
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

The Supreme Court reversed the denial of habeas relief to a death-row inmate, finding that he was prejudiced by his attorney's failure to investigate and present penalty-phase mitigation evidence. See *Porter v. McCollum*, at p. 4.

The Fourth Circuit reversed a defendant's conviction under 18 U.S.C. § 922(g) based on the district court's failure to give a jury instruction on the justification defense. See *United States v. Ricks*, at p. 9.

The Fourth Circuit reversed a defendant's convictions and sentence based on a misjoinder of charges. The court found that counts alleging that the defendant committed a carjacking and that he knowingly possessed and brandished a firearm in furtherance of the carjacking were not of a same or similar character to a count alleging that the defendant was a felon in possession of a loaded firearm that was based on an incident unrelated to the carjacking. See *United States v. Hawkins*, at p. 9.

of you at the next CJA felony panel training in Baltimore on May 14, 2010.

In addition to the annual CJA felony panel training, we are putting together a series of Sentencing Workshops for this spring, where, in a seminar format, we will discuss sentencing issues and specific topic areas, including cooperation cases, drug sentencing cases, child pornography cases, etc. We will hold the program in our new space in Baltimore. The first session is scheduled for March 12, 2010. Paula Xinis and Bob Bonsib will present an Introduction to Sentencing Advocacy. We are still in the process of finalizing the next dates and topics. We will get out scheduling and registration details by email in the near future.

NOTES FROM THE DEFENDER

Training

We had a very successful felony training program in Greenbelt on December 4, 2009. Training Director Paula Xinis organized the training and it was very well-received. We had a strong turnout and look forward to seeing many

Cooperation

The United States Attorney's Office continues to make the cooperation process in this District more difficult to navigate for defendants. Over the past few years, while the dangers facing cooperators become increasingly severe, the United States Attorney's Office has raised more obstacles in the path of clients attempting to cooperate. Increasingly, even for clients with signed

cooperation plea agreements, the government is refusing to move for 5K relief for clients.

We have seen a series of adjustments to the process, including changes to the proffer agreement, the techniques employed in the interviews, and an additional layer of supervision and review, shortly before the sentencing. These changes have given the government even more power in an already one-sided process. The shifts make it easier for the government to refuse to move for the reductions contemplated in the cooperation agreements. And they do. At the same time, it is almost impossible for the client to withdraw from their guilty plea. In mandatory minimum cases, this is an impossible situation for counsel and the client.

When discussing with a client the benefits of entering into a cooperation agreement, you have to acknowledge that, after starting the process of proffering, there is very little chance that the client can NOT plead guilty. Because of changes to the proffer letter, and the government's insistence that the client first admit their guilt in any proffer session, it is nearly impossible to "explore" cooperating. In exchange, even if the government enters into a signed plea agreement contemplating cooperation, the client will not know until shortly before the sentencing whether he will receive any benefit for his efforts. Furthermore, the determination will not turn solely on the truthfulness of the client's cooperation prior to signing the plea, but, on factors beyond the client's and counsel's control, including the energy of the agents and the perspective of supervisors. Adding "insult" to injury, some AUSA's refuse to allow our office's investigators (almost all former law

enforcement officers) to sit in on proffer sessions. So, if there is a dispute, we end up as witnesses and have to withdraw as counsel.

The most recent change to the process may be the most disturbing. Clients frequently cooperate "outside the case." The disclosure of this additional criminal activity inevitably implicates the client in some role in additional drug transactions, fraud schemes, etc. Historically, the "culture" of this district's cooperation policy has always been that clients are not harmed by these admissions. We cannot say that anymore. We now have three cases in our office where clients were charged with additional criminal conduct, about which the client provided information during the cooperation proffers, even though the government was completely satisfied with the client's cooperation.

Even without the United States Attorney's policy changes, it has become very difficult to bring clients in to cooperate in any case. The "stop-snitching" culture has made it increasingly dangerous for clients to assist the government. Cooperators get murdered in this District. Because of limited resources, the Marshals can do little to protect cooperators. The Marshals transport cooperating witnesses – and the targets of the same cooperators – to Court in the same van. The number of homicides in the Bureau of Prisons nearly doubled this past year. We all get bombarded with phone calls from clients in prison requesting PSR's so that they can "prove" they did not cooperate. No one can assure any cooperating witness that harm will not come to them.

It has become even more difficult if the cooperation is "outside the case." The

practice of charging cooperating clients, with matters about which they have implicated themselves during the cooperation process, dramatically changes again the conversations we have to have with our clients who are considering cooperating. We must advise our clients now that, if they start this process, there is little or no chance they can go to trial, whether their cooperation is successful or not. Furthermore, because of the changes to the supervisory process, they will not know until long after the guilty plea, whether they have in fact helped themselves. And now, if they share information about additional criminal misconduct "outside the case," they might have made things worse for themselves.

