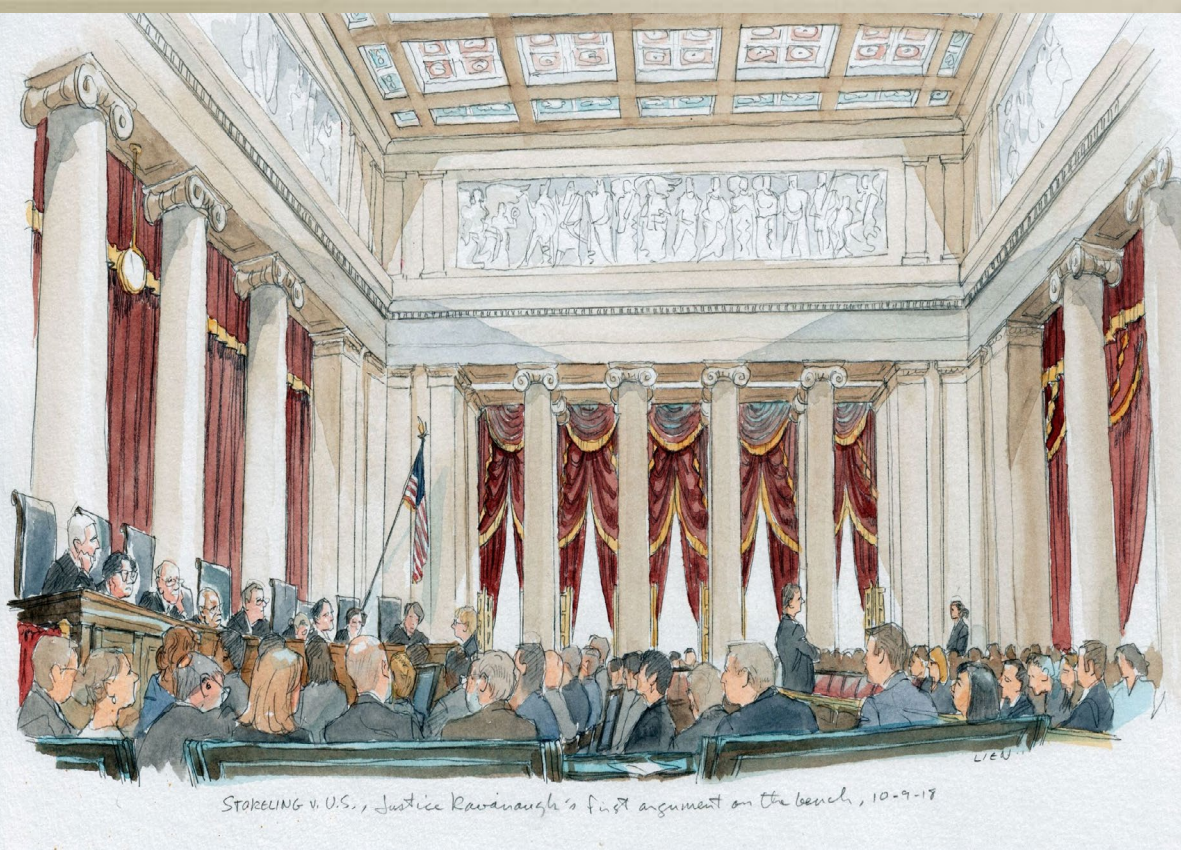




SUPREME COURT AND FOURTH CIRCUIT UPDATE:

KEY CASES THAT WILL AFFECT YOUR PRACTICE

Eric Brignac, Chief Appellate Attorney, EDNC
Jackie Tarlton, AFPD, EDNC

WHAT WE'LL COVER

- | | |
|---|--|
| <ul style="list-style-type: none">• The <i>Erlinger</i> ACCA Sea Change• <i>Rahimi</i> and the Second Amendment• Detention Hearings• Double Jeopardy | <ul style="list-style-type: none">• Sentencing Issues• Expert Opinions/Evidentiary Issues• Fourth Amendment Update• Other Supreme Court Cases of Interest |
|---|--|

ERLINGER v. UNITED STATES (June 21, 2024)

- ACCA: requires 3 qualifying convictions, for offenses that were “committed on occasions different from one another”
 - Bottom Line: The Fifth and Sixth Amendments require the ACCA’s 15-year minimum to be alleged in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt.
 - Sea Change: Every circuit had rejected this argument for 20+ years
-

