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Case Summaries: Fourth Circuit Court of Appeals (June 3, 7, 12, and 24, 2024)

18 U.S.C. 922(g)(1) is not facially unconstitutional

U.S. v. Canada, 103 F.4th 257 (June 3, 2024). The defendant was convicted of possession of firearm by a felon following a jury trial in the District of South Carolina. He argued on appeal that 18 U.S.C. 922(g)(1), the federal law prohibiting people convicted of a felony from possessing firearms, is facially unconstitutional and violated the Second Amendment in any and all applications. Because the law may be applied constitutionally in at least some circumstances (such as against people convicted of serious, violent crimes), the facial challenge failed. According to the court:

> The law of the Second Amendment is in flux, and courts (including this one) are grappling with many difficult questions in the wake of *New York State Rifle & Pistol Ass'n., Inc. v. Bruen*, 597 U.S. 1 (2022). But the facial constitutionality of Section 922(g)(1) is not one of them. Indeed, no federal appellate court has held that Section 922(g)(1) is facially unconstitutional, and we will not be the first. *Canada* Slip op. at 2.

While acknowledging that the law may be subject to as-applied Second Amendment challenges under *Bruen,* the court noted that the defendant here declined to advance such a challenge. In light of the defendant's stance, the court declined to determine the proper analysis of the law's facial constitutionality. "No matter which analytical path we choose, they all lead to the same destination: Section 922(g)(1) is constitutional because it 'has a plainly legitimate sweep' and may be constitutionally applied in at least *some* 'set of circumstances.'" *Id*. at 3 (citation omitted) (emphasis in original).

A challenge to an Armed Career Criminal Act sentencing enhancement was successful, and the unanimous court vacated the sentence imposed by the district court, remanding the case for resentencing.

False statements about the defendant's identity made to Syrian authorities during intake fell within the routine booking exception to *Miranda*; FBI agents did not exploit earlier, un-*Mirandized* intelligence gathering interrogations to circumvent the defendant's protections against self-incrimination; defendant failed to show that statements he made to media organizations while in custody were involuntary

U.S. v. Elsheikh, 103 F.4th 1006 (June 7, 2024). The defendant was a British citizen who moved to Syria in 2012 and joined the terrorist group ISIS. He and others in the group were responsible for kidnapping and sometimes executing hostages, some of whom were American. Armed forces associated with the Syrian government eventually captured the defendant when he tried to flee the country in 2018. He initially gave a false name to the Syrian authorities but was quickly identified by biometric markers. While in the custody of Syrian forces, U.S. Department of Defense ("DOD") officials interviewed the man. These interviews were conducted for "intelligence gathering" purposes and no *Miranda* warning was given to the defendant before or during the interviews. Some weeks after the DOD interviews, FBI agents visited the defendant and requested to interview him. This time, the agents gave the defendant a *Miranda*

warning, explicitly warning him that any of his statements could be used against him in a criminal case. In late 2019, the U.S. government took custody of the defendant from the Syrian authorities, and he was eventually charged with multiple offenses in the Eastern District of Virginia, including hostage taking resulting in death, conspiracy to murder, and providing material support to a terrorist organization. The defendant was convicted at trial and sentenced to multiple life terms. On appeal, he raised various arguments concerning the admission of his statements at trial.

The defendant first complained about the admission his false statements regarding his identity given to the Syrian authorities. The trial court allowed the un-*Mirandized* statements, finding that they fell within the "routine booking" exception to *Miranda*. Under the routine booking exception, statements made in response to police questions designed to obtain "biographical data" during the normal arrest intake process are not covered by *Miranda*, because such questions do not seek to elicit an incriminating response. *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir. 1994) (internal citation omitted). The Fourth Circuit agreed with the district court that the routine booking exception applied, despite the differences between a typical arrest environment and the war-like circumstances here. Even if the exception did not apply, any error in the admission of the false statements regarding the defendant's identity was harmless. The challenged statements were not a major part of the prosecution's case and there was ample other evidence of the defendant's identity.

