

## Fourth Circuit Case Summaries: June 8, 9, 16, 17, 26, and 30, 2020

**(1) Plaintiff stated claim for a free speech violation where Sheriff allegedly interfered with legal mail; defendants were not entitled to qualified immunity; (2) Qualified immunity applied to alleged Fourth Amendment violation; other claims were waived**

[Haze v. Harrison](#), 961 F.3d 654 (June 8, 2020) In this 42 U.S.C. § 1983 suit from the Eastern District of North Carolina, the plaintiff was a pretrial detainee in custody of the Wake County Sheriff. He claimed that detention officers repeatedly interfered with his rights by refusing to send or deliver his legal mail, by opening his legal mail outside of his presence, and by copying and forwarding his legal mail to the Wake County District Attorney's Office. The plaintiff filed complaints within the jail and protested to staff. According to the plaintiff, one officer replied, "Sue me." Slip op. at 3. The plaintiff obliged and sued *pro se*, alleging First, Fourth, and Sixth Amendment violations. The trial court granted summary judgment to the defendants on all counts. The Fourth Circuit affirmed in part and reversed in part.

(1) The plaintiff argued that his rights to free speech under the First Amendment were violated by the Sheriff's acts. The court acknowledged that interfering with legal mail in the manner alleged "could chill protected speech" and thus violate the First Amendment. *Id.* at 5. To determine whether a detainee's constitutional rights have been violated by a jail or prison, the court applies the "legitimate penological purposes" test from *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, the court examines:

(1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether there are ready alternatives. *Haze* Slip op. at 6 (citation omitted).

Here, no valid penological purpose existed as to the alleged acts of the Sheriff's Department. That the plaintiff had received contraband items in non-legal mail did not justify opening his legal mail outside of his presence. The plaintiff had no other alternative to protect his right to freely communicate with his attorney, and there would be no adverse impact on the guards, inmates, or jail resources as a result of opening legal mail in the plaintiff's presence (demonstrated by the Sheriff's existing policies on legal mail, which required that step). As alleged, these acts were not mere negligence but rather indicated "a deliberate pattern and practice," thus potentially exposed the defendants to liability if proven at trial. *Id.* at 8. The court rejected the defendants' argument that the plaintiff could not demonstrate actual injury: ". . . [T]he infringement of Haze's First Amendment rights itself constitutes an injury." *Id.* Finally, the court rejected the defendants' contention that qualified immunity applied because the law was not clearly established. The defendants acknowledged in district court that established law required legal mail to be opened in the inmate's presence and could not argue to the contrary on appeal.

(2) The plaintiff claimed the Sheriff's actions constituted an unreasonable search and seizure in violation of the Fourth Amendment. The court acknowledged that inmates may have a reasonable expectation of privacy in their legal mail. However, given the lack of precedent on any such right, the plaintiff could not show that the officers violated clearly established law, and the defendants were therefore entitled to qualified immunity on this claim.

The plaintiff also alleged the officers' acts violated his First Amendment right of access to the courts and his Sixth Amendment right to effective assistance of counsel. Because the claims were not properly raised in the plaintiff's *pro se* brief, they were waived on appeal. The matter was thus unanimously remanded for further proceedings on the plaintiff's free speech claim.

**Qualified immunity denied for officers where decedent was allegedly secured and incapacitated when officers used deadly force; Fourth Amendment excessive force claims may proceed**

