FOURTH CIRCUIT CRIMINAL UPDATE
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Note on Cross-References to "Handbook" in Text

The reader will notice regular cross-references in the text to sections in a **Handbook**. Each refers to the Fourth Circuit Criminal Handbook (2014 edition), by Carl Horn, III, the author of this Update.

The Fourth Circuit Criminal Handbook, which is revised annually, is available from:

LexisNexis/Matthew Bender
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The author also edits Michie's Fourth Circuit Criminal Reporter, published eight times annually and reporting Supreme Court and Fourth Circuit criminal decisions as they are issued. Subscriptions to the Reporter, are also available from Lexis/Nexis/Matthew Bender.

Like the annual Criminal Law Update, these two publications are intended to give defense attorneys, prosecutors, judges, law clerks, agents and probation officers clear and reliable coverage of hundreds of recurring criminal issues.

This Update reports published Supreme Court and Fourth Circuit decisions in the same format as the Handbook and Reporter. To make information in the Update easier to access, a complete Table of Contents of the former is included on the following pages.

The author has included in the 2013 Update all holdings and related points thought to have precedential value. Issues are reported in the exact order of the Table of Contents, with cross-references to related sections in the Handbook. Therefore, if a particular topic is not covered, the reader may assume no holding or related point was found in this year's published decisions.

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Probable cause to search.

In *United States v. Saafir*, 754 F.3d 262 (4th Cir. 2014), the Defendant was stopped in Durham, North Carolina for having excessively tinted windows. The officer testified that he noticed a flask in the Defendant's pocket, but did nothing further to examine the flask or to determine its contents.

Although the Defendant consented to a frisk, he refused to consent to search of the vehicle, explaining to the officer that it was not his car. The officer responded by "instruct[ing] Saafir that he had probable cause to search the car based on the presence of the hip flask." *Id.* at 265. The Defendant still refused to consent to search of the vehicle, but in response to a subsequent question he did tell the officer that there "might" be a gun in the car, and when an initial search was unproductive, provided the key to a locked glove compartment where a gun was found. *Id.*

The Defendant was indicted for being a felon in possession of a firearm to which – after District Judge Catherine C. Eagles denied his motion to suppress – the Defendant entered a conditional guilty plea.

In a published per curiam opinion (itself a rarity), a panel consisting of Judges Motz and Thacker and Senior Judge Davis *reversed*. The Fourth Circuit agreed with the Defendant, and the Government conceded, that "the officer's assertion that the hip flask gave him probable cause to search the car was a misstatement of the law." *Id.* at 266. That being the case, the Court also "conclude[d] that the officer's false assertion of his authority to search the car irreparably tainted [the Defendant's] incriminatory statements and the ensuing search of the car." *Id.* (reversing denial of suppression motion and vacating conviction), *citing Bumper v. North Carolina*, 391 U.S. 543, 547-48 (1968) (invalidating consent to search after officer falsely stated that he had a warrant); *and Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (search is unreasonable if its justification is grounded in an officer "engaging or threatening to engage in conduct that violates the Fourth Amendment").

For discussion of these and related issues, *see* **Handbook** § 2 (Probable cause to search).

Investigative stops.

In *United States v. Bumpers*, 706 F.3d 168 (4th Cir. 2013), a police officer observed the Defendant and another individual in the parking lot of a convenience store in a "high-crime area" in Newport News, Virginia. Aware that the "shopping plaza" in which the convenience store was located had been the location of "multiple shootings" and "countless drug arrests" – and that the store owner had posted "No Trespassing" signs on the property

and had asked local police to "enforce criminal violations" – the officer noticed that the two men were "not even close" to the store entrance and suspected that they might be trespassing. *Id.* at 170.

As the officer pulled into the convenience store parking lot, driving a marked patrol car, he testified that the two men began to walk away at a "fast pace," which he characterized as trying to "get away from the area." The officer ordered the men to stop and identify themselves. One of them disregarded the officer's order and kept walking; the other, the Defendant, complied. When the officer learned the Defendant's name and ran a records check, he discovered that there was an unrelated warrant for his arrest. Search incident to that arrest led to the discovery of a loaded firearm, which resulted in a federal felon in possession of a firearm and ammunition charge.

The issue on appeal was whether the officer had reasonable suspicion to justify the investigative stop in the first place. In an opinion written by Judge Wilkinson and joined by Judge Floyd, a split panel held that he did. Judge Diaz disagreed in a lengthy and strongly worded dissenting opinion.

The majority began its analysis by emphasizing the appellate court's obligation to show deference to the factual findings and credibility assessment of district court judges. *Id.* at 173-74. From that vantage point the Court found no clear error in Senior District Judge Jerome B. Friedman's denial of the Defendant's motion to suppress. Specifically, the majority noted "the high-crime nature of the area"; that "the particular location and manner in which [the two men] were standing suggested that they may have been engaged in the specific, ongoing crime of trespassing"; that the Defendant engaged in "evasive behavior" after observing the marked patrol car turn into the parking lot; and "that when [the Defendant] left the premises, he took a path that led him past the convenience store's front door -- and yet he made no effort to enter." *Id.* at 175-76.

Judge Diaz came to a sharply different conclusion, finding the undisputed facts "insufficient to establish a reasonable, particularized suspicion that criminal activity was afoot." *Id.* at 177-78 (Diaz, J., dissenting), *citing Terry v. Ohio*, 392 Y.S. 1, 27, 30 (1968). Specifically, Judge Diaz noted that "the majority appeared to give [the fact that the Defendant was in a high-crime area] dispositive weight"; characterized what the majority called "evasive behavior" as "simply walk[ing] away from the officer," which in the absence of reasonable suspicion the Defendant was entitled to do; and concluded that the recent decisions in *United States v. Foster*, 634 F.3d 243, 246-47 (4th Cir. 2011) (*reversing* district court's denial of motion to suppress); and *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011) (same) were indistinguishable from the facts in this case. *Id.* at 179-82 (Diaz, J., dissenting).

In *United States v. Black*, 707 F.3d 531 (4th Cir. 2013), police officers observed a vehicle parked at a gas pump at a station located in a high crime area in Charlotte, North Carolina. Although they did not observe the vehicle arrive at the pump, the officers found the fact that the driver and sole occupant did not exit the vehicle for the three minutes they observed him to be "unusual" and "indicative of drug transactions." *Id.* at 534. The

officers then followed the vehicle to a nearby parking lot between two apartment complexes where they observed the driver exit and join a group of five men. Not wanting to be "outnumbered," the officers called for back up, which led to the arrival of additional marked patrol vehicles and five more officers.

As they approached the men, two of the officers recognized one of them as an individual who had prior felony drug arrests, although neither was aware whether the arrests had resulted in convictions. Another of the men had a firearm in a holster on his hip – which is legal in North Carolina, although the officer testified at a suppression hearing that "he had never seen anyone do it" during his years on patrol in the area. *Id.* at 535. Another officer testified that he had been trained to operate consistent with the "Rule of Two," that is, "if the police find one firearm, there will 'most likely' be another firearm in the immediate area." *Id.* Thus, the decision was made to identify and frisk all six men in the group.

During the identification and frisk process, the Defendant, offered one of the officers his North Carolina Identification Card, which the officer testified was also "unusual" in his experience, as apparently was the fact that the Defendant continued to be "extremely cooperative." *Id.* at 536. In any event, rather than returning the Defendant's Identification Card, the officer "pinned it to his uniform." *Id.*

At that point the Defendant stood up, announced that he was going home, and began walking toward the apartments. One of the officers placed himself in front of the Defendant, told him "that he was not free to leave," and when the Defendant kept walking, grabbed the Defendant's arm. The officer later testified that when he grabbed the Defendant "he could feel [his] 'extremely fast' pulse through [his] t-shirt, which he believed to be a sign of nervousness." *Id.* Shortly thereafter, the Defendant pulled away from the officer, and began to run. Two officers tackled the Defendant and, after a handgun was discovered in the fray, he was charged with being a felon in possession of a firearm. *Id.*

The Defendant moved to suppress the gun, arguing that he was unlawfully seized, that is, that his seizure was not supported by the requisite "reasonable suspicion." District Judge Max O. Cogburn, Jr. denied the motion, and the Defendant entered a conditional guilty plea, reserving his right to appeal the denial of his suppression motion.

In an opinion written by Judge Gregory and joined by Judge Davis, the Fourth Circuit *reversed*. Chief Judge Traxler wrote a separate opinion concurring in the result. In a strongly worded opinion, the majority noted and held: (1) the Defendant "was seized for Fourth Amendment purposes … at the point that [the officer] pinned [the Defendant's] ID to his uniform," *id.* at 538, *citing United States v. Weaver*, 282 F.3d 302,310 (4th Cir. 1968) ("the retention of a citizen's identification or other personal property or effects is highly material under the totality of the circumstances analysis"); and (2) noting the "four times in 2011 [the Fourth Circuit] admonished against the Government's misuse of innocent facts as indicia of suspicious activity," that the officers did *not* have reasonable suspicion to detain the Defendant. *Id.* at 539, *citing United States v. Powell*, 666 F.3d 180 (4th Cir.

2011); *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011); *and United States v. Foster*, 634 F.3d 243 (4th Cir. 2011).

Explaining these conclusions in greater detail, the Court opined that the officer's suspicion "that a lone driver at a gas pump who he did not observe drive into the gas station is engaged in drug trafficking borders on the absurd … [and] defies reason." *Id.* Second, the Court noted that "[another individual's] prior arrest history cannot be a logical basis for a reasonable particularized suspicion as to [the Defendant]." *Id.* at 540, *citing Powell*, 666 F.3d at 188. Third, because North Carolina law permits its residents to openly carry firearms, "the exercise of this right, without more, cannot justify an investigatory detention." *Id.* Fourth, it would be an abdication of the judicial role to take "law enforcement-created rules as sufficient to establish reasonable suspicion." *Id.* at 540-41. "Fifth, it is counterintuitive that [the Defendant] provided a justification for reasonable suspicion by volunteering his ID to the officer," nor can the Defendant's conduct be properly characterized as "overly cooperative." *Id.* at 541.

The majority reserved its strongest language, however, to reject the Government's contention that the fact that the men were in "a high crime area at night" was inherently suspicious:

> In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept carte blanche the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.

Id. at 542 (reversing conviction and 180-month sentence).

In *United States v. George*, 732 F.3d 296, 297 (4th Cir. 2013), the Defendant was a passenger in the back seat of a car stopped for "giving chase to another vehicle and running a red light." The Defendant, conceded on appeal that this was a proper basis for a vehicle stop, but argued in the District Court and on appeal that he was frisked in violation of the Fourth Amendment. In an opinion written by Judge Niemeyer and joined by Judge Agee and Senior Judge Hamilton, the Fourth Circuit disagreed.

In essence, after observing what he believed to be suspicious conduct on the Defendant's part, a police officer in Wilmington, North Carolina (Officer Roehrig) ordered the Defendant to exit the back seat and proceeded to frisk him. During frisk of the Defendant, a convicted felon, a handgun was discovered, which led to his federal prosecution as a felon in possession of a firearm. The Defendant moved to suppress the handgun, but after District Judge Terrence W. Boyle denied his motion the Defendant pled guilty to the charge, preserving only his right to appeal the denial of his suppression motion.

The issue on appeal was whether Officer Roehrig had reasonable suspicion, at the time he frisked the Defendant, to believe that the Defendant was armed and dangerous. *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 326-29 (2009); *United States v. Powell*, 666 F.3d 180, 187-89 (4th Cir. 2011) (insufficient basis to establish reasonable suspicion that passenger was armed and dangerous, vacating conviction); *United States v. Sakyi,* 160 F.3d 164, 168-69 (4th Cir. 1998) (approving "patdown" of passengers during traffic stop based on an "articulable suspicion of danger"); *and United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (approving patdown of passenger based on "reasonable suspicion" in that case, but declining to decide whether patdown of passengers should be permitted "as a matter of course").

"In determining whether such reasonable suspicion exists, [the Fourth Circuit] examine[s] the 'totality of the circumstances' to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous." *George*, 732 F.3d at 299, *citing United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Cortez*, 449 U.S. 411, 417 (1981); *and United States v. Mayo*, 361 F.3d 802, 808 (4th Cir. 2004) (reviewing a frisk based on totality of the circumstances).

The Fourth Circuit highlighted seven factors in route to concluding "from the totality of the circumstances [that] Officer Roehrig's frisk of [the Defendant] was supported by objective and particularized facts sufficient to give rise to a reasonable suspicion that [the Defendant] was armed and dangerous," namely: (1) the stop was late at night (3:30 a.m.) in a high-crime area; (2) the "circumstances of the stop," which involved the stopped vehicle "aggressively chasing" another vehicle and running a red light at "a speed sufficient to cause the vehicles' tires to screech"; (3) there were four males in the stopped vehicle, which "increas[ed] the risk of making a traffic stop at 3:30 a.m. in a high-crime area"; (4) the Defendant "acted nervously" by holding up his identification card before the officer asked to see it, appearing to avoid making eye contact with the officer intentionally, and failing repeatedly to comply with the officer's order to place both of his hands on the headrest in front of him; (5) the driver's "misleading" and "implausible" explanation of his "aggressive driving"; (6) the Defendant's concealment of his right hand while failing to comply with the officer's order to show his hands; and (7) the fact that the Defendant dropped his wallet and cell phone as he exited the vehicle, which "could have created an opportunity to reach for a weapon or to escape." *Id.* at 300-02, *distinguishing Powell*, 666 F.3d at 184-89 (*reversing* district court's denial of motion to suppress handgun discovered during frisk following vehicle stop).

For discussion of these and related issues, *see* **Handbook** § 11 (Investigative stops); *and* § 17 (Vehicle stops/searches).

Search incident to arrest.

In *Riley v. California*, 134 S. Ct. 2473, 2480 (2014), the Supreme Court granted certiorari in two cases raising a single issue: "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." The Supreme Court's unanimous and self-styled "simple" answer: except in the rare circumstances when exigent circumstances permit a warrantless search, "before searching a cell phone seized incident to an arrest, [law enforcement must] get a warrant." *Id*. at 2495.

En route to that conclusion, in an opinion written by the Chief Justice and joined by all but Justice Alito (who concurred in part and in the judgment), the Court first discussed its historic jurisprudence regarding searches incident to arrest. *Id*. at 2482-84, *discussing Weeks v. United States*, 232 U.S. 383, 392 (1914) (acknowledging in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime"); *Chimel v. California*, 395 U.S. 752, 753-54 (1969) (arrest of defendant in his residence did not permit warrantless search of the residence incident to arrest); *United States v. Robinson*, 414 U.S. 218, 220,223 (1973) (examination of contents of crumpled cigarette package found on defendant's person during search incident to arrest reasonable under Fourth Amendment); *and Arizona v. Gant*, 556 U.S. 332, 343 (2009) (search of vehicle incident to occupant's arrest permitted "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" *or* "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle") (internal quotation omitted).

Applying the collective teaching of these decisions to modern cell phones "based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided," the Supreme Court concluded "that officers must generally secure a warrant before conducting such a search." *Id*. at 2485. The opinion includes a great deal of information on the nature and quantity of data found on cell phones, squarely rejecting the Government's and State's argument that search of a cell phone is "materially indistinguishable" from search of "physical items." Chief Justice Roberts' response:

> That is like saying a ride on horseback is materially indistinguishable from a flight to the moon….Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.

Id. at 2488-89. (Those with the time and inclination to read the opinion, which your Editor recommends, will be treated to a technology feast, including discussion of "remote wiping," data encryption, "Faraday bags," apps ranging from "sharing prayer requests" to "improving your romantic life," the capacity of gigabytes, and "cloud computing.")

Justice Alito concurred that search of data in a cell phone ordinarily requires a warrant, but wrote separately to make two primary points. First, he expressed his view that the historic approval of searches incident to arrest was broader than concerns for officer safety and the destruction of evidence, as *Chimel* characterized it. To the contrary, Justice

Alito wrote, "when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence." *Id*. at 2495 (Alito, J., concurring in part and in the judgment). And second, he stated that he would reconsider his position "if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables." *Id*. at 2497 (Alito, J., concurring in part and in the judgment) (further opining that "it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment").

For discussion of these and related issues, *see* **Handbook** § 15 (Search incident to arrest).

Vehicle stops/searches.

In *United States v. McGee*, 736 F.3d 263 (4th Cir. 2013), the Defendant was the passenger in a rented vehicle which was stopped by a Charleston, West Virginia police officer, Jonathan Halstead, who testified at a suppression hearing that he stopped the vehicle after he observed a brake light that was not working properly. The Defendant presented evidence to the contrary, through the testimony of an investigator and a representative from the car rental company, that the brake light was working properly at that time (four months later) and that there was no record of any complaint about the light or of any repair of the light. District Judge Timothy E. Johnston nevertheless credited Officer Halstead's testimony, which he characterized as "frank and earnest" and as "unwavering," and accordingly denied the Defendant's motion to suppress. *Id.* at 270.

In an opinion written by Judge Davis and joined by Judges Keenan and Floyd, the Fourth Circuit affirmed. The Court first noted that "[o]bserving a traffic violation provides sufficient justification for a police officer to detain the offending vehicle for as long as it takes to perform the traditional incidents of a routine vehicle stop." *Id.*, *quoting United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008). Next noting that appellate courts properly "defer to a district court's credibility determinations," the Court ultimately concluded that Judge Johnston had not committed clear error in crediting the officer's testimony regarding what he had observed. The Court explained:

> The issue presented here is whether the district court committed clear error in making the finding that it did….Although McGee's evidence that the brake light was not inoperative is significant, it is nonetheless circumstantial and relies on untested reliability of a third party's recordkeeping…..Even if we might have reached a different determination if presented with the same evidence in the first instance, we cannot say that it was clear error for the district court to rule as it did.

Id. at 271, *citing United States v. Vaughan*, 700 F.3d 705, 709 (4th Cir. 2012); *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008); *and United States v. Murray*, 65 F.3d 1161, 1169 (4th Cir. 1995).

In *United States v. Green*, 740 F.3d 275 (4th Cir. 2014), the Defendant was stopped by a Virginia State Police Trooper for having excessively tinted windows and a partially obscured license plate. About 14 minutes into the stop a drug dog alerted to the presence of drugs, and search of the vehicle resulted in the discovery of over a kilogram of cocaine and $7,000 in cash.

The Defendant filed two Motions to Suppress, one challenging the duration and scope of the vehicle stop and the other challenging the reliability of "Bono," the drug dog. Chief District Judge Glen E. Conrad denied both motions and the Fourth Circuit affirmed.

The Defendant conceded that the initial stop was justified, but "argue[d] that the 14-minute period of detention between the initial stop and the alert by the drug-detection dog was not reasonably related in scope to the circumstances that justified the stop." *Id.* at 279. In essence, the Defendant argued that the Trooper "used the traffic stop to embark on an unlawful drug investigation," *citing United States v. Digiovanni*, 650 F.3d 498, 501-10 (4th Cir. 2011) (police officer who made traffic stop, promptly "embarked on a sustained investigation into the presence of drugs," and did not initiate the driver's license check until after questioning driver for approximately 10 minutes violated Fourth Amendment, suppressing evidence).

Noting that "questions unrelated to the purpose of the traffic stop do not necessarily run afoul of the scope component of the *Terry* inquiry," and that "the maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision," the Fourth Circuit concluded "that the traffic stop was reasonable in scope and duration and that [the Defendant] was lawfully seized for a traffic violation when the dog sniff occurred." *Id.* at 280-81. Specifically, in an opinion written by Judge Shedd and joined by Judges Gregory and Keenan, the Court pointed to the Trooper's wait time after inquiring about the Defendant's license and registration, his discovery that the Defendant was the subject of a protective order and his wait time after requesting further information on the protective order and the Defendant's criminal record, and time spent communicating with the Defendant about the two violations of Virginia law. *Id.* at 281 (affirming denial of first motion to suppress), *citing Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiry into matters unrelated to the justification for the traffic stop … do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop"); *and United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008) (maximum acceptable length of traffic stop cannot be stated with mathematical precision).

Regarding the second Motion to Suppress, seeking to suppress evidence discovered as a result of the drug dog's alert, the Fourth Circuit first noted that "where a delay in conducting a dog sniff can be characterized as de minimis under the totality of the circumstances, the delay does not violate the defendant's Fourth Amendment rights." *Id.*

at 280-81, *citing United States v. Farrior*, 535 F.3d 210, 220 (4th Cir. 2008). Finding no undue delay here, the Court therefore saw no constitutional violation in the drug dog sniff approximately 14 minutes into a lawful vehicle stop.

The Defendant also argued that "Bono's track record in the field is not sufficiently reliable for his positive alert to provide probable cause to search [the Defendant's] vehicle." *Id.* at 281. In support of his argument, the Defendant presented evidence "which showed that drugs were found only 22 of the 85 times that Bono had alerted in the field before his alert on [the Defendant's] vehicle … [a] success rate in the field of [only] 25.88%." *Id.* at 282-83.

But again the Fourth Circuit was unpersuaded. Applying the Supreme Court's recent opinion in *Florida v. Harris*, 133 S. Ct. 1050 (2013), the Court emphasized the importance in assessing a dog's reliability of "evidence of a dog's satisfactory performance in a certification or training program [which] can itself provide sufficient reason to trust his alert." *Id.* at 282, *citing Harris*, 133 S. Ct. at 1057. And on this key point, the Court concluded that "when taking Bono's training and certification record into account, the record [wa]s sufficient to establish Bono's reliability." *Id.* at 283 (affirming conviction).

For discussion of these and related issues, *see* **Handbook** § 17 (Vehicle stops/searches); *and* § 104 (Use of "drug dogs").

Consent to search.

In *United States v. Robertson*, 736 F.3d 677 (4th Cir. 2013), the police in Durham, NC received a report that three African-American men were chasing a fourth man who had a gun. A number of police responded. One of them, Officer Welch, approached the Defendant, who was one of six or seven men in a nearby bus shelter. Three of the men in the shelter were wearing white shirts. The Defendant was wearing a dark shirt.

Officer Welch approached the Defendant, who was seated with his back against the shelter's back wall, stopping about four yards in front of him. Meanwhile other officers were "dealing with" the other individuals in the shelter. *Id.* at 679.

Officer Welch began the conversation by asking the Defendant if he "had anything illegal on him. [The Defendant] remained silent. Officer Welch then waived [the Defendant] forward in order to search [him], while simultaneously asking to conduct the search. In response to Officer Welch's hand gesture, [the Defendant] stood up, walked two yards toward Officer Welch, turned around, and raised his hands." *Id.* During the search a firearm was recovered, which led to the instant charges.

The issue in the District Court and on appeal was whether the Defendant *consented* to the search or merely *acquiesced* to an order from the officer. District Judge Catherine C. Eagles concluded that the Defendant had consented; a divided panel disagreed, *reversing* her denial of the Defendant's motion to suppress.

In an opinion written by Judge Gregory and joined by Judge Duncan, the majority began by noting the standard and certain of the factors which should be considered in determining whether there has been consent to a search:

> We apply a subjective test to analyze whether consent was given, looking to the totality of the circumstances. The government has the burden of proving consent. Relevant factors include the officer's conduct, the number of officers present, the time of the encounter, and characteristics of the individual who was searched, such as age and education. Whether the individual searched was informed of his right to decline the search is a highly relevant factor.

Id. at 680 (internal citations and quotations omitted).

Applying certain of those factors here, and based solely on the testimony of Officer Welch (which the District Court had credited), the majority concluded that the Defendant's conduct was no more than "begrudging submission to a command." *Id.* Specifically, the Court noted that "[t]he area around the bus shelter was dominated by police officers"; that "every other individual in the bus shelter [was being] handled by the other police officers"; and that Officer Welch's questioning "was immediately accusatory." *Id.* at 680-81 (concluding that the Defendant's stepping forward and raising his hands was merely "a begrudging surrender to Officer Welch's order, reversing denial of the motion to suppress).

District Judge Samuel G. Wilson, sitting by designation, dissented, citing the well-settled principle that appellate courts should "defer to the district court's plausible findings." And because he at least found Judge Eagles' findings to be "plausible" he would have affirmed her ruling on the motion to suppress. *Id.* (Wilson, J, dissenting), *citing Anderson v. Bessemer City, NC*, 470 U.S. 564, 573-77 (1985).

For further discussion of these and related issues, *see* **Handbook** § 18 (Consent to search).

Scope of search.

In *United States v. Dargan*, 738 F.3d 643, 646 (4th Cir. 2013), police in Columbia, Maryland executed a search warrant authorizing seizure, *inter alia*, of "[i]ndicia of residency" of the place being searched. During the search officers found and seized a receipt for a Louis Vuitton belt, which was in a bag on the top of a dresser in the Defendant's bedroom. The receipt showed "that the belt cost $461.10 and that the buyer, who identified himself as 'Regg Raxx,' purchased the belt with cash the day after the [Hobbes Act] robbery with which he was subsequently charged. *Id.* The Defendant's first name is Reginald and his co-defendants referred to him as "Little Reggie."

The Defendant moved to suppress the receipt, arguing essentially that it was outside the scope of items the search warrant authorized for seizure. District Judge Catherine C. Blake agreed that the receipt was beyond the scope of the warrant, but denied the motion to suppress on the ground "that the seizure was nevertheless justified under the plain-view exception to the warrant requirement." *Id.*

In an opinion written by Judge Wilkinson and joined by Judges Agee and Keenan, the Fourth Circuit affirmed Judge Blake's denial of the motion to suppress, albeit on a different ground. Noting that a search warrant should not be interpreted as a "constitutional strait jacket" or in a "hypertechnical" manner, but rather in a "commonsense and realistic" manner, the Court concluded that the receipt was properly seized as "indicia of occupancy … of the premises" and therefore did not find it necessary to address the plain view doctrine. *Id.* at 647-49, *citing United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988) (search warrant requirement not intended to impose "constitutional strait jacket" on law enforcement); *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010) (courts should not interpret search warrants in "hypertechnical" manner); *and United States v. Robinson*, 275 F.3d 371, 381 (4th Cir. 2001) (interpreting "particularity requirement" broadly).

For further discussion of these and related issues, *see* **Handbook** § 20 (Scope of search).

Exigent circumstances.

In *United States v. Yengel*, 711 F.3d 392 (4th Cir. 2013), local police initially responded to a 911 call reporting a domestic dispute. Sergeant Brian Staton was further informed that Mrs. Yengel had left the residence, but that Mr. Yengel "was potentially armed and threatening to shoot law enforcement personnel." *Id.* at 394. After Mr. Yengel, a.k.a. the Defendant, was arrested and removed, Mrs. Yengel returned to the residence and told Sergeant Staton that her husband kept a "grenade" in a locked closet in a guest bedroom next to the room in which their young son was still sleeping.

Rather than contacting explosives experts, evacuating the house or nearby houses, or obtaining a search warrant, Sergeant Staton used a screwdriver to pry open the closet door. Inside the closet he found a variety of military equipment. Subsequent search by explosives experts resulted in discovery of a partially assembled explosive device, which in turn resulted in the Defendant being federally charged with possession of an unregistered "firearm." *Id.* at 394-96.

Although Mrs. Yengel gave permission to Sergeant Staton to "kick the door open" and told him to "do whatever you need to do to get in there," for some reason the Government abandoned its argument on appeal that the warrantless search was a permissible consent search. Thus, the only issue on appeal was whether the search was justified based on "exigent circumstances." Senior District Judge Henry Cake Morgan, Jr. answered this question in the negative, and the Fourth Circuit agreed. *Id.* at 396.

In an opinion written by Judge Thacker and joined by Judges Traxler and Wynn, the Fourth Circuit began its analysis by noting "that warrantless searches and seizures inside a home are presumptively unconstitutional." *Id.*, *citing Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The panel also noted that exceptions to the warrant requirement must be "narrow and well-deliniated in order to retain their constitutional character." *Id.*, *citing Flippo v. West Virginia*, 528 U.S. 11, 13 (1999).

As for the "exigent circumstances" exception, the Court emphasized that it too must be narrowly construed, that is, it only applies to circumstances that constitute "an immediate and credible threat or danger," *id.*, explaining:

> The Supreme Court has recognized a variety of specific circumstances that may constitute an exigency sufficient to justify the warrantless entry and search of private property. These circumstances have included when officers must enter to fight an on-going fire, prevent the destruction of evidence, or continue in "hot pursuit" of a fleeing suspect. *Brigham City*, 547 U.S. at 403 (citing *Mighigan v. Tyler*, 436 U.S. 499, 509 (1978); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion); and *United States v. Santana*, 427 U.S. 38, 42, 43 (1976). In addition to these well-established exigencies, the Supreme Court and this Circuit have held that more general "emergencies," if enveloped by a sufficient level of urgency, may also constitute an exigency and justify a warrantless entry and search. *See generally*, *Brigham City*, 547 U.S. at 403; *United States v. Hill*, 649 F.3d 258, 265 (4th Cir. 2011).
>
> Under this more general emergency-as-exigency approach, in order for a warrantless search to pass constitutional muster, "the person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992). An objectively reasonable belief must be based on specific articulable facts and reasonable inferences that could have been drawn therefrom. *See Mora v. City of Gaithersburg*, 519 F.3d 216, 224 (4th Cir. 2008) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968).
>
> Regardless of the particular exigency being invoked, we have repeatedly found the non-exhaustive list of factors first provided in *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981), to be helpful in determining whether an exigency reasonable justified a warrantless search. *Hill*, 649 F.3d at 265. The *Turner* factors include:
>
> > (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers' reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the

> site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.
>
> 650 F.2d at 528.

Id. at 396-97.

Applying these principles and factors, the Court agreed with the Defendant that "exigent circumstances" did *not* justify the warrantless search in *Yengel*. In route to this conclusion, the Court reasoned: (1) "the information available to Sergeant Staton regarding the stable nature of the threat prior to the search indicated that the scope of any danger was quite limited," *id.* at 398; (2) "the immobile and inaccessible location of the threat [in a locked closet] further diminished the scope of any possible danger," *id.* at 398-99; and (3) "the fact that no officers on the scene sought to evacuate the nearby residences, or, in particular, to evacuate Mrs. Yengel's young son who was sleeping in the room *directly next to the alleged grenade* provides stark evidence that a reasonable police officer would not – and did not – believe an emergency was on-going such as would justify a warrantless entry." *Id.* at 399 (emphasis in original), *citing United States v. Whitehorn*, 813 F.2d 646, 649 (protective bomb sweep not justified by exigent circumstances where there as "no evidence that anyone was evacuated from the building or warned of the potential danger, or that the agents had otherwise prepared for the risk of an exploding bomb").

For discussion of these and related issues, *see* **Handbook** § 22 (Exigent circumstances).

Standing/Reasonable expectation of privacy.

In *United States v. Castellanos*, 716 F.3d 828 (4th Cir. 2013), the Defendant conditionally pled guilty to a drug conspiracy charge, reserving his right to challenge District Judge N. Carlton Tilley's denial of his motion to suppress. The drugs in question, 23 kilograms of cocaine with a street value of approximately $3 million, were found in the gas tank of a vehicle which was being transported by a Direct Auto Shippers ("DAS") commercial car carrier.

Captain Kevin Roberts of the Reeves County, Texas Sheriff's Department observed the vehicle at a truck stop and initially became suspicious because the vehicle had a "dealership placard" rather than a regular license plate like the other vehicles being transported. *Id.* at 830. Shipping documents identified the owner of the vehicle as Wilmer Castenada and the end destination as an address in Greensboro, North Carolina. Efforts to contact Castenada by telephone were unsuccessful and no connection with Castenada was found either at the place of origin (in California) or at the address in Greensboro.

Unable to reach Castenada, Captain Roberts asked the driver of the DAS car carrier for permission to search the vehicle, which was given. When he entered the vehicle

Captain Roberts smelled Bondo, "a compound commonly used in the repair and after-market alteration of vehicles." Further inspection led Captain Roberts to suspect that there might be contraband in the gas tank, which he confirmed by "insert[ing] a fiber optic scope into the [vehicle's] gas tank in order to peer into its interior." *Id.* At that point Captain Roberts took custody of the vehicle.

Captain Roberts subsequently discovered that someone claiming to be Castenada had been calling DAS to inquire about delivery of the vehicle in Greensboro. Captain Roberts returned the calls and told the caller, falsely, that the driver of the DAS car carrier had been arrested and that he would have to travel to Texas to pick up the vehicle. A few days later the Defendant, Arturo Castellanos, arrived to do just that.

Rather than being given the vehicle, however, the Defendant was detained, waived his *Miranda* rights, and told Captain Roberts

> that he was in the process of purchasing the Explorer from Castenada, who lived in North Carolina. He then explained that Castenada advised him to go from the Castellanos' home in California to Texas to retrieve the Explorer, then drive it to Castenada in North Carolina where Castellanos would pay Castenada for the vehicle. Castellanos would then drive the Explorer back to California.

Id. at 831. When Captain Roberts "expressed considerable skepticism at his story," the Defendant terminated the interview. *Id.*

The Government only offered Captain Roberts' testimony at the suppression hearing, emphasizing the Defendant's story that Castenada was a third party from whom he intended to purchase the vehicle. In the majority opinion written by Judge Agee and joined by Chief Judge Traxler, the Fourth Circuit found it significant that the Defendant "did not introduce any evidence [at the suppression hearing] to show that he owned the [vehicle] at the time Roberts conducted the warrantless search or had permission to use the vehicle." *Id.*

The sole issue on appeal was whether, on these facts, the Defendant had a reasonable expectation of privacy in the vehicle. As the majority articulated it, the legal framework in deciding this issue is grounded in the following general principles:

> "In order to demonstrate a legitimate expectation of privacy, [Castellanos] must have a subjective expectation of privacy," *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010), and that subjective expectation of privacy must be "objectively reasonable; in other words, it must be an expectation that society is willing to recognize as reasonable," *United States v. Bullard*, 645 F.3d 237, 242 (4th Cir. 2011) (internal quotation marks omitted). The burden of showing a legitimate expectation of privacy in the area searched rests with the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

Id. at 832. The Court also emphasized that "[t]he Fourth Amendment protects people and not places," and that Fourth Amendment rights "may not be vicariously asserted." *Id.* at 832-33, *quoting Katz v. United States*, 389 U.S. 347, 351 (1967); *Rakas v. Illinois*, 439 U.S. 128, 133-134 (1978); *and United States v. Rumley*, 588 F.3d 202, 206 n.2 (4th Cir. 2009).

Applying these general principles to the facts in this case, the majority agreed with the Government that the Defendant had failed to prove by a preponderance of the evidence that he had a reasonable expectation of privacy in the vehicle when it was searched. Although the Court conceded that "[p]arties other than owners may possess a reasonable expectation of privacy in the contents of a vehicle," and that "[i]ndividuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names," it ultimately concluded that the Defendant had failed to meet his burden of proof under either theory. *Id.* at 834 (affirming conviction and 120-month sentence.

In a strenuous 28-page dissenting opinion, Judge Davis came to quite a different conclusion, essentially accusing the majority of "ignor[ing]" the facts and the law. *Id.* at 836 (Davis, Jr. dissenting). In sharp contrast to the conclusions reached by the majority, Judge Davis concluded that the record established, by a preponderance of the evidence, that "Wilmer Castenada" was the Defendant's alias, and that Judge Tilley "erred, procedurally and substantively, factually and legally, in reaching its conclusion that [the Defendant] failed to establish an objectively reasonable … expectation of privacy sufficient to maintain his Fourth Amendment challenge to the warrantless, nonconsensual search of the vehicle." *Id.* (Davis, J., dissenting).

In *United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013), police in Richmond, Virginia removed two bags of trash from a trash can located about 20 feet behind an apartment. The officers were conducting their investigation in response to tips that the Defendant was selling drugs from the apartment.

The Defendant argued in the District Court and on appeal that the police "physically intruded on a constitutionally protected area when they walked up to the trash can located near the rear patio of [the] apartment." *Id.* at 369, *citing Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (officers conduct a Fourth Amendment search when they enter the curtilage of a residence to gather evidence, in that case on the porch with a "drug dog"). The defendant also argued that the officers violated his reasonable expectation of privacy, distinguishing *California v. Greenwood*, 486 U.S. 35, 41 (1988) (no reasonable expectation of privacy in trash left for collection in an area accessible to public), in that the trash cans in this case had not been taken to the street for collection. *Id.*

District Judge Henry E. Hudson found as a fact that at the time "the trash was seized the trash can was sitting on common property, rather than next to the apartment's rear door"; that this location was "beyond the apartment's curtilage"; and that the Defendant "also lacked a reasonable expectation of privacy in the trash can's contents." *Id.* at 369-70. In an opinion written by Judge Niemeyer and joined by Judge Agee a divided panel

found that Judge Hudson's factual finding was not clearly erroneous and affirmed his legal conclusions. Judge Thacker wrote a lengthy and rigorous dissenting opinion.

Regarding the factual finding, the majority credited the "specific testimony [by the police officers] regarding where they found the trash can over the testimony of the Defendant's witnesses who "could only speak to where [the Lessee] normally kept her trash can." *Id.* at 372 (emphasis in original). Based on this factual finding, the majority applied the four factors set forth in *United States v. Dunn*, 480 U.S. 294, 301 (1987), and ultimately concluded that the trash can was "located outside the apartment's curtilage." *Id.* at 373-74. And finally, the majority also agreed with Judge Hudson's conclusion that the Defendant had no reasonable expectation of privacy in trash left outside the curtilage of the apartment, irrespective of the fact that it had not yet been taken to the street for collection. *Id.* at 374-75, *citing Katz v. United States*, 389 U.S. 347 (1967); *and Greenwood*, 486 U.S. at 37-41.

As noted, Judge Thacker wrote a lengthy (22-page) and rigorous dissenting opinion. Noting inconsistencies in the police officers' accounts of where the trash can was located and contrary testimony of the property manager and several residents, Judge Thacker criticized the majority opinion as affirming "a version of the Fourth Amendment that permits agents of the state to conduct a warrantless search of a citizen's trash can where the receptacle is located directly behind their home and not otherwise abandoned or left for collection along a public thoroughfare…." *Id.* at 376 (Thacker, J., dissenting).

Judge Thacker also concluded that the defendant *did* have a reasonable expectation of privacy in the trash can, which was located about 20 feet from the rear of his apartment, under the *Katz* line of authority. Judge Thacker summed up her conclusions, in stark contrast to those of the majority, thus:

> [I]n conducting a search, the Government may violate an individual's Fourth Amendment rights in two different ways: 1) by physically intruding on the individual's property in an unreasonable manner, and 2) by violating an individual's reasonable expectation of privacy. In my view, the warrantless search of Jackson's trashcan, located directly behind his home in a private area, was an unreasonable search under both approaches.

Id. at 379 (Thacker, J., dissenting).

For discussion of these and related issues, *see* **Handbook** § 27 (Standing/Reasonable expectation of privacy).

Electronic tracking devices/Good faith exception.

In *United States v. Stephens*, 764 F.3d 327 (4th Cir. 2014), a Maryland police officer assigned to a task force investigating state and federal crimes installed a Global-Positioning-System ("GPS") device under the bumper of the Defendant's vehicle. With

the aid of the GPS device subsequent surveillance resulted in the discovery of a firearm and ultimately to federal charges.

After discovery of the firearm but while the case was still pending, the Supreme Court held in *United States v. Jones,* 132 S. Ct. 945, 949 (2012), that "installation of a GPS device on a target's vehicle [by law enforcement], and … use of that device to monitor the vehicle's movements, constitutes a 'search' within the meaning of the Fourth Amendment" – and therefore requires a search warrant. As the Court in *Stephens* noted, prior to *Jones* "it was not uncommon for law enforcement officers in Maryland [and elsewhere] to attach tracking devices to vehicles without a warrant," based, in part, on the Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 285 (1983) (placing "beeper" in container, which was filled with substance law enforcement suspected was being used to manufacture drugs and later placed in defendant's vehicle "was not a search under the Fourth Amendment"). *Id.* at 331.

Based on *Jones*, the Defendant moved to suppress evidence of the firearm. Although District Judge James K. Bredar agreed with the Defendant that the warrantless installation of the GPS was a violation of the Fourth Amendment following *Jones*, because the officer had reasonably relied on pre-*Jones* precedent and practice in installing the device he concluded that the good faith exception applied and denied the suppression motion accordingly.

In an opinion written by Judge Shedd and joined by Senior Judge Hamilton, a divided Fourth Circuit panel affirmed. The majority began by noting that "the good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances," *Id.* at 336, *quoting Herring v. United States*, 555 U.S. 135, 145 (2009), and that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id., quoting Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011). And from these two well established legal principles the majority moved with relative ease to its conclusion that "[the officer's] use of the GPS was objectively reasonable because of the binding appellate precedent of Knotts." *Id.* at 337.

