
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

The Supreme Court has ruled that a defendant's prior state conviction for escape, arising from his failure to report for penal confinement, was not a "violent felony" for purposes of sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e). See *Chambers v. United States*, at p. 5.

The Supreme Court has reiterated that a district judge commits reversible error when he or she applies a presumption of reasonableness to a defendant's Sentencing Guidelines range. See *Nelson v. United States*, at p. 6.

The Fourth Circuit found that a defendant's prior conviction for statutory rape was not a "violent felony" within the meaning of the Armed Career Criminal Act. See *United States v. Thornton*, at p. 19.

luncheon following the training at The Pratt Street Ale House (formerly The Wharf Rat). My assistant, Rosemary Blaylock, will send you information on how to register for the training and information about the luncheon. If you would like to bring associates from your firms, we can accommodate additional attendees. Just let Rosemary know.

17(c) Subpoenas

The United States Attorney's Office (USAO) recently complained to the Court that the indigent defense bar is misusing 17(c) subpoenas. As a remedy, the USAO requested that the Court should limit – or eliminate – our ability to seek 17(c) subpoenas *ex parte*. The basis for the request was several instances of alleged "over-reaching" on defense counsel's part in seeking these subpoenas.

While the USAO remedy seems like an over-reach itself, and the Court is not making any procedural changes in response, we do need to be careful. The *ex parte* process brings with it a special responsibility. It is generally indefensible to request a "gag order" on the recipients of our subpoenas. Subpoenas are an

NOTES FROM THE DEFENDER

CJA Panel Training

The next CJA Panel Training is scheduled for May 15, 2009 in the Baltimore Courthouse. This is always a fun event. This is our regular felony training. We will address topics including, using investigators, 17(c) subpoenas, and criminal history. We will present The John Adams Award and have our annual

important tool in investigating our cases. We have to treat the *ex parte* process with care. Because of that concern, we are planning a series of trainings on the proper use of 17(c) subpoenas starting with the upcoming training in Baltimore.

Pretrial Detention

The Marshals have greatly expanded the number of beds for detainees in the region. The Marshals have doubled the available beds at the Maryland Correctional Adjustment Center (Supermax). They have also lined up a number of beds in the Annex to the DC Jail. This will allow the Marshals to use the Northeast Ohio Correctional Center far less. The Marshals are still using over 20 facilities to house over 500 detainees. While we continue to have concerns about the conditions at Supermax and the DC facility, it is a relief not to be traveling to Youngstown, Ohio on a regular basis.

District of Maryland and Capital Litigation

The United States District Court of Maryland is the home to more federal capital litigation than almost any other United States District Court in the nation. The District had three capital cases, with four defendants, scheduled for trial this spring. We are consistently at or near the top in terms of numbers of cases for any district in the nation. Recent data obtained from National Capital Resource Counsel reveals that the District of Maryland is first in the nation compared to other Districts in capital cases pending trial. The District is ranked fifth in bringing death-eligible charges. For “authorized cases,” *i.e.* where the USAO has received permission from the Department of Justice to seek the death penalty, we are ranked third out of 94 districts, behind

only the Eastern District of Virginia and the Central District of California.

Justice Clarence Thomas has noted that, in capital litigation, the government has a strong interest in having the jury express “the conscience of the community on the ultimate question of life or death.” The surge of federal death penalty cases in the District of Maryland seems out of sync with the “conscience” of a state where the criminal justice system has virtually abandoned the sanction. The state legislature has vigorously debated whether the death penalty should be abolished and has greatly limited its breadth. As a practical matter, the death penalty in Maryland is a thing of the past. There has not been an execution in more than four years. There has been one new death sentence in eight years. Meanwhile, federal authorities continue to pursue capital cases with a vigor that seems contrary to the values and priorities of the community.

While the sheer volume of federal capital cases strikes a discordant note in a state that has demonstrated an ambivalence to the morality and efficacy of the policy, the role that race plays in the federal death penalty may be the most uncomfortable note of all. The District of Maryland has pursued more authorized capital cases than almost any other district in the nation. Since federal death penalty prosecutions reappeared in the late 1980s, the USAO in the District of Maryland has filed death notices against 23 defendants. In every instance, the defendant is a poor person of color.

The decision-making in the District of Maryland’s capital cases spans multiple United States Attorneys and multiple administrations. I do not believe that the

decision-makers in the United States Attorney's Office, over the decades that the modern federal death penalty has existed, are motivated by the race of the defendant. They have made policy decisions to pursue drug cases and violent crimes in urban areas where a majority of the population is black.

But the impact of these discretionary decisions is disturbing. The numbers make all of us very uncomfortable. They suggest that the death penalty in the federal courts in Maryland is reserved exclusively for indigent black or Hispanic men. The criminal justice system is all about "sending messages." When it works well, and it often does in this District, we send important messages about the rule of law, but also of fairness, equal justice, and the integrity of our process. It seems that, in the District of Maryland, we are at risk of sending some pretty disheartening, unproductive messages about how our criminal justice system works.

The Robert Heeney Award

Our CJA colleague - Bob Bonsib - is this year's winner of the MSBA's Criminal Law & Practice Section's prestigious Heeney Award. The Heeney Award goes to an individual who has made substantial contributions to the criminal justice system during their career. Fred Bennett, Bill Brennan and Judge Fred Motz are among the past winners of this important award. Bob is a very deserving addition to this impressive group. The award will be presented at the Section's annual dinner on the evening of May 20, 2009. If you can attend, contact Theresa Michaels at TMichaels@msba.org for ticket information.

FPD Personnel

Joanna Silver is leaving our office in June to join the Bazelon Center for Mental Health Law. The Bazelon Center is named after Judge David Bazelon, who authored a series of groundbreaking decisions that changed mental health law. The Center is a fascinating organization that does a lot of great work - both policy and litigation - on behalf of people with mental disabilities.

Joanna has been with us for five years. I am very pleased for Joanna that she is going to join a very important organization that will allow her to continue to make a difference for under-served clients. There is no doubt Joanna will continue to do great work. And we can always benefit from a lawyer friend who can give us insight into our clients and their mental health issues. But she's going to be missed here.

