

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Winter 2022

The Defender's Message

It's hard to believe that we are more than two years into the COVID-19 pandemic. It is equally hard to believe how well the district's criminal defense bar has performed during this time of unprecedented challenges and difficulties. While we now know more about Zoom and Jurislink than we ever would've imagined (or desired!), we have also learned that with skill, persistence, and creativity, we can deliver excellent results for our clients no matter the circumstances. If there is any upside to what we've all gone through during the pandemic, it is that, as we approach whatever passes for a return to normalcy these days, we will be able to take the lessons learned during the pandemic, the new ways of doing things, the new skills we have obtained, and raise the already high standard of representation in the district to even higher levels.

In this Winter Edition of the Zealous Advocate, we have a couple of articles touching on Fourth Amendment issues ranging from extending protections for searches incident to arrest to the justifications for an arrest. We also have tips for defending against constructive possession in felon in possession cases; a note on a recently argued case regarding attempted Hobbs Act robbery as a crime of violence; strategies for addressing prosecutor statements made at trial; and a case note demonstrating the evolving jurisprudence in competency cases post-*Wayda*. There are also updates to new rules and guidelines as well as the usual links to updated case law holdings and news around the district.

As always, the Editors and I hope you find these articles helpful to your practice. As you know, this publication is only one of the ways we try to keep the panel up to date on recent legal developments. Most notable are the CLE training programs our office presents. COVID has required us to present these programs virtually for the last two years, but I wanted to let everyone know that it is our hope to have a live option for training in the coming year. Whenever that happens, I look forward to seeing everyone in person and thanking you all personally for the amazing job you have done and continue to do for criminal defendants in the EDNC.

G. Alan DuBois
Federal Public Defender



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PANEL ATTORNEY INFORMATION

Reminders

Please watch for emails our Panel Administrator, April Bunn, sends out regarding any training, CLE opportunities, and new procedures and protocols regarding eVoucher and updates. You can always find the most updated version of the Attorney Manual for eVoucher on the Court's website: <http://www.nced.uscourts.gov/pdfs/AttorneyManual.pdf>

Seminar BOLOs

Please note that no decisions have yet been made about FPD CLE/Seminars for 2022. For information regarding upcoming seminars, please check email and our website.



PRACTICE TIPS

United States v. Davis: Fourth Circuit Extends Fourth Amendment Protections for Searches Incident to Lawful Arrest

In *Thornton v. United States*, Justice O'Connor chastised lower courts for treating "the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception."¹ Accordingly, the U.S. Supreme Court in *Arizona v. Gant* held that officers may search a vehicle without obtaining a warrant when the search is incident to lawful arrest of an occupant, but only when it is reasonable to believe that 1) the arrestee is unsecured and able to reach the vehicle and 2) evidence related to the crime that the occupant was arrested for could be found in the car.² In *United States v. Davis*, the Fourth Circuit Court of Appeals addressed whether the U.S. Supreme Court's holding in *Gant* applies not just to vehicles, but to containers generally.³ The Court found that the first holding of *Gant* does apply and, in doing so, joined the Third, Ninth, and Tenth Circuits.⁴

On March 1, 2017, in Holly Springs, North Carolina, Howard Davis was pulled over by Officer D. Richardson because the officer believed the car's tinted windows were too dark.⁵ The officer approached Mr. Davis, told him why he had been pulled over, and collected his license and registration.⁶ Next, the officer went back to his patrol car with the documents to check the database for information about Mr. Davis.⁷ The officer ran his record and saw that Mr. Davis had a valid license, no outstanding warrants, and no recent criminal convictions, although he had three drug convictions including a felony that was 20 years old.⁸

While the officer was in his patrol car, two other officers arrived on the scene.⁹ A few minutes

later, the three officers saw Mr. Davis stick his hand out the window and make "a pointing gesture indicating he was leaving."¹⁰ He then began to drive away, and the three officers chased after him.¹¹ The officers eventually followed Mr. Davis into a residential neighborhood.¹² After stopping the car, Mr. Davis grabbed his backpack and ran into a swamp where he became stuck.¹³ One officer drew his gun and ordered Mr. Davis to come back.¹⁴ At this point, Mr. Davis came out of the swamp, dropped his backpack, and laid face down.¹⁵ He was then handcuffed in the same position so that he was immobile.¹⁶

Mr. Davis was placed under arrest for resisting the officers, speeding to elude, and traffic violations.¹⁷ After Mr. Davis had been handcuffed and arrested, one of the officers opened the closed backpack and found "large amounts of cash and two plastic bags containing what appeared to be cocaine."¹⁸ A search of Mr. Davis's car revealed a digital scale and more bundles of cash.¹⁹

In June of 2017, Federal authorities indicted Mr. Davis for possession with intent to distribute twenty-eight grams or more of cocaine base, possession of a firearm in furtherance of a drug trafficking offense, and being a felon in possession of a firearm.²⁰ Mr. Davis filed a motion to suppress arguing that the warrantless search of his backpack and car violated his Fourth Amendment rights.²¹ The District Court for the Eastern District of North Carolina denied his motion, and Mr. Davis was convicted by a jury on all three counts.²² After the motion was denied, he appealed to the Fourth Circuit.²³

On appeal, the Fourth Circuit held that the district court erred by denying Mr. Davis's motion to suppress.²⁴ The Court concluded that the first holding in *Arizona v. Gant* applies to searches of containers generally.²⁵ Therefore, law enforcement can only conduct warrantless searches of containers incident to arrest "when the arrestee is unsecured and within reaching distance of the item [here a backpack] at the time of the search."²⁶ The Court found that although the second holding of *Gant* was limited to vehicles, the first holding was not, especially because the *Gant* Court relied on a non-vehicle warrantless search case, *Chimel v. California*, to reach its second holding.²⁷

Ultimately, *Davis* is a small victory for the rights of the accused and those who advocate on their behalf. Defense attorneys should be able to use *Davis* to successfully argue motions to suppress, lack of reasonable suspicion, or lack of probable cause in cases where warrantless searches occur. Firearm-related crimes are prevalent in our district, accounting for 20.6% of EDNC Federal crimes, nearly double the 10.8% national level.²⁸ Because firearms are commonly found during searches incident to lawful arrest, *Davis* could be particularly helpful for practitioners here in the EDNC.²⁹

¹ *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring).

