

Supreme Court and Fourth Circuit Court of Appeals Update

2024 Fall Federal Criminal Defense Practice Seminar for the Eastern
District of North Carolina

November 7-8, 2024
Wrightsville Beach, NC

**Including published 4th Circuit criminal cases issued between
May 17, 2024 and October 11, 2024 and selected Supreme Court
criminal cases**

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INTRODUCTION

This presentation summarizes all published Fourth Circuit criminal cases issued between May 17, 2024 and October 11, 2024. Note that not every issue raised in every case is discussed. Our focus, instead, is on the more relevant holdings in each case. Attached to the end of this presentation is Paul Rashkind's Supreme Court Review/Overview/Preview, which reviews criminal cases of note from the Supreme Court's recent and upcoming term.

We would like to thank Assistant Federal Public Defenders Jonathan Byrne from the District of West Virginia for his assistance in helping to compile this presentation.

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DETENTION HEARINGS

***United States v. Vane*, ____ F.4th ____ (4th Cir. Sept. 13, 2024) (Diaz, C.J.) (E.D. Va.)**

Russell Richardson Vane, IV, was charged with attempted production of a biological agent or toxin, in violation of 18 U.S.C. § 175(a). The government moved to detain him and, during a combined preliminary and detention hearing, the government attempted to offer evidence by proffer that Vane was a prepper, had “go bags” with emergency supplies, had an apocalypse checklist, and had filed an obituary for himself to Legacy.com. The government proffered a photograph seized during a home search of a “Plan” to fake his own suicide and claim life insurance benefits for his family. And it proffered that Vane had a prior misdemeanor conviction for bringing a firearm to a federal facility and that he had been charged under state law for firing a weapon in public. Vane objected, arguing that 18 U.S.C. § 3142 refers only to proffered evidence during a detention hearing, not a preliminary hearing, and that § 3142(f) only allows the defense to provide evidence by proffer, not the government. The magistrate judge disagreed and detained Vane. On appeal to the district court, it affirmed. Vane appealed to the Fourth Circuit.

After argument and the filing of an expedited and summary order affirming detention, Vane pleaded guilty to possession of ricin and sought to voluntarily dismiss his appeal as moot. The court declined, concluding that it had jurisdiction when it decided the case and that the bar was entitled to a reasoned decision explaining the summary order on a question of first impression in our Circuit. The court also affirmed Vane’s detention, explaining that the negative implication of Congress explicitly giving the right to proffer to defendants cannot survive the context of the statute. If the government were barred from any evidentiary methods granted expressly only to defendants, it would have nothing left to present its case for detention. What is more, the statute refers to “information,” rather than “evidence,” suggesting that the judge is tasked with considering a broad swath of information, without regard to evidentiary rules. The court noted the agreement of other circuits and explained that allowing both sides to present by proffer is consistent with the expedited and urgent nature of detention hearings, where neither side “is likely to have marshalled all its proof.”

ENTRAPMENT

***United States v. Elboghady*, ____ F.4th ____ (4th Cir. Sept. 11, 2024) (Benjamin, J.) (S.D.W.V.)**

Last week, the Fourth Circuit held that “repeated suggestions” by undercover law enforcement officers do not constitute inducement requiring an entrapment jury instruction, even where an accused has a significant language barrier. The panel majority also vacated and remanded for resentencing where the district court applied an

enhancement and cross-reference at sentencing that were inconsistent with its factual findings.

In February 2020, an undercover West Virginia police officer posted an advertisement to Craigslist entitled, “Young momma bear in town for weekend looking for fun for the family.” Malek Elboghdady, an Egyptian-born permanent resident of the United States, responded the same night, saying he was “interesting.” He is not a native English speaker and struggles with the language. Over the course of a day, the two emailed, texted, and called each other. Elboghdady repeatedly expressed sexual interest in the fictional mother, but the undercover officer continued to redirect the conversation to sexual activity with the fictional daughters, said to be 11 and 13. Elboghdady ultimately drove from Ohio to West Virginia for a face-to-face meeting, where he was arrested and charged with traveling with the intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(b) and (e). Elboghdady went to trial and requested an entrapment instruction, which the district court declined to give. He was convicted and sentenced to 120 months in prison after the district court applied a cross-reference applicable to crimes that involve a victim under the age of 12.

Elboghdady appealed his conviction and sentence, arguing that he was entitled to an entrapment instruction and that his sentence is unreasonable. The court affirmed the conviction but vacated and remanded the sentence. Judge Benjamin wrote the opinion, joined by Judge Gregory. Judge Quattlebaum concurred in part and dissented in part.

The court defined government overreach as “solicitation plus some overreaching or improper conduct on the part of the government,” requiring an accused to point to evidence that was “sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party.” Elboghdady argued that the UC’s continued efforts to focus him on fictitious young girls when he consistently expressed interest in the mother, coupled with his language barrier expressing himself in English showed overreach.

The court rejected that argument, finding no inducement and explaining that “repeated suggestions” from law enforcement do not constitute overreach. Nonetheless, it felt compelled to say that “where Elboghdady’s focus before he travelled to the meeting was on the fictitious mother and all comments made about children were either (1) later revealed in the timeline as a point of his confusion and/or (2) never initiated by him but offered in response to a direct question from the UC, the belief that Elboghdady was “preying on children” should have been less tenable to a seasoned officer. It warned pointedly that law enforcement should “remember the purpose of its conduct when operating undercover operations,” namely not “manufacturing . . . crime.”

SECOND AMENDMENT ISSUES

***Bianchi v. Brown*, 111 F.4th 438 (4th Cir. Aug. 6 2024) (en banc) (Wilkinson, J.)**

“Maryland enacted the Firearms Safety Act of 2013 in the wake of mass shootings across the country and a plague of gun violence in the state. This case is about whether the Act's general prohibition on the sale and possession of certain military-style ‘assault weapons,’ including the AR-15, the AK-47, and the Barrett .50 caliber sniper rifle, is unconstitutional under the Second Amendment.

...

“With the respectful consideration and benefit of *Bruen*, we now [hold that] [t]he assault weapons at issue fall outside the ambit of protection offered by the Second Amendment because, in essence, they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense. Moreover, the Maryland law fits comfortably within our nation's tradition of firearms regulation. It is but another example of a state regulating excessively dangerous weapons once their incompatibility with a lawful and safe society becomes apparent, while nonetheless preserving avenues for armed self-defense.”

***United States v. Price*, 111 F.4th 392 (4th Cir. Aug. 6, 2024) (en banc) (Wynn, J.) (S.D.W.V.)**

The Fourth Circuit (sitting en banc) affirmed the constitutionality of 18 U.S.C. 922(k), which prohibits the possession of a firearm with an obliterated serial number. The Fourth held that under the Supreme Court’s Second Amendment decision in *Bruen*, “the conduct regulated by § 922(k) does not fall within the scope of the right enshrined in the Second Amendment because a firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes.”

Writing for the majority, Judge Wynn explained that *Bruen* established a new “two-step evaluation” for determining whether a challenged regulation withstands Second Amendment scrutiny. First, “we must ask whether the Second Amendment’s plain text covers the conduct at issue. If not, that ends the inquiry: the Second Amendment does not apply.” If the answer to the first step is yes, then second, “we must ask whether the Government has justified the regulation as consistent with the principles that underpin our nation’s historical tradition of firearm regulation.”

The first step, in turn, involves asking three questions outlined in *Bruen*: “(1) whether the petitioners were part of the people whom the Second Amendment protects; (2) whether the weapons regulated by the challenged regulation were in common use for a lawful purpose, in that case, self defense; and (3) whether the Second Amendment protected the petitioners’ proposed course of conduct.”

In *Bruen*, the Fourth noted, the focus was on the third question, because there was no dispute that the petitioners there were law-abiding citizens and the weapons involved were ordinary handguns. But in *Price*, the Fourth said the inquiry failed at the second question, because, it concluded, guns with obliterated serial numbers are not in common use for a lawful purpose. “Under this test, if we conclude that a weapon is not in common use for a lawful purpose, it can be permissibly excluded from the Second Amendment’s protection based on the tradition of regulating dangerous and unusual arms.”

To determine whether a weapon is in common use for a lawful purpose, courts may use “common sense” as well as statistics. “If no common-sense reasons exist for a law-abiding citizen to prefer a particular type of weapon for a lawful purpose like self-defense, and no evidence suggests that law-abiding citizens nonetheless commonly choose the weapon for lawful uses, then courts can conclude that the weapon is not in common use for lawful purposes.” Dangerousness of functionality, the Fourth said, was relevant but not the sole determinative factor. The Fourth concluded there was no compelling reason why a law-abiding citizen would prefer a firearm with an obliterated serial number and that such weapons would be preferable only for criminal activities. As such, these firearms do not receive any Second Amendment protection.

Judges Niemeyer, Agree, and Quattlebaum (joined by Rushing) wrote separate opinions concurring in the judgment (but not the majority’s analysis). Judges Gregory and Richardson wrote dissenting opinions.

Mr. Price will surely petition the Supreme Court for review, so we’ll see whether this is the final word on 922(k).

***Maryland Shall Issue v. Moore*, ____ F.4th ____ (4th Cir. Aug. 23, 2024) (en banc) (Keenan, J.)**

“In the aftermath of mass shootings across the country, the Maryland General Assembly passed the Firearm Safety Act of 2013 (FSA). Among other measures, the FSA contains a statutory licensing regime for handgun purchasers to ensure comprehensive background checks, to prevent straw purchases, and to aid in the safe and legal use of firearms (the handgun qualification statute, or the HQL statute). Under this law, the state of Maryland does not retain any discretion to deny a “handgun qualification license” to applicants who meet the statutory requirements. This type of law is commonly referred to as a “shall-issue” licensing law, as opposed to a “may-issue” licensing law in which the state retains some discretion in deciding whether to issue a firearm license to an applicant. The plaintiffs in this appeal assert a facial challenge to the constitutionality of the “shall-issue” HQL statute, chiefly contending that any “temporary deprivation” of the ability to purchase a handgun violates the Second Amendment right to keep and bear arms.

“This case requires us to apply the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*. We conclude that the Supreme Court in *Bruen* foreclosed the plaintiffs’ “temporary deprivation” argument by stating that, despite some delay

occasioned by “shall-issue” permit processes, this type of licensing law is presumptively constitutional because it operates merely to ensure that individuals seeking to exercise their Second Amendment rights are “law-abiding” persons. *Bruen*, 597 U.S. at 38 n.9, 142 S.Ct. 2111. We hold that the plaintiffs have failed to rebut this presumption of constitutionality afforded to “shall-issue” licensing laws like the handgun qualification statute. So the plaintiffs’ challenge to the HQL statute fails, and we affirm the district court’s award of summary judgment to the state of Maryland.”

INEFFECTIVE ASSISTANCE OF COUNSEL

***United States v. Sutherland*, 103 F.4th 200 (4th Cir. May 31, 2024) (Agee, J.) (W.D.N.C.)**

A jury convicted Mr. Sutherland of three counts of filing false tax returns and one count of obstructing an official proceeding. He served his time and served the supervised release term for the tax return convictions. When he was still serving a supervised release term for the obstruction conviction, he filed a Section 2255 motion alleging ineffective assistance of counsel on the obstruction conviction and a Coram Nobis petition on the other counts. The district court denied all petitions without a hearing. Mr. Sutherland appealed.

The 4th affirmed. Mr. Sutherland alleged in the 2255 petition that his attorney was ineffective for not calling witnesses that would have helped the jury find him innocent of the false return counts. The 4th held that even if true, the lack that additional evidence did not prejudice Mr. Sutherland regarding the *obstruction* count. Mr. Sutherland argued that if he hadn’t been guilty of the crime then he wouldn’t have had anything to cover up or obstruct. The 4th did not let him back door his argument in that manner.

The 4th also affirmed the denial of the Coram Nobis writ. Coram Nobis is an extraordinary remedy. To obtain relief, a petitioner must show, among other things, that valid reasons exist for not attacking the conviction earlier. Here, Mr. Sutherland could not show—or even attempted to show—why he could not just file a timely Section 2255 motion to attack the fraud counts.

***United States v. Hashimi*, 110 F.4th 621 (4th Cir. Aug. 2, 2024) (Harris, J.) (E.D. Va.)**

The government charged Mr. Hashimi with two counts related to drug distribution and two counts related to violence against his ex-girlfriend (kidnapping and interstate domestic violence). At trial, his attorney told the jury that Mr. Hashimi did in fact commit the acts of violence and based on him conceding that please do not convict him of the drugs, which he did not do. The jury took half of that advice and convicted him of all four counts.

In a 2255 motion, Mr. Hashimi argued that his lawyer was ineffective for making this concession against his will and that he wanted to challenge guilt on every count. The

district court denied the motion, holding that because Mr. Hashimi never made this objection at trial, he could not now raise it in a 2255.

The 4th reversed and remanded for an evidentiary hearing.

Under two recent Supreme Court cases, McCoy and Nixon, the law is now clear. The defendant—not the lawyer—has the power to decide whether to concede guilt as a practical matter before the jury in order to strategically attempt to obtain leniency in some other aspect of the case (this occurs most often, as you might expect, in death penalty cases where an attorney wants to concede guilt in order to try and avoid a death sentence).

Thus, if an attorney is considering that strategy, they must (1) consult the client about it, and (2) if the client expresses a wish, follow that wish. Anything else is ineffective and a per se new trial. If the client refuses to opine on the question, then the attorney may use their best judgment to determine a course of action.