RECENT CASE LAW

SUPREME COURT

Substantive Federal Law

Harmless-Error Analysis Applies To Alternative-Theory Instructional Error

The Supreme Court has ruled that a conviction on a general verdict in a case in which the jury was instructed on alternative theories of guilt, and may have relied on an invalid theory, is subject to review for harmless error. In a *per curiam* opinion, the Court vacated a judgment of the Ninth Circuit, which had deemed the error "structural" in nature, and remanded the case for further proceedings.

Hedgpeth v. Pulido, 129 S. Ct. 530 (Dec. 2, 2008).

Constitutional Criminal Procedure

For Purposes Of 18 U.S.C. § 922(g)(9), Misdemeanor Crime Of Domestic Violence Includes Prior Offense That Does Not Incorporate Domestic Relationship As Element

The Supreme Court held that the predicate offense supporting the defendant's conviction under 18 U.S.C. § 922(g)(9) for possession of a firearm after having been convicted of a misdemeanor crime of domestic violence need not have included, as a discrete element, the existence of a domestic relationship between the defendant and the victim. *United States v. Hayes*, 129 S. Ct. 1079 (Feb. 24, 2009).

Delay On Part of Public Defenders Appointed To Represent Indigent Defendants Ordinarily Not Attributable To Government

The Supreme Court ruled that counsel assigned to represent indigent defendants, just as privately retained counsel, act on behalf of their clients, and therefore delays sought by assigned counsel are ordinarily attributable to the defendants they represent. Although the government may bear responsibility for the delay that results if a gap in an indigent defendant's representation is caused by the trial court's failure to appoint replacement counsel with dispatch or if there is a breakdown in the public defender system, the Court found that the record did not establish either in this case. *Vermont v. Brillion*, 129 S. Ct. 1283 (March 9, 2009).

Evidence Seized As Result Of Recordkeeping Error By Neighboring Police Department Did Not Have To Be Suppressed

According to the Supreme Court, the exclusionary rule did not apply to require suppression of evidence found by police officers in a search incident to an arrest based on a warrant that the clerk of a neighboring county police department had said was outstanding, but which was subsequently found to have been recalled. The Court stated that the police recordkeeping error in failing to update the computer database to reflect the recall of the arrest warrant was negligent not intentional, that the error was not the result of a systematic error or the reckless disregard of constitutional requirements, and that any minimal deterrence that might result from applying the exclusionary rule would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence. *Herring v. United States*, 129 S. Ct. 695 (Jan. 14, 2009).

Traffic Stop Pat-Down Of Passenger Reasonably Suspected Of Being Armed And Dangerous Does Not Violate Fourth Amendment

After police officers patrolling a neighborhood associated with gang membership had pulled over a vehicle when a license plate check revealed that its registration had been suspended for insurance-related violation, and an officer, wanting to question a passenger on his possible gang affiliation, had asked the passenger to get out of the car, the officer's patdown of the passenger, whom she suspected was armed, did not violate the Fourth Amendment, the Supreme

Court has ruled. *Arizona v. Johnson*, 129 S. Ct. 781 (Jan. 26, 2009).

Sentencing

Failure To Report For Imprisonment Is Not "Violent Felony" Under Armed Career Criminal Act

A defendant's prior conviction under Illinois law for escape, arising from his failure to report for penal confinement, is not a "violent felony" for purposes of sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), the Supreme Court has ruled, reversing a Seventh Circuit decision. *Chambers v. United States*, 129 S. Ct. 687 (Jan. 13, 2009).

Requiring Judge To Make Predicate Factual Findings Before Imposing Consecutive Sentences Did Not Violate Jury Trial Right

The Supreme Court has ruled that Oregon's practice of constraining judges' discretion as to whether to impose sentences consecutively rather than concurrently, by requiring them to make certain predicate factual findings before imposing consecutive sentences, did not violate the defendant's Sixth Amendment right to a jury trial. *Oregon v. Ice*, 129 S. Ct. 711 (Jan. 14, 2009).

Supreme Court Reiterates That District Judge May Deviate From Sentencing Guidelines Based On Categorical Rejection Of 100:1 Powder Cocaine/Crack Cocaine Ratio

In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Supreme Court held that the cocaine Guidelines, like all the

United States Sentencing Guidelines, are advisory, and that a district judge, in finding that a Guidelines sentence is “greater than necessary” to serve the objectives of sentencing, may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses. In a strongly worded *per curiam* summary reversal, the Court has reaffirmed its holding in *Kimbrough* that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines and, based on a policy disagreement with those Guidelines, may adopt their own powder cocaine/crack cocaine ratios in sentencing defendants for crack cocaine offenses (in this case, the sentencing court adopted a 20:1 ratio). The Court clearly stated:

[E]ven when a particular defendant in a crack cocaine case presents no special mitigating circumstances – no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation – a sentencing court may nonetheless vary downward from the advisory guideline range. The court may do so based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates “an unwarranted disparity within the meaning of [18 U.S.C.] § 3553(a)” and is “at odds with § 3553(a).” The only fact necessary to justify such a variance is the sentencing court’s disagreement with the guidelines – its policy view that the 100-to-1 ratio creates an unwarranted disparity.

Spears v. United States, 129 S. Ct. 840 (Jan. 21, 2009).

District Court Erroneously Applied Presumption Of Reasonableness To Sentencing Guidelines Range

Simultaneously granting certiorari and issuing a *per curiam* opinion, the Supreme Court held that a district judge’s comments indicated that the judge erroneously applied a presumption of reasonableness to a defendant’s Sentencing Guidelines range. During sentencing, the judge explained that, under Fourth Circuit precedent, “the Guidelines are considered presumptively reasonable,” so that “unless there’s a good reason in the [statutory sentencing] factors . . . the Guideline sentence is the reasonable sentence.” The government conceded that the Fourth Circuit erred in affirming the sentence. In reversing the Fourth Circuit, the Supreme Court emphasized that its prior decisions in *Rita v. United States*, 551 U.S. 338 (2007), and, in *Gall v. United States*, 128 S. Ct. 586 (2007), did not allow a district court to presume that a sentence within the applicable Guidelines range was reasonable. *Nelson v. United States*, 129 S. Ct. 890 (Jan. 26, 2009).

