Phil Dixon
919.966.4248
dixon@sog.unc.edu
UNC School of Government©

# Fourth Circuit Case Summaries: July 1, 3, 11, 12, 29, 30, and 31, 2019

**Finding prior circuit precedent abrogated, court holds North Carolina offenses of common law robbery and accessory before the fact to armed robbery are violent felonies under the ACCA**

U.S. v. Dinkins, 928 F.3d 349 (July 1, 2019). In this case from the Western District of North Carolina, the court held that North Carolina's offenses of common law robbery and accessory before the fact to armed robbery qualified as violent felonies within the meaning of the "force clause" of the Armed Career Criminal Act ("ACCA"). The defendant was convicted of firearm by felon and sentenced as a career offender under the ACCA due to his North Carolina convictions for accessory before the fact to armed robbery and common law robbery. The defendant sought post-conviction relief in light of *U.S. v. Johnson*, 135 S. Ct. 2551 (2015), which held that the definition of violent felonies in the residual clause of the ACCA was unconstitutionally vague. Following *Johnson*, the Fourth Circuit held in *U.S. v. Gardner*, 823 F.3d 793 (4th Cir. 2016), that North Carolina's common law robbery offense did not qualify as a violent felony for ACCA purposes. However, in *U.S. v. Stokeling*, 139 S. Ct. 544 (2019), the U.S. Supreme Court revised the definition of "physical force" within the meaning of the force clause of the ACCA. Under that new framework, North Carolina's offense of common law robbery meets the definition of a violent felony. "[B]ecause North Carolina's case law establishes that the state's common law robbery offense requires the use of force sufficient to overcome the victim's resistance, that offense is encompassed by the holding of *Stokeling* and qualifies as a violent felony under the ACCA's force clause." Slip op. at 14-15. The court found that *Gardne*r, the court's prior precedent on the matter, was overruled by *Stokeling*. As to the accessory before the fact to armed robbery offense, the court noted it previously held that North Carolina's armed robbery offense is a violent felony within the meaning of the ACCA. Here, "[b]ecause a completed act of armed robbery is an element of the offense of being an accessory before the fact of armed robbery under North Carolina law, we conclude that [the defendant's] conviction of the inchoate offense is therefore a violent felony under the ACCA's force clause." *Id*. at 17. The district court's denial of post-conviction relief was therefore unanimously affirmed.

**(1) Evidence objectively supported offense of conviction and actual innocence claim rejected; (2) no ineffective assistance of counsel in failing to consult defendant about appeal where no rational defendant would have wanted to appeal**

U.S. v. Courtade, 929 F. 3d 186 (July 3, 2019; amended July 10, 2019). This case arose in the Eastern District of Virginia. The defendant pled guilty to possession of child pornography based on videotaping of his 14-year-old stepdaughter in the shower, in exchange for dismissal of a related child pornography production charge. A broad appeal waiver was executed as a part of the plea and the defendant did not

directly appeal. However, a year after sentencing, the defendant moved for post-conviction relief, arguing that he was actually innocent and that he received ineffective assistance of counsel by his trial attorney failing to discuss a direct appeal with him, among other claims.

(1) As to the innocence claim, the defendant claimed the video failed to show sexually explicit conduct, as required by the statute. Sexually explicit conduct is defined in part to include "lascivious exhibition" of the private areas of a person. The interpretation of "lascivious exhibition" was a question of first impression in the circuit. Rejecting the innocence claim, the court found that "the video's objective characteristics . . .reveal the video's purpose of exciting lust or arousing sexual desire within the plain meaning of 'lascivious exhibition.'" Slip op. at 13. While more than "mere nudity" is required, here the video spoke for itself: "Its images and audio reveal a young girl deceived and manipulated by an adult man into filming herself nude in the shower and methodically directed to do so in a way that ensures she records her breasts and genitals." *Id*. at 14. The defendant therefore failed to show that a reasonable juror would not have convicted, and his innocence claim fails.

