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Fourth Circuit Case Summaries: November 5, 6, 7, 21, 25 and 27, 2019

(1) Motion in limine to prohibit the use of the word "robbery" by government witnesses properly denied; (2) No error to deny mistrial following witness's emotional outburst; (3) Pretrial publicity did not rise to the level of creating a presumption of prejudice and defendant failed to show actual prejudice; (4) Failure to disclose pending investigation of government witness was not a *Brady* violation under the facts

U.S v. Taylor, 942 F.3d 205 (Nov. 5, 2019). This case involved racketeering, robbery, fraud, conspiracy, and other offenses committed by police officers in Baltimore, Maryland. In the course of official duties, members of the "Gun Trace Task Force" within the police department targeted drug dealers for robbery and stole money and property from them. The officers also fraudulently claimed overtime pay. Two officers went to trial and were convicted of RICO violations and Hobbs Act robbery. The defendants appealed.

(1) The defendants argued the use of the word "robbery" by government witnesses during trial was prejudicial and violated the rules of evidence for lay and expert opinion. The government witnesses who used the term had pled guilty to robbery before trial. The use of the word here was not an opinion, but reflected the facts of those witnesses' cases. Further, the district court gave repeated limiting instructions, warning the jury not to consider the guilt of the witnesses when determining the defendants' guilt. Any error here was unlikely to have affected the outcome of the proceedings and the district court did not abuse its discretion in denying the motion.

(2) The district court did not err in denying a mistrial following a government witness's emotional "outburst." During defense cross-examination, a witness was asked about his home mortgage payments. In pertinent part, the witness answered:

> This destroyed my whole family. I am in a divorce process right now because of this bullshit. This destroyed my f—kin' family, man. You sit here asking me questions about a f—kin' house. . .Everybody's life is destroyed, man. My house don't have nothing to do with this. The problem is my wife is taking medication 'cause of this. *Id*. at 24.

Two defendants moved for a mistrial the next day. The trial court ordered the testimony stricken from the record, instructed the jury not to consider it, and denied the motion for mistrial. The defendants complained on appeal that the remarks poisoned the jury and made a fair trial impossible. Rejecting this challenge, the court observed that "the district court is best positioned to assess whether a mistrial is warranted or whether other means exist to address the issue adequately." *Id*. at 26. Where the defendant can show actual prejudice, the trial court errs in denying a mistrial request, but "there is no prejudice if we determine that the jury, despite the incident in question, was able to 'make individual guilt determinations by following the court's cautionary instructions.'" *Id*. Here, the witness's remarks were not particularly focused on the two defendants at issue. The jury was able to make individual

determinations of guilt, because it did not convict both defendants on all counts. That the answer arose on cross-examination during questioning by the defense and not by intentional action of the government also reduced the possibility of prejudice. The trial court therefore did not abuse its discretion in denying the mistrial.

(3) One defendant also challenged the denial of his motion to dismiss or alternative motion to continue for three months due to prejudicial pretrial publicity. He claimed that widespread press coverage of the case in the area effectively denied him the right to an impartial jury under the Sixth Amendment. Under *Skilling v. U.S.,* 561 U.S. 358 (2010), claims of unfair pretrial publicity are assessed with a two-step inquiry. First, the court must determine "whether pretrial publicity was so extreme as to give rise to a presumption of prejudice." *Id*. at 28. Second, the court must determine whether the jury pool was infected with actual prejudice from the publicity. News articles attached to the defendant's motion showed the reporting on the case was "predominantly factual, and did not present the type of 'vivid, unforgettable information' that warrants a presumption of prejudice." *Id*. The size of the geographic area where the pretrial publicity occurred is another relevant consideration in determining whether a presumption of prejudice should apply, and the population of the Baltimore area was large enough to weigh against such a presumption here. This defendant was also acquitted on one count, which further weighed against presuming prejudice. The court rejected the defendant's claim of actual prejudice, finding the evidence in support of that claim "meager and inadequate." *Id*. at 29. The defendant therefore failed to establish a violation of his right to an impartial jury, and the district court did not abuse its discretion in denying the motion.