Habeas Corpus

State Judgment Becomes "Final" For Purposes Of Habeas Review At Conclusion Of Out-Of-Time Direct Appeal

Reversing a decision of the Fifth Circuit, the Supreme Court held that, when a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, the

conviction is not yet “final” so as to trigger the one-year limitations period for federal habeas review until either the conclusion of the out-of-time direct appeal or the expiration of the time for seeking review of that appeal. *Jimenez v. Quaterman*, 129 S. Ct. 681 (Jan. 13, 2009).

State Court’s Determination That
Accomplice Liability Instruction
Was Unambiguous Was Not
Objectively Unreasonable

Reversing the Ninth Circuit, the Supreme Court ruled that the conclusion reached by the Washington courts that the trial judge’s accomplice liability instruction was unambiguous did not result in an “unreasonable application of . . . clearly established Federal law,” and, thus, did not warrant federal habeas relief for a petitioner who had been convicted of second-degree murder and attempted murder. The Ninth Circuit had found that the trial court’s instructions were ambiguous because there was no sentence in the instructions specifically instructing the jury that a person could be guilty of “a crime” as an accomplice only if that person knew that “a crime” was “the crime” the principal intended to commit. *Waddington v. Sarausad*, 129 S. Ct. 823 (Jan. 21, 2009).

Certiorari Granted

Whether Eighth Amendment
Creates Substantive Right Of
Innocent Not To Be Executed

The Supreme Court has granted a stay of execution of a death sentence imposed upon a defendant convicted of murder, pending disposition of the defendant's petition for a writ of certiorari. The petition presents three questions: (1) whether the Eighth Amendment creates a

substantive right of the innocent not to be executed, so as to invoke the protections of the Due Process Clause when substantial evidence of innocence is discovered; (2) whether Georgia's creation of an extraordinary motion for a new trial created a liberty interest protected by procedural due process; and (3) whether, if either the Eighth Amendment or Georgia law created a liberty interest, the Georgia Supreme Court's failure to grant the defendant an evidentiary hearing violated due process. *Davis v. Georgia*, 128 S. Ct. 2527 (Sept. 25, 2008).

Whether Defendant's Voluntary
Statement Is Admissible For
Impeachment Purposes Absent
Waiver Of Sixth Amendment Right
To Counsel

The Supreme Court has agreed to decide whether a defendant's voluntary statement obtained in the absence of a knowing and voluntary waiver of his Sixth Amendment right to counsel is admissible for impeachment purposes. *Kansas v. Ventris*, 129 S. Ct. 29 (Oct. 1, 2008).

Indigent Defendant's Right To
Counsel For Interrogation
Purposes

The Supreme Court will decide whether, when an indigent defendant's right to counsel has attached and counsel has been appointed, the defendant must take additional affirmative steps to "accept" the appointment to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present. *Montejo v. Louisiana*, 129 S. Ct. 30 (Oct. 1, 2008).

Standard For Proving Association-In-Fact Enterprise In RICO Case

Granting certiorari, the Supreme Court has agreed to decide whether proof of an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations (RICO) statute requires a showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which the alleged enterprise engages. *Boyle v. United States*, 129 S. Ct. 29 (Oct. 1, 2008).

Erroneous Denial Of Peremptory Challenge As Harmless Error

The Supreme Court will decide whether a conviction can stand if defense counsel sought to exclude a juror by making a peremptory challenge but the juror was seated anyway. The appeal noted a split among the lower courts on whether the conviction should be overturned automatically, or whether the error of wrongly seating the juror can be excused as “harmless.” *Rivera v. Illinois*, 129 S. Ct. 29 (Oct. 1, 2008).

Suppression Of Confession Made More Than Six Hours After Arrest But Before Presentment To Federal Magistrate Judge

The Supreme Court has agreed to decide whether a voluntary confession taken more than six hours after a defendant’s arrest but prior to his presentment before a magistrate judge must be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge. *Corley v. United States*, 129 S. Ct. 29 (Oct. 1, 2008).

Whether Plain Error Standard Of Review Governs Forfeited Claim That Government Breached Plea Agreement

The Supreme Court will decide whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of review under Rule 52(b) of the Federal Rules of Criminal Procedure. *Puckett v. United States*, 129 S. Ct. 29 (Oct. 1, 2008).

Scope Of Mens Rea Requirement For Crime Of Aggravated Identity Theft

Granting certiorari, the Supreme Court has agreed to decide whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the government must show that the defendant knew the means of identification he used belonged to another person. *Flores-Figueroa v. United States*, 129 S. Ct. 457 (Oct. 20, 2008).

Seeking Post-Trial Access To Evidence Through Civil Rights Suit For Further DNA Testing

The Supreme Court will decide whether a state prisoner has a due process right to biological evidence used to convict him of sexual assault for the purpose of further DNA testing in a § 1983 action. The prisoner seeks the evidence, consisting of semen and hairs, in advance of filing a free-standing post-trial claim of innocence. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 488 (Nov. 3, 2008).

President's Authority To Detain As Enemy Combatant Alien Lawfully Residing In United States

The Supreme Court will determine whether the President had the authority to seize and detain as an enemy combatant an alien lawfully residing in the United States who was accused of being a "sleeper agent" of the al Qaeda terrorist organization. *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (Dec. 5, 2008).

Application Of Collateral Estoppel To Bar Retrial On Hung Counts Following Acquittal On Related Counts

The Supreme Court has granted certiorari to address the issue of whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, collateral estoppel bars a retrial on the hung counts. The Fifth Circuit held that, although the jury could have acquitted the defendant of securities fraud only by concluding that he did not have insider information, collateral estoppel did not bar a retrial on related insider trading counts on which the jury hung because it was impossible to determine why the jury hung. *Yeager v. United States*, 129 S. Ct. 593 (Nov. 14, 2008).

