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Fourth Circuit Case Summaries: March 3, 4, 25, and 27, 2020

Odor of marijuana supported search warrant for entire home, including safes, even after officers discovered apparent source of odor

U.S. v. Jones, 952 F.3d 153 (March 3, 2020). In this Eastern District of Virginia case, officers received a detailed anonymous tip that the defendant was distributing drugs from his residence and later conducted a knock and talk. When the defendant answered the door, officers smelled a strong odor of burning marijuana. The defendant was detained on the front porch while officers performed a protective sweep of the home. Inside, they found smoldering marijuana in a trash can. Based on the odor and their observations, officers sought and received a search warrant to look for evidence of marijuana. The warrant application detailed the tip, the knock and talk, the odor of marijuana, officer training and experience, and the still-smoking marijuana inside. The warrant authorized search of the home for narcotics and drug activity, including "any safes or locked boxed that could aid in the hiding of illegal narcotics." Slip op. at 5. A safe containing a gun was found in the defendant's bedroom, and various drugs and drug distribution paraphernalia were also found in the residence. The defendant was charged with drug offenses and as a felon in possession and moved to suppress. The district court denied the motion and the defendant pled guilty, reserving his right to appeal. The Fourth Circuit unanimously affirmed.

The defendant argued the search warrant lacked probable cause and was overbroad in light of the offense at issue. According to the defendant, once officers discovered the apparent source of the odor of marijuana (the smoking marijuana in the trash), probable cause existed only as to that offense for that amount of marijuana, and gave officers no further justification to search the rest of the house or to open safes. This argument was squarely rejected. The odor of marijuana provides probable cause to search the entire residence for any other marijuana. The warrant was also not overbroad:

> The geographical scope of a warrant complies with the Fourth Amendment if, in light of 'common-sense conclusions about human behavior' there is a 'fair probability that contraband or evidence of a crime' will be found in the areas delineated by the warrant. *Id*. at 9.

This situation was different from searches where probable cause only existed to search for a specific piece of evidence. There, the search would be limited to places the item could be located and would conclude once the particular item was located. "[C]ommon sense" here suggested that the smoking marijuana found by officers would not be the only amount of marijuana in the home and that any other marijuana in the home might be hidden elsewhere, including in any safes. The warrant therefore complied with the Fourth Amendment and the district court did not err denying the motion.

(1) Traffic stop was supported by reasonable suspicion of drug trafficking and was not unreasonably extended under *Rodriguez*; (2) Admission of phone call between defendant and non-testifying

informant to show context of defendant's statements on the call did not violate the Confrontation Clause; (3) Any Confrontation Clause violation by admission of evidence of the informant's act of calling the defendant did not rise to the level of plain error

U.S. v. Jordan, 952 F.3d 160 (March 3, 2020). This case from the Western District of North Carolina stemmed from a drug trafficking investigation. Federal authorities apprehended another suspect involved in drugs, and that person became an informant, providing law enforcement with the defendant's name as a supplier. The informant agreed to call the defendant and set up a purchase. The phone call was recorded, and the two men discussed drug transactions using coded language. Based on that conversation, officers obtained search warrants for the defendant's phone and to authorize placement of a tracking device on the defendant's vehicle. Agents observed him make several quick visits to different locations, at times bringing one package into a location and leaving with a different package. The agents asked local police to conduct a traffic stop of the defendant based on these observations.

