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Case Summaries: Fourth Circuit Court of Appeals (March 3, 10, 11, 18, 26, 30, and 31, 2021)

No error to deny *Franks* hearing where defendant failed to show false statements impacting the probable cause determination

[U.S. v. Seigler](#), 990 F.3d 331 (Mar. 3, 2020). In this case from the Western District of Virginia, the defendant was indicted for conspiracy to distribute methamphetamine and other drugs. The defendant's involvement in the case was discovered when law enforcement wire-tapped a co-conspirator's phone. The defendant moved to suppress the phone calls based on alleged false or misleading information in the wiretap warrant affidavit. He pointed to a statement that a wiretap was needed because physical surveillance was "foreclosed" by the close-knit Hispanic community involved. None of the conspirators involved were Hispanic, and police did in fact conduct physical surveillance at the location in question. The trial court denied the motion without conducting a hearing, and the defendant was convicted at trial. He appealed, arguing in part that the district court erred by failing to conduct a hearing.

Under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant is entitled to an evidentiary hearing where he shows that a warrant application contains intentionally false or recklessly misleading statements, and that the affidavit would not establish probable cause without the false statements. Here, the defendant failed to make the "substantial" preliminary showing. The warrant application at issue was more than 45 pages long with over 100 paragraphs. The statement challenged by the defendant was within one part of one paragraph in the document. The defendant failed to show that the reference to Hispanic communities was misleading or that it was essential to the probable cause determination. The reference to physical surveillance being foreclosed was similarly not false within context of other information in the affidavit, and there was no showing that this statement was critical to the probable cause determination. The trial court therefore did not err in refusing to hold a hearing.

Other challenges to the conviction and sentence were also rejected. Chief Judge Gregory concurred in judgment and wrote separately to address other aspects of the court's opinion.

No *Bivens* remedy for First Amendment violations by federal prison officials

[Earle v. Shreves](#), 990 F.3d 774 (Mar. 10, 2021). The plaintiff was a federal inmate sentenced to life. He alleged that prison officials retaliated against him for filing legitimate grievances within the prison in violation of the First, Fifth, and Eighth Amendments. Examples of alleged

retaliation included moving the plaintiff to a different housing unit, removing him from his job within the prison, and placing him in segregation for 30 days. He sued pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court granted summary judgment to the defendants, finding that there was no First Amendment claim at hand and that the defendants were entitled to qualified immunity on the other claims. The defendant appealed on the First Amendment claim only.

Bivens recognizes an implied cause of action against federal officials for certain constitutional violations. Since its recognition, the U.S. Supreme Court has repeatedly refused to extend the *Bivens* remedy to new contexts and has cautioned lower courts against doing so. Under *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), courts must consider if the claim presents new context from previously recognized *Bivens* claims. If a claim presents a new context of the doctrine, courts must examine if there are “special factors *counselling hesitation* in absence of affirmative action by Congress.” *Id.* (emphasis in original). Where such factors are found, *Bivens* does not apply. The plaintiff’s First Amendment claim was new context for the doctrine. While *Bivens* permits federal prisoners sue prison officials for Eighth Amendment violations, the Supreme Court has never recognized a First Amendment *Bivens* claim. Further, special factors existed weighing against *Bivens* application here, including judicial intrusion into prison management and concern for official’s exposure to “manufactured” claims, should a cause of action be recognized. The Fourth Circuit therefore declined to recognize a First Amendment *Bivens* claim, and the district court was unanimously affirmed.

Error to deny hearing on ineffective assistance claim for trial counsel’s failure to pursue suppression of confession; remand for evidentiary hearing

[U.S. v. Pressley](#), 990 F.3d 383 (Mar. 11, 2021). The petitioner was convicted at trial of various drug and financial crimes and sentenced to life in the Eastern District of North Carolina. He sought habeas relief, arguing that he repeatedly asked his trial attorney to move to suppress statements made to law enforcement before his arrest and that his attorney’s failure to do so constituted ineffective assistance of counsel. The district court denied the motion without a hearing and the defendant appealed.

