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Case Comments G. Criminal Law Adams V. Aiken

G. CRIMINAL LAW

Adams v. Aiken

965 F.2d 1306 (4th Cir. 1992),
petition for cert. filed (Oct. 14, 1992)

The retroactive application of a constitutional criminal procedure rule is frequently an issue in federal habeas corpus proceedings.[259] The court's determination of applicability hinges on whether the rule is new.[260] Justice Harlan opined in *Mackey v. United States*[261] that, given the nature, scope and purpose of habeas corpus, courts should not retroactively apply new rules in habeas cases unless one of two narrow exceptions is present.[262] In *Teague v. Lane*,[263] the Supreme Court, in a plurality decision, adopted Justice Harlan's approach to retroactivity of new rules in habeas corpus proceedings. The *Teague* Court, while admitting the difficulty of identifying a new rule, nevertheless attempted the task.[264] The Court held that a new rule arises when it breaks new ground or imposes a new obligation on the government, or if precedent existing at the time the defendant's conviction became final would not dictate the decision of the court announcing the rule.[265] Subsequent Supreme Court decisions have not clarified this question.[266]

In 1990, the Supreme Court, in *Cage v. Louisiana*,[267] found that jury instructions equating "reasonable doubt" with "substantial doubt" and

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259. *See* Henderson v. Singletary, 968 F.2d 1070, 1073 (11th Cir. 1992) (applying Teague v. Lane and concluding that Michigan v. Jackson should not apply retroactively in habeas proceeding); Nickerson v. Lee, 971 F.2d 1125, 1134 (4th Cir. 1992) (applying Teague v. Lane and finding that rule prohibiting discrimination in selection of grand jury foremen in North Carolina constituted new rule), *petition for cert. filed*, October 21, 1992 (No. 92-6327); Andiarena v. United States, 967 F.2d 715, 717-18 (1st Cir. 1992) (holding that rule in McClesky v. Zant was not new rule and would apply retroactively); Butler v. McKellar, 494 U.S. 407, 409 (1990) (holding that rule of *Arizona v. Roberson* was new rule that did not fall within exceptions to bar on retroactive application); Saffle v. Parks, 494 U.S. 484, 486 (1990) (holding that rule urged by defendant was new rule and was not entitled to retroactive application under exceptions).

260. *See Butler*, 494 U.S. at 409 (holding that new rule did not meet exceptions to bar on retroactive application); *Saffle*, 494 U.S. at 486 (same).

261. 401 U.S. 667, 690 (1970) (Harlan, J., concurring in part, dissenting in part).

262. Mackey v. United States, 401 U.S. 667, 692-94 (1970) (Harlan, J., concurring in judgments of two of three cases considered, but disagreeing with plurality on retroactivity rules used to reach judgment in case on collateral review).

263. 489 U.S. 288 (1989).

264. Teague v. Lane, 489 U.S. 288, 301 (1989) (adopting Justice Harlan's approach to retroactive application of new rules in habeas corpus cases).

265. *Id.*

266. *See* Butler v. McKellar, 494 U.S. 407, 415 (1990) (holding that court announces new rule if outcome is "susceptible to debate among reasonable minds"); Saffle v. Parks, 494 U.S. 484, 488 (1990) (holding that court establishes new rule if state court would feel compelled by existing precedent to conclude that Constitution requires rule).

267. 111 S. Ct. 328 (1990).

"moral certainty" lowered the degree of proof required for conviction to a standard below that required by the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution.[268] In *Adams v. Aiken*,[269] the United States Court of Appeals for the Fourth Circuit applied *Teague* as it decided whether the Supreme Court had announced a new rule in *Cage*, barring the application of the *Cage* rule in a habeas corpus proceeding.

A South Carolina jury had convicted the defendant, Sylvester Adams, of murder, kidnapping, and housebreaking and sentenced him to death for his crimes. The South Carolina Supreme Court overturned his conviction in 1981 because of procedural and evidentiary errors. On remand, a second jury convicted Adams of the same crimes and again sentenced him to death. The South Carolina Supreme Court upheld this conviction in 1983. Following denial of certiorari by both the South Carolina Supreme Court and the United States Supreme Court, Adams, in 1986 filed a petition for a writ of habeas corpus, alleging the presence of numerous errors in his second trial. After an evidentiary hearing on the specific issue of Adams's mental competence, a United States magistrate recommended denial of the petition. The United States District Court for the District of South Carolina adopted the magistrate's recommendation. Adams then appealed the denial of his petition to the United States Court of Appeals for the Fourth Circuit.

Adams raised eleven issues on appeal. Adams first argued that under *Cage* a jury instruction equating "reasonable doubt" with "substantial doubt" and "moral certainty" violated his right to due process by unconstitutionally lowering the state's burden of proof. In response, the Fourth Circuit found that the jury instruction given in Adams's second trial was similar to the instruction in *Cage* and had the effect of diluting the reasonable doubt standard, in violation of Adams's right to due process. However, this finding alone did not require a new trial.

Relying on *Teague v. Lane*,[270] the *Adams* court found that new rules do not apply retroactively to cases brought on collateral review. Because Adams's conviction was final in 1983 and *Cage* was decided in 1990, the court's application of *Cage* would be retroactive. If *Cage* was a new rule, the court could not apply it to Adams by granting him a new trial.

The Fourth Circuit first reviewed the definition of a "new rule." *Teague* stated that a court announces a new rule when the court's holding breaks new ground or imposes a new obligation on the lower courts.[271] In *Butler v. McKellar*,[272] the Supreme Court elaborated on this definition, holding that even if the result of a case is controlled by precedent, a court

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268. U.S. CONST. amend V, cl. 3; amend XIV, § 1, cl. 3; Cage v. Louisiana, 111 S. Ct. 328, 329-30 (1990).

269. 965 F.2d 1306 (4th Cir. 1992), *petition for cert. filed*, Oct. 14, 1992 (No. 92-6259).

270. Teague v. Lane, 489 U.S. 288 (1989).

271. *Id.* at 301.

272. 494 U.S. 407 (1990).

announces a new rule if the outcome is "susceptible to debate among reasonable minds."[273] The Supreme Court provided another articulation of the test for a new rule in *Saffle v. Parks*, stating that a court establishes a new rule if a state court would feel compelled by existing precedent to conclude that the Constitution required the rule.[274]

Adams argued that the *Cage* rule was not a new rule, but merely an application of the principle announced in *In re Winship*[275] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every element of the crime for which he is charged.[276] However, the Fourth Circuit found that cases dealing with reasonable doubt instructions, subsequent to *Winship* and prior to *Cage*, had only criticized the jury instructions using "substantial certainty" and "moral certainty," without reversing convictions on the basis of those instructions.[277] The Fourth Circuit concluded that *Cage*, which reversed a conviction based on a jury instruction diluting the reasonable doubt standard, announced a new rule. Consequently, the court held it could not retroactively apply the new rule of *Cage* to Adams, unless it found that either of two exceptions to the *Teague* standard was present.

The first exception applies to new rules that place an entire category of behavior beyond the reach of criminal law or that prohibit imposition of certain types of punishment for a class of defendants based upon their offense or status.[278] The Fourth Circuit found this exception inapplicable because the *Cage* rule did neither. The second exception applies to a new rule that requires the observance of procedures that are "implicit in the concept of ordered liberty."[279] This exception is limited to rules without which the likelihood of an accurate conviction is diminished.[280] The new rule must both improve the accuracy of a trial and alter the understanding of the "bedrock procedural elements" that are essential to a fair trial.[281] The court found that while *Cage* did eliminate confusion and improve the accuracy of a trial, it did not alter the essential elements of a fair trial or the court's understanding of them. Finding the circumstances of the case satisfied neither exception, the Fourth Circuit concluded that it should not

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273. Butler v. McKellar, 494 U.S. 407, 415 (1990).

274. Saffle v. Parks, 494 U.S. 484, 488 (1990).

275. 397 U.S. 358 (1970).

276. In re Winship, 397 U.S. 358, 364 (1970).

277. *See* Taylor v. Kentucky, 436 U.S. 478, 488 (1978) (remarking that jury instruction equating reasonable doubt with substantial doubt is not itself reversible error); United States v. Moss, 756 F.2d 329, 333-34 (4th Cir. 1985) (same); Smith v. Bordenkircher, 718 F.2d 1273, 1277-78 (4th Cir. 1983) (refusing to reverse conviction on basis of jury instruction clarifying reasonable doubt), *cert. denied*, 466 U.S. 976 (1984).

