

# **FOURTH CIRCUIT UPDATE**

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**FOURTH CIRCUIT DECISIONS ON  
CRIMINAL LAW AND PROCEDURE**

Published Between April 1, 2016, and March 30, 2017

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**INTRODUCTION**

This outline documents the published decisions of the Fourth Circuit over the past twelve months that address criminal law and procedure issues encountered by court-appointed attorneys or relevant to court-appointed representation, primarily on direct appeal. Decisions that represent defense wins or otherwise contain defense-favorable findings are marked by an exclamation point (!). Decisions that, in the compilers' judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked by an asterisk (\*). Note that not every issue raised in a decision is reflected in the outline. Please report errors or omissions in the outline to the compilers at [fran\\_pratt@fd.org](mailto:fran_pratt@fd.org).

**I. OFFENSES**

**8 U.S.C. § 1326, Illegal Reentry After Removal**

! *Mena v. Lynch*, 820 F.3d 114 (4th Cir. Apr. 27, 2016) (Shedd, J.; Wilkinson, J., dissenting) (BIA) (federal offense of knowingly receiving either stolen or embezzled property, in violation of 18 U.S.C. § 659, is not categorically a theft offense and therefore does not qualify as aggravated felony)

*Alvarez v. Lynch*, 828 F.3d 288 (4th Cir. July 7, 2016) (Thacker, J.) (BIA) (Virginia conviction for forging a public record, in violation of Va. Code § 18.2-168, qualifies as aggravated felony)

! *Larios-Reyes v. Lynch*, 843 F.3d 146 (4th Cir. Dec. 6, 2016) (Gregory, J.) (BIA) (Maryland conviction for third-degree sex offense, Md. Code, Crim. Law § 3-307, does not qualify as aggravated felony because offense proscribes more conduct than does federal offense of sexual abuse of a minor)

*United States v. Lopez-Collazo*, 824 F.3d 453 (4th Cir. June 1, 2016) (Traxler, J.; Gregory, J., dissenting) (D. Md.) (on appeal by government of dismissal of indictment in 8 U.S.C. § 1326 prosecution, reversing after finding that even if defendant's removal proceeding was procedurally defective because defendant was not provided Spanish translations of removal charges and his rights in contesting them, defendant was not prejudiced where he was subject to expedited removal due to his Maryland conviction for second-degree assault, which was aggravated felony under circuit precedent at time of defendant's removal)

*United States v. Morena-Tapia*, 848 F.3d 162 (4th Cir. Jan. 26, 2017) (Harris, J.) (M.D.N.C.) (although prior convictions giving rise to defendant's removal from United States were vacated in state court on basis of *Padilla v. Kentucky*, 559 U.S. 356 (2010), convictions remain valid as matter of federal law because *Padilla* does not apply retroactively, see *Chaidez v. United States*, 133 S. Ct. 1103 (2013), and thus do not provide basis for collateral attack on removal (the reentry after which resulted in § 1326 prosecution) pursuant to § 1326(d))

14 U.S.C. § 88, Communicating False Distress Signal

*United States v. Serafini*, 826 F.3d 146 (4th Cir. June 10, 2016) (Wilkinson, J.) (E.D. Va.) (cost provision of 14 U.S.C. § 88(c), which holds an individual "liable for all costs the Coast Guard incurs as a result of the individual's action" in communicating false distress message, authorizes district court to order restitution to Coast Guard for its response)

16 U.S.C. § 3372, Lacey Act / 16 U.S.C. § 5151, Bass Act

*United States v. Saunders*, 828 F.3d 198 (4th Cir. July 5, 2016) (per curiam) (E.D.N.C.) (on appeal by government, reversing grant of motion to dismiss indictment alleging Lacey Act violations for catching Atlantic striped bass in federal waters; rejecting claim of unconstitutional vagueness)

18 U.S.C. §§ 922, 924, Firearms

N.B.: for cases addressing the Armed Career Criminal Act, see Part X, Sentencing Statutes.

*United States v. Hosford*, 843 F.3d 161 (4th Cir. Dec. 6, 2016) (Gregory, J.) (D. Md.) (prosecution for unlicensed firearms dealing, 18 U.S.C. § 922(a)(1)(A), does not violate Commerce Clause or Second or Fifth Amendments)

*United States v. Evans*, 848 F.3d 242 (4th Cir. Feb. 2, 2017) (Keenan, J.) (E.D.N.C.) (carjacking in violation of 18 U.S.C. § 2119 qualifies as "crime of violence" for purpose of serving as predicate offense for violation of 18 U.S.C. § 924(c))

18 U.S.C. § 2111 et seq., Robbery and Burglary

! *United States v. Bailey*, 819 F.3d 92 (4th Cir. Apr. 12, 2016) (Davis, J.) (M.D.N.C.) (reversing carjacking conviction under 18 U.S.C. § 2119 for insufficient evidence of intent, whether conditional or unconditional, to kill or seriously harm vehicle's driver if necessary to take vehicle)

*United States v. Evans*, 848 F.3d 242 (4th Cir. Feb. 2, 2017) (Keenan, J.) (E.D.N.C.) (carjacking in violation of 18 U.S.C. § 2119 qualifies as "crime of violence" for purpose of serving as predicate offense for violation of 18 U.S.C. § 924(c))

