

Fourth Circuit Update Presentation Handout – November 4, 2022

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Controlled Substance Offense

United States v. Campbell, 22 F.4th 438 (4th Cir. Jan. 7, 2022) (Motz, J.) (W.D. W. Va.) (holding that sentencing guidelines’ definition of “controlled substance offense” does not include inchoate offenses found only in the commentary, because the plain text of USSG § 4B1.2(b) is inconsistent with that commentary (since they define the same term two different ways) and because courts should not defer to agency’s interpretation of its own rules unless rule is “genuinely ambiguous,” and the text of the guideline is not; as applied here, West Virginia offense prohibiting, inter alia, delivering drugs not a controlled substance offense because delivery defined to include attempts, making attempt the most innocent conduct criminalized under the law and not a categorical match to guideline text’s definition of “controlled substance offense”)

United States v. Locklear, No. 19-4443, 2022 WL 2526671 (4th Cir. July 15, 2022) (Motz, J.) (M.D.N.C.) (unpublished) (per curiam) (applying *Campbell* and holding that district court plainly erred in Career Offender designation, despite lack of objection to guideline range calculation at sentencing, because North Carolina state court conviction under § 90-95(a)(1) for felony sale or delivery of a controlled substance within 300 feet of a school is not a “controlled substance offense” as defined in § 4B1.2 because delivery defined to include attempt)

United States v. Groves (4th Cir. W.D. W. Va.) (pending) (may decide whether or not a federal conviction under 21 U.S.C. § 841(a) for delivery of a controlled substance meets the sentencing guidelines’ definition of “controlled substance offense”)

“Violent Felony” under ACCA

United States v. White, 24 F.4th 378 (4th Cir. Jan. 27, 2022) (Keenan, J.) (M.D.N.C.) (holding that Virginia common law robbery is not a violent felony because it can be accomplished by threatening to accuse the victim of having engaged in sodomy; applying Supreme Court of Virginia’s answer to certified question in light of fact “that the Virginia court only had referenced this theory of robbery in dicta in decisions issued before 1939)

United States v. Proctor, 28 F.4th 538 (4th Cir. Mar. 16, 2022) (Wynn, J.) (D. Md.) (holding that Maryland assault with intent to prevent lawful apprehension or detainer is not categorically a violent felony because common law assault, incorporated into the statute as an element, can be accomplished through a de minimis use of force)

“Crime of Violence” under § 924(c)

United States v. Jackson, 32 F.4th 278 (4th Cir. Apr. 20, 2022) (Motz, J.) (W.D.N.C.) (applying the modified categorical approach and holding that federal first-degree murder is a crime of violence for purposes of 18 U.S.C. § 924(c); also noting that felony murder is not a crime of violence; rejecting Mr. Jackson’s arguments that the statute was indivisible and that the *Shepard* documents did not establish he was convicted of federal premeditated murder)

United States v. Melaku, 41 F.4th 386 (4th Cir. July 27, 2022) (Keenan, J.) (E.D. Va.) (applying the categorical approach and holding that willfully injuring government property causing damage exceeding \$1,000, in violation of 18 U.S.C. § 1361, is not a crime of violence for purposes of 18 U.S.C. § 924(c) because one may cause damage without applying physical force)

United States v. Manley, 2022 WL 14725226 (4th Cir. Oct. 26, 2022) (Niemeyer, J.) (E.D. Va.) (holding that VICAR assault and VICAR murder, each in violation of 18 U.S.C. § 1959(a), are crimes of violence for purposes of 18 U.S.C. § 924(c) where the VICAR assault count is premised on Virginia assault by unlawful wounding and the VICAR murder count is premised on Virginia first and second-degree murder; holding that each requires proof of mens rea that exceeds recklessness (as to unlawful wounding, specific intent, and as to murder, extreme recklessness))

ACCA and Collateral Review

United States v. Benton, 24 F.4th 309 (4th Cir. Jan. 24, 2022) (Harris, J.) (D. Md.) (“the government cannot rely on collateral review on ACCA predicates that were not identified at sentencing, in order to preserve an enhancement that no longer can be sustained by the original predicates”; on § 2255 motion after ACC-sentence in FIP case, district court determined that two of defendant’s four predicates no longer qualified as “violent felonies” under ACCA but agreed with government’s new argument that original predicate for “serious drug offense” actually could be counted as four predicate offenses; Fourth Circuit cited *Hodge* and reversed, noting defendant’s due process rights and opportunity to make case under appropriate burden of proof)

