

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
FOURTH CIRCUIT CRIMINAL LAW UPDATE
Cases Published Between April 1, 2010 and August 31, 2010**

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I. INTRODUCTION

This outline summarizes Fourth Circuit decisions published between April 1, 2010 and August 31, 2010. 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 laura_wasco@fd.org.

II. SPECIFIC OFFENSES

***United States v. Jackson*, 608 F.3d 193 (4th Cir. 2010) (J. Wilson - by designation)**

Facts: Defendant was charged with multiple violations of 18 U.S.C. § 1001 for falsifying the amount of time he had worked on some federal defense contracts. Defendant worked for Northrup Grumman, who was a subcontractor for Computer Sciences Corporation, the prime contractor with the NSA. Defendant moved to dismiss the charges arguing that the NSA was created by executive order rather than by statute and therefore it had no statutory authority to access his timesheets. The motion was denied and Defendant appealed.

Held: Defendant's actions fall within the scope of § 1001, because § 1001 covers all situations where either the legislative, executive, or judicial branch has the power to exercise authority. Here, the NSA, an agency of the executive branch, has the authority not to pay a false invoice. Furthermore, the executive branch had the authority to revoke Defendant's security clearance. Therefore, Defendant's false statements were within the nexus of executive jurisdiction under § 1001.

***United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendants, MS-13 members, were convicted for conspiracy to participate in racketeering activity (RICO and VICAR), conspiring to commit murder, and possession of firearms during a crime of violence. On appeal, Defendants raised several issues: double jeopardy, crimes of violence, and evidentiary matters.

Held: Double Jeopardy: Defendants argued that the murder conspiracy was part of the same conduct that constituted the racketeering conspiracy, and therefore, conviction and sentencing as to both violated double jeopardy. The court applied the *Blockburger* test (two offenses are separate if they each require a distinct element that the other does not have) and held that the two offenses were separate, and therefore conviction on both offenses did not violate double jeopardy.

Crime of Violence: Defendants argued that the racketeering conspiracy was not a crime of violence as some racketeering activities are not inherently violent and as the Government

did not state in the indictment the predicate acts underlying the conspiracy. The court rejected this argument stating that the key issue is whether the racketeering conspiracy was a violent crime (which it was here), and not whether the predicate acts underlying the conspiracy are violent.

Evidentiary: Defendants raised several evidentiary issues including the admission of past guilty pleas, the admission of statements to grand juries, admission of expert testimony that relied on hearsay statements, and limitations on cross-examinations in the district court. The court rejected all these arguments.

III. FOURTH AMENDMENT / SUPPRESSION

United States v. Johnson, 599 F.3d 339 (4th Cir. 2010) (J. Wilkinson)

Facts: Defendant was observed in an open-air drug market, on video camera by an officer at a nearby police station making quick hand-to-hand contact with several men, each of whom immediately hurried away. It appeared to the officer that something small was passed between the men, and the officer concluded that drug exchanges had occurred. The officer called for officers to investigate the scene while he continued to monitor the video camera. Defendant milled on the sidewalk, turned down a side street and returned to his previous position. Eventually, the officer observed Defendant head to a local Chinese restaurant with two others following him. Officers arrived on the scene as Defendant entered the restaurant with one man, while another continued walking past the restaurant. Officers identified themselves and asked to see Defendant's hands. The Defendant threw a gelcap over the restaurant counter and a struggle ensued; eventually, Defendant was arrested. The officer at the police station viewed earlier recordings of video surveillance and noticed that before the suspected drug deals, Defendant went to a car on the street, opened the passenger door, shut it, paced back and forth, reached back into the car and came out holding something in his hand. At the scene, an officer looked inside the passenger window of the car and saw a plastic bag containing gelcaps and a set of keys. He opened the door and saw vials of suspected cocaine. A later search revealed 56 heroin gelcaps, 39 cocaine vials, a mirror and scale, razor blade, and a firearm. Defendant was charged with, and convicted of, drug and firearm charges. Defendant was sentenced to 360 months' imprisonment. Defendant appealed: (1) the denial of his suppression motions; (2) the sufficiency of the evidence on the firearm charges; and (3) raised a Sixth Amendment objection to part of his sentence.

Held: Affirmed. (1) The court found that it was reasonable in the officer's experience for the officer to infer that Defendant's behavior on the sidewalk was related to drug transactions. The court rejected Defendant's contention that the officer's experience, regardless of its extent, could transform his outwardly legal behavior into something suspicious. The court also criticized Defendant for disregarding the factual findings of the district court, noting that "[d]istrict courts offer an unbiased forum to test the conclusions of police, and they possess a perspective that appellate forums cannot match." (2) The

court held that Johnson was properly seized by an officer in possession of reasonable suspicion when he threw away the gelcap in the restaurant. Additionally, the court held that the money recovered from Defendant was found during a search incident to a lawful arrest, for which the officers had probable cause once they saw the gelcap. (3) The court held that there was probable cause to search Defendant's car.

United States v. Green, 599 F.3d 360 (4th Cir. 2010) (J. Davis)

Facts: Defendants were convicted for being part of a drug conspiracy and for money laundering. They were acquitted of use of a communication facility in furtherance of the drug conspiracy and of three drug distribution charges. Defendants raised several issues on appeal: sufficiency of evidence, conflicting verdicts, suppression, *Batson*, and jury charge.

Held: Sufficiency of evidence: Defendants argued that the Government's evidence was insufficient to support the convictions because much of the evidence was coconspirator testimony. The court disagreed holding that the jury was entitled to credit that testimony as much as they found it to be credible and accurate.

Conflicting verdicts: Defendants argued that acquittal on the related charges shows that the evidence was insufficient to prove a drug conspiracy. The court disagreed holding that inconsistent jury verdicts do not call into question the legitimacy of guilty verdicts.

Suppression: Defendants argued that the district court should have suppressed \$54,000 in cash found under Defendants' bed. The court disagreed holding that the cash was found as part of a protective sweep and that a suspect could have reasonably been hiding underneath Defendants' bed.

Batson: Defendants argued that the district court erred by rejecting their *Batson* challenge to the prosecution using its peremptory strikes to remove teachers from the jury. The court held that this was not a Constitutionally protected classification.

Jury Charge: Defendants argued that the district court erred by not including his "theory of the defense" instruction. The court disagreed holding that the instruction had been given, albeit in parts and in different portions of the instruction.

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010) (J. Motz)

Facts: As a result of an undercover investigation, Defendant was discovered to have posted child pornography to Yahoo! forums. The FBI issued administrative subpoenas to Yahoo! and to the Internet service provider to access the Defendant's identity. They executed the resulting search warrant at the Defendant's mother's home and seized his laptop from his room. At trial, the Defendant moved to suppress all the seized evidence as products of an unlawful search. The district court denied the motion. On appeal, the Defendant argued that (1) the Government's use of secretive administrative subpoenas violated his Fourth Amendment rights, (2) the search warrant was not supported by probable cause, (3) the Government did not produce sufficient evidence to prove that the Defendant was the

offender, (4) the Government did not produce sufficient evidence to prove that the children in the pornography were real children, and (5) his within-Guidelines sentence was “insane” for being too long.

Held: Affirmed. (1) The secretive administrative subpoenas did not violate the Fourth Amendment because the Defendant did not have a reasonable expectation of privacy in his Internet subscriber information. Defendant had volunteered all that information and he had also assumed the risk that the companies would reveal that information when he subscribed. (2) The search warrant was supported by probable cause because the affidavit supporting the warrant established a fair probability that a search of the mother’s home might uncover evidence of child pornography. (3) There was sufficient evidence to prove the Defendant was the offender. The Yahoo! screenname that posted the images matched the Defendant’s screenname. The bedroom containing the seized computer was the same bedroom used in Defendant’s profile photo. The computer contained chat histories in which Defendant described the child pornography to others. (4) There was sufficient evidence to prove that the children in the pornography were real. The jury had time to view the relevant images and had heard an expert who testified that the children in the pornographic images were real. (5) The Defendant had not produced any evidence to show that a within-Guidelines sentence is excessive for him.

