

Case Summaries: Fourth Circuit Court of Appeals (August 3, 8, 10, 16, and 18, 2022)

Post-conviction non-profit lacked standing to assert First Amendment challenge to South Carolina's law surrounding disclosure of execution protocols

[Justice 360 v. Stirling](#), 42 F.4th 450 (Aug. 3, 2022). In this case from the District of South Carolina, the plaintiff is an organization providing post-conviction assistance to state death-row prisoners. It filed a complaint against the director of the state department of corrections seeking a declaration that state law prohibiting disclosure of certain execution protocol information violates the First Amendment. Under the state law, protected information includes the identity of members of an execution team, which has been interpreted by the state Attorney General to include information concerning individuals or organizations involved in the preparation of chemicals used for execution. The plaintiff sought information about the death protocols of several inmates with upcoming executions, including the any person or organization supplying or preparing any drugs used in the lethal injection process, the chain of custody for those drugs, the job titles and job descriptions of execution team members or contractors, and certain details of the electric chair protocols. The Attorney General responded in part by noting that state law prohibited the disclosure of much of the information sought. The plaintiff then brought suit, alleging a First Amendment violation. The federal district court dismissed for failure to state a claim, finding no First Amendment violation could lie under existing precedent.

On appeal, the Fourth Circuit vacated and remanded with instructions to dismiss for lack of jurisdiction. The plaintiff could not demonstrate that any injury on behalf of the organization could be redressed by the court and therefore lacked standing. According to the unanimous court, “[g]ranted Justice 360 the relief it seeks in its Amended Complaint would amount to no more than an impermissible advisory opinion, as the organization’s alleged injuries would remain unredressed.” *Justice 360* Slip op. at 19.

“Stem pipe” provided probable cause to search the car, despite the possibility that the pipe could have been used to ingest legal hemp products

[U.S. v. Runner](#), 43 F.4th 417 (Aug. 8, 2022). Local law enforcement in the Northern District of West Virginia received an anonymous tip that a woman was using intravenous drugs in a car in a Wal-Mart parking lot. The caller described the color and model of the car and stated that the car had Ohio plates. A responding officer found the car and saw a woman exit the passenger side as he approached. The woman denied using drugs, was not impaired, and showed the officer her arms to demonstrate the lack of recent needle marks. Another officer arrived on scene. He noticed scars on the woman’s arms consistent with prior intravenous drug use but did not see any indications of recent use. The woman consented to a search of her purse but refused to consent to a search of the car, stating that it belonged to the defendant, who was inside of the store. While waiting for the man to exit the store, officers saw a glass “stem” pipe sitting in plain view within the center console. The officer could not tell if the pipe had been used or what, if anything, had been in the pipe. An officer then went inside the store to find the defendant. The officer told the defendant to come outside with him and that he was not free to leave. More officers arrived on scene and the defendant was asked for consent to search the car. He declined. Officer then informed the defendant that the pipe provided probable cause to search, and the defendant unlocked the car for the search. Methamphetamine and other drugs were found inside, along with a firearm, clip, ammo, and more meth in the trunk.

The defendant was indicted for felon in possession of a firearm and moved to suppress. He argued that the pipe did not provide probable cause because its contraband nature was not immediately apparent to the officer. At suppression, officers testified that a pipe like the one observed was commonly used to ingest hard drugs such as crack cocaine and meth. A witness for the defendant testified about the increase in popularity of hemp products like CBD and stated that his hemp store sold pipes like the one at issue here for purposes of ingesting legal hemp. The district court ultimately denied the suppression motion, finding that officer properly observed the pipe in plain view and that, despite the existence of legal hemp, its contraband nature was nonetheless still immediately apparent. The defendant entered a guilty plea, preserving his right to appeal denial of his suppression motion. On appeal, a unanimous panel of the Fourth Circuit affirmed.