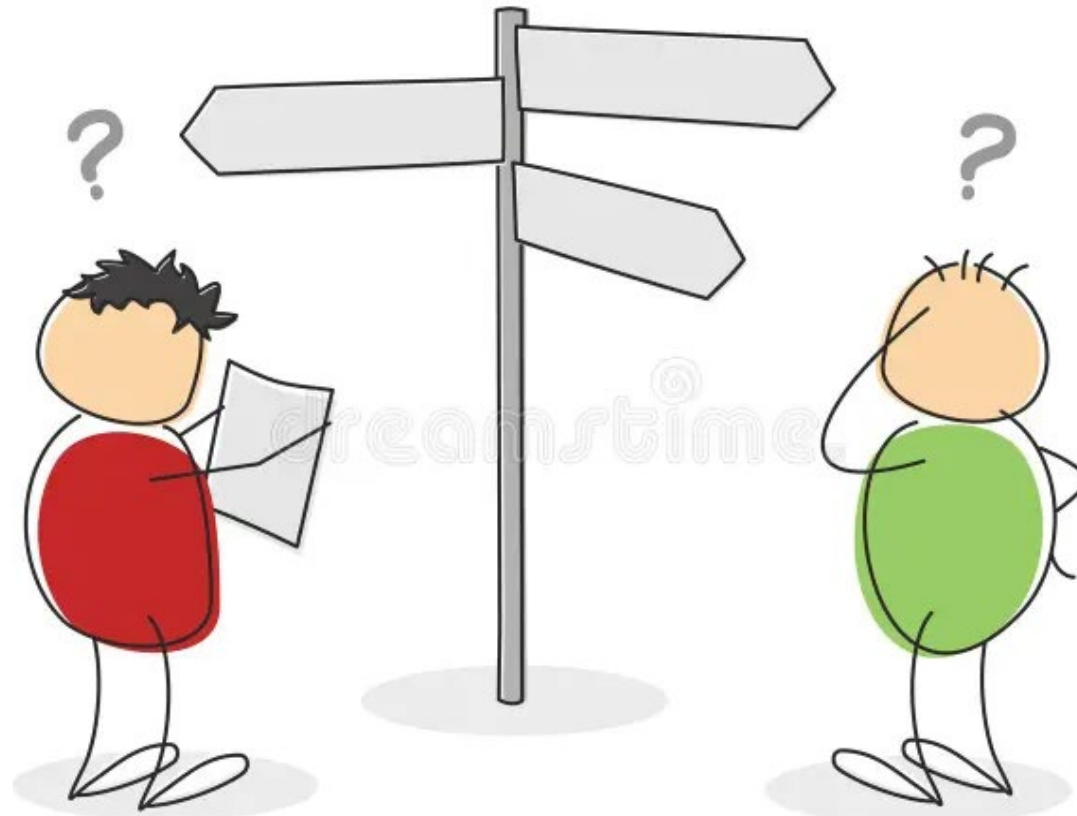
ERLINGER: The Why?

- Apprendi: any fact that increases the statutory penalty

versus

- Almendarez-Torres: except for fact of prior conviction
 - Holding: based on the Wooden decision (2022), the different-occasions requirement depends upon facts beyond “the fact of prior conviction”
-

ERLINGER: Where do we go from here?



NUMBER 1 – NEGOTIATE!

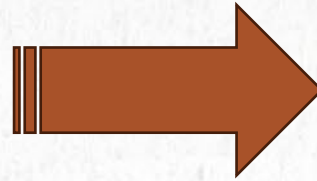
SENTENCING ALLEGATION

Before the defendant, [REDACTED] committed the violation set forth in this Bill of Indictment, he had at least three previous convictions for a violent felony or serious drug offense committed on occasions different from one another.

All in violation of Title 18, United States Code, Section 924(e)(1).

NUMBER 1 – NEGOTIATE!

- ACCA is no longer automatic, so government can choose whether or not to pursue



- Pleading down doesn't require a 922(j) (stolen firearm) anymore

I. Plea

1. The defendant agrees to enter a voluntary plea of guilty to Count One as set forth in the Bill of Indictment and admits to being in fact guilty as charged in Count One. The defendant does not admit to the sentencing allegation included in the indictment, and the government is not seeking to prove the facts necessary to support that allegation.

