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Fourth Circuit Case Summaries: October 24, 25, and 31, 2019

(1) Defendant's statements following officer's promise to not arrest were involuntary and properly suppressed; defendant's statements before the promise were voluntary; (2) No *Rodriguez* violation where officer had reasonable suspicion to stop vehicle and to extend the stop's duration; (3) Inevitable discovery applied where the officer could and would have searched the vehicle apart from illegally obtained statements; (4) Arrest of defendant by task force here was sufficiently attenuated from constitutional violations

U.S. v. Alston, ___ F.3d ___, 2019 WL 5440084 (Oct. 24, 2019). In this case from the Middle District of North Carolina, the defendant pled guilty to a weapons offense and appealed the denial of his motion to suppress. A Durham County deputy blue-lighted the defendant after seeing him run a red light. The defendant did not stop and reached under the passenger seat to the point that the deputy couldn't see him. The defendant continued reaching under the passenger seat while looking back at the deputy and collided with a parked car. When the deputy approached, the defendant stated the reason that he reached under the seat was because he dropped his cell phone. The deputy found this suspicious because the defendant was on a call over the car speakers and was holding his phone in his left-hand (but had reached under the seat with his right). When asked if he had any contraband, the defendant explained he only had a small amount of marijuana, which he gave the deputy. Discovering that the defendant's license was suspended, the deputy allowed the defendant to call his mother to get the car, who quickly arrived on scene. The deputy pressed the defendant about anything else that might be in the car, and the defendant offered a bag with scales, baggies, and more marijuana. The following exchange then occurred:

> Deputy: "I'm going to need to get the heater [slang for a gun]."
>
> Defendant: "Are you going to take me to jail?"
>
> Deputy: "I need you to be honest with me and I won't take you to jail today."
>
> Defendant: "It's underneath the passenger seat." Slip op. at 3.

While the deputy was talking with the defendant, he received a call from a task-force agent. The agent explained they were investigating the defendant for weapons offenses and asked whether the defendant had been stopped and if he was armed. The deputy confirmed. The agent informed the deputy that the task force was coming and to hold the defendant. The task-force agents arrived, arrested the defendant, and took him into custody.

The trial court allowed the motion to suppress in part, finding that some of the statements of the defendant were obtained in violation of *Miranda*—his remarks were involuntary past the point where the deputy promised not to arrest, although the defendant's earlier remarks before that point were

voluntary and admissible. As to the gun, the trial court found that it would have inevitably been discovered because the officer had probable cause to search the vehicle. The defendant appealed.

(1) The Fourth Circuit agreed with the trial court regarding the defendant's statements and rejected the view that all of the statements and derivative evidence should have been suppressed. "Of course, the exclusionary rule bars admission of the nontestimonial physical fruit of statements obtained in violation of *Miranda* when those statements are involuntary, and statements obtained in violation of *Miranda* are presumptively involuntary." *Id*. at 6-7. Here, the district court agreed that many of the defendant's statements here were involuntary, admitting the gun on a separate basis: "The court admitted the derivative evidence, including the gun, not because it was the fruit of voluntary statements but because the court found that the inevitable discovery exception to the exclusionary rule rendered the derivative evidence admissible." *Id*. at 7. While the statement about the gun was involuntary and properly suppressed, the earlier statements by the defendant acknowledging possession of marijuana came before any promises or other coercion from the deputy and were therefore voluntary and admissible.

(2) There was no *Rodriguez* violation, because the deputy had reasonable suspicion to stop based on the red-light violation. He similarly had grounds to extend the stop after the defendant acknowledged possessing marijuana.

(3) Although neither the defendant nor the government argued inevitable discovery on appeal, the court addressed its application since this was the justification for the trial court's denial of the motion.

> Inevitable discovery demands that the prosecution prove by a preponderance of the evidence: first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so. . .To rely on evitable discovery doctrine, the Government first must prove that police could have used 'lawful means' to discover the illegally obtained evidence. 'Lawful means' include an inevitable search falling within an exception to the warrant requirement . . . that would have inevitably discovered the evidence. *Id*. at 8-9 (emphasis in original).

Here, the trial court specifically found that the deputy could have searched the car based on the automobile exception after the suspicious nature of the encounter and the defendant admitting to possession of marijuana, before any promises or involuntary statements. The Fourth Circuit agreed—the deputy plainly had probable cause to search the vehicle for marijuana. The car also inevitably *would* have been searched. The deputy's testimony showed that his primary objective was to get the gun "off the street," and that this was more important to him than taking the defendant into custody. All of the deputy's acts were aimed at discovering the weapon and the deputy would have found the gun if he had lawfully searched the car. While some determinations of what may have inevitably happened will determine a remand for factual development, "[i]n this case, the evidence that the search was inevitable jumps off the pages of the record." *Id*. at 12.

