

Case Summaries: Fourth Circuit Court of Appeals (Jan. 3, 4, 5, 11, 22, 23 and 25, 2024)

Prison guards were entitled to qualified immunity on conditions of confinement claim for denying inmate access to water and cleaning supplies while investigating the potential ingestion of contraband, but plaintiff's First Amendment claim of retaliatory transfer in response to his complaints could proceed

[Jones v. Solomon](#), 90 F.4th 198 (Jan. 3, 2024). The plaintiff was an inmate at Avery-Mitchell Correctional Institution in the Western District of North Carolina. Guards noticed the plaintiff put something into his mouth and believed he may have been swallowing contraband. He was placed into a restrictive unit in a so-called “dry” cell—one without running water, including for the sink and toilet. Prison staff told the plaintiff that he would be held in the cell until he made three bowel movements. All three were supervised by prison staff. Procedure for this type of investigation requires that the inmate use a portable toilet lined with a biohazard bag, which is then inspected by guards. For the first two bowel movements, the procedure was followed, but the plaintiff was not provided any soap or hand sanitizer at any point, including before his subsequent meals. For the third bowel movement, typical procedure was not followed—the plaintiff remained handcuffed while he defecated, no toilet paper was provided, no biohazard bag was provided, and the plaintiff was allegedly required to do the inspection himself under supervision of the guards. Still no soap or sanitization products were provided. This latter event was recorded on surveillance video. All in all, the plaintiff had no access to running water for around 17 hours, went without any shower or access to soap for around 30 hours, and remained in “soiled” clothing for about 23 hours. No contraband was ever discovered (the plaintiff claimed he had merely eaten a piece of candy).

After being released from the restrictive unit, the plaintiff filed grievances relating to the incident. Two guards were disciplined as a result. A guard later told the plaintiff that he would likely be transferred because of his complaints. A few weeks later, a unit supervisor asked the plaintiff if his complaints were designed to obtain a transfer. A few months later, an assistant prison administrator told the plaintiff to “ease up” on filing complaints. A few days later, the plaintiff was transferred to Lanesboro Correctional, a much more dangerous prison where an inmate who had previously assaulted the plaintiff resided. The transfer caused the plaintiff to be removed from a class in which he was enrolled at Avery. Prison officials gave differing accounts of why the plaintiff was transferred. After nearly two weeks, the plaintiff was transferred back to Avery-Mitchell.

The plaintiff sued, arguing that prison officials violated his rights with the conditions of his confinement during his stay in the restrictive unit and alleging unconstitutional retaliation via his transfer in response to his filing of grievances relating to the event (among other claims). The district court granted summary judgment to the prison officials on both claims. The plaintiff appealed, and the Fourth Circuit reversed in part and affirmed in part. As to the plaintiff's Eighth Amendment conditions of confinement claim, the prison employees were entitled to qualified immunity. While it is clearly established that inmates are constitutionally entitled to basic sanitation and hygiene, the specific conditions here fell short types of extremely unsanitary conditions previously held to violate the Eighth Amendment. Without more

evidence of a specific and established risk of serious physical injury linked to these conditions, his claim failed. In the words of the court:

These facts depict a sequence of events that are gross, degrading, and deeply concerning. And we have serious doubts about their constitutionality. But, even assuming Defendants violated Jones's Eighth Amendment right to be free from cruel and unusual punishment, we conclude that they are entitled to qualified immunity under the clearly established prong of the qualified-immunity analysis. *Jones* Slip op. at 15.

The court noted that it was a close question on the facts of the case and that even slightly more severe or longer lasting conditions of a similar sort may violate the Eighth Amendment. It also observed that its ruling could differ if faced with more specific evidence about particular risks to inmate health posed by the same or similar circumstances.

As to the First Amendment retaliation claim, the district court erred in granting summary judgment to the prison defendants. A prisoner may not be transferred as retaliation for protected speech such as grievances. Viewing the evidence in the light most favorable to the plaintiff, he stated a claim for a retaliatory transfer. Further, it has been clearly established in the circuit since 2015 that a retaliatory transfer in response to inmate complaints violates the First Amendment. The prison defendants were therefore not entitled to qualified immunity on this claim, and that claim could proceed. The case was remanded for further proceedings relating to the First Amendment claim only.

Judge King concurred separately. He agreed that the prison officials were entitled to qualified immunity on the conditions of confinement claim but would have held that such conditions violate the Eighth Amendment (a question not squarely decided by the majority) in order to clearly establish the right to be free from such conditions in future cases.