Judge Thacker wrote a strenuous, 20-page dissenting opinion, concluding to the contrary that "the exclusionary rule is well-tailored to hold accountable the law enforcement officers in this case who relied on non-binding, non-precedential authority regarding emerging technology – without first bothering to seek legal guidance – in order to conduct a warrantless search which spanned a period of nearly two months." *Id.* at 339 (Thacker, J., dissenting). More specifically, Judge Thacker reasoned that prior opinions involving "beepers" were not "binding precedent" governing the use of GPS devices; that in the Supreme Court's prior decisions "the beepers in question had initially been placed in containers with the consent of the then-owner, and the containers later came into the defendant's possession"; and therefore, that "no … binding authority existed in this circuit at the time of the warrantless search in this case…." *Id.* at 345 (Thacker, J., dissenting).

For discussion of these and related issues, *see* **Handbook** § 29 (Electronic tracking devices); *and*§ 21 (Good faith exception).

Miranda warnings.

The Fourth Circuit decided two appeals turning on *Miranda* issues on the same date (October 29, 2013), deciding one in favor of the Government and the other in favor of the Defendant.

In *United States v. Johnson*, 734 F.3d 270, 272 (4th Cir. 2013), police patrolling a high crime area in Baltimore observed a vehicle with "a bent and illegible temporary registration tag." The car was stopped and two small bags of marijuana were found (in the Defendant's mouth), resulting in his arrest.

On the way to jail, and before he had been given *Miranda* warnings, the Defendant said, "I can help you out, I don't want to go back to jail, I've got information for you." One of the officers asked "What do you mean?" and the Defendant replied, "I can get you a gun." *Id.* at 273. At that point the Defendant was advised of his *Miranda* rights and was told not to say anything more until they reached the station. Upon arrival at the station the Defendant was advised again of his *Miranda* rights, which he waived in writing and proceeded to tell the officers that *he* had a gun in his home. The officers then drove the Defendant to his home where he led them to a gun in his bedroom closet.

After the Defendant was charged with being an Armed Career Criminal he moved to suppress his statements, citing an alleged *Miranda* violation. District Judge Catherine C. Blake denied the motion, and the Fourth Circuit affirmed.

In an opinion written by Judge Duncan and joined by Judges Wilkinson and Agee the Fourth Circuit first found that the vehicle stop was proper, rejecting the Defendant's dual argument that the testimony did not establish that the registration tag was, in fact, bent and, even if it did, that the stop was unreasonable because it was pretextual. On the first point the Court described Judge Blake's factual finding as "a paradigmatic credibility determination," and the Defendant's conflicting testimony as "nothing more than a competing version of the facts." *Id.* at 274-75.

On the Defendant's second argument – that the stop was unreasonable because it was pretextual – the panel found the fact that the police "did not seize the tag, photograph it, or issue a citation," outweighed by the fact that the officers detected the odor of marijuana emanating from the Defendant's vehicle "almost immediately" after he was stopped. *Id.* at 274. The Court also noted that "when officers observe a traffic violation, regardless of their true, subjective motives for stopping [a] vehicle," the stop is deemed reasonable and otherwise proper. *Id.* at 275, *citing Whren v. United States*, 517 U.S. 806, 810-13 (1996); *United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir. 2011); *and United States v. Branch*, 537 F.3d 328, 337 (4 th Cir. 2008).

Once the Court determined that the vehicle stop was reasonable and otherwise proper, the question became whether the officers pre-*Miranda* question in response to the Defendant's offer of assistance ("What do you mean?") constituted "interrogation." Applying *Rhode Island v. Innis*, 446 U.S. 291, 293-302 (1980), the Fourth Circuit answered this question in the negative. In *Innis*, the Defendant had been arrested as a suspect in the armed robbery of a taxi driver, had been advised of his *Miranda* rights, and had invoked his right to counsel. Sometime after that, in route to the jail the Defendant overheard the officers talking about the risk to nearby school children if they found the sawed-off shot gun that had been used in the robbery – at which point the Defendant offered to lead the officers to the weapon. The Supreme Court ultimately held that there was no *Miranda* violation because *Miranda* only applies to the "functional equivalent" of interrogation, that is, to conduct "that the police should know [is] reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 299-301.

Similarly, the Fourth Circuit in *Johnson* concluded that responding to the Defendant's offer of assistance by asking what he meant "would not have seemed likely to elicit incriminating information…. " *Johnson*, 734 F.3d at 276. "In sum," the Court concluded:

> *Innis* teaches that when the police have no reason to expect that a question will lead a suspect to incriminate himself, that question cannot constitute an interrogation under *Miranda*. Under such circumstances they cannot be blamed for failing to anticipate a suspect's incriminating response and the threat of suppression could not plausibly deter them from eliciting it. We therefore agree with the district court that the officers did not conduct an unwarned custodial interrogation on these facts.

Id. at 277-78 (affirming conviction and 15-year Armed Career Criminal sentence).

In *United States v. Hashime*, 734 F.3d 278 (4th Cir. 2013), between 15 and 30 state and federal law enforcement officers entered the Defendant's home, with their guns drawn, to execute a search warrant. The Defendant, a 19-year-old community college student who was ultimately charged with multiple child pornography offenses, was roused from his bed, separated from his family, and taken to a storage area in the basement for what turned out to be a three-hour interrogation. The officers did not give *Miranda* warnings to the Defendant, who readily confessed, showed the officers where he stored the child pornography on his hard drive, and was otherwise cooperative, until over two hours into the interrogation.

The defendant moved to suppress his statements, which District Judge Leonie M. Brinkema denied. Judge Brinkema noted in particular that the Defendant's statements, which were recorded, "expressed no kind of hesitation, no nervousness," and concluded he "was free to leave … and believed himself free to leave." *Id.* at 281. The Defendant pled guilty to the receipt and possession charges, which carried a five year minimum term of imprisonment, but the Government nevertheless chose also to prosecute him on the production and distribution charges, which carry 15-year mandatory minimum sentences.

The key issue on appeal was whether the Defendant was "in custody" at the time of the interrogation. In an opinion written by Judge Wilkinson and joined by Judges King and Wynn, the Fourth Circuit answered this question in the affirmative, reversing the Defendant's convictions and sentences on the more serious production and distribution charges.

The Court began its analysis by noting the factors which are considered in determining whether an individual is "in custody" for *Miranda* purposes:

> When deciding whether a defendant not under formal arrest was in custody – and thus if the *Miranda* requirements apply – a court asks whether, "under the totality of the circumstances, 'a suspect's freedom of action [was] curtailed to a degree associated with formal arrest.'" *Parker*, 262 F.3d at 419 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)). This inquiry is an objective one, and asks whether "'a reasonable man in the suspect's position would have understood his situation' to be one of custody." *United States v. Colonna*, 511 F.3d 431, 435 (4th Cir. 2007) (quoting *Berkemer*, 468 U.S. at 422). In other words, the court considers whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *United States v. Jamison*, 509 F.3d 623, 628 (4th Cir. 2007) (alteration in original) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)) (internal quotation marks omitted).
>
> Facts relevant to the custodial inquiry include, but are not limited to, "the time, place and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the presence of multiple officers, the potential display of a weapon by an officer, and whether there was any physical contact between the officer and the defendant." *United States v. Day*, 591 F.3d 679, 696 (4th Cir. 2010) (quoting *United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2002)) (internal quotation marks omitted). Also pertinent are the suspect's isolation and separation from family, *see United States v. Griffin*, 7 F.3d 1512, 1519 (10th Cir. 1993), and physical restrictions, *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990).

Id. at 282-83.

The Government's argument that the Defendant was *not* in custody was based on (1) "law enforcement's conduct toward and statements to [the Defendant] prior to and during the interrogation"; and (2) "[the Defendant's tone and demeanor during the interrogation." *Id.* at 283. On the first point, the Government argued that the family, including the Defendant, was told that no one was under arrest; that the Defendant was told that he didn't have to talk to the interrogators and that he could "leave any time," was offered "multiple breaks for the bathroom and coffee," and was not handcuffed. *Id.* The Fourth Circuit characterized this argument as "fine as far as it goes, but [as] wholly

ignor[ing] the larger setting," which included being awakened at gunpoint, finding his home "occupied by a flood of armed officers who proceeded to evict him and his family and restrict their movements once let back inside," and the Defendant's "isolat[ion] from his family members, with his mother's repeated requests to see him denied." *Id.* at 283-85, *citing United States v. Hargrove*, 625 F.3d 170, 180 (4th Cir. 2010) (statements that an individual is not under arrest or is free to leave is not "talismanic or sufficient in and of [themselves] to show a lack of custody"); *and Colonna*, 511 F.3d at 433-36 (interrogation was custodial where twenty-four armed agents entered home to execute search warrant for child pornography, suspect was isolated, and family lost control over their home).

Nor did the Fourth Circuit agree with the Government's argument that "[the Defendant's] tone and demeanor during the interrogation demonstrate that it was not custodial." *Id.* at 284-85. On this point the panel conceded that the Defendant was fully cooperative, and "that the tone of the interrogation was calm and in some instances almost chatty…." *Id.* at 285. However, the Court also noted "the Supreme Court has emphasized … that the test for whether an interrogation was custodial is an objective one. '[T]he subjective views harbored by either the interrogating officers or the person being questioned are irrelevant.'" *Id.*, *quoting J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011); *accord United States v. Parker*, 262 F.3d 415, 419 (4th Cir. 2001) ("Custody determinations do not depend on the subjective views of either the interrogating law enforcement officers or the person being questioned, but depend instead [on] the objective circumstances of the interrogation"). And here, the Court concluded, the objective factors noted by the Government which "cut against custody" were "decidedly outweighed" by the previously noted objective factors indicating that the interrogation *was* custodial. *Id.* (reversing convictions and sentences).

For discussion of these and related issues, *see* **Handbook** § 41 (*Miranda* warnings); *and* § 17 (Vehicle stops/searches).

Voluntariness of statements.

In *United States v. Watson*, 703 F.3d 684 (4th Cir. 2013), the Defendant was an employee of a convenience store which law enforcement believed to be a location at which heroin was distributed. Following the arrest of several individuals near the building who were believed to be involved in drug trafficking, local law enforcement in Baltimore entered the store and detained the Defendant for three hours while a search warrant was obtained and a search was conducted. After District Judge Richard D. Bennett denied the Defendant's motion to suppress statements he made during the three hour detention (statements about a gun found in a room in which he lived above the convenience store), a jury found the Defendant guilty, after nine hours of deliberation, of being a felon in possession of a firearm and ammunition.

In an opinion written by Judge Keenan and joined by District Judge Michael F. Urbanski sitting by designation, a split panel *reversed*. Specifically, the majority held that:

> (1) [The Defendant's] three-hour detention constituted an unlawful custodial arrest in violation of his Fourth Amendment rights; (2) the taint of the unlawful custodial arrest was not purged by the two *Miranda* warnings provided during his detention or by any intervening circumstance; and (3) the erroneous admission of Watson's statement was not harmless error.

Id. at 686.

In route to so holding the majority noted and concluded that at the time he was detained "the officers did not have information linking [the Defendant or the owner of the store, who was also detained] to criminal activity of any kind," *id.* at 688; that, balancing the public interest and the Defendant's "right to personal security free from arbitrary interference by law officers," the detention in this case was "unreasonable" and therefore violated the Fourth Amendment, *id.* at 689-94, *quoting United States v. Stanfield*, 109 F.3d 976, 979 (4th Cir. 1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); that the Defendant's incriminating statements "should be suppressed as the product of his unlawful custodial arrest," notwithstanding the fact that he was given *Miranda* warnings twice during the course of his detention, *id.* at 696-98, *citing Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (vacating conviction on basis of admission of confession given following unlawful arrest); *Brown v. Illiniois*, 422 U.S. 590, 603 (1975) (incriminating statement obtained following unlawful arrest cannot be used against criminal defendant); *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) (same); *and United States v. Seidman*, 156 F.3d 542, 548-49 (4th Cir. 1998) (applying *Brown* and *Wong Sun*); and that the constitutional violation in this case was not "harmless beyond a reasonable doubt." *Id.* at 698-99, *citing Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (harmless error analysis applies to coerced or involuntary statements); *United States v. Poole*, 640 F.3d 114, 119-340 (4th Cir. 2011) (applying harmless error analysis to incriminating statements made following unlawful detention); *and United States v. Blauvelt*, 638 F.3d 281, 290 (4th Cir. 2011) (same).

Judge Niemeyer came to quite different conclusions, which he summarized in a lengthy and vigorous dissent. Essentially, Judge Niemeyer faulted the majority for "[i]gnoring the *suspicion* created by [the Defendant's] presence in a building as to which officers had probable cause to believe was the site of criminal activity"; and concluded that what he characterized as "temporary detention" of the Defendant was therefore "reasonable" under the circumstances. *Id.* at 699-707 (Niemeyer, J, dissenting).

In *United States v. Brown*, 757 F.3d 183, 190 (4th Cir. 2014), the Defendant argued "that the lawyer who represented her in the [initial] prosecution was constitutionally ineffective by failing to accompany her to the police station, where she was questioned about [then] uncharged criminal activity," and that this rendered the statements she made involuntary and therefore inadmissible. In an opinion written by Judge King and joined by Judges Wynn and Floyd, the Fourth Circuit was unpersuaded. As the Court explained:

> Brown's theory of involuntariness is not one that we are willing to embrace. Indeed, "[t]he sole concern of the Fifth Amendment … is governmental coercion." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). That is to say, "[t]he voluntariness of a waiver of the [Fifth Amendment] privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id.* Were it otherwise, we would risk imposing "a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there is no claim that governmental conduct coerced his decision." *Id.* at 165-66.

Id.

Additionally, the Court noted that it "routinely decline[s] to address on direct appeal a criminal defendant's contention that counsel has performed in an ineffective manner, unless 'the lawyer's ineffectiveness conclusively appears from the record.'" *Id.* at 191, *quoting United States v. Bernard*, 708 F.3d 583, 593 (4th Cir. 2013). "We see no reason to depart from such a settled rule," the panel concluded, "notwithstanding that Brown's suggestion of ineffective assistance does not stand alone as a Sixth Amendment assignment of error, but is instead asserted as a predicate to relief under the Fifth Amendment." *Id.* (affirming convictions and life sentence).

For discussion of these and related issues, *see* **Handbook** § 43 (Voluntariness of statements); *and* § 335 (Ineffective assistance of counsel).

Statements of co-conspirators.

In *United States v. Graham*, 711 F.3d 445 (4th Cir. 2013), the Defendant argued that District Judge William D. Quarles, Jr. erred in admitting wiretap recordings of telephone conversations of his co-defendants in a drug conspiracy. Specifically, the Defendant argued that the recorded conversations were "idle chatter" about the Defendant's unpaid debt for marijuana which had been supplied in the past – *not* statements in furtherance of the conspiracy properly admitted under Federal Rule of Evidence 801(d)(2)(E). *Id.* at 452-53.

In an opinion written by Judge Davis and joined by Chief Judge Traxler and Judge Agee, the Fourth Circuit disagreed, beginning their analysis by noting what it called "the three prongs of admissibility for conspirator statements":

> In order to admit a statement under 801(d)(2)(E), the moving party must show that (i) a conspiracy did, in fact, exist, (ii) the declarant and the defendant were members of the conspiracy, and (iii) the statement was made in the course of, and in furtherance, of the conspiracy. *See, e.g., United*

> *States v. Heater*, 63 F.3d 311, 324 (4th Cir. 1995). Idle conversation that touches on, but does not further, the purposes of the conspiracy does not constitute a statement in furtherance of a conspiracy under Rule 801(d)(2)(E). *See United States v. Urbanik*, 801 F.2d 692, 698 (4th Cir. 1986).

Id. at 453, *quoting United States v. Pratt*, 239 F.3d 640, 643 (4th Cir. 2001). The Court further noted that "[a] statement made by a co-conspirator is made 'in furtherance' of a conspiracy if it was intended to promote the conspiracy's objectives, whether or not it actually has that effect." *Id.*, *quoting United States v. Shores*, 33 F.3d 438, 443 (4th Cir. 1994), *cert denied*, 514 U.S. 1019 (1995).

The Defendant first unsuccessfully argued that Judge Quarles "erred by not making explicit findings on the existence of a conspiracy prior to admitting the statements." *Id.* To the contrary, the Court held, a trial court is not required to make findings regarding the existence of a conspiracy and the Fourth Circuit "may affirm a judgment where the record reveals that the co-conspirator's statements were plainly admissible…." *Id.*, *citing United States v. Blevins*, 960 F.3d 1252, 1256 (4th Cir. 1992).

And second, the Fourth Circuit also agreed with the Government that the objective of the telephone conversations regarding the Defendant's drug debt was "to salvage the relationship with their … supplier," and that there was no evidence that the Defendant had *withdrawn* from the conspiracy before the telephone conversations were recorded. *Id.* at 454-55. On the latter point, the Court made it clear that, as in establishing withdrawal from a conspiracy generally, the Defendant had the burden to establish affirmative acts of withdrawal to preclude admission of co-conspirator statements in further of the conspiracy under Rule 801. *Id.* at 454.

For discussion of these and related issues, *see* **Handbook** § 46 (Statements of co-conspirators); *and* § 171 (Conspiracy).

Prior statement of a nontestifying witness.

In *United States v. Jackson*, 706 F.3d 264 (4th Cir. 2013), the Defendant was convicted of murder and various drug and firearms offenses. At trial the Defendant opposed admission of statements by the murder victim under the "forfeiture-by-wrongdoing" exception to the Confrontation Clause. The Defendant essentially argued that the forfeiture-by-wrongdoing exception "does not apply unless a criminal defendant's *sole* motivation in making a witness unavailable was to prevent that witness's testimony," and that in this case there were "additional reasons for killing [the victim], to wit, preventing [him] from harming [the Defendant's competing] drug operation and exacting revenge on [the victim] for robbing [one of the Defendant's associates in the drug business]." *Id.* at 265 (emphasis in original).

Senior District Judge Norman K. Moon disagreed, concluding that while "[the Defendant's] desire to prevent [the victim] from testifying" may not have been the *sole* motivation for the murder, it was at least a "precipitating" and "substantial" motivation, which was sufficient for admission of the statements under the forfeiture-by-wrongdoing exception. *Id.* at 267. In an opinion written by Judge Wilkinson and joined by Judges Agee and Keenan, the Fourth Circuit affirmed.

The Fourth Circuit began by noting that it f[ound] no support in controlling precedent for [the Defendant's] restrictive view of the forfeiture-by-wrongdoing exception…." *Id.* To the contrary, the Court pointed to the "broad understanding of the forfeiture-by-wrongdoing exception" it articulated last year in *United States v. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012) (statements of murder victim admissible against defendant following his murder *by co-conspirators*), and ultimately concluded that "[Judge Moon's] finding was sufficient to permit the admission of [the murder victim's] statement" in this case. *Id.* at 269-70, *citing* authority in other circuits and in several state courts.

In *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), the Defendant objected to admission of recorded prison telephone calls he made to his cousin Otis, one of which was a three-way call that included the Defendant's Uncle Austin. Specifically, the Defendant argued that admission of the recorded calls, which included statements by his nontestifying cousin and uncle, violated his rights under the Confrontation Clause of the Sixth Amendment. In an opinion written by Judge Diaz and joined by Judges King and Floyd, the Fourth Circuit squarely disagreed.

The Sixth Amendment does, in fact, prohibit the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant has had a prior opportunity for cross-examination." *Id.* at 855, *quoting Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). However, as the Court explained:

> While the Supreme Court has postponed "any effort to spell out a comprehensive definition of 'testimonial,'" *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (internal quotations omitted), it has limited the Confrontation Clause's reach to those statements "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Crawford*, 541 U.S. at 52. We have paraphrased this standard to mean that statements are testimonial when "a reasonable person in the declarant's position would have expected his statements to be used at trial – that is, whether the declarant would have expected or intended to 'bear witness' against another in a later proceeding." *United States v. Udeozor*, 515 F.3d 260, 268 (4th Cir. 2008).

Id. at 856; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements made during 911 emergency phone call were nontestimonial when made only to "enable police assistance to meet an ongoing emergency").

Applying these general principles to the facts in this case, the Court concluded that:

> Otis and Austin certainly did not speak on these phone calls for that reason. Nowhere in these casual conversations, which primarily concerned Otis's emotional state and the prison conditions at CCC, do either Otis or Austin demonstrate an intent to 'bear witness' against Jones. In fact, any incriminating statement made during these conversations tended to also incriminate them in the fraudulent scheme.
>
> Because we are satisfied that the statements made by Otis and Austin on the prison telephone calls were not testimonial, their admission did not violate the Confrontation Clause.

Id.

In *United States v. Dargan*, 738 F.3d 643 (4th Cir. 2013), a co-defendant – Harvey, who was tried separately – told his cellmate that he and two other individuals had committed the Hobbes Act robbery with which he was charged. In an opinion written by Judge Wilkinson and joined by Judges Agee and Keenan, the Fourth Circuit affirmed admission of the cellmate's testimony pursuant to Federal Rule of Evidence 804(b)(3) *and* rejected the Defendant's Confrontation Clause and *Bruton* challenges.

The Court began by noting that for the testimony to be admissible under Rule 804(b)(3) the Government must show: (1) the declarant (here the co-defendant) was unavailable to testify; (2) the statements of the declarant were inculpatory; and (3) the statements were "supported by corroborating circumstances that clearly indicate [their] trustworthiness." *Id.* at 649, *citing Williamson v. United States*, 512 U.S. 594, 598-99 (1994). As applied here, the Fourth Circuit concluded that the co-defendant, having invoked his Fifth Amendment privilege against self-incrimination, was "unavailable" within the meaning of the Rule; that the co-defendant's admission of his role in the charged robbery was inculpatory, and that sufficient "corroborating circumstances" had been established. *Id.* at 649-50. Regarding the corroborating circumstances, the Court noted that the declarant "remained exposed to the full range of penal consequences attached to his illicit conduct" and that his statements were "confirmed by a wealth of independent evidence … including [a] series of [incriminating] text messages" sent immediately prior to the robbery. *Id.* at 650.

Regarding the Defendant's Confrontation Clause challenge, the Fourth Circuit first noted that to be protected by the Confrontation Clause a statement must be "testimonial" in nature. *Id., citing Crawford v. Washington*, 541 U.S. at 53-54; *and United States v. Udeozar*, 515 F.3d 260, 268 (4th Cir, 2008). Determining that Harvey's statements to his cellmate were "plainly nontestimonial," the Court quickly concluded that the Confrontation Clause was "inapplicable." *Id.* at 650-51, *citing Davis v. Washington*, 547 U.S. at 825; *and United States v. Jones*, 716 F.3d 851, 856 (4th Cir. 2013).

Finally, the Fourth Circuit rejected the Defendant's *Bruton* argument in even more summary fashion. First, the Court noted that, unlike the declarant in *Bruton*, Harvey and the Defendant "were not tried jointly"; and second, that "Bruton is simply irrelevant in the context of nontestimonial statements." *Id.* at 651 (affirming convictions and 135-month sentence).

For further discussion of related issues, *see* **Handbook** § 48 (Prior statement of nontestifying witness); *and* § 47 (*Bruton* rule).

Wiretaps.

In *United States v. Galloway*, 749 F.3d 238, 242 (4th Cir. 2014), the Defendant argued that the affidavits submitted in support of wiretaps failed to include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. § 2518(1)(c). The Defendant essentially contended that the information in the affidavits was no more than "bare conclusory statements and boilerplate recitations that would more or less apply to any drug-trafficking investigation." *Id.* at 242.

In an opinion written by Judge Niemeyer and joined by Chief Judge Traxler and Judge Duncan, the Fourth Circuit disagreed with the Defendant's characterization of the facts, reasoning to the contrary:

> Those affidavits detailed at length the steps that police had taken … in investigating the Baltimore portion of an international drug conspiracy, and they contained fairly extensive discussions of why the affiants believed the wiretaps were necessary, addressing at least ten alternative investigatory procedures. They explained that the police had already used several of those techniques – for example, conducting physical surveillance, analyzing telephone toll records, and affixing GPS devices – but that those methods had failed to reveal the full scope of the organization, showing instead "that members of this organization [were] extremely cautious in their movements and activities." The affidavits further explained why the officers believed that other investigatory techniques were unlikely to achieve the investigation's objectives, taking the position that certain methods (e.g., attempting to develop a confidential informant, subpoenaing witnesses to appear before a grand jury, and executing search warrants) were likely to reveal the existence of the ongoing investigation to Galloway and his associates, while other methods (e.g., trash searches and pole cameras) were not practical under the circumstances.

Id. at 243. Acknowledging that "bare conclusory statements that normal techniques would be unproductive or mere boilerplate recitation of the difficulties of gathering usable evidence" is an insufficient factual foundation for authorization of a wiretap, the Court found the information in the affidavits in this case to be sufficient. *Id., quoting United*

States v. Smith, 31 F.3d 1294, 1297-98 (4th Cir. 1994) (noting that the government's burden "is not great," requiring "only…specific factual information sufficient to establish that it has encountered difficulties in penetrating [the] criminal enterprise or in gathering evidence" such that "wiretapping becomes reasonable" despite "the statutory preference for less intrusive techniques").

For discussion of these and related issues, *see* **Handbook** § 53 (Wiretaps).

Right to counsel.

In *United States v. Holness*, 706 F.3d 579 (4th Cir. 2013), the Defendant was initially charged in state court with murdering his wife. While the state charges were pending, and after a public defender had been appointed to represent him, the state prosecutor received a letter from an individual in the same cellblock who advised that he had "come across some unique information regarding [the Defendant]." *Id.* at 585. In response, a Deputy Sheriff, Sergeant Hall, was sent to meet with the informant, Stephen McGrath. Sergeant Hall advised McGrath "to reinitiate contact if [the Defendant] volunteered additional information, but cautioned him to not ask any direct questions." *Id.* at 586.

Not long thereafter, the Defendant:

> asked McGrath to help him write a letter, which [the Defendant] planned to have delivered to the *Washington Post* and other area newspapers. The letter, with the anonymous (yet, remorseful) carjacker as its purported author, was designed to divert suspicion from [the Defendant] by suggesting that the real culprit in Dunkley's murder was yet at large. McGrath forwarded news of the plan to Sergeant Hall, who, on September 15, 2009, provided McGrath with a recording device, which McGrath kept hidden in his pillow.
>
> At first, [the Defendant] dictated the contents of the letter for McGrath to transcribe, but [the Defendant] became dissatisfied with the effort. Thereafter, [the Defendant] himself composed, then destroyed, a second draft of the letter, of which McGrath was able to retain one page and recite the remainder into the recorder. At a meeting on October 6, 2009, McGrath provided Sergeant Hall with the letter fragment and the recorder. Hall used the information to obtain a search warrant for the cell, which was executed on October, 6, 2009. Among the items recovered was the intact initial draft of the letter in McGrath's handwriting.

Id. at 586. After the Defendant discovered, through his attorney, that McGrath was informing against him, evidence he wrote on the wall of his cell "'Stephen Scott McGrath, rat snitch,' together with McGrath's home address and phone number." *Id.* at 587.

Some time after that the United States Attorney's Office agreed to prosecute the case, the Defendant was indicted federally, and the state charges were dismissed. Thereafter, the Defendant was convicted, in a jury trial, of interstate domestic violence (resulting in death) and of attempted witness intimidation. The Defendant received a life sentence on the former and a 240-month concurrent sentence on the latter. *Id.* at 587-88

The Defendant moved to suppress McGrath's testimony, arguing that McGrath became an "agent of the police" following his meeting with Sergeant Hall. In route to deciding that the Defendant's Sixth Amendment rights had *not* been violated, and that any violation of the Fifth Amendment was harmless beyond a reasonable doubt, the Court began by addressing the seminal Supreme Court and Fourth Circuit authority governing the right to counsel in related contexts. In an opinion written by Judge King and joined by Judges Keenan and Thacker the Fourth Circuit noted that the Defendant's argument:

> finds its genesis in *Massiah v. United States*, 377 U.S. 201 (1964), in which the Supreme Court held that the defendant "was denied the basic protections" of his Sixth Amendment right to counsel by the admission of uncounseled post-indictment statements obtained from a listening device supplied by the police to a cooperating codefendant. *Id.* at 206. These statements were the product of active interrogation, according to the Court, in that they had been "deliberately elicited" by the government. *Id.*
>
> Some years later, we found occasion to apply *Massiah* in the prison environment. In *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978), the government enlisted an inmate informant to engage the defendant, who proceeded to make incriminating statements concerning his participation in an armed robbery for which he was awaiting trial. When trial arrived, the government relied on the statements to secure a guilty verdict against the defendant. We set aside the conviction, determining that the government's actions in obtaining the statements breached the defendant's Sixth Amendment right to counsel, as set forth in *Massiah*. *See* 590 F.2d at 546-47. The Supreme Court accepted certiorari and affirmed. *See United States v. Henry*, 447 U.S. 264 (1980).
>
> In confirming that *Massiah* controlled, the Supreme Court eschewed the notion that the government had not deliberately elicited the statements at issue merely because it had cautioned the informant "not to question Henry about the robbery." *Henry*, 447 U.S. at 270. The Court instead considered it more significant that the informant was facilitating the government's agenda and being compensated therefore, that the resultant agency relationship had not been disclosed to the defendant, and that the defendant was susceptible to the pressures of confinement while under indictment. *See id*. at 270-74.

Id. at 588-89.

Applying *Massiah* and *Henry* to the facts in this case, however, the Court found it "a critical distinguishing factor … that the actions alleged to have resulted in a constitutional violation were taken by *state* authorities prior to the defendant's indictment on *federal* charges." *Id.* at 589 (emphasis added), *citing McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (right to counsel secured by Sixth Amendment is "offense specific," that is, "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced"); *Texas v. Cobb*, 532 U.S. 162, 174 (2001) (questioning by law enforcement of defendant who was represented on burglary charge about uncharged murders did not violate Sixth Amendment); *and United States v. Alvarado*, 440 F.3d 191, 196-98 (4th Cir. 2006) (because "federal and state crimes are not the same offense, no matter how identical the conduct they proscribe," questioning of represented defendant charged with *state* drug offenses by federal agents regarding drug trafficking in violation of *federal* law did not violate Sixth Amendment). Applying this authority, and rejecting the Defendant's attempt to distinguish it, the Fourth Circuit proceeded to affirm Senior District Judge William M. Nickerson's "inevitable conclusion" that "the Sixth Amendment right [to counsel] 'simply did not attach' to the federal charges." *Id.* at 591.

Rather than ending its opinion there the Court proceeded to do something it rarely does – addressing an issue that had not been raised by the Defendant. Specifically, the Court addressed whether the Defendant's Fifth Amendment privilege against self incrimination or his right not to be subjected to non-Mirandized custodial interrogation had been violated. Following a lengthy and ultimately inconclusive discussion of issues relevant to this determination, the Court chose to presume a Fifth Amendment violation had occurred but "nevertheless conclude[d] that any Fifth Amendment error was, under the circumstances of this case, harmless beyond a reasonable doubt." *Id.* at 598 (concluding, based on the totality of the evidence, that "the jury's guilty verdict could not have been substantially swayed by the evidence that may have been admitted in violation of the Fifth Amendment").

For discussion of these and related issues, *see* **Handbook** § 64 (Right to counsel).

Right to self-representation.

In *United States v. Bernard*, 708 F.3d 583 (4th Cir. 2013), a mentally and emotionally challenged Defendant waived his right to counsel and was allowed to represent himself at trial. On appeal the Defendant – now represented by counsel – argued that under *Indiana v. Edwards*, 554 U.S. 164 (2008), the District Court was required to "conduct an additional inquiry and hold the defendant to a higher standard of competency than that required to stand trial." *Id.* at 585. Because Senior District Judge James C. Fox did not conduct this "additional inquiry," the Defendant argued, he was entitled to a new trial.

In an opinion written by Judge Thacker and joined by Judge Shedd, a divided panel affirmed. Judge Diaz wrote a lengthy and rigorous dissent.

The majority and the dissent *agreed* that the "additional inquiry" advocated by the Defendant is discretionary, that is, it is *permitted* but not *required*. As the majority applied *Edwards* and *Godinez v. Moran,* 509 U.S. 389 (1993):

> *Edwards* first explained that *Godinez* addressed only the level of competency required to waive the right to counsel when the defendant intends to enter a guilty plea and, accordingly, that a different standard may be used when the defendant asserts his right to self-representation to defend himself at trial. The Court [in *Edwards*] also emphasized that *Godinez* involved a state trial court that had *permitted* the defendant to represent himself, whereas in the case at hand, a state trial court *denied* the defendant that right.
>
> Thus, the Court [in *Edwards*] reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. On the other hand, the state may insist on counsel and deny the right of self-representation for defendants who are "competent enough to stand trial … but who still suffer from severe mental illness to the point they are not competent to conduct trial proceedings by themselves."

Id. at 589 (citations omitted).

Nor did the majority find fault with the District Court's judgment regarding the Defendant's "competence to waive counsel and represent himself" in this case. As the Court reasoned:

> The district court's satisfaction as to [the Defendant's] competence to waive counsel and represent himself was justified throughout the trial because [the Defendant] was able to make opening and closing statements, testify, and have his case reopened to conduct an examination of a law enforcement officer. The district court remained alert to [the Defendant's] behavior, and, in fact, when the court observed at the first sentencing hearing that [the Defendant's] mental functioning had become compromised, it committed [him] for evaluation and treatment and rescheduled the sentencing hearing, and heard arguments at sentencing from [the Defendant's] former standby counsel. In light of these circumstances and the record as a whole, we find no error.

Id. at 591-92. Not surprisingly, Judge Diaz had quite a different take on the Defendant's performance at trial:

> [Defense counsel's] concerns [about the Defendant's competence to waive counsel] proved prescient given [the Defendant's] performance during the trial. To put it charitably, [the Defendant] did not manage his pro se defense well. He rambled during open and closing statements, and

> offered self-inculpatory explanations for his behavior on the night of November 5, 2007. [The Defendant] cast himself as an undercover agent for the [local] police, explaining that his criminal conduct was an elaborate ploy to attract police attention to the real drug traffickers that were present in the neighborhood.

Id. at 595 (Diaz, J., dissenting).

As noted, Judge Diaz *agreed* that whether to impose a higher standard in determining competency to proceed pro se is *discretionary*, but concluded that since "the district court … was unaware of that discretion," it could not reasonably be deemed to have exercised it. "The majority … disclaims any error because *Edwards* permits a court to choose to apply the same competency standard to pro se defendants. But there can be no greater abuse of discretion than to reach a permissible result believing it to be mandatory, for that is not an act of discretion at all." *Id.* at 594 (Diaz, J., dissenting).

In the dissent's view this "abuse of discretion" by the District Court – in the form of lack of awareness that it had discretion – "resulted in an invalid *Faretta* waiver, and as a result violated [the Defendant's] Sixth Amendment right to counsel" which is "per se prejudicial … structural error." *Id.* at 598 (Diaz, J., dissenting).

In *United States v. Woods*, 710 F.3d 195 (4th Cir. 2013), the Defendant represented himself and argued on appeal that Senior District Judge James C. Fox had restricted his right to testify in his own defense.

The Defendant was charged in a thirty-four count indictment with committing tax fraud through his side business preparing income tax returns. Specifically, the Defendant was charged with preparing false and fraudulent tax returns; wire fraud; identity theft; and aggravated identity theft. The latter two charges involved the listing of individuals on tax returns as "dependents," including their birth dates and social security numbers, when in fact the taxpayers had no relationship at all with them. The individuals listed as "dependents" were actually patients of the Veterans Administration where the Defendant was employed; Government witnesses testified that he "charged [income tax return] clients a $500 premium for each false dependent included on a tax return." *Id.* at 199.

After a four-day trial the jury found the Defendant guilty of all counts, and he was ultimately sentenced to a 132-month term of imprisonment and ordered to pay the IRS $464,500 in restitution.

On appeal the Defendant argued "that he effectively was denied his constitutional right to testify in his own defense because, during his testimony, the district court repeatedly sustained the government's objections and otherwise limited his presentation of evidence." *Id.* at 200. "The majority of the government's objections rested on the ground that Woods was arguing to the jury rather than testifying about factual matters, was summarizing other witnesses' testimony, or was testifying concerning facts about which

he had no personal knowledge." As summarized by Judge Keenan in an opinion joined by Chief Judge Traxler and Judge Thacker:

> In response to these repeated objections, the district court advised [the Defendant] to "just relate the facts," and to "confine [his testimony] to the facts … about what happened." The court further explained to [the Defendant] that "we don't want to argue about … whether [a previous witness] said something or didn't say something." The court additionally informed [the Defendant] that he would have an opportunity to make arguments to the jury at a later time. At various points during [the Defendant's} testimony, the court responded to the prosecutor that [he] should be allowed some leeway in presenting his testimony.

Id. at 201.

After reviewing "the entire record," the Fourth Circuit "conclude[d] that the district court did not abuse its discretion in its evidentiary rulings, did not act arbitrarily, and did not impose limitations on [the Defendant's] testimony that were disproportionate to legitimate concerns of evidentiary reliability or trial management." *Id.* at 201-02.

In *United States v. Beckton*, 740 F.3d 303 (4th Cir. 2014), Senior District Judge W. Earl Britt appointed three lawyers to represent the Defendant, who was charged with two counts of bank robbery. "Because [the Defendant] alleged conflicts of interest and personality with the first lawyer and made crude sexual remarks to the second, the court permitted each of them to withdraw." *Id.* at 304.

A week before trial, the Defendant made an oral motion to disqualify his third court-appointed attorney, Thomas ("Tommy") Manning, a seasoned and well-respected Raleigh attorney, which Judge Britt denied. When the Court also denied his "eleventh-hour request to postpone his trial," the Defendant announced that he would represent himself. After giving the prescribed caution and recommendation against self-representation, and "[e]xplaining that [the Defendant] would be bound by the same rules of evidence and procedure as trained lawyers," Judge Britt permitted the Defendant to represent himself with Mr. Manning serving as standby counsel. *Id.* at 304-05.

On the first day of trial the Judge again advised the Defendant of the perils of representing himself, "reviewed the basics of courtroom procedure …, stress[ed] that [the Defendant] needed to follow all the rules, and warn[ed] him that outbursts or comments addressed to the jury or to the court are not permitted by the rules and would not be tolerated." *Id.* at 305 (internal quotation omitted). In an opinion written by Judge Motz and joined by Judges Keenan and Thacker, the Fourth Circuit described what happened next:

> The court's warnings went unheeded. *Beckton* repeatedly sought to present to the jury inadmissible evidence and improper arguments. Indeed, in the course of his opening statement alone, he impugned the honesty of

> the prosecutor; claimed that the State charges against him, based on the "same evidence" about to be put to the jury, had been dismissed "for a reason"; and argued – after repeatedly asserting to the district court his desire to appear pro se – that he had been denied his constitutional right to counsel.

Id.

At the close of the Government's case, the Defendant informed the Court that he wished to testify. Judge Britt advised that he was free to testify, but that "he would not be permitted to present narrative testimony. Instead, like all other witnesses, [he] would have to proceed in question-answer form so opposing counsel could object to a question before it was answered." *Id.*

The Defendant did not like that option, and proposed instead that he draft questions that his standby counsel would ask. Judge Britt rejected this plan, advising the Defendant that he could not "have it both ways" – that "[e]ither Manning would assume control of the case and question [him], or [the Defendant] would retain control and present his testimony by questioning himself." The Defendant then chose to continue to represent himself. *Id.*

Again, however, the Defendant proceeded to ignore the Court's instruction, testifying in narrative form. After the jury was excused and the Defendant and Judge Britt had a "lengthy discussion," the Defendant "reluctantly agreed" to testify by asking himself questions and only answering them if there was no objection from the Government or any objection was overruled. *Id.* at 305-06. But yet again, when the jury was brought back to the Courtroom, the Defendant "began to testify in narrative form, and adding insult to injury, "accused [Judge Britt] of favoring one party." *Id.* The jury was again removed from the Courtroom and the Defendant was given the choice at issue on appeal: he could continue to represent himself – without testifying on his own behalf – or could allow standby counsel to assume control of the case and direct his testimony. When the Defendant responded that he "definitely" did not want Mr. Manning to represent him and advised the Court that he had no other witnesses, Judge Britt closed the evidence and recalled the jury for closing arguments. *Id.* at 306.

