DEFENSE NEWS

Newsletter for Maryland CJA Panel Attorneys

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HIGHLIGHTS IN THIS ISSUE

The Supreme Court has ruled, and will rule in the future, in at least three important cases dealing with sentencing under the advisory Guidelines. In *Rita v. United States*, the Court approved of an appellate court adopting a nonbinding presumption that a sentencing within the advisory Guidelines range is reasonable, but emphasized that "the presumption applies only on appellate review," and that the "presumption that a Guidelines sentence is reasonable does not require the sentencing judge to impose that sentence." *See* p. 5. In *Gall v. United States*, to be decided in the fall, the Court will decide whether, when determining the reasonableness of a district court's sentence under the advisory Guidelines, it is appropriate for an appellate court to require a district court to justify a deviation from the Guidelines with a finding of extraordinary circumstances. *See* p. 6-7. And, in *Kimbrough v. United States*, the Court will decide whether a district court, in sentencing under the advisory Guidelines, may consider either the impact of the 100-to-1 crack/powder ratio implemented in the Sentencing Guidelines, or the reports and recommendations of the Sentencing Commission favoring a lower ratio. *See* p. 4-7.

NOTES FROM THE DEFENDER

Fred W. Bennett

Former Federal Public Defender Fred W. Bennett, died on July 15, 2007. Fred was special. One of those people who – because of his larger-than-life presence – could simply be referred to by his first name and everyone – at least in the criminal defense community – knew immediately who was being discussed. And they probably knew to get ready for yet another "Fred" story. Many of you responded to the e-mail announcement of Fred's death by sharing a memory of Fred's tenacity as a litigator, or how patient Fred was in dispensing advice or inspiring young lawyers. Teacher, litigator, mentor: Fred touched a lot of lives.

The Federal Public Defender's Office for the District of Maryland will always bear Fred's imprint. His portrait presides prominently in our conference room. He spoke at a number of office trainings and joined us for celebrations of important office events. Most importantly, he hired Susan Bauer, Joe Balter, Denise Barrett, Joe Segreti, Renee Watts, and others, much of the backbone of our current office, who remain to maintain Fred's memory and his legacy of commitment to the right to counsel and the dream of equal justice.

CJA Training

Our Fall CJA training is scheduled for November 16, 2007 at the Greenbelt Courthouse. We will again use the Jury

Assembly Room on the first floor. This space allows us to include small group breakout sessions as part of our program. Please drop me an e-mail note if you have thoughts on topics or speakers that we should include in our training.

In addition, Baltimore has been chosen as the host for two important national Criminal Justice Act training programs. The first is the Multi-Track Federal Criminal Defense Seminar: Strategies for Defending Complex Cases. The program is scheduled for September 6-8, 2007 at the Marriott Inner Harbor Hotel. The seminar promises to be a very good program with a mix of national and local faculty addressing a number of important litigation topics, including special litigation issues related to trying gang cases. A draft registration and information can be found at www.fd.org. This should be a very good program for all of us. The seminar includes a special small group session on persuasive writing. If you work regularly with young associates at your firm on CJA work, please encourage them to register as well.

The second is the Federal Death Strategy Session, an essential program for all lawyers currently handling federal death penalty cases at the trial level. The Strategy Session is scheduled for November 9-10, 2007. Again, if associates in your firm are significantly involved in your capital work, they should be able to attend. Registration information can be found at www.capdefnet. org.

Pretrial Detention

An already bleak pretrial detention situation seems to have grown worse over the past few months. Our number of detained clients continues to grow. And our options continue to shrink. Fewer Maryland facilities are providing beds. Although beds are still available and judges can place clients at VOA, Pretrial Services will not "recommend" Volunteers of America (VOA) because of BOP's inadequate response to the recent incidents where VOA staff accepted bribes to allow detainees to leave the facility at night.

The one place accepting our clients is the privately run Northeast Ohio Corrections Center (NEOCC). NEOCC distinguishes itself – and sustains its profit margin – by accepting more detainees than it can adequately house. NEOCC staff pick clients up in Maryland and deliver them to their plastic "boats" in Ohio for a price lower than any government-run facility will charge – in conditions that no Maryland agency would tolerate.