(4) The defendant also alleged *Brady* and *Giglio* violations for the government's failure to disclose that one of their trial witnesses was under criminal investigation. Three months after trial, one of the government's witnesses was indicted for drug trafficking. The defense sought a new trial on the basis that the investigation of that witness should have been disclosed at trial. The defense argued that since the drug conspiracy for which the witness was indicted was ongoing at the time of the defendant's trial (and the witness was indicted within three months of trial), the government must have known about the investigation. According to the defendant, the government was therefore obligated to provide that impeachment evidence to the defense before the defendant's trial. The evidence here failed to support this claim. The day after the jury verdict in the defendant's case, a law enforcement agency unrelated to the defendant's case made a report to the U.S. Attorney concerning criminal activity of the witness. There was no evidence that any U.S. attorney involved in the defendant's case knew about this information at the time of trial. The witness was impeached at trial with his prior convictions, including for weapons and drugs offenses. This additional impeachment evidence regarding the new criminal investigation of the witness was not material under the circumstances, because that evidence was cumulative and unlikely to have affected the verdict in this case. The knowledge of other U.S. attorneys could not be imputed to the prosecutors here, because the U.S. Attorney's office wasn't aware of the information until the day after trial. Knowledge of the law enforcement agency making the report of the witness's new crimes similarly could not be imputed to the prosecution team here based on the unrelated circumstances under which law enforcement was investigating the witness: "Imputing their knowledge to the prosecutors in this case would require us to stretch *Brady* beyond its scope and would effectively impose a duty on prosecutors to learn of any favorable evidence known by *any* government agent." *Id.* at 34 (emphasis in original). The trial court did not therefore err in denying the motion for a new trial for *Brady* violations.

The defendants also unsuccessfully challenged the sufficiency of evidence for various convictions and the reasonableness of their 216-month sentences, and the convictions were affirmed in all respects. Concluding, the court observed:

> This is a particularly sad case. The community places a noble trust in police officers to define and enforce, in the first instance, the delicate line between the chaos of lawlessness and the order of rule of law. And when police officers breach that trust and misuse their authority, as here, a measure of despair infuses in the community, tainting far more than do similar crimes by others. The officers' convictions and sentences in this case are just and necessary, and we can only hope for a renewed commitment to the trust that we place in police officers who discharge their duties well. *Id.* at 37.

A concurring judge would have denied the *Brady* claim on materiality grounds only, without addressing the "closer question" of whether the other law enforcement agency's knowledge of the witness's crimes could have been imputed to the government.

Denial of summary judgment on excessive force and unlawful entry claims against officer affirmed where plaintiff credibly alleged that he was shot in his residence before police announced themselves

Betton v. Belue, 942 F.3d 184 (Nov. 5, 2019). This South Carolina case involved a claims of unlawful entry and excessive force against a police officer. An informant reported to a drug unit officer that he had twice bought $100 worth of marijuana from the plaintiff. Based on the report, the officer applied for a search warrant, which called for "standard 'knock and announce'" procedures when entering the home. The warrant did not authorize "no-knock" procedures for entry. Officers arrived to serve the search warrant in plain clothes with few visible indications that the members of the team belonged to a law enforcement agency. One officer was in a baseball hat, and another wore a mask over the lower part of his face. The plaintiff had security cameras in place that captured the officers' entry into the home. The officers did not knock or announce their presence, but rather immediately opened the screen door and battered open the main door. The officers entered with assault rifles. The plaintiff was in the back of the home and reached for a gun in his waistband as he saw the figures approaching in his home. Officers fired 29 times, hitting the plaintiff 9 times, leading to his long-term hospitalization and permanent paralyzation. 220 grams of marijuana, a little less than a half-pound, was recovered from the home. The plaintiff was initially charged with pointing a gun at the officers, but that charge was dismissed. The plaintiff sued the officers under 42 U.S.C. § 1983 for unlawful entry and excessive force. The district court denied the officers qualified immunity at summary judgment, and the officer appealed the ruling as to the excessive force claim. The Fourth Circuit affirmed.

The court observed that deadly force may be used by officers only when probable cause exists to believe that a suspect presents a serious risk of violence to the officer or others.

> [A]n officer does not possess an 'unfettered authority to shoot' based on the 'mere possession of a firearm by a suspect.' Instead, an officer must make a 'reasonable assessment' that he, or another, has been '*threatened* with the weapons' in order to justify the use of deadly force. Slip op. at 11 (emphasis in original).

Evidence here showed that the officer shot the plaintiff while the plaintiff's gun was still down, before commanding the plaintiff to stop and before notifying the plaintiff of the presence of law enforcement.