NUMBER 2 – BIFURCATE!

- ACCA trials will generally now be bifurcated into guilt phase and penalty phase.
 - The government has agreed to bifurcation in nearly all post-Wooden ACCA trials.
 - The Supreme Court blessed this (but did not mandate it for every case).
-

NUMBER 3 – LITIGATE!

- What counts as a “different occasion” remains very much in question
 - Reminder: Multi-Factor test from *Wooden v. United States* (2022):
 - Timing, but not “split-second”;
 - “proximity of location”;
 - were there “significant intervening events”;
 - “character and relationship of the offenses,” including whether “they share a common scheme or purpose”
-

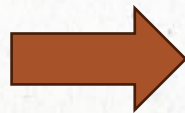
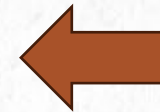
NUMBER 3 – LITIGATE!

The potentially relevant factors turn out to be many and disparate. The Court says that offenses committed close in time “often”—but not always—take place on a single occasion. *Ibid.* Offenses separated by “substantial gaps in time or significant intervening events” usually occur on separate occasions—though what counts as a “substantial” gap or “significant” event remains unexplained. *Ibid.* “Proximity of location” can be “important” too—but it is not necessarily dispositive. *Ibid.* Whether the defendant’s crimes involve “similar or intertwined” conduct also “may”—or may not—make a difference. *Ibid.* And even this long list of factors probably is not exhaustive. *Ante*, at 8–9. Nor does the list come with any instructions on how to weigh the relative importance of so many factors or how to resolve cases when those factors point in different directions.

NUMBER 3 – LITIGATE!

What about Erlinger itself? Three burglaries over an eight-day span.

nal episode (so that they would not). Presented with evidence about the times, locations, purpose, and character of those crimes, a jury might have concluded that some or all occurred on different occasions. Or it might not have done so. All we can say for certain is that the sentencing court erred in taking that decision from a jury of Mr. Erlinger's peers.¹



This case is a good example. There can be no reasonable doubt that Erlinger committed three burglaries “on occasions different from one another.” 18 U.S.C. §924(e)(1). Erlinger burglarized three separate businesses, and each burglary occurred several days apart from the other two. His crimes had different victims, different dates, and different locations. And when offered the opportunity

NUMBER 3 – LITIGATE!

Defense Win # 1 – N.D. Georgia (September 2022)

PHASE TWO VERDICT

Count One: Possession of a Firearm by a Convicted Felon

1. We, the Jury, having found the Defendant DARIUS PENNINGTON guilty of the offense charged in Count One, further find unanimously that Defendant's prior convictions:

- Possession of Marijuana with the Intent to Distribute in the Superior Court of Fulton County, Georgia for which he was convicted on January 18, 2005;
- Possession of Marijuana with the Intent to Distribute in the Superior Court of Fulton County, Georgia for which he was convicted on June 10, 2013; and
- Possession with the Intent to Distribute Cocaine and Possession with Intent to Distribute Marijuana in the Superior Court of Cobb County, Georgia for which he was convicted on October 30, 2013.

were committed on different occasions from one another:

_____ Yes

 _____ No

NUMBER 3 – LITIGATE!

Defense Win # 2 – E.D. Missouri (July 2024)

The indictment in this case alleges that Defendant Anthony Willis has three or more prior convictions for offenses committed on occasions different from one another, including but not limited to:

1. First Degree Robbery, in violation of Mo. Rev. Stat. § 569.020, committed on or about August 1, 2010, in the 22nd Judicial Circuit Court of Missouri, Case No. 1022-CR04973, with the judgment entered on December 2, 2011;
2. First Degree Robbery, in violation of Mo. Rev. Stat. § 569.020, committed on or about July 15, 2010, in the 21st Judicial Circuit Court of Missouri, Case No. 10SL-CR07713-01, with the judgment entered on August 10, 2012; and
3. First Degree Robbery, in violation of Mo. Rev. Stat. § 569.020, committed on or about August 19, 2010, in the 21st Judicial Circuit Court of Missouri, Case No. 10SL-CR07713-01, with the judgment entered on August 10, 2012.

