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Case Summaries: Fourth Circuit Court of Appeals (Feb. 3, 7, 8, 14, 22, and 24, 2023)

Denial of motion to suppress affirmed; search warrant for digital devices in electronic threats case was properly tailored to the defendant's property and established a nexus between the crime under investigation and the items to be seized

U.S. v. Sueiro, 59 F.4th 132 (Feb. 3, 2023). In this case from the Eastern District of Virginia, the defendant (a disgruntled former security officer) threatened to kill a former coworker through multiple emails and was arrested under a state threats law. While the defendant was in custody, police obtained a search warrant for his home. The warrant specifically authorized the seizure of any cell phones, computers, or other digital evidence, along with any firearms or "ballistic equipment." Three laptops and three external hard drives were seized, and officers obtained new search warrants to examine those devices for evidence of the threats. During the search of the devices, an officer discovered apparent child pornography. Yet another search warrant was obtained to search the devices for evidence of that crime. The federal government ultimately indicted the defendant for numerous child pornography offenses. He moved to suppress, arguing that the first warrant for his home was invalid. The district court denied the motion and the defendant was convicted of all counts at trial.

The defendant argued on appeal the initial warrant was overbroad because he lived with another person in the home and the warrant permitted the seizure of any electronic devices irrespective of ownership. He also pointed out that the affiant knew only that he possessed a computer and that the officer had no reason to believe he owned a cell phone or the other items identified in the warrant. He further argued a lack of nexus between the threats crime and the digital devices. The Fourth Circuit rejected these arguments and unanimously affirmed. Because the warrant stated that the items to be seized were in relation to the threats offense, it was appropriately tailored to evidence supporting that allegation. Further, the affidavit in support of the warrant identified which part of the home was occupied by the defendant and the warrant was limited to that area of the home. There was also a substantial likelihood that evidence of the threats crime would be found in the digital devices in the defendant's home. "[W]e conclude that the initial warrant was appropriately confined in scope and established a sufficient connection between the alleged crime and the items sought." *Suiero* Slip op. at 10. Although the defendant's roommate had mentioned to the officer that he did not believe the defendant had a cell phone, that information was not presented to the magistrate. Given the prevalence of cell phone ownership and the fact that this case initially involved threatening electronic communications, including cell phones in the warrant's description of items to be seized was not overbroad. According to the court: "[W]e do not accept the proposition that the ubiquity of cell phones, *standing alone*, can justify a sweeping search for such a device. . .". Here, though, "Sueiro committed the crime using an electronic device just days before the magistrate judge issued the initial warrant." *Id*. at 11 (emphasis in original). The suppression motion was therefore properly denied.

Sentencing challenges were likewise rejected, with the exception of certain conditions of supervised release barring the defendant from viewing adult pornography, using computers, or playing certain

online video games. Those conditions were vacated, and the case remanded for further findings on the propriety of the conditititions. The district court's judgment was otherwise affirmed in full.

Pro se inmate's procedural due process and First Amendment retaliation claims against prison officials should have proceeded to discovery; dismissal of the first claim and grant of summary judgment to defendants on the second claim reversed and remanded

Shaw v. Foreman, 59 F.4th 121 (Feb. 3, 2023). The plaintiff was an inmate serving a fifty-year sentence in the Eastern District of Virginia. A guard accused him of indecent exposure, which he denied. He was placed in disciplinary segregation awaiting a hearing on the accusation. The hearing date was continued several times and the defendant complained repeatedly about the delays. At the administrative disciplinary hearing, the hearing officer refused to review security footage of the alleged event, which the plaintiff claimed would have exculpated him. The officer determined that the plaintiff committed the offense, and he was transferred to a maximum-security facility as a result. He sued, alleging procedural due process violations in the hearing process. He also asserted a First Amendment claim based on alleged retaliation by prison officials in response to his internal complaints. The district court dismissed the due process claim and later granted summary judgment to the prison officials on the First Amendment claim.