The court noted that plain view observations by law enforcement do not amount to a search. Where law enforcement can clearly observe an item from a place the officer is lawfully entitled to be and the contraband nature of the item is immediately apparent to the officer, that observation falls within the plain view exception to the warrant requirement. The court acknowledged that it had not decided whether a pipe, standing alone, could give rise to probable cause, but distinguished this situation from a “pipe-only” case. Officers were responding to an anonymous tip about intravenous drug use in a public place, and one officer—trained as a drug recognition expert—thought the pipe was contraband. “On its face, that evaluation meets the admittedly low standard: that the facts available warrant that items *may be* contraband or stolen property. *Runner Slip* op. at 9 (citation omitted) (emphasis in original). The court distinguished cases from other circuits where the alleged contraband seized in plain view was “intrinsically innocent” items which could not fairly be cast as immediately recognizable contraband. According to the court:

A stem pipe is not such an object. . . [T]he predominate purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substance such as CBD oil, it is still reasonable to a police officer would reach the belief that a glass pip was evidence of a crime supporting probable cause. *Id.* at 10.

The court noted that, while a pipe alone may not qualify, and that this case presented a “close question.” The tip (albeit for drug use via a different method) was at least partially corroborated, as far as the woman with a history of drug use and the specific description of the car. That, coupled with the drug recognition officer’s “expertise,” was enough to establish probable cause. The district court was therefore unanimously affirmed.

Material issues of fact existed regarding contraband nature of seized cash despite defendant possessing marijuana at the time of the arrest, prior drug history of the defendant, defendant’s inconsistent tax records, and trace amounts of cocaine on the money; divided panel reverses grant of summary judgment to the government

[U.S. v. McClellan](#), 44 F.4th 200 (Aug. 10, 2022). In this civil forfeiture case from the District of South Carolina, the district court erred in granting summary judgment to the government. It found that the seized cash—over \$69,000—was clearly drug money. The defendant crashed his car, and an officer smelled marijuana when he approached the wreck. The defendant was passed out with a bottle of liquor beside him. There was marijuana in the car’s ashtray and the defendant admitted to having recently smoked marijuana. There was cash in the console of the car and a larger bag of cash in the trunk. The

defendant also had two medical marijuana cards from California in his wallet. While he claimed the money was from his girlfriend's shop, he declined to provide her name or the details about the store. The money was later scanned and found to test positive for cocaine (and, in the case of one bundle of money, for explosives). The defendant had a criminal record, including convictions for trafficking cocaine and meth and possession with intent to distribute marijuana (in the latter matter, law enforcement seized more than \$50,00.00 in cash from the defendant). During forfeiture proceedings, the defendant claimed the cash came from a variety of sources, including some inheritance and profits from his girlfriend's store. The government pointed out that the girlfriend's tax returns did not indicate the level of profit necessary to account for such a large amount of cash.

It is the government's burden in a forfeiture proceeding to establish that the property is forfeitable by a preponderance of the evidence. Here, the district court erred by using the defendant's prior criminal history and prior forfeited funds to find that the government had indisputably met its burden. Though the money was scanned and found to contain trace amounts of contraband, this had little probative value without an explanation of how the presence of trace amounts of other drugs indicated that this defendant's involvement with drug sales, finding that inference "speculative at best." In the court's words: "At least some information suggests 'widespread' cocaine contamination in our money supply." *McClellan* Slip op. at 10 (citation omitted). This conclusion was reinforced by the fact that the government did not argue that the presence of explosive material on the money indicated explosives trafficking. The presence of medical marijuana cards did not create a strong inference of drug trafficking. In marijuana-legal states, both drug dealers and normal citizens may purchase marijuana legally. Similarly, the personal amount of marijuana found in the car did not show a nexus to drug trafficking. Finally, although the defendant's explanation for the source of the funds had at least "discrepancies" and could be false, that alone did not firmly establish that the money was drug proceeds. Credibility determinations, the court noted, are for the jury. "A jury, faced with evidence that the seized currency was not from [the girlfriend's business], could conclude that the currency is drug proceeds, but they would not be required to." *Id.* at 16. Concluding, the majority observed:

Here, the Government convinced the district court that the facts paint a picture that definitively establishes that the cash was drug money. But as we see it, the record is not so clear. The painting is more Pollock than Monet. *Id.* at 19.

The district court was therefore reversed, and the matter remanded for trial.

Judge Wilkinson dissented and would have affirmed the grant of summary judgment to the government.

