
DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

Two recent decisions by the Supreme Court have revolutionized sentencing practice for federal criminal defense attorneys. Building on its *Booker* decision that rendered the Sentencing Guidelines advisory, the Court in *Gall v. United States*, 128 S. Ct. 586 (2007), ruled that a non-Guidelines sentence is not to be presumed unreasonable. Rather, "the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guidelines range." See pp. 6-8.

In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court held that a sentencing judge may impose a downward variance based on his or her disagreement with the cocaine Guidelines. In so ruling, the Court rejected the notion that, if district judges are free to deviate from the Guidelines based on their disagreement with the crack/powder ratio, unwarranted sentencing disparities will ensue. "It would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve [18 U.S.C.] § 3553(a)'s purposes, even in a mine-run case." See p. 8.

of outside speakers and presenters from the Federal Public Defender's Office and the Panel. Our topics included special challenges in gang cases and hot topics in sentencing. Many thanks to CJA Member Alan Bussard who presented on some of the recent problems with cooperation cases and the United States Attorney's Office.

Our next panel training will be held in Baltimore on May 2, 2008. I am sure we will address the implications of *Gail* and *Kimbrough* for our practice. If you have additional ideas for topics or speakers for us to include, please let me know. We are also accepting nominations for The John Adams Award, which is annually presented at the Baltimore felony panel training.

NOTES FROM THE DEFENDER

Greenbelt Panel Training

We held another successful felony panel training in Greenbelt on November 16, 2007. The Jury Assembly Room in the Greenbelt courthouse works very well as a training venue for us. We had a mix

Detention Conditions

The District of Maryland continues to struggle with an overwhelmed pretrial detention system. FPD "duty days" are full of clients – most ordered detained – charged with gun and drug offenses. The Marshals - short on contract facility beds-increasingly use remote facilities for pretrial and pre-sentencing clients.

The distances place great strain on the attorney-client relationship. We simply are not able to see our clients as much. Our clients confront long potential sentences and difficult decisions. Without attorney contact, our desperate clients become vulnerable to “jailhouse lawyers” and delusions like the “flesh and blood” defense. Not surprisingly, we have seen more clients unable to get through Rule 11 proceedings or otherwise failing to take counsel’s advice. Many judges have been understanding and allowed counsel and their clients more time. But, these incidents place stress on court calendars already full of criminal matters.

In addition to the remoteness, conditions at these facilities can be unbearable. The Northeast Ohio Correctional Center (NEOCC) has routinely triple-celled clients with one unlucky resident sleeping on a plastic “boat” instead of a bed. In the rough justice of these facilities, the outnumbered detainees from Maryland usually get the “boat.”

Even more disheartening, we have seen a rise in violence at these facilities. The Wicomico County Detention Center and the Maryland Correctional Adjustment Center both had stabbings in the past few weeks. The Wicomico incident involved a local detainee assaulting a federal detainee. These incidents might be isolated. But they suggest that the overcrowded conditions at these facilities are beginning to have an impact on safety.

It feels like we are in a perfect storm. The rise in detainees is constant. The shortage of beds is worsening.

Our Court continues to push for a federal pretrial facility. The Marshals are

always seeking new contracts and more beds. Halfway house beds are scarce or non-existent. Hope Village is simply not safe for Baltimore detainees. There are no solutions on the horizon.

We have to continue to raise the inadequacy of these facilities as a detention and sentencing matter. This is also a growing scheduling problem. A number of District Court judges are insisting on strict adherence to tight trial calendars. When clients are housed pretrial in other states, sometimes it is simply impossible to investigate these cases, review discovery, and advise our clients while adhering to these schedules. When setting schedules, or requesting postponements, we have to make it part of the request that our clients’ remote detention location has diminished our ability to prepare our cases.

Retroactivity and the Crack Guidelines

After finding that the disparate sentencing of crack offenses was unjustified and failed to serve the purposes of sentencing, the United States Sentencing Commission lowered the guidelines for cocaine base (“crack”) offenses. Subsequently, the Commission made the amended guideline retroactive under USSG § 1B1.10. The Commission describes the amendment as a “partial remedy” for the crack/powder disparity. While it is a welcome revision, even with the amendment, crack offenses still yield sentences “between two and five times longer than sentences for equal amounts of powder.” For current and former clients, although an unjustified disparity and many unresolved issues remain, the amended guideline provides partial relief to right a long-standing wrong.