On appeal, a unanimous panel of the Fourth Circuit reversed and remanded. The plaintiff at least had a liberty interest in avoiding placement in a maximum-security prison. He also adequately alleged a procedural due process violation based on the failure of officials to review the security camera footage. While qualified immunity may protect the defendants on the due process claims, that issue was not decided below and was properly for the district court to consider on remand. Regarding the First Amendment retaliation claim, the court noted that pre-discovery grants of summary judgment (as happened here) are generally disfavored. The district court here abused its discretion in granting summary judgment at this stage on these facts. "[I]t defies logic and common sense that summary judgment was appropriate when the video evidence—core to Shaw's theory of vindication for the underlying disciplinary offense—had yet to surface." *Shaw* Slip op. at 12. The district court also erred by finding that the plaintiff's complaints to prison officials were protected speech while also determining that there was no connection between those complaints and the alleged retaliation. The court also observed "that the Prison Officials' failure to provide the disputed video is profoundly powerful circumstantial evidence that perhaps they did retaliate." *Id*. at 15. The district court was therefore reversed in full and the case remanded with instructions to consider appointment of counsel for the plaintiff and to permit discovery on both claims.

Officer was entitled to qualified immunity on First Amendment claim relating to livestreaming of a traffic stop, but claim for Town's policy against livestreaming may proceed

Sharpe v. Winterville Police Dept., 59 F.4th 674 (Feb. 7, 2023). The plaintiff was a passenger in a car stopped by local police in the Eastern District of North Carolina. He immediately began livestreaming, broadcasting video of the encounter in real time. An officer tried to take the phone and then told the plaintiff he was not allowed to livestream in the interest of officer safety. An officer told him that his phone would be confiscated by police if he attempted to livestream another police encounter in the future. He sued, alleging that the officer's actions during the stop and the Town's policy against livestreaming a traffic stop violated the First Amendment. The district court dismissed the case, finding

that the policy did not violate the First Amendment and that the officer was entitled to qualified immunity for any potential constitutional violation. The plaintiff appealed, and the Fourth Circuit reversed in part.

The court found that the plaintiff adequately claimed that the Town had a policy prohibiting livestreaming during traffic stops and that the policy could violate his First Amendment rights. The court acknowledged that recording police interactions is generally protected by the First Amendment and found that livestreaming is well. "Recording police encounters creates information that contributes to discussion about governmental affairs. So does livestreaming. . .We thus hold that livestreaming a police traffic stop is speech protected by the First Amendment." *Sharpe* Slip op. at 8. The Town could attempt to show that the policy passed constitutional muster despite restricting protected speech by demonstrating that the ban on livestreaming advances important governmental interests and by showing that the policy is narrowly tailored on remand. Thus, the case was remanded for further proceeding on that claim. As to the claim against the officer individually, the court agreed with the trial judge that any right to livestream the police during a traffic stop was not clearly established at the time. The officer was therefore entitled to qualified immunity, and the claim against him individually was properly dismissed. The case was therefore vacated in part, affirmed in part, and remanded for further proceedings,

Judge Neimeyer concurred in judgment separately. He would have analyzed the claims with an eye towards the Fourth Amendment. [Jeff Welty blogged about this case, here.]

North Carolina's crime of making derogatory reports about candidates for office likely violates the First Amendment; denial of preliminary injunction enjoining the law reversed for further findings

Grimmett v. Freeman, 59 F.4th 689 (Feb. 8, 2023). Under N.C. Gen. Stat. 163-274(a)(9), making a "derogatory report" about a candidate for office is a class 2 misdemeanor if the report was knowingly false or made in reckless disregard of the truth and intended to influence an election. In the wake of the 2020 election for North Carolina's Attorney General, a complaint was filed with the state Board of Elections alleging that Josh Stein's campaign committed the misdemeanor offense by running an advertisement against his opponent that was knowingly false or in reckless disregard of the truth. Election officials investigated and determined that they would take no action, in part due to concerns about the constitutionality of the law. The Wake County District Attorney then asked the SBI to investigate the matter. Some time later, a prosecutor informed Stein's campaign that the State would be convening a grand jury to consider charges in the matter. The plaintiffs filed suit in federal district court asking that the law be declared unconstitutional under the First Amendment and seeking to enjoin its enforcement. After initially granting a temporary restraining order, the district court ultimately vacated that order and denied a preliminary injunction, finding that the plaintiff were not likely to succeed on the First Amendment claim. The plaintiffs appealed to the Fourth Circuit, which reversed in a unanimous opinion.