***United States v. Richardson*, 607 F.3d 357 (4th Cir. 2010) (C.J. Traxler)**

Facts: As part of a normal filtering and detection routine, AOL detected Defendant sending child pornography through its email system. AOL notified the Cyber Tip Line at the National Center for Missing and Exploited Children pursuant to 42 U.S.C. § 13032(b)(1). Four months later, an investigation revealed Defendant’s identity, address, and his sex offender status. Officers applied for and received a search warrant for Defendant’s home computer supported by AOL’s evidence, the investigative findings, and an affidavit by the applying officer stating that, based on his experience, child pornography traffickers generally store more child pornography on their home computers. Defendant argued at trial that (1) AOL, as an agent of the Government, violated his 4th Amendment rights when it searched his emails and reported its findings to the Government and that (2) the search warrant was not supported by probable cause because it was stale from the four month passage of time between the Defendant’s act and the investigation and because it was too vague for relying on the generalities in the officer’s affidavit. The court rejected these arguments and Defendant appealed.

Held: Affirmed. The evidence presented against the Defendant was properly obtained. (1) AOL was not acting as an agent of the Government when its systems performed the scan of Defendant’s email. The Government did not mandate or request AOL to perform the scan, nor did it guide AOL on how to perform the scan. The Government only required AOL to report if it detected child pornography, it did not require AOL to actually scan for the pornography. (2) The search warrant was not stale or insufficiently supported. A

four-month period between act and investigation in a child pornography case does not render the information stale, because child pornographers rarely if ever dispose of such material, and store it for long periods in a secure place. Furthermore, a magistrate is allowed to make reasonable inferences based on the totality of the circumstances when assessing probable cause. This analysis may include generalities based on an officer's experience.

***United States v. Rendon*, 607 F.3d 982 (4th Cir. 2010) (J. Niemeyer)**

Facts: Defendant was a soldier in the Army. As part of standard intake procedure, a staff sergeant examined Defendant's MP3 player for contraband and discovered child pornography. The staff sergeant informed his captain, who then confirmed the staff sergeant's claims. Defendant was referred to the Criminal Investigation Division and subsequently revealed to them that there was child pornography on his personal computer as well. Defendant was federally indicted. He moved to suppress all evidence as being products of an illegal search of his MP3 player. The district court denied the motion and Defendant appealed.

Held: The search of Defendant's MP3 player was not illegal because Defendant did not have a reasonable expectation of privacy in the contents of his MP3 player given the context of the search. During a traditional military inspection, no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection. Here, the Defendant's MP3 player was searched pursuant to standard intake procedure, and therefore, he had no reasonable expectation of privacy in its contents at that time. Furthermore, the inspection was not done pursuant to a particularized suspicion or a person or a crime because nobody suspected the Defendant when the search took place and all soldiers underwent the inspection as part of intake. Even though the staff sergeant had suspicions when he brought the MP3 player to his captain for further inspection, he did so because he was required to pass his findings up the chain of command. The staff sergeant's findings alone were sufficient to serve as the basis for the warrant and arrest, and therefore, the captain's inspection did not taint the searches.

***United States v. Young*, 609 F.3d 348 (4th Cir. 2010) (C.J. Traxler)**

Facts: Federal agents had been staking out Defendant's home pursuant to the execution of an arrest warrant. They witnessed Defendant's friend, Wynter, knock on Defendant's front door, which was quickly opened. Wynter entered and later left with a red bag. The agents stopped Wynter and discovered packaged bundles of cash in the red bag. They returned to Defendant's home and knocked and announced their presence. When Defendant did not answer the door after twenty seconds, the agents entered the home. They found Defendant with a gun in his waistband and bricks of cocaine in plain view in his kitchen. The agents then applied for a search warrant, received it, and began

searching the house. They found two kilograms of cocaine in the kitchen, three kilograms of cocaine in the washing machine, cash, and cell phones, some of which were used to call Wynter. After a jury convicted Defendant, the sentencing court refused to sentence according to the amount of cocaine specified in the presentence report, which was greater than the amount found by the jury, stating that it was not free to depart from a jury finding even during sentencing. Defendant appealed arguing: (1) evidence seized from his home should have been suppressed because the officers entered his home without properly knocking and announcing, (2) the Government's evidence was insufficient to prove a conspiracy to distribute cocaine because it merely showed a buyer-seller relationship between Defendant and Wynter. The Government cross-appealed arguing that (3) the sentencing court should have been free to consider an amount of cocaine greater than that found by the jury so long as the greater amount is supported by a preponderance of the evidence.

Held: The 4th Circuit affirmed in part, vacated in part, and remanded for resentencing. (1) The evidence from Defendant's home was properly seized because the officers waited twenty seconds before they entered the home. Twenty seconds was a reasonable amount of time because the officers had just witnessed a quick response to Wynter's knock and because the home was relatively small. The officers' use of the arrest warrant as a pretext for entering Defendant's home is irrelevant because they received a search warrant before searching the home. (2) The Government's evidence was sufficient to prove a conspiracy to distribute cocaine because it established more than a buyer-seller relationship. The evidence established that Defendant possessed almost five kilograms of cocaine, a quantity much too great for personal consumption, that Defendant and Wynter both possessed a large amount of cash common in a drug distribution scheme, and that Defendant used multiple cell phones to communicate with Wynter, also common in a drug distribution scheme. (3) The sentencing court was free to consider whether the Government could establish a higher quantity of cocaine under a preponderance of the evidence standard. It was not limited to the jury's finding.

***United States v. Lewis*, 606 F.3d 193 (4th Cir. 2010) (J. King)**

Facts: In 2006, Defendant was sitting in the driver's seat of a parked car when police officers approached his vehicle. After noticing an open beer bottle, the officers asked Defendant to step out. They then searched the vehicle and found a semiautomatic handgun with an extended magazine in the driver's seat. The Defendant was charged and, two years later, was convicted of being a felon in possession. During the trial, the district court denied Defendant's motion to suppress the handgun as the product of an unlawful search, and it used the 2005 version of the Sentencing Guidelines to calculate his Guideline range, rather than the 2008 version stating that applying the 2008 version would violate the Ex Post Facto Clause. On appeal, the Government argued that the district court would not have violated the Ex Post Facto Clause by applying the 2008 version of the Guidelines because they are advisory. Defendant cross-appealed arguing that his motion to suppress

should have been granted.

Held: Affirmed as to both appeals. The Defendant's motion to suppress was properly denied. The officers had not seized the Defendant when they approached his vehicle, and they had probable cause to search the vehicle when they saw the open bottle. The district court did not err by applying the 2005 version of the Guidelines. Because the Guideline range is the crucial starting point for sentencing, the retroactive application of an upwardly amended advisory sentencing range poses a significant risk of an increased sentence sufficient to violate the Ex Post Facto Clause.

IV. FIFTH AMENDMENT

***United States v. Wilson*, __ F.3d __, 2010 WL 3495876 (4th Cir. 2010) (J. Agee)**

Facts: Defendant had been convicted of kidnaping resulting in death, conspiring to kidnap, and three firearms violations. At trial, several witnesses and investigators testified to Defendant's guilt in the kidnaping and conspiracy. Prosecutors also presented evidence of a subsequent shooting involving the Defendant. On appeal, Defendant raised numerous issues on evidence, closing argument, confession, and *Brady*.

Held: Affirmed.

Evidence: The district court did not err by admitting evidence regarding the subsequent shooting involving the Defendant. The court was confident that this evidence, in light of all the other evidence admitted against the Defendant at trial, did not substantially sway the conviction. Also, the district court had issued a limiting instruction to the jury that would have mitigated this issue further.

Closing Argument: The prosecutor's closing argument was not improper. Some statements, if viewed in isolation, could be improper if made in the context of the kidnaping. However, these statements were made in the context of the other charges, and were proper in those contexts.

Confession: The district court did not err in admitting Defendant's confession, which he had made to civilian authorities while a member of the military. Defendant had read and signed a statement indicating he understood his right to silence. He subsequently waived that right by speaking with the investigators. The district court did not err in finding not credible the Defendant's statement that he felt he was being ordered to give a confession.

Brady: The district court did not err in denying Defendant's motion for a new trial based on an alleged *Brady* violation. The district court found that the new evidence was neither material nor exculpatory, and it also found the new testimony to be not credible.

