

Supreme Court and Fourth Circuit Court of Appeals Update

2023 Fall Federal Criminal Defense Practice Seminar for the Eastern
District of North Carolina

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**Including published 4th Circuit criminal cases issued between
April 1, 2023 and September 30, 2023 and selected Supreme
Court criminal cases**

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INTRODUCTION

This presentation summarizes all published Fourth Circuit criminal cases issued between April 1, 2023 and September 30, 2023. Note that not every issue raised in every case is discussed. Our focus, instead, is on the more relevant holdings in each case. Attached to the end of this presentation is Paul Rashkind's Supreme Court Review/Overview/Preview, which reviews criminal cases of note from the Supreme Court's recent and upcoming term.

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SUBJECT MATTER JURISDICTION

***United States v. Moran*, 70 F.4th 797 (4th Cir. June 21, 2023) (Richardson, J.) (E.D.N.C.)**

Emilio Moran pleaded guilty with a written plea agreement to sexually abusing and enticing a minor in Japan under the Military Extraterritorial Jurisdiction Act, 18 USC § 3261. Moran's plea agreement barred all appeals "on any ground...excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct." After entry of his guilty plea, Moran was sentenced to 420 months of imprisonment.

Moran appealed, arguing that he was not employed by or accompanying the Armed Forces and the district court therefore "lack[ed] jurisdiction" over his case. The Government moved to dismiss the appeal based on the appellate waiver. The court dismissed, explaining that Moran's appeal doesn't go to the subject-matter jurisdiction of the district court (it is empowered to adjudicate "all offenses against the law of the United States") —a claim that would not be barred by the waiver-- but goes instead to the sufficiency of the evidence on whether the Government had sufficient evidence to establish an element of the offense, namely that Congress had the authority to legislate against someone in Moran's position. That claim, the court held, was waived by Moran's appellate waiver.

This isn't really breaking new ground but gives a helpful explanation of the difference between jurisdictional claims and sufficiency-of-the-evidence claims related to jurisdictional elements of offenses.

EXTRATERRITORIAL APPLICATION OF CRIMINAL STATUTES

***United States v. Skinner*, 70 F.4th 219 (4th Cir June 8, 2023) (per curiam)**

Mr. Skinner lived in New Zealand. He chatted online with a 13-year-old girl in Virginia. These chats became sexual, and they each masturbated on camera for each other. Unknown to Mr. Skinner's victim, he also recorded her several times while she was in sexual positions.

Eventually, the victim told Mr. Skinner he wanted to end the relationship with him. So he flew to the United States, bought duct tape, pepper spray, and a knife and went to her house. He got to her house, and her mom would not let him in. So he tried to break in through a door, and the mom shot him.

Once police sorted everything out, Mr. Skinner was charged with 9 counts of producing child pornography. He entered a conditional plea that let him appeal the district court's denial of certain motions discussed below.

First, Mr. Skinner argued that because he was in New Zealand the whole time, the prosecution was an impermissible extraterritorial application of the statute. The 4th rejected this claim—it agreed that the CP statute applies only domestically. But, relying on its recent decision in *United States v. Elbaz*, held that the act of knowingly sending chats to a victim in Virginia was enough to make his conduct domestic. The focus of the statute is the production of the illicit image, and that image was produced in Virginia.

Second, Mr. Skinner argued that the district court should have let him raise a mistake of age defense to the jury. Acknowledging that Section 2251 does not allow for mistake of age defense, Mr. Skinner nonetheless argued that Due Process demanded it in his case because he never saw his victim in person. He argues that in an online-only situation, the defense should be allowed because a defendant has no way to verify the victim's age in person. The Court held open the possibility that Due Process might create some situations where a defendant would have the right to a mistake of age defense. But Mr. Skinner's case is nowhere near there. Chat logs with his victim show that he knew her age and knew what the relevant laws forbid. And the district court made factual findings based on some of the images that the victim clearly appeared underage—which Mr. Skinner did not challenge as clearly erroneous.

Finally, Mr. Skinner challenged the district court's application of a two-level enhancement for "the commission of . . . sexual contact" during the offense. The 4th held that the Guidelines define "sexual contact" as the sexual touching of "any person," so Mr. Skinner's masturbating counts because he touched himself.

AIDING AND ABETTING

***United States v. Odum*, 65 F.4th 714 (4th Cir. Apr. 26, 2023) (Motz, J.) (W.D.N.C.)**

After a jury trial, Odum was convicted of one Hobbs Act robbery and possessing a firearm in furtherance of that robbery, as well as possessing a firearm as a felon. The jury hung on another Hobbs Act robbery and acquitted Odum of brandishing a firearm in furtherance of the first robbery, and of possessing and brandishing in furtherance of the second robbery. He was sentenced to 111 months' imprisonment, followed by 5 years of supervised release.

Odum appealed, arguing first that the district court plainly erred in failing to properly instruct the jury on aiding and abetting. The court agreed the error was plain but found it did not affect Odum's substantial rights because the evidence presented by the government on that score was "powerful": Police found a ski mask with Odum's DNA (and only his DNA) along the escape route minutes after the robbery occurred and Odum's gold Buick was seen entering and exiting the area immediately before and after the robbery. Also, the jury convicted Odum of possessing a firearm in furtherance of the robbery. The only evidence linking a firearm to the robbery was evidence the gun was used during the robbery and the only evidence connecting Odum to the gun was evidence he participated in the robbery. Assuming the jury found Odum did not commit the robbery himself, the jury must have found he had the power and intention to control the gun while someone else committed the robbery on his behalf. Odum thus could not demonstrate prejudice (a reasonable probability the outcome would have been different if the jury had been properly instructed). **Take away: be sure to object if district court fails to instruct on intent element of aiding and abetting; who knows what the jury might have actually done if properly instructed?**

Odum next argued the district court abused its discretion by denying his for-cause challenge to Juror Eight, who complained of having trouble hearing during jury selection. The court rejected both challenges, explaining first that the district court allowed Juror Eight to remain on the jury because it believed he could hear, not because a hearing issue would not be disqualifying. The court explained it would not second guess the district

court's assessment because the district court was in a superior position to assess "the configuration of the courtroom, the ambient level of noise, and the volume at which the court was speaking before and after Juror Eight expressed difficulty hearing." Second, the court satisfied its obligation by allowing counsel to question prospective jurors after Juror Eight expressed difficulty hearing. Defense counsel asked no questions of Juror Eight and did not seek permission to inquire further after the district court indicated it would not strike Juror Eight for cause. **Take away: Follow up to build record/make a proffer if district court declines to strike a juror for cause.**

JUDICIAL VINDICTIVENESS

***United States v. Singletary*, 75 F.4th 416 (4th Cir. Aug. 1, 2023) (Harris, J.) (E.D.N.C.)**

In 2019, Singletary was sentenced to 60 months for Hobbs Act robbery, plus 84 consecutive months for brandishing a firearm during the robbery. On appeal, he challenged the imposition of two supervised release conditions. The Fourth Circuit agreed that the conditions were improperly imposed, vacated the entire sentence, and remanded for resentencing.

On remand, the district court imposed a 66-month sentence on the robbery, and ordered the federal sentence to run consecutively to a state sentence that had been imposed after his initial federal sentencing. The upshot was that Singletary's sentence was, in effect, almost 11 years longer than it had been before his appeal.

The Fourth Circuit affirmed. First, the Court held that the claim of vindictive sentencing fell outside the scope of Singletary's plea agreement (even though it was not expressly mentioned as an exception). Second, the Court held that Singletary's prison disciplinary record and the existence of the new state convictions were factors that were not present at the first sentencing that the district court was entitled to consider at the second proceeding.

PROSECUTORIAL VINDICTIVENESS

***United States v. Villa*, 70 F.4th 704 (4th Cir. June 13, 2023) (Rushing, J.) (W.D.N.C.)**

Villa was suspected of dealing drugs and, after a period of surveillance, was pulled over by police. Searches of his car and home uncovered evidence of drug trafficking. Villa volunteered that he was not a US citizen, explaining that he had been in the country since he was 17. After arrest on state charges, Villa was initially charged via a complaint with possession of a firearm as an illegal alien and illegal reentry. A pretrial services report showed a prior administrative illegal reentry charge (although no resolution) and prior drug convictions. Villa was then indicted, but only on the firearm charge. He filed a motion to suppress which lingered for months until Villa asserted his speedy trial rights. The magistrate judge recommended partially granting Villa's motion and the district court adopted that recommendation.

While objections to the magistrate's recommendation were pending, the Government enlisted the Department of Homeland Security to obtain additional evidence as to Villa's immigration status. At that point, evidence showed that Villa had been previously removed from the United States. The Government obtained a separate indictment charging Villa with illegal reentry following an aggravated felony – 14 months after his arrest, but only days after obtaining the new information – and then dismissed the firearm charge. The new charge carried a statutory maximum twice as long as the firearm charge. The district court denied Villa's motion to dismiss on prosecutorial vindictiveness grounds and as violation of his speedy trial rights and convicted Villa at a bench trial, sentencing him to 42 months in prison.

On appeal, the Fourth Circuit affirmed Villa's conviction. As to vindictiveness, the court rejected Villa's argument to apply a presumption of vindictiveness "in all cases where a defendant receives a favorable suppression ruling and the prosecutor obtains a new or superseding indictment resulting in greater sentencing exposure," concluding that "these circumstances do not pose a realistic likelihood of vindictiveness." That is because when the Government obtained evidence to support a new charge, it obtained a new indictment without delay. In addition, this was not a case where the new charge was rooted in the same conduct as the charge to which the suppression motion applied. As to Villa's right to a speedy trial, the court first determined that the proper starting point for the Speedy Trial Act was when the new indictment was obtained, as it did not relate back to his initial

arrest. That made his trial timely under the Act, as well as the Sixth Amendment.

COMPETENCY ISSUES/EVALUATIONS

***United States v. Council*, 77 F.4th 240 (4th Cir. Aug. 9, 2023) (Heytens, J.) (D.S.C.)**

Council committed a bank robbery, during which he shot and killed a teller and the bank manager. He was convicted of bank robbery resulting in death and using and carrying a firearm during and in relation to a crime of violence in a manner causing death. The jury imposed the death penalty.

Council raised four challenges to the guilt phase of the trial, but the Fourth Circuit rejected them all. First, he argued that the district court—after raising potential competency issues—should have ordered an independent evaluation rather than relying on the defense expert’s examination. The Fourth Circuit found no abuse of discretion, even if an independent evaluation was preferable, given the representations of counsel regarding Council’s communications with them and their vigorous objection to an evaluation that might lead to damaging information coming into the hands of the government. Second, the district court did not abuse its discretion in denying a fifth continuance of the trial date, given the wide latitude afforded to district judges in managing their dockets and the weakness of the defense’s arguments as to the need for more time. Third, the district court was not obligated to ask jurors Council’s proposed voir dire questions about racial bias and attitudes, because the judge did ask some (more generic) questions on that subject, and Council’s attorneys did not ask their requested questions during the available period of attorney-led voir dire. Fourth, defense counsel affirmatively waived the *Batson* claim he attempted to raise on appeal.

