

U.S. Court of Appeals for the Fourth Circuit
Criminal Appellate Practice Seminar



October 28, 2019
James River Ballroom, Omni Hotel
Richmond, VA

FOURTH CIRCUIT CRIMINAL APPELLATE PRACTICE SEMINAR

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1.

Agenda



FOURTH CIRCUIT CRIMINAL APPELLATE PRACTICE SEMINAR
MONDAY, OCTOBER 28, 2019
JAMES RIVER BALLROOM, OMNI HOTEL, 100 S.12TH ST., RICHMOND

8:15 Registration and Light Refreshments

9:00 Welcome and Overview

Hon. Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit
Hon. James A. Wynn, Jr., Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

9:10 Tips for Effective Appellate Advocacy—Perspectives from the Bench and Bar

Moderator: Hon. Roger L. Gregory, Chief Judge U.S. Court of Appeals for the Fourth Circuit
Panel: Hon. James A. Wynn, Jr., Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Hon. Pamela A. Harris, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Amy Ray, Chief of Appeals, Office of the U.S. Attorney, WDNC
Joshua Carpenter, Appellate Chief, Office of the Federal Public Defender, WDNC

10:25 Break

10:40 A “Devil’s Advocate” Approach to Brainstorming and Writing

G. Alan DuBois, Federal Public Defender, EDNC

11:30 Oral Argument Do’s and Don’ts

Catherine Stetson, Co-Director, Hogan Lovells Appellate Practice Group

12:15 Lunch Buffet

1:15 Finding the Resources You Need

Suzanne Corriell, Fourth Circuit Librarian

1:30 Navigating Appellate Procedure in Criminal Cases—Tips from Behind the Scenes

Moderator: Fran Pratt, Assistant Federal Public Defender, EDVA
Panel: Melissa Wood, Senior Staff Attorney, U.S. Court of Appeals for the Fourth Circuit
Patricia Connor, Clerk of Court, U.S. Court of Appeals for the Fourth Circuit
Mark Zanchelli, Chief Deputy Clerk, U.S. Court of Appeals for the Fourth Circuit

2:00 Resolving Ethical Issues on Appeal

Eric Placke, First Assistant, Office of the Federal Public Defender, MDNC

3:00 Break

3:15 United States Supreme Court Review-Preview-Overview

Paul Rashkind, Appellate Division Chief, Office of the Federal Public Defender, SDFL

4:05 Fourth Circuit Decisions on Criminal Law and Procedure

Paresh Patel, Appeals Chief, Office of the Federal Public Defender, DMD
Patrick Bryant, Research and Writing Attorney, Office of the Federal Public Defender, EDVA

4:35 Budgeting, Use of Service Providers, and Other Developing CJA Matters

Larry Dash, Fourth Circuit CJA Case Budgeting Attorney

4:55 Closing Remarks

Honorable Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit

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Faculty

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PATRICK BRYANT, Research and Writing Attorney, Office of the Federal Public Defender for the Eastern District of Virginia.

Patrick Bryant received his undergraduate degree from Duke University and his law degree from Washington & Lee University School of Law. He was a staff attorney for the U.S. Court of Appeals for the Fourth Circuit from 2002-04 and again from 2005-07. He served as a law clerk to the Honorable Charles R. Wilson on the U.S. Court of Appeals for the Eleventh Circuit from 2004-05. Since 2007, he has been an appellate attorney for the Office of the Federal Public Defender for the Eastern District of Virginia.

JOSHUA CARPENTER, Assistant Federal Public Defender, Appellate Division Chief, Office of the Federal Public Defender for the Western District of North Carolina.

Josh Carpenter is the chief of the appellate division for the Federal Public Defender for the Western District of North Carolina. Before joining that office in 2012, he served as a law clerk to the Honorable M. Blane Michael of the United States Court of Appeals for the Fourth Circuit and worked for several years in Washington, D.C. as a litigation associate at the law firms of Gibson, Dunn & Crutcher LLP and Covington & Burling LLP. Josh graduated *magna cum laude* from the Georgetown University Law Center, where he served as an Executive Articles Editor for The Georgetown Law Journal. He received a B.A. in Political Science and Economics from Marshall University and was a member of the university's Society of Yeager Scholars. Since joining the office, he has argued 30 appeals, including *United States v. Simms* before the en banc Fourth Circuit and *Whitfield v. United States* before the U.S. Supreme Court.

PATRICIA CONNOR, Clerk of Court, United States Court of Appeals for the Fourth Circuit.

Patricia Connor was appointed as Clerk of the United States Court of Appeals for the Fourth Circuit in 1996, having previously served as Chief Deputy Clerk, Supervising Staff Attorney, and Staff Attorney at the Fourth Circuit. Before coming to the Fourth Circuit, Ms. Connor was a law clerk to United States District Judge Albert V. Bryan, Jr., in Alexandria, Virginia, and an associate with the firm of Paxson, Smith, Gilliam & Scott in Charlottesville, Virginia. Ms. Connor earned her J.D. from the University of Virginia School of Law and her undergraduate degree from Georgetown University.

SUZANNE B. CORRIELL, Circuit Librarian, United States Court of Appeals for the Fourth Circuit.

Suzanne B. Corriell has been with the Fourth Circuit Library since early 2015, and currently serves as Circuit Librarian. Previously, she had been Associate Director of the University of Richmond Law Library. At the University of Richmond, she also taught first-year legal research in the Lawyering Skills program and co-taught Public Policy Research and Drafting. Ms. Corriell has a J.D. and an M.A. in Library & Information Science from the University of Iowa, and a Bachelor of Arts from Mount Holyoke College. During law school, she was the Senior Managing Editor of the *Iowa Law Review*. She is a past president of the Virginia Association of Law Libraries, an occasional contributor to the "Law Libraries" column in the *Virginia Lawyer* magazine and is active in the American Association of Law Libraries.

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LARRY DASH, CJA Case Budgeting Attorney, United States Court of Appeals for the Fourth Circuit.

Larry Dash is the Criminal Justice Act (CJA) Case Budgeting Attorney for the Fourth Circuit Court of Appeals, working with both CJA attorneys and judges to identify needed resources and to ensure that attorneys receive adequate funding to defend their indigent clients.

After spending more than 22 years in the United States Air Force, he opened a private practice in Newport News, VA and was a member of the CJA panel for the Eastern District of Virginia. In 2001, he became an Assistant Federal Public Defender for the newly opened Office of the Federal Public Defender in Norfolk, VA. During his time in private practice and while he was with the Federal Public Defenders, he represented hundreds of indigent clients in district court and the Fourth Circuit Court of Appeals for offenses ranging from misdemeanors to capital murder. In 2014, he assumed his current duties as the circuit's Case Budgeting Attorney. He frequently serves as a guest faculty member for CJA training programs, and regularly consults with court personnel on various matters involving CJA programs. Mr. Dash is a graduate of Columbia College, and holds a J.D. from Touro College, Jacob D. Fuchsberg Law Center. He is admitted to practice in California, the District of Columbia, Virginia, various military courts, and the United States Supreme Court.

G. ALAN DUBOIS, Federal Public Defender for the Eastern District of North Carolina.

Alan DuBois is the Federal Public Defender for the Eastern District of North Carolina. He graduated from Duke University in 1984 and the University of Virginia School of Law in 1987. In 1989, after two years as a staff law clerk at the United States Court of Appeals for the Fourth Circuit, he joined the Federal Public Defender's Office. In 2005, he was the visiting federal defender at the United States Sentencing Commission and also served as a visiting attorney with the Legal Policy Branch of the Office of Defender Services in Washington, D.C. He is currently a member of the Federal Defender Sentencing Guidelines Committee and is a co-chair of the Defender Supreme Court Resource and Advisory Project.

HONORABLE ROGER L. GREGORY, Chief Judge, United States Court of Appeals for the Fourth Circuit.

Roger L. Gregory, Chief Judge of the United States Court of Appeals for the Fourth Circuit, formerly a partner in the law firm of Wilder & Gregory, grew up in Petersburg, Virginia and graduated from Virginia State College and the University of Michigan Law School. He is the first African-American to sit on the United States Court of Appeals for the Fourth Circuit, which includes the states of Maryland, West Virginia, Virginia, North Carolina and South Carolina. President William J. Clinton recess appointed him to the Court on December 27, 2000, and President George W. Bush commissioned his lifetime appointment to the Court in July 2001. Judge Gregory is the only person in the history of the United States to be appointed to a federal appellate court by two presidents of different political parties. Judge Gregory became Chief Judge on July 9, 2016. He is a member of the Judicial Conference of the United States that governs the Federal Judiciary.

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Judge Gregory's past leadership positions include Chairman of the Industrial Development Authority of Richmond, President of the Friends Association for Children, President of the Black History Museum and Cultural Center of Virginia, Rector of Virginia Commonwealth University, and President of the Old Dominion Bar Association.

Judge Gregory presently serves as Trustee Emeritus for the University of Richmond.

Judge Gregory's numerous awards include the National Conference of Christians and Jews Humanitarian Award, the National Bar Association's Gertrude E. Rush and Equal Justice Awards, the Washington Bar Association's Charles Hamilton Houston Merit Medallion, the Old Dominion Bar Association's L. Douglas Wilder Vanguard Award, the Thurgood Marshall College Fund Award of Excellence, and the University of Richmond School of Law's William Green Award for Professional Excellence.

Judge Gregory is a fellow of the Virginia State Bar Foundation, a member of the American Law Institute, and an inductee in the Virginia Interscholastic Heritage Association's Hall of Fame. He holds honorary degrees from Virginia Union University, Virginia State University, Virginia Commonwealth University, Widener University, Saint Paul's College, and The American University.

HONORABLE PAMELA A. HARRIS, Circuit Judge, United States Court of Appeals for the Fourth Circuit.

Pamela Harris is a judge on the United States Court of Appeals for the Fourth Circuit, appointed in 2014 by President Obama. Previously, Judge Harris worked in private practice as a Supreme Court and appellate litigator with the firm of O'Melveny & Myers LLP. She served twice at the United States Department of Justice, as Principal Deputy Assistant Attorney General for the Office of Legal Policy from 2010 to 2012, and as an Attorney-Advisor at the Office of Legal Counsel from 1993 to 1996. Judge Harris also taught constitutional law and criminal procedure at the University of Pennsylvania Law School and the Georgetown Law Center, served as Executive Director of Georgetown Law Center's Supreme Court Institute, and was a Co-Director of Harvard Law School's Supreme Court and Appellate Advocacy Clinic. A graduate of Yale College and Yale Law School, she served as a law clerk to Justice John Paul Stevens of the United States Supreme Court and Judge Harry T. Edwards of the D.C. Circuit Court of Appeals.

PARESH PATEL, Appeals Chief, Office of the Federal Public Defender for the District of Maryland.

Paresh Patel is currently the Chief of Appeals at the Office of the Federal Public Defender for the District of Maryland. He has been at the Federal Public Defender since 2003. Before then, he worked as a staff attorney at the Public Defender Service in Washington, D.C., the Office of the Appellate Defender in New York, New York, and the Office of the Public Defender in Charleston, West Virginia. In 1999-2000, he clerked for the Honorable Ancer L. Haggerty of the United States District Court for the District of Oregon in Portland. Paresh earned his J.D. from

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American University in 1996, and he received his undergraduate degree from the University of Southern California in 1993.

ERIC D. PLACKE, First Assistant Federal Public Defender, Office of the Federal Public Defender for the Middle District of North Carolina.

Eric D. Placke was born in Cincinnati, Ohio, but spent most of his childhood in Fayetteville, Arkansas. He was a National Merit Scholar at the University of Arkansas, was elected to Phi Beta Kappa, and earned his B.A. in political science in 1983. He remained at the University of Arkansas for law school, where he was a Leflar Scholar and Managing Editor of the Arkansas Law Review. He earned his J.D., with high honors, in 1986.

An Air Force ROTC Distinguished Graduate, Mr. Placke was commissioned in 1983, was an active duty judge advocate from 1986 until 1993, and then served in the Air Force Reserve until his retirement in 2010. He is a graduate of Squadron Officer School, Air Command and Staff College, and the Air War College. His military assignments included Assistant Staff Judge Advocate at Carswell AFB, Texas; Circuit Trial Counsel at Travis AFB, California; Instructor at the Air Force Judge Advocate General School at Maxwell AFB, Alabama; Appellate Government Counsel at Bolling AFB, District of Columbia, Air Staff Counsel at the Pentagon, and Appellate Military Judge on the Air Force Court of Criminal Appeals.

Mr. Placke has been an Assistant Federal Public Defender for the Middle District of North Carolina since 1993 and was named First Assistant in 2014. He is a supervising attorney for the Litigation Clinic at Wake Forest University School of Law, and an adjunct instructor in trial practice at Elon University School of Law. He has lectured at federal defender programs in North and South Carolina, and for the North Carolina Bar Association, the Federal Bar Association and Wake Forest Law School. He is admitted to practice in Arkansas, North Carolina, the Air Force Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court.

FRANCES H. PRATT, Assistant Federal Public Defender, Office of the Federal Public Defender for the Eastern District of Virginia.

Frances H. Pratt, an assistant federal public defender, joined the Office of the Federal Public Defender for the Eastern District of Virginia when that office opened in March 2002. In addition to her work as the head of her office's appellate section, Ms. Pratt is a co-chair of the Defenders Supreme Court Resource and Assistance Panel since its formation in 2007. She has also served as a faculty member at the Appellate Writing Workshop for Federal Defenders (Federal Judicial Center) since 2012. Before joining the Alexandria office, Ms. Pratt worked at the national level in the federal defender program from 1995 to 2002, providing training and other assistance to federal defender office staff and private court-appointed attorneys throughout the country. Prior to that, she clerked for the Honorable William L. Osteen, Sr., U.S. District Court, in Greensboro, North Carolina, and worked for both the North Carolina State Appellate Defender and the North Carolina Resource Center. Ms. Pratt earned her B.A. from Duke University in 1986, and her J.D. from Duke Law School in 1993.

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PAUL M. RASHKIND, Appellate Division Chief, Office of the Federal Public Defender for the Southern District of Florida.

Paul M. Rashkind is Chief of the Appellate Division for the Federal Public Defender, Southern District of Florida, and a Board-Certified Criminal Trial Lawyer. He represents clients in both trial and appellate courts and has appeared before the Supreme Court on five occasions, arguing as lead counsel in two of those cases. He has served as co-chair of the Federal Defenders Supreme Court Resource and Assistance Panel, as well as the National Association of Federal Defenders Amicus Curiae Committee. He has also served as a member of the Adjunct Faculty for the University of Miami School of Law and has written extensively on the subjects of criminal law, legal ethics, trial and appellate practice. He lectures frequently on behalf of the Federal Judicial Center and the Administrative Office of the U.S. Courts. He publishes the "U.S. Supreme Court Review-Preview-Overview," and "Web Cites for Federal Defenders," available at www.rashkind.com.

AMY RAY, Assistant United States Attorney, Chief of Appeals, Office of the United States Attorney for the Western District of North Carolina.

Amy Ray is an Assistant United States Attorney and the Chief of Appeals in the Western District of North Carolina. Ms. Ray has written and filed nearly 400 appellate briefs in the federal courts of appeals and presented more than 85 oral arguments, including two en banc arguments. She also received a Director's Award in 2014 from the Executive Office of the United States Attorneys for superior performance by an appellate Assistant United States Attorney. Before joining the United States Attorney's Office, Ms. Ray served as a law clerk to Judge Clyde H. Hamilton on the United States Court of Appeals for the Fourth Circuit, to Judge Sharon Blackburn on the United States District Court for the Northern District of Alabama, and to then Magistrate Judge Max Cogburn in the Western District of North Carolina. Ms. Ray received her undergraduate degree in English from the University of Virginia and her law degree from Florida State University.

CATHERINE STETSON, Elected Member, Hogan Lovells Global Board and Co-Director, Hogan Lovells Appellate Practice Group.

Cate Stetson is an elected member of Hogan Lovells' Global Board and the co-director of its nationally acclaimed Appellate Practice Group. One of only four women in the country ranked in *Chambers* Band 1 or 2, Cate handles high-stakes and complex appeals in federal and state courts across the country. She has argued upwards of 95 appeals, including multiple arguments before the United States Supreme Court, in 12 of 13 federal circuits, in state appellate courts ranging from New York to California, and in district courts spanning the country from Alaska to Vermont. Cate's appellate practice cuts across many jurisdictions, industries, and subject matters, including administrative law and procedure, antitrust law, the False Claims Act, class certification, civil procedure, and constitutional, contract, copyright, employment, energy, environmental, food and drug, health care, insurance, patent, telecommunications, and tort law.

MELISSA WOOD, Senior Staff Attorney, United States Court of Appeals for the Fourth Circuit.

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Melissa Wood received her A.B. from the University of Michigan and her J.D. from Washington University in St. Louis, Missouri, where she served on the editorial board of the *Journal of Urban and Contemporary Law*. She has worked at the Fourth Circuit's Office of Staff Counsel since graduating from law school in 1988. She began as a staff attorney with a two-year appointment, and subsequently served as assistant operations manager, supervising staff attorney, and deputy senior staff counsel. She is now the Court's Senior Staff Attorney. She was an adjunct faculty member at the University of Richmond, T.C. Williams School of Law, from 1991 to 1995. She has served on numerous committees at the Administrative Office of the United States Courts, as well as the board of the ABA's Council of Appellate Staff Attorneys; she was Chair of CASA in 2000-2001. She is a founding member of the National Association of Appellate Court Attorneys and was NAACA's first president in 2005-06.

HONORABLE JAMES A. WYNN, JR., Circuit Judge, United States Court of Appeals, Fourth Circuit.

Appointed by President Obama, Judge James A. Wynn, Jr. was confirmed in August 2010 by the United States Senate to serve on the United States Court of Appeals for the 4th Circuit. Previously, he served for twenty years as an appellate judge on both the North Carolina Court of Appeals and the Supreme Court of North Carolina. He was in the private practice of law before becoming a state appellate judge. His legal career also includes thirty years in the U.S. Navy Reserves where he served as a military judge and retired at the rank of Navy Captain. He holds degrees from UNC-Chapel Hill (B.A.); Marquette University School of Law (J.D.) and the University of Virginia School of Law (L.L.M.).

MARK ZANCHELLI, Chief Deputy Clerk, United States Court of Appeals for the Fourth Circuit.

Mark J. Zanchelli has been the Chief Deputy Clerk for the U.S. Fourth Circuit Court of Appeals since 1997. He received his BS degree in psychology in 1978 from the State University of New York, College at Oswego, and his Juris Doctor degree, with honors, from Tulane University School of Law in New Orleans, La. in 1982. He was a staff attorney with the Louisiana Fourth Circuit Court of Appeal from 1982 to 1984 and was promoted to the Director of the Central Legal Staff in 1984, a position he held until 1997. He was an adjunct faculty member at the University College at Tulane University from 1986 until 1996 where he earned the Excellence in Teaching Award. He has served on numerous committees with the American Bar Association and the Administrative Office of the United States Courts and is a founding member and of the National Association of Appellate Court Attorneys (NAACA).

3.

Tips for Effective Appellate Advocacy-- Perspectives from the Bench and Bar

Moderator: Hon. Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit

Panel:

Hon. James A. Wynn, Jr., Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

Hon. Pamela A. Harris, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

Amy Ray, Chief of Appeals, Office of the U.S. Attorney, WDNC

Joshua Carpenter, Appellate Chief, Office of the Federal Public Defender, WDNC

Tips for Effective Appellate Advocacy

- 1) Consider opening your brief with a short introduction—less than a page if possible—that conveys to the reader the essence of your case.
 - “It is not easy to write a good introductory paragraph. It takes great effort, but it is time well spent. A properly written introduction makes the rest of the brief-writing task comparatively easy. If you are unable to write a cogent, succinct, encompassing introduction, you probably do not have a solid grasp of the subject matter. . . . If the introduction offers context before detail, then the reader is able to discern the important from the unimportant.” – former Justice William A. Bablitch of the Wisconsin Supreme Court, quoted in Dysart, Southwick, and Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (3d ed. 2017), at 209.
- 2) Don’t underestimate the importance of good headers and a strong table of contents.
 - “Remember that the court usually gets its basic impression of the nature of your legal argument from these headings, because the usual practice is to turn to the index, where such headings should be inserted verbatim, and read it before reading the brief.” – Raymond E. Peters, *The Preparation and Filing of Briefs on Appeal*, 22 Cal. St. B.J. 175, 179-80 (1947), quoted in Bryan A. Garner, *The Winning Brief* (2d ed. 2004), at 299.
- 3) Focus in your brief writing on establishing a narrative flow that makes your argument easy for the reader to follow.
 - “Good writers are sticklers for continuity. They won’t let themselves write a sentence that isn’t clearly connected to

the ones immediately preceding and following it. They want their prose to flow, and they know this is the only way to achieve that beautiful effect.” – John R. Trimble, *Writing with Style* (2d ed. 2000), at 45.

