

**Supreme Court and Fourth Circuit
Court of Appeals Update**

2025 Fall Federal Criminal Defense Practice Seminar
Eastern District of North Carolina

Beaufort Hotel
Beaufort, NC

**Including published Fourth Circuit and Supreme Court
criminal cases issued between April 1, 2025, and October 10,
2025.**

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I. FOURTH CIRCUIT DECISIONS

RULE 11

***United States v. Golestan*, 151 F.4th 634 (4th Cir. Aug. 22, 2025) (Motion to Withdraw Guilty Plea; Rule 11):**

Amir Golestan, a naturalized US citizen born in Iran, was the founder and CEO of Micfo, LLC, a technology company that provided hosting services to Internet providers and businesses. Golestan and Micfo created several fictitious companies (“Channel Partners”) to fraudulently obtain approximately 1.3 million IP addresses from the American Registry for Internet Numbers (ARIN). Golestan sold some of these fraudulently-obtained IP addresses through third-party brokers, making approximately \$3.3 million in profits.

Golestan and Micfo were indicted on 20 counts of wire fraud in violation of 18 U.S.C.S. § 1343. During a bench trial, Golestan’s defense counsel was unable to produce forecasted evidence showing that the Channel Partners were legally recognized entities. Defense counsel requested time to confer with the government, and the court took a break. When the trial resumed, Golestan moved for a change of plea. Golestan pled guilty both personally and on behalf of Micfo to all 20 counts of wire fraud.

During the plea colloquy, the district court did not advise Golestan of possible immigration consequences of his guilty plea. Approximately 17 months after entering the guilty pleas, Golestan moved to withdraw them, citing the Supreme Court’s then-pending decision in *Ciminelli v. United States*.

The district court denied Golestan and Micfo’s motion to withdraw their guilty pleas, ruling that *Ciminelli* did not impact Golestan’s guilty plea because that case a different theory of wire fraud. The district court also ruled that, because Golestan was a naturalized American citizen, Rule 11 did not require the district court to advise Golestan at his plea colloquy that he may be at risk of deportation. They appealed, and the Fourth Circuit (Judge Berner, joined by Chief Judge Diaz and Judge Harris) affirmed.

Although the panel agreed the district court erred in failing to provide the immigration warning, this error was harmless because (1) the text of the Rule references only immigration consequences for non-citizens, and Golestan was a U.S. citizen; and (2) given the overwhelming evidence against him and his counsel’s inability to present crucial defense evidence, Golestan failed to show a reasonable probability that he would not have pled guilty but for the error. The Fourth declined to address Golestan’s argument that his attorney was ineffective for failing to

advise him of the immigration consequences, because the record did not conclusively show IAC.

Regarding the *Ciminelli* argument, the Fourth agreed with the district court that the Supreme Court's invalidation of the "right-to-control" theory in *Ciminelli* did not apply because the government did not prosecute Golestan and Micfo under that theory. Instead, the government alleged that Golestan and Micfo deprived ARIN of actual IP addresses, not merely the right to control information about IP addresses.

Finally, the Fourth rejected Micfo's argument that Golestan lacked authority to enter a plea on their behalf, citing Golestan's affirmation during the plea colloquy that he had such authority. Additionally, Federal Rules of Criminal Procedure provide that an organizational defendant need not be present if represented by counsel, which Micfo was.

***United States v. Milam*, 150 F.4th 320 (4th Cir. Aug. 13, 2025) (Motion to Withdraw Guilty Plea):**

Milam pled guilty to drug and gun charges after a search of his home yielded guns and drugs. Milam's later-appointed attorney then discovered that the government had inadvertently provided an incomplete copy of the search warrant and supporting affidavit, missing every other page. Milam sought to withdraw his guilty pleas based on this discovery error, which the district court denied.

The Fourth (Judge Niemeyer, joined by Judges Richardson and Senior Judge Floyd) affirmed, concluding that the incomplete warrant affidavit was not material to Milam's decision to plead guilty because the complete affidavit contained stronger evidence of probable cause. Milam's attorney testified that Milam was adamant about pleading guilty quickly to avoid further investigation, and her advice would not have changed had they received the complete warrant.

***United States v. Smith*, 134 F.4th 248 (4th Cir. Apr. 14, 2025) (Wynn, Thacker, Floyd):**

Quamaine Smith pled guilty under a plea agreement to robbery and a 924(c) count. The plea agreement contained the standard appellate waiver. At the Rule 11, Judge Boyle conducted his standard, fairly brief arraignment hearing, which omits quite a few of the advisements that Rule 11 says you're supposed to give. Regarding the appeal waiver, Judge Boyle said only: "you're entering into a plea agreement in which you plead guilty to . . . Counts One and Two of the indictment and waive your right to appeal and waive your right to contest the conviction in any post-conviction proceeding." Notably, Judge Boyle did not advise Mr. Smith that he was giving up his right to contest the sentence—only the conviction. At sentencing (which was also, per usual for Judge Boyle, fairly brief) Judge Boyle did not respond to the

arguments for a downward variance and gave little explanation for the 144-month sentence (which was a low-end GL sentence).

Mr. Smith appealed, arguing that the sentence was procedurally unreasonable and that the appellate waiver did not bar the appeal because it was unknowing and unintelligent. He did not seek to withdraw the plea, asserting instead that the waiver was severable from the rest of the agreement.

The Fourth Circuit agreed in all respects. First, the Fourth confirmed that the standard of review for determining whether to enforce an appeal waiver is *de novo*. It then held that Judge Boyle failed to comply with Federal Rule 11(b)(1)(N) of Criminal Procedure, which requires the district court to “address the defendant personally in open court” and “inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” The panel explained:

“It is clear from the record that the district court here failed to properly advise and question Appellant, as required by Rule 11(b)(1)(N). The court did not explain what the appeal waiver meant or explain that exceptions existed to the waiver of Appellant’s rights (i.e., ineffective assistance of counsel, prosecutorial misconduct, sentences in excess of the Guidelines range, or constitutional error). Worse still, the court misstated the terms of the appeal waiver by informing Appellant that he waived only his right to appeal his conviction -- as opposed to his right to appeal his conviction *and sentence*. Rule 11 requires the court to inform Appellant that he is “waiving the right to appeal or to collaterally attack *the sentence*.” Fed. R. Crim. P. 11(b)(1)(N) (emphasis supplied). Because the court only informed Appellant that he waived his right to appeal his conviction, the court mischaracterized the terms of Appellant’s appeal waiver.”

Next, the panel concluded that under the totality of the circumstances, which included Mr. Smith’s history of mental illness and minimal education “coupled with the district court’s failure to inform Appellant of the terms of the appeal waiver, mischaracterization of the plea agreement’s material terms, and failure to ensure that Appellant understood the meaning of the appeal waiver, is sufficient for us to hold that the appeal waiver here was not knowingly and voluntarily made.”

Having concluded that the appellate waiver was not intelligent, the Fourth then declined to vacate the entire plea, finding instead that the appellate waiver was severable: “Today, we make clear that the proper remedy for an invalid appeal waiver is to sever the appeal waiver from the remainder of the plea agreement and relieve the defendant of the waiver.”

That is a huge deal for the government. You can all expect to see new “non-severability” provisions popping up in the standard plea agreements from now on.

Finally, the Fourth reached the truly “wowza” part of the opinion, holding that **“[e]ven if this appeal waiver were valid, however, we would still refuse to enforce it.”**

The panel says that Judge Boyle’s “practice of omitting necessary information in both plea and sentencing hearings, disregarding proper procedure, and relying on appeal waivers to shield procedurally unreasonable sentences from review constitutes a miscarriage of justice.” Yes, the panel essentially says that Judge Boyle’s regular practices fall within the “narrow class” of claims constituting a “miscarriage of justice.” The panel provides several pages of cases in which Judge Boyle has been reversed for disregarding precedent: “Unfortunately, we have reversed the court below with increasing frequency to no avail. Heretofore, the district court’s omissions, failures, and disregard for our precedent have been effectively shielded from review by appeal waivers in cases such as the one at hand. No more.”

The panel concludes that the sentence is procedurally unreasonable and sends it back to a different district court judge for resentencing.

***United States v. Solis-Rodriguez*, 144 F.4th 617 (4th Cir. July 23, 2025) (Rule 11; Sentencing):**

Edin Anael Solis-Rodriguez, who had entered the United States illegally, was involved in two separate firearms incidents. In August 2020, he entered a Charlotte restaurant with a visible Hi-Point.45 caliber pistol. In November 2021, following an argument at a restaurant, he shot a patron named Silva at point-blank range, causing serious injuries. He was federally charged with two counts of possessing a firearm as an illegal alien under 18 U.S.C.S. § 922(g)(5).

During his plea colloquy, the magistrate judge told Solis-Rodriguez that “the maximum penalty for these offenses would be 10 years imprisonment,” without clarifying that each count carried a 10-year maximum. At sentencing, Solis-Rodriguez argued for a 151-month sentence based on his young age (22) and lack of violent criminal history. The district court imposed a 180-month sentence (120 months on Count 1 and 60 months on Count 2, running consecutively).

On appeal, Solis-Rodriguez challenged his plea colloquy as plainly erroneous and his sentence as procedurally unreasonable. The Fourth Circuit (Judge Quattlebaum, joined by Judge Heytens and Senior Judge Traxler) affirmed.

Regarding the Rule 11 colloquy challenge, the Fourth assumed without deciding that the magistrate judge plainly erred by not clarifying that each count carried a 10-year maximum penalty. But Solis-Rodriguez failed to demonstrate a reasonable probability that he would not have pled guilty absent this error because: (1) he never objected to or moved to withdraw his guilty plea; (2) he showed no surprise at sentencing when presented with the possibility of 20 years' imprisonment; (3) the government had strong evidence against him; and (4) his plea significantly reduced his guidelines range from 210-240 months to 151-188 months.

As to the procedural reasonableness of the sentence, the Fourth held that the district court adequately considered Solis-Rodriguez's age and lack of criminal history arguments by: (1) explicitly stating twice that it had considered "all of the § 3553(a) sentencing factors," which include "the history and characteristics of the defendant"; and (2) highlighting the factors it found "particularly important," indicating these outweighed other considerations. The court's explanation was sufficient for meaningful appellate review, as it discussed the disturbing nature of the offense, the need for specific and general deterrence, and the importance of promoting respect for the law.

SPEEDY TRIAL ACT/JURISDICTION

***United States v. Myrick*, 150 F.4th 308 (4th Cir. Aug. 13, 2025) (Speedy Trial; Guidelines; Reckless Endangerment):**

On April 20, 2022, a police officer attempted to stop Myrick for a traffic violation. Myrick fled at speeds of up to 100 mph in a 35 mph zone. After the officer ended the pursuit for safety reasons, she found Myrick's crashed car. Myrick fled on foot. Police recovered methamphetamine, cocaine, digital scales, three loaded handguns, and identification documents from the wreck. Myrick was indicted on October 4, 2022, for possession with intent to distribute methamphetamine. He made his initial appearance on October 14, 2022. On February 21, 2023, a superseding indictment added two firearms charges, as well as cocaine to the drug charge. His trial began on March 22, 2023, 159 days after his initial appearance.

During the pretrial period, there were several periods of delay, including 21 days for a change of counsel and continuance, 62 days related to suppression motions, and 7 days for motions in limine. The district court found these delays excludable under the Speedy Trial Act and denied Myrick's motion to dismiss the indictment on grounds that the government had violated the Speedy Trial Act ("STA").

On appeal, Myrick challenged the denial of his motion to dismiss, focusing on the court's exclusion of the time related to the suppression motion. The Fourth (Judge Niemeyer, joined by Judges Agee and Thacker) affirmed. The panel confirmed that

the filing of a superseding indictment does not reset the speedy trial clock for offenses charged in the original indictment. But when a superseding indictment adds new charges not required to be joined with the original charge, the speedy trial clock for those new charges starts with the defendant's initial appearance on those charges. In counting days for the STA, time spent on pretrial motions is excluded. The Fourth determined the district court properly excluded the 62-day period from the filing of Myrick's suppression motions to the court's written decision from the Speedy Trial Act calculation, and that the trial was thus timely.

The panel also affirmed the two-level enhancement Myrick received for reckless endangerment, concluding that his erratic driving at 100 mph in a semi-residential area where the speed limit was 35 mph was sufficient to show he endangered the officer pursuing him.

***United States v. Perez*, 150 F.4th 237 (4th Cir. Aug. 12, 2025) (Criminal Jurisdiction):**

After a bench trial, the district court convicted Jesse Perez of producing and possessing child pornography in violation of 18 U.S.C. § 1466A at the Federal Correctional Institution in Petersburg, Virginia. The district court determined Perez "committed his offense in the special maritime and territorial jurisdiction of the United States" because FCI Petersburg is within federal territorial jurisdiction. Perez appealed, arguing the government must prove FCI Petersburg's jurisdictional status to the factfinder. He contended the underlying facts needed to determine FCI Petersburg's status are adjudicative in nature and thus must be presented to the factfinder. And since the government failed to introduce evidence of FCI Petersburg's jurisdictional status at trial, Perez argued the government presented insufficient evidence to convict him.

A divided Fourth Circuit (Judge Quattlebaum, joined by Judge Wynn, who also wrote a separate concurring opinion. Judge Harris wrote an opinion concurring in part and dissenting in part) disagreed with Perez's argument but nonetheless found that the district court did not conduct the proper analysis. The majority held that the government was only required to prove to the factfinder "that Perez's conduct occurred at FCI Petersburg" and that "the court decides whether FCI Petersburg is within federal territorial jurisdiction as a matter of law." The majority said that previous decisions "similarly approved of bifurcating a criminal jurisdictional element into a fact-conduct component and a legal-status component." The majority distinguished between adjudicative facts and legislative facts and determined that facts underlying a location's jurisdictional status are legislative in nature because they are "established truths, facts or pronouncements that do not change from case to case but apply universally." Legislative facts can be judicially noticed by the court without the constraints of Federal Rule of Evidence 201, which applies only to adjudicative facts.

But the majority faulted the district court for finding that FCI Petersburg lay within the special territorial jurisdiction of the United States due to the government’s “practical usage and dominion” over the prison. Instead, the majority said, the court should have employed a “three-part test for special territorial jurisdiction: (1) federal acquisition of the property; (2) state consent to federal, or cession of its own, jurisdiction; and (3) federal acceptance of jurisdiction.” The majority thus remanded the case to the district court to conduct this analysis.

Judge Wynn wrote separately to explain that his concurrence “hinged on the fact that this matter was tried as a bench trial, not before a jury.” “Had this trial proceeded before a jury,” Judge Wynn wrote, “I doubt that we could remand this case without infringing upon Perez’s Sixth Amendment right to trial by jury.” Judge Harris dissented, concluding that Perez was entitled to acquittal because the government failed to prove the facts necessary to establish the jurisdictional element of the offense.

SECOND AMENDMENT (*Bruen* challenges)

***United States v. Nutter*, 137 F.4th 224 (4th Cir. May 14, 2025) (King, Agee, Harris):**

In *United States v. Nutter*, the Fourth Circuit rejected a Second Amendment facial challenge to 922(g)(9), which is the subsection that prohibits persons who have been convicted of misdemeanor crimes of domestic violence from possessing firearms.

Mr. Nutter had three prior Ohio convictions that qualified as misdemeanor crimes of domestic violence and was federally charged under 922(g)(9) in West Virginia. He sought to dismiss the indictment, asserting that 922(g)(9) is unconstitutional under the Second Amendment. The district court denied the motion, and Mr. Nutter pled guilty under a conditional plea that preserved his right to appeal.

His appeal was placed in abeyance for several years waiting for the Supreme Court to decide *United States v. Rahimi*. In *Rahimi*, the Supreme Court upheld the constitutionality of 922(g)(8), which is the subsection that prohibits people who are under a domestic violence restraining order from possessing firearms.

Applying *Rahimi* (as well as the Supreme Court’s earlier Second Amendment decision in *Bruen*), the Fourth Circuit held that 922(g)(9) was facially constitutional “for many of the same reasons the Supreme Court held § 922(g)(8) constitutional in *Rahimi*.” The Court “agree[d] with the Sixth Circuit’s recent application of *Bruen* and *Rahimi* to uphold the constitutionality of § 922(g)(9) in *United States v. Gales*, 118 F.4th 822 (6th Cir. 2024).” The Fourth explained:

“At its core, *Rahimi* held that “our Nation’s tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not” and “allows the Government to disarm individuals who present a credible threat to the physical safety of others.” 602 U.S. at 700. “Section 922(g)(9), which categorically disarms individuals with valid, domestic-violence convictions, fits well within this historical tradition.” *Gailes*, 118 F.4th at 828. As the definition of a “misdemeanor crime of domestic violence” confirms, every individual that § 922(g)(9) would disarm has been convicted of an offense in which they had been adjudicated by a court of law to have used or attempted to use physical force or threatened the use of deadly force against their victim. § 921(a)(33)(A). Consequently, the historical regulatory tradition *Rahimi* relied on to uphold the constitutionality of § 922(g)(8) under *Bruen*’s framework is materially indistinguishable from how that same tradition would apply to § 922(g)(9).”

Keep in mind that *Nutter* involves a *facial* challenge to the statute, not an *as-applied* challenge. So if you have a client with sympathetic facts and, for example, very old convictions, you can still consider whether an as-applied challenge might be fruitful.