All of this in a district which is one of the most violent and threatening for cooperators in the nation, and where the United States Attorney's office is the stingiest in the nation in terms of the extent of the departure it recommends for cooperators. When advising a client about cooperation matters "outside of the case," proceed with great caution.

New Hires

We are very pleased that Lucius Outlaw and Patrick Kent have joined our office as Assistant Federal Public Defenders in Baltimore. Lucius graduated from Wesleyan University and the University of Pennsylvania Law School. Before going to law school, Lucius was a reporter with the Dow Jones News Service. After law school, Lucius was an associate at Williams and Connolly. He joined Mayer Brown in 2005 where he specialized in white collar criminal litigation. Lucius was named partner at Mayer Brown in 2009.

Patrick Kent joins us from the Office of the Public Defender where he was Chief of the Forensics Unit. Patrick graduated from St. Lawrence University and the University of Baltimore School of Law. Many of you know Patrick already. By giving generously of his time for trainings and consultations on forensic matters, he has been a tremendous help to our office and the CJA program over the years. Patrick is a very experienced trial lawyer with a national reputation for his working in the forensics area.

RECENT CASE LAW

SUPREME COURT

Constitutional Criminal Procedure Officer's Warrantless Entry Into Defendant's Home Was Justified By Emergency-Aid Exception To Warrant Requirement

The Supreme Court ruled that the emergency-aid exception to the Fourth Amendment's warrant requirement justified an officer's warrantless entry into a defendant's residence. The Court found that the officer properly invoked the exception to enter the defendant's residence after he and another officer responded to a complaint of a disturbance and "encountered a tumultuous situation in the house." The officers found a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, with the glass still on the ground outside. They also noticed blood on the hood of the pickup and on clothes inside it, as well as on one of the doors to the house. Through a window the officers could see the defendant inside the house with a cut

on his hand, screaming and throwing things. When the officers asked the defendant if he needed medical attention, the defendant profanely told the officers to get a search warrant. Under these circumstances, the Court found that it was reasonable for the officers to believe that the defendant's "projectiles" might have had a human target, such as a spouse or a child, or that the defendant would hurt himself while enraged. *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

Habeas Corpus

Supreme Court Reverses Habeas Relief For Death Row Inmates Based On Trial Counsels' Failure To Investigate And Present Mitigating Evidence At Sentencing

The Supreme Court reversed the Ninth Circuit's grant of habeas relief to a state prisoner sentenced to death for capital murder. The Ninth Circuit had concluded that trial counsel could have presented additional penalty-phase evidence "humanizing" the prisoner and that counsel's failure to do so was prejudicial. The Supreme Court ruled that, even assuming trial counsel performed deficiently in failing to present the additional mitigation evidence, the prisoner was not prejudiced because the additional evidence would have been cumulative and could have opened the door to the admission of damaging evidence regarding a prior murder. *Wong v. Belmontes*, 130 S. Ct. 383 (2009).

The Supreme Court also reversed the Sixth Circuit's grant of habeas relief to a death row inmate. The Sixth Circuit found that trial counsel had inadequately investigated mitigation evidence regarding the prisoner's background in preparation for the sentencing phase of the prisoner's

capital murder trial. In reversing that decision, the Supreme Court concluded that, given all the evidence unearthed by counsel from those individuals closest to the prisoner's upbringing and the experts who reviewed his history, it was not unreasonable for counsel not to identify and interview every other living family member or every therapist who had once treated the prisoner's parents. *Bobby v. Van Hook*, 130 S. Ct. 13 (2009).

Counsel's Failure To Investigate Penalty-Phase Mitigation Evidence Was Prejudicial To Capital Defendant

The Supreme Court has reversed the denial of habeas relief to a Florida death-row inmate, finding that he was prejudiced by his attorney's failure to investigate and present additional penalty-phase mitigation evidence. The Court concluded that the defense attorney, who had served solely as standby counsel until the penalty phase, performed deficiently in failing to take the first step of interviewing witnesses or requesting records that would have uncovered mitigation evidence regarding the petitioner's heroic military service during the Korean War, his struggles to regain normality after returning from the war, his childhood history of physical abuse, his brain abnormality that caused difficulty in reading and writing, and his limited schooling. The Court emphasized that the minimal evidence presented by counsel at the penalty phase left the jury knowing hardly anything about the petitioner other than the facts of his crimes. *Porter v. McCollum*, 130 S. Ct. 447 (2009).

