

## Fourth Circuit Case Summaries: April 2, 3, 16, 22, 25, and 26, 2019

### **No Eighth or Fourteenth Amendment violations for Parole Board’s failure to consider age-specific characteristics of juvenile offender serving life with parole sentence**

[Bowling v. Director](#), 920 F.3d 192 (April 2, 2019). In this case from the Western District of Virginia, the defendant was sentenced to life with parole when he was seventeen years old. He has been eligible for parole since 2005 but has been denied by the Parole Board each year since then. The defendant sued, arguing that because the Parole Board was not required to consider “age-related characteristics unique to juvenile offenders,” the Parole Board decisions amounted to a Fourteenth Amendment procedural due process violation, as well as an Eighth Amendment violation. The district court granted the director’s motion to dismiss, finding no constitutional violations. The Fourth Circuit affirmed.

As to the Eighth Amendment claim, the court rejected that the denial of parole under these circumstances constituted cruel and unusual punishment. The U.S. Supreme Court’s juvenile jurisprudence requires that a sentencing court consider the age-specific characteristics of the juvenile before imposing a life without parole sentence. It is not clear that this consideration must be given to juveniles sentenced to life with parole. Some courts have applied *Miller v. Alabama*, 567 U.S. 460 (2012), to de facto life sentences, but other courts have found the rights limited only to situations involving a sentence of life without parole.

[E]ven where circuit courts have found that the constraints of *Graham* and *Miller* apply to de facto life without parole sentences, those courts have only gone so far as to require parole boards to consider a juvenile’s *eligibility for parole* with the juvenile’s lifetime. Slip op. at 10 (emphasis in original).

In light of this split, the court rejected the opportunity to expand *Miller* rights by applying them to a juvenile serving life and currently receiving parole consideration.

The court likewise rejected that the manner of parole consideration was constitutionally defective. It is not established that the *Miller* line of cases applies to parole hearings at all, but to the extent they do, these procedures were sufficient. The Parole Board looks at numerous factors in deciding whether to grant parole, including those specific to the offender.

The existing factors, therefore, allowed the Parole Board to fully consider the inmate’s age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then, and account for the concern at the heart

of *Graham* and *Miller*: ‘that children who commit even heinous crimes are capable of change.’ *Id.* at 11-12 (internal citation omitted).

As to the procedural due process claim, the court noted that “no constitutional or inherent right to parole proceedings” exists. *Id.* at 13. While Virginia law does create a liberty interest in parole determination, it does not guarantee release. The process due for this interest is satisfied by giving the inmate an opportunity to be heard during the parole determination and by explaining any adverse decision. Because the existing Parole Board procedures provide these protections, the court found no due process violation. The court therefore unanimously affirmed.

**Statements from custodial interrogation properly used to revoke supervised release; supervised release hearings are not a ‘criminal’ proceeding for *Miranda* purposes**

[U.S. v. Riley](#), 920 F.3d 200 (April 3, 2019). In this case from the Western District of Virginia, the defendant was on federal supervised release and was charged with new state drug offenses. His probation officer filed a violation of supervised release and the defendant was arrested. The probation officer interviewed the defendant at the local jail. No *Miranda* warning was given and the defendant made several inculpatory remarks, admitting to drug use and distribution. At hearing, the defendant objected that his statements were obtained in violation of *Miranda* and should not be used to revoke supervision. The district court overruled the objection and supervised release was revoked.

The court noted that *Miranda* warnings are required for custodial interrogation. However, *Miranda* protections are a trial right: “Accordingly, ‘a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.’” Slip. Op. at 6. The U.S. Supreme Court has held that proceedings to revoke parole do not qualify as a criminal case, and supervised release violation hearings are “largely indistinguishable” from parole hearings. “It is therefore clear that, like parole and probation revocation proceedings, ‘supervised release revocation hearing are not criminal proceedings.’” *Id.* at 7.

The district court relied on *U.S. v. Armstrong*, 187 F.3d 392 (4th Cir. 1999), to deny relief. *Armstrong* declined to apply the exclusionary rule to a Fourth Amendment violation in the supervised release revocation context. The defendant sought to distinguish *Armstrong*, arguing that different considerations were at issue with a *Miranda* violation, as opposed to the Fourth Amendment violation addressed in *Armstrong*. Here, because the defendant’s statements were not used in a criminal proceeding, there was no constitutional violation (and thus no need to reconsider the application of the exclusionary rule in this context). The district court’s judgment was therefore unanimously affirmed.

**No due process right to family unity in immigration detention context**

[Reyna v. Hott](#), 921 F.3d 204 (April 16, 2019). In this case from the Eastern District of Virginia, the plaintiffs were illegally present in the county and were arrested by Immigration and

Customs Enforcement (“ICE”) in Virginia. They were held in a Virginia facility while awaiting removal proceedings. One month into the detention, one of the plaintiffs was moved to another ICE facility in Texas without any notice of the transfer. The plaintiffs and their children sued ICE, alleging that the agency’s acts in transferring (or planning to transfer) the plaintiffs to out-of-state facilities violated their substantive due process rights to “family unity.” The plaintiffs also alleged a procedural due process violation, arguing that they should have notice and an opportunity to be heard before such transfers occur. The district court dismissed and the Fourth Circuit affirmed.

