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No abuse of discretion to deny the defendant an opportunity to examine jurors post-verdict on alleged racial bias in deliberations

U.S. v. Birchette, 908 F.3d 50, 2018 WL 5916088 (November 7, 2018). In this drugs and firearms prosecution from the Middle District of North Carolina, the court affirmed the trial judge's decision denying the defendant an opportunity to examine jurors for evidence of racial bias post-verdict. After around four and a half hours of deliberation, the jury indicated they were deadlocked on several counts. The trial judge gave an *Allen* charge, and the jury returned a verdict a few moments later. After the *Allen* charge but before verdict, an African-American female juror asked to be excused but failed to offer a reason. The court denied the request and left her on the jury. After the verdict, an African-American male juror spoke to defense counsel and made the following remarks: (1) "He was 'sorry they had to do that'"; (2) "A white lady said, 'the two of you are only doing this because of race'"; (3) "we worked it all out." Slip op. at 5. Additionally, an affidavit from a defense paralegal claimed that the same juror also stated: (4) "a white female juror said to the two African-American jurors, 'It's a race thing for you'" and (5) the juror said to counsel, "I appreciate what ya'll do."" *Id*. Defense counsel moved *ex parte* to examine the jurors for evidence of racial bias in their deliberations, which the court denied. The trial judge found that the statements at issue were "internal jury deliberations" and did not indicate racial bias.

Federal Rule of Evidence 606(b)(1) limits evidence of jury deliberations and codifies the common law principle that jury verdicts are typically not subject to impeachment. Receipt by jurors of improper outside information, improper influences on a juror, and mistakes on the verdict sheet are among the limited exceptions to the no-impeachment rule. In *U.S. v. Peña-Rodriguez*, 137 S. Ct. at 861 (2017), the U.S. Supreme Court established an additional exception: where there is evidence of "racial animus as a significant motivating factor" in the verdict. *Peña-Rodriguez* requires an initial showing of racial basis in the verdict, but did not set out a standard for when a defendant may be entitled to examine jurors on the issue. The case did, however, distinguish between "offhand comment[s] indicating racial bias" and "statements exhibiting overt racial bias that cast serious doubt on the fairness and integrity of the jury's deliberations," with only the latter justifying an exception from the general no-impeachment rule. *Id*. at 11 (internal citations omitted).

Peña-Rodriguez observed that *how* evidence of racial bias in jury deliberations might be obtained will be influenced by "state rules of professional ethics and local court rules." *Id*. Here, a local rule in the jurisdiction prohibits counsel from examining a juror post-verdict without the court's permission, which is granted only on a showing of good cause. In light of this local rule, the court noted: "The question thus boils down to whether the district court abused its discretion in finding that [the defendant] had not shown "good cause" to interview jurors." *Id*. at 12. The Fourth Circuit found it did not:

> Even accepting, *arguendo*, that all proffered evidence was reliable, none of the statements here required the district court to find that the defendant would likely uncover evidence that "racial animus was a significant motivating factor in the jury's vote to convict." *Id*. at 13.

The statement that one juror was "sorry they had to do that" was simply something one might say to the losing side. That "a white lady" said to two black jurors "you are only doing this because of race" does not imply that racial bias affected the verdict and is more akin to an "offhand comment" (assuming the speaker was juror at all), as was a juror's purported comment "it's a race thing for you." *Id*. at 14. That a juror stated "we worked it all out" provides no support at all for the defendant's request; given the remark came after an *Allen* charge, "this statement reflects a jury's working in the way juries should." *Id*. These statements, particularly when compared to the overtly racist remarks at issue in *Peña-Rodriguez*, do not suggest racial bias infected the deliberations, and the trial judge could reasonably find they failed to show good cause justifying an exception to the no-impeachment rule. That an African-American juror asked to be excused, without explanation, similarly fails to show that any juror voted based on racial bias.

The court noted that the trial judge was free to evaluate the evidence differently, but in light of the deferential standard, the district court acted within its discretion. Other evidentiary rulings were affirmed on appeal, and the conviction was affirmed.