The officer's original story changed substantially as evidence developed, and material facts were in dispute. The district court therefore did not err in concluding that the evidence supported a claim for excessive force in the light most favorable to the plaintiff.

The officer was also not entitled to qualified immunity. In the words of the court:

> [T]he question before us here is whether it was clearly established in April 2015 that shooting an individual was an unconstitutional use of excessive force after the officer: (1) came onto a suspect's property; (2) forcibly entered the suspect's home while failing to identify himself as a member of law enforcement; (3) observed inside the home an individual holding a firearm at his side; and (4) failed to give any verbal commands to that individual. The answer . . . plainly is yes. *Id*. 16-17.

This district court was therefore unanimously affirmed, and the matter remanded for trial.

(1) Search warrant affidavit established probable cause and nexus to the defendant's home; (2) No error to deny *Franks* hearing where omitted information was not material to probable cause

U.S. v. Jones, 942 F.3d 634 (Nov. 6, 2019). The defendant was charged in state court in the Northern District of West Virginia with driving with a revoked license, and thereafter began making threats towards officers on social media, including that he was on a "cop manhunt" and seeking information on the stopping officer's location. More online threats ensued towards that officer and two others around six months later. Officer surveilled the defendant's home in response and eventually obtained a search warrant for the defendant's home based on the state offense of making terroristic threats. Law enforcement found ammunition and ammunition parts and the defendant was indicted in federal court as a felon in possession. The defendant moved to suppress, alleging that the warrant was unsupported by probable cause and contained material omissions under *Franks v. Delaware*, 438 U.S. 154 (1978). The district court denied the motion and the request for a *Franks* hearing, and the defendant pled guilty and appealed. The Fourth Circuit unanimously affirmed.

(1) Under state precedent, the defendant's remarks sufficiently established probable cause to believe the crime of making terroristic threats had occurred. "Jones made threats against police officers generally, as well as individualized threats against certain named officers." Slip op. at 7. The warrant also established a nexus to the defendant's home. Among other comments, the defendant posted stating that "pigs" were cautioned against coming his home, which indicated that he was prepared to effectuate his threats from his home. This linked his home to the crime. It was reasonable to infer that the threats were sent from the defendant's home computer and that the gun referenced in the defendant's post would be found in the home. The affidavit in support of the warrant also recounted the surveillance of the home, and all of this established probable cause and a nexus to the residence.

(2) As to the *Franks* hearing, the defendant argued that the omission of two of his social media posts in the affidavit was intentional and material, and that their inclusion would have defeated any probable cause. The defendant has the burden of proof in a *Franks* hearing to demonstrate that material information was intentionally or recklessly omitted from the affidavit. If the omitted information would have defeated probable cause, the information was material. If the warrant still supports probable cause with the omitted material included, the information is not material and does not require a *Franks* hearing. Here, the omitted posts stated that the defendant hoped another person was "burning in hell"

and that the defendant was "[g]etting ready to pull this big trigger bang bang." *Id*. at 10. According to the defendant, these statements indicated his suicidal intent and would have provided relevant context to the other social media posts referenced in the affidavit. Rejecting this contention, the court found these statements immaterial. It was "implausible on its face" that the issuing magistrate would have taken the statements as the defendant claimed he intended—indeed, the omitted statement about pulling a trigger likely would have further supported probable cause. The statements were therefore not material and the district court did not err in denying a *Franks* hearing.

Border search exception did not apply to digital searches where search was motivated by domestic law enforcement concerns, but good-faith exception precluded suppression under the circumstances

U.S. v. Aigbekaen, ___ F.3d ___, 2019 WL 6200236 (Nov. 21, 2019). This case from the District of Maryland involved sex trafficking of a minor and related offenses. A minor reported being trafficked by the defendant. The defendant was out of the country at the time but was apprehended at the airport upon his return. A cell phone and other electronic devices were seized and searched without a warrant. The defendant moved to suppress the electronic evidence, claiming that the searches of the devices here fell outside of the border search exception to the warrant requirement. The district court rejected that argument, finding that the border search did apply and alternatively that the government had at least reasonable suspicion at the time.

