

Supreme Court and Fourth Circuit Court of Appeals Update

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

McKimmon Center
Raleigh, NC

**Including published 4th Circuit criminal cases issued between
October 18, 2022, and March 31, 2023, and selected Supreme
Court criminal cases yet to be decided this term.**

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INTRODUCTION

This presentation is divided into two parts. The first part summarizes all Fourth Circuit criminal cases published between October 18, 2022, and March 31, 2023. The second part previews upcoming Supreme Court cases that may have a significant impact on federal criminal practice going forward. Note that not every issue raised in every case is discussed. Our focus, instead, is on the more relevant holdings in each case.

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Fourth Amendment/Searches/Warrant Requirements

***United States v. Miller*, 54 F.4th 219 (4th Cir. Nov. 29, 2022) (Gregory, Agee, Diaz):**

Here, the Fourth Circuit relied on dashcam footage to reject the district court's findings about a traffic stop and hold that the officer conducting the stop did not have reasonable suspicion to extend the stop.

Specifically, the Fourth said that the video evidence refuted the officer's testimony that the driver, Teresa Miller, was (1) slow to pull over (she pulled over within 17 seconds at the first available spot) and was (2) excessively nervous. Contrary to the court's findings and the officer's testimony, the Fourth said Miller's hands were not shaking, and that she did not speak nervously, but was instead "simply making related small talk and responding to questions." The Fourth also rejected the idea that Miller's tapping her fingers on the car door was a sign of excessive nervousness:

"But tapping is not an indicator of excessive or sustained nervousness because it is completely consistent with law abiding behavior. Although fidgeting may certainly be a sign of nervousness, tapping one's fingers may just as likely be a sign of annoyance, impatience, or even boredom—any of which may be expected when a person is stopped by a police officer and is awaiting the results of a license check. By itself, tapping one's fingers is a very weak indicator of nervousness."

Another great quote: "Just as officers are not required to complete a traffic stop as quickly as humanly possible, drivers should not be required to pull over as quickly as humanly possible—especially when a driver may need to continue driving for a slightly longer amount of time to reach a safer stopping point—as long as the time it took to stop was reasonable."

Finally, the Fourth said that the fact that Miller was traveling on a "known drug corridor" was not probative of criminal behavior.

Miller is a good opinion to cite if you have a case where waiting for the drug dog only extends the stop by a few minutes. Here, the officer who conducted the stop was a K-9 officer, so the dog was already on scene. After printing out Miller's warning ticket, the officer walked the dog around the car only a minute later. The dog alerted, and a search of the vehicle was conducted within five minutes. Nonetheless, extension of the stop was unreasonable.

If you listen to the oral argument, you will see just how important dashcam footage can be to help the appellate court understand what really happened.

***United States v. Taylor*, 54 F.4th 795 (4th Cir. Dec 5, 2022) (Gregory, Wynn, Thacker):**

Taylor was involved in the trafficking of marijuana from Arizona to Maryland. Her involvement was uncovered partly due to the Government's obtaining of cellphone-related records pursuant to the Stored Communications Act and the Rules of Criminal Procedure. That information led to a GPS tracking warrant and, eventually, search warrants which were executed on various properties. Taylor was convicted at trial on multiple drug offenses and sentenced to 144 months in prison. She then filed a 2255 motion arguing that her trial counsel had been ineffective for failing to move to suppress the evidence found as a result of the warrants. The district court denied the motion, concluding that any motion to suppress would not have been successful.

On appeal, the Fourth Circuit affirmed. While noting that the law in the area of how and when the Government can obtain cellphone data has been in flux, at the time of these operations it had complied with applicable statutory and regulatory provisions. As a result, any motion to suppress would have been subject to a good faith analysis and would have been denied. As the evidence would have been admissible, there was no ineffective assistance of counsel based on not trying to suppress it.

We, of course, strive to be more than minimally constitutionally effective for our clients, so in such a situation, you should totally file the motion to suppress.

***United States v. Peters*, 60 F.4th 855 (4th Cir. Feb 24, 2023) (Gregory, Traxler, Floyd):**

Creighton Court and the Richmond PD had a memorandum of understanding authorizing officers to enforce state trespass laws on the property. On the afternoon of February 3, 2019, RPD officers Butler, an 8-year veteran, and Cooper, a trainee, were in their patrol car when they spotted Garrison and Peters walking down the sidewalk in the 2000 block of Creighton Road. Butler recognized Garrison as someone prohibited from being in Creighton Court. He also recognized Peters and knew he had been arrested for trespassing in 2011. But he did not know where the 2011 trespass charge occurred or how it had been resolved.

In addition to the 2011 trespass charge, Butler had received an uncorroborated tip a month earlier from a CI who said that a drug dealer named “Amp” was selling crack from an address at Creighton Court. When shown a photo, the CI identified Peters as “Amp,” prompting Butler to review Peters’ info. Police records showed that Peters’ last known address was a location outside Creighton Court, and he had three separate alerts showing that Peters was believed to be: (1) a “gang member,” as alerted in 2011; (2) a “narcotics seller/user,” as alerted in 2009; and (3) “probably armed,” as alerted in 2009.

With this info in mind, Butler and Cooper activated their body-cams and approached Garrison and Peters. *Notably, the Fourth Circuit opinion relies entirely on the body-cam footage for its factual recitation of the police encounter—NOT the district court’s factual findings—underscoring how critical the footage can be, and how the right panel can view such footage very differently than the DJ.

Speaking in “stern” and “authoritative” voices, Butler told the men they were “not supposed to be out here” and asked if they had guns. Garrison and Peters said no and kept walking. The officers then told them to raise their shirts. Garrison did so and kept walking. Peters, who was dressed in “skinny jeans” and a hooded sweatshirt, only partially lifted his shirt and stopped walking when the officers repeated their request. Butler then alternated between asking Peters to lift his shirt and stating that he was barred from the area. He addressed Peters as “Amp” and asked if he had an official form of identification. Peters responded that he did not and asked that Officer Butler search his name in the police records to verify that he was not barred. Peters also asked a bystander to call his mother. Butler and Peters then discussed what would happen next:

Officer Butler: So you don’t mind if [Officer Cooper] pats you down?

Peters: I don’t want him to pat me down. Why he got to pat me down?

Officer Butler: So, you just want me to take you to jail then?

Peters: For what?

Officer Butler: For trespassing.

After repeatedly being threatened with arrest for trespassing (in response to which Peters insisted they check the records to verify he was not barred),

Peters lifted his shirt above his belt buckle, revealing the muzzle of a pistol tucked into his pants.

At the suppression hearing, Butler testified that the sole basis for the stop was to investigate potential trespassing—not drug trafficking. Butler verified that the only basis he had to believe that Peters was trespassing was his 2011 arrest. Butler also testified he suspected Peters was armed because of his skinny jeans (which apparently work a lot better than baggy jeans when you want to secure your gun in your waistband) and his refusal to fully lift his shirt.

Despite Butler’s testimony, the government on appeal argued that eight factors created reasonable suspicion that Peters was trespassing and armed: (1) a confidential informant identified Peters as a person who sold crack cocaine from a specific address in Creighton Court; (2) the confidential informant was previously reliable; (3) Peters’s “last known address” was not in Creighton Court; (4) Peters “was present with Garrison,” an individual the officers stated was barred from Creighton Court; (5) Peters was “nearly in front of” the building where the informant said Peters sold drugs; (6) Peters had a 2011 arrest for trespass; (7) three police alerts marked Peters as a gang member in 2011, a buyer or seller of narcotics in 2009, and “probably armed” in 2009; and (8) Officer Butler observed drug-trafficking in Creighton Court where he found “drug-dealing and armed violence was one [of] the residents’ chief complaints to [the] police”—none of such observations involved Peters.

But Chief Judge Gregory, joined by Judge Floyd, said these factors, even when combined, were not enough. Neither Peters’ criminal history nor the police database could provide reasonable suspicion without more specific facts. The Fourth also said that the CI’s tip “could not have significantly elevated the police officers’ suspicion” and that it was “of crucial importance that Officer Butler had not taken any notable steps to corroborate” the CI’s statement. Similarly, the location was of little value, and the fact that Peters was with Garrison, a known trespasser, did not create RS as to Peters. The majority said the officers’ actions were “more indicative of a generalized sweep for guns than a particularized suspicion of criminal activity.”

Judge Traxler dissented, citing the district court’s findings. The majority, however, took pains to explain why it believed the record did not support the lower court’s findings.

You definitely want to flag this opinion not just for your Fourth Amendment cases but for an important discussion on pages 14-15 questioning the “general

reliability of gang alerts and databases,” which could prove useful in a variety of situations, not just suppression hearings.

***United States v. Sueiro*, 59 F.4th 132 (4th Cir. Feb. 3, 2023) (Keenan, King, Richardson):**

Christopher Sueiro sent emails threatening to kill his former coworker. Based on these emails, the police obtained a warrant to search his residence, which he shared with another unrelated man. During the search, officers seized several computers and hard drives and, with additional warrants to search them, found evidence of child pornography. Sueiro was charged with child pornography offenses. He moved to suppress the seized devices, arguing that the initial warrant was overbroad. The motion was denied and Sueiro was sentenced to 240 months’ imprisonment and lifetime supervised release with special conditions. On appeal, Sueiro challenged denial of the motion to suppress and argued that his term of imprisonment and special conditions were procedurally and substantively unreasonable.

The Fourth Circuit affirmed denial of the motion to suppress, held that the term of imprisonment and one special condition were reasonable, and vacated and remanded for reconsideration of three unexplained special conditions.

With respect to the motion to suppress, the court held that the warrant was adequately supported by probable cause because the suspected offense was committed by electronic means and allowed seizure of all electronic devices within Sueiro’s home. As to the term of imprisonment, the court held that the district court adequately considered the need to avoid sentencing disparities when it carefully reviewed and calculated Sueiro’s advisory guideline range—it was not required to specifically address other cases cited by Sueiro’s counsel and compare their sentences to his. It also adequately addressed Sueiro’s argument that the guideline range is “absurdly high compared to far worse crimes” when it restated that argument and said it had considered it and was consulting the guidelines and the 3553(a) factors in determining Sueiro’s sentence.

The court also upheld as procedurally reasonable a special condition of supervised release prohibiting Sueiro from viewing sexually explicit images of minors because the reason for the condition, given Sueiro’s crimes of conviction, was “so self-evident and unassailable.” However, the court found the district court failed to provide any particularized explanation for imposing three additional conditions—barring Sueiro from (1) engaging in employment

or volunteer activities with access to computers, (2) viewing adult pornography, and (3) using any video game system that would allow communication with other people. The court thus vacated those conditions and remanded for resentencing on them alone.

***United States v. Ebert*, 61 F.4th 394 (4th Cir. March 3, 2023) (Agee, Diaz, Quattlebaum):**

The Fourth Circuit affirmed Ebert's conviction and sentence for one count of sexual exploitation of a minor and one count of possession of pornography depicting a minor.

In mid-2016 (at age 21), HH reported that, when she was a minor, her father took sexually suggestive and explicit photographs of her. Police investigated her allegations and obtained a search warrant for Ebert's home to seize computers and digital-media storage devices to search for images and videos of HH. Numerous photos were seized. Ebert moved to suppress the evidence as seized pursuant to a search warrant with stale evidence. The district court allowed the evidence, both on the merits and alternatively because, absent probable cause, *Leon's* good-faith exception applied. At trial, HH was the principal witness. Another friend of hers who had been a minor at the time, corroborated aspects of her testimony and testified of Ebert's communications with her, as well, encouraging her to masturbate and seeking to take lewd photographs of her. The jury found Ebert guilty of sexual exploitation of a minor and possession of child pornography, but not guilty of transportation of a minor. Ebert was sentenced to 300 months on the sexual-exploitation conviction and 120 months, concurrent, on the child-pornography conviction.