The issue on appeal was whether the District Court abused its discretion in refusing to allow the *pro se* Defendant to testify in narrative form, which the Defendant contends "served only to make him [appear] schizophrenic [and] damaged his credibility with the jury." *Id.* The Fourth Circuit disagreed, finding to the contrary that Judge Britt's ruling was "eminently reasonable, particularly given [the Defendant's] repeated attempts during the trial to present inadmissible evidence to the jury." *Id.*

The Fourth Circuit noted the well-established principle that precludes a hybrid arrangement where a Defendant and standby counsel share responsibility for representation. *Id.* at 307, *citing United States v. Singleton*, 107 F.3d 1091, 1100 (4th Cir. 1997). *Accord Faretta v. California*, 422 U.S. 806, 835 (1975).

And finally, the Court distinguished *United States v. Midgett*, 342 F.3d 321 (4th Cir. 2003), where counsel advised the District Court during trial that he did not want to call his client to testify because he believed he intended to perjure himself, and orally moved to withdraw. In that case, instead of permitting the lawyer to withdraw, the District Court "offered *Midgett* the choice of either acceding to defense counsel's refusal to put him on the stand or representing himself without further assistance from counsel," thus forcing the Defendant "to choose between two constitutionally protected rights: the right to testify on his own behalf and the right to counsel." *Midgett*, 342 F.3d at 327. In contrast, in *Beckton:*

> the district court expressly afforded Beckton the opportunity to simultaneously exercise both constitutional rights he asserted – the right to testify and the right to represent himself. Beckton lost that opportunity only when he repeatedly defied the court's instruction to use the same question-answer procedure required of all other witnesses. Therefore, unlike Midgett, Beckton was not compelled to choose between two constitutionally protected rights.

Beckton, 740 F.3d at 308 (affirming convictions and sentence).

In *United States v. Galloway*, 749 F.3d 238, 242 (4th Cir. 2014), the *pro se* Defendant argued that District Judge Richard D. Bennett abused his discretion by not allowing him to take discovery materials he was allowed to review in a lockup area in the Courthouse, or his handwritten notes taken while he reviewed the materials, back to the federal detention facility where he was being held. The Defendant also argued that his opportunity to review discovery "was inadequate because the [lockup] did not have an electrical outlet, limiting his ability to review electronic evidence." *Id.*

In an opinion written by Judge Niemeyer and joined by Chief District Judge Traxler and Judge Duncan, the Fourth Circuit concluded that Judge Bennett "acted within [his] discretion in so controlling discovery." *Id.* Specifically, the Court noted the District Judge's explanation that there were "enormous security issues with respect to federal detention facilities," that Judge Bennett had himself presided over two trials involving the murder of witnesses, and the fact that the *pro se* Defendant had not requested a continuance to give himself more time to prepare for trial. *Id.*

For discussion of related issues, *see* **Handbook** § 65 (Right to self-representation).

Commitment for mental condition.

In *United States v. Chatmon*, 718 F.3d 369 (4th Cir. 2013), the Defendant was evaluated twice and found incompetent to stand trial on both occasions. The Government then filed a motion seeking permission to forcibly medicate the Defendant, hoping that would restore him to competency. Although Senior District Judge Claude M. Hilton "purported to apply the standard mandated in *Sell v. United States*, 539 U.S. 166, 181 (2003)," which permits forcible medication, inter alia, only if "less intrusive treatments are

unlikely to achieve substantially the same results," he "did not mention or analyze any of the less intrusive alternatives suggested by the Supreme Court in *Sell* or by [the Defendant] himself." *Id.* at 371, *quoting Sell*, 539 U.S. at 181.

In an opinion written by Judge Wilkinson and joined by Judges Motz and Shedd, the Fourth Circuit vacated Judge Hilton's order and remanded for further proceedings. In route to this result the Court noted in particular that Judge Hilton had failed to address one of the less intrusive means identified by the Supreme Court in *Sell*, namely, "a court order to the defendant backed by the contempt power." *Id.* at 373, *quoting Sell*, 539 U.S. at 181. Nor did the court discuss two less intrusive treatments proposed by [the Defendant]: group therapy and permitting [the Defendant] to remain in an open unit [where he had previously shown improvement] rather than solitary confinement." *Id.*

The Fourth Circuit emphasized in its opinion that forcible medication was a "'drastic resort' that, if allowed to become 'routine,' could threaten an elementary 'imperative of individual liberty.'" *Id., quoting United States v. White*, 620 F.3d 401, 422 (4th Cir. 2010).

On the other hand, the Fourth Circuit disagreed with the Defendant's argument that Judge Hilton also erred in determining that his drug trafficking charge was a "serious" crime, another prong of the *Sell* test. In deciding to the contrary, the Court noted that "the central consideration when determining whether a particular crime is serious enough to satisfy this factor is the 'maximum penalty authorized by the statute,'" and that the Defendant faced a maximum penalty of life imprisonment. *Id.* at 374-75, *citing United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005); and *White*, 620 F.3d at 410-11.

The Fourth Circuit also rejected the Defendant's alternative argument that his was not a "serious crime," because, under *Sell*, to constitute a "serious crime," the offense must be against "persons" or "property." *Id.* at 375. On this point the Court simply observed that "that is not the law," and that this argument was "expressly rejected in *Evans*." *Id., citing Evans*, 404 F.3d at 237 n.6.

For discussion of these and related issues, *see* **Handbook** § 67 (commitment for mental conditions).

Double jeopardy.

In *United States v. Ford*, 703 F.3d 708 (4th Cir. 2013), the narrow question was whether the Double Jeopardy Clause barred retrial where reversal is based on a post-trial change in the law. In an opinion written by District Judge Catherine C. Eagles sitting by designation and joined by Chief Judge Traxler and Judge Diaz, the Fourth Circuit answered this question in the negative.

Briefly, the Defendant in *Ford* was charged with being a felon in possession of a firearm, and the only felony conviction the Government offered into evidence at the first

trial was a 2003 North Carolina conviction for which the Defendant faced an 8-10 month sentence. Under the law as it existed at that time, as articulated in *United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005), because a defendant with a worse criminal record (than Ford's) could have received a sentence in excess of 12 months, the Defendant's 2003 conviction was deemed to be a "felony." However, while "*Ford I*" was on appeal, the Fourth Circuit decided *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), which expressly overruled *Harp*, holding that it was the maximum sentence the Defendant himself faced – not a hypothetical Defendant with a worse criminal record – which determined whether a prior conviction was a felony.

In determining that the Double Jeopardy Clause did *not* bar retrial in *Ford*, the Court distinguished cases in which the prosecution fails in the first trial to produce sufficient evidence (where retrial is prohibited) from convictions which are reversed because of an error in the initial trial or a post-trial change in law (where retrial is permitted). *Ford*, 703 F.3d at 710-11, *citing Burks v. United States*, 437 U.S. 1, 11 (1978) (Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"); *Lockhart v. Nelson*, 488 U.S. 33, 38-40 (1988) (Double Jeopardy Clause "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside … because of some error in the proceeding leading to the conviction"); *and United States v. Ellyson*, 326 F.3d 522, 533-34 (4th Cir. 2003) (Double Jeopardy Clause does not prevent retrial where reversal was based on post-trial change in the law, in this case the Supreme Court's narrowing of what could constitutionally be prosecuted as "child pornography").

For discussion of related issues, *see* **Handbook** § 73 (Double Jeopardy).

Joinder and severance.

In *United States v. Min*, 704 F.3d 314 (4th Cir. 2013), six Defendants were charged with conspiracy to commit a robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Only one of the six defendants (Min) gave a statement to law enforcement, which was edited to make the identity of co-conspirators ambiguous. The first issue on appeal was whether District Judge Liam O'Grady "erred in denying the five non-confessing defendants' motions to sever [or by] admitting the redacted confession of their non-testifying codefendant, Min [who, in spite of his confession, went to trial], in the resulting joint trial." *Id.* at 319.

The issues on appeal called on the Fourth Circuit to consider both the law governing joinder and severance and the "*Bruton* rule." In *Bruton v. United States*, 391 U.S. 123, 135-37 (1968), the Supreme Court acknowledged the prejudice to a defendant where the confession of a non-testifying codefendant implicating another defendant is admitted in a joint trial, concluding that limiting instructions were an inadequate remedy. The Supreme Court refined the *Bruton* rule in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (Confrontation Clause not implicated where codefendant's confession, accompanied by

limiting instruction, "is redacted to eliminate not only the defendant's name, but any reference to his or her existence"); *and Gray v. Maryland*, 523 U.S. 185, 195 (1998) (redacting codefendant's statement by merely substituting defendant's name "with an obvious blank, the word 'delete,' or similarly notif[ies] the jury that a name has been deleted" is inadequate, even with a limiting instruction). However, as the Fourth Circuit explained in *Min*:

> The Supreme Court has yet to face a situation in which a confession's reference to other defendants is less obvious than a blank space, such as where defendants' names are replaced with generic pronouns. However, taking our cue from hints in *Gray*, we have held admissible a codefendant's redacted statement that referred to the existence of another person through neutral phrases. *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999). In that case, each of two codefendants made an out-of-court statement implicating the other. The statements were altered by replacing the defendants' respective names with the phrases "another person" or "another individual." *Id.*

Id. at 320-21.

In an opinion written by Judge Duncan and joined by Judge Diaz and District Judge Catherine C. Eagles sitting by designation, the Fourth Circuit ultimately concluded that *Akinkoye* allowed the edited confession admitted in *Min*. The Court explained:

> Unlike in *Gray*, the obfuscation of the names of other defendants in the version of Min's confession admitted at trial was not obvious. Written in the third person and in grammatically correct phrases, the redacted confession referred generally and without facial incrimination to some number of individuals who could, or could not, be the other defendants. The statement did not implicate any one defendant in particular, nor did it leave the jury to fill in any obvious blanks. For these reasons, we conclude that the district court did not abuse its discretion by denying defendants' motions to sever, and that Min's redacted confession was properly admitted against him with a limiting instruction.

Id.

For discussion of these and related issues, *see* **Handbook** § 74 (Joinder and severance); *and* § 47 (*Bruton* rule).

Assertion of privileges before grand jury.

In *United States v. Under Seal*, 737 F.3d 330 (4th Cir. 2013), the Defendants refused to comply with grand jury subpoenas requiring production of certain foreign bank records. District Judge Leonie M. Brinkema held that the "required records doctrine"

overrode the Defendants' privilege against self incrimination, and the Fourth Circuit agreed.

In an opinion written by Judge Agee and joined by Judges King and Gregory, the Court addressed an issue of first impression in the Fourth Circuit: whether the recordkeeping, reporting, and inspection provisions in the Bank Secrecy Act ("BSA"), 31 U.S.C. §§ 5311-25, met the three requirements of the required records doctrine – and, therefore, were *not* subject to the Fifth Amendment privilege. As the Supreme Court summarized them in 1968, the three requirements, or prongs, of the required records doctrine are:

> (1) the purposes of the United States inquiry must be essentially regulatory; (2) information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and (3) the records themselves must have assumed public aspects which render them at least analogous to a public document

Id. at 334, *citing Grosso v. United States*, 390 U.S. 62, 67-68 (1968); *and United States v. Webb*, 398 F.2d 553, 556 (4th Cir. 1968) (recognizing required records doctrine in this Circuit, in context of regulation of interstate trucking).

The Defendants argued that the first requirement was not met because "the BSA's recordkeeping requirement is criminal in nature, rather than regulatory," that is, that one of its principal purposes is to prosecute "those suspected of tax fraud." *Id.* The Fourth Circuit was unpersuaded, noting "that a statute which includes a criminal law purpose in addition to civil regulatory matters does not strip the statute of its status as 'essentially regulatory.'" *Id.* at 335, *citing Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 77 (1974). And here, the Court observed, the BSA also states "[civil] tax [and] regulatory purposes," has "high usefulness in regulatory investigations or proceedings … [and in gathering] intelligence," "facilitates supervision of financial institutions," and requires the Treasury Department to share the gathered information with a variety of other governmental entities "none of which are empowered to bring criminal prosecutions." *Id.* at 335-36 (concluding that the first prong was satisfied, that is, that the BSA is "essentially regulatory).

In somewhat more summary fashion the Court also found that the BSA satisfied the second and third prongs of the required records doctrine. Regarding the latter, the Court cited *Grosso*, 390 U.S. at 68, for the proposition that "the records [sought] must have assumed 'public' aspects which render them at least analogous to public documents," and cited with approval opinions from the Ninth and Second Circuits which held that "if the government's scheme is essentially regulatory," as it is in the BSA, "then it necessarily has some public aspects sufficient to satisfy the third prong…." *Id.* at 336-37, *citing In re M.H.*, 638 F.3d 1067, 1076 (9th Cir. 2011); *and Donovan v. Mehlenbacher*, 652 F.2d 228, 231 (2d Cir. 1981).

In *Under Seal v. United States*, 755 F.3d 213 (4th Cir. 2014), Deputy Sheriffs in Hartford County, Maryland responded to a 911 domestic violence call from the

Defendant's wife, and upon arrival found and seized "approximately 40 firearms, including two assault-style rifles, a WWII pistol, a loaded semi-automatic handgun, an AK-47 assault rifle; equipment used to alter and convert firearms (i.e., torches, welding equipment, and saws); and in the basement, marijuana plants growing in five-gallon buckets and drug paraphernalia. *Id.* at 215. Domestic abuse charges were filed, but "Mrs. Doe" later dropped them.

Present in the residence when the Deputy Sheriffs arrived were the to-be Defendant, Mrs. Doe, an 18-year-old son, and two minor children. The Government subsequently opened a grand jury investigation, and subpoenaed the then 19-year-old son ("Doe Jr.") to testify "to determine the ownership of the illegal guns." *Id.* Doe Jr. filed a motion to quash the subpoena, based on a parent-child privilege, which Senior District Judge J. Frederick Motz granted.

In an opinion written by Judge Thacker and joined by Judge Wilkinson and Senior Judge Hamilton, the Fourth Circuit *reversed*.

The Court began with a discussion of evidentiary privileges generally, noting that while Federal Rule of Evidence 501 leaves open the possibility of new privileges being granted "in the light of reason and experience," the Supreme Court and other federal courts have done so very sparingly. *Id.* at 217, *citing Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (cautioning that "testimonial … privileges contravene the fundamental principle that the public has the right to every man's evidence," and therefore that "they must be strictly construed"); *and United States v. Sterling*, 724 F.3d 482, 502 (4th Cir. 2013) (noting that "the federal courts' latitude for adopting evidentiary privileges under Rule 501 remains quite narrow indeed").

The Court then observed that while "a very small handful of federal district courts have recognized the parent-child privilege," "every federal appellate court that has considered adoption of the parent-child – including our own – has rejected it." *Id.* at 219, *citing United States v. Dunford*, 148 F.3d 385, 391 (4th Cir. 1998); and authority in other circuits.

And finally, acknowledging that the Fourth Circuit has "stopped short of issuing a blanket rejection of the [parent-child] privilege," the Court squarely "conclude[d] that the district court erred in creating a parent-child privilege in this case." *Id.* at 220 (reversing and remanding).

For discussion of these and related issues, *see* **Handbook** § 82 (Assertion of privileges before the grand jury).

Motions to continue.

In *United States v. Copeland*, 707 F.3d 522, 530-31 (4th Cir. 2013), defense counsel asked for a continuance *during the sentencing hearing* after District Judge James C. Dever

III found that the Defendant faced a 10-year, rather than a 5-year, mandatory minimum, and after Judge Dever mentioned a recent Supreme Court opinion with which defense counsel was unfamiliar. Applying *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) ("unreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" constitutes abuse of discretion), *United States v. Midgett*, 488 F.3d 288, 297 (4th Cir. 2007) (denial of motion to continue not an abuse of discretion in this case), and *United States v. Williams*, 445 F.3d 724, 739 (4th Cir. 2006) (must show specific prejudice for denial of continuance to constitute reversible error), the Fourth Circuit found no abuse of discretion in Judge Dever's denial of counsel's motion to continue in this case.

In an opinion written by Judge Duncan and joined by Judges Motz and Wynn, the Court explained:

> Assessed under this deferential standard, it was not an abuse of discretion for the district court to deny [the Defendant's] motion for a continuance, either because "he wasn't prepared for the 10 to life" sentencing range, or because counsel was unfamiliar with a Supreme Court decision. As to the former, the district court explained that the written plea agreement specified the enhanced statutory range and the United States filed a § 851 statement of its intent to seek the enhanced range. The district court further explained the enhanced penalty to [the Defendant] at the plea hearing. [The Defendant] therefore had ample notice of the potential sentence. Nor did the district court abuse its discretion in not allowing a continuance so that [the Defendant] could familiarize himself with a recent Supreme Court opinion with no demonstrable effect on his case. In light of the fact that [the Defendant's] June 9, 2011 sentencing had been scheduled for over three months, the district court's denial of additional time for preparation was neither unreasoning nor arbitrary. *See United States v. Hedgepeth*, 418 F.3d 411, 424 (4th Cir. 2005) (considering amount of time defense counsel had had to prepare for sentencing in finding that the district court's denial of continuance of sentencing hearing was not an abuse of discretion).

Id. at 531 (affirming 216-month sentence followed by eight-year term of supervised release).

For discussion of these and related issues, *see* **Handbook** § 86 (Motions to continue).

Motions to withdraw guilty plea/ Waiver of appeal.

In *United States v. Fisher*, 711 F.3d 460 (4th Cir. 2013), a warrant authorized search of the Defendant's house and vehicle. The search warrant was supported by an affidavit prepared by Mark Lunsford, a DEA Task Force Officer in Baltimore. Lunsford's sworn affidavit

> averred that he targeted Defendant after a confidential informant told him that Defendant distributed narcotics from his residence and vehicle and had a handgun in his residence. Lunsford described the confidential informant as a "reliable" informant who had previously provided him with information that led to numerous arrests for narcotics violations. Lunsford further averred that the confidential informant provided him with a physical description of Defendant, Defendant's residential address, the make and model of Defendant's vehicle, and his license plate number. Based on the information provided by the confidential informant, Lunsford obtained a photograph of Defendant. Lunsford showed the photograph to the confidential informant, who then confirmed Defendant's identity. Lunsford declared that he subsequently conducted surveillance and saw Defendant make narcotics transactions from his car, after which Defendant returned to his residence.

Id. at 462-63 (internal citation omitted). Execution of the warrant led to the discovery of a firearm, and ultimately to the Defendant's guilty plea to being a felon in possession of a firearm. Following his guilty plea, Senior District Judge J. Frederick Motz sentenced the Defendant to ten years in prison.

Over a year after the Defendant pled guilty, Lunsford was charged with "various fraud and theft offenses related to his duties as a DEA officer, including falsely attributing information to a confidential informant with whom he was splitting reward money." *Id.* at 463. In a debriefing following his guilty plea, Lunsford "admitted … that the confidential informant he identified in his affidavit 'had no connection to the case' and that another individual was 'the real informant.'" *Id.*

After Lunsford entered his guilty plea and statement the Defendant filed a 2255 motion seeking to vacate his guilty plea and sentence. Although Senior District Judge J. Frederick Motz assumed that the Defendant would have filed a motion to suppress had he known of Lunsford's criminal misconduct, including the false statements in the affidavit in the Defendant's case, and opined that "the motion may well have been successful," he nevertheless denied the motion to vacate. *Id.* at 463-64.

In an opinion written by Judge Wynn and joined by Judge Floyd, a divided panel *reversed*. Essentially, the majority found that Lunsford's false statements rendered his plea "involuntary" under *Brady v. United States,* 397 U.S. 742 (1970). In route to that conclusion the majority found that Lunsford's misconduct "str[uck] at the integrity of the prosecution as a whole," *id.* at 466; that the Defendant had shown that there was " a reasonable probability … he would not have pled guilty, had he known about Lunsford's criminal misconduct," *id.* at 469; that the Defendant's "due process rights" had been violated, *id.*; and that vacating the Defendant's plea and sentence furthered "the important interest of deterring police misconduct." *Id.*

Judge Agee dissented in an opinion almost as long as the majority opinion. Judge Agee noted the familiar proposition that "[w]hen a defendant pleads guilty, he waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea," *id.* at 470 (Agee, J., dissenting); pointed out that the Defendant did not contend that he was actually innocent, *id.* at 477 (Agee, J., dissenting); and ultimately concluded that "Lunsford's criminal act does not instantly transform [the Defendant's] guilty plea into some form of due process violation that permits him to now withdraw that plea." *Id.* at 478 (Agee, J., dissenting).

In *United States v. Weon*, 722 F.3d 583 (4th Cir. 2013), the Defendant entered a Plea Agreement in which he agreed to plead guilty to multiple counts of tax evasion, and in which he stipulated to tax losses of approximately $2.4 million. After the Rule 11 hearing but prior to sentencing the Defendant advised the prosecutor that he had determined in the interim that the tax losses were "around $40,000" rather than the much higher amount to which he had stipulated in the Plea Agreement.

At sentencing a short time later Senior District Judge Benson Everett Legg held that the Defendant was bound by the stipulation in the Plea Agreement. Judge Legg also subsequently denied the Defendant's motion to withdraw his guilty plea.

In an opinion written by Judge Keenan and joined by Judges Floyd and Hudson the Fourth Circuit first considered whether the waiver of appeal provision in the Plea Agreement should be enforced, precluding the appeal altogether. The Court answered this question in the negative, reasoning that the Defendant had reserved his right to appeal any sentence above the "advisory guidelines range of 19," and because Judge Legg initially found that the offense level 20 applied (although the actual sentence was at the low end of offense level 19) that the Defendant "ha[d] a colorable argument that the [waiver] provision [was] ambiguous as to him." *Id.* at 588 (declining to enforce appellate waiver).

Proceeding to the merits of the Defendant's arguments, however, the Fourth Circuit agreed with the Government that Judge Legg had *not* erred in declining to consider – in applying the § 3553(a) factors – whether the tax loss was less than the amount to which the Defendant had stipulated in his Plea Agreement. *Id.* at 588-90, *citing United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (neither party to plea agreement permitted "unilaterally to renege or seek modification simply because of uninduced mistake or change of mind"); *and United States v. Granik*, 386 F.3d 404, 411-13 (2d Cir. 2004) (rejecting defendant's argument that loss amount was less than he had previously stipulated, observing that "a stipulation as to amount of loss in a plea agreement that is knowing and voluntary will generally govern the resolution of that issue").

For discussion of related issues, *see* **Handbook** § 90 (Motions to withdraw guilty plea); § 88 (Guilty pleas/Rule 11 proceedings); § 323 (Waiver of appeal); *and* § 340 (28 U.S.C. § 2255 proceedings).

Right to speedy trial.

In *United States v. Cherry*, 720 F.3d 161 (4th Cir. 2013), the Defendant was indicted more than 30 days after his arrest, which is a violation of the Speedy Trial Act, but did not file a motion to dismiss the indictment in the District Court. Rather, the Defendant argued on appeal that no motion was necessary and, in essence, that Senior District Judge Robert G. Doumar should have dismissed the indictment *sua sponte*.

There are two rights granted in 18 U.S.C. § 3161 – the right to a "speedy indictment" (within thirty days of arrest), and the right to a speedy trial (within seventy non-excluded days of indictment). Because the provision that failure of a defendant to move for dismissal constitutes "waiver of the right to be dismissed" is in the paragraph pertaining to the right to a *speedy trial*, the Defendant argued that it did not apply to the right to a *speedy indictment*. *Id.* at 165.

In an opinion written by Judge Duncan and joined by Judges Wilkinson and Wynn, the Fourth Circuit characterized the Defendant's argument as "creative," but nevertheless contrary to "the plain language of the statute." Specifically, deciding an issue of first impression in the Fourth Circuit, the Court held that "[t]he waiver clause applies to 'this section' – i.e., Section 3162, which governs both the speedy trial right and the speedy indictment right." *Id.* at 165-66 (emphasis in original).

In *United States v. Keita*, 742 F.3d 184 (4th Cir. 2014), the Defendant, who was arrested January 31, 2012 but was not indicted until April 9, 2012, contended that the delay violated the Speedy Trial Act, specifically 18 U.S.C. § 3162(a)(1) (requiring indictment within 30 *non-excludable* days after arrest).

In an opinion written by Judge Wynn and joined by Judge Niemeyer and District Judge Louise W. Flanagan sitting by designation the Fourth Circuit disagreed, concluding to the contrary that properly excluded periods between arrest and indictment reduced the number of days to less than thirty. First, the Court found that the days in which the Government and Defendant were engaged in plea bargaining were excludable. *Id.* at 188, *citing United States v. Leftenant*, 341 F.3d 338, 344-45 (4th Cir. 2003). And second, the Court found that the two extensions granted by District Judge Alexander Williams, Jr. to allow plea negotiations and an on-going grand jury investigation – and upon finding that that "the ends of justice served by [the extensions] … outweigh[ed] the best interest of the public and the defendant in a speedy trial" – were also excludable. *Id., citing Zedner v. United States*, 547 U.S. 489, 498-99 (2006) (discussing "ends-of-justice" extensions under Speedy Trial Act). As the Court reasoned:

> Applying the[se] exclusions, the speedy trial clock began on February 1 (the day after Defendant's arrest) and stopped on February 10 (when the first extension was granted). See United States v. Stoudenmire, 74 F.3d 60, 63 (4th Cir. 1996) (noting that the day of the event that triggers the speedy trial clock 'is not included in the calculation; the clock begins to run the following day'). It resumed on April 6 (when the second continuance lapsed) and stopped again on April 9 (when the indictment was

filed). Thus, a total of twelve non-excluded days elapsed, well within the Speedy Trial Act's thirty-day limit.

Id.

For discussion of related issues, *see* **Handbook** § 92 (Right to a speedy trial).

Motions to suppress generally.

In *United States v. Moore*, ___ F.3d ___, ___ (4th Cir. 2014), the Defendant was first observed by a police officer walking down a street carrying a green bottle in Takoma Park, Maryland, which the officer testified he thought might be "a bottle of Heineken beer or the like." The officer motioned to the Defendant to come to him, which the Defendant began to do before he ultimately fled.

The officer pursued and eventually apprehended the Defendant. "In the course of that pursuit, both the officer and two bystanders saw [the Defendant] run behind a dumpster and toss up a package," which was recovered and found to contain a half kilogram of cocaine. *Id.* at ___.

Two days later, officers responded to a report of an attempted break-in of an apartment. Although the Defendant had given the officer a different address two days prior, the landlord informed the officers investigating the attempted break-in that the apartment in question was, in fact, rented to the Defendant.

Based on his arrest two days earlier and the attempted break-in, the officers obtained a search warrant for the apartment. In the apartment the officers found 2.8 kilograms of phencyclidine (PCP), a digital scale which tested positive for cocaine residue, baggies, bottles, approximately $45,000 in cash, and two handguns, one of which was loaded.

Between the close of evidence and closing arguments, in a bench trial before District Judge Alexander Williams, Jr., the Defendant moved to suppress "all tangible evidence," arguing that the officer did not have the requisite "reasonable suspicion" for the initial stop – and that evidence discovered through the illegal initial stop "tainted all subsequent evidence." *Id.* at ___. Rather than addressing the merits of the motion, however, Judge Williams ruled that the Defendant's right to file a motion to suppress had been waived by not filing it before trial, and the Fourth Circuit affirmed.

In an opinion written by Judge Wilkinson and joined by Judges Gregory and Keenan, the Fourth Circuit began by citing the foundational requirement in Fed. R. Crim. P. 12 (b)(3)(C) that motions to suppress be filed before trial – noting that failure to do so constitutes "waiver" unless the District Court grants relief from the waiver "[f]or good cause" pursuant to Fed. R. Crim P. 12(e). *Id.* at ___; *accord United States v. Chavez*, 902

F.2d 259,263 (4th Cir. 1990) (interpreting former Fed. R. Crim. P. 12(f), which allowed relief from waiver "for cause shown").

The Defendant unsuccessfully argued on appeal "that good cause existed because he knew information at the end of the trial that he did not know at the beginning." *Id.* at ___, *citing United States v. Wilson*, 115 F.3d 1185, 1190-91 (4th Cir. 1997); *and United States v. Ricco*, 52 F.3d 58, 62 (4th Cir. 1995). Rejecting the Defendant's argument, The Court reasoned:

> [T]he Defendant's position would render the pretrial requirement virtually meaningless. Defendants often learn information during trial that they did not know before. If that is sufficient grounds to set aside Rule 12's pretrial requirement on "good cause," the exception swallows the rule.

Id. at ___ (affirming convictions).

For discussion of these and related issues, *see* **Handbook** § 98 (Motions to suppress generally).

Use of "drug dogs."

In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), a Detective in the Miami-Dade Police Department and a "drug dog" were on the Defendant's front porch when the dog alerted to the odor of drugs. This information was used to obtain a search warrant, which led to the discovery of a marijuana growing operation and ultimately to state criminal charges.

The trial court agreed with the Defendant that bringing the "drug dog" onto the Defendant's front porch was an unconstitutional search, and suppressed the evidence accordingly. The Florida Court of Appeal reversed, but the Florida Supreme Court agreed, reinstating the trial court's suppression ruling. The U.S. Supreme Court granted *certiorari* to determine "whether the officers' behavior was a search within the meaning of the Fourth Amendment." *Id.* at 1413.

The resolution of this issue resulted in the proverbial "strange bedfellows." Justice Scalia wrote the majority opinion in which Justices Thomas, Ginsburg, Sotomayor, and Kagan joined – all agreeing with the Florida Supreme Court that the "dog sniff" on the Defendant's porch was an unconstitutional search. Justice Kagan wrote a concurring opinion in which Justices Ginsburg and Sotomayor joined. And Justice Alito wrote a dissenting opinion in which Chief Justice Roberts, and Justices Kennedy and Breyer joined.

Justice Scalia's controversial "originalism" was in full display in the majority opinion, which he grounded in what he understood to be ancient principles of property law – the law of trespass. Thus, he cites not only more recent Supreme Court authority but also Blackstone's 1769 *Commentaries on the Laws of England*, a 1765 decision of an English

Court, and "a case undoubtedly familiar to every American statesman at the time of the Founding," namely, *Boyd v. United States*, 116 U.S. 616, 626 (1886) (internal quotations omitted). From these ancient roots Justice Scalia moves to "the habits of the country [in regard to] entry upon a close," which includes an "implicit license [which] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 1415. "But," Justice Scalia reasons, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*." *Id.* at 1416 (emphasis in original).

The concurring Justices – Justices Kagan, Ginsburg, and Sotomayor – would have grounded the opinion "on privacy as well as property grounds," that is, per the *Katz* line of cases which address where one does – or does not – have a "reasonable expectation of privacy." *Id.* at 1418-19 (Kagan, J., concurring).

Justice Alito, the Chief Justice, and Justices Kennedy and Breyer, would have none of either. In perhaps the most entertaining of the three opinions, it is here that we learn that the dog's name is "Franky," who we can only picture as friendly and loving to have his soft ears scratched. And it is in the dissent where the conservatives appear to engage their wayward fellow traveller, Justice Scalia, in a battle over whose views are *really* rooted in antiquity – amusingly, in your Editor's view – noting that "[d]ogs have been domesticated for about 12,000 years; were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and [that] their acute sense of smell has been used in law enforcement for centuries." *Id*. at 1420. (Alito, J., dissenting). And in a final touché of the sort for which Justice Scalia is well known , the dissent cites "a Scottish law from 1318 that made it a crime 'to disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors," then "reasons":

> If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.
>
> For these reasons, the real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," *ante*, at 4, its trespass rule is really *a newly struck counterfeit*.

Id. at 1424 (Alito, J., dissenting) (emphasis added).

For discussion of related issues, *see* **Handbook** § 104 (Use of "drug dogs").

Drug conspiracies.

In *United States v. Allen*, 716 F.3d 98 (4th Cir. 2013), the Defendant argued that the evidence merely proved that he sold cocaine base on two occasions to an individual

who then distributed it to street level dealers to sell in small amounts. The Defendant argued that this evidence only proved two "simple buy-sell transactions," not that he knowingly became part of a larger conspiracy. *Id.* at 102. In an opinion written by Judge Gregory and joined by Judges King and Keenan, the Fourth Circuit disagreed, affirming the Defendant's conspiracy conviction.

The Court began its analysis by noting several general principles of law pertaining to proof of a conspiracy charge. First, the Court noted the elements of conspiracy, specifically, that "the government must prove (1) an agreement to possess [here, crack cocaine] with intent to distribute between two or more persons; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of the conspiracy." *Id.* at 103, *citing United States v. Strickland*, 245 F.3d 368, 384-85 (4th Cir. 2001).

Second, the Court noted that "[a] conspiracy may be proved wholly by circumstantial evidence." *Id.* (internal quotation omitted), *citing United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996) (en banc). Third, the Court noted that "one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence." *Id.*, *quoting United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993). *Accord Strickland*, 245 F.3d at 385 ("Once a conspiracy has been proved, the evidence need only establish a slight connection between any given defendant and the conspiracy to support conviction"); *and United States v. Brooks*, 662 F.2d 1138, 1147 (4th Cir. 1992). And fourth, the Court noted that it "will uphold a conspiracy conviction even if the defendant's involvement is minimal." *Id.*, *citing United States v. Lewis*, 54 F.3d 1150, 1154 (4th Cir. 1995); *United States v. Mills*, 995 F.2d 480, 484 (4th Cir. 1993); *Brooks*, 957 F.2d at 1147); *and United States v. Seni*, 662 F.2d 277, 285 n.7 (4th Cir. 1991).

Applying these general principles, the Court agreed with the Government that the evidence was sufficient to support the Defendant's conspiracy conviction. Although the Court agreed that "mere evidence of a simple buy-sell transaction" is *insufficient* to prove conspiracy, in this case the quantity of drugs (3.5 ounces, "enough to produce over 1000 crack rocks") sold "over the course of two days" was sufficient to prove that "[the Defendant knew the drug was going to be further distributed]." *Id.* at 103-04.

The Defendant also unsuccessfully argued that District Judge Martin K. Reidinger erred in denying his request to see his co-conspirators' Presentence Reports ("PSRs"), and in prohibiting "expert testimony to help explain the ramifications of his co-defendants' plea agreements with the government." *Id.* at 104. On the first point, his right to review co-conspirators' PSRs, the Defendant proffered that one of his co-conspirators had a significant lesser quantity of cocaine base attributed to him, and he argued that he was entitled to know what "sweetheart deals" the others who testified against him had been given and to use it for impeachment purposes. *Id.* at 104-05. Although the Court agreed that evidence of a "sweetheart deal" *is* relevant to a witness's credibility, the panel ultimately concluded that the Defendant's showing was insufficient to require Judge

Reidinger to conduct *in camera* review of the PSRs – the next step in determining whether disclosure was required. *Id.* at 105.

On the second issue, whether Judge Reidinger erred in excluding the expert testimony, the Court likewise agreed with the Government that no error had occurred. Specifically the Court concluded that "[e]ssentially, [the Defendant] wanted to introduce expert testimony solely for the purpose of undermining the credibility of the codefendant witnesses," and that "[e]xpert testimony of this nature is not permitted under the Federal Rules of Evidence." *Id.*

For discussion of these and related issues, *see* **Handbook** § 107 (Drug conspiracies).

Proof of controlled substance.

In *United States v. McFadden*, 753 F.3d 432, 435 (4th Cir. 2014), the Defendant was convicted of violations of the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. §§ 802(32)(A) and 813, which "Congress enacted … to prevent 'underground chemists' from creating new drugs that have similar effects on the human body as drugs explicitly prohibited under the federal drug laws." To sustain a conviction under the Act, the Government must prove that: "(1) the alleged analogue substance has a chemical structure that is substantially similar to the chemical structure of a controlled substance classified under Schedule I or Schedule II (the chemical structure element); (2) the alleged analogue substance has an actual, intended or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than such effect produced by a Schedule I or Schedule II controlled substance (the pharmacological similarity element); and (3) the analogue substance is intended for human consumption (the human consumption element)." *Id.* at 436, *citing United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003).

The substance in question in *McFadden* were "bath salts" sold through a video rental store in Charlottesville, Virginia, which the Defendant described to a cooperating co-conspirator as producing similar effects to cocaine and methamphetamine. The four day trial, which resulted in the Defendant's conviction on all nine counts, was dominated by the conflicting testimony of three expert witnesses, two for the Government and one for the Defendant.

To prove the chemical structure element the Government called a chemist employed by the DEA, who testified as an expert that two of the chemical compounds in the bath salts were substantially similar to those in methcathinone and that a third chemical compound was substantially similar to a compound found in ecstasy. Both methcathinone and ecstasy are Schedule I controlled substances. *Id.* at 437-38. To prove the pharmacological similarity element the Government called a "drug science specialist," also employed by the DEA, who testified as an expert that the chemical compounds in the bath

salts would have substantially similar effects on the central nervous system as the effects caused by the ingestion of methcathinone and ecstasy. *Id.* at 438.

The Defendant's expert witness, who was both a pharmacist and a primary care physician, was qualified as an expert on "pharmacology and the effects of medication." The defense expert criticized the methodology used by both DEA witnesses, and testified that the chemical compounds in the bath salts were not substantially similar to those in the controlled substances, and that there was insufficient scientific data to conclude that they would produce similar pharmacological effects. *Id.*

In an opinion written by Judge Keenan and joined by Chief Judge Traxler and Judge Wilkinson, the Fourth Circuit affirmed. In route to that conclusion, the Court first considered the Defendant's primary argument on appeal – that the Act was unconstitutionally vague, at least as applied to him. Noting that it had "rejected a nearly identical constitutional challenge" in *Klecker*, the Court reviewed the Government's expert evidence with approval, noted the Defendant's statements to his co-conspirator regarding the drug-like effects the bath salts produced, and rejected outright the Defendant's contention that the undefined term "human consumption" was itself unconstitutionally vague. *Id.* at 439-41. Nor did the Court find it problematic that there was no list of prohibited substances in the Act or that the lack of such a list rendered the Act "subject to arbitrary and discriminatory enforcement." *Id.* at 441. And finally, the Court found "no merit in [the Defendant's] argument that the Act is unconstitutional as applied [to him] because he "took reasonable steps to inform himself as to the legality of the chemical that he was selling,' and did not find any information [on the DEA website] indicating that his actions were illegal." *Id.*

The Court also considered the Defendant's objections to three of Chief District Judge Glen E. Conrad's rulings during the trial. Specifically, the Defendant argued that Judge Conrad erred: "(1) in permitting the testimony of Toby Sykes, an individual who purchased bath salts from [the video rental store owner]; (2) in admitting into evidence recordings of [the Defendant's] telephone conversations with [the store owner]; and (3) in declining to instruct the jury that the government was required to prove that [the Defendant] effectively knew that the substances at issue had the essential characteristics of controlled substance analogues." *Id.* at 441-42. The panel found no error in any of the three targeted rulings.

Regarding the testimony of Toby Sykes, a former methamphetamine addict who testified that the bath salts supplied by the Defendant "produced a more potent effect on his body than his use of methamphetamine," the Court concluded that the testimony was relevant to prove that some of the bath salts had been supplied by the Defendant and "for purposes of establishing the pharmacological similarity element." *Id.* at 442-43. The Court declined to engage the Defendant's specific argument regarding the telephone recordings – that they should not have been admitted because neither drug he mentioned as producing similar effects (cocaine and methamphetamine) were the drugs proven at trial (methcathinone and ecstasy) – finding it unnecessary to do so because the conversations were at least relevant to prove the "human consumption element." *Id.* at 443. And third,

the Court found no error in refusal to give the requested jury instruction because it misstated the applicable Fourth Circuit law as announced in *Klecker*. *Id.* at 443-44.

Finally, the Court considered the Defendant's argument that the evidence was insufficient to support his convictions, that is, insufficient to prove that the three chemical compounds identified in the bath salts qualified as controlled substance analogues. Viewing the evidence in the light most favorable to the Government, and noting that the credibility of witnesses – including the credibility of expert witnesses – was within the province of the jury, the Court found that the evidence *was* sufficient to prove that two of the three compounds were controlled substance analogues, and that being the case, found it unnecessary to address whether the third compound also qualified. *Id.* at 444-45 (affirming convictions).

For discussion of these and related issues, *see* **Handbook** § 110 (Proof of controlled substance); § 210 (Statutory interpretation generally); § 238 (Evidentiary rulings generally); § 252 Jury instructions generally); *and* § 232 (Expert testimony).

Expert testimony on drug distribution methods and organizations.