Here, the district court erred by relying on the lack of an in-trial objection by the client. Mr. Hashmi's 2255 motion laid out allegations that, if true, would entitle him to a new trial. Thus, the district court needed to conduct an evidentiary hearing and apply the above test to determine whether to grant the motion.

FOURTH AMENDMENT/SEARCHES/WARRANT REQUIREMENTS

***United States v. Horsley*, 105 F4th 193 (4th Cir. June 24, 2024) (Thacker, J.) (W.D. Va.)**

Officers arrested Mr. Horsley at the door to his hotel room, handcuffed his hands behind his back, and moved him into the room next to the queen-sized bed. His cellphone was on a table about two to three feet from the opposite side of the bed. His girlfriend was also sitting on the opposite side of the bed between him and his cellphone. And there were several federal marshals in the room. One of the officers testified that Mr. Horsley “could not have reached for the phone because he was under arrest.” Nevertheless, officers seized Mr. Horsley’s phone, searched it, and found evidence. Mr. Horsley moved to suppress the evidence obtained from his cellphone. The district court denied the motion and admitted the evidence.

The Fourth Circuit held the district court clearly erred in ruling the cellphone was properly seized incident to arrest because Mr. Horsley was secured “and the cellphone was not within his reach.” The Court first assumed, without deciding, “that when the conditions for a proper search incident to arrest arise, officers may secure cellphones with probable evidentiary value to prevent their destruction.” But the Court held, “even if the Government is correct that Appellant could ordinarily have reached the phone with ‘no more than a few steps to go around the bed, or a linear high-step or jump to get on top of (and quickly across) it,’ ... Appellant would still have needed to hurdle [his girlfriend] and break past multiple able law enforcement officers before he even had a

chance to twist around and seize the phone with cuffed hands. All of this compels our conclusion that Appellant was ‘not within reaching distance’ of the cellphone.” The Court went on to hold, “Beyond this, even if Appellant reasonably could 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 a search incident to arrest.”

Unfortunately for Mr. Horsley, however, the Court held any error was harmless given other evidence from controlled buys, co-defendants’ testimony, text messages from a different phone, drugs, cash, and ledgers.

Be on the lookout for opportunities to use the Court’s holding of Fourth Amendment error where officers seize and search a cellphone that was not within the arrestee’s reach.

***United States v. Green*, 106 F.4th 368 (4th Cir. July 2, 2024) (Harris, J.) (D.Md.)**

After witnesses observed Mr. Green engage in an alleged armed home invasion, the court issued a warrant for his arrest.

An officer later observed Mr. Green in a “road rage” incident. He followed him to a house and later reported that Mr. Green was in an open-air backyard gazebo at that house with another man (who turned out to be the homeowner and Mr. Green’s cousin). Officers could see everything in the backyard through a chain link fence.

Due to Mr. Green’s criminal record and the two recent violent incidents, police decided to come in with a show of force. Officer Hansen (in charge of the operation) drew his gun (still outside of the backyard) and told Mr. Green that he was under arrest. Mr. Green then pulled a gun out of his pocket and placed it on a nearby shelf. He then went toward the back fence of the yard. Multiple other officers entered the yard and began to arrest Mr. Green. Officer Hansen then entered the yard and did not touch the gun on the theory that it might be evidence, but he positioned himself such that the other individual could not access the gun. The whole process took about 60 seconds. Police eventually seized the gun as evidence.

Mr. Green was charged with being a felon in possession, and he moved to suppress the gun. The 4th Circuit affirmed the district court denial of the motion, making the following observations:

- (1) The backyard was curtilage, so it had 4th Amendment protections equal to the house.
- (2) Mr. Green did have standing to challenge the search. Evidence showed that he was a frequent social guest of his cousin, visiting multiple times a week, and

that he had “free reign” of the house and yard. He was there for social and not business purposes. The fact that he never spent the night there was not a dispositive factor despite cases often talking about “overnight guests.” It is a totality test. Also, the fact that he brought a gun onto the property without the homeowner’s knowledge did not affect the analysis despite government arguments to the contrary.

- (3) But the suppression motion still fails because Officer Hansen had the right to enter the yard and ultimately seize the gun in plain view. Mr. Green argued that the “plain view” exception allows officers to seize items in plain view but it does not allow officers to search where they otherwise cannot search and that Officer Hansen had no authority to enter the yard. The 4th disagreed. It held that the arrest warrant allowed Officer Hansen to enter the yard. Mr. Green’s argument that he was already arrested by the other officers when Officer Hansen entered was too hyper-technical. The whole process was fast-moving and took 30 seconds. Regardless of when the handcuffs might have “clicked” on Mr. Green, Officer Hansen—for 4th Amendment purposes—entered the yard as part of the overall arrest process.

You 4th Amendment geeks might be thinking of other ways that police could have justified seizing the gun (protective sweep, exigent circumstances, etc.). The 4th acknowledged these but did not reach them because it held that the plain view exception allowed for the seizure of the gun.

***United States v. Chatrie*, 107 F.4th 319 (4th Cir. July 9, 2024) (Richardson, J.) (E.D.Va.)**

A divided Fourth Circuit panel (Judge Richardson, joined by Judge Wilkinson; Judge Wynn dissenting) held that “the government did not conduct a Fourth Amendment search when it obtained two hours’ worth of [the defendant, Okello] Chatrie’s location information, since he voluntarily exposed this information to Google.”

Judge Wynn filed a lengthy dissent (the majority opinion is 35 pages; the dissent is twice as long) concluding the government’s actions did constitute a search.

There were tons of amici attached to this appeal, and a petition for rehearing en banc is currently pending (with amici support), so this may not be (and hopefully is not!) the last word on the subject. The Supreme Court will likely eventually step in at some point. Needless to say, if you have a case involving geofencing, this opinion is a must-read. And the list of amici attached to the appeal are also good resources to contact if you have questions about geofencing.

Okay, so what is geofencing? Geofencing involves a setting on your phone called “Location History.” As the majority explains it, “Location History is an optional account setting that allows Google to track a user’s location while he carries his mobile devices.”

Location History is turned off by default, so you have to opt in for Google to start tracking you. About one third of Google's users have enabled Location History. Once you turn it on, Google continuously monitors your location through GPS, even if you are not using your phone. Google says its location data has an accuracy rate of approximately 68%. Google stores all Location History data in a repository called the "Sensorvault." The Sensorvault assigns each device a unique identification number and maintains all Location History data associated with that device. So yeah, Google is tracking you and keeping all that data for itself.

In 2016, Google began receiving "geofence warrants" from law enforcement seeking to access this treasure trove of location information. A geofence warrant requires Google to produce Location History data for all users (i.e., those with Location History enabled) who were within a geographic area (called a geofence) during a particular time period.

When geofence requests began skyrocketing, Google developed a three-step protocol for responding to geofence requests: "At Step One, law enforcement obtains a warrant that compels Google to disclose an anonymous list of users whose Location History shows they were within the geofence during a specified timeframe." Google then gives law enforcement a list that includes for each user an anonymized device number, the latitude and longitude coordinates and timestamp of each location point, a confidence interval, and the source of the stored Location History (such as GPS or Wi-Fi). "At Step Two, law enforcement reviews the information it receives from Google. If it determines that it needs more, then law enforcement can ask Google to produce additional location coordinates. This time, the original geographical and temporal limits no longer apply; for any user identified at Step One, law enforcement can request information about his movements inside and outside the geofence over a broader period." At Step Three, "law enforcement determines which individuals are relevant to the investigation and then compels Google to provide their account-identifying information (usually their names and email addresses)." Google "typically requires law enforcement to taper its request from the previous step, so law enforcement can't merely request the identity of every user identified in Step Two."

The geofence warrant at issue here stemmed from a bank robbery in Virginia. After a series of dead-end leads, law enforcement sought a warrant for a 150-meter radius geofence covering the bank from 30 minutes before to 30 minutes after the robbery. At Step One, there were nineteen accounts present in the geofence during the hour. Law enforcement then requested Step Two info on nine accounts. Of these nine, law enforcement requested the subscriber information for three accounts at Step Three, which Google provided. One of these accounts belonged to Okello Chatrie.

Chatrie was eventually indicted on charges related to the bank robbery, and he moved to suppress the evidence obtained using the geofence warrant. He lost and conditionally pled guilty, preserving the motion. The district court denied the motion based on the good faith exception, but the Fourth Circuit affirmed based on a different reason: it held "Chatrie did not have a reasonable expectation of privacy in two hours' worth of

Location History data voluntarily exposed to Google. So the government did not conduct a search when it obtained this information from Google.”

In a nutshell, the majority based its reasoning on the “third party doctrine,” which says that you have no legitimate expectation of privacy in information you voluntarily turn over to third parties, as well as the “limited” amount of location history information (in total, two hours’ worth) obtained by the warrant. Since Chatrue voluntarily opted in to the Location History, he had no legitimate expectation of privacy in the info, the majority said.

Judge Wynn vehemently dissented at length, accusing the majority of failing to “honestly and diligently” apply the Supreme Court’s decision in *Carpenter v. United States* (the decision that said the government must obtain a warrant for historical cell-site location information).

Both sides noted that Google has since “shut down the technology that permits geofence intrusions, thereby reducing the potential for legitimate investigatory uses of this innovative technology, even with a warrant.” So maybe it’s not an issue we will have to deal with in the future. But for now, Judge Wynn’s dissent is useful for preserving any challenges to a geofence warrant, and the opinion in general is a helpful guide to understanding geofencing.

***United States v. Sanders*, 107 F.4th 234 (4th Cir. July 9, 2024) (King, J.) (E.D.Va.)**

A jury found Zackary Sanders guilty of 5 counts of CP production, 6 counts of receipt of CP, and 1 count of possessing CP. He was sentenced to 216 months in prison. In his “multifaceted appeal,” Sanders challenged: (1) the denial of his motion to suppress evidence seized from his home pursuant to a search warrant, along with alleged misrepresentations in the search warrant affidavit and denial of a Franks hearing; (2) statements he made to FBI agents; (3) exclusion of evidence at trial about the victims’ purported voluntary participation in the production of the CP, including expert testimony about “BDSM” culture (allegedly standing for bondage, discipline, dominance, submission, sadism, and masochism) and (4) the jury instructions.

The Fourth Circuit affirmed. Here’s what happened:

The FBI learned from a foreign agency that a particular IP address was being used to access and share CP focused on BDSM and other violent porn. There’s lots of technical computer-related details about how the material was accessed, but the important thing to know is that the access was deliberate. The FBI’s investigation into the IP address led them to the residence in McLean, VA where Mr. Sanders lived with his parents. The FBI then applied for a warrant to search the McLean residence. In support of the warrant, the FBI submitted a 36-page affidavit summarizing the investigation, including info received from the foreign agency.

When the FBI executed the warrant, Sanders' dad let them in. They took Sanders to an office in the home to be interviewed. They told Sanders he was not under arrest and he did not have to talk to them. Sanders agreed to the interview and understood it was being recorded. He did not receive *Miranda* warnings.

During the search, agents found multiple electronic devices in Sanders' bedroom, including a flash drive containing CP. When confronted with the flash drive, Sanders asked to speak with his mother. The agents stopped and retrieved his mom. After speaking with his mom, the interview resumed. Sanders told the agents he recognized the flash drive and admitted he had transferred CP to the flash drive himself. After about two hours, the FBI left without arresting Sanders.

A forensic exam of Sanders' devices revealed messages Sanders had sent to six different boys aged 13 to 17 instructing them to send him nude videos and photos of themselves engaging in various sex acts, many of them degrading. The FBI also found multiple CP videos. Sanders was subsequently indicted on 12 CP counts. He filed multiple motions to suppress, all of which were denied.

At the 7-day trial, the government called nine witnesses, including two of the minor victims, and introduced scores of exhibits. The court excluded evidence of the victims' purported voluntary participation in their conduct with Sanders, as well as expert testimony by a professor prepared to speak about BDSM "culture." Over Sanders' objections, it also instructed the jury that (1) the minor victims' consent was irrelevant to the charged offenses; (2) that the production of visual depictions of sexually explicit conduct had to be a motivating factor for the defendant, but need not be the predominant purpose; and (3) provided a multi-factor test (called the Dost test) for the jury to consider whether the visual depictions included "sexually explicit conduct," defined in relevant part to include "lascivious exhibition" of genitals. It took the jury all of two hours to find Sanders guilty on all 12 counts. He appealed, but no dice.

I. Validity of Search Warrant

The Fourth first rejected Sanders' challenge to the validity of the search warrant, concluding that the affidavit was sufficient and supported by probable cause. The Fourth emphasized that the CP was accessible only by taking multiple affirmative steps on-line—in other words, it was impossible to just "stumble" across this material or not know what you were accessing, and that the affidavit spelled that out.

It also rejected Sanders' contention that the facts in the affidavit were too stale to support PC. Although nine months passed between the time Sanders' IP address accessed the material and the time the search warrant issued (which would definitely be a problem in, say, a drug case), the Fourth has previously held that "the staleness inquiry is unique" in CP cases and that "due to (1) the tendency of individuals who intentionally access to collect child pornography, and (2) the material's electronic nature

causing evidence of collection to be recoverable long after it is deleted — search warrants can reasonably be sustained “months, and even years, after the events that gave rise to probable cause.”

The Fourth upheld the court’s denial of Sanders’ request for a Franks hearing, concluding there was no material discrepancy between the affidavit and a report from the foreign agency that first alerted the FBI. Because there was no material discrepancy, there was likewise no merit to Sanders’ argument that the court should have allowed him to pursue discovery into the alleged misrepresentation.