18 U.S.C. § 2421 et seq., Transportation, etc, for Illegal Sexual Activity

*United States v. Clarke*, 842 F.3d 288 (4th Cir. Nov. 18, 2016) (Wynn, J.) (E.D. Va.) (in question of first impression in circuit, holding that communications with intermediary aimed at persuading, inducing, enticing, or coercing minor to engage in sexual activity fell within scope of criminal attempt prohibited by 18 U.S.C. § 2422(b); further finding evidence to be sufficient to convict defendant of attempting to violate § 2422(b) where jury could find that defendant had intent to persuade minors to engage in sexual activity and defendant took substantial step to do so by arranging with person he believed was father of minors to visit children)

*United States v. Schmidt*, 845 F.3d 153 (4th Cir. Jan. 4, 2017) (Wilkinson, J.) (D. Md.) (on appeal by government of grant of § 2255 motion, reinstating conviction for § 2423(c), engaging in illicit sexual conduct in foreign places, based on molesting child in Cambodia where defendant initially traveled from United States to Philippines, where he remained for 18 months (though without any settled address) before traveling to Cambodia; travel in foreign commerce encompasses movement abroad that maintains some nexus with United States and ends only with permanent resettlement in foreign country)

21 U.S.C. § 841 et seq., Controlled Substance Offenses

*United States v. McFadden*, 823 F.3d 217 (4th Cir. May 19, 2016) (Keenan, J.) (W.D. Va.) (on remand from Supreme Court, concluding that jury instruction error concerning defendant's knowledge of nature of controlled substance analogue (either as to substance's legal status or its chemical structure and physiological effects) was harmless as to some counts, but not harmless as to others)

30 U.S.C. § 820, Penalties for Violations of Mandatory Mining Health or Safety Standards

*United States v. Blankenship*, 846 F.3d 663 (4th Cir. Jan. 19, 2017) (Wynn, J.) (S.D. W. Va.) (in criminal prosecution stemming from Massey coal mine accident, indictment was sufficient to allege violation of 30 U.S.C. § 820(d), which provides penalties for willful violations of mandatory health or safety standards, where indictment, although it did not provide citations for which standards or regulations were violated in specific count, tracked statutory language in count and provided extensive factual background describing regulations and how defendant violated them)

II. COMMERCE CLAUSE ISSUES

*United States v. Hosford*, 843 F.3d 161 (4th Cir. Dec. 6, 2016) (Gregory, J.) (D. Md.) (prohibition against unlicensed firearms dealing contained in 18 U.S.C. § 922(a)(1)(A), is valid exercise by Congress of its power under Commerce Clause)

### III. SECOND AMENDMENT ISSUES

*United States v. Hosford*, 843 F.3d 161 (4th Cir. Dec. 6, 2016) (Gregory, J.) (D. Md.) (prohibition against unlicensed firearms dealing contained in 18 U.S.C. § 922(a)(1)(A), does not violate Second Amendment, either facially or as applied)

### IV. FOURTH AMENDMENT ISSUES

#### Automobile Exception

*United States v. Gardner*, 823 F.3d 793 (4th Cir. May 18, 2016) (Keenan, J.) (E.D.N.C.) (police officer had probable cause to search defendant's car for firearm based on tip from confidential informant with whom officer had working relationship and who had consistently provided accurate information, which officer largely corroborated before making stop, and where defendant made furtive movements when being pulled over and acknowledged having firearm)

#### Reasonable Suspicion

*United States v. Palmer*, 820 F.3d 640 (4th Cir. Apr. 21, 2016) (King, J.; Wynn, J., concurring) (E.D. Va.) (officer did not unreasonably extend traffic stop in order to get drug dog where officer had reasonable suspicion to believe defendant was involved in drug dealing based on: overwhelming smell of air freshener in car; defendant's status as suspected gang member; his four previous arrests on drug charges and conviction for firearm possession; his possession of two cell phones on his hip; his nervousness; his listing of post office box on driver's license; registration of car to someone else; heavy tinting of car's windows; and location of stop in high-crime area where citizens had complained about drug dealing)

*United States v. Gardner*, 823 F.3d 793 (4th Cir. May 18, 2016) (Keenan, J.) (E.D.N.C.) (police officer had reasonable suspicion to conduct traffic stop of defendant for unlawful possession of firearm based on tip from confidential informant with whom officer had working relationship and who had consistently provided accurate information, where officer corroborated information in tip before making stop)

*United States v. Foster*, 824 F.3d 84 (4th Cir. May 24, 2016) (Diaz, J.; Wilkinson, J., concurring) (N.D. W. Va.) (affirming denial of motion to suppress firearm seized after stop-and-frisk based on anonymous 911 call regarding gunfire in high-crime area late at night where defendant did "security check" on himself before answering officer's question about whether he had a weapon)

*United States v. White*, 836 F.3d 437 (4th Cir. Sept. 9, 2016) (Wynn, J.) (S.D. W. Va.) (affirming denial of motion to suppress firearm brought on ground that officer unconstitutionally prolonged traffic stop where, after pulling over car for traffic stop, officer smelled burnt marijuana when he first approached car)

