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## November 2017 Summaries of Fourth Circuit Decisions

### **(1) Sex Trafficking of a Minor Does Not Require Actual Knowledge of the Victim's Age; Reckless Disregard of the Victim's Age is Sufficient; (2) Enticement of a Minor to Engage in Prostitution Does Not Require Any Knowledge of the Victim's Age.**

United States v. Banker, \_\_\_ F.3d \_\_\_, 2017 WL \_\_\_\_\_ (4<sup>th</sup> Cir. 2017). The defendant was charged in the western district of Virginia with sex trafficking of a minor under 18 U.S.C. § 1591(a), a related conspiracy offense under 18 U.S.C. § 1594, and enticement of a minor for illegal sexual activity under 18 U.S.C. § 2422(b). He was convicted of all counts at trial. On appeal, he challenged the jury instructions for each offense relating to his knowledge of the victim's age, as well as the sufficiency of the evidence. As to the sex trafficking of a minor offense, the trial court instructed the jury that it "needed to find beyond a reasonable doubt that Banker knew or was in reckless disregard of the fact that [the minor] was under the age of eighteen." Slip Op. at 5 (internal citations omitted). For the enticement count, the trial court ruled that the government was not required to prove the defendant's knowledge of the minor's age at all, finding that the statute required only that the victim was less than eighteen and that the defendant knowingly enticed her to participate in prostitution. The defendant argued that the use of a recklessness standard for the knowledge element of the sex trafficking of a minor was improper, and that actual knowledge of the victim's status as a minor was required under the statute. For the enticement offense, he similarly argued that the jury should have been instructed that he actually knew the victim was a minor, relying on a construction argument stemming from *Flores-Figueroa v. U.S.*, 556 U.S. 646 (2009) (requiring actual knowledge for aggravated identity theft under that statute).

Analyzing the language of the sex trafficking statute, the court found as a matter of statutory interpretation and grammar that it allowed for a conviction based on reckless disregard of the victim's age, rejecting the argument that a greater *mens rea* was required. "The district court did not err in instructing the jury as to the requisite mental state required to convict under § 1591(a) or § 1594(c)." *Id.* at 10. In regards to the enticement statute, the court similarly rejected the idea that actual knowledge of the victim's age was required. It noted that a similar challenge had been made and rejected in *U.S. v. Washington*, 743 F.3d 938 (4<sup>th</sup> Cir. 2014) to a related statute banning the knowing transportation of a minor for prostitution. The court found that the enticement statute should be read *in pari materia* with the transportation statute and with the legislative intent behind the Mann Act generally. This result is consistent with the 11th Circuit's 2012 decision in *U.S. v. Daniels*, 685 F.3d 1237 (11<sup>th</sup> Cir. 2012), which is "the only other circuit court to consider the issue of whether, under *Flores-Figueroa*, the government is required to prove that a defendant knew the victim was a minor to establish a violation of § 2422(b)." *Id.* at 17. The court also rejected the defendant's challenge to the sufficiency of the evidence that he knew or should have known that the victim was a minor. There was ample evidence that the defendant actually knew the victim was under the age of eighteen, as well as evidence that he recklessly disregarded that fact. The convictions were therefore affirmed in all respects.

### **Abuse of Discretion for District Court to Deny Evidentiary Hearing on Alleged *Brady* Violations**

Juniper v. Zook, \_\_\_ F.3d \_\_\_, 2017 WL \_\_\_\_\_ (4<sup>th</sup> Cir. 2017). In this case from the Eastern District of Virginia, the petitioner was tried in state court for a quadruple homicide. Evidence at trial included the presence of his DNA on a cigarette butt outside of the victims' apartment and on a knife used in one of the murders (although all four victims were also shot). A latent fingerprint was also found on the knife handle matching the petitioner. Eyewitnesses placed him at the scene of the crime with a gun, and a witness testified to an inculpatory admission. However, a fingerprint on a box of ammunition matching the bullets used in the murders found inside the apartment was not a match, and a cigarette butt inside the apartment had unknown DNA. The source of this print and DNA was never identified, and the gun used in the murders was never recovered. The petitioner had been in a relationship with one of the victims and was a frequent visitor to the apartment. He was convicted of all four murders and sentenced to death. The lead detective in the case was later convicted of accepting bribes to influence court proceedings. The prosecution of that case led to the discovery of investigative notes related to the murders that were not disclosed to the defense, notes which contained witness statements offering a different account of the crime. They showed the killing occurred at a later time (when the petitioner was not present), provided a substantially different description of the suspect, and revealed that the same witness not only failed to identify the petitioner at a photo line-up but also identified another person altogether. This undisclosed information formed the basis for a habeas action under 28 U.S.C. § 2254 alleging *Brady* violations. The district court granted limited discovery, but ultimately denied the petition without an evidentiary hearing. While finding that the new information was "exculpatory and impeaching and improperly withheld," the court denied relief on grounds that the information did not meet the *Brady* standard of materiality. "The facts alleged by the Petitioner were insufficient, even if proven true, to entitle Petitioner to relief." In the view of the trial court, even once the new evidence was taken into account, other evidence irrefutably established guilt and the undisclosed evidence was therefore not material. Slip op. at 15.

The Fourth Circuit reversed in part. After finding the *Brady* claim properly before the court as a procedural matter, the court turned to the sufficiency of the factual allegations. To determine if an evidentiary hearing is warranted, the court reviews the allegations in the light most favorable to the petitioner. A *Brady* claim is established by proof that the information was (1) exculpatory or impeaching evidence, (2) suppressed by the State, (3) causing prejudice. *Id.* at 18-19. Prejudice is determined by considering whether the evidence is "material"—that is, evidence which "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 23. The court agreed with the trial court that the petitioner met the first and second prongs. Turning to the prejudice prong, the court found that the district court misapplied the standard by failing to consider the petitioner's evidence in the light most favorable to him, failing to consider the value of the suppressed impeachment evidence, and by improperly making credibility determinations at this stage. The suppressed evidence, if taken as true, plausibly showed the crime taking place under different circumstances than alleged by the prosecution. The district court found this alternate theory incredible, pointing to the contradiction between the new evidence and the trial testimony. It was that very contradiction, however, that stood to impeach the trial witness' testimony. The credibility of the various witness accounts was a matter to be resolved with an evidentiary hearing, and it was improper to credit the trial witness' account over the account of the undisclosed witness without taking evidence. The suppressed evidence, if found credible at hearing, was strong enough to cast doubt on the verdict, and

the district court abused its discretion in denying the petition without a hearing. Thus, the court remanded the matter for further proceedings, noting that the grant of an evidentiary hearing was not a statement on the merits of the *Brady* claim.

The court cautioned against the practice by prosecutors of failing to turn over exculpatory evidence that they find to not be credible, as the trial prosecutor here argued as the reason for his failure to disclose. The court urged the government to err on the side of disclosure, an admonishment that the court has repeatedly issued to Commonwealth attorneys in recent years. “We find it troubling that, notwithstanding these rebukes, officials in the Commonwealth’s Attorney’s office continue to stake out positions plainly contrary to their obligations under the Constitution.” *Id.* at 22, n.7.