Fourth Amendment

United States v. Hobbs, 24 F.4th 965 (4th Cir. Feb. 1, 2022) (Keenan, J.) (D. Md.) (after defendant broke into girlfriend’s home, threatened her at gunpoint, and fled, she called police and told them he was “obsessed with firearms” and declared that he would kill any police that approached him; police verified defendant’s criminal record including violent crimes then requested real-time, warrantless tracking from his cell phone provider and used the “pings” to locate him; on appeal, Fourth Circuit affirmed district court’s holding that exigent circumstances exception applied and permitted search, noting that exception limited to cases of “immediate danger to persons, a fleeing suspect, or the need to prevent the imminent destruction of evidence,” but that those factors were present here, and that waiting for cell phone provider to comply with a warrant would not have been fast enough)

United States v. Buster, 26 F.4th 627 (4th Cir. Feb. 22, 2022) (Heytens, J.) (E.D. Va.) (after defendant handcuffed on ground, police officers cut the strap on bag he was wearing, removed it from his person, took it some distance away, and then opened and searched it; holding that this search was not valid under the protective search doctrine of *Terry v. Ohio* because defendant was separated from bag and had no access to it, thus presented “no realistic danger to officer safety”; expressly declining to address any other unoffered theory for how police might have been able to search bag, and not reaching question of whether police may search a bag on someone’s person or within reach or that might be returned to the person after the *Terry* stop)

United States v. Perez, 30 F.4th 369 (4th Cir. Apr. 7, 2022) (Diaz, J.) (W.D.N.C.) (affirming denial of motion to suppress drugs and firearms located during vehicle search after dog sniff and two alerts; district court did not clearly err in finding that 15-minute traffic stop for an expired registration tag was not unconstitutionally prolonged, though stop could have been shorter and conducted more efficiently by asking for car’s registration and collecting VIN earlier)

United States v. Gist-Davis, 41 F.4th 259 (4th Cir. July 18, 2022) (Keenan, J.) (M.D.N.C.) (affirming denial of motion to suppress firearm located inside fanny pack during stop and frisk; district court did not err in finding reasonable suspicion to stop and frisk defendant while walking in a fairground based on law enforcement knowledge that he was a convicted felon and gang member, his residence was the target of recent shootings, and he posted on Facebook a warning to opposition gang members that he was bringing a gun to the fair in a fanny pack and a photo of himself wearing a fanny pack; district court also did not err in finding handcuffing of defendant and search of fanny pack within scope of the brief detention for officer and public safety reasons)

United States v. Orozco, 41 F.4th 403 (4th Cir. July 25, 2022) (Richardson, J.) (E.D.N.C.) (Dever) (affirming denial of motion to suppress drug trafficking-related warrant-based search of micro-SD cards and cell phone both of which contained child pornography and rejecting arguments related to specific language of warrant application; after traffic stop, dog sniff, location of \$111,252 in cash with drug residue in vehicle belonging to someone else, and intel defendant’s phone number linked to ongoing DEA investigation, defendant arrested for driving without a license; at police station five micro-SD cards fall out of folded \$100 bill in defendant’s shoe and defendant attempts to eat them)

United States v. Daniels, 41 F.4th 412 (4th Cir. July 25, 2022) (Richardson, J.) (W.D.N.C.) (affirming denial of motion to suppress gun found in rental car parked outside hotel and searched after defendant’s arrest in hotel room and car rental company provided consent to search; defense failed to present evidence of lawful possession of rental car and, therefore, did not meet its burden to establish legitimate expectation of privacy in the vehicle)

United States v. Runner, 43 F.4th 417 (4th Cir. Aug. 8, 2022) (Floyd, J.) (N.D. W. Va.) (affirming denial of motion to suppress drugs and firearm found in empty, parked car for probable cause based on recent anonymous tip of intravenous drug use inside car, a glass stem pipe in plain view in center console, and unspecified “trained drug recognition expertise” of a responding officer; court’s reasoning suggests that glass stem pipe alone “would not necessarily” be sufficient due to possible lawful uses to smoke legal hemp and CBD oil)

