

**FOURTH CIRCUIT DECISIONS ON  
CRIMINAL LAW AND PROCEDURE**

Published Between April 1, 2015, and March 31, 2016  
(with addendum covering cases decided between April and September 2016)

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TABLE OF CONTENTS

INTRODUCTION. . . . .	1
I. OFFENSES. . . . .	1
8 U.S.C. § 1326, Illegal Reentry After Removal. . . . .	1
18 U.S.C. § 871 <i>et seq.</i> , Extortion and Threats. . . . .	1
18 U.S.C. §§ 922, 924, Firearms. . . . .	1
18 U.S.C. § 1111, Murder. . . . .	2
18 U.S.C. § 1341 <i>et seq.</i> , Fraud Offenses. . . . .	2
18 U.S.C. § 1959, Violent Crimes in Aid of Racketeering Activity (VICAR). . . . .	3
18 U.S.C. § 2251 <i>et seq.</i> , Sexual Exploitation and Other Abuse of Children. . . . .	3
18 U.S.C. § 2421 <i>et seq.</i> , Transportation, etc, for Illegal Sexual Activity. . . . .	3
21 U.S.C. § 841 <i>et seq.</i> , Controlled Substance Offenses. . . . .	3
II. COMMERCE CLAUSE ISSUES. . . . .	4
III. <u>FOURTH AMENDMENT ISSUES</u>	
Automobile Exception. . . . .	4
Reasonable Suspicion. . . . .	4
Search Incident to Arrest. . . . .	5
Warrants. . . . .	5
Exclusionary Rule. . . . .	5

IV.	FIFTH AMENDMENT ISSUES (Pre-trial and Trial).....	6
	Competency to Stand Trial. ....	6
	Double Jeopardy. ....	6
	Due Process. ....	6
	Grand Jury / Indictment. ....	7
V.	SIXTH AMENDMENT ISSUES (Pre-trial and Trial). ....	7
	Compulsory Process.....	7
	Confrontation.....	7
	Counsel. ....	7
VI.	OTHER PRE-TRIAL ISSUES.....	8
	Joinder / Severance (Fed. R. Crim. P. 8, 14). ....	8
	Juvenile Prosecutions (18 U.S.C. § 5031 <i>et seq.</i> ). ....	8
VII.	TRIAL ISSUES. ....	8
	Evidence.....	8
	Federal Rules of Evidence 401 <i>et seq.</i> .....	8
	Federal Rules of Evidence 701 <i>et seq.</i> .....	9
	Federal Rules of Evidence 801 <i>et seq.</i> .....	9
	Jury Selection.....	9
	Conduct of Judge (Judicial Interference).....	10
VIII.	PLEA ISSUES. ....	10
	Plea Agreement Provisions. ....	10

	Entry of Guilty Plea (Fed. R. Crim P. 11). . . . .	10
IX.	SENTENCING ISSUES. . . . .	11
	Constitutional Considerations. . . . .	11
	Eighth Amendment. . . . .	11
	Sentencing Statutes. . . . .	11
	18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA). . . . .	11
	18 U.S.C. § 3584, Concurrent and Consecutive Sentences. . . . .	12
	Sentencing Guidelines. . . . .	12
	U.S.S.G. 2A3.1 <i>et seq.</i> , Criminal Sexual Abuse, Failure to Register as Sex Offender. . . . .	12
	U.S.S.G. § 2B1.1, Fraud. . . . .	12
	U.S.S.G. § 2G2.1 <i>et seq.</i> , Child Pornography. . . . .	12
	U.S.S.G. § 2K2.1 <i>et seq.</i> , Firearms. . . . .	12
	U.S.S.G. § 2L1.2, Illegal Reentry After Removal. . . . .	13
	U.S.S.G. § 3C1.1 <i>et seq.</i> , Obstruction Adjustments. . . . .	13
	U.S.S.G. § 3D1.1 <i>et seq.</i> , Grouping. . . . .	14
	U.S.S.G. § 4B1.1 <i>et seq.</i> , Career Offenders and Other Recidivists. . . . .	14
	U.S.S.G. § 5D1.1 <i>et seq.</i> , Imposition of Supervised Release. . . . .	14
	Reasonableness of Sentence. . . . .	14
X.	REVOCATION ISSUES. . . . .	15
	Revocation. . . . .	15
	Sentencing. . . . .	15

XI.	APPELLATE ISSUES.....	15
	Reviewability of Issues. ....	15
	Standards of Review. ....	16
	De Novo.....	16
	Clear Error Review. ....	16
	Procedural Issues. ....	16
XII.	POST-CONVICTION ISSUES.....	17
	18 U.S.C. § 3582, Modification of Sentence of Imprisonment After Imposition. ....	17
	28 U.S.C. §§ 2241, 2255, Post-Conviction Relief.....	17
	ADDENDUM	
	Published cases decided between April and September 2016.....	18

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**INTRODUCTION**

This outline documents the published decisions of the Fourth Circuit over the past twelve months that address criminal law and procedure issues encountered by court-appointed attorneys or relevant to court-appointed representation, primarily on direct appeal. Decisions that represent defense wins or otherwise contain defense-favorable findings are marked by an exclamation point (!). Decisions that, in the compiler's judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked by an asterisk (\*). Note that not every issue raised in a decision is reflected in the outline. Please report errors or omissions in the outline to the compiler at [fran\\_pratt@fd.org](mailto:fran_pratt@fd.org).

**I. OFFENSES**

**8 U.S.C. § 1326, Illegal Reentry After Removal**

! *Amos v. Lynch*, 790 F.3d 512 (4th Cir. June 10, 2015) (Keenan, J.) (Bd. of Immigration Appeals) (alien's Maryland state conviction for causing abuse to a child does not qualify as "aggravated felony" under generic federal crime of "sexual abuse of a minor")

**18 U.S.C. § 871 et seq., Extortion and Threats**

*United States v. White*, 810 F.3d 212 (4th Cir. Jan. 7, 2016) (Thacker, J) (W.D. Va.) (in prosecution under 18 U.S.C. § 875(b) in case involving threatening communications sent by defendant to ex-wife to extort alimony payments, "claim of right" defense does not apply because offense involves wrongful threats to injure or kidnap; defendant may not threaten to injure or kidnap someone to collect debt, even debt legitimately due and owing)

*United States v. White*, 810 F.3d 212 (4th Cir. Jan. 7, 2016) (Thacker, J) (W.D. Va.) (to obtain conviction for violating 18 U.S.C. § 875(c) after *Elonis v. United States*, 135 S. Ct. 2001 (2015), government must prove that defendant knowingly transmitted communication in interstate or foreign commerce; that defendant subjectively intended communication as threat; and that content of communication contained "true threat" to kidnap or injure)

**18 U.S.C. §§ 922, 924, Firearms**

*United States v. Barlow*, 811 F.3d 133 (4th Cir. Dec. 21, 2015) (Mozt, J.) (M.D.N.C.) (when determining for 18 U.S.C. § 922(g)(1) prosecution whether prior North Carolina conviction was for

offense punishable by more than one year of imprisonment, N.C. Structured Sentencing Act's requirement that defendant be released on supervision nine months before expiration of defendant's maximum sentence does not operate to reduce statutory maximum sentence; post-release supervision is part of term of imprisonment, unlike federal supervised release)