To this point, the Marshals have reserved NEOCC for clients awaiting designation after sentencing. Now, the Marshals, because of the unavailability of space in Maryland, are sending more clients to Ohio, including some who are awaiting trial. We now have lawyers traveling to Ohio to attend proffer sessions and to prepare for sentencings.

Please continue to make the Court aware of the way our detention facility crisis impacts access to counsel. We need to raise this situation at detention hearings and sentencings. If your client does end up at NEOCC, and they almost all do, Assistant Federal Public Defender Carrie Corcoran has become our in-house expert in addressing issues with the facility - including chronic delays in delivery of medications to clients transferred there.

The Marshals claim that clients with serious medical conditions will not be sent to NEOCC. We have had clients with HIV/AIDS and diabetes end up at NEOCC. They almost always suffer dangerous delays in getting medications. If you have a client with medical problems, please advise the Court that NEOCC is not safe for our clients and ask the Court's help to make sure that our sick clients are not sent there. If they are sent there anyway, Carrie Corcoran may be able to help you negotiate the bureaucracy there.

Cooperation

I recently attended a meeting of the Criminal Chiefs from United States Attorney's Offices from around the country. When the topic of cooperation came up, the entire room was baffled and amused by our District's miserly "two in and two out" cooperation policy. Ours is the only District in the nation with such a rigid policy.

The policy – the creation of the United States Attorney's Office in Maryland – has never been consistent with § 5K1.1 which requires the District Court judge to consider multiple factors before deciding the extent of the departure. While it has never been supported by the law, the policy makes even less sense now that there has been a steady inflationary rise in the length of federal sentences. The sentences keep going up, but the cooperation recommendation from the United States Attorney's Office stubbornly remains at two levels.

The goal of the United States Sentencing Guidelines is to limit disparity. Many of our neighboring districts – including the Eastern District of Virginia – routinely reduce the sentences of cooperators by half. Inconsistent with the rationale for the Guidelines themselves, the District of Maryland's policy stands alone in restraining judges' discretion in this area.

Crack Sentencing

This spring the Sentencing Commission approved an amendment to the Guidelines to address the 100:1 crack powder ratio. The disparity between the crack and powder cocaine guidelines has led to inordinately harsh sentences – disproportionately on black defendants. The Commission's action is long overdue and as the Commission puts it - would do more to reduce the sentencing gap between blacks and whites "than any other single policy change."

The proposed amendment will lower crack sentences by two levels and will result in an average sentence reduction of 15 months for defendants convicted of crack offenses. The Commission sent the proposed amendment to Congress on May 1, and, unless Congress passes a bill rejecting the amendment by November 1, it will become a permanent change in the Guidelines. The proposed amendment can be currently found at the Commission's website, www.ussc.gov.

Unless the Commission expressly makes the proposed amendment retroactive, it will not apply to cases sentenced before November 1, 2007. Accordingly, if you have a crack case, do everything you can to postpone the sentencing until November. If you cannot do so, try to use the proposed amendment and the Sentencing Commission's related report to Congress (in which the Commission recommends to Congress that it should lower the 100-to-1 crack/powder cocaine ratio currently

codified under 21 U.S.C. § 841 to not more than 20-to-1), to argue for a variance under 18 U.S.C. § 3553(a). In light of the Commission's determination that the current crack guideline imposes a sentence greater than necessary to achieve the goals of federal sentencing, the proposed amendment and the Commission's report support a finding that the current crack penalties are presumptively unreasonable under the Supreme Court's recent decision in *Rita v. United States*. This reasoning certainly supports a downward variance under § 3553(a). The Commission's report can also be found at the website listed above.

Finally, if you are unable to either delay the sentencing or achieve a downward variance, you should take an appeal, in order to string out the case for as long as possible. In the fall, the Supreme Court, in *Kimbrough v. United States*, will decide whether a district court in the post-*Booker* world may consider either the impact of the 100-to-1 crack/powder ratio currently implemented in the Sentencing Guidelines (prior to the proposed amendment), or the reports and recommendations of the Sentencing Commission favoring a lower ratio. Depending on how the Court decides this issue, taking an appeal in a crack case may result in a remand for resentencing under *Kimbrough*, which could be favorable in light of the proposed amendment.