In *United States v. Galloway*, 749 F.3d 238, 243 (4th Cir. 2014), the Defendant contended that District Judge Richard D. Bennett abused his discretion in admitting expert and fact testimony from a DEA Special Agent and a Baltimore Detective. Specifically, the Defendant contended that the District Judge erred in three ways: (1) by allowing the Special Agent to testify as an expert "because he failed adequately to explain his methodology for identifying and translating coded language"; (2) in "fail[ing[to ensure that both [expert] witnesses reliably applied their methods and principles to the facts in this case"; and (3) in "fail[ing] to enforce safeguards to prevent the jury from being confused regarding the officers' dual roles" as both expert and fact witnesses. *Id.*

In an opinion written by Judge Niemeyer and joined by Chief Judge Traxler and Judge Duncan, the Fourth Circuit disagreed. Regarding the District Court's qualification of the DEA Special Agent as an expert, the Court noted "his fifteen years of experience during which he had participated in a number of DEA investigations that used wiretaps, personally reviewing 'thousands' of narcotics-related telephone calls," and that he "had previously been qualified as an expert in other trials with respect to the interpretation of coded-language used in narcotics-related communications." *Id.* at 244.

The Fourth Circuit opinion includes two examples of the expert testimony with which the Defendant particularly took issue. First, the Defendant complained about the Special Agent's interpretation of the following intercepted statement:

> Here's um, here's what we're gonna do, um, I, I don't want to just fly out there, like I had told you, for just, you know, couple of bucks, so, what I have to do, is, have 20 dollars here with me for these guys when they gonna

> give me the 6 credit cards…. Okay, they gonna give me the 3 of my boys and 3 of the other 3.

Id. Specifically, the Defendant objects to admission of the Special Agent's expert opinion that "20 dollars" was code for $20,000; and that "6 credit cards" and "3 of my boys and 3 of the other 3" was "coded language to refer to drugs." *Id.*

The Defendant also objected to the Detective's expert testimony that "based on the context," in his opinion "demonstration" was a code word in two conversations for drugs and in a third conversation for a gun; that a statement by the drug courier to the Defendant that "[t]he people with the contract, they probably have their own heads" meant that "the network's heroin suppliers were using their own couriers"; that "baby" and "CDs" were code words for drugs; that "food caps" and "food jars" were coded references to drug packaging materials; and that the phrase "getting ready to get the birds out" was coded language meaning that the speaker intended "to wake early and get out on the street to sell product." *Id.* at 244-45.

Because no objection was made at trial to the qualification of the expert witnesses or to their expert testimony, the Fourth Circuit conducted plain error review, finding none in either the qualification or in the testimony. Nor did the Court find error in the Special Agent and Detective being allowed to testify as both fact witnesses and expert witnesses. On this last point, the Court reasoned:

> After accepting both officers as expert witnesses, the court emphasized to the jury that while these witnesses would be permitted to give "opinions as to coded language and methods of distribution," it was still for the jury to "accept, reject, or whatever in terms of whether or not you accept that testimony or not." The court further admonished the prosecutor in the jury's presence to "be careful that we separate . . . lay testimony as a lay witness from the proffer of any expert testimony." And based on our review, the government heeded this instruction.

Id. at 245-46 (affirming convictions and 292-month sentence).

On the other hand, in *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014), the Government called an FBI Special Agent as both a fact witness and as an expert witness on coded drug-related conversations. The subject conversations were "audio recordings of wiretapped mobile telephone conversations concerning drug supplies, deliveries, and payments therefor," *id.* at 384, and, in an opinion written by Senior Judge Davis and joined by Judges Gregory and Keenan, the Fourth Circuit ultimately concluded "that the errors in the decoding expert's testimony so infected the entire trial that … the judgment [must be vacated]…." *Id.*

In route to reversal, the Court noted that the Government had called the Agent to testify on "*eighteen* separate occasions during six days [of a] two week trial," *id.* at ___ (emphasis added); and that her testimony "interpret[ed] words in nearly half the [1,928]

calls played before the jury." *Id.* at 388. Although the Fourth Circuit found no abuse of discretion in District Judge Catherine C. Blake's qualification of the Agent as a decoding expert or in accepting her explanation of her general methodology, it did find reversible error in:

> the conflation of [the Agent's] expert and fact testimony, particularly her reliance on her knowledge of the investigation to support her coding interpretations; her failure to apply her methodology reliably; and last, her failure to state on the record an adequate foundation for very many of her specific interpretations. Moreover, because [the Agent's] testimony was so extensive and most likely influential on the jury's evaluation of the Government's case against [the Defendant], we are constrained to hold that these flaws deprived Garcia of a fair trial, i.e., that these missteps were not harmless, and thus require vacatur of [the Defendant's] convictions.

Id. at 391-92.

Regarding the inadequacy of steps taken to prevent jury confusion of the fact and expert opinion testimony, the Court observed that there were "repeated instances of [the Agent] moving back and forth between expert and fact testimony, with no distinction in the Government's questioning or in [the Agent's] answers." *Id.* at 392. The Court also expressed concern that the Agent "used her personal knowledge of the investigation to form (not simply to 'confirm') her 'expert' interpretations…." *Id.* at 393. The Court also found "an equally fundamental flaw … in the lack of foundations laid for each interpretation … so much so that the record fails to demonstrate the requisite reliability in [the Agent's] of her claimed methodology." *Id.* at 395. Examples of this particular shortcoming were otherwise unexplained "interpretation" of "show time" to mean heroin, "2" to mean $200 on one occasion and $2,000 on another, "5" to mean $5,000 on one occasion and 500 grams of heroin on another, and "590" to mean 590 grams of heroin. *Id.* at 395-96.

Finally, The Fourth Circuit expressed concern over testimony in which the Agent decoded words or phrases "that needed no expert translation at all since the meaning was either apparent on its face or apparent with contextual information that any fact witness could have provided." *Id.* at 396. Examples of this class of error given by the Court were testimony that "first one" and "second one" meant two different deliveries of cocaine, that "over there" meant in Baltimore, that "stuff" meant heroin, and that "number meant the price of drugs. *Id.* (vacating convictions and remanding for further proceedings).

For discussion of related issues, *see* **Handbook** § 112 (Expert testimony on drug distribution methods and organizations).

Drug quantity.

In *United States v. Crawford*, 734 F.3d 339, 340 (4th Cir. 2013), the Defendant argued that District Judge James C. Dever III erred by relying on "multiple hearsay evidence to determine the quantity of drugs" for which he should be held accountable. In an opinion written by Judge Floyd and joined by Judges Wilkinson and Motz the Fourth Circuit disagreed, finding no error and affirming the Defendant's sentence.

The drug quantity was based on seven controlled buys and on the statements of three witnesses, two of whom summarized for a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, in telephone interviews, their purchases of crack cocaine from the Defendant over the course of a number of years. These two witnesses were drug users and paid informants who were cooperating, in part, to help themselves following their own arrests on drug charges. Information about these transactions was presented to Judge Dever at the sentencing hearing through a Deputy Sheriff who testified that he had worked with the informants in the past, that they were reliable, that the information they had provided had been corroborated, and had resulted in arrests. The Deputy Sheriff also testified regarding the information provided to the BATF&E Special Agent in the telephone interviews. *Id.* at 340-41.

The Fourth Circuit ultimately found that the information relied upon by Judge Dever to calculate the advisory Sentencing guidelines range was sufficiently reliable to pass muster. In route to this conclusion, the Fourth Circuit noted that the directive to the District Court in such situations is to "*approximate* the quantity of the controlled substance," *Id.* at 342, *citing* U.S.S.G. § 2D1.1 cmt.n.5 (emphasis added); and that "for sentencing purposes, hearsay alone can provide sufficiently reliable evidence of [drug] quantity." *Id., citing United States v. Uwaeme*, 975 f.2d 1016, 1019 (4th Cir. 1992); *and United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2011); *and United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010).

Having rejected his argument that multiple hearsay evidence is "per se unreliable," the Court also rejected three of the Defendant's more specific arguments, namely, "that the telephone is an inherently unreliable form of communication, which 'simply cannot provide the same dynamics to probe the accuracy and credibility of an informant as a face-to-face interview does." *Id.* at 343; "that [the witnesses] … are unreliable because they are drug users who cooperated with law enforcement officials to 'work off' pending felony charges." *Id., citing United States v. Benehaley*, 281 F.3d 423, 425 (4th Cir. 2002) (affirming a drug-addicted witness' estimates of drug purchases as the *sole* basis for calculating drug quantity); and that basing the sentence on what witnesses not present at sentencing told an agent "violated his Sixth Amendment right to confrontation." *Id.* at 344, *citing United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) (Confrontation Clause does not apply to sentencing hearings).

In *United States v. McGee*, 736 F.3d 263, 266 (4th Cir. 2013), police first encountered the Defendant near a Greyhound bus station in Charleston, West Virginia after they received a tip that he was "acting suspiciously." Although he told the police he was there to meet a friend and was not himself travelling, a bus ticket, albeit in another name, was later found in his pocket. Police also found $5,800, which was seized after the

Defendant stated that he had not had a job for over a year, and a cell phone which had several text messages on it that the officers believed to be drug-related. *Id.* Nevertheless, the Defendant was later released without arrest.

Police in Charleston next encountered the Defendant about two weeks later when a vehicle in which he was a passenger was stopped for a traffic violation. A consensual search of the Defendant on that occasion led to the discovery of 246 oxycodone pills, which in turn led to his indictment and conviction, and a quantity of other pills for which the Defendant was not charged.

The issue at sentencing and on appeal was whether District Judge Thomas E. Johnston erred in determining that the cash seized from the Defendant two weeks prior to his arrest were drug proceeds, and therefore converting the cash to its "drug equivalent" in calculating the relevant drug quantity. In an opinion written by Judge Davis and joined by Judges Keenan and Floyd, the Fourth Circuit found no error, reasoning:

> The police interacted with [the Defendant] twice, both times in places of interstate transportation (once a bus station, and the other on an interstate highway); once seizing a substantial amount of cash, and the other a significant quantity of drugs ready for distribution. [The Defendant] could not provide a consistent explanation for why he had that much cash on him when the police interviewed him at the bus station. This, combined with his suspicious behavior in having a ticket under someone else's name and text messages which were consistent with a drug trafficking scheme, is enough to make it more likely than not that [the Defendant] was transporting drug proceeds in the same series of actions as that was actually charged with when he was found in possession of the pills.

Id. at 272, *citing United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998). *Accord United States v. Kiulin*, 360 F.3d 456, 461-62 (4th Cir. 2004) (in addition to pills actually seized, "drug equivalent" of seized cash also properly considered based on estimated conversion rate of $20 per pill); *and United States v. Hicks*, 948 F.2d 877, 882 (4th Cir. 1995) ("drug equivalent" of $295,000 in cash properly considered in determining drug quantity for sentencing purposes).

In *United States v. Robinson*, 744 F.3d 293 (4th Cir. 2014), the PSR calculated the drug quantity based almost entirely on the statements of a single cooperating defendant, Melvin Battle, who claimed to have purchased crack cocaine from the Defendant over a six-year period. The Probation Officer credited these statements, in spite of inconsistencies noted *infra*, as did District Judge Louise W. Flanagan.

When the Defendant challenged the reliability of Battle's statements at sentencing – pointing out the inconsistencies and arguing that Battle was "blatantly lying" to please the prosecutor – the Government responded that there were other witnesses of whom the Probation Officer was unaware whose statements would attribute as much or more drug

weight to the Defendant during the course of the conspiracy. *Robinson*, 744 F.3d at 296-97.

Judge Flanagan responded to the arguments of counsel by giving the Defendant a choice:

> We'll do it one of two ways. We're going to go forward today with what's here and now, and I'll make the decisions I need to make by a preponderance of the evidence. Or I'll unwind the whole thing. I'll start the PSR process all over. If there are statements that didn't, for whatever reason, make it to the Probation Office, I'll start again. And, whatever happens, happens. And then, you'll have a chance to object….That's the only way I see – those are the only two choices.

Id. at 297. The Defendant "responded by reiterating that Battle's statement was not credible," but given the choices framed by the Court ultimately stated the [h] would rather go ahead and do it now." *Id.*. Judge Flanagan then credited the challenged statement and sentenced the Defendant to a 140-month term of imprisonment.

In an opinion written by Judge Motz and joined by Judge Niemeyer, a divided panel affirmed. The majority essentially concluded that "[w]hen [the Defendant] made the conscious choice at sentencing to proceed on the basis of the information contained in the PSR, including Battle's statement, [he] waived his right to appeal the district court's reliance on that information." *Id.* at 298.

Judge Diaz rigorously dissented, sharply disagreeing that the Defendant's decision to go forward constituted "waiver of his right to challenge the sufficiency of evidence supporting the drug weight for which he was held accountable." *Id.* at 302 (Diaz, J, dissenting). And in Judge Diaz' view, "[t]he paltry evidence the government offered cannot suffice." *Id.* at 303 (Diaz, J., dissenting). The dissent reasoned:

> Battle's "evidence" is a sorry mess. In a 2010 statement, Battle accused [the Defendant] of providing six kilograms of cocaine base; in 2012, less than two kilograms. The government conceded that the statements differed "significantly," yet somehow contends that they are "not inconsistent." Of greater concern is Battle's statement that he regularly purchased PCP cigarettes from [the Defendant] in North Carolina between 2005 and 2008. This defies common sense: as the PSR explains, [the Defendant] lived in Florida for much of that time. The district court excused this discrepancy, noting that those PCP cigarettes were not in the drug weight calculation.
>
> But such a rationale sidesteps the real issue: by lying about the PCP cigarettes, Battle has shown himself unworthy of belief. And because the government declined to put either Battle or the probation officer who interviewed him on the stand, the court had no opportunity to assess his

> credibility in any other light. Simply put what little the government presented to support the drug weight calculation cannot constitute a preponderance of the evidence.

Id. at 303-04 (Diaz, J., dissenting) (internal citations and footnote omitted).

"Thus," the dissent concluded, "I would vacate and remand with instructions that the district court resentence [the Defendant] on the record – but without crediting Battle's statements as to drug weight. Any other result would grant the government the very benefit – a second chance to present evidence – it does not merit." *Id.* at 304 (Diaz, J., dissenting).

In *United States v. Brown*, 757 F.3d 183, 188 (4th Cir. 2014), the Government asked District Judge William D. Quarles to instruct the jury that 1,000 kilograms equals 2,200 pounds – and, after a brief interchange with the Judge, the Defendant acquiesced. "The [instruction], however, turned out to be incorrect: 2,200 pounds equals a metric mass of just less than 998 kilograms, more than two kilograms short of the minimum quantity necessary to bring into play the possibility of life imprisonment under the sentencing statute," which was the sentence Judge Quarles imposed in this case. *Id.*

Conducting plain error review (due to the absence of a contemporaneous objection by the Defendant), in an opinion written by Judge King and joined by Judges Wynn and Floyd, the Fourth Circuit first noted the Supreme Court's admonition that "*Apprendi* errors under § 841(b) should not be recognized when the evidence as to drug quantity was 'overwhelming' and 'essentially uncontroverted.'" *Id.* at 194, *quoting United States v. Cotton*, 535 U.S. 625, 633 (2002). Applying that principle here – where the evidence tended to establish that the Defendant's organization distributed up to 2,000 pounds of marijuana per month over a ten year period – the Court determined "that Brown's sentence is not among those contemplated by *Cotton* as one we should choose to disturb." *Id.* at 195 (affirming conviction and life sentence).

For discussion of these and related issues, *see* **Handbook** § 115 (Drug quantity).

Cocaine base.

In *United States v. Allen*, 716 F.3d 98 (4th Cir. 2013), the Defendant was convicted of conspiracy to distribute cocaine base ("crack cocaine") based on conduct before the effective date of the Fair Sentencing Act (August 3, 2010), but was sentenced after the effective date. The narrow question was whether the sentence was governed by the pre-Act law (where *50 grams* of cocaine base required a 10-year mandatory minimum) or by the post-Act law (where the 10-year mandatory minimum amount was increased to at least *280 grams*). The Defendant's offenses involved a drug quantity (99.2 grams) between these two amounts.

In an opinion written by Judge Gregory and joined by Judges King and Keenan, the Fourth Circuit held that the Defendant – who was given a 10-year mandatory minimum

under the pre-Act law – should have been sentenced in accordance with the more lenient penalties in the Fair Sentencing Act. Thus, applying the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012), the Court reversed the 10-year mandatory minimum sentence and remanded for resentencing. *Id.* at 106-07.

For discussion of related issues, *see* **Handbook** § 116 (Cocaine base).

Possession of firearm/ammunition by disqualified person.

In *United States v. Al Sabahi*, 719 F.3d 305 (4th Cir. 2013), the Defendant was convicted of three counts of possessing a firearm while illegally and unlawfully present in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). The Defendant's primary argument on appeal was that he was not illegally or unlawfully present in the United States.

The undisputed facts were that the Defendant initially entered the United States using a properly issued visa, but then remained in the United States after his visa expired. Thereafter, however, the Defendant voluntarily registered with the National Security Entry-Exit Registration System (NSEERS). He also married a United States citizen and filed an I-485 application, an Immigration form requesting to legalize his presence in the United States. *Id.* at 307. The Defendant argued "that he was not illegally in the United States because he registered with NSEERS and had filed an I-485 application for an adjustment of his status." *Id.* at 308. He also argued "that only an [I]mmigration [J]udge had jurisdiction to determine whether he was legally present in the United States because he had been placed in removal proceedings." *Id.*

In an opinion written by Judge Floyd and joined by Judge Shedd and District Judge Joseph R. Goodwin sitting by designation, the Fourth Circuit disagreed on both points. The Court began its analysis by noting that "[f]ederal regulations recognize that '[a]liens illegally or unlawfully in the United States' include "nonimmigrant[s] whose authorized period of stay has expired.'" *Id.* at 309, *quoting* 27 C.F.R. § 478.11. Second, the Court held that neither registering with NSEERS nor filing the I-485 application changed the Defendant's illegal and unlawful status. *Id.* at 309-310. Nor, finally did the Court agree that the authority of an Immigration Judge to decide the "inadmissibility or deportability of an alien" under 8 U.S.C. § 1229a(1) "divest(s) district courts of the ability to decide whether aliens are illegally or unlawfully present in the United States for the purposes of 18 U.S.C. § 922(g)(5)(A)." *Id.* at 310.

For discussion of related issues, *see* **Handbook** § 135 (Possession of firearm by disqualified person).

Possession of firearm/ammunition by disqualified person/"crime of violence."

In *United States v. Martin*, 753 F.3d 485 (4th Cir. 2014), the Defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The only issue on appeal was whether Senior District Judge Peter J. Messitte erred in finding the Defendant's prior conviction for "fourth-degree burglary" in violation of Maryland law was a "crime of violence," the import of which was to increase the Defendant's base offense level from 20 to 24. *See* U.S.S.G. § 2K2.1(a)(2) (providing for a base level of 24 where a defendant has two prior convictions for crimes of violence).

In an opinion written by Chief Judge Traxler and joined by Judge Diaz, who also wrote a concurring opinion, a divided panel concluded that the Maryland conviction was *not* a crime of violence. District Judge Liam O'Grady, sitting by designation, wrote a lengthy dissenting opinion.

At the heart of the analyses of all three jurists was the proper standard for determining whether a prior conviction was for a "crime of violence," under what is known as "the residual clause," following the Supreme Court decisions in *Begay v. United States*, 553 U.S. 137 (2008) (driving under the influence *not* a crime of violence); and *Sykes v. United States*, 131 S. Ct. 2267 (2011) (fleeing to elude law enforcement in violation of Indiana law *is* crime of violence). And although there was ultimately a divided panel, all three Judges agreed that the relevant Supreme Court and Fourth Circuit opinions are very difficult to parse, and that further guidance from Congress or the Supreme Court is badly needed.

The Defendant in *Martin* was convicted of burglary of a dwelling in violation of a statute which allowed as a defense that he either mistakenly thought he had permission to enter or remain in the dwelling. The majority concluded that for this to qualify as a crime of violence under the residual clause the Government was required to establish that: (1) the "degree-of-risk" of the offense was "roughly similar" to one of the enumerated crimes (here, generic burglary), *id.* at 490-91; and (2) "the prior conviction [was] *similar in kind* to the enumerated crimes." *Id.* at 492-93. As will be discussed *infra*, District Judge O'Grady concluded that only the first test applied.

Under *Begay*, the "degree-of-risk" test requires a showing that the risk of physical injury is "roughly similar," or "comparable" [to that] "posed by its closest analog among the enumerated offenses." *Id.* at 492, *quoting Begay*, 553 U.S. at 143; *and James v. United States*, 550 U.S. 192, 202 (2007). As noted, the majority and the dissent agreed with the Government that fourth-degree burglary in violation of the Maryland statute *did* pose a "roughly similar" or "comparable" risk to that posed by generic burglary.

The judicial ranks broke, however, over whether fourth-degree burglary was "similar in kind" to generic burglary – or, more importantly, whether this test survived the Supreme Court's 2011 decision in *Sykes*. On this point, Senior Judge Traxler and Judge Diaz concluded that for a prior conviction to be deemed a crime of violence under the residual clause following B*egay* it had to be "purposeful, violent, and aggressive," *Id.* at 493, *quoting United States v. Peterson*, 629 F.3d 432, 439 (4th Cir. 2011); and that this excluded crimes which could be committed through negligence. *Id.*, *citing Peterson*, 629

F.3d at 439-40 (involuntary manslaughter in violation of North Carolina law *not* a crime of violence); *and United States v. Rivers*, 595 F.3d 558, 565 (4th Cir. 2010) (violation of South Carolina's blue-light statute *not* a crime of violence.) Accordingly, because the Maryland statute could be violated by "a defendant who unreasonably believed that he had permission to enter" – which the it characterized as "negligent rather than intentional conduct" – the majority concluded that the Defendant's fourth-degree burglary conviction was *not* "similar in kind to the Guidelines' enumerated crimes." *Id.* at 493-94 (vacating and remanding for resentencing).

District Judge O'Grady strenuously, though graciously, dissented. He began by opining that "[t]he extent to which *Begay*'s 'similar in kind' requirement survived *Sykes* remains highly uncertain" and "join[ing] in Judge Diaz's call for clarity from Congress or the Court." *Id.* at 496 (O'Grady, J., dissenting). Judge O'Grady proceeded to underscore the conflicts and confusion in the application of the residual clause following *Begay* – by the Supreme Court, the Fourth Circuit, and by sister circuits – before concluding that: (1) as a general intent crime with a "knowledge" element, the Maryland statute "does not criminalize accidental or negligent acts," *Id.* at 497-500 (O'Grady, J., dissenting); and (2) "because Maryland's fourth degree burglary is a knowledge crime, the *Begay* test is unnecessary, that is, the degree of risk test is dispositive. However, even if *Begay's* 'similar in kind' analysis were applied in this case, [the Maryland statute] is a crime of violence because it *typically* requires a knowing, affirmative criminal act." *Id.* at 501 (O'Grady, J., dissenting).

For discussion of related issues, *see* **Handbook** § 135 (Possession of firearm/ammunition by disqualified person); § 145 (Armed Career Criminal Act/Violent felony); and § 292 (Career offender).

Possession of firearm/ammunition by disqualified person/Second Amendment challenges.

In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court struck down the District of Columbia's across-the-board ban on the possession of firearms in one's home. To the contrary, the Court held, the Second Amendment protects the right of "law-abiding, responsible citizens" to possess firearms in their homes. *Id.*

In *United States v. Staten*, 666 F.3d 154, 157 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 154 (2012), the district court denied the defendant's motion to dismiss "on the ground that § 922(g)(9) violated his right to bear arms in defense of his home under the Second Amendment to the United States Constitution." In affirming, the Fourth Circuit made certain findings based on social science research regarding domestic violence and, based on those findings, concluded "that the government ha[d] carried its burden of establishing a reasonable fit between the substantial government objective of reducing domestic gun violence and keeping firearms out of the hands of: (1) persons who have been convicted of a crime in which the person used or attempted to use force capable of causing physical pain or injury to another against a spouse, former spouse, or other person with whom such person had a domestic relationship specified in § 922(a)(33)(A); and (2) persons who have

threatened the use of a deadly weapon against such a person." *Id.* at 162. *Accord United States v. Carpio-Leon*, 701 F.3d 974, 976-83 (4th Cir. 2012) (affirming conviction for possessing firearms while being "illegally in the United States in violation of 18 U.S.C. § 922(g)(5) against Second and Fifth Amendment challenges), *cert. denied*, 134 S. Ct. 58 (2013); *United States v. Chapman*, 666 F.3d 220, 227-31 (4th Cir. 2012) (applying *Staten*, finding "reasonable fit" between "substantial government objective of reducing domestic gun violence" and § 922(g)(8), which prohibits possession of firearms and ammunition by one subject to a domestic violence protective order, rejecting defendant's Second Amendment argument to the contrary); *and United States v. Mahin*, 668 F.3d 119, 122-28 (4th Cir. 2012) (applying *Staten* and *Chapman*, affirming conviction for violation of § 922(g)(8) against Second Amendment challenge of defendant subject to domestic violence protective order who rented handgun and fired it at shooting range).

However, in *United States v. Carter*, 669 F.3d 411, 418-21 (4th Cir. 2012) ("*Carter I*"), the Fourth Circuit vacated the Defendant's conviction for possessing a firearm while being a user of marijuana in violation of § 922(g)(3), finding that the government had not demonstrated the required "reasonable fit," but allowing it to attempt to do so on remand. In *United States v. Carter*, 759 F.3d 462 (4th Cir. 2014) ("*Carter II*"), the Fourth Circuit agreed with District Judge John T. Copenhaver that the Government had met its burden, that is, that it had "adequately demonstrated a reasonable fit between the important interest in protecting the community from gun violence and § 922(g)(3), which disarms unlawful drug users and addicts." *Id.* at 464.

In an opinion written by Judge Niemeyer and joined by Judge Diaz and Senior Judge Hamilton, the Fourth Circuit addressed – and ultimately rejected – the Defendant's arguments that the District Court "(1) improperly relied on factors other than empirical factors [including common sense] in evaluating the soundness of § 922(g)(3); and (2) it failed to recognize that the studies submitted by the government were inadequate because they related to drug use generally rather than marijuana use specifically and they failed to prove a causal link between marijuana use and violence." *Id.* at 466 (emphasis in original).

Regarding the Defendant's first argument, the Court reasoned:

> While it is true that we found the government's commonsense arguments, standing alone, insufficient to justify § 922(g)(3) [in *Carter I*], that did not imply that legislative text and history, case law, and common sense could play no role in justifying Congress's enactment. To the contrary, we noted that the government's commonsense arguments in this case were plausible and therefore supported § 922(g)(3)'s constitutionality, observing that the government's remaining burden should not be difficult to satisfy. In short, our holding in Carter I clearly did not preclude the district court from considering factors other than empirical evidence … [including] the narrowed design of the statute, the empirical and scholarly evidence, the weight of precedent nationwide, and common sense."

Id. (internal quotations and citations omitted).

Regarding the Defendant's argument that the studies considered by the District Court focused on drug use generally rather than on marijuana use specifically, the Fourth Circuit simply concluded to the contrary that the studies demonstrated a "strong link between drug use and violence" – including the use of marijuana. *Id.* at 466-67.

Regarding the Defendant's "flawed" argument that the Government had "demonstrated, at most, a correlation between marijuana use and violence and not a causal relationship," the Court reasoned:

> This argument is flawed … because it assumes, incorrectly, that Congress may not regulate based on correlational evidence. We conclude that it may and that the government need not prove a causal link between drug use and violence to carry its burden of demonstrating a reasonable fit between § 922(g)(3) and an important government objective. See Staten, 666 F.3d at 164-67 (upholding § 922(g)(9)'s disarmament of those convicted of a misdemeanor of domestic violence in large part based on correlational evidence about recidivism rates).

Id. at 469.

And finally, the Court cited with approval the Government's specific "common sense" arguments, namely, that "due to the illegal nature of their activities, drug users and addicts would be more likely than other citizens to have hostile run-ins with law enforcement officers, which would threaten the safety of the law enforcement officers when guns are involved"; that "the inflated "the inflated price of illegal drugs on the black market could drive many addicts into financial desperation, with the common result that the addict would be forced to obtain the wherewithal with which to purchase drugs through criminal acts against the person or property of another or through acts of vice such as prostitution or sale of narcotics"; and that "drugs impair users' mental function and thus subject others (and themselves) to irrational and unpredictable behavior." *Id.* at 469-70 (internal quotations and citations omitted).

For discussion of related issues, *see* **Handbook** § 135 (Possession of firearm/ammunition by disqualified person).

Armed Career Criminal Act.

In *United States v. Hunter*, 735 F.3d 172 (4th Cir. 2013), the Defendant possessed a firearm when he was thirty-three years old, but was sentenced as an Armed Career Criminal based on convictions for "violent felonies" committed as a juvenile. Citing *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (sentence of juvenile offender to life without parole violates Eighth Amendment ban of "cruel and unusual punishment"), the Defendant argued that his seventeen-year sentence, based on criminal conduct when he was a juvenile, likewise violated the Eighth Amendment. *Id.* at 173.

In an opinion written by Judge Wynn and joined by Judges Shedd and Hamilton, the Fourth Circuit *disagreed*.

The Court began its analysis by noting recent Supreme Court decisions involving the criminal prosecution and sentencing of juveniles. Specifically, in addition to *Miller*, the Court noted and briefly discussed the Supreme Court's decisions in *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (Eighth Amendment prohibits sentence of life without parole for juvenile convicted of offense other than homicide); *and Roper v. Simmons*, 543 U.S. 551, 560 (2005) (imposing death penalty on juvenile violates Eighth Amendment).

The Fourth Circuit ultimately concluded in *Hunter*, however, that these relatively recent Supreme Court decisions did not require the result urged by the Defendant, "because the sentence he challenges punishes only his adult criminal conduct." *Hunter*, 735 F.3d at 175, *citing United States v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013) (sentence of life without parole based on two drug convictions before defendant turned eighteen did not violate Eighth Amendment); *and United States v. Orono*, 724 F.3d 1297, 1307 (10th Cir. 2013) (rejecting defendant's argument that basing Armed Career Criminal sentence, in part, on juvenile conviction violated Eighth Amendment).

Following the Tenth and Eleventh Circuits, the Fourth Circuit summarized its holding thus:

> In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentencing enhancements themselves constitute punishment for the prior criminal convictions that trigger them….Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, Miller's concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.

Id. at 176 (affirming Armed Career Criminal sentence).

In *United States v. Kerr*, 737 F.3d 33 (4th Cir. 2013), the Defendant was sentenced as an Armed Career Criminal based on three North Carolina breaking and entering convictions. Under North Carolina's Structured Sentencing Act, there are three possible sentencing ranges: a presumptive range; a mitigated range (where the Judge determines that mitigating factors outweigh aggravating factors); and an aggravated range (where the Judge determines that aggravating factors outweigh mitigating factors). In this case the North Carolina Judge determined that the mitigated range applied, which did not include a sentence in excess of one year, and sentenced the Defendant to 8-to-10 months imprisonment. *Id.* at 736. Senior District Judge N. Carlton Tilley nevertheless concluded that each conviction was an Armed Career Criminal predicate, reasoning that the presumptive range did provide for a possible sentence in excess of a year (up to 14 months), and the majority agreed.

In an opinion written by Judge Diaz and joined by Judge Agee, the majority simply concluded that it is the *maximum* sentence in the presumptive range, not the *actual* sentence (or sentencing range), which determines whether a prior conviction carried a term of imprisonment exceeding one year. *Id.* at 38-39. In other words, the majority concluded that the State Judge's finding that mitigating factors outweighed aggravating factors, and therefore that a lower sentencing range applied, to be of no moment because the Judge "remained free at all time to sentence [the Defendant] to a presumptive term of up to 14 months." *Id.*

In his lengthy and sharply worded dissent Judge Davis characterized the majority opinion as "fantasy" and as "Alice-in-Wonderland analysis." *Id.* at 40 (Davis, J, dissenting). Specifically, Judge Davis viewed the majority as engaging in the kind of speculation about possible sentencing outcomes, and as violating the "well-established federalism principles" prohibited and advocated respectively in *United States v. Simmons*, 649 F.3d 237, 249 (4th Cir. 2011)(en banc). However, in the end of the day it appears the harsh and even draconian outcome that drives the intensity of his dissent, which he concludes thus:

> I am willing to believe, and to act on that belief, that no one – even the prosecutors themselves – thinks a twenty-two-year sentence on a fifty-one-year-old mentally ill veteran is appropriate under the circumstances of this case. The law affords us an opportunity to decide this case on that belief. I deeply regret the institutional ennui that precludes our doing so.

Id. at 45 (Davis, J, dissenting) (internal quotation and citation omitted).

The narrow issue in *United States v. Grant*, 753 F.3d 480 (4th Cir. 2014), was whether *general Court-martial convictions* can serve as the basis for an armed career criminal sentence. Relying on *Small v. United States*, 544 U.S. 385 (2005), in which the Supreme Court held that an armed career criminal sentence could not be based on a *foreign* conviction, the Defendant argued that Senior District Judge Cameron McGowan Currie likewise erred in basing his armed career criminal sentence, in part, on court-martial convictions.

In an opinion written by Judge Floyd and joined by Chief Judge Traxler and Senior Circuit Judge Hamilton, the Fourth Circuit disagreed. Although the Court conceded that the Defendant had "identifie[d] several dissimilarities between court-martial and civilian courts," it ultimately concluded that "these differences do not rise to the level of the contrasts between domestic and foreign courts that Small highlighted." *Id.* at 485 (affirming 212-month Armed Career Criminal sentence).

In *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), the key issue on appeal was whether District Judge Richard D. Bennett committed reversible error in applying the modified categorical approach in determining that a prior conviction for "second-degree assault in violation of Maryland law was a violent felony – and therefore in sentencing the Defendant as an Armed Career Criminal. In an opinion written by Judge Diaz and joined

by Chief Judge Traxler and District Judge Catherine C. Eagles sitting by designation, the Fourth Circuit answered this question in the affirmative, vacated the sentence, and remanded for resentencing.

In fairness to Judge Bennett, his ruling and sentence were in accord with Supreme Court and Fourth Circuit precedent when they were made and imposed. However, that all changed with the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), in which the application of the modified categorical approach was significantly limited. In holding that the modified categorical approach can now only be applied to statutes that are "divisible," the Fourth Circuit explained:

> In Descamps, the Supreme Court recently clarified whether courts may apply the modified categorical approach to assess, for ACCA sentencing enhancement purposes, the violent nature of a defendant's prior conviction under an indivisible criminal statute (i.e., one that does not set out elements of the offense in the alternative, but which may nevertheless broadly criminalize qualitatively different categories of conduct). Answering that question in the negative, the Court explained that the modified categorical approach "serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which elements played a part in the defendant's conviction." Descamps, 133 S. Ct. at 2283.

Id. at 340

Applying *Descamps* to Maryland's second-degree assault statute, the Fourth Circuit *rejected* the Government's argument "that authoritative judicial decisions have, in effect, converted Maryland's second-degree assault statute from indivisible to divisible, because the Maryland courts have held that the completed battery form of second-degree assault may consist of either 'offensive physical contact' or infliction of 'physical harm.'" *Id.* at 340-41. Although the Fourth Circuit recognized that in *Descamps* the Supreme Court had "reserved the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it," the panel did not reach that issue "because regardless of whether judicial decisions might in theory turn an indivisible statute into a divisible one, that is simply not what the Maryland courts have done with respect to the completed battery form of second-degree assault." *Id.* at 341.

In reaching this conclusion (that the Maryland statute was indivisible, and therefore the modified categorical approach was inapplicable) the Court focused on the Maryland jury instructions pertaining to second-degree assault. And here, as it turns out, Maryland juries are instructed that they may return a guilty verdict if all jurors agree that a defendant caused *either* "offensive physical contact" *or* "physical harm" to the victim; in other words, it is *not* necessary for the jury to agree on which. Thus, the Court concluded, the Maryland courts have not created divisible offenses; they have simply allowed "alternate means of

satisfying a single element…." *Id.* at 341-42 (reversing Armed Career Criminal sentence, and remanding for resentencing).

In *United States v. Hemingway*, 734 F.3d 323 (4th Cir. 2013), the Fourth Circuit applied the same analysis as it had in *Royal* – and reached the same conclusion, namely, that the South Carolina *common law* crime of Assault and Battery of a High and Aggravated Nature ("ABHAN") (1) was not categorically a "violent felony" for ACCA purposes, and (2) that, following the Supreme Court's decision in *Decamps*, because the common law crime was not "divisible," the modified categorical approach "has no role to play in the decision of whether a common law ABHAN offense is an ACCA violent felony." *Id.* at 338 (reversing Armed Career Criminal sentence, and remanding for resentencing).

In *United States v. Mungro*, 754 F.3d 267 (4th Cir. 2014), the narrow question was whether "breaking *or* entering" in violation of North Carolina law is "generic burglary," and therefore a "violent felony" under the Armed Career Criminal Act ("ACCA"). In an opinion written by Judge Duncan and joined by Chief Judge Traxler and Judge Niemeyer, the Fourth Circuit affirmed Chief District Judge Frank D. Whitney's ruling that it is.

The Court began by noting that to determine whether a particular offense is "generic burglary," and therefore a "violent felony" under the ACCA, the Court compares the elements of the particular offense with those of generic burglary. *Id.* at 268-69, *citing Taylor v. United States*, 495 U.S. 575, 599 (1990). Per *Taylor*, 495 U.S. at 598, generic burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure with intent to commit a crime." And as the Supreme Court made clear last year in *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013), the "unlawful entry element *excludes* any case in which a person enters premises open to the public; the generic crime requires breaking and entering or similar unlawful activity."

To determine the elements of a particular offense, the Court "examines the relevant language and interpretations of that language by the state's highest court," here, the North Carolina Supreme Court. *Id.* at 269, *citing Johnson v. United States*, 599 U.S. 133, 138 (2010); *and United States v. Aparicio-Soria*, 740 F.3d 152, 154 (4th Cir. 2014) (en banc). "If the elements of the state offense correspond to or are narrower than those … [of] generic burglary, then the offense qualifies as burglary and, accordingly, as a predicate offense under the ACCA." *Id., citing Descamps*, 133 S. Ct. at 2281. "Under this 'formal categorical approach,' [the Court] may consider only the elements of the offense and the fact of conviction, and not the actual facts underlying that conviction." *Id., citing Descamps*, 133 S. Ct. at 2283.

The Fourth Circuit conceded that the unusual language in the North Carolina "breaking or entering" statute could be interpreted as applying to "a person [who] enters with the building owner's consent," which "might indeed disqualify it as a predicate offense…." *Id.* at 270. However, because the North Carolina Supreme Court had interpreted the statute as only proscribing "breaking or entering without the consent of the owner," the Court concluded "that N.C. Gen. Stat. § 14-54(a) … sweeps no more broadly

than the generic elements of burglary" and "therefore qualifies as an ACCA predicate offense." *Id.* at 272 (affirming ACCA sentence).

For discussion of these and related issues, *see* **Handbook** § 145 (Armed Career Criminal Act/Violent felonies); § 292 (Career offender); *and* § 199 (Prosecution of juveniles).

Use or carrying of firearm during and in relation to, or possession in furtherance of, crime of violence or drug trafficking.

In *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. 2014), the Government conceded that the Defendant's mandatory minimum sentence for "brandishing" a firearm in violation of 18 U.S.C.§ 924(c) must be vacated and remanded in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, the Supreme Court overruled prior case law in the Fourth and other Circuits, holding that "any fact that increases the mandatory minimum [there and here, whether a firearm was "brandished] is an 'element' that must be submitted to the jury." *Id*. at 2155, 2158-63.

In an opinion written by Judge Wynn and joined by Judges Gregory and Davis, the Fourth Circuit first held that even though the Defendant in *Strayhorn* was sentenced before the Supreme Court decided *Alleyne*, the Defendant was entitled to the relief it provides "because [when *Alleyne* was decided] this appeal was still pending." *Strayhorn*, 743 F.3d at 926, *citing Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

Applied in *Strayhorn*, where the district court instructed "that brandishing was one method of 'using' the firearm rather than an element of the charged offense," and therefore the jury did not determine whether "brandishing" had been proven beyond a reasonable doubt, all agreed that *Alleyne* mandated reversal. *Id.* at 926-27 (vacating 7-year mandatory minimum sentence, remanding for resentencing).

In *United States v. Moore*, ___ F.3d ___, ___ (4th Cir. 2014), police in Takoma Park, Maryland seized the following items from the Defendant's apartment: 2.8 kilograms of phencyclidine (PCP), a digital scale that tested positive for cocaine residue, plastic bags, bottles, approximately $45,000 in cash, and two handguns, one of which was loaded. Based on this evidence, and on the Defendant's arrest for possession of cocaine with intent to distribute two days earlier, the Defendant was indicted on four counts, including a violation of 18 U.S.C. § 924(c).

