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

Cases Published Between October 1, 2012 and January 31, 2013

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I. INTRODUCTION

This outline summarizes Fourth Circuit decisions published between October 1, 2012 and January 31, 2013. 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 or laura_wasco@fd.org.

II. SPECIFIC OFFENSES

A. 18 U.S.C. § 2–Aiding and Abetting

***United States v. Day*, 700 F.3d 713 (4th Cir. 2012)(J. Wilkinson)**

Facts: Defendant orchestrated scheme to secure $8.6 million in Department of Defense contracts by setting up companies that delivered non-conforming parts for "critical application items" – parts essential to weapons systems operations and/or operator safety. Following arrest of some co-conspirators, defendant fled to Mexico, from where he directed the conversion of the profits to gold, which others then delivered to Mexico. Mexican authorities eventually arrested him and extradited him to the U.S. for wire fraud and smuggling prosecution. Jury convicted, and court sentenced him to Guideline sentence of 105 years. On appeal, defendant challenged court's use of a jury instruction for aiding and abetting as a constructive amendment of the indictment, which did not specify that theory of liability.

Held: Convictions and sentence affirmed. The court rejected the constructive amendment challenge, emphasizing that aiding and abetting provides an alternate theory of liability, and does not constitute a distinct offense.

B. 18 U.S.C. § 401–Power of court (Contempt)

***United States v. Peoples*, 698 F.3d 185 (4th Cir. 2012)(J. Motz)**

Facts: Defendant brought a number of 42 U.S.C. § 1983 civil actions against prison officials. Throughout these actions he arrived late to court a number of times, and was admonished by the judge repeatedly. The district judge dismissed his last case with prejudice when he arrived late yet again. After the judge left the bench, Mr. Peoples then approached the clerk and cursed out the judge. A contempt trial resulted for the colorful language, where Mr. Peoples arrived late, again. At the contempt trial, the district judge informed Mr. Peoples a second contempt trial would be held at the conclusion of the first trial as a result of his tardiness. Peoples was convicted at both contempt proceedings and appealed both convictions.

Held: "Peoples did more than merely utter profane words; he profanely threatened judicial authority." Court held ample evidence supported his conduct was misbehavior, it occurred in the courtroom and interrupted court personnel in their official duties and so obstructed the administration of justice. First conviction upheld. As to the second contempt proceeding, the Court found it did not comply with Fed. R. Crim. P. 42(a) procedural safeguards; and this error affected his substantial rights. Second conviction reversed.

C. 18 U.S.C. §§ 702 and 704(a)–Wearing Military Uniform/Medals Without Authorization

***United State v. Hamilton*, 699 F.3d 356 (4th Cir. 2012)(J. Keenan)**

Facts: Defendant served in the Marine Corps for nine months in the 1960's before being honorably discharged due to amputation of two fingers. He did not serve in combat or receive any awards, and he was not commissioned as an officer or deployed. After his discharge, he began receiving disability benefits from the VA based on the finger injury. Many years later, Defendant filed several additional VA disability claims, which falsely stated that he had served in Vietnam and was suffering from PTSD. Eventually, Defendant was diagnosed with PTSD and additional VA benefits were awarded. In addition, Defendant gave a speech at a Marine Corps ceremony while wearing full general's uniform, including a variety of awards and rank insignia that he had neever earned. He was invited to speak at the ceremony on the basis of false statements he made to the organizer about his military service.

Held: Evidence was sufficient to support convictions for making false statements to a government agency and stealing VA funds. Defendant deliberately communicated false accounts of military service to assessing VA physician, and it was clear from the record that the VA had awarded additional benefits on that basis and not on the basis of his finger injury.

D. 18 U.S.C. §§ 922(a)(6)–Straw Purchase

***United States v. Abramski*, – F.3d –, 2013 WL 238922 (4th Cir. 2013)(J. King)**

Facts: Defendant was charged and convicted of being a straw purchaser of a firearm and making a false statement with respect to records kept by firearms dealers.

Held: Acknowledging a circuit split, the Court held that fact that individual on behalf of whom defendant purchased a firearm was legally entitled to purchase such a firearm did not preclude a conviction for being a straw purchaser.

E. 18 U.S.C. § 922(g)–Felon in Possession

***United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012)(J. Motz)**

Facts: Defendant pled guilty to § 922(g), reserving the right to challenge the conviction under the Second and Fifth Amendments. Defendant was formerly a licensed firearms dealer, weapons collector and owner and operator of a military museum, but lost his rights to possess firearms after multiple offenses of illegal arms dealing. Pruess was arrested for attempting to buy belted ammunition, grenades, and flares from a confidential informant.

Held: (1) The statute does not violate the Second Amendment. The felon in possession statute was enumerated as "presumptively lawful" by the Supreme Court in *District of Columbia v. Heller,* 554 U.S. 570 (2008). Defendant failed to rebut the presumption of lawfulness by "showing his conduct was that of a law-abiding responsible citizen acting in defense of hearth and home." Defendant acknowledged that he believed the ammunition to be stolen, failing the "law-abiding responsible citizen" prong. The Court held that the ammunition in question was clearly designed for military purposes, thereby failing the "defense of hearth and home" prong. (2) The statute does not violate the Fifth Amendment's equal protection guarantee. Under rational basis review, the Court found that there is a plainly rational relation between the felon-in-possession statute and the Government interest in public safety.

***United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012)(J. Niemeyer)**

Facts: Defendant pled guilty to § 922(g)(5), possession of a firearm while being illegally in the United States. Defendant, who had been in the United States for 13 years, argued that he had no prior criminal record and that the weapons he possessed (a .22 caliber rifle and a 9mm handgun) were the type of arms a person might use in defense of hearth and home.

Held: The statute does not violate the Second Amendment or Equal Protection. Under *Heller* and the Fourth Circuit's subsequent analysis in *United States v. Chester,* 638 F.3d 673 (4th Cir. 2010), "illegal aliens do not belong to the class of law-abiding members of the political community to who the Second Amendment gives protection." The Court further held that, although illegal aliens are "persons" protected by the Fifth Amendment's equal protection clause, there is no fundamental right to possess firearms under the Second Amendment for illegal aliens. Hence, the appropriate standard of review for the equal protection challenge is rational basis review, and there is a rational connection between prohibiting illegal aliens from possessing firearms and public safety.

F. 18 U.S.C. § 1028/§ 1028A–Identity Theft

***United States v. Hilton*, 701 F.3d 959 (4th Cir. 2012)(J. Keenan)**

Facts: Defendants were convicted of, among other things, identity theft based on a scheme where they intercepted checks intended for a business where they worked and cashed the checks for themselves by establishing a bank account for an identically named company. Defendants challenged the convictions based on the fact that the statute did not cover theft of a business's identity.

