Phil Dixon, Jr.
919.966.4248
dixon@sog.unc.edu
UNC School of Government ©

Fourth Circuit Case Summaries: July 14, 15, 20, and 22, 2020

Fourth Amendment claims based on extension of first traffic stop and second traffic stop by U.S. Parks Police of on-duty Secret Service agent could proceed; denial of qualified immunity affirmed; argument that the case presented new context for *Bivens* claim was waived

Hicks v. Farreyra, 965 F.3d 302 (July 14, 2020). The plaintiff, a U.S. Secret Security agent, was parked on the side of a Maryland interstate highway awaiting a motorcade which he was to lead. His government car had police-like emergency lights and a police antenna. A U.S. Parks Service police officer pulled behind the plaintiff. As the officer approached the plaintiff's car, he noticed the plaintiff's weapon and drew his own gun. The plaintiff explained that he was a federal agent and showed the officer his badge. The officer took the plaintiff's badge and gun to verify his identity. The officer was apparently satisfied that the plaintiff was a federal agent but called other officers to the scene and did not release the plaintiff. The plaintiff missed the motorcade and ultimately was detained at least 40 minutes, even though the park officers had verified his identity within 25 minutes of the initial encounter. Immediately after being released from this stop, the plaintiff was again stopped by one of the same Parks officers, this time for his alleged use of a cell phone while driving (an act illegal in Maryland, but agents and officers in the performance of their duties are exempted from the ban). The plaintiff was again briefly detained and required to show the officer his license and registration. The plaintiff sued under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (allowing an implied civil action for damages against federal agents for certain civil rights violations), alleging the stops were unreasonable seizures in violation of the Fourth Amendment. The officers moved for summary judgment based on qualified immunity, which the district court denied. The officers appealed, and the Fourth Circuit unanimously affirmed.

The district court found that the record, viewed in the light most favorable to the plaintiff, supported the plaintiff's claims that the first stop was unreasonably extended and that no reasonable suspicion existed as to the second stop. It further ruled that the defendant-officers' acts of detaining the plaintiff beyond the time it took to verify his identity in the first stop and stopping the defendant without reasonable suspicion the second time would violate clearly established Fourth Amendment law if proven at trial. On appeal, the defendant-officers challenged only the district court's view of the factual record; they did not challenge whether the allegations would support Fourth Amendment violations or argue that the rights at issue were not clearly established. The Fourth Circuit dismissed this argument, finding that it lacked jurisdiction. The appeal of an order denying qualified immunity is an interlocutory appeal. "[S]uch interlocutory appeals are limited to legal questions: Our jurisdiction extends only to the denial of qualified immunity 'to the extent it turns on *an issue of law*.'" *Hicks* Slip op. at 9 (emphasis in original) (citation omitted).

The court also rejected a challenge that the plaintiff's claims presented an extension of *Bivens*, and were disallowed under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (refusing the extend *Bivens* claims to new

contexts and "disfavoring" expansion of the doctrine). According to the defendants, the trial court erred by failing to *sua sponte* consider whether the case presented new context under *Ziglar*. The court noted that *Bivens* itself involved allegations of Fourth Amendment violations by federal agents. "[T]his case appears to represent not an extension of *Bivens* so much as a replay." *Hicks* Slip op. at 15. Further, the defendants never raised this argument at the trial court, and it was waived on appeal. The district court was thus affirmed in part and the appeal dismissed in part.

SEC civil disgorgement order is not a criminal penalty within the meaning of the Double Jeopardy Clause

U.S. v. Bank, 965 F.3d 287 (July 14, 2020). The Securities and Exchange Commission ("SEC") investigated the defendant for fraudulent investment activities and obtained an order of disgorgement for more than $4 million dollars based on illegally obtained profits. The defendant was later indicted in the Eastern District of Virginia for some of the same conduct that was the subject of the order. He moved to dismiss, claiming that double jeopardy precluded criminal prosecution based on the earlier civil punishment. The Fourth Circuit rejected this argument, joining the seven other circuit courts that have considered the question. Double jeopardy only protects from subsequent criminal prosecution and does not prohibit other civil penalties. *Hudson v. U.S.*, 522 U.S. 93 (1997), controls whether a penalty is criminal or civil for under double jeopardy principles, and requires courts to conduct a two-part analysis:

> [W]hether the legislature, in establishing [the penalty], expressed either expressly or impliedly a preference for one label or the other, [and] . . . whether the statutory scheme was so punitive either in purpose of effect as to transform what was clearly intended as a civil penalty into a criminal penalty. *Hudson* at 99.