- “View each paragraph opener as a *bridge sentence* aimed at smoothing our way into the new paragraph.” – John R. Trimble, *Writing with Style* (2d ed. 2000), at 47.
- 4) Draft the statement of facts only after identifying the legal issues that you will raise in the argument section. That approach will allow you to focus on the facts relevant to your arguments and omit the extraneous stuff.
- “The unskilled brief writer ... simply recites what happened at trial, witness by witness and motion by motion, making for a dull and unhelpful presentation. After reading a statement of facts like this, the judge often has little idea of the merits of the arguments, much less any underlying equities. The skilled brief writer, by contrast, uses the statement of facts (and perhaps a one- or two-page introduction as well to set up an overarching ‘theme’ of the case) to tell the client’s side of the story in an engaging way that both captivates and convinces.” – Mayer Brown LLP, *Federal Appellate Practice* (2008), at 292.
- 5) Focus in your briefs on identifying the strongest issues or the strongest arguments on a particular issue. If you include too many issues (or too many sub-arguments on a particular issue), you create a risk that the weakness of a marginal argument will distract from your other, stronger arguments.
- “An appeal is not a law-school exam in which you win points for spotting issues. A judge seeing 10 items in your statement of the issues may get the impression that you hope to retry your entire case on appeal. Appellate judges—

many of whom once served on the trial bench—are instinctively likely to doubt that a lengthy laundry list of alleged prejudicial errors could possibly be sound, even if the inexperienced brief writer thinks that he is effectively signaling that the judgment reflects a fundamental miscarriage of justice.” – Mayer Brown LLP, *Federal Appellate Practice* (2008), at 292.

- 6) When *preparing* to write, err toward *all* of the facts. Your final product, however, should include *only* the relevant facts.
 - Checkov’s Gun: “Remove everything that has no relevance to the story. If you say in the first chapter that there is a rifle hanging on the wall, in the second or third chapter it absolutely must go off. – Anton Chekhov, according to the internet.
- 7) Avoid legalese, and write in language that is direct and clear.
 - “Simple English is no one’s mother tongue. It has to be worked for.” Jacques Barzun, *Teacher in America* 47 (1945), quoted in Bryan A. Garner, *The Winning Brief* (2d ed. 2004), at 175.
- 8) Write in a respectful tone, especially toward the district court and your opposing party. Omit snark.
 - “A well-written appellate brief should not contain criticisms directed at other parties in the case, opposing counsel, or the judge below. Judges are, generally, a collegial bunch. While appellate judges do correct mistakes made by trial court judges, they still consider those judges to be colleagues and socialize with them at bench and bar functions. Therefore, they are not impressed with briefs that attack their friends and colleagues.” – Dysart, Southwick, and Aldisert, *Winning*

on Appeal: Better Briefs and Oral Argument (3d ed. 2017), at 209.

- 9) The key to oral advocacy is preparation. To effectively present your case and answer the judge's questions, you must ensure that you know the record and the case law better than the judges do.
 - “There is no substitute for putting in the time necessary to know the case. There is no excuse for allowing a judge (who must familiarize himself with many cases on an argument calendar) to know more about the case than the advocates.” – Fourth Circuit Judge Albert Diaz, quoted in Dysart, Southwick, and Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (3d ed. 2017), at 209.
- 10) Embrace the questions at oral argument because your answers—not your pre-planned comments—are your best opportunity to persuade the judges.
 - “There is no greater difference between the novice and the veteran oral advocate than in the way they respond to questioning from the bench. The former is almost put off that the court would dare intrude on his or her time by interrupting, or is visibly nervous by the interchange from the court. The latter, however, views questions from the court as a godsend because he or she knows that questions are windows on the court's concerns about the issues in the cases, and that every question carries with it an invitation to persuade the court that your position, and not your opponent's, is the one that should prevail.” – Hon. Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, Tex. B.J., Mar. 2006, as 224, 228, quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 159.

11) Devote part of your preparation time to ensuring that you understand the connections between your various points and to practice making an effective transition (or segue) from one point to the next.

- “[M]uch time can and should be spent thinking about how to make a transition from the answer to a hostile question into an affirmative point. Before he ascended to the bench, John Roberts had a useful exercising for practicing segues. He would put on note cards the six or seven key points he wanted to make during an argument. In the days before the argument, he would shuffle the note cards and practice making those points in a different order each time. . . . The idea behind this drill is that a question from the bench may spark an answer that calls for articulating one of those themes. If the advocate had practiced transitioning from that particular topic to another affirmative point, the segue in the courtroom will appear seamless.” – David C. Frederick, *Supreme Court and Appellate Advocacy* (2d ed. 2010), at 156-57.

12) Prepare for oral argument by practicing your argument out loud, including the answers to potential questions. If possible, recruit colleagues or other practicing attorneys to pepper you with questions during a moot court session.

- “Prepare for oral argument the way the President prepares for a press conference. His aides pitch him the hard balls and curves that the press will be throwing. And if such a rehearsal is mandatory for the President, it should be mandatory for you.” – Hon. Ruggero J. Aldisert, *Winning on Appeal* 319 (1992), quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 150.

- 13) Remember that you are not required to use all of the time allotted for oral argument. If you have made your key points and the panel has no more questions, you are free to sit down.
- “[A] very common error in oral argument is not to sit down when done. I have on innumerable occasions observed a lawyer who, clearly having made all the points intended, but realizing there is time remaining, feels compelled to continue. This invariably results in random repetition of points previously made, but far less effectively than originally, and detracting greatly even from what had been a solid performance.” – Timothy A. Baughmann, *Effective Appellate Oral Advocacy: “Beauty is Truth, Truth Beauty,”* 77 Mich. B.J. 38, 40 (Jan. 1998), quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 150.
- 14) Know the limitations of your position before oral argument. Through hypotheticals, judges will seek to explore the limits of your position. Be prepared to concede what you can safely concede.
- “Any concession you make should have been well thought out ahead of time. In fact, if you can volunteer your concession before being asked to do so, this will show that you are reasonable and in control of your case.” – Myron Moskovitz, *Winning on Appeal* § 4.3 at 63 (3d ed. 1995), quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 191.
- 15) Answer the questions at oral argument directly, including the difficult questions. If possible, use the judges’ phrasing in your answer. For example, if a judge asks you to identify your best argument in favor of overturning the jury’s verdict, begin your answer with, “Our best argument for overturning the jury’s verdict is” Similarly, when possible, begin your answer with “yes” or “no” and then explain any caveats as necessary.

- “The best advocates understand the relative impatience of the members of the court to get an answer to their questions. Virtually all great advocates answer questions with simple, dispositive answers.” – David C. Frederick, *Supreme Court and Appellate Advocacy* (2d ed. 2010), at 250.

16) Do not interrupt a judge.

- “Never under any circumstance interrupt a Justice who is addressing you. Give your full time and attention to that Justice – do not look down at your notes and do not look at your watch. If you are speaking and a Justice interrupts you, cease talking immediately and listen.” Michael B. Tigar & Jane B. Tigar, *Federal Appeals Jurisdiction and Practice*, § 10.09, at 519-20 (3d ed. 1999), quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 163.

17) Do not be afraid of silence during oral argument. If a judge asks a difficult question, take a moment to consider your answer before offering it.

- “Listen to the question. It’s what you tell a witness. Listen to the question, think about it for a second, and answer that question. That judge is worried about something, so answer it.” – Justice Stephen Breyer, quoted in Bryan A. Garner, *The Winning Oral Argument* (2009), at 165-66.

18) If you made a mistake in your brief or if you make a misstatement during your argument, acknowledge your mistake. Your credibility is your currency.

- “A man who has committed a mistake and doesn’t correct it, is committing another mistake.” – Confucius, according to the internet.

4.

A “Devil’s Advocate” Approach to Brainstorming and Writing

G. Alan DuBois, Federal Public Defender, EDNC

A “DEVIL’S ADVOCATE” APPROACH TO BRAINSTORMING AND WRITING: Unconventional Ideas That Will Help You Write a Better Brief

Alan DuBois
Federal Defender, Eastern District of North Carolina

Part One- Brainstorming and Strategy

1. The Law is Irrelevant

Start with the facts and work towards the law.

Read the transcript and record materials as a layperson (or client), not as a lawyer.

First identify what bothers you about the case. Brainstorm by thinking about what is wrong, not what is illegal.

- Once you figure out what’s wrong *then* find a reason why it is illegal.

- Work from different levels of abstraction; that is, go from specific to general until you find a principle that supports your position. You can almost always find some law to support your position if you pitch it at a high enough level of abstraction, even you have to resort to “justice is good.”

Treat the law as a peg on which to hang your facts. In other words, you need the law to get in the door but the facts close the sale.

Develop issues as if we lived in a just world, where the law is what it should be, not necessarily what it is.

Don't reject an issue just because there is no law or bad law. In other words, don't let bad law get in the way of a good argument (barring, of course, completely controlling precedent).

There is almost always **some** law to support your position. If your argument is convincing, you only need to give the judges a thread.

Appellate judges for the most part **make** the law. Go back to the old legal realist notion— there is no fixed, platonic ideal of what the law **is**; the law is what the judges say it is.

2. Procrastination is a Virtue

Don't be too eager to jump to the writing stage of the appeal. Its called **writing** an appeal but really the most important part is **thinking** about the appeal. The thinking stage too often gets short shrift

Thinking takes time.

Everyone's writing style is different. The usual instructions on how to write well are to write multiple drafts and to refine, hone, and polish until you get to the final result. However, there is more than one way to skin a cat. Find out what works for you.

Don't start writing too soon. It may be that your first draft is the last. It is possible to revise as you write, paragraph by paragraph.

If you are the type of person who writes early and thinks as you write, don't become invested in your work. Let it go. Allow enough time and flexibility for your ideas to change. Be ready to completely rewrite—and pillage and burn—large sections of your draft.

Take the time to step back from the record materials and your folder of research. The brief is not a list of citations. It should focus on your thinking.

The realities of your work load may get in the way. Leave as much time as possible for the appeal. Your client may be better served by an extension than a rush job.

Don't fall for an issue too early. Love, as we know, is blind. Casting your lot too soon with a particular issue may cause you to miss other, better arguments. Keep your eyes and mind open as long as possible.

If you have the nerve to wait until you really understand the argument, the writing will be easier. Wait until the ideas crystallize in your mind.

If you are having trouble writing, it is almost always because you haven't really figured out what you want to say.

Conversely, one way to figure out if an issue works is to see if it "writes." Just be sure to junk it if it doesn't.

3. You Are More Likely to Win Your Appeal in the Shower than in the Law Library

Trust yourself: you've already internalized the basics of criminal law.

At the brainstorming stage, don't be afraid to rely on what you know or half-know about the law.

Your unconscious or subconscious mind is more creative than your conscious mind.

It is very difficult to conjure up an argument by brute force.

Burying yourself in the law library (or computer) and hoping to uncover an ancient case that will win your appeal is usually not the best approach.

Feed your brain the raw material, make yourself familiar with the record and the facts and then let it percolate and sink in.

Allow room for inspiration and don't ignore that "in the shower" flash.

It's very hard to spot omissions. Don't limit yourself to the claims argued below. Letting the facts sink in and getting out of the law library may allow room for the lightbulb to include something that the government or the court should have done and didn't, in which case you may have a legal claim that the trial counsel (possibly you) missed.

Trust that the idea will come. Relax, don't panic.

Creative ideas most often pop up when we are not reaching for them. We have to remain open and receptive to them bubbling up.

Despite the dry nature of appeals and appellate courts' resistance to spin, there is still **some** room for style. You are more likely to sing in the shower than the law library.

4. Appellate Practice is a Team Sport- Build Your Network

We often think of brief writing as a solo practice. One lawyer in the library, doing research, formulating the argument and getting it down on paper.

And it certainly can be done that way— as an individual, almost monastic endeavor. But that is not necessarily the best or most efficient approach.

A better way is to create a network of friends, colleagues, and associates who are also engaged in appellate practice and use them as a resource, sounding-board and force-multiplier.

In your firm, on the CJA panel, and in local and national defender offices, there are talented appellate lawyers who up on the latest issues and are more than willing to share their knowledge and their time with other members of the appellate fraternity.

No matter how smart or talented an appellate lawyer you are, the collective knowledge and expertise of this group of experts is almost certainly greater.

Part of this is about not reinventing the wheel- unless your issue is truly novel, there are probably other lawyers who have researched similar issues, faced similar problems, written similar briefs. Using these materials will give you a head start and save you time and effort. There's no such thing as plagiarism when it comes to legal writing.

More than that though, a strong network will help you strength test and improve your argument, will see weaknesses you might have missed, and will provide insight and different ways of looking at the case that will make your argument stronger and deeper.

Simply put, with all the appellate big brains and resources out there, you don't have to and shouldn't go it alone.

5. No Appeal Has More Than One Winning Issue

Remember that it is very tough to win appeals. The affirmance rate is probably close to 85- 90% in most circuits.

Most appeals, at least in the eyes of the courts, have **NO** winning issues.

It is usually unrealistic to think you are going to find multiple reversible errors in your garden variety appeal.

We are usually taught to brief every non-frivolous issue on the theory that its impossible to know which issue, of the many to choose from, will move the court.

Contrary to that message, it is often possible to accurately (though not perfectly) predict when an issue, though non-frivolous, has little realistic chance of success.

While your instincts are probably right about what constitutes your most convincing argument, remember your own limits and the risks of overconfidence, as well as complacency. Although you will usually know what issue matters, it is still true that people, including judges, think differently about similar issues. When you can, hash it out with your colleagues **before** any moot, if you have one, preferably at the initial stages of deciding what issues to raise.

The advice to “brief’em all” ignores the reality of our workload and the patience of the court. The court is not going to happily wade through a seven-issue brief to pluck out the one issue it actually likes. Don’t make the court work too hard.

There is big signal to noise problem in many briefs. Numerous weak issues may drag down a strong one.

You will invariably do a better job on your best issue if your time is not divided writing five other issues.

Be selective. In most single-defendant cases, it is rare for most lawyers to raise more than 2-3 issues.

6. But, You Must Often Brief Losing Issues

Notwithstanding the above, you must often raise issues that you have no hope of winning.

There are several reasons for this:

- 1. *Issue preservation*– Even if your circuit has bad law, there may still be a hot issue that the Supreme Court will agree to take on. (Witness: *Johnson, Zedner, Crawford, Apprendi, Blakely, Booker, Florida v. J.L. and Bond*). Don't give up on *Almendarez-Torres* and *Watts*, or injustices you identified while brainstorming; if it bothers you, it may eventually bother judges or justices.
- 2. *Cumulative effect*– There may be a number of nagging, not-quite-reversible errors at trial which viewed individually don't add up to much but, viewed as a whole, show that your client got screwed. This works best when you have one winning or almost winning issue and the other weaker issues can be used to reinforce it or at least to show lack of harmlessness or prejudice—to give it that little extra boost to push it over the finish line.
- 3. *Tug the heartstrings*– Your best issue may be a dry legal error, a classic “technicality.” You may make reversal more appealing to the court by supplementing it with non-winning issues that allow you to humanize the client or generate some sympathy. An example might include a sentencing issue that allows you to write about mitigating conduct in your client's background, but is otherwise irrelevant to the main legal issue.

7. You Can Lose Even When You Are Right

In many cases—or in many courts—being right is not enough.

Even if you have a “winning issue,” the majority of cases are close enough or arguable enough that the court can find a way to reject relief if it wants to.

You have two choices: make the court **have** to rule in your favor or make it **want** to rule in your favor.

The former is often difficult. Rarely is the error so clear-cut, so undeniable, so well-preserved, so “not harmless” that a court has no other choice but to grant you relief.

But, if you do have an issue that completely boxes in the court, great. Frame the issue that way and make sure court understands that its only option is to reverse or remand.

Like alibis, however, your arguments are often not as airtight as they seem. Most times, the court will have some wiggle room. Therefore, you have to make the court **want** to go your way.

A few ways to do this:

- 1. *Appeal to the court's courage and sense of justice.* Since most courts more or less despise our clients, this works best when there was truly egregious behavior by the trial court or the government or, counter-intuitively, when you are asking court to do something unpopular and can appeal to court's sense of itself as a bulwark against popular passion or defender of a bedrock principle under threat.

– 2. *Minimize the impact of the ruling.* Cast the issue as small potatoes, show that no great harm will result from a favorable ruling. Narrow the issue or the class of defendants who will be affected. Show that the case is no big deal and has a limited impact. Think how you would argue the case to Sandra Day O'Connor.

– 3. *Give court the option of throwing your client a bone.* This is easier when your client got a raw deal or is quasi-sympathetic. For example, if client got hammered at sentencing and has no great legal issues but maybe a couple of OK ones. Raise three or four guidelines issues, knowing at least three are going to lose but hoping that the court will relent on one and save your client a couple of levels. You still must have a decent issue but you may be able to frame the brief to maximize sympathy from the court, allowing it to cut the client a little break even if it is not inclined to cut her a big one.

– 4. *Appeal to the panel's pet issues.* Try to overcome the pro-government/anti-defendant inclination by appealing to a judge's pet legal issues or theories. Make conservative tropes your friend. If you happen to know a particular judge is a big advocate of federalism, frame your issue as governmental overreaching into matters best left to states. If the judge is big on ethics/fair dealing, frame the issue as governmental misconduct. If the judge is an originalist, frame the issue as one with a solution imbedded in text of Constitution or statute. Think about what arguments might appeal to Justices Scalia and Thomas. This is most effective with judges who are not entirely result-oriented. Often, you won't know the panel when you write the brief but you might by the time of the reply or in preparing for oral argument.

8. The Most Important Battle Is Over Where To Fight

You always want to fight the battle on ground of your choosing if possible.

The way you frame the issues is critical. Try to make the case about your strongest issues, not the government's.

For example, in a traffic stop case, you might be strong on no reasonable suspicion to stop and weak on consent. So, write your motion/brief as if the stop issue is the key issue in the case- if you win that, you win. You may not even address some other justification for the search.

If you're lucky, the govt will accept your framing of the case and focus their argument entirely on whether the stop was good.

They are then fighting on your turf.

If they raise some alternative ground to justify the search, you can always address it on reply.

This strategy is often useful where there might be an error preservation issue. Even if there is some doubt about whether the issue was preserved, write the opening brief as if it clearly was. If the government makes a waiver argument in its response, you can address it in your reply brief.

In other words, don't outline the government's argument for them in your opening brief. You must figure out which issues to pre-emptively attack and which to leave alone.

There are both legal and practical considerations:

- How likely is it that the govt will raise the issue?

- How good a response do you have?
- Do you risk credibility by not addressing?
- How comfortably does it fit within the rest of your pleading? Will it be a distraction?

Framing isn't about simply raising your strongest arguments. It's about presenting your argument in such a way that it appears to be the most important, most central issue in the case.

Put it first, put it alone, foreshadow it.

Who wins the framing battle often wins the case.

Part Two- The Hard Part: Writing

9. Writing Sucks

You've broken down the facts, analyzed the issues, done your legal research, developed your theme.

What's next? Well, unfortunately, you've got to write it.

And that is the hard part.

Analyzing the issue, thinking about it, that eureka moment when it all comes together and you figure out what the case is about and what your argument is— these are all fun.

But it is all downhill after that.

Translating your great ideas onto the page is **not** fun. In fact, it is generally frustrating, time-consuming and anti-climatic.

I'm often reminded of an old Red Smith quote– "Writing a column is easy. You just sit at a typewriter until little drops of blood appear on your forehead."

Still, until we invent a direct brain-to-brain interface, it's unavoidable; we've got to do it.

10. Focus on The Three S's

Going to break down discussion into three broad categories.

Structure- the big picture, what is the overall shape or organization of pleading.

Story- how to tell the tale

Strategy- how to present the argument in a way that maximizes your chances of winning.

This is not a magic bullet or some iron-clad dictate but a template for proceeding and some tricks to help when you get stuck or off track.