The defendant ran a red light and was stopped by a Charlotte police officer. The defendant was on the phone and was "unwilling to engage" the officer. Multiple other cell phones were in view within the vehicle. The defendant was frisked, and a rubber glove found in the defendant's pockets (an item the officer knew to be associated with drug trafficking). The defendant's brother appeared on the scene of the stop and tried to involve himself in the encounter. The officer waited 11 minutes for backup and then allowed a drug dog to check the vehicle. It alerted, and the defendant admitted to possessing cocaine. A search subsequently revealed cocaine, more than $25,000 in cash, six phones and a gun. The defendant waived Miranda and admitted his involvement in trafficking. Other drug stashes, guns, and large amounts of currency were found in the other places visited by the defendant on the day of the stop and at residences associated with him. The defendant moved to suppress, arguing that the traffic stop was unreasonably extended in violation of *U.S. v. Rodriguez,* 575 U.S. 348 (2015). He also sought to suppress his statements made on the phone call with the informant, arguing that they violated the Confrontation Clause (since the informant was not testifying at trial). The district court denied both motions, and the defendant was convicted at trial of all charges. He was sentenced to 35 years imprisonment and appealed.

(1) A stop based on a traffic offense may not be extended beyond the time necessary to complete the mission of the stop absent reasonable suspicion of an offense or consent pursuant to *Rodriguez*. Here, the stopping officer was aware that the defendant was under investigation for trafficking drugs. Further, under the collective knowledge doctrine, all of the information possessed by federal agents was imputed to the stopping officer. Based on the information from the informant, the search warrants that had issued, and the defendant's movements earlier in the day, law enforcement had reasonable suspicion of drug trafficking at the time of the stop. The suspicion of drug trafficking coupled with the presence of the defendant's brother on the scene justified the 11-minute extension to wait for backup to arrive as a matter of officer safety. The stop was therefore not unconstitutionally extended, and the district court's denial of the motion to suppress was affirmed.

(2) Parts of the phone call between the defendant and the informant were played at trial. An agent testified that he instructed the informant to call his supplier and explained the use of coded language between drug traffickers generally. The trial judge instructed the jury not to consider the informant's

statements on the phone call for the truth of the matter asserted, but only for context of the defendant's statements on the call. This did not violate the Confrontation Clause. In the court's words:

> The [Confrontation] Clause does not, however, 'bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' And so we have made clear—along with several other circuits—that recorded statements of non-testifying informants . . . may be used at trial consistent with the Confrontation Clause as long as they are offered only to provide context for the defendant's statements, and not for the trust of the matter asserted. That is exactly what happened here. Slip op. at 13.

(3) The defendant also objected to the admission of the phone call because he claimed the informant's act of calling him was a nonverbal assertion that identified him as the informant's supplier. This, he argued, was subject to the Confrontation Clause as assertive conduct. This argument was not raised at trial and was reviewed for plain error only. The Fourth Circuit noted that the Confrontation Clause applies to testimonial statements and agreed that assertive conduct can be a statement within the meaning of the clause. The First Circuit has deemed the act of an informant calling a defendant to arrange for delivery at police direction and driving with officers to the location of the transaction to be non-assertive conduct. *See U.S. v. Bailey*, 270 F.3d 83 (1st Cir. 2001). "Testimony about that compliance [with law enforcement instructions], . . . 'described conduct' rather than introducing statements." *Jordan* Slip op. at 15. The court distinguished other precedent where an officer selected the defendant's number from the informant's phone. There, the conduct was held to be assertive and subject to confrontation rights because of the clear implication that the informant must have told the officer the defendant's name—a verbal statement identifying the suspect could be inferred from that conduct. "Here, by contrast, [the officer] neither said nor suggested that [the informant] verbally identified [the defendant] as his supplier." *Id*. at 16. Without deciding "whether and under what circumstances compliance with law enforcement instruction might be deemed 'assertive conduct,'" the court declined to find plain error on these facts. *Id.* at 15.

Two sentencing challenges were rejected, and the district court was unanimously affirmed in full.

