

July 2018 Fourth Circuit Case Summaries: July 2, 10, 13, and 16, 2018

Court rejects alleged Brady and Napue violations, challenges to joint trial, and Eighth Amendment claims in MS-13 prosecution

[U.S. v. Chavez](#), 894 F.3d 593, 2018 WL 3215914 (July 2, 2018). This multi-defendant case from the eastern district of Virginia involved charges of murder in aid of racketeering or conspiracy to commit murder in aid of racketeering for each of the defendants, among other offenses. The prosecution was aimed at disrupting the MS-13 organization. Six defendants pled guilty prior to trial and five agreed to cooperate, while the remaining six defendants proceeded to trial. All six were convicted of all charges at a joint trial and appealed, alleging constitutional discovery violations. Additionally, two defendants challenged the trial judge's decision to deny their motions to sever their individual trials from those of the co-defendants, and two challenged their life sentences under *Miller v. Alabama*, 543 U.S. 470 (2012), among several other claims advanced by various defendants.

The *Brady* and *Napue* claims focused on the one of the cooperating co-defendants, "Junior." Under *Brady*, the prosecution's suppression of evidence favorable to the defendant and material to guilt or sentencing constitutes a due process violation. *Napue* rights are closely related and prohibit the government from knowingly using or allowing false evidence at trial as a matter of due process. Junior received assistance with his immigration status from the FBI as a part of his efforts to cooperate with the investigation, including a letter in support of his green card application, which was ultimately granted. This potential source of impeachment was explored by both sides at trial. At one point during his testimony, Junior indicated that the immigration judge never received the FBI letter in support of his green card application, but later acknowledged on cross that he showed the immigration judge the letter in person at hearing. The defense moved unsuccessfully to subpoena his immigration file. In a later, related proceeding against a different defendant, Junior's immigration file was produced, showing that he had misrepresented his criminal record and gang ties on certain immigration forms. The district court here then ordered the information produced, and the defendants moved for a new trial based on the undisclosed information. The trial judge denied that motion, finding that the government "did not know or have reason to know of the impeachment potential of the immigration documents and that the new disclosures were immaterial in any event." Slip op. at 7-8.

Materiality under *Brady* requires that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 8. If a *Brady* claim clearly fails to meet the standard of "material" evidence, the reviewing court may begin its analysis with that element. Here, most of Junior's cooperation was in the investigative stage, infiltrating the gang and finding tangible evidence. The government produced several eyewitnesses to each murder beyond Junior's testimony, as well as "hours" of phone call recordings where the defendants admitted the offenses and forensic evidence linking them to the crimes. The immigration benefits were discussed and explored at trial, and the witness corrected his own testimony on cross-examination regarding whether or not the immigration judge received the FBI letter. This, the court held, simply failed to meet the *Brady*

standard for material evidence. “Whatever impeachment value Junior’s immigration file may have held, it certainly did not rise to that level.” *Id.* at 8. Further impeachment of Junior on these points did nothing to undercut the “overwhelming and significantly corroborated body of evidence.” *Id.* at 9. The *Napue* claim failed for similar reasons: to the extent the witness gave false testimony regarding the immigration help he received from the FBI, he corrected it during cross. “It is unclear what more the government could or should have done to correct the false testimony once Junior corrected himself on the stand.” *Id.* at 10. Moreover, a *Napue* violation requires that the prosecution *knowingly* used false evidence. Here, there was no evidence that the government knew about the FBI letter being personally presented to the immigration judge or the contents of the immigration file until the witness mentioned it on cross. Even assuming that there was false testimony by Junior of which the government was aware at the time, it too was not material: “Whether the FBI’s letter was successfully delivered to the immigration judge or not could not plausibly throw the jury verdict into question, particularly when the truth of the matter was disclosed to the jury during the trial.” *Id.* at 11.

As to the severance issue, the court noted that the decision to deny severance of co-defendants is reviewed for abuse of discretion. When defendants are indicted together for related offenses, the “preference” is for a joint trial, particularly in longer and more complex cases. This promotes more efficient use of court resources, avoids witnesses having to repeatedly return to court for repetitive testimony, and helps avoid inconsistent verdicts among codefendants, among other benefits. Only in “relatively few” instances have convictions been vacated for an abuse of discretion as to severance. Here, one appellant claimed error in the trial judge’s failure to sever his trial based on the fact that evidence presented at the joint trial included violent acts in which he did not participate and was not involved. This argument was foreclosed by *U.S. v. Dinkins*, 691 F.3d 358 (4th Cir. 2012) (severance of defendants not required solely due to different defendant being charged with different murders where all were a part of the conspiracy, all were charged with a murder in furtherance thereof, and all had similar degrees of culpability). Other defendants argued that another co-defendant presented a defense antagonistic to their defenses, and the cases should have been severed on that basis. Under *Zafiro v. U.S.*, 506 U.S. 534, 538 (1993), “mutually antagonistic defenses are not prejudicial per se.” Severance is required only where “there is such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the other, or that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.” *Chavez slip op.* at 19. Here, the one codefendant’s defense alleged to be antagonistic to that of the others involved a claim that he did not know about the plan to commit murder before it occurred. This was consistent with the defenses of the other codefendants, which all focused on the lack of proof as to who was present at which murder, who actually participated in the murder, and who knew about the plans to commit murder ahead of time. Thus, the court found the defense “perfectly consistent with the core of the defense[s]” presented by the other codefendants. *Id.*