11. The Story is in the Telling

A brief that doesn't engage the reader is a brief that will lose. You must command the court's attention and interest. In a word, don't be boring. But how to do this?

The easiest and best way is to make sure your brief has a interesting, compelling structure.

It is very easy to settle into a default organization: Start with a statement of black letter law, apply the law to the facts of your case, and show how that application results in the conclusion you desire.

We've all followed this template. It's familiar, safe, and above all, easy.

But we need to resist the urge to go down that path.

We want to avoid a Berlin Wall-type of separation of law and facts. Instead, we want to achieve a blend where the law and the facts exist side-by-side, where they reinforce one another.

This might feel unnatural and awkward at first but there are a few ways to get into the rhythm.

The easiest way to begin doing this is to start the brief differently:

1. *Don't start with a recitation of the law*– “In *Terry v. Ohio*, the Supreme Court held that the police must have reasonable suspicion that criminal activity is afoot before they may briefly detain an individual...blah, blah, blah”
2. *Instead begin in medias res, throw the reader into the action*– “Joe Blow was walking out of the hospital when the two armed police officer accosted him and began peppering him with questions.”
3. *Or with an emotional hook*– “Joe Blow, who had an IQ of 70, was on his way to visit his dying mother in the hospital when he was stopped by the police that he could not proceed unless he consented to a search of his person.”
4. *Or by showing what is at stake*– “Joe Blow was the twelfth African-American that Office Jones had stopped that day. Jones had not stopped a single white person in the last month.”

A mini-summary of the argument is also a good way to get things rolling. As you weave the facts and law, a certain amount of looping and repetition is ok, even desirable.

12. Keep Your Balance

We have focused a lot on the importance of facts and story-telling and avoiding overly “legalistic” writing. This is good advice but in structuring your pleading, you need to be more nuanced.

Every argument has the right balance of facts and law and it is your job to find it. The problem is that the balance is different in every case.

Some arguments are truly “legal” and an over-emphasis on facts might come off as a lack of confidence in the strength of your legal argument. If you want to project inescapable inevitability–100% confidence that you win on the law point–you dilute that message by spending undue time on facts that are “sympathetic” but irrelevant to your argument.

For instance, if a prior conviction no longer counts as a predicate after *Johnson*, it no longer counts regardless of how good or bad your guy is so don’t spend time try to pluck heartstrings. Otherwise, the court might start wondering why you are.

On the other hand, and perhaps more commonly, some arguments are very fact-intensive. The law may be clear or undisputed and the only thing that really matters is what the court feels about your client.

A sentencing memo might be the paradigmatic example of this.

In such cases, there is no need for pages of black letter law about advisory guidelines and the legality of variances and departures that the court is already certainly familiar with.

You need to get right into it.

Many pleadings, even many briefs, have too much law. Focus your cites on the critical legal points, on the things the court doesn’t know.

Above, we talked about the difference about arguments that make a court **have to** rule in your favor and those that make it **want to** rule in your favor.

Your choice of approaches will often influence the “law/fact” balance calculation. “Have to” arguments are generally tilted toward the legal side of the scale. “Want to” arguments are generally more factual.

Consider the following example: the police arrest a low-IQ suspect and ask

him to come down to the station for questioning. After several hours, without a lawyer present, the suspect confesses to the crime.

How might you structure your argument?

Law-focused approach:

Anyone who's ever watched an episode of *Law and Order* knows at least two things about being arrested: (1) the police must give *Miranda* warnings and (2) once a lawyer is appointed, the police can't initiate questioning of the defendant without the lawyer's knowledge. *See Massiah*. Everyone knows this, that is, except it seems for the police officers in this case who questioned Mr. Suspect before reading him his rights and without ever notifying his lawyer.

Fact-focused approach:

On July 15, 2014, John Suspect was confused. This was not surprising; he was often confused. Mr. Suspect had an IQ of 56. Growing up he was confused in school and later he was confused at work. He was confused by people. What was different about this day was that the police took advantage of Mr. Suspect's confusion, his intellectual limitations, in order to wring out a "confession" of dubious validity by isolating him from his lawyer and failing to inform him of his right to remain silent and to the assistance of counsel.

13. Read the New Yorker, Not Harvard Law Review.

Enough about structure. Let's talk a little about story.

Everyone, including judges, loves stories, craves narrative. So give the people what they want. Tell them a story.

Especially in district court, where factual findings have not yet been made, want narrative flow. If you tell a coherent, logical story with your set of facts, court is more likely to accept your view of them.

This is super important because as discussed above you really want to win the framing battle.

In telling the story, it is tempting to fall back on straight chronology, and that is sometimes the way to go if events are confusing or sprawling.

But, if you notice, almost no literary or journalistic non-fiction uses this structure. Instead, it often it starts with pivotal event and moves backwards and forwards from it. Why? It creates interest and tension. You want the court to keep turning the page.

There are many alternatives to chronological narrative.

- Character-based
- Event-based
- Thematic

Shorter is always better.

Don't over explain, trust your reader.

14. Your Freak Flag Can Only Fly So High

The danger with novel narrative structures is, of course, confusion.

Clarity must always be the paramount goal. If the choice is between clarity and novelty, you must always choose clarity.

But you can have both.

So how to maintain clarity within a non-chronological structure:

- Put a summary near the beginning
- Clear road-mapping through headers
- Include copious cites to the record.

- Use consistent terminology and frequent reorientation.
- Be highly specific

There is a “push-pull”, “yin-yang” dynamic between structure and language. The more daring your structure, the more straightforward your language should be. Conversely, ornate, high-flow rhetoric should be paired with a clear and simple structure.

15. Write Like a Human Being, Not a Lawyer

Transparent clarity is your aim. However, transparent does not mean boring.

Repetitive, monotone, “just the facts” writing is not the goal. You do not want your brief to sound like it was written by a robot. Your writing must sound human.

You are striving for flow, for narrative momentum. How do you achieve this?

- Strong, varied sentences which are direct and not mealy-mouthed.
- Avoidance of cliché and tired constructions.
- Verbs give life. Adjectives and adverbs destroy life.

Do not use intensifiers. They are not persuasive and betray weakness. They are lame stand-ins for an actual argument.

“The government’s argument is absolutely frivolous.” What does the intensifier add to this sentence? Has any judge anywhere been pushed from uncertainty into agreement with your argument by the addition of “absolutely?” No.

16. Good Writing Wins- It's Science!

Check out this article:

Campbell, John E., *Writing that Wins: An Empirical Study of Appellate Briefs*, The Colorado Lawyer, Vol. 46, No. 3, March 2017; U Denver Legal Studies Research Paper. Available at SSRN: <https://ssrn.com/abstract=3011605>

Campbell conducted an empirical stylistic analysis of appellate briefs at the Supreme Court and appellate level.

He found that a writing style marked by brevity, simplicity, and active voice was more likely to win than voiceless, passive, complex writing.

He concluded: "Given that energetic, simple writing rules in the Supreme Court and even correlates with winning in the busy Ninth Circuit, we'd all do well to set aside some time to make our briefs read more like a Grisham novel and less like a statute."

17. Beauty is Not Skin Deep.

So you've got a great idea, great issue, that you've written up with clarity and power.

It really won't matter if pleading looks like crap. How your brief looks is not an afterthought. A clean, good-looking pleading is not a luxury, it is an essential.

You **must** think about typography, layout, format, consistency. Here are a few specific tips:

- Use a good font- Century, Palatino, **not** Courier or Times
- Read the 7th Cir. Typography Guide-
<http://www.ca7.uscourts.gov/rules/type.pdf>
- One space between sentences, **NOT TWO**.
- Widow/orphan protection.

- No page breaks between header and body
- In proportional type, use bold or italic, **not underline**, especially for case names.
- Don't worry about bluebook, pick a style and **BE CONSISTENT**.

If want to do a deep dive into fonts and typography, read *Typography for Lawyers* by Matthew Butterick available at <https://typographyforlawyers.com/>. Super interesting.

Solicitor General briefs are a model. They always look great. Just do what they do.

A super clean, professional brief will buy the trust and attention of the court and will ensure your argument is shown in the best possible light.

5.

Oral Argument Do's and Don'ts

Catherine Stetson, Co-Director, Hogan Lovells Appellate Practice Group

Effective Oral Advocacy--Oral Argument Do's and Don'ts

Do's

- Write an impeccable brief before your argument
- Allow yourself sufficient time to prepare
- Master your record and the key authorities
- Identify your core points and your toughest issues
- Look at your case from the court's point-of-view
- Simplify your arguments
- Prepare the best responses for difficult questions
- Memorize a succinct, professional, and persuasive opening and closing
- Moot your argument and rehearse out loud
- Plan for both an active panel and a quiet panel
- Properly calendar the date and time of oral argument, and then show up early
- Know the court and the court's rules (especially those regarding oral argument)
- If possible, observe the panel in action before the day of your argument
- Make eye contact
- Invite questions by slowing down; welcome and listen to every question
- Answer questions simply, clearly, and immediately
- Answer "yes or no" questions with a "yes" or a "no" before explaining or qualifying
- Be conversational, but not informal; sound like you care
- Give where you can give, and take a stand where you must
- Stop talking if you have answered all questions and said what you need to say
- Use rebuttal to address a few key points raised by your opponent or the court
- Where appropriate, consider waiving rebuttal

Don'ts

- Wait to prepare until the night before—or even the week before
- Read from a prepared statement
- Bring voluminous or disorganized materials to the podium
- Bring a pen or pencil to the podium
- Rush to get your points out
- Interrupt the court
- Continue speaking when a judge begins to speak
- Avoid or ignore the question asked of you
- Refuse to answer a hypothetical because it is “not your case”
- Begin a statement with the word “listen”
- Attack your opponent, the court, or the lower tribunal
- Treat the judge as your adversary or your pal
- Misstate the law or the facts
- Guess – if you don't know an answer, admit it and possibly offer to submit a letter response
- Lose focus because of off-based arguments, misstatements, or questions
- Allow nervous tics to affect your appearance
- Ask how much time you have left
- Ask the judges questions (that's their job, not yours)
- Offer your opinion or what you “feel” or “believe”
- Joke, fawn, or bluff
- Use specialized lingo
- Use rebuttal to address your opponent's lesser arguments
- Give up

6.

Finding the Resources You Need

Suzanne Corriell, Fourth Circuit Librarian

Finding the Resources You Need

Suzanne Corriell, Fourth Circuit Librarian

suzanne_corriell@ca4.uscourts.gov

804-916-2322

- Local law libraries and the resources they can provide
 - Locating local libraries
 - MD: <https://mdcourts.gov/lawlib/using-library/for-librarians/maryland-law-libraries>
 - NC: <https://library.law.unc.edu/research/northcarolina/>
 - SC: <https://virtualchase.justia.com/law-libraries/south-carolina/>
 - VA: http://www.courts.state.va.us/courtadmin/library/virginia_public_lib.html
 - WV: <https://virtualchase.justia.com/law-libraries/west-wirginia/>
 - Online/public access to Lexis & Westlaw
 - Materials that aren't online
 - Circulation policies
- What the Fourth Circuit Library can do for you
 - <http://www.ca4.uscourts.gov/about-the-court/offices/about-the-fourth-circuit-libraries>
 - Public access policies
 - Recommending resources
 - Research assistance – limited
 - Researching old state statutes
 - How to compile a legislative history
 - Providing old sentencing guidelines
 - Current awareness alerts
- Finding relevant materials
 - Using secondary sources first
 - Recommended titles:
 - [Introduction to Habeas Corpus: A Primer on Federal Collateral Review](#) by Brian R. Means (print only)
 - [Federal Habeas Corpus Practice & Procedure](#) by Randy Hertz and James S. Liebman (Lexis)
 - [Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation](#) by Brian R. Means (Westlaw)
 - [Postconviction Remedies](#) by Brian R. Means (Westlaw)
updated by *Postconviction Remedies Note: A Biennial Review...*
 - [Federal Postconviction Remedies and Relief](#) by Donald E. Wilkes, Jr. (Westlaw)
 - [Habeas Corpus Checklists](#) by Ira Robbins (print only)
 - [Defending a Federal Criminal Case](#), c. 2016 by Federal Defenders of San Diego
 - [Moore's Federal Practice - Criminal](#) (Lexis)
 - [Federal Practice & Procedure](#) (Wright & Miller) (Westlaw)

- Finding relevant materials, cont.
 - Staying current on the law
 - Federal Sentencing Guide
<https://jamespublishing.com/product/federal-sentencing-guide/>
<https://sentencingcases.com/>
 - Georgetown Law Journal Annual Review of Criminal Procedure
<https://www.law.georgetown.edu/georgetown-law-journal/arcp/>
 - Sentencing Law and Policy Blog
<https://sentencing.typepad.com/>
 - United States Sentencing Commission
<https://www.ussc.gov/>

7.

Navigating Appellate Procedure in Criminal Cases—Tips from Behind the Scenes

Moderator: Fran Pratt, Assistant Federal Public Defender, EDVA

Panel:

Melissa Wood, Senior Staff Attorney, U.S. Court of Appeals for the Fourth Circuit

Patricia Connor, Clerk of Court, U.S. Court of Appeals for the Fourth Circuit

Mark Zanchelli, Chief Deputy Clerk, U.S. Court of Appeals for the Fourth Circuit

NAVIGATING APPELLATE PROCEDURE IN CRIMINAL CASES: TIPS FROM BEHIND THE SCENES

Patricia Connor, Clerk of Court
Mark Zanchelli, Chief Deputy Clerk
Melissa Wood, Senior Staff Attorney
Fran Pratt, AFD, ED Va., Panel Moderator

October 28, 2019

This outline is intended to provide program attendees with an overview of the criminal direct appeal process in the Fourth Circuit. The Federal Rules of Appellate Procedure (Fed. R. App. P.) and the Fourth Circuit's Local Rules (Loc. R.) referenced in the outline are available on the Fourth Circuit's website, <http://www.ca4.uscourts.gov/>, under the Rules and Procedure tab. For detailed information on each topic covered, please consult the Appellate Procedure Guide, available on the Fourth Circuit's website under Rules & Procedure / Resources. For specific questions related to a pending appeal, the Court's case managers are more than happy to assist counsel.

PRELIMINARY MATTERS

Notice of appeal: For the defendant, the notice of appeal is due within 14 days of the entry on the district court docket of the judgment or order being appealed; for the government, the notice of appeal is due within 30 days. See Fed. R. App. P. 4(b)(1) (time to appeal), Fed. R. App. 26(a) (computing time). Additional information on notices of appeal can be found in the Appellate Procedure Guide under Initial Requirements / New Appeals & Petitions.

Practice tip: The operative date is the date the judgment or order is entered on the docket, which may be later than the filing. See Fed. R. App. P. 4(b)(6).

Practice tip: The district court has the authority to extend the time for filing the notice of appeal by up to 30 days, even after the initial time for filing has run. See Fed. R. App. P. (b)(4).

Appointment of counsel: The Court appoints counsel in all direct appeals in which a defendant was represented by appointed counsel in the district court. See 18 U.S.C. § 3006A(c); Loc. R. 46(d). The Court automatically appoints the attorney who represented the defendant in the district court to continue that representation on appeal. If, however, the attorney has moved to withdraw, the defendant is claiming ineffective assistance of counsel in the district court, or the notice of appeal was filed pro se and out of time, a new attorney is appointed on appeal. So-called "cold record" case appointments are offered initially to the Federal Defender office for the district from which the appeal arises. If an appointment is not accepted by the Federal Defender office, it is offered, on a rotating basis, to a member of the Fourth Circuit's CJA panel for the district in which the appeal arises. CJA panel members or Federal Defender offices from outside

the district are appointed as needed to equalize appointments or utilize special skills. Additional information on the Fourth Circuit's CJA panel,¹ appointment of CJA counsel, and resources for CJA counsel can be found on the Court's website under Rules & Procedure / CJA & Assigned Counsel.

Preliminary documents: The Court requires the filing of the following preliminary documents.

Appearance of counsel: Counsel for both parties are required to file a notice of appearance within 14 days after the appeal is docketed or within 14 days after being retained or appointed, using a form provided by the Clerk's Office. Loc. R. 46(c). Only attorneys admitted to the Fourth Circuit bar and registered as ECF filers may enter an appearance in a case.² Additional information on appearances of counsel can be found in the Appellate Procedure Guide under Initial Requirements / Appearance, Disclosure & Docketing Statements.

Docketing statement: The counsel for the appellant who files a notice of appeal is responsible for filing the docketing statement within 14 days after docketing of the appeal, even if different counsel will handle the appeal. See Loc. R. 3(b). Additional information on docketing statements can be found in the Appellate Procedure Guide under Initial Requirements / Appearance, Disclosure & Docketing Statements.

Transcript orders: Counsel must order the transcript from the court reporter within 14 days of filing the notice of appeal. A copy of the transcript order must be attached to the docketing statement filed with the Fourth Circuit. Separate transcript orders must be completed for each court reporter. In CJA cases, counsel must certify that AUTH-24 requests have been submitted through the district court's eVoucher system for approval by the district judge.

¹ To qualify for the Fourth Circuit's CJA Panel, attorneys must be members in good standing of the Fourth Circuit bar and have demonstrated experience in, and knowledge of, federal criminal law and appellate procedure and the Sentencing Guidelines. Attorneys should also maintain a physical office within the Circuit since the Plan's appointment provisions generally call for appointment of counsel from the district in which the case arose. Attorneys interested in joining the CJA Panel must apply for membership using the CJA Panel Application. The CJA Panel application period runs from June 1 to September 1 each year. Panel membership is for a three-year term, which can be renewed by filing a Renewal Application. Applications are reviewed by the CJA Panel Committee, which is chaired by a circuit judge and includes a representative from each district within the Circuit. The Committee makes its final recommendations to the Court each fall after completing its review of the applications.

² If an attorney is not admitted to practice before the Court, they must file an application for admission and register as an electronic filer in CM/ECF. See Loc. Rule 46(b). The attorney admission fee is waived on the basis of trial counsel's continuing appointment to provide CJA representation; it is also waived for Federal Defender attorneys, and attorneys for the United States.

Once the transcript has been prepared, counsel also submits the CJA-24 voucher for payment in the district eVoucher system. In criminal appeals seeking review of application of the sentencing guidelines, a transcript of the sentencing hearing must be ordered. In appeals under *Anders v. California*, 386 U.S. 738 (1967), counsel must order a transcript of all proceedings (except opening and closing statements, voir dire, and jury instructions) since the entire record must be reviewed for error. Additional information on transcripts (e.g., page size, witness captions, redactions) can be found in the Appellate Procedure Guide under Initial Requirements / Transcript & Record on Appeal, and also on the Court's website under Rules & Procedures / Transcript Procedures.

Practice tip: Transcript orders for proceedings recorded by FTR in magistrate court should list the district court clerk's office's transcript coordinator as the court reporter, who will make the arrangements for the transcription.

MOTIONS

In general: Motions may be filed throughout the case; however, jurisdictional motions should be filed early in the case. Most procedural motions are acted on by the Clerk's Office in the first instance. See Loc. R. 27(b). All substantive motions are submitted to the Court. The parties may move to suspend briefing pending action on the motion. Additional information on motions can be found in the Appellate Procedure Guide under Motions / Motions Practice.

Requirements:

In general: Motions, responses, and replies must be double-spaced, with 1" margins, on 8-1/2" x 11" paper. The document must contain a caption setting forth the name of the Court, the title of the case, the case number, a brief descriptive title, and must identify the party(ies) for whom it is filed. Typeface must be a 12-point monospaced font (such as Courier) or a 14-point proportional font (such as Times New Roman). Fed. R. App. P. 27(d). A certificate of compliance with type-volume limit is required if produced by computer.

Motions: A motion may not exceed 5,200 words (20 pages if handwritten or typewritten). In cases in which all parties are represented by counsel, the motion must state that the other parties have been informed of the intended filing of the motion and indicate whether the other parties consent or intend to file responses in opposition. See Loc. R. 27(a).

Responses: A response to a motion must be filed within ten days after service of the motion unless the Court shortens or extends the time. A motion authorized by Rules 8, 9, or 41 may be granted before the ten-day period runs only if the Court gives reasonable notice to the parties that it intends to act sooner. Responses must not exceed 5,200 words (20 pages if handwritten or typewritten).

