OFFICE OF THE FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
FOURTH CIRCUIT CRIMINAL LAW UPDATE

Cases Published Between May 1, 2008 and February 28, 2009

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I. INTRODUCTION

This outline summarizes Fourth Circuit decisions published between May 1, 2008 and February 28, 2009. For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. To receive daily published Fourth Circuit opinions, register at http://pacer.ca4.uscourts.gov/opinions/opinion.php. Please direct any email questions about this outline or the websites listed above to vidalia_patterson@fd.org.

II. SPECIFIC OFFENSES

A. 18 U.S.C. § 924(e)–Armed Career Criminal

***United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009) (J. Hamilton)**

Facts: Defendant was convicted by a jury of being a felon in possession of a firearm. He was sentenced under the Armed Career Criminal Act based on three prior convictions for South Carolina failure to stop for a blue light violations. His classification as an Armed Career Criminal increased his Guideline range from 84 to 105 months up to 262 to 327 months, and he was sentenced to 262 months' imprisonment. Defendant claims that the failure to stop for a blue light convictions were not violent felonies.

Held: The Court held that failure to stop for a blue light is not **categorically** and invariably a crime of violence, though it may be if the offense involved intentional conduct. Rejecting its holding in *United States v. James*, 337 F.3d 387 (4th Cir. 2003) and applying the analysis set forth in *Begay v. United States*, — U.S. —, 128 S.Ct. 1581 (2008), the court found that, although the South Carolina offense did carry the potential for serious physical injury to another, this alone was not determinative of a violent crime. In deciding whether prior offenses qualify as violent felonies, a court must first ask whether they "involved purposeful, violent, and aggressive conduct," suggesting the likelihood that the defendant would use a firearm during the commission of a crime. (J. Niemeyer dissented stating that *Begay* did not overrule *James* because the two statutes in question were different and that even under *Begay*, the South Carolina offense qualified as a violent felony.)

***United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (J. Duncan)**

Facts: Defendant was convicted of being a felon in possession of a firearm and body armor. The district court had initially classified him as an Armed Career Criminal based on four predicate convictions. However the Fourth Circuit remanded, finding that two of convictions were not "separate" offenses and that Defendant had only three qualifying prior convictions. On remand, the district court again imposed an ACCA sentence. Defendant objected, arguing that one of his prior Virginia convictions, for "carnal knowledge of a minor" without the use of force (statutory rape), was not a "violent felony" as defined by the Act. At issue

on appeal was whether the Virginia statute was sufficiently similar to the crimes enumerated in 18 U.S.C. § 924(e)(2)(B)(ii) and involved a "serious potential risk of physical injury."

Held: Applying *Begay*, Virginia's statutory rape law cannot categorically be considered a crime of violence. Although nonforcible sexual activity with a minor pose a risk of physical injury, like STDs and pregnancy, such risks are not "violent and aggressive" as those contemplated by § 924(e)(2)(B).

B. 18 U.S.C. § 1201– Kidnapping

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, and was convicted again. Among other issues, Defendant appealed claiming that the Government failed to meet its burden on the "holding" element of the kidnapping statute.

Held: The "holding" element of § 1201 has been met where circumstantial evidence indicates that the victim was held at Defendant's house against her will for an appreciable amount of time before her death.

C. 18 U.S.C. §§ 1462, 1466– Child Pornography

***United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008)(J. Niemeyer)**

Facts: Defendant was convicted by a jury of numerous obscenity and child pornography charges including 20 counts of receiving obscene Japanese cartoons depicting children, 20 counts of receiving such images after having been previously convicted of possessing child pornography, 15 counts of possessing child pornography (in photographic form), and 20 counts of sending or receiving, via interstate commerce, obscene emails describing children. On appeal, he raised numerous constitutional and First Amendment claims including that: (1) 18 U.S.C. § 1462 violates the 1st Amendment's protection of private possession of obscene materials as held in *Stanley v. Georgia*, 394 U.S. 557 (1969); (2) the term "receives" in § 1462 is unconstitutionally vague; (3) § 1462 further violates the 1st Amendment as applied to text-only emails because text alone cannot be obscene; and (4) § 1466 as applied to cartoons violates the 1st Amendment as these cartoons did not depict actual children.

Held: (1) Although the Supreme Court in *Stanley* held that private possession of obscene materials is protected, there does not exist a related right to receive obscene material. (2) Because § 1642 only criminalizes knowing receipt of obscene materials, it is not impermissibly vague. (3) As there is no precedent specifically protecting obscenity in text-only form, and obscenity has been regulated in all forms and media, § 1642 is not unconstitutional. (4) Regardless of whether the cartoons depict actual children, § 1466 is a valid restriction on obscene speech.

(J. Gregory dissented on the issue of whether the text-only emails could be obscene and indicated that § 1466 should be read to require the depiction of actual children.)

D. 18 U.S.C. § 2113(a)– Bank Robbery

***United States v. Ketchum*, 550 F.3d 363 (4th Cir. 2008) (J. Shedd)**

Held: Defendant walked into a bank and handed a teller a note indicating that he was being forced at gunpoint to obtain $500 from the bank. The teller gave him $1686, and he was arrested shortly thereafter. Defendant was charged with one count each of bank robbery and bank larceny. Before a magistrate judge, the parties agreed on the factual basis for a guilty plea, but not which charge it proved. Agreeing that the district judge would resolve the matter, Defendant then pleaded guilty to both charges. The district court concluded that Defendant's statements to the teller constituted "intimidation" under 18 U.S.C. § 2113(a) and found him guilty of bank robbery. Defendant appealed arguing there was insufficient evidence to support a guilty plea for bank robbery as his note did not amount to intimidation and was instead evidence that he was at risk, not the bank teller.

Facts: A sufficient factual basis for to prove intimidation under 18 U.S.C. § 2113(a) exists where the demand for money (which, the court notes "alone may be sufficient") is combined with the mention of a gun.

E. 18 U.S.C. 2319(b)(1)– Criminal Infringement of a Copyright

***United States v. Armstead*, 524 F.3d 442 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant was convicted by a jury of distributing, in two transactions, more than 300 bootlegged DVDs. In order to violate the felony statute, the copyrighted works at issue must have "a total retail value of more than $2500." Defendant claimed that because he only received a total of $1500 (the black market value) for the DVDs, that amount should be used to determine whether he violated the statute. The Government argued that the value a buyer would pay for legitimate copies of the works should be employed.

Held: The term "retail value' set forth in § 2319 refers to the value copyrighted works have at the time Defendant illegally sold the copies. The value may be determined by taking the highest of the face value, par value, or market value of the copyrighted materials in a retail context.

F. 21 U.S.C. §§ 841(b) & 846– Drug Conspiracy

***United States v. Brooks,* 524 F.3d 549 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant (Mathis) and several codefendants were charged with multiple drug counts, including conspiracy to distribute more than 500 grams of cocaine and 50 grams of crack.

At trial, the court failed to instruct the jury to make a determination on the amount of drugs individually attributable to Defendant in carrying out the conspiracy. On appeal, Defendant argued that his convictions violated *United States v. Collins*, 415 F.3d 304 (4th Cir. 2005), requiring the jury to determine the drug amount attributable to each member of a conspiracy before a mandatory minimum could be triggered. The Government claimed that *Booker* overruled *Collins.*

Held: *Booker*, which applies only to advisory guideline sentencing ranges, does not overrule *Collins,* and it was therefore error for the judge not to submit the question of drug amount to the jury.

III. FOURTH AMENDMENT / SUPPRESSION

A. *Terry* Stop and Frisk

***United States v. Black*, 525 F.3d 359 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant was walking home in a "high crime" area when he passed a police car. After the officer engaged Defendant in conversation, he noticed Defendant's hand in his pocket and repeatedly asked him to take it out. Defendant complied, and the officer saw a bulge in the pocket. When questioned about what it was, Defendant said it was just money and his ID, and placed his hand back in the pocket. Suspecting a firearm, the officer ordered Defendant to take his hand out of the pocket as he didn't want to have to shoot Defendant. Another officer then patted down Defendant, recovering a firearm from the pocket. After being handcuffed, Defendant admitted that he did not have a permit for the weapon and was a convicted felon. After being charged with felon in possession, Defendant moved to suppress the gun, arguing that the officers lacked reasonable suspicion to seize and pat him down. The district court denied the motion, and Defendant appealed.

Held: As the parties stipulated, the initial encounter between Defendant and the officer was consensual. However, the officer had reasonable suspicion to justify the pat down and seizure based on the totality of the circumstances, including the area, the officer's experience, how defendant was positioned in his pocket, his failure to take the hand out at the officers' first request, and the inconsistency between what Defendant claimed was in the pocket and the shape of the bulge. (J. Gregory dissented, stating that the majority's opinion "significantly lowers [Fourth Amendment] protections for" citizens living in high-crime areas).

B. Traffic Stop

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car. The police stopped him because his tag light was out. At

first, the officer gave him a verbal warning about the light and said he was free to go. The officer then asked Defendant if he could search the car, and Defendant consented. Although nothing was found initially, a canine unit arrived and, based on this search, officers found crack cocaine and several thousand dollars in cash. Defendant claims the district erred in denying his motion to suppress the evidence claiming the officer's continued questioning impermissibly prolonged the stop and became an unlawful seizure of his person.

Held: Brief, non-coercive questioning after a traffic-stop seizure has ended and a defendant's license has been returned does not constitute a new seizure for Fourth Amendment purposes.