[Estate of Wayne A. Jones v. City of Martinsburg](#), 961 F.3d 661 (June 9, 2020). This case involved the police killing of a 51-year-old homeless black man with schizophrenia. A city police officer encountered Jones walking in the road downtown in Martinsburg, West Virginia. Pedestrians are required to use the sidewalk under state and local law, and the officer briefly followed the man before stopping him. Jones was unable to produce identification at the officer's request. When asked if he had any weapons, Jones asked the officer, "What's a weapon?" When told a weapon could be anything, Jones responded that he had "something." When ordered to put his hands on the patrol car, Jones became uncooperative, refusing commands, moving away from the officer, and asking what he did wrong. The officer did not reply and used a taser on Jones without apparent effect. Another officer arrived and also tased the man without effect. Jones ran away from the officers, and one officer caught up, striking him in the arm. As the two officers reached him, Jones appeared to raise his hands in surrender. During the process of securing him though, the group "tumbled down the stairs" together, injuring one of the officers. Jones was then put in a choke hold on the ground, where he could be heard "choking or gurgling" on bodycam audio. Three more officers arrived on scene. While Jones was face-down with his legs kicking in the chokehold, one officer called him "a mother\*\*ker;" another officer kicked him; a third officer tased him again (again to no seeming effect). The officer still holding Jones in a choke hold "felt 'like a scratch on [his] hand'" and a few seconds later felt "a sharp poke in [his] side." He noticed a knife in Jones' right hand and alerted the other officers, who all stepped approximately five feet away and drew their guns. Jones was motionless on the ground laying on his right side while the officers ordered him to drop his weapon. He did not move or respond, and a few second later, the officers fired 22 shots, killing him. No first aid was attempted by the officers following the shooting, and "a small fixed blade knife" was recovered from the decedent's right sleeve. The officers were recorded on body cam audio acknowledging their need to "have to gather some f\*\*cking story" regarding the incident.

The decedent's estate sued under 42 U.S.C. § 1983, alleging an excessive force claim against the officers (among other claims) and a *Monell* claim against the city for failure to train and discipline officers. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (allowing § 1983 claims against municipalities where the entity has a pattern or policy of constitutional violations). The district court previously twice granted the defendants' motions for summary judgment and the Fourth Circuit twice reversed. In the current appeal, the district court found that qualified immunity protected the officers from liability and that *Monell* liability did not apply to the City. The Fourth Circuit reversed as to the officer-defendants and affirmed as to the City.

It is clearly established in the Fourth Circuit that officers may not continue to use force on a secured or incapacitated suspect. Taking the evidence in the light most favorable to the plaintiff, a jury could find that Jones was secured at the time of the shooting, whether he was armed at the time or not. “If Jones was secured, then police officers could not constitutionally release him, back away, and shoot him. To do so violated Jones’s constitutional right to be free from deadly force under clearly established law.” *Jones Slip op.* at 13. Similarly, in the light most favorable to the plaintiff, a jury could find excessive force based on the decedent’s incapacitation at the time of the shooting. “By shooting an incapacitated, injured person who was not moving, and who was laying on his knife, the police officers crossed a ‘bright line’ and can be held liable.” *Id.* at 15. The grant of summary judgment as to the officers was therefore reversed, the order of dismissal again vacated, and the matter remanded for further proceedings.

The plaintiff failed to state a claim for *Monell* liability against the city, and the district court’s award of summary judgment as to it was affirmed. In conclusion, the unanimous court observed:

Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity [to the officers] at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept. *Id.* at 20.

### **Officer’s testimony about common drug trade practices was proper lay opinion and did not violate the Confrontation Clause**

[U.S. v. Smith](#), 962 F. 3d 755 (June 16, 2020). In this methamphetamine case from the Western District of North Carolina, drugs and baggies were found on two separate occasions in the defendant’s vehicle, and scales were found on one of those occasions. At trial, an officer testified to the relevance of baggies and scales to the drug trade based on his experience in law enforcement, over defense objection. The officer was asked on cross-examination if his knowledge and experience was based in part on information obtained from interrogating suspects and cooperating witnesses. The officer acknowledged it was. The defense then moved to strike all of the officer’s testimony as improper lay opinion and a Confrontation Clause violation. The district court denied the objection, the defendant was convicted, and appealed.

The court found the testimony was proper lay opinion under Rule 701 of the Federal Rules of Evidence. “[The officer’s] testimony was essentially observational and ‘based on personal knowledge’. Indeed, it is well-settled that ‘experience-derived police testimony concerning criminals’ typical *modi operandi* during a drug transaction’ may qualify as lay opinion under Rule 701.” *Slip op.* at 16 (citation omitted). The admission of this testimony was therefore not error, and, in the alternative, was harmless. The testimony at issue also did not involve “testimonial hearsay” in violation of the Confrontation Clause: “[The officer] did not describe a single statement that he had heard during earlier investigations, but rather drew on what he had generally learned over the course of his entire law enforcement career.” *Id.*

at 20. Other challenges to the convictions were similarly rejected and the case was unanimously affirmed, with Judge Traxler concurring separately on an unrelated issue.