Replies: Any reply to a response must be filed within seven days after service of the response. The Court will not ordinarily await the filing of a reply before reviewing a motion and response. If a movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, the movant should notify the clerk in writing of the intended filing of the reply and request that the Court not act until the reply is received. Loc. R. 27(d). Replies must not exceed 2,600 words (ten pages if handwritten or typewritten).

Specific motions:

Release pending appeal: A motion for release pending appeal must be made first to the district court. After action by the district court, the appellant may, if an appeal has been taken from the conviction, file a motion for release, or for a modification of the conditions of release, in the Fourth Circuit without noting an additional appeal. A copy of the district court statement of reasons and the judgment of conviction must accompany the motion. *See* Fed. R. App. P. 9(b); Loc. R. 9(b).

Abeyance: In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held in abeyance, the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. When the reason for abeyance involves the disposition of matters before another court (e.g., a decision from the Supreme Court), the parties will be required to make periodic status reports and/or notify this Court upon resolution of the matter for which the case was placed in abeyance. *See* Loc. R. 12(d).

Practice tip: When a party requests that a case be placed in abeyance after a briefing order has been issued, counsel should request in the same motion that the briefing schedule be suspended.

Expedited proceedings: The Court may, on its own motion or on motion of the parties, expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. Loc. R. 12(c). As required by Local Rule 27(a) for all motions, a motion to expedite should state the position of opposing counsel. If opposing counsel agrees to expedited briefing, the motion should set forth the schedule agreed to by counsel. The granting of a motion to expedite affects the briefing and/or oral argument of the case; the timing of the ultimate disposition rests within the discretion of the panel.

Extensions: The Court may extend the time prescribed for filings. Fed. R. App. P. 26(b). A motion for extension of time to file a brief must be filed well in advance of the brief due date, and must set forth the additional time requested and the reasons for the request. *See* Loc. R. 31(c).

Practice tip: In general, the larger the extension requested, the further in advance of the briefing deadline it should be filed. The Clerk's Office may grant a first extension of a briefing deadline (generally up to 21 days), but further extensions shall be disfavored. The Clerk's Office may grant a second extension (generally up to an additional 21 days), but no additional extensions will be granted absent a showing of extraordinary circumstances.

Practice tip: In a situation when an emergency arises that prevents the timely filing of a brief (e.g., a power failure the day the brief is due), counsel may seek leave to file the brief out of time. *See* Fed. R. App. P. 27(b) (court may permit an act to be done after time expires).

Voluntary dismissal: In criminal appeals, counsel must generally provide the written consent of the defendant to the voluntary dismissal. Counsel must serve a copy of the motion on the defendant. *See* Loc. R. 42.

Practice tip: Because motions for voluntary dismissal are generally granted quite quickly, if counsel files a motion for voluntary dismissal in a criminal appeal early enough in the day, it may be possible to send the order granting the motion and the mandate with the copy of the motion to the defendant.

Withdrawal as counsel: Once an appearance has been filed, an attorney may not withdraw from representation without notice to the party they are representing and consent of the Court. A motion to withdraw should state fully the reason for the request (e.g., if trial counsel believes that appointment of new counsel on appeal is in the best interests of the client and consistent with counsel's professional skills and obligations). *See* Loc. R. 46(c). If new counsel is appointed, withdrawing counsel must provide the new counsel with all documents and information relevant to the defendant's appeal.

Additional information on specific types of motions can be found in the Appellate Procedure Guide under Motions / Specific Motions.

BRIEFING

Filing deadlines: When the record is complete in a direct criminal appeal (including all transcripts), the Court will issue a formal briefing schedule. The opening brief and appendix are due within 35 days. Loc. R. 31(a). The response brief is due within 21 days after the due date for the opening brief. *Id.* The reply brief is due within ten days after the filing of the response brief. *Id.* Briefs and appendices are deemed filed as of the date and time stated on the notice of docket activity for the electronic brief, provided that paper copies are mailed, dispatched to a third-party

commercial carrier, or delivered to the clerk's office on the next business day. See Loc. R. 25(a)(1)(B) & (D); Loc. R. 25(a)(3).³

Practice tip: Note that while a response brief must be filed by a date certain specified in the briefing order, the deadline for filing a reply brief depends on when the response brief is actually filed.

Length limitations: An opening or response brief may not exceed 13,000 words, and must be accompanied by a certificate of compliance with type-volume limit if in excess of 30 pages. Fed. R. App. P. 32(a). A reply brief may not exceed 6,500 words, and must be accompanied by a certificate of compliance with type-volume limit if in excess of 15 pages. A motion to exceed the length limitations for briefs must be filed at least ten days prior to the due date of the brief and must be supported by a statement of reasons. These motions are disfavored and will be granted only for exceptional reasons. See Loc. R. 32(b).

Practice tip: The Clerk's Office has authority to grant a motion to expand the word count by up to ten percent of the word limit (i.e., up to 1,300 additional words for opening and response briefs, and up to 650 words for reply briefs).

Brief formatting requirements: Detailed information on the requirements for the contents and formatting of briefs can be found in the Appellate Procedure Guide under Briefing / Brief & Appendix Requirements. Although commercial appellate printing services such as the Lex Group should format the brief in accordance with the brief formatting requirements, counsel should also be familiar with the requirements.

Practice tip: The Clerk's Office updates the Brief & Appendix Requirements document from time to time, so be sure to review the current version.

Joint appendix requirements: Appendices filed by court-appointed private counsel cannot exceed 250 double-sided sheets without advance permission of the Court. See Loc. R. 32(a).⁴ Digital media and other bulky exhibits that were admitted in the district court must be placed in a separate exhibit volume that includes a statement providing specified required information concerning the media; the cover, table of contents, and statement for the exhibit volume must also be uploaded as part of the electronic filing. Detailed information on the requirements for the contents and formatting of joint appendices can be found in the Appellate Procedure Guide

³ Additional information on formal briefing schedules for other types of cases can be found in the Appellate Procedure Guide under Briefing / Formal Briefing. Information on the informal briefing process (used in *pro se* appeals and in any appeal in which a certificate of appealability is required) can be found under Briefing / Informal Briefing.

⁴ Because Federal Defender and U.S. Attorney offices pay for the copying of the appendices in their appeals, those offices are not restricted by the 250-sheet limit.

under Briefing / Brief & Appendix Requirements. As with briefs, although commercial appellate printing services such as the Lex Group should format the brief in accordance with the brief formatting requirements, counsel should also be familiar with the requirements.

Practice tip: The Clerk's Office revises the Brief & Appendix Requirements document from time to time, so be sure to review the current version.

Practice tip: Start the appendix preparation process early, in consultation with opposing counsel as to the contents, in order to avoid surprises or problems later that could have been avoided. See Loc. R. 30(b); Loc. R. 39(c). With respect to the inclusion of exhibits from a hearing, trial, or sentencing, ensure that what is submitted as part of the appendix (1) is part of the district court record, and (2), is the same as what is in the record. On occasion, it may be necessary to supplement the district court record. See Fed. R. App. P. 10(e)(2); Loc. R. 10(d).

Anders briefs: If appellate counsel is convinced, after obtaining and reviewing the entire record in a criminal appeal, that the appeal is frivolous, counsel should file a brief pursuant to *Anders v. California*, 388 U.S. 738 (1967), raising anything in the record that could possibly support an appeal. Counsel must serve a copy of counsel's brief on the defendant with a letter advising the defendant that the Court will afford him time to raise any issues he may wish to pursue. The Court then notifies the defendant that he has 30 days to file his *pro se* brief. Because the Court obtains and reviews the district court record, court-appointed private counsel cannot be reimbursed for appendix costs in *Anders* cases unless the Court has directed or authorized filing of an appendix.⁵ If the Court identifies issues that could support an appeal, it will direct supplemental briefing and may, on occasion, appoint replacement counsel at the supplemental briefing stage.

Sealed and confidential materials: Because both the dockets for Fourth Circuit cases and the documents filed in them are available on the Internet through PACER, counsel should carefully review the document titled Sealed and Confidential Materials that is included as part of the docketing notice when an appeal is docketed. Counsel is responsible for ensuring that all personal identifying information in briefs and all documents included in public appendix volumes (e.g., transcripts, exhibits, attachments to pleadings) is redacted in compliance with Fed. R. App. P. 25(a)(5) and Fed. R. Crim. P. 49.1.

Materials previously sealed: If material that was sealed below needs to be referenced in a brief, motion, or other document, counsel must file both a sealed, highlighted version and a public, redacted version of the document, along with a certificate of confidentiality. Because

⁵ Some Federal Defender attorneys find it more convenient, in straightforward cases with small records and limited potential issues, to prepare and file an appendix even though it is not required.

the electronic version of a sealed document is accessible only to the Court, counsel must serve paper copies of the sealed documents on the other parties.

Materials not previously sealed: For material not previously sealed that counsel wants sealed on appeal, counsel should file a motion to seal. Counsel should also file a motion to seal if it is necessary to seal an entire brief or motion and not possible to create a public, redacted version. Because a motion to seal must appear on the public docket for five days, counsel must file both a sealed, highlighted version and a public, redacted version of the motion. The motion to seal must identify the document or portions thereof for which sealing is requested, the reasons why sealing is necessary, the reasons a less drastic alternative will not afford adequate protection, and the period of time for which sealing is required.

Practice tip: The Clerk's Office revises the Sealed and Confidential Materials document from time to time, so be sure to review the current version.

PRE-ARGUMENT REVIEW AND SUBMISSION ON THE BRIEFS

Pre-argument review: The Court reviews the briefs prior to scheduling a case for argument to determine whether the case can be decided on the briefs or requires argument. *See* Fed. R. App. P. 34(a)(2); Loc. R. 34(a). Argument will not be granted if the randomly selected three-judge review panel unanimously agrees that (1) the appeal is frivolous; (2) the dispositive issue(s) have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the Court's decisional process. If all three judges on the pre-argument review panel agree on the disposition of the case and that argument is not needed, the panel will proceed to a decision on the briefs. If any judge requests argument, the case will be argued.

Practice tip: Although requesting argument in the oral argument statement at the end of the opening brief, *see* Loc. R. 34(a), does not ensure that argument will be granted, it is unusual for argument to be granted without a request. To increase the odds of receiving oral argument, which is granted in only about 15 to 20 percent of direct criminal appeals, counsel should craft an argument request that provides specific reasons why argument should be granted (e.g., the case presents an important issue on which the Fourth Circuit has no published decision, or the issue is one on which the federal circuits are split and the Court has not yet weighed in).

Submission on the briefs: After agreeing upon the disposition and that argument is not required, the pre-argument review panel files its opinion in the case. Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.

Practice tip: In many, though not all, cases, counsel will receive a "Rule 34 notice" at the time the case is submitted to a pre-argument review panel. If the case does not subsequently

receive argument, a decision will issue anywhere from just a few days to several months after submission, depending on the complexity of the case.

CALENDARING AND ORAL ARGUMENT

In general: The Court schedules argument during six regular sessions, or “court weeks,” held in Richmond between September and May and lasting three to four days. The Court also holds special sessions throughout the year, at law schools and other locations within the Circuit. See Loc. R. 34(c).

Calendaring: For a case selected for argument, notice is sent eight to ten weeks in advance that the case has been tentatively scheduled for a particular session. See Loc. R. 34(c). Counsel must notify the Court of any conflicts or file any motions affecting argument within ten days. Counsel for each party must also submit three additional paper copies of their briefs and the appendix within five days. The Court issues the final calendar about six weeks in advance of the session. Additional information on calendaring can be found in the Appellate Procedure Guide under Calendaring & Argument / Pre-argument Review & Calendaring.

Argument: The Court schedules argument in four cases per day before five randomly drawn panels during each session. Loc. R. 34(c). The identity of the panel is not disclosed until the morning of argument. Each side is allotted 20 minutes of argument time except that 15 minutes are allowed in specific case types identified in Local Rule 34(d), and 30 minutes are allowed in *en banc* cases. Detailed information about oral argument days, from courthouse entry security screening to oral argument procedure and protocol, can be found in the Appellate Procedure Guide under Calendaring & Argument / Oral Argument.

DECISION AND POST-DECISION

Opinions and judgments:

In general: Opinions and judgments are sent to counsel on the day judgment is entered. See Fed. R. App. P. 36. All opinions, published and unpublished, are posted on the Court’s Internet site beginning at 2:30 p.m. on the day of issuance. Opinions designated for immediate release (e.g., in cases of high public interest) are posted as soon as they have been filed in the Clerk’s Office and served on the parties and the district court.

Publication criteria: The Court will publish opinions only in cases that have been fully briefed and argued. The Court will not publish an opinion unless (1) it establishes, alters, modifies, clarifies, or explains a rule of law within this circuit; (2) it involves a legal issue of continuing public interest; (3) it criticizes existing law; (4) it contains an historical review of a legal rule that is not duplicative; or (5) it resolves a conflict between panels of this court, or creates a

conflict with a decision in another circuit. See Loc. R. 36(a). Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result. See Loc. R. 36(b).

Practice tip: The Court's standards for publication can be of assistance when requesting oral argument.

Citation of unpublished decisions: Rule 32.1 permits unrestricted citation of unpublished federal judicial opinions, orders, judgments, or other written dispositions issued on or after January 1, 2007. See Fed. R. App. P. 32.1. Citation of the Fourth Circuit's unpublished dispositions issued prior to January 1, 2007, in briefs and oral argument in the Court and in the district courts within the Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or law of the case. If counsel believes that an unpublished disposition of the Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, the decision may be cited. See Loc. R. 32.1.

Additional information on opinions and judgments can be found in the Appellate Procedure Guide under Decision & Post-Decision / Opinion & Judgment.

Petitions for rehearing and rehearing en banc:

Duty of counsel: When a decision is adverse to the criminal defendant, counsel's duty to the defendant is fully discharged without filing a petition for panel or en banc rehearing unless, in counsel's judgment, the case meets the rigorous requirements of Local Rule 40(b) for panel rehearing or Fed. R. App. P. 35(b) for en banc rehearing.

Grounds for panel rehearing: Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of the privilege. A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked in the decision; (2) a change in the law occurred after the case was submitted and was overlooked by the panel; (3) the opinion is in conflict with a decision of the U.S. Supreme Court, the Fourth Circuit, or another court of appeals and the conflict is not addressed in the opinion; or (4) the proceeding involves one or more questions of exceptional importance. The petition must state with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. See Fed. R. App. P. 40; Loc. R. 40(a) & (b).

Grounds for en banc rehearing: Rehearing en banc is not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. See Fed. R. App. P. 35(a).

Time for filing: In direct appeals and § 3582(c) appeals, rehearing petitions are due within 14 days of judgment. In § 2255 appeals, rehearing petitions are due within 45 days of judgment. *See* Loc. R. 40(c). No response is permitted unless requested by the Court.

Format and length: The format of a petition must comply with Fed. R. App. P. 32. No cover is required, but the title page must state plainly whether it is a petition for rehearing or petition for rehearing and rehearing en banc. A petition for rehearing en banc must be made at the same time and in the same document as a petition for rehearing. Except by permission of the Court, a petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3,900 words (15 pages if typewritten or handwritten) and must be accompanied by a certificate of compliance with type-volume limit if produced by computer. *See* Fed. R. App. P. 40(b); 35(b)(2) & (3).

Additional information on the rehearing process can be found in the Appellate Procedure Guide under Decision & Post-Decision / Rehearing & Rehearing En Banc.

Mandate: The Court issues a formal mandate on the date its decision takes effect. *See* Fed. R. App. P. 41. Upon issuance of the mandate, the jurisdiction of the Court over the case terminates, and the district court acquires jurisdiction to implement the mandate. The mandate issues seven days after the time to file a petition for rehearing expires, or seven days after entry of an order denying a timely petition for rehearing or rehearing en banc, or a motion for stay of mandate. Additional information on the mandate can be found in the Appellate Procedure Guide under Decision & Post-Decision / Mandate.

Petitions for certiorari:

Duty of counsel: After a case is decided, counsel (whether retained or court-appointed) shall inform the criminal defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari (cert. petition). *See* Loc. R. 46(d). To ensure that counsel fulfills this obligation, the Court requires counsel to file a certiorari status form within the first 60 days of the certiorari period and serve a copy on defendant. Counsel must file an amended certiorari status form if the information subsequently changes.

If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, *see* S. Ct. R. 10, counsel shall prepare and file a timely cert. petition and provide a copy to the defendant. *See* Loc. R. 46(d). Counsel must also take whatever further steps are necessary to protect the rights of the defendant until the petition is granted or denied.

If the defendant requests that a cert. petition be filed, but counsel believes that a petition would be frivolous, counsel may file a motion to withdraw with this Court requesting to be relieved of the responsibility of filing a cert. petition. The motion must reflect that a copy was served on the defendant. *See* Loc. R. 46(d).

Practice tip: When serving the copy of a motion to withdraw on the defendant, counsel may also want to include a copy of the Supreme Court's Guide to Filing *In Forma Pauperis* Cases, available at <https://www.supremecourt.gov/casehand/guideforIFPcases2019.pdf>.

Time for filing: A cert. petition is due within 90 days of the filing of the judgment (*not* of the mandate), or within 90 days of the denial of a timely petition for panel or en banc rehearing. See S. Ct. R. 13; 4th Cir. I.O.P.-41.2.

Format and length: The format, contents, and length of a cert. petition must comply with S. Ct. R. 12 and S. Ct. R. 14.

Additional information on cert. petitions can be found in the Appellate Procedure Guide under Court Forms & Fees / Forms by Category (scroll down to Certiorari, near bottom of page).

8.

Resolving Ethical Issues on Appeal

Eric Placke, First Assistant Office of the Federal Public Defender, MDNC

1 ☐ **Resolving Ethical Issues on Appeal**

*Fourth Circuit Criminal Appellate Practice Seminar
October 28, 2019*

Eric D. Placke
First Assistant Federal Public Defender
Middle District of North Carolina

2 ☐ **Three Key Questions**

Whether to Appeal

What to Appeal

How to Appeal

3 ☐ **Whether to Appeal**

Who Decides

Duty to Advise

Appeal Waivers

4 ☐ **Who Decides**

"[A] lawyer shall abide by a client's decisions concerning the objectives of representation ...
." ABA Model Rule 1.2(a).

"The decisions ultimately to be made by a competent client, after full consultation with
defense counsel, include ... whether to appeal." ABA Std. 4-5.2(b)(viii).

"[T]he accused has the ultimate authority to make certain fundamental decisions regarding
the case, ... [including] whether ... to take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751
(1983)

5 ☐ **Who Decides**

"We have long held that a lawyer who disregards specific instructions from the defendant to
file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-
Ortega*, 528 U.S. 470, 477 (2000).

"Once Poindexter unequivocally instructed his attorney to file a timely notice of appeal, his attorney was under an obligation to do so." *United States v. Poindexter*, 492 F.3d 263, 269 (4th Cir. 2007).

6 ☐ **Duty to Advise**

"[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... *shall consult* with the client as to the means by which they are pursued." ABA Model Rule 1.2(a) (emphasis added).

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Model Rule 1.4(b).

"The decisions ultimately to be made by a competent client, *after full consultation* with defense counsel, include ... whether to appeal." ABA Std. 4-5.2(b)(viii) (emphasis added).

7 ☐ **Duty to Advise**

"Defense counsel should provide the client with counsel's professional judgment as to whether there are meritorious grounds for appeal and the possible, and likely, results of an appeal. Defense counsel should also explain to the client the advantages and disadvantages of an appeal including the possibility that the government might cross-appeal, and the possibility that if the client prevails on appeal, a remand could result in a less favorable disposition." ABA Std. 4-9.1(a).

8 ☐ **Duty to Advise**

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal ..., or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. ... [T]o show prejudice, ... a defendant must [only] demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 484 (2000).

9 ☐ **Appeal Waivers**

"An attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instruction to file a timely notice of appeal, *even though* the defendant may have waived his right to challenge his conviction and sentence in the plea agreement." *United States v. Poindexter*, 492 F.3d 263, 265 (4th Cir. 2007)(emphasis added).

"[T]he presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver." *Garza v. Idaho*, 139 S. Ct. 738, 742 (2019).

10 ☐ **What to Appeal**

Who Decides

Sniper Rifle or Shotgun

Anders Briefs

11 ☐ **Who Decides**

"[W]hile it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press." *Garza v. Idaho*, 139 S. Ct. 738, 748 (2019).