Criminal defamation laws are constitutional so long as they reach only false statements made with malice. *Garrison v. Louisiana*, 379 U.S. 64 (1964). According to the court, the North Carolina statute at issue likely sweeps in truthful but derogatory statements. "We may assume a speaker cannot 'know' a statement 'to be false' unless the statement is false. But by its plain terms this statute also criminalizes truthful derogatory statements so long as the speaker acts 'in reckless disregard [of a statement's] truth

or falsity.'" *Grimmett* Slip op. at 6-7. In other words, if a speaker were to make a reckless, derogatory assertion concerning a political candidate, he or she could be charged with this offense, even if the statement was ultimately true. Thus, the statute could encompass protected speech and could therefore chill truthful political speech during a campaign. "Nothing more is needed to show that this Act is likely unconstitutional." *Id*. at 9. Further, by targeting only speech directed at political candidates for office, the statute creates an unconstitutional content-based restriction on speech. "Under this statute, speakers may lie with impunity about businesspeople, celebrities, purely private citizens, or even government officials so long as the victim is not currently 'a candidate in any primary or election.' That is textbook content discrimination." *Id*. at 11. Thus, the denial of the motion for preliminary injunction was reversed and the matter remanded for additional hearing on the injunction.

Judge Rushing wrote separately to concur, agreeing that the plaintiffs were likely to succeed on the merits and noting that the district court would need to resolve the remaining factors in support of a preliminary injunction on remand.

(1) District court erred by admitting suggestive and unreliable show-up procedure, but any error was harmless in light of the evidence; (2) Certain spontaneous statements by the defendant were not in response to police questioning and did not implicate *Miranda*; other statements by the defendant may have implicated *Miranda* but any violation was harmless

U.S. v. Ivey, 60 F.4th 99 (Feb. 14, 2023). In this case from the Western District of North Carolina, the defendant was one of two men involved in an armed robbery and fatal shooting at a strip club in Charlotte in 2009. The men were apprehended shortly after the robbery when their truck crashed. The defendant fled on foot and was caught in a nearby backyard. Once the defendant was arrested, officers brought witnesses from the strip club to the location of arrest for show-up identifications. Police told the witnesses that the suspect fit the description of the robbery and murder suspects and that the police were not sure whether the suspect was involved in the crime. A total of 14 witnesses individually viewed the defendant over the course of four hours. 12 of 14 witnesses failed to identify the defendant. One witness claimed that the defendant looked like one of the robbers; another witness identified the defendant as the shooter. The latter two identifications were recorded, but none of the other 12 witnesses were recorded. Officers did not ask the two witnesses how sure they were about the identifications. The defendant was charged with Hobbs Act robbery and use of a firearm in furtherance of a crime of violence. He was ultimately convicted of both and sentenced to life without parole plus 260 months.

On appeal, the defendant complained that his motion to suppress the show-up identification should have been granted. The court agreed that the identification procedure used by police was unduly suggestive and unreliable. The witnesses were only showed the defendant, and he was cuffed and in the back of a police car at the time. The police also told the witnesses that the defendant matched the description of the suspects ahead of time. The two witnesses who identified the defendant were among the last witnesses of the show-up, hours after the incident, and both witnesses made inconsistent statements about their memories of the event. Further, those witnesses were not asked to describe the suspects before viewing the defendant and were not asked about their level of certainty with the identifications. The motion to suppress the identifications as unreliable therefore should have been granted. However, this error was harmless beyond a reasonable doubt on the facts of the case. The defendant was in custody within 15 minutes of the robbery and had cash—including a number of $1

