

## Case Summaries: Fourth Circuit Court of Appeals (March 11, 2024)

### **Failure to disclose change in witness's statement before trial and failure to correct the witness's misleading statements at trial was not material under the facts of the case and did not justify post-trial relief**

[U.S. v. George](#), 95 F.4th 200 (March 11, 2024). The defendant was tried before a jury and convicted of possession of a firearm and ammunition by a felon in the Eastern District of North Carolina. The defendant's cousin was on scene at the time of the defendant's arrest and was interviewed by law enforcement near that time. The cousin told police then that there were two additional people in the car immediately before the defendant's car was stopped—a woman identified only as "Kate" and another, unnamed man. According to the witness, both were dropped off before the traffic stop leading to the defendant's arrest occurred. A few weeks before trial, the Assistant U.S. Attorney and an ATF agent interviewed the cousin again. This time, he claimed that two different people were in the car before the stop, both of whom were men and were related to the defendant. This change in the cousin's story about the identity of passengers in the car prior to the stop was not disclosed to the defendant at any point before trial.

The cousin testified at trial for the government. Defense counsel attacked the cousin's credibility and argued that the gun belonged to one of the other passengers in the car. The cousin's trial testimony was inconsistent with his first statement to police about the identity of the passengers, but consistent with his second interview. While this apparently surprised both the defense and the prosecution, the government did not try to correct or clarify the witness testimony, nor did it mention the late disclosure by the cousin of this new information during the trial. The cousin was extensively impeached regarding this inconsistency, as well as on several other grounds. The jury ultimately convicted the defendant. As a result of the conviction, the court later found a supervised release violation stemming from another matter as well.

After trial, the defendant requested a mistrial and for a dismissal with prejudice, or, in the alternative, for the trial court to order a new trial, pointing to the government's failure to disclose and alleging a *Brady* violation. The government was willing to admit a *Brady* violation and consented to a new trial, but backpedaled when the trial court expressed skepticism about whether the information rose to the level of a material fact that could support such a claim. Because the defendant was obviously in the car with the passengers at the relevant time, and because the cousin-witness was thoroughly cross-examined on the point (and others) at trial, the trial judge asked the government to submit a new response to the defendant's request for post-trial relief. The government's new response acknowledged its failure to disclose the witness's new statement and its duty to do so, but argued the information was not material evidence (for the same reasons identified by the court). The trial court ultimately denied the defendant's requests, finding that defense counsel had been able to effectively impeach the witness, that the statement was not material under the facts of the case, and that sufficient evidence existed for the jury to convict even without the statement about the passengers. Among other facts, the gun was

found beside the defendant, its magazine was under the defendant's seat, and the defendant had been found with other guns at other times in the past under "strikingly similar" circumstances. The defendant appealed.

The Fourth Circuit agreed that the government's withholding of the inconsistent statement by the cousin was improper. The information was impeachment evidence, and the government had a duty to disclose it before trial and to correct any misleading impression given by the witness at trial. Here, though, the information was not material, given the extensive impeachment of the witness at trial (including by using the newly discovered inconsistent statement). "Because the jury knew about the inconsistent statement and [the cousin] was impeached by it, we find it difficult to imagine how an earlier disclosure would have materially altered the trial." *George* Slip op. at 21. Further, the jury convicted the defendant pursuant to a special verdict form, giving it the choice to convict the defendant under a theory that he possessed the firearm or that he possessed the ammunition found near the weapon. The jury convicted under both theories, but the cousin's testimony only went to the defendant's possession of the firearm. Thus, the undisclosed statement did not have a likely impact on the verdict. The court therefore affirmed both the trial court's ruling on the post-conviction motions, and its revocation of the defendant's supervised release.

Judge Thacker concurred in a separate opinion to express frustration with a pattern of discovery abuses by the U.S. Attorney's Office for the Eastern District of North Carolina. While the non-disclosure here was not material within the meaning of *Brady*, the impact of the government's discovery violation "violates constitutional guarantees and erodes public trust in the judicial system." *Id.* at 24 (cleaned up). Here, the government disclosed the general fact of the second interview with the cousin, but not the change in his story about the passengers. In addition to failing to disclose this information, it failed to correct misleading testimony on the point by the witness at trial. Going back ten years, the court has chastised this U.S. Attorney's office in at least three previous cases for remarkably similar misconduct. See *U.S. v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013). Judge Thacker further noted that the court heard a fifth case claiming similar violations from that office on the same day as this case was argued. Her concurrence closed with these words:

Suffice it to say, I am concerned about the Government's discovery practices in the Eastern District of North Carolina. Given the confluence of cases in which the Eastern District of North Carolina United States Attorney's Office has breached its discovery standards, it appears a re-evaluation [of its discovery standards] is in order. *Id.* at 25.