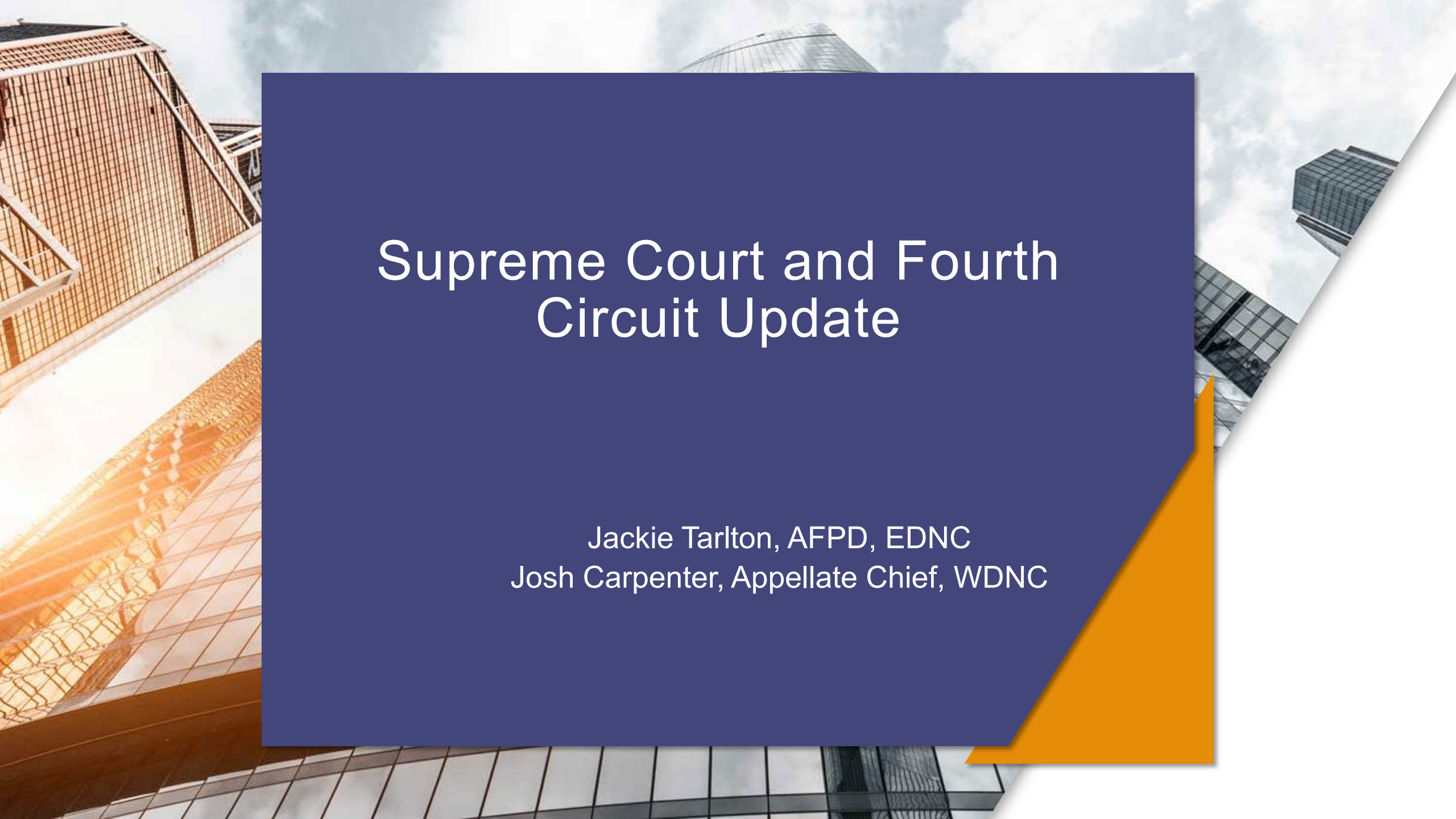




Supreme Court and Fourth Circuit Update

Jackie Tarlton, AFD, EDNC
Josh Carpenter, Appellate Chief, WDNC

OVERVIEW

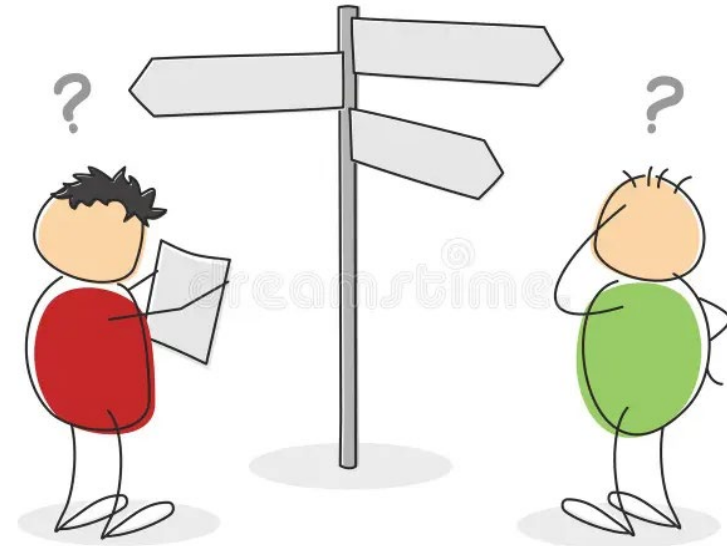
- *Erlinger* & ACCA: Continued Developments
- Fourth Amendment
- Waivers and Procedural Traps
- Statutory / Offense-Specific Decisions
- Supervised Release

- Sentencing Issues
- Guidelines Decisions
- Categorical Approach
- Prosecutorial Shenanigans

Note: Second Amendment will be covered in a separate session

Erlinger (June 2024): Refresher

ACCA's occasions requirement – that prior offenses were “committed on occasions different from one another” – is subject to the Sixth Amendment's jury trial right



Update #1: Still no bright lines on occasions

- *Wooden* (2022): Occasions is “multi-factored” inquiry or “balancing test” that includes factors such as timing (but not “split-second”); “proximity of location”; presence of “significant intervening events”; and “character and relationship of the offenses,” including whether “they share a common scheme or purpose”

- *Erlinger* (2024):

After all, this Court has held that no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones. *Wooden*, 595 U. S., at 369–370. Often, a qualitative assessment about “the character and relationship” of the offenses may be required. *Id.*, at 369. So may an inquiry into whether the crimes shared “a common scheme or purpose.” *Ibid.*

Update #1: Still no bright lines on occasions

- BUT: the government keeps arguing that offenses committed a day or more apart are necessarily separate occasions
- *US v. Cogdill* (6th Cir. March 3, 2025)
- Reminder: Favorable jury verdicts in *Pennington* (drug offenses separated by multiple months) and *Willis* (robberies on three separate dates over five-week span)

Update #1: Still no bright lines on occasions

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED IN OPEN COURT
DATE: 3/27/2025
TIME: 11:15 AM