Ineffective assistance of counsel in the context of an unfiled motion requires a “refined” *Strickland* analysis:

With respect to the performance prong, we ask whether the unfiled motion would have had some substance. If the motion would have had some substance, then we ask whether reasonable strategic reasons warranted not filing the motion. To satisfy the prejudice prong, the defendant must show that: (1) the [suppression] motion was meritorious and likely would have been granted, and (2) a reasonable probability that granting the motion would have affected the outcome of his trial. Slip op. at 6 (cleaned up).

There was a dispute about whether the petitioner had been in custody for purposes of *Miranda* at the time of his statements to police, and there was no evidence regarding defense counsel's justification for failing to challenge the admission of the statements. There was also no information about what information was available to defense counsel at the time. An evidentiary hearing was required to resolve these issues.

The court observed that should deficient performance be established on remand, that performance would have prejudiced the defendant. Despite the "significant" evidence against the defendant presented at trial, evidence of a confession is uniquely impactful. "[A]n improperly admitted confession can be prejudicial even in the face of substantial other evidence of guilt, given the potential that a confession will have 'a devastating and pervasive effect on the outcome of a trial.'" *Id.* at 12. Here, the government highlighted the confession at closing argument, and it was a central part of the evidence against the defendant. The co-defendant, who did not confess, was acquitted of all counts at trial. Under these circumstances, there was a reasonable probability that the outcome of trial would have been affected, had the confession been excluded. Thus, the district court's order denying habeas relief was vacated and the matter remanded for an evidentiary hearing on the IAC claim.

Sufficient evidence supported convictions for acting as unregistered foreign agent and conspiracy; post-verdict judgment of acquittal reversed

[U.S. v. Rafiekian](#), 991 F.3d 529 (Mar. 18, 2021). The defendant was a former executive at the lobbying agency of retired Lt. Gen. Michael Flynn. He was convicted of acting as an unregistered agent on behalf of the Turkish government and conspiracy at trial. The district court later entered a post-verdict judgment of acquittal and conditionally ordered a new trial based on insufficiency of the evidence. The Fourth Circuit unanimously found the evidence was sufficient. The court therefore reversed the judgement of acquittal, vacated the order for a new trial, and remanded for reinstatement of the verdict and sentencing.

Stop was not supported by reasonable suspicion under the totality of circumstances; denial of motion to suppress reversed

[U.S. v. Drakeford](#), 992 F.3d 255 (Mar. 26, 2021). In this case from the Western District of North Carolina, an informant provided a tip to police about a person selling drugs. The informant described the suspect as a heavysset, light-skinned black male with a full beard and provided the vehicle tag numbers of the suspect. The tip did not name the defendant or identify his address, nor did it provide any "predictive" information about when and where the suspect would be selling drugs. Officers linked the vehicle tag to the defendant and discovered he had a record of drug arrests (although police were not aware of any convictions arising from the prior arrests). Two months after receiving the tip, police located an address believed to belong to the suspect. One month later, police conducted surveillance on the address over ten times and over the course of two more months but never saw the defendant. Police were able to link the suspect to a female and surveilled her residence as well, where they did see the defendant but did not observe any drug activity.

While police were watching the female's home, the defendant left that location and travelled to a gas station. Someone parked next to the defendant and entered his vehicle for 30-45 seconds, and then got back into their own vehicle and left. Police followed that vehicle and observed driving consistent with impairment. A search of that vehicle revealed syringes but no drugs. Police believed that this was significant given that the person had just been in the defendant's presence. A few days later, the defendant travelled to a different convenience store and parked, but eventually left without anything happening. A detective contacted the informant to try and arrange for a purchase of heroin. According to the informant, the defendant stated he was awaiting resupply. Officers then observed the defendant travel to another home and walk inside. Another car arrived at the location and a person entered the home with several bags. The defendant left after about an hour and was carrying a bag. Police followed the defendant. During the trip, the informant contacted police and informed them that the defendant had called and stated that he now had drugs to sell.