"Following the trial, counsel determined what *he* believed to be petitioner's most viable arguments and raised them on appeal. Doing so was sound trial strategy." *United States v. Thompson*, 881 F.3d 117, 124 (4th Cir. 1989) (emphasis added).

12 ☐ **Who Decides**

"[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... *shall consult* with the client as to the means by which they are pursued." ABA Model Rule 1.2(a) (emphasis added).

"Appellate counsel should discuss with the client the arguments to present in appellate briefing and at argument, and should diligently attempt to accommodate the client's wishes. If the client desires to raise an argument that is colorable, counsel should work with the client to an acceptable resolution regarding the argument." ABA Std. 4-9.2(g).

13 ☐ **Sniper Rifle or Shotgun**

"Defendants do not have "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

"[A]ppellate counsel does not have a duty to raise every nonfrivolous argument on appeal, ... but a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Bell v. Jarvis*, 263 F.3d 149, 180 (4th Cir. 2000).

14 ☐ **Anders Briefs**

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing laws." ABA Model Rule 3.1

"Appellate defense counsel should not file a brief that counsel reasonably believes is devoid of merit. However, counsel should not conclude that a defense appeal lacks merit until counsel has fully examined the trial court record and the relevant legal authorities. If appellate counsel does so conclude, counsel should fully discuss that conclusion with the client, and explain the 'no merit' briefing process applicable in the jurisdiction" ABA Std. 4-9.2(e).

15 ☐ **Anders Briefs**

Appellate counsel's "role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be *wholly frivolous*, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is *wholly frivolous*." *Anders v. California*, 386 U.S. 738, 744 (1967) (emphasis added).

16 ☐ **How to Appeal**

Candor to the Court

Communication with the Client

Petitions for Certiorari

17 ☐ **Candor to the Court**

"A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact previously made to the tribunal by the lawyer; [or] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model Rule 3.3(a).

"Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument. Appellate counsel should present directly adverse authority in the controlling jurisdiction of which counsel is aware and that has not been presented by other counsel in the appeal." ABA Std. 4-9.3(f).

18 ☐ **Communication with the Client**

"A lawyer shall: (2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished, (3) keep the client *reasonably* informed about the status

of the matter, [and] promptly comply with *reasonable* requests for information.” ABA Model Rule 1.4(a) (emphasis added).

“Before filing an appellate brief, appellate defense counsel should consult with the client about the appeal, *and seek to meet with the client unless impractical*.” ABA Std. 4-9.3(a) (emphasis added).

19 ☐ ***Petitions for Certiorari***

“[A]ppellate counsel should ordinarily continue to represent the client through all stages of a direct appeal, including review by the United States Supreme Court.” ABA Std. 4-9.3(4).

“The duty of counsel appointed under the CJA extends through advising an unsuccessful appellant in writing of the right to seek review in the Supreme Court. If the appellant requests in writing that a petition for a writ of certiorari be filed and in counsel’s considered judgment there are grounds for seeking Supreme Court review, counsel shall file such a petition.” Fourth Circuit Local Rule 46(d).

20 ☐ ***Petitions for Certiorari***

“If appellant requests that a petition for writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with the Court of Appeals. The motion must reflect that a copy was served on the client and that the client was informed of the right to file a response to the motion within seven days. The Clerk will hold the motion after filing for fifteen days before submitting it to the Court to allow time for appellant’s response, if any, to be received.” Fourth Circuit Local Rule 46(d).

21 ☐ ***Resolving Ethical Issues on Appeal***

Fourth Circuit Criminal Appellate Practice Seminar
October 28, 2019

Eric D. Placke
First Assistant Federal Public Defender
Middle District of North Carolina

9.

United States Supreme Court Review- Preview-Overview

Paul Rashkind, Appellate Division Chief, Office of the Federal Public Defender, SDFL

**UNITED STATES SUPREME COURT
REVIEW-PREVIEW-OVERVIEW**

**CRIMINAL CASES GRANTED REVIEW AND DECIDED
DURING THE OCTOBER 2018-19 TERMS
THRU OCTOBER 4, 2019**

**PAUL M. RASHKIND
CHIEF, APPELLATE DIVISION
OFFICE OF THE FEDERAL PUBLIC DEFENDER, S.D. FLA.**

I. SEARCH & SEIZURE

A. Vehicles and Motorists

1. **Warrantless Blood Draw from Unconscious Motorist.** *Mitchell v. Wisconsin*, 139 S. Ct. ____ (June 27, 2019). In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, the Supreme Court referred approvingly to “implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply” with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is unconscious. Ruling more broadly than the question presented about such state statutes, Justice Alito wrote for a plurality (joined by CJ Roberts, Breyer and Kavanaugh) that the exigent circumstances exception to the warrant requirement “almost always permits a blood test without a warrant” when a breath test is impossible, such as when the motorist is unconscious. “Thus, when a driver is unconscious, the general rule is that a warrant is not needed.” The plurality allowed that the general rule might not apply in certain circumstances: “When police have probable cause to believe a person has committed a drunk-driving offense and the driver’s unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver’s BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to

show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.” Justice Thomas concurred, adding the fifth vote, but his rationale is different. As he proposed in his dissent in *Birchfield* and his concurrence in *McNeely*, a *per se* rule should apply: “[T]he natural metabolism of alcohol in the blood stream ‘creates an exigency once police have probable cause to believe the driver is drunk.’” His concurrence argues his *per se* rule is preferable to the plurality’s “difficult-to-administer rule, in which (as he sees it), “[e]xigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren’t.” Justice Sotomayor dissented (joined by Ginsburg and Kagan) and Justice Gorsuch penned his own dissent. Justice Sotomayor’s dissent rejected the plurality’s law-enforcement friendly rule. “The plurality’s decision rests on the false premise that today’s holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant.” Justice Gorsuch would have refused to decide this case which raised a question about whether certain statutes violated the Fourth Amendment, but was answered, generally, far beyond the question raised: “We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented. Instead, it upholds Wisconsin’s law on an entirely different ground—citing the exigent circumstances doctrine. While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question.”

2. **Reasonable Suspicion to Stop Motorist.** *Kansas v. Glover*, 139 S. Ct. ____ (cert. granted Apr. 1, 2019); decision below at 422 P.3d 64 (Kan. 2018). While on routine patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue's electronic database indicated the truck was registered to Charles Glover, Jr. and that Glover's Kansas driver's license had been revoked. The officer stopped the truck to investigate whether the driver had a valid license because he "assumed the registered owner of the truck was also the driver." The stop was based only on the information that Glover's license had been revoked; the deputy did not observe any traffic infractions and did not identify the driver. Glover was in fact the driver, and was charged as a habitual violator for driving while his license was revoked. Though Glover admitted he "did not have a valid driver's license," he moved to suppress all evidence from the stop, claiming the stop violated the Fourth Amendment, as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979), because the deputy lacked reasonable suspicion to pull him over. The trial court granted the motion to suppress based only on the judge's anecdotal personal experience that it is not reasonable for an officer to infer that the registered owner of a vehicle is the driver of the vehicle. The first state court of appeal reversed, but the state supreme court granted review and reinstated the order of suppression – Although it expressly rejected reliance on just "common sense," it held that an officer lacks reasonable suspicion to stop a vehicle when the stop is based on the officer's suspicion that the registered owner of a vehicle is driving the vehicle unless the officer has "more evidence" that the owner actually is the driver. The state petitioned for cert, contending: (1) The Kansas decision conflicts with state and federal precedent involving "12 other state supreme courts, 13 intermediate state appellate courts, and 4 federal circuit courts, including the Tenth Circuit, which covers Kansas. See, e.g., *United States v. Pyles*, 904 F.3d 422, 425 (6th Cir. 2018) (noting the split); *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1207-08 (10th Cir. 2007) (Gorsuch, J.);" (2) The Kansas ruling adopted a more demanding standard than the "minimal" suspicion set forth in *United States v. Sokolow*, 490 U.S. 1, 7 (1989); and (3) The Kansas ruling defies common sense on an important and recurring Fourth Amendment question about "judgments and inferences" that law enforcement officers make every day. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)." The

Supreme Court granted cert to determine: “[W]hether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.”

II. FIFTH AMENDMENT

A. Double Jeopardy

1. **Separate Sovereigns.** *Gamble v. United States*, 139 S. Ct. ____ (June 17, 2019). The Fifth Amendment states that “No person shall . . . be twice put in jeopardy” “for the same offence.” Yet, Gamble was subjected to two convictions and two sentences – one in state court and one in federal court – for the single offense of being a felon in possession of a firearm. As a result of the duplicative conviction, he must spend three additional years of his life behind bars. Gamble argued that the Double Jeopardy Clause prohibits that result and that existing Supreme Court precedent permitting “separate sovereigns” to prosecute for the same crime should be overruled. The Supreme Court rejected his argument (7-2) in an opinion authored by Justice Alito, which adheres to the dual-sovereigns exception to the Double Jeopardy Clause. “We consider in this case whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment. That Clause provides that no person may be ‘twice put in jeopardy’ ‘for the same offence.’ Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular ‘offence’ cannot be tried a second time for the same ‘offence.’ But what does the Clause mean by an ‘offence’? We have long held that a crime under one sovereign’s laws is not ‘the same offence’ as a crime under the laws of another sovereign. Under this ‘dual-sovereignty’ doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. Or the reverse may happen, as it did here. to overrule the dual-sovereignty doctrine.” Gamble contends that the dual-sovereignty doctrine “departs from the founding-era understanding of the right enshrined by the Double Jeopardy Clause. But the historical evidence assembled by Gamble is feeble; pointing the other way are the Clause’s text, other historical evidence, and 170 years of precedent. Today we affirm that precedent, and with it the decision below.” Justice

Ginsburg dissented, as did Justice Gorsuch. Each wrote a separate dissent rejecting the majority's conclusion.

III. Fourteenth Amendment Incorporation of Bill of Rights

- A. **Sixth Amendment: Unanimous Verdicts.** *Ramos v. Louisiana*, 139 S. Ct. ____ (cert. granted Mar. 18, 2019); decision below at 231 So.3d 44 (La. App. 2017). Evangelisto Ramos was charged with second-degree murder. He was tried by a twelve-member jury. The State's case against Mr. Ramos was based on purely circumstantial evidence. The prosecution did not present any eyewitnesses to the crime. Some of the evidence was susceptible of innocent explanation. After deliberating, ten jurors found that the government had proven its case against Ramos. However, two jurors concluded that the government had failed to prove Ramos guilty beyond a reasonable doubt. Notwithstanding the different jurors' findings, under Louisiana's non-unanimous jury verdict law, a guilty verdict was entered. Ramos was sentenced to spend the remainder of his life in prison without the possibility of parole. Ramos challenged the non-unanimous verdict law in state court. On appeal, the Court of Appeal noted that "some of the evidence may be susceptible of innocent explanation," yet, it rejected his challenge, concluding that "non-unanimous twelve-person jury verdicts are constitutional," Ramos petitioned the Supreme Court for cert, arguing that under the Sixth Amendment, a unanimous jury is required and this right should be incorporated to the states under the Fourteenth Amendment: "The vast majority of the Bill of Rights have been fully incorporated and made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment should incorporate the Sixth Amendment's guarantee of a unanimous jury because a) this Court has made clear that the guarantees in the Bill of Rights must be protected regardless of their current functional purpose; b) this Court has rejected the notion of partial incorporation or watered down versions of the Bill of Rights, and c) Louisiana's non-unanimous jury rule was adopted as part of a strategy by the Louisiana Constitutional Convention of 1898 to establish white supremacy." The Supreme Court granted cert. Question presented: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?
- B. **Eighth Amendment: Excessive Fines Clause.** *Timbs v. Indiana*, 139 S. Ct. 682 (Feb. 20, 2019). Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required

Timbs to pay fees and costs totaling \$1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$42,000, more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. Timbs sought cert, arguing that the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause. The Supreme Court granted certiorari and reversed in a unanimous opinion authored by Justice Ginsburg. "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.' *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment."

- C. **Eighth Amendment: Abrogation of Insanity Defense.** *Kahler v. Kansas*, 139 S. Ct. ____ (cert. granted Mar. 18, 2019); decision below at 410 P.3d 105 (Kan. 2018). In Kansas, along with four other states (Alaska, Idaho, Montana, and Utah), it is not a defense to criminal liability that mental illness prevented the defendant from knowing his actions were wrong. So long as he knowingly killed a human being—even if he did it because he believed the devil told him to, or because a delusion convinced him that his victim was trying to kill him, or because he lacked the ability to control his actions—he is guilty. Petitioner argues that this rule defies a fundamental, centuries-old precept of our legal system: "People cannot be punished for crimes for

which they are not morally culpable. Kansas's rule therefore violates the Eighth Amendment's prohibition of cruel and unusual punishments and the Fourteenth Amendment's due process guarantee." Even a capital murder defendant need not be of sound mind. Yet, state statutes abolishing the M'Naughten Rule (or a variant of it) have been upheld by those five states. The Supreme Court granted cert in response to Kahler's petition asking the Supreme Court to determine the question reserved in *Clark v. Arizona*: Whether "the Constitution mandates an insanity defense." 548 U.S. 735, 752 n.20 (2006); see *Delling v. Idaho*, 133 S. Ct. 504, 506 (2012) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting from denial of certiorari) (urging review of this question). Question presented: Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?

IV. CRIMES

- A. **Federal Preemption of State Prosecutions.** *Kansas v. Garcia, Morales and Ochoa-Lara* 139 S. Ct. ____ (cert. granted Mar. 18, 2019) (petition by Kansas as to three separate criminal prosecutions); decisions below at 401 P.3d 588 (Kan. 2017). In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a. Regulations implementing IRCA created a "Form I-9" that employers are required to have all prospective employees complete—citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). Here, Respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions. This petition presents two questions: (1) Whether IRCA expressly preempts the States from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or

alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) If IRCA bars the States from using all such information for any purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

- B. Oklahoma Tribal Jurisdiction.** *Sharp, Warden (formerly Carpenter) v. Murphy*, 138 S. Ct. 2026 (cert. granted May 21, 2018; Justice Gorsuch recused); decision below at 875 F.3d 896 (10th Cir. 2017). **(Case set for reargument during the October 2019 Term).** The Tenth Circuit held that Oklahoma lacks jurisdiction to prosecute a capital murder committed in eastern Oklahoma by a member of the Creek Nation. The panel held that Congress never disestablished the 1866 boundaries of the Creek Nation, and all lands within those boundaries are therefore “Indian country” subject to exclusive federal jurisdiction under 18 U.S.C. § 1153(a) for serious crimes committed by or against Indians. In its cert petition, the state argues that this holding has already placed a cloud of doubt over thousands of existing criminal convictions and pending prosecutions. To put this holding into perspective, the former Creek Nation territory encompasses 3,079,095 acres and most of the City of Tulsa. Moreover, other litigants have invoked the decision below to reincarnate the historical boundaries of all “Five Civilized Tribes”—the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. This combined area encompasses the entire eastern half of the State. According to the state, the decision thus threatens to effectively redraw the map of Oklahoma. The state also contends that prisoners have begun seeking post-conviction relief in state, federal, and even tribal court, contending that their convictions are void *ab initio*; and that civil litigants are using the decision to expand tribal jurisdiction over non-members. Question presented: Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a).
- C. Wyoming Tribal Jurisdiction.** *Herrera v. Wyoming*, 139 S. Ct. ____ (May 20, 2019). In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon” and “peace subsists . . . on the borders of the hunting districts.” Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in

Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not “unoccupied.” In a 5-4 decision authored by Justice Sotomayor, the Court disagreed, holding that the Crow Tribe’s hunting right survived Wyoming’s statehood, and the lands within Bighorn National Forest did not become categorically “occupied” when set aside as a national reserve. Justice Alito dissented, joined by CJ Roberts, Thomas and Kavanaugh.

D. ACCA, Guns, Drugs and Vagueness

1. **Florida Robbery as a “Violent Felony” Under ACCA.** *Stokeling v. United States*, 139 S. Ct. 544 (Jan. 15, 2019). Robbery under Florida law is a violent felony under the ACCA, even though Florida court decisions have virtually dispensed with a physical force requirement. In a 5-4 decision authored by Justice Thomas, the Court held: “This case requires us to decide whether a robbery offense that has as an element the use of force sufficient to overcome a victim’s resistance necessitates the use of ‘physical force’ within the meaning of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(2)(B)(i). We conclude that it does.” The majority’s holding significantly diluted the Court’s earlier opinion in *Curtis Johnson*. In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined “physical force” as a quantity of “force capable of causing physical pain or injury,” adding words such as “severe,” “extreme,” “furious,” or “vehement” to define “physical force.” In its majority decision here the Court limited its reading of *Johnson*, holding that “*Johnson* [] does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.” Applying this definition, the Court held that “the elements clause encompasses robbery offenses that require the criminal to overcome the victim’s resistance.” The Court ruled that Florida robbery is one of these offenses because it requires an “amount of force necessary to overcome a victim’s resistance,” even though Florida robbery only requires force “however slight” to overcome that resistance. The majority’s holding concludes that the term “physical force” in the ACCA was meant to “encompass[] the degree of force necessary to commit common-law robbery.” That included the quantity of force necessary to “pull a diamond pin out of a woman’s hair when doing so tore away hair attached to the pin.” Justice Thomas’s opinion was joined by Breyer, Alito, Gorsuch & Kavanaugh. Justice

Sotomayor dissented (joined by Roberts, Ginsburg & Kagan). The dissent claims the majority “distorts” the “physical force” definition laid out earlier by the Court in *Johnson*, as it requires “only slight force.” Noting that under Florida law “[i]f the resistance is minimal, the force need only be minimal as well,” the dissenting opinion cites to Florida cases where the “force element . . . is satisfied by a [thief] who attempts to pull free after the victim catches his arm,” “pulls cash from a victim’s hand by ‘peel[ing] [his] fingers back,’” “grabs a bag from a victim’s shoulder . . . , so long as the victim instinctively holds on to the bag’s strap for a moment,” and “caus[es] a bill to rip while pulling cash from a victim’s hand.” Furthermore, “as anyone who has ever pulled a bobby pin out of her hair knows, hair can break from even the most minimal force.” The dissenters would not predicate a 15-year mandatory minimum sentence on such conduct and find that by so doing the Court leaves in the dark a common-sense understanding of robbery, Congressional intent to impose an enhanced penalty on offenders with prior “violent” felonies, and its prior decision in *Johnson*.

2. **Burglary of Nonpermanent or Habitable Mobile Structure as “Violent Felony” Under ACCA.** *United States v. Stitt*, 139 S. Ct. 399 (Dec. 10, 2018). Two defendants, Stitt and Sims, challenged state burglary convictions used as ACCA predicates that were bottomed on allegedly non-generic burglary laws. Stitt was convicted under a Tennessee statute defining burglary as “burglary of a habitation,” and defining “habitation” as any “structure” or “vehicle . . . designed or adapted for overnight accommodation.” Sims was convicted under an Arkansas statute prohibiting burglary of a residentially occupiable structure, including a “vehicle, building, or other structure . . . customarily used for overnight accommodation of persons.” In a decision authored by Justice Breyer, the Court unanimously rejected the claim that these statutes do not qualify as predicates: “The Armed Career Criminal Act requires a federal sentencing judge to impose upon certain persons convicted of unlawfully possessing a firearm a 15-year minimum prison term. The judge is to impose that special sentence if the offender also has three prior convictions for certain violent or drug-related crimes. 18 U.S.C. §924(e). Those prior convictions include convictions for ‘burglary.’ §924(e)(2)(B)(ii). And the question here is whether the statutory term ‘burglary’ includes burglary of a structure or vehicle that has been adapted or is customarily used for

overnight accommodation. We hold that it does.” The Court held that Congress intended for ACCA to apply to generic burglaries as defined by most states at the time the law was passed; it found that a majority of states at that time applied it to vehicles adapted or customarily used for lodging. On the other hand, the Court agreed that generic burglary does not apply to statutes covering *any* boat, vessel, or railroad car without the customary lodging caveat (laws that would apply whether or not the vehicle or structure is customarily used for overnight accommodations). Both defendants had been successful in the court of appeals and the Supreme Court reversed both cases, but Sims’ case was remanded for consideration of his additional claim that was never ruled on below: The statute in his case includes burglary of a vehicle “in which any person lives,” which seemingly covers an automobile in which a homeless person sleeps occasionally (a broader definition than “customarily used for overnight accommodations”).