NUMBER 4 – JURY INSTRUCTIONS

In deciding whether the defendant's prior offenses occurred on different occasions, you may consider a variety of factors, including the timing and location of the offenses, the character and relationship of the offenses to one another, whether they are similar or intertwined, whether they are separated by substantial gaps in time or significant intervening events, and whether they share a common scheme or purpose. Two or more offenses may constitute part of a common scheme or purpose if they are substantially connected by a common factor, such as having a similar modus operandi, even if they occur months apart. It is up to you, the jury, to determine whether the government has proved beyond a reasonable doubt that Mr. Pennington's offenses occurred on occasions different from one another based on the particular evidence presented here.

NUMBER 4 – JURY INSTRUCTIONS

facts. In many cases, a single factor—especially of time or place—can decisively differentiate occasions. Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a “significant distance.” *United States v.*



⁴Going forward, I assume that the *Wooden* statement about offenses committed a day or more apart or at a significant distance will inform the content of jury instructions.

NUMBER 4 – JURY INSTRUCTIONS

- From the *Erlinger* majority opinion:

After all, this Court has held that no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones. *Wooden*, 595 U. S., at 369–370. Often, a qualitative assessment about “the character and relationship” of the offenses may be required. *Id.*, at 369. So may an inquiry into whether the crimes shared “a common scheme or purpose.” *Ibid.*

NUMBER 5 – EVIDENTIARY ISSUES

- Government typically relies solely on the prior court documents (*Shepard* documents)
 - Justice Jackson (dissent): argues that jury fact-finding in this context will be impractical:
 - “presumably, the **original evidence and witnesses** related to a defendant’s past crimes would have to be located and produced, despite the passage of time and potential chain-of-custody issues”; and
 - “the **rules of evidence** would most likely come into play—screening out potentially probative considerations”
 - Hearsay / Confrontation Clause
 - E.g., FRE 803(22)(C): prior judgment is admissible only if “admitted to prove any fact essential to the judgment.”
-

THE SECOND AMENDMENT



Aaaand we changed our mind,
This is a Machine Gun



UNITED STATES V. RAHIMI (JUNE 21, 2024)

- *Bruen* came down and we thought we knew what it said. But . . . we didn't. And neither did they!



RAHIMI

- Basic holding: 18 U.S.C. § 922(g)(8) is facially constitutional
 - Decision is nominally 8-1 (only Justice Thomas, *author of Bruen*, dissents)
 - What does that mean?
 - The Government can *temporarily* disarm someone based on an *individualized judicial finding* that he poses a threat to the safety of other people
 - What does that not necessarily mean?
 - The Government can *permanently* disarm someone *without* an individualized finding of dangerousness
 - Anyone who is deemed “irresponsible” or “not law-abiding” can be disarmed
-

STATE OF PLAY IN THE FOURTH CIRCUIT??



CANADA

- *United States v. Canada* (June 3, 2024): 18 U.S.C. § 922(g)(1) is facially constitutional but as-applied challenges are fair game.
 - Does not say “the people” in the Second Amendment is limited to a subset of people
 - Does not say there is a “history and tradition of disarming dangerous people”
 - Does not say the Supreme Court has limited Second Amendment rights to “law-abiding citizens”
 - Does not say the Fourth Circuit’s pre-*Bruen* cases are good law
 - Does not say *Heller*’s reference to “longstanding prohibitions on the possession of firearms by felons” is binding
-

BIANCHI AND PRICE

- *Bianchi v. Brown* (August 6, 2024): Maryland’s ban on “assault weapons” is upheld. Most importantly for us, beware of this passage:
 - One qualification recognized by *Heller* is on who can keep and bear arms: **there are “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”** *Id.* at 626, 128 S. Ct. 2783. While these individuals maintain a right to self-preservation, society has concluded that the danger that they will misuse their armament-amplified power is too great to permit possession. See *Rahimi*, 144 S. Ct. at 1896–97; *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“**History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.**”).
- This is dicta about dicta. Fight back with FN4 from *Price*, issued by the Court the same day
- *United States v. Price* (August 6, 2024): 18 U.S.C. § 922(k) does not facially violate the Second Amendment
 - “there remain open questions at both the first and second steps of the *Bruen* analysis The answers to these questions post-*Bruen* are the subject of disagreement among the circuits and will require further analysis post-*Rahimi*.”
 - **READ: WE HAVEN’T DECIDED ANYTHING ABOUT 922(g)(1)!**

