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## Case Summaries: Fourth Circuit Court of Appeals (June 9, 24, and 30, 2022)

### **North Carolina offense of assault by strangulation qualifies as a felony crime of violence**

[U.S. v. Rice](#), 36 F.4th 578 (June 9, 2022). In this case from the Western District of North Carolina, the defendant pled guilty to possession of a firearm by felon in federal court. The district court found that the defendant's prior North Carolina state conviction for assault by strangulation qualified as felony crime of violence over the defendant's objection and applied a sentencing enhancement, increasing the sentencing exposure. The defendant appealed, arguing that the state offense did not qualify as a crime of violence. The Fourth Circuit disagreed and affirmed. Under the categorical approach, simple assault and assault on female do not qualify as crimes of violence because they may be committed by culpable negligence. See *U.S. v. Vinson*, 805 F.3d 12 (4th Cir. 2015). Assault by strangulation, by contrast, requires an intentional act, and no North Carolina case has ever held that the offense could be committed by mere negligence or recklessness. "A person cannot commit the act of strangling without knowing or intending it." *Rice* Slip op. at 10. The pattern jury instruction for the offense also requires "intentional" strangling. See [N.C.P.I. Crim. 208.61](#). The sentence was therefore affirmed.

Judge King dissented and would have held that the offense did not qualify as a crime of violence.

### **Total ban on internet and social media without approval from probation implicated the defendant's constitutional rights and were subject to challenge**

[U.S. v. Morris](#), 37 F.4th 971 (June 24, 2022). In this case from the Western District of North Carolina, the defendant was convicted of child pornography offenses. As conditions of supervised release, the district court ordered that the defendant could not use a computer or other digital device and could not maintain any social media accounts without approval from probation (among other conditions). The defendant challenged the computer and social media restrictions pursuant to *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (holding that North Carolina's restriction on social media accounts by registered sex offenders violated the First Amendment). The district court denied relief on procedural grounds, but the Fourth Circuit reversed on appeal, remanding for consideration of the argument. The court noted that a complete internet ban may be justified where the defendant utilized the internet to facilitate sexual contact with a minor, but is typically inappropriate where, as here, the defendant's conduct involved "non-contact child pornography" offenses. Other challenged conditions of supervised release were not timely raised, and the district court correctly concluded that it lacked jurisdiction to consider those challenges. The district court's decision was therefore affirmed in part, vacated in part, and remanded for further proceedings.

**Disparaging remarks about the defendant overheard by a juror were not prejudicial and did not require a mistrial**

[U.S. v. Elbaz](#), \_\_\_ F.4th \_\_\_; 2022 WL 2348691 (June 30, 2022). The defendant was convicted of wire fraud and conspiracy at trial in the District of Maryland. During a weekend break of the trial, a juror overheard people in a drug store discussing the defendant and her case in a negative light. When deliberations resumed, the juror did not immediately notify the court of the remarks but brought it to the court's attention the next day. The juror informed the court that the remarks had influenced his thoughts on the defendant's guilt, but that he had not discussed the remarks with any of the other jurors. The district court removed the juror, substituted an alternate juror in his place, questioned the original jurors on the subject, and ordered the jury to begin deliberations anew. The defendant complained on appeal that the district court erred in not declaring a mistrial. The Fourth Circuit disagreed. Assuming without deciding that the overheard conversation was prejudicial extraneous information, the Government rebutted any presumption of prejudice and there was no reasonable possibility that the remarks impacted the verdict. In the court's words:

Juror 9 was replaced. And judicial questioning ensured no other jurors had heard outside information. The juror who overheard the information testified that he did not mention it, so the other jurors were unaware of the remark. As a result, we are assured that no juror on the reconstituted jury was tainted by the overheard conversation. *Elbaz* Slip op. at 18.

The district court therefore did not err by failing to order a mistrial.

Other challenges to her conviction and sentence were overruled, but the Fourth Circuit determined that the district court erred in its restitution award and reversed on that limited basis only. The case was therefore affirmed in part, reversed in part, and remanded for a new restitution hearing.