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

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Prepared by Vidalia V. Patterson and Laura Wasco
Research and Writing Attorneys
Office of the Federal Public Defender
for the Eastern District of North Carolina

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I. INTRODUCTION

This outline summarizes Fourth Circuit decisions published between April 1, 2009 and September 15, 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. § 7–Special Maritime & Territorial Jurisdiction

***United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009) (J. Motz)**

Facts: Defendant was convicted by a jury of one count of felony assault resulting in serious bodily injury and three counts of misdemeanor simple assault arising from his assaulting an Afghan national on a U.S. military outpost in Afghanistan during an interrogation. Federal jurisdiction for the case was based on 18 U.S.C. § 7, which extends special maritime and territorial jurisdiction to "the premises of . . . military . . . missions." On appeal, he raised several issues. Most significantly, Defendant challenged the court's subject matter jurisdiction over the charges against him as the offense took place on a small U.S. military base in Afghanistan.

Held: Finding that the terms "premises" and "mission" referred to an actual physical location, and not just a team of individuals with an objective (as decided by the trial court), the Fourth Circuit set out several factors to determine whether a particular location qualifies as such a "premises" including, size of a given location, length of U.S. control over the premises, improvements and use of the premises, number of personnel stationed there, and host nation's consent to U.S. presence there. Applying those factors, the court determined that the federal government had jurisdiction at Defendant's military outpost in Afghanistan.

B. 18 U.S.C. § 471– Obligations or Securities of United States

***United States v. Cameron*, 573 F.3d 179 (4th Cir. 2009) (J. Gregory)**

Facts: Defendant was convicted by a jury of three counts of uttering counterfeited obligations (18 U.S.C. § 472) and one count of falsely making and counterfeiting obligations under 18 U.S.C. § 471. On appeal, he raised several arguments challenging his conviction, with the primary theme being insufficiency of the evidence.

Held: Evidence was sufficient to support conviction for falsely making and counterfeiting obligations where officers found equipment and uncut counterfeit bills in Defendant's bedroom, Defendant's fingerprints were found on the counterfeit bills, and a deleted image

was found on Defendant's computer that depicted a $20 bill matching the serial number of one of the bills seized from the bedroom.

C. 18 U.S.C. § 922(g)–Justification Defense

***United States v. Ricks*, 573 F.3d 198 (4th Cir. 2009) (J. Gregory)**

Facts: Defendant's partner returned to their home after several days' absence, acting strangely and holding a gun. Defendant immediately knocked the gun out of his hand, picked up the gun, remove the clip and threw the gun and clip in separate directions. His partner ran out of the house and drove away. Meanwhile, Defendant placed the gun and clip on a bedroom dresser and left the room. Fifteen minutes later, his partner returned accompanied by two police officers. The officers repeatedly asked whether there was a gun in the house, and Defendant admitted there was. He was subsequently convicted of being a felon in possession of a firearm. On appeal, Defendant claims the district court erred when it refused to instruct his jury on a justification defense, claiming that while he likely had such a defense, it was not available in the Fourth Circuit.

Held: The justification defense for § 922(g) cases is recognized in the Fourth Circuit, and the evidence in this case was sufficient to warrant an instruction on the defense.

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

***United States v. White*, 571 F.3d 365 (4th Cir. 2009) (J. King)**

Facts: Defendant pled guilty to being a felon in possession of a firearm and was sentenced as an Armed Career Criminal. On appeal, Defendant claimed that a predicate North Carolina felony for conspiracy to commit robbery with a dangerous weapon was not a "violent felony" as the conspiracy did not have an overt act as an element of the offense.

Held: Applying *Begay v. United States*, — U.S.—, 128 S.Ct. 1581 (2008), the court found that because the conspiracy offense was similar in kind to those enumerated in the ACCA (burglary, etc.) and the law required the intent that the agreement be carried out, it did qualify as a violent felony

E. 18 U.S.C. § 1382– Entering miltary, naval or Coast Guard property

***United States v. Madrigal-Valadez*, 561 F.3d 370 (4th Cir. 2009) (J. Alarcon- by designation)**

Facts: While driving a soldier back to Fort Lee, Defendant's car was stopped to be checked prior to entry. Defendant failed to present the proper identification to satisfy Fort Lee's entry requirements, and he was arrested. Defendant was convicted after a bench trial of entering

a military installation for a purpose prohibited by law pursuant to 18 U.S.C. § 1382. The government alleged that purpose was the act of being an illegal alien.

