

SUPREME COURT & FOURTH CIRCUIT CRIMINAL LAW UPDATE APRIL 12, 2019

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Getting Started

Online resources:

- Supreme Court Blog:
 - <https://www.scotusblog.com/>
- Paul Rashkind's Supreme Court case summaries:
 - <https://www.rashkind.com/>
- Fourth Circuit Case Summaries and Analysis from FD Offices:
 - <http://circuit4.blogspot.com/>
- UNC School of Government Fourth Circuit Criminal Case Summaries:
 - <https://www.sog.unc.edu/resources/legal-summary-collections/fourth-circuit-case-summaries>
- Wake Forest Law Review's Fourth Circuit Blog:
 - <http://wakeforestlawreview.com/category/fourth-cir-blog/>
- In Plain Cite – 4th Cir. podcast by FPD SDWVa

Supreme Court of the United States



Fifth Amendment

- ▶ *Gamble v. United States* (argued Dec. 6, 2018)
 - Whether the Court should overrule the “separate sovereigns” exception to the Double Jeopardy Clause
 - Justices Thomas and Ginsburg called for reexamination of this question in *Sanchez-Valle*
 - Conventional wisdom is argument did not go well
 - Tough questions for Mr. Gamble about stare decisis
 - BUT: Justice Thomas is a known vote for Gamble and he rarely asks questions
 - Good advice from Justice Kagan about writing for ALL Justices



GRANTED

GUNS

- ▶ *Rehaif v. United States* (cert. granted Jan. 11, 2019)
(set for argument Apr. 23, 2019)
 - Whether the “knowingly” provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a § 922(g) crime, or whether it applies only to the possession element.
 - Could have significant implications for folks charged with being an alien in possession of a firearm
 - Justice Gorsuch, when he was on the Tenth Circuit, adopted Mr. Rehaif’s position



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GRANTED

SORNA

- ▶ *Gundy v. United States*, No. 17-6086 (argued Oct. 2, 2018)
 - Non-delegation doctrine says that Congress cannot transfer its power to legislate to another branch of government without specifying an “intelligible principle”
 - *Gundy* asks whether SORNA violates the nondelegation doctrine by conferring on the Attorney General the authority to decide whether, when, and how to apply SORNA’s registration requirement to sex offenders convicted before the date of SORNA’s enactment on July 27, 2006.
 - Argued October 2, 2018 before 8-member Court; decision could come any day
 - One local win on this issue before Judge Boyle in *United States v. Edward Wass*, No. 7:18-CR-45-BO
 - If you have a SORNA client whose sex offense pre-dates SORNA, you will want to move to dismiss the case.
 - This case could also provide a basis to move for relief in a 4248 case where the SORNA conviction provided the basis for custody