*United States v. Robinson*, 846 F.3d 694 (4th Cir. Jan. 23, 2017) (en banc) (Niemeyer, J.; Wynn, J., concurring in judgment; Harris, J., joined by Gregory, Motz, and Davis, JJ., dissenting) (N.D. W. Va.) (concluding that police officer who makes lawful traffic stop and has reasonable suspicion to believe that one of car's occupants is armed may frisk that occupant, regardless of whether occupant has permit to carry concealed weapon; fact that person legally carries weapon does not negate danger to police)

*United States v. (Donald) Hill*, \_\_\_ F.3d \_\_\_, 2017 WL \_\_\_\_\_ (4th Cir. Mar. 30, 2017) (Keenan, J.; Davis, J., dissenting) (E.D. Va.) (concluding that 20-minute-long traffic stop, during which one officer interrupted his writing of traffic summonses to check local PISTOL database (after having learned already from NCIC that both vehicle occupants had been associated with drug trafficking and were likely armed) while other officer asked occupants three times in making small talk whether there were guns or drugs in vehicle and received affirmative answer as to a gun on last try, did not exceed time reasonable required to complete tasks incident to mission of stop for slight speeding and crossing yellow double line because evidence showed that officers acted with reasonable diligence and did not impermissibly expand scope or length of stop)

#### Inventory Searches

*United States v. Clarke*, 842 F.3d 288 (4th Cir. Nov. 18, 2016) (Wynn, J.) (E.D. Va.) (district court did not err in denying motion to suppress based on improper inventory search where court considered both Virginia Department of State Police inventory search policy and standard inventory search form signed by officer who conducted search)

#### Warrants

! *United States v. Lull*, 824 F.3d 109 (4th Cir. May 25, 2016) (Duncan, J.; Davis, J., concurring in part and dissenting in part) (E.D.N.C.) (finding *Franks* violation and reversing denial of suppression motion where police investigator at least recklessly omitted from search warrant application information about reliability of confidential informant who was primary source of information used to establish probable cause (specifically, that after completing controlled buy, informant stole \$20 of buy money and was immediately terminated as informant and arrested for theft), and omitted information was material)

*United States v. Graham*, 824 F.3d 421 (4th Cir. May 31, 2016) (en banc) (Motz, J.; Wilkinson, J., concurring; Wynn, J., joined by Floyd and Thacker, JJ., dissenting)) (D. Md.) (joining three other circuits in holding that, under third-party doctrine, government's acquisition of historical cell-site location information (CSLI) for defendant's cell phone from cell phone provider does not violate Fourth Amendment; government not required to obtain warrant), *petition for cert. filed and distributed for conference*, No. 16-6308

*United States v. Wharton*, 840 F.3d 163 (Oct. 21, 2016) (Motz, J.) (D. Md.) (affirming denial of suppression motion challenging search warrant on ground that material exculpatory information was recklessly omitted because even if included, omitted information would not have defeated probable cause for search, therefore information was not material)

*United States v. White*, \_\_\_ F.3d \_\_\_\_, 2017 WL 942653 (4th Cir. Mar. 9, 2017) (Duncan, J.) (D. Md.) (rejecting government's argument that defendant waived *Franks* argument by not raising it before trial when basis for argument did not become apparent until witness testified at trial; rejecting *Franks* argument on merits where defendant failed to make substantial showing that officer knowingly, intentionally, or recklessly made false statement in warrant affidavit)

#### Exclusionary Rule

*United States v. (Darren) Hill*, 849 F.3d 195 (4th Cir. Feb. 23, 2017) (Duncan, J.) (W.D.N.C.) (under good-faith exception to exclusionary rule, Supreme Court and appellate decisions (here, *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), and *United States v. Williams*, 808 F.3d 238 (4th Cir. 2015)) do not apply to searches and seizures occurring before decisions issued)

### V. FIFTH AMENDMENT ISSUES (Pre-trial and Trial)

#### Due Process

*United States v. Hare*, 820 F.3d 93 (4th Cir. Apr. 19, 2016) (Floyd, J.) (D. Md.) (in stash-house robbery sting case, affirming denial of motion to dismiss indictment based on outrageous government conduct where, although law enforcement agents failed to investigate defendants' criminal histories, defendants were recruited by co-conspirator, not targeted by law enforcement; and where ATF use of stash house stings as investigative tool is not so outrageous as to shock conscience)

*United States v. Bello Murillo*, 826 F.3d 152 (4th Cir. June 14, 2016) (King, J.) (E.D. Va.) (prosecution of defendant in United States for armed robbery and murder in Columbia of U.S. citizen with diplomatic status, i.e., an internationally protected person (IPP), does not violate due process where prosecution was neither arbitrary nor unfair)

*United States v. Rand*, 835 F.3d 451 (4th Cir. Aug. 26, 2016) (Gregory, J.) (W.D.N.C.) (rejecting argument that exclusion of testimony that certain accusations were false prevented defendant from fully defending himself by explaining circumstances of his confession and limiting ability to cross-examine witnesses; but even if exclusion of testimony was error, error was harmless)