Over 200 former clients in the District of Maryland are potentially eligible for some sentencing relief. The District Court has asked the Federal Defender's Office initially to screen for eligibility as many of these cases as we can. Conflicts will arise and some cases eventually will be handled by the panel.

If you have questions, please contact Denise Barrett in our Baltimore Office who manages much of this litigation for us. There is no single master "list" to identify all those who are eligible for relief, so we are devoting a great deal of time to identifying all clients potentially eligible for relief. It would help if you check your files and e-mail us the names of any clients that you think may benefit from the revisions. We also may be in touch for help obtaining documents and information about your cases so that we can preliminarily identify eligible clients. Many of you have already helped. Thanks.

USAO and Cooperation

For those who missed it, much of our recent Greenbelt panel training was spent complaining about the growing heavy-handedness of the United States Attorney's Office. For many defense lawyers, it feels like we are fighting over issues that were more easily resolved in the past. And there's a growing uneasiness about the plea bargaining process, including direct threats from AUSA's to file Section 841 notices requiring a life sentence if clients pursue motions and the explicit use of mandatory minimums solely to prevent judges from exercising discretion in sentencing.

At our recent training, many complaints centered around the cooperation process. CJA lawyers reported that it is becoming much harder

to get the Maryland United States Attorney's Office (USAO) to reward clients for cooperating. Anecdotally, there are numerous stories about cooperation sessions that seem relatively productive and defense lawyers later finding out that supervisors have deemed the cooperation insufficient or not fully truthful. We have always complained about such decisions. The frequency and volume are increasing. It seems to be the product of a new, more intense supervisory process in the USAO. Under the new process, a new layer of supervision has been added. Supervisors review 5K requests twice, both at the time the cooperation plea agreement is signed, and, again, shortly before the sentencing.

Perhaps even more troubling from the defense perspective are the number of cases where clients have signed cooperation plea agreements in anticipation of receiving a 5K motion that allows them to get below the mandatory minimum at sentencing, only to learn at sentencing that AUSA's will refuse to make the motions. This has happened approximately half a dozen times over the past few months to lawyers on the panel and in our office.

This is a dramatic change in our District's "culture." I have never had a client sign a cooperation agreement and NOT had the government make the motion. The practice has been that, when there is a signed plea agreement, unless the client engages in egregious misconduct, the motion will be made. Smaller failures result in toned down presentations to the Court and less of a reduction for cooperation. But the practice has never been to refuse to make the motion unless intentional acts have been committed to undermine the cooperation.

To fail to make these motions in any case, but particularly in mandatory minimum drug cases, is a very heavy card to play. Without a motion, the defense attorney is helpless to get his client below the mandatory minimum. The fact that the attorney is learning about the decision on the day of sentencing, as has happened in a number of CJA cases, seems mean-spirited and a reminder that every prosecutor should be required to represent a person before they represent the "United States government."

In addition, some AUSA's are using a proffer agreement that is much more aggressive than past proffer letters. If a plea agreement is not reached, it allows them to use evidence from the proffer if the client raises a defense inconsistent with the proffer – not just if the client presents testimony inconsistent with the proffer. Alan Bussard was the defense attorney in a recent case where the government took advantage of this new language to enter evidence from the proffer at trial. Alan's trial defense was to challenge the government's proof of his client's knowledge. The government successfully argued that – based upon the language in the proffer agreement – this "opened the door" to the proffer statements.

Exacerbating the problem, some AUSA's now begin proffers by reviewing the client's guilt in the instant offense before reviewing the cooperation information. This practice locks the client into an admissible confession. All of this means that you can only bring your client in for a cooperation session if you are sure the client will plead guilty, whether a 5K is made or not. The defense lawyers' message to clients who wish to cooperate has become much more complex. Our clients are always suspicious of court-

appointed lawyers recommending cooperation. Now we see them even less because of the pretrial detention situation. In addition, there are frightening elements in our communities who are all too willing to use threats and violence against anyone who "snitches." Changes in the USAO policy and in our community's response to "snitching" makes it increasingly difficult for clients to cooperate and resolve cases, particularly in mandatory minimum cases.