C. Inventory Search

***United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009) (J. Reidinger– by designation)**

Facts: Defendant was convicted of conspiracy to distribute cocaine and hydromorphone based on evidence obtained during warrantless searches following a traffic stop. The car in which Defendant was a passenger was stopped for speeding. During the stop, the officers investigated the identities provided by the car's occupants. Upon determining that none of the car's occupants had valid licenses, the police arranged for the car to be towed. Because Defendant provided several names, and his true identity could not be verified, he was arrested for obstruction of justice. Defendant moved to suppress $14,790 found in the car's trunk during an inventory search conducted at the sheriff's department claiming that the officers' failure to complete the inventory search at the scene of the stop gave rise to an inference of bad faith. The district court denied the motion.

Held: So long as the vehicle to be inventoried is in lawful police custody and the search is conducted according to standard police procedures, the police may lawfully inventory the vehicle even if the search is commenced at the scene and completed at the police department.

D. Search Warrant / *Franks* Hearing

***United States v. Gary*, 528 F.3d 324 (4th Cir. 2008) (J. O'Connor)**

Facts: Defendant's conviction (unspecified by the opinion) was based on information gathered during a search of a home identified by an anonymous tipster as the location where a man named "Melvin" was selling heroin. The investigating officer rummaged through the trash in the alley behind the home, discovering items with heroin residue and drug paraphernalia and discarded mail indicating the trash came from the target address. He applied for a search warrant, in which he failed to disclose that there were multiple trash cans in the alley, only one of which was marked as belonging to the target address, and that the letter was not addressed to "Melvin." The warrant also incorrectly indicated that the investigation took place a year and a day before the date on which it actually occurred. Defendant appealed the district court's denial of his motion to suppress the evidence.

Held: The officer's failure to disclose the existence of the other trash cans and the addressee in the discarded letter was not material to the finding of probable cause, and therefore, the warrant was valid. Moreover, because it was clear that the date of the investigation was a typographical error, the good-faith exception applies and the warrant was valid.

***United States v. Srivastava*, 540 F.3d 277 (4th Cir. 2008) (J. King)**

Facts: Defendant, a cardiologist, was originally under investigation for health care fraud. As part of that investigation, search warrants were obtained for Defendant's two medical offices and his home. The warrant for his home was based on information that Defendant handled his insurance billing there. Investigators executed the warrants, seizing many personal documents at his home. Upon recovering documents showing financial transfers to the Bank of India, investigators determined that Defendant had filed false income tax returns, and he was indicted on two counts of tax evasion and one count of making false statements on a tax return. Defendant moved to suppress the documents discovered in his home, arguing that they were personal, not business documents, and beyond the scope of the items the warrant authorized investigators to seize. The district court granted his motion and suppressed all the evidence seized during the three searches. The Government appealed.

Held: Because the search warrant allowed the seizure of financial documents, the seizure of personal as well as business documents was within the scope of the warrant. Moreover, the personal documents fell within the warrant's scope requiring that the only documents seized be those that "may constitute evidence that health care fraud had been committed." Finally, an agent's subjective belief that a warrant's terms did not limit his conduct did not justify the district court's blanket suppression order.

***United States v. Williams*, 548 F.3d 311 (4th Cir. 2008) (J. King)**

Facts: Defendant and his co-defendant were charged with drug conspiracy. They moved to suppress evidence found at their residences pursuant to state search warrants. Although there was evidence of Defendant's drug trafficking activities, no direct evidence linked that activity to these residences. Rather, probable cause was based on the agent's claim that, in his experience, drug traffickers "stash" quantifies of money and drugs in their homes and this warranted the search of these residences. The district court granted the defendants' motion, and the Government appealed.

Held: Warrants to search a home are proper if (1) there is probable cause to support a charge of criminal activity and (2) there is reasonable suspicion that drug dealers store evidence in their homes. Under the good faith exception to the exclusionary rule set out in *U.S. v. Leon*, 468 U.S. 897 (1984), evidence obtained pursuant to a search warrant need not be excluded if the officer's reliance on it was objectively reasonable. As such, the district court erred when it disregarded the agent's experience with how drug traffickers store money and drugs. The agent's experience and (uncorroborated) statement that the homes searched were the

defendants' residences saved the affidavits and demonstrated that they were not so lacking in indicia of probable cause as to render them unreliable.

***United States v. Tate*, 524 F.3d 449 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant was charged with being a felon in possession of a firearm. The gun at issue was recovered during a search of Defendant's home based on a warrant obtained by a police officer. As a basis for obtaining the warrant, the officer stated that he had searched through two of Defendant's trash bags that were "easily accessible from the rear yard of" Defendant's home and discovered marijuana residue. However, the officer failed to add that the trash bags were "easily accessible" because the officer hopped a fence and took the bags off of the back porch rather than in a nearby alley where they would be picked up by trash collectors. Defendant moved to suppress the evidence and requested a *Franks* hearing, claiming that the information omitted by the officer constituted material facts missing from the warrant application. The district court denied Defendant's request, finding that, because the officer's affidavit was "literally true," Defendant could not meet the *Franks* requirement that a statement in the affidavit was "intentionally or recklessly false or misleading."

Held: A search warrant affidavit may be literally true and still be intentionally misleading, requiring a *Franks* hearing to assess the truthfulness of the affidavit. Moreover, to be "material," thus warranting *Franks* hearing, an omission must be such that its inclusion in the affidavit would defeat probable cause.

E. Warrantless Search

***United States v. Moses*, 540 F.3d 263 (4th Cir. 2008)(J. Niemeyer)**

Facts: Defendant pled guilty to possession with intent to distribute crack and being a felon in possession of a firearm. Police seized the evidence against him during warrantless searches of two different homes. Based on tips indicating Defendant's involvement in gang and drug activities, the police surveiled a duplex apartment building. When Defendant walked out of the home, the police stopped his car based on his driving with a suspended license. Police, having observed Defendant make a call during the stop, went to the home he had been seen leaving. Police eventually used Defendant's keys to open one unit, fearful that someone might be there destroying evidence and found evidence of narcotics in plain view. Police obtained a search warrant and recovered a pistol. During that search, police received information that Defendant had sold drugs from another home nearby. Again using Defendant's keys, officers went to the second home and entered to prevent the destruction of evidence. Finding some evidence of narcotics activity, a warrant was obtained, and officers found crack cocaine in the home. Defendant appealed the denial of his motion to suppress the evidence from these searches.

Held: Exigent circumstances justified entry of the first home without a warrant when an officer was concerned that Defendant had alerted someone in the home about the police. The warrantless entry of the second home was not supported by probable cause; however, the search warrant obtained for the second home, even when stripped of any information gained from the initial illegal warrantless entry, was sufficient. Judge Gregory dissented in part, concluding that there were no exigent circumstances sufficient to justify searching the first apartment because there was no evidence that there was anyone in the apartment likely to destroy evidence.

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car. The police stopped him because his tag light was out. At first, the officer, new to the police force, gave him a verbal warning about the light and said he was free to go. The officer then asked Defendant if he could search the car, and Defendant consented. Nothing was found. Meanwhile, a canine unit arrived and, based on Defendant's initial consent, searched the car. After the dog alerted, the officers conducted a more thorough search of the car and found crack cocaine and several thousand dollars in cash. Defendant claims the district erred in denying his motion to suppress evidence recovered during the warrantless search of his car.

Held: Defendant voluntarily consented to the search of his car and, despite the unusual sequence of events, the second search of Defendant's car by the officers and canine unit was not unreasonable.

***United States v. White*, 549 F.3d 946 (4th Cir. 2008) (J. Wilkinson)**

Facts: A cooperating defendant in a drug possession case provided police officers names of drug dealers he knew, including Defendant's. This informant agreed to set up a deal with Defendant at a Family Dollar parking lot. The police drove by the lot and saw a car matching Defendant's arrive and leave. Later, the informant claimed Defendant called to change the meeting location because the parking lot was "too hot." On the way to the second location, police pulled over Defendant. Defendant refused to consent to search the car, however police called for a canine unit. After a second drug dog alerted on Defendant's driver-side door, officers searched the trunk and found cocaine. Defendant filed a motion to suppress arguing that the informant's tip was unreliable and insufficiently corroborated. The district court denied the motion to suppress and the Defendant appealed.

Held: The informant in this case, who had incentive to cooperate, was a reliable source whose information had been corroborated "by actual events." As such, the informant's tip provided probable cause to search Defendant's car.

***United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009) (J. Reidinger– by designation)**

Facts: Defendant was convicted of conspiracy to distribute cocaine and hydromorphone based on evidence obtained during warrantless searches related to a traffic stop. The car in which Defendant was a passenger was stopped for speeding. During the stop, the officers investigated the identities provided by the car's occupants. In order to verify his identity, Defendant showed the officer a cell phone, which contained a number for his employer. However, because Defendant provided several names, and his true identity could not be verified, he was arrested for obstruction of justice and his cell phone was seized and searched. The district court denied Defendant's motion to suppress information found in his cell phone.

Held: Because the cell phone was on Defendant's person during his arrest, it was properly seized during a search incident to a lawful arrest. Moreover, due to the potential loss of information from the cell phone, the officers were justified in reviewing its contents without first obtaining a search warrant.

F. Prompt Presentment

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, the Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh, resulting in several raids at suspected terrorist safe houses by the Saudi Mabahith (secret police). Defendant was arrested two weeks later and taken into Saudi custody and interrogated by the Mabahith, but never given a probable cause determination. During the interrogation, he confessed to his affiliation with al-Qaeda, intention to prepare and train for an operation inside the United States, and intention to assassinate the president. Defendant argued these statements were obtained in violation of the Fourth Amendment's prompt presentment guarantee.

