

Case Summaries: Fourth Circuit Court of Appeals (March 3, 6, 22, 29, and 30, 2023)

Three-month delay in obtaining search warrant for child pornography did not render information stale; video of adult daughter and testimony from daughter's friend was not unduly prejudicial or improper character evidence

[U.S. v. Ebert](#), 61 F.4th 394 (Mar. 3, 2023). In this case from the Western District of North Carolina, the defendant's adult daughter reported to law enforcement that her father had taken explicit photographs of her when she was a minor (five to eight years earlier). Around three months after the initial report, an SBI agent applied for and received a search warrant for the defendant's home. The warrant authorized the seizure of electronic devices, including computers and digital storage devices. The affidavit in support of the warrant detailed the daughter's report to law enforcement, as well as general information about common practices of people involved in possessing or creating child pornography based on the officer's knowledge and experience. It also included details about law enforcement's ability to retrieve deleted images from digital devices. Explicit photos and videos of the underage child were recovered from the defendant's house. He was indicted for child pornography, sexual exploitation of a minor and a related offense. The defendant moved to suppress, arguing the information in support of the search warrant was stale. The district court denied the motion, finding probable cause existed to believe the defendant possessed media with evidence of child pornography and, alternatively, that the good-faith exception would apply. At trial, the daughter testified at length about grooming behaviors and sexual abuse by her father. A video taken of the daughter by the defendant after the child had turned eighteen was admitted into evidence, over the defendant's objection. A friend of the daughter who had witnessed the defendant's behaviors towards her during the relevant time also testified over the defendant's objection, corroborating the victim's testimony. The defendant was convicted of the child pornography and exploitation offenses and appealed. A unanimous Fourth Circuit affirmed.

The court agreed with the trial judge that the warrant was supported by probable cause. Stale information does not establish probable cause, but whether information is stale depends on the facts of the case under the totality of the circumstances. In child pornography cases, "the staleness inquiry is somewhat different" based on the contraband at issue not being "consumable," the ease at which the contraband can be stored, and the proclivity of child pornography offenders to "rarely if ever dispose of such material . . .". *Ebert* Slip op. at 9-10. Such was the case here, and the trial court did not err in finding probable cause. Further, while the trial court held that the good-faith exception would have operated to save the warrant even without probable cause, the defendant did not challenge that portion of the judgment, and any argument there was waived.

The defendant also complained that the video of his daughter taken after she had reached the age of majority and her friend's testimony was improper character evidence and unduly prejudicial. The court likewise rejected this argument. The jury was given multiple limiting instructions about the challenged evidence. The video of the daughter was corroborative of her testimony as to acts taken by the

defendant while she was underage and provided context for her testimony. The friend's testimony was properly admitted as evidence of the defendant's intent, lack of mistake or accident, and for corroborative purposes. While the district court did not err in admitting this evidence, even if it had, any error would have been harmless under the facts of the case.

A sentencing challenge was similarly rejected, and the district court's judgment was affirmed in full.

In transferring obscenity to a minor prosecution, district court erred by excluding evidence that the victim was the defendant's sister as unduly prejudicial

[U.S. v. Miller](#), 61 F.4th 426 (Mar. 6, 2023). The defendant was indicted in the Southern District of West Virginia for transferring obscene materials to a minor, his fourteen-year-old sister. In pretrial proceedings, the district court granted the defendant's motion to exclude reference to the fact that the minor was the defendant's sister based on prejudice under Federal Rule of Evidence 403. The Government appealed pretrial, and the Fourth Circuit unanimously reversed.

While unfairly prejudicial evidence is properly excluded under Rule 403, otherwise probative evidence that prejudices the defendant because it "directly establishes an element of the offense" is admissible. According to the court, "contemporaneous evidence relevant to both the context and to the crime is not the type of prejudice that Federal Rule of Evidence 403 addresses . . .". *Miller* Slip op. at 4. Here, the defendant was in prison for a separate offense when he allegedly mailed an obscene letter to his underage sister. He offered to stipulate that the intended recipient of his letter was underage in lieu of the Government offering evidence about the specific intended recipient. The Government refused to accept that stipulation, arguing that the identity of the sister was relevant both to the knowledge of age element and the obscenity element of the charged offense and that it was part of the narrative of the offense. The district court granted the motion over the Government's objection, and the Government appealed.

On appeal, the court agreed with the Government, finding that the district court abused its discretion in granting the defendant's motion in limine on the issue. The fact that the letter was written to the defendant's sister was the most probative evidence that the defendant knew she was underage and explained how he had such knowledge. It also helped establish the obscene nature of the letter, given that the letter described incestuous acts between her and the defendant. The specific context of the letter also helped "tell the complete story" of the circumstances of the crime. While that context is harmful to the defendant's defense, it is not unfairly prejudicial.

The district court's ruling on the motion was therefore reversed and the case remanded to proceed to trial.