II. Statements to FBI agents

Sanders also moved to suppress his statements to the FBI agents. Unfortunately, he filed his motion 112 days past the deadline and failed to provide good cause for the tardy filing. The trial court denied the motion, finding that it would delay trial and that no good cause had been shown. On appeal, Sanders focused on the merits of his substantive claim and did not argue that the court abused its discretion in finding the motion untimely. “Absent an argument on why and how the court abused its discretion” the Fourth said it was “constrained to conclude that the court did not reversibly err in denying the suppression effort as untimely and without good cause.” So the Fourth did not “officially” reach the merits. But in a footnote, the Fourth said Sanders was not in custody when he made the statements, and that the statements were thus voluntary and admissible.

III. Consent is no Defense to Child Pornography

Sanders also took issue with exclusion of evidence purportedly showing that the minors voluntarily participated in the offense conduct. He argued that to prove the CP offenses, the government was required to prove that the will of the depicted minor was overcome during the production of the pornographic material. He asserted that a child’s “voluntary participation in the production of pornographic material would tend to establish that his will was not overcome.”

The Fourth found no merit to this argument, noting that under prior precedent (as well as decisions in multiple circuits), the government need not prove that the will of the minor child is overcome. Thus, the district court properly excluded as irrelevant evidence of the minors’ voluntary participation. The court likewise properly excluded as irrelevant expert testimony about BDSM culture and relationships (because the point of this testimony was again to show the voluntary nature of the minors’ participation).

IV. Jury Instructions

Finally, the Fourth rejected Sanders’ arguments about three jury instructions. First, for the reasons already addressed, it said the court properly instructed the jury that a minor’s voluntary participation in pornographic activities was irrelevant. Second, the

Fourth said the court did not err in instructing the jury that the prosecution was required to prove that “[t]he production of a visual depiction of sexually explicit conduct” was “a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct.” Sanders argued that the jury should have been instructed that producing child pornography was his “predominant” purpose. The Fourth said that producing child porn must be a “significant” purpose (rather than an incidental one) and that the given instruction correctly stated the law. Third, the Fourth rejected Sanders’ attack on the “lascivious” instruction, which relied on the *Dost* factors. The Fourth acknowledged that “the *Dost* Factors have been subjected to criticism over the years” but pointed out that “nine of our sister courts of appeals have adopted or endorsed them to aid in determining whether a certain visual depiction connotes a lascivious exhibition” while two had rejected them. But the court only instructed the jurors that they could consider the *Dost* factors, not that they had to. As such, the Fourth said:

“The *Dost* Factors may not be necessary or helpful in every child pornography prosecution, but we are satisfied that the trial court did not err in using those Factors in these circumstances. This appeal highlights, however, that trial courts should ensure that a jury (1) is not instructed to rely exclusively on the *Dost* Factors, (2) understands that no single *Dost* Factor is dispositive, and (3) is discouraged from a strict and mathematical application of the *Dost* Factors.”

If you have a child porn case, this may be the most useful part of the Sanders opinion.

United States v. Doe (In re: Search Warrants Issued February 18, 2022), 111 F.4th 316 (4th Cir. Aug. 2, 2024) (Richardson, J.)

The Fourth Circuit decided that it lacked jurisdiction to hear an appeal of a defendant’s challenge to the protocol the district court employed to ensure that it did not violate attorney-client privilege when reviewing documents seized from John Doe’s business.

The government suspected John Doe of committing various fraud/business related crimes and obtained warrants to seize business records. Suspecting that some of these records would contain attorney-client privileged communications, the government instituted a protocol in which it had a filter team look over records and, if the team suspected privileged communications, did not turn those records over to the attorneys involved in the prosecution. Mr. Doe objected and asked the court to propose a different protocol. The details get a bit into the weeds, but the gist of it is that the government wanted to look at all the records and decide what to keep/use. Mr. Doe wanted the court (or other neutral 3rd party appointed by the court) to look at the records and not give the government any access to the privileged stuff.

The district court agreed with the government and refused to implement Doe’s proposed protocol.

On appeal, the 4th held that it lacked jurisdiction to consider the issue. The question presented is not a final order. And the Supreme Court has held that in these instances, appellate review of district court orders regarding seized materials are reviewable only if the defendant request (1) is only for the return of property, and (2) is not related to a criminal case against the requester. Mr. Doe fails both of these prongs.

Judge Quattlebaum concurred. He agreed that the panel was bound by Supreme Court precedent. But he explained that the government's protocol was very troubling because either through malice or inadvertence, the government's access to privileged communications could affect its case against a defendant. And the defendant would have no way of challenging (or even knowing about) the government's misuse. He encouraged the Supreme Court to reconsider its precedents and encouraged district judges to be very careful about respecting attorney-client privilege when confronted with these issues.

A cert. petition is coming, so stay tuned.

United States v. Brown (L) consolidated with United States v. McCullers, 111 F.4th 253 (4th Cir. Aug. 16, 2024) (Richardson, J.) (E.D. Va.)

Friday, the Fourth Circuit affirmed denial of motions to suppress firearms found during an investigatory stop filed by Brown and McCullers. Judge Richardson wrote the opinion, joined by Judge Wilkinson. Judge Wynn dissented. Keep an eye on this case for further review, which really brings home that Fourth Amendment reasonable suspicion is in the eye of the beholder.

Around 5am on a July morning in 2021, Detective Frias of the Richmond Police Department saw an Instagram video posted an hour or two earlier by a known gang member, showing that gang member and six others displaying various firearms in front of the Belt Atlantic apartment complex. Detective Frias noted the "distinctive" clothing worn by two men and accessed live video surveillance of the apartment complex. The footage showed someone wearing a hooded purple jacket like the one shown in the Instagram video and someone carrying a drum (high-capacity) magazine standing outside the building. Five officers deployed to the complex, continuing to monitor the video surveillance. When they arrived at the complex 10- to 15- minutes later, two men, Brown and McCullers, were standing outside the complex with two other men. As the officers approached, Brown and McCullers walked away. Brown walked upstairs. He moved his hands to the front of his torso and Detective Frias told him to "stop reaching" while pointing his weapon at Brown. Brown complied. Detective Frias started to pat Brown down, but Brown said he wore a colostomy bag and Frias stopped. While this was going on, Sergeant Rogers came from a different direction and followed McCullers up to the third-floor landing, where he ordered McCullers to get on the ground and show his hands. McCullers complied. Sergeant Rogers cuffed and frisked him, finding a firearm in his underwear. McCullers admitted he had a prior felony conviction.

McCullers and Brown were both asked for identifying information and gave it. Detective Frias texted Brown's information to Detective Story, who ran all of the information detectives collected. It took Story nine minutes to get to his patrol car, and twenty-nine minutes to run information, after which he told Detective Spence to let Brown go. But she and another officer first spent a few minutes searching for discarded weapons. After 46 minutes, they started to let Brown go, but then saw a bulge in his pants that turned out to be a gun. He had a prior felony, so detectives arrested him.

Both men were charged with possessing firearms as felons and both moved to suppress the guns found on them, which the district court denied.

The panel majority affirmed denial of those motions, explaining its view that the officers had reasonable suspicion to stop the men because the Instagram video showed evidence of a Virginia misdemeanor (pointing, holding, or brandishing a firearm in such a manner to reasonably induce fear in the mind of another) and the apartment complex was a "hot spot for gang violence" where gang members "post inciting videos on social media to goad each other to violence." The panel majority concluded that an officer could reasonably suspect the video was taken shortly before it was posted and it was not unreasonable for the officers to investigate. Both men walking away and "ignoring the officer's commands" was also an important factor to consider. The panel majority also found reasonable suspicion to frisk McCullers because he was armed in the video and it was reasonable to believe he still was. And it held that Brown's stop was not unreasonably extended because Detective Frias did not unreasonably delay asking for his identifying information (he was waiting for the detective in charge of running information) and the next forty minutes were explained by Detective Story retrieving his car and running background checks on all of the four detained suspects and three seized firearms. Searching for discarded firearms was "a reasonable effort to ensure their safety that did not impermissibly extend the length of the stop because they reasonably believed Brown had been in possession of two firearms at the time the video was recorded.

Judge Wynn dissented vigorously, raising concerns that the panel majority devalued the Second and Fourth Amendment rights of Brown and McCullers because they were young, black men in a high-crime area. He explained that the officers had no idea when the video was recorded and that, in any event, noted the men in the video were openly displaying firearms in a state that permits open carry. He explained that the purported misdemeanor the panel majority suggested had been committed contemplated an unknown Instagram viewer who somehow feared being harmed by the firearms displayed in the video. Judge Wynn would've held that any reasonable suspicion found in the Instagram video was quickly dispelled by the live surveillance footage and the men's conduct did nothing to increase the officers' suspicions. In the surveillance footage, the large group had dispersed, and no one had a visible firearm. When the officers arrived at the apartment complex, Brown and McCullers walked away from the officers "calmly" and quickly complied with officers' commands, describing their conduct as that of "two people who wanted—for whatever reason—to be left alone."

Judge Wynn also raised concerns about the length of Brown's detention, explaining he was held for almost an hour before Frias noticed something in his pants and frisked him.

MIRANDA/CONFESSION ISSUES

***United States v. Elsheikh*, 103 F.4th 1006 (4th Cir. June 7, 2024) (Per curiam) (E.D.Va.)**

Mr. El Shafee Elsheikh was convicted of taking hostages in support of ISIS. It was a very brutal crime, with many hostages (who were generally journalists and aid workers) executed on camera for ISIS propaganda.

On appeal, he raised several evidentiary issues, all of which the 4th Circuit rejected:

First, when he was initially captured on the battlefield, the government put him in biometric processing, in which he was asked his name, place of birth, etc. He lied in response to these questions. The government admitted these lies at trial. He objected to them as un-Mirandized statements. The district court allowed them in under the booking exception to Miranda (which allows police to ask routine booking questions even if you have invoked your Miranda rights). The Fourth did not reach the question of whether Miranda's booking exception extended to an international battlefield. Instead, it held that any error would be harmless because these statements were a very small part of the government's case, and they were freestanding—they did not lead to or buttress any other evidence.

Second, he argued that Mirandized statements that he gave to the FBI should be barred because he gave those statements after having given un-Mirandized statements to the DOD. Generally, if a defendant confesses without Miranda warnings and is then Mirandized and asked to confess again, that first confession can taint the second confession and make it inadmissible. In making this determination, the courts look at several factors including the intent of the officers in doing the two-step process, the similarity of the two confession scenarios (same location? Same officers? Etc.), the closeness in time between the two confessions, etc.

Here, the 4th held that there was a significant difference between the DOD interrogations and the FBI interrogations. The personnel differed (the evidence did not indicate if the room was the same). There was time between the interrogations. And, critically, the FBI agents issuing Miranda warnings expressly told him that his previous statements could not be used against him and that they were "starting anew," and statements going forward could be used against him. Indeed, there was some evidence that the FBI explicitly used case law to help ensure that it was following the proper procedures. And the government also had a good reason for the two-stage interrogations. The DOD was attempting to collect battlefield intelligence.

Third, he argued that the district court should have suppressed several statements as involuntary because he was being beaten and abused by guards. The 4th rejected this on a pretty straightforward clear error analysis. The district court held a hearing where it heard from lots of witnesses and found as a matter of fact that Mr. Elsheikh was not being beaten or mistreated. That finding, supported by evidence, was not clear error.

Fourth, he argued that the district court erred in allowing in the statements of unavailable witnesses—the executed hostages—under the forfeiture-by-wrongdoing hearsay exception. Under Rule 804(b)(6) of the Federal Rules of Evidence, otherwise inadmissible hearsay may be admitted upon a showing of three things: (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.

Mr. Elsheikh argued that he killed the hostages for political and ideological reasons, but not to render them unavailable as witnesses in a possible future trial. The 4th held that the district court did not abuse its discretion holding otherwise. The purpose to make a declarant unavailable does not need to be the sole or primary purpose motivating the wrongdoing under the rule. It need only be *a* purpose. Here, the record showed that the captors did a lot to hide their identity from the hostages and consistently threatened hostages to stay silent, etc. Thus, the district court did not abuse its discretion in holding that the captors were motivated, in part, by a desire to keep the hostages from testifying.

***United States v. Bowman*, 106 F.4th 293 (4th Cir. July 1, 2024)
(Richardson, J.) (W.D.Va.)**

Mr. Bowman was charged with distributing methamphetamine as part of the Sinola Cartel. After unsuccessful attempts to work with appointed counsel, he decided to proceed pro se. He was convicted and appealed. The Fourth Circuit affirmed his conviction and sentence, making the following points:

(1) Mr. Bowman filed a motion to suppress statements he made to police. The district court denied the motion without a hearing, holding that Mr. Bowman did not allege any factual dispute regarding the situation in which he gave the statements and that under the undisputed facts, the law did not require suppression. He appealed, arguing that the district court had an obligation to hold a hearing. The Fourth rejected this argument because a district court needs to hold a hearing only in situations where there is a factual dispute to resolve. Mr. Bowman argued that he did not have enough information to allege a factual dispute because he had not been given enough discover. But, the Fourth countered, nothing stopped him—at the pleading stage—from alleging the facts as he believed them to be true. That would have been enough to trigger a hearing had those allegations made a valid legal claim. **Takeaway: While we ethically cannot allege facts that we know to be untrue in a motion, we are supposed to allege facts in the light most favorable to our client. Tell your**

client's story, and make the district judge resolve those facts in a hearing. Don't just accept the police report version of events.