Failure of defendant-officer to disclose evidence of prior allegations and pending excessive force litigation constituted misconduct affecting the integrity of the proceedings; plaintiff's motion to set aside verdict should have been allowed

[Morgan v. Tincher](#), 90 F. 4th 172 (Jan. 3, 2024) The plaintiff sued an officer for excessive force and other claims in the Southern District of West Virginia. He requested discovery about prior allegations of misconduct and any litigation involving the officer. The officer-defendant turned over information on one previous allegation of excessive force, but nothing relating to any lawsuits. The plaintiff discovered that that previous allegation had resulted in a lawsuit. During trial, plaintiff's counsel asked the officer about that litigation and the officer testified that the lawsuit had been dismissed. After the plaintiff rested his case, he discovered a third lawsuit against the officer for excessive force, which had been pending for two months prior to trial. The officer's attorney represented the officer in all three cases. The plaintiff sought sanctions against the defendant and to recall the officer to the stand to testify about the newly discovered evidence. The defendant opposed the motions, claiming the failure to disclose was merely an oversight. The district court failed to rule on these motions, and the jury ultimately entered a verdict in favor of the officer-defendant. The plaintiff then filed a Rule 60(b) motion to set aside the judgment, claiming that the undisclosed evidence amounted to fraud and misrepresentation. The district court denied that motion, and the plaintiff appealed. A unanimous panel of the Fourth Circuit reversed.

The district court declined to impose sanctions because the discovery request from the plaintiff was untimely, despite the defendant not having raised the timeliness of the request and having responded to it (if less than candidly). Considering the motion to set aside the judgment, it determined that the plaintiff failed to meet the standard under Rule 60(b) and that finality concerns outweighed any impact the undisclosed evidence may have had. The Fourth Circuit disagreed. The failure to disclose the third excessive force lawsuit constituted misconduct, whether intentional or not, and the failure to produce that information required a new trial. According to the court:

...[W]e easily conclude that evidence of the [third] lawsuit ‘would have helped’ strengthen Morgan’s arguments before the jury. Not only did [the third lawsuit] represent a third claim of excessive force against Officer Tincher, but the allegations regarding Tincher’s actions against [that plaintiff] were strikingly similar to Morgan’s own allegations against Tincher. *Morgan* Slip op. at 15 (internal citation omitted).

Not only did the undisclosed allegations and lawsuit impact the fairness of the proceedings, but the officer’s testimony at trial denying his involvement in other lawsuits may have constituted perjury. Thus, the denial of the motion to set aside the judgment was reversed and the matter was remanded for a new trial following a new period of discovery.

***Bruen* challenge to sentencing enhancement for being an unlawful user of controlled substances was not plain error**

[U.S. v. Claybrooks](#), 90 F.4th 248 (Jan. 4, 2024) In this case from the Middle District of North Carolina, the defendant pled guilty to possession of a stolen firearm. His sentencing exposure was increased for being under indictment at the time of his offense in another matter and for being an unlawful user of controlled substances (both of which disqualify a person from possessing firearms under 18. U.S.C. 922). The defendant objected to the unlawful user designation but did not contest that he had been under indictment at the time of his possession of the gun. *New York Rifle and Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022), was decided the week before sentencing. Under *Bruen*, the government has the burden to establish modern regulation of firearms are consistent with historical tradition and impose a comparable burden on Second Amendment rights. The district court agreed that both enhancements applied and sentenced the defendant to an above-Guidelines term of imprisonment without considering the impact of *Bruen*. The defendant appealed, arguing that the ‘unlawful user of controlled substances’ enhancement was unconstitutional and faulting the district court for failing to conduct a *Bruen* analysis on the issue. The Fourth Circuit rejected these challenges and affirmed.

For the unlawful user of controlled substances statute to apply, there must be evidence that the person regularly used illegal drugs over a time period relevant to the person’s possession of a gun. While the defendant here admitted to daily marijuana use, he argued that his admissions were referencing past use and that his drug use was not relevant to his possession of the guns. The court disagreed. Sentencing enhancements need only be proven by a preponderance of the evidence, and the defendant’s admissions here were sufficient for the enhancement to apply. Further, the defendant’s ongoing marijuana use was corroborated by officers who were involved in one of the defendant’s arrests. The defendant was also not situated to challenge the enhancement on vagueness grounds. “...[W]hen a defendant’s conduct falls squarely within the confines of the disputed statute, he abandons the right to challenge that statute for vagueness.” *Claybrooks* Slip op. at 11. Such was the case here.

