Supreme Court and Fourth Circuit Court of Appeals Update

2020 Spring Federal Criminal Defense Practice Seminar for the Eastern District of North Carolina

A Virtual Experience

Including published 4th Circuit criminal cases issued between September 16, 2019 and June 25, 2020 and selected Supreme Court criminal cases from the October 2019 and upcoming October 2020 Terms

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INTRODUCTION

This presentation summarizes all published Fourth Circuit criminal cases issued between September 15, 2019 and June 25, 2020. Note that not every issue raised in every case is discussed. Our focus, instead, is on the more relevant holdings in each case. Attached to the end of this presentation is Paul Rashkind's Supreme Court Review/Overview/Preview, which reviews criminal cases of note from the Supreme Court's October 2019 term and previews cases for the upcoming October 2020 term.

We would like to thank Assistant Federal Public Defender Jonathan Byrne from the District of West Virginia, for his assistance in helping to compile this presentation.

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INEFFECTIVE ASSISTANCE OF COUNSEL

United States v. Akande, 956 F.3d 257 (4th Cir. April 20, 2020) (Motz, J.) (D. Md.)

In this Maryland case, the defendant's motion to suppress was denied and he pleaded guilty without an agreement to federal fraud offenses. Before sentencing, he moved to withdraw the plea. His attorney had advised him that such an "open" plea would ensure preservation of all issues for appeal. This was incorrect. The defendant alleged he would not have pled guilty but-for the erroneous advice, and his counsel agreed. Other counsel was appointed to argue the motion, and that attorney ultimately withdrew the motion. The conviction and sentence were affirmed on direct appeal. The defendant sought habeas relief, alleging that his plea was not knowing and voluntary and that he received ineffective assistance of counsel ("IAC") from his first lawyer. The district court denied relief without hearing, finding that the petitioner could not show prejudice, and the defendant appealed to the Fourth Circuit, which reversed.

Here, plea counsel's advice was incorrect, and this constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). Where the court corrects any misunderstanding resulting from erroneous advice of counsel and the defendant acknowledges his understanding of the correction, the defendant cannot succeed on an IAC claim based on erroneous advice of counsel. *See United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012). While the trial court here conducted a typical plea colloquy, including advising the defendant about waiver of his right to appeal, the Fourth said those advisements "were too general to cure counsel's misadvice." The defendant was specifically concerned about preservation of his motion to suppress, and it was unlikely he understood that he was waiving review of the issue by pleading open, given the court's general advisements.

To establish *Strickland* prejudice based on incorrect advice resulting in a plea, the defendant must show by a reasonable probability that he would not have pled guilty and would have gone to trial without the erroneous advice. *Lee v. United States*, 137 S. Ct. 1958 (2017). The defendant claimed that preserving his appeal rights was his "top strategic priority," and record evidence supported that assertion. This showed a reasonable probability

that the defendant would have gone to trial instead of accepting an open plea based on the incorrect advice of counsel and amounted to *Strickland* prejudice, thus establishing IAC. The court unanimously reversed and remanded. The Fourth observed: "[T]he legitimacy of [guilty pleas] in our criminal justice system depends on a defendant's ability to understand the consequences of a guilty plea in order to make an informed decision about whether to enter one. Plea counsel's inaccurate advice deprived [the defendant] of this ability, and in doing so also denied [him] the Sixth Amendment right to effective assistance of counsel."

FOURTH AMENDMENT/SEARCHES/WARRANT REQUIREMENTS

United States v. Aigbekaen, 943 F.3d 713 (4th Cir. Nov. 21, 2019) (Motz, J.; Richardson, J., concurring) (D. Md.)

Law enforcement received a tip that Defendant had sexually trafficked someone in the United States. When he returned from an overseas trip, the government seized all of his electronic devices at the airport and conducted warrantless forensic searches on them. He was found guilty after a trial that included evidence found on those devices. He appealed, arguing that the warrantless searches were improper and the evidence found should have been suppressed.

The Fourth Circuit affirmed the conviction. The Court, however, held that the "border search" exception did not permit the searches. While the border search exception is broad, it is not limitless. A non-routine intensive search requires some justification. Further, the justification for the border search—protection of sovereign interests—must have some relation to the search. The border search exception cannot be used to simply advance domestic law enforcement unrelated to the protection of the border. This search was improper.

Nonetheless, the law in this area was unsettled at the time of the search, so the good faith exception applied to permit admission of the evidence.

Judge Richardson concurred, arguing that the majority's restrictions on the border search doctrine are "in deep tension" with Supreme Court precedent.

***United States v. Alston*, 941 F.3d 132 (4th Cir. Oct. 24, 2019) (Motz, J.)(M.D.N.C.)**

Mr. Alston ran a red light, and the police tried to pull him over. Alston drove away until he hit a parked car. Due to his movements, the officer suspected he had a gun. When the officer came to the window of the car, he asked Mr. Alston what he had, and Mr. Alston threw him a bag of marijuana. The officer kept asking about a gun.

Eventually, the officers searched the car and found a gun. Mr. Alston was charged with being a felon in possession. He moved to suppress statements and evidence discovered during his interactions.

The Fourth Circuit agreed with the district court that many of the statements and most of the evidence found should be suppressed because they were part of what amounted to an Unmirandized interrogation and the fruits thereof.

But the gun came in because the bag of marijuana (which was given to the police voluntarily) gave probable cause to search the car. And, considering that the officer at the scene was concerned about a gun, he would have searched the car, so the gun would have inevitably been discovered.

***United States v. Blakeney*, 949 F.3d 851 (4th Cir. Feb. 6, 2020)(Harris, J.)(D. Md)**

Blakeney was driving in Maryland (in a federal enclave) when he crossed a median and struck an oncoming car, injuring the other driver and killing the passenger in his car. Police and emergency responders smelled alcohol coming from his car and obtained a warrant to draw his blood, which showed the presence of alcohol. Three weeks later, police also obtained a warrant to search the "black box" from Blakeney's car. The data showed that the car was going 79 miles per hour (in a 45 mph zone) at the time of the accident. After Blakeney unsuccessfully sought to suppress the evidence seized pursuant to both warrants he was convicted at trial on multiple counts and sentenced to 40 months in prison.

Challenging warrants is hard. On appeal, the Fourth Circuit affirmed the denial of Blakeney's motions to suppress. As to the blood-draw warrant, the

court concluded that it was supported by probable cause. The court rejected Blakeney's argument that the application described a regular traffic accident, rather than a crime, and that because the officer smelled alcohol in the car itself, rather than on Blakeney's person, there was not a sufficient basis for a finding of probable cause. The court noted that an officer is not required to "rule out all innocent explanations for suspicious facts before seeking a warrant." As to the black box warrant, the court also concluded it was supported by probable cause. It also rejected the argument, made about both warrants, that they were insufficient because neither identified the particular crime being investigated. The court held that "the premise of Blakeney's argument – that a search warrant must specify the crime for which the executing officers may seek evidence – is mistaken."

***United States v. Jones*, 942 F.3d 634 (4th Cir. Nov. 6, 2019)(Kennan, J.)(N.D. WV)**

Defendant made statements online about being on a "cop manhunt" for a specific police officer. 6 months later, he again made online statements about wanting to kill certain police officers, which he indicated by name. Finally, he posted about wanting to kill all police officers.

Officers obtained a warrant to search his home for evidence of terroristic threats. They found ammunition, and the government charged him with being a felon in possession of ammunition. He entered a conditional plea, and appealed, arguing that there was not probable cause for the warrant, and that the district court erred in denying him a *Franks* hearing.

The Fourth Circuit affirmed. West Virginia has a terroristic threats statute that the state courts interpret broadly, and Defendant's statements sufficed for the judge to find probable cause that he committed this crime and that evidence of it could be found at his home.

Further, the district court did not err in refusing to grant a *Franks* hearing. The fact that the government did not include certain statement that Defendant made that might indicate mental illness would not have made a difference to the probable cause determination.

United States v. Jordan, 952 F.3d 160 (4th Cir. March 3, 2020)(Harris, J.)(W.D.N.C.)

