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Fourth Circuit Case Summaries: January 18 and 25, 2018

West Virginia offense of unlawful wounding is a crime of violence under the Guideline's force clause

U.S. v. Covington, ___ F.3d ___ 2018 WL 454909 (4th Cir. 2018). The district court determined that the West Virginia offense of unlawful wounding was not a crime of violence under the force clause of Section 4B1.2 of the Sentencing Guidelines and therefore declined to classify the defendant as a career offender (decreasing his guidelines range by over 12 years). The government appealed, and the Fourth Circuit reversed. The force clause defines a "crime of violence" as an offense punishable by more than one year of imprisonment that has an element the use, attempted use, or threatened use of physical force against another person. In analyzing if an offense falls within that definition, courts look to whether the statute at issue is divisible—that is, whether the statute provides for more than one offense. If the statute is not divisible, courts apply the categorical approach, whereby only the elements of the offense are considered and not the specific conduct underlying the conviction. If the statute is divisible, courts may apply the modified categorical approach, whereby the court looks beyond the elements of the offense to a limited class of supporting documents (such as the indictment, jury instructions, and plea colloquy) to determine the specific offense of conviction. Here, while the offense of unlawful wounding is divisible, the parties did not contest the district court's decision that the defendant was convicted under one prong of the statute (unlawful, as opposed to malicious, wounding). The court therefore applied the straightforward categorical approach. In comparing the offense to the force clause, the court noted that under *Johnson v. U.S.*, the force required must be "violent force—that is, capable of causing physical pain or injury to another person." 559 U.S. 133, 140 (2010). Under *U.S. v. Gardner*, 823 F.3d 793 (4th Cir. 2016), the Fourth Circuit also analyzes the "minimum conduct" necessary to sustain the conviction. "A predicate offense qualifies as a crime of violence if all of the conduct criminalized by the statute—'including the most innocent conduct'—matches or is narrower than the Guidelines' definition of 'crime of violence.'" Slip op. at 6 (internal citations omitted).

The district court had relied on *U.S. v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) in part in determining the offense was not a crime of violence because there were circumstances it could imagine under which the offense could be committed through indirect force. The distinction in *Torres-Miguel* between direct and indirect applications of force was overruled in *U.S. v. Castleman*, 134 S. Ct. 1405 (2014), a point the Fourth Circuit has reiterated in several decisions since *Castleman*. The defendant was unable to produce a single case from West Virginia interpreting the offense as capable of being committed without the use of violent force, while the government was able to produce "scores of cases" supporting their position that "the unlawful wounding offense only criminalizes the degree of force required under *Johnson*." *Id*. at 10. Here, the statute is limited to circumstances where the defendant "shoots, stabs, cuts, or wounds any person, or by any means causes him or her bodily injury with intent to maim, disfigure, disable, or kill." *Id*. This definition categorically meets the requirements of *Johnson* and *Gardner* and is therefore properly considered a crime of violence under the force clause. The sentence was therefore vacated and the matter remanded for resentencing.

Civil commitment is not subject to catch-all 4 year statute of limitations of 28 U.S.C. § 1658

U.S. v. Searcy, ___ F.3d ___ 2018 WL 454907 (4th Cir. 2018). Under 18 U.S.C. § 4248, a person deemed to be a sexually dangerous person may be civilly committed after a hearing. This law was enacted while the defendant was serving a sentence for sexual offenses. Before his scheduled release date, the Bureau of Prisons moved to have the defendant committed, initiating the process in the Eastern District of North Carolina. The defendant objected and pointed to 28 U.S.C. § 1658, a "catch-all" statute providing for a four-year statute of limitations in civil actions in the absence of a more specific statute of limitations. He argued that the Government should now be time-barred from pursuing civil commitment since it failed to initiate commitment proceedings within four years of his sentencing. The district court denied relief, finding that the civil commitment statute provides for preconditions to commitment that the defendant met, and that the more general four-year statute of limitations did not apply. On appeal, the court dissected the two statutes at issue and affirmed.