On appeal, Ebert argued (1) that the district court should have granted his motion to suppress evidence seized under a search warrant of his home because the affidavit contained stale evidence; (2) that the district court abused its discretion in admitting video evidence of his victim after she turned 18 and testimony of sexually suggestive conversations he had with another minor; and (3) that the district court erred in imposing a 5-level enhancement under Section 4B1.5(b)(1).

The court of appeals held that (1) the evidence supporting the search warrant was not stale because of the nature of the alleged offenses; the property to be seized was not consumable and digital pornographic images are often stored for long periods in a secure place. In any event, the *Leon* good-faith exception supported the seizure because Ebert failed to separately appeal that basis of

the district court's decision. It next held that (2) evidence provided by HH's friend was not inadmissible under FRE 403 and 404(b) because (a) it was intrinsic and 404(b) thus did not apply; (b) the evidence was admissible as proof of absence of mistake and intent; (c) the evidence went to the same relevant time frame and did not involve conduct that was any more sensational or disturbing than that underlying the charged offenses; (d) the court offered appropriate limiting instructions; and (e) any error was harmless. Talk about belt and suspenders—the panel was really trying to be sure these convictions wouldn't be unwound. Finally, (3) the court affirmed application of the “pattern of activity” enhancement, concluding that HH's testimony covered many qualifying acts when she was a minor and Ebert had not discredited that testimony.

Fifth Amendment/Self Incrimination

***United States v, Leggette*, 57 F.4th 406 (4th Cir. Jan 10, 2023)
(Richardson, Quattlebaum, Floyd):**

An officer saw a car in the parking lot of a park an hour after it closed and stopped to investigate trespassing. He called for backup because trespassing is dangerous business. The officer saw Mr. Leggette and a woman walking near the picnic area and walked them back to the parking lot. Meanwhile, the backup officer found a gun in a bag inside a trash can near the picnic area and radioed the first cop. The cop patted Mr. Leggette down and found nothing. Over the course of 90 seconds, the officer asked Mr. Leggette about the gun three times. Mr. Leggette denied ownership twice, but said he just did 15 years in prison. The officer asked again, and Mr. Leggette admitted the gun was his.

The Fourth Circuit upheld the district court's denial of Mr. Leggette's motion to suppress his statement under Miranda. The Court recognized a person is in custody when their “freedom of action is curtailed to a degree associated with a formal arrest.” That test has two parts: 1) whether a reasonable person would have felt free to stop talking and leave, and 2) “whether the relevant environment presents the same inherently coercive pressures as the type of stationhouse questioning at issue in Miranda.” The Court held that while a reasonable person in Mr. Leggette's position would not have felt free to leave during the Terry stop, the circumstances did not present the same pressures as the stationhouse questioning in Miranda. Only one officer questioned him; the officer asked only a few questions in a polite voice; the officer never drew

his firearm or physically restrained Mr. Leggette; and the encounter took place in public.

***United States v. Linville*, 60 F.4th 890 (4th Cir. Feb. 24, 2023) (Richardson, Quattlebaum, Heytens):**

As we all know, one of the standard conditions of supervision requires our clients to “answer truthfully the questions asked by your probation officer.”

So what happens when the PO asks about criminal behavior? Does your client have to answer truthfully, or should he assert his Fifth Amendment privilege?

That was the dilemma Eugene Linville faced while on supervised release for a CP conviction. During a polygraph examination, Mr. Linville was asked whether he possessed CP. Without asserting his Fifth Amendment privilege, he admitted he did. He and his PO then went to his house, where he turned over the CP.

We all know what happened next. In addition to being revoked, of course, Mr. Linville got new CP charges. He then moved to suppress his statement to the PO, arguing that the questions placed him in a “classic penalty situation.” A “classic penalty situation” exists when invoking the Fifth Amendment privilege presents a “nearly certain risk” of criminal penalty. Importantly, if a classic penalty situation exists, then the Fifth Amendment privilege is self-executing—meaning the privilege applies whether or not you expressly invoke it.

Since Mr. Linville had not invoked his Fifth Amendment privilege, his motion to suppress—and ultimately his case—turned on whether his PO had placed him in a classic penalty situation. The district court ruled it did not, and the Fourth Circuit agreed. The Fourth affirmed the denial of the motion to suppress and Mr. Linville’s 120-month sentence.

The Court said that applying the penalty exception in the supervised release context required the court to consider two questions: “First, do the conditions actually require a choice between asserting the Fifth Amendment and revocation of supervised release? Second, even if they do not, is there a reasonable basis for a defendant to believe they do?”

The Fourth held the penalty exception did not apply to Mr. Linville because (1) the condition requiring Mr. Linville to answer truthfully did not expressly state that if he exercised his Fifth Amendment privilege, he risked revocation

and (2) no one ever expressly threatened him with revocation (or any other penalty) if he invoked his privilege. The Fourth relied heavily on USSG 5D1.3, n. 1, which makes clear that despite “the condition . . . to ‘answer truthfully’ the questions asked by the probation officer, a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.”

The important takeaway here is that when you are reviewing the conditions of supervised release with your client, make sure your client understands that his Fifth Amendment privilege remains intact, despite the condition he answer questions truthfully. **Your client should not answer incriminating questions.** If your client needs to, he can point to 5D1.3 for support. If the PO then threatens your client with revocation anyway (or some other penalty), that will trigger the classic penalty situation and should protect them from criminal liability.

Multiplicity

***United States v. Smith*, 54 F.4th 755 (4th Cir. Dec 1, 2022) (Gregory, Diaz, Heytens):**

The FBI started investigating Smith after an informant told them that Smith was interested in traveling to Syria to join ISIS. The FBI then had a second informant pose as an ISIS recruiter who could facilitate Smith’s travel to Syria. Smith met with the informant several times, and he obtained a plane ticket for another recruit. When the plane ticket went unused, however, Smith cut off contact with the informant, saying he “couldn’t have anything to do with this.”

During a subsequent interview with the FBI, Smith made two false statements: first, he denied that he ever had any plan or intent to go to Syria. Second, he denied knowing that the plane ticket (technically, it was an internal “buddy pass” that airlines issue to employees, which Smith obtained from his girlfriend, who worked for the airline) would be used by the recruit to travel to Syria and join ISIS. Smith was then indicted for both false statements. The district court denied his motion to dismiss Count Two as multiplicitous. The court also denied his request to instruct the jury on an entrapment defense. He was convicted at trial on both counts and received a downward variance of 60 months.

On appeal, the Fourth agreed that the court erred in denying the motion to dismiss Count Two. The Fourth applied the rule of lenity to 18 U.S.C. 1001(a)(2), which criminalizes making a materially false statement to a federal agent. The Fourth said that it was not clear what the “allowable unit of prosecution” was under 1001, and this ambiguity favored Smith. Smith’s two different false statements over the course of a single interview represented one crime, not two, and so the Fourth threw out as multiplicitous his conviction on Count Two.

Judge Diaz dissented in part, because he believed that Count Two was not multiplicitous. In Judge Diaz’s view, these were different statements turning on different facts, and so “each individual, nonidentical false statement” represented a separate unit of prosecution. He otherwise agreed with the majority.

Regarding entrapment, Judge Heytens wrote a separate concurrence about the theory of entrapment, noting that Smith “may have been able to establish a valid entrapment defense under a different theory” and cautioning that “similar government conduct may not be countenanced in future cases.” Safe to say, if you have a potential entrapment defense, you’re going to want to read Judge Heytens’s analysis.

Speedy Trial

***United States v. Velasquez*, 52 F.4th 133 (4th Cir. Oct. 25, 2022) (Agee, Harris, Motz):**

Mr. Velasquez expressed a desire to go to trial. The district judge told the parties to be in touch with his chambers about trial dates. When he did set a date (outside of the permissible Speedy Trial Act window), he simply set a docket entry noting the ends of justice grounds to exclude the time from the Act. After a few more issues, Mr. Velasquez got a new attorney who moved to dismiss certain counts on Speedy Trial Act grounds. The judge denied the motion, the client lost at trial, the court sentenced him, and he appealed.

On appeal, the 4th Circuit held that the Speedy Trial Act says what it means and means what it says. If the court violates the Act, then it *shall dismiss* the affected counts (though it can do it with or without prejudice). The Court acknowledged that “ends of justice” are grounds to exclude time from the Act, but that a docket entry entered with no on-the-record analysis does not meet

the standards. The government argued on appeal that it was implicit that the District Court was granting the motion to give the defendant more time to prepare for trial. But the record, according to the Fourth Circuit, simply did not reflect that, and it was not going to give the district court that motive post-hoc.

The government further argued that the defendant's counsel did not get back to the District Court about trial dates, so that should count against the defendant. The Fourth held that nothing in the Act indicated that the defendant's actions made the delay excludable. It could, however, get to the question of whether the dismissal should be with or without prejudice.

The Court also held that the defendant did not consent to the continuance even though he did not object to it.

This opinion is very clear that the Act is a *shall dismiss* statute. So if you have a client who wants to go to trial and you don't have all the discovery, it might be worth pushing the government to trial—either they don't give you the discovery, and you have that fight about that at trial, or you force them to move for a continuance over your objections and perhaps start building a speedy trial record then.

Illegal Reentry

***United States v. Alas*, 2023 U.S. App. LEXIS 7114 (4th Cir. March 24, 2023) (Wilkinson, Diaz, Cogburn):**

In *United States v. Alas*, the Fourth Circuit affirmed Mr. Alas' conviction for illegal reentry, rejecting his statute-of-limitations claim and his collateral attack on his removal order.

Alas entered the US without authorization in 2004, spent a few years in prison for a Virginia malicious wounding conviction, and was removed to El Salvador in 2011. He then reentered the US. In April 2016, he was hospitalized after his employer assaulted him. A sheriff's deputy visited him to investigate the assault. At the time, the sheriff's office had a 287(g) agreement, but the deputy was not designated under the agreement to enforce immigration law. The deputy said he would not report Alas to immigration, and he kept his word. In 2020, Alas was arrested for assault and battery in Virginia. ICE arrested him and he was indicted in May 2021 for illegal reentry.

Alas filed two motions to dismiss. First, he argued he was “found in” the US in April 2016 when he spoke with the deputy. Therefore, the 5-year statute of limitations ran before his May 2021 indictment. Second, he challenged his 2011 removal order on the ground that Virginia malicious wounding was not an aggravated felony. The district court denied both motions. Alas pleaded guilty and preserved his right to appeal the denial of the motions to dismiss.

The Fourth Circuit affirmed. First, the Court recognized that an alien is “found” when discovered by federal, not state officials, except for state officials designated under a 287(g) agreement. But the Court held that because the deputy Alas spoke to in April 2016 was not a designated official, Alas was not “found” by him. It did not matter that the deputy’s employer had a 287(g) agreement.

Second, the Court affirmed the denial of the collateral challenge to the 2011 removal order. To win a challenge, you have to show (1) exhaustion of administrative remedies, (2) the removal proceedings deprived the alien of judicial review, and (3) the removal order was fundamentally unfair. As to fundamental unfairness, Alas argued malicious wounding was not an aggravated felony and was therefore not a deportable offense. The Court disagreed, holding malicious wounding was an aggravated felony both in 2011 and now. The Court therefore affirmed without addressing Alas’ arguments about the other requirements.

False Statements (18 U.S.C. § 1001(a)(2))

***United States v. Smith*, 54 F.4th 755 (4th Cir. Dec 1, 2022) (Gregory, Diaz, Heytens):**

The FBI started investigating Smith after an informant told them that Smith was interested in traveling to Syria to join ISIS. The FBI then had a second informant pose as an ISIS recruiter who could facilitate Smith’s travel to Syria. Smith met with the informant several times, and he obtained a plane ticket for another recruit. When the plane ticket went unused, however, Smith cut off contact with the informant, saying he “couldn’t have anything to do with this.”