V. SIXTH AMENDMENT

***United States v. Johnson*, 599 F.3d 339 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant was observed in an open-air drug market, on video camera by an officer at a nearby police station making quick hand-to-hand contact with several men, each of whom immediately hurried away. It appeared to the officer that something small was passed between the men, and the officer concluded that drug exchanges had occurred. The officer called for officers to investigate the scene while he continued to monitor the video camera. Defendant milled on the sidewalk, turned down a side street and returned to his previous position. Eventually, the officer observed Defendant head to a local Chinese restaurant with two others following him. Officers arrived on the scene as Defendant entered the restaurant with one man, while another continued walking past the restaurant. Officers identified themselves and asked to see Defendant's hands. The Defendant threw a gelcap over the restaurant counter and a struggle ensued; eventually, Defendant was arrested. The officer at the police station viewed earlier recordings of video surveillance and noticed that before the suspected drug deals, Defendant went to a car on the street, opened the passenger door, shut it, paced back and forth, reached back into the car and came out holding something in his hand. At the scene, an officer looked inside the passenger window of the car and saw a plastic bag containing gelcaps and a set of keys. He opened the door and saw vials of suspected cocaine. A later search revealed 56 heroin gelcaps, 39 cocaine vials, a mirror and scale, razor blade, and a firearm. Defendant was charged with, and convicted of, drug and firearm charges. Defendant was sentenced to 360 months' imprisonment. Defendant appealed: (1) the denial of his suppression motions; (2) the sufficiency of the evidence on the firearm charges; and (3) raised a Sixth Amendment objection to part of his sentence.

Held: Affirmed. (1) The court found that it was reasonable in the officer's experience for the officer to infer that Defendant's behavior on the sidewalk was related to drug transactions. The court rejected Defendant's contention that the officer's experience, regardless of its extent, could transform his outwardly legal behavior into something suspicious. The court also criticized Defendant for disregarding the factual findings of the district court, noting that "[d]istrict courts offer an unbiased forum to test the conclusions of police, and they possess a perspective that appellate forums cannot match." (2) The court held that Johnson was properly seized by an officer in possession of reasonable suspicion when he threw away the gelcap in the restaurant. Additionally, the court held that the money recovered from Defendant was found during a search incident to a lawful arrest, for which the officers had probable cause once they saw the gelcap. (3) The court held that there was probable cause to search Defendant's car.

***United States v. Dean*, 604 F.3d 169 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant was convicted on a drug possession charge. At sentencing, the judge imposed a "career offender" sentence enhancement based on Defendant's two prior cocaine felonies. Because the sentencing for both prior convictions occurred on the same day, the Government produced two bond orders as well as records from the clerk's office to show that there had been an intervening arrest, which would cause the two convictions to count

separately rather than as one conviction. On appeal, Defendant argued that the bond orders and clerk's records were documents proscribed under *Shepard*, and therefore the district court erred by looking at them in determining the character of his prior convictions.

Held: Affirmed. *Shepard's* Sixth Amendment protection does not apply to the process of calculating an advisory Guideline sentence. *Shepard's* holding was meant to ensure that judges do not smuggle in facts reserved for juries, but there is no right to have a jury determine the existence of a prior conviction nor any fact necessarily established for the conviction to have been valid. Furthermore, under *Rita* and *Gall*, it is permissible and critical that a sentencing court calculate an advisory range using the fact-finding tools normally available to it, and this includes the bond orders and clerk's records.

***United States v. Cooper*, __ F.3d __, 2010 WL 3213681(4th Cir. 2010) (J. Neimeyer)**

Facts: Defendant had pled guilty to two drug trafficking offenses and a related firearms offense. Defendant had expressed an interest in completing the judicial proceedings as quickly as possible and had taken an *Alford* plea. As part of the deal, the Government agreed not to pursue an enhancement for the Defendant's managerial role in the drug trafficking. The district court sentenced the Defendant to the low end of the agreed upon range, and informed him of his limited right to appeal. Defendant did not express an interest in appealing and his counsel did not discuss the possibility of an appeal with him. On appeal, Defendant argued that he received ineffective assistance of counsel because his attorney failed to consult with him about taking an appeal.

Held: Affirmed. Counsel made a reasonable decision in not consulting with the Defendant on taking an appeal. It was reasonable for counsel to believe Defendant did not want to appeal because Defendant had expressed a desire to conclude the judicial proceedings quickly and took a plea as a result. Defendant had also received the best sentence he could have received under the terms of the deal, and never expressed an interest in appealing. Although counsel should have tied up all loose ends and talked with Defendant about taking an appeal, failure to do so does not rise to a Sixth Amendment violation.

***United States v. Luck*, 611 F.3d 183 (4th Cir. 2010) (J. Gregory)**

Facts: Defendant was charged with multiple drug offenses. At his trial, the state's key witnesses were two paid informants who allegedly performed controlled buys with the Defendant. During the controlled buys, one informant was wired, but the quality of the recording was so poor that the state could not present the recording at trial. Also, officers never checked the informants for drugs before they went to go meet with the Defendant; they assumed that the informants had purchased drugs from the Defendant when they returned with drugs in hand. After presentation of all the evidence, defense counsel did not request an

informant instruction. The jury convicted Defendant, and Defendant appealed arguing ineffective assistance of counsel.

Held: Defense counsel was ineffective for not requesting an informant instruction. Even though informant instructions are not required in every case involving an informant, an informant instruction should be requested and granted in a case in which the informants are paid and their testimony cannot be corroborated by any other evidence. Here, the informants received payment and neither the recording nor police testimony could corroborate their claim that they purchased drugs from the Defendant. Defense counsel should have requested an informant instruction.

VI. PLEA ISSUES / RULE 11

***United States v. Bowles*, 602 F.3d 581 (4th Cir. 2010) (J. Shedd)**

Facts: Defendant was indicted on several drug charges. After his initial appearance, the district court found him incompetent to stand trial. It then granted the Government's motion to forcibly medicate the Defendant to render him competent to stand trial. The Defendant was medicated and pled guilty. The Defendant appealed the forcible medication order.

Held: Affirmed. A defendant who has pled guilty has no nonjurisdictional ground upon which to attack a judgment except the inadequacy of the plea or the Government's power to bring an indictment. Here, Defendant has waived his right to appeal the forcible medication order because he has pled guilty and because the validity of the order is a nonjurisdictional issue.

VII. SENTENCING

***United States v. Hernandez*, 603 F.3d 267 (4th Cir. 2010) (J. Niemeyer)**

Facts: Defendant had been convicted of conspiring to possess illegal drugs with the intent to distribute. He requested and was sentenced to 262 months imprisonment, a within-Guidelines sentence. At sentencing, Defendant did not object to his sentence, and the district court stated that it had considered the Guidelines and the § 3553(a) factors, and that a Guideline sentence accomplished the purposes of the statute. On appeal, the Defendant argued that the district court did not provide sufficient explanation for his sentence.

Held: Affirmed. There is no plain error in the district court's explanation. When imposing a sentence within the Guidelines, the explanation need not be elaborate or lengthy. Generally, under *Rita*, a district court provides an adequate explanation for a Guidelines sentence when it rests its decision upon the Commission's own reasoning that the sentence is proper in the typical case, and when it finds the instant case to be typical.

Here, the district court (1) noted no objections from the Defendant, (2) adopted the findings and calculations of the PSR, (3) heard counsels' arguments, (4) heard Defendant's statement, (5) considered § 3553(a) factors, (6) concluded a Guideline sentence was appropriate, and (7) imposed the sentence requested by Defendant. The court noted that the district court could have said more, but found its given explanation, under the circumstances, to be adequate.

***United States v. Bethea*, 603 F.3d 254 (4th Cir. 2010) (J. Gregory)**

Facts: Defendant received a sentencing enhancement under the Armed Career Criminal Act (ACCA) for three previous convictions for violent felonies, one of which was for the violation of South Carolina's escape statute. That statute made it a crime "for a person, lawfully confined in prison or upon the public works of a county or while in the custody of a superintendent, guard, or officer, to escape." Also, Defendant had only been charged with and convicted of "escape." On appeal, Defendant argued that violation of the statute does not qualify as a violent felony under the ACCA.

Held: Reversed. An offense constitutes a violent felony under the ACCA if the prohibited conduct, as generally committed, includes an element of violence or if a defendant's conduct, as shown by charging documents and judicial records, constitutes the type of generic conduct that would implicate the ACCA. Here, the South Carolina escape statute prohibits some violent conduct and also some nonviolent conduct (e.g. failing to report to custody is considered "escape"). Therefore, the court had to see if the charging documents and judicial records in the instant case necessarily showed the Defendant's conduct constituted a violent felony. Because the indictment and sentencing sheet showed only that the Defendant was charged with and convicted of "escape," which is not inherently violent in South Carolina, the Defendant's escape conviction should not have counted as a violent felony under the ACCA.