***United States v. Gould*, 146 F.4th 421 (4th Cir. July 29, 2025) (922(g)(4); *Bruen* challenge):**

James Gould pled guilty to violating 18 U.S.C. § 922(g)(4) by possessing a firearm after having previously been involuntarily committed to a mental institution. He appealed, claiming that the Second Amendment renders the statute facially unconstitutional under the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

The Fourth Circuit (Chief Judge Diaz, joined by Judges Heytens and Benjamin) affirmed. The panel found that § 922(g)(4) restricts conduct presumptively protected by the Second Amendment’s plain text. It then analyzed whether the government demonstrated that the regulation is consistent with the nation’s historical tradition of firearm regulation. The Fourth identified two relevant historical traditions supporting § 922(g)(4)’s constitutionality: (1) The historical practice of incapacitating those suffering from mental illness when they posed a danger to themselves or others, including through confinement and restraint; and (2) The historical power of legislatures to disarm groups of people considered dangerous, including religious minorities, racial groups, and others deemed to pose threats. Following *Rahimi*, the Fourth found § 922(g)(4) “relevantly similar” to historical laws in three key ways: It applies only after a judicial finding that an individual is a threat to themselves or others due to mental illness. In West Virginia, the disarmament is not permanently fixed, as individuals can petition to have their rights restored. The historical tradition allowed for incapacitation of dangerous

individuals, making disarmament (a lesser restriction) constitutionally permissible. The panel rejected Gould’s argument that release from a mental institution should automatically restore firearm rights, noting that in West Virginia, release doesn’t necessarily mean a person is no longer dangerous.

FOURTH AMENDMENT

***United States v. Murillo-Lopez*, 151 F.4th 584 (4th Cir. Aug. 18, 2025) (Fourth Amendment; Illegal Reentry):**

In a divided opinion, the Fourth Circuit affirmed the denial of Mr. Murillo-Lopez’s motion to suppress. State and federal task force officers sought to execute an arrest warrant for armed robbery on a member of MS-13 named Jose Torres Cruz. They had information that Cruz was in an area of addresses in the same block in Sterling, Virginia, and conducted surveillance. They had a photograph of Mr. Cruz along with a general description that he was “a Hispanic male with short black hair.”

The officers saw two or three people leave one of the residences on the block and drive away in a Ford Explorer. At least one fit the general description. They followed the car to a nearby 7-Eleven, where the group in the Ford Explorer met a second group in a Honda Accord. Officers watched as five people went in and out of the store and back and forth between the cars. The officers then followed both cars for more than an hour and did not observe any illegal or suspicious activities. The cars eventually stopped at another gas station and the officers stopped them. Mr. Murillo-Lopez was in the driver’s seat of the Ford Explorer and another person was in the backseat. The officers did not believe the picture they had eliminated Mr. Murillo-Lopez as the person named in the warrant—Cruz. Officers soon found a firearm in a cross-body satchel affixed to Mr. Murillo-Lopez’s body.

The government charged Mr. Murillo-Lopez with possession of a firearm while being an undocumented non-citizen, in violation of 18 U.S.C. § 922(g)(5)(A). The district court denied Mr. Murillo-Lopez’s motion to suppress the stop and search. A jury found Mr. Murillo-Lopez guilty, and he appealed.

The majority (Judge Heytens and Chief Judge Diaz) affirmed. First, the majority clarified that officers only needed reasonable suspicion that Mr. Murillo-Lopez was wanted for a felony, not that he was engaged in ongoing criminal activity. Second, the majority held the officers had reasonable suspicion that Mr. Murillo-Lopez was the person named in the warrant—Cruz. When officers began following the Ford Explorer, they determined one of the occupants fit Cruz’s description. And when they eventually stopped the Ford Explorer, officers still thought Murillo-Lopez might have been Cruz. The majority held those facts eliminated a substantial portion of innocent travelers.

Judge Benjamin dissented, explaining that “the majority overstates the degree of certainty the officers had when approaching the car. In fact, at every step of the surveillance, the task force’s suspicion that Cruz was among the group diminished.” At the start, the officers only had information that Cruz was in a block of addresses, not at a particular house. Also, the officers never confirmed that Cruz was among the men who left in the Ford Explorer. Moreover, the generic description of a Hispanic male with short black hair could have applied to many people in the predominantly Hispanic community of Sterling, Virginia. The officers also had plenty of time during their hours-long surveillance to determine that Cruz was not in the Ford Explorer. Finally, Mr. Murillo-Lopez was completely cooperative and calm with the officers. Judge Benjamin would have ruled the officers lacked reasonable suspicion to stop Mr. Murillo-Lopez.

All three judges unanimously rejected Mr. Murillo-Lopez’s sufficiency challenge. Mr. Murillo-Lopez admitted he “was illegal” and that admission was corroborated by other evidence. Therefore, the Fourth Circuit held there was sufficient evidence that Mr. Murillo-Lopez knew he was a prohibited person. The Fourth Circuit also unanimously rejected Mr. Murillo-Lopez’s *Bruen* challenge. Importantly, the Fourth Circuit held it was bound by its pre-*Bruen* decision in *Carpio-Leon* from 2012 that “undocumented non-citizens ‘do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection.’”

***United States v. Krueger*, 145 F.4th 460 (4th Cir. July 25, 2025) (Fourth Amendment; Staleness):**

Andrew David Krueger was convicted of receipt and possession of child sexual abuse material in violation of 18 U.S.C. § 2252 and sentenced to 78 months’ imprisonment. He appealed, challenging the district court’s denial of his motion to suppress evidence discovered on his electronic devices pursuant to a search warrant. The Fourth Circuit rejected Krueger’s arguments and agreed with the district court that the search of Krueger’s devices did not violate the Fourth Amendment.

In January 2019, Virginia state police observed illicit online activity at Krueger’s residence over a four-day period, identifying an IP address linked to downloading and uploading child sexual abuse material over the BitTorrent network. Eleven months later, in November 2019, state police obtained and executed a warrant to search Krueger’s residence and seized his electronic devices. Officers found hundreds of images depicting sexual abuse of minors on the devices and charged Krueger in July 2020. But the state court suppressed the evidence on state statutory grounds because the affidavit page was missing from the warrant application, and the state dismissed charges in July 2022.

In September 2022, federal agents obtained copies of Krueger’s devices (which were still in state custody) and applied for a federal warrant to search them, relying solely on the same January 2019 online activity. Federal agents found at least 600 images depicting minors engaged in sexually explicit conduct, and Krueger was indicted on federal charges.

After he was indicted in federal court, Krueger moved to suppress the evidence federal agents had collected from his electronic devices. First, he argued that there was no probable cause to support the federal search warrant for his devices, because the evidence became “stale” in the gap between January 2019, when the activity occurred, and November 2019, when state agents seized his devices and memorialized their contents. Whatever might have been found on his electronic devices in January 2019, Krueger contended, there was no probable cause to believe that illegal images would still be discovered on his devices eleven months later.

Second, Krueger argued that federal agents had delayed unreasonably in seeking their search warrant in September 2022. His devices, he pointed out, had been seized from him years earlier, in November 2019. And according to Krueger, that years-long gap between seizure and search warrant was plainly unreasonable under the Fourth Amendment.

The Fourth Circuit (Judge Harris, joined by Judges Quattlebaum and Keenan) agreed with the district court that the search of Krueger’s devices did not violate the Fourth Amendment and thus affirmed his conviction. As to the staleness claim, the panel applied the “collector inference” - the widespread view that collectors of child sexual abuse material value it highly and rarely dispose of it, storing it for long periods in secure places. Unlike in *United States v. Raymond* (a Second Circuit case holding that application of the collector inference must be based on something more than a one-time encounter with a few pages of a website containing links to child sexual abuse material), Krueger’s encounters with illicit material occurred repeatedly over four days, included downloading and uploading full images, and used BitTorrent which requires elaborate steps to access illegal content. Even if Krueger had tried to delete the material, it could still have been retrieved during an expert forensic search due to the persistence of digital media files. For these reasons, the Fourth concluded that probable cause existed, notwithstanding the eleven-month gap.

The Fourth also rejected Krueger’s unreasonable delay claim, which, the Fourth said, failed “at the threshold.” The Fourth Amendment unreasonable delay doctrine protects property interests, specifically an individual’s possessory interest in seized property. But the time taken by federal authorities to obtain a warrant had no effect on the length of the seizure “in this unusual case,” because Krueger’s devices remained in *state* custody throughout both state and federal proceedings. “Nothing about the federal warrant - allowing a search of copies of the devices’ contents,

while the devices themselves remained with the state - had anything to do with the length of time for which Krueger was deprived of a possessory interest in his devices.” Krueger never asserted any interest in his property until a year after federal officials had obtained and executed their warrant, and he did so by making inquiries with the state. The seizure was executed and maintained by Virginia, not the federal government, so any “delay” by federal officers had no effect on the length of the seizure.

***United States v. Johnson*, 148 F.4th 287 (4th Cir. Aug. 5, 2025) (Fourth Amendment; Dog Sniff):**

In *United States v. Johnson*, the Fourth Circuit (Judge Harris, joined by Judges Richardson and Heytens) held that a warrantless dog sniff outside an apartment door did not constitute a search under the Fourth Amendment because (1) there was no reasonable expectation of privacy in the area outside the front door and (2) the area outside the front door was not curtilage. The panel thus upheld the denial of Eric Johnson’s motion to suppress and affirmed his convictions for drug and gun-related offenses.

Investigators suspected Johnson of trafficking drugs from his apartment in a “large multi-unit complex” in Maryland. At 3 am, agents with a drug dog entered the apartment complex with the permission of building management and conducted a sniff outside Johnson’s apartment, which was located on the second floor on a long hallway. The apartment door was “recessed from the common hallway by approximately three and a half feet, and there was nothing in the area in front of the apartment door at the time of the dog sniff.” The dog alerted to “the area of the lower door seam.” Agents then obtained a warrant, relying in part on the positive sniff. You know what happened next—lots of bad stuff was found.

Johnson moved to suppress, arguing that the dog sniff constituted a search under the “reasonable expectation of privacy” standard because the police used a specialized device (the trained dog) to discover details of his home (the presence of drugs) that would otherwise have been unavailable absent a physical intrusion into the apartment. He further contended that the dog sniff violated the Fourth Amendment under a property-based approach because it involved an unlicensed physical intrusion onto the “curtilage” of his home – with the “curtilage” being the area of the apartment-building hallway just outside Johnson’s door.

The Fourth rejected both arguments. First, it explained that “dog sniffs are different” because a dog sniff (unlike other devices) can only reveal the possession of contraband, and an individual’s interest in possessing contraband cannot be deemed legitimate. “Unlike a visual inspection of the inside of a home, or the use of Kyllo’s thermal imaging device from the outside . . . an alert by a trained narcotics detection dog does not expose noncontraband items that otherwise would remain

hidden from public view” but instead “exposes only the presence or absence of narcotics, a contraband item – which means that it cannot violate any reasonable expectation of privacy.” “Because a dog sniff can reveal only the presence of contraband, and there is no reasonable expectation of privacy in contraband, a dog sniff is not a search – period.”

Second, the Fourth said that the area outside Johnson’s front door was not curtilage because he had no ability to exclude people from this area (and there was no evidence he had ever tried to). The Fourth was careful, however, to limit this aspect of its decision to the facts of Johnson’s case, explaining that “Multi-dwelling units come in all kinds of configurations, and some may include “common” areas different from the apartment hallway here Other cases may present different factual twists. We hold only that on the facts as found by the district court and disputed by neither party, the police did not intrude on Fourth Amendment-protected curtilage when they conducted a dog sniff in the common hallway just outside Johnson’s apartment door.”

Under *Johnson*, if you have a dog sniff within an area that you believe is curtilage, you are going to want to develop facts showing that your client had the ability to exclude others from that area.

***United States v. Moore*, 145 F.4th 572 (4th Cir. Aug. 1, 2025) (Fourth Amendment; Traffic Stop; Racial Discrimination; Equal Protection):**

In a disappointing decision reversing a hard-won victory in the district court, the Fourth Circuit (Judge Niemeyer, joined by Judges Harris and Berner) held the district court erred in dismissing the indictment against Moore on Equal Protection grounds. The panel concluded there was insufficient evidence to support the district court’s conclusion that police stopped and arrested Moore because he was Black. Although the district court agreed that police had probable cause to stop Moore and that there was no evidence of bad faith, the court relied on statistical evidence that Black drivers were 5.13 times more likely to be stopped in Richmond than White drivers, viewed in the context of Richmond’s history of racial discrimination, to conclude that Moore had successfully shown both the discriminatory effect and discriminatory purpose elements required for selective enforcement claim.

The Fourth rejected this reasoning. The Fourth found a complete absence of evidence that the officers who stopped Moore acted with discriminatory purpose, which, standing alone, the panel said, was fatal to Moore’s equal protection claim. The statistical evidence presented was also insufficient to show discriminatory purpose because: (1) the relationship between race and traffic stops was described as “somewhat weak”; (2) courts have declined to infer Equal Protection violations from statistical disparities far starker than those presented; (3) the statistics lacked an appropriate benchmark for comparison; and (4) the analysis failed to control for

confounding variables like poverty or residence in high-crime areas. The historical evidence of discrimination in Richmond had little probative value because it did not extend beyond 1989 and was not reasonably contemporaneous with Moore's 2020 traffic stop. The existence of probable cause to stop Moore (identical temporary tags seen on three different vehicles) made it less likely that the stop was motivated by discriminatory purpose rather than the observed traffic violation. The Fourth concluded that accepting Moore's evidence as sufficient would effectively justify dismissing every prosecution arising from the traffic stop of a Black person in Richmond, which it deemed "untenable."

The Fourth Circuit thus reversed the district court's order dismissing the indictment and remanded with instructions to reinstate the indictment against Moore for illegal possession of a firearm by a felon.

***United States v. Chatrie*, 136 F.4th 100 (4th Cir. Apr. 30, 2025) (en banc):**

The en banc Fourth Circuit affirmed the denial of a motion to suppress a geofence warrant where the district court had ruled the good faith exception applied. The entire operative opinion reads: "PER CURIAM: The judgment of the district court is AFFIRMED."

So even though all 15 judges proceeded to fill 126 pages with concurring opinions (with one dissent from Judge Gregory), we still have no idea whether geofence warrants (generally or this one specifically) are permissible under the Fourth Amendment. Even an informal tally of the judges' positions leaves us in the dark. It looks like there are 7 votes that this isn't even a search and 6 votes for it's a search without PC and therefore violates the Fourth Amendment. But Chief Judge Diaz and Judge Heytens didn't show their hands. So the ultimate question could go either way.

As Chief Judge Diaz put it, "In simple terms, a geofence warrant requires a service provider to produce location data from cell phone users who were near the scene when a crime occurred." This case involved Google, which has now changed its policy so that it will no longer respond to geofence warrants. However, this issue could rear its head again because plenty of other companies retain users' location data.

The reason for the summary affirmance was that, despite the judges' wildly divergent views on the merits of the Fourth Amendment claim, 14 of 15 agreed that (even if there was a violation) the good faith exception applies. Only Judge Gregory dissented from that holding. Judge Gregory would have held that the detective "could not have reasonably believed that the liberty authorized by the warrant was constitutional given the lack of specificity the Fourth Amendment explicitly demands."

***United States v. Dubon*, 135 F.4th 202 (4th Cir. Apr. 30, 2025) (King, Gregory, Heytens):**

The Fourth Circuit upheld the denial of a motion to suppress the warrantless search of Mr. Dubon’s home. The Fourth Circuit held the district court did not clearly err by finding that Mr. Dubon consented to the search and never withdrew his consent.

Richmond officers did a knock and talk at Mr. Dubon’s house. They were looking for another guy who a tipster said had an AR-15 and other big weapons and may have been planning to shoot up schools. Mr. Dubon answered the door and allowed the officers into the front room. At that point, the officers saw a handgun magazine on a mantle and another man walked into the front room. The officers asked Mr. Dubon if there were other people or firearms in the house. Mr. Dubon said no one else was there but did not respond about the firearm inquiry. An officer then told Mr. Dubon that they were going to check to see if anyone else was in the house. Mr. Dubon said, “Go check,... there’s no one else.” He also nodded and gestured toward the rear of the house. An officer went to check and Mr. Dubon said, “Well, I understand you can’t get into my house without a warrant, then. But...” The searching officer then returned and said he found “the rifle” they were looking for. The cops seized guns and ammunition. Mr. Dubon was charged with violating 18 U.S.C. § 922(g)(5), possession of a firearm by an unlawful alien. He entered a conditional guilty plea that preserved his ability to appeal the denial of his motion to suppress.

The Fourth Circuit held the district court did not clearly err in finding that Mr. Dubon consented to the search. It relied on findings that Mr. Dubon consented when he said, “Go check,... there’s no one else” and gestured towards the area to be searched. The Fourth Circuit said it did not matter that the officers initially told him they were going to search because “those statements were made before [Mr.] Dubon gave consent, and ‘the Government need not demonstrate that the defendant knew of his right to refuse consent to prove that the consent was voluntary.’”

The Fourth Circuit further held the district court did not clearly err by finding that Mr. Dubon did not withdraw his consent. The Fourth Circuit held that Mr. Dubon’s statement—“Well, I understand you can’t get into my house without a warrant, then. But...”—was susceptible to different meanings. But the district court found he could have “finish[ed] his comment by saying ‘I’m allowing you to search anyway.’” The Fourth Circuit further relied on the district court’s finding that neither Mr. Dubon’s “affect” nor his actions suggested he was withdrawing consent because he never protested or told the officers to leave. Because the Fourth Circuit upheld the search on consent grounds, it declined to reach the district court’s alternative ruling that the officers lawfully found the gun during a valid protective sweep.

***United States v. Deritis*, 137 F.4th 209 (4th Cir. May 14, 2025) (Thacker, Quattlebaum, Rushing):**

Vincent Deritis photographed/filmed his 12-year-old stepdaughter in the shower/bed using a hidden camera. A jury convicted him of various CP offenses and he was sentenced to 600 months' imprisonment and a \$117,000 special assessment. The Fourth Circuit affirmed the convictions and sentence but vacated the special assessment. Here's what happened.

In March 2019, Microsoft sent law enforcement a cyber tip linking CP materials to an IP address at a home in Hickory where Deritis lived with his wife and stepdaughter. When police showed up to serve a search warrant, Deritis did not answer the door. Instead, he "began searching on the internet about how to report child sexual abuse material and erasing the data on his two hard drives." When officers entered the house, they saw he was running a program to permanently delete his computer data and stopped the process. They then made copies of the hard drive and submitted a preservation request to Google to pull and hold records associated with his email account.