Held: Because there was no improper collaboration between Saudi and U.S. authorities, and the prompt presentment guarantee applies only to actions taken by domestic authorities, Defendant had no right to be properly presented before his detention and interrogation by Saudi officials.

G. Expectation of Privacy

***United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009) (J. Gregory)**

Facts: Defendant was convicted of taking or possessing a migratory bird without a permit. Part of the evidence against him was obtained from surveillance cameras set up on Defendant's open field to record activities near where a bird trap was set. Defendant moved to have the

evidence suppressed, arguing that it violated his 4th Amendment expectation of privacy in his property. The district court denied the motion and fined Defendant $500.

Held: Although the surveillance camera was placed on Defendant's property, this did not violate Defendant's expectation of privacy. The search was reasonable because Defendant's fields were located several miles from his home, the land was being used exclusively for farming, the state had received a report of a trapped protected bird on his property, and Defendant failed to take steps to protect the property from observation.

IV. FIFTH AMENDMENT

A. Right Against Self-Incrimination / *Miranda*

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in several raids at suspected terrorist safe houses by the Saudi Mabahith (secret police). Defendant was arrested two weeks later and taken into Saudi custody and interrogated by the Mabahith. He confessed to his affiliation with al-Qaeda, intention to prepare and train for an operation inside the United States, and intention to assassinate the president. Some of the questioning took place in the presence of FBI agents and these agents submitted questions, some of which were posed to Defendant by the Mabahith. Defendant argued that these statements were obtained in violation of his *Miranda* rights.

Held: The mere presence of the FBI at the interrogation did not constitute a "joint venture" between U.S. and Saudi authorities. Because there was no impermissible joint venture in interrogating Defendant, and *Miranda* applies only to interrogations conducted by domestic authorities, the voluntary statements obtained by foreign law enforcement were generally admissible. Moreover, as Defendant had confessed to each crime prior to the interrogation during which the FBI was present, any error in refusing to suppress these statements was harmless.

B. Voluntariness of Statement

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in several raids at suspected terrorist safe houses by the Saudi Mabahith (secret police). Defendant was arrested two weeks later and taken into Saudi custody and interrogated by the Mabahith. He confessed to his affiliation

with al-Qaeda, intention to prepare and train for an operation inside the United States, and intention to assassinate the president. Defendant argued that he was tortured during the questioning and his statements were therefore involuntary. After reviewing the evidence and hearing the testimony of witnesses, the district court found that Defendant's testimony about being tortured was not supported by the facts, and Defendant appealed.

Held: The district court's findings regarding Defendant's claims of torture were not clearly erroneous. Moreover, the totality of the circumstances, notwithstanding the Saudi's failure to provide Defendant legal counsel, indicate that his statements were, in fact, voluntary.

C. Double Jeopardy

***United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008) (J. Wilkinson)**

Facts: During a prior bench trial, Defendant was accused of attending a jihadist training camp, supplying services to the Taliban, and using a firearm in furtherance of a crime of violence, and he was acquitted of all charges. Shortly thereafter, the Government subpoenaed Defendant to testify before grand juries investigating violations of 18 U.S.C. §§ 2339A and 2339B (providing material support to terrorists) and granted him immunity from criminal prosecution for truthful testimony. Defendant consistently denied involvement with any jihadist training camps or knowing anything significant about the individuals with whom he consorted. He was subsequently indicted and convicted of making false material statements to the grand juries, obstructing justice, and making false material statements to the FBI. Defendant claimed that the charges should have been dismissed on collateral estoppel grounds.

Held: Defendant's acquittal on charges of engaging in terrorist activities did not give him license to perjure himself before a grand jury when asked about those activities. Moreover, as the ultimate issue to be decided in the case at hand was whether he made false material statements, there was no collateral estoppel or double jeopardy issue.

***United States v. Hall*, 551 F.3d 257 (4th Cir. 2009) (J. King)**

Facts: Defendants were convicted on multiple drug offenses arising from a drug trafficking scheme including conspiracy, use of a communications facility during a drug trafficking crime, and possession with intent to distribute. Although they were ultimately convicted in Maryland, their convictions followed a previous hung jury trial in Maryland and two prior mistrials in the District of Columbia (D.C.). On appeal, Defendants claimed that the proceedings in Maryland subjected them to repeated prosecutions for the same offense, the doctrine of collateral estoppel barred their prosecution on the conspiracy charge, and the multiple trials and prosecutions subjected them to double jeopardy.

Held: Because Defendants were convicted of offenses that had elements which differed from the ones of which they were acquitted in D.C., they were not subject to double jeopardy. Moreover, because the prior D.C. acquittals failed to determine any element of the conspiracy offense of which Defendants were ultimately convicted, collateral estoppel did not preclude the Maryland prosecution.

D. Due Process

***United Sates v. Holman*, 532 F.3d 284 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant served a prison term for various drugs and weapons offenses to which he pled guilty. During his incarceration, he fluctuated between cooperating with and refusing treatment for his schizoaffective disorder. Prison officials were eventually granted permission to administer anti-psychotic medication over Defendant's objections. Upon release, Defendant's doctor prescribed anti-psychotic medication to be administered by intramuscular injection. As a special condition of his release, the district ordered that Defendant comply with his mental health treatment plan and receive the injections prescribed. While on supervised release, Defendant was violated by his probation officer for failure to take his medication, and he was sentenced to 12 months imprisonment with an additional 37 months of supervised release to follow with the same conditions. Defendant claims that the special condition violated his Fifth and Fourteenth Amendment due process rights.

Held: The special condition requiring Defendant to undergo involuntary intramuscular injections of anti-psychotic medications during his supervised release did not violate his due process rights as the requirement was reasonably related to the need to protect the public and provide Defendant with proper medical care.

***United States v. Hall*, 551 F.3d 257 (4th Cir. 2009) (J. King)**

Facts: Defendants were convicted on multiple drug offenses arising from a drug trafficking scheme including conspiracy, use of a communications facility during a drug trafficking crime, and possession with intent to distribute. Although they were ultimately convicted in Maryland, their convictions followed a previous hung jury trial in Maryland and two prior mistrials in the District of Columbia (D.C.). On appeal Defendants claimed that subjecting them to a fourth trial, after three mistrials to which they did not object, violated fundamental fairness principles incorporated in Fifth Amendment due process.

Held: Subjecting Defendants to a fourth trial after three prior mistrials involving the same events did not violate their due process rights.

V. SIXTH AMENDMENT

A. Confrontation Clause / Compulsory Process

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in his capture, trial and conviction for terrorist activities. In anticipation of trial, the Government was permitted to depose Saudi witnesses in Saudi Arabia without Defendant's physical presence. Defendant argued that these depositions violated his Sixth Amendment Confrontation Clause rights. Defendant further argued that his being permitted to review classified documents in redacted form, pursuant to the Classified Information Procedures Act (CIPA), while the jury was able to see unredacted substitute versions also violated his Sixth Amendment right to confront evidence against him.

Held: Introducing testimony at trial from witnesses deposed in Saudi Arabia without Defendant's being physically present did not violate Defendant's Confrontation Clause rights. Moreover, the district court's Sixth Amendment violation for failing to provide unredacted versions of classified documents to Defendant that were given to the jury was harmless beyond a reasonable doubt.

B. Right to Speedy Trial

***United States v. Hall*, 551 F.3d 257 (4th Cir. 2009) (J. King)**

Facts: Defendants were convicted on multiple drug offenses arising from a drug trafficking scheme including conspiracy, use of a communications facility during a drug trafficking crime, and possession with intent to distribute. Although they were ultimately convicted in Maryland, their convictions followed a previous hung jury trial in Maryland and two prior mistrials in the District of Columbia (D.C.). On appeal Defendants claimed that the amount of time that passed between their first indictment in D.C. and their second trial in Maryland violated their Sixth Amendment right to a speedy trial.

Held: The right to a speedy trial does not protect a defendant from pre-indictment delay. Thus, because the pertinent period of time was the span between the first indictment in Maryland and the second trial there, their speedy trial right was not violated.

C. Right to Counsel

***United States v. Cain*, 524 F.3d 477 (4th Cir. 2008) (J. Williams)**

Facts: After being arrested during a DEA sting, Defendant told DEA agents that he wanted to cooperate. The next day, at his initial appearance, the court determined he was eligible for court appointed counsel under the Criminal Justice Act (CJA), but no attorney was appointed at that time. Thereafter, Defendant again told agents that he wanted to cooperate, but they were unable to talk with him at that time. Based on his renewed requests to speak with agents, an interview took place. Although it was unclear when his CJA attorney was appointed, one was appointed at some point on the day of the interview. During the interview, Defendant was advised of his *Miranda* rights and made incriminating statements leading to his being charged with multiple drug distribution counts. Defendant filed a motion to suppress his interview statements, arguing that his Sixth Amendment rights were violated because the agents did not attempt to contact his CJA attorney. The district court granted the motion based on a violation of Defendant's Sixth Amendment right to counsel and, in the alternative, for violation of the court's CJA Plan. The Government appealed.

Held: Although the right to counsel had attached, there is no Sixth Amendment violation where Defendant initiated contact with Government agents and voluntarily waived his *Miranda* rights, including the right to counsel. Moreover, the CJA did not preclude Defendant from voluntarily initiating contact with DEA agents and speaking with them about the charges faced.