License checkpoint was reasonable despite lack of written plan or definite hours of operation

U.S. v. Moore, 952 F.3d 186 (March 4, 2020). This drug case arose from a license checkpoint in the Eastern District of North Carolina. The defendant was stopped in Columbus County at a "routine traffic checkpoint" in the early morning hours. A sergeant of the Sheriff's office organized and supervised the checkpoint, assisted by four other deputies. The checkpoint was set up on a "well-travelled" road. Patrol cars were parked alongside the checkpoint with lights flashing, and traffic cones were placed in the roadway. All of the officers were in uniform and wore reflective gear. The stated purpose of the checkpoint was to look for motor vehicle violations. The sergeant directed the deputies to stop each car that approached the checkpoint and to ask each driver for a driver's license and registration. When the defendant approached the checkpoint, officers noticed apparent bullet holes in the defendant's car. Officers approaching the car smelled marijuana and saw smoke coming from the passenger side. Upon questioning, the defendant admitted he had been smoking a "blunt" of marijuana. The defendant consented to a search of his car, which revealed rock-like substances, scales, guns and ammo. A search of the defendant's person revealed more rock-like substances, as well as pills and cash. The defendant was arrested (the only person arrested at the checkpoint that night), and the checkpoint ended. The rock-like substances tested positive as crack cocaine. The defendant moved to suppress, arguing that

the checkpoint was unconstitutional. The district court denied the motion and the defendant appealed following his guilty plea. The Fourth Circuit unanimously affirmed.

A traffic checkpoint is a seizure within the meaning of the Fourth Amendment and must be reasonable. Under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), a traffic checkpoint must be conducted for a valid primary purpose. Checking driver compliance with motor vehicle laws is a valid purpose; general crime control is not. If a checkpoint has a valid purpose, the court may then assess its reasonableness. Reasonableness is determined by weighing "the public interest sought to be advances and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty of those stopped." Slip op. at 7. On appeal, the defendant conceded that the checkpoint had a valid purpose but complained that the checkpoint was operated unreasonably because officers had unbridled discretion—"the primary 'evil' to be avoided in the context of suspicionless stops"—based on the lack of a start and end time and lack of checkpoint plan. *Id*.

The Fourth Circuit disagreed, finding the checkpoint here "minimally intrusive." Flashing lights, traffic cones, and the reflective gear of the officers warned the public about the checkpoint. "More importantly, the checkpoint was operated pursuant to a 'systemic procedure that strictly limit[ed] the discretionary authority of police officers' and reduced the potential for arbitrary treatment." *Id*. at 9. Multiple officers were on scene, as well as a supervisor (the sergeant), and drivers were not detained longer than necessary to check driver licenses and registration (unless separate reasonable suspicion was developed during the interaction). "

> [F]ar from exercising 'unfettered discretion,' the actions of [the] officers were plainly regulated and specifically directed toward ensuring highway safety and compliance with motor vehicle laws. Such a narrowly prescribed operation clears the hurdle of Fourth Amendment reasonableness. *Id*. at 10.

The lack of a written checkpoint plan was not fatal—the sergeant testified there was a written plan, and in any event, a written plan, while "preferable," is "not a sine qua non of reasonableness." *Id*. (citation omitted). The lack of established hours of operation likewise did not render the checkpoint unreasonable. Officers must have some discretion to respond to events on the ground, such as traffic, weather, or emergencies. "In short, the position that failing to establish and abide by rigid start and end times automatically transforms a lawful checkpoint into a Fourth Amendment violation is untenable, and we reject it." *Id*. The denial of the motion to suppress was therefore affirmed.

Failure to hold *Remmer* hearing for potential juror bias was reversible error

U.S. v. Johnson, ___F.3d ___, 2020 WL 1443525 (March 25, 2020). This Maryland case involved various drug, gun, and racketeering charges against multiple gang members, including charges of conspiracy to murder a witness. The witness had been in protective custody but was "evicted" from the program for violating its rules and then murdered, despite a tip to police the night of his murder about the threat. During trial testimony about the murder ("the heart of the government's case"), the jury saw graphic images of the deceased victim and heard about "frantic efforts" by the police to find the witness on the night of his death. After this testimony, several jurors informed the clerk that they'd noticed the defendant talking with his defense team and that he had "looked up" at the jurors. The trial judge dismissed this concern and took no further action. Later that day, "one or more" jurors informed the clerk of their concerns that the defendant might have learned personal details of the jurors during jury selection. At the

end of that day, jurors passed a note to the clerk again expressing concerns about their safety. The judge dismissed these concerns as too general and not warranting further inquiry. Motions for mistrial and individual voir dire of jurors on the issue were denied.