(2) Mr. Bowman argued that the district court abused its discretion by refusing to ask the jury during voir dire questions he proposed about racial prejudice. The Fourth rejected this argument, holding that under the Constitution, courts must only ask about racial prejudice when racial issues are “inextricably bound up with the conduct of a trial.” Here, the fact that Mr. Bowman was Black and the jury was all White did not rise to that level. Nor did the fact that Mr. Bowman’s girlfriend (and co-defendant before she pleaded guilty) was White. Interestingly, the Court noted that it has the inherent supervisory power to correct a district court’s voir dire (with a presumably less onerous burden for defendants to meet to obtain relief), but because Mr. Bowman only alleged a constitutional violation, that was the only standard it was reviewing. **Takeaway: Our clients’ rights often derive from multiple sources—the Constitution, statutes, rules, etc.. When you object, make sure to object under all of the relevant grounds. The remedies and what you need to show to obtain relief may differ.**

(3) When Mr. Bowman was conducting his pro-se preemptory strikes, he noticed that the court had provided the government with a list with more information about the prospective jurors than he had. (The opinion does not say, but I suspect the district court was reluctant to give personal juror information to a pro-se defendant alleged to be part of a cartel) He objected, which was overruled. On appeal, he argued that this was per se reversible error. The Fourth Circuit went over the history of court responses to preemptory strike errors, and agreed that prior Supreme Court and Circuit language did indicate that it was per se error. But both Courts have subsequently rejected this approach and any cases saying otherwise are implicitly and explicitly overruled. Mr. Bowman at oral argument acknowledged that he could not show prejudice and needed the per se rule to win. So he lost. The Fourth Circuit did indicate that it was not cool that the district court gave the government this advantage, but, you know, whatever.

***United States v. Sanders*, 107 F.4th 234 (4th Cir. July 9, 2024) (King, J.) (E.D.Va.)**

A jury found Zackary Sanders guilty of 5 counts of CP production, 6 counts of receipt of CP, and 1 count of possessing CP. He was sentenced to 216 months in prison. In his “multifaceted appeal,” Sanders challenged: (1) the denial of his motion to suppress evidence seized from his home pursuant to a search warrant, along with alleged misrepresentations in the search warrant affidavit and denial of a Franks hearing; (2) statements he made to FBI agents; (3) exclusion of evidence at trial about the victims’ purported voluntary participation in the production of the CP, including expert testimony about “BDSM” culture (allegedly standing for bondage, discipline, dominance, submission, sadism, and masochism) and (4) the jury instructions.

The Fourth Circuit affirmed. Here’s what happened:

The FBI learned from a foreign agency that a particular IP address was being used to access and share CP focused on BDSM and other violent porn. There's lots of technical computer-related details about how the material was accessed, but the important thing to know is that the access was deliberate. The FBI's investigation into the IP address led them to the residence in McLean, VA where Mr. Sanders lived with his parents. The FBI then applied for a warrant to search the McLean residence. In support of the warrant, the FBI submitted a 36-page affidavit summarizing the investigation, including info received from the foreign agency.

When the FBI executed the warrant, Sanders' dad let them in. They took Sanders to an office in the home to be interviewed. They told Sanders he was not under arrest and he did not have to talk to them. Sanders agreed to the interview and understood it was being recorded. He did not receive *Miranda* warnings.

During the search, agents found multiple electronic devices in Sanders' bedroom, including a flash drive containing CP. When confronted with the flash drive, Sanders asked to speak with his mother. The agents stopped and retrieved his mom. After speaking with his mom, the interview resumed. Sanders told the agents he recognized the flash drive and admitted he had transferred CP to the flash drive himself. After about two hours, the FBI left without arresting Sanders.

A forensic exam of Sanders' devices revealed messages Sanders had sent to six different boys aged 13 to 17 instructing them to send him nude videos and photos of themselves engaging in various sex acts, many of them degrading. The FBI also found multiple CP videos. Sanders was subsequently indicted on 12 CP counts. He filed multiple motions to suppress, all of which were denied.

At the 7-day trial, the government called nine witnesses, including two of the minor victims, and introduced scores of exhibits. The court excluded evidence of the victims' purported voluntary participation in their conduct with Sanders, as well as expert testimony by a professor prepared to speak about BDSM "culture." Over Sanders' objections, it also instructed the jury that (1) the minor victims' consent was irrelevant to the charged offenses; (2) that the production of visual depictions of sexually explicit conduct had to be a motivating factor for the defendant, but need not be the predominant purpose; and (3) provided a multi-factor test (called the Dost test) for the jury to consider whether the visual depictions included "sexually explicit conduct," defined in relevant part to include "lascivious exhibition" of genitals. It took the jury all of two hours to find Sanders guilty on all 12 counts. He appealed, but no dice.

I. Validity of Search Warrant

The Fourth first rejected Sanders' challenge to the validity of the search warrant, concluding that the affidavit was sufficient and supported by probable cause. The Fourth emphasized that the CP was accessible only by taking multiple affirmative steps on-

line—in other words, it was impossible to just “stumble” across this material or not know what you were accessing, and that the affidavit spelled that out.

It also rejected Sanders’ contention that the facts in the affidavit were too stale to support PC. Although nine months passed between the time Sanders’ IP address accessed the material and the time the search warrant issued (which would definitely be a problem in, say, a drug case), the Fourth has previously held that “the staleness inquiry is unique” in CP cases and that “due to (1) the tendency of individuals who intentionally access to collect child pornography, and (2) the material’s electronic nature causing evidence of collection to be recoverable long after it is deleted — search warrants can reasonably be sustained “months, and even years, after the events that gave rise to probable cause.”

The Fourth upheld the court’s denial of Sanders’ request for a Franks hearing, concluding there was no material discrepancy between the affidavit and a report from the foreign agency that first alerted the FBI. Because there was no material discrepancy, there was likewise no merit to Sanders’ argument that the court should have allowed him to pursue discovery into the alleged misrepresentation.

II. Statements to FBI agents

Sanders also moved to suppress his statements to the FBI agents. Unfortunately, he filed his motion 112 days past the deadline and failed to provide good cause for the tardy filing. The trial court denied the motion, finding that it would delay trial and that no good cause had been shown. On appeal, Sanders focused on the merits of his substantive claim and did not argue that the court abused its discretion in finding the motion untimely. “Absent an argument on why and how the court abused its discretion” the Fourth said it was “constrained to conclude that the court did not reversibly err in denying the suppression effort as untimely and without good cause.” So the Fourth did not “officially” reach the merits. But in a footnote, the Fourth said Sanders was not in custody when he made the statements, and that the statements were thus voluntary and admissible.

III. Consent is no Defense to Child Pornography

Sanders also took issue with exclusion of evidence purportedly showing that the minors voluntarily participated in the offense conduct. He argued that to prove the CP offenses, the government was required to prove that the will of the depicted minor was overcome during the production of the pornographic material. He asserted that a child’s “voluntary participation in the production of pornographic material would tend to establish that his will was not overcome.”

The Fourth found no merit to this argument, noting that under prior precedent (as well as decisions in multiple circuits), the government need not prove that the will of the minor child is overcome. Thus, the district court properly excluded as irrelevant

evidence of the minors' voluntary participation. The court likewise properly excluded as irrelevant expert testimony about BDSM culture and relationships (because the point of this testimony was again to show the voluntary nature of the minors' participation).

IV. Jury Instructions

Finally, the Fourth rejected Sanders' arguments about three jury instructions. First, for the reasons already addressed, it said the court properly instructed the jury that a minor's voluntary participation in pornographic activities was irrelevant. Second, the Fourth said the court did not err in instructing the jury that the prosecution was required to prove that "[t]he production of a visual depiction of sexually explicit conduct" was "a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct." Sanders argued that the jury should have been instructed that producing child pornography was his "predominant" purpose. The Fourth said that producing child porn must be a "significant" purpose (rather than an incidental one) and that the given instruction correctly stated the law. Third, the Fourth rejected Sanders' attack on the "lascivious" instruction, which relied on the *Dost* factors. The Fourth acknowledged that "the *Dost* Factors have been subjected to criticism over the years" but pointed out that "nine of our sister courts of appeals have adopted or endorsed them to aid in determining whether a certain visual depiction connotes a lascivious exhibition" while two had rejected them. But the court only instructed the jurors that they could consider the *Dost* factors, not that they had to. As such, the Fourth said:

"The *Dost* Factors may not be necessary or helpful in every child pornography prosecution, but we are satisfied that the trial court did not err in using those Factors in these circumstances. This appeal highlights, however, that trial courts should ensure that a jury (1) is not instructed to rely exclusively on the *Dost* Factors, (2) understands that no single *Dost* Factor is dispositive, and (3) is discouraged from a strict and mathematical application of the *Dost* Factors."

If you have a child porn case, this may be the most useful part of the Sanders opinion.

RULE 11 PROCEEDINGS

***United States v. Dunlap*, 104 F.4th 544 (4th Cir. June 18, 2024) (Gregory, J.) (D.S.C.)**

Here, the Fourth Circuit held that if the record is ambiguous whether a district court accepted a Fed. R. Crim. P. 11(c)(1)(C) plea, the ambiguity must be resolved in favor of the defendant.

A mother and daughter co-defendants were charged with jury tampering for approaching a juror in their husband/father's criminal case and offering money in

exchange for a not-guilty verdict. They each entered into an 11(c)(1)(C) plea with the government for a sentence of 12 months and a day of imprisonment. The district court never stated in the change-of-plea hearing whether it was accepting or rejecting or deferring decision on accepting the plea, but a subsequent docket entry read, “Plea agreement accepted.”

At sentencing, the district court expressed concern that the sentence may not reflect the severity of the conduct and the prosecutor expressed similar doubts, ultimately stating “at the end of the day” it was “a sentence that we could live with.” The court then said it was rejecting the agreement’s sentencing provision, offered the defendants the opportunity to withdraw their pleas, and calculated a guideline range of 46 to 57 months. Defense counsel argued that the agreement had already been accepted and the court was thus bound by the sentencing provision; the court said it was only “conditionally accepted” and, if it rejected the recommended sentence at sentencing, defendants would have the opportunity to withdraw their pleas. Ultimately, each defendant was sentenced to 36 months in prison.

The defendants appealed, arguing that the district court accepted the agreements and was bound to impose the recommended sentence under Fed. R. Crim. P. 11(c)(1)(C). The government responded that the district court rejected the agreements, offered the defendants an opportunity to withdraw their pleas, and therefore acted within its discretion under the Rule. The court found that the record was ambiguous on the acceptance/rejection issue and, therefore, the ambiguity should be construed “against the district court” as the actor that “possessed control over clarity,” similar to the rule dictating that ambiguity be construed against the drafter in interpretation of plea agreements.

As an interesting side note, the court declined to address the defendants’ separate arguments that the Government breached its plea agreements, noting that the Government conceded breach in a 28j letter before the court of appeals and expressing confidence “that the government will not stand in the way of expeditiously resolving this case in accordance with the plea agreement on remand.”

***United States v. Perdue*, 110 F.4th 662 (4th Cir. Aug. 9, 2024) (Floyd, J.) (N.D.W.V.)**

In 2018, law enforcement began investigating Perdue and two others for drug trafficking activities. A search of the home out of which the drugs were being sold uncovered (among other things) three firearms. All three defendants were charged with multiple offenses, including aiding and abetting each other in possessing the firearms in connection with a drug trafficking crime. Perdue pleaded guilty to all counts. At the plea hearing, the district court, in describing what the Government would be required to prove at trial, failed to explain that the Government would have to prove that “the defendants had advance knowledge that a firearm would be possessed by a confederate

in furtherance of the drug crimes.” Perdue admitted to owning and possessing a Ruger handgun as part of his plea. He was sentenced to a total term of 195 months in prison.

In 2020, Perdue filed a § 2255 motion that ultimately resulted in the district court entering an amended judgment to allow him to pursue a direct appeal. As part of those proceedings, however, Perdue’s trial counsel submitting an affidavit stating that the decision to plead to all counts without an indictment was Perdue’s alone and that he “made clear to me that he would not consider a plea agreement that required his cooperation against other co-defendants.”

On direct appeal, the Fourth Circuit affirmed Perdue’s convictions and sentence. Perdue argued that the district court’s failure to explain the advance knowledge element at the time of his guilty plea required vacation of his firearm offense. Applying plain error, the court disagreed. The district court erred and that error was plain, the court concluded, rejecting a Government argument that the plea should be read as being one of principal, rather than accomplice, liability. However, Perdue could not show prejudice because he could not show a reasonable probability that he would have not pleaded guilty had he been properly instructed.

PUBLIC TRIAL CLAUSE

***United States v. Smith consolidated with United States v. Alcorn*, ____ F.4th ____ (4th Cir. Sept. 18, 2024) (King, J.) (E.D. Va.)**

During the COVID-19 pandemic, the United States charged Smith and Alcorn with various fraud offenses. They were convicted after a 14-day trial. They jointly challenged their convictions under the Public Trial Clause. Specifically, during the pandemic, the E.D. Va. had procedures wherein the entire “trial courtroom” consisted of the parties, the attorneys, the judge, and the jurors. Due to social distancing, the jurors were seated in the public gallery area of the courtroom. The court then had a “public courtroom” where members of the public could watch the proceedings on closed circuit video. The cameras allowed the public to see most of the proceedings, but they could not observe the jury. This setup, defendants argued, violated their right to a public trial.

The 4th disagreed. First, it noted that the Public Trial Clause first asks courts to determine whether proceedings were fully or partially closed. If not, then there is no violation. The 4th held that these proceedings were not fully closed. It then expressed strong skepticism that this framework even constituted a partial closure. But, assuming without deciding that the court was partially closed, it held that the district court did not err because the EDVA protocol was no more restrictive than the pandemic required. The parties and attorneys got to observe the jury, and there is simply no absolute right for the public to have a view of everything in the courtroom for every possible vantage point.