### **Divided panel grants motion to seal court documents referencing defendant's cooperation**

[U.S. v. Jon Doe](#), 962 F.3d 139 (June 17, 2020). In this case from the Eastern District of North Carolina, the defendant pled guilty to drug offenses and received a downward departure for his cooperation with the government. He subsequently moved for a sentence reduction. The district court denied the motion, referencing the defendant's cooperation with the government and the downward departure of the original sentence in its order. The defendant then moved to seal that order, claiming that his safety in prison would be compromised if other inmates discovered his cooperation. He pointed out that the document could be found through online legal research tools available within the prison. The district court denied the motion, finding that the information had already existed online for several months by the time the defendant moved to seal. The defendant appealed, and a divided Fourth Circuit reversed.

The public and the press have a "qualified right of access" to court files under both the common law and the First Amendment. The Fourth Circuit assumed without deciding that the First Amendment standard applied. Under that standard, court documents may be sealed from the public where the defendant has a compelling interest, there is a substantial risk to the defendant without sealing, and no narrower alternative to sealing exists. *See, e.g., Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). Here, the defendant made the requisite showing. The defendant's safety was a compelling interest—protection of cooperating witnesses in prison not only serves the defendant's interest in his personal safety, but also promotes public safety and the administration of criminal law generally. The district already had a standing order recognizing the threat to prisoners who assist the government that required sealing of all substantial assistance motions for at least two years (as many other districts have). The court took judicial notice of a report by the Committee on Court Administration and Case Management of the Judicial Conference of the United States showing the protection of this category of inmates was a problem. The defendant need not demonstrate an actual or direct threat, only that he is at a "heightened" risk. In light of these "background facts" and the particular facts of the defendant's case (and cooperation), the defendant was at substantial risk. Finally, sealing was the only available alternative to protect the interests at stake. Merely redacting the document would effectively flag the defendant's cooperation and would not suffice. The majority therefore reversed and remanded, directing the district court to grant the motion to seal for at least two years.

Judge Richardson would have affirmed the denial of the motion, finding that the defendant failed to overcome the presumption of public access on the facts of the case.

### **Speedy trial issue was waived by guilty plea; no plain error in the alternative**

[U.S. v. Lozano](#), 962 F.3d 773 (June 17, 2020). In this Western District of North Carolina case, the defendant entered the country illegally and was deported. He entered the country again and was arrested on state charges. While those charges were pending, the federal government charged the defendant with illegal reentry, but he was deported before discovering the new federal charge. When he again reentered the county illegally six years later, he was arrested on the illegal reentry charge. He pled guilty and appealed, complaining that the delay between the charge and his plea violated his speedy trial rights under the Sixth Amendment. The Fourth Circuit disagreed.

In general, a guilty plea waives non-jurisdictional claims, and the defendant's speedy trial claim here was waived. Unlike claims for vindictive prosecution, double jeopardy, or that the statute of conviction is unconstitutional, "[s]peedy trial claims don't challenge the government's power to *initiate the proceedings* against the defendant. Instead, they challenge 'case-related government conduct that [took] place before the plea [was entered]'" and are waived with a guilty plea. Slip op. at 8 (emphasis in original).

Even assuming the claim was not waived, the court rejected it on the merits. Because no objection was made at trial, the claim was reviewed for plain error. While the length of delay was presumptively prejudicial and the reason for the delay weighed at least "slightly" in the defendant's favor, the other two factors—assertion of the right and prejudice—weighed in favor of the government. The defendant failed to assert the right until the instant appeal and could not show prejudice, since he was unaware of the pendency of the charge for most of the time period of the delay. He also made no argument that the delay hampered his defense. There was therefore no plain error in the alternative. A challenge to the sentence was also rejected, and the district court's judgment was unanimously affirmed.