*United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. Sept. 1, 2016) (on panel rehearing) (Diaz, J.; Davis, J., dissenting) (E.D.N.C.) (assuming that government's improper use of ethnic stereotype to rebut defendant's trial defense theory that he was too poor to be a major drug dealer was constitutional error, but finding that such error was harmless beyond a reasonable doubt)

*United States v. Hosford*, 843 F.3d 161 (4th Cir. Dec. 6, 2016) (Gregory, J.) (D. Md.) (prohibition against unlicensed firearms dealing contained in 18 U.S.C. § 922(a)(1)(A), is not void for vagueness, either facially or as applied)

### Grand Jury / Indictment

*United States v. Alvarado*, 840 F.3d 184 (4th Cir. Oct. 26, 2016) (Duncan, J.) (W.D. Va.) (on interlocutory appeal by government of district court order precluding government from using certain grand jury evidence at trial, reversing order where district court expressly found that government's did not commit misconduct in grand jury proceeding and did not otherwise explain that government engaged in bad-faith questioning of grand jury witnesses or otherwise abused grand jury process; rejecting government's argument that district court has no power to impose remedy absent finding of misconduct)

*United States v. Blankenship*, 846 F.3d 663 (4th Cir. Jan. 19, 2017) (Wynn, J.) (S.D. W. Va.) (in criminal prosecution stemming from Massey coal mine accident, indictment was sufficient to allege violation of 30 U.S.C. § 820(d), which provides penalties for willful violations of mandatory health or safety standards, where indictment, although it did not provide citations for which standards or regulations were violated in specific count, tracked statutory language in count and provided extensive factual background describing regulations and how defendant violated them)

### Selective Enforcement / Prosecution

\* *United States v. Hare*, 820 F.3d 93 (4th Cir. Apr. 19, 2016) (Floyd, J.) (D. Md.) (in stash-house robbery sting case, affirming denial of motion for discovery into race discrimination in investigation where defendants' statistical data did not demonstrate that similarly-situated white offenders who could have been prosecuted were not, and where district court ordered disclosure of ATF criteria for stash-house sting operations)

## VI. SIXTH AMENDMENT ISSUES (Pre-trial and Trial)

### Confrontation

*United States v. Blankenship*, 846 F.3d 663 (4th Cir. Jan. 19, 2017) (Wynn, J.) (S.D. W. Va.) (even if defendant's right to confrontation was violated by not being allowed to engage in recross-examination of government witness, any error was harmless beyond a reasonable doubt)

### Counsel

*United States v. Chittenden*, 848 F.3d 188 (4th Cir. Jan. 31, 2017) (Gregory, J.) (E.D. Va.) (on plain error review, finding that pre-trial restraint of defendant's tainted and untainted assets, other than funds already paid to attorneys representing her in pre-indictment investigation, did not violate defendant's Sixth Amendment right to choice of counsel, *see Luis v. United States*, 136 S. Ct. 1083 (2016), where defendant continued with same counsel through trial and on appeal and nothing in record indicated that she wanted to retain different attorneys)

## VII. OTHER PRE-TRIAL ISSUES

### Discovery (Fed. R. Crim. P. 16)

*United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. Sept. 1, 2016) (on panel rehearing) (Diaz, J.) (E.D.N.C.) (on plain error review, finding that government's failure to comply with Fed. R. Crim. P. 16(b)(1)(G)'s notice requirement to provide written summary of expert testimony by police officer on drug trafficking, even if plain error, did not affect defendant's substantial rights)

### Subpoenas (Fed. R. Crim. P. 17)

*United States v. Rand*, 835 F.3d 451 (4th Cir. Aug. 26, 2016) (Gregory, J.) (W.D.N.C.) (in question of first impression, rejecting argument that test for issuance of subpoenas laid out in *United States v. Nixon*, 418 U.S. 683, 699-700 (1974), applies only to subpoenas issued to prosecution and ruling that test applies to subpoenas issued to third parties)

## VIII. TRIAL ISSUES<sup>1</sup>

### Jury Selection

*United States v. Powell*, 850 F.3d 145 (4th Cir. Mar. 1, 2017) (Niemeyer, J.) (E.D.N.C.) (juror's alleged comments to defendant's father that "everything would be alright" and that father needed to give his son "a good kick in the butt," made when entering courthouse after jury selection but before trial began, were not sufficiently clear to indicate actual bias; thus, defense counsel was not ineffective for failing to try to have juror removed)

### Evidence

#### Confrontation

*See* Sixth Amendment, *supra*

#### Federal Rules of Evidence 401 et seq.

*United States v. Faulls*, 821 F.3d 502 (4th Cir. May 5, 2016) (Diaz, J.; Shedd, J., concurring) (W.D. Va.) (in kidnapping and interstate domestic violence case, evidence of defendant's previous incidents of domestic violence against victim was properly admitted to establish defendant's motive and victim's state of mind)

<sup>1</sup> *United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. Sept. 1, 2016) (on panel rehearing) (Diaz, J.) (E.D.N.C.) (on plain error review, finding that admission in drug prosecution of

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<sup>1</sup> Subsections are arranged by stage of trial.

defendant's illegal immigrant status violates Rule 404(b), but even assuming error was plain, it did not affect defendant's substantial rights)

