

FOURTH CIRCUIT UPDATE

October 1, 2005 through April 7, 2006

**Prepared by Diana Cap and Vidalia Patterson
Research and Writing Attorneys
Office of the Federal Public Defender
for the Eastern District of North Carolina**

TABLE OF CONTENTS*

FOURTH CIRCUIT UPDATE

Offenses 1

 18 U.S.C. § 371 - Conspiracy 1

 18 U.S.C. § 374 - Solicitation 1

 18 U.S.C. §1028A(a)(1) - Aggravated Identity Theft 1

 18 U.S.C. § 1956(a) - Conspiracy to Commit Money Laundering 1

 18 U.S.C.§§ 2251(a) - Exploitation of Children & 2252A(a)(5)(B) - Activities Relating to
 Child Pornography 1

 18 U.S.C. §7, 13(a) - Assimilative Crimes Act 2

 18 U.S.C. § 922 - Felon in Possession 2

 8 U.S.C. § 1326 Illegal Re-entry After Deportation 2

4th Amendment 2

 Search Warrants 2

 Searches 3

 Custodial Interrogation 3

 Consent to Search 3

 Reasonable Suspicion 3

5th Amendment 3

 Incrimination 3

 Double Jeopardy 4

* Decisions that, in the compilers’ judgment, are especially significant have been marked with an asterisk (*).

6th Amendment	4
Counsel	4
Sufficiency of Indictment	4
Pre-Trial Issues	5
Joinder and Severance	5
Discovery	5
Evidence	5
Sufficiency	5
Relevance/Admissibility	5
Jury Instructions	6
Sentencing	6
Sentencing Procedure	6
Sentence Enhancements	8
Sentencing Guidelines	8
2D1.1(c) - Drug Quantity Table	8
4B1.1 - Career Offender	9
6A1.2(b) - Presentence Report	9
SUPREME COURT UPDATE	10
Fourth Amendment	10
Eighth Amendment	10
Criminal Procedure	10

FOURTH CIRCUIT UPDATE

OFFENSES

18 U.S.C. § 371 Conspiracy

United States v. Cardwell, 433 F.3d 378 (4th Cir. 2005) (Williams, J.) (W.D. Va.) No overt act in furtherance of the conspiracy is necessary in order to be convicted of a conspiracy, and a conspirator's unhelpfulness does not amount to withdrawal from the conspiracy.

18 U.S.C. § 374 Solicitation

United States v. Cardwell, 433 F.3d 378 (4th Cir. 2005) (Williams, J.) (W.D. Va.) The crime of solicitation to commit murder is complete when a defendant attempts to persuade another to commit a murder, regardless of whether the other person was persuaded to do so.

18 U.S.C. 1028A(a)(1) Aggravated Identity Theft

United States v. Montejo, — F.3d —, 2006 WL 785060 (4th Cir. 2006) (Widener, J.) (E.D. Va.) A defendant charged with aggravated identity theft does not need to know that the identification numbers on falsified documents he possesses or uses actually belonged to another person.

18 U.S.C. § 1956(h) Conspiracy to Commit Money Laundering

United States v. Alerre, 430 F.3d 681 (4th Cir. 2005) (King, J.) (D. S.C.) No evidence was needed to prove promotion money laundering where the charge was *conspiracy* to commit promotion money laundering and ample evidence supported the conviction.

18 U.S.C. §§ 2251(a) Exploitation of Children & 2252A(a)(5)(B) Activities Relating to Child Pornography

United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) (Mozt, J.) (D.Md.) Rejecting Defendants claim that his private intrastate production and possession of child pornography did not affect interstate commerce; Commerce Clause permits Congress to regulate purely local activities, such as drug possession or, analogously, child pornography, if they are “part of an ‘economic class of activities that have a substantial effect on interstate commerce.’”