Defendant was convicted of various drug and gun counts after a trial. He objected to the admission at trial of portions of recordings of a phone calls made by a CI to him, arguing that they were incriminating testimonial statements and he did not have the opportunity to cross-examine the CI (who did not testify at trial).

The Fourth Circuit held that the district court did not err in admitting the statements. The judge instructed the jury that the statements on the recording made by the CI were not to be considered for the truth of the matter asserted but instead only to provide context to Defendant's responses on the recording. It does not violate the Confrontation Clause to admit non-crossed testimonial statements for purposes other than proving the truth of the matter asserted.

United States v. Moore, 952 F.3d 186 (4th Cir. March 4, 2020)(Wilkinson, J.)(E.D.N.C.)

Moore was driving in "the early morning hours" in Columbus County, North Carolina when he came upon a checkpoint operated by the local sheriff's department. The goal of the checkpoint was to ensure compliance with state vehicle regulations and required every vehicle to be stopped. Aside from traffic violations, officers "were permitted to detain motorists . . . only if the deputy became aware of other facts suggesting criminal activity." Officers observed what appeared to be bullet holes on Moore's car and, when it was stopped, "immediately noticed the odor of marijuana and saw smoke emitting from the passenger area." Moore eventually consented to a search of his car, which uncovered drugs, guns, and ammunition. Moore unsuccessfully sought to suppress that evidence and pleaded guilty to possession of crack with intent to distribute it.

On appeal, the Fourth Circuit affirmed Moore's conviction. The only issue Moore raised was that "the initial stop of his vehicle . . . was unconstitutional." The court disagreed, first holding that the checkpoint had a "valid primary purpose," that is, traffic enforcement and was not motivated by a "general interest in crime control." Second, the court held that the checkpoint was reasonable because it furthered that valid purpose

and was minimally intrusive. That the department lacked a written policy for the checkpoint didn't matter. However, the court did emphasize "the limits of our holding," because there "are no indications in the record of roving vehicular spot checks" in which case "courts would bring the leash up short."

United States v. Scott, 941 F.3d 677 (4th Cir. Oct. 25, 2019)(King, J.)(E.D.N.C.)

Mr. Scott was on North Carolina state probation, which subjected him to a search by "a post-release supervision officer." A multi-agency search was conducted of his residence, which found 2 guns. He was charged with being a felon in possession of those guns. He moved to suppress, arguing that the search wasn't related to his probationary status and was merely a front for federal law enforcement to search him without probable cause. He lost, and appealed the denial of his motion to suppress.

The Fourth Circuit affirmed the denial of Scott's motion to suppress. The court first rejected Scott's argument that his probation officer's absence from the search meant it was not conducted within the parameters of the condition to which he was subject. The court concluded that the statutory condition that refereed to "a post-release supervision officer" was mandatory and could not be modified by the conditions set forth in Scott's particular agreement. Then the court concluded that the search of Scott's apartment was "reasonably related to his post-release supervision" as required by the condition because it was "initiated and supervised" by probation officers. The involvement of other agencies did not change that analysis.

United States v. Seay, 944 F.3d 220 (4th Cir. Dec. 4, 2019)(Rushing, J.)(E.D. Va.)

Seay was in a hotel room with Mr. Bracey, when they were asked to leave by police in response to complaints from hotel staff. As they were leaving, Seay was carrying a clear plastic bag. After searching the room, finding ammunition and drug paraphernalia, Seay and Bracey were questioned. Particularly, Bracey, who cops were planning to arrest on drug charges, said that they clear bag was "ours." It was searched, without a warrant, uncovering a firearm. Seay was eventually charged with being a felon in

possession of that firearm. His motion to suppress was denied because the district court concluded the officers would have inevitably discovered the gun.

The Fourth Circuit affirmed. It pointed to testimony of the officers involved that the clear plastic bag would have been inventory searched in one of two ways – either as Bracey's property when she was booked after being arrested or if she wanted to give it to Seay before she was taken away. Both were consistent with department policy. The court rejected Seay's argument that because the officers had some discretion in how to conduct an inventory search in the second instance (if Seay had taken it) that did not make the decision to search so discretionary as to not be a valid inventory search.

United States v. Small, 944 F.3d 490 (4th Cir. Dec. 6, 2019)(Wilkinson, J.)(D. Md.)

Small was one of three masked men who stole a car. Three days later, Small was seen driving it at a local mall. A chase ensued, which ended when Small "drove through a fence surrounding a National Security Agency" facility. When police arrived at the crash site, Small was gone, only to be found the next morning when he "emerged from a nearby sewer." At the scene of the crash officers recovered blood-stained clothing and a cell phone, which they used multiple times without getting a warrant. Information gathered during those uses provided the basis for the eventual warrant to search the phone, which provided evidence used against Small at his subsequent trial, where he was convicted of carjacking and destruction of Government property. He appealed.

The Court he rejected Small's argument that the district court erred by denying his motion to suppress the information gathered from the phone, holding that it had been abandoned when Small fled from the scene of the accident.

United States v. Fall, 955 F.3d 363 (4th Cir. April 3, 2020) (Quattlebaum, J.) (E.D. Va.).

A relative of the defendant discovered several computers with child pornography at the defendant's residence and contacted police. The woman

showed an officer the images she found and was referred to a detective. The detective examined the home screen of the laptop and saw thumbnail images that he thought could be child pornography. The detective clicked on the items and confirmed his suspicions. When contacted by police, the defendant refused to make a statement or consent to a search of his home. Officers went to secure the home while awaiting the search warrant. Around this time, neighbors saw a man climb out of an upstairs window of the defendant's residence, discard an item on the roof, jump down, and run away. Officers discovered a laptop on the roof, as well as other computers inside the home, all of which were later determined to contain child pornography. The search warrant application recounted the relative's report, the detective's viewing of the images identified by the niece and in the thumbnails and described those images. It also stated that neighbors had seen the defendant climbing out of the window (when in fact they had reported seeing only someone climb out). The defendant moved to suppress, arguing police exceeded the scope of the private search and materially misrepresented the neighbor's report. The district court denied the motion and the defendant was convicted at trial of various offenses. He appealed, arguing the motion to suppress should have been granted.

The Fourth Circuit affirmed the district court. Under the private search exception, no Fourth Amendment violation occurs when a private person searches property in an individual capacity. Police may therefore lawfully review evidence obtained from a search conducted by a private party. However, law enforcement may generally not go beyond the scope of the search performed by the third party without obtaining a warrant unless the officers are "substantially certain" to learn nothing new by the additional examination. *See United States v. Jacobson*, 466 U.S. 109 (1984). Circuits have divided in applying this doctrine to electronic storage devices, with some requiring police to have "an exact one-to-one match" between what the private party found and what police examine, and others allowing police some leeway to go beyond the private search via the substantial certainty rule. The Fourth determined it "need not determine today the outer boundaries of the private search doctrine," because *Leon's* good-faith exception applied. The warrant was not defective and established probable cause even without the detective's statement about clicking on the thumbnail images.

The alleged misrepresentation about the neighbor's report to the police of seeing the defendant was found to be a harmless "miscommunication" between officers and did not rise to the level of a material misrepresentation, according to the trial court. The Fourth Circuit agreed, finding that "[this] error does not constitute evidence of dishonesty or recklessness in preparing the affidavit." The district court did not therefore err in denying the motion to suppress.

United States v. Ferebee, 957 F.3d 406 (4th Cir. April 22, 2020) (Traxler, J.) (Floyd, J., dissenting) (W.D.N.C.)

The defendant was visiting a friend who was on state probation. When officers arrived at the friend's home to conduct a probation search, the defendant was sitting next to a backpack and holding a marijuana cigarette. Officers asked the defendant to stand in order to check the couch for weapons. When he stood up, the defendant grabbed the backpack and held it while he was patted down. When asked if the bag contained any weapons, the defendant told the officer it was "actually not his [bag]." The defendant was placed under arrest for the marijuana and officers found a gun in the couch. A detective obtained the backpack from the officer with the defendant and searched it, finding the defendant's identification, marijuana-related contraband and another gun. During later questioning, the defendant admitted that the gun in the bag belonged to him. He was charged as a felon in possession and moved to suppress. The district court found that the defendant had no standing to challenge the search after disclaiming ownership. It further concluded that, even if the defendant had standing, the search was constitutional as a valid search incident to arrest. A divided Fourth Circuit affirmed.

