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## June 2018 Fourth Circuit Case Summaries: June 20, 21, 26, and 27, 2018

### **Seizure was supported by reasonable suspicion and affirmed despite trial court's inappropriate comments about defendant's race as a factor**

[U.S. v. Kehoe](#), \_\_\_ F.3d \_\_\_, 2018 WL 3039956 (June 20, 2018). In this case arising from the eastern district of Virginia, police received reports of an intoxicated person at a bar with a gun. The first caller gave dispatch his first name and phone number, and reported that a white male had been drinking and had a gun in his waistband, also describing the man's shirt. A second caller, an off-duty police officer, called immediately after the first caller, reporting a bartender notified him that someone was intoxicated and had a gun in the bar. The bar was well known to local officers as a "problem area", where there was a history of calls to law enforcement. Under Virginia law, a person may only possess a firearm where alcohol is served if he or she has a permit to carry concealed and may not consume alcohol while inside. After entering the bar, the bartender relayed several reports by patrons of a man with a gun to the officers, which matched the previous descriptions given to police. The bartender had also personally observed a "bulge" in the suspect's waist and pointed officers to the area of the bar where the suspect was located. They approached the suspect and noticed him leaning to one side and exhibiting slightly slurred speech. The defendant initially did not respond to requests to stand up, which indicated nervousness to the officers. The defendant ultimately stood and walked out with the officers. Outside, the officers again noticed the defendant's slurred speech and glassy eyes among other indicators of impairment, and eventually frisked him. Officers found a gun in his waistband, leading to his conviction for possession of firearm by felon. Reviewing the denial of the motion to suppress for lack of reasonable suspicion, the Fourth Circuit affirmed.

The parties agreed that the defendant was seized when officers walked him out of the bar. At that point, the officers needed reasonable suspicion to believe that he was concealing a weapon and drinking inside the bar. Based on the phone calls, the officers' experience with the location, and their corroboration of the tip information, that standard was met here. The court declined to treat the phone calls as anonymous tips. "[T]he first caller provided both his first name and phone number, and the second call was from another police officer, who was reporting the concerns of the bartender and other patrons." Slip op. at 5. The phone calls were corroborated by the description of the defendant given to the officers inside the bar by the bartender and their own observations inside. The defendant was the only person present in the bar matching the descriptions. The officers' experience with the particular bar was another factor in support of reasonable suspicion, as was the defendant's slurred speech, which further corroborated the tips. Under the totality of the circumstances, it was "clear" officers had reasonable suspicion to seize the defendant.

During the suppression hearing, the district court repeatedly referred to the defendant's race and asked the parties to address "whether there was a reasonable suspicion of whomever the white person was *in*

*this particular bar with the clientele that was in that bar.”* *Id.* at 12 (emphasis in original). The bar primarily served African-American customers, and the defendant was in fact the only Caucasian person inside at the time. The district court also compared this situation to “racially motivated murders of African-American churchgoers by a white man and suggested that if officers had not arrested [the defendant], he too might have engaged in racially motivated violence.” *Id.* at 13. Finding the remarks about the defendant’s race “clearly improper”, the Fourth Circuit nonetheless refused to reverse on this basis. While race may provide a basis to establish identity of a suspect, “it is axiomatic that race alone cannot furnish reasonable suspicion of criminal activity. The suggestion that someone is more likely to engage in crime because of his or her race is equally impermissible.” *Id.* at 13, n.5. Here, however, there was no evidence that the *officers* involved improperly relied on the defendant’s race. The reviewing court was able to assess the incident based on the body camera footage, and there was no showing that the comments of the district court deprived the defendant of a fair hearing. The result may have been different if the district court comments were made before a jury, but the same concerns are not necessarily present at suppression. Concluding, the court observed:

In sum, racial remarks like those at issue here have no place in our judicial system and we do not in any way condone them. But our independent review of the record—particularly the video and telephone recordings—establishes that in this case, the district court’s references to [the defendant’s] race at the suppression hearing did not prejudice him, and so do not require reversal. *Id.* at 15.

