No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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RICKY DONNELL ABNER
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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TABLE OF APPENDIX

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Pro Se/Pro Per,
Ricky Donnell ABner
Reg. No. 17368-058
FCI Williamsburg
Federal Correctional Inst.
P.O. BOX 340
Salters, S.C. 29590

# Table Of Appendix

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 23-4018**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKY DONNELL ABNER,

Defendant - Appellant.

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Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Norman K. Moon, Senior, District Judge. (6:21-cr-00001-NKM-5)

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Submitted: March 12, 2024 Decided: March 26, 2024

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Before KING and GREGORY, Circuit Judges, and MOTZ, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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**ON BRIEF:** Paul G. Beers, GLENN, FELDMANN, DARBY & GOODLATTE, Roanoke, Virginia, for Appellant. Christopher R. Kavanaugh, United States Attorney, Jonathan Jones, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

Appendix I

PER CURIAM:

A federal jury convicted Ricky Donnell Abner of conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 846, and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), (1)(C)(i). The district court sentenced Abner to a total of 420 months' imprisonment. On appeal, Abner challenges the denial of his suppression motion, as well as the denial of his Fed. R. Crim. P. 29 motion for a judgment of acquittal as to the § 924(c) count. We affirm.

"In reviewing a district court's denial of a motion to suppress, we review legal conclusions de novo and factual findings for clear error." *United States v. Pulley*, 987 F.3d 370, 376 (4th Cir. 2021) (internal quotation marks omitted). We consider the evidence in the light most favorable to the government and "must also give due weight to inferences drawn from those facts by resident judges and law enforcement officers." *Id.* (internal quotation marks omitted).

An affidavit supporting a warrant that authorizes a search "must provide the magistrate with a substantial basis for determining the existence of probable cause" in light of the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). In deciding whether probable cause exists, "a judicial officer must simply make 'a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Allen*, 631 F.3d 164, 172 (4th Cir. 2011) (quoting *Gates*, 462 U.S. at 238).



Appendix 1

"Generally, evidence seized in violation of the Fourth Amendment is subject to suppression under the exclusionary rule." *United States v. Andrews*, 577 F.3d 231, 235 (4th Cir. 2009). However, "evidence will not be suppressed if it is obtained by police officers in objectively reasonable reliance on a search warrant, even if that warrant later is determined to be invalid." *United States v. Blakeney*, 949 F.3d 851, 861 (4th Cir. 2020) (describing good faith exception to exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 922-23 (1984)). When, as here, a defendant challenges both a probable cause finding and the applicability of the good faith exception, we "may proceed to the good faith exception without first deciding whether the warrant was supported by probable cause." *United States v. Legg*, 18 F.3d 240, 243 (4th Cir. 1994).

"[A] warrant issued by a [judicial officer] normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *United States v. Perez*, 393 F.3d 457, 461 (4th Cir. 2004) (internal quotation marks omitted). There are, however, circumstances in which the good faith exception will not apply. As is relevant to Abner's argument, the good faith exception does not apply "when the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Wellman*, 663 F.3d 224, 228-29 (4th Cir. 2011). In assessing whether the exception applies, our analysis is "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." *Leon*, 468 U.S. at 922 n.23.



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We conclude that the affidavit supporting the search warrant for Abner's residence bears sufficient indicia of probable cause. The affidavit detailed the information on which the officer relied, including his experience and knowledge relating to narcotics investigations, statements of multiple coconspirators, and findings from law enforcement investigations corroborating much of the information given by the coconspirators. Considering the totality of this information, the affidavit was not so lacking in indicia of probable cause as to render reliance on the warrant unreasonable, and the district court did not err in finding that the good faith exception applied.[1] *See Wellman*, 663 F.3d at 229.

Next, we review de novo the district court's denial of Abner's Rule 29 motion for judgment of acquittal. *United States v. Rodriguez-Soriano*, 931 F.3d 281, 286 (4th Cir. 2019). Abner contends that he should have been acquitted as to the firearm offense because the Government failed to prove that he possessed a firearm in the Western District of Virginia, as alleged in the indictment.[2]

A fatal variance—also known as a constructive amendment—occurs when the government or the district court "broadens the possible bases for conviction beyond those presented by the grand jury," effectively amending the indictment to allow the defendant

[1] In light of this conclusion, we need not consider whether the affidavit was deficient in establishing probable cause and cast no doubt on the district court's decision in this regard.

[2] While Abner frames the issue as one of insufficiency of the evidence, the substance of his argument asserts a factual divergence between the allegations in the indictment and the Government's trial evidence, not a challenge to the sufficiency of the evidence to support his § 924(c) conviction.



