FOURTH CIRCUIT UPDATE

G. Alan DuBois
Patrick L. Bryant

DISCUSSION OVERVIEW

I. State of the Fourth Circuit

A. Judicial personnel updates

B. Increase in oral arguments and published decisions

II. Developments in Fourth Circuit Case Law

A. Crimes of Violence and Violent Felonies

1. Use of Physical Force

a. *Covington*, *Reid*, and *In re Irby* (indirect use of force, causing injury by omission, and what's left of *Torres-Miguel*)

b. *Burns-Johnson* (North Carolina robbery with a dangerous weapon)

c. *Middleton* (South Carolina involuntary manslaughter)

2. Mens Rea

a. *Townsend* (North Carolina assault with a deadly weapon)

b. *Smith* (North Carolina voluntary manslaughter)

3. Categorical Approach

a. *Gattis* (North Carolina common law robbery)

4. Inchoate Offenses

a. *McCollum* (federal conspiracy to commit murder in aid of racketeering)

B. Fed. R. Evid. 404(b)

1. *Recio* (Facebook posts)

2. *Hall* (prior drug convictions)

C. Fraud

1. *Raza*, *Palin* (materiality)

2. *Wolf*, *Stone* (sentencing issues)

D. Sex Crimes

1. *Banker* (mens rea)

2. *Maynes* (materiality)

3. *Stitz*, *Miltier* (distribution)

E. Sentencing Issues

1. *Concha* (substantial assistance)

2. *Bolton* (safety valve)

3. *Savage* (obstruction of justice)

4. *Blue*, *Slappy* (consideration of non-frivolous arguments)

F. Fifth Amendment

1. *Giddins* (Miranda waiver)

G. Forfeiture

1. *Chamberlain* (pre-trial restraint of innocent assets)

2. *Marshall* (forfeited untainted assets and paying for appeal)

H. Appeals / Post-conviction

1. Dismissal of late appeals

a. *Oliver* (sua sponte dismissal)

b. *Hyman* (timeliness of motion to dismiss)

2. *Carthorne II* (ineffective assistance of counsel)

FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

Published Between April 1, 2017, and March 31, 2018

Prepared by Frances H. Pratt, Assistant Federal Public Defender,
and Patrick L. Bryant, Appellate Attorney,
Office of the Federal Public Defender, Alexandria, Virginia

TABLE OF CONTENTS

FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

Published between April 1, 2017, and March 31, 2018

Prepared by Frances H. Pratt, Assistant Federal Public Defender,
and Patrick L. Bryant, Appellate Attorney,
Office of the Federal Public Defender, Alexandria, Virginia

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.

I. OFFENSES

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

! *Castendet-Lewis v. Sessions*, 855 F.3d 253 (4th Cir. Apr. 25, 3017) (King, J.) (BIA) (Virginia statutory burglary is broader than generic burglary, so does not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G))

18 U.S.C. § 242, Deprivation of Rights Under Color of Law

United States v. Cowden, 882 F.3d 464 (4th Cir. Feb. 16, 2018) (Keenan, J.) (N.D. W. Va.) (evidence was sufficient to support police officer's conviction for violating arrestee's civil rights where officer assaulted arrestee when he presented no threat to officer but officer thought arrestee was not showing adequate respect, and officer had twice used excessive force under strongly similar circumstances within two-year period preceding instant offense)

18 U.S.C. § 641, Theft of Government Property

United States v. Kiza, 855 F.3d 596 (4th Cir. May 1, 2017) (Duncan, J.) (E.D. Va.) (social security survivors' benefits are "a thing of value of the United States," i.e., government property, within meaning of § 641)

United States v. Landersman, ___ F.3d ____, 2018 WL 1514417 (4th Cir. Mar. 28, 2018) (Thacker, J.) (E.D. Va.) (evidence was sufficient to establish violation of § 641 by unauthorized conversion of government funds in defense contracting case where defendant circumnavigated

procurement and diligence process in several ways in order to deliver government funds to his boss's brother)

18 U.S.C. § 666, Theft or Bribery Concerning Programs Receiving Federal Funds

! *United States v. Pinson*, 860 F.3d 152 (4th Cir. June 19, 2017) (per curiam) (where offense requires proof of embezzlement, conversion, or fraudulent misapplication of at least $5,000 of property in care and control of entity by "agent" of that entity and entity receives over $10,000 of federal "benefits" within a year, reversing one conviction for failure to prove that one entity's employee was its agent, and reversing second conviction concerning different entity for failure to prove that money it received from federal government was "benefit" within meaning of statute)

18 U.S.C. § 793, Gathering, Transmitting, or Losing Defense Information

! *United States v. Sterling*, 860 F.3d 233 (4th Cir. June 22, 2017) (Diaz, J.; Traxler, J., dissenting) (E.D. Va.) (vacating conviction under § 793(e) for failure to prove that essential conduct element – communication, delivery, or transmission of classified program letter – took place in Eastern District of Virginia; rejecting proof challenges to venue for other § 793 counts)

18 U.S.C. §§ 922, 924, Firearms

N.B.: For cases addressing the Armed Career Criminal Act, see Sentencing Statutes in Part IX.

* *United States v. Robinson*, 855 F.3d 265 (4th Cir. Apr. 25, 2017) (Wilkinson, J.) (D. Md.) (finding that charging in one § 922(g)(1) count of possession of both handgun on defendant's person and shotgun possessed by accomplice was not duplicitous because simultaneous possession of multiple firearms generally constitutes only one § 922(g) offense) N.B.: This decision contains a nice statement of the rule regarding duplicity and reinforces general rule about simultaneous possession of multiple firearms.

