FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

Published Between April 1, 2010 and March 31, 2011

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INTRODUCTION

This outline documents the published decisions of the Fourth Circuit, beginning in April 2010, that address criminal law and procedure issues, primarily on direct appeal. Decisions that represent defense wins or otherwise contain defense-favorable findings are marked by an exclamation point (!). Decisions that, in the compiler's judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked by an asterisk (*). Note that not every issue raised in a decision is reflected in the outline. Please report errors or omissions in the outline to fran_pratt@fd.org.

I. OFFENSES

18 U.S.C. § 228, Failure to Pay Child Support

United States v. Novak, 607 F.3d 968 (4th Cir. June 15, 2010) (Hamilton, Sr. J.) (E.D. Va.) (rejecting two challenges to jury instructions on venue)

18 U.S.C. § 641, Theft of Government Property

United States v. Jeffery, 631 F.3d 669 (4th Cir. Feb. 9, 2011) (Traxler, C.J.) (E.D. Va.) (where status of property is jurisdictional fact only, § 641 does not require that defendant know that property belongs to United States; distinguishing *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (knowledge requirement for violation of 18 U.S.C. § 1028A (aggravated identity theft) extends to element that identification be "of another person"))

18 U.S.C. § 912, Impersonation of Federal Officer or Employee

United States v. Roe, 606 F.3d 180 (4th Cir. May 27, 2010) (Agee, J.) (D. Md.) (evidence was sufficient to support conviction for pretending to be federal police officer (over dissent by Gregory, J.); jury instruction did not constructively amend indictment)

18 U.S.C. § 922(g), Possession of Firearm or Ammunition by Prohibited Person

United States v. White, 606 F.3d 144 (4th Cir. June 1, 2010) (Agee, J.) (E.D. Va.) (in light of *Johnson v. United States*, 130 S. Ct. 1265 (2010), Virginia offense of domestic assault and battery, Va. Code § 18.2-57, is not "misdemeanor crime of domestic violence" for purpose of § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A) because it can be committed by mere touching)

United States v. Chester, 628 F.3d 673 (Dec. 30, 2010) (Traxler, C.J.) (S.D. W. Va.) (in case involving alleged violation of § 922(g)(9) (possession of firearm after conviction for domestic violence misdemeanor), setting forth two-part inquiry to Second Amendment challenges: first, does challenged law burden or regulate conduct that comes within scope of Second Amendment (i.e., conduct that is protected), and second, if it does, then has government met burden of justifying validity of challenged law under intermediate scrutiny; remanding case to district court for further proceedings in light of appropriate standard)

18 U.S.C. § 924(c), Use or Possession of Firearm in Connection with Crime of Violence of Drug Trafficking

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (upholding § 924(c) conviction based on underlying offense of RICO conspiracy where objectives of conspiracy were violent crimes)

United States v. Ashley, 606 F.3d 135 (4th Cir. June 1, 2010) (Wilkinson, J.) (D. Md.) (where indictment alleged that defendant possessed and discharged a firearm both "during and in relation to" and "in furtherance of" a criminal of violence, jury instruction did not constructively amend indictment by omitting "during and relation to" language, as it was surplusage to offense of possession (N.B.: court notes that difference between phrases is "subtle" and "slight" and that "if anything," the "in furtherance" language is "slightly higher standard")

United States v. Ashley, 606 F.3d 135 (4th Cir. June 1, 2010) (Wilkinson, J.) (D. Md.) (where indictment alleged conspiracy to retaliate against a witness, district court did not err in instructing jury on *Pinkerton* liability as to § 924(c) charge and there was no constructive amendment of indictment by doing so)

United States v. Robinson, 627 F.3d 941 (4th Cir. Dec. 1, 2010) (Wilkinson, J.) (D.S.C.) (in case in which indictment charged in one count both use or carrying of firearm during and in relation to a drug trafficking crime and also possession of a firearm in furtherance of a drug trafficking crime, and in which jury was improperly instructed that trading drugs for guns satisfies § 924(c) "use or carry" provision in light of *Watson v. United States*, 522 U.S. 74 (2007), holding that trading drugs for guns satisfies § 924(c)'s "possession" prong (as to which jury was properly instructed) and finding no plain error because defendant could not show that he was not convicted under possession prong in face of jury's return of general verdict)

United States v. King, 628 F.3d 693 (4th Cir. Jan. 10, 2011) (Motz, J.) (E.D.N.C) (where indictment alleged that defendant used, carried, and possessed firearm in furtherance of drug trafficking crime, finding on plain error review that omission of "in furtherance" language did not impermissibly relax nexus to drug trafficking required for conviction; noting that decisions from various circuits disagree on whether indictment's mixing of use and carry prong and possession prong constitutes reversible error)

18 U.S.C. § 1001, False Statements

United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. June 11, 2010) (Wilkinson., J.) (E.D. Va.) (where defendant was in United States on temporary protected status (TPS), which provides authorization to work, finding defendant's false statements about citizenship on I-9 employment eligibility form submitted as part of employment application to be material)

United States v. Jackson, 608 F.3d 193 (4th Cir. June 24, 2010) (Wilson, D.J., by designation) (D. Md.) (defendant could be prosecuted for making false statements based on submission of falsified time sheets to his employer, a subcontractor to prime contractor with contract with National Security Agency, where NSA was ultimately billed and paid for hours that defendant did not actually work)

18 U.S.C. §§ 1028, 1028A, Identification Fraud, Aggravated Identity Theft

United States v. Luke, 628 F.3d 114 (4th Cir. Dec. 8, 2010) (Wilkinson, J.) (D. Md.) (finding evidence sufficient to sustain convictions for passport application fraud, rejecting defendant's restrictive reading of broadly worded statutes)

18 U.S.C. § 1513, Witness Retaliation

United States v. Ashley, 606 F.3d 135 (4th Cir. June 1, 2010) (Wilkinson, J.) (D. Md.) (finding evidence sufficient to support conviction)

18 U.S.C. § 1546, Fraud and Misuse of Immigration Documents

United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. June 11, 2010) (Wilkinson., J.) (E.D. Va.) (where defendant was in United States on temporary protected status (TPS), which provides authorization to work, finding defendant's false statements about citizenship on I-9 employment eligibility form submitted as part of employment application to be material)

18 U.S.C. § 1959, Violent Acts in Aid of Racketeering

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (in case arising out of MS-13 gang activity, finding no double jeopardy problem with prosecution arising out of same course of conduct for both conspiracy to commit murder in violation of VICAR statute and larger racketeering conspiracy charged under RICO, 18 U.S.C. § 1962(d) because Congress intended murder conspiracy and racketeering conspiracy to be distinct offenses)

18 U.S.C. § 1962, RICO

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (in case arising out of MS-13 gang activity, finding no double jeopardy problem with prosecution arising out of same course of conduct for both conspiracy to commit murder in violation of VICAR statute, 18

U.S.C. § 1959(a)(5), and larger racketeering conspiracy charged under RICO because Congress intended murder conspiracy and racketeering conspiracy to be distinct offenses)