***United States v. Bynum*, 604 F.3d 161 (4th Cir. 2010) (J. Motz)**

Facts: As a result of an undercover investigation, Defendant was discovered to have posted child pornography to Yahoo! forums. The FBI issued administrative subpoenas to Yahoo! and to the Internet service provider to access the Defendant's identity. They executed the resulting search warrant at the Defendant's mother's home and seized his laptop from his room. At trial, the Defendant moved to suppress all the seized evidence as products of an unlawful search. The district court denied the motion. On appeal, the Defendant argued that (1) the Government's use of secretive administrative subpoenas violated his Fourth Amendment rights, (2) the search warrant was not supported by probable cause, (3) the Government did not produce sufficient evidence to prove that the Defendant was the offender, (4) the Government did not produce sufficient evidence to prove that the children in the pornography were real children, and (5) his within-Guidelines sentence was "insane" for being too long.

Held: Affirmed. (1) The secretive administrative subpoenas did not violate the Fourth Amendment because the Defendant did not have a reasonable expectation of privacy in his Internet subscriber information. Defendant had volunteered all that information and he had also assumed the risk that the companies would reveal that information when he subscribed. (2) The search warrant was supported by probable cause because the affidavit supporting the warrant established a fair probability that a search of the mother's home might uncover evidence of child pornography. (3) There was sufficient evidence to prove the Defendant was the offender. The Yahoo! screenname that posted the images matched the Defendant's screenname. The bedroom containing the seized computer was the same bedroom used in Defendant's profile photo. The computer contained chat histories in which Defendant described the child pornography to others. (4) There was sufficient evidence to prove that the children in the pornography were real. The jury had time to view the relevant images and had heard an expert who testified that the children in the pornographic images were real. (5) The Defendant had not produced any evidence to show that a within-Guidelines sentence is excessive for him.

***United States v. Dean*, 604 F.3d 169 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant was convicted on a drug possession charge. At sentencing, the judge imposed a "career offender" sentence enhancement based on Defendant's two prior cocaine felonies. Because the sentencing for both prior convictions occurred on the same day, the Government produced two bond orders as well as records from the clerk's office to show that there had been an intervening arrest, which would cause the two convictions to count separately rather than as one conviction. On appeal, Defendant argued that the bond orders and clerk's records were documents proscribed under *Shepard*, and therefore the district court erred by looking at them in determining the character of his prior convictions.

Held: Affirmed. *Shepard's* Sixth Amendment protection does not apply to the process of calculating an advisory Guideline sentence. *Shepard's* holding was meant to ensure that judges do not smuggle in facts reserved for juries, but there is no right to have a jury determine the existence of a prior conviction nor any fact necessarily established for the conviction to have been valid. Furthermore, under *Rita* and *Gall*, it is permissible and critical that a sentencing court calculate an advisory range using the fact-finding tools normally available to it, and this includes the bond orders and clerk's records.

***United States v. Boulware*, 604 F.3d 832 (4th Cir. 2010) (C. J. Traxler)**

Facts: Defendant had been convicted of making a fraudulent statement under penalty of perjury for failing to disclose nine previous bankruptcy filings when a Chapter 13 bankruptcy petition required her to disclose all prior bankruptcy filings. The sentencing court calculated her Guideline range using § 2J1.3 (perjury). After stating that it had considered all the § 3553(a) factors, the district court imposed a sentence at the low end

of the Guideline range. On appeal, Defendant argued that the district court erred (1) by using § 2J1.3 (perjury) rather than § 2B1.1(fraud and deceit) to calculate her Guideline range, and (2) by not offering sufficient reasons to show that it had made an individual assessment of the specific circumstances in her case in light of the relevant § 3553(a) factors.

Held: Affirmed. (1) The district court did not err by using § 2J1.3 to calculate Defendant's Guideline range. A sentencing court must choose the guideline that is most applicable by comparing the guideline texts with the charged misconduct. Here, the Defendant was charged with perjury, and her conduct was more akin to perjury than fraud on creditors. (2) The district court did commit error by not offering sufficient reasons to support its sentence, but that error was harmless. The district court did hear Defendant's arguments on the § 3553(a) factors and it did state that it had considered the factors, thereby rendering the error harmless.

***United States v. Knight*, 606 F.3d 171 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant was arrested for being a felon in possession of a firearm in North Carolina in 2006. She posted bond and was released for pre-trial supervision, but then fled to Texas. She was arrested a year later and sent back to North Carolina where she pled guilty to the felon in possession charge. At sentencing, the court used the 2007 Sentencing Guidelines and applied a base offense level of 20 for being a felon in possession subsequent to a conviction for a crime of violence because the Defendant had a prior second degree arson conviction in Texas. The court imposed an obstruction-of-justice enhancement and denied an acceptance-of-responsibility reduction because the Defendant absconded before trial. On appeal, the Defendant argued that the district court erred (1) by relying on her prior arson conviction because the Texas definition of arson is broader than the generic definition of arson, (2) by denying the acceptance-of-responsibility reduction because it should not have considered her pre-plea activities in denying the reduction, and (3) by applying the 2007 Sentencing Guidelines when her conduct occurred in 2006.

Held: Affirmed. (1) The district court did not err by relying on Defendant's prior arson conviction. The Sentencing Guidelines establish that arson is a crime of violence, but do not define arson. Therefore, the court may enhance the offense-level if the state crime substantially corresponds to the contemporary, generic definition of the crime at issue. The modern, generic crime of arson involves the burning of real or personal property. Even though the Texas definition of arson includes the burning of vegetation, it still substantially corresponds with the modern, generic definition of arson; vegetation can be personal property. Therefore, the enhancement was warranted. (2) The district court did not err by denying the acceptance-of-responsibility reduction. Whether a defendant, who obstructed justice by absconding, is entitled to an acceptance of responsibility reduction is a factual matter to be determined by the district court. This means the court may look at the totality of the circumstances, and is not limited to post-guilty-plea activity, in

determining whether a defendant accepted responsibility. (3) Because the Defendant did not raise this issue at sentencing, it is reviewed for plain error. That is, there must be a non-speculative basis in the record to conclude that the district court would have imposed a lower sentence but for the error. On review, the court found no such basis.

***United States v. Alston*, 611 F.3d 219 (4th Cir. 2010) (J. Niemeyer)**

Facts: Defendant received an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), for having three prior violent felonies or serious drug offenses. In enhancing the sentence, the district court counted Defendant's *Alford* plea for second-degree assault in Maryland as a previous violent felony. In the second-degree assault case, the Maryland prosecutor proffered evidence that she would have presented at trial indicating that Defendant had pointed a gun at three victims and threatened to kill them. The alleged behavior qualified as a violent felony, but the Defendant pled down to second-degree assault, which encompassed conduct that did not qualify as a violent felony. The district court relied on the Maryland prosecutor's proffered evidence and the Defendant's *Alford* plea to enhance his sentence under the ACCA. Defendant appealed.

Held: The 4th Circuit vacated and remanded for resentencing. *Shepard* prevents sentencing courts from relying on facts neither inherent in the conviction nor admitted by the Defendant when assessing whether a prior conviction counts as an ACCA predicate offense. Here, the alleged behavior does qualify as a violent felony, but the alleged behavior is not a necessary element of second-degree assault and Defendant never admitted the alleged behavior. Therefore, the district court should not have counted the second-degree assault conviction as a predicate offense under the ACCA.

***United States v. Pettiford*, 612 F.3d 270 (4th Cir. 2010) (J. Duncan)**

Facts: Pettiford pled to one count of being a felon in possession of a firearm in violation of 18U.S.C. §922(g) and received an enhanced sentence of 188 months imprisonment. The enhanced sentence came in part because Pettiford qualified as a career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Subsequently two of the state court convictions were vacated and Pettiford petitioned for post-conviction relief from the enhanced federal sentence. The district court granted Pettiford's petition and resentenced him to 100 months. The Government appealed: (1) whether the vacatur of two of the five predicate convictions rendered Pettiford's sentence under the Armed Career Criminal Act unlawful; (2) whether defendant is barred from attacking a conviction based upon errors that could have been but were not pursued on direct appeal; and (3) whether defendant showed actual innocence to excuse the procedural default.

Held: (1) No. Defendant's sentence under the Armed Career Criminal Act was lawful as a result of the vacatur of two of the five predicate convictions. After the vacatur of the two convictions, three predicate convictions remained, meeting the statutory requirements for

sentencing under the Armed Career Criminal Act. (2) Yes. Defendant was barred from bringing procedurally defaulting challenges to the remaining predicate convictions. Pettiford's belief that a challenge to two of the five predicate offenses supporting enhanced sentencing would have been futile because two of the remaining three offenses required to support the enhanced sentence had not been vacated yet did not excuse his procedural default by failing to challenge the two convictions at sentencing or on direct appeal. (3) No. Defendant did not make an argument that he did not commit the crime he was trying to have vacated as a predicate offense under ACCA. The defendant's argument that his prior conviction should not have been classified as a violent felony under ACCA was not recognizable as a claim of actual innocence.