In re Irby, 858 F.3d 231 (4th Cir. June 1, 2017) (Shedd, J.) (D. Md.) (holding that second degree retaliatory murder under 18 U.S.C. § 1513 and § 1111 is crime of violence under 18 U.S.C. § 924(c)'s force clause)

18 U.S.C. § 1341 *et seq.*, Mail Fraud and Other Fraud Offenses

United States v. Raza, 876 F.3d 604 (4th Cir Nov. 20, 2017) (King, J.) (E.D. Va.) (in multi-defendant wire fraud case stemming from fraudulent mortgage loan applications approved by SunTrust, rejecting contention that materiality must be defined in subjective manner, from viewpoint of actual decision maker, rather than objectively, from perspective of reasonable person)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (evidence was sufficient to support conviction for bank fraud conspiracy where co-conspirator, a bank teller, testified at trial and identified defendant's voice on recorded phone calls to bank in which he

changed contact information on accounts, and where defendant was seen on videotape of his meeting with co-conspirator's family during which he confessed to participating in scheme)

United States v. Bolton, 858 F.3d 905 (4th Cir. June 7, 2017) (Thacker, J.) (M.D.N.C.) (in case involving fraudulent billing of Medicare for x-rays and other imaging services where technicians reviewed images and wrote reports that they passed off as prepared by board-certified radiologists and two patients died as a result of misread images, holding that in light of unambiguous statutory text, it is execution of fraudulent scheme, not simply submission of false claims, that may give rise to § 1347 liability when execution of scheme results in death)

United States v. Palin, 874 F.3d 418 (4th Cir. Oct. 30, 2017) (Motz, J.) (W.D. Va.) (materiality constitutes element of health care fraud and conspiracy to commit health care fraud "by means of false or fraudulent pretenses, representations, or promises," in violation of 18 U.S.C. § 1347 and § 1349)

18 U.S.C. § 1425, Unlawful Procurement of Naturalization or Citizenship

United States v. Garcia, 855 F.3d 615 (4th Cir. May 2, 2017) (Duncan, J.) (W.D.N.C.) (evidence was sufficient to support convictions for naturalization fraud where defendant failed to disclose information about new charges against him during second naturalization interview or at time of naturalization ceremony)

18 U.S.C. § 1591, Sex Trafficking of Children

United States v. Banker, 876 F.3d 530 (4th Cir. Nov. 14, 2017) (Agee, J.) (W.D. Va.) (finding as matter of statutory interpretation, in light of grammar, syntax, and punctuation, that government could establish defendant's mens rea as to victim's status as minor by proof of either actual knowledge or reckless disregard)

United States v. Maynes, 880 F.3d 110 (4th Cir. Jan. 18, 2018) (Wilkinson, J.) (E.D. Va) (in case involving recruitment of adult prostitutes through fraudulent misrepresentations, misrepresentations must be material, i.e., used to cause someone to engage in commercial sex act)

18 U.S.C. § 1951, Hobbs Act Robbery

United States v. Lopez, 860 F.3d 201 (4th Cir. June 19, 2017) (Harris, J.) (D. Md.) (in Hobbs Act robbery case involving robbery of brothel in Langley Park, Maryland (near borders with District of Columbia and Virginia), evidence was sufficient to establish de minimis effect on interstate commerce where prostitutes moved across state lines between home and brothel, and condoms used by prostitutes were manufactured outside of Maryland)

18 U.S.C. § 1958, Use of Interstate Commerce Facilities in Murder for Hire

United States v. Davis, 855 F.3d 587 (4th Cir. May 1, 2017) (Shedd, J.) (W.D.N.C.) (in appeal of denial of motion to dismiss, rejecting argument that government "manufactured

jurisdiction" where there was no evidence that law enforcement officers directed third party to contact defendant by text message in order to contrive § 1958 federal nexus, and defendant otherwise used several cell phones to contact undercover agents and drove herself to meetings with agents in connection with her efforts to have her ex-husband murdered)

18 U.S.C. § 1961 *et seq.*, Rackeetering

! *United States v. Pinson*, 860 F.3d 152 (4th Cir. June 19, 2017) (per curiam; Diaz, J., dissenting in part) (D.S.C.) (reversing conviction for RICO conspiracy for insufficient evidence to establish a single conspiracy, a RICO enterprise, or a pattern of racketeering activity where defendant and business partners did not conspire to commit same crimes, they did not form a RICO enterprise, and predicate acts alleged did not form a pattern of racketeering activity)

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

United States v. Robinson, 855 F.3d 265 (4th Cir. Apr. 25, 2017) (Wilkinson, J.) (D. Md.) (finding evidence sufficient in § 2119 carjacking case to establish that defendant had requisite intent to cause serious death or harm where although defendant's threat "Do you want to die" occurred before defendant attempted to rob victim of items in her apartment occurred before defendant grabbed victim's car keys, at latter moment defendant was holding loaded handgun and had already threatened victim's life)

18 U.S.C. § 2252 *et seq.*, Child Pornography

United States v. Stitz, 877 F.3d 533 (4th Cir. Dec. 14, 2017) (Thacker, J.) (W.D.N.C.) (joining other circuits in holding that downloading of files from shared folder on computer via peer-to-peer file-sharing software constitutes distribution within purview of § 2252A)

United States v. Miltier, 882 F.3d 81 (4th Cir. Feb. 7, 2018) (Floyd, J.) (E.D. Va.) (in child pornography case involving peer-to-peer file-sharing, finding that evidence was sufficient to support convictions for knowing receipt and possession of child pornography over claims (1) that defendant did not download files because did not have access to computer at times files were downloaded, and (2) that as to two counts, interstate commerce nexus was not satisfied due to insufficient evidence that files were downloaded from internet)

United States v. Miltier, 882 F.3d 81 (4th Cir. Feb. 7, 2018) (Floyd, J.) (E.D. Va.) (in child pornography case involving peer-to-peer file-sharing, affirming use of jury instruction that interstate or foreign commerce element of possession and receipt offenses could be satisfied by movement of computer on which files were found rather than by movement of files themselves because (1) Congress has power to criminalize intrastate receipt of child pornography based on movement of computer in interstate commerce, and (2) jurisdictional element of § 2252A((a)(2)(A) is written broadly enough to encompass movement of computer rather than files; further, use of jury instruction did not constructively amend receipt allegations in indictment)

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

United States v. Banker, 876 F.3d 530 (4th Cir. Nov. 14, 2017) (Agee, J.) (W.D. Va.) (finding as matter of statutory interpretation that § 2422(b) does not require proof of defendant's knowledge of victim's age; interpreting provision in same manner as § 2423(a) was interpreted in *United States v. Washington*, 743 F.3d 938 (4th Cir. 2014))