21 U.S.C. § 841 *et seq.*, Drug Offenses

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (evidence of conflict between co-conspirators did not support defendant's contention that he affirmatively withdrew from drug conspiracy where to establish defense of withdrawal, defendant must show that he took affirmative actions inconsistent with object of conspiracy that were communicated in manner reasonably calculated to reach co-conspirators)

! *United States v. Hickman*, 626 F.3d 756 (4th Cir. Nov. 29, 2010) (Davis, J.) (D. Md.) (finding that while evidence was sufficient to support that defendant was involved in conspiracy to distribute 100 grams or more of heroin, it was insufficient to establish that defendant intended to distribute more than one kilogram of heroin; "[t]he Government's strained attempt, through extrapolations testified to by a drug enforcement agent, to prove beyond a reasonable doubt that the charged conspiracy involved at least one kilogram of heroin relies on impermissible speculation and cannot be sustained")

26 U.S.C. § 7201 *et seq.*, Tax Offenses

United States v. Cole, 631 F.3d 146 (4th Cir. Jan. 21, 2011, amended Jan. 24) (Davis, J.) (D. Md.) (in tax failure-to-report and evasion case, rejecting defendant's argument as to sufficiency of evidence that because proper characterization of $2 million he received from real estate transactions was uncertain as a matter of law, he could not be found to have requisite mental state of willfulness)

II. SECOND AMENDMENT ISSUES

United States v. Chester, 628 F.3d 673 (Dec. 30, 2010) (Traxler, C.J.) (S.D. W. Va.) (in case involving alleged violation of § 922(g)(9) (possession of firearm after conviction for domestic violence misdemeanor), setting forth two-part inquiry to Second Amendment challenges: first, does challenged law burden or regulate conduct that comes within scope of Second Amendment (i.e., conduct that is protected), and second, if it does, then has government met burden of justifying validity of challenged law under intermediate scrutiny; remanding case to district court for further proceedings in light of appropriate standard)

United States v. Masciandaro, ___ F.3d ___, 2011 WL 1053618 (4th Cir. Mar. 24, 2011) (Niemeyer, J.) (E.D. Va.) (in case involving misdemeanor offense of carrying or possessing loaded handgun in motor vehicle within national park area where defendant asserted he had gun for self-defense as he frequently slept overnight in his car while travelling, even assuming that conduct implicates Second Amendment, finding that government sustained burden of justifying regulation under intermediate scrutiny standard)

III. FOURTH AMENDMENT ISSUES

Expectation of Privacy

United States v. Bynum, 604 F.3d. 161 (4th Cir. May 5, 2010) (Motz, J.) (W.D.N.C.) (in challenge to administrative subpoenas used to obtain Yahoo subscriber information, which eventually led to search warrant for defendant's home and seizure of evidence, finding that defendant had no expectation of privacy, either subjective or objectively reasonable, in information he voluntarily provided to internet and telephone service providers); *see also United States v. Clenney*, 631 F.3d 658 (4th Cir. Feb. 3, 2011) (Wilkinson, J.) (E.D. Va.) (because Fourth Amendment does not apply to basic subscriber information, exclusionary rule does not apply; rejecting challenges to procurement of records brought under Electronic Communications Privacy Act of 1986 (ECPA) because statute does not provide for exclusion of evidence in court as remedy for violation of statute)

United States v. Rendon, 607 F.3d 982 (4th Cir. June 17, 2010) (Niemeyer, J.) (E.D. Va.) (in child pornography case, defendant, who was military service member being prepared for discharge, had no reasonable expectation of privacy in MP3 player that was searched as part of a valid military inspection pursuant to standard intake procedures on military base)

Government Action

United States v. Richardson, 607 F.3d 357 (4th Cir. June 11, 2010) (Traxler, C.J.) (W.D.N.C.) (in child pornography case, AOL did not act as agent or instrument of government when it detected illegal images attached to defendant's e-mail transmissions through its internal security scanning programs, which it reported pursuant to federal statute to National Center for Missing and Exploited Children; distinguishing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

Arrests

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (even if three-hour detention of defendant at his home while police obtained search warrant and then executed it constituted illegal arrest pursuant to which defendant's incriminating statements should have been suppressed, any error in failing to suppress statements was harmless in light of minimal significance of statements when considered against overwhelming evidence of illegal activity)

Exigent Circumstances

United States v. Taylor, 624 F.3d 626 (4th Cir. Nov. 4, 2010) (Wilkinson, J.) (E.D. Va.) (police officer was justified in entering residence, the door was which was open, to look for parent or guardian of little girl found walking on street by herself; officer was further justified in performing protective sweep in bedroom upon finding man who would not identify himself in bed where there were bullets located near bed)

"Knock and Announce"

United States v. Young, 609 F.3d 348 (4th Cir. June 28, 2010) (Traxler, C.J.) (D. Md.) (police did not violate "knock and announce" requirement before entering residence where defendant testified that townhouse was small, officers had just seen defendant promptly answer door when co-conspirator knocked, and officers waited twenty seconds after repeatedly knocking loudly and announcing their presence before entering house with key provided by leasing office)

Bellotte v. Edwards, 629 F.3d 415 (4th Cir. Jan. 11, 2011) (Wilkinson, J.) (N.D. W. Va.) (in § 1983 action brought against county SWAT officers for violation of Fourth Amendment rights in executing "no knock" late-night entry of home to execute search warrant for child pornography, finding that officers not entitled to qualified immunity when possession of a single photograph depicting possible child pornography did not give rise to reasonable suspicion that possessor would react violently if police announced their presence and when there was no evidence that occupants of house had any tendency toward violence despite fact that they had concealed-carry weapon permits)

Probable Cause (see also Warrants, *infra*)

* *United States v. Johnson*, 599 F.3d 339 (4th Cir. Apr. 1, 2010) (Wilkinson, J.) (D. Md.) (affirming district court's rulings that there was reasonable suspicion to detain defendant on basis that he was selling drugs, which ripened into probable cause to arrest him for drug dealing, and that there was probable cause to search a car located nearby) ((N.B.: contains discussion about role of district and appellate courts that could be useful for defending against the government's appeal of a defense-favorable ruling)

United States v. Mason, 628 F.3d 123 (4th Cir. Dec. 8, 2010) (Niemeyer, J.; Gregory, J., dissenting) (D.S.C.) (state trooper did not illegally extend completed traffic stop after defendant refused consent to search vehicle when officer had reasonable suspicion of drug trafficking (based on driver's demeanor and driving behavior, strong smell of air freshener, and driver's and passenger's inconsistent stories about purpose of travel), which ripened into probable cause to search when drug dog jumped through open window of vehicle and alerted after alerting to outside of driver and passenger doors)

United States v. Hampton, 628 F. 3d 654 (4th Cir. Dec. 16, 2010) (Davis, J.) (D.S.C.) (officer had probable cause to arrest back seat passenger in car after passenger was ordered to exit car and then assaulted another officer by shoving him in chest before fleeing)