State waived any objection to use of evidence from evidentiary hearing at the federal habeas stage; petitioner is entitled to new sentencing or grant of habeas petition on remand

[Stokes v. Stirling](#), ___ F.4th ___; 2023 WL 2589691 (Mar. 22, 2023). The Fourth Circuit formerly vacated the death sentence in this case from the District of South Carolina for ineffective assistance of counsel ("IAC") at the penalty phase. *Stokes v. Stirling*, 10 F.4th 236 (4th Cir. 2021) (summarized [here](#)). That prior panel decision depended in part on evidence from an evidentiary hearing held at the federal habeas stage. The State appealed that decision to the U.S. Supreme Court, which vacated and remanded the matter for reconsideration in light of *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022) (restricting the ability of a

federal habeas court to conduct an evidentiary hearing on ineffective assistance of state post-conviction counsel claims unless the narrow exceptions of 28 U.S.C. 2254(e)(2) are met). On remand, the State argued that the Fourth Circuit's earlier decision was flawed due to its reliance in part on the evidence from the habeas evidentiary hearing under the holding in *Shinn*. However, while the State was aware of the possibility that the evidentiary hearing at the federal habeas stage may not have been permitted under the law, it did not make that argument below (and in fact joined the petitioner in asking the Fourth Circuit to consider evidence from that hearing on the merits of the IAC claim). As such, the State's argument on the point was forfeited. According to the court:

We decline to exercise our discretion to excuse the State's forfeiture, which would potentially reinstate an unconstitutional death sentence and result in grave injustice. Because the State abandoned any argument that our prior opinion relied on inadmissible evidence, we affirm that opinion and direct the district court to order resentencing. *Stokes* Slip op. at 3.

The case was therefore remanded with instructions for the habeas petition to be granted if the State does not conduct a resentencing within a reasonable amount of time.

Judge Quattlebaum dissented and would have remanded the case to the district court for it to consider the petitioner's claims on the basis of the state post-conviction court record only.

***Bivens* claim for Fourth Amendment violations was proper and not new context; Parks officers were not entitled to qualified immunity for illegal stop and improper extension; damages awards were not excessive and were supported by the evidence**

[Hicks v. Ferreya](#), ___ F.4th ___; 2023 WL 2669648 (Mar. 29, 2023). The plaintiff was an on-duty U.S. Secret Security agent who was stopped by a U.S. Parks Service official. That traffic stop was improperly extended for at least 40 minutes, despite the Parks officers quickly determining the plaintiff's identity and circumstances. When the plaintiff was finally released, another Parks officer immediately stopped him again for alleged use of a cell phone while driving. Use of a cell phone while driving is an offense in Maryland, but agents and officers are exempted from that law. The plaintiff sued the officers under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Parks officer-defendants moved for summary judgment, asserting qualified immunity and arguing that the case represented an improper extension of *Bivens* jurisprudence. In an earlier decision (summarized [here](#)), the Fourth Circuit unanimously rejected these arguments and allowed the case to proceed to trial. A jury ultimately found the Parks officers liable for Fourth Amendment violations and awarded damages to the plaintiff in the total amount of \$730,000.00. A motion for judgment as a matter of law by the defendants was denied prior to verdict, as was a post-trial motion for a new trial, and the defendants again appealed. Once again, the Fourth Circuit unanimously affirmed.

The district court correctly determined that the plaintiff presented a viable *Bivens* claim. The case presented a Fourth Amendment claim based on a warrantless seizure, just as in *Bivens*. "[T]he present case involves 'not an extension of *Bivens* so much as a replay' of the same principles of constitutional criminal law prohibiting the unjustified, warrantless seizure of a person." *Hicks* Slip op. at 13. This was not new context under *Bivens* and presented no special circumstances warranting caution against a *Bivens* remedy.

The district court likewise correctly determined that officers were not entitled to qualified immunity. The plaintiff's Fourth Amendment right to be free from unreasonable seizures was clearly violated by the improper extension of the stop and subsequent second stop, and that right was clearly established at the time of the incident. "[W]e have little trouble concluding that settled law provided fair warning to the officers that their actions would constitute a deprivation of Hicks's rights during both the first and second stop." *Id.* at 20.

The district court also did not abuse its discretion in denying the motion for a new trial. Sufficient evidence supported the compensatory damages awards to the plaintiff. The plaintiff credibly testified to severe emotional distress and presented corroborating evidence from another witness on the point. "On this record, we conclude that Hicks presented evidence of a 'genuine injury' that was 'sufficiently articulated' to support an award of compensatory damages." *Hicks Slip op.* at 30-31. Likewise, the punitive damages award was not excessive, given the record evidence that the defendants acted with malice during their roadside interactions with the plaintiff. The punitive damages awards were also less than three times the amount of the respective compensatory damages awards, a ratio consistent with U.S. Supreme Court and circuit precedent on the issue.

The district court was therefore affirmed in full.

***Rehaif* applies retroactively to cases on collateral review as a new substantive rule**

[U.S. v. Waters](#), ___ F.4th ___; 2023 WL 2699503 (Mar. 30, 2023). Under *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019), to prove violations of the felon-in-possession ban under 18 U.S.C. 922(g) and 924(a)(2), the Government must show that the defendant knew he possessed a gun and that he knew he was ineligible to possess a gun due to a prior felony conviction. The defendant was convicted in the District of South Carolina in 2015 of being a felon in possession and was sentenced to 10 years. In 2019, the defendant filed a habeas petition, which the district court summarily denied. On appeal, the Fourth Circuit unanimously reversed. *Rehaif* was decided while the defendant's habeas petition was pending. Because it announced a new substantive rule, *Rehaif* applies retroactively to cases on collateral review. The Government conceded as much on appeal. The matter was therefore vacated and remanded for further hearing at the district court level, including any procedural default and prejudice questions.

Judge Wynn concurred separately to complain that the majority improperly raised the issue of procedural default.