#### Federal Rules of Evidence 701 et seq.

*United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. Sept. 1, 2016) (on panel rehearing) (Diaz, J.) (E.D.N.C.) (on plain error review, finding that government's failure to comply with Fed. R. Crim. P. 16(b)(1)(G)'s notice requirement to provide written summary of expert testimony by police officer on drug trafficking, even if plain error, did not affect defendant's substantial rights)

*United States v. Clarke*, 842 F.3d 288 (4th Cir. Nov. 18, 2016) (Wynn, J.) (E.D. Va.) (district court did not erroneously instruct jury on meaning of "induce" as used in 18 U.S.C. § 2422(b))

#### Sufficiency of Evidence

*See Offenses, supra*

#### Jury Instructions

*United States v. Clarke*, 842 F.3d 288 (4th Cir. Nov. 18, 2016) (Wynn, J.) (E.D. Va.) (district court violated Fed. R. Crim. P. 30(b) when it failed to apprise parties before closing arguments of how it would instruct jury, but error was harmless where defense counsel was able to make all necessary arguments and government introduced sufficient evidence to convict defendant)

*United States v. Blankenship*, 846 F.3d 663 (4th Cir. Jan. 19, 2017) (Wynn, J.) (S.D. W. Va.) (jury instruction on "willfully" properly defined that term to include acting or failing to act with "reckless disregard" in prosecution for violation of 30 U.S.C. § 820(d) (violations of mandatory mining health or safety standards))

\* *United States v. Blankenship*, 846 F.3d 663 (4th Cir. Jan. 19, 2017) (Wynn, J.) (S.D. W. Va.) (in issue of apparent first impression in circuit, although finding that "two-inference" instruction (i.e., if jury views case as reasonably permitting two conclusions, one of innocence and the other of guilt, it must acquit) did not impermissibly reduce government's burden of proof in case at hand, directing district courts to stop giving instruction)

*United States v. Vinson*, \_\_\_ F.3d \_\_\_, 2017 WL 1103007 (4th Cir. Mar. 24, 2017) (King, J.) (W.D.N.C.) (in large-scale real estate fraud case, district court did not abuse discretion in instructing jury on willful blindness where each count required jury to find that defendant acted knowingly and government presented evidence of deliberate ignorance)

#### Closing Arguments

! *United States v. Rand*, 835 F.3d 451 (4th Cir. Aug. 26, 2016) (Gregory, J.) (W.D.N.C.) (finding error in government's references to defendant's wealth during rebuttal, but error harmless)

## IX. PLEA ISSUES

### Plea Agreement Provisions

! *United States v. Warner*, 820 F.3d 678 (4th Cir. Apr. 27, 2016) (Niemeyer, J.) (W.D.N.C.) (where government agreed in plea agreement that certain enhancement did not apply but at sentencing said that it did apply (even though it then asked court to honor plea agreement and not apply enhancement), concluding that “the government, although acting in good faith, breached its undertaking in the plea agreement by stating that the enhancement did apply”)

*United States v. Tate*, 845 F.3d 571 (4th Cir. Jan. 11, 2017) (Floyd, J.) (W.D.N.C.) (on plain error review, where government agreed in plea agreement to recommend sentence at bottom of “applicable guideline range,” government did not breach agreement by recommending sentence at bottom of range found by district court, not range that defendant argued to court was correct range)

### Entry of Guilty Plea (Fed. R. Crim P. 11)

*United States v. Fitzgerald*, 820 F.3d 107 (4th Cir. Apr. 27, 2016) (Traxler, J.) (D. Md.) (discussing what is required to enter conditional plea that preserves right to appeal denial of pretrial motion where plea is straight up, without a written plea agreement)

*United States v. Agyekum*, 846 F.3d 744 (4th Cir. Jan. 24, 2017) (Niemeyer, J.) (S.D. W. Va.) (on plain error review, finding that district court adequately advised defendant that he was giving up rights in plea agreement to challenge forfeiture proceedings and that defendant knowingly and intelligently waived any forfeiture challenge)

## X. SENTENCING ISSUES

### Constitutional Considerations

#### Fifth Amendment

*United States v. Lara*, \_\_\_ F.3d \_\_\_, 2017 WL 991700 (4th Cir. Mar. 14, 2017) (Keenan, J.) (W.D. Va.) (use at sentencing in SORNA case of statements made by defendant during participation in sex offender treatment program ordered as condition of supervision in a different case does not violate Fifth Amendment privilege against self-incrimination where defendant made statements voluntarily and was never threatened with revocation of supervision in other case if he did not answer questions)

### Sentencing Statutes

#### 18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA)

\* *United States v. Linney*, 819 F.3d 747 (4th Cir. Apr. 26, 2016) (Wilkinson, J.) (W.D.N.C.) (affirming district court's ruling that two burglaries committed on same night were committed on "occasions different from one another" where burglaries were committed at two distinct street addresses (albeit only 30 feet apart) and involved different victims)

! *United States v. Gardner*, 823 F.3d 793 (4th Cir. May 18, 2016) (Keenan, J.) (E.D.N.C.) (North Carolina common law robbery, i.e., "the 'felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear,'" does not fall within "force clause" of ACCA's "violent felony" definition where state law permits only *de minimus* force to suffice for conviction)