Held: Convictions vacated. The statute is ambiguous over whether it covers businesses as well as individuals. Under the rule of lenity, the convictions could not stand.

G. 18 U.S.C. § 1341–Mail Fraud

***United States v. Hilton*, 701 F.3d 959 (4th Cir. 2012)(J. Keenan)**

Facts: Defendant was an office manager at a company. As part of her official duties, she mailed invoices and receipts to customers. As part of a fraud scheme, she would mail false invoices and receipts to customers and intercept checks intended for the business. She was convicted of, among other things, mail fraud. She argued that because her use of the mail was not the focus of her fraud but simply incidental to it, she did not fall under the mail fraud statute.

Held: No error. *Schmuck v. United States*, 489 U.S. 705 (1989) controls this issue. In *Schmuck*, the Supreme Court held that the use of the mail does not need to be the focus of the fraud, but simply needs to be incident to an essential part of the scheme or a step in the plot. In this case, the mailing of the invoices and receipts easily satisfied that standard.

***United States v. Gillion*, 704 F.3d 284 (4th Cir. 2012)(J. Duncan)**

Facts: Defendant, who worked for a trailer leasing company, created a sham side company with a similar name. On behalf of the side company, Defendant signed a lease-to-own agreement for eight trailers owned by the legitimate company with a customer of the legitimate company, and kept all of the profits. At trial, the government submitted that the legitimate company had a property interest in the stolen profits derived from the use of their trailers and customer, that the profits were obtained by Defendant's misrepresentations, and that the mailing of checks to Defendant by the customer was for the purpose of executing the scheme.

Held: Government provided sufficient evidence to prove each of the elements of mail fraud.

H. 18 U.S.C. § 1708–Mail Theft

***United States v. Hilton*, 701 F.3d 959 (4th Cir. 2012)(J. Keenan)**

Facts: Defendant worked as an office manager for a business. She had authority to take the company's mail from the company's post office box. She took checks from the post office box and then cashed them for herself as part of an overall fraud scheme. She was convicted of, among other things, mail theft. She argued that, because she had the authority to remove the checks, she was not guilty of mail theft but of common law larceny.

Held: No error. The relevant time period is the point at which the checks were removed from the P.O. Box—at which point they were still "mail." At that point, she had the intent to steal the checks. Additionally, under basic agency principles, her authority to remove the mail on behalf of the company did not extend to removing it to steal it.

I. 18 U.S.C. § 1951–Hobbs Act

***United States v. Min*, 704 F.3d 314 (4th Cir. 2012)(J. Duncan)**

Facts: Undercover government agents invented whole-cloth a drug stash house. Multiple defendants worked with the undercover agents to agree to rob the stash house and steal 5-10 kilos of cocaine. Defendants were convicted after trial of conspiracy to commit Hobbs Act robbery and conspiracy to possess the cocaine. Defendants challenged the conspiracy convictions as factual impossibilities because there was no stash house and no drugs.

Held: No error. In a case of first impression, the Fourth joined other circuits in holding that the impossibility and/or non-existence of the object of a conspiracy does not defeat a conviction for the conspiracy. The crime in a conspiracy is the agreement–the fact that it may end up being impossible to commit the object of the conspiracy is not necessary to a conviction.

J. 18 U.S.C. § 1956 - Money Laundering

***United States v. Day*, 700 F.3d 713 (4th Cir. 2012)(J. Wilkinson)**

Facts: Defendant orchestrated scheme to secure $8.6 million in Department of Defense contracts by setting up companies that delivered non-conforming parts for "critical application items" – parts essential to weapons systems operations and/or operator safety. Following arrest of some co-conspirators, defendant fled to Mexico, from where he directed the conversion of the profits to gold, which others then delivered to Mexico. Mexican authorities eventually arrested him and extradited him to the U.S. for wire fraud and smuggling prosecution. Jury convicted, and court sentenced him to Guideline sentence of 105 years. On appeal, defendant contended gold did not constitute "a monetary instrument or funds" to support money laundering conviction under 18 U.S.C. § 1956(a)(2).

Held: Convictions and sentence affirmed. Gold, as a "liquid asset," meets the statutory definition of "funds" for purposes of the money laundering offense.

K. 18 U.S.C. § 2252–Child Pornography

***United States v. Brown*, 701 F.3d 120 (4th Cir. 2012)(J. King)**

Facts: Defendant found guilty of receiving and possessing child pornography. Court vacated conviction for possession count, and sentenced him solely on the receipt count.

Held: Court properly adhered to a long line of authorities directing vacation of the conviction that carried the more lenient penalty when a defendant is convicted of both a greater and lesser-included offense.

L. 21 U.S.C. § 851–Cocaine

***United States v. Min*, 704 F.3d 314 (4th Cir. 2012)(J. Duncan)**

Facts: Undercover government agents invented whole-cloth a drug stash house. Multiple defendants worked with the undercover agents to agree to rob the stash house and steal 5-10 kilos of cocaine. Defendants were convicted after trial of conspiracy to commit Hobbs Act robbery and conspiracy to possess the cocaine. Defendants challenged the conspiracy convictions as factual impossibilities because there was no stash house and no drugs.

Held: No error. In a case of first impression, the Fourth joined other circuits in holding that the impossibility and/or non-existence of the object of a conspiracy does not defeat a conviction for the conspiracy. The crime in a conspiracy is the agreement–the fact that it may end up being impossible to commit the object of the conspiracy is not necessary to a conviction.

M. 36 C.F.R. § 4.23–Operating Under the Influence of Alcohol or Drugs

***United States v. Smith*, 701 F.3d 1002 (4th Cir. 2012)(J. Diaz)**

Facts: A jury convicted Defendant of involuntary manslaughter during the commission of an unlawful act not amounting to a felony. The underlying unlawful act was Defendant's alleged violation of 36 C.F.R. § 4.23(a)(2), prohibiting operating a motor vehicle with an alcohol concentration of .08% or more. Defendant asserted that the evidence produced by the government was insufficient to show her blood alcohol level exceeded .08% at the time of the accident, contending that the blood test showing a blood alcohol level of .09 was almost three hours later than the accident. Defendant argued that the court erred in denying her motion for judgment of acquittal, challenging the sufficiency of the government's evidence.