FPD Personnel

Staff Attorney Sarah Gannett has left our office to join the Federal Defender's Office for the Eastern District of Pennsylvania in Philadelphia. Sarah joins that office–and its excellent appellate unit–as an appellate attorney. Sarah has been with our office for over 7 years and will be sorely missed.

Sapna Mirchandani fills Sarah's staff attorney position. Sapna joins us from the Federal Public Defender's Office for the Eastern District of Virginia, where she built an excellent reputation as an appellate attorney. Before joining the Federal Public Defender's Office for the Eastern District of Virginia, Sapna worked for the National Coalition to Abolish the Death Penalty as a Soros Fellow. After graduating from Columbia Law School and before moving to this area, Sapna began her career at the law firms of Skadden, Arps, Slate, Meagher & Flom LLP, and Akin, Gump, Strauss, Hauer and Feld LLP, in New York.

Sean Vitrano will join us early in the Fall as an Assistant Federal Public Defender. Sean has been an active member of our CJA Panel for the past three years. He joins us from Zuckerman Spaeder, where Sean worked following his clerkship with The Honorable Richard D. Bennett.

SUPREME COURT

Substantive Federal Law

Federal Appeals Courts Have No Jurisdiction To Hear Appeals After Time For Filing Has Expired

The Supreme Court has ruled that federal appellate courts do not have authority to consider an appeal after the time for filing a notice of appeal has expired, even if a district court has allowed the appeal to be filed outside that time period. *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

Constitutional Criminal Procedure

Passenger May Bring Fourth Amendment Challenge To Legality Of Traffic Stop

The Supreme Court has ruled that a passenger who is in a vehicle when the police make a traffic stop is "seized" within the meaning of the Fourth Amendment and thus may challenge the constitutionality of the stop. *Brendlin v. California*, 127 S. Ct. 2400 (2007).

Sentencing

Appellate Courts May Adopt Presumption Of Reasonableness In Regard To Guidelines Sentences

The Supreme Court has ruled that a court of appeals may apply a presumption of reasonableness to a sentence that is within the Guidelines range. The Court made clear both that "the presumption is not binding," and that "the presumption applies only on appellate review." The Court also emphasized that "a nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." In addition, the Court made clear that traditional departure jurisprudence is alive and well: "The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines, or, since *Booker*, by imposing a non-Guidelines sentence)."

In his concurring opinion, Justice Stevens (joined by Justice Ginsburg), emphasized that sentencing courts are still required to consider all the factors set forth in 18 U.S.C. § 3553(a) and apply them in individual cases. He further noted that "appellate court must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines." "*Presumptively* reasonable does not mean *always* reasonable; the presumption of course must be genuinely rebuttable." Justice Stevens also indicated that district courts which have been treating the advisory Guidelines as all but mandatory should no longer do so: "Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory." *Rita v. United States*, 127 S. Ct. 2456 (2007).

Habeas Corpus

Habeas Court Did Not Abuse Its Discretion In Refusing To Grant Hearing On Ineffectiveness Claim

The Supreme Court has ruled that a district court did not abuse its discretion in refusing to grant an evidentiary hearing to a habeas petitioner, finding that the petitioner would not have been able to make out a colorable claim of ineffective assistance of counsel arising from his attorney's failure to present additional mitigating evidence at a capital sentencing hearing. The Court found that the petitioner could not have obtained relief because the state courts' decision that he would not have allowed counsel to present the evidence was not an unreasonable factual determination and because the mitigating evidence he sought to introduce would not have changed the result. *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007).

Ninth Circuit Erred In Granting Habeas Relief Based On Trial Judge's Excusal of Juror For Cause

The Supreme Court found that the Ninth Circuit erred in granting habeas relief to a petitioner because the trial judge's excusal for cause of a juror who expressed confusion over application of the death penalty was not an unreasonable application of federal law. The Court emphasized that the trial judge had engaged in lengthy questioning of the prospective juror and supervised a diligent and thoughtful voir dire, and therefore had broad discretion to exclude the juror. *Uttecht v. Brown*, 127 S. Ct. 2218 (2007).