Existence Of Intent Element In Sentence Enhancement Under § 924(c)(1)(A)(iii) For "Discharge" Of Firearm During Crime Of Violence

The Supreme Court will decide whether a statutory sentencing enhancement for defendants who "discharge" a firearm during a crime of violence applies only to intentional firearm discharges. The enhancement, under 18 U.S.C. § 924(c)(1)(A)(iii), establishes a mandatory minimum sentence of not less than 10 years in addition to the punishment provided for the crime of

violence (or the drug trafficking crime) for any person who uses or carries a firearm if "the firearm is discharged." *Dean v. United States*, 129 S. Ct. 593 (Nov. 14, 2008).

Use Of Telephone To Buy Drugs For Personal Use As Facilitation Of Drug Felony

The Supreme Court has agreed to decide whether an individual who uses a telephone to purchase drugs for his personal use, ordinarily a misdemeanor under federal law, can be charged with a felony on the basis that he has "facilitate[d]" the commission of a drug felony in violation of 21 U.S.C. § 843(b). The Courts of Appeal that have ruled on the issue are split. In the case at bar, the defendant arranged the purchase of drugs for his personal use by using his cell phone to call his drug dealer, and was convicted under § 843(b). The Fourth Circuit affirmed. *Abuelhawa v. United States*, 129 S. Ct. 593 (Nov. 14, 2008).

Federal Habeas Court's Standard Of Review For Analyzing Sufficiency Of Evidence Claim

The Supreme Court has granted certiorari in a case in which the Ninth Circuit affirmed the district court's grant of federal habeas relief to a petitioner who had been convicted in state court of sexual assault. The Court will decide the standard of review for a federal habeas court in analyzing a sufficiency-of-the-evidence claim, and whether such a claim permits a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial. *McDaniel v. Brown*, 129 S. Ct. 1038 (Jan. 26, 2009).

Whether Passage Of Time Or Break In Custody Terminates Application Of *Edwards* Rule

The Supreme Court will decide whether either a substantial lapse in time or a break in custody is sufficient to extinguish the protections afforded by *Edwards v. Arizona*, 451 U.S. 477 (1981), which holds that a suspect who expresses a desire to have counsel cannot be subject to further interrogation until either counsel has been made available or the accused initiates further communication. *Maryland v. Shatzer*, 129 S. Ct. 1043 (Jan. 26, 2009).

Double Jeopardy As Bar On Relitigation Of Pre-*Atkins* Finding Of Mental Retardation

The Supreme Court has granted certiorari in a case in which the Sixth Circuit held that the state of Ohio was collaterally estopped, under the Double Jeopardy Clause, from relitigating, in a state post-conviction proceeding, the issue of a death-row inmate's mental retardation, because that issue had been decided in the inmate's favor when the inmate's conviction and sentence were affirmed on direct appeal. The direct appeal was completed before the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment precludes the execution of mentally retarded persons. In the direct appeal, the Ohio Supreme Court found the inmate was mentally retarded, but rejected his contention that his mental retardation was a mitigating circumstance that warranted a life sentence. *Bobby v. Bies*, 129 S. Ct. 988 (Jan. 16, 2009).

Preclusive Effect Under ACCA Of State Court's Determination That Battery Was Not "Forcible Felony"

The Supreme Court will review a case in which the Eleventh Circuit concluded that a ruling by the Florida Supreme Court that battery was not a "forcible felony" for purposes of the state's violent career criminal law did not preclude a federal court's finding that battery was a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Supreme Court will decide two of the questions presented by the defendant. The first is whether, when a state's highest court holds that a given state offense does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether the offense qualifies as a violent felony under § 924(e)(2)(B)(I) of the ACCA (defining "violent felony" as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). The second question asserts a circuit split on two issues, and asks the Supreme Court to resolve those issues – first, whether a prior state conviction for simple battery is in all cases a violent felony under § 924(e)(2)(B)(I), and second, whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics," or instead, whether the physical force must be in some way violent in nature, that is, the sort of force that is intended to cause bodily injury, or, at a minimum, is likely to do so. *Johnson v. United States*, 129 S. Ct. 1315 (Feb. 23, 2009).

Federal Habeas Review In Absence Of Supreme Court Precedent On Identical Factual Pattern

The Supreme Court has granted certiorari in a habeas case in which the Sixth Circuit, on remand, found for a second time that instructional error and ineffective assistance of counsel in the penalty phase of the petitioner's capital murder trial warranted a new mitigation phase trial. The government alleges that the Sixth Circuit ignored the constraints on its habeas power by interpreting a prior Supreme Court decision – *Mills v. Maryland*, 486 U.S. 367 (1988) – to resolve questions that were not decided or addressed in *Mills*, and on which the Supreme Court had provided no clear guidance. The government also asserts that the Sixth Circuit applied the wrong standard when it presumed that the defendant had suffered prejudice from counsel's closing argument in its review of the defendant's ineffective assistance claim. *Smith v. Spisak*, 129 S. Ct. 1319, (Feb. 23, 2009).

Whether Counsel's Incorrect Advice On Effect Of Guilty Plea On Immigration Status Constituted Ineffective Assistance

The Supreme Court has granted certiorari in a case in which the Kentucky Supreme Court determined that neither defense counsel's failure to advise the defendant about the potential for deportation as a consequence of his guilty plea, nor counsel's act of advising the defendant incorrectly about the possibility of deportation, constituted ineffective assistance under the Sixth Amendment. *Padilla v. Kentucky*, 129 S. Ct. 1317 (Feb. 23, 2009).

Due Process Requirement Of Prompt Hearing After Seizure Of Potentially Forfeitable Vehicle

The Supreme Court has granted certiorari in part, in a case in which the Seventh Circuit held that due process required a prompt post-seizure hearing to test the validity of a city's retention of personal property seized for potential civil forfeiture under the Illinois Drug Asset Forfeiture Procedure Act. *Alvarez v. Smith*, 129 S. Ct. 1401 (Feb. 23, 2009).