Several days later, the defendant was observed travelling to a car stereo store. He parked in front of the store, directly in front of surveillance cameras for the business, and sat inside the vehicle. The area was a public, busy parking lot in the middle of the day and was not considered a high crime area. Another car parked in the area and two men exited that vehicle. The defendant exited his car at the same time and the men approached each other. Officers saw a quick handshake between the defendant and one of the men, and a few minutes later observed another handshake, apparently of slightly longer duration than the first. Officers believed this was a hand-to-hand drug transaction, although no money or drugs were observed. All three men then entered the store together. A detective followed and saw the men talking with a store employee at a counter. One of the men had a bookbag by his feet and used his foot to bring the bag closer to his body when the detective walked by. The men left the store and continued talking together outside. Officers approached and detained the defendant. The defendant was asked to remove his hands from his pocket and place them on a car, but he twice put them back into his pockets. The detective believed this, coupled with the defendant's body language, was suspicious. According to the detective, a pat-down revealed a bulge in the defendant's pocket which the officer immediately knew to be drugs. According to the defendant, no pat-down occurred and the detective simply reached into his pockets. Based on the drugs found in the defendant's pocket, police obtained a search warrant for the home of the female associated with the defendant and found additional contraband. The defendant was charged with various drug distribution and firearms offenses and moved to suppress.

The district court denied the motion, finding the stop and frisk supported by reasonable suspicion, and that the scope of the frisk was proper. The defendant pled guilty, reserving his right to appeal the denial of the motion, and was sentenced to 210 months. On appeal, the Fourth Circuit unanimously reversed.

There was little information in the record regarding the informant's reliability, and the informant provided no more information about the defendant other than his vehicle tags and a vague description. This was not sufficient to connect the defendant to drug activity, and the tip was entitled to only "little weight" in the analysis. Officers never attempted to conduct a controlled buy between the informant and the defendant and waited about a week from the time they suspected that the defendant had resupplied before stopping him. The officers' testimony about the alleged hand-to-hand transaction in the car stereo store parking lot was merely conclusory—no property was observed changing hands, and nothing about the handshake was otherwise suspicious, even considering all the circumstances. According to the court:

[W]e cannot hold that officers' bare suspicion of drug trafficking -- without more -- can allow even an experienced officer to reasonably conclude that such a benign and common gesture can be viewed as an exchange of drugs. This cannot amount to reasonable, particularized suspicion. The Fourth Amendment does not allow the Government to label a person as a drug dealer and then view all of their actions through that lens. *Drakeford* Slip op. at 16.

Officers had observed a suspected drug transaction at the gas station parking lot earlier in the investigation but did not discover any drugs as a result. Despite extensive surveillance of the defendant at different locations, officers never observed any other suspected drug activity. Additionally, the detective testified that it was common in the area for drugs to be sold from cars and that in a typical case one person would enter another person's car, obtain drugs, and both would leave. The detective's testimony indicated that his observations of the defendant were consistent with this pattern of activity. Here though, the suspected transaction occurred outside of the cars and the men went shopping thereafter, instead of re-entering their respective vehicles and leaving the scene. That these events occurred in the middle of the day in a busy, public area under the eye of store security cameras further cut against reasonable suspicion on these facts. Concluding, the court observed:

Taken together with the uncorroborated informant information and the inconclusive surveillance detectives had conducted in which no drugs were ever located, Appellant's presence at the Car Stereo Warehouse failed to create reasonable suspicion sufficient to justify a *Terry* stop. Given all of the foregoing, 'we are skeptical of Government attempts to spin . . . largely mundane acts into a web of deception.' *Id.* at 17-18 (citations omitted).

The district court's ruling on the motion to suppress was therefore reversed and remanded for proceedings consistent with this decision. Because the court determined that police lacked reasonable suspicion to seize the defendant, it did not reach the question of the scope of the frisk.

Judge Wynn concurred in a separate opinion to address the deference typically given to officer testimony by the courts. His opinion observes that allowing officers to rely on their training and experience, rather than objective facts, injects more subjectivity into the Fourth Amendment analysis. This is problematic in light of known and emerging data on implicit racial bias. According to Judge Wynn, police officers should be treated like any other expert witness and courts should at least reduce the deference officer testimony is typically afforded. Judge Wynn concluded:

If a veteran officer catches something that would elude a novice—a code word, a pattern, etc.—he may of course rely on it, so long as he can later explain in court why the fact is significant. But if an officer’s explanation is paltry or conclusory, as in this case, the judge must not hesitate to assign it less weight. *Id.* at 22 (Wynn, J., concurring).