Habeas Court Must Assess Prejudice Of Error Under *Brecht* Standard

A federal habeas court must assess the prejudicial impact of the unconstitutional exclusion of evidence during a state criminal trial under the "substantial and injurious effect" standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court has held, even if the state appellate court on direct review failed to recognize the error and thus did not review it for harmlessness under the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967). *Fry v. Pliler*, 127 S. Ct. 2321 (2007).

Court Stops Execution Of Delusional Death Row Inmate And Remands Case For Further Proceedings

The Supreme Court granted habeas relief to a petitioner whose attorneys claimed his delusions prevented him from understanding the reason for his impending execution, and remanded the case without setting forth a definitive standard for determining competency under *Ford v. Wainwright*, 477 U.S. 399 (1986) (prohibiting death penalty for insane prisoners). The Court concluded (1) the petition was not "second or successive" despite an earlier petition concerning the conviction; (2) the state court's procedures in rejecting the incompetency claim involved an unreasonable application of *Ford*; and (3) the Fifth Circuit employed an improperly restrictive test when it refused to consider whether the petitioner's delusions prevented him from having a rational understanding of the link between his crime and his impending execution. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

Certiorari Granted

State Courts, Retroactivity, And *Teague*

The Supreme Court will decide whether state supreme courts must use the standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989), when deciding whether U.S. Supreme Court decisions apply retroactively to state-court criminal cases, or whether a state court may apply a broader retroactivity test based on state law. *Danforth v. Minnesota*, 127 S. Ct. 2427 (2007).

Court Again Agrees To Decide Legality Of Below-Guidelines Variance

In *Gall v. United States*, the Eighth Circuit held that a sentence of probation was unreasonable because it was an "extraordinary variance" from the Sentencing Guidelines range that was not

supported by "extraordinary circumstances." The Supreme Court will review that decision, and decide whether, when determining the reasonableness of a district court's sentence under *Booker*, it is appropriate to require district courts to justify a deviation from the Guidelines with a finding of extraordinary circumstances.

Gall raises the same issue as *Claiborne v. United States*, in which the Court previously granted certiorari and heard argument, but then dismissed as moot in light of the petitioner's death. *Gall v. United States*, 127 S. Ct. 2933 (2007).

Court Will Decide Whether District Judge May Consider Unfairness Of 100-to-1 Crack/Powder Ratio In Granting Sentence Reduction

The Supreme Court will review a case in which the Fourth Circuit held that a below-Guidelines sentence was per se unreasonable because it was based in part on the district court's "disagreement with the sentencing disparity for crack and powder cocaine offenses."

In conducting this review, the Court will decide two questions: (1) whether a district court, in carrying out the mandate of 18 U.S.C. § 3553(a) to impose a sentence that is "sufficient but not greater than necessary," may consider either the impact of the 100-to-1 crack/powder ratio implemented in the Sentencing Guidelines, or the reports and recommendations of the Sentencing Commission favoring a lower ratio; and (2) how, in carrying out its statutory mandate under § 3553(a), a district court is to consider and balance the various factors set forth in the statute, and in particular subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct." *Kimbrough v. United States*, 127 S. Ct. 2933 (2007).

Court Will Review Prosecutor's Reference To O.J. Simpson Verdict In Death Case

In a Louisiana death penalty case where the prosecutor struck from the jury all five African-Americans who had survived challenges for cause, the Supreme Court will decide whether, in finding that the petitioner had not proven discriminatory intent under *Batson*, the state court failed to consider highly probative evidence of such intent, including the prosecutor's repeated references to the O.J. Simpson case. The Court will also decide whether the state court erred in importing into a direct appeal the highly deferential standard of review applied in habeas cases. *Snyder v. Louisiana*, 127 S. Ct. 3004 (2007).

Court Will Consider Habeas Rights Of Guantanamo Bay Detainees

The Supreme Court will decide whether the Military Commission Act of 2006 validly deprived the federal courts of jurisdiction to consider habeas claims of Guantanamo Bay detainees, and, if so, whether the MCA is constitutional. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007).