! *United States v. White*, 836 F.3d 437 (4th Cir. Sept. 9, 2016) (Wynn, J.) (S.D. W. Va.) (vacating ACCA sentence where, although West Virginia burglary, in violation of W. Va. Code § 61-3-11(a), qualified as violent felony under residual clause at time of defendant's sentencing, it no longer qualifies after *Johnson* (which came out during pendency of appeal), and does not qualify as generic burglary because it sweeps more broadly)

*United States v. Doctor*, 842 F.3d 306 (4th Cir. Nov. 21, 2016) (Gregory, J.; Wilkinson, J., concurring) (D.S.C.) (South Carolina robbery ("by violence or putting [victim] in fear" of bodily harm from perpetrator's acts) qualifies under ACCA's "force clause" as "violent felony")

*United States v. McDonald*, \_\_\_ F.3d \_\_\_, 2017 WL 937469 (4th Cir. Mar. 9, 2017) (Shedd, J.) (W.D.N.C.) (where defendant sentenced as armed career criminal based in part on two convictions for South Carolina second-degree burglary, assuming error but finding it harmless where district court indicated it would impose same 188-month sentence as upward variance (by varying from non-ACCA range of 140-175 months up by one criminal history category to 151-188 months and then running 68-month sentence for one of four § 922(g) convictions consecutively to 120-month sentences on other § 922(g) counts), and 188-month sentence imposed as variance was substantively reasonable)

! *United States v. Winston*, \_\_\_ F.3d \_\_\_, 2017 WL 977031 (4th Cir. Mar. 13, 2017) (Keenan, J.) (W.D. Va.) (Virginia common law robbery does not fall within "force clause" of ACCA's "violent felony" definition because offense can be committed by use of only *de minimus* force, not "force capable of causing physical pain or injury to another person;" concluding that *United States v. Presley*, 52 F.3d 64 (4th Cir. 1995), is no longer binding because it has been undermined by later Supreme Court precedent)

#### 18 U.S.C. § 2251(e), Penalties for Sexual Exploitation of Children

\* *United States v. Mills*, \_\_\_ F.3d \_\_\_, 2017 WL 1014393 (4th Cir. Mar. 15, 2017) (Thacker, J.) (E.D.N.C.) (on plain error review, applying categorical approach in ruling that North

Carolina conviction for indecent liberties with children constitutes conviction “relating to the sexual exploitation of children” that triggers 35-year mandatory minimum penalty for violation of § 2251)

### Sentencing Guidelines

#### U.S.S.G. § 1B1.3, Relevant Conduct

*United States v. Agyekum*, 846 F.3d 744 (4th Cir. Jan. 24, 2017) (Niemeyer, J.) (S.D. W. Va.) (where defendant pled guilty to two structuring cash transactions pursuant to 31 U.S.C. § 5324, such that U.S.S.G. § 2S1.3 applied, district court did not err in considering drug distribution conspiracy as relevant conduct, and applying enhancements for leadership role and abuse of position of trust based on drug conspiracy, when structuring charges resulted from defendant’s efforts to conceal source and nature of proceeds from drug distribution)

#### U.S.S.G. § 2B1.1, Fraud

*United States v. Rand*, 835 F.3d 451 (4th Cir. Aug. 26, 2016) (Gregory, J.) (W.D.N.C.) (in securities fraud case involving loss based on changes in securities prices after fraud was disclosed to market, joining Third, Sixth, and Ninth Circuits in agreeing that loss-causation principles set out in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), do not apply in criminal case)

*United States v. White*, \_\_\_ F.3d \_\_\_, 2017 WL 942653 (4th Cir. Mar. 9, 2017) (Duncan, J.) (D. Md.) (affirming application of enhancement under § 2B1.1(b)(9)(A) for misrepresentation that defendant was acting on behalf of government agency where defendant created fraudulent IRS notices and was involved in leaving of voice mail in which unidentified caller claimed to be official tax collector)

*United States v. White*, \_\_\_ F.3d \_\_\_, 2017 WL 942653 (4th Cir. Mar. 9, 2017) (Duncan, J.) (D. Md.) (affirming application of enhancement under § 2B1.1(b)(10)(C) for use of sophisticated means where scheme to defraud incapacitated person involved several layers of fraudulent conduct and lasted nearly three years)

#### U.S.S.G. § 2B3.1 et seq., Robbery

! *United States v. Williams*, 841 F.3d 656 (4th Cir. Nov. 10, 2016) (Floyd, J.) (E.D.N.C.) (where defendant was charged with, and pled guilty to, attempted bank burglary and bank larceny under 18 U.S.C. § 2113(a), not bank robbery, guideline for burglary, U.S.S.G. § 2B2.1, should have been applied)

#### U.S.S.G. § 2D1.1 et seq., Drug Offenses

! *United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. Sept. 1, 2016) (on panel rehearing) (Diaz, J.) (E.D.N.C.) (on plain error review, finding plain error that affected defendant’s substantial rights where district court agreed to final offense level based on granting two defense objections and

a downward departure and stated it would sentence defendant at low end of range, but then court applied wrong range when it forgot to reduce offense level in light of one objection it had granted)

U.S.S.G. § 2L1.2, Illegal Reentry After Removal

N.B.: as of Nov. 1, 2016, § 2L1.2 no longer considers convictions for aggravated felonies, and limits consideration of crimes of violence to misdemeanor convictions, in calculating offense level.