Mr. Smith also contended that the district court violated the Confrontation Clause by admitting the depositions of three elderly witnesses who, for various medical reasons, were unable to travel across the country to testify.

The 4th disagreed. It noted that the district court complied with Federal Criminal Rule 15, which is designed to balance confrontation rights with practical issues in witnesses appearing at trial. Under that compliance, Mr. Smith had notice of the depositions, and his attorney had the right to full confrontation at the depositions. Also, the Confrontation Clause/Rule 15 does not require the government to make every possible effort to secure witness presence at trial. Instead, it must make reasonable efforts in the context of the case. Here, reviewing the district court's factual findings for clear error and decisions for an abuse of discretion, the 4th held that the district court properly complied.

Judge Heytens dissented on both points. First, he contended that, upon being alerted to defendants' request that the public be able to see the jury, the district court made no findings regarding why such a reconfiguration would be impossible/impractical. It should have, at a minimum, made such findings, and its failure to do so was reversible error. Second, though he is sympathetic to the idea that elderly witnesses should not have to travel across country during the pandemic, the district court did not even try to subpoena them. Without trying *anything* to compel compliance, the district court should not have determined that the witnesses were "unavailable."

Finally, the 4th Circuit did vacate Mr. Alcorn's sentence and remand for full resentencing under *Rogers/Singletary*. Most importantly, it reaffirmed that it reviews these claims de novo, rejecting the government's argument that, under *United States v. Elbaz*, it actually reviews them for plain error. It also held that the district court's attempted incorporation of a standing order that did not actually exist had no effect, and the appellate court could not look at context to try and figure out what the district court must have meant to do. And, finally, the Court reaffirmed the idea that just because a condition of supervised release appears in the PSR, a district court must still actually impose it to avoid a *Rogers* problem.

DOUBLE JEOPARDY

***United States v. Whitley*, 105 F.4th 672 (4th Cir. June 28, 2024) (Quattlebaum, J.) (E.D.Va.)**

Here, the Fourth Circuit held that Hobbs Act robbery is not a lesser-included offense of carjacking, such that convictions and sentences for both did not violate the Double Jeopardy Clause.

Mr. Whitley and his girlfriend drove from their D.C. apartment to a Peloton warehouse in Virginia and then followed a full Peloton delivery van with MD plates to a shopping center. When one of the Peloton delivery workers went into a store, Whitley got into the

van, pointed a gun at the driver's chest, and told him to "get the f--- out." After he did, Whitley drove off with the van, which was later found empty in Maryland.

In his Rule 29 motion and on appeal, Mr. Whitley argued that Hobbs Act Robbery was a lesser-included offense of carjacking. He asserted that both required a taking of personal property from another by force, violence, or intimidation, and affecting interstate commerce, and that carjacking merely added an intent to cause death or serious bodily harm.

The Fourth Circuit disagreed. It applied the *Blockburger* test, asking whether each required proof of a fact that the other did not. And it held that the two jurisdictional elements (which the Fourth Circuit says you can consider under *Blockburger*) require proof of different facts. Specifically, "[t]he jurisdictional element of federal carjacking looks backwards. It turns on what happens before the theft—whether the stolen vehicle had previously been transported, shipped or received in interstate or foreign commerce." By contrast, "the jurisdictional element of Hobbs Act robbery looks forward. It turns on what happens as a result of the theft—whether the theft affects interstate commerce." It did not matter that carjacking may *also* obstruct, delay, or affect interstate commerce, as it did in this case.

***United States v. Slocum*, 106 F.4th 308 (4th Cir. July 1, 2024)
(Quattlebaum, J.) (S.D.W.V.)**

Mr. Solcum was convicted of, among other things, a meth conspiracy and a heroin conspiracy. He filed a 2255 motion alleging IAC, specifically that his counsel was ineffective for not moving to dismiss one of the two conspiracies under the Double Jeopardy Clause because they were actually the same conspiracy. The district court rejected the motion, holding that the conspiracies were distinct. The 4th disagreed and, relevant for our purposes, helped clarify the standard to apply when a defendant brings a double jeopardy challenge to multiple conspiracy charges that he asserts are actually the same conspiracy.

The Court first noted that the traditional *Blockburger* test does not make sense to apply when both charges come under the same statute (here Section 846). It also held that the *MacDougall* test (previously applied to conspiracy double jeopardy claims) was a problem because it required looking at overt acts, and federal conspiracies do not require overt acts.

So the Court very helpfully gave us the new test to use when the government charges multiple conspiracies and we argue that it was only one conspiracy:

- the overlap in time periods,
- the overlap in locations,
- the overlap in coconspirators,

- as well as the nature and scope of the charged conspiracies, including methods and goals.

Nothing like a good multi-factor test 😊

VOIR DIRE

***United States v. Bowman*, 106 F.4th 293 (4th Cir. July 1, 2024) (Richardson, J.) (W.D.Va.)**

Mr. Bowman was charged with distributing methamphetamine as part of the Sinola Cartel. After unsuccessful attempts to work with appointed counsel, he decided to proceed pro se. He was convicted and appealed. The Fourth Circuit affirmed his conviction and sentence, making the following points:

(1) Mr. Bowman filed a motion to suppress statements he made to police. The district court denied the motion without a hearing, holding that Mr. Bowman did not allege any factual dispute regarding the situation in which he gave the statements and that under the undisputed facts, the law did not require suppression. He appealed, arguing that the district court had an obligation to hold a hearing. The Fourth rejected this argument because a district court needs to hold a hearing only in situations where there is a factual dispute to resolve. Mr. Bowman argued that he did not have enough information to allege a factual dispute because he had not been given enough discover. But, the Fourth countered, nothing stopped him—at the pleading stage—from alleging the facts as he believed them to be true. That would have been enough to trigger a hearing had those allegations made a valid legal claim. **Takeaway: While we ethically cannot allege facts that we know to be untrue in a motion, we are supposed to allege facts in the light most favorable to our client. Tell your client’s story, and make the district judge resolve those facts in a hearing. Don’t just accept the police report version of events.**

(2) Mr. Bowman argued that the district court abused its discretion by refusing to ask the jury during voir dire questions he proposed about racial prejudice. The Fourth rejected this argument, holding that under the Constitution, courts must only ask about racial prejudice when racial issues are “inextricably bound up with the conduct of a trial.” Here, the fact that Mr. Bowman was Black and the jury was all White did not rise to that level. Nor did the fact that Mr. Bowman’s girlfriend (and co-defendant before she pleaded guilty) was White. Interestingly, the Court noted that it has the inherent supervisory power to correct a district court’s voir dire (with a presumably less onerous burden for defendants to meet to obtain relief), but because Mr. Bowman only alleged a constitutional violation, that was the only standard it was reviewing. **Takeaway: Our clients’ rights often derive from multiple sources—the Constitution, statutes, rules, etc.. When you object, make sure to object under all of the**

relevant grounds. The remedies and what you need to show to obtain relief may differ.

(3) When Mr. Bowman was conducting his pro-se preemptory strikes, he noticed that the court had provided the government with a list with more information about the prospective jurors than he had. (The opinion does not say, but I suspect the district court was reluctant to give personal juror information to a pro-se defendant alleged to be part of a cartel) He objected, which was overruled. On appeal, he argued that this was per se reversible error. The Fourth Circuit went over the history of court responses to preemptory strike errors, and agreed that prior Supreme Court and Circuit language did indicate that it was per se error. But both Courts have subsequently rejected this approach and any cases saying otherwise are implicitly and explicitly overruled. Mr. Bowman at oral argument acknowledged that he could not show prejudice and needed the per se rule to win. So he lost. The Fourth Circuit did indicate that it was not cool that the district court gave the government this advantage, but, you know, whatever.

JURY TRIALS

***United States v. McCabe*, 103 F.4th 259 (4th Cir. June 3, 2024) (King, J.) (E.D.Va.)**

Robert McCabe was Sheriff of Norfolk, VA from 1994 through 2017. In that capacity, he exercised a lot of control over the city's process of contracting with vendors to provide food and medical care to the inmates in the county and city jails. He used that control to corruptly and improperly help two major contractors continue to win and extend bids to provide those services cover the course of decades. In exchange, he received "substantial benefits" including "free catering of McCabe's personal events, fully-expensed travel, entertainment expenses, cash payments, gift cards, and other valuable benefits."

The feds got wind of this, and "McCabe was convicted of 11 federal offenses, including charges of conspiracy, honest services mail fraud, Hobbs Act extortion, and money laundering. In May 2022, McCabe was sentenced to 144 months in prison, plus supervised release."

He appealed, raising several issues discussed below:

(1) Improper Order of Trials of Co-Defendants: McCabe argued that the district court abused its discretion in forcing him to go to trial before his co-defendant (one of the people bribing him). He claims that the co-defendant would have testified at the trial and provided exculpatory evidence for McCabe. The 4th Circuit acknowledged that it has never addressed a trial-sequence issue before. It noted that some other circuits hold that a defendant has no right to have trials occur in a certain order. The 4th does not go that far. Instead, it finds useful the standard that it applies to address trial-severance motions. There, a defendant must show "(1) a bona fide need for the testimony of his co-

defendant, (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege, (3) the substance of his co-defendant's testimony, and (4) the exculpatory nature and effect of such testimony." Here, McCabe could not make that showing. The tenor of this section shows that while the 4th has not totally closed the door to a defendant proving an abuse of discretion on a trial order claim, I expect that it will never find one in my lifetime.

(2) Admission of Hearsay: McCabe objected to the admission of hearsay statements made by his Undersheriff, Mr. Hughey. Hughey made these statements to other office employees at lunch, etc. The district court admitted them as non hearsay under Rule 801(d)(2)(D) as a statement by a party's agent or employee on a matter within the scope of that relationship. McCabe argued that he did not want or authorize Hughey to make those statements, and that they were "office gossip" and not part of his official duties. The 4th rejected this argument. The question is not whether the employer/principle authorized the statements—it is simply about whether they were about matters within the scope of the employment, and here they were. The same analysis applies to location—he was talking about office matters to other office workers. That they were at a restaurant and not within the office does not take them out of Rule 801(d)(2)(D).

McCabe also raised a Confrontation Clause objection that was rejected because the statements were not testimonial. They were made years before the criminal proceedings against McCabe.

(3) Jury Instructions: McCabe also objected to several bribery/extortion/honest services fraud jury instructions, arguing that they allowed the jury to convict without finding an "express" quid pro quo. The opinion does a pretty in-depth job here, so instead of poorly summarizing it, I would encourage you to look at the opinion if you have a bribery/extortion cases that might go to trial. For our purposes, I also note that the 4th reviewed this challenge on plain error because McCabe did not specifically object to the jury instructions. Even though his pre-trial filings made it clear that he had a problem with this legal theory, he still needed to expressly object to these instructions to avoid plain error review. **WHEN IN DOUBT—OBJECT.**

***United States v. Henderson*, 107 F.4th 287 (4th Cir. July 9, 2024) (Traxler, J.) (E.D.N.C.)**

Police went to Henderson's home to execute a search warrant. Once there, they saw a blue car pull into the front yard. Henderson walked toward the car, but as the officers approached, he "opened his hand and tossed items underneath the vehicle," including a firearm and a plastic bag with small amounts of crack and powder cocaine. The search of the residence uncovered additional drugs and firearms, as well as a digital video recorder with a week's worth of footage from security cameras around the home. The video showed Henderson selling drugs "with an easily accessible handgun placed on the table in front of him" and "Henderson and other men, armed with multiple handguns and an AR-15 style rifle, standing in the front yard of the residence as cars and people

would approach it.” He was convicted at trial on conspiracy, drug, and firearm counts and sentenced to a downward variance sentence of 324 months in prison.

On appeal, the Fourth Circuit affirmed Henderson’s convictions and sentence. As Henderson’s conspiracy conviction (and related firearm conviction), the court held that there was sufficient evidence to support the verdicts. It rejected Henderson’s argument that the evidence was insufficient because it was only on his confession, which he later recanted (his family testified at trial that he was a liar, as well), noting that there was significant additional evidence (largely on video) to corroborate the confession.

CONFRONTATION CLAUSE/RULE 15

***United States v. Smith consolidated with United States v. Alcorn*, ____ F.4th ____ (4th Cir. Sept. 18, 2024) (King, J.) (E.D. Va.)**

During the COVID-19 pandemic, the United States charged Smith and Alcorn with various fraud offenses. They were convicted after a 14-day trial. They jointly challenged their convictions under the Public Trial Clause. Specifically, during the pandemic, the E.D. Va. had procedures wherein the entire “trial courtroom” consisted of the parties, the attorneys, the judge, and the jurors. Due to social distancing, the jurors were seated in the public gallery area of the courtroom. The court then had a “public courtroom” where members of the public could watch the proceedings on closed circuit video. The cameras allowed the public to see most of the proceedings, but they could not observe the jury. This setup, defendants argued, violated their right to a public trial.

The 4th disagreed. First, it noted that the Public Trial Clause first asks courts to determine whether proceedings were fully or partially closed. If not, then there is no violation. The 4th held that these proceedings were not fully closed. It then expressed strong skepticism that this framework even constituted a partial closure. But, assuming without deciding that the court was partially closed, it held that the district court did not err because the EDVA protocol was no more restrictive than the pandemic required. The parties and attorneys got to observe the jury, and there is simply no absolute right for the public to have a view of everything in the courtroom for every possible vantage point.

