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Fourth Circuit Case Summaries: September 4, 5, 12, and 27, 2019

Inmate-plaintiff's complaint about lack of medical care presented sufficient claim for deliberate indifference by prison officials and can proceed; summary judgment reversed

Gordon v. Schilling, 937 F.3d 348 (Sept. 4, 2019). The plaintiff, an inmate in the Western District of Virginia, sued the Health Services Director and Chief Physician of the Virginia Department of Corrections ("VDOC") for Eighth Amendment violations under 42 U.S.C. § 1983. He claimed that the officials acted with deliberate indifference in denying him treatment for Hepatitis C. The VDOC had a policy whereby inmates eligible for parole were "categorically excluded" from receiving treatment for Hepatitis C (among other exclusions). Inmates meeting the VDOC treatment policy requirements were provided testing and medication as needed, including a liver biopsy and "baseline workup." Inmates not eligible under the policy were assigned to a clinic where they could be examined and have liver function tested twice annually, but did not receive the medication, biopsy, or baseline workup. The plaintiff was diagnosed in prison with the disease in 2008. His ultimate parole date was in 2028. Although he became eligible for discretionary parole in 2002, he never sought a hearing before the parole board. Because he was parole eligible, he was excluded from treatment pursuant to the policy and was provided only the lesser clinic care. His clinic tests showed possible liver damage in 2011, and he filed complaints within the prison system to alert officials to his need for more significant treatment. Meanwhile, the prison changed the clinic treatment policy to reduce the number of liver function tests for the clinic patients to one per year. The plaintiff again complained, pointing to medical standards from the Centers for Disease Control and Prevention that recommend multiple examinations each year for patients with this condition. The grievances were denied and those decisions affirmed on appeal to the Health Services Director. In 2012, the plaintiff was moved to a different facility and did not receive even the clinic care for at least 18 months. When he complained, the complaint was again denied and affirmed on appeal to the administration. The plaintiff then requested the prison system policies on Hepatitis treatment, which was denied. By October 2013, he filed a new grievance, which was again denied, this time with the explanation that the plaintiff's condition no longer qualified for even the clinic care.

In 2014, the Chief Physician suspended the treatment policy based on the advice of national medical groups (which recommended use of different medications). This decision had the effect of stopping all treatment of all inmates with the condition until a new policy could be implemented. The treatment policy remained suspended for one year. When new guidelines were instituted, the plaintiff was no longer excluded from receiving treatment on the basis of his parole eligibility. A few months later the plaintiff received proper testing, which showed the onset of cirrhosis of the liver. He sued pro se, alleging an Eighth Amendment violation. The district court granted summary judgment to the defendants, finding they played no direct role in treatment decisions affecting the plaintiff. On appeal, the Fourth Circuit appointed counsel to the plaintiff and reversed.

When prison officials are deliberately indifferent to an inmate's serious medical condition, the Eighth Amendment is violated. "In context of a claim related to denial of medical treatment, a defendant 'acts with deliberate indifference if he had actual knowledge of [the plaintiff's] serious medical needs and the related risks, but nevertheless disregarded them.'" Slip op. at 16. As to the Director of Health Services, he had knowledge of the plaintiff's condition and need for treatment by way of the plaintiff's repeated administrative complaints. He was also aware of the risks, which were also detailed in the institution's policies. As the person that denied the complaints and reviews the healthcare policies each year, there was sufficient evidence of the health director's personal involvement for the matter to proceed. As to the Chief Physician, he was aware that the plaintiff's condition affected a large percentage of the prison system and was likewise aware of the risks of failing to treat the disease. The physician failed to change the policy for nearly a year after assuming office and then ceased all treatment for inmates with the disease when the policy was suspended without instituting a replacement policy for another full year. The physician offered no explanation of why the plaintiff stopped receiving even the minimal clinic care for more than a year beginning in 2012. While the physician offered medical explanations for some of his decisions, there were at least genuine issues of material fact in dispute, making summary judgment improper. The trial court's decision was therefore unanimously vacated and remanded for disposition in the trial court. "To rule otherwise would encourage prison official to turn a blind eye to the real-world consequences of their policymaking and permit them to escape liability for constitutional harms caused by their decisions." *Id*. at 26.