The statements made by the defendant to the FBI were also admitted at trial. The defendant alleged that law enforcement improperly took advantage of the earlier interrogation by DOD authorities in an effort to circumvent his *Miranda* rights. When law enforcement utilizes a two-step process, whereby the defendant is interrogated without *Miranda* warnings, confesses, and then later gives inculpatory statements after *Miranda* warnings, no constitutional violation typically occurs. *Missouri v. Seibert*, 542 U.S. 600 (2004). Only when police use such a process in a "calculated" way, intending to circumvent the defendant's protections against self-incrimination, does this tactic violate *Miranda*. The FBI agents did not interview the defendant until 20 days after the last DOD interview. They provided the defendant complete *Miranda* warnings orally and in writing. The *Miranda* warning was modified to address the prior interviews by military authorities, stating in part: ". . . you may have already spoken to others from the U.S. Government. We do not know what, if anything, they said to you, or what you said to them . . . We are starting anew. You do not need to speak with us today just because you have spoken with others in the past." *Elsheikh* Slip op. at 14. The district court denied the motion to suppress the defendant's statements to the FBI, finding both that the FBI agents had not deliberately utilized a two-step interrogation process and, alternatively, that the agents took sufficient curative measures to separate their questioning from the DOD interrogations. The Fourth Circuit agreed. These were appropriate measures to ensure that the defendant's statements were knowingly and voluntarily given, despite the earlier military interrogations. "These circumstances do not even come close to the sort of calculated staging that the Supreme Court disapproved of in *Seibert*." *Elsheikh* Slip op. at 18.

Finally, the defendant challenged the admission of statements he made to media outlets while in custody of the Syrian government, claiming that they were not voluntarily given and were only made in response to physical violence and threats of violence by Syrian authorities. The only evidence in support of the alleged violence was his contention that it occurred. Multiple other witnesses contradicted his claims. The district court found those witnesses credible and denied the defendant's motion to suppress. Again, the Fourth Circuit affirmed. According to the court:

> Numerous witnesses across nationalities and professions testified credibly—and subject to cross-examination—that Elsheikh alone determined whether to participate in media interviews, decided how or whether to respond to questions posed by the press, and could even terminate an interview mid-course at his discretion. That testimony was backed up by the substance and timing of Elsheikh's statements during the media interviews in question, which exhibited decision-making and discretion in what information he disclosed when and to whom. *Id*. at 26.

Further, the defendant only offered a sworn declaration in support of these allegations and did not testify at suppression, where he would have been subject to cross-examination. Considering these circumstances, the district court did not clearly err in finding the media statements were voluntarily given and admissible.

Other evidentiary challenges were likewise rejected, and the district court's judgment was affirmed in all respects.

Unrelated officer misconduct was not material on the facts of the case; motion to enforce plea bargain properly denied where the parties had not reached a firm agreement

U.S. v. Banks, 104 F.4th 496 (June 12, 2024). In this multi-defendant gang prosecution from the District of Maryland, members of a branch of the Bloods gang were prosecuted for racketeering, drugs, and conspiracy offenses, including murder in furtherance of racketeering. Each of the five co-defendants were convicted of serious offenses and sentenced to life or long prison terms. Before sentencing, the defendants discovered that one of the officers involved in the investigation had stolen drugs during a traffic stop. That incident was unrelated to the defendants' cases, except insofar as the officer had been an affiant on some of the search warrants and wiretap applications during the investigation of the defendants. The defendants moved for a new trial based on this information, which the district court denied. On appeal, the Fourth Circuit affirmed.

The officer in question worked as a local police officer but was on detail with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") when he became involved with the investigation of the defendants. That investigation had been ongoing for some time prior to the ATF's involvement. Further, the ATF had been involved in the case for some time before the officer in question joined the investigation. The officer performed the checking of an informant before a recorded controlled purchase of drugs in one instance, and he conducted some surveillance of one of the co-defendants. The controlled purchase the officer participated in did not become part of the evidence in the case, and the surveillance the officer conducted was recorded on video and was not significant evidence in the case. Other than these two instances of the officer acting alone, he otherwise was always acting in the presence of other officers involved with the case. While he had been a signatory on several warrant and wiretap applications, the information contained in the affidavits in support came from sources other than the officer.