INITIALS: RJ

UNITED STATES OF AMERICA,
Plaintiff,
v. Case No. 2:23-cr-20230-MSN
JAIRUS BATES,
Defendant.

SPECIAL VERDICT FORM

We, the jury, having found the defendant, Jairus Bates, guilty of the offense charged in Count 1, further unanimously find that, before the defendant committed the offense in Count 1:

☐ The defendant, Jairus Bates, did have three previous convictions for offenses that were committed on occasions different from one another.

☒ The defendant, Jairus Bates, did not have three previous convictions for offenses that were committed on occasions different from one another.

Update #1: Still no bright lines on occasions

- Jury Instructions
 - Kavanaugh's *Erlinger* dissent
- US v. Willis (E.D. Mo. July 2024)

You must determine whether these offenses were committed on different occasions. Crimes occur on different occasions when each crime was a distinct event, occurrence, or episode, rather than part of a single, uninterrupted course of conduct. In determining whether Defendant Anthony Willis's prior offenses occurred on different occasions, you may consider a variety of factors, including the timing and location of the offenses, the character and relationship of the offenses to one another, whether they are similar or intertwined, whether they are separated by substantial gaps in time or significant intervening events, and whether they share a common scheme or purpose. A single occasion may encompass multiple, temporally distinct activities. No particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones.



Update #2: Pre-trial Litigation

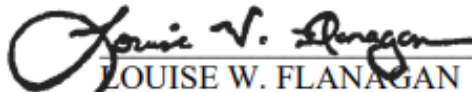
- Indictment practices vary widely
 - *Consider whether to ask for a bill of particulars*
- Challenge potentially non-qualifying predicates before trial or plea, rather than waiting until sentencing
 - Motion to Strike and/or Dismiss
 - Fed. R. Crim. P. 12(b)(1): “A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.”