! *Mena v. Lynch*, 820 F.3d 114 (4th Cir. Apr. 27, 2016) (Shedd, J.; Wilkinson, J., dissenting) (BIA) (federal offense of knowingly receiving either stolen or embezzled property, in violation of 18 U.S.C. § 659, is not categorically a theft offense and therefore does not qualify as aggravated felony)

! *United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. June 21, 2016) (Davis, J.) (W.D.N.C.) (conviction for aggravated assault under Tex. Penal Code § 22.02(a) is not categorically “crime of violence” that can be used to increase offense level by 16 levels under § 2L1.2 where indivisible offense sweeps more broadly than generic offense by including reckless as well as intentional or knowing causation of bodily injury)

*Alvarez v. Lynch*, 828 F.3d 288 (4th Cir. July 7, 2016) (Thacker, J.) (BIA) (Virginia conviction for forging a public record, in violation of Va. Code § 18.2-168, qualifies as aggravated felony) (N.B.: Nov. 2016 guideline no longer considers convictions for aggravated felonies)

*United States v. Alfaro*, 835 F.3d 470 (4th Cir. Aug. 29, 2016) (Traxler, J.) (D. Md.) (Maryland third-degree sex offense, Md. Code, Crim. Law § 3-307, qualifies as crime of violence; “sex offense” is offense involving sexual conduct, and is forcible if it is not consensual; sex offense does not require element of sexual gratification) (N.B.: although this decision will have limited application to the Nov. 1, 2016 revised version of § 2L1.2, that section’s definition of crime of violence tracks the Aug. 1, 2016 definition of crime of violence in § 4B1.2, such that decision will apply to career offender guideline and other guidelines incorporating § 4B1.2 definition)

! *Larios-Reyes v. Lynch*, 843 F.3d 146 (4th Cir. Dec. 6, 2016) (Gregory, J.) (BIA) (Maryland conviction for third-degree sex offense, does not qualify as aggravated felony because offense proscribes more conduct than does federal offense of sexual abuse of a minor; distinguishing *Alfaro*, *supra*)

*United States v. Morena-Tapia*, 848 F.3d 162 (4th Cir. Jan. 26, 2017) (Harris, J.) (M.D.N.C.) (although prior convictions giving rise to defendant’s removal from United States were vacated in 2015 in state court on basis of *Padilla v. Kentucky*, 559 U.S. 356 (2010), because convictions were valid at time of defendant’s removal in 2009, they could be used to enhance sentence under § 2L1.2)

U.S.S.G. § 2S1.1 et seq., Money Laundering

*United States v. Agyekum*, 846 F.3d 744 (4th Cir. Jan. 24, 2017) (Niemeyer, J.) (S.D. W. Va.) (where defendant pled guilty to two structuring cash transactions pursuant to 31 U.S.C. § 5324, such that U.S.S.G. § 2S1.3 applied, district court did not err in considering drug distribution conspiracy as relevant conduct, and applying enhancements for leadership role and abuse of position of trust based on drug conspiracy, when structuring charges resulted from defendant's efforts to conceal source and nature of proceeds from drug distribution)

U.S.S.G. § 3B1.1 et seq., Role Adjustments

*United States v. Agyekum*, 846 F.3d 744 (4th Cir. Jan. 24, 2017) (Niemeyer, J.; Wynn, dissenting in part) (S.D. W. Va.) (in case involving pharmacy that illegally distributed oxycodone, finding that enhancements for leadership role, U.S.S.G. § 3B1.1, and abuse of position of trust, U.S.S.G. § 3B1.3, were properly applied to defendant, a licensed pharmacist intern, where he was chief executive officer of pharmacy, handling all financial matters and state reporting requirements and directing pharmacist to fill out-of-state prescriptions and suspicious prescriptions)

U.S.S.G. § 4B1.1 et seq., Career Offenders and Other Recidivists

N.B.: as of August 1, 2016, the U.S. Sentencing Commission significantly revised the definition of "crime of violence" contained in § 4B1.2.

*United States v. Dozier*, 848 F.3d 180 (4th Cir. Jan. 30, 2017) (Davis, J.) (S.D. W. Va.) (concluding that when dealing with state attempt statutes, sentencing courts must compare elements of state and generic attempt offenses as well as elements of underlying substantive offense when determining whether prior attempt conviction qualifies as controlled substance offense for career offender guideline)

Reasonableness of Sentence

*United States v. Spencer*, 848 F.3d 324 (4th Cir. Feb. 9, 2017) (Wilkinson, J.) (E.D. Va.) (on appeal after resentencing, at which district court imposed above-range sentence of 45 months after imposing high-end sentence of 46 months at original sentencing, finding any procedural error in imposition of variance sentence to be harmless and finding sentence to be substantively reasonable)

*United States v. White*, \_\_\_ F.3d \_\_\_, 2017 WL 942653 (4th Cir. Mar. 9, 2017) (Duncan, J.) (D. Md.) (in tax fraud case involving fraud on incapacitated person that was complex and lasted nearly three years, affirming as substantively reasonable sentence of 108 months, at top of range)