It is hard to understand what problems these changes in USAO policy are intended to address. The changes feel unnecessary and likely to have unintended consequences for the entire system. Nevertheless, the USAO cites to the fact that these policies have been used effectively in other districts and are consistent with DOJ policy. I met with Rod Rosenstein and the USAO supervisory team to suggest that these policy changes are counter productive. It remains to be seen if the USAO will reconsider this policy. After our meeting, I believe they have made changes to give more notice to counsel when they have decided not to make a 5K motion. More substantial changes seem unlikely.

This does provide one opportunity for us. Some District Court judges still give significant weight to the USAO "2 plus 2" policy in determining the extent of the cooperation. Many seem to use it as a starting point, as if the policy were an advisory guideline from the Commission. There has never been a legal justification for judges to surrender to the USAO their discretion to determine the extent of the departure under 5K. Many no longer do so. The few who do give it weight rely on the claim that the District of Maryland's cooperation "culture" is different from other districts. The argument is that this

District sees more 5K motions and, hence, the extent of the reductions should be less. Again, this is nowhere in the 5K Guideline and contradicts the purpose of the Guidelines to reduce unwarranted disparity. There should not be one set of sentencing rules in the District of Maryland and another for the rest of the country.

If the District of Maryland's "cooperation culture" was ever sufficiently different to justify the "2 plus 2" anathema, it is not anymore. The "2 plus 2" cooperation reward system should finally be put to rest and the District of Maryland should join the rest of the country where judges consider all of the 5K factors to exercise their discretion to determine the extent of the departure.

FPD/CJA Holiday Party

On December 14, 2008, we had our first Annual FPD/CJA Holiday Party. Approximately 30 CJA members joined us in our Baltimore Office for our holiday party. It was a fun event and felt like the start of a new holiday tradition.

CJA Lawyers on the Road

We have a remarkable group of committed and talented lawyers on our CJA Panel. Increasingly, our capital lawyers are in demand for court appointed indigent work in other jurisdictions. Even on the road, they continue to obtain very good results. Tom Saunders resolved a very difficult capital case, *United States v. Talik*, in the Northern District of West Virginia with a plea to a potential sentence of thirty-three years. And Tom Hill of Pillsbury Winthrop in DC resolved a very difficult capital habeas case out of Ohio. Tom has been representing John Spirko for over fifteen

years. Shortly before Spirko's scheduled execution, Governor Ted Strickland commuted Spirko's sentence to life without parole based upon residual doubt evidence that the Pillsbury team developed concerning Spirko's innocence. The case has been up and down the Ohio state and federal courts for many years. Both of these outcomes are remarkable tributes to our colleagues' skill and steadfast commitment to their clients.

Finally, Barry Pollack obtained the release of his client, Marty Tankleff, who had been convicted of murder in 1990. Barry has represented Marty for over a decade. Before Barry joined the FPD's Office, Barry represented Marty while Barry was an associate and then a partner at Miller, Cassidy, Larroca & Lewin in DC. Barry had become convinced that Marty was wrongfully convicted. After years of high-profile litigation throughout the New York court system, Barry never gave up his faith in Marty's innocence and in our criminal justice system's ability to fix this injustice. Barry was right. On January 4, 2008, Marty Tankleff was exonerated and went home.

United States v. Cain

Marty Himeles and Bill Meyer of Zuckerman Spaeder have done the CJA a great service by filing an amicus brief on behalf of the Maryland CJA Panel on an important issue in *United States v. Cain*, regarding the disparate treatment of a CJA client. At his initial appearance, Lenny Cain requested appointed counsel. The FPD was conflicted and the court ordered the appointment of CJA counsel. Before CJA counsel was in place, the government took an incriminating statement from Cain. If the FPD did not

have an ethical conflict, or if Cain had the resources to hire an attorney, he would have had a lawyer to protect him. Instead, the government took a statement and insists on using it at trial. Judge Bennett suppressed the statement as a violation of his Sixth Amendment Right to Counsel and as a violation of the District Court's CJA Plan. Idus Daniel represented Cain before Judge Bennett and continues to defend Cain on appeal.

