
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

The Supreme Court has ruled that the police violated the Fourth Amendment by searching the defendant's car—after the defendant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car—finding that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might have access to the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. See *Arizona v. Gant*, at p. 5.

The Supreme Court has held that the admission in a defendant's drug trial of certificates reporting the results of forensic analysis, violated the defendant's Sixth Amendment rights under the Confrontation Clause, because the analysts did not testify in person at trial. See *Melendez-Diaz v. Massachusetts*, at p. 6.

The Fourth Circuit has ruled that a defendant's consent to a search of his trunk did not include the entire vehicle, even though the defendant handed the police officer the keys to his car, left the door of his car open, and failed to object to a search of the interior of his car. See *United States v. Neely*, at p. 14.

The Fourth Circuit has vacated a defendant's life sentence under 21 U.S.C. § 851, finding that the government did not prove beyond a reasonable doubt that the defendant was the same person who had been convicted in the two prior predicate offenses. See *United States v. Kellam*, at p. 16.

NOTES FROM THE DEFENDER

CJA Training

We have a number of important training events coming up. Many thanks to Training Director Paula Xinis for organizing these events.

September 3, 2009 from 1:30-4:30pm (Baltimore) "Lessons Learned: Lessons from the Defense Teams in "Recent Capital Trials" (limited to capital lawyers)

September 18, 2009 at 12:30pm (Baltimore) Brown Bag Lunch Training "The Nuts and Bolts of Trying Firearms Cases"

December 4, 2009 - 8:30-1:30 (Greenbelt) CJA Fall Training Program

Holiday Party

We look forward to moving into our new office space on the ninth floor of our current building in Baltimore. We would like to hold our Third Annual FPD/CJA Holiday Party in our new space. In order to make sure we are actually IN the new

space, we will hold the party a little later than usual. This year the party is scheduled for Friday, December 18, 2009 beginning at 3:30pm. We are building a fun tradition. Hope you can join us!

Crack Sentencing Issues

One of the quiet, but remarkable, local criminal justice stories is just how few problems there have been applying the new crack guidelines retroactively, particularly after the strong initial opposition from the Department of Justice. The retroactive application of the revised crack sentencing guidelines became effective March 3, 2008. Since then, our office, with the help of a handful of CJA attorneys, has worked closely with the U.S. Attorney's Office, U.S. Probation Office, and the Court, to resolve hundreds of cases that were potentially eligible for sentencing relief under the revised guidelines.

The numbers are staggering. In this District, over 241 defendants have received reductions totaling 5,105 months, nearly 425 ½ years. This is a conservative estimate because we did not include the clients who received time served sentences. (It was too difficult to determine the precise length of the reduction.) We still have about 150 cases pending. We expect to obtain reductions in many of these cases. Pretty remarkable. Reductions of over 425 years and no one really notices. Many clients have been returned to families, the community and, hopefully, jobs. The taxpayers, when you calculate that everyday in the Bureau of Prisons costs the taxpayers \$70.75 per day per inmate, saved more than \$11,000,000.

The process in the District of Maryland worked particularly well because of the

diligence of lawyers in our office, but also CJA lawyers Gary Proctor, Mike Lawlor, Mary Davis, the U.S. Attorney's Office Criminal Chief Barbara Sale, Supervising Staff Attorney Kim Berger from the Clerk's Office, Deputy Chief USPO Estelle Santana and numerous other probation officers. For all of us, this was "extra work" in addition to our regular caseloads.

But, for our clients, these cases meant everything. We were able to resolve so many cases quickly and fairly because so many professionals from different offices were able to collaborate and work diligently and professionally to correct unfair sentences.

While the implementation of retroactive crack guidelines has been a great local success, and a tribute to the various court institutions being able to work together, the Department of Justice's current policy regarding crack versus powder cocaine sentences is more complicated, if not, incoherent. Attorney General Eric Holder has stated that the crack powder sentencing ratio is "simply wrong" and "plainly unjust." Attorney General Holder has further explained that "it is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups."

Assistant Attorney General Lanny A. Breuer has made similar statements:

[W]e cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so

dramatically because of the drug's form.

Moreover, the Sentencing Commission has documented that the quantity-based cocaine sentencing scheme often punishes low-level crack offenders far more harshly than similarly situated powder cocaine offenders. . . . The impact of these laws has fueled the belief across the country that federal cocaine laws are unjust.

Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crimes and Drugs of the S. Comm. On the Judiciary, 111th Cong. 1 (2009 (Statement of Lanny A. Breuer, Assistant Attorney Gen. Of the Criminal Division, United States Department of Justice, at 9.)

And yet on a local level, there seems to be little or no change. I am aware of only one pending case where the U.S. Attorney's Office for the District of Maryland has apparently expressed a willingness to eliminate the disparity and apply the powder guidelines to a crack offense.