bills—in his possession and in the truck used to flee the scene of the crime. A hoodie with the defendant's DNA was found in the truck that matched eyewitness descriptions of the robbers' clothing as well as the surveillance tape of the incident. The defendant was wearing "distinctive" jeans similar to those seen on the surveillance tape as well. Additionally, a gun and property stolen from people in the club were found on the defendant or in the truck. "[W]e conclude that [the witnesses'] identifications of Appellant as one of the perpetrators did not unduly influence the jury's guilty verdict on either count, as the verdict was otherwise supported by overwhelming evidence." *Id*. at 18.

When the defendant was under arrest and being held awaiting the show-ups, he asked officers what the investigation was about and why a homicide detective was needed. The district court denied a motion to suppress those statements as a *Miranda* violation, finding that they were spontaneous remarks by the defendant and not made in response to interrogation. The Fourth Circuit agreed. "Spontaneous or volunteered statements that are not the product of interrogation or its functional equivalent are not barred by *Miranda*, even if the defendant is in custody when the statements are made." *Id*. at 20 (cleaned up). Officers may have violated *Miranda* by repeatedly asking the defendant if he needed medical care and whether the truck used to flee the scene of the crime had hit him as he fled the crashing vehicle. Those questions presented a "closer call," but the challenged statements of the defendant in response likely did not impact the verdict and any error in their admission was therefore harmless.

Other challenges were rejected, and the district court's judgment was affirmed in full.

Judge Rushing wrote separately, concurring in part and concurring in judgment. She agreed that any errors in the case were harmless both individually and collectively but would have ruled that the show-up procedure was not inherently suggestive.

Disorderly conduct at school and disturbing schools laws failed to give fair notice of prohibited conduct and were unconstitutionally vague; South Carolina enjoined from further enforcement and ordered to expunge relevant records

Carolina Youth Action Project v. Wilson, 60 F.4th 770 (Feb. 22, 2023). Plaintiffs in the District of South Carolina obtained class certification to challenge two state criminal laws aimed at school misbehavior. The class consisted of all middle and high school-age children in the state, as well as any among that group who had a record of referral to the Department of Juvenile Justice ("DJJ") for alleged violations of the laws. One law prohibited "disorderly" or "boisterous" conduct and "profane" or "obscene" language within hearing of a school. The other law prohibited the willful or unnecessary interference with or disturbance of teachers or students in any way or place, along with prohibiting "obnoxious" acts at schools. Between 2014 and 2020, more than 3,700 students aged between 8 and 18 were referred to DJJ for consideration of charges under the first law. Between 2010 and 2016, over 9,500 students aged between 7 and 18 were referred to DJJ for consideration of charges under the second law. While the State did not prosecute each referral, both DJJ and the local prosecutor kept a record of each referral, which could be used in the future for various purposes. The case was initially dismissed for lack of standing. The Fourth Circuit reversed. *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018). On remand, the district court certified the class of plaintiffs and ultimately granted summary judgment to them. It found that the challenged laws were unconstitutionally vague and entered a permanent injunction prohibiting the State from enforcing them against members of the class. It also ordered that the records

of the referrals to DJJ of class members be destroyed except as otherwise permitted under state expunction rules. The State appealed, and a divided Fourth Circuit affirmed.

A law is void for vagueness as a matter of the Due Process Clause if it fails to give an ordinary person sufficient notice of the prohibited conduct at issue, or if the law is so vague as to allow for arbitrary or discriminatory enforcement. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). Criminal laws are subject to a heightened standard of review for vagueness challenges. *Carolina Youth* Slip op. at 14 (citation omitted). The majority agreed that both laws failed to provide sufficient notice of prohibited conduct. As to the disorderly conduct at schools law, the court observed that a person of ordinary intelligence would not be able to determine whether certain "disorderly" or "boisterous" conduct in a school was merely a disciplinary matter versus a criminal one. In the court's words:

> Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing a schoolyard during recess is likely witnessing a large-scale crime scene. *Id*. at 18.

