DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

Published Quarterly by
THE OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF MARYLAND
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Volume 4, Issue 1 *April 1999*

HIGHLIGHTS IN THIS ISSUE

The Fourth Circuit holds that 18 U.S.C. section 3501, enacted over thirty years ago, overrules Miranda and governs the admissibility of confessions in federal court. Review en banc is denied. U.S. v. Dickerson at page 3.

Defense Wins

The Supreme Court holds that a full search of an automobile is not authorized, in the absence of probable cause, when the driver has been issued a traffic citation, but not arrested. Knowles v. Iowa at page 5.

The Fourth Circuit finds that the search of a passenger's bag as part of a bus interdiction was in violation of the Fourth Amendment and the actions of the agents could not be justified based on the inevitable discovery doctrine. U.S. v. Allen at page 12.

The Fourth Circuit reverses a conviction based on prosecutorial misconduct where the prosecutor threatened the defendant's wife with prosecution on marijuana charges if she testified at trial on her husband's behalf regarding the ownership of a firearm and then at trial repeatedly called the jury's attention to the fact that the wife had not testified indicating that the defendant's testimony was false. U.S. v. Golding at page 17.

NOTES FROM THE DEFENDER

Panel Training Program

The Criminal Justice Panel Act training program is scheduled for May 14, 1999 at 8:45 a.m. in Baltimore at the United States District Courthouse. You should have already received information about how to register for the program. Josh Treem has already contacted you separately regarding the post-conference luncheon at the Wharf Rat.

Supermax

The United States Marshals Service is exploring entering into a new contractual arrangement with the State of Maryland to house federal pretrial detainees at the Supermax facility at 401 E. Madison Street in Baltimore. Although the contract has not been finalized, the Marshals Office is in the final stage of negotiations. It is expected that Northern Division pretrial detainees will be housed at the Supermax facility starting in the fall of 1999.

Obviously, this is not without its complications. Supermax is a facility that has been previously reserved for "problem" prisoners -- violent inmates and escape risks. The "culture" of such a facility is far different from that of a pretrial facility. The Marshals Office recognizes this and has sought our input in helping make the transition. I, along with CJA panel members Josh Treem and Bill Purpura, met with Magistrate Judge James K. Bredar and Deputy Marshal Donald Donovan to initiate a dialogue on these issues. We emphasized to Marshal Donovan that Supermax would have to ease its procedures for attorney and for family visits with detainees. In addition, we expressed concern that the detainees be permitted reasonable opportunity to recreate while detained at Supermax. The Marshals Office recognizes these problems and is attempting to resolve them prior to federal detainees actually entering the facility.

Bill, Josh and I expect to tour the facility soon. We also expect to have an ongoing dialogue with the Marshals Office regarding these problems. To this end, I would appreciate it if members of the panel would share with me their thoughts regarding this issue and any experiences they may have had with the Supermax facility. Marshal Donovan is expected to participate in part of the May panel training program and will provide an update regarding the status of the plan and answer any questions or concerns.

CJA Panel Representatives Conference

Maryland CJA Panel Representative Josh Treem and I attended the National Conference of CJA Panel Representatives at Crystal City, Virginia, on March 6-7, 1999. The purpose of the meeting was for district panel representatives and defenders to get together and discuss ways for defenders to better serve the panels' needs. Josh and I both left the meeting with the sense that the District of Maryland's CJA panel is well administered in relation to other districts in great part due to Donna Shearer's work as the CJA Panel Administrator.

Josh and I also fielded many complaints about the Fourth Circuit cutting vouchers for panel members handling appeals. Josh expects to lead a group of Fourth Circuit panel representatives to meet with Chief Judge Wilkinson to discuss the situation. I would encourage any CJA panel members who have suffered this misfortune to share their complaints with Josh so that he may share the concerns with Chief Judge Wilkinson.

The federal judiciary has included in its FY 2000 Defender Services appropriation request funding to implement a $75 hourly Criminal Justice Act (CJA) private "panel" attorney rate nationwide. If Congress approves the judiciary's request, the $75 maximum hourly rate for in-court and out-of-court work in non-capital cases would take effect on April 1, 2000.

The issue of the $75 maximum hourly rate for CJA panel cases was also an important topic at the Conference. In his *1998 Year-End Report of the Federal Judiciary*, Chief Justice William H. Rehnquist urged Congress to give "very serious consideration" to the judiciary's request for funding to implement the $75 rate in FY 2000. Justice Rehnquist observed that inflation has eroded the currently authorized hourly rates and that "[i]nadequate compensation for panel attorneys is seriously hampering the ability

of judges to recruit attorneys to provide effective representation."

In 1986, Congress enacted legislation which authorized the Judicial Conference to increase the hourly rates paid to panel attorneys from $60 in-court/$40 out-of-court to $75, and to make annual cost-of-living adjustments to the $75 rate beginning in 1990. Although the Judicial Conference has approved the $75 rate for in-court and out-of-court work in 93 of the 94 judicial districts, most districts have received only one $5 per hour increase to the $60/$40 rates set by statute in 1984, over 14 years ago. Congress has appropriated funds sufficient to pay higher rates up to $75 in only 16 districts, which were the first to apply for alternative CJA hourly rates. The $75 rate is substantially lower than the $104 per hour rate which would be authorized in 1999 if the annual federal pay increases, approved by the Judicial Conference for CJA rates, were applied.

There is widespread support in the federal criminal justice system for the $75 hourly rate, from judges, the Department of Justice, private bar associations, and federal defenders. The Federal Judges Association, in endorsing the rate, stated that the current hourly rates are "significantly compromising the ability of the court to recruit and retain attorneys under the Criminal Justice Act." The Federal Magistrate Judges Association endorsed the rate as "imperative...to assure that the courts can appoint qualified and experienced counsel." The Department of Justice also has indicated its support for the $75 rate.

At its August 1998 meeting, the ABA's House of Delegates unanimously approved a resolution (adopted by the ABA's Criminal Justice Section in March 1998) urging Congress to fund the CJA at a level sufficient to support implementation of the $75 rate and annual cost-of-living increases for CJA panel attorneys, and urging the Judicial Conference to make every effort to obtain this funding. The NACDL, National Legal Aid and Defender Association, and Association of Federal Defenders likewise have passed resolutions in support of the $75 rate and cost-of-living adjustments. Josh Treem will provide a further update regarding this important issue at the May training conference.

United States v. Dickerson

The most sensational caselaw news is that the Fourth Circuit has held that 18 U.S.C. § 3501 legislatively overruled the Supreme Court's decision in Miranda and governs the admissibility of confessions in federal court. The decision itself is summarized in the caselaw update. The Fourth Circuit invited our office to participate as an amicus and we filed a Memorandum in Support of the Petition for Rehearing En Banc. (Our Memorandum is available upon request.) The Court recently denied the Petition and we anticipate further litigation in the Supreme Court. At least one district court judge in Maryland has raised Dickerson, sua sponte, despite the fact that the government was not pressing it. Dickerson is the law in this circuit and counsel must be prepared to address it.

Ethical Standards for Federal Prosecutors Act

Despite much gnashing of teeth and indignant lobbying, the Department of Justice has apparently failed in its bid to block a new law that requires federal

prosecutors to abide by local ethics rules. The Ethical Standards for Federal Prosecutors Act reverses a 10-year old Justice Department policy that allows federal prosecutors to violate local ethics rules and, among other things, speak with represented persons without first talking to their counsel. The Act became law on April 19, 1999, and, for the first time in a decade, AUSAs in this district will be bound by the Maryland Rules of Professional Conduct.