Main Justice could not make stronger statements about the injustices of these sentences, including an acknowledgment of the pernicious racial disparity that these sentences have created. And Lanny Breuer, in his testimony, acknowledges the authority of the Court, and his prosecutors, to recommend sentences outside of the guidelines because they are "simply wrong." Yet, in this district, it remains business as usual for line prosecutors to continue to seek "simply wrong" sentences that "illogically affect some racial groups."

In response, District of Maryland judges and judges around the nation, have started to adopt a 1-1 crack/powder sentencing ratio over the government's objections. In a system that justifies harsh sentences because of the need to "send messages," we are at risk of sending the wrong messages about how our system of justice works. The perception of fairness matters. For more than 15 years, we have exacerbated racial disparity in our federal sentencing system by imposing sentences based upon unfair guidelines. It should stop.

Two New Hires

Our office recently added two new attorneys. Tamara Theiss joins us from the Atlanta Public Defender's Office where she has been a trial attorney in their complex trial division for the past eight years. Tamara also worked in the Southern Center for Human Rights in Atlanta. Tamara graduated from Barnard College in 1993 and Northeastern University School of Law in 2003. Tamara comes highly recommended by Ruth Friedman, Director of the 2255 Capital Project, and Steve Bright of the Southern Center.

LaKeytria Felder also recently joined our office. LaKeytria joins us from Holland & Knight, where she was the firm's Pro Bono Fellow. Previously, LaKeytria was an associate at Sherman & Sterling in New York. LaKeytria is a graduate of Duke University in 2001 and Harvard Law School in 2004. At Harvard, LaKeytria was the Earl Warren NAACP Legal Defense Fund Scholar. After graduating from Harvard, LaKeytria clerked for United States District Court Judge Petrese Tucker of the Eastern District of Pennsylvania. Many thanks to AFPD Debbie Boardman who learned of

LaKeytria's interest in our work and encouraged her to apply. Both Tamara and LaKeytria will work out of our Baltimore Office.

RECENT CASE LAW

SUPREME COURT

Substantive Federal Law

Forfeited Claim That Government Breached Plea Agreement Subject To Plain-Error Review

The Supreme Court ruled that a criminal defendant's forfeited claim that the government violated the terms of his plea agreement was subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure. *Puckett v. United States*, 129 S. Ct. 1423 (2009).

Trial Court's Good-Faith Error In Denying Defendant's Peremptory Challenge To Juror Did Not Require Automatic Reversal Of Conviction

The Supreme Court has ruled that due process does not require automatic reversal of a criminal conviction because of the trial court's good-faith error in denying a defendant's peremptory challenge to a juror, provided that all the jurors seated in the case are qualified and unbiased. *Rivera v. Illinois*, 129 S. Ct. 1446 (2009).

Identity Theft Statute Requires Proof That Defendant Knew Means Of Identification Belonged To Another Person

The Supreme Court has held that, under 18 U.S.C. § 1028A(a)(1), which prohibits aggravated identity theft and imposes a mandatory consecutive two-year prison term upon persons convicted of certain other crimes if, during or in relation to the commission of those other crimes, the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," the prosecution must show that the defendant knew the means of identification that he or she unlawfully transferred, possessed, or used in fact belonged to another person. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).

Jury Instructions On Association-In-Fact RICO Enterprise

To qualify as an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), the enterprise is required to have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages," the Supreme Court has ruled. The Court found that under RICO an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise's purpose. However, a district court need not necessarily use the term "structure" in its jury instructions. Rather, a court has considerable discretion in choosing the language of the jury instruction so long as the substance of the relevant point is adequately expressed. *Boyle v. United States*, 129 S. Ct. 2237 (2009).

Hung Counts Do Not Affect Preclusive Force Of Acquitted Counts Under Double Jeopardy Clause

Reversing the Fifth Circuit, the Supreme Court has held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. The Fifth Circuit had held that, although a jury could have acquitted an Enron defendant of securities fraud only by concluding that he did not have insider information, the issue preclusion component of the Double Jeopardy Clause did not bar a retrial on related insider trading counts on which the jury hung because it was impossible to determine why the jury did not reach a decision. In reversing the Fifth Circuit, the Supreme Court found that the interest in preserving the finality of the jury's judgment on the fraud counts— including the jury's finding that the defendant did not possess insider information – barred a retrial on the insider trading counts. In so ruling the Court reaffirmed that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. *Yeager v. United States*, 129 S. Ct. 2360 (2009).

Buyer's Phone Call To Drug Dealer Was Not "Facilitation" Of Felony Drug Distribution

Reversing the Fourth Circuit, the Supreme Court held that a defendant, in making a phone call for the purposes of effectuating a misdemeanor drug purchase, does not "facilitate" the felony of drug distribution within the meaning of

21 U.S.C.A. § 843(b), which makes it unlawful "to use any communication facility in committing or in causing or facilitating" certain prohibited felonies. *Abuelhawa v. United States*, 129 S. Ct. 2102 (2009).

