2014 FOURTH CIRCUIT CASELAW

A regularly updated, topically organized compilation of case summaries circulated to members of the Office of the Federal Defender for the District of Maryland and the District of Maryland CJA Panel. This document is not inclusive of all decisions issued by the Fourth Circuit Case and the summaries do not necessarily discuss the entire case; they simply highlight issues of interest or importance. Some cases may appear multiple times due to the topical organization. Within each section, cases appear roughly in chronological order. A chronological index of cases appears at the end of the document.

Cases Through: February 28, 2014

Compiled by,

Joanna Silver, Staff Attorney
Office of the Federal Defender, District of Maryland
Tower II, 9th Floor
100 South Charles Street
Baltimore, Maryland 21201
(410) 962-3962
(410) 962-0872 (facsimile)
joanna_silver@fd.org

PRETRIAL AND TRIAL

FOURTH AMENDMENT

United States v. Green, 740 F.3d 275
January 17, 2014, Shedd, Gregory, Keenan
(WDVA Conrad)
The 4th Cir. held that the scope and duration of this traffic stop -- lasting 14 mins from the time of the stop until a drug dog alerted -- was reasonable given the facts of the case. Approximately 3 mins after the officer pulled the appellant out of his car to run his information and initiate the ticketing process for his illegally tinted windows and obscured license plate (the bases for the stop), the officer learned that the appellant had a protective order issued against him. The court agreed that this justified the officer's decision to prolong the stop to get a criminal history check "for officer safety." It was while the officer was waiting for a response that the dog sniff was conducted. The court held that the officer's "brief questioning about matters unrelated to the traffic violations," during the 14 mins did not run afoul of the 4th Amendment, and that the officer's observations of the appellant's conduct during the stop (heavy breathing...) also justified prolonging the stop for a criminal history check in the interest of officer safety. Finally, the 4th Cir. agreed that the alert of the drug dog justified a search of the car. While the dog's success rate in the field was only 25%, the court agreed that it should be treated as closer to 43% when factoring in those cases in which there was independent evidence that drugs had recently been in the car at the time the dog alerted. This, combined with the dog's training and certification was sufficient.

United States v. Williams, 740 F.3d 308
January 23, 2014,Wynn, Niemeyer, Flanagan, sitting by designation
(DMD Messitte)
The 4th Cir. rejected the appellant's argument that the firearm found in his car should have been suppressed because the traffic offense for which he was stopped and cited (blocking traffic) did not apply to the residential road on which he had stopped his car. The court concluded that the stop was lawful because another closely related traffic law (stopping in the middle of the road when it would be safe to stop on the side) did bar the conduct for which Defendant was cited. The court relied on a 6th Cir. case (*United States v. Hughes*, 606 F.3d 311, 316 (6th Cir. 2010)) for the proposition that a police officer's inability to identify the correct code section at the time of a stop does not undermine valid probable cause or reasonable suspicion that a driver violated a traffic law. Specifically, the court quoted the following with approval: "a police officer must know or reasonably believe that the driver of the car is doing something that represents a violation of the law. This is not to say that officers must be able to, at the time of a stop, cite chapter and verse—or title and section—of a particular statute or municipal code in order to render the stop permissible." In a separate ruling, and with little analysis, the court upheld the district court's exclusion at trial of evidence of prior police misconduct by the officers in the case.