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“buddy pass” that airlines issue to employees, which Smith obtained from his girlfriend, who worked for the airline) would be used by the recruit to travel to Syria and join ISIS. Smith was then indicted for both false statements. The district court denied his motion to dismiss Count Two as multiplicitous. The court also denied his request to instruct the jury on an entrapment defense. He was convicted at trial on both counts and received a downward variance of 60 months.

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Assorted Jury Trial Issues

***United States v. Ivey*, 60 F.4th 99 (4th Cir. Feb. 14, 2023) (Gregory, Thacker, Rushing):**

Mr. Ivey was convicted after a jury trial of Hobbs Act Robbery and 924(c) for using a gun in connection with the robbery of Nikki’s—a strip club in Charlotte. He raised several attacks on his conviction, none of which succeeded:

Show-Up Identification

A show-up is a lineup-type proceeding where the police use procedures that are so suggestive that the witness identification likely results from something other than the witness's memory. Here, the police basically pulled Mr. Ivey out of the back of a squad car in handcuffs and had the witnesses look at him and asked them if he was the guy. The 4th held that this was an impermissible show-up. But it further held that the jury heard so much other evidence of guilt that the admission of the witness identification was harmless.

Still—this opinion has a very in-depth discussion of show-ups, and it reached the right result on finding error (even though it found the error harmless), so you should take a look at it if you ever have a client in a show-up situation.

Waived Expert Challenge

The defendant also moved to admit an expert to testify as to the unreliability of eyewitness identification. The government objected. The district court indicated that it would provisionally reject the expert's testimony, but it asked the defendant to have him testify about what he was going to say outside of the jury's presence. The defense responded that they were "withdrawing" their expert and did not have him give a proffer as to what he was going to say. The 4th held that this withdrawal was a waiver, and so the defendant could not then allege the exclusion of the expert as error on appeal.

So be sure not to formally "withdraw" your proposed evidence or witnesses, even if the Court indicates that it will exclude them. And, if possible, get on the record what the excluded testimony would have said.

Hobbs/924(c)

Mr. Ivey raised on appeal that the district court erred in instructing the jury that Hobbs Act Robbery is a 924(c) predicate. He did not object to the jury instruction, so the Court applied plain error review. It held that Hobbs Act Robbery IS a 924(c) predicate.

So is that it for us? Is the Hobbs/924(c) argument dead? Not quite. this opinion did not address or mention *Taylor*, which is the main argument we have that Hobbs is not a 924(c) predicate. That issue is in front of the 4th Circuit in *United States v. Green*, which was argued this term and (as of this writing) has not come out yet.

Now, it is not good that this opinion came out the way it did. And the US Atty appellate section has already indicated to us that it thinks that Ivey resolves this issue. But keep preserving it unless/until the 4th or the Supreme Court directly rejects our *Taylor*-based argument.

***United States v. Ebert*, 61 F.4th 394 (4th Cir. March 3, 2023) (Agee, Diaz, Quattlebaum):**

The Fourth Circuit affirmed Ebert's conviction and sentence for one count of sexual exploitation of a minor and one count of possession of pornography depicting a minor.

In mid-2016 (at age 21), HH reported that, when she was a minor, her father took sexually suggestive and explicit photographs of her. Police investigated her allegations and obtained a search warrant for Ebert's home to seize computers and digital-media storage devices to search for images and videos of HH. Numerous photos were seized. Ebert moved to suppress the evidence as seized pursuant to a search warrant with stale evidence. The district court allowed the evidence, both on the merits and alternatively because, absent probable cause, *Leon*'s good-faith exception applied. At trial, HH was the principal witness. Another friend of hers who had been a minor at the time, corroborated aspects of her testimony and testified of Ebert's communications with her, as well, encouraging her to masturbate and seeking to take lewd photographs of her. The jury found Ebert guilty of sexual exploitation of a minor and possession of child pornography, but not guilty of transportation of a minor. Ebert was sentenced to 300 months on the sexual-exploitation conviction and 120 months, concurrent, on the child-pornography conviction.

On appeal, Ebert argued (1) that the district court should have granted his motion to suppress evidence seized under a search warrant of his home because the affidavit contained stale evidence; (2) that the district court abused its discretion in admitting video evidence of his victim after she turned 18 and testimony of sexually suggestive conversations he had with another minor; and (3) that the district court erred in imposing a 5-level enhancement under Section 4B1.5(b)(1).

The court of appeals held that (1) the evidence supporting the search warrant was not stale because of the nature of the alleged offenses; the property to be seized was not consumable and digital pornographic images are often stored for long periods in a secure place. In any event, the *Leon* good-faith exception supported the seizure because Ebert failed to separately appeal that basis of

the district court's decision. It next held that (2) evidence provided by HH's friend was not inadmissible under FRE 403 and 404(b) because (a) it was intrinsic and 404(b) thus did not apply; (b) the evidence was admissible as proof of absence of mistake and intent; (c) the evidence went to the same relevant time frame and did not involve conduct that was any more sensational or disturbing than that underlying the charged offenses; (d) the court offered appropriate limiting instructions; and (e) any error was harmless. Talk about belt and suspenders—the panel was really trying to be sure these convictions wouldn't be unwound. Finally, (3) the court affirmed application of the “pattern of activity” enhancement, concluding that HH's testimony covered many qualifying acts when she was a minor and Ebert had not discredited that testimony.

***United States v. Miller*, 61 F.4th 426 (4th Cir. March 6, 2023) (Agee, Quattlebaum, Rushing):**

In *United States v. Miller*, the Fourth Circuit reversed a district court's pretrial ruling excluding government evidence under Rule 403.

The government indicted Mr. Miller for knowingly transferring obscene material to a minor. Unfortunately for 38-year-old Mr. Miller, there was a very bad fact in his case—the recipient of the allegedly obscene material was his 14-year-old sister.

To avoid introduction of that evidence at trial, the defense offered to stipulate that Mr. Miller knew the recipient was under 16. But the government refused to accept the stipulation. The government asserted the fact that the recipient was Mr. Miller's 14-year-old sister was relevant to show his knowledge and that the letter was obscene because it described sexual activity between them.

The defense filed a motion in limine to exclude the evidence as unduly prejudicial under 403. Miraculously, the SDWV district court agreed. But the victory was short lived. The government filed an interlocutory appeal and the Fourth Circuit reversed, finding a plain abuse of discretion in the exclusion of the evidence.

The Fourth Circuit held the evidence was highly relevant because it went directly to two elements of the offense. Also, the Court held the evidence was a “significant part of the ‘narrative integrity’ of the Government's case.” The Court further held there was no “unfair” prejudice because the evidence would

not suggest guilt on a ground different from proof specific to the offense charged.

***United States v. Wysinger*, 2023 U.S. App. LEXIS 7560 (4th Cir. March 30, 2023) (Rushing, Harris, Keenan):**

The Fourth Circuit affirmed Kendall Wysinger's convictions after trial for (1) conspiracy to commit sex-trafficking, (2) interstate transportation for the purpose of prostitution, (3) distribution of, and possession with intent to distribute, fentanyl, the use of which resulted in death, and (4) distribution of, and possession with intent to distribute, fentanyl, the use of which resulted in serious bodily injury. He was sentenced to mandatory life on counts 3 and 4 and life on count 1, as well as 120 months' imprisonment on count 2.

Wysinger appealed, arguing first that the evidence was insufficient and the jury was improperly instructed on his conspiracy to commit sex-trafficking conviction. The court held that the evidence was sufficient on both the coercion and conspiracy elements to support the jury's findings. In support of the finding that Wysinger intended to use coercion by exploiting their drug dependencies, the government presented testimony of multiple victims who testified that he took almost all of the money they made in exchange for daily rations of drugs. This was not undermined by the fact that drugs were not provided for free or that some women purchased heroin from other dealers while involved with him. Physical violence is not necessary to establish coercion under the statute. With respect to conspiracy, a reasonable jury could conclude his alleged co-conspirator (the late mother of his child who died of a fentanyl overdose) knew of and intended to participate in his illegal scheme because evidence supported they lived in the same house where commercial sex acts took place, his co-conspirator posted advertisements for the victims on a prostitution website, and she knew Wysinger was supplying drugs and the victims had no cars or credit cards of their own. The jury instructions were not plainly erroneous because they did not allow the jury to convict Wysinger on count 1 by finding he conspired to advertise the victims (advertising was only mentioned in one of the overt acts of the indictment to support the charge).

Wysinger also challenged the jury instructions on the distribution counts, arguing they were duplicitous and incompatible with the statute. The Fourth Circuit held that, with respect to duplicity, Wysinger was bound to and failed to raise an objection to the indictment before trial. Because he did not, the argument was forfeited. With respect to the law, the jury was instructed that it could convict Wysinger of death resulting on a finding of possession with

intent to distribute. The Fourth Circuit thought this was fine, explaining that the statute requires only (1) conduct prohibited by Section 841(a)(1) and (2) “death caused by (‘resulting from’) the use of that drug.” In other words, nothing in the statute requires the jury to find the defendant actually delivered the drug to the victim to support the increased penalty.

He also argued that his mandatory life sentences were not supported by a prior conviction for a felony drug offense, as required by Section 841(b)(1)(C). The court reviewed for plain error and found none because it applied the categorical approach to compare the state statute of conviction’s elements to the definitions in Section 802(44). Contrary to both parties’ arguments, the court did not look to state law but instead to the statute’s own terms, asking whether Virginia’s drug Schedules I and II—the basis for Wysinger’s conviction—penalize conduct with respect to any substances that are not “narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” Wysinger argued that Virginia’s definition includes positional isomers of cocaine while the federal definition does not, making the Virginia schedule fatally overbroad. The court found no plain error because any error is far from obvious: It’s not clear positional isomers of cocaine exist in the drug trade and even if they were criminalized in Virginia, it’s not obvious they don’t qualify as a narcotic or stimulant under the statute.

Finally, Wysinger argues that he should not have been a career offender. The court quickly dispatched with that argument because any assumed error would be harmless; he was bound by statute to be sentenced to life on counts 3 and 4 even without the career-offender designation.

Use of a Firearm in Relation to a Crime of Violence (18 U.S.C. § 924(c))

***United States v. Manley*, 52 F.4th 143 (4th Cir. Oct. 26, 2022) (Niemeyer, Diaz, Quattlebaum):**

The Court addressed whether Violent Crimes in Aid of Racketeering (VICAR) in violation of 18 U.S.C. § 1959 are “crimes of violence” for purposes of 924(c). The Court held that they were in Mr. Manley’s case, but that conclusion might not hold for every VICAR conviction—especially ones that we are likely to see in North Carolina.

In 2009, Mr. Manley pleaded guilty to, among other things, two counts of 924(c). The predicate convictions for the 924(c)s were Assault in Aid of

Racketeering and Murder in Aid of Racketeering. Then *Davis* came out (striking the 924(c) crime of violence residual clause), and Mr. Manley filed a 2255 arguing that his VICAR convictions were no longer crimes of violence. The legal issue in the case boiled down to whether the convictions had the necessary mens rea to meet the crime of violence force clause.

The Court held that they did. But in so holding, the Court focused on the fact that VICAR assault and VICAR murder each require as an element that the assault or murder at issue be a specific violation of a state or federal law. In Mr. Manley's case, the assault and the murder were each violations of different Virginia laws. And so the Court has to go to the mens reas of those state statutes to see if they are greater than recklessness (which is the test for whether something has enough of a mens rea to be a crime of violence). In both cases, they were. The Virginia murder statute has a mens rea of "extreme recklessness," which the Court held was enough more than recklessness to count. So for those keeping track at home, North Carolina "culpable negligence" = not enough. Virginia "extreme recklessness" = enough. And please don't ask us to tell you what those mens rea actually mean.

Two positive takeaways from this case despite the bad outcome for Mr. Manley:

- (1) Because the Court goes to the mens rea of the state crime, and b/c certain versions of NC Assault do not qualify as crimes of violence, this holding will not apply to all of our clients. You need to go to the state crime at issue to see.
- (2) Judge Niemeyer wrote separately to argue that the "purpose" of wanting to aid racketeering should be enough to make all VICAR crimes qualify as crimes of violence. But Judge Diaz and Quattlebaum did not join him. Which makes me think that there are not enough votes on the 4th Circuit to go that far. Which might be nice if we ever get a VICAR based on culpable negligence assault.

