

Federal Criminal Case Law Update

Kearns Davis

Brooks Pierce McLendon Humphrey & Leonard LLP

Greensboro Office

2000 Renaissance Plaza

230 North Elm Street

Greensboro NC 27401

Direct Phone: (336) 271-3174

Raleigh Office

1700 Wells Fargo Capitol Center

150 Fayetteville Street

Raleigh NC 27601

Direct Phone: (919) 573-6214

kdavis@brookspierce.com
[@KearnsDavis](#)

BROOKS 
PIERCE 
FOUNDED 1897

SCOPE

- Selected United States Supreme Court cases from October Term 2020 (October 2020 through July 2021).
- Selected published Fourth Circuit cases from August 1, 2020 through July 31, 2021.

NOTES

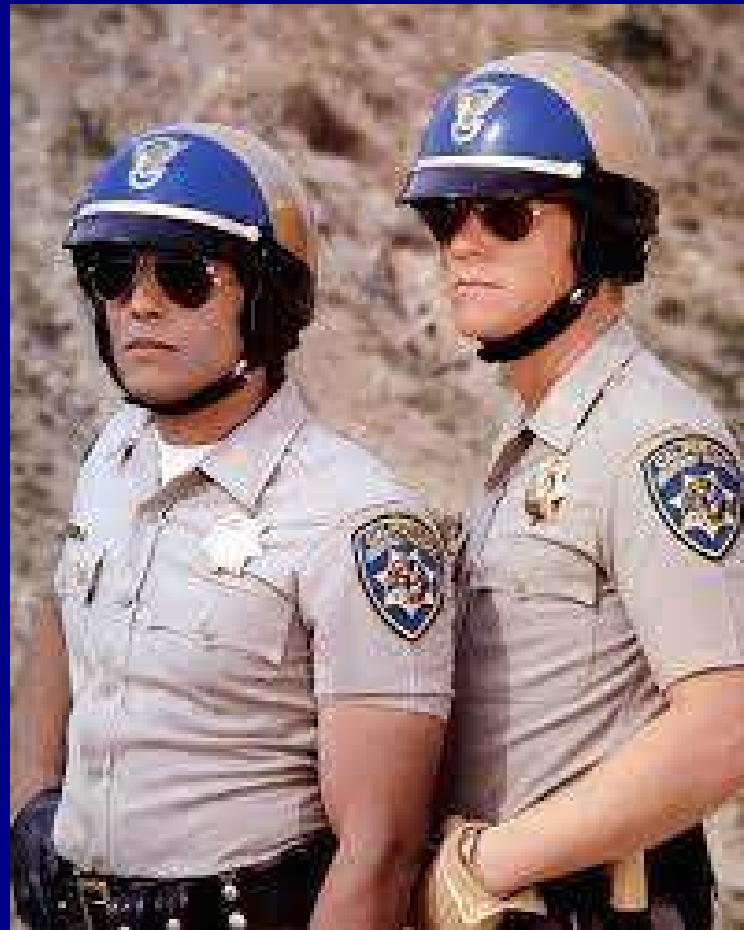
- Time is limited, so I will describe holdings broadly.
- My objective is to point you to court decisions, not explore their fine contours.
- Please read opinions carefully to evaluate how they apply to your cases.

Search, Seizure, & Arrest

Lange v. California

141 S. Ct. (2021)

- Defendant drove past California Highway Patrol officer with his windows down, loud music playing, and his horn blowing.



Lange v. California

(*cont.*)

- The officer followed the defendant, and turned on his lights to pull him over when the defendant was about 100 feet from his house.
- Instead of stopping beside the road, the defendant drove into his detached garage.
- The officer followed the defendant into the garage, questioned him, and administered field-sobriety tests.
- The officer then charged him with misdemeanor DUI and a noise infraction.

Lange v. California

(*cont.*)

- Supreme Court:
 - Pursuit of a misdemeanor suspect does not categorically constitute an exigent circumstance permitting warrantless entry in to a home.
 - Exigent circumstances must be considered on a case-by-case basis.
 - Remanded to state court.