MISCELLANEOUS CRIMINAL PROCEDURE

United States v. Shepperson, 739 F.3d 176
January 8, 2014, Agee, Motz, Anderson, sitting by designation
(DMD Williams)
In this case, the 4th Cir. rejected the appellant's argument that certain rights afforded defendants in capital cases should have been afforded him given that he was facing death-eligible charges, despite the fact that the government did not seek the death penalty. First, the court rejected his claim that he should have been afforded the assistance of two counsel, pursuant to 18 U.S.C. § 3005. The 4th Cir. noted that while he could have had two counsel despite the gov's decision not to seek the death penalty, both Sec. 3005 and caselaw interpreting it require said appointment only upon a defendant's request. Here, the defendant had not requested 2 counsel, so under a plain error SOR, the court held that the district court's failure to raise this issue itself, even in the face of the appellant's obvious displeasure with his one attorney, was not legal error. Second, the 4th Cir. rejected the appellant's argument that the government should have furnished him with a list of witnesses three days before commencement of trial, pursuant to 18 U.S.C. § 3432, holding that in this area, the law is much less clear as to whether this requirement applies when the government does not actually seek the death penalty. Given this lack of clarity, and the plain error SOR, the court refused to find plain error.

United States v. Beckton, 740 F.3d 303
January 21, 2014, Motz, Keenan, Thacker
(EDNC Britt)
The 4th Cir. held that the DC did not abuse its discretion by refusing to allow the appellant, who appeared pro se at trial, to testify in narrative form. The court found it "eminently reasonable," for the DC to require a question/answer format so that the government would have the opportunity to object to improper questions, particularly given the appellant's attempts to introduce improper evidence throughout the trial. The court held further that it was reasonable for the DC to refuse to permit the appellant's standby counsel to ask the questions for him, given that the appellant continued to refuse to allow standby counsel to actually represent him. The court held that this refusal did not force the appellant to choose between his right to testify on his own behalf and his right to represent himself. Finally, in a footnote, the court noted that the difficulty of a self-question/answer format was one that the appellant was competent to take on, give his educational background.

United States v. Mosteller, 741 F.3d 503
February 4, 2014, Keenan, Motz, Thacker
(DSC Wooten)
The 4th Cir. held in this case that the district court erred in requiring that the appellant agree to waive her rights under the Speedy Trial Act as a condition of granting a mistrial in her case, relying on Zedner v. United States, 547 U.S. 489, 497 (2006) for the proposition that a defendant may not waive application of the Act for a violation that might occur in the future, but has not yet occurred. However, the court held that under the plain language of the Act (the failure to file a motion to dismiss before trial “shall” constitute a “waiver of the right to dismissal” under the Act. 18 U.S.C. § 3162(a)(2)) appellant's failure to make a timely motion to dismiss her

indictment before the start of her new trial constitutes a waiver of her right to assert a violation of the Act, and the court refused to consider the issue, even under a plain error standard of review. See also, Appellate Procedure.

United States v. Johnson, 2014 WL 464230
February, 6, 2014
(EDNC Dever)
This unpublished opinion contains an interesting, and rarely seen discussion of whether a sentencing court should grant a subpoena for incarcerated witnesses to testify on a defendant's behalf at sentencing. Here, the court upheld the denial of certain subpoenas, while vacating the sentence and remanding because the district court denied two other subpoenas. Specifically, the court focused on the proximity of the place of incarceration of the witnesses, the specificity with which the defendant had proffered their expected testimony, and the relevance of that testimony to contested guideline issues.

EVIDENCE

United States v. Zayyad, 741 F.3d 452
January 24, 2014, Agee
(WDNC Conrad)
In this counterfeit drug case, the 4th Cir. held that the DC's limit on cross-examination about the "gray market" for drugs was not an abuse of discretion. The court reasoned that the DC did not abuse its discretion because the defendant never actually introduced any evidence - through himself or others, that he believed the drugs came from the gray market. Therefore, any cross-examination would have been irrelevant. The court further explained that, because the appellant was able to attack the government's witnesses on other grounds and could have raised his preferred argument in his own case, the district court acted well within its discretion to limit cross-examination on the particular theory at issue. See also, Appellate Procedure, Evidence