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (in child pornography case, finding that affidavit in support of search warrant contained sufficient indicia of reliability of information provided by tipster (defendant's ex-girlfriend and sister of child in pornographic pictures sent to defendant's e-mail account from his cell phone) and of tipster's credibility where police officers had met with her twice in hours leading up to issuance of warrant and had confirmed with child that she was girl appearing in pictures)

Protective Sweeps

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (police did not act improperly during protective sweep of house when they looked under bed in defendant's bedroom, where they found bundles of cash in plain view)

United States v. Taylor, 624 F.3d 626 (4th Cir. Nov. 4, 2010) (Wilkinson, J.) (E.D. Va.) (police officer was justified in entering residence, the door was which was open, to look for parent or guardian of little girl found walking on street by herself; officer was further justified in performing protective sweep in bedroom upon finding man who would not identify himself in bed where there were bullets located near bed)

Reasonable Suspicion

* *United States v. Johnson*, 599 F.3d 339 (4th Cir. Apr. 1, 2010) (Wilkinson, J.) (D. Md.) (affirming district court's rulings that there was reasonable suspicion to detain defendant on the basis that he was selling drugs, which ripened into probable cause to arrest him for drug dealing, and that there was probable cause to search a car located nearby) (N.B.: decision contains discussion about role of district and appellate courts that could be useful for defending against the government's appeal of a defense-favorable ruling)

United States v. Hernandez-Mendez, 626 F.3d 203 (4th Cir. Nov. 29, 2010) (Davis, J.) (D. Md.) (police had individualized reasonable suspicion to detain Hispanic female near high school and frisk her purse where in course of investigating gang violence, officer – who knew that several Hispanic gangs were represented at school, had personally responded to half a dozen gang-related incidents at school, was aware of stabbing incident involving some of gangs active at school that had occurred previous night, and knew that female gang members were often responsible for holding weapons – had set up surveillance at school, during which he observed gathering of seven Hispanic males and one Hispanic female across street from school shortly before school let out, which alerted him to the possibility that group might be planning some sort of retaliatory action)

United States v. Mason, 628 F.3d 123 (4th Cir. Dec. 8, 2010) (Niemeyer, J.; Gregory, J., dissenting) (D.S.C.) (state trooper did not illegally extend completed traffic stop after defendant refused consent to search vehicle when officer had reasonable suspicion of drug trafficking (based on driver's demeanor and driving behavior, strong smell of air freshener, and driver's and passenger's inconsistent stories about purpose of travel), which ripened into probable cause to search when drug dog jumped through open window of vehicle and alerted after alerting to outside of driver and passenger doors)

! * *United States v. Foster*, ___ F.3d ___, 2011 WL 711858 (4th Cir. Mar. 2, 2011) (E.D.N.C.) (Gregory, J.) (finding that police did not have reasonable suspicion to investigate parked car and occupants based on officer's prior knowledge of defendant's criminal record, defendant's sudden appearance from crouched position in car immediately upon driver apparently saying something to him after seeing officer walking towards them, and defendant's frenzied arm movements, including movement toward the floor of car) (N.B.: contains good language that could

be used in case with similar facts about court's "concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and with "the way in which the Government attempts to spin these largely mundane acts into a web of deception" because "the Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband")

Traffic Stops

United States v. Mason, 628 F.3d 123 (4th Cir. Dec. 8, 2010) (Niemeyer, J.; Gregory, J., dissenting) (D.S.C.) (state trooper did not illegally extend completed traffic stop after defendant refused consent to search vehicle when officer had reasonable suspicion of drug trafficking (based on driver's demeanor and driving behavior, strong smell of air freshener, and driver's and passenger's inconsistent stories about purpose of travel), which ripened into probable cause to search when drug dog jumped through open window of vehicle and alerted after alerting to outside of driver and passenger doors)

United States v. Hampton, 628 F. 3d 654 (4th Cir. Dec. 16, 2010) (Davis, J.) (D.S.C.) (officer had authority under *Maryland v. Wilson*, 519 U.S. 408 (1997), to order backseat passenger out of car without reasonable suspicion that passenger poses safety risk)

Warrants (see also Probable Cause, *supra*)

United States v. Claridy, 601 F.3d 276 (4th Cir. Apr. 9, 2010) (Niemeyer, J.) (D. Md.) (rejecting argument that evidence seized from defendant's house pursuant to search warrant should have been suppressed because federally deputized Baltimore City police officer, participating in joint task force, obtained warrant from state court judge without first attempting to obtain it from federal magistrate judge, in violation of Rule 41(b); Traxler, C.J., concurs in result while offering different analysis)

United States v. Bynum, 604 F.3d. 161 (4th Cir. May 5, 2010) (Motz, J.) (W.D.N.C.) (in child pornography case, search warrant for defendant's home was based on probable cause notwithstanding minor discrepancies in dates and six-month delay between uploading of child pornography and request for warrant)

United States v. Richardson, 607 F.3d 357 (4th Cir. June 11, 2010) (Traxler, C.J.) (W.D.N.C.) (in child pornography case, finding that search warrant was supported by probable cause where affidavit established sufficient nexus between evidence of offenses and apartment that was searched; failure to specify dates on which defendant possessed or e-mailed illegal images did not make information in affidavit stale, notwithstanding four-month delay)

United States v. Allen, 631 F.3d 164 (4th Cir. Jan. 21, 2011) (King, J.) (D. Md.) (in case involving three warrants, finding with respect to first warrant that probable cause supported its issuance even without reference in affidavit to location of revolver in plain view on top of filing cabinet (when in fact it was found inside a drawer, as stated in affidavit submitted by detective who found gun in support of second warrant) and thus, even if statement in first affidavit about location

of revolver was reckless, district court did not err in denying request for *Franks* hearing; also finding with respect to first warrant that even if detective's entry into store was unconstitutional, sufficient untainted information was presented in affidavit to support probable cause finding; finding with respect to third warrant (for defendant's home) that it was not tainted by seizure of revolver at store because seizure was lawful, and that affidavit provided probable cause)

United States v. Clenney, 631 F.3d 658 (4th Cir. Feb. 3, 2011) (Wilkinson, J.) (E.D. Va.) (finding arrest and search warrants to be valid where they contained neither any false statements nor any material omissions, and thus did not violate *Franks*)

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (officers did not act intentionally or recklessly when they failed to include impeaching information in affidavit about child custody and support litigation between tipster and defendant or other impeaching information when officers did not know about such information; declining to extend collective knowledge doctrine to impute knowledge to officer merely because facts are accessible to law enforcement community at large)

IV. FIFTH AMENDMENT ISSUES

Double Jeopardy

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (in case arising out of MS-13 gang activity, finding no double jeopardy problem with prosecution arising out of same course of conduct for both conspiracy to commit murder in violation of VICAR statute, 18 U.S.C. § 1959(a)(5), and larger racketeering conspiracy charged under RICO, 18 U.S.C. § 1962(d), because Congress intended murder conspiracy and racketeering conspiracy to be distinct offenses)

Due Process

! *United States v. King*, 628 F.3d 693 (4th Cir. Jan. 10, 2011) (Motz, J.) (E.D.N.C) (vacating conviction and remanding for *in camera* inspection of grand jury testimony in unusual *Brady* situation where government acknowledged it had testimony but refused to turn it over notwithstanding court's offer to issue order permitting it to do so, and defendant made plausible showing that material could be exculpatory; rejecting defendant's other *Brady* claims)