(4) The court acknowledged the result may be different in another case — "there might well be irreconcilable tension between an officer's determination to obtain a gun and repeated assurances that he would not arrest the suspect." *Id*., n.2. Here, "[t]he task force's pursuit of [the defendant] 'is a critical intervening circumstance that is wholly independent' of [the deputy's] promise not arrest . . .," citing *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (where intervening circumstances separate the unconstitutional

act from the seized evidence, the evidence is admissible under the attenuation doctrine exception to the exclusionary rule). *Id*.

(1) N.C. Post-Release Supervision and Parole Commission's supervision agreement was not entitled to *Chevron* deference over statutory search conditions; (2) Supervision agreement did not modify statutory conditions of supervision and the statutory terms controlled; (3) Search was reasonably related to purposes of supervision; and (4) No individualized suspicion was required because supervision search was justified by special needs doctrine

U.S. v. Scott, ___F. 3d ___, 2019 WL 5473862 (Oct. 25, 2019). The defendant was on state post-release supervision in the Eastern District of North Carolina for a sex offense conviction. Under North Carolina law at the time, he was subject to search by *a* post-release supervision officer at reasonable times when the search is reasonably related to the purposes of supervision. [The statute, G.S. 15A-1368.4, has since been amended to substitute "directly related" for "reasonably related."] Upon the defendant's release from prison, the North Carolina Post-Release Supervision and Parole Commission ("the Commission") prepared and executed a supervision agreement with the defendant, which stated the defendant would be subject to such searches by *his* assigned supervising officer.

During the term of supervision, the defendant was assigned to a new supervising officer. She was aware that the defendant was validated as a gang member, had previously violated his curfew, and was neither employed nor enrolled in school as required by the terms of supervision. She also noticed the defendant wearing seemingly expensive clothes and jewelry. The North Carolina Department of Public Safety ("NCDPS") policies mandate a search of validated gang members and sex offenders within every 180 days, and the defendant (falling into both categories) was due to be searched within the next 45 days under that policy.

A joint federal/state task force began a local operation to search for absconders and to conduct searches on supervisees. Based on the above circumstances, the post-release supervision officer submitted defendant's name to the task force as a person to be searched. The defendant's residence was searched by task force agents, including NCDPS post-release supervision officers but not including the defendant's supervising officer. Two guns were found near the residence and a third gun was found in the defendant's car, leading to felon in possession charges. The defendant moved to suppress, arguing that the search was unreasonable because it violated the terms of his supervision agreement—his supervising officer wasn't present as required by the agreement. He also argued the search was unrelated to the purpose of supervision and that the search lacked reasonable suspicion. The trial court denied the motion and the Fourth Circuit affirmed.

(1) The defendant argued that NCDPS's supervision agreement controlled, and that the agreement was the agency's interpretation of an ambiguous law, entitled to *Chevron* deference. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), a government agency's permissible interpretation of an ambiguous statute administered by that agency is entitled to deference from a reviewing court. Rejecting this view, the court noted "[i]t is far from clear that the *Chevron* deference principles can ever apply to state agency interpretations of state law." Slip op. at 10. Even if they did, the procedural requirements for application of that doctrine here were unmet.

(2) The court rejected the argument that the supervision agreement modified the statutory terms to require *his* supervising officer to be present during a supervision search. The Commission lacked

discretion under the statute to modify the mandatory supervision conditions that were imposed on the defendant as a sex offender, and the defendant was subject to search by any post-release supervision officer under those terms. The trial court also did not err in failing to interpret the two agreements "in concert" with one another. Given the discrepancy between the supervision agreement and the statutory requirement, no harmonization of the two was possible, and the statute had to control.

(3) Warrantless supervision searches performed in accordance with statutory authorization are generally permissible under the special needs doctrine. *See Griffin v. Wisconsin*, 483 U.S. 868 (1987). Acknowledging the general rule, the defendant argued the purpose of this task-force search was general crime control and not related to his supervision, pointing to the involvement of federal agents. The court disagreed:

> Here, NCDPS initiated and supervised the warrantless search of [defendant's] apartment. Although the Marshals Service organized Operation Spring Sweep, [defendant's supervising officer] selected [him] for a search after her NCDPS supervisor asked her to choose a few supervisees to be searched as part of the Sweep. And a team of four NCDPS officers led the search team into Scott's apartment. *Id*. at 15.

That the search occurred by way of a task force and with the involvement of federal agents did not affect its validity when NCDPS approved, initiated, and supervised the search. The search was also reasonably related to the terms of probation because the defendant's supervising officer was suspicious about the defendant's "flashy" items and lack of employment. Searching the defendant to ensure his compliance with the conditions of supervision regarding committing no new crimes and maintaining employment was itself enough of a justification. Additionally, the defendant was due for a search per policy within the next 45 days as a gang member and sex offender. "At bottom, the record supports the district court's determination that the warrantless search of [the defendant's] apartment was not for the purpose of furthering general law enforcement goals. Rather, NCDPS officers undertook the search to ensure [the defendant's] continued compliance with the terms of his supervision agreement." *Id*. at 16. This search was reasonably related to purposes of supervision and not unreasonable under the Fourth Amendment.

