

FOURTH CIRCUIT UPDATE

July 25, 2006

***Conaway v. Polk*, Docket No. 04-20 (11 July 2006)**

State death penalty case on habeas review. Fourth Circuit rejects appellant's claim that he is entitled to a hearing on the issue of mental retardation, but reverses and remands to the district court for a hearing on whether the appellant's Sixth Amendment right to an impartial jury was contravened because a trial juror concealed a close familial relationship to a co-defendant who was also a key prosecution witness.

***United States v. Sullivan & United States v. Campbell*, Docket Nos. 03-4601, 03-4610 (11 July 2006)**

In a split decision, a panel of the Fourth Circuit affirmed the defendants' convictions and vacated their sentences. All three judges agreed to affirm the convictions. Three judges agreed to vacate Sullivan's sentence, but one for different reasons. Judge Widener dissented from the opinion vacating Campbell's sentence, on the grounds that, based on facts found by the jury, Campbell was eligible for a life sentence.

Defendants in this case were convicted after a trial of conspiracy to possess with intent to distribute and distribution of 50 grams or more of crack and of conspiring to possess firearms in furtherance of the drug trafficking crime. The sentencing in these cases occurred pre-*Booker*. At sentencing, the judge found that the defendants had participated in two murders, found drug amounts, and for Campbell, found that Campbell was a leader of the drug distribution ring. None of these enhancing facts had been found by a jury.

The Court summed up its *Booker* analysis as follows: "We have determined that in the ordinary case the proper application of *Booker* is to affirm sentences that are within the statutorily prescribed range and are reasonable, *United States v. Hughes*, 401 F.3d 540, 546-47 (4th Cir. 2005); and to vacate and remand mandatory guideline sentences when the guideline range involves extra-verdict enhancement. *White*, 405 F.3d at 222." Slip Op. at 7.

The Court rejected Campbell's argument under *Crawford v. Washington*, 541 U.S. 38 (2004), that testimony by government witnesses regarding what other conspirators had told them was improper and that the government's introduction of codefendants' proffer letters and plea agreements was improper. The Court also rejected the argument that the trial court should have given a jury instruction concerning multiple conspiracies. The Court also rejected Sullivan's challenge to the sufficiency of the evidence to convict him.