The border search exception allows warrantless searches at the border. The exception is justified by the government's need to protect its "territorial integrity," including keeping out unauthorized people or contraband and collecting duties on items in international commerce. This exception is broad, given the government interests at stake. Courts have distinguished between "routine" border searches and "nonroutine" border searches. Routine border searches may be conducted without a warrant or individualized suspicion. Nonroutine or "highly invasive" border searches may require some level of individualized suspicion under *U.S. v. Flores-Montano*, 541 U.S. 149 (2004). This circuit previously decided that forensic analysis of electronic devices at the border (like the searches of the devices at issue here) were nonroutine, requiring individualized suspicion. *See U.S. v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

However, the Court determined that the border search doctrine could not justify the search under these circumstances. "[N]either the Supreme Court nor this court has ever authorized a warrantless border search unrelated to the sovereign interests unpinning the exception, let alone nonroutine, intrusive searches like those at issue here." *Id.* at 9. In order for the border search exception to apply, the government must show a nexus between the reason for the search and the purposes of the border search. Because the search here was motivated solely by domestic law enforcement interests and not concerns over border integrity, applying the border search would untether the exception from its justifications. The government here likely had probable cause to believe that the defendant had committed serious domestic crimes and could have obtained a warrant. It is unreasonable under the Fourth Amendment to conduct warrantless searches of digital devices at the border where the government's motivation is simply general crime control, as opposed to the protection of its borders. "Where a search at the border is so intrusive as to require some level of individualized suspicion, the object of that suspicion must bear some nexus to the purposes of the border search exception in order for the exception to apply." *Id*. at 14. There was no such nexus here, and the search violated the Fourth Amendment.

At the time of the search, however, no court had found a Fourth Amendment violation based on the warrantless search of an electronic device at the border, and the Fourth Circuit did not recognize the possibility that such a search might violate the Fourth Amendment until last year (well after the 2015 search at issue here). The government was therefore entitled to rely in good faith on the "uniform" existing law at the time, and the good-faith exception precluded suppression under these circumstances. The trial court was affirmed on that basis. [*Author's note*: North Carolina does not recognize the good-faith exception for violations of the North Carolina Constitution.]

A concurring judge wrote separately to note disagreement with the majority's requirement that a nexus exist between the search and the purposes of the border search. This judge would have ruled that no such nexus was required. Even if it was, that nexus was met under the facts of this case. He would have therefore found the search lawful and agreed with the majority only insofar as ultimate conclusion that the evidence was lawfully admitted at trial.

(1) No abuse of discretion to deny fourth motion to continue on eve of trial; (2) No abuse of discretion to proceed without the defendant's presence when he voluntarily absented himself from trial; (3) Any error in admitting government's expert witness was harmless; (4) Where the court advised the defendant of his right to testify and he declined, the trial court did not plainly err by failing to conduct additional colloquies with the defendant; (5) No abuse of discretion to deny motion to withdraw as counsel by fourth defense counsel

U.S. v. Muslim, ___ F.3d ___, 2019 WL 6258636 (Nov. 25, 2019). This case from the Western District of North Carolina involved sex trafficking and exploitation of a child, among other offenses. The Fourth Circuit rejected various challenges and affirmed the convictions and multiple life sentences.

(1) The trial court did not abuse its discretion in denying the defendant's motion to continue made two days before trial. "A district court abuses its discretion 'when its denial of a motion to continue is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'" Slip op. at 3. Even if the court so abuses its discretion, a defendant is not entitled to relief without demonstrating prejudice. This was the defendant's fourth motion to continue, and the trial date had been set with the last continuance order. Defense counsel argued no new grounds supporting a continuance from the last motion other than a reference to "unexpected time drains." Counsel did not identify what those time drains were or how they affected trial preparation and failed to explain why the motion was not filed earlier. Under these circumstances, there was no abuse of discretion.

(2) The trial court did not err in proceeding with the trial where the defendant voluntarily absented himself from the trial. While the Fifth Amendment grants the defendant the right to be present at trial, that right may be waived where the defendant voluntarily absents himself from trial without "compelling justification." In determining whether the right to presence is waived, the trial court "should make efforts to ascertain the defendant's location and reason for absence, as well as the 'likelihood that trial could soon proceed with the defendant, the difficulty of rescheduling and the burden on the government." *Id*. at 5. After the first two days of trial with the defendant present, the court received information that the defendant had "some type of seizure activity." He had no history of seizures and exhibited no signs of seizures when examined by medical professionals. The defendant was brought to the courthouse and "la[id] on the floor passively refusing to come to court." *Id*. Defense counsel talked to him and observed the defendant seemingly respond to counsel's advice by making a head movement. Defense counsel reported back to the trial court, and the court found that the

defendant voluntarily absented himself from trial. The trial court arranged for an audio/video feed from the courtroom to run to the defendant's cell. During the afternoon proceedings, the defendant returned to court and participated in the trial. "Unlike in cases in which this Court concluded that the district court summarily assumed that the defendant waived his right to be present, the district court here made repeated efforts to ascertain the Defendant's status and ensure Defendant's presence." *Id*. at 6. The decision to proceed without the defendant present under these circumstances was not an abuse of discretion.