Constitutional Criminal Procedure

Search Of Defendant's Vehicle While He Was Handcuffed In Patrol Car Violated Fourth Amendment

A defendant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before police officers searched his automobile and found cocaine in a jacket pocket. The Supreme Court subsequently ruled that the police violated the Fourth Amendment in searching the defendant's car, finding that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might have access to the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

Uncounseled Statement Was Admissible For Impeachment Purposes

According to the Supreme Court, an incriminating statement to a jailhouse informant, even when elicited in violation of the defendant's Sixth Amendment right to counsel, was admissible to impeach the defendant's testimony at trial. *Kansas v. Ventris*, 129 S. Ct. 1841 (2009).

Assignment Of Counsel At Arraignment Does Not Necessarily Preclude Subsequent Waiver Of Rights

The Supreme Court has overruled its decision in *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his Sixth Amendment right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid). Here, the trial court had admitted, over the defendant's objection at his capital murder trial, an incriminating letter of apology that he wrote to the victim's widow while the defendant was accompanying two detectives on an excursion to locate the murder weapon. That excursion occurred after the defendant's preliminary hearing, during which the trial court had appointed counsel to represent the defendant. The Court remanded the case to allow the defendant the opportunity to claim that his letter of apology should have been suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which would preclude any interrogation initiated by the police if the defendant had made a clear assertion of his right to counsel when the officers approached him about accompanying them on the trip to locate the murder weapon. On remand the defendant may also argue that his waiver of the right to counsel was not knowing and voluntary. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

Certificates Of State Lab Analysts Admitted In Drug Trial Were Subject To Defendant's Right Of Confrontation

The Supreme Court has held that the admission in a defendant's drug trial of

certificates reporting the results of forensic analysis, which showed that material seized by police and connected to the defendant was cocaine, violated the defendant's Sixth Amendment rights under the Confrontation Clause. Based on its previous decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the Court found that, absent a showing that the analysts were unavailable to testify and that the defendant had a prior opportunity to cross-examine them, the analysts were required to testify in person at trial. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

Statute Governing Admissibility Of Confessions In Federal Court Does Not Eliminate McNabb-Mallory Exclusionary Rule

The Supreme Court ruled that, when federal agents delay presentment of a defendant to a magistrate judge, and during that delay take statements from the defendant outside the six hours permitted under 18 U.S.C. § 3501(c), the statements must be suppressed if the delay in presentment was unnecessary under the Supreme Court rulings in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *Corley v. United States*, 129 S. Ct. 1558 (2009).

Sentencing

Statutory Sentencing Enhancement Under § 924(c) Requires No Separate Proof Of Intent

The Supreme Court has determined that the sentencing enhancement for a defendant's discharge of a firearm during and in relation to any crime of violence or drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(iii) required no separate

proof of intent, and therefore the enhancement applied if a gun was discharged in the course of a crime of violence or a drug trafficking crime whether on purpose or by accident. *Dean v. United States*, 129 S. Ct. 1849 (2009).

Loss Threshold For Deportation Based On Fraud Conviction Is Fact-Specific, Not Categorical

The Supreme Court recently issued a ruling in a civil deportation case that has ramifications for the use of prior convictions to enhance a defendant's sentence under *Almendarez-Torres* and the use of the *Taylor/Shepard* approach for certain aggravated felonies under 8 U.S.C. § 1101(a)(43) (which is applied in criminal immigration cases under 8 U.S.C. § 1326 and U.S.S.G. § 2L1.2). In *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Court noted that certain "aggravated felonies" set forth in 8 U.S.C. § 1101(a)(43) contain no generic definition because no criminal statute defines the offense. At issue in *Nijhawan* was "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000" under 8 U.S.C. § 1101(a)(43)(m)(I)). For such an offense, the Court rejected a categorical approach in favor of a "circumstance-specific" approach, where a judge looks to the "particular circumstances in which an offender committed the crime on a particular occasion" in determining whether it qualifies as a prior conviction for sentence enhancement purposes. To avoid the constitutional concerns with using predicate convictions to enhance sentences when a predicate fact was never an element of the offense, the Court noted a government concession that, in criminal cases, the prosecution would have to prove to a jury the specific

circumstances that make the offense an aggravated felony.

Habeas Corpus

Defense Counsel's Advice To Withdraw Insanity Claim Was Not Proper Basis For Federal Habeas Relief

The Supreme Court has reversed the grant of habeas relief to a state prisoner based on the prisoner's claim that his counsel had been ineffective, at the second stage of a bifurcated guilt-phase proceeding, in advising him to withdraw his claim that he was not guilty by reason of insanity, after he had been convicted at the first stage of first-degree murder. *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009).