Council also raised four challenges to the sentencing phase of the proceeding; they too were unsuccessful. First, the Fourth Circuit found that certain of the aggravating circumstances (the murder was for pecuniary gain and the murder was not necessary to achieve the robbery) were not “inherently contradictory,” and that others did not result in impermissible “triple counting,” noting that duplicative aggravators are not necessarily unconstitutional, and that the factors focused on different aspects of the crime or Council’s conduct. Second, the district court did not err in admitting

victim impact testimony that was allegedly too extensive and arguably addressed harm to the community rather than the victims, particularly since there was no objection during the testimony. Third, the district court did not fail to give a required instruction that the jury not consider race in its penalty determination, as that language was covered in other instructions, and additional language Council requested was substantially included in instructions that the court gave, or not an abuse of discretion to omit. Finally, Council's belated challenge to his death sentence in a Rule 33 motion (filed more than a year and a half after the verdict) was properly denied as untimely, and in any event, Council had post-conviction avenues to seek relief.

ATTORNEY INVOLVEMENT IN CRIME

***United States v. Ravenell*, No. 22-4369, 66 F.4th 472 (4th Cir. Apr. 25, 2023) (Wilkinson, J.; Gregory, J., dissenting in part)**

It's not every day that the Fourth Circuit issues an opinion that has more of an impact on our colleagues than our clients, but here we are.

Kenneth Ravenell, a criminal defense attorney, was convicted after a three-week jury trial of one count of conspiracy to commit money laundering, in violation of 18 USC § 1956(h). The indictment alleged that between 2009 and 2017, Ravenell was involved in a conspiracy to commit money laundering (1) to promote narcotics sales, (2) to conceal the source of funds from narcotics sales, or (3) engaging in monetary transactions of \$10,000 or more using the proceeds of narcotics sales. The government put on evidence that Ravenell used his position as a partner at his law firm to launder money in connection with the illegal drug activities of his clients, one drug organization led by Richard Byrd and the other by Leonaldo Harris. Byrd testified that Ravenell advised his drug ring how to evade law enforcement detection, how to launder drug proceeds through businesses and real estate investments, and how to mix drug profits with money generated from these ventures to conceal their illegal source. Ravenell advised Byrd to run cash-focused businesses as a front, including cash-ticket concerts. In exchange, Byrd's drug ring gave Ravenell stacks of cash. After Byrd's arrest, he sent money to Ravenell's law firm via third parties and testified that money came from drug proceeds and other sources and that Ravenell knew some of the money was from drug sales. Ravenell's firm accepted \$1.8 million in drug funds and co-mingled

drug funds. \$1.1 million was directed to projects and third parties to benefit Byrd. Ravenell kept \$600,000 for legal fees in addition to cash payments.

Like Byrd, Leonaldo Harris sent more than \$350,000 in drug proceeds to Ravenell via an associate, with only \$187,000 credited to his case. Harris's associate testified she told Ravenell exactly where the money was coming from and how she collected it.

Ravenell claimed he had no knowledge about either drug organization and argued that his clients testified against him in exchange for shorter sentences and put on evidence he was an upstanding attorney. Critically, this case was mostly a he-said, he-said dispute.

Ravenell appealed, arguing that (1) the jury should've been instructed on the applicable statute of limitations, (2) the jury should've been instructed on the definition of "monetary transaction" in 18 USC § 1957, (3) the jury should not have been instructed on conscious avoidance, and (4) the conviction must be vacated under *Yates v. United States* because there is no way to determine whether he was convicted on a legally valid theory given these alleged errors.

The court affirmed in all respects.

With regard to the statute of limitations instruction, the parties entered a pre-indictment tolling agreement stating that the five-year statute of limitations ran back to July 2, 2014. Ravenell claimed Byrd's last payment to his law firm was in January 2014 and Byrd was arrested in April 2014, after which Byrd testified he stopped his illegal activity. Ravenell also claimed Harris's last payment to his firm was in April 2014. So he argued the Government did not prove the conspiracy continued into the limitations period. The court explained that the statute of limitations is an affirmative defense, not an element. The district court did not abuse its discretion in declining to instruct on the statute of limitations because first, neither of Ravenell's proffered instructions were legally correct because the first included an overt act requirement and the second misstated the burden of proof as by a preponderance when it should have been beyond a reasonable doubt. Second, in any event, money laundering conspiracy is a non-overt act conspiracy and so once the government establishes an agreement to enter a conspiracy, it continues unless a defendant can show affirmative withdrawal or termination. Absent such evidence, no instruction was required. And

third, the government did present evidence of conduct in furtherance of the conspiracy that occurred after July 2, 2014, including (a) that Ravenell was Byrd's lawyer until October 10, 2014, (b) money credited to Byrd's drug ring remained at Ravenell's law firm past July 2, 2014, (c) jurors heard testimony about a proposed partnership between Byrd, Ravenell, and Darnell Miller and Miller and Ravenell met in May 2014, during which Ravenell offered to "wash" Miller's money like he did Byrd's, and (d) Ravenell made a \$750 payment on August 1, 2014 to a towing service on Byrd's behalf to pay for storage of Byrd's vehicles seized during an earlier arrest. The court rejected Ravenell's arguments that the conspiracy terminated because of Byrd or Harris's arrests or last payments to the law firm.

With regard to the "monetary transaction" instruction, Ravenell did not seek an instruction or object to the district court's failure to give one, so this argument is at least forfeited (if not waived) and reviewed at most for plain error. The panel held that any error was not plain because it is not clear he would have had a plausible safe harbor defense: 18 USC 1957(f) excepts "any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution" from the definition of "monetary transaction" but (1) it is not clear under existing precedent that one has a right to use illegally obtained funds to hire an attorney and (2) Ravenell was charged under Section 1956(h), and only one of his three alleged types of money laundering was subject to the safe harbor in any event. Judge Wilkinson wrote separately, agreeing that plain error applied and Ravenell failed to meet that standard, but asserting that, in his view, no error occurred and, even if it did, it was invited by Ravenell's agreement to jury instructions without the definition of "monetary transaction."

With respect to conscious avoidance, Ravenell argued the court erred in giving the government's conscious avoidance instruction because it was not supported by evidence. The court disagreed because the knowledge element can be proven either by subjective knowledge or by evidence a defendant made himself "deliberately ignorant." The government put on evidence of conscious avoidance, including the Okullo transaction, in which Byrd used offshore accounts to send drug money through the law firm to the mother of Byrd's youngest child. He sent \$90,000 to an attorney in Jamaica, who wired it to a realtor in NYC, to a Ugandan diplomat, to Ravenell through the law firm. Ravenell then directed the money to be sent to Byrd's child's mother. Even though Ravenell had no prior business with the diplomat, he

“intuitively” knew to wire the money to Byrd’s child’s mother. There was additional testimony that Ravenell refused to accept funds directly from Byrd and insisted they be sent by approved third parties. In any event, the government put on evidence of actual knowledge (Harris, Byrd, and Miller’s trial testimony, law firm employees’ testimony Ravenell maintained control over movement of Byrd’s money), which Ravenell disputed, but makes the instruction harmless under the court’s decision in Farrell.

With respect to *Yates*, the court rejected Ravenell’s statute of limitations and safe-harbor arguments and thus, in its view, Ravenell could not have been convicted under an invalid legal theory.

The Court denied en banc, which included a published dissent by then Chief Judge Gregory. There is a chance the Supreme Court may be interested.

FOURTH AMENDMENT/SEARCHES/WARRANT REQUIREMENTS

***United States v. Treisman*, 71 F.4th 225 (4th Cir. June 23, 2023) (Quattlebaum, J.) (M.D.N.C.)**

In May 2020, a manager of a bank in Kannapolis, North Carolina, noticed a van parked in the same spot of the bank’s lot where it was parked the day before. She contacted police, who responded at 11am. They couldn’t see inside the rear cargo area and couldn’t electronically identify the van’s owner. In the front of the van, officers could see an assault rifle with a scope and an extended magazine, a handgun box, an ammunition box, a Tannerite container (a legal target shooting product that can also be used to make explosives), a container of pills, and a suitcase. The bank’s cameras did not reach that parking spot. The officers contacted their supervisor and all believed the van was highly unusual and presented safety concerns; the supervisor also asked whether someone inside the van might need help, especially because it was a hot day and the air conditioning unit was not running (NC law allows searches in the event of an urgent medical situation).

The officers pulled open the back door of the van (which was ajar). No one was inside, but more gun cases were in the back of the van. The officers agreed they needed to safekeep the items so they would not be stolen. The officers conducted an inventory search of the van’s contents (which included books about survival, bombmaking, improvised weapons, and Islam, as well

as several electronic devices, a drone, and a large amount of cash banded and sealed in bank bags). The bank bags caused the officers to suspect criminal activity, so they obtained a search warrant and towed the van to a police department storage area.

Trieisman, the owner of the van, then returned to the bank and asked about his van. He was detained and officers got a search warrant for his cell phone. Although no evidence was found of criminal activity related to the guns, explosives or cash, the cell phone contained child pornography images.

Treisman was indicted for possession and transportation of child pornography. He moved to suppress evidence related to the search of his van. The district court denied the motion, Treisman pleaded guilty (reserving the right to challenge denial of his motion to suppress), and was sentenced to 156 months of imprisonment and 15 years of supervised release.

Treisman appealed, arguing that (1) the district court erred in concluding the officers had reasonable grounds to enter and search the van under the community caretaking doctrine and (2) the court erred in concluding the officers' warrantless impoundment and inventory search were reasonable under their community caretaking functions.

The Fourth Circuit affirmed denial of the motion to suppress, finding no error in the district court's holding the search was reasonable. First, the district court credited the officers' testimony that they were concerned someone was in medical distress and, in the alternative, that they had public safety concerns. Second, the district court credited the officers' impoundment of the car to assuage their public safety concern and concern that the contents of the van were valuables that needed to be safeguarded. The district court found the officers followed department policy in impounding the car and did not remove any items that would normally be seized in a criminal investigatory search.

***United States v. Howell*, 71 F.4th 195 (4th Cir. June 22, 2023) (Niemeyer, J.) (E.D. Va.)**

In September 2019, two Chesapeake police officers were investigating drug trafficking and received a tip from a confidential informant that an out-of-town target would be traveling to Chesapeake to traffic in drugs. The tip—

from an informant who had provided 5 years of accurate information to law enforcement—was that the target would meet with other drug dealers at the Aloft hotel, would stay there overnight, and would be driving a dark-colored or black rental SUV with out-of-state tags from a northern state, accompanied by an unknown Black female.