Marty and Bill took on this amicus representation because of the importance of the issue. The USAO's actions in this case are contrary to everything we have worked together to create for this District's indigent defense system. We have all strived to ensure that the quality and breadth of our client's rights does not turn on their wealth, or the arbitrariness of whether they get assigned an AFPD or an assigned CJA lawyer. Thanks Marty and Bill.

RECENT CASE LAW

SUPREME COURT

Substantive Federal Law

ACCA's "Civil Rights Restored" Exemption Does Not Encompass Convictions That Did Not Result In Loss Of Civil Rights

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a conviction for which a defendant has had his or her civil rights restored does not qualify as a predicate offense. A defendant argued that this exemption should apply to his three prior convictions for battery, because those convictions had never resulted in the loss of his civil rights. The Supreme Court

disagreed, finding that the "civil rights restored" exemption does not encompass prior convictions that at no time deprived the defendant of his civil rights, distinguishing the retention of civil rights from the restoration of such rights. *Logan v. United States*, 128 S. Ct. 475 (2007).

Defendant Does Not "Use" Gun Under § 924(c) When He Receives It In Trade For Drugs

The Supreme Court has held that a person does not "use" a firearm "during and in relation to . . . [a] drug trafficking crime" under 18 U.S.C. § 924(c) when he receives it in trade for drugs. *Watson v. United States*, 128 S. Ct. 579 (2007).

Sentencing

Supreme Court Emphasizes That Appellate Courts Must Apply Deferential Standard Of Review To All Sentences, Including Those That Are Below The Advisory Guidelines Range

In *Gall v. United States*, the Supreme Court held that a court of appeals may not require a district judge who imposes a sentence in substantial variance with the Guidelines to justify that sentence based on extraordinary circumstances. The Court rejected such an approach, and held that, while the extent of the variance is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard. The Court stated that, in reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but may not apply an

appellate rule that requires extraordinary circumstances to justify a sentence outside the Guidelines range. The Court also rejected the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required by a specific sentence. Either of these approaches “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.” Most importantly, both approaches reflect a practice that “is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guidelines range.”

Under *Gall*, a district court must first correctly calculate the applicable Guidelines sentence. The court should then consider all of the factors under 18 U.S.C. § 3553(a) to determine whether they support the sentence proposed by either party. The court should not presume that a Guidelines sentence is reasonable, but must instead make an individualized assessment based on the facts presented. If the court decides that a sentence outside the Guidelines is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. A major variance should be supported by a more significant justification than a minor one. After settling on an appropriate sentence, the district court must adequately explain the chosen sentence to allow for meaningful appellate review and the perception of fair sentencing.

“Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court

must review the sentence under an abuse-of-discretion standard.” The appellate court must first ensure that the district court correctly calculated the Guidelines, and then review the substantive reasonableness of the sentence imposed under the abuse-of-discretion standard, based on the totality of the circumstances, including the extent of any variance from the Guidelines. “If the sentence is outside the Guidelines range, the [appellate] court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify a reversal of the district court.”

In reaching its decision, the Supreme Court emphasized that the sentencing judge is in a superior position to find facts and assess their import under § 3553(a) in any given case. The district court also has an institutional advantage over the appellate court in making such determinations.

In *Gall*, the defendant had joined an ongoing ecstasy distribution conspiracy while in college, but withdrew from that conspiracy after seven months, had sold no illegal drugs since then, and had worked steadily since graduation. Based on these facts, the district judge imposed a variance from a Guidelines range of 30-37 months in prison, sentencing the defendant to 36 months probation. The Eighth Circuit reversed that sentence and the Supreme Court reversed the Eighth Circuit, finding that the court of appeals had given virtually no deference to the district judge’s decision that such a

variance was justified. *Gall v. United States*, 128 S. Ct. 586 (2007).