Errors of law by trial counsel at sentencing constituted ineffective assistance of counsel

[U.S. v. Freeman](#), 992 F.3d 268 (Mar. 30, 2021). The defendant in this case from the District of South Carolina pled guilty to a drug distribution offense. She had developed a serious opioid addiction during her teen years, which culminated in forging prescriptions. She would keep half of the pills and sell the other half to a co-worker. State charges were eventually brought against the defendant, and she was indicted federally while in state custody. Probation initially indicated the defendant was responsible for distributing around 87,500 tablets of pain pills at the sentencing hearing. The defendant questioned that amount and complained of difficulty in contacting her attorney, as well as strategy disagreements with the attorney. Sentencing was continued for the defendant to obtain a new lawyer, and the parties agreed that the government would recalculate the drug amounts. Probation revised the drug amounts and indicated the defendant was responsible for distributing more than 175,000 pills. The defendant’s new attorney filed objections to the sentencing report, but waived all objections at the time of sentencing, apparently to the defendant’s surprise. The defendant initially indicated reservation about the decision to waive objections but concurred after speaking with her lawyer. Defense counsel instead moved for the defendant to be enrolled in a drug court program. The record indicated that defense counsel was not familiar with the program or its requirements. The district court denied the motion and sentenced the defendant to 210 months (at the low end of the recommended range).

On appeal, counsel filed a no-merit brief. The Fourth Circuit examined the matter and directed appellate counsel to argue ineffective assistance of trial counsel, as well as a sentencing challenge. A majority of the court reversed. The right to effective assistance of counsel applies to sentencing. Failure to investigate the law or facts of a case can constitute ineffective assistance, and the waiver of meritorious arguments may as well. Here, an objection to the drug weight would have resulted in a lesser sentence. Counsel also could have successfully objected to an enhancement for obstruction of justice, which would have reduced the offense level by five levels. According to the court:

[A]n objection to the adjustment was available and could result in significantly less sentencing exposure for Freeman. But counsel waived his client's objection to the obstruction enhancement because, he told the court, it would not affect his client's sentence. He was incorrect on the law. *Freeman* Slip op. at 12.

Other errors infected the sentence as well. After sentencing, defense counsel filed a civil motion to set aside the judgment, rearguing the objections that the defense had earlier waived. "Counsel's attempt to resurrect these issues immediately after waiving them indicates that he may have improperly advised his client regarding waiver at the sentencing hearing." *Id.* at 14. There was also evidence that counsel encouraged the defendant to waive objections to sentencing out of concern for creating a "hostile environment" in the courtroom. The court noted that while this explanation may justify waiving a meritless objection, it would never justify waiver of a meritorious objection. Thus, defense counsel was "woefully unprepared" for the sentencing hearing. These errors affected the defendant's sentence individually and collectively. In the words of the court:

On this record, it appears that counsel did not understand his client's sentencing exposure nor the law fundamental to his client's objections. His performance in this case was thus the kind of quintessentially ineffective assistance that lies beneath the constitutional floor. *Id.* at 15.

Given that the defendant was sentenced to around a decade more of prison time that she would have otherwise received, the prejudice from counsel's deficient performance was plain. The majority also found the sentence was substantively unreasonable as an additional ground. The sentence was therefore vacated, and the matter remanded for resentencing.

Judge Quattlebaum dissented and would have affirmed the trial court.