More than a month later during trial, a bailiff informed the judge that a juror had reported that people associated with the defendant had tried to photograph the juror while the jurors left the courtroom, and that this concern was expressed in front of the rest of the jury. The judge ordered a law clerk and deputy to question each juror on whether something happened. The questioning took place off the record and outside the presence of the lawyers or judge. The questioning was limited to whether something had happened and did not inquire into juror's feelings or impartiality. Juror #4 responded to the questioning by reporting he saw two women photograph jurors and that he informed some of the other jurors of this concern. Other jurors confirmed that Juror #4 had reported this concern. Other jurors reported seeing people on their phones in the public spaces of the courthouse but didn't believe the jurors were being photographed. The trial judge determined that nothing corroborated Juror #4's concerns and concluded that no juror had been photographed. Out of concern that the juror may potentially have been prejudiced, Juror #4 was dismissed. The remaining jurors were not informed of why Juror #4 was dismissed, and the court denied a request to individually voir dire the jury on any potential prejudice.

Law enforcement investigated the issue the next day and searched a cell phone of a person seen by the jurors but failed to find any images of the jurors. Hearing this, the trial court informed the jury of the investigation and its results. It concluded any concerns had been addressed and again declined to grant a mistrial or question the jurors further. The jury convicted on all counts and the defendants moved for a new trial, arguing that the failure to hold a *Remmer* hearing on the issue of potential juror bias was error. The court denied the motion, the defendants were sentenced to life and appealed.

Outside or external influences on a jury affecting their deliberative process violate a defendant's right to an impartial jury under the Sixth Amendment. Pursuant to *Remmer v. U.S.*, 347 U.S. 227 (1954), a defendant who makes an initial credible showing "that 'unauthorized contact was made,' and that the contact 'was of such a character as to reasonably draw into question the integrity' of the trial proceedings . . ." is entitled to an evidentiary hearing on the effect of the contact on the jury, as well as a presumption that such outside contact affected the jury's impartiality (a "*Remmer* presumption"). Slip op. at 9. Such outside conduct may be direct or indirect. The government can overcome that presumption by demonstrating "'no reasonable possibility' that the jury 'was influenced by an improper communication.'" *Id*. at 10. Here, the circumstances involving Juror #4's reports met *Remmer's* requirements and a hearing should have been held.

The trial judge procedurally erred by having court staff, rather than the trial judge, conduct jury questioning. "[T]he procedure employed by the district court disregarded the fact-finding purpose of a *Remmer* hearing, which is based on considerations of due process. . .This procedure also deprived the defendants of the presumption of prejudice to which they were entitled under *Remmer.*" *Id*. at 11. The trial judge also substantively erred by failing to question jurors on the impact of the reports by Juror #4, instead focusing only on whether in fact something had happened. "Without questioning each juror individually, the district court could not know whether any remaining jurors were prejudiced by Juror #4's stated concerns, even if those jurors had not witnessed any of the alleged activity." *Id*. at 13. The district court's denial of the post-trial motion was therefore vacated, and the matter remanded for a *Remmer* hearing.

Judge Motz dissented. She would have found that the conduct at issue was "innocuous" and that the defendants were not entitled to a *Remmer* presumption or hearing.

