FOURTH CIRCUIT UPDATE

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DISCUSSION OVERVIEW

I. State of the Fourth Circuit

A. Judicial personnel updates

B. Increase in oral arguments

II. Developments in Fourth Circuit Case Law

A. Fourth Amendment

1. Border searches

Kolsuz (degree of suspicion necessary for nonroutine border search of cell phone)

2. Warrants

Pratt (reasonableness of delay in obtaining warrant to search seized cell phone)

Lyles (validity of warrant based on evidence gathered from trash pull)

3 Reasonable suspicion

Kehoe (factors going to reasonable suspicion)

4. Consent

Azua-Rinconada (voluntariness of consent to warrantless entry into home)

B. Fifth Amendment

1. Self-incrimination

Abdallah (invocation of right to remain silent)

C. Sentencing Issues

1. Sentencing statutes

Simms (validity of residual clause in 18 U.S.C. § 924(c))

2. Sentencing Guidelines

Moore (credit for undischarged term of imprisonment)

Brown (criminal history points for "good behavior" condition)

3. Forfeiture

Chittenden (forfeiture of untainted property under 18 U.S.C. § 982(a)(2))

D. Appeals / Post-conviction

1. Standards of review

Lockhart (plain error review in context of failure to advise on mandatory minimum and statutory maximum)

2. Appellate Procedure

Chaney (deadline for appeal from resentencing after successful § 2255 motion)

FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

Published Between April 1, 2018, and March 31, 2019

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TABLE OF CONTENTS

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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.

I. OFFENSES

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

United States v. Guzman-Velasquez, ___ F.3d ____, 2019 WL 1387557 (4th Cir. Mar. 28, 2019) (Motz, J.) (E.D. Va.) (defendant was not denied due process when there was no meaningful review provided for denial of defendant's application for temporary protected status (TPS); collateral attack provision in § 1326(d) is limited by its plain language to challenges to prior removal orders, which defendant did not challenge)

18 U.S.C. § 32, Destruction of Aircraft

United States v. Hamidullin, 888 F.3d 62 (4th Cir. Apr. 18, 2018) (Floyd, J.) (E.D. Va.) (affirming conviction of defendant, a former Russian army officer affiliated with the Taliban, for attacking U.S. aircraft because plain language of statute applies to unlawful acts even when committed in a combat zone)

18 U.S.C. § 287, False Claims

United States v. Whyte, 918 F.3d 339 (4th Cir. Mar. 12, 2019) (Agee, J.) (W.D. Va.) (in prosecution for false claims and major fraud involving fraudulent requests for payment on military equipment contract issued by Joint Contracting Command – Iraq, finding for purposes of offense element that United States or one of its agencies be the defrauded party, Department of Defense was that party, not the Joint Contracting Command)

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

* *United States v. Tillmon*, ___ F.3d ____, 2019 WL 921534 (4th Cir. Feb. 26, 2019) (Agee, J.) (E.D.N.C.) (in case where police officer accepted bribes to provide security during interstate transportation of drugs, for which he was paid $2,000 or $2,500 per trip, considering for first time § 666's requirement that charged conduct involve "anything of value of $5,000 or more" and how to measure value for intangible services provided in exchange for bribe; vacating defendant's three convictions for accepting bribes because each bribe was less than $5,000)

18 U.S.C. §§ 922, 924, Firearms

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

United States v. Simms, 914 F.3d 229 (4th Cir. Jan. 24, 2019) (en banc) (Motz, J.) (E.D.N.C.) (holding that "residual clause" of 18 U.S.C. § 924(c)'s definition of "crime of violence" is void for vagueness, and therefore unconstitutional, for same reasons that Supreme Court found residual clause in 18 U.S.C. § 924(e)'s definition of "violent felony" and in 18 U.S.C. § 16's definition of "crime of violence" to be unconstitutional) (N.B.: The Supreme Court will hear oral argument on this issue on April 17, 2019, in *United States v. Davis*, U.S. No. 18-431; a decision should issue by late June)

18 U.S.C. § 1031, Major Fraud Against the United States

United States v. Whyte, 918 F.3d 339 (4th Cir. Mar. 12, 2019) (Agee, J.) (W.D. Va.) (in prosecution for false claims and major fraud involving fraudulent requests for payment on military equipment contract issued by Joint Contracting Command – Iraq, finding for purposes of offense element that United States or one of its agencies be the defrauded party, Department of Defense was that party, not the Joint Contracting Command)

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

United States v. Burfoot, 899 F.3d 326 (4th Cir. Aug. 8, 2018) (Diaz, J.) (E.D. Va.) (where city council member was charged with wire fraud for scheme to solicit bribes, holding that evidence was sufficient where developers testified that they paid defendant in order to be awarded development project; further finding that defendant could reasonably foresee that developers would use wire transfers to make payments; holding that demand that developer pay delinquent taxes before being awarded contract was in furtherance of fraud scheme notwithstanding legal duty to pay taxes regardless of scheme)

18 U.S.C. § 1512, Witness Tampering, Obstructing Official Proceeding

United States v. Edlind, 887 F.3d 166 (4th Cir. Apr. 10, 2018) (Shedd, J.) (W.D. Va.) (finding evidence sufficient to convict defendant of "corruptly persuading" witness in friend's human-trafficking trial; noting that government must prove that defendant acted "voluntarily and

intentionally to bring about false or misleading testimony"; finding temporal connecting between pending trial and communications with witness to be significant, as well as the fact that defendant took steps to avoid being recorded; noting that corrupt persuasion includes "coaching" witness by providing false story as if it is true)