Update #2: Pre-trial Litigation

- *US v. Everett* (ED NC): Striking ACCA allegation based on expunction

addresses the issues raised by defendant's motions. Upon careful review of the M&R and of the record generally, having found no clear error, the court hereby ADOPTS the M&R as its own, and, for the reasons stated therein, defendant's motions are granted. The court STRIKES the "allegation of prior convictions" from the indictment. (DE 1 at 1). The clerk is DIRECTED to schedule arraignment for the next available term of court.

SO ORDERED, this the 17th day of March, 2025.


LOUISE W. FLANAGAN
United States District Judge

Update #3: Evidentiary Issues

INTO THE UNKNOWN

- Challenges to prior convictions records
- Challenges to witness testimony



FOURTH AMENDMENT

MERE REASONABLE BELIEF

- Refresher: warrantless searches are *per se* unreasonable under the Fourth Amendment
 - UNLESS: an exception applies
- One exception: searches incident to arrest
- *Arizona v. Gant* (2009): warrantless vehicle searches authorized “when it is **reasonable to believe** evidence relevant to the crime of arrest **might** be found in the vehicle”
- WHAT DOES THAT MEAN?
- *United States v. Turner* (4th Cir. 2024): less demanding than probable cause
- ...but we’re not telling you any more than that!



MERE REASONABLE BELIEF

...whatever it is, this is enough.



- Turner's brother calls the police to report that his gun was missing from the lockbox in his bedroom
- Turner's brother tells Officer Flores Turner stole it, that Turner is in the Folk Nation gang, and that the gang is fighting with another gang
- Officer Flores learns that Turner is a felon and validated gang member
- The next night, Officer Flores responds to a carjacking report where victim alleges Turner pointed the same model gun at him and threatened to shoot if he didn't turn over the keys
- 27 hours later, Officer Flores responds to a shots-fired call at the mini mart and arrests Turner in the driver's seat of a stationary Buick
- Two minutes after he's in custody, officers find a firearm in the glovebox

ABANDONMENT



- *United States v. Mayberry* (4th Cir. 2025)
 - Another exception to ban on warrantless searches

ABANDONMENT: If you voluntarily abandon a piece of property, you can't seek to suppress evidence obtained from seizure and search of that property

- Do you have a reasonable expectation of privacy in the property?
- Objective analysis: words spoken, acts done, other objective facts known to officers when they performed warrantless search
- Factual finding reviewed for clear error
- Backpack abandoned when Mayberry left it in closed common stairwell, exited the stairwell and walked 15-20 feet away from it with no indication of an intent to return (behind a closed door, did not need a hotel key, not hidden)
- No consideration of Mayberry's failure to claim ownership of backpack where record doesn't reveal whether officers knew of failure

PROSECUTORIAL SHENANIGANS

GLOSSIP V. OKLAHOMA

- *Napue v. Illinois*: a conviction obtained through knowing use of false evidence violates the Fourteenth Amendment's Due Process Clause
- So...is it fine for the only witness testifying with direct evidence of guilt of a capital crime to lie about his bipolar disorder **and for the prosecution to let him do it?**
- **NO! Mr. Glossip is entitled to a new trial.** Sneed was prescribed lithium to treat bipolar disorder, but testified he had asked for cold medicine. The prosecution almost certainly had access to Sneed's medical file from his competency evaluation. Prosecutor talked with Sneed pretrial where he mentioned his doctor and his lithium.
- **Jury assessment of Sneed's credibility material and determinative, false testimony bore on Glossip's guilt, additional prosecutorial misconduct.**