Under the collective knowledge doctrine, information known by an "instructing" officer may be imputed to the "acting" officer. The Fourth Circuit limits application of the doctrine—it does not apply it to "bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions." There was no evidence that the detective who searched the bag had overheard the defendant's statement to the officer that the bag was not his, and the defendant argued that the government improperly relied on collective knowledge in relying on his statement disclaiming ownership, rendering the search of the bag unreasonable. The Fourth Circuit disagreed. Because the defendant

abandoned the bag, he had no reasonable expectation of privacy and was not entitled to suppression. "That rule makes sense, as one who abandons property would have no subjective expectation that the property would remain private, nor would society recognize any such expectation as reasonable." While there must be some objective evidence that the defendant intended to abandon the property, the defendant's explicit disclaimer of ownership of the bag here was sufficient to forfeit any expectation of privacy. It was "irrelevant" that the searching detective did not hear the defendant's statement since the search occurred after the abandonment, and the collective knowledge doctrine simply had no bearing on the case. That the defendant still had physical possession of the bag at the time of his statement disclaiming ownership was relevant to the court's abandonment inquiry but "the court is not precluded from finding abandonment where the defendant has physical possession of the property he has disavowed."

Assuming the defendant did not abandon the property, the search of the bag was also justified as a search incident to arrest. *Arizona v. Gant*, 556 U.S. 332 (2009), limited the scope of such searches in the vehicle context to circumstances where the defendant is not secured and is within reaching distance of the passenger area of a car (or where there is reason to believe evidence of the crime of arrest will be found inside the car, although that prong of *Gant* was not at issue here). The Fourth assumed without deciding that *Gant* applied outside of the vehicle context and found that the defendant here was not "secured" despite having been cuffed. Unlike the facts in *Gant* (where the defendant was handcuffed in the back of a patrol car), this defendant was "only a few feet outside the house and thus could reach the other officers and the backpack within seconds." In fact, body camera footage showed that the defendant threw away a marijuana cigarette without officers noticing while he was cuffed outside. According to the Fourth: "We need not rely solely on the speculative possibility that a handcuffed defendant can still be dangerous, as we have in this case a handcuffed defendant who in fact was able to tamper with evidence while handcuffed. We therefore conclude that, despite the fact that [the defendant] was handcuffed, the police could have reasonably believed that [he] could have accessed the backpack." The conviction was thus affirmed. Judge Floyd dissented on both issues and would have reversed the district court's denial of the suppression motion.

***United States v. Mitchell*, 963 F.3d 385 (4th Cir. June 30, 2020) (Rushing, J.) (Wynn, J., dissenting) (S.D. W. Va.)**

Officers responded to a report of a fight and a person with a gun at a local bar at closing time. A witness described the man with the gun and told an officer which way the man went when he left the area. Another officer saw the defendant matching that description nearby and frisked him, finding a gun. The defendant was indicted for felon in possession of firearm, but the arrest warrant was not served for four years. When served, the defendant moved to suppress, alleging an illegal stop.

A divided Fourth Circuit affirmed the stop. Evidence at suppression showed that police were familiar with the initial caller as a person that either worked at, or was a regular customer of, the bar. The bar was a frequent location for police responses at closing time. An officer arrived at the bar within five minutes of the report from the caller and was immediately given a description of the suspect by a person on scene. That officer could no longer remember the bystander's name and did not otherwise have documentation as to the identity of that person. The bystander reported the suspect was a black man with a black shirt and red pants and relayed the street and direction that the suspect was last seen heading. Within one minute of that information going out over the radio, another officer encountered the defendant, wearing "very bright red" pants. No one else was in the area. This occurred within 9 minutes of the initial call to police.

The district court treated the bystander description as more than "a purely anonymous phone tip," and found that reasonable suspicion to stop and frisk the defendant existed under the totality of circumstances. The Fourth Circuit agreed. The initial caller to the police had provided his name and number, the area was a known problem location at that time of night, and the caller reported a large fight and person with a gun. The bystander corroborated the caller's information that someone recently on scene had a gun, and the arresting officer corroborated the bystander by finding the defendant matching that description on the street and headed in the direction described by the bystander. The bystander's information also "was not the catalyst that alerted officers to illegal activity;" rather, the known caller is what prompted the police response, and the bystander's information merely added detail to information already possessed by the officers. The bystander's information was thus properly treated as more

reliable than ananonymous tip: “The bystander provided the description to a police officer in person and in public, in close proximity to the alleged criminal activity and to [the defendant], all of which support the bystander’s veracity and enhance the reliability of the bystander’s tip.” These facts combined to support a reasonable suspicion that the defendant had been involved in the fight and that he was armed and dangerous.

The Fourth distinguished the situation of a face-to-face (if unknown) informant from that of a truly anonymous tipster: “[F]ace-to-face encounters with informants are altogether different from anonymous tips because they typically provide a measure of accountability and an opportunity to evaluate the informant’s credibility and demeanor.” The bystander report was therefore properly part of the reasonable suspicion calculus by the officers.

The defendant also argued that the bystander information failed to allege any crime, pointing out that having a gun is not per se illegal, and arguing that the caller and bystander could have been referencing two separate incidents. This argument was “simply contrary to the evidence” and the court similarly rejected it, finding the circumstances sufficiently created reasonable suspicion of a crime committed by the defendant.

Judge Wynn dissented at length and would have ruled that no reasonable suspicion existed to stop the defendant.

***United States v. Jones*, 952 F.3d 153 (4th Cir. March 3, 2020) (Niemeyer, J.) (E.D. Va.)**

Officers received a detailed anonymous tip that the defendant was distributing drugs from his residence and later conducted a knock and talk. When the defendant answered the door, officers smelled a strong odor of burning marijuana. The defendant was detained on the front porch while officers performed a protective sweep of the home. Inside, they found smoldering marijuana in a trash can. Based on the odor and their observations, officers sought and received a search warrant to look for evidence of marijuana. The warrant application detailed the tip, the knock and talk, the odor of marijuana, officer training and experience, and the still-smoking marijuana inside. The warrant authorized search of the home for narcotics and drug activity, including “any safes or locked boxed that

could aid in the hiding of illegal narcotics." A safe containing a gun was found in the defendant's bedroom, and various drugs and drug distribution paraphernalia were also found in the residence. The defendant was charged with drug offenses and as a felon in possession and moved to suppress. The district court denied the motion and the defendant pled guilty, reserving his right to appeal. The Fourth Circuit unanimously affirmed.

The defendant argued the search warrant lacked probable cause and was overbroad in light of the offense at issue. According to the defendant, once officers discovered the apparent source of the odor of marijuana (the smoking marijuana in the trash), probable cause existed only as to that offense for that amount of marijuana, and gave officers no further justification to search the rest of the house or to open safes. This argument was squarely rejected. The odor of marijuana provides probable cause to search the entire residence for any other marijuana. The warrant was also not overbroad: "The geographical scope of a warrant complies with the Fourth Amendment if, in light of 'common-sense conclusions about human behavior' there is a 'fair probability that contraband or evidence of a crime' will be found in the areas delineated by the warrant."

This situation was different from searches where probable cause only existed to search for a specific piece of evidence. There, the search would be limited to places the item could be located and would conclude once the particular item was located. "[C]ommon sense" here suggested that the smoking marijuana found by officers would not be the only amount of marijuana in the home and that any other marijuana in the home might be hidden elsewhere, including in any safes. The warrant therefore complied with the Fourth Amendment and the district court did not err denying the motion.

SIXTH AMENDMENT/RIGHT TO CONFRONT WITNESSES

United States v. Smith, 962 F. 3d 755 (4th Cir. June 16, 2020) (Wilkinson, J.) (Traxler, J., concurring) (W.D.N.C.)

