

FILED: October 25, 2021

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 20-7534  
(7:19-cv-00702-JPJ-PMS)

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JESSICA EWING

Petitioner - Appellant

v.

HAROLD W. CLARKE

Respondent - Appellee

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O R D E R

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The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Floyd, Judge Richardson, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: October 29, 2020

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 20-7534  
(7:19-cv-00702-JPJ-PMS)

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JESSICA EWING

Petitioner - Appellant

v.

HAROLD W. CLARKE

Respondent - Appellee

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O R D E R

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The court defers consideration of the motion for certificate of appealability pending review of the appeal on the merits.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

FILED: August 18, 2021

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 20-7534  
(7:19-cv-00702-JPJ-PMS)

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JESSICA EWING

Petitioner - Appellant

v.

HAROLD W. CLARKE

Respondent - Appellee

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JUDGMENT

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In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PER CURIAM:

Jessica Ewing seeks to appeal the district court's order denying relief on her 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Ewing has not made the requisite showing. Accordingly, we deny Ewing's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*DISMISSED*

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 20-7534**

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JESSICA EWING,

Petitioner - Appellant,

v.

HAROLD W. CLARKE,

Respondent - Appellee.

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Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James P. Jones, District Judge. (7:19-cv-00702-JPJ-PMS)

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Submitted: July 29, 2021

Decided: August 18, 2021

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Before FLOYD and RICHARDSON, Circuit Judges, and SHEDD, Senior Circuit Judge.

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Dismissed by unpublished per curiam opinion.

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Jessica Ewing, Appellant Pro Se.

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Unpublished opinions are not binding precedent in this circuit.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

JESSICA EWING, )  
Petitioner, ) Case No. 7:19CV00702  
v. )  
FINAL ORDER  
HAROLD W. CLARKE, )  
By: James P. Jones  
Respondent. ) United States District Judge

For the reasons set forth in the Opinion accompanying this Final Order, it is  
**ORDERED** that the respondent's Motion to Dismiss, ECF No. 9, is **GRANTED**;  
the Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DISMISSED**; a  
Certificate of Appealability is **DENIED**, based upon the court's finding that the  
petitioner has not made the requisite showing of denial of a substantial right; and the  
Clerk shall close the case.

ENTER: September 30, 2020

/s/ JAMES P. JONES  
United States District Judge

< 1 of 28 Results list >

## N.C. v. Alford, 400 U.S. 25

### Copy Citation

Supreme Court of the United States

November 17, 1969, Argued ; November 23, 1970, Decided

No. 14

#### Reporter

400 U.S. 25 \* | 91 S. Ct. 160 \*\* | 27 L. Ed. 2d 162 \*\*\* | 1970 U.S. LEXIS  
3 \*\*\*\* | 56 Ohio Op. 2d 85

#### NORTH CAROLINA v. ALFORD

**Subsequent History:** [\*\*\*\*1] Reargued October 14, 1970.

**Prior History:** APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** 405 F.2d 340, vacated and remanded.

#### Core Terms

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guilty plea, guilt, murder, innocence, sentence, death penalty, second-degree, trial court, admit, first-degree, proceedings, invalid, maximum

#### Case Summary



##### Procedural Posture

Appellant, the State of North Carolina, sought review of a judgment from the United States Court of Appeals for the Fourth Circuit that reversed the denial of appellee's petition for a writ of habeas corpus on the ground that appellee's guilty plea in a murder case was made involuntarily because

reason compelled within the meaning of U.S. Const. amend. V. Q. More  
Document: Go to ▼ Page Page #  North Carolina v. Alford, 400 U.S. 25, 26  
like this Headnote  North Carolina v. Al... 1 of 1 ▼

Shepardize® - Narrow by this Headnote (91)  6  
1 of 26 Results list

Criminal Law & Procedure > Preliminary Proceedings ▼ > Entry of Pleas ▼  
> General Overview ▼

View more legal topics

### **HN2** Preliminary Proceedings, Entry of Pleas

The standard for determining the validity of guilty pleas is whether a plea represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. Q More like this Headnote

Shepardize® - Narrow by this Headnote (3160)  3  465

Criminal Law & Procedure > ... > Entry of Pleas ▼ > Guilty Pleas ▼ >  Alford Pleas ▼