UNITED STATES V. GARRETT

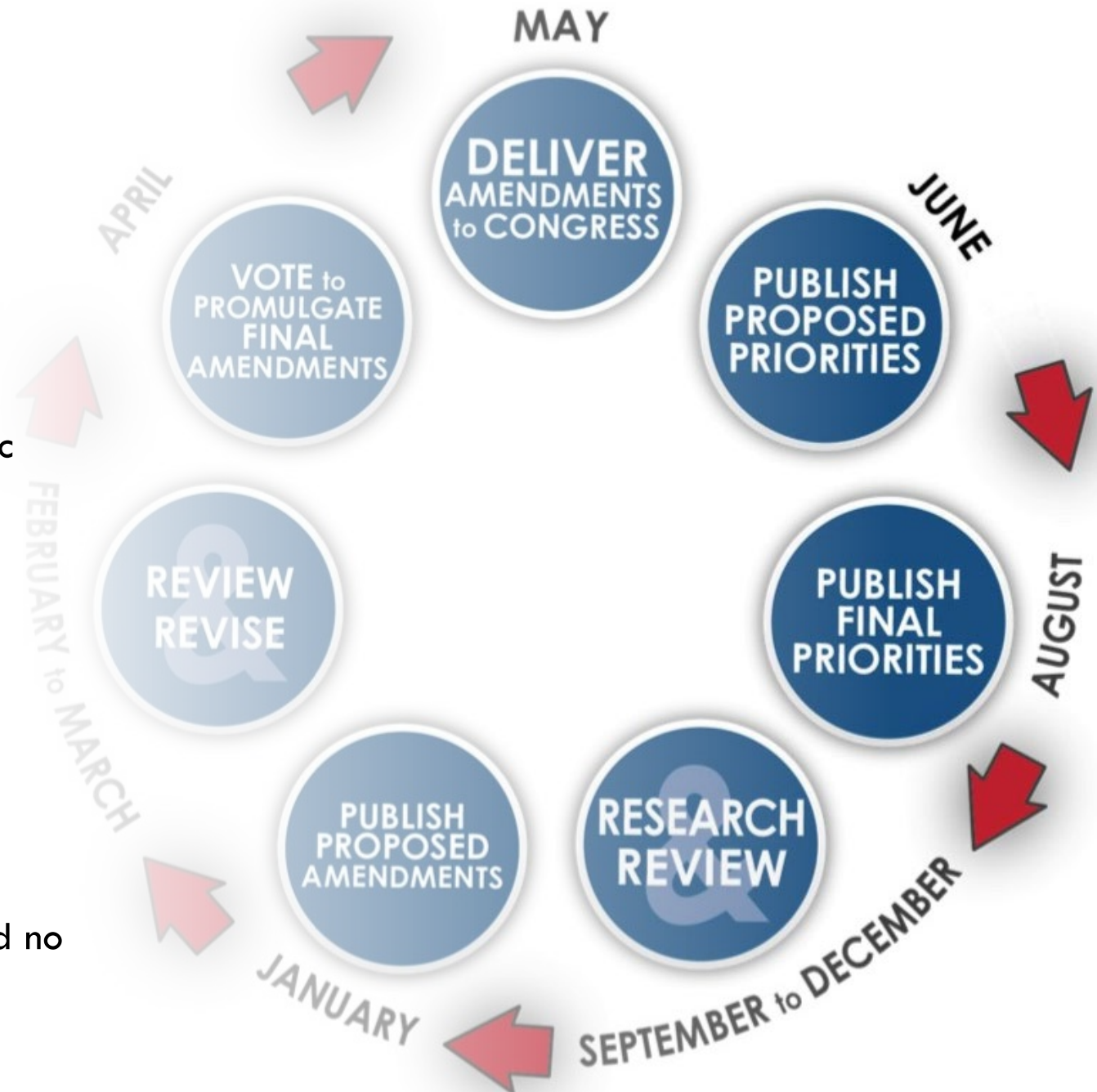


- Reasonable defendant in Garrett's shoes would not have pled guilty if he'd known...
 - Blatant misrepresentations in warrants
 - Affidavit doesn't distinguish between CIs
 - Affidavit doesn't explain that CI-2 existed, was a first-time informant, was paid for participation, never ID'd Garrett as the drug dealer
 - Affidavit doesn't explain that CI-1 misidentified Garrett as McDuffie and never corrected it after being shown a photo of McDuffie, speaking to Garrett on the phone, and having a close face-to-face encounter with Garrett
 - Intentionally choosing to omit or misrepresent facts that weakened their case, law enforcement caused Garrett to plead guilty without the benefit of all of the facts
- Lack of candor to District Court
 - Repeated representation that only one CI was used
- Six months before sentencing, "this was a dump of 775 pages of evidence with the relevant misconduct scrawled into the margins of one or two of those pages"

GUIDELINES UPDATE

2025 AMENDMENT CYCLE

- 2025 proposed amendments submitted for public comment, public meeting on April 11
 - Career offender
 - Firearms offenses
 - Simplification
 - Circuit conflicts
 - Greater discretion in supervised release
 - Drug offenses
- Sentencing Commission: currently 2 vacancies and no pending nominees; still have a quorum



HOW DO WE DO GUIDELINE ANALYSIS TODAY?