RECENT CASE LAW

SUPREME COURT

Constitutional Criminal Procedure

Defendants Did Not Have Standing to Contest Search of Apartment Where They Were Not Overnight Guests and Had No Prior Connection to the Residence

Defendants were convicted of state drug offenses after they were observed in another person's apartment bagging cocaine. They filed a motion to suppress on the ground that the officer's initial observation into the apartment window through a gap in the closed blind constituted an unreasonable search in violation of the Fourth Amendment. The Minnesota Supreme Court held that the defendants had "standing" to challenge the search. The Supreme Court reversed.

The Supreme Court held that under Rakas v. Illinois, 439 U.S. 128 (1978), only if a person has a reasonable expectation of privacy in the place searched can they claim the protections of the Fourth Amendment. In this case, the defendants lived in another city, were at the apartment only to bag cocaine, were there only 2 ½ hours, and had no prior connection to the apartment. They were obviously not overnight guests but were essentially present for a business transaction. The Court notes that: "The purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [defendants] and the householder, all lead us to conclude that the [defendants'] situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights." Minnesota v. Carter, 119 S. Ct. 469 (1998).

Police Officers May Not Search Vehicle After Issuing Traffic Citation and Not Arresting Individual

A police officer stopped defendant for speeding, issued him a citation, but did not arrest him. The officer then conducted a full search of the car, without either defendant's consent or probable cause, and found drugs. At defendant's state trial on drug charges, he moved to suppress the evidence. The trial court denied the motion because under Iowa law, officers have the authority to conduct a full-blown search of an automobile and driver when they issue a citation instead of making a custodial arrest. The Iowa Supreme Court affirmed and the Supreme Court reversed. The Court held that although the search was authorized by state law, it violated the Fourth Amendment. Neither of the two historical rationales for the "search incident to arrest" exception set forth in United States v. Robinson, 414 U.S. 218 (1973), were sufficient to justify the search in this case. First, the threat to officer safety from issuing a traffic citation is

much less than in the case of a custodial arrest. Although "the concern for officer safety may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the vehicle, it does not by itself justify the often considerably greater intrusion attending a full-field-type search." Second, the need to discover and preserve evidence does not exist in a traffic stop because once the citation is issued, all the evidence needed for prosecution has been obtained. Knowles v. Iowa, 119 S. Ct. 484 (1998).

Substantive Federal Law

"Intent to Cause Death or Serious Bodily Harm" Under 18 U.S.C. § 2119 Includes Both Conditional and Unconditional Intent

Defendant was convicted of carjacking in violation of 18 U.S.C. § 2119. One of the elements which the jury had to find for conviction was that the defendant took the motor vehicle with the intent to "cause serious bodily harm to the person from whom the car was taken." The issue before the court involved the jury instruction which allowed the jury to convict if it found that the defendant had the intent even if it was "conditional", i.e. only if certain other events arose.

The Supreme Court upheld that instruction and noted that "[w]e believe ... that a commonsense reading of the carjacking statute counsels that Congress intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies." The Court identified two reasons to support this conclusion. "First, the statute as a whole reflects an intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern..... Second, it is reasonable to presume that Congress was familiar with the cases and the scholarly writing that have recognized that the 'specific intent' to commit a wrongful act may be conditional." Holloway v. United States, 119 S. Ct. 966 (1999).

Habeas Corpus

No Basis for Collateral Relief Where Trial Court Fails to Inform Defendant of His Right to Appeal But Defendant Was Aware of His Right to Appeal

Petitioner pled guilty to drug charges. At the sentencing hearing, the judge failed to inform him of his right to appeal the sentence. Petitioner filed a petition for writ of habeas corpus alleging that the failure to inform him of his right to appeal violated Federal Rule 32(a)(2).

The Supreme Court affirmed the conviction. The Court found that it was error on the part of the sentencing court to fail to inform the petitioner of his right to appeal and mentioned in dicta the reasons such notice is important. However, the Supreme Court found that in this case, because petitioner had full knowledge of his right to appeal, the district court's failure to comply with Rule 32(a)(2) did not prejudice him. Peguero v. United States, 119 S. Ct. 961 (1999).

FOURTH CIRCUIT

Sentencing

En Banc Court Holds that Maryland Conviction for Common Law Assault is Not a Per Se "Violent Felony" for Armed Career Criminal Sentencing -- District Court May Examine Statement of Charges Incorporated Into Charging Document to Determine Whether Maryland Common Law Assault is a "Violent Felony"

The district court sentenced defendant as an armed career criminal based in part on defendant's prior Maryland common law assault conviction. On appeal, defendant argued that his prior assault conviction did not constitute a "violent felony" and thus did not qualify as a predicate offense for armed career criminal sentencing. The Fourth Circuit affirmed. The court first found that under the Maryland common law definition of assault it was "unable to conclude that a Maryland conviction for common-law assault is per se a violent felony within the meaning of § 924(e)(2)(B)(I)." The court then held that the district court properly inquired into the statement of charges accompanying the charging document to determine whether the assault offense was violent. By reference to the statement of charges and accompanying affidavit setting forth probable cause, which is part of the charging papers as held in United States v. Kirksey, 138 F.3d 120 (4th Cir. 1998), the district court properly concluded that defendant's assault involved the use, attempted use, or threatened use of physical force against the victim and was thus a violent felony for purposes of armed career criminal sentencing. United States v. Coleman, 158 F.3d 199 (4th Cir. 1998).

En Banc Court Holds that Maryland Common Law Assault is Not a Misdemeanor Punishable By Less Than Two Years Imprisonment Under 18 U.S.C. § 921(a)(20)(B)

Defendant was sentenced as an armed career criminal based in part on a prior Maryland common law assault conviction. He argued on appeal that his Maryland common law assault conviction did not qualify as a "violent felony" because it does not constitute a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 924(e)(2)(B). A crime punishable by imprisonment for a term exceeding one year excludes a state misdemeanor punishable by a term of imprisonment of two years or less. 18 U.S.C. § 921(a)(20)(B). Relying on United States v. Schultheis, 486 F.2d 1331 (4th Cir. 1973), defendant argued that because assault is a misdemeanor and he received only an eighteen month sentence of imprisonment, his conviction falls under the misdemeanor exclusion.

The Fourth Circuit disagreed. The court first noted that although Maryland common law assault is classified as a misdemeanor it carries no maximum term of imprisonment. The only limit on punishment is prohibition against cruel and unusual punishment. Therefore, Maryland common law assault "clearly is punishable by more than two years imprisonment." The court then held that "[w]e believe that the statutory language of § 921(a)(20)(B) un-ambiguously indicates that the critical inquiry in determining whether a state offense fits within the misdemeanor exception is whether the offense is "punishable" by a term of imprisonment greater than two years -- not whether the offense "was punished" by such a term of imprisonment as held in

Schultheis. The statute applies equally when a potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishment as when the range of imprisonment is established by statute. United States v. Coleman, 158 F.3d 1999 (4th Cir. 1998).

Fourth Circuit Discusses Procedure District Court Must Follow in Upwardly Departing Based on Under-Represented Criminal History Category

Defendant was convicted of attempted bank robbery and bank larceny. At sentencing, the district court departed upward from an offense level of 22 and a criminal history category of V, a range of 77 to 96 months, to an offense level of 38 and a criminal history category of VI, a range of 360 months to life. The defendant was sentenced to 360 months. In upwardly departing, the district court did not explain which criminal conduct it believed to be unaccounted for or the method that it used to reach the guideline range that it chose.