District Court May Impose Downward Variance Based On Its Disagreement With Cocaine Guidelines

The Supreme Court has held that the cocaine Guidelines, like all the United States Sentencing Guidelines, are advisory, and that a district judge, in finding that a Guidelines sentence is “greater than necessary” to serve the objectives of sentencing, may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses. The Court rejected the notion that, if district courts are free to deviate from the Guidelines based on disagreement with the crack/powder ratio, unwarranted sentencing disparities will ensue. “It would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve [18 U.S.C.] § 3553(a)’s purposes, even in a mine-run case.”

In *Kimbrough v. United States*, the Court ruled that the Fourth Circuit had erred in finding a sentence outside the Guidelines to be per se unreasonable because it was based on the district judge’s disagreement with the sentencing disparity for crack and powder offenses. Based in part on its disagreement with the cocaine Guidelines, the district court had imposed a 180-month sentence even though the Guidelines range was 228-270 months.

Although *Kimbrough* involved the 100-to-1 crack/powder ratio that is no longer in place, there is nothing about the Court’s decision to suggest that the current ratio

could not also be the basis for a downward variance. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

Habeas Corpus

Federal Habeas Limitations Period Not Tolloed By Pendency Of Untimely State Petition

In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Supreme Court ruled that a post-conviction petition rejected by a state court as untimely is not “properly filed” under the tolling provision in 28 U.S.C. § 2244(d)(2) (which states that the one-year statute of limitations for filing a federal habeas petition is tolled while a “properly filed” application for state post-conviction relief is pending). The Court has now clarified that *Pace* applies to all time bars on state post-conviction relief, regardless of whether they are jurisdictional or non-jurisdictional under state law. *Allen v. Siebert*, 128 S. Ct. 2 (2007).

Certiorari Granted

Court To Define Parameters Of Money Laundering

The Supreme Court will decide whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction under 18 U.S.C. § 1956. *Cuellar v. United States*, 128 S. Ct. 436 (2007).

Whether DWI Is “Violent Felony” Under ACCA

Granting certiorari in a Tenth Circuit case, the Supreme Court will decide whether prior felony convictions for driving while intoxicated (DWI) qualify as “violent felonies” under the Armed Career

Criminal Act, 18 U.S.C. § 924(e). *Begay v. United States*, 128 S. Ct. 32 (2007).

Appropriateness Of Using Recidivist Sentences In Determining Whether Drug Crime Is Predicate Offense Under ACCA

The Supreme Court will decide whether a state drug-trafficking offense, for which state law authorized a 10-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act. The Ninth Circuit had held that a federal sentencing court could not consider the recidivist enhancement in determining whether the controlled substance offense had a maximum term of imprisonment of 10 years or more, as required by the ACCA. *United States v. Rodriguez*, 128 S. Ct. 33 (2007).

Search Incident To Arrest That Was Unauthorized Under State Law

Police arrested a defendant in Virginia for driving with a suspended license, and a search incident to that arrest yielded drugs and cash. Because the officers were authorized only to issue a summons for such an offense, the Virginia Supreme Court ruled that the search incident to the unauthorized arrest violated the Fourth Amendment. The Supreme Court will now review that decision. *Virginia v. Moore*, 128 S. Ct. 28 (2007).

Whether Diversion Of Corporate Funds Was Income For Purposes Of Tax Evasion Laws

The Supreme Court will decide whether a defendant in a tax evasion prosecution is entitled to present a defense that the funds he diverted from

his corporation without earnings and profits automatically qualifies as a non-taxable return of capital, rather than income, even if the diversion was not intended as a return of capital. *Boulware v. United States*, 128 S. Ct. 32 (2007).

Constitutionality Of Kentucky's Lethal Injection Method Of Execution

The Supreme Court will review the Kentucky Supreme Court's decision that the lethal injection method of execution as used in that state violates the Eighth Amendment's ban on cruel and unusual punishment. *Baze v. Rees*, 128 S. Ct. 34 (2007).

Delegation Of Voir Dire To Non-Article III Judge

The Supreme Court will decide whether it is necessary to obtain the personal consent of a defendant before delegating voir dire to a non-Article III magistrate judge. *Gonzalez v. United States*, 128 S. Ct. 32 (2007).

