

Case Summaries: Fourth Circuit Court of Appeals – (Dec. 23, 2020 and Jan. 8, 12, 13, 21, 22, 26, 27, and 28, 2021)

Error to deny evidentiary hearing on IAC claim for failure to investigate and present mitigating evidence of brain damage; district court properly denied alleged *Brady* and *Batson* violations

[U.S. v. Runyon](#), 983 F.3d 716 (Dec. 23, 2020). The defendant was convicted of conspiracy to murder, carjacking resulting in death, and murder with the use of a firearm relating to a crime of violence in the Eastern District of Virginia. The charges stemmed from his involvement as the shooter in a murder-for-hire killing of a U.S. Naval officer. The defendant received a death sentence and the Fourth Circuit affirmed on direct appeal. He sought habeas relief, alleging ineffective assistance of counsel (“IAC”), *Brady* violations, and a *Batson* violation, among other claims. The district court dismissed the petition and the defendant appealed.

The defendant claimed his trial attorneys were ineffective for failing to investigate and present evidence of his brain injury in mitigation at the penalty phase of the trial. Trial counsel was aware that the defendant had received head injuries from two car wrecks and a grenade explosion. A defense neuropsychologist examined the defendant and found some indications of brain damage. He recommended further medical investigation. A defense neuropsychiatrist also examined the defendant and ordered scans of his brain. A radiologist found the scans normal, but the test results were never provided to either defense expert. Neither expert testified at sentencing and the information they obtained was not otherwise used during the penalty phase. Trial counsel did submit 14 mitigating factors and called numerous other witnesses. The jury unanimously found 9 factors in mitigation (and a majority of the jury found four more), but it nonetheless imposed death.

Both defense experts reviewed the brain scans years later. They each testified at post-conviction that the scans indicated significant brain damage. Trial counsel testified that he sought evidence of brain damage but had difficulty finding records of the underlying incidents. He recalled the brain scans but did not know why the defense experts did not review them before trial and could not articulate why he failed to present evidence from the experts. Under these circumstances, the trial court erred in denying an evidentiary hearing on the IAC claim. Defense counsel had “red flags” about the defendant’s potential neurological impairments and the record was unclear on whether counsel’s decision to forgo this evidence was a strategic one. Prejudice similarly could not be determined without a more developed record. The district court’s judgment dismissing this claim was therefore reversed and the matter remanded for hearing.

As to the *Brady* claim, the defendant claimed that the government withheld evidence relating to a codefendant’s prior assaultive conduct, including allegations of sexual assault, an assault conviction, and the entry of an order of protection. According to the defendant, this evidence would have supported his arguments at trial that his codefendants (both sentenced to life) were equally culpable and could have

been used to attack the weight of an aggravating circumstance. He argued in the alternative that his attorneys were ineffective for failing to discover and present this evidence. This claim was properly dismissed by the district court. The jury found as a mitigating factor that the equally culpable codefendants had received life sentences, as well as numerous other mitigating factors. Under the circumstances, the evidence allegedly withheld was not material, because there was no reasonable probability of a different result at trial. According to the court:

[I]n light of all the mitigation found, the jury unanimously recommended the death sentence. Given the willingness of the jury to recommend death in the face of all of these mitigating factors, there is no reasonable probability that a more detailed understanding of [the codefendant's] criminal history would have made a difference. Slip op. at 28.

The inability to show prejudice defeated the IAC claim as to this evidence for the same reason, and the district court's judgment on these claims was therefore affirmed.

The defendant did not raise a *Batson* objection at trial. He nonetheless claimed a *Batson* violation on appeal, pointing to evidence that the government struck 70% of Black potential jurors from the venire (seven Black potential jurors). He also asserted in the alternative that trial and appellate counsel were ineffective for failing to raise the issue. The Fourth Circuit rejected these claims as well, again affirming the district court. Because the *Batson* objection was not made at trial, it could only be heard if the defendant could show good cause for defaulting the claim and prejudice resulting from the default. Here, the defendant failed to make out a *Batson* claim. All seven of the struck jurors indicated they had concerns about the death penalty. Further:

[T]he statistics on which [the defendant] relies are misleading and overlook the larger reality. . . [G]iven relatively steady percentage of Black potential jurors throughout jury selection — and indeed the slightly increased percentage of Black members on the empaneled jury — undermines [the defendant's] reliance on a statistical pattern to create an inference of discrimination. *Id.* at 32.