The officers surveilled the hotel, beginning the morning after the tip came in. They did not see the vehicle described in the tip, so checked the hotel's guest register to look for the target's name or the name of other drug dealers. They found Xavier Howell's name and recognized it from a drug-trafficking investigation that began 5 years earlier. One of the officers knew Howell had three prior arrests and one prior conviction (11 years earlier) for drug trafficking. A criminal history inquiry revealed an outstanding GA arrest warrant for failure to appear but did not indicate whether the warrant was extraditable.

Later that morning, the officers saw a black Cadillac SUV rental pull up to the front of the hotel with Georgia plates. One officer recognized Howell get out and a Black female exited the passenger side. Howell returned from the hotel ten minutes later with a small duffel bag and they both reentered the car and drove away.

The officers followed them in an unmarked car and requested a K9 unit. Howell was driving "in an extremely cautious manner." The officers got a traffic officer to stop Howell, who told him (lying) that there was a mismatch between the vehicle and its license plate. The officer ran Howell's license and registration and confirmed an outstanding warrant that was non-extraditable. Around the same time, an officer and K9 dog arrived and conducted a sniff. Within 30 seconds, the dog alerted. A search of the interior of the vehicle led to two keys of meth, cell phones and "incriminating paperwork." The paperwork led officers to an apartment, for which a warrant was obtained, leading to more drugs and text messages supporting a drug-trafficking conspiracy.

Howell was charged with PWID and an 846 conspiracy, filed an unsuccessful motion to suppress, and was convicted on all charges after a bench trial. He was sentenced to 30 years and appealed.

The Fourth Circuit found reasonable suspicion criminal activity was afoot for the stop, citing (1) the reliable informant's tip and confirmation of many aspects by the officers before the stop, (2) the officers' historical knowledge of Howell's drug-trafficking, (3) the officers' knowledge that the Aloft hotel was a location drug dealers preferred, and (4) Howell's "extremely cautious" driving. And it held the stop was not unreasonably prolonged by the drug sniff where the stop was initiated at 12:06pm, the K9 officer arrived 5 minutes later and had 5 minutes of conversation and removing the occupants of the car before initiating the sniff, and probable cause was obtained at 12:17pm. The court focused on the fact that the permissible length of a stop is determined by the "mission" justifying the stop and here, the "mission" was not an ordinary traffic stop, but a stop to allay suspicion of Howell's participation in an ongoing drug-trafficking conspiracy.

***United States v. Bailey*, 74 F.4th 151 (4th Cir. July 17, 2023) (Gregory, J.) (M.D.N.C.)**

Kannapolis police officer Page stopped someone who had just left Bailey's home, and in a search of that person's car, found 0.1 grams of crack cocaine. Page then went to Bailey's house and told him that if he turned over any additional drugs he had, they would be "squared away." The officer believed that Bailey would then assist him in future investigations. Bailey handed Page 0.7 grams of crack.

Bailey helped Page a little with one other case, but apparently did not provide much help. So Page got two warrants for Bailey's arrest: one for the 0.1 grams of crack, and another for the 0.7 grams. When police executed those warrants, they found 17.8 more grams of crack, and Bailey was indicted for possession with intent to distribute.

Bailey moved to suppress the evidence, arguing that his arrest was a breach of the police officer's promise that everything would be "squared away" if he surrendered the drugs he had. The government argued, first, that Bailey breached any "informal nonprosecution agreement" by not fully cooperating, and second, that even if the 0.7 grams of crack were suppressed, the seizure of the 0.1 grams and the arrest warrant based on that quantity were valid and provided independent support for Bailey's arrest that led to the federal charges.

The Fourth Circuit punted. The Court held that Page did have authority to extend a promise not to *arrest* Bailey, even if the officer did not have the authority to promise that Bailey would never be prosecuted. The Fourth Circuit sent the case back to the district court to determine, in the first instance, whether there actually was such an agreement, what its terms were, and who breached it. If the district court concludes that Page breached an agreement, it should then determine what remedy applies—specific performance, or “other equitable relief.”

***United States v. Critchfield*, 81 F.4th 390 (4th Cir. Aug. 31, 2023) (Rushing, J.; Richardson, J., dissenting)**

Gerhart, a U.S. Postal Inspector, stepped out of his house to go to work one morning. He saw Critchfield walk onto his street from an alley that was adjacent to a house that Gerhart thought was unoccupied. According to Gerhart (who was not in uniform or otherwise identifiable as a law enforcement officer), Critchfield saw Gerhart, made an “Oh no, I’m caught!” face, and walked in the other direction. Gerhart also thought that Critchfield’s hoodie pocket seemed to have something very heavy in it. Gerhart called a police officer he knew and mentioned his suspicions of Critchfield’s actions. The officer came to the location and stopped Critchfield. He was carrying a firearm and a variety of pills. Critchfield entered a conditional plea to possessing a firearm while being an unlawful user of drugs.

The Fourth Circuit reversed the district court’s denial of Critchfield’s motion to suppress the evidence the police obtained from him. The majority held that police lacked reasonable suspicion to stop Critchfield. All the police knew when they stopped him was based on Gerhart’s report, and that amounted to the following: “he was a man with a weighed-down sweatshirt pocket who had walked through a residential neighborhood past an occasionally unoccupied home next to a commercial area in broad daylight and who behaved evasively when a neighborhood resident watched and followed him.” The Court noted particularly that Critchfield’s evasive behavior was not (to him) in response to police, and that the heavy sweatshirt pocket could have been due to anything, not just a gun.

TRIAL STIPULATIONS

***United States v. Robertson*, 68 F.4th 855 (4th Cir. May 23, 2023) (Agee, J.) (E.D. Va.)**

Christopher Robertson was indicted on 22 counts of robbery-related activity and one count of being a felon in possession of a firearm. A mistrial was declared before a verdict was reached. Before retrial, at Robertson's request, the court severed his felon-in-possession trial from his robbery trial and both trials resulted in guilty verdicts on all counts. Robertson moved for acquittal in each case, which the district court denied.

Robertson appealed, arguing that (1) the district court abused its discretion by enforcing a stipulation in the retrial which the parties entered into before the first trial, (2) insufficient evidence supported his convictions, (3) the district court abused its discretion in using a jointly proposed jury instruction, and (4) the district court violated his right to a speedy trial.

The court affirmed in all respects.

First, the court held that a district court may enforce in a later trial a stipulation entered into in an earlier trial when nothing in the stipulation's language limited its applicability to the first trial.

Second, the court held that sufficient evidence supported each of Robertson's convictions:

Felon in possession: Robertson stipulated that he knew he was previously convicted of a felony and he did not contest that the possession did not affect commerce. And the government offered sufficient proof of constructive possession of the firearm where Robertson's on-again-off-again girlfriend purchased the firearm, it was found in the home of another one of his girlfriends and the mother of his child (where he was hiding at 6AM) in a room where Robertson kept other belongings. And police recovered a bullet from his pocket that had identical markings as the bullets in the firearm.

Hobbs Act Robbery: Robertson's coconspirators testified and that alone can be sufficient to sustain a conviction. His arguments that this testimony was unreliable are unavailing because the jury must resolve credibility issues and

the court of appeals must view the evidence and all reasonable inferences therefrom in the light most favorable to the government.

Third, the district court did not abuse its discretion by using a jointly proposed jury instruction because any error was invited.

Fourth and finally, Robertson waived his right to assert a speedy trial violation on his retrial because he failed to move for dismissal prior to trial.

Take away: Limit any stipulations you don't want to apply in a retrial, object to errors in jury instructions, move to dismiss before trial if you believe your client's speedy-trial rights have been violated.

SPEEDY TRIAL

***United States v. Villa*, 70 F.4th 704 (4th Cir. June 13, 2023) (Rushing, J.) (W.D.N.C.)**

Villa was suspected of dealing drugs and, after a period of surveillance, was pulled over by police. Searches of his car and home uncovered evidence of drug trafficking. Villa volunteered that he was not a US citizen, explaining that he had been in the country since he was 17. After arrest on state charges, Villa was initially charged via a complaint with possession of a firearm as an illegal alien and illegal reentry. A pretrial services report showed a prior administrative illegal reentry charge (although no resolution) and prior drug convictions. Villa was then indicted, but only on the firearm charge. He filed a motion to suppress which lingered for months until Villa asserted his speedy trial rights. The magistrate judge recommended partially granting Villa's motion and the district court adopted that recommendation.

While objections to the magistrate's recommendation were pending, the Government enlisted the Department of Homeland Security to obtain additional evidence as to Villa's immigration status. At that point, evidence showed that Villa had been previously removed from the United States. The Government obtained a separate indictment charging Villa with illegal reentry following an aggravated felony – 14 months after his arrest, but only days after obtaining the new information – and then dismissed the firearm charge. The new charge carried a statutory maximum twice as long as the firearm charge. The district court denied Villa's motion to dismiss on

prosecutorial vindictiveness grounds and as violation of his speedy trial rights and convicted Villa at a bench trial, sentencing him to 42 months in prison.

On appeal, the Fourth Circuit affirmed Villa's conviction. As to vindictiveness, the court rejected Villa's argument to apply a presumption of vindictiveness "in all cases where a defendant receives a favorable suppression ruling and the prosecutor obtains a new or superseding indictment resulting in greater sentencing exposure," concluding that "these circumstances do not pose a realistic likelihood of vindictiveness." That is because when the Government obtained evidence to support a new charge, it obtained a new indictment without delay. In addition, this was not a case where the new charge was rooted in the same conduct as the charge to which the suppression motion applied. As to Villa's right to a speedy trial, the court first determined that the proper starting point for the Speedy Trial Act was when the new indictment was obtained, as it did not relate back to his initial arrest. That made his trial timely under the Act, as well as the Sixth Amendment.

MENS REA DEFENSES

***United States v. Evans*, 74 F.4th 597 (4th Cir. July 25, 2023) (Rushing, J.) (W.D.N.C.)**

Evans started a fire that eventually burned 70 acres of national forest land. He was charged with arson "on land owned by the United States." The district court granted the government's motion in limine to exclude any evidence from Evans regarding whether he knew that the land was federal property. He wanted to testify that he believed that he set the fire on his own land (which abutted the federal property). The district court held that the federal ownership element was merely jurisdictional and precluded the evidence.

On appeal, the Fourth Circuit agreed that the ownership element was jurisdictional, and did not require proof that the defendant knew it was owned by the federal government. But, the Court did conclude that there was a mistake-of-fact defense because the government had to prove that Evans set the fire willfully, that is, "with a bad purpose or with knowledge that his conduct is unlawful." What separates lawful from unlawful conduct is whether Evans set the fire knowing that the land belonged to someone other

than him—the federal government or anyone else. If he mistakenly believed that he was on his own land when he set the fire, he is not guilty. Therefore, evidence of his knowledge is relevant to the willfulness question.

Takeaway: *Evans* is useful for any case with a willfulness mens rea, or any case where knowledge might be relevant for one element but not another. And there is good language finding the error not harmless, because it was up to the jury to weigh the evidence and Evans’s defense, not the appellate court. In other words, even if there was sufficient evidence that Evans knew he was on federal land to defeat a motion for acquittal, the jury could have believed his evidence and found him not guilty.