As to the defendant's *Bruen* challenge, he failed to raise it at the district court level. Reviewing for plain error only, the court rejected this argument as well. In the words of the court:

Claybrook's *Bruen* arguments cannot survive plain error review. This Circuit lacks precedent establishing that any of the relevant statutes violate the Second Amendment right to keep and bear arms...The contours of *Bruen* continue to solidify in district and appellate courts across the nation, yet there is no consensus. There can be no plain error where neither this nor other circuits have resolved the issues in dispute. *Id.* at 13-14.

A challenge to the reasonableness of the sentence was also rejected, and the judgment of the district court was unanimously affirmed.

Summary judgment was properly granted to the investigator when the arrest of one plaintiff was supported by probable cause; denial of summary judgment on malicious prosecution claim as to the other plaintiff affirmed for lack of jurisdiction

[English v. Clarke](#), 90 F.4th 636 (Jan. 5, 2024) The plaintiffs were wrongfully accused of sexual assault and robbery in the District of South Carolina. The pair (Mr. English and Mr. Powell) were held in custody for more than a year before the cases were dismissed. They sued the lead investigator (and others), alleging various alleged civil rights violations relating to their arrest and detention. The lawsuit was centered around a claim that the investigator coerced false confessions from the men. The district court granted the defendants' motion for summary judgment on all of English's claims and all but one of Powell's claims. It found English's claims were either time-barred or defeated by the existence of probable cause to arrest. As to Powell, the district court found that there were disputes over material facts supporting his claim of malicious prosecution against the investigator only and allowed that claim to proceed. English appealed, arguing that the district court erred in dismissing his claims. The investigator cross-appealed, arguing that his motion for summary judgment should have been granted as to all claims.

As to the malicious prosecution claim, English claimed that he was arrested, cuffed, and held in custody for hours while interrogated. He alleged that the investigator created the confession out of whole cloth. English denied ever making any inculpatory statements. He also claimed to have only signed the confession after being told he would not be allowed to leave without doing so. He maintained that he had never read the document purporting to contain his confession. The confession implicated Powell, who was arrested soon after.

Powell made similar allegations of being held for hours and being forced him to sign a confession as well. Both men claimed to have requested attorneys and allegedly were not permitted to contact one. DNA results from the victim became available around eight months after the men's arrest, which did not match English or Powell but did match a different person. The investigator admitted to English's attorney that he thought English was innocent around this time. The cases proceeded for seven more months despite repeated requests by defense counsel for the charges to be dismissed. At the fifteen-month mark, the charges against both men were dismissed for insufficient evidence.

On appeal, the Fourth Circuit affirmed the dismissal of English's claims. "We in no way underestimate the serious deprivation English suffered here, but we cannot fault officers who proceed to perform their solemn duties reasonably." *English* Slip op. at 12-13. A plaintiff must show that law enforcement lacked probable cause to support a claim of malicious prosecution. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir.

2012). Because probable cause existed to support English's arrest based on the victim's identification, the district court correctly granted the defendant's motion for summary judgment on this claim. Further, at the point when the DNA results were known to exclude English, the matter was with the prosecutor's office. Absent evidence that the investigator suppressed "substantial" evidence or misrepresented facts to the prosecution, the decision to continue the prosecution at that point was out of the investigator's hands.

English claimed a First Amendment violation based on the allegedly compelled confession. The court rejected this argument too. "The proper remedy for a coerced confession is suppression of the confession, not a separate First Amendment suit." *English Slip op.* at 19. Similarly, English could not show an equal protection violation on these facts, nor did the officer's conduct rise to the level of governmental misconduct shocking to the conscience that could support a due process claim. Without factual or legal support for these claims, the district court correctly granted the investigator summary judgment on them.

As to the investigator's cross-appeal of the denial of his motion for summary judgment on Powell's malicious prosecution claim, the Fourth Circuit dismissed the appeal. The district court correctly determined that this claim turned on whether the investigator forced English and Powell to sign false confessions. Absent the allegedly forced confessions, the investigator did not have probable cause to arrest Powell. While issues of qualified immunity concerning issues of law may be appealed on an interlocutory basis, summary judgment denying qualified immunity based on factual disputes are not subject to interlocutory review. *Iko v. Shreve*, 535 F.3d 225, 235 (4th Cir. 2008). "Notwithstanding [the investigator's] protestations, we hold that the appeal here is heavily factual and unsuitable for interlocutory treatment." *English Slip op.* at 22.

The matter was therefore remanded to the district court for the disputed facts surrounding the confession to be resolved at trial, and the district court was affirmed in all respects.