The defendant therefore failed to make a prima facie showing of a *Batson* violation, and trial and appellate counsel were not ineffective for failing to argue this claim.

Chief Judge Gregory concurred in part and dissented in part. He agreed with the majority's analysis of the IAC claim for failure to investigate the brain damage evidence but would have allowed the petitioner to be heard on the alleged *Brady* and *Batson* violations on remand as well.

Judge Wilkinson also concurred in part and dissented in part. He would have found that trial counsel's failure to investigate and present evidence of brain damage at the penalty phase was a reasonable strategic decision and that the petitioner could not show prejudice on the claim, but otherwise agreed with the majority opinion.

Total ban on internet access and all pornography as condition of supervised release was overbroad and unsupported by the record despite prior conviction for possession of child pornography

[U.S. v. Ellis](#), 984 F.3d 1092 (Jan. 8, 2021). In this case from the Western District of North Carolina, the defendant was convicted of state child pornography charges and was later convicted in federal court of

failure to register as a sex offender. The government sought conditions of supervised release that included a ban on internet access and a ban on all pornography. The pornography condition mandated that the defendant could not enter any location where pornography was accessible.

Reviewing for abuse of discretion, the court unanimously held that the total ban on all internet access and all pornography were overbroad. While total bans on pornography have been upheld where there is a showing that legal pornography could negatively affect the defendant's behavior, they will be struck where no such evidence appeared in the record. "Restrictions on otherwise legal pornography are permissible under § 3583(d) where the district court adequately explains why they are appropriate, and the record supports such a finding." Slip op. at 9 (citation omitted). Here, without any evidence showing the impact of legal pornography on the defendant's behavior, the condition could not stand. Further, the condition requiring the defendant to avoid any place where pornography could be found was far more restrictive than needed to ensure the defendant did not access pornography and would prevent the defendant from entering any variety of places where the internet is available.

The ban on internet access by the defendant likewise swept too broadly on the facts of the case. While total internet bans have been upheld where there is a relation between internet usage and the crime of conviction, here there was no such relation. The defendant's federal conviction was for failure to register and none of his violations of supervised release concerned internet usage. That the defendant had been convicted of possessing child pornography in the past was not enough to establish a relationship between the defendant's conduct and the need to restrict internet access on its own. "[E]ven though [the defendant] was convicted of crimes that are often carried out online, those convictions alone do not justify an internet ban under § 3583(d) absent some evidence of [the defendant's] own illegal internet activity. *Id.* at 17. Like the total ban on pornography, the total ban on internet use was similarly overbroad. "A complete ban on internet access is a particularly broad restriction that imposes a massive deprivation of liberty." *Id.* at 18-19. While a more targeted condition restricting internet use may be permissible, a complete ban has been found unjustified by a majority of circuit courts, even when the defendant's underlying crime involved viewing child pornography on the web. The district court's judgment was therefore reversed and remanded with instructions for the two conditions of release to be struck.

Judge Quattlebaum concurred in judgment. He would have found that both restrictions were overbroad but disagreed that the conditions were not reasonably related to the defendant's conduct and treatment.

Inadequate care claims of unaccompanied minor children in detention should be judged under the "substantial departure from accepted professional judgment" standard, rather than deliberate indifference standard; grant of summary judgment to defendants reversed

[John Doe 4 v. Shenandoah Valley Juvenile](#), 985 F.3d 327 (Jan. 12, 2021; amended Jan. 14, 2021). The plaintiffs were a class of unaccompanied minor children being held at a juvenile detention facility in the Western District of Virginia. Most of the children had fled violence from another country and had witnessed or experienced serious trauma. While the facility provided some therapy and medication management, it admittedly did not have qualified professionals capable of properly treating severe post-traumatic stress disorder or other serious mental illness. The plaintiffs alleged that they were forcibly punished by staff at the facility for what were effectively manifestations of their mental illnesses. One plaintiff spent at least a month in confinement over the course of seven months for disciplinary

infractions, and at least 45 children attempted suicide or other self-harm over the course of three years. According to the plaintiffs, staff often mocked the children over their self-harm, with comments like “let them bleed out.” An expert for the plaintiffs testified that the facility primarily relied on punishment rather than rehabilitation or treatment to control the children, and this approach was “not only unsuccessful, but extremely detrimental . . .” Slip op. at 14. The plaintiffs sued as a class and sought injunctive and declaratory relief under 42 U.S.C. § 1983, claiming excessive force and inadequate care (among other claims). The district court denied summary judgment as to the excessive force claim but granted it on the inadequate medical care claim. The plaintiffs appealed and a divided Fourth Circuit reversed.

