

Case Summaries: Fourth Circuit Court of Appeals (July 1, 2, 9, 10, 12, 16, 19, 22, 25, and 29, 2024)

No error to summarily deny suppression motion where facts were not in dispute; no constitutional violation for failure to inquire about racial bias during voir dire or for impairment of defendant's peremptory strikes; defendant was not entitled to enforce terms of plea bargain between his witness and the government; no error to refuse to play the entirety of the defendant's jail calls for the jury during closing argument

[U.S. V. Bowman](#), 106 F.4th 293 (July 1, 2024). Law enforcement in the Western District of Virginia had information that methamphetamine was being sold from the defendant's residence. They obtained a search warrant for the home and cars within the curtilage and an arrest warrant for the defendant. Officers found nearly 1,000 grams of meth in the defendant's car, a lock box containing a cell phone, and a drug ledger with detailed records of transactions. The defendant was not present when officers arrived, but his girlfriend, Carr, was present during some of the search. The defendant was arrested at a nearby hotel the same day. He was carrying more than \$7,000 in cash and an additional cell phone. Officers asked the defendant to talk in the hotel room. Upon entering the room, unprompted, he stated, "I'm good at what I do, and I'm connected to the Sinaloa Cartel." A DEA agent immediately told the defendant to stop talking and read him *Miranda* warnings, after which the defendant agreed to talk without a lawyer. He went on to admit that he was a drug dealer, and said the meth found at his house was part of a 20-pound shipment that he moved from California to Virginia in a spare tire. He claimed the meth was from the cartel and admitted he had transported between 150-200 pounds of meth during the last year. The defendant was arrested and indicted on drug distribution offenses. While in pretrial custody, he made several phone calls to his girlfriend, directing her to collect money owed from drug transactions and making further admissions of his involvement in drug sales. While his girlfriend eventually pleaded guilty, the defendant went to trial. After cycling through two court-appointed lawyers, he chose to represent himself.

The defendant filed a motion to suppress the first statements made in the hotel room about his connection to the cartel. The district court summarily denied the motion, finding that the motion failed to state a claim, given that it did not allege the statement was made during a custodial interrogation.

During voir dire, the defendant asked the district court to ask prospective jurors the following questions:

- 1) Should law enforcement have to abide by the same hunting and fishing regulations as everyone else?
- 2) Do you believe it's okay to stereotype people?
- 3) What do you think about black and white marriage?
- 4) Do you believe in common law marriage?
- 5) Do you think it's right for the government to use scare tactics?

The district court declined to ask any of the questions. Both parties were given a "juror strike list," which showed the name, general place of residence, and occupation of each potential juror. The defendant saw that government had a different list with additional juror information on it, including their addresses,

level of education, employment information, birth year, and similar demographic information (apparently provided to the government by the trial court). The defendant complained, but the district court did not rule on his objection to the government's juror list. Instead, the judge asked the defendant whether he intended to exercise his peremptory strikes. The defendant refused to do so under the circumstances, and the district court ultimately exercised the defendant's peremptory strikes on his behalf.

The government presented evidence at trial about standard drug trafficking operations and tied that evidence to the physical evidence in the case, in addition to the defendant's admissions and the jail calls. The defendant called his girlfriend to testify, but Carr invoked her privilege against self-incrimination. Another defense witness testified that she sold the defendant car tires, apparently in an effort to show that the defendant was a car dealer instead of a drug dealer. During closing argument, the government replayed part of a selection of the jail calls. The defendant objected and asked that the calls be played in full during his closing. The district court initially denied that request, thinking that only portions of the calls had been admitted into evidence. After the defendant's closing argument, the judge realized that the calls had been admitted in full. Each call was around 16 minutes. Instead of reopening argument or playing the calls for the jury, the trial judge instructed the jury on how to listen to the calls and told them that the defendant wished for them to listen to them in their entirety because he believed the government's presentation of the calls was misleading. The jury convicted the defendant on all counts, and he was sentenced to 360 months.