Mandatory masking of all trial attendees and witnesses during COVID-19 pandemic did not violate the defendant's Confrontation Clause rights

[U.S. v. Maynard](#), 90 F.4th 706 (Jan. 11, 2024). In this case from the Southern District of West Virginia, the defendant was a police officer charged with civil rights violations relating to the use of excessive force against an arrestee. The district court required all people in the courtroom during trial to wear a face mask covering their mouths and noses. The defendant objected to this ruling, arguing that clear face shields would be an adequate substitute and seeking for those to be used in place of opaque face masks. The district court denied the motion. Face masks were worn by everyone in the courtroom at all times during the trial, including by testifying witnesses. The defendant was convicted at trial and sentenced to 108 months in prison. He appealed, challenging the masking requirement at trial as a Sixth Amendment Confrontation Clause violation.

The Confrontation Clause generally entitles a criminal defendant to confront his or her accusers in court in person. The U.S. Supreme Court recognized a narrow exception to the right of face-to-face confrontation in *Maryland v. Craig*, 497 U.S. 836 (1990). There, a child witness was permitted to testify remotely by video to avoid the possibility of further traumatization from personally testifying before the defendant. Under *Craig*, when the denial of confrontation rights advances an important public interest

and protections exist to ensure the reliability of the remote testimony, face-to-face confrontation may be denied without violating the Confrontation Clause. The court applied *Craig* to affirm the trial court.

The defendant was tried by a jury in November 2021 amidst the delta variant surge of COVID-19. At this point of the pandemic, more than 70,000 lives had been lost to the disease in the U.S. West Virginia specifically had lost more than 5,000 lives. Guidance from the Centers for Disease Control (“CDC”) recommended masking in public at the time. The CDC had also warned that masking was more effective than face shields. The government’s interest in protecting public health amounted to an important public policy interest on these facts. Protections were in place during the trial to ensure the reliability of witness testimony. Like in *Craig*, the witnesses were sworn, subject to cross-examination, and observable by the jury. Unlike *Craig*, the witnesses were physically present in the courtroom. While the jury was not able to view the facial expressions of the witnesses, they were still largely able to gauge the credibility of witnesses by judging other witness characteristics. This was, according to the court, “even more protective of the defendant’s interests than was the case in *Craig*.” *Maynard* Slip op. at 10. The central protections of the Confrontation Clause—the ability to confront and cross-examine one’s accusers—were preserved here. In the court’s words:

...[J]urors assess credibility not only by facial expressions, but also by the words the witnesses said, how they said them, their body language, their pauses, their mannerisms, and all the other intangible factors that are present in a trial. So we can’t say that a mask covering only a witness’s nose and mouth violates the Confrontation Clause. *Id.* at 11 (cleaned up).

The defendant also argued that *Craig* was overruled by *Crawford v. Washington*, 541 U.S. 36 (2004) (establishing the modern Confrontation Clause analysis and overruling the former indicia of reliability test). The court rejected this argument as well. While *Crawford* overruled *Roberts v. Ohio*, 448 U.S. 56 (1980), the kind of remote testimony at issue in *Craig* was not before the Court there and the Court has never since explicitly overruled *Craig*. Mere tension with a subsequent case is not enough; U.S. Supreme Court caselaw remains good law unless and until the Court overrules it. *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam) (so holding).

Challenges to the use of sentencing enhancements for causing serious bodily injury and for obstruction of justice by perjury were also rejected, and the judgment of the district court was unanimously affirmed in full.

Divided panel affirms extension of stop for canine sniff based on extreme nervousness, inconsistent travel plans, and the presence of a gas can on the passenger seat

[U.S. v. Smart](#), 91 F.4th 214 (Jan. 22, 2024). The defendant was travelling on the interstate in Louisiana when he was stopped for speeding 82 mph in a 70-mph zone. The state trooper thought the defendant seemed extremely nervous. He allegedly gave inconsistent answers about his travel plans and took long pauses between his answers to the trooper’s questions. He stared straight ahead at the windshield and did not look at the trooper while they talked. The defendant also had a gas can sitting in the passenger seat. The trooper thought this was suspicious in light of the defendant’s admission that he was on a long trip. The trooper was experienced as a drug interdiction officer and believed the gas can and other circumstances potentially indicated drug trafficking activity. A canine alerted on the car, and over 5 kilograms of cocaine was discovered under the seat.