*United States v. Burlison*, \_\_\_ F.3d \_\_\_, 2016 WL 878136 (4th Cir. Mar. 8, 2016) (Harris, J.) (M.D.N.C.) (when determining whether a prior felony conviction can be used as a predicate for 18 U.S.C. § 922(g)(1) prosecution, the time for determining whether a defendant is subject to state firearm restrictions is the time at which the defendant's civil rights were restored, not the time that the defendant is arrested on the federal § 922(g) charge)

! *United States v. Vinson*, 805 F.3d 120 (4th Cir. Nov. 3, 2015) (Traxler, J.) (E.D.N.C.) (on appeal by government of dismissal of indictment charging defendant with violating 18 U.S.C. § 922(g)(9) (possession of a firearm after sustaining a misdemeanor conviction for a crime of domestic violence ("MCDV")), vacating earlier published decision (794 F.3d 418) and holding that misdemeanor assault by a male adult on a female, in violation of N.C. Gen. Stat. § 14-33(c)(2), does not constitute MCDV because it can be committed recklessly or negligently) (N.B.: the Supreme Court's pending decision in *Voisine v. United States*, No. 14-10154 (argued Feb. 29, 2016), will address this issue and may abrogate the decision)

! *United States v. Fuertes*, 805 F.3d 485 (4th Cir. Aug. 18, 2015) (Davis, J.) (D. Md.) (*inter alia*, as to one defendant, finding on plain error review that 18 U.S.C. § 1591(a) is not categorically a "crime of violence" under either prong of 18 U.S.C. § 924(c)'s definition of that term)

*United States v. McNeal*, \_\_\_ F.3d \_\_\_, 2016 WL 1178823 (4th Cir. Mar. 28, 2016) (King, J.) (E.D. Va.) (armed bank robbery in violation of 18 U.S.C. § 2113(d) qualifies as "crime of violence" for purposes of serving as predicate offense under "force clause" of 18 U.S.C. § 924(c)'s definition of "crime of violence") (N.B.: the court avoids the question of whether the offense qualifies under the "residual clause" and whether that clause is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015))

#### 18 U.S.C. § 1111, Murder

*United States v. Beyle*, 782 F.3d 159 (4th Cir. Apr. 3, 2015) (Wilkinson, J.) (E.D. Va.) (murder committed 30 to 40 nautical miles off coast of Somalia was committed on the "high seas" and was therefore within the "special maritime and territorial jurisdiction of the United States" as defined in 18 U.S.C. § 7)

#### 18 U.S.C. § 1341 et seq., Fraud Offenses

*United States v. Bajoghli*, 785 F.3d 957 (4th Cir. May 11, 2015) (Niemeyer, J.) (E.D. Va.) (on interlocutory appeal by government of district court's rulings in health care billing fraud case that excluded evidence not directly relevant to acts charged in indictment, concluding that where government charges defendant under 18 U.S.C. § 1347 with scheme to defraud and elects to charge

only certain executions of that scheme, its election does not limit its proof to only charged executions; rather, it may introduce other evidence of uncharged executions to prove the scheme)

18 U.S.C. § 1959, Violent Crimes in Aid of Racketeering Activity (VICAR)

! *United States v. Under Seal*, \_\_\_ F.3d \_\_\_, 2016 WL 1239115 (4th Cir. Mar. 30, 2016) (Agee, J.) (E.D. Va.) (on appeal by government, affirming district court's denial of motion to transfer defendant for prosecution as adult pursuant to 18 U.S.C. § 5032 when he was juvenile at time of alleged murder in aid of racketeering in violation of 18 U.S.C. § 1959, for which penalties are death or life imprisonment without parole, in light of recent Supreme Court decisions prohibiting imposition of such sentences on juveniles)

18 U.S.C. § 2251 et seq., Sexual Exploitation and Other Abuse of Children

! *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. Nov. 5, 2015) (Gregory, J.) (D. Md.) (in § 2251(a) prosecution, finding evidence *insufficient* to establish that defendant had engaged in sexual conduct with minor *for the purpose* of producing depiction of that conduct)

18 U.S.C. § 2421 et seq., Transportation, etc, for Illegal Sexual Activity

*United States v. Bollinger*, 798 F.3d 201 (4th Cir. Aug. 19, 2015) (Gregory, J.) (W.D.N.C.) (Congress has authority under Foreign Commerce Clause to enact 18 U.S.C. § 2423(c), which prohibits U.S. citizens who live and travel abroad from engaging in non-commercial "illicit sexual conduct")

21 U.S.C. § 841 et seq., Controlled Substance Offenses

! *United States v. Blue*, 808 F.3d 226 (4th Cir. Dec. 10, 2015) (Hamilton, J.) (D. Md.) (finding evidence *insufficient* to support conviction under 21 U.S.C. § 841(a) for possession with intent to distribute over 100 grams of heroin on constructive possession theory where defendant possessed key to apartment in which 108.6 grams of heroin was found in footstool, entered building containing apartment but stayed only five minutes, and left with sandwich-sized plastic container in hand; rejecting government's argument that possession of key creates constructive possession of contents in the dwelling, vehicle, etc, to which key goes)

! *United States v. Blue*, 808 F.3d 226 (4th Cir. Dec. 10, 2015) (Hamilton, J.) (D. Md.) (finding evidence *insufficient* to support conviction under 21 U.S.C. § 846 for conspiring to distribute and to possess with intent to distribute over 100 grams of heroin where evidence was insufficient to tie defendant to 108.6 grams of heroin (as described in preceding case entry; rejecting government's argument that appellate court should instruct district court to enter judgment on lesser-included offense of conspiracy involving less than 100 grams of heroin)

*United States v. Alvarado*, \_\_\_ F.3d \_\_\_, 2016 WL 860328 (4th Cir. Mar. 7, 2016) (Niemeyer, J.; Davis, J., dissenting) (W.D. Va.) (in case involving heroin distribution resulting in death, district court did not abuse its discretion, much less plainly err, in declining to give *Burrage*



instruction in response to jury's questions about causation where there was no evidence to suggest that victim could have died without heroin; also ruling that in light of *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), which remains good law after *Burrage*, § 841(b)(1)(C) does not contain foreseeability requirement, such that jury must find that death resulting from drug use was foreseeable to defendant)

## II. COMMERCE CLAUSE ISSUES

*United States v. Bollinger*, 798 F.3d 201 (4th Cir. Aug. 19, 2015) (Gregory, J.) (W.D.N.C.) (Congress has authority under Foreign Commerce Clause to enact 18 U.S.C. § 2423(c), which prohibits U.S. citizens who live and travel abroad from engaging in non-commercial "illicit sexual conduct")

## III. FOURTH AMENDMENT ISSUES

### Automobile Exception

! *United States v. Patiutka*, 804 F.3d 684 (4th Cir. Oct. 23, 2015) (Motz, J.) (W.D. Va.) (on appeal by government, affirming district court's grant of motion to suppress evidence flowing from warrantless search of defendant's SUV following traffic stop, finding search was not justified under automobile exception because officer did not have probable cause to search vehicle based on what was seen in it before defendant revoked consent that officer thought defendant had given to search of SUV; rejecting government's arguments about application of collective-knowledge doctrine)

### Reasonable Suspicion

! *United States v. Slocumb*, 804 F.3d 677 (4th Cir. Oct. 22, 2015) (Gregory, J.) (W.D. Va.) (reversing denial of suppression motion where police officer did not have reasonable suspicion of criminal activity to justify detaining defendant, whom officer encountered late at night in parking lot of closed salvage business in known high-crime area where defendant was helping girlfriend whose car had broken down, where only particularized suspicion was based on defendant avoiding eye contact with officer and giving mumbled answers to officer's questions)