² *Arizona v. Gant*, 556 U.S. 332, 344 (2009).

³ *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021).

⁴ *Id.* at 193.

⁵ *Id.*

⁶ *Id.* at 193-94.

⁷ *Id.* at 194.

⁸ *Opening Brief of Appellant Howard Davis* at 6-7, *Davis*, 997 F.3d 191 (No. 20-4035).

⁹ *Davis*, 997 F.3d at 194.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Opening Brief of Appellant* at 8, *Davis*, 997 F.3d 191 (No. 20-4035).

¹⁸ *Davis*, 997 F.3d at 194.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 195.

²⁴ *Id.* at 198.

²⁵ *Id.* at 197.

²⁶ *Davis*, 997 F.3d at 197 (citing *Gant*, 556 U.S. at 343).

²⁷ 997 F.3d at 197 (citing *Chimel v. California*, 395 U.S. 752 (1969)).

²⁸ United States Sentencing Com'n, *Statistical Information Packet Fiscal Year 2018 Eastern District of North Carolina* (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/nce18.pdf> (last visited Nov. 18, 2021).

²⁹ *Id.*

The ZA Editors thank Ava Jennette for contributing this helpful information. Ava is a third-year law student at Campbell University School of Law and was an extern in the FPD office during the Fall of 2021.



Inferences and Justifications: Necessary for Police Work or Threat to Constitutional Rights?

In the recent case of *United States v. Myers*¹, the Fourth Circuit held police can use the totality of the circumstances to find multiple people in a vehicle are part of a common enterprise in order to arrest them.² There is U.S. Supreme Court precedent explaining when illegal drugs are found in a car during a legal stop and search, if the drugs are unclaimed officers can reasonably assume all the car occupants are responsible and there is probable cause to arrest everyone.³ But, *Myers* raises interesting concerns about what facts or circumstances can be used as justification for an arrest.

In *Myers*, police were surveilling bus stations, hotels, motels, and other areas to prevent drugs from coming into Norfolk, Virginia.⁴ As police were surveilling, a bus arrived from Chinatown in New York City ("NYC").⁵ The police knew this bus route was used to traffic drugs from NYC and drugs had previously been seized from this bus route.⁶ Police observed Mr. Myers with a dark, unidentifiable object, but with no luggage, backpack, or bag, which raised the officers' suspicions.⁷ Mr. Myers made a phone call and a car picked him up, which further raised suspicion, and the police followed the car.⁸ Police eventually decided to stop the car because officers thought the car windows were unlawfully tinted.⁹ When police smelled marijuana from the driver and passenger sides of the car, they searched the vehicle and the occupants.¹⁰ During the search, officers found a graham cracker box behind the front passenger seat and found a vacuum-sealed bag inside filled with fentanyl.¹¹ Officers also found three cellphones and a pistol, which the driver claimed as his property.¹² However, no one claimed ownership of the drugs.¹³

Mr. Myers challenged his arrest.¹⁴ He argued that, because the driver claimed ownership of the cellphones and gun, and drugs and guns "often go hand in hand[,]," there was no reason to believe the drugs were his.¹⁵ Mr. Myers claimed the officers merely had a hunch when they arrested him for the fentanyl, and the officers had no reason to believe guilt was particularized to him.¹⁶

Mr. Myers attempted to distinguish the facts of his case from *Maryland v. Pringle*.¹⁷ He argued because the driver of the car claimed ownership of the gun and cellphones, the driver was likely the culprit.¹⁸ The Fourth Circuit did not give any weight to this argument and explained "the significance of *Pringle*'s holding [is] [b]ecause the three occupants in *Pringle* denied ownership of drugs that were found in the automobile, the officer was justified in inferring that all three were involved in illegal conduct, justifying their arrest."¹⁹ However, practitioners could use other language to distinguish situations like this from *Pringle*. There, the Supreme Court reasoned because "[vehicle occupants] failed to offer any information with respect to the ownership of the cocaine or the money [w]e think it an entirely reasonable inference . . . that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine."²⁰ And importantly, "none of the three men provided information with respect to the ownership of the cocaine or money."²¹ The Supreme Court explicitly noted because no vehicle occupants had any information or claimed any ownership over anything in the car, the officers had probable cause. In a case with similar facts (like in *Myers* where one occupant claims ownership of some items), attorneys should focus on the facts as much as possible and emphasize that any ownership or responsibility creates particularized suspicion for only the person claiming the ownership or responsibility.