It is unclear whether this incident resulted in charges, but the defendant was linked by the DEA to an ongoing drug trafficking investigation in Virginia the next year. DEA agents learned of the Louisiana incident and received information from an informant that the defendant was the supplier of a local suspect. A controlled buy was successfully conducted. The defendant was placed under surveillance and was seen dumping trash bags lined with cocaine residue. Agents then obtained an order authorizing tracking of the defendant's car. This led to a traffic stop in Virginia by local authorities, where the defendant was found with \$15,000 cash and an ounce of cocaine. A few months later, the DEA arranged for the defendant to be stopped and brought in for questioning. He initially agreed to cooperate and consented to searches of his homes. Guns and more evidence of drug trafficking were discovered there. Before charges were brought, the defendant fled and evaded capture for around 10 months. He was ultimately captured and charged with various drugs and firearms offenses in the Eastern District of Virginia. The defendant was acquitted of the gun charge at trial but convicted of distributing at least 5 kilos of cocaine and related drug offenses. He appealed, complaining in part that the district court erred in by denying his motions to suppress. A divided Fourth Circuit affirmed.

The defendant claimed that the initial Louisiana stop was extended without reasonable suspicion of a crime to permit the canine sniff. At the suppression hearing, the state trooper explained his concerns about the defendant's extreme nervousness and the "clunky" conversation the two had on the roadside. Between his refusal to make eye contact, inconsistent travel plans, and the presence of a gas can on a long car trip, the district court found that the trooper had reasonable suspicion to extend the stop to investigate drug trafficking. The court agreed. It deferred to the district court's credibility determination that, in the officer's experience, a gas can inside a car during a long road trip is consistent with drug trafficking. Standing alone, that would not have been enough. But the defendant's answers and behaviors during the interaction further added to the trooper's suspicion. While routine nervousness should be viewed skeptically in the reasonable suspicion analysis, extreme nervousness—which the trooper here could articulate—remains a relevant consideration. Under the totality of the circumstances, the trooper had reasonable suspicion to extend the stop to conduct a sniff, and the district court's judgment denying the motion to suppress was affirmed.

The defendant also challenged the traffic stop in Virginia by local authorities resulting in the DEA interview, arguing police lacked probable cause for that stop and search. The court rejected this contention, noting the seizure of 5 kilos in Louisiana, the controlled buy in Virginia, the trash pull evidence, and the earlier Virginia traffic stop leading to the discovery of an ounce of cocaine. "This is more than enough to establish probable cause," for that stop, search, and detention. *Smart* Slip op. at 19, n.11.

The court also rejected the defendant's argument that his rights under the Speedy Trial Act were violated and the district court's judgment was affirmed by the majority.

Judge Traxler concurred in a separate opinion to further explain the evidence supporting reasonable suspicion for Louisiana stop's extension. The trooper testified that, unlike most cars seeing a trooper pull onto the highway behind them, the defendant did not initially slow down or move to the right. He appeared to be trying to pull ahead of traffic, and only at the point of getting ahead of a pack of cars did he change lanes. The defendant admitted to speeding 80/70 when he was stopped. During the awkward conversation where the defendant would not look at the trooper and gave awkward answers to routine travel questions, and his answers about his plans were inconsistent. The trooper sensed that the

defendant was considering fleeing and at one point asked the defendant if he was ok. The defendant's unusual behavior and extreme nervousness was also corroborated at the suppression hearing by the defendant's testimony that he was high on cocaine during the stop.

Judge Wynn dissented. He disagreed with the majority that the Louisiana trooper had reasonable suspicion to extend that stop. He disputed the value of the defendant's nervousness, noting that the defendant exhibited no signs of nervousness once he exited the car. This included the defendant making eye contact with the trooper and speaking normally, without any pauses. He also would have discounted the inconsistent travel plans. The defendant said he was headed to Mississippi from Louisiana and was ultimately travelling to North Carolina. The path to North Carolina from the location of the stop included going through the portion of Mississippi consistent with the defendant's answers. The defendant had an NC license and license plate. According to Judge Wynn, ". . . law enforcement's misunderstanding of geography shouldn't be able to establish reasonable suspicion." *Id.* at 40 (Wynn, J., dissenting). Left with only the gas can, Judge Wynn would have held that the motion to suppress the Louisiana stop should have been granted. In closing, he noted:

After today, all an officer has to do is describe a driver's nervousness as extreme and give one or two otherwise innocent facts a nefarious gloss and, *viola*, reasonable suspicion. Police officers' opinions cannot be unassailable. Otherwise, we undermine the protections of the Fourth Amendment for every traveler on the road. *Id.* at 42.