***United States v. Kim*, No. 22-4221, 71 F.4th155 (4th Cir. June 20, 2023) (Traxler) (E.D.N.C.)**

Kim, a medical doctor, pleaded guilty to Section 841 charges for prescribing oxycodone and other controlled substances outside the usual course of professional practice and without a legitimate medical need. He did so before the Supreme Court’s decision in *Ruan*. At the time of Kim’s guilty plea, Fourth Circuit precedent held that whether a doctor’s actions were authorized was an objective inquiry. *Ruan* changed that, holding that the statutory knowing-or-intentional mens rea applies not only to the distribution-related elements of the crime, but also to the question of authorization. In other words, if the defendant produces evidence that he was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that he knew he was acting in an unauthorized manner or intended to do so. The court affirmed the conviction, concluding that there was no error because, whether or not the district court adequately described the correct post-*Ruan* standard, the indictment may be considered to determine whether a plea is knowing and voluntary and the indictment reflected *Ruan*’s holding, even though it predated that decision and exceeded the government’s burden under then-governing case law. That is sufficient, especially in light of Kim’s characteristics: He was a “mature, well-educated, financially successful defendant who had no mental health conditions or substance abuse problems.”

Even if error existed, the court held in the alternative that Kim could not show that his substantial rights were affected because he could not establish

a reasonable probability he would have gone to trial if the charges had been more fully explained.

Kim also argued that the district court failed to give him an adequate opportunity to allocute before imposing sentence because it only invited him to speak after it had “express[ed] its views on the extent of Mr. Kim’s moral culpability.” The court quickly dispatched with that argument, citing its decision in *Engle*, which explained that a defendant does not have a right to allocate at a specific point in the sentencing proceeding and any pre-allocation statements by the sentencing court are presumed to be tentative, with the final sentence incorporating any impact of the defendant’s allocation.

JURY TRIALS

***United States v. Colon*, 64 F.4th 589 (4th Cir. Apr. 11, 2023) (Quattlebaum, J.) (E.D. Va.)**

The defendant argued that the “district court’s sua sponte decision to strike unvaccinated prospective jurors for cause from a properly assembled venire during the COVID-19 pandemic violates the Sixth Amendment’s fair-cross-section requirement.” The Fourth Circuit held that the district court did not violate the Sixth Amendment because “[t]he fair-cross-section requirement applies to jury venires, not petit juries. And the district court’s decision to strike unvaccinated jurors based on their perceived inability to serve without creating unnecessary safety risks affected the composition of the petit jury for this particular case, not the individuals represented in the venire from which the petit jury is selected.”

Let us hope for a pandemic-free future where this case is never cited for its specific facts.

***United States v. Ross*, 72 F.4th 40 (4th Cir. June 30, 2023) (Gregory, J.) (W.D.N.C.)**

At trial, the government asked one of its key witnesses whether she saw “the defendant, Jacob Ross” in the courtroom and she said no. When the government asked the defendant to remove his mask, the district court

stated, “*Mr. Ross*, if you would please take down your mask.” After the defendant removed his mask, the witness identified him.

On appeal the defendant argued the district court committed structural error by identifying the defendant for the witness. The Fourth Circuit rejected the claim, holding the error was not structural. Specifically, the Court held it was “not a defect in the very framework of Ross’s trial.” Moreover, the defendant’s counsel had the ability to cross-examine the witness and argue about the accuracy of the identification. The Fourth Circuit also held the district court did not commit plain error by admitting the identification. Even if the identification involved an unduly suggestive procedure, the Court held the identification was reliable.

The Fourth Circuit also rejected the defendant’s Eighth Amendment challenge to his sentence. The Court held that even assuming the fifty-five-year sentence for the forty-seven-year-old defendant was the functional equivalent of LWOP, it could not infer the sentence was grossly disproportionate to his offenses, which were very serious.

***United States v. Odum*, 65 F.4th 714 (4th Cir. Apr. 26, 2023) (Motz, J.) (W.D.N.C.)**

After a jury trial, Odum was convicted of one Hobbs Act robbery and possessing a firearm in furtherance of that robbery, as well as possessing a firearm as a felon. The jury hung on another Hobbs Act robbery and acquitted Odum of brandishing a firearm in furtherance of the first robbery, and of possessing and brandishing in furtherance of the second robbery. He was sentenced to 111 months’ imprisonment, followed by 5 years of supervised release.

Odum appealed, arguing first that the district court plainly erred in failing to properly instruct the jury on aiding and abetting. The court agreed the error was plain but found it did not affect Odum’s substantial rights because the evidence presented by the government on that score was “powerful”: Police found a ski mask with Odum’s DNA (and only his DNA) along the escape route minutes after the robbery occurred and Odum’s gold Buick was seen entering and exiting the area immediately before and after the robbery. Also, the jury convicted Odum of possessing a firearm in furtherance of the robbery. The only evidence linking a firearm to the robbery was evidence the

gun was used during the robbery and the only evidence connecting Odum to the gun was evidence he participated in the robbery. Assuming the jury found Odum did not commit the robbery himself, the jury must have found he had the power and intention to control the gun while someone else committed the robbery on his behalf. Odum thus could not demonstrate prejudice (a reasonable probability the outcome would have been different if the jury had been properly instructed). **Take away: be sure to object if district court fails to instruct on intent element of aiding and abetting; who knows what the jury might have actually done if properly instructed?**

Odum next argued the district court abused its discretion by denying his for-cause challenge to Juror Eight, who complained of having trouble hearing during jury selection. The court rejected both challenges, explaining first that the district court allowed Juror Eight to remain on the jury because it believed he could hear, not because a hearing issue would not be disqualifying. The court explained it would not second guess the district court's assessment because the district court was in a superior position to assess "the configuration of the courtroom, the ambient level of noise, and the volume at which the court was speaking before and after Juror Eight expressed difficulty hearing." Second, the court satisfied its obligation by allowing counsel to question prospective jurors after Juror Eight expressed difficulty hearing. Defense counsel asked no questions of Juror Eight and did not seek permission to inquire further after the district court indicated it would not strike Juror Eight for cause. **Take away: Follow up to build record/make a proffer if district court declines to strike a juror for cause.**

FED. R. EVID. 106 ("RULE OF COMPLETENESS")

***United States v. Davis*, 75 F.4th 428 (4th Cir. Aug. 1, 2023) (King, J.) (D.S.C.)**

Davis was the driver and lone occupant in a vehicle that police attempted to pull over for a traffic violation. He sped away for a few miles, eventually stopping the car and fleeing on foot. Once police seized him, they found a variety of pills in his pocket, and then found a firearm in the car. He was charged with possession with intent to distribute fentanyl and oxycodone, as well as possessing a firearm in furtherance of a drug trafficking offense.

While in pretrial custody, Davis made a recorded call from the jail to his girlfriend. During that call, he said that he told police when he was arrested that “none of that ain’t mine. If it was mine, I would claim it” (“the exculpatory comment”). A few minutes later, Davis told his girlfriend, “I ain’t want to talk about the gun got in the car” (“the inculpatory comment”).

At trial, the government introduced the inculpatory comment to prove that Davis knew the gun was in the car. He unsuccessfully objected that the “rule of completeness” in Fed. R. Evid. 106 required the court to admit the exculpatory comment as well. The Rule provides that “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”

The Fourth Circuit affirmed, holding that the rule of completeness does not require the admission of “self-serving, exculpatory statements made by a party which are being sought for admission by that same party.” The Court also noted that the exculpatory comment was likely hearsay as well (although it did not squarely hold as much), and the rule does not override the general hearsay prohibition.

(One takeaway: The Court said that admission of the exculpatory statement was “not necessary to avoid misleading the jury, and it was not needed to place the inculpatory firearm comment in proper context,” so if this comes up in your case, you could try arguing that those circumstances did apply to the statement you want admitted.)

In addition to that evidentiary issue, the Court quickly rejected challenges to the sufficiency of the evidence of constructive possession of the firearm in the car; and to the district court’s refusal to give a jury instruction on the lesser-included offense of simple possession of the drugs, finding that there was essentially no evidence that would have supported an argument that the drugs were for personal use instead of distribution.

Finally, the Fourth Circuit held that Davis had properly been designated as a career offender because his South Carolina drug distribution convictions were controlled substance offenses. The Court distinguished its *Campbell*

decision (which held that a West Virginia statute criminalizing “attempt to deliver” drugs was overbroad since the Guidelines did not reach attempt crimes) by saying that, under South Carolina law, an “attempted transfer” is an actual distribution, and not an “attempt to deliver.” This seems like the thinnest of hairs to split, but the Court has shown no inclination to read its *Campbell* decision broadly.

POSSESSION OF A FIREARM AFTER A CONVICTION FOR A FELONY (18 U.S.C. § 922(g)(1))

***United States v. Miller*, 75 F.4th 215 (4th Cir. July 21, 2023) (M.D.N.C.)**

After engaging in a gang-related shootout, Miller was charged with two counts of possession of a firearm after a felony conviction. He pleaded guilty, but argued on appeal that the indictment, plea colloquy, and statement of facts inadequately charged the element that he knew of his status as a felon. On plain error review, the Fourth Circuit rejected those claims: First, the indictment clearly charged the knowledge element; second, the district court suitably addressed that element in describing the nature of the charges; and third, there was an adequate factual basis for that element based on evidence that Miller had signed state-court documents indicating that he knew he had been convicted of a felony, combined with his statements indicating that he had read and understood the indictment and understood the district court’s recitation of the elements.

Miller also challenged the reasonableness of his sentence. First, he argued that the district court erred in increasing his offense level after finding that the firearm was used in connection with the felony of assault with intent to kill. The Fourth Circuit disagreed, stating that North Carolina law does not require an identified victim for that offense, and that the district court did not clearly err in finding that Miller had an intent to kill whoever he shot at. Second, the Court held that North Carolina’s drug distribution statute was a controlled substance offense because, like federal law (*Groves*), North Carolina separately punishes attempts, so the distribution statute is not overbroad (as in *Campbell*). Finally, the district court did not rely on erroneous factual findings at sentencing when it concluded that Miller was in a gang due to the strong evidence of his gang involvement. The Fourth Circuit did remand for resentencing anyway in light of the government’s

concession that the district court had improperly applied two criminal history points.

USE OF A FIREARM IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSE (18 U.S.C. § 924(c))

***United States v. Green*, 67 F.4th 657,(4th Cir. May 16, 2023) (Gregory, J.) (E.D. Va.)**

The Fourth Circuit joined every other circuit to consider the question and held that Hobbs Act robbery is a crime of violence for Section 924(c) purposes.