A detainee is entitled to adequate medical care, including mental health care. Considering a question of first impression, the majority determined that the proper standard of care for detained immigrant children should be analyzed under *Youngberg v. Romeo*, 457 U.S. 307 (1982). Under *Youngberg*, “liability may be imposed only when the decision by the professional” represents a “substantial departure from accepted professional judgment.” *Id.* at 320-323. Pursuant to the relevant statutes authorizing the children’s detention, the children are to be held in the “least restrictive setting.” While other circuits have applied the deliberate indifference standard to detained adult immigrants, unaccompanied minors are expressly detained for caretaking purposes, unlike detained adult immigrants. The “substantial departure” test imposes liability at a lesser standard than the “deliberate indifference” standard, as it does not contain any element of subjective intent. The trial court erred in applying the deliberate indifference standard applicable to prisoners or pretrial detainees. It also erred in failing to view the evidence in the light most favorable to the plaintiffs. The grant of summary judgment was therefore reversed, and the matter remanded for further proceedings.

Judge Wilkinson dissented, rejecting the majority’s adoption of the “substantial departure” test as an improper extension of due process rights, as well as for “needlessly creat[ing] a circuit split,” and for improperly second-guessing detention center professionals.

Hearing impaired civil detainee was entitled to video phone calls under the First Amendment; district court verdict reversed

[Heyer v. U.S. Bureau of Prisons](#), 984 F.3d 347 (Jan. 13, 2021). In this case from the Eastern District of North Carolina, the plaintiff was a federal civil committee and was deaf. He sought to use point-to-point video phone calls, whereby he could communicate through sign language with other deaf individuals. The facility provided voice relay services (“VSR”) calls, which allowed the plaintiff to make calls relayed through a sign language translator to someone that does not use sign language, as well as TTY service (a teletypewriter that facilitates phone communication for hearing impaired individuals) and email. However, VSR by its nature does not allow communication between two deaf individuals, and the TTY and email services require the user be fluent in English. The plaintiff had limited proficiency with written English and struggled to make meaningful use of the available services. When the plaintiff sought point-to-point video calls (which would allow him to communicate in sign language with other deaf people), the facility refused. The plaintiff sued and alleged a First Amendment violation, among other claims. The district court found for the defendants following a bench trial and denied a subsequent motion by the plaintiff to modify the judgement. He appealed and a unanimous Fourth Circuit reversed.

To analyze the constitutional claims of a civil detainee, the court applied a modified version of the test from *Turner v. Safley*, 428 U.S. 78 (1987), examining the government’s “legitimate nonpunitive

objectives” and weighing them against the claimed constitutional deprivation. Here, the court found the policy of disallowing point-to-point calls implicated the plaintiff’s First Amendment rights, in that it restricted his ability to communicate with others outside of the facility. The facility provided rational and legitimate reasons for prohibiting the calls, including cost, safety, and rehabilitation of the defendant. However, the plaintiff had no alternate means of exercising his right to effectively communicate with other deaf individuals without the video calls. “[The plaintiff] lacks any other means of communication with the Deaf community that does not involve written English.” *Heyer* Slip op. at 24. Examining the impact on the facility of the requested accommodation, the court found no significant “ripple effects” would occur by allowing the video calls, and that existing prison security measures would adequately protect the facility’s interests in security. Finally, the court found that the facility’s total ban on video calls was an “exaggerated response” by the facility and that the facility had ready alternatives to a complete ban that would impose no more than de minimis cost. Concluding, the court observed:

The evidence at trial established that [the plaintiff] lacks any ability to communicate with the Deaf community. And the district court clearly erred by crediting BOP testimony about the risks of point-to-point calls without considering the wealth of testimony about safety features that have managed those risks for every other form of communication it makes available. Although we are hesitant to disturb the district court’s considered findings, we must do so here. *Id.* at 37.

The judgments of the district court were therefore reversed, and the matter remanded for entry of judgment for the plaintiff.