Here, there was compelling evidence that Congress expressly intended the securities disgorgement as a civil penalty. Under *Hudson*, only the "clearest proof" suffices to show that a penalty denoted as civil is in fact a criminal punishment, and the defendant's "proof here is far from clear." *Bank* slip op. at 23. The denial of the motion to dismiss was therefore unanimously affirmed.

Judge Diaz wrote separately to concur and would have ruled that an appeal waiver in the consent disgorgement order barred the challenge.

En banc court affirms grant of motion to suppress, reversing prior decision; exigent circumstances based on the sound of gunshots in the area did not justify stop and frisk

U.S. v. Curry, 965 F.3d 313 (July 15; amended July 16, 2020). Four Richmond, Virginia police officers were patrolling Creighton Court, a heavily populated neighborhood, as a part of a "focus mission team" in response to recent shooting and homicides. The officers heard gunshots nearby and responded to the area where they believed the shots originated in less than a minute, an open area between apartment buildings. Five to eight people were walking away from the area in various directions in a field between buildings and other people were standing closer to the buildings. Two dispatch calls relayed reports of gunshots in the area but did not provide any further information. The officers spread out and began approaching different people in the field, asking them to show their hands and waistbands and using a flashlight to check for weapons. The defendant and another man were separately walking in the field when an officer stopped them and asked them to raise their hands. The defendant complied and

pointed the officer in the direction the shots had come from. When asked to raise his shirt, the defendant complied in a "lackadaisical manner" according to the officer, and eventually two officers patted him down, finding a gun. The defendant was charged with felon in possession of firearm and moved to suppress. The district court granted the motion, finding that officers lacked reasonable suspicion for the stop and that exigent circumstances did not apply. The government appealed, and a panel of the Fourth Circuit reversed. [I summarized that decision here, and Jeff Welty blogged about it here (presciently, I'd note).] On rehearing en banc, the divided full court reversed the three-judge panel decision and affirmed the trial court 9-6.

The government conceded on appeal that no reasonable suspicion supported the stop but maintained that the exigencies of the situation justified the stop and frisk. The majority disagreed. Exigent circumstances are an exception to the warrant requirement arising when an emergency justifies immediate action by the police. *See Mincey v. Arizona*, 437 U.S. 385 (1987). The "narrow" exception has traditionally been applied to situations involving pursuit of a fleeing suspect, prevention of "imminent harm," and prevention of destruction of evidence. The government argued that the recent nearby gunshots constituted a threat of imminent harm. The court disagreed.

> Though the 'emergency-as-exigency approach,' may sound broad in name, it is subject to important limitations and thus is quite narrow in application. For example, the requirement that the circumstances present a true "emergency" is strictly construed—that is, an emergency must be "enveloped by a sufficient level of urgency. Curry Slip op. at 16 (citation omitted).

Further, the exigent circumstances exception is typically applied to the search of private property, not to pedestrian stops, and the court declined to apply the doctrine to these facts. "[T]he few cases that have extended the exigent circumstances exception to such seizures all involve specific and clear limiting principles that were absent in Curry's stop." *Id.* at 18. The officers here did not have any specific information about the crime or the suspect. According to the court:

> [T]he officers approached Curry in an open field, at one of several possible escape routes, in an area that they only *suspected* to be near the scene of an *unknown* crime. Likewise, the officers lacked a description of the suspect's appearance or, more importantly, any indication that the suspect was in the vicinity. . . *Id*. at 21 (emphasis in original) (citations omitted).

The officers also stopped only the men walking in the area and not other people standing around. This illustrated the "relatively unrestricted nature of the search." *Id.* While the exigent circumstances exception may allow this type of search with a known crime or suspect or more controlled geographic area, here it did not. The trial court's ruling was therefore affirmed.

Judge Wilkinson dissented. He argued that the majority decision would lead to underpolicing of disadvantaged communities. His opinion emphasizes that police were in the area due to so-called "predictive policing" strategies (aimed at crime prevention) and warns that the majority opinion's "gut-punch" to those strategies will harm high-crime communities.

Judge Richardson also dissented separately, joined by Judges Wilkinson, Neimeyer, Agee, Quattelbaum, and Rushing. They would have found no Fourth Amendment violation based on the exigent circumstances exception and criticized the majority's limitations on that doctrine.

Chief Judge Gregory wrote separately to concur with the majority and to address Judge Wilkinson's dissent. His opinion emphasizes the problem of overpolicing in minority communities (while acknowledging the problem of under-policing emphasized by Judge Wilkinson) and responds to the dissent's criticism that the majority opinion undermines effective policing practices.

