Case Summaries: Fourth Circuit Court of Appeals (May 1, 7, 14, 20 & 28, 2025)

Motion to compel information from foreign law enforcement agency was properly denied; motion to suppress also properly denied where search warrant affidavit established a strong likelihood of defendant's involvement in child pornography offenses

U.S. v. Dugan, 136 F.4th 162 (May 1, 2025). A foreign agency with whom the FBI had a relationship and who was known to give reliable information notified the FBI that a certain domestic IP address had visited a "dark web" website known to contain and disseminate child sexual abuse material. The IP address was traced to the defendant's home, and an FBI agent obtained a search warrant for the residence. The affidavit in support of the search warrant detailed how the "dark web" site worked. Users of the website were required to post a certain number of megabytes of child sexual abuse material to the site to maintain an account. The website was only accessible via a TOR browser, which requires downloading specific software to use and makes tracking of users IP addresses more difficult. Because the addresses of dark web sites are usually complex and TOR software is required to access them, it is extremely difficult to accidentally access such sites. The affidavit further detailed that the foreign agency was a "friendly country" that operated an independent investigation pursuant to the laws of that country without the involvement of any U.S. law enforcement agency, and that it took no actions to search, seize, or access any U.S. computer data. When the search warrant was executed, law enforcement seized over 1000 images of child sexual abuse. The defendant also admitted to using the dark web to access child pornography sites and acknowledged his interest in such material. The defendant was indicted for accessing with intent to view child pornography in the Southern District of West Virginia. He moved to compel discovery relating to the foreign agency and sought to suppress the evidence obtained as a result of the search warrant. The court denied the motions, finding that no basis existed to compel discovery from the foreign entity and that the search warrant was supported by probable cause. Following a one-day jury trial, the defendant was convicted and sentenced to 54 months in prison. A unanimous Fourth Circuit affirmed.

Regarding the motion to compel discovery, the defendant argued that he needed more information about the foreign agency to adequately advance his suppression arguments. He sought to show that the foreign entity was working in tandem with the FBI from the start, and that the Fourth Amendment therefore applied to the initial flagging of his IP address. He also alleged that the foreign agency had searched his computer without a warrant. Because these assertions of the defendant were wholly speculative, the district court properly denied the motion. Defense counsel admitted to the district court judge that no evidence existed showing that the foreign agency was acting on behalf of the FBI when it submitted its tip, and that no evidence existed showing that the defendant's IP address could have only been discovered by an illegal search. "Put simply, Dugan's joint venture theory is unsupported by any evidence, and

it fails to undermine the legitimacy of the foreign agency's tip to the FBI. . . And because Dugan can only speculate on what the requested information might reveal, he cannot satisfy *Brady's* materiality requirement" *Dugan* Slip op. at 13.

The district court also correctly denied the motion to suppress. The affidavit showed a high probability that the defendant intentionally sought out child sexual abuse material and accessed the website in question by detailing the "chain of deliberate actions" needed to do so, including installing a TOR browser, discovering the hidden website's address, and registering an account with the site. *Id*. at 17. This provided ample probable cause to believe evidence of child pornography would be found at the defendant's home.

A challenge to the restitution award was similarly rejected and the judgment of the district court was fully affirmed.

Officers were justified in good-faith reliance on search warrant for digital devices in meth trafficking investigation

U.S. v. Henderson, 136 F.4th 527 (May 7, 2025). A sheriff's deputy stopped a woman, Langley, for driving erratically. Langley notified the deputy that drugs were in the car, and one of the car passengers admitted to having a gun. A full search of the car led to the discovery of the gun, several ounces of methamphetamine, and paraphernalia associated with drug dealing. Langley and the other occupants informed the deputy that more meth was at Langley's home, along with her supplier. An investigator applied for a search warrant based on the traffic stop, the search of the car, and the statements of the occupants. The warrant authorized searches of digital devices for records of drug distribution. Later that day, officers executed the search warrant on the residence. The defendant was inside the home, along with a large amount of meth, more drug paraphernalia, and another gun. The defendant had two cell phones. The phones had texts and photographs showing involvement in drug distribution.