(1) SORNA's registration requirement does not violate nondelegation principles under *Gundy v. U.S.*; (2) application of SORNA to conduct occurring after SORNA's enactment does not violate ex post facto principles

U.S. v. Wass, ___ F.3d ___, 2020 WL 1443526 (March 25, 2020). The defendant was indicted in the Eastern District of North Carolina for failing to register pursuant to the Sex Offender Registration and Notification Act ("SORNA"). He was convicted of sex offenses in Florida in 1995 and was required to register under SORNA (enacted in 2006). The defendant moved to dismiss the prosecution for violations of the nondelegation and ex post facto doctrines, and the district court granted the motion. The government appealed, and the Fourth Circuit reversed.

(1) The court observed that the Supreme Court recently considered nondelegation in the context of SORNA in *Gundy v. U.S.*, 139 S. Ct. 2116 (2019) (Kagan, J.) (plurality opinion).

> The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. But Congress may 'confer substantial discretion on executive agencies to implement and enforce the laws', as long as it 'has supplied an intelligible principle to guide the delegee's use of discretion.' Slip op. at 4 (citations omitted).

With 34 U.S.C. 20913(d), Congress gave the Attorney General the authority to "specify" the application of SORNA's registration requirements to offenders with an offense pre-dating SORNA's enactment. The Attorney General authorized those requirements in 2011 and applied the registration requirement to all offenders, including those with pre-SORNA offense dates. The defendant argued that SORNA improperly delegated this decision to the Attorney General. *Gundy*, though, already rejected this argument, finding the Attorney General was only delegated authority to determine "feasibility issues" with SORNA's rollout, and that this "easily passed constitutional muster." *Gundy* at 2121. That *Gundy* was a plurality decision did not help the defendant—under *Marks v. U.S.,* 430 U.S. 188, 193 (1977), the "narrowest grounds" of the concurring judgments in a plurality decision is the holding of the case. In *Gundy*, five justices agreed in judgment that SORNA did not violate the nondelegation doctrine and that holding therefore defeated any nondelegation claim.

(2) The court also rejected the ex post facto challenges. Ex post facto laws are laws that impose punishment on conduct that was not criminal at the time of the act, or laws that increase a penalty for conduct beyond what the law provided at the time of the act. An initial inquiry in an ex post facto challenge is whether the statute provides for punishment. Where the law is meant to impose retroactive punishment, it violates the ex post facto clause. "But if the legislature's intention 'was to enact a regulatory scheme that is civil and nonpunitive,' courts must examine 'whether the statutory scheme is so punitive either in purpose or effect as to negate' that intention." *Id*. at 7. The defendant argued that application of the criminal failure to register law to his pre-SORNA conviction constituted retroactive punishment in violation of the ex post facto clause. Circuit precedent foreclosed this argument—the failure to register law with which the defendant was charged "punishes the failure to register *after* SORNA's enactment and therefore . . . does not violate the Ex Post Facto Clause." *Id*. at 8 (emphasis in original) (citing *U.S. v. Gould*, 568 F.3d 459 (4th Cir. 2009).

The court also rejected the argument that the registration scheme itself was so punitive as to qualify as punishment for ex post facto purposes. SORNA's stated purpose to create a civil regulatory scheme to track sex offenders, and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id*. at 13. Circuit precedent again foreclosed this argument—in *U.S. v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), the court held that SORNA was not punitive and did not constitute punishment. The order granting the motion to dismiss was consequently reversed and the matter remanded for trial.

Fourth Amendment suit against police for use of cell site simulator device remanded for additional factfinding; summary judgment to defendants reversed

Andrews v. Baltimore City Police Dept., ___ F.3d ___, 2020 WL _____, No. 18-1953 (March 27, 2020). Baltimore police used a cell site simulator (a "Hailstorm" device) to locate the plaintiff, relying on a pen register/trap and trace order ("the order"). Cell site simulators mimic cell phone towers and force all phones within an area to connect to the device, rather than nearby cell towers to which the phones would normally connect. Every phone connecting to a cell tower (or simulator device) sends an identifying signal that may be collected and stored by the cell tower (or simulator). This data in turn can provide location data on the connecting devices—if the suspect's phone connects to the device, police can determine the cell phone user's vicinity. Much secrecy surrounds the use of these devices, and the police had a nondisclosure agreement with the FBI limiting disclosures information about the device here, as is common. "Law enforcement agencies are reluctant to disclose information about cell site simulators. This case is no different." *Id*. at 2 n. 1. (citations omitted) (observing that the government has dismissed cases rather than disclose details about the devices).