Self-Incrimination

United States v. Hargrove, 625 F.3d 170 (4th Cir. Nov. 19, 2010) (Agee, J.) (N.D. W. Va.) (defendant was not in custody for purposes of *Miranda* where, even though large number of police search home pursuant to warrant early in morning, defendant was questioned in his kitchen by only two officers, who did not handcuff him, told him he was not under arrest and was free to go, and did not have guns drawn; distinguishing *United States v. Colonna*, 511 F.3d 431 (4th Cir. 2007))

United States v. Clenney, 631 F.3d 658 (4th Cir. Feb. 3, 2011) (Wilkinson, J.) (E.D. Va.) (declining to add to *Miranda* warning additional warning that suspect be informed of charges against him)

V. SIXTH AMENDMENT ISSUES

Confrontation

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (grand jury statements used at trial were not admitted for their truth but only to establish that witnesses denied certain things before grand jury; thus statements were not "testimonial" and their admission at trial did not violate defendant's right to confrontation)

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (limitations on defendant's ability to cross-examine two witnesses did not violate Confrontation Clause)

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (admission of three expert witnesses' testimony as to structure and operation of MS-13, which was based on interviews with unnamed declarants, did not violate Confrontation Clause)

! *United States v. Williams*, 632 F.3d 129 (4th Cir. Jan. 21, 2011) (Gregory, J.; Dever, D.J. sitting by designation, concurring in part and dissenting in part) (D.S.C.) (publication to jury over defendant's objection of stipulation (signed by defense attorney but not by defendant himself) regarding drug type and quantity violated defendant's right to confrontation, and constitutional error was not harmless beyond a reasonable doubt)

Counsel

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (use of defendant's uncounseled grand jury statements at trial did not violate his right to counsel where he had not yet been charged at time he testified before grand jury, such that right to counsel had not yet attached)

VI. OTHER PRE-TRIAL ISSUES

Competence to Stand Trial

United States v. Bowles, 602 F.3d 581 (4th Cir. Apr. 23, 2010) (Shedd, J.) (D.S.C.) (where defendant pled guilty but did not take interlocutory appeal challenging order regarding forcible medication and did not negotiate a conditional plea pursuant to Rule 11(a)(2), defendant waived right to appeal issue and appeal must be dismissed)

! * *United States v. White*, 620 F.3d 401 (Sept. 22, 2010) (Davis, J.; Keenan, J., concurring; Niemeyer, J., dissenting) (E.D.N.C.) (in *Sell* hearing case, while non-violent offenses of conspiracy, credit card fraud, and identity theft are "serious offenses," special circumstances so undermined government's interests in prosecuting defendant for those charges that governmental deprivation of defendant's constitutionally protected liberty interest in refusing medications could not be justified, where defendant was non-violent and had served more than entirety of her likely sentence, alleged victims of her crimes likely would not have benefited or have been made whole by her prosecution, she was not danger to herself or to public, and ambiguity was involved in medicating individual with her particular medical condition)

Continuances

United States v. Cole, 631 F.3d 146 (4th Cir. Jan. 21, 2011, amended Jan. 24) (Davis, J.) (D. Md.) (in tax failure-to-report and evasion case, district court did not abuse discretion in denying defendant's motion for continuance based on health issues where motion not made until four weeks into trial, just before defendant was to testify, and there was not documented evidence of defendant's alleged disorientation during trial)

Severance

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (district court did not err in denying severance in capital case where defendants' defenses, while conflicting on certain points, were not mutually antagonistic to point that jury was required to believe core of one defense and disbelieve core of other)

Subpoenas

United States v. Richardson, 607 F.3d 357 (4th Cir. June 11, 2010) (Traxler, C.J.) (W.D.N.C.) (in child pornography case, district court did not abuse discretion under Fed. R. Crim. P. 17 in quashing subpoena *duces tecum* issued by defendant to AOL where subpoena was insufficiently specific)

Venue

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (venue on money-laundering conspiracy charge properly existed in district)

United States v. Novak, 607 F.3d 968 (4th Cir. June 15, 2010) (Hamilton, Sr. J.) (E.D. Va.) (rejecting two challenges to jury instructions on venue in failure-to-pay-child-support case (18 U.S.C. § 228))

VII. TRIAL ISSUES[1]

Jury Selection

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (where prosecution struck several female jurors on ground that they were teachers and defendant argued that because most teachers were female, strikes were discriminatory, rejecting argument that *Batson v. Kentucky* covers not only strikes that are intentionally discriminatory but also strikes that have discriminatory effect)

United States v. Jeffery, 631 F.3d 669 (4th Cir. Feb. 9, 2011) (Traxler, C.J.) (E.D. Va.) (declining to require district courts to always inquire during voir dire about prospective jurors' ability to apply reasonable doubt standard and hold government to burden of proof; further declining to require courts to so inquire when requested by defendant (and noting circuit split on issue); rejecting defendant's argument that on facts of particular case, allegations against him were so inflammatory that inquiry was required)

Evidence

Federal Rule of Evidence 404

! *United States v. Lighty*, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (while district court erred in capital case in admitting evidence of defendant's involvement in another murder where it was neither intrinsic evidence to charges being tried nor met requirements under Rule 404(b), error was harmless in light of government's relatively limited use of evidence, court's cautionary instruction prior to its admission, and other overwhelming evidence of defendant's guilt); *see also United States v. Wilson*, 624 F.3d 640 (4th Cir. Sept. 8, 2010) (Agee, J.) (D. Md.) (similar ruling in related case)

! *United States v. Johnson*, 617 F.3d 286 (4th Cir. Aug. 16, 2010) (Gregory, J.) (D.S.C.) (in drug conspiracy case, finding reversible error in district court's admission under Rule 404(b) of alleged prior drug transaction)

United States v. Cole, 631 F.3d 146 (4th Cir. Jan. 21, 2011, amended Jan. 24) (Davis, J.) (D. Md.) (in tax failure-to-report and evasion case, even if district court abused discretion in admitting evidence that defendant falsely denied being unlawful user of and addicted to controlled substances on ATF forms where propriety of admission of ATF forms was "very close question" because statements "were at best only tenuously related to proof of the willful mischaracterization of income charged here and posed a genuine risk of prejudice," any error in improper admission was harmless)

United States v. Cole, 631 F.3d 146 (4th Cir. Jan. 21, 2011, amended Jan. 24) (Davis, J.) (D. Md.) (in tax failure-to-report and evasion case, evidence of defendant's "lavish spending" properly admitted under Rule 404(b) as it was probative of defendant's motive)

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[1] Subsections are arranged by stage of trial.