278. *See* Sawyer v. Smith, 497 U.S. 227, 234 (1990) (holding that *Caldwell v. Mississippi* announced new rule and did not come within exceptions to bar on retroactive application to habeas cases).

279. Teague v. Lane, 489 U.S. 288, 311 (1989).

280. *Id.* at 313.

281. *Sawyer*, 497 U.S. at 242 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

retroactively apply the rule announced in *Cage*. In arriving at this conclusion, the court noted that its holding was consistent with the United States Court of Appeals for the Fifth Circuit's decision in *Skelton v. Whitley*.[282]

The Fourth Circuit also found that Adams' other claims raised on appeal were not meritorious. For example, Adams contended that the prosecutor withheld exculpatory evidence in violation of *Brady v. Maryland*.[283] For a *Brady* violation to occur the information withheld must be both exculpatory and material, which the United States Supreme Court defined as reasonably likely to affect the outcome of the trial.[284] The *Adams* court concurred in the district court's finding that the statements in question, because of their inconsistencies, were neither exculpatory nor material.

Adams also argued that the trial court should have excluded his confession to the police because the police obtained it in violation of his Fifth and Sixth Amendment rights. The court, noting that the Supreme Court has established safeguards to protect the constitutional rights of the accused, found that the defendant had given his confession to police only after consultation with his counsel. The fact that the police had improperly obtained incriminating statements at an earlier time did not require suppression of a later, validly obtained confession.[285]

The Fourth Circuit's holding that the jury instruction rule announced in *Cage* is new and cannot be applied retroactively in a habeas corpus proceeding is in accord with the Fifth Circuit, the only other circuit to consider the *Cage* rule.[286] At first glance, the court's decision in *Adams* seems to produce a harsh result. It upholds the death penalty for a conviction based on a constitutionally defective jury instruction. However, policy considerations in support of this decision are strong. As Justice Harlan pointed out in his separate opinion in *Mackey*, both the criminal defendant and society have an interest in insuring with certainty that there will be an end to a criminal prosecution.[287] Without finality, criminal law is deprived of its deterrent effect.[288] Allowing retroactive application of new rules to habeas corpus proceedings stymies these policy goals. Furthermore, when state courts have relied in good faith on constitutional

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282. 950 F.2d 1037 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992).

283. 373 U.S. 83 (1963).

284. United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that nondisclosure of impeachment evidence is constitutional error requiring reversal of conviction only if evidence is material in that it might have affected outcome of trial).

285. Oregon v. Elstad, 470 U.S. 298, 314 (1985) (holding that Fifth Amendment protection against self incrimination does not require suppression of confession obtained after proper Miranda warning and waiver of rights, solely because police obtained earlier unwarned confession).

286. Skelton v. Whitley, 950 F.2d 1037 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992) (holding that Supreme Court decision that reasonable doubt jury instruction was unconstitutional was new rule that did not apply retroactively on collateral review).

287. Mackey v. United States, 401 U.S. 667, 690 (1970) (Harlan, J., concurring in part, dissenting in part).

288. Teague v. Lane, 489 U.S. 288, 309 (1989).

precedents, federal habeas corpus should not be used to reverse their decisions, even when their judgments are contrary to a subsequent Supreme Court decision.[289] Retroactive application of new rules would dampen the decision-making of the lower courts.

The *Adams* court found that *Cage* diluted the burden of proof, but did not change it.[290] However, in *Cage* the court found that the faulty jury instructions had lowered the burden of proof for the defendant.[291] In barring convictions based on the lower standard of proof, the *Cage* court arguably changed the existing understanding of reasonable doubt. This change appears to meet Justice Harlan's second exception in *Mackey*, by altering the understanding of such an important "bedrock procedural element" of every criminal trial.[292]

Adams has filed a petition for certiorari from the Supreme Court.[293] However, the Supreme Court has denied the petition for certiorari filed by the defendants in *Skelton v. Whitley*, where the Fifth Circuit had interpreted the *Cage* rule similarly to the Fourth Circuit.[294] Thus, it is unlikely that *Adams v. Aiken* will receive Supreme Court review. Absent the granting of Adams's petition, no additional guidance on the definition of new rules will be forthcoming from the Court, and *Cage* will stand as a mere clarification of the Constitutional right to due process in criminal cases.

United States v. Kincaid

964 F.2d 325 (4th Cir. 1992)

Section 6A1.3 of the United States Sentencing Guidelines[295] requires sentencing courts to provide both the prosecution and the defense with an adequate opportunity to present relevant information when any factor important to the sentencing determination is "reasonably in dispute." In pre-guidelines practice, informal proceedings often sufficed to resolve disputed sentencing factors.[296] Under the Sentencing Guidelines, however, resolution of disputed sentencing factors could affect criminal history categorization and offense level determination significantly. Therefore, to ensure that the sentencing process is fair and accurate, sentencing courts must adopt more formal procedures, in accordance with Rule 32(a)(1) of

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289. *Skelton*, 950 F.2d at 1044.

290. Adams v. Aiken, 965 F.2d 1306, 1311 (4th Cir. 1992), *petition for cert. filed*, Oct. 14, 1992 (No. 92-6259).

291. Cage v. Louisiana, 111 S. Ct. 328, 329 (1990).

292. Mackey v. United States, 401 U.S. 667, 693 (1970).

293. *Adams*, 965 F.2d at 1306.

294. Skelton v. Whitley, 950 F.2d 1037 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992).

295. 18 U.S.C. app. 4 (Supp. 1992) [hereinafter Sentencing Guidelines].

296. *See* Sentencing Guidelines § 6A1.3 (1992). The Sentencing Guidelines Commentary points out that in preguidelines practice particular offense or offender characteristics rarely had highly specific or required sentencing consequences. Therefore, informal proceedings were sufficient to handle issues regarding relevant sentencing factors. *Id.*

the Federal Rules of Criminal Procedure,[297] which allow both parties an adequate opportunity to present relevant information regarding the disputed factors.[298] Prior to May 7, 1992, however, no federal circuit court of appeals had granted a prosecutor's request to be heard on a sentencing factor in dispute.

In *United States v. Kincaid* (*Kincaid II*),[299] the United States Court of Appeals for the Fourth Circuit considered whether a sentencing court abused its discretion by not granting the government's request for continuance at a resentencing hearing when the defendant made surprise objections to the presentence investigation report. Additionally, in *Kincaid II*, the Fourth Circuit considered the defendant's claim that the sentencing court violated the Due Process and Double Jeopardy Clauses of the Fifth Amendment. The defendant, William F. Kincaid, Jr., argued that by applying the sentence enhancement provisions of 18 U.S.C. section 3147[300] and Sentencing Guidelines section 2J1.7[301] to his second sentence, the sentencing court acted vindictively because the sentencing court had declined to apply those provisions to Kincaid's first sentence. The Fourth Circuit also addressed the defendant's claim that the government failed to provide adequate notice of the existence of the enhancement provisions.[302] Finally, the Fourth Circuit considered the defendant's claim that the district court improperly applied a two-level enhancement based on the defendant's aggravating role in the offense.

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297. FED. R. CRIM. P. 32(a)(1).

298. *See* Sentencing Guidelines § 6A1.3. The Commentary explains that the exact procedure used in resolving the disputes should be determined by the sentencing court based on the nature of the dispute. The Commentary insists, therefore, that lengthy sentencing hearing will rarely be necessary because under some circumstances written statements by counsel, such as affidavits of witnesses or transcripts of previous testimony may be sufficient to resolve the disputes. *Id.*; *see also* United States v. Upshaw, 918 F.2d 789, 791 (9th Cir. 1990) (holding that sentencing court did not abuse its discretion by refusing to allow defendant to testify at sentencing hearing when court permitted written submissions to address issue in dispute), *cert. denied*, 111 S. Ct. 1335 (1991); United States v. Rutter, 897 F.2d 1558, 1566 (10th Cir.) (determining that trial court need not grant evidentiary hearing when court permitted defendant to raise points at sentencing hearing and disputes were legal rather than factual in nature), *cert. denied*, 111 S. Ct. 88 (1990); United States v. Gerante, 891 F.2d 364, 367 (1st Cir. 1989) (ruling that district court did not abuse its discretion in denying evidentiary hearing regarding important sentencing factor where defendant's version of facts was implausible based on prior admissions and other evidence).

299. 964 F.2d 325 (4th Cir. 1992).

300. 18 U.S.C.A. 3147 (West Supp. 1992). Section 3147 provides in pertinent part that, "[a] person convicted of an offense committed while on release pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony. . . ."