Held: Noting that § 4.23(a)(2) sets no explicit time limit for the taking of a blood alcohol test that may be used at trial to show a defendant's alcohol concentration, the court held that "the government may, in some circumstances, establish a 'per se' violation without direct evidence of the defendant's blood alcohol content while actually driving and without introduction of relation-back evidence." *Smith* at 1011-12. The court concluded that the blood alcohol test did not stand alone, but was considered in conjunction with expert testimony, witness observations of Defendant's erratic driving, and Defendant's own statements about her drinking and driving. The evidence was sufficient to support a rational juror's conclusion beyond a reasonable doubt that Defendant's blood alcohol content was above .08% at the time of the accident.

III. SECOND AMENDMENT

A. Presumption of Lawfulness

***United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012)(J. Motz)**

Facts: Defendant pled guilty to § 922(g), reserving the right to challenge the conviction under the Second Amendment. Defendant was formerly a licensed firearms dealer, weapons collector and owner and operator of a military museum, but lost his rights to possess firearms after multiple offenses of illegal arms dealing. Pruess was arrested for attempting to buy belted ammunition, grenades, and flares from a confidential informant.

Held: The statute does not violate the Second Amendment. The felon in possession statute was enumerated as "presumptively lawful" by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Defendant failed to rebut the presumption of lawfulness by "showing his conduct was that of a law-abiding responsible citizen acting in defense of hearth and home." Defendant acknowledged that he believed the ammunition to be stolen, failing the "law-abiding responsible citizen" prong. The Court held that the ammunition in question was clearly designed for military purposes, thereby failing the "defense of hearth and home" prong.

B. Fundamental Rights

***United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012)(J. Niemeyer)**

Facts: Defendant pled guilty to § 922(g)(5), possession of a firearm while being illegally in the United States. Defendant, who had been in the United States for 13 years, argued that he had no prior criminal record and that the weapons he possessed (a .22 caliber rifle and a 9mm handgun) were the type of arms a person might use in defense of hearth and home.

Held: The statute does not violate the Second Amendment. Under *Heller* and the Fourth Circuit's subsequent analysis in *United States v. Chester*, 638 F.3d 673 (4th Cir. 2010), "illegal aliens

do not belong to the class of law-abiding members of the political community to who the Second Amendment gives protection." The Court further held that although illegal aliens are "persons" protected by the Fifth Amendment's equal protection clause, there is no fundamental right to possess firearms under the Second Amendment for illegal aliens.

IV. FOURTH AMENDMENT / SUPPRESSION

A. *Terry* Stops and Frisk

***United States v. Bumpers*, 705 F.3d 168 (4th Cir. 2013)(J. Wilkinson)(J. Diaz, dissenting)**

Facts: Defendant filed a motion to suppress alleging his Fourth Amendment right to be free from unreasonable seizures was violated when an officer stopped him for suspicion of trespassing outside of a convenience store. The district court denied his motion, and the defendant was found guilty of being a felon in possession. On appeal, he challenged the district court's denial of his motion to suppress.

Held: Despite the fact that the standard of review for a question of law is de novo, deference must be paid to a lower court's assessment of facts surrounding a *Terry* stop and whether they amount to a reasonable, articulable suspicion of criminal activity. The district court is more familiar with the locations in which these stops occur, and is better equipped to assess the situation as a whole. In this case, the combination of a high-crime area, the location and manner in which the defendant and another individual were standing, and the defendant's evasive behavior, provided a sufficient basis for the *Terry* stop. The case provides a thorough discussion of *Terry* stops and cites many opinions helpful in drafting a motion to suppress. (J. Diaz, dissenting: Allowing *Terry* stops under these scant facts will unfairly burden individuals who live in high-crime neighborhoods.)

B. Traffic Stops

***United States v. Vaughan*, 700 F.3d 705 (4th Cir. 2012)(J. Davis)**

Facts: Defendant was driving a rental car with another individual when a Virginia state trooper pulled his vehicle over for speeding. Shortly after noticing four cell phones in the center console, including two "TracFones" (prepaid cell phones that may be obtained with no personal data), the passenger's obvious nervousness, and the different stories given by the defendant and passenger, the trooper requested a canine unit. While waiting on the canine unit, the trooper did background checks on defendant and the passenger. The canine unit arrived and gave a positive alert for narcotics; cocaine and a handgun were found in the trunk. The traffic stop lasted sixteen minutes. Defendant moved to suppress the evidence discovered at the traffic stop and argued that the trooper lacked reasonable suspicion to prolong the stop. Defendant appealed the district court's denial of his motion to suppress.

Held: Affirmed. Viewed in their totality, the circumstances were sufficient to generate a reasonable suspicion that criminal activity was afoot, including conflicting explanations regarding travel arrangements, multiple "TracFones" in the car, and nervous, evasive behavior. As a result, the trooper was justified in briefly extending the stop to confirm or allay his suspicions of criminal activity. The delay in this case was reasonable.

***United States v. Lawing*, 703 F.3d 229 (4th Cir. 2012)(J. Agee)**

Facts: Confidential informant told police, face-to-face, that he had previously bought cocaine from person known as "Drew," and gave police a description of Drew and his vehicle. CI phoned Drew, in presence of officers, and ordered a delivery of cocaine. Prior to Drew's arrival at CI's, police stopped a vehicle matching CI's description, driven by a person matching description of Drew, and driven along route identified by CI. A records check indicated the vehicle was registered in Lawing's name, which did not include given name of Drew. To verify Lawing was Drew, police called the same number the CI called to set up deal. Lawing's phone rang immediately. Police then searched vehicle, based on probable cause, and found a sawed-off-shotgun, and minuscule amount of cocaine. Defendant was federally charged with felon-in-possession of a firearm and ammunition, and of a sawed-off shotgun, 18 U.S.C. § 922(g)(1), 26 U.S.C. §§ 5841, 5861. District court denied his motion to suppress. Jury convicted on the felon-in-possession count and court sentenced him to 100 months' imprisonment. Defendant appealed the denial of suppression motion.

Held: The traffic stop was supported by reasonable suspicion. The CI's descriptive information to police, given face-to-face, matched the vehicle, driver, and route identified, all of which provided reasonable suspicion to stop the vehicle.

C. Search Warrant

***United States v. Abramski*, – F.3d –, 2013 WL 238922 (4th Cir. 2013)(J. King)**

Facts: Defendant was a suspect in a bank robbery. He argued a second search warrant issued (relating to marital home, not other home associated with him) was not supported by probable cause. From this search, a receipt was obtained that memorialized his purchase of a firearm for another individual.

Held: There was a substantial basis for a magistrate judge to conclude that probable cause existed for a search of Defendant's residence; the affidavit connected defendant to the bank robbery in numerous ways. Moreover, receipt memorializing transfer of firearm was within the scope of the search warrant, as it was found in a zippered bank bag with the logo from the robbed bank, and was for a firearm that was thought to have been used in the bank robbery.