This case raises interesting concerns for the community and those defending criminal defendants. First, if officers are surveilling places

and people based on seemingly inconsequential facts, such as not carrying luggage or there having been prior drug transactions in the defendant's location, this may create a policing practice where innocent people are unnecessarily targeted. In *United States v. Sokolow*,²² a man bought roundtrip plane tickets to Miami with cash and did not check any luggage.²³ These facts prompted the airline ticket agent to contact the police department, which resulted in an investigation and later arrest.²⁴ The Supreme Court held DEA agents had a reasonable suspicion to stop this man.²⁵ But, as the dissent aptly pointed out, "in sustaining this conviction on the ground that the agents reasonably suspected Sokolow of ongoing criminal activity, the Court diminishes the rights of *all* citizens 'to be secure in their persons,' as they traverse the Nation's airports."²⁶ Certainly, profiles or other standardized, stereotypical behaviors or mannerisms are helpful to law enforcement in doing their jobs. However, it is possible that these generalizations go too far and cast a wide net that erodes the Fourth Amendment's safeguards against unreasonable searches and seizures. Many people travel to and from cities that could be considered drug hubs. Many people may also travel lightly or choose not to check luggage, but that does not mean they are automatically suspicious and must be monitored. There is a fine line between diligent police work and crossing over into Big Brother territory with constant monitoring.

This case also may also affect other civil liberties. For example, the holding may affect individuals' First Amendment rights. One can imagine how this sort of observation or surveillance could impact peoples' decisions to gather, speak, and more. This case also raises issues of bias. Everyone is biased and has beliefs or opinions about what a "criminal" looks like. It is certainly likely that benign facts or circumstances (like traveling without luggage, waiting around at a bus stop, or more) would seem more suspicious or worthy of investigation when associated with people of a certain gender, race, nationality, etc.

Law enforcement certainly has a difficult job investigating crimes and protecting our communities. It is appropriate and reasonable for courts and lawmakers to allow law enforcement to make certain inferences or to justify certain generalizations officers might make. However, it is important to vigilantly question what types of circumstances can be used to justify an arrest. Based on the case law, it seems even the smallest fact (for example, deciding to travel lightly for a weekend trip) could put someone at risk of police suspicion. If a client is arrested under similar circumstances, unfortunately it seems courts will likely find law enforcement had probable cause to arrest. When vehicle occupants all deny ownership of drugs, officers are essentially allowed to infer all occupants are culpable.

While this case law is not particularly beneficial to defense attorneys, there are a few practice points to remember. First, *Myers* was decided by a three judge panel, so while it is controlling precedent, it is possible to raise an objection with the law especially if there are distinguishing facts. Second, in situations like these, facts are very important. For example, it will be important for defense attorneys to emphasize where illegal items are found in relation to the defendant's location. In *Myers*, the drugs were found in the graham cracker box behind the defendant's seat.²⁷ But, if illegal items are found in the trunk, or other areas inaccessible to the defendant, defense attorneys are encouraged to distinguish the facts of their case from *Myers*.

¹ *United States v. Myers*, 986 F.3d 453 (4th Cir. 2021).

² *Id.* at 454.

³ *Id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 373 (2003)).

⁴ *Myers*, 986 F.3d at 455.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 455-56.

¹³ *Id.* at 456.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Myers*, 986 F.3d at 454; *Pringle*, 540 U.S. at 373.

¹⁸ *Id.*

¹⁹ *Myers*, 986 F.3d at 458.

²⁰ *Pringle*, 540 U.S. at 372.

²¹ *Id.* at 374.

²² *United States v. Sokolow*, 490 U.S. 1 (1989).

²³ *Id.* at 4.

²⁴ *Id.* at 4-6.

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 11-12.

²⁷ *Myers*, 986 F.3d at 455.

The ZA Editors thank Haley Tanner for contributing this helpful information. Haley is a third-year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2021.



Prosecution by Proximity: Defending Constructive Felon-in-Possession Cases

Every year numerous people are convicted of felonies. Thousands wind up back in the criminal justice system post-conviction due to federal felony firearm possession laws.¹ The Eastern District of North Carolina is one of the federal judicial districts with the largest number of felony firearm possession

prosecutions.² Therefore, felony firearm possession cases predictably constitute a large portion of an EDNC federal criminal defense practitioner's caseload. Under 18 U.S.C. § 922 (g), certain individuals are prohibited from shipping, transporting, possessing, or receiving a firearm or ammunition while subject to a prohibition from doing so—most commonly because of a prior conviction for a felony offense. Accordingly, there are essentially two elements to a felon-in-possession charge under 18 U.S.C. § 922(g): (1) a prior felony conviction and (2) the possession of a firearm.³

However, pursuant to *Rehaif v. United States*,⁴ the government must also prove beyond a reasonable doubt that the accused knew they belonged to the relevant class of prohibited persons when they possessed a firearm.⁵ Namely, the government must show that the accused knew they were a felon.⁶ Additionally, the government must prove possession beyond a reasonable doubt through either actual possession or constructive/joint possession.⁷ Actual possession occurs when the accused has direct physical control over the firearm.⁸ On the other hand, constructive possession occurs when the accused exercised—or had to power to exercise—ownership, dominion, or control over the firearm or the area where the firearm was discovered.⁹ Constructive possession is often at issue when a firearm is found in a car or house and the accused is one of several occupants of that car or house.¹⁰ Federal courts have grappled with how to approach felon-in-possession, especially since jurisdictions vary in their requisite elements for a constructive possession case.¹¹ Defending a 18 U.S.C. § 922(g) violation becomes especially thorny in cases where the possession occurs in cars—i.e., the accused may not own the car, the firearm may not be in plain view, or there may be multiple occupants in the car. Two Fourth Circuit cases, *United States v. Blue*¹² and *United States v. Bodie*,¹³ show the difficulty that exists in defending such cases due to nuances in the law concerning constructive possession.