(2) As to the ineffective assistance claim, the court noted that under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), defense counsel must consult with the defendant about the possibility of appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id*. at 15-16. The defendant argued that he met the first prong—according to the defendant, a rational defendant in his shoes would have wanted to appeal, and he had nonfrivolous grounds for doing so. *Flores-Ortega* requires the court to consider "all relevant factors" in determining whether a rational defendant would have wanted to appeal. Here, the defendant pled guilty, signed an extensive appeal waiver, and "otherwise indicated a desire for the proceedings to end, including through providing a written statement" where the defendant acknowledged his wrongful behavior. Further, because the more serious child pornography production charge (carrying a mandatory 15 year minimum and possible maximum sentence of 30 years) was dismissed pursuant to the plea bargain, it was unlikely that a rational defendant would have wanted to appeal on these facts. The claim for ineffective assistance of counsel therefore failed and the judgment of the district court was unanimously affirmed in all respects.

**No *Bivens* remedy against Naval officials for alleged torts occurring on foreign soil**

Doe v. Meron, 929 F.3d 153 (July 3, 2019). This Maryland case arose from the Navy's investigation of alleged child abuse by the defendant of his three children in the Kingdom of Bahrain. The children were interviewed by Navy officials and physically examined for signs of sexual abuse (none were found). The plaintiff claimed that his children were "twice seized, interrogated, and battered" during the investigation. He sued, alleging various state torts, as well as pressing claims for constitutional violations against the Naval officials under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971) (finding an implied cause of action for damages against federal officials for constitutional violations). The district court dismissed the constitutional claims, finding *Bivens* inapplicable. The Fourth Circuit affirmed.

The court noted that *Bivens* has not been extended in 30 years and that the U.S. Supreme Court has cautioned against extending that remedy. The decision whether *Bivens* should be applied turns on the question of whether the case presents a new context for the remedy. "A context is considered new if it 'is different in a meaningful away from previous *Bivens* cases decided by [the U.S. Supreme] Court.'" *Id*.

at 19 (internal citations omitted). The court noted it recently declined to extend *Bivens* to the context of alleged constitutional violations committed by Immigration and Customs Enforcement agents, finding those claims to be a new context and thus inappropriate for a *Bivens* claim. *See Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019). Here, all the plaintiff's claims against the Navy officials presented new context, and several factors weighed against extending *Bivens* to supply a remedy. The acts constituting the alleged torts took place in a foreign county, which "would extend *Bivens* extraterritorially." *Id*. at 23. Further, *Bivens* has never been applied to military officials, and an "alternative remedial scheme" for damages exists under military law. These factors weighed strongly against extending *Bivens*, and the district court's dismissal of the claims was unanimously affirmed.

**Non-disparagement clause in police misconduct settlement agreement violated the First Amendment**

Overbey v. Mayor and City Council of Baltimore, ___F.3d ___, 2019 WL 3022327 (July 11, 2019). The city of Baltimore had a practice of including a "non-disparagement clauses" in most settlement agreements resolving police misconduct claims, which prohibits the claimant from discussing the facts of the case or the settlement with the media. A claimant typically forfeits half of the settlement money back to the city if he or she is found to be in breach of that clause. The city unilaterally determines whether such breach has occurred. The plaintiff settled her police misconduct case and signed an agreement with a non-disparagement clause. A local paper then published the plaintiff's name, address and the dollar amount of her proposed settlement. A city solicitor was quoted in that story describing the plaintiff as "hostile" during the police encounter leading to the settlement and implying that she was responsible for the incident. Several people made "race-inflected comments implying that [the plaintiff] had initiated a confrontation with the police in hope of getting a payout . . ." on the story online. Slip op. at 5. The plaintiff responded to these comments and attempted to refute them by reiterating that the police had acted wrongfully and listing some of her injuries. The City concluded these remarks violated the terms of the settlement agreement and withheld half of her payment. The plaintiff sued the city again, alleging in pertinent part that her First Amendment rights were violated by the City's actions in enforcing the clause. Another local paper joined the lawsuit, claiming that the City's practice of using non-disparagement clauses in this way interfered with the paper's First Amendment rights. The district court granted the City's motion for summary judgment, finding that the plaintiff voluntarily waived her First Amendment rights to talk about the case by signing the settlement agreement. It further held that the City's acts in enforcing that waiver (by withholding settlement money) did not contravene public policy. The local paper's claims were dismissed for lack of standing. Both appealed. The Fourth Circuit reversed, finding that "the non-disparagement clause . . . amounts to a waiver of her First Amendment right and that strong public interest rooted in the First Amendment make it unenforceable and void." *Id*. at 8.

