

Phil Dixon
919.966.4248
dixon@sog.unc.edu
UNC School of Government

Case Summaries: Fourth Circuit Court of Appeals (July 11, 14, 18, 25, and 26, 2022)

Application of the “silent witness rule” did not violate the defendant’s rights to a public trial or to present a defense

[U.S. v. Mallory](#), 40 F.4th 166 (July 11, 2022). The defendant, a former CIA agent and intelligence officer, was charged with making false statements to the FBI and conspiracy to transmit national defense information to a foreign government in the Eastern District of Virginia (among other charges). The government requested and the trial court approved the use of the “silent witness” rule to handle classified information pertinent to the case, whereby the court, the parties, and the jury can hear the classified information, but it is withheld from the public. During trial, the defense presented publicly available information to counter the government’s evidence that the information transmitted by the defendant was classified. The government objected that this open-source information, when combined with witness testimony, would inevitably reveal classified information to the public. The trial court applied the silent witness rule to the open-source information offered by the defense along with the government’s classified information, allowing the jurors to have a written copy of the materials and allowing the parties to question witnesses about the documents without discussing the specific documents or their contents. The defendant was convicted of the conspiracy and false statements offenses and was sentenced to 20 years.

On appeal, the defendant argued that the application of the silent witness rule to his evidence violated his rights to a public trial and to present a defense. The Fourth Circuit disagreed. While the Sixth Amendment protects the right to a public trial, that right may be limited in “rare” circumstances, including preventing the disclosure of classified information. Here, at no point was the courtroom closed or the public excluded from the courtroom. This situation was therefore distinguishable from other cases finding a violation of the right to a public trial. “This fact sets this case markedly apart from *every decision* finding a violation of the constitutional right to a public trial that Mallory has identified or that we have found.” *Mallory* Slip op. at 16 (emphasis in original). To the extent that the application of the silent witness rule could be treated as a courtroom closure, it was more akin to a partial closure than a complete one and was fully justified by the circumstances of the case. “[A]ny limited impingement of Mallory’s public-trial right was justified by the government’s compelling interest in preserving the disclosure of the classified information at issue.” *Id.* at 19-20. The court also rejected the argument that the application of the silent witness rule violated the defendant’s due process rights to present a defense. The jury was able to read and review the defendant’s open-source information, and the jury was repeatedly informed that those documents were publicly available (despite being shielded from the public during trial). “At bottom, our review of the record leaves us firmly convinced that the limited use

of the silent witness rule did not meaningfully impair Mallory's ability to present evidence . . ." *Id.* at 21. Other challenges were likewise rejected, and the district court's judgment was affirmed in all respects.

Writ of coram nobis properly invoked to challenge conviction after completion of sentence; where petitioner was actually innocent, failure to seek relief sooner did not bar relief

[U.S. v. Lesane](#), 40 F.4th 191 (July 14, 2022). The petitioner was convicted of possession of firearm by felon in the Eastern District of North Carolina in 2003. In 2011, the Fourth Circuit decided *U.S. v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), holding that a North Carolina state felony conviction did not qualify as a crime of violence for federal sentencing purposes where the defendant was not actually exposed to more than a year in prison. Following *Simmons*, none of the petitioner's predicate felony convictions qualified as a felony for purposes of the federal firearms disqualification. The defendant's sentence was completed shortly before the decision. Habeas relief is only available to a prisoner "in custody," and the petitioner no longer qualified for that remedy. 28 U.S.C. 2255. He filed a common law petition for writ of coram nobis seeking to vacate the 2002 conviction based on actual innocence. The government agreed that the predicate convictions no longer qualified as federal felonies but nonetheless opposed relief. The district court denied the petition based on the petitioner's failure to seek relief sooner. On appeal, the Fourth Circuit unanimously reversed and remanded for the writ to be granted. Under *U.S. v. Morgan*, 346 U.S. 502 (1954), a district court has the authority to issue a writ of coram nobis to vacate a conviction after completion of the sentence, and the district court here abused its discretion in refusing to award relief. According to the court:

[W]e are satisfied that, when a coram nobis petitioner presents a persuasive claim of actual innocence, a failure to explain a lack of effort in seeking relief earlier can be relevant, but will not categorically preclude the writ. Moreover, if the petitioner is clearly innocent of the offense being challenged, untimeliness should not ordinarily bar relief. *Lesane* Slip op. at 16.

Fanny-pack frisk and temporary detention of the defendant was supported by reasonable suspicion

[U.S. v. Gist-Davis](#), 41 F.4th 259 (July 18, 2022). The defendant was a known gang member and felon, and his home had been targeted in recent drive-by shootings. Winston-Salem police therefore monitored his social media. Officers were patrolling a local fair (where firearms were not allowed) and one noticed the defendant post to social media with a thinly veiled reference to his intent to attend the fair armed with a gun in his "fanny pack." Officers then saw the defendant at the fair with the fanny pack around the front of his body and immediately cuffed and detained him. A pat down of the fanny pack revealed a gun, and the defendant was charged in the Middle District of North Carolina with possession of firearm by felon. He moved to suppress, arguing that law enforcement lacked reasonable suspicion to detain him and that officers exceeded the proper scope of a *Terry* frisk by handcuffing him and searching the fanny pack. The district court denied the motion and the defendant entered a conditional guilty plea, reserving his right to appeal the suppression ruling.