Undisclosed impeachment evidence did not rise to the level of material evidence for purposes of a Brady violation; verdict and death sentence affirmed

[Bowman v. Stirling](#), 45 F.4th 740 (Aug. 16, 2022). The defendant was convicted of capital murder in South Carolina state court and sentenced to death. The defendant claimed throughout state post-conviction and federal habeas that material impeachment evidence was suppressed by the prosecution in violation of his due process rights. Specifically, the defendant pointed to a memo by an investigator for the State documenting an interview with a jailhouse informant who claimed that a co-defendant (and witness for the State) named Gadson had confessed to his involvement in the murder, a mental health report on Gadson's competency to stand trial, and pending state charges (unindicted at the time) of another prosecution witness, none of which were disclosed before or during trial.

The state post-conviction court rejected that argument and found that none of these individual items rose to the level of material evidence supporting a *Brady* violation. While the memo regarding the jailhouse informant was not disclosed, that memo was created in response to a handwritten note by the informant, which was provided to the defense and which the defense investigated. The defense ultimately concluded the informant was not credible and declined to use him as a witness in the case. The informant repeatedly recanted the information in the note and memo, and the impeachment value of the report above and beyond that of the handwritten note was minimal. Regarding the mental health report on Gadson, the court found that the defense had other means available to obtain the report and that it lacked impeachment value, given that it did not diagnose Gadson with memory impairment or mental illness (beyond cannabis dependence). Regarding the undisclosed charges of another prosecution witness, the court again found the information was not material because the charges were not related to the murder, there was no agreement between that witness and the State, and the witness at issue was substantially impeached with other evidence at trial. Given these findings and in light of overwhelming evidence of guilt, the state post-conviction court denied relief, a decision affirmed by the state appellate court. At the federal habeas stage, the district court also denied relief and the defendant appealed. The Fourth Circuit unanimously affirmed.

While the state post-conviction court analyzed the materiality of each item of allegedly suppressed evidence, it did not analyze the collective impact of the items. The court observed that “individual items of suppressed evidence that are not material on their own may, in the aggregate, undermine confidence in the outcome of the trial.” *Bowman* Slip op. at 24 (cleaned up). Even assuming the petitioner was entitled to de novo review of the collective impact claim, and assuming the undisclosed evidence was both favorable and suppressed, the undisclosed evidence failed to rise to the level of materiality and did not warrant habeas relief in light of the overwhelming evidence of the petitioner’s guilt. In the words of the court:

[T]he undisclosed evidence, at best, would have undercut Johnson’s and Gadson’s reliability in the eyes of the jury. But both men’s testimony was consistent with the other evidence at trial. This was not a thin or circumstantial case, or one that relied on the testimony of one, or even two, crucial witnesses . . . To the contrary, the State offered a veritable mountain of evidence linking Bowman to the murder. *Id.* at 34.

The district court therefore correctly denied the habeas petition and was affirmed in full.

(1) No violation of the right to public trial where the trial court limited access to the public gallery in response to serious security concerns; (2) Motions to suppress cell phone tracking and wiretap evidence were properly denied despite subsequent misconduct by officers involved in the warrant application; (3) Defendant did not unequivocally request counsel during interrogation and voluntarily waived his Miranda rights; (4) The trial court did not abuse its discretion in denying a request for a mistrial; (5) Any error in admitting grand jury testimony of a government witness murdered before trial under the forfeiture by wrongdoing exception was harmless

[U.S. v. Barronette](#), ___ F.4th ___; 2022 WL 3452694 (Aug. 18, 2022). (1) In this multi-defendant gang prosecution from Maryland, the trial court limited the numbers of spectators in the courtroom following serious security incidents before and during trial. These concerns included fights in the courthouse gallery, knives being found in the courthouse, a courthouse table being vandalized with the name of the gang, the murder of witnesses for the government, and an apparent request by a defendant of his

supporters to “pack the courtroom” during testimony of government witnesses. The courtroom could hold 100 people, but the trial court allowed the U.S. Marshalls to limit the number of people in the gallery to 25.