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### **HN3** Guilty Pleas, Alford Pleas

Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. Q More like this Headnote

Shepardize® - Narrow by this Headnote (94)

Banking Law > ... > Criminal Offenses ▼ >  Bank Fraud ▼ > Penalties ▼

Criminal Law & Procedure > ... > Entry of Pleas ▼ > Types of Pleas ▼ >  No Contest Pleas ▼

View more legal topics

### **HN4** Bank Fraud, Penalties

The U.S. Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence. Q More like this Headnote

Shepardize® - Narrow by this Headnote (137)  10



that a defendant who so pleaded "putteth hym selfe in Gratiam Document: Regiae withoute Certe more, Page 1 N.C. v. Alford, 400 U.S. 25 . . .," W. Lambard, *Eirenarcha* 427 (1581), while an 18th-century case distinguished between a *nolo* plea and a jury verdict of guilty, noting that in the former 1 of 28 Results list, the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt. *Queen v. Templeman*, 1 Salk. 55, 91 Eng. Rep. 54 (K. B. 1702).

1 of 1

Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.

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Blum v. United States, 196 F. 269 (CA7 1912); Shapiro v. United States, 196 F. 268 (CA7 1912); Tucker v. United States, 196 F. 260 (CA7 1912).

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Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that HN7 pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see, e. g., Griffin v. United States, 132 U. S. App. D. C. 108, 110, 405 F.2d 1378, 1380 (1968); Bruce v. United States, *supra*, at 342, 379 F.2d, at 119 (1967); Commonwealth v. Cottrell, 433 Pa. 177, 249 A. 2d 294 (1969); and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. See, e. g., People v. Serrano, 15 N. Y. 2d 304, 308-309, 206 N. E. 2d 330, 332 (1965); State v. Branner, 149 N. C. 559, 563, 63 S. E. 169, 171 (1908). See also Kreuter v. United States, 201 F.2d 33, 36 (CA10 1952).

- In the federal courts, Fed. Rule Crim. Proc. 11 expressly provides that a court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

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Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so.



< 1 of 8 Results list >

## ▲ Buck v. Davis, 137 S. Ct. 759

### Copy Citation

Supreme Court of the United States

October 5, 2016, Argued; February 22, 2017, Decided

No. 15-8049

#### Reporter

**137 S. Ct. 759** \* | 197 L. Ed. 2d 1 \*\* | 2017 U.S. LEXIS 1429 \*\*\* | 85  
U.S.L.W. 4037 | 26 Fla. L. Weekly Fed. S 419 | 2017 WL 685534

DUANE EDWARD BUCK, Petitioner v. LORIE DAVIS, DIRECTOR, TEXAS  
DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS  
DIVISION

**Notice:** The LEXIS pagination of this document is subject to change pending  
release of the final published version.

**Subsequent History:** On remand at, Remanded by Buck v. Davis, 865 F.3d  
215, 2017 U.S. App. LEXIS 6362 (5th Cir. Tex., Apr. 13, 2017)

**Prior History:** 1\*\*\*1 ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT  
Buck v. Stephens, 623 Fed. Appx. 668, 2015 U.S. App. LEXIS 14755 (5th Cir.  
Tex., Aug. 20, 2015)

**Disposition:** 623 Fed. Appx. 668, reversed and remanded.

### Core Terms



cases, merits, district court, extraordinary circumstances, sentence, factors, reopen, future dangerousness, violence, ineffective assistance claim, death sentence, ineffective, shoot, probability, confessed, jurists, violent, waived,

in the initial-review collateral proceeding, or appointed counsel in that proceeding was ineffective under the Strickland standards; and (2) the underlying claim is a substantial one, which is to say that the claim has some merit. [More like this Headnote](#)

Shepardize® - Narrow by this Headnote (30) 3  3

Civil Procedure > Judgments ▾ > Relief From Judgments ▾ >   
Extraordinary Circumstances ▾