***United States v. Davis*, 53 F.4th 168 (4th Cir. Nov. 10, 2022) (Niemeyer, Wynn, Floyd)**

The Fourth Circuit held that the 1994 version of the federal arson statute is not a 924(c) crime of violence because the force clause of 924(c) prohibits "the use, attempted use, or threatened use of physical force against the person or property of another" and arson (844(f)) includes force against a defendant's own property.

At the time of Davis's conviction in 1994, the statute applied to anyone who

maliciously damages or destroys . . . by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance

In other words, a person who wholly owned a property but let a qualifying federal organization *use* it could be convicted under 844(f) if he maliciously damaged that property using fire or an explosive. That property is not “the property of another,” and the statute is thus categorically overbroad.

NB: This analysis is limited to an old version of the statute, so be sure to separately analyze any revisions under the text of 924(c)’s force clause.

***United States v. Mack*, 56 F.4th 303 (4th Cir. Dec 22, 2022) (Thacker, Heytens, Griggsby):**

The opinion starts like this: “Less than a year after being released from federal prison, Sonny Mack ‘engaged in an unjustified, merciless beating’ of an unarmed, 72-year-old security guard that caused ‘permanent damage’ to one of the victim’s eyes.” So you can probably predict how this ended for Sonny.

The district court revoked Mr. Mack’s supervised release, finding that his conduct was a violation South Carolina first-degree assault and battery. The legal question for the 4th Circuit was whether this statute is a “crime of violence” under Section 4B1.2(a)(1) of the Guidelines, leading to an enhanced Guidelines range on revocation. The Court held that it IS a crime of violence.

First, the 4th held that the statute was divisible, and that Mr. Mack’s conduction was a violation of Section 16-3-600(C)(1)(b)(i) of the statute. **NOTE WELL—this holding does not mean that all violations of Section 16-3-600 are crimes of violence. If you have a client with a conviction under a different subsection, make sure to look at the elements.**

Second, the 4th held that the force required to be convicted under that subsection was “violent force” and not *di minimus* because the force must be “likely to produce death or great bodily injury.” That’s well within the “violent force” requirement.

Finally, the 4th held that the mens rea issue did not save Mr. Mack. He argued that the statute could be committed recklessly, which would take it outside of the crime of violence definition. The 4th disagreed. It noted that the statute

did not contain any of the traditional mens rea words (intentionally, knowingly, recklessly, etc.) but that a defendant can only violate the statute by offering or attempting to injure another person. And the 4th held that “offering” and “attempting” imply a knowing state of mind at a minimum. And even if one could fancifully envision a scenario involving a reckless offer, that does not change the result because that goes into the realm of a “theoretical possibility” and not a “realistic probability.”

***United States v. McKinney*, 60 F.4th 188 (4th Cir. Feb 16, 2023) (Wilkinson, Motz, Keenan):**

McKinney and a codefendant robbed a restaurant using a firearm, which discharged (nobody got hurt). He was charged with Hobbs Act robbery, conspiracy to commit Hobbs Act robbery, and use of a firearm in connection with a crime of violence under 18 USC 924(c). Twice, McKinney refused to plead guilty to the robbery and a 924(c) count based on the robbery. Instead, he eventually pleaded guilty to conspiracy to commit the robbery and a 924(c) where the identified crime of violence was the conspiracy to commit the robbery. He wound up sentenced to 70 months for the robbery, plus 120 months for the 924(c) charge.

In 2016, after the Supreme Court’s decision in *Johnson*, McKinney filed a 2255 motion arguing that his 924(c) conviction was no longer valid. The motion sat while the Supreme Court made further decisions that supported McKinney’s claim, but the district court ultimately dismissed the motion at the Government’s request, concluding that he waived the right to do so in his plea agreement and had procedurally defaulted on the claim by not raising it earlier.

On appeal, a divided Fourth Circuit reversed the district court’s dismissal of McKinney’s 2255 claim. The court noted that it typically leaves the merits of the claim until last, but everyone in this case agreed that McKinney’s 924(c) conviction was now invalid. Therefore, the court turned to the issue of whether McKinney was barred from seeking relief on that ground. As to the waiver in McKinney’s plea agreement, the court concluded that to enforce it would work a miscarriage of justice because it would leave McKinney convicted of an offense that was no longer a crime. As to procedural default, the court found good cause for it because at the time of McKinney’s sentencing a challenge to his 924(c) conviction on these grounds would have not just been futile but contrary to existing Supreme Court precedent. In other words, it was only the

change in Supreme Court precedent that made the argument available in the first place. The court also found prejudice, rooted in the record of McKinney refusing (twice) to plead guilty to charges related to robbery rather than conspiracy.

Judge Wilkinson dissented, arguing that the majority had created a “per se” rule of automatic prejudice which is “fundamentally at odds with the most basic principles of our criminal justice system.”

***United States v. Ivey*, 60 F.4th 99 (4th Cir. Feb. 14, 2023) (Gregory, Thacker, Rushing):**

Mr. Ivey was convicted after a jury trial of Hobbs Act Robbery and 924(c) for using a gun in connection with the robbery of Nikki’s—a strip club in Charlotte. He raised several attacks on his conviction, none of which succeeded:

Show-Up Identification

A show-up is a lineup-type proceeding where the police use procedures that are so suggestive that the witness identification likely results from something other than the witness’s memory. Here, the police basically pulled Mr. Ivey out of the back of a squad car in handcuffs and had the witnesses look at him and asked them if he was the guy. The 4th held that this was an impermissible show-up. But it further held that the jury heard so much other evidence of guilt that the admission of the witness identification was harmless.

Still—this opinion has a very in-depth discussion of show-ups, and it reached the right result on finding error (even though it found the error harmless), so you should take a look at it if you ever have a client in a show-up situation.

Waived Expert Challenge

The defendant also moved to admit an expert to testify as to the unreliability of eyewitness identification. The government objected. The district court indicated that it would provisionally reject the expert’s testimony, but it asked the defendant to have him testify about what he was going to say outside of the jury’s presence. The defense responded that they were “withdrawing” their expert and did not have him give a proffer as to what he was going to say. The 4th held that this withdrawal was a waiver, and so the defendant could not then allege the exclusion of the expert as error on appeal.

So be sure not to formally “withdraw” your proposed evidence or witnesses, even if the Court indicates that it will exclude them. And, if possible, get on the record what the excluded testimony would have said.

Hobbs/924(c)

Mr. Ivey raised on appeal that the district court erred in instructing the jury that Hobbs Act Robbery is a 924(c) predicate. He did not object to the jury instruction, so the Court applied plain error review. It held that Hobbs Act Robbery IS a 924(c) predicate.

So is that it for us? Is the Hobbs/924(c) argument dead? Not quite. this opinion did not address or mention *Taylor*, which is the main argument we have that Hobbs is not a 924(c) predicate. That issue is in front of the 4th Circuit in *United States v. Green*, which was argued this term and (as of this writing) has not come out yet.

Now, it is not good that this opinion came out the way it did. And the US Atty appellate section has already indicated to us that it thinks that Ivey resolves this issue. But keep preserving it unless/until the 4th or the Supreme Court directly rejects our *Taylor*-based argument.

ACCA Force Clause

***United States v. Williams*, 2023 U.S. App. LEXIS 7215 (4th Cir. March 27, 2023) (Gregory, Harris, Quattlebaum):**

The Fourth Circuit vacated a district court’s denial of a Section 2255 motion and remanded for further proceedings, holding unanimously that the Court’s prior decision in *White* makes plain that Virginia common-law robbery is not a violent felony under ACCA and nothing about the statute enacted in 1975 excluded the sodomy-threat theory that made that offense categorically overbroad. Because the district court did not address whether the defendant’s three convictions for violating Virginia’s use-or-display-of-firearm statute qualified as ACCA predicates, the Court remanded for consideration of that issue.

Career Offender

***United States v. Boyd*, 55 F.3d 272 (4th Cir. Nov 30, 2022) (Harris, Quattlebaum, Rushing) (Harris, J. dissenting):**

Sometimes the determination of whether a prior conviction is a crime of violence or a controlled substance offense hinges on the Shepard documents (a limited class of documents that include “charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms,” *Johnson v. United States*, 559 U.S. 133, 144 (2010), as well as “comparable judicial record[s] of this information”).

In *Boyd*, a divided panel of the Fourth Circuit held that the Shepard docs proved that the defendant’s prior drug conviction under a broad South Carolina statute criminalizing different drug offenses (i.e., a divisible statute) was for possession with the intent to distribute, rather than mere purchase or conspiracy. Because the prior conviction was PWID, it qualified as a controlled substance offense, and Boyd was thus a career offender.

Judge Rushing, joined by Judge Quattlebaum, said that Boyd’s sentencing sheet proved that Boyd pled guilty to PWID. Judge Harris dissented, concluding that the sentencing sheet did not meet the “high standard” required to prove a prior conviction with “certainty,” especially with a career offender designation in the balance: “The stakes here are too high for guesswork.”

This opinion has a LOT of detailed information about South Carolina sentencing sheets (which are apparently pretty muddled documents), as well as other SC procedures, so if you ever have a client with a South Carolina conviction that you have a question about, this opinion might be helpful.

Sentencing Enhancements

***United States v. Shivers*, 56 F.4th 320 (4th Cir. Dec 27, 2022) (Agee, Harris, Griggsby):**

In 2019, Shivers robbed a convenience store at gunpoint. Unbeknownst to him, an off-duty police officer was working security at the store and called the police, who confronted Shivers with a perimeter when he left the street. Shivers ran, at which point “one officer saw Shivers discard a revolver in the street.” Shivers was convicted of Hobbs Act robbery and brandishing a firearm. At sentencing,

he was assessed a two-level increase for reckless endangerment during his flight from the police. The district court agreed that “something more” than simple flight was required and was present in this case because Shivers had to reach for the gun in order to dispose of it, which could have led an officer to opening fire, and that when the gun was thrown it could have accidentally discharged and harmed someone (including, perhaps, Shivers himself). The district court imposed a sentence of 114 months, seven months below the applicable advisory Guideline range.

On appeal, the Fourth Circuit concluded both that the district court’s application of the enhancement was erroneous and that the error was not harmless. After noting that the district court erred by considering risks created to Shivers himself (the enhancement requires risk to “another person”), the court concluded that there was no evidence in the record to support the district court’s conclusions about risks created by Shivers’ conduct. There was no evidence that he pulled the gun out of his pocket, rather than just holding it in his hand, and no evidence that there was a “substantial risk of the firearm discharging when it hit the ground.” As to harmless error, the court held that although the advisory Guideline range had not been a “significant factor” in the sentence imposed there was no evidence that the range was irrelevant.

***United States v. Dix*, Revised Opinion, 2023 U.S. App. LEXIS 8097 (4th Cir. April 5, 2023) (Wilkinson, Niemeyer, King):**

The defendant 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 PRS 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, fine, 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 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.

Supervised Release Conditions

***United States v. Castellano*, 60 F.4th 217 (4th Cir. Feb. 17, 2023) (Diaz, Rushing, Heytens):**

In recent years, the 4th Circuit has become increasingly interested in conditions of supervised release. This case presents another example.

Mr. Castellano was convicted of transporting child pornography, sentenced to twelve years in prison and lifetime supervised release. Upon release from prison, he had trouble complying with his supervised release. This appeal comes from his third revocation of supervised release.

Relevant to this appeal, one of the conditions—Special Condition Nine—said ““The defendant shall not have access to or possess any pornographic material or pictures displaying nudity or any magazines using juvenile models or pictures of juveniles.”