In *Blue*, the Fourth Circuit reversed Blue's conviction for possession of a firearm by a convicted felon.¹⁴ Blue was a passenger in a car, which drove past an officer who was watching a home for possible drug activity.¹⁵ The officer pulled over Blue's car, alleging that neither Blue nor the driver had been wearing a seatbelt as they drove past him.¹⁶ The officer also claimed that, as he approached the car, he saw Blue "dip" his shoulder as if he were reaching under the seat with his right hand.¹⁷ Upon the officer's request, the driver consented to a search of the car.¹⁸ The officer found a firearm underneath Blue's seat during the search.¹⁹ Blue denied knowledge of the firearm's presence and also denied "dip[ping]" his shoulder as the officer approached the car.²⁰ The Fourth Circuit found that the quantum of evidence was insufficient to support a finding of constructive possession for a

conviction.²¹ The court noted that Blue was only a passenger in the car.²² The court reasoned that a passenger's mere proximity to a weapon was relevant only to the firearm's accessibility, but did not prove dominion or control.²³ To substantiate its case, the government would have needed to produce fingerprints or other physical evidence that linked Blue to the firearm.²⁴

Conversely, in *Bodie*, he and his co-defendant were convicted following a high-speed chase by Drug Enforcement Administration agents.²⁵ Bodie, unlike Blue, was the driver of the car.²⁶ During a search incident to arrest, the agents discovered an Uzi submachine firearm in the car.²⁷ Although the gun was, in fact, owned by a woman from whom Bodie had borrowed the car, Bodie was nonetheless charged and convicted of possession of a firearm by a convicted felon in addition to possession of heroin and cocaine.²⁸ The Fourth Circuit rejected Bodie's appeal for the possession of a firearm conviction, reasoning that because the firearm—which was in the backseat—was "clearly visible" from Bodie's position in the car, it deduced a strong inference that Bodie knew the firearm was in the car.²⁹ Citing *Blue*, the court held, "A felon has constructive possession of a firearm if he/she has 'dominion . . . or control over . . . the vehicle in which the firearm is [found].'"³⁰ The *Bodie* court further reasoned that it was easier to find that a *driver*, as opposed to a *passenger*, constructively possessed a firearm found in a car.³¹

Based on the Fourth Circuit's respective reasoning in *Blue* and *Bodie*, a court is more likely to find constructive possession when: (1) the firearm is visible from where the defendant is seated, (2) there is physical evidence linking the accused to the firearm, or (3) the defendant is the driver of the car. Visibility leads to the inference that the accused has knowledge of the presence of the firearm in the car. Meanwhile, physical evidence such as fingerprints allow the government to substantiate its case. Finally, a key principle of criminal procedure is that the driver of the car has a greater possessory interest in the car's contents than a passenger. Accordingly, criminal defense practitioners should attack the visibility and physical evidence prongs when defending a constructive felon-in-possession case. With felon-in-possession cases predictably constituting a large portion of an EDNC federal criminal defense practice, it is best to be prepared to handle these cases so that no client suffers prosecution based on mere proximity to a firearm.

¹ Quick Facts on Felon in Possession of Firearm, THE U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf (last visited Nov. 4, 2021).

- ² *Id.*
- ³ 18 U.S.C.A. § 922(g)(1) (West Supp. 1997); see also *Rehaif v. United States*, 139 S. Ct. 2191, 2200, (2019) (holding that the government must prove both that the accused knew that they possessed a gun and that the accused knew they held the relevant status).
- ⁴ 139 S. Ct. 2191, 2200 (2019).
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *United States v. Roe*, 422 F. App'x 242, 243 (4th Cir. 2011); see also *United States v. Bodie*, No. 92-5181, No. 92-5187, 1992 U.S. App. LEXIS 33987, at *4 (4th Cir. Dec. 30, 1992).
- ⁸ *Henderson v. United States*, 575 U.S. 622, 626 (2015).
- ⁹ *United States v. Penniegraft*, 641 F.3d 566, 572 (4th Cir. 2011) (quoting *United States v. Armstrong*, 187 F.3d 392, 396 (4th Cir. 1999)).
- ¹⁰ 88 A.L.R. 5th 121 (2001).
- ¹¹ *Id.* (stating that the majority of some jurisdictions require the accused to know of the presence of a firearm, whereas other jurisdictions only require that the firearm was accessible to the accused and in an area under their control).
- ¹² 957 F.2d 106 (4th Cir. 1992).
- ¹³ No. 92-5181, No. 92-5187, 1992 U.S. App. LEXIS 33987 (4th Cir. Dec. 30, 1992).
- ¹⁴ *Blue*, 957 F.2d at 108.
- ¹⁵ *Id.* at 106-07.
- ¹⁶ *Id.*
- ¹⁷ *Id.* at 107.
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 108.
- ²⁰ *Id.* at 107.
- ²¹ *Id.* at 108.
- ²² *Id.* at 107-08.
- ²³ *Id.* at 108.
- ²⁴ *Id.*
- ²⁵ *United States v. Bodie*, No. 92-5181, No. 92-5187, 1992 U.S. App. LEXIS 33987, at *3 (4th Cir. Dec. 30, 1992).
- ²⁶ *Id.* at *1.
- ²⁷ *Id.* at *3.
- ²⁸ *Id.*
- ²⁹ *Id.* at *2.
- ³⁰ *Id.* at *4.
- ³¹ *Id.*

The ZA Editors thank Anna-Nicole Cooke for contributing this helpful information. Anna-Nicole is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2021.



Attempted Hobbs Act Robbery: A Crime of Violence?

On December 7, 2021, the Supreme Court of the United States heard oral arguments in *United States v. Taylor*, a Fourth Circuit case that looks at whether 18 U.S.C. § 924(c)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).¹ The Fourth Circuit previously held that attempted Hobbs Act robbery is not a

"crime of violence" under § 924(c).² The Supreme Court granted certiorari on this issue July 2, 2021. The Court's decision will likely be released this summer. Still, the Court's granting certiorari has the unfortunate consequence of delaying decisions for defendants whose cases are being held in abeyance for *Taylor*. Moreover, there is the possibility that the Supreme Court will overturn the Fourth Circuit's decision in *Taylor*, in turn expanding the "crime of violence" definition to include attempted crimes. This will make it easier for the government to convict defendants under the Hobbs Act and in turn, will open the door for judges to sentence defendants for up to twenty years in prison for mere attempts to threaten force.