The order did not specifically identify the use of cell site simulator technology, but rather allowed for the "duplication of facilities, technical devices or equipment . . .[to] initiate a signal to determine the location of the subject's mobile device . . ." Slip op. at 3. The order was limited to 60 days but was not limited by geographic area. The plaintiff was arrested after police located him using the device, but the state court suppressed the evidence, finding that the pen register order lacked probable cause and particularity. The plaintiff then sued under 42 U.S.C. § 1983 for a Fourth Amendment violation. The district court granted summary judgment to the defendants. It found that the order was effectively a search warrant and did not hold a hearing on what data a Hailstorm device could or did collect, or how it operated. Without this information, the court was unable to conduct adequate review of the Fourth Amendment claim:

> Absent a more detailed understanding of the Hailstorm simulator's configuration and surveillance capabilities, we cannot address the issues necessary for resolution of this case. Despite the government's use of a sophisticated, wide-reaching, and hard-to-detect new surveillance tool—one with potentially significant implications for constitutional privacy—we know very little about how many searches it conducted, of whom, and what data it collected and stored. We thus cannot strike the appropriate 'balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers' that is central to the Fourth Amendment analysis. *Id*. at 7.

On remand, the district court is to consider the following factors: (1) the device's range; (2) the number of phones to which it may connect; (3) "all categories of data" collected by the device; (4) whether such data is stored; (5) what data is available to law enforcement; and (6) any efforts at protecting against data collection from innocent third-parties within the device's configuration. The district court was also

instructed to consider if the defendants had any policy or practice of withholding information about the use of a cell site simulator from judicial officials when seeking search warrants or pen register orders. Without expressing judgment on the alleged Fourth Amendment violation, the court reversed and remanded for hearing.

Judge Wilkinson concurred, noting the public interest in solving crime and suggesting that the district court consider that governmental interest on remand as well.

Failure to inform defendant of element requiring knowledge of status as a prohibited person in felon in possession prosecution was structural (and plain) error

U.S. v. Gary, ___ F.3d ___, 2020 WL 1443528 (March 25, 2020). In *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she was prohibited from possessing a firearm (in addition to proving knowing possession of the weapon) in order to convict a defendant of felon in possession of a firearm under 18 U.S.C. § 922(g)(1). The defendant pled guilty to that offense, and the trial judge instructed the defendant on the elements of the crime during the plea colloquy. The trial judge failed to mention the knowledge-of-status element required by *Rehaif*. On plain error review, the court held this was structural error and reversed. The defendant could not make an informed choice about pleading guilty without being informed of the correct and complete elements of the crime, and this omission amounted to a violation of the defendant's Sixth Amendment right to autonomy in the conduct of his defense. *See McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

> The defendant] had the right to make an informed choice on whether to plead guilty or to exercise his right to go to trial. In accepting [the defendant's] plea after misinforming him of the nature of the elements, the court deprived him of his right to determine the best way to protect his liberty. *Gary* Slip op. at 15-16.

Because the error was structural, harmless error review did not apply and the defendant was not required to show prejudice.

This error also violated due process under the Fifth Amendment and principles of fundamental fairness.

> When [the defendant] pled guilty, he waived, among other rights, his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. The impact of his unknowing waiver of his trial rights based on an unconstitutional guilty plea . . . is unquantifiable [and therefore structural error]. *Id*. at 17.

The conviction was therefore vacated and the matter remanded for further proceedings.