The Defendant argued on appeal, *inter alia*, that the evidence was insufficient to sustain his § 924(c) conviction. Although the Defendant did not dispute that there *was* sufficient evidence to convict him of possession with intent to distribute drugs and of possession of the firearms (illegal, because he was a convicted felon), he contended on

appeal that "the government failed to prove that the firearms were possessed 'in furtherance of' the drug trafficking offense," that is, that the evidence failed to establish the "requisite nexus between the firearms and the drug trafficking crime." *Id.* at ___.

In an opinion written by Judge Wilkinson and joined by Judges Gregory and Keenan, the Fourth Circuit disagreed. The Court began by citing *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002), for the proposition that "[w]hether the requisite nexus between the firearms and the drug trafficking crime existed under § 924(c) 'is ultimately a factual question,' subject to the clearly erroneous standard [of review on appeal]." *Id.* at ___, *citing United States v. McKenzie-Gude*, 671 F.3d 452, 463 (4th Cir. 2011) (factual findings reviewed on appeal for clear error). And again citing *Lomax*, 293 F.3d at 705, the Court addressed "the numerous ways a firearm might further or advance drug trafficking":

> Some of the ways a firearm might "further[ ], advance[ ], or help[ ] forward a drug trafficking crime" include defending the dealer's drugs, drug profits, or his person. *Lomax*, 293 F.3d at 705. Firearms may also operate as an enforcement mechanism in a dangerous transactional business or they may serve as a visible deterrent. *Id.* A number of factors may be considered in making this determination, among them:
>
> > "the type of drug activity that is being conducted, accessibility to the firearm, the type of weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found."
>
> *Id*. (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)). The fact finder may consider direct and circumstantial evidence, and a conviction may rest upon the latter. *United States v. Bonner*, 648 F.3d 209, 213 (4th Cir. 2011).

Id. at ___.

Applying this broad evidentiary standard in *Moore*, ___ F.3d at ___, the Fourth Circuit concluded that there *was* substantial evidence to support the District Court's finding (this having been a bench trial) that "a nexus existed between the firearm possession and drug trafficking." As the Court reasoned:

> Multiple relevant factors were present in this case. [The Defendant] was keeping a great deal of cash ($45,057), as well as PCP (2.8 kilograms) in his apartment where the firearms were found. The baggies, bottles, and digital scale with cocaine residue suggest that the cocaine likewise had been distributed from the residence and kept there. The firearms, one of which was loaded, were kept in [the Defendant's] bedroom in close proximity to the money, suggesting their purpose was protection. Moreover, it was

> unlawful for [the Defendant] to possess any firearm as a convicted felon. The half kilogram of cocaine and 2.8 kilograms of PCP were much larger amounts than anyone would need for personal use, and indeed [the Defendant] does not contest on sufficiency grounds the charge of possession with intent to distribute.
>
> It was perfectly reasonable for the trier of fact to weigh these factors and apply the commonsense notion that here the guns and drugs were anything but unrelated. Taken together, a reasonable fact finder could find beyond a reasonable doubt that the firearms were in the apartment for the purpose of protecting [the Defendant], his drugs, and his trafficking profits. In the words of the statute, the firearms here were possessed "in furtherance of" drug trafficking.

Id. at ___ (affirming convictions and sentences).

For discussion of these and related issues, *see* **Handbook** § 148 (Use or carrying of firearm during and in relation to, or possession in furtherance of, crime of violence or drug trafficking).

Conspiracy.

In *United States v. Min*, 704 F.3d 314, 318 (4th Cir. 2013), six individuals conspired to steal cocaine and cash from a "stash house" of what they believed to be fellow drug traffickers. However, as the Fourth Circuit put it, "unbeknownst to the defendants, the stash house and cocaine never existed, but were rather a fiction created by undercover law enforcement officers." *Id.*

On appeal the Defendants unsuccessfully argued that they were entitled to assert an "impossibility defense," that is, to have the jury instructed and to be permitted to argue that because the stash house never existed they could not be found guilty of a conspiracy to rob it (in violation of the Hobbs Act, 18 U.S.C. § 1951(a)). In an opinion written by Judge Duncan and joined by Judge Diaz and District Judge Catherine C. Eagles sitting by designation, the Fourth Circuit disagreed, deciding an issue of first impression in the Fourth Circuit. The Court reasoned:

> We have yet to face the question of whether factual impossibility is a defense to the crime of conspiracy. The fundamental tenets of conspiracy law, however, in addition to the persuasive reasoning of several of our sister circuits, compel our determination that it is not.
>
> It is well-established that the inchoate crime of conspiracy punishes the agreement to commit an unlawful act, not the completion of the act itself. *See United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003). Indeed, in the specific context of conspiracies to distribute cocaine in

> violation of 21 U.S.C. § 846, not even a single overt act in furtherance of the conspiracy is required. *United States v. Shabani*, 513 U.S. 10, 15 (1994). Because "special conspiracy-related dangers remain" apart from the danger of attaining the particular objective, impossibility does not terminate conspiracy. *Jimenez Recio*, 537 U.S. at 275.
>
> In *Jiminez Recio*, the Supreme Court held that the charge of conspiracy was not defeated where police actions frustrated the conspiracy's specific objective before its completion without the conspirators' knowledge. *Id.* That holding extends naturally to the present case, where the police had defeated the criminal objective from the beginning, by inventing it. *Cf. United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir. 1995) ("There is no basis for making a distinction between those who start a conspiracy that is impossible from the beginning and one who joins a conspiracy that has become impossible due to intervening events unknown to the conspirators"). Defendants have offered no convincing reason to distinguish the type of impossibility deemed irrelevant to conspiracy in *Jimenez Recio* from the type of impossibility we confront here.

Id. at 321-22 (citing authority in other circuits coming to the same conclusion in what it called "stash house sting" cases).

For related issues, *see* **Handbook** § 171 (Conspiracies); *and* § 107 (Drug conspiracies).

***Pinkerton* liability for crimes committed by co-conspirators.**

In *United States v. Blackman*, 746 F.3d 137 (4th Cir. 2014), the Defendant planned three armed robberies, participated in the first robbery in which an individual was forced into a truck at gunpoint, and fenced the stolen goods after each of the robberies. The Defendant was convicted in a bench trial of a Hobbs Act conspiracy and, under *Pinkerton* liability for the acts of co-conspirators, of using and carrying a firearm during and in relation to a crime of violence (conspiracy to commit the robberies in violation of the Hobbs Act).

The defendant argued on appeal that District Judge Leonie M. Brinkema's reliance on *Pinkerton* as a basis for his conviction was improper "because Pinkerton was not mentioned in the indictment" – which caused him to suffer "unfair surprise." *Id.* at 141.

In an opinion written by Judge Wilkinson and joined by Judges Niemeyer and Duncan, the Fourth Circuit disagreed. As the Court explained:

> The Pinkerton doctrine provides that a defendant is "liable for substantive offenses committed by a co-conspirator when their commission

> is reasonably foreseeable and in furtherance of the conspiracy." United States v. Dinkins, 691 F.3d 358, 384 (4th Cir. 2012) (quoting United States v. Ashley, 606 F.3d 135, 142-43 (4th Cir. 2010)) (internal quotation marks omitted). "The idea behind the Pinkerton doctrine is that the conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency." United States v. Aramony, 88 F.3d 1369, 1379 (4th Cir. 1996) (internal quotation marks omitted).…
>
> Contrary to [the Defendant's] argument, this court held in Ashley that the Pinkerton doctrine need not be charged in the indictment, even when it later acts as the legal basis for the defendant's conviction. 606 F.3d at 143. The Ashley court drew an analogy to aiding and abetting liability, which can properly be omitted from an indictment because it "simply describes the way in which a defendant's conduct resulted in the violation of a particular law."

Id.

In concluding that *Pinkerton* liability *was* proper here, the Court noted that the Defendant "was privy to pre-robbery discussions that included explicit references to the use of a firearm"; "that a firearm was actually brandished in the course of each robbery"; and that the defendant "played a crucial role in the success of the operation [by] acting as the fence for the stolen goods." *Id.* at 141. That being the case, the Court concluded that the use of the firearms in these robberies was reasonably foreseeable – and therefore, that there was "no danger of unfair surprise." *Id.* at 141-42, *quoting Ashley*, 606 F.3d at 144.

For discussion of these and related issues, *see* **Handbook** § 172 (*Pinkerton* liability for crimes committed by co-conspirators); *and* § 148 (Use or carrying of a firearm during and in relation to, or possession in furtherance of, crime of violence or drug trafficking).

"Access device" fraud.

In *United States v. Keita*, 742 F.3d 184 (4th Cir. 2014), a jury convicted the Defendant of multiple counts of "access device" (credit card) fraud. The Defendant argued on appeal "that the introduction of business records relating to cardholders who did not testify at trial violated his Sixth Amendment right to confrontation." *Id.* at 188-89. The Defendant also argued that the records were "unfairly prejudicial" under Fed. R. Evid. 403; and that District Judge Alexander Williams, Jr. incorrectly calculated the "amount of loss." *Id.* at 191-92. In an opinion written by Judge Wynn and joined by Judge Niemeyer and District Judge Louise W. Flanagan sitting by designation the Fourth Circuit disagreed on all three points.

Regarding the Confrontation Clause argument, the Fourth Circuit applied *Crawford v. Washington*, 541 U.S. 36, 59 (2004), noting "that the Confrontation Clause bars only testimonial statements," and that "business records are generally not testimonial if they are

'created for the administration of an entity's affairs' rather than for 'proving some fact at trial.'" *Id.* at 189-90, *quoting Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). *Accord United States v. Cabrera-Beltran*, 660 F.3d 742, 752 (4th Cir. 2011). Applied here, the Court concluded that the admitted records were "for the administration of … regularly conducted business," that is, they were "not testimonial" and therefore their admission did *not* violate the Confrontation Clause. *Id.* at 190-91.

Regarding the Defendant's Rule 403 argument, the Court found that the cardholder records were "probative of the access device fraud charges," and *not* "unduly prejudicial under Rule 403," explaining:

> In light of the substantial evidence presented by the government, which included videotapes and photographs of the Defendant using the cloned credit cards, as well as highly incriminating evidence seized from the Defendant's laptop computers, we are satisfied that introduction of the business records posed no disproportionate risk of inflaming the passions of the jury to 'irrational behavior.'"

Id. at 191, *quoting United States v. Siegel*, 536 F.3d 306, 319 (4th Cir. 2008).

And finally, the Fourth Circuit no clear error in Judge Williams' calculation of the loss amount for Guidelines purposes. Specifically, the Court noted the testimony of "Detective Hill," who had:

> created a seven-page spreadsheet detailing Defendant's fraudulent transactions, including the dates, the locations, the credit card numbers used, the amounts charged, and the banks associated with the credit card numbers. Detective Hill noted that videotape surveillance showed Defendant conducting many of the listed fraudulent transactions, and that other losses were traced through the stolen credit card information found on Defendant's laptops. Regardless, each loss attributed to Defendant was ultimately supported by videotape evidence; Detective Hill explained, "[i]f I had no video of the transaction and I could not associate that credit card number with one where we did have [video], then I … didn't count it and did not put it on the spreadsheet."

Id. at 192 (affirming loss amount, convictions, and 76-month sentence).

For discussion of these and related issues, *see* **Handbook** § 181 ("Access device" fraud); § 48 (Prior statement of nontestifying witness); § 240 (Rule 403); *and* 275 (Amount of loss).

Bank fraud.

Although the Fourth Circuit cited the Tenth Circuit's articulation of the elements of bank fraud with approval in *United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002), the articulation was not fully adopted as the Fourth Circuit's own until its decision in *United States v. Adepoju*, 756 F.3d 250, 255 (4th Cir. 2014).

The two subsections "in § 1344 proscribe slightly different conduct, but a person may commit bank fraud by violating either subsection." *Brandon*, 298 F.3dat 311, *citing United States v. Colton*, 231 F.3d 890, 897 (4th Cir. 2000); *and United States v. Celesia*, 945 F.2d 756, 758 (4th Cir. 1991).

It is now clear that the elements of bank fraud in violation of § 1344(1) are:

> (1) that the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution; (2) that the defendant did so with intent to defraud; and (3) that the financial institution was a federally insured or chartered bank.

Adepoju, 756 F.3d at 255 (finding sufficient evidence to sustain § 1344(1) conviction), *citing Brandon*, 298 F.3d at 311.

"The requirements for a § 1344(2) conviction differ only as to the first element, which is that the defendant knowingly execute a scheme to obtain property held by a financial institution through false or fraudulent pretenses." *Id.* To secure a conviction under § 1344(2), "the bank [need not] be the intended victim of the fraud; a person can violate the statute by obtaining funds from a bank while intending to defraud another person or entity." *Id.*

Although the Fourth Circuit affirmed bank fraud convictions in *Adepoju*, it *reversed* Senior District Judge Marvin J. Garbis' application of a two-level enhancement for use of "sophisticated means" pursuant to U.S.S.G. § 2B1.1(b)(10)(C). In an opinion written by Judge Gregory and joined by Judge Floyd and Senior Judge Davis, the Court explained:

> "Sophisticated means" means especially complex or especially intricate offense conduct, pertaining to the execution or concealment of an offense….Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore accounts also ordinarily indicates sophisticated means. U.S.S,G.§ 2B1.1 cmt. n. 9(B)….[S]ophistication requires more than the concealment or complexities inherent in fraud. Thus fraud per se is inadequate for demonstrating the complexity required under U.S.S.G.§ 2B1.1(b)(10)(C).
>
> It is axiomatic that the government must prove by a preponderance of the evidence the applicability of a sentencing enhancement. In this case, the government failed to carry that burden. Adepoju's use of forged checks and a stolen identity to attempt bank fraud is beyond dispute. Indeed, virtually all bank fraud will involve misrepresentation, which includes unauthorized acquisition and use of another's information….Therefore, the

> realm of especial complexities and intricacies involves more than the forgeries, misrepresentation, and concealment in bank fraud.

Id. at 257-58 (vacating and remanding for resentencing).

For discussion of related issues, *see* **Handbook** § 186 (Bank fraud).

Hobbs Act violations.

In *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. 2014), the Defendants were charged with a Hobbs Act robbery and with conspiracy to commit a second Hobbs Act robbery. In an opinion written by Judge Wynn and joined by Judges Gregory and Davis, the Fourth Circuit clearly articulated the elements for both offenses.

The Court articulated the two elements of a Hobbs Act robbery as: "(1) the underlying robbery … crime; and (2) an effect on interstate commerce," also noting that the Hobbs Act defines robbery as "the unlawful taking or obtaining of personal property from the person … by means of actual or threatened force, or violence, or fear of injury, … to his person or property … at the time of the taking or obtaining." *Id.* at 922, *quoting United States v. Williams*, 342 F.3d 350, 353 (4th Cir. 2003); *and* 18 U.S.C. § 1951(b)(1).

To prove a Hobbs Act conspiracy, "the government must prove that the defendant agreed with at least one other person to commit acts that would satisfy the following three elements: (1) [coercion of a victim] to part with property; (2) … through the wrongful use of actual or threatened force, violence or fear or under color of official right; and (3) … in such a way as to affect adversely interstate commerce." *Id.* at 925, *quoting United States v. Buffey*, 899 F.2d 1402, 1403 (4th Cir. 1990).

In *United States v. Taylor*, 754 F.3d 217 (4th Cir. 2014), the Defendant contended (1) that the Government presented insufficient evidence that the subject robberies affected interstate commerce; and (2) that the district court erred in prohibiting evidence that sale of marijuana grown in the same state did *not* affect interstate commerce. In an opinion written by Judge Wilkinson and joined by Judge Thacker and Senior Judge Hamilton, the Fourth Circuit disagreed on both points.

The Defendant was part of a group, based in Roanoke, Virginia, which called itself "Southwest Goonz" and was engaged in the "business" of robbing drug dealers. At issue in this case were two "home invasions" of the residences of two suspected drug dealers – which, as it turned out, produced very little bounty. In the first robbery, the Defendant and his cohorts "made off with [the dealer's girlfriend's] jewelry, $40 from her purse, two cell phones, and a marijuana cigarette," and the second robbery yielded only a single cell phone. *Id.* at 220-21.

After the first trial resulted in a hung jury, the Government moved in limine to preclude the Defendant "from offering evidence that robbing a drug dealer who sells

marijuana grown within the borders of Virginia does not affect interstate commerce and thus does not violate the Hobbs Act." Chief District Judge Glen E. Conrad granted the motion "on the grounds that the enterprise of drug dealing affects interstate commerce as a matter of law under *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003)." *Id.* at 221, *also citing United States v. Tillery*, 702 F.3d 170, 175 (4th Cir. 2012) (upholding conviction for Hobbs Act robbery of a business because it affected interstate commerce "in the aggregate"). The Defendant was convicted on three of the four counts in the indictment in the second jury trial, and was ultimately sentenced to a 336-month term of imprisonment.

Regarding the sufficiency of the Government's evidence, the Court began its analysis by noting "the extraordinary breadth and reach of the Hobbs Act." *Id.*, *citing Stirone v. United States*, 361 U.S. 212, 215 (1960) (recognizing that Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce"); *Tillery*, 702 F.3d at 174 (in determining whether a robbery affects interstate commerce, more than the effect of the individual robbery is in question; rather, evidence is sufficient if it establishes that the "relevant class of acts" affects interstate commerce); *Williams*, 342 F.3d at 354 (government *not* required to prove "defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions"); *United States v. Buffey*, 899 F.2d 1402, 1404 (4th Cir. 1990) (*de minimus* effect on interstate commerce sufficient); *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985) (effect on interstate commerce may be demonstrated by "proof of probabilities"); *and* U*nited States v. Spagnolo*, 546 F.2d 1117,1119 (4th Cir. 1976) ("minimal" effect on interstate commerce sufficient).

The Court also preliminarily noted that the Supreme Court has approved federal regulation of intrastate marijuana markets under the Commerce Clause because of their "aggregate impact on interstate commerce." *Id.* at 222, *citing Gonzales v. Raich*, 545 U.S. 1, 18-19, 22 (2005). *Accord Williams*, 342 F.3d at 355 (finding that drug dealing is "an inherently economic enterprise that affects interstate commerce").

Applying these principles in this case, the Fourth Circuit concluded that it was "entirely reasonable" for the jury to conclude that the two robberies "would have the effect of depleting the assets of an entity engaged in interstate commerce," *id.* at 224, *quoting Buffey*, 899 F.2d at 1404, and in addition, that "there was evidence that the defendant intentionally targeted a business engaged in interstate commerce." *Id.* at 225 (concluding that "[w]hether viewed through the lens of the effect of the defendant's crimes (depletion of assets) or his intent (targeting), the government adduced sufficient evidence in this case to meet the jurisdictional element of the Hobbs Act").

Finally, the Fourth Circuit dispensed with the Defendant's second argument on appeal – that the district court committed reversible error in precluding him from presenting evidence that the marijuana at issue was grown in Virginia and thus was not connected to interstate commerce – in a brief footnote at the end of its opinion. Specifically, the Court reasoned:

> The district court found that, because drug dealing enterprises inherently affect interstate commerce, any argument or evidence tending to show that the drugs in the particular case had not moved across state lines was not relevant. For the reasons expressed in Part IIA, supra, that ruling was correct, and the trial court necessarily did not abuse its discretion in granting the government's motion.

Id. at 226 n.* (affirming convictions and sentence).

For discussion of these and related issues, *see* **Handbook** § 191 [Hobbs Act violations (18 U.S. C. § 1951). See also Horn's Federal Criminal Jury Instructions For The Fourth Circuit, Instructions 2.73 & 2.73a, available from Fourth Circuit Seminars & Publications. Please go to www.carlhornlaw.com for ordering details.

Money laundering.

In *United States v. Santos*, 553 U.S. 507, 511 (2008), the issue was whether the term "proceeds" in § 1956(a)(1) means all "receipts" of the unlawful activity (the Government's position) or only "profits" (the Defendant's position). The majority concluded that the statutory language was ambiguous, and therefore adopted the narrower definition advocated by the defendant. *Id.* at 514-21 (affirming post-verdict acquittal for money laundering convictions based on payments to associates in illegal gambling business). *Accord United States v. Simmons*, 737 F.3d 319, 328-29 (4th Cir. 2013) (payments to investors in Ponzi scheme, made in 2008, were necessary to continue the fraud, not "profits," reversing money laundering convictions); *and United States v. Cloud*, 680 F.3d 396, 403-08 (4th Cir. 2008) (reversing money laundering convictions based on payments to various co-conspirators to carry on mortgage fraud scheme, but affirming money laundering convictions based on transactions with profits after underlying mortgage fraud was "complete"). However, it is important to note that Congress "effectively overruled *Santos*" in May 2009, when it amended the money laundering statute, defining "proceeds" thereafter to include "gross receipts." *See Simmons*, 737 F.3d at 324; *and* 18 U.S.C. § 1956(c)(9).

For discussion of these and related issues, *see* **Handbook** § 193 (Money laundering).

Sexual crimes.

In *United States v. Price*, 711 F.3d 455 (4th Cir. 2013), the Defendant sent ninety-three (93) different emails with a total of fifty-four (54) attachments, each of which contained images of child pornography. Using these numbers the Presentence Report

calculated the total number of images of child pornography sent by the Defendant to be "approximately 2,696 images." *Id.* at 457.

The Defendant argued in the District Court and on appeal that "duplicate images sent to multiple individuals should only be counted once," and therefore Senior District Judge Frederick P. Stamp, Jr. erred in imposing a five-level enhancement pursuing to U.S.S.G. § 2G2.2 (b)(7)(D) because the related conduct involved 600 or more images. Rather, the Defendant argued that only "the number of unique images he possessed or emailed [should be counted], which in this case was 113." *Id.* at 457-58.

In an opinion written by Judge Gregory and joined by Judge Keenan and Senior District Court Judge Robert E. Payne sitting by designation, the Fourth Circuit disagreed. Applying Application Note 4 to § 2G2.2(b)(7)(D), the Court held "that when applying the number of images enhancement, each and every depiction of child pornography without regard to originality must be counted." *Id.* at 459, *citing United States v. McNerney*, 636 F.3d 772, 777 (6th Cir. 2011) ("duplicate digital images, like duplicate hard copy images, should be counted separately for the purpose of calculating a sentence enhancement pursuant to § 2G2.2 (b)(7)"); *and United States v. Sampson*, 606 F.3d 505, 510 (8th Cir. 2010) ("The distribution of duplicate images increases the supply and availability of child pornography just as the distribution of unique images does."). Accordingly, Judge Stamp "did not err … when [he] counted each image in each email separately without regard to uniqueness of the image." *Id.* at 460 (affirming 120-month sentence).

In *United States v. McManus*, 734 F.3d 315 (4th Cir. 2013), the Defendant used a file-sharing computer program known as "Gigatribe" to maintain and acquire child pornography. Gigatribe allows users to share files with other users, but only after they have become "friends." Users are also able to limit which of their Gigatribe "friends" are allowed to access which file(s).

The narrow question on appeal in *McManus* was whether this "closed file-sharing" arrangement supported the *five-level* enhancement imposed by District Judge Catherine C. Eagles pursuant to U.S.S.G. § 2G2.2(b)(3)(B). The five-level enhancement applies where a defendant has distributed child pornography "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." Addressing an issue of first impression, the Fourth Circuit answered this question in the negative, vacated the sentence, and remanded for resentencing.

In an opinion written by Judge Duncan and joined by Judge Gregory and District Judge Samuel G. Wilson sitting by designation, the panel first noted its decision in *United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009), in which a *two-level* enhancement pursuant to U.S.S.G. § 2G2.2(b)(3)(F) was approved where the defendant had participated in an "open file-sharing" arrangement in which participants are permitted to access and download child pornography without any "friending" or other limiting condition. The Court also specifically noted that trading child pornography *is* deemed under the Guidelines to be exchange for "a thing of value." *Id.* at 319, *citing* U.S.S.G. § 2G2.2, cmt. 1.

The Government argued that the Gigatribe arrangement "constitute[d] acts greater than those seen in *Layton*," namely, the requirement that the parties become "friends" before access to the child pornography is allowed and thereafter to control who is allowed access to which files. The Court disagreed, noting that "a user [of Gigatribe] does not necessarily have access to another user's files merely because they are Gigatribe 'friends,'" that "Gigatribe users can freeload in the same manner as users of open file-sharing programs," and therefore "a user … can have no reasonable expectation of gaining access to pornographic files or any other thing of value solely because he creates a shared folder populated with files containing child pornography." *Id.* at 321-23 (rejecting the Government's proposed *per se* rule, and finding further that the Government had failed to carry its burden of "submit[ting] sufficient individualized evidence of [the Defendant's] intent to distribute his pornographic materials in expectation of receipt of a thing of value").

In *United States v. Washington*, 743 F.3d 938 (4th Cir. 2014), a jury convicted the Defendant of violating 18 U.S.C. § 2423(a), which prohibits interstate transportation of a minor with the intent that the minor engage in criminal sexual activity. The evidence established that the Defendant, then thirty-two years old, met R.C., a fourteen-year-old runaway already engaging in prostitution, on a street in Maryland. The Defendant soon became R.C.'s pimp, and in that capacity took her to Tennessee, Alabama, and Virginia to engage in prostitution. The Defendant used the proceeds to pay their expenses and kept most of the balance. The Defendant "also had sex with R.C. on multiple occasions." *Id.* at 940.

The Defendant argued on appeal that District Judge John A. Gibney, Jr. erred in instructing the jury that "the government d[id] not have to prove that the defendant knew the individual he transported across state lines was under the age of 18 at the time she was transported." *Id.* This completely undermined the Defendant's defense, which was that R.C. had told him she was 19, which he believed to be true.

In an opinion written by Judge Diaz and joined by Chief Judge Traxler and Judge Floyd, the Fourth Circuit began by noting that it had rejected this very argument in *United States v. Jones*, 471 F.3d 535, 541 (4th Cir. 2006), and concluded that, contrary to Defendant's argument, *Jones* remained "good law" following the Supreme Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (to sustain aggravated identity theft conviction government must prove that defendant knew the stolen identity belonged to "another person"). *Id.* at 941-43 (joining the First, Sixth, and Eleventh Circuits in holding that *Flores-Figueroa* does *not* require the government to prove knowledge of the minor victim's age under § 2423(a)).

The Defendant also argued in *Washington* that the District Court abused its discretion in imposing a 240-month sentence, an upward variance from the advisory Guidelines range of 135 to 168 months. Reviewing, as required, for procedural and substantive error, the Fourth Circuit found neither. Specifically, the Court noted with approval that the District Judge had notified the Defendant in advance of sentencing that he would "consider sentencing [him] outside of the advisory sentencing range"; that the

advisory range was, in fact, considered before the variance sentence was imposed; that the Judge had articulated why he considered the offense conduct in this case to be particularly aggravated; and the Judge's conclusion that the upward variance was necessary, in light of the Defendant's "extensive criminal history, … to deter [him] from committing future crimes and to protect the public." *Id.* at 944-45.

Nor, finally did the Court find the extent of the upward variance, which was "approximately one-and-a-half times longer than the high end of the advisory range," to be unreasonable, noting in this regard that the sentence was "well below the statutory maximum of life imprisonment and serves the § 3553(a) factors." *Id.* at 945 (affirming convictions and 240-month sentence), *citing United States v. Hernandez-Villanueva*, 473 F.3d 118, 123 (4th Cir. 2007) (affirming sentence three times the high end of the advisory range as "reasonable").

In *United States v. Cox*, 744 F.3d 305 (4th Cir. 2014), the Defendant took and dated forty-six Polaroid photographs of his naked minor niece (M.G.) The Defendant's daughter, A.C., told authorities that her father had sexually abused her between the ages of ten and thirteen. The end of that period coincided with the earliest dates on the photographs of M.G. *Id.* at 306.

When M.G. was interviewed, she told the authorities that the Defendant gave her and A.C. liquor laced with "stuff to make them feel better"; that she and the Defendant had sexual intercourse; and that "he would masturbate and ejaculate on her stomach after taking the pictures." *Id.* at 307.

The Defendant pled guilty to possessing child pornography, which is governed by U.S.S.G. § 2G2.2. The issue on appeal was whether District Judge David C. Norton erred in applying the cross-referenced enhancement in § 2G2.2(c)(1), which is triggered "if the offense involved causing … a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." The enhancement in this case – thirteen offense levels – was significant.

The Defendant argued in the district court and on appeal that the Government had failed to prove that he "acted *for the purpose of* producing a visual depiction of sexually explicit conduct," contending that Judge Norton applied the cross-reference based solely on the "existence of the photographs." *Id.* at 308 (emphasis added). "Although [the Defendant] d[id] not dispute that he caused M.G. to engage in sexually explicit conduct, or that he photographed that conduct," he argued that taking the photographs was not the "central component of the sexual encounters." *Id.* at 309.

In an opinion written by Judge Diaz and joined by Judges Wilkinson and Thacker, the Fourth Circuit began by citing the application note directing that the cross-reference "be construed broadly," *id., quoting* U.S.S.G. § 2G2.2 cmt. n.5, then proceeded to discuss opinions in two Circuits which had done just that. *Id., citing United States v. Hughes*, 282 F.3d 1228, 1231 (9th Cir. 2002) ("[i]n ordinary usage, doing X 'for the purpose of' Y does not imply that Y is the exclusive purpose," and concluding that a defendant "cannot

immunize himself from the operation of [the cross-reference] merely by demonstrating that he had an additional reason other than the creation of … photographs for causing [the victim] to engage in sexually explicit conduct"); *and United States v. Veazey*, 491 F.3d 700, 707 (7th Cir. 2007) ("the cross-reference applies when *one of the purposes* was to create a visual depiction," regardless of "whether that purpose was the primary motivation for the defendant's conduct") (emphasis added).

Addressing an issue of first impression in our circuit, the Fourth Circuit came to the same conclusion:

> We agree with our sister circuits that the cross-reference's purpose requirement is satisfied anytime one of the defendant's purposes was to produce a visual depiction of the sexually explicit conduct. In other words, producing the depiction *need not be the defendant's sole, or primary, purpose*.

Id. (emphasis added). The Court also agreed with Judge Norton that the Government had presented sufficient evidence to establish that producing the photographs was at least one of the Defendant's purposes:

> On these facts, we have little trouble concluding that the district court's application of the cross-reference was proper. Contrary to [the Defendant's] assertions, the district court did not base its application of the cross-reference solely on the existence of the photographs. Rather, to support its finding that the cross-reference's purpose requirement was satisfied, the district court specifically referred to paragraphs 11, 12, and 13 of the PSR. Those paragraphs recounted evidence that [the Defendant] took the photographs of M.G. after having sex with her; provided her with alcohol and money and threatened to abuse her younger sister; and both dated the photographs and retained them for as many as seven years. Additionally, the district court noted [the Defendant's] attempts to convince A.C. to lie about the photographs' origins.
>
> We agree with the district court that the evidence presented in the PSR "corroborate[s]" that [the Defendant's] purpose was to produce a visual depiction of the sexually explicit conduct….The production of the photographs – all of which was sexually explicit – was part and parcel of [the Defendant's] sexual exploitation of M.G., lending strong support to the conclusion that producing the images was at least <u>one</u> of his purposes in abusing her. Given that [the Defendant] also took the photographs over a <u>series</u> of encounters, dated them, and retained them after the encounters, the evidence was plainly sufficient to support application of the cross-reference.

Id. (affirming 240–month sentence).

In *United States v. McVey*, 752 F.3d 606 (4th Cir. 2014), the Defendant pled guilty to possession of child pornography. The only issue on appeal was whether Chief District Judge Robert C. Chambers clearly erred in applying a two-level enhancement for *distribution* pursuant to U.S.S.G. § 2G2.2(b)(3)(F). The Defendant essentially argued that although he admitted distributing child pornography at least six times during a ten year period, "his only *documented* instance of distribution 'occurred more than two years prior to his offense of conviction' and thus was not relevant conduct." *Id.* at 608 (emphasis added).

In an opinion written by Judge Niemeyer and joined by Judges Wilkinson and Duncan the Fourth Circuit disagreed, reasoning:

> In sum, where an individual continually possesses child pornography over a period of ten years and admits that he distributed that pornography over the same period, it is reasonable for a district court to conclude that seven specific distributions during that period are closely connected with the ongoing offense of possession. Accordingly, we conclude that the district court did not clearly err in finding that [the Defendant's] distribution activity was part of the same course of conduct as his offense of conviction."

Id. at 613 (affirming 78-month term of imprisonment).

For discussion of these and related issues, *see* **Handbook** § 196 (Sexual crimes); *and* § 295 (Upward departures and variances).

Sexual crimes/Lengthy sentences.

Is a 120-year sentence for production, possession, and transportation of child pornography – which included the Defendant "sexually molest[ing] a four-year old boy on four separate occasions while acting as the child's babysitter, and … photograph[ing] and film[ing] his sexual encounters with the child" – cruel and unusual punishment in violation of the Eighth Amendment, *or* an "unreasonable" sentence? These were the questions before the Fourth Circuit in *United States v. Cobler*, 748 F.3d 570 (4th Cir. 2014). The Court also noted that the Defendant was "a 28-year-old man in poor health who is afflicted by a serious communicable disease, [who] admitted that at the time he molested the child, he was aware of the possibility his disease could be transmitted to the child by sexual contact." *Id.* at 574.

The Defendant pled guilty to three counts of production of child pornography in violation of 18 U.S.C. § 2251(a) and (e), one count of transportation of child pornography in interstate commerce in violation of 18 U.S.C. § 2252 (a)(1) and (b)(1); and one count of possession of child pornography in violation of 18 U.S.C. § 2252 (a)(4)(B) and (b)(2). The Probation Officer who prepared the Presentence Report "concluded that although [the Defendant] lacked any prior convictions, the severity of his offenses warranted an initial

advisory guidelines term of life imprisonment. However, because none of [the] charges provided for a sentence of life imprisonment, [the Defendant's] guidelines sentence was calculated to be 1,440 months, or 120 years, which represented the sum of the statutory maximum sentences available for each count of conviction." *Id.* District Judge Michael F. Urbanski considered the sentencing factors in 18 U.S.C. § 3553(a), rejected the Defendant's request for "a significant downward variance … based in part on his grave medical condition and short life expectancy, as well as his lack of criminal history," and imposed a sentence of 120 years imprisonment. *Id.*

In an opinion written by Judge Keenan and joined by Judge Wynn, the Fourth Circuit answered both questions posed in the first paragraph in the negative, affirming the lengthy sentence. Judge Duncan wrote a separate opinion, disagreeing with the majority's conclusion that prior Circuit decisions conflicted and therefore that substantial analysis was required, but concurring in the judgment that the 120-month sentence should be affirmed. *Id.* at 583 (Duncan, J., concurring in judgment).

Regarding proportionality review under the Eighth Amendment, the majority noted there are two kinds of potential challenges, both raised by the Defendant in *Cobler*: (1) "an 'as-applied challenge,' [in which] a defendant contests the length of a certain term-of-years sentence as being disproportionate 'given all the circumstances in a particular case'"; and (2) "a 'categorical' challenge [in which] a defendant asserts that an entire class of sentences is disproportionate based on 'the nature of the offense' or 'the characteristics of the offender.'" *Id.* at 575, *quoting Florida v. Graham*, 560 U.S. 48, 59-60 (2010). The Court also noted the Supreme Court's repeated emphasis of "the limited scope of both types of proportionality challenges." *Id., citing Graham*, 560 U.S. at 59-60 (recognizing that the Eighth Amendment "forbids only extreme sentences that are grossly disproportionate to the crime").

As the majority observed, "[t]he Supreme Court has identified a term-of-years sentence as being grossly disproportionate on only one occasion *Id., citing Solem v. Helm*, 463 U.S. 277, 296-300 (1983) (sentence of life without parole for passing a $100 bad check was "cruel and unusual punishment" in violation of Eighth Amendment). Moreover, "[s]ince the decision in *Solem*, no defendant before the Supreme Court has been successful in establishing even a threshold inference of gross proportionality." *Id.* at 576, *citing Lockyer v. Andrade*, 538 U.S. 63 (2003) (two consecutive sentences of 25 years to life, under California's "three strikes" statute, for theft of videotapes worth about $150 did not violate Eighth Amendment); *Ewing v. California*, 538 U.S. 11, 19-20 (2003) (sentence of 25 years to life, under California's "three strikes" statute, for theft of $1200 in merchandise did not violate Eighth Amendment); *and Harmelin v. Michigan*, 501 U.S. 957 (1991).

If the scope of an "as-applied" proportionality challenge is extremely narrow, the scope of "categorical" challenges is narrower still. Indeed, "[b]efore 2010, the Supreme Court had deemed only certain classes of *death* sentences as being categorically disproportionate," *Id.* at 577 (emphasis added), *citing Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (rape); *Enmund v. Florida*, 458 U.S. 782 (1982) (certain types of felony murder), "or because some populations of offenders had diminished personal responsibility

for their crimes …." *Id.*, *citing Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *and Atkins v. Virginia*, 536 U.S. 304 (2002) (mentally disabled). Finally, the majority recognized that since 2010 the Supreme Court "has extended its use of the categorical analysis to a very narrow group of non-capital prison sentences involving juvenile offenders *Id.*, *citing Florida v. Graham*, 560 U.S. 48 (2010) (life imprisonment without parole for juveniles convicted of non-homicide crimes violates Eighth Amendment); *and Miller v. Alabama*, 132 S. Ct. 2455 (2012) (mandatory life without parole sentence for juveniles convicted of homicide crimes violates Eighth Amendment).

In light of this limited framework in which proportionality review has been allowed by the Supreme Court, the majority proceeded to consider whether Fourth Circuit precedent "improperly imposes a wholesale restriction against proportionality review for any prison sentence of less than life imprisonment without parole." *Id.* On this point, the majority concluded that its first published opinion on the subject, *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), was consistent with Supreme Court rulings, and to the extent subsequent panels issued opinions inconsistent with *Rhodes* they were not controlling. *Id.*, *citing Rhodes*, 779 F.2d at 1026 (reviewing sentences of 50 and 75 years for drug conspiracy, and finding neither in violation of Eighth Amendment).

With that foundation established, the majority next considered the Defendant's "as-applied" and "categorical" challenges in this case, ultimately rejecting both. Regarding the "as-applied" challenge, the majority noted that "preventing the sexual exploitation of [children] 'constitutes a government objective of surpassing importance.'" *Id.*, *quoting New York v. Ferber*, 458 U.S. 747, 757-58 (1982). The Court further observed that:

> [T]he usual severity of conduct of this nature is far exceeded by the particular circumstances of this case. Not only did [the Defendant] possess large quantities of child pornography that he downloaded and shared on the Internet, fueling the public consumption of materials harmful to children, but he also created depictions of his own sexual exploitation, molestation, and abuse of a four-year-old child. To make matters worse, [the Defendant] was aware that his sexual contact with the child could have caused the child to contract [the Defendant's] serious communicable disease.

Id. at 580 (also concluding, for much the same reasons, "that [the Defendant's] categorical challenge likewise lacks merit").

And finally, the majority considered, and rejected, the Defendant's arguments that the 120-year within-guidelines sentence was procedurally and substantively "unreasonable." Specifically, the majority held that Judge Urbanski's reference to the Defendant's "rape" of his four-year-old victim was not a "procedural error," or an error at all, *id.* at 581, ultimately concluding that the sentence was also "substantively reasonable." *Id.* at 581-82, *citing United States v. Demeyer*, 665 F.3d 1374, 1375 (8th Cir. 2012) (120-year within-guidelines sentence for sexual exploitation of minor was substantively reasonable); *United States v. Noel*, 581 F.3d 490, 500-01 (7th Cir. 2009) (80-year below-guidelines sentence for production and possession of child pornography was substantively

reasonable); *United States v. Sarras*, 575 F.3d 1191, 1219-21 (11th Cir. 2009) (100-year within-guidelines sentence for "child sex crimes" was substantively reasonable); *United States v. Betcher*, 534 F.3d 820, 827-28 (8th Cir. 2008) (750-year sentence for production, receipt, and possession of child pornography was substantively reasonable); *and United States v. Johnson*, 451 F.3d 1239, 1244 (11th Cir. 2006) (140-year within-guidelines sentence for production and distribution of child pornography was substantively reasonable).

For discussion of these and related issues, *see* **Handbook** § 196 (Sexual crimes); *and* § 304 (Lengthy sentences).

Prosecution of juveniles.

