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Case Summaries: Fourth Circuit Court of Appeals (Sept. 8, 15, and 22, 2021)

Where convictions were overturned for reasons unrelated to guilt or innocence, no double jeopardy violation to reinstate those and other related offenses dismissed pursuant to defendant's guilty plea

[U.S. v. Johnson](#), 13 F.4th 348 (Sept. 8, 2021). In 2010, the defendant pled guilty to two federal firearms offenses stemming from armed robberies in exchange for dismissal of other related offenses and was sentenced to 384 months. The convictions were later vacated in habeas proceedings based on development of federal law relating to the definition of a crime of violence. *See Johnson v. U.S.*, 576 U.S. 591 (2015). The same day that the habeas court ordered the convictions vacated, the government issued an arrest warrant and reinstated some of original charges. The defendant challenged the arrest warrant and sought an order precluding further prosecution of the case, in part on double jeopardy grounds. The government filed a motion seeking to reinstate all charges previously dismissed by the original plea bargain, in the event that further prosecution of the defendant was required. Habeas relief was stayed, and a hearing was conducted. The district court ultimately denied the defendant's double jeopardy claim and granted the government's motion to reinstate the charges. Under circuit precedent, "the Double Jeopardy Clause does not preclude prosecution of the offenses to which the defendant did not plead guilty." Slip op. at 10 (citation and marks omitted). As to the offenses to which the defendant pled guilty, circuit precedent held that double jeopardy does not attach where the conviction is vacated due to an error in the elements, as opposed to reasons of guilt or innocence. *See United States v. Green*, 139 F.3d 1002 (4th Cir. 1998).

On appeal, the defendant argued that *Green* had been abrogated by *Evans v. Michigan*, 568 U.S. 313 (2013) (holding that jeopardy attached to directed verdict of acquittal, even when dismissal was based on legal error). A unanimous Fourth Circuit disagreed. Under *Evans*, double jeopardy does not attach to procedural dismissals, and its holding is consistent with *Green*. "...[P]rocedural dismissals include rulings on questions that are unrelated to factual guilt or innocence, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem like an error with the indictment." *Johnson* Slip op. at 13 (citation omitted). The change in law of the definition of a "crime of violence" at issue here was analogous to an indictment defect or other procedural error, as the district court correctly found. Thus, there was no bar to reprosecution of the defendant, and the judgment of the district court was affirmed.

State secrets privilege precluded further litigation of telecommunications surveillance case

[Wikimedia v. NSA](#), 14 F.4th 276 (Sept. 15, 2021). The lead plaintiff in this Maryland case is an organization dedicated to free education (and the parent entity of Wikipedia). The plaintiffs sued, challenging the "Upstream" surveillance program run by the National Security Agency ("NSA"). While most internet surveillance is conducted via the [PRISM](#) program with the assistance of users' internet

providers, this method of international surveillance identifies target information “upstream” from a user, at the telecommunications cable level (the “Internet backbone”). Upstream works with telecommunications companies to capture data moving through the lines by identifying target information (like an email address). The plaintiffs claimed First and Fourth Amendment violations. They sought to enjoin the defendants from continuing the program and to have all data relating to their organizations purged from any databases connected with the program. The district court initially dismissed the matter, finding that the plaintiffs lacked standing. On appeal, the Fourth Circuit reversed as to Wikimedia only, finding that the organization showed a plausible injury in being subject to the surveillance. *See Wikimedia v. NSA*, 857 F.3d 193 (2017). The district court began the process of discovery on remand, and the plaintiff requested information on Upstream. The NSA responded that disclosure of the information would be harmful to national security and invoked the state secrets privilege. “The privilege permits the United States to prevent the disclosure of information in a judicial proceeding if there is a reasonable danger that such disclosure will expose matters of state which, in the interest of national security, should not be divulged.” Slip op. at 8 (citations and internal marks omitted). The then-Director of National Intelligence certified that disclosure of the information sought would harm national security interests, and the district court ultimately dismissed based on state secrets privilege (and alternatively for lack of standing).

On appeal the second time, the Fourth Circuit again disagreed that the plaintiff failed to show standing but affirmed the district court on state secrets grounds. Contrary to the plaintiff’s arguments, the Foreign Intelligence Surveillance Act (“FISA”) did not abrogate the privilege. Where the government formally invokes the privilege and satisfies the court under the totality of circumstances that the information constitutes state secrets—information that, if released, could reveal military or national security secrets—the information is “absolutely protected from disclosure.” Slip op. at 50 (citation omitted). The trial court properly found the privilege applied on the facts. Further, because the information was critical to the plaintiff’s claims, the litigation could not proceed, and the district court properly dismissed the matter.

Judge Motz wrote separately to concur in part and dissent in part. She agreed that the district court erred in finding that the plaintiff lacked standing but disagreed with the majority that the state secrets privilege prevented further litigation. She noted that the U.S. Supreme Court has taken up the question of whether FISA abrogates the common law state secrets privilege and would have stayed the proceedings pending the outcome in that case. *See Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, 2021 WL 2301971 (U.S. June 7, 2021). She criticized the majority for an expansive view of state secrets and would have required an in camera review of the contested materials by the trial judge to determine the application and extent of the privilege.

Judge Rushing also wrote separately to concur in part and concur in judgment. She would have affirmed the district court’s ruling on the issue of standing in addition to state secrets grounds.

In challenge to federal handgun purchase age limits, plaintiff turning 21 years old after a decision in her favor but before the opinion’s mandate issued rendered the case moot; earlier decision finding Second Amendment violation vacated; matter remanded for dismissal

[Hirschfeld v. ATF](#), 14 F.4th 322 (Sept. 22, 2021) In this case from the Western District of Virginia, the plaintiffs sought to enjoin enforcement of federal law that requires a person to be 21 years old before purchasing a handgun or handgun ammunition from a federally licensed dealer. *See* [18 U.S.C. 922\(b\)\(1\)](#).

In an earlier decision in the case, a split panel of the Fourth Circuit held that the federal purchase age limit violated the Second Amendment and that Second Amendment rights attached at age 18 (summarized [here](#)). A dissenting judge would have upheld the age requirement. After the case was decided but before the mandate issued, the sole remaining plaintiff in the case turned 21 years old. This rendered the case moot. The court rejected various motions to intervene or add parties and rejected an alternate argument for the plaintiff's standing. The court normally vacates the moot decision and remands for entry of order of dismissal, and the unanimous court found that remedy appropriate here. Thus, the earlier decision was vacated, and the federal handgun purchase age limit law remains in force within the circuit.

Judge Wynn wrote separately in concurrence and emphasized that the earlier panel decision was now without any precedential value whatsoever.