301. Sentencing Guidelines § 2J1.7. Section 2J1.7 provides that, "[i]f an enhancement under 18 U.S.C. § 3147 applies, add three levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

302. *See* United States v. Cooper, 827 F.2d 991, 995 (4th Cir. 1987) (holding that 18 U.S.C. § 3147 does not apply if judicial officer authorizing release failed to give defendant written notice of release conditions and penalties for violating conditions).

In *Kincaid II*, the Fourth Circuit addressed the second set of appeals arising from Kincaid's conviction on narcotics and firearms charges. Initially, a magistrate judge arraigned Kincaid on a bank fraud charge in October 1988. Kincaid pled guilty to that charge and, while on release pending sentencing, committed the narcotics and firearm offenses. Prior to the trial regarding the narcotics and firearms charges, the government filed notice that in the event of a conviction, it would seek an enhanced sentence under 18 U.S.C. section 3147 and Sentencing Guidelines section 2J1.7.

Following Kincaid's conviction, the district court imposed a sentence of 188 months imprisonment for the narcotics violations and a consecutive sentence of sixty months for the firearm offense. The district court, in computing Kincaid's first sentence, erroneously added two points to his criminal history category pursuant to Sentencing Guidelines section 4A1.1(d). Section 4A1.1(d) applies when a defendant commits a crime while under a criminal justice sentence. The district court declined, however, to apply U.S.C. section 3147 and Sentencing Guidelines section 2J1.7 because Kincaid's sentence was "sufficiently severe."

Kincaid subsequently appealed his 248 month sentence to the Fourth Circuit, claiming that the district court erred by applying Sentencing Guidelines section 4A1.1(d). In Kincaid's first appeal, *United States v. Kincaid* (*Kincaid I*),[303] the Fourth Circuit rejected the government's challenge to the two-level reduction for acceptance of responsibility, and ruled that the district court erred by applying Sentencing Guidelines section 4A1.1(d). In *Kincaid I*, the Fourth Circuit noted that the district court erroneously determined that Kincaid committed the narcotics and firearms offenses while under a judicial sentence for the bank fraud conviction when, in fact, Kincaid was still awaiting sentencing. Therefore, the Fourth Circuit remanded Kincaid's case for resentencing on the narcotics and firearms convictions, instructing the district court not to apply Sentencing Guidelines section 4A1.1(d).

Prior to the resentencing hearing, Kincaid objected to the portions of the presentence investigation report regarding the amount of cocaine he allegedly possessed. The government subsequently requested a continuance to respond to Kincaid's surprise objections by calling witnesses and offering evidence. The district court denied the government's request, and subsequently determined that Kincaid's base offense level was twenty-eight. The district court then applied a two-level enhancement for Kincaid's role in the offense pursuant to Sentencing Guidelines section 3B1.1(c), and a two-level reduction for acceptance of responsibility under Sentencing Guidelines section 3E1.1(a). Finally, the district court applied 18 U.S.C. section 3147 and Sentencing Guidelines section 2J1.7, which resulted in a three-level increase to the base offense level. The court then sentenced Kincaid to 121 months on the narcotics conviction and a consecutive sixty month sentence on the firearm violation.

303. 912 F.2d 464 (4th Cir. 1990) (per curiam).

In *Kincaid II*, the Fourth Circuit first concluded that Kincaid failed to demonstrate any judicial vindictiveness regarding the second sentence. The Fourth Circuit, therefore, determined that the district court did not violate Kincaid's due process rights. The Fourth Circuit then found that the application of the enhancement provisions of the Sentencing Guidelines in the second sentence did not violate Kincaid's right against double jeopardy. The Fourth Circuit also rejected Kincaid's claim that the government did not provide adequate notice of the existence and effect of the enhancement provisions. The court further ruled that the district court properly applied the two-level enhancement in Kincaid's sentence for his role as an organizer in the offenses.

After ruling on Kincaid's claims, the Fourth Circuit then turned to the government's appeal. The government claimed that the district court erred by refusing to grant the requested continuance after Kincaid objected to his presentence investigation report. The government argued that under Sentencing Guidelines section 6A1.3 and Rule 32(a)(1) of the Federal Rules of Criminal Procedure, the court must provide both parties an opportunity to present relevant information when a reasonable dispute arises concerning any factor important to the sentencing determination.

The Fourth Circuit agreed with the government's argument and held that the district court abused its discretion by failing to grant the continuance. The Fourth Circuit reasoned that, by entertaining Kincaid's surprise objections to the presentence investigation report, the district court effectively provided Kincaid with an opportunity to be heard on the issue. Moreover, by raising objections to the content of the presentence investigation report, Kincaid brought those issues into dispute. The Fourth Circuit concluded that the district court, therefore, denied the government its opportunity to present relevant evidence regarding the amount of cocaine attributable to Kincaid. On remand, the district could must resolve the disputed facts by permitting both Kincaid and the government an opportunity to present evidence to support their positions.

In *Kincaid II*, the Fourth Circuit determined that Kincaid did not suffer an abuse of his due process and double jeopardy rights, and that the magistrate provided him with adequate notice of the enhancement provisions. The Fourth Circuit also decided that the district court properly applied a two-level enhancement to Kincaid's sentence for his role in the offenses.

The Fourth Circuit took issue, however, with the district court's refusal to grant the government's request for a continuance. By remanding the case to the district court, the Fourth Circuit became the first circuit court to grant the government's request to be heard on sentencing factors pursuant to section 6A1.3 and Rule 32(a)(1). Prior to *Kincaid II*, only the United States Court of Appeals for the Eighth Circuit in *United States v. Yellow Earrings*,[304] had considered the government's request to present evidence on a relevant sentencing factor. The Eight Circuit, however, denied the

304. 891 F.2d 650 (8th Cir. 1989).

government's request because the sentencing court had already provided the government with an opportunity to be heard, and the government chose not to call witnesses or present evidence at the sentencing hearing.[305]

The Fourth Circuit's decision in *Kincaid II* makes clear that the provisions of section 6A1.3 and Rule 32(a)(1) are applicable for both the prosecution and the defense. Before *Kincaid II*, only defendants appealing their sentencing procedures had availed themselves under Sentencing Guidelines section 6A1.3. Now, after *Kincaid II*, if a sentencing court entertains the defendant's objections to the presentence report, the sentencing court must permit the government to respond by adopting procedures appropriate to resolve the dispute.

United States v. Lambey

974 F.2d 1389 (4th Cir. 1992) (en banc)

Rule 32(d) of the Federal Rules of Criminal Procedure provides that a court may permit, for any fair and just reason, the withdrawal of a guilty or no contest plea before sentencing.[306] The United States Court of Appeals for the Fourth Circuit has struggled to determine whether Rule 32(d) requires a showing of constitutionally ineffective assistance of counsel when a defendant bases his motion to withdraw his plea on the conduct of his counsel.[307] In 1989, a three-judge panel for the Fourth Circuit in *United States v. DeFreitas*[308] determined the criteria to establish a fair and just reason to withdraw a guilty or no contest plea. The court held in *DeFreitas* that the defendant must demonstrate that his attorney's performance fell below an objective standard of reasonableness and that, had

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305. United States v. Yellow Earrings, 891 F.2d 650, 653 (8th Cir. 1989).

306. FED. R. CRIM. P. 32(d). Rule 32(d) provides in pertinent part that, "[i]f a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.

307. *See* Hill v. Lockhart, 474 U.S. 52, 57-59 (1985) (establishing that in challenges to guilty pleas based on ineffective assistance of counsel, defendant must show counsel's assistance fell below objective standard of reasonableness and there was reasonable likelihood that, but for counsel's errors, defendant would not have pled guilty). In *Hill*, the Supreme Court considered what degree of proof was necessary for a defendant to establish ineffective assistance of counsel when attempting to withdraw a guilty plea. *Id.* at 56-57. In *Hill*, the defendant pled guilty to first degree murder and theft in an Arkansas trial court. *Id.* at 53. Two years later the defendant sought federal habeas corpus relief. *Id.* The defendant contended that his plea was involuntary because his attorney misinformed him about his parole eligibility date. *Id.* at 54-55. The Supreme Court rejected the defendant's arguments and determined that when a defendant brings a Sixth Amendment ineffective assistance of counsel claim, the defendant must show both that the attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that had the attorney not erred, the result of the proceeding would have been different. *Id.* at 57.