On appeal, the defendants claimed that this limitation amounted to a denial of their rights to a public trial under the Sixth Amendment. The court disagreed. In addition to the security concerns during trial, the case involved around 12 distinct murders. Further, the trial court never completely closed the courtroom to the public. Instead, it limited access to the public gallery and allowed additional people interested in attending the trial to listen to the proceedings from an overflow room. This was more akin to a partial closure than a total one, and likely subject to review under a more relaxed standard than the one applied to total courtroom closures. Here, the trial court’s decision would meet even the higher standard for a complete closure, given the interests in maintaining order in the courtroom and preventing witness intimidation. The restriction on the number of public attendees was narrowly tailored and excluded no more people than was necessary. Finally, the court considered and applied alternatives to a complete closure, and it documented those steps with written findings of fact. In the words of the court: “Appellants did not have a trial in secret. While some spectators who wanted to be in the courtroom were not able to be in there, Appellants still received the benefit of a public trial as twenty-five spectators were able to be in the courtroom.” *Barronette* Slip op. at 20. The defendants’ rights to a public trial were therefore not violated.

(2) One phone of a defendant was tracked and later two of his phones were tapped pursuant to search warrants. Another defendant’s voice was recorded during the course of that wiretap. Both moved to suppress the resulting electronic evidence and the fruits of that evidence. The trial court denied the motions, finding that the tracking and wiretapping warrants were supported by probable cause. The Fourth Circuit agreed. The affidavit in support of the initial warrant for location data detailed controlled buys by an informant, law enforcement surveillance of the defendant selling drugs, and other wiretapped phones where the defendant was discussing guns and drugs, among other significant evidence linking the phone to crimes. The affidavit in support of the wiretap warrant was similarly detailed, including controlled calls by an informant, the information in support of the tracking warrant, and other significant evidence that the phone would be linked to criminal activity. While some of the officers involved in the warrant applications were later charged with and convicted of racketeering, none of that officer misconduct was related to the investigation of this case and the court found that it was not relevant to the probable cause determinations here. Further, even if the evidence from those officers was struck from the warrant application, the remaining information still supplied probable cause. The trial court therefore correctly denied the motions to suppress.

(3) During a post-arrest interview and while being Mirandized, one defendant exclaimed, “I can’t use my cell phone to call my attorney.” *Id.* at 24. A detective explained to the defendant that, while the police would not call his attorney at the moment, they would cease questioning him until he could consult with his lawyer and could resume interrogation at a later time if he wished. The defendant continued signing and initialing the *Miranda* waiver form, and then spoke with the officers about the case. He moved to suppress his statements to police, claiming a violation of his right to counsel. The trial court found that the defendant knowingly and voluntarily waived his *Miranda* rights, and that his statement about not being able to call his lawyer on his cell phone was not an unequivocal assertion of his right to an attorney. It therefore denied the motion. The Fourth Circuit again agreed. The defendant’s statement about his cell phone did not amount to a clear request for an attorney and for questioning to stop.

Further, officers engaged the defendant with his statement and offered to provide an attorney and to cease questioning. The defendant continued filling out the waiver form and answered questions in response. “[I]nstead of asking for an attorney, [the defendant] simply signed the waiver-of-rights form voluntarily, relinquishing his rights and continuing to speak with law enforcement.” *Id.* at 26.

(4) The district court did not abuse its discretion in declining to order a mistrial. During cross-examination of a witness for the prosecution, the witness stated that he had seen a media report naming one of the defendants as the “number one gun puller” in the area. The district court denied the motion, finding that it was invited by defense counsel’s questioning, but nonetheless gave the jury a limiting instruction to ignore that comment. The defendants here could not show the district court’s handling of this issue was prejudicial, and there was therefore no abuse of the trial court’s discretion in denying the mistrial request.

(5) A cooperating witness for the prosecution was murdered by gang members following the witness’s testimony to the grand jury. The trial court admitted the statements of that witness under the forfeiture-by-wrongdoing exception to the Confrontation Clause, finding that one of the defendants authorized the murder and that the killing was done to prevent the witness from testifying in the case. To the extent any error occurred in the admission of this evidence, it was harmless beyond a reasonable doubt in light of the evidence in the case and the verdicts.

Other challenges to the verdicts and sentences were likewise rejected, with the exception that one defendant was entitled to a new trial on his firearm by felon due to a *Rehaif* jury instruction issue. The district court judgments were otherwise unanimously affirmed.