! *United States v. Young*, 916 F.3d 368 (4th Cir. Feb. 21, 2019) (Agee, J.) (E.D. Va.) (because an FBI investigation is not an "official proceeding" for purposes of federal obstruction statute and defendant's actions had no nexus to another specific official proceeding, evidence was insufficient to prove that defendant knew that an official proceeding (such as a grand jury investigation) was pending or that one was reasonably foreseeable when he allegedly attempted to mislead FBI investigations)

18 U.S.C. § 1951, Hobbs Act Robbery and Extortion

United States v. Burfoot, 899 F.3d 326 (4th Cir. Aug. 8, 2018) (Diaz, J.) (E.D. Va.) (Hobbs Act extortion indictment was not duplicitous despite charging receipt of multiple things of value in single count because the extortion was one continuing scheme, not discrete violations; holding, in line with other circuits, that Hobbs Act extortion can be charged as continuing offense and that five-year statute of limitations does not bar conviction if scheme continued within limitations period)

18 U.S.C. § 1959, Violent Crimes in Aid of Racketeering

United States v. Zelaya, 908 F.3d 920 (4th Cir. Nov. 14, 2018) (Duncan, J.; Floyd, J. dissenting in part) (W.D.N.C.) (evidence was sufficient to prove that defendant committed murder in aid of racketeering where jury could infer, based on extreme nature of murder and communications to fellow gang member about it afterwards, that he committed it because it was expected of him as a gang member so he could maintain his position) (dissenting judge argued that evidence on purpose element was so thin that "majority comes perilously close to holding that an act of violence by a gang member is gang-related by default")

18 U.S.C. § 2339B, Providing Material Support to Terrorist Organizations

United States v. Dhirane, 896 F.3d 295 (4th Cir. July 16, 2018) (Niemeyer, J.) (E.D. Va.) (evidence was sufficient to prove that defendants provided money to al-Shabaab, a designated foreign terrorist organization, where district court, in bench trial, found that defendants were "ardent supporters" of the organization, collected money on its behalf, and sent that money to individuals who used it to support the organization's activities)

33 U.S.C. § 1908, Act to Prevent Pollution from Ships

United States v. Oceanic Illsabe Limited, 889 F.3d 178 (4th Cir. May 7, 2018) (King, J.) (E.D.N.C.) (in case charging corporate shipping concerns with environmental crimes, finding evidence sufficient to support convictions because ship engineers who illegally dumped pollutants and falsified ship's oil record book were employees of the companies who were acting within the scope of their employment with an intent to benefit the corporations)

II. FOURTH AMENDMENT ISSUES

Border Searches

* *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. May 18, 2018) (Harris, J.; Wilkinson, J, concurring) (E.D. Va.) (holding that forensic search of phone seized from outbound airplane passenger was not a routine border search, and thus required some level of individualized suspicion, and holding that defendant's arrest did not transform forensic search months later at a distant site into search incident to arrest; concluding that suppression of evidence related to smuggling recovered from phone was not necessary because agents acted in good faith) (N.B.: panel expressly declined to decide whether, or under what circumstances, some level of suspicion greater than reasonable suspicion (such as probable cause) might be required to conduct a nonroutine border search)

Consent

United States v. Azua-Rinconada, 914 F.3d 319 (4th Cir. Jan. 28, 2019) (Niemeyer, J.) (E.D.N.C.) (finding that defendant's fiancee's consent to allow officers into home was voluntary where, although one officer stated "open the door or we're going to knock it down," body-cam footage and fiancee's testimony demonstrated that encounter was voluntary and that officers had valid consent to enter home)

Franks Hearings

United States v. Dhirane, 896 F.3d 295 (4th Cir. July 16, 2018) (Niemeyer, J.) (E.D. Va.) (Foreign Intelligence Surveillance Act (FISA) procedure that allows district court to review government's surveillance evidence *in camera* and *ex parte* does not violate Fourth Amendment even though it denies defense counsel the ability to review government's warrant application for possibility of *Franks* hearing over validity of warrant)

Fruit of the Poisonous Tree

! *United States v. Terry*, 909 F.3d 716 (4th Cir. Nov. 30, 2018) (Gregory, J.) (S.D. W. Va.) (reversing denial of suppression motion where stop of car only two days after warrantless attachment of GPS tracking device resulted from "flagrant" constitutional violation)

Reasonable Suspicion

United States v. Kehoe, 893 F.3d 232 (4th Cir. June 20, 2018) (Motz, J.) (E.D. Va.) (officers had reasonable suspicion to seize defendant for possession of a concealed firearm while drinking in a bar based on two 911 calls, bartender's description of defendant, and officers' past experience with bar; finding, however, that district court's "repeated reference" to defendant's race (he was sole white male among predominately black patrons of bar) during suppression hearing "was clearly improper")

Standing

! *United States v. Terry*, 909 F.3d 716 (4th Cir. Nov. 30, 2018) (Gregory, J.) (S.D. W. Va.) (defendant had standing to contest stop of car to which GPS tracking device had been attached when, although he was passenger at time of stop, he was driving car at time tracking device had been attached, because stop of car resulted from illegal attachment of device)

Warrants

United States v. Thomas, 908 F.3d 68 (4th Cir. Nov. 8, 2018) (Harris, J.) (W.D. Va.) (although warrant affidavit was deficient on its face, good faith exception applied where officer had inadvertently omitted from affidavit uncontroverted facts known to him, and officer had objectively reasonable belief in existence of probable cause)

