

Case Summaries: Fourth Circuit Court of Appeals (Sept. 3, 4, 9, and 17, 2024)

No violation of the defendant's right to counsel of his choice where his chosen attorney became a material witness for the government; district court did not improperly limit cross-examination of former attorney where the testimony sought was unrelated to the defendant's charges

[U.S. v. Freitekh](#), 114 F.4th 292 (Sept. 3, 2024). The defendants were father (Izzat) and son (Tarik). They operated a restaurant in Charlotte, North Carolina, together along with other members of the immediate family. In the face of widespread business closures relating to the COVID-19 pandemic in Spring of 2020, the defendants applied for Paycheck Protection Program ("PPP") loans totaling \$1.75 million dollars. Investigators later determined that the loan applications were fraudulent. The applications claimed businesses and employees that did not exist, overstated the number of employees and payrolls, and in some instances, used forged documents. When the defendants received the money from the loans, Izzat wrote checks of \$30,000.00 to each of the family members, despite none of them being listed as employees of the companies listed in the loan applications. At some point during the investigation, Izzat and his attorney met with federal authorities and claimed that a third party had handled the loan applications in exchange for a percentage of the total loan amount. This turned out to be false. The defendants were eventually indicted in the Western District of North Carolina for bank fraud and conspiracy to commit wire fraud, and Izzat was charged with making false statements for the false claim about the third-party loan facilitator.

The attorney who initially represented Izzat during his meeting with federal officials became a witness for the government, and Izzat hired new counsel for trial. Meanwhile, Tarik provided his attorney with screenshots of communications between him and the same third-party who allegedly completed the fraudulent loan applications on the men's behalf. These too turned out to be fraudulent. Additional charges were brought for money laundering and related conspiracy offenses, as well as a false statements charge for Tarik.

The government sought to have the defendants stipulate to the admissibility of certain documentary evidence used to support the false statements offenses. When they refused to stipulate, the government sought to clarify the role of Tarik's defense counsel. Because Tarik's lawyer had provided the screenshots to the government at Tarik's request, the government believed the lawyer was a necessary witness in the case and therefore was conflicted out of the matter. Tarik's lawyer agreed with this assessment, and the trial court allowed his motion to withdraw from the case over Tarik's objection. The district court then continued the matter for six months to allow Tarik to obtain substitute counsel and for substitute counsel to prepare for trial.

When the two prior defense attorneys involved in the proceedings were subpoenaed by the government for trial, the defendants both moved to quash the subpoenas on grounds that the information sought would violate attorney-client privilege. Both former attorneys joined that motion. The district court allowed the attorneys to be subpoenaed but limited the scope of questioning of them to five court-approved questions relating to the fact of their prior representation of the clients and their acts of

providing the government with the false statements supplied to them by the defendants. The district court also conducted voir dire of the attorneys before they testified outside of the presence of the jury to ensure no privileged information would arise before the jury. Izzat was convicted of five counts and acquitted of three others; Tarik was convicted of five counts and acquitted of a sixth.

On appeal, Tarik claimed that the district court violated his right to choose his own counsel when it allowed his attorney to withdraw over his objection. The Fourth Circuit disagreed. While defendants who do not need court-appointed counsel are generally entitled to counsel of their choice, the trial court also has an obligation to ensure the integrity of the proceedings. *U.S. v. Howard*, 115 F.3d 1151, 1155 (4th Cir. 1997). Even when a defendant is willing to waive a conflict of interest with counsel of his choice, the trial court has broad discretion to reject that waiver, disqualify counsel from the matter, and order the defendant to obtain substitute counsel. *Wheat v. U.S.*, 486 U.S. 153, 163 (1988). Such was the case here. Tarik's attorney was the only person who could authenticate the document in question, and he could not ethically provide such adverse testimony while representing Tarik. Tarik's right to counsel of his choice had to be balanced against the need for the defendant to have effective representation by someone other than a material witness for the government in the case. Thus, the district court did not err in allowing the defense attorney's motion to withdraw and requiring the defendant to obtain substitute counsel.

Izzat complained that the district court improperly limited the scope of his cross-examination of Tarik's former defense attorney in violation of his Sixth Amendment right to confront his accusers. In addition to the five court-approved questions, the district court allowed the former defense attorneys to be cross-examined outside the presence of the jury. When Izzat asked Tarik's former defense attorney on cross-examination about certain other communications between Tarik and his attorney, Tarik's current attorney objected on grounds that any such communications were protected by attorney-client privilege. The district court allowed the question to be asked and answered in voir dire for purposes of preserving the appellate record, but did not allow that question to be asked before the jury. The district court did not abuse its discretion in so ruling. The proposed testimony only marginally implicated Izzat's charges, and Izzat's attorney at trial was still able to effectively cross-examine Tarik's former attorney on other points. Even if the district court had erred in preventing this line of questioning, the error would be harmless. "[Tarik's former attorney's] testimony had little to no effect on Izzat's verdict." *Freitekh* Slip op. at 33.