Discretionary State Procedural Rule Can Serve As Adequate Ground Barring Federal Habeas Review

Vacating a Third Circuit decision, the Supreme Court has held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. Under the adequate state ground doctrine, a federal habeas court will not review a decision by a state court resting on a state law ground that is independent of the federal question and adequate to support the judgment. 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 a prisoner's claims that were alleged to be procedurally defaulted pursuant to the rule. The Supreme Court disagreed. *Beard v. Kindler*, 130 S. Ct. 612 (2009).

Certiorari Granted

Whether Prisoner's Challenge Of New Sentence Is A "Second Or Successive" Claim For Purposes Of Habeas Law

The Supreme Court will decide whether, when a prisoner is resentenced after having obtained federal habeas relief from an earlier sentence, a claim in a federal habeas petition challenging the new sentence is subject to dismissal under 28 U.S.C.A. § 2244(b)(2) as a "second or successive" claim, if the prisoner could have challenged his previously imposed, but now vacated, sentence on the same constitutional grounds. *Magwood v. Culliver*, 130 S. Ct. 624 (Nov. 16, 2009).

Habeas Court's Authority To Order Release Of Gitmo Detainees After Their Enemy Combatant Status Was Removed

The Supreme Court has granted certiorari in a case in which the D.C. Court of Appeals held that a habeas court lacked the authority to order the Executive Branch to bring to the United States, and release within its borders, Chinese citizens detained at Guantanamo Bay after their enemy combatant status had been removed. *Kiyemba v. Obama*, 130 S. Ct. 458 (Oct. 20, 2009).

Court Will Review Jeffrey Skilling's Convictions In Enron Case

The Supreme Court will review a case in which the Fifth Circuit rejected the claims of Jeffrey Skilling, the convicted former chief executive officer of the Enron Corporation. The Court will decide whether the honest-services fraud statute, 18 U.S.C.A. § 1346, requires that the government prove an employee's conduct was intended to achieve private gain rather than to advance the employer's interests, and, if not, whether the statute is unconstitutionally vague. The Court will also address whether the government may rebut the presumption of prejudice arising from the widespread community impact of a defendant's alleged conduct and massive, inflammatory pretrial publicity, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced. *Skilling v. United States*, 130 S. Ct. 393 (Oct. 13, 2009).

Court Will Address The Scope Of Ex Post Facto

The Supreme Court has granted certiorari in a case in which the Second

Circuit, reviewing for plain error, held that a defendant's convictions under the sex trafficking and forced labor provisions of the Trafficking Victims Protection Act violated the Ex Post Facto Clause. The Second Circuit noted that the indictment charged the defendant with violating the statute between January of 1999 and October of 2001, that the government presented evidence at trial covering this entire time period, that the statute was enacted in October of 2000, and that the district court had failed to instruct the jury regarding the date of the statute's enactment. *United States v. Marcus*, 130 S. Ct. 393 (Oct. 13, 2009).

Equitable Tolling Of Habeas Filing Period Due To Counsel's Gross Negligence

The Supreme Court will review a case in which the Eleventh Circuit held that the conduct of a habeas petitioner's appointed counsel during post-conviction proceedings, in failing to communicate with his client on the status of his case and in failing to file a federal habeas petition despite repeated instructions to do so, did not warrant equitable tolling of the one-year limitations period for filing a federal habeas petition. The Eleventh Circuit determined that the attorney's negligence did not warrant such tolling absent "an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." *Holland v. Florida*, 130 S. Ct. 398 (Oct. 13, 2009).

Test For Analyzing Sixth Amendment Challenge To Racial Composition Of Venire Panels

The Supreme Court has granted certiorari in a case in which the Sixth Circuit granted relief to a habeas

petitioner, who had been convicted of second degree murder in state court, on the ground that his Sixth Amendment right to have a jury drawn from a fair cross section of the community had been violated. In the case below, the Sixth Circuit concluded that the under representation of African Americans in the county's venire panels was a result of systematic exclusion. *Berghuis v. Smith*, 130 S. Ct. 48 (Sept. 30, 2009).

Whether Nature Of Weapon Under 18 U.S.C. § 924(c) Is Element Of The Offense

The Supreme Court will decide whether, under 18 U.S.C. § 924(c), which forbids the carrying and use of guns in connection with a federal crime, the nature of the weapon is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt. Under § 924(c), the mandatory minimum sentence is increased if the firearm is a short-barreled rifle or shotgun. A mandatory minimum sentence of 30 years is also imposed under the statute if the firearm is a machine-gun or destructive device or is equipped with a silencer or muffler. *United States v. O'Brien*, 130 S. Ct. 49 (Sept. 30, 2009).