! *United States v. Lyles*, 910 F.3d 787 (4th Cir. Dec. 14, 2018) (Wilkinson, J.) (D. Md.) (after trash pull produced three plant stems and three empty packs of rolling papers, police obtained warrant to search any persons within home and seize essentially anything inside; holding that "astonishingly broad warrant – resembling a general warrant" was not supported by probable cause as such meager residue did not indicate marijuana possession or distribution by the homeowner, and it empowered police to seize items not related to marijuana possession; further holding that good faith exception did not apply, despite "subjective good faith"of officers, given clear lack of probable cause to support warrant)

! *United States v. Pratt*, 915 F.3d 266 (4th Cir. Feb. 8, 2019) (Diaz, J.) (D.S.C.) (extended seizure of defendant's cell phone on suspicion it contained child pornography was unreasonable where police waited 31 days to obtain a warrant with no justification for delay; noting that phone itself, as opposed to digital files within phone, did not have independent evidentiary value, so police could have removed or copied files and returned phone)

United States v. Seerden, 916 F.3d 360 (4th Cir. Feb. 20, 2019) (Thacker, J.) (E.D. Va.) (as to claim that search of phone belonging to Navy SEAL violated Military Rules of Evidence, holding that although military rules can add context to reasonableness analysis, it is Fourth Amendment that controls admissibility of evidence in civilian federal courts; concluding that even if search, technically in violation of military procedures, violated Fourth Amendment, investigators acted in good faith reliance on apparently valid military search warrant, making evidence obtained via their search (which served as the basis for a later federal warrant) admissible in civilian trial)

United States v. Young, 916 F.3d 368 (4th Cir. Feb. 21, 2019) (Agee, J.) (E.D. Va.) (police officers did not exceed the scope of a warrant authorizing seizure of items related to ISIL/ISIS and "other designated terrorist groups" when officers seized items related to Nazis, as Nazis engaged in "terrorism," as broadly defined, and some seized items concerned ties between Nazism and radical Islamism)

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

Double Jeopardy

United States v. Whyte, 918 F.3d 339 (4th Cir. Mar. 12, 2019) (Agee, J.) (W.D. Va.) (in prosecution for false claims and major fraud involving fraudulent requests for payment on military equipment contract, finding by jury in civil False Claims Act of no fraud did not collaterally estop criminal prosecution where government did not intervene in civil suit)

Due Process

United States v. Saint Louis, 889 F.3d 145 (4th Cir. May 2, 2018) (Diaz, J.) (E.D. Va.) (finding that witness's out-of-court identification of defendant, made three months after kidnapping offense, was not unduly suggestive where defendant's picture in police photo array was taken from a rap group poster that witness had seen during kidnapping; noting that police did adequate job in making that picture look like others in array; holding that even if process was suggestive, the identification was not unreliable)

United States v. Chavez, 894 F.3d 593 (4th Cir. July 2, 2018) (Wilkinson, J.) (E.D. Va.) (in racketeering murder case, evidence concerning cooperating witness's immigration proceedings was not material under *Brady*/*Napue* in light of extensive physical, forensic, and eyewitness testimony concerning murder, and defendants had opportunity at trial to cross-examine witness on his immigration proceedings, including on letter the FBI submitted in support of witness's green card application)

United States v. Guzman-Velasquez, ___ F.3d ____, 2019 WL 1387557 (4th Cir. Mar. 28, 2019) (Motz, J.) (E.D. Va.) (in illegal reentry case, 8 U.S.C. 1326, defendant was not denied due process when there was no meaningful review provided for denial of defendant's application for temporary protected status (TPS); collateral attack provision in § 1326(d) is limited by its plain language to challenges to prior removal orders, which defendant did not challenge)

Self-Incrimination

United States v. Bell, 901 F.3d 455 (4th Cir. Aug. 28, 2018) (Niemeyer, J.; Wynn, J., dissenting) (D. Md.) (during execution of search warrant, after defendant had been seated near his wife, officer asked the wife (owner of the home) if there were any weapons present, and defendant interjected that there was a gun; holding that defendant was not subjected to interrogation or its functional equivalent because question was directed to wife even if defendant was within earshot and it was possible he would answer) (dissenting judge argued that court must view interrogation from perspective of suspect, who reasonably could have believed that question was directed to him)

! *United States v. Abdallah*, 911 F.3d 201 (4th Cir. Dec. 18, 2018) (Wynn, J.) (E.D. Va.) (defendant unambiguously invoked right to remain silent by stating he "wasn't going to say anything at all"; court cannot look to circumstances after otherwise clear invocation in order to create ambiguity in invocation (although it can look to circumstances preceding invocation); it does not

matter that defendant invoked prior to completion of *Miranda* warnings because there is no requirement that invocation of right to remain silent must be "knowing and intelligent," like a waiver of right must be; further holding that police did not scrupulously honor invocation, rendering later waiver invalid; finally holding that error in admitting statements was not harmless in light of "particularly damaging nature of confessions")

United States v. Azua-Rinconada, 914 F.3d 319 (4th Cir. Jan. 28, 2019) (Niemeyer, J.) (E.D.N.C.) (totality of circumstances supported conclusion that defendant was not in custody when questioned in his residence where he chose his seat in livingroom, tone of interaction (which was captured on body cam) was conversational, and defendant was permitted to leave livingroom, unaccompanied, to change clothes before going outside with officer to be fingerprinted)

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

Confrontation

United States v. Smith, ___ F.3d ____, 2019 WL 1372326 (4th Cir. Mar. 27, 2019) (Richardson, J.) (D. Md.) (in trial of members of the violent Baltimore prison and street gang Black Guerilla Family, expert's testimony about meaning of gang members' coded language did not violate defendants' constitutional right to confrontation where expert relied on hearsay as part of proper expert opinion, and was not simply relaying statements by non-testifying co-conspirators into record)