Counsel Appointed To Represent Federal Habeas Petitioner Is Authorized To Represent Petitioner In Subsequent State Clemency Proceedings

The Supreme Court has ruled that an attorney who is appointed under 18 U.S.C. § 3599 to represent an indigent prisoner in a federal habeas proceeding is also authorized to represent his or her client in a state clemency proceeding and is entitled to compensation for that representation. *Harbison v. Bell*, 129 S. Ct. 1481 (2009).

State Courts' Rejection Of Habeas Petitioner's Brady Claim Did Not Rest On Ground That Barred Federal Review

Tennessee courts' rejection of a death-sentenced habeas petitioner's *Brady* claim did not rest on a ground that procedurally barred federal review, the

Supreme Court has ruled, vacating a Sixth Circuit decision. The Court noted that the petitioner had properly preserved and exhausted his claim in state court; the state post-conviction court's erroneous conclusion that the claim had previously been determined following a full and fair hearing in state court created no bar to federal habeas review; and no state court had held that the petitioner waived his *Brady* claim. *Cone v. Bell*, 129 S. Ct. 1769 (2009).

Hearing On Whether Defendant Was Mentally Retarded Under Atkins Did Not Violate Double Jeopardy Clause

A defendant was convicted and sentenced to death in Ohio state court. In imposing the death sentence, the court found that the defendant's mild mental retardation was a mitigating factor, but that the aggravating factors nonetheless outweighed the mitigators. Years later, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment precludes the execution of mentally retarded defendants. The defendant subsequently obtained habeas relief from his sentence, with the district court finding that a death sentence would be unconstitutional under *Atkins* because the state court had previously determined that the defendant was mentally retarded. The Sixth Circuit affirmed but the Supreme Court reversed, holding that the Ohio Supreme Court's finding on direct appeal that the defendant had mild to borderline mental retardation that merited some weight in mitigation did not bar, under the Double Jeopardy Clause, a subsequent hearing on whether the defendant qualified as mentally retarded under *Atkins*. In so ruling, the Court noted that mental retardation as a mitigator and mental

retardation under *Atkins* are discrete legal issues, and that the change in the law effected by *Atkins* substantially altered the State's incentive to contest the defendant's mental capacity. *Bobby v. Bies*, 129 S. Ct. 2145 (2009).

Prisoner Lacked Due Process Right Of Access To DNA Evidence

According to the Supreme Court, a state prisoner lacks a due process right of access to the state's evidence for DNA testing to prove his innocence. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009).

Certiorari Granted

Excludability Under Speedy Trial Act Of Pretrial Motion Preparation Time

The Supreme Court will review the Eighth Circuit's decision that a district court's express 28-day extension of the deadline for filing pretrial motions, at the defendant's request, was excludable under the Speedy Trial Act, 18 U.S.C. § 3161(h)(1), even though the defendant did not actually file any pretrial motions. *Bloate v. United States*, 129 S. Ct. 1984 (April 20, 2009).

Constitutionality of Federal Statute Prohibiting Depictions Of Animal Cruelty

Under 18 U.S.C. § 48, it is illegal to knowingly create, sell, or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain. The Supreme Court will decide whether § 48 is facially invalid under the Free Speech Clause of the

First Amendment. *United States v. Stevens*, 129 S. Ct. 1984 (April 20, 2009).

Constitutionality Of Sentencing Juvenile To Life Without Parole For Non-Homicide Offense

The Supreme Court will decide whether the Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a crime other than homicide. *Graham v. Florida*, 129 S. Ct. 2157 (May 4, 2009).

Adequacy Of Discretionary State Rule For Purposes Of Federal Habeas Review

The Supreme Court will decide whether a state procedural rule is automatically inadequate under the adequate-state-grounds doctrine, and is therefore unenforceable on federal habeas corpus review, because the state rule is discretionary rather than mandatory. In the case below, the Third Circuit concluded that, because Pennsylvania's fugitive forfeiture rule was discretionary, it did not preclude federal habeas review of claims that were alleged to be procedurally defaulted pursuant to the rule. *Beard v. Kindler*, 129 S. Ct. 2381 (May 18, 2009).

Conviction For Mail Fraud Absent Economic Harm To Private Party To Whom Honest Services Are Owed

The Supreme Court will decide both a substantive and a procedural question in regard to 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" as including a scheme or artifice to "deprive another of the intangible right of honest services," for purposes of the federal mail fraud statute, 18 U.S.C. § 1341. The

substantive question is whether § 1346 applies to the conduct of a private individual whose alleged scheme to defraud did not contemplate economic or other property harm to the private party to whom honest services were owed. The procedural question, challenging the Seventh Circuit's ruling that the defendants waived the argument that they were entitled to a special verdict form concerning the substantive issue, is whether an appellate court may avoid review of a prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules. *Black v. United States*, 129 S. Ct. 2379 (May 18, 2009).