Exigent circumstances supported stop and flashlight search of defendant where officers responded to gunshots in a residential area within seconds; grant of suppression motion reversed

U.S. v. Curry, 937 F.3d 363 (Sept. 5, 2019). This case from the Eastern District of Virginia involved a felon in possession of a firearm charge. Police responded within seconds to the sound of gunshots in a neighborhood. The defendant and several other men were walking away from the area when police arrived, and officers pointed lit flashlights at them, instructing the men to stop, show their hands, and raise their shirts. The defendant did not comply and was frisked, leading to the discovery of a gun on his person. The trial court granted the defendant's motion to suppress finding that the government lacked reasonable suspicion supporting the seizure of the defendant. The trial court expressly found that the lack of particularized suspicion was fatal and that any exigencies of the situation could not excuse the lack of reasonable suspicion. The Fourth Circuit reversed.

The court identified exigent circumstances as a subset of the special needs doctrine of the Fourth Amendment. "Even without suspicion of criminal activity, a search or seizure may still be reasonable when 'special governmental needs, beyond the normal need for law enforcement' justify the intrusion." Slip op. at 10. This exception is limited and applies where the government's interest is something more than "ordinary crime control," such as responding to the threat of a terrorist attack. These special governmental interests may overlap with general crime prevention interests, and often do. To determine whether special needs apply, the court must consider the primary goal of the officers' actions at the time of the seizure by looking at the totality of circumstances.

Reviewing exigent circumstances cases in the circuit, the court observed that "the need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent

an exigency or emergency." *Id*. at 13. Whether a situation rises to the level of an exigent circumstance is a fact-driven question but typically requires the need for immediate action to prevent harm. The U.S. Supreme Court has recognized exigent circumstances where the was an imminent threat of harm to people or an imminent threat of destruction of evidence, among others. Here, the officers were faced with exigent circumstances. The shots had been fired in a "densely populated residential neighborhood" only seconds before officers arrived. The officers' primary purpose in shining flashlights on the men was to protect themselves and the public from the shooter. Further, these actions were reasonable under the factors in *Brown v. Texas*, 443 U.S. 47 (1979): Grave public interests for public safety and officer safety were implicated by the situation; the officers' actions were narrowly tailored to deal with the urgency of the situation; and the intrusion was limited in time and scope—the flashlight search was complete in under a minute, and asking the men to expose their waistbands was a less intrusive way to determine if the men were armed. The flashlight search occurred within the area and close in time to the gunshots. The stop and flashlight search were therefore reasonable. The grant of the motion to suppress was consequently reversed and the case remanded for a determination whether the frisk of the defendant following the flashlight search was justified.

A dissenting judge would have affirmed the trial court and criticized the majority opinion for expanding exigent circumstances doctrine and conflating it with the special needs doctrine.

Death verdict vacated for juror misconduct in penalty-phase deliberations

Barnes v. Thomas (Barnes II), ___F.3d ___, 2019 WL 4308636 (Sept. 12, 2019). This habeas case from the Middle District of North Carolina involved juror misconduct in the penalty phase of a capital murder case. The petitioner and two co-defendants were jointly tried for murder in 1994. One of the co-defendant lawyers made an extended, overtly religious argument during the penalty phase to the jury, strongly implying that the jurors' souls would be jeopardized if they voted for death:

> Surely, one among you believes in God, the father, the son, the Holy Ghost, the teachings of Jesus Christ. . .All of us will stand in judgement one day. . .[d]oes a true believer want to explain to God, yes, I did violate one of your commandments. Slip op. at 3.