In this meth case, drugs and baggies were found on two separate occasions in the defendant's vehicle, and scales were found on one of those occasions. At trial, an officer testified to the relevance of baggies and scales to the drug trade based on his experience in law enforcement, over defense objection.

The officer was asked on cross-examination if his knowledge and experience was based in part on information obtained from interrogating suspects and cooperating witnesses. The officer acknowledged it was. The defense then moved to strike all of the officer's testimony as improper lay opinion and a Confrontation Clause violation. The district court denied the objection, the defendant was convicted, and appealed.

The Fourth found the testimony was proper lay opinion under Rule 701 of the Federal Rules of Evidence. "[The officer's] testimony was essentially observational and 'based on personal knowledge'. Indeed, it is well-settled that 'experience-derived police testimony concerning criminals' typical modi operandi during a drug transaction' may qualify as lay opinion under Rule 701." The admission of this testimony was therefore not error, and, in the alternative, was harmless. The testimony at issue also did not involve "testimonial hearsay" in violation of the Confrontation Clause: "[The officer] did not describe a single statement that he had heard during earlier investigations, but rather drew on what he had generally learned over the course of his entire law enforcement career." Other challenges to the convictions were similarly rejected and the case was unanimously affirmed, with Judge Traxler concurring separately on an unrelated issue.

***United States v. Benson*, 957 F.3d 218 (4th Cir. Apr. 24, 2020) (Agee, J.) (Richardson, J., concurring) (E.D. Va.)**

Four defendants were jointly tried for use of a firearm in furtherance of murder and three were convicted. On appeal, they challenged the admission into evidence of out-of-court statements made to witnesses by various co-defendants (among other arguments). One co-defendant told a witness that his vehicle was "hot" and mentioned a "robbery." This co-defendant told the witness that the crime was planned as a residential breaking and entering but had not gone well ("the Brown statements").

Another co-defendant told police officers the crime was "supposed to be a burglary," that "he and others . . . took Brown's truck" to the scene of the crime, and that "he didn't go inside the house where the murder occurred but was there in front of the car," among other statements ("the Wallace statements").

The final codefendant made statements to three witnesses—he told a cellmate in pretrial detention that "they did the joint he was locked up for;" he told a jail visitor about being in town in Virginia for "something [he] wasn't supposed to do" and made other statements tending to show a conspiracy between the four men; he asked another witness to procure a gun for him ahead of the robbery and invited him to travel to Virginia and participate. According to that witness, the defendant also later told him someone had been shot during the robbery ("the Benson statements").

The defendants objected to the admission of these statements as a Confrontation Clause violation pursuant to *Bruton v. United States.*, 391 U.S 123 (1968) (finding a confrontation violation when an out-of-court statement by a non-testifying codefendant incriminating the defendant is admitted at a joint trial). The trial court found that all the challenged statements were non-testimonial, admitted the testimony, and gave limiting instructions as to the use of each statement at trial. The Fourth Circuit affirmed.

Citing *Richarson v. Marsh*, 481 U.S. 200 (1987), the Fourth Circuit observed: "If the statement of a non-testifying codefendant incriminates another only by virtue of linkage to other evidence at trial—that is, if in incriminates 'inferentially' rather than 'facially'—then it does not implicate *Bruton*."

Further, a *Bruton* confrontation issue only arises as to testimonial statements. Where there is no *Bruton* issue, jurors are presumed to apply the limiting instructions given by the trial court. No confrontation rights were violated here. The "Brown statements" were not testimonial and thus did not implicate *Bruton*, as the remarks occurred in an informal setting to the declarant's friend. As to the "Wallace statements," while a "clos[er] question" on the issue of whether the remarks were testimonial, the court found those statements only provided an inferential link to the defendant in question and thus did not implicate *Bruton*. With the "Benson statements," the remarks to the cellmate were "plainly non-testimonial" and did not implicate the defendant's confrontation rights. The statements to the witness before and after the crime were similarly non-testimonial, and the trial court did not err in admitting the statements made to the jail visitor. Any possible errors as to the admission of any of the statements were

harmless under the facts of the case, and the confrontation claims were denied.

RULE 11 PROCEEDINGS

United States v. Lockhart, 947 F.3d 187 (January 10, 2020)(Keenan, J.; Rushing, J., dissenting)(W.D.N.C.) (en banc)

Defendant was not advised at his Rule 11 proceedings that he was eligible for an ACCA sentence. And, as you may have guessed by the fact that this went to the en banc 4th Circuit, he was ACCA. After he was sentenced, his attorney (after a discussion with the prosecutor) put on the record that the defendant was aware of his ACCA exposure before pleading guilty.

He appealed. Because he did not object to the failure to inform him or try to withdraw his plea, this Fourth Circuit reviewed for plain error.

Going en banc to overturn precedent to the contrary, the Fourth Circuit overturned the plea. The Court had little trouble holding that failing to inform a defendant of the penalties associated with his crime was error that was plain.

To address the third prong of plain error, the Court asked whether, looking at the record as a whole, the defendant would have pleaded guilty but for the error. Considering that the defendant received no benefit from his guilty plea, and that on appeal his counsel asserted that he would go to trial on remand, the Fourth Circuit held that he met that standard.

The Fourth also put little to no weight on Lockhart's trial attorney putting on the record that Lockhart understood his exposure. The Court noted that it had no way of knowing what Lockhart himself understood (and, reading between the lines, it was pretty clearly a CYA move by the AUSA and the defense attorney that did not have the client's interest at heart).

JURY TRIALS

United States v. Gutierrez, 963 F.3d 320 (4th Cir. June 26, 2020) (Agee, J.) (W.D.N.C.)

The defendants were charged with Racketeer Influenced and Corrupt Organization Act ("RICO") violations stemming from their leadership roles in the Bloods. All defendants were convicted of RICO conspiracy at trial and appealed, raising multiple issues. The Fourth Circuit affirmed.

First, the Fourth found the trial court did not err in granting the government's motion to empanel an anonymous jury. The government pointed to acts of obstruction of justice by other gang members in support of the motion, including the murder of a witness and his wife in another North Carolina Bloods prosecution and the kidnapping of a family member of a prosecutor. Over objection, the trial court granted the motion and ordered that defense counsel not share the names of the jurors with the defendants.

An anonymous jury is warranted if two conditions are present: "(1) there is strong reason to conclude that the jury needs protection from interference or harm, or that the integrity of the jury's function will be compromised absent anonymity; and (2) reasonable safeguards have been adopted to minimize the risk that the rights of the accused will be infringed."

Here, strong reasons supported the decision—the defendants were leaders of a violent gang facing long prison sentences; they had committed acts of obstruction of justice in this case; and other gang members had violently obstructed justice in connection with other prosecutions of its members. This demonstrated a risk to the jury. The trial court also adopted reasonable safeguards by giving jurors a neutral explanation for withholding juror identities and instructing the jury about the presumption of innocence during that explanation. That jurors expressed some safety concerns to the trial court after hearing some of the evidence was not enough to show prejudice to the defendants. In the Fourth's words: "The timing of this concern shows that it bears no relation to the functioning of an anonymous jury, and Appellants do not provide any evidence to show otherwise."

Next, the Fourth determined that the trial court did not err in failing to recuse itself. In a prior Blood gang prosecution, the same judge recused himself after a picture of the judge was found in the defendant's prison cell. The defendants here argued that prior recusal required the judge to recuse himself in the present case. Here, there was no similar showing of a threat

to the judge by the defendants and no other grounds to question the trial judge's impartiality. The trial court also expressed concern that granting the motion would "create [a] precedent. . .[that] you can get rid of me by getting my picture," which would "encourage 'judge-shopping.'" Unlike the earlier case where there was an ostensible threat to the judge, the defendants here put forth no evidence to question the judge's impartiality other than the prior recusal. The denial of the motion was not therefore an abuse of discretion.

Other challenges to suppression, juror selection, the sufficiency of the evidence, jury instructions, post-verdict motions, and sentencing were similarly rejected, and the convictions unanimously affirmed.