Federal Habeas Court's Review Of State Court Factual Findings

The Supreme Court will review a case in which the Eleventh Circuit reversed a district court's grant of habeas relief, based on ineffective assistance of counsel, to a petitioner convicted of capital murder and sentenced to death. In reversing the district court's ineffective assistance determination, the Eleventh Circuit stated that its review of findings of fact by a state court under 28 U.S.C. § 2254 is even more deferential than under a clearly erroneous standard of review. The Supreme Court will decide (1) whether the state post-conviction court's decision was based on an unreasonable determination of the facts when it concluded that, during the sentencing phase of the capital case, the failure of an attorney with no criminal law experience to pursue or present evidence of the defendant's severely impaired mental functioning was a strategic decision, while ignoring evidence in the record that demonstrated otherwise; and (2) whether the standard of review applied by the Eleventh Circuit abdicated the court's

judicial review function under § 2254, by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there was clear and convincing evidence in the record to rebut certain subsidiary factual findings. *Wood v. Allen*, 129 S. Ct. 2389 (May 18, 2009).

Constitutionality Of Federal Statute
Authorizing Civil Commitment Of
"Sexually Dangerous Person"
Following Completion Of Prison
Sentence

The Supreme Court will review a decision of the Fourth Circuit that found unconstitutional a provision of the Adam Walsh Child Protection and Safety Act of 2006 authorizing the federal government to civilly commit any "sexually dangerous person" in the custody of the Bureau of Prisons, even after that person has completed his prison sentence. *United States v. Comstock*, 129 S. Ct. 2828 (June 22, 2009).

Sufficiency of *Miranda* Warning
Regarding Right To Have Counsel
Present During Questioning

The Supreme Court has granted certiorari in a case in which a state court held that *Miranda* warnings informing a defendant that he had the right to talk with a lawyer before questioning, and that he could use that right at any time during the interview, were insufficient to inform the defendant of his right to have counsel present during the actual police questioning. The state court found the warnings to be misleading, because the "before answering any questions" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before

questioning, but nothing in that statement suggests the attorney can be present during the actual questioning. The state court held that the defendant should have been clearly informed of his right to the presence of counsel during the custodial interrogation, and that the final warning, "You have the right to use any of these rights at any time you want during this interview," did not effectively convey to the defendant his right to the presence of counsel before and during police questioning. *Florida v. Powell*, 129 S. Ct. 2827 (June 22, 2009).

Right To Confront Forensic Analyst
Who Prepared Certificate Admitted
In Drug Trial

The Supreme Court will decide whether a state that allows a prosecutor to introduce a certificate of a forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate avoids violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness. *Briscoe v. Virginia*, 129 S. Ct. 2858 (June 29, 2009).

Public Official's Federal Liability
For Honest Services Fraud Absent
State Law Violation

The Supreme Court will review the Ninth Circuit's ruling that the criminal liability of a state or local official for federal honest-services fraud does not depend on an independent violation of state law. *Weyhrauch v. United States*, ___ S. Ct. ___, 2009 WL 789239 (June 29, 2009).

FOURTH CIRCUIT

Substantive Criminal Law

Title III Applies Even When Government Not Involved In Intercepted Communications

In proving that a defendant violated the terms of his supervised release, the prosecution introduced into evidence certain audio tapes that were made by the defendant's girlfriend in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522. The Fourth Circuit vacated the defendant's sentence, finding that, while the government was not involved in the interception of the defendant's conversations, Title III nonetheless prohibited the prosecution from introducing evidence of the intercepted conversations. *United States v. Crabtree*, 565 F.3d 887 (4th Cir. 2009).

District Court Did Not Abuse Its Discretion By Disqualifying Defense Counsel In Capital Case

in affirming a defendant's death sentence, the Fourth Circuit rejected a number of the defense's claims on appeal. Among its rulings, the Fourth Circuit found that the trial court did not abuse its discretion in disqualifying the defendant's attorneys based on a conflict of interest. During a search for the victim's body, defense counsel proposed to the police a "hypothetical" theory of events and the location of the strap used to strangle the victim. The Fourth Circuit found that, although counsel's statements were ultimately not admitted at trial, the potential remained that, if counsel stayed on the case, the defendant could later argue that counsel tried the case to avoid

testifying in a way that was prejudicial to the defense. The court further emphasized that the replacement of the defendant's court-appointed counsel, which occurred 16 months before jury selection, did not violate the defendant's Sixth Amendment rights, because the original counsel was removed during the infancy of the proceeding and replacement counsel were extremely experienced in capital litigation. *United States v. Basham*, 561 F.3d 302 (4th Cir. 2009).