Two of the defendants were respectively 18 and 19 years old at the time of the commission of the offenses, and argued that their mandatory life sentences violated the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), pointing to the fact that they were “barely over this threshold of adulthood” at the time of their offenses. Rejecting *Miller’s* application in this context, the court stated:

Individual differences in maturity will necessarily mean that age-based rules will have an element of arbitrariness, particularly when they have such stark differences in effect between those just one week below the cut-off and those

just one week above. . . But we cannot say this makes them unconstitutional. *Id.* at 25-26.

Various other challenges were rejected by the court, and all convictions affirmed in all respects.

Trial court properly denied instruction on defendant's ineligibility for parole; NC death sentence affirmed

[Warren v. Thomas](#), 894 F.3d 609, 2018 WL 3355468 (July 10, 2018). In this matter from the middle district of North Carolina, the petitioner was convicted of murder in South Carolina and sentenced to life. He subsequently pled guilty to another murder in North Carolina and received a death sentence. The petitioner went to trial on a third murder in 1996 in North Carolina and was again convicted, again receiving a death sentence. He sought habeas relief in the middle district of North Carolina as to the last murder case, alleging that the jury should have been instructed that he was not parole-eligible under the law of the state at the time. Under sentencing statutes then in place in North Carolina, one serving a life sentence was generally eligible for parole. A person already serving a death sentence, however, was not. Pursuant to *Simmons v. U.S.*, 512 U.S. 154 (1994), if the defendant is in fact not eligible to receive parole on a life sentence as a matter of law and the prosecution argues the future dangerousness of the defendant in support of a death sentence at trial, due process requires that the jury be informed of the defendant's parole ineligibility. The North Carolina Supreme Court rejected this argument, finding that the prosecution did not argue future dangerousness of the defendant; rather, the prosecution argued that he deserved death as someone convicted of multiple murders. The sole aggravating factor alleged by the prosecutor in support of a death sentence was that the defendant was previously convicted of capital felonies (the two earlier murders). The North Carolina Supreme Court found that the prosecution's argument in support of death was "essentially backward-looking".

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), when a claim has been adjudicated on the merits in state court, the federal habeas court is prohibited from granting relief unless "the state court's determination is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." Slip op. at 8. This, the court noted, is a "high bar" and one that requires the state court decision to be "objectively unreasonable, not merely wrong." *Id.* *Simmons* establishes the defendant's due process right to have the jury informed of his parole ineligibility when the prosecution argues the defendant's future dangerousness as a factor in support of death. It does not stand for the proposition that the State cannot argue future dangerousness, nor that the jury should always be informed of parole eligibility. Absent such an argument, the states are free to apply their own rules about the relevance of parole eligibility in capital sentencings.

What matters is whether the prosecutor urged the jury to look forward, to the possibility that the defendant would eventually be released from prison if not sentenced to death and hence become a danger to the community. *Id.* at 11.

Here, the North Carolina Supreme Court's application of *Simmons* was not unreasonable. The argument of the prosecutor here was essentially focused on the petitioner's past actions; namely, his two prior capital murder convictions. That such past acts painted the defendant as "dangerous" did not, on its own, trigger *Simmons*. Unlike the comments of the prosecutor in *Simmons* (which included implying the defendant would be released unless given death, and calling on the jury to impose death as an act of

“self-defense”), here the prosecution comments focused on “[the petitioner’s] moral reprehensibility and deservedness of the death penalty.” *Id.* at 11-12. Under the “highly deferential” AEDPA standard, North Carolina’s determination that the prosecutor’s argument did not focus on future dangerousness was “well within the bounds of reasonableness.” The district court’s denial of the habeas petition was therefore affirmed.

Challenge to factual basis for plea preserved despite appeals waiver

[U.S. v. McCoy](#), 895 F.3d 358, 2018 WL 3405480 (July 13, 2018). The defendant pled guilty to drug trafficking in the western district of North Carolina. As a part of his plea, the defendant signed an appeals waiver, purporting to waive all rights to appeal the basis for his conviction or sentence. Only ineffective assistance of counsel or misconduct by the prosecutors claims were explicitly preserved as a basis for appeal under the waiver. The defendant nonetheless appealed, arguing in part that his plea was unsupported by a factual basis. The government sought dismissal of the appeal, pointing to the waiver. The Fourth Circuit found that while the defendant could still mount a challenge to the factual basis for the plea despite the appeal waiver, here the factual basis was sufficient.

