at the guidelines and 924(c), and there is certainly language that would support this interpretation, though there is no plain language there. In any case, just be aware.

United States v. Boney, Slip Copy, 2010 WL 4561349 (4th Cir. 2010)

Looks carefully at the scope of what a court may consider in imposing a sentence after revocation of supervised release. Cites to Ch. 7 of the GL's, which states that, "at revocation, the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S.S.G. ch. 7, pt. A(3)(b). Here, the 4th Cir. ultimately rejected, though seriously considered,

the defendant's argument that the district court focused too heavily on the seriousness of the defendant's new criminal acts underlying the violation.

United States v. Ide, --- F.3d ---, 2010 WL 4541810 (4th Cir. 2010)

Held that a term of supervised release is tolled under 18 U.S.C. § 3624(e) while a defendant is held in pretrial detention on charges for which he is later convicted. Defendant had been on month 11 of a 36 month period of SR when he was arrested for a new offense. He was ultimately convicted and served a sentence. Two years after release from that sentence, the government filed a petition to violate his SR based on the new conviction. He argued that the petition wasn't timely because, at that point, he had already served about forty-one months of supervised release. However, his calculation included a period of seven months and six days that he had spent in pretrial detention on the new offense. The 4th's analysis turned on whether a person held in pretrial detention is "imprisoned" "in connection with a conviction," within the meaning of § 3624(e), which states that, "A term of supervised release *does not run during any period* in which the person is *imprisoned in connection with a conviction* for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." This holding joins the Fourth with the Fifth, Sixth, and Eleventh Circuits and, not surprisingly, brings it into conflict with the Ninth. Here, the defendant received credit towards his new sentence for the time in PT detention. While this was not held to be a necessity in order to toll SR, it definitely factored into the court's consideration, so I would argue it probably is necessary.

United States v. Kellam, Slip Copy, 2010 WL 4949484 (4th Cir. 2010)

This case is worth noting as it reminds us that on remand, a sentencing court must stay within the confines of the mandate from the court of appeals. Here, the district court conducted a de novo resentencing, when the 4th Circuit believed it was issuing a mandate that was "precise and unambiguous, and instructed the district court to correct one specific error only."

United States v. Glisson, Slip Copy, 2010 WL 5189541 (4th Cir. 2010)

Involves the awarding of restitution to 3rd parties. Here, the defendant embezzled money from the victim, and then borrowed money from a 3rd party to pay the victim back. The District Court ordered restitution to both the victim and the 3rd party. The 4th Cir. held that while it was permissible to order restitution to a 3rd party under 18 USC 3664(f) (receipt of compensation by a victim from a 3rd party with respect to a loss caused by the defendant), the District Court failed to specify, as required, that the actual victim had to be paid before the 3rd party was paid.

United States v. Rogers, Slip Copy, 2010 WL 5135249 (4th Cir. 2010)

The 4th Circuit upheld a sentence based on drug quantities that were approximately 10 times those found by the jury at trial. While the judge is clearly not bound by the quantities determined by the jury, what is disturbing about this case is that the additional quantities weren't from acquitted conduct, or other relevant conduct, they were derived from the same testimony that the jury heard at trial. The probation officer actually recommended quantities that were even larger, but after recalling a couple of the gov's witness at sentencing, the judge settled on the 10 fold amount.

United States v. Leftwich, --- F.3d ----, 2010 WL 5151619 (4th Cir. 2010)

Vacated a 2 1/2 million dollar restitution award and remanded for resentencing. The court ordered the restitution amount without referencing the statutory basis for the order, or making the findings necessary under the Victim Witness Protection Act (VWPA), factors which, the defendant had argued in his sentencing letter, did not support the restitution award. The defendant had further argued below that the Mandatory Victims Restitution Act (MVRA) did not apply to his case at all. The 4th Cir. observed that because the two statutes have different requirements, the failure of the district court in this case to specify the statute under which it ordered restitution prevented it from effectively determining whether the court properly exercised its discretion in fashioning that restitution order. Thus, the court held that it could not review the district court's decision and remanded the case for the court to identify which statute it was relying on and apply the appropriate factors as required by that statute.