! *United States v. Charles Williams*, 808 F.3d 238 (4th Cir. Dec. 14, 2015) (King, J.) (M.D.N.C.) (reversing denial of suppression motion where police, who stopped defendant for speeding in a soon-to-be-overdue rental car on I-85, a supposedly "known drug corridor," in middle of night did not have reasonable suspicion to extend stop in order to conduct dog sniff for drugs after defendant refused to consent to search)

*United States v. Stover*, 808 F.3d 991 (4th Cir. Dec. 18, 2015) (Motz, J.; Gregory, J., dissenting) (D. Md.) (affirming denial of suppression motion where even though defendant was not free to leave at point that armed and uniformed officers had blocked defendant's car with their cruiser, had turned on cruiser's emergency lights, and had illuminated driver's side of defendant's

car with spotlight, defendant did not submit to show of authority when he got out of his car and walked toward front of car despite orders to get back inside, tossing gun before one officer put service weapon in defendant's face; accordingly, defendant was not seized at time he abandoned gun) (N.B.: the government did *not* contend that officers had reasonable suspicion to stop defendant, and the court appears to agree that there was none, when all officers claimed was that defendant had double-parked his Virginia-tagged car late at night in small private parking lot of apartment building located in Maryland neighborhood close to Virginia where several violent robberies had recently occurred)

! *United States v. Robinson*, 814 F.3d 201 (4th Cir. Feb. 23, 2016) (Harris, J.; Niemeyer, J., dissenting) (N.D. W. Va.) (reversing denial of suppression motion where although police who frisked defendant had reasonable suspicion to believe he was armed with a loaded gun, they did not have reasonable suspicion to believe that he was presently dangerous in light of West Virginia's "concealed carry" law) **Note: Rehearing en banc granted, decision pending.**

#### Search Incident to Arrest

! *United States v. Patiutka*, 804 F.3d 684 (4th Cir. Oct. 23, 2015) (Motz, J.) (W.D. Va.) (on appeal by government, affirming district court's grant of motion to suppress evidence flowing from warrantless search of defendant's SUV following traffic stop, finding it was not a search incident to arrest because officer did not have probable cause to arrest defendant for any offense at time that defendant revoked consent that officer thought defendant had given to search of SUV; rejecting government's arguments about application of collective-knowledge doctrine)

#### Warrants

! *United States v. Graham*, 796 F.3d 332 (4th Cir. Aug. 5, 2015) (Davis, J.; Motz, J., dissenting) (D. Md) (holding, *inter alia*, that government's warrantless procurement of cell site location information ("CSLI") for extended period of time from defendants' cell phone service provider was unreasonable search in violation of defendants' Fourth Amendment rights because "[e]xamination of a person's historical CSLI can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user"; however, because government relied in good faith on court orders issued in accordance with statutory authority that requires finding akin to reasonable suspicion, not "substantially higher" probable cause, holding that court's admission of challenged evidence must be sustained) (N.B.: this decision was vacated when the court granted the government's petition for rehearing en banc on this issue; the court heard en banc argument on Mar. 23, 2016)

#### Exclusionary Rule

*United States v. Qazah*, 810 F.3d 879 (4th Cir. Nov. 17, 2015) (Niemeyer, J.) (W.D.N.C.) (in case involving conspiracies to transport stolen cigarettes and to launder money, evidence recovered in search based on warrant, which authorized search of one defendant's house but incorporated attachment that described items to be seized from co-defendant's house, was admissible under good-faith exception to exclusionary rule where prosecutor had emailed copy of warrant with

correct version of attachment to magistrate and magistrate had reviewed those documents before signing copy of warrant with incorrect attachment and where agents executed warrant using summary list of items prepared from correct version of attachment)

! *United States v. Rush*, 808 F.3d 1007 (4th Cir. Dec. 21, 2015) (Wynn, J.) (S.D. W. Va.) (reversing denial of suppression motion where, after defendant's girlfriend gave her apartment key to police and asked them to remove her boyfriend from apartment because she suspected he had been dealing drugs from it, police went into apartment, lied to defendant about having warrant to search apartment (supposedly in order to protect girlfriend), thereby depriving him of his right to object to search as a present co-occupant of apartment; good-faith exception to exclusionary rule does not apply to officer's intentional false representation to defendant because a reasonable officer would know that deliberately lying about existence of warrant would violate defendant's Fourth Amendment rights)

#### IV. FIFTH AMENDMENT ISSUES (Pre-trial and Trial)

##### Competency to Stand Trial

! *United States v. Watson*, 793 F.3d 416 (4th Cir. July 17, 2015) (Harris, J.; Traxler, J., dissenting in part) (E.D. Va.) (concluding that government did not meet its heavy burden of proving that involuntary medication was substantially likely to restore defendant's competency)

##### Double Jeopardy

*United States v. Schnittker*, 807 F.3d 77 (4th Cir. Dec. 2, 2015) (Wilkinson, J.) (E.D. Va.) (where indictment in child pornography case charged one count of possession and one count of receipt but neither count identified specific images or computers containing images, double jeopardy did not bar trial on receipt count based on contents of one hard drive after defendant pled guilty to possession count based on contents of different hard drive)

##### Due Process

*United States v. Beyle*, 782 F.3d 159 (4th Cir. Apr. 3, 2015) (Wilkinson, J.) (E.D. Va.) (defendant, a Somali national charged with murder and piracy, was not denied due process when he was not able to obtain testimony of foreign nationals located outside United States for his defense at trial due to security situation in Somalia)

! *United States v. Parker*, 790 F.3d 550 (4th Cir. June 25, 2015) (Keenan, J.) (D.S.C.) (in prosecution for operating gambling business in violation of 18 U.S.C. § 1955, government committed *Brady* violation in failing to turn over information that it been advised by a witness just prior to trial that witness was being investigated by SEC for fraud; information was both favorable impeachment evidence and material)

### Grand Jury / Indictment

*United States v. Moore*, 810 F.3d 932 (4th Cir. Jan. 20, 2016) (Harris, J.) (D.S.C.) (jury instructions in murder-for-hire case did not constructively amend indictment where although indictment charged defendants with violating “interstate travel” prong of 18 U.S.C. § 1958(a) but court instructed, without objection, not only on travel prong but also on “interstate facility” prong, totality of case made clear that jury could not have reasonably concluded that it was free to convict defendants under facility prong)

## V. SIXTH AMENDMENT ISSUES (Pre-trial and Trial)

### Compulsory Process

*United States v. Beyle*, 782 F.3d 159 (4th Cir. Apr. 3, 2015) (Wilkinson, J.) (E.D. Va.) (defendant, a Somali national charged with murder and piracy, was not denied his right to compulsory process when he was not able to obtain testimony of foreign nationals located outside United States for his defense at trial due to security situation in Somalia; )

### Confrontation

*United States v. Alvarado*, \_\_\_ F.3d \_\_\_, 2016 WL 860328 (4th Cir. Mar. 7, 2016) (Niemeyer, J.) (W.D. Va.) (finding that admission of out-of-court statements by person who died from overdose of heroin distributed by defendant that decedent purchased heroin from defendant did not violate defendant’s right to confrontation because statements were not testimonial in nature where decedent made them to fiancée and to best friend)