The court defined the issue narrowly: Does the decision of ICE to transfer detainees from a location close to the detainees’ families to another facility further away implicate due process? Answering the question in the negative, the court observed:

While the plaintiffs have sought support from a few cases in the constitutional neighborhood of such a right . . . we have found no precedent recognizing that there is a ‘right to family unity’ limiting detainee transfers. Slip op. at 12.

Previous substantive due process cases do provide parents with certain rights to decide the care, education, and upbringing of their children. However, nothing in those decisions support the idea that a detained person must be kept in the same state as their children, or that the children have a right to visitation, or that there are any “family unity” rights in this context at all. The U.S. Supreme Court has cautioned against expanding substantive due process rights, and the Fourth Circuit here declined to do so.

For the same reasons, the procedural due process claim fails. “Procedural due process applies only to the deprivation of liberty and property interests.” *Id.* at 13 (internal citation omitted). Because the court found that there was no right to family unity in the immigration detention context (and therefore no protected liberty interest), there could be no procedural due process violation. The district court’s judgment was therefore unanimously affirmed.

### **New evidence failed to meet “exacting” standard for actual innocence exception to procedural default**

[Hayes v. Carver](#), \_\_\_ F.3d \_\_\_, 2019 WL 1757684 (April 22, 2019). The petitioner was convicted of two counts of second-degree murder in Forsyth County, North Carolina, and received two life sentences in 1994. In 2013, the petitioner began pursuing post-conviction relief and eventually filed a habeas petition in the Middle District of North Carolina, seeking to overturn his conviction on grounds of actual innocence. The district court dismissed the petition as time-barred.

While this petition was not timely, a claim of actual innocence can act as an exception to procedural default in habeas proceedings. Under *Schlup v. Delo*, 513 U.S. 298 (1995), if the petitioner can demonstrate that no reasonable jury would have convicted him in light of new evidence, then other procedurally defaulted claims may be considered. The habeas court will

not consider the defaulted claims unless this standard is first met. Here, the petitioner alleged *Brady*, *Napue*, and *Strickland* claims, pointing to new evidence in support. This evidence consisted of witness statements pointing to an additional shooter on scene at the time of the crime, evidence that a third victim may have been shot, statements given to police at the time by witnesses which varied from the witnesses' trial testimony, and new shell casings found at the scene of the crime. Here, even assuming this new evidence supported claims of constitutional error, the petition failed to show that that no reasonable jury would have convicted him. In the court's words:

Contrary to Hayes's arguments, however, none of this evidence contradicts, or even undermines, the essential testimony of the identifying witnesses or the State's other evidence such that it is more likely than not than no reasonable juror would find him guilty beyond a reasonable doubt. *Id.* at 8.

None of the trial witnesses that identified the petitioner recanted and there was no other suggestion that the trial identifications were suspect. The inconsistencies identified by the petitioner regarding the testimony of some witnesses were "minor" and did nothing to undercut the identifications at trial or to establish actual innocence. The evidence that there was an additional shooter and additional gunshot victim on the scene was generally consistent with the State's theory and failed to contradict the trial evidence that the petitioner was responsible for the two murders of which he was convicted. The location of the new shell casings was also consistent with the State's evidence at trial. The petitioner therefore failed to meet the "demanding" standard of *Schlup*, and the Fourth Circuit unanimously affirmed the dismissal.

**(1) No error to reject plea agreement; (2) *Batson* challenge rejected**

[\*U.S. v. Walker\*](#), \_\_\_ F.3d \_\_\_, 2019 WL 1825824 (April 25, 2019). The defendant was charged with various offenses relating to heroin and fentanyl distribution in the Southern District of West Virginia. A plea agreement was reached, but once the trial judge reviewed the presentence report, he rejected the plea. This decision was based on the defendant's extensive (and violent) criminal history, the relative leniency he had received for prior convictions, and the nature of the offense. In rejecting the plea, however, the trial judge also emphasized the impact of the opioid crisis on the state and the nation at large, and expressed concerns about "excessive plea bargaining in federal court." Slip op. at 6. The judge examined whether the plea agreement was in the public interest and decided it was not. The defendant ultimately pled guilty to three drug offenses without a plea agreement and was convicted at trial of a firearms offense. At trial, the prosecution used a peremptory strike to remove a black female juror, the only African American in the panel. The defendant appealed, arguing that the judge erred in rejecting the original plea agreement and alleging a *Batson* violation.