Caniglia v. Strom

141 S. Ct. 1596 (2021)

- A civil case under § 1983, but clarified the “community caretaking” exception to the Fourth Amendment.
- Plaintiff’s wife couldn’t reach him by phone, so she called police to request a welfare check.
- Police found him on porch of his home, believed he posed a risk to himself or others, and recommended a psychiatric evaluation.
- Plaintiff agreed to go to hospital on condition officers not confiscate his firearms.

Caniglia v. Strom

(*cont.*)

- Once plaintiff left, officers entered his home and seized weapons.
- Held: Community caretaking exception—previously applied in *United States v. Cady* to search of impounded vehicle for weapons—did not extend to warrantless search of home.
- Warrantless entry of home is permitted under certain circumstances, such as need provide emergency assistance.
- But there is a “constitutional difference” between a vehicle and a home.

Torres v. Madrid

141 S. Ct. 989 (2021)

- Another civil case under § 1983.
- Officers serving an arrest warrant at an apartment complex for an unrelated person saw petitioner dropping someone off.
- They approached her car and instructed her to either get out of the car or allow them to open the doors.
- Due to darkness and the officers' dark clothing, the petitioner thought she was being carjacked and started to drive off.

Torres v. Madrid

(*cont.*)

- Officers fired their handguns, hitting the petitioner twice, but she managed to escape.
- Police arrested her in the hospital the following day.
- Held:
 - Even though petitioner managed to get away, she was seized within the meaning of the Fourth Amendment when the bullets struck her.
 - Seizure occurred where police used force with *intent* to restrain.

United States v. Cloud

994 F.3d 233 (4th Cir. 2021)

- Decided just eighteen days after *Torres*.
- Fourth Circuit acknowledged and distinguished *Torres*.
- Officers made a show of authority sufficient that reasonable person would have felt he was not free to leave.
- Defendant, however, walked away from them.

United States v. Cloud

(cont.)

- Fourth Circuit:
 - Where suspect did not acquiesce to show of authority, no seizure occurred.
 - Attempted seizure does not implicate Fourth Amendment.

United States v. Rose

3 F.4th 722 (4th Cir. 2021)

- Defendant had packages containing drugs delivered by FedEx to a friend's house, addressed to the friend's dead brother.
- A DEA agent screening packages at the Greensboro FedEx hub noticed a suspicious package.



United States v. Rose

(cont.)

- A law enforcement database revealed that neither the phone number nor the address matched the name of the addressee.
- Minutes later, the agent saw another package addressed the same way.
- A narcotics dog alerted on the package, after which officers obtained a search warrant and opened the package.

United States v. Rose

(*cont.*)

- Fourth Circuit:
 - The defendant did not have a reasonable expectation of privacy in the packages.
 - People may have reasonable expectations of privacy in packages addressed to them under fictitious names.
 - But there must be “objective indicia” that the person “owned, possessed, or exercised control” over the searched items.
 - The objective indicia must be present at the time of the search.

Leaders of a Beautiful Struggle v.
Baltimore Police Dept.
2 F.4th 330 (4th Cir. 2021)

- Plaintiffs in civil case sought preliminary injunction against police use of Aerial Investigation Research (“AIR”) surveillance system.
- “[A]ny single AIR image—captured once per second—includes around 32 square miles of Baltimore and can be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs.”
- *En banc* court reversed district court and panel, finding preliminary injunction appropriate.

Leaders of a Beautiful Struggle v.
Baltimore Police Dept.
(*cont.*)

- Court likened AIR data to cell-site location information in *United States v. Carpenter*, 138 S. Ct. 2206 (2018).
- AIR data, though, was more accurate than cell-site location information.
- Essentially tracked every person in the city over a long period of time.
- “Because the AIR program enables police to deduce from the whole of individuals’ movements, we hold that accessing its data is a search, and its warrantless operation violates the Fourth Amendment.”

United States v. Buzzard

1 F.4th 198 (4th Cir. 2021)

- Lone officer stopped vehicle containing multiple occupants.
- Following standard practice for overnight shift, officer radioed for another officer to join him.
- While waiting for other officer to arrive, first officer asked whether there was anything illegal in the car.
- Defendants pulled out drug paraphernalia.
- Officers then searched the car and found firearms.