FOURTH CIRCUIT

Substantive Criminal Law

Continuance Of Trial Violated Speedy Trial Act

The Fourth Circuit ruled that, in a drug conspiracy prosecution, the district court did not conduct the required balancing of the ends of justice against the best interests of the public and the defendants in a speedy trial when it continued the defendants' trial for 103 days, and, therefore, the 103-day continuance could not be excluded from the Speedy Trial Act's 70-day period for bringing the defendants to trial. The Fourth Circuit noted that, in continuing the trial after learning that plea negotiations were unsuccessful, the district court, without the benefit of a later Supreme Court decision holding that a defendant could not prospectively waive Speedy Trial Act rights, relied on prospective speedy trial waivers the defendants had previously executed, and that the district court did not mention a concern for giving the parties additional time to prepare for trial or other ends-of-justice factors under 18 U.S.C. § 3161(h)(8). Because the delay in the case exceeded the Speedy Trial Act's 70-day limit, the Fourth Circuit found

that the indictment must be dismissed, and remanded the case for the district court to determine whether the dismissal should be with or without prejudice. *United States v. Henry*, 538 F.3d 300 (4th Cir. 2008).

Issuance of Indictment Did Not Violate Speech Or Debate Clause

The issuance of an indictment charging a sitting member of the United States House of Representatives with a variety of crimes, including conspiracy, wire fraud, foreign corrupt practices, money laundering, obstructing justice, racketeering, and soliciting bribes, did not violate the Speech or Debate Clause (U.S. Const. Art. 1, § 6, cl. 1), according to the Fourth Circuit, even though grand jury materials contained references to the defendant's status as a congressman and a member of various congressional committees, where the grand jury record disclosed no constitutionally protected information. *United States v. Jefferson*, 546 F.3d 300 (4th Cir. 2008).

District Judge Is "Judicial Officer" Within Meaning Of Statute Authorizing Release Of Defendant Who Otherwise Qualified For Mandatory Detention When "Exceptional Reasons" Exist

Under 18 U.S.C. § 3145(c), a defendant who otherwise qualifies for mandatory detention may be released "under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." The Fourth Circuit has ruled that, for purposes of § 3145(c), a district judge is a "judicial officer." *United States v. Goforth*, 546 F.3d 712 (4th Cir. 2008).

Court Affirms Defendant's Convictions Under 18 U.S.C. § 1462 For Downloading Obscene Japanese Anime Cartoons And Other Child Pornography From Internet And Sending Or Receiving Obscene E-Mails

A defendant was convicted of several counts, including the knowing receipt on a computer of 20 obscene Japanese anime cartoons depicting minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 1462. On appeal, the Fourth Circuit rejected the defendant's claim that § 1462 was facially unconstitutional, finding that the statute was valid under the First Amendment because its focus was on the movement of obscene matter in interstate commerce, not on its possession in the home. The court also rejected the claim that § 1462 was facially unconstitutional because the term "receives," when used in the context of a computer, was unconstitutionally vague, finding instead that the term was sufficiently precise to provide adequate notice to a person of ordinary intelligence of the conduct that Congress had prohibited. The court also ruled that the statute was not unconstitutional as applied to the defendant, who claimed he did not know that the cartoons lacked the protection of the First Amendment. The Fourth Circuit found that the as-applied challenge was frivolous to the extent that it was based on the defendant's ignorance of the law or his belief that his similar conduct in the past should somehow have provided him a defense. *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008).

Sufficient Factual Basis For Defendant's Guilty Plea To Bank Robbery

The Fourth Circuit found that a sufficient factual basis existed for a defendant's guilty plea to taking money from a bank "by intimidation" under 18 U.S.C. § 2113(a). After presenting a note to the teller that read, "These people are making me do this," the defendant then stated, "They are forcing me and have a gun," and, in response to the defendant's demand for "at least \$500," the teller gave the defendant \$1,686 and he left the bank. *United States v. Ketchum*, 550 F.3d 363 (4th Cir. 2008).

Court Affirms Multiple Conviction Arising From Drug Trafficking Scheme, Rejecting Defendants' Claims Under Double Jeopardy Clause

The Fourth Circuit has affirmed the multiple convictions of four defendants arising from a drug trafficking scheme, rejecting several arguments, including multiple claims raised under the Double Jeopardy Clause. Among the court's rulings was that the prosecution's introduction of overt acts evidence that related to offenses for which the defendants had been acquitted – including possession of a firearm in furtherance of a drug trafficking offense, possession with intent to distribute cocaine, and unlawful maintenance of a premises for the manufacture of a controlled substance – did not violate the defendants' right to protection against double jeopardy in a prosecution for conspiracy to violate the federal drug laws, because such acts were not elements of a drug-related conspiracy; that the convictions of the defendants, who were allegedly involved in a complex

drug trafficking scheme, for possession with intent to distribute cocaine in the District of Maryland did not violate double jeopardy, even though the defendants previously had been acquitted of three counts of possession with intent to distribute cocaine in the District of Columbia, because the acquitted counts concerned discrete shipments of cocaine that the defendants allegedly received weeks before the cocaine delivery charged in the indictment in Maryland; and that the defendants' convictions on drug-related offenses after three mistrials did not trigger double jeopardy concerns, where the defendants did not object to any of the earlier mistrials, and each mistrial was declared because of the jury's inability to reach a verdict. *United States v. Hall*, 551 F.3d 257 (4th Cir. 2009).

Court Rejects Speedy Trial Claim Based On Two-Year Period Of Delay Between Indictment And Trial

The Fourth Circuit ruled that a two-year period of delay between the indictment and the trial in a prosecution for drug charges did not violate the defendant's speedy trial rights under the Sixth Amendment, when the reasons for the delay were neutral, the prosecution was complicated, involving a serious, complex conspiracy charge that implicated multiple parties in at least two jurisdictions, there were pre-trial proceedings largely resulting from defense motions, and there had been a mistrial. *United States v. Hall*, 551 F.3d 257 (4th Cir. 2009).