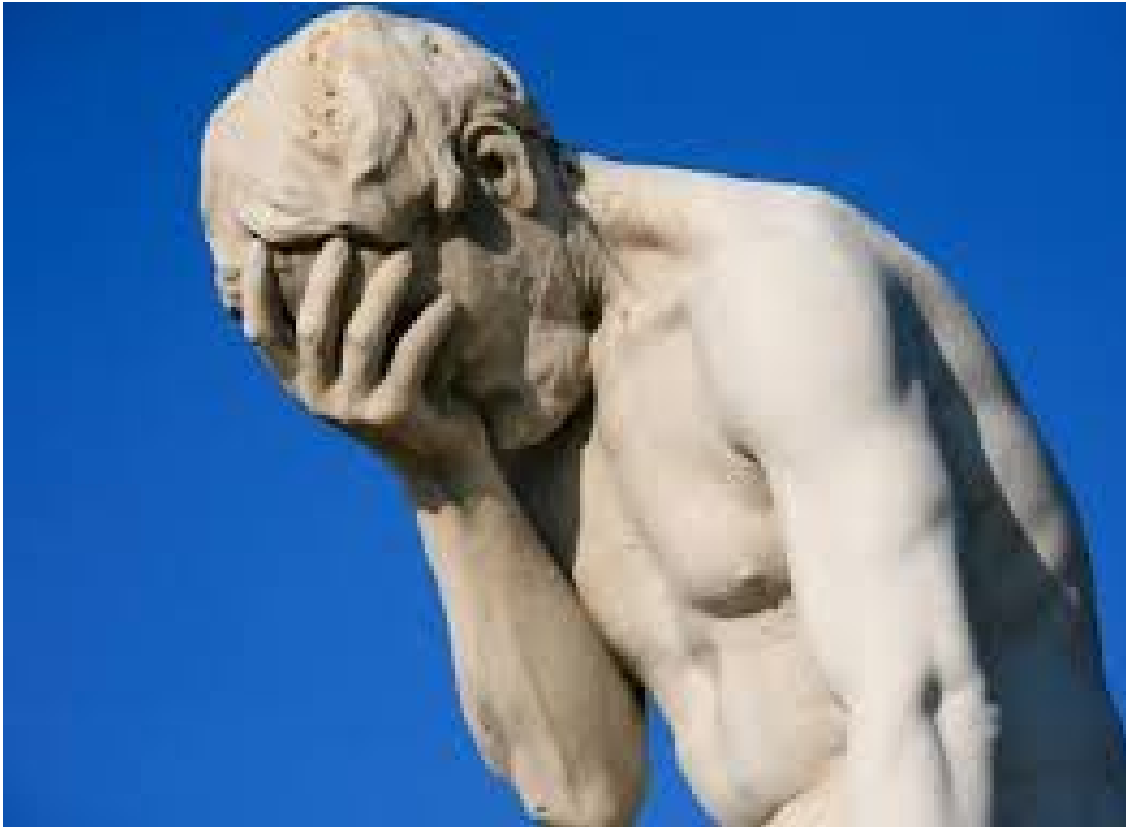
GRANTED

Fourth Amendment

- ▶ *Kansas v. Glover*, No. 18-556 (cert. granted April 1, 2019)
 - Question presented is whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner is the one driving the vehicle, absent any information to the contrary.
 - Case arose when a Kansas officer ran a registration check on a truck and learned that the owner's license had been revoked. Suspecting that the driver was unlicensed, the officer stopped the truck, confirmed that the owner was driving, and issued the driver a citation.
 - The Kansas Supreme Court held that the officer could not reasonably assume that the registered owner was the driver of the vehicle and that the stop thus violated the Fourth Amendment.
 - In so ruling, the Kansas court split from decisions by 12 state supreme courts and 4 circuit courts holding that it is reasonable for an officer to suspect that the owner of a vehicle is driving the vehicle



Crimes of Violence



Crimes of Violence

- ▶ *United States v. Davis* (cert. granted Jan. 4, 2019)
(argument set for Apr. 17, 2019)
 - Whether the residual clause definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague
 - On January 24, the Fourth Circuit held that it is. Judge Motz wrote the opinion, which Chief Judge Gregory and Judges King, Wynn, Diaz, Floyd, Thacker, and Harris joined. A number of concurrences and dissents followed.



GRANTED

Crimes of Violence

- ▶ *Stokeling v. United States*, 139 S. Ct. 544 (Jan. 15, 2019) (Thomas) (5-4)
 - Florida robbery is a violent felony under the ACCA. Court holds that a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of "physical force" within the meaning of the ACCA.
 - Note that Chief Justice Roberts joins Justice Sotomayor's dissent, along with Justices Ginsburg and Kagan
 - Possibly imperils 4th Cir. decisions in *Winston* and *Gardner*
 - Stay tuned for *United States v. Dinkins*, No. 18-6264 (to be argued May 9)
 - NC common-law robbery may be based on "de minimis contact" and does not require victim resistance



Crimes of Violence

- ▶ *United States v. Stitt*, 139 S. Ct. 399 (Dec. 10, 2018) (Breyer) (9-0)
 - Burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation qualifies as the enumerated violent felony of burglary for ACCA purposes
 - Note that Court remanded *Sims* to determine whether a state statute is overbroad if it includes burglary of “a vehicle . . . [i]n which any person lives.” (supplemental briefing was filed in Eighth Circuit in February)
 - North Carolina breaking or entering
 - Atkinson and Robinson cert petitions coming
 - Fourth Circuit continues to follow *Mungro*



Crimes of Violence

- ▶ *Quarles v. United States* (cert. granted Jan. 11, 2019) (argument set for Apr. 24, 2019)
 - Whether *Taylor v. United States*' definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, as two circuits hold.
 - Four circuits have held that it's enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure. Fourth Circuit is on this side of the split.
 - For discussion of state statutes potentially affected, see concurring opinion in *United States v. Bernel-Aveja*, 844 F.3d 206 (5th Cir. 2016).