II. COMMERCE CLAUSE ISSUES

United States v. Miltier, 882 F.3d 81 (4th Cir. Feb. 7, 2018) (Floyd, J.) (E.D. Va.) (in child pornography case involving peer-to-peer file-sharing, affirming use of jury instruction that interstate or foreign commerce element of possession and receipt offenses could be satisfied by movement of computer on which files were found rather than by movement of files themselves because (1) Congress has power to criminalize intrastate receipt of child pornography based on movement of computer in interstate commerce, and (2) jurisdictional element of § 2252A((a)(2)(A) is written broadly enough to encompass movement of computer rather than files)

III. FOURTH AMENDMENT ISSUES

Consent

! *United States v. Bowman*, 884 F.3d 200 (4th Cir. Mar. 1, 2018) (Traxler, J.) (W.D.N.C.) (reversing denial of suppression motion in part because police officer conducting traffic stop did not have defendant's consent to extend otherwise-completed stop when officer directed defendant to remain in officer's car so that officer could question other occupant of car (agreeing with district court's ruling on this point))

Inventory Searches

United States v. Bullette, 854 F.3d 261 (4th Cir. Apr. 20, 2017) (Duncan, J.) (D. Md.) (rejecting challenge to warrantless search of unoccupied, and apparently abandoned, vehicle at active crime scene for PCP manufacturing where DEA agents would have inevitably conducted inventory search as part of impoundment of vehicle)

Inevitable Discovery Doctrine

United States v. Bullette, 854 F.3d 261 (4th Cir. Apr. 20, 2017) (Duncan, J.) (D. Md.) (rejecting challenge to warrantless search of unoccupied, and apparently abandoned, vehicle at active crime scene for PCP manufacturing where DEA agents would have inevitably conducted inventory search as part of impoundment of vehicle)

Reasonable Suspicion

! *United States v. Bowman*, 884 F.3d 200 (4th Cir. Mar. 1, 2018) (Traxler, J.) (W.D.N.C.) (reversing denial of suppression motion in part because police officer conducting traffic stop did not have reasonable articulable suspicion of ongoing criminal activity to justify extending otherwise-completed stop where defendant had not consented to extension; rejecting, both individually and collectively, numerous purportedly suspicious facts proffered by officer to support his claim of reasonable suspicion)

Warrants

United States v. Kimble, 855 F.3d 604 (4th Cir. May 2, 2017) (Wynn, J.) (D. Md.) (where agents executed search warrant in July of 2011 to look for evidence of perjury and of marriage and immigration fraud and found $41,000 in cash in laundry basket, which led to further investigation of defendant after she attempted to recover seized funds, holding that search was not overbroad given scope of search warrant)

United States v. McLamb, 880 F.3d 685 (4th Cir. Jan. 25, 2018) (Thacker, J.) (E.D. Va.) (in challenge to validity of warrant authorizing government to deploy Network Investigative Technique ("NIT") to locate computers of users of child pornography website on dark web's Tor network, joining other courts that have considered same warrant in holding that even if warrant violates Fourth Amendment, good faith exception precludes suppression of evidence found as result of warrant's execution).

IV. FIFTH AMENDMENT ISSUES (Pre-trial and Trial)

Double Jeopardy

! *United States v. Jones*, 858 F.3d 221 (4th Cir. June 1, 2017) (Thacker, J.) (W.D. Va.) (on interlocutory appeal by defendant, reversing denial of motion to dismiss indictment alleging drug conspiracy in Western District of Virginia when defendant had already been convicted in Eastern District of Virginia for drug conspiracy that was part and parcel of conspiracy charged in Western District)

Due Process

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, affirming denials of defendant's three motions for new trials based on purported *Brady / Giglio* violations that only came to light after trial where as to one motion, evidence at issue was not newly discovered but in defense's possession before trial, was not material, and would not likely result in acquittal; as to second motion, evidence was not material and would not likely result in acquittal; and as to third motion, there was no indication that government had information before trial)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (in case charging bank fraud conspiracy where co-conspirator, a bank teller, testified at trial, district court did not err in not conducting *in camera* review to determine whether material gathered by government during meeting with witness was subject to disclosure pursuant to *Brady* or *Jencks*)

United States v. Lopez, 860 F.3d 201 (4th Cir. June 19, 2017) (Harris, J.) (D. Md.) (in Hobbs Act robbery case involving robbery of brothel, rape of one victim and murder of another, where defendant was juvenile at time of offense but was not identified via DNA evidence and indicted until he was over 21, six-year gap between offense and indictment did not violate defendant's due process rights where he could not carry burden of establishing actual substantial prejudice caused by delay)

Self-Incrimination

! *United States v. Giddins*, 858 F.3d 870 (4th Cir. June 6, 2017) (Floyd, J.; Agee, J., dissenting) (D. Md.) (finding that defendant's statement to police, given when he went to retrieve his car after it had been used in three bank robberies, was given after involuntary waiver of his Fifth Amendment rights when he was effectively locked in a room at police station and told that he would not get car back unless he signed *Miranda* waiver form and spoke with officers, and when officers affirmatively misled him by answering "no" when he asked if he was in trouble when in fact they had arrest warrant for him in room at time of interview)

V. SIXTH AMENDMENT ISSUES (Pre-trial and Trial)

Compulsory Process

United States v. Zhu, 854 F.3d 247 (4th Cir. Apr. 12, 2017) (per curiam) (E.D. Va.) (in case involving government's deportation of key witness before defendant's prosecution for immigration fraud, declining to decide under *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), whether defendant must establish government's bad faith in addition to prejudice because defendant failed to establish prejudice)

Confrontation

United States v. Maynes, 880 F.3d 110 (4th Cir. Jan. 18, 2018) (Wilkinson, J.) (E.D. Va) (in case involving recruitment of adult prostitutes through fraudulent misrepresentations, defendant's right to confrontation was not violated when district court limited his ability to cross-examine victims about their sexual histories while allowing questioning about victims' prior experience as prostitutes)

United States v. Torrez, 869 F.3d 291 (4th Cir. Aug. 28, 2017) (Thacker, J.) (E.D. Va.) (in capital case in which defendant confessed to jailhouse informant about committing charged murders and bragged about killing many other people (most of whom he did not in fact kill), district court did not improperly limit defendant's confrontation rights by conditioning portion of cross-examination of informant on admission of evidence of other murders defendant had committed)