On appeal, a unanimous panel of the Fourth Circuit affirmed. Given that officers knew the defendant was a felon and gang member, and that he had recently been targeted for violence, they reasonably interpreted the defendant's comments on social media to mean that he would attend the fair armed with a gun. Under these circumstances, the officers had reasonable suspicion to believe that the defendant was committing the offense of firearm by felon and that he was armed and dangerous,

justifying the detention and frisk. Further, the detention was not transformed into an arrest by the officers' use of handcuffs during the encounter. According to the court:

Because [the defendant's] liberty was restricted only temporarily to permit officers to conduct the protective frisk for weapons, the officers' use of handcuffs in this crowded public space was permissible as a part of the brief investigatory detention and did not transform the stop into a custodial arrest. *Gist-Davis* Slip op. at 9.

The frisk was properly limited in scope as well. Officers had reasonable suspicion to believe that the gun would be found in the defendant's fanny pack, and the pack was on the defendant's person. Unlike situations where the defendant is fully restrained, there was still a "realistic danger" to officers and the public that the defendant could access the gun despite being handcuffed. In the court's words: "... [The defendant] was not fully secured on the ground, and had not been separated from his bag, which the officer reasonably believed contained a firearm." *Id.* at 11. The motion to suppress was properly denied, and the district court's judgment was therefore affirmed.

No standing to challenge search of rental car where the defendant failed to present any evidence showing he lawfully possessed the car

[U.S. v. Daniels](#), 41 F.4th 412 (July 25, 2022). In this case from the Western District of North Carolina, police were attempting to locate the defendant to serve multiple arrest warrants. After obtaining his cell location data pursuant to a search warrant, the defendant was seen driving a gray Dodge Charger. A check of the plate showed the car was a rental. The defendant and car were found at a local hotel the next day. The defendant was arrested in his room. As he was walked to the patrol car, an officer asked the defendant about the Charger. The defendant disclaimed any knowledge of the car. Police then called the rental car company and explained that they had found their vehicle in the defendant's possession. The company determined that the defendant was not authorized as a driver under the rental contract and sent a tow truck to pick up the car. Police accompanied the car to the rental car company and requested permission to search it, leading to the discovery of a gun. The defendant's DNA was found on the gun, and he was charged with being a felon in possession. He moved to suppress, arguing that police lacked probable cause to search the car. The district court denied the motion, finding that the rental car company had validly consented, that the defendant abandoned any expectation of privacy in the vehicle, and that the gun would have been inevitably discovered. The defendant entered a conditional guilty plea and appealed. A unanimous panel of the Fourth Circuit affirmed. Under *Byrd v. U.S.*, 138 S. Ct. 1518 (2018), a person in lawful possession of a rental car may retain a legitimate expectation of privacy in the car, even without being an authorized driver under the rental contract. However, the defendant has the burden to show a he or she has a reasonable expectation of privacy by a preponderance of the evidence, and the defendant here failed to meet that burden. There was no evidence presented that the defendant had lawful possession of the car, and this was fatal to the defendant's argument. In the words of the court:

In suppression hearings, criminal defendants have the burden of putting forward evidence to support all elements of their reasonable expectation of privacy. But here, [the defendant] did not introduce any evidence to support his lawful possession of the Charger. *Daniels* Slip op. at 6.

The judgment of the district court was therefore affirmed.

Search warrants for cell phone and flash drives were supported by probable cause

[U.S. v. Orozco](#), 41 F.4th 403 (July 25, 2022). The defendant was driving through Harnett County when officers ran his plate and discovered that the registered owner's license was suspended. They followed the car and stopped it after seeing it twice swerve across the center line. The defendant was not the registered owner and told the officers that he did not have a driver's license. Officer asked where the defendant was going. He responded by closing a GPS application open and running on his phone in his lap but did not answer the question. He eventually stated that he was looking for farm work in the area. The defendant was sweating heavily despite the air conditioning running, and officers noticed that the dashboard had toolmarks and other indications that it had been opened. A canine unit was called, which alerted on the car near the dashboard. Officers opened the dash, revealing over \$100,00 in cash. The defendant then stated that he was hired to drive the car and disclaimed ownership of the money. One officer alerted the DEA to the situation and provided the defendant's phone number. A DEA agent informed the officer that the phone number was tied to an ongoing drug investigation. The defendant was then taken into custody for traffic offenses. A canine later alerted to the presence of drug residue on the cash. The defendant was searched at the station and an officer found a folded \$100 bill in his show. When the bill was unfolded, five micro-SD cards (a type of flash drive) fell out. The defendant attempted to eat two of the cards and successfully ingested one. Based on these circumstances, officers obtained search warrants for the defendant's phone and the remaining SD cards. When officers began searching the contents of one SD card, they saw apparent child pornography. Two new search warrant was obtained to search the items for evidence of child pornography, which led to the discovery of hundreds of similar images on the SD cards and five additional images on the phone. The defendant was charged with possession of child pornography and moved to suppress, arguing that the initial warrant to search the phone and SD cards were not supported by probable cause to believe they would contain evidence of drug trafficking. The district court disagreed and denied the motion. The defendant was then convicted at trial and sentenced to twelve years.