While a person can waive constitutional protections by contracting with the government, the waiver must be knowing and voluntary. Further, the government bears the burden to show that "the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement." *Id*. at 11. Here, the court found that enforcement of the waiver of speech rights in the settlement agreement were outweighed by First Amendment policy concerns. A core concern of the First Amendment is to protect debate of issues relevant to the public at large. Police misconduct is a public issue. The First Amendment also protects against governmental overreach by permitting citizens to freely criticize the government without fear of reprisal. "[W]e conclude that the enforcement of the non-disparagement clause at issue here was contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public

discourse." *Id*. 13. The City's interest in settling such claims quickly and efficiently was insufficient to overcome the First Amendment concerns. Any purported interest of the City in protecting the officers involved in the encounter from reputational harm, or in protecting the City at large from "harmful publicity" were similarly insufficient to overcome the First Amendment concerns. The court also rejected the City's argument that it was simply "unfair" to allow the plaintiff to receive the money previously promised in exchange for her silence: "We have never ratified the government's purchase of a potential critic's silence merely because it would be unfair to deprive the government of the full value of its hush money. We are not eager to get into that business now." *Id*. at 16. The grant of summary judgment was therefore reversed as to the individual plaintiff. The court also reversed the dismissal of the newspaper for lack of standing, finding the question of standing needed to be further developed at an evidentiary hearing. The district court was therefore reversed and the matter remanded. A dissenting judge would have found the non-disparagement clause enforceable and not outweighed by First Amendment concerns.

**Rule 60(b)(6) motion was successive habeas petition and should have been dismissed**

Richardson v. Thomas, ___F.3d ___, 2019 WL 3048516 (July 12, 2019). The petitioner was convicted in 1995 of murder and kidnapping in North Carolina and was sentenced to death. Following unsuccessful appeals, he sought post-conviction relief in state court, arguing that he was intellectually disabled and that his death sentence violated the Eighth Amendment under *Atkins v. Virginia*, 536 U.S. 304 (forbidding the death penalty for the intellectually disabled). A full hearing on the merits was held and the court denied relief. Following denial of review of that decision by the state supreme court, he filed a habeas petition in federal court advancing the same arguments. The federal district court found that the state court did not unreasonably apply federal law or unreasonably determine the facts from the evidence and denied the petition. The Fourth Circuit affirmed in 2012. In *Hall v. Florida*, 572 U.S. 701 (2014), the court struck down Florida's statutory scheme for determining intellectual disability, which treated a defendant's IQ score as conclusive and barred the presentation of other evidence of disability for defendants with an IQ above 70, as a violation of the Eighth Amendment. The petitioner then sought state post-conviction relief once more, arguing that *Hall* applied and that North Carolina's capital sentencing scheme also suffered the same problem as Florida's did in *Hall*. The state court found this claim was procedurally barred and that *Hall* did not apply retroactively in the post-conviction context. The state court alternatively held that *Hall* did not apply to the petitioner's case at all, in that North Carolina did not impose a bright line cutoff based on IQ score and did not prevent the presentation of other evidence of intellectual disability beyond the IQ score. Further, "unlike *Hall*, [the petitioner] *had* been 'allowed to present evidence of his alleged deficits in adaptive functioning in a full evidentiary hearing without restriction', as well as evidence on 'the standard error of measurement.'" Slip op. at 9 (emphasis in original). The state supreme court again denied review, as did the U.S. Supreme Court. The petitioner then filed a motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure to reopen the judgment in his first federal habeas case. The district court granted that motion, resulting in the current appeal.

A second or successive habeas petition is typically only allowed where the claim is based on a new constitutional rule that has been made retroactive, or where a claim of actual innocence is asserted. Such a successive petition must be certified by a federal appeals court before it may be heard at the district court. A rule 60(b) motion may be used to attack a habeas judgment only in certain circumstances. "The narrow role . . . for Rule 60(b) motions in the habeas context . . . allows a district

court to reopen nonmerits-based denials or dismissals of a state prisoner's federal habeas petition or claim, which resulted in no federal court having considered the merits of the claim at all." *Id*. at 15. A habeas petitioner may not assert new claims, new evidence for previously decided claims, or argue the application of new law in a Rule 60(b)(6) motion—"such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and treated accordingly." *Id*. at 14. If a district court determines that a Rule 60(b) motion is in fact a habeas petition, it is required to either dismiss the motion or transfer it to the appeals court for certification.