Counsel

* *United States v. Marshall*, 872 F.3d 213 (4th Cir. Sept. 25, 2017) (Agee, J.) (although defendant has constitutional right to counsel on appeal when appeal is as of right (i.e., in federal system, authorized by statute), defendant who can afford to hire counsel does not have right after conviction to have forfeited funds, even those that are untainted substitute assets, released in order to pay for appellate counsel)

VI. OTHER PRE-TRIAL ISSUES

Statutes of Limitations (18 U.S.C. § 3281 *et seq.*)

United States v. Lopez, 860 F.3d 201 (4th Cir. June 19, 2017) (Harris, J.) (D. Md.) (in Hobbs Act robbery case involving robbery of brothel, rape of one victim and murder of another, where defendant was juvenile at time of offense but was not identified via DNA evidence and indicted until he was over 21, six-year gap between offense and indictment did not preclude prosecution because 18 U.S.C. § 3297 permits running of statute of limitations from time that DNA testing implicates defendant)

Juvenile Delinquency Proceedings (18 U.S.C. § 5031 *et seq.*)

United States v. Under Seal, 853 F.3d 706 (4th Cir. Apr. 5, 2017) (Floyd, J.) (E.D. Va.) (district court had discretion to authorize disclosure of transfer proceeding transcript and investigative report under 18 U.S.C. § 5038, and court did not abuse that discretion in authorizing release)

United States v. Lopez, 860 F.3d 201 (4th Cir. June 19, 2017) (Harris, J.) (D. Md.) (in Hobbs Act robbery case involving robbery of brothel, rape of one victim and murder of another, where defendant was juvenile at time of offense but was not identified via DNA evidence and indicted until he was over 21, defendant was properly prosecuted as adult rather than under Juvenile Delinquency Act; rejecting constitutional challenges to JDA's definition of "juvenile")

Grand Jury Proceedings (Fed. R. Crim. P. 6)

! * *In re Grand Jury Subpoena*, 870 F.3d 312 (4th Cir. Aug. 18, 2017) (per curiam, Niemeyer, J., concurring in part and dissenting in part) (W.D.N.C.) (on appeal from denial of motion to quash grand jury subpoenas demanding testimony from defendant's attorney and investigator, finding that part of testimony sought was opinion work product that could be compelled under crime-fraud exception to work product privilege only if government established that defense counsel was aware of or a participant in alleged crime or fraud, while other part of testimony sought was fact work product, which is not subject to that prong of crime-fraud exception)

VII. TRIAL ISSUES[1]

Evidence

Confrontation

See Sixth Amendment, *supra*

Federal Rules of Evidence 201 *et seq.*

United States v. Garcia, 855 F.3d 615 (4th Cir. May 2, 2017) (Duncan, J.) (W.D.N.C.) (in naturalization fraud case prosecuted under 18 U.S.C. § 1425, district court did not abuse discretion in taking judicial notice of USCIS website; rejecting claim that taking of judicial notice supported government's view of what constituted "interview")

Federal Rules of Evidence 401 *et seq.*

United States v. Recio, 884 F.3d 230 (4th Cir. Mar. 7, 2018) (Motz, J.) (D. Md.) (in prosecution for unlawful possession of a firearm, affirming admission under Rule 402 and Rule 403 of posting, made eight months after defendant was seen with gun tucked in waistband of his pants, of rap lyrics on defendant's FaceBook page ("It's Always Tucked, Kuz I'll B Damn If My Life Get Took!!") where lyrics matched details of alleged offense and were relevant to show knowledge and motive and probative value was not substantially outweighed by prejudice; evidence was part of instant offense, not "other acts" evidence, such that Rule 404(b) did not prohibit admission)

! * *United States v. Hall*, 858 F.3d 254 (4th Cir. June 1, 2017; amended June 21, 2017) (Wynn, J.; Wilkinson, J., dissenting) (D.S.C.) (defendant's prior convictions for marijuana PWID offenses and marijuana simple possession offense were improperly admitted under Rule 404(b) as evidence that defendant constructively possessed marijuana and firearms in locked bedroom of house in which he may or may not have lived with others) N.B.: The majority opinion contains an extensive discussion of Rule 404(b) and when prior convictions for possession of drugs may be admissible, and under what circumstances; the majority opinion also rejects several arguments that government routinely makes about Rule 404(b) evidence.

United States v. Sterling, 860 F.3d 233 (4th Cir. June 22, 2017) (Diaz, J.) (E.D. Va.) (in case involving improper retention of classified documents, district court did not abuse discretion in admitting evidence pursuant to Rule 404(b) that defendant had previously improperly kept other classified documents, unrelated to ones at issue in trial, in his home during same time frame as charged retention)

United States v. Torrez, 869 F.3d 291 (4th Cir. Aug. 28, 2017) (Thacker, J.) (E.D. Va.) (in capital case in which defendant murdered victim by choking or asphyxiation, likely as she slept in

[1] Subsections are arranged by stage of trial.

her bed, district court did not abuse discretion in admitting evidence pursuant to Rule 404(b) of pornographic videos found on defendant's electronic media that depicted violence against women who were sleeping, unconscious, or restrained; nor did court abuse discretion in admitting evidence of other sex offenses committed by defendant with months after murder that resembled murder in multiple ways)

United States v. Cowden, 882 F.3d 464 (4th Cir. Feb. 16, 2018) (Keenan, J.) (N.D. W. Va.) (in case brought under 18 U.S.C. § 242 involving deprivation of arrestee's civil rights by police officer in assaulting arrestee when he presented no threat to officer but officer thought arrestee was not showing adequate respect, affirming admission under Rule 404(b) of two instances of officer's use of excessive force under strongly similar circumstances within two-year period preceding instant offense, evidence went toward contested issue of officer's intent, evidence was reliable, evidence was not unduly prejudicial, and district court twice gave appropriate limiting instruction)

Federal Rules of Evidence 601 *et seq.*

United States v. Zhu, 854 F.3d 247 (4th Cir. Apr. 12, 2017) (per curiam) (E.D. Va.) (rejecting argument that district court took on role of prosecutor by improperly questioning defense witnesses and interfering with defense counsel's closing argument)