The defendant was indicted in the Western District of Virginia for various drug distribution and firearms offenses. He moved to suppress the cell phone evidence, arguing that the warrant was overbroad and that the affidavit in support of the warrant made only vague, conclusory allegations that evidence of drug trafficking would be found on the devices. The district court denied the motion. It ruled that the affidavit adequately alleged reasons to think drug dealing evidence would be found on the phones, and, alternatively, that the officers relied on the warrant in good faith.

On appeal, a unanimous panel of the Fourth Circuit agreed, affirming on good faith grounds. Langley told the deputy during the traffic stop that her supplier was from out of state and that more drugs could be found in her home. The investigator who applied for the warrant recounted her experience investigating meth distribution and stated that people involved in the field often kept "notes, records, messages, and telephone numbers" relating to drug dealing and that this information was often stored on digital devices like cell phones. *Henderson* Slip op. at 7. While police may not automatically search for digital devices absent a

specific showing connecting the crime of investigation to the likelihood of evidence being found on a device, here, the officers were seeking evidence of drug trafficking, which necessarily involves coordination with others. Assuming without deciding that search warrant was nonetheless flawed, it was not so obviously lacking in probable cause as to render it facially invalid, and officers were entitled to rely on it in good faith under *U.S. v. Leon*, 468 U.S. 897 (1984).

A challenge to the jury instructions was likewise rejected, as were challenges to the sentencing calculation. The judgment of the district court was therefore affirmed in all respects.

Motion to suppress properly denied where contested evidence was obtained by a separate, independent, and lawful source

U.S. v. Deritis, 137 F.4th 209 (May 14, 2025). Local police in Hickory, North Carolina received a tip from Microsoft notifying them that the defendant's IP address had accessed child sexual abuse material. A police officer obtained a search warrant for the defendant's home. Instead of answering the door, the defendant began attempting to encrypt and delete data on his two hard drives. He also googled how to report child pornography to law enforcement. The officer who attempted to execute the search warrant left and returned with backup, eventually gaining access to the home. The officers saw that the defendant was trying to permanently delete data. Officers were able to stop that process and copy the defendant's hard drives. The officers also sent Google a notice to preserve the defendant's Gmail account information. After seizing and reviewing the defendant's electronic devices, they discovered naked images of the defendant's 12-year-old stepdaughter, apparently taken by a secret recording device. Officers obtained a new search warrant to look for the camera used to take the images. They found two small cameras in the defendant's office.

During this second encounter, the defendant acknowledged that he had hidden the cameras in certain bathrooms of the home and that he had viewed the image of his nude stepdaughter. While the defendant's then-wife was talking with an investigator on the front porch of the home, the defendant attempted to kill himself with a kitchen knife. A full search of the defendant's computer revealed thousands of pictures of child sexual abuse material, as well as the original video of his stepdaughter. Nearly two months later, officers sent Google a search warrant for the defendant's Gmail account information. Google provided a copy of the data they originally preserved at the time of their receipt of the preservation notice, as well as the email account data still available at the time the search warrant was received. The two data sets were largely identical. Law enforcement discovered pornographic images created by the defendant with his sleeping stepdaughter within both sets of data.

The defendant was indicted in the Western District of North Carolina for various child pornography offenses. He moved to suppress the evidence from his Gmail account, arguing that the preservation notice sent to Google amounted to a warrantless seizure and that the delay of 55 days between the preservation notice and the issuance of the search warrant for Gmail

account information was unreasonable. The district court denied the motion, finding that the preservation request did not amount to a Fourth Amendment seizure. Because no seizure occurred until the Gmail search warrant was executed, the delay between the preservation notice and the warrant was irrelevant. The defendant was convicted at trial of all charges and sentenced to 600 months in prison.

On appeal, the Fourth Circuit affirmed the denial of the suppression motion, but on different grounds than the district court. Google provided nearly identical sets of data to law enforcement in response to the preservation notice and the search warrant. Even if the information provided in response to the preservation notice was unlawfully obtained, law enforcement obtained the same information from an independent source, the Google search warrant. In the words of the court:

> '[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired in from a separate, independent source.' *Utah v. Strieff*, 579 U.S. 232, 238 (2016). Because the officers obtained the photographs Appellant took of his stepdaughter from a separate independent source in this case, we need not inquire whether any part of the Government's search of the Appellant's Gmail account was unlawful. *Deritis* Slip op. at 11.