***United States v. Carter*, 601 F.3d 252 (4th Cir. 2010) (J. Harwell—by designation)**

Facts: Officers observed Defendant taking part in suspected drug activity. They followed him to a convenience store, and when Defendant left the store, he noticed an officer near his vehicle. Defendant turned to enter the store again. One officer identified himself, but Defendant continued walking towards the store. The officer tried to grab the Defendant, but he pulled away and ran, tossing a plastic bag along the way, which was later found to contain crack cocaine. Officers received a 911 call informing them that Defendant entered an apartment. Upon arrival, the tenant met the police outside and the officers went into the apartment and took Defendant into custody. Subsequently, he was charged with, and plead guilty to, possession with intent to distribute cocaine base. At sentencing, the court applied a two-level enhancement to his sentence under U.S.S.G. § 3C1.2 for reckless endangerment during flight. Defendant appealed, arguing the court erred: (1) by concluding the tenant was present in his apartment when Defendant entered without permission; and (2) by finding his conduct was sufficient to support the enhancement for reckless endangerment during flight.

Held: Affirmed. (1) The court concluded that the district court did not clearly err in determining that the tenant was present in the apartment when Defendant entered, based on second-hand hearsay testimony from an officer involved in the case and after dismissing a handwritten statement of the tenant as “illegible.” (2) The court concluded that, when a defendant during flight from police enters the residence of another person without the other person’s permission, and regardless of whether that other person is present within the residence at the time of entry, the enhancement under U.S.S.G. § 3C1.2 is triggered.

***United States v. Lewis*, 606 F.3d 193 (4th Cir. 2010) (J. King)**

Facts: In 2006, Defendant was sitting in the driver’s seat of a parked car when police officers approached his vehicle. After noticing an open beer bottle, the officers asked Defendant to step out. They then searched the vehicle and found a semiautomatic handgun with an extended magazine in the driver’s seat. The Defendant was charged and, two years later, was convicted of being a felon in possession. During the trial, the district court denied

Defendant's motion to suppress the handgun as the product of an unlawful search, and it used the 2005 version of the Sentencing Guidelines to calculate his Guideline range, rather than the 2008 version stating that applying the 2008 version would violate the Ex Post Facto Clause. On appeal, the Government argued that the district court would not have violated the Ex Post Facto Clause by applying the 2008 version of the Guidelines because they are advisory. Defendant cross-appealed arguing that his motion to suppress should have been granted.

Held: Affirmed as to both appeals. The Defendant's motion to suppress was properly denied. The officers had not seized the Defendant when they approached his vehicle, and they had probable cause to search the vehicle when they saw the open bottle. The district court did not err by applying the 2005 version of the Guidelines. Because the Guideline range is the crucial starting point for sentencing, the retroactive application of an upwardly amended advisory sentencing range poses a significant risk of an increased sentence sufficient to violate the Ex Post Facto Clause.

United States v. Peterson, 607 F.3d 975 (4th Cir. 2010) (J. Hamilton)

Facts: As part of a divorce settlement, Defendant needed to deposit \$100,000 cash, hidden in her safe deposit box, into a bank account. In an attempt to evade the currency reporting requirements of 31 U.S.C. § 5313(a), Defendant broke up her deposit into eleven separate deposits, which she made in a one-month period. Defendant pled guilty to violating 31 U.S.C. § 5313(a) and received a two-level enhancement pursuant to USSG § 2S1.3(b)(2) because the sentencing court determined she engaged in a pattern of unlawful activity involving more than \$100,000 in a twelve month period. Defendant appealed the enhancement arguing that she did not engage in a pattern of unlawful activity because the source of her deposits was the same for all deposits.

Held: The court affirmed the enhancement. The source of the deposits is irrelevant under USSG § 2S1.3(b)(2). This Guideline section applies to serial structuring involving a defendant who structures a series of deposits. Taking the source of the deposits into consideration would lead to absurd results (e.g. a defendant who structures deposits with cash in a safe deposit box and cash hidden in her closet would be punished more severely than a defendant who structures deposits with the same amount of cash, but only from her safe deposit box).

United States v. Alvarado Perez, 609 F.3d 609 (4th Cir. 2010) (J. Alarcón)

Facts: Defendant was convicted in 2006 of a sex offense. In 2007, he was called into the probation office because he had missed several meetings with his probation officer. When he arrived, Immigrations and Customs Enforcement agents approached him about his illegal immigration status. Defendant admitted to being illegally in the country and was arrested and searched. Agents discovered that Defendant had brought a loaded

revolver to the probation office. Defendant pled guilty to being a felon in possession under 18 U.S.C. § 922(g)(1). The sentencing court applied three sentencing enhancements under U.S.S.G. §§ 2K2.1(b)(6), 5K2.3, and 5K2.7, and the court applied an upward variance after considering the 18 U.S.C. § 3553(a) factors. Defendant appealed the enhancements and variance.

Held: Affirmed. The court reviewed the facts and circumstances and determined that the sentencing court did not clearly err in any of its sentencing enhancements. The court then reviewed the findings of the sentencing court and held that the sentencing court did not abuse its discretion in applying the upward variance.

***United States v. White*, 606 F.3d 144 (4th Cir. 2010) (J. Agee)**

Facts: Defendant was convicted of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence. This conviction was based on a prior Virginia conviction for assault and battery against a family or household member. On appeal, Defendant argued that the Virginia definition for assault and battery is broader than and encompasses conduct not included in the definition for misdemeanor crime of domestic violence as supplied in the Guidelines.

Held: Reversed. After considering precedent from other circuits and Supreme Court precedent, the court held that the Guideline definition for misdemeanor crime of domestic violence, which involves the use of “physical force,” necessarily contains the element of violent force that is capable of causing physical pain or injury to another person. After reviewing the trial transcripts from Virginia, the court determined that there was nothing that indicated Defendant used “physical force” or violent force during the misdemeanor.

VIII. RULES OF EVIDENCE

***United States v. Johnson*, 599 F.3d 339 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant was observed in an open-air drug market, on video camera by an officer at a nearby police station making quick hand-to-hand contact with several men, each of whom immediately hurried away. It appeared to the officer that something small was passed between the men, and the officer concluded that drug exchanges had occurred. The officer called for officers to investigate the scene while he continued to monitor the video camera. Defendant milled on the sidewalk, turned down a side street and returned to his previous position. Eventually, the officer observed Defendant head to a local Chinese restaurant with two others following him. Officers arrived on the scene as Defendant entered the restaurant with one man, while another continued walking past the restaurant. Officers identified themselves and asked to see Defendant’s hands. The Defendant threw a gelcap over the restaurant counter and a struggle ensued; eventually, Defendant was arrested. The officer at the police station viewed earlier recordings of video surveillance

and noticed that before the suspected drug deals, Defendant went to a car on the street, opened the passenger door, shut it, paced back and forth, reached back into the car and came out holding something in his hand. At the scene, an officer looked inside the passenger window of the car and saw a plastic bag containing gelcaps and a set of keys. He opened the door and saw vials of suspected cocaine. A later search revealed 56 heroin gelcaps, 39 cocaine vials, a mirror and scale, razor blade, and a firearm. Defendant was charged with, and convicted of, drug and firearm charges. Defendant was sentenced to 360 months' imprisonment. Defendant appealed: (1) the denial of his suppression motions; (2) the sufficiency of the evidence on the firearm charges; and (3) raised a Sixth Amendment objection to part of his sentence.

Held: Affirmed. (1) The court found that it was reasonable in the officer's experience for the officer to infer that Defendant's behavior on the sidewalk was related to drug transactions. The court rejected Defendant's contention that the officer's experience, regardless of its extent, could transform his outwardly legal behavior into something suspicious. The court also criticized Defendant for disregarding the factual findings of the district court, noting that "[d]istrict courts offer an unbiased forum to test the conclusions of police, and they possess a perspective that appellate forums cannot match." (2) The court held that Johnson was properly seized by an officer in possession of reasonable suspicion when he threw away the gelcap in the restaurant. Additionally, the court held that the money recovered from Defendant was found during a search incident to a lawful arrest, for which the officers had probable cause once they saw the gelcap. (3) The court held that there was probable cause to search Defendant's car.