Important!! Don't confuse this *Green* case with the other HAR case, *United States v. Green*, 996 F.3d 176 (4th Cir. 2021), which held that HAR is NOT a COV for purposes of the Guidelines, which uses a different COV definition than the COV definition in 924(c). So remember, if your client has been convicted of HAR, they cannot be a career offender (unless, of course, they've also pled guilty to some other offense that qualifies as a career offender predicate), and this new *Green* case does *not* change that.

***United States v. Graham*, 67 F.4th 218 (4th Cir. May 3, 2023) (Heytens, J.; Wilkinson, J. concurring)**

In 2005, Mr. Graham and three others pulled a gun on someone who had nice rims on his car. They ordered him into the car, drove across state lines, hit him with the gun, and threatened to kill him by burning him with gasoline if he didn't help remove the rims. After he gave them the rims, they let him go. Mr. Graham was indicted for carjacking, kidnapping, 924(c), and FIP. He pled guilty to kidnapping and 924(c) in exchange for dismissal of other charges. "Neither the indictment nor the plea agreement specified a predicate 'crime of violence' for the Section 924(c) charge, and the plea agreement contained no agreed upon factual statement." At the plea hearing, the government's factual provided the facts recited above and stated Mr. Graham had the gun. Mr. Graham admitted to participating in the kidnapping and using the gun. The district court sentenced him to 260 months.

A decade later, Mr. Graham filed a pro se motion to vacate his 924(c) conviction. The district court agreed kidnapping was no longer a valid 924(c) predicate. But the district court denied the motion, ruling that the factual basis for his guilty plea also included carjacking, which was still a valid predicate.

The Fourth Circuit reversed and remanded for resentencing. The Court distinguished *United States v. Crawley*, 2 F. 4th 257 (4th Cir. 2022), where it affirmed denial of relief on a 924(c) conviction “expressly based” on both a valid predicate and an invalid one. Unlike in *Crawley*, the Court held Mr. Graham’s guilty plea to 924(c) was “expressly based” only on kidnapping, and not on carjacking or any other crime of violence.

Judge Wilkinson, in concurrence, noted that district judges can (and should) use their power to upwardly vary at sentencing when the categorical approach prevents them from imposing various sentencing enhancements.

***United States v. Draven*, 77 F.4th 307 (4th Cir. Aug. 11, 2023) (Gregory, J.) (E.D. Va.)**

Draven was in a relationship with a woman, and the two of them hatched a plan to kill her husband. They hired a hitman to commit the murder. Draven was eventually convicted of, among other charges, 18 U.S.C. § 924(j) (basically an enhanced version of 924(c)), with both conspiracy to commit murder and aiding and abetting carjacking serving as predicate crimes of violence.

In this 28 U.S.C. § 2255 proceeding, Draven argued that neither predicate qualified as a crime of violence. He conceded (based on a decision in the hitman’s case) that carjacking was a crime of violence. But he argued that aiding and abetting a crime was not categorically violent, relying on the Supreme Court’s decision in *Taylor* (regarding attempted Hobbs Act robbery).

The Fourth Circuit held that “aiding and abetting and attempt are not one and the same.” Aiding and abetting does not have separate elements, and is merely a different theory of liability for the completed offense. So aiding and abetting carjacking remains a crime of violence for the same reasons that carjacking is.

Draven argued that, even if the carjacking offense is a crime of violence, his conviction should still be vacated because conspiracy is not a crime of violence, and the jury rendered a general verdict, meaning that we don't know which predicate it relied on. The Fourth Circuit said that, even assuming conspiracy was not a crime of violence (which it did not hold), there was no chance that the jury—which also convicted Draven of the carjacking offense—would have chosen *only* the conspiracy predicate, and not the carjacking predicate as well.

FILING A FALSE LIEN AGAINST A FEDERAL EMPLOYEE (18 U.S.C. § 1521)

***United States v. Reed*, 75 F.4th 396 (4th Cir. July 31, 2023) (Rushing, J.) (S.D. W. Va.)**

Reed was a long-time tax protestor who filed a bogus lien against the IRS agent who was investigating him. He filed the lien against the pseudonym the agent used for her work. He was convicted of filing a false lien or encumbrance against a federal employee, 18 U.S.C. § 1521.

On appeal, Reed argued that the evidence failed because he filed against a pseudonym, not “any officer or employee of the United States or of any agency in any branch of the United States government” or “any person assisting such an officer or employee.” The Fourth Circuit disagreed, holding that the pseudonym sufficiently identified the agent, and was not a “wholly fictitious persona.” Plus, the statute criminalizes attempts, and there was no question that Reed at least attempted to file a lien against the agent.

The Fourth Circuit also affirmed Reed's conviction for corruptly endeavoring to obstruct or impede the due administration of the Internal Revenue Code. That statute, 26 U.S.C. § 7212(a), reaches only “targeted” proceedings or investigations, not the “routine, day-to-day work carried out in the ordinary course by the IRS.” Here, the Fourth Circuit found the evidence sufficient to prove that Reed knew he was the subject of a targeted investigation, and that he corruptly tried to thwart it.

Finally, the court brushed aside Reed's challenge to three sentencing enhancements: for conduct (overt acts) evidencing an intent to carry out his threat (the false lien), based on letters he sent to the IRS; for causing or

threatening property damage, based on the lien's potential to damage the victim's property value or interest in their property; and for conduct "extensive in scope, planning, or preparation," based largely on the numerous filings Reed made.

CHILD PORNOGRAPHY (18 U.S.C. § 2251)

***United States v. Skinner*, 70 F.4th 219 (4th Cir June 8, 2023) (per curiam)**

Mr. Skinner lived in New Zealand. He chatted online with a 13-year-old girl in Virginia. These chats became sexual, and they each masturbated on camera for each other. Unknown to Mr. Skinner's victim, he also recorded her several times while she was in sexual positions.

Eventually, the victim told Mr. Skinner he wanted to end the relationship with him. So he flew to the United States, bought duct tape, pepper spray, and a knife and went to her house. He got to her house, and her mom would not let him in. So he tried to break in through a door, and the mom shot him.

Once police sorted everything out, Mr. Skinner was charged with 9 counts of producing child pornography. He entered a conditional plea that let him appeal the district court's denial of certain motions discussed below.

First, Mr. Skinner argued that because he was in New Zealand the whole time, the prosecution was an impressible extraterritorial application of the statute. The 4th rejected this claim—it agreed that the CP statute applies only domestically. But, relying on its recent decision in *United States v. Elbaz*, held that the act of knowingly sending chats to a victim in Virginia was enough to make his conduct domestic. The focus of the statute is the production of the illicit image, and that image was produced in Virginia.

Second, Mr. Skinner argued that the district court should have let him raise a mistake of age defense to the jury. Acknowledging that Section 2251 does not allow for mistake of age defense, Mr. Skinner nonetheless argued that Due Process demanded it in his case because he never saw his victim in person. He argues that in an online-only situation, the defense should be allowed because a defendant has no way to verify the victims age in person. The Court held open the possibility that Due Process might create some

situations where a defendant would have the right to a mistake of age defense. But Mr. Skinner’s case is nowhere near there. Chat logs with his victim show that he knew her age and knew what the relevant laws forbid. And the district court made factual findings based on some of the images that the victim clearly appeared underage—which Mr. Skinner did not challenge as clearly erroneous.

Finally, Mr. Skinner challenged the district court’s application of a two-level enhancement for “the commission of . . . sexual contact” during the offense. The 4th held that the Guidelines define “sexual contact” as the sexual touching of “any person,” so Mr. Skinner’s masturbating counts because he touched himself.

DRUG OFFENSES (21 U.S.C. § 841)

***United States v. Coby*, 65 F.4th 707 (4th Cir. Apr. 24, 2023) (Heytens, J.) (D. Md.)**

Mr. Coby was charged with six drug-related offenses, including conspiring to distribute fentanyl and heroin, knowingly distributing “a mixture and substance containing a detectable amount of . . . fentanyl,” and that the death of a woman “resulted from the use of such substance.” At the close of the government’s case, Coby moved for a judgment of acquittal, arguing the government failed to prove he distributed fentanyl and fentanyl was the drug that caused the woman’s death. The district court denied that motion then and when it was renewed. After instructing the jury about the conspiracy charge’s elements, it explained that, if the jury found Coby involved in the conspiracy beyond a reasonable doubt, it could convict on the substantive counts if (1) the offense was committed (2) by a member of the conspiracy, (3) pursuant to the common plan an understanding of the conspirators, (4) while Coby was a member of the conspiracy, and (5) Coby could have reasonably foreseen that it might be committed by his coconspirators. Coby was convicted of all six offenses and the jury found by special interrogatory that use of the fentanyl mixture distributed by Coby resulted in the death of the female victim.

Coby was sentenced to 40 years in prison. At sentencing, the district court increased his offense level by two because it found he was “an organizer, leader, manager, or supervisor” under USSG §3B1.1(c) and it increased it by

four because it concluded Coby misrepresented fentanyl as heroin based on a provision added to the Guidelines after the crimes of conviction were committed.

The court affirmed the convictions but remanded for resentencing. First, it held that Coby's conviction for distributing a mixture containing fentanyl and the death resulting from that distribution was supported by sufficient evidence. Coby did not object to the instruction explaining that he was charged with distributing a mixture containing fentanyl, from which the female victim's death resulted. The government thus was not required to prove that the victim died of a fentanyl overdose, but only from a substance containing fentanyl for whose distribution Coby was legally responsible. Because the jury heard evidence Coby supplied the drugs she consumed on the day of her death and she died three hours later from a drug overdose, a jury could conclude that substance caused her death.

Second, the court concluded that any instructional error on this count was harmless because the special interrogatory relied on fentanyl distributed by Coby and so it did not matter whether the jury was properly instructed on any theory of co-conspirator liability.

Third, the district court did not err in finding Coby was an organizer or leader because the government represented, and Coby did not object, that he extended over \$300K in credit to other dealers over a period of seven months and his apartment had four scales and drugs in different packaging and sizes, which was "more than one person would have needed." The court made plain it was not holding that fronting drugs—standing alone—is enough to support the leadership enhancement.

Fourth, the court vacated and remanded for resentencing because the district court applied a guideline enhancement that took effect on November 1, 2018—after the offense conduct charged in the indictment. Because Coby never argued the court was using the wrong manual, the Fourth Circuit applied plain error review. But under its precedent, all four prongs of plain error were satisfied.

***United States v. Kim*, No. 22-4221, 71 F.4th155 (4th Cir. June 20, 2023) (Traxler) (E.D.N.C.)**

Kim, a medical doctor, pleaded guilty to Section 841 charges for prescribing oxycodone and other controlled substances outside the usual course of professional practice and without a legitimate medical need. He did so before the Supreme Court's decision in *Ruan*. At the time of Kim's guilty plea, Fourth Circuit precedent held that whether a doctor's actions were authorized was an objective inquiry. *Ruan* changed that, holding that the statutory knowing-or-intentional mens rea applies not only to the distribution-related elements of the crime, but also to the question of authorization. In other words, if the defendant produces evidence that he was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that he knew he was acting in an unauthorized manner or intended to do so. The court affirmed the conviction, concluding that there was no error because, whether or not the district court adequately described the correct post-*Ruan* standard, the indictment may be considered to determine whether a plea is knowing and voluntary and the indictment reflected *Ruan*'s holding, even though it predated that decision and exceeded the government's burden under then-governing case law. That is sufficient, especially in light of Kim's characteristics: He was a "mature, well-educated, financially successful defendant who had no mental health conditions or substance abuse problems."