United States v. Keita, --- F.3d ---- 2014 WL 464229
February 6, 2014, Wynn, Niemeyer, Flannigan, sitting by designation
(DMD Williams)
In this credit card fraud case, the primary issue involved the admission of credit card records belonging to non-testifying/uncharged alleged victims of the appellant's offense. The court began by holding that objecting to the admission of records solely on hearsay grounds was not sufficient to preserve a confrontation clause argument. Thus, the court reviewed the confrontation clause challenge to the records under a plain error SOR. The court then held that records of the credit card company related to fraud detection were admissible under the business records exception to the hearsay rule and did not violate the confrontation clause. That some of the records may have contained statements by the alleged victims saying that they had not authorized a given transaction did not make the records testimonial. Also under a plain error SOR, the court rejected the appellant's argument that the records were not relevant and were overly prejudicial. While the court agreed that they might not be relevant to the charged aggravated ID theft counts, it held that they could be relevant to proving the intent to defraud element of the access device

fraud counts that the appellant faced, since his intent in engaging in the charged acts could be proven by his conduct in the uncharged acts. Finally, the court held that, given all the other evidence against the defendant, these records were not overly prejudicial.

United States v. Calderon, 2014 WL 486664
February 7, 2014
(DSC Childs)
In this drug conspiracy case, the 4th Cir. affirmed the DC's decision to prohibit the appellant from cross-examining cooperating witnesses about the specific lengths of the sentences they were to receive for their cooperation. The court cited an earlier decision in which it held that the threat of jury nullification that could result if the jury assumed the defendant faced the same lengthy sentences as the witnesses "trumped the minor marginal value added by permitting inquiry into specific sentencing ranges." Given this, the court held that the DC did not abuse its discretion by permitting the appellant to cross-examine each of the cooperating witnesses about their expected prison sentences using "adjectives" but not "numbers." The court also held that if it was wrong, any error was harmless as the DC allowed the appellant to cross-examine the witnesses as to their biases in a variety of ways, and several of the witnesses ended up sharing the lengths of their sentences anyway. See also, Substantive Offenses/Narcotics The court next held that even though the gov charged the appellant with conspiracy to distribute marijuana, cocaine, and cocaine base, it did not need to prove his personal connection with each of those substances beyond a reasonable doubt; instead, proving his part in advancing the general conspiracy (which included the distribution of all three substances) plainly suffices to sustain his conviction. For the same reason, the court rejected an argument that there was actually a separate conspiracy involving just crack cocaine, that the appellant was not a part of.

SUBSTANTIVE OFFENSES

FIREARMS

United States v. Ruiz, 2014 WL 92448
January 10, 2014, Shedd, Duncan, Davis
(DMD Titus)
The 4th Cir. holds in this case that it was not plain error to have failed to instruct the jury that the defendant needed to know that the machine gun he possessed was a machine gun. While the court acknowledged that the law is clear re: the jury's obligation to find that a defendant possessed a machine gun in order to convict him under 18 U.S.C. § 924(c)(1)(B)(ii) , it held that the law is much less clear regarding the mens rea requirement. J. Davis dissented, arguing that he believes knowledge is an element of the offense and that because it is, the failure of the jury to have expressly found knowing possession of a machine gun was plain error.

United States v. Bishop, 740 F.3d 927
January 28, 2014, Wilkinson, Diaz, Thacker
(EDVA Hilton)
The 4th Cir. upheld the appellant's convictions under the Arms Export Control Act (AECA), 22 U.S.C. § 2778, for attempting to export small-arms ammunition to Jordan without a license. First, the court agreed with the government's argument that it was enough that the appellant knew exporting the ammunition without a license was generally illegal, the government did not need to prove that he knew that the specific ammunition at issue was prohibited under AECA. This ruling comprised the bulk of the opinion, and the court followed it with a brief discussion holding that there was sufficient evidence in this case to conclude that the appellant knew his actions were illegal rather than merely violations of State Department policy.