Local ordinance requiring gun and ammo retailers to distribute literature on firearm safety, suicide prevention, and conflict resolution to each purchaser was not unconstitutional compelled speech

[Maryland Shall Issue, Inc. v. Anne Arundel County, Maryland](#), 91 F.4th 238 (Jan. 23, 2024). Around 48,000 deaths by suicide occur each year in the U.S., and more than 50% of those deaths occur by use of a gun. Anne Arundel County, Maryland has comparable numbers. In response, the County declared the phenomenon a public health crisis. It passed a local ordinance requiring the local health department to create handouts on "gun safety, gun training, suicide prevention, mental health, and conflict resolution," to be distributed to all gun and ammunition sellers in the county. The ordinance also requires any entity selling guns or ammo to visibly display the handouts at the point of sale and to provide copies of the documents to anyone buying guns or ammo. Violations of the ordinance are punishable initially with a \$500 civil fine; second or subsequent violations are subject to a \$1,000 fine. The plaintiffs challenged the ordinance as unconstitutional compelled speech in violation of the First Amendment. The district court granted summary judgment to the County, finding that the ordinance passed constitutional muster.

The district court also excluded proffered expert testimony from the plaintiffs that sought to establish that the literature wrongly implied that firearms are the cause of suicide, thereby implicitly discouraging the purchase of guns and ammo. The district court disagreed with that interpretation of the literature and deemed the proposed expert testimony irrelevant. The plaintiffs appealed, arguing error on both points.

The literature required to be distributed by the ordinance consisted of an eight-page document co-written by the American Foundation for Suicide Prevention and the National Shooting Sports Foundation on firearm safety and suicide risk and prevention, along with a one-page document created by the local

health department on conflict resolution strategies and resources. Under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), commercial speech may be compelled when the content of the speech is “factual and uncontroversial” and advances a legitimate government interest. Safety warnings for products are a common example of permissible compelled speech. The district court recognized the controversial nature of firearms and firearms regulations generally but determined that the literature in question only addressed peaceful conflict resolution and prevention of suicide by safe storage of weapons, which it found were not controversial subjects. While the booklet noted that access to guns was among risk factors for suicide, it did not purport to establish firearms possession or access as a *cause* of suicide.

The Fourth Circuit agreed that the message in the information was one of product safety and did not advocate against guns. “We conclude that the pamphlet does not reach as far as the plaintiffs maintain and that any reasonable reader would understand . . . that it only gives the message that *because firearms are the leading means by which suicide is committed, firearms should be stored safely to reduce suicide by firearms*. *Maryland Shall Issue, Inc.* Slip op. at 10 (emphasis in original). The court also agreed that the speech at issue was compelled commercial speech (not political advocacy) and that *Zauderer* applied. “...[I]t is facially apparent that the required disclosures are a safety advisory linked to the sales of guns and ammunition, which are commercial transactions.” *Id.* at 14. The district court properly concluded that the challenged information was fact-based and not controversial. The information correctly identifies mental health as a major cause of suicide (not guns) and suggests only that gun suicides can be reduced by safe storage of the weapons. This information is “reasonably related” to a matter of County concern and was not “unduly burdensome.” *Id.* at 19 (citing *Zauderer*, 471 U.S. at 651). Suicides in the county had been increasing during the last several years, and firearms were the most common method. The challenged information advanced a government interest, was justified by local circumstances, and was not otherwise particularly burdensome for gun store owners. “Complying is as simple as having the literature at the checkout counter and including it in the bag with the purchased goods. This need only take seconds.” *Id.* at 20.

The district court also did not err by excluding the plaintiff’s expert testimony as irrelevant. In the words of the court:

We agree with the district court that [the expert’s] opinion that the pamphlet was not factual and therefore was controversial was predicated on his reading of the pamphlet as asserting that firearms cause suicide. Because we conclude that the pamphlet does not make that claim, we also conclude that the district court did not abuse its discretion in excluding [the expert’s] report. *Id.* at 22.

The judgment of the district court was thus unanimously affirmed.