28 U.S.C. § 1658 was designed to be a statute of limitations for any federal civil suits arising from statutes without their own time limitation. The statute provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." The civil commitment statutes (part of the Adam Walsh Act) were in fact passed after the enactment of the catch-all statute of limitations and do not contain an explicit statute of limitations. However, the court found that the 4 year statute of limitations did not apply for two other reasons. First, the commitment statute does contain a time limitation—an inmate in the defendant's situation can only be committed while they are still in custody of the Bureau of Prisons. "Because this rule anchors civil commitment proceedings to a discrete duration of time, no additional statute of limitations is required." Slip op. at 11. This, the court held, "amounts to de facto statute of limitations," and 28 U.S. § 1658 simply did not apply. Second, while civil commitment proceedings are technically civil as opposed to criminal in nature, the court found that the general statute of limitations was ill-suited to apply in the civil commitment context. "[W]e are satisfied that a civil commitment proceeding is not the sort of 'civil action' Congress had in mind when it enacted Section 1658." *Id*. at 14. Unlike more traditional civil litigation, no complaint is filed in commitment cases, criminal procedure protections buttress the civil procedure of the process, and the burden of proof is higher. The outcome of the commitment process can challenged on a semi-annual basis until release. Further, beyond the hearing procedures, defendants committed pursuant to the statute also have the option of collateral attack via habeas. These differences led the court to conclude that the civil commitment process is not a civil action within the meaning of 28 U.S.C. § 1658.

Even if an illegal search, good-faith exception applied to government's installation of malware on defendant's home computer.

U.S. v. McLamb, ___ F.3d ___, 2018 WL _____ (4th Cir. 2018). This appeal of a denial of a suppression motion arose out of a child pornography case from the Eastern District of Virginia. The FBI was investigating a child pornography website called "Playpen" on the so-called dark web. To access sites on the dark web, users must download and use anonymity software (such as a "Tor" router) that makes tracking IP addresses or obtaining other identifying information difficult. Once the FBI found and seized the website, it obtained a search warrant to install tracking malware on the computers of anyone accessing the website, a procedure that the FBI calls a Network Investigative Technique or "NIT". By

using the NIT, agents were able to defeat the users' anonymity software—once installed, the malware would identify the host computer and report the identifying information back to the agents. A warrant was issued by a magistrate authorizing use of the NIT for 30 days, and the defendant was identified as a person that was accessing the site. After being charged with multiple counts of receipt and possession of child pornography, he moved to suppress the NIT warrant on grounds that it was not sufficiently particular and that the warrant's issuance exceed the jurisdiction of the magistrate, among other grounds. The district court denied the motion and the Fourth Circuit affirmed.

The Playpen investigation generated considerable controversy, as the FBI maintained the child pornography website and kept it operable for at least a month after seizing it. Three other circuits had considered similar challenges to this same NIT warrant, and all found that the *Leon* good-faith exception saved the warrant from suppression even if the search was a Fourth Amendment violation. The Fourth Circuit reached the same conclusion in *McLamb.*

Under *U.S. v. Leon,* 368 U.S. 897 (1984), a search conducted in reasonable, good-faith reliance on a search warrant issued by a neutral magistrate is not subject to suppression under the exclusionary rule. No exceptions to the good-faith rule applied here: The magistrate was not given false information by the officers and remained neutral and impartial. The warrant was not facially deficient, and was supported by at least an "indicia of probable cause." Slip op. at 8. The application for the warrant explained the investigative challenges of the case and the details of how the NIT would operate, including its expansive reach beyond the borders of the district. That the warrant had named the Eastern District of Virginia as the place for the search to occur was not misleading in light of other language in the application that notified the magistrate of the scope of the NIT. "[The government] cured any ambiguity by informing the magistrate judge that the NIT would cause activating computers 'wherever located' to transmit data to the FBI." *Id*. at 9. The jurisdiction of the magistrate to issue such a warrant was admittedly not clear at the time, but agents consulted with the Department of Justice in crafting the warrant in an effort to address those concerns. The court declined to interpret such consultation as bad faith.

> [I]n light of rapidly developing technology, there will not always be definitive precedent upon which law enforcement can rely when utilizing cutting edge investigative techniques. In such cases, consultation with government attorneys is precisely what Leon's 'good-faith' expects of law enforcement. *Id*. at 9-10.

Suppression was not appropriate for the jurisdictional issue, because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," quoting *Leon*. *Id.* at 10. Suppression here would not have a deterrent effect on law enforcement, and was thus was not a suitable remedy. *Author's note*: The *Leon* good-faith exception to the exclusionary rule does not exist under the North Carolina Constitution for state constitutional violations. *State v. Carter*, 322 N.C. 709 (1988).