3. **Generic Burglary.** *Quarles v. United States*, 139 S. Ct. 914 (June 10, 2019). The Armed Career Criminal Act, 18 U.S.C. § 924(e), mandates a minimum 15-year prison sentence for a felon who unlawfully possesses a firearm and has three prior convictions for a “serious drug offense” or “violent felony.” Section 924(e) defines “violent felony” to include “burglary.” Under the Court’s 1990 decision in *Taylor v. United States*, the generic statutory term “burglary” means “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” The narrow question in this case concerns remaining-in burglary. The question is whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime at the exact moment when he or she first unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. In a unanimous decision authored by Justice Kavanaugh, the Court concluded that remaining-in burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.
4. **Determining “Serious Drug Offense.”** *Shular v. United States* 139 S. Ct. ____ (cert. granted June 28, 2019); decision below at 736 Fed. App’x 876 (11th Cir. 2018). Shular qualified as an armed career criminal based on six prior Florida

convictions for controlled substance offenses, none of which required a finding that Shular had “knowledge of the illicit nature of the substance,” i.e., that he was dealing with a “controlled substance.” Because the Florida crimes lack the *mens rea* element required for the generic offense, none of Shular’s Florida convictions should qualify as a “serious drug offense” under the categorical approach. The Eleventh Circuit affirmed Shular’s conviction, holding that the definition of a “serious drug offense” under ACCA does not include a *mens rea* element regarding the illicit nature of the controlled substance; the ACCA requires only that a prior offense “involve[]” . . . certain activities related to controlled substances.” Cert was granted. Question presented: Whether the determination of a “serious drug offense” under the Armed Career Criminal Act requires the same categorical approach used in the determination of a “violent felony” under the Act?

- E. ***Johnson and 924(c)***. *United States v. Davis*, 139 S. Ct. 782 (June 24, 2019). In a 5-4 decision authored by Justice Gorsuch, the Court held that 18 U.S.C. §924(c)(3)(B), which provides enhanced penalties for using a firearm during a “crime of violence,” is unconstitutionally vague. In so holding, the majority applied the same principles it applied when finding the same language vague as applied to ACCA in *Johnson* and 16(b) in *Dimaya*. The majority opinion makes clear that such vagueness is categorical-language dependent, and is not statute specific. The majority begins: “In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature’s responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.” The Court rejected the government’s arguments – old and new – to uphold the residual clause in the specific context of 924(c). “The statute’s residual clause points to those felonies ‘that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’ §924(c)(3)(B). Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of

violence and thus is unconstitutionally vague. So today the government attempts a new and alternative reading designed to save the residual clause. But this reading, it turns out, cannot be squared with the statute's text, context, and history. Were we to adopt it, we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted." Justice Kavanaugh filed a dissent, joined by Thomas, Alito, and in part by CJ Roberts. Both the majority opinion and dissent discuss the Eleventh Circuit's contrary precedent in *Ovalles (en banc)*; the majority rejects the *Ovalles* approach to 924(c)'s residual clause, and the dissent ultimately uses the defendants in that case as an example of "offenders who will now potentially avoid conviction under §924(c)." *Ovalles*' own cert petition was denied nine days before the *Davis* decision, but it is worth noting that in that case the Eleventh Circuit panel also found the underlying carjacking crime qualified under the elements clause, §924(c)(3)(A).

- F. Requisite Proof Under § 922(g)(5) for Undocumented Alien Knowingly Possessing Firearm.** *Rehaif v. United States*, 139 S. Ct. 914 (June 21, 2019). Rehaif is a citizen of the UAE who overstayed his student visa. He was convicted under § 922(g)(5) for unlawful possession of a firearm and ammunition by an undocumented immigrant. At trial, the court instructed the jury that the government is not required to prove that the defendant knew that he was "illegally or unlawfully in the United States" at the time he possessed the firearm and ammunition. The Eleventh Circuit affirmed his conviction. Question presented: Whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of an offense under § 922(g), or whether it applies only to the possession element. The Supreme Court reversed the conviction (7-2) in an opinion authored by Justice Breyer: "A federal statute, 18 U.S.C. §922(g), provides that '[i]t shall be unlawful' for certain individuals to possess firearms. The provision lists nine categories of individuals subject to the prohibition, including felons and aliens who are 'illegally or unlawfully in the United States.' A separate provision, §924(a)(2), adds that anyone who '*knowingly* violates' the first provision shall be fined or imprisoned for up to 10 years. The question here concerns the scope of the word '*knowingly*.' Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)? We hold that the word '*knowingly*' applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the

relevant status when he possessed it.” The majority’s conclusion was based both on the plain language of the statute and what it believes was congressional intent. The same statute covers other status offenses, such as possession of a firearm by a convicted felon, and the court’s holding seemingly applies to the other status offenses, as well, even if the quantum of proof might be different for other offense categories : “We conclude that in a prosecution under 18 U.S.C. §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. We express no view, however, about what precisely the Government must prove to establish a defendant’s knowledge of status in respect to other §922(g) provisions not at issue here.” Justice Alito (joined by Thomas dissented) to the Court majority “casually” overturning the long-established interpretation of an important criminal statute, and the likely storm of collateral review petitions that will result from the decision. For good measure, the dissent restates the facts of the case to underscore the injustice of the majority opinion: “The majority provides a bowdlerized version of the facts of this case and thus obscures the triviality of this petitioner’s claim. The majority wants readers to have in mind an entirely imaginary case, a heartless prosecution of “an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status.” ... Such a defendant would indeed warrant sympathy, but that is not petitioner, and no one has called to our attention any real case like the one the majority conjures up. Here is what really happened. Petitioner, a citizen of the United Arab Emirates, entered this country on a visa that allowed him to stay here lawfully only so long as he remained a full-time student. ... He enrolled at the Florida Institute of Technology, but he withdrew from or failed all of his classes and was dismissed. After he was conditionally readmitted, he failed all but one of his courses. His enrollment was then terminated, and he did not appeal. The school sent him e-mails informing him that he was no longer enrolled and that, unless he was admitted elsewhere, his status as a lawful alien would be terminated ... Petitioner’s response was to move to a hotel and frequent a firing range. Each evening he checked into the hotel and always demanded a room on the eighth floor facing the airport. Each morning he checked out and paid his bill with cash, spending a total of more than \$11,000. This went on for 53 days. ... A hotel employee told the FBI that petitioner claimed to have weapons in his room. Arrested and charged under §922(g) for possession of a firearm by an illegal alien, petitioner claimed at trial that the Government had to prove beyond a reasonable doubt that he actually knew that his lawful status had been terminated. Following what was

then the universal and long-established interpretation of §922(g), the District Court rejected this argument, and a jury found him guilty. The Eleventh Circuit affirmed. ... Out of the more than 8,000 petitions for a writ of certiorari that we expected to receive this Term, we chose to grant this one to see if petitioner had been deprived of the right to have a jury decide whether, in his heart of hearts, he really knew that he could not lawfully remain in the United States on a student visa when he most certainly was no longer a student.”

G. Defrauding the Government. *Kelly v. United States*, 139 S. Ct. ____ (cert. granted June 28, 2019); decision below at 909 F.3d 550 (3rd Cir. 2018). Bridget Kelly was convicted for her involvement in the “Bridgegate” scheme, which imposed crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee’s mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. Specifically, she was convicted of conspiring to obtain by fraud, knowingly converting, or intentionally misapplying property of an organization receiving federal benefits, in violation of 18 U.S.C. §§ 371 and 666(a)(1)(A); a substantive count of § 666(a)(1)(A); and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; and two substantive counts of wire fraud. She contested whether her public statements about the purported reasons for the action qualify as violations of these federal crimes. After the Third Circuit sustained her convictions, Kelly argued that cert should be granted to reaffirm the body of case law limiting prosecutions for government officials who allegedly deprive the citizenry of good government. “For over three decades, this Court has repeatedly warned against using vague federal criminal laws to impose ‘standards of ... good government’ on ‘local and state officials.’ *McNally v. United States*, 483 U.S. 350, 360 (1987); see also *Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016). This case proves that some prosecutors still resist that directive—and some courts still refuse to rein them in. The court below adopted a theory of fraud so incredibly potent as to undo—in one fell swoop—the restrictions this Court imposed in all of those decisions. Its opinion is a playbook for how to prosecute political adversaries, and transforms the federal judiciary into a Ministry of Truth for every public official in the nation.” The Court granted cert. Question presented: Does a public official “defraud” the government of its property by advancing a “public policy reason” for an official decision that is not her subjective “real reason” for making the decision?

H. Inducing Illegal Immigration for Profit – Constitutionality of Statute. *United States v. Sineneng-Smith*, 139 S. Ct. ____ (cert. granted Oct. 4, 2019); decision below at 910 F.3d 461 (9th Cir. 2018). Following

a jury trial, respondent was convicted of two counts of encouraging or inducing illegal immigration for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), and two counts of mail fraud, in violation of 18 U.S.C. 1341. The 1324(a) offenses criminalize encouraging or inducing immigration violations for profit. Here, the respondent was charged and convicted of “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law,” 8 U.S.C. 1324(a)(1)(A)(iv), “for the purpose of commercial advantage or private financial gain.” The Ninth Circuit reversed the 1324(a) convictions, finding that the statute is facially unconstitutional in violation of the First Amendment. The Ninth Circuit relied on a First Amendment overbreadth theory to facially invalidate Section 1324(a)(1)(A)(iv), focusing on Section 1324(a)(1)(A)(iv) alone, deeming the financial gain element in Section 1324(a)(1)(B)(i) “irrelevant” to the validity of respondent’s convictions. The court took the view that Section 1324(a)(1)(A)(iv) defines “the predicate criminal act” without which respondent “could not have been convicted” and that “the chilling effect of the ‘encourage or induce’ statute extends to anyone who engages in behavior covered by it, whether for financial gain or not.” The government petitioned for cert, which was granted. Question presented: Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.

V. SENTENCING

A. **Mandatory Career Offender Guidelines Post-*Johnson* & *Beckles*.** *Brown v. United States*, 139 S. Ct. 14 (cert. denied Oct. 15, 2018). Petitioners in a series of cases argued that the pre-*Booker* mandatory career offender guidelines suffered from the same unconstitutional vagueness that *Johnson* found in the residual clause of ACCA. The question had seemingly been left open by the Court’s decision in *Beckles*, which addressed the question as it relates to advisory guidelines, post-*Booker*. The Supreme Court denied cert in each of the cases. Only two justices – Sotomayor and Ginsburg – dissented from the Court’s denial of certiorari. Justice Sotomayor’s dissent explains that the refusal to grant cert “all but ensures that the question will never be answered”: “Today this Court denies petitioners, and perhaps more than 1,000 like them, a chance to challenge the constitutionality of their sentences. They were sentenced under a then-mandatory provision of the U.S. Sentencing Guidelines, the exact language of which we have recently identified as unconstitutionally vague in another legally binding provision. These petitioners argue

that their sentences, too, are unconstitutional. This important question, which has generated divergence among the lower courts, calls out for an answer.” The dissent explains the significant circuit conflict on the issue: “The question for a petitioner like Brown [] is whether he may rely on the right recognized in *Johnson* to challenge identical language in the mandatory Guidelines. Three Courts of Appeals have said no. See 868 F.3d 297 (CA4 2017)(case below); *Raybon v. United States*, 867 F.3d 625 (CA6 2017); *United States v. Greer*, 881 F.3d 1241 (CA10 2018). One Court of Appeals has said yes. See *Cross v. United States*, 892 F.3d 288 (CA7 2018). Another has strongly hinted yes in a different posture, after which point the Government dismissed at least one appeal that would have allowed the court to answer the question directly. See *Moore v. United States*, 871 F.3d 72, 80–84 (CA1 2017); see also *United States v. Roy*, 282 F.Supp.3d 421 (Mass. 2017); *United States v. Roy, Withdrawal of Appeal* in No. 17–2169 (CA1). One other court has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. See *In re Griffin*, 823 F.3d 1350, 1354 (CA11 2016).” The dissent strongly suggests that one reason cert was denied is a related timeliness concern for these underlying 2255 petitions for collateral relief, a concern that the dissent refutes: “Federal law imposes on prisoners seeking to mount collateral attacks on final sentences ‘[a] 1-year period of limitation . . . from the latest of several events. See 28 U.S.C. §2255(f). One event that can reopen this window is this Court ‘newly recogniz[ing]’ a right and making that right ‘retroactively applicable to cases on collateral review.’ §2255(f)(3). The right recognized in the ACCA context in *Johnson*, we have held, is retroactive on collateral review. *Welch v. United States*, 578 U.S. ___, ___ (2016) (slip op., at 9).” Although the dissent rejects this timeliness concern, it seemingly lies at the heart of the cert denial by the balance of the justices.

B. Supervised Release

1. **Mandatory Minimum Sentence for Supervised Release Violation.** *United States v. Haymond*, 139 S. Ct. ___ (June 26, 2019). Haymond was originally convicted of one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. Following his release from prison, Haymond was found in violation of his supervised release by viewing child pornography. The determination was made by a preponderance of evidence, not beyond a reasonable doubt. The district court applied 18

U.S.C. § 3583(k) to Haymond's violation, requiring revocation of supervised release and reimprisonment for at least five years on a finding that a defendant like Haymond has violated supervised release. Finding "no factor present that warrant[ed]" reimprisonment beyond the required five years, the district court ordered Haymond to return to prison for five years, to be followed by five years of supervised release. See 18 U.S.C. § 3583(h) (allowing for a term of supervised release to follow reimprisonment). However, the court noted its "serious concerns about" the requirement that Haymond return to prison for at least five years. The court of appeals affirmed the revocation of supervised release, but vacated the order of reimprisonment and remanded. A majority of the appellate panel concluded that the case should be remanded for further proceedings in which only 18 U.S.C. § 3583(e)(3), and not § 3583(k), would apply to the district court's imposition of additional consequences for the supervised release violation. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment for at least five years on a finding that a particular type of defendant has violated. In the majority's view, §3583(k) "violates the Fifth and Sixth Amendments," for two reasons: (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt. The majority concluded that § 3583(k) "violates the Sixth Amendment" under *United States v. Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines. The government petitioned for cert, arguing that the majority's holding that the invalidated provisions cannot constitutionally be applied is premised on a novel interpretation of the Fifth and Sixth Amendments (and the supervised-release statute itself) at odds with their text and history, the precedents of the Supreme Court, and the statements of other courts of appeals. "Nothing in the Constitution requires jury findings beyond a reasonable doubt as a prerequisite to the implementation or administration of a previously imposed sentence." **In a plurality opinion authored by Justice Gorsuch (joined by Ginsburg, Sotomayor and Kagan), the Supreme Court vacated and remanded for further proceedings. The plurality agreed**

with the application of *Alleyne v. United States*, 570 U.S. 99 (2013) to the supervised release proceedings here because the statute imposes a mandatory minimum sentence (and, for that reason, did not need to address application of *Apprendi* to the statutory maximum in this decision, *see*, fn. 4). The plurality affirmed the findings of Fifth and Sixth amendment violations, but remanded for further consideration of remedial measures: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty ... Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.” Although at oral argument a number of justices expressed constitutional concerns about the current supervised release violation process (lack of jury findings and reasonable doubt standard), and potential remedial measures, those question are left unanswered, for now. The plurality “decline[d] to tangle with the parties’ competing remedial arguments today. The Tenth Circuit did not address these arguments; it appears the government did not even discuss the possibility of empaneling a jury in its brief to that court; and this Court normally proceeds as a “court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). Given all this, we believe the wiser course lies in returning the case to the court of appeals for it to have the opportunity to address the government’s remedial argument in the first instance, including any question concerning whether that argument was adequately preserved in this case.” **Justice Breyer concurred in the judgment, providing the fifth vote for a majority**, but his reasoning was more limited and he cautioned that he “agree[s] with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole. As 18 U.S.C. §3583 makes clear, Congress did not intend the system of supervised release to differ from parole in this respect. And in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context.” “Nevertheless, I agree with the plurality that this specific provision of the supervised-release statute, §3583(k), is unconstitutional.” After analyzing how §3583(k) operates, Justice Breyer concluded that this particular statute is infirmed and agreed with a remand for further proceedings:

“Taken together, the[] features of §3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution that trigger a mandatory minimum prison term. *Alleyne*, 570 U.S., at 103. Accordingly, I would hold that §3583(k) is unconstitutional and remand for the Court of Appeals to address the question of remedy. Because this is the course adopted by the plurality, I concur in the judgment.” **Justice Alito dissented, joined by CJ Roberts, Thomas and Kavanaugh:** “I do not think that there is a constitutional basis for today’s holding, which is set out in Justice Breyers’ opinion, but it is narrow and has saved our jurisprudence from the consequences of the plurality opinion, which is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications.” The dissent concludes with a warning that translates into an agenda for defense counsel in future cases challenging supervised release violation proceedings: “The plurality opinion appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of much broader scope.”

2. **Tolling Supervised Release Term.** *Mont v. United States*, 139 S. Ct. ____ (June 3, 2019). Is a convicted criminal’s period of supervised release tolled—in effect, paused—during his pretrial detention for a new criminal offense? Specifically, the question is whether that pretrial detention qualifies as “imprison[ment] in connection with a conviction for a Federal, State, or local crime.” 18 U.S.C. §3624(e). In a 5-4 decision authored by Justice Thomas, the Court held the answer is yes, it is tolled during the pretrial detention: “Given the text and statutory context of §3624(e), we conclude that if the court’s later imposed sentence credits the period of pretrial detention as time served for the new offense, then the pretrial detention also tolls the supervised-release period.” “We hold that pretrial detention later credited as time served for a new conviction is “imprison[ment] in connection with a conviction” and thus tolls the supervised-release term under §3624(e). This is so even if the court must make the tolling calculation after learning whether the time will be credited. In our view, this reading is compelled by the text and statutory context of §3624(e).” Justice Ginsburg joined Thomas’ majority opinion. Justice Sotomayor dissented, joined by Breyer, Kagan, and Gorsuch: “The Court errs by treating Mont’s pretrial detention as tolling his supervised release term. Because its approach misconstrues the

operative text and fosters needless uncertainty and unfairness, I respectfully dissent.”

VI. DEATH PENALTY

A. Incompetency to be Executed.

1. **Vascular Dementia.** *Madison v. Alabama*, 139 S. Ct. 718 (Feb. 27, 2019). Death row inmate Madison suffers vascular dementia, which prevents him from remembering the crimes for which he is scheduled to be executed. He previously obtained collateral relief that was reversed by the Supreme Court based on limitations in available remedies under AEDPA. The Supreme Court did not address the merits of his claims in the first case. On remand, his execution was scheduled on an expedited basis. Madison applied to the state circuit court to suspend entry of the death penalty due to his incompetency. That effort was denied. With no available appeal in the Alabama state courts, Madison filed a petition for writ of certiorari in the Supreme Court directed to the state trial court, this time “outside of the AEDPA context,” requesting that his execution be stayed and certiorari be granted to address the following two substantive questions: (1) Consistent with the Eighth Amendment, and this Court’s decisions in *Ford v. Wainwright* and *Panetti v. Quarterman*, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense? *See Dunn v. Madison*, 138 S. Ct. 9, 12 (Nov. 6, 2017) (Ginsburg, J., with Breyer, J., and Sotomayor, J., concurring); (2) Do evolving standards of decency and the Eighth Amendment’s prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution? The Court stayed the execution and granted certiorari. **In a 6-3 decision authored by Justice Kagan, the Court answered the two questions (“No” and “Yes” – consistent with the parties’ newfound agreement in the Supreme Court), but remanded to the state court to apply those answers to the ultimate resolution of whether Madison can be executed.** “The Eighth Amendment, this Court has held, prohibits the execution of a prisoner whose mental illness prevents him from “rational[ly] understanding” why the State

seeks to impose that punishment. *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). In this case, Vernon Madison argued that his memory loss and dementia entitled him to a stay of execution, but an Alabama court denied the relief. We now address two questions relating to the Eighth Amendment's bar, disputed below but not in this Court. First, does the Eighth Amendment forbid execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime? We (and, now, the parties) think not, because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence. Second, does the Eighth Amendment apply similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions? We (and, now, the parties) think so, because either condition may—or, then again, may not—impede the requisite comprehension of his punishment. The only issue left, on which the parties still disagree, is what those rulings mean for Madison's own execution. We direct that issue to the state court for further consideration in light of this opinion." Justice Alito dissented, joined by Thomas and Gorsuch; Kavanaugh did not participate in the decision.