Reviewing the hard drive, analysts found thousands of CP images, including naked images of Deritis's stepdaughter showering in the master bathroom that were obviously made with a hidden camera. Since no such camera was initially found, officers obtained a second warrant to search for it. Deritis admitted placing the camera in the bathroom and viewing the images. He handed over the camera. During the search, police took Deritis's wife out on the front porch and showed her the images. She told them that Deritis "was always telling his stepdaughter not to take showers in the master bathroom." But she allowed her daughter to take showers there without his knowledge. While they were on the porch, Deritis walked to the kitchen and stabbed himself with a knife. He later testified to a history of depression and suicide attempts.

Officers then obtained warrants to search the preserved Google records. Google then turned over two sets of data: the "preserved" data and a second set that was still active at the time of the search. There was little difference between the two data sets and they turned up yet more images of Deritis's stepdaughter, including one of her hand touching what appeared to be his penis and what appeared to be his hand touching her genitals.

Deritis was indicted on three counts of manufacturing CP (based on (1) the shower photo; (2) penis pic; (3) genital pic) and one count of CP possession (the thousands of other images). He sought to suppress the results of the Google search, asserting that the preservation request was a "seizure" and that the 55 days that passed before officers obtained a search warrant was unreasonable. The district court

rejected the motion, holding that the preservation request did not constitute a seizure under the Fourth Amendment.

At trial, Deritis testified that he set up the camera as part of his sexual relationship with his wife and had captured images of his stepdaughter by mistake. He said he had told her never to use the master bathroom. He denied knowledge of the penis/genital photos. The government offered evidence identifying Deritis's hand in the photos based on his wedding ring, clothing, and other distinguishing features. Deritis admitted downloading the CP, claiming he was working to "clean up" the internet by reporting "nefarious" materials to website administrators. (Later, at sentencing, the judge told him: "[Y]ou lied every chance you got and in some of the most incredulous ways. I don't know how you could get up there with even a straight face and ask anybody to believe your testimony.").

In support of his testimony about his stepdaughter, Deritis attempted to elicit testimony from his ex-wife about how he had banned the stepdaughter from the master bathroom. Specifically, he asked her if "there was a time when [he] had told [his ex-wife] not to allow [the stepdaughter] to use that bathroom" and "Did [the minor] have permission to go into that bathroom [from him]?" The district court sustained the government's objections to these questions because the statements were "impermissible hearsay."

After two days of trial, the jury found him guilty on all counts. He was sentenced to 600 months and a total of \$117,000 in special assessments, to which he did not object. On appeal, he raised the following arguments: (1) the district court erred by denying his motion to suppress evidence obtained from his Google Account; (2) the district court erroneously instructed the jury as to the term "lascivious exhibition," and that such instruction incurably prejudiced his trial; (3) the district court erred by denying his Rule 29 motion; (4) the district court erroneously excluded exculpatory testimony from his ex-wife; and (5) the district court plainly erred by imposing a special assessment without considering the applicable statutory factors.

Of these five arguments, the Fourth Circuit agreed only with the last: the district court plainly erred by imposing a special assessment without considering any of the factors that the statute requires it to consider. Otherwise, the Fourth affirmed the conviction and sentence.

First, as to the suppression motion, the Fourth said it did not need to reach the merits of whether the preservation request was a seizure, because "the Government received an identical set of data from Google that was not the fruit of the preservation request." The Fourth thus affirmed under the "independent source" theory (which the district court never even considered, but the Fourth said that

didn't matter, because it's allowed to affirm for any grounds apparent on the record).

Next, the Fourth rejected Deritis's challenge to jury instructions on the definition of "lascivious exhibition" (with its reliance on the infamous *Dost* factors). The Fourth said that the challenge was foreclosed by its recent decision in *United States v. Sanders*, which affirmed a court's reliance on the *Dost* factors to explain "lascivious exhibition". The Fourth said: "In summary, *Sanders* affirmed a district court's reliance on the *Dost* factors where the trial court ensures that the jury: (1) understands that mere nudity is not sufficient to establish a "lascivious exhibition"; (2) is not instructed to rely exclusively on the *Dost* Factors, (3) understands that no single *Dost* Factor is dispositive, and (4) is discouraged from a strict and mathematical application of the *Dost* factors."

Applying this analysis, the Fourth said the court had not erred in instructing the jury.

Third, the Fourth affirmed the court's denial of Deritis's Rule 29 motion for acquittal on Counts One and Two, which involved manufacturing CP based on photos of the stepdaughter, concluding it was not "a close question." Deritis "hid a camera to capture footage of his minor stepdaughter's genitals while she was naked." That was sufficient evidence for Count One. And his argument that the penis pic did not show the minor's genitalia and thus could not be a "lascivious exhibition" was even less persuasive.

The Fourth actually agreed with Deritis's evidentiary argument and said the court erred in excluding the ex-wife's testimony because "both questions sought to elicit a non-hearsay command." It explained that "an out of court statement providing directions from one individual to another does not constitute hearsay" because it is not offered for the truth of the matter asserted but for the fact that it was said. But even though this was error, the Fourth found it to be harmless, given all the other evidence.

Finally, the Fourth said the court plainly erred in ordering a special assessment without considering and making findings that the statute (18 USC 2259A) says the court must consider and find. The government pretty much conceded this on appeal. So the Fourth sent it back for a limited resentencing.

***United States v. Joseph*, 138 F.4th 797 (4th Cir. May 28, 2025) (Heytens, Berner, Gibney):**

The Fourth Circuit upheld the denial of Mr. Joseph's two suppression motions.

This case started when a West Virginia officer received a tip about possible drug activity at a motel room and watched the room for several hours. Eventually, the officer knocked and received no answer but saw numerous sandwich bags, digital scales, and folded pieces of paper—which the officer knew were consistent with drug distribution—through the window.

After leaving and returning, the officer saw Mr. Joseph use a key to enter the room. Mr. Joseph later walked across the street to McDonald's carrying a duffel bag while repeatedly looking over his shoulders. The officer called for backup and the two officers each approached a different door to the McDonalds. When Mr. Joseph saw one officer come in, he immediately turned tail and left through the other door (where the backup officer was waiting). The backup officer ordered Mr. Joseph to stop but Mr. Joseph took off running and threw down the duffel bag. The officers caught him and he consented to a pat down, which revealed a hotel key and a knife with a white powdery residue. Around the same time, a drug dog that was already on the scene alerted to the bag, which contained guns and drugs.

Citing *Hodari D.*, the Fourth Circuit held Mr. Joseph was not seized until the officers caught him. But the seizure was supported by reasonable suspicion based on the drug distribution materials in plain view in the room and Mr. Joseph's unprovoked flight. The Court also held the officers did not unreasonably prolong the seizure because the white powdery residue on the knife and the dog alert gave rise to probable cause for a search warrant, which they got. It did not matter that the officers violated their office policy by not using their body cams. The Court further rejected the argument that the officers conducted a full-blown arrest before the dog alerted.

The Fourth Circuit also upheld the denial of a separate motion to suppress arising from a later traffic stop. Another West Virginia officer got a tip from a known informant that an out-of-state drug dealer was selling meth from a house. The officer surveilled the house and saw two people leave in a rental car with out-of-state plates. When the car committed a minor traffic violation, the officer stopped it. Mr. Joseph was a passenger. While preparing the ticket, the officer called for a drug dog, which arrived 15 minutes later and alerted to drugs. A search revealed drugs and a gun.

The Fourth Circuit rejected the argument that the officer unreasonably prolonged the stop for the drug dog. The Court held the determination of undue delay was a finding of fact reviewed only for clear error. And it found no clear error. Among other things, the stop was prolonged because the driver had no identification and a pedestrian leaned into the car to speak to the driver at one point, and the officer had to get him away.

***United States v. Ray*, 141 F.4th 129 (4th Cir. June 3, 2025) (Gregory, Thacker, Rushing):**

Fourth Amendment superfans know that the good-faith exception is slowly swallowing the Fourth Amendment rule. So it is nice to see a case where the Court actually puts some teeth into it and makes the government actually prove good faith before relying on it.

- Ray, a Navy service member, was investigated by NCIS for alleged child sexual abuse.
- NCIS obtained a **Command Authorization for Search and Seizure (CASS)**, the military equivalent of a warrant, which **only permitted seizure** of Ray's phone.
- **Without additional authorization**, NCIS performed a **full forensic search** of the phone and discovered child sexual abuse material (CSAM).
- A second CASS was later obtained, but only after the initial warrantless search had occurred.
- The government attempted to justify the initial search under the **good faith exception**, despite conceding that:
 - The CASS did not authorize a search,
 - The CASS did not incorporate the affidavit that mentioned a search,
 - No verbal authorization was given.

The district court granted the motion to suppress. The government appealed. The Fourth Circuit affirmed the grant of the motion.

1. Scope of the Warrant

- A warrant (military or civilian) is limited to what it explicitly authorizes.
- The court emphasized the **plain language** of the warrant, which only allowed seizure—not search—of the phone.
(Practice tip: Scrutinize whether law enforcement **strictly followed the scope** of any warrant.)

2. Good Faith Exception (Leon Doctrine)

- The government argued for suppression to be denied under *United States v. Leon*, which allows some illegally obtained evidence to be admitted if officers acted in **objectively reasonable reliance** on a warrant.
- The Fourth Circuit **rejected** this argument:
 - **Leon does not apply** when officers **exceed a warrant's express limits**, especially when the warrant is **unambiguous**.
 - Officers must **read and understand** the warrants they execute.
 - **Negligence** in following warrant instructions is not equivalent to good faith.

PLEA AGREEMENT

***United States v. Wilson*, 149 F.4th 448 (4th Cir. Aug. 25, 2025) (Plea Agreement; Breach by Government):**

Mr. Wilson entered into a plea agreement in which the government agreed to certain stipulations, including drug weight and role in the offense. The government also moved at sentencing for a substantial assistance motion BUT ALSO moved for an upward departure/variance.

Mr. Wilson appealed, arguing that the government violated the plea agreement by moving for an upward variance that effectively nullified the 5K motion and its stipulations in the plea agreement. It also violated the plea by making arguments based on facts regarding drug weight and role that contradicted the stipulation in the plea agreement.

The Fourth Circuit agreed that the government behavior was “troubling” but (you know where this is going) affirmed the sentence. Sigh. First, it noted that the appeal was on plain error because counsel did not object to the government’s motions on these grounds at sentencing. Second, it noted that the government did not agree in the plea agreement not to move for an upward departure or variance. And, in fact, it reserved the right to make a sentence recommendation. Third, it agreed that the government’s arguments based on facts that contradicted the stipulations were troubling and risked making such stipulations pointless, it nonetheless did not rise to the level of “plain” error. The government did not ask the court to establish an offense level inconsistent with the stipulations, so it did not breach the plea.

Judge Gregory dissented, finding plain error by viewing the case in a more holistic way and noting how the government’s arguments completely undercut the stipulations to which it agreed.

TRIAL; EVIDENTIARY ISSUES

***United States v. Hudak*, __ F.4th __, 2025 U.S. App. LEXIS 26026 (4th Cir. Oct. 7, 2025): Trial, Evidentiary Rulings, Hate Crimes:**

In a unanimous opinion (Judge Wilkinson, joined by Chief Judge Diaz and Judge Wynn), the Fourth Circuit affirmed Mr. Hudak’s convictions for federal hate crimes, in violation of 42 U.S.C. § 3631(a) and 18 U.S.C. § 245(b)(2).

At trial, Mr. Hudak conceded that he had the specific intent to injure, intimidate, and interfere with the first victim and that he had the specific intent to intimidate

and interfere with the second victim. But he contested that he assaulted either man “because of” his race, color, or national origin, arguing instead that both incidents were the product of generalized road rage.

The Government introduced items from Mr. Hudak’s truck and house, including a Confederate flag, a KKK flag, two Nazi flags, a swastika patch, a ring bearing the Iron Cross, and a comic book with racist caricatures of Black and Hispanic people. It also presented testimony by other people in town who were called racial epithets by Mr. Hudak. The jury convicted on both counts and Mr. Hudak was sentenced to 41 months in prison.

Mr. Hudak appealed, arguing that the court erred in excluding evidence of his mental illness and by admitting evidence of his Nazi memorabilia. The Fourth Circuit affirmed both rulings. With respect to mental health evidence, the district court excluded an expert report by Dawn Graney that stated Mr. Hudak was suffering from “serious mental health issues including depressive, anxiety, obsessive-compulsive and psychotic symptoms” and that, but for these symptoms, he likely would not have engaged in the alleged conduct. The district court excluded the report and testimony, concluding that it contained no factual basis for its opinion and that mental diseases or defects are not a defense to a federal crime unless the defendant pleads insanity. The Fourth Circuit blessed both rulings, adding that his mental health was not particularly relevant, given that the question before the jury was “whether Hudak assaulted his victims ‘because of’ their race, color, and national origin.”

With respect to admission of Nazi memorabilia, the district court initially excluded it under Rule 403 because the victims were Black and Hispanic, not Jewish, and Nazi memorabilia was likely to be “more associated in a lay juror’s mind with antisemitism” than with prejudice against Black or Hispanic people. But when Mr. Hudak testified, he referred to owning Nazi and Confederate flags and said he did so because he was a “collector,” “support[s] the military,” and “because of the history of war,” not because of “any racisms, not any hate.” The court thus reversed its ruling, concluding that Mr. Hudak opened the door to this evidence by casting himself as a “military collector.”

***United States v. Contreras*, 149 F.4th 349 (4th Cir. Aug. 14, 2025) (Trial; Admission of Evidence):**

Following an eight-week trial, defendant MS-13 gang members received life sentences after the jury found them guilty of kidnapping and murdering two teenagers. They appealed, raising numerous challenges. The Fourth (Judge Berner, joined by Judges Wilkinson and Quattlebaum) rejected all of their arguments except for one: a *Rogers* error, because the court’s oral pronouncement of the sentence was inconsistent with the written judgment. The panel otherwise affirmed. The Fourth

held that the district court did not abuse its discretion in qualifying the government's expert as an MS-13 expert witness and that his testimony did not violate the Confrontation Clause because it represented his independent judgment. Admission of historical racketeering evidence and graphic evidence did not violate Rule 403, the panel concluded. The district court also properly refused to instruct the jury on a duress defense, because there was insufficient evidence that any of the defendants acted under a threat of death or serious bodily injury. The district court likewise did not abuse its discretion in denying a defendant's request for a lesser included offense instruction on aggravated assault. The Fourth held that the evidence was sufficient to support the convictions and that the district court properly joined the defendants and counts. Finally, the Fourth rejected one of the defendant's Fourth and Fifth Amendment challenges, agreeing with the district court that the defendant's mother consented to a search of the apartment where police located the defendant, and that the defendant intelligently waived his *Miranda* rights. The Fourth vacated one defendant's sentence for *Rogers* error and remanded for resentencing.

***United States v. Booker*, 146 F.4th 332 (4th Cir. July 22, 2025) (Trial; Sufficiency of Evidence; Admission of Evidence; Sentencing; Loss Amount):**

Donald Booker owned and operated United Youth Care Services, which billed North Carolina's Medicaid program for millions of dollars' worth of medically unnecessary drug tests. A jury convicted him on ten counts arising from this scheme. He appealed, and the Fourth Circuit (Chief Judge Diaz, joined by Judges Agee and Benjamin) affirmed.

At trial, the government presented evidence showing that Booker set protocols requiring all participants in the company's programs to be tested twice per week, regardless of individual medical need. To recruit Medicaid beneficiaries, Booker arranged kickback deals with two entities: "Do It 4 the Hood" and Legacy Housing. United Youth paid Do It 4 the Hood about \$124,000 in kickbacks for collecting urine samples from Medicaid beneficiaries. United Youth paid Legacy Housing's owner, Delores Jordan, nearly \$1.5 million in kickbacks for referring tenants for drug testing. Booker took steps to disguise the kickbacks, including using misleading descriptions on checks and structuring payments to avoid federal transaction reporting thresholds. Evidence showed that \$1 million was debited from United Youth's bank account on the same day that Booker deposited \$1 million into his personal bank account. North Carolina Medicaid paid United Youth just under \$12 million for medically unnecessary drug tests between 2016 and 2019.

The final presentence report included a 20-level enhancement based on a loss amount exceeding \$9.5 million under U.S.S.G. § 2B1.1(b)(1)(K). Booker objected to the loss amount calculation before the district court. But the court overruled the objection, finding that United Youth used Johnson's provider credentials to file

about \$11.8 million in fraudulent claims. Still, the court reduced Booker's offense level by two based on Booker's lack of prior criminal history. The resulting offense level was 37, with a guideline range of 210 to 262 months' imprisonment.

The court varied downward to address the sentencing disparity between drug users, who can earn time off their sentences, and non-drug users like Booker, who can't. It imposed a 200-month sentence.

On appeal, Booker challenged the district court's denial of his Rule 29 motion, as well as its decision to permit testimony about an adverse audit. He also asserted the court clearly erred in finding that the Medicaid fraud scheme caused a loss of at least \$9.5 million and argued that his downward-variant sentence was substantively unreasonable. The Fourth found no merit to these arguments.

Regarding the conspiracy conviction, the Fourth found abundant evidence that Booker owned United Youth, set the company's drug-testing policies, and negotiated kickback arrangements with Do It 4 the Hood and Legacy Housing. On the Anti-Kickback Statute convictions, multiple witnesses testified that Booker negotiated kickback deals with Legacy Housing and authorized every kickback check. The Fourth rejected Booker's nondelegation doctrine challenge because Congress set out nine intelligible principles in 42 U.S.C.S. § 1320a-7d(a)(2) to guide the Department of Health and Human Services' discretion. The Fourth found no merger problem with the money-laundering convictions because Congress amended the statute after *Santos* to define "proceeds" to include "gross receipts," and because Booker was convicted of concealment money laundering, not promotional money laundering.