*United States v. Lara*, \_\_\_ F.3d \_\_\_, 2017 WL 991700 (4th Cir. Mar. 14, 2017) (Keenan, J.) (W.D. Va.) (court could use at sentencing in SORNA case statements made by defendant during participation in sex offender treatment program ordered as condition of supervision in different case where defendant had affirmatively waived any psychotherapist-patient privilege when he agreed as

part of conditions of supervision in prior case to disclosure of statements he made in treatment program)

*United States v. Vinson*, \_\_\_ F.3d \_\_\_\_, 2017 WL 1103007 (4th Cir. Mar. 24, 2017) (King, J.) (W.D.N.C.) (in large-scale real estate fraud case, below-range sentence of 216 months was not substantively unreasonable although it was much higher than sentences imposed upon co-conspirators where co-conspirators pled guilty and cooperated, whereas defendant went to trial, continued to deny guilt in sentencing allocution, and never expressed remorse for his criminal activities)

#### Restitution and Forfeiture

*United States v. Serafini*, 826 F.3d 146 (4th Cir. June 10, 2016) (Wilkinson, J.) (E.D. Va.) (cost provision of 14 U.S.C. § 88(c), which holds an individual “liable for all costs the Coast Guard incurs as a result of the individual’s action” in communicating false distress message, authorizes district court to order restitution to Coast Guard for its response)

*United States v. Chittenden*, 848 F.3d 188, 203-04 (4th Cir. 2017) (when defendant is convicted of conspiracy, it is appropriate to hold defendant jointly and severally liable for forfeiture of amount of proceeds that were reasonably foreseeable to defendant, including substitute assets when co-conspirators dissipated, commingled, or transferred proceeds)

*United States v. Chittenden*, 848 F.3d 188, 203-04 (4th Cir. 2017) (district court’s failure to include forfeiture in judgment does not deprive it of jurisdiction to later enter preliminary and final forfeiture orders; Fed. R. Crim. P. 32.2 is not jurisdictional condition but rather time-related directive so long as court had made clear prior to sentencing that it planned to order forfeiture)

#### Supervised Release

*United States v. Faulls*, 821 F.3d 502 (4th Cir. May 5, 2016) (Diaz, J.; Shedd, J., concurring) (W.D. Va.) (because interstate domestic violence case is offense that requires registration under SORNA, district court did not err in requiring sex offender registration as condition of supervised release)

*United States v. Douglas*, \_\_\_ F.3d \_\_\_\_, 2017 WL 937496 (4th Cir. Mar. 9, 2017) (Traxler, J.) (W.D. Va.) (where defendant was sentenced for violating SORNA by failing to register as sex offender, court did not abuse discretion when including submission to sex offender evaluation as condition of supervised release even though defendant’s conviction for sex offense was over 20 years old, where defendant spent nearly 15 years successfully evading detection and arrest for failing to register)

## XI. APPELLATE ISSUES

### Reviewability of Issues

\* *United States v. White*, 836 F.3d 437 (4th Cir. Sept. 9, 2016) (Wynn, J.) (S.D. W. Va.) (discussing circumstances under which appellant may raise new issue, not raised in opening brief, without triggering abandonment rule, i.e., when intervening Supreme Court case makes available argument that had been previously foreclosed (here, raising challenge to ACCA sentence based on *Johnson*, which was decided after appellant had filed opening brief))

*United States v. Tate*, 845 F.3d 571 (4th Cir. Jan. 11, 2017) (Floyd, J.) (W.D.N.C.) (appeal waiver did not bar appellant's argument that government breached its obligation in plea agreement to recommend sentence at bottom of "applicable guideline range")

*United States v. (Darren) Hill*, 849 F.3d 195 (4th Cir. Feb. 23, 2017) (Duncan, J.) (W.D.N.C.) (where defendant does not object in district court to one of magistrate judge's findings or recommendations with sufficient specificity to alert district court of basis for objection, then defendant waives that objection on appeal; in this case, defendant challenging traffic stop did so only on basis of delay in issuing ticket, not on basis of delay after issuance of ticket, so waived latter argument on appeal to Fourth Circuit)

## XII. POST-CONVICTION ISSUES

### 18 U.S.C. § 3582, Modification of Sentence of Imprisonment After Imposition

*United States v. Peters*, 843 F.3d 572 (4th Cir. Dec. 12, 2016) (Wilkinson, J.; Gregory, J., dissenting) (E.D. Va.) (district court did not err in denying defendant's § 3582(c) motion for reduction in drug sentence when court failed to explain non-eligibility determination (i.e., that defendant was responsible for at least 25.2 kilograms of crack cocaine) in sufficient detail, and that court's implicit finding as to at least 25.2 kilograms was not clearly erroneous)

*United States v. Muldrow*, 844 F.3d 434 (4th Cir. Dec. 27, 2016) (Duncan, J.) (D. Md.) (for purpose of deciding whether and by how much to reduce sentence under § 3582(c), court must determine applicable guideline range without any discretionary departure (such as criminal history pursuant to U.S.S.G. § 4A1.3) in light of U.S.S.G. amendment 759, which abrogated *United States v. Munn*, 595 F.3d 183 (4th Cir. 2010))

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