308. 865 F.2d 80 (4th Cir. 1989). Judges Widener, Murnaghan and Wilkins presided in *DeFreitas*. *Id.* at 80.

the attorney not erred, there was a reasonable probability that the defendant would not have pled guilty.[309]

Two years later, in *United States v. Moore*,[310] a different three-judge panel[311] adopted the United States Court of Appeals for the Seventh Circuit's interpretation that Rule 32(d) establishes a less stringent standard distinctly independent of the Sixth Amendment's objective standard of reasonableness test.[312] Later in 1991, another three-judge panel in *United States v. Lambey* (*Lambey I*),[313] reaffirmed the *DeFreitas* standard. Against this background, the Fourth Circuit en banc vacated the panel opinion in *Lambey I* and agreed to rehear the case en banc in *United States v. Lambey* (*Lambey II*).[314]

In *Lambey II*, the Fourth Circuit reconsidered whether Rule 32(d) creates its own less stringent standard for withdrawal of pleas or whether the Sixth Amendment's objective standard of reasonableness is the correct measure for any fair and just reason to permit withdrawal. The Fourth Circuit in *Lambey II* also considered the defendant's claim that the district court failed to inform him that under Rule 11(e)(2) of the Federal Rules of Criminal Procedure that he could not withdraw his plea. Additionally, the Fourth Circuit, on its own invitation, heard the defendant's argument that the district court erred by misapplying the Sentencing Guidelines.

The defendant, Dean A. Lambey, based his appeal on facts arising after his arrest in August 1989, following a prolonged investigation to uncover child pornographers. Lambey's counsel subsequently advised Lambey that his case probably would fall into the Sentencing Guidelines category providing for a sentence ranging from 70 to 108 months. Lambey's attorney, however, advised Lambey that he could not accurately predict the actual sentence Lambey ultimately would receive. Lambey, upon the advice of his counsel, pled guilty to a two-count information charging him in Count I with conspiracy to kidnap a minor and in Count II with using an interstate computer facility to publish notices and advertisements to produce child pornography and to engage in sexually explicit

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309. United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989) (holding that "any fair and just reason" to permit plea withdrawal meant that defendant maintained same burden as if defendant asserted Sixth Amendment claim of ineffective assistance by counsel as articulated in Hill v. Lockhart, 474 U.S. 52 (1985)).

310. 931 F.2d 245 (4th Cir. 1991).

311. United States v. Moore, 931 F.2d 245 (4th Cir.), *cert. denied*, 112 S. Ct. 171 (1991). Judges Russell, Phillips, and Murnaghan presided in *Moore*. *Id.* at 247.

312. *Id.* at 248. In *Moore*, the Fourth Circuit panel declared that under Rule 32(d) the court should consider factors including: (1) whether the defendant offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant credibly asserted his innocence; (3) whether the defendant delayed significantly in the time between entering the plea and entering the motion to withdraw the plea; (4) whether the defendant has had close assistance of competent counsel; (5) whether withdrawal will prejudice the government; and (6) whether withdrawal will inconvenience the court and waste judicial resources. *Id.*

313. 949 F.2d 133 (4th Cir. 1991). Judges Widener, Wilkins and Niemeyer presided in *Lambey I*. *Id.* at 135.

314. 974 F.2d 1389 (4th Cir. 1992).

conduct with minors. Lambey's plea agreement expressly stated that any sentencing estimate his counsel, the probation officer, or the prosecution quoted to him would not be binding on the court.

Following Lambey's guilty plea, the United States District Court for the Eastern District of Virginia conducted a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure. At the Rule 11 hearing, Lambey testified that he fully understood the terms of the agreement and that the agreement constituted his entire understanding with the government. The district court then reiterated to Lambey that under the guidelines no one could accurately predict the sentence until after the court examined the presentence report and then imposed the sentence.

After the Rule 11 hearing, the probation officer tentatively calculated Lambey's possible sentence pursuant to the Sentencing Guidelines and advised Lambey that a large discrepancy existed between the sentence Lambey expected and the sentence he had calculated. Lambey promptly wrote a letter to the district court requesting to file a motion to withdraw his plea. Lambey's counsel subsequently filed a motion to withdraw the plea. Lambey then retained new counsel to argue the motion to withdraw the plea. The district court, following an evidentiary hearing, denied Lambey's motion and then sentenced Lambey to 360 months imprisonment on Count I and a concurrent 120 months on Count II.

Lambey then appealed the district court's refusal to grant his motion to withdraw his plea. On appeal in *Lambey I*, Lambey claimed that his first counsel's erroneous estimate of his potential sentence constituted a fair and just reason for the plea withdrawal. Lambey also contended that the district court failed to advise him, pursuant to Rule 11(e)(2), that he could not withdraw his plea. The three-judge panel in *Lambey I*, however, rejected both arguments and affirmed the district court's ruling.

Lambey filed a motion for rehearing and the Fourth Circuit en banc agreed to rehear Lambey's arguments. In *Lambey II*, Lambey presented the same two arguments he did in *Lambey I*. In *Lambey II*, Lambey also argued, upon invitation of the court, that the district court erred by misapplying the Sentencing Guidelines. Lambey argued that, applied properly, the Sentencing Guidelines would require a sentencing range on Count I from 63-78 months and 41-51 months on Count II.

In a seven to six decision, the Fourth Circuit in *Lambey II*, rejected Lambey's arguments and affirmed the district court's decision and sentence. The Fourth Circuit rejected Lambey's contention that the district court failed to advise him that he could not withdraw his plea pursuant to the requirements of the Rule 11(e)(2). The Fourth Circuit noted that Lambey's plea agreement was not the type of plea arrangement to which Rule 11(e)(2) applied. Therefore, the district court did not need to advise Lambey he could withdraw his plea. Additionally, by affirming the district court's sentence without explanation, the majority determined that the district court properly applied the Sentencing Guidelines.

The majority also accepted the objective standard of reasonableness test and the requirement that the defendant prove that but for his counsel's

error he would have gone to trial. The Fourth Circuit began its analysis of the Rule 32(d) issue by stipulating that the decision to permit the plea withdrawal fell within the purview of the district court's discretion and, therefore, the Fourth Circuit could review the district court's decision only under the abuse of discretion standard. The majority then declared that if the court warns the defendant of the consequences of the guilty plea and the defendant acknowledges that he understands those consequences, then the defendant will bear a heavy burden in attempting to show a fair and just reason to permit the withdrawal.

In its analysis, the majority noted that Lambey's main contention, that his first counsel erred significantly when estimating possible sentencing ranges, raised the question of Lambey's counsel's competence. Because the question rested on the competence of counsel, the Fourth Circuit quoted from the Supreme Court's decision in *Hill v. Lockhart* which required a showing that the attorney's performance fell below an objective standard of reasonableness and thereby prejudiced the defendant. The court then applied the objective reasonableness standard to Lambey's case and concluded that because of the complexities of the Sentencing Guidelines, the attorney's sentencing range estimate did not fall below an objective standard of reasonableness. Moreover, the majority noted that Lambey testified that his counsel warned him not to rely on the estimates. The Fourth Circuit majority, therefore, determined that Lambey's attorney did not perform unreasonably.

Four judges filed separate dissents in which two other judges joined. Judge Widener filed a dissent in which Judge Sprouse joined. Widener's dissent contended that the Fourth Circuit should overrule *DeFreitas* in favor of the rule enunciated in *United States v. Moore*. According to Judge Widener, under the lower Rule 32(d) standard, Lambey had stated a fair and just reason to permit withdrawal. Similarly, Judge Phillips filed a separate dissent in which Chief Judge Ervin joined. Phillips also contended that the Fourth Circuit's decision in *DeFreitas* was incorrect and that the proper standard would be Rule 32(d)'s fair and just standard.

Judge Murnaghan dissented on the ground that the district court imposed the wrong sentence. According to Judge Murnaghan, because there were ambiguities in the Sentencing Guidelines, the court should resolve the ambiguities by resorting to the rule of lenity. Murnaghan contended that the sentencing court created a miscarriage of justice by adopting the guideline for accomplished first degree murder. At issue, according to Murnaghan, was whether the sentencing court should adopt the guideline for accomplished first degree murder when the defendant only conspired to kidnap and murder a minor. Murnaghan argued that under the guidelines, the sentencing court should have sentenced Lambey for the accomplished offense of kidnapping, not for accomplished first degree murder because the rule of lenity required such a result. Judge Hall filed a separate dissent acknowledging his agreement with Judge Murnaghan's analysis and contending that, because of the ambiguities in the Sentencing Guidelines and wide discrepancy in the sentencing ranges,

Lambey established a fair and just reason to withdraw his plea.