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (in child pornography case, no error in admission of sexually explicit videos and still photographs of defendant masturbating and engaging in sex with adult female to counter defendant's defense of identity)

Federal Rule of Evidence 701 *et seq.*

United States v. Roe, 606 F.3d 180 (4th Cir. May 27, 2010) (Agee, J.) (D. Md.) (in prosecution of defendant for impersonating federal law enforcement officer, district court did not abuse discretion in admitting as lay, rather than expert, testimony by government witness who had neither been designated as expert prior to trial, nor qualified as expert during trial)

! *United States v. Johnson*, 617 F.3d 286 (4th Cir. Aug. 16, 2010) (Gregory, J.) (D.S.C.) (in drug conspiracy case, finding reversible error in district court's admission of DEA agent's testimony when agent was not offered as expert, but opinions as lay witness were not based on his own personal knowledge and perception)

United States v. Bynum, 604 F.3d. 161 (4th Cir. May 5, 2010) (Motz, J.) (W.D.N.C.) (affirming district court's admission under Rule 702 of expert testimony by forensic photographic investigator in child pornography case over challenge that government failed to demonstrate reliability of methodology for determining authenticity of child pornography)

Federal Rule of Evidence 801 *et seq.*

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (upholding admission of defendant's state court guilty plea as admission by a party-opponent under Rule 801(d)(2)(A) where plea was constitutionally valid even though he was not informed that it might be used as evidence against him in future federal prosecution; finding possibility of future prosecution to be a collateral, not direct, consequence of plea) (N.B.: query whether, in light of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), there could be ineffective assistance of counsel for failing to advise client of possibility of future federal prosecution)

United States v. Ayala, 601 F.3d 256 (4th Cir. Apr. 8, 2010) (Wilkinson, J.) (D. Md.) (upholding admission of statements made by MS-13 gang members at clique meetings as coconspirator statement hearsay exception under Rule 801(d)(2)(E))

Other Evidentiary Issues

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (district court in capital case did not err in excluding testimony from two defense witnesses that they saw another person involved in murder with firearm that looked similar to murder weapon where there was insufficient evidence of connection between other person and murder)

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (government in capital case did not improperly vouch for own witness when prosecutor asked witness whether she had any doubt about statements defendant made to her)

Sufficiency of Evidence

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (Gregory, J., dissenting on issue of sufficiency of evidence to support money laundering conviction)

Jury Instructions

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (district court did not err in declining to give "theory of defense" instruction based on government witness credibility where credibility was covered in other parts of jury instructions)

United States v. Ashley, 606 F.3d 135 (4th Cir. June 1, 2010) (Wilkinson, J.) (D. Md.) (district court did not err in instructing jury on *Pinkerton* liability and there was no constructive amendment of indictment by doing so)

United States v. Luck, 611 F.3d 183 (4th Cir. July 2, 2010) (Gregory, J.; Shedd, J., dissenting) (W.D. Va.) (reversing district court's refusal to grant § 2255 relief on claim that counsel was ineffective for not seeking informant instruction at trial on drug trafficking charges where two of government's three main witnesses were paid informants)

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (district court did not err in giving "willful blindness" instruction; nor did court err in declining to give instruction defining "reasonable doubt")

United States v. Jeffery, 631 F.3d 669 (4th Cir. Feb. 9, 2011) (Traxler, C.J.) (E.D. Va.) (because 18 U.S.C. § 641, theft of government property, does not have as element any requirement that defendant know that property belonged to United States, district court did not err in refusing to so instruct jury)

Closing Arguments

United States v. Green, 599 F.3d 360 (4th Cir. Apr. 5, 2010) (Davis, J.) (E.D. Va.) (district court did not abuse discretion in overruling defense counsel's objection to government attorney's reference during closing argument to court's admonishment of defense counsel during trial about rolling his eyes and twirling around)

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (government in capital case did not make improper argument on various points during closing when there was evidence to support it; while government did make improper argument at sentencing about wishes of victim's family, defendant's substantial rights were not affected)

United States v. Wilson, 624 F.3d 640 (4th Cir. Sept. 8, 2010) (Agee, J.) (D. Md.) (ruling in challenge to government's closing argument that prosecutor did not incorrectly state law of conspiracy)

Motions for New Trial

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (in capital case, upholding denial of motion for new trial based on newly discovered evidence and recantation by trial witness where denial based on findings regarding witnesses' credibility); *see also United States v. Wilson*, 624 F.3d 640 (4th Cir. Sept. 8, 2010) (Agee, J.) (D. Md.) (similar ruling in related case; also rejecting motion for new trial based on alleged *Brady* violation where withheld information did not exculpate defendant in any way)

United States v. Robinson, 627 F.3d 941 (4th Cir. Dec. 1, 2010) (Wilkinson, J.) (D.S.C.) (police misconduct that was unrelated to investigation of defendant's case or truth-finding function of criminal proceeding did not warrant grant of new trial on counts not resulting from investigation by officers involved in misconduct, either under Rule 33 or as *Brady* violation)

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (juror's failure to disclose relationship with AUSA not involved in defendant's case and contact during trial with AUSA on matter unrelated to trial did not deprive defendant of fair and impartial jury and did not warrant grant of new trial)

VIII. PLEA ISSUES

Plea Agreements

! * *United States v. Lewis*, ___ F.3d ___, 2011 WL 310805 (4th Cir. Feb. 2, 2011) (King, J.) (E.D.N.C.) (where Rule 11(c)(1)(C) plea agreement provided that district court would impose concurrent sentence and court conditionally accepted plea agreement by signing it at time it was entered but did not formally accept or reject it at time of sentencing, court was required to give defendant opportunity to withdraw plea when it decided to impose consecutive sentence) (N.B.: opinion contains good language about importance of government adhering to terms of plea agreement and chastises government for standing silent at sentencing and advancing "near-frivolous" argument that concurrent sentence provision was mere recommendation)

IX. SENTENCING ISSUES

Constitutional Considerations

Eighth Amendment

United States v. Jalaram, Inc., 599 F.3d 347 (4th Cir. Apr. 2, 2010) (Motz, J.) (N.D. W. Va.) (on appeal by government, reversing district court's ruling that forfeiture of $385,400 violated Excessive Fines clause because forfeiture was not grossly disproportionate to defendant corporation's crime, but only after rejecting government's main argument that *in personam* criminal forfeiture is never punitive)

Ex Post Facto Clause

! *United States v. Lewis*, 606 F.3d 193 (4th Cir. May 27, 2010) (King, J.) (E.D. Va.) (on appeal by government, holding that Sentencing Guidelines are still subject to constitutional ex post facto considerations, as provided in U.S.S.G. § 1B1.11)

Capital Sentencing Procedure

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (in capital case, even if district court erred in refusing to admit mitigating evidence of defendant's mother's baby journal, in which she wrote about her drug use while pregnant with defendant, any error was harmless beyond a reasonable doubt; district court did not err in refusing to admit testimony by defendant's uncle as to whether defendant would be positive influence while in prison; district court did not commit plain error in refusing to admit letter written by defendant to his grandmother during verdict in guilt phase of trial)

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (in capital case, district court did not err in declining to give defendant's proposed "mercy instruction" in light of requirements of Federal Death Penalty Act)

United States v. Lighty, 616 F.3d 321 (4th Cir. Aug. 11, 2010) (Hamilton, Sr. J.) (D. Md.) (in capital case, while government is required to give pre-trial notice of non-statutory aggravating factors, it need not do so in indictment)

Non-Capital Sentencing Procedure

United States v. Hernandez, 603 F.3d 267 (4th Cir. Apr. 27, 2010) (Niemeyer, J.) (D.S.C.) (where defendant received sentence that he requested, at the low end of the applicable guideline range, claim of error with respect to sufficiency of district court's statement of reasons was not preserved and would be reviewed only for plain error)

United States v. Boulware, 604 F.3d 832 (4th Cir. May 11, 2010) (Traxler, C.J.) (D.S.C.) (where error as to sufficiency of statement of reasons was preserved by counsel's request for

sentence lower than that imposed by court, burden falls on government to demonstrate that error "'did not have a substantial and injurious effect or influence on the' result and 'we can [ ] say with ... "'fair assurance,'" ... that the district court's explicit consideration of [the defendant's] arguments would not have affected the sentence imposed.'")