On appeal, the defendant (now represented) first argued that the denial of his motion to suppress without a hearing was error. The Fourth Circuit disagreed. The decision to conduct an evidentiary hearing is within the discretion of the trial judge. A hearing is only required when there are material factual disputes to resolve. It is the defendant's burden to show disputed facts, and the defendant here failed to do so. According to the court:

The motion only asserted that his statement should be suppressed because he made them before he was *Mirandized*. The Government did not contest that order of events. So the district court didn't have to hold an evidentiary hearing—it needed only to resolve the *legal* dispute of whether, taking the facts as the parties agreed them to be, Bowman's Fifth Amendment rights were violated. *Bowman* Slip. op. at 9 (emphasis in original).

The defendant argued that his limited access to discovery prevented him from developing evidence in support of the motion. He also noted that he claimed during trial to have requested a lawyer before making the statement. The court was unpersuaded. The defendant still could have alleged facts in dispute in support of his motion, even if discovery access was limited. Further, even if he had requested a lawyer before making the initial remarks to the DEA agent, his *Miranda* protections still would have been waived by his unsolicited, spontaneous remark.

The defendant next complained of the district court's handling of jury selection. The defendant argued his proposed questions should have been asked to root out any racial bias in the pool. The defendant is Black, and the entire jury pool was White. While the trial court has a duty to inquire into racial bias upon request when race issues are "inextricably bound up with the conduct of the trial," such was not the case here. *Id.* at 13. Other than the fact that the defendant's girlfriend was White, racial issues were not germane to the case. In the words of the court:

True, Carr is White, and the Government presented evidence that Bowman and Carr were romantically involved. Yet we explicitly held in *Barber* that the mere existence of an interracial relationship is not enough to show that race is so inextricably bound up in a case that the Constitution requires the district court to ask about racial prejudice. We also reject Bowman's invitation to assume that, because the jury pool was all White, there was a constitutionally significant risk of racial prejudice. In our system, there is no constitutional presumption of juror bias for or against members of any particular racial or ethnic group. *Id.* at 14 (cleaned up).

There may be times when the trial court abuses its discretion and reversibly errs by failing to inquire about racial bias even when not constitutionally required, but the defendant here only made a constitutional argument and did not argue the trial court abused its discretion.

As to the district court's use of the defendant's peremptory strikes, the defendant again only argued that this violated his constitutional rights. "But the denial or impairment of one's peremptory strikes only amounts to constitutional error if he can show that a 'member of his jury was removable for cause.'" *Id.* at 16 (citing *Rivera v. Illinois*, 556 U.S. 148, 157 (2009)). The defendant admitted that he could not make that showing at oral argument. Regarding the different jury lists, the court observed that it is not unusual for parties to have different amounts of data on potential jurors, especially when one party is representing himself *pro se*. "Yet the Sixth Amendment does not require district courts to ensure equality of information and ability." *Id.* at 19. The court noted that it was improper for the district court to provide different juror information to the government and denounced that practice. "But while the district court could have conducted jury selection better, that doesn't mean it violated Bowman's constitutional right to an impartial jury." *Id.*

The defendant also alleged error in the district court's decision to allow Carr to invoke the Fifth Amendment, pointing out that Carr's plea bargain with the government required her to waive her right to remain silent. While that was true, that plea bargain was between Carr and the government, and the defendant was not entitled to enforce it. In fact, the district court lacked authority to enforce that bargain at the defendant's request. Carr was awaiting sentencing and could have increased her exposure by testifying at the defendant's trial. "The district court's obligation, therefore, was not to enforce the Government's contractual rights—it was to ensure Carr could exercise her constitutional rights." *Id.* at 21.

Finally, there was no error in the district court's handling of the jail phone calls at closing argument and during jury instructions. The district court asked the defendant to identify any specific portions of the call he wanted to be played for the jury to provide the alleged missing context from the government's presentation of them, but he was unable to do so. It was within the discretion of the trial court to deny the defendant's request to play the entire phone calls, and likewise within its discretion to instruct the jury that the defendant wished for the jury to listen to the calls in full.

The judgment of the district court was therefore unanimously affirmed.