Held: An individual's illegal immigration status cannot constitute a "purpose prohibited by law" for which he entered the base.

F. 18 U.S.C. § 2250– Sex Offender Registration and Notification Act ("SORNA")

***United States v. Gould*, 568 F.3d 459 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was convicted of a sex offense in Washington, D.C. in 1985. After his release, he moved to several states around the D.C. area, finally settling in Maryland in August 2006. He did not register as a sex offender, as required by Maryland law. A year later, Defendant was charged with failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. After unsuccessfully raising several challenges to the charges, he entered a conditional plea and was sentenced to 24 months in prison. On appeal, he raised several challenges to SORNA including 1) that SORNA did not apply to him because the state of Maryland had not yet updated its sex offender registrationto conform with SORNA and its application would violate the Ex Post Facto Clause of the Constitution; 2) his inability to comply with SORNA, which required registration before completing a sentence, something he had done 5 years before; 3) that he could not "knowingly" fail to comply with SORNA when the government failed to notify him of the requirements, as SORNA requires; 4) that the Attorney General's interim regulation on SORNA violated the Administrative Procedures Act (APA), as it was enacted without the requisite notice procedure; and 5) that SORNA exceeded the scope of Congress' power under the Commerce Clause.

Held: 1) Because Maryland had a pre-SORNA registration program under which Defendant could and was required to register, he could be convicted federally for failing to so register. Moreover, because he was punished for his conduct after SORNA was enacted, there was no Ex Post Facto clause violation. 2) Because Maryland law required Defendant register with the state, SORNA applies to him despite the timing of SORNA's passage. 3) SORNA's criminal provision is not a specific intent law, thus the element of "knowing" failure to register does not require that Defendant know he was violating a federal law in order to convict him. 4) The Attorney General demonstrated "good cause" (i.e. the need for legal certainty concerning retroactive application of the law) under the APA for issuing SORNA without the notice and comment period. 5) SORNA did not exceed Congress' power under the Commerce Clause as the statute mandates that the individual, after conviction, travel to another state and fail to register. (**J. Michael** dissented, stating that the Attorney General did not provide adequate reasoning to justify failing to follow APA procedures.)

G. 18 U.S.C. § 2251– Sexual Exploitation of a Minor

***United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009) (J. Duncan)**

Facts: On two occasions, Defendant's friend brought a 14-year old girl to his house, and they both had sex with her. Defendant, a police officer, videotaped the first encounter. Although he thought the girl looked young, he believed she was an adult and did not investigate her age further. He was charged and convicted under 18 U.S.C. § 2251(a) of sexual exploitation of a minor for the purpose of producing a visual depiction and sentenced to the mandatory minimum sentence of 180 months. Defendant appealed the district court's refusal to allow a reasonable mistake of age defense, claiming that failing to do so renders § 2251 unconstitutionally overbroad under the First Amendment. He also claimed that the statute exceeded Congress' authority under the Commerce Clause.

Held: Comparing § 2251 to a statutory rape law, the Fourth Circuit determined that, because the legislature had a substantial interest in protecting the well-being of children and § 2251 did not substantially chill speech, the statute was not unconstitutionally overbroad. Moreover, as Defendant used a video camera and videotape that had traveled in interstate commerce to record the encounter with a minor, the statute was a valid exercise of Congressional power under the Commerce Clause.