Waiver of Miranda Rights By Continuing To Talk To Officer After Receiving Warnings

The Supreme Court will decide whether *Miranda* prevents a police officer from attempting to non-coercively persuade a defendant to cooperate where the officer had informed the defendant of his rights, the defendant had acknowledged that he understood those rights, and the defendant neither invoked his rights nor waived them. *Berghuis v.*

Thompkins, 130 S. Ct. 48 (Sept. 30, 2009).

Applying Second Amendment To States Through Incorporation Under Fourteenth Amendment

The Supreme Court will review the Seventh Circuit's ruling that municipal bans on the possession of most handguns did not violate a citizen's Second Amendment right to keep such guns at home for self-protection because the Second Amendment did not apply to municipalities as subordinate bodies of the State. *McDonald v. City of Chicago*, 130 S. Ct. 48 (Sept. 30, 2009).

Whether SORNA Applies To Sex Offender Who Traveled In Interstate Commerce Prior To Statute's Enactment

The Supreme Court will decide whether the Constitution's Ex Post Facto Clause precludes a federal conviction for failing to register as a sex offender after crossing state lines, with respect to a sex offender whose underlying conviction for a sex offense, as well as his interstate travel, occurred before enactment of the federal Sex Offender Registration and Notification Act (SORNA), where the offender failed to register within a reasonable time after SORNA became applicable to him. *Carr v. United States*, 130 S. Ct. 47 (Sept. 30, 2009).

Constitutionality Of Statute That Prohibits "Training" To Designated Foreign Terrorist Organizations

The Supreme Court has granted certiorari in a case in which the Ninth Circuit held that 18 U.S.C.A. § 2339B(a)(1), which prohibits providing "training" to designated foreign terrorist

organizations, was impermissibly vague. *Holder v. Humanitarian Law Project*, 130 S. Ct. 48 (Sept. 30, 2009).

Lack Of Manifest Necessity For Mistrial As Bar To Retrial Under Double Jeopardy Clause

The Supreme Court granted certiorari in a case in which a divided panel of the Sixth Circuit affirmed a district court's grant of habeas relief on the grounds that the retrial of a defendant on murder and firearms charges, after a state trial court had previously declared a mistrial, violated the defendant's right not to be placed twice in jeopardy. Under Supreme Court precedent, a court may not force a defendant to undergo retrial on a matter that concluded without a conviction or acquittal unless there was "manifest necessity" for declaring a mistrial. The Sixth Circuit held that there was no manifest necessity for the state trial court's mistrial declaration. *Renico v. Lett*, 130 S. Ct. 743 (Nov. 30, 2009).

Defining "Term Of Imprisonment" For Purposes Of Good Time Credits

The Supreme Court will review the Ninth Circuit's decision summarily affirming district court decisions that rejected two habeas petitioners' contention that their good time credits under 18 U.S.C.A. § 3624(b), at the end of each year of the "term of imprisonment," should have been based on the sentences imposed rather than the time served. The petition asserts that the BOP, by interpreting the statutory phrase "term of imprisonment" as referring to time served rather than the sentence imposed, gives prisoners seven fewer

days of available credits. *Barber v. Thomas*, 130 S. Ct. 737 (Dec. 30, 2009).

Applicability Of Booker To Sentence Reduction Based On Amended Guidelines Range

The Supreme Court will review a case in which the Third Circuit held that *United States v. Booker*, which made the United States Sentencing Guidelines advisory only, did not apply to the length of a sentence reduction that may be granted under 18 U.S.C. § 3582(c)(2) as a result of a subsequent lowering of a defendant's sentencing range by the Sentencing Commission. The defendant in the case sought a reduced sentence under § 3582(c)(2) based on the Sentencing Commission's 2008 amendment to the Guidelines which retroactively reduced the base offense level for crack cocaine offenses by two levels. The district court reduced the defendant's sentence by two levels, but held that *Booker* did not apply to a § 3582(c)(2) motion, and thus found it lacked the authority to reduce the defendant's sentence further. *Dillon v. United States*, 130 S. Ct. 797 (Dec. 7, 2009).

Search Of Text Messages On Police Officer's Pager

The Supreme Court will review the Ninth Circuit's decision that a city violated the Fourth Amendment by searching personal messages sent to or received by a police sergeant on his city-issued wireless text-messaging pager. *City of Ontario, Cal. v. Quon*, ___ S. Ct. ___, 2009 WL 1146443 (Dec. 14, 2009).

Successive State Misdemeanor Drug Conviction As "Aggravated Felony" Under Immigration Law

The Supreme Court has granted certiorari in a case in which the Fifth Circuit held that, because an undocumented immigrant's second state misdemeanor drug possession offense could have been punished as a felony under federal law, it qualified as an "aggravated felony" under 8 U.S.C.A. § 1101(a)(43)(B). That statute defines an aggravated felony to include a "drug trafficking crime," which in turn is defined as any felony punishable under the Controlled Substances Act. *Carachuri-Rosendo v. Holder*, ___ S. Ct. ___, 2009 WL 2058154 (Dec. 14, 2009).