Factual omissions from the search warrant affidavit known to the officer established *Leon* good-faith to save defective warrant

U.S. v. Thomas, 908 F.3d 68, 2018 WL 5915965 (November 8, 2018). In this child pornography case from the Western District of Virginia, the court affirmed the denial of a motion to suppress evidence obtained from the defendant's cell phone. In the course of investigating sexual assault of minors, law enforcement received information that the defendant had used his phone to contact the mother of the children in an effort to see them again. When the defendant was arrested for sexual battery of the children, the phone was seized incident to arrest. Law enforcement obtained a search warrant to examine it, which ultimately produced inculpatory evidence against the defendant leading to the present prosecution. The defendant complained that the affidavit in support of the search warrant failed to establish probable cause. The affidavit contained information about the sexual battery warrants and that it was common for sex offenders to keep evidence of sexual abuse on their phones, but no other information in the affidavit linked the phone to the suspected crimes and no information indicated when the suspected offenses occurred. Thus, the defendant argued, the search warrant was defective for a lack of nexus—it failed to show that the evidence sought was likely to be found on the phone—as well as for a staleness problem—there was no way for a reviewing judge to determine whether the evidence was likely to still be present on the phone at the time of the search. The trial court agreed that the affidavit failed to establish probable cause, but found that cell phone evidence was admissible under the *Leon* good-faith exception because of the officer's objectively reasonable belief that probable cause existed to search the phone.

Affirming, the Fourth Circuit reviewed the good-faith exception to the exclusionary rule. Under *Leon*, evidence seized in objectively reasonable reliance on a defective warrant will not be suppressed. Relying on a warrant will typically be objectively reasonable. Where, however, the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," then an

officer cannot reasonably rely on it and the evidence may still be suppressed. The defendant claimed this search exceeded the boundaries of *Leon*. The government disagreed that the warrant failed to establish probable cause, but even if it did, the officer reasonably believed he had probable cause based on information known to him through the investigation. The court agreed with the government and pointed to *U.S. v. McKenzie-Gude*, 671 F.3d 452 (4th Cir. 2011): "*Leon* presents no barrier to considering uncontroverted facts known to an officer but inadvertently not presented to the magistrate in assessing the officer's good faith." Slip op. at 9. Here, the officer knew the defendant had used a phone to contact the children's mother, and it was reasonable to assume that the phone used then was the same phone the defendant was carrying when he was arrested. The officer also knew the sexual battery and phone contact occurred within the last five months. These facts known to the officer but omitted from the affidavit constituted objectively reasonable reliance and supported application of *Leon* good-faith.

The court also rejected the argument that these omissions were intentional. The law enforcement agency had a policy to include no more information in a search warrant application than was necessary to establish probable cause. This, the defendant argued, took the case outside of the "inadvertent" omissions in *McKenzie-Gude*. The court again disagreed: "The police department's purported policy was not to file deficient affidavits; it was to file affidavits that included enough, but no more than necessary, to establish probable cause." *Id*. at 12. This, the court held, was "not the kind of deliberate misconduct that the exclusionary rule was intended to deter." *Id*. at 13. The denial of the motion to suppress was therefore affirmed. [*Author's note*: The *Leon* good-faith exception is not recognized for violations under the North Carolina state constitution pursuant to *State v. Carter*, 322 N.C. 709 (1988)].

Exclusion of expert mitigation evidence in death case was unreasonable application of federal law and warranted habeas relief