- *United States v. Mitchell*



- (1) Is the relevant guideline genuinely ambiguous? If not, apply the plain text.
- (2) If it is, consider “whether the commentary’s [relevant] definition . . . falls within the ‘zone of ambiguity’ such that it should be given deference.” If not, no deference to commentary on that subject (see step one).
- (3) If so, “independently inquire as to whether the commentary’s ‘character and context’ entitles it to ‘controlling weight.’ ”
- (4) An ambiguous guideline is also subject to the rule of lenity.
- (5) Even if the guideline is not ambiguous, the commentary can “explain[] the guidelines and provide[] concrete guidance as to how” the guidelines are applied in practice.

CHAPTER 3: VULNERABLE VICTIM ENHANCEMENT

Victim was unusually vulnerable and defendant knew or should have known

- *United States v. Luong*

- Victim had cultural belief that valued reputation within the family, so Ms. Luong's threats to tell the victim's aunt embarrassing things about the victim were meaningful
- Victim lacked knowledge of the American legal system, making her susceptible to threats
- Video evidence and victim's testimony showed vulnerability



- Membership in a class is not enough and the second and third characteristics were not clear enough

- *United States v. Lawson*

- Not every crime committed against the elderly automatically enhanced
- 
- Link here between victims' ages and susceptibility because this was a "telemarketing scheme that dangled potentially life-changing prize winnings"
 - "common knowledge" that Jamaican lottery scams target the elderly
 - Lawson knew he was targeting the elderly

CHAPTER 3: ROLE IN THE OFFENSE

- *United States v. Bright*: sentencing court must determine scope of activity (1B1.3) before assessing a defendant's role (3B1.1)
- *United States v. Lawson*: court may consider defendant's "indispensability" to offense
- *United States v. Pliego Pineda*: "supervision" of undercover officer cannot be considered because officer cannot be a participant



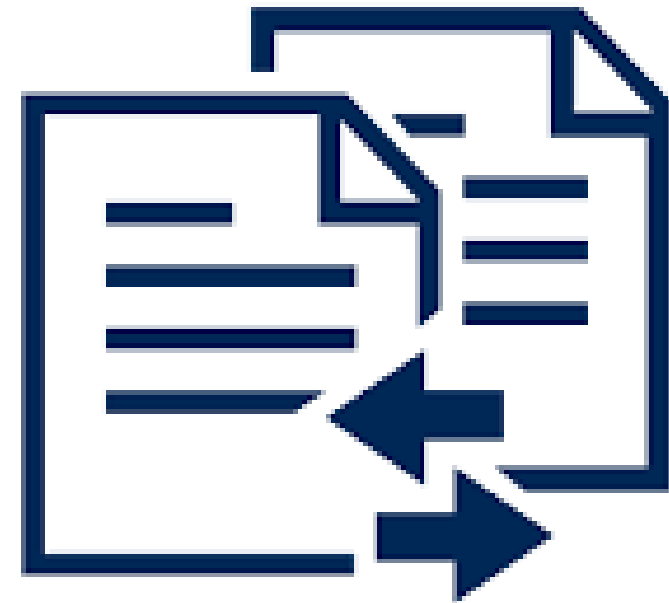
CHAPTER 4: CRIMINAL HISTORY POINTS

- *United States v. Edwards*: NC's special probation statute creates two separate prison terms, an active term and a suspended term. The original term of imprisonment thus is added to the term of imprisonment imposed on revocation and the total is used to calculate criminal history points.



CROSS-REFERENCES

- *United States v. Ellis*: under the state statute for attempted murder, Ellis would not have a viable voluntary intoxication defense. So the District Court did not err in applying the attempted murder cross-reference.



PROCEDURAL REASONABLENESS

THE GOOD

- *United States v. Shields*: failure to address nonfrivolous argument for a downward variance
- *United States v. Jackson*: failure to address argument for downward variant sentence or to explain its sentence



- *United States v. Nixon*:
 - Reliance on dissimilar conduct to depart to a higher criminal history category
 - Failure to give proper consideration to intervening categories and offense levels
 - Rejection of expert testimony without any counterevidence or basis for doing so
 - Errors not harmless where sentence was more than twice the proper guideline range