***United States v. Carter*, 601 F.3d 252 (4th Cir. 2010) (J. Harwell—by designation)**

Facts: Officers observed Defendant taking part in suspected drug activity. They followed him to a convenience store, and when Defendant left the store, he noticed an officer near his vehicle. Defendant turned to enter the store again. One officer identified himself, but Defendant continued walking towards the store. The officer tried to grab the Defendant, but he pulled away and ran, tossing a plastic bag along the way, which was later found to contain crack cocaine. Officers received a 911 call informing them that Defendant entered an apartment. Upon arrival, the tenant met the police outside and the officers went into the apartment and took Defendant into custody. Subsequently, he was charged with, and plead guilty to, possession with intent to distribute cocaine base. At sentencing, the court applied a two-level enhancement to his sentence under U.S.S.G. § 3C1.2 for reckless endangerment during flight. Defendant appealed, arguing the court erred: (1) by concluding the tenant was present in his apartment when Defendant entered without permission; and (2) by finding his conduct was sufficient to support the enhancement for reckless endangerment during flight.

Held: Affirmed. (1) The court concluded that the district court did not clearly err in determining that the tenant was present in the apartment when Defendant entered, based on

second-hand hearsay testimony from an officer involved in the case and after dismissing a handwritten statement of the tenant as “illegible.” (2) The court concluded that, when a defendant during flight from police enters the residence of another person without the other person’s permission, and regardless of whether that other person is present within the residence at the time of entry, the enhancement under U.S.S.G. § 3C1.2 is triggered.

***United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendants, MS-13 members, were convicted for conspiracy to participate in racketeering activity (RICO and VICAR), conspiring to commit murder, and possession of firearms during a crime of violence. On appeal, Defendants raised several issues: double jeopardy, crimes of violence, and evidentiary matters.

Held: Double Jeopardy: Defendants argued that the murder conspiracy was part of the same conduct that constituted the racketeering conspiracy, and therefore, conviction and sentencing as to both violated double jeopardy. The court applied the *Blockburger* test (two offenses are separate if they each require a distinct element that the other does not have) and held that the two offenses were separate, and therefore conviction on both offenses did not violate double jeopardy.

Crime of Violence: Defendants argued that the racketeering conspiracy was not a crime of violence as some racketeering activities are not inherently violent and as the Government did not state in the indictment the predicate acts underlying the conspiracy. The court rejected this argument stating that the key issue is whether the racketeering conspiracy was a violent crime (which it was here), and not whether the predicate acts underlying the conspiracy are violent.

Evidentiary: Defendants raised several evidentiary issues including the admission of past guilty pleas, the admission of statements to grand juries, admission of expert testimony that relied on hearsay statements, and limitations on cross-examinations in the district court. The court rejected all these arguments.

***United States v. Roe*, 606 F.3d 180 (4th Cir. 2010) (J. Agee)**

Facts: Defendant was a hired security officer for NASA facilities. One night, he was driving in an unmarked car that appeared like a police vehicle (e.g. paint, lights, siren, etc.). A real police officer in an unmarked car pulled him over. Defendant left his car and declared that he was a federal police officer. At trial for impersonating an officer of the United States, the police officer testified that Defendant’s certifications and licenses did not grant him any arrest authority or turn him into a police officer. Defendant was convicted and on appeal, he argued that the district court erred (1) by admitting the police officer’s testimony because he was not a qualified expert who could testify on the subject matter, (2) by finding the evidence presented sufficient to convict him of impersonating a federal officer, and (3) by constructively amending the jury instructions when it inserted the word “police” before the word “officer.”

Held: Affirmed. (1) The district court did not err by admitting the police officer's testimony because it was admissible lay testimony rationally based on the perception of the witness. (2) The district court did not err in upholding the verdict because the evidence supporting it was sufficient. Specifically, the evidence was sufficient to show that Defendant acted as a federal police officer in a single chain of unbroken events. (3) The district court did not constructively amend the indictment by inserting the word "police" before the word "officer" in its jury instructions. If anything, the word "police" limited the scope of the charge, and at worst, made it a lesser included offense of impersonating a federal officer.

***United States v. Johnson*, __ F.3d __, 2010 WL 3307360 (4th Cir. 2010) (J. Gregory)**

Facts: As a result of an undercover investigation, Defendant had been convicted of conspiring to possess with the intent to distribute cocaine. At trial, the Government presented evidence of a wiretapped conversation between Defendant and his alleged coconspirator. The Government offered the expert testimony of a DEA agent to interpret some of the lingo in the conversation. Also, another witness testified to working some drug deals with the Defendant five years prior to the alleged conspiracy. On appeal, Defendant argued that the district court erred by (1) improperly admitting the DEA agent's testimony as expert testimony, and (2) improperly admitting the witness testimony because it was irrelevant to the alleged conspiracy.

Held: Reversed and Remanded. (1) The district court erred by admitting the DEA agent's testimony as expert testimony. This testimony was inadmissible as lay opinion testimony under Rule 701 because the agent did not actually observe the wiretap or participate in it. The testimony was also inadmissible under Rule 702 because the agent never discussed the methodologies or guiding principles that allowed him to interpret the lingo in the taped conversations. (2) The district court erred by admitting the witness testimony because it was irrelevant. The witness described events that occurred five years prior to the alleged conspiracy and the testimony did not link the Defendant to the alleged coconspirators. Taken in the context of the conspiracy charge, the testimony was wholly irrelevant.

IX. TRIAL

***United States v. Green*, 599 F.3d 360 (4th Cir. 2010) (J. Davis)**

Facts: Defendants were convicted for being part of a drug conspiracy and for money laundering. They were acquitted of use of a communication facility in furtherance of the drug conspiracy and of three drug distribution charges. Defendants raised several issues on appeal: sufficiency of evidence, conflicting verdicts, suppression, *Batson*, and jury charge.

Held: Sufficiency of evidence: Defendants argued that the Government's evidence was

insufficient to support the convictions because much of the evidence was coconspirator testimony. The court disagreed holding that the jury was entitled to credit that testimony as much as they found it to be credible and accurate.

Conflicting verdicts: Defendants argued that acquittal on the related charges shows that the evidence was insufficient to prove a drug conspiracy. The court disagreed holding that inconsistent jury verdicts do not call into question the legitimacy of guilty verdicts.

Suppression: Defendants argued that the district court should have suppressed \$54,000 in cash found under Defendants' bed. The court disagreed holding that the cash was found as part of a protective sweep and that a suspect could have reasonably been hiding underneath Defendants' bed.

Batson: Defendants argued that the district court erred by rejecting their *Batson* challenge to the prosecution using its peremptory strikes to remove teachers from the jury. The court held that this was not a Constitutionally protected classification.

Jury Charge: Defendants argued that the district court erred by not including his "theory of the defense" instruction. The court disagreed holding that the instruction had been given, albeit in parts and in different portions of the instruction.

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010) (J. Motz)

Facts: As a result of an undercover investigation, Defendant was discovered to have posted child pornography to Yahoo! forums. The FBI issued administrative subpoenas to Yahoo! and to the Internet service provider to access the Defendant's identity. They executed the resulting search warrant at the Defendant's mother's home and seized his laptop from his room. At trial, the Defendant moved to suppress all the seized evidence as products of an unlawful search. The district court denied the motion. On appeal, the Defendant argued that (1) the Government's use of secretive administrative subpoenas violated his Fourth Amendment rights, (2) the search warrant was not supported by probable cause, (3) the Government did not produce sufficient evidence to prove that the Defendant was the offender, (4) the Government did not produce sufficient evidence to prove that the children in the pornography were real children, and (5) his within-Guidelines sentence was "insane" for being too long.

Held: Affirmed. (1) The secretive administrative subpoenas did not violate the Fourth Amendment because the Defendant did not have a reasonable expectation of privacy in his Internet subscriber information. Defendant had volunteered all that information and he had also assumed the risk that the companies would reveal that information when he subscribed. (2) The search warrant was supported by probable cause because the affidavit supporting the warrant established a fair probability that a search of the mother's home might uncover evidence of child pornography. (3) There was sufficient evidence to prove the Defendant was the offender. The Yahoo! screenname that posted the images matched the Defendant's screenname. The bedroom containing the seized computer was the same bedroom used in Defendant's profile photo. The computer contained chat histories in which Defendant described the child pornography to others. (4) There was

sufficient evidence to prove that the children in the pornography were real. The jury had time to view the relevant images and had heard an expert who testified that the children in the pornographic images were real. (5) The Defendant had not produced any evidence to show that a within-Guidelines sentence is excessive for him.