As to the evidentiary issues, the Fourth found no unfair prejudice in admitting testimony about the adverse audit because Booker opened the door by eliciting testimony suggesting United Youth didn't know it was engaged in wrongdoing. The court found the \$1 million bank transaction evidence was highly probative of Booker's intent or motive to commit Medicaid fraud and not substantially more unfairly prejudicial than probative.

Finally, the Fourth upheld the loss-amount calculation based on the amount United Youth billed to Medicaid for medically unnecessary tests, which represented the intended loss. And Booker's sentence was reasonable because his co-defendants were not similarly situated to him, as they pleaded guilty, cooperated with the government, and played lesser roles in the scheme.

***United States v. Sanders*, 146 F.4th 372 (4th Cir. July 24, 2025) (Trial; Jury Instructions; Guidelines; Sophisticated Means Enhancement):**

A jury convicted Cory Fitzgerald Sanders of wire fraud, submitting false claims, and submitting a false document as a result of a scheme to fraudulently sell video

teleconference equipment and related services to the federal government. Sanders argued on appeal that the district court misstated the law when instructing the jury and misapplied an enhancement for sophisticated means at sentencing. The Fourth (District Court Judge Hanes, sitting by designation, joined by Judges Thacker and Harris) rejected his arguments and affirmed.

Sanders, through his companies SandTech and later CyCorp, contracted with the federal government to supply teleconference equipment and support services. Sanders repeatedly misrepresented his companies' certifications with Cisco and Polycom, falsely claiming to be an authorized distributor with higher certification levels than he actually possessed. He submitted falsified documents, including a photoshopped certificate claiming to be a "Gold Certified Partner" with Cisco. Sanders supplied used equipment while representing it as new and under warranty, failed to provide contracted services, and continued to enter into government contracts after his authorizations were terminated. When SandTech developed a poor performance record, Sanders formed CyCorp to continue bidding on federal contracts. He used varying business names, usernames, and addresses to avoid detection when attempting to register as an authorized distributor.

The total loss amount determined at sentencing was \$899,150.65. Sanders' Guidelines range was 46 to 57 months. The district court sentenced Sanders to a 45-month term of imprisonment.

On appeal, Sanders first took issue with an instruction on intent, which stated that: "[w]illful intent or guilty knowledge may be inferred from the secretive or irregular manner in which a transaction is carried out." Sanders argued that this instruction improperly equated irregularity with willfulness. Although the Fourth Circuit agreed that "the challenged instruction, if read in isolation, could run the risk of confusing the jury," the panel concluded that "the bulk of the district court's jury instructions, coming immediately before and after this one instruction, adequately explained the requisite intent and clearly articulated the required mens rea." As such, the instructions "construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party."

Next, Sanders argued the district court erred by applying a sentencing Guidelines enhancement for using "sophisticated means" to carry out his fraud. U.S.S.G. § 2B1.1(b)(10)(C). Sanders asserted that his fraud lacked sophistication, making the sentencing enhancement inapplicable to his conduct.

The Fourth also rejected this argument. The panel determined that "sophisticated means" in the Guidelines is genuinely ambiguous, and that the Commentary's definition ("especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense") thus deserved deference. The Fourth

found that Sanders' conduct was sophisticated when viewed holistically - his scheme spanned five years, involved multiple government entities, used name variations to create the appearance of multiple employees, involved forming a new company to evade his negative performance history, included supplying false certifications, and employed blind-shipping to conceal product sources. This conduct went beyond the minimum required to establish fraud in its simplest form.

***United States v. Parada*, 134 F.4th 188 (4th Cir. Apr. 9, 2025) (Diaz, Agee, Wynn):**

Defendants were accused of RICO conspiracies as part of MS-13 affiliation. The government struck two jurors—one a nationalized citizen originally from Nigeria and one an African-American grandmother—that the defense challenged under *Batson*.

The 4th Circuit agreed (and formally held for the first time) that national origin is a valid basis for a *Batson* challenge. But here, the Court deferred to the district court's acceptance of the government's origin-neutral reason for excluding the juror based on his accent. It gave similar deference to the court's exclusion of the other juror based on what the government claimed were incomplete responses to the jury questionnaire. In short, deference won the day.

***United States v. Oliver*, 133 F.4th 329 (4th Cir. Apr. 8, 2025) (Wilkinson, Agee, Floyd):**

Mr. Oliver's ex-wife worked for the Mr. Fuel truck plaza. She told him that they had a lot of money in the registers and where the security cameras did not cover. So Mr. Oliver devised a plan to rob the Mr. Fuel. He explained this plan to his ex-wife and tried to recruit her into it. She was so horrified by the plan she quit her job just to make sure that she'd have nothing to do with it.

Undeterred, Mr. Oliver looked for others to help him. He found someone known only as "New York." He explained his plan to New York, and New York also said no.

But the third time is often the charm, and it was so here, as Mr. Oliver found Mr. Brown, who agreed to the plan of robbing Mr. Fuel with knowledge of the security cameras so as to avoid detection. Mr. Oliver gave Mr. Brown a gun and parked in a getaway car across from Mr. Fuel. Mr. Brown then tried to rob the register, discharging his firearm when the cashier was too slow. (A good Samaritan who was in the store tried to intervene and help the cashiers and was shot by Mr. Brown, sadly suffering permanent injuries). Mr. Brown then fled to the getaway car, and Mr. Brown and Oliver sped away. The whole thing was captured by the Mr. Fuel security cameras.

The men were quickly found and charged with and convicted of conspiracy to commit Hobbs Act robbery and 924(c)s. Mr. Oliver got his 924(c) vacated b/c conspiracy cannot be a 924(c) predicate. At his resentencing, he wanted to call Mr. Brown as a witness to authenticate letters he wrote from jail that indicated that Mr. Oliver had reduced culpability and also to answer questions about the incident. Mr. Brown, on the advice of counsel, invoked his 5th Amendment right not to testify b/c his case was currently on appeal and if he were to get a resentencing, he could incriminate himself with the testimony he gave at Mr. Oliver's hearing.

Mr. Oliver appealed, arguing that the district court erred in letting Mr. Brown refuse to testify. The Fourth affirmed. First, it noted that even though there are constitutional implications for Mr. Brown, from Mr. Oliver's perspective (which is what is relevant here), this was a district court decision about a witness, so it is an evidentiary ruling reviewed for an abuse of discretion, not de novo.

Here, the district court did not abuse its discretion. Mr. Brown did face possible exposure that could increase his Guidelines range at a resentencing, such as testimony that might make him qualify for a leadership enhancement. And even something simple like authenticating the letters would open him up to cross-examination by the government on the contents of the letters, which could hurt him. And because this whole area was a landmine for Mr. Brown, the district court did not abuse its discretion in giving him a blanket 5th Amendment ruling instead of making him go question by question.

***United States v. Elfenbein*, 144 F.4th 551 (4th Cir. July 17, 2025) (Trial; Fraud) (Agee, Richardson, Nachmanoff):**

After an eleven-day trial, a jury found Dr. Ron Elfenbein guilty of healthcare fraud. But the district court acquitted him, ruling there was too little evidence to convict. The Fourth Circuit reversed the acquittal but agreed that the evidence was close, so it affirmed the district court's contingent order granting a new trial.

Dr. Elfenbein operated urgent care clinics in Maryland that pivoted to primarily providing COVID-19 testing during the pandemic. His clinics billed Medicare and other insurers using level-four evaluation and management (E/M) codes (99204 for new patients and 99214 for established patients) for COVID-19 testing visits. These level-four codes generated substantial payments: \$354.22 for each 99204 visit and \$231.50 for each 99214 visit. The visits were typically brief (5-10 minutes) and involved minimal services beyond COVID-19 testing. With nearly 1500 patients coming through on some days, the clinics made millions.

Dr. Elfenbein was charged with five counts of healthcare fraud related to specific patient visits that were coded at level four. Each count corresponded to one patient visit for COVID-19 testing conducted during the spring and summer of 2021. As the

United States saw things, for each visit, Dr. Elfenbein committed fraud in two ways. First, the United States alleged that Dr. Elfenbein billed insurers too much for the simple diagnoses he provided. Second, the United States alleged that Dr. Elfenbein supported his overbilling by sending insurers medical reports that reflected services his clinic never provided.

At trial, the government relied on an expert witness who explained the CPT code system to the jury. The expert also opined that level-four codes were generally too high for the quick and easy task of testing someone for COVID-19. But the expert did not specifically testify that Elfenbein's coding was improper, and he admitted on cross-examination that he was unfamiliar with the latest, pandemic-era coding rules. The government also called staff from Elfenbein's clinic, many of whom expressed some discomfort with Elfenbein's coding practices. And alongside these witnesses, the government also showed the jury internal emails and patient medical records.

Dr. Elfenbein offered his own expert, who provided a fuller explanation of how the CPT coding system works and what level-four codes require. After explaining the system, the expert also opined that Elfenbein's coding decisions were correct. Finally, Dr. Elfenbein himself testified about the treatments he provided and the codes he used.

The district court acquitted Elfenbein, concluding that the CPT codes were ambiguous. Alternatively, the court granted a new trial. The government appealed.

The Fourth Circuit reversed the acquittal, concluding that a reasonable jury could have concluded that Elfenbein's use of level-four codes was false because Elfenbein himself testified that for "the vast majority of our COVID patients the risk was very low, minimal or low risk" and described the management plan as minimal, which contradicted the requirement for level-four codes that the condition presented a high risk of morbidity. And the treatments he prescribed (rest, hydration, Tylenol) were basic and aligned with level-two codes according to his own expert.

The panel rejected Elfenbein's argument that the CPT codes were too ambiguous to be false, explaining that only "fundamentally ambiguous" language (where persons of ordinary intellect cannot agree on meaning) cannot form the basis for a false statement. The CPT Manual and testimony established that the codes had discernible meanings in the medical community.

Nonetheless, the Fourth deferred to the district court's discretion granting a new trial, noting that the government's case-in-chief was relatively weak, with much of the damning evidence coming from Elfenbein's own testimony and expert.

***United States v. Mosby*, 143 F.4th 264 (4th Cir. July 11, 2025) (Trial; Perjury; Mortgage Fraud; Jury Instructions) (Niemeyer, Agee, Thacker):**

In this high-profile case, a divided Fourth Circuit affirmed Marilyn Mosby's convictions for perjury but granted a new trial on her mortgage fraud convictions after concluding that the district court's venue instruction was overbroad and prejudicial. Judge Niemeyer dissented in part, arguing that any error in instructing the jury was harmless.

Mosby was the Baltimore City State's Attorney from 2015-2023. In 2020, she made two withdrawals from her retirement account (\$40,000 and \$50,000) under the CARES Act, which allowed penalty-free withdrawals for those experiencing "adverse financial consequences" from COVID-19. On the Distribution Request Forms, Mosby certified under penalty of perjury that she had experienced adverse financial consequences stemming from COVID-19. Mosby then used these funds to purchase properties in Florida - a home in Kissimmee and a condominium in Longboat Key. For the Longboat Key Condo purchase, Mosby signed a gift letter on February 10, 2021, falsely stating that her husband had gifted her \$5,000 for the purchase when she had actually wired him the money. At trial, the government presented circumstantial evidence that Mosby was in Maryland when she transmitted the gift letter to her mortgage lender. Mosby traveled to Florida on February 16, 2021, and closed on the Longboat Key Condo on February 19, 2021.

Mosby appealed from her perjury and mortgage fraud convictions. As to her perjury conviction, the Fourth rejected her argument that the term "adverse financial consequences" on the Distribution Request Form was fundamentally ambiguous, concluding that the term had a meaning that persons of ordinary intellect could understand, especially when read in context with the qualifying examples provided on the form. And the district court did not err, the Fourth reasoned, in permitting the Government to introduce evidence as to how Mosby utilized the funds she withdrew from her retirement accounts because the evidence was relevant to determine whether she suffered adverse financial consequences from COVID-19, and its probative value was not substantially outweighed by the risk of unfair prejudice or jury confusion.

The Fourth agreed with Mosby, however, that her mortgage fraud conviction could not be sustained because the court mis-instructed the jury about venue. The district court's instruction that venue could be established if "any act in furtherance of the crime occurred within the District of Maryland" was erroneously overbroad because it permitted the jury to establish venue based on mere preparatory acts, which is prohibited by Fourth Circuit precedent. The Fourth found the error was prejudicial because the Government presented only circumstantial evidence of venue, and a rational jury could have found that the Government failed to prove that Mosby

transmitted the gift letter from Maryland. Judge Niemeyer disagreed on this final point, concluding that any instructional error was harmless.

***United States v. Chaudhri*, 134 F.4th 166 (4th Cir. Apr. 8, 2025) (Gregory, Thacker, Berner):**

M.B. was from Pakistan. She was arranged in marriage to Salman Chaudhri, who lived in Virginia. She came to Virginia to live with him, moving into the home with his mother and brothers. He left for medical education. His mother and brothers (the defendants here) started abusing M.B. and forcing her to perform household labor. I won't repeat the disturbing details here, but it continued to escalate and was just horrible. Years later, her brother came to visit from Pakistan (the defendants had kept her out of contact with her family) and saw the situation. He got in touch with authorities and following an investigation, defendants were charged with conspiracy to commit forced labor, in violation of 18 U.S.C. § 371; forced labor, in violation of 18 U.S.C. § 1589; and document servitude, in violation of 18 U.S.C. § 1592. They were convicted after a jury trial.

The Fourth Circuit affirmed the convictions, making the following relevant holdings

1. There is no familial/domestic exception to the forced labor statutes. They are written broadly, and Congress intended them to apply broadly. Appellants cited a Sixth Circuit case for the idea that a familial exception existed, but that case was narrow and limited to a parent's right to make a child do household chores (which is apparently codified in Michigan).
2. Evidence of continued abuse after the forced labor had ended was properly admitted. It "completed the story" of the victim and was not unduly prejudicial in light of the horrific nature of the evidence that was properly admitted.
3. The district court did err under *Counterman* in refusing to give a jury instruction that for the defendants' statements to M.B. to be considered threats without running afoul of the First Amendment, the jury needed to find that they intended a threat or knew that it would be perceived as a threat. This error was harmless, however, because sufficient evidence supported the jury's finding under the second means of conviction under the statute.

Judge Berner writes a short and wonderful concurrence pointing out that we had a whole civil war to end slavery and enact the 13th Amendment and so yeah we could probably broadly interpret the anti-slavery statutes we have on the books. Further, a lot of slavery involved forced domestic labor, so the defendants' argument that anti-forced-labor statutes should not apply to domestic labor flies in the face of the

history and purpose of the 13th Amendment and the statutes designed to enact its promise.

***United States v. Naum*, 134 F.4th 234 (4th Cir. Apr. 11, 2025) (King, Quattlebaum, Floyd):**

Dr. Naum was registered with the DEA and had a DEA number to allow him to prescribe and dispense controlled substances.

He worked shifts at Advance Healthcare, which focused primarily on helping people with opioid addiction. He knew that one of the nurses there would sometimes prescribe suboxone under his DEA authorization. Suboxone is a controlled substance used to help people with addiction. The nurse had no authorization to prescribe suboxone.

The United States charged Dr. Naum under 841 with distributing controlled substances by allowing the unauthorized nurse to prescribe them under his name and outside of the bounds of accepted medical practice. At trial he testified that he knew what the nurse was doing and did not agree with it, but he did not stop it because he felt that cutting the patients off would make it more likely that they would find narcotics on the street.

The jury convicted him, he appealed, and the 4th affirmed. During this time, the Supreme Court decided *Ruan*, which held that a defendant charged under a theory of improper authorization had to know that his conduct was outside of the bounds of accepted medical practice. The Supreme Court vacated the 4th Circuit opinion under *Ruan* and remanded for reconsideration. The 4th affirmed, making the following relevant holdings:

1. The error here was not invited error. Normally, when a defendant asks for something and gets it, he cannot receive any relief on appeal if the thing for which he asked was an error because he invited that error. Here, though, even though Dr. Naum proposed the erroneous jury instructions, the 4th is not going to hold him to the exacting invited error standard when he was just proposing instructions that complied with the settled circuit law at the time.
2. The instructions were error. The jury had only to find that his authorization was outside of accepted medical practice and not the additional finding that he knew that his conduct was outside of those bounds.
3. But plain error applies because Dr. Naum never objected to the instructions. He did attempt to put in evidence of his subjective intent at trial, but he did so as part of wanting to raise a good-faith defense. An attempt to put on evidence for one

legal theory is not enough to preserve a challenge to a jury instruction on a different theory.

4. And, under plain error, Dr. Naum loses. He testified that he knew what he was doing was outside of the standard of care but he nonetheless did it for the benefit of his patients. However admirable his motivations, this testimony shows that a properly instructed jury would have almost certainly found that he had the required knowledge, so he cannot show that the error affected his substantial rights.

***United States v. Seward*, 135 F.4th 161 (4th Cir. Apr. 25, 2025) (Wilkinson, Heytens, Benjamin):**

Trevor Seward appealed his conviction for murdering a rural mail carrier. He raised two challenges under the Federal Rules of Evidence and one under the Sixth Amendment’s Confrontation Clause.

First, he argued the government’s firearms toolmark examiner was not qualified to give expert testimony under FRE 702. The Fourth Circuit rejected his argument that this testimony is categorially inadmissible and deferred to the district court’s ruling that the expert was sufficiently qualified to testify and any concerns on that score could be explored on cross.

Second, he argued the district court erred in preventing him from presenting evidence that a witness failed a polygraph test. The Fourth Circuit rejected that argument, too, explaining that it follows a “per se rule that the results of . . . a witness’s polygraph test are not admissible to bolster or undermine credibility.”