Multiple conspiracy convictions violated double jeopardy, but ineffective assistance for failing to make the challenge could not be determined on the cold record; denial of habeas petition vacated and remanded for evidentiary hearing

[U.S. v. Slocum](#), 106 F.4th 308 (July 1, 2024). In this case from the Southern District of West Virginia, the defendant was tried by a jury for one count each of conspiring to distribute heroin and conspiring to distribute oxycodone under the same statute (21 U.S.C. 846), among other charges. He was convicted on all counts and sentenced to 360 months. His direct appeal was unsuccessful, and he sought habeas relief *pro se*, arguing that trial counsel was ineffective in failing to raise a double jeopardy challenge to his multiple conspiracy convictions. The defendant maintained that there was only a single conspiracy to distribute both drugs. The district court denied the petition without holding a hearing, finding that the defendant did not show a double jeopardy violation. The Fourth Circuit disagreed and reversed.

The Double Jeopardy Clause protects against both a defendant being twice punished for the same offense and against a defendant being twice prosecuted for the same offense. *United States v. Ragins*, 840 F.2d 1184, 1187 (4th Cir. 1988). While the same elements test of *Blockburger v. U.S.*, 284 U.S. 299 (1932), is the guidepost for determining whether the same conduct constitutes two distinct crimes, it is “a poor fit” for determining whether criminal conduct amounts to multiple violations of the same criminal law (as the defendant argued here). According to the court: “. . . [T]he *Blockburger* test applies only when the government charges distinct offenses arising under separate statutes.” *Slocum* Slip op. at 8 (cleaned up). The same elements test is particularly unhelpful when determining whether a defendant engaged in multiple conspiracies. Instead, the Fourth Circuit and others have adopted a totality of the circumstances approach to determining the existence of multiple conspiracies. Under that test, the court should consider the time frame of the alleged conspiratorial acts, the statutory offenses charged, the location of the alleged crimes, the identity of the co-conspirators, and the overt acts or other circumstances in furtherance of the conspiracy that speak to the nature and scope of the conspiracy. Although subsequent circuit and U.S. Supreme Court precedent overruled the “overt act” element of a conspiracy charge under 21 U.S.C. 846, the factors under the totality of circumstances test remain useful. At base, the question is a factual one—were there multiple conspiracies or only one? A conspiracy to distribute drugs may involve the distribution of multiple controlled substances, as the circuit has recognized many times. “It is the factual circumstances that inform whether a defendant entered into one overall agreement to commit multiple crimes, or, instead, multiple agreements to commit separate crimes.” *Id.* at 10-11. Here, the balance of factors showed only one conspiracy. There was substantial overlap between the relevant time frame, locations, co-conspirators, and the nature and scope of the conspiracies. The defendant therefore successfully showed that his dual conspiracy convictions violated double jeopardy.

That said, the double jeopardy argument was raised in the context of an ineffective assistance of counsel claim. To show ineffective assistance, the petitioner will need to show deficient performance that prejudiced him. If defense counsel made a reasonable strategic decision not to pursue a double jeopardy argument, the petitioner could not show ineffective assistance. Whether such decision was reasonable will turn in large part on whether the precedent existing at the time suggested that the double jeopardy argument would be successful. None of this was clear from the record and a remand for an evidentiary hearing was required. Thus, the district court’s decision summarily denying the habeas petition was vacated and the case remanded for further proceedings.

Chief Judge Diaz penned a separate concurrence. He agreed that the dual conspiracy convictions violated double jeopardy protections but would have also held that relevant authority at the time of the trial strongly suggested that the double jeopardy argument would have been successful. He would have limited the scope of the remand to the question of defense counsel’s motivations in failing to bring the

double jeopardy challenge only (and not included the question of the strength of the double jeopardy precedent at the time).

