

# SUPREME COURT & FOURTH CIRCUIT UPDATE AND PREVIEW

Jackie DiLauro

Jenny Leisten

# Justice Brett M. Kavanaugh



# Judge Julius Ness Richardson



# Judge Marvin Quattlebaum



# FIFTH AMENDMENT

Double Jeopardy

*Gamble v. United States,*  
No. 17-646 (to be argued 12.5.18)



## *Gamble*

Question: Should the Court overrule the separate-sovereigns exception to the Double Jeopardy Clause of the Fifth Amendment?

*Currier v. Virginia,*  
138 S. Ct. 2144 (2018)



## *Currier*

Question: Can a defendant who agrees to have the charges against him considered in two trials later successfully argue that the second trial violates the Double Jeopardy Clause of the Fifth Amendment?

# What to file?

- ◇ Motion to dismiss where federal prosecution follows state prosecution
- ◇ Blockburger and other buzzkills
- ◇ Next frontier: supervised release revocations following federal or state prosecution

# FOURTH AMENDMENT

## Third-Party Doctrine

*Carpenter v. United States*  
138 S. Ct. 2206 (2018)



Search ID: jknn1448  
"I got so fed up with dropped calls and no service, I bought my own cell tower and take it where ever I go."

## *Carpenter*

Question: Does the warrantless seizure and search of historical cell site location information over the course of 127 days violate the Fourth Amendment?

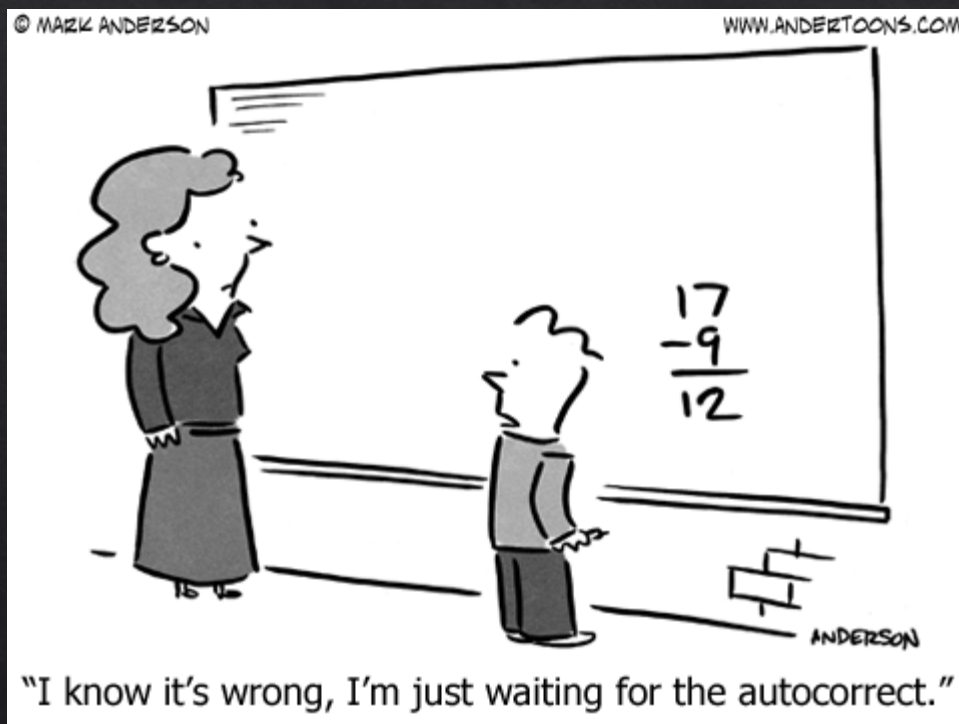
# What to file?

- ◆ Suppression motion for any electronic data seized without a warrant
- ◆ Third-party doctrine is changing...

# SENTENCING GUIDELINES

Plain Error

*Rosales-Mireles v. United States,*  
138 S. Ct. 1897 (2018)



# *Rosales-Mireles*

- ◇ A guidelines error, raised for the first time on appeal, will, in the ordinary case, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief
- ◇ True even though sentence imposed falls within correct guideline range
  - ◇ Substantive reasonableness analysis does not preempt procedural reasonableness

# MONEY MATTERS

Forfeiture

Restitution

*United States v. Chittenden,*  
896 F.3d 633 (4th Cir. 2018)



# *Chittenden*

- ◆ “Forfeiture under 18 U.S.C. § 982(a)(2) is limited to property the defendant acquired as a result of the crime. The statute does not permit courts to hold a defendant liable for proceeds that only her co-conspirator acquired.” That is, no joint and several liability.
- ◆ Chittenden “is not liable for conspiracy proceeds she never obtained”
- ◆ Argument not waived: “We cannot fault her—or the district court—for relying on our precedent and not prophesying *Honeycutt*.”