United States v. Buzzard

(*cont.*)

- Defendants argued that officer's question violated their Fourth Amendment rights.
- Fourth Circuit:
 - Asking occupants of vehicle if they had anything illegal was related to officer safety.
 - In this instance, the question did not prolong the traffic stop at all, because the officer was waiting for other officer to arrive.
 - Affirmed denial of motion to suppress.

United States v. Simmons

11 F.4th 239 (4th Cir. 2021)

- Defendants were convicted of 37 out of 38 counts in an indictment.
- The district court then granted a motion to set aside one of those counts: possession of a firearm during or in furtherance of a crime of violence under 18 U.S.C. § 924(c), which carries a mandatory consecutive sentence.
- District court concluded that a RICO conspiracy does not qualify as a “crime of violence” under Section 924(c), even when the indictment alleges aggravating factors that themselves would be crimes of violence.
- The government appealed, even though two defendants had received life sentences and the third received a 35-year sentence.

United States v. Simmons

(*cont.*)

- Defendants cross-appealed.
- The Fourth Circuit affirmed the district court's conclusion on the RICO issue the government had appealed.
- It held that neither a "generic" nor an "aggravated" RICO conspiracy is a "crime of violence" for purposes of Section 924(c)

United States v. Simmons

(*cont.*)

- The Fourth Circuit also agreed with portions of the defendants' cross appeal.
- It found that the district court had constructively amended the indictment by instructing the jury that it could convict based on a predicate state-law offense that had not been alleged as a predicate in the indictment.
- “The Fifth Amendment’s Grand Jury Clause guarantees that a criminal defendant will be tried only on the charges in a grand jury indictment, so *only the grand jury may broaden or alter the charges in the indictment.*” (emphasis added) (internal quotations omitted).

United States v. Davis

997 F.3d 191 (4th Cir. 2021)

- Suspect drove off during traffic stop, leaving his license and proof of insurance with officers.
- When he reached a dead end, he left his car and fled on foot into a swamp, where he got stuck.
- An officer brandished his gun and ordered the suspect to come out.
- He emerged, dropping his backpack along the way, and lay down on his stomach.
- The officer then handcuffed and arrested him.

United States v. Davis

(*cont.*)

- After securing the suspect, the officer unzipped and searched his backpack.
- Officers also searched his vehicle.
- The district court denied the defendant's motion to suppress.
- The Fourth Circuit reversed.
- Warrantless search of a vehicle incident to arrest is permitted only if it was reasonable for officers to believe the suspect "could have accessed his car *at the time of the search.*" (emphasis added).
- It applied the same principle to the backpack.

United States v. Myers

986 F.3d 453 (4th Cir. 2021)

- An officer conducted a legitimate traffic stop.
- The officer smelled marijuana, and on that basis officers searched the vehicle.
- Officers found fentanyl on floor of vehicle.
- Neither the defendant nor the driver claimed ownership of it.
- Officers arrested both of them.

United States v. Myers

(*cont.*)

➤ Fourth Circuit:

- It was “entirely reasonable for the officer to infer that occupants [we]re in a common enterprise and therefore to arrest them.”
- “[T]he community of conduct suggested by the circumstances *particularized the suspicion*” as to both defendants, justifying their arrest. (emphasis in original).

United States v. Khweis

971 F.3d 453 (4th Cir. 2020)

- Defendant was a United States citizen who traveled to Iraq to join ISIL.
- Kurdish forces captured him and took him to a Kurdish detention center.
- At the Kurdish detention center, the FBI's Assistant Legal Attaché for Iraq interviewed him seeking intelligence about ISIL.
- The Attaché did not give him a *Miranda* warning.

United States v. Khweis

(cont.)

- 10 days later, a different FBI team interviewed the defendant “for purposes of a potential United States criminal prosecution.”
- This time, they advised him of his *Miranda* rights, which he waived.
- Fourth Circuit affirmed use of statements given to the second team of investigators.
- Even if FBI used a two-step interview process intentionally (which Court did not determine) agents took curative measures that ensured a reasonable person “would understand the import” of *Miranda* and his waiver.

Substantive Charges & Pretrial Issues

Van Buren v. United States

141 S. Ct. 1648 (2021)

- Defendant was a police officer.
- He used his legitimate credentials to access a law-enforcement database and run a license-plate check in exchange for money.
- Prosecutors charged him with a federal felony under Computer Fraud and Abuse Act, which prohibits using authorized access “to obtain . . . information . . . that the accesser is not entitled so to obtain.”