The Fourth Circuit's decision in *Lambey II* creates a split with other circuits that have interpreted Rule 32(d) as creating a less stringent fair and just reasons standard. For example, the Second Circuit in *United States v. Sweeney*,[315] and the Seventh Circuit in *United States v. Bennett*,[316] both determined that Rule 32(d) requires only a showing of a fair and just reason for plea withdrawal and not the more stringent ineffective assistance of counsel standard. Moreover, even within the Fourth Circuit, the decision in *Lambey II* creates a split among the judges. At least four of the judges who presided at the rehearing in *Lambey II* would have adopted the less demanding fair and just standard and would have overruled *DeFreitas*.[317]

The issue of whether Rule 32(d) creates a separate less stringent standard than the constitutionally defective assistance of counsel standard is controversial. As indicated by the dissents in *Lambey II*, the issue probably will remain controversial within the Fourth Circuit until the Supreme Court determines which standard Rule 32(d) requires. Until the Supreme Court rules, however, defendants in the Fourth Circuit wishing to withdraw their guilty or no contest pleas based on their counsels' performance will face a stringent standard of proof that their attorneys' conduct prejudiced them and fell below an objective standard of reasonableness.

Poyner v. Murray

964 F.2d 1404 (4th Cir.), *cert. denied*, 113 S. Ct. 419 (1992)

In *Miranda v. Arizona*[318] the United States Supreme Court held that prosecutors could not use statements made during custodial interrogation at trial unless the defendants were advised of certain constitutional rights, in particular the right to counsel, prior to questioning. Once the police advise a defendant of his *Miranda* rights and the defendant then knowingly, intelligently, and voluntarily waives them, the police may question the defendant without providing counsel.[319] The Supreme Court, in *Edwards v. Arizona*, held that if a suspect explicitly requests an attorney during questioning all interrogation must cease.[320] If the suspect then actively

315. 878 F.2d 68 (2d Cir. 1989).

316. 716 F. Supp. 1137 (N.D. Ind. 1989), *aff'd*, 907 F.2d 152 (7th Cir. 1990).

317. United States v. Lambey, 974 F.2d 1389 (4th Cir. 1992). In *Lambey II*, Judge Sprouse joined in Judge Widener's dissent and Chief Judge Ervin joined in Judge Phillips dissent. In both of those dissents, the judges argued that Rule 32(d) requires a less stringent standard than the constitutional ineffective assistance of counsel standard. *Id.* at 1402-08.

318. 384 U.S. 436 (1966).

319. *See* Patterson v. Illinois, 487 U.S. 285 (1988) (holding that police may interrogate suspect without providing attorney if suspect does not ask for one).

320. *See* 451 U.S. 477 (1981) (holding inadmissible statements obtained after suspect's request for attorney during interrogation).

initiates further discussion, any postrequest statements made by the suspect may be admissible.[321] However, the Supreme Court has not addressed the issue of whether a defendant who mentions the right to counsel, but does not clearly and affirmatively invoke that right, has in fact invoked the right to counsel.[322]

In *Poyner v. Murray*[323] the United States Court of Appeals for the Fourth Circuit considered whether a defendant's statement, "Didn't you say that I have a right to an attorney?" during questioning constituted a request for counsel that prevented the police from further interrogation of the defendant. The court also considered the petitioner's contentions that his counsel was ineffective so as to deny him his right to counsel under the Sixth and Fourteenth Amendments, that Virginia's system of appointing counsel for indigent defendants violated due process, and that the district court should have granted him evidentiary hearings on his *Miranda* and ineffective assistance of counsel claims.

The petitioner, Syvasky Lafayette Poyner, was convicted and sentenced to death in three separate trials for the murder of five women over the space of eleven days. When arrested, the police took him into custody and advised him of his *Miranda* rights before he made any statements. Poyner indicated that he understood his rights. The police took Poyner before a magistrate who advised him of the charges against him and determined that Poyner be held without bond. Two detectives then took Poyner into a room for interrogation. The detectives again advised Poyner of his *Miranda* rights and he reindicated that he understood those rights. When the detectives informed Poyner of some of the evidence against him, he responded by saying, "Didn't you tell me that I have the right to an attorney?" One detective replied, "Yes, you do, that is correct," and both detectives stood up to leave believing the defendant had invoked his right to counsel. As the detectives stood, Poyner said, "Let me tell you about the car." The detectives then returned to their seats, and Poyner made incriminating statements concerning the car of one of the murder victims. A detective, referring to the victim, then asked Poyner, "Did you kill her?" and Poyner responded by confessing in detail to her murder. Later that same day Poyner confessed to the murders of the other four women and discussed the crimes in great detail. After further questioning, Poyner read and signed a waiver of his *Miranda* rights and confessed again on videotape. The prosecution used this videotape at trial, over Poyner's objections, in both the guilt and sentencing phases of his three trials.

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321. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (finding that statements made after request for counsel are admissible if suspect initiates further communication).

322. *But see* Connecticut v. Barrett, 479 U.S. 1058 (1985) (holding that court must give suspect's statement its ordinary meaning, and not interpret it as request for counsel, unless statement is ambiguous).

323. 964 F.2d 1404 (4th Cir.), *cert. denied*, 113 S. Ct. 419 (1992).

The Supreme Court of Virginia affirmed all five convictions, and the United States Supreme Court denied certiorari. Poyner collaterally appealed these convictions in the Virginia state courts, but was denied appellate relief. Thereafter, Poyner sought relief in the federal courts through a writ of habeas corpus. The United States District Court for the Eastern District of Virginia dismissed all of Poyner's claims. With regard to Poyner's *Miranda* claim, the court held that Poyner's remarks were only a request for an explanation of his rights and not an invocation of his right to counsel. Therefore, according to the federal district court, the state trial judge properly admitted the confessions at trial. On appeal, the Fourth Circuit dismissed Poyner's inadequate assistance claim and his claims for evidentiary hearings. The court also refused to consider the constitutional claim regarding appointment of counsel because Poyner had not raised the issue at any of his trials.

To resolve the *Miranda* issue, the *Poyner* court noted that because Poyner did not dispute that the detectives read him his *Miranda* rights or that he indicated his understanding of them, the only issue was whether Poyner's later remark was an invocation of his right to counsel. The court adopted the holding of *United States v. Jardina*[324] where the United States Court of Appeals for the Fifth Circuit held that a defendant's mere use of the word attorney is not necessarily an invocation of the right to counsel.[325] The *Poyner* court found that Poyner's remark was not a request for counsel under *Jardina* because Poyner's question to the detectives suggested even less of an immediate desire to speak with counsel than the statement in *Jardina*.

Poyner argued that even if his statement was ambiguous, and therefore not an invocation of the right to counsel under *Jardina*, because both detectives believed he was requesting counsel the court should legally construe his question as an invocation of the right. The *Poyner* court found no basis for such a rule and applied *Moran v. Burbine*[326] which held that, in the similar context of waiver of *Miranda* rights, the state of mind of the police is irrelevant. The court also expressed reluctance to adopt a rule that would penalize detectives for being too careful about complying with a suspect's constitutional rights during questioning. The detectives interrogating Poyner had shown admirable respect for Poyner's right to counsel, and the court refused to allow Poyner to use the detective's caution as evidence of an invocation of his own constitutional rights.

Finding no invocation of Poyner's right to counsel from his remark, the *Poyner* court next looked at the events following the remark to

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324. 747 F.2d 945 (5th Cir. 1984).

325. United States v. Jardina, 747 F.2d 945, 949 (5th Cir. 1984) (holding that defendant's remark that he was interested in type of plea bargain he could arrange between government and his counsel was not invocation of his right to counsel), *cert. denied*, 470 U.S. 1058 (1985).

326. 475 U.S. 412 (1986).

determine if Poyner's actions suggested an invocation of the right to counsel. After the detectives moved to leave the room, Poyner offered the information about the car apparently to keep them in the room. The court reasoned that this action was contradictory to a desire to postpone further questioning until an attorney arrived. Poyner invoked *Smith v. Illinois* where the Supreme Court held that the prosecution could not use words or actions following a request for counsel to cast doubt on that request.[327] The *Poyner* court, however, distinguished *Smith* because that case dealt with a clear, unambiguous request for counsel, whereas the case *sub judice* did not involve a request for counsel at all. *Smith* only protects a suspect from the police coercing him into withdrawing a request for counsel. Therefore, the *Poyner* court found *Smith* inapplicable where the defendant requests a clarification of his right to counsel and then offers an unsolicited incriminating statement.