In *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), the Defendant had been adjudicated a juvenile delinquent based on sexual contact with his half-sisters, and was ordered to register under the Sex Offender Registration Act ("SORNA"), 42 U.S.C. § 16901 *et seq*. The sexual contact occurred in Japan, where the Defendant's mother was stationed in the Navy, and the Defendant was prosecuted in federal court in South Carolina under 18 U.S.C. § 3261(a) (providing for prosecution of individuals who commit criminal offenses while "accompanying" a member of the Armed Forces outside the United States). The sexual contact in question included anal and vaginal penetration of the Defendant's sisters, who were ten and six years old at the time. *Id.* at 259-60.

The single issue on appeal was whether District Judge David C. Norton erred in ordering the juvenile to register under SORNA. The Defendant argued (1) that the order contravened the confidentiality provisions of the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5038(e); and (2) that ordering him to register as a sex offender constituted "cruel and unusual punishment" in violation of the Eighth Amendment. In an opinion written by Judge Agee and joined by Judges Wilkinson and Keenan, the Fourth Circuit disagreed on both points, and affirmed Judge Norton's order.

Regarding the confidentiality provisions in the FJDA, the Court agreed that the provisions of the two statutes conflicted. However, as a matter of statutory interpretation, the Court observed:

> Where two statutes conflict, "a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Emp't Sec. Comm'n of N.C.*, 4 F.3d 1274, 1284 (4th Cir. 1993). We conclude that SORNA is the more specific statute, and therefore controls over any contrary provision of the FJDA. SORNA unambiguously directs juveniles ages fourteen and over convicted of certain aggravated sex crimes to register, and thus carves out a narrow category of juvenile delinquents who must disclose their status by registering as a sex offender. *See* 42 U.S.C. § 16911(8). For all other juvenile delinquents, the FJDA's confidentiality provisions remain in force.

Id. at 262. The Court also cited legislative history indicating that Congress clearly intended to require older juveniles convicted of more serious sexual offenses to register under SORNA. *Id.* at 262-63.

Nor was the Fourth Circuit any more sympathetic with the Defendant's Eighth Amendment argument. Specifically the Court held:

> In sum, when it enacted SORNA, Congress did not intend to impose additional punishment for past sex offenses but instead wanted to put into place a non-punitive, civil regulatory scheme. Given that intent, the question is whether Appellant has presented the "clearest proof" that SORNA is so punitive in effect, as applied to him, as to negate its civil intent. *Smith*, 538 U.S. at 92. That "clearest proof" is lacking, as examination of the *Mendoza-Martinez* factors makes clear. *Id*. at 97-106. We therefore hold that SORNA's registration requirements, as applied to Appellant, do not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Id. at 266 (affirming district court's order imposing SORNA registration as a condition of supervision), *applying Smith v. Doe*, 538 U.S. 84, 92 (2003) (setting forth two-part test to determine whether statute has a "punitive effect"); *and Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (setting forth seven factors to be considered in determining whether statute has "punitive effect").

For discussion of related issues, *see* **Handbook** § 199 (Prosecution of juveniles).

Illegal reentry after deportation.

In *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), the Defendant was convicted of illegal reentry by an alien after having been convicted of an aggravated felony. The only issue on appeal was whether District Judge Martin K. Reidinger erred in applying a sixteen-level enhancement, pursuant to U.S.S.G § 2L1.2(b)(1)(A)(ii), based on a statutory rape conviction in violation of Tennessee law. To justify the enhancement it was necessary for the Government to establish that the statutory rape conviction was for a "crime of violence."

The Defendant's statutory rape conviction was based on his having had sexual intercourse with his "then-girlfriend," who was sixteen years old, and twelve years younger than he was, at the time. The "victim" openly conceded that the relationship was consensual and that the Defendant believed she was eighteen rather than sixteen. The Tennessee Court weighed all of these considerations and imposed a two-year suspended sentence. *Id.* at 375.

Because the applicable Sentencing Guidelines commentary includes "statutory rape" as an example of a "crime of violence" for sentence enhancement purposes under this statute, *see* U.S.S.G. § 2L1.2 cmt.n.1(B)(iii), the question became whether the Defendant's conviction was for "generic" statutory rape or for something less, that is, whether the Defendant was convicted of "statutory rape" as "the term is now used in the criminal code of most States." *Id.* at 377-78, *quoting Taylor v. United States*, 495 U.S. 575, 598 (1990).

Noting that the "age of consent [to sexual relations] is central to the conception of statutory rape in every jurisdiction across the country," and that "the contrast between age sixteen [which 32 states and the federal government set as the "age of consent"] and the age of eighteen [which a small minority of states, including Tennessee, set as the age of consent] is highly consequential," the Fourth Circuit ultimately answered this question in the negative. *Id.* at 378-81.

In an opinion written by Judge Wilkinson and joined by Judges Floyd and Goodwin, the Court *reversed* the enhanced sentence in a decision which is likely not only to affect future sentences on convictions for illegal reentry after deportation, but will perhaps also more frequently be relevant to sentences for convictions under the Armed Career Criminal Act (in determining whether a prior conviction was for a "violent felony") and in career offender sentences (in determining whether a prior conviction was for a "violent crime").

In *United States v. Medina*, 718 F.3d 364, 365-66 (4th Cir. 2013), the Defendant pled guilty to possession of a concealed weapon and marijuana in violation of Maryland law, and was sentenced to eighteen months of "probation before judgment." The issue on appeal was whether this guilty plea and diversionary sentence constituted a "conviction," and therefore subjected the Defendant – who was being sentenced for illegal reentry after deportation – to the four-level enhancement under U.S.S.G. § 2L1.2(1)(D).

The Defendant argued that § 2L1.2(b)(1)(D) does not specifically state that diversionary dispositions are "convictions," and that "Maryland courts generally do not consider diversionary dispositions to be convictions for the purposes of state law." *Id.* at 366. District Judge James K. Bredar disagreed, ruled that the Defendant's guilty plea and diversionary disposition were a "felony conviction within the meaning of § 2L1.2 (b)(1)(D)," and applied the four-level enhancement accordingly. *Id.* at 366-67.

In an opinion written by Judge Wilkinson and joined by Judges Duncan and Wynn, the Fourth Circuit affirmed. The Court first rejected the Defendant's state law argument, holding to the contrary that "federal law controls … interpretation of the Guidelines absent a specific indication to the contrary." *Id.* at 367. And as to "whether a guilty plea that results in a diversionary disposition is a conviction under federal law," the Court found "the general definitions for the immigration laws [in which] Congress specifically defined a conviction to include a diversionary disposition" to be dispositive. *Id.* at 367-68, *citing* 8 U.S.C. § 1101(a)(48).

In *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013), the Defendant pled guilty to illegal reentry of the United States after deportation in violation of 8 U.S.C. § 1326(a)(1). Based on a prior conviction under Maryland's child abuse statute – the conduct in question being sexual intercourse with an 11-year-old girl when the Defendant was 19-years-old – Senior District Judge Peter J. Messitte concluded that the Defendant had been convicted of a "crime of violence" and, on that basis, enhanced his base offense by 16 levels. *Id.* at 349; *see also* U.S.S.G. § 2L1.2(b)(1)(A)(ii).

In an opinion written by Chief Judge Traxler and joined by Judges Niemeyer and Motz, the Fourth Circuit *reversed*. Citing the Supreme Court's recent decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), and its own decision in *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012), the Court concluded "that the modified categorical approach [applied by Judge Messitte] is inapplicable and that under the categorical approach [the Defendant's] prior conviction is not a crime of violence." *Id.*

The key issue in reaching this conclusion was whether the Maryland child abuse statute was "divisible" in a manner that one or more but not all sections of the statute proscribed a crime or crimes of violence. *Id.* at 350, *citing Descamps*, 133 S. Ct. at 2284; *and Gomez*, 690 F.3d at 199. The Court concluded that although the Maryland statute was "generally divisible" into the proscription of *physical* abuse and *sexual* abuse, a defendant could be found guilty of sexual abuse without even touching the child victim, for example, by failing to act to prevent molestation or exploitation. *Id.* at 352-53 (citing Maryland cases). That being the case, and given the more restrictive use of the "modified categorical approach" following *Descamps* and *Gomez*, the Court concluded:

> Sexual abuse under [the Maryland statute] does not amount to a generic "forcible sex offense" because a forcible sex offense requires the use or threatened use of force or compulsion, *see United States v. Chacon*, 533 F.3d 250, 257 (4th Cir. 2008), an element not required under [the statute]. *See Walker*, 2013 WL 3456566, at *15; *Brackins*, 578 A.2d at 302. Sexual abuse under [the statute] likewise does not amount to generic "sexual abuse of a minor," which we have defined as "physical or non physical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *United States v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008) (internal quotation marks omitted). As previously noted, intent to gratify sexual urges is not an element of sexual abuse under [the Maryland statute]. *See Tate*, 957 A.2d at 648. Finally, sexual abuse under [the statute] does not amount to generic statutory rape within the meaning of § 2L1.2. Statutory rape requires sexual intercourse, see *Rangel-Casteneda*, 709 F.3d at 376, but a defendant need not even touch the victim to be convicted of sexual abuse under [the statute]. *See Walker*, 2013 WL 3456566, at *15.
>
> Accordingly, while [the Maryland statute] can be divided into categories of physical abuse and sexual abuse, the sexual abuse category does not, by its elements, constitute any of the potentially applicable crimes of violence enumerated in the Guidelines Commentary. The statute is

> therefore not divisible in the manner necessary to warrant application of the modified categorical approach.

Id. (reversing and remanding for resentencing).

In *United States v. Montes-Flores*, 736 F.3d 357 (4th Cir. 2013), the Defendant pled guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326. The issues on appeal were: (1) whether District Judge Richard M. Gergel erred in applying the modified categorical approach in determining that a prior conviction for assault and battery of a high and aggravated nature ("ABHAN") in violation of South Carolina common law was a "crime of violence"; and (2) if so, whether the error was harmless. In an opinion written by Judge Thacker and joined by Judge King, a split panel answered these questions "Yes" and "No," respectively.

The significance of whether the ABHAN conviction was for a "crime of violence" was that it determined whether the Defendant was subject to a 16-level enhancement pursuant to U.S.S.G. § 2L1.1 (b)(1)(A)(ii). Without the enhancement the applicable Guidelines rang was either 10-16 months or 18-24 months. With the enhancement the range increased to 46-57. Judge Gergel imposed a 46-month sentence.

The majority began its analysis by noting that it "rel[ies] on precedents evaluating whether an offense constitutes a 'crime of violence' under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a 'violent felony' under the [Armed Career Criminal Act ("ACCA"], because the two terms have been defined in a manner that is 'substantively identical.'" *Id.* at 263, *quoting United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012); *and United States v. Jarmon*, 596 F.3d 228, 231 n.* (4th Cir. 2010). *Accord United States v. Mobley*, 687 F.3d 625, 628 n.3 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 888 (2013); *United States v. Jenkins*, 631 F.3d 680, 683 (4th Cir. 2011); *United States v. Peterson*, 629 F.3d 432, 438-39 (4th Cir. 2011); *United States v. Clay*, 627 F.3d 859, 965-66 (4th Cir. 2010); *and United States v. Seay*, 553 F.3d 732, 739 (4th Cir.), *cert. denied*, 130 S. Ct. 127 (2009).

Applying *Descamps*, *Cabrera-Umanzor*, and *United States v. Hemingway*, 734 F.3d 323, 338 (4th Cir. 2013), the majority in *Montes-Flores* concluded: (1) that ABHAN is *not* categorically a "crime of violence"; (2) that the divisibility/indivisibility distinction in these cases applied equally to common law and statutory crimes; and (3) that South Carolina's ABHAN crime was indivisible and therefore it was error to apply the "modified categorical approach in determining that the Defendant had been convicted of a "crime of violence." *Id.* at 366-69.

In route to determining that ABHAN was not categorically a "crime of violence," the majority noted that the South Carolina courts had broadly interpreted the common law crime as proscribing both violent and nonviolent conduct, including "such offenses as a stranger on the street embracing a young lady," and had accepted a wide variety of factors as aggravating circumstances, including "disparity in ages or physical conditions of the

parties, a difference in gender, infliction of shame and disgrace, … and resistance of lawful authority." *Id.* at 368, citing South Carolina authority.

The Government also argued, in the alternative, that any error below was harmless. It was on this alternative argument that the majority and the dissent sharply disagreed. Simply put, Judges Thacker and King were not persuaded that the District Judge would have imposed the same sentence – would have required an upward variance or departure – in the absence of the error, while Judge Shedd was certain he would have.

As the majority noted, to find a sentencing error harmless, an appellate court must determine, first, that the district court would have reached the same result in the absence of error, and second, that the sentence was reasonable. *Id.* at 370, *citing United States v. Savillon-Matute*, 636 F.3d 119, 123 (4th Cir. 2011); *and United States v. Gomez*, 690 F.3d 194, 203 (4th Cir. 2012). The majority also noted that "a correct calculation of the advisory Guidelines range is the crucial 'staring point' for sentencing [and that] an error at that step 'infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court." *Id.*, *quoting United States v. Lewis*, 606 F.3d 193, 201 (4th Cir. 2010); *and United States v. Diaz-Ibarra*, 522 F.3d 343, 347 (4th Cir. 2008). Applying these principles here the majority found nothing in the record supporting Judge Shedd's conclusion, namely, that Judge Gergel "would have varied upward from a Guidelines range of 10 to 16 months or 18 to 24 months to arrive at a 46 month sentence." *Id.* at 371 (vacating and remanding for resentencing).

Judge Shedd essentially made two points in support of his conclusion "that the district court believed that nothing less than a 46-month sentence was appropriate." *Id.* at 373 (Shedd, J., dissenting)(emphasis in original). First, he noted that the District Judge had rejected the Defendant's request for a downward variance "perhaps to a sentence of 36 months." *Id.* at 372-73 (Shedd, J., dissenting). And second, he pointed to Judge Gergel's "serious concern for public safety and deterrence" in light of the Defendant's "extensive criminal history," which he articulated at the sentencing hearing. *Id.* at 373 (Shedd, J., dissenting) (suggesting that district courts consider announcing alternate sentences, or stating that they would impose the same sentence regardless, where there are contested sentencing issues).

In *United States v. Perez-Perez*, 737 F.3d 950 (4th Cir. 2013), the issue on appeal was whether the Defendant's North Carolina conviction for taking indecent liberties with a minor – based on having had sexual relations with a 15-year-old girl when he was 25 – was a "crime of violence" for purposes of the U.S.S.G. § 2L1.2(b)(1)(A) enhancement. In an opinion written by Judge Davis and joined by Judges Motz and Gregory, concluding that it was "constrained by *United States v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008)," the Fourth Circuit held that it was. *Id.* at 951-55 (affirming enhanced sentence).

In an unusual move, Judge Davis also issued a concurring opinion, longer than his opinion for the panel, in which he let us know how he "really felt." Specifically, the concurring opinion criticized the "breathtaking limitlessness" of *Diaz-Ibarra*, described the Circuit's more recent interpretations of the reentry enhancement as having "substantial

dissonance, rapidly approaching incoherence," and urged a future *en banc* Court "to begin the clean-up process by revisiting *Diaz-Ibarra* and thereby bring a measure of coherence to the meaning of 'sexual abuse of a minor' at the very least." *Id.* at 959 (Davis, J, concurring).

In *United States v. Henriquez*, 757 F.3d 144, 146 (4th Cir. 2014), the Defendant pled guilty to illegal reentry after deportation, and the only issue on appeal was "whether first degree burglary in Maryland constitutes a generic burglary, i.e., a crime of violence that can support a [16-level] sentence enhancement under United States Guidelines Section 2L1.2(b)(1)." In an opinion written by Judge Wynn and joined by Chief Judge Traxler, a divided Fourth Circuit panel answered this question in the negative. Judge Motz wrote a dissenting opinion.

At issue was whether Maryland's highest court, the Maryland Court of Appeals, had interpreted the Maryland statute to be broader than "generic burglary," as defined in *Taylor v. United States*, 495 U.S. 575, 598 (1990) (excluding burglary of *automobiles* from definition of generic burglary); and *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (excluding burglary of "*a boat or motor vehicle*" from definition of generic burglary) (emphasis added). Simply put, the majority concluded that it had – by interpreting the statute as covering a recreational vehicle in which someone was regularly sleeping. *Id.* at 148-51.

As noted, Judge Motz concluded to the contrary that the Maryland Court of Appeals' interpretation was not broader than generic burglary in that it only encompassed vehicles (and boats) "where one resides or sleeps," that is, vehicles and boats that are being used as dwellings. *Id.* at 152-55 (Motz, J., dissenting) (concluding that the Maryland statute was actually "'narrower than the generic' definition developed in *Taylor*," which "necessarily implies that [the Defendant] has been found guilty of all the elements of generic burglary").

In *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc), the Defendant pled guilty to illegal reentry after deportation. At sentencing Chief District Judge Deborah K. Chasanow applied the modified categorical approach, and concluded that the Defendant's conviction for resisting arrest in violation of Maryland law *was* a "crime of violence" for purposes of the sixteen-level enhancement under U.S.S.G § 2L1.2(b)(1)(A).

Sitting en banc, a thirteen judge majority disagreed with the District Court and with the panel opinion affirming Judge Chasanow, albeit on different grounds. *See United States v. Aparicio-Soria*, 721 F.3d 317 (4th Cir. 2013). Specifically, the en banc Court held (1) that the statute was indivisible and therefore that the *categorical approach* should have been applied, and (2) that a violation of the Maryland statute did *not* qualify as a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A). *Id.* at 157 (vacating and remanding for resentencing).

In reaching this conclusion, the majority emphasized the difference in the "crime of violence" standard under the *residual clause* of the Armed Career Criminal Act (whether criminalized "conduct … presented a serious potential risk of physical injury to another"), and the applicable standard under the "force clause" of the same statute – the standard which applied here (whether "a crime … has as an element the use or attempted use of violent force"). *Id.* at 157-58 (concluding that "violent force is simply not an element of resisting arrest in Maryland").

Judge Wilkinson wrote a strenuous 28- page dissent, which was joined only by Judge Niemeyer. The dissent agreed that the categorical approach should have been applied, but strongly disagreed with the majority's conclusion that resisting arrest under Maryland law was not categorically a crime of violence. And to illustrate and in support of their conclusion to the contrary, the dissent attached Appendices listing and annotating 32 resisting arrest cases decided by Maryland's Court of Appeals and Special Court of Appeals, all of which involved "violent force." *Id.* at 158-67 (Wilkinson, J., dissenting).

In *United States v. Valdovinos*, 760 F.3d 322 (4th Cir. 2014), the Defendant pled guilty to illegal reentry after deportation. Based on a prior North Carolina drug conviction – for which the Defendant *could* have received up to 16 months imprisonment, but for which he *actually* received a sentence of 10 to 12 months (pursuant to a plea agreement) – District Judge Frank D. Whitney enhanced the offense level pursuant to U.S.S.G. § 2L1.2(b)(1)(B) (providing for a 12 level increase where a defendant has a prior conviction for a "felony drug trafficking offense"). The Guidelines specifically limit *felony* drug trafficking offenses to those "punishable by more than one year in prison." *Id.* at 323.

The narrow issue on appeal in this case was whether an offense carrying a possible sentence in excess of a year, but limited by a plea agreement to no more than 12 months, was "punishable by a term exceeding one year." *Id.* at 324-25. In an opinion written by Judge Motz and joined by Judge Diaz, a divided panel answered this question in the affirmative, concluding that:

> North Carolina's legislatively mandated sentencing scheme, not a recommended sentence hashed out in plea negotiations, determines whether an offender's prior North Carolina conviction was punishable by more than a year in prison. Because [the Defendant's] offense of conviction was indeed punishable by imprisonment exceeding one year it qualifies as a predicate felony under Section 2L1.2(b)(1)(B).

Id. at 330 (affirming sentence based, in part, on the enhancement).

Senior Judge Davis wrote a fervent 29-page dissent in which he sharply criticized what he called "a flailing federal sentencing regime" which has caused "the harmful effects of over-incarceration," and which is now widely "recognized as unjust and inhumane, as well as expensive and ineffectual." *Id.* (Davis, J., dissenting). However one comes out on the merits of the appeal, Judge Davis' unvarnished criticism of our federal criminal

jurisprudence, which follows this opening salvo, is well worth reading. Among the points he makes, citing largely to academic and social science research, are the following:

> - 1 out of every 100 adults … currently sit in an American prison or jail – a marked departure from the historical experience of the United States as well as the modern experience of peer democracies….The United States now holds the highest prison population rate in the world, over 5 to 10 times more than western European democracies.
>
> - Though it is home to only 5 percent of the world's population, our nation accounts for nearly 25 percent of its prisoners.
>
> - By all accounts, these "tough on crime" policies have been an abject failure. A rapidly accumulating group of multi-disciplinary research studies have come to the conclusion that the rate of incarceration in the United States needs to be significantly reduced.
>
> - Each inmate costs our system, and thus the taxpayers, $29,291 annually….A Brookings Institute project shows that direct corrections expenses total $80 billion a year; total expenditure soars to more than $260 billion once police, judicial, and legal services are included.
>
> - The heady weight of this experiment's failure falls disproportionately on our poor, our communities of color and excruciatingly so on young black men (noting a Hamilton Project Report which found that "[t]here is nearly a seventy percent chance that an African-American man without a high school diploma will be imprisoned by his mid-thirties").

Id. at 331-32 (Davis, J., dissenting).

For discussion of these and related issues, *see* **Handbook** § 200 (Illegal reentry after deportation); § 122 [Sentence enhancement for prior drug conviction(s)]; § 145 (Armed Career Criminal Act/Violent felonies); *and* § 292 (Career offender).

Identity theft.

In affirming the Defendant's conviction for aggravated identity theft in *United States v. Adepoju*, 756 F.3d 250 (4th Cir. 2014), the Fourth Circuit restated the elements of the offense, and affirmed again that the government must prove that a defendant knew the "means of identification" he or she used belonged to a real person.

To establish an aggravated identity theft conviction in violation of 18 U.S.C. § 1028A, the government must prove that the defendant "(1) knowingly transferred, possessed, or used, (2) without lawful authority, (3) a means of identification of another person, (4) during and in relation to a predicate felony offense." *Id.* at 256, *quoting United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 182 (2010).

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Defendant used a social security number which was assigned to another person to obtain employment. On the basis of this conduct – but without proving that the defendant *knew* the social security number belonged to someone else – he was convicted of aggravated identity theft in violation of 18 U.C.C. § 1028A(a)(1).

Resolving a split in the circuits, a unanimous Supreme Court reversed, holding "that § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification belonged to another person." *Id.* at 1894. This effectively reversed the Fourth Circuit's holding to the contrary in *United States v. Montejo*, 442 F.3d 213, 215-17 (4th Cir.) (aggravated identity theft statute does *not* require proof that defendant knew means of identification belonged to someone else), *cert. denied*, 549 U.S. 879 (2006). *Accord Adepoju*, 756 F.3d at 256 (government must prove defendant "knew that the 'means of identification' belonged to another person; an accused unaware that the means of identification belonged to another person cannot be guilty"). However, "[k]nowledge of existence is enough; the accused need not know the individual personally." *Id.*

For discussion of these and related issues, *see* **Handbook** § 206 (Identity theft, fraud, and related activity).

Healthcare offenses.

In *United States v. McLean*, 715 F.3d 129 (4th Cir. 2013), the Defendant was an "interventional cardiologist" convicted of "healthcare fraud and making false statements in connection with the delivery of or payment for health care services." The conduct in question involved false statements regarding the percentage of blockage in arteries, which allowed the surgical insertion of stents, and then billing the Government or private insurers for the medically unnecessary services.

The evidence presented by the Government at trial included testimony of two cardiologists (testifying as experts), current and former staff members who had worked with the Defendant, and the Defendant's former patients; evidence that the Defendant was in the process of shredding documents in relevant files when the FBI arrived to execute a search warrant; and the falsified documents themselves. This evidence established that the Defendant often recorded 80% to 95% blockage when it was, in fact, no more than 10% to 30%, and that a stent was not medically indicated until blockage was at least 50%. *Id.* at 133. The evidence also established that the Defendant recorded reports by a patient of chest discomfort when there had been none, that he showed before-and-after pictures to another patient of an artery purportedly showing 95% blockage when, in fact, there was no blockage at all, and that the Defendant scheduled a series of medically unnecessary post-operative stress tests for each patient. *Id.* at 134.

Following ten days of trial the jury found the Defendant guilty on all counts. District Judge William D. Quarles, Jr. found that there had been more than $1 million in related losses, applied a 16-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(1)(I), and

then sentenced the Defendant to 97 months imprisonment. Judge Quarles also entered forfeiture and restitution orders of $579,070. *Id.* at 136.

In an opinion written by Judge Gregory and joined by Judge Keenan and Senior Judge Payne, the Fourth Circuit rejected each of the Defendant's arguments on appeal, affirming his convictions and sentence. As the Court summarized them, the Defendant's appellate arguments were:

> that the health care fraud statute is unconstitutionally vague as applied to him; that the evidence was insufficient to support his convictions on all counts; and that his trial was prejudiced by the government's failure to disclose impeachment evidence and [by] certain erroneous evidentiary rulings … by the district court.

Id.

The Defendant first argued that the health care fraud statute, 18 U.S.C. § 1347, was unconstitutionally vague as applied to him "because no clear standard of medical necessity governed the use of coronary artery stents during the relevant time period." *Id.* The Fourth Circuit flatly disagreed, noting that the statute had a *mens rea* requirement, that is, that the Government was required to prove that Defendant *knowingly and willfully* executed a scheme to defraud – "which necessarily entails proof that he knew the stent procedures were unnecessary." *Id.* at 136-37.

The Fourth Circuit likewise found that the convictions on all counts were supported by sufficient evidence. On this point, the Court noted that the Defendant "repeatedly overstated blockage by a wide margin"; that he showed misleading pictures and made false statements to patients and "recorded symptoms patients did not experience"; that he "gave inconsistent explanations for his conduct"; that he "attempted to shred patient files subpoenaed by the United States"; and that he "had a financial motive for his fraudulent scheme." *Id.* at 139. The Court also rejected the Defendant's argument that "the government had failed to prove beyond a reasonable doubt that an objective standard of medical necessity existed." *Id.* at 141. To the contrary, noted the Court, the government's experts both testified that a stent was not justified unless there was at least 70% blockage and *the Defendant's* expert testified that stents were medically unnecessary unless there was at least 50% blockage. *Id.*

The Defendant next argued that he was prejudiced because he was not informed that the hospital had settled a civil fraud investigation – "for being aware of and failing to take action to prevent [the Defendant's] medically unnecessary procedures." *Id.* at 141-42. Specifically, the Defendant argued that this information could have been used to impeach one of the Government's expert witnesses, a cardiologist who was affiliated with the hospital. Again, the Court disagreed, "find[ing] no due process violation here because the settlement information had little impeachment value, and there was no reasonable probability it would have affected the jury's verdict." *Id.* at 142.

The Defendant also argued that Judge Quarles erred in allowing the Government to voir dire his expert the day before he testified and then limiting the scope of his testimony. Again, the Fourth Circuit disagreed, concluding that the Defendant's expert disclosure did not comply with the requirements of Fed. R. Crim. P. 16, that is, it only "state[d] the conclusion he had reached [after reviewing five of the Defendant's cases] and did not give the reasons for those opinions as required under Rule 16 (b)(1)(C)." *Id.* at 142-43, *citing United States v. Barile*, 286 F.3d 749,758 (4th Cir. 2002). Nor, for the same reason – nondisclosure as required by Rule 16 – did the Court find any error in excluding the defense expert's testimony on the medical necessity of post-operative stress tests and treatment the Defendant gave to patients named in the disclosure. *Id.* at 143. The Court also concluded that any error in excluding the expert's testimony about a *Journal of American Medical Association* article showing a 12% error rate in stent procedures was harmless in that the article was addressed during the cross-examination of one of the Government's experts and defense counsel relied on the article during closing argument. *Id.* at 143-44. And finally, the Court found that any error in excluding the expert's testimony that four of the five cases met the medical standard of care because "he had seen other doctors perform similar stents" was harmless. *Id.* at 144. On this point, the Court noted that the expert *was* allowed to testify that in his opinion the Defendant had met the standard of care in these four cases because each had at least 50% blockage, and reasoned that there was no prejudice in exclusion of "an additional explanation for his opinion." *Id.*

The Defendant's final argument was that his sentence was "procedurally unreasonable" because Judge Quarles incorrectly determined that the amount of loss exceeded $1 million. The Fourth Circuit disagreed, finding ample support in the amount of loss finding on the basis of evidence that the Defendant had received $579,070 in reimbursement for medically unnecessary stent procedures *and* that the hospital had repaid $1.3 million to federal programs, "which corresponded to reimbursement it received for hospital facilities used in [the Defendant's] unnecessary stent procedures." *Id.* at 144-45.

In *United States v. Perry*, 757 F.3d 166, 169 (4th Cir. 2014), the Defendant applied for Social Security disability benefits, and began receiving payments "in 1996 or 1997," agreeing in his application to report to the Social Security Administration ("SSA") if his medical condition improved to the extent that he could "work whether as an employee or a self-employed person." Thereafter, from 1996, when he began working at Macy's, until 2009 (with the exception of 2001 to 2004), the Defendant "worked for a variety of employers including Hertz Corporation, L & J Cleaning, and Nordstrom," but never reported this income to the SSA. *Id.*

Thereafter, in 2006 and 2007, the Defendant likewise failed to disclose his income in applications for prescription drug benefits under the Medicare Part D and Low Income Subsidy programs, falsely stating in the latter application "that he was receiving no income other than Social Security disability." *Id.* at 170. He also failed to respond to at least four subsequent inquiries by the SSA and Medicare about his income, and in response to a fifth inquiry, sent to the Defendant by the SSA in 2008, "report[ed] some, but not all, of his employment from the previous years." *Id.*

On the basis of this conduct, the Defendant was charged in a three count indictment, filed in March 2012, with Social Security fraud, federal health benefit program fraud, and health care fraud. At the close of evidence in his 2013 trial the Defendant "moved for judgment of acquittal on the basis of the statute of limitations," which District Judge Richard D. Bennett denied.

In an opinion written by Judge Wynn and joined by Judges Duncan and Agee, the Fourth Circuit affirmed, agreeing with Judge Bennett that these were "continuing offenses" and rejecting the Defendant's argument to the contrary "that the [five-year] limitations period began to run not when the continuing offenses were complete, but instead in 1999 when the government knew of, or could have discovered, [his] non-disclosure." *Id.* at 173-74. And finally, although the Court agreed that "silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud," this was of no benefit to the Defendant "who knew he had a duty to report any employment to SSA." *Id.* at 176 (affirming conviction and sentence).

For discussion of these and related issues, *see* **Handbook** § 216 (Healthcare offenses); § 77 (*Giglio* material); § 232 (Expert testimony); *and* § 275 (Amount of loss).

Voir dire.

In *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), the Defendant was charged with several counts stemming from a scheme to arrange fraudulent marriages between Navy sailors and foreign nationals. As the Court explained, the arrangement provided benefits to both parties. The sailors received an additional monthly stipend known as a "Basic Allowance for Housing," and the foreign nationals were able to obtain permanent residency in the United States. *Id.* at 854.

During voir dire one of the jurors disclosed that she was the host of a conservative radio talk show that addressed, among other issues, illegal immigration. When asked about her views on illegal immigration, the juror responded that her mother was a naturalized citizen who had come to the country and sought citizenship legally, and that she and her mother both thought other immigrants "should have to do the same thing." *Id.* However, the juror also stated – on three different occasions – that she could and would put her personal views aside and reach a verdict based solely on the evidence which was presented at trial.

In an opinion written by Judge Diaz and joined by Judges King and Floyd, the Fourth Circuit found no abuse of discretion in District Judge Mark S. Davis' refusal to excuse this juror for cause. In reaching this conclusion the Court noted the broad discretion a District Judge has in deciding when to excuse a juror for cause, discussed the three questions posed to the juror by Judge Davis regarding whether she could render an impartial verdict and her responses, and ultimately "defer[red] to the district court's determination that [the contested juror] could serve impartially." *Id.* at 857.

For discussion of related issues, see **Handbook** § 224 (Voir dire).

In-court identification.

In *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013), the Defendant was convicted of armed bank robbery and of brandishing a firearm during the robbery, for which he received consecutive sentences totaling 30 years in prison. He argued on appeal that admission of testimony of one of the bank tellers that certain of his features resembled those of the robber (specifically, "[t]he nose, … the teeth, the slimness of the face and vaguely the mouth"), and the District Court's failure to give a *Holley-Telfaire* instruction regarding eyewitness identification, constituted reversible error. Because defense counsel neither objected to the in-court identification testimony nor requested a *Holly-Telfaire* instruction, the Fourth Circuit conducted plain error review of both.

Regarding identification testimony generally, the Fourth Circuit noted the two-step process the Supreme Court has established to determine whether it should be admitted:

> First, the court must consider whether the identification testimony is unnecessarily suggestive. Second, if the testimony was unnecessarily suggestive, a court must look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances.

Id. at 305, *quoting Satcher v. Pruett*, 126 F.3d 561, 566 (4th Cir. 1997), *and citing Manson v. Brathwaite*, 432 U.S. 98, 110 (1977); *and Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The Court also acknowledged its long time awareness "of the danger of erroneous eyewitness identification." *Id.* at 306, *citing Smith v. Paderick*, 519 F.2d 70, 75 n.6 (4th Cir. 1976); *and New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011) (lengthy analysis of the factors affecting the reliability of eyewitness identification).

Applying these general principles to the facts in *Greene*, the Court concluded that the identification evidence "was unnecessarily suggestive"; that it "was also unreliable under the five *Biggers* factors," and therefore that "it was error to admit [the teller's] testimony as to the similarities between [the Defendant] and the bank robber." *Id.* at 310, *applying Biggers*, 409 U.S. at 199-200 (setting forth five factors to consider in determining reliability of identification evidence). However, in an opinion written by Judge Davis and joined by Judges Niemeyer and Motz, the Court conducted plain error review and ultimately concluded – due to independent evidence, including the testimony of an accomplice who pled guilty and agreed to cooperate – that the error did not affect the Defendant's substantial rights. *Id.* at 310-13.

And finally, the Court addressed the failure to give the jury a *Holley-Telfaire* instruction, beginning its analysis by noting "that a *Holley-Telfaire* instruction *should* be given in cases where there is 'no evidence of identification except eyewitness testimony'."

Id. at 313 (emphasis added), *quoting United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974). The Court described the required instruction, and when it was required, thus:

> Such an instruction advises the jury on how to appraise a witness's identification testimony, emphasizing whether the witness had adequate opportunity to observe the offender, how far the witness was from the offender, how good the light was, the length of time between the offense and the identification, and other factors. *Id.* at 277. We have cautioned that the *Holley-Telfaire* rule is a flexible one and not a rigid requirement on trial courts. *United States v. Brooks*, 928 F.2d 1403, 1408 (4th Cir. 1991). "The *Holley-Telfaire* instruction or its substantial equivalent is not required to be given, *sua sponte*, in a case where other independent evidence, whether direct or circumstantial, or both, is presented to the trier of fact which is corroborative of the guilt of the accused." *United States v. Revels*, 575 F.2d 74, 76 (4th Cir. 1978).

Id. Thus, the Court concluded:

> Because, assuming that [the bank teller's] testimony should be treated as eyewitness testimony, there was independent evidence of [the Defendant's] participation in the robbery, we hold the district court did not err in failing to give a *Holley Telfaire* instruction when such an instruction was not requested by the defense.

Id. (affirming convictions and sentences).

For discussion of related issues, *see* **Handbook** § 228 (In-court identification).

Expert testimony.

In *United States v. Lespier*, 725 F.3d 437, 445 (4th Cir. 2013), the Defendant sought to introduce an expert in human psychology to testify regarding "the neurological effects of extended sleep deprivation" to explain inconsistencies in the seven different statements the Defendant made to law enforcement throughout the evening of his arrest and, without being allowed to sleep, the following day. In an opinion written by Judge King and joined by Chief Judge Traxler and Senior Judge Hamilton, the Fourth Circuit concluded that District Judge Martin K. Reidinger did *not* abuse his discretion in refusing to admit this proffered expert testimony.

The Court began its analysis by noting that to be admissible expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue," and that "[t]he helpfulness requirement of Rule 702 thus precludes the use of expert testimony related to matters which are 'obviously … within the common knowledge of jurors.'" *Id.* at 449, *quoting* Fed. R. Evid. 702(a); and *Scott v. Sears Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986). That being the foundational principle, the Court ultimately "agree[d]

with the government that, in the typical case, the effects of sleep deprivation … are readily comprehended by jurors and [therefore] do not require an expert for their explanation." *Id.* (concluding that the District Court did *not* abuse its discretion in excluding it).

In *United States v. Strayhorn*, 743 F.3d 917 (4th Cir. 2014), brothers – Janson and Jimmy Strayhorn – were charged with a Hobbs Act robbery (of "P&S Coins") and with conspiracy to commit a second Hobbs Act robbery (of "All American Coins"). Janson Strayhorn argued on appeal that his Rule 29 motion should have been granted as to the robbery of P&S Coins, that is, that the evidence was insufficient to support his conviction.

The focus of the Fourth Circuit's sufficiency analysis was a "partial fingerprint on an easily movable object," here, the duct tape used to bind the legs of the store's owner. *Id.* at 922. In an opinion written by Judge Wynn and joined by Judges Gregory and Davis, the Court began by discussing five opinions going back over fifty years, namely: *United States v. Corso*, 439 F.2d 956, 957 (4th Cir. 1971) (defendant's fingerprint on matchbook cover used by thieves to jam a lock, together with other evidence presented by government, *insufficient*, noting that "[t]he probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed only during the commission of the crime"); *United States v. Van Fossen*, 460 F.2d 38, 40-41 (4th Cir. 1972) (fingerprints on two photographic negatives and an engraving print *insufficient* where there was no evidence indicating when the fingerprints were imprinted); *United States v. Harris*, 530 F.2d 576, 579 (4th Cir. 1976) (fingerprints on a note used in bank robbery, together with other evidence presented by government, *sufficient* to sustain conviction); *United States v. Anderson*, 611 F.2d 504, 508-09 (4th Cir. 1979) (sustaining bank robbery convictions based on fingerprints on movable objects and "additional substantial evidence"); *and United States v. Burgos*, 94 F. 3d 849, 874-75 (4th Cir. 1996) (en banc) (sustaining drug convictions based on fingerprint on a plastic bag containing crack cocaine and other "incriminating evidence establishing [the defendant's] guilt").

Applying these precedents to the facts in *Strayhorn*, the Court found the fingerprint and other evidence presented *insufficient* to sustain the Defendant's conviction for the Hobbs Act robbery. Here, the only other evidence presented by the government was the Defendant's arguable possession of a gun stolen in the robbery, which was found two months after the robbery when he was stopped while driving his brother's girlfriend's car. "In sum," the Court concluded:

> a fingerprint on an easily movable object with no evidence of when it was imprinted is sufficient to support a conviction only when it is accompanied by additional incriminating evidence which would allow a rational juror to find guilt beyond a reasonable doubt. Here, the government failed to adduce such evidence.

Id. at 924 (reversing convictions pertaining to first robbery).

For discussion of these and related issues, *see* **Handbook** § 232 (Expert testimony); § 251 (Rule 29 motions); *and* § 327 (Sufficiency of the evidence).

Rule 404(b) evidence.

In *United States v. Moore*, 709 F.3d 287 (4th Cir. 2013), in which the Fourth Circuit reversed Senior District Judge J. Frederick Motz's denial of the Defendant's motion for a new trial, the Court also addressed whether certain Rule 404(b) evidence had been properly admitted.

At issue was Rule 404(b) evidence that the Defendant had possessed a firearm on three prior occasions. According to the Government's evidence, on one occasion the Defendant had possessed a "revolver," and on two occasions he had possessed a "semi-automatic pistol." The Defendant, who was charged with using a *revolver* to commit a carjacking, objected to admission of the evidence that he possessed the *semi-automatic pistols*. Judge Motz overruled the objection, concluding that the evidence was properly admitted to establish "that [the Defendant] had the 'opportunity' to possess and to access firearms." *Id.* at 295.

In an opinion written by Chief Judge Traxler and joined by Judges Gregory and Davis, the Fourth Circuit *reversed*. As the Court explained:

> The evidence of [the Defendant's] possession of a different type of firearm, introduced via Rule 404(b), served only to establish [his] criminal disposition and was therefore inadmissible. *See United States v. Hawkins*, 589 F.3d 694, 705 (4th Cir. 2009) (explaining that evidence of defendant's prior possession of a firearm would not be admissible under Rule 404(b) at a separate trial on charges that defendant brandished a different firearm during a carjacking: "There [is] simply nothing about [the defendant's] being in possession of a different firearm … that [is] related to any of the elements of the carjacking counts.").