D. Warrantless Search or Seizure

***United States v. Brown*, 701 F.3d 120 (4th Cir. 2012)(J. King)**

Facts: Law enforcement obtained a search warrant for medical transport company where Mr. Brown worked, looking for an IP address that was associated with child pornography. Law enforcement determined files were always downloaded when defendant and another person were on duty. No contraband was found at company, however, agents seized Mr. Brown's personal laptop from ambulance when he arrived back at the company.

Held: Seizure of laptop was reasonable and fell within exigent circumstances exception to the Fourth Amendment's warrant requirement.

***United States v. Lawing*, 703 F.3d 229 (4th Cir. 2012)(J. Agee)**

Facts: Confidential informant told police, face-to-face, that he had previously bought cocaine from person known as "Drew," and gave police a description of Drew and his vehicle. CI phoned Drew, in presence of officers, and ordered a delivery of cocaine. Prior to Drew's arrival at CI's, police stopped a vehicle matching CI's description, driven by a person matching description of Drew, and driven along route identified by CI. A records check indicated the vehicle was registered in Lawing's name, which did not include given name of Drew. To verify Lawing was Drew, police called the same number the CI called to set up deal. Lawing's phone rang immediately. Police then searched vehicle, based on probable cause, and found a sawed-off-shotgun, and minuscule amount of cocaine. Defendant was federally charged with felon-in-possession of a firearm and ammunition, and of a sawed-off shotgun, 18 U.S.C. § 922(g)(1), 26 U.S.C. §§ 5841, 5861. District court denied his motion to suppress. Jury convicted on the felon-in-possession count and court sentenced him to 100 months' imprisonment. Defendant appealed the denial of suppression motion.

Held: The search of the vehicle and cell-phone was supported by probable cause. The phone call to the same number used by the CI to set up the deal, together with the descriptive information, supplied probable cause to search the vehicle.

E. Statement as Result of Unlawful Arrest

***United States v. Watson*, 703 F.3d 684 (4th Cir. 2013)(J. Keenan)(J. Niemeyer, dissenting)**

Facts: Defendant worked at a convenience store and lived in one of several rooms located above the store. Police observed suspected drug transactions near the building and made several arrests, including one of a tenant of another room above the store. After the arrests, officers decided to obtain a search warrant for the building. While waiting for the warrant, officers detained Defendant for three hours, despite the fact that he was not a suspect. Officers ultimately found a gun and ammunition in the room belonging to Defendant who, after being

read his *Miranda* rights, gave an incriminating statement.

Held: District court erred by not suppressing Defendant's statement on Fourth Amendment grounds because it was the product of an unlawful detention, which lacked probable cause. Defendant The three-hour detention was unreasonable in light of the government's failure to demonstrate a legitimate public interest. Despite the fact that *Miranda* rights were given, statement was still a product of the unlawful arrest. Error was not harmless because it was clear from the government's evidence and the jury's deliberations that the statement was a critical component of the guilty verdict. (In dissent, Judge Niemeyer explained that he would have held that Defendant's presence in a building as to which officers had probable cause to search in relation to drug activity was enough to establish reasonable suspicion and that law enforcement had a legitimate interest in detaining occupants of the building while a search warrant was obtained.)

V. FIFTH AMENDMENT

A. Equal Protection

***United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012)(J. Motz)**

Facts: Defendant pled guilty to § 922(g), reserving the right to challenge the conviction under the Fifth Amendment. Defendant was formerly a licensed firearms dealer, weapons collector, and owner and operator of a military museum, but lost his rights to possess firearms after multiple offenses of illegal arms dealing. Pruess was arrested for attempting to buy belted ammunition, grenades, and flares from a confidential informant.

Held: The statute does not violate the Fifth Amendment's equal protection guarantee. Under rational basis review, there was a plainly rational relation between the felon-in-possession statute and the Government interest in public safety.

***United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012)(J. Niemeyer)**

Facts: Defendant pled guilty to § 922(g)(5), possession of a firearm while being illegally in the United States. Defendant, who had been in the United States for 13 years, argued that he had no prior criminal record and that the weapons he possessed (a .22 caliber rifle and a 9mm handgun) were the type of arms a person might use in defense of hearth and home.

Held: The statute does not violate the Fifth Amendment's guarantee of Equal Protection. Although illegal aliens are "persons" protected by the Fifth Amendment's equal protection clause, there is no fundamental right to possess firearms under the Second Amendment for illegal aliens. Hence, the appropriate standard of review for the equal protection challenge is rational basis review, and there is a rational connection between prohibiting illegal aliens from possessing firearms and public safety.

B. Voluntariness of Statement

***United States v. Ayesh*, 702 F.3d 162 (4th Cir. 2012)(J. Cogburn)**

Facts: Defendant, who was convicted of Theft of Public Money and Committing Acts Affecting a Personal Financial Interest, appeals the ruling on his motion to suppress. When the crime was discovered, Mr. Ayesh was flown to the United States under the pretense of training and taken into custody and questioned. He was offered food and drink on several occasions but declined. He took 3 bathroom breaks. The interviewers remarked that he looked "fine" and video of the interview shows that he was animated and active during the interview. He was informed of his rights in both English and Arabic two times. Additionally, a later search of his carry-on luggage revealed that it contained multiple food items. In total, the interview was less than 6 hours long. Defendant argues his statements were coerced because they were made during a lengthy interview after a 19-hour flight during which he went without sleep or food.

Held: In determining the voluntariness of a confession the court looks at the totality of the circumstances including police action and the defendant's situation. The key question is whether the defendant is "overborne" or his "capacity for self-determination has been critically impaired." Based on the totality of the circumstances, the confession was not coerced.

C. Double Jeopardy

***United States v. Jackson*, – F.3d –, 2013 WL 204690 (4th Cir. 2013)(J. Wilkinson)**

Facts: For the first time on appeal, Defendant argued his conviction violated the Double Jeopardy Clause because two conspiracy convictions were really a single conspiracy.

Held: The district court did not commit plain error, as the two conspiracies involved different individuals, they were conducted in different locations (60 miles apart), and Defendant had a very different role in each of the two operations.