Fourth Circuit Strikes Down Civil Commitment Provision in Adam Walsh Act; Supreme Court Puts Decision On Hold Pending Decision on Certiorari

The Fourth Circuit has ruled that Congress did not have the authority under the Commerce Clause or the Necessary and Proper Clause to enact the provision of the Adam Walsh Child Protection and Safety Act, 18 U.S.C. § 4248, that permitted the government to civilly commit, in a federal facility, any “sexually dangerous” person in the custody of the Bureau of Prisons (BOP), even after completion of that person’s entire prison sentence.¹ *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

Court Upholds Prosecution Of Juvenile As Adult In District Court

The Fourth Circuit found that an amended information issued as to a juvenile charged as an adult for conspiracy to participate in a racketeering enterprise alleged a substantial federal interest, as is required to warrant transfer of the juvenile to district court under the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. § 5032, where the prosecutor certified such an interest due to the severe nature of the underlying acts in furtherance of the RICO conspiracy and the dangerous nature of the alleged enterprise. *United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009).

¹ The Supreme Court has temporarily blocked the Fourth Circuit’s decision in *Comstock* while it decides whether to grant the government’s motion for a writ of certiorari.

Statute Of Limitations Did Not Bar Prosecution Under 8 U.S.C. § 1326

According to the Fourth Circuit, the statute of limitations did not begin to run on the federal charge that the defendant was found in the United States without permission of the Attorney General after having previously been deported for an aggravated felony as of the date on which the defendant was incarcerated in state prison, when there was no evidence that federal immigration authorities were then aware of his identity and his illegal presence in the United States, notwithstanding the defendant’s contention that he was “found” in the United States as of that date, as is required to establish a violation of 8 U.S.C.A. § 1326. *United States v. Uribe-Rios*, 558 F.3d 347 (4th Cir. 2009).

Court Limits Defendants To Whom SORNA’s Registration Requirements Apply

Four defendants were convicted of knowingly failing to register or update their registration as required by the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). On appeal, the Fourth Circuit reversed, finding that SORNA’s registration requirements did not apply to defendants who finished serving their sentences before July 27, 2006 (the date SORNA was enacted) and whose alleged failure to register occurred before February 28, 2007 (the date on which the Attorney General issued an interim rule making SORNA apply retroactively to persons whose sentences were completed prior to SORNA’s enactment). *United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009).

Constitutional Criminal Procedure

Police Questioning Following Traffic Stop Did Not Violate Fourth Amendment

According to the Fourth Circuit, a police officer's questioning of the defendant after he returned the defendant's driver's license and registration, orally warned him to fix his tag light, and told him that he was free to go, did not constitute a subsequent seizure under the Fourth Amendment, because a reasonable person in the defendant's position would have felt free to decline to answer the officer's questions, and the defendant voluntarily responded to the questions in what appeared to have been a completely consensual exchange. *United States v. Fariior*, 535 F.3d 210 (4th Cir. 2008).

Detention Of Driver Until Arrival Of Drug Detection Dog Was Based On Reasonable Suspicion

The Fourth Circuit has ruled that the police's detention of a driver beyond the scope of an initial valid traffic stop for 30 minutes until the arrival of a drug detection dog was justified based on the officer's reasonable suspicion of narcotics activity. The court noted that the officer knew the same vehicle had been pulled over less than a month earlier in an area known for drug trafficking, the driver's hands were shaking when he turned over his license and registration, neither the driver nor his passenger would make eye contact with the officer, the vehicle contained multiple air fresheners, commonly used to mask the smell of narcotics, the vehicle was not registered to the driver or the passenger, and the officer was informed by a fellow officer that the driver was a well-known drug

dealer. *United States v. Branch*, 537 F.3d 328 (4th Cir. 2008).

Exigent Circumstances Justified Warrantless Entry Into Apartment

The Fourth Circuit found that the circumstances justified the police's warrantless entry into a duplex unit, when, during a traffic stop, the suspect made a telephone call to his cousin in the adjacent unit, the officer was concerned that the suspect had warned his cousin about the police so that evidence could be removed or destroyed, when interrogating the cousin at the duplex she created a loud and unprovoked commotion that the officers believed was calculated to warn someone in the other unit, the windows to the unit in question were blocked, and a vehicle was seen outside the duplex, suggesting the possibility that someone else might be present. The court also found that the warrantless entry was supported by probable cause. *United States v. Moses*, 540 F.3d 263 (4th Cir. 2008).

In Health Care Fraud Case, Fourth Circuit Broadly Reads Search Warrant For Defendant's Home

The Fourth Circuit has found that a search warrant affidavit arising from an investigation of health care fraud involving a cardiologist justified the issuance of a warrant for the cardiologist's residence that authorized law enforcement officers to seize a broad range of items, including financial, business, patient, insurance, and other records related to the cardiologist's business that could constitute evidence of such fraud, given that the cardiologist conducted a substantial part of his medical practice from his residence. *United States v. Srivastava*, 540 F.3d 277 (4th Cir. 2008).

Affidavits Supporting Search Warrants Did Not So Lack Indicia Of Probable Cause As To Render Official Belief Entirely Unreasonable

Reversing the district court, the Fourth Circuit found that affidavits supporting search warrants for the defendants' residences were not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and therefore the *Leon* good-faith exception to the exclusionary rule barred suppression of evidence seized from the homes. In so ruling, the court stated that the affidavits detailed evidence of the defendants' involvement in drug trafficking activities and the special agent asserted knowledge, based on his training and experience, that drug dealers tend to maintain quantities of narcotics, firearms, and evidence about proceeds and transactions in their houses. *United States v. Williams*, 548 F.3d 311 (4th Cir. 2008).

Officers Had Probable Cause To Search Defendant's Car Based On Informant's Tip

The Fourth Circuit has ruled that police officers had probable cause to search a defendant's car based on an informant's tip, when, following his arrest, the informant agreed to cooperate with the police, the informant had every incentive to cooperate, the informant called the defendant to set up a drug deal, the officers observed the informant's phone conversation with the defendant, and information provided by the informant was borne out by actual events since he pinpointed two locations where the defendant would appear and described the exact car driven by the defendant.