Lawlor v. Zook, ___ F.3d ___, 2018 WL 6174652 (Nov. 27, 2018). The petitioner was convicted of capital murder in 2011 in the Eastern District of Virginia. To support a death verdict under Virginia law, the jury must find an aggravating factor that the defendant was likely to engage in violent acts in the future that would present a "continuing serious threat to society" (among other potential aggravators). The jury found this factor and the defendant was sentenced to death. During the penalty phase of the trial, the petitioner offered testimony from a psychologist with expertise in "prison risk assessment and adaptation" to try and establish the petitioner's low risk for future violence. The trial judge allowed the testimony but sharply proscribed its breadth, prohibiting the expert from testifying about the petitioner's likely future dangerousness while in prison. The trial judge repeatedly sustained objections to the expert's testimony regarding the petitioner's risk of violence while in prison and the testimony was repeatedly interrupted for bench conferences. In the view of the trial judge, the issue for the jury was "future dangerousness, period, not future dangerousness in prison," and it was misleading the jury for the expert to opine that the petitioner's risk of future violence *in prison* was low. Slip op. at 9. The jury deliberated punishment for two days, sending three notes to the court during that time, all of which indicated confusion over the meaning of "continuing threat to society." One juror later attested that they believed the petitioner did not present a threat to society if incarcerated for life, but did not think this was relevant based on the court's instructions. Because the juror believed that the petitioner would be dangerous "out in regular society" and based on the court's instructions and answers to the jury's questions, the juror voted for death. *Id*. at 14.

After exhausting state appeals and post-conviction remedies, the petitioner pursued federal habeas, raising the argument that these rulings by the trial judge interfered with his ability to rebut the Commonwealth's evidence of future dangerousness. The Fourth Circuit agreed. Reviewing relevant U.S. Supreme Court precedent, the court found:

> [The cases] together stand for the proposition that a defendant must be permitted to introduce evidence of past good behavior in prison to aid the sentencing body in predicting probable future behavior and conduct, where that defendant may be "spared (but incarcerated)."
>
> It is likewise clearly established that the sentencing body should be presented with all possible relevant information to enable it to make a prediction about a defendant's probable conduct in prison. *Id*. at 24 (internal citations omitted).

The Virginia Supreme Court unreasonably applied clearly established federal law to improperly limit the expert testimony about the petitioner's risk of future dangerousness in prison under these circumstances. Given the trial judge's repeated comments to the jury about the irrelevance of prison society, and the juror affidavit's indicating confusion over the meaning of "society", the error was substantial and injurious, and warranted relief. The court therefore reversed and remanded the denial of the habeas petition. The opinion concludes: "When the choice is between life and death, the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id*. at 36-37 (internal citations omitted).

Criminal history point for prior conviction properly assigned where one of two consolidated North Carolina offenses carried a point

U.S. v. Vol Allen, ___F.3d ___, 2018 WL 6187567 (November 28, 2018). In this case from the Western District of North Carolina, the defendant pled guilty to possession of firearms as a felon. A single point was added to his criminal history score based on consolidated North Carolina convictions for possession of less than a half-ounce of marijuana and second-degree trespass, resulting in a higher Sentencing Guidelines range. The district court varied downward to impose a 77 month sentence and the defendant appealed. Under the Sentencing Guidelines, misdemeanors usually carry one or more criminal history points, but some, including North Carolina's crime of trespass, carry no points. North Carolina's misdemeanor possession of marijuana offense carries one point. The defendant argued that since his consolidated conviction included an offense for which no point could be assessed, it was improper to rely on the conviction for an additional point. The court rejected this argument, noting: "The misdemeanor marijuana possession offense independently would have been assessed a criminal history point, and the fact that the consolidated judgment also included a non-qualifying offense does not change that result." Slip op. at 11.

The court also rejected an argument that a prior conviction for use of a communication facility to commit a controlled substance violation should not be considered a "controlled substance offense" for purposes of another sentencing enhancement. The sentence was therefore affirmed in all respects.

Illegal GPS tracking supported suppression and speeding vehicle was insufficient to attenuate evidence from constitutional violation