*United States v. Steele,*  
897 F.3d 606 (4th Cir. 2018)



# *Steele*

- ◆ Steele was a mail handler at USPS and...surprise!...stole video game discs sent by GameFly (like old-school Netflix)
- ◆ Steele pleaded guilty to postal theft w/o plea agreement
- ◆ PSR tagged him with 1,290 unrecovered video games
- ◆ GameFly estimated cost \$40/each + \$1/each mailing
- ◆ MVRA: Fair market value is the appropriate measure; Government has burden of proof
- ◆ Replacement cost may be appropriate where fair market value is difficult to determine or would inadequately capture the value of the victim's actual losses

# Pending Petitions for Certiorari

- ◆ Whether the Sixth Amendment right to counsel attaches when a prosecutor begins plea negotiations before a formal charge has been filed. *Turner v. United States*, No. 18-106 (BIO due Oct. 24)
- ◆ Whether the categorical approach applies to determine whether a defendant has “previously been convicted” of a relevant offense. *Torrez v. United States*, No. 17-1189
- ◆ Whether a state statute criminalizing only causation or threat of bodily harm (no use or threatened use of force) qualifies as a crime of violence under § 16(a). No. 18-78. *Ramirez-Barajas v. Sessions*

# Crimes of Violence

Robbery, Burglary, Hobbs Act Robbery, North  
Carolina Assault

# Robbery and “Violent Force”

## *Stokeling v. United States*

Whether “robbery” under Florida law is a “violent felony” under the Armed Career Criminal Act.

Florida permits robbery convictions based on only “slight force” snatchings

Is that sufficient to constitute “violent force” under ACCA’s force clause?

Argued October 9<sup>th</sup> with Justice Kavanaugh

Has the potential to overrule the Fourth Circuit’s decision in *Gardner*, which held that North Carolina common law robbery, which can also be committed through slight force, does not fall within ACCA’s force clause.

# Generic Burglary

## *United States v. Stitt ; Sims*

Whether unlawful entry into a vehicle used for overnight accommodation should count as generic burglary under ACCA

The government is seeking to expand the definition of generic burglary established in *Taylor*

Argued October 9, back to back with *Stokeling*

Justices expressed general frustration with ACCA

Has the potential to shift the Fourth Circuit's view in *Mungro* that North Carolina breaking and entering counts as generic burglary

# 18 U.S.C. § 924(c)'s residual clause

- *United States v. Joseph Simms*, No. 15-4640
- Whether conspiracy to commit Hobbs Act robbery is a crime of violence under the residual clause
- Argued en banc September 26, 2018
- Fourth Circuit appeared evenly split
- Issue is headed to the Supreme Court

# Hobbs Act Robbery

§924(c) case held in abeyance for *Simms*

Separate question whether Hobbs Act robbery qualifies as a crime of violence under the Guidelines

Hobbs Act robbery is not a crime of violence under the Guidelines: *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Camp*, \_\_\_ F.3d \_\_\_ (6th Cir. Sept. 7, 2018)

If your client's instant offense is Hobbs Act robbery, your client cannot be classified as a career offender

# North Carolina Assault

*United States v. Randy Carney*; No. 18-4081;  
*United States v. Tomonta Simmons*, No. 17-4618

Both cases will be argued before the same panel in December

# *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018)

Defendant was originally sentenced under ACCA, but brought a § 2255 challenge under *Johnson*

The government argued that Hodge was not entitled to relief, because he still had other qualifying predicates.

However, the original presentence report had never identified those other predicates as ACCA predicates, and the government did not object to the PSR at the original sentencing.

On appeal, the Fourth Circuit held that the defendant's prior conviction for reckless endangerment under Maryland law was not an ACCA predicate because the ACCA force clause requires a higher degree of *mens rea* than recklessness

*Hodge* further holds that “the Government must identify all convictions it wishes to use to support a defendant's ACCA sentence enhancement at the time of sentencing.”

# Federal Drug Conspiracy Under 21 U.S.C. § 846 is not a Controlled Substance Offense Under the Guidelines

*United States v. Whitley*, 737 F. App'x 147 (4th Cir. 2018) (per curiam)

The United States is resisting this opinion because it is unpublished

But the logic of the opinion is supported by the published decision of *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018), which held that generic conspiracy under the Guidelines requires an overt act.

And now for  
something completely  
different . . .

# *Gundy v. United States*

Non-delegation doctrine and the Sex Offender Registration and Notification Act

The non-delegation doctrine says that Congress cannot transfer its power to legislate to another branch of government without specifying an “intelligible principle” to guide its delegate.

*Gundy* asks whether SORNA violates the nondelegation doctrine by conferring on the Attorney General the authority to apply SORNA’s registration requirement to sex offenders convicted before the date of SORNA’s enactment in 2006.

Argued October 2, 2018 before 8-member Court

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.

# Disclaimer

The images in this presentation are the property of their respective creators and publishers. The producer of this presentation claims no ownership of or copyright in any of the images. The producer asserts that their inclusion in this presentation is **fair use** under the First Amendment of the United States Constitution and the factors set out in 17 U.S.C. § 107. In particular, the use of these images, including unpublished images, is for purposes such as “criticism, comment , . . . teaching” and other “nonprofit educational purposes,” and “the effect of the use upon the potential market for or value of the copyrighted work” is nonexistent or not deleterious.