FOURTH CIRCUIT

Substantive Criminal Law

Evidence Was Sufficient To Warrant Jury Instruction On Justification Defense

The Fourth Circuit has reversed a defendant's conviction under 18 U.S.C. § 922(g) for being a felon in possession of a firearm based on the district court's failure to give a jury instruction on the justification defense. The Fourth Circuit found that the evidence at trial was sufficient to warrant such an instruction, noting that the defendant's partner returned to their shared apartment acting erratically and walking and talking strangely; the defendant realized that his partner had a gun in his hand and knocked the gun out of his partner's hand; the defendant then picked up the gun and removed the clip, throwing the pieces in different directions; the partner ran out of the apartment and drove away;

after the partner left, the defendant retrieved the gun and clip and placed the pieces on top of a dresser under clothes in the bedroom; and, after leaving the bedroom, the defendant went to the living room and watched television until the partner and the police arrived at the apartment. *United States v. Ricks*, 573 F.3d 198 (4th Cir 2009).

Conspiracy Charge Based On Predicate Offense Of “Animal Fighting Venture” Rendered Invalid By Omission Of Element Of Offense

Under 7 U.S.C. § 2156(a)(1), it is unlawful for any person to knowingly sponsor or exhibit an animal in an “animal fighting venture.” The Fourth Circuit has ruled that an indictment charging a defendant with conspiracy to sponsor or exhibit an animal fighting venture contravened the Fifth Amendment’s requirement that an indictment expressly charge all the elements of an offense, because it omitted the statutory phrase “an animal in” from the predicate offense. *United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009).

Fourth Circuit Remands Case For Further Findings To Establish Whether Involuntary Medication Of Defendant Was Warranted Under *Sell*

In applying the Supreme Court’s decision in *Sell v. United States*, 539 U.S. 166 (2003), the Fourth Circuit remanded a case so that the district court could determine whether the government could, consistent with due process, involuntarily administer antipsychotic drugs to render the defendant competent to stand trial. The court noted that the government would have to prove by clear and

convincing evidence that such involuntary medication would significantly further the state’s interests. To show that involuntary medication which renders a defendant competent to stand trial will significantly further the government’s interests under *Sell*, the government must not only show that a treatment plan works on a defendant’s type of mental disease in general, but that it is likely to work on that defendant in particular. *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009).

Misjoinder Of Carjacking Counts And Felon-In-Possession Count Affected Defendant’s Substantial Rights, Thus Requiring Reversal

The Fourth Circuit has reversed a defendant’s convictions and his 360-month sentence based on a misjoinder of charges. The court found that counts alleging that the defendant committed a carjacking and that he knowingly possessed and brandished a firearm in furtherance of the carjacking were not of a same or similar character to a count alleging that the defendant was a felon in possession of a loaded firearm that was based on an incident unrelated to the carjacking. The Fourth Circuit ruled that the trial judge committed reversible error in the joinder of the three offenses – even though all occurred during a three-week period – absent allegations of an explicit connection between the two carjacking charges and the felon-in-possession charge. *United States v. Hawkins*, 589 F.3d 694 (4th Cir. 2009).

Constitutional Criminal Procedure

Fourth Circuit Finds That Officer's Questioning Of Suspect Did Not Violate *Miranda*

After a defendant invoked his right to counsel pursuant to *Miranda* warnings, a detective provided the defendant with the statement of charges, informed him that he had been named as the triggerman, that he was being charged with first-degree murder arising from a carjacking, and that the maximum penalty for the charge was death. A police officer then taunted the defendant in a loud confrontational voice, "I bet you want to talk now, huh?" According to the Fourth Circuit, the police did not engage in the functional equivalent of interrogation, and therefore *Miranda* did not require suppression of the defendant's incriminating post-arrest statements. *United States v. Blake*, 571 F.3d 331 (4th Cir. 2009).

Fourth Circuit Finds That Police Relied Upon Anticipatory Warrant In Good Faith

The Fourth Circuit ruled that, even if the information that the police presented to a magistrate judge who issued an anticipatory search warrant for the defendant's residence was insufficient to establish probable cause that the package delivery which was the triggering condition for the warrant was likely to occur, it was not so lacking in indicia of probable cause that the officers' reliance on the warrant was entirely unreasonable, so as to render inapplicable the *Leon* good faith exception to the exclusionary rule. In so ruling the court noted that the information presented to the magistrate judge included that the package containing approximately eight pounds of

marijuana was shipped to the addressee at apartment nine of the address on the defendant's street, that no one known by the addressee's name lived at the address on the package, and that the only apartment nine on the same street was the defendant's residence. *United States v. Andrews*, 577 F.3d 231 (4th Cir. 2009).