**(1) No error to empanel anonymous jury in gang prosecution; (2) No abuse of discretion in denial of recusal motion; (3) Various jury selection challenges rejected; (4) Motion to suppress properly denied**

[U.S. v. Gutierrez](#), \_\_\_ F.3d \_\_\_, 2020 WL 3476987 (June 26, 2020). The defendants in this Western District of North Carolina case were charged with Racketeer Influenced and Corrupt Organization Act ("RICO") violations stemming from their leadership roles in the Bloods. All defendants were convicted of RICO conspiracy at trial and appealed.

(1) The trial court did not err in granting the government's motion to empanel an anonymous jury. The government pointed to acts of obstruction of justice by other gang members in support of the motion, including the murder of a witness and his wife in another North Carolina Bloods prosecution and the kidnapping of a family member of a prosecutor. Over objection, the trial court granted the motion and ordered that defense counsel not share the names of the jurors with the defendants.

An anonymous jury is warranted if two conditions are present: '(1) there is strong reason to conclude that the jury needs protection from interference or harm, or that the integrity of the jury's function will be compromised absent anonymity; and (2) reasonable safeguards have been adopted to minimize the risk that the rights of the accused will be infringed.' Slip op. at 6 (citation omitted).

Here, strong reasons supported the decision—the defendants were leaders of a violent gang facing long prison sentences; they had committed acts of obstruction of justice in this case; and other gang members had violently obstructed justice in connection with other prosecutions of its members. This demonstrated a risk to the jury. The trial court also adopted reasonable safeguards by giving jurors a neutral explanation for withholding juror identities and instructing the jury about the presumption of innocence during that explanation. That jurors expressed some safety concerns to the trial court after hearing some of the evidence was not enough to show prejudice to the defendants. In the court's words: "The timing of this concern shows that it bears no relation to the functioning of an anonymous jury, and Appellants do not provide any evidence to show otherwise." *Id.* at 11.

(2) The trial court did not err in failing to recuse itself. In a prior Blood gang prosecution, the same judge recused himself after a picture of the judge was found in the defendant's prison cell. The defendants here argued that prior recusal required the judge to recuse himself in the present case. Here, there was no similar showing of a threat to the judge by the defendants and no other grounds to question the trial judge's impartiality. The trial court also expressed concern that granting the motion would "create [a] precedent. . . [that] you can get rid of me by getting my picture," which would "encourage 'judge-shopping.'" *Id.* at 11. Unlike the earlier case where there was an ostensible threat to the judge, the defendants here put forth no evidence to question the judge's impartiality other than the prior recusal. The denial of the motion was not therefore an abuse of discretion.

(3) The court also rejected various challenges to the jury selection process and the trial court's refusal to grant a mistrial based on those alleged errors. (3a) The defendants argued that the use of the word "gang" to describe the Bloods organization to potential jurors was unduly prejudicial. Rejecting this challenge, the court observed: "Not only is use of the term 'gang' factually accurate and supported by the record, but in the RICO context, that usage effectively translates the RICO statutory language into terms a non-lawyer jury can readily comprehend." *Id.* at 13. (3b) Two juror questionnaires were inadvertently swapped with one another and the defense struck a juror based on the wrong questionnaire. When the parties realized the mistake, the trial court instructed the jury about what happened, ensured each remaining juror questionnaire was correct, granted the defendant an additional peremptory strike, and eliminated one of the government's remaining peremptory strikes. These were appropriate responses by the trial court and were not an abuse of discretion. (3c) The government struck a potential juror based on that juror's unpleasant experience with law enforcement in the past, over defense objection. The defendants argued this ruling indicated bias on the part of the trial judge. The court found that no evidence supported a claim of bias and that the use of the strike was proper: "We have held that the Government may strike a potential juror based on his 'dissatisfactory [experience] with the police', because that experience demonstrates 'bias [against] law enforcement officials,' which is 'inappropriate.'" *Id.* at 4 (citation omitted) (cleaned up). (3d) The trial court excused one juror for cause based on her statements that the criminal justice system "doesn't work." The trial court refused to excuse another juror for cause, who indicated he could follow the law, despite having "some problems" with the justice system. The respective answers of the two jurors "differed substantially" from one another and the trial court did not abuse its discretion in excusing the one juror and seating the other.