Challenges to the jury instructions, sufficiency of evidence, and evidentiary rulings were also rejected, although the defendant successfully challenged the imposition of a special assessment of $117,000.00. The special assessment was vacated, and the case was remanded for reconsideration of that sole issue. The judgment of the district court was otherwise affirmed.

Fourth Circuit rejects facial Second Amendment challenge to the federal ban on possession of firearms by a person convicted of a misdemeanor crime of domestic violence

U.S. v. Nutter, 137 F.4th 224 (May 14, 2025). The defendant was charged with possessing a firearm after having been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. 922(g)(9). The defendant had been convicted three times of domestic violence offenses in Ohio state court between 1998 and 2002. The defendant moved to dismiss, arguing that 18 U.S.C. 922(g)(9) violated the Second Amendment. Applying pre-*Bruen* precedent, the district court denied relief. *New York Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), was decided after the defendant pleaded guilty but before sentencing.

The defendant renewed his motion to dismiss for a Second Amendment violation under *Bruen*. The district court again denied the motion, finding that the ban on possession of firearms by persons convicted of misdemeanor crimes of domestic violence was lawful under *Bruen*. The defendant's plea agreement was altered to allow him to preserve the denial of his second motion to dismiss for appeal and he was sentenced to 12 months in prison. On appeal, a unanimous panel of the Fourth Circuit affirmed.

While the defendant purported to mount both a facial and as-applied challenge to the statute of conviction, the court determined that he only argued a facial challenge. Any as-applied challenge to the statute was therefore waived on appeal. "[The defendant] did not raise an as-applied challenge in his opening brief. Nutter's fleeting and generalized reference to it in his supplemental opening brief was both untimely and insufficient." *Nutter* Slip op. at 7. To succeed on a facial challenge, the defendant must show that all applications of the statute are unconstitutional. Here, the defendant argued that *United States v. Rahimi*, 602 U.S. 680 (2024), which upheld the constitutionality of the federal restriction on gun possession by a person subject to a qualifying domestic violence protective order in 18 U.S.C. 922(g)(8), did not control the outcome of his challenge. He pointed to the fact that the disarmament for a person subject to the 922(g)(8) ban was temporary, lasting only so long as the order was in place. He also noted that a qualifying protective order required a finding of physical violence or the threat thereof, while some qualifying misdemeanor crimes of domestic violence may be committed without actual violence.

The court disagreed. "At its core, *Rahimi* held that 'our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not' and 'allows the Government to disarm individuals who present a credible threat to the physical safety of others.'" *Nutter* Slip op. at 13 (citation omitted). At least some of the people to whom 922(g)(9) applies may therefore be disarmed consistent with the country's historical tradition. The court further observed that not all misdemeanor domestic violence offenses trigger the federal ban, only such crimes that meet the definition of the term in 922(a)(33)(A). A person subject to this disqualification may also obtain civil restoration of their gun rights and in some cases is only subject to the ban for a period of five years. 18 U.S.C. 922(a)(33)(C). Thus, the facial challenge failed, and the judgment of the district court was affirmed.

Plea attorney's incorrect advice led to rejection of plea deal and constituted ineffective assistance of counsel; a defendant need not present contemporaneous evidence to corroborate his claim that he would have accepted a rejected plea had he been properly advised

U.S. v. Brown, 137 F.4th 248 (May 20, 2025). The defendant was indicted for four drugs offenses and one gun offense in the Eastern District of North Carolina stemming from sales of cocaine base to an informant on four occasions. The total weight of the drugs involved amounted to 1.63 grams. The defendant faced up to 20 years for each drug offense and up to 10 years for the firearm offense, up to a potential total of 90 years.

Attorney #1 properly advised the defendant of the amount of time he was facing. The defendant told his first attorney (Attorney #1) that he wanted a plea bargain and did not want to go to trial. Attorney #1 informed the defendant that he was likely facing 10 years in prison and that he could likely get the drug offenses dismissed in exchange for a plea to the gun offense. Attorney #1 later provided two possible plea bargains to the defendant, one that required the

defendant's cooperation with law enforcement and one which did not. Both deals capped the defendant's sentencing exposure at 10 years. Attorney #1 advised the defendant to take one of the deals, but the defendant thought that the attorney could have gotten him a better deal. The relationship between the defendant and Attorney #1 broke down, and Attorney #1 was allowed to withdraw from the case.