III. FOURTH AMENDMENT / SUPPRESSION

A. *Terry* Stop and Frisk

***United States v. Neely,* 564 F.3d 346 (4th Cir. 2009) (per curiam)**

Facts: While on routine patrol, an officer saw a car in a high crime area without its headlights on. The officer initiated a traffic stop and asked the driver for license and registration. Defendant provided the same, and a check revealed no issues. The officer did not return the license and registration, but instead asked whether Defendant had any weapons in the vehicle. Defendant stated that he did not and asked if the officer wanted to check his trunk. Defendant fumbled with the trunk switch for approximately thirty seconds before the officer asked him to exit the vehicle and was directed to the back of the vehicle. Defendant exited the vehicle, leaving the driver's side door open, and handed the keys to the officer. The interior of the car was searched, which revealed a firearm. Defendant was charged with being a felon in possession of a firearm. After his motion to suppress the firearm was denied, Defendant entered a conditional plea. Later, Defendant appealed the denial of the motion to suppress, arguing that the district court erred in concluding he consented to the search, and in the alternative, that the search was justified under *Terry*.

Held: The search exceeded the scope of Defendant's consent and cannot be justified under *Terry*. Although Defendant consented to the search of his trunk, his decision to hand his keys to the officer and leave the driver's side door open was not sufficient to overcome his prior verbal limitation. Additionally, the officer could not reasonably have believed Defendant was dangerous, due to Defendant's cooperation and the officer's lack of suspicion that Defendant had anything in the vehicle. The Court conceeded this was a close case, however, it rejected the district court's finding of "articulable suspicion" based on the high crime area and Defendant's fumbling with the trunk switch.

B. Traffic Stop

***United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009) (J. King)**

Facts: Co-defendants Kellam and Michel were convicted of multiple charges related to the distribution of crack cocaine in a large multi-defendant drug conspiracy. Defendant Kellam appealed the district court's denial of her motion to suppress evidence resulting from a traffic stop. The arresting officer had stated that he stopped her car after observing it cross and straddle the double center divider line and display a left turn signal despite there being no place in which to turn. During the stop, he smelled marijuana and attempted to search her car and its contents including her purse. After she fled and was subsequently caught, marijuana was found in her purse. Defendant claimed the stop was pretextual and the resulting search of her car and belongings unconstitutional.

Held: Defendant's driving across the center line provided the officer reasonable suspicion to stop her car, and accordingly did not violate her Fourth Amendment rights. Moreover, the smell of marijuana emanating from Defendant's car provided probable cause for her arrest and search of her purse in the car.

C. Search Warrant / *Franks* Hearing

***United States v. Andrews*, 577 F.3d 231 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant was convicted of being a felon in possession of a firearm after officers discovered a gun while searching his home pursuant to an anticipatory search warrant. The warrant was issued after a package containing marijuana was intercepted at a FedEx shipping center. The package was not addressed to defendant and the street address did not match the number of his home. However, after the shipper called in to modify the address to one that still did not match Defendant's, the officers planned a controlled delivery deciding that the most likely address was Defendant's. They obtained an anticipatory search warrant which would become effective once Defendant accepted the parcel. Defendant accepted the box, briefly brought it inside his home, and took it to another nearby home. He was arrested , his home searched, and a gun was retrieved. On appeal, he claimed that the warrant was improperly obtained and the search violated his Fourth Amendment rights.

Held: The Court applied *United States v. Leon*, 468 U.S. 897 (1984) and concluded that the facts presented to the magistrate were not so deficient such that they clearly failed to establish probable cause or that the magistrate was essentially a rubber stamp for the officer. Defendant also failed to prove that the officer who applied for the warrant misled the magistrate judge.

IV. FIFTH AMENDMENT

A. Right Against Self-Incrimination / *Miranda*

***United States v. Blake*, 571 F.3d 331 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant received a life sentence based on his participation in a carjacking, during which the driver was shot, run over, and killed. After Defendant asserted his right to an attorney, an officer delivering documents to his cell which alleged that he'd been named as the triggerman stated, "I bet you want to talk now, huh?" Defendant then indicated to another officer that he wished to talk. He was re-*Mirandized* and gave his account of the carjacking. The Maryland courts suppressed these statements. However, when the state of Maryland failed to prosecute him, Defendant was federally prosecuted and convicted of carjacking resulting in death and related firearm violations. On appeal, he claimed that the district court erred in refusing to suppress those same post-arrest statements.

Held: The police officer's taunting statements would not reasonably have been expected to intimidate Defendant into making incriminating statements and, therefore, did not rise to the level of interrogation.

