



SUPREME COURT AND FOURTH CIRCUIT CASE UPDATE

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SUPREME COURT DOCKET 2023

Pulsifer v. US, No. 22-340 (argued 10/02/23)-
whether 18 USC 3553(f)(1) safety valve requires
only one or all of these: no more than 4 criminal
history points, excluding 1-point offenses; a prior 3-
point offense; **and** a prior 2-point violent offense.
Held: “and” means “or” and safety valve relief is
available only when defendant does not have all 3

SUPREME COURT DOCKET 2023

- *McIntosh v. United States*, No. 22-7386: Whether a district court may enter a criminal forfeiture order outside the time limitations set forth in Rule 32.2. Court held that failure to issue preliminary forfeiture order did not preclude forfeiture at sentencing under harmless error analysis on appeal.

SUPREME COURT DOCKET 2023

- *US v. Rahimi*, No. 22-915 (argued 11/07/23) – issue: whether 18 U.S.C. 922(g)(8) – possession of firearm/ammo while under domestic protective order – is unconstitutional as held by 5th Circuit.
- *US v. Range*, No. 23-374 (cert pet. pending) – related to *Rahimi*, SG petitioned Court to hear en banc 3rd Circuit case that held 18 U.S.C. 922(g)(1) is unconstitutional. No decision on petition yet.

SUPREME COURT DOCKET 2023

Brown/Jackson v. US, No. 22-6389 (argued 11/27/23)- for ACCA drug predicates, when challenging overbreadth of drug type, which drug schedule should be consulted – the one in effect at the time of sentencing or one from some previous time (time of state conviction used as predicate)?

SUPREME COURT DOCKET 2023

Erlinger v. US, No. 23-370 (argued 03/27/24)

- Does Constitution require jury trial and proof beyond a reasonable doubt that ACCA predicates occurred on occasions different from one another before imposing enhanced sentence?
- Also note *Rico Brown v. US* – petition filed, but no decision on petition yet (issue: must occasions be pled in indictment/ found by jury in light of *Wooden*)

SUPREME COURT DOCKET 2023

- *Garland v. Cargill*, 22-976 (argued 02/28/24)– whether bump stock is a machine gun as defined in 26 U.S.C. 5845(b)
- *Diaz v. US*, No. 23-24 (argued 03/19/24)– Whether FRE 704(b) permits a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters to prove element of knowledge.

SUPREME COURT DOCKET 2023

Smith v. AZ, No. 22-899 (argued Jan. 10, 2024)-
State offered substitute expert testimony who
relayed testimonial statements of forensic analyst.
Raises confrontation clause issue.

Fourth Circuit Cases (4th Amendment)

- *United States v. Critchfield*, 81 F.4th 390 (4th Cir. 2023) – conviction vacated based on lack of reasonable suspicion to stop man when facts known were that man was walking in mixed use neighborhood and had something heavy in sweatshirt pocket and walked evasively when neighbor (not identifiable as law enforcement) was watching him
- *United States v. Treisman*, 71 F.4th 225 (4th Cir. 2023) – denial of suppression motion affirmed under community caretaking functions
- *United States v. Howell*, 71 F.4th 195 (4th Cir. 2023) – affirmed car stop based on CI tip

Fourth Circuit Cases (4th Amendment)

- *United States v. Davis*, 94 F.4th 310 (4th Cir. 2024) – Court upheld denial of seizure of cell phone during execution of search warrant as being in plain view with the incriminating nature being immediately apparent. The Court did not approve a blanket rule, but said “The government's seizure of Davis's phone was only justified because officers found the phone together with substantial evidence of drug trafficking—a crime that inherently involves coordination between multiple individuals.”
- *United States v. Zelaya-Veliz*, 94 F.4th 321 (4th Cir. 2024) – challenge to warrant accessing Facebook accounts. Denial of motion to suppress affirmed, but panel noted defendants had reasonable expectation of privacy given the amount of personal information revealed

Fourth Circuit Cases (4th Amendment)

- *United States v. Smart*, 91 F.4th 214 (4th Cir. 2024) – Court affirmed denial of motion to suppress. Officer had reasonable suspicion to delay for dog to arrive b/c of gas can in passenger seat, defendant's extreme nervousness and inconsistent travel itinerary. Judge Wynn dissented, because majority gave too much credence to officer's subjective hunches.
- *United States v. Perry*, 92 F.4th 500 (4th Cir. 2024) – Court affirmed warrantless search of defendant's phone, when his girlfriend consented. Girlfriend had possessed the phone while defendant was in jail, had passcode and used the phone for personal matters.

Fourth Circuit Cases (Violent Predicates)

- *United States v. Redd*, 85 F.4th 153 (4th Cir. 2023) - Maryland first-degree assault is not a “violent felony” under ACCA, so district court's denial of § 2255 motion reversed
- *United States v. Ogle*, 82 F.4th 272 (4th Cir. 2023) – held Tennessee aggravated assault statute was divisible and was an ACCA predicate – even the most innocent conduct because it required threatened use of force

Fourth Circuit Cases (VICAR)

- *United States v. Thomas*, 87 F.4th 267 (4th Cir. 2023) - VICAR assault with a dangerous weapon remains a valid crime-of-violence predicate for 924(c)—no look-through to state offense required.
- *United States v. Ortiz-Orellana*, 90 F.4th 689 (4th Cir. Jan. 10, 2024)- Defendant challenged § 924(c) conviction based on VICAR murder involving Maryland murder. Court held Maryland murder was divisible, and look at defendant’s “deliberate, premeditated, and willful killing”, holding it was a crime of violence.