CASES RECENTLY ARGUED/SET FOR ARGUMENT

- *United States v. Simmons*, No. 23-4607 (argued Sept. 27, 2024): Constitutionality of 18 U.S.C. § 922(g)(3) and application of U.S.S.G. § 2K2.1(a)(4)(B)(ii)(I) following *Bruen*
- *United States v. Murillo-Lopez*, No. 23-4302 (argued Sept. 27, 2024): Constitutionality of 18 U.S.C. § 922(g)(5) following *Bruen*
- *United States v. Hunt*, No. 22-4525 (argued Oct. 30, 2024): Whether 18 U.S.C. § 922(g)(1) as applied violates the Second Amendment
- *United States v. Gould*, No. 24-4192 (to be argued Dec. 12, 2024): Constitutionality of 18 U.S.C. § 922(g)(4) following *Bruen*



WHAT DOES ALL OF THIS MEAN FOR FIP POST-RAHIMI?

- *United States v. Langston* (1st Cir.): on plain error, *Rahimi* does not compel the conclusion that § 922(g)(1) violates the Second Amendment
- *United States v. Moore* (3d Cir.): a convict completing his sentence on supervised release does not have a Second Amendment right to possess a firearm (§ 922(g)(1) constitutional as applied)
- *United States v. Brown* (4th Cir.): “it’s fair to say that such a claim would face a steep climb”
- *United States v. Diaz* (5th Cir.): Section 922(g)(1) is facially constitutional and constitutional as applied to Diaz, who had previous convictions for vehicle theft, evading arrest, and possessing a firearm as a felon
- *United States v. Williams* (6th Cir.): Section 922(g)(1) is facially constitutional, constitutional as applied to “dangerous people,” and constitutional as applied to Williams, who had previous convictions for aggravated robbery, attempted murder, and unlawfully possessing a firearm as a felon
- *United States v. Cunningham* (8th Cir.): no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) because “the longstanding prohibition on possession of firearms by felons is constitutional”
- More to come from *Range* (3d Cir., argued Oct. 9, 2024) and *Duarte* (9th Cir., to be argued en banc in December 2024)

FIREARM LITIGATION RESOURCES

- Box.com: Email Carl_Adams@fd.org and write: “Please add me as a ‘viewer’ to the box folder ‘Firearm Litigation’”
 - Listserv: Email Cullen_Macbeth@fd.org and ask to be added to the Firearm Litigation listserv
 - Duke’s firearm repository: <https://firearmslaw.duke.edu/repository/search-the-repository/>
 - These issues are in constant flux right now. Be sure to update your research *weekly*.
-

DETENTION HEARINGS (*VANE*)

- *United States v. Vane* (Sept. 13, 2024) is a rare case involving detention hearings. The Court issued a published opinion even after the parties agreed that the issue was mooted by defendant's guilty plea so that it could provide guidance.
 - Joining other circuits, the Court held that the government CAN present "information" at a detention hearing by proffer. They need not formally present evidence and testimony.
 - Some of our magistrate judges had already been proceeding this way with consent of the parties. Now they can do it over defense objection.
 - Of course, you can always argue that the judge should give information presented by proffer less weight than testimony and evidence formally presented and subjected to cross-examination or other adversarial testing.
 - Note Bene: you can appeal detention decisions all the way to the 4th Circuit and receive expedited determinations. Detention orders are collateral orders than can be appealed interlocutory.
-



UNITED STATES V. SLOCUM (JULY 1, 2024)

- A new multi-factor test! It is like Christmas for appellate lawyers!
- The question—if the government charges the defendant with multiple Section 846 conspiracies, how should the courts adjudicate a Double Jeopardy challenge to those charges.
- The traditional *Blockburger* test makes no sense because it looks at the elements of the statutes, and here the same statute underlies both charges.
- The previously-used *McDougall* test also makes no sense because it looks at overt acts, and federal conspiracies does not have an overt act element.
- So what test do we use?



UNITED STATES V. SLOCUM CONTINUED

- We apply a multi factor test, looking at
 - The overlap in time periods
 - The overlap in locations
 - The overlap in coconspirators
 - The nature and scope of the charged conspiracies, including methods and goals.