Even if error existed, the court held in the alternative that Kim could not show that his substantial rights were affected because he could not establish a reasonable probability he would have gone to trial if the charges had been more fully explained.

Kim also argued that the district court failed to give him an adequate opportunity to allocute before imposing sentence because it only invited him to speak after it had "express[ed] its views on the extent of Mr. Kim's moral culpability." The court quickly dispatched with that argument, citing its decision in *Engle*, which explained that a defendant does not have a right to allocate at a specific point in the sentencing proceeding and any pre-allocation statements by the sentencing court are presumed to be tentative, with the final sentence incorporating any impact of the defendant's allocation.

MAINTAINING A DWELLING (21 U.S.C. § 856)

***United States v. Hicks*, 64 F.4th 546 (4th Cir. Apr. 5, 2023) (Rushing, J.) (E.D.N.C.)**

In *US v. Hicks*, the Fourth Circuit rejected all of Mr. Hicks’ challenges to his jury convictions for maintaining a dwelling, PWID cocaine and marijuana, and FIP.

First, the Court held the government presented sufficient evidence of maintaining. The Court held that a drug-related purpose need not be the “sole purpose for maintaining the property” but must be “one of the defendant’s specific purposes for maintaining the property and not merely incidental to some other purpose.” The Court declined to decide whether to adopt the tests of other circuits as to whether the drug-related purpose must be “one of the primary or principal uses” or a “significant or important” purpose. The Court held there was sufficient evidence under any standard.

Specifically, Hicks admitted he lived there; cops found distribution amounts of marijuana and cocaine, as well as a cutting agent, digital scales, and packaging materials, in a search; Hicks said the marijuana was his and had a photo of one of the marijuana bags on his phone; some of the marijuana was packaged in 20 plastic bags for sale; cops found firearms in the house and in the BMW parked outside; an informant did two controlled buys of crack from Hicks at the house; and there was significant foot traffic to and from the house. It did not matter that Hicks also lived there and operated a barber shop from the kitchen. This same evidence supported his separate conviction for PWID cocaine and marijuana.

Second, the Court rejected Hicks’ challenge to the possession element of FIP because Hicks was found hiding “under a bed with his hand wedged between the mattress and box spring, one foot away from a handgun hidden there.” There were boxes of ammo (and loose ammo) in the house, photos on his phone of the ammo boxes and the BMW, spent casings and one of his utility bills in the BMW, and two firearms in the trunk. He also admitted to driving the BMW.

**IMPEDING THE DUE ADMINISTRATION OF THE INTERNAL REVENUE CODE
(26 U.S.C. § 7212(A))**

***United States v. Reed*, 75 F.4th 396 (4th Cir. July 31, 2023)
(Rushing, J.) (S.D. W. Va.)**

Reed was a long-time tax protestor who filed a bogus lien against the IRS agent who was investigating him. He filed the lien against the pseudonym the agent used for her work. He was convicted of filing a false lien or encumbrance against a federal employee, 18 U.S.C. § 1521.

On appeal, Reed argued that the evidence failed because he filed against a pseudonym, not “any officer or employee of the United States or of any agency in any branch of the United States government” or “any person assisting such an officer or employee.” The Fourth Circuit disagreed, holding that the pseudonym sufficiently identified the agent, and was not a “wholly fictitious persona.” Plus, the statute criminalizes attempts, and there was no question that Reed at least attempted to file a lien against the agent.

The Fourth Circuit also affirmed Reed’s conviction for corruptly endeavoring to obstruct or impede the due administration of the Internal Revenue Code. That statute, 26 U.S.C. § 7212(a), reaches only “targeted” proceedings or investigations, not the “routine, day-to-day work carried out in the ordinary course by the IRS.” Here, the Fourth Circuit found the evidence sufficient to prove that Reed knew he was the subject of a targeted investigation, and that he corruptly tried to thwart it.

Finally, the court brushed aside Reed’s challenge to three sentencing enhancements: for conduct (overt acts) evidencing an intent to carry out his threat (the false lien), based on letters he sent to the IRS; for causing or threatening property damage, based on the lien’s potential to damage the victim’s property value or interest in their property; and for conduct “extensive in scope, planning, or preparation,” based largely on the numerous filings Reed made.

MOTION FOR A NEW TRIAL/MOTION FOR ACQUITTAL

***United States v. Rafiekian*, 68 F.4th 177 (4th Cir. May 18, 2023)
(Wynn, J.; Niemeyer, J., dissenting) (E.D. Va.)**

This case provides a good distinction on the review given to a district court granting a motion of acquittal vs. granting a new trial.

Rafiekian was charged with conspiracy and acting as a foreign agent without notifying the Attorney General. After a jury trial where he was convicted on both counts, the district court granted a motion for a judgment of acquittal, concluding that there was insufficient evidence that Rafiekian had been operating “subject to the direction or control of that foreign government.” In the alternative, the court granted Rafiekian a new trial on several grounds.

The Government appealed. As to the judgment of acquittal, the court found that there was sufficient evidence to support Rafiekian’s convictions, when the evidence was viewed in the light most favorable to the Government. The court also vacated the grant of a new trial because it was only based on the district court’s erroneous conclusion as to the sufficiency of the evidence. The court remanded, noting that “the district court may have additional justifications for its decision.” On remand, the district court again granted the motion for a new trial, based largely on its conclusion that the jury had erroneously drawn certain inferences from witness testimony presented at trial.

On a second appeal, a divided Fourth Circuit affirmed the grant of a new trial. The court explained that the analysis of trial evidence is different when deciding whether to grant a new trial than it was when resolving a request for a judgment of acquittal. In the latter, the court must view the evidence in the light most favorable to the Government, including any inferences that could be drawn by the jury. By contrast, in ruling on a new trial motion, a district court can disagree with the jury’s weighing of the evidence when determining whether the “evidence weighs so heavily against the verdict that it would be unjust to enter judgment.” Reviewing the district court’s decision for abuse of discretion, the court found no such abuse in the district court’s decision. It rejected the Government’s argument that a new trial decision could not be based “solely on” the district court’s “disagreement with the jury’s inferences of guilt.” Ultimately, what matters is “not what kinds of evidence support the verdict, but the weight of that evidence.” In a case like this, where there was no metaphorical “smoking gun,” the Government’s “case relied on the jury’s drawing inferences of guilty,” leaving the district

court “no choice but to examine those inferences in considering the new-trial motion.”

ACCA

***United States v. Brown*, 67 F.4th 200 (4th Cir. May 3, 2023) (Niemeyer, J.; Heytens, J., concurring) (W.D.N.C.)**

Mr. Brown sold a handgun to an undercover cop and was indicted for felon in possession of a firearm. The indictment did not allege whether he was subject to ACCA. The defendant pled guilty and the PSR concluded he was subject to ACCA’s enhanced penalties based on three NC convictions. At sentencing, the district court relied on information from state court records included in the PSR, found that the three convictions were committed on different occasions, and sentenced Mr. Brown under ACCA. Mr. Brown objected under the Fifth and Sixth Amendments. He argued that “even if the fact of his convictions could constitutionally be found by the court at sentencing under the holding of *Almendarez-Torres*, the fact that the underlying offenses had been committed on different occasions should have been charged in his indictment and found by the jury or admitted by him in his guilty plea.” The district court overruled the objection based on existing precedent.

By the time of the appeal, the government had changed its tune and agreed with Mr. Brown that only a jury can find that ACCA predicates were committed on different occasions (though the government argued the error was harmless). But despite the agreement of the parties as to error, the Fourth Circuit affirmed, describing ACCA as a recidivism enhancement that was a sentencing matter for the district court. Unfortunately, the Fourth Circuit held it was bound by *Almendarez-Torres* and its own previous decision in *United States v. Thompson*, which authorizes sentencing courts to consult “conclusive judicial records” and determine whether the defendant’s prior convictions were committed on different occasions. The Court further held that *Descamps*, *Mathis*, and *Wooden* did not fatally undermine *Thompson*. Thus, the Court held ACCA’s requirement that a defendant’s three predicate convictions be “committed on occasions different from one another” need not be alleged in the indictment and found by a jury or admitted by the defendant.

In later denying en banc rehearing the Court all but admitted that its prior precedents were no longer tenable, but a majority of the Court wants to wait for the Supreme Court to weigh in on the issue, which it almost certainly will in some case soon because all of the circuit courts are struggling with this issue.

***United States v. Ogle*, No. 21-4043, ____ F.4th ____ (4th Cir. Sept. 13, 2023) (Rushing, J.) (S.D. W. Va.)**

Ogle pleaded guilty to being a felon in possession of a firearm, and at sentencing, the district court determined that he qualified for the ACCA. That finding depended on the classification of Ogle's Tennessee conviction for aggravated assault as a violent felony.

On appeal, the Fourth Circuit affirmed the ACCA sentencing. It held that the Tennessee statute was divisible, and that Ogle had been convicted of the version of the offense involving "knowingly and feloniously causing his victim to reasonably fear imminent bodily injury through the use of a deadly weapon," which meant that he had admitted to "use or display of a deadly weapon." That display of a weapon meant that the assault "necessarily" involved "a threat of violent force." Even if the assault element required only de minimis force, the aggravating weapon element necessarily involved the threat of force because it required that the assault be accomplished through the use of a weapon.

"IN CONNECTION WITH ANOTHER FELONY OFFENSE" (U.S.S.G. § 2K2.1(B)(6))

***United States v. Dix*, 64 F.4th 230 (4th Cir. Apr. 5, 2023) (Niemeyer, J.; King, J., dissenting in part) (D.S.C.)**

The defendant in *US v. Dix* was driving a truck when an officer pulled up behind him. He then sped away; the officer activated his blue light, and a high-speed chase ensued until Mr. Dix crashed the truck. A gun and ammunition were found in the truck, and Mr. Dix (a felon) pleaded guilty to 922(g).

The PSR recommended the 4-level enhancement under USSG 2K2.1(b)(6)(B) for using or possessing the gun in connection with another

felony offense—theft of the truck he was driving. It came out at sentencing that Mr. Dix had permission to use the truck and that the owner reported it stolen to scam her insurance company. So he did not steal it.

Then the government switched gears and said that the gun was possessed in connection with the felony offense of failing to stop for the blue light. Mr. Dix objected, arguing that he had no notice of the alternative felony offense alleged and that, in any event, how the heck does possessing a gun connect to failing to stop for a blue light? The court applied the enhancement, and Mr. Dix appealed.