No objections to this argument were lodged. The jury returned a death recommendation the next day. The defense lawyer immediately notified the trial court of information that one juror had contacted her pastor to discuss the death penalty and had discussed his advice with the other jurors during deliberations. The trial court denied the request to investigate the matter, and the state supreme court denied relief on the claim.

During state post-conviction proceedings, the petitioner again raised his juror misconduct claim, but the state court rejected that claim as procedurally barred since the matter was addressed on direct appeal. The petitioner then filed for habeas relief in federal district court. The district court ultimately denied relief without a hearing, and the petitioner appealed. In *Barnes I*, the Fourth Circuit reversed, finding the state court's disposition of the juror misconduct claim to be an unreasonable application of federal law. Under *Remmer v. U.S.*, 347 U.S. 227 (1954), where the petitioner credibly alleges third-party contact with jurors, he is entitled to an evidentiary hearing

and a presumption of prejudice applies. The petitioner's claims plausibly alleged such improper third-party contact, and the trial court erred in failing to conduct a hearing. The case was therefore remanded for a hearing on the habeas petition to determine whether this error and the trial court's failure to investigate the alleged juror misconduct impacted the verdict.

On remand, a hearing was held where the petitioner presented several witnesses (including former jurors from the trial), who testified that the juror at issue read from the Bible and discussed with the jury her pastor's view that the jury should "live by the laws of the land" for up to 30 minutes during the penalty deliberations. The district court ultimately found that this error likely had no impact on the verdict and again denied the petition. The petitioner again appealed (in the present case), and the Fourth Circuit again reversed, this time granting the petition and vacating the death verdict.

While the state post-conviction court unreasonably applied *Remmer* to the petitioner's claims, the court may not grant a habeas petition unless that error resulted in actual prejudice. To show prejudice, the petitioner must demonstrate that the external influence impacted the verdict. Courts deciding this question will consider "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id*. at 11. When the court finds itself conflicted over whether or not the error impacted the verdict, it should err on the side of the petitioner:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. However, '[I]f the federal court is 'in grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the verdict and finds itself 'in virtual equipoise' about the issue, the error is not harmless.' *Id*. at 12-13.

Reviewing the petitioner's evidence, the court found that this error was not harmless. The court discussed the quandary of juror misconduct claims in light of Federal Rule of Evidence 606, which prohibits inquiry into the deliberative processes of jurors. An exception to that rule exists allowing jurors to testify about outside influences or communications, but the rule still prohibits jurors from testifying to the impact of such outside contact on the deliberations. The parties hotly debated the application of Rule 606 at the habeas hearing in district court. In light of the limitations imposed by the evidentiary rule in this context, "it is especially important for us to view the record practically and holistically when considering the effect that a juror's misconduct 'reasonably may be taken to have had upon the jury's decision.'" *Id*. at 13. Here, the pastor's advice was unquestionably an outside influence. That advice, passed on to the rest of the jury, acted to undercut the defense attorney's religious argument and to convince any reluctant jurors of the propriety of a death sentence.

> It is reasonable to conclude, especially coming from a figure of religious authority, [the pastor's] message assuaged reservations about imposing the death penalty that the attorney's comments may have instilled. Further, the length of [the juror's] conversation with the jury—up to 30 minutes in less than two full days of deliberations—counsels against concluding that the discussion had no effect on the jury's decision. *Id*. at 16-17.

The court being "in virtual equipoise" over the impact of this outside communication, the district court was reversed and the petition granted. A dissenting judge would have affirmed the district court and denied the petition.

North Carolina conditional discharge plea of guilty does not qualify as a conviction for purposes of the federal felon in possession statute where no final judgment had been entered, despite violations of the terms of the discharge

U.S. v. Smith, ___ F.3d ___, 2019 WL 4724052 (Sept. 27, 2019). In this case from the Western District of North Carolina, the defendant pled guilty to felony larceny in state court and received a conditional discharge. Under the conditional discharge statute, the defendant enters a plea of guilty and judgment is withheld during a period of probation, during which the defendant demonstrates good conduct by avoiding further charges and abiding by the terms of probation. Upon successful completion of the period of probation, the plea is vacated and the matter dismissed by the court without conviction. If the terms of the conditional discharge agreement are violated, the court may enter judgment on the plea and sentence the defendant normally.