### Counsel

*United States v. Ragin*, \_\_\_ F.3d \_\_\_, 2016 WL 930202 (4th Cir. Mar. 11, 2016) (Gregory, J.) (W.D.N.C.) (in question of first impression in circuit, holding that defendant is deprived of Sixth Amendment right to effective assistance of counsel when counsel sleeps through substantial portion of defendant’s trial; such conduct compromises reliability of trial to such a degree that no separate showing of prejudice is necessary)

! *United States v. Ductan*, 800 F.3d 642 (4th Cir. Sept. 2, 2015) (per curiam) (W.D.N.C.) (holding that although magistrate judge correctly determined that defendant did not knowingly and intentionally waive right to counsel, judge erred in concluding that defendant forfeited right through his frivolous arguments and answers to questions; because in Fourth Circuit having counsel is the default position and defendant cannot forfeit right to counsel, reiterating that before defendant can waive counsel and represent himself, district court must ensure (1) that defendant knowingly and intelligently forgoes benefits of counsel after being made aware of dangers and disadvantages of self-representation, and (2) that defendant’s waiver of counsel must be clear and unequivocal)

## VI. OTHER PRE-TRIAL ISSUES

### Joinder / Severance (Fed. R. Crim. P. 8, 14)

*United States v. McDonnell*, 792 F.3d 478 (4th Cir. July 10, 2015) (Thacker, J.) (E.D. Va.) (district court did not abuse discretion in denying defendant's motion to sever his trial on, *inter alia* conspiracy charges, from that of his wife where defendant offered only vague and conclusory statements regarding substance of wife's testimony, nor did court act improperly in declining to consider defendant's *ex parte* proffer of substance of wife's testimony) **Note: Cert granted and conviction vacated and remanded by Supreme Court**

### Juvenile Prosecutions (18 U.S.C. § 5031 et seq.)

! *United States v. Under Seal*, \_\_\_ F.3d \_\_\_, 2016 WL 1239115 (4th Cir. Mar. 30, 2016) (Agee, J.) (E.D. Va.) (on appeal by government, affirming district court's denial of government's motion to transfer defendant for prosecution as an adult pursuant to 18 U.S.C. § 5032 when he was juvenile at time of alleged murder in aid of racketeering in violation of 18 U.S.C. § 1959, for which penalties are death or life imprisonment without parole, in light of recent Supreme Court decisions prohibiting imposition of such sentences on juveniles)

## VII. TRIAL ISSUES<sup>1</sup>

### Evidence

#### Confrontation

*See* Sixth Amendment, *supra*

#### Federal Rules of Evidence 401 et seq.

*United States v. Bajoghli*, 785 F.3d 957 (4th Cir. May 11, 2015) (Niemeyer, J.) (E.D. Va.) (on interlocutory appeal by government of district court's rulings in health care billing fraud case that excluded evidence in part under Rule 404(b), concluding that evidence of post-scheme conduct was intrinsic to charged scheme; fact that conduct occurs after activities charged in indictment does not automatically make it extrinsic and thus subject to Rule 404(b))

*United States v. Fuertes*, 805 F.3d 485 (4th Cir. Aug. 18, 2015) (Davis, J.) (D. Md.) (in prosecution for, *inter alia*, conspiracy to transport individual across state lines for purposes of prostitution where overt acts alleged in indictment included threats and violence against competitor pimps, introduction of evidence concerning defendants' violence against competitors did not violate Rule 404(b))

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<sup>1</sup> Subsections are arranged by stage of trial.

Federal Rules of Evidence 701 et seq.

*United States v. McDonnell*, 792 F.3d 478 (4th Cir. July 10, 2015) (Thacker, J.) (E.D. Va.) (in trial of former Virginia governor, district court did not abuse discretion in precluding defense expert from testifying about government's star witness's cooperation agreement with government because expert testimony cannot be used for sole purpose of undermining witness's credibility) **Note: Cert granted and conviction vacated and remanded by Supreme Court.**

*United States v. Fuertes*, 805 F.3d 485 (4th Cir. Aug. 18, 2015) (Davis, J.) (D. Md.) (district court did not abuse discretion in admitting government's expert witness's testimony about source of victim's injuries over defense objection that testimony served only to bolster witness's credibility about her injuries)

Federal Rules of Evidence 801 et seq.

*United States v. Moore*, 810 F.3d 932 (4th Cir. Jan. 20, 2016) (Harris, J.) (D.S.C.) (statements made by co-conspirator to cellmate before committing suicide were properly admitted as statements against interest under Rule 804(b)(3) over defendant's challenge that statement were inherently unreliable)

*United States v. Alvarado*, \_\_\_ F.3d \_\_\_, 2016 WL 860328 (4th Cir. Mar. 7, 2016) (Niemeyer, J.) (W.D. Va.) (finding harmless any error in admission as statements against interest under Rule 804(b)(3) of out-of-court statements by person who died from overdose of heroin distributed by defendant that person purchased heroin from defendant)

Sufficiency of Evidence

*See Offenses, supra*

Jury Selection

*United States v. McDonnell*, 792 F.3d 478 (4th Cir. July 10, 2015) (Thacker, J.) (E.D. Va.) (in trial of former governor of Virginia, whose prosecution had generated tremendous publicity, district court did not abuse discretion in declining to individually question every potential juror about the publicity) **Note: although the Supreme Court granted certiorari in this case, the Court declined to grant cert. on this issue.**

*United States v. White*, 810 F.3d 212 (4th Cir. Jan. 7, 2016) (Thacker, J.) (W.D. Va.) (district court did not abuse discretion in empanelling anonymous jury where defendant had prior convictions for using personal information to intimidate persons involved in judicial proceedings, including using Internet to publicize a juror's personal information, and where court otherwise employed reasonable safeguards to protect defendant's right to fair trial)

### Conduct of Judge (Judicial Interference)

! *United States v. Martinovich*, 810 F.3d 232 (4th Cir. Jan. 7, 2016) (Thacker, J.; Wynn, J., concurring) (E.D. Va.) (on plain error review because counsel did not object to district court's behavior, finding that district court's frequent interruptions of counsel and questioning of counsel's tactics "crossed the line" and constituted plain error; further finding, however, that "although the district court's interferences in this case went beyond the pale," defendant's substantial rights were not affected where evidence of guilt was overwhelming)

## VIII. PLEA ISSUES

### Plea Agreement Provisions

*United States v. Obey*, 790 F.3d 545 (4th Cir. June 24, 2015) (Motz, J.) (E.D.N.C.) (where plea agreement provided that parties would recommend that court impose 18-year sentence but court imposed 20-year sentence, government did not breach plea agreement where prosecutor did not criticize terms of agreement or express doubt about legality or propriety of recommended sentence and where, although the terms of agreement did not require prosecutor to state reasons to support recommendation, he did so)

### Entry of Guilty Plea (Fed. R. Crim P. 11)

! *United States v. Braxton*, 784 F.3d 240 (4th Cir. Apr. 28, 2015) (Harris, J.) (D. Md.) (district court impermissibly participated in plea negotiations, in violation of Fed. R. Crim. P. 11(c)(1), where court told defendant that "I am not favorably inclined towards having you go to trial and trigger a mandatory minimum of 20 years, as opposed to a plea offer that's down in the 10 to 15 year range in terms of years of your life"; that defendant was "hurting [his] own interest" by choosing to go to trial; and comparing defendant's decision to go to trial to putting his head in buzz saw or vice)