Person Cannot Be Convicted Of Entering Military Installation In Violation Of Its Entry Requirements Unless He Or She Was Provided With Adequate Notice That Entry Is Prohibited Or Restricted

A defendant was convicted of entering a military installation for a purpose prohibited by law, to wit: entering onto the base as an illegal alien. On appeal the Fourth Circuit reversed, finding that the evidence was insufficient to prove that the defendant received notice of the entry requirements before he entered the military base, as required to support his conviction. The court noted that the defendant had no warning before leaving a public highway to enter an access roadway leading visitors to the military base guard post that entry by an illegal alien was prohibited; the warning sign listing the entry requirements was not visible until after a visitor already had entered the access roadway to the guard post; the security guards did not inform the defendant that he could not proceed beyond the guard post because he did not have a Department of Defense decal on his vehicle and an identification card or driver's license; and, instead of ordering the defendant to leave the base because he did not have a valid identification card

or a driver's license, the guards called the military police to arrest him for presenting a fraudulent identification card. *United States v. Madrigal-Valadez*, 561 F.3d 370 (4th Cir. 2009).

For Purposes Of § 1326,
Defendant Found In U.S. On Date
That Local Officer Deputized By
ICE Issued Immigration Detainer

For purposes of the offense of being found in the United States after deportation under 8 U.S.C. § 1326(a), the Fourth Circuit has ruled that a defendant was found in the U.S. on the date he was arrested on a state charge by a local police officer who was deputized by the Office of Immigration and Customs Enforcement, and the local officer issued an Immigration Detainer stating that ICE was initiating an investigation to determine whether the defendant was subject to removal. *United States v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009).

Defendant Was Not Deprived Of
Right To Counsel By
Disqualification Of One Of His
Chosen Attorneys

The Fourth Circuit ruled that a defendant convicted of conspiracy to commit bank fraud was not deprived of his Sixth Amendment right to counsel by the trial judge's disqualification of one of his attorneys of choice. The trial judge disqualified the attorney on the grounds that his continued representation of the defendant posed a serious potential for conflict of interest, where counsel was hired by a purported co-conspirator and was allegedly paid with proceeds of conspiracy, so that the fee arrangement could have discouraged the defendant from considering a plea offer, and

counsel could have become witness against his client. *United States v. Urutyan*, 564 F.3d 679 (4th Cir. 2009).

Statute Criminalizing The
Production Of Child Pornography
Contains No Reasonable Mistake
Of Age Defense

Under 18 U.S.C. § 2251(a), "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished . . . if that visual depiction was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means. . . ." The Fourth Circuit has rejected a defendant's argument that the statute is constitutionally infirm unless it is interpreted to incorporate a reasonable mistake of age defense. *United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009).

Conspiracy Charge Was Invalid
Due To Indictment's Omission Of
Element Of Predicate Offense

The Fourth Circuit has ruled that an indictment charging conspiracy based on a predicate offense of an "animal fighting venture" under 7 U.S.C. § 2156(a) was invalid under the Fifth Amendment because it omitted an element of the predicate offense, namely the sponsorship or exhibiting of "an animal in" such a venture. The court also found that the omission from the indictment of an element of the predicate offense could not be cured by the trial court's instruction incorporating the missing element. *United States v. Kingrea*, 567 F.3d 119 (4th Cir. 2009).

Erroneous Jury Instruction
Regarding Drug Conspiracy
Affirmed Under Plain Error Review

Under Fourth Circuit precedent, to properly apply the sentencing provisions of 21 U.S.C. § 841(b)(1) in a § 846 drug conspiracy prosecution, the jury must determine that the threshold drug quantity was reasonably foreseeable to the defendant. In this case, the district court failed to give any instruction requiring a jury determination of the quantity of cocaine base reasonably foreseeable to the defendant. The defendant did not object, and the appellate court therefore applied plain error review, finding that, while the district court had committed a plain error in instructing the jury, the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, because overwhelming evidence established that the defendant was personally responsible for the conspiracy's distribution of 50 grams or more of crack cocaine. *United States v. Jeffers*, 570 F.3d 557 (4th Cir. 2009).

Defendant Was Required To
Register As Sex Offender Under
SORNA Even Though Maryland
Had Not Implemented SORNA's
Registration Requirements

The Fourth Circuit has affirmed a defendant's conviction under the Sex Offender Registration and Notification Act (codified at 42 U.S.C. § 16901 et seq. and 18 U.S.C. § 2250), for failing to register in Maryland as a sex offender even though Maryland had not yet implemented SORNA's enhanced registration requirements. In so ruling, the court stated that Maryland had a pre-SORNA program under which the defendant could register and was

required to register, and therefore the defendant could not claim that there was no place to register simply because Maryland had not implemented the enhanced standards of SORNA. The Fourth Circuit also ruled that the Attorney General had "good cause" for issuance of interim regulations relating to SORNA's retroactivity and applicability in pre-implementation jurisdictions absent the required time period for notice and comment under the Administrative Procedure Act. Finally, the court ruled that SORNA does not violate the Commerce Clause. *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009).

