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Case Summaries: Fourth Circuit Court of Appeals (July 10, 17, 19, and 25, 2023)

Rule of completeness did not require or permit the admission of self-serving hearsay

U.S. v. Davis, ___ F.4th ___; 2023 WL 4876392 (July 10, 2023; amended August 1, 2023). The defendant was convicted by a jury of drugs and firearms offenses in the District of South Carolina and received a 180-month sentence as a career offender. While in pretrial custody for the charges, the defendant made two statements on recorded calls to his girlfriend. One of his comments indicated that the gun found in his car "ain't mine;" the other indicated he did not want to discuss how the gun came to be in the car. The latter statement was offered by the government at trial as a party admission to show the defendant's awareness of the weapon. The government sought to exclude reference to the first statement as self-serving hearsay. The defendant responded that the first statement should be admitted under the rule of completeness. The district court allowed the second, inculpatory statement to be admitted but excluded the first statement as hearsay. The defendant did not testify at trial, and the jury did not hear the first statement.

On appeal, the defendant complained that this was an abuse of discretion. The Fourth Circuit disagreed. The rule of completeness operates to prevent misleading impressions being made to the finder of fact. When part of a statement is admitted, the rule allows admission of the rest of the statement when the remainder "in fairness ought to be considered at the same time." *Davis* Slip op. at 12 (citing Fed. R. Evid. 106). However, "Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules…[or]…require the admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party." *Id*. (citations omitted). Here, the first statement was made by the defendant and offered for the defendant's benefit. It therefore did not qualify as a party admission and was properly categorized as hearsay when offered by the defendant. It was also not needed to clarify or give context to the second statement, or to rectify a misleading impression. The district court's ruling was therefore affirmed.

Other arguments were likewise rejected, and the verdict and judgment were unanimously affirmed.

Officer's promise of non-arrest in exchange for cooperation may be enforceable; remanded for factual findings

U.S. v. Bailey, 74 F.4th 151 (July 17, 2023). A Kannapolis officer in the Middle District of North Carolina searched a car that had recently left the defendant's home and discovered a small amount of cocaine. He then went to the defendant's home to discuss the suspected sale. During their conversation, the officer told the defendant that if he would turn over any illegal drugs, the officer would "take it . . . and leave," and that the defendant would be "squared away." The officer's expectation was that the defendant would cooperate in other drug investigations in exchange for the officer foregoing his arrest. The defendant turned over less than a gram of cocaine in response. He then assisted the officer in finding another suspect who was wanted by the police but did not otherwise cooperate in drug investigations. A few weeks later, the officer charged the defendant with sale of cocaine based on the first incident and possession of cocaine based on the second. When he was arrested for those charges, more cocaine (around 18 grams) was found on his person, leading to an additional charge of possession

with intent to distribute. He moved to suppress the 18 grams, arguing that the officer's initial promise that the defendant would be "squared away" amounted to a promise not to bring charges (among other arguments). The district court did not resolve this argument, finding instead that the initial cocaine discovered on the driver who had recently left the defendant's home provided an independent basis for the later warrant for sale of cocaine (rendering moot any challenge to the initial possession charge). The defendant then entered a conditional guilty plea. On appeal, the Fourth Circuit reversed and remanded for additional findings.

The independent source doctrine would support the district court's view that the initial sale of cocaine was sufficiently divorced from the discovery of the cocaine that the defendant turned over in response to the officer's later request as a matter of Fourth Amendment law. But the defendant here alleged a due process violation, not a Fourth Amendment violation. Due process requires that the defendant receive the benefit of the deal when he acts to incriminate himself or others in response to a promise by the government. *U.S. v. Carter*, 454 F.2d 426, 427 (4th Cir. 1972). According to the court: "[I]f the government utilizes its discretion to strike bargains with potential defendants, those bargains can be enforced against the government." *Bailey* Slip op. at 11. This includes agreements to refrain from arresting, prosecuting and "informal grants of transactional immunity." *Id*. at 12. Depending on whether the officer here promised to refrain from arresting the defendant in exchange for his cooperation, whether the defendant relied on that agreement when incriminating himself to the officer, and whether the officer breached the agreement by later arresting the defendant, the defendant could be entitled to enforce the agreement (or to another remedy, such as suppression). The defendant's plea was vacated, and the case was remanded for additional hearing on those questions. "If the district court determines that Officer Page did breach such an agreement, it should also determine whether specific performance or other equitable relief is appropriate to remedy that breach." *Id*. at 16.

Cumulative effect of *Napue* violations and *Brady* evidence in death sentence case was not material; denial of habeas relief affirmed; court articulates standard of review when assessing cumulative materiality of *Brady* and *Napue* claims

Juniper v. Davis, 74 F.4th 196 (July 19, 2023). The defendant was convicted by a jury of quadruple homicide in state court in the Eastern District of Virginia and sentenced to death. That sentence was later commuted to life without parole following Virginia's legislative abolition of the death penalty. The murders occurred in 2004. The petitioner has spent almost 20 years pursuing post-conviction relief, including more than 10 years in federal habeas proceedings, "thanks in large part to the Commonwealth's refusal to disclose potentially exculpatory evidence to the defense." *Juniper* Slip op. at 2. At the Fourth Circuit for the second time, a unanimous panel affirmed the district court's denial of relief. While the Commonwealth repeatedly withheld favorable evidence—some of which the petitioner only obtained during federal habeas proceedings—and offered arguably misleading evidence at trial, the misleading and suppressed information did not rise to the level of material evidence individually or collectively.