The record before the district court showed officers could not meaningfully articulate objective standards under which the law was enforced on the ground—using instead a "glorified smell test." *Id*. at 20. The evidence also showed a significant racial disparity in enforcement, with Black children being referred for violations of the law at around seven times the rate of referrals for White children. "The Constitution forbids this type of inequitable, freewheeling approach." *Id*. at 21.

The disturbing schools law was likewise unconstitutional. "It is hard to know where to begin with the vagueness problems with this statute." *Id*. at 24. The court found that the law lacked meaningful standards from which criminal "unnecessary disturbances" and "obnoxious acts" at a school could be distinguished from non-criminal acts. According to the court:

> The Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was annoying or indecent—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. We do the same here. *Id*. at 26 (cleaned up).

The court agreed with the trial court as to the remedy, noting that the U.S Supreme Court and others have acknowledged the right to class-wide expungement at times. The district court was therefore affirmed in all respects.

Judge Neimeyer dissented. He would have found that no plaintiff had standing to seek expungement, and, on the merits, that the challenged laws were not unconstitutionally vague.

Threat to arrest the defendant for trespassing unless he consented to a frisk was unsupported by reasonable suspicion; denial of motion to suppress reversed by divided court

U.S. v. Peters, 60 F.4th 855 (Feb. 24, 2023). Two officers were patrolling housing authority property in the Eastern District of Virginia around 5:30 pm when they noticed two men walking down the sidewalk. The officers knew one of the men was not authorized to be present in the area; they also knew the other man (the defendant) had been charged with trespassing in 2011 but could not determine the disposition of that arrest or the location involved. About a month before this interaction, one of the

officers was tipped off by an informant that a man by a certain nickname was selling drugs from an address within the housing authority property. The informant provided a physical description of the alleged drug dealer. The officer showed a photo of the suspected dealer to the informant, who identified the defendant as the suspect. This caused the officer to pull the defendant's criminal history. That history included various "alerts" on the defendant—that he was a gang member in 2011; that he was a user or seller of illegal drugs in 2009; and that he was "probably armed" in 2009. The same information indicated that the defendant did not live in the neighborhood but was silent as to when the information had last been updated. Seeing the two men and armed with this information, the officers approached and activated their body cams. The officers told the men in a "stern" tone that they were not allowed on the property. The men continued walking and officers asked if either man had possessed any guns. Both men denied having a gun. The officers asked the men to raise their shirts. One man did so, but the defendant only partially lifted his shirt. The two officers stood on either side of the defendant three to five feet away. They addressed the defendant under his supposed nickname and asked for identification. The defendant denied having any. He also claimed he was not barred from being present on the property and asked police to verify that he was not on the banned persons list. One of the officers asked the defendant if he minded being patted down. The defendant refused consent. One of the officers threatened to arrest him for trespassing and continued seeking consent to frisk. The defendant reiterated that he was lawfully present in the area. At this point, one of the officers jumped towards the defendant with a "sudden forward movement," apparently in an attempt to draw a reaction from the defendant. About a minute later, the defendant lifted his shirt and officers saw the shape of a gun muzzle in his pants. He was arrested and indicted for possession of firearm by felon.

The defendant moved to suppress, arguing that officers lacked reasonable suspicion to detain him. The officers testified at the suppression hearing that the initial encounter began as a trespassing investigation and stated that they began suspecting the defendant was armed based on his "skinny jeans" and refusal to fully lift his shirt. The district court denied the motion. The defendant pled guilty, was sentenced to 120 months, and appealed. A divided Fourth Circuit reversed.