No error to deny continuance for new counsel to prepare a month before trial when the defendant hired and fired multiple attorneys and her final attorney stated that he would be prepared for trial

[U.S. v. Bennett](#), ___ F.3d ___; 2021 WL 209088 (Jan. 21, 2021). The defendant in the Maryland case defrauded investors of over 14 million dollars. She was convicted at trial of wire and mail fraud, securities fraud, conspiracy and other offenses. Before trial, the defendant cycled through multiple different attorneys, including several appointments of the Federal Public Defender’s office. A privately retained attorney withdrew in May 2018 and the Federal Defender was again appointed; new retained counsel appeared for the defendant on August 28, 2018 (about one month before trial). This lawyer filed a motion to continue, and the district court raised concerns about the ability of the new attorney to be prepared for the Oct. 2, 2018 trial, in the event the continuance was denied. Trial counsel represented that he would be prepared and declined the court’s offer to assist with discovery. The trial court denied the motion, finding that granting the continuance under the circumstances would give wealthy defendants an unfair strategic advantage:

[Granting the motion] would allow a defendant with financial means to upset the administration of justice by claiming to locate money right before trial, hiring new counsel and then having the newly hired counsel claim they cannot be ready for the previously scheduled trial. Slip op. at 5.

The trial court also denied a later motion to continue as prejudicial to the government. On appeal, the defendant claimed the district court erred by denying a continuance. The Fourth Circuit unanimously affirmed the trial court. The trial court thoroughly addressed its concerns that trial counsel would have difficulty preparing for trial at the late stage, and trial counsel “unequivocally” represented he would be

prepared. The defendant received representation from the counsel of her choice despite the trial court's warnings about the late substitution. Under these circumstances, the trial court did not abuse its discretion in denying the motion to continue.

Challenges to a criminal order of forfeiture and the sentence were likewise rejected and the judgment of the trial court was affirmed in full.

Probable cause existed to arrest passenger where the vehicle contained evidence indicating drug dealing and neither occupant admitted possession

[U.S. v. Myers](#), ___ F.3d ___; 2021 WL 243521 (Jan. 26, 2021). Under *Maryland v. Pringle*, 540 U.S. 366 (2003), if an officer discovers evidence of drug dealing in a car with multiple occupants, all of whom disclaim ownership of the contraband, it is reasonable for the officer to infer that each of the occupants knew about the contraband under the totality of circumstances. While probable cause requires “a reasonable belief of guilt . . . particularized with respect to the person’ being arrested,” and mere proximity alone to a crime is insufficient, when the circumstances justify an inference that the driver and occupants are acting with a common purpose (as is likely with drug dealing), probable cause exists to arrest each occupant. Slip op. at 9-10 (citation omitted).

An officer was watching a bus stop in the Eastern District of Virginia known as a drug trafficking hub and observed the defendant exit a bus from New York without any luggage. Within minutes, a car picked him up. Officers followed the car and suspected it violated state window tint law. The car passed two convenience stores and stopped a third, then travelled back to the bus stop area. Officers found these movements suspicious and eventually stopped the car for speeding and the window tint violation. Officers immediately noticed the smell of burnt marijuana when approaching the car. A search of the care revealed a 300-gram brick of fentanyl, along with a gun, cash, and multiple cell phones. The driver admitted that the gun, money, and phones were his, but neither he nor the defendant admitted to possession of the drugs. The officer arrested both. The defendant moved to suppress, arguing that no probable cause particularized to him existed supporting his arrest (he did not challenge the stop). After the motion was denied, the defendant pled guilty and appealed the denial of his motion.

On appeal, the Fourth Circuit unanimously affirmed. Officers knew the bus stop was a hub for drug smuggling; the defendant left the bus from New York without any luggage; the car that picked him up drove an “unusually circuitous route”; officers smelled marijuana after stopping the car; and a distribution-level amount of drugs was found, which neither occupant claimed (but which was accessible by each). On these facts, it was reasonable to infer a relationship between the two men under the totality of circumstances. That the driver here claimed some of the contraband items did not meaningfully distinguish the facts from those in *Pringle*. According to the court:

While the role of each occupant was not known to the officer [in *Pringle*], he well could conclude that the community of conduct suggested by the circumstances particularized the suspicion as to all three and thus justified their arrest. The same is true for [the defendant] and the driver of the silver Infiniti, in which the fentanyl was found. *Myers* Slip op. at 10.

The denial of the motion to suppress was therefore unanimously affirmed.