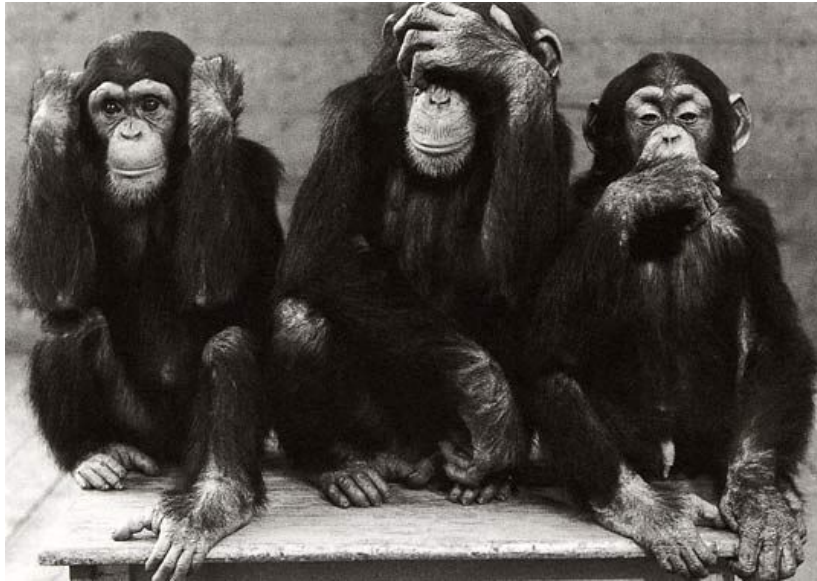
Supervised Release

- ▶ *United States v. Haymond* (argued Feb. 26, 2019)
 - Section 3583(k) required a district court to revoke Andre Haymond's supervised release and impose a prison term of five years to life if it found by a preponderance of the evidence that Mr. Haymond had committed a new offense listed in the statute. But for § 3583(k), the maximum term of imprisonment the district could have imposed was two years based upon Mr. Haymond's original conviction. The question presented is whether § 3583(k) violates the jury trial right or due process.
 - Argument was held on February 26. Justices appeared skeptical of 3583(k)'s constitutionality and of the constitutionality of supervised release generally, when it results in a total term of incarceration over the statutory maximum. Justice Alito alone appeared to advocate in favor of the current system.



Appeals

- ▶ *Garza v. Idaho*, 139 S. Ct. 738 (2019) (Sotomayor) (6-3)
 - The presumption of prejudice resulting from lawyer's failure to file a notice of appeal applies regardless of whether defendant has filed an appeal waiver.
 - Rule follows squarely from *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)
 - "Garza did retain a right to appeal; he simply had fewer possible claims than some other appellants."
 - Justice Thomas, joined by Alito and Gorsuch, dissented.



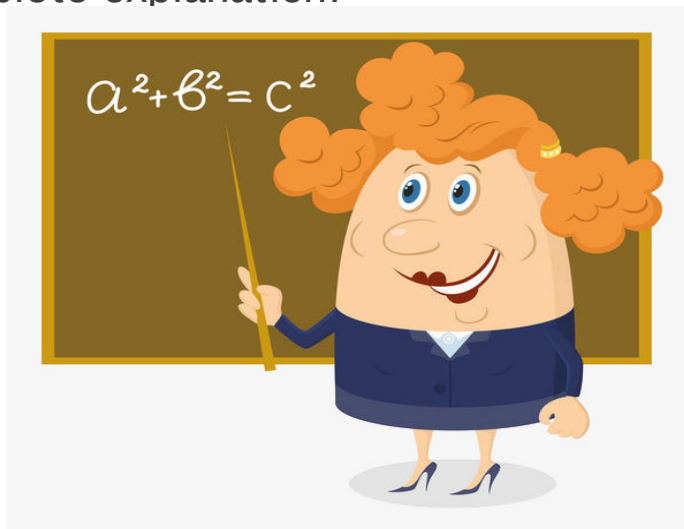
Post-Conviction

- ▶ *Chavez-Meza v. United States*, 138 S. Ct. 1959 (Jun. 18, 2018) (Breyer) (5-3)
 - After no hearing, district court granted in part petitioner's 3582(c)(2) motion and checked a box with boilerplate explaining it had considered the motion and taken into account relevant guidelines policy statements and 3553(a) factors.
 - Supreme Court held that, in conjunction with original sentencing transcript, this "explanation" satisfied *Rita* and *Gall*
- Sounds pretty bad, right?
 - Enter Chief Judge Gregory, joined by Judges Motz and Floyd.