Even assuming Poyner's remarks and actions evidenced an invocation of his right to counsel, the court found that his subsequent comment about the car was a reinitiation of the interrogation and a waiver of *Miranda* rights under *Edwards v. Arizona*. In *Edwards* the Supreme Court held that if a defendant initiates further dialogue after requesting counsel during custodial interrogation, his statements and responses to subsequent police questioning are admissible provided they pass a two-prong test.[328] To satisfy the first prong, a court must find that the suspect reinitiated the interrogation. Accordingly, the *Poyner* court determined that Poyner's statement about the car was a reinitiation of interrogation because it evidenced a desire to continue the interrogation by preventing the detectives from leaving the room and because he made the statement without solicitation by the detectives.

To satisfy the second prong, a court must find that the suspect voluntarily, knowingly, and intelligently waived the right to counsel, looking at the totality of the circumstances. Applying the second prong, the *Poyner* court found ample indication that Poyner did voluntarily, knowingly, and intelligently waive his rights. There was no sign of police misconduct intimidating Poyner into talking further, so the court found the waiver to be voluntary.

In analyzing whether the defendant knowingly and intelligently gave the waiver, the court looked to the suspect's intelligence, education, criminal record, and the time frame between the *Miranda* warnings and the waiver. Analyzing the relevant factors, the *Poyner* court noted that Poyner was of near average intelligence, had completed eighth grade, was literate, and, apart from his criminal behavior, was able to function and support himself in society. Poyner also had an extensive criminal record, so he was very familiar with police and judicial process. Poyner's actions

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327. *See* 469 U.S. 91 (1984) (holding that suspect's response to interrogation following unambiguous request for counsel cannot be used to question clarity of that request for counsel).

328. Edwards v. Arizona, 451 U.S. 477, 482 (1981).

after his remark were also convincing evidence of a knowing and intelligent waiver. The detectives advised Poyner of his *Miranda* rights, he indicated that he understood them, and then, after the detectives presented him with some of the evidence against him, Poyner asked for clarification about his right to counsel. After the detectives told him that he did in fact have that right, and after seeing the detectives obvious willingness to cease interrogation, the *Poyner* court felt it would be absurd to argue that when Poyner continued to volunteer information he was not knowingly and intelligently waiving his right to counsel. Accordingly, the court found Poyner's statements were admissible at trial under the *Edwards* two-prong test.

Finding that Poyner's statements were clearly admissible, the Fourth Circuit dismissed Poyner's petitions and upheld the findings of the federal district court and the Virginia Supreme Court. The Fourth Circuit's holding that a invocation of the right to counsel must be more than just a reference to that right, or to an attorney, is in agreement with all other federal courts of appeal that have addressed the issue.[329]

United States v. Moss

963 F.2d 673 (4th Cir. 1992)

The Fourth Amendment of the United States Constitution guarantees the right of citizens to be free from unreasonable searches and seizures.[330] The United States Supreme Court has long held that the Fourth Amendment generally prohibits the warrantless entry of a person's home, including entry to make an arrest or to search for specific objects.[331] Such warrantless searches are per se unreasonable under the Fourth Amendment—subject only to few specifically established and well-delineated exceptions.[332] The exclusionary rule prohibits evidence seized in violation

329. *See* Norman v. Ducharme, 871 F.2d 1483, 1486 (9th Cir. 1989) (holding that defendant's question to police officer as to whether he should get attorney was not invocation of right to counsel), *cert. denied*, 494 U.S. 1031 (1990); United States v. Eirin, 778 F.2d 722, 728 (11th Cir. 1985) (holding that refusal to sign waiver of right to counsel without attorney's guidance was not affirmative request for counsel); *Jardina*, 747 F.2d at 949 (holding that defendant's remark that he was interested in type of plea bargain he could arrange between government and his counsel was not invocation of his right to counsel).

330. U.S. CONST. amend. IV. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

331. *See* Illinois v. Rodriguez, 110 S. Ct. 2793, 2797 (1990) (citing Payton v. New York, 445 U.S. 573 (1980); Johnson v. United States, 333 U.S. 10 (1948)).

332. Katz v. United States, 389 U.S. 347, 357 (1967); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971) (holding that warrantless search of suspect's premises per se unreasonable unless within one of carefully defined set of exceptions).

of the Fourth Amendment from being introduced against a criminal defendant at trial.[333]

One well-recognized exception to the warrant requirement is the exigent circumstances exception. The exigent circumstances exception provides that a warrantless search is not always unreasonable for the purposes of the Fourth Amendment if certain circumstances exist, such as hot pursuit, risk of evidence destruction, and threat of bodily harm or death.[334]

Another exception to the exclusionary rule is the good-faith exception, which the Supreme Court has developed in recent cases. In *United States v. Leon*,[335] the Supreme Court established the good-faith exception and applied it to keep evidence from being suppressed when law enforcement officers obtained evidence through objective good-faith reliance on a facially valid warrant that was later found to lack probable cause.[336] Later, in *Illinois v. Krull*,[337] the Supreme Court extended the good-faith exception to searches conducted in good faith reliance on a statute later declared to be unconstitutional.[338] Prior to 1990, some circuit courts limited *Leon* and *Krull* to their facts by declining to extend the good-faith exception to searches which were not conducted in reliance on either a warrant or a statute.[339] However, in 1990, the Supreme Court, in *United States v. Rodriguez*,[340] further extended the good-faith exception to a warrantless search conducted on the basis of an officer's mistaken, but good-faith belief that a consenter to a search had authority to allow it.[341] Against this backdrop, the United States Court of Appeals for the Fourth Circuit, in *United States v. Moss*,[342] considered how to apply both the good-faith exception and the exigent circumstances exception to the exclusionary rule.

In *Moss*, the United States Court of Appeals for the Fourth Circuit considered whether marijuana obtained during a warrantless search of

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333. *Rodriguez*, 110 S. Ct. at 2799. Only if the defendant consents to illegally seized evidence will the evidence be admitted at trial. *Id.*

334. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE §§ 6.1(f), 6.5(b), 6.5(d) (2d ed. 1987) (discussing exigent circumstances, risk of evidence destruction, and threat of bodily harm or death respectively).

335. 468 U.S. 897 (1984).

336. *See* United States v. Leon, 468 U.S. 897, 913 (1984) (summarizing results of opinion that evaluated costs and benefits of suppressing evidence in question).

337. 480 U.S. 340 (1987).

338. *See* Illinois v. Krull, 480 U.S. 340, 349 (1987) (holding that *Leon* good-faith exception to exclusionary rule was also applicable to evidence obtained by officer acting in objectively reasonable reliance on statute).

339. *See* United States v. Winsor, 846 F.2d 1569, 1579 (9th Cir. 1988) (refusing to apply *Leon* good-faith exception to search of each room in hotel while in hot pursuit of bank robber); United States v. Whiting, 781 F.2d 692, 698-99 (9th Cir. 1986) (refusing to apply good-faith exception to search conducted in reliance on regulations later determined not to authorize search at issue).

340. 110 S. Ct. 2793 (1990).

341. *See* United States v. Rodriguez, 110 S. Ct. 2793, 2798-2801 (1990) (holding that warrantless entry is valid when based upon consent of third party whom police, at time of entry, reasonable believe to possess common authority over premises, but who in fact does not).

342. 963 F.2d 673 (4th Cir. 1992).

defendant's cabin should be suppressed as evidence under the exclusionary rule when an officer conducted the search under the mistaken belief that the defendant's occupation of the cabin was unauthorized. In reaching its conclusion that the search was unconstitutional and that the evidence should have been suppressed, the Fourth Circuit reviewed the good-faith doctrine and the emergency doctrine, finding that neither applied to the facts at bar.

In *Moss*, the defendant Bryan Moss, along with his friend Christopher Monroe, reserved, registered, and legally occupied a cabin in the Nantahala National Forest during a hiking and fishing trip. Forest Service Officer Riner, who had previously received false information from the Forest Service park clerk that the cabin was neither registered to anyone nor legally occupied, went to Moss's cabin to advise Moss that his car was illegally parked and to check on Moss's safety. When Riner arrived at the cabin, both Moss and Monroe were away from the cabin. Riner entered the cabin without a warrant, observed Monroe's wallet, and continued to look around the cabin in order to find more identification. During his extended search, Riner noticed Moss's driver's license in an open pocket in a backpack, picked up the license and found a small bag of marijuana beneath it. He confiscated the marijuana and continued the search of the cabin. Riner then called the park clerk to confirm whether Moss and Monroe had in fact reserved the cabin. This time the park clerk, who previously had failed to look in the reservations book, told Riner that Moss had indeed reserved the cabin. Riner then waited for the campers' return rather than searching for them. When Moss returned, Riner cited him for simple possession under 18 U.S.C. section 844.