HOBBS ACT ROBBERY

United States v. Strayhorn, --- F.3d ---- 2014 WL 718319
February 26, 2014, Wynn, Gregory, Davis
(MDNC Eagles)
Rare ruling that there was insufficient evidence to support the robbery conviction in this case. The sufficiency discussion is truly remarkable, and would likely have gone the other way with another panel. The primary holding is that where incriminating evidence, here a fingerprint on a roll of duct tape, is found on a "readily movable object," and thus could have been placed on that object at a time other than during the commission of the offense, "the government must marshal sufficient additional incriminating evidence so as to allow a rational juror to find guilt beyond a reasonable doubt." The court then found that the other evidence offered was not sufficient. This included a gun stolen from the robbery that was found in a car appellant was driving two months after the robbery. Here, the court held that appellant was not actually in "unexplained possession of a recently stolen object," because the passage of time meant appellant was not in possession of something that was "recently stolen," and that there was evidence that he had just recently been given the firearm to commit a different, upcoming robbery. Finally, the court held that the jury could not consider his planned participation in the second robbery as evidence of his participation in the first, as it was simply propensity evidence.

NARCOTICS

United States v. Zayyad, 741 F.3d 452
January 24, 2014, Agee
(WDNC Conrad)
The 4th Cir. ruled that there was sufficient evidence to prove that the appellant knew the counterfeit drugs he sold were counterfeit and that the district court did not abuse its discretion in prohibiting cross examination about the "gray" drug market -- genuine drugs manufactured for much less money abroad and then illegally imported into the United States. The court first made an interesting preservation ruling: holding that D probably failed to preserve his right to argue that the limit on cross-examination prevented him from arguing that he didn't know the drugs

were counterfeit, because at trial he argued that the limit on cross-examination prevented him from arguing that the drugs were not, in fact, counterfeit -- two different arguments. However, the court did not ultimately decide the correct SOR because it held that D's argument failed even under an abuse of discretion SOR. The court reasoned that the DC did not abuse its discretion because the defendant never actually introduced any evidence - through himself or others, that he believed the drugs came from the gray market. Therefore, any cross-examination would have been irrelevant. The court further explained that, because the appellant was able to attack the government's witnesses on other grounds and could have raised his preferred argument in his own case, the district court acted well within its discretion to limit cross-examination on the particular theory at issue. See also, Appellate Procedure, Evidence.

United States v. Calderon, 2014 WL 486664
February 7, 2014
(DSC Childs)
In this drug conspiracy case, the 4th Cir. held that even though the gov charged the appellant with conspiracy to distribute marijuana, cocaine, and cocaine base, it did not need to prove his personal connection with each of those substances beyond a reasonable doubt; instead, proving his part in advancing the general conspiracy (which included the distribution of all three substances) plainly suffices to sustain his conviction. For the same reason, the court rejected an argument that there was actually a separate conspiracy involving just crack cocaine, that the appellant was not a part of. See also, Evidence.

SEX OFFENSES/CP/SORNA

United States v. Bridges, 741 F.3d 464
January 27, 2014, Thacker, Wilkinson, Diaz
(WDVA Jones)
The 4th Cir. held in this case that the appellant's plea in a Florida state court of *nolo contendere* to attempted sexual battery, in which adjudication was withheld, qualified as a conviction under SORNA. As a result of the plea, the state court directed the appellant to pay court costs and serve two years of probation. Appellant also received credit for three days served in jail and was required to register as a sex offender under state law. The 4th Cir. began by noting the force of law of the SMART guidelines (The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008)), which state that "an adult sex offender is 'convicted' for SORNA purposes if the sex offender remains subject to penal consequences based on the conviction, however it may be styled." The appellant conceded that probation was a "penal consequence," under the guidelines, and the 4th Cir. held that the state's decision to "withhold adjudication," did not alter the effect of the imposition of this penal consequence. In so holding, the court relied on the "however it may be styled" language of the SMART guideline, as well as the fact that the 8th and 11th circuits have both held, in different contexts, that a Florida *nolo contendere* plea with adjudication withheld constitutes a "conviction" under federal law.