***Miller and Montgomery* require resentencing of D.C. sniper for juvenile homicide offenses; appeals waiver ineffective to preclude *Miller* claim**

[Malvo v. Mathena](#), \_\_\_ F.3d \_\_\_, 2018 WL 3058931 (June 21, 2018). This habeas case arose from the eastern district of Virginia and stemmed from the petitioner’s involvement in the infamous “D.C. sniper” homicides. The petitioner was convicted at trial of two counts of capital murder in 2004 and entered an *Alford* plea to an additional count of capital murder and other charges, resulting in four life-without-parole sentences. Subsequently, the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), holding that juveniles cannot be sentenced to life without parole for a homicide offense under the Eighth Amendment unless the “permanent incorrigibility” of the juvenile was established. Specifically, *Miller* requires a sentencing court to take into account the “offender’s youth and attendant characteristics.” *Montgomery v. Louisiana*, 577 U.S. \_\_\_ (2016), later held that *Miller* applied retroactively. The district court granted habeas relief after *Miller* was announced, finding that the procedures under which the petitioner was originally sentenced did not comply with the Eighth Amendment and ordering a new sentencing. The warden appealed on three grounds rejected by the district court: First, he contended that *Miller* was only applicable to mandatory life without parole sentences. Because Virginia law allows the sentencing court to suspend part of a life sentence in any homicide offense, the sentences were not mandatory and *Miller* therefore did not apply. Second, he argued that the sentencing proceedings conducted at petitioner’s trial effectively afforded the petitioner all he was due under *Miller*, and that at least those two life sentences should therefore remain undisturbed. Finally, the warden argued that because the petitioner entered into a plea agreement as to the other two life sentences (which by its terms precluded the death penalty, contained a stipulation to that sentence, and provided for waiver of appeal), the petitioner had waived any right to review of a *Miller* claim.

The court rejected the first claim, finding that *Miller* applied to both mandatory life sentences as well as discretionary life sentences. While Virginia has since made clear that trial courts can suspend part of a capital murder sentence, that point was not clear at the time of sentencing. Further, regardless of whether the petitioner's sentences were truly mandatory or discretionary made no difference: "*Montgomery* clearly stated that, under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare offenders whose crimes reflect permanent incorrigibility." *Id.* at 18. *Miller*, therefore, "potentially applies to any case where a juvenile homicide offender was sentenced to life imprisonment without the possibility of parole." *Id.* at 19. The court similarly rejected the warden's second claim, that the petitioner effectively received *Miller* protections during the penalty phase of his trial. Under Virginia law at the time, a capital murder defendant not sentenced to death was required to be sentenced to life without parole. That the jury actually chose to impose the less severe punishment between those two choices indicates they were swayed by at least some of the petitioner's mitigation evidence, but the jury was not given an option of any lesser sentence. Likewise, the jury was not specifically charged with determining whether the "crimes reflected irreparable corruption or permanent incorrigibility," or to consider the petitioner's "youth and attendant circumstances" in considering a sentence of less than life-without-parole. *Id.* at 20. Thus, the sentencing procedures for the two verdicts following trial failed to comport with the Eighth Amendment. The warden's final argument that any *Miller* claim was waived as to the two life sentences resulting from the petitioner's plea agreement was also rejected by the court. The court distinguished this situation from other cases holding that where a defendant pleads guilty to avoid a penalty later declared unconstitutional, the resulting conviction remains intact. *See, e.g., Brady v. U.S.*, 397 U.S. 742 (1970). Here, the petitioner did not seek to challenge the fact of his conviction; rather, only his sentence was challenged. The "more formidable" question was the impact of the appeal waiver in the plea agreement. Rejecting that the claim was waived, the court observed: "[I]t is far from clear that a broad waiver of a substantive constitutional right, as the Warden maintains happened here, would even be enforceable." *Id.* at 23. There was no explicit waiver of the right to challenge the sentence in light of subsequent Supreme Court developments documented in the plea agreement, and nothing in the plea colloquy indicated as much. The court declined to find implicit waiver of this right and therefore affirmed the district court's grant of habeas relief in full. The court concluded: "We make this ruling not with any satisfaction but to sustain the law. As for [the petitioner], who knows but God how he will bear his future." *Id.* at 25.