Judge Wynn wrote separately to concur, noting that Judge Wilkinson's dissent relied on statistical data and that the U.S. Supreme Court had recently expressed skepticism of the use of such data in deciding constitutional issues. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018). He also addressed Judge Richardson's dissent, arguing that the approach there would allow police to stop frisk anyone in a high-crime area or near the scene of recent gunshots. "[A] consideration of the high crime area alone is anathema under our jurisprudence. Individuals who happen to live in high crime areas are not second-class citizens." *Curry* Slip op. at 47 (Wynn, J., concurring).

Judge Diaz wrote separately to concur, joined by Judge Harris. His opinion argues that exigent circumstances may be justified as a special need under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and finding that case persuasive in this context. [A majority of the panel who initially decided the case in favor of the government relied on a variation of this argument.]

Judge Thacker also wrote separately in concurrence, joined by Judge Keenan. Her opinion also took issue with Judge Wilkinson's dissent and condemned predictive policing strategies as "little more than racial profiling writ large." *Curry* Slip op. at 58 (Thacker, J., concurring).

Pro se inmate stated claims for ADA violations and injunctive relief where prison allegedly acted arbitrarily in denying work opportunities based on the plaintiff-inmate's medical condition; qualified immunity barred equal protection claims

Fauconier v. Clarke, 966 F. 3d 265 (July 20, 2020). In this Eastern District of Virginia case, the plaintiff was an inmate in state custody and suffered from a neuromuscular disease. He was able to competently perform jobs within the prison despite the disease and received various positive evaluations of his work in prison over time. After he was briefly hospitalized in 2010, the prison allegedly refused to allow the plaintiff to resume his work within the institution. The plaintiff had been allowed to return to his work after other, earlier hospitalizations, and his medical condition had not changed. After the 2010 hospital stay, though, the plaintiff was informed his classification had been changed so that he was no longer eligible for any work whatsoever. After exhausting internal complaint procedures, the plaintiff sued pro se under 42 U.S.C. § 1982 and the Americans with Disabilities Act ("ADA"), alleging equal protection violations and seeking injunctive relief. The district court dismissed the case on its own motion for failure to state a claim and on immunity grounds, and the Fourth Circuit reversed. On remand, the district court granted the defendants' motion to dismiss, finding in part that the plaintiff failed to state a claim under the ADA or the Equal Protection Clause. The Fourth Circuit again reversed in part.

When the pro se complaint was read liberally, it properly stated claims for ADA and equal protection challenges, and the trial court erred in dismissing on those grounds. However, the trial court's grant of

qualified immunity to the defendants in their individual capacity for all claims was affirmed. The defendants' actions here were "apparently consistent" with state corrections procedure, and the plaintiff could not demonstrate violations of clearly established law. As to the claims against defendants in their official capacity, the ADA claim could proceed, as could the request for injunctive relief against the director of the state prison system. The district court was therefore affirmed in part and reversed in part.

Death verdict at third capital sentencing trial affirmed

Owens v. Stirling, ___ F.3d. ___, 2020 WL 4197742 (July 22, 2020). The petitioner was sentenced to death in South Carolina in 1997. The state supreme court twice awarded the petitioner a new penalty-phase trial on direct appeal but affirmed the third death verdict. Two post-conviction claims alleging ineffective assistance of counsel at the third sentencing trial were denied on the merits by the state post-conviction court; a later claim alleging ineffective assistance of trial and post-conviction counsel brought by federal habeas counsel in the state post-conviction court was dismissed as procedurally barred. The petitioner sought habeas relief in federal court, renewing the three claims. The district court granted summary judgment to the defendants, finding the state court determinations on the merits were reasonable applications of federal law as to the first two claims, and that the petitioner failed to meet the standard under *Martinez v. Ryan*, 566 U.S. 1 (2012), to excuse the procedural default of the third claim. The petitioner appealed, and the Fourth Circuit unanimously affirmed. The state court judgments for the first two claims correctly determined that sentencing counsel did not fail to conduct and present an adequate mitigation investigation and did not err by failing to object to prison disciplinary records on Confrontation Clause grounds. The defaulted claim focused on the failure of sentencing and post-conviction counsel to obtain neuroimaging of the petitioner's brain, and the Fourth Circuit agreed with the district court that this claim was not substantial under *Martinez* on the facts of the case. That the court had granted a certificate of appealability on the question did not preclude this finding. The district court's denial of relief was therefore affirmed in all respects.