Here, the petitioner presented the same claim that was previously fully adjudicated in his first habeas proceeding. In the court's words: "One can hardly imagine a second or successive habeas application that is so poorly disguised as a Rule 60(b)(6) motion. [The petitioner's] motion was a clear attempt to circumvent AEDPA's restrictions on the filing of a second or successive federal habeas petition based upon a new rule of law, presenting his *Hall* claim to the district court instead of coming first to us." *Id*. at 16. The district court here erred in considering the merits of the claim first, without determining whether the motion was actually a habeas petition. The matter was therefore unanimously vacated and remanded with instruction for the district court to dismiss the motion. The opinion noted that, during the pendency of this appeal, the petitioner did file a request for certification of a successive habeas petition in the Fourth Circuit, which remains pending.

**Refusal to compel DEA chemist to testify for the defense violated Sixth Amendment compulsory process rights**

U.S. v. Galecki, ___F.3d ___, 2019 WL 3403890 (July 29, 2019). Following conviction after trial for offenses relating to the distribution of controlled substance analogues, defendants appealed, arguing in part that the district court erred in denying a request to compel a DEA chemist to testify for the defense. The offenses require that the government show that the defendant knew the substances were controlled substances (or substantially similar to controlled substances) and intended the substance to be ingested by humans. The defendants argued at trial that the substance at issue was not substantially similar to a controlled substance and that they had no knowledge that the about the similarity of their product to controlled substances. They sought to compel the testimony of a DEA chemist who had reviewed the similarity of the substance to existing controlled substances for that agency and determined the two were not substantially similar. Despite that opinion from their expert, the DEA later classified the substance at issue as substantially similar (and thus subject to the analogue controlled substances act). The defendants presented expert testimony from two other chemists that offered the same opinion—that the substance at issue was not similar to existing controlled substances. The district court refused to compel the DEA chemist. The jury hung at the first trial and convicted at the second. The defendants appealed, and the Fourth Circuit remanded, ordering the district court to determine the materiality of the excluded testimony. On remand, the district court determined that the excluded testimony of the DEA chemist was merely cumulative to the other defense experts, and that no Sixth Amendment violation occurred. The defendants again appealed, and the Fourth Circuit reversed.

To show a compulsory process violation, the defendant must demonstrate that the excluded testimony was favorable and material. Material evidence "must be exculpatory; it must be 'not merely cumulative to the testimony of available witnesses;' [and] it must present 'a reasonable likelihood that the testimony could have affected the judgment of the trier of fact;' and it must otherwise be admissible." Slip op. at 15. Here, the excluded testimony was admissible, exculpatory, and not cumulative. The DEA

chemist testimony was "qualitatively different" from the other defense experts. Unlike the defense experts, the DEA chemist would not have been paid by the defense to make the opinion or to testify. The prosecution impeached the defense experts at trial with the fact that they were "hired guns," and specifically argued this point at trial. "[The DEA chemist's] inability to be impeached on the basis of pecuniary interest made his testimony unique and particularly relevant, not cumulative." *Id*. at 16. That witness was also uniquely situated to rebut the government's DEA expert, showing the jury that there was disagreement on the similarity of the substances even within the DEA itself. This testimony reasonably may have led to a different outcome at trial and should have been allowed. This Sixth Amendment violation of the right to compulsory process was not harmless and required a new trial. The court also addressed several other evidentiary rulings and declined to reassign the matter to a different trial judge on remand. The convictions were therefore unanimously vacated and the matter remanded.

**Untimely request for *Franks* hearing failed on the merits**

U.S. v. Moody, ___F.3d ___, 2019 WL 3403030 (July 29, 2019). After being convicted of drug and firearm offense at trial, the defendant moved for a *Franks* hearing, challenging the veracity of the search warrant that led to evidence in his trial. He argued that the officer's trial testimony materially varied from the allegations in her affidavit in support of the warrant. The district court declined to hold a hearing on the matter, finding that the defendant failed to meet the requirements for a *Franks* hearing. The Fourth Circuit affirmed.