18 U.S.C. §§ 7, 13(a) Assimilative Crimes Act

United States v. Adams, 426 F.3d 730 (4th Cir. 2005) (Luttig, J.) (E.D. Va.) Road that had been indefinitely and completely closed to the public until further notice, due to hurricane damage did not have “highway” status under Virginia law.

18 U.S.C. §922 Felon in Possession

United States v. Gilbert, 430 F.3d 215 (4th Cir. 2005) (Wilkinson, J.) (W.D. Va.) Defendant found bundle of weapons (including various firearms, ammunition, knives and brass knuckles) approximately 10-15 minutes prior to encountering law enforcement. Defendant wanted to turn in guns for reward given by law enforcement, but was apprehended walking in opposite direction of police station. Court disagrees with D.C. circuit (recognized innocent possession defense) and joins 7th and 10th circuits (rejected innocent possession defense) holding that felon in possession statute is not amenable to “innocent possession defense.”

8 U.S.C. §1326 Illegal Reentry after Deportation

U.S. v. El Shami, 434 F.3d 659 (4th Cir. 2005) (Gregory, J.) (E.D. Va.) Failure to give an alien notice of deportation proceeding deprived him of right to seek administrative relief and to appeal deportation, so as to satisfy first two elements for collateral attack on deportation; failure to give notice deprived alien of due process; and alien was actually prejudiced by lack of notice, given reasonable probability he would have qualified for 212(c) relief from deportation.

4TH AMENDMENT

Search Warrants

United States v. Rizzi, 434 F.3d 669 (4th Cir. 2006) (Niemeyer, J.) (D. Md.) 21 U.S.C. 879, which specifically authorizes warrants for searches at any time of day involving controlled substances, trumps Federal Rule of Criminal Procedure 41(e)(2)(B), which requires a showing of good cause for a warrant to be executed at night.

U.S. v. Singleton, 2006 WL 724800 (4th Cir.) (Motz, J.) (D. Md.) Defendant challenges district court’s denial of motion to suppress; motion was based on lack of exigent circumstances to justify police’s no-knock entry for execution of search warrant. Court held evidence admissible as police reasonably relied in good faith upon properly obtained search warrant that specifically authorized no-knock search. In doing so, Court joins 7th, 2nd, 1st, 8th, and 10th Circuits holding that *U.S. v. Leon* good faith exception applies to no-knock warrants.

Searches

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) (Wilkins, J.) (S.D.W.Va.) Resident of home had worked as informant and had previously allowed undercover officer into house to purchase drugs. Officers knocked on door, resident allowed them to enter, without explicitly saying they could enter, they then arrested defendant. Court held informant's consent to search of his residence could be inferred from totality of circumstances.

Custodial Interrogation

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) (Gregory, J.) (E.D.N.C.) Because Defendant was offered refreshments, told he was free to leave the questioning room, not forcefully restrained, told he was not under arrest, and the door was left partially open, interrogation was not custodial.

Consent to Search

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) (Gregory, J.) (E.D.N.C.) Because Defendant gave general consent to search his entire residence, marijuana and other drug paraphernalia, which were within plain view and incriminating on their face, were properly seized.

Reasonable Suspicion

United States v. Eura, 440 F.3d 625 (4th Cir. 2006) (Hamilton, J.) (E.D. Va.) Reasonable suspicion requires a "minimal level of objective justification." K-9 sniff of a vehicle's exterior was supported by reasonable suspicion where a confidential source told law enforcement that Defendant sold crack-cocaine, the source ordered crack cocaine from Defendant in a recorded telephone conversation, a search of Defendant's home produced no drugs, a person residing in the home told law enforcement that Defendant owned two vehicles, and the license plates on the vehicles confirmed that the vehicles were registered to Defendant.

5TH AMENDMENT

Incrimination

United States v. Cardwell, 433 F.3d 378 (4th Cir. 2005) (Williams, J.) (W.D. Va.) *Miranda* rights are impliedly waived when, after their being read, Defendant fails to invoke his rights and instead answers officer's questions.