APPEAL WAIVERS

United States v. Marsh, 944 F.3d 524 (4th Cir. Dec. 9, 2019)(E.D. Va.)(Harris, J.; Gregory, CJ, dissenting)

Defendant pleaded guilty with a plea agreement that contained an appeal waiver. At sentencing, the district court did not inform him of his right to appeal or the relevant time frame. Defendant filed a late notice of appeal.

The 4th Circuit dismissed the appeal as untimely (over J. Gregory's dissent). It held that the time limit for filing criminal appeals was not jurisdictional, but that the Court still strictly applied it. The defendant's proper avenue for relief was a 2255 motion.

More interestingly, however, the Court disagreed with the government's argument that the defendant's appeal waiver mooted the issue because the defendant had waived his right to appeal. The Court noted that an appeal waiver always comes with inherent exceptions, so it is not right to say that a defendant has *no* right to appeal in the face of a waiver. Further, a district court failing to inform the defendant of his rights is one of the more fundamental error that a court can make, so the appeal waiver would not cover it.

JURY MISCONDUCT/JURY INTERFERENCE

United States v. Johnson, 954 F.3d 174 (4th Cir. March 25, 2020) (Keenan, J.); Motz, J., dissenting)(D. Md)

Mr. Johnson and his codefendant were on trial for numerous charges related to their alleged membership in a "violent street and prison gang in Baltimore." Among the charges were those related to the intimidation and murder of witnesses. During trial a juror told a court security officer (in front of the other juror) that some of "the defendants' associates" had tried to take pictures of jurors as they stepped out into the hallway. The district court denied the defendants' motion for a mistrial, utilizing court staff to perform a brief investigation, but without holding a hearing where any of the jurors were questioned under oath. The mistrial was denied (although the initial reporting juror was dismissed), the defendants convicted, and sentences of life imposed on both.

On appeal, a divided Fourth Circuit vacated the district court's judgment (although not the verdicts) and remanded with orders to the district court to hold a hearing on the matter of jury interference. The court concluded that the single juror's report of possibly being photographed was sufficient to trigger the district court's obligation to hold a hearing and that the district court's outsourcing of its investigation to court staff was not appropriate. Furthermore, the court noted that the most important issue was how the conduct impacted the jury (at least the initial juror who made the report, if not the rest of the jury), not whether the reported conduct was accurately described. In other words, whether the photo taking actually took place was irrelevant compared to whether the juror thought she was being targeted.

Judge Motz dissented, arguing that the reported conduct was "what we ordinarily would consider innocuous," noting that none of the other jurors "interpreted their actions as photographing or attempting to photograph the jury."

FED. R. EVID. 404(B)

United States v. Bush, 944 F.3d 189 (4th Cir. Nov. 27, 2019)(King, J.) (D.S.C.)

Defendant was convicted of a drug conspiracy that went from 2008 through 2017. He objected to the admission at trial of evidence of a 2013 drug conviction, arguing that admitting it violated Rule 404(b). The district court, holding that the state conviction was inherent to the conspiracy, overruled the objection.

The Fourth Circuit noted a circuit split on the question of the standard of review. Some circuits hold that the question as to whether evidence is intrinsic to a charged offense is a question of law reviewed de novo. The Fourth, however, holds that it is part of the evidentiary question reviewed for an abuse of discretion.

The Court then held that the district court did not abuse its discretion in holding that the drug conviction was intrinsic to the charges for a drug conspiracy that allegedly occurred over the time period involving the conviction.

INTERSTATE AGREEMENT ON DETAINERS ACT (IADA)

United States v. Peterson, 945 F.3d 144 (4th Cir. Dec. 16, 2019)(Wilkinson, J.)(D.S.C.)

Peterson and his codefendant, Bun, were inmates in a South Carolina prison when they were charged federally with running a methamphetamine distributing ring while incarcerated. They were brought to federal court but Peterson, in violation of the Interstate Agreement on Detainers Act ("IADA") was sent back to state prison in violation of the Act's "anti-shuttling" provision. The district court dismissed the indictment without prejudice as to both defendants, but a new indictment was obtained (and a subsequent superseding indictment) and both defendants were eventually convicted after a jury trial and sentenced to lengthy terms of imprisonment (to be served consecutively to their lengthy state terms of imprisonment).

The Fourth Circuit affirmed the convictions, focusing on the arguments related to the IADA and similar issues arising under the Speedy Trial Act ("STA"). First, the defendants argued that the district court should have dismissed the initial indictment with prejudice rather than without (a similar state violation under the IADA would require dismissal with prejudice). Reviewing for abuse of discretion, the court looked at the three factors the IADA lays out for making that determination and found that they all cut against the defendants. First, all parties agreed that the seriousness of the charged offenses weighed in favor of dismissal without prejudice. Second, the court concluded that the "surrounding facts and circumstances" weighed in favor of dismissal without prejudice because although the US Marshals in South Carolina have a history of violating IADA in this particular case the moving of Peterson was done at his request so that he could be closer to counsel. Finally, the court concluded that the "administration of justice" weighed in favor of dismissal without prejudice because although the defendants were already serving long state prison sentences (in Bun's case, a life sentence) the federal government has a "weighty interest" in seeking convictions for offenses committed against the United States. The court next held that the defendants' speedy trial rights under IADA were not violated because those provisions should be construed as closely as possible to match the STA and the delays here were excusable under the STA. Finally, the court held that the superseding indictment was not untimely filed under the STA because the indictment returned after the dismissal of the initial indictment was done within the 30-day limit set forth in the STA.

POSSESSION OF A FIREARM AFTER A CONVICTION FOR A FELONY (18 U.S.C. § 922(g)(1))

***United States v. Smith*, 939 F.3d 612 (4th Cir. Sept. 27, 2019) (Richardson, J.)(W.D.N.C.)**

Normally, the Fourth Circuit ties itself in knots trying to understand whether a prior crime is a "felony." To shake things up, this time, the Court addressed what it means to have been "convicted" of a crime.

Mr. Smith was convicted of being a felon in possession of a firearm. He appealed, arguing that the only possible felony on his record was a North

Carolina "conditional discharge" that he received after a state larceny plea, and that is not a "conviction."

The Fourth Circuit agreed with him and vacated his conviction. Recognizing that the issue is one of state law, the Court concluded that the North Carolina Supreme Court would not consider a conditional discharge a conviction, and that ends the inquiry.

United States v. Gary, 954 F.3d 194 (4th Cir. March 25, 2020) (Gregory, C.J.) (D.S.C.)

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew of his prohibited status (in addition to proving knowing possession of the firearm) to convict a defendant under 18 U.S.C. § 922(g). The defendant in *Gary* pled guilty to that offense, and the trial judge instructed the defendant on the elements of the crime during the plea colloquy. The trial judge failed to mention the knowledge-of-status element required by *Rehaif*. On plain error review, the Fourth held this was structural error and reversed. The defendant could not make an informed choice about pleading guilty without being informed of the correct and complete elements of the crime, and this omission amounted to a violation of the defendant's Sixth Amendment right to autonomy in the conduct of his defense. In the words of the Fourth: "The [defendant] had the right to make an informed choice on whether to plead guilty or to exercise his right to go to trial. In accepting [the defendant's] plea after misinforming him of the nature of the elements, the court deprived him of his right to determine the best way to protect his liberty."

Because the error was structural, harmless error review did not apply and the defendant was not required to show prejudice. This also violated due process under the Fifth Amendment and principles of fundamental fairness: "When [the defendant] pled guilty, he waived, among other rights, his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. The impact of his unknowing waiver of his trial rights based on an unconstitutional guilty plea . . . is unquantifiable [and therefore structural error]." The conviction was therefore vacated and the matter remanded for further proceedings.

USE OF A FIREARM IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSE (18 U.S.C. § 924(c))

United States v. Bryant, 949 F.3d 168 (4th Cir. Jan. 24, 2020)(Floyd, J.)(D.S.C.)