Right to notice before administrative segregation hearing was not clearly established; prison officials were entitled to summary judgment based on qualified immunity

[Halcomb v. Ravenell](#), 992 F.3d 316 (Mar. 30, 2021). The plaintiff was serving a life sentence in the District of South Carolina. Contraband was found in his cell, and he was given advance notice of a disciplinary hearing. He was found responsible at the hearing and transferred to disciplinary detention. A few days later another hearing was conducted, this time to determine the plaintiff's security classification within the prison in light of the violation. No advance notice of this hearing was provided to the plaintiff, and the hearing concluded with a recommendation to transfer him to more restrictive custody. The plaintiff sued under 42 U.S.C. 1983, alleging due process violations for the lack of notice. The district court agreed that the plaintiff was at least entitled to "fair notice" of the proceeding and denied qualified immunity for the defendants. A unanimous Fourth Circuit reversed, finding that the defendants were entitled to qualified immunity: "[W]e cannot conclude that the case law is so clearly established that a reasonable official would know whether prior notice of an administrative segregation hearing

is required.” *Halcomb* Slip op. at 9. The matter was therefore remanded with instructions for the district court to grant the defendant’s motion for summary judgment.

Plaintiff stated a due process claim for deliberate indifference to medical needs; order of dismissal reversed

[Mays v. Sprinkle](#), 992 F.3d 295 (Mar. 30, 2021). Police officers in the Western District of Virginia found a man asleep in a car with prescription pills next to him. He was impaired and officers arrested him for public intoxication, but he was released on his own recognizance. The next day, officers again found the man severely intoxicated in his car. A 911 caller reported that the man had consumed drugs and alcohol and needed medical attention. He was again arrested for public intoxication and taken to jail. The man fell asleep during the ride and could not exit the patrol car without assistance. He was placed into a cell without any medical attention. The man died in custody and his estate sued, alleging Eighth and Fourteenth Amendment violations. The district court dismissed the case, finding that the plaintiff failed to adequately plead deliberate indifference for the claims and that the officers were entitled to qualified immunity. The Fourth Circuit unanimously reversed.

The court noted that, as a pretrial detainee, the deceased was protected by the Due Process Clause of the Fourteenth Amendment and not the Eighth Amendment. Under either amendment, however, deliberate indifference to medical needs constitutes a violation, and courts examine Eighth Amendment precedent when addressing deliberate indifference claims under the Fourteenth Amendment. Such a claim has subjective and objective components: the plaintiff’s medical condition must objectively be a serious one, and the defendants must subjectively be aware of the medical condition and the risk of failing to address it. Qualified immunity applies unless the plaintiff shows that a constitutional right was violated and that the right was clearly established at the time. Here, although no physician or other medical professional diagnosed the defendant with any particular condition, his objective need for medical attention was “obvious” and was sufficiently pled by the estate. According to the court: “Mays could barely communicate, could not move his extremities without assistance, and could not hold himself up when he sat down.” *Mays* Slip op. at 14. The subjective prong was also properly pled. The district court found that officers lacked specific information about what substances the deceased had ingested and in what amounts, and that the defendants therefore lacked any subjective awareness of his condition. The complaint established enough facts from which it could be inferred that officers were aware of the need for medical treatment in light of the 911 call, the drugs found near the deceased, and his behavior. Factual disputes about the specifics of those circumstances could be argued at summary judgment or trial but did not support dismissal or qualified immunity at this stage.

The district court’s order of dismissal was therefore reversed and remanded.

North Carolina’s prayer for judgment continued counts as a prior adjudication of guilt for purposes of criminal history points under the Sentencing Guidelines

[U.S. v. Miller](#), 992 F.3d 322 (Mar. 31, 2021). The defendant pled guilty to firearm by felon in the Western District of North Carolina. The district court included a point in the defendant's criminal history based on a North Carolina state conviction for marijuana. The defendant had received a prayer for judgment continued ("PJC") in that matter. He challenged the inclusion of this conviction in his criminal history score. Under the Sentencing Guidelines, criminal history points may be assessed for "diversionary dispositions" when there is a finding or admission of guilt. North Carolina's PJC disposition is available when a defendant pleads or is found guilty and this diverts the defendant's case from regular sentencing. Federal law controls the interpretation of the Guidelines, not state classification. "Under the Guidelines, the adjudication or admission of guilt preceding entry of the PJC, rather than the ultimate outcome of the PJC disposition, places such a disposition in the category of cases assigned one criminal history point under Guidelines Section 4A1.1(c)." *Miller* Slip op. at 5-6. Finding the criminal history point was properly assessed by the district court, its judgment was unanimously affirmed.