Other challenges to evidentiary rulings, the sufficiency of the evidence, and sentencing issues were all likewise rejected, and the judgment of the district court was unanimously affirmed.

Hemp-derived THC-O qualifies as a legal hemp product and is not an illegal synthetic form of THC

[Anderson v. Diamondback Investment Group, LLC](#), ___ F.4th ___ (Sept. 4, 2024). In this employment dispute from the Middle District of North Carolina, the plaintiff was fired from the defendant's business after a urine screen showed the presence of delta-9 THC. She claimed that the positive test was the result of her lawful use of legal hemp products, including hemp-derived delta-8 THC, delta-10 THC, THC-O, HHC, and CBD. She also claimed that she had never used marijuana. The business had a policy that made all employees subject to drug testing and stated that offers of employment depended on passing a drug screen. After failing the first test, the plaintiff was provided an opportunity to re-test. She informed the defendants that she was using hemp products and explained some of her health conditions. The second test did not produce a valid result, but the third test came back positive for marijuana, and the

woman was fired. She sued, alleging violations of the Americans with Disabilities Act and of North Carolina's Lawful Use of Lawful Products statute, [G.S. 95-28.2](#).

As to the lawful use of lawful products claim, the defendant argued in part that one of the cannabinoids that the plaintiff admitted to using, THC-O, was an illegal synthetic cannabinoid. They asserted that her claims failed because THC-O was not a legal hemp-derived cannabinoid but was rather an illegal synthetic form of THC. The defendant pointed to an opinion letter from the Drug Enforcement Administration ("DEA") finding that, because THC-O does not naturally occur in the cannabis plant and can only be manufactured by synthetic means, it does not fall within the definition of legal hemp. Synthetic THC's remain illegal Schedule I substances under federal law regardless of the concentration of delta-9 THC, according to the DEA. A majority of the Fourth Circuit disagreed.

The court noted that the Ninth Circuit decided a similar challenge to hemp-derived delta-8 THC, where that court rejected the DEA's position that the substance qualified as an illegal synthetic form of THC. *AK Futures LLC v. Boyd St. Distro*, 35 F.4th 682, 690 (9th Cir. 2022). There, the Ninth Circuit found that the process by which a cannabinoid was produced was not determinative of its legal status. The 2018 Farm Act unambiguously defines "hemp" to include "all products derived from the cannabis plant, 'so long as they do not cross the 0.3% delta-9 THC threshold.'" *Anderson* Slip op. at 36 (citation omitted) (emphasis in original). Thus, the Ninth Circuit held that hemp-derived delta-8 THC (not exceeding the legal limit for delta-9 THC) easily qualified as a legal hemp product. The Fourth Circuit agreed with the reasoning of the Ninth Circuit to hold the same of hemp-derived THC-O. Further, in light of the demise of *Chevron* deference, the DEA's interpretation of the law was not binding. In the words of the court:

Between the DEA's February 2023 letter and *AK Futures*, we think the Ninth Circuit's interpretation of the 2018 Farm Act is the better of the two. And we're free to make that determination ourselves, despite a contrary interpretation from the DEA, because we agree with the Ninth Circuit that [7 U.S.C.] § 1639o is unambiguous, and because, even if it were ambiguous, we needn't defer to the agency's interpretation. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2023). *Id.* at 37.

The court found further support for this interpretation from other federal agencies, such as the National Institute on Drug Abuse. They and others define synthetic cannabinoids as "a class of lab-made substances that are chemically similar to chemicals found in the cannabis plant, though they often produce very different results." *Id.* at 38 (citation omitted). When a substance like THC-O is derived from a cannabis plant, it keeps its character as a legal hemp product, unlike substances produced entirely from synthetic compounds.

However, the plaintiff presented no evidence that the products she was using were in fact legal, unlike the plaintiff in *AK Futures*. Even had the plaintiff presented such evidence, North Carolina's lawful use statute has an exception for an employer restriction on the use of lawful products when "the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities." G.S. 95-28.2(c)(1). The employer here argued that its drug-free policy was related to concerns over "workplace safety and efficiency." The court agreed, and the district court properly granted summary judgment to the defendant on this claim.

The plaintiff's other claims failed as well, and the judgment of the district court was affirmed.

Judge Richardson concurred in part. He would not have reached the question of the legality of THC-O but agreed with the outcomes.

Author's Note: This seems to be the first case, state or federal, interpreting North Carolina's lawful use of lawful products statute.