***United States v. Ford*, 703 F.3d 708 (4th Cir. 2013)(J. Eagles)**

Facts: Defendant was tried by a jury on one count of unlawfully possessing a firearm; he was earlier convicted of a crime punishable by imprisonment for a term exceeding one year. At trial, Defendant objected to the introduction of a North Carolina conviction in 2003 for which he was sentenced to 8-10 months in prison; North Carolina's sentencing laws at the time prevented Defendant's sentence from exceeding 12 months, given his prior criminal record. Defendant objected that his 2003 conviction was inadmissible because it was for a crime not punishable by more than a year in prison, however the court overruled Defendant's objection. The jury found Ford guilty of being a felon in possession of a firearm, the Court sentenced

him to 78 months, and he appealed. The Court of Appeals reversed and remanded the conviction due to a post-trial change in the law by *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011). On remand, the court allowed the government to retry Ford based on other previous convictions, for crimes indisputably punishable by more than a year in prison. Ford was convicted again and appealed on grounds of double jeopardy.

Held: The Double Jeopardy Clause did not prohibit retrial following reversal based on a post-trial change in law, likening the initial decision to a reversal for trial error.

D. Fatal Variance

***United States v. Allmendinger*, — F.3d— , 2013 WL 264662 (4th Cir. 2013)(C.J. Traxler)**

Facts: Defendant, along with several co-conspirators, founded a company which sold interests in life insurance policies to investors. In marketing their product, they lied about many critical facts of their "business," including where the investors' funds were being kept. They then took advantage of this structure and misappropriated millions of dollars for themselves between 2004 and mid-2007. In 2007, Defendant sold his share of the company to what turned out to be a secret entity set up by his co-conspirators, who continued to run the fraudulent business thereafter.

Held: The district court's alteration of the superseding indictment–by both deletion and revision–to remove references to the time period after Defendant left the conspiracy was not a fatal variance in violation of the Fifth Amendment because it simply allowed the government to prove a *more narrow* conspiracy than that which was charged.

VI. SIXTH AMENDMENT

A. Confrontation Clause

***United States v. Min*, 704 F.3d 314 (4th Cir. 2012)(J. Duncan)**

Facts: Multiple defendants were convicted after trial on multiple charges related to an attempted robbery of a drug stash house. One defendant, Mr. Min, confessed. His confession was used against him at trial, but it was altered to replace the names of his co-defendants with plain language phrases like "someone else." The other defendants challenged this, arguing that the use of Mr. Min's confession violated their right to confront the witnesses against them.

Held: No error. It is error to use a confession against a co-defendant that expressly names him. And it is error to use a confession that has obvious omissions–like replacing a name with a blank–because of the strong implication that the co-defendant's name would be in the blank. While the Supreme Court has not ruled on this particular situation–rewriting a confession to omit co-defendant's names in a less obvious way–the way this confession was altered did not

create a strong enough implication concerning the co-defendants to violate the Confrontation Clause.

***United States v. Jackson*, – F.3d –, 2013 WL 204690 (4th Cir. 2013)(J. Wilkinson)**

Facts: Defendant was convicted of murder and various drug and firearm offenses in connection with drug distribution conspiracy. Before trial, government filed motion in limine to admit murder victim's written statement to police describing Jackson's involvement in an attempt on his life. District court admitted murder victim's statement, applying forfeiture by wrongdoing exception.

Held: In accordance with other circuits, Court held that forfeiture by wrongdoing exception applies even when a defendant has multiple motivations for harming a witness.

VII. SENTENCING

A. Reasonableness of Sentences

***United States v. Allmendinger*, — F.3d— , 2013 WL 264662 (4th Cir. 2013)(C.J. Traxler)**

Facts: Defendant, along with several co-conspirators, founded a company which sold interests in life insurance policies to investors. In marketing their product, they lied about many critical facts of their "business," including where the investors' funds were being kept. They then took advantage of this structure and misappropriated millions of dollars for themselves between 2004 and mid-2007. At sentencing, Defendant was sentenced to 540 months' imprisonment, while his co-defendants received sentences as low as 60 months, which he claimed was both substantively and procedurally unreasonable.

Held: Sentence was reasonable despite significant disparity between it and sentences of co-conspirators because Defendant had refused to accept responsibility, attempted to squirrel away cash after learning of the indictment, and attempted to flee days before the trial.

***United States v. Hargrove*, 701 F. 3d 156 (4th Cir. 2012)(J. Shedd)**

Facts: Based on his extensive involvement in dogfighting activity, Defendant pled guilty to violating the federal Animal Welfare Act, 7 U.S.C. § 2156, and received the maximum sentence of 60 months. Defendant objected to the pre-sentence report's calculation of a 10-16 month advisory guideline range, arguing instead that the range should be 0-6 months. The court relied on enhancements based on more than minimal planning, vulnerable victims, and Defendant's role in the offense. The district court announced a sentencing range of 41-51 months, and imposed an upward departure and upward variance to 60 months. Responding to a question from the government, the court stated: "If I had sustained the Defendant's objections and come up with a Guideline range that the Defendant did not object to, I would

still have imposed both the upward departure to 60 months and an upward variance to 60 months." Defendant appealed, arguing the district court incorrectly applied the sentencing enhancements and incorrectly determined his relevant conduct.

Held: Assuming the district court improperly calculated Defendant's guideline sentencing range, such error was harmless since the upward variance to 60 months was substantively reasonable, and the court articulated that it would have sentenced defendant to 60 months even if the guideline range was 0-6 months.

B. Supervised Release

***United States v. Bennett*, 698 F.3d 194 (4th Cir. 2012)(J. Wilkinson)**

Facts: District Court revoked Defendant's concurrent supervised release terms imposed for federal felon-in-possession and escape convictions, based on new criminal conduct and positive drug screens, all of which Defendant admitted. Court sentenced him to consecutive, 24-month imprisonment terms, above the advisory Guideline range and above the 18-month concurrent sentence requested by defendant. The court cited "the serious nature of the breach of trust" and reasoned a 48-month term would "provide ample time for substance abuse treatment." On appeal, Defendant challenged the court's reliance on the need for substance abuse treatment, as contrary to *Tapia v. United States*, 131 S. Ct. 2382 (2011), which held that 18 U.S.C. § 3582(a) prohibited "imposing or lengthening a prison term" to provide treatment or rehabilitation. Defendant contended *Tapia* applied to re-sentencing following revocation, not just the original sentence.

Held: *Tapia* applies to the revocation context. Courts may not consider a defendant's rehabilitative needs when determining the "fact or length of imprisonment," but may and should consider those needs when "recommending treatment options or the location of confinement." Reviewing for plain error, the Fourth Circuit affirmed the 48-month sentence, finding that Defendant's request for a lesser sentence did not preserve the *Tapia* issue, and that the error did not influence the sentencing outcome.