Id. at 295-96 (recognizing, however, that evidence of possession of the semi-automatic pistols may be admissible "under a different rule," or "that evidence at retrial may differ significantly enough to warrant reconsideration of its admissibility under Rule 404(b)."

In *United States v. Lespier*, 725 F.3d 437 (4th Cir. 2013), District Judge Martin K. Reidinger excluded certain of the Government's proffered Rule 404(b) evidence and admitted the rest. Specifically, in a trial in which the Defendant was charged with murdering his ex-girlfriend (Mandi Smith), on the Cherokee Indian Reservation, and using a firearm to do so, Judge Reidinger:

> permitted the evidentiary use of certain threats and physical violence by Lespier against Smith in the years leading up to her murder. Smith's sister, Tasha, told the jury that she saw Lespier shove Smith through a glass

> window, resulting in gashes and cuts on Smith's back. Tasha also described an incident when Lespier grabbed a heavy wooden mail holder and "turned and threw it at [Smith], hitting her "in the area of the head." In addition, Tasha recounted that Lespier told her he hated Smith, once going so far as to threaten "to put rat poison in her food." Lespier also said to Tasha that he "could just kill [Smith], strangle her." Id. Finally, Tasha described a horrifying experience when Smith and her son came to stay with Tasha after a fight with Lespier. Lespier called Smith repeatedly until, when Smith finally answered (on speakerphone), Lespier threatened to come to Tasha's house, tie Smith to a chair, shoot their son in front of her, and finally "shoot [Smith] and then turn the gun on himself."
>
> Smith's grandmother, Dorothy Conner, recounted a violent incident that took place at her home on Mother's Day in 2009. While cooking outside on a grill, Conner saw Smith run out of the house, pursued by Lespier with a knife, while Smith carried their son in her arms. Bill Caley, Lespier's friend, told the jury that on one occasion, Lespier hung up on Smith and stated, "Need to shoot that bitch in the face." The trial court repeatedly instructed the jury that the Rule 404(b) evidence could be considered only for the limited purposes of Lespier's intent and the absence of an accident, that such evidence was not relevant to Lepier's character, and that the jury could not infer, based on character, that Lespier may have committed the acts charged in the indictment.

Id. at 444.

In an opinion written by Judge King and joined by Chief Judge Traxler and Senior Judge Hamilton, the Fourth Circuit found no error. Applying the four prong test articulated in *United States v. Queen*, 132 F.3d 991,995 (4th Cir. 1997), the Court concluded that the evidence was: (1) "relevant to prove [the Defendant's] intent and to show that [the victim] did not shoot herself by accident or mistake" as the Defendant contended; (2) that it "was necessary to prove the disputed element of [the Defendant's] intent"; (3) that it was reliable; and (4) that "the probative value of the Rule 404(b) evidence was substantial, and was not outweighed by unfair prejudice on any of the Rule 403 criteria." *Id.* at 448. On the latter point, the Court noted in particular that "any risk of unfair prejudice was effectively mitigated by the Court's carefully framed limiting instructions regarding proper consideration of such evidence." *Id., citing United States v. White*, 405 F.3d 208, 213 (4th Cir. 2005).

For discussion of these and related issues, *see* **Handbook** § 241 (Rule 404(b) evidence); *and* § 240 [Rule 403 (probative value versus prejudice)].

Entrapment/Rule 404(b) evidence/Joinder and severance.

In *United States v. McLaurin*, 764 F.3d 372 (4th Cir. 2014), undercover officers posing as "disgruntled drug couriers" devised a plan with the Defendants, McLaurin and Lowery, to rob a non-existent "stash house" of seven to nine kilograms of non-existent cocaine. This kind of "reverse sting operation" is known in law enforcement circles as a "home-invasion investigation." *Id.* at 375.

A third undercover officer, Charlotte Mecklenburg Police Officer Rolando Ortiz-Trinidad, was first introduced by a confidential informant to Defendant McLaurin, who sold Officer Ortiz-Trinidad a handgun for $200 and told the officer that he also had a shotgun for sale. Two days later they met again and McLaurin sold the officer a "sawed-off shotgun" for $150. *Id.*

About two weeks later the confidential informant introduced two other undercover officers, BATF Special Agent Shawn Stallo and his partner Task Force Officer Ashley Asbill, to McLaurin. In the initial meeting, recorded on audio and video, the undercover officers expressed their displeasure with the non-existent Mexican drug trafficking organization (the Organization) for which said they worked, and "expressed their desire to steal drugs from a stash house belonging to the Organization." Also at this initial meeting:

> Agent Stallo told McLaurin that he regularly picked up cocaine from various rental houses used by the Organization as stash houses, and that they were looking for someone to rob one of these stash houses. According to the cover story … each stash house, when stocked, contained between seven to nine kilograms and was guarded by two armed men; the Organization constantly changed which stash house held the stock; Stallo picked up two kilograms of cocaine from a stocked stash house about every 30 days, but would not learn the address of such stash house until the day of the pick-up. Stallo proposed to keep two kilograms of the stolen cocaine for himself, while McLaurin and any others he recruited to help in robbing the stash house could keep the balance because they would be responsible for the "heavy lifting."

Id. at 376. In response, McLaurin told the undercover officers that he was interested; that he had "committed a similar robbery in the past," that he would have to get a gun because he had recently sold his (to undercover Officer Ortiz-Trinidad); that he would need "a large-caliber weapon" because the job was "real big"; and that it "would … take him three or four days to recruit others to help him in the robbery *Id.*

Consistent with training he had received on how to conduct "home-invasion investigations," presumably to prevent a successful entrapment defense, "Agent Stallo made clear to McLaurin several times during the meeting that he did not have to go through with the robbery if he did not want to, including telling McLaurin to take a few days to consider whether he wanted to participate." *Id.* Two weeks later McLaurin, Defendant Lowery (who McLaurin brought with him), and Agent Stallo met again. During this meeting, which was recorded on audio, McLaurin told Agent Stallo that upon entering the house, he would order everyone to "get on the floor, face down." Lowery stated that "he

would strike anyone who resisted with the butt of his gun or shoot them in the leg if necessary"; stated that he was carrying a firearm at that time; opined that "the job called for a 'K,' referring to an AK-47 rifle, because it was more powerful and could 'chop ligaments'"; and "offered to help sell Agent Stallo's share of the drugs." *Id.* at 376-77. And finally, following a third recorded meeting and a number of calls and text messages, the appointed date for the robbery arrived, which turned out instead to be the date scheduled for the arrest of the surprised Defendants.

McLaurin and Lowery were both charged with three conspiracy counts based on their roles in planning the fictitious stash house robbery: (1) a Hobbes Act conspiracy in violation of 18 U.S.C. § 1951(a); (2) conspiracy to possess with intent to distribute five or more kilograms of cocaine; and (3) conspiracy to use or carry a firearm in furtherance of a crime of violence and a drug trafficking offense. In addition, McLaurin was charged with two counts of possession of a firearm by a convicted felon (based on the sale of the two firearms to Officer Ortiz-Trinidad), and Lowery was charged with one count of possession of a firearm by a convicted felon (based on his possession of a firearm the preceding year, conduct unrelated to this investigation).

Both Defendants moved to sever their felon in position charge(s), which District Judge Robert J. Conrad, Jr. granted in regard to Lowery but denied in regard to McLaurin. Both Defendants relied primarily on an entrapment defense, which the jury rejected, finding the Defendants guilty on all counts. On appeal the Defendants *unsuccessfully*: (1) challenged a supplemental instruction given after the jury requested clarification of the term "inducement" as it applied to the entrapment defense; (2) contended that it was error to admit Rule 404(b) evidence that McLaurin had been convicted of common law robbery in 2003, and that Lowery had possessed a firearm in 2010 (the factual basis of the severed count); and (3) argued that the District Court had erred in denying McLaurin's motion to sever the felon in possession charge.

In an opinion written by Chief Judge Traxler and joined by Senior Judge Hamilton and Judge Floyd, the Fourth Circuit began by noting that "[e]ntrapment is an affirmative defense consisting of 'two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct.'" *Id.* at 379, *quoting Mathews v. United States*, 485 U.S. 58, 63 (1988). The Defendants took no issue with the initial entrapment instruction, challenging only the District Court's supplemental instruction that "inducement requires more than mere solicitation by the government. Inducement is a term of art necessitating government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *Id.* Specifically, the Defendants argued that the "clarification" "improperly permitted the jury to reject the entrapment defense based on a non-factual, value-laden determination that the government had not overreached, without ever considering the core issue of an entrapment defense – predisposition." *Id.* Finding no error in the supplemental instruction, the Court reasoned:

> The unobjected-to general entrapment instruction … made it clear to the jury that an entrapment defense consists of two elements and the defense

> could be rejected on either the inducement prong or the predisposition prong. The supplemental "inducement" instruction did not remove the predisposition element from the jury's consideration any more than the agreed-upon general instructions did. Instead, the supplemental instruction simply elaborated on the circumstances that can be considered inducement, and did so in a manner consistent with the law of this circuit.

Id. at 379-80, *citing United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993) ("'Inducement' is a term of art: it involves elements of government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party.").

Nor did the Fourth Circuit find error in admission of the Rule 404(b) evidence. In route to this conclusion the Court cited authority from other circuits standing for the proposition "that proving predisposition [to defeat an entrapment defense] is one of the purposes for which bad-act evidence may be admissible"; concluded that Lowery's testimony that his telling the undercover officers he was carrying a gun was "bravado" and "just talk" opened the door to 404(b) evidence that had possessed a firearm eight months earlier; and that eliciting testimony from Agent Stallo on cross-examination that the only information he had that McLaurin had committed a robbery in the past was "his verbal admission" opened the door to 404(b) evidence that McLaurin had a prior conviction for common law robbery. *Id.* at 383-84.

The panel split, however, over whether the conspiracy charges and the two counts charging McLaurin with being a felon in possession of a firearm were properly joined. The majority (Chief Judge Traxler and Senior Judge Hamilton) concluded that they were; Judge Floyd, who concurred in the remainder of Chief Judge Traxler's opinion, dissented on this point. Essentially, the majority reasoned that the offenses were "logically related" in that the same confidential informant introduced McLaurin to the undercover officer who purchased the guns and to the undercover agent and officer with whom he planned the fictitious robbery; the gun sales and planning of the robbery occurred within weeks of each other and the former established "that McLaurin stood at the ready to consider meeting about a criminal opportunity"; that the sale of the guns explained McLaurin's statement "that he would need a gun for the robbery and that he had recently sold his gun"; that McLaurin suffered no prejudice by joinder in that evidence of possession and sale of the guns would have been admissible under Rule 404(b); and that, in any event, sawed-off shotguns have no lawful purpose. *Id.* at 385-86. On the last point, *see also United States v. Mobley*, 687 F.3d 625, 631 (4th Cir. 2012) (sawed-off shotguns have no lawful purpose), *cert. denied*, 133 S. Ct. 888 (2013).

The Fourth Circuit agreed with McLaurin, however, that Judge Conrad "erred by accepting the PSR's calculation of his criminal history category [in which it] erroneously assessed a total of three criminal history points for the two common law robbery convictions, because McLaurin committed such robberies at age sixteen." *Id.* at 387. In concluding that it should "notice" the error under plain error review, the Court noted that the error increased the low-end of the Guideline range by 30 months; and that the Judge had stated that he was "very troubled" by the high range "driven by the fictitious weight of

the fictitious drugs contained in the fictitious stash house". *Id.* at 388 ("These concerns, when considered along with the district court's decision to sentence McLaurin at the low end of the Guideline range it believed to be applicable, provide a non-speculative basis for concluding that the district court would have imposed a sentence of less than 151 months had the Guidelines range been properly calculated.").

For discussion of these and related issues, *see* **Handbook** § 244 (Entrapment); § 241 (Rule 404(b) evidence); § 252 (Jury instructions generally); § 74 (Joinder and severance); *and* § 291 (Criminal history).

Prosecutorial misconduct.

In *United States v. Woods*, 710 F.3d 195 (4th Cir. 2013), the prosecutor accused the Defendant, in his closing statement, of "l[ying] … under oath." In *rejecting* the Government's argument that the prosecutor's comment was "proper," the Fourth Circuit explained its precedent on this issue thus:

> First, we disagree with the government's contention that this statement was proper. We long have rebuked government counsel for making inflammatory statements of this nature. Twenty years ago, in *United States v. Moore*, 11 F.3d 475 (4th Cir. 1993), we strongly criticized a prosecutor's statement during closing argument that the crime was "compounded when the defendant … comes into a federal court, takes the oath on the Bible, and lies." 11 F.3d at 480. We explained unequivocally that "it is *highly improper* for the government to refer to a defense witness as a liar," and further noted that we had "continually admonished the government not to engage in such conduct." *Id*. at 481 (emphasis added). Applying plain error review in *Moore*, we held that the prosecutor's statement was error that was plain, and we "strongly admonished [the government] to 'clean up its act,'" issuing the warning "hopefully for the last time." *Id*. at 482 n.9; *see also United States v. Weatherless*, 734 F.2d 179, 181 (4th Cir. 1984) (noting that government counsel's multiple statements that the defendant was a liar and a "loser" fell "well beneath the standard which a prosecutor should observe"); *cf. United States v. Loayza*, 107 F.3d 257, 262 (4th Cir. 1997) ("it is improper for a prosecutor to directly express his opinion as to the veracity of a witness.") (quoting *Moore*, 11 F.3d at 481).

Id. at 203.

In an opinion written by Judge Keenan and joined by Chief Judge Traxler and Judge Thacker, the Fourth Circuit quickly concluded that "[its] reasoning in *Moore* applies with equal force in the present case"; that plain error "results when a prosecutor states that a defendant has lied under oath during trial"; and "that such an error occurred here." *Id.*

On the other hand, the Defendant did not fare as well in his argument that the error affected his "substantial rights," that is, that he suffered prejudice as a result. On those points, the Fourth Circuit concluded to the contrary that "[t]he comment was relatively isolated in nature," and that the "competent proof introduced against him … overwhelmingly supported a finding of guilt and undermined his credibility." *Id.* at 204-05 (reviewing government's testimonial evidence). Accordingly, although the Court "strongly criticize[d] the prosecutor's argument that [the Defendant] had lied under oath," it ultimately determined "that [the Defendant's] substantial rights were not violated and [therefore] that this trial error d[id] not warrant reversal of [the Defendant's] convictions." *Id.* at 205.

The Court also found that the prosecutor in this case improperly asked the Defendant's supervisor, who had testified that the Defendant's integrity had never been called into question at work, whether the charges in this case "call[ed] into question the defendant's integrity." As the Court explained:

> The prosecutor's question … effectively required that Harrison assume Woods' guilt for purposes of influencing the content of the character testimony, a practice clearly prohibited under our precedent. We repeatedly have held that "questions put to defense character witnesses that assume [ ] a defendant's guilt of the crime for which he was charged [are] improper." *United States v. Mason*, 993 F.2d 406, 408 (4th Cir. 1993) (citing *United States v. Siers*, 873 F.2d 747 (4th Cir. 1989)). Harrison's response to the improper question therefore did not provide a valid basis on which to refuse the proffered character instruction.

Id. at 207.

For discussion of these and related issues, *see* **Handbook** § 247 (Prosecutorial misconduct).

Judicial misconduct.

In *United States v. Cherry*, 720 F.3d 161 (4th Cir. 2013), the jury returned guilty verdicts on drug and firearm charges. The Courtroom Clerk then asked "Members of the jury, is this your verdict, so say you all?" All the members of the jury indicated an affirmative response, at which point Senior District Judge Robert G. Doumar thanked the jury and made the following remarks:

> Sometimes all of the information is not given to you. This defendant had previously been convicted of distributing controlled substance, had previously been convicted of resisting arrest, and had previously been convicted of carrying a firearm in furtherance of a drug trafficking crime.

> I only tell you that to tell you that these things are not admissible because of the way the rules are written, that a person has to be judged on this particular crime, but I just thought I would tell you about that because it tells you a little bit about Mr. Cherry's background and it will give you some idea of that.
>
> I thank you for your paying close attention, just so you would know what, unfortunately, I know because I can see all of this information, and you haven't seen it and it would not be admissible. But the rules of evidence under these circumstances didn't permit it.

Id. at 164. Immediately following these comments, and without objection to the Judge's remarks, defense counsel asked that the jurors be polled individually.

In an opinion written by Judge Duncan and joined by Judges Wilkinson and Wynn, the Fourth Circuit concluded that Judge Doumar's comments *before* the jurors were individually polled was error but, conducting plain error review, that the plain error did not affect the defendant's "substantial rights," that is, that the error was not "prejudicial." *Id.* at 167-68.

In reaching this conclusion the Court noted that the evidence against the defendant was overwhelming; that "the circumstances surrounding the erroneous remarks are strong indicia that the jury had reached a unanimous guilty verdict," presumably referring to the affirmative responses of the individual jurors to the Courtroom Clerk's question; the fact that the jury already knew that the Defendant was a convicted felon, and that he had been previously arrested for possession of marijuana – which was admitted to impeach the Defendant's testimony "that he was not aware that smoking marijuana was illegal." *Id.* at 168.

In *United States v. Brown*, 757 F.3d 183 (4th Cir. 2014), District Judge William D. Quarles, Jr. was absent from the courtroom while a recording of a police interview of the Defendant was replayed, at the jury's request, after they had begun deliberating. In an opinion written by Judge King and joined by Judges Wynn and Floyd, the Fourth Circuit acknowledged that "[a] trial judge's absence from the bench may, depending on the circumstances, constitute a structural error that is reversible per se." *Id.* at 190. That is, a Judge's absence from a portion of the trial proceedings may be, but is not always, structural error requiring reversal.

In route to holding that the Judge's absence in *Brown* was *not* structural error, the Court discussed *United States v. Love*, 134 F.3d 595 (4th Cir. 1998), where it first "recognized that the absence of the district court from a portion of a trial is not always a structural defect." *Id.* at 192-93. As in *Love* – where the Judge leaving the bench prior to the closing arguments was held not to be structural error – Judge Quarles "was absent for a relatively short time after all the evidence had been presented; no rulings were requested during the court's absence, and, fortunately, nothing else of note occurred in the courtroom." *Id.* at 192. "We are therefore content to say," the Fourth Circuit panel

concluded, "that our decision in *Love* compels the conclusion that the error complained of here was harmless." *Id.* at 193.

For discussion of related issues, *see* **Handbook** § 250 (Judicial bias or misconduct).

Rule 29 motions.

In *United States v. Lespier*, 725 F.3d 437 (4th Cir. 2013), following a six-day jury trial, the Defendant was convicted of murdering his ex-girlfriend (Mandi Smith) on the Cherokee Indian Reservation, and of using a firearm to do so. In rejecting his argument that District Judge Martin K. Reidinger erred in denying his Rule 29 motions for judgment of acquittal, the Fourth Circuit reasoned:

> In the light most favorable to the prosecution, the evidence permitted the jury to find ample incriminating facts supporting the two convictions, including the following:
>
> - In the past, Lespier had physically abused and repeatedly threatened to kill Smith;
>
> - On the evening of the fatal shooting, Smith sought to leave Lespier's home, proceeding as far as the driveway before a bag containing makeup and clothing was ripped from her arm;
>
> - Lespier hit Smith on the head with the shotgun with sufficient force to crack its stock;
>
> - Lespier had retrieved the murder weapon, the .38 caliber revolver, from a locked safe;
>
> - Based on the trajectory of the gunshot that killed Smith, a self-inflicted wound was not possible;
>
> - Lespier had tampered with the crime scene, moving Smith's body, wiping up her blood, an planting the revolver and a pill near her body;
>
> - Lespier waited some period of time before calling 911; and
>
> - Lespier made multiple false exculpatory statements seeking to explain the relevant events.
>
> Predicated on the foregoing, together with the balance of the record, it is clear that the government presented substantial evidence proving that

> Lespier committed murder in the first degree, as alleged in Count One. The district court therefore properly denied judgments of acquittal.

Id. at 447 (affirming convictions and two consecutive life sentences).

For discussion of these and related issues, *see* **Handbook** § 251 (Rule 29 motions).

Specific jury instructions.

In *United States v. Woods*, 710 F.3d 195 (4th Cir. 2013), the Defendant requested that Senior District Judge James C. Fox instruct the jury regarding "evidence of his good general reputation for honesty and integrity." In an opinion written by Judge Keenan and joined by Chief Judge Traxler and Judge Thacker, the Fourth Circuit found that Judge Fox "abused [his] discretion in refusing to give the requested character instruction," but ultimately concluded in light of "the strength of the government's case … [that] the jury would have returned guilty verdicts with or without the requested character evidence [and therefore] … [that] the record … fails to establish … prejudice." *Id.* at 207.

The Fourth Circuit began its analysis by noting its standard of review of a district court's refusal to give a requested jury instruction, and the standard applied in determining whether the refusal constitutes reversible error. As the Court explained:

> We review a district court's decision whether to give a particular jury instruction for abuse of discretion. *United States v. Lighty*, 616 F.3d 321, 366 (4th Cir. 2010). "A district court commits reversible error in refusing to provide a proffered jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *Id.* (citation omitted). However, "an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole." *Wellinton v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983).

In this case the Defendant requested the following instruction:

> The defendant has offered evidence of his good general reputation for honesty and integrity. The jury should consider this evidence along with all the other evidence in the case reaching a verdict.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crimes charged, may give rise to a reasonable doubt since the jury may think it improbable or unlikely that a person of good character for honesty or integrity and for being a law-abiding citizen would commit such crimes.

Id. at 206.

The Court noted that a defendant is permitted to introduce affirmative evidence of good character, and that the Defendant in this case had "offered two sources of evidence regarding his good character: (1) his own testimony; and (2) the testimony of his supervisor … Milton Harrison." *Id., citing Mickelson v. United States*, 335 U.S. 469, 476 (1948) (approving character evidence); Fed. R. Evid. 404(a)(2)(A) (same); *and Mannix v. United States,* 140 F.2d 250, 253-54 (4th Cir. 1944) (same).

Although Harrison (the Defendant's supervisor at the Veterans Administration) testified on direct examination that "[the Defendant's] integrity was never called into question regarding his work at the VA," he conceded on redirect examination (by the prosecutor) that the charges the Defendant faced at trial did "call into question [his] integrity." *Id.* Judge Fox ultimately concluded that Harrison had "equivocated" in his opinion of the Defendant's good character and, on that basis, declined to give the requested instruction. *Id.* at 206-07.

The Fourth Circuit squarely rejected the Government's argument that Harrison had "retracted his opinion of the defendant's character," concluding to the contrary that the prosecutor's question itself was improper. As the Court explained:

> The prosecutor's question … effectively required that Harrison assume Woods' guilt for purposes of influencing the content of the character testimony, a practice clearly prohibited under our precedent. We repeatedly have held that "questions put to defense character witnesses that assume [ ] a defendant's guilt of the crime for which he was charged [are] improper." *United States v. Mason*, 993 F.2d 406, 408 (4th Cir.1993) (citing *United States v. Siers*, 873 F.2d 747 (4th Cir. 1989)). Harrison's response to the improper question therefore did not provide a valid basis on which to refuse the proffered character instruction.

Id. at 207. However, as noted, while the Court found the district court's refusal to give the instruction to be an abuse of discretion, in the absence of prejudice it ultimately declined to reverse the conviction or sentence. *Id.*

In *United States v. Lespier*, 725 F.3d 437 (4th Cir. 2013), the Defendant was charged with murdering his ex-girlfriend on the Cherokee Indian Reservation, and using a firearm to do so. The Defendant's defense was that the victim accidentally shot herself as they physically struggled over a gun she had initially fired at him.

At the conclusion of the trial *the Government* requested a lesser-included offense instruction, specifically instructing the jury that if it did not find the Defendant guilty of First Degree Murder, it could find him guilty of the lesser-included offense of Second Degree Murder. The Defendant unequivocally opposed any such instruction. *Id.* at 445-46.

On appeal, following his conviction for First Degree Murder and the imposition of a life sentence, the Defendant argued that District Judge Martin K. Reidinger erred in declining to give the lesser-included offense instruction. Reviewing for plain error and citing the "invited error doctrine," the Fourth Circuit concluded that:

> an error that was invited by the appellant "cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings." United States v. Gomez, 705 F.3d 68, 76 (2d Cir. 2013). Indeed, recognizing an invited error would seriously undermine confidence in the integrity of the courts. See id. ("[T]he fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he had invited."); see also United States v. Day, 700 F.3d 713, 727 n.1 (4th Cir. 2012) ("[A] 'defendant in a criminal case cannot complain of error which he himself has invited.'" (quoting Shields v. United States, 273 U.S. 583, 586 (1927))).

Id. at 450 (district court erred in declining to give lesser-included offense instruction, but nevertheless affirming convictions and consecutive life sentences).

For discussion of these and related issues, *see* **Handbook** § 253 (Specific jury instructions); § 252 (Jury instructions generally); *and* § 334 (Invited error doctrine).

Motion for new trial.

In *United States v. Moore*, 709 F.3d 287 (4th Cir. 2013), the Defendant was charged with armed carjacking. The primary defense was that another individual, Pollin, who was the first one seen driving the car after it was stolen, was the perpetrator.

The encounter with the victim was brief ("last[ing] only twenty to thirty seconds"), and the perpetrator was wearing a hat and had a bandana over his face. Thus, the victim "could only see his eyes and dreadlocks showing below his hat." *Id.* at 288. For this reason "[the victim] initially indicated [prior to being shown a photo array] that he was not sure he would be able to make an identification," but after he was "instructed to focus on the portion of the face that [he] could see at the time of the carjacking – the eyes," stated that he was "95% certain that [the Defendant] was the carjacker." *Id.* at 290.

The Defendant requested and was provided several photographs of Pollin, including one with dreadlocks ("Dreadlocks Picture") and one with short hair ("Short Hair Picture"). The Short Hair Picture was dated about a month after the carjacking; the Dreadlocks Picture was undated. The Government, in an attempt to prove that Pollin did *not* have dreadlocks at the time of the carjacking, offered testimony of an officer who interacted with Pollin three days later and the Short Hair Picture taken about a month after that. *Id.*

After the trial it was discovered that the Short Hair Picture was misdated, that it was not taken until over a year later, and that "Pollin did indeed have dreadlocks" on the date of the carjacking. *Id.* at 291.

"To be entitled to a new trial under Federal Rule of Criminal Procedure 33 based on newly discovered evidence, a defendant must satisfy a five part test by showing that (1) the evidence is newly discovered; (2) the defendant exercised due diligence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence would probably result in acquittal at a new trial." This is commonly referred to as the "*Chavis* test." *Id.* at 292, citing *United States v. Chavis,* 880 F.2d 788, 793 (4th Cir. 1989).

In ruling on the Defendant's motion for a new trial in *Moore,* Senior District Judge J. Frederick Motz "concluded that [the Defendant] satisfied the first three prongs of the *Chavis* Test," but "could not satisfy the materiality prong because he put on a defense at trial … [which included] perjured testimony…." *Id.* at 292-93. "I will not permit him to have another opportunity to obtain an acquittal," Judge Motz righteously pronounced, "because of the innocent errors that was made by the production of an erroneous photograph to him." *Id.* at 292. Judge Motz also determined that it was unnecessary to address the fifth prong in light of "[the] conclusion that the evidence was not material." *Id.* at 293.

In an opinion written by Chief Judge Traxler and joined by Judges Gregory and Davis, the Fourth Circuit *reversed*. Specifically, the Court agreed that the Defendant had satisfied the first three prongs, and found that Judge Motz had erred in concluding that the newly discovered evidence was not material:

> At bottom, this case was about the identity of the carjacker, a very close issue given the small amount of the assailant's face [the victim] could see during the incident. Accordingly, evidence bearing on the identification of the carjacker was undoubtedly material….

Id. at 294 (also concluding that the fifth prong – that the newly discovered evidence would probably result in acquittal at a new trial – had been satisfied, and therefore that the defendant *was* entitled to a new trial).

For discussion of these and related issues, *see* **Handbook** § 258 (Motion for new trial).

Sentencing issues generally.

In *United States v. Graham,* 711 F.3d 445 (4th Cir. 2013), District Judge William D. Quarles, Jr. made it clear that he would not have imposed a life sentence on the Defendant – who was convicted of felony drug offenses and had three prior drug

convictions – if he had discretion to impose a lesser sentence. Accordingly, the Defendant argued on appeal that, should the Supreme Court at some point reverse its opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) – which held the trial court had no discretion *not* to impose an otherwise mandatory minimum sentence – the life sentence in his case should also be reversed. *Id.* at 455.

In *United States v. McGee*, 736 F.3d 263 (4th Cir. 2013), District Judge Thomas E. Johnston stated at sentencing that there is

> "a problem with drugs coming into West Virginia … from Detroit" and that he hoped "that sentences in these cases where I have defendants from Detroit … will send a message back to Detroit that the drugs being brought here from Detroit are not welcome and that serious punishments await people who bring drugs here from Detroit."

Id. at 269. The Defendant objected to the District Court using the sentence to "send a message" to Detroit, and argued on appeal that so doing rendered the sentence procedurally unreasonable in that it deprived him of "an individualized assessment" by "simply put[ting] him in a class of people who brought drugs from Detroit and sentence[ing] him on that basis." *Id.*

In an opinion written by Judge Davis and joined by Judges Keenan and Floyd, the Fourth Circuit conceded that "viewed in isolation, some of the district court's comments evince a perilously close flirtation with the line [it] drew in *United States v. Diamond*, 561 F.2d 557, 559 (4th Cir. 1977) (reversing sentence where district court noted that it "takes a dim view of people coming down from New York to commit their crimes in Virginia," remanding for resentencing before a different district court judge). However, here the Court ultimately concluded that Judge Johnston *had* sufficiently articulated an individualized basis for the sentence. The Court reasoned:

> In addition to the statements about Detroit, the court made numerous references to [the Defendant's] criminal history, the nature of the offense, and the need for deterrence….
>
> The court's belief that [the Defendant], in particular needed to be deterred, as well as others similarly situated, unquestionably was a valid consideration. Contrary to [the Defendant's] arguments, the court's desire to send a message was not just about [the Defendant] and Detroit, it was also about [the Defendant's] own criminal history.

Id. at 272-73.

For discussion of these and related issues, *see* **Handbook** § 271 (Sentencing issues generally).

Amount of loss.

In *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), the Defendant was involved in a scheme to arrange fraudulent marriages between sailors and foreign nationals which resulted, *inter alia*, in the sailors receiving a monthly stipend known as a "Basic Allowance for Housing" ("BAH"). District Judge Mark S. Davis found that the amount of BAH payments made as a result of the fraudulent claims was $134,702.39, and therefore that this was the "amount of loss" for Sentencing Guidelines purposes.

The Defendant argued that he should not be held responsible for $28,844.40 of that amount, which represented the BAH payments made *after* two of the coconspirators confessed to investigators that their marriages were, in fact, fraudulent. *Id.* at 860.

In an opinion written by Judge Diaz and joined by Judges King and Floyd the Fourth Circuit disagreed. Specifically, the Court concluded that "it is entirely foreseeable that losses caused by a fraudulent scheme will not cease the moment that coconspirators confess to the fraud," and that in this case "it was reasonably foreseeable that the Navy would not terminate BAH payments until it had finished its investigation and formally determined that the BAH funds had been illicitly obtained." *Id.* at 860-61 (confirming conviction and sentence).

For discussion of related issues, *see* **Handbook** § 275 (Amount of loss).

Role in the offense.

In *United States v. Steffen*, 741 F.3d 411, 412 (4th Cir. 2013), the Defendant was a South Carolina Highway Patrolman who pled guilty to "a conspiracy involving the large-scale cultivation of marijuana." The only issue on appeal was whether Senior District Judge C. Weston Houck clearly erred in concluding that the Defendant was a manager or supervisor of the criminal activity – which precluded the Defendant from receiving a "safety-valve" sentence of less than the otherwise applicable five-year mandatory minimum.

The Defendant's involvement in the conspiracy included purchasing one of the properties on which marijuana was grown, paying for cultivation equipment and a shed furnished with electricity in which marijuana was grown, traveling in his patrol car to the property and to transport marijuana, and, on two occasions, following a co-conspirator who was transporting marijuana (Verdugo) "to prevent any other law enforcement agency from stopping [Verdigo's vehicle]." *Id.* at 413.

In an opinion written by Judge Keenan and joined by Judges Wilkinson and Agee, the Fourth Circuit began with a lengthy discussion of the role in the offense enhancement generally and of the proper standard of review on appeal. Regarding the former, the Court noted that to qualify for the three-level enhancement the Government must prove by a preponderance of the evidence that the criminal activity involved five or more participants

or was "otherwise extensive," *and* that the Defendant managed or supervised at least one of them. *Id.* at 414, *citing* U.S.S.G. § 3B1.1(b). The Court also noted that to qualify for the enhancement the Defendant must have managed or supervised *people*; management or supervision of *property* is insufficient. *Steffen*, 414 F.3d at 414, *citing United States v. Cameron*, 573 F.3d 179, 185 (4th Cir. 2009); *and United States v. Sayles*, 296 F.3d 219, 226 (4th Cir. 2002).

Regarding the proper standard of review on appeal, the Court noted that because what role a particular defendant played in criminal activity is "essentially factual," review on appeal is for clear error. *Id.*, *citing United States v. Cabrera-Beltran*, 660 F.3d 742, 756 (4th Cir. 2011); *United States v. Kellam*, 568 F.3d 125, 147 (4th Cir. 2009); *Sayles*, 296 F.3d at 224; *United States v. Sheffer*, 896 F.2d 842, 846 (4th Cir. 1990); *and United States v. Daughtrey*, 874 F.2d 213, 756 (4th Cir. 1989).

Applying this standard of review, the Fourth Circuit found no clear error in Judge Houck's application of the role in the offense enhancement in this case. Specifically, the Court concluded that the Defendant's use of his police vehicle on two occasions to follow and protect Verdugo, and his decision to transfer the electric service from his name to Verdugo's name both "reflected an exercise of authority over Verdugo and a management decision regarding which co-conspirator should be assigned a particular risk of exposure for the crime." *Id.* at 416 (affirming role in offense enhancement and five-year mandatory minimum sentence).

For further discussion of these and related issues, *see* **Handbook** § 286 (Role in the offense).

Abuse of position of trust/Amount of loss/Expert witnesses.

In *United States v. Weiss*, 754 F.3d 207 (4th Cir. 2014), the Defendant operated several "professional employer organizations" (PEOs), which provide human resource functions, including payroll processing, paying employment taxes, depositing state and federal income taxes withheld from employees' paychecks, and paying workers' compensation insurance premiums. The Defendant failed to make a substantial portion of the required payments and deposits, converting them to his own use instead. The Defendant also falsely held himself out to be a Certified Public Accountant "by using the initials 'CPA' on his letterhead, on his business cards, and in his email address (artweisscpa@aol.com). *Id.* at 209.

Nor did the Defendant's criminal conduct stop there. Rather, he also pled guilty to making material false statements to a federally insured bank by providing false federal income tax returns to Branch Bank & Trust (BB & T) to secure loans in the amount of $2,266,500 "for the purchase of a lot and construction of a home … [which] subsequently sold in bankruptcy proceedings for $1,350,000"; to "failing to report any of his illegally obtained income to the IRS … result[ing] in [underpayment of] personal income taxes in the amount of $1,093,813"; and to submitting a claim to his insurance carrier, through the

U.S. mail, in which he falsely reported theft of four pieces of jewelry appraised at $177,480 (which he successfully collected), which pieces were subsequently located by law enforcement in his residence. *Id.* at 210.

The Presentence Report (PSR) calculated the Defendant's total offense level to be 33, which included a two-level enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3, and a total loss of $7,140,339.18 which, pursuant to U.S.S.G § 2B1.1(b)(1)(J), resulted in a 20-level increase in the offense level. Combined with other enhancements not at issue on appeal and a Criminal History Category of III, the PSR recommended an advisory Guidelines range of 168 to 210 months. District Judge Thomas D. Schroeder ultimately adopted the PSR's recommended findings and imposed an approximate midpoint, 185-month, sentence.

The Defendant raised three issues on appeal. First, he argued that the District Court erred by applying the abuse of a position of trust enhancement. Second, he argued that the amount of loss should not have included the taxes he personally owed on unreported income. And third, he argued that Judge Schroeder erred "by failing sua sponte to appoint various experts to assist in his defense at sentencing." *Id.* at 211.

U.S.S.G. § 3B1.3, which governs the two-level enhancement for abuse of a position of trust, "also applies to imposters [here, holding himself out to be a CPA], so long as the imposter-defendant 'provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust.'" *Id.*, *quoting United States v. Brack*, 651 F.3d 388, 392-93 (4th Cir. 2011) (abuse of position of trust enhancement properly applied to defendant who held herself out, falsely, to be a bail bondsman, in order to secure money, property, and personal identifying information from an elderly man who thought he was securing his granddaughter's release from custody).

In an opinion written by Senior Judge Hamilton and joined by Judges Niemeyer and Diaz, the Fourth Circuit began by affirming the application of the abuse of a position of trust enhancement. The Court reasoned:

> Here, there is more than sufficient evidence in the record from which a reasonable person could infer that [the Defendant] had a trust relationship with at least one of his victim-companies which provided him with the freedom to commit a difficult-to-detect wrong. While all payroll processing companies are not headed up by a CPA, when a CPA does head up a payroll processing company, with the attendant required calculations for tax withholding and payments over to the IRS and applicable state agency, the client company reasonably believes that it has hired a licensed professional in the accounting/tax field to ensure the proper processing of its payroll liabilities and responsibilities. [The Defendant] only had to take advantage of his trust relationship with one client on one occasion for the enhancement to apply. This fact is easily inferred from the record evidence.

Id. at 213-14.

The Defendant's narrow argument regarding the amount of loss was that Judge Schroeder erred by including the income taxes he evaded by failing to report his ill gotten gains ($1,093,813), which would have reduced the enhancement from 20 to 18 levels. Again, the Fourth Circuit disagreed, concluding to the contrary that "the plain language of the relevant Guideline sections and their corresponding commentary" supported inclusion of any reasonably foreseeable pecuniary harm caused by the Defendant's conduct – and that the income taxes he sought to evade fell in that broad category. *Id.* at 216 (noting further that in this case the Defendant was charged with, and pled guilty to, a separate tax count – and stipulated to the amount of the unpaid tax).

And finally, the Fourth Circuit was no more sympathetic with the Defendant's argument, which it reviewed for plain error, that Judge Schroeder committed reversible error "by failing sua sponte to appoint him various experts to assist at sentencing," including "a tax expert," an expert in calculating the amount of a bank's loss following a material false statement, "an expert witness to help him prove that his companies were not, in fact, 'PEOs' … such that he could have avoided a sentencing enhancement under U.S.S.G. § 2B1.1(b)(10)(C) for using sophisticated means in the implementation of his scheme," and an expert to assist in cataloging, analyzing, and challenging "the sheer volume of records and complex analyses upon which the government relied over the course of its four year investigation." *Id.* at 216-17.

As they say, the Defendant's final argument, which he raised for the first time on appeal, did not detain the Court for long. Reviewing for plain error the Court simply concluded that:

> Weiss' assignment of error regarding his need for experts to aid in his defense at sentencing does not survive plain error review. Assuming arguendo that Weiss can establish error as he alleged (a big stretch in and of itself), there is absolutely no basis for us to conclude that such error is plain. Accordingly, Weiss is entitled to no relief with respect to his argument on appeal regarding his need for expert assistance in preparing for his defense at sentencing, which he never made known to the district court.

Id. at 217 (internal citation omitted).

Fr discussion of these and related issues, *see* **Handbook** § 288 Abuse of position of trust); § 275 (Amount of loss); *and* § 232 (Expert testimony).

Criminal history.

In *United States v. Robinson*, 744 F.3d 293 (4th Cir. 2014), the Defendant was convicted of conspiracy to distribute crack cocaine from 2002 to 2011. In addition to objecting to the calculation of drug quantity (discussed above), the Defendant argued on

appeal that District Judge Louise W. Flanagan committed two errors in determining his criminal history category.

At issue was the impact of a 2003 conviction for simple possession of marijuana for which the Defendant received a single day of probation. The Defendant first argued that Judge Flanagan should have determined that the 2003 conviction was "related conduct" rather than counting it as a "prior sentence." *See* U.S.S.G. § 4A1.2 cmt.1 (excluding from the definition of "prior sentences" any sentence resulting from "relevant conduct"). In an opinion written by Judge Motz and joined by Judge Niemeyer and, on this issue, by Judge Diaz, the Fourth Circuit disagreed, finding no clear error. The Court explained:

> The 2003 sentence was for marijuana possession, while the ongoing conspiracy involved the crack cocaine distribution – suggesting two distinct crimes. Moreover, the 2003 sentence was for simple possession rather than distribution – suggesting that the marijuana was for personal use and played no role in a drug-dealing conspiracy. The fact that an unrelated drug conviction and sentence occur during the timeframe of a drug conspiracy does not automatically convert them into relevant conduct of the conspiracy….The district court's finding is thus "plausible in light of the record viewed in its entirety" and is entitled to our deference.