United States v. Smith, Slip Copy, 2010 WL 5392807 (4th Cir. 2010)

This is a little scary - the court approved of the admission, at sentencing, of a statement made by the defendant to his polygraph examiner. The sentencing judge said he was not considering the fact that the defendant failed (though obviously he was aware of this), but was only considering the statement made by the defendant after being told that he failed -- the statement being that he lied when he denied continuing to deal drugs while on pretrial release. This statement resulted in the district court denying the defendant his safety valve adjustment.

United States v. Godwin, Slip Copy, 2010 WL 5421372 (4th Cir. 2010)

This decision clarifies that before varying from the guideline range, a sentencing court must first determine whether a departure is warranted under the guidelines and, if so, vary only if the departure is inadequate to achieve a reasonable sentence. In this case, the district court imposed an upward variance without first considering whether a departure was warranted and without providing the notice to the defendant that an upward departure would have required. Clarifies that this rule, set forth in *Moreland*, 437 F.3d 424, 432 (4th Cir. 2006), is still the law, regardless of some language in *United States v. Hawes*, 309 F. App'x 726, 732 n.2 (4th Cir. 2009) suggesting that the rule may not be necessary after *Gall*.

APPELLATE PROCEDURE/POST-CONVICTION/DEATH PENALTY

INEFFECTIVE ASSISTANCE OF COUNSEL

United States v. Chapman, 593 F.3d 365 (4th Cir. 2010)

The Fourth Circuit held that the determination whether to accept a trial court's offer to grant a defendant a mistrial without prejudice was a tactical decision to be made by defense counsel

rather than the defendant, and that defense counsel did not provide constitutionally ineffective assistance by refusing the defendant's instruction to accept the trial court's offer.

United States v. Tucker, 603 F.3d 260 (4th Cir. 2010)

The Fourth Circuit ruled that a defense attorney's failure to object at sentencing to the use of his client's prior conviction for the South Carolina misdemeanor offense of common law assault and battery as a predicate violent felony under the Armed Career Criminal Act – which must be "punishable by imprisonment for a term exceeding one year" – constituted ineffective assistance of counsel, when information in the pre-sentence report was sufficient to alert the attorney that the state charge was remanded to a magistrate court where the defendant pled guilty to the misdemeanor offense, which only carried a maximum penalty of 30 days in prison.

United States v. Luck, 611 F.3d 183 (4th Cir. 2010)

2255 finding ineffective assistance of counsel where trial counsel did not request an informant instruction in a trial in which there was testimony by paid informants ("informants for hire") whose testimony was not corroborated by other evidence at trial.

United States v. Cooper, 617 F.3d 307 (4th Cir. 2010)

2255 case re: when failing to consult about the decision to appeal constitutes ineffective assistance of counsel. Here, it did not because the defendant repeatedly expressed his desire to have the criminal proceeding concluded, received the best possible sentence he could have received under the agreement he entered into with the government, and had no nonfrivolous issues to appeal. Other relevant facts are that the defendant claimed to have asked his attorney to visit him in jail after his sentencing (at which time he intended to express his desire to appeal) but the attorney never showed up. The defendant testified further that he tried to call the attorney's office but he did not accept collect calls. The attorney denied being asked to visit his client and said he did no further work on the case after the sentencing.

United States v. Garcia, Slip Copy, 2010 WL 4683556 (4th Cir. 2010)

In a child porn case, rejected an argument that failing to view the videos seized from the defendant's computer constituted ineffective assistance of counsel.

DEATH PENALTY AND RELATED HABEAS RULINGS

United States v. Caro, 597 F.3d 608 (4th Cir. 2010)

The Fourth Circuit has rejected a defendant's appeal in his capital case, finding that the trial court's *voir dire* question, which asked whether the prospective jurors would always vote for a death sentence for someone convicted of a capital offense regardless of the facts and circumstances, adequately enabled the court to weed out prospective jurors irrevocably committed to imposing the death penalty. Therefore, the court's decision not to adopt the defendant's proposed question, asking whether anyone convicted of intentional and premeditated murder deserved to get the death penalty, was not an abuse of discretion.

Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010)

The Fourth Circuit has vacated the denial of federal habeas relief to a death row inmate, finding that new evidence of an I.Q. test showing the petitioner's score to be 66, which was first presented during the federal habeas proceedings, did not fundamentally alter and render unexhausted the petitioner's claim that his trial counsel was ineffective for failing to argue that he should not be executed because he was mentally retarded.

Lewis v. Wheeler, 609 F.3d 291 (4th Cir. 2010)

In affirming the denial of habeas relief to a Virginia woman sentenced to death after being convicted of murder for hire, the Fourth Circuit ruled a state appellate court's determination that the petitioner was not prejudiced by her attorney's failure to present expert testimony that she suffered from borderline intellectual functioning, dependent personality disorder, and prescription drug addiction as mitigation evidence at the sentencing phase was not an unreasonable application of clearly established federal law, and thus the petitioner was not entitled to relief on her claim of ineffective assistance of counsel. The Fourth Circuit found that the evidence showed that, notwithstanding the petitioner's borderline intellectual functioning, she deliberately planned and executed a scheme to kill her relatives for monetary gain.

Walker v. Kelly, 593 F.3d 319 (4th Cir. 2010)

According to the Fourth Circuit, a district court did not clearly err in concluding that a habeas petitioner failed to prove he suffered from significant limitations in adaptive behavior, as required to establish that he was mentally retarded under Virginia law, even though four experts testified that the petitioner's skills limitations were significant, when the district court was presented with conflicting evidence concerning the petitioner's adaptive skills and had the opportunity to assess the various witnesses who testified.

United States v. Lighty, 616 F.3d 321 (4th Cir. 2010)

These are companion death/life cases tried by CJA counsel involving three co-defendants, one of whom was severed for trial. The opinions are long, with lots of rulings, but the Fourth Circuit found not one instance of reversible error. In almost every instance, the overwhelming evidence of guilt rendered whatever mistakes the court or the government made at trial irrelevant under the harmless error standard. The opening paragraph of the opinion reads: "While the actions of the Assistant United States Attorneys (AUSAs) handling Lighty and Flood's joint trial unnecessarily introduced error into it, such error is not reversible . . ."

The most egregious error at trial probably involved the admission of evidence of an unrelated murder by the alleged shooter in the case under R. 404(b) and there's some good language to use there for 404(b) arguments. Error was also found in the government's statement in closing that the victim's family asked the jury to impose the death penalty. However, the Fourth Circuit held that, "It is . . . highly unlikely that the jury was misled because the district court instructed the jury that the arguments of counsel were not evidence."

One specific ruling that death penalty folks might want to take note of is that the Fourth Circuit joined a number of other circuits in holding that *Blakely v. Washington* does not change the rule that non-statutory aggravating factors do not have to be charged in the indictment. Another reason to look at this for future death penalty cases is that the Fourth Circuit upheld the district court's denial of a motion for discovery on a selective prosecution claim. While there is not much by way of analysis, the case cites some really good & shocking stats re: the application of the death penalty against African Americans in our district.

Finally, the Fourth Circuit upheld the stacking of multiple, subsequent 924(c)s where the "multiple," 924(c)s were all from the same offense – here, brandishing the gun during the kidnapping at two different people and shooting a third person – three 924(c)s.

Miscellaneous Post-Conviction/Appellate Procedure Issues:

Appleby v. Warden, 595 F.3d 532 (4th Cir. 2010)

Denied habeas relief in a case where defendant entered a guilty plea to a third-time DUI offense, and was advised that the maximum penalty he could receive was six years in prison. Between the plea and sentencing, the state prosecutor filed an information alleging that he had 5 previous convictions for crimes punishable by imprisonment in a penitentiary and is eligible for a life sentence under a recidivist statute. Defendant received a life sentence. The Fourth Circuit held that the state Supreme Court's holding that the recidivist proceedings were not a direct consequence of the guilty plea, and thus his plea was knowing and voluntary, was not contrary to or an unreasonable application of established federal law as determined by the Supreme Court.