B. Constructive Amendment of Indictment and Variance

***United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009) (J. Duncan)**

Facts: On two occasions, Defendant's friend brought a 14-year old girl to his house and they both had sex with her. Defendant, a police officer, videotaped the first encounter. Although he thought the girl looked young, he believed she was an adult and did not investigate her age further. He was charged and convicted under 18 U.S.C. § 2251(a) of sexual exploitation of a minor for the purpose of producing a visual depiction and sentenced to the mandatory minimum sentence of 180 months. Although his indictment alleged his having violated the statute "knowingly," the district court declined to include that language in the jury instructions, and Defendant appealed.

Held: The trial court's jury instructions, although slightly different than the indictment, did not constructively amend the indictment. Rather, because the instructions did not alter the crime charged in the indictment, the instructions resulted in a "mere variance," which in this case did not prejudice Defendant.

***United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was federally indicted after government agents conducted a raid on a cockfighting enterprise in which roosters wore sharpened devices to fight eachother and spectators often gambled on the fights. Defendant, considered a co-conspirator in the venture, ran a booth in which he sold various cockfighting supplies including knives and gaffs. He was charged in a four-count indictment. On the conspiracy count, the government failed to include an element of the offense, namely that the underlying conspiracy involve "*an animal in* an animal fighting venture" under 7 U.S.C. § 2156(a)(1). At trial, the district court attempted to correct the defect in its jury instructions, and Defendant appealed.

Held: The Government's omission of the element "an animal in" broadened the crime outside the scope intended by Congress and amounted to a fatal defect in the indictment. Because this was a necessary element of the crime, the district court's attempt to cure the omission was an impermissible constructive amendment of the indictment.

***United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009) (J. King)**

Facts: Co-defendants Kellam and Michel were convicted of multiple charges related to the distribution of crack cocaine in a large multi-defendant drug conspiracy. On appeal, defendant Kellam claimed that the court's dismissing Michel from Count 8, the one substantive distribution charge filed against these two co-defendants, was in error and prejudiced her defense. Specifically, Kellam maintained that the dismissal served to broaden or alter the indictment, in violation of her Fifth Amendment rights.

Held: As Kellam was charged as both principal and aider and abetter, the dismissal of a charge against co-defendant Michel was a permissible variance. It did not broaden or alter the indictment such that defendant was prejudiced under the Fifth Amendment.

V. SIXTH AMENDMENT

A. Right to Counsel

***United States v. Urutyan*, 564 F.3d 679 (2009) (J. Duncan)**

Facts: Defendant was convicted of conspiracy to commit bank fraud, bank fraud, and aggravated identity theft based on a scheme in which he obtained debit account information from his job at a gas station and, with several others, used the information to conduct fraudulent withdrawals from ATMs. He was arrested, and shortly after having been appointed a federal public defender, retained Elliot Bender to represent him. Shortly thereafter, William Graysen, a California attorney, was admitted *pro hoc vice* to also present Defendant. The government began to investigate the nature of the fee arrangement Defendant had with Graysen and determined there were several conflicts of interest including Graysen's having been hired by

a third party and consequently becoming a subject of the investigation. The district court disqualified Graysen, and Bender represented Defendant through trial. Defendant argued on appeal that, as he had expressly waived the conflict of interest issue with his attorney, Graysen's disqualification had deprived him of his Sixth Amendment right to counsel.

Held: District Court properly disqualified counsel where attorney was allegedly hired by co-conspirators and paid with proceeds of the conspiracy, producing the potential for a conflict of interest. Moreover, in such cases, the district court may disqualify a defendant's choice of counsel despite the defendant's waiver of the conflict.

VII. SENTENCING

A. Standard of Review

***United States v. Massenburg,* 564 F.3d 337 (4th Cir. 2009) (J. Williams)**

Facts: Defendant pled guilty to being a felon in possession of a firearm. After the Rule 11, the probation office concluded that Defendant was subject to the Armed Career Criminal Act. At sentencing, Defendant made *Blakely/Apprendi* objections to the ACCA status. Ultimately, the Court overruled Defendant's objections and imposed a term of 210 months' imprisonment. Defendant appealed, arguing that the district court failed to inform him of the mandatory minimum sentence prior to his plea.