No error to deny jury instruction on entrapment defense where government merely suggested illegal conduct, despite the defendant's difficulty speaking English and apparent confusion at times

[U.S. v. Elboghdady](#), ___ F.4th ___ (Sept. 9, 2024). In this case from the Southern District of West Virginia, a state trooper posed online as a mother as a part of an effort by law enforcement to identify and prosecute child predators. She posted ads vaguely referencing her desire to find someone to "have fun" and "play" with her children. The defendant responded and began communicating with the undercover trooper over email and then text message. The defendant was Egyptian and did not speak English well. The undercover trooper proposed that the defendant come over and have "a good time" with her children and indicated her desire to "watch my girls have a good time." After establishing certain rules for the proposed encounter, the trooper informed the defendant for the first time that the children were 11- and 13-year-old girls. The defendant asked for more pictures, and the undercover trooper sent two more pictures of young girls. The next day, the two resumed communicating, and the defendant asked for a picture of her and indicated his interest in the adult mother. The undercover sent a picture purporting to depict herself but reiterated that she was "not part of the deal." They planned an in-person meeting for that evening in West Virginia, which required the defendant to travel from Ohio. When asked to bring gifts for the children, the defendant again seemed to express interest in the mother. When the undercover indicated that she would participate in a sexual encounter with her children for money if the defendant wished, the defendant said, "No I don't want see I'm okay with girls." He agreed to bring the children candy at the undercover's request. The defendant continued communicating with the undercover and continued explicitly expressing sexual interest in the mother.

The two spoke on the phone when the defendant was travelling to the meeting place, and he told the undercover that he only spoke a little English and did not understand everything that was being said during their conversations. The conversation moved back to text and the defendant sought clarification about what the mother wanted him to do with the girls. When the undercover began discussing him having sex with the children, he asked the undercover her age and again indicated a desire to be with her. The undercover asked if she should have her children shower in preparation for the encounter, and the defendant responded that he was clean and had showered. This kind of confused back and forth communication continued, with the undercover suggesting that he have sex with her virgin 11-year-old, and the defendant seeming to accept the proposition, while also expressing his desire to have a sexual encounter with the mother. The defendant asked for a picture of the "virgin child" at one point. The two met in public and eventually began walking towards the home where the woman said the children were. In a final exchange, the undercover again asked the defendant whether he was willing to have sex with the child, and the defendant indicated that he would try. Police arrived and arrested the defendant for traveling interstate with intent to engage in criminal sexual activity.

At trial, the defendant sought a proposed jury instruction on entrapment. The district court declined to give the instruction, and the jury convicted the defendant. He was sentenced to 120 months imprisonment. He appealed, arguing in part that the district court erred in refusing to instruct the jury on entrapment.

The court began by addressing the standard for an entrapment instruction. The defendant must present “more than a scintilla of evidence” that the government induced him to commit the crime and that he was not predisposed to commit the crime. *U.S. v. Hsu*, 364 F.3d 192, 198 (4th Cir. 2004). “To be entitled to the defense, [the defendant] must point to evidence of ‘government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party.’” *Elboghdady* Slip op. at 11 (citation omitted). The defendant argued that the undercover’s acts of repeatedly bringing up the children despite his stated interest in the mother and his difficulties with English constituted sufficient government overreach. The court disagreed. In its words:

[R]epeated suggestions from law enforcement do not give rise to government overreach. . . Each time [the defendant] expressed interest in the mother, the [undercover trooper] declined the advance and refocused the conversation on the two young girls. She did so without persuading or otherwise swaying [the defendant] to act, so the defense is unwarranted. *Id.*

That said, the court expressed concern over the government’s conduct given the defendant’s obvious confusion during the communications. According to the court:

The entrapment standard does not act as a free pass for the government to ignore the context of the interactions they engage in during undercover operations. . . We caution law enforcement to remember the purpose of its conduct when operating undercover operations: ‘The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.’ *Id.* at 12-13 (citation omitted).

While the district court’s decision not to instruct on entrapment was affirmed, the defendant successfully challenged his sentence. The sentence was therefore vacated, and the matter remanded for resentencing.

Judge Quattlebaum concurred in part and dissented in part. He took issue with the majority’s categorization of the evidence during its discussion of the entrapment issue and disagreed that the defendant was entitled to resentencing.