United States v. Washington,--- F.3d ---- 2014 WL 783740
February 28, 2014, Diaz, Traxler, Floyd
(EDVA Gibney)
The 4th Cir. holds that 18 U.S.C. § 2423(a), which prohibits the interstate transportation of a minor with the intent that the minor engage in prostitution or
other criminal sexual activity, does not require proof that the defendant knew the victim was a minor. In so holding, the court explained that this rule, which was originally announced in United States v. Jones, 471 F.3d 535, 541 (4th Cir. 2006), was not altered by the SC's holding in Flores-Figueroa v. United States, 556 U.S. 646 (2009), which requires proof that the defendant knew the false id he possessed belonged to another, real person, in order to be convicted of aggravated id theft. The court further explained that the "special context" of crimes involving minor victims rebuts the general presumption that a specified mens rea (here, "knowingly,") applies to all elements of the offense.

TERRORISM-RELATED OFFENSES

United States v. Hassan, --- F.3d ---- 2014 WL 406768
February 4, 2014, King, Wilkinson, Wilson, sitting by designation
(EDNC Flanagan)
The appellants in this case were convicted of various crimes related to terrorism and support of terrorist organizations. In a very long and detailed opinion, the 4th Cir. affirmed all of their convictions and sentences. The court engaged in a lengthy discussion rejecting the appellants' argument that the DC unlawfully limited their ability to argue that language used by them in support of violent jihad was protected by the First Amendment. In so holding, the court focused on the fact that the crimes with which the appellants were convicted (providing, and conspiring to provide, material support for terrorism, see 18 U.S.C. § 2339A; conspiring to murder, kidnap, or maim outside the United States, 18 USC § 956(a); and conspiring to kill a federal officer or employee, 18 USC § 1117) often involve speech, and that their convictions rested not only on their agreement to join one another in a common terrorist scheme, but also on a series of calculated overt acts in furtherance of that scheme. In separate rulings, the court held that the DC did not abuse its discretion in admitting expert testimony re: "Islamic extremism;" that certain Facebook pages and YouTube videos were self-authenticating under Federal Rule of Evidence 902(11), and thus were admissible as business records; that opinions of lay witnesses as to the meaning of certain statements the appellants made to them were admissible under Rule 701; that evidence seized pursuant to a FISA (Foreign Intelligent Surveillance Act) application was properly introduced because there was probable cause to believe the target was an agent of a foreign power when the FISA orders were issued; and that the court made sufficient findings to apply the "terrorism enhancement" under USSG § 3A1.4 for all of the appellants. The court also engaged in a detailed discussion of the sufficiency of the evidence against all appellants, finding that it was sufficient. Finally, the court took the opportunity to praise "the societal utility of conspiracy prosecutions," for the ability it gave the government in this case to stop the appellants before their actions, "could escalate to visit grievous harm upon the government, other countries, or innocent civilians."

SENTENCING

PROCEDURAL AND SUBSTANTIVE REASONABLENESS

United States v. Chaimowitz, 2014 WL 448443.
February 5,2014
(EDNC Boyle)
The 4th Cir. held that the sentence in this supervised release revocation hearing was procedurally unreasonable. It's a nice little opinion in that it refuses to credit the government's "post hoc explanation of the court's sentence, which expands significantly on the court's statements during the sentencing hearing and draws conclusions not clearly evident from comments the court actually made." It acknowledges that the court provided some explanation for its sentence, but found it to be insufficient given the detailed nature of the defendant's arguments and the court's "demonstrated hostility" to the defendant's allocution and his refusal to admit one of the violations.