United States v. Wilson, 624 F.3d 640 (4th Cir. Sept. 8, 2010) (Agee, J.) (D. Md.) (district court did not err at sentencing in relying on defendant's statement, made to civilian authorities while defendant was in military, when statement was voluntarily made after being informed of constitutional right to remain silent)

United States v. Diosdado-Star, 630 F.3d 359 (4th Cir. Jan. 24, 2011) (Agee, J.) (E.D.N.C.) (where guideline range was 4 to 10 months, district court did not commit procedural error by imposing sentence of 84 months as variance without first considering relevant departure grounds; finding that *United States v. Moreland*, 437 F.3d 424 (2006), has been superseded by Supreme Court's decisions in *Rita* and *Gall*, and thus language in *Moreland* about considering departures before variances is no longer binding) (N.B.: while this may apply to departure grounds included in U.S.S.G. Ch. 5, query whether it applies to departure grounds specified in Chapter Two, Three, or Four guidelines, which go toward the correct calculation of the guideline range rather than a determination as to whether a sentence outside the range is appropriate)

Sentencing Statutes

18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA)
(see also U.S.S.G. § 2K2.1 and U.S.S.G. 4B1.1, *infra*)

! *United States v. Bethea*, 603 F.3d 254 (4th Cir. Apr. 27, 2010) (Gregory, J.) (D.S.C.) (holding that South Carolina offense of escape, which includes both unlawfully leaving and failing to report to custody, S.C. Code Ann. § 24-13-410(A) (2009), is not inherently a "violent felony" in light of *Chambers v. United States*, 129 S. Ct. 687 (2009))

* *United States v. Tucker*, 603 F.3d 260 (4th Cir. Apr. 30, 2010) (Shedd, J.) (D.S.C.) (finding on appeal of denial of § 2255 motion that failure to object to use of defendant's prior conviction for South Carolina misdemeanor offense of common law assault and battery as a predicate violent felony conviction at sentencing was objectively unreasonable, and that error was prejudicial; in context of prejudice showing, contains discussion of what must be shown with respect to ACCA's "separate occasion" requirement)

! *United States v. Alston*, 611 F.3d 219 (4th Cir. July 2, 2010) (Niemeyer, J.) (D. Md.) (finding that defendant's sentence could not be enhanced pursuant to ACCA where prior conviction for Maryland second-degree assault based on *Alford* plea did not necessarily establish that defendant committed type of assault that qualifies as "violent felony")

United States v. Vann, 620 F.3d. 431 (4th Cir. Sept. 24, 2010) (Niemeyer, J.; King, J., dissenting) (E.D.N.C.) (ruling that North Carolina offense of taking indecent liberties with child, which *United States v. Pierce*, 278 F.3d 282 (4th Cir. 2002), had held to be "crime of violence"

under career offender guideline, is "violent felony" in light of recent Supreme Court decisions; distinguishing *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (holding Virginia offense of statutory rape not to be violent felony) (N.B.: decision has been vacated in light of grant of rehearing en banc; case to be reargued on May 11, 2011)

* *United States v. Washington*, 629 F.3d 403 (4th Cir. Jan. 10, 2011) (Wilkinson, J.) (D. Md.) (district court did not err in finding by preponderance of evidence, using *Shepard*-approved documents, that Maryland statutory drug distribution offense was "serious drug offense" (i.e., subject to maximum penalty of at least ten years, *see* 18 U.S.C. § 924(c)(2)(A)(ii)), because it involved cocaine; in applying *Shepard*, noting that when determining whether government has adequately established that prior conviction qualifies as ACCA predicate, "it is important to distinguish two issues: what records may the government use in determining [the] offense of conviction, and what records may the government use in determining whether the nature of that conviction qualifies it as an ACCA predicate")

18 U.S.C. § 3663 *et seq.*, Restitution

! *United States v. Leftwich*, 628 F.3d 665 (4th Cir. Dec. 20, 2010) (Agee, J.) (D. Md.) (failure of district court to indicate statutory basis for order of restitution precluded appellate review and necessitated remand of case to district court to identify basis for order and for specific findings)

21 U.S.C. §§ 841, 851, Drug Sentences Based on Prior Convictions

United States v. Mason, 628 F.3d 123 (4th Cir. Dec. 8, 2010) (Niemeyer, J.) (D.S.C.) (use of two prior convictions to impose mandatory life sentence was not improper where state court records demonstrated that defendant was represented by counsel in both cases; suggesting that challenge to prior convictions on this ground may be barred by five-year statute of limitations in § 851); *see also United States v. Simmons*, ___ F.3d ____, 2011 WL 546425 (4th Cir. Feb. 16, 2011)

United States v. Simmons, ___ F.3d ____, 2011 WL 546425 (4th Cir. Feb. 16, 2011) (Agee, J.) (W.D.N.C.) (decision in *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005), as to how statutory maximums of prior convictions for North Carolina offenses are to be determined is not affected by Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010)) (N.B.: decision has been vacated in light of grant of rehearing en banc; case to be reargued on May 11, 2011)

Sentencing Guidelines

U.S.S.G. § 1B1.2, Applicable Guidelines

United States v. Boulware, 604 F.3d 832 (4th Cir. May 11, 2010) (Traxler, C.J.) (D.S.C.) (where U.S.S.G. App. A listed both § 2B1.1 and § 2J1.3 for violations of 18 U.S.C. § 152, district court did not err in applying § 2J1.3 to violation of § 152(3))

U.S.S.G. § 1B1.11, Use of Guidelines in Effect on Date of Sentencing

! *United States v. Lewis*, 606 F.3d 193 (4th Cir. May 27, 2010) (King, J.) (E.D. Va.) (on appeal by government, holding that Guidelines are still subject to constitutional ex post facto considerations, as provided in § 1B1.11)

United States v. Knight, 606 F.3d 171 (4th Cir. June 4, 2010) (Traxler, C.J.) (W.D.N.C.) (district court's plain error in applying sentencing guidelines version in effect at time of sentencing, resulting in 4-level offense level enhancement because gun had obliterated serial number, rather than 2-level enhancement applicable under guidelines in effect when defendant committed offense, did not affect defendant's substantial rights; although error resulted in guidelines range of 92-115 months, rather than 77-96 months, defendant received downward variance 60-month sentence, which court did not explicitly connect that sentence to advisory range, instead making it clear sentence was chosen to give defendant opportunity to receive intensive vocational training)