Due process violations and claim of ineffective assistance of counsel at state revocation proceeding could proceed; grant of summary judgment reversed

Farabee v. Clark, ___ F.3d ___, 2020 WL 4197527 (July 22, 2020). In this habeas appeal from the Eastern District of Virginia, the petitioner has been in state facilities continuously since the age of 13 as a result of serious mental illness. In 1999, he was found not guilty by reason of insanity and was committed to state hospitals. He was charged with assaulting another patient there in 2000 and was sentenced to time in prison and a suspended sentence. In prison, he incurred more assault charges against an inmate, leading to an additional ten-year prison term in 2003. In 2012, he was released back to a state hospital pursuant to the original commitment order. Three years later, Virginia sought to revoke the petitioner's period of supervised release from the 2000 conviction based on a recent misdemeanor assault conviction from conduct at the hospital. The original notice of violation alleged only that recent misdemeanor conviction. Counsel was appointed to represent the petitioner at the revocation proceeding, who sought a capacity evaluation. The petitioner would not cooperate with the exam, so the evaluation was completed on record evidence only and the petitioner was found competent. The day before the competency hearing, the state filed an addendum to the revocation report, alleging numerous other violations of the terms of release for various acts of the petitioner between 2014 and 2015. The petitioner sought substitute counsel at the competency hearing, complaining that his lawyer

had failed to communicate with him or conduct basic investigation, but the motion was denied. Defense counsel made no challenge whatsoever to the expert opinion at the competency hearing regarding the petitioner's capacity to proceed.

The day before the revocation hearing, the state sought to amend the revocation report a third time, adding a new allegation that the 2003 conviction violated the terms of release from his 2000 conviction. The defendant never received notice of this amendment prior to the hearing and alleged that he had no contact with his counsel in the time leading up to the hearing. The petitioner complained during the revocation hearing that his attorney was not adequately defending him. The trial court acknowledged the attorney's "limited ability to question evidence . . . and present argument." Slip op. at 9. The attorney put on no evidence contesting the revocation or advancing mitigation evidence, instead only asking the court for leniency. The petitioner spoke at length about his attorney's deficient performance in the case, raised a self defense argument, complained about the timing of the proceedings, and pointed to his longstanding and severe mental health issues. The trial court found a violation based on the 2003 conviction and revoked the suspended portion of the 2000 conviction, activating another term of imprisonment. His trial counsel filed an *Anders* brief on appeal, and the petitioner filed a pro se brief alleging violations of his rights to due process, speedy trial, and effective assistance of counsel. State courts declined to consider the argument on direct appeal, and the petitioner filed for state habeas. The state supreme court ruled that the due process claims could not be considered via habeas, and that no prejudice could be shown for the ineffective assistance claim. The petitioner then filed multiple habeas petitions in federal court, all of which were dismissed by the district court. The Fourth Circuit granted a certificate of appealability, appointed counsel, and ultimately vacated the revocation order.

On appeal, the state argued that the defendant had no right to counsel whatsoever in the revocation hearing. The Fourth Circuit disagreed. Under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), probationers or parolees may be entitled to counsel at revocation proceedings as a matter of due process when counsel is necessary to effectively present the defense case. Where the supervisee requests counsel to assist in defending against the allegations on the merits or in order to present complex or difficult evidence, a presumption of entitlement to counsel arises. The petitioner met the *Gagnon* standard and had a due process right to counsel on the facts [including the right to effective assistance of counsel].

The court further found that the petitioner stated claims for procedural due process violations based on improper notice of the third amended revocation report and the delay between the violation (his 2003 conviction) and the state's decision to seek revocation on that basis in 2015. The petitioner also adequately stated a substantive due process claim based on the alleged failure of the state to properly provide for the defendant's medical treatment (as required by the order of commitment) and the risk to the petitioner's health posed by continuing to be confined in prison under the conditions. According to the petitioner, instead of treating his mental illness, he has been repeatedly incarcerated and placed in solitary confinement, which worsened his condition. The court noted that prisoners or committed person retain a due process right in necessary food, shelter, and medical treatment, and the allegations here were sufficient to state a substantive due process violation. Any procedural default was excused as necessary to avoid a fundamental miscarriage of justice. In the words of the court:

> For many of the reasons already discussed—such as inadequate notice, undue delay, and the potential viability of mitigation evidence—Farabee has established enough facts to show prejudice in order to excuse any procedural default. Moreover, prejudice is

> presumed when, as alleged here, Farabee's counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing.' (citing U.S. v. Chronic, Even absent cause and prejudice, we conclude a fundamental miscarriage of justice would result if Farabee were not allowed to move forward in challenging Virginia's revocation of his suspended sentence. *Id*. at 28 (citation omitted).

The district court's order of dismissal was therefore vacated, and the matter remanded for merits hearing on the due process and ineffective assistance of counsel claims.