"[T]o obtain the hearing, a defendant must make a 'substantial preliminary showing' that (1) law enforcement made a 'false statement'; (2) the false statement was made 'knowingly and intentionally, or with reckless disregard for the truth'; and (3) the false statement was 'necessary to the finding of probable cause.'" Slip op. at 5 (internal citations omitted). A request for a *Franks* hearing must typically be made pretrial. If an affidavit in support of a search warrant shows probable cause even once the challenged statements are excised, the trial court need not hold an evidentiary hearing on the motion. Here, the defendant contended that the officer misrepresented that he was present at a controlled buy in her affidavit, when in fact he was not. The court acknowledged that the language in the affidavit was ambiguous and could be read naturally to suggest that he was in fact present at the buy. The challenged statement, even if false, was not intentionally false or misleading, nor was it made in reckless disregard for the truth under the circumstances. Further, the affidavit established probable cause to believe that drug evidence would be found at the defendant's home, even without the challenged statement. "That shows any falsity was immaterial . . ." and the *Franks* challenge was rejected. *Id*. at 9. Other challenges to the affidavit, raised for the first time on appeal, were reviewed for plain error and similarly rejected. The convictions were therefore unanimously affirmed.

**Fourth Amendment and Due Process claims for wrongful conviction may proceed; denial of summary judgment to officers affirmed**

Gilliam v. Snead, ___ F.3d ___, 2019 WL 3419173 (July 30, 2019). This case from the Eastern District of North Carolina arose from the plaintiffs' wrongful conviction for the 1983 murder and rape of a young girl in Robeson County. The plaintiffs, Brown and McCollum, were exonerated by DNA testing after serving 31 years in prison for the crime. They sued under 42 U.S.C. 1983, alleging Fourth Amendment and due process violations by state and local law enforcement authorities. The district court denied the defendant-officers qualified immunity and the officers appealed.

Both plaintiffs were teenagers at the time of the crime and had significant intellectual disabilities. Both agreed to be interviewed by police, and both ultimately signed (contradictory) confessions to the crimes. The DNA results revealed that the other suspect was the actual culprit, but police had failed to follow through with basic investigation into his involvement at the time. That other suspect was convicted of a "strikingly similar" rape and murder of another woman in the area that occurred less than one month after the murder for which the plaintiffs were convicted. The circumstances of the confessions were the primary focus of the claims. Specifically, the plaintiffs alleged their confessions were coerced by police, that exculpatory evidence pointing to the other suspect was withheld, that a witness was coerced to give false testimony, and that the police officers acted in bad faith in failing to more fully investigate the crime.

As to the confessions, the plaintiffs alleged they were interrogated late into the morning, threatened and verbally abused during the interrogations, and "tricked" into signing Miranda waivers and the confessions. In the light most favorable to the plaintiff, these allegations were sufficient to establish a Fourth Amendment violation to be free from arrest without probable cause. That right was clearly established in 1983. The district court was therefore correct in finding genuine disputes of material fact existed about the circumstances of the confessions and that qualified immunity did not apply.

As to the due process violations, the plaintiffs alleged *Brady* violations by the officers for failing to disclose the other suspect at the time, and for failing to disclose (or document) a witness's statement to investigators that she saw that other suspect attack the victim on the night of the murder. They also alleged due process violations by forcing a witness to give false testimony, by coercing the plaintiffs' confessions, and by the failure of the officers to investigate the crime in good faith. Once more, the district court found that in the light most favorable to the plaintiffs, they had stated claims for due process violations based on the "clearly established due process right 'not to be deprived of liberty as a result of fabrication of evidence by a government officer acting in an investigating capacity.'" Slip op. at 37. In the words of the court: "It was beyond debate at the time of the events in this case that Appellees' constitutional rights not to be imprisoned and convicted based on coerced, falsified, and fabricated evidence or confessions, or to have material, exculpatory evidence suppressed, were clearly established." *Id*. at 45. The district court's denial of summary judgment for the defendants was therefore affirmed in all respects. A judge wrote separately to dissent in part. He would have found some of the due process claims did not establish a constitutional violation, or if they did, that such rights were not clearly established at the time.