## **HN2. Relief From Judgments, Extraordinary Circumstances**

Fed. R. Civ. P. 60(b) enumerates specific circumstances in which a party may be relieved of the effect of a judgment, such as mistake, newly discovered evidence, fraud, and the like. The Rule concludes with a catchall category, Fed. R. Civ. P. 60(b)(6), providing that a court may lift a judgment for any other reason that justifies relief. Relief is available under Rule 60(b)(6), however, only in extraordinary circumstances, and judicial precedent explains that such circumstances will rarely occur in the habeas context. Q More like this Headnote

Shepardize® - Narrow by this Headnote (65)  5

Criminal Law & Procedure > Habeas Corpus ▾ > Appeals ▾ >  
Certificate of Appealability ▾

**HN3. Appeals, Certificate of Appealability**

To obtain a certificate of appealability, a petitioner is required to make a substantial showing of the denial of a constitutional right. 28 U.S.C.S. § 2253(c)(2). More like this Headnote

Shepardize® - Narrow by this Headnote (4) 1

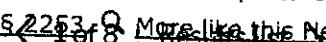
Criminal Law & Procedure > Habeas Corpus ▾ > Appeals ▾ >  
Certificate of Appealability ▾

**HN4. Appeals, Certificate of Appealability**

A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a certificate of appealability (COA) from a circuit justice or judge. 28 U.S.C.S. § 2253(c)(1). A COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.S. § 2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.  [More like this Headnote](#)



denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner at the COA stage. *Buck v. Davis*, 137 F.3d 759, 1 of 4 ✓ 

precedent flatly prohibits such a departure from the procedure prescribed by 28 U.S.C.S. § 2253. 

[Shepardize® - Narrow by this Headnote \(52\)](#)  1  6

Criminal Law & Procedure > [Habeas Corpus](#) ▾ > [Appeals](#) ▾ > [Certificate of Appealability](#) ▾

#### **HN8. Appeals, Certificate of Appealability**

A claim can be debatable even though every jurist of reason might agree, after the certificate of appealability (COA) has been granted and the case has received full consideration, that petitioner will not prevail. 28 U.S.C.S. § 2253 sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then, if it is, an appeal in the normal course. Judicial precedent does not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry.

 [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(85\)](#)  8

Constitutional Law > ... > [Fundamental Rights](#) ▾ > [Criminal Process](#) ▾ >  [Assistance of Counsel](#) ▾

Criminal Law & Procedure > [Counsel](#) ▾ > 

[Effective Assistance of Counsel](#) ▾ > 

[Tests for Ineffective Assistance of Counsel](#) ▾

#### **HN9. Criminal Process, Assistance of Counsel**

The Sixth Amendment right to counsel is the right to the effective assistance of counsel. A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.  [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(45\)](#)  6

Constitutional Law > ... > [Fundamental Rights](#) ▾ > [Criminal Process](#) ▾ >  [Assistance of Counsel](#) ▾

Criminal Law & Procedure > [Counsel](#) ▾ > 

[Effective Assistance of Counsel](#) ▾ > 

[Tests for Ineffective Assistance of Counsel](#) ▾



**HN14** [Appeals, Certificate of Appealability](#)

A litigant seeking a certificate of appealability must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not deserve encouragement to proceed further. [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(699\)](#)  78

Civil Procedure > [Judgments](#) > [Relief From Judgments](#) >   
[Extraordinary Circumstances](#)

**HN15** [Relief From Judgments, Extraordinary Circumstances](#)

[Fed. R. Civ. P. 60\(b\)\(6\)](#) permits a court to reopen a judgment for any other reason that justifies relief. [Fed. R. Civ. P. 60\(b\)](#) vests wide discretion in courts, but judicial precedent holds that relief under [Rule 60\(b\)\(6\)](#) is available only in extraordinary circumstances. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process. [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(151\)](#)  3  20

Civil Procedure > [Judgments](#) > [Relief From Judgments](#) > [General Overview](#)

**HN16** [Judgments, Relief From Judgments](#)

The whole purpose of [Fed. R. Civ. P. 60\(b\)](#) is to make an exception to finality. [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(0\)](#)

Criminal Law & Procedure > [Habeas Corpus](#) > [Review](#) > [Scope of Review](#)

**HN17** [Review, Scope of Review](#)

States can waive a Teague defense by failing to raise it in a timely manner. [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(1\)](#)



Signed in as Virginia Department of Corrections.