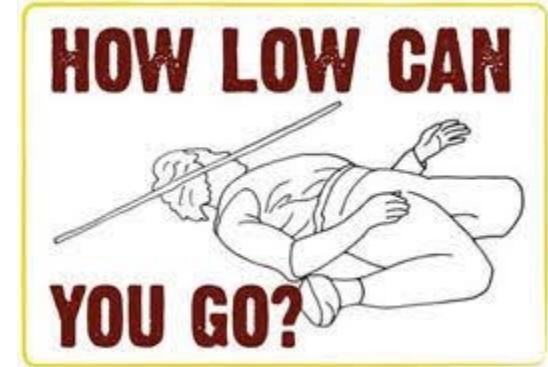
THE BAD



- *United States v. Gaspar*: court meaningfully considered “central thesis” and was not required to “address separately” each supporting fact
- *United States v. Davis*: revenge of the district court judges!!
 - District Court’s statements about putting a number of people at risk show it did not credit Davis’s argument that his disclosure was voluntary or gun was for “no nefarious purpose”
 - Clear that sentencing court considered mitigation evidence but found it outweighed by competing factors
 - No linkage between CDC and DOJ research and Davis’s individual history, so “lengthy analysis” not required

SUBSTANTIVE REASONABLENESS

UNITED STATES V. FITZPATRICK



- Time served, 17-day sentence followed by 20 years of supervised release substantively unreasonable
 - District Court focused solely on Fitzpatrick's personal characteristics (youth and autism) and concern over BOP's ability to manage his condition (unsupported by the record)
 - District Court failed to account for seriousness of crimes, need to promote respect for the law, ensure just punishment, deter others, and protect the public

WAIVERS AND PROCEDURAL TRAPS

Preserving Claims of Statutory Innocence



- *United States v. Pittman* (4th Cir. Jan. 13, 2025)
 - Pled guilty under 18 U.S.C. 844(f) to burning a “building ... owned or possessed by ... any institution or organization receiving Federal financial assistance”
 - Filed a motion to dismiss after plea arguing that the alleged conduct – which he continue to admit – did not actually violate the statute
- Holding: Pleading guilty **WAIVES** any argument that your conduct does not violate the statute as a matter of statutory interpretation
 - Rejects argument that *Class* (2018) permits such claims, reading *Class* as limited to “constitutional” claims



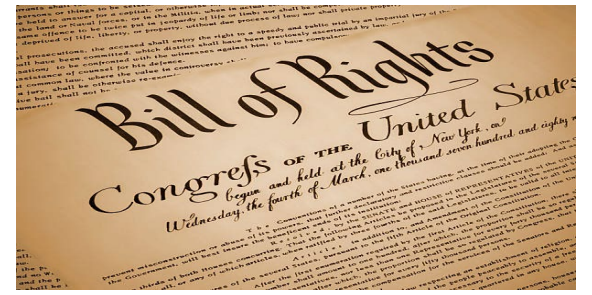
Preserving Claims of Statutory Innocence



- How to preserve this type of claim?
 - Fed. R. Crim. P. 12(b)(1): “A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.”
 - Rule 29
 - Stipulated Bench Trial



Preserving Constitutional Claims



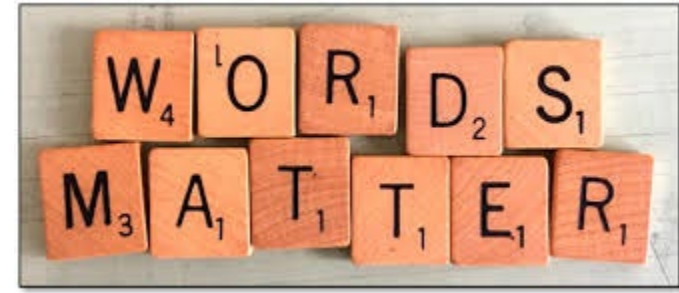
- US v. Pittman (4th Cir. Jan. 13, 2025): D also made as-applied constitutional claims
 - Fourth Circuit assumes based on *Class* that the guilty plead did not WAIVE as-applied constitutional challenges
 - But see *Deng* (8th Cir. 2024): holding that a guilty plea waives an as-applied constitutional challenge
- Holding: An as-applied challenge made after the deadline for pre-trial motions is FORFEITED, meaning it is subject to plain-error review on appeal.
 - Takeaway: Pay attention to court-imposed deadlines!