(4) No individualized suspicion is required under *Griffin* to search a supervisee pursuant to valid conditions, because special needs justify such a search. Where the search was performed in accord with valid statutory conditions like it was here, there is no Fourth Amendment violation. *See United States v. Midgette*, 478 F.3d 616 (4th Cir. 2007). The district court was therefore unanimously affirmed.

(1) District court's denial of preliminary injunction to stop filter team review of seized law firm emails reversed; error for trial court to delegate judicial function of attorney-client privilege determinations to executive branch; (2) Ex parte approval of filter team procedures was improper; (3) Filter team procedures authorizing contact with represented clients of the Law Firm undermined attorney-client privilege and were improper

In re: Search Warrant, ___ F.3d ___, 2019 WL 5607697 (Oct. 31, 2019). In this District of Maryland case, Client A was an attorney under investigation for money laundering and obstruction of justice. The government came to believe his attorney, Lawyer A, was obstructing the investigation and sought a search warrant for the firm where Lawyer A was employed. Along with the warrant, the magistrate approved "Filter Team Practices and Procedures," setting out the rules under which the materials seized

from the Law Firm would be reviewed for potential privilege. The filter team members were not involved in the investigation of Lawyer A, but included other government lawyers, federal agents, and paralegals. The procedures allowed the filter team to determine which material was not privileged and forward that material onto the prosecution team without judicial involvement or contact with the firm. Only when the filter team determined material was potentially privileged, or privileged but capable of redaction, would the Law Firm be contacted, and only then would judicial review of the issue become available. The procedures also allowed the government to seek waiver of attorney-client privilege from the clients of the firm, which, if obtained, allowed bypass of any privilege review. The procedures provided no guidance to the filter team on the application of plain-view doctrine in this context. The warrant was executed, and "voluminous" material was seized from the firm, including the contents of Lawyer A's phone. That phone held all of the lawyer's emails, a vast majority of which had nothing to do with Client A (only 0.2% of the emails related to Client A). Many other clients of the firm were under investigation or indictment in the same district for unrelated matters. Partners of the Law Firm objected to the search to agents during the search and unsuccessfully requested any examination of Lawyer A's email be limited in scope to search terms involving Client A. The government refused.

Three days later, the Law Firm sent a letter to the U.S. Attorney again complaining of the scope of the search and seizures and asserting attorney-client privilege. It offered to conduct the privilege review or to have a judge review the material but received no response. Seven days later, the Law Firm filed for temporary restraining order to enjoin the filter team from sending information to the prosecution team and for a return of the seized property. At hearing, the Law Firm pointed out that the government seized all of the Lawyer's email, much of which contained privileged material. The firm identified 116 emails involving Client A, out of around 52,000 total emails. The government pointed out that the filter team had requested a list of clients with pending matters involving the U.S. Attorney's office from the Law Firm but the firm declined (in keeping with its confidentiality duties). The government argued because the firm would not identify clients with pending matters, it had to seize all of Lawyer A's emails for practical reasons and to avoid allowing Lawyer A to interfere by revealing to the firm any specific search terms. The district court denied the injunction, finding that the Law Firm failed to show a likelihood of irreparable harm. It also found that the filter team procedures were appropriate and authorized by the court, that there was no need for an *in camera* review, and that the firm "delay[ed] in coming to court . . ." *Id*. at 11. The Law Firm appealed.

While the appeal was pending, a consent order was entered modifying the filter procedures so that either the Law Firm or the court had to approve all material before it was sent from the filter team to the prosecution team. The firm then sought an injunction pending appeal from the Fourth Circuit, which was granted in part. The Fourth Circuit expedited review and ultimately issued an interim order directing the filter team to stop review of the seized material, to return the materials to the court (including the filter team's work-product), and for the trial court to conduct review of the information. This opinion followed.

(1) In order to obtain the "extraordinary remedy" of a preliminary injunction, the plaintiff must show a likelihood of success on the merits, irreparable harm without the relief, that equity dictates relief, and that the injunction is in the interest of the public. Here, the district court ignored "unrefuted" evidence showing the scope of potentially privileged and unrelated material seized, including material involving firm clients under investigation or indictment by the government within the district. *Id*. at 17. The trial court also failed to appreciate the important interests underpinning attorney-client privilege.