On appeal, a unanimous panel of the Fourth Circuit affirmed. While (as the defendant argued) "cash is not contraband" and that it "is not illegal to be paid to drive a car," here there was a large amount of money with drug residue on it, wrapped in grocery bags, hidden behind the dash of the car. Coupled with the defendant's "sweating and nervous behavior," officers had probable cause to believe the defendant was involved in drug trafficking. Further, officers demonstrated a nexus between the SD cards and the crime of drug trafficking. Even if finding the SD cards hidden in the defendant's shoe was not enough of a nexus on its own, that the defendant attempted to destroy the cards by ingesting them upon discovery by the officers supplied the necessary nexus. According to the court:

Intentionally destroying an item before it can be examined would permit someone to believe the item is inculpatory. . . . And where police have probable cause to believe an arrestee is engaged in drug trafficking, the most reasonable inference is that the item relates to that crime." *Orozco* Slip op. at 11.

The court rejected the argument that officers were required to expressly state in the warrant application that drug traffickers store information related to the crime on SD cards in the officers' training and experience, finding that it was enough to show that the defendant attempted to destroy the cards. "[A] magic-words requirement for warrant affidavits runs headlong into the Supreme Court's clear instruction that we should not add technical requirements of elaborate specificity into the warrant

application process . . .". *Id.* at 12 (cleaned up). Officers also had probable cause to believe that the defendant's phone would reveal evidence of the crime, given that officers had probable cause to believe the defendant was trafficking drugs and the phone was seemingly being used to navigate at the time officers encountered the defendant. The court therefore unanimously affirmed, calling the case "a model example of a proper investigation under the Fourth Amendment." *Id.* at 15.

Failure to meaningfully consider mitigation evidence in death penalty case violated the Eighth Amendment; defendant is entitled to grant of habeas petition or a new sentencing hearing

[Allen v. Stephan](#), ___ F.4th ___, 2022 WL 2923841 (July 26, 2022). In this capital habeas case, the defendant was convicted of two counts of murder in South Carolina state court and sentenced to death. Before trial, defense counsel met with the trial judge, who (according to defense counsel) strongly implied that he would enter a life sentence and not impose the death penalty if the defendant pleaded guilty to the murders. The defendant entered pleas of guilty and the parties proceeded to the sentencing phase. Experts on both sides agreed that the defendant suffered from a mental illness but disagreed about whether the defendant had schizophrenia and over the extent to which the defendant was malingering or otherwise exaggerating his symptoms. The trial court heard extensive, uncontradicted evidence of severe abuse and neglect throughout the defendant's life, including repeated involuntary commitments, suicide attempts, and homicidal ideation. The trial court ultimately imposed the death penalty, finding "no convincing evidence" of confirmed mental illness at the time of the offenses and no factors in mitigation. Following denial of his direct appeal, the defendant sought state post-conviction relief, arguing that his plea was involuntary, that he received effective assistance of counsel, and that the sentence was properly imposed. The state post-conviction court denied relief on all claims and that decision was affirmed on certiorari review by the state supreme court. He then filed for federal habeas relief. The federal district court denied relief but issued a certificate of appealability, and the defendant sought review in the Fourth Circuit. A divided court reversed and remanded for a new sentencing hearing or grant of the writ. According to the majority, the sentencing judge failed to meaningfully consider the defendant's mitigation evidence and the state post-conviction court's conclusion to the contrary was an unreasonable determination of the facts and in contravention of clearly established federal law that prejudiced the defendant. The sentencing judge expressly found that the defendant was "not conclusively diagnosed to be mentally ill." This was prejudicial error on the facts of the case. "That the sentencing judge found that the evidence did not support the existence of mitigating circumstances, despite undisputed expert evidence regarding two disorders and childhood abuse, shows that the sentencing judge excluded the uncontroverted testimony from the analysis." *Allen* Slip op. at 45-46. Concluding, the court observed:

A sentencer may very well impose the death sentence because she believes a defendant should pay for his crimes with his life. But a sentencer can only do so after considering all of the aggravators and all of the mitigators, and weighing them in a way that conforms with Eighth Amendment jurisprudence. That did not happen here. *Id.* at 63.

Thus, the petitioner was entitled to a new sentencing hearing or for his writ to be granted.

Judge Rushing dissented and would have affirmed the district court.