C. U.S.S.G. § 2B1.1–Loss Amount Related to Fraud

***United States v. Allmendinger*, — F.3d— , 2013 WL 264662 (4th Cir. 2013)(C.J. Traxler)**

Facts: Defendant, along with several co-conspirators, founded a company which sold interests in life insurance policies to investors. In marketing their product, they lied about many critical facts of their "business," including where the investors' funds were being kept. They then took advantage of this structure and misappropriated millions of dollars for themselves between 2004 and mid-2007. In 2007, Defendant sold his share of the company to what turned out to be a secret entity set up by his co-conspirators, who continued to run the fraudulent business thereafter. At sentencing, Defendant was sentenced to 540 months'

imprisonment, which accounted in part for loss amounts dating from the time period after he left the conspiracy.

Held: The district court did not err in attributing loss amounts dating from the time period after Defendant left the conspiracy–despite the fact that when he left all premiums were current and investors would not have experienced losses but for the failure of certain bonds out of Defendant's control–because Defendant had built a business permeated by fraud and it was reasonably foreseeable that such losses may occur.

D. U.S.S.G. § 2C1.1(b)(2)–Offenses Involving Public Officials

***United States v. Hamilton,* 701 F.3d 404 (4th Cir. 2012)(J. Motz)**

Facts: Defendant, a Virginia legislator, was convicted of federal program bribery and extortion under color of official right after he secured state funding for a public university (Old Dominion) in exchange for employment by the university. On appeal, Defendant argued that the Court miscalculated a 14-level sentencing enhancement by relying on the value of the benefit Old Dominion obtained, approximately $500,000, rather than the lesser value of the payment defendant received, approximately $87,000.

Held: The enhancement was properly calculated because the Sentencing Guidelines require that the enhancement be based on the greater of the payment received or the benefits obtained, and in this particular case the payment to Old Dominion was greater than the payment Defendant received.

E. U.S.S.G. § 2L1.2–Crime of Violence

***United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012)(J. Motz)**

Facts: The defendant pled guilty to illegal reentry by an aggravated felon. In his presentence report (PSR), a prior California conviction for criminal threat was classified as a "crime of violence," which triggered a 16-level enhancement under U.S.S.G. § 2L1.2. The district court adopted the PSR over the defendant's objection. Defendant appealed, arguing that his the prior conviction was not a "crime of violence," and therefore his sentence was unreasonable.

Held: Vacated and remanded. A conviction under the predicate state statute of criminal threat was not categorically a "crime of violence," which would trigger the 16-level enhancement. Applying a categorical approach, the Court found that, although the statute contained a threatened violent result, it does not contain an element requiring the use or threatened use of physical force.

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

***United States v. Tillery*, 702 F.3d 170 (4th Cir. 2012)(J. Gregory)**

Facts: Defendant was convicted at trial of Hobbs Act Robbery and Possession of a Firearm In Furtherance of a Crime of Violence. He was sentenced as a Career Offender based in part on a Virginia state conviction for Eluding Police. On appeal, Defendant challenged his designation as a Career Offender.

Held: Pursuant to *United States v. Hudson*, 673 F.3d 263 (4th Cir. 2012), "intentional vehicular flight in any manner poses a potential level of risk that is sufficient to render the offense a violent felony." Virginia's statute requires that you willfully and wantonly disregard a police officer's signal while driving, therefore, Eluding Police is a crime of violence.

G. Fair Sentencing Act

***United States v. Edmonds*, 700 F.3d 146 (4th Cir. 2012)(J. Niemeyer)**

Facts: In 2010, the defendant was convicted of numerous drug crimes including the distribution of more than 50 grams of Crack Cocaine. The government filed an enhancement pursuant to 21 U.S.C. § 851 citing two previous drug convictions. This necessitated a mandatory life sentence. On August 3, 2010, the day the Fair Sentencing Act went in to effect, Mr. Edmonds was sentenced to life imprisonment. He appealed his sentence and the Fourth Circuit affirmed. Then, the Supreme Court's issued its decision in *United States v. Dorsey*, 132 S.Ct. 2321 (2012), and Mr. Edmonds again appealed.

Held: The Supreme Court in *Dorsey* stated that the Fair sentencing act applies to offenders who committed their crimes before August 3, 2010, so long as they were sentenced after that date. The Court vacated the original decision in *Edmonds* and remanded the case to the district court for resentencing to include consideration of the provisions of the Fair Sentencing Act.

VIII. EVIDENCE

A. Fed. R. Evid. 701–Opinion Testimony by Lay Witnesses

***United States v. Min*, 704 F.3d 314 (4th Cir. 2012)(J. Duncan)**

Facts: Officer testified as a government fact witness about conversations that he had with a defendant. The officer explained certain terms in the conversation to the jury, like that "take out" meant "kill" and that "brick" of cocaine was a kilo. Defendant challenged the testimony as outside the scope of fact witness testimony.

Held: No error. The officer was not testifying as an expert, but simply based on his personal

experience with the meaning of those terms in that conversation. It was helpful to the government's argument that this was the officer who had the conversation as opposed to another officer reading a transcript and providing her interpretation of it.

B. Fed. R. Evid. 702–Expert Testimony

***United States v. Smith*, 701 F.3d 1002 (4th Cir. 2012)(J. Diaz)**

Facts: Defendant wrecked her car in a National Parks Service area after consuming alcohol resulting in a passenger's death. A jury convicted Defendant of involuntary manslaughter during the commission of an unlawful act not amounting to a felony. The underlying unlawful act was a violation of 36 C.F.R. § 4.23(a)(2), operating a motor vehicle with an alcohol concentration of .08% or more. At trial, a toxicologist testified over Defendant's objection about how the human body metabolizes alcohol, and Defendant claimed the testimony exceeded the scope of the government's pretrial disclosure per Fed. R. Crim. P. 16. Specifically, Defendant claims the government had represented that the toxicologist's testimony would be limited to the results of the blood test, and that without explicit notice that testimony would concern metabolization rates more generally, Defendant was unprepared to effectively cross examine the expert or secure a rebuttal witness.

Held: The testimony on typical alcohol absorption and elimination rates could be characterized as generic background information falling within the scope of the toxicologist's expertise, and no prejudicial error occurred. The court further reasoned that Defendant interviewed the expert before trial, cross examined him at trial, and although given the opportunity, did not call a rebuttal expert or ask for a continuance to consider it, thus finding no prejudice occurred from the admission of the testimony.