United States v. White, 549 F.3d 946 (4th Cir. 2008).

Placement Of Surveillance Camera In Defendant's Field Did Not Violate Fourth Amendment

According to the Fourth Circuit, a farmer's field in which a bird trap was located constituted an "open field," not "curtilage," and, therefore, game agents' placement of a hidden, fixed-range, motion-activated video camera in the field did not constitute an unreasonable search under the Fourth Circuit. The court noted that the field was located a mile from the farmer's home, the land was being used for farming and not intimate activities, the agents had received a report of a trapped protected bird, and the farmer had taken no steps to protect the field from observation. *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009).

Court Upholds Search Of Motorist's Cell Phone

The Fourth Circuit ruled that a district court's finding that a cell phone was on a motorist's person at the time of his arrest, so as to permit the police's seizure of the phone as incident to the arrest, did not rise to the level of clear error, given testimony that the motorist showed the phone to the officer and indicated how it could be used to obtain the names of individuals who would corroborate his identity. The Fourth Circuit further held that, because the need for the preservation of evidence justified the police's warrantless retrieval of call records and text messages from the cell phone, the officers did not first have to attempt to ascertain the phone's storage capacity prior to retrieving this

information. *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009).

Evidence

In Fraud Case, Defendant's Other Fraud Crimes Admissible Under Rule 404(b)

The Fourth Circuit reversed a district court's order precluding the government from introducing evidence of a defendant's other fraud crimes during her trial for alleged frauds related to her ex-boyfriend. The court found that the evidence relating to the defendant's other frauds over a 20-year time span was relevant under Rule 404(b) to her motive and her modus operandi in the instant fraud prosecution – which included the charge that she killed her ex-boyfriend to prevent him from reporting her fraud – noting that the evidence showed that the defendant's typical pattern was to obtain the personal information of another person and use that information to obtain credit in that name, then take whatever steps were necessary to prevent that person from learning about the new accounts, and that the defendant engaged in that pattern of behavior when defrauding former husbands, daughters, friends, and her ex-boyfriend. *United States v. Siegel*, 536 F.3d 306 (4th Cir. 2008).

Interpreter's Translation Of Defendant's Responses During Interview For Refugee Application Did Not Create Additional Level Of Hearsay

The Fourth Circuit has ruled that a Serbian interpreter used in an immigrant defendant's interview with an immigration officer was a language conduit, rather than a declarant, and therefore the

interpreter's translation of the defendant's responses did not create an additional level of hearsay, for purposes of determining whether the immigration officer's testimony about the interview was admissible. The court emphasized that the interpreter was an employee of a refugee aid organization which was an independent United Nations-funded agency that assisted refugees, there was no indication that the interpreter was selected by the United States government, and there was no evidence suggesting that the interpreter harbored any bias against the defendant, or that she had any motive to mislead or distort. *United States v. Vidacak*, 553 F.3d 344 (4th Cir. 2009).

District Court Did Not Err In Admitting Israeli Briefing Document And FBI Report In Espionage Case

The Fourth Circuit has ruled that a district court did not abuse its discretion in deeming a classified Israeli briefing document relevant to the defense in a prosecution under the Espionage Act, 18 U.S.C. § 793, so as to render it admissible, even though the document included information that could be proven by other means. The Fourth Circuit also found that the district court did not err in concluding that a classified FBI report was relevant to the defense and therefore admissible, since the alleged offenses under the Espionage Act were predicated in part on the disclosure of the report's existence. *United States v. Rosen*, 557 F.3d 192 (4th Cir. 2009).

Sentencing

Defendant's Challenge Rendered Moot By His Release From Prison During Pendency Of Appeal

The Fourth Circuit ruled that a defendant's appeal claiming that the district court lacked jurisdiction to revoke his supervised release due to the fact that the revocation hearing occurred after his supervised release expired was rendered moot by the defendant's release from prison during the pendency of his appeal, where the defendant was no longer on supervised release and failed to identify any collateral consequences stemming from the revocation. *United States v. Hardy*, 545 F.3d 280 (4th Cir. 2008).

District Court Lacked Authority To Impose New Sentence That Was Less Than Minimum Of Amended Guideline Range

The Fourth Circuit has held that a district court, when resentencing a defendant based on the retroactive amendment to the guideline that applies to crack cocaine offenses, lacked the authority to impose a sentence that was less than the minimum of the amended guideline range, when the original sentence was within the guideline applicable at the time of the original sentencing. In so ruling, the court noted that 18 U.S.C. § 3582(c)(2), the statute authorizing the sentence reduction, created a jurisdictional bar to reducing sentences below the range authorized by the Commission. *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009).

District Court Did Not Have Authority To Convene Second Resentencing Hearing To Reimpose Fine

On remand from the Fourth Circuit, a district court reimposed the same term of imprisonment upon the defendant, but without the fine that it had previously assessed, and then convened a second resentencing hearing to reimpose the fine. On appeal, the Fourth Circuit ruled that the district court erred in conducting the second resentencing hearing. The Fourth Circuit held that, while, in resentencing the defendant on remand, the district court may at all times have intended to reimpose the same fine it had previously imposed, the court's failure to act on this undisclosed intent did not rise to the level of an "arithmetical, technical, or other clear error," such as would permit the court to convene another sentencing hearing under Rule 35(a). *United States v. Fields*, 552 F.3d 401 (4th Cir. 2009).

Repeal Of Statutory Semiautomatic Assault-Weapon Ban Did Not Affect Defendant's Prior Sentence Which Was Increased Based On His Possession Of Such A Weapon

The Fourth Circuit ruled that the repeal of the statutory semiautomatic assault-weapon ban did not render the 2005 Sentencing Guideline, which increased a defendant's sentence based on his possession of such an assault weapon, a nullity. *United States v. Myers*, 552 F.3d 328 (4th Cir. 2009).