Under § 924(c), a "crime of violence" has enhanced penalties for a person who uses, carries, or possesses a firearm in connection with a crime of violence or drug trafficking offense.³ Under this statute, a "crime of violence" is defined under an elements clause and residual clause. The elements clause, also known as the "force clause," requires that a crime of violence be a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."⁴ Additionally, the residual clause further requires "that by its nature, [the offense] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."⁵

In the last decade, decisions by the Supreme Court made it so that lower courts could not Constitutionally enhance a defendant's sentence based on offenses that qualified as violent crimes under residual clauses.⁶ For instance, in 2014, *Johnson v. United States* held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague.⁷ Similarly, in 2019, *United States v. Davis* found that the § 924(c) residual clause was unconstitutionally vague and could not be enforced unless the legislature rewrote the statute.⁸ In other words, *Davis* eliminated the residual clause from the § 924(c) definition of "crime of violence" and left only the elements clause to be analyzed by courts.⁹ In *Davis*, the Supreme Court found that courts must use the "categorical approach" in analyzing crimes of violence rather than the "case-specific" method used across jurisdictions.¹⁰ Under the categorical approach, rather than looking at the specific facts of a defendant's case, "judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized 'ordinary case' of the defendant's crime and then guess whether a 'serious potential risk of physical injury to another' would attend its commission."¹¹ Specifically, courts need to analyze the elements of the offense rather than the conduct underlying the conviction.¹²

In the *Taylor* case currently before the Supreme Court, respondent Justin Eugene Taylor

was charged with conspiracy to commit Hobbs Act Robbery and attempted Hobbs Act Robbery, in violation of 18 U.S.C. § 1951.¹³ In 2003, Taylor arranged a transaction to sell marijuana to Martin Sylvester, but he had planned to steal Sylvester's money instead.¹⁴ The Fourth Circuit held that attempted Hobbs Act Robbery does not qualify as a "crime of violence" under the categorical approach because Taylor "merely *attempted to threaten* to use physical force," which was not covered under the § 924(c)(3)(A) definition of a "crime of violence."¹⁵ In its argument, the government emphasized that four other jurisdictions (the Third, Ninth, Seventh, and Eleventh Circuits) have ruled contrary to the Fourth Circuit's holding.¹⁶

The way forward to protect defendants in the same position as Justin Eugene Taylor will be determined once the Supreme Court issues its decision. However, until a decision is made, it is essential to preserve the Fourth Circuit's decision in *Taylor*. It is also important to note that the definition of "crime of violence" evaluated by the Supreme Court under *Taylor* covers only the statutory definition under § 924(c). This case does not consider the definition of "crime of violence" from the Federal Sentencing Guidelines Manual § 4B1.2. The primary difference between the statutory and guideline definitions is that the statutory definition of "crime of violence" includes physical force against people *OR* property.¹⁷ On the other hand, the guidelines only include physical force against a person, but not property.¹⁸

¹The Hobbs Act makes it illegal to "obstruct[], delay[], or affect[] commerce . . . by robbery or extortion." 18 U.S.C. § 1951(a).

²*United States v. Taylor*, 979 F.3d 203 (4th Cir. 2020) ("Some crimes of violence can be accomplished merely through the threatened use of force . . . but an attempt to *threaten* force does not constitute an attempt to *use* force").

³18 U.S.C. § 924(c)(1)(A) (2011).

⁴§ 924(c)(3)(A).

⁵§ 924(c)(3)(B).

⁶*Johnson v. United States*, 576 U.S. 591 (2015); *United States v. Davis*, 139 S. Ct. 2319 (2019).

⁷*Johnson*, 576 U.S. at 597.

⁸*Davis*, 139 S. Ct. at 2336.

⁹*Id.*

¹⁰*Id.* at 2326.

¹¹*Id.*

¹²*Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

¹³*Taylor*, 979 F.3d at 205.

¹⁴*Id.*

¹⁵*Id.* at 208.

¹⁶See Petition for Writ of Certiorari, *United States v. Taylor*, No. 20-1459.

¹⁷18 U.S.C. § 924(c)(3)(A) (Explaining that a crime of violence "[h]as as an element . . . physical force against the person or property of another") (emphasis added).

¹⁸Federal Sentencing Guidelines Manual § 4B1.2(a)(1) (2018) (Explaining that a crime of violence "has an element . . . of physical force against the person of another") (emphasis added).

The ZA Editors thank Nicole Litvan for contributing this helpful information. Nicole is a third year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2021.



Prosecutor, Your Words Can (And Will) Be Used Against You on Appeal

A prosecutor's closing statements can significantly impact the outcome of a defendant's case since they provide the last words a jury will hear before beginning deliberations. However, anything they say can also be used against them on appeal if they do not choose their words carefully. Such was the case in *Plymail v. Mirandy*.¹ In *Plymail*, the Fourth Circuit reversed Charles Plymail's 1993 conviction due to the prosecutor's improper closing argument, where the prosecutor encouraged the jury to find for society and send a message with their verdict.² Although the circumstances of a state court case may not always make the prosecutor's improper statements reviewable by a circuit court, this serves as an important reminder that the case does not end after the defense closes.