FOURTH CIRCUIT

Substantive Criminal Law

Fourth Circuit Affirms Fraud Convictions On Numerous Bases

The Fourth Circuit rejected several arguments in affirming two defendants' multiple convictions for wire fraud. The court ruled among other things that the jury instructions accurately stated that a belief a victim would be eventually repaid is not a defense to fraud; that the codefendants' defenses were not so inherently antagonistic as to justify severance; and that the trial judge did not err in failing to inquire as to the validity of a potential defense witness' invocation of his Fifth Amendment right against self-incrimination. *United States v. Allen*, 491 F.3d 178 (4th Cir. 2007).

Attorney Must File Notice Of Appeal When Instructed To Do So By Client

The Fourth Circuit has ruled that an attorney violates the Sixth Amendment if he fails to follow his client's unequivocal instruction to file a timely notice of appeal, even when the client waives his right to challenge his conviction and sentence in a plea agreement. *United States v. Poindexter*, ___ F.3d ____, 2007 WL 1845119 (4th Cir. 2007).

Constitutional Criminal Procedure

Officer Had Probable Cause To Believe Defendant Partially Committed Offense Of Harassment In His Presence

The Fourth Circuit ruled that a police officer had probable cause to believe the defendant had committed the Maryland misdemeanor offense of harassment partially in the officer's presence, and thus the officer's warrantless arrest of the defendant did not violate the Fourth Amendment. The officer responded to an emergency call by the victim and found the defendant and the victim standing next to each other, and the defendant followed right beside the victim as she approached the officer. The court emphasized that the victim told the officer that the defendant was following her and "messing" with her and that she had obtained a protective order against the defendant, the defendant attempted to interrupt the officer's interview of the victim, and the officer heard the defendant tell the victim that he was going to get her for this. *United States v. McNeill*, 484 F.3d 301 (4th Cir. 2007).

Business Relationship Did Not Provide Fourth Amendment Standing, And Voluntary Statements Were Not Fruit Of Illegal Search

Two defendants were charged with drug offenses after the unlawful search of an apartment leased by one of them. The Fourth Circuit found that the defendant who did not lease the apartment had no standing to challenge the search, because the relationship between the two men was at core a business one and therefore the non-leasing defendant had no legitimate expectation of privacy in the other's apartment. The defendant who leased the apartment argued that, in addition to the physical evidence, the testimony of witnesses who were present during the search was also the product of the Fourth Amendment violation and should be suppressed. The Fourth Circuit rejected this argument as well, finding that the witnesses' statements were given

voluntarily and therefore were not the fruit of the illegal search.

In deciding the suppression issue, the court (over a vigorous dissent by Judge Michael) relied on facts developed during the defendant's sentencing investigation and the sentencing hearing. *United States v. Gray*, 491 F.3d 138 (4th Cir. 2007).

Testimony Was Not Fruit Of Defendant's Compelled Disclosure Of Witness' Whereabouts

A defendant alleged that police officers coerced him into revealing the whereabouts of a man who subsequently testified for the government. The defendant claimed on appeal that the witness' testimony, as well as drugs found in the witness' hotel room, should have been suppressed as fruits of his coerced disclosure. The Fourth Circuit affirmed denial of the suppression motion, finding that the witness' testimony was sufficiently attenuated from the defendant's compelled communication to be admissible because there was no reason to believe the witness' decision to testify against the defendant was not the product of his own free will. *United States v. Sweets*, ___ F.3d ____, 2007 WL 1893590 (4th Cir. 2007).

Request For Identification From Passenger In Lawfully Stopped Vehicle Was Proper Under Circumstances Of Stop

The Fourth Circuit has ruled that a defendant's Fourth Amendment rights were not violated when a police officer requested identification from him while he was a passenger in a lawfully stopped vehicle (a van that contained 11 highly-anxious passengers and which had a broken headlight, a cracked windshield, and an unrestrained infant on the floor). The court noted that the request for identification did not prolong the stop, and that any further delay due to an immigration administration inquiry occurred only after the driver of the vehicle indicated that his passengers were illegal aliens. The court also emphasized the many passengers in the vehicle and the number of obvious infractions. *United States v. Soriano-Jarquin*, ___ F.3d ____, 2007 WL 1990236 (4th Cir. 2007).