Constitutional Criminal Procedure

Court Rules That Encounter
Between Police And Defendant
Was Consensual

A district court was not clearly erroneous in concluding that an encounter between the defendant and police officers at the defendant's place of business was consensual, the Fourth Circuit has ruled. In affirming the district court, the Fourth Circuit noted that the officers were not in uniform and were traveling in an unmarked vehicle, they waited outside while the defendant closed up his place of business, the officers asked the defendant to accompany them to his house, the officers never displayed any weapon or restrained the defendant, and, after agreeing to accompany the officers, the defendant remained in the police vehicle voluntarily and unrestrained. *United States v. Perry*, 560 F.3d 246 (4th Cir. 2009).

District Court Erred In Refusing To Allow Defendant To Withdraw Guilty Plea To Illegal Reentry Based On Proof He Was U.S. Citizen

A defendant pled guilty to illegal reentry under 8 U.S.C. § 1326, but subsequently moved to withdraw his guilty plea, contending that newly obtained DNA evidence showed that he may be the biological son of a United States citizen and, if so, he was also a U.S. citizen under 8 U.S.C. § 1403(a), which creates a right of derivative citizenship for certain persons born in the Canal Zone. The district court denied the motion and the Fourth Circuit reversed, remanding the case with instructions to the district court to allow the defendant to withdraw his plea. *United States v. Thompson-Riviere*, 561 F.3d 345 (4th Cir. 2009).

Defendant's Consent To Search Of Trunk Did Not Include Entire Vehicle, And Officer Could Not Have Reasonably Believed Defendant Was Dangerous

Reversing a defendant's conviction, the Fourth Circuit has ruled that the defendant's consent to a search of his trunk did not include the entire vehicle, even though the defendant handed the police officer the keys to his car, left the door of his car open, and failed to object to a search of the interior of his car. The Fourth Circuit further held that the police could not have reasonably believed that the defendant was dangerous, as would justify a protective search of the defendant's vehicle during a traffic stop, because the defendant was stopped for a mere headlights violation, he produced a valid license and registration, and nothing indicated that he was confrontational or

threatening. *United States v. Neely*, 564 F.3d 346 (4th Cir. 2009).

Sentencing

Defendant's Use Of File-Sharing Computer Program Constituted "Distribution" Of Child Pornography

The Fourth Circuit has affirmed as reasonable a defendant's 97-month sentence for possession of child pornography. In so ruling, the court joined three other circuits in finding that the use of a peer-to-peer file-sharing program constitutes "distribution" for the purposes of U.S.S.G. § 2G2.2(b)(3)(F). *United States v. Layton*, 564 F.3d 330 (4th Cir. 2009).

District Court Erred In Failing To Provide Particularized Basis For Sentencing Determination

The Fourth Circuit has ruled that a district court's imposition of a term of probation for a defendant who pled guilty to being a felon in possession of a firearm was not procedurally reasonable, when the sentencing court (1) did not explain its individualized reasons for imposing a sentence significantly below the advisory Guidelines range, (2) did not explain how the statutory sentencing factors applied to the defendant or the particular facts of his case, and (3) failed to articulate which of the defendant's arguments, if any, it found persuasive. *United States v. Carter*, 564 F.3d 325 (4th Cir. 2009).

District Court Committed Plain Error By Failing To Inform Defendant At Rule 11 Proceeding That He Could Face 15-Year Mandatory Minimum Sentence Under ACCA

The Fourth Circuit ruled that a district judge committed plain error by failing to inform a defendant who was pleading guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) that he could be subject to a 15-year mandatory minimum sentence under § 924(e), but that the defendant's substantial rights were not affected by the error, because nothing indicated that the defendant would not have pled guilty if properly informed of the sentencing exposure he faced, the defendant failed to move to withdraw his plea after becoming aware that he faced sentencing under the ACCA, and the case against the defendant was strong since he picked up a rifle and pointed it at his neighbor. The court applied the plain error standard of review because the defendant did not object to the lower court's error. *United States v. Massenburg*, 564 F.3d 337 (4th Cir. 2009).

Evidence That Defendant Took Loaded Revolver And Cocaine Onto Public Street Was Sufficient To Support Finding That Gun Facilitated Defendant's Cocaine Possession

The Fourth Circuit ruled that a drug possession offense is sufficient to support a four-level enhancement under section 2K2.1(b)(6) of the Sentencing Guidelines for possession of a firearm in connection with another felony offense, when the drug possession offense constitutes a felony under state law. The court further ruled that, in contrast to the presumption

of facilitation that applies in the case of a drug trafficking offense, the district court must evaluate whether the firearm facilitated or had the potential of facilitating a drug possession offense to determine whether the four-level enhancement applies. The court concluded that evidence showing the defendant took a loaded revolver and cocaine onto a public street was sufficient to support the four-level enhancement, because the defendant's possession of an accessible and ready-to-use revolver in an area where a gun had recently been fired, close to midnight, suggested that there was a heightened need for protection and that the firearm was present to embolden the defendant in possessing the cocaine. *United States v. Jenkins*, 566 F.3d 160 (4th Cir. 2009).

