

Fourth Circuit Case Summaries: March 4, 5, 14, and 27, 2019

North Carolina’s assault with a deadly weapon on a government official is not a crime of violence under the categorical approach

[U.S. v. Simmons](#), 917 F.3d 312 (March 4, 2019; amended March 6, 2019). In this case from the Western District of North Carolina, the defendant’s supervised release was revoked based in part on his conviction of the state offense of assault with a deadly weapon on a government official (“AWDWOGO”). The district court determined that crime constituted a “crime of violence” under the Sentencing Guidelines and treated it as a Grade A supervised release violation (thus requiring revocation). Following *Anders* review, the Fourth Circuit found that the issue of whether the state crime constituted a “crime of violence” was not frivolous and ordered briefing on that point.

Under the Sentencing Guidelines, a crime of violence is defined as follows:

[A]ny federal or state offense punishable by imprisonment for a term exceeding a year that either ‘has as an element the use, attempted use, or threatened use of physical force against the person of another’ (the force clause) or ‘is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material . . .’ (the enumerated clause). Slip op. at 5.

Under the categorical approach, the court determines whether the offense may be committed without meeting the definition of “crime of violence” above. If so, the offense may not be treated as a crime of violence. The court looks only to the elements of the crime and not the specific facts underlying the offense. AWDWOGO requires that the defendant assaulted a government official engaged in his or her official duties with a deadly weapon. The government contended that this offense qualified as a crime of violence under either the force clause or the enumerated clause as an aggravated assault. The defendant contended that because the offense may be committed with a lesser *mens rea* than is required under the Guidelines definition, it did not qualify.

Under any formulation of assault in North Carolina, the defendant must act intentionally. However, North Carolina assault law always allows intent to “be established through proof of ‘culpable negligence.’” *Id.* at 10. By contrast, the Model

Penal Code and a majority of other jurisdictions require a *mens rea* of at least recklessness for aggravated assault, a standard higher than culpable negligence. Examining the minimum conduct necessary to support an AWDWOGO conviction, the court agreed with the defendant. “[W]e are satisfied that the North Carolina AWDWOGO statute punishes conduct that is broader in scope than that punished by generic aggravated assault. It thus fails the enumerated-offenses-clause test for a ‘crime of violence.’” *Id.* at 13. For the same reasons, the offense also fails to meet the standard under the force clause—“‘negligent or merely accidental conduct’ does not constitute a *use of physical force.*” *Id.* at 14 (emphasis in original) (internal citation omitted). Because North Carolina assault law allows a conviction for this offense based on negligent conduct, it categorically cannot be a crime of violence under the enumerated clause. Finding this mistake to be plain error, the court unanimously reversed and remanded.

Fourth Amendment excessive force claim may proceed; denial of qualified immunity affirmed

[Williams v. Strickland](#), 917 F.3d 763 (March 5, 2019). In this South Carolina case, the plaintiff was traveling from Georgia to South Carolina with his minor child. He encountered a friend during a stop and agreed to drive him home. On the way, an officer ran the plaintiff’s license, which came back stolen. The plaintiff stopped in the parking lot of the friend’s apartment complex after the officer activated his blue lights, and two other officers arrived on scene. As one officer approached the car, the plaintiff began reversing the car. One officer drew a gun in response and another officer walked towards the car. The plaintiff then drove towards one of the officers. Two officers opened fire, with at least one shot hitting the plaintiff in the back. The plaintiff “lost the full and proper function of his bowels, lungs, and bodily systems.” Slip op. at 4. The passenger-friend was also injured.

The plaintiff ultimately pled guilty to assault charges related to the incident, admitting that he moved the car in the direction of one of the officers and drove towards another officer. However, his plea agreement also indicated that officers shot at his car after the car had moved past the officers. The plaintiff filed a § 1983 action against the officers, alleging their use of deadly force was excessive and violated his Fourth Amendment rights. The district court denied qualified immunity. Viewing the evidence in the light most favorable to the plaintiff, a fact-finder could have concluded that the plaintiff had either already driven past the officers when they fired on the car, or that the plaintiff was in the process of passing the officers at the time. The officers appealed.

The Fourth Circuit affirmed the denial of qualified immunity. In the court’s view, the case boiled down to one question: “Would the officers be entitled to qualified immunity if a jury concluded that they fired on Williams when they were no longer in the trajectory of Williams’ car?” *Id.* at 7. The Fourth Amendment protects citizens from the use of excessive force by officers during a seizure. Under *Pearson v. Callahan*, 555 U.S. 223 (1985), officers may use deadly force to subdue a fleeing suspect only where probable cause exists to believe that the suspect presents a “significant threat of death or serious physical injury to the officer or others.” *Id.* at 9. Even

then, the threat must be “immediate.” Under existing circuit precedent, no Fourth Amendment violation occurs when an officer fires upon a car that the officer reasonably believes will immediately strike him unless stopped. However, a Fourth Amendment violation may occur if officers use or continue to use deadly force once the car is past them—under such circumstances, it is no longer reasonable for the officers to believe the car is an immediate threat. “This is true even though mere seconds separated the point at which deadly force was lawful from the point at which deadly force was unlawful.” *Id.* (internal citation omitted). Therefore, if officers here fired on the plaintiff’s car after it no longer presented an immediate threat, then a Fourth Amendment violation for excessive force occurred.