(4) One defendant challenged the denial of her motion to suppress. A gang member was involved in a home invasion and shooting in Raleigh in 2011 and called the defendant after fleeing the scene of the crime on foot, who picked him up in her car. Police had a description of the person that fled and were stationed at the neighborhood entrance to try and apprehend him. The defendant's car was stopped leaving the neighborhood within 20 minutes of the report of the crime and the suspect was found in the back seat. The two were apprehended immediately and the defendant's phone was seized. The defendant alleged that police lacked reasonable suspicion to stop her car and that the phone was not hers. Because of the passage of time between the seizure of the phone and the current prosecution, officers could not remember seizing the phone, but the government presented digital forensic evidence tying the phone to the defendant. Rejecting the challenge, the court found the stop and arrest were justified—the defendant's car was leaving the neighborhood in the early hours of the morning within minutes of a robbery in the area, it was the only car on the road at that time, and officers immediately

realized the person in the backseat was the suspect at large. Officers therefore had reasonable suspicion to stop the vehicle and probable cause to arrest both occupants, and the cell phone was lawfully seized incident to arrest. The court also rejected the argument that the cell phone was not properly authenticated and affirmed the admission of the cell phone evidence at trial.

Other challenges to the sufficiency of the evidence, jury instructions, post-verdict motions, and sentencing were similarly rejected, and the convictions unanimously affirmed.

**Totality of circumstances supported stop and frisk; unknown bystander’s tip had more indicia of reliability than a purely anonymous tip and the totality of circumstances connected the defendant to a suspected crime**

[U.S. v. Mitchell](#), \_\_\_ F.3d \_\_\_, 2020 WL 3525542 (June 30, 2020). In this case from the Southern District of West Virginia, officers were called to a local bar at closing time in response to a report of a fight and a person with a gun. A witness at the scene described the man with the gun and told an officer which way the man went when he left the area. Another officer saw the defendant matching that description nearby and frisked him, finding a gun. The defendant was indicted for felon in possession of firearm, but the arrest warrant was not served for four years. When served, the defendant moved to suppress, alleging an illegal stop.

Evidence at suppression showed that police were familiar with the initial caller as a person that either worked at, or was a regular customer of, the bar. The bar was a frequent location for police responses at closing time. An officer arrived at the bar within five minutes of the report from the caller and was immediately given a description of the suspect by a person on scene. That officer could no longer remember the bystander’s name and did not otherwise have documentation as to the identity of that person. The bystander reported the suspect was a black man with a black shirt and red pants and relayed the street and direction that the suspect was last seen heading. Within one minute of that information going out over the radio, another officer encountered the defendant, wearing “very bright red” pants. No one else was in the area. This occurred within 9 minutes of the initial call to police. The district court denied the motion, and the defendant pled guilty and appealed.

The district court treated the bystander description as more than “a purely anonymous phone tip,” and found that reasonable suspicion to stop and frisk the defendant existed under the totality of circumstances. The Fourth Circuit agreed. The initial caller to the police had provided his name and number, the area was a known problem location at that time of night, and the caller reported a large fight and person with a gun. The bystander corroborated the caller’s information that someone recently on scene had a gun, and the arresting officer corroborated the bystander by finding the defendant matching that description on the street and headed in the direction described by the bystander. The bystander’s information also “was not the catalyst that alerted officers to illegal activity;” rather, the known caller is what prompted the police response, and the bystander’s information merely added detail to information already possessed by the officers. Slip op. at 15. The bystander’s information was thus properly treated as more reliable than an anonymous tip: “The bystander provided the description to a police officer in person and in public, in close proximity to the alleged criminal activity and to [the defendant], all of which support the bystander’s veracity and enhance the reliability of the bystander’s tip.” *Id.* at 9. These facts combined to support a reasonable suspicion that the defendant had been involved in the fight and that he was armed and dangerous.