Counsel / Self-Representation

United States v. Cohen, 888 F.3d 667 (4th Cir. Apr. 25, 2018) (King, J.) (D. Md.) (affirming district court's denial of appointed counsel to defendant who had represented himself throughout proceedings but requested counsel in the midst of sentencing, finding that request was "very tardy," and that, once waived, the right to counsel is no longer unqualified)

Trial by Impartial Jurors

United States v. Birchette, 908 F.3d 50 (4th Cir. Nov. 7, 2018) (Wilkinson, J.) (E.D. Va.) (where juror approached defense counsel after trial to say that another juror made comments related to race during deliberations ("The two of you [holdouts who were same race as defendant] are only doing this because of race" and "It's a race thing for you"), holding that district court did not abuse its discretion in finding that defendant had not shown "good cause" to obtain leave, required under local rules, to interview jurors concerning presence of racial animus during deliberations)

V. OTHER PRE-TRIAL ISSUES

Combatant Immunity

United States v. Hamidullin, 888 F.3d 62 (4th Cir. Apr. 18, 2018) (Floyd, J.; King, J., dissenting) (E.D. Va.) (affirming denial of motion to dismiss indictment because defendant, who was former Russian army officer affiliated with the Taliban, was not entitled to combatant immunity under either Third Geneva Convention or common law combatant immunity defense of public authority)

Pre-trial Restraint of Assets

United States v. Miller, 911 F.3d 229 (4th Cir. Dec. 20, 2018) (Duncan, J.) (E.D. Va.) (on interlocutory appeal from pretrial order denying motion to release seized assets (specifically, two pieces of real property), ruling that government had probable cause to find that defendant used fraudulently obtained and laundered funds to pay for mortgage, taxes, and improvements)

Severance (Fed. R. Crim. P. 14)

United States v. Chavez, 894 F.3d 593 (4th Cir. July 2, 2018) (Wilkinson, J.) (E.D. Va.) (district court did not abuse discretion in refusing to sever trials of co-defendants in racketeering case where defendants' strategies were not entirely antagonistic; finding defenses not inconsistent even though each were disclaiming responsibility for murder, because none specifically pointed the finger at a co-defendant; stating that standard is whether believing one defense requires disbelieving another)

VI. TRIAL ISSUES[1]

Evidence

Confrontation

See Sixth Amendment, *supra*

Federal Rules of Evidence 401 *et seq.*

United States v. Young, 916 F.3d 368 (4th Cir. Feb. 21, 2019) (Agee, J.) (E.D. Va.) (in trial for attempting to provide material support to terrorist organization, district court did not abuse its discretion under FRE 401 and 403 in admitting materials related to Nazis and their ties to radical Islamism, because they were relevant to whether defendant had predisposition to support terrorist organization in light of interest in groups with radical anti-Semitic viewpoints, and evidence was not unfairly prejudicial, especially given court's cautionary instruction)

[1] Subsections are arranged by stage of trial.

Federal Rules of Evidence 701 *et seq.*

United States v. Young, 916 F.3d 368 (4th Cir. Feb. 21, 2019) (Agee, J.) (E.D. Va.) (district court did not abuse its discretion in admitting expert testimony under FRE 702 about various extremist movements and neo-Nazis; affirming conclusion that witness's academic credentials and social sciences-based research made him qualified to testify; noting that court did not need to hold a *Daubert* hearing before admitting testimony if court's review of credentials convinces court that the witness is qualified; finally holding that expert testimony was relevant in material-support-to-terrorists trial because it provided context and historical background for defendant's predisposition to support radical groups)

United States v. Smith, ___ F.3d ____, 2019 WL 1372326 (4th Cir. Mar. 27, 2019) (Richardson, J.) (D. Md.) (in trial of members of the violent Baltimore prison and street gang Black Guerilla Family, finding no error in district court's qualification of agent as expert, based on his years of investigating drug and gang activity, in coded jargon used in gang member communications; rejecting as "novel" defense contention that factual context on which expert bases opinion must come from independent evidence, not from expert's own observations, whether made before or during trial)

Federal Rules of Evidence 801 *et seq.*

United States v. Davis, 918 F.3d 397 (4th Cir. Mar. 19, 2019) (Niemeyer, J.) (W.D.N.C.) (on plain error review, finding that district court did not err in admitting out-of-court statement of informant, that she obtained drugs from defendant, through testimony of police officer who had used informant to make controlled buy of drugs from defendant, because informant's statement was not offered for its truth but rather to explain officer's decision to use informant for buy; i.e., statement was not hearsay in first instance)

Federal Rules of Evidence 901 *et seq.*

United States v. Davis, 918 F.3d 397 (4th Cir. Mar. 19, 2019) (Niemeyer, J.) (W.D.N.C.) (district court did not abuse discretion in admitting photographs taken by police officer of text messages on informant's phone even though officer, while authenticating photographs, did not link contact name on informant's phone with phone number linked to defendant, where there was ample contextual evidence that person with whom informant was texting was defendant; similarly, district did not abuse discretion in admitting recording of telephone call between informant and defendant when officer testified that he recognized the voices on the recording as being those of the informant and defendants)

Sufficiency of Evidence

See Offenses, *supra*

Jurors

United States v. Smith, ___ F.3d ____, 2019 WL 1372326 (4th Cir. Mar. 27, 2019) (Richardson, J.) (D. Md.) (in trial of members of the violent Baltimore prison and street gang Black Guerilla Family, district court did not abuse discretion in its questioning of jurors for bias after one juror expressed fear of retaliation in light of testimony about gang's violent acts and defendant's knowledge, gained from jury selection, of information about that juror's husband's exact employment location)