The United States District Court for the Western District of North Carolina denied Moss's motion to suppress evidence of the seized marijuana on the express basis that exigent circumstances existed to justify the warrantless search and seizure. The district court convicted Moss for possession of marijuana. The district court's ruling was problematic for two reasons. First, the court simply stated that exigent circumstances existed without identifying the nature of the exigency. Second, the court relied on *Rodriguez* to support its ruling. However, *Rodriguez* was not an exigent circumstances case; rather, it dealt with the good-faith exception to the exclusionary rule.

Moss appealed to the Fourth Circuit, arguing that Riner's search was unconstitutional and that the district court's refusal to suppress the evidence was error requiring that the convictions based upon it be vacated. The government advanced three theories for upholding the district court's ruling: (1) Moss had no reasonable expectation of privacy in the cabin and, therefore, no search within the contemplation of the Fourth Amendment occurred; (2) a general good-faith exception to the warrant requirement should apply to this case in light of the false information Riner received; and (3) the exigent circumstances exception should apply to this case.

Before considering the government's two exception theories, the Fourth Circuit decided that it would not address the government's first theory

that Moss had no reasonable expectation of privacy. The court reasoned that this theory was neither advanced by the government in the district court nor addressed by that court in its ruling. The district court's ruling rested exclusively on the exigent circumstances justification for what that court implicitly found to be a "search." The Fourth Circuit relied on the rule set forth in *Singleton v. Wulff*[343] that, unless exceptional circumstances exist, a federal court should not consider an issue not passed upon below.[344] The Fourth Circuit determined that no exceptional circumstances existed which would justify considering the privacy expectation theory.

The Fourth Circuit next considered the government's intertwined theories of good-faith exception and exigent circumstances exception. The Fourth Circuit acknowledged that although *Rodriguez* involved a consensual search, the Supreme Court implied that the good-faith exception should have a wider reach in warrantless search situations than the facts directly before the Court in *Rodriguez*. However, the Fourth Circuit pointed out that *Rodriguez* did not extend the good-faith exception beyond the generally recognized exceptions to the warrant requirement. Therefore, in order to assert a *Rodriguez* good-faith exception theory, the government must show that the mistake was related to one of the exceptions to the warrant requirement.

The Fourth Circuit noted that the government had not invoked any of the commonly invoked exigencies which justify warrantless entries and searches. The court also noted that there was no cause to believe that Riner required immediate entry to arrest anyone inside, to protect anyone inside from harm or to prevent the destruction or removal of evidence of crime. The Fourth Circuit stated that other grounds for warrantless entries and searches, such as the emergency doctrine, might also supply the basis for applying the good-faith exception. The court defined the emergency type of exigency as a reasonably perceived "emergency" requiring immediate entry as an incident to the service and protective functions of the police as opposed to their law enforcement functions.

In explaining the circumstances under which the emergency doctrine could be invoked, the Fourth Circuit set forth both a test and a limitation on the doctrine. In order to invoke the emergency doctrine, a law enforcement officer making a warrantless entry must have an objectively reasonable belief that an emergency exists that requires immediate entry to render assistance or to prevent harm to persons or property within. In addition, any search following a warrantless entry for emergency reasons is then limited by the type of emergency involved; it cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry.

Using the emergency doctrine test and limitation, the Fourth Circuit analyzed Riner's search of Moss' cabin. First, the court concluded that

343. 428 U.S. 106 (1976).

344. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

the government failed to satisfy the emergency test because there was no objectively reasonable basis upon which Riner could have determined that he confronted an emergency requiring immediate entry into the cabin. In reaching this conclusion, the court looked at Riner's stated purposes for entering the cabin—to determine if there had been a break-in and to learn the identity of the occupants so that he could render them assistance. In the court's opinion, both of Riner's stated purposes were legitimate concerns; however, neither purpose could be considered an emergency requiring immediate entry.

Second, the Fourth Circuit determined that even if Riner's original entry were justified under the emergency doctrine, or as the result of a good-faith mistake in believing it so justified, his ensuing search was unreasonable. According to the court, there was no objectively reasonable basis upon which Riner could have believed that the accomplishment of the stated purposes of his entry required making the search that allegedly then disclosed the marijuana "in plain view." The court found that Riner accomplished all imaginable purposes once he walked in the door and found Monroe's wallet in plain view. After that point, Riner's search of both the cabin and Moss's personal belongings was completely outside the legitimate range of any search justified by this particular emergency purpose.

The Fourth Circuit concluded that Riner's search and seizure of the marijuana was unconstitutional and that the evidence so seized was not admissible under the good-faith exception to the warrant requirement. Accordingly, the Fourth Circuit vacated Moss's conviction and remanded with directions to suppress the evidence.

In the *Moss* decision, the Fourth Circuit employed the Supreme Court's doctrine of good-faith exception to the exclusionary rule set forth in *Leon* and later extended in *Rodriguez* to include searches which did not involve reliance on warrants or statutes. In addition, the court decided that the good-faith exception, which the Supreme Court extended to a consensual search based on misinformation supplied by an external civilian source in *Rodriguez*, could also be applied to a situation involving a nonconsensual search based on misinformation supplied by an internal police source. The Fourth Circuit might have, as a preliminary matter, distinguished the facts in the case at bar from those in *Rodriguez* and therefore avoided implicitly expanding the good-faith doctrine to a situation in which the erroneous information was created by the negligent conduct of law enforcement agents.[345] Most importantly, in finding that the exception did not apply

345. *See* Ott v. Maryland, 600 A.2d 111, 116 (Md. 1992) (stating that officer's reliance on incorrect police records precluded application of good-faith exception to exclusionary rule); *cf.* United States v. Leon, 468 U.S. 897, 898 (1984) (noting that exclusionary rule is designed to deter police misconduct); LAFAVE, *supra* note 323, § 3.5(d) (stating that police may not rely upon incorrect or incomplete information when they are at fault in permitting records to remain uncorrected). *But see* United States v. De Leon-Reyna, 930 F.2d 396, 399 (5th Cir. 1991) (holding

in this case, the Fourth Circuit effectively narrowed the scope of this potentially broad doctrine and set a standard for future applications of this exception. In this respect, the Fourth Circuit is in accord with several of the other circuits.[346]

The *Rodriguez* decision was decided in the wake of several Supreme Court criminal procedure cases that arguably expanded the discretion of the government at the expense of individual liberties.[347] This trend prompted some commentators to observe a troubling direction for the Supreme Court[348] and to speculate that both Fourth Amendment rights and exclusionary rule trial rights were not receiving an adequate level of protection in the Supreme Court.[349] Other commentators observed that *Rodriguez* was indicative of how the Fourth Amendment has become "caught in the crossfire of the 'war on drugs'," pointing out that some law enforcement agencies have recognized the good-faith exception to the exclusionary rule as a "strong new weapon in the war on crime."[350] The *Moss* opinion indicates the impact that *Rodriguez* is currently having in the federal

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that neither reliance on incorrect police license report information nor negligent failure to comply with license number transmission policy precluded application of good-faith exception to exclusionary rule).

346. *See, e.g.*, United States v. Flippin, 924 F.2d 163, 166 (9th Cir. 1991) (stating that scope of warrantless search and seizure is limited by its underlying justification or exception to warrant requirement); United States v. Halliman, 923 F.2d 873, 880 (D.C. Cir. 1991) (stating that valid, emergency entry into room did not authorize search of remainder of room); United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988) (stating that entry made under exigent circumstances must be limited in scope to minimum intrusion necessary to prevent destruction of evidence); United States v. Socey, 846 F.2d 1439, 1445 (D.C. Cir. 1988) (same).

347. *See, e.g.*, Horton v. California, 496 U.S. 128, 130 (1990) (allowing warrantless seizure of "plain view" evidence even if discovery of evidence was not inadvertent); Maryland v. Buie, 494 U.S. 325, 327 (1990) (holding that while executing arrest warrant, police officers may execute warrantless protective sweep of entire house on reasonable suspicion of danger); Maryland v. Garrison, 480 U.S. 79, 85-86 (1987) (holding that factual mistakes about premises, in drawing up or executing warrant, will not invalidate warrant or search); Colorado v. Bertine, 479 U.S. 367, 369-72 (1987) (holding that evidence obtained during inventory search of impounded automobile may be used as basis of prosecution).