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, was convicted again, in part based on evidence of a murder for hire plot he hatched from jail against witnesses from the first trial and some of the AUSAs. While in jail awaiting his trial, Defendant told a cellmate about his desire to hire a hitman to kill witnesses and a prosecutor from his first trial. The cellmate related this information to the Government, which in turn arranged for an agent posing as a hitman to meet with defendant. Defendant, however, called off the meeting after calling his attorney from jail, who advised him to abandon the plan. Among other issues, defendant appealed claiming that all statements regarding his attempt to hire a hitman should have been suppressed.

Held: Statements made by Defendant prior to his cellmate's becoming a government informant were not acquired in violation of the Sixth Amendment.

***United States v. Mir*, 525 F.3d 351, (4th Cir. 2008) (J. Wilkinson)**

Facts: Defendant was convicted of fraud, but acquitted of conspiracy and witness tampering. Defendant, and the law firm he owned, specialized in immigration law. As part of his practice, he helped employers complete immigration forms required for employing alien workers and execute paperwork to assist those alien workers seeking permanent U.S. resident status. Defendant and his firm were investigated on suspicion that some of the documents he completed contained false information. During the investigation, Defendant's attorney notified the Government that he was represented by counsel. A grand jury indicted Defendant and his firm on charges of conspiracy to commit labor certification fraud, fraud, and racketeering. Thereafter, investigators suspected Defendant of witness tampering. The Government employed two aliens as confidential informants who met with Defendant and recorded conversations with him in his office. Based on those recordings, the Government added a witness tampering charge to the indictment. The district court denied Defendant's motion to suppress the recordings as a violation of his right to counsel, and Defendant appealed.

Held: Because the Sixth Amendment right to counsel is offense-specific and cannot be invoked for all future prosecutions, Defendant's prior invocation of that right did not guarantee him the presence of counsel during investigation of the uncharged conduct.

VI. PLEA ISSUES / RULE 11

A. Plea Agreements

***United States v. Linder*, 552 F.3d 391 (4th Cir. 2009) (J. Williams)**

Facts: In a written plea agreement, which contained a knowing and voluntary appeal waiver, Defendant pleaded guilty to conspiracy to distribute and possess with the intent to distribute heroin. The plea was entered before *Blakely*, but sentencing was delayed until the Fourth Circuit's decision in *Hammoud* had incorrectly concluded that *Blakely* did not apply to the Guidelines. Accordingly, the district court rejected Defendant's Sixth Amendment objections to the Guidelines calculations and imposed a sentence of 262 months and an alternative sentence of 120 months. After *Booker*, Defendant appealed, but the Fourth Circuit rejected his arguments due to the appellate waiver. Defendant then filed a motion under 28 U.S.C. § 2255 requesting the district court impose the alternate sentence. The district court declined to do so, finding that *Booker* did not apply to Defendant's case.

Held: Although *Booker* did apply in Defendant's case, once a defendant has knowingly and voluntarily waived his right to appeal in a plea agreement, he may not may not escape the terms of that agreement by attempting to raise a previously-denied claim on collateral review.

***United States v. Seay*, 553 F.3d 732 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was convicted of being a felon in possession of a firearm and sentenced to 96 months in prison. Prior to sentencing, Defendant filed a motion for downward departure based on diminished capacity. Thereafter, Defendant agreed to be interviewed by a South Carolina law enforcement officer who disclosed the nature of the questions he would ask but did not reveal that the interview would be used to prepare a "threat assessment." The Government subsequently attached this report in support of a motion for upward variance. At sentencing, the court denied Defendant's motion to suppress the report, allowed testimony by the interviewing officer, and imposed a five-level upward variance. Defendant claimed he believed the interview was part of his cooperation and that this violated the terms of his plea agreement, which required that he cooperate with any investigation and prosecution of others and promised that incriminating information provided as a result would not be used against him.

Held: The Government's use of the threat-assessment report did not violate the parties' plea agreement because the officer made clear to Defendant that his interest was solely in the crime to which Defendant pled guilty and Defendant's own behaviors.

***United States v. Dews*, 551 F.3d 204 (4th Cir. 2008) (J. Ellis)**

Facts: Defendants pleaded guilty to conspiracy to distribute and possess with intent to distribute crack cocaine and money laundering via a plea agreement under Fed. R. Crim. P. 11(e)(1)(C). The plea agreement included a recommendation that 168 months, the bottom of the Guideline range, was the appropriate sentence for each case. After the crack Guidelines were amended and made retroactive, both defendants moved the district court to reduce their sentences based on the newly calculated (and lower) Guideline range. The district court concluded that it lacked the authority to consider the motion because the court had accepted Defendants' plea agreements, which called for a specific sentence, and accordingly, the sentences were not "based on" the Guidelines.

Held: The district court had authority to consider Defendants' motions under the crack cocaine amendment because, despite the stipulation in the plea agreement, the plea agreement was based on the judge's determination that the recommended sentence was within the applicable guidelines range. Moreover, neither Rule 11 nor the plea agreements themselves precluded a reduction based on a later, favorable retroactive amendment to the Guidelines. (J. Agee dissented, finding that the sentences were based on the plea agreement, not the Guidelines).

VII. SENTENCING

A. Standard of Review

***United States v. Finley*, 531 F.3d 288 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant pleaded guilty to the assimilated crimes of driving while under the influence of alcohol and driving with a suspended driver's license, and he was sentenced to 27 months in prison. Defendant argued that the district court's failure to adequately consider the sentence required under the assimilated Virginia statute was unreasonable and that the sentence itself was excessive and also unreasonable.

Held: Because no sentencing guideline exists for assimilated crimes, the standard of review is "plainly unreasonable." (Citing *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006)). The Court also found that the district court adequately considered the Virginia sentencing statute and imposed a sentence that would have been available in state court.

B. Evidence Admissible During Sentencing Hearing

***United States v. Seay*, 553 F.3d 732 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was convicted of being a felon in possession of a firearm and sentenced to 96 months in prison. Prior to sentencing, Defendant filed a motion for downward departure based on diminished capacity. Thereafter, Defendant agreed to be interviewed by a South Carolina law enforcement officer who disclosed the nature of the questions he would ask but did not reveal that the interview would be used to prepare a "threat assessment." The Government subsequently attached the threat-assessment in support of a motion for upward variance. At sentencing, the court denied Defendant's motion to suppress the report, allowed testimony by the interviewing officer, and imposed a five-level upward variance. Defendant claimed that the evidence should not have been allowed as it was opinion evidence.

Held: At sentencing, the Federal Rules of Evidence do not apply and district judges have great latitude in considering evidence. Morever, the sentencing judge did not significantly rely on the report or testimony of the officer, but rather relied on the report of a psychologist and Defendant's record when imposing the variance.

C. *Apprendi* / *Booker* / *Rita*, etc.

***United States v. Brooks,* 524 F.3d 549 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendants were charged with multiple drug counts, including conspiracy to distribute more than 500 grams of cocaine and 50 grams of crack. At sentencing, the district court made findings of fact as to the drug quantity for each defendant and for two defendants, the court

applied enhancements for possession of firearm based on conduct that had been acquitted at trial. On appeal, Defendants argued that the district court should not have found drug quantity by a preponderance of the evidence and improperly considered acquitted conduct when applying the firearm enhancement.

Held: Post-*Booker*, a sentencing court may, as part of its calculating the advisory guideline range, find individualized drug quantities by a preponderance of the evidence. And, because the standard of proof at sentencing is lower than that at trial, a district judge may consider acquitted conduct during sentencing.

***United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008) (J. Wilkinson)**

Facts: During a prior bench trial, Defendant was acquitted of charges alleging he attended a jihadist training camp, supplied services to the Taliban, and used a firearm in furtherance of a crime of violence. Shortly thereafter, the Government subpoenaed Defendant to testify before grand juries investigating violations of 18 U.S.C. §§ 2339A and 2339B (providing material support to terrorists) and, based on his testimony, subsequently indicted him on charges of providing false material statements. Defendant was convicted, and the terrorism sentencing enhancement was used to increase his Guideline range. Defendant claimed that because the application of the enhancement relied on judge-found facts, it violated the Sixth Amendment.

Held: Sentencing judges may find facts relevant to determining the sentencing Guideline range by a preponderance of the evidence. Thus, the point is "the Guidelines must be advisory, not that the judges may find no facts." (Citing *Rita v. United States*, 551 U.S.—, 127 S.Ct. 2456 (2007) and *United States v. Battle*, 499 F.3d 315 (4th Cir. 2007)).

***United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009) (J. Duncan)**

Facts: In 2003, Defendant pleaded guilty to possession with intent to distribute crack cocaine and was sentenced to the bottom of the Guideline range, 135 months. After the Guidelines were amended and made retroactive, she moved for a reduction in her sentence and requested a larger reduction. She argued that, post-*Booker*, the district court was not limited to imposing a sentence somewhere within the new Guideline range. The district court disagreed and imposed a sentence of 108 months, which represented the bottom of her reduced guideline range.

Held: *Booker* does not apply to resentencing crack cocaine defendants under 18 U.S.C. § 3582. Court may not impose a reduction greater than that allowed by § 3582(c).

***United States v. Thompson*, 554 F.3d 450 (4th Cir. 2009) (J. Shedd)**

Facts: Defendant pled guilty to bank robbery. At sentencing, the district court determined that he qualified for a mandatory life sentence under the "three strikes" law, 18 USC § 3559(c) as

he had two prior convictions for a "serious violent felony" and the current bank robbery conviction constituted a third. He was sentenced to life in prison, and Defendant appealed claiming that § 3559(c) violated the rule of *Apprendi* as it increased his statutory maximum from 20 years to life based on judge-found facts.

Held: There was no constitutional violation because the judicial factfinding at sentencing did not increase Defendant's sentence. Rather, the judge found facts to determine whether the law's safety valve provision applied. Defendant pled guilty to bank robbery knowing that he had two predicate convictions and that the Government intended to seek a mandatory life sentence under § 3559(c).