In Fraud Investigation, Items Seized Fell Within Scope Of Search Warrant

The Fourth Circuit has found that postal inspectors' seizure of invoices related to purchases made for a defendant's business, the defendant's personal financial records, and individual investor files related to the business, as part of an investigation into the defendant's alleged access device fraud and identity fraud, fell within the scope of a search warrant allowing for the seizure of fraudulently purchased items, which included the seizure of evidence representing purchases using credit cards obtained by fraud and/or proceeds of other forms of fraud, even if the items seized were not specifically listed in the warrant. In so ruling the court stated that the invoices demonstrated that the defendant paid for business advertisements with fraudulent credit cards, the personal and business records demonstrated that the defendant misrepresented his income on credit card applications, and the amount investors invested in the company was directly tied to the company's revenue. *United States v. Phillips*, 588 F.3d 218 (4th Cir. 2009).

Court Finds Pistol Was Lawfully Seized From Defendant's Vehicle Under Plain View Doctrine

Applying plain error review, the Fourth Circuit has ruled that a deputy who stopped a truck for an equipment violation, arrested the driver after learning that his license was suspended, placed him in the back seat of the patrol car, asked the passenger to step out of the truck, and then discovered a pistol lying on the floorboard in front of the passenger-side seat when the passenger moved, lawfully seized the pistol under the plain view doctrine. The court stated that the deputy's lawful request that the passenger exit the truck was a discrete act that brought the pistol into plain view, and the firearm came into plain view before any search of the truck. *United States v. Rumley*, 588 F.3d 202 (4th Cir. 2009).

Police Had Reasonable Suspicion To Support Investigatory Stop Of Vehicle, And Had Reasonable Belief Defendant Was Dangerous And Might Gain Immediate Control Of Weapon, Thereby Justifying Protective Search Of Defendant's Vehicle

The Fourth Circuit found that police officers had reasonable suspicion to support an investigatory stop of a vehicle the defendant was driving, based on the following facts. An informant had called the police from a motel, reporting a man in possession of a gun, and, when the officer went to the motel and was speaking with the informant, the informant saw the defendant's car drive past in the motel parking lot and identified the defendant as the man with the gun. The Fourth Circuit noted that the officer had met with the informant in a face-to-face

encounter, and, having observed the informant's physical appearance and location, the officer could have returned to the motel and tracked him down to hold him accountable if his accusations had proven false. The Fourth Circuit further held that, following the stop of the defendant's vehicle, the officer had a reasonable belief the defendant was dangerous and might gain immediate control of weapons, as was required to support a protective search of the defendant's vehicle, because the informant had stated that the defendant had a gun, the motel was in a high-crime neighborhood in which the officer had taken numerous calls reporting dangerous weapons, and, when the defendant exited his vehicle, he looked around as though he might take off running. The Fourth Circuit also noted that, although the defendant was restrained in the backseat of the police vehicle at the time of the search, he was being detained solely pursuant to the investigatory stop, and would have regained access to his vehicle if released. *United States v. Griffin*, 589 F.3d 148 (4th Cir. 2009).

Search Pursuant To Girlfriend's Consent Was Reasonable

The Fourth Circuit has ruled that police officers' search of a defendant's bedroom and under the mattress of his bed, in connection with their investigation of a break-in and shooting at his residence, was reasonable, where the defendant's live-in girlfriend signed an authorization "to conduct a complete search of the premises and the property, including all buildings and vehicles, both inside and outside," she did not verbally restrict their search in any way, and the officers were following a trail of blood that led from the kitchen into the bedroom and onto the

bedspread. *United States v. Coleman*, 588 F.3d 816 (4th Cir. 2009).

Evidence

Admission Of Expert Testimony Decoding Terms Used By Defendants And Coconspirators During Recorded Telephone Conversations Did Not Violate Confrontation Clause

The Fourth Circuit ruled that, in a drug conspiracy prosecution, the admission of expert testimony from a government witness decoding terms used by the defendants and coconspirators during recorded telephone conversations did not violate the Confrontation Clause as interpreted by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004). The defendants argued that the expert testimony violated *Crawford* because the experts based their opinions on testimonial interviews with informants and cooperating witnesses. The Fourth Circuit disagreed, noting that (1) the experts did not act as mere transmitters of testimonial hearsay because they never made any direct reference to the other sources they relied on in decoding the conversations; (2) each expert presented his independent judgment to the jury based on his expertise in investigating narcotics organizations; and (3) the experts were subject to cross-examination. *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009).