Bryant was convicted in 2010 of assaulting a postal employee with intent to rob, steal or purloin and placing their life in jeopardy, along with brandishing a firearm in connection with a crime of violence. In the wake of *Johnson* in 2015, Bryan filed a 2255 motion arguing that his assault conviction was not a "crime of violence" as defined in 18 USC § 924(c). The district court denied the motion.

The Fourth Circuit affirmed, holding that 18 U.S.C. § 2114(a) is a Section 924(c) crime of violence. Recognizing that the statute was divisible into at least two different offenses, the issue was whether both of them could be committed in aggravated fashion, or only the robbery offenses could. The court held that both offenses could be committed in aggravated fashion, noting that while the arrangement of the clauses and the omission of "assault" from one clause suggested otherwise, "all of the other evidence" favored that conclusion. That includes the history of the statute (which dates to 1792), which showed that attempting to commit a robbery related back to the assault. Thus defined, the court moved on to the ultimate issue, which was whether the "additional life-in-jeopardy-with-a-dangerous-weapon element transforms such an assault into a crime of violence under the force clause." The court held that it did, because the use of a weapon "ensures that at least the threat of physical force is present."

United States v. Jordan, 952 F.3d 160 (4th Cir. March 3, 2020)(Harris, J.)(W.D.N.C.)

The First Step Act, among other things, eliminated Section 924(c) "stacking" at sentencing. (Stacking is the mechanism through which a defendant guilty of multiple Section 924(c) convictions in the same sentencing has the mandatory minimum for each count run consecutively to each other, with all convictions after the first carrying a 25-year minimum sentence.)

Defendant was guilty of multiple Section 924(c) offenses, and the district court stacked them for sentencing. After his sentencing, but while his appeal was pending, Congress passed the First Step Act prohibiting stacking.

Defendant raised two arguments on appeal to the stacking, both of which the Court rejected. First, he argued that he committed only one act with a gun that happened to support two separate drug trafficking offenses; thus, he continued, it would violate Double Jeopardy to punish him twice for that conduct. The Fourth Circuit, acknowledging a Circuit split on the issue, held that it was bound by its own precedent that as long as the two underlying drug predicates were separate offenses for Double Jeopardy purposes (as they were here), they can support two separate Section 924(c) convictions for the same conduct.

Second, he argued that the Court should apply the First Step Act's bar to his case. The Court, relying on the plain language of the statute, held that it does not apply retroactively to cases that were sentenced before its enactment.

AGGRAVATED IDENTITY THEFT (18 U.S.C. § 1028A(A)(1)

United States v. George, 946 F.3d 643 (4th Cir. January 9, 2020)(Floyd, J.)(E.D.N.C.)

Defendant was charged with aggravated identity theft for using a dead person's identity to obtain a loan. The district court dismissed the charge, holding that a "person" as used in the statute had to be a living person. The government appealed the dismissal.

The Fourth Circuit agreed with the government and reversed. Recognizing that the term was not defined in the act and dictionaries were "inconclusive," the court retreated to the use of the term in "common parlance" and concluded it included the deceased. That holding, the court pointed out, was the one that every other Circuit to confront the issue had come to. The legislative history also supported that conclusion.

HOBBS ACT ROBBERY (18 U.S.C. § 1951)

United States v. Taylor, 942 F.3d 205 (4th Cir. Nov. 5 2019) (Niemeyer, J)(D. Md.)

Taylor and his codefendant, Hersl, were Baltimore police officers who were involved with a number of others in a scheme to rob suspected drug dealers and falsify overtime reports. As a result, they were convicted by a jury of Hobbs Act robbery and other offenses. They appealed.

The Court affirmed the convictions for Hobbs Act robbery, based on separate events. For Taylor, the court concluded there was sufficient evidence to conclude that he stole some of the money seized from a drug dealer during a purchase of drugs based on the dealer's testimony about the terms of the deal and the lesser amount of money turned over to police evidence control. For Hersl, the court concluded there was sufficient evidence to show that he was involved in a warrantless search of another drug dealer's home, during which cash was seized and a portion of it divided up by the officers involved.

RICO (18 U.S.C. § 1962)

United States v. Taylor, 942 F.3d 205 (4th Cir. Nov. 5 2019) (Niemeyer, J)(D. Md.)

Taylor and his codefendant, Hersl, were Baltimore police officers who were involved with a number of others in a scheme to rob suspected drug dealers and falsify overtime reports. As a result, they were convicted by a jury of RICO conspiracy, substantive racketeering, and other counts. They appealed.

The Fourth Circuit affirmed Taylor and Hersl's convictions and sentences. First, the court rejected their argument that there was insufficient evidence of one of the two racketeering acts charged as part of the RICO count, wire fraud. Specifically, the defendants argued that there was insufficient evidence to show that it was reasonably foreseeable to them that the false overtime reports – which were processed by a company in another state and resulted in paychecks being sent or electronic funds transfers – used the "wires." The court disagreed, noting that the interstate nexus portion of

wire fraud was a jurisdictional element and that there was sufficient evidence of the defendants' familiarity with the overtime time and payroll scheme that it was foreseeable that the wires would be involved. Second, the court applied that holding in rejecting the argument that there was insufficient evidence to support the substantive racketeering count, since it was based on multiple acts of wire fraud.

CARJACKING (18 U.S.C. § 2219(1))

United States v. Small, 944 F.3d 490 (4th Cir. Dec. 6, 2019)(Wilkinson, J.)(D. Md.)

Small was one of three masked men (one of which had a gun) who confronted a driver in Baltimore just after he'd parked his car. They demanded that he "hand over everything he had" while pointing a gun in his face. After they had the keys, they demanded that the driver come with them, but he "turned around and walked home." The car was stolen. A jury convicted him of carjacking.

The Fourth Circuit affirmed Small's conviction. Small's primary argument was that the government failed to prove that he acted with the intent to cause death or serious bodily harm needed to sustain the carjacking conviction. The court disagreed, concluding that there was sufficient evidence given the time of night, that the driver was confronted by three masked men, one of those men was armed and it "would remained trained on [the driver], only a foot from his head, during the entire interaction." The court also noted that the three men made physical contact with the driver when they patted him down to see if he had anything else on him. That the three men did not threaten the driver, did not harm him when he disobeyed instructions, and there was no evidence that the gun was loaded were all relevant factors to the question of intent, but were not dispositive on an issue best left to the jury.

SORNA (18 U.S.C. § 2250)

United States v. Helton, 944 F.3d 198 (4th Cir. December 3, 2019)(Quattlebaum, J.; Floyd, J., dissenting)(N.D. W.Va.)

Defendant was charged with failing to register under SORNA. The question was whether the defendant's prior conviction for South Carolina voyeurism was a "sexual act" for SORNA purposes. The Fourth Circuit held that it was.

SORNA does not define "sexual act." The Court rejected the defendant's argument that the Court should adopt a definition from elsewhere in the United States Code that would require physical contact. "Sexual act" does not require physical contact. And, because the SC voyeurism statute at issue required that the defendant's act be in furtherance of arousing sexual desire, it met the SORNA definition.

Judge Floyd dissented. He agreed that "sexual act" does not require physical contact. But the only sexual component of SC voyeurism involves the defendant's subjective state of mind, which is not enough to convert a non-sexual act into a sexual act. Also, Congress did not include the federal voyeurism statute—which is narrower than the SC statute—into SORNA, showing that Congress did not intend to cover this type of conduct.

***United States v. Spivey*, 956 F.3d 212 (4th Cir. April 15, 2020) (Floyd, J.) (E.D.N.C.)**

Spivey moved from North Carolina to Colorado while required to register as a sex offender for state convictions. He was charged with registration violations in North Carolina after failing to register in Colorado and moved to dismiss for improper venue, arguing the case must be heard in Colorado. The Fourth rejected this argument, reasoning that because Spivey's interstate travel was an essential conduct element of the offense, and because the offense began in North Carolina (and ended in Colorado), venue was proper in either state. This result was also consistent with 18 U.S.C. § 3237 ("Offenses begun in one district and completed in another"). The district court was therefore unanimously affirmed.