U.S.S.G. § 2D1,1 *et seq.*, Drug Offenses

United States v. Young, 609 F.3d 348 (4th Cir. 28, 2010) (Traxler, C.J.) (D. Md.) (on appeal by government, where jury found that defendant's offense involved at least 500 grams, but less than 5 kilos, of cocaine and district court believed itself bound by that determination, finding that while jury's determination set the statutory maximum to which defendant is subject, it does not otherwise affect district court's ability to find facts necessary to set sentence within that maximum, and government is not estopped from putting on evidence as to drug quantity that it did not present at trial; vacating and remanding for resentencing)

U.S.S.G. § 2K2.1 *et seq.*, Firearms Offenses
(see also 18 U.S.C. § 924(e), *supra*, and U.S.S.G. § 4B1.1, *infra*)

United States v. Knight, 606 F.3d 171 (4th Cir. June 4, 2010) (Traxler, C.J.) (W.D.N.C.) (for purposes of determining whether defendant has prior conviction for "crime of violence," modern, generic crime of arson involves the burning of real or personal property)

! *United States v. Clay*, 627 F.3d 959 (4th Cir. Dec. 8, 2010) (Hamilton, Sr. J.) (W.D.N.C.) (joining five circuits in ruling that generic crime of walk-away escape from non-secure facility is not crime of violence; in remanding case for resentencing, reminding district court that defendant convicted of being felon in possession of firearm is not automatically ineligible for "lawful sporting purpose" reduction in subsection (b)(2))

United States v. Alvarado Perez, 609 F.3d 609 (4th Cir. July 1, 2010) (Alarcon, Sr. J., sitting by designation) (D. Md.) (affirming district court's application of 4-level enhancement under subsection (b)(6) on ground that carrying loaded firearm that had no safety mechanism in cloth bag on public bus facilitated or had potential to facilitate crime of reckless endangerment)

United States v. Hampton, 628 F.3d 654 (4th Cir. Dec. 16, 2010) (Davis, J.) (D.S.C.) (upholding application of 4-level enhancement for use or possession of firearm in connection with another felony offense, here, assault on police officer while resisting arrest)

U.S.S.G. § 2S1.3, Structuring Transactions to Evade Reporting Requirements

United States v. Peterson, 607 F.3d 975 (4th Cir. June 17, 2010) (Hamilton, Sr. J.) (E.D. Va.) (district court did not err when it determined that defendant's structuring offense was committed as part of pattern of unlawful activity involving more than $100,000 in twelve-month period, such that enhancement in § 2S1.3(b)(2) applied and, as a result, safe harbor of § 2S1.3(b)(3) did not apply)

U.S.S.G. § 3A1.2, Official Victim

United States v. Hampton, 628 F. 3d 654 (4th Cir. Dec. 16, 2010) (Davis, J.) (D.S.C.) (upholding application of 6-level enhancement under subsection (c)(1) for creating substantial risk of bodily injury when assaulting law enforcement officer while trying to flee)

U.S.S.G. § 3B1.1 *et seq*., Role in Offense

! *United States v. Slade*, 631 F.3d 185 (4th Cir. Jan. 27, 2011) (Gregory, J.) (E.D.N.C.) (finding plain error in application of 3-level manager / supervisor enhancement where there was no evidence of any exercise of supervisory responsibility by defendant)

United States v. Thorson, 633 F.3d 312, 2010 WL 5646048 (4th Cir. Jan. 28, 2011) (Niemeyer, J.; Gregory, J., dissenting) (D. Md.) (finding no clear error in application of 4-level organizer / leader enhancement)

U.S.S.G. § 3C1.1, Obstruction of Justice

United States v. Thorson, 633 F.3d 312, 2010 WL 5646048 (4th Cir. Jan. 28, 2011) (Niemeyer, J.; Gregory, J., dissenting) (D. Md.) (finding no error in application of obstruction enhancement for production of fabricated or backdated documents to grand jury in response to subpoena)

United States v. Blauvelt, ___ F.3d ___, 2011 WL 810111 (4th Cir. Mar. 9, 2011) (Traxler, C.J.) (D. Md.) (in child pornography case, finding no error in application of obstruction enhancement when defendant acquired tattoo on penis after becoming aware of charges against him for purposes of mounting identity defense and by encouraging terminally ill friend to testify that defendant had tattoo prior to offense)

U.S.S.G. § 3C1.2, Reckless Endangerment During Flight

United States v. Carter, 601 F.3d 252 (4th Cir. Apr. 1, 2010) (Harwell, D.J., sitting by designation) (S.D. W. Va.) (affirming application of § 3C1.2, where defendant entered another person's apartment without permission when fleeing from officers)

U.S.S.G. § 3E1.1, Acceptance of Responsibility

United States v. Knight, 606 F.3d 171 (4th Cir. June 4, 2010) (Traxler, C.J.) (W.D.N.C.) (district court did not clearly err in determining that defendant was not entitled to reduction for acceptance where, although defendant immediately confessed to law enforcement and eventually pled guilty, she absconded while on pretrial release (for which she received an enhancement for obstruction of justice) and was only brought back into criminal justice system by arrest, not by surrender)

United States v. Jeffery, 631 F.3d 669 (4th Cir. Feb. 9, 2011) (Traxler, C.J.) (E.D. Va.) (defendant not entitled to reduction for acceptance of responsibility notwithstanding claim that he went to trial to test applicability of statute of conviction to his conduct because legal argument he raised was not unrelated to his guilt and was not issue that affected applicability of statute to his conduct and because at trial he strongly asserted innocence)

U.S.S.G. 4B1.1, Career Offender
(see also 18 U.S.C. § 924(e) and U.S.S.G. § 2K2.1, *supra*)

United States v. Dean, 604 F.3d 169 (4th Cir. May 5, 2010) (Wilkinson, J.) (W.D.N.C.) (for purpose of determining whether defendant had two convictions that qualified him as a career offender, and even assuming that magistrate's orders and clerk's office records relating to prior convictions would not qualify for consideration as to nature of prior convictions under *Shepard v. United States*, 544 U.S. 13 (2005), those documents could be used to determine whether offenses were separated by intervening arrest)

United States v. Hood, 628 F.3d 669 (Dec. 29, 2010) (Motz, J.) (M.D.N.C.) (possession of weapon of mass death and destruction, i.e., a sawed-off shotgun, remains "crime of violence" under career offender guideline even if it does not qualify as "violent felony" for ACCA, because commentary to Sentencing Guidelines' definition of crime of violence specifically includes possession of sawed-off shotgun)

! *United States v. Peterson*, 629 F.3d 432 (4th Cir. Jan. 14, 2011) (Niemeyer, J.) (E.D.N.C.) (involuntary manslaughter under North Carolina law not crime of violence because it does not fit generic offense of manslaughter and because there is no requirement of intent or *mens rea*)