348. *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (noting that criminal procedure cases that expand discretion of police at expense of individual liberties represent troubling direction for Supreme Court); *see also* United States v. Leon, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting) ("I have witnessed the [Supreme] Court's gradual but determined strangulation of the [exclusionary] rule"); United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J. dissenting) (expressing concern that Supreme Court's decision may lead to admissibility of evidence secured by official lawlessness and to abandonment of exclusionary rule in search-and-seizure cases).

349. *See* Tammy Campbell, Note, Illinois v. Rodriguez*: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481 (1992) (observing that Fourth Amendment rights are more easily overcome than other constitutional rights and that *Rodriguez* reasonable belief standard cannot protect Fourth Amendment rights).

350. *See* John Wesley Hall, Jr., *Privacy: Drug War Casualty*, NAT'L L.J., Feb. 17, 1992, at 19 (discussing adverse effects of *Leon* and *Rodriguez* on individual liberties and observing that some law enforcement agencies have hailed good-faith exception as strong new weapon in war on crime).

courts. Both the good-faith exception and the exigent circumstances exception to the warrant requirement and the exclusionary rule are flexible doctrines that can be applied in various situations. However, the Fourth Circuit in *Moss* suggests that these exceptions should be very narrowly tailored.

Thomas v. Whalen

962 F.2d 358 (4th Cir. 1992)

Title 18, section 3568 of the United States Code directs that the sentence of a federal convict does not begin until he is received at the facility where the sentence is to be served.[351] For defendants who are convicted of unrelated state and federal offenses and who serve the state sentence first, federal courts generally have interpreted section 3568 to mean that the federal sentence must run consecutively to rather than concurrently with the state sentence.[352] In *United States v. Croft*,[353] however, the United States Court of Appeals for the Sixth Circuit held that a defendant delivered to a state prison, rather than the federal penitentiary as directed in the commitment order, is entitled to credit on his federal sentence for the time he spent in state prison.[354] The *Croft* court based its departure from the usual interpretation of section 3568 in large part on the state court's order that the defendant serve his state sentence concurrently with the federal sentence.[355] The language of the federal commitment order in *Croft*, which apparently directed the federal marshal

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351. 18 U.S.C. § 3568 (1982), *repealed by* Pub. L. No. 98-473, §§ 212(a)(2), 235(a)(1), 98 Stat. 1987, 2001, 2031 (1984), *reenacted in part*, 18 U.S.C. § 3585 (1988), states:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . .
>
> If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

Although Congress repealed § 3568, it still applies to offenses committed before November 1, 1987. *See* Randall v. Whelan, 938 F.2d 522, 524 n.1 (4th Cir. 1991) (holding that federal inmate was not entitled to credit against his sentence for time spent in drug rehabilitation prior to entering federal penitentiary).

352. *See, e.g.*, United States v. Wilson, 112 S. Ct. 1351, 1357 (1992) (Stevens, J., dissenting); United States v. Garcia-Gutierrez, 835 F.2d 585, 586 (5th Cir. 1988); United States v. Segal, 549 F.2d 1293, 1301 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977); Casebeer v. United States, 531 F.2d 949, 952 (9th Cir. 1976); United States v. Williams, 487 F.2d 215, 215 (5th Cir. 1973), *cert. denied*, 416 U.S. 942 (1974).

353. 450 F.2d 1094 (6th Cir. 1971).

354. United States v. Croft, 450 F.2d 1094, 1099 (6th Cir. 1971).

355. *Id.* at 1096.

to deliver the defendant to federal prison "immediately," also influenced the Sixth Circuit's decision.[356]

In *Thomas v. Whalen*,[357] the United States Court of Appeals for the Fourth Circuit questioned the Sixth Circuit's interpretation of section 3568 in *Croft*.[358] In *Thomas*, the petitioner, Lewis Thomas, was convicted of two federal offenses and one unrelated Pennsylvania offense within a one year period. The federal district court had released Thomas on bond after his arrest on bank robbery charges; subsequently, Pennsylvania law enforcement officials arrested him for unrelated weapons and assault charges and held him without bond. The state released Thomas from confinement for the federal trials and sentencing hearings, which occurred before the state trial. After each trial and hearing, federal officials returned Thomas to Pennsylvania authorities. Following his state conviction, the Pennsylvania court sentenced Thomas to serve thirteen to twenty-six years in the state penitentiary. After he completed sixteen years of that sentence, federal marshals took Thomas into custody to begin his federal sentence. While confined at the federal penitentiary in Petersburg, Virginia, Thomas sought to credit his time in state prison toward his federal sentence. The United States District Court for the Eastern District of Virginia granted Thomas's petition for a writ of habeas corpus and ordered that he be credited for the time served in the state penitentiary in Pennsylvania. The district court based its decision on the precedent in *Croft*. The Court stayed its order pending appeal by the Government.

On appeal, the Fourth Circuit reversed, refusing to give Thomas credit on his federal sentence for the time he served in Pennsylvania for the unrelated state offense. In distinguishing *Croft*, the *Thomas* court first focused on the factual differences between the two cases. The Court noted that, unlike *Croft*, neither the state nor the federal courts had ordered or anticipated concurrent state and federal sentences for Thomas. The Court rejected Thomas's argument that Pennsylvania state law favored concurrent sentencing. Instead the Court reasoned that when different sovereigns impose sentences, a court cannot presume that the sentences run concurrently. The Fourth Circuit also noted that primary jurisdiction in *Croft* rested with the federal court, while the Pennsylvania state court had primary jurisdiction over Thomas.

The *Thomas* court considered the language of the respective commitment orders as the final and most important factual difference between the two cases. In *Thomas*, the order did not require the federal marshals to deliver the defendant to federal prison "immediately," as had the order in *Croft*. Because the Sixth Circuit had placed such emphasis on the immediacy of the commitment order, the Fourth Circuit was able to distinguish *Croft*. The *Thomas* court instead followed the example of

356. *Id.* at 1099.

357. 962 F.2d 358 (4th Cir. 1992).

358. Thomas v. Whalen, 962 F.2d 358, 363 (4th Cir. 1992).

Larios v. Madigan.[359] In that case, the United States Court of Appeals for the Ninth Circuit interpreted a commitment order with language very similar to that in *Thomas* as postponing the commencement of the defendant's federal sentence until state officials released him and physically delivered him to federal authorities.

In addition to distinguishing the facts in *Croft*, the *Thomas* court questioned the Sixth Circuit's interpretation of section 3568. It felt that statute gave federal courts clear instructions for determining the commencement of sentences. Having found the statute unambiguous, the *Thomas* court criticized the Sixth Circuit (and the district court in *Thomas*) for its equitable departure from Congress's instruction. The majority opinion in *Thomas* concluded by holding that under the language of section 3568, Thomas's federal sentence did not commence until federal authorities took him into custody at the completion of his state sentence.

Judge Hall's concurring opinion in *Thomas* argued that while Pennsylvania state law and federal law dictated consecutive sentences in this case, other situations might allow for concurrent sentencing. Arguing that Section 3568 was more flexible than as interpreted by the majority, Judge Hall explained that a federal court could give credit for a state sentence made expressly concurrent. Because the state court gave no such order in Thomas's case, the concurring opinion interpreted Pennsylvania state law as requiring consecutive sentences.

The Fourth Circuit's decision in *Thomas v. Whalen* is consistent with the weight of authority interpreting 18 U.S.C. section 3568.[360] Its strong criticism of the legal reasoning in *United States v. Croft* further weakens the value of that twenty year old case.[361] *Thomas* reinforces the interpretation of section 3568 that federal and state sentences will be consecutive unless the state court specifically orders concurrent sentencing for a defendant already convicted and sentenced for a federal offense committed before November 1, 1987. As a result, attorneys in the Fourth Circuit's jurisdiction who have clients convicted of unrelated state and federal offenses and who are unsuccessful in requesting concurrent sentences should ensure that those clients serve the federal sentence first. For a client currently serving his state sentence first, *Thomas* suggests that petitioning the court for a writ of mandamus to order delivery to a federal facility is the appropriate tactic.

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359. 299 F.2d 98 (9th Cir. 1962).

360. *See supra* note 341 (listing cases that hold 18 U.S.C. § 3568 to require consecutive federal and state sentences for unrelated offenses).

361. *See* United States v. Blankenship, 733 F.2d 433, 434 (6th Cir. 1984) (construing 18 U.S.C. § 3568 to allow credit on federal sentence for prisoner's time in state custody only when federal detainer is exclusive reason for prisoner's failure to obtain release on bail); Vaughn v. United States, 548 F.2d 631, 633 (6th Cir. 1977) (limiting *Croft* to circumstance in which state court explicitly orders its sentence to run concurrently with federal sentence).