United States v. Pegram, 2014 WL 572348
February 14, 2014
(EDVA Payne)
This little unpublished opinion, issued in response to an Anders brief, is a reminder that procedural reasonableness is still required in supervised release revocations. The 4th Cir. vacated and remanded because there was no evidence in the record that the DC considered the Ch. 7 sentencing range; there was no record of a sentencing worksheet, no mention of the worksheet on the record, or discussion of the sentencing range at the hearing.

United States v. Boccone, 2014 WL 643016
February 20, 2014, Flanagan, sitting by designation, Niemeyer, Wynn
(EDVA Hilton)
This is a long opinion in an unlawful distribution of narcotics by a medical provider case, touching mostly upon fact-intensive issues regarding the admissibility of evidence and the sufficiency of the evidence. However, there are two sentencing issues worth noting. First, is a terrible ruling that appears to hold that where there is no guideline error and the court imposes a downward variance, a sentence that is procedurally unreasonable because the court failed to adequately explain the sentence or address the arguments of the defendant will always be harmless. See also, Guideline Construction/Application

GUIDELINE CONSTRUCTION/APPLICATION

United States v. Bryant, 2014 WL 115490
January 14, 2014, Wynn, Keenan, Thacker
(WDNC Cogburn)
The 4th Cir. held in this case that it could not determine that the DC made an adequate finding in support of its decision to apply a guideline adjustment under § 2A2.2 (assault resulting in serious bodily injury or involving a dangerous or deadly weapon), instead of the adjustment under §

2A2.2 (obstructing or impeding an officer). The defendant was convicted of 18 USC Sec. 111(b) - assault on an officer involving either a dangerous weapon or bodily injury. The court began by noting that a defendant who pleads guilty to the offense element of bodily injury under 18 U.S.C. § 111(b) has not necessarily admitted to facts that would support a finding during sentencing that he inflicted "serious bodily injury." The court then engaged in a fact-intensive analysis of the sentencing record and found that although the district court stated that "all of the findings in the Presentence Report (which included infliction of SBI and use of a weapon) are accepted, the court made other statements that belie this finding." While the 4th Cir. stated that the record contained facts that might support the application of the 2A2.2 guideline, it ultimately concluded that it could not determine that the DC intended to find those facts from the record before it.

United States v. Boccone, 2014 WL 643016
February 20, 2014, Flanagan, sitting by designation, Niemeyer, Wynn
(EDVA Hilton)
This is a long opinion in an unlawful distribution of narcotics by a medical provider case, touching mostly upon fact-intensive issues regarding the admissibility of evidence and the sufficiency of the evidence. However, there are two sentencing issues worth noting. Second, is that the court held the DC did not err in including the entire quantity of drugs prescribed by the defendants to the patients at issue in this case because the evidence showed that the prescriptions were unlawfully issued in their entirety, as opposed to cases in which prescriptions were lawfully issued, but some quantity of the drugs obtained with the prescriptions were unlawfully distributed -- in such a case, as opposed to this one -- the court may have a burden of calculating precisely how many of the drugs were lawfully consumed when calculating the total quantity unlawfully distributed for guidelines purposes. See also, Procedural/Substantive Unreasonableness

United States v. Robinson, --- F.3d ---- 2014 WL 661574
February 21, 2014, Motz, Niemeyer, Diaz, dissenting in part
(EDNC Flanagan)
In this cocaine/crack distribution conspiracy case, the 4th Cir. held that the DC was correct to treat appellant's conviction for possession of MJ, which occurred during the time of the conspiracy, as a prior conviction instead of as relevant conduct because it concluded that it was unrelated to the conspiracy. Adding insult to injury, the court concluded that the DC was correct to award the appellant 2 points for being on probation during his commission of the conspiracy because he received one day (!) of probation for the possession of MJ and, while there was evidence that he could not have dealt drugs on that one day, the date in question was during the time frame of the ongoing conspiracy. See also, Misc. App. Proced

CRIMINAL HISTORY

United States v. Aparicio-Soria, 740 F.3d 152
January 14, 2014, Davis, en banc panel, Wilkinson, Niemeyer dissenting
(DMD Chasanow)