The 4th Circuit agreed that the district court procedurally erred by applying the enhancement without notice. But, it held, the lack of notice was harmless. It said that Mr. Dix did not move for a continuance to address the new information. And he made a substantive argument in response, and he could not identify on appeal any arguments or evidence that he would have presented had he had notice.

The 4th also held that the district court did not clearly err in substantively applying the enhancement because possessing the gun could have “emboldened” Mr. Dix to flee from the officer when he turned on his blue lights.

The “emboldened” holding, while bad for defendants, does not break new ground; the law is very defendant-unfriendly in this area.

The procedural holding puts defense lawyers in a really bad position. The court held that the error was harmless in part because his trial lawyer addressed the merits of the argument. But if his lawyer did not address the merits, then he had no chance to win, and the 4th on appeal might say that he waived his arguments. And, as you know, lots of factors go into seeking a continuance, so it is not as easy to just say that you can “just” move for a continuance.

All that said, if you are sandbagged at sentencing, and you do think that more time will actually help you respond, ask for that continuance.

***United States v. Miller*, 75 F.4th 215 (4th Cir. July 21, 2023)
(M.D.N.C.)**

After engaging in a gang-related shootout, Miller was charged with two counts of possession of a firearm after a felony conviction. He pleaded guilty, but argued on appeal that the indictment, plea colloquy, and statement of facts inadequately charged the element that he knew of his status as a felon. On plain error review, the Fourth Circuit rejected those claims: First, the indictment clearly charged the knowledge element; second, the district court suitably addressed that element in describing the nature of the charges; and third, there was an adequate factual basis for that element based on evidence that Miller had signed state-court documents indicating that he knew he had been convicted of a felony, combined with his statements indicating that he had read and understood the indictment and understood the district court's recitation of the elements.

Miller also challenged the reasonableness of his sentence. First, he argued that the district court erred in increasing his offense level after finding that the firearm was used in connection with the felony of assault with intent to kill. The Fourth Circuit disagreed, stating that North Carolina law does not require an identified victim for that offense, and that the district court did not clearly err in finding that Miller had an intent to kill whoever he shot at. Second, the Court held that North Carolina's drug distribution statute was a controlled substance offense because, like federal law (*Groves*), North Carolina separately punishes attempts, so the distribution statute is not overbroad (as in *Campbell*). Finally, the district court did not rely on erroneous factual findings at sentencing when it concluded that Miller was in a gang due to the strong evidence of his gang involvement. The Fourth Circuit did remand for resentencing anyway in light of the government's concession that the district court had improperly applied two criminal history points.

***United States v. Mitchell*, 78 F.4th 661 (4th Cir. Aug. 17, 2023)
(Benjamin, J.) (E.D.N.C.)**

Mitchell was inside a car, stopped on a rural road at a stop sign with the engine running, while "non-responsive and slumped over in the driver seat with a gun in his right hand." Police arrived and tried to rouse him after they secured the gun. When he awoke, at first Mitchell just stared at police. When

one officer tried to remove Mitchell from the car, Mitchell punched him in the face, causing the officer to fall over and hit his face. After a struggle, the police eventually got Mitchell out of the car; they found a baggie containing cocaine in his pocket.

The primary issues on appeal were two sentencing enhancements—a six-level increase for assault of a law enforcement officer that created a serious risk of serious bodily injury, and a four-level increase for possessing the firearm in connection with another felony (cocaine possession).

The panel split on both enhancements. As for the six-level increase, Judges Benjamin and Rushing held that the district court made sufficient factual findings, that the evidence of assault was sufficient, that Mitchell acted knowingly, and that the assault created a serious risk of serious bodily injury (even though no actual injury occurred). Judge Keenan dissented, arguing that the district court’s factual findings were insufficient to support the enhancement.

With respect to the four-level enhancement, Judges Benjamin and Keenan held that the district court did not make sufficient factual findings that the firearm possession facilitated the cocaine possession, rather than merely being coincidental. Judge Rushing dissented as to that enhancement, arguing that the judge’s findings were adequate.

ENHANCEMENT FOR ASSAULTING A LAW ENFORCEMENT OFFICER
(U.S.S.G. § 3A1.2(C)(1))

***United States v. Mitchell*, 78 F.4th 661 (4th Cir. Aug. 17, 2023)**
(Benjamin, J.) (E.D.N.C.)

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GUIDELINES SERIOUS DRUG OFFENSE DEFINITION (U.S.S.G. § 4B1.2)

***United States v. Groves*, 65 F.4th 166 (4th Cir. Apr. 14, 2023) (King, J.) (N.D. W. Va.)**

In *Groves*, the defendant unsuccessfully asked the Fourth Circuit to apply *United States v. Campbell* and hold that 21 U.S.C. § 841 is not a “controlled substance offense.”

The opinion rejects the application of *Campbell* to Section 841, reasoning that the federal statutes criminalize attempted offenses separately from completed ones, and that an “attempted transfer” (which is found in the definition of the word “delivery”) is nonetheless a completed distribution offense. The panel distinguishes *Campbell*, claiming that the West Virginia scheme at issue in that case was different because “the West Virginia scheme — at least as it was presented in *Campbell* — does not criminalize attempt offenses separately from completed drug distribution offenses. That renders the West Virginia scheme materially different from the federal scheme, wherein completed drug distribution offenses are defined in § 841(a)(1) and attempt offenses in 21 U.S.C. § 846.”

Groves also hints that *Campbell* may have improperly construed the West Virginia statute, but that *Campbell* is nonetheless binding. But it certainly looks like the 4th Circuit has no appetite to extend it any further.

The Court also held that aiding and abetting a Section 841(a) offense of distribution is a “controlled substance offense” under the Guidelines.

***United States v. Davis*, 75 F.4th 428 (4th Cir. Aug. 1, 2023) (King, J.) (D.S.C.)**

Davis was the driver and lone occupant in a vehicle that police attempted to pull over for a traffic violation. He sped away for a few miles, eventually stopping the car and fleeing on foot. Once police seized him, they found a variety of pills in his pocket, and then found a firearm in the car. He was charged with possession with intent to distribute fentanyl and oxycodone, as well as possessing a firearm in furtherance of a drug trafficking offense.

While in pretrial custody, Davis made a recorded call from the jail to his girlfriend. During that call, he said that he told police when he was arrested that “none of that ain’t mine. If it was mine, I would claim it” (“the exculpatory comment”). A few minutes later, Davis told his girlfriend, “I ain’t want to talk about the gun got in the car” (“the inculpatory comment”).

At trial, the government introduced the inculpatory comment to prove that Davis knew the gun was in the car. He unsuccessfully objected that the “rule of completeness” in Fed. R. Evid. 106 required the court to admit the exculpatory comment as well. The Rule provides that “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”

The Fourth Circuit affirmed, holding that the rule of completeness does not require the admission of “self-serving, exculpatory statements made by a party which are being sought for admission by that same party.” The Court also noted that the exculpatory comment was likely hearsay as well (although it did not squarely hold as much), and the rule does not override the general hearsay prohibition.

(One takeaway: The Court said that admission of the exculpatory statement was “not necessary to avoid misleading the jury, and it was not needed to place the inculpatory firearm comment in proper context,” so if this comes up in your case, you could try arguing that those circumstances did apply to the statement you want admitted.)

In addition that evidentiary issue, the Court quickly rejected challenges to the sufficiency of the evidence of constructive possession of the firearm in the car; and to the district court’s refusal to give a jury instruction on the lesser-included offense of simple possession of the drugs, finding that there was essentially no evidence that would have supported an argument that the drugs were for personal use instead of distribution.

Finally, the Fourth Circuit held that Davis had properly been designated as a career offender because his South Carolina drug distribution convictions were controlled substance offenses. The Court distinguished its *Campbell* decision (which held that a West Virginia statute criminalizing “attempt to deliver” drugs was overbroad since the Guidelines did not reach attempt crimes) by saying that, under South Carolina law, an “attempted transfer” is an actual distribution, and not an “attempt to deliver.” This seems like the thinnest of hairs to split, but the Court has shown no inclination to read its *Campbell* decision broadly.

***United States v. Miller*, 75 F.4th 215 (4th Cir. July 21, 2023) (M.D.N.C.)**

After engaging in a gang-related shootout, Miller was charged with two counts of possession of a firearm after a felony conviction. He pleaded guilty, but argued on appeal that the indictment, plea colloquy, and statement of facts inadequately charged the element that he knew of his status as a felon. On plain error review, the Fourth Circuit rejected those claims: First, the indictment clearly charged the knowledge element; second, the district court suitably addressed that element in describing the nature of the charges; and third, there was an adequate factual basis for that element based on evidence that Miller had signed state-court documents indicating that he knew he had been convicted of a felony, combined with his statements indicating that he had read and understood the indictment and understood the district court’s recitation of the elements.

Miller also challenged the reasonableness of his sentence. First, he argued that the district court erred in increasing his offense level after finding that the firearm was used in connection with the felony of assault with intent to kill. The Fourth Circuit disagreed, stating that North Carolina law does not require an identified victim for that offense, and that the district court did not clearly err in finding that Miller had an intent to kill whoever he shot at. Second, the Court held that North Carolina's drug distribution statute was a controlled substance offense because, like federal law (*Groves*), North Carolina separately punishes attempts, so the distribution statute is not overbroad (as in *Campbell*). Finally, the district court did not rely on erroneous factual findings at sentencing when it concluded that Miller was in a gang due to the strong evidence of his gang involvement. The Fourth Circuit did remand for resentencing anyway in light of the government's concession that the district court had improperly applied two criminal history points.

EX POST FACTO REGARDING GUIDELINES

***United States v. Coby*, 65 F.4th 707 (4th Cir. Apr. 24, 2023) (Heytens, J.) (D. Md.)**

Mr. Coby was charged with six drug-related offenses, including conspiring to distribute fentanyl and heroin, knowingly distributing "a mixture and substance containing a detectable amount of . . . fentanyl," and that the death of a woman "resulted from the use of such substance." At the close of the government's case, Coby moved for a judgment of acquittal, arguing the government failed to prove he distributed fentanyl and fentanyl was the drug that caused the woman's death. The district court denied that motion then and when it was renewed. After instructing the jury about the conspiracy charge's elements, it explained that, if the jury found Coby involved in the conspiracy beyond a reasonable doubt, it could convict on the substantive counts if (1) the offense was committed (2) by a member of the conspiracy, (3) pursuant to the common plan an understanding of the conspirators, (4) while Coby was a member of the conspiracy, and (5) Coby could have reasonably foreseen that it might be committed by his coconspirators. Coby was convicted of all six offenses and the jury found by special interrogatory that use of the fentanyl mixture distributed by Coby resulted in the death of the female victim.