***United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendants, MS-13 members, were convicted for conspiracy to participate in racketeering activity (RICO and VICAR), conspiring to commit murder, and possession of firearms during a crime of violence. On appeal, Defendants raised several issues: double jeopardy, crimes of violence, and evidentiary matters.

Held: Double Jeopardy: Defendants argued that the murder conspiracy was part of the same conduct that constituted the racketeering conspiracy, and therefore, conviction and sentencing as to both violated double jeopardy. The court applied the *Blockburger* test (two offenses are separate if they each require a distinct element that the other does not have) and held that the two offenses were separate, and therefore conviction on both offenses did not violate double jeopardy.

Crime of Violence: Defendants argued that the racketeering conspiracy was not a crime of violence as some racketeering activities are not inherently violent and as the Government did not state in the indictment the predicate acts underlying the conspiracy. The court rejected this argument stating that the key issue is whether the racketeering conspiracy was a violent crime (which it was here), and not whether the predicate acts underlying the conspiracy are violent.

Evidentiary: Defendants raised several evidentiary issues including the admission of past guilty pleas, the admission of statements to grand juries, admission of expert testimony that relied on hearsay statements, and limitations on cross-examinations in the district court. The court rejected all these arguments.

***United States v. Roe*, 606 F.3d 180 (4th Cir. 2010) (J. Agee)**

Facts: Defendant was a hired security officer for NASA facilities. One night, he was driving in an unmarked car that appeared like a police vehicle (e.g. paint, lights, siren, etc.). A real police officer in an unmarked car pulled him over. Defendant left his car and declared that he was a federal police officer. At trial for impersonating an officer of the United States, the police officer testified that Defendant's certifications and licenses did not grant him any arrest authority or turn him into a police officer. Defendant was convicted and on appeal, he argued that the district court erred (1) by admitting the police officer's testimony because he was not a qualified expert who could testify on the subject matter, (2) by finding the evidence presented sufficient to convict him of impersonating a federal officer, and (3) by constructively amending the jury instructions when it inserted the word "police" before the word "officer."

Held: Affirmed. (1) The district court did not err by admitting the police officer's testimony because it was admissible lay testimony rationally based on the perception of the witness. (2) The district court did not err in upholding the verdict because the evidence supporting it was sufficient. Specifically, the evidence was sufficient to show that Defendant acted as a federal police officer in a single chain of unbroken events. (3) The district court did not constructively amend the indictment by inserting the word "police" before the word "officer" in its jury instructions. If anything, the word "police" limited the scope of the charge, and at worst, made it a lesser included offense of impersonating a federal officer.

***United States v. Wilson*, __ F.3d __, 2010 WL 3495876 (4th Cir. 2010) (J. Agee)**

Facts: Defendant had been convicted of kidnaping resulting in death, conspiring to kidnap, and three firearms violations. At trial, several witnesses and investigators testified to Defendant's guilt in the kidnaping and conspiracy. Prosecutors also presented evidence of a subsequent shooting involving the Defendant. On appeal, Defendant raised numerous issues on evidence, closing argument, confession, and *Brady*.

Held: Affirmed.

Evidence: The district court did not err by admitting evidence regarding the subsequent shooting involving the Defendant. The court was confident that this evidence, in light of all the other evidence admitted against the Defendant at trial, did not substantially sway the conviction. Also, the district court had issued a limiting instruction to the jury that would have mitigated this issue further.

Closing Argument: The prosecutor's closing argument was not improper. Some statements, if viewed in isolation, could be improper if made in the context of the kidnaping. However, these statements were made in the context of the other charges, and were proper in those contexts.

Confession: The district court did not err in admitting Defendant's confession, which he had made to civilian authorities while a member of the military. Defendant had read and signed a statement indicating he understood his right to silence. He subsequently waived that right by speaking with the investigators. The district court did not err in finding not credible the Defendant's statement that he felt he was being ordered to give a confession.

Brady: The district court did not err in denying Defendant's motion for a new trial based on an alleged *Brady* violation. The district court found that the new evidence was neither material nor exculpatory, and it also found the new testimony to be not credible.

***United States v. Ashley*, 606 F.3d 135 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant had been convicted of conspiring to kill an informant in retaliation for providing information to law enforcement and of possessing and discharging a firearm in furtherance of the crime. A suspected drug dealer had befriended Defendant and told him that he wished to have an informant taken care of. Defendant then brokered a deal between the suspected drug dealer and a shooter to kill the informant. At trial, the jury

instructions had omitted the indictment's "during an in relation to" language regarding the firearm possession offense, telling the jury it could convict for possession "in furtherance of" a crime of violence. The jury instructions also included an aiding and abetting instruction even though there had not been an aiding and abetting charge in the indictment. On appeal, the Defendant argued that the district court erred (1) by upholding the conspiracy conviction when there was insufficient evidence that he conspired to kill in retaliation, (2) by constructively amending the indictment when it omitted the "during and in relation to" language from the jury instructions, and (3) by including an aiding and abetting instruction when there was no aiding and abetting charge in the indictment.

Held: Affirmed. (1) The jury had sufficient evidence to convict on the conspiracy charge. Given the facts of the case, the jury could have reasonably inferred that the Defendant had conspired to kill in retaliation for providing information. (2) The district court did not constructively amend the indictment. A constructive amendment to an indictment occurs only if the Government broadens the bases for conviction beyond those charged in the indictment. Here, the distinction between "during and in relation to" and "in furtherance of" is subtle, and according to the drafters of the provision, "in furtherance of" is a slightly higher standard than "during and in relation to." At worst, the jury was instructed on a lesser included offense, which is not a constructive amendment. (3) The district court did not err by including the aiding and abetting instruction. The court adopted the position of the other circuits holding that a district court does not constructively amend an indictment when it gives an aiding and abetting instruction based on vicarious coconspirator liability not charged in an indictment.

***United States v. Novak*, 607 F.3d 968 (4th Cir. 2010) (J. Hamilton)**

Facts: Defendant had fathered children in California and New York with two different women. He married the woman in New York and owned a marital home there. In 2003, the wife filed for divorce and shortly after, the Defendant went to Virginia to complete a consulting contract. While in Virginia, the Defendant lived in a furnished, company-rented apartment and traveled to New York once a week to visit his child. His belongings and documents stayed in the marital home. In 2007, the Defendant was arrested in Virginia for willfully failing to pay child support under 18 U.S.C. § 228(a)(3). At trial, Defendant argued that venue in Virginia was not proper because he did not reside there. The district court instructed the jury that venue is proper where the Defendant "resides" and that "reside" simply means the act or fact of living in a given place for an extended period of time. The jury convicted the Defendant, and he appealed this instruction arguing that "reside" includes an intent to remain in a given place.

Held: Affirmed. The court did not err in its instruction to the jury regarding the meaning of "reside." The definition of "reside" does not include an intent to remain in a given place, which is more akin to the definition of "domicile." "Reside" means a place where a person regularly lives or has a home as opposed to where the person might visit or

vacation.

***United States v. Young*, 609 F.3d 348 (4th Cir. 2010) (C.J. Traxler)**

Facts: Federal agents had been staking out Defendant's home pursuant to the execution of an arrest warrant. They witnessed Defendant's friend, Wynter, knock on Defendant's front door, which was quickly opened. Wynter entered and later left with a red bag. The agents stopped Wynter and discovered packaged bundles of cash in the red bag. They returned to Defendant's home and knocked and announced their presence. When Defendant did not answer the door after twenty seconds, the agents entered the home. They found Defendant with a gun in his waistband and bricks of cocaine in plain view in his kitchen. The agents then applied for a search warrant, received it, and began searching the house. They found two kilograms of cocaine in the kitchen, three kilograms of cocaine in the washing machine, cash, and cell phones, some of which were used to call Wynter. After a jury convicted Defendant, the sentencing court refused to sentence according to the amount of cocaine specified in the presentence report, which was greater than the amount found by the jury, stating that it was not free to depart from a jury finding even during sentencing. Defendant appealed arguing: (1) evidence seized from his home should have been suppressed because the officers entered his home without properly knocking and announcing, (2) the Government's evidence was insufficient to prove a conspiracy to distribute cocaine because it merely showed a buyer-seller relationship between Defendant and Wynter. The Government cross-appealed arguing that (3) the sentencing court should have been free to consider an amount of cocaine greater than that found by the jury so long as the greater amount is supported by a preponderance of the evidence.