During Plymail's 1993 trial for sexual assault, the prosecutor's "initial closing argument focused on the evidence, burden of proof, and credibility of the witnesses."³ However, when it was time for defense counsel's closing argument, they took a different approach; defense counsel discussed the "social ills that would result from a guilty verdict" and the "difficulty of disproving rape charges" since "'society tends to believe [the] woman.'" ⁴ Instead of objecting, the prosecutor used his rebuttal to encourage the jury to use their verdict to send a message that the community would not "condone . . . 'sodomasochis[m]'" and warned the jury to think of their children.⁵ Plymail's direct appeal took over 20 years in what the Fourth Circuit described as "an ordeal."⁶ In 2014, "Plymail petitioned the district court for habeas relief" under 28 U.S.C. § 2254.⁷ After determining jurisdiction, and that the case was not moot because of Plymail's release, the court then began evaluating the prosecutor's statements.⁸

The U.S. Code allows for a writ of habeas corpus for a person in custody unless the "claim was adjudicated on the merits in a state court proceeding," or the state case "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."⁹ Here, the Fourth Circuit determined that the West Virginia Supreme Court did not adjudicate Plymail's claim on the merits.¹⁰ The Circuit Court reasoning was based on the state court's finding that the argument had been "waived because Plymail failed to object to the prosecutor's [closing] comments at trial."¹¹

Federal courts have limited "supervisory power" over state prosecutors and can only

evaluate whether a due process violation occurred.¹² However, it is possible that a prosecutor's closing remarks "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."¹³ To determine whether due process was violated by the prosecutor's closing statements, the court will consider: (1) whether the remarks were improper, and (2) "if so, whether the improper remarks so prejudiced the defendant's substantial rights [so] that the defendant was denied a fair trial."¹⁴

Some factors that courts will consider when determining whether the prosecutor's statements prejudiced the defendant and denied them a fair trial are: "(1) the degree to which the prosecutor's remarks . . . tend[] to mislead the jury and [] prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters."¹⁵ Additionally, the court may also consider "(5) whether the prosecutor's remarks were invited by improper conduct of defense counsel," and "(6) whether curative instructions were given to the jury."¹⁶ "These factors are examined in the context of the entire trial, and *no one factor is dispositive*."¹⁷

In the context of defense, it is important to understand what potential repercussions any improper comments made by the prosecutor in a closing may have for the trial and on appeal. Although any prejudicial comments will likely be found to have been cured by a corrective jury instruction, some comments are just too prejudicial to fix.¹⁸ Still, defense counsel should be aware of the restrictions placed on prosecutors and should listen for anything that could be construed as the prosecutor's attempting to persuade the jury to decide the verdict based on something other than the evidence. Even if the trial judge asserts the statement can be corrected by a curative instruction, that is not dispositive since it is only one of the factors our Circuit will consider on appeal when analyzing whether the improper remark prejudiced the defendant's rights and denied them a fair trial.

¹ 8 F.4th 308, 312 (4th Cir. 2021), as amended (Sept. 7, 2021).

² *Id.*

³ *Id.* at 312.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 313 (explaining the appeal took twenty years because Plymail had issues with counsel, scheduling, and health problems).

⁷ *Id.* at 314.

⁸ *Id.* at 313-15.

⁹ 28 U.S.C. § 2254(d)-(d)(1).

¹⁰ *Plymail*, 8 F.4th at 316.

¹¹ *Id.*

¹² *Id.* at 317.

¹³ *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

¹⁴ *United States v. Lighty*, 616 F.3d 321, 359 (4th Cir. 2010) (quoting *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998)).

¹⁵ *Lighty*, 616 F.3d at 361 (quoting *United States v.*

Adam, 70 F.3d 776, 780 (4th Cir. 1995)).

¹⁶ *Id.* (quoting *United States v. Young*, 470 U.S. 1, 12-13 (1985); *United States v. Harrison*, 716 F.2d 1050, 1053 (4th Cir.1983)).

¹⁷ *Wilson*, 135 F.3d at 299 (emphasis added).

¹⁸ *Lighty*, 616 F.3d at 362; *Wilson*, 135 F.3d at 299 (finding that the prosecutor's assertion in closing that the defendant was also guilty of murder—which he was not on trial for, nor had he been charged with—was too harmful to be diluted by a corrective instruction, even though the evidence against the accused for the charge they were actually on trial for was strong).

The ZA Editors thank Marissa Sierra Ramirez Flack for contributing this helpful information. Marissa is a third year law student at UNC School of law and was an extern in the FPD Office during the Fall of 2021.



The Importance of Preservation: Unpacking United States v. Curbow

The Fourth Circuit has issued another mental competency and certification opinion. Defenders should be aware of, *United States v. Curbow*.¹ Similar to *United States v. Wayda*, *Curbow* emphasizes the importance of vigilance when mounting a zealous defense.² Congress has laid out a statutory timeline for competency cases in 18 U.S.C. §§ 4241-4248 to guard against the risk of indefinite detention for those in custody while courts make competency and restoration determinations.³ *Curbow* serves as an additional roadmap in understanding how courts interpret and apply the fundamental principles of mental health statutes.