D. Restitution Pursuant to 18 U.S.C. §§ 3663, 3664

***United States v. Harvey*, 532 F.3d 326 (4th Cir. 2008) (J. Keeley, by designation)**

Facts: The two co-defendants were convicted by a jury of honest services wire fraud and bribery. The convictions arose from a scheme by which defendant Harvey, a civilian military employee, arranged award of a no-bid contract to a company owned by co-defendant Kronstein. In exchange for the contract, Kronstein funneled earnings to Harvey. The court sentenced Harvey to 72 months in prison, Kronstein to 70 months, and ordered them, jointly and severally, to pay $383,621 in restitution. Because the Government failed to prove an actual loss amount, the court used the company's $383,621 profit to approximate the loss amount for purposes of ordering restitution. Defendants objected.

Held: Vacated and remanded. Under both the Victim and Witness Protection Act (VWPA) or the Mandatory Victim Restitution Act (MVRA), a court may only award restitution based on a victim's provable actual loss amount, not an approximation based on intended loss.

E. Sentencing Reductions Pursuant to 18 U.S.C. § 3582 (Retroactive Crack Amendment)

***United States v. Dews*, 551 F.3d 204 (4th Cir. 2008) (J. Ellis)**

Facts: Defendants pleaded guilty to conspiracy to distribute and possess with intent to distribute crack cocaine and money laundering via a plea agreement under Fed. R. Crim. P. 11(e)(1)(C). The plea agreement included a recommendation that 168 months, the bottom of the Guideline range, was the appropriate sentence for each case. After the Guidelines were amended and made retroactive, both defendants moved the district court to reduce their sentences based on the newly calculated (and lower) Guideline range. The district court concluded that it lacked the authority to consider the motion because the court had accepted Defendants' plea agreements, which called for a specific sentence, and accordingly, the sentences were not "based on" the Guidelines.

Held: The district court had authority to consider Defendants' motions under the crack cocaine amendment because, despite the stipulation in the plea agreement, the plea agreement was based on the judge's determination that the recommended sentence was within the applicable guidelines range. Moreover, neither Rule 11 nor the plea agreements themselves precluded a reduction based on a later, favorable retroactive amendment to the Guidelines. (J. Agee dissented, finding that the sentences were based on the plea agreement, not the Guidelines).

***United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009) (J. Duncan)**

Facts: In 2003, Defendant pleaded guilty to possession with intent to distribute crack cocaine and was sentenced to the bottom of the Guideline range, 135 months. After the Guidelines were amended and made retroactive, she moved for a reduction in her sentence and requested a larger reduction. She argued that, post-*Booker*, the district court was not limited to imposing a sentence somewhere within the new Guideline range. The district court disagreed and imposed a sentence of 108 months, which represented the bottom of her reduced guideline range.

Held: When resentencing under § 3582, a district court's authority is limited to imposing a sentence within the newly calculated Guideline range.

***United States v. Lindsey*, 556 F.3d 238 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendants had been convicted of crack cocaine offenses. After the Guidelines were amended and made retroactive, they sought a reduction in their sentences. Because their offense levels were so high, their sentencing ranges did not change, even with a two-level reduction in their offense level. Because these defendants had received a substantial assistance departure at sentencing, they maintained they were eligible for a reduced sentence from the post-departure offense level. The district court denied the motion, and defendants appealed.

Held: U.S.S.G. § 1B1.10 focuses on the lowering of sentencing ranges, and not offense levels. Thus, because Amendment 706 did not have the effect of lowering the guideline range in these cases, these defendants were ineligible for a sentence reduction.

***United States v. Hood*, 556 F.3d 226 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendants in these consolidated cases were convicted of cocaine trafficking and were subject to mandatory minimum sentences of at least 240 months. However, based on their substantial assistance to the government, they each received shorter sentences (100 and 108 months). After the crack guidelines were amended, they each applied for a further reduction. The district courts denied the motions, each holding that the sentences were not "based on" the changed Guideline ranges, but on the mandatory minimum sentence, which was greater than the Guideline ranges. The defendants appealed this ruling and further challenged the

delay in processing their appeals under the informal briefing calendar reserved for retroactive crack cases.

Held: (1)The district court was only able to depart from the mandatory minimum based on a statute, not the Guidelines. Because the mandatory minimum becomes the Guideline sentence when the Guideline range is less than the statutory minimum, the sentences were still "based on" the mandatory minimum. As such, the sentences were not "based on" a sentencing range that had been subsequently lowered by the Sentencing Commission. (2) The informal briefing process may be more streamlined for appellants, and the sixth month delay in these cases were neither significant nor raised due process concerns.

F. Reasonableness of Sentences vis a vis 18 U.S.C. § 3553(a)

***United States v. Evans*, 526 F.3d 155 (4th Cir. 2008) (J. Motz)**

Facts: Defendant pled guilty to possessing and uttering a forged security, committing identity fraud, and possessing stolen mail. Defendant had bought information to access and write bad checks on two Wachovia Bank accounts. Cooperating with the Government, Defendant helped in prosecuting the bank employee who sold him the account information. The offenses and loss amount of over $13,600 in bad checks written on the two accounts produced an advisory Guideline range at sentencing between 24 to 30 months. Based on Defendant's substantial assistance, the Government moved for a downward departure. The district court disagreed and, finding that the Guidelines greatly understated Defendant's criminal history and the seriousness of his offense, imposed a 125-month sentence. This sentence represented a 316% increase from the advisory guideline range, and Defendant appealed claiming the sentence was unreasonable and its scope was too great.

Held: The district court properly applied the § 3553(a) sentencing factors and did not commit any significant procedural error in imposing a 125-month sentence in this case. Moreover, the 316% increase was not an abuse of discretion given Defendant's extensive criminal history and the substantial harm suffered by the victims.

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in his capture, trial and conviction for terrorist activities. At sentencing, the district court compared Defendant's case to those of Timothy McVeigh and Terry Nichols and determined that, because this case involved fewer steps in furtherance of the conspiracies and the actions resulted in less material harm, a sentence similar to those of McVeigh's and Nichols' was excessive. Thus, although the guideline range was life imprisonment, Defendant was sentenced to 360 months'

imprisonment and 360 months of supervised release. The Government cross-appealed the variance as unreasonable.

Held: Vacated and remanded. When a life sentence is the presumptively reasonable guideline range, a sentence of 360 months imposed on a Defendant who was expected to live more than 50 years is not reasonable without "more significant justification." (In dissent, J. Motz noted that the district court had provided sufficient justification and the majority's decision amounted to a failure to conduct the proper abuse-of-discretion review of the sentencing court's decision, contrary to *Gall* and *Kimbrough*).

***United States v. Finley*, 531 F.3d 288 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant pleaded guilty to the assimilated crimes of driving while under the influence of alcohol and driving with a suspended driver's license, and he was sentenced to 27 months in prison. Defendant argued that, because the Assimilative Crimes Act requires defendants be "subject to a like punishment," the court should have imposed a sentence similar to the sentence required under the assimilated Virginia statute.

Held: Because "like punishment" does not require identical punishment, the district court had the discretion to impose a sentence within the minimum and maximum terms established by state law. And, a 27-month sentence was not substantively unreasonable given Defendant's criminal history, the leniency shown him in the past, the need to deter future criminal conduct, and the seriousness of his offense.

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car. At sentencing, Defendant was classified as a career offender and given a mandatory life sentence pursuant to 21 U.S.C. § 841(b)(1)(A). On appeal, he claimed that his sentence was excessive and unreasonable.

Held: A statutorily required sentence is *per se* reasonable.

***United States v. Seay*, 553 F.3d 732 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court varied from Defendant's original sentencing range of 46 to 57 months by five levels and imposed the top of the new 77 to 96 month range as his sentence. In doing so, the court cited the need to protect the public, Defendant's likelihood of reoffending, and Defendant's progressively dangerous criminal behavior. Defendant appealed, claiming the five-level variance was unreasonable.

Held: In light of the district court's findings, it was not unreasonable for the court to impose a five-level upward variance and impose a 96-month sentence.

G. Three Strikes Law– 18 U.S.C. § 3559(a)

***United States v. Thompson*, 554 F.3d 450 (4th Cir. 2009) (J. Shedd)**

Facts: Defendant pled guilty to bank robbery. At sentencing, the district court determined that he qualified for a mandatory life sentence under the "three strikes" law, 18 USC § 3559(c) as he had two prior convictions for a "serious violent felony" and the current bank robbery conviction constituted a third. Defendant admitted that he had two qualifying predicate convictions, but maintained that a "safety valve" provision, allowing a defendant to avoid a life sentence if he can prove by clear and convincing evidence that he did not use or threaten to use a dangerous weapon during the robbery, applied in his case. Based on witness testimony alleging that Defendant made threats involving shooting, the district court disagreed and sentenced him to life in prison. Defendant appealed claiming that § 3559(c) violated *Apprendi* as it imposed a life sentence based on judge-found facts.

Held: Given the witness testimony on the record, there was no clear error in the district court's determination that Thompson threatened to use a dangerous weapon. As such, the safety valve provision of § 3559(c)(3)(A) did not apply.

H. U.S.S.G. § 2C1.1(a)– Bribery

***United States v. Harvey*, 532 F.3d 326 (4th Cir. 2008) (J. Keeley, by designation)**

Facts: The two co-defendants were convicted by a jury of honest services wire fraud and bribery. The convictions arose from a scheme by which defendant Harvey, a civilian military employee, arranged award of a no-bid contract to a company owned by co-defendant Kronstein. In exchange for the contract, Kronstein funneled earnings to Harvey. Defendants objected to the court's applying a two-level enhancement for the offense involving more than one bribe since the jury made no specific findings about which transactions were bribes and which were not.