2. **Intellectual Disability.** *Moore v. Texas*, 139 S. Ct. 666 (Feb. 19, 2019) (per curiam). Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed fact findings and determined that, under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. ____ (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore's death sentence violated the Eighth Amendment's proscription of "cruel and unusual punishments." The habeas court therefore recommended that Moore be granted relief. The Texas Court of Criminal Appeals declined to adopt the judgment recommended by the state habeas court. In the court of appeals' view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (2004). The appeals court further determined that the evidentiary factors announced in *Briseno* "weigh[ed] heavily" against upsetting Moore's death sentence. The U.S. Supreme Court vacated that ruling in 2017 in a 5-3 decision authored by

Justice Ginsburg: “As we instructed in *Hall*, adjudications of intellectual disability should be ‘informed by the views of medical experts.’ . . . That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community’s consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source. Not aligned with the medical community’s information, and drawing no strength from our precedent, the *Briseno* factors ‘creat[e] an unacceptable risk that persons with intellectual disability will be executed,’ . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.” Chief Justice Roberts dissented, joined by Justices Thomas and Alito. *Moore v. Texas*, 581 U. S. ___, ___ (2017) (slip op., at 18). The state appeals court subsequently reconsidered the matter on remand but reached the same conclusion. *Ex parte Moore*, 548 S. W. 3d 552, 573 (Tex. Crim. App. 2018) (*Ex parte Moore II*). Moore filed a second cert petition, challenging that conclusion. Notably, the prosecutor, the district attorney of Harris County, agreed with Moore that he is intellectually disabled and cannot be executed. Moore also had amicus support from the American Psychological Association, the American Bar Association, and other amici. The Texas Attorney General persisted, however, filing a motion to intervene in the current cert proceeding, and arguing that relief should be denied. The Supreme Court reversed the second determination (and denied the Attorney General’s motion to intervene) in a per curiam decision from which three justices dissented (Alito, Thomas and Gorsuch). The Chief Justice, who dissented from the Court’s original decision, this time filed a concurrence to the reversal, explaining his apparent change of heart. “When this case was before us two years ago, I wrote in dissent that the majority’s articulation of how courts should enforce the requirements of *Atkins v. Virginia*, 536 U.S. 304 (2002), lacked clarity. *Moore v. Texas*, 581 U.S. ___, ___–___ (2017) (slip op., at 10–11). It still does. But putting aside the difficulties of applying *Moore* in other cases, it is easy to see that the Texas Court of Criminal Appeals misapplied it here. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance. The court repeated its improper reliance on the factors articulated in *Ex parte Briseno*, 135 S.W. 3d 1, 8 (Tex. Crim. App. 2004), and again emphasized Moore’s adaptive strengths

rather than his deficits. That did not pass muster under this Court's analysis last time. It still doesn't."

- B. Applicable Law at Capital Resentencing.** *McKinney v. Arizona*, 139 S. Ct. ____ (cert. granted June 10, 2019); decision below at 426 P.3d 1224 (2018). This case asks whether a court must apply current law when deciding, for the first time, whether the mitigating and aggravating evidence in a capital case warrants the death sentence. In 1993, James Erin McKinney was convicted of murder and sentenced to death by a judge in Arizona. More than 20 years later, the Ninth Circuit granted McKinney a conditional writ of habeas corpus, finding that Arizona courts over a 15-year period had refused as a matter of law to consider non-statutory mitigating evidence in death penalty cases, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Ninth Circuit held that no Arizona court had ever considered mitigating evidence that McKinney suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his abusive childhood, which by all accounts was horrific. The Ninth Circuit specifically found that this error was not harmless, and it ordered Arizona to correct the constitutional error in McKinney's death sentence. Questions presented: (1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted. (2) Whether the correction of error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), requires resentencing.
- C. Method of Execution.** *Bucklew v. Precythe*, 139 S. Ct. ____ (Apr. 1, 2019). Russell Bucklew was scheduled for execution on March 20 by a method that he alleged is very likely to cause him needless suffering because he suffers from a rare disease, cavernous hemangioma. The disease is progressive, and has caused unstable, blood-filled tumors to grow in his head, neck, and throat. Those highly sensitive tumors easily rupture and bleed. The tumor in his throat often blocks his airway, requiring frequent, conscious attention from Bucklew to avoid suffocation. His peripheral veins are also compromised. That means that the lethal drug cannot be administered in the ordinary way, through intravenous access in his arms. An expert who examined Bucklew concluded that while undergoing Missouri's lethal injection protocol, Bucklew is "highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway." As he struggles to breathe through the execution procedure, Bucklew's throat tumor will likely rupture. "The resultant hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process." Bucklew's execution will

very likely be gruesome and painful far beyond the pain inherent in the process of an ordinary lethal injection execution. He proposed an alternative lethal gas method of execution, which was rejected by the district court. In a 2-1 decision, a panel of the Eighth Circuit concluded that this execution is not cruel and unusual solely because, in its view, Bucklew failed to prove that his alternative method would substantially reduce his risk of needless suffering. **The Supreme Court granted cert and a stay of execution, but then affirmed the Eighth Circuit in a 5-4 decision authored by Justice Gorsuch (joined by Roberts, Thomas, Alito and Kavanaugh).** The majority summarized its holding in the opening paragraph of Justice Gorsuch's opinion: "Russell Bucklew concedes that the State of Missouri lawfully convicted him of murder and a variety of other crimes. He acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State's lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so." The majority held that two of its prior decisions govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain. In *Baze v. Rees*, 553 U.S. 35 (2008) (plurality), the Court had held that a state's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." And, in *Glossip v. Gross*, 576 U.S. ____ (2015) – which also held that the *Baze* plurality is controlling law – the Court held that an inmate must show his proposed alternative method of execution is not just theoretically feasible, but also readily implemented. The majority here held that Bucklew failed to satisfy the *Baze-Glossip* tests. In addition, the majority held that Bucklew failed to provide a detailed alternative means of execution that is both viable and likely to significantly reduce the substantial risk of severe pain. Justice Thomas concurred, but noted in a separate opinion his belief that punishment violates the Eighth Amendment only if it is deliberately designed to inflict pain. Justice Kavanaugh concurred and in a separate opinion noted that a valid alternative means of execution need not necessarily be authorized by a state's law – "all nine Justices today agree on that point." Justice Breyer dissented (joined by in part by Ginsburg, Sotomayor and Kagan), and Justice Sotomayor filed her own

dissent as well. The portion of Justice Breyer's dissent in which he stands alone (part III) reasserts his oft-stated belief that the excessive delays caused by a condemned inmate's legitimate constitutional challenges make it impossible for capital punishment to be constitutionally imposed.

- D. **Florida Death Penalty.** *Reynolds v. Florida*, 139 S. Ct. 27 (cert. denied Nov. 13, 2018). Justices Breyer and Sotomayor wrote statements critical of the Court's denial of certiorari. Justice Breyer's statement begins: "This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in its application of this Court's decision in *Hurst v. Florida*, 577 U.S. ____ (2016). In *Hurst*, this Court concluded that Florida's death penalty scheme violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court now applies *Hurst* retroactively to capital defendants whose sentences became final after this Court's earlier decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which similarly held that the death penalty scheme of a different State, Arizona, violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence. The Florida Supreme Court has declined, however, to apply *Hurst* retroactively to capital defendants whose sentences became final before *Ring*. *Hitchcock v. State*, 226 So.3d 216, 217 (2017). As a result, capital defendants whose sentences became final before 2002 cannot prevail on a "*Hurst-is-retroactive*" claim." After some discussion of Justice Breyer's general concerns about the death penalty and its administration, he identified the key issue he and Justice Sotomayor believe is at the heart of these cases and that should be preserved and raised in future cases: **"Although these cases do not squarely present the general question whether the Eighth Amendment requires jury sentencing, they do present a closely related question: whether the Florida Supreme Court's harmless-error analysis violates the Eighth Amendment because it 'rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'** *Caldwell v. Mississippi*, 472 U.S. 320, 328–329 (1985). For the reasons set out in JUSTICE SOTOMAYOR's dissent, post, at 3–7, I believe the Court should grant certiorari on that question in an appropriate case. That said, I would not grant certiorari on that question here. In many of these cases, the Florida Supreme Court did not fully consider that question, or the defendants may not have

properly raised it. That may ultimately impede, or at least complicate, our review.”

VII. APPEALS

- A. **Preservation of Sentencing Issue for Appeal.** *Holguin-Hernandez v. United States*, 139 S. Ct. ____ (cert. granted June 3, 2019); decision below at 746 Fed. Appx. 403 (5th Cir. 2018). Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant’s sentence.

VIII. COLLATERAL CONSEQUENCES

- A. **Sex Offender Registration & Notification Act – Nondelegation Doctrine.** *Gundy v. United States*, 139 S. Ct. ____ (June 20, 2019). Congress did not determine SORNA’s applicability to individuals convicted of a sex offense prior to its enactment. Instead, the legislation delegated to the Attorney General the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act. Gundy argued that the statute violates the nondelegation doctrine, U.S. Const. art. I §§ 1, 8, a doctrine rooted in the principle of separation of powers. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The case was argued the first week of the Term, before Justice Kavanaugh was confirmed, and he did not participate in the decision. In a plurality decision authored by Justice Kagan, four justices (Ginsburg, Breyer & Sotomayor) overruled the challenge: “The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. §20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under §20913(d), the Attorney General must apply SORNA’s registration requirements as soon as feasible to offenders convicted before the statute’s enactment. That delegation easily passes constitutional muster.” The plurality explained that the totality of the statute provides an “intelligible principle” for exercise of the delegation, and that statute makes clear that Congress only delegated to the Attorney General the authority to determine *how* the law would apply to pre-Act offenders, not *whether* it should apply to pre-Act offenders. In closing, the plurality warned that if Gundy’s argument were correct, then most of government is unconstitutional based on the vast number of statutes that delegate authority to the Executive. Three justices dissented: Justice Gorsuch’s dissent was joined by CJ Roberts and Thomas. Justice Alito, whose vote formed the majority, concurred in the judgment, leaving open the

door to reconsideration if the full court of nine justices chooses to rehear the issue: “The Constitution confers on Congress certain “legislative [p]owers,” Art. I, §1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *ibid.* If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm

IX. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2241, 2254 AND 2255

- A. Rule 59(e) Motions as Second or Successive Petitions.** *Banister v. Davis, Dir.*, 139 S. Ct. ____ (cert. granted June 24, 2019); decision below at 664 Fed. App'x. 673 (5th Cir. 2018). The Court recharacterized the questions presented by a pro se petitioner and granted review of the following question, on which a circuit split exists: Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).
- B. Retroactivity: Mandatory Life Without Parole for Juveniles.** *Mathena v. Malvo*, 139 S. Ct. ____ (cert. granted Mar. 18, 2019); decision below at 893 F.3d 265 (4th Cir. 2018). This case involves the notorious serial murderers committed by the D.C. snipers. One of the two snipers, Lee Malvo was originally sentenced in 2004 to life without parole, even though he was a juvenile when the crime occurred. The life sentence was not mandatory under the sentencing statute. Eight years later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’ ” Four years after that, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that “*Miller* announced a substantive rule of constitutional law” that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given “retroactive effect” in cases where direct review was complete when *Miller* was decided. The Fourth Circuit concluded that Virginia must resentence Malvo for crimes for which he was sentenced in 2004. The basis of that decision was the Fourth Circuit’s conclusion that *Montgomery*

expanded the prohibition against “mandatory life without parole for those under the age of 18 at the time of their crimes” announced in *Miller v. Alabama* to include discretionary life sentences as well. Virginia’s highest court has adopted a diametrically opposed interpretation of *Montgomery*. In its view, *Montgomery* did not extend *Miller* to include discretionary sentencing schemes but rather held only that the new rule of constitutional law announced in *Miller* applied retroactively to cases on collateral review. See *Jones v. Commonwealth*, 795 S.E.2d 705, 721, 723 (Va.), cert. denied, 138 S. Ct. 81 (2017). The Supreme Court of Virginia acknowledged that prohibiting discretionary life sentences for juvenile homicide offenders may be the next step in the Supreme Court’s Eighth Amendment jurisprudence, but it concluded that both *Montgomery* and *Miller* “addressed mandatory life sentences without possibility of parole.” The question presented is: Did the Fourth Circuit err in concluding—in direct conflict with Virginia’s highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

- C. **Prosecutor as Career *Batson* Offender.** *Flowers v. Mississippi*, 139 S. Ct. ____ (June 21, 2019). In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor, Doug Evans, represented the State in all six trials. In the initial three trials, Flowers was convicted, but the Mississippi Supreme Court reversed each conviction. In the first trial, Flowers was convicted, but the Mississippi Supreme Court reversed the conviction due to “numerous instances of prosecutorial misconduct.” *Flowers v. State*, 773 So. 2d 309, 327 (2000). In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror. The trial court seated the black juror. Flowers was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial. In the third trial, Flowers was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The court’s lead opinion stated: “The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.” *Flowers v. State*, 947 So. 2d 910, 935 (2007). The opinion further stated that the “State engaged in racially discriminatory practices during the jury selection process” and that the

“case evinces an effort by the State to exclude African-Americans from jury service.” The fourth and fifth trials of Flowers ended in mistrials due to hung juries. In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated *Batson* in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction. **The Supreme Court reversed** (7-2) in an opinion authored by Justice Kavanaugh. “Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. ... Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white jurors who were not struck by the State. We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not “motivated in substantial part by discriminatory intent.” *Foster v. Chatman*, 578 U. S. ___, ___ (2016). ... In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.” Justice Alito concurred due to the unique circumstances of this case. Justice Thomas dissented (joined by Gorsuch as to all but part IV, which is a critique of the *Batson* rule, its adoption, and Thomas’ belief that the rule will prevent Black defendants from using peremptory challenges to strike hostile white jurors).

- D. IAC: Failure to Appeal Following Plea Waiver.** *Garza v. Idaho*, 139 S. Ct 738 (Feb. 27, 2019). In a 6-3 decision authored by Justice Sotomayor, the Court held that the presumptive prejudice standard applies where counsel fails to appeal following a guilty plea in which the defendant waives the right to appeal. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court held that when an attorney’s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed “with no further showing from the defendant of the merits of his underlying claims.” This case asks whether that rule applies even

when the defendant has, in the course of pleading guilty, signed what is often called an “appeal waiver”—that is, an agreement forgoing certain, but not all, possible appellate claims. “We hold that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver.”

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10.

Fourth Circuit Decisions on Criminal Law and Procedure

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FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

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DISCUSSION OVERVIEW

Recent Fourth Circuit Decisions on Appellate Practice and Procedure

Ineffective Assistance of Counsel on Appeal

- *United States v. Allmendinger*, 894 F.3d 121 (4th Cir. 2018)
- *United States v. Carthorne (Carthorne II)*, 878 F.3d 458 (4th Cir. 2017)

Raising New Issues After Opening Brief vs. Abandonment

- *United States v. White*, 836 F.3d 437 (4th Cir. 2016)

Dismissing Appeals – Sua Sponte and on Appellee's Motion

- *United States v. Oliver*, 878 F.3d 120 (4th Cir. 2017)
- *United States v. Hyman*, 884 F.3d 496 (4th Cir. 2018)

Timeliness of Appeal After Successful § 2255

- *United States v. Chaney*, 911 F.3d 222 (4th Cir. 2018)

FOURTH CIRCUIT DECISIONS
CRIMINAL LAW AND PROCEDURE

Published Between April 1, 2018, and October 14, 2019

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FOURTH CIRCUIT DECISIONS ON CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This outline documents the published decisions of the Fourth Circuit over the past 18 months that address criminal law and procedure issues. 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, 919 F.3d 841 (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)

United States v. De Leon-Ramirez, 925 F.3d 177 (4th Cir. May 29, 2019) (Diaz, J.) (E.D. Va.) (statute of limitations on unlawful reentry offense was tolled under the fugitive tolling statute (18 U.S.C. § 3290), even though defendant was not charged with the offense until 10 years after the government learned of his illegal re-entry; the court reasoned that the fugitive tolling statute applied because the defendant concealed himself with the intent to avoid prosecution over the 10-year period)

United States v. Cortez, 930 F.3d 350 (4th Cir. July 17, 2019) (Harris, J.) (W.D. Va.) (rejecting defendant's claim under *Pereira v. Sessions* that conviction should be vacated because the notice to appear at his deportation hearing did not provide a date or time; notice to appear was not invalid because although it did not comply with certain regulatory criteria, unlike that in *Pereira*, there was

no statutory violation here; additionally, even if notice to appear was statutorily improper, it is not clear that *Pereira* applies to allow collateral attacks of deportation proceedings in illegal reentry cases)

United States v. Silva, 931 F.3d 330 (4th Cir. July 25, 2019) (Niemeyer, J.) (E.D. Va.) (under particular facts of the case, prior removal order from United States was not fundamentally unfair because defendant could not show prejudice from any due process violation; however, 8 U.S.C. § 1225(b)(1)(D) (which provides that in a § 1326 prosecution, a court shall not have jurisdiction to hear a challenge to certain prior removal orders) is unconstitutional; when a prior removal order is an element of a prosecution, a defendant must have the right to challenge that prior removal order)

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. § 249, Hate Crimes Act

United States v. Hill, 927 F.3d 188 (4th Cir. June 13, 2019) (Wynn, J.; Agee, J., dissenting) (E.D. Va.) (finding that the Hate Crimes Act (§ 249(a)(2)) prosecution of defendant who assaulted victim working at Amazon warehouse because he was gay affected commerce, and therefore, was justified under the Commerce Clause; Judge Agree dissented, reasoning, in part, that the root activity § 249(a)(2) regulated in this case—a bias-motivated punch—is not an inherently economic activity and therefore not within the scope of Congress' Commerce Clause authority)

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)

United States v. Rodriguez-Soriano, 931 F.3d 281 (4th Cir. July 24, 2019) (Gregory, J.) (E.D.Va.) (reversing conviction for straw purchaser under § 924(a)(1)(A) because the only evidence in the case that the defendant knew he was making a false statement to the gun seller was the defendant’s uncorroborated confession, which standing alone, cannot support a conviction)

United States v. Locke, 932 F.3d 196 (4th Cir. July 30, 2019) (Wilkinson, J.; Berger, D.J., dissenting) (E.D.Va.) (affirmative defense (under 18 U.S.C. § 921(a)(33)(B)(i)(II)(bb)), that defendant did not knowingly waive the right to jury trial on prior conviction, was not applicable to defendant’s charge for possessing a firearm after being convicted for a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)); under relevant Virginia domestic violence conviction, the defendant was entitled to a jury trial under Virginia’s two-tier trial court system because even though he was not entitled to jury trial in Virginia’s lower trial court, he was entitled to a jury trial in the higher trial court merely by taking the affirmative step of appealing to this second tier court from a conviction in the lower tier court; but defendant did not take this step; therefore, he was ineligible for the affirmative defense under § 921(a)(33)(B)(i)(II)(bb); West Virginia District Court Judge Irene Berger, sitting by designation, disagreed upon stating that Virginia court system (which does not provide the automatic right to jury trial in lower tier court for misdemeanor offenses carrying a potential sentence of twelve months of incarceration) unconstitutionally deprives defendants of their right to a jury trial)

United States v. Mathis, 932 F.3d 242 (4th Cir. July 31, 2019) (Keenan, J.) (W.D.Va.) (Hobbs Act robbery (18 U.S.C. § 1951) and witness tampering (18 U.S.C. § 1512(a)(1)) remain “crimes of violence” under the remaining § 924(c) force clause “crime of violence” definition; however, Virginia kidnapping is NOT a § 924(c) “crime of violence” because it can be accomplished by deception)

United States v. Smith, ___ F.3d ___, 2019 WL 4724052 (4th Cir. Sept. 27, 2019) (W.D. N.C.) (defendant’s guilty plea to prior North Carolina felony larceny offense, which was followed by a conditional-discharge probation, was not a predicate felony “conviction” for purposes of § 922(g)(1))

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)