Finally, he argued that the government’s DNA expert gave testimony that violated the Sixth Amendment’s Confrontation Clause. The Court agreed there was a problem (remember Smith? The golfing lab analyst cannot testify about the diligent analyst’s work!):

The DNA expert admitted that she was not “hands-on with the evidence samples” in this case and that a non-testifying analyst tested the samples. The DNA expert explained her role was to review the analyst’s notes and work, and then to “independently review the [analyst’s] conclusions” to ensure she agreed with the analyst. The DNA expert then discussed each DNA sample taken from the crime scene, testified that her “lab analyze[d]” each swab (seemingly according to the procedures she had explained earlier), and provided her conclusions—all without having tested the samples herself.

This testimony was offered for the truth of the matter asserted and thus implicated the Confrontation Clause. In so holding, the Court abrogated its prior decision 2011

in *Summers*. Neither the district court nor the parties meaningfully addressed the issue of whether the expert's statements were "testimonial," so the Court assumed without deciding that they were because...

It found, even if there was error, it was harmless. That was so, the Court said, because of that old chestnut—"the government offered overwhelming evidence of Seward's guilt."

***United States v. Dugan*, 136 F.4th 162 (4th Cir. May 1, 2025) (Niemeyer, King, Benjamin):**

The Fourth Circuit affirmed Mr. Dugan's conviction and sentence for accessing with intent to view CP.

This case began when an undisclosed foreign law enforcement agency, known by the FBI to be reliable, told the FBI that a specific IP address accessed CSAM on the dark web. The FBI referred the tip to Homeland Security, which tracked the IP address to Mr. Dugan's home and used the foreign tip to get a search warrant where they recovered lots of evidence.

On appeal, Mr. Dugan first argued the district court erred by denying his motion to compel discovery, under *Brady* and Rule 16, regarding the foreign agency's investigation. The Fourth Circuit held that both claims failed because it was pure speculation that the FBI engaged in a joint venture with the foreign organization.

Second, Mr. Dugan argued the district court erred by denying his motion to suppress the search of his home. Citing *Sanders*, the Fourth Circuit recognized that "a 'single click' of an Internet link will not establish probable cause to search a residence for evidence of child pornography." However, that is only true when "no additional facts exist that suggest the person behind that click plausibly knew about and sought out child pornography." The Fourth Circuit held, "Although the search warrant relied on a single instance of Dugan accessing child pornography on the TARGET WEBSITE, the affirmative steps required for access to the site and its illicit material strongly suggests that Dugan knew that such content was available and had actively sought it out."

Third and finally, Mr. Dugan argued the district court erred by ordering more than the statutory minimum of \$3,000 in restitution to three of the victims. The Fourth Circuit held the district court carefully considered the *Paroline* factors and therefore did not abuse its discretion.

***United States v. Deritis*, 137 F.4th 209 (4th Cir. May 14, 2025) (Thacker, Quattlebaum, Rushing):**

Vincent Deritis filmed his 12-year-old stepdaughter in the shower/bed using a hidden camera. A jury convicted him of various CP offenses and he was sentenced to 600 months' imprisonment and a \$117,000 special assessment. The Fourth Circuit affirmed the convictions and sentence but vacated the special assessment. Here's what happened.

In March 2019, Microsoft sent law enforcement a cyber tip linking CP materials to an IP address at a home in Hickory where Deritis lived with his wife and stepdaughter. When police showed up to serve a search warrant, Deritis did not answer the door. Instead—entirely coincidentally, I'm sure--he “began searching on the internet about how to report child sexual abuse material and erasing the data on his two hard drives.” When officers entered the house, they saw he was running a program to permanently delete his computer data and stopped the process. They then made copies of the hard drive and submitted a preservation request to Google to pull and hold records associated with his email account.

Reviewing the hard drive, analysts found thousands of CP images, including naked images of Deritis's stepdaughter showering in the master bathroom that were obviously made with a hidden camera. Since no such camera was initially found, officers obtained a second warrant to search for it. Deritis admitted placing the camera in the bathroom and viewing the images. He handed over the camera. During the search, police took Deritis's wife out on the front porch and showed her the images. She told them that Deritis “was always telling his stepdaughter not to take showers in the master bathroom.” But she allowed her daughter to take showers there without his knowledge. While they were on the porch, Deritis walked to the kitchen and stabbed himself with a knife. He later testified to a history of depression and suicide attempts.

Officers then obtained warrants to search the preserved Google records. Google then turned over two sets of data: the “preserved” data and a second set that was still active at the time of the search. There was little difference between the two data sets and they turned up yet more images of Deritis's stepdaughter, including one of her hand touching what appeared to be his penis and what appeared to be his hand touching her genitals.

Deritis was indicted on three counts of manufacturing CP (based on (1) the shower photo; (2) penis pic; (3) genital pic, and one count of CP possession (the thousands of other images). He sought to suppress the results of the Google search, asserting that the preservation request was a “seizure” and that the 55 days that passed before officers obtained a search warrant was unreasonable. The district court rejected the motion, holding that the preservation request did not constitute a seizure under the Fourth Amendment.

At trial, Deritis testified that he set up the camera as part of his sexual relationship with his wife and had captured images of his stepdaughter by mistake. He said he had told her never to use the master bathroom. He denied knowledge of the penis/genital photos. The government offered evidence identifying Deritis's hand in the photos based on his wedding ring, clothing, and other distinguishing features. Deritis admitted downloading the CP, claiming he was working to "clean up" the internet by reporting "nefarious" materials to website administrators. (Later, at sentencing, the judge told him: "[Y]ou lied every chance you got and in some of the most incredulous ways. I don't know how you could get up there with even a straight face and ask anybody to believe your testimony.>").

In support of his testimony about his stepdaughter, Deritis attempted to elicit testimony from his ex-wife about how he had banned the stepdaughter from the master bathroom. Specifically, he asked her if "there was a time when [he] had told [his ex-wife] not to allow [the stepdaughter] to use that bathroom" and "Did [the minor] have permission to go into that bathroom [from him]?" The district court sustained the government's objections to these questions because the statements were "impermissible hearsay."

After two days of trial, the jury found him guilty on all counts. He was sentenced to 600 months and a total of \$117,000 in special assessments, to which he did not object. On appeal, he raised the following arguments: (1) the district court erred by denying his motion to suppress evidence obtained from his Google Account; (2) the district court erroneously instructed the jury as to the term "lascivious exhibition," and that such instruction incurably prejudiced his trial; (3) the district court erred by denying his Rule 29 motion; (4) the district court erroneously excluded exculpatory testimony from his ex-wife; and (5) the district court plainly erred by imposing a special assessment without considering the applicable statutory factors.

Of these five arguments, the Fourth Circuit agreed only with the last: the district court plainly erred by imposing a special assessment without considering any of the factors that the statute requires it to consider. Otherwise, the Fourth affirmed the conviction and sentence.

First, as to the suppression motion, the Fourth said it did not need to reach the merits of whether the preservation request was a seizure, because "the Government received an identical set of data from Google that was not the fruit of the preservation request." The Fourth thus affirmed under the "independent source" theory (which the district court never even considered, but the Fourth said that didn't matter, because it's allowed to affirm for any grounds apparent on the record).

Next, the Fourth rejected Deritis’s challenge to jury instructions on the definition of “lascivious exhibition” (with its reliance on the infamous *Dost* factors). The Fourth said that the challenge was foreclosed by its recent decision in *United States v. Sanders*, which affirmed a court’s reliance on the *Dost* factors to explain “lascivious exhibition.” The Fourth said: “In summary, *Sanders* affirmed a district court’s reliance on the *Dost* factors where the trial court ensures that the jury: (1) understands that mere nudity is not sufficient to establish a “lascivious exhibition”; (2) is not instructed to rely exclusively on the *Dost* Factors, (3) understands that no single *Dost* Factor is dispositive, and (4) is discouraged from a strict and mathematical application of the *Dost* factors.”

Applying this analysis, the Fourth said the court had not erred in instructing the jury.

Third, the Fourth affirmed the court’s denial of Deritis’s Rule 29 motion for acquittal on Counts One and Two, which involved manufacturing CP based on photos of the stepdaughter, concluding it was not “a close question.” Deritis “hid a camera to capture footage of his minor stepdaughter’s genitals while she was naked.” That was sufficient evidence for Count One. And his argument that the penis pic did not show the minor’s genitalia and thus could not be a “lascivious exhibition” was even less persuasive.

The Fourth actually agreed with Deritis’s evidentiary argument and said the court erred in excluding the ex-wife’s testimony because “both questions sought to elicit a non-hearsay command.” It explained that “an out of court statement providing directions from one individual to another does not constitute hearsay” because it is not offered for the truth of the matter asserted but for the fact that it was said. But even though this was error, the Fourth found it to be harmless, given all the other evidence.

Finally, the Fourth said the court plainly erred in ordering a special assessment without considering and making findings that the statute (18 USC 2259A) says the court must consider and find. The government pretty much conceded this on appeal. So the Fourth sent it back for a limited resentencing.

***United States v. Ferguson*, 140 F.4th 538 (4th Cir. June 16, 2025) (Diaz, Richardson, Heytens):**

The Fourth Circuit held that the district court properly admitted a 45-minute forensic interview of Donald Ferguson’s adopted daughter at his trial for abusive sexual contact of a minor under the age of 12.

This is a helpful opinion if you’re looking for a refresher on evidentiary rules 401 (relevance), 801 (hearsay), and 403 (unfair prejudice), but otherwise, the decision is

straightforward and fact-specific: the case against Ferguson began when his 11-year-old adopted daughter told her mother (Ferguson's wife) that Ferguson had made her touch his "hot dog." At the time, the family lived in Japan, where Ferguson's wife served as a Department of Defense contractor. After speaking with her daughter, Mom immediately moved out of the house, got a restraining order, and reported Ferguson to authorities. A criminal investigator trained to conduct child forensic interviews met with the daughter and videotaped the interview. Ferguson was then charged with abusive sexual contact.

At trial, the government introduced the testimony of the daughter and her mother, as well as the entire 45-minute interview. Ferguson objected to the first 9 ½ minutes of the interview, during which the interviewer asked basic "rapport-building" questions, as nonrelevant hearsay. The district court overruled the objection and admitted the video, a decision Ferguson challenged on appeal.

The Fourth Circuit affirmed, reasoning that the "rapport-building" segment of the video was relevant because it showed that the investigator had complied with the specific protocol used in child interviews. It further held that the segment was not offered for the truth of the matter asserted and was thus not hearsay. Finally, it said that the district court did not abuse its discretion in concluding that the probative value of the segment outweighed any prejudice.

***United States v. Castro-Aleman*, 141 F.4th 576 (4th Cir. June 26, 2025) (Richardson, Benjamin, Berner):**

The Fourth Circuit affirmed Mr. Castro-Aleman's illegal reentry conviction after rejecting his challenge to his prior removal order.

Mr. Castro-Aleman came to the United States in 1973 as an eight-year-old after his father was killed during El Salvador's civil war. Although he entered illegally, he was eventually issued a SSN and work permit in the 1980s and got a Virginia driver's license in 1995. But unfortunately, he racked up several convictions including 4 convictions for driving under the influence in Virginia between 2009 and 2014. While serving 5 years for his fourth DUI, ICE sought his removal.

At his first removal hearing before an IJ in 2016, Mr. Castro-Aleman expressed fear of returning to El Salvador because the faction that killed his father was back in power. The IJ gave him additional time to apply for asylum and held another hearing three weeks later. At that point, Mr. Castro-Aleman said he had not applied for asylum because he could not get his father's death certificate. The IJ did not explain to Mr. Castro-Aleman that he did not need the death certificate to apply for asylum. But the IJ offered more time to seek asylum. Mr. Castro-Aleman declined that offer but requested voluntary departure. After rejecting that request due to the DUIs, the IJ ordered his removal.

The IJ then said, “Sir, I’ve entered an order of removal for you back to El Salvador. Do you want to accept it as final and be removed or appeal it to a higher court?” Mr. Castro-Aleman responded to this compound question with: “No. The only thing is that I don’t have a passport or any ID. So I just want to know what do I need so you can send me back to my country?” The IJ explained that the government would handle the removal process. Mr. Castro-Aleman did not appeal his removal order and was removed the next month.

At some point after his removal, Mr. Castro-Aleman returned to the US and was found in Virginia in 2023. The government indicted him for illegal reentry after deportation. Mr. Castro-Aleman moved to dismiss on the ground that his 2016 removal was invalid, and the district court denied the claim. Mr. Castro-Aleman entered a conditional plea, reserving his right to appeal the denial of his motion to dismiss.

The Fourth Circuit affirmed. The Fourth Circuit recognized that, to mount a successful collateral attack on the underlying removal order, an alien must show three things: (1) he exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. Failure to show any one of those things defeats a challenge.

The district court had ruled Mr. Castro-Aleman did not meet the first two requirements. But on appeal, the Fourth Circuit held it did not need to reach those issues because Mr. Castro-Aleman failed to meet the third requirement—he failed to show his removal order was “fundamentally unfair.”

To show the removal proceeding was fundamentally unfair, a defendant has to show two things: (1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects. Mr. Castro-Aleman argued he was deprived of due process because the IJ (1) failed to inform him he could apply for asylum and (2) failed to inform him of the right to appeal. His first argument was foreclosed by precedent because there is no constitutional right to be informed of eligibility for discretionary relief. As to the second, the Fourth Circuit recognized that failure to explain the right to appeal may violate due process and assumed a due process violation. Nevertheless, the Court held Mr. Castro-Aleman could not show actual prejudice from that violation because he could not show a reasonable probability of success had he appealed the removal order. Specifically, “an appeal of his removal order would have been futile” because of his numerous convictions.

Although unsuccessful, this case is a good reminder that in illegal reentry cases, which we're seeing a lot more of, you can fight the charge by challenging the underlying removal order. FD.org has some great trainings on fighting 1326 charges by challenging the prior removal order. Get those documents from the prior removal and fight!

***United States v. Fulton*, 136 F.4th 185 (4th Cir. May 6, 2025) (Agee, Quattlebaum, Rushing):**

Mr. Fulton had been convicted of a prior New Jersey offense that was, as a matter of law, a felony. He did not serve a year for that offense. He then tried to buy a gun, and on the background check form, indicated that he had not been convicted of a prior felony. The government charged him with knowingly making a false statement on the application. At trial, it presented as evidence a copy of the New Jersey judgment, but that form did not indicate in any way whether the offense was a felony. After the jury convicted Mr. Fulton, he moved for a judgment of acquittal under Rule 29, arguing that the government had not presented any evidence that Mr. Felton had a prior felony, so it had not presented any evidence through which a jury could find that he knew he was a felon when he filled out the form saying that he was not.

Mr. Fulton noted that the government had many ways to show the jury his felony status, but it chose not to present those, and it should not be excused from that choice.

The district court agreed and granted the motion for an acquittal. The United States appealed, and the 4th Circuit reversed. The Court held that the judgment was, legally, for a felony conviction, so that question was never properly before the jury. And the law presumes that someone guilty of a felony generally knows that they have a felony conviction, so the evidence was sufficient to support the jury verdict.

***United States v. Contreras-Avalos*, 139 F.4th 314 (4th Cir. June 3, 2025) (Wilkinson, Niemeyer, Wynn):**

After a series of violent killings, the United States brought RICO murder charges against various MS-13 members. (Side note: Apparently the term “homeboy” is an MS-13 term of art that basically means full gang member. Reading a very serious 4th Circuit opinion that keeps calling the defendants homeboys is weird). Two of the counts were substantive murder counts. When the district court orally instructed the jury, it twice mistakenly used the word “conspiracy”—once instead of the term “aiding and abetting” and once when it called the statute the Conspiracy to Commit Murder in Aid of Racketeering Statute instead of the Murder in Aid of Racketeering Statute. The parties and the court caught this mistake after the jury was charged, and the court corrected the written instructions. After the jury convicted the defendants, they appealed. Their primary argument on appeal is that the district court’s oral misstatements allowed the jury to convict them of conspiracy even though they were

not charged with conspiracy, thereby creating a fatal variance with the indictment. The Fourth Circuit affirmed.

The Court held that the defendants were on plain error because they did not object to the district court's decision to correct the written instructions but not orally reinstruct the jury. The Court then did not address whether the difference between the oral and written instructions was erroneous, because the defendants lose on prong 3 of plain error for various reasons:

The misstatements were two lines over the course of 2.5 hours of jury instructions.

The court properly listed the elements of the offense and did not list the conspiracy elements.

The written instructions got it right.

Both parties argued to the jury based on the correct elements; neither party discussed conspiracy.

The evidence of substantive murder was overwhelming.

So the defendants could not meet the high burden of showing that the oral misstatements altered the outcome.

***United States v. Purks*, 139 F.4th 388 (4th Cir. June 5, 2025) (Gregory, Harris, Keenan):**

Mr. Purks was a state inmate in Florida. Federal agents suspected him of directing the distribution of drugs up and down the East Coast from prison. He was charged and convicted in the Western District of Virginia after a trial. He appealed, raising two issues discussed below.

First, he claimed that the district court erred in not suppressing statements that he gave to federal agents while being interviewed as a state inmate. He claims that the statements violated *Miranda* and that they were not voluntary because they happened while he was in a wheelchair because state prison guards had beaten him two days earlier for having a contraband cell phone.

The Fourth Circuit ducked the interesting question of whether Mr. Purks was “in custody” for *Miranda* purposes by virtue of being in prison for unrelated charges while he was interviewed. They assumed that he was but had little trouble finding that the federal agents complied with *Miranda*. Basically, there was conflicting testimony regarding *Miranda*, and the district court credited the testimony that police read him his rights and he understood them and chose to answer questions. The Fourth Circuit deferred to the district court's credibility finding.

The Court next addressed whether the prior beating made the statements involuntary (note—considering the nature of Mr. Purks’s allegations, both the district court and the Fourth Circuit were careful to assume without deciding that the beating happened). It held that it did not for several reasons: (1) a few days had passed between the beating and the interview; (2) Mr. Purks was not in so much pain that he could not resist questions; (3) Nothing connected the beating to the federal agents—it appeared to be two unrelated events; (4) The tone of the interview was cordial; (5) Mr. Purks chose not to answer some questions, showing that his will was not overborn.