BLOCKBURGER—NOT DEAD

- But worry not, *Blockburger* fans—it is still the test to use when different statutes apply.
- In *United States v. Whitley* (June 28, 2024), the defendant 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,
 - affecting interstate commerce
 - and that carjacking merely added an intent to cause death or serious bodily harm.
- The 4th Circuit disagreed, holding that courts can consider the jurisdictional element of a statute under *Blockburger* and that the jurisdictional elements of the two statutes differ because carjacking looks backwards (had the car travelled in commerce?) while Hobbs Act looks forward (does the robbery affect commerce?).



SENTENCING UPDATE



Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37

Cat-egorical Approach



Still Unpredictable



- Assaults
 - Maryland first degree assault is not a violent felony. *US v. Redd*, 85 F.4th 153 (Oct. 19, 2023).
 - Tennessee “*knowing* aggravated assault” is a violent felony. *US v. Ogle*, 82 F.4th 272 (Sept. 23, 2023).
 - Reminder: Most NC assaults are not, except for those with “intent to kill” or “strangulation” elements. *US v. Robinson*, 92 F.4th 531 (Feb. 13, 2024) (holding that “assault by strangulation” satisfies force clause).
- *US v. Hamilton*, 95 F.4th 171 (March 6, 2024): NC *attempted* RWDW is a violent felony
 - Reminder: Most *attempted* robberies do not qualify. See *US v. Taylor*, 596 U.S. 845 (2022)
- VICAR plus murder (*Tipton*), attempted murder (*Lassiter / Hunt*), or assault with DW (*Thomas / Kinard*) all qualify as “crimes of violence” under 18 U.S.C. 924(c).



DELLIGATTI v. UNITED STATES (to be argued Nov. 12, 2024)

The question presented is:

Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

WHEN DOES A SENTENCING END?

- In *United States v. Melvin*, the 4th Circuit adopted what I call the “gavel rule.”
- At Mr. Melvin’s revocation, the court accepted the agreement of the parties and imposed a time-served sentence and terminated supervision. Perfect, right?
- Well, then Mr. Melvin began to speak out against his probation officer, which disturbed the court, so it kept him on supervision so he could be monitored.
- Did the court have the power to do that after it had already announced a sentence?
- Yes, says the 4th Circuit. A court cannot modify an “imposed” sentence, but a sentence is not “imposed” until it has been announced AND there has been a “formal break in the proceedings from which to logically and reasonably conclude that sentencing [has] finished.”



EXPERT OPINIONS



DIAZ V. UNITED STATES (JUNE 20, 2024)

- FRE 704(b): In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
- Parties in a criminal trial can introduce expert testimony about the mental state of “most” people in the defendant’s position without running afoul of FRE 704(b)
- Justice Jackson: Remember, what’s good for the goose is good for the gander!
- Justice Gorsuch: Don’t forget about Rule 402 (relevance), Rule 403(prejudice/probative balancing test), *Kumho Tire* (expert testimony must be reliable)



SMITH V. ARIZONA (JUNE 21, 2024)



The Confrontation Clause prohibits an expert from reciting an absent expert's statements as the basis for his independent opinion

- *Crawford v. Washington*: testimonial hearsay inadmissible unless speaker can be cross-examined
- *Melendez-Diaz v. Massachusetts*: Confrontation Clause applies to forensic reports
- *Bullcoming v. New Mexico*: State cannot introduce one lab analyst's written findings through the testimony of another

The next case: How does a court determine whether statements are “testimonial?”