On rehearing *en banc*, 12 of the 14 members of the court held that the Maryland crime of resisting arrest, does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," and therefore categorically does not qualify as a "crime of violence" under USSG § 2L1.2, the reentry Guideline. The court determined that although RA requires the use of force, precedent from MD's highest court indicates that the force required for conviction of resisting arrest is no more than the type of *de minimis* force constituting an offensive touching. *See Nicolas v. State*, 44 A.3d 396, 409 (Md. 2012). The court held that 4th Cir. cases finding RA to be a violent felony/crime of violence under the ACCA/CO residual clauses was irrelevant, refusing to conflate the risk of physical injury with the use of violent force. Finally, in response to the Gov's "mountain" of Maryland RA cases in which violent force was used, the court responded, "we do not need to hypothesize about whether there is a "realistic probability" that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so." J. Niemeyer joined J. Wilkinson in a colorful and lengthy dissent, revealing their continued displeasure with the way the circuit's criminal history jurisprudence has evolved in the past few years.

United States v. Crawford, 2014 WL 265490
January 24, 2014
(MDNC Osteen)
This case contains a ruling re: the intervening arrest rule under the Career Offender guideline that is worth taking note of. The defendant was arrested for a misdemeanor assault, released, arrested for a different felony offense, and then while still in custody, indicted for a felony offense based on the conduct underlying the misdemeanor assault. The defendant argued that the offenses were not separated by an intervening arrest because he was indicted for the offense after his arrest. The 4th Cir. held that because the conduct underlying the two convictions at issue were separated by an intervening arrest, even if the ultimate charges were not, the convictions counted separately for career offender purposes.

SUPERVISED RELEASE

United States v. Gray, 2014 WL 57815
January 8, 2014
(MDNC Beaty)
I am including this little unpublished case so you will all know that the 4th Cir. will think little of your creative efforts to argue that your client deserves a shorter sentence on his supervised release revocation because he did not get the benefit of the Fair Sentencing Act in his original sentence. The court held that because the FSA is not retroactive, it is simply not relevant to the length of time a supervisee should get if he violates SR after serving a pre-FSA sentence.

MISCELLANEOUS SENTENCING ISSUES

United States v. Freeman, 741 F.3d 426
January 17, 2014, Thacker, Duncan, Wynn
(DMD Titus)
The 4th Cir. vacated a $631,000+ order of restitution in this obstructing an official proceeding case (18 U.S.C. § 1512(c)(2)), holding that awards of restitution ordered as a condition of supervised release must compensate "only for the loss caused by the specific conduct that is the basis of the offense of conviction." The offense in this case was based on false statements that the appellant made in his bankruptcy proceedings. The bankruptcy came at the end of a 10 year period in which the appellant, a minister, convinced his parishioners to purchase various properties, cars, etc., in their names, with the promise that he would pay off the loans secured for the properties, and he never did. For some reason, the appellant was never charged with fraud in relation to these properties. The 4th Cir. rejected the gov's argument that the appellant's false statements in his bankruptcy proceeding -- essentially denying owning any property -- caused the victims of his fraud to be unable to take advantage of the proceedings to recover their losses. The court held that it was unclear that the victims would have recovered their money even if the appellant had been truthful in the bankruptcy proceedings, and that while his lies in the bankruptcy proceeding may have exacerbated the victims' harm, "it certainly did not cause it." Because the DC imposed restitution in lieu of a fine, the court remanded the case so that the DC could determine whether a fine was appropriate.