Mr. Curbow was charged with a federal criminal offense after shooting at military helicopters flying over his Mississippi farm.⁴ At four different proceedings, the court ordered evaluations to determine Mr. Curbow's competency, restorability, and dangerousness.⁵ After the Mississippi District Court deemed Mr. Curbow mentally incompetent, it committed him to the custody of the Attorney General for further evaluation.⁶ He was placed at the Federal Medical Center at Butner, North Carolina ("FMC Butner") where physicians concluded it was unlikely that Mr. Curbow would be restored to competency in the foreseeable future.⁷ The Mississippi court ordered him to be readmitted to FMC Butner for a dangerousness determination, where physicians later deemed Mr. Curbow dangerous and recommended civil commitment.⁸ The Government filed for and was granted certification in the Eastern District of North Carolina, and Mr. Curbow's appeal in a subsequent proceeding was denied.⁹

Mr. Curbow appealed, principally arguing that under *Wayda*, he was "ineligible for dangerousness certification and the resultant civil commitment."¹⁰ Specifically, Mr. Curbow challenged the timeliness of certification, positing

that the Government's legal custody under § 4241 had expired at the time of filing.¹¹ Conversely, the Government argued that Mr. Curbow waived his unreasonable delay arguments regarding the first two evaluation periods by failing to challenge or object to alleged delays during the Mississippi competency proceedings.¹² The question before the Fourth Circuit was whether the lower court erred in focusing only on the third period of determination instead of considering the entire competency, restorability, and dangerousness determination process in evaluating whether administrative delays were reasonable under statute.¹³

The statute provides the framework for guidance. For a § 4246 or § 4248 certification, the individual must be one of the following: (1) in custody of the Bureau of Prisons with a sentence that is about to expire; (2) committed to the custody of the Attorney General for a competency evaluation to stand trial under § 4241; or (3) a person against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person.¹⁴ At issue was whether Mr. Curbow was in the legal custody of the Attorney General at the time of filing for certification or whether that custody had expired due to unreasonable or unjustifiable administrative delays.¹⁵ The Fourth Circuit assessed whether the district court properly applied the rule of reasonableness to the alleged delays during the proper period determination process.¹⁶ Affirming, the court held that focusing solely on the third period of the evaluation determination (the 49 days between the § 4241 evaluation for dangerousness and the filing for the § 4246 certification) was proper and that the administrative delays were reasonably justified.¹⁷ Referencing *Wayda*, the court asserted that “reasonable explainable administrative delays in [the] certification process are allowed,” adding that “the Government proffered evidence substantiating its activities resulting in delays.”¹⁸

Curbow highlights the need for vigilance in preserving critical issues for appeal in mental competency cases. The opinion referenced that the Mississippi courts held four different proceedings at which they ordered competency hearings for Mr. Curbow, noting that Mr. Curbow raised no objections. The opinion further noted that there was no “challenge to the court’s continuing authority to enter the orders or the duration of his custodial hospitalization.”¹⁹ Finding the Government’s arguments persuasive, the Fourth Circuit reasoned that objections to delays in competency proceedings could be forfeited or waived if not raised in the criminal case.²⁰ The lower court’s decision was affirmed, an isolated focus on the third period of determination was deemed proper, and the administrative delays were considered reasonable based on justifications provided by the Government. Therefore, the certification was timely since Mr. Curbow was still in the legal custody of the Attorney General at the time of filing.²¹

Competency cases present unique challenges, but resources are available. For

example, in a recent presentation titled, “Are You Stuck in the Waiting Place?” from the Training Division of the Defender Services Office, the presenters discussed arguments to support motions for immediate release and the importance of establishing a record for reasonableness in court as well as other highly effective strategies.²² While *Wayda*’s helpful holding stands, *Curbow* demonstrates the importance of timely motions and objections to increase the odds of more favorable outcomes for our clients. For additional information or a copy of the training presentation referenced herein, Contact Joe Craven (joseph_craven@fd.org) or Jackie Tarlton (jackie_tarlton@fd.org).

¹ *United States v. Curbow*, No. 20-7797, 2021 U.S. App. LEXIS 31408, at 3 (4th Cir. Oct. 19, 2021).

² *United States v. Wayda*, 966 F.3d 294 (4th Cir. 2020) (holding certification was untimely because Mr. Wayda was not in legal custody of the Attorney General at the time).

³ 18 U.S.C. § 4241 - § 4248.

⁴ See *Curbow*, 2021 U.S. Dist. LEXIS 31408, * 16.

⁵ *Id.* at 17.

⁶ *Id.* at 18.

⁷ *Id.*

⁸ *Id.* at 19.

⁹ *Id.* at 20-23.

¹⁰ *Id.* at 24-25.

¹¹ *Id.*

¹² *Id.* at 26. See also *Wayda*, 966 F.3d at 298-299.

¹³ See *Curbow*, 2021 U.S. Dist. LEXIS 31408, * 39-40.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 41-6.

¹⁷ *Id.* at 47. See also *Wayda*, 966 F.3d at 308; and *United States v. Timms*, 664 F.3d 436, 453 n.14 (4th Cir. 2012).

¹⁸ See *Curbow*, 2021 U.S. Dist. LEXIS 31408, *47-48.

¹⁹ *Id.* at 18.

²⁰ *Id.*

²¹ *Id.*

²² Craven, Joseph, and Jackie Tarlton. “Are You Stuck In The Waiting Place?” 19 (2020) (on file with authors). See also *Jackson v. Indiana*, 406 U.S. 715, 733 (1972).

The ZA Editors thank Terris Riley for contributing this helpful information. Terris is a third-year law student at NCCU School of Law and was an extern in the FPD office during the Fall of 2021.



LEGAL UPDATES

4th Circuit Update

For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check <http://circuit4.blogspot.com>. For daily, published Fourth Circuit opinions, visit <https://www.ca4.uscourts.gov/opinions>.

U.S. Supreme Court Update

For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check <http://ussc.blogspot.com>. Be sure to click on "U.S. Supreme Court Case Summaries" under Links and Resources and scroll down to download the PDF summary.



New Rules and Guideline Amendments

Proposed Amendment to the Federal Rules of Appellate Procedure

If the proposed amendment is adopted by the Supreme Court and transmitted to Congress by May 1, 2023, absent congressional action, it will take effect on December 1, 2023. The text of the proposed amendment and Committee Note can be found at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

Proposed amendment to **Rule 2** would authorize broader authority to suspend provisions of the Federal Rules of Appellate Procedure when the Judicial Conference of the United States declares an Appellate Rules emergency. It provides that a court of appeals may suspend in all or part of that circuit any provision of the rules, other than time limits imposed by statute and described in Appellate Rule 26(b)(1)-(2). As such, this would allow the court of appeals to suspend the time to appeal or seek review set only by a rule. However, it does not authorize the court to suspend jurisdictional time limits imposed by statute.