After entering into the agreement, the defendant was twice found in violation by possessing guns. A probation violation was filed in state court, but prior to its resolution, the federal government sought and obtained an indictment for felon in possession of a firearm. He was convicted at trial and appealed, arguing that the state court plea and deferred judgment did not qualify as a conviction for purposes of the felon in possession statute. The Fourth Circuit agreed and reversed.

Under *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019), to be convicted of the federal crime of felon in possession, a person must knowingly possess a gun and must be aware that he or she is not entitled to possess it—the defendant must know he or she had a conviction that disqualified them from possessing the firearm. While either a state or federal conviction will suffice, under 18 U.S.C. 921(a)(20), convictions are determined by reference to the relevant law of the jurisdiction where the underlying proceedings occurred. The court therefore examined whether North Carolina law would treat this circumstance as a conviction.

The word "conviction" in North Carolina law means different things in different contexts. Looking by analogy to the state crime of firearm by felon, the court observed that statute defines "conviction" as "a final judgment . . ." *See* N.C.G.S. 14-415.1(b). Because final judgment was withheld here pending the outcome of the conditional discharge agreement, there was no final judgment in the case, and therefore no conviction.

The court was unpersuaded by the government's argument that North Carolina's sentencing law treats a plea of guilty as a conviction from the moment of the plea. For one, the definition of "conviction" in the sentencing statutes is limited by the statute's plain language—it applies only "for the purpose of imposing sentence." And while a "convicted offender" may be sentenced for up to five years of probation, probation imposed pursuant to a conditional discharge is limited to two years, further suggesting that state law distinguishes between a true conviction and a conditional discharge plea.

The court likewise rejected the government's analogy that this scenario was like a prayer for judgment continued ("PJC"). Citing *Friend v. North Carolina*, 609 S.E.2d 476 (N.C. Ct. App. 2005),

the government argued that North Carolina would treat this situation like the conviction in *Friend*—there, the defendant was found to have been convicted following a guilty plea where he received a PJC, and such conviction sufficed to serve as a basis for the subsequent charges of possession of firearm by felon. The Fourth Circuit disagreed for two reasons. One, the holding in *Friend* conflicts with earlier decisions by the North Carolina Supreme Court where a true PJC was found to be not a judgment at all:

> Only if a judge also 'imposes conditions amounting to punishment (fine or imprisonment)' does a prayer for judgement order become a 'final judgment.' For when the prayer and punishment occur at the same time, the court must treat the prayer as surplusage because the punishment creates a final judgment, subject to appeal. Since punishment has already been inflicted, 'the court has exhausted its power and cannot thereafter impose additional punishment. Thus, a key predicate of *Friend's* holding—that a 'prayer for judgment continued' constitutes 'judgment' appears to be inconsistent with North Carolina law. Slip op. 8-9.

However, even if *Friend* was correctly decided, conditional discharges in this posture are nonetheless different. Under the wording of the conditional discharge statute, probation is imposed "without entering a judgment of guilt." This materially distinguishes the situation from cases involving sentencing.

> This procedure permits the court to impose consequences in the form of conditions and fines as a part of the conditional-discharge probation while leaving open the possibility of [further] punishment. As a result, even if a prayer for judgment is properly treated as a 'judgment' (as *Friend* held) and thus a conviction, the governing statute tells us that a conditional discharge is not a 'judgment.' *Id*. at 9-10.

Finally, where the law is unclear, the rule of lenity would apply. In light of the state case law and *Rehaif*, the court concluded that a plea of guilty in the conditional discharge process at this stage did not qualify as a conviction for purposes of the federal felon in possession statute. The conviction was therefore unanimously vacated and reversed. [*Author's note:* The Fourth Circuit's interpretation of state law is not binding on North Carolina courts.]