APPELLATE PROCEDURE/POST-CONVICTION/DEATH PENALTY

MISCELLANEOUS POST-CONVICTION/APPELLATE PROCEDURE ISSUES ON DIRECT APPEAL

United States v. Zayyad, 741 F.3d 452
January 24, 2014, Agee, Diaz, Floyd
(WDNC Conrad)
In this counterfeit drug case, the court first made an interesting preservation ruling that D probably failed to preserve his right to argue that the DC's limit on his cross-examination regarding the "gray market" of drugs prevented him from arguing that he didn't know the drugs were counterfeit, because at trial he argued that the limit on cross-examination prevented him from arguing that the drugs were not, in fact, counterfeit -- two different arguments. See also, Substantive Offenses/Narcotics, Evidence

United States v. Antone,--- F.3d ---- 2014 WL 407390
February 4, 2014, Davis, Gregory, Wynn
(EDNC Flanagan)
We don't get these cases, but I thought folks might be interested in seeing what a reversal looks like in a civil commitment proceeding under the Adam Walsh Act, since I think they are exceedingly rare. The specific holding here was that the Government did not present clear and convincing evidence that the appellant's mental illnesses would cause him to have serious difficulty refraining from sexually violent conduct. The major point of difference between the 4th Cir. and the DC (which actually reversed a favorable finding by the magistrate judge) was that the 4th Cir. placed significant weight on appellant's conduct during his 14 years of incarceration. Given that the appellant was able to be so successful in a structured environment in which he was sober, the court refused to accept that there was clear and convincing evidence that he would have serious difficulty refraining from sexually violent conduct when he was released.

United States v. Mosteller, 741 F.3d 503
February 4, 2014, Keenan, Motz, Thacker
(DSC Wooten)
The 4th Cir. held in this case that the district court erred in requiring that the appellant agree to waive her rights under the Speedy Trial Act as a condition of granting a mistrial in her case, relying on Zedner v. United States, 547 U.S. 489, 497 (2006) for the proposition that a defendant may not waive application of the Act for a violation that might occur in the future, but has not yet occurred. However, the court held that under the plain language of the Act (the failure to file a motion to dismiss before trial "shall" constitute a "waiver of the right to dismissal" under the Act. 18 U.S.C. § 3162(a)(2)) appellant's failure to make a timely motion to dismiss her indictment before the start of her new trial constitutes a waiver of her right to assert a violation of the Act, and the court refused to consider the issue, even under a plain error standard of review. See also, Misc. Crim. Procedure.

United States v. Robinson, --- F.3d ---- 2014 WL 661574
February 21, 2014, Motz, Niemeyer, Diaz, dissenting in part
(EDNC Flanagan)
In this cocaine/crack distribution conspiracy case, the 4th Cir. first held that the appellant waived his right to challenge the DC's reliance on certain information in his PSR in determining the drug quantity. Specifically, the appellant had objected at sentencing to statements in the PSR by a witness who claimed that the appellant sold drugs to him beyond those drugs included in the counts of conviction. In response, the government proffered that there were other witnesses available to testify about other drug sales, and the DC therefore gave the appellant the option of proceeding that day with the current PSR, or postponing sentencing so that the gov could have the other witnesses' statements incorporated. Because the appellant chose to proceed that day, the 4th Cir. held that he waived his right to challenge the DC's reliance on the information in the PSR. J. Diaz dissented on the waiver issue. See also, Guideline Construction/Application. .

DEATH PENALTY AND HABEAS

United States v. Dehlinger, 740 F.3d 315
January 23, 2014, Motz, Davis, Gregory, concurring
(DSC Wooten)
The 4th Cir. held that trial counsel's relationship with certain potential witnesses did not create a prejudicial conflict in violation of the petitioner's 6th Amend right to counsel. The potential conflict is fairly complicated and the opinion contains a detailed review of the facts. The 4th Cir. ultimately agreed with the DC's determination that trial counsel's decision not to call the potential witnesses at trial "was based on trial strategy alone and not linked to any potential conflict of interest." Thus, the 4th Cir. held, even if the petitioner could show an actual conflict existed, he could not show that the conflict adversely affected counsel's performance -- the third prong of the IAC test set forth in *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001).