Mr. Smith also contended that the district court violated the Confrontation Clause by admitting the depositions of three elderly witnesses who, for various medical reasons, were unable to travel across the country to testify.

The 4th disagreed. It noted that the district court complied with Federal Criminal Rule 15, which is designed to balance confrontation rights with practical issues in witnesses appearing at trial. Under that compliance, Mr. Smith had notice of the depositions, and his attorney had the right to full confrontation at the depositions. Also, the Confrontation Clause/Rule 15 does not require the government to make every possible effort to secure witness presence at trial. Instead, it must make reasonable efforts in the context of the

case. Here, reviewing the district court’s factual findings for clear error and decisions for an abuse of discretion, the 4th held that the district court properly complied.

Judge Heytens dissented on both points. First, he contended that, upon being alerted to defendants’ request that the public be able to see the jury, the district court made no findings regarding why such a reconfiguration would be impossible/impractical. It should have, at a minimum, made such findings, and its failure to do so was reversible error. Second, though he is sympathetic to the idea that elderly witnesses should not have to travel across country during the pandemic, the district court did not even try to subpoena them. Without trying *anything* to compel compliance, the district court should not have determined that the witnesses were “unavailable.”

Finally, the 4th Circuit did vacate Mr. Alcorn’s sentence and remand for full resentencing under *Rogers/Singletary*. Most importantly, it reaffirmed that it reviews these claims de novo, rejecting the government’s argument that, under *United States v. Elbaz*, it actually reviews them for plain error. It also held that the district court’s attempted incorporation of a standing order that did not actually exist had no effect, and the appellate court could not look at context to try and figure out what the district court must have meant to do. And, finally, the Court reaffirmed the idea that just because a condition of supervised release appears in the PSR, a district court must still actually impose it to avoid a *Rogers* problem.

APPENDI ERROR

***United States v. Sherifi*, 107 F.4th 309 (4th Cir. July 9, 2024) (Wilkinson, J.) (D.Md.)**

In 2011, Sherifi was convicted on five counts related to terrorism activities, including a plot to attack the US Marine base at Quantico, Virginia. Two of those counts were convictions for possession of firearms in connection with a crime of violence, under 18 U.S.C. §924(c). He was convicted on all five counts and sentenced to a total of 540 months in prison. After the Supreme Court’s decision in *Davis*, however, Sherifi filed a §2255 motion arguing that his two §924(c) convictions were no longer valid. The district court agreed, vacated those counts, and scheduled a full resentencing. The district court eventually imposed a new sentence of 516 months in prison.

On appeal, the court did find *Apprendi* error in the sentence on one count, where the jury did not make a finding of whether the object of the conspiracy was to murder, kidnap, or maim persons, which impacts the statutory maximum. However, under plain error review, Sherifi could not show prejudice (due to valid sentences on other counts) or that his sentence undermined the integrity of the criminal justice system.

Rule 29

***United States v. Watkins*, 111 F.4th 300 (4th Cir. Aug. 2, 2024) (Richardson, J.) (W.D.N.C.)**

“Ziggy” Cloud was a rap producer in Charlotte. “KennyMan” Watkins was a rapper in Atlanta. They were engaged in the music business together. Unfortunately, the government also suspected they were engaged in the interstate drug trafficking business together.

After investigation the government charged Mr. Watkins with conspiracy to PWID a controlled substance. A jury convicted him, the court sentenced him, and he appealed. The Fourth Circuit affirmed his conviction and sentence. The primary issue in this case was explaining what is required to preserve a Rule 29 motion for acquittal.

The evidence at trial was conflicting and circumstantial, so Mr. Watkins moved for a Rule 29 judgment of acquittal for insufficient evidence. Though the Court ended up denying the motion on the merits, it did make a good ruling clarifying what a defendant needs to do to preserve the issue for appellate review. Basically, there are three points at which a defendant can make a Rule 29 motion—Under Rule 29(a) at the close of the government’s case and again at the close of the defendant’s case. And, under Rule 29(c), within 14 days of a guilty verdict.

If a defendant makes a Rule 29(a) motion at the close of the government’s case but does not renew it at the close of his case, then he waives the right to bring it on appeal. Mr. Watkins made a motion at the end of the government’s case, but he did NOT renew it at the close of his case. But he DID make a Rule 29(c) motion after the guilty verdict, so the question was did that motion suffice to preserve the issue. It did. So the Court reviewed it de novo. That said, there is no reason NOT to renew the motion at the close of your case, so you should do that.

On the merits, the 4th had little trouble holding that even though the evidence was circumstantial and conflicting, the deference owed to the jury meant that the verdict had to stand.

FED. R. EVID. 403

***United States v. Banks*, 104 F.4th 496 (4th Cir. June 12, 2024) (Agee, J.) (D. Md.)**

Banks and four codefendants were convicted after a joint trial for multiple offenses related to racketeering as part of the Murdaland Mafia Piru gang. The Fourth Circuit, for the most part, affirmed their convictions and sentences.

Of the main issues raised on appeal, three are worth highlighting. First, this case marks yet another chapter in the Fourth Circuit’s dealings with the corrupt Gun Trace Task Force of the Baltimore police department. In this case, one of those officers was involved in part of the investigation of the defendants, who moved for a new trial once the corruption was uncovered. The court affirmed the denial of the new trial motion, holding that the defendants could not show that any of the officer’s “criminal conduct” was material to their case. That he was corrupt was not enough, on its own, to warrant a new trial.

Second, the court did vacate a felon-in-possession conviction for one defendant, Davis, due to a Rehaif error, as the prior conviction on which the Government relied was one that the state of conviction labelled a misdemeanor and for which Davis’ sentence had been suspended. He therefore met the plain error standard for relief.

Finally, the defendants argued that the district court abused its discretion in admitting various “music videos, lyrics, and social media posts” of the defendants, arguing that they were irrelevant and unduly prejudicial. The court chastised the defendants for not specifically objecting to particular items, instead objecting with a “broad brush,” and proceeded to analyze the issue with similar generality, finding no abuse of discretion on the district court’s part.

FED. R. EVID. 804(B)(6)

***United States v. Elsheikh*, 103 F.4th 1006 (4th Cir. June 7, 2024) (Per curiam) (E.D.Va.)**

Mr. El Shafee Elsheikh was convicted of taking hostages in support of ISIS. It was a very brutal crime, with many hostages (who were generally journalists and aid workers) executed on camera for ISIS propaganda.

On appeal, he raised several evidentiary issues, all of which the 4th Circuit rejected:

First, when he was initially captured on the battlefield, the government put him in biometric processing, in which he was asked his name, place of birth, etc. He lied in response to these questions. The government admitted these lies at trial. He objected to them as un-Mirandized statements. The district court allowed them in under the booking exception to Miranda (which allows police to ask routine booking questions even if you have invoked your Miranda rights). The Fourth did not reach the question of whether Miranda’s booking exception extended to an international battlefield. Instead, it held that any error would be harmless because these statements were a very small part of the government’s case, and they were freestanding—they did not lead to or buttress any other evidence.

Second, he argued that Mirandized statements that he gave to the FBI should be barred because he gave those statements after having given un-Mirandized statements to the

DOD. Generally, if a defendant confesses without Miranda warnings and is then Mirandized and asked to confess again, that first confession can taint the second confession and make it inadmissible. In making this determination, the courts look at several factors including the intent of the officers in doing the two-step process, the similarity of the two confession scenarios (same location? Same officers? Etc.), the closeness in time between the two confessions, etc.

Here, the 4th held that there was a significant difference between the DOD interrogations and the FBI interrogations. The personnel differed (the evidence did not indicate if the room was the same). There was time between the interrogations. And, critically, the FBI agents issuing Miranda warnings expressly told him that his previous statements could not be used against him and that they were “starting anew,” and statements going forward could be used against him. Indeed, there was some evidence that the FBI explicitly used case law to help ensure that it was following the proper procedures. And the government also had a good reason for the two-stage interrogations. The DOD was attempting to collect battlefield intelligence.

Third, he argued that the district court should have suppressed several statements as involuntary because he was being beaten and abused by guards. The 4th rejected this on a pretty straightforward clear error analysis. The district court held a hearing where it heard from lots of witnesses and found as a matter of fact that Mr. Elsheikh was not being beaten or mistreated. That finding, supported by evidence, was not clear error.

Fourth, he argued that the district court erred in allowing in the statements of unavailable witnesses—the executed hostages—under the forfeiture-by-wrongdoing hearsay exception. Under Rule 804(b)(6) of the Federal Rules of Evidence, otherwise inadmissible hearsay may be admitted upon a showing of three things: (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.

Mr. Elsheikh argued that he killed the hostages for political and ideological reasons, but not to render them unavailable as witnesses in a possible future trial. The 4th held that the district court did not abuse its discretion holding otherwise. The purpose to make a declarant unavailable does not need to be the sole or primary purpose motivating the wrongdoing under the rule. It need only be *a* purpose. Here, the record showed that the captors did a lot to hide their identity from the hostages and consistently threatened hostages to stay silent, etc. Thus, the district court did not abuse its discretion in holding that the captors were motivated, in part, by a desire to keep the hostages from testifying.

POSSESSION OF A FIREARM AFTER A CONVICTION FOR A FELONY (18 U.S.C. § 922(g)(1))

***United States v. Canada*, 103 F.4th 257 (4th Cir. June 3, 2024) (Heytens, J.) (D.S.C.)**

Sometimes a good opinion gets in and gets out without doing more than it needs to.

Mr. Canada was convicted of 922(g) and sentenced under ACCA. He raised two arguments on appeal.

First, the 4th declined to be the first circuit court to hold 922(g) facially unconstitutional. The law here is obviously in great flux, so who knows where it will eventually settle.

Second, upon response to a certified question, the South Carolina Supreme Court held that criminal domestic violence can be committed with a mens rea of recklessness. Thus, it is no longer an ACCA predicate. *United States v. Drummond*, 925 F.3d 681, 696 (4th Cir. 2019), which held otherwise, is abrogated as to that holding.

***United States v. Banks*, 104 F.4th 496 (4th Cir. June 12, 2024) (Agee, J.) (D. Md.)**

Banks and four codefendants were convicted after a joint trial for multiple offenses related to racketeering as part of the Murdaland Mafia Piru gang. The Fourth Circuit, for the most part, affirmed their convictions and sentences.

Of the main issues raised on appeal, three are worth highlighting. First, this case marks yet another chapter in the Fourth Circuit’s dealings with the corrupt Gun Trace Task Force of the Baltimore police department. In this case, one of those officers was involved in part of the investigation of the defendants, who moved for a new trial once the corruption was uncovered. The court affirmed the denial of the new trial motion, holding that the defendants could not show that any of the officer’s “criminal conduct” was material to their case. That he was corrupt was not enough, on its own, to warrant a new trial.

Second, the court did vacate a felon-in-possession conviction for one defendant, Davis, due to a Rehaif error, as the prior conviction on which the Government relied was one that the state of conviction labelled a misdemeanor and for which Davis’ sentence had been suspended. He therefore met the plain error standard for relief.

Finally, the defendants argued that the district court abused its discretion in admitting various “music videos, lyrics, and social media posts” of the defendants, arguing that they were irrelevant and unduly prejudicial. The court chastised the defendants for not specifically objecting to particular items, instead objecting with a “broad brush,” and

proceeded to analyze the issue with similar generality, finding no abuse of discretion on the district court's part.

CHILD PORNOGRAPHY (18 U.S.C. § 2251)

***United States v. Sanders*, 107 F.4th 234 (4th Cir. July 9, 2024) (King, J.) (E.D.Va.)**

A jury found Zackary Sanders guilty of 5 counts of CP production, 6 counts of receipt of CP, and 1 count of possessing CP. He was sentenced to 216 months in prison. In his “multifaceted appeal,” Sanders challenged: (1) the denial of his motion to suppress evidence seized from his home pursuant to a search warrant, along with alleged misrepresentations in the search warrant affidavit and denial of a Franks hearing; (2) statements he made to FBI agents; (3) exclusion of evidence at trial about the victims’ purported voluntary participation in the production of the CP, including expert testimony about “BDSM” culture (allegedly standing for bondage, discipline, dominance, submission, sadism, and masochism) and (4) the jury instructions.

The Fourth Circuit affirmed. Here’s what happened:

The FBI learned from a foreign agency that a particular IP address was being used to access and share CP focused on BDSM and other violent porn. There’s lots of technical computer-related details about how the material was accessed, but the important thing to know is that the access was deliberate. The FBI’s investigation into the IP address led them to the residence in McLean, VA where Mr. Sanders lived with his parents. The FBI then applied for a warrant to search the McLean residence. In support of the warrant, the FBI submitted a 36-page affidavit summarizing the investigation, including info received from the foreign agency.

When the FBI executed the warrant, Sanders’ dad let them in. They took Sanders to an office in the home to be interviewed. They told Sanders he was not under arrest and he did not have to talk to them. Sanders agreed to the interview and understood it was being recorded. He did not receive *Miranda* warnings.

During the search, agents found multiple electronic devices in Sanders’ bedroom, including a flash drive containing CP. When confronted with the flash drive, Sanders asked to speak with his mother. The agents stopped and retrieved his mom. After speaking with his mom, the interview resumed. Sanders told the agents he recognized the flash drive and admitted he had transferred CP to the flash drive himself. After about two hours, the FBI left without arresting Sanders.

A forensic exam of Sanders’ devices revealed messages Sanders had sent to six different boys aged 13 to 17 instructing them to send him nude videos and photos of themselves engaging in various sex acts, many of them degrading. The FBI also found multiple CP

videos. Sanders was subsequently indicted on 12 CP counts. He filed multiple motions to suppress, all of which were denied.