The Fourth Circuit vacated and remanded for resentencing. The court noted that a sentencing court has two options if it chooses to depart based on an under-represented criminal history category. First, the sentencing court should depart to the next higher criminal history category and move on to a still higher category "only upon a finding that the next higher category fails adequately to reflect the seriousness of the defendant's record." Then, if the court gets to category VI and finds the criminal history category still inadequate, "the district court may depart directly to the guideline range applicable to career offenders similar to the defendant." In this case, the district court should have initially considered the guidelines for offense level 22 and criminal history category VI and determined if that was adequate before considering its other options. United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998).

District Court Did Not Err in Departing Upward Based on Domestic Terrorism Activities

Defendant was convicted of twelve counts of mail fraud, bank fraud, interference with IRS officials and interstate transportation of stolen property. On appeal, he argued that the district court erred at sentencing in departing upward based on domestic terrorism activities for his involvement with the Freemen. The Fourth Circuit affirmed. The court then held that although there was no specific provision authorizing a court to consider domestic terrorism, the catch-all provision of the guidelines is "certainly broad enough to allow such consideration." In this case, ample evidence of defendant's plans and activities support the upward departure. United States v. Wells, 163 F.3d 889 (4th Cir. 1998).

District Court Did Not Err in Calculating the Amount of Loss By Including Amounts on Warrants That Were Sealed and Addressed, But Not Mailed

Defendant was convicted of twelve counts of mail fraud, bank fraud, interference with IRS officials and interstate transportation of stolen property. On appeal, he argued that the district court erred in calculating the amount of loss. Specifically, he argued that the court should not have included in its calculation warrants that were in sealed, addressed

envelopes but were never mailed. The Fourth Circuit affirmed. In a case of first impression, the court initially rejected defendant's attempt to distinguish this case from United States v. Chappell, 6 F.3d 1095 (5th Cir. 1993), the only case addressing a similar issue. In Chappell, defendant was involved in a counterfeit check scheme. The loss calculation was based in part on checks that had not been cashed. Some of those checks were completed and some were blank. The dollar amounts on the blank checks were estimated based on previously recorded checks. The Fourth Circuit found that, like Chappell, defendant in this case appeared to have a detailed way of distributing the warrants through third parties. In addition, unlike Chappell, no estimates or conjecture were needed because the warrants in defendant's possession were completed. "Because [defendant] cannot distinguish Chappell, the one case to address a similar issue, his intended loss calculation should include the checks found in his possession." Thus, the district court correctly included those amounts on the face of the warrants that defendant had sealed and addressed, but had not mailed. United States v. Wells, 163 F.3d 889 (4th Cir. 1998).

Law of the Case Doctrine Precluded Defendants from Arguing that District Court Erred in Including Certain Losses As Relevant Conduct In Second Appeal of Sentencing

Defendants were convicted of various federal crimes for participating in a scheme to defraud the United Way of America (UWA). In United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996), the Fourth Circuit vacated defendants' money laundering convictions and remanded for resentencing. In this second appeal, defendants argued that the district court erred in including, under the theory of relevant conduct, the amount of losses of an organization relating to UWA in calculating their respective offense levels. The Fourth Circuit held that the law of the case doctrine precluded defendants from making this argument in the second appeal. The court noted that the district court held defendants accountable for the same exact losses in determining their respective offense levels at the initial sentencing and resentencing. In addition, defendants, in their joint brief in the first appeal, challenged this action by the district court on the same basis as the defendants now challenge the identical action by the district court. The court stated that although it did not separately address that argument in the first opinion, it "explicitly acknowledged" that it had reviewed all of the other contentions raised by defendants and found no reversible error. Thus, the rejection of the argument became the law of the case. Because none of the exceptional circumstances allowing the court to consider the same issue a second time were present, *i.e.* there was no subsequent trial or proceeding producing different evidence, no controlling authority has since made a contrary decision of law on the issue, and the prior decision was not clearly erroneous to be manifestly unjust, the court did not address the argument. United States v. Aramony, 166 F.3d 655 (4th Cir. 1999).

District Court Properly Enhanced Defendants Offense by Two Levels Under U.S.S.G. § 2F1.1(b)(2)(B)

Defendants were convicted of various federal crimes for participating in a scheme to defraud the United Way of America (UWA). In United States v.

Aramony, 88 F.3d 1369 (4th Cir. 1996), the Fourth Circuit vacated defendants money laundering convictions and remanded for resentencing. In the second appeal, defendants argued that the district court erred in increasing their respective offense by two levels pursuant to U.S.S.G. § 2F1.1(b)(2)(B) for a scheme to defraud involving more than one victim. The Fourth Circuit disagreed. The court first rejected defendants argument that the district court violated the "mandate rule," which forecloses litigation on remand of issues decided by the district court but foregone on appeal, by increasing defendants sentence by two levels under U.S.S.G. § 2F1.1(b)(2)(B). While the district court expressly addressed the applicability of the two-level increases under U.S.S.G. § 2F1.1(b)(2)(A) for more than minimal planning, it did not expressly address the applicability of the two-level increase under § 2F1.1(b)(2)(B) for a scheme to defraud involving more than one victim. In addition, the district court did not by implication address and reject an increase pursuant to § 2F1.1(b)(2)(B). In fact, the district court's failure to address the applicability of § 2F1.1(b)(2)(B) at the initial sentencing is understandable because the money laundering convictions, which were subsequently vacated, "drove [defendants'] respective offense levels at their initial sentencings." United States v. Aramony, 166 F.3d 655 (4th Cir. 1999).

District Court Properly Enhanced Defendants Offense by Two Levels Under U.S.S.G. § 2F1.1(b)(3)(A)

Defendants were convicted of various federal crimes for participating in a scheme to defraud the United Way of America (UWA). In United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996), the Fourth Circuit vacated defendants money laundering convictions and remanded for resentencing. In the second appeal, defendants argued that the district court erred in increasing their respective offense by two levels under U.S.S.G. § 2F1.1(b)(3)(A) for an offense involving a misrepresentation that the defendant was acting on behalf of a charitable organization. Specifically, defendants argued that the application notes and comment to this section, read together, indicate that an increase is only appropriate if a defendant misrepresents his own ability to act on behalf of a particular organization in order to take advantage of a victim's trust in government or charitable motives. The Fourth Circuit rejected that argument. The court noted that United States v. Marcum, 16 F.3d 599 (4th Cir. 1994), where the court upheld a two-level increase pursuant to § 2F1.1(b)(3)(A) under analogous factual circumstances, makes clear that a two-level increase in a defendant's offense level under that section is appropriate even if the defendant did not misrepresent his authority to act on behalf of a particular organization but rather only misrepresented that he was conducting an activity wholly on behalf of such organization. In this case, defendant did not misrepresent his authority to act on behalf of UWA but he did misrepresent that he was acting wholly on behalf of UWA in soliciting donations. Thus, the two-level increase under § 2F1.1(b)(3)(A) was proper. United States v. Aramony, 166 F.3d 655 (4th Cir. 1999).