United States v. Jenkins, 631 F.3d 680 (4th Cir. Jan. 31, 2011) (King, J.) (D. Md.) (Maryland common law offense of "resisting arrest" is crime of violence even after *Begay* as risk of confrontation brings it under residual/otherwise clause)

U.S.S.G. § 5K2.3, Extreme Psychological Injury

United States v. Alvarado Perez, 609 F.3d 609 (4th Cir. July 1, 2010) (Alarcon, Sr. J., sitting by designation) (D. Md.) (affirming district court's decision to depart up by 2 levels where, after probation officer had informed defendant that he was on verge of violating probation, defendant brought loaded gun to meeting with officer (at which time he was arrested on federal immigration

charges, apparently right when he arrived at office), and officer was so distressed by this that she started wearing bulletproof vest and requested job transfer)

U.S.S.G. § 5K2.7, Disruption of Governmental Function

United States v. Alvarado Perez, 609 F.3d 609 (4th Cir. July 1, 2010) (Alarcon, Sr. J., sitting by designation) (D. Md.) (affirming district court's decision to depart up by 2 levels where, after probation officer had informed defendant that he was on verge of violating probation, defendant brought loaded gun to meeting with officer (at which time he was arrested on federal immigration charges, apparently right when he arrived at office), after which probation office transferred officer and posted sign stating policy against bringing weapons into office)

Reasonableness of Sentence

United States v. Bynum, 604 F.3d 161 (4th Cir. May 5, 2010) (Motz, J.) (W.D.N.C.) (finding mid-range sentence of 192 months in child pornography case to be substantively reasonable where district court refused to consider defendant's conduct leading to earlier charges and also denied government's request for upward variance)

United States v. Alvarado Perez, 609 F.3d 609 (4th Cir. July 1, 2010) (Alarcon, Sr. J., sitting by designation) (D. Md.) (in felon-in-possession case where district court had already applied enhancements and departures to increase offense level by 8 points, all based on defendant's carrying of loaded firearm into state probation office, such that adjusted guideline range was 63 to 78 months, affirming as substantively reasonable variance sentence of 96 months based on same factors as well as defendant's membership in MS-13 gang)

United States v. Hargrove, 625 F.3d 170 (4th Cir. Nov. 19, 2010) (Agee, J.) (N.D. W. Va.) (where defendant initially entered into "C" plea to 20 years for child pornography and enticement offenses, but then withdrew plea and went to trial, finding on plain error review that life sentence was not substantively unreasonable because district court relied in part on its view that minor victim was further damaged by having to testify at trial; even assuming error that was plain, defendant failed to establish that error affected substantial rights because he could not show that he would have received a lower sentence but for error)

United States v. Diosdado-Star, 630 F.3d 359 (4th Cir. Jan. 24, 2011) (Agee, J.) (E.D.N.C.) (in illegal reentry and immigration document fraud case where guideline range was 4 to 10 months, sentence of 84 months, while "certainly substantial," was substantively reasonable, i.e., did not constitute abuse of discretion, in light of totality of circumstances present in case, including defendant's impersonation of border patrol agent, substantial profit from fraud, and criminal history and high likelihood of recidivism)

United States v. Savillon-Matute, ___ F.3d ___, 2011 WL 567467 (4th Cir. Feb. 18, 2011) (Shedd, J.) (D. Md.) (sentence imposed in illegal reentry case – 36 months where guideline range was as low as 4 to 10 months – was reasonable where district court found that defendant had sexually

assaulted a minor and had flouted American law when he had come back twice to United States after being deported)

X. REVOCATION ISSUES

United States v. Ide, 624 F.3d 666 (4th Cir. Nov. 12, 2010) (Keenan, J.) (S. D. W. Va.) (agreeing with Fifth, Sixth, and Eleventh Circuits that for purposes of provision in 18 U.S.C. § 3624(e) that tolls running of supervised release, defendant's term of supervised release was tolled while he was held in pretrial detention on charges for which he was later convicted, and thus that filing of petition on supervised release was timely)

XI. APPELLATE ISSUES

Consultation with Client About Taking Appeal

United States v. Cooper, 617 F.3d 307 (4th Cir. Aug. 16, 2010) (Niemeyer, J.) (N.D. W. Va.) (finding that defense counsel was not ineffective in failing to consult with client about taking appeal where defendant, who had entered *Alford* plea to drug and firearms charges and had agreement with government as to sentencing range, repeatedly expressed his desire to have criminal proceeding concluded, received best possible sentence he could have under sentencing agreement, and had no nonfrivolous issues to appeal)

Reviewability of Issues

United States v. Bowles, 602 F.3d 581 (4th Cir. Apr. 23, 2010) (Shedd, J.) (D.S.C.) (where defendant pled guilty but did not take interlocutory appeal challenging order regarding forcible medication and did not negotiate a conditional plea pursuant to Rule 11(a)(2), defendant waived right to appeal issue and appeal must be dismissed)

Standards of Review (Sufficiency of Issue Preservation)

Harmless Error Review

United States v. Boulware, 604 F.3d 832 (4th Cir. May 11, 2010) (Traxler, C.J.) (D.S.C.) (where error as to sufficiency of statement of reasons was preserved by counsel's request for sentence lower than that imposed by court, burden falls on government to demonstrate that error "'did not have a substantial and injurious effect or influence on the' result and 'we can [ ] say with ... "'fair assurance,'" ... that the district court's explicit consideration of [the defendant's] arguments would not have affected the sentence imposed.'")

! *United States v. Lewis*, ___ F.3d ___, 2011 WL 310805 (4th Cir. Feb. 2, 2011) (King, J.) (E.D.N.C.) (where Rule 11(c)(1)(C) plea agreement provided that district court would impose concurrent sentence and court stated that it was imposing consecutive sentence over defendant's

objection, defendant did not waive issue when counsel mistakenly said plea agreement was not binding on court)

United States v. Savillon-Matute, ___ F.3d ___, 2011 WL 567467 (4th Cir. Feb. 18, 2011) (D. Md.) (Shedd, J.) (even assuming *Shepard* error in use of prior conviction under U.S.S.G. § 2L1.2, error was harmless because district court believed "absolutely" that much higher sentence was appropriate and sentence imposed (36 months where guideline range was 4 to 10 months) was reasonable; discussing requirements of "assumed error harmlessness inquiry")

Plain Error Review

United States v. Hernandez, 603 F.3d 267 (4th Cir. Apr. 27, 2010) (Niemeyer, J.) (D.S.C.) (where defendant received sentence that he requested, at the low end of the applicable guideline range, claim of error with respect to sufficiency of district court's statement of reasons was not preserved and would be reviewed only for plain error)

United States v. Hargrove, 625 F.3d 170 (4th Cir. Nov. 19, 2010) (Agee, J.) (N.D. W. Va.) (where defendant challenged substantive (but not procedural) reasonableness of sentence on specific legal ground rather than as general challenge to sentence's length, and defendant did not raise specific ground in district court, appellate court would review claim only for plain error) (N.B.: it appears that where a defendant makes a substantive-reasonableness challenge to the overall length of a sentence, there need be no specific objection in the district court to preserve the issue for appeal)