(1) Rejections of plea agreements are reviewed for abuse of discretion. A plea may not be rejected for "arbitrary or irrational" reasons, nor may a plea be rejected based on discriminatory reasons "such as race, sex, or religion." *Id.* at 13. The decision to reject a plea should be made based on

the specific plea agreement at issue and not “on extraneous considerations or broad categorical determinations.” *Id.* at 14. The trial court always has the discretion to determine if a plea arrangement is too severe or too merciful. The court may also consider the public interest based on the specific facts of the case, including the defendant’s risk to the public. Here, the defendant alleged that the trial judge erred when it expressed dissatisfaction with the role of plea bargains in the federal system and emphasized the opioid crisis. Rejecting this argument, the court noted:

It is true that, in rejecting Walker’s plea agreement, the district court relied on some generalized analysis, and it invoked broad considerations such as the ‘cultural context’ of Walker’s offenses. If the court’s rulings had been premised only on such considerations, Walker’s challenge would be more substantial. But the court did not rely solely on its discussion of the opioid crisis or its criticism of the plea bargaining system. The court actually centered its analysis on whether the particular plea agreement between Walker and the United States Attorney was too lenient and on whether it served the public interest. *Id.* at 17.

This “individualized assessment” of the defendant’s situation was therefore proper, and the district court did not abuse its discretion in rejecting the plea. Further, the government did not raise (and the defendant did not preserve) a claim that the trial judge’s decision violated separation of powers principles—that is, that the trial judge interfered with prosecutorial discretion. Under these circumstances, there was no error.

(2) In order to prevail on a *Batson* claim, the defendant must make a showing that a strike was exercised on racially discriminatory grounds. The government must then offer a race-neutral explanation for the use of the strike. The defendant then must show that the offered reason is a pretext for racial discrimination. Pretext may be demonstrated by showing that the prosecution’s reasons for the strike would apply to other jurors not struck with similar characteristics (other than race). Here, the government identified three race-neutral reasons when confronted with the objection: the struck juror was unmarried, did not have any children, and was comparatively younger than other jurors. These were “facially race-neutral” reasons and shifted the burden back to the defendant to demonstrate pretext. The defendant identified four white females selected to serve on the jury as a comparison. Three were older than the struck juror, and all had children. One was younger, but was married and had children. Another was divorced, but had children and was ten years older than the struck juror. Rejecting the *Batson* challenge, the court noted: “Because each of Walker’s comparators possessed at least two of the three race-neutral characteristics relied on by prosecutors, we are unable to say that the trial court clearly erred in overruling Walker’s *Batson* challenge.” *Id.* at 20.

The court also rejected a challenge to the defendant’s Guidelines range calculation, and affirmed the convictions in all respects.

***Bivens* remedy not available for alleged constitutional violations by ICE**

[Tun-Cos v. Perrote](#), \_\_\_ F.3d \_\_\_, 2019 WL 1867819(April 26, 2019). The plaintiffs were a group of Latino men residing in the Eastern District of Virginia. They filed suit against Immigration and Customs Enforcement (“ICE”) agents for illegal stops, searches, and seizures stemming from immigration enforcement efforts in February 2017. In addition to the Fourth Amendment claims, a later amended complaint added an equal protection claim under the Fifth Amendment. The plaintiffs sought monetary damages for the constitutional violations under *Bivens v. Six Unknown Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971). *Bivens* provides a private cause of action against federal officials for certain constitutional violations. The ICE agents moved to dismiss, arguing that *Bivens* was not available in this context. The district court denied the motion, finding *Bivens* applicable and denying qualified immunity. The Fourth Circuit reversed.

*Bivens* is a narrow remedy that has only been approved in three contexts—against a federal drug enforcement officer for Fourth Amendment violations, against a Congressman for an Equal Protection violation, and against federal jailers for an Eighth Amendment violation. The U.S. Supreme Court has declined to extend *Bivens* beyond this for over 30 years, and has “urged ‘caution’ before ‘extending *Bivens* remedies into any new context.’” Slip op. at 13 (internal citation omitted). The court therefore examined whether the context of this case fell within the existing recognized *Bivens* categories. If the context is not new, a *Bivens* claim is available. However, even minor differences can justify a finding of new context: “Given this Court’s expressed caution about extending the *Bivens* remedy, however, the new context inquiry is easily satisfied.” *Id.* at 14. Where the context is new, the court must determine if there are “special factors *counselling hesitation* in the absence of affirmative action by Congress.” *Id.* at 13 (emphasis in original). If such a special factor is identified, *Bivens* is not available.

Because this case involved immigration officials, rather than traditional law enforcement officers, the court determined this was a new context. The agents here were enforcing immigration, not criminal law, and the policy concerns of immigration enforcement are different from the aims of criminal law enforcement. *Bivens* has not been previously applied to ICE agents, and prior Supreme Court precedent warns against applying *Bivens* to new categories of defendants. Turning the question of whether special factors warranted caution in extending the remedy, the court found such factors here existed. The national security, foreign policy, and diplomatic concerns implicit in immigration enforcement is one. Another is that Congress has indicated in the Immigration and Nationality Act (“INA”) that “the INA would be exclusive of any additional judicial remedy.” *Id.* at 20. The court observed:

Congress’s legislative actions in this area persuasively indicate that Congress did not want a money damages remedy against ICE agents for their allegedly wrongful conduct, as indicated by its frequent amendment of the INA and its repeated refusal to provide a damages remedy. *Id.* at 21.

Concluding that no *Bivens* remedy was available in this context, the court reversed with instructions for the district court to dismiss the suit.