**Court finds ineffective assistance of appellate counsel, rejecting as unreasonable that failure to raise a meritorious claim was a tactical decision by appellate counsel**

[U.S. v. Allmendinger](#), \_\_\_ F.3d \_\_\_, 2018 WL 3117199 (June 26, 2018). The defendant was tried and convicted in the eastern district of Virginia for money laundering, mail fraud, and various related fraud and conspiracy counts. The prosecution stemmed from an investment scheme that ultimately resulted in the loss of around 100 million dollars of investor funds. The defendant was tried separately from his co-defendant and was sentenced to 540 months in prison. On direct appeal, his counsel raised four issues, none of which were successful. The co-defendant successfully raised a "merger problem" on direct appeal, resulting in a new sentencing hearing (although the co-defendant ultimately received the identical sentence). The merger problem occurred with respect to the two money laundering convictions. "When a defendant's crime involves the use of money transactions to pay for the cost of illegal activity, the government cannot use those same money transactions to also prosecute the defendant for money laundering." Slip op at 7 (internal citations omitted). In this situation, the money

laundering offenses “merge” with the underlying offenses and cannot be the basis for additional sentences. In light of the result in his co-defendant’s case, the defendant (with new counsel) sought collateral relief, arguing that his appellate counsel was ineffective in failing to raise the merger issue on direct appeal. In that proceeding at the district court, his original appellate counsel testified that he considered the merger problem but did not raise it for strategic reasons—specifically, counsel asserted that he believed even if the merger issue was successful, it was unlikely to reduce the sentence in a meaningful way. He believed that the other issues raised on direct appeal had a better chance of actually lowering the defendant’s sentence. The district court denied relief, finding that the performance of the original appellate counsel was not deficient and did not cause prejudice under *Strickland*. As to the performance prong, the trial court found the decision to pursue other grounds on direct appeal was a “reasonable tactical decision.” Further, had the merger issue been raised, it was unlikely to impact the sentence because, in the words of the district court, it “could—and would—have sentenced him again to 540 months of imprisonment,” thereby defeating any claim of prejudice as well. *Id.* at 5.

The court began by noting that defendants have a right to effective assistance of appellate counsel. As to the performance prong, the court observed that “effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit.” *Id.* at 6. However, failure to raise an issue that is “clearly stronger” than the issues actually pursued can constitute deficient performance. The reviewing court must therefore consider the strength of the issues raised on appeal with the strength of the issue appellate counsel failed to raise. Such review considers the strength of the issues at the time appellate counsel made its decision to forego the claim and does not take into account subsequent cases or developments. The co-defendant’s appeal was decided after the defendant’s appeal was concluded, and the government argued that the merger issue here was therefore unsettled at the time of defendant’s appeal. The court disagreed, finding that two prior cases from the circuit strongly indicated the merger issue was a meritorious one. Those cases were decided before the defendant’s direct appeal—one a full year before, and the other two months before the defendant’s appeal. Turning to the issues appellate counsel did raise, the court determined that they were unlikely to result in relief, a point not contested by the government. The government contended that since the failure to raise the merger issue was a calculated tactical decision, counsel’s performance could not be deficient. Assuming without deciding that it may be possible for counsel to provide effective assistance where there is a tactical reason for foregoing a stronger claim, the court noted that such decision must be reasonable. “[N]ot every purported strategic reason will do.” *Id.* at 13. Here, the court rejected the alleged reasons for the tactical decision:

Neither appellate counsel nor the Government [explain] why, at the time of [the co-defendant’s] appeal, it was reasonable for counsel to believe that overturning two counts of money laundering (which together accounted for 160 months of a 540 month sentence) would have no effect in resentencing proceedings. We can discern none from the record. *Id.*

It was unreasonable for appellate counsel to presume the merger issue was unlikely to change the sentence and compared to the issues appellate counsel did raise, the merger issue was “clearly stronger.” Thus, counsel’s performance was deficient under *Strickland*. Turning to the prejudice prong, the court noted that the standard for prejudice in this context required a showing of a reasonable likelihood of success on appeal but for the deficient performance of counsel. The court rejected the

government's argument that because the district court had indicated an intention to impose the same sentence, prejudice could not be established. "Whether the sentence would change on remand does not control the *Strickland* inquiry in the context of alleged ineffective assistance *on appeal*. What matters is whether, had counsel raised the merger problem on direct appeal, we likely would have reversed the money laundering convictions and remanded to the district court for resentencing." *Id.* at 15 (emphasis in original). The defendant thus demonstrated a reasonable likelihood of success on direct appeal had the merger issue been raised, meeting the prejudice standard. The district court's order denying habeas relief was therefore vacated and the case remanded to the district court.