Guilty Pleas in Immigration Cases



- *United States v. Dominguez* (4th Cir. Feb. 6, 2025)
 - Pled guilty under 8 U.S.C. 1326(a) to reentry following a prior removal
 - Argued on appeal that prior removal proceedings, which formed the basis for the 1326(a) conviction, were constitutionally deficient in violation of due process
- **Holding:** Pleading guilty **WAIVES** any argument about case-specific constitutional defects that arose prior to the guilty plea, including challenges to prior removal proceedings in a 1326 prosecution

Appellate Waivers in Plea Agreements



- *United States v. Lubkin* (4th Cir. 2024)
 - Plea agreement waived “the right to consent either the conviction or any sentence in any direct appeal or other post-conviction action”
 - Can a defendant waive challenge to an ACCA sentence?
 - *Marin* (4th Cir. 1992): D’s appeal waiver cannot waive challenge to a “sentence imposed in excess of statutory maximum”
- Holding: Waiver language precluded appeal; *Marin* does not provide an “unwaivable right” to challenge an ACCA sentence

Who Qualifies Under ACCA?

↓
Offenders who violate 18 U.S.C. § 922(g)

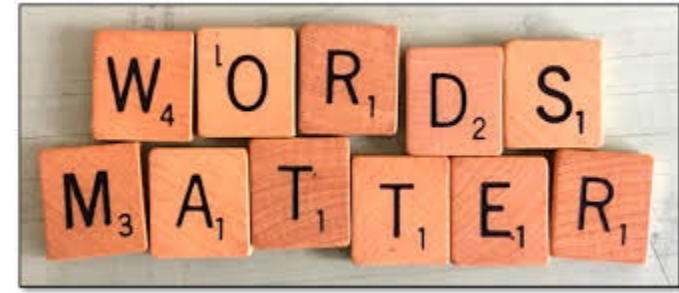
AND

have three or more prior convictions for
a “violent felony,” a “serious drug offense,”
or both.



Section 922(g) criminalizes the possession, receipt, or transport of a firearm by certain prohibited persons.

Appellate Waivers in Plea Agreements



- *United States v. Notgrass* (4th Cir. Feb. 28, 2025)
 - Plea agreement waived right to challenge on appeal “any sentence of imprisonment, fine or term of supervised release . . . so long as that sentence of imprisonment, fine or term of supervised release is below or within the Sentencing Guidelines range”
 - This waiver did **NOT** preclude a defendant from challenging the conditions imposed as part of a sentence of probation.

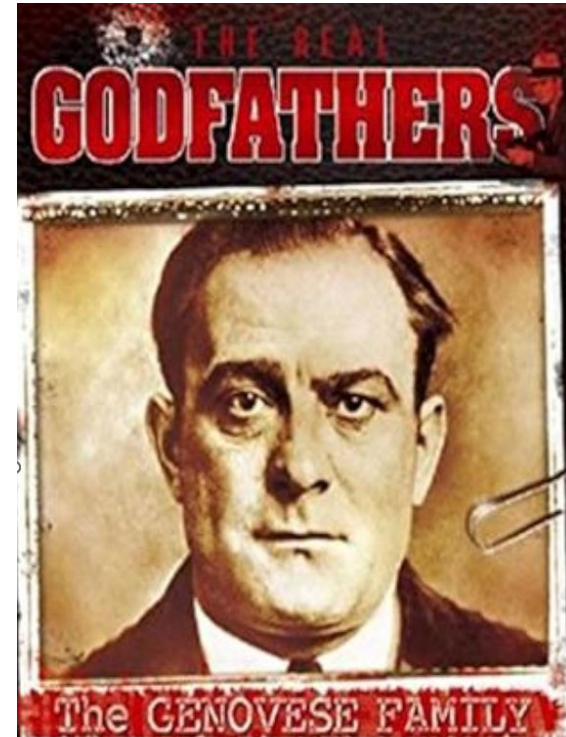
CATEGORICAL APPROACH

Delligatti v. United States (Sup. Ct. March 21, 2025)

Background

- Facts: 924(c) conviction where the “crime of violence” was a VICAR offense that was, in turn, based on the underlying offense of New York second-degree murder
- Acts of Omission: under New York law, second degree murder can be based on a failure to act where there is a legal duty to do so
- Circuit Split: Can a crime that can be based on a failure to act qualify as a crime that has as an element the use (or threatened use) of physical force?