! * *United States v. Lefsih*, 867 F.3d 459 (4th Cir. Aug. 14, 2017) (Harris, J.) (E.D.N.C.) (on plain error review in case involving naturalization fraud, vacating conviction and ordering new trial where district court made disparaging remarks both about immigration lottery program through which defendant initially entered United States and about individuals who participate in program; judge crossed line between exercising discretion to manage trial and conveying negative impression of defendant to jury in close case that turned on defendant's credibility when testifying)

Federal Rules of Evidence 701 *et seq.*

United States v. Chikvashvili, 859 F.3d 285 (4th Cir. June 9, 2017) (Wilkinson, J.) (D. Md.) (in case involving fraudulent billing of Medicare for x-rays and other imaging services where technicians reviewed images and wrote reports that they passed off as prepared by board-certified radiologists and two patients died as result of misread images, district court did not err in allowing expert to testify that failure to properly read x-rays was but-for causation of death)

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, district did not err in allowing expert on mortgage banking and underwriting to testify about materiality where that testimony did not constitute improper legal conclusion)

United States v. Landersman, ___ F.3d ____, 2018 WL 1514417 (4th Cir. Mar. 28, 2018) (Thacker, J.) (E.D. Va.) (in defense contracting case involving manufacturing of machine gun suppressors, district court did not abuse discretion in admitting at bench trial expert testimony concerning results of expert's testing of suppressors that found them ineligible for contract award; defendant's arguments about problems with testing went to weight, not admissibility, of evidence)

Federal Rules of Evidence 801 *et seq.*

United States v. Zhu, 854 F.3d 247 (4th Cir. Apr. 12, 2017) (per curiam) (E.D. Va.) (considering whether email sent by co-conspirator qualified as hearsay because co-conspirator needed interpreter to translate message before sending it; concluding that narrow exception in *United States v. Vidacek*, 553 F.3d 344 (4th Cir. 2009), did not apply to preclude admission)

United States v. Recio, 884 F.3d 230 (4th Cir. Mar. 7, 2018) (Motz, J.) (D. Md.) (in prosecution for unlawful possession of a firearm, affirming admission of posting, made eight months after defendant was seen in possession of firearm, of rap lyrics on defendant's FaceBook page as party-opponent adoptive admission and therefore non-hearsay under Rule 801(d)(2)(A) where posting did not attribute wording to anyone different from defendant)

Jencks Act (18 U.S.C. § 3500)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (in case charging bank fraud conspiracy where co-conspirator, a bank teller, testified at trial, district court did not err in not conducting *in camera* review to determine whether material gathered by government during meeting with witness was subject to disclosure pursuant to *Brady* or *Jencks*)

Sufficiency of Evidence

See Offenses, *supra*

Jury Instructions

United States v. Hale, 857 F.3d 158 (4th Cir. May 15, 2017) (Niemeyer, J.) (W.D.N.C.) (in case involving interstate transportation of stolen property, district court did not abuse discretion in giving instruction on willful blindness (deliberate ignorance) where there was ample evidence, both direct and circumstantial, that defendant was subjectively aware of high probability that goods were stolen and/or that defendant purposefully took action to avoid confirming goods' status; while defendant preserved challenge to giving of any instruction at all, he waived objection to form of instruction by agreeing to wording of proposed instruction, which accurately stated controlling law)

United States v. Hale, 857 F.3d 158 (4th Cir. May 15, 2017) (Niemeyer, J.) (W.D.N.C.) (in case in which defendant testified, instruction about defendant's testimony did not impermissibly imply that defendant's testimony was inherently unbelievable but rather treated defendant as any other witness who had interest in verdict and whose testimony should be therefore carefully scrutinized)

Closing Arguments

United States v. Lopez, 860 F.3d 201 (4th Cir. June 19, 2017) (Harris, J.) (D. Md.) (on plain error review in Hobbs Act robbery case involving robbery of brothel, defendant's substantial rights were not affected by any error stemming from improper witness bolstering or vouching for

confidential informant by prosecutor in rebuttal when defense counsel, in his closing, urged jury not to credit informant's testimony because government had not put on corroborating evidence)

Motion for New Trial (Fed. R. Crim. P. 33)

United States v. Stone, 866 F.3d 219 (4th Cir. Aug. 2, 2017) (Agee, J.) (E.D. Va.) (in case involving scheme to defraud mortgage companies where motion for new trial filed after sentencing, district court did not abuse discretion in denying motion claiming that judge should have recused himself from case based on conflict of interest stemming from his ownership of stock in some of victim banks)

VIII. PLEA ISSUES

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

United States v. Swaby, 855 F.3d 233 (4th Cir. Apr. 24, 2017) (Gregory, J.) (D. Md.) (in case involving immigration consequences flowing from guilty plea, defense counsel provided ineffective assistance in failing to correctly advise client about immigration consequences of guilty plea when he provided immigration attorney with wrong version of offense statute and failed to read statute to verify immigration attorney's advice, and district court's general advice at plea hearing that defendant was at risk of removal rather than categorically removable did not cure counsel's deficient performance)

IX. SENTENCING ISSUES

Sentencing Statutes

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

United States v. Townsend, ___ F.3d ____, 2018 WL 1547107 (4th Cir. Mar. 30, 2018) (Shedd, J.) (M.D.N.C.) (North Carolina assault with a deadly weapon with intent to kill inflicting serious injury categorically qualifies as violent felony under § 924(e)'s force clause)

United States v. Smith, 882 F.3d 460 (4th Cir. Feb. 15, 2018) (Wilkinson, J.) (M.D.N.C.) (North Carolina voluntary manslaughter qualifies as violent felony under § 924(e)'s force clause because it requires intentional killing)

United States v. Burns-Johnson, 864 F.3d 313 (4th Cir. July 18, 2017) (Keenan, J.) (W.D.N.C.) (North Carolina robbery with dangerous weapon categorically qualifies as violent felony under § 924(e)'s force clause)

! *United States v. Middleton*, 883 F.3d 485 (4th Cir. Feb. 26, 2018) (Gregory, J.) (D.S.C.) (South Carolina involuntary manslaughter, when committed by selling alcohol, to a minor, does not qualify as violent felony under § 924(e)'s force clause)

United States v. Reid, 861 F.3d 523 (4th Cir. June 28, 2017) (Niemeyer, J.) (W.D.N.C.) (Virginia offense of knowingly and willfully inflicting bodily injury (here in violation of Va. Code § 18.2-55, commission of offense by prisoner against non-prisoner) is violent felony under § 924(e)'s force clause)