United States v. Birchette, 908 F.3d 50 (4th Cir. Nov. 7, 2018) (Wilkinson, J.) (E.D. Va.) (where juror approached defense counsel after trial to say that another juror made comments related to race during deliberations ("The two of you [holdouts who were same race as defendant] are only doing this because of race" and "It's a race thing for you"), holding that district court did not abuse its discretion in finding that defendant had not shown "good cause" to obtain leave, required under local rules, to interview jurors concerning presence of racial animus during deliberations)

Jury Instructions

United States v. Camara, 908 F.3d 41 (4th Cir. Nov. 6, 2018) (Harris, J.) (E.D. Va.) (in case involving conspiracy to acquire and resell luxury cars where jury asked whether it had to agree that defendant was conspiring with one specific person or conspiring in general, and court instructed that "the government has to prove specifically that the defendant was conspiring with Ray *or* others known or unknown co-conspirators," that instruction did not violate Fifth Amendment by constructively amending indictment to broaden it; nor did the instruction violate Sixth Amendment's venue requirement by permitting jury to find defendant guilty of crime not committed within district)

VII. PLEA ISSUES

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

United States v. Lockhart, 917 F.3d 259 (4th Cir. Feb. 27, 2019) (Keenan, J.; Gregory, J., concurring in judgment; Floyd, J., concurring in judgment) (W.D.N.C.) (on plain error review in case in which defendant pled without plea agreement to single count of possession of firearm by convicted felon, he was advised at plea hearing that statutory maximum was ten years, and then was sentenced to fifteen-year mandatory minimum as armed career criminal, finding that defendant did not establish reasonable probability that he would not have pled guilty if he had been advised of correct penalties beforehand) (N.B.: in light of all three panel members' criticism of *United States v. Massenburg*, 564 F.3d 337 (4th Cir. 2009), which compelled the result in this case, appellate defense counsel has petitioned for rehearing en banc; the Court has directed a response by the government to the petition)

Plea Agreements

! *United States v. Edgell*, 914 F.3d 281 (4th Cir. Jan. 25, 2019) (Harris, J.) (N.D. W. Va.) (on plain error review, holding that government's sharing with probation office of post-plea lab test results that led to higher guideline range did not breach plea agreement in which parties had stipulated to drug type and quantity; further holding, however, that government *did* breach plea agreement when it failed to argue for sentence consistent with range that resulted from stipulation; and vacating sentence and remanding for resentencing before different judge)

VIII. SENTENCING ISSUES

Constitutional Challenges

United States v. Chavez, 894 F.3d 593 (4th Cir. July 2, 2018) (Wilkinson, J.) (E.D. Va.) (life sentences for 18-year-old and 19-year-old defendants convicted of murder in aid of racketeering did not violate Eighth Amendment)

Sentencing Statutes

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

! *United States v. Hodge*, 902 F.3d 420 (4th Cir. Aug. 22, 2018) (Gregory, C.J.) (M.D.N.C.) (Maryland reckless endangerment is not a predicate offense under the ACCA because force clause requires higher degree of mens rea than recklessness)

United States v. Bell, 901 F.3d 455 (4th Cir. Aug. 28, 2018) (Niemeyer, J.; Wynn, J., dissenting) (D. Md.) (Maryland robbery with a dangerous or deadly weapon qualifies as an ACCA predicate under the force clause because offense requires actual use of weapon to inflict or threaten harm and taking of property from the person of another) (dissenting judge argued that state cases permit conviction for threats to property, which would disqualify statute as an ACCA predicate)

! *United States v. Jones*, 914 F.3d 893 (4th Cir. Feb. 4, 2019) (King, J.) (D.S.C.) (South Carolina offense of assaulting, beating, or wounding law enforcement officer while resisting arrest is indivisible, and does not categorically qualify as a violent felony because it can be committed by means of assault, which includes an attempted touching in a rude or angry manner, or an attempted spitting at someone, and thus does not categorically have an element requiring the use, attempted use, or threatened use of force)

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

United States v. Under Seal, 902 F.3d 412 (4th Cir. Aug. 22, 2018) (Traxler, J.) (D. Md.) (where defendant testified at co-conspirators' trial as part of cooperation agreement, but did not testify truthfully and fully in the government's view, government was not required under terms of agreement to hold defendant in breach of agreement before declining to move for sentence reduction;

rather, government could waive breach of agreement, elect to keep plea agreement in place, and exercise right under agreement to refuse to move for reduction)

18 U.S.C. § 3559(c), Federal Three Strikes Statute

United States v. Johnson, 915 F.3d 223 (4th Cir. Feb. 6, 2019) (Wilkinson, J.) (W.D. Va.) (New York third-degree robbery qualifies as robbery "described in" 18 U.S.C. §§ 2111, 2113, or 2118, and thus was properly considered as "serious violent felony" that constituted a strike)

Sentencing Guidelines

U.S.S.G. § 2B1.1, Fraud

United States v. Carver, 916 F.3d 398 (4th Cir. Feb. 26, 2019) (Wilkinson, J.) (D.S.C.) (in case involving access device fraud, holding that device need not be functional to count for purposes of calculating loss amount of $500 per device; disagreeing with reasoning of Ninth Circuit in *United States v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012) (concluding that device that cannot be used to get money is not an "access device"), in light of full statutory definition of "unauthorized access device," which includes expired, revoked, or cancelled card that cannot be used to obtain money)