Held: At sentencing, the district court may make findings of fact by a preponderance of the evidence when applying the Guidelines. Moreover, based on the various exchanges between the defendants, the court properly determined that the case involved multiple bribes, and the enhancement was warranted.

I. U.S.S.G. § 2C1.1(b)– Loss Amount

***United States v. Harvey*, 532 F.3d 326 (4th Cir. 2008) (J. Keeley, by designation)**

Facts: The two co-defendants were convicted by a jury of honest services wire fraud and bribery. The convictions arose from a scheme by which defendant Harvey, a civilian military employee, arranged award of a no-bid contract to a company owned by co-defendant Kronstein. In exchange for the contract, Kronstein funneled earnings to Harvey. Defendants objected to the court's calculating loss amount based on the $383,621 profit Kronstein's company made, claiming the company had properly performed its job and the profit was not unreasonable.

Held: To calculate loss amount, the Guidelines specifically state that the sentencing court may consider the value of "the benefit received," such as the profit made by Kronstein's company.

J. U.S.S.G. § 2K2.1– Unlawful Possession of Firearms

***United States v. Myers*, 553 F.3d 328 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant pleaded guilty to being a felon in possession of a firearm. The firearm at issue qualified as a "semiautomatic weapon" under 18 U.S.C. § 921(a)(30) as part of the assault weapons ban that lapsed in 2004. Applying the 2006 version of the Sentencing Guidelines, in effect at sentencing, the district court applied a six-level enhancement because the firearm was capable of accepting a large-capacity magazine. Defendant objected, arguing that the 2005 version of the Guidelines, in effect at the time he committed the offense, should be applied. The 2005 version did not have the large magazine enhancement, but applied a six-level enhancement if the firearm was listed in 921(a)(30). Since that section had lapsed before he committed the offense, Defendant argued that the 2005 enhancement was no longer in effect and applying the enhancement violated the Ex Post Facto Clause of the Constitution. The district court disagreed, and Defendant appealed.

Held: Only if the lapsing of the assault-weapons ban invalidated the 2005 Guideline enhancement provision, would the enhancement violate ex post facto prohibitions. However, Congressional repeal of the semiautomatic assault-weapon ban does not render the related 2005 sentencing guideline invalid as the guideline did not state that the enhancement could be applied only while the assault-weapon ban remained in effect. As such, the repeal did not affect the guideline and its application was constitutional.

***United States v. Seay*, 553 F.3d 732 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was convicted of being a felon in possession of a firearm and sentenced to 96 months in prison. At sentencing, the court adopted the findings of the pre-sentence report,

which determined that his prior conviction in North Carolina for felony stalking was a "crime of violence," placing his base offense level at 20. Defendant appealed.

Held: Defendant's prior felony stalking conviction was a crime of violence in two ways: (1) in accordance with U.S.S.G. § 4B1.2(a)(1), Defendant was convicted of conduct that was "purposefully carried out with the intended effect of placing a reasonably prudent person in fear of bodily harm;" and (2) in accordance with U.S.S.G. § 4B1.2(a)(2), the felony stalking statute punished conduct that is "purposeful, violent, and aggressive,"posed risks similar to-if not greater than– burglary or extortion, and "presented a serious potential risk of physical injury to another." Because the language of § 4B1.2(a)(2) is similar to the definition of "violent felony" in 18 U.S.C. § 924 (c), the court utilized the analysis in *Begay v. United States*, — U.S. —, 128 S.Ct. 1581 (2008).

K. U.S.S.G. § 2L1.2– Unlawful Reentry

***United States v. Martinez-Varela*, 531 F.3d 298 (4th Cir. 2008) (J. Gregory)**

Facts: Defendant pleaded guilty to illegal reentry after deportation following an aggravated felony. He had three prior convictions for distribution of drugs, all of which took place and were sentenced on the same day. Each carried a 6-8 month sentence, but two were made consecutive, for a total sentence of 12-16 months. At sentencing, Defendant's Guideline range was enhanced 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A) because the "sentence imposed" for the prior offenses was greater than 13 months. The district court aggregated the sentences imposed for the three offenses pursuant to § 4A1.2(a)(2). Accordingly, the court decided that the 13-month threshold was exceeded and a 16-level increase was appropriate.

Held: While § 2L1.2 does not specifically provide for aggregating prior convictions, a related section, § 4A1.2, does provide support for the aggregation approach. As such, the district court properly aggregated Defendant's sentences.

***United States v. Chacon*, 533 F.3d 250 (4th Cir. 2008)(J. King)**

Facts: Defendant pleaded guilty to illegally reentering the United States and fraud and misuse of a permanent resident card. His criminal history included a conviction for second-degree rape, which under Maryland law could have been violated in three ways: rape by force, rape of a person unable to give consent, or statutory rape. The criminal information to which he pleaded guilty did not specify which of the three subsections he violated. The pre-sentence report classified this prior conviction as a "crime of violence," which resulted in a sixteen-level increase of his offense level. Defendant objected to this classification stating that the rape offense was an "aggravated felony" under § 2L1.2(b)(1)(v) and only merited an eight-level increase.

Held: The court employed the categorical approach as required by *Taylor v. U.S.*, 495 U.S. 575 (1990) and *Begay v. United States*, — U.S. —, 128 S.Ct. 1581 (2008), finding that two provisions of the Maryland law, rape by force and statutory rape, were forcible sex offenses by the language in the Guidelines. As to the second provision, noting a circuit split on the issue, the court held that sex offenses committed in the absence of consent even those which lack an element the use, attempted use, or threatened use of physical force nonetheless constitute crimes of violence for purposes of enhancement under § 2L1.2.

L. U.S.S.G. § 3A1.4–Terrorism

***United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008) (J. Wilkinson)**

Facts: During a prior bench trial, Defendant was acquitted of charges alleging he attended a jihadist training camp, supplied services to the Taliban and used a firearm in furtherance of a crime of violence. Shortly thereafter, the Government subpoenaed Defendant to testify before grand juries investigating violations of 18 U.S.C. §§ 2339A and 2339B (providing material support to terrorists) and, based on his testimony, subsequently indicted him on charges of providing false material statements. Defendant was convicted, and the terrorism sentencing enhancement was used to increase his guideline range.

Held: Obstruction offenses may qualify for the enhancement so long as the thing obstructed involves an investigation into a "federal crime of terrorism." Thus, because the district court found evidence that showed Defendant's involvement in jihadist training and acquaintance with people involved in jihad and terrorism, and that he lied about that involvement, the terrorism enhancement was warranted.

M. U.S.S.G. § 3B1.1– Aggravating Role

***United States v. Harvey*, 532 F.3d 326 (4th Cir. 2008) (J. Keeley, by designation)**

Facts: The two co-defendants were convicted by a jury of honest services wire fraud and bribery. The convictions arose from a scheme by which defendant Harvey, a civilian military employee, arranged award of a no-bid contract to a company owned by co-defendant Kronstein. In exchange for the contract, Kronstein funneled earnings to Harvey through others including family members. Defendants objected to the court's applying a four-level enhancement based on their roles as leaders or organizers in the offense, arguing that neither defendant exercised authority over any other participant in the scheme.

Held: Because the district court found that family members of the defendants were participants in the activity and Defendants were their organizers, the enhancement for leadership role was appropriate.

N. U.S.S.G. § 4A1.3– Upward Departures for Underrepresentation of Criminal History

***United States v. Black*, 525 F.3d 359 (4th Cir. 2008) (J. Niemeyer)**

Facts: Defendant was convicted of being a felon in possession of a firearm after he was stopped in a "high crime" area and had an encounter with police that resulted in their finding a gun in his pocket. The Government moved for an upward departure based on underrepresentation of Defendant's criminal history, which included voluntary manslaughter, receiving stolen property, possession of cocaine, malicious wounding of a man he had severely beaten, parole violations, and numerous infractions during times he was incarcerated. At sentencing, the district court granted the Government's motion, and because Defendant was at criminal history category VI, departed upward by one offense level. Defendant appealed, claiming the sentence was unreasonable.

Held: Because the district court articulated its reasons for departing, considered the increased sentence in light of 18 U.S.C. § 3553(a), and there is no procedural or substantive error, the sentence cannot said to be unreasonable in this case.

***United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008)(J. Niemeyer)**

Facts: Defendant was convicted by a jury of numerous obscenity and child pornography charges. At sentencing, the court upwardly departed for underrepresentation of criminal history and imposed a sentence of 240-months in prison. This represented a 33% increase over the sentence recommended by the Guidelines. Defendant appealed claiming the increase was unreasonable.

Held: The upward departure in this case was reasonable where the district court considered Defendant's extensive unscored history of downloading child pornography, repeated disregard of court orders prohibiting his accessing such materials, and his failure to show any progress in reforming this conduct.

O. U.S.S.G. § 4B1.1– Career Offender Classification

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car and was sentenced to life in prison. At sentencing, Defendant objected to his classification as a career offender. He claimed that a prior conviction should not have been considered because documentation for a predicate conviction had an authorized signature rather than the actual signature of a judge.

Held: In classifying Defendant as a career offender, the district court properly considered Defendant's formal records for a predicate offense, which included a certified, signed copy of the conviction. The actual signature of a judge was not required.