The Court observed that attorney-client privilege is the oldest privilege and protects the free exchange of information from client to lawyer. The privilege serves the public interest because full communication from the client allows the lawyer to best ensure that justice is done. Attorney work product similarly serves the interests of justice by allowing the attorney to prepare a case without "interference." Both attorney-client privilege and attorney work-product privilege protect the defendant's right to effective assistance of counsel under the Sixth Amendment. "[T]he essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel." *Id*. at 21. In failing to give weight to these considerations and determining that the Law Firm had not shown a likelihood of irreparable harm to itself and its clients, the magistrate plainly erred.

Reviewing the other elements for the injunction, the court found that the Law Firm made the requisite showing and reversed the district court's denial of the motion. Resolution of a lawyer's claim of attorney-client privilege is a question for the court, and the filter team procedures here improperly delegated judicial roles to the executive branch. "Put simply, a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute." *Id*. at 26. That the filter team had non-lawyer members compounded this error. Filter teams will make negligent errors due to the team's "conflicting interest," and some filter teams may take a more limited view of privilege, which "could cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team." *Id.* at 27. For these reasons, the privilege review needed to be conducted by a neutral judicial official.

Further, the filter team procedures here provided no guidance on the application of the plain-view exception to the warrant requirement. This at least created an appearance of unfairness for Law Firm clients and the public at large that "the government's fox in charge of guarding the Law Firm's henhouse." *Id*. at 28.

> Federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice. *Id*. at 39.

The Law Firm's request for preliminary injunction to halt the filter team should have therefore been granted.

(2) The magistrate also erred by authorizing the filter procedures ex parte and before the return of the search warrant. The trial court could not exercise its discretion to decide the appropriate procedures before receiving information on the materials seized and the context surrounding the seized material. The filter team procedures might have modified or rejected if the trial court had been aware of the full circumstances—specifically the low percentage of emails involving Client A and the high percentage of privileged information unrelated to Client A. In the recent case of Michael Cohen and the search of his law firm, an adversarial hearing was held after the search but before the filter team began review, and the parties argued for and against certain protections for potentially privileged information—a process the Fourth Circuit approved as "sensible." Here, "if the magistrate judge had conducted adversarial proceedings after the search but before approving the Filter Team and its Protocol in this case, the judge would have been fully informed of the materials that were seized from the Law Firm. The judge would have then heard from the Law Firm's counsel, and possibly also from the clients of the Firm through their lawyers, before the Filter Team reviewed any seized materials." *Id*. at 31. The decision to approve

filter team procedures should have been made after return of the search warrant, and an adversarial hearing should have been conducted before any filter procedures were ordered.

(3) Under long-standing ethics rules, a lawyer usually may not communicate with a represented party. A court may find an exception to that prohibition, but only after an individual determination of the relationship between the lawyer and client. The filter team procedures here allowed the government to contact Law Firm clients ex parte to seek waivers of attorney-client privilege. The filter team also requested a client list from the Law Firm in order to do so—something the Law Firm could not ethically provide. The ex parte approval of these steps was a "serious defect" and "authorizing the government in an ex parte proceeding to contact any and all clients of the Law Firm is another example of how the Filter Protocol . . . undermined attorney-client principles." *Id*. at 33-34. Concluding, the court observed:

> At bottom, the magistrate judge erred in assigning judicial functions to the Filter Team, approving the Filer Team and its Protocol in ex parte proceedings without first ascertaining what had been seized in the Law Firm search, and disregarding the foundational principles that serve to protect attorney-client relationships. In these circumstances, we are satisfied that the magistrate judge (or an appointed special master) – rather than the Filter team – must perform the privilege review of the seized materials. *Id*. at 34.

A judge wrote separately to concur in judgment, and the district court was unanimously reversed.

Other cases of note:

Petitioners under existing orders of removal but awaiting "withholding-only" hearing before immigration court are entitled to individual bond determinations

Chavez v. Hott, ___ F.3d ___, 2019 WL 5078367 (Oct. 10, 2019). In this case from the Eastern District of Virginia, the petitioners were noncitizens that had reentered the country illegally after being ordered removed and were consequently subject to the prior orders of removal. A non-citizen is typically not entitled to a hearing or other relief on an existing removal order and is subject to mandatory detention under the removal order for at least 90 days. However, a non-citizen may seek withholding of removal where return to the country of origin would pose a risk of persecution to the individual on the basis of a protected ground (such as race), as the petitioners did here, and removal cannot be completed until the asylum case is resolved. The government detained these individuals pending resolution of their withholding of removal cases before an immigration judge, and petitioners sought pretrial release during the period of mandatory detention. Affirming the trial court, the Fourth Circuit determined this narrow class of non-citizens—those subject to reinstated orders of removal but who made a credible claim of persecution warranting asylum if proven—were entitled to individual bond hearings under the relevant statutes. The petitioners will have the burden of proof at such hearings. "Our holding does not, of course, guarantee the petitioners' release from custody." Slip op. at 31. The decision deepens a split of authority among the circuits on the issue.