Van Buren v. United States

(cont.)

- Held: The CFAA was not violated where the defendant was entitled to obtain the particular information but obtained it for an improper purpose.
- The government's reading would turn every violation of a computer-use policy into a federal felony.

Borden v. United States

141 S. Ct. 1817 (2021)

- Defendant convicted of possession of a firearm by a felon.
- Sentence enhanced under Armed Career Criminal Act based on prior Tennessee conviction for reckless aggravated assault.
- Fourth Circuit:
 - Offense with mens rea of recklessness does not qualify as a “violent felony” for purposes of enhancement under ACCA.
 - Statute requires physical force “against the person or property of another,” which the Court interpreted to mean “a deliberate choice of wreaking harm on another, rather than mere indifference to risk.”

United States v. Moriello

980 F.3d 924 (4th Cir. 2020)

- Immigration judge and bailiff repeatedly asked attorney to stop using her cell phone in courtroom.



United States v. Moriello

(cont.)

- Attorney was prosecuted in WDNC with violating federal regulations issued by the General Services Administration under authority of 40 U.S.C. § 1315:
 - 41 C.F.R. 102-74.385 – “What is the policy concerning conformity with official signs and directions?”
 - 41 C.F.R. 02-04-390 – “What is the policy concerning disturbances?”
- Attorney challenged conviction on multiple grounds.

United States v. Moriello

(cont.)

- The Fourth Circuit first rejected the attorney's argument that the GSA regulations were void for vagueness.
- It held:
 - Section 1315 is a constitutional delegation of authority.
 - Regulations did not exceed authority provided in statute.

United States v. Moriello

(cont.)

- The defendant attorney also made an argument under the Tenth Amendment.
 - She claimed that “[t]he challenged regulations interfere[d] with [her] rights as a private citizen to disregard unwarranted exercise of authority.”
- The Fourth Circuit was unimpressed:
 - “These regulations are firmly within the federal government’s power to make such laws as are necessary and proper to regulate property belonging to the United States.” (internal quotation omitted).

Trial

United States v. Zeigler

1 F.4th 219 (4th Cir. 2021)

- Defendant wrecked his car while intoxicated.
- Trying to avoid charges and retrieve his impounded car, he claimed to be an Assistant U.S. Attorney.
- He made that claim to the deputies, to the magistrate judge, and to the towing company.
- An actual Assistant U.S. Attorney then prosecuted him for impersonating a federal officer.

United States v. Zeigler

(cont.)

- At trial, he changed his mind and decided to impersonate a defense lawyer, instead, by representing himself.
- Then, on appeal, he claimed:
 - The district court should not have allowed him to represent himself, because he wasn't capable.
 - The district court should have inquired into his competency.
 - The evidence failed to prove that he "acted" as a federal officer.

United States v. Zeigler

(*cont.*)

- The Fourth Circuit affirmed because:
 - District judge carefully considered request to represent himself.
 - Public defender said he did not question defendant's legal competency.
 - Judge repeatedly told defendant he should accept public defender.
 - Defendant made a sufficient show of authority to "act" as an official where he told officers that, because he was an AUSA, they had no jurisdiction over him, charges would be dismissed, and he did not need a driver's license.

United States v. Hardy

999 F.3d 250 (4th Cir. 2021)

- 18 U.S.C. § 3501(a) directs trial judges, when they admit confessions into evidence, to “instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.”
- However, neither party requested the instruction at trial, and the trial judge did not give it to the jury.
- Because it was not raised below, the Fourth Circuit reviewed for plain error.

United States v. Hardy

(*cont.*)

- Fourth Circuit did not resolve the question of whether failure to give the instruction constituted plain error.
- Even if it were plain error, it did not affect defendant's substantial rights.
- To affect the defendant's substantial rights, an error must be prejudicial--that is, it must "affect[] the outcome."
- Here, the defendant did not meaningfully challenge his confession at trial, and the trial judge gave other instructions that guided the jury to give all evidence in the case the weight it believed appropriate.