Held: The 4th Circuit affirmed in part, vacated in part, and remanded for resentencing. (1) The evidence from Defendant's home was properly seized because the officers waited twenty seconds before they entered the home. Twenty seconds was a reasonable amount of time because the officers had just witnessed a quick response to Wynter's knock and because the home was relatively small. The officers' use of the arrest warrant as a pretext for entering Defendant's home is irrelevant because they received a search warrant before searching the home. (2) The Government's evidence was sufficient to prove a conspiracy to distribute cocaine because it established more than a buyer-seller relationship. The evidence established that Defendant possessed almost five kilograms of cocaine, a quantity much too great for personal consumption, that Defendant and Wynter both possessed a large amount of cash common in a drug distribution scheme, and that Defendant used multiple cell phones to communicate with Wynter, also common in a drug distribution scheme. (3) The sentencing court was free to consider whether the Government could establish a higher quantity of cocaine under a preponderance of the evidence standard. It was not limited to the jury's finding.

X. MISCELLANEOUS ISSUES

***United States v. Lighty*, __ F.3d __, 2010 WL 3156777 (4th Cir. 2010) (J. Hamilton)**

Facts: Defendant had been convicted of kidnaping resulting in death, conspiring to kidnap, and possessing firearms relating to the kidnaping. The Government pursued and the jury imposed the death penalty. On appeal, Defendant argued numerous issues on severance, evidence, closing arguments, mitigating evidence, jury instructions, the indictment, passion/prejudice/arbitrary factor, consecutive sentences, and new trial.

Held: Severance: The district court did not err by refusing to sever Defendant's trial from that of a codefendant, who had been charged in the same indictment. The court held that their defenses were not antagonistic, did not limit the evidence they could present, and did not limit their right to individual sentences.

Evidence: The court affirmed several of the district court's decisions regarding the admission of evidence.

Closing Argument: The court held that the prosecutor did make two improper arguments in closing, but that these arguments did not affect Defendant's substantial rights.

Mitigating Evidence: The district court did not err by refusing to admit certain pieces of mitigating evidence during the penalty phase.

Jury Instructions: The district court did not err by failing to instruct the jury that it was not required to impose the death penalty.

Indictment: The court held that a nonstatutory aggravating factor need not be included in an indictment.

Passion/Prejudice/Arbitrary Factor: The court held that Defendant's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Consecutive Sentences: The district court did not err by imposing consecutive sentences.

New Trial: As in *Wilson*, the district court did not err by refusing to grant a new trial or new sentencing hearing.

***United States v. Garcia-Ochoa*, 607 F.3d 371 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant was a Temporary Protected Status (TPS) alien who made false statements regarding his citizenship status on several I-9 Forms in contravention of 18 U.S.C. § 1001 and 1546(a). Based on these false assertions of citizenship, Defendant secured employment with Heard Concrete Construction, which worked on naval bases, and the Navy granted Defendant complete access to all naval bases throughout the mid-Atlantic. Naval screening revealed Defendant's false I-9 statements. At trial, the court rejected Defendant's argument that his statements were immaterial as he was authorized to work regardless of his I-9 statements. Defendant appealed.

Held: Affirmed. Defendant's statements were material because they had a natural tendency to

or were capable of influencing agency action. False I-9 statements were capable of affecting how United States Immigration and Customs Enforcement monitored employers and employees. Furthermore, the false I-9 statements actually caused the Navy to issue a clearance to Defendant that it otherwise would not have issued.

***United States v. Jalaram, Inc.*, 599 F.3d 347 (4th Cir. 2010) (J. Motz)**

Facts: Defendants were convicted by a jury of violating the Mann Act, conspiracy to violate the Mann Act, money laundering, and conspiring to commit money laundering. The district court vacated the money laundering convictions for insufficiency of the evidence and set aside the other convictions and ordered a new trial based on error in its jury instructions. The Government appealed and the Fourth Circuit reversed, finding the district court improperly vacated the money laundering convictions and erred in finding its jury instructions improper; the jury verdict was reinstated and the case remanded for resentencing. On remand, the Government sought to enforce the jury verdict and obtain forfeiture of property and gross proceeds of the conspiracy. The district court denied the Government's request, finding the forfeiture would be grossly disproportionate to this particular defendant's crime and therefore against the Eighth Amendment's prohibition on excessive fines. The Government appealed.

Held: The judgment was reversed and remanded for further proceedings. The court held that the forfeiture of criminal proceeds constitutes punishment to which the Excessive Clause fine applies. However, the Defendant's offense was serious and its individual culpability was significant, therefore it could not meet its burden to show the forfeiture was grossly disproportionate to the crime.

***United States v. Claridy*, 601 F.3d 276 (4th Cir. 2010) (J. Niemeyer)**

Facts: Defendant was arrested and convicted for various drugs and weapons charges as part of a joint federal-state law-enforcement task force investigation in Maryland. Before the arrest, a Maryland officer, who had also been federally deputized as part of the joint task force investigation, had applied for and received a search warrant from a Maryland judge. Execution of the warrant led to Defendant's arrest and conviction. Prior to trial, Defendant moved to suppress all evidence obtained through the warrant arguing that the Maryland officer violated Rule 41(b) of the Federal Rules of Criminal Procedure because, as part of a federal investigation, he did not attempt to obtain the warrant from a federal magistrate judge before obtaining the warrant from a state judge. The district court denied the motion, and Defendant raised the same argument on appeal.

Held: Affirmed. Under Rule 41(b), in a federal criminal proceeding, a magistrate judge can issue a search warrant at the request of a federal law enforcement officer. A state judge may issue the warrant if no magistrate judge is reasonably available. The court holds, however, that Rule 41(b) applies to federal criminal *proceedings*, and the federal nature

of an *investigation* does not turn the search warrant proceeding into a federal one. Alternatively, nothing prevents a joint task force from using either federal or state investigatory tools. Here, the Maryland officer applied for a state search warrant, and the state judge issued the warrant to a state police officer. This conduct violated neither state nor federal rules.

***United States v. Joshua*, 607 F.3d 379 (4th Cir. 2010) (J. Duncan)**

Facts: Defendant was an Army officer prosecuted by military court-martial for sexually molesting children. After pleading guilty, the court-martial sentenced him to twenty-five years imprisonment. Defendant started serving his sentence at a military facility, but was later transferred to the Federal Correctional Institute in Butner, North Carolina operated by the Bureau of Prisons. Eight days before his release, the Attorney General certified Defendant as sexually dangerous and petitioned for civil commitment under § 4248. Defendant moved to dismiss the petition arguing that he was not “in the custody of the Bureau of Prisons” under 18 U.S.C. § 4248(a). The district court granted the petition and the Government appealed.

Held: Affirmed. Using principles of statutory interpretation, the court concluded that “custody” cannot refer to mere physical custody or some qualified derivative, but to legal custody. The Defendant was not under the legal custody of the Bureau of Prisons because the BOP merely housed the Defendant as a service to another entity responsible for his incarceration.

***United States v. Pettiford*, 612 F.3d 270 (4th Cir. 2010) (J. Duncan)**

Facts: Pettiford pled to one count of being a felon in possession of a firearm in violation of 18U.S.C. §922(g) and received an enhanced sentence of 188 months imprisonment. The enhanced sentence came in part because Pettiford qualified as a career criminal under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). Subsequently two of the state court convictions were vacated and Pettiford petitioned for post-conviction relief from the enhanced federal sentence. The district court granted Pettiford's petition and resentenced him to 100 months. The Government appealed: (1) whether the vacatur of two of the five predicate convictions rendered Pettiford's sentence under the Armed Career Criminal Act unlawful; (2) whether defendant is barred from attacking a conviction based upon errors that could have been but were not pursued on direct appeal; and (3) whether defendant showed actual innocence to excuse the procedural default.

Held: (1) No. Defendant's sentence under the Armed Career Criminal Act was lawful as a result of the vacatur of two of the five predicate convictions. After the vacatur of the two convictions, three predicate convictions remained, meeting the statutory requirements for sentencing under the Armed Career Criminal Act. (2) Yes. Defendant was barred from bringing procedurally defaulting challenges to the remaining predicate convictions.

Pettiford's belief that a challenge to two of the five predicate offenses supporting enhanced sentencing would have been futile because two of the remaining three offenses required to support the enhanced sentence had not been vacated yet did not excuse his procedural default by failing to challenge the two convictions at sentencing or on direct appeal. (3) No. Defendant did not make an argument that he did not commit the crime he was trying to have vacated as a predicate offense under ACCA. The defendant's argument that his prior conviction should not have been classified as a violent felony under ACCA was not recognizable as a claim of actual innocence.