Id. at 300, *quoting United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005).

The Defendant also argued that Judge Flanagan erred in adding two additional criminal history points because he was on probation during the course of the conspiracy. *See* U.S.S.G. § 4A1.1(d) (requiring assessment of two criminal history points "if the defendant committed the instant offense while under any criminal justice sentence, including probation[or] parole"). Rejecting his argument "that he was in transit on the day of his probation in 2003 and that he could not have sold crack cocaine on that day," the Court reasoned to the contrary:

> Given the plain language of the Guidelines, even a short period of probation imposed during an ongoing conspiracy triggers an enhancement under § 4A1.1(d). [The Defendant's] "instant offense" was a drug-dealing conspiracy that spanned from 2002 to 2011. Because this timeframe included [his] day of probation in 2003, the enhancement was proper.

Id. at 301 (affirming convictions and 140-month term of imprisonment).

For discussion of these and related issues, *see* **Handbook** § 291 (Criminal history).

Career offender.

In *United States v. Davis*, 720 F.3d 216 (4th Cir. 2013), the Defendant received one consolidated sentence for multiple violations of North Carolina law, namely, six armed robberies. District Judge Max O. Cogburn, Jr. determined that this consolidated sentence constituted "at least two prior convictions," and sentenced the Defendant accordingly as a career offender. *Id.*

In an opinion written by Judge Gregory and joined by Judges Motz and Hollander – and, in fairness to Judge Cogburn, deciding an issue of first impression – the Fourth Circuit *reversed*. The Court distinguished *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999), in which it *upheld* a career offender sentence based on two prior convictions which were "consolidated for sentencing." *Id.* at 219. As the Court explained:

> The term "consolidated for sentencing" as addressed in *Huggins* does not equate to "consolidated sentence" (or "consolidated judgment"). The distinction is not merely textual or grammatical; the former is procedural while the latter is substantive. When offenses are "consolidated for sentencing," the consolidation is merely a procedural mechanism used primarily out of concern for judicial economy and efficiency…. Whereas, under North Carolina law, a "consolidated sentence" is a mechanism that affects the substantive rights of a defendant, and in some scenarios, could be beneficial to the defendant…. As such, a consolidated sentence is distinct from a consolidated proceeding….
>
> We hold today that where a defendant receives a "consolidated sentence" (or "consolidated judgment") under North Carolina law, it is one sentence and absent another qualifying sentence, the [career offender] enhancement is inapplicable.

Id. (internal citations omitted) (vacating and remanding for resentencing).

In *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), the Defendant pled guilty to possession with intent to distribute cocaine base and possession of a firearm in furtherance of drug trafficking. The issue on appeal was whether District Judge William L. Osteen, Jr. "committed plain error in holding that [the Defendant's] prior conviction for assault and battery of a police officer in violation of [Virginia law] categorically qualified as a crime of violence, and constituted a predicate offense for the career offender enhancement." *Id.* at 507.

In an opinion written by Judge Keenan and joined by District Judge John A. Gibney sitting by designation the Fourth Circuit answered this question in the negative, affirming the 26-year-old Defendant's 300-month sentence. Judge Davis issued a lengthy and passionate dissent.

The majority and the dissent *agreed* with the Defendant that the Virginia conviction was not, in fact, "categorically a crime of violence," noting that "the offense of assault and battery referenced in that statute is defined by the common law, the elements of which do

not substantiate a serious risk of injury in the usual case." *Id.* However, citing "the absence of controlling authority and the divergence of opinion among … sister circuits," the majority nevertheless concluded that Judge Osteen had not committed "plain error" in reaching a contrary conclusion. *Id.*

The factual basis for the Virginia conviction was summarized thus in the Defendant's Presentence Report ("PSR"):

> "On May 7, 2002, Lynchburg, Virginia, police officers were on foot patrol in the White Rock area of the city when the defendant walked toward the officers. An officer asked the defendant, 'What's up?', to which Defendant Carthorne replied, 'What's up with your mother?' and spit in the officer's face. The defendant was placed under arrest after a brief struggle."

Id. at 508. Based on this conduct the Defendant, who was a teenager at the time, received a three year sentence with all but six months suspended. *Id.*

The difference between the sentencing range with the career offender enhancement (322 to 387 months) and without it (181 to 211 months) was significant. At sentencing, Judge Osteen adopted the PSR recommendation that the Defendant be sentenced as a career offender but, citing his "cooperation" and "unusual and extraordinary acceptance of responsibility" varied downward by 22 months from the low end of the career offender range, and imposed a 300-month sentence. *Id.* at 509.

In route to affirming, the majority first concluded that the applicable standard of review, in the absence of any objection by the Defendant in the District Court, was for plain error – not "de novo review," as the Defendant contended. *Id.* The majority opinion proceeds with a lengthy discussion of why the underlying conviction was *not* categorically a "crime of violence" for career offender purposes (13½ pages of the slip opinion), and a much briefer discussion (4 pages) of why the District Court's error was not "plain." *Id.* at 510-17.

Judge Davis came to quite a different conclusion, citing the Supreme Court's recent decision in *Henderson v. United States*, 133 S. Ct. 1121 (2013), and reasoning that:

> [a]ppellate courts should not hesitate to remediate failures to object at sentencing when those failures result in the imposition of unlawful sentences and the unlawfulness is sufficiently clear at the time the appeal is decided, regardless of the state of the law up until that time. Henderson unequivocally so holds. See 133 S. Ct. at 1130-31 ("[W]e conclude that whether a legal question was settled or unsettled at the time of trial, it is enough that an error be 'plain' at the time of appellate consideration for [t]he second part of the [four-part] Olano test [to be] satisfied.") … We should do so here.

Id. at 519-20 (Davis, J., dissenting). Judge Davis then proceeds to discuss cases in this and other circuits which he believes are sufficiently clear to render the District Court's error in this case "plain," but saves his most passionate points – philosophical/sociological as well as legal ones – for last:

> The need for a more enlightened conception of plain error review has recently been well articulated. See, e.g., Dustin D. Berger, Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases, 67 U. Miami L. Rev. 521 (2013). Perhaps Henderson signals a step down the road to enlightenment. But enlightenment is not needed in this case; faithful adherence to existing doctrine would do just fine.
>
> For years now, all over the civilized world, judges, legal experts, social scientists, lawyers, and international human rights and social justice communities have been baffled by the "prison-industrial complex" that the United States has come to maintain. If they want answers to the "how" and the "why" we are so devoted to incarcerating so many for so long, they need only examine this case. Here, a 26-year-old drug-addicted confessed drug dealer, abandoned by his family at a very young age and in and out of juvenile court starting at age 12, has more than fourteen years added to the top of his advisory sentencing guideline range (387 months rather than 211 months … because, as a misguided and foolish teenager, he spit on a police officer. His potential sentence thus "anchored" and "framed", at the high end, between 17 and 32 years, Carthorne may or may not feel fortunate to have received "only" 25 years (300 months) in prison. I do not believe he is "fortunate" at all.

Id. at 523-24.

For discussion of related issues, *see* **Handbook** § 292 (Career offender); *and* § 332 (Plain error).

Lengthy sentences.

In *United States v. Hashime*, 734 F.3d 278 (4th Cir. 2013), discussed *infra* in the *Miranda* section, the Defendant also raised an Eighth Amendment proportionality challenge to his fifteen-year mandatory minimum sentences (for child pornography convictions). However, because the Fourth Circuit reversed the conviction based on *Miranda* violations, Judge Wilkinson's majority opinion did not reach the sentencing issue.

Judge King wrote a concurring opinion, fully concurring in the reversal of the Defendant's convictions, but writing separately "to draw attention to a misperception of the law of this Court with respect to whether a sentence short of life imprisonment may be reviewed to ensure that it is constitutionally proportionate to the offense of conviction, and

not cruel and unusual in contravention of the Eighth Amendment." *Id.* at 286-87 (King, J., concurring).

The conventional understanding for some time has been that proportionality review is not permitted in the Fourth Circuit for any sentence less severe than life without possibility of parole. Indeed, this principle of law has been cited in many published Fourth Circuit opinions.

Judge King, however, makes a persuasive case that neither *Solem v. Helm*, 436 U.S. 277 (1983), nor the foundational and often mis-cited Fourth Circuit opinion on this point, *United States v. Polk*, 905 F.2d 54, 55 (4th Cir. 1990), stand for this proposition; rather, they hold that proportionality review is not *required* for any sentence less than life without parole – not that such review is impermissible. In other words, as Judge King concludes his concurring opinion, the law of the Fourth Circuit is that "where a sentence of less than life imprisonment has been imposed upon a defendant, proportionality review under the Eighth Amendment is discretionary." *Id.* at 288 (King, J., concurring).

Finally, although Judge Wilkinson's opinion did not reach the proportionality review issue, he rather sharply questioned the prosecution's decision to charge this Defendant with offenses carrying fifteen-year mandatory minimum sentences. Judge Wilkinson initially noted with apparent sympathy the "unease" Judge Brinkema felt in imposing the mandatory minimums sought by the government," "chaf[ing] at the prosecutors' use of their charging authority to 'get into sentencing decisions' … and [at] their lack of respect for the sentencing discretion traditionally accorded district courts," and describing the 15-year mandatory minimum sentences in this case as not "fair or just." *Id.* at 286. Judge Wilkinson appeared to agree, describing the prosecution as "appl[ying] a heavy foot to the accelerator," and questioning whether "throw[ing] the full force of the law against this 19-year-old in a manner that would very likely render his life beyond repair" was a "wise exercise of prosecutorial discretion." *Id.*

For discussion of these and related issues, *see* **Handbook** § 304 (Lengthy sentences).

Restitution.

In *United States v. Davis*, 714 F.3d 809 (4th Cir. 2013), the Defendant broke into a house and stole a handgun, a bag of ammunition, and several pieces of jewelry. A neighbor who observed the Defendant crawl out of a window called the police. While fleeing from the police the Defendant wrecked his car, and got out and ran into a wooded area where he discarded the handgun. Although the defendant pled guilty to possession of a stolen firearm, the handgun was never recovered.

The only issue on appeal was whether Senior District Judge Malcolm J. Howard erred in ordering $685 in restitution to the homeowner – $500 for his insurance deductible and $185 for damage caused when the Defendant broke his window. Applying *Hughey v.*

United States, 495 U.S. 411, 413 (1990) (restitution limited to victim(s) in count(s) of conviction unless specifically agreed to the contrary in plea agreement); and *United States v. Blake*, 81 f.3d 498,506 (4th Cir. 1996) (reversing order of restitution where defendant was convicted of using unauthorized access devices – credit cards – for loss of pocketbooks, wallets, and other items stolen along with the cards), the Fourth Circuit concluded that Judge Howard *did* err in ordering restitution to the homeowner in this case.

In an opinion written by Judge Motz and joined by Chief Judge Traxler and Judge Wynn, the Fourth Circuit noted that possession of a stolen firearm is not a listed offense in the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, and concluded that the homeowner was not otherwise a "victim" of the one count of conviction. *Id.* at 814. The only remaining question was whether, as § 3663 permits, the Plea Agreement provided for restitution to the homeowner, a question the Court also answered in the negative. *Id.* at 814-15.

Finally, because there had been no objection to the restitution order at sentencing, the Fourth Circuit conducted plain error review, concluding that the error was plain, did affect the Defendant's substantial rights, and "if uncorrected, the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings because it would impose an illegal burden on the defendant." *Id.* at 815-16 (reversing restitution order and remanding for resentencing).

In *United States v. Freeman*, 741 F.3d 426, 428-29 (4th Cir. 2014), the Defendant "purported to be a minister" but, without question, "us[ed] church funds to accumulate substantial assets, including a $1.75 million residence and [two] luxury automobiles," that is, "he caused one church member to buy a Bentley Arnage and lease a Maybach luxury automobile, [together] valu[ed at] more than $340,000 … and another [to purchase the residence], in which [he] and other church members lived." But alas, even with all the generous "help" from the church and its members, by 2005 the Defendant and his wife owed more than $1.3 million in their own names, which included $846,000 in back rent and more than $87,000 in lease payments on a jet airplane," and they decided to file bankruptcy.

The factual basis for the criminal charge, to which the Defendant pled guilty – that is, obstructing federal bankruptcy proceedings – were a number of false statements he made, and false documents he presented, in the bankruptcy proceeding. Specifically, the Defendant stated that he had no real or personal property, including any "property owned by another that [he] held or controlled"; that his occupation was "consultant of a maintenance company"; that he had no income in 2003 or 2004 and only $4,000 in income in 2005; "that he and his spouse rented a house at a certain address, which was not true"; and that his ministry "went out of business," which was also not true. The Defendant also presented seven documents to the Bankruptcy Trustee, which purported to be earnings statements from a business called Automatic Data Processing, Inc. which, in fact, "were wholly fictitious." *Id.* at 429.

At sentencing the Government asked District Judge Roger W. Titus to order the Defendant to pay restitution to four of the church members who suffered various losses as a result of serving as the Defendant's nominee owners. The identified "victims" all incurred significant debt at the Defendant's behest, which they believed he or the church would repay; two were forced to sell their homes, resulting in losses of over $400,000 in equity, and another was forced to resign from his job. Judge Titus agreed with the Government and, in lieu of a fine, ordered the Defendant to pay these four individuals $631,050.52 in restitution.

The issue on appeal, in brief, was whether the identified victims were victims "of the offense" to which the Defendant pled guilty. In an opinion written by Judge Thacker and joined by Judges Duncan and Wynn, the Fourth Circuit answered this question in the negative.

In route to reversing the restitution order, the Court noted that it had overturned restitution awards in other cases where "the Government could not show the requisite causal connection between the specific conduct underlying the offense of convictionand the victims' losses." *Id.* at 435-36, *citing United States v. Davis*, 714 F.3d 809, 816 (4th Cir. 2013) (reversing order that defendant who pled guilty to possessing stolen firearm pay homeowner from whom he stole the firearm restitution for insurance deductible and cost of repairing window the defendant broke to gain entry); *United States v. Broughton-Jones*, 71 F.3d 1143, 1148-49 (4th Cir. 1999) (reversing order that defendant who pled guilty to perjury about a wire fraud offense, with which she was charged but not convicted, pay restitution to victim of wire fraud); *and United states v. Blake*, 81 F.3d 498, 502-06 (4th Cir. 1996) (reversing order that defendant who pled guilty to access device fraud pay restitution for "expenses related to lost property and document replacement, i.e., pocketbooks, wallets, and other items [he] took when he stole the cards").

Similarly, the Court concluded in this case that there was *not* a causal connection between the offense of conviction (obstruction of the bankruptcy proceeding) and the losses sustained by the purported victims. However, because Judge Titus had ordered the restitution in lieu of a fine, the District Court was permitted on remand to consider whether a fine should now be imposed. *Id.* at 439.

In *United States v. Seignious*, 757 F.3d 155 (4th Cir. 2014), Senior District Judge Benson Everett Legg ordered the Defendant to pay $1,213,347 in restitution, the exact amount on a 36-page spread sheet detailing the fraud on each stolen card number which was prepared by Secret Service Agents investigating his case. However, not until a week after the Defendant filed Notice of Appeal did the Government file a document specifying the losses by victims and the amounts each was owed, which document was subsequently adopted by Senior District Judge Benson Everett Legg.

The issue on appeal was "whether the government and the district court sufficiently complied with § 3664 (a) – (d), the statutory section setting forth the procedures for issuance and enforcement of an order of restitution under the [Mandatory Victim Restitution Act ("MVRA")]. *Id.* at 160 . Conducting plain error review (because the

Defendant failed to object in the District Court to the procedural irregularities or the amount of loss calculation on which the ordered restitution was based), the Fourth Circuit found no reversible error.

In an opinion written by Senior Judge Hamilton and joined by Judges Wilkinson and Thacker, the Court noted the proper procedure, as provided in the statute:

> Section 3664(a) … directs the district court to order preparation of a presentence report that will include "information sufficient for the court to exercise its discretion in fashioning a restitution order" including "to the extent practicable, a complete accounting of the losses to each victim … and information relating to the economic circumstances of each defendant"….Section 3664(b) directs the district court to disclose such information to the parties….
>
> In addition, under § 3664(d), "to the extent practicable," the government must provide information concerning restitution to the probation officer sixty days in advance of the scheduled sentencing date, id. § 3664(d)(1); the probation officer, in turn, must, to the extent practicable, provide notice to and collect information from victims, id. §3664(d)(2), and the defendant must provide the probation officer with information concerning his background, financial resources and ability to pay restitution, id. § 3664(d)(3). Under § 3664(d)(4), the district court can require additional information, including documentation and testimony. "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing," the district court can set another date for disclosure of this information, up to ninety days after sentencing. Id. § 3664(d)(5).

Id. at 161.

Although the Court acknowledged that restitution in this case was ordered "without the various procedural requirements of § 3664(a) – (d) being observed," it nevertheless concluded, as the panel succinctly put it, that the Defendant was "entitle[d] … to no appellate relief." *Id.* at 162. Specifically, the Court concluded that the Defendant had failed to carry his burden on appeal [per the principles governing plain error review] of demonstrating that such error affected his substantial rights, i.e., that such error affected the outcome of the district court proceeding. *Id.*, *citing Puckett v. United States*, 556 U.S. 129, 135 (2009) (discussing principles governing plain error review); *and United States v. Olano*, 507 U.S. 725, 734 (1993) (same).

In addition to concluding that the procedural irregularities did not constitute reversible error, the Court also determined that the calculation of the amounts of losses was adequately supported by a preponderance of the evidence, that is, that Senior Judge Legg's calculations were not clearly erroneous. *Id.* at 163-65, *citing* 18 U.S.C. § 3664(e) (restitution properly determined by preponderance of the evidence); *and United States v. Wilkinson*, 590 F.3d 259, 271 (4th Cir. 2010) (district court's actual loss standard under

MVRA reviewed on appeal under clearly erroneous standard). In sum, viewing the record as a whole – including the Secret Service spread sheet and testimony, and the testimony of three cooperating co-conspirators – the Court found "no basis … to conclude that the district's actual loss figure of $1,213,347 is clearly erroneous." *Id.* at 165.

For discussion of these and related issues, *see* **Handbook** § 309 (Restitution).

Forfeiture.

In *United States v. Blackman*, 746 F.3d 137 (4th Cir. 2014), the Defendant was charged with a Hobbs Act conspiracy and with brandishing a firearm during the subject robberies – in an indictment which included a Notice of Forfeiture. Following his conviction, District Judge Leonie M. Brinkema ordered restitution in the amount of the value of the stolen goods ($136,601.03), but declined to order forfeiture in the same amount, apparently based on the Defendant's lack of assets to satisfy the judgment.

In an opinion written by Judge Wilkinson and joined by Judges Niemeyer and Duncan, the Fourth Circuit *reversed.* Noting that the language of the relevant statute, 28 U.S.C. § 2461(c), provides that the district court "shall order" forfeiture, the Court held that "§ 2461 mandates that forfeiture be imposed when the relevant prerequisites are satisfied, as they [we]re here" – and that "[f]orfeiture is mandatory even when restitution is also imposed." *Id.* at 143. In reaching this conclusion, the Court rejected the Defendant's argument that ordering restitution *and* forfeiture constitutes impermissible "double recovery," noting that while the Government is not required to use proceeds from the forfeiture to compensate victims, it has the discretion to do so, and that "[r]ealistically, a victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets." *Id.*

Finally, the Fourth Circuit held that "[t]he fact that a defendant is an indigent or otherwise lacks adequate assets to satisfy a judgment does not operate to frustrate entry of a forfeiture order"; and squarely rejected the Defendant's argument that ordering restitution and forfeiture constituted an "excessive fine" under the Eighth Amendment. *Id.* at 143-44. Regarding the Eighth Amendment argument, the Court applied the four factors set forth in *United States v. Jalaram*, 599 F.3d 347, 355-56 (4th Cir. 2010), namely:

> (1) "the amount of the forfeiture and its relationship to the authorized penalty"; (2) "the nature and extent of the relationship to the authorized penalty"; (3) "the relationship between the crime charged and other crimes"; and (4) "the harm caused by the charged crime."

Id. at 144.

Applying the *Jalaram* factors, the Court noted that the maximum statutory fine was $250,000; that the Guidelines maximum range was $150,000; that "as a fence, [the Defendant] served the crucial function of enabling the conspiracy to dispose of its loot both profitably and discretely"; and that the Defendant "participated in the commission of the

first robbery and the planning of all three …." *Id.* at 144-45("Given these circumstances, the imposition of a forfeiture order in the amount of $136,601.03 poses no Eighth Amendment problem.").

For discussion of related issues, *see* **Handbook** § 311 (Forfeiture); *and* § 310 (Fines & Special Assessments).

Supervised release.

In *United States v. Webb*, 738 F.3d 638, 639 (4th Cir. 2013), the Defendant argued that his thirty-two month consecutive sentence following revocation of supervised release was "plainly unreasonable" because Senior District Judge Norman K. Moon "considered statutorily prohibited factors" in formulating it. In an opinion written by Judge Floyd and joined by Judges Davis and Keenan, the Fourth Circuit *disagreed*.

In exercising its broad discretion in determining a revocation sentence, District Courts are "guided by the Chapter Seven policy statements in the federal Guidelines manual, as well as the statutory factors applicable to revocation sentences under 18 U.S.C. §§ 3553(a) [and] 3583(a)." *Id.* at 641. As the Fourth Circuit further explained:

> Chapter Seven instructs that, in fashioning a revocation sentence, "the court should sanction primarily the defendant's violation of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S. Sentencing Guidelines Manual ch. 7, pt. A(3)(b) (2012). Section 3583(e), the statute governing supervised release, further directs courts to consider factors enumerated in "section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)" when imposing a sentence upon revocation of supervised release. Absent from these enumerated factors is § 3553(a)(2)(A), which requires district courts to consider the need for the imposed sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Accordingly, in Crudup we stated, without analysis or explanation, that a district court is not permitted to impose a revocation sentence based upon these omitted considerations.

Id., *citing United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006) (revocation sentence may not be based primarily on omitted factors).

Relying on *Crudup*, the Defendant argued that his sentence was likewise "plainly unreasonable" because Judge Houck mentioned "the three omitted § 3553(a) factors, namely, the seriousness of [the Defendant's offense, the need to provide just punishment, and the need to promote respect for the conditions of supervision" in explaining the revocation sentence. *Id.* The Fourth Circuit concluded to the contrary, however, "that those factors were related to other considerations permissibly relied upon by the district

court," and that there was "no error … in the … consideration of related factors." *Id.* at 642 (affirming revocation sentence).

In *United States v. Ferguson*, 752 F.3d 613 (4th Cir. 2014), District Judge Henry E. Hudson revoked the Defendant's supervised release based in part on a laboratory report that a substance recovered from the Defendant's car was marijuana – which was prepared by a forensic examiner who did not testify. Other evidence considered by Judge Hudson in regard to that particular violation included the fact that the police officer who stopped and arrested the Defendant on that date smelled marijuana and seized several bags containing a substance the officer believed, based on his experience, to be marijuana; and that after his arrest the Defendant "admitted he was a marijuana dealer." *Id.* at 615-16.

In an opinion written by Judge Gregory and joined by Senior Judge Davis, a divided panel *reversed*. Applying *United States v. Doswell*, 670 F.3d 526 (4th Cir. 2012), announcing that prior to admitting hearsay in a supervised release violation hearing "the district court must balance the releasee's interest in confronting an adverse witness against any proffered good cause for denying such confrontation," the majority was troubled that the Government in this case had "proffered no explanation for the laboratory expert's absence. Thus there was no showing of good cause." *Id.* at 618, *citing* Fed. R. Crim. P. 32.1(b)(2)(C).

Nor did the majority agree with the Government that, because there were multiple violations and there was other evidence of this particular violation, any error was harmless. As the majority reasoned:

> After reviewing the record, we cannot conclude that the legal error in this case had "but very slight effect" on the district court's decision. Kotteakos, 328 U.S. at 764. The district judge imposed a severe sentence on [the Defendant], going nine months above the maximum recommended sentence under the guidelines. Though [the Defendant] was found guilty of six violations, two of these were much more serious than the others because they involved possession of large amounts of narcotics. The effect of the nature and frequency of these violations is plainly evident, as the judge reasoned that "what is serious about this case is [the Defendant's] "continuing course of conduct … of violating the nation's drug laws, not just for personal use, but commercially. Thus the district judge relied heavily on the fact that [the Defendant] possessed substantial amounts of drugs on more than one occasion. Given this reasoning, we cannot say that the legal error was harmless when it calls into question one of the two violations suggesting commercial use of drugs.

Id. at 619. Nor was the majority hesitant to take the Government behind the proverbial woodshed for failing to proffer "good cause" for admitting the hearsay testimony at issue here, concluding its opinion thus:

> Finally, we emphasize our displeasure with the government's barefaced failure to abide by our command in Doswell. In many cases, a facially compelling harmlessness argument can be made because … defendants who have been stripped of their confrontation rights will be hard-pressed to point to concrete symptoms of the constitutional harm that afflicts them. We refuse to let the government take advantage of this reality, essentially ignoring our command in Doswell by using harmlessness as a substitute for proper procedure.

Id. at 620 (reversing and remanding).

Judge Keenan wrote a dissenting opinion in which she concluded that the Government's error, although constitutional in nature (rather than, as the majority concluded, merely a Rule 32 violation), *was* harmless beyond a reasonable doubt. As Judge Keenan reasoned:

> The evidence was overwhelming that [the Defendant] violated the terms of his supervised release by possessing marijuana with the intent to distribute. The district court credited the arresting officer's testimony that he smelled marijuana in [the Defendant's] vehicle, and that a search of the vehicle resulted in the discovery of what the officer concluded was marijuana "packaged and quantified in a fashion consistent with an intent to distribute." The arresting officer further testified that [the Defendant] admitted that he sold marijuana. Based on this record, which is particularly strong given [the Defendant's] statement to the arresting officer, I would hold that it is clear beyond a reasonable doubt that the court's erroneous admission of the laboratory report did not affect the judgment rendered in this case.

Id. at 622 (Keenan, J, dissenting).

For further discussion of these and related issues, *see* **Handbook** § 312 (Supervised release).

Waiver of appeal.

In *United States v. Copeland*, 707 F.3d 522 (4th Cir. 2013), the Defendant waived his right to appeal, "reserving only the right to appeal from a sentence in excess of the applicable advisory guideline range that is established at sentencing." Following sentencing, the Fourth Circuit decided *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), in which it reversed *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005). In essence, *Simmons* held that North Carolina convictions for which a defendant could not have received a sentence of incarceration in excess of 12 months could no longer be treated as prior "felony" convictions.

The Defendant in *Copeland* argued that because his prior convictions were erroneously treated as felonies – which resulted in his being sentenced as a career offender and subjected to a significantly higher guidelines range – his appeal was "outside the scope of his waiver," that is, that he should be permitted to appeal what constituted an "illegal" sentence. *Id.* at 528.

In an opinion written by Judge Duncan and joined by Judges Motz and Wynn, the Fourth Circuit disagreed. Specifically, the Court applied *United States v. Blick*, 408 F.3d 162, 169-73 (4th Cir. 2005) (appeal based on post-sentencing change in the law was within scope of waiver), and *United States v. Brown*, 232 F.3d 399, 404 (4th Cir. 2000) (appeal based on alleged erroneous classification of defendant as career offender was within scope of waiver), concluding that "[the Defendant's] argument that he should receive the benefit of *Simmons* on appeal is analytically indistinguishable from those in *Blick* and *Brown*." *Id.* at 529-30 (affirming 216-month sentence followed by eight-year term of supervised release).

For discussion of related issues, *see* **Handbook** § 323 (Waiver of appeal).

Sufficiency of indictment.

"When a defendant challenges the sufficiency of an indictment *prior to* the verdict, [the Fourth Circuit appl[ies] … heightened scrutiny" to ensure every essential element has been charged. *United States v. Kingrea*, 573 F.3d 186, 191 (4th Cir. 2009). Specifically:

> [an] indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense.

Id. (emphasis added). *Accord United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *and United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014).

"It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974) (internal quotation omitted). However, any general description based on the statutory language "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific [offense], coming under the general description, with which he is charged." *Id.* at 117-18. *Accord Russell v. United States*, 369 U.S. 749, 765 (1962) (noting that indictment must "descend to particulars" where definition of an offense is in generic terms); *and United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (noting that "the indictment must also contain a statement of the essential facts constituting the offense charged").

For discussion of related issues, *see* **Handbook** § 325 (Post-conviction challenge to sufficiency of indictment).

Appeal/Evidence not in record below.

In *United States v. Graham*, 771 F.3d 445 (4th Cir. 2013), recordings of wiretapped conversations were played during the trial but were not recorded or transcribed by the Court Reporter. Concerned that this might impede appellate counsel, who was not present at trial, the Fourth Circuit remanded for further proceedings before the District Court pursuant to Federal Rule of Appellate Procedure ("FRAP") 10. Thereafter, based on affidavits of the lead prosecutor and case agent, their testimony at an evidentiary hearing, and a CD and transcript of the calls, the District Judge who had presided at the trial made findings of fact regarding exactly which of the many intercepted calls were played to the jury.

The Defendant argued on appeal "that the evidence presented at the FRAP 10 hearing was insufficient to correct the lack of transcription of the recordings played to the jury," that is, that "the trial court did not hear enough evidence at the FRAP 10 hearing to find definitively which recordings were played during the trial." *Id.* at 452. In an opinion written by Judge Davis and joined by Chief Judge Traxler and Judge Agee, the Fourth Circuit squarely disagreed. Specifically, the Court found that District Judge William D. Quarles, Jr.'s findings "were adequately supported by the evidence," and therefore "ha[d] no hesitation in concluding that [the Defendant's] counsel ha[d] available … an appellate record that fully and accurately reflected the pretrial and trial proceedings … leading to the jury's verdict." *Id.* (affirming convictions and mandatory life sentence).

For discussion of a related issue, *see* **Handbook** § 330 (Evidence not in record below).

Harmless error.

In *United States v. Woods*, 710 F.3d 195, 208 (4th Cir. 2013), the Defendant argued that "the *cumulative* effect of the claimed errors [the district court's refusal to give an instruction on the Defendant's character evidence, and the prosecutor's improper question to a witness that assumed the Defendant's guilt and statement in his closing argument that the Defendant had "lied under oath"] prejudiced the outcome of his trial."

In an opinion written by Judge Keenan and joined by Chief Judge Traxler and Judge Thacker the Fourth Circuit explained the "cumulative error doctrine" thus:

> Under our cumulative error doctrine, "the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Lighty*, 616 F.3d at 371 (quoting *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009)). However, we will reverse a conviction on the basis of cumulative error only when the errors "so fatally infect the trial that they violated the trial's fundamental fairness." *Id*. (citation omitted).

Id.

Although the Court described the errors in this case as "not insignificant" and "caution[ed] the government against engaging in such conduct in the future," it ultimately concluded that "the errors [had not] prejudiced [the Defendant's] case so as to justify the unusual remedy of reversal based on cumulative error." *Id.* at 208-09.

For discussion of related issues, *see* **Handbook** § 333 (Harmless error).

Ineffective assistance of counsel.

In *United States v. Galloway*, 749 F.3d 238 (4th Cir. 2014), the Defendant retained an attorney with whom he became dissatisfied, firing her five months later. An Assistant Federal Public Defender was then appointed to represent him, but the Defendant subsequently fired him, too, and ultimately chose to represent himself at trial. The Defendant argued on direct appeal that he was denied effective assistance of counsel by the lawyer he retained, contending that she:

> failed to file any substantive pretrial motions on his behalf, failed to demand discovery in a timely fashion, and failed to communicate with him about his case. He further asserts that her deficient performance resulted in his being "at a disadvantage at the motions hearing"; in his having "to scramble" with stand-by counsel for discovery only "weeks before trial"; and in his "electing to go forward with a trial, unprepared."

Id. at 241.

In an opinion written by Judge Niemeyer and joined by Chief Judge Traxler and Judge Duncan, the Fourth Circuit began by noting that "a defendant may raise [a] claim of ineffective assistance of counsel in the first instance on direct appeal <u>if and only if it conclusively appears</u> from the record that … counsel did not provide effective assistance. Otherwise, [he] must raise [his] claim in the district court by a collateral challenge pursuant to 28 U.S.C. § 2255…." *Id.* (emphasis in original), *quoting United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995). Also noting that the appellate court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" the Court found that "the record d[id] *not* show conclusively that his allegations had any merit." *Id.* (emphasis added), *quoting Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998).

The Court also concluded that the Defendant had failed to show "prejudice," as required for a successful ineffective assistance of counsel claim, that is, the Defendant had not shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and that "the result of the proceeding was fundamentally unfair or unreliable." *Id.*, *quoting Sexton*, 163 F.3d at 882.

Specifically, the Court noted that soon after the Defendant complained about retained counsel, the District Court appointed an Assistant Federal Public Defender to represent him, who filed pretrial motions and moved for a continuance to allow sufficient time to prepare for trial. In short, the Fourth Circuit concluded:

> [The Defendant's] claim that he was ultimately unprepared for trial surely stems more from subsequent decisions he made (1) to discharge the Assistant Federal Public Defender representing him; (2) to withdraw that lawyer's motion to continue the trial date; and (3) to represent himself at trial with stand-by counsel.

Id. at 241-42.

For discussion of these and related issues, *see* **Handbook** § 335 (Ineffective assistance of counsel).

Mandate Rule.

In *United States v. Pileggi*, 361 F. App'x 475, 477-79 (4th Cir. 2010) ("*Pileggi I*"), the Fourth Circuit held that the District Court in the Western District of North Carolina erred in imposing a 600-month (50 year) sentence on a 48-year-old man after the United States agreed with Costa Rica – as a condition of the Defendant's extradition – that he would not receive a penalty … that requires that he spend the rest of his natural life in prison." *United States v. Pileggi*, 703 F.3d 675, 677 (4th Cir. 2013) ("*Pileggi II*"). In fairness to the District Court, the Government inaccurately stated at the initial sentencing that the United States' agreement with Costa Rica was that it would "not seek a sentence in excess of 50 years." The Fourth Circuit vacated the 600-month sentence in *Pileggi I*, remanding with the instruction that the case be reassigned for resentencing.

Following remand, the case was reassigned to Chief District Judge Robert J. Conrad, Jr. who reduced the Defendant's term of imprisonment (from 50 to 25 years), but also increased the amount of restitution the Defendant was required to pay (from approximately $4.3 million to almost $21 million). In an opinion written by Judge Davis and joined by Judge Gregory, the majority "unhesitatingly conclude[d] that the mandate rule barred the district court from reconsidering the restitution order on remand," vacating the restitution order and instructing the District Court to reinstate the initial restitution order. *Id.* at 678. Chief Judge Traxler wrote a brief separate opinion concurring in the result.

Both the majority opinion and Chief Judge Traxler's concurring opinion focused on the binding nature of the scope of a mandate on a District Court, and both agreed that the mandate in this case was limited to resentencing the Defendant to a term of imprisonment which did not constitute a de facto life sentence. The majority opinion addressed the inapplicability of what it called a District Court's "limited discretion to reopen [an issue outside the scope of the mandate on remand]." *Id.* at 679-81, *quoting*

United States v. Bell, 5 F.3d 64, 67 (4th Cir. 1993). As the Fourth Circuit stated in *Bell*, these limited circumstances require:

> (1) a showing that controlling legal authority has changed dramatically; (2) that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in a serious injustice.

Id. at 682, *quoting Bell*, 5 F.3d at 67. The remainder of the majority opinion simply addressed and rejected the Government's arguments that exceptions one or three to the Mandate Rule permitted the higher restitution order in this case.

Chief Judge Traxler's brief concurring opinion simply noted the difference between a *general remand*, where "the resentencing is *de novo*, and the district court is entitled (but not required) to reconsider any and all issues relevant to sentencing, whether or not the issues were raised in the first appeal," *id.* at 684 (Traxler, CJ, concurring), *citing Pepper v. United States*, 131 S. Ct. 1229, 1250-51 (2011) (noting that general remands for resentencing place no restrictions on a district court's discretion at resentencing); *and United States v. Susi*, 674 F.3d 278, 284-86 (4th Cir. 2012); and a "*limited remand* that restrict[s] the district court," as in the instant case. *Id.*, *citing Bell*, 5 F.3d at 66-67.

For discussion of these and related issues, *see* **Handbook** § 337 (Mandate Rule).

28 U.S.C. § 2255 proceedings.

In *United States v. Hairston*, 754 F.3d 258 (4th Cir. 2014), the Defendant's state conviction for driving without a license was vacated years after his federal sentencing, which would have reduced his criminal history category, and therefore the corresponding advisory Guidelines range. However, because he had filed a prior motion pursuant to 28 U.S.C. § 2255, District Judge Richard L. Voorhees dismissed the instant motion as "second or successive" in violation of 28 U.S.C. §§ 2244(b)(3)(a) and 2255(h). *Id.* at 258.

In an opinion written by Senior Judge Davis and joined by Judges Gregory and Thacker, the Fourth Circuit *reversed.*

Granting a Certificate of Appealability on "whether Hairston's numerically second § 2255 motion is a 'second or successive' motion for purposes of 28 U.S.C. § 2255(h), where the basis for the claim did not arise until after the district court denied his first § 2255 motion," and appointing counsel to represent him, *id.* at 259-60 the Fourth Circuit answered this question in the negative. Following decisions in the Tenth and Eleventh Circuits, the Court concluded:

> that a numerically second § 2255 motion should not be considered second or successive pursuant to § 2255(h) where, as here, the facts relied on by the movant seeking resentencing did not exist when the numerically first motion was filed and adjudicated. Here, Hairston's claim was unripe at the

> time his numerically first motion was adjudicated. Accordingly, in light of the subsequent vacatur of his state No Operator's License conviction, which contributed to the original Guidelines calculation of his federal sentence, his motion was not successive.

Id. at 262 (reversing and remanding).

In *United States v. Jones*, 758 F.3d 579 (4th Cir. 2014), the Defendant had been sentenced, in 1996 on federal cocaine charges, to a 360-month term of imprisonment. The advisory Guidelines range was 360 months to life, which was based in part on two prior Florida convictions.

The Defendant subsequently and successfully challenged both Florida convictions, resulting in vacatur of one in 2004 and the other in 2008. Thereafter, but not until 2012, the Defendant filed a § 2255 motion, arguing that the one-year statute of limitations under 28 U.S.C. § 2255 (f) (4) did not apply because he was "actually innocent of his sentence." *Id.* at 581. More particularly, the Defendant asked District Judge Terence W. Boyle and the Fourth Circuit to apply *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (statute of limitations did not bar habeas motion where defendant demonstrated he was actually innocent of the *crime of conviction*), upon demonstration that a defendant is "actually innocent" *of a sentence*. *Id.*

In an opinion written by Judge Niemeyer and joined by Judge Agee, a split panel held generally that *McQuiggin* did not apply to sentencing errors. The majority agreed with Judge Boyle that the one-year statute of limitations began to run, at the latest, sometime in 2008 when the Defendant learned that the second conviction had been vacated, and therefore was time-barred when the § 2255 motion was filed in 2012. *Id.* at 586-87.

Judge King dissented in part but ultimately, albeit via a different analytical route, concurred in the judgment. The dissent criticized the breadth of the majority's "sweeping decision," which "concludes that no petitioner can ever overcome an AEDPA statute of limitations by showing actual innocence of any non-capital – or even capital – sentence," which as "highly debatable" and "unnecessary to disposing of [the] appeal." *Id.* at ___ (King, J., dissenting in part, but concurring in the judgment). Judge King "concur[red] in the judgment insofar as it affirms the district court," explaining:

> In getting to that result, I would assume that *Maybeck*'s actual innocence of non-capital sentence exception may function under *McQuiggin* to overcome an AEDPA statute of limitations, but conclude that such exception cannot help Jones because he was not sentenced as a habitual offender. *See United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010) (explaining that the *Maybeck* exception applies only "in the context of habitual offender provisions" and only then "where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes").

Id. at 587 (King, J., dissenting in part, but concurring in the judgment).

For discussion of related issues, *see* **Handbook** § 340 (28 U.S.C. § 2255 proceedings).