Whether Attorney Provided Ineffective Assistance By Advising Client To Reject Non-Death Plea Offer In Capital Case

The Supreme Court has granted certiorari in a habeas case in which the Ninth Circuit found that defense counsel in a first-degree murder prosecution performed deficiently by recommending that his client reject a plea offer in which the state would not seek the death penalty in exchange for a guilty plea. The attorney based his advice on incomplete research that led him to believe that the Idaho death penalty was unconstitutional. The defendant took the advice of counsel, rejected the plea offer, was convicted,

and was sentenced to death. The Ninth Circuit found that the defense attorney had provided ineffective assistance of counsel and the defendant was prejudiced as a result. *Arave v. Hoffman*, 128 S. Ct. 532 (2007).

Court Will Decide Whether Second Amendment Protects Individual's Right To Possess Firearms

The Supreme Court has agreed to decide whether the Second Amendment guarantees to an individual the right to keep and bear arms, or whether it only guarantees a collective right to a well-armed militia. The case involves a Washington D.C. law that imposes a sweeping ban on the private possession or use of handguns, and requires that any gun kept at home (not only handguns but also rifles and shotguns) be unloaded and disassembled or at least locked. *District of Columbia v. Heller*, 128 S. Ct. 645 (2007).

Whether Defendant's Sixth Amendment Rights Attached Upon Appearance Before Magistrate Judge

The Supreme Court will decide whether a warrantless arrestee's Sixth Amendment right to counsel attached upon his appearance before a magistrate judge, who provided statutory warnings and made a probable cause determination. The Fifth Circuit held that the Sixth Amendment did not attach because no prosecutor was involved in the defendant's arrest or appearance before the magistrate. *Rothgery v. Gillespie County*, 128 S. Ct. 714 (2007).

Whether Misdemeanor Offense Resulting In One-Year Sentence Qualifies As "Felony Drug Offense" Warranting Mandatory Sentence

The Supreme Court has granted certiorari in a case in which the Fourth Circuit held that 21 U.S.C. § 841(b)(1)(A), which imposes a 20-year mandatory minimum sentence for a drug offense committed after a prior felony drug conviction, was correctly applied when sentencing a defendant for drug conspiracy, even though the defendant's predicate South Carolina conviction for cocaine possession, for which the defendant received a one-year sentence, was classified under state law as a misdemeanor. *Burgess v. United States*, 128 S. Ct. 740 (2007).

Existence Of Relational Element In Crime Of Carrying Explosives "During" Commission Of Felony

The Supreme Court will decide whether 18 U.S.C. § 844(h)(2), which prescribes a mandatory 10-year sentence for any person who "carries an explosive during the commission of any felony," requires that the explosive be carried "in relation to" the underlying felony. *United States v. Ressam*, 128 S. Ct. 741 (2007).

Whether Standard For Competency To Waive Counsel Is The Same As For Competency To Stand Trial

The Supreme Court will decide whether the standard for competence to waive the right to counsel is the same as that for competence to stand trial. *Indiana v. Edwards*, 128 S. Ct. 741 (2007).

FOURTH CIRCUIT

Substantive Criminal Law

Court Upholds Firebombing Convictions

Under 18 U.S.C. § 1512(a), it is unlawful to attempt to kill or use physical force against a person with the intent to prevent communication with “a law enforcement officer or judge of the United States” of information relating to the possible commission of a federal offense. Three defendants were convicted under the statute based on the firebombing of a Baltimore home in 2005. The victim had complained to the local police regarding the drug dealing activities of the defendants in her neighborhood, but there was no federal investigation or involvement in the case. The Fourth Circuit ruled that, because the defendants sought to impede the communication of information relating to a possible federal offense, they had violated the statute, even though the local police were not federal officers. *United States v. Harris*, 498 F.3d 278 (2007).

Defendant Could Not Unconditionally Withdraw Guilty Plea Even Though District Court Stated It Was Only Accepting Plea Provisionally

After a thorough plea colloquy, a district court accepted a defendant’s guilty plea, stating that “your plea of guilty is provisionally accepted pending receipt of a presentence investigation.” The defendant subsequently moved to withdraw the plea but the district court refused, stating that the defendant had failed to show “a fair and just reason” for withdrawal. On appeal, the defendant argued that he had an unconditional right

to withdraw the plea because the district court had not yet accepted it, but the Fourth Circuit ruled otherwise, finding that the district court had accepted the plea notwithstanding its statement that the plea was provisionally accepted. *United States v. Battle*, 499 F.3d 315 (4th Cir. 2007).