United States v. Sutherland, 921 F.3d 421 (4th Cir. Apr. 19, 2019) (Wilkinson, J.) (W.D.N.C.) (rejecting defendant’s argument that government failed to prove nexus between his conduct (providing fraudulent documents to the prosecutor) and an “official proceeding” required under the federal obstruction statute; specifically, defendant argued that he was only attempting to influence the U.S. Attorney’s Office’s investigation of him, not the grand jury, but the court did not agree; the court found that the evidence was sufficient to prove a nexus between the defendant’s conduct and the grand jury proceeding because the defendant was aware that the grand jury was investigating him for filing false tax returns at time he provided the fraudulent documents to the prosecutor, and it was foreseeable that the prosecutor would serve as channel or conduit to the grand jury for presenting evidence to it)

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)

18 U.S.C. § 2252, Possession of Child Pornography

United States v. Courtade, 929 F.3d 186 (4th Cir. July 3, 2019) (Gregory, J.) (E.D. Va.) (video of minor stepdaughter showering, in which the defendant tricked and manipulated the minor into positions that made the film more sexually explicit, depicted “lascivious exhibition,” and thus was “sexually explicit conduct” under 28 U.S.C. § 2256(2)(A) as required under possession of child pornography statute; therefore, defendant was not actually innocent of the offense and § 2255 relief was denied)

21 U.S.C. § 846, Drug Conspiracy

United States v. Cannady, 924 F.3d 94 (4th Cir. May 8, 2019) (Floyd, J.) (D. Md.) (rejecting defendant’s argument that government charged him with one conspiracy but provided the jury with evidence of multiple unrelated conspiracies resulting in a fatal variance; fatal variance requires showing of actual prejudice, which in turn, requires appellant to prove that there are so many defendants and so many separate juries before the jury that the jury was likely to transfer evidence from one conspiracy to a defendant involved in an unrelated conspiracy; appellant did not make this showing of prejudice because the evidence at trial comported with the single conspiracy alleged in

the indictment; additionally, the district court did not abuse its discretion in failing to give a multiple conspiracy instruction because the evidence presented at trial described a single conspiracy with overlapping actors, methods, and goals; given the strong evidence favoring a single conspiracy, the court was unable to say that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction; therefore, court found no reversible error in district court's refusal to give instruction)

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 fiancée'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 fiancée's testimony demonstrated that encounter was voluntary and that officers had valid consent to enter home)

Exigent Circumstances

United States v. Curry, 937 F.3d 363 (4th Cir. Oct. 15, 2019) (Richardson, J.; Floyd, J., dissenting) (E.D.Va.) (stop and patdown of defendant (after hearing gunshots in neighborhood) without individualized suspicion that he possessed a gun was warranted under exigent circumstances exception because exigent circumstances exception was subset of the special needs exception; the seizure was valid here because (1) the public concerns were grave, (2) the limited seizure advanced the public concerns, and (3) the limited seizure only slightly interfered with individual liberty; Judge

Floyd dissented upon reasoning that the majority conflated exigent circumstances with the special needs exception, even though the two doctrines are animated by very different concerns and applied in different contexts)

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)

United States v. Moody, 931 F.3d 366 (4th Cir. July 29, 2019) (Richardson, J.) (E.D. Va.) (affirming district court's refusal to hold *Franks* hearing, agreeing that defendant failed to make threshold showing that affidavit supporting search warrant included intentional falsity or reckless disregard for the truth; although ambiguous statement in search warrant affidavit could be read as stating that defendant was present at time of drug sale (which was not, in fact, true), a lack of precision in the affidavit did not demonstrate falsity. And even assuming that the affidavit was false, defendant failed to show that the falsity was intentional or a reckless disregard for the truth. And finally, there was sufficient other evidence noted in the affidavit that made the defendant's presence at the drug sale immaterial)

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)

United States v. Bosyk, 933 F.3d 319 (4th Cir. Aug. 1, 2019) (Diaz, J.; Wynn J., dissenting) (E.D. Va.) (probable cause existed in affidavit underlying warrant for search of child pornography in defendant’s computer; Bosyk and his amicus (the Electronic Frontier Foundation, or “EFF”) argued that the facts recounted in the affidavit didn’t give the government probable cause to search Bosyk’s house for evidence of child pornography; they argued that the government obtained its warrant based on a “single click” of a URL, which, they said, could not support a search of somebody’s home; but the Court disagreed upon concluding that the facts in the affidavit supported a reasonable inference that someone using Bosyk’s IP address clicked the link knowing that it contained child pornography,

which in turn made it fairly probable that criminal evidence would have been found at Bosyk's address; Judge Wynn dissented upon concluding "the majority opinion displays a troubling incomprehension of the technology at issue in this matter")

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, 919 F.3d 841 (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)

United States v. Riley, 920 F.3d 200 (4th Cir. Apr. 3, 2019) (Traxler, J.) (W.D.Va.) (supervised release proceedings are not “criminal” proceedings, so in such proceedings, the 5th Amendment does not bar the use of incriminating statements made without *Miranda* warnings)

United States v. Bernard, 927 F.3d 799 (4th Cir. June 24, 2019) (Gregory J.) (W.D.N.C.) (police officer’s statement to the defendant encouraging him to be forthcoming with information was functional equivalent of interrogation under *Miranda* because it was reasonably likely to elicit response from the defendant; that this statement was made in the course of a friendly conversation with the defendant did not change this result; friendly conversation can be just as likely to elicit a response from a defendant as a threatening conversation; therefore, defendant’s *Miranda* rights were triggered, and the police officer’s failure to advise the defendant of those rights before he confessed violated his right against self incrimination; nonetheless, the error was harmless due to the wealth of physical evidence against the defendant)

United States v. Oloyede, 933 F.3d 302 (4th Cir. July 31, 2019) (Niemeyer, J.) (D. Md.) (a person in custody who has not been given *Miranda* warnings was not compelled to incriminate herself in violation of the Fifth Amendment when she voluntarily, pursuant to the officer’s request, used her passcode to open her cell phone but did not disclose the passcode; no Fifth Amendment violation occurred because (1) unlocking the cell phone was not a “testimonial communication” and (2) even if testimonial, it was voluntary, so no need to suppress; also, district court erred in admitting into evidence a series of charts detailing certain bank deposits made by the defendants; the charts failed to comport with Rule of Evidence 1006 because they were incomplete and implied that all the bank transactions and activity were fraudulent; but the error was harmless)

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

Confrontation

United States v. Smith, 919 F.3d 825 (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)

Right to Compel Witnesses

United States v. Galecki, 932 F.3d 176 (4th Cir. July 29, 2019) (Agee, J.) (E.D. Va.) (district court erred in failing to compel a DEA chemist to testify on behalf of defendants accused of conspiracy to distribute controlled substance analogues – in this case, spice with chemical additives XLR-11 and UR-144; the DEA agent would have testified that the chemical additives in spice were not substantially similar to the controlled chemical in marijuana; DEA chemist's testimony was qualitatively different from other defense witnesses because (1) the DEA chemist was not paid outside his DEA employment to form his opinion, and thus was not a hired gun, (2) the DEA chemist could have rebutted the testimony of the government's DEA expert with his own knowledge of DEA's processes and analyses, and (3) his testimony was material to chemical structure of the alleged analog, considering how much jury struggled with the issue)

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 ISSUES¹

Evidence

Attorney-Client Privilege

United States v. Farrell, 921 F.3d 116 (4th Cir. Apr. 5, 2019) (King, J.) (D. Md.) (finding that district court did not err in admitting conversations that the defendant (who was an attorney) had with two drug dealers with whom he was involved in drug trafficking; there was no attorney-client relationship between the defendant and the drug dealers; therefore, the attorney-client privilege did not apply; in any event, even if there was such relationship, that still does not help the defendant because the privilege belongs to the client, not the lawyer, so he cannot invoke it if his client does not want the statements suppressed)

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, 919 F.3d 825 (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, 919 F.3d 825 (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

Court's Acceptance of Guilty Plea

United States v. Walker, 922 F.3d 239 (4th Cir. Apr. 25, 2019) (King, J.) (S.D.W.Va.) (the district court did not abuse its discretion by rejecting plea agreement to one drug count when defendant was originally charged with multiple drug charges; the court appropriately centered its analysis on whether the particular plea agreement between Walker and the United States Attorney was too lenient and on whether it served the public interest; additionally, the government on appeal no longer vouched for the plea and did not attempt to defend it on appeal, making the Fourth Circuit's decision easier in this case)

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; the Court granted en banc rehearing on June 10, 2019, and scheduled oral argument for September 19, 2019)

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)

United States v. Drummond, 925 F.3d 681 (4th Cir. June 5, 2019) (Traxler, J.; Floyd, J., dissenting on ACCA issue) (D.S.C.) (South Carolina offense for crime of domestic violence is a “violent felony” under the ACCA force clause because it requires physical harm or injury, which constitutes violent physical force; Judge Floyd dissented because the South Carolina statute contains similar language to South Carolina common law assault, which can be committed without violent physical force)

United States v. Battle, 927 F.3d 160 (4th Cir. June 11, 2019) (Quattlebaum, J.) (D. Md.) (Maryland assault with intent to murder is a “violent felony” under the ACCA force clause; although Court did not dispute the defendant’s argument that an offense which can be committed by act of omission (i.e., starvation) is not a “violent felony” under the ACCA force clause; the Court found that no realistic probability existed that the Maryland offense could be committed by an act of omission because the defendant could not point to a single case in which assault with intent to murder had been prosecuted for an act of omission)

United States v. Furlow, 928 F.3d 311 (4th Cir. June 27, 2019) (King, J.) (D.S.C.) (South Carolina drug trafficking conviction (S.C. Code Ann. § 44-53-375(B)) has alternative elements – some which do not qualify as a “serious drug offense” under the ACCA and the career offender provision (purchasing drugs) and some which do (distribution of drugs); thus, the modified categorical approach applies; here, the defendant was convicted for distribution of drugs; therefore, the prior conviction was a “serious drug offense;” additionally, the district court did not plainly err in finding that Georgia arson is a generic arson that qualifies as an ACCA “violent felony” and a career offender “crime of violence;” although defendant argued that Georgia arson does not have a mens rea of malicousness required under the generic definition, no clear law exists as to what mens rea is required under the generic arson definition)

United States v. Dinkins, 928 F.3d 349 (4th Cir. July 1, 2019) (Keenan, J.) (W.D.N.C.) (North Carolina robbery is a “violent felony” under the ACCA force clause post-*Stokeling* because it requires the offender to compel the victim to part with the property and overcome his resistance; also accessory before the fact of armed robbery is a “violent felony” under force clause because under North Carolina law, a person convicted as an accessory is effectively convicted of the underlying offense (here, armed robbery, which has an element of violent physical force); no requirement exists under the ACCA force clause that the defendant personally use force or threaten force; rather, it is enough that the crime of which the defendant was convicted have an element the use or threatened use of force)

United States v. Cornette, 932 F.3d 204 (4th Cir. July 30, 2019) (Floyd, J.) (W.D.N.C.) (defendant’s 1979 Georgia burglary conviction was not generic burglary under the ACCA “serious violent felony” definition because at the time of conviction the offense criminalized unlawful entry into any vehicle; although under current Georgia law, the offense constitutes an ACCA “serious violent felony,” the operative question is whether the defendant’s conviction at the time he obtained it qualified as an ACCA predicate; also, defendant’s appeal waiver could not be enforced because his ACCA sentence was beyond the statutory maximum, and therefore, illegal)

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 GuidelinesU.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. § 3C1.2, Reckless Endangerment During Flight

United States v. Dennings, 922 F.3d 232 (4th Cir. Apr. 24, 2019) (Agee, J.) (E.D.N.C.) (sentencing enhancement for creating reckless endangerment during flight upheld where defendant, who seemed to have his hand on a gun in his pocket, ran away from a police officer; while mere flight is not enough, not much more is needed to trigger the enhancement. Seemingly having one's hand on a gun while running created enough of a risk that the gun would go off or that the officer would pull his gun to warrant the enhancement)

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, 919 F.3d 252 (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 because it can be committed negligently)

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 because it can be committed negligently)

United States v. Norman, 935 F.3d 232 (4th Cir. Aug. 15, 2019) (Motz, J.) (D.S.C.) (a federal conspiracy conviction under 21 U.S.C. § 846 is not a “controlled substance offense” under § 4B1.2(b) because it does not have an overt act element, and therefore, is not generic as required under the guidelines)

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 sentence 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)

United States v. Thompson, 924 F.3d 122 (4th Cir. May 10, 2019) (Harris, J.) (E.D.V.A.) (supervised release was tolled on unlawful reentry offense when defendant reentered the United States with six months left on his supervised release term and remained hidden under an alias for several years; the court relied on the fugitive tolling doctrine, but it noted that fugitive tolling ends when the federal government is capable of bringing the defendant to justice)

United States v. Dennison, 925 F.3d 185 (4th Cir. May 29, 2019; amended Aug. 21, 2019) (Gregory, J.) (D.S.C.) (defendant’s supervised release was erroneously revoked based on the distribution of crack cocaine; the error was plain because the evidence showed that the defendant had powder – not crack cocaine. However, the revocation grade for powder and crack was the same; therefore, the defendant could not show prejudice)

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)

Upward Variance

United States v. McCall, 934 F.3d 380 (4th Cir. Aug. 12, 2019) (Richardson, J.) (S.D.W. Va.) (district court erred in varying upward in methamphetamine distribution case; district court noted that the defendant was from Detroit and imposed an upward variance based on the fact that the offense involved the interstate transport of drugs; in so doing, the district court wrongly increased the defendant's punishment for being out of town, which is an impermissible sentencing factor).

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)

United States v. Winbush, 922 F.3d 227 (4th Cir. Apr. 23, 2019) (Gregory, J.) (S.D.W. Va.) (lawyer's ineffectiveness for failing to challenge one of his career offender predicates at the original sentencing was not harmless even though the defendant had two other valid career offender predicates because one of those was not designated in the original PSR as a possible career offender predicate and the government did not rely on it at the original sentencing; therefore, pursuant to *Hodge*, the district court could not rely on it as a substitute predicate to deny a § 2255 petition)

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)

United States v. Murillo, 927 F.3d 808 (4th Cir. June 24, 2019) (Thacker, J., King, J. dissenting) (E.D.Va.) (defense attorney's failure to advise defendant (who was lawful permanent resident of the United States) that his guilty plea subjected him to mandatory deportation was ineffective; therefore, defendant should be allowed to withdraw his guilty plea despite language in the plea agreement discussing deportation; Judge King dissented, arguing that the defendant was properly advised by the court and that he was attempting to undermine his plea proceedings)

United States v. Charles, II, 932 F.3d 153 (4th Cir. July 26, 2019) (Niemeyer, J.) (W.D.N.C.) (even though defendant had a valid challenge to his ACCA sentence, because defendant has been sentenced to 360 months on a drug count and a concurrent 360 months on a § 922(g) ACCA count, district court properly exercised its discretion in declining to review the ACCA challenge under the concurrent case doctrine because the defendant would still have the 360-month sentence on the drug count; it was too speculative to conclude that vacatur of ACCA sentence would have had any impact on the concurrent 360-month sentence on the drug count; nonetheless, remand was warranted for the district court to determine whether the defendant was eligible for First Step Act relief)

Federal Rule of Criminal Procedure 36

United States v. Vanderhorst, 927 F.3d 824 (4th Cir. June 25, 2019) (Wynn, J.; Diaz, J., dissenting in part) (E.D.V.A.) (Rule 36 was appropriate vehicle to correct clerical error caused by county records that miscoded prior conviction, which in turn, qualified the prior conviction as a career offender predicate at sentencing; however, error was harmless because defendant remained a career offender even with the correction; Judge Diaz dissented in part upon arguing that the majority overreached by deciding a very important issue that did not have to be resolved due to the harmlessness of the error)

XI. IMMIGRATION

Aggravated Felony

Thompson v. Barr, 922 F.3d 528 (4th Cir. Apr. 26, 2019) (Wilkinson, J.) (BIA) (Virginia offense of taking custodial indecent liberties with a child is a generic “sexual abuse of a minor” satisfying the aggravated felony definition for deportation purposes; a generic “sexual abuse of a minor” has three requirements: (1) the offense targets conduct directed toward minors; (2) the offense requires a mental element focused on sexual gratification; and (3) the offense requires physical or nonphysical misuse or maltreatment)

11.

Budgeting, Use of Service Providers, and Other Developing CJA Matters

Larry Dash, Fourth Circuit CJA Case Budgeting Attorney

BUDGETING, USE OF SERVICE PROVIDERS, AND OTHER DEVELOPING CJA MATTERS

Fourth Circuit Criminal Appellate Practice Seminar

October 28, 2019

Presented By

Larry Dash, 4th Circuit Case Budgeting Attorney



WHAT WE WILL COVER TODAY

Budget Requirements

Cardone Recommendations that Pertain
to Budgets/Service Providers

Miscellaneous Issues

WHEN TO BUDGET

**When You Anticipate Your Case Will
Exceed 300 Hours of Attorney Time**

**When You Anticipate Your Case Will
Exceed \$44,400**

HOW TO BUDGET

Currently Using a Word Based Document

Call me at 804-916-2177 or email me at

Larry_Dash@ca4.uscourts.gov

for an updated copy of the form

HOW TO SUBMIT YOUR BUDGET

Create a BUDGETAUTH in eVoucher

**GUIDE TO JUDICIARY POLICY
VOLUME 7, CHAPTER 3 & 6
(SEE 18 USC § 3006A(E))
(SEE 18 USC § 3599(G)(2))**

\$900 maximum, without prior approval
(all SP's combined)

➤ \$900, Must create and submit an AUTH in eVoucher

INTERIM RECOMMENDATION 8

VOUCHER CUTS LIMITED TO

- Mathematical Errors
- Hours Billed but Not Compensable
- Hours Billed but Not Undertaken or Completed
- Hours Billed are CLEARLY in Excess of What Was Required to Complete the Task

MISCELLANEOUS MATTERS

Vague Entries (Discovery Review, Research, etc.)

Compensation Maximums (Use of CJA 27)

Use of Associates

Administrative Work

Travel Time

Copy Costs/PACER Fees, etc.

Need to Claim Matters on CJA 21/31

Timely Submission of Vouchers

CALL FOR ASSISTANCE

Larry Dash

804-916-2177

Larry_Dash@ca4.uscourts.gov

PROPOSED NON-CAPITAL APPEAL BUDGET

Appeal No:

Counsel Name(s):

Date:

| ATTORNEY TIME | | | Hours |
|---|---------|----------|---------------|
| In-Court Hearings (CJA 20, Line 15g) | | | |
| Interviews & Conferences (Line 16a) <i>include corresponding w/client</i> | | | |
| Witness Interviews (Line 16a) | | | |
| Consultation w/Expert Counsel (Line 16e) | | | |
| Obtaining & Reviewing the Court Record (Line 16b) <i>incl. review prior pldgs</i> | | | |
| Obtaining & Reviewing Documents & Evidence (Line 16e) | | | |
| Legal Research & Writing - Draft Miscellaneous Pleadings (Line 16c) | | | |
| Legal Research & Writing - Principal Brief (Line 16c) | | | |
| Legal Research & Writing - Reply Brief (Line 16c) | | | |
| Legal Research & Writing - Petition for Panel Rehearing and/or En Banc (16c) | | | |
| Legal Research & Writing - Petition for Certiorari (Line 16c) | | | |
| Travel to confer with client (Line 16d) | | | |
| Travel to confer with expert counsel (Line 16d) | | | |
| Travel for preparation & oral argument (Line 16d) | | | |
| Travel: Other :(Line 16d) <i>Describe:</i> | | | |
| Other: Case Management Conference/Preparation (Line 16e) | | | |
| Other: Oral Argument Preparation (Line 16e) | | | |
| Other: (Line 16e) <i>Describe:</i> | | | |
| TOTAL HOURS | | | 0.0 |
| EXPENSES | | | Dollars |
| Travel (incl. lodging, mileage if driving, parking, meals, etc.) (CJA 20, Line17) | | | |
| In-House Copying (Line 18) | | | |
| Commercial Copying (Line 18) | | | |
| Postage & Delivery (Line 18) | | | |
| Computer Assisted Legal Research (CALR) (Line 18) | | | |
| Other: <i>Describe:</i> | | | |
| Experts or Other Services: (CJA21 or Line 18, CJA20) | Rate/hr | # of Hrs | Hrs x Rate |
| Paralegal/Legal Assistant: <i>Describe tasks:</i> | | | \$0.00 |
| Associate: <i>Describe tasks:</i> | | | \$0.00 |
| Other: <i>Describe tasks:</i> | | | \$0.00 |
| TOTAL EXPENSES | | | \$0.00 |