Plea Agreements

United States v. Petties, 42 F.4th 388 (4th Cir. Aug. 1, 2022) (Harris, J.) (E.D.N.C.) (Dever) (holding that the government could not pursue charges dismissed pursuant to a plea agreement following the defendant's successful challenge on appeal of the offense of conviction; rejecting the government's arguments that the successful appeal frustrated the purpose of the plea agreement and in part because the plea agreement specifically contemplated that Petties would appeal)

Relevant Conduct

United States v. Moses, 23 F.4th 347 (4th Cir. Jan. 19, 2022) (Niemeyer, J.) (E.D.N.C.) (Flanagan) (cert petition pending) (Application Note 5(C) to § 1B1.3 of USSG must be afforded binding effect under *Stinson* (1993)—commentary binding even if text not ambiguous so long as not inconsistent with text—"which continues to apply unaltered by *Kisor*" (2019)—controlling deference of agency's interpretation of own regulations only if regulation is genuinely ambiguous; accordingly, district court did not err in applying career-offender enhancement where defendant argued one of predicates part of same course of conduct as offense of conviction and, therefore, relevant conduct; downward variant sentence imposed by district court also not substantively unreasonable)

Rehaif/Knowledge of Felon Status

United States v. Barronette, 46 F.4th 177 (4th Cir. Aug. 18, 2022) (Floyd, J.) (D. Md.) (deciding several issues, but significantly reversing a conviction pursuant to 18 U.S.C. 922(g)(1) where the defendant had previously been convicted only of state-level misdemeanors, even though the defendant had been convicted of state-level misdemeanors meeting the predicate crime definition for purposes of § 922(g)(1))

Jury Instructions, Constructive Amendment of Indictment

United States v. Banks, 29 F.4th 168 (4th Cir. Mar. 18, 2022) (Quattlebaum, J.) (W.D. Va.) (holding that the Fourth Circuit's decision in *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) is inconsistent with subsequent Supreme Court opinions and no longer tenable; applying plain error review to a defendant's claim that jury instructions constructively amended his indictment where Mr. Banks was charged with PWID 50 grams of methamphetamine, but the instruction stated government must prove possession with intent to distribute *or distribution*; affirming on the basis of overwhelming evidence of guilt and that jury could not have convicted on theory of distribution but not PWID)

Sentencing/Supervised Release

United States v. Perez, 22 F.4th 430 (4th Cir. Jan. 6, 2022) (Harris, J.) (M.D.N.C.) (holding that listing of length of terms of supervised release set out in 21 U.S.C. § 841(b)(1) control over general terms provided for in 18 U.S.C. § 3583, and that since § 841(b)(1)(D) calls for “at least 2 years” of supervised release, but does not mention a maximum, the maximum available supervised release term is life; noting that § 3583 sets out authorized terms “[e]xcept as otherwise provided” and that § 841(b)(1) states that it applies “[n]otwithstanding section 3583 of Title 18,” and thus the default maximums in § 3583 do not cap the terms provided for in § 841(b)(1))

United States v. Morris, 37 F.4th 971 (4th Cir. June 24, 2022) (Diaz, J.) (W.D.N.C.) (holding that changed legal circumstances—namely, an intervening Supreme Court decision and two Fourth Circuit decisions—vested the district court with jurisdiction to modify internet-use conditions of supervised release pursuant to 18 U.S.C. § 3583(e)(2))

IAC

United States v. Freeman, 24 F.4th 320 (4th Cir. Jan. 25, 2022) (en banc) (Gregory, C.J.) (D.S.C.) (holding, on direct appeal, that counsel provided ineffective assistance to a defendant by waiving meritorious objections the defendant’s PSR—principally objections to the calculated drug weight and to a two-level enhancement for obstruction of justice, the latter of which prevented counsel from arguing that Ms. Freeman should receive a three-level reduction for acceptance of responsibility)

United States v. Nunez-Garcia, 31 F.4th 861 (4th Cir. Apr. 20, 2022) (Agee, J.) (W.D. Va.) (holding that a § 2255 petition was time-barred because Mr. Nunez-Garcia was on notice in 2016, two years before the petition was filed, that he could be deported; where counsel informed Mr. Nunez-Garcia that a guilty plea to conspiring to PWID methamphetamine would not subject him to deportation)