U.S.S.G. § 2H1.1, Offenses Involving Individual Rights

United States v. Slager, 912 F.3d 224 (4th Cir. Jan. 8, 2019) (Wynn, J.) (D.S.C.) (because sentencing guideline for police officer convicted of depriving another of civil rights under color of law required district court to cross-reference underlying offense, court did not err in referring to second-degree murder guideline, instead of voluntary manslaughter, where court reasonably found that evidence showed that officer acted intentionally and not in the heat of passion or in the midst of a quarrel)

U.S.S.G. § 2K2.1 *et seq.*, Firearms Offenses

United States v. Allen, 909 F.3d 671 (4th Cir. Nov. 28, 2018) (Keenan, J.) (W.D.N.C.) (conviction under 21 U.S.C. § 843(b), use of communication facility to facilitate possession of drugs with intent to distribute, qualifies as "controlled substance offense" for purpose of increasing offense level based on prior conviction)

U.S.S.G. § 2M5.3, Providing Material Support to Terrorist Organizations

United States v. Dhirane, 896 F.3d 295 (4th Cir. July 16, 2018) (Niemeyer, J.) (E.D. Va.) (district court's finding that defendants' financial support of al-Shabaab, a designated foreign terrorist organization, was directed at and designed to support the organization's military operations generally was sufficient to affirm application of two-level enhancement requiring showing that defendants had intent or knowledge that their material support would be used in commission of violence; enhancement did not require finding that support was linked to specific violent act)

U.S.S.G. § 3A1.1 *et seq.*, Victim Related Adjustments

United States v. Shephard, 892 F.3d 666 (4th Cir. June 15, 2018) (Diaz, J.; Wynn, J., dissenting) (W.D.N.C.) (in "foreign sweepstakes" wire fraud scheme, process of "reloading" – i.e., raising purported prize levels and inducing victims who had already fallen for scheme to send more money – supported vulnerable victim enhancement, because repeated targeting of victim is evidence that defendant knew that the person was "particularly susceptible to the criminal conduct"; indeed, these victims' previous gullibility was the very reason they were targeted by members of the conspiracy who were known as "loaders"; suggesting that merely asking previous victim for more money, standing alone, might not support enhancement) (dissenting judge would have required district court to make fuller explanation for enhancement, including findings as to circumstances of specific victims, rather than a class of victims)

U.S.S.G. § 4A1.1 *et seq.*, Computation of Criminal History

United States v. Brown, 909 F.3d 698 (4th Cir. Nov. 29, 2018) (Diaz, J.) (E.D. Va.) (probation officer properly added two points to defendant's criminal history score for committing federal offense "while under a criminal justice sentence," U.S.S.G. § 4A1.1(d), where defendant committed offense while on "good behavior" imposed as condition of Virginia suspended sentence, because "good behavior" is "'the functional equivalent to a term of unsupervised probation'")

United States v. Hawley, ___ F.3d _____, 2019 WL 1341826 (4th Cir. Mar. 26, 2019) (Wynn, J.) (E.D.N.C) (finding no error in counting as criminal history defendant's uncounseled misdemeanor conviction where defendant had validly waived his right to counsel in that prosecution and was sentenced to 30 days of imprisonment)

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

United States v. Allen, 909 F.3d 671 (4th Cir. Nov. 28, 2018) (Keenan, J.) (W.D.N.C.) (conviction under 21 U.S.C. § 843(b), use of communication facility to facilitate possession of drugs with intent to distribute, qualifies as "controlled substance offense")

! *United States v. Fluker*, 891 F.3d 541 (4th Cir. June 5, 2018) (Agee, J.) (W.D. Va.) (holding that Georgia robbery was broader than generic robbery because it can be committed by "sudden snatching")

United States v. Hammond, 912 F.3d 658 (4th Cir. Jan. 4, 2019) (Keenan, J.) (W.D.N.C.) (because "forcible stealing" is element of New York robbery, that offense qualifies as "crime of violence" under "force clause" of Guidelines definition)

! *United States v. Simmons*, 917 F.3d 312 (4th Cir. Mar. 4, 2019) (Gregory, J.) (W.D.N.C.) (ruling, in context of supervised release revocation and on plain error review, that North Carolina assault with a deadly weapon on a government official is not "crime of violence" under current definition in § 4B1.2 as it is broader than enumerated offense of aggravated assault and does not satisfy force clause)

United States v. Mills, 917 F.3d 324 (4th Cir. Mar. 5, 2019) (Niemeyer, J.) (W.D.N.C.) (suggesting, without deciding, that North Carolina assault with a deadly weapon inflicting serious injury may not be "crime of violence" under current definition in § 4B1.2)

U.S.S.G. § 5G1.3, Imposition of Sentence on Defendant Subject to Undischarged or Anticipated State Sentence

United States v. Lynn, 912 F.3d 212 (4th Cir. Jan. 7, 2019) (Jones, J.; Floyd, J., dissenting in part) (M.D.N.C.) (where defendant in felon-in-possession case faced anticipated state sentence, district court did not abuse its discretion in declining to run federal sentence concurrently with state sentence because it lacked sufficient information about length of state sentence; noting that state court could take federal sentence into account and defendant could ask BOP to designate state prison as place of confinement) (dissenting judge argued that district court abdicated its duty to accept or reject guideline's recommendation for concurrent sentenced by "mak[ing] no decision at all")

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

United States v. Under Seal, 902 F.3d 412 (4th Cir. Aug. 22, 2018) (Traxler, J.) (D. Md.) (where defendant testified at co-conspirators' trial as part of cooperation agreement, but did not testify truthfully and fully in the government's view, government was not required under terms of agreement to hold defendant in breach of agreement before declining to move for sentence reduction; rather, government could waive breach of agreement, elect to keep plea agreement in place, and exercise right under agreement to refuse to move for reduction)