C. Admission of Prior Statements

***United States v. Gillion*, 704 F.3d 284 (4th Cir. 2012)(J. Duncan)**

Facts: Defendant, who worked for a trailer leasing company, created a sham side company with a similar name. On behalf of the side company, Defendant signed a lease-to-own agreement for eight trailers owned by the legitimate company with a customer of the legitimate company, and kept all of the profits. Prior to being indicted, Defendant signed a proffer agreement with the government, pursuant to which he agreed to provide information about his scheme. Per the agreement, failure to submit to or pass a polygraph upon the government's request would allow his proffer agreement statements to be used by the government at trial.

Held: District court did not err by allowing the government to introduce Defendant's proffered statements at trial after he failed to successfully complete a polygraph. Proffer agreement did not terminate upon indictment but rather operated like a binding contract and, furthermore,

admission of the statements, even if in error, would have been harmless because they established only facts proven by the government in other ways.

D. Privileged Communications and Confidentiality

***United States v. Hamilton*, 701 F.3d 404 (4th Cir. 2012)(J. Motz)**

Facts: Defendant, a Virginia legislator and employee of the public school system, was convicted of federal program bribery and extortion under color of official right after he secured state funding for a public university in exchange for employment by the university. Emails sent by defendant to his wife from his workplace computer, through his work email account, discussing their financial situation and his plan to secure a university job, were admitted into evidence during the trial. Defendant argued this was a violation of the martial communications privilege.

Held: Defendant waived the marital communications privilege by communicating with his wife through his work email account and failing to safeguard or protect the emails, even after he was put on notice of his employer's policy, which permitted inspection of emails stored on the system at the discretion of the employer.

IX. TRIAL

A. Improper In-Court Identification

***United States v. Greene*, 704 F.3d 298 (4th Cir. 2013)(J. Davis)**

Facts: Defendant was on trial for bank robbery. A teller, who had not previously identified Defendant, was on the stand. The prosecutor told the teller to look at Defendant and asked if he resembled the person who robbed the bank. She said that he did. Defendant did not object to this. On appeal, he argued that this was an improper in-court identification.

Held: There was error, but it was not reversible error under the plain error standard. It is clearly and plainly improper for a prosecutor to point to a defendant at trial and ask a witness if he resembles the person who committed the crime. Further, the fact that the teller in this case had never identified defendant before makes this even worse. However, under the fourth prong of plain error—whether the error substantially affected the fairness of the proceedings—defendant loses. There was substantial evidence presented that he committed the robbery. Looking at the whole record, the improper identification did not cause the trial to be fundamentally unfair.

B. Jury Instructions

***United States v. Tillery*, 702 F.3d 170 (4th Cir. 2012)(J. Gregory)**

Facts: Defendant was convicted at trial of Hobbs Act Robbery and Possession of a Firearm In Furtherance of a Crime of Violence. When the judge instructed the jury, he admonished them that "a mistrial would be very bad . . . you all would go home but I would have to do this again. That would be very bad." The defendant appealed, asserting the instructions gave the impression that anything less than a unanimous verdict would reflect negatively on the competency of the jury's deliberations.

Held: The instruction when read in context was in accordance with precedent. The judge is allowed to explain that if the jury informs the court of how it stands during deliberations, a mistrial would be declared.

***United States v. Smith*, 701 F.3d 1002 (4th Cir. 2012)(J. Diaz)**

Facts: A jury convicted Defendant of involuntary manslaughter during the commission of an unlawful act not amounting to a felony. The underlying unlawful act was Defendant's alleged violation of 36 C.F.R. § 4.23(a)(2), prohibiting operating a motor vehicle while the alcohol concentration in one's blood is more than .08%. Defendant proposed an instruction prohibiting jurors from inferring that Defendant's blood alcohol level exceeded .08% at the time of the accident, solely basing that inference on the results of the blood test nearly three hours later. The court rejected Defendant's instruction, and the jury returned a guilty verdict. Defendant argued that the court erred in rejecting one of her proposed jury instructions.

Held: The district court did not abuse its discretion in refusing to give Defendant's proposed instruction. Defendant's instruction could have easily confused jurors and was not necessarily correct, and the district court's instruction acknowledged the lack of direct evidence of Defendant's blood alcohol level at the time of the accident.

X. MISCELLANEOUS ISSUES

A. First Amendment Violation

***United State v. Hamilton*, 699 F.3d 356 (4th Cir. 2012)(J. Keenan)**

Facts: Defendant served in the Marine Corps for nine months in the 1960's before being honorably discharged due to amputation of two fingers. He did not serve in combat or receive any awards, and he was not commissioned as an officer or deployed. After his discharge, he began receiving disability benefits from the VA based on the finger injury. Many years later, Defendant filed several additional VA disability claims, which falsely stated that he had served in Vietnam and was suffering from PTSD. Eventually, Defendant was diagnosed with

PTSD and additional VA benefits were awarded. In addition, Defendant gave a speech at a Marine Corps ceremony while wearing full general's uniform, including a variety of awards and rank insignia that he had ever earned. He was invited to speak at the ceremony on the basis of false statements he made to the organizer about his military service. On appeal, Defendant argued that his convictions were facially invalid under the First Amendment, or were invalid as applied to him in this case.

Held: Convictions for wearing a military uniform and medals without authorization did not violation Defendant's First Amendment rights. The statutes in question did require the violator to act with an "intent to deceive," but they were not facially unconstitutional because, even assuming that strict scrutiny applied, they are narrowly tailored to serve the government's compelling interest in preserving the integrity of the military and preventing the deceptive wearing of military uniforms and medals. Facts here were distinguishable from those in *United States v. Alvarez*, 132 S.Ct. 2537 (2012) because the statute in that case dealt with pure speech and those here dealt with expressive conduct.

B. Constructive Amendment of Indictment

***United States v. Day*, 700 F.3d 713 (4th Cir. 2012)(J. Wilkinson)**

Facts: Defendant orchestrated scheme to secure $8.6 million in Department of Defense contracts by setting up companies that delivered non-conforming parts for "critical application items" – parts essential to weapons systems operations and/or operator safety. Following arrest of some co-conspirators, defendant fled to Mexico, from where he directed the conversion of the profits to gold, which others then delivered to Mexico. Mexican authorities eventually arrested and extradited him to the U.S. for wire fraud and smuggling prosecution. Jury convicted, and court sentenced him to Guideline sentence of 105 years. On appeal, defendant challenged court's use of a jury instruction for aiding and abetting a constructive amendment of the indictment, which did not specify that theory of liability.

Held: The Fourth Circuit affirmed all convictions and the sentence. The court rejected the constructive amendment challenge, emphasizing that aiding and abetting provides an alternate theory of liability and does not constitute a distinct offense.