Mr. Castellano was revoked once and given 9 months imprisonment and placed back on release. He was revoked again and given 20 months of imprisonment and revoked again. This time, his PO found a cell phone on him (a violation of a no unauthorized internet condition), five adult pornographic movies (a violation of Special Condition Nine) and unapproved contact with the 17-year-old daughter of his girlfriend (though no findings that he was alone with her or did anything inappropriate).

The district court sentenced him to the maximum 24 months, indicating that earlier terms of imprisonment has not worked. The court also asked if Mr. Castellano wanted to change any of the conditions, and Mr. Castellano's lawyer asked the court to modify or strike Special Condition Nine, arguing that it was overly broad and unconstitutionally vague. The district court disagreed, holding that the condition was necessary to keep Mr. Castellano from lapsing into viewing child pornography. Mr. Castellano appealed.

The Government first argued that Mr. Castellano's argument was waived because a defendant has an obligation to object to a condition when it is imposed, not at a subsequent revocation hearing. The 4th Circuit held that the government waived its waiver argument by not raising it in the district court. **Relevant for us—we should be on the ball and ready to object to these conditions at the original sentencing. Waiting until revocation puts us in a worse position.**

The 4th then addressed whether Mr. Castellano was asking it to address the condition on a clean slate, or whether what was really happening was that Mr. Castellano asked the court to modify Special Condition Nine and it refused. Looking at the record, the Fourth Circuit held that Mr. Castellano had asked to modify the condition, so in order for the 4th to reach the merits of his argument, he needed to show a change in factual or legal circumstances. **Again, we see the benefit of objecting at the original sentencing. Even though the defendant here (spoiler alert) managed to overcome the procedural hurdles of a post-sentencing challenge, future defendants may not be so fortunate.**

The 4th held that its recent cases of *United States v. Van Donk*, 961 F.3d 314, 321 (4th Cir. 2020), & *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021) had created changed legal circumstances by holding that a blanket ban on all pornography was too broad of a condition without an individualized

assessment that such a ban was necessary for an individual defendant. Thus, it could reach the merits of his argument.

And, in Mr. Castellano's case, the government had not provided specific evidence (like testimony from an expert) that a ban on all pornography was necessary in his particular case. The Court did not reach the constitutional vagueness issue because it did not need to.

The 4th also then remanded for resentencing because the record was not clear concerning how much of the 24-month sentence was driven by the violation of a condition that should not have been imposed in the first place.

Judge Rushing dissented.

***United States v. Sueiro*, 59 F.4th 132 (4th Cir. Feb. 3, 2023) (Keenan, King, Richardson):**

Christopher Sueiro sent emails threatening to kill his former coworker. Based on these emails, the police obtained a warrant to search his residence, which he shared with another unrelated man. During the search, officers seized several computers and hard drives and, with additional warrants to search them, found evidence of child pornography. Sueiro was charged with child pornography offenses. He moved to suppress the seized devices, arguing that the initial warrant was overbroad. The motion was denied and Sueiro was sentenced to 240 months' imprisonment and lifetime supervised release with special conditions. On appeal, Sueiro challenged denial of the motion to suppress and argued that his term of imprisonment and special conditions were procedurally and substantively unreasonable.

The Fourth Circuit affirmed denial of the motion to suppress, held that the term of imprisonment and one special condition were reasonable, and vacated and remanded for reconsideration of three unexplained special conditions.

With respect to the motion to suppress, the court held that the warrant was adequately supported by probable cause because the suspected offense was committed by electronic means and allowed seizure of all electronic devices within Sueiro's home. As to the term of imprisonment, the court held that the district court adequately considered the need to avoid sentencing disparities when it carefully reviewed and calculated Sueiro's advisory guideline range—it was not required to specifically address other cases cited by Sueiro's counsel and compare their sentences to his. It also adequately addressed Sueiro's

argument that the guideline range is “absurdly high compared to far worse crimes” when it restated that argument and said it had considered it and was consulting the guidelines and the 3553(a) factors in determining Sueiro’s sentence.

The court also upheld as procedurally reasonable a special condition of supervised release prohibiting Sueiro from viewing sexually explicit images of minors because the reason for the condition, given Sueiro’s crimes of conviction, was “so self-evident and unassailable.” However, the court found the district court failed to provide any particularized explanation for imposing three additional conditions—barring Sueiro from (1) engaging in employment or volunteer activities with access to computers, (2) viewing adult pornography, and (3) using any video game system that would allow communication with other people. The court thus vacated those conditions and remanded for resentencing on them alone.

***United States v. Cohen*, 2023 U.S. App. LEXIS 6555, 2023 WL 2564405 (4th Cir. March 20, 2023) (Heytens, Wilkinson, Hudson):**

The Fourth Circuit continues to scrutinize supervised release conditions to our clients’ benefit. In *United States v. Cohen*, the Fourth Circuit handed down several positive rulings in the SR context. But first, some background.

Marshall Cohen pled guilty in New Jersey to distributing child pornography and received a 60-month term of imprisonment, followed by five years of supervised release. When he got out, Cohen received permission to transfer his supervision to South Carolina (terrible idea, IMO), but had to agree to some new conditions. These required him to “participate in a sex offender treatment program” and prohibited him from possessing “audio or visual depictions” containing sexually explicit conduct as defined in 18 USC 2256(2)(A).

Cohen moved to South Carolina and enrolled in a sex offender treatment program, where the rules prohibited “dating websites and pornography.” Ten months later, Cohen’s PO learned that he “had been discussing sexual fetishes and exchanging pictures of his erect penis for photos of women’s breasts on social media.” When the PO told Cohen’s treatment provider, the provider said Cohen’s behavior violated the program’s pornography rules and “would be raised at an upcoming group therapy session.” But Cohen was then arrested for violating his supervised release.

At the revocation hearing, Cohen admitted to trading explicit photos but argued he did not violate the terms of his supervised release. The district court disagreed, concluding that Cohen's violation of the program's pornography rules amounted to nonparticipation in the program, and that Cohen's photos contained depictions of sexually explicit conduct. The court revoked release and sentenced Cohen to time served followed by *lifetime* supervision with new special conditions.

Cohen appealed, and the Fourth Circuit reversed in part.

First, the Fourth held that Cohen did not violate his supervised release by failing to follow the rules of his sex offender treatment program. Even though Cohen broke the rules, the Court said, he was still "participating" in the program and had not been kicked out: "As a matter of 'commonsense meaning,' there is a difference between participating in something and perfect compliance with the rules of that thing."

Next, the Fourth determined that the court did not err in revoking supervised release based on Cohen's possession of the sexually explicit photos.

Finally, the Fourth struck down as overbroad Clause One of a new supervised release condition stating that Cohen "[1] must not possess, access, subscribe to, or view any videos, magazines, literature, photographs, images, drawings, video games, or Internet web sites depicting children or adults in the nude and/or engaged in sexual activity[], and [2] may not patronize businesses or places whose primary purpose is to provide sexually-oriented material or entertainment[,] [and] . . . [3] must not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256[,] [and] . . . [4] must not enter a place where such materials can be obtained or viewed, electronically or otherwise."

Clause One, the Fourth said, had "breathtaking reach;" "On its face, this condition would prevent Cohen from watching a great many things on network television and counsels strongly against ever turning on HBO."

The Fourth rejected the government's attempt to defend Clause One:

"The government insists clause 1 covers only 'visual portrayals of nudity or sexual activity' and thus would not bar 'classic works like the Bible.' Gov't Br. 46–47. But that view cannot be squared with clause 1's text, which expressly includes depictions in 'literature.' JA 56. Nor are we comforted by the

government's assurances that—even if clause 1 is overbroad as written—Cohen need not worry because the district court would not actually enforce the restriction to its full scope. We know of no authority supporting this 'trust us' theory of interpretation, and we will not put Cohen to the choice of submitting to an unwarranted deprivation of his liberty or flouting the plain language of his terms of supervised release in the hope that probation and the district court will implicitly rewrite those terms."

The Fourth rejected, however, Cohen's overbreadth arguments as to the remaining clauses. And it otherwise affirmed the sentence, including the lifetime supervised release term (which Cohen did not object to below).

A few takeaways: First, this is a good opinion to review if your client is being revoked because he has violated the rules of some sort of treatment program, whether it's for drugs, sex offender, what have you. As long as your client hasn't been kicked out entirely, you can argue that he is still participating and has not violated SR. Second, the opinion is a good reminder that there are limits to the conditions courts can impose, and you should definitely object if you believe the conditions are overbroad or onerous. Finally, remember to object specifically to the length of a new term of SR, not just the conditions, or otherwise you're on plain error on appeal.

Revocation of Supervised Release

***United States v. Mack*, 56 F.4th 303 (4th Cir. Dec 22, 2022) (Thacker, Heytens, Griggsby):**

The opinion starts like this: "Less than a year after being released from federal prison, Sonny Mack 'engaged in an unjustified, merciless beating' of an unarmed, 72-year-old security guard that caused 'permanent damage' to one of the victim's eyes." So you can probably predict how this ended for Sonny.

The district court revoked Mr. Mack's supervised release, finding that his conduct was a violation South Carolina first-degree assault and battery. The legal question for the 4th Circuit was whether this statute is a "crime of violence" under Section 4B1.2(a)(1) of the Guidelines, leading to an enhanced Guidelines range on revocation. The Court held that it IS a crime of violence.

First, the 4th held that the statute was divisible, and that Mr. Mack's conduction was a violation of Section 16-3-600(C)(1)(b)(i) of the statute. **NOTE**

WELL—this holding does not mean that all violations of Section 16-3-600 are crimes of violence. If you have a client with a conviction under a different subsection, make sure to look at the elements.

Second, the 4th held that the force required to be convicted under that subsection was “violent force” and not *de minimus* because the force must be “likely to produce death or great bodily injury.” That’s well within the “violent force” requirement.

Finally, the 4th held that the *mens rea* issue did not save Mr. Mack. He argued that the statute could be committed recklessly, which would take it outside of the crime of violence definition. The 4th disagreed. It noted that the statute did not contain any of the traditional *mens rea* words (intentionally, knowingly, recklessly, etc.) but that a defendant can only violate the statute by offering or attempting to injure another person. And the 4th held that “offering” and “attempting” imply a knowing state of mind at a minimum. And even if one could fancifully envision a scenario involving a reckless offer, that does not change the result because that goes into the realm of a “theoretical possibility” and not a “realistic probability.”

***United States v. Rios*, 55 F.4th 969 (4th Cir. Dec 20, 2022) (Wilkinson, Diaz, Motz):**

Sometimes the 4th Circuit issues a published criminal opinion that will affect many of our clients. And sometimes they issue one that is intellectually interesting but unlikely to ever occur in your career. *United States v. Rios* is one of the latter.

Mr. Rios was convicted in federal court of a drug offense. He was sentenced to a term of imprisonment and supervised release. 4 years into his term of imprisonment, he was transferred to Mexico to serve his sentence under the prisoner transfer treaty. Mexico then released him early, and he (illegally) returned to the United States before his sentence would have expired here.

He was charged with illegal re-entry, and the court revoked his supervised release for violating the conditions by committing the crime of illegal reentry and of violating a specific condition of not returning to the United States.

Mr. Rios argued that the prisoner transfer divested the district court of jurisdiction over his case, so it could not revoke him. The 4th Circuit disagreed. It held that Congress must provide a “clear statement” that it is intending to divest a court of jurisdiction over a matter. And, looking at the details of the

treaty, Congress made no such statement. While it clearly intends for Mexican law to apply to the administration of the sentence, it did not also intend to rob the federal courts of jurisdiction “to deal with violations of that sentence committed on [domestic] soil.”

Criminal History Category

***United States v. Fowler*, 58 F.4th 142 (4th Cir. Jan 18, 2023) (Wilkinson, Niemeyer, King):**

Mr. Fowler pleaded guilty to federal charges and was sentenced. He raised on appeal that the district court erred in assigning one criminal history point to a South Carolina domestic violence offense for which he was directed to participate in a 26-week domestic violence intervention program. The PSR assigned one criminal history point to this “conviction” even though it noted that records about the case were lost.