Rice v. Rivera, 617 F.3d 802 (4th Cir. 2010)

Reviews some basic habeas principles in denying relief under 28 U.S.C. § 2241 and 2255, but then focuses on a post-conviction motion to vacate, filed by the government under Rule 48 (rule governing motions to dismiss indictments, informations, or complaints). Held that the SC's decision in *Eberhart v. United States*, 546 U.S. 12 (2005) applies to Rule 48 motions to vacate. Under *Eberhart*, the Supreme Court held that the filing requirements under Rule 33 (motion for a new trial) are not jurisdictional, so if the government agrees to file out of time, or doesn't raise timeliness as a defense to a Rule 33 motion, the district court can still entertain the motion. Under Rule 48, if neither the government nor the defendant object to the use of the Rule to move to vacate a conviction (even though that is not what the rule is meant for) the court has to rule on the substance of the motion. Looks at the distinction between "claims-processing rules" and "jurisdictional rules," and holds that both Rule 33 and Rule 48 are claims processing rules. Citing a number of cases, the court explained that, the "jurisdictional" label, is properly limited to

"prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority," while claim-processing rules – such as court-prescribed rules of practice and procedure – "merely prescribe the *method* by which the jurisdiction granted the courts by Congress is to be exercised." Ultimately, the Fourth Circuit reversed the denial of the government's motion to vacate under Rule 48, applying previous holdings that a Rule 48 motion must be granted unless to do so would be "clearly contrary to manifest public interest," and that a Rule 48 "that is not motivated by bad faith is not clearly contrary to manifest public interest, and it *must* be granted."

United States v. Fennell, 592 F.3d 506 (4th Cir. 2010)

The Fourth Circuit held that a district court that granted a defendant's motion for a sentence reduction based on the amendment to the crack guidelines was not required to use the same method it originally used in calculating the extent of a downward departure, but could instead use any reasonable measure for calculating a comparable departure from the amended range.

United States v. Goodwyn, 596 F.3d 233 (4th Cir. 2010)

A district court treated a defendant's request for a second reduction in his sentence for conspiracy to distribute powder and crack cocaine as a motion for reconsideration of the earlier sentence reduction, and granted the motion, further reducing the defendant's sentence. On appeal, the Fourth Circuit reversed, finding that the court lacked the authority to grant the defendant's motion for a second reduction of his sentence.

United States v. Stewart, 595 F.3d 197 (4th Cir. 2010)

Held that even defendants who already received Rule 35 sentence reductions for substantial assistance are eligible to receive a further reduction to reflect, proportionally, the retroactive changes in the crack sentencing guidelines. Declined to follow two previous, unpublished decisions holding otherwise: *United States v. Russell*, 322 Fed. Appx. 346 (4th Cir.2009); *United States v. Farabee*, 316 Fed. Appx. 258 (4th Cir.2009).

United States v. Jones, Slip Copy, 2010 WL 2825624 (4th Cir. 2010)

This is a bad crack reduction case that could have repercussions in other re-sentencing contexts. The district court held that the defendant was not eligible for a crack reduction because his offense involved more than 4.5 kilos of crack (the offense level remained the same after the guideline amendments for quantities over 4.5 kilos). On appeal, the defendant argued that at his original sentencing, the district court only found him responsible for 1.5 kilos and thus it was barred from now concluding that he was responsible for more. The Fourth Circuit joined the Sixth and Seventh Circuits in concluding that, "While the district court may not make new findings of drug amounts inconsistent with those made during the original sentencing, the court is permitted to make new findings that are supported by the record and not inconsistent with the findings at the original sentencing." Here, the Fourth Circuit found that the district court's implicit adoption of the PSR, which found the defendant liable for 26.3 kilos of crack, justified ignoring its explicit finding at the original sentencing hearing that the defendant was only responsible for 1.5 kilos. The intellectually dishonest part of the opinion is that the Sixth and Seventh Circuit cases involved original findings that the defendant possessed "at least 1.5 kilos,"

or "more than 1.5 kilos," which was not the case here – it was simply 1.5 kilos, none of this "at least," or "more than," language.