At the 7-day trial, the government called nine witnesses, including two of the minor victims, and introduced scores of exhibits. The court excluded evidence of the victims' purported voluntary participation in their conduct with Sanders, as well as expert testimony by a professor prepared to speak about BDSM "culture." Over Sanders' objections, it also instructed the jury that (1) the minor victims' consent was irrelevant to the charged offenses; (2) that the production of visual depictions of sexually explicit conduct had to be a motivating factor for the defendant, but need not be the predominant purpose; and (3) provided a multi-factor test (called the Dost test) for the jury to consider whether the visual depictions included "sexually explicit conduct," defined in relevant part to include "lascivious exhibition" of genitals. It took the jury all of two hours to find Sanders guilty on all 12 counts. He appealed, but no dice.

I. Validity of Search Warrant

The Fourth first rejected Sanders' challenge to the validity of the search warrant, concluding that the affidavit was sufficient and supported by probable cause. The Fourth emphasized that the CP was accessible only by taking multiple affirmative steps on-line—in other words, it was impossible to just "stumble" across this material or not know what you were accessing, and that the affidavit spelled that out.

It also rejected Sanders' contention that the facts in the affidavit were too stale to support PC. Although nine months passed between the time Sanders' IP address accessed the material and the time the search warrant issued (which would definitely be a problem in, say, a drug case), the Fourth has previously held that "the staleness inquiry is unique" in CP cases and that "due to (1) the tendency of individuals who intentionally access to collect child pornography, and (2) the material's electronic nature causing evidence of collection to be recoverable long after it is deleted — search warrants can reasonably be sustained "months, and even years, after the events that gave rise to probable cause."

The Fourth upheld the court's denial of Sanders' request for a Franks hearing, concluding there was no material discrepancy between the affidavit and a report from the foreign agency that first alerted the FBI. Because there was no material discrepancy, there was likewise no merit to Sanders' argument that the court should have allowed him to pursue discovery into the alleged misrepresentation.

II. Statements to FBI agents

Sanders also moved to suppress his statements to the FBI agents. Unfortunately, he filed his motion 112 days past the deadline and failed to provide good cause for the tardy filing. The trial court denied the motion, finding that it would delay trial and that no good cause had been shown. On appeal, Sanders focused on the merits of his substantive

claim and did not argue that the court abused its discretion in finding the motion untimely. “Absent an argument on why and how the court abused its discretion” the Fourth said it was “constrained to conclude that the court did not reversibly err in denying the suppression effort as untimely and without good cause.” So the Fourth did not “officially” reach the merits. But in a footnote, the Fourth said Sanders was not in custody when he made the statements, and that the statements were thus voluntary and admissible.

III. Consent is no Defense to Child Pornography

Sanders also took issue with exclusion of evidence purportedly showing that the minors voluntarily participated in the offense conduct. He argued that to prove the CP offenses, the government was required to prove that the will of the depicted minor was overcome during the production of the pornographic material. He asserted that a child’s “voluntary participation in the production of pornographic material would tend to establish that his will was not overcome.”

The Fourth found no merit to this argument, noting that under prior precedent (as well as decisions in multiple circuits), the government need not prove that the will of the minor child is overcome. Thus, the district court properly excluded as irrelevant evidence of the minors’ voluntary participation. The court likewise properly excluded as irrelevant expert testimony about BDSM culture and relationships (because the point of this testimony was again to show the voluntary nature of the minors’ participation).

IV. Jury Instructions Specific to Child Pornography

Finally, the Fourth rejected Sanders’ arguments about three jury instructions. First, for the reasons already addressed, it said the court properly instructed the jury that a minor’s voluntary participation in pornographic activities was irrelevant. Second, the Fourth said the court did not err in instructing the jury that the prosecution was required to prove that “[t]he production of a visual depiction of sexually explicit conduct” was “a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct.” Sanders argued that the jury should have been instructed that producing child pornography was his “predominant” purpose. The Fourth said that producing child porn must be a “significant” purpose (rather than an incidental one) and that the given instruction correctly stated the law. Third, the Fourth rejected Sanders’ attack on the “lascivious” instruction, which relied on the *Dost* factors. The Fourth acknowledged that “the *Dost* Factors have been subjected to criticism over the years” but pointed out that “nine of our sister courts of appeals have adopted or endorsed them to aid in determining whether a certain visual depiction connotes a lascivious exhibition” while two had rejected them. But the court only instructed the jurors that they could consider the *Dost* factors, not that they had to. As such, the Fourth said:

“The *Dost* Factors may not be necessary or helpful in every child pornography prosecution, but we are satisfied that the trial court did not err in using those Factors in these circumstances. This appeal highlights, however, that trial courts should ensure that a jury (1) is not instructed to rely exclusively on the *Dost* Factors, (2) understands that no single *Dost* Factor is dispositive, and (3) is discouraged from a strict and mathematical application of the *Dost* Factors.”

If you have a child porn case, this may be the most useful part of the Sanders opinion.

MOTION FOR A NEW TRIAL/MOTION FOR ACQUITTAL

***United States v. Banks*, 104 F.4th 496 (4th Cir. June 12, 2024) (Agee, J.) (D. Md.)**

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ACCA

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USE OF ACQUITTED CONDUCT UNDER THE GUIDELINES

***United States v. Freitekh*, 114 F.4th 292 (4th Cir. Sept. 3, 2024) (Thacker, J.) (W.D.N.C.)**

Izzat Freitakh owned a restaurant in Charlotte along with several related businesses. His son Tarik helped him. In 2020, the men obtained four PPP loans for the businesses totaling \$1.75 million. Izzat used this money, among other things, to write \$30K checks to various family members. An investigation eventually revealed that the loan applications were fraudulent, obtained through fabricated tax and payroll documents.

In December 2020, Izzat and Tarik were indicted for bank fraud and conspiracy to commit wire fraud. In August 2021, a superseding indictment was handed down adding more charges; mainly money laundering, but also a fabrication of evidence charge against Tarik. The jury found Izzat guilty of money laundering and making false statements but not the bank fraud. They found Tarik guilty on most counts except for one money laundering count.

At sentencing, both men objected to the Guideline calculations, particularly the loss amount. A central objection turned on “intended loss” (the full \$1.75 million) versus actual loss (less than half a million, because the government was able to recover much of the funds). The court overruled these objections and sentenced Izzat to 48 months, while Tarik got 87 months.

The meatiest part of the Freitakh opinion turns on the Guidelines issues. The Fourth affirmed that the sentencing court may rely on acquitted conduct to determine the Guideline range, even as the Fourth acknowledged that “the Supreme Court has recently called this practice into question, see *McClinton v. United States*, 600 U.S. -- , 143 S. Ct. 2400, 2401 (2023) (noting that the practice of relying on acquitted conduct “raises important questions that go to the . . . perceived fairness of the criminal justice system.”). The Fourth also acknowledged that the Sentencing Commission has voted in favor of limiting the use of acquitted conduct.

As for the challenge to the “intended loss”, the Fourth cited its recent decision in *United States v. Boler*, which held that “loss” as written in the Guidelines is genuinely ambiguous and deserving of deference. Again, the Fourth noted that the Sentencing Commission has now defined loss, which will resolve the issue going forward.

Judge Quattlebaum wrote a short concurrence, citing his dissent in *Boler* as to the meaning of “loss” but conceding that *Boler* is binding.

LOSS AMOUNT (U.S.S.G. § 2B1.1)

***United States v. Boler*, 115 F.4th 316 (4th Cir. Aug. 23, 2024) (Thacker, J.) (D.S.C.)**

Ms. Boler was convicted of 1 count of making a false statement on a PPP loan application and 6 counts of presenting false claims against the US by submitting false tax returns. Although the IRS only paid 4 of the 6 tax returns, the district court relied on commentary to USSG 2B1.1, which defines “loss” as the “greater of actual loss or intended loss.” The district court therefore included the amount of all 6 tax returns in the loss calculation, which triggered a 10-level sentencing enhancement.

The majority held the term “loss” in USSG 2B1.1 was “genuinely ambiguous” under *Kisor v. Wilkie*. The majority relied on the relevant conduct guideline, USSG 1B1.3, which directs sentencing courts to consider not only the harm caused by a defendant but also “all harm that was the object of such acts and omissions.” The majority distinguished *United States v. Campbell*, where the guidelines defined “controlled substance offense” to exclude attempt crimes. The majority said that unlike in *Campbell*, “section 2B1.1 does not define ‘loss’ and does not suggest that intended loss should be excluded from its definition.” Having found the guideline “genuinely ambiguous,” the Fourth Circuit then held the commentary’s definition of loss falls within the “zone of ambiguity” such that it should be given deference. The majority ducked the recent decision eliminating Chevron deference, noting, “Since *Loper Bright* dealt specifically with ambiguities in statutory directives to agencies and did not address the issue of agency interpretations of their own regulations, we will apply the Supreme Court’s recent guidance in *Kisor* to address the issue before us today.”

Judge Quattlebaum's dissent begins with a quote that we have all thought at one point or another: "Sometimes lawyers and judges overcomplicate things." Judge Quattlebaum goes on to find that the term "loss" is not ambiguous and means actual loss, not intended loss. Judge Quattlebaum supported his dissent with the ordinary meaning of the term loss, dictionary definitions of the term loss, and (somewhat controversially) corpus linguistics.

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IMPOSITION OF A SENTENCE

***United States v. Melvin*, 105 F.4th 620 (4th Cir. June 26, 2024) (Motz, J.) (E.D.N.C.)**

The Fourth Circuit adopted the Fifth, Ninth, and Tenth Circuits’ holdings that a sentence is not finally “imposed” until (1) it has been unequivocally stated in open court and (2) there has been a formal break in the proceedings from which to logically and reasonably conclude that sentencing had finished.

The Probation Office moved to revoke Mr. Melvin’s supervised release. Mr. Melvin had severe mental health issues. The government, the probation officer, and the defense all agreed the district court should issue a time-served sentence and terminate supervision; Mr. Melvin was already dialed into mental health services. At the hearing, the district court accepted that resolution and announced a time-served sentence followed by termination of supervision.

Unfortunately for everyone, Mr. Melvin then asked to speak and engaged in a five-minute rant against his probation officer. As soon as he was done, the district court withdrew the previous rulings, announced Mr. Melvin was dangerous, and remanded him into custody until the afternoon. When the hearing resumed, the district court initially wanted to lock Mr. Melvin up. But again, all parties agreed he should receive mental health treatment instead. The district court agreed to maintain Mr. Melvin on supervised release but added a mental health condition and ordered him committed to a psychiatric hospital. The court later entered the written judgment and Mr. Melvin appealed.

He argued that after the district court announced the time-served sentence and termination of supervision, it lacked authority to modify that sentence. She pointed out that under Rule 35, the only provision authorizing modification of a sentence, “sentencing” means the “oral announcement of the sentence.” Rule 35(c).

The Fourth Circuit recognized that under 18 U.S.C. § 3582(c), district courts cannot modify a sentence “once it has been imposed.” The issue then became when a sentence is considered “imposed.” Unfortunately, the Fourth Circuit adopted the “pragmatic rule” of the Fifth, Ninth, and Tenth Circuits that “Section 3582(c) does not ‘deprive the district court of [authority] to alter a sentence during the course of the same hearing.’” The Court held that a sentence announced in open court is not “imposed” until there has been a “formal break in the proceedings from which to logically and reasonably conclude that sentencing [has] finished.” The Court said Rule 35 did not touch on when a sentence is “imposed” for Section 3582 purposes. Here, there was no break in proceedings between the court’s initial announcement of the sentence and its retraction of that sentence. The district court therefore “did not violate Section 3582 by retracting its initial agreement to a time-served sentence.”

If there is an upside to this ruling, it may just be that under the right circumstances and in front of the right judge, defense counsel can continue advocating for a lower sentence (even if one has already been announced) right up until the gavel sounds.

CRIMINAL FORFEITURE

***United States v. Sanders*, 107 F.4th 223 (4th Cir. July 9, 2024) (Niemeyer, J.) (E.D.Va.)**

Mr. Sanders was convicted of child pornography offenses. The 4th Circuit affirmed the district court's order directing the forfeiture of nine electronic devices (3 laptops, 2 iPads, 2 iPhones, and 2 thumb drives) on which Sanders stored CP, even though the devices also contained plenty of non-contraband items, such as his personal photographs, personal business records, etc. The district court also refused Sanders' request to permit his forensic expert to segregate and make digital copies of non-contraband items, concluding that "nowhere does [18 U.S.C. § 2253(a), the forfeiture statute at issue] provide that only some portion of the property containing child pornography should be subject to forfeiture. Nor does the statute provide that non-contraband material on the devices should be separated from contraband materials on the devices and returned to a defendant."

In a nutshell, the Fourth Circuit agreed with the district court. The forfeiture statute, § 2253(a), provides for the forfeiture of "any property used to commit" CP crimes. It was uncontroverted that Sanders used all nine devices to commit the CP crimes; they were thus subject to forfeiture in their entirety. The Fourth rejected as "textually unsupportable" Sanders' argument that only the contraband computer files themselves were subject to forfeiture. The Fourth likewise rejected his argument, made for the first time on appeal, that the forfeiture of non-contraband items violated the Eighth Amendment's Excessive Fines Clause.

ROGERS/SINGLETARY ERROR

***United States v. Mathis*, 103 F.4th 193 (4th Cir. May 29, 2024) (Quattlebaum, J.) (W.D.Va.)**

The district court resentenced Mr. Mathis after one of his convictions was vacated. The district court imposed a supervised release condition that he be subjected to searches and seizures. The written judgement expanded this condition by adding the requirement that he warn other occupants that the premises may be subject to search. This expansion violated the rule from *United States v. Rogers* and *United States v. Singletary* and mandated full resentencing.