C. 28 U.S.C. § 1291–Appellate Jurisdiction

***United States v. Abramski*, – F.3d –, 2013 WL 238922 (4th Cir. 2013)(J. King)**

Facts: Defendant filed numerous motions to suppress and dismiss. After the district court rejected each motion, he entered conditional guilty pleas to both charges in the indictment. During the plea hearing, the issues reserved for appeal were not specified on the record, although the court and prosecutors briefly discussed alterations of the plea agreement; presumably for the purpose of specifying issues that could be appealed.

Held: Because district court and prosecutors discussed issues to be preserved for appeal on the record, Court had jurisdiction to address merits of challenges to denials of motions to dismiss and suppress.

D. Fed. R. Crim. P. 16–Discovery and Inspection

***United States v. Smith*, 701 F.3d 1002 (4th Cir. 2012)(J. Diaz)**

Facts: Defendant wrecked her car in a National Parks Service area after consuming alcohol resulting in the death of a passenger. A jury convicted Defendant of involuntary manslaughter during the commission of an unlawful act not amounting to a felony. The underlying unlawful act was a violation of 36 C.F.R. § 4.23(a)(2), operating a motor vehicle with an alcohol concentration of .08% or more. At trial, a toxicologist testified over Defendant's objection about how the human body metabolizes alcohol, and Defendant claimed the testimony exceeded the scope of the government's pretrial disclosure per Fed. R. Crim. P. 16. Specifically, Defendant claims the government had represented that the toxicologist's testimony would be limited to the results of the blood test, and that without explicit notice that testimony would concern metabolization rates more generally, Defendant was unprepared to effectively cross examine the expert or secure a rebuttal witness.

Held: The testimony on typical alcohol absorption and elimination rates could be characterized as generic background information falling within the scope of the toxicologist's expertise, and no prejudicial error occurred. The court further reasoned that Defendant interviewed the expert before trial, cross examined him at trial, and although given the opportunity, did not call a rebuttal expert or ask for a continuance to consider it, thus finding no prejudice occurred from the admission of the testimony.

E. Fed. R. Crim. P. 43–Defendant's Presence at Proceedings

***United States v. Gonzales-Flores*, 701 F.3d 112 (4th Cir. 2012)(J. Wilkinson)**

Facts: Defendant was charged with drug, immigration, and firearm offenses. Two days before trial, the government filed a notice that it would produce testimony from several expert witnesses at trial. Defendant moved to exclude the testimony based on the late disclosure. The day before trial, the court held a telephonic hearing with the government and defense counsel; the defendant was not present and his counsel did not object to his absence. The district court denied his motion to exclude the testimony. Defendant challenged his conviction and sentence on the ground that his absence from the telephonic hearing required reversal of his conviction.

Held: Affirmed. Federal Rule of Criminal Procedure 43(b)(3) does not require the defendant's presence at proceedings that involves only a "conference or hearing on a question of law."

F. Mandate Rule

***United States v. Pileggi*, 703 F.3d 675 (4th Cir. 2013)(J. Davis)**

Facts: After a fraud conviction, defendant was originally sentenced to 600 months and ordered to pay $3.9 million in restitution. He appealed the length of his sentence. The government did not cross-appeal. The restitution award was not addressed during the appeal. The Fourth Circuit vacated the sentence. At re-sentencing, the district court sentenced him to 300 months and ordered restitution of $20.7 million. Defendant appealed, arguing that the mandate rule barred re-consideration of the restitution award.

Held: With very limited exception, the mandate rule bars a district court on remand from considering issues that either were resolved on appeal or that could have been but were not addressed on appeal. In this case, the original appeal and remand focused solely on the length of the sentence. Neither the government nor the defendant addressed the restitution award during the first appeal. Therefore, the mandate rule barred reconsideration of that on remand. The Court was sympathetic to the fact that the original restitution award did appear to be too low and that, as a result, certain victims would not be made whole. But that fact did not rise to the level of injustice necessary to violate the mandate rule.

G. Federal Jurisdiction

***United States v. Tillery*, 702 F.3d 170 (4th Cir. 2012)(J. Gregory)**

Facts: Defendant robbed a local dry cleaners at gun point. During the course of the robbery, Defendant took a computer, which belonged to an employee, and $40-$100 from the cash register. He was subsequently convicted at trial of Hobbs Act Robbery and Possession of a Firearm In Furtherance of a Crime of Violence. The defendant appealed, alleging that the robbery did not have the requisite "minimal effect" on interstate commerce.

Held: A robbery has a "minimal effect" on interstate commerce if it depletes the assets of an "inherently economic enterprise" when considering the relevant class of acts, not the immediate offense committed by the defendant. As the dry cleaners in question acquired many of the products used in its business from out of state and around the world, the money that the defendant stole did deplete an inherently economic enterprise of its assets and the jurisdiction requirement was met.

***United States v. Ayesh*, 702 F.3d 162 (4th Cir. 2012)(J. Cogburn)**

Facts: Defendant, a Jordanian citizen working for the U.S. Embassy in Iraq, devised a scheme to divert United States monies to a bank account owned by his wife. When the crime was discovered, he was flown to the United States under the pretense of training and taken into custody and questioned. He was eventually convicted of Theft of Public Money and

Committing Acts Affecting a Personal Financial Interest. On appeal, Defendant contended that the United States lacked extraterritorial jurisdiction for acts committed outside the United States.

Held: The default rule is that criminal laws only apply within the territorial jurisdiction of the United States, and Congress must explicitly state otherwise if a law is to apply outside of that area. The exception is for criminal laws that are not logically dependant on their locality for the government's jurisdiction, but instead are enacted because of the right of the government to defend itself against obstruction or fraud wherever perpetrated, especially if a violation of law is committed by its own citizens, officers, or agents.

H. Extradition

***United States v. Day*, 700 F.3d 713 (4th Cir. 2012)(J. Wilkinson)**

Facts: Defendant orchestrated scheme to secure $8.6 million in Department of Defense contracts by setting up companies that delivered non-conforming parts for "critical application items" – parts essential to weapons systems operations and/or operator safety. Following arrest of some co-conspirators, defendant fled to Mexico. Mexican authorities eventually arrested and extradited him to the U.S. for wire fraud and smuggling prosecution. Jury convicted, and court sentenced him to Guideline sentence of 105 years. On appeal, defendant challenged court's use of a jury instruction for aiding and abetting as violating the extradition rule of specialty.

Held: The Fourth Circuit affirmed all convictions and the sentence. The court held the extradition did not violate the "rule of specialty," which only permits extradition for specified offenses recognized by both countries. Since aiding and abetting did not constitute a distinct offense, extradition for money laundering did not violate that rule.