Constitutional Criminal Procedure

Fourth Circuit Holds That 18 U.S.C. § 3501, Not *Miranda*, Governs the Admissibility of Confessions in Federal Court

Defendant was indicted by a federal grand jury for conspiracy to commit bank robbery and bank robbery. He moved to suppress his confession on the grounds that it was taken in violation of Miranda. The district court suppressed the confession. In so doing, the district court specifically found that the confession was voluntary for purposes of the Fifth Amendment but was obtained in technical violation of Miranda. The Fourth Circuit reversed and remanded, holding that the admissibility of confessions in federal court is governed by 18 U.S.C. § 3501, not Miranda. The court first noted that Congress enacted § 3501 two years after the Miranda decision with the express purpose of legislatively overruling Miranda and restoring voluntariness as the test for admitting confessions in federal court. The court noted that although the Department of Justice has continuously refused to enforce the statute and has stated that the provision is unconstitutional, the "question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today." The court then noted that Congress has the authority to overrule judicially created rules of evidence and procedure that are not required by the Constitution. The court then held that the rule set forth by the Supreme Court in Miranda is not constitutionally required. The Supreme Court has consistently referred to the Miranda warnings as "prophylactic" and "not themselves rights protected by the Constitution" and invited Congress and the states to "develop their own safeguards for [protecting] the privilege." Thus, the Fourth Circuit stated that "[w]e have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of Miranda. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

Tape-Recorded Conversation Was Not Tainted Fruit of Unlawful Search

Defendant was convicted of conspiracy to embezzle funds from a labor union and embezzlement from a labor union. He argued on appeal that the district court erred in denying his motion to suppress a tape-recorded conversation made by his codefendant while in defendant's home. Specifically, defendant argued that his codefendant, acting as a government agent, entered his home illegally and the tape-recorded conversation was the fruit of that illegal entry and should have been suppressed. The Fourth Circuit affirmed. The court first noted that the government conceded that defendant was acting as a government agent. The court then held that assuming, without deciding, that the codefendant's entry into defendant's residence violated the Fourth Amendment, the taint of the illegal entry had been purged and therefore, the tape-recorded conversation was properly admitted at trial. In finding that the taint had been purged, the court applied the three factors outlined in Brown v. Illinois, 422 U.S. 590 (1975). First, the court recognized that very little time had elapsed between the codefendant's entry and the tape-recorded

conversation. Second, defendant's actions toward the codefendant after his entry constituted intervening circumstances. Almost immediately, defendant consented to the conversation, shut the front door behind the codefendant and motioned him into the kitchen. Third, the flagrancy and offensiveness of the governmental misconduct in this case pales in comparison to other cases where evidence has been held inadmissible. Defendant admitted that he and the codefendant had been friends for years and the codefendant's visit to defendant's house was not entirely unexpected. Thus, because the second and third Brown factors weigh heavily in favor of admissibility, the tape recording at trial did not violate the Fourth Amendment. United States v. Seidman, 156 F.3d 542 (4th Cir. 1998).

No Perjury Entrapment if Government Has Valid Purpose in Eliciting Testimony

Defendant was convicted of perjury before a grand jury in violation of 18 U.S.C. § 1623. He argued on appeal that the government committed perjury entrapment by eliciting testimony from him when it knew that he was going to provide false testimony. The Fourth Circuit disagreed. The court noted that perjury entrapment occurs when a government agent coaxes a defendant to testify under oath for the sole purpose of eliciting perjury. The court then held that the government did not seek defendant's testimony for the sole purpose of eliciting perjury. At the time defendant testified before the grand jury, the government was investigating possible money laundering at a corporation. Defendant's testimony was a source of possible evidence into several individuals' involvement in criminal activity. Although the government suspected that defendant provided false statements to government agents in a prior interview, it does not mean that the government did not have a valid purpose in eliciting defendant's testimony before the grand jury. It also does not show that the government knew defendant would testify falsely before the grand jury. Thus, the government did not commit perjury entrapment. United States v. Sarihifard, 155 F.3d 301 (4th Cir. 1998).

Inevitable Discovery Doctrine Did Not Apply to Search of Duffel Bag on Bus

Defendant was convicted of possession of crack cocaine with intent to distribute. He argued on appeal that the district court erred in denying his motion to suppress evidence on the basis of the inevitable discovery doctrine. Defendant was a passenger on board a bus where officers of a drug interdiction task force were on board to interview passengers. One of the officers asked defendant if he had any bags with him. Defendant pointed to a knapsack and consented to a search of that knapsack. Marijuana was recovered from that knapsack and defendant was arrested. There was one bag on the bus that could not be identified and it was searched as an abandoned bag. Inside the bag were a package of crack cocaine and a train ticket in the name of an alias used by defendant. The district court first found that defendant had not abandoned the bag because neither written version of the events states that the officer asked defendant if he had any bags other than the knapsack or that defendant denied having any other bags. The court did find, however, that the crack cocaine would have inevitably been discovered after a drug dog had sniffed the bag. Therefore, the court denied the motion to suppress.

The Fourth Circuit reversed and remanded, holding that the inevitable discovery doctrine did not apply to this case. The court first noted that courts have frequently "upheld the use, and implicitly, the effectiveness of the use, of dogs to ferret out illegal drugs" and dog alert testimony does not need to satisfy the requirements for expert scientific testimony. The court then concluded that the problem with the inevitable discovery reasoning was the lack of evidentiary support for the conclusion that the officer would have used the drug dog. When the officer who was the dog's handler testified, he did not even suggest that the dog had ever been used to sniff bags located inside a passenger compartment of a bus. Furthermore, both officers testified that it was the task force policy to treat an unidentified bag as abandoned and search it, not to run a drug dog over it to establish probable cause to search. The court then held that "[o]n the record here, particularly in view of the district court's factual findings on the abandonment claim ... we cannot possibly conclude that the government inevitably would have discovered the cocaine by employing a drug dog to establish probable cause."

The court rejected the government's alternative theory that even without a drug alert, the police arguably had probable cause to obtain a search warrant and, absent the unlawful search, they inevitably would have discovered the cocaine through this lawful means. The court noted that even assuming that the evidence established probable cause, that fact does not automatically trigger the inevitable discovery doctrine. The court stated that "[t]he existence of probable cause for a warrant, in and of itself, and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid." The court concluded that "when evidence could not have been discovered without a subsequent search, and no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place." United States v. Allen, 159 F.3d 832 (4th Cir. 1998).

Pat-Down Search of Passenger is Lawful So Long as Officer Has Objectively Reasonable Suspicion of Criminal Activity and a Legitimate Concern About His Own Safety

Defendant pled guilty to possession of cocaine base. He argued on appeal that the district court erred in denying his motion to suppress. The Fourth Circuit affirmed. Defendant was a passenger in an automobile that was stopped for a traffic violation. When the driver opened the glove compartment to retrieve his registration, the officer observed a Phillies Blunt cigar box. The officer testified that in his experience, there is almost always marijuana in the cigar box. The officer asked the driver to step out of the vehicle while he checked on the status of his license. After the check revealed that the driver's license was revoked, the driver was arrested. The officer asked defendant to step to the rear of the vehicle and he then conducted a pat-down search of defendant. During the pat-down, a large piece of tin foil fell to the ground which contained cocaine. The district court held that the pat-down was lawful and the Fourth Circuit agreed. The court first noted that because a frisk or "pat-down" is substantially more intrusive than an order

to exit a vehicle or to open its doors, an officer must have justification for a frisk or a 'pat-down' beyond the mere justification for the traffic stop. With that in mind, the court then held that "in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others." In this case, the officer had a reasonable suspicion that illegal drugs were in the vehicle based on his experience that marijuana is almost always associated with a Phillies Blunt cigar box. In addition, the other factors present did not allay the officer's suspicion but in fact heightened it. Neither defendant nor the driver could produce identification, the stop occurred in a high crime area, and the officer could not tell whether defendant was armed because he was wearing loose clothing. Although the officer admitted that defendant's conduct was not suspicious, it is not necessary that a passenger engage in suspicious conduct to justify a pat-down search when other factors are present. United States v. Sakyi, 160 F.3d 164 (4th Cir. 1998).