The tenor of this opinion shows that several members of the Court think that full resentencing is not the proper remedy for a *Rogers/Singletary* violation. But unless and until the en banc 4th Circuit or the Supreme Court says otherwise, panels of the Court are also aware that they are bound to impose that remedy.

***United States v. Smith consolidated with United States v. Alcorn*, ____ F.4th ____ (4th Cir. Sept. 18, 2024) (King, J.) (E.D. Va.)**

During the COVID-19 pandemic, the United States charged Smith and Alcorn with various fraud offenses. They were convicted after a 14-day trial. They jointly challenged their convictions under the Public Trial Clause. Specifically, during the pandemic, the E.D. Va. had procedures wherein the entire “trial courtroom” consisted of the parties, the attorneys, the judge, and the jurors. Due to social distancing, the jurors were seated in the public gallery area of the courtroom. The court then had a “public courtroom” where members of the public could watch the proceedings on closed circuit video. The cameras allowed the public to see most of the proceedings, but they could not observe the jury. This setup, defendants argued, violated their right to a public trial.

The 4th disagreed. First, it noted that the Public Trial Clause first asks courts to determine whether proceedings were fully or partially closed. If not, then there is no violation. The 4th held that these proceedings were not fully closed. It then expressed strong skepticism that this framework even constituted a partial closure. But, assuming without deciding that the court was partially closed, it held that the district court did not err because the EDVA protocol was no more restrictive than the pandemic required. The parties and attorneys got to observe the jury, and there is simply no absolute right for the public to have a view of everything in the courtroom for every possible vantage point.

Mr. Smith also contended that the district court violated the Confrontation Clause by admitting the depositions of three elderly witnesses who, for various medical reasons, were unable to travel across the country to testify.

The 4th disagreed. It noted that the district court complied with Federal Criminal Rule 15, which is designed to balance confrontation rights with practical issues in witnesses appearing at trial. Under that compliance, Mr. Smith had notice of the depositions, and his attorney had the right to full confrontation at the depositions. Also, the Confrontation Clause/Rule 15 does not require the government to make every possible effort to secure witness presence at trial. Instead, it must make reasonable efforts in the context of the case. Here, reviewing the district court’s factual findings for clear error and decisions for an abuse of discretion, the 4th held that the district court properly complied.

Judge Heytens dissented on both points. First, he contended that, upon being alerted to defendants’ request that the public be able to see the jury, the district court made no findings regarding why such a reconfiguration would be impossible/impractical. It should have, at a minimum, made such findings, and its failure to do so was reversible error. Second, though he is sympathetic to the idea that elderly witnesses should not have to

travel across country during the pandemic, the district court did not even try to subpoena them. Without trying *anything* to compel compliance, the district court should not have determined that the witnesses were “unavailable.”

Finally, the 4th Circuit did vacate Mr. Alcorn’s sentence and remand for full resentencing under *Rogers/Singletary*. Most importantly, it reaffirmed that it reviews these claims de novo, rejecting the government’s argument that, under *United States v. Elbaz*, it actually reviews them for plain error. It also held that the district court’s attempted incorporation of a standing order that did not actually exist had no effect, and the appellate court could not look at context to try and figure out what the district court must have meant to do. And, finally, the Court reaffirmed the idea that just because a condition of supervised release appears in the PSR, a district court must still actually impose it to avoid a *Rogers* problem.

SUPERVISED RELEASE CONDITIONS

***United States v. Ellis*, 112 F.4th 240 (4th Cir. Aug. 14, 2024) (Quattlebaum, J) (W.D.N.C.)**

In the latest installment of the Robert Ellis supervised release saga, the Fourth Circuit issued a published decision affirming the District Court’s imposition of two supervised release conditions: First, a condition requiring a probation officer’s approval before using internet-capable devices for non-employment purposes and second, a condition requiring six months of location monitoring. Judge Gregory dissented.

On appeal, Ellis argued that the first condition (a) improperly delegated judicial power to a probation officer, (b) functioned as a complete internet ban (struck down in the Fourth Circuit’s prior Ellis opinion), and deprived him of more liberty than is reasonably necessary. The panel majority (Judge Quattlebaum, joined by Judge Floyd) rejected each argument, explaining that the court ordered a broad principle and the probation officer was allowed only to fill in the “details” of which devices are approved. It also did not constitute a complete internet ban because Ellis was permitted to use any devices needed for employment and the condition contemplates non-employment use as well, so long as a probation officer reviews and approves the device. Finally, the majority concluded the condition was not overbroad because, even though the record was unclear whether Ellis had ever used the internet in his original child pornography convictions and there was no evidence presented that he had ever used the internet to engage in illegal conduct, his repeated supervision violations regarding internet use constituted “particular and identifiable characteristics” suggesting that “such a restriction was warranted.” Judge Gregory dissented, arguing that an approval internet condition is meaningfully the same as a complete internet ban, which was not justified on this record (as reflected in Ellis’s prior appeal).

With respect to the second condition, Ellis argued that it (a) lacked a reasonable relationship to the sentencing factors and (b) deprived him of more liberty than is

reasonably necessary. The panel majority held the condition related to his underlying offense of failing to register as a sex offender and also to enforcing other conditions of supervised release (obtain approval before changing residences, remain in the judicial district), as well as to his history and characteristics because he has repeatedly left the judicial district without permission. It also allows probation officers to detect whether he failed to appear for treatment or left the jurisdiction, relating to deterrence and protecting the public. And it relates to rehabilitation by informing the probation officer if Ellis failed to report to treatment. Finally, the majority held that the condition was not overbroad because it was imposed after Ellis had repeatedly left the district. The majority emphasized the role of the standard of review—abuse of discretion—in its decision. Judge Gregory dissented here too, arguing the condition bears only a “tenuous relationship” to the relevant statutory factors. He noted that location monitoring is a severe restriction on liberty and recommended by the Commission only where home confinement or curfew is imposed. What is more, Ellis fully complied with location conditions during his most recent term of supervised release. Compliance with SORNA may adequately be addressed by requirements that Ellis report to his probation officer to get approval of his living arrangements and inform the jurisdiction of any changes in residence.

***United States v. Olson*, 114 F.4th 269 (4th Cir. Aug. 20, 2024) (Rushing, J.) (W.D.N.C.)**

Mr. Olson, a former fifth-grade teacher, pleaded guilty to CP offenses and received a 120-month sentence and 30 years of supervised release on numerous special conditions. On appeal, he challenged six of those conditions as substantively unreasonable. The Fourth Circuit affirmed.

Mr. Olson challenged the condition prohibiting interaction with anyone engaged in criminal activity or with any felons except by permission. The Court held this condition was related to his offenses because he downloaded the CP with a peer-to-peer program, a communal network over which he and other criminals could share CP. Despite lacking an explicit mens rea requirement, the Court further held the condition was not broader than necessary. The Court cited *United States v. Comer*, 5 F.4th 535 (4th Cir. 2021), for the propositions that “probationers generally may not be punished for inadvertent violations” and “we do not hesitate to read an implied knowledge requirement into the condition.”

Mr. Olson also challenged conditions prohibiting excessive use of alcohol and requiring substance abuse testing and treatment if directed. Even though there was no evidence alcohol played a role in his offenses, the Court held these conditions were related to his offenses and characteristics because his own expert opined that he had the protective factor of sobriety, which lowered his risk of recidivism. The Court held that his own expert report “provides a basis for believing Olson needs to be restrained from using alcohol.” The Court further held the “no excessive use of alcohol” condition was not vague.

The Court also rejected Mr. Olson’s challenges to the search condition, a condition requiring that he not loiter near any place primarily used by children without approval, and that he not possess any children’s items without approval.

Although these particular challenges were not successful, this case is a reminder that supervised-release conditions can be a substantial imposition on our clients’ liberty. We should be challenging proffered conditions whenever possible

APPEAL WAIVERS

***United States v. Ashford*, 103 F.4th 1052 (4th Cir. June 12, 2024) (Agee, J.) (D.S.C.)**

Marcus Ashford pled guilty to drug counts under a plea agreement with an appellate waiver. He nonetheless appealed, and his appellate attorney filed an *Anders* brief, raising only an IAC claim. The government did not file a response brief and instead filed a letter notifying the Court it did not intend to file a brief unless requested by the Court (which is pretty standard practice in an *Anders* appeal). The letter did not mention the appellate waiver (which did not apply to IAC claims). Ashford himself filed a pro se brief challenging certain sentencing enhancements. The government did not respond to the pro se brief.

After the Fourth Circuit conducted its *Anders* review, it ordered the parties to brief whether the district court erred in failing to give Ashford an opportunity to allocute before the sentence was imposed. The Fourth Circuit then issued a supplemental briefing schedule. In its supplemental brief, the government for the first time raised the appeal waiver.

Ashford argued the government waived its right to raise the appeal waiver, but the Fourth Circuit held the “Government raised the appellate waiver when it was required to do so—in its supplemental response brief.” It said the government “was not required to raise the waiver in its original letter in response to Ashford’s *Anders* brief, as the dissent asserts, because we have consistently told the Government that it need not respond to *Anders* briefing unless we order otherwise.” The Fourth said the government had no reason to raise the appellate waiver earlier, because the only issue raised in the *Anders* brief was an IAC claim, which was not an issue covered by the waiver. And it said the government had no duty to respond to a pro se brief unless ordered to do so, and since the Fourth had not ordered the government to respond to the pro se brief, it was not required to do so.

In accordance with *Anders*, the Fourth reviewed the case and found no meritorious grounds for appeal outside the scope of the valid appeal waiver. So the Fourth dismissed the case.

Judge King dissented, asserting that under the Fourth Circuit’s appellate rules, the government had waived its right to raise the appeal waiver.

COMPASSIONATE RELEASE

***United States v. Moody*, 115 F.4th 304 (4th Cir. Aug. 21, 2024) (Diaz, J.) (W.D.N.C.)**

In 2002, Mr. Moody was convicted of conspiracy to manufacture and distribute methamphetamine, was determined to be a career offender with a guidelines range of 360-life and received the pre-Booker mandatory minimum of 360 months. Twenty years later, Mr. Booker filed a motion for compassionate release, which the district court denied. Upon a first appeal, the Fourth Circuit reversed and remanded. But upon remand, the district court again denied the motion.

On this appeal, Mr. Moody argued the district court failed to consider his argument that his guidelines range would be up to 150 months shorter than when he was sentenced. But the Fourth Circuit held the district court did not abuse its discretion because it considered that sentencing disparity along with Mr. Moody's criminal history, risk of recidivism, and offense conduct and determined he "would likely receive a sentence today 'not too dissimilar' to the one imposed."

Mr. Moody also argued the district court erred by failing to consider the two-point reduction from Amendment 782 when considering the disparity. While the Fourth Circuit held the district court was incorrect to disregard that reduction in assessing the disparity, the Fourth Circuit recognized that the "district court alternatively considered a 150-month disparity, which was based on a guidelines range that included the Amendment's reduction." The Fourth Circuit therefore held the district court did not abuse its discretion.

Finally, Mr. Moody argued the district court erred by failing to acknowledge that his NC assault convictions no longer qualified as career-offender predicates. But the Fourth Circuit held the district court correctly recognized that Mr. Moody's instant conspiracy conviction no longer qualified as a career-offender predicate and that he would no longer qualify as a career offender. However, the district court "provided a reasoned basis for concluding that the disparity 'does not rise to the level of being an extraordinary and compelling reason for a sentence reduction.'"

The Fourth Circuit therefore held the district court did not abuse its discretion in finding that Mr. Moody failed to establish extraordinary and compelling reasons for release. However, even if it did, the Court held the district court appropriately determined the Section 3553(a) factors weighed against compassionate release. Specifically, the district court and the Fourth Circuit emphasized the seriousness of his offense and his 30-year criminal history, which included assault on a law enforcement officer. Thus, even though Mr. Moody was now 69 years old, had served almost 24 years in prison, had only one

infraction in that time, had completed 30 programs, and had gotten his GED, the district court did not abuse its discretion by denying a sentence reduction. Ouch.

CORAM NOBIS

***United States v. Sutherland*, 103 F.4th 200 (4th Cir. May 31, 2024) (Agee, J.) (W.D.N.C.)**

A jury convicted Mr. Sutherland of three counts of filing false tax returns and one count of obstructing an official proceeding. He served his time and served the supervised release term for the tax return convictions. When he was still serving a supervised release term for the objection conviction, he filed a Section 2255 motion alleging ineffective assistance of counsel on the obstruction conviction and a Coram Nobis petition on the other counts. The district court denied all petitions without a hearing. Mr. Sutherland appealed.

The 4th affirmed. Mr. Sutherland alleged in the 2255 petition that his attorney was ineffective for not calling witnesses that would have helped the jury find him innocent of the false return counts. The 4th held that even if true, the lack that additional evidence did not prejudice Mr. Sutherland regarding the *obstruction* count. Mr. Sutherland argued that if he hadn't been guilty of the crime then he wouldn't have had anything to cover up or obstruct. The 4th did not let him back door his argument in that manner.

The 4th also affirmed the denial of the Coram Nobis writ. Coram Nobis is an extraordinary remedy. To obtain relief, a petitioner must show, among other things, that valid reasons exist for not attacking the conviction earlier. Here, Mr. Sutherland could not show—or even attempted to show—why he could not have just filed a timely Section 2255 motion to attack the fraud counts.