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to be convicted of a crime other than the one charged. *United States v. Burfoot*, 899 F.3d 326, 338 (4th Cir. 2018) (internal quotation marks omitted). Conversely, a "mere" or non-fatal variance "occurs when the facts proven at trial support a finding that the defendant committed the indicted crime, but the circumstances alleged in the indictment to have formed the context of the defendant's actions differ in some way nonessential to the conclusion that the crime must have been committed." *United States v. Miltier*, 882 F.3d 81, 93 (4th Cir. 2018) (internal quotation marks omitted). "Such a variance does not violate a defendant's constitutional rights unless it prejudices the defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for the same offense." *Id.* (internal quotation marks omitted). We review de novo whether the district court permitted a fatal variance to the indictment. *Id.* at 92.

"To sustain a conviction under § 924(c), the government must prove that the defendant (1) used or carried a firearm and (2) did so during and in relation to a" drug trafficking crime. *United States v. Fuertes*, 805 F.3d 485, 497 (4th Cir. 2015). The statute does not require the government to prove that a defendant possessed a firearm at any particular location and, accordingly, the geographic location alleged in the indictment is not an element of the crime. A district court does not constructively amend an indictment when it does not require the jury to find a fact that was alleged in the indictment but is not an element of the charged crime. *See Burfoot*, 899 F.3d at 338-39; *see also United States v. Malloy*, 568 F.3d 166, 178 (4th Cir. 2009) (noting constructive amendment occurs when indictment is altered to change elements of charged offense). Moreover, Abner has not



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demonstrated any prejudice resulting from this alleged variance. The district court thus did not err in denying Abner's Rule 29 motion for a judgment of acquittal on the firearm charge.

Accordingly, we deny Abner's motion to appoint new counsel and affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*



Appendix 1

FILED: May 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 23-4018
(6:21-cr-00001-NKM-5)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKY DONNELL ABNER

Defendant - Appellant

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ORDER

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The court denies the petition for rehearing.

Entered at the direction of the panel: Judge King, Judge Gregory, and Senior Judge Motz.

For the Court

/s/ Nwamaka Anowi, Clerk

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task force undertook no controlled purchases inside the residence or other measures to corroborate TFO Bailey's suspicion that Abner was an active, ongoing member of Storey's drug distribution network. TFO Bailey and the issuing magistrate in North Carolina knew or should have known that under binding Fourth Circuit precedent, CC-5's statement that on some unspecified date Abner delivered marijuana to him in Lynchburg, Virginia, could not constitute probable cause to search his home in Charlotte, North Carolina. Lalor, 996 F.2d at 1582.

Because the Affidavit so clearly lacked sufficient facts to create probable cause, the Leon good faith doctrine is inapplicable. See United States v. Wilhelm, 80 F.3d 116, 121 (4th Cir. 1996) ("We find that the good-faith exception to the exclusionary rule should not apply in this case due to the 'bare bones' nature of the affidavit, and because the state magistrate could not have acted as other than a 'rubber stamp' in approving such an affidavit.").

The Affidavit was "bare bones" with respect to Abner's role in Storey's conspiracy. TFO Bailey's sworn allegations amounted to nothing but guilt by association. The Leon exception does not rescue the Warrant.

In sum, the United States Court of Appeals for the Fourth Circuit should reverse Abner's convictions on Counts One and Fourteen because the jury's verdicts on those charges were based on tangible evidence and incriminating admissions agents obtained as a direct result of the unconstitutional Warrant.

Appendix 3

## II. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY DENYING ABNER'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT FOURTEEN.

Even assuming, arguendo, the Warrant was constitutional, the district court erred by refusing to acquit Abner on Count Fourteen when the government completed its case-in-chief.

At trial, Abner moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the 18 U.S.C. § 924(c) offense charged in Count Fourteen. (JA1059-1060; JA1070-1071.) Because the government failed to prove Abner possessed a firearm in the Western District of Virginia, the district court erred by denying Abner's motion for judgment of acquittal on Count Fourteen.

Count Fourteen reads in pertinent part,

> On or about January 26, 2021, in the Western District of Virginia and elsewhere, the defendant, RICKY DONNELL ABNER, did knowingly possess firearms . . . in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of Title 21, United States Code Section 841(a)(1) and 846, as charged in Count One of this Fourth Superseding Indictment.

(JA118-119.)

To establish Abner's guilt of this unambiguous charge, the government had to prove he possessed the firearms listed in Count Fourteen on or about January 26,



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2021, "in the Western District of Virginia and elsewhere." The government failed to carry its burden of proof on this count.