(3) The defendant also appealed the denial of his motion to exclude an expert government witness in software quality assurance. The witness provided a link between a camera used to produce child pornography and video found on the defendant's computer, which supported a charge of using materials in interstate or foreign commerce to produce child pornography. The decision to permit expert testimony is reviewed for abuse of discretion. Here, the trial court's ruling on the issue was "quite brief." Without conducting a *Daubert* analysis, the court concluded that any potential error here was harmless. "Defendant's conviction did not rest on [the expert's] testimony alone; the jury would have connected the video to the Flip Video camera based [another expert's] unchallenged testimony in this case." *Id*. at 8. Any possible error here was therefore harmless.

(4) The defendant was not denied his right to testify. "A defendant's right to testify in his own defense is rooted in the Constitution's Due Process Clause, Compulsory Process Clause, and Fifth Amendment right against self-incrimination." *Id*. This issue was not preserved at trial and was therefore reviewed for plain error. When the government rested its case, the trial judge informed the defendant of his right to testify. The defendant acknowledged and informed the court that he wanted to testify but was not prepared to do so. The trial judge told the defendant that defense testimony was the next step. After a conference between defense counsel and the defendant, defense counsel stated on the record that the defendant was not offering any evidence. Later, defense counsel stated to the trial judge that the defendant would not answer questions about testifying either way. Defense counsel made clear on the record that the decision to testify was up to the defendant. Trial was adjourned for the day. The next morning, the trial judge asked about any defense motions to reopen evidence to allow the defendant to testify. Defense counsel responded affirmatively, and the defendant began taking the stand. Before he could testify, a recess occurred. Thereafter, defense counsel withdrew the request to reopen evidence and moved for dismissal at the close of evidence. There was no indication that defense counsel prevented the defendant from testifying. The trial judge allowed multiple conferences on the issue between the defendant and his lawyer and gave the defendant time to consider the decision. The defendant was given a chance to testify each time he indicated he wished to give testimony, but each time the defendant ultimately changed his mind. Under these circumstances, the district court did not plainly err in failing to conduct a more thorough colloquy with the defendant on the point.

(5) The district court did not abuse its discretion in denying a post-trial motion to withdraw as counsel. When reviewing the denial of a motion to withdraw, the court will look at the "(1) timeliness of the motion; (2) adequacy of the court's inquiry; and (3) 'whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense.'" *Id*. at 14. During this case, the defendant cycled through four defense lawyers. His first attorney withdrew due to a conflict. The second attorney represented the defendant through trial. That attorney filed a motion to withdraw two months after trial (but before sentencing), alleging that the defendant was abusive towards counsel and had accused counsel of incompetence and of "conspiring against him." The motion

to withdraw was granted and a third attorney was appointed. The defendant would not cooperate with this attorney, continued with his assertions that defense counsel was conspiring against him, and filed a bar complaint against the lawyer. A motion to withdraw was again granted and a fourth attorney appointed. When the same problems persisted, defense counsel moved to withdraw (as the North Carolina State Bar advised him to do). The government argued this was mere subterfuge to delay sentencing. The trial court ultimately denied the motion and a subsequent motion to reconsider. Applying the factors above, the court affirmed the trial judge. The defendant's fourth lawyer filed the motion to withdraw 20 months after trial, and the refusal of the defendant to work with the lawyers was preventing sentencing from occurring. Timeliness was therefore a factor in favor of denying the motion. The trial court conducted a substantial hearing on the motion. This was an adequate inquiry by the court and weighed towards denial of the motion. As to the third factor, while there was a significant breakdown of the attorney/client relationship, it was due to the defendant's own actions, acts that were a pattern with his attorneys. This factor also weighed in favor of denying the motion, and the denial here was well within the trial court's discretion.

Other sentencing errors were likewise rejected, along with an argument that the case presented a "complete miscarriage of justice." The district court's judgement was therefore unanimously affirmed.