While the gang investigation was continuing, federal authorities began a separate investigation into corrupt police officers in Baltimore. The corruption investigators began to find some circumstantial evidence that the officer was potentially involved in criminal activity before the defendants' trial, but they had no firm evidence implicating the officer until after the defendants' trial was underway. The federal corruption task force reported their evidence implicating the officer in drug activity to the prosecutors responsible for the gang case, but U.S. Attorneys decided that they were not obligated to

disclose the information since the officer in question was not going to be a witness at the trial, the information in the applications signed by the officer relevant to the case were of independent origin, and the investigation into corrupt officers was still ongoing. After their convictions but before sentencing, the defendants discovered this information about the officer and moved to set aside the verdict, arguing that the failure to disclose the misconduct justified a new trial on constitutional grounds (among other arguments). The district court denied the motion, finding that the officer's misconduct did not rise to the level of material information. Even if the warrant and wiretap applications would not have been approved had the issuing official known of the misconduct, the information was still not material within the meaning of Brady. For one, the officer in question did not testify at the defendants' trial. For another, the officer's misconduct merely called into question his credibility and not that of the larger investigation. According to the court:

> . . . [T]he purported basis for a new trial is entirely unrelated to (1) the evidence establishing probable cause for any evidence obtained as a result of the wiretaps or searches, and (2) the evidence introduced to establish the Defendants' guilt at trial. Their sole point in raising [the officer's] criminal conduct is to argue that he was a corrupt officer with suspect credibility. . . But we have previously held that evidence which is merely impeaching does not generally warrant the granting of a new trial. To the contrary, motions for a new trial based on impeaching evidence discovered after trial should be granted 'only with great caution and in the most extraordinary circumstances, as there must be a real concern that an innocent person may have been convicted. *Banks* Slip op. at 15 (cleaned up).

The district court therefore correctly denied the motion for a new trial.

Shortly before trial, one of the defendants moved to enforce a purported plea bargain with the government that would have allowed him to avoid exposure to a sentence of life without parole. At one point, the defendant was offered a plea agreement for a term of 27-40 years. At another point, he was offered a deal for a set term of 37 years. According to the defendant, he accepted both deals. The district court disagreed, finding that the government's offers were conditional on other, unmet conditions, such as the other codefendants also accepting the deal. The offers also explicitly stated that they were subject to approval by a supervisor, which never happened. The party seeking to enforce the purported agreement bears the burden of establishing the existence of a contract. The record was clear that no meeting of the minds had occurred by the time of the defendant's purported acceptance of the offer, and the district court properly denied the motion to enforce the (nonexistent) plea deal.

One defendant was entitled to have his firearm by felon convictions reversed, but the district court indicated at sentencing that it would impose the same sentence even if those convictions were reversed on appeal. Given that posture, the case was remanded only for entry of an amended judgment without the firearm by felon convictions (and not for resentencing).

Other challenges to certain other evidentiary rulings, the verdict form, and the sentences were rejected as well. With the exception of the need to vacate and remand the one firearm conviction for entry of amended judgment, the district court was affirmed.

Seizure of cell phones incident to the defendant's arrest was improper when the defendant was secured and not within reaching distance of the phones, but the error was harmless on the facts of the case; defendant's car was properly seized as likely proceeds of drug dealing; inventory search of the car was proper

U.S. v. Horsley, ___ F.4th ___ (June 24, 2024). The defendant sold and distributed large amounts of cocaine, methamphetamine, and heroin around Lynchburg, Virginia between 2016 and 2019. After arranging and observing a series of controlled purchases of drugs from the defendant by informants, law enforcement obtained multiple search warrants for properties connected to him. These included the defendant's apartment, an apartment of a co-conspirator, and a woman's home used as a stash house for storing drugs and drug distribution paraphernalia. Large amounts of various drugs were found at the stash house, and large amounts of cocaine and cash were found at the co-conspirator's apartment. During the search of the defendant's apartment, police found multiple cell phones, along with a ledger book entitled "Gotta Get Every Dollar" and a money counting device. Police performed a forensic extraction of one of those phones, leading to extensive text message evidence showing the defendant and a co-conspirator discussing drug transactions. The defendant was later arrested in a hotel room with two cell phones, one of which contained evidence relating to the crimes charged, which was later admitted at trial. Both phones were seized by police without a warrant. The defendant's car (a Jaguar) was found in the hotel garage and police searched it without a warrant, finding more phones, cash, and jewelry. The defendant would not sign a form documenting his ownership of the cash found in the car, but claimed it was money he had inherited.