Sentencing

Conviction For Selling Imitation Narcotics Qualified As Controlled Substance Offense

The Fourth Circuit has ruled that, under the ordinary meaning of the term "counterfeit substance," the defendant's prior Maryland conviction for selling imitation narcotics constituted a counterfeit substance offense and thus was a controlled substance offense under the Guidelines. *United States v. Mills*, 485 F.3d 219 (4th Cir. 2007).

Sale Of Drugs In Jail Was Not Relevant Conduct For Offense Of Drug Distribution In Town

A district court enhanced the sentence of a defendant who was convicted for the distribution of crack cocaine because he had been found to distribute marijuana and a prescription drug while in jail. The Fourth Circuit vacated the enhancement, finding that the object of the offense of conviction was the distribution of drugs in a certain town, not the detention center, and the sale of the drugs in jail was not relevant conduct. *United States v. Dugger*, 485 F.3d 236 (4th Cir. 2007).

Upward Variance For Physician's Distribution Of Anabolic Steroids And HGH Was Reasonable

The Fourth Circuit affirmed as reasonable a defendant's sentence of 12 months and a day for conspiracy to distribute anabolic steroids and human growth hormone, which was an upward variance from the Guidelines range of zero to six months imprisonment, finding that the Guidelines failed to reflect the seriousness of the offense, which lasted over seven years and involved 139 prescriptions. *United States v. Shortt*, 485 F.3d 243 (4th Cir. 2007).

Defendants Not Entitled To Reduction For Acceptance Of Responsibility

The Fourth Circuit found that defendants who went to trial on tax and fraud charges were not entitled to a two-level reduction in offense level for acceptance of responsibility even though they went to trial partly to mount a constitutional challenge, when the defendants contested the intent element in addition to making the constitutional argument, and pursued an obstructive course prior to trial. *United States v. Baucom*, 486 F.3d 822 (4th Cir. 2007).

Sentence On One Charge And Its Lesser Included Offense Violated Double Jeopardy

The Fourth Circuit found that a defendant's rights under the Double Jeopardy Clause were violated when he was subjected to separate sentences on both a charge that he put in jeopardy the life of another by use of a dangerous weapon during a bank robbery, and the lesser included offense of bank robbery by force or violence. *United States v. Midgett*, 488 F.3d 288 (4th Cir. 2007).

Defendant Convicted Of Sexual Abuse Could Properly Receive Enhancement Based On Physical Restraint Of Victim

A defendant convicted of aggravated sexual abuse following his rape of a woman appealed his sentence, arguing that he should not have received a two-level enhancement under U.S.S.G. § 3A1.3 for physical restraint of the victim, because the restraint factor was taken into account through his offense guideline, § 2A3.1, which required a four-level enhancement for the conduct (forcible rape) described in the statute of conviction. The Fourth Circuit rejected the argument, finding that, while force is an element of the offense, forcible rape may be committed without resort to physical restraint. *United States v. Johnson*, ___ F.3d ____, 2007 WL 1829184 (4th Cir. 2007).

Court Affirms Sentence Despite Government's Late Notice Of Intent To Seek Enhanced Penalty

In a drug prosecution, the government filed notice of its intent to seek an enhanced penalty based on the defendant's two prior felony drug convictions after the jury was selected but two weeks before it was sworn. Following the defendant's conviction, the district court imposed an enhanced sentence based on the prior convictions. The defendant argued on appeal that the court erred in imposing the enhanced sentence because the government's notice was not filed "before trial," as required by 21 U.S.C. § 851(a). The Fourth Circuit affirmed the sentence, finding that (1) § 851 is not jurisdictional

and (2) the lower court's assumption that the notice was filed before trial was not plain error (the defendant had not objected below). *United States v. Beasley*, ___ F.3d ____, 2007 WL 2121722 (4th Cir. 2007).

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