U.S. v. Nichols, 438 F.3d 437 (4th Cir. 2006) (Wilkins, J.) (W.D. N.C.) Fifth Amendment does not prohibit district court from considering statement obtained in violation of *Miranda* at sentencing if statement was otherwise voluntary. Where there is no evidence that an illegally obtained statement was actually coerced or otherwise involuntary the

substantial burden on the sentencing process resulting from exclusion of that statement outweighs any countervailing concerns about police deterrence or unreliable evidence.

Double Jeopardy

U.S. v. Fitzgerald, 435 F.3d 484 (4th Cir. 2006) (Shedd, J.) (E.D. Va.) Defendant appeals district court's application of three-level enhancement pursuant to 18 U.S.C. §3147 to sentence following conviction for failing to appear at sentencing. Court noted that Supreme Court has historically found double jeopardy protections inapplicable at sentencing proceedings and has refused to construe sentence enhancements as additional punishments.

United States v. Smith, 2006 WL 697529 (4th Cir. (Va.)) (Wilkins, J.) (E.D. Va.) Double Jeopardy Clause does not apply when a defendant requests or consents to a mistrial, unless the prosecutor has engaged in conduct intended to provoke a mistrial. The defendant bears the burden of proving that the prosecution acted with specific intent to provoke a mistrial.

6TH AMENDMENT

Right to Counsel

United States v. Alvarado, 440 F.3d 191(4th Cir. 2006) (Wilkinson, J.) (E.D. Va.) Even if based on the same events, dual sovereignty maintains that federal and state crimes are separate offenses for Sixth Amendment purposes. Defendant's right to counsel had not yet attached when he was interrogated by federal investigators after having been appointed counsel by the state for state charges, which had been dismissed. The Sixth Amendment right to counsel does not attach merely at the filing of a federal criminal complaint, but when formal charges are filed.

Sufficiency of Indictment

United States v. Smith, 2006 WL 697529 (4th Cir. (Va.)) (Wilkins, J.) (E.D. Va.) Defendant argues that indictment was unconstitutionally vague for alleging date "in or about Winter, 200," and argues that he cannot mount a defense to charge that does not identify particular date. Court finds an indictment meets the guarantees of the Fifth and Sixth Amendments if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

PRE-TRIAL ISSUES

Joinder and Severance

United States v. Cardwell, 433 F.3d 378 (4th Cir. 2005) (Williams, J.) (W.D. Va.) A gun count may be joined to a murder-for-hire count where the facts show that the two crimes were logically related and no clear prejudice stemmed from the joinder.

Discovery

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) (Gregory, J.) (E.D.N.C.) A criminal defendant is not entitled to discovery of expert witness's lab notes absent an order from the District Court. Where Defendant failed to follow-up on discovery request or establish prejudice from the deprivation of access to discovery, District Court did not abuse discretion by permitting expert to testify.

EVIDENCE

Sufficiency

United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) (Motz, J.) (D.Md.) Any error in admitting expert testimony implying Defendant was a child molester was harmless as there was overwhelming evidence supporting the convictions.

United States v. Alerre, 430 F.3d 681 (4th Cir. 2005) (King, J.) (D. S.C.) No evidence was needed to prove promotion money laundering where the charge was *conspiracy* to commit promotion money laundering and ample evidence supported the conviction.

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) (Gregory, J.) (E.D.N.C.) Defendant claimed that government failed to prove that he possessed the functional parts necessary to convert pipes and end caps into destructive devices, as defined by statute. Evidence showing the explosive properties of the materials involved was sufficient to prove that a destructive device had been assembled and supported the convictions of manufacture or receipt and possession of unregistered firearms

Relevance/Admissibility

United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) (Motz, J.) (D.Md.) Images of adult males seized from defendant's home rebutted two defense theories, were relevant, and not so prejudicial as to outweigh their probative value.