U.S.S.G. § 5K2.0 *et seq.*, Grounds for Departure

United States v. Moore, 918 F.3d 368 (4th Cir. Mar. 14, 2019) (Floyd, J.) (D.S.C.) (on appeal by government, holding that sentencing court may not reduce mandatory minimum sentence by departing down to account length of discharged state sentence for related conduct pursuant to U.S.S.G. § 5K2.23)

Sentencing Procedure

United States v. Harris, 890 F.3d 480 (4th Cir. May 21, 2018) (Gregory, C.J.) (D.S.C.) (affirming sentence but remanding to district court with instructions to permit defendant to submit sentencing memorandum under seal, with redacted version available to public, because memorandum contained defendant's family members' names and photos; finding that public interest in open access to proceedings would not be undermined by minimal redactions to protect privacy interests of family members)

Restitution and Forfeiture

United States v. Miller, 911 F.3d 229 (4th Cir. Dec. 20, 2018) (Duncan, J.) (E.D. Va.) (on interlocutory appeal from pretrial order denying motion to release seized assets (specifically, two

pieces of real property), ruling that government had probable cause to find that defendant used fraudulently obtained and laundered funds to pay for mortgage, taxes, and improvements)

United States v. Dillard, 891 F.3d 151 (4th Cir. May 30, 2018) (Agee, J.) (W.D. Va.) (on appeal by government of district court's order denying restitution to non-contact victims in child pornography case, vacating and remanding where district court misapplied *Paroline v. United States*, 572 U.S. 464 (2014), by requiring more evidence of victims' losses and previous amounts recovered, and more precision in government's apportionment formula, than *Paroline* itself required) (N.B.: the court declined to opine on whether the government's proposed methodology, or any other method, was consistent with *Paroline* or 18 U.S.C. § 2259, because district court had rejected restitution entirely)

! *United States v. Steele*, 897 F.3d 606 (4th Cir. July 27, 2018) (Gregory, C.J.) (W.D.N.C.) (where defendant stole video game discs, district court erred in accepting victim's unsupported loss estimate of replacement costs instead of fair market value of stolen discs; noting that "fair market value generally provides the best measure of value to satisfy the MVRA," and holding that government must put forth more evidence than victim's loss estimate alone)

! *United States v. Chittenden*, 896 F.3d 633 (4th Cir. July 25, 2018) (Gregory, J.) (E.D. Va.) (on remand from the Supreme Court in light of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which limited forfeiture under 21 U.S.C. § 853(a)(1) to property the defendant himself actually acquired as part of the crime, holding here that the same rule applies to the general forfeiture statute, 18 U.S.C. § 982(a)(2), because the text of the latter mirrors § 853; thus, cannot forfeit substitute (untainted) assets from defendant who did not obtain tainted assets; overrules *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), which had extended liability (and forfeitability) to co-conspirator proceeds)

Supervised Release

United States v. Sanchez, 891 F.3d 535 (4th Cir. June 5, 2018) (Wilkinson, J.) (E.D. Va.) (supervised release revocation proceeding is not proper forum for challenging validity of original sentence – here, the constitutionality post-*Johnson* of defendant's ACCA sentence – and district court does not have jurisdiction to consider challenge)

United States v. Gibbs,897 F.3d 199 (4th Cir. July 16, 2018) (Niemeyer, J.; Gregory, C.J., dissenting) (E.D.N.C.) (affirming 24-month sentence upon revocation of supervised release – the maximum term available – over defendant's arguments that district court had failed to adequately consider his arguments for a shorter sentence; finding sufficient the court's statement of "All right" when counsel specifically asked the court to consider those arguments) (dissenting judge argued that precedent requires sentencing court to state on the record its reasons for rejecting nonfrivolous arguments)

Reasonableness of Sentence

United States v. Gibbs,897 F.3d 199 (4th Cir. July 16, 2018) (Niemeyer, J.; Gregory, C.J., dissenting) (E.D.N.C.) (affirming 24-month sentence upon revocation of supervised release – the maximum term available – over defendant's arguments that district court had failed to adequately consider his arguments for a shorter sentence; finding sufficient the court's statement of "All right" when counsel specifically asked the court to consider those arguments) (dissenting judge argued that precedent requires sentencing court to state on the record its reasons for rejecting nonfrivolous arguments)

! *United States v. Ross*, 912 F.3d 740 (4th Cir. Jan. 14, 2019) (Gregory, J.) (D. Md.) (in child pornography case where guideline range was 188 to 235 months and court imposed government's requested sentence of 120 months consecutive to state sentence for child sex offense rather than defendant's requested sentence of 60 months concurrent, finding sentence procedurally unreasonable because court's explanation for sentence was insufficient and failed to address non-frivolous arguments in mitigation; also finding court failed to explain why it was imposing special conditions of supervised release)

United States v. Davis, 918 F.3d 397 (4th Cir. Mar. 19, 2019) (Niemeyer, J.) (W.D.N.C.) (in case where defendant was acquitted of drug conspiracy charge but probation used trial testimony of co-conspirators to increase quantity of drugs attributable to defendant for sentencing, finding that district court sufficiently explained why it accepted presentence report's finding of drug quantity)

Resentencing After Appeal or Grant of Other Post-Conviction Relief

United States v. Harris, 890 F.3d 480 (4th Cir. May 21, 2018) (Gregory, J.) (D.S.C.) (affirming 20-year sentence for marijuana conspiracy, imposed after identical sentence was vacated due to *Apprendi* error, and despite significant drop in guideline range, where district court did not merely "reinstate" prior sentence, but instead considered defendant's individualized circumstances, including post-sentencing rehabilitation and mitigation evidence)