FOURTH AMENDMENT UPDATE



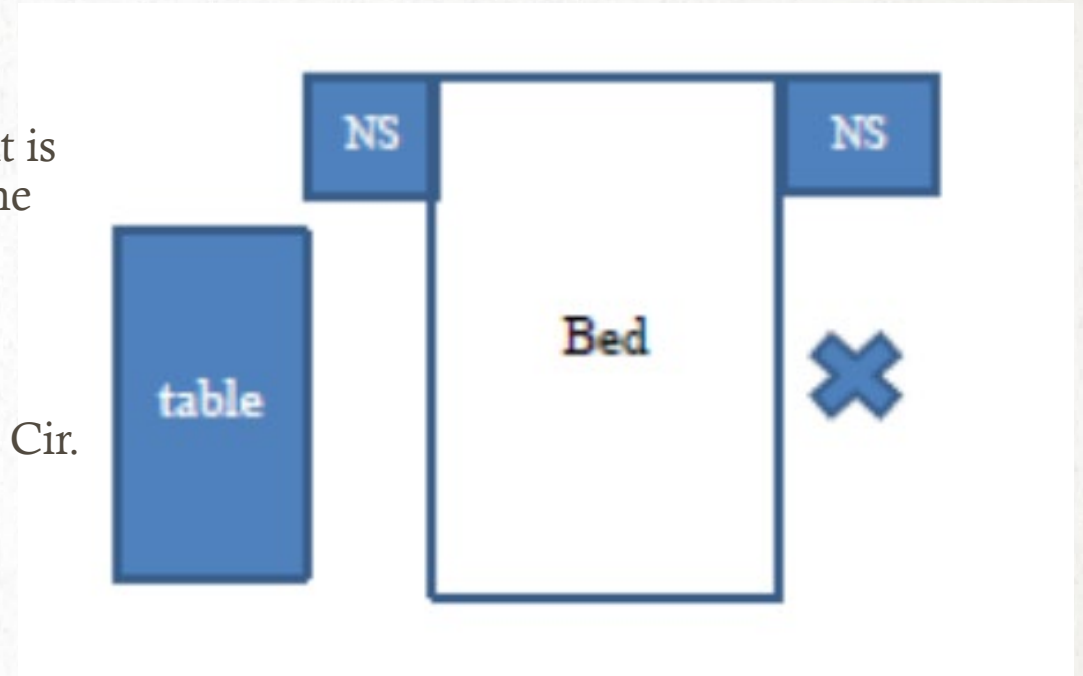
Legitimate Expectation of Privacy

- US v. Green, 106 F.4th 368 (CA4 July 2, 2024)
 - Holding 1: A social guest at another person's home can have a legitimate expectation of privacy even if he or she is not an "overnight guest."
 - Holding 2: The expectation of privacy is not forfeited simply because you bring in contraband without the homeowner's permission.
- BUT: denial of suppression still **AFFIRMED**: the seizure of the firearm was independently justified by an arrest warrant and the plain-view doctrine.



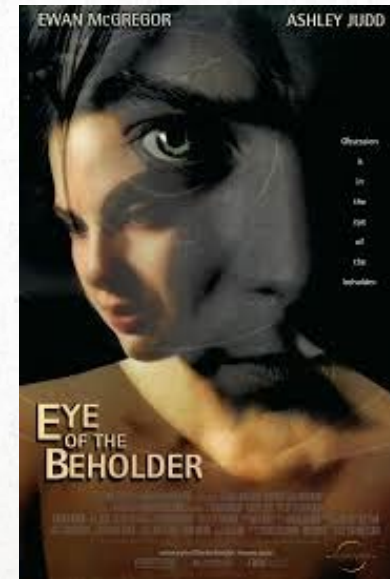
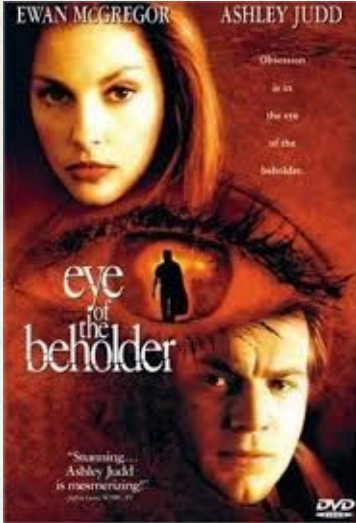
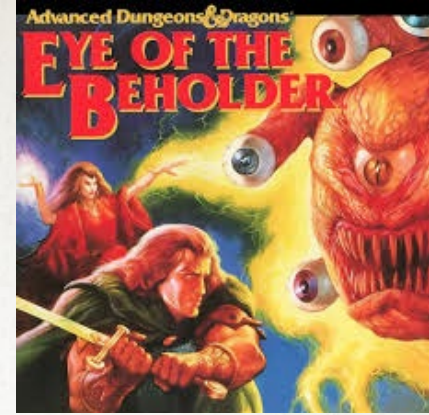
Search Incident to Arrest