United States v. Munn, 595 F.3d 183 (4th Cir. 2010)

Held that the district court had authority to reduce defendant's sentence based on amendment to sentencing guidelines for crack cocaine convictions, even though defendant was designated career offender at sentencing where the defendant was granted an overrepresentation departure from career offender guidelines range, and sentencing court relied on guidelines for crack cocaine convictions in calculating extent of departure.

United States v. Pettiford, 612 F.3d 270 (4th Cir. 2010)

The Fourth Circuit held that the district court erred in granting Pettiford's § 2255 petition because Pettiford did not show that the vacated sentences alone rendered his federal sentence unlawful (he still had three predicates left at the time Legg agreed to hear the case). It also held that by failing to challenge his remaining predicates at sentencing or on direct appeal, Pettiford procedurally defaulted on his claim that the district court improperly enhanced his sentence under the ACCA. And, it held that actual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from actual innocence of the predicate crimes.

United States v. Bowles, 602 F.3d 581(4th Cir. 2010)

Bowles was charged with multiple drug and firearm charges. After he requested a psychiatric evaluation, Bowles was diagnosed with multiple mental disorders and determined to be incompetent to stand trial. He was committed for the purpose of restoring his competency. After four years, the Government sought to have Bowles forcibly medicated. The district court so ordered. Bowles did not seek an interlocutory appeal of the medication order. The medication restored Bowles's competency, after which he pleaded guilty to being a felon in possession of a firearm. Bowles was sentenced to 188 months in prison.

Bowles appealed, seeking to challenge the district court's order that he be forcibly medicated to restore competency. The Fourth Circuit dismissed the appeal, holding that the issue had been waived by Bowles's guilty plea. A plea deprives the defendant of the ability to seek review on any non-jurisdictional ground, aside from the voluntariness of the plea itself. The proper means to challenge an order to forcibly medicate a defendant is via an interlocutory appeal.

United States v. Guerra, Slip Copy, 2010 WL 4561351 (4th Cir. 2010)

The court held that the defendant's written appeal waiver - specifically, the waiver of his right to appeal his conviction and raise claims of ineffective assistance of counsel or prosecutorial misconduct on direct appeal - were not binding where neither the government nor the court reviewed the right to appeal the conviction or raise prosecutorial misconduct on the record during the Rule 11 hearing and the government actually mis-stated the nature of the right to raise claims of ineffective assistance of counsel.

Timms v. Johns, -- F.3d ----, 2010 WL 4925395 (4th Cir. 2010)

This is a VERY convoluted opinion that relates directly to the remanded *Comstock* opinion (*United States v. Comstock*, -- F.3d ----, 2010 WL 4925389 (4th Cir. 2010)). Essentially, a guy outside of the *Comstock* case who was due to be released aside from the Gov's attempt to commit him under Adam Walsh filed a pro se habeas petition instead of appealing the DC's decision to stay his commitment proceeding pending *Comstock*. The 4th Circuit reversed the DC's grant of the habeas petition with directions to dismiss the petition without prejudice, finding that the defendant should have exhausted his remedies in the commitment action before availing himself of habeas review under § 2241.

United States v. Thomas, --- F.3d ----, 2010 WL 5383892 (4th Cir. 2010)

This collateral review decision includes two significant holdings. First, the court joins several other circuits in holding that in order to file a petition under 2255(f)(3) (based on a newly announced rule of law by the Supreme Court, made retroactive on cases on collateral review) the new rule does not have to have been announced as retroactive by the Supreme Court. Instead, the Circuit Court entertaining the petition can determine that the new rule is retroactive. The court then engages in a good discussion of the law regarding when a new rule of law is retroactive, comparing new procedural rules (less often held to be retroactive) to new substantive rules (generally held to be retroactive) and defined a substantive rule as a rule that "alters the range of conduct or the class of persons that the law punishes." Applying this law, the court holds that the new rule announced in *Watson v. United States*, 552 U.S. 74, 83 (2007), which held that "a person does not 'use' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs," can be retroactively applied to cases on collateral review. Finally, given the lack of detail in the record from below, and the fact that the defendant was pro se in district court, the 4th refused to find procedural default as urged by the government, and remanded the case for further consideration of that part of the argument.