The court first examined whether the defendant was seized or, as the Government argued, the encounter was consensual. The court found that the defendant was seized within one minute of the police encounter. When the armed, uniformed officers threatened to arrest him for trespassing and indicated he would need to consent to a frisk or be arrested, this was a show of authority that a reasonable person would not feel free to disregard. The court went on to find that the seizure was unsupported by reasonable suspicion. Given the age of the defendant's criminal history and lack of accompanying detail, that information did not contribute to reasonable suspicion that the defendant was trespassing. Without more, the court rejected the notion that historical "caution data" from police databases added to reasonable suspicion. Though the defendant repeatedly asked the officers to double check their databases to confirm he was not a person prohibited from the property, the officer declined to do so. In fact, the defendant's 2011 arrest for trespass had not resulted in a conviction, and he correctly informed the officers that he was allowed on the property. The informant's tip about the defendant dealing drugs also failed to add to the reasonable suspicion calculus, as the officer acknowledged that he had done nothing to corroborate the tip in the month since receiving it and nothing about the behavior of the men during the encounter indicated drug activity. Neither did the tip point to evidence of trespassing. That the defendant was walking in front of the building identified by the informant as the place where drugs were being sold also failed to meaningfully contribute to the

officer's suspicions here, as the men were simply walking in front of the building down the sidewalk and had not been seen entering, exiting, or loitering by the building. That the defendant was walking with another person who was banned from the property was also not sufficient, as it was not specific to the defendant. While the officer testified at suppression that he had confidential informant information that men with skinny jeans often tuck a gun into their waistbands, this too added little to the equation. In the words of the court:

> A general tip 'that men specifically were wearing skinny jeans' to 'wedge a firearm in their waistband' does not justify the seizure here, because it is not at all particular to Peters. The argument that this rises to the level of reasonable suspicion is premised, at least in part, on the belief that individuals like Peters—present in public housing communities like Creighton Court—must lift their shirts upon request to prove they are unarmed. Such a belief cannot provide reasonable suspicion because 'a refusal to cooperate' alone does not justify a seizure. To hold otherwise would seemingly give way to the sort of general searched that we, as an en banc court, have found to violate the Fourth Amendment. *Peters* Slip op. at 21 (*citing U.S. v. Curry*, 965 F.3d 313 (4th Cir. 2020) (en banc)).

The seizure being unsupported by reasonable suspicion, the district court's denial of the suppression motion was reversed, the conviction vacated, and the matter remanded for any additional proceedings.

Judge Traxler dissented and would have affirmed the district court.

Order for involuntary medication affirmed; extended commitment of defendant in an attempt to restore capacity was reasonable

U.S. v. Tucker, 60 F.4th 879 (Feb. 24, 2023). Under *Sell v. U.S.*, 539 U.S. 166, 179 (2003), forced medication to restore competency to stand trial for a serious crime may be permitted. Due process requires that forced medication is only available when the Government shows by clear and convincing evidence that important governmental interests are at stake, that forced medication will advance those interests, that the medication is needed in light of those interests, and that the involuntary treatment is "medically appropriate." *Id.* Under *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), civil commitment to restore competency is allowed, but a defendant may not be held for more time than is reasonably necessary to determine whether the defendant is likely to become competent. The defendant was charged with various child pornography offenses in the Middle District of North Carolina in 2017. He was quickly found to lack competency to proceed and civilly committed in hopes of restoration. The commitment was extended without defense objection. In 2018, the court was informed that the defendant remained incompetent but would likely regain competency with continued treatment and medication. The commitment was again extended without defense objection. In 2019, the treating psychologist reported that the defendant had responded well to treatment and was close to competency, but the defendant refused to consistently comply with medication. The doctor sought an order permitting forced medication as needed to restore his competency. The district court ultimately found that involuntary medication was appropriate and entered that order along with an extension of commitment. That order was appealed, and the Fourth Circuit stayed the order pending resolution of the appeal. Around two years later, the Government sought a remand to the district court, which was granted. The district court again concluded that involuntary treatment was appropriate, and the defendant again appealed, leading to the present matter. Analyzing the *Sell* factors, the court affirmed.