Protective sweep of home in drug-trafficking investigation was reasonable; motion to suppress properly denied

[U.S. v. Everett](#), ___ F.4th ___; 2024 WL 236514 (Jan. 23, 2024). The defendant was charged with various drug and firearms offenses in the Eastern District of North Carolina. The defendant sold vast amounts of marijuana, marijuana “wax,” cocaine, and other substances in and around Fayetteville, NC. It was estimated that he sold almost two tons of marijuana (around 4000 pounds) between 2016 and 2018. When a co-conspirator was arrested following a knock and talk at his home, he implicated the defendant

as the leader of the distribution ring. Police placed the defendant's residence under surveillance. They stopped a known associate seen leaving the home, developed reasonable suspicion to conduct a stop and canine sniff, and ultimately found marijuana, cocaine, a scale, a gun, and ammo in the car. Police visited the front door of the residence and conducted a canine sniff. The dog alerted. Fayetteville police then obtained a state search warrant for the home. Once inside, they determined the home was being used as a "stash house." They found marijuana in bags matching those taken from the traffic stop earlier in the day, over 340 grams of cocaine, several pounds of marijuana, marijuana wax, scales, ledgers, cash and a gun. A receipt with the defendant's name and a different address was also found. Officers believed that address could be the defendant's new residence. They confirmed the connection between the new address and the defendant by checking local utility company records. An arrest warrant for the defendant was issued.

Before serving that warrant, officers surveyed the new address and discovered it was operating as a child day care facility. In an effort to minimize the number of children and parents in the home, police waited until that evening to execute the warrant. They found the defendant and placed him under arrest. The defendant's wife, a friend of hers, and two children were also present in the home. Law enforcement then conducted a protective sweep of the home, finding marijuana gummies and rifles in plain view. This led to a search warrant for the home. Further search of the home revealed eight loaded guns, around \$65,000.00 in cash, scales, packaging paraphernalia (matching materials discovered at the earlier residence), marijuana wax, an opioid, and other paraphernalia. They also discovered evidence of a storage unit and had information that the defendant had recently used the unit. There, police found an additional 67 pounds of marijuana.

While in custody awaiting charges, the defendant attempted to continue managing the drug operation and sought to influence witnesses against him to recant. The defendant was ultimately federally indicted for various conspiracy, distribution of marijuana, possession of firearm used in a drug trafficking offense, and other related charges. The defendant moved to suppress, arguing that the protective sweep of his (most recent) residence was improper and that the evidence discovered by the subsequent search warrant was fruit of the poisonous tree. The district court denied the motion and the defendant was convicted on all charges following a jury trial. The district court imposed an above-Guidelines sentence of 480 months. The defendant appealed.

Under *Maryland v. Buie*, 494 U.S. 325 (1990), a protective sweep may be permissible to ensure that other people are not hiding in the home who could threaten officer safety. To justify a protective sweep, officers must have specific facts, along with any rational inferences based on the facts, which would cause a reasonably prudent officer to believe that other people could be present in the home who could present a danger to law enforcement. A general fear of potential harm to officers is not enough—officers must be able to articulate specific concerns warranting the sweep. Here, the officers pointed out that they knew the defendant was directing a major drug dealing operation. They had already found guns at the first stash house and believed more could be present at this residence. The home was surrounded by surveillance cameras, which the officers believed meant that they were being surveilled from within as they entered. The officers also pointed out that they encountered unexpected people in the home (the wife, her friend, and the children) upon their arrival. Particularly in context of a major drug trafficking investigation, the protective sweep here was justified and did not offend the Fourth Amendment. "The circumstances presented at [the residence] on July 17, 2018—including that Everett was clearly a high-level drug dealer—made the protective sweep a very prudent step by law enforcement." *Everett* Slip op.

at 19. The court also noted that officers almost certainly had probable cause to obtain a search warrant at the time they obtained the arrest warrant for the defendant. Thus, “to deprive the officers of the right to conduct a protective sweep at the Residence on the evening of July 17, 2018, would undermine officer safety.” *Id.* at 21.

Various challenges to the sufficiency of the evidence and the sentence were likewise rejected, and the judgment of the district court was unanimously affirmed.

Search warrant for guns was supported by probable cause; drugs were properly discovered either as in plain view, incident to the defendant’s arrest, or part of the search authorized by the warrant; cell phone in plain view was properly seized as likely instrumentality of drug trafficking on the facts

[U.S. v. Davis](#), ___ F.4th ___; 2024 WL 271127 (Jan. 25, 2024). Federal agents in the Northern District of West Virginia were conducting surveillance on a local gun store. They knew of an individual who had bought 15 guns in the last year and who would be picking up three more guns from the store that day. The man arrived, bought an additional gun, and provided a false address on ATF forms required for the purchases. Agents learned that the man paid cash for the guns and was driving a rental car, which agents thought was consistent with gun trafficking activity. Law enforcement watched as the man pulled into a gas station. Another man quickly entered and exited the car. The suspect then returned to his residence. At this point the agents activated their blue lights and attempted to stop the man. The suspect attempted to flee, nearly hitting an agent’s car near the driveway. After a brief chase, the man hit an agent’s car and was apprehended. Along with the driver, there was a passenger in the car who was a convicted felon. The agents found guns within reach of the passenger, along with \$2,220, other shredded cash, and torn plastic baggies, believed to be evidence of drug activity. Both men were arrested and booked.