Judge's Comments Expressing Opinion About Defendant's Guilt or Innocence Did Not Deprive Defendant of a Fair Trial

Defendant was convicted of distributing crack cocaine. Defendant, who was the mayor of a small town, admitted to selling the crack cocaine but claimed that he was selling the crack cocaine to a manager at a local store as part of his own investigation into employee theft and drug use at the store. While instructing the jury, the district judge explained to the jury that while they "must not accept [his] view of the evidence" and the determination of what the evidence established was entirely up to the jury, the judge told the jury that he did not "credit and accept the defendant's testimony that he was acting solely in his capacity as the Mayor to investigate drug sales in his town .. and that he had no intent to violate the federal drug laws." The judge then stated that he believed defendant "was acting illegally as a drug dealer." Defendant argued on appeal that these comments denied him a fair trial and his conviction must be reversed.

The Fourth Circuit disagreed. The court first noted that the Supreme Court, "in exceptional cases," has approved of a trial judge's expression of an opinion as to the guilt of a defendant. The court then stated that "while we do not approve of the practice of a trial judge's expressing an opinion about a defendant's guilt or innocence," "we do not hold here that giving an opinion on the guilt or innocence of the defendant is per se error in every case." The court then held that two factors saved this case from reversal. First, all the facts required for conviction were admitted by the defendant during his testimony and were not controverted by any other evidence. Second, the district court's clear and repeated statements to the jury that the court's opinion concerning defendant's guilt "was only the judge's personal view and that the jury 'must not accept [his] view of the evidence in this case.'" Thus, although the expression of the opinion was ill-advised, it did not deny defendant a fair trial. United States v. Fuller, 162 F.3d 256 (4th Cir. 1998).

Police Need Not Knock and Announce Their Presence at a Drug Stash House Where They Have Reasonable Belief that Drug Dealer is Present in the House

Defendant was charged with possession with intent to distribute heroin and cocaine. The district court granted his motion to suppress the drugs seized at his home on the grounds that the police unreasonably failed to knock and announce their presence in violation of Wilson v. Arkansas, 514 U.S. 927 (1995). On appeal, the government argued that the officers had a reasonable suspicion that knocking and announcing their presence would have placed the officers in personal danger.

The Fourth Circuit agreed and reversed the suppression ruling. The court found that the officers had reliable information that a drug dealer stored cocaine, heroin and related paraphernalia at a residential "stash house" where the defendant lived. Here, the police had a particularized basis to reasonably suspect that knocking and announcing would be met with "violent resistance" because they were aware that the drug dealer frequented the house daily and were aware of his history of gun-related violence. In addition, "the connection between illegal drug operations and guns in our society is a tight one." United States v. Grogins, 163 F.3d 795 (4th Cir. 1998).

District Court Erred in Dismissing Indictments Based on Prosecutorial Misconduct

Defendants were convicted of various offenses related to political corruption in the South Carolina statehouse. Their convictions were reversed and on remand, the district court dismissed the indictments based on prosecutorial misconduct during the first trial. The Fourth Circuit vacated and remanded, ordering that the indictments be reinstated. In a lengthy opinion, the Fourth Circuit examined the record and discussed the reasons why the district court erred in dismissing the indictments. The Fourth Circuit first held that the district court erred in dismissing the indictments based on prosecutorial misconduct absent a showing a prejudice. Relying on Supreme Court, Fourth Circuit and other circuit precedent, the court held that an indictment may not be dismissed based on prosecutorial misconduct absent a showing of prejudice to defendant. The court then examined the record and reviewed each instance of prosecutorial misconduct the district court relied on in dismissing the indictments. With regard to the instances of prosecutorial misconduct dealing with alleged Brady violations, the Fourth Circuit first noted that the district court operated under a mistaken belief that there was an "open file policy" for discovery in this case. After finding that there was no such "open file policy," the court went on to find that each piece of evidence allegedly withheld in violation of Brady was either not Brady material at all, not exculpatory, cumulative, immaterial or the defendants were aware of the information. Thus, there was no prosecutorial misconduct with regard to any of these instances.

The court then addressed the other instances of prosecutorial misconduct cited by the district court. The district court found that the government did not adequately investigate an individual on allegations of bribery relating to South Carolina's capital gains legislation. The Fourth Circuit held that the district court was without authority to comment on that

investigation because the case law is clear that investigatory and prosecutorial functions rest exclusively with the Executive Branch. Thus, the district court erred in holding that the individual was not adequately investigated by the government. Finally, the Fourth Circuit held that the allegations that the government both committed and suborned perjury in different instances is not supported in the record. Thus, the district court clearly erred in finding that the government engaged in prosecutorial misconduct during the trials of defendants. United States v. Derrick, 163 F.3d 799 (4th Cir. 1998).

No Constructive Amendment Where Description of Weapon in Indictment was Different than Description of Weapon at Trial

Defendant was convicted of robbing three banks and attempting to rob a fourth. On appeal, he argued that the indictment was constructively amended because the indictment charged him with using a black revolver in the robberies but the eyewitness testimony at trial was that the weapon was a silver handgun. The Fourth Circuit held that there was no constructive amendment, and that only if a defendant is prejudiced does a variance violate his rights. The Fourth Circuit and other circuits have held that the inclusion of a description of a weapon in an indictment does not render that description an essential element of the offense. Thus, because the type of firearm is not an essential element of the crime charged, defendant had sufficient notice of the charges against him and his Fifth Amendment rights were not violated. United States v. Redd, 161 F.3d 793 (4th Cir. 1998).

Fourth Circuit Refuses to Notice Plain Error in Admitting Evidence at Trial That Was Obtained From the Witness's Immunized Grand Jury Testimony

Defendant was convicted of perjury, money laundering and conspiracy. He moved to dismiss the indictment under Kastigar v. United States, 406 U.S. 441 (1972), which holds that the government must establish an independent source for all evidence used to prosecute a witness who had previously testified under a grant of immunity. The district court denied the motion and entered an order making factual findings that a sufficient independent source existed for all of the evidence presented by the government at trial. On appeal, defendant argued that the government's direct use at trial of a series of checks, cashed by defendant's brother, which defendant produced before the grand jury and the testimony accompanying those checks to support the money laundering charges violated Kastigar.

Due to the record below, the standard of review was plain error. The court then found that although the introduction of the checks and accompanying testimony constituted error, the introduction of the evidence did not affect defendant's "substantial rights." The court found that the introduction of the checks was not prejudicial and was merely cumulative and harmless beyond a reasonable doubt. In addition, the government's referral to defendant's brother's participation during the introduction of the checks also did not affect defendant's substantial rights because his brother's participation "simply does not tend to establish guilt." In concluding, the court noted that the government did not follow the recommendation of the Department of

Justice that the prosecution be handled by an attorney unfamiliar with the substance of the compelled testimony and is "saved from reversal only by our application of the plain error rule." United States v. France, 164 F.3d 203 (4th Cir. 1998).

En Banc Court Holds Checkpoint Where Motorcycles Were Stopped, Driver's Licenses Examined and Licenses and Persons Videotaped Did Not Violate Fourth Amendment

Plaintiffs filed a § 1983 action challenging police conduct at a stop and search checkpoint set up at the entry to a charity motorcycle rally. On the day of the rally, a single checkpoint was established on a public street outside the "cattlegate" entrance to the fairgrounds where the rally was being held. Persons on motorcycles were stopped, had their licenses examined and their licenses and persons videotaped.