U.S. v. Terry, ___ F.3d ___, 2018 WL 6253385 (November 30, 2018). The defendant was convicted at trial of possession of methamphetamine with intent to distribute in the Southern District of West Virginia following the denial of his motion to suppress and appealed. Drug task force officers found drug residue in the defendant's trash and obtained a search warrant for his home. Before the search warrant was executed, officers observed the defendant driving a gold Kia from his home and followed him. An officer approached the car when the defendant parked and smelled marijuana. The defendant gave the officer a small amount of marijuana, for which he was cited, but no other drugs were found. While one officer was talking with the defendant during the encounter, another officer secretly placed a global-positioning satellite ("GPS") tracking device on the defendant's car. The defendant returned to his home with the police and allowed them to search, but again no drugs were found. Following that search, officer applied for and received warrants to "ping" the defendant's cell phone and to authorize the GPS tracking device. The officers did not inform the magistrate that the GPS device had already been attached. Based solely on the GPS evidence, officer determined that the defendant travelled to Ohio, where they suspected he was obtaining drugs. On the return trip from Ohio, officers observed the Kia travelling five miles over the speed limit, confirmed the speed with the GPS device, and stopped the car for speeding. The defendant was a passenger and the Kia was registered to the driver. Based on the odor of marijuana, the vehicle was again searched, leading to the discovery of nearly 200 grams of methamphetamine.

At suppression, the officer acknowledged that he knew a warrant was required to install a GPS device and that this drug task force had installed GPS trackers without warrants in other cases. He also confirmed that the GPS device was the only way that police were able to track the defendant here. The district court found that the officer's conduct constituted a "flagrant constitutional violation", but denied the motion on the basis that the defendant lacked standing to object to the search on the day in question. The trial judge concluded that, while the defendant had a possessory interest in the vehicle on the day the tracking device was installed because he was driving the vehicle then, he had given up that interest to the owner on the day of the search. A motion for reconsideration (showing that the car was kept at the defendant's home and that he regularly drove it) was denied. The Fourth Circuit unanimously reversed.

On appeal, the government conceded that the defendant had standing to challenge the GPS search, and the court agreed. "[The defendant] has standing to move for suppression of the evidence that resulted from the illegal GPS search, because he was the driver of the Kia when officers surreptitiously placed the GPS device on the vehicle . . ." Slip op. at 5-6. Under the "fruit of the poisonous tree" doctrine, defendants may challenge both evidence directly obtained by an illegal search and evidence later discovered as a result of the illegal search. However, the government argued that the circumstances surrounding the seizure of meth from the defendant was sufficiently attenuated from the illegal installation of the GPS device, and should not be suppressed on that basis. Under *Wong Sun v. U.S.,* 371 U.S. 471 (1963), "where there is sufficient attenuation between the unlawful search and the acquisition of evidence, the 'taint' of that unlawful search is purged." *Id*. at 7 (internal citation omitted). The court considers three factors: 1) the closeness in time between the illegal search and the discovery of the evidence at issue ("temporal proximity"); 2) the intervening circumstances; and 3) the "purpose and flagrancy" of the misconduct by law enforcement, with the last factor being especially important to the analysis. Where the purpose of the exclusionary rule is not served by suppression, such as when the

connection between the illegality and the evidence is tenuous under these factors, the evidence is sufficiently attenuated and is not subject to suppression.

Here, only two days separated the discovery of the drugs and the installation of the GPS tracker. Circuit precedent requires “substantial time” to pass to support attenuation under this factor, and the government conceded two days was not substantial. The intervening circumstance—the speeding vehicle—did not weigh heavily in favor of the government, given the GPS information was used in part to determine the vehicle’s speed. Even if there were sufficient independent grounds to stop the vehicle for speeding, “the other attenuation factors substantially outweigh this minor infraction.” *Id.* at 8. As to the third factor, the court agreed with the trial judge that the misconduct was “flagrant”:

> The undisputed evidence here amply support the district court’s conclusion that the agents’ misconduct was not simply the result of mistake or ignorance of the law but instead constituted a flagrant disregard for the well-established warrant requirement set out in *U.S. v. Jones*, 565 U.S. 400 (2012). Indeed, [the officer] testified he knew a warrant was required for the tracking device . . . and despite this knowledge, he failed to inform the magistrate the he had already placed the GPS tracker before applying for the warrant—a practice that occurred in other cases. The exclusionary rule exists to deter exactly this type of official misconduct. *Id*. at. 9.

The court therefore reversed the denial of the motion to suppress and vacated the conviction.