Prosecutor’s Closing Argument Did Not Constructively Amend Indictment

The Fourth Circuit ruled that a prosecutor’s statement during rebuttal argument that the jurors were the final deciders of what the conspiracy looked like and that they could go big or small did not constructively amend an indictment charging a large, loose-knit drug conspiracy, emphasizing that the court’s instruction tracked the conspiracy charge in the indictment, the evidence at trial was consistent with the charged indictment, and the jury was instructed that the arguments of counsel did not constitute evidence. *United States v. Foster*, 507 F.3d 233 (4th Cir. 2007).

Court Overturns Conviction Based On Prior Plea Agreement

Two co-defendants were convicted of conspiring to commit multiple drug, firearm, and murder offenses arising from the killing of a drug courier. Prior to trial, one defendant moved to dismiss the indictment, arguing that it was barred under an earlier plea agreement he entered with the government in regard to a 2002 indictment that charged a drug conspiracy. The district court denied that motion, and also overruled both defendant’s objections to the use of hearsay testimony from a deceased coconspirator during trial.

On appeal, the Fourth Circuit reversed the district court's rulings as to one defendant but affirmed as to the other. The court found that the plea agreement prevented the government from prosecuting the defendant based on any of the conduct that was described in the 2002 indictment, and, because the 2004 case was based on the same conspiratorial conduct as charged in the earlier case, the 2004 case was barred by the 2002 agreement. Moreover, the Fourth Circuit noted that, while the plea agreement was not ambiguous, had it been, the ambiguity would have been construed against the government.

In regard to the other defendant, the court held that the statements admitted at trial, which were made by a coconspirator who was involved in the murder conspiracy to a friend with whom she lived, were not barred by *Crawford*, because the defendant would not have reasonably believed that her friend would eventually testify about those statements in court. In addition, the court found that the statements were admissible as statements against penal interest. *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007).

Constitutional Criminal Procedure

Fingerprint Evidence Not Immune From Suppression Merely Because It Was Identity-Related

After arresting the defendant without a warrant as part of a nationwide initiative to apprehend illegal alien gang members, law enforcement officers first fingerprinted him and then obtained his criminal and immigration records, which led to his prosecution for illegal reentry under 8 U.S.C. § 1326. Prior to trial, the defendant moved to suppress the

fingerprint evidence and the records as the fruit of his illegal arrest. The district court denied the motion, reasoning that this evidence constituted "identity" evidence and therefore could never be suppressed. On appeal, the Fourth Circuit reversed and remanded the case, finding that the evidence was not immune from suppression merely because it was identity-related. The court noted that if, in obtaining the fingerprint evidence, the police were motivated, even partially, by an investigative, rather than a purely administrative purpose, the evidence should be suppressed. *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007).

Defendant Not In Custody While Being Questioned By Police In Hospital Room

After suffering a gunshot wound, a defendant sought treatment at a hospital. Upon arriving there, he told a police officer stationed at the entrance that he had been shot, which led to a lengthy police interview while the defendant was in a bed in the hospital emergency room. During this time, the police took photographs of the defendant's wound, and placed bags on his hands while waiting to conduct a gunshot-residue test. The Fourth Circuit held that under these circumstances the defendant was not in custody, and thus the police were not obligated to warn him of his rights under *Miranda v. Arizona* prior to questioning him. The court stated that, because the defendant's freedom to terminate the interview was curtailed by circumstances resulting from his injury and hospital admittance rather than by any police restraint, statements he made in response to the police questioning were admissible. *United States v. Jamison*, 509 F.3d 623 (4th Cir. 2007).