The en banc Fourth Circuit held that these checkpoint procedures did not violate the Fourth Amendment for the reasons given in the panel opinion. The court first noted that under the Supreme Court's analysis in Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), the reasonableness of particular checkpoint seizures is determined by balancing the gravity of the public interest sought to be advanced, and the degree to which the seizures advance that interest, against the extent of the resulting intrusion upon the liberty interest of those stopped. The plaintiff conceded that, under Sitz, the initial stop for brief questioning and observation was reasonable, but argued that the videotaping made the initial reasonable seizures unreasonable. The court disagreed, holding that "though this videotaping procedure may well have pushed to the limit the kind of 'brief questioning and observation' that may accompany valid checkpoint seizures without individualized suspicion, ... under the circumstances it did not make unreasonable the checkpoint seizures whose reasonableness in other respects has been conceded for purposes of this case." Applying the Sitz balancing test, the entire seizure lasted no more than a minute or two, and the videotaping neither added to the intensity of the investigation being conducted by the eyes and ears of the checkpoint officers nor could not have generated the sort of "fear and surprise" with which the Sitz Court was concerned. Norwood v. Bain, 166 F.3d 243 (4th Cir. 1998).

Fourth Circuit Reverses 18 U.S.C. § 922(g) Conviction Based on Prosecutorial Misconduct

Defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). On appeal, defendant argued that the prosecutor violated his constitutional rights by threatening to prosecute his wife if she testified and then calling the absence of his wife's testimony to the attention of the jury. The Fourth Circuit agreed. Defendant's wife stated in an affidavit that she owned the gun, that she kept it between the mattress and the box spring on her side of the king-size bed for her protection, and that she intended to testify to those facts at trial. She then asserted that defendant's attorney had informed her that he had been approached by the prosecutor who told him that defendant's wife would be prosecuted federally for possession of marijuana if she testified on defendant's behalf. Based on that threat, defendant's wife stated that she was "forced" not to testify on her husband's

behalf. At oral argument, the prosecutor admitted that she informed defendant's counsel that she would prosecute defendant's wife if she testified.

In addition to that threat, the prosecutor repeatedly called defendant's wife's failure to testify to the jury's attention and indicated it showed that defendant's story was false. The prosecutor also called to the jury's attention the fact that if there was nothing wrong with defendant's wife possessing a weapon, why didn't she testify that the weapon belonged to her. The Fourth Circuit held that "[n]ot only was the argument in violation of the testimonial privilege of the wife, the suggestion that the [prosecutor] did not know the reason for the absence of [defendant's wife] as a witness was at least highly improper." "The authorities are uniform that threatening a witness with prosecution and commenting about the absence of a witness who has a privilege not to testify are a violation of the Sixth Amendment right of a defendant to obtain witnesses in his favor. The same rule applies for the testimonial privilege of a wife, except not on Constitutional grounds." Thus, the court vacated defendant's conviction and remanded for a new trial. <u>United States v. Golding</u>, 168 F.3d 700 (4th Cir. 1999).

Substantive Federal Law

<u>Statement is Material Under 18 U.S.C. § 1001 if the Statement Could Have Swayed Grand Jury</u>

Defendant was convicted of perjury before a grand jury in violation of 18 U.S.C. § 1623. He argued on appeal that his false statements before the grand jury were not material because the grand jury was told to disregard them and therefore, those statements did not influence the substance of the grand jury's decision. The Fourth Circuit disagreed. The court first noted that a finding of materiality is not dependent upon whether the fact finder was actually influenced by a defendant's false statements. Whether a false statement has the potential to influence the fact finder must be measured at the time that the statement was uttered. In this case, if defendant's false statements were believed by the grand jury, the statements might have led the grand jury not to indict certain individuals for money laundering. The fact that the government told the grand jury not to rely on defendant's testimony after he testified is irrelevant. "It matters only that at the time [defendant] testified, he provided the grand jury with information that might have influenced their decision." <u>United States v. Sarihifard</u>, 155 F.3d 301 (4th Cir. 1998).

<u>Contractor Performing Printing Services Is Indirectly Employed by Union for Purposes of 29 U.S.C. § 501(c)</u>

Defendant was convicted of conspiracy to embezzle funds from a labor union, embezzlement from a labor union and aiding and abetting the embezzlement from a labor union. He argued on appeal that he could not be convicted of aiding and abetting a violation of 29 U.S.C. § 501(c) because his coconspirator could not have been convicted under § 501(c) as a matter of law. Defendant argued that because his coconspirator was an independent contractor performing printing services for the union, he was not an employee of the union and he could not be convicted of embezzlement in violation of § 501(c). Therefore, defendant could not be convicted of aiding and abetting that embezzlement. The Fourth Circuit disagreed. The court first noted that

"Section 501, by its own terms, only applies to persons 'employed' by the Union." An individual may be convicted under § 501(c) if he is employed "directly or indirectly" by a labor organization. The court then held that defendant's coconspirator was employed by the union because the coconspirator's employment as a contractor hired to perform printing services constituted indirect employment by the union. The court concluded by noting that it believes that the language of § 501(c) is "broad enough to include independent contractors" like the defendant's coconspirator. United States v. Seidman, 156 F.3d 542 (4th Cir. 1998).

A Defendant is in the Custody of the Attorney General for Purposes of 18 U.S.C. § 751(a) if he is Delivered to State Authorities Under a Writ of Habeas Corpus Ad Prosequendum

Defendant was convicted of escape in violation of 18 U.S.C. § 751(a). Defendant was arrested for a violation of supervised release from an earlier federal conviction. While incarcerated, a state judge issued a writ of habeas corpus ad prosequendum so that defendant could be tried on state charges. Defendant was released to state authorities pursuant to the writ. After suffering a seizure at the state facility, defendant was transported to a hospital by state authorities and he escaped from the hospital. After defendant was captured by United States marshals, he was charged with escape. Defendant argued that his conviction must be vacated because he was not in the custody of the Attorney General as required by § 751(a) because at the time of his escape he was in state custody awaiting trial on state charges pursuant to the writ of habeas corpus ad prosequendum.

The Fourth Circuit disagreed. The court held that a writ of habeas corpus ad prosequendum does not effect a transfer of custody for purposes of § 751(a). Thus, at the time defendant escaped from the hospital, he was in the custody of the Attorney General as the term "custody" is used in § 751(a). United States v. Evans, 159 F.3d 908 (4th Cir. 1998).

Arrest for Violation of Supervised Release is Custody "By Virtue of" the Underlying Conviction for Purposes of 18 U.S.C. § 751(a)

Defendant was convicted of escape in violation of 18 U.S.C. § 751(a). He argued on appeal that the government failed to meet its burden on § 751(a)'s offense requirement which provides that a defendant's custody must be "by virtue of a[] ... conviction of any offense...," because he escaped before his supervised release was revoked and a sentence was imposed for violating his supervised release, his confinement was not by virtue of a conviction of any offense. The Fourth Circuit disagreed. The court noted that defendant was convicted of violating 18 U.S.C. § 922(g)(1) and his sentence for that offense included a period of supervised release. Thus, the question was whether defendant's custody was by virtue or reason of his § 922(g)(1) conviction. The court then held that because the conduct underlying the proposed revocation of defendant's supervised release formed the basis of his incarceration, "it follows that his incarceration for violating the terms of his supervised release was by reason of his § 922(g)(1) conviction." Thus, defendant's custody was "by virtue of" his § 922(g)(1) conviction. United States v. Evans, 159 F.3d 908 (4th Cir. 1998).