Held: The Court used a plain error standard because Defendant failed to object to the Rule 11 violation during the sentencing proceedings (citing *United States v. Vonn,* 535 U.S. 55 (2002)). Although the district court committed plain error by failing to inform Defendant of the mandatory minimum sentence, Defendant's substantial rights were not affected by the error.

B. Evidence Admissible During Sentencing Hearing

***United States v. Layton*, 564 F.3d 330 (4th Cir. 2009) (J. Smith- by designation)**

Facts: Based on an informant's claiming he saw Defendant looking at child pornography on his computer, officers searched the computer, and Defendant admitted to downloading pornography. He pled guilty to possession of child pornography. At sentencing, he objected to enhancements based on the number of images and their type (i.e., masochistic and prepubescent). Defendant's arguments were primarily factual objections that the judge resolved in favor of the government. The district court sentenced him to the bottom of the Guideline range of 97 months, and Defendant appealed.

Held: Giving the district court's credibility determination "great deference," the court concluded that the district court properly relied on Defendant's own admissions when applying sentencing enhancements for possession of child pornography.

C. Eighth Amendment- Cruel and Unusual Punishment

***United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009) (J. Duncan)**

Facts: On two occasions, Defendant's friend brought a 14-year old girl to his house and they both had sex with her. Defendant videotaped the first encounter. He was charged and convicted under 18 U.S.C. § 2251(a) of sexual exploitation of a minor for the purpose of producing a visual depiction and sentenced to the mandatory minimum sentence of 180 months. Defendant appealed, claiming that the 15-year mandatory minimum sentence violated the Eight Amendment's prohibition against cruel and unusual punishment.

Held: Because Eighth Amendment proportionality review is not available for sentences less than life without parole, Defendant's sentence was not cruel and unusual within the meaning of the Eighth Amendment.

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

***United States v. Smith,* 566 F.3d 410 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was sentenced to 197 months after being convicted of drug trafficking and firearm offenses. The court sentenced Defendant within the Sentencing Guidelines range. Defendant appealed the sentence, arguing the district court inappropriately presumed the reasonableness of his sentence because it fell within the Guidelines range.

Held: The district court improperly presumed that a sentence within the Sentencing Guidelines range would be reasonable. It must first calculate the Guidelines range, consider what sentence is appropriate for the specific defendant in light of § 3553(a), and explain any variance from the Guidelines with reference to § 3553(e).

***United States v. Carter,* 564 F.3d 325 (4th Cir. 2009) (J. Motz)**

Facts: Defendant pled guilty to being a felon in possession of a firearm. At sentencing, the district court adopted a downward variance from Defendant's original sentencing range of 37 to 46 months to a term of probation. The Government appealed, challenging the sentence.

Held: The sentence was not procedurally reasonable because the Court failed to articulate an individualized rationale for the sentence. A sentencing judge must make an individualized assessment based on the presented facts and state in open court the reasons supporting its sentence. The sentencing judge must set forth enough reasons to demonstrate that the parties'

arguments were considered and that the judge had a reasoned basis for exercising his or her own legal decision-making authority.

***United States v. Raby*, 575 F3d 376 (4th Cir. 2009) (J. Niemeyer)**

Facts: Raby pled guilty to possessing child pornography. His guideline range was between 210-262 months. After several sentencing hearings, during which Defendant argued for a variance and the Government objected, the sentencing judge repeatedly indicated that he believed imposing a sentence outside the Guideline range would be reversed on appeal. He ultimately imposed a 210-month sentence, explaining that he was unable to consider any of Defendant's mitigating factors as there was a presumption that the guidelines range was reasonable.

Held: While the presumption of reasonableness is available to appellate courts as a tool for evaluating sentences, a sentencing court may not apply a presumption of reasonableness to a within-Guidelines sentence.