Failure to present expert testimony at state post-conviction defeated any claim of prejudice for IAC of trial and post-conviction counsel

[Vandross v. Stirling](#), ___ F.3d ___ (Jan. 26, 2021). The petitioner was convicted of murder and other offense in South Carolina state court. Extensive forensic evidence was presented at trial, some of which was inconclusive in linking the defendant to the crimes. Trial counsel pointed out the failures of the forensic evidence at closing argument but did not retain experts to combat the testimony or present expert testimony in opposition to it at trial. At state post-conviction proceedings, the petitioner argued his trial counsel was ineffective for failing to do so. His trial counsel testified at the hearing that he believed experts would have been helpful to the defense and that he failed to do so because the client could not afford expert services (trial counsel apparently failed to realize that state law entitled the client to funds for experts). However, the petitioner presented no expert testimony demonstrating how the lack of experts prejudiced his defense during the proceeding. The state post-conviction court found the failure to present expert evidence precluded a finding of prejudice and denied relief. The petitioner then sought habeas relief in federal district court, reiterating his argument and seeking to overcome procedural default by asserting that his state post-conviction counsel was ineffective in failing to present expert testimony at the hearing. The district court ordered funds for the petitioner to hire an expert, and the expert submitted an affidavit noting areas where forensic experts would have been helpful at trial in attacking the state's case. The expert did not perform any analysis of the forensics at issue and did not testify at the habeas hearing. The district court granted summary judgment to the defendant. It agreed with the state post-conviction court that the petitioner's failure to present expert testimony at state post-conviction precluded a finding of prejudice for purposes of ineffective assistance of trial counsel. It also found that the petitioner's failure to present substantive evidence at federal habeas precluded a finding that his state post-conviction counsel was ineffective. The petitioner appealed and the Fourth Circuit affirmed.

The claim that trial counsel was ineffective for failing to retain experts and present expert testimony was considered on the merits in state court. The claim was therefore procedurally defaulted in federal habeas unless the petitioner can demonstrate that the state court's resolution was contrary to federal law, an unreasonable application of federal law, or an unreasonable interpretation of the facts. The petitioner here could not meet that standard. According to the court:

[The district court] . . . concluded correctly that no evidence was presented or offered to show prejudice in that any of the forensic evidence presented by the State at trial was flawed. While [the petitioner] did point out various gaps in the State's evidence, he highlighted those gaps to the jury. Moreover, he did not offer or present any evidence to the state PCR court that would have filled the gaps such that it would show a reasonable probability of a change in the result. Slip op. at 13.

As to the claim of ineffective assistance of post-conviction counsel, federal habeas review of state convictions is limited to the record in state court. Under *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), a procedurally defaulted claim may be excused in certain circumstances where post-conviction counsel is ineffective in failing to present the claim to the post-conviction court. However, *Martinez* does not authorize new evidence in support of a claim already decided on its merits. The federal district court therefore erred in considering the new affidavit of the expert submitted on behalf of the petitioner at habeas. Even considering the affidavit on the merits though, the district court correctly concluded that it

failed to provide substantive evidence and therefore could not demonstrate prejudice. The Fourth Circuit affirmed on that basis in the alternative. The affidavit merely identified grounds that forensic experts could have investigated which may have helped the defense. This defeated any claim of ineffective assistance of post-conviction counsel:

More is required. When a petitioner’s ineffective assistance of counsel claim rests on trial counsel’s failure to call particular witnesses, expert or otherwise, we require ‘a specific proffer . . . as to what an expert witness would have testified.’ A petitioner’s failure to do so ‘reduces any claim of prejudice to mere speculation and is fatal to his claim.’ *Vandross* slip op. at 19.

The district court’s denial of habeas relief was therefore unanimously affirmed in full.

No error to deny *Franks* hearing where defendant failed to show the officer acted with intent to mislead the magistrate by omitting facts about the informant

[U.S. v. Haas](#), ___ F.3d ___; 2021 WL 261988 (Jan. 27, 2020). The defendant in this case from the Eastern District of Virginia had previously hired a woman as a prostitute and had expressed to her his desire for “younger women.” The defendant again contacted the woman and they met, where he showed her images of child pornography. He eventually requested her help in obtaining children in order to create child pornography. The woman then contacted the FBI and agreed to work as an informant against the defendant. She told the agent that she had previously been convicted of prostitution and was on probation. She then fabricated a story that she had access to children out of state and shared it with the defendant. He repeatedly contacted her about that possibility. During a recorded phone call between the two, the defendant expressed his desire for children around 8 years of age. While this investigation was underway, the woman was pulled over by local police on traffic violations and gave them a false name. The next week, she admitted this to the FBI agent and expressed a desire to resolve the local matter. The defendant was arrested on unrelated state charges of molesting a child and the FBI obtained search warrants for his home and car. Neither affidavit in support of the warrants included the information about the informant’s prior conviction, her status on probation, or the false information to she provided to local police. As a result of the searches, the defendant was charged with attempted sex trafficking of a minor, as well as receipt and possession of child pornography. He moved to suppress the two search warrants, arguing a lack of probable cause and requesting a *Franks* hearing for alleged material omissions in the warrant affidavits (at two separate times). The district court denied the motions and refused to hold a *Franks* hearing. The defendant was convicted on all counts at trial and sentenced to life without parole. He appealed.