Post-Conviction

- ▶ *United States v. Martin*, 916 F.3d 389 (4th Cir. Feb. 26, 2019) (Gregory, Motz, Floyd)
 - Sentencing judge must provide individualized explanation for rulings and must respond to inmate's significant evidence of mitigation in considering sentencing reduction under 3582(c)(2).
 - Chief Judge Gregory takes dicta from *Chavez-Meza* to beef up the burden on district courts: "If the court of appeals considers an explanation inadequate in a particular case, it can send the case back to the district court for a more complete explanation."



U.S. Court of Appeals Fourth Circuit



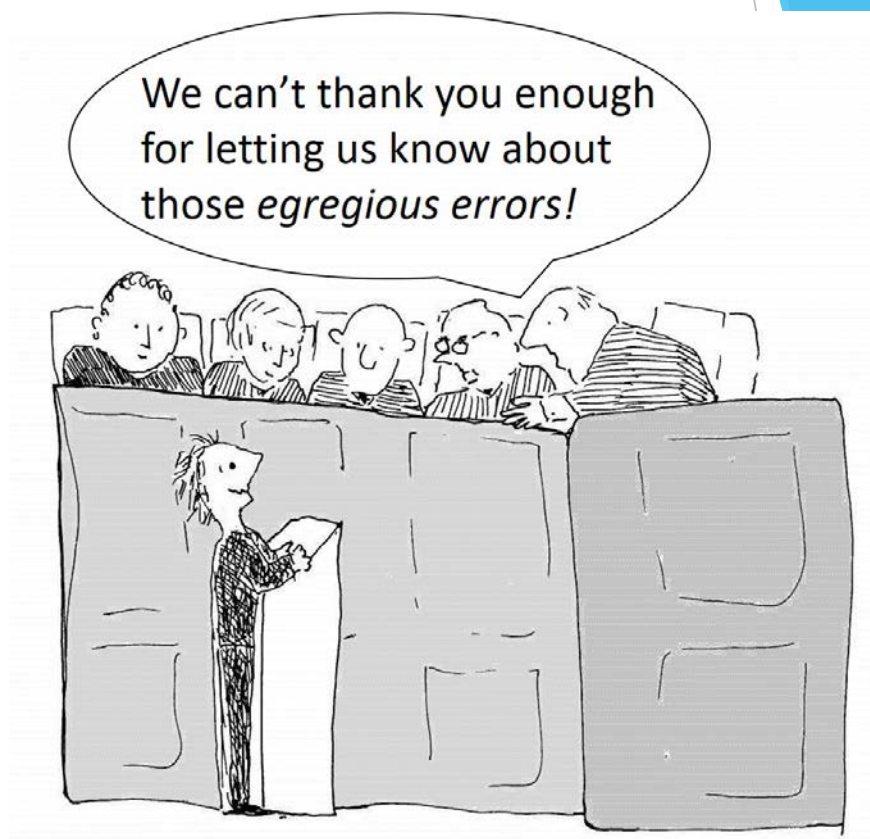
The Fourth Circuit: New Judge

- ▶ Allison Jones Rushing
 - ▶ Confirmed March 6, 2019
 - ▶ North Carolina – chambers will be in Asheville
 - ▶ Judge Duncan's seat
 - ▶ Law clerk for Justice Thomas, Judge Sentelle (D.C. Cir.) and then-Judge Gorsuch (10th Cir.)
 - ▶ Wake Forest undergrad, Duke Law School
 - ▶ Practiced at Williams & Connolly in D.C.
 - ▶ 37 years old



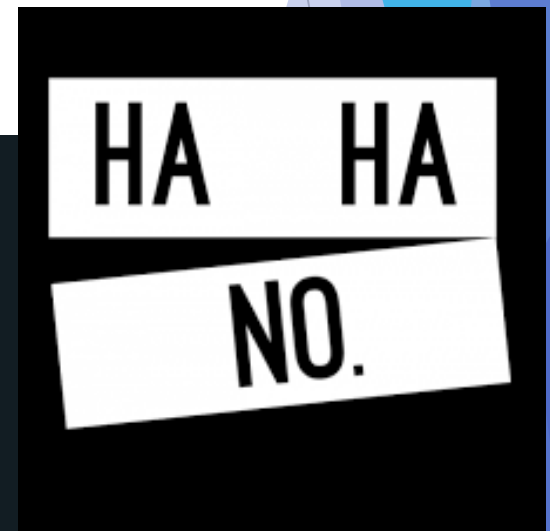
The Fourth Circuit: Oral Argument Upward Trend Continues