VIII. RULES OF EVIDENCE

A. Hearsay

***United States v. Vidacak*, 553 F.3d 344 (4th Cir. 2009) (J. Bennett– by designation)**

Facts Defendant was convicted by a jury on four counts of making false statements in immigration applications based on allegations that he failed to disclose or admit his membership in the VRS (Army of the Republika Srpska) during the Bosnian Civil War. Part of the evidence against Defendant came from military documents. The Government elicited testimony from a military analyst to authenticate the documents, but Defendant claimed these documents were not properly authenticated. Defendant also challenged the district court's allowing the testimony, via interpreters, of two immigration officials to whom Defendant allegedly made false statements. He appealed the district court's admitting the evidence.

Held: As to the military documents, these foreign records fell within the hearsay exception of Fed. R. Evid. 803(8) ("[r]ecords, reports, statements or data compilations . . . of public offices or agencies"), and as such, no foundational testimony was required to admit evidence under this rule. Regarding the witness testimony, the interpreter's translations did not create double hearsay because an interpreter is a "language conduit" and not considered a declarant under the hearsay rule. Moreover, Defendant's statements to the immigration officials were not hearsay as they were both party admissions (Fed. R. Evid. 801(d)(2)) and were not offered "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)).

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, and was convicted again. During trial, Defendant objected to the district court's admission of a hearsay statement made by his deceased wife claiming that he told her, "if OJ [Simpson] can do it and get away with it, so can I." Among other issues, Defendant appealed claiming that the court abused its discretion in admitting the statement as it was unfairly prejudicial and should have been excluded under Fed. R. Evid. 403.

Held: Because the district found, by a preponderance of the evidence standard, that Defendant had engaged in wrongdoing intended to procure the victim's unavailability as a witness, her statement was admissible under the forfeiture for wrongdoing hearsay exception (Fed. R. Evid. 804(b)(6)).

B. Fed. R. Evid. 106– Remainder of Recorded Statements

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, was convicted again, in part based on evidence of a murder for hire plot he hatched from jail against witnesses from the first trial and some of the AUSAs. While in jail awaiting his trial, Defendant told a cellmate about his desire to hire a hitman to kill witnesses and a prosecutor from his first trial. The cellmate related this information to the Government, which arranged for an agent posing as a hitman to meet with defendant. Defendant, however, called off the meeting after calling his attorney from jail, who advised him to abandon the plan. At trial, the district court admitted a redacted recording of Defendant's conversation with his attorney, excluding various self-serving statements made by Defendant. Among other issues, defendant appealed claiming that the Rule of Completeness was violated when the court admitted this version of the recording.

Held: The Rule of Completeness did not demand the admission of defendant's "self-serving exculpatory statements" to his attorney.

C. Fed. R. Evid. 403–Exclusion of Relevant Evidence

***United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008) (J. Wilkinson)**

Facts: After having been acquitted of charges for attending a jihadist training camp, supplying services to the Taliban, and using a firearm in furtherance of a crime of violence, the Government subpoenaed Defendant to testify before grand juries investigating violations of 18 U.S.C. §§ 2339A and 2339B (providing material support to terrorists). He was subsequently indicted and convicted for making false material statements to the grand juries, obstructing justice, and making false material statements to the FBI regarding his participation in terrorist activities in Afghanistan and Pakistan. At trial, the Government's expert witness gave testimony concerning radical Islam and jihad that Defendant claimed was irrelevant and unduly prejudicial.

Held: Expert testimony and exhibits concerning radical Islam, including the ideas, terms, people, and organizations was necessary in this complicated case. Although the evidence's scope was wide, it was relevant to the elements of the offenses charged and not unduly prejudicial as demonstrated by the jury's acquitting Defendant of several falsehoods charged.

D. Fed. R. Evid. 404(b)-Other Crimes, Wrongs, or Acts

***United States v. Siegel*, 536 F.3d 306 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was indicted for multiple fraud offenses including wire and mail fraud. She was also charged with a count of murder to prevent the reporting of those crimes. The substantive charges dealt specifically with a fraudulent scheme against her boyfriend. However, the Government also included in the indictment allegations against several other people stretching back decades, stating these were part of the definition of the "scheme or artifice to defraud." Prior to trial, the Government filed notice that it intended to introduce other evidence of prior frauds (both named and omitted from the indictment) as FRE 404(b) evidence. One week before her trial was set to begin, the district court granted Defendant's motion in limine to preclude the Government from presenting evidence of these other crimes in its case in chief and to strike as surplusage allegations in the indictment about other crimes. The Government filed an interlocutory appeal.

Held: Reversed and remanded. Evidence of other prior fraudulent acts were relevant in fraud case to show Defendant's motive and modus operandi. Moreover, the probative value of these acts outweighed the danger of unfair prejudice. While the district court had a valid interest in not unduly prolonging the trial, it had other means available to it to streamline and expedite the proceedings short of completely excluding the otherwise admissible 404(b) evidence.

***United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008)(J. Niemeyer)**

Facts: Defendant was convicted by a jury of numerous obscenity and child pornography charges. At trial, the court admitted evidence of his prior conviction for child pornography and the terms of his probation prohibiting him from possessing pornography. On appeal, he argued that the evidence was unduly prejudicial and outweighed any probative value it might have.

Held: After finding the evidence admissible under FRE 403, the court further held that evidence of this prior conviction was also admissible to prove that Defendant had received the images knowingly and that he had knowledge that the images were of minors.

E. Fed. R. Evid. 901– Authentication

***United States v. Vidacak*, 553 F.3d 344 (4th Cir. 2009) (J. Bennett– by designation)**

Facts: Defendant was convicted on four counts of making false statements in immigration applications based on allegations that he failed to disclose or admit his membership in the VRS (Army of the Republika Srpska) during the Bosnian Civil War. Part of the evidence against Defendant at trial came from military documents. The Government elicited testimony from a military analyst to authenticate the documents. Defendant claimed these

documents were not properly authenticated because the Government failed to make a *prima facie* case that the documents were created during a time period related to his alleged military involvement. The district court allowed use of that evidence, and Defendant appealed.

Held: Military records were sufficiently authenticated, where a military analyst testified in detail about his role in seizing the documents and offered his knowledge of military record-keeping. As such, this testimony was independently sufficient to authenticate the documents even though the witness could not testify to being present when those particular documents were seized.

IX. TRIAL

A. Jury Selection/*Batson* Violations

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car. During jury selection, the Government used a peremptory strike to exclude the only prospective African American juror. Defendant claimed that the Government moved to strike this juror because he and the juror were both African American. The Government indicated three race-neutral reasons for excluding the juror. Defendant argued the district court erred by failing to sustain his *Batson* objection and denying his motion for a new trial.

Held: Simply because a prospective juror is a member of a minority group does not make a *prima facie* case of racial discrimination under *Batson*. Because the Government provided race-neutral reasons supporting the strike, the district court did not err in rejecting the *Batson* challenge.

B. Closing Argument and Fair Trial

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in his capture, trial and conviction for terrorist activities. During Government's closing argument, the prosecutor referred to Defendant's actions as his plan to "kill" or "hurt us." Defendant argued that these statements improperly inferred that the jurors themselves were Defendant's intended targets and potential victims, thereby denying him a fair trial.

Held: Given the weight of evidence against Defendant, the prosecutor's statements were unlikely to have had a disproportionate effect on the jury, and therefore, did not deny Defendant a fair trial.

***United States v. Farrior*, 535 F.3d 210 (4th Cir. 2008) (J. Williams)**

Facts: Defendant was convicted of possession with intent to distribute crack cocaine based on drugs found during a search of his car. During its closing argument, the Government explained that reasonable doubt did not mean "beyond all doubt" and is based on common sense. Defendant argued the district court erred by denying his motion for a new trial based on the Government's improperly defining reasonable doubt during its argument.

Held: Remarks made during closing arguments that are improper and prejudicially affect a defendant's substantive rights may be sufficient to warrant a new trial. However, the remarks made by the Government in this case did not rise to that level of impropriety.

C. Sufficiency of the Evidence

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out a number of suicide bombings in Riyadh resulting in several raids at suspected terrorist safe houses by the Saudi Mabahith (secret police). Defendant was arrested two weeks later and taken into Saudi custody and interrogated by the Mabahith. He confessed to his affiliation with al-Qaeda, intent to prepare and train for an operation inside the United States, and intent to assassinate the president. Defendant argued that the Government failed to corroborate the veracity of these confessions.

Held: A confession may be corroborated by circumstantial evidence. Here, the Government's independent evidence corroborated Defendant's statements as it established that items described by Defendant were found in the locations he identified and that two coded communications between Defendant and other operatives constituted knowledge of the Riyadh bombing.

D. Joinder and Severance

***United States v. Mir*, 525 F.3d 351, (4th Cir. 2008) (J. Wilkinson)**

Facts: Defendant was convicted by a jury of fraud, but acquitted of conspiracy and witness tampering. Defendant, and the law firm he owned, specialized in immigration law. As part of his practice, he helped employers complete immigration forms required for employing alien workers and execute paperwork to assist those alien workers seeking permanent U.S.

resident status. Defendant and his firm were investigated on suspicion that some of the documents he completed contained false information. A grand jury indicted Defendant and his firm on charges of conspiracy to commit labor certification fraud, fraud, and racketeering. Thereafter, investigators suspected Defendant of witness tampering. Based on recordings obtained by two confidential informants, the Government added a witness tampering charge to the indictment. The district court denied Defendant's motion to sever the witness tampering charge from the rest of the indictment, and Defendant appealed.