Lexis® |

Document: **United States v. Brodie, 686 F. Supp. 941**

Go to ▼ Page Page # ▲ ▼ All terms 45 ▼ ▲ ▼ Search Document

◀ 4 of 10,000+ Results list ▶

## **United States v. Brodie, 686 F. Supp. 941**

### **Copy Citation**

United States District Court for the District of Columbia

May 19, 1988 ; May 19, 1988, Filed

Criminal No: 87-0492

#### **Reporter**

**686 F. Supp. 941** \* | 1988 U.S. Dist. LEXIS 4646 \*\* | 1 Fed. Sent. R. 14

United States of America v. Wilbert S. Brodie

### **Core Terms**

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Sentencing, guidelines, delegation, executive branch, judicial branch, separation of powers, courts, federal judge, decisions, factors, cases, branch of government, agencies, offender's, functions, legislative authority, sentencing decision, membership, unconstitutionality, mitigation, regulation, placement, offenses, binding, elected, powers, terms

### **Case Summary**

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#### **Procedural Posture**

Defendant, convicted of possession of cocaine with intent to distribute,

Constitutional Law > Separation of Powers ▾

Criminal Law & Procedure > Sentencing ▾ > Sentencing Guidelines ▾ > General Overview ▾

**HN9** **Constitutional Law, Separation of Powers**

Placement of the Sentencing Commission in the Executive Branch would violate separation of powers principles. It is not only unseemly but functionally entirely inconsistent with the philosophy underlying the doctrine of the separation of powers to combine in the same body and the same branch of government the persons who prosecute criminal defendants and the supposedly impartial commission that drafts, amends, and interprets the code that governs the equally impartial sentencing decisions of the federal judges. Q More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Administrative Law > Separation of Powers ▾ > Constitutional Controls ▾ > Nondelegation Doctrine ▾

Constitutional Law > Separation of Powers ▾

**HN10** **Constitutional Controls, Nondelegation Doctrine**

The delegation doctrine is rooted in the principle of separation of powers that underlies the three-branch system of government established by the Constitution. However, the delegation issue has generally be considered by courts and text writers on a separate basis. Q More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Separation of Powers ▾

Governments > Legislation ▾ > Enactment ▾

**HN11** **Constitutional Law, Separation of Powers**

The power to define criminal offenses and to prescribe the punishments resides wholly with the Congress. The formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. Q More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > Sentencing ▾ > Sentencing Guidelines ▾ > General Overview ▾

**adopted by non-constitutional commissioners invisible to him and to the general public.** Q [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(2\)](#)

Constitutional Law > ... > [Fundamental Rights](#) ▾ > 

[Procedural Due Process](#) ▾ >  [Scope of Protection](#) ▾

Criminal Law & Procedure > [Sentencing](#) ▾ > [Sentencing Guidelines](#) ▾ > [General Overview](#) ▾

◆ **HN15\* Procedural Due Process, Scope of Protection**

It is proper -- indeed even necessary for the rational **exercise of discretion** -- to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision. The sentencing court must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Q [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(1\)](#)

Constitutional Law > [Separation of Powers](#) ▾

Criminal Law & Procedure > [Sentencing](#) ▾ > [Sentencing Guidelines](#) ▾ > [General Overview](#) ▾

**HN16\* Constitutional Law, Separation of Powers**

The United States District Court for the District of Columbia declares unconstitutional Title II of the Comprehensive Crime Control Act of 1984, 28 U.S.C.S. §§ 991-998. Q [More like this Headnote](#)

[Shepardize® - Narrow by this Headnote \(0\)](#)

**Counsel:** Counsel for the Government: Jay B. Stephens, United States Attorney, Douglas Letter, Attorney, Thomas Millet, Attorney, United States Department of Justice, William R. Martin, Assistant United States Attorney, Washington, District of Columbia.

Counsel for Defendant: Gregory Bruce English, English & Smith, Alexandria, Virginia.

For United States Sentencing Commission: John R. Steer, General Counsel, Donald A. Purdy, Jr., Deputy General Counsel, United States Sentencing Commission, Washington, District of Columbia.