Trial May Be Held In Defendant's Absence Where He Was Present at the Beginning of the Trial and Voluntarily Absented Himself from the Trial

Defendant was tried and convicted of attempted bank robbery. He argued on appeal that the district court committed reversible error when it allowed him, proceeding pro se, to remove himself from the courtroom after the time the case was called and the trial began, but before the jury was empaneled, and to remain absent throughout the trial until he returned to hear the verdict. The Fourth Circuit first noted that in United States v. Diaz, 223 U.S. 442 (1912), the Supreme Court held that where the trial began in defendant's presence, and the defendant voluntarily absented himself, "it would not nullify what had been done or prevent the completion of the trial." The absence of the defendant would be a waiver of his right to be present. The Fourth Circuit applied Diaz and Rule 43 to this case and held that because defendant "was present at the beginning of his trial and voluntarily absented himself, there is no error in this case. Even if there be error, it was invited error brought on at [defendant's] request and, as such, is not reversible." United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998).

Evidence was Sufficient to Sustain Conviction for Bribery Under 18 U.S.C. § 666

Defendant was convicted of bribery in violation of 18 U.S.C. § 666. Defendant was a construction contractor who made cash payments to a federal administrator of a program to renovate houses in return for his obtention of contracts. On appeal, defendant argued that the evidence was insufficient to convict him of bribery because it showed only that he gave gratuities and § 666 prohibits only bribes.

The Fourth Circuit disagreed. The court first held that because the evidence was sufficient to convict defendant of bribery, it need not decide whether § 666 also prohibits gratuities. The court then noted that to prove bribery, it is sufficient for the government to show that the payor intended each payment to induce the official to adopt a specific course of action. In other words, there must be a "quid pro quo." In this case, there was sufficient evidence of the quid pro quo so that a reasonable juror could conclude that defendant paid bribes. United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998).

Fourth Circuit Refuses to Notice Plain Error in Jury Instructions on the Element of Intent in Bribery Prosecution Under 18 U.S.C. § 666

Defendant was convicted of bribery in violation of 18 U.S.C. § 666 for paying money to an administrator of a housing renovation program in order to obtain contracts to work on the houses to be renovated. On appeal, he argued that the district court committed plain error by omitting the requirement of an intent to engage in a quid pro quo in its jury instructions on the elements of bribery. The Fourth Circuit agreed that the jury instruction had been erroneous but refused to find plain error. The court first noted that it would assume, without deciding, that § 666 makes the same bribe/gratuity distinction as § 201 so that a court instructing a jury on § 666(a)(2) must define the "corrupt intent" element the same way it would in instructing on § 201(b). In defining "corrupt intent," a trial court must explain that a payment is made with corrupt intent only if was made or

promised with the intent to corrupt the particular official, i.e. an intent to engage in a quid pro quo. In this case, although the court explained the terms “influence” and “reward,” the court did not instruct the jury that defendant must have the intent to engage in a specific quid pro quo. Without an appropriate definition of corrupt intent, an instruction mistakenly suggests that § 666 prohibits any payment made with a generalized desire to influence or reward no matter how indefinite or uncertain the payor’s hope of future benefit. Standing alone or read with the other jury instructions, the instruction was plainly erroneous. Nevertheless, the court refused to notice the error because there was a fair and reliable determination of defendant’s guilt. Defendant testified that he never paid any money to the administrator. The jury completely rejected the testimony. A quid pro quo instruction would not have changed the jury’s assessment of defendant’s story or his guilt. The evidence leads only to the conclusion that he intended to engage in a quid pro quo with the administrator. United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998).

District Judge Did Not Abuse His Discretion in Refusing to Recuse Himself Under 28 U.S.C. § 455(a) or (b)

Defendant was convicted of numerous counts of arson, wire fraud, and bankruptcy fraud. On appeal, he argued that his convictions must be reversed because the district judge erred in failing to recuse himself. The Fourth Circuit disagreed. Defendant cited numerous grounds for recusal under 28 U.S.C. § 455(b) which primarily revolved around the fact that the judge, while a partner at a law firm, represented an unsecured creditor of defendant in his personal bankruptcy filing.

The Fourth Circuit rejected each of the grounds based on actual conflict due to the prior representation. Finally, defendant argued that recusal was required under § 455(a) because the specific factors of the case provide reason to believe that the judge’s “impartiality might reasonably be questioned.” The court first noted that the critical question presented by § 455(a) is not whether the judge is impartial in fact but is simply “whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.” This objective standard asks whether the judge’s impartiality might be questioned by a reasonable, well-informed observer who assesses “all the facts and circumstances.” The court found that a reasonable outside observer, aware of all the facts and circumstances of this case, would not question the judge’s impartiality. The multiple contentions “not only lack a factual basis demonstrating impropriety, but also fail to create even the appearance of bias.” The strongest contention, that the judge represented an unsecured creditor who was a victim of the bankruptcy fraud, is entirely benign after examining the facts. The judge last represented the unsecured creditor almost two years before defendant filed for personal bankruptcy and five years prior to his indictment. In addition, the unsecured creditor was never mentioned at the trial. United States v. DeTemple, 162 F.3d 279 (4th Cir. 1998).

18 U.S.C. § 922(g)(8), Which Prohibits An Individual Subject to a Domestic Violence Protective Order from Possessing a Firearm, is Constitutional

Defendant was convicted of violating 18 U.S.C. § 922(g)(8), which prohibits an individual subject to a domestic violence protective order from possessing a firearm. He raised a number of arguments on appeal. The Fourth Circuit affirmed the conviction. The court first rejected defendant's argument that the domestic violence protective order did not meet the three requirements of § 922(g)(8). The order was issued after a hearing at which defendant received notice, was represented by counsel and was able to testify. In addition, the order restrained defendant from harassing or abusing the victim. Finally, the order prohibited the use, attempted use, or threatened use of physical force against the victim. The court then addressed defendant's constitutional challenges. The court rejected defendant's first argument that § 922(g)(8) violates the notice and fair warnings principles of the Fifth Amendment. The court held that United States v. Langley, 62 F.3d 602 (4th Cir. 1995), where the court held that proof that defendant knew he was violating § 922(g)(1) is not required for prosecution and ignorance of the law is no defense, governs this case. In this case, defendant was aware that he was subject to a domestic violence restraining order and he was aware that he possessed a firearm. Thus, due process does not entitle defendant to notice that his conduct was illegal.

The court then rejected defendant's argument that Congress exceeded its Commerce Clause authority in enacting § 922(g)(8). Section 922(g)(8) requires that the firearm be shipped or transported in interstate or foreign commerce. Thus, because § 922(g)(8) contains an express jurisdictional element, it does not exceed Congress' Commerce Clause authority. Finally, the court rejected defendant's argument that § 922(g)(8) interferes with the state's domestic relations laws in violation of the Tenth Amendment. Unlike Printz v. United States, 521 U.S. 98 (1997), where the Supreme Court held that the Brady Act's requirement that state officials perform background checks placed an unconstitutional obligation on sovereign state officials, § 922(g)(8) poses no similar affirmative obligation. Rather, "§ 922(g)(8) is a constitutional exercise of Congress's commerce power supplementing complementary state legislation." United States v. Bostic, 168 F.3d 718 (4th Cir. 1999).

Habeas Corpus

District Court Erred in Holding Evidentiary Hearing on Double Jeopardy Claim

The district court granted petitioner a writ of habeas corpus after conducting an evidentiary hearing and determining that petitioner had been placed in double jeopardy by the government's use of a prior conspiracy conviction as the predicate conspiracy for a second continuing criminal enterprise conviction. Defendant had entered guilty pleas in both cases. The Fourth Circuit reversed and remanded holding that the district court erred in holding an evidentiary hearing on petitioner's double jeopardy claim. The court noted that in United States v. Broce, 488 U.S. 563 (1989), the Supreme Court has held that prisoners who enter successive guilty pleas may not collaterally attack their convictions on

double jeopardy grounds absent special circumstances. The Court held that a defendant waives his right to claim double jeopardy by pleading guilty because a guilty plea is an acknowledgment that the defendant committed the crime charged and not just the underlying conduct. The Court noted two exceptions to the rule of waiver. One, if the plea entered was not knowing and voluntary, and two, if the government had no right to bring the charges at all. In this case, only the second exception may apply. If the district court could not determine from the indictments and the record evidence that the two convictions placed petitioner in double jeopardy, his claim would be deemed waived. The district court in this case ignored the directive in Broce to make the decision on the face of the indictment and the record and instead held an evidentiary hearing. Thus, the court remanded for the district court to make a decision based on the record evidence as it existed before the evidentiary hearing as to whether petitioner's double jeopardy rights were violated. United States v. Brown, 155 F.3d 431 (4th Cir. 1998).