United States v. Santos-Portillo

997 F.3d 159 (4th Cir. 2021)

- Federal agent saw a person who looked familiar.
- It was the defendant, who previously had been deported.
- Agents arrested him at his home without a warrant.
- They then transported him to a federal facility, fingerprinted him, gave him *Miranda* warnings, and questioned him.
- Defendant moved to suppress all evidence collected after his arrest based on 8 U.S.C. § 1357(a), which authorizes arrest without a warrant only where agents have probable cause and “reason to believe” the person is likely to escape before they can obtain a warrant.”

United States v. Santos-Portillo

(*cont.*)

- District court denied motion to suppress.
- Fourth Circuit affirmed.
- Statute does not authorize suppression as a remedy.
- Fourth Circuit declined to create a suppression remedy absent statutory authorization, citing a “proper respect for Congress’s role in determining the consequences of statutory violations.”

Sentencing

United States v. Boyd

5 F.4th 550 (4th Cir. 2021)

- Defendant was sentenced in the Western District of North Carolina for possession of a firearm by a felon.
- On appeal, he challenged only his conditions of supervised release.
- In the district court, the defendant had objected to several conditions in writing, before his sentencing hearing.
- At the hearing, the district judge announced the sentence including “the standard conditions . . . in the Western District.”
- Neither the defendant’s counsel nor the judge mentioned at the hearing the specific conditions to which the defendant had objected in writing.

United States v. Boyd

(*cont.*)

- Fourth Circuit:
 - Defendant did not waive objections by failing to mention again at hearing.
 - Sentencing judge must explain rationale for each discretionary condition.
 - “Individualized assessment” is required, so “duty to explain” cannot be circumvented by adoption of a standing order.
 - “No matter how ‘routine’ a case might be, a defendant’s sentence is procedurally unreasonable if the district court fails to address the defendant’s nonfrivolous arguments.”

United States v. Hamilton

986 F.3d 413 (4th Cir. 2021)

- Defendant convicted of possession of child pornography.
- Court imposed special conditions of supervised release including requirement that defendant obtain approval of probation officer before beginning any kind of employment.
- Fourth Circuit held condition was overbroad, because it lacked sufficient nexus to nature and circumstances of offense.
 - Remanded for crafting of an employment restriction based on defendant's particular misconduct.
 - Affirmed other challenged conditions.

United States v. Williams

5 F.4th 500 (4th Cir. 2021)

- Defendant was convicted of producing child pornography.
- Presentence Investigation Report included a Sentencing Guidelines range of 210-262 months.
 - Probation Officer also identified multiple possible grounds for upward departure from the Guidelines range.
- Court imposed upward-variance sentence of 327 months.
- Defendant argued on appeal that court had failed to give notice before hearing that it was considering a departure from the Guidelines range.

United States v. Williams

(*cont.*)

- Fourth Circuit noted that the sentencing court had made clear it was imposing an upward variance based on *statutory* sentencing factors.
- An upward variance is distinct from an upward departure, in which the court actually changes the Guidelines range based on specific authority within the Guidelines themselves.
- Prior notice is required for an upward departure under the Guidelines, on a ground not otherwise identified before the hearing.
- But prior notice is *not* required for a variance, which the sentencing statute authorizes a judge to impose independent of the Guidelines.

United States v. Green

996 F.3d 176 (4th Cir. 2021)

- Defendant convicted of Hobbs Act robbery under 18 U.S.C. § 1951.
- He was sentenced as a career offender under Section 4B1.1 of the U.S. Sentencing Guidelines, on the basis that Hobbs Act robbery qualified as a “crime of violence.”
- The Fourth Circuit remanded for resentencing.
- Hobbs Act robbery may be committed through force or threats of force against property, not only against persons, so it does not qualify as a “crime of violence” under Section 4B1.1.

United States v. Taylor

979 F.3d 203 (4th Cir. 2020)

- Fourth Circuit considered whether Hobbs Act robbery constitutes a “crime of violence” under 18 U.S.C. § 924(c).
- Similar to the issue in *Green*, except Section 924(c) is the basis for a separate offense carrying a mandatory consecutive sentence.
- The Fourth Circuit determined that Hobbs Act robbery is not a “crime of violence” under Section 924(c), either, because it can be committed without the required “use, attempted use, or threatened use of physical force.”

