

Phil Dixon, Jr.  
919.966.4248  
[dixon@sog.unc.edu](mailto:dixon@sog.unc.edu)  
UNC School of Government ©

## Case Summaries: Fourth Circuit Court of Appeals (April 9, 19, 20, and 30, 2021)

### **Defendant who did not submit to officers' show of authority was not seized; alternatively, any seizure was supported by reasonable suspicion**

*U.S. v. Cloud*, 994 F.3d 233 (April 9, 2021). In this case from the Western District of North Carolina, officers were patrolling a hotel in a high crime area in Charlotte around 10:30 p.m. The officers had previously made gun and drug arrests at the hotel, and a task force had made two such arrests at the hotel earlier the same month based on investigation into "people loitering in cars" in the hotel parking lot. The officers noticed a car with its lights on and engine running in the parking lot. Four people were inside the car, but no one was sitting in the driver seat. As officers drove by the car, its occupants rolled up the windows. The officers parked behind the car in such a way that the car's path of exit was partially, but not completely, blocked. When officers approached the car, one officer immediately noticed one of the occupants had a firearm and appeared to be trying to hide it. A passenger informed the officers that they were not staying at the hotel. The defendant then exited a nearby hotel room and approached the car. He acknowledged the officers and explained that the front seat passenger was his daughter, and then got into the driver seat. Another officer was questioning the back seat passengers about whether they had hidden a gun. The defendant was asked if there were guns or drugs in the car and responded in the negative. He then exited the vehicle and started walking back and forth on the sidewalk and talking on the phone to his mother. An officer asked him to "come back," which the defendant ignored. Police meanwhile got the passengers out of the car and noticed that they all looked like minors. An officer attempted to speak with the defendant, but the defendant handed the officer his phone and told the officer to speak with his mother. The officer declined and eventually handed the phone back to the defendant, who continued pacing about. The defendant eventually acknowledged that his mother owned the vehicle. He refused to provide consent to search the car. An officer "frisked" the car and discovered a handgun near where the gun had originally been observed. At this point, officers sought to detain the defendant, who ran and resisted arrest. Another firearm was discovered in his pocket during the arrest, and the defendant was charged with felon in possession based on that gun.

The district court denied the motion to suppress, and the Fourth Circuit unanimously affirmed. The defendant claimed he was seized as soon as the officer parked behind the car. Because the defendant was not present in the car when this occurred, he could not claim a Fourth Amendment violation. By the time the defendant entered the driver seat, however, the officers' acts amounted to a show of authority. The defendant was nonetheless not seized at the time, because he never submitted to that authority. While he initially engaged

the officers, he quickly exited the car, ignored officer questions, walked around the area, and spoke to his mother on the phone. In the words of the court:

Only when Officer Jenkins announced the retrieval of the gun under Cloud's seat and police sought to detain him did Cloud resist and attempt to flee. . . Cloud's initial action was not to cooperate with police and answer their questions, but instead to disobey a police order to hang back with an officer, and conduct himself the way that he, not police, desired. *Cloud* Slip op. at 17 (cleaned up).

Alternatively, any seizure was supported by reasonable suspicion. An officer saw someone trying to hide a gun in the car, the defendant acknowledged he was in lawful possession of the car, and the defendant was the only adult on the scene. Further, the events occurred at a later hour at a known problem hotel with a recent history of similar crimes. This was sufficient reasonable suspicion to detain the defendant, assuming he was detained at some point before officers used force to gain control of him. The district court was therefore affirmed.

#### **IAC claims based on erroneous information in plea negotiations and failure to challenge sentencing enhancement required an evidentiary hearing**

*U.S. v. Mayhew*, 995 F.3d 171 (April 19, 2021). The defendant was charged with fraud and conspiracy offenses in the Eastern District of North Carolina. He was convicted at trial and sentenced to 320 months in prison. After his case was affirmed on direct appeal, the defendant sought habeas relief. He argued that his trial attorney had advised him that he would only face between two- and five-years imprisonment if he were convicted at trial, and that he rejected a plea offer based on this erroneous advice. He also alleged that his trial counsel was ineffective for failing to challenge a restitution award.

Under *Lafley v. Cooper*, 566 U.S. 156 (2012), defendants have a Sixth Amendment right to effective representation during plea negotiations. Ineffective assistance of counsel may be established in this context by showing that the defendant likely would have accepted the plea but for the erroneous advice of counsel, and that the defendant received a harsher sentence as a result of rejecting the plea. The government had offered one count of conspiracy in lieu of all related charges, which would have limited the defendant's exposure to no more than five years in prison. According to the defendant, his counsel "guaranteed" that he could receive no more than five years at trial. The trial court had advised the defendant and the codefendants as a group that any sentence would ultimately be up to the court, and that estimates of sentencing exposure provided by defense counsel were only that. The trial court also individually advised the defendant of his maximum sentencing exposure on the charges immediately before the defendant entered his plea of not guilty. The district court determined that the defendant could not show prejudice based on these advisements by the trial court and dismissed the petition without a hearing. A unanimous Fourth Circuit vacated in part and remanded.

Without an evidentiary hearing, the court could not determine whether the defendant was in fact misadvised about his sentencing exposure at trial, or whether that mistaken advice prejudiced the defendant. While a trial court can correct the erroneous advice of counsel by correctly advising the defendant of his exposure at arraignment, here, the plea offer had already been rejected by the time of the colloquy between the court and the defendant, and the record was silent as to whether the offer was still available at that point. The order of dismissal was therefore reversed, and the matter remanded for evidentiary hearing.