Business records and certifications of records custodians are nontestimonial and do not implicate confrontation rights

U.S. v. Denton, ___ F. 3d ___, 2019 WL 6258638 (Nov. 25, 2019). In this case from the Eastern District of North Carolina, the defendant stalked his ex-wife, threatened and assaulted her boyfriend, and placed and detonated a pipe bomb in the boyfriend's car. Investigation into this event led to evidence of involvement in drugs. The defendant was convicted at trial of conspiracy to distribute methamphetamine and offenses relating to the possession and use of an explosive device. He appealed, arguing in part that the trial court violated his confrontation rights under the Sixth Amendment by admitting certain business records.

Records from Facebook, Google, and Time Warner Cable were admitted at trial, along with business records certifications from records custodians for each company. The defendant failed to object at trial to this evidence, so the issue was reviewed for plain error. Facebook records linked the defendant to the drug offenses, and the other records showed the defendant threatening his ex-wife and impersonating her current boyfriend. Under the rules of evidence, the business records were self-authenticating and no testimony of a custodian was required. The court rejected the argument that their admission violated the Confrontation Clause. "[B]usiness records, 'having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial,' are not testimonial." Slip op. at 21. The business records therefore did not implicate the defendant's confrontation rights. While the business records certifications were created for use at trial, they also did not implicate confrontation rights. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2000), recognized the distinction between affidavits created to give evidence against a defendant and affidavits created to authenticate an existing record. "[T]he Sixth Amendment right to confront witnesses does not include the right to confront a records custodian who submits a . . . certification of a record that was created in the course of regularly conducted business activity." *Id*. at 22 (internal citation omitted). There was therefore no Sixth Amendment error, much less plain error, for the admission of these records.

Challenges to the sufficiency of the evidence, the jury instructions, and a Rule 404(b) ruling were similarly rejected. The sentence and convictions were therefore unanimously affirmed, with one judge concurring separately on the jury instruction issue.

Inconsistent testimony on dates of conspiracy did not rise to a *Napue* violation

U.S. v. Bush, ___ F.3d ___, 2019 WL 6333695 (Nov. 27, 2019). The defendant was convicted in the District of South Carolina of various drug and conspiracy offenses at trial and appealed. In part, he argued that the government knowingly offered false testimony from a government witness. The knowing use of false testimony by the government violates due process under *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Due process is also violated when the government knowingly allows false testimony to stand uncorrected. To establish a *Napue* violation, the defendant must demonstrate that the testimony at issue was false and material. Here, the witness was merely inconsistent, and subsequent questioning clarified the witness's answers about the timeline of the drug conspiracy. The defendant failed to show this was false testimony, and the *Napue* claim therefore failed.

A challenge to an evidentiary ruling under Federal Rule of Evidence 404(b) regarding use of a record of the defendant's prior state drug conviction was also rejected, and the conviction and life sentence was affirmed.

Other cases of note:

Trial court had authority to consider First Step Act sentence reduction for defendant serving term for revocation of supervised release

U.S. v. Venable, 943 F.3d 187 (Nov. 20, 2019). In this case from the Western District of Virginia, the defendant sought a sentence reduction under the First Step Act, 18 U.S.C. § 3582(c)(1)(B). Because he was currently incarcerated on a supervised release revocation (and not his initial active term of imprisonment), the district court found the defendant ineligible for relief. The Fourth Circuit reversed. The offense at issue was a covered offense within the First Step Act, and the revocation of supervised release is a part of the original sentence of the case subject to reduction under the act. "Thus, the district court had authority to consider his motion for a sentence reduction, just as if he were still serving the original custodial sentence." Slip op. at 13. The court noted its holding was limited to the district court's authority to consider the motion, and expressly declined to weigh in on the merits of the motion or the impact of the defendant's violation of supervised release on it. The district court's judgment was vacated and the matter remanded for hearing on the motion.

Trial court erred in determining offense of conviction was not subject to the First Step Act

U.S. v. Wirsing, 943 F.3d 175 (Nov. 20, 2019). In this case from the Northern District of West Virginia, the trial court denied a motion for sentence reduction under the First Step Act. The trial court determined the defendant's offenses (which included distributing crack cocaine) were not covered by the act (despite the government's agreement with the defendant at the hearing). Reviewing the act and its history, the court found the defendant's offense was eligible under the law. The matter was therefore reversed and remanded for hearing on the motion.