Proposed Amendments to the Federal Rules of Criminal Procedure

If the proposed amendments are adopted by the Supreme Court and transmitted to Congress by May 1, 2023, absent congressional action, they will take effect on December 1, 2023. The text of the proposed amendment and Committee Note can be found at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

The Advisory Committee proposed **Rule 62 (Criminal Rules Emergency)**. To declare a rules emergency under **Subdivision (a)**, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. Under **Subdivision (b)**, the Judicial Conference may terminate a declaration for one or more courts before the termination date, and it may issue additional declarations under this rule. Under **Subdivision (c)**, if a particular proceeding is already underway and resuming compliance with the Federal Rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated. Under **Subdivision**

(d), courts must provide reasonable alternative access (contemporaneous when feasible) if emergency conditions substantially impair the public's in-person attendance at a public proceeding. If any rule, including this proposed rule, requires a defendant's signature, written consent, or written waiver, then defense counsel may sign for the defendant if the defendant consents on the record and emergency conditions limit a defendant's ability to sign. Under **Subdivision (e)**, if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings. The remainder of this subdivision provides various rules and protections for defendants when videoconferencing is required under emergency conditions.

Proposed Amendments to the Federal Rules of Evidence

If the proposed amendments are adopted by the Supreme Court and transmitted to Congress by May 1, 2023, absent congressional action, they will take effect on December 1, 2023. The text of the proposed amendments and Committee Note can be found at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

A proposed amendment to **Rule 106** would (1) allow a completing statement to be admissible over a hearsay objection; and (2) cover unrecorded oral statements. Under the proposed amendment, when the proponent of an out-of-court statement provides a misleading presentation, they forfeit the right to foreclose admission of the remainder that is necessary to remedy the misimpression. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact or whether it will be admissible for the more limited, non-hearsay purpose of providing context.

A proposed subdivision under **Rule 615** provides that a court has discretion to issue further orders to prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom. Second, it provides that excluded witnesses are prohibited from accessing trial testimony. Finally, it allows an entity-party to designate "an officer or employee" to be exempt from exclusion. The amendment is designed to ensure that the Federal Rules of Evidence are keeping up with technological advancements, given the increased possibility of witness access to information about testimony through news, social media, YouTube, or daily transcripts.

A proposed amendment to **Rule 702(d)** would require courts to find that an expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology. The language of the amendment does more to empower a court to pass judgment on the conclusion that an expert

has drawn from the methodology. This amendment is consistent with *General Electric Co., v. Joiner*, 522 U.S. 136 (1997), in which the Court held that a trial court must consider the expert's conclusion in addition to the expert's methodology.

A proposed amendment will add the preponderance of the evidence standard to the text of **Rule 702(a)-(d)**. The Committee did not intend to raise any negative inference regarding the applicability of **Rule 104(a)** standard of proof to other rules. Rather, the decision to add the preponderance standard in **Rule 702** was made due to court decisions that failed to apply it to the reliability requirements of **Rule 702**.

Sentencing Guidelines Update

For the past several years, the Sentencing Commission has been operating without the quorum of voting members needed to promulgate new guidelines. The absence of the quorum required to draft new sentencing guidelines has left courts relying on the same guidance since January 2019. The 2021 edition contains a reprint of the guidelines, policy statements, and commentary contained in the *2018 Guidelines Manual*. However, the 2021 edition of the Guidelines also contains an updated version of **Appendix B**, which contains the principal statutory provisions governing the Commission and the drafting sentencing guidelines as of August 21, 2021.

Due to challenges in the paper supply chain, hard copies of the 2021 *Guidelines Manual* will be available in early 2022. More information on the Sentencing Commission and Guidelines can be found at <https://www.ussc.gov/guidelines/2021-guidelines-manual-annotated>.

Proposed Amendments to the E.D.N.C. Local Rules of Criminal Procedure

There will be no changes to the E.D.N.C. Local Rules of Criminal Procedure in 2021. The most recent changes were included in the Fall 2019 edition of the *Zealous Advocate* and took effect on December 1, 2019.

The ZA Editors thank Kevin Poursaied for contributing this helpful information. Kevin is a third year law student at UNC Law School and was an intern in the FPD office during the Fall of 2021.



LOCAL NEWS

EDNC News

The Fourth Circuit reappointed Alan DuBois to a four-year term as the Federal Public Defender for our district, to start on April 16, 2022. Alan has been our Federal Defender since April 2018. Congratulations, Alan!

The FPD welcomes newly sworn United States Attorney, Michael F. Easley, Jr. We extend a

warm welcome on behalf of our office and the panel attorneys from this district.

FPD Office News

In December 2021, we bid a fond farewell to James Anthony ("Tony") Martin, Assistant Federal Public Defender, who retired. Tony worked in our Greenville office for 23 years and had 30 years of federal service.

We are pleased to welcome new Assistant Federal Public Defenders, Jay Saunders, who joined us in September 2021 in the Greenville office, Michael McDonald and Andrew DeSimone who joined us in October 2021 in the Raleigh office, and Leza Driscoll, who joined us in October 2021 in the Wilmington office.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh, NC: Jackie Willingham and Callie Thomas; and in Wilmington, NC: Monique Kreisman and Floyd "Trey" Cooke.

William Walker and Jessica Arnold are new panel attorneys in Raleigh, NC.



If you have a suggestion
for an article, we want to
hear from you!

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