Fourth Circuit Cases (VICAR)

- *United States v. Kinard*, 93 F.4th 213 (4th Cir. 2024) – VICAR assault with a dangerous weapon predicated on North Carolina assault with a deadly weapon is a valid crime-of-violence predicate for 924(c) (relying on *Thomas*) (petition for rehearing en banc denied 4/19/24).
- *United States v. Lassiter*, 96 F.4th 629 (4th Cir. 2024) – VICAR attempted murder predicated on Virginia attempted murder is a valid crime of violence predicate for 924(c) (look-through).
- *United States v. Tipton*, 95 F.4th 831 (4th Cir. 2024) – VICAR murder is categorically violent (relying on *Thomas*).
- *United States v. Hunt*, 2024 WL 1626301 (4th Cir. 2024) – VICAR attempted murder & assault with a deadly weapon predicated on Virginia attempted murder and Virginia unlawful wounding, respectively, are categorically violent (look-through).

Fourth Circuit Cases (Guidelines)

- *United States v. Pettus*, 90 F.4th 282 (4th Cir. 2024) – District court failed to adequately explain its ruling overruling defendant’s objection to obstruction of justice enhancement.
- *United States v. Gross*, 90 F.4th 715 (4th Cir. 2024) – Clear error—not de novo review—applies for argument against serious bodily injury enhancement.
- *United States v. Evans*, 90 F.4th 257 (4th Cir. 2024) – vacating sentence because district court did not use proper analysis for relevant conduct per U.S.S.G. § 1B1.3, but only analyzed under the whole conspiracy (Pinkerton) liability, committing procedural error.

Fourth Circuit Cases (Procedure)

- *United States v. King*, 91 F.4th 756 (4th Cir. 2024) – District courts must advise defendants of consequences of supervised release revocation during Rule 11 colloquy.
- *United States v. Hart*, 91 F.4th 732 (4th Cir. 2024) – Plea negotiations, alone, are not a sufficient basis for a continuance under the Speedy Trial Act.
- *United States v. Castellon*, 92 F.4th 540 (4th Cir. 2024) – Likely permissible for a defendant to voluntarily waive the right to be present during sentencing.

Fourth Circuit Cases

- United States v. Carter, 87 F.4th 217 (4th Cir. 2023) – gave high end of GL range because would not name co-conspirator. On appeal, claimed violated 5th Amendment self-incrimination right, which Fourth Circuit rejected, largely because Carter did not invoke 5th Amendment right at sentencing (and Court seemed to do an analysis that indicated any information could not have been used to incriminate him because he received federal immunity and related state charges had been dismissed).
- United States v. Amin, 85 F.4th 727 (4th Cir. 2023) – reiterates SR conditions must be challenged originally or on direct appeal, not at later revocation proceedings (except as applied). The general conditions involved following probation's instructions, not associating with felons; computer monitoring. Probation told Amin he could not use language other than English without permission, view terrorist materials or associate with extremists. District court declined to formalize this as conditions. Fourth Circuit held SR conditions were appropriate.

Fourth Circuit Cases

- *United States v. Brown*, 78 F.4th 122 (4th Cir. 2023) – denial of compassionate release appeal. District court repeatedly failed to address the stacked 924(c) sentences, which Fourth Circuit held was “extraordinary and compelling reason” to grant motion. Based on the 30-year MM 924(c) sentences, the Fourth Circuit held “We therefore reverse and remand with instructions to rectify that disparity and reduce Brown's prison sentence by twenty years.”

Fourth Circuit Cases (Sex offenses)

- United States v. Skinner, 70 F.4th 219 (4th Cir. 2023) – New Zealand defendant challenged extraterritorial application of 18 USC §2251(a). Court held it applied, not on the statute's face, but the focus of statute is CP production, so prosecution was proper. No due process violation because of 15-year MM even though no requirement defendant knew age of victim.
- United States v. Ross, 72 F.4th 40, 48 (4th Cir. 2023) – affirmed even though witness could not originally identify defendant in courtroom, court held it was not structural error or plain error because of the overly suggestive identification procedure. Also held sentence did not violate Eighth Amendment when defendant received 660-month sentence (downward variance from 2,040-month GL range) after jury convicted for 5 counts of child porn production and 1 count possession of CP

Fourth Circuit Cases (Waiver)

- *United States v. Singletary*, 75 F.4th 416 (4th Cir. 2023) – appeal that sentence on remand 6 months higher and to run consecutively to subsequently-imposed state sentence was vindictive punishment for his initial appeal. Court held outside appeal waiver, but not vindictive because court gave sufficient reasons.
- *United States v. Sturtz*, 70 F.4th 740 (4th Cir. 2023) – dismissed based on appeal waiver related to whether prior state conviction was predicate triggering 120-month MM (child porn case) was not timely.
- *United States v. Toebe*, 85 F.4th 190, 192 (4th Cir. 2023) – dismissed based on waiver. Alleged due process violation that 262-month sentence was so far above what was contemplated, waiver should be disregarded (Selling Navy secrets to foreign country)
- *United States v. Brantley*, 87 F.4th 262 (4th Cir. 2023) – untimely appeal dismissed. Held *Rogers* issue not outside Rule 4(b) timeliness rule (and even though district court failed to inform defendant he could appeal and defendant claimed attorney did not send him appeal paperwork).