The government proved Abner possessed the firearms listed in Count Fourteen on January 26, 2021, when the DEA task force executed the Warrant at his Charlotte, North Carolina residence. Prosecutors presented no evidence Abner possessed the listed firearms in the Western District of Virginia on January 26, 2021, or any other date. The trial court therefore should have dismissed Count Fourteen for insufficient evidence.

Overruling Abner's Rule 29 motion, the trial judge declared that the government need not prove Abner possessed the firearms in the Western District of Virginia. (JA1100-1101.) In making this untenable ruling, the district court acknowledged that Abner's reading of Count Fourteen was reasonable from the standpoint of a "layman."

> The Court: The indictment, notwithstanding the law, would indicate that it has to be -- that the gun itself has to be --
>
> [Def. Counsel]: Yes, sir.
>
> The Court: -- used in the Western District of Virginia.
>
> [Def. Counsel]: That's what my client has been telling me from day one. I think that's a reasonable reading of the charge.

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> The Court: Well, it may be a reasonable reading, but it's not the reading we're taking here today. I mean, for a layperson, it might be.
>
> [Def. Counsel]: I'm not a layperson. That's what it says.
>
> The Court: Well, I know it. Okay. I know it. . . .

(JA1100-1101.)

Under the Fifth and Sixth Amendments, Abner was entitled to reasonable notice of the offense charged in Count Fourteen and to a trial limited to that charge.

> As the Supreme Court has explained: "court[s] cannot permit a defendant to be tried on charges that are not made in the indictment against him."

United States v. Simmons, 999 F.3d 199, 225 (4th Cir. 2021) (quoting Stirone v. United States, 361 U.S. 212, 217 (1960)). Accord, United States v. Miller, 891 F.3d 1220, 1235 (10th Cir. 2018) ("It is settled law in this circuit, as elsewhere, that the language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars.") [internal quotations omitted].

These fundamental due process principles under the Fifth and Sixth Amendments, applied here, demonstrate that the district court erred as a matter of law in denying Abner's Rule 29 motion for judgment of acquittal on Count

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Count 14 because there was not any evidence of him possessing the gun in Virginia. JA1100-01. He now fully embraces this position on appeal, arguing there was insufficient evidence to convict him because the government was obligated to prove possession in Virginia, not for any venue or substantive legal reason, but simply because of the phrasing used in the indictment. *See* Br. at 24-27.

At the outset, it bears noting the indictment charges that Abner knowingly possessed certain firearms "in the Western District of Virginia *and elsewhere*[,]" JA118—meaning the language expressly contemplated possession outside of Virginia and there is arguably no discrepancy at all. *Cf. United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009), *as corrected* (Mar. 31, 2009) (explaining the general principle that a defendant's conduct is charged conjunctively but proven disjunctively).

More importantly, what Abner is complaining about is, at worst, a variance, not a sufficiency-of-the-evidence problem. "A variance occurs where the proof at trial differs materially from the facts alleged in the indictment[,]" without broadening the bases for conviction. *Variance and Constructive Amendment*, 3 Fed. Prac. & Proc. Crim. § 516 (5th ed.). That is all Abner is alleging—there's no claim that the government failed to

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that's right.

THE COURT: Okay. But that's --

MR. BEERS: That's how it's charged.

THE COURT: But that's --

MR. BEERS: He knowingly possessed it in the Western District of Virginia and elsewhere.

THE COURT: Well, I think he can be prosecuted in Virginia. What if he -- one of these people down there killed somebody, murdered somebody in the drug deal but it was all part of the conspiracy, and the conspiracy is brought here? Could they be prosecuted here? I think so.

MR. BEERS: The way this is written they have to prove he possessed it in the Western District of Virginia and elsewhere.

THE COURT: Well, the conspiracy.

MR. BEERS: Okay.

THE COURT: And the conspiracy is --

MR. BEERS: I respectfully object. Aside from the venue, just the way this is alleged, they need to prove he possessed the gun in the Western District of Virginia and elsewhere. That's how they've alleged it. So in addition to a venue objection, I'm objecting to a notice problem. That's the way we've been reading it, they have to prove it in the Western District of Virginia and elsewhere.

MR. WELSH: Your Honor, the citation provided by the

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Count Fourteen charges that, on or about January 26, 2021, in the Western District of Virginia and elsewhere, the defendant, Ricky Donnell Abner, did knowingly possess firearms, that is an Eaglearms Rifle Model Eagle 15, a FNH Pistol Model 5-7, a Smith and Wesson Pistol Model 410S, a Smith and Wesson Pistol Model 686-2, a Taurus Pistol Model 1911, and a Springfield Armory Pistol Model XD5, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of Title 21, United States Code Section 841(a)(1) and 846. The charge of knowing possession of firearms in furtherance of drug trafficking is in violation of Title 18, United States Code, Sections 924(c)(1)(A).

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