To establish materiality under *Brady*, the petitioner must show a reasonable probability of a difference result at trial, had the evidence been disclosed. To establish materiality for a *Napue* claim, the petitioner need only show "*any reasonable likelihood* that the false testimony *could have affected* the judgment of the jury." *Id*. at 211 (emphasis in original). The court had never before determined the proper standard

of review for assessing the cumulative materiality of *Brady* and *Napue* claims together, and it took the opportunity to do so here. In the words of the court:

> [W]e hold that a court considering the cumulative materiality of *Brady* and *Napue* claims must (1) evaluate, pursuant to the *Napue* standard, the cumulative materiality of the *Napue* evidence and any *Brady* evidence tending the show the falsity of the testimony at issue in the *Napue* claims; and (2) evaluate, pursuant to the *Brady* standard, the cumulative materiality of all of the *Napue* and *Brady* evidence. *Id*. at 213.

The court noted that the habeas court can consider what impact the undisclosed information could have had on the defendant's trial strategy and case preparation, including what the defendant may have done differently had he been aware of the undisclosed information.

Here, while the *Brady* and *Napue* information chipped away at minor parts of the prosecution's case, none of it—even cumulatively considered—undercut the substantial evidence against the petitioner and did not rise to the level of undermining the verdict in the case. Nonetheless, the court again cautioned the Commonwealth over its "dilatory" tactics in the case, reminding the state that its discovery obligations under state law and ethics rules went beyond the constitutional minimums. *Id*. at 253-54. In closing, the court observed:

> With a modestly different record . . . our decision today may well have come out the other way, and would require putting the victims' family through a retrial nearly twenty years after these horrific murders…We have said it before, and we repeat it again now: we will not condone the suppression of exculpatory and impeaching evidence by the prosecution, notwithstanding that we have ultimately concluded that such evidence was not material. As a matter of practice—and fundamental fairness—the prosecution should err on the side of disclosure, especially when the defendant is facing the specter of execution . . . *Id*. at 254 (cleaned up).

Random drug testing policy for corrections employees did not violate clearly established law; defendants were entitled to qualified immunity for any Fourth Amendment violation

Garrett v. Clarke, ___ F.4th ___; 2023 WL 4713754 (July 25, 2023). In this case from the Eastern District of Virginia, the plaintiff was employed by the state corrections department as a telecommunications coordinator. He mostly worked at the corrections headquarters where some inmates were employed but none resided. The plaintiff had some contact with the inmate-employees at headquarters, and occasionally spent time inside state prisons for certain projects. He was not charged with supervising inmates in any capacity. As a condition of his employment, he was subject to random drug testing. The policy of the department (which the plaintiff received when he was hired) was that an employee could be fired for failure to submit to drug testing upon demand. The plaintiff was chosen for drug testing one day. When he arrived to take the test, he answered a phone call and informed the test administrator that his supervisor needed him. The plaintiff then left and did not return to submit a sample that day. He left the next day for an already-planned vacation. When supervisors learned of his failure to complete the drug test, they fired him. The plaintiff sued, arguing that the requirement of random drug testing and his termination for failure to complete the test violated the Fourth Amendment. The district court

denied the prison administrators qualified immunity and allowed the suit to proceed from the summary judgment stage. It found that the defendants did not demonstrate an important government interest in random drug testing and that, absent that interest, the testing scheme was unconstitutional. On appeal, a unanimous panel of the Fourth Circuit reversed.

The court acknowledged that a drug test is a search within the meaning of the Fourth Amendment. Here, despite the absence of individualized suspicion of criminal activity, the special needs of the prison system rendered the search reasonable. The plaintiff worked for the state prison system, a "highly regulated" government department. He was aware of the policy when he accepted employment, and the nature of the intrusion into the plaintiff's privacy—an oral swab—was minor. The prison system had a significant interest in ensuring its employees (particularly those, like the plaintiff, who were in contact with inmates) were not using illegal drugs, for a variety of reasons, including the prevention of "blackmail, bribery, and funneling of contraband—as well as public confidence in a law-abiding corrections workforce." *Garrett* Slip op. at 9. No prior circuit precedent has addressed suspicionless drug testing of employees in the prison context, and it was not clearly established that the drug testing policy here was unreasonable. "In broad strokes, the relevant binding authority establishes that a suspicionless drug test calibrated to address a genuine safety risk may be reasonable." *Id*. at 13. Such was the case here, and the defendants were entitled to qualified immunity. That the plaintiff had only limited contact with inmates and was not responsible for inmate supervision did not alter the calculus. The district court's denial of qualified immunity was therefore reversed.

Judge Wilkinson penned a separate concurrence, arguing that the testing scheme was altogether reasonable under the Fourth Amendment and highlighting the problem of drugs in prisons.