Petitioner Did Not Receive Ineffective Assistance of Counsel From Any Failure to Inform Him That He Need Not Testify At Trial

Petitioner was convicted of kidnapping, rape and murder and sentenced to death. He filed a petition for writ of habeas corpus arguing that his trial counsel were ineffective because they forced him to testify at trial. The district court denied the writ and the Fourth Circuit affirmed. The court first noted that the Supreme Court has never resolved the question of whether the right to testify is "personal" and can be waived only by the defendant. However, every circuit considering the issue has held that the right to testify is personal and can only be waived by the defendant. The court then noted that some courts, including the Fourth Circuit, "perhaps unwisely," have determined that the trial court does not have a sua sponte duty to conduct a colloquy with the defendant to determine whether the defendant has knowingly and intelligently waived the right to testify. Because trial counsel has the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify, that burden is a component of effective assistance of counsel. Thus, a criminal defendant's claim that his trial counsel was constitutionally ineffective by forcing him to testify must satisfy the two-prong test established in Strickland.

In this case, although the state habeas court found that petitioner did not express any reluctance or resistance to testifying and that his trial counsel explained, and he understood, that he needed to testify if his account of the encounter with the victim was going to be accepted by the jury, his allegation that he was never apprised of his right to waive his right to testify or that the decision ultimately rested with him, has some support. The state court record does not indicate that Petitioner was apprised of his right to waive his right to testify or that the decision to testify was his. Nevertheless, the court found that the issue need not be resolved because even if these allegations were true, Petitioner cannot establish prejudice under the second prong of Strickland. He cannot meet that burden because his testimony at trial only helped his case because it was consistent with his confession that was previously admitted into evidence. Even if, as contended by Petitioner, he would have successfully had the confession suppressed and not testify,

the result of the proceeding was not fundamentally unfair or unreliable. Absent the confession and the trial testimony, there was "overwhelming evidence" that Petitioner kidnapped, raped and murdered the victim. The only plausible defense was one based on consent. That defense was placed before the jury and they rejected it. Without that defense, Petitioner's "fate was a foregone conclusion." Sexton v. French, 163 F.3d 874 (4th Cir. 1998).

Fourth Circuit Reverses District Court's Grant of Writ of Habeas Corpus Holding that the Virginia Supreme Court's Conclusion Was Not "Contrary To" or an "Unreasonable Application of" Clearly Established Supreme Court Precedent

Petitioner was convicted of capital murder and sentenced to death based on the jury's finding that he presented a future danger to society. He filed a petition for writ of habeas corpus arguing that his trial counsel were ineffective because they failed to present certain evidence in mitigation of punishment during the sentencing phase of petitioner's trial. The district court granted the writ and the Fourth Circuit reversed, concluding that, in contrast to the district court's conclusion, the Virginia Supreme Court's finding of no prejudice under Strickland was "neither based on an unreasonable application of the tests set forth by the United States Supreme Court in Strickland and Lockhart for determining prejudice, nor based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the [state] circuit court." First, the court stated that it was assuming, without deciding, that trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation during the sentencing phase. The court then rejected the district court's conclusion that the Virginia Supreme Court's application of the Strickland prejudice standard was unreasonable because it found that there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence been presented. The court noted that a court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. The Strickland prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. The fact that one hypothetical juror may have been swayed by a piece of evidence is insufficient to establish prejudice. The Fourth Circuit agreed with the Virginia Supreme Court that petitioner was not prejudiced because evidence that he presented a future danger to society was "simply overwhelming."

The court also rejected the district court's conclusion that the Virginia Supreme Court's application of Lockhart was unreasonable. The district court found that because petitioner sought to demonstrate prejudice based on trial counsel's failure to present mitigating evidence, which he was entitled to present under current law, the standard in Lockhart was inapplicable. The Fourth Circuit held that the district court construed Lockhart too narrowly. As the majority in Lockhart stated, the requirement that a criminal defendant alleging prejudice show that the result of the proceeding was unfair or unreliable was the rule, not the exception. That holding is not limited to the "unusual" case. The court next rejected petitioner's argument that the Virginia Supreme Court

erroneously applied a "weighing" analysis from Strickland in finding no prejudice because only in a "weighing" state may prejudice be determined by considering whether the aggravating evidence outweighed the mitigating evidence and Virginia is not a weighing state. The court held that there is no evidence that any portion of the prejudice analysis in Strickland was meant to apply only to "weighing states."

Finally, the Fourth Circuit rejected the district court's conclusion that the Virginia Supreme Court "made an error of fact in discussing its findings of no prejudice." Specifically, the district court criticized the characterization of the allegedly mitigation evidence as "mostly relatives" who thought that petitioner was nonviolent. Despite the district court's contention, the Virginia Supreme Court "accurately described the omitted mitigation evidence that was credited by the [state] circuit court" after the evidentiary hearing. The state circuit court only identified petitioner's estranged wife, daughter, siblings, mother and friend. Thus, the description of these witnesses as mostly family members was reasonable. Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998).

Court May Consider the Issue of Procedural Default When State Does Not Raise Issue in District Court

Petitioner, convicted of capital murder and sentenced to death, filed a petition for writ of habeas corpus arguing that the state trial court violated his constitutional right to due process by failing to permit him to inform the jury that he would not be eligible for parole for thirty years if sentenced to life imprisonment. The district court denied the relief sought and the Fourth Circuit denied petitioner's request for a certificate of probable cause to appeal. At the Fourth Circuit, the state argued that petitioner's claim was procedurally defaulted because he did not raise any due process claim relating to the failure to inform the jury of his parole eligibility either on direct appeal or during his state post-conviction proceedings. Petitioner responded that the court should consider his claim on the merits because the state did not raise the procedural default issue before the district court. The court first stated that although the state's failure to raise the procedural default issue waived its right to pursue the issue before the Fourth Circuit, the court may, in its discretion, deny federal habeas relief on the basis of issues that were not preserved or presented properly by a state. The court then joined the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits in holding that a federal habeas court possesses the authority, in its discretion, to decide a petitioner's claim on the basis of procedural default despite the failure of the state to properly preserve procedural default as a defense. In this case, the court exercised that authority. The court noted that it is clear from the record that the failure of the state to raise the issue was unintentional and in fact, the state argued that it had raised the issue in the district court. In addition, no additional hearing or argument is required given that the parties thoroughly briefed and argued the procedural default issue before the court and petitioner offered no excuse for his default. Finally, judicial economy "strongly favors" a disposition on the ground of procedural default because the procedural default is obvious in that petitioner did not raise on direct appeal or in his state post-conviction proceedings any due process argument relating to the failure of the state trial court to inform the

jury of his parole eligibility and any attempt to raise the issue in state court now would result in a determination that the issue was procedurally defaulted. Yeatts v. Angelone, 166 F.3d 255 (4th Cir. 1999).

DEFENSE NEWS

is published by the

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for the District of Maryland
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