Second, he moved to dismiss the case because venue was improper in Western Virginia. The 4th rejected this claim. Initially, there is a good footnote explaining why *Pinkerton* liability does not provide venue. The acts of co-conspirators CAN provide venue in a conspiracy case. But they CANNOT for substantive counts of conviction. Sadly for Mr. Purks, he still lost because drug distribution is a continuing offense, and evidence showed that he directed drugs into the Western District of Virginia. That he was physically in Florida does not matter because the relevant element of the crime is the distribution, which does not require the defendant’s personal presence.

***United States v. Cabrera-Rivas*, 142 F.4th 199 (4th Cir. June 30, 2025) (Diaz and Thacker in majority) (Wynn dissenting):**

Cabrera-Rivas, who “likely has a learning disability . . . doesn’t speak fluent English” and has a third-grade education, nonetheless “had a side business peddling” cocaine. He met Hector – actually a Homeland Security confidential informant – and arranged for Hector to meet a “dude from Texas” who could sell him methamphetamine. After arranging the deal and bringing all the parties together, Cabrera-Rivas was arrested and charged with conspiracy to distribute and possession with intent to distribute methamphetamine.

Prior to trial, Cabrera-Rivas’s counsel moved for a competency evaluation. At a hearing before a magistrate judge, defense counsel testified about Cabrera-Rivas’s behavior and difficulty communicating with him and a paralegal testified about Cabrera-Rivas’s “anger issues.” The judge also considered a declaration from Cabrera-Rivas’s wife about his “irrational and violent behavior throughout their four-year marriage.” In response, a Government expert who had evaluated Cabrera-Rivas testified that he understood what he was charged with, various legal concepts (when explained in a “simplified” manner), and what the end result of his case might be (conviction and deportation). The magistrate judge found that opinion credible and concluded that Cabrera-Rivas had not shown he was incompetent. Cabrera-Rivas did not object to that decision and it was never reviewed by the district court.

Cabrera-Rivas was convicted on both counts after a jury trial. Following trial, Cabrera-Rivas filed a motion for a “retrospective competency hearing” arguing that Cabrera-Rivas’s conduct at trial (he testified in his own defense) “showed he was unable to comprehend the proceedings.” The district court denied the motion, based on its personal observations of Cabrera-Rivas’s testimony and conduct during trial and the lack of objection to any competency-related issue during trial.

On appeal, a divided Fourth Circuit affirmed Cabrera-Rivas’s convictions, primarily focused on the district court’s handling of Cabrera-Rivas’s competency issues. The court first rejected the Government’s argument that because Cabrera-Rivas had not objected to the magistrate judge’s competency decision that the court lacked jurisdiction, concluding that an untimely (or absent) filing of objections does not divest the court of appeals of jurisdiction. As to the merits of that decision, the court concluded that there was no clear error in the magistrate judge’s crediting of the expert testimony over the evidence presented by Cabrera-Rivas, noting that the burden is on a defendant to demonstrate lack of competence, not on the Government to prove competence.

Next, the court turned to the issue of whether a magistrate judge could “finally decide” the issue of competency. Noting that this issue was “important, but it wasn’t preserved,” the court applied plain error review and found none, noting both the lack of objection in the district court and failure to raise the argument in Cabrera-Rivas’s opening brief. The court rejected the framing that Cabrera-Rivas could not waive issues related to competency issues, concluding that that “isn’t at all what happened here,” where Cabrera-Rivas had a competency hearing, but “forfeited instead . . . his right to challenge the magistrate judge’s powers.” The court also held that there could be no prejudice (in the plain error analysis) because even if the magistrate judge had entered proposed findings and recommendations for the district court to adopt Cabrera-Rivas would have failed to object to those, too. The court also found no clear error in the district court’s denial of his post-trial motion.

Judge Wynn dissented on the competency issue, arguing that the majority “overlooks well-established precedent from the Supreme Court and this Court to deny Cabrera-Rivas the remedy that the Constitution compels – review of his competency by an Article III judge.”

***United States v. Sandoval*, 2025 U.S. App. LEXIS 26187 (4th Cir. Oct. 8, 2025) (Diaz, Niemeyer, Maddox):**

In a unanimous published opinion (written by District Judge Maddox and joined by Chief Judge Diaz and Judge Niemeyer), the Fourth Circuit affirmed the district court’s denial of a motion for mistrial and for a new trial.

Three members of an MS-13 clique in Northern Virginia were charged with crimes arising out of their attempted murder of two people. At trial, because the defendants and many witnesses spoke Spanish, the district court appointed two Spanish language interpreters to interpret for the defendants and two to interpret Spanish testimony into English for the jury. The interpreters replaced each other every 15 minutes or so. On the second day of testimony from Bonilla, a former MS-13 member involved in both attempted murders, a juror sent a note to the district court:

I am completely fluent in Spanish and the translation was really poor today. Some of the questions were not translated correctly. Another juror felt the same. [Prado] was the worst. It was tough at times. Don't think it always reflected the testimony.

The defendants moved for a mistrial and the district court held a hearing, first asking the juror whether her concerns were confined to a single day, which she confirmed. Another interpreter described Prado's interpretation of Bonilla's testimony as "slightly shy of catastrophic," explaining it was difficult to understand his pronunciation and also that the translation was inaccurate. The other two interpreters said they did not perceive any material misinterpretations. Another juror was also questioned, describing some misinterpretations. The district court denied a mistrial but granted defense counsel leave to reexamine Bonilla about the issues raised in the juror's note. The court found no identification of any widespread issues that would infect the entire fairness of the trial or raise grave doubt about overall interpretation accuracy.

The Fourth Circuit affirmed, finding no structural error infecting the entire trial process. It concluded that the interpretation issues were minor and did not render the trial "fundamentally unfair."

The defendants also learned, after trial, that when the Government's expert witness on MS-13, Sergeant Claudio Saa of the Herndon Police Department, testified, he had been referred to the FBI for "gifting \$29,000 worth of gun holsters to El Salvador's National Police at the Salvadoran Embassy in December 2021, in his HPD uniform and without authorization." Ultimately, the FBI determined there was insufficient evidence of a crime but HPD found that Sergeant Saa had violated several HPD policies and he resigned while the investigation was pending. After trial, the Government disclosed this investigation to the defendants, who filed a motion for a new trial. The district court denied the motion, assuming without deciding that the Government suppressed the evidence about Sergeant Saa. It determined that the evidence was highly unlikely to produce an acquittal: Sergeant Saa's testimony was not about these specific defendants, but about MS-13 generally. And ample evidence independently supported the defendants' guilt.

The Fourth Circuit affirmed this ruling, too, explaining that the new evidence was, at best, grounds for impeaching Sergeant Saa's testimony. His testimony was corroborated at trial and the alleged conduct by Sergeant Saa was tangential to this case. What is more, he was thoroughly cross-examined and impeached by defense counsel for not personally participating in a gang investigation for nearly ten years before testifying, for having no advanced degrees relating to gangs, for not studying current literature on the topic, for not taking any recent academic courses on MS-13, for having dated and only general knowledge, and for not having investigated the defendants in this case. Any Confrontation Clause violation was harmless.

SENTENCING GUIDELINES

***United States v. Brewer*, __ F.4th __, 2025 U.S. App. LEXIS 24988 (4th Cir. Sept. 26, 2025) (Guidelines; Abuse of Trust Enhancement):**

In a fact pattern somewhat common in fraud cases, Mr. Brewer told his victims that he was a sophisticated stock market investor and offered them the opportunity to invest money with him, which he would put in the stock market and in a cannabis store from which he could guarantee returns. He then simply spent the victims' money on his own lifestyle. He made the scheme look official by producing promissory notes, statements of returns, etc. Unlike some fraud schemes, however, Mr. Brewer's did not appear designed for the long haul, inasmuch as he threatened to kill one investor who requested his money back.

He was charged with one count of wire fraud. He pleaded guilty and at sentencing, the district court, over his objection, enhanced his Guidelines range under USSG 3B1.3 for abuse of a position of trust.

He appealed, arguing that the enhancement did not apply because he did not actually have a position of trust. He lied and told his victims that he was a big-time investor and he sent them documents acting like a big-time investor. But that was all fraud. The Fourth affirmed. First, it noted that the abuse of trust enhancement was not mechanical but was instead case-by-case, so there were not bright line rules. And the relevant inquiry was whether the person had a position of trust "from the perspective of the victim." So the real question was whether the victims thought that Mr. Brewer occupied a position of trust—not whether he actually did. And evidence supported that finding, so the district court did not err in applying the enhancement.

***United States v. Faulls*, 148 F.4th 280 (4th Cir. Aug. 5, 2025) (Guidelines; Use of Firearm enhancement):**

Thomas Faulls kidnapped his estranged wife by "luring her to his house under false pretenses and forcing her into his truck." When the wife got into the truck, Faulls

told her he had a gun. The wife could see the gun in the backseat, and she testified that she was afraid to attempt escaping because she knew Faulls had a gun in the truck and feared he would hurt someone.

Faulls was eventually found guilty by a jury of kidnapping, interstate domestic violence, and 924(c); he received a 295-month sentence. But these latter two counts were eventually vacated by a successful 2255 motion when decisions by the Supreme Court made clear that kidnapping was not a crime of violence. Faulls was then resentenced for the kidnapping count alone and received (no surprise) the same 295-month sentence.

He appealed, challenging the district court's application of the enhancement for use of a dangerous weapon, U.S.S.G. § 2A4.1(b)(3). Faulls argued he had not "used" the firearm to kidnap his wife because he lured her into the truck under false pretenses and never handled it or pointed it at her.

The Fourth (Judge Berner, joined by Chief Judge Diaz and Judge Harris) disagreed and affirmed the sentence. The panel explained that to "use" a firearm for the enhancement, a defendant must create a personalized threat of immediate harm rather than general intimidation, i.e., implying the possibility of future harm at some unspecified time. The panel held that Faulls' actions amounted to a threat of immediate harm:

"Faulls employed his gun to threaten his estranged wife Lori with imminent harm, not to convey a hypothetical possibility of harm in the future. Faulls knew Lori would feel threatened by the gun and that it would make her afraid to attempt escape. When Faulls kidnapped Lori, he let her know about the gun as soon as she got into his truck, immediately after he showed her the zip ties that were fashioned into handcuffs and asked whether she wanted to "do this the easy way or the hard way." This was an implicit threat of imminent harm. At no point during the kidnapping was the possibility of physical violence against Lori merely theoretical. In the weeks leading up to the kidnapping, Faulls rear-ended her car and punched her in the chest. Shortly after Faulls kidnapped Lori, he raped her. And moments before Faulls picked up his gun to move it from the backseat to the truck bed, he told Lori that he could drive them off a cliff. The combined force of these episodes created an imminent threat of violence with the gun. Faulls's conduct went beyond non-specified intimidation."

***United States v. Simmons*, 143 F.4th 200 (4th Cir. July 7, 2025) (Guidelines; Firearm Enhancement) (Gregory, Quattlebarm, Berner):**

In January 2023, ATF agents executed a search warrant on Stephen Simmons's home and discovered 10 unregistered items covered by the National Firearms Act (NFA): four auto sears and six silencers. They also found 33 firearms not covered by

the NFA and evidence of unlawful drug use. When arrested, Simmons admitted to using methamphetamine and Adderall during the prior two to three months and tested positive for methamphetamine and marijuana on the day of his arrest. He ultimately pled guilty to a single count of possessing an unregistered machinegun (one of the auto sears) in violation of the National Firearms Act. He was not charged with any drug-related offenses or with possessing a firearm as a prohibited person.

At sentencing, Simmons was subject to a higher advisory sentencing range under the Guidelines because of his status as an unlawful user of controlled substances. He contested the district court's application of three separate Guidelines provisions that factored into his advisory range: (1) an enhancement that penalizes the possession of NFA Firearms by "prohibited persons"; (2) an enhancement that penalizes the unlawful possession of multiple firearms; and (3) an enhancement that penalizes the possession of stolen firearms.

The Fourth rejected Simmons' *Bruen*-based challenge to the enhancement for being a prohibited person, but it found merit to his challenge to the enhancements for multiple and stolen firearms. The Fourth said the district court erred in applying the (b)(1) enhancement for multiple firearms to Non-NFA Firearms because they were not part of "the same course of conduct or common scheme or plan as the offense of conviction." The offense of possessing a Non-NFA Firearm as a prohibited person is distinct from the offense of possessing an NFA Firearm. Similarly, the district court erred in applying the (b)(4)(A) enhancement for stolen firearms because the Government provided no evidence that the stolen firearm found in Simmons's possession was connected to his National Firearms Act offense. The Fourth found that the errors were not harmless because the panel could not determine whether the district court would have imposed the same 36-month sentence with a correctly calculated Guidelines range of 30-37 months instead of 57-71 months.

***United States v. Avila*, 134 F.4th 244 (4th Cir. Apr. 14, 2025) (Guidelines; Cross-Reference) (Gregory, Wynn, Heytens):**

In a succinct, 6-page opinion, the Fourth Circuit reversed the district court's application of a cross-reference under 2G2.2(c)(1), which applies if the offense "involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct."

Luis Avila pled guilty to three counts of violating 18 U.S.C. § 2252A(a)(2) and (b)(1) (child porn offenses). His base offense level was 22, but this skyrocketed to 38 with application of the cross-reference. Mr. Avila challenged the use of the cross-

reference, arguing “that nothing [he] did *caused* the sexually explicit material” to be created in the first place because the victims were sending the same videos to other people and the government could not prove that his requests were what prompted the victims to make them.”

The district court overruled the objection but made no specific findings, saying only: “It does appear to the Court that this is exactly the offense conduct involved in the factual basis, that there was money offered for specific conduct that meets the elements of the cross-reference (c)(1).”

The Fourth rejected this reasoning: “[T]he fact that Avila offered money for specific conduct does not establish that any victim made a video after—much less in response to—Avila’s requests.” But the district court made no other findings. The Fourth thus concluded “that what the district court found—offering money for specific conduct—and “causing” that conduct to happen are different things and that proving the former is not enough to prove the latter. We thus vacate the district court’s judgment and remand for resentencing.”

***United States v. Craig*, 142 F.4th 192 (4th Cir. June 30, 2025) (Diaz, Quattlebaum, Rushing):**

Mr. Craig pleaded guilty, with a plea agreement, to possessing a firearm as a felon. In relevant part, the plea agreement stated

Pursuant to Sections 6B1.4 and 1B1.3 of the Guidelines, the parties hereby stipulate and agree that on April 26, 2018, in Jefferson County, in the Northern District of West Virginia, . . . Craig knowingly possessed a firearm in and affecting commerce. . . Defendant possessed the firearm after having previously been convicted of a crime punishable by imprisonment for a term exceeding one year . . . Defendant possessed the firearm knowing he had been convicted of such a crime.

At the R11 proceedings, the court referred several times to this paragraph as the “relevant conduct” or “total relevant conduct” provision.

At sentencing, the government argued for two enhancements—stolen firearm and in connection with another felony offense. Mr. Craig objected, arguing that the government could not argue for any enhancements not supported by the factual stipulation in the written plea. The government countered that that paragraph was simply the facts to establish guilt, and it had the right to argue for enhancements based on other facts. The district court agreed with the government and applied the enhancements. Mr. Craig appealed, arguing that the government breached the plea.

The Fourth Circuit agreed with Mr. Craig. The Government certainly *could* have drafted a plea agreement that made clear that the facts listed were solely to establish guilt. But that is not the plea agreement that the parties signed. The Guidelines (6B1.4 and its commentary) contemplate that factual stipulations in pleas contain all information relevant for sentencing. Additionally, the court referred to these facts as “relevant conduct” which is a term of art meaning all facts relevant to sentencing. Thus, the government could not argue for sentencing enhancements based on facts not in that paragraph.

The government’s duty of candor to the tribunal means that it did not breach the plea by informing the court of the additional information. But it crossed the line by arguing for the enhancements. The Court vacated the sentence and remanded with instructions to resentence Mr. Craig in accordance with the terms of his plea agreement.

CRIMES OF VIOLENCE/CONTROLLED SUBSTANCE OFFENSE

***United States v. Suncar*, 142 F.4th 259 (4th Cir. July 2, 2025) (Guidelines; Controlled Substance Offense):**

In *United States v. Campbell*, the 4th Circuit held that West Virginia’s drug distribution statute encompassed attempts to deliver drugs, making it categorically broader than the Guidelines definition of “controlled substance offense” (which does not include attempts). We were (if you remember) very excited about *Campbell* when it came out. Since that time, the 4th Circuit has made clear that it will not overrule *Campbell*, but it will never follow it. It has found every other state drug offense at issue distinguishable from *Campbell*.

Here, in *Suncar*, the Fourth continued that approach with a Pennsylvania drug statute (delivery of a controlled substance under 35 Pa. Stat. § 780-113(a)(30)). The details are not that important (unless you like deep dives into Pennsylvania law), but the upshot is that, unlike the West Virginia statute at issue in *Campbell*, the Pennsylvania statute here did not encompass attempt crimes. And in any event, the Guidelines have recently been amended to eliminate the *Campbell* argument.

***United States v. Nelson*, 151 F.4th 577 (4th Cir. Aug. 15, 2025) (Controlled Substance Offense):**

The Fourth Circuit continued to reject *Campbell*’s approach in *Nelson*, holding that the defendant’s prior Virginia conviction for distribution of a controlled substance under Va. Code § 18-2-248(A) was a controlled substance offense. The defendant also argued that his crack distribution conviction under 21 U.S.C. § 841(a)(1) was overbroad and thus not a controlled substance offense because schedules I and II

included at least two substances at the time of his prior conviction — the cocaine derivative ioflupane and hemp-type marijuana — that were legal by the time of his sentencing. The Fourth rejected this argument under the reasoning of the Supreme Court’s decision in *Brown v. United States*, 602 U.S. 101 (2024) and held that the proper time to compare offenses is at the time of the conviction, not the time of sentencing.