Evidence

Victim's Statements To Fellow Airline Passengers Were Excited Utterances

In a prosecution for abusive sexual contact of a minor, in which the victim was a 13-year old girl who sat next to the defendant on an airline flight, the Fourth Circuit found that the testimony of fellow airline passengers about the victim's statements to them was admissible under the excited utterance exception to the hearsay rule. One passenger testified that, five minutes after a flight attendant had moved the defendant away from the seat next to the victim, and while the victim was in a state of shock, anger, and confusion, the passenger asked the victim what happened and the victim related the defendant's conduct, and then began crying and became hysterical. Another passenger testified to statements the victim made immediately after the defendant approached her in the airport shortly after the airplane had landed. *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007).

Lab Date Regarding Blood Sample Was Not Testimonial Hearsay

According to the Fourth Circuit, a trial court did not violate a defendant's Confrontation Clause rights when it allowed a toxicology expert to testify that data generated by lab machines indicated the defendant's blood sample contained PCP and alcohol. *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007).

Photo Array Was Impermissible Suggestive, But Identification Evidence Could Still Be Used At Trial

The Fourth Circuit ruled that a six-photograph array that was shown to a witness of a liquor robbery was impermissibly suggestive, because (a) the defendant's photo looked strikingly different from the five other photos; (b) on the way to the station house the police told the witness that they had arrested one or more suspects; and (c) the police did not follow their own procedures when they failed to tell the witness that the suspect's photo might not be included in the array. The court found, however, that the trial judge did not commit fatal error in admitting the out-of-court identification and an in-court identification at trial, because the witness had a good opportunity to see the defendant during the robbery, the witness' initial description of the suspect was accurate, the witness did not hesitate before selecting the defendant's photo, the identification occurred only two hours after the robbery, and other evidence connected the defendant to the robbery. *United States v. Saunders*, 501 F.3d 384 (4th Cir. 2007).

Sentencing

Court Properly Enhanced Sentence Under 18 U.S.C. § 1512(j)

Under 18 U.S.C. § 1512(j), a person who influences testimony in a criminal trial faces the maximum sentence that could have been imposed for any offense charged in that trial (otherwise, the offense carried a maximum term of 10 years). The Fourth Circuit found that a district court did not err in applying this provision to find that the defendant's maximum sentence was life, because the

factual predicate for that finding was submitted to the jury. *United States v. Ruhbayan*, ___ F.3d ___, 2007 WL 2215955 (4th Cir. 2007).

Defendant's Drug Conviction Under Youthful Offender Act Was ACCA Predicate

The Fourth Circuit has ruled that a defendant's prior conviction for possession with intent to distribute crack was a serious drug offense under the Armed Career Criminal Act, even though the defendant was sentenced under South Carolina's Youthful Offender Act. The court ruled that, even though the YOA permitted the state sentencing court to commit youthful offenders to an indefinite period of treatment not to exceed six years, it also gave the sentencing court authority to impose a sentence of up to 15 years in prison. *United States v. Williams*, 508 F.3d 724 (4th Cir. 2007).

Habeas Corpus

Court Upholds Death Sentence Despite Counsel's Deficient Performance

The Fourth Circuit has found that a state court acted reasonably in ruling that, while a capital defendant's lawyer performed deficiently by failing to request a jury instruction stating that "the term life imprisonment is to be understood in its ordinary and plain meaning," the defendant was not prejudiced by his attorney's failure to request the instruction. The Fourth Circuit also ruled that the state court properly applied the reasonable doubt standard in deciding that the evidence was sufficient to find the defendant guilty of the murder of his wife and son, when evidence showed the

defendant was experiencing severe financial and marital difficulties, had taken out additional insurance for his wife and son, and his wife's body contained injuries consistent with his own. *Williams v. Ozmint*, 494 F.3d 478 (4th Cir. 2007).

Court Vacates Conviction Based On Attorney's Erroneous Advice

A defense attorney rendered deficient performance in violation of the Sixth Amendment, the Fourth Circuit has ruled, by advising a defendant to plead guilty based on the erroneous assumption that no justification defense existed to a charge of being a felon in possession of a firearm. The court also found that the defendant was prejudiced by the attorney's deficient performance, because he would not have pleaded guilty but for the erroneous advice, and because the justification defense would likely have persuaded the jury, based on the defendant's claim that he had seized the firearm from his ex-wife in self-defense after she pointed it at his head, and then walked several blocks to his place of employment to hand the weapon over to police. *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007).

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