Despite the potential constitutional violation, the defendants are entitled to qualified immunity if the right at issue was not clearly established at the time. Turning to this question, the court found that these rules had been clearly established since at least 2005. The judgment of the district court was therefore affirmed and the case allowed to proceed to trial.

Trial court lacked authority to award credit for time in state custody for related conduct against a mandatory minimum federal sentence

[U.S. v. Moore](#), 918 F.3d 368 (March 14, 2019). In this South Carolina case, the defendant pled guilty to drug offenses and was subject to a 10 year mandatory minimum based on a prior drug conviction. At the time of his federal sentencing, the defendant had already served a seven month sentence on related state charges arising from the same conduct. He argued that he should receive credit on the mandatory minimum for the time already served on the state charges. Sections 5K2.23 and 5G1.3(b) of the Sentencing Guidelines authorize a downward departure where the defendant has already served a sentence for another offense “that is relevant conduct to the instant offense of conviction.” Slip op. at 3. There was no dispute that the conduct forming the basis of the state offenses was the same (and therefore relevant to) the basis for the federal offenses. The government argued that the Sentencing Guidelines do not allow a downward departure from a mandatory minimum. The district court granted the departure and the government appealed.

Reversing, the Fourth Circuit joined all other circuits that have considered the question:

Because mandatory minimums are imposed by Congress, only Congress—through the enactment of another statute—can authorize downward departures from them. The district court lacked authority to impose a sentence less than the statutory mandatory minimum absent permission from another source of congressional authority, permission that is lacking here. *Id.* at 4.

The sentence was therefore vacated and the matter remanded for a new sentencing hearing.

Trial judge properly handled juror fears of retaliation and potential jury contamination; no error to deny mistrial

[U.S. v. Smith](#), 919 F.3d 825 (March 27, 2019). The government brought various charges against members of the Black Guerrilla Family, a gang operating in the District of Maryland, relating to drug dealing and violence. During the month-long trial, the jury heard extensive evidence about the violent practices of the gang. One juror expressed fear of retaliation from the gang. The trial judge conducted a hearing where the juror explained that she had shared her husband's place of employment during jury selection and feared the gang would target her family. The juror indicated uncertainty about her ability to remain fair and was excused for cause. The judge asked whether the juror had voiced her concerns to other jurors and she acknowledged that she had spoken to three other jurors. The defense sought a mistrial based on potential contamination of the jury by these remarks. The trial judge denied the request for a mistrial but examined the remaining jurors for possible bias.

Each juror was asked whether anything had changed since the jury selection process that made the juror feel no longer able to be fair and impartial, and each juror was asked whether they said or heard anything in the jury room that would affect their ability to be fair and impartial. Two additional jurors reported concerns about remaining impartial. One "became emotional and . . . was crying or nearly crying and struggling to control his emotions" when the trial judge questioned him. The other, an alternate juror, was concerned that she may be recognized in public by gang members in the area. Both jurors were excused for cause. The trial court denied a renewed motion for mistrial, "finding that its questioning 'did not detect any contamination or something untoward, rampant, or even running among the jurors.'" Slip op. at 8. The defendants were ultimately convicted of all charges and appealed, arguing in part that the district court erred in handling the juror concerns and denying the requests for mistrial.

The defendants alleged that the trial judge should have specifically asked each juror about the first juror's fears and any discussions the other jurors may have had with her. The Fourth Circuit disagreed.

When a serious, non-speculative question of juror impartiality arises during trial, the district court must determine whether the affected jurors remain fair and impartial. As the trial judge is in the best position to make this determination, the inquiry is committed to his discretion, including ample leeway to formulate the questions to be asked. *Id.* at 13.

Here, the trial judge questioned each juror individually after learning of the juror concerns. Each juror was asked about bias, without reference to the first juror's fears or the risk of gang retaliation. The trial judge considered the answers and demeanor of the

each juror and asked follow up questions when needed. He then excused jurors that expressed reservation about remaining fair and kept only jurors that indicated they remained impartial. Asking the jurors more specific questions about the details of the first juror's fears carried its own risks—"detailed or fact-specific questions could 'become the toxin by which [the jurors'] minds are poisoned and the fears generated,'" a point acknowledged by the district court. *Id.* "This trial judge made reasoned judgments in walking the line between detecting bias and creating bias." *Id.* at 14. There was therefore no error in the questions asked by the trial judge of the remaining jurors.

For the same reasons, the trial court did not err by denying the motions for mistrial. "Just as the trial judge has latitude in framing the inquiry, so too does he have broad discretion in evaluating the significance of potential juror bias." *Id.* Since the judge properly inquired into the issue and excused jurors for cause that could not be fair, the trial judge was "well within his discretion in denying the requested mistrial." *Id.*

The court also rejected various evidentiary challenges, unanimously affirming all of the convictions.