

**Responses of Andre M. Davis
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator John Cornyn**

1. Judge Davis, since 2004 your opinions in criminal cases have been reversed by the 4th Circuit at least eight times. Six of those reversals were unanimous.

- You have repeatedly suppressed confessions that were obtained outside of interrogation, including a confession that a suspect made to his own mother in the presence of police.¹**
- You have downward departed from mandatory minimum sentences.²**
- You have found arrests and searches to be invalid in cases where common sense amply demonstrated that probable cause existed.³**

These decisions appear to go well beyond the Fourth Circuit's law, and err on the side of criminal defendants. How can law enforcement officers and citizens know that, as a Fourth Circuit judge, you will more faithfully apply the law of the Circuit, the Supreme Court, and the Constitution?

Response: I fully accept the appellate court's rulings in these cases, in which the court rejected my assessment of the facts and/or concluded that I had misapplied the law to the evidentiary record before me. In every case that has ever come before me, I have done my best to determine the facts (where I have been the fact finder) and to apply the law to the facts impartially and fairly. I fully respect the role of appellate courts in our system and fully accept their decisions in all cases, including the cases in which they have reviewed my rulings. If confirmed as a Fourth Circuit judge, I will follow the precedents of the Supreme Court and the Circuit and continue to apply the law to the facts of each case impartially and fairly.

2. On January 7, 2003, a woman named Tonya Malone called 911 from a 7-Eleven convenience store on West Franklin Street in Baltimore. She needed police protection from a man named Gregory McNeil. The 911 operator dispatched the Baltimore police, who arrived within 5 minutes.

When the officer arrived on the scene, he saw Ms. Malone step out of a telephone booth with several children in tow. McNeill was still standing next to her. When Ms. Malone approached the officer, McNeil followed beside her, and the two proceeded to talk over one another.

The officer separated them, and asked Ms. Malone's side of the story. Ms. Malone told the officer that "she wanted [McNeil] to leave her alone," but that instead McNeill was following her and "messing with" her. McNeill tried to interrupt, prompting the officer to warn him to "chill out."

¹ See *United States v. Jamison*, 2007 U.S. App. LEXIS 27978 (2007); *United States v. Kimbrough*, 477 F.3d 144 (4th Cir. 2007).

² See *United States v. Allen*, 450 F.3d 565 (4th Cir. 2006); *United States v. Stone*, 85 Fed. Appx. 925 (4th Cir. 2004).

³ See *United States v. Dickey-Bey*, 393 F.3d 449 (4th Cir. 2004).

Ms. Malone then told the officer that she had obtained a state court protective order against McNeill. In fact, she had obtained the protective order just a few hours earlier, so recently that the order was not yet entered into the police dispatcher's system.

Once Ms. Malone told the officer about the protective order, McNeill became agitated, and threatened Ms. Malone, saying "you dead, you know I am going to get you for this," prefaced by a vile, sexist epithet. Because of this direct and vulgar threat, the officer placed Mr. McNeill under arrest.

While in custody, Mr. McNeill confessed to two bank robberies that had been committed a few months before. This confession implicated other bank robbers as well.

As District judge, you granted a motion to suppress McNeill's confession, on the grounds that his arrest had been unlawful. You opined that the officer did not have probable cause to believe that assault or harassment had occurred in his presence, and so the arrest was unlawful and the confession inadmissible.

You came to this conclusion despite all of the facts above: the 911 call; McNeill following Malone around the parking lot; the interrupting; the protective order; and the gross and violent sexist threat that she was "dead" and he would "get" her. The Fourth Circuit unanimously reversed your decision.⁴

Please feel free to add any additional facts that you believe are necessary in answering the following questions:

A. Could you please explain your reasoning in this case?

Response: I fully accept the appellate court's ruling in this case. The principal issue presented in the case and argued before me by counsel was whether, for a warrantless misdemeanor arrest, the Fourth Amendment required that the misdemeanor be committed in the officer's presence. I concluded, relying on Fourth Circuit and Supreme Court precedents, that the answer was "yes," and that no misdemeanor had been committed in the officer's presence as of the moment of arrest. On appeal, the Fourth Circuit declined to address that issue. Instead, relying on a Maryland state court decision from the 1950s, the Fourth Circuit held that for a misdemeanor to be committed in an officer's presence, not all of the elements of the offense must occur in his presence. This argument and precedent had not been presented to me.