### **North Carolina's PJC is not a conviction for purposes of Immigration and Naturalization Act**

[Guzman-Gonzalez v. Sessions](#), \_\_\_ F.3d \_\_\_, 2018 WL 3130544 (June 27, 2018). This matter arose on petition for review of an order of the Board of Immigration Appeals denying the petitioner's application for cancellation of removal. The petitioner entered the United States illegally around December 2000. He pled guilty to misdemeanor possession of less than a half ounce of marijuana in North Carolina in 2002. A Wake County court imposed a prayer for judgment continued ("PJC") and ordered payment of court costs in the amount of \$100.00. The court imposed no other conditions as a part of the sentence. In 2015, Homeland Security sought to deport the petitioner on the basis of this conviction. The petitioner admitted he was subject to removal based on the PJC, but sought cancellation of removal. Among other conditions, a petitioner seeking to qualify for cancellation of removal must have no prior convictions for controlled substance violations. The Immigration Judge found that the North Carolina PJC qualified as a conviction in this context and denied relief. On appeal, the sole issue was whether the Wake County PJC qualified as a "conviction" for purposes of the Immigration and Naturalization Act (8 U.S.C. § 1101 *et seq.*).

Under the statutory definition in the Act, a conviction may include situations where "adjudication of guilt has been withheld" if the petitioner has been found guilty or entered a plea of guilty *and* "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Slip op. at 6. The government agreed that here, no formal judgment was entered against the petitioner, so the question was whether the order to pay court costs constituted a "punishment or penalty" within the meaning of the statute. This was an issue of first impression for the circuit; punishment and penalty are undefined in the statutes. The government argued that payment of costs was a form of punishment, pointing by analogy to fines and restitution (which courts have traditionally treated as punishment, "at least in the criminal sentencing context"). Applying the plain language of the statute, the court found that "a monetary assessment amounts to a punishment or penalty for purposes of [the statute] if it is principally intended to serve a punitive purpose—that is, if a judge orders the monetary assessment to advance a punitive goal tethered to the defendant's degree of culpability in light of her specific actions." *Id.* at 8. A conviction for purposes of the Act, in other words, must have "some punitive aspect". *Id.* On the other hand, "courts generally refuse to treat a monetary assessment as a punishment or penalty when the assessment solely reflects the cost of compensating a private party or the government for losses resulting from the wrongdoing." *Id.* at 10. Where the entity imposing the monetary assessment has discretion on whether to assess the obligation and in what amount, the assessment is more likely to be treated as a punitive measure qualifying as a penalty or punishment. "[P]ayment of a mandatory assessment untethered from the petitioner's degree of culpability" does not qualify. *Id.* at 14. Turning to North Carolina law, the court noted that the label attached to the monetary assessment by a state is not determinative for purposes of determining a penalty or punishment under the Act. North Carolina

recognizes three categories of monetary assessments: costs, fines, and restitution. The court noted that costs are “tied to the revenue and expenses of the Judicial Department incurred in adjudicating a defendant.” *Id.* at 15. Unlike restitution or fines where the court has discretion whether to impose those assessments and in what amount, court costs are “not punitive in nature . . . [and] are designed to compensate the North Carolina justice system for the cost of adjudication.” *Id.* at 17. Further, court costs in North Carolina are “mandatory.” *Id.* Thus:

We conclude that the \$100 in costs assessed attendant to [the] guilty plea and the North Carolina state court’s entry of a verdict of prayer for judgment continued do not constitute a ‘punishment’ or ‘penalty’ within 8 U.S.C. § 1101(a)(48)(A)’s definition of ‘conviction’. We therefore grant [the] petition, reverse the Board’s Order, and remand the case to the Board for further proceedings consistent with this opinion. *Id.* at 19.