Mr. Fowler argued that the government did not prove that this 26-week program was ““previously imposed upon adjudication of guilt, whether by guilty plea, trial or plea of nolo contendere.” U.S.S.G. § 4A1.2(a)(1), so it could not be used to enhance his criminal history.

The 4th rejected this argument. It held that Mr. Fowler specifically withdrew all of his factual objections to the PSR at sentencing. Thus, the district court had the authority to rely on the PSR itself to find the burden of proof. NOTE that this goes even beyond plain error—by not formally objecting to the PSR, the defendant was stuck with it. This is true even though he argued for a downward variance based on the argument that the DV conviction overstated his criminal history. **The takeaway here is to be sure to formally object to facts and conclusions in the PSR, or you will be stuck with them on appeal. A downward variance argument is not enough to preserve factual objections.**

The 4th also affirmed the procedural reasonableness of the sentence, but it did not break any new ground there.

Restitution

***United States v. Taylor*, 62 F.4th 146 (4th Cir. March 10, 2023) (Heytens, King, Lydon):**

The Fourth Circuit held that under the MVRA, a person convicted of robbery must pay restitution even if the cash and property he stole were proceeds of illegal drug sales.

Mr. Taylor was a Baltimore detective who was convicted of Hobbs Act robbery and racketeering offenses for stealing money, drugs, and other property while on the job. His convictions and sentence were affirmed in a separate appeal.

The district court later ordered Mr. Taylor to pay over 228k in restitution for the money and property he stole. The court did not order restitution for the drugs he stole. On appeal of the restitution order, Taylor argued the people from whom he stole the money and property were not “victims” who suffered “pecuniary loss” under the MVRA because at least some of the money and property came from illegal activity.

The Fourth Circuit rejected that argument. The Fourth Circuit applied the plain language of the MVRA and held the victim’s unlawful conduct in acquiring the money and property in the first place is irrelevant. One judge filed a concurring opinion emphasizing that while the defendant must pay restitution to the robbery victims, the government could seek civil forfeiture of the ill-gotten gains from those robbery victims.

Attorney’s Fees

***United States v. Drake*, 2023 U.S. App. LEXIS 7683, 2023 WL 2723100 (4th Cir. March 31, 2023) (Wilkinson, Gregory, Heytens):**

The Fourth Circuit affirmed denial of discovery and attorneys’ fees under the Hyde Amendment because it found that the government’s criminal case against Shannon Drake was not vexatious, frivolous, or in bad faith.

Bruce Harrison was prosecuted for tax crimes and bank fraud, including a factoring loan scheme in which he sold the accounts receivable for his temporary-staffing business to a bank. In exchange, the bank loaned him a cash advance repaid over time as accounts receivable are collected. Harrison

established companies that appeared to be controlled by others but were actually controlled by him. So the factoring loans were paid to him and used to fund his lifestyle.

After his trial, the government investigated the bank's practices in connection with the fraud. It found that the bank's employees helped Harrison circumvent legal lending limits. Shannon Drake administratively executed many of the criminal transactions, entered false records, and reviewed account credit limits. Two employees testified to the grand jury that she helped conceal the fraud by shredding documents and using nonstandard forms. Drake herself testified to the grand jury. The government advised her she was only a factual witness and not a target, so she was represented by the same law firm that represented the bank. But at the same time, the AUSA sent an email to agents asking whether she should be treated as a target, suggesting possible crimes with which she could be charged.

Drake was ultimately charged with conspiracies, bank fraud, and misapplication of bank funds. Her co-defendant pleaded guilty and agreed to cooperate. The government acknowledged Drake was misled by the AUSA's representation she was not a target and decided not to use her grand jury testimony at trial.

At the close of the government's case, Drake moved for a Rule 29 acquittal, arguing insufficient evidence of any fraudulent intent to conceal Harrison's interest or circumvent the bank's lending limit. The court granted acquittal on all counts but noted that its ruling on some counts was a "close call," acknowledging possibly mistaken rulings on evidentiary questions and noting it would have denied the motion if the government had presented at trial testimony from a co-worker who told the grand jury Drake shredded documents in a "hush hush manner."

Drake moved for attorney's fees and expenses under the Hyde Amendment and for discovery on the government's decision to prosecute her and not to call two coworker witnesses at trial who testified for the grand jury. The court denied both motions because probable cause existed on the actus reus and the grand jury testimony provided probable cause on her mens rea. The statement she was not a target was deemed harmless because her grand jury testimony was not admitted. And discovery is not provided for in the text of the Hyde Amendment and, in any event, there was not a sufficient showing the government pursued the charges for an improper purpose or that further discovery was required.

The Fourth Circuit affirmed, finding no abuse of discretion because the prosecution was supported by probable cause at the time the government decided to prosecute, given the testimony presented to the grand jury. This was not undermined by the Rule 29 acquittal given the court's caveats and the fact that the standard is so different: The acquittal means only that there was not sufficient evidence admitted at trial to prove her guilt beyond a reasonable doubt. Drake did not present evidence the government's misrepresentation of target-status was done with ill will or for a dishonest purpose and it was harmless in any event because her grand-jury testimony was not admitted. Also, there is no constitutional right to conflict-free counsel at grand jury proceedings and Drake did not show any other adverse consequences of the representation. Denial of the motion for discovery was also not an abuse of discretion because even if the Hyde Amendment authorized it, "volumes of discovery" had already been produced and Drake still failed to show that the government acted vexatiously, frivolously, or in bad faith.

Safety Valve

***United States v. Jones*, 60 F.4th 230 (4th Cir. Feb 21, 2023) (Agee, Diaz, Harris):**

The Fourth Circuit rejected the government's appeal and affirmed the district court's application of the safety valve at sentencing. The Fourth Circuit's decision adds to a growing split among the circuits interpreting 18 USC 3553(f)(1), the safety-valve statute (more on that later).

Cassity Jones pled guilty to possession with the intent to distribute fifty grams or more of meth, an offense that carries a mandatory minimum of 10 years. At sentencing, she argued that she was eligible for safety-valve sentencing, and the court agreed and sentenced her to 100 months, even though Ms. Jones had more than four criminal history points. The government appealed, arguing that because she had more than four criminal history points, she was ineligible for the safety valve.

The Fourth Circuit sided with Ms. Jones and affirmed the district court.

This is a statutory construction case, and the opening paragraph of the opinion sums it up fairly well:

The safety valve provision found in the First Step Act allows a district court to impose a sentence without regard to a mandatory minimum if certain criteria are met. Relevant here, the court must find that the defendant “does not have . . . more than 4 criminal history points, . . . a prior 3-point offense, . . . and a prior 2-point violent offense” (the “criminal history characteristics”). 18 U.S.C. § 3553(f)(1) (emphasis added). Cassity Jones has more than four criminal history points but does not have a prior three-point offense or two-point violent offense. The district court concluded that a defendant must have all three criminal history characteristics to be ineligible for relief and applied the safety valve in sentencing Jones. The sole issue on appeal is whether the word “and” in § 3553(f)(1) connecting the criminal history characteristics applies conjunctively or disjunctively. We conclude that “and” is conjunctive and affirm the district court’s decision.

At bottom, the Fourth Circuit said that “and” means “and,” no matter how hard the government wanted it to mean “or.”

Make sure you understand when your client is eligible for safety valve--it might be more often than you think!

The Supreme Court will resolve the Circuit Split over this issue in *Pulsifer v. United States* (No. 21-1609) during the October 2023 term, so lean into the good 4th Circuit law while you can because it might go away.

Compassionate Release

***United States v. Ferguson*, 55 F.4th 262 (4th Cir. Nov. 29, 2022) (Wilkinson, Thacker, Richardson):**

In 2004, Mr. Ferguson was convicted on multiple drug offenses and sentenced to 765 months in prison. He unsuccessfully challenged his conviction and sentence on direct appeal and in two separate Section 2255 petitions.

In 2020, he requested Compassionate Release from the warden of his facility, raising medical grounds. The warden denied his request, and he moved for Compassionate Release in the district court, raising the medical grounds as well as several collateral legal attacks on the validity of his conviction and sentence. He appealed, and the Fourth Circuit first established a few

procedural rules. (1) The Court concluded that it had jurisdiction under 28 USC 1291 to review the denial of Ferguson’s motion. (2) The court concluded that the compassionate release statute had no requirement that a defendant exhaust his remedies within the Bureau of Prisons with regard to every issue raised in a compassionate release motion. It is enough to request compassionate release on some ground.

But Mr. Ferguson lost on the merits of his appeal. The Fourth Circuit held that Section 2255 is the “exclusive remedy” provided to federal inmates to attack the validity of their conviction and sentence. Thus, an inmate cannot use Compassionate Release as an end-run around Section 2255’s procedural requirements. Mr. Ferguson noted that he had exhausted his 2255 motions, so that they were practically unavailable to him. But, the Fourth Circuit held, Section 2255’s legitimate procedural bars do not constitute extraordinary and compelling grounds for Compassionate Release.

Note that this opinion does not overturn *United States v. McCoy*, which allows Compassionate Release based on changed, non-retroactive law that led to reduced sentences—because those are not attacks on the validity of a conviction or sentence. Also, nothing in *Ferguson* prevents a defendant who has shown extraordinary and compelling reasons for Compassionate Release on valid grounds from arguing about the validity of his prior convictions and sentences as part of the Section 3553(a) analysis arguing for the judge to exercise her discretion in his favor.

***United States v. Bond*, 56 F.4th 381 (4th Cir. Jan 4, 2023) (Wilkinson, Diaz, Motz):**

The district court denied Mr. Bond’s motion for Compassionate Release, citing the counts dismissed as part of the plea agreement, saying that Mr. Bond got “the exact sentence bargained for” and that granting compassionate release would “disturb the parties’ carefully negotiated agreement.” The Fourth Circuit affirmed.

The 4th Circuit affirmed, saying that courts have broad discretion when weighing the factors in a compassionate release motion, and that Bond “identifies no authority forbidding courts from weighing plea agreements.” At bottom, the Fourth held that: “The district court considered the relevant factors and concluded that the original sentence remained appropriate. Especially given our highly deferential standard of review, the district court was well within its purview to deny Bond’s motion.”

This was a bad result for Mr. Bond but note that the 4th didn't say that the district court's approach was required; just that it is not forbidden.

***United States v. Bethea*, 54 F.4th 826 (4th Cir. Dec 13, 2022) (Agee, Wynn, Motz):**

Mr. Bethea initially received a life sentence for conspiracy to distribute cocaine after priors, but ultimately won resentencing. At the same hearing, the district court resentenced Mr. Bethea to 188 months and denied his Covid-based motion for compassionate release. Mr. Bethea only appealed the denial of his compassionate-release motion.

The Fourth Circuit held the district court did *not* rule that Mr. Bethea's Covid vaccinations were a per se bar to finding extraordinary and compelling reasons for release. As a result, the Court did *not* weigh in on the propriety of such a per se bar. The Court then assumed, without deciding, that Mr. Bethea demonstrated extraordinary and compelling reasons and moved on to the Section 3553(a) factors.

In analyzing Mr. Bethea's arguments that the district court failed to properly consider the Section 3553(a) factors and his arguments, the Fourth Circuit held "the fact that Bethea's resentencing and compassionate release motion were decided by the same judge during the same hearing weighs against his criticism of the sufficiency of the court's discussion." Specifically, the Court recognized that "the district court conducted a thorough analysis of the § 3553(a) factors at Bethea's resentencing just moments prior to considering those same factors as part of Bethea's § 3582(c) motion."

The 4th also rejected arguments related to the district court's weight of the Section 3553(a) factors.

***United States v. Malone*, 57 F.4th 167 (4th Cir. Jan 5, 2023) (Gregory, King, Harris):**

The Fourth Circuit held that the district court abused its discretion when it denied compassionate release to an inmate who had already been released to home confinement. Not only did the Fourth Circuit reverse the district court, it remanded with instructions to grant compassionate release!