B. Do you believe that the officer should have left Tonya Malone at the scene without arresting Gregory McNeill? Please explain.

Response: In my ruling, I commented on the fact that the arresting officer had acted quite appropriately in taking steps to protect Ms. Malone.

⁴ See *United States v. McNeill*, 484 F.3d 301 (4th Cir. 2007).

C. Do you stand behind your reasoning and interpretation of the law in the McNeill case?

Response: The “in the presence” requirement for a warrantless misdemeanor arrest seems perfectly sound in light of Supreme Court and Fourth Circuit precedent. As described above, in reversing my decision, the Fourth Circuit did not call into question my reasoning in that regard.

3. In *United States v. Dickey-Bey*,⁵ you suppressed evidence arising out of the interception by Los Angeles and Baltimore police officers of 8 kilograms of cocaine worth approximately \$200,000.

In that case, drug sniffing dogs had alerted LA police that there may have been drugs in a package addressed to “Special Design at Box 187, Mail Boxes etc., 727 DuLaney Road, Towson, Maryland.” Other packages were similarly identified by drug-sniffing dogs, all from the same return address.

The police obtained search warrants and confirmed that 4 packages from the same return address each contained a total of 2 kilograms of cocaine. They then re-sealed the packages and waited to see who would pick them up.

An employee at the Mailboxes etc. store in Towson described the man who regularly picked up packages addressed to “Special Design” at Box 187. The police stationed an undercover officer in the store, posing as an employee, with the understanding that the actual employees would signal him when the individual who picked up packages from Box 187 arrived.

At approximately 11:30 a.m., another Baltimore police officer who was staking out the scene observed a man, who matched the description provided by the Mailboxes etc. employee, back into a parking spot near the store and look around suspiciously before entering. Once the defendant entered the store, the Mailboxes etc. employees gave the undercover officer the signal. Sure enough, the defendant requested the contents of Box 187.

When defendant left the store, the police arrested him. After the arrest, the officers searched his vehicle and discovered rental contracts and keys for other mailboxes at other UPS retail stores. The addresses on these contracts corresponded perfectly with the addresses to which the other 3 packages of cocaine had been mailed.

You held that the police did not have probable cause to arrest the defendant. Your rationale for this holding was that, at the time they executed the arrest, the officers did not have probable cause to believe that the defendant knew that the package contained cocaine.

It seems clear to me, as it was to the Fourth Circuit, that in the totality of the circumstances the officers had probable cause to believe that the defendant was involved in a drug

⁵ See *United States v. Dickey-Bey*, 393 F.3d 449 (4th Cir. 2004).

conspiracy, and was not simply an innocent courier who was ignorant of the package's contents.

Please feel free to add any additional facts that you believe are necessary in answering the following questions:

- A. Leaving aside the issues surrounding the search of the car, please further explain your reasoning in holding that there was insufficient probable cause to arrest the defendant.**

Response: I fully accept the appellate court's rejection of my legal conclusion that the evidence presented at the hearing on the motion to suppress was insufficient to establish a "fair probability," i.e., probable cause, to believe that the person picking up the package knew that narcotics were hidden inside.

- B. Do you believe that probable cause should turn on the defendant's subjective knowledge of the contents of the package, or should it turn on law enforcement's reasonable belief considering the totality of the circumstances?**

Response: The Supreme Court has repeatedly emphasized that the propriety of a seizure under the Fourth Amendment hinges solely on commonsense assessments of objective facts, taking into account the totality of the circumstances. I have attempted in every case to adhere to that requirement and I will continue to do so.

- C. How would a rule that turned on the defendant's subjective knowledge work in practice?**

Response: Proof of a person's knowledge is permissible by both direct and circumstantial, i.e., indirect, evidence, and this is true at both the motion-to-suppress stage as well as at trial.

- D. Wouldn't such a rule encourage drug criminals to keep their drugs wrapped in a box to maintain plausible deniability and avoid liability?**

Response: Although I can understand your concern that might result, my role as a judge is to follow the law as written by Congress and interpreted by higher courts.

- E. Do you stand behind your reasoning and interpretation of the law in the Dickey-Bey case?**

Response: I fully accept the appellate court's rejection of my legal conclusion that the evidence presented at the hearing on the motion to suppress was insufficient to establish a "fair probability," i.e., probable cause to believe, that the person picking up the package knew that narcotics were hidden inside.