United States v. Palacios-Arias, 2022 WL 1172167 (4th Cir. Apr. 20, 2022) (Heytens, J.) (E.D. Va.) (unpublished) (in a prosecution for illegal re-entry, vacating the district court’s order denying the defendant’s motion to dismiss and remanding for the district court to consider in the first instance whether Palacios-Arias received ineffective assistance of counsel during the underlying removal proceedings)

Coram Nobis

United States v. Lesane, 40 F.4th 191 (4th Cir. July 14, 2022) (King, J.) (E.D.N.C.) (Boyle) (reversing denial of petition for writ of coram nobis and vacating 2003 conviction for felon in possession of a firearm; defendant not a convicted felon under *Simmons* as of 2003 conviction and, therefore, actually innocent of offense of conviction)

Compassionate Release

United States v. Hargrove, 30 F.4th 189 (4th Cir. Mar. 29, 2022) (finding no abuse of discretion in denial of motion for compassionate release; noting that district court must provide sufficient explanation to allow for meaningful appellate review and that “[t]he factors applicable to the determination of what circumstances can constitute an extraordinary and compelling reason for release from prison are complex and not easily summarized”)

Speedy Trial

United States v. Velasquez, --- F.4th ----, 2022 WL 14278481 (4th Cir. Oct. 25, 2022) (Agee, J.) (E.D.N.C.) (Dever) (vacating defendant’s sentence due to district court’s failure to comply with procedural requirements of Speedy Trial Act; Act requires that trial commence within 70 days of indictment or arraignment—whichever is later—but here district court granted ends-of-justice continuance of unspecified length for trial preparation despite lack of supporting record evidence, resulting in impermissible 108-day delay between arraignment and order setting trial date; defendant not estopped from raising speedy trial challenge because argument not “clearly inconsistent” with position at arraignment; procedural error requires dismissal of charges, but whether with or without prejudice a matter of discretion for district court)

Section 404 Motions

United States v. Swain, 41 F.4th 412 (4th Cir. Sept. 14, 2022) (Thacker, J.) (E.D.N.C.) (Dever) (vacating order denying § 404 motion; substantively unreasonable to impose same sentence where First Step Act and changes to guidelines reduced advisory guideline range by 5-10 years; district court did not justify large upward variance and focused largely on same factual basis as original sentencing hearing)

Drug Offenses

United States v. Barnett, 48 F.4th 216 (4th Cir. Aug. 30, 2022) (Rushing, J.) (W.D.N.C.) (district court did not err in apply USSG § 2D1.1(b)(12) enhancement for maintain a premises for the purpose of manufacturing or distributing a controlled substance; whether defendant has a possessory interest in the dwelling is a factor, but it not dispositive in the fact-specific analysis)

Illegal Reentry Offenses

United States v. Fernandez Sanchez, 46 F.4th 211 (4th Cir. Aug. 23, 2022) (Wynn, J.) (W.D. Va.) (assuming, as a result of the government’s waiver of the argument, that an immigration’s judge’s denial of the defendant’s right to appeal his deportation order violated due process, holding that the due process violation was prejudicial and affirming a successful collateral attack on a deportation order underlying an illegal reentry prosecution)

Pornography Offenses

United States v. Morehouse, 34 F.4th 381 (4th Cir. May 20, 2022) (Wynn, J.) (E.D. Va.) (applying a new, four-part test to the five-level exchange-for-value enhancement under §2G2.2(b)(3)(B) following a 2016 Guidelines amendment; reversing the district court’s application of the enhancement because the government had not established that defendant had agreed to exchange child pornography with another person to obtain valuable consideration in exchange)

United States v. Arce, 49 F.4th 382 (4th Cir. Sept. 8, 2022) (Richardson, J.) (E.D. Va.) (holding that (1) a total internet ban imposed as a condition of supervised release was a greater deprivation of liberty than reasonably necessary and (2) the admission of a Cellebrite report including testimonial statements categorizing images as likely child pornography violated Arce’s Sixth Amendment Confrontation Clause rights, but that the error was harmless; and rejecting the defendant’s remaining arguments that he was in custody prior to being read his *Miranda* warnings, that a restitution order constituted an abuse of discretion, and that a supervised release condition preventing the Arce from accessing pornography was an abuse of discretion)

* Portions taken from “Fourth Circuit Decisions on Criminal Law and Procedure: Published Between April 1, 2021, through March 31, 2022” by attorneys from the Office of the Federal Public Defender, Eastern District of Virginia