18 U.S.C. § 3553(e), Substantial Assistance

! * *United States v. Concha*, 861 F.3d 116 (4th Cir. June 26, 2017) (Traxler, J.) (M.D.N.C.) (finding that district court abused discretion at sentencing when it considered factors unrelated to defendant's cooperation when determining how much of a reduction to grant for defendant's cooperation) N.B.: Th edecision provides a good summary of cooperation standards, considerations

18 U.S.C. § 3591 *et seq.*, Federal Death Penalty Act

United States v. Torrez, 869 F.3d 291 (4th Cir. Aug. 28, 2017) (Thacker, J.; Floyd, J., dissenting in part) (E.D. Va.) (upholding use of post-offense conduct resulting in convictions as statutory aggravators under § 3592; reaffirming application of factual approach rather than categorical approach in determining whether previous convictions "involved" use, attempted use, or threatened use of firearm)

Sentencing Guidelines

U.S.S.G. § 2A3.5, Failure to Register as Sex Offender

United States v. Cammorto, 859 F.3d 311 (4th Cir. June 13, 2017) (Niemeyer, J.) (W.D. Va.) (conviction for Georgia offense of aiding and abetting rape qualified defendant as Tier III offender for purpose of setting base offense level in SORNA guideline)

U.S.S.G. § 2B1.1, Fraud

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, district court used reasonable method of determining actual loss when it took total loan amount for each property, which was based on defendant's inflated price, and subtracted amount recovered by lender after foreclosure sale)

United States v. Stone, 866 F.3d 219 (4th Cir. Aug. 2, 2017) (Agee, J.) (E.D. Va.) (in case involving scheme to defraud mortgage companies, district court did not clearly err in determining that amount of actual loss was difference between balances on mortgages and amounts paid by defendant to mortgage holders from short sales of mortgaged property)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (in sentencing for bank fraud conspiracy, district court did not err in determining intended loss amount either by (1) including balances in bank accounts that conspirators tried to access but failed when they could not obtain checkbooks, or (2) by using balances of accounts on dates one co-conspirator, a bank teller, first accessed accounts)

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, district court had sufficient basis for applying sophisticated means enhancement, § 2B1.1(b)(1)(C), where defendant disguised kickbacks to straw buyers as payments to companies for work done on properties)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (in sentencing of defendant for bank fraud conspiracy, district court did not clearly err in applying sophisticated means enhancement, § 2B1.1(b)(1)(C), where defendant hid assets, hid his own name, had phones registered under others' names in more than one state, and used insider information provided by bank teller co-conspirators to circumvent bank's fraud countermeasures)

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

United States v. Bolton, 858 F.3d 905 (4th Cir. June 7, 2017) (Thacker, J.) (M.D.N.C.) (weapon enhancement in § 2D1.1(b)(6) was properly applied with respect to shotgun and rifle found in defendant's closet with marijuana and $912 in cash; fact that guns were found nearly two years after last date alleged for marijuana distribution conspiracy was not enough to preclude them from being part of "same course of course or common scheme or plan" as offense of conviction, and appellate court would not second-guess district court's credibility findings with respect to defense witness who testified that defendant used guns for hunting)

United States v. Mondragon, 860 F.3d 227 (4th Cir. June 21, 2017) (Niemeyer, J.) (W.D.N.C.) (evidence unrebutted by defendant was sufficient to support weapon enhancement in § 2D1.1(b)(6) where co-conspirator who knew defendant only during time of conspiracy, and whom defendant described as his closest associate in drug trafficking organization, said that defendant broke down and cleaned revolver at co-conspirator's residence)

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.

United States v. Walker, 858 F.3d 196 (4th Cir. May 24, 2017) (Traxler, J.) (D.S.C.) (Ohio offense of possession of drugs with knowledge or reason to know that they are intended for sale or resale constitutes "drug trafficking offense" that qualified as "aggravated felony" subjecting defendant to 16-level enhancement in effect at time of defendant's sentencing)

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

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, district court did not err in applying three-level enhancement under § 3B1.1(b) for defendant's managerial role where he drew up compensation agreements, decided on gross prices for properties, determined what information to include in HUD settlement statements, recruited new participants to conspiracy, and controlled which documents would be submitted to lender)

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (where bank fraud conspiracy involved five or more participants, evidence was sufficient to establish that defendant recruited bank teller, directed her efforts in scheme, and delivered fraud proceeds to her, such that three-level enhancement under § 3B1.1(b) for defendant's managerial role was properly applied)

United States v. Wolf, 860 F.3d 175 (4th Cir. June 19, 2017) (Traxler, J.) (W.D.N.C.) (in mortgage fraud case involving kickbacks from seller to buyers, district court did not err in applying enhancement for abuse of position of trust, § 3B1.3, where defendant's position as licensed real estate broker created duties to lenders under North Carolina law akin to fiduciary duties)

U.S.S.G. § 3C1.1 *et seq.*, Obstruction and Related Enhancements

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (where district court found that defendant made misrepresentations to pretrial services officer about his address, his driver's license, and his international travel, those statements were introduced in his pretrial detention hearing, and misrepresentations went to risk of flight posed by defendant, district court did not err in applying enhancement for obstruction of justice in § 3C1.1)

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. Lamar Lee, 855 F.3d 244 (4th Cir. Apr. 25, 2017) (Gregory, J.) (E.D. Va.) (ruling, in light of *Beckles v. United States*, 137 S. Ct. 886 (2017), that *Johnson*'s vagueness holding does not apply to (now-deleted) residual clause in U.S.S.G. § 4B1.2(a)(2))

United States v. Mack, 855 F.3d 581 (4th Cir. May 1, 2017) (Niemeyer, J.) (M.D.N.C.) (concluding that for purposes of Sentencing Guidelines, in which the definition of crime of violence includes inchoate offenses such as attempt and conspiracy in commentary to § 4B1.2, North Carolina convictions for conspiracy and attempt to commit first-degree burglary qualify as crimes of violence under (now-deleted) residual clause because North Carolina first-degree burglary categorically matches generic definition of offense)

! *United States v. McCollum*, 885 F.3d 300 (4th Cir. Mar. 20, 2018) (Duncan, J.; Wilkinson, J., dissenting) (conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), does not categorically qualify as crime of violence because failure of § 1959(a)(5) conspiracy to require overt act makes it broader than generic conspiracy)