After a second attorney made an appearance in the case (Attorney #2), he and the defendant discussed the plea deals. Attorney #2 incorrectly advised the defendant that "for sentencing purposes, it did not matter whether he accepted the plea agreement because the guideline range would be the same." *Brown* Slip op. at 4. Thus, the defendant believed that his maximum potential exposure was 10 years imprisonment regardless of whether he pleaded guilty. The defendant relied on that advice and rejected the plea.

During the subsequent plea colloquy, the district court judge advised the defendant that he was facing up to 20 years per count on the drug crimes and 10 years on the gun office. The judge asked if the defendant understood his sentencing exposure. The defendant conferred with Attorney #2 twice during the plea hearing and ultimately stated to the court that he understood the potential sentences. The district court judge also told the defendant that the sentencing guidelines were not binding on the court, and the court could impose the maximum possible punishments. The defendant again stated that he understood this and entered open guilty pleas to all five counts.

The district court sentenced the defendant to 210 months (around 17.5 years) after departing upwards from the guidelines range. The Fourth Circuit affirmed the sentence on direct appeal and the defendant sought habeas relief. He argued that his plea counsel was ineffective for failing to properly advise him about the more favorable plea deal he could have struck. The government acknowledged that the defendant's petition showed deficient performance by Attorney #2 and joined the defendant's request for an evidentiary hearing on the issue of prejudice.

The defendant testified at an evidentiary hearing that he did not understand his situation until another inmate helped explain it to him. He also stated that he would have taken the initial plea bargain had he understood his actual sentencing exposure and that he relied on Attorney #2's erroneous advice when rejecting the plea. The defendant further explained that, when he conferred with Attorney #2 during the plea colloquy, the attorney told him not to worry about the sentencing exposure remarks from the judge.

Attorneys #1 and #2 testified at the hearing, although Attorney #2 had no memory of the sentencing hearing or the private conferences with his client during the colloquy. The magistrate judge recommended denial of the petition, finding that there was no evidence that the defendant would have taken the plea deal if he had been properly advised. The district court adopted the magistrate's recommendation and denied the petition. On appeal, a divided panel of the Fourth Circuit reversed.

Under *Lee v. United States*, 582 U.S. 357 (2017), a defendant's after-the-fact justifications for accepting a plea instead of going to trial are not enough to set aside a plea. Instead, there must be "contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee* at 369. The district court and the magistrate relied on *Lee* to deny relief. This was error, because *Lee* dealt with ineffective assistance of counsel in the context of an *accepted* plea bargain, not a *rejected* one. The relevant authority in the context of a plea bargain rejected due to attorney error is *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012).

While different circuits have approached the question of the need for contemporaneous evidence to corroborate the defendant's contention that he would have accepted a rejected plea bargain, here the Fourth Circuit joined the Fifth Circuit in holding that an ineffective assistance claim in the context of a rejected plea does not require contemporaneous evidence in support.

The defendant here unquestionably received incorrect advice from Attorney #2. To show prejudice from that deficient performance, the defendant must show that he would have accepted the plea bargain had he received effective assistance, that the plea bargain would have been accepted, and that the outcome of the proceeding would have been more favorable to him. *Frye*, 566 U.S. at 147. The defendant here met his burden to demonstrate prejudice. He received 7.5 more years in prison that he would have had he accepted the deal, and acceptance of the plea bargain would have been a more favorable outcome for the defendant (the parties did not contest the second factor of whether the bargain would have been accepted). The prejudicial effect of Attorney #2's advice was not cured by the fact that Attorney #1 properly advised the defendant before the appearance of Attorney #2.

The district court's denial of relief was therefore reversed, and the case was remanded with instructions for the government to offer the defendant the original plea bargains.

Judge Rushing dissented and would have affirmed the denial of relief.

Drug distribution material seen in plain view coupled with the defendant's unprovoked flight at the sight of officers supplied reasonable suspicion; probable cause supported subsequent search warrant for the defendant's bag; failure of police to operate bodycams in accordance with department policy did not violate the Fourth Amendment; separate traffic stop was not unreasonably extended

U.S. v. Joseph, ___ F.4th ___; 2025 WL 1509394 (May 28, 2025). Local police in Charleston, West Virginia received a tip that the defendant was involved in drugs. An officer began surveilling a hotel room where the police suspected the defendant would be found. While watching the room for over five hours, the officer saw only the defendant enter or leave the room. After the first four hours of surveillance, the officer approached the room and knocked on the door. No one answered, but the officer saw baggies, digital scales, and folded paper consistent with drug packaging through the hotel room window.