Lonnie Malone was sentenced to 330 months in 2008 after he pled guilty to possession of a short-barreled shotgun in furtherance of a drug trafficking offense and conspiracy to distribute 50 grams or more of a mixture containing

meth. At the time of his sentencing, Malone was suffering from colon-rectal cancer. By 2014, his condition had worsened considerably-- although his colon-rectal cancer was in remission, a 2010 surgery sewed his rectum shut, and so he had a colostomy bag permanently affixed to his body. He also suffered from cystic kidney disease, hernia, malignant neoplasm of rectum, hypertension, morbid obesity, neoplasm of uncertain behavior, hyperlipidemia, and other disorders of his liver. The district court then granted his pro se motion for a sentence reduction under Amendment 782 and reduced his sentence from 330 to 288 months.

In 2019, at age 69, he filed his first motion for compassionate release, citing his age and the general wretchedness of living with a colostomy bag in the BOP. He had also developed yet additional health conditions, including diabetes, sleep apnea, and heart problems. The district court denied the motion, finding no extraordinary and compelling reasons for release.

In 2020, due to the pandemic, BOP moved Malone to home confinement under the CARES Act. In December 2020, Malone filed a second motion for compassionate release, citing his age, health conditions, and the COVID-19 risk, should he return to prison. He cited a letter from the Office of Legal Counsel opining that released individuals would be returned to prison once the pandemic risk abated. The district court again denied the motion. Malone appealed, and the Fourth Circuit reversed.

In reversing, the Fourth Circuit found not only that the court had relied on improper considerations and failed to adequately justify its decision, but that Malone's age and health conditions constituted extraordinary and compelling circumstances, and that his sentence was "no longer just."

The Court wrote: "We conclude that the district court abused its discretion by failing to recognize that the relevant § 3553(a) factors clearly favor release. Having a Category I criminal history, Malone acknowledged the seriousness of his offense in prior motions to the court and has now served over fourteen years of his sentence. While in prison, he participated in multiple classes and was also placed in a low-level prison camp. His new extraordinary and compelling health-related circumstances have condemned him to a life filled with limitations. Due to these circumstances, his potential for recidivism is low to none and he does not pose a threat to others or the community at large. To affirm the district court's denial would not only be a great disservice to Malone,

but to any defendant with failing health seeking autonomy in their twilight. There is a reason this is called *compassionate* release, after all.”

Chief Judge Gregory, along with Judge King, directed the district court to grant the motion. Judge Harris quibbled only with this remedy, saying that it would be enough to return the case to the district court for reconsideration.

***United States v. Mangarella*, 57 F.4th 197 (4th Cir. Jan 10, 2023) (Gregory, King, Harris):**

Mr. Mangarella was originally sentenced to 50 years for his part in a fraudulent Costa Rican sweepstakes scheme, but was resentenced to 30 years after his codefendant, Pillegi, got relief. Prior to COVID-19, 65-year-old Mr. Mangarella filed a compassionate release motion citing emphysema, chronic obstructive pulmonary disease (COPD), and good conduct during 13 years in prison. The district court denied the motion in March 2020 and denied reconsideration two weeks later.

In July 2020, 66-year-old Mr. Mangarella filed an emergency motion for reconsideration and compassionate release due to the risks posed by COVID-19 in light of his emphysema and COPD. As to 3553(a), Mr. Mangarella relied primarily on his vulnerability to COVID-19, but also on his good conduct over 14 years in prison. The government agreed and filed a response in support of compassionate release, conceding extraordinary and compelling reasons and, under 3553(a), emphasizing the risk of severe illness or death due to COVID-19 as well as good conduct.

The district court called a telephonic hearing and blasted the government for allegedly taking a position that was inconsistent with its position on similar motions. The court said the government failed to explain why—disregarding COVID-19—a 14-year sentence was now justified under 3553(a). The government explained its position under 3553(a), but the court wasn’t having it. The court ordered the government to file a new response addressing 3553(a) without reference to COVID-19. The government then filed a response opposing compassionate release. And surprise...the district court denied compassionate release.

The Fourth Circuit reversed. The Court did not reach the argument that the district court violated the party presentation rule because it held “the district court’s explanation of its denial of compassionate release does not reflect that it considered Mangarella’s heightened vulnerability to COVID-19 in weighing

the § 3553(a) factors[.]” Although the district court gave a thorough explanation for its decision under 3553(a), it did not mention Mr. Mangarella’s argument regarding COVID-19. And although the district court mentioned COVID-19 when it assumed without deciding there were “extraordinary and compelling” circumstances, the Fourth Circuit refused to assume that it considered that claim under 3553(a) because of the district court’s comments at the telephonic hearing.

First Step Act

***United States v. Roane*, 51 F4th 541 (4th Cir. Oct. 18th, 2022) (Wilkinson, Rushing, Floyd):**

The Fourth Circuit held that drug-related murder is not a covered offense under the First Step Act.

The defendants argued their murder convictions under 21 U.S.C. § 848(e)(1)(A) were “covered offenses” under the First Step Act because they were predicated on PWID crack, the penalty for which was changed by the Fair Sentencing Act. The Fourth Circuit disagreed.

Section 404 of the First Step Act defines a “covered offense” as “a violation of a Federal criminal statute” whose statutory penalties were “modified by section 2 or 3 of the Fair Sentencing Act.” The Fourth Circuit held drug-related murder was not explicitly contemplated by the text of the First Step Act because it was not listed in Sections 2 and 3 of the Fair Sentencing Act. Also, under *Terry v. United States*, 141 S. Ct. 1858 (2021), the Fourth Circuit held the focus should be on the statutory penalty for the offense, not the statute or the statutory scheme. The penalty for the offense of drug-related murder was the same both before and after the Fair Sentencing Act: 20-life or death.

The defendants also argued the district court erred by denying their motions to reduce their sentences for crack distribution offenses. The Fourth Circuit held those were covered offenses. However, it found no abuse of discretion in declining to reduce the sentences because it said the defendants were such bad dudes.

***United States v. Payne*, 54 F.4th 748, 750 (4th Cir. Nov 30, 2022) (Wilkinson, Thacker, Richardson):**

Mr. Payne was convicted in 2000 of drug possession under 21 U.S.C. § 844(a). The district court sentenced him to 63 months of incarceration. He finished serving his sentencing—including his term of supervised release—in 2007. This is the only felony on his record.

In 2010, Congress enacted the Fair Sentencing Act, reducing the penalty for his crime to no more than 12 months, making it a misdemeanor. Congress did not make the Fair Sentencing Act retroactive. Then, in 2018, Congress enacted the First Step Act, providing district courts with the discretion to apply the Fair Sentencing Act retroactively to defendants serving sentences under statutes affected by the Fair Sentencing Act.

Mr. Payne filed a motion under the First Step Act, asking the district court to reclassify his offense as a misdemeanor, thus relieving him of the collateral burdens of his felony conviction. The district court denied the motion, and he appealed.

The Fourth Circuit also denied him relief. It held that the First Step Act authorizes district courts to reduce sentences. Because Mr. Payne was no longer serving a sentence, the Act simply gave the court no power to reclassify his conviction—even if it had wanted to. The Court also held that the Declaratory Judgment Act did not help Mr. Payne for the same reasons. Though the First Step Act authorized district courts to provide retroactive relief, it did not actually change the fact that, at the time of Mr. Payne’s conviction, he was convicted of a felony. Thus, with no change in law, the Declaratory Judgment Act gave the district court no power to declare that Mr. Payne was not a felon.

Side note—because the 4th Circuit held that the relevant statutes did not give the district court the power to act, it technically vacated the order *denying* the motion and remanded with instructions to *dismiss* the motion. Which must have really stunk for the defense attorney who got the CM/ECF notice saying “Vacate and Remand” and got excited before they read the opinion.

***United States v. Reed*, 58 F.4th 816 (4th Cir. Jan 31, 2023) (Quattlebaum, Richardson, Floyd):**

The 4th Circuit, in *United States v. Collington*, had one of the most defendant-friendly First Step Act Section 404 holdings in the country. *Reed* cuts back on

that a lot. The Fourth Circuit held that the Supreme Court case of *Concepcion* undermines the reasoning of *Collington* and, therefore, a district court is not required to reduce a defendant's sentence to fall within the new, post-First Step Act statutory maximum. Nonetheless, because the court was not satisfied that the district court considered this nonfrivolous argument, it vacated and remanded for reconsideration of Mr. Reed's motion.

Mr. Reed was sentenced, pre-Booker, to life plus 25 years for drug trafficking and firearm offenses where he killed two people in connection with the drug conspiracy. After the First Step Act was passed, which reduced the statutory penalties on the drug offenses from 10 years-life to 5-40 years and reduced the permissible "stack" of 924(c) offenses, Mr. Reed filed a motion for a reduced sentence under Section 404(b) of the First Step Act. The court found he was eligible for relief but declined to exercise its discretion to reduce Mr. Reed's sentence. He appealed. The Fourth Circuit concluded that its decision in *Collington*—requiring courts to sentence within the post-FSA statutory range—was abrogated by the Supreme Court's decision in *Concepcion*, which held that district courts are never required to reduce a sentence in the face of a change to the advisory guideline range.

Although the court thus was not required to reduce Mr. Reed's sentence, it was bound under *Concepcion* to consider all nonfrivolous arguments made by Mr. Reed, including the argument that statutory changes counseled in favor of a sentence reduction. Because the court did not do that (and because both Mr. Reed and the probation office gave the court incorrect information about his statutory exposure and advisory guideline range), the court nonetheless vacated and remanded for reconsideration.

***United States v. Troy*, 2023 U.S. App. LEXIS 7429 (4th Cir. March 29, 2023) (Motz, Harris, Keenan):**

The Fourth Circuit elaborated on the impact of *Concepcion* on First Step Act resentencings. In *United States v. Troy*, it held that a district court must recalculate a petitioner's guideline range accounting only for changes effected by the Fair Sentencing Act. After that, the court *may* consider other changes in law and their impact on the guideline range, but the benchmark for determining the reasonableness of a sentence (and any departure or variance) is the guideline range that accounts only for changes effected by the Fair Sentencing Act.

David Troy was initially sentenced to 276 months' imprisonment for (1) conspiracy to possess with intent to distribute 5 grams of cocaine base, (2) attempted Hobbs Act robbery, (3) discharging a firearm in furtherance of a drug trafficking crime and a crime of violence, and (4) possession of a firearm as a convicted felon. At the time, his guideline range was 382-447 months, which was reduced to 235-293 months due to a 5K departure.

After the First Step Act was passed, Troy moved for resentencing, arguing that although his guideline range was not affected by the Fair Sentencing Act, he should not have received a career offender enhancement because one of his prior convictions was not a qualifying felony under *Simmons*. He argued his guideline range should have been 121-151 months.

The district court applied that guideline range but retained the original sentence of 276 months. Troy appealed, arguing that (1) the district court should've responded more thoroughly to three of his mitigation arguments, (2) the court failed to provide a sufficient explanation for rejecting the *Simmons* guideline range, (3) the district court failed to sentence him individually, and (4) his sentence was substantively unreasonable.

The Fourth Circuit affirmed. It held that (1) the court satisfied the "low bar" *Concepcion* set for district courts considering First Step Act motions because the opinion made clear why it found Troy's arguments unpersuasive, (2) the district court appropriately considered the impact of *Simmons* but reasonably determined the 23-year sentence was "still appropriate today" after considering the Section 3553(a) factors (especially given that the appropriate guideline range remained 235-293 months), (3) the court properly considered Troy's specific role in the robbery and individual criminal history to sentence him individually, and (4) the sentence was substantively reasonable because it was within the applicable guideline range and the court did not unduly focus on a juvenile assault conviction or the violence of the offense, standing alone.