***United States v. Wass*, 954 F.3d 184 (4th Cir. March 25, 2020) (Wynn, J.) (E.D.N.C.)**

Wass was convicted of sex offenses in Florida in 1995 and was required to register under SORNA (enacted in 2006). He moved to dismiss the SORNA prosecution for violations of the nondelegation and ex post facto doctrines,

and the district court granted the motion. The government appealed, and the Fourth Circuit reversed.

The Fourth observed that the Supreme Court recently considered nondelegation in the context of SORNA in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Kagan, J.) (plurality opinion). The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. But Congress may 'confer substantial discretion on executive agencies to implement and enforce the laws', as long as it 'has supplied an intelligible principle to guide the delegee's use of discretion." With 34 U.S.C. 20913(d), Congress gave the Attorney General the authority to "specify" the application of SORNA's registration requirements to offenders with an offense pre-dating SORNA's enactment. The Attorney General authorized those requirements in 2011 and applied the registration requirement to all offenders, including those with pre-SORNA offense dates. Wass argued that SORNA improperly delegated this decision to the Attorney General. *Gundy*, though, already rejected this argument, finding the Attorney General was only delegated authority to determine "feasibility issues" with SORNA's rollout, and that this "easily passed constitutional muster." *Gundy* at 2121. That *Gundy* was a plurality decision did not help Wass—under *Marks v. United States*, 430 U.S. 188, 193 (1977), the "narrowest grounds" of the concurring judgments in a plurality decision is the holding of the case. In *Gundy*, five justices agreed in judgment that SORNA did not violate the nondelegation doctrine and that holding therefore defeated any nondelegation claim.

The Fourth also rejected the ex post facto challenges. Ex post facto laws are laws that impose punishment on conduct that was not criminal at the time of the act, or laws that increase a penalty for conduct beyond what the law provided at the time of the act. An initial inquiry in an ex post facto challenge is whether the statute provides for punishment. Where the law is meant to impose retroactive punishment, it violates the ex post facto clause. "But if the legislature's intention 'was to enact a regulatory scheme that is civil and nonpunitive,' courts must examine 'whether the statutory scheme is so punitive either in purpose or effect as to negate' that intention." Wass argued that application of the criminal failure to register law to his pre-SORNA conviction constituted retroactive punishment in violation of the ex post facto clause. Circuit precedent foreclosed this argument—the failure to register law with which the defendant was charged "punishes the failure to

register after SORNA's enactment and therefore . . . does not violate the Ex Post Facto Clause."

The Fourth also rejected the argument that the registration scheme itself was so punitive as to qualify as punishment for ex post facto purposes, noting that circuit precedent foreclosed the argument. The order granting the motion to dismiss was consequently reversed and the matter remanded for trial.

DRUG CONSPIRACY (21 U.S.C. § 846)

United States v. Denton, 944 F.3d 170 (4th Cir. Nov. 25, 2019)(King, J.)(E.D.N.C.)

Defendant was convicted of a drug conspiracy. He raised several claims on appeal. The most significant of which was the impropriety of the jury instruction. The jury was instructed to determine the amount of drugs that Defendant conspired to distribute or possess with intent to distribute. The jury was not, however, told to limit that determination only to drugs that were reasonably foreseeable to the Defendant. This instruction was error under *United States v. Collins*, 415 F.3d 304 (4th Cir. 2015).

The Fourth Circuit, however, affirmed the conviction on plain error because the evidence against the defendant regarding drug amount was "overwhelming," so the error did not affect the fairness, integrity, or public reputation of the judicial proceedings.

United States v. Williamson, 953 F.3d 264 (4th Cir. March 23, 2020)(Wilkinson, J.)(N.D.W.V.)

The defendant was convicted of aiding and abetting methamphetamine distribution. Basically, he got some meth from a supplier, and he and his girlfriend used some of it and sold some of it. He argued that the meth that he gave to his girlfriend (whose distribution he was aiding and abetting) for her personal use should not be counted toward the drug weight against him.

The 4th wasn't buying it. Judge Wilkinson (who adorably called the drugs "Ice" (with the scare quotes) every time he referred to them) noted that the

defendant distributed the drugs to his girlfriend, and that ends the inquiry. What she did with them is not material. The Court noted that other circuits do not allow for a co-conspirator personal use exception in conspiracy cases, which are highly analogous to the aiding and abetting situation here.

And, in a not-unfamiliar nod to the harsh difficulties faced by our heroic federal prosecutors, the Fourth pointed out that if it allowed the defendant here to claim that he should not be punished for the drugs that his effective co-conspirator consumed, then *other defendants might raise the same argument at other sentencings where it applies*. And that would put way too high of a burden on federal prosecutors who might have to do something other than nod toward the PSR and grunt to hold a defendant responsible for every gram of methamphetamine that passed through his county over a three year period.

FIRST STEP ACT SECTION 404

United States v. Gravatt, 953 F.3d 258 (4th Cir. March 23, 2020)(Quattlebaum, J.)(D.S.C.)

The legal issue here is narrow, but it will help a lot of guys. Section 404 of the First Step Act allows a convicted defendant to come back to court for a retroactive sentence reduction if he was charged with a crack offense that had its statutory penalties lowered by the Fair Sentencing Act but he did not get the benefit of the Fair Sentencing Act at his original sentencing.

The question in Gravatt centered on what we have been calling "mixed drug" cases. What if a guy was charged with both crack AND another drug such that the crack penalties were lowered by the Fair Sentencing Act, but his overall statutory penalties would remain the same because of the other drug (which was not lowered)? Focusing on the plain text of the 1SA, the Fourth Circuit had little trouble holding that such a defendant IS eligible for a resentencing under the 1SA. It, of course, noted that the district court could rely on the presence and amount of the other drug in making its discretionary decision about whether and how much of a reduction to give. But, the defendant is legally eligible to be considered for a reduction, so the court must move to that "whether and how much" step and cannot categorically deny relief.

United States v. Venable, 943 F.3d 187 (4th Cir. November 20, 2019)(Agee, J.)(W.D. Va.)

The question was whether a defendant who is currently serving a sentence on revocation of supervised release is eligible for a sentencing reduction under Section 404 of the First Step Act if his original conviction was for a First Step Act covered offense. The Fourth Circuit held that he is because the revocation sentence relates back to the original conviction and sentence.

Practice tip: The government filed a mini-brief the day before oral argument raising a new argument ground. Don't do that. Turns out that the Fourth Circuit HATES that. Who knew?

United States v. Wirsing, 943 F.3d 175 (4th Cir. Nov. 20, 2019)(Wynn, J.)(N.D. W.Va.)

The defendant moved for a sentence reduction under the First Step Act. He had pleaded guilty to possessing 16 grams of crack. At the time, the statutory sentencing range for crack cocaine punished him for possessing 5 grams or more. Then the Fair Sentencing Act changed the relevant amounts, such that the statutory sentencing range for 5 grams or more of crack would be lower. The district court refused to consider a reduction. It held that the defendant had admitted in his plea to possessing 60 grams of crack. And 60 grams of crack would not change the defendant's sentence, so he is not eligible.

The Fourth Circuit reversed. The First Step Act looks to whether the statutory range for the crime of conviction changed. It does not ask what conduct the defendant actually engaged in that was unrelated to the crime of conviction. Both the language and the purpose of the statute support this conclusion. The statutory range for 5 grams of crack changed, so defendant is eligible for a reduction.

ACCA FORCE CLAUSE

United States v. Allred, 942 F.3d 641(4th Cir. Nov. 7, 2019)(Wilkinson, J.) (M.D.N.C.)

Allred was convicted of being a felon in possession of a firearm. He was sentenced to 264 months under the Armed Career Criminal Act because, among other things, of a prior conviction under 18 USC 1513 for retaliation against a witness by causing bodily injury. That was in 1995. In 2016, after Johnson, Allred filed a 2255 motion arguing that his 1513 conviction was no longer a "violent felony" because it did not require the use of force. The district court agreed and resentenced Allred to 120 months in prison.