United States v. Edwards

995 F.3d 342 (4th Cir. 2021)

- Defendant pleaded guilty under Trafficking Victims Protection Act.
- He forced the victim to work for five years at his restaurant, for more than 100 hours per week.
- District court imposed sentence of 120 months in prison plus \$273,000 in restitution.
- Restitution order included both unpaid minimum wages and overtime compensation, computed pursuant to Fair Labor Standards Act.

United States v. Edwards

(cont.)

- Fourth Circuit reversed.
- Directed district court on remand to add liquidated damages as provided by FLSA.
- Restitution requires compensating victim for full amount of his losses, including the full value of his labor.
- Liquidated damages represent a reasonable estimate of actual damages.

United States v. Mayhew

995 F.3d 171 (4th Cir. 2021)

- Defendant filed petition under 28 U.S.C. § 2255 to vacate his conviction and sentence.
- Alleged his lawyer had guaranteed he would receive a sentence of just 2-5 years if convicted at trial, and he had relied on that guarantee in rejecting a plea offer.
- District court dismissed petition, holding that any prejudice was cured when court advised him of actual sentencing exposure during arraignment.
- Fourth Circuit reversed, holding that because defendant had rejected plea offer before arraignment, an evidentiary hearing was needed to determine whether advice at arraignment had cured any prejudice.

United States v. Miller

992 F.3d 322 (4th Cir. 2021)

- In calculating criminal history score under Sentencing Guidelines, district court treated as a “prior sentence” a North Carolina conviction for possession of marijuana for which the defendant had received a Prayer for Judgment Continued.
- Fourth Circuit affirmed.
- Even though sentence was deferred indefinitely, the finding of guilt before entry of the PJC was determinative.
- Federal law, not North Carolina law, controlled the treatment of the prior sentence under the U.S. Sentencing Guidelines.

United States v. Singletary

984 F.3d 341 (4th Cir. 2021)

- Defendant appealed on ground that special conditions of supervised release that appeared in Court’s written judgment had not been pronounced orally at the sentencing hearing.

- Fourth Circuit reversed and remanded.
 - Appeal waiver did not bar appeal, because it barred only defendant’s right to appeal the “sentence . . . imposed.”

 - Condition not pronounced at sentencing hearing had not been “imposed.”

 - Court would not assume sentencing court would impose conditions included in written judgment, because defendant would have opportunity to object to oral pronouncement.

Appeal

United States v. White

987 F.3d 340 (4th Cir. 2021)

- Defendant convicted in MDNC of possession of firearm by a felon.
- Plea agreement included waiver of appellate rights.
- Court imposed sentence of 15 years, enhanced from maximum of 10 years to minimum of 15 years under Armed Career Criminal Act.
- Defendant appealed, arguing that prior Virginia conviction for robbery did not qualify as “violent felony” under ACCA.

United States v. White

(*cont.*)

- Fourth Circuit held oral argument in December 2020.
- Issued opinion February 5, 2021.
 - Held that appeal waiver did not apply, because it included an exception for a sentence in excess of statutory maximum.
 - Fourth Circuit certified legal question to Virginia Supreme Court: “Under Virginia common law, can an individual be convicted of robbery by means of threatening to accuse the victim of having committed sodomy?”

Acknowledgements

Brooks Pierce summer associates James Kendall and Christiane Smedley provided research assistance in the preparation of this presentation. Additional sources we consulted, and which provide useful perspectives on particular cases, include Justia (<https://law.justia.com/cases/federal/appellate-courts/ca4/>), www.oyez.org, www.ScotusBlog.com, the UNC School of Government's North Carolina Criminal Law Blog (<https://nccriminallaw.sog.unc.edu/>), Westlaw, and the Supreme Court syllabi.

Federal Criminal Case Law Update

Kearns Davis

Brooks Pierce McLendon Humphrey & Leonard LLP

Greensboro Office

2000 Renaissance Plaza

230 North Elm Street

Greensboro NC 27401

Direct Phone: (336) 271-3174

Raleigh Office

1700 Wells Fargo Capitol Center

150 Fayetteville Street

Raleigh NC 27601

Direct Phone: (919) 573-6214

kdavis@brookspierce.com
[@KearnsDavis](#)

BROOKS 
PIERCE 
FOUNDED 1897