SENTENCING

***United States v. Milam*, 150 F.4th 320 (4th Cir. Aug. 13, 2025) (Reasonableness of Sentence, Acceptance of Responsibility):**

David Milam was the leader of the Aryan Kings, a White supremacist group. Officers conducted surveillance of Milam’s residence and stopped vehicles leaving it, recovering drugs and cash. A search warrant executed at Milam’s home yielded firearms, ammunition, methamphetamine, heroin, and drug paraphernalia. Milam pled guilty to possession of a firearm by a felon and drug distribution charges. While detained awaiting sentencing, Milam distributed drugs to other inmates and assaulted sheriff’s deputies, leading to additional charges. At sentencing, the district court denied Milan credit for acceptance of responsibility and imposed a 300-month sentence, which was 60 months below the Guidelines range.

The Fourth Circuit affirmed. Regarding acceptance of responsibility, the Fourth determined that Milam’s continued criminal conduct while awaiting sentencing—distributing drugs in jail and assaulting officers—justified denying him credit for acceptance of responsibility, regardless of the government’s agreement in the plea deal that acceptance of responsibility was appropriate. As to reasonableness, the Fourth found that Milam’s leadership in a violent gang, significant drug distribution, extensive criminal history, and continued criminal activity while awaiting sentencing justified a 300-month sentence, which was already 60 months below the Guidelines range.

APPEAL

***United States v. Richardson*, 146 F.4th 394 (4th Cir. July 28, 2025) (Appellate Waiver; IAC):**

Mr. Richardson pleaded guilty with a written plea agreement to two counts related to drug distribution. At sentencing, the district court applied, among other enhancements, the enhancement under 2D1.1(b)(1) for possession of a firearm during the offense. On appeal, he argued that the district court erred in applying the enhancement and, in the alternative, that his attorney was ineffective for not objecting to it. The Fourth Circuit affirmed.

First, it held that Mr. Richardson’s appeal waiver barred a substantive challenge to the enhancement. Mr. Richardson argued that, under post-plea changes to the Guidelines, he would have been eligible for a sentence reduction as a zero-point offender but for the enhancement. This change in the law made enforcement of the appeal waiver a “miscarriage of justice.” The Court disagreed, holding that missing out on post-plea changes in the law are simply one of the risks that a defendant bears when he waives his right to appeal.

Second, it held that Mr. Richardson’s counsel was not ineffective for failing to object to the enhancement (IAC claims are expressly excluded from the appeal waiver). He argued that the enhancement should not apply because the court based it on a shotgun found in the trunk of his car and “(1) the record connects the shotgun to his car, not his drug activities; (2) shotguns are not typically used to aid drug traffickers; and (3) the shotgun may not have been loaded or functional.”

The Fourth held that Mr. Richardson used his car to distribute drugs, and courts have long held that that connection is enough to apply the enhancement if a gun is found in the car. Also, the enhancement applies to shotguns. There may be an exception for something like an unloaded hunting rifle in the back of a closet. But a shotgun in the trunk does not fall into that exception. And when the record shows no evidence that the gun was nonfunctional, the district court does not err in assuming that it is. Because, the Fourth concluded, the objection the enhancement would have failed, counsel could not have been ineffective for failing to make it.

MISCELLANEOUS OFFENSES

***United States v. Florentine*, 147 F.4th 477 (4th Cir. Aug. 7, 2025) (Interstate Domestic Violence; Harmless Error):**

When the first sentence of an opinion discusses a murder, it’s usually a sign that the opinion is not going to be super defendant-friendly. But surprisingly, *United States v. Florentine* has some brights spots for defendants in general (even if not for Mr. Florentine in particular).

The first few paragraphs of the opinion (authored by Judge Berner, joined by Judges Agee and Thacker) neatly summarize the argument:

“During an interstate road trip, Lawrence Florentine shot and killed his wife, Nicole Zahnd Florentine. Florentine then attempted to conceal his crime by driving Nicole’s corpse to a cemetery and setting it aflame. The Government charged Florentine with four counts, including the crime of interstate domestic violence—a felony established by Congress as part of the historic Violence Against Women Act of 1994.”

“Florentine was also charged with the crime of using fire to commit a felony. In bringing this charge, the Government asserted that Florentine used fire to commit the felony of interstate domestic violence. Florentine moved to dismiss the use-of-fire charge, arguing that because he burned Nicole’s corpse only after she was dead, he was no longer engaged in the felony of interstate domestic violence at the time he used fire.”

“The district court rejected Florentine’s argument. It held that interstate domestic violence is a continuing offense, and that the offense had not been completed at the time Florentine used fire. Consequently, the district court denied Florentine’s motion to dismiss and sentenced him to 360 months’ imprisonment.”

“We conclude that the district court erred in denying Florentine’s motion to dismiss the use-of-fire charge. The crime of interstate domestic violence ends when a victim dies. Because conduct undertaken to conceal a victim’s death after the fact lies beyond the reach of the interstate domestic violence statute, Florentine did not use fire to commit the felony of interstate domestic violence.”

The main statutory takeaway from Florentine is that the crime of interstate domestic violence ends when the victim dies and thus any steps taken afterwards—efforts to escape, to conceal guilt, etc., are not part of the crime. I can imagine scenarios where this would be helpful, particularly with GL enhancements, etc.

Given this conclusion, the Fourth Circuit held that the district court erred when it denied Mr. Florentine’s motion to dismiss the charge of using fire to commit a felony, a charge which carried a 120-month consecutive sentence.

Nonetheless, the Fourth held the error was harmless. But in good news, the Fourth emphasized that a thorough explanation is required from the district judge to support any alternative variance: “To be clear, a district court cannot insulate a sentence from vacatur through a general statement that it would have imposed same sentence regardless of any error.”

We can use this language to argue that harmless error cannot apply where the district court simply says it would impose the same sentence regardless of any error and does not provide a fulsome explanation supporting the alternative variance.

***United States v. Kokinda*, 146 F.4th 405 (4th Cir. July 28, 2025) (SORNA):**

A good Samaritan noticed a man pushing two pre-teen girls on a swing in a park in West Virginia and inappropriately touching one of them on the buttocks. She approached them, and the man left. The girls explained what happened, and the

woman called the police who made a report. The man, Mr. Kokinda, came back to the park the next day, and the police were waiting.

He was eventually charged with failing to register in West Virginia under SORNA based on a prior New Jersey conviction. At trial, he admitted that he has a prior conviction and that he failed to register, but he argued that he had no fixed abode in West Virginia and was constantly on the move from campground to campground so he never “resided” in West Virginia for purposes of SORNA.

The district court, over Mr. Kokinda’s objection, gave the jury an instruction from the SORNA regulations that defined “resides” broadly and includes the concept of “habitually lives,” which would encompass Mr. Kokinda’s conduct. The jury convicted, and he appealed.

The Fourth Circuit initially analyzed the case under Chevron, giving deference to the regulations and affirming the conviction. Mr. Kokinda petitioned for certiorari, and the Supreme Court remanded the case for reconsideration after Loper Bright effectively overruled Chevron.

The result was the same for Mr. Kokinda. Congress expressly left the term “resides” undefined and delegated the authority to make regulations for it. And, considering that the whole point of SORNA is to prevent people from slipping through the cracks, the regulations that capture peripatetic individuals like Mr. Kokinda are the best interpretation of the statute. Even without full Chevron deference, the regulations still properly interpret the statute.

Mr. Kokinda’s reliance on the rule of lenity was misplaced. SORNA is a civil scheme, so there is a strong argument that the question of who has to register is not subjected to the rule of lenity. The criminal statute at issue was not ambiguous. And even if the rule of lenity applied, the term “resides” is not so ambiguous as to call for its application.

Mr. Kokinda also made several challenges to his sentence that were all resolved easily based on deference to the district court’s factual findings about his conduct with the two girls (and some CSAM found on his phone).

SUPERVISED RELEASE/REVOCATION

***United States v. Walton*, 145 F.4th 476 (4th Cir. July 28, 2025) (Supervised Release Revocation; Commutation of Sentence):**

In 1994, Walton was convicted of multiple counts related to a conspiracy to distribute marijuana and sentenced to life in prison. “Shortly thereafter,” he was also convicted for jury tampering and given a consecutive 60-month sentence. Both

sentences had terms of supervised release as well (13 years in total). In 2017, President Obama granted Walton clemency, reducing his total sentence to 387 months while “leaving intact and in effect that 13-year term of supervised release with all its conditions and all other components of the sentence.” Walton finished his term of incarceration in May 2021.

In February 2022, Walton was pulled over for speeding twice, with the second stop leading to the discovery of \$26,000 in cash (“stuffed inside a teddy bear”) and a ledger that showed Walton was owed approximately \$200,000 in drug proceeds. Walton explained that “he was collecting old drug debts . . . owed to him before he went to prison decades earlier.” He was convicted in Kansas for criminal transportation of drug proceeds, after which his home in West Virginia was searched, leading to the discovery of 13.5 pounds of marijuana. He was charged in West Virginia with possession with intent to distribute the marijuana.

Based on all this, Walton’s federal probation officer filed a motion to revoke his term of supervised release. Prior to the revocation hearing, Walton filed a pro se motion seeking to represent himself during his revocation proceedings. He also made substantive arguments as to the nature of the state offenses and whether the court had jurisdiction to revoke him. Walton’s appointed counsel also moved to withdraw because Walton would not speak to him. Newly appointed counsel appeared with Walton at the revocation hearing but was unsure as to his role. Walton told the district court that he wanted to proceed “without counsel. Stand-by counsel, yes, sir” and the hearing proceeded in that manner. Walton admitted the violations but renewed his jurisdictional argument. The district court held that it had jurisdiction, ordered Walton’s term of supervised release revoked, and imposed a sentence of 60 months in prison (in addition to additional terms of supervised release).

On appeal, a divided Fourth Circuit affirmed Walton’s revocation and sentence. First, the court addressed Walton’s jurisdictional argument – that his sentence was a “Presidentially commuted sentence, not a judicially imposed sentence.” The court disagreed, noting the language in the clemency order specifically keeping in place the terms and conditions of supervised release. Second, the Fourth held that the district court did not abuse its discretion in allowing Walton to proceed pro se during his revocation. That standard of review applied because there is no Sixth Amendment right to counsel during revocation proceedings. Here, the Fourth held, Walton made clear (multiple times) that he wished to represent himself and explained the large amount of legal work he had done while incarcerated. Finally, the Court held that Walton’s sentence was not plainly unreasonable because he understood the alleged violations, the violations were graded correctly (even though the court recognized Walton failed to make a timely *Campbell* argument as to them), and that the district court adequately explained the basis for the sentence it imposed.

Judge Gregory concurred in part but mostly dissented. Agreeing only that the court had jurisdiction over Walton's revocation, Judge Gregory argued that Walton "did not knowingly and voluntarily waive his right to an attorney," which was enough to reverse, but that the "supervised release revocation hearing was riddled with procedural errors" as well.

***United States v. Williams*, 134 F.4th 134 (4th Cir. Apr. 7, 2025) (Niemeyer, Heytens, Floyd):**

The United States moved to revoke Mr. Williams' supervised release, alleging assault of his girlfriend. The government could not find her, so they admitted hearsay of her statements to police over Mr. Williams' objection. The district court revoked him. He appealed, and the 4th affirmed.

The 4th had somewhat recently decided *United States v. Wheeler* in which it addressed a very similar situation and found in favor of the defendant. Contrasting this case with *Wheeler* proves instructive.

A defendant at a revocation does not have a 6th Amendment confrontation right. But the Due Process Clause and Fed. R. 32.1 do provide him with some protections against revocation based on hearsay. Hearsay is presumptively inadmissible at a revocation unless the government can establish its reliability and show good cause for the declarant's unavailability. If it cannot then the hearsay is barred. If it can, then it must still balance the government's interest in it with the defendant's interest in confronting the witness.

Here, the defendant argued that the government did not do enough to find the declarant. The 4th disagreed. The government did not know her address, and it attempted to call and text and email her and go to her last known address. That was enough. It contrasted the situation to *Wheeler* in which the government knew where the declarant lived but only went there once.

The 4th also held that the hearsay was reliable because it was corroborated by other physical evidence (records of her injuries) and her statements to various individuals were always internally consistent (in contrast to *Wheeler* where the hearsay was filled with contradictions). For the same reasons, Mr. Williams' interest in confrontation was not high because the cross-examination would likely not have changed or challenged her statements.

(Reading between the lines, there is a sense where the *Wheeler* panel thought that the declarant was lying and the *Williams* panel thought that the declarant was telling the truth. The "reliability" test is certainly malleable enough to allow a panel to reach a decision based on a practical factor like that).

So no new ground here, but a good case to hold up next to *Wheeler* and to emphasize if your facts fall more on the *Wheeler* side than the *Williams* side.

COMPASSIONATE RELEASE

***United States v. Armstrong*, 132 F.4th 736 (4th Cir. Apr. 2, 2025) (Gregory, Richardson, Benjamin):**

The Fourth Circuit held that under Rule 37, a district court retains jurisdiction to *deny* (but not grant) a motion for reconsideration even after the defendant filed notice of appeal from the district court's initial denial of his motion for compassionate release.

The district court denied Mr. Armstrong's motion for compassionate release and he filed notice of appeal. He then filed a motion for reconsideration and the district court denied it. Mr. Armstrong then appealed the denial of the motion for reconsideration.

In an earlier opinion from 2023, the Fourth Circuit affirmed the district court's denial of Mr. Armstrong's initial motion for compassionate release. This opinion dealt only with the district court's authority to deny the motion for reconsideration. The Court recognized that "Rule 37 unambiguously gives district courts the right to defer considering a motion for reconsideration, deny the motion, offer an indicative ruling as to the motion, or state that the motion raises a substantial issue." Thus, the district court had authority to deny the motion. The Court pointed out the district court would have lacked authority to *grant* the motion for reconsideration "because Rule 37 does not provide such an exception to the general rule" stated in *United States v. Christy*, that the filing of notice of appeal divests the district court of jurisdiction. "But here, the district court proceeded in accord with Rule 37 by denying the motion for reconsideration. Therefore, *Christy* is inapplicable." The Court said the merits were already determined in its earlier 2023 opinion and therefore did not address them.

***United States v. Burleigh*, 145 F.4th 541 (4th Cir. July 31, 2025) (Compassionate Release):**

A divided Fourth Circuit (Judge Quattlebaum, joined by Judge Niemeyer; Judge Gregory dissenting) affirmed the district court's denial of compassionate release to Larry Burleigh. In 2010, Burleigh and two others carjacked a man at gunpoint, forced him to withdraw money from ATMs, and threatened to kill him and his family. Burleigh pled guilty to carjacking (Count 3) and two counts of possessing a firearm in furtherance of a crime of violence (Counts 4 and 6). In 2011, Burleigh was sentenced to 125 months for Count 3, 120 months for Count 4, and 300 months for Count 6, to be served consecutively for a total of 545 months. In other words, Burleigh received stacked 924(c) sentences under the law at the time.

After serving approximately nine years, Burleigh moved for compassionate release, arguing that his rehabilitation while in prison, his young age at the time of his offense, and his lengthy stacked § 924(c) sentences constituted extraordinary and compelling reasons to reduce his sentence. He argued that under the First Step Act, which eliminated stacking of § 924(c) charges in a single prosecution, his sentence would have been significantly shorter if imposed today.

The Fourth Circuit held that the district court did not abuse its discretion for several reasons: The district court adequately considered Burleigh’s argument about sentence disparity under the First Step Act. The court explicitly recognized that Burleigh’s sentence would be lower if he were sentenced today but explained that compassionate release was not appropriate because of the seriousness of his crime, its impact on the victim, and Burleigh’s criminal history. The court rejected Burleigh’s claim that the district court failed to consider his arguments collectively. The district court acknowledged Burleigh’s argument that his rehabilitation, age, and sentence disparity should be considered “altogether” and then rejected “these circumstances” as not constituting extraordinary and compelling reasons. The majority found that the district court’s analysis of the § 3553(a) factors was sufficient. The district court discussed the nature and circumstances of Burleigh’s offense, his rehabilitation efforts, and concluded that his rehabilitation did not outweigh other factors like the seriousness of his crime and the need to promote respect for the law. The majority emphasized that district courts have broad discretion in analyzing compassionate release motions and are not required to address every argument in detail. The touchstone is whether the court provided enough explanation to allow for meaningful appellate review.

Judge Gregory dissented, concluding that the district court abused its discretion by (1) failing to properly apply Fourth Circuit precedent when considering whether extraordinary and compelling reasons warranted reducing Burleigh’s sentence; (2) by not considering Burleigh’s three arguments—sentence disparity, age, and rehabilitation—in combination when considering extraordinary and compelling reasons for a sentence reduction; and (3) when considering the § 3553(a) factors by failing to provide an individualized explanation of why it believed compassionate release was inappropriate and failing to address Burleigh’s argument regarding the sentencing disparity.

***United States v. Johnson*, 143 F.4th 212 (4th Cir. July 8, 2025)
(Compassionate Release) (Niemeyer, Gregory, Quattlebaum):**

The district court granted Shaheem Johnson’s compassionate release motion and reduced his sentence from two life sentences plus 790 months to 35 years in prison. The government appealed, arguing that no extraordinary and compelling reasons existed to warrant the reduction. The Fourth Circuit found no abuse of discretion.

The panel reasoned that the disparity between Johnson's life sentence and his co-conspirators' reduced sentences was significant and could properly be considered as a factor weighing in favor of compassionate release. While the co-defendants cooperated with the government, this cooperation alone did not justify such a vast disparity between their sentences and Johnson's sentence. An even greater disparity existed between Johnson and a third co-conspirator, who at most served five years for the same killing for which Johnson received a life sentence. The district court appropriately considered that Johnson was not the trigger man, did not substantially plan or premeditate one of the killings, and did not procure payment for it. In the absence of an applicable policy statement from the Sentencing Commission, district courts are empowered to consider any extraordinary and compelling reason for release that a defendant might raise.