District Court Erred In Presuming That Sentence Within Guidelines Range Was Reasonable

After determining the sentencing range applicable to the defendant under the advisory Guidelines, the district court stated: "That's a range that shows the Court what might be a reasonable sentence, and it is viewed under the law as a presumptively reasonable sentence because that's what this Court is supposed to do; it's to sentence you to a reasonable amount of time." Finding that this statement suggested the district court improperly presumed that a sentence within the Guidelines range was reasonable, the Fourth Circuit vacated the defendant's sentence and remanded the case for resentencing. *United States v. Smith*, 566 F.3d 410 (4th Cir. 2009).

To Support Recidivist Sentence Enhancement, Government Must Prove Beyond Reasonable Doubt That Defendant Was Person Convicted In Prior Cases

The Fourth Circuit vacated a defendant's life sentence under 21 U.S.C. § 851, finding that the government did not prove beyond a reasonable doubt that the defendant was the same person who had been convicted in the two prior predicate offenses. The Fourth Circuit found that, although the government had produced sufficient evidence to establish the prior convictions, it made no apparent effort to establish the defendant was the person convicted in those previous cases, even though the record reflected a number of discrepancies with respect to the issue of identity. The Court noted that the documents establishing the prior convictions had inconsistent names and partially redacted social security numbers; that the government made no effort to link the defendant to the address and birth date listed on the prior conviction; and that the district judge had failed to inquire of the defendant whether she affirmed or denied the prior convictions. *United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009).

Habeas Corpus & Post-Conviction

Fourth Circuit Rejects Ineffective Assistance Of Counsel Claim In Affirming Denial Of Habeas Relief To Death Row Inmate

The Fourth Circuit has affirmed the denial of habeas relief to a defendant convicted of capital murder and sentenced to death. In so ruling, the Fourth Circuit found that the state court's determination that defense counsel was not ineffective for failing to object at

sentencing to a National Crime Information Center report which incorrectly stated that the defendant had been convicted of capital murder and referenced the pending capital murder charge was not an unreasonable application of federal law, because it was reasonable to believe that the jury understood the defendant had not previously been convicted of capital murder of two other victims in addition to the victim in question; the jury knew the defendant's previous capital murder conviction had been successfully appealed and vacated; and the jury was aware of crimes that had been committed against the victim's sister, including a resulting attempted capital murder conviction. *Powell v. Kelly*, 562 F.3d 656 (4th Cir. 2009).

Fourth Circuit Vacates Denial Of Habeas Relief To Death Row Inmate Based On District Court's Failure To Address Actual Innocence Claim

The Fourth Circuit has vacated the denial of habeas relief to a death row inmate, finding that the district court abused its discretion and committed an error of law by failing to assess the inmate's actual innocence claim, based on a recantation by the prosecution's key witness, and by failing to determine whether it was more likely than not that no reasonable juror would have convicted the inmate of capital murder in light of the new evidence. The Fourth Circuit also found that the district court failed to make the requisite fact-based threshold determinations in denying the inmate's request for an evidentiary hearing on his *Brady* claims and his claim that the prosecution used false evidence at his trial. *Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009).

In Affirming Death Sentence,
Fourth Circuit Finds Defendant Did
Not Unequivocally Invoke Right To
Counsel During Police Questioning

In affirming an inmate's death sentence, the Fourth Circuit rejected the inmate's claim that his statement during interrogation by the police – that his “daddy wanted him to call a lawyer” – sufficed to invoke counsel. The Fourth Circuit ruled that the defendant did not unequivocally express a desire for counsel, and that he failed to present any authority demonstrating that the police's failure to tell him of his attorney's presence at the sheriff's office during the custodial interrogation was “egregious” under clearly established Supreme Court precedent. *Hyatt v. Branker*, 569 F.3d 162 (4th Cir. 2009).

Fourth Circuit Rejects Conflict Of
Interest Claim In Affirming Death
Sentence

The Fourth Circuit affirmed the denial of habeas relief to a death row inmate, rejecting the inmate's argument that his attorney operated under a conflict of interest because he had previously represent the sheriff's office in connection with an Equal Employment Opportunity Commission complaint. The court found that, even assuming that an actual conflict of interest existed, the defendant failed to establish that the conflict adversely affected the attorney's performance at any time during the defendant's trial, when the attorney pursued all available defenses and trial strategies which were of help to the defendant, and vigorously cross-examined the sheriff's deputies, questioning at every turn their actions, identification techniques and investigatory

methods. *Stephens v. Branker*, 570 F.3d 198 (4th Cir. 2009).

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