! *United States v. Hodge*, 902 F.3d 420 (4th Cir. Aug. 22, 2018) (Gregory, J.) (M.D.N.C.) (at a resentencing after ACCA predicate used in original sentence has been struck, government cannot rely on a different predicate that it did not rely on at original sentencing because defendant has a right to notice of prior convictions the government will rely on to prove the enhancement)

IX. APPELLATE ISSUES

Appeal Waivers

United States v. Cohen, 888 F.3d 667 (4th Cir. Apr. 25, 2018) (King, J.) (D. Md.) (holding that *Apprendi* claim was not covered by appeal waiver in plea agreement, because violation of *Apprendi* rule would result in sentence in excess of statutory maximum, but deciding, on plain error

review, that even assuming *Apprendi* violation, defendant's substantial rights were not affected because he received sentence far below correct statutory maximum)

United States v. McCoy, 895 F.3d 358 (4th Cir. July 13, 2018) (Diaz, J.) (W.D.N.C.) (where defendant agreed to waive his right to appeal his conviction and "whatever sentence is imposed" except on basis of ineffective assistance of counsel or prosecutorial misconduct, joining other circuits in deciding that challenge to sufficiency of factual basis supporting plea fell outside scope of waiver because challenge goes to validity of plea itself)

Timeliness of Appeal

United States v. Chaney, 911 F.3d 222 (4th Cir. Dec. 19, 2018) (Niemeyer, J.; Gregory, J, dissenting) (W.D.N.C.) (because judgment amending sentence that is entered after successful § 2255 motion is part of defendant's criminal case (although it also completes a civil case), defendant must note appeal within 14 days, pursuant to Fed. R. App. P 4(b))

Reviewability of Issues

! *United States v. Fluker*, 891 F.3d 541 (4th Cir. June 5, 2018) (Agee, J.) (W.D. Va.) (finding appeal was not moot, even though defendant had completed serving Virginia federal sentence under appeal, because he was serving a Florida federal sentence that had been ordered to run consecutively to Virginia sentence, such that if Virginia sentence was reduced after remand, defendant's release date on Florida sentence would come sooner, creating a cognizable interest in outcome of appeal)

United States v. Ketter, 908 F.3d 61 (4th Cir. Nov. 8, 2018) (Motz, J.) (D.S.C) (joining other circuits in finding that appellate challenge to term of imprisonment is not moot where defendant was still serving term of supervised release, because imprisonment and supervised release are components of unitary sentence with interdependent relationship; should defendant prevail on appeal, district court could grant relief for over-served term of imprisonment in form of shorter period of supervised release)

Publication of Opinions

United States v. Gibbs, 905 F.3d 768 (4th Cir. Oct. 5, 2018) (Wynn, J., voting to redesignate panel opinion as unpublished or vacate it as moot) (after petition for rehearing en banc from panel decision,897 F.3d 199 (4th Cir. July 16, 2018), had been denied, defendant was released from prison; Judge Wynn argued that court should vacate panel opinion as moot to prevent an unreviewable case from spawning consequences for future cases; further arguing that panel opinion was either an application of prior precedent, and thus not worth publishing, or a deviation from precedent, and therefore not binding; finally noting that court's practice here of issuing order denying rehearing in expedited fashion instead of waiting on separate opinions has the salutary effect of not giving a judge a "pocket veto" by taking so long to write an opinion that the case becomes moot before en banc court can issue decision)

Rehearing Petitions

United States v. Gibbs, 905 F.3d 768 (4th Cir. Oct. 5, 2018) (Wynn, J., voting to redesignate panel opinion as unpublished or vacate it as moot) (noting that court's practice here of issuing order denying rehearing in expedited fashion instead of waiting on separate opinions has salutary effect of not giving any judge a "pocket veto" by taking so long to write an opinion that the case becomes moot before en banc court can issue decision)

Ineffective Assistance of Counsel on Appeal

! *United States v. Allmendinger*, 894 F.3d 121 (4th Cir. June 26, 2018) (Motz, J.) (E.D. Va.) (appellate counsel was ineffective in failing to raise issue (here, one with near-certain chance of success, merger problem with money laundering conviction) that was clearly stronger than issues counsel did raise; counsel's ineffectiveness prejudiced defendant because court of appeals likely would have reversed money laundering convictions)

X. POST-CONVICTION ISSUES

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

United States v. Martin, 916 F.3d 389 (4th Cir. Feb. 26, 2019) (Gregory, J.) (D. Md.) (when ruling on a motion for reduction of sentence under § 3582(c)(2) where defendant makes substantial arguments in mitigation, court must give individualized explanation for denying motion, whether in part or in whole)

28 U.S.C. § 2241, 2255, *et seq.*

United States v. Morris, 917 F.3d 818 (4th Cir. Mar. 8, 2019) (Harris, J.) (E.D. Va.) (finding that defense counsel was not ineffective for failing to argue at sentencing that Virginia attempted abduction (kidnapping) did not qualify as crime of violence under 2013 version of § 4B1.2's definition of that term where, even though there was relevant authority suggesting that Virginia's offense was broader than generic kidnapping, other authority made clear that offense would qualify under residual clause of definition)

Lester v. Flournoy, 909 F.3d 708 (4th Cir. Nov. 30. 2018) (Diaz, J.) (E.D. Va.) (defendant sentenced as career offender under mandatory Sentencing Guidelines who (1) has already filed one unsuccessful § 2255 challenge to conviction or sentence and (2) cannot meet requirements for filing second or successive § 2255 motion in § 2255(h) may use § 2241 motion, via savings clause of § 2255(e), to challenge career offender designation based on subsequent change in law that is retroactively applicable)