While the defendant has been in custody for over five years, the Government's interest in prosecuting him for child pornography offenses was significant. The offenses were more serious than mere possession of child pornography—the defendant was charged with two counts of soliciting people he believed to be minors to create child pornography, offenses the court categorized as "grave by any measure." *Tucker* Slip op. at 13. Consequently, it was unlikely that the defendant would have completed any sentence imposed as a result of the charges at this point in time—two of his charges carry 15-year minimum sentences in the event of conviction. The overall length of time of commitment was considerable, but the defendant forfeited or waived his challenge to much of that time by failing to object to earlier extensions, by seeking continuances, and by seeking multiple stays pending appeals. The court therefore authorized the involuntary medication order and extended the period of commitment once more to attempt restoration while cautioning the Government against further extensions. In the court's words:

> Given the deferential standards of review, we conclude the district court committed no reversible error in deciding an involuntary medication order was warranted and finding it appropriate to grant one final four-month period of confinement to attempt to restore Tucker's competency. We emphasize, however, that '[a]t some point [the government] can't keep trying and failing and trying and failing, hoping to get it right,' and we trust no further extensions will be sought once the current appeal is finally resolved. *Id*. at 17-18.

"Penalty exception" to *Miranda* did not apply; probation condition that one "truthfully answer" questions by probation officer did not (and likely could not) waive the defendant's right against self-incrimination

U.S. v. Linville, 60 F.4th 890 (Feb. 24, 2023). The defendant on supervised release in the Middle District of North Carolina for child pornography offenses. One of the standard conditions of release required him to truthfully answer questions asked by his probation officer; another special condition required him to submit to polygraph testing at his probation officer's direction. During a polygraph, the defendant admitted to possessing adult pornography. Some of his other responses about pornography were found to be potentially deceptive. Without reading *Miranda* warnings to him, the probation officer then asked if the defendant possessed any child pornography, and the defendant admitted he did. The Government moved to revoke supervised release and the defendant was charged with the new child pornography offenses. He moved to suppress his admission, arguing that the penalty exception to *Miranda* applied. Under *Minnesota v. Murphy*, 465 U.S. 420 (1984), *Miranda* protections apply even without being invoked by the defendant when invocation of the privilege against self-incrimination is very likely to result in criminal liability. The defendant argued that, because he was required to truthfully answer questions by his probation officer, the *Murphy* exception applied—that is, if he declined to answer the probation officer's questions, he would have violated that condition of release and potentially been revoked; if he answered the question, he would incriminate himself (as he did). The district court denied the motion, finding *Murphy* inapplicable. The defendant pled guilty, reserving his right to appeal denial of the motion, and was sentenced to 120 months. He appealed, and a unanimous panel of the Fourth Circuit affirmed.

In *Murphy*, the Court rejected the idea that conditions of supervised release requiring truthful answers of the defendant to his probation officer "in all matters" amounted to a choice between self-incrimination and revocation of supervised release. The defendant here, like the one in *Murphy*, was

required only to be truthful in any answers he gave his probation officer; he was not required to answer the questions at the expense of his right to remain silent. The court noted that the Government likely could not constitutionally require the defendant to choose between asserting his right to silence or revocation of supervised release. No condition of release stated that invocation of the privilege against self-incrimination would result in revocation, and the probation officer did not tell the defendant that it would. There was also no evidence that the defendant made the inculpatory statement out of fear that his conditional release would be revoked. The Sentencing Guidelines have a note to the provisions on standard conditions of release speaking to this as well, stating that legitimate invocations of the right to silence shall not violate the "answer truthfully" condition. Other cases finding that the penalty exception applied were distinguishable, as they involved situations where invocation of the privilege by supervisees to a probation officer was expressly disallowed or where there was other evidence showing that the defendant reasonably believed he would be revoked in response to his silence. "In sum, the Government did not expressly or implicitly assert that it would revoke Linville's supervised release if he invoked his Fifth Amendment right to remain silent. And even if Linville believed invoking the Fifth Amendment would have risked revocation, his belief was not reasonable." *Linville* Slip op. at 15.

The motion to suppress was therefore properly denied, and the district court's judgment was affirmed.