Held: The district court was not required to sever the witness tampering charge from the prior charged offenses. Because the witness tampering offense was committed to obstruct the Government's prosecution of the fraud counts, the Government would have essentially had to try the same case twice. Moreover, there was no showing of prejudice related to the joinder of the offenses and a limiting instruction was provided by the Government.

X. MISCELLANEOUS ISSUES

A Sufficiency of Indictment

***United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009) (J. King)**

Facts: Defendant was originally charged, by juvenile delinquency information, with conspiring to participate in a racketeering enterprise, based on his alleged involvement with the MS-13 gang. After the court transferred him for prosecution as an adult, Defendant appealed to the Fourth Circuit, which remanded the case. The Government filed an amended information, alleging that the offense was a crime of violence and detailing Defendant's involvement in a drive-by shooting, an attack on a rival gang member, and gang initiations. The district court again transferred Defendant for prosecution as an adult, and Defendant appealed, claiming that the amended information failed to allege a substantial federal interest.

Held: The severe nature of the underlying acts in furtherance of the alleged conspiracy demonstrated the Government's "substantial federal interest" in prosecuting Defendant.

B. Constructive Amendment of Indictment

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping (by transporting the victim from Virginia to Maryland) resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, was convicted again, and again appealed. Among other issues, Defendant argued that the district court constructively amended the indictment by instructing the jury that the District of Columbia was a "state"for purposes of the kidnapping statute.

Held: Because the indictment did not require proof of travel directly from Virginia to Maryland, but only that they be the starting and ending points, the district court's instruction did not constructively amend the indictment.

C. Speedy Trial Act

***United States v. Henry*, 538 F.3d 300 (4th Cir. 2008) (J. Michael)**

Facts: Defendants were convicted of conspiracy to manufacture 100 or more marijuana plants. After the trial date was set, both defendants moved for a continuance noting that they had both previously executed prospective waivers of their speedy trial rights. The court granted the motion that same day. More than a year later, after plea negotiations failed, Mr. Henry complained that the case had dragged on too long, but the court dismissed this stating that he had validly waived his speedy trial rights. Thereafter, the Supreme Court decided *Zedner v. United States*, 547 U.S. 489 (2006), holding that a defendant may not prospectively waive his speedy trial rights. Defendants moved to dismiss for violation of the Speedy Trial Act.

Held: The district court's failure to balance the ends of justice against the best interest of the public and defendants when granting a103-day continuance violated Defendants' Speedy Trial Act rights.

D. Interlocutory Appeal

***United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009) (J. King)**

Facts: Defendant was transferred for prosecution as an adult after a prior transfer had been invalidated by the Fourth Circuit. Defendant appealed on multiple grounds, asserting the Fourth Circuit had jurisdiction to hear the interlocutory appeal under the collateral-order doctrine.

Held: Although courts of appeals may generally only consider appeals stemming from final judgements of district courts (28 U.S.C. § 1291), the collateral order doctrine authorizes interlocutory challenges to juvenile transfer orders and related procedural issues. However, the collateral-order doctrine prevents courts of appeal from considering issues that fail to include rights that would be "irreparably lost if appellate review await[ed] the entry of a final judgment" (such as Defendant's Commerce Clause and First Amendment claims).

E. Special Administrative Measures

***United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008)**

Facts: Defendant, a United States citizen, traveled to Saudi Arabia to study at the Islamic University. Upon arrival, Defendant became involved an al-Qaeda cell. Al-Qaeda carried out

a number of suicide bombings in Riyadh resulting in his capture, trial and conviction for terrorist activities. Pending trial for these acts, Special Administrative Measures (SAMs) were imposed upon Defendant in the interest of national security, including denied access to the media and communication with others. Defendant claimed that these restrictions were based solely on his conviction and were invalid as only the courts may sentence an individual.

Held: By statute, an appellate court may not consider claims attacking SAMs. An inmate must first follow the statutory mechanisms prescribed for appealing an SAM and exhaust his administrative remedies before the court can become involved.

F. Juvenile Transfer Proceedings

***United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009) (J. King)**

Facts: Defendant was originally charged, by juvenile delinquency information, with conspiring to participate in a racketeering enterprise. After the court transferred him for prosecution as an adult, Defendant appealed to the Fourth Circuit, which remanded. After the Government filed an amended information, the district court again transferred Defendant for prosecution as an adult. On appeal, Defendant claims that the transfer proceedings were defective in three ways: (1) his Sixth Amendment right to confront witnesses was violated when he was not allowed to question the agent who issued the Affidavit in his case; (2) the district court's considering two statements made by Defendant during a twelve-hour delay between his arrest and arraignment violated 18 U.S.C. § 5033 and *Miranda*; and (3) statements obtained during a court-ordered psychiatric evaluation violated his Fifth Amendment rights.

Held: (1) Because transfer proceedings are civil in nature and meant solely to select the proper form for a trial, there was no violation of Defendant's Sixth Amendment rights. (2) Because the court relied on the U.S. Attorney's allegations and other supporting evidence any error in considering Defendant's statements was not prejudicial. (3) Because Defendant's statements obtained during a court-ordered psychiatric evaluation were not used to incriminate him in this civil proceeding, Defendant's Fifth Amendment rights were not implicated.

G. Attorney-Client Privilege

***United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (J. Traxler)**

Facts: Defendant was convicted of interstate kidnapping resulting in the death of his estranged wife. Defendant appealed, was granted a retrial, was convicted again, in part based on evidence of a murder for hire plot he hatched from jail against witnesses from the first trial and some of the AUSAs. While in jail awaiting his trial, Defendant told a cellmate about his desire to hire a hitman to kill witnesses and a prosecutor from his first trial. The cellmate related this information to the Government, which in turn arranged for an agent posing as a hitman to

meet with defendant. Defendant, however, called off the meeting after calling his attorney from jail, who advised him to abandon the plan. Among other issues, defendant appealed claiming that the statements he made on the recorded conversation with his attorney were privileged.

Held: The attorney-client privilege did not apply because, under the crime fraud exception, Defendant had called his attorney with the hopes of advancing the hitman plot.

H. Fed. R. Crim. P. 35(a)– Correcting Clear Error on Judgment

***United States v. Fields*, 552 F.3d 401 (4th Cir. 2009) (J. Motz)**

Facts: In 2006, Defendant was convicted by a jury of making a false loan and credit application. At his initial sentencing, the district court sentencing him under the 2000 version of the Guidelines, imposed a 12-month prison term and found that he lacked the ability to pay a fine. The Fourth Circuit remanded the case for resentencing, finding the district court erred in using the 2000 version of the Guidelines. After his resentencing hearing, during which he was given the same sentence and again found unable to pay a fine, the district court convened a second resentencing hearing and decided that it was clear error not to have previously imposed a fine as it had intended to do. The court, citing Fed. R. Crim. P. 35(a), imposed a $2000 fine, and Defendant appealed.

Held: The failure to impose a fine, where the district judge has not previously disclosed the intent to impose it, does not rise to the level of clear error as contemplated by Fed. R. Crim. P. 35(a). Thus, a district court may not use this rule to impose a fine after the judgment is entered.

I. 18 U.S.C. § 3145– Definition of Judicial Officer

***United States v. Goforth*, 546 F.3d 712 (4th Cir. 2008) (J. Shedd)**

Facts: Defendant pleaded guilty to a Controlled Substances Act offense. After the district court concluded that detention was mandatory under 18 U.S.C. § 3143(a)(2), Defendant sought release pending sentencing arguing that "exceptional reasons" made detention inappropriate. The district court concluded that, because the "exceptional reasons" language was located in 18 U.S.C. § 3145, which generally applies to circuit court appeals, it was not a "judicial officer" under the statute authorizing release of defendants otherwise qualified for mandatory detention.

Held: The plain language of 18 U.S.C. § 3145 indicates that district court judges are judicial officers.

J. 18 U.S.C. § 4248– Civil Commitment of Sexually Dangerous Offenders

***United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009) (J. Motz)**

Facts: In several cases, the Government sought civil commitment of offenders under 18 U.S.C. § 4248, a portion of the Adam Walsh Act that allows the government to civilly commit someone indefinitely who is a "sexually dangerous" person after completion of their federal prison sentence. Defendants had been detained past the end of their criminal sentences under this law, and the district court concluded that the law exceeded Congress' authority and intruded on powers reserved to the states.

Held: The Commerce Clause does not provide Congress the authority to indefinitely commit "sexually dangerous" persons in the custody of the Bureau of Prisons (BOP) where the provision creates a civil remedy aimed at preventing non-economic sexual violence, a function traditionally reserved to the states.

K. 18 U.S.C. § 5032 – Transfer of Juvenile for Criminal Prosecution

***United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009) (J. King)**

Facts: Defendant was originally charged, by juvenile delinquency information, with conspiring to participate in a racketeering enterprise. After the court transferred him for prosecution as an adult, Defendant appealed to the Fourth Circuit, which remanded because the information failed to allege that the offense was a "crime of violence." Accordingly, the Government filed an amended information, alleging that the offense was a crime of violence and also providing more detail. The district court again transferred Defendant for prosecution as an adult. Defendant appealed, claiming (1) that the United States Attorney has only one opportunity to certify a juvenile for transfer to adult prosecution and (2) the district court abused its discretion in ordering the transfer.

Held: (1) 18 U.S.C. § 5032 does not require any specific procedure for certification. Because the Government complied with the statute's requirement that there be a "crime of violence" and a "substantial federal interest" at stake, the Government was not barred from filing an amended information after the remand. (2) The district court did not abuse its discretion in ordering Defendant's transfer where it considered Defendant's age (nearly 18 years old at the time of arrest), social background, and the violent nature of the alleged offenses.