E. Sentencing Enhancements under 21 U.S.C. §§ 841(b)(1)(A) & 851(b)

***United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009) (J. King)**

Facts: Co-defendants Kellam and Michel were convicted of multiple charges related to the distribution of crack cocaine in a large, multi-defendant drug conspiracy. Defendant Kellam appealed her life sentence, claiming an erroneous application of the 21 U.S.C. § 841(b)(1)(A) sentencing enhancement. The Government had filed an information under 21 U.S.C. § 851 alleging that she had prior convictions making her eligible for the enhancement, and submitted certified copies of criminal dockets for two of the prior cases as proof. Defendant maintained that the Government had failed to prove beyond a reasonable doubt that she had been convicted of these prior offenses.

Held: Evidence of prior convictions was insufficient where documentation of the prior convictions had inconsistent identification information, the Government failed to link Defendant to the identification information in those documents, and the sentencing court failed to determine whether Defendant affirmed or denied those prior convictions.

F. U.S.S.G. § 2G2.2(b)(3)(F)- Distribution of Child Pornography

***United States v. Layton*, 564 F.3d 330 (4th Cir. 2009) (J. Smith- by designation)**

Facts: Based on an informant's claiming he saw Defendant looking at child porn on his computer, officers searched the computer, and Defendant admitted to downloading pornography from a peer to peer file-sharing program called WinMX. He pled guilty to possession of child pornography. At sentencing, he objected to an enhancement based on his having

"distributed" images via the WinMX program. The district court applied the enhancement, and Defendant appealed.

Held: Agreeing with the Seventh Eight and Eleventh Circuits, the court determined that the use of peer-to-peer file sharing software constituted distribution for purposes of applying the enhancement.

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

***United States v. Jenkins,* 566 F.3d 160 (4th Cir. 2009) (J. Wilkinson)**

Facts: Late one evening, officers received a report that an individual had fired a weapon in downtown Charleston. Upon arriving at the scene, they found Defendant, who matched the description of the armed individual. Officers approached and attempted to interview Defendant, who refused and acted aggressively. Subsequently, Defendant was detained and officers found a firearm and cocaine base between Defendant's fingers. Defendant pled guilty to being a felon in possession of a firearm. At sentencing, the Court found, over Defendant's objection, that a four-level enhancement applied for possession of a firearm in connection with another felony offense (possession of the cocaine base). Defendant appealed his sentence.

Held: The possession of cocaine base offense was sufficient to support a four-level sentencing enhancement, because it is clear that the possession of a firearm can facilitate a simple drug possession crime (as opposed to a drug trafficking crime). Further, evidence that Defendant took a firearm and cocaine base onto a public street close to midnight where a firearm was recently fired was sufficient to support a finding that firearm possession had the potential to facilitate the cocaine base possession.

H. U.S.S.G. § 3B1.1– Aggravating Role

***United States v. Cameron*, 573 F.3d 179 (4th Cir. 2009) (J. Gregory)**

Facts: Defendant was convicted by a jury of three counts of uttering counterfeited obligations (18 U.S.C. § 472) and one count of falsely making and counterfeiting obligations under 18 U.S.C. § 471. Defendant appealed the four-level sentencing enhancement he received for being a leader or organizer of the counterfeiting operation pursuant to U.S.S.G. § 3B1.1.

Held: The leadership enhancement pursuant to § 3B1.1 was applied in error where the government failed to present evidence that Defendant's role in the conspiracy was that of an organizer or leader of people, as opposed to that of a manager over the currency of the operation.

I. U.S.S.G. § 4A1.1– Criminal History Category

***United States v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009) (J. Alarcon- by designation)**

Facts: Defendant was arrested on North Carolina state charges after illegally reentering the United States. While in state custody, a local officer who was certified to screen state arrestees for immigration violations placed an ICE detainer on him. After Defendant's conviction and sentencing for the state charge, he was federally indicted for illegal reentry and pled guilty. At sentencing, Defendant objected to two additional criminal history points he received for committing the instant offense less than two years after his release from the state conviction. U.S.S.G. § 4A1.1(e). Defendant argued that because he was "found" by ICE prior to the state sentence being imposed, it should not be counted, but the government contended Defendant could not be found before a full investigation was completed. The district court applied the enhancement.

Held: The Fourth Circuit vacated and remanded the case, finding that Defendant was "found" on the day ICE lodged a detainer with local authorities that identified him by name, birth date, place of birth, and A-file number.