United States v. Alerre, 430 F.3d 681 (4th Cir. 2005) (King, J.) (D. S.C.) Evidence that a physician's performance has departed from (civil) accepted medical standards may be introduced in a criminal trial if found relevant to establish the physician contravened the criminal standard of liability.

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) (Gregory, J.) (E.D.N.C.) Where Defendant failed to follow-up on discovery request or establish prejudice from the

deprivation of access to discovery, District Court did not abuse discretion by permitting expert to testify. Testimony of Defendant's prior attempts at making pipe bombs was probative of knowledge under Federal Rule of Evidence 404(b). Testimony of prior bad acts was properly admitted where Defendant had first asked witness questions about good character traits.

United States v. Nunez, 432 F.3d 573 (4th Cir. 2005) (Traxler, J.) (E.D. Va.) District court abused its discretion in permitting government to reopen its case after summation and after jury began deliberations to admit into evidence report previously held inadmissible.

United States v. Smith, 2006 WL 697529 (4th Cir. (Va.)) (Wilkins, J.) (E.D. Va.) The Federal Rules of Evidence exclude from the definition of hearsay a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. To admit testimony under this rule, a court must conclude (1) that there was a conspiracy involving the declarant and the party against whom admission of the evidence is sought and (2) that the statements at issue were made during the course of and in furtherance of that conspiracy.

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) (Wilkins, J.) (S.D.W.Va.) While witness testifying as expert regarding drug chemical analysis had "significant gaps in knowledge," this was matter of weight and not admissibility.

JURY INSTRUCTIONS

United States v. Nunez, 432 F.3d 573 (4th Cir. 2005) (Traxler, J.) (E.D. Va.) Defendant not entitled to instruction for multiple conspiracies when evidence established existence of single drug conspiracy as evidence indicated that coconspirators shared common goal and mutual interest to obtain heroin and cocaine and distribute it for profit.

SENTENCING

Sentencing Procedure

United States v. Rodriguez, 433 F.3d 411 (4th Cir. 2006) (King, J.) (E.D. Va.) Unlike the defendant in *United States v. White*, 405 F.3d 208 (4th Cir. 2005), Defendant, by interposing a *Blakely* objection at sentencing, preserved his claim of statutory *Booker* error which is reviewed under a harmless error standard. The sentencing court committed statutory error in treating the Guidelines as mandatory, and this error prejudiced Defendant.

* *United States v. Green*, 436 F.3d 449 (4th Cir. 2006) (Niemeyer, J.) (D. Md.) Sentences imposed with the Sentencing Guidelines range are presumptively reasonable. Where

District Court declined to sentence Defendant as a career criminal, and applied a sentence below the guidelines range, it erred by failing to correctly apply U.S.S.G. § 4B1.1.

United States v. Hampton, 441 F.3d 284 (4th Cir. 2006) (Motz, J.) (D. S.C.) Three years of probation is an unreasonable sentence for a felon in possession conviction where the District Court failed to explain how the sentence promoted deterrence and protection of the public or how the variance better served the 3553(a) factors than a guidelines sentence would.

United States v. Barnette, 427 F.3d 259 (4th Cir. 2005) (Michael, J.) (D. S.C.) The authority vested in a court to decide a §5K1.1 motion must be exercised fully at the initial sentencing; the discretion attending this authority may not be “partially ‘reserved’ for a future time” when a Rule 35(b) motion might be filed. District court fully exercised its authority in granting a downward sentencing departure on government’s motion based on defendant’s substantial assistance.

United States v. Clark, 434 F.3d 684 (4th Cir. 2006) (Luttig, J.) (E.D. Va.) District court judge improperly considered sentencing disparities between state and federal jurisdictions for similar offenses when sentencing defendant below guideline range.