The restitution amount found by the trial court increased the defendant's offense level. While orders of restitution may not be challenged via habeas, the defendant stated a claim that his trial counsel was ineffective in failing to challenge the amount of restitution, resulting in a longer sentence. The district court correctly found that the restitution order itself was not subject to habeas challenge but erred in failing to consider counsel's alleged ineffectiveness in failing to object to the sentencing enhancements based on the restitution amounts. The district court was therefore affirmed as to the restitution order itself but ordered on remand to conduct a hearing on ineffective assistance for this issue as well.

**District court's grant of habeas relief failed to afford proper deference to state court's adjudication of claims on their merits; new *Brady* claims were procedurally defaulted; remand for hearing on unadjudicated IAC claims**

*Horner v. Nines*, 995 F.3d 185 (April 20, 2021). The defendant was charged with attempted murder and other offenses relating to assaults against his ex-wife in Maryland state court (which included shooting her in the head). He was convicted after a bench trial and sentenced to life. The defendant raised *Brady* due process and *Strickland* ineffective assistance of counsel claims, along with a claimed violation of his right to a jury trial, in state post-conviction proceedings to no avail. He filed for federal habeas relief. New evidence emerged when certain prosecution witnesses recanted their trial testimony, and the federal case was stayed while the defendant sought to reopen his state post-conviction case. The Maryland post-conviction court allowed the matter to be reopened, but only regarding the new evidence claim (and not for claims previously adjudicated). The state court again ruled against the defendant and he returned to federal habeas. The federal district court granted the habeas petition on a previously unraised *Brady* claim, along with other *Brady* claims previously rejected in state court. It also granted relief for a violation of the defendant's right to a trial by jury, another claim rejected by the state court. The ineffective assistance claims were dismissed without prejudice and not adjudicated.

Once a state court has adjudicated a defendant's claim on the merits, a federal court may overturn that decision only if it was "contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts . . ." *Horner* Slip op. 13 (citation omitted). The defendant's claim that his right to a jury trial was violated was fully litigated in state post-conviction and that court's decision was reasonable. The defendant's *Brady* claims were also rejected—the majority of the claims had been adjudicated on the merits in state court and were not unreasonably decided; other

*Brady* claims were procedurally defaulted based on the defendant's failure to raise them in state post-conviction.

Turning to the defendant's ineffective assistance of counsel claims, the court noted that the best practice for district courts is to adjudicate all issues raised in the habeas proceedings and to rule on each. Here, the district court declined to consider the *Strickland* claims in light of the relief granted on other claims. The Fourth Circuit therefore vacated the grant of habeas relief and remanded for determination of the ineffective assistance claims only.

**District court erred in refusing to hear evidence in support of motion to dismiss for loss of cell phone evidence; remand for evidentiary hearing**

*U.S. v. Johnson*, \_\_\_ F.3d \_\_\_; 2021 WL 1703605 (April 30, 2021). The defendant and a co-defendant were charged in the Northern District of West Virginia for distribution of heroin resulting in death. They were convicted at trial and received lengthy prison terms. The government had been in possession of the deceased victim's cell phone. Both defendants entered into plea agreements and entered guilty pleas before magistrates, which required later approval from the district court judge. The government then released the victim's phone to the family, who quickly lost the device. One defendant's plea agreement was subsequently rejected by the district court, and the other successfully sought to withdraw her plea thereafter. The defendants contended the phone would have shown that the victim died as a result of other drugs and sought to have it analyzed, at which point it was determined that the phone was lost. Some screenshots of text messages and some Snapchat video from the phone were preserved and released to the defendants, but the defendants were never directly informed that the government possessed the phone. The defendants maintained that the phone contained exculpatory evidence and that its loss was therefore a *Brady* violation, irrespective of the government's good faith. Alternatively, they contended that there was sufficient evidence of bad faith under *Arizona v. Youngblood*, 488 U.S. 51 (1988) (requiring a showing of bad faith where the lost evidence is only potentially exculpatory). The district court forbade the defendants from calling witnesses or questioning officers as a part of the hearing on the defense motion to dismiss, and instead relied solely upon the representations of counsel. Denying the motion, the trial court determined that the phone was available for inspection by the defendants for a period of several months before being released to the victim's family (and before trial). It also found the phone to be only potentially exculpatory and determined that the government did not act in bad faith. The trial court further rejected a request for a jury instruction that the jury could infer that the loss of the phone reflected adversely on the government's case.

The Fourth Circuit unanimously reversed. Without conducting a hearing into the circumstances surrounding the loss of the phone, the defendant's due process arguments could not be determined. The defendants plausibly raised *Brady* and *Youngblood* claims, and the government conceded that the phone contained at least some exculpatory evidence. It was therefore error for the district court to fail to meaningfully resolve the claims before trial, and the defendants were entitled to a new hearing, and (if necessary) a new trial, as a result.

If a retrial is necessary following the evidentiary hearing on the motion, the district court was instructed to reconsider the question of whether the defendants may be entitled to a jury instruction on adverse inference against the government for loss of the phone.

The court also determined that the trial court erred in admitting evidence of another drug overdose death connected with the defendants. This too was prejudicial error requiring a new trial. The convictions were therefore vacated, and the matters remanded for additional proceedings.