Under *Franks v. Delaware*, 438 U.S. 154 (1978), the defendant is entitled to a hearing on alleged falsehoods or misleading omissions in a search warrant affidavit if he or she makes a “substantial preliminary showing” that material information in the affidavit was false or misleading. With omissions, the defendant is required to show that the decision to not include the information was made “knowingly and intentionally, or with reckless disregard for the truth,” and that no probable cause would have existed had the omitted information been included. *Haas* Slip op. at 7 (citation omitted). The defendant argued that the affidavits intentionally omitted the informant’s criminal history, her credibility as an informant, and any corroborating evidence that she saw child pornography on his computer. As to the corroborating evidence argument, this went to the existence of probable cause—the addition of this information to the warrant would not have overcome probable cause under the circumstances. As to

her credibility as an informant, the defendant failed to allege any facts in support that she was unreliable:

If these unidentified ‘outcomes’ [of the informant’s prior work] were known and consistently showed that [the informant] provided misinformation, they could have formed the basis to grant a *Franks* hearing. But without that, we conclude that [the defendant’s] second argument did not warrant a *Franks* hearing. *Id.* at 8.

As to the informant’s criminal history, an affiant is neither expected nor required to include all known information. Here, the informant’s lie to local police did not concern any aspect of the investigation of the defendant, and the informant was truthful with the FBI about that encounter (the FBI also kept her as an informant after that episode). Further, “nothing about her unrelated criminal history so undermined her credibility that we otherwise would question the agent’s subjective intent.” *Id.* at 13. The district court therefore correctly determined the defendant failed to make the necessary preliminary showing that the agent acted intentionally and did not err in denying the *Franks* hearings.

A challenge to post-verdict motions was rejected, but the defendant prevailed on a challenge to his sentence based on an improper enhancement. The case was remanded for a new sentencing hearing, and the district court was otherwise unanimously affirmed.

Refusal to consider plaintiff’s outstanding discovery requests and verified complaints at the summary judgment stage was error and required a new hearing

[Goodman v. Diggs](#), ___ F.3d ___; 2021 WL 280518 (Jan. 28, 2021). The plaintiff was a mobility-impaired inmate in the Eastern District of Virginia. He sued corrections officers pro se in 2012 over allegations of excessive force in violation of the Eighth Amendment. The case has a lengthy procedural history. Most recently, the district court granted summary judgment to the defendants. While the defendant had filed two verified complaints, he filed an additional third pleading (the second amended complaint) which was not verified. He objected to summary judgment and pointed to his complaints as evidence of material facts in dispute but did not file any documents with new information. The district court held that the defendants’ evidence in support of summary judgment was uncontradicted and refused to consider the plaintiff’s verified complaints. The Fourth Circuit vacated and remanded for a new hearing.

A non-moving party at summary judgment cannot typically rely only on its complaint in opposition to a defendant’s motion for summary judgment. “However, it is well established that ‘a verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge.’” Slip op. at 9 (citation omitted). That the plaintiff later filed a superseding, unverified complaint did not alter this conclusion—a position shared by several other circuits: “[A]n amended complaint does not divest an earlier verified complaint of its evidentiary value as an affidavit at the summary judgment stage.” *Id.* at 12. The district court therefore erred in failing to consider the verified complaints in its summary judgment analysis, and the matter was remanded for a new hearing.

The plaintiff also had numerous discovery requests outstanding. Summary judgment is typically inappropriate before the discovery process has concluded. The records and information sought by the plaintiff were material to his claim and could have altered the summary judgment analysis. The district

court was instructed to consider the discovery requests on remand as well, and to reconsider summary judgment in light of any new discovery in addition to the plaintiff's verified complaints.