INEFFECTIVE ASSISTANCE OF COUNSEL/2255

***United States v. Powell*, 134 F.4th 222 (4th Cir. Apr. 10, 2025) (Diaz, Niemeyer, Quattlebaum):**

Mr. Powell pleaded guilty to and was sentenced for dealing heroin. In this 2255 case, Mr. Powell raised IAC based on his attorney's failure to adequately investigate or object to the district court's imposition of a two-level Guidelines enhancement for maintaining a dwelling.

The PSR recommended applying the enhancement because one of Mr. Powell's co-defendants, Ms. Wilson, gave the police information about a property where she claimed that Mr. Wilson had been dealing drugs for five years.

Mr. Powell asked his attorney to investigate that claim because his girlfriend's lease for the apartment was much more recent, so he could not have been dealing drugs from that place for years. Mr. Powell's attorney told him that the judge wouldn't care about a lease and that he'd focus instead on discrediting Ms. Wilson.

Mr. Powell argued in the 2255 that that performance was ineffective. The 4th disagreed. First, it emphasized that *Strickland* sets a high bar. It then held that Mr. Powell's attorney made a strategic decision to attack Williams' credibility instead of the factual predicate of who owned the house and when. And while gathering that information would have certainly been better, the lawyer's decision to ignore that line of investigation didn't fall below the *Strickland* bar.

Additionally, the district court in this case when adjudicating the 2255 specifically mentioned that even had the 2 points not applied, it would have imposed the same sentence that it did originally (of course it did). That was enough for the Court to say that any ineffectiveness would have been harmless.

Chief Judge Diaz has a nice concurrence. He says that since the error was not prejudicial, the Court should not have reached whether it was effective representation or not. And, since he's writing about it, Chief Judge Diaz had serious problems with the attorney's failure to investigate his client's statements that he did not have access to the place from which he was accused of dealing drugs.

Chief Judge Diaz also has a nice bit about how defense attorneys shouldn't get into the mindset of "it's only two levels" when two levels means years in prison at the higher end of the Guidelines.

***United States v. Brown*, 137 F.4th 248 (4th Cir. May 20, 2025) (Gregory and King in majority) (Rushing dissenting):**

A divided Fourth Circuit panel held that a person who rejects a plea offer and later argues that he would have accepted it, but for counsel's deficient advice, need not present contemporaneous evidence to substantiate his claim. Mr. Brown demonstrated that he was prejudiced by his lawyer's advice that it "didn't matter" whether he accepted a plea with a 10-year cap or pled open with 90 years of sentencing exposure. (Both parties agreed counsel performed deficiently.) First, Mr. Brown showed a reasonable probability that he would have accepted the plea offer if he had received effective assistance of counsel (he received 17.5 years of imprisonment when the plea would have capped him at 10 years). Second, the parties agreed that the plea would have been entered if Mr. Brown had accepted it. And third, Mr. Brown showed there is a reasonable probability the end result of the criminal process would have been more favorable because he received a 17.5-year sentence when the plea would have capped him at 10 years. The panel majority reversed Judge Dever's denial of relief, remanded the case, and required the Government to re-offer the same plea agreements.

Judge Rushing dissented, arguing that contemporaneous evidence is required in cases where a person rejects a plea offer and later argues that he would have accepted it, but for counsel's deficient advice. And she argued that the panel majority ignored the contemporaneous evidence: that Mr. Brown was properly advised of his sentencing exposure at his plea hearing and at sentencing, and that Mr. Brown told his appellate lawyer that he refused to sign a plea agreement and give up his appellate rights (consistent with the testimony of both of his trial counsel).

***United States v. Yelizarov*, 140 F.4th 597 (4th Cir. June 23, 2025) (Heytens, Berner, Gibney):**

The Fourth Circuit issued a published opinion in a habeas case with a complicated procedural history. The Court held (1) Mr. Yelizarov did not receive IAC because he

could not show he would have gone to trial in his kidnapping/robbery case but for his lawyer's deficiencies, and (2) Mr. Yelizarov waived his right to appeal his sentence.

In 2015, Mr. Yelizarov initially accepted a plea to kidnapping, conspiracy to commit Hobbs Act robbery, and brandishing a weapon during a COV in exchange for dismissal of other counts and the government's promise not to seek a sentence above 40 years. But before he entered his guilty plea, the prosecutor told his attorney he was a suspect in an unrelated murder and they had a strong case. The government declined to consider a package deal that would include the murder. When the attorney told Mr. Yelizarov about the unrelated murder, Mr. Yelizarov claimed the government could not prove it. After that, they didn't discuss the unrelated murder any further.

In the meantime, the attorney worked out a better plea in which the parties agreed to a sentence of 360 months under Rule 11(c)(1)(C). Among other things, the government agreed not to prosecute Yelizarov further for crimes in a stipulation of facts, which did not include the unrelated murder. By this time, the legality of the brandishing count was questionable, so the parties also agreed that if brandishing was vacated, Mr. Yelizarov would still get 360 months for kidnapping/robbery. The plea agreement also included an appellate waiver. The district court sentenced Mr. Yelizarov to 360 months in accordance with the plea agreement.

Unfortunately, about 2 months later, the government indicted Mr. Yelizarov for the unrelated murder. He pleaded guilty and got 20 years consecutive to his 360-month sentence. In the midst of the murder proceedings, Mr. Yelizarov filed a 2255 motion alleging IAC in the plea process in the kidnapping/robbery case because trial counsel did not advise him of the risk of the murder prosecution, did not investigate the murder charge, and inaccurately told him the kidnapping/robbery plea would end the charges against him and that he would not get more than 30 years. The district court denied the motion.

On appeal, the Fourth Circuit skipped over the performance prong of IAC and went right for prejudice. The Court held there was no credible evidence that Yelizarov would have gone to trial in the kidnapping/robbery case but for his lawyer's deficient performance. Therefore, the IAC claim failed.

Along with his 2255 based on IAC, Mr. Yelizarov also moved the district court to vacate his 924(c) conviction because kidnapping and conspiracy to commit Hobbs Act robbery were no longer predicates. The district court granted the motion, vacated the sentence, and then resentenced Yelizarov to 360 months in the kidnapping/robbery case.

On appeal, Mr. Yelizarov argued his sentence was procedurally and substantively unreasonable. The Fourth Circuit, however, dismissed this portion of the appeal

pursuant to the appeal waiver. The Court held Yelizarov entered the appeal waiver knowingly and voluntarily and the exception for IAC did not apply. The Court further held the miscarriage of justice exception did not apply based on actual innocence because even though he was “innocent” of the 924(c) charge, that charge was vacated and he was resentenced solely for the kidnaping/robbery.

ARMED CAREER CRIMINAL

***United States v. Brown*, 136 F.4th 87 (4th Cir. Apr. 29, 2025) (Niemeyer, Heytens, Floyd):**

The Fourth Circuit issued its long-awaited decision in *Rico Brown*. Unfortunately, the Fourth Circuit held that *Erlinger* error is subject to harmless-error review and that the *Erlinger* errors in Mr. Brown’s case were harmless beyond a reasonable doubt.

Before *Erlinger*, the Fourth Circuit held in *Brown I* that ACCA was merely a recidivism enhancement that could be found by a judge. Therefore, the government did not need to allege in the indictment that the defendant committed the three priors on different occasions. And the district court did not need to advise defendants of the right to have a jury decide whether the defendant committed the priors on “different occasions.” But then *Erlinger* held that a defendant is “entitled to have a jury resolve ACCA’s occasions inquiry unanimously and beyond a reasonable doubt.” After *Erlinger*, the Supreme Court vacated the Fourth Circuit’s decision in *Brown I* and remanded for further consideration.

The Fourth Circuit has now issued *Brown II*. At the outset, the Fourth Circuit acknowledged there were two *Erlinger* errors under the Fifth and Sixth Amendments: (1) the government’s failure to allege in the indictment that Brown’s prior convictions were for offenses committed on different occasions and (2) the district court’s failure to advise Brown during his guilty-plea hearing that he had a right to have a jury determine whether those priors were indeed committed on different occasions. But the Fourth Circuit proceeded to hold that harmless error applied and the errors were harmless.

First, the Fourth Circuit analogized *Erlinger* error to *Apprendi* error. And because *Recuenco* held that *Apprendi* errors are subject to harmless error review, so too are *Erlinger* errors. The Fourth Circuit also analogized *Erlinger* error to *Rehaif* error under *Greer*, which is also subject to harmless error. Thus, the Fourth Circuit held that harmless error review applies to *Erlinger* error. The Fourth Circuit rejected Mr. Brown’s arguments that *Erlinger* error was structural error. The Fourth Circuit distinguished *Whitfield*, a case holding that constructive amendments are structural errors.

Second, the Fourth Circuit held the *Erlinger* errors were harmless. The Fourth Circuit initially stated the parties proposed the wrong harmless test—whether the government’s proof of the missing fact or element was overwhelming and uncontroverted such that a jury would have found the fact or element beyond a reasonable doubt. The Court held, “While the harmless-error analysis that the parties invoke applies when a defendant went to trial and was convicted by the jury, there was no trial in this case.” Because Mr. Brown pleaded guilty, the test should be different. Instead, the Fourth Circuit held the government must show that if it had properly alleged the “different occasions” element in the indictment and if the district court had correctly advised Brown he was entitled to a jury trial on that issue, it is clear beyond a reasonable doubt that he would not have pled guilty.

The Fourth Circuit then held the government easily satisfied that test. The Court stressed that the district court advised Mr. Brown about the ACCA enhancement at his initial appearance and at the guilty plea hearing but Brown still wanted to plead guilty. He also did not object to the facts in the PSR and did not argue that two of his priors were committed on a single occasion. And even after he raised the *Apprendi* issue, he did not seek to withdraw his guilty plea.

The Fourth Circuit also recognized that “a defendant’s evaluation of the likelihood of a jury’s finding that his prior predicate offenses were not committed on at least three different occasions could be a significant factor when deciding whether to plead guilty to that fact.” But the Court held a jury likely would have found Mr. Brown committed the priors on different occasions. Specifically, Mr. Brown committed the first and second priors more than two months apart and he committed his third prior more than five years later. The Fourth Circuit therefore held “there is no doubt that Brown would have pleaded guilty if the indictment had alleged that he committed his prior robberies on three different occasions and if he had been informed that he was entitled to have a jury find that fact beyond a reasonable doubt.”

CIVIL COMMITMENT

***United States v. Berry*, 142 F.4th 184 (4th Cir. Jun. 24, 2025) (Wilkinson, King, Maddox):**

The Fourth Circuit affirmed a district court order civilly committing Mr. Berry under 18 U.S.C. § 4246.

In 2015, the government indicted Mr. Berry for planting a fake bomb but a district court in Michigan soon sent him for a competency evaluation. The district court found Mr. Berry incompetent and committed him for restoration. After years of litigation regarding the district court’s order of involuntary medication, the Sixth Circuit

vacated that order in 2018. The district court then ordered a new competency evaluation.

On December 17, 2019, the district court concluded Mr. Berry's competency could not be restored and granted the government's motion to dismiss the charges. But the district court also ordered an evaluation under 18 U.S.C. § 4246 to determine whether Mr. Berry was mentally ill and dangerous. After more delays, Mr. Berry was admitted to Butner in March 2020, after which the director at Butner got a 30-day extension. On April 30, 2020, Butner issued a report concluding that Mr. Berry was dangerous. And on May 21, 2020, the government filed a certificate under Section 4246(a). The North Carolina district court stayed Mr. Berry's release from federal custody and scheduled a hearing. The district court committed Mr. Berry pursuant to Section 4246 and Mr. Berry appealed.

The Fourth Circuit recognized that “an individual is only qualified to be committed under § 4246(a) if he is (1) ‘a person in the custody of the Bureau of Prisons whose sentence is about to expire,’ (2) a person ‘who has been committed to the custody of the Attorney General pursuant to section 4241(d),’ or (3) a person ‘against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person.’” The Fourth Circuit also recognized Mr. Berry's argument “that only the dismissed charges category applies to him and, further, that the dismissed charges category is unconstitutional under *United States v. Comstock*, 560 U.S. 126 (2010), because the federal government lacks the power to civilly commit individuals who are no longer in its legal custody.”

However, the Fourth Circuit completely ducked Mr. Berry's argument. The Court held that Mr. Berry separately qualified because he was “committed to the custody of the Attorney General pursuant to section 4241(d)” when the § 4246 proceedings began. The Court held that “[b]ecause Berry only needs to fall within one § 4246(a) category to be validly committed, we need not consider whether it would be constitutional to commit him under the dismissed charges category.”

The Fourth Circuit proceeded to reject Mr. Berry's alternative claims that he was not within the custody of the Attorney General pursuant to section 4241(d) at the time the government filed its Section 4246 certification. The Court held that the delay between the district court's unrestorability determination in December 2019 and the filing of the § 4246 certificate in May 2020 was “limited to a reasonable period” under Wayda given staffing shortages and the Covid-19 pandemic.

The Court also rejected Mr. Berry's argument that “both of his § 4241 commitment orders had expired by the time the government filed the § 4246 certification.” The Court held it did not matter whether the first commitment order expired because “it was superseded when the court issued its second commitment order.” The Court also held the district court did not err by failing to make a restorability finding when it

issued its second commitment order. The Court held such a finding was only necessary when the court extends a commitment. But the second commitment order was not an extension of the first—it was a new order. Finally, the Court held that Mr. Berry’s custody under Section 4241 did not end when the government dismissed the charges against him.

II. SUPREME COURT DECISIONS

***Estaras v. United States*, 145 S. Ct. 2031 (June 20, 2025) (Revocation):**

Question presented: Whether district courts may consider 18 U.S.C.

§3553(a)(2)(A)—the retributive sentencing factor requiring consideration of “the seriousness of the offense,” promoting “respect for the law,” and providing “just punishment”—when revoking supervised release.

Held: District courts cannot consider §3553(a)(2)(A) when revoking supervised release under 18 U.S.C. §3583(e). Congress omitted this retributive factor from the enumerated list of factors courts must consider for supervised release purposes, while including 8 of the other 10 general sentencing factors.

What does that mean in plain English? When an individual violates supervised release conditions, courts must consider forward-looking sentencing purposes (deterrence, incapacitation, and rehabilitation) but may not consider the backward-looking purpose of retribution or punishment for the original offense. As the Court explained, supervised release “fulfills rehabilitative ends” and “provides individuals with post confinement assistance”—it’s not additional punishment for the original crime.

Bottom line: As the Court put it: “when an individual violates the conditions of his supervised release, it makes sense that a court must consider the forward-looking ends of sentencing (deterrence, incapacitation, and rehabilitation), but may not consider the backward-looking purpose of retribution.”

***Hewitt v. United States & Duffey v. United States*, 145 S. Ct. 2165 (June 26, 2025) (First Step Act, § 924(c)):**

Question Presented: These cases asked whether in post-First Step Act cases, what penalties apply when a §924(c) client had been sentenced as of the Act’s enactment, but that sentence was subsequently vacated, such that the individual faces a post-Act resentencing?

Held: Justice Jackson authored the opinion for a five-Justice majority (Justices Jackson, Sotomayor, Kagan, Roberts, and Gorsuch), holding that under these circumstances, a sentence “has not been imposed” for purposes of §403(b) of the First Step Act. Therefore, the FSA’s more lenient penalties apply to individuals facing post-Act resentencing following vacatur of their pre-Act sentence.

***Kousisis v. United States*, 145 S. Ct. 1382 (May 22, 2025) (Wire Fraud):**

Question presented: Whether someone can be convicted of wire fraud when they lie to get a contract but still deliver what they promised. In other words, does federal fraud law require that the person sought to cause the victim economic harm, or is it enough that they obtained money through false pretenses even when providing fair value in return?

Held: An individual violates 18 U.S.C. §1343 (federal wire fraud) by scheming to “obtain” the victim’s “money or property,” regardless of whether he/she seeks to leave the victim economically worse off.

What does that mean in plain English? For the government to obtain a wire fraud conviction, it needs to prove someone used wires to obtain money or property through deception, where getting that money or property was the aim of the deception. Here’s the rub: you can still be convicted even if you gave the victim fair value in return. The only real limit: the misrepresentation resulting in obtaining money or property must be “material,” meaning a reasonable person would consider it important when deciding whether to proceed with the transaction.

Bottom line: Wire fraud does not require that the victim suffers economic loss. Rather, lying to get someone’s money through a contract can be fraud even when you deliver exactly what you promised.

Upcoming Supreme Court Criminal Cases Set for Argument:

Villarreal v. Texas, No. 24-557

Issue(s): Whether a trial court abridges a defendant’s Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant’s testimony during an overnight recess.

Barrett v. U.S., No. 24-5774

Issue(s): Whether the double jeopardy clause of the Fifth Amendment permits two sentences for an act that violates 18 U.S.C. § 924(c) and (j).

Ellingburg v. U.S., No. 24-482

Issue(s): Whether criminal restitution under the Mandatory Victim Restitution Act is penal for purposes of the Constitution’s ex post facto clause.

Case v. Montana, No. 24-624

Issue(s): Whether law enforcement may enter a home without a search warrant based on less than probable cause that an emergency is occurring, or whether the emergency-aid exception requires probable cause.

Rico v. U.S., No. 24-1056

Issue(s): Whether the fugitive-tolling doctrine applies in the context of supervised release.

Rutherford v. U.S., No. 24-820

Issue(s): Whether a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

Fernandez v. U.S., No. 24-556

Issue(s): Whether a combination of "extraordinary and compelling reasons" that may warrant a discretionary sentence reduction under 18 U.S.C. § 3582(c)(1)(A) can include reasons that may also be alleged as grounds for vacatur of a sentence under 28 U.S.C. § 2255.

Hamm v. Smith (Capital Punishment), No. 24-872

Issue(s): Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an Atkins claim.