The officer left for a few hours and then resumed watching the room. The officer saw the defendant enter the room with a hotel key and leave around 90 minutes later with a duffle bag. The officer observed that the defendant seemed anxious and was "looking around" and "checking to see if anybody was watching him." *Joseph* Slip op. at 2. The defendant walked inside of a nearby McDonald's. The officer called for a backup officer and the two officers approached McDonald's from different sides. When the defendant saw one officer coming through one of the doors, he walked out through a different door. The defendant encountered the other officer there, who commanded him to stop. The defendant began running and dropped his duffle bag. The officers quickly apprehended him, and the defendant agreed to be frisked. Officers discovered a hotel key and a knife with suspected drug residue on it. One of the officers could feel a gun inside the duffle bag. The officers arranged for a canine sniff of the bag, which lead to an alert by the animal. The officers then applied for a search warrant for the bag, leading to the discovery and drugs and guns. The defendant was charged federally in the Southern District of West Virginia and moved to suppress.

The district court denied the motion. On appeal, a unanimous panel of the Fourth Circuit affirmed. No search or seizure occurred until the defendant was apprehended. At that point, the officers had reasonable suspicion to detain the defendant for suspected drug activity based on the first officer's observations through the defendant's hotel room window and the defendant's later "headlong flight" at the sight of the officers in McDonald's. From there, the defendant's consent justified the pat-down, and officers developed probable cause to arrest him based on the discovery of the defendant's possession of a knife with suspected drug residue, the positive canine alert, and the officer feeling a gun in the duffle bag. That the officers did not activate their body cameras or otherwise record the interaction in violation of local police policy did not alter the equation. "[I]t is no more the province of the Fourth Amendment to enforce local department policies than it is not enforce state law." *Id*. at 5. While this policy failure could be used to attack the officers' credibility at trial or suppression, the district court did not err by ultimately crediting the officers' versions of events.

The defendant also challenged the tip that initiated the surveillance. The court declined to review that issue, because the officers' actions were justified by their own observations after receiving the tip. The defendant also took issue with the district court's finding that he abandoned the duffle bag when he dropped it during his flight. Whether or not the defendant abandoned his bag, the officers properly investigated it without conducting a full search before obtaining a warrant to do so. Finally, the fact that the defendant was handcuffed before the canine alert did not transform his detention to a formal arrest at that point. The drug dog was already present on the scene and there was no indication that the defendant was detained any longer than necessary for police to conduct the investigatory stop.

The same defendant was also charged federally in connection with another incident in Parkersburg, West Virginia. Police received a tip from a confidential informant about a visiting drug dealer operating out of a local residence. After seeing two people leave the home and get

into a rental car with out-of-state tags, the officer stopped the car for a traffic infraction. A drug dog arrived within 15 minutes while the officer was still preparing the traffic citation. The driver did not have identification on him, and the defendant was the passenger. A pedestrian approached the stopped car during the encounter, leading to the officer removing the defendant from the car for safety reasons.

Following a canine alert on the car, the officer found a gun and drugs inside the car. The defendant complained that the officer improperly extended the traffic stop to effectuate a drug investigation. The district court correctly rejected that argument. The officer's acts of calling for the drug dog was not an unreasonable extension of the stop because he did so contemporaneously with other duties attendant to the stop.

The fact that the officer initially missed a call from dispatch that would have informed him that the occupants of the car had valid driver's licenses similarly did not unduly extend the stop. The officer was speaking with a drug task force member from Charleston while waiting for a return call from dispatch and only missed the call due to background noise. The call with the task force member occurred eight minutes into the stop, and the officer returned the call to dispatch within one minute.

In conclusion, the court observed:

> We reiterate that officers must be 'reasonably diligent' in completing traffic stops, and may not perform such stops 'in a deliberately slow or inefficient manner, in order to expand a criminal investigation within the temporal confines of the stop.' But the district court found that is not what happened here, and that finding is not clearly erroneous. *Id*. at 10 (citations omitted).