Other Case of Note:

(1) Deference to state judgment properly applied to the petitioner's exhausted claims and new evidence did not transform the claims to unexhausted ones; (2) Petitioner could not meet *Martinez* exception to procedural default on new unexhausted claim

Moore v. Stirling, 952 F.3d 174 (March 3, 2020). The petitioner was convicted of murder in South Carolina state court and sentenced to death, which was affirmed on direct appeal. His postconviction claims were denied in state court and he sought federal habeas review, bringing three ineffective

assistance of counsel claims. Two of those claims involved new evidence in support of allegations that his trial attorneys failed to sufficiently investigate the crime scene and failed to conduct sufficient mitigation investigation. Both of those claims were heard and denied in state postconviction (but without the benefit of the new evidence). The petitioner claimed that new evidence "fundamentally altered" the claims, such that they were now unexhausted claims—claims that had not been heard in state court. Unexhausted claims that the petitioner could have brought in state post-conviction but are now procedurally barred by state law will normally be treated as defaulted in federal habeas. Default may be excused only in limited circumstances. Under *Martinez v. Ryan*, 566 U.S. 1 (2012):

> If a prisoner can show 'cause' for a failure to exhaust and 'prejudice' from the alleged violation of federal law, we may excuse the procedural default. Under *Martinez*, a prisoner may establish cause where his post-conviction counsel was constitutionally ineffective for failing to raise and exhaust a claim of 'ineffective assistance of trial counsel' where the State 'effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal'. *Moore* Slip op. at 12 (citations omitted).

If the default is excused, the petitioner is entitled to de novo review of his claims. If not, the state court's judgment is set aside "only if no fairminded jurist could agree" with its conclusions under 28 U.S.C. § 2254(d). *Id*. at 12. The district court disagreed the new evidence transformed the claims and applied § 2254(d) deference to the state judgment, dismissing the petition. The Fourth Circuit affirmed:

> We cannot follow [the petitioner] down this twisted road [towards an improved standard of review]. The new evidence *does not* fundamentally alter the heart of the two ineffective-assistance-of-counsel claims presented to the state court. So the district court properly deferred to the state court rejection of these claims. *Id*. at 3 (emphasis in original).

The third claim was procedurally defaulted under § 2254(b)—the petitioner failed to raise the unexhausted claim in state post-conviction. The underlying ineffective assistance of counsel claim—that his trial attorney should have challenged the prosecutor's discretionary decision to seek a death verdict—lacked merit and could not meet the "cause" standard to excuse the default under *Martinez*. The district court's dismissal of the petition was therefore affirmed.

Petitioner met requirements for § 2241 habeas petition under savings clause to challenge *Simmons* error

Braswell v. Smith, 952 F.3d 441 (March 4, 2020). This habeas appeal from the Eastern District of North Carolina involved the "saving clause" in 28 U.S.C. § 2254(e). While § 2254 is typically the mandatory vehicle for collateral attack of a sentence in federal court, if that motion will be ineffective or inadequate, the savings clause allows an inmate to utilize the "traditional" habeas relief in 28 U.S.C. § 2241. Here, a *Simmons* error affected the petitioner's (career offender) sentence. *See U.S. v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) (error to count North Carolina felony as crime punishable by more than a year for federal sentencing purposes where the defendant's non-hypothetical sentencing exposure was less than a year). The petitioner sought § 2254 relief on the issue but was denied, as *Simmons* had been decided at the time of his petition but had not yet been held to apply retroactively.

He did not appeal, and a subsequent § 2254 petition was dismissed. He then filed the § 2241 action pro se. The district court dismissed but the Fourth Circuit reversed.

Because of the "unique circumstances" here, the savings clause applied and a traditional § 2241 petition was appropriate. An appeal waiver in the petitioner's plea agreement did not bar this relief under the circumstances, and the matter was reversed and remanded for hearing on the petition.