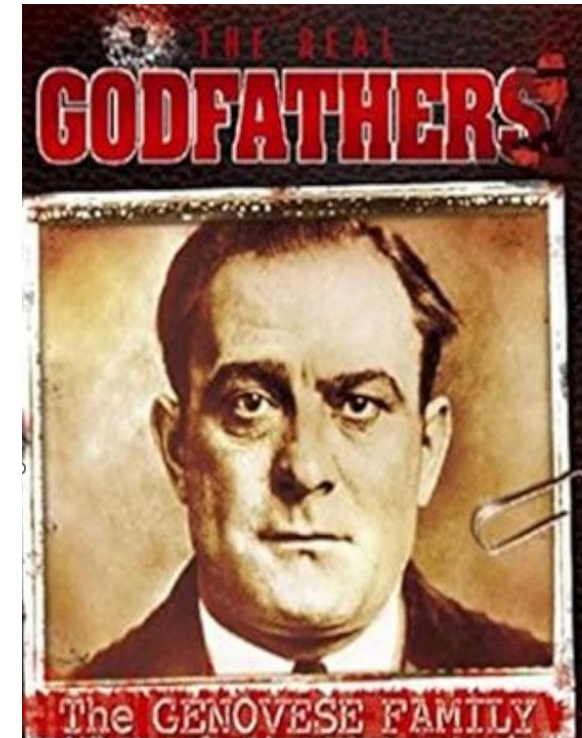
Holding: “The knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the use of physical force against the person of another.”



Delligatti v. United States (Sup. Ct. March 21, 2025)

Takeaways:

- 1) No change in governing precedent for us. *See United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020).
- 2) Not all offenses with an injury or death element will automatically qualify; *Borden* continues to exclude any offense with mens rea of recklessness or less, including most North Carolina assault offenses (e.g., ADWISI).
- 3) Textualism has limits for criminal defendants: The Court “whistles past the terms Congress gave us” in favor of “an examination of precedent and assumptions about congressional purposes” (Gorsuch, J.).



COV's in Fourth Circuit



- *US v. Shanton* (Jan. 14, 2025): re-affirmed that Maryland robbery is an ACCA “violent felony”; rejected defendant’s *Borden*-based argument
- *US v. Parham* (Feb. 26, 2025): extending prior ACCA holdings in *White* and *Williams* to hold that is not generic “robbery” under the guidelines
- *US v. Shade* (Jan. 29, 2025) (unpublished): re-affirming that NC assault with intent to kill satisfies force clause

Future of the Categorical Approach?



- Sentencing Commission's Proposed Amendment (Dec. 2024)

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It would eliminate the categorical approach when determining whether an offense qualifies as a crime of violence by providing a definition for “crime of violence” that is based on a defendant’s conduct and a definition of “controlled substance

- Note: Categorical Approach would still apply under ACCA, 924(c), and 3559

SUPERVISED RELEASE REVOCATIONS

Esteras v. United States (argued Feb. 25, 2025)

QUESTION PRESENTED

The supervised-release statute, 18 U.S.C. § 3583(e), lists factors from 18 U.S.C. § 3553(a) for a court to consider when terminating, modifying, or revoking supervised release. In that list, Congress omitted the factors set forth in Section 3553(a)(2)(A)—the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

The question presented is:

Even though Congress excluded Section 3553(a)(2)(A) from Section 3583(e)'s list of factors to consider when revoking supervised release, may a district court rely on the Section 3553(a)(2)(A) factors when revoking supervised release?

Esteras v. United States (Sup. Ct. March 21, 2025)

- in *United States v. Pennington*, No. 21-4664, 2022 WL 2702577 (4th Cir. Jul. 12, 2022), the district court “particularly” relied on “the seriousness of the violation conduct”—a section 3553(a)(2)(A) factor—while “briefly mention[ing]” four other factors, including the remaining two section 3553(a)(2)(A) factors. *Id.* at *2. Relying on its published precedent, the Fourth Circuit vacated the resulting sentence because the court “relied predominantly on impermissible factors.”
- *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2013) (joining “many of our sister circuits” on this issue).
- *Pennington / Webb* – (a)(2)(A) factors cannot be “predominate” basis for sentence

Confrontation Right at an SRV Hearing

Background

- FRE 1101(d)(3): rules of evidence don't apply at revo hearing
- *Morrissey v. Brewer* (1972): “due process” provides a person facing revocation with a “right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)”
- *US v. Doswell* (CA4 2012): before admitting hearsay at SRV hearing, “district court must balance the releasee’s interest in confronting an adverse witness against any proffered good cause for denying such confrontation”



Confrontation Right at an SRV Hearing

- *United States v. Wheeler* (4th Cir. --- 2025)
- A