On the Government's appeal, the Fourth Circuit reversed the district court's grant of the 2255 motion. The court first had to decide whether 1513 was a divisible statute or not. The court ultimately concluded that it was, laying out four different offenses, at least one of which (because it involves property) would clearly not be an ACCA predicate anymore. However, once that finding was made, a check of Allred's indictment showed he was charged and convicted under the version of the offense that involved causing bodily injury. The court then looked to whether that satisfied ACCA's force clause and concluded, based on Castleman that it did. Indirect force was enough to satisfy the clause and the offense at issue here could not be committed negligently or recklessly. Therefore, Allred still qualified for sentencing under ACCA.

***United States v. Johnson*, 945 F.3d 174 (4th Cir. Dec. 18, 2019)(Motz, J.)(D. Md.)**

Johnson was convicted of being a felon in possession of a firearm. At sentencing, the Government argued that he qualified for a 15-year mandatory minimum sentence under the Armed Career Criminal Act because of a prior conviction in Maryland for robbery. The district court disagreed.

Despite Mr. Johnson's somewhat lucky name in the ACCA context, the Fourth Circuit vacated the sentence. The court noted that Maryland robbery can be committed by either the threat of violence or the actual use of violence in the taking of property from another. The court concluded that both of those versions of the offense met the "violent force" requirement of ACCA. The threat of violence, under state law, requires a threat of bodily harm, which is sufficient to meet the standard. Using actual force requires enough to overcome the will of the victim, but has to be more than the force

necessary to take the property. That, too, met the ACCA standard, according to the court.

ENHANCEMENT FOR UNDULY INFLUENCING A MINOR TO ENGAGE IN PROHIBITED SEXUAL CONDUCT (U.S.S.G. § 2G3.1(B)(2)(B)

United States v. Arbaugh, 951 F.3d 167 (4th Cir. Feb. 20, 2020)(Agee, J.)(W.D.Va.)

Defendant was convicted of engaging in illicit sexual conduct with a minor in a foreign country. Among several objections at sentencing, he objected to the district court's use of U.S.S.G. § 2G1.3(b)(2)(B)'s age disparity provision to enhance his sentence, arguing that it was impermissible double counting because his base offense level and other Guidelines provisions already inherently accounted for the age disparity.

The Fourth Circuit had little trouble rejecting his argument. First, Section 2G1.3(b)(2)(B) targets a slightly different harm than the other Guidelines provisions. Second, to the extent some overlap exists, the Guidelines permit double counting unless they expressly prohibit it, which they do not do here.

SERIOUS DRUG OFFENSE DEFINITION (U.S.S.G. § 2K2.1(A)(4))

United States v. Johnson, 945 F.3d 174 (4th Cir. Dec. 18, 2019)(Motz, J.)(D. Md.)

Johnson was convicted of being a felon in possession of a firearm. At sentencing, the Government argued that Johnson's prior Maryland conviction for possession with intent to distribute was a "controlled substance offense" under the Sentencing Guidelines.

The Fourth Circuit vacated the sentence. The court rejected Johnson's argument that under Maryland law the offense could be committed by merely offering drugs to another person, without any intent to distribute, finding that position unsupported in Maryland statutory and case law.

SENTENCING VARIANCES (18 U.S.C. § 3553(a))

United States v. Fowler, 948 F.3d 663 (4th Ci.r Jan. 27 2020) (Wilkinson, J.)(D. Md.)

Defendant was convicted of various child pornography offenses. His guidelines were life. The government asked for a 50 year sentence. The defendant asked for the minimum 15 year sentence. The district court sentenced him to 40 years imprisonment. In so doing, it acknowledged the existence of good time credits and indicated that it was fashioning a sentence that, assuming defendant earned those credits, would have him released in his early 60s.

Defendant appealed, arguing that it was improper for the district court to consider good time credits when fashioning a sentence.

The Fourth Circuit reviewed that unpreserved claim for plain error. It affirmed the sentence, holding that the district court did not err. It looked at the sentencing proceedings holistically and said that the district court's overall goal—trying to have the defendant released at a certain age—was authorized by Section 3553(a). Further, because the district court granted a downward variance, it could not be said to have considered good time credits to *increase* the defendant's sentence.

Two thoughts. First, this opinion glosses over (i.e. does not even mention) that lots of courts have noted serious separations of powers concerns with sentencing courts considering good-time credits at sentencing because the administration of the sentence is an executive branch matter. You should continue to object if the government argues for this at a sentencing. Second, Judge Wilkinson praised the 40-year sentence as "not . . . inhumane," which just goes to show that Judge Wilkinson sees the world differently than a lot of us.

United States v. Provance, 944 F.3d 213 (4th Cir. Dec. 3, 2019)(Thacker, J.)(E.D.N.C.)

Mr. Provance pleaded guilty to child abuse while on federal property. The district court imposed a downward variance from his 33-41 month Guidelines range and sentenced him to probation and community service.

The government appealed, arguing that the sentence was substantively unreasonable.

The 4th Circuit vacated the sentence as *procedurally* unreasonable because the district court did not provide an adequate explanation. In so doing, the Court clarified two points. First, even though neither party raised procedural unreasonableness, the Court held that it had the power (and obligation) to consider the issue sua sponte. It was not an argument that a party could waive by not raising. Second, the Court held that it must satisfy itself that a sentence is procedurally reasonable before it can engage in substantive reasonableness review.

***United States v. Torres-Reyes*, 952 F.3d 147 (4th Cir. March 2, 2020)(Richardson, J.)(E.D.N.C.)**

Defendant pleaded guilty to illegal reentry. At sentencing, he made a legal objection to the inclusion of a 1995 California drug conviction as part of his criminal history calculation, arguing that it was too old to count. Critically, he also argued in the alternative that, if the court did include that conviction, that it should downwardly vary from the resulting range because that range would over-represent his criminal history, creating a sentencing disparity under Section 3553(a). The district court denied his legal objection, did not address the variance argument, and sentenced him to the bottom of his Guidelines range. He appealed.

The Fourth Circuit reversed, holding that the district court procedurally erred in not addressing Defendant's nonfriv0lous argument for a downward variance. It is possible for a district court's resolution of a legal objection at sentencing to also incorporate discussion of the equitable/variance dimensions of that objection. And it is possible for the transcript of a sentencing hearing, taken as a whole, to show that a district court considered and addressed a party's arguments. On this record, however, neither of those circumstances occurred. Unless the record makes it "patently obvious" that a court considered a party's arguments, the appellate court cannot assume that it did.

SUPERVISED RELEASE

United States v. Arbaugh, 951 F.3d 167 (4th Cir. Feb. 20, 2020)(Agee, J.)(W.D.Va.)

Defendant was convicted of engaging in illicit sexual conduct with a minor in a foreign country. Among other issues, he appealed the district court's imposition of several special conditions of supervised release related to the use of a computer without explaining why it was imposing them, arguing that his offense had nothing to do with use of a computer.

The Fourth Circuit agreed with him. Conditions of supervised release are part of a sentence, so the district court has a procedural obligation to adequately explain them. The Fourth Circuit rejected the government's attempts to save the conditions by pointing to other aspects of the record to justify them. As the Court noted, it cannot assume the district court's reasons in the face of silence. Finally, the fact that the defendant will have to register under SORNA, which imposes similar conditions, is not relevant. SORNA does not alter the district court's power and obligation to consider what conditions to impose on supervised release.

INTERLOCUTORY APPEALS

United States v. Sueiro, 946 F.3d 637 (4th Cir. January 9, 2020)(Floyd, J.)(E.D. Va.)

Defendant moved to represent himself in a child pornography prosecution. The district court denied his motion. He filed an interlocutory appeal.

The Fourth Circuit dismissed the appeal as untimely. It held that the denial of a motion for self-representation does not fall under the "collateral order" exception to the bar on interlocutory appeals. If the district court erred in denying self-representation, then the defendant can raise that issue on appeal after his conviction. He would then get the right to self-representation at his new trial. Thus, self-representation is not a right that can be vindicated only by an interlocutory appeal, which is required for the narrow "collateral order" doctrine to apply.