Fourth Circuit Rules That Evidence Discrediting Government's Drug Informant Was Properly Excluded

The Fourth Circuit ruled that evidence that a drug informant could readily have purchased cocaine from someone other than the defendant had already been

presented to the jury in the defendant's drug trial and would have resulted in a "mini-trial," and therefore the evidence was not of a high probative value and was properly excluded by the trial court. The Fourth Circuit emphasized that the jury had already heard evidence that the informant was a convicted drug felon, that he had recently been charged with selling drugs to another informant, and that he otherwise had access to drugs in the area where the drug transaction with the defendant had occurred. *United States v. Myers*, 589 F.3d 117 (4th Cir. 2009).

Sentencing

Defendant's N.C. Conviction For Conspiracy To Commit Robbery With Deadly Weapon Was Violent Felony Under ACCA

The Fourth Circuit held that a defendant's prior North Carolina conviction for conspiracy to commit robbery with a dangerous weapon constituted a violent felony under the Armed Career Criminal Act. *United States v. White*, 571 F.3d 365 (4th Cir. 2009).

Sentencing Court Clearly Erred In Finding Defendant Was Organizer Or Leader Of Criminal Activity

The Fourth Circuit found that, in sentencing a defendant for uttering counterfeited obligations of the United States, the district court clearly erred in applying an offense level enhancement under U.S.S.G. § 3B1.1(a) for being an organizer or leader of the criminal activity, because there was no evidence that the defendant planned or organized the counterfeiting operation, exercised any control or authority over other participants, recruited accomplices into

the operation, or claimed any share of the fruits of the criminal activity. The Fourth Circuit stated that merely supplying contraband to the other participants in the criminal activity, without more, could not sustain the enhancement. *United States v. Cameron*, 573 F.3d 179 (4th Cir. 2009).

District Court Improperly Applied Presumption Of Reasonableness To Guidelines Sentence

In sentencing a defendant to the bottom of the properly calculated Guidelines range, the district court concluded that it was constrained in considering a sentence outside the range because Guidelines sentences “are always reasonable and are presumed always reasonable.” The Fourth Circuit vacated the sentence, finding that the district court improperly applied a presumption of reasonableness to the Sentencing Guidelines and misconceived its obligations under 18 U.S.C. §§ 3551 and 3553. *United States v. Raby*, 575 F.3d 376 (4th Cir. 2009).

District Court Failed To Sufficiently Explain Need For Special Conditions On Defendant’s Term Of Supervised Release

The Fourth Circuit vacated a defendant’s sentence based on the district judge’s failure to offer an explanation as to the necessity of “very rigid” special conditions imposed on the defendant’s term of supervised release. In vacating the sentence, the Fourth Circuit noted that the record did not contain essential information about the justifications offered for the sentence imposed, thereby preventing the court from conducting meaningful review on appeal. *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009).

District Court Erred By Failing To Make Required Findings As To What, If Any, Instrumentality Constituted Basis For Sentence Enhancement For Threatened Use Of Dangerous Weapon

The Fourth Circuit found that a district judge erred, in sentencing a civilian government contractor for an assault on an Afghan national at a United States military outpost, by failing to make required findings as to what, if any, instrumentality constituted the basis for its imposition of an enhancement for the threatened use of a dangerous weapon and, if such a weapon were actually used, in failing to apply the required enhancement for the actual use of a dangerous weapon. The court also found that the district judge erred by failing to provide the required rationale for an upward departure for extreme conduct. *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009).

Fourth Circuit Affirms Use Of Uncharged Conduct As Basis For Enhancing Defendant’s Sentence

The Fourth Circuit ruled that a district court’s use of uncharged conduct in enhancing a defendant’s sentence did not violate the Sixth Amendment, and that the district court was not required to apply a heightened standard of proof to such conduct when using it as the basis for the sentence enhancement. *United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009).

Unclear Whether Illegal Reentry Defendant's Prior Conviction For Selling Or Transporting Marijuana Was Prior Drug-Trafficking Conviction For Purposes Of 16-Level Sentence Enhancement

The Fourth Circuit found that it was unclear whether an illegal reentry defendant's prior California conviction for selling or transporting marijuana was a drug-trafficking conviction – as required to support the imposition of a 16-level sentencing enhancement under the Guidelines – since transporting marijuana may not necessarily qualify as a drug-trafficking offense. The Fourth Circuit remanded the case so that the district judge could determine whether the California court had convicted the defendant for drug-trafficking activity. *United States v. Maroquin-Bran*, 587 F.3d 214 (4th Cir. 2009).