Coby was sentenced to 40 years in prison. At sentencing, the district court increased his offense level by two because it found he was “an organizer, leader, manager, or supervisor” under USSG §3B1.1(c) and it increased it by four because it concluded Coby misrepresented fentanyl as heroin based on a provision added to the Guidelines after the crimes of conviction were committed.

The court affirmed the convictions but remanded for resentencing. First, it held that Coby’s conviction for distributing a mixture containing fentanyl and the death resulting from that distribution was supported by sufficient evidence. Coby did not object to the instruction explaining that he was charged with distributing a mixture containing fentanyl, from which the female victim’s death resulted. The government thus was not required to prove that the victim died of a fentanyl overdose, but only from a substance containing fentanyl for whose distribution Coby was legally responsible. Because the jury heard evidence Coby supplied the drugs she consumed on the day of her death and she died three hours later from a drug overdose, a jury could conclude that substance caused her death.

Second, the court concluded that any instructional error on this count was harmless because the special interrogatory relied on fentanyl distributed by Coby and so it did not matter whether the jury was properly instructed on any theory of co-conspirator liability.

Third, the district court did not err in finding Coby was an organizer or leader because the government represented, and Coby did not object, that he extended over \$300K in credit to other dealers over a period of seven months and his apartment had four scales and drugs in different packaging and sizes, which was “more than one person would have needed.” The court made plain it was not holding that fronting drugs—standing alone—is enough to support the leadership enhancement.

Fourth, the court vacated and remanded for resentencing because the district court applied a guideline enhancement that took effect on November 1, 2018—after the offense conduct charged in the indictment. Because Coby never argued the court was using the wrong manual, the Fourth Circuit applied plain error review. But under its precedent, all four prongs of plain error were satisfied.

PRESERVATION OF SENTENCING ERROR FOR APPEAL

***United States v. Covington*, 65 F.4th 726 (4th Cir. Apr. 26, 2023) (Richardson, J.) (E.D.N.C.)**

Joel Covington pleaded guilty to escaping from custody in a halfway house and was sentenced to 60 months' imprisonment—the statutory maximum for his crime of conviction. After he allocuted but before his lawyer made any arguments, the judge announced that the minimum sentence he would receive was the stat max of 60 months. He told Covington's lawyer to "make your record" and he would "take into account and deliberate on every one of your arguments." Defense counsel made several arguments for a lower guideline range and sentence. The judge said: "I've listened deliberately to each and every word that you've said . . . and I find that absolutely none of it is convincing and that it is at variance with the reality of this case." The government argued against Covington's guideline objections, the judge adopted and agreed with the government's arguments, elaborated on its reasons for selecting the sentence, and imposed a 60-month sentence. The judgment adopted the revised presentence report without change.

The Fourth Circuit affirmed the sentence, rejecting Covington's arguments that his sentence was announced before his attorney argued. The court first explained it would review his first claim only for plain error because the specific objection to the court announcing his sentence early in the hearing was not made in the district court.

Significantly, this case cabined the defense-friendly preservation holding from *United States v. Lynn*. Under *Lynn*, asking for a sentence lower than the one your client ultimately received preserved all procedural reasonableness arguments for appellate review. Well, those days are over. From now on, this standard will apply: "A general objection to sentence length does not preserve a specific allegation of error unless the 'context makes the finer, more specific [objection] obvious.'" In other words, "lodging one specific claim of procedural sentencing error before the district court . . . does not preserve for appeal a different claim of procedural sentencing error."

APPEAL WAIVERS

***United States v. Sturtz*, 70 F.4th 740 (4th Cir. June 14, 2023) (Niemeyer, J.) (D. Md.)**

Mr. Sturtz was charged with possession and distribution of child pornography and entered into a plea agreement with the Government to plead guilty to the possession count, while the distribution count was dismissed. The parties disagreed about whether a prior conviction from Maryland triggered the 10-year mandatory minimum for possession and, thus, the plea agreement explicitly reserved Sturtz's ability to argue the point at sentencing. The plea agreement also included a waiver of appellate rights in which Sturtz agreed not to appeal any sentence below an offense level 30. That offense level, which was calculated in the PSR, produced an advisory Guideline range of 108 to 135 months, pending the resolution of the prior conviction issue. The district court concluded the prior conviction triggered the mandatory minimum and imposed a sentence of 120 months in prison.

The Fourth Circuit dismissed Sturtz's appeal, rejecting his challenge to the district court's ruling. The court found the waiver language "unambiguous" and applied, given the sentence Sturtz ultimately received. It rejected his argument that the waiver did not apply because the advisory Guideline range without the prior conviction enhancement was below 120 months "his sentence can be reviewed on appeal based on the exception allowing him to appeal a sentence that exceeds any sentence within the advisory guideline range." The court also rejected the argument that the waiver only applied to a correctly calculated Guideline range.

FIRST STEP ACT SECTION 404

***United States v. Smith*, 75 F.4th 459 (4th Cir. Aug. 3, 2023) (Diaz, J.) (E.D. Va.)**

Smith had been convicted of conspiracy to distribute crack cocaine and received the then-mandatory minimum 240-month sentence (which was above the guideline range of 181 to 235 months). He sought relief under the First Step Act, noting that the mandatory minimum was now only 120 months. The district court denied the motion, finding Smith eligible for relief, but declining to grant it. The court found the new guideline range to

be 130 to 162 months, but observed that (1) 240 months was still within the statutory maximum; (2) the amount of crack attributable to Smith was just below the new threshold for the 240-month mandatory minimum; and (3) the court had “strong suspicion” that Smith had been involved in an informant’s murder.

On appeal, the Fourth Circuit affirmed. It found that the actual guideline range was 151 to 188 months, which was higher than the one the district court used. Accordingly, there was no reasonable probability that the district court would have imposed a lower sentence under a higher guideline range. The Court also found the sentence to be substantively reasonable based on the totality of the circumstances the district court cited.

Finally, n.b. the Court’s footnote 3: “We calendared this case for the express purpose of considering how *Swain* [another First Step Act case involving retaining an existing sentence despite significantly reduced guidelines] applied here. Yet even though Smith relied repeatedly on *Swain* in his opening brief, the government’s response failed to cite it. We remind the government—and all other litigants—that when we ask for the parties’ views on the import of a case to the appeal, we expect the parties to address it.”

COMPASSIONATE RELEASE

***United States v. Brown*, 78 F.4th 122 (4th Cir. Aug. 16, 2023) (Gregory, J.; Quattlebaum, J., dissenting) (E.D. Va.)**

Brown had been convicted in 2014 of two 18 U.S.C. § 924(c) offenses. At the time, the second of those convictions required a consecutive 25-year sentence. He received a total of 687 months in prison. In 2020, he filed a motion for compassionate release, arguing that he had an increased risk of complications if he contracted COVID-19, and that he had rehabilitated himself in prison. The district court denied relief, but the Fourth Circuit remanded because the court did not consider all of Brown’s arguments.

On remand, Brown additionally argued that recent changes to § 924(c) meant that—if sentenced today—he would only be subject to a five-year consecutive sentence, instead of 25. The district court did not agree with Brown’s COVID-related arguments, and did not address the § 924(c) argument because it had not been submitted to the warden first.

In the second appeal, the Fourth Circuit found no error in the district court’s treatment of the COVID claims. But it concluded that the district court erred with respect to the § 924(c) argument. First, intervening Fourth Circuit law provided that Brown did not have to exhaust that claim within the BOP before presenting it in court. Second, the changes to § 924(c), combined with the impact on Brown’s sentence, constituted “extraordinary and compelling circumstances” warranting relief. But instead of remanding for reconsideration, the majority held that the record “so clearly favor[ed] a sentence reduction” that it simply remanded with instructions to grant the motion and reduce the sentence to 447 months.

DEATH PENALTY

***United States v. Council*, 77 F.4th 240 (4th Cir. Aug. 9, 2023) (Heytens, J.) (D.S.C.)**

Council committed a bank robbery, during which he shot and killed a teller and the bank manager. He was convicted of bank robbery resulting in death and using and carrying a firearm during and in relation to a crime of violence in a manner causing death. The jury imposed the death penalty.

Council raised four challenges to the guilt phase of the trial, but the Fourth Circuit rejected them all. First, he argued that the district court—after raising potential competency issues—should have ordered an independent evaluation rather than relying on the defense expert’s examination. The Fourth Circuit found no abuse of discretion, even if an independent evaluation was preferable, given the representations of counsel regarding Council’s communications with them and their vigorous objection to an evaluation that might lead to damaging information coming into the hands of the government. Second, the district court did not abuse its discretion in denying a fifth continuance of the trial date, given the wide latitude afforded to district judges in managing their dockets and the weakness of the defense’s arguments as to the need for more time. Third, the district court was not obligated to ask jurors Council’s proposed voir dire questions about racial bias and attitudes, because the judge did ask some (more generic) questions on that subject, and Council’s attorneys did not ask their requested questions during the available period of attorney-led voir dire. Fourth, defense counsel affirmatively waived the *Batson* claim he attempted to raise on appeal.

Council also raised four challenges to the sentencing phase of the proceeding; they too were unsuccessful. First, the Fourth Circuit found that certain of the aggravating circumstances (the murder was for pecuniary gain and the murder was not necessary to achieve the robbery) were not “inherently contradictory,” and that others did not result in impermissible “triple counting,” noting that duplicative aggravators are not necessarily unconstitutional, and that the factors focused on different aspects of the crime or Council’s conduct. Second, the district court did not err in admitting victim impact testimony that was allegedly too extensive and arguably addressed harm to the community rather than the victims, particularly since there was no objection during the testimony. Third, the district court did not fail to give a required instruction that the jury not consider race in its penalty determination, as that language was covered in other instructions, and additional language Council requested was substantially included in instructions that the court gave, or not an abuse of discretion to omit. Finally, Council’s belated challenge to his death sentence in a Rule 33 motion (filed more than a year and a half after the verdict) was properly denied as untimely, and in any event, Council had post-conviction avenues to seek relief.

SECTION 2255

***In re McNeill* 68 F.4th 195 (4th Cir. May 22, 2023) (Wynn, J.) (E.D.N.C.)**

In 2009, McNeill was convicted by a jury of being a felon in possession of a firearm. He was sentenced to 180 months’ imprisonment. He unsuccessfully appealed and filed an unsuccessful initial Section 2255 postconviction motion.

After the Supreme Court decided *Rehaif*, McNeill moved in the Fourth Circuit to file a second or successive Section 2255 petition.

The Fourth Circuit held that *Rehaif* did not announce a new constitutional rule (it was a rule of statutory interpretation). Therefore, it denied permission to file a second or successive 2255. However, it held that McNeill could file a Section 2241 motion under the savings clause because the remedy

provided by a Section 2255 motion would be “inadequate or ineffective to test the legality of his detention.”

NOTE: Soon after this opinion issued the Supreme Court issued *Jones v. Hendrix*, which held that litigants in Mr. McNeill’s position CANNOT file a Section 2241 motion. So that part of *McNeill* is no longer good law.