- *US v. Horsley*, 105 F.4th 193 (4th Cir. June 24, 2024)
 - “Search incident to arrest”: only permissible if the defendant is “unsecured” and “within reaching distance” of the item at the time of the search
 - Rejects alternative holding in *US v. Ferebee*, 957 F.3d 406 (4th Cir. 2020), as “dicta”
- BUT: conviction still AFFIRMED based on other evidence



Reasonable Suspicion

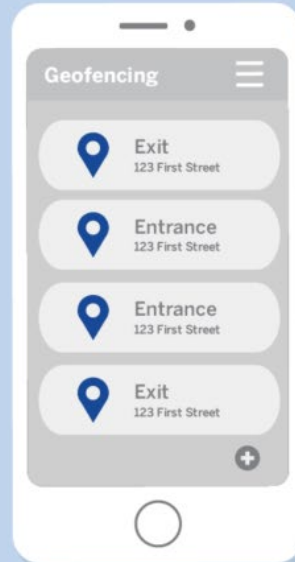
- US v. Brown (CA4 Aug. 16, 2024)
 - Majority (Wilkinson, Richardson): Police had RAS
 - Wynn (dissent): majority “relegates” both Second and Fourth Amendment rights “to second-class status”



Geofence Warrants

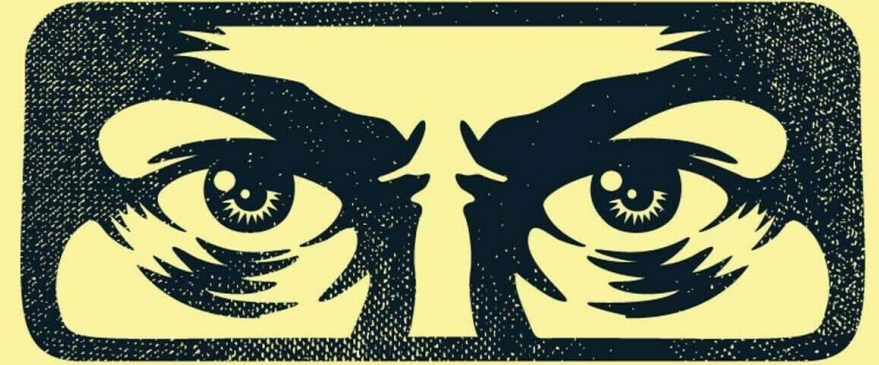
What is a Geofence?

A **geofence** is a virtual geographic boundary, defined by GPS or RFID technology, that is preprogrammed to perform a set of actions, receive alerts, and manage smart routines.



 Constellation

BIG BROTHER



IS WATCHING YOU



Geofence Warrants

- *United States v. Chatrue*, 107 F.4th 319 (CA4 July 9, 2024), en banc petition **granted**
 - Majority (over a Judge Wynn dissent):
Geofence warrants do NOT create a search under the Fourth Amendment
- *United States v. Smith*, 110 F.4th 817 (CA5 Aug. 9, 2024), en banc petition pending

We hold that the use of geofence warrants—at least as described herein—is unconstitutional under the Fourth Amendment. In doing so, we part ways with our esteemed colleagues on the Fourth Circuit. *See United*



Geofence Warrants

Is This the End of Geofence Warrants?

BY JENNIFER LYNCH | DECEMBER 13, 2023

Did Google Just Defeat Every Geofence Warrant?

Code is law, they say.

ORIN S. KERR | 12.13.2023 6:42 PM

Forbe

FORBES > INNOVATION

EDITORS' PICK

Google Just Killed Warrants That Give Police Access To Location Data

OTHER SUPREME COURT CASES OF INTEREST

- *Kousisis v. United States*, No. 23-909 (to be argued Dec. 9, 2024): (1) Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme; (2) whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services; and (3) whether all contract rights are "property"
 - *Thompson v. United States*, No. 23-1095: Whether 18 U.S.C. § 1014, which prohibits making a "false statement for the purpose of influencing certain financial institutions and federal agencies, also prohibits making a statement that is misleading but not false.
 - *Esteras v. United States*, No. 23-7483: Whether, even though Congress excluded 18 U.S.C. § 3553(a)(2)(A) from 18 U.S.C. § 3583(e)'s list of factors to consider when revoking supervised release, a district court may rely on the Section 3553(a)(2)(A) factors when revoking supervised release.
-