Defendant's Prior Felony Stalking Conviction Was Crime Of Violence Under Sentencing Guidelines

The Fourth Circuit found that a defendant's prior felony stalking conviction under North Carolina law was

a crime of violence justifying an enhanced offense level under the Sentencing Guidelines. The court noted that the statute of conviction required that the defendant act with either “the intent to cause death or bodily injury” to the victim or “the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury.” The court also emphasized that the defendant was convicted of conduct that was purposefully carried out with the intended effect of placing a reasonably prudent person in fear of bodily harm, and that the conduct that violated the statute was necessarily purposeful, violent, and aggressive, and posed a risk similar to, if not greater than, burglary or extortion, thereby involving conduct that presented a serious potential risk of physical injury to another. *United States v. Seay*, 553 F.3d 732 (4th Cir. 2009).

Defendant's Virginia Conviction For Statutory Rape Was Not “Violent Felony” Under ACCA

The Fourth Circuit has ruled that a defendant’s Virginia conviction for statutory rape was not a “violent felony” within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). The court emphasized that, even assuming the statutory rape offense involved conduct that presented a serious potential risk of physical injury under the clause defining the term “violent felony,” the offense fell outside the clause's scope because it was unlike the clause's example crimes which all involve purposeful, violent, and aggressive conduct. *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009).

Defendant’s Prior Convictions For Failing To Stop When Signaled By Police Officer Did Not Necessarily Constitute Violent Felonies Under ACCA

A defendant was convicted of being a felon in possession of firearm and was sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The defendant challenged his sentence on the theory that his prior convictions under South Carolina's failure-to-stop-for-a-blue-light statute did not qualify as prior “violent felonies” under the ACCA. On appeal, the Fourth Circuit found that the mere fact that the South Carolina failure-to-stop-for-a-blue-light offenses of which the defendant was previously convicted, based on his failure to stop when signaled by police officer, carried a potential for serious physical injury to another, was not determinative of whether those prior offenses “presented a serious potential risk of physical injury to another,” so as to constitute violent felonies under the ACCA. Accordingly, the appellate court remanded the case back to district court to allow the lower court to consult additional materials as appropriate to decide whether the prior convictions involved intentional misconduct. *United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009).

Defendant Did Not Qualify For Safety Valve Relief Under Three Strikes Law

Under the federal “three strikes” law, 18 U.S.C. § 3559(c)(1), a district court must impose a mandatory life sentence upon a defendant convicted of a “serious violent felony” if the defendant has either two prior convictions for serious violent felonies or at least one conviction for a serious violent felony and at least one

conviction for a serious drug offense. Although the statute defines “serious violent felony” to include robbery, under the statute’s safety valve provision, § 3559(c)(3)(A), a robbery does not qualify as a serious violent felony if the defendant establishes by clear and convincing evidence that he did not threaten to use a firearm or other dangerous weapon. The Fourth Circuit ruled that a defendant convicted of bank robbery failed to show that he qualified for safety valve relief from the three strikes law, when, even though none of the bank employees or customers who witnessed the robbery actually saw a firearm, the defendant gave the teller a written note threatening to shoot her, during the robbery the defendant was seen with one hand in his pocket as if he had a gun, and the defendant was heard making threats to shoot. *United States v. Thompson*, 554 F.3d 450 (4th Cir. 2009).

Defendant’s Original Sentencing Range, Rather Than His Post-Departure Offense Level, Applied In Determining Whether Sentence Reduction Was Authorized

Under 18 U.S.C. § 3582(c)(2), a district court may reduce a sentence when “a defendant . . . has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” The Fourth Circuit held that a defendant’s offense level and corresponding sentencing range, rather than his post-departure offense level based on substantial assistance to the court, applied in determining whether the retroactive amendment to the crack Guidelines lowered his applicable guideline range as required to authorize a sentence

reduction. *United States v. Lindsey*, 556 F.3d 238 (4th Cir. 2009).

Defendant Sentenced To Statutory Mandatory Minimum Penalty Not Entitled To Relief Under Retroactive Amendment To Crack Guideline

According to the Fourth Circuit, a defendant’s sentence for cocaine trafficking was not “based on” any sentencing range authorized by the Sentencing Guidelines section setting forth offense levels for crack cocaine offenses, but rather was based on the statutory mandatory minimum penalty under 21 U.S.C. § 841(b). Therefore, the court found, the defendant was not entitled to relief under the statute authorizing modification of a sentence that was “based on” a sentencing range that had been subsequently lowered by the Sentencing Commission, even though the district court had departed from the statutory minimum based on the defendant’s substantial assistance. *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009).

240-Month Sentence Was Not Unreasonable, Even Though Guideline Range Was 100-125 Months

A district court sentenced a defendant to a prison term of 240 months for interfering with commerce by robbery, which represented a significant increase from the Sentencing Guidelines range of 100 to 125 months, on the grounds that the Guidelines under represented the defendant’s criminal history and that he had a high likelihood of recidivism. On appeal, the Fourth Circuit affirmed, finding that the district court had not committed any procedural error and that

the 240-month sentence was not substantively unreasonable, in light of the fact that the defendant's criminal history included assault with a deadly weapon by stabbing the victim in the chest, and shooting a police officer three times, and that, while in prison, the defendant had accrued 31 infractions, many of which were for violent behavior. *United States v. Heath*, 559 F.3d 263 (4th Cir. 2009).

Habeas Corpus and Post-Conviction

Waiver Of Right To Appeal Barred Defendant From Raising Claim Under § 2255 That Could Have Been Raised On Appeal

In a plea agreement the defendant waived his right to a direct appeal of his conviction and sentence. On direct appeal, the Fourth Circuit enforced the waiver and rejected the defendant's challenge to his sentence under *United States v. Booker*, 543 U.S. 220 (2005). The Fourth Circuit subsequently found that the appeal waiver also precluded the defendant from raising his sentencing claim on collateral review under 28 U.S.C. § 2255, because it was the type of claim that could have been raised on appeal. *United States v. Linder*, 552 F.3d 391 (4th Cir. 2009).

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