*United States v. Aplicano-Oyuela*, 792 F.3d 416 (4th Cir. July 7, 2015) (King, J.) (D. Md.) (on plain error review, even if district court had insufficiently advised defendant about term of supervised release where court advised him of statutory maximum and defendant's "plea letter" stated that if he violated supervised release, he could be imprisoned, any error did not affect defendant's substantial rights where nothing indicated that defendant would not have entered guilty plea)

## IX. SENTENCING ISSUES

### Constitutional Considerations

#### Eighth Amendment

*United States v. Said*, 798 F.3d 182 (4th Cir. Aug. 13, 2015) (King, J.; Davis, J., concurring) (E.D. Va.) (on appeal by government of district court's refusal to impose life sentences mandated by statute, holding that mandatory life sentences as applied to defendants in this case do not violate Eighth Amendment; threshold comparison of gravity of offense and severity of sentence does not give rise to inference of gross disproportionality)

#### Sentencing Statutes

##### 18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA)

! *United States v. Span*, 789 F.3d 320 (4th Cir. June 8, 2015) (Davis, J.; Motz, J., dissenting) (W.D.N.C.) (finding that district court committed clear error in determining as factual matter based on ambiguous *Shepard*-approved documents that defendant's prior robbery convictions were committed on occasions different from one another)

! *United States v. McLeod*, 808 F.3d 972 (4th Cir. Oct. 30, 2015) (Niemeyer, J.) (D.S.C.) (South Carolina second-degree burglary, S.C. Code § 16-11-312, does not qualify as "violent felony" because offense's statutory elements do not limit convictions to generic burglary, i.e., burglary of buildings or structures, but allow for possibility of breaking and entering into vehicles, boats, and planes)

*United States v. Sellers*, 806 F.3d 770 (4th Cir. Nov. 18, 2015) (Shedd, J.) (D.S.C.) (district court properly counted defendant's three prior South Carolina drug convictions as "serious drug offenses" because they have maximum term of imprisonment of ten or more years, even though defendant was sentenced under South Carolina Youthful Offender Act, which permits courts to exercise discretion to cap sentence at six years; reaffirming *United States v. Williams*, 508 F.3d 724 (4th Cir. 2007), regarding treatment of South Carolina Youthful Offender Act sentences, and finding that *Simmons* reinforces, rather than rejects, *Williams*'s holding that statutory penalty, not sentence defendant received, is what controls)

! *United States v. Barlow*, 811 F.3d 133 (4th Cir. Dec. 21, 2015) (Motz, J.) (M.D.N.C.) (North Carolina offense of felony speeding to elude arrest, N.C. Gen. Stat. § 20-141.5(b), does not qualify as "violent felony" where offense does not have use, attempted use, or threatened use of physical force against a person as an element; is not an enumerated offense, and cannot count under residual clause where Supreme Court declared clause unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015))



18 U.S.C. § 3584, Concurrent and Consecutive Sentences

! *United States v. Obey*, 790 F.3d 545 (4th Cir. June 24, 2015) (Motz, J.) (E.D.N.C.) (although district court may order instant sentence to run consecutively to any anticipated state court sentence, court cannot order instant sentence to run consecutively to another federal sentence not yet imposed)

Sentencing Guidelines

U.S.S.G. 2A3.1 et seq., Criminal Sexual Abuse, Failure to Register as Sex Offender

! *United States v. Berry*, 814 F.3d 192 (4th Cir. Feb. 19, 2016) (Wynn, J.) (E.D.N.C.) (in SORNA failure-to-register case, holding as matter of first impression in circuit that categorical approach, not circumstance-specific approach, applies to determining in which tier defendant falls for purpose of determining base offense level based on sex offender tier under U.S.S.G. § 2A3.5; further finding that New Jersey offense of endangering welfare of child did not categorically qualify as Tier III offense)

U.S.S.G. § 2B1.1, Fraud

! *United States v. Qazah*, 810 F.3d 879 (4th Cir. Nov. 17, 2015) (Niemeyer, J.) (W.D.N.C.) (in case involving conspiracies to transport stolen cigarettes, district court erred in using retail value rather than wholesale value of cigarettes to determine intended loss amount under U.S.S.G. § 2B1.1 when court made no inquiry into whom intended victim(s) of offense were; remanding for reevaluation of loss amount by district court in light of decision)

U.S.S.G. § 2G2.1 et seq., Child Pornography

\* *United States v. Helton*, 782 F.3d 148 (4th Cir. Apr. 2, 2015) (Wilkinson, J.; Gregory, J., concurring) (S.D. W. Va.) (imposition of lifetime term of supervised release on child pornography offender was both procedurally and substantively reasonable where court linked length of term of supervision to below-range term of imprisonment and removed some of more onerous conditions of supervision) (N.B.: in his concurrence, Judge Gregory criticizes the child pornography guideline)

U.S.S.G. § 2K2.1 et seq., Firearms

! *United States v. Shell*, 789 F.3d 335 (4th Cir. June 12, 2015) (Harris, J.; Wilkinson, J., dissenting) (W.D.N.C.) (North Carolina second-degree rape, N.C. Gen. Stat. § 14-27.3, is not categorically a “crime of violence” for purposes of U.S.S.G. §§ 2K2.1 and 4B1.2; distinguishing definition in U.S.S.G. § 2L1.2)

U.S.S.G. § 2L1.2, Illegal Reentry After Removal

*United States v. Flores-Granados*, 783 F.3d 487 (4th Cir. Apr. 15, 2015) (Wilkinson, J.) (E.D. Va.) (North Carolina second-degree kidnapping, N.C. Gen. Stat. § 14-39, constitutes “crime of violence” for purposes of U.S.S.G. § 2L1.2’s definition of that term)

*United States v. Bercian-Flores*, 786 F.3d 309 (4th Cir. May 14, 2015) (Wynn, J.) (W.D.N.C.) (*Simmons* does not preclude use for offense level enhancement under U.S.S.G. § 2L1.2 of prior federal conviction for which guideline range under then-mandatory sentencing guidelines was 0 to 6 months where sentencing court had discretion to impose more than 12 months of imprisonment)

! *Amos v. Lynch*, 790 F.3d 512 (4th Cir. June 10, 2015) (Keenan, J.) (Bd. of Immigration Appeals) (alien’s Maryland state conviction for causing abuse to a child, former Md. Code Art. 27 § 35A, does not qualify as “aggravated felony” under generic federal crime of “sexual abuse of a minor”)

! *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. July 23, 2015) (Floyd, J.; Wilkinson, J., dissenting) (E.D.N.C.) (offense of discharging a firearm into an occupied building, N.C. Gen. Stat. § 14-34.1, does not constitute “crime of violence” because use-of-force clause in U.S.S.G. § 2L1.2’s definition of “crime of violence” is limited to use of force against persons whereas offense at issue does not require use of force against persons but includes use of force against property)

U.S.S.G. § 3C1.1 et seq., Obstruction Adjustments

*United States v. Andrews*, 808 F.3d 964 (4th Cir. Oct. 30, 2015) (Wilkinson, J.) (M.D.N.C.) (affirming application of U.S.S.G. § 3C1.1 where defendant’s attorney put on two defense witnesses to establish alibi, defendant knew of substance of witnesses’ testimony from pretrial discussions with attorney, and defendant sat silent during witnesses’ testimony; although district court did not make explicit findings that defendant procured perjured testimony, holding that application of enhancement on facts of case could rest on broader ground that its application satisfied “very essence” of enhancement, the willful obstruction of justice; rejecting defendant’s arguments that application of enhancement violated his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel)