The court distinguished the situation of a face-to-face (if unknown) informant from that of a truly anonymous tipster. “[F]ace-to-face encounters with informants are altogether different from anonymous tips’ because they typically provide a measure of accountability and an opportunity to evaluate the informant’s credibility and demeanor.” *Id.* at 12 (citing *U.S. v. Christmas*, 222 F.3d 141 (4th Cir. 2000)). The bystander report was therefore properly part of the reasonable suspicion calculus by the officers.

The defendant also argued that the bystander information failed to allege any crime, pointing out that having a gun is not per se illegal, and arguing that the caller and bystander could have been referencing two separate incidents. This argument was “simply contrary to the evidence” and the court similarly rejected it, finding the circumstances sufficiently created reasonable suspicion of a crime committed by the defendant.

Judge Wynn dissented at length and would have ruled that no reasonable suspicion existed to stop the defendant.

#### **Other cases of note:**

##### **New trial for Rule 404(b) violation in “pill mill” prosecution**

[U.S. v. Brizuela](#), 962 F.3d 784 (June 19, 2020). In this case from the Northern District of West Virginia, the defendant was a pain-management physician charged with illegally distributing opioids to patients. The prosecution presented testimony from two patients whose treatments were at issue in the indictments, as well as testimony from four other patients whose treatments were not part of the charges. The defendant complained on appeal that the latter evidence violated Rule 404(b) of the Federal Rules of Evidence. The Fourth Circuit agreed, finding the testimony was not proper. The government had the burden to demonstrate such error was harmless and it failed to argue harmless ness on appeal. Acknowledging it was a “close question,” the court found the government failed to meet its burden and unanimously reversed for a new trial.

##### **Evidentiary, joinder, and jury instruction challenges rejected in drug conspiracy and death by distribution case**

[U.S. v. Campbell](#), \_\_\_ F.3d \_\_\_, 2020 WL 3442877 (June 24, 2020). The defendants were members of a conspiracy to sell heroin and rob other drug dealers, an effort they undertook with the assistance of then-law enforcement officers in the District of Maryland. At least one person died from overdosing on the conspirators’ heroin. The now-former officers testified against the defendants at trial, describing their involvement in a home-invasion robbery of another dealer at the request of the defendants. The defendants challenged this as improper evidence under Rule 404(b) of the Federal Rules of Evidence. A medical expert testified over objection at trial that but-for the heroin ingested by the victim, she would still be alive. A defendant challenged this testimony as improper expert testimony going to the ultimate issue in the case. The same defendant requested multiple special jury instructions supplementing the but-for causation principle for the death by distribution of heroin offense, which the district court declined to give (although other but-for causation instructions were given for that offense). Another defendant objected to having been joined for trial with the other defendants, based on his lesser culpability (he was not charged with or directly involved in the overdose-death incident). The same defendant complained that he received ineffective assistance of counsel, based on his counsel’s failure



to do anything about the purported theft of documents from the defendant's cell. Finally, another defendant complained that a mistrial should have been granted when his mug shot was inadvertently shown to jurors for a few seconds. All challenges were rejected, and the convictions unanimously affirmed.

#### **North Carolina's felony breaking or entering statute qualifies as a violent felony under the ACCA**

[U.S. v. Dodge](#), \_\_\_ F.3d \_\_\_, 2020 WL 3525168 (June 30, 2020). The defendant in this Eastern District of North Carolina case had numerous prior North Carolina state convictions for felony breaking or entering. The trial court determined these convictions qualified as prior violent felonies for purposes of the Armed Career Criminal Act ("ACCA") and sentenced the defendant accordingly. On appeal, the defendant challenged that determination. According to the defendant, since the state offense of felony breaking or entering applies broadly to any building, it was more broad than generic burglary and did not qualify as a violent felony under the ACCA. Prior precedent settled the issue in favor of the government. See *United States v. Mungro*, 754 F.3d 267, 272 (4th Cir. 2014) (holding North Carolina's felony breaking or entering statute qualified as a violent felony under the ACCA). While acknowledging "tension" of the holding with subsequent U.S. Supreme Court decisions, the panel was bound by *Mungro* unless and until the Fourth Circuit sitting en banc or the U.S. Supreme Court overruled that decision. The district court's judgment was therefore unanimously affirmed.