- ▶ 2015-16: 201 arguments
 - ▶ 2016-17: 321 arguments
 - ▶ 2017-18: 313 arguments
 - ▶ 2018-19: 333 arguments
-
- ▶ 2018: 7.12% cases argued



Fourth Amendment

- ▶ *United States v. Pratt*, 915 F.3d 266 (2019) (Diaz, with Motz and Agee)
 - Extended seizure of Pratt's phone for 31 days before obtaining warrant was unreasonable and not harmless.
 - Court balances government's interest in seizure against individual's possessory interest in object seized.
 - Pratt's possessory interest was undiminished.
 - Government didn't proceed diligently.
 - Court vacated 2 CP convictions but left 6 convictions in place.
 - Applied sentencing package doctrine and vacated entire sentence.



Fourth Amendment

- ▶ *United States v. Terry*, 909 F.3d 716 (4th Cir. 2018)
(Gregory, Motz, Diaz)
 - Officers placed GPS tracker on car and got warrant afterward. Then used tracker to confirm speeding and pull over the car.
 - Defendant had standing because he was driver of the car when GPS was placed on it.
 - Discovery of evidence two days later wasn't sufficiently attenuated from unlawful GPS search. Evidence suppressed.
 - "To hold otherwise would allow the government to disregard a constitutional requirement simply by using an illegal GPS search long enough to observe a minor traffic violation."



Fourth Amendment

- ▶ *United States v. Lyles*, 910 F.3d 787 (4th Cir. 2018) (Wilkinson, Wynn, Diaz)
 - Slight evidence of drug possession (3 plant stems and 3 empty packs of rolling papers) obtained from trash pull can't support sweeping search of home, and warrant was astoundingly broad.
 - Trash pulls include trash from guests.
 - Rejects application of good faith exception: "What we have before us is a flimsy trash pull that produced scant evidence of a marginal offense but that nonetheless served to justify the indiscriminate rummaging through a household. Law enforcement can do better."



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Fifth Amendment

- ▶ *United States v. Abdallah*, 911 F.3d 201 (4th Cir. 2018) (Wynn, Gregory, Harris)
 - Reversed because law enforcement failed to scrupulously honor Abdallah's unequivocal invocation of right to remain silent. Can't look to circumstances after invocation for ambiguity.
 - During reading of rights, Abdallah said he "wasn't going to say anything at all."
 - Officers asked if he knew why he was arrested, incriminating statements followed.
 - Invocation of rights need not be knowing and intelligent, need not wait until all rights are read.



MORE Crimes of Violence



Crimes of Violence

United States v. Simmons, 917 F.3d 312 (4th Cir. 2019)
(Gregory, Duncan, Diaz)

- o NC AWDWOGO (assault with a deadly weapon on a government official) is not a COV under USSG § 7B1.1
- o AWDWOGO doesn't qualify as enumerated offense of aggravated assault.
 - o Generic aggravated assault requires mens rea greater than recklessness.
 - o AWDWOGO is categorically overbroad because it can be committed with culpably negligent conduct.
- o Except for assaults with the specific intent to kill, all NC assaults can be established through proof of culpable negligence, and none of them qualifies as crimes of violence under force clause.



Crimes of Violence

- ▶ *United States v. Eddie Fluker*, 891 F.3d 541 (4th Cir. Jun. 5, 2018) (Agee, King, Harris)
 - By statute, Georgia robbery can be committed by “sudden snatching” and is broader than generic robbery.
 - Is this still good law after *Stokeling*?
 - Distinguishable: Georgia robbery does not always require the amount of force necessary to overcome the victim’s resistance.
 - But, stay tuned...