*United States v. White*, 810 F.3d 212 (4th Cir. Jan. 7, 2016) (Thacker, J.) (W.D. Va.) (district court’s findings about applicability of U.S.S.G. § 3C1.1 based on defendant’s trial testimony, while not as explicit as they should have been, were nonetheless sufficient)

! *United States v. Shell*, 789 F.3d 335 (4th Cir. June 12, 2015) (Harris, J.) (W.D.N.C.) (in addressing question of first impression in circuit, joining other circuits in holding that reckless endangerment during flight, U.S.S.G. § 3C1.2, does not apply where defendant was unaware that he was being pursued by law enforcement officer; remanding case for determination by district court of whether defendant knew he was being pursued)

U.S.S.G. § 3D1.1 et seq., Grouping

*United States v. White*, 810 F.3d 212 (4th Cir. Jan. 7, 2016) (Thacker, J) (W.D. Va.) (where four counts of sending threatening communications to same victim on different occasions were excluded from grouping under U.S.S.G. § 3D1.2(d), district court did not plainly err in failing to group counts under § 3D1.2(a) or (b) where application notes suggest that grouping would not be proper under either subsection)

U.S.S.G. § 4B1.1 et seq., Career Offenders and Other Recidivists

! *United States v. Shell*, 789 F.3d 335 (4th Cir. June 12, 2015) (Harris, J.; Wilkinson, J., dissenting) (W.D.N.C.) (North Carolina second-degree rape, N.C. Gen. Stat. § 14-27.3, is not categorically a “crime of violence” for purposes of U.S.S.G. §§ 2K2.1 and 4B1.2; distinguishing definition in U.S.S.G. § 2L1.2)

U.S.S.G. § 5D1.1 et seq., Imposition of Supervised Release

*United States v. Aplicano-Oyuela*, 792 F.3d 416 (4th Cir. July 7, 2015) (King, J.) (D. Md.) (finding that imposition of term of supervised release as part of sentence for alien who is likely to be removed was appropriate and procedurally reasonable even though district court did not specifically reference U.S.S.G. § 5D1.1(c) and that provisions’ recommendation that supervised release ordinarily should not be imposed on removable alien)

Reasonableness of Sentence

\* *United States v. Helton*, 782 F.3d 148 (4th Cir. Apr. 2, 2015) (Wilkinson, J.; Gregory, J., concurring) (S.D. W. Va.) (imposition of lifetime term of supervised release on child pornography offender was both procedurally and substantively reasonable where court linked length of term of supervision to below-range term of imprisonment and removed some of more onerous conditions of supervision) (N.B.: in his concurrence, Judge Gregory criticizes the child pornography guideline)

*United States v. Bollinger*, 798 F.3d 201 (4th Cir. Aug. 19, 2015) (Gregory, J.) (W.D.N.C.) (25-year sentence of imprisonment requested by government, which represented 35-year (60%) downward variance, was procedurally reasonable where district court adequately considered defendant’s request for 5-year sentence and court did not inappropriately consider victims’ ages as aggravating factor used to limit extent of variance where ages already factored into advisory guideline range calculation)

! *United States v. Martinovich*, 810 F.3d 232 (4th Cir. Jan. 7, 2016) (Thacker, J.) (E.D. Va.) (sentence within advisory guideline range was procedurally unreasonable where district court treated guidelines as mandatory; error was not harmless as sentence may have been lower where court indicated that guidelines did not take into account defendant’s positive attributes and good works)

*United States v. Bollinger*, 798 F.3d 201 (4th Cir. Aug. 19, 2015) (Gregory, J.) (W.D.N.C.) (25-year sentence of imprisonment requested by government, which represented 35-year (60%)

downward variance, was not substantively unreasonable “when considered in light of our deferential standard of review, the heartrending victim-impact statements in the record, the powerlessness of the victims, and the [defendant-]minister’s heinous abuse of authority,” even where it amounts to life imprisonment in light of defendant’s age)

*United States v. McCoy*, 804 F.3d 349 (4th Cir. Oct. 15, 2015) (Motz, J.) (E.D. Va.) (188-month sentence for drug offenses was not substantively unreasonable where district court departed upward from 135-168 months to 188-235 months, pursuant to U.S.S.G. § 4A1.3, on basis of three adult convictions for conduct committed when defendant was a teenager 25 years earlier; distinguishing *United States v. Howard*, 773 F.3d 519 (4th Cir. 2014))

## X. REVOCATION ISSUES

### Revocation

*United States v. Padgett*, 788 F.3d 370 (4th Cir. June 9, 2015) (Motz, J.) (S.D. W. Va.) (in clarifying standard of review for decision to revoke defendant’s supervised release in first instance, stating that appellate court will review district court’s decision to revoke for an abuse of discretion and district court’s factual findings underlying revocation for clear error; if decision rests on clearly erroneous factual finding, then district court has abused discretion)

### Sentencing

*United States v. Wynn*, 786 F.3d 339 (4th Cir. May 20, 2015) (Keenan, J.) (E.D. Va.) (where violation of supervised release consisted of illegal drug possession, court may consider defendant’s prior drug convictions in determining statutory maximum for new drug offense when deciding whether offense constitutes Grade B or C violation)

## XI. APPELLATE ISSUES

### Reviewability of Issues

\* *United States v. Vinson*, 805 F.3d 120 (4th Cir. Nov. 3, 2015) (Traxler, J.) (in vacating opinion on defendant-appellee’s petition for panel rehearing, noting that defendant did not raise issue that panel found dispositive upon rehearing in either the district court or in his merits response brief on appeal, but finding that because rule precluding consideration of issue for first time on rehearing is prudential, not jurisdictional, and because issue was purely legal and closely related to argument raised by government in its opening and reply briefs, court would exercise discretion to consider issue)

*United States v. McLaughlin*, 813 F.3d 202 (4th Cir. Feb. 16, 2016) (Wilkinson, J.) (E.D.N.C.) (where defendant’s plea agreement reserved right to appeal sentence imposed above

advisory guideline range but not manner in which that range was calculated, defendant's challenge to calculation of range fell within scope of appellate waiver)

! *United States v. Adams*, 814 F.3d 178 (4th Cir. Feb. 19, 2016) (Floyd, J.) (E.D.N.C.) (in 18 U.S.C. § 922(g)(1) case in which defendant claimed he was actually innocent of offense because prior conviction was not for a felony in light of *Simmons*, ruling that claim of actual innocence falls outside scope of waivers of appeal and collateral attack)

\* *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. Nov. 5, 2015) (Gregory, J.) (D. Md.) (noting that government waived its argument about defendant having waived an argument where government did not raise its waiver claim until one week before oral argument in Rule 28(j) letter)

*United States v. Williams*, 811 F.3d 621 (4th Cir. Jan. 28, 2016) (Wynn, J.) (D.S.C.) (finding that appellate court lacked jurisdiction to review appeal of defendant's sentence under 18 U.S.C. § 3742 because sentence imposed pursuant to terms of Rule 11(c)(1)(C) plea agreement may only be reviewed if sentence is unlawful or is expressly based on Sentencing Guidelines; extending rationale of *Freeman v. United States*, 131 S. Ct. 2685 (2011) (where sentence imposed pursuant to Rule 11(c)(1)(C) agreement, district court can grant relief in § 3582(c) context only where sentence was expressly based on Sentencing Guidelines), to § 3742 context)