United States v. Riley, 856 F.3d 326 (4th Cir. May 9, 2017) (Wilkinson, J.) (D. Md.) (on plain error review, Maryland offense of simple robbery (and therefore also robbery with dangerous weapon) is crime of violence under residual clause of crime-of-violence definition in effect when defendant was sentenced)

United States v. Thompson, 874 F.3d 412 (4th Cir. Oct. 26, 2017) (Motz, J.) (E.D.N.C.) (North Carolina offense of assault inflicting serious bodily injury is crime of violence under (now-deleted) residual clause)

United States v. Gattis, 877 F.3d 150 (4th Cir. Dec. 4, 2017) (Niemeyer, J.) (E.D.N.C.) (North Carolina common law robbery constitutes generic robbery for § 4B1.2's definition of crime of violence, which includes robbery in list of enumerated offenses, even though robbery does not qualify under definition's force clause)

United States v. Salmons, 873 F.3d 446 (4th Cir. Oct. 12, 2017) (Wilkinson, J.) (S.D. W. Va.) (West Virginia aggravated robbery, W. Va. Code § 61-2-12 (robbery committed by partial strangulation, suffocation, striking, beating, or other violence, or by threat or presentation of firearm or other deadly weapon or instrumentality), qualifies as crime of violence under force clause of § 4B1.2)

United States v. Covington, 880 F.3d 129 (4th Cir. Jan. 18, 2018) (Biggs, D.J., sitting by designation) (S.D. W. Va.) (West Virginia unlawful wounding, W. Va. Code § 61-2-9(a) categorically qualifies as crime of violence under force clause of § 4B1.2) N.B.: The Virginia unlawful wounding statute, Va. Code § 18.2-51, is worded nearly identically to the West Virginia statute at issue in *Covington*.

U.S.S.G. § 5C1.2, Safety Valve

United States v. Bolton, 858 F.3d 905 (4th Cir. June 7, 2017) (Thacker, J.) (M.D.N.C.) (recognizing that application of weapon enhancement pursuant to § 2D1.1(b)(6) does not foreclose safety valve reduction because of differing standards of proof)

U.S.S.G. § 5G1.2, Sentencing on Multiple Counts of Conviction

United States v. Savage, 885 F.3d 212 (4th Cir. Mar. 12, 2018) (Floyd, J.) (D. Md.) (where defendant was convicted of two counts of aggravated identity theft, 18 U.S.C. § 1028A, district court did not abuse discretion in running one count partially concurrently with and partially consecutive to other count for total sentence on two counts of 36 months)

U.S.S.G. § 5K1.1, Substantial Assistance

! * *United States v. Concha*, 861 F.3d 116 (4th Cir. June 26, 2017) (Traxler, J.) (M.D.N.C.) (finding that district court abused discretion at sentencing when it considered factors unrelated to defendant's cooperation when determining how much of a reduction to grant for defendant's cooperation) N.B.: The decision provides good summary of cooperation standards, considerations.

Reasonableness of Sentence

! *United States v. Blue*, 877 F.3d 513 (4th Cir. Dec. 12, 2017) (Gregory, J.) (M.D.N.C.) (vacating within-range sentence and remanding for resentencing after finding sentence procedurally unreasonable where district court mentioned only two of defendant's eight non-frivolous arguments in favor of a below-range sentence and thus failed to provide sufficient explanation for sentence; reinforcing that presumption of reasonableness applicable to within-range sentences applies only to substantive reasonableness challenges, not to procedural reasonableness challenges)

United States v. Zuk, 874 F.3d 398 (4th Cir. Oct. 24, 2017) (Niemeyer, J.) (W.D.N.C.) (on appeal by government in child pornography case in which 240 months (the statutory maximum and substantially below otherwise applicable range calculation of 324 to 405 months) was recommended range, finding 26-month sentence to be substantively unreasonable)

Restitution and Forfeiture

! *United States v. Chamberlain*, 868 F.3d 290 (4th Cir. Aug. 18, 2017) (Wynn, J.) (E.D.N.C.) (abandoning circuit's "anomalous rule" that federal forfeiture statute, 21 U.S.C. § 853, authorized pretrial restraint of defendant's innocent property and joining other circuits in holding that § 853 does *not* authorize such restraint; overruling circuit precedent construing § 853 and other identically phrased restraint provisions allowing pretrial restraint of substitute assets)

* *United States v. Marshall*, 872 F.3d 213 (4th Cir. Sept. 25, 2017) (Agee, J.) ()D. Md.) (although defendant has constitutional right to counsel on appeal when appeal is as of right (i.e., in federal system, authorized by statute), defendant who can afford to hire counsel does not have right after conviction to have funds forfeited pursuant to 21 U.S.C. § 853, even those that are untainted substitute assets, released in order to pay for appellate counsel)

United States v. Marshall, 872 F.3d 213 (4th Cir. Sept. 25, 2017) (Agee, J.) (D. Md.) (government did not violate Fed. R. Crim. P. 32.2 by waiting several weeks after verdict to seek forfeiture of defendant's substitute assets, and court likewise did not violate rule by not promptly determining that assets were subject to forfeiture)

United States v. Ritchie, 858 F.3d 201 (4th Cir. May 30, 2017) (mixed authorship) (D. Md.) (after reiterating that district courts must state statutory basis for imposing restitution, applying fact-based inquiry (or circumstance-specific approach, rather than categorical approach) to hold that 18 U.S.C. § 1001, making of false statement, is "offense against property" that requires mandatory

payment of restitution pursuant to 18 U.S.C. § 3663A (MVRA); discussing calculation of restitution amount in fraudulent mortgage transaction)

! *United States v. Diaz*, 865 F.3d 168 (4th Cir. July 26, 2017) (Floyd, J.) (E.D. Va.) (interference with flight crew, by assault or intimidation, in violation of 49 U.S.C. § 46504, is not categorically a crime of violence, as defined in 18 U.S.C. § 16, for purposes of mandatory restitution under 18 U.S.C. § 3663A)