Ineffective Assistance of Counsel

***United States v. Taylor*, 54 F.4th 795 (4th Cir. Dec 5, 2022) (Gregory, Wynn, Thacker):**

Taylor was involved in the trafficking of marijuana from Arizona to Maryland. Her involvement was uncovered partly due to the Government's obtaining of cellphone-related records pursuant to the Stored Communications Act and the

Rules of Criminal Procedure. That information led to a GPS tracking warrant and, eventually, search warrants which were executed on various properties. Taylor was convicted at trial on multiple drug offenses and sentenced to 144 months in prison. She then filed a 2255 motion arguing that her trial counsel had been ineffective for failing to move to suppress the evidence found as a result of the warrants. The district court denied the motion, concluding that any motion to suppress would not have been successful.

On appeal, the Fourth Circuit affirmed. While noting that the law in the area of how and when the Government can obtain cellphone data has been in flux, at the time of these operations it had complied with applicable statutory and regulatory provisions. As a result, any motion to suppress would have been subject to a good faith analysis and would have been denied. As the evidence would have been admissible, there was no ineffective assistance of counsel based on not trying to suppress it.

We, of course, strive to be more than minimally constitutionally effective for our clients, so in such a situation, you should totally file the motion to suppress.

28 U.S.C. § 2255

***United States v. Williams*, 56 F.4th 366 (4th Cir. Jan 3, 2023) (Gregory, Wynn, Thacker):**

In 2004, Mr. Williams was convicted on multiple counts related to drug trafficking and was sentenced to life (plus 30 years) in prison. In 2008, he filed a Section 2255 motion challenging his convictions, which was denied in 2012. In 2016, he filed a motion under Rule 60(b)(3) of the Rules of Civil Procedure arguing that the Government had misrepresented several things during his Section 2255 proceedings and “prevented him from fully and fairly presenting his case.” The district court ultimately denied the motion, concluding that it was outside the 1-year time limit, that Williams was not entitled to equitable tolling, and that his motion argument failed on the merits.

On appeal, the Fourth Circuit affirmed the denial of Mr. Williams’ Rule 60(b) motion. The court ultimately decided it could not resolve whether the 1-year time limit had been equitably told or the merits of Williams’ arguments because, the court concluded, equitable tolling is not applicable to Rule 60(b) motions. While the 1-year time limit was not jurisdictional, it was a mandatory claim processing rule and the court therefore was left “without discretion to

extent Rule 60(b)'s one-year time limit for equitable reasons, whatever their merit.” (FWIW, the practical difference between jurisdictional rules and mandatory claims processing rules is that an opposing party can waive a defense based on violation of a claims processing rule).

***United States v. Taylor*, 54 F.4th 795 (4th Cir. Dec 5, 2022) (Gregory, Wynn, Thacker):**

Taylor was involved in the trafficking of marijuana from Arizona to Maryland. Her involvement was uncovered partly due to the Government's obtaining of cellphone-related records pursuant to the Stored Communications Act and the Rules of Criminal Procedure. That information led to a GPS tracking warrant and, eventually, search warrants which were executed on various properties. Taylor was convicted at trial on multiple drug offenses and sentenced to 144 months in prison. She then filed a 2255 motion arguing that her trial counsel had been ineffective for failing to move to suppress the evidence found as a result of the warrants. The district court denied the motion, concluding that any motion to suppress would not have been successful.

On appeal, the Fourth Circuit affirmed. While noting that the law in the area of how and when the Government can obtain cellphone data has been in flux, at the time of these operations it had complied with applicable statutory and regulatory provisions. As a result, any motion to suppress would have been subject to a good faith analysis and would have been denied. As the evidence would have been admissible, there was no ineffective assistance of counsel based on not trying to suppress it.

We, of course, strive to be more than minimally constitutionally effective for our clients, so in such a situation, you should totally file the motion to suppress.

***United States v. McKinney*, 60 F.4th 188 (4th Cir. Feb 16, 2023) (Wilkinson, Motz, Keenan):**

McKinney and a codefendant robbed a restaurant using a firearm, which discharged (nobody got hurt). He was charged with Hobbs Act robbery, conspiracy to commit Hobbs Act robbery, and use of a firearm in connection with a crime of violence under 18 USC 924(c). Twice, McKinney refused to plead guilty to the robbery and a 924(c) count based on the robbery. Instead, he eventually pleaded guilty to conspiracy to commit the robbery and a 924(c) where the identified crime of violence was the conspiracy to commit the

robbery. He wound up sentenced to 70 months for the robbery, plus 120 months for the 924(c) charge.

In 2016, after the Supreme Court's decision in *Johnson*, McKinney filed a 2255 motion arguing that his 924(c) conviction was no longer valid. The motion sat while the Supreme Court made further decisions that supported McKinney's claim, but the district court ultimately dismissed the motion at the Government's request, concluding that he waived the right to do so in his plea agreement and had procedurally defaulted on the claim by not raising it earlier.

On appeal, a divided Fourth Circuit reversed the district court's dismissal of McKinney's 2255 claim. The court noted that it typically leaves the merits of the claim until last, but everyone in this case agreed that McKinney's 924(c) conviction was now invalid. Therefore, the court turned to the issue of whether McKinney was barred from seeking relief on that ground. As to the waiver in McKinney's plea agreement, the court concluded that to enforce it would work a miscarriage of justice because it would leave McKinney convicted of an offense that was no longer a crime. As to procedural default, the court found good cause for it because at the time of McKinney's sentencing a challenge to his 924(c) conviction on these grounds would have not just been futile but contrary to existing Supreme Court precedent. In other words, it was only the change in Supreme Court precedent that made the argument available in the first place. The court also found prejudice, rooted in the record of McKinney refusing (twice) to plead guilty to charges related to robbery rather than conspiracy.

Judge Wilkinson dissented, arguing that the majority had created a "per se" rule of automatic prejudice which is "fundamentally at odds with the most basic principles of our criminal justice system."

***United States v. Williams*, 2023 U.S. App. LEXIS 7215 (4th Cir. March 27, 2023) (Gregory, Harris, Quattlebaum):**

The Fourth Circuit vacated a district court's denial of a Section 2255 motion and remanded for further proceedings, holding unanimously that the Court's prior decision in *White* makes plain that Virginia common-law robbery is not a violent felony under ACCA and nothing about the statute enacted in 1975 excluded the sodomy-threat theory that made that offense categorically overbroad. Because the district court did not address whether the defendant's three convictions for violating Virginia's use-or-display-of-firearm statute

qualified as ACCA predicates, the Court remanded for consideration of that issue.

United States v. Waters, 2023 U.S. App. LEXIS 7558, 2023 WL 2699503 (4th Cir. March 30, 2023) (Wilkinson, Agee, Wynn):

The Fourth Circuit held that *Rehaif* announced a new substantive rule and thus applies retroactively on initial Section 2255 motions (not a surprise, but helpful to have the published opinion). The majority, however, remanded for the district court to consider whether the defendant procedurally defaulted his claim or could establish prejudice.

Judge Wynn concurred separately, fired up. He accused the majority of acting as prosecutors rather than judges and noted that the government had failed to raise any procedural default argument in the district court and affirmatively waived it in the Fourth Circuit. Given that “our courts extend no charity to defendants who fail to raise an issue,” “why should courts sua sponte raise an issue that the government flatly did not raise and affirmatively waived on appeal?”

18 U.S.C. § 4246

United States v. Williams, 53 F.3d 825 (4th Cir. Nov. 17, 2022) (Richardson, Heytens, Motz) (Richardson, dissenting)

The government sought to commit Mr. Williams under Section 4246 just before he was scheduled for release. At the time of the hearing, everyone agreed Mr. Williams was doing well on his medication for schizoaffective disorder; the issue boiled down to whether he was likely to continue taking his medication if released.

The defense argued Mr. Williams would be subject to several supervised release conditions (imposed by the sentencing court) that would mitigate his risk to others—he would have to allow his PO to verify he was taking his Haldol shots, participate in mental health treatment, etc. The government argued the district court should not even consider the supervised release conditions. The district court committed Mr. Williams, but did not explain whether, or how, the supervised release conditions factored into its decision.

In a split decision, the Fourth Circuit reversed. The Court held the supervised release conditions were “inherently relevant” to whether Mr. Williams posed a substantial risk to others if released. The Court emphasized that committing someone based upon a prediction of future dangerousness is “serious business.” And before prolonging a person’s “loss of liberty,” courts “must consider all evidence bearing on the issue, including whether and how well other preexisting restrictions on the person’s conduct (including an unserved term of supervised release) could reduce the risks posed by the person’s release.”

Judge Richardson dissented, reasoning that the risk Mr. Williams might stop taking his medication after his supervised release ended (up to three years in the future) was enough to justify the present commitment.

Sell/Wayda Claims

***United States v. Tucker*, 60 F.4th 379 (4th Cir. Feb. 24, 2023) (Gregory, Wilkinson, Heytens):**

The Fourth Circuit held that the district court did not err in finding that involuntary medication was substantially likely to render Mr. Chris Tucker competent and ordering “a final extension of confinement to permit that medication to work,” despite the fact that Mr. Tucker had already “languished in pretrial custody for more than five years.” (!!!!) The Fourth thus rejected Mr. Tucker’s *Sell* and *Wayda* claims.

The most important takeaway from *Tucker* is that when you have an incompetent client, you must, must, must stay on top of the statutory deadlines (found at 18 USC 4241) or risk waiving *Wayda* claims. Insist that evaluations be conducted in a timely manner, and don’t let FMC Butner tell you they have no bed space—the statutes say that “any suitable facility” will do. Chris Tucker’s case shows what can happen when attorneys acquiesce to extensions.

The sole saving grace of the opinion comes at the end, when the Fourth acknowledges that “prolonged pretrial detention of a presumptively innocent person is serious business” and approves “one final four-month period of confinement to attempt to restore Tucker’s competency.” It writes: “We emphasize, however, that “[a]t some point [the government] can’t keep trying and failing and trying and failing, hoping to get it right,” and we trust no further extensions will be sought once the current appeal is finally resolved.”

II. Selected Supreme Court Cases for October Term 2022

***Jones v. Hendrix*, No. 21-857 (Argued 11/1/2022)**

Whether federal inmates who did not — because established circuit precedent stood firmly against them — challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under 28 U.S.C § 2241 after the Supreme Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

***Ciminelli v. US*, No. 21-1170 (Argued 11/28/2022)**

Whether the U.S. Court of Appeals for the 2nd Circuit’s “right to control” theory of fraud — which treats the deprivation of complete and accurate information bearing on a person’s economic decision as a species of property fraud — states a valid basis for liability under the federal wire fraud statute.

***Dubin v. US*, No. 22-10 (Argued 2/27/2023)**

Whether a person commits aggravated identity theft any time they mention or otherwise recite someone else’s name while committing a predicate offense.

***US v. Hansen*, No. 22-179 (Argued 3/27/2023)**

Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

***Lora v. US*, No. 22-49 (Argued 3/28/2023)**

Whether 18 U.S.C. § 924(c)(1)(D)(ii), which provides that “no term of imprisonment imposed ... under this subsection shall run concurrently with any other term of imprisonment,” is triggered when a defendant is convicted and sentenced under 18 U.S.C. § 924(j).

***Smith v. US*, No. 21-1576 (Argued 3/28/2023)**

Whether the proper remedy for the government’s failure to prove venue is an acquittal barring re-prosecution of the offense, as the U.S. Courts of Appeals

for the 5th and 8th Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the U.S. Courts of Appeals for the 6th, 9th, 10th and 11th Circuits have held.

***Samia v. US*, No. 22-196 (Argued 3/29/2023)**

Whether admitting a codefendant’s redacted out-of-court confession that immediately inculcates a defendant based on the surrounding context violates the defendant’s rights under the Confrontation Clause of the Sixth Amendment.

***Pugin v. Garland*, No. 22-23 (Argued 4/17/2023)**

To qualify as “an offense relating to obstruction of justice,” 8 U.S.C. § 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or judicial proceeding?