### Standards of Review

#### De Novo Review

*United States v. Ductan*, 800 F.3d 642 (4th Cir. Sept. 2, 2015) (per curiam) (W.D.N.C.) (holding that proper standard of review of claim that defendant had not waived or forfeited his right to counsel when *pro se* defendant did not object to lower court's finding that he had forfeited right, an issue on which the circuits have split, is de novo review)

#### Clear Error Review

*United States v. Padgett*, 788 F.3d 370 (4th Cir. June 9, 2015) (Motz, J.) (S.D. W. Va.) (in clarifying standard of review for decision to revoke defendant's supervised release in first instance, stating that appellate court will review district court's decision to revoke for an abuse of discretion and district court's factual findings underlying revocation for clear error; if decision rests on clearly erroneous factual finding, then district court has abused discretion)

### Procedural Issues

\* *United States v. Graham*, 796 F.3d 332 (4th Cir. Aug. 5, 2015) (Davis, J.) (D. Md) (where government filed letter with court of appeals addressing what it claimed were erroneous factual assertions in defendant's reply brief and appellants moved to strike letter as a sur-reply, granting motion to strike because government did not move for leave to file sur-reply brief and letter failed to demonstrate adequately that sur-reply brief was needed) (N.B.: this decision was vacated when

the court granted the government's petition for rehearing en banc on different aspect of case; the court heard en banc argument on Mar. 23, 2016)

\* *United States v. Vinson*, 805 F.3d 120 (4th Cir. Nov. 3, 2015) (Traxler, J.) (E.D.N.C.) (on petition for rehearing by defendant/appellee, vacating earlier decision on new ground raised by defendant for first time on rehearing; noting that although court of appeals will not ordinarily consider issue raised for first time on rehearing, that rule is prudential, not jurisdictional)

\* *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. Nov. 5, 2015) (Gregory, J.) (D. Md.) (noting that government waived its argument about defendant having waived an argument where government did not raise its waiver claim until one week before oral argument in Rule 28(j) letter)

## XII. POST-CONVICTION ISSUES

### 18 U.S.C. § 3582, Modification of Sentence of Imprisonment After Imposition

*United States v. Lance Williams*, 808 F.3d 253 (4th Cir. Dec. 14, 2015) (King, J.) (M.D.N.C.) (where court imposed sentence on defendant in drug distribution case that was below mandatory minimum sentence (because government moved pursuant to 18 U.S.C. § 3553(e) for substantial assistance reduction) but was still above advisory guideline range that would have applied absent mandatory minimum, defendant was eligible for sentence reduction pursuant to 18 U.S.C. § 3582(c) and U.S.S.G. Ams. 750 and 782; a different amendment, Am. 780, supersedes *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009), on which district court had relied in denying defendant's § 3582(c) motion)

### 28 U.S.C. §§ 2241, 2255, Post-Conviction Relief

*United States v. Foote*, 784 F.3d 931 (4th Cir. Apr. 27, 2015) (Thacker, J.) (M.D.N.C.) (finding that *Simmons* claim (here, career offender designation based on pre-*Simmons* conviction) is not cognizable in § 2255 proceeding because sentencing error does not amount to fundamental defect that inherently results in complete miscarriage of justice where defendant's prior state conviction had not been vacated and defendant was sentenced under advisory Guidelines system)

! *United States v. Newbold*, 791 F.3d 455 (4th Cir. June 30, 2015) (Gregory, J.) (M.D.N.C.) (concluding that pursuant to *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), petitioner could challenge in § 2255 proceeding a *Simmons* error resulting in erroneous designation as armed career criminal under 18 U.S.C. § 924(e))

! *United States v. Adams*, 814 F.3d 178 (4th Cir. Feb. 19, 2016) (Floyd, J.) (E.D.N.C.) (in felon-in-possession case in which defendant claimed in § 2255 motion that he was actually innocent because prior conviction used to establish element of 18 U.S.C. § 922(g)(1) offense was not for a felony in light of *Simmons*, ruling that claim of actual innocence falls outside scope of plea agreement's waiver of appeal and collateral attack)

*United States v. Surratt*, 797 F.3d 240 (4th Cir. July 31, 2015) (Agee, J.; Gregory, J., dissenting) (W.D.N.C.) (defendant cannot use petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 to get relief under *Simmons* from mandatory life sentence imposed upon conviction for drug offense that was based on two prior convictions because § 2241 allows relief only where petitioner is actually innocent of criminal conduct, not innocent of his recidivist sentence, where prior convictions are sentencing enhancement, not element of offense) (N.B.: this decision was vacated when the court granted petition for rehearing en banc; the court heard en banc argument on Mar. 23, 2016)

! *Fontanez v. O'Brien*, 807 F.3d 84 (4th Cir. Dec. 2, 2015) (Harris, J.) (N.D. W. Va.) (in context of paying restitution while imprisoned, holding that inmate's challenge to BOP's administration of Inmate Financial Responsibility Program is challenge to "execution" of sentence cognizable under 28 U.S.C. § 2241)

## ADDENDUM

### Published Cases Decided Between April and September 2016

- (1) *United States v. Bailey*, \_\_\_ F.3d \_\_\_ (4th Cir. Apr. 12, 2016) (Davis, J.) (M.D.N.C.) (reversing carjacking conviction under 18 U.S.C. § 2119 for insufficient evidence of intent, whether conditional or unconditional, to kill or seriously harm vehicle's driver if necessary to take vehicle)
- (2) *United States v. Hare*, \_\_\_ F.3d \_\_\_, 2016 WL 1567051 (4th Cir. Apr. 19, 2016) (Floyd, J.) (D. Md.) (Hobbs Act robbery conspiracy, 846, & 924(c)/(o) charges stemming from plan to rob fake stash house; denial of motion for discovery into race discrimination in investigation (Armstrong, selective investigation/prosecution); motion dismiss indictment; 924(c) Rosemond claim; avoiding Hobbs Act as 924(c) predicate b/c 846 count sufficed)
- (3) *United States v. Palmer*, \_\_\_ F.3d \_\_\_ (4th Cir. Apr. 21, 2016) (King, J.) (E.D. Va. - Doumar) (suppression, traffic stop based on heavily windows, fraudulent looking inspection sticker; overbearing smell of air freshener (from at least 5), D suspected gang member, after 11 minutes and two inquiries about drug dog, learned that D had been previously arrested on drug charges, . . . )
- (4) \* *United States v. Linney*, \_\_\_ F.3d \_\_\_ (4th Cir. Apr. 26, 2016) (Wilkinson, J.) (W.D.N.C.) ("In this case we must determine whether two burglaries that served as part of the predicate for Russell Linney's Armed Career Criminal Act ("ACCA") sentencing enhancement occurred on different occasions. See 18 U.S.C. § 924(e)(1). The district court ruled that the burglaries did in fact occur on different occasions. We now affirm.") - bad result, but decent discussion of analysis to apply; distinguishing *Span*, 789 F.3d 320, 324 (4th Cir. 2015); *Carr*, 592 F.3d 636 (4th Cir. 2010))