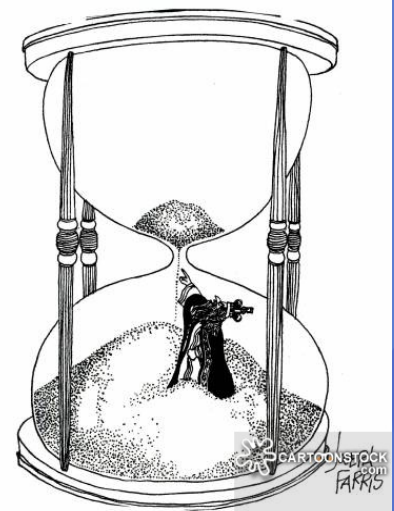
Mitigating Arguments: Yes, You Do Have to Respond to That

- ▶ *United States v. Ross*, 912 F.3d 740 (4th Cir. 2019)
(Gregory, Niemeyer, Harris)
 - Sentence of imprisonment and lifetime term of supervised release were procedurally unreasonable because court failed to address or consider numerous non-frivolous arguments for a lower sentence.
 - Failed to address arguments that mental health issues caused him to appear to lack remorse, pursue litigation strategies against his interest
 - Failed to address history of employment, caretaking, relatively small amount of illicit material



Credit for discharged term of imprisonment

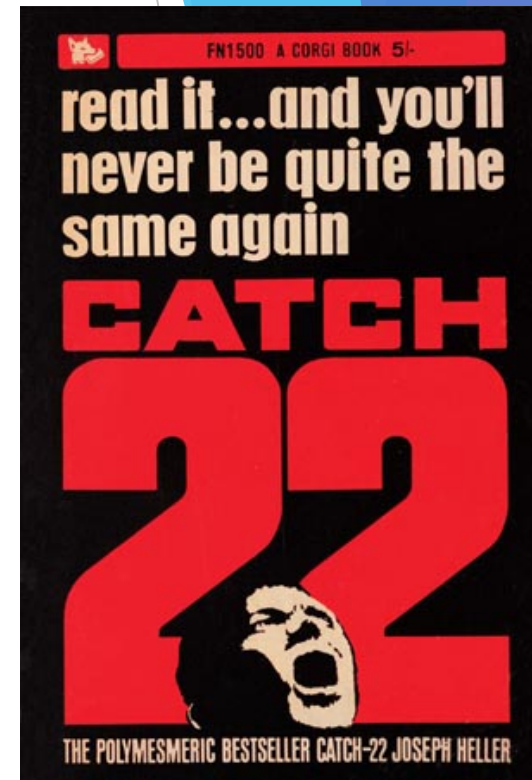
- ▶ *United States v. Moore*, 2019 WL 1179301 (Mar. 14, 2019) (Floyd, Agee, Traxler)
 - District court reduced mandatory minimum sentence by 7 months based on defendant's prior service of 7 months in state custody for related conduct.
 - USSG 5K2.23, which allows credit for discharged term of imprisonment, can't authorize downward departure from MM for discharged term of imprisonment.
 - Panel leaves for another day whether 5G1.3, dealing with undischarged term, would allow court to impose MM concurrent from start date of undischarged sentence.



"I order you to slow down!"

Appeals

- ▶ *United States v. Lockhart*, 917 F.3d 259 (4th Cir. 2019) (Keenan, Gregory, Floyd with 3 separate opinions)
 - Defendant wasn't advised of ACCA min/max at plea hearing.
 - Subject to plain error review.
 - Court finds error that is plain, but under *United States v. Massenburg*, 564 F.3d 337 (4th Cir. 2009), Lockhart can't show that error affected substantial rights.
 - *Massenburg* "strongly suggests that to succeed on plain error review, the defendant must have stated on the record in the trial court that the error affected his plea decision, and that he must have moved to withdraw his plea after learning of his actual sentencing exposure."
 - En banc petition pending; US response due 5/6/19



Appeals

- ▶ *United States v. Ketter*, 908 F.3d 61 (4th Cir. 2018) (Motz, Gregory, and Osteen (MDNC))
 - Challenge to time-served sentence wasn't moot, because defendant was still on supervised release.
 - Imprisonment + supervised release = unitary sentence.
 - On remand, court can grant relief in form of shorter supervised release term.
 - Time-served sentence is unexplained upward variance and is procedurally unreasonable, but error is harmless.



Appeals

- ▶ *United States v. Chaney*, 911 F.3d 222 (4th Cir. 2018) (Niemeyer, Agee) (Gregory concurs in part and in judgment)
 - In § 2255 proceeding, district court granted relief in part and denied in part.
 - Chaney filed notice of appeal in the civil case 60 days after order entered—54 days after amended judgment entered in criminal case.
 - Court relies on *United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007), to say that Chaney was appealing a new criminal judgment; appeal dismissed as untimely.
 - When § 2255 is granted in part and denied in part, time limits for appeal depend on arguments made.
 - Beware: you won't find this in the Rules of Appellate Procedure!



THE END