No violation of the right to a public trial based on the inability of the public to view jurors; even if the limitation of the public to view the entire courtroom amounted to a partial court closure, it was justified by COVID-19 precautions then in place; no violation of confrontation rights to admit video deposition testimony where the district court correctly determined that the witnesses were unavailable due to distance, age, and infirmity during the COVID-19 pandemic

[U.S. v. Smith](#), ___ F.4th ___ (Sept. 17, 2024). Several defendants were indicted in the Eastern District of Virginia in 2019 for offenses relating to mail and wire fraud conspiracies. For years, the defendants enticed victims to invest in fraudulent companies, netting more than \$9 million dollars in the process. Two of the eight defendants were tried and convicted together in November of 2020. Per an order of the Chief District Court Judge, protocols designed to protect against the spread of COVID-19 were in place at the time. These required the use of a “socially distanced jury box,” the allocation of a separate courtroom where members of the public could observe the trial over video in real time, and the use of a third courtroom to be used for socially distanced deliberations by the jury. Prior to trial, the two

defendants challenged some of these protocols as unconstitutional. Because members of the public watching the trial would not be able to view the jury on the live feed, the defendants argued the procedure violated their rights under the Sixth Amendment Public Trials Clause. They complained that this amounted to a closure of the courtroom to the public and went beyond what was necessary to protect the public. The district court denied the motion. It found that the COVID-19 procedures did not amount to either a partial or full closure of the courtroom implicating the right to a public trial. Alternatively, even if the procedures did amount to closure of the courtroom, they passed constitutional muster under *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*, a courtroom may constitutionally be closed when:

1) the party seeking to close the hearing [advances] an overriding interest that is likely to be prejudiced, 2) the closure [is] no broader than necessary to protect that interest, 3) the trial court [considers] reasonable alternatives to closing the proceeding, and 4) it [makes] findings adequate to support the closure. *Smith Slip op.* at 8.

The district court determined that protection of the public health was a sufficient substantial interest; that the proposed trial procedures were not overbroad in light of the interest at stake; and that courtroom staff were making extraordinary efforts to ensure that the jury could view the witness stand, the judge, the defendants, and the attorneys for the defense. It ultimately determined these procedures were “a reasonable alternative” to completely closing the courtroom to the public. The district court also noted that the defendants pointed to no authority supporting the notion that the public must be permitted to view the jury specifically.

Prior to trial, the government learned that several of its witnesses would not be able to appear in person at the trial due to health, age, and health risk issues. The government sought to conduct video depositions of these witnesses in lieu of them physically appearing in court at trial. Each of the witnesses at issue lived in California and had serious health limitations and restrictions on their ability to travel across the country, and each were at elevated risk if they were to become infected with COVID-19. The district court allowed the government’s motion and depositions were conducted in California, with the presence of the defendants and defense counsel. Although the motion to depose the witnesses was not opposed by the defendants, one of the defendants moved to exclude the deposition testimony as a Sixth Amendment Confrontation Clause violation. The defendants’ cases were continued for several months, but the witnesses remained unavailable for trial, and the district court ultimately denied the motion to exclude the deposition testimony. It found that the government undertook good-faith efforts to obtain the live testimony of the witnesses and that the deposed witnesses were properly considered unavailable for purposes of confrontation rights.

During trial, the same defendant renewed his objections to the deposition testimony, arguing that the health risks to the deposed witnesses no longer justified a finding of unavailability in light of the development of a vaccine for COVID-19, which was apparently again overruled. The jury convicted both men on all counts, and each received sentences of imprisonment (156 months for one; 185 months for the other). On appeal, they challenged the district court’s ruling on the public trial issue, the confrontation issue, and raised certain sentencing challenges.

As to the Public Trial Clause claims, the Fourth Circuit rejected the idea that the inability of the public to view members of the jury from the viewing courtroom on video feed amounted to a complete courtroom closure. According to the court:

[T]here is no legal authority indicating that the Sixth Amendment requires every spectator to have a view of every angle of the Courtroom. And as a practical matter, a spectator viewing a trial from the courtroom gallery would not have a perfect sight line of each angle of the courtroom—let alone each individual juror. *Id.* at 25 (internal cites omitted).

At most, the COVID-19 procedures amounted to a partial court closure and could be justified by merely a “substantial” (versus “overriding”) interest. *U.S. v. Smith*, 426 F.3d 567, 571 (2nd Cir. 2005). Assuming *arguendo* this was so, the closure at issue here only impacted the ability of the public to view the jury during the trial, while the public was effectively able to view all other courtroom actors as the trial progressed. This was not broader than necessary to protect the health interests at stake, and no violation of the right to a public trial occurred.

The court likewise rejected the Confrontation Clause objection to the video deposition evidence. The district court correctly concluded that the government made a sufficient good-faith effort to produce the witnesses for trial. In addition to articulating the significant impediments and risks to having the witnesses travel across the country, the government used an investigator to personally verify the health conditions and situations of the witnesses and repeatedly contacted the witnesses by phone to determine their abilities to travel. The district court did not clearly err in finding the witnesses were not available to testify in person. Neither did it err in relying on “generalized” health concerns relating to the vulnerability of the witnesses. “In this situation, public health concerns and the personal safety of the three victim witnesses provided strong support for [the finding of their unavailability]. *Id.* at 34.

One of the defendants succeeded in a challenge to his sentence. His sentence was vacated, and the matter remanded for resentencing. The other defendant’s challenges were all rejected, and the district court affirmed in full on all other grounds.