The driver gave an interview and acknowledged that he dealt guns. He admitted the presence of additional firearms at the residence from which he fled. The passenger possessed that home at the time, and the defendant intended to move into the home soon as a renter. Agents obtained a search warrant for the home based on this information. When officers arrived to execute the search warrant, the defendant (who was not otherwise involved up to this point) was seen coming to a side door and then quickly running back into the interior of the home. The defendant was sitting on the living room floor and attempted to secret drugs into the floor vents of the home as agents entered. Cocaine base and over \$2,600 was found on the defendant. Officers were able to connect the defendant to one of the bedrooms, where they found “large” amounts of cocaine and heroin, along with a loaded shotgun. The defendant admitted that one of the cell phones recovered from the home was his. Agents seized the phone and obtained a warrant to search it.

The defendant was indicted on conspiracy, possession with intent to distribute offenses, and possession of a firearm in furtherance of a drug trafficking offense. He moved to suppress, arguing that the warrant for the home was unsupported by probable cause, that the search and seizure of the home for drugs was beyond the scope of the warrant, and that the search and seizure of his cell phone was not supported by probable cause. The district court denied the motion. The defendant entered a conditional guilty plea and reserved his right to appeal the denial of his suppression motion.

The search warrant for the home established probable cause based on the statements of the driver of the car agents initially stopped. While the driver’s credibility was not established, his identity was

known, and his post-arrest inculpatory statements increased the likelihood that his statements were true. According to the court:

Because an informant in such circumstances ‘exposes himself to possible criminal prosecution or other consequences for giving false information, his reliability is enhanced, and less corroboration is required as compared to an anonymous informant.’ *Davis* Slip op. at 7 (citation omitted).

The statements made by the driver were corroborated insofar as law enforcement knew he had bought multiple guns over the last year, had given false information as a part of the transactions, paid cash, drove a rental car to conduct the transactions, and attempted to run when stopped by law enforcement (among other facts). He explicitly implicated the passenger and the passenger’s home as a part of his criminal activity. Law enforcement also found a receipt on the passenger from the driver for renting the home. This established a connection between both men to the home, and was ample evidence to establish probable cause to search the home for evidence of gun trafficking.

In addition to evidence of gun crimes, the warrant authorized the search of evidence relating to possession of drugs and electronic media and communication devices. The defendant complained that the warrant failed to establish probable cause to believe drugs would be found in the home. The court acknowledged (as the district court did) that this was a more difficult question than the issue of probable cause to support a search for the firearms offenses, but the court ultimately declined to decide the issue. It found instead that the drugs found in the home were lawfully seized under either the plain view or search incident to arrest of the defendant. Officers were justified in being present in the home and saw the defendant putting apparent drugs into the air vents of the home. This led to an arrest and search incident to arrest of the defendant, leading to the discovery of more drugs on his person. The drugs located in the defendant’s bedroom were found in a place that could have held guns or ammo and were discovered in plain view incident to the search for firearms authorized by the warrant.

As to the search and seizure of his cell phone, the court acknowledged that law enforcement had no information connecting electronic devices to the firearms crimes under investigation at the time they entered the home. The phone was not on the defendant’s person at the time of its seizure and could not be justified by search incident to the defendant’s arrest. But under the circumstances of the defendant hiding drugs, the presence of large amounts of drugs in the defendant’s bedroom packaged for distribution, and the defendant’s acknowledgement of his ownership of the phone, it was reasonable to infer that the phone could contain evidence of drug trafficking. The seizure of the phone was thus justified by plain view. The court noted that seizure of a cell phone as an instrumentality of a crime was not a per se rule. Here, due to the large amount of drugs in the home, police had probable cause to believe the defendant was engaged in drug trafficking. A phone will not always or necessarily be immediately apparent as contraband to justify a plain view seizure. Under the specific facts of the case, however, police had probable cause to justify its seizure as an instrumentality of drug trafficking. In the words of the court:

[W]e do not hold that cell phones in plain view may *always* be seized as instrumentalities of a crime. The nature of the alleged crime and the totality of the evidence are critical considerations. 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. *Id.* at 14 (emphasis in original).

The court also noted that law enforcement obtained a new and separate warrant to search the phone before accessing its content, which could not have been justified by plain view or search incident to arrest.

The judgment of the district court was therefore unanimously affirmed.