**Unlocking cell phone upon law enforcement request was not testimonial communication under the Fifth Amendment**

U.S. v. Oloyede, ___ F.3d ___, 2019 WL 3432459 (July 31, 2019). In this multi-defendant wire fraud case from the District of Maryland, one defendant moved to suppress evidence obtained from her cell phone. While police were executing a search warrant at her home, an agent discovered a locked cell phone in the defendant's bedroom. He asked the defendant, "Could you please unlock your iPhone?" Slip op. at 6. The defendant then unlocked the phone and gave it back to the agent. Her motion to suppress alleged that this was a Fifth Amendment violation of her right to remain silent, and that she should have been Mirandized before the request. The district court rejected this argument, finding that the act of unlocking her phone was not a communication subject to *Miranda*. It further found that the request was not "coercive" and that the defendant voluntarily complied. The Fourth Circuit affirmed.

The Fifth Amendment protection from self-incrimination applies to compelled testimonial communications that inculpate the defendant. A testimonial communication may consist of an act, but "the act must 'relate a factual assertion or disclose information;' it must 'express the contents of [the person's] mind.'" *Id*. at 8. Here, the agent did not ask the defendant the password; he asked her to enter it herself. The defendant did not show the agent the password and the agent did not see it when she entered it to unlock the phone. "Unlike a circumstance, for instance, in which she gave the passcode to the agent for the agent to enter, here she simply used the unexpressed contents of her mind to type the passcode herself." *Id*. This act did not qualify as a testimonial communication and was unprotected by the Fifth Amendment. Furthermore, even if the act of unlocking her phone did constitute a testimonial communication, the phone would still have been admissible: "'[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause' and . . . the Clause 'is not implicated by the admission into evidence of the physical fruit of a *voluntary statement*.'" *Id*. at 9, (*citing U.S. v. Patane*, 542 U.S. 630 (2004)) (emphasis in original). This situation fell within the *Patane* rule, in that use of the phone evidence at trial did not create any risk that coerced statements by the defendant would be used at trial. The trial court's denial of the motion to suppress was consequently affirmed. Other challenges to evidentiary rulings, joinder of the defendants, the jury instructions, the sufficiency of the evidence, and the sentences were all likewise rejected, and the convictions unanimously affirmed.

**No error to empanel anonymous jury in capital gang prosecution**

U.S. v. Mathis, ___ F.3d ___, 2019 WL 3437626 (July 31, 2019). This multi-defendant prosecution of Blood gang members in the Western District of Virginia involved the murder of a police officer, witness tampering and violent crimes in furtherance of racketeering. During the first trial, the court became aware that one of the defendants had obtained a list of the jury panel members and removed it from the courtroom. The defendants moved for a mistrial, which was granted. Venue was moved to an adjacent district at the defendant's request, and the court granted the government's motion for an anonymous jury. "In a capital case, a district court may empanel an anonymous jury only after determining 'by a preponderance of the evidence that providing the [juror] list . . . may jeopardize the life or safety of any person.'" Slip op. at 10.

This rare decision must be based on record evidence, not merely the allegations of the offenses. There must be "strong reasons" to believe the jury is at risk or that the jury's function is at risk, and reasonable precautions must be taken to protect the defendants from any potential resulting prejudice. Courts will consider five factors in this inquiry:

> (1)the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer a lengthy period of incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. *Id.*

Here, the case involved a "violent street gang" who were accused of murdering a potential witness to the crimes, and evidence indicated that the gang included other members, not party to the current prosecution, that were capable of harming jurors. Evidence was presented to the court regarding the gang's history of not only retaliating against perceived enemies, but also taking

actions to prevent harm to the organization. Evidence showed that two defendants continued recruiting for the gang while in pretrial detention for this case. This evidence, coupled with the events surrounding the first mistrial and the severe penalties faced by the defendants, justified the decision. Further, the court acted to protect the defendants from any prejudice by giving venire persons a neutral explanation of the decision, allowing full voir dire of potential jurors, and providing redacted jury questionnaires to the defendants (the defense attorneys were allowed to view unredacted versions). The decision was therefore supported by the evidence and met the "strict standard" for an anonymous jury. Finding no abuse of discretion, the decision was affirmed on appeal.