U.S. v. Baldovinos, 434 F.3d 233 (4th Cir. 2006) (King, J.) (W.D. N.C.) Prosecution conceded plain error, but court declined to correct the error. Record demonstrated that defendant had been involuntarily medicated with antipsychotic drugs solely for purpose of rendering him competent for sentencing, rather than for his own safety; and district court’s plain error in medicating defendant against his will did not seriously affect fairness, integrity or public reputation of judicial proceedings. Court found if defendant was resentenced under 18 U.S.C. §4244(d), he would be exposed to sentence four times longer than the 10 years he was sentenced to while medicated, and *this* would undermine the public’s confidence in the judicial process.

United States v. Simms, 2006 U.S. App. LEXIS 7560 (Wilkins, J.) (D. Md.) Defendant argues district court erred in utilizing an “application for charge” relating to a prior Maryland conviction to determine whether the conviction was a predicate felony for ACCA. Court distinguishes *United States v. Shepard* and determined in case in which the charging document unambiguously alleges a “violent felony” the prior conviction for battery may serve as a predicate for application of Armed Career Criminal Act.

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) (Wilkins, J.) (S.D.W.Va.) Defendant convicted on two counts of possession with the intent to distribute cocaine base. Sentencing court concluded a variance was warranted because it was not “appropriate” to sentence defendant as career offender, based on a number of 18 U.S.C. § 3553(a) factors. Court of Appeals remands for sentencing for not less than 20 years imprisonment; imposition of variance sentence of 10 years unreasonable; sentence that

falls within properly calculated advisory guideline range is entitled to a rebuttable presumption of reasonableness.

* *United States v. Johnson*, __ F.3d __, 2006 WL 893594 (4th Cir. 2006) (Wilkinson, J.) (E.D.N.C.) The advisory Guidelines are presumptively reasonable because they are the product of over twenty years of legislative and administrative sentencing policy, they embody many of Congress's objectives in 18 U.S.C. § 3553(a), and they foster an environment of judicial fact-finding "that invites defendants to raise objections and requires courts to resolve them." A sentencing court need not make individual findings on each of the § 3553(a) factors; it is sufficient for a court to state that it has considered all of the factors.

Sentence Enhancements

18 U.S.C. §3147

U.S. v. Fitzgerald, 435 F.3d 484 (4th Cir. 2006) (Shedd, J.) (E.D. Va.) Pursuant to 18 U.S.C. §3147, Defendant appeals district court's application of three-level enhancement to sentence following conviction for failing to appear at sentencing. Court found statutory enhancement for committing crime while on release applied to offense of failure to appear.

Sentencing Guidelines

§ 2D1.1(c) - Drug Quantity Table

* *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006) (Hamilton, J.) (E.D. Va.) A sentencing court may not vary from the 100:1 crack-powder ratio legislated by congress and substitute its own ratio. To establish reasonableness of a sentence, a District Court need not explicitly discuss every statutory factor on the record; rather the record must reflect that the court adequately and properly considered the statutory sentencing factors under 18 U.S.C. § 3553(a).

§ 4B1.1 - Career Offender

United States v. Green, 436 F.3d 449 (4th Cir. 2006) (Niemeyer, J.) (D. Md.) Sentences imposed within the Sentencing Guidelines range are presumptively reasonable. Where District Court declined to sentence Defendant as a career criminal, and applied a sentence below the guidelines range, it erred by failing to correctly apply U.S.S.G. § 4B1.1.

§ 6A1.2(b) - Presentence Report

* *United States v. Milam*, — F.3d — , 2006 WL 871287, (4th Cir. 2006) (Niemeyer, J.) (S.D.W.Va.) Facts that increase a defendant's maximum sentence are essentially elements of the offense, and a defendant cannot waive Sixth Amendment rights by failing to object to those facts in the PSR. Rule 32(i)(3)(A), USSG § 6A1.2(b), and prior Circuit law (see *United States v. Terry*, 916 F.2d 157, 162 [4th Cir. 1990]) violated prohibitions on burden shifting by forcing the defendant to disprove allegations in the PSR.