The defendant acknowledged his counsel’s stipulation to the factual basis during his Rule 11 hearing. The plea agreement inaccurately referred to “cocaine” rather than “cocaine base”. The parties agreed to a “pen and ink change” to the plea agreement to remedy this defect, and defense counsel signed the handwritten change (although the defendant did not). No objection was made to the change. During the government’s summary of the factual basis, it incorrectly stated the quantity of drugs involved in the conspiracy. Again, no objection was made at the time or filed afterwards. The defendant thereafter accepted the plea agreement during his colloquy with the judge. In reviewing the validity of the appeal waiver, the court looks to the totality of the circumstances. “Generally though, ‘if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.’” Slip op. at 7. Here, the defendant did not argue he misunderstood the impact of the waiver or that the court failed to conduct the proper inquiry; rather, he only argued that the factual inaccuracies during the colloquy should invalidate the waiver. His arguments that the factual mistakes created confusion were undercut by the fact that the defendant was present in court when the mistakes were made (and corrected) and no objection was lodged then. Further, the plain language of the plea agreement ultimately stated the correct drug designation in the correct amount. “Even if some confusion existed, [the defendant] hasn’t established prejudice by showing absent the government’s errors, he wouldn’t have pleaded guilty.” *Id.* at 8. The appeal waiver here was therefore valid.

Turning to the issue of whether his challenge to the factual basis was within the scope of the appeal waiver, the court noted that some issues are preserved for appeal despite a valid waiver. Beyond the express exceptions in the waiver, a defendant may still appeal a sentence in excess of the statutory maximum, or a conviction obtained in violation of the defendant’s right to counsel. On the issue of the impact of a valid appeal waiver on a challenge to the factual basis of the plea, the court acknowledged conflicting precedent within the circuit. Resolving that conflict and joining the 2d, 5th, and 11th Circuits, the court held that an appellate challenge to the factual basis survives a valid appeal waiver. “[A] challenge to a plea’s factual basis [is] an attack on the voluntariness of the waiver itself.” *Id.* at 10. Thus, the court considered the challenge. The court found that because the defendant stipulated to his

membership in the conspiracy, the factual basis was sufficient. “A stipulated recitation of facts alone is sufficient to support a plea.” *Id.* at 12. The court therefore found no error and affirmed.

Ex Parte and in camera procedures of Foreign Intelligence Surveillance Act warrant valid; denial of motion to suppress affirmed.

[U.S. v. Dhirane](#), 896 F.3d 295, 2018 WL 3421085 (July 16, 2018). In this case from the eastern district of Virginia, the defendants were convicted of conspiring to provide material aid to the al-Shabaab terrorist organization and related offenses. Both defendants were naturalized citizens who coordinated fundraising and distribution of the money from the United States to al-Shabaab affiliates in Africa. Much of the evidence of the defendants’ communication with members of the al-Shabaab network was obtained by the government through the use of a Foreign Intelligence Surveillance Act (“FISA”) warrant, and the government gave notice pretrial of its intent to use this classified evidence. The FISA warrant and documentation were not provided to the defense. The defendants filed a motion to suppress that evidence, arguing variously that the evidence was unlawfully obtained, that their lawyer should be allowed to review the evidence supporting the FISA warrant, and that the FISA procedures were unconstitutional. As to the FISA procedures, the defendants specifically pointed to their inability to challenge the veracity of the FISA warrants via a *Franks* challenge. Further, defense counsel possessed the requisite national security clearance to view the classified information. The trial judge denied the motion to suppress after conducting an *ex parte* and *in camera* review of the warrants and supporting documentation.

FISA provides that the trial judge may conduct an *ex parte* and *in camera* examination of the challenged information to determine if the surveillance was “lawfully authorized and conducted.” Slip op. at 10. This procedure applies whenever the defendant files a motion to suppress and the government then files an affidavit with the court asserting a national security interest in the information, as happened here. Where disclosure to the defendant is “necessary” to determine the lawfulness of the surveillance, the court may, but is not required to, order the information disclosed to the defense. Similarly, the court may, but is not required to, conduct an evidentiary hearing. “[E]ven in the criminal context, the right to an adversarial proceeding to determine disputes of fact is not absolute.” *Id.* (internal citations omitted). That the procedures allow the trial judge to make the determination of the lawfulness of the surveillance without defense involvement is consistent with congressional intent to balance the rights of defendants with national security interests. Under FISA procedures, the trial judge reviews all of the classified information and the defendant’s motion in deciding the motion. Whether a hearing is required is properly within the court’s discretion. A FISA warrant requires sworn testimony in an application personally approved by the Attorney General, which is then certified by other high-level executive branch officers. Given these protections in the context of the competing interests of the defendant and the nation, “Congress did not run afoul of the Constitution when it reasoned that the additional benefit of an unconditional adversarial hearing was outweighed by the Nation’s interest in protecting itself from foreign threats.” *Id.* at 11. Every other federal circuit court that has considered similar challenges to FISA procedures has found them reasonable and therefore constitutional. The court therefore rejected the defendants’ challenge to the FISA procedures and affirmed the denial of the motion to suppress. Other defense challenges to the definition of certain elements of the offenses and the sentences were likewise rejected, and the convictions affirmed.