- (5) *United States v. Fitzgerald*, \_\_\_ F.3d \_\_\_ (4th Cir. Apr. 27, 2016) (Traxler, J.) (D. Md.) (what is required to enter conditional plea that preserves right to appeal denial of pretrial motion where plea is straight up, without a written plea agreement)
- (6) ! *Mena v. Lynch*, \_\_\_ F.3d \_\_\_ (4th Cir. Apr. 27, 2016) (Shedd, J.; Wilkinson, J., dissenting) (18 U.S.C. § 659 receipt of embezzled property is not “theft offense” for purposes of § 1101(a)(43)(G))
- (7) ! *United States v. Warner*, \_\_\_ F.3d \_\_\_, 2016 WL 1660200 (4th Cir. Apr. 27, 2016) (Niemeyer, J.) (W.D.N.C – FPD) (where government agreed in plea agreement that certain enhancement did not apply but at sentencing said that it did apply (even though it then asked court to honor plea agreement and not apply enhancement), concluding that “the government, although acting in good faith, breached its undertaking in the plea agreement by stating that the enhancement did apply”)
- (8) *United States v. Faulls*, \_\_\_ F.3d \_\_\_ (4th Cir. May 5, 2016) (Diaz, J.; Shedd, J., concurring) (E.D. Va.) (in kidnapping and interstate domestic violence case, “On appeal, Faulls contends that his counsel was ineffective in opening the door to testimony by a government expert, and in failing to object to the district court’s decision to keep the jury late one evening. He also contends that the district court erred in admitting prior acts evidence and in requiring him to register as a sex-offender. For the reasons that follow, we affirm.”)
- (9) *United States v. Gardner*, \_\_\_ F.3d \_\_\_ (4th Cir. May 18, 2016) (Keenan, J.) (E.D.N.C.) (affirming denial of motions to suppress evidence and for new trial, but holding that North Carolina common law robbery is not a violent felony under the ACCA)
- (10) *United States v. McFadden*, \_\_\_ F.3d \_\_\_ (4th Cir. May 19, 2016) (Keenan, J.) (W.D. Va.) (on remand from Supreme Court, concluding that jury instruction error was harmless as to some counts, but not harmless as to others)
- (11) *United States v. Foster*, \_\_\_ F.3d \_\_\_ (4th Cir. May 24, 2016) (Diaz, J.) (N.D. W. Va. – FPD) (affirming denial of motion to suppress firearm seized after stop-and-frisk b/c defendant did “security check” on himself before answer’s officers question re whether he had a weapon)
- (12) ! *United States v. Lull*, \_\_\_ F.3d \_\_\_ (4th Cir. May 25, 2016) (Duncan, J.; Davis, J., concurring in part and dissenting in part) (E.D.N.C.) (“Because the search warrant application omitted material information about the reliability of the confidential informant who was the primary source of the information used to establish probable cause, we reverse the district court’s denial of Lull’s motion to suppress, . . .”)
- (14) *United States v. Graham*, \_\_\_ F.3d \_\_\_ (4th Cir. May 31, 2016) (en banc) (Motz, J., for majority; Wynn, J., joined by Floyd and Thacker, JJ., dissenting)) (D. Md.) (sitting en banc, holding that government’s acquisition of historical cell-site location information (CSLI) from cell phone provider does not violate Fourth Amendment; government not required to obtain warrant)



- (14) *United States v. Lopez-Collazo*, \_\_\_ F.3d \_\_\_ (4th Cir. June 1, 2016) (Traxler, J.) (D. Md.) (on appeal by government of dismissal of indictment in 8 U.S.C. § 1326 prosecution, reversing)
- (15) *In re. Hubbard*, \_\_\_ F.3d \_\_\_ (4th Cir. June 8, 2016) (Gregory, J.) (E.D.N.C.) (*Johnson*, 2244 authorization in CO case)
- (16) *United States v. Serafini*, \_\_\_ F.3d \_\_\_ (4th Cir. June 10, 2016) (Wilkinson, J.) (E.D. Va. – FPD) (14 U.S.C. § 88(c) authorizes court to order restitution to Coast Guard for its response to the communication of a false distress message)
- (17) *United States v. Bello Murillo*, \_\_\_ F.3d \_\_\_ (4th Cir. June 14, 2016) (King, J.) (E.D. Va.) (“He reserved the right to pursue this appeal, however, on the ground that his prosecution in this country for offenses committed in Colombia contravened the Fifth Amendment’s Due Process Clause. As explained below, we affirm Bello’s convictions.” - note 5, scope of appeal waiver/conditional plea)
- (18) *United States v. Barcenas-Yanez*, \_\_\_ F.3d \_\_\_ (4th Cir. June 21, 2016) (Davis, J.) (W.D.N.C. – FPD) (conviction for aggravated assault under Tex. Penal Code § 22.02(a) is not categorically “crime of violence” that can be used to increase offense level under § 2L1.2)
- (19) *United States v. Saunders*, \_\_\_ F.3d \_\_\_ (4th Cir. July 5, 2016) (per curiam) (E.D.N.C.) (on appeal by government, reversing grant of motion to dismiss indictment alleging Lacey Act violations for catching Atlantic striped bass in federal waters; rejecting claim of unconstitutional vagueness)
- (19.5) *United States v. Bryant*, \_\_\_ F. App’x \_\_\_ (4th Cir. July 19, 2016) (unpublished without argument, but authored by Diaz, J.) (reversing district court’s denial of suppression motion based on anonymous tip resulting in Terry stop; dismantles tip, finds clear error in some of d ct’s findings about D’s nervousness; “Fourth Amendment protections do not turn on faultless elocution or the outcome of staring contests. Only those among us with ice water in our veins would fail to exhibit mild signs of nervousness when confronted by a police officer, especially when the officer says that ‘somebody called the police on you.’” )
- (20) *United States v. Rand*, \_\_\_ F.3d \_\_\_ (4th Cir. Aug. 26, 2016) (Gregory, J.) (W.D.N.C.) (accounting fraud; evidentiary rulings, quashing of defense subpoena, gov’t rebuttal arg’t; sentencing loss calculation. Seth Waxman argued for Rand)
- (21) *United States v. Alfaro*, \_\_\_ F.3d \_\_\_ (4th Cir. Aug. 29, 2016) (Traxler, J.) (D. Md. – FPD (Paresh)) (Md. third-degree sex offense is CoV for previous version of 2L2.1 definition of CoV; “Accordingly, we reject Alfaro’s argument that to qualify as a forcible sex offense under U.S.S.G. § 2L1.2, the underlying offense must include as an element the intent to gratify sexual urges. Instead, we join the other circuits addressing the issue and hold that, for purposes of the re-entry Guideline, a “sex offense” is an offense involving sexual conduct with another person. . . .

And as the Guidelines commentary itself makes clear, a sex offense is “forcible” if it is not consensual.”)

(22) *United States v. Garcia-Lagunas*, \_\_\_ F.3d \_\_\_ (4th Cir. Sept. 1, 2016) (Diaz, J.; Diaz, J., dissenting) (E.D.N.C.) (on panel rehearing) (assuming that government’s improper use of ethnic stereotype to rebut defendant’s trial defense theory that he was too poor to be a major drug dealer was constitutional error, but finding that such error was harmless beyond a reasonable doubt)

(23) *United States v. White*, \_\_\_ F.3d \_\_\_ (4th Cir. Sept. 9, 2016) (Wynn, J.) (S.D. W. Va.—FPD) (in FiP case, affirming denial of motion to suppress evidence about firearm, but, on plain error review, vacating sentence imposed under ACCA because W.Va. burglary do not qualify as predicates) N.B. Good stuff in opinion about when defendant can file supplemental brief raising new issue