The defendant moved to suppress the evidence obtained from his car and the cell phone found in his hotel room. The district court denied the motion, finding that the phones were properly seized incident to the defendant's arrest and that police had probable cause to believe the car was proof of the defendant's illegal proceeds from drug dealing. As to incriminating items discovered inside the car, the district court ruled that police discovered those during a lawful inventory search. At trial, an officer was allowed to testify to the meaning of coded language in the defendant's text messages without being sworn as an expert witness. The jury ultimately convicted the defendant of all charges and the defendant appealed. He challenged the denial of his motion to suppress and the admission of the text interpretation testimony, among other arguments. The Fourth Circuit unanimously affirmed.

As to the cellphone seized from the defendant's hotel room, the defendant was nude when he opened the door for the police. He was standing up and was immediately handcuffed with his hands behind his back. Police moved him to the side of the bed. The nearest cell phone was on a table 2-3 feet away. Another cell phone—this one containing the evidence later admitted at trial—was across the room. There were several U.S. Marshals in the room as well. Given these circumstances, the cell phones were not within reaching distance of the secured defendant, and search incident to arrest could not justify their seizure. According to the court:

> . . . Appellant would have still needed to hurdle past [his female companion] and break past multiple able law enforcement officers before he even had a chance to twist around and seize the phone with cuffed hands. . . Beyond this, even if Appellant could reasonably have reached the cell phone—which he could not have—it is unreasonable to believe that he could have had the time and opportunity to delete evidence from the cell phone, which

> is what the purported concern would be for search incident to arrest. *Horsley* Slip op. at 25.

This was all the more true given that the phone containing evidence actually admitted at trial was even farther away than the one on the table beside the bed. Thus, the district court erred in finding that the cell phone was properly seized incident to the defendant's arrest. However, uncontested evidence offered at trial—including testimony from multiple co-conspirators, the text messages, the drugs found, the drug ledger and money counter machine found in the defendant's home, and more—rendered this error harmless. ". . .[T]he jury could easily have convicted Appellant without relying on the cellphone seized during the hotel room . . ." *Id*. at 40.

As to the car, police were justified in seizing it without a warrant because probable cause existed to believe it constituted proceeds of drug trafficking. Police had seen the defendant driving it during surveillance; they knew the defendant was engaged in kilogram-level drug transactions involving tens of thousands of dollars; and police had never observed the defendant working a normal job (nor was any employment ever reported to the state) during the year and half of their surveillance. While the car was registered in the name of the defendant's sister, this fact did not defeat the totality of circumstances strongly suggesting that the car was purchased with drug proceeds. The subsequent inventory search of the car was also proper. "Officers may conduct an inventory search of an automobile if circumstances reasonably justify seizure, and law enforcement conducts the inventory search pursuant to routine and standard procedures designed to secure the vehicle or its contents." *Id*. at 36. Law enforcement did so here, and the district court did not err in denying the defendant's motion to suppress the evidence from the car. Even if some of the evidence from the car was improperly obtained, none of it was significant in context of the prosecution's case, and any error was again harmless.

As far as the officer's testimony interpreting the defendant's text messages, the defendant mostly failed to preserve his challenge by not objecting to its introduction at trial. Despite that posture, the court acknowledged that the lay opinion testimony was improper and amounted to plain error. Nonetheless, the error did not seriously prejudice the defendant on the facts of the case. Beyond the overwhelming other evidence of guilt, another officer was sworn as an expert and defined many of the terms used in the officer's testimony at issue. In the words of the court: "…[T]he error was harmless and the testimony did not seriously affect the fairness, integrity, or public reputation of the proceedings." *Id*. at 46.

Another challenge relating to the verdict forms was likewise rejected and the district court was affirmed in full.