VIII. RULES OF EVIDENCE

A. Hearsay

***United States v. Blake*, 571 F.3d 331 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant received a life sentence based on his participation in a carjacking during which the driver was shot, run over, and killed. After the state of Maryland failed to prosecute him, Defendant was federally prosecuted and convicted of carjacking resulting in death and related firearm violations. Defendant argued that the district court erred by excluding a statement by a witness who had been incarcerated with the other suspect involved in the carjacking. The witness would have testified that he heard the suspect admit his guilt in shooting the victim, however, the district court excluded it as hearsay.

Held: The witness' testimony was not a statement against interest, Fed.R.Evid 804(b)(3), but rather inadmissible hearsay as the statement lacked corroborating evidence that the statement was trustworthy.

B. Rebuttal Evidence Generally

***United States v. Blake*, 571 F.3d 331 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant received a life sentence based on his participation in a carjacking, during which the driver was shot, run over, and killed. After the state of Maryland failed to prosecute him, Defendant was federally prosecuted and convicted of carjacking resulting in death and related firearm violations. Defendant argued that the district court erred by permitting the government to introduce evidence related to a polygraph test he took.

Held: Although polygraph test results are generally inadmissible in federal court, testimony concerning a polygraph test may be admitted where it is not offered to prove the truth of the test result, "but instead is offered for a limited purpose such as rebutting a defendant's assertion that his confession was coerced." Because Defendant made the argument that law enforcement's interrogation of him was coerced, evidence of the polygraph was properly admitted for rebuttal.

C. Fed. R. Evid 1002–Best Evidence Rule

***United States v. Smith*, 566 F.3d 410 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was sentenced to 197 months after being convicted of drug trafficking and firearm offenses. At trial, the government presented testimony of an ATF agent to prove the interstate nexus element of the felon in possession count. Defendant objected to the testimony, asserting that it violated the "best evidence rule." The district court overruled the objection, and the testimony was admitted. Defendant appealed.

Held: The "best evidence rule" (which is more accurately described as the "original document rule") was not violated by the introduction of testimony by the ATF agent, as the government did not seek to prove the content of any writing or recording related to the firearms or their place of manufacture. Rather, it sought to prove the fact that the firearms were manufactured outside of North Carolina.

IX. TRIAL

A. Sufficiency of the Evidence

***United States v. Madrigal-Valadez*, 561 F.3d 370 (4th Cir. 2009) (J. Alarcon- by designation)**

Facts: While driving a soldier back to Fort Lee, Defendant's car was stopped to be checked prior to entry. The only sign indicating the requirements for entry to the base was located on base property and written in English. Defendant failed to present the proper identification to satisfy Fort Lee's entry requirements, and he was arrested. Defendant was convicted, after a

bench trial, of entering a military installation for a purpose prohibited by law pursuant to 18 U.S.C. § 1382. On appeal, Defendant claimed that there was insufficient evidence demonstrating that he had received notice of the entry requirements.

Held: Agreeing with other courts that had characterized this offense as a trespass, the court found that notice of the entry requirements must be provided before a person could be convicted of the trespass. Here, the notice was insufficient as once the person turned onto the access road leading to the base, and where the sign was located, the person was already on military property.

B. Jury Instructions

***United States v. Jeffers*, 570 F.3d 557 (4th Cir. 2009) (J. King)**

Facts: Defendant was convicted by a jury of drug conspiracy and carrying a firearm during and in relation to the drug trafficking offense. 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. Moreover, the evidence at trial indicated that Defendant may have competed against some of his co-conspirators during the course of their drug dealing. On appeal, Defendant attacked the court's jury instructions claiming, 1) the district court erred when it failed to give the jury a multiple-conspiracy instruction rather than the single-conspiracy instruction it provided on the drug charge. Defendant alleged that this error "created a prejudicial variance." And, 2) 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. Defendant failed to preserve these objections and was on plain error review on appeal.