District Court Erred In Relying On Maryland Statement Of Charges In Sentencing Defendant Under ACCA

The Fourth Circuit vacated a defendant's 235-month prison sentence under the Armed Career Criminal Act and remanded the case so that the district court could determine whether the defendant's prior conviction for second-degree assault under Maryland law was a "violent felony" offense. In so ruling, the Fourth Circuit found that the information charging the defendant with second-degree assault did not incorporate the statement of charges, and therefore the district court erred in relying on the statement of charges in sentencing the defendant. *United States v. Harcum*, 587 F.3d 219 (4th Cir. 2009).

Prosecutor's Failure To Recommend Two-Level Minor Participant Reduction At Sentencing Constituted Plain Error Breach Of Plea Agreement

The Fourth Circuit ruled that a prosecutor's failure to recommend at sentencing a two-level minor participant reduction for a defendant who pled guilty to drug charges constituted a plain error breach of the plea agreement. In issuing its ruling, the court noted that the plea agreement expressly provided that the prosecutor would recommend the reduction; there was no showing that the defendant likely would not have obtained the reduction if the prosecutor had recommended it; nothing occurred after the plea agreement was executed that undermined the defendant's entitlement to the sentencing reduction; facts set forth in the presentence investigation report demonstrated that the defendant was substantially less culpable than other coconspirators; and, although the defendant was sentenced within the Sentencing Guidelines range that would have applied if he had received the minor participant reduction, the sentence imposed was at the low end of the Guidelines range that applied without the reduction. *United States v. Dawson*, 587 F.3d 640 (4th Cir. 2009).

Defendant's Prior North Carolina Convictions For Breaking Or Entering Were Violent Felonies Under ACCA

The Fourth Circuit found that a defendant's prior convictions for breaking or entering, in violation of North Carolina law, constituted burglaries that categorically qualified as violent felonies under the Armed Career Criminal Act, 18

U.S.C. § 924(e). *United States v. Thompson*, 588 F.3d 197 (4th Cir. 2009).

Defendants Could Not Be Held Liable For Restitution To Estate When Their Criminal Conduct Did Not Increase Financial Harm To Estate

The Fourth Circuit found that defendants convicted of being accessories-after-the-fact to first degree murder could not be held jointly and severally liable under the Mandatory Victims Restitution Act, 18 U.S.C.A. § 3663A, for restitution to the victim's estate for lost future income and wages, since their criminal activity did nothing to cause or increase the financial harm to the estate. *United States v. Squirrel*, 588 F.3d 207 (4th Cir. 2009).

Habeas Corpus & Post Conviction

Fourth Circuit Affirms Denial Of Habeas Relief To John Muhammad

In upholding the Virginia conviction and death sentence for John Muhammad, the Fourth Circuit issued several rulings, including that (1) an FBI report indicating that the sniper was likely acting alone was not exculpatory during the capital murder prosecution in which Muhammad was accused of controlling the codefendant's acts, and thus the government's failure to disclose the report did not violate *Brady*; (2) the government's failure to disclose to the defense certain witness statements that allegedly conflicted with each other did not amount to a *Brady* violation; and (3) defense counsel's failure to object to the defendant's self-representation was not prejudicial. *Muhammad v. Kelly*, 575 F.3d 359 (4th Cir. 2009).

Death Row Inmate Failed To Establish *Brady* Violation

The Fourth Circuit affirmed a district court's ruling that a habeas petitioner did not establish a *Brady* violation, finding that the petitioner failed to prove by a preponderance of the evidence that during his capital murder trial the prosecution suppressed evidence of police reports allegedly indicating that a key eyewitness may not have seen the shooter but only heard his voice. In so ruling, the Fourth Circuit noted that the prosecutor had an open file policy and had made available to the defense whatever was in her file; the prosecutor said it was probable that the alleged *Brady* items were in her files and disclosed to defense counsel; the prosecutor recalled having discussions with defense counsel about the police reports at issue; and trial counsel's handwritten notes reflected that she was aware of the information included in the reports. The court also found that, even if the prosecutor had withheld the police documents, it did not undermine confidence in the guilty verdict, as would be required to support the habeas petitioner's *Brady* claim. *Walker v. Kelly*, 589 F.3d 127 (4th Cir. 2009).

Defense Attorney's Failure To Consult With Client About Filing An Appeal Violated Sixth Amendment

The Fourth Circuit has reversed a habeas petitioner's murder conviction, finding that the defense attorney's failure to consult with his client about filing an appeal constituted ineffective assistance under the Sixth Amendment, when the attorney had heard his client tell his daughter that he would appeal and admitted that he never talked to his client about an appeal. The court also noted

that the defense attorney's failure to consult with his client was prejudicial because there were non-frivolous grounds for an appeal. *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009).

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