United States v. Stone, 866 F.3d 219 (4th Cir. Aug. 2, 2017) (Agee, J.) (E.D. Va.) (on plain error review in case involving scheme to defraud mortgage companies, holding that amount of restitution mandated under 18 U.S.C. § 3663A on facts of case was difference between balances on mortgages and amounts paid by defendant to mortgage holders from short sales of mortgaged property)

Resentencing After Appeal

United States v. Ventura, 864 F.3d 301 (4th Cir. July 18, 2017) (King., J.) (D. Md.) (on appeal after resentencing, at which district court imposed same sentence as before even though § 924(c) count had been vacated, court did not violate mandate rule, and acted in accordance with sentencing package doctrine, when it reconsidered sentences imposed on other counts and considered new information about defendant's conduct in prison pursuant to *Pepper v. United States*, 562 U.S. 476 (2011); because new sentence imposed was same length as previous sentence under aggregate package approach applied by majority of circuits, defendant could not establish vindictiveness)

Supervised Release

United States v. Harris, 878 F.3d 111 (4th Cir. Dec. 19, 2017) (Floyd, J.) (E.D. Va.) (holding that district court had jurisdiction to revoke defendant's supervised release a second time based on conduct that was alleged as violation of state criminal law in addendum filed before revocation hearing but not acted upon (although court revoked defendant based on technical violations and sentenced him to one month in prison and new term of supervised release), and then alleged in addendum filed after revocation as violation of federal criminal law)

! *United States v. Slappy*, 872 F.3d 202 (4th Cir. Sept. 22, 2017) (Gregory, C.J.; Shedd, J., dissenting) (E.D.N.C.) (vacating above-range revocation sentence and remanding for resentencing after finding sentence plainly unreasonable where district court failed to address defendant's non-frivolous arguments in favor of a within-range sentence and failed to provide sufficient explanation for statutory maximum sentence)

X. APPELLATE ISSUES

Reviewability of Issues

United States v. Under Seal, 853 F.3d 706 (4th Cir. Apr. 5, 2017) (Floyd, J.) (E.D. Va.) (holding that appellate court lacked jurisdiction to hear defendant's interlocutory appeal of district court's order dismissing criminal information in juvenile delinquency proceeding without prejudice because order did not constitute final judgment and was not reviewable as collateral order; similarly, appellate court lacked jurisdiction to hear defendant's interlocutory appeal of denial of his motion to have information dismissed with prejudice)

United States v. Under Seal, 853 F.3d 706 (4th Cir. Apr. 5, 2017) (Floyd, J.) (E.D. Va.) (holding that appellate court has jurisdiction pursuant to collateral order doctrine to hear defendant's interlocutory appeal of district court's order authorizing disclosure of protected juvenile records and information; further, defendant had standing to appeal lower court's rulings, and appeal was not moot as to two categories of information (disclosure of transfer hearing transcript and investigative report), although it was moot as to third (defendant's identity); finally, on merits, ruling that district court had authority to authorize disclosure under 18 U.S.C. § 5038, and did not abuse that discretion in authorizing release)

United States v. Oliver, 878 F.3d 120 (4th Cir. Dec. 20, 2017) (Gregory, J.) (D.S.C.) (where defendant filed notice of appeal four years out of time (and after denial of § 2255 motion) but government did not seek dismissal based on untimeliness, holding that court has authority to dismiss untimely criminal appeals *sua sponte*, although it should exercise that authority only in extraordinary circumstances; finding such extraordinary circumstances present given procedural history of case)

United States v. Hyman, 884 F.3d 496 (4th Cir. Mar. 9, 2018) (Agee, J.) (M.D.N.C.) (where defendant filed notice of appeals several months out of time but government did not move to dismiss appeal as being out of time until after defendant had filed opening brief, ruling that motion to dismiss was timely in light of Fourth Circuit Local Rule 27(f) (providing that "[m]otions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time"))

XI. POST-CONVICTION ISSUES

Time at Liberty Doctrine

* *United States v. Grant*, 862 F.3d 417 (4th Cir. July 6, 2017) (Motz, J.) (E.D. Va.) (in case in which marshals released defendant eleven days early on fifteen-day revocation sentence, questioning whether federal common law right to credit for time erroneously spent at liberty exists, but finding that even if it does, district court did not abuse discretion in denying credit to defendant)

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

United States v. May, 855 F.3d 271 (4th Cir. Apr. 25, 2017) (Floyd, J.) (W.D. Va.) (in case in which defendant pled guilty pursuant to Rule 11(c)(1)(C) plea agreement that only partially laid out guidelines calculation and district court *sua sponte* denied § 3582(c) reduction based on 2014 amendment to U.S.S.G. § 2D1.1, government waived argument that district court did not have authority to entertain motion for reconsideration; on merits, affirming district court's *sua sponte* denial and distinguishing *Freeman v. United States*, 564 U.S. 522 (2011)) N.B.: In *Hughes v. United States*, S. Ct. No. 17-155 (argued March 26, 2018), the Supreme Court is considering what *Freeman* holds; a decision is expected by the end of June 2018.

28 U.S.C. § 2241, 2255, *et seq.*

! * *United States v. Wheeler*, ___ F.3d ____, 2018 WL 1514418 (4th Cir. Mar. 29, 2018) (Thacker, J.) (if defendant satisfies jurisdictional requirements of 28 U.S.C. § 2255(e)'s "savings clause," defendant may use 28 U.S.C. § 2241 (codifying traditional writ of habeas corpus) to challenge legality of sentence, not simply conviction; setting out test for application of savings clause to erroneous sentences)

United States v. Brown, 868 F.3d 297 (4th Cir. Aug. 21, 2017) (Duncan, J.) (D.S.C.) (because Supreme Court has not ruled that *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidates residual clause of "crime of violence" definition contained in mandatory Sentencing Guidelines, § 2255 motion was not timely filed under 28 U.S.C. § 2255(f)(3))

United States v. Carthorne (Carthorne II), 878 F.3d 458 (4th Cir. Dec. 21, 2017) (Keenan, J.) (M.D.N.C.) (on appeal of denial of § 2255 motion based on counsel's failure at sentencing to object to treatment of Virginia assault and battery on a police officer as a crime of violence (which Fourth Circuit held on direct appeal in *United States v. Carthorne* (*Carthorne I*), 726 F.3d 503 (4th Cir. 2013), was error, but not plain error), holding that counsel's failure to research issue and object constituted ineffective assistance of counsel)