Held: 1) Defendant's having competed with some of his co-conspirators did not invalidate the government's single-conspiracy theory. Because the evidence showed that several drug dealers were involved in a series of transactions that furthered a single conspiracy, the trial court properly instructed the jury. 2) It was error for the judge not to submit the question of drug amount to the jury. However, because there was ample evidence that Defendant distributed more than the threshold amount of crack cocaine to trigger the mandatory minimum, the drug conviction was upheld. Moreover, the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

X. MISCELLANEOUS ISSUES

A. Timeliness of Notice of Appeal

***United States v. Urutyan*, 564 F.3d 679 (2009) (J. Duncan)**

Facts: Defendant was convicted of conspiracy to commit bank fraud, bank fraud, and aggravated identity theft based on a scheme in which he obtained debit account information from his job at a gas station and, with several others, used the information to conduct fraudulent withdrawals from ATMs. Defendant filed a notice of appeal more than one month later than his judgment was entered. As he did not seek an extension, the notice was filed out of time. However, the government expressly waived any objection to the timeliness of the notice of appeal.

Held: Because the deadline for filing a notice of appeal is a "court-prescribed, procedural rule" and "is not backstopped by any statutory deadline," Defendant's filing an untimely notice of appeal did not divest the Fourth Circuit of subject-matter jurisdiction over the appeal.

B. Fed. R. Crim. P. 16– Prosecution's Discovery Obligations

***United States v. Jeffers*, 570 F.3d 557 (4th Cir. 2009) (J. King)**

Facts: Defendant was convicted by a jury of drug conspiracy and carrying a firearm during and in relation to the drug trafficking offense. Prior to trial, prosecutors created a binder containing all written discovery. However, in accordance with its open case file policy, it refused Defendant's attorneys to copy these materials and required them to review the binder at the U.S. Attorney's Office. On appeal, Defendant argued that the government's failure to comply with its discovery obligations warranted vacating his convictions.

Held: Because Fed.R.Crim.P. 16 requires that the prosecution "permit the defendant to inspect *and to copy*" discovery, the government failed to meet its discovery obligations. However, since Defendant could not show how this prejudiced his case, any error was harmless.

C. 18 U.S.C. § 5031– Juvenile Delinquency Act Definitions

***United States v. Blake*, 571 F.3d 331 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant received a life sentence based on his participation in a carjacking, during which the driver was shot, run over, and killed. After the state of Maryland failed to prosecute him, Defendant was federally prosecuted and convicted of carjacking resulting in death and related firearm violations. Defendant was 17 years old when he committed the offense, but was 21 years old when he was federally indicted. On appeal, he claimed that he should have been

prosecuted as a juvenile and that the case should be dismissed because the government failed to comply with the Juvenile Delinquency Act's (JDA) certification requirements.

Held: Although Defendant was 17 years old at the time of the offense, he was not a "juvenile" as defined by the JDA. So long as he had attained his 18th birthday at the time he was indicted, he could be prosecuted as an adult.

D. 28 U.S.C. § 753(b)- Court Reporter Act

***United States v. Jeffers*, 570 F.3d 557 (4th Cir. 2009) (J. King)**

Facts: Defendant was convicted by a jury of drug conspiracy and carrying a firearm during and in relation to the drug trafficking offense. On appeal, Defendant claimed that the trial court's failure to place on the record portions of the charge conference, including objections to jury instructions, amounted to a violation of his due process rights under the Court Reporter Act, 28 U.S.C. § 753(b).

Held: Citing cases out of the First and Seventh Circuits, the Court found that the responsibility to place objections on the record rests with the attorneys, not the district court.

E. 18 U.S.C. §§ 2510-2522– Title III of the Omnibus Crime Control and Safe Streets Act of 1968

***United States v. Crabtree.* 565 F.3d 887 (4th Cir. 2009) (J. Traxler)**

Facts: Defendant was sentenced to twenty-four months for violating the terms of his supervised release. To establish some violations, the government introduced into evidence audiotapes of Defendant's telephone conversations that were made by Defendant's girlfriend, who made the tapes after she suspected Defendant was seeing his ex-wife. Defendant objected to the introduction under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The district court overruled the objections. Defendant appealed.

Held: Defendant's telephone conversations, which were recorded without his permission, were not admissible. The Court sided with the majority opinion in a Circuit split, rejecting a "clean hands" exception to the statute, where the government was not involved in the illegal interception.