Despite never spending the night, the defendant had standing to bring a Fourth Amendment claim as a close and regular social guest of his cousin's home, but lawful warrant for his arrest allowed police to enter the property, leading to the plain view seizure of a gun

[U.S. v. Green](#), 106 F.4th 368 (July 2, 2024). The defendant was a suspect in an armed home invasion. While investigating, police discovered that the defendant had a prior felony conviction for robbery and obtained a warrant for his arrest for various offenses. Within a few days of the home invasion, an officer observed the defendant driving erratically during a 'road rage' event with another driver. While surveilling the defendant, the officer saw him park at a residence and enter the back yard. The officer reported to the warrant squad that the defendant was sitting in a gazebo in the back of the residence with another man. The team of officers charged with executing the arrest warrant was concerned with the possibility of violence from the defendant, given the circumstances of the home invasion, the road rage incident, and the defendant's criminal history. In addition to a coordinated approach by officers on the ground from the front and back of the residence, law enforcement arranged for a police helicopter to cover the scene from the air. The first officer to contact the defendant (while still on the perimeter of the property) pulled his gun out and informed the defendant he was under arrest. The defendant pulled a gun and held it "in a non-threatening manner." The same officer alerted the other officers to the presence of the weapon as they converged on the yard. The defendant put the gun down on a shelf of the gazebo and started moving towards the back of the yard. A number of officers effectuated the defendant's arrest there. The first officer climbed over the fence and started towards the gazebo to secure the gun left by the defendant. The man who was sitting with the defendant remained in the gazebo and officers discovered that he was the property owner and the defendant's cousin. The gun matched the description of the weapon used in the home invasion and was photographed and seized. The defendant was federally indicted for possession of a firearm by a felon and moved to suppress. The district court denied the motion, finding that the defendant lacked standing to challenge the law enforcement entry onto the property. While the defendant presented evidence from his cousin at suppression showing that the defendant was a regular guest at the home and able to move freely about the residence, he never spent the night in the house. The defendant was convicted at trial and appealed.

Under *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990), an overnight guest has a reasonable expectation of privacy in the home of another. On the other hand, under *Minnesota v. Carter*, 525 U.S. 83, 90 (1998), a person visiting a home for purposes of conducting a commercial transaction lacks a reasonable expectation of privacy. Here, the defendant was a regular social guest of the property owner. While being an overnight guest is an important factor in determining whether someone has a reasonable expectation of privacy in the home of another, "what matters most is the social as opposed to commercial nature of [the] relationship and visit, and not whether the visit includes an overnight stay." *Green* Slip op. at 12. The court noted it was not adopting a blanket rule that all social guests will always have standing, but on these facts, the defendant did. He was close with the property owner and had a family relationship with him. The defendant regularly visited the home for long stretches of time, and always did so in a social capacity. He was also able to come and go freely, was allowed to access all parts of the home, and could invite his own friends to the place. "Taken together, these factors indicated precisely the 'degree of acceptance into the household' that generates a reasonable expectation of privacy for a social guest." *Id.* at 13 (citation omitted). That the defendant brought his firearm onto the

property without the knowledge of the homeowner did not alter the analysis. The district court therefore erred in concluding that the defendant lacked Fourth Amendment standing.

Nonetheless, the defendant's Fourth Amendment challenge failed on the merits. Police had a lawful warrant for arrest, had reason to believe the defendant was on the property, and saw the gun in plain view from there. Officers were in the process of arresting the defendant when the first officer climbed over the fence and went to secure the gun. The arrest was still in progress at that point, which was around 15 seconds after the initial officers entered the yard. The unattended firearm, with an unidentified man sitting next to it on the gazebo, potentially posed a threat to the officers making the arrest and was properly seized pursuant to the plain view exception. Thus, both the entry by police onto the property and the subsequent seizure of the gun were lawful.

The district court's judgment was therefore affirmed by a unanimous court.

Divided court holds short-term location data shared by Google in response to geofencing warrant did not amount to a search

[U.S. v. Chatrie](#), 107 F.4th 319 (July 9, 2024). A bank was robbed in the Eastern District of Virginia, and police were unable to determine a suspect. Security cameras in the bank showed that the robber possessed a cell phone, and the detective applied for a geofencing warrant to obtain information from Google for a 150-meter area around the bank for the thirty-minute periods of time immediately before and after the robbery. The information obtained as a result ultimately led police to the defendant and he was indicted in federal court for various offenses relating to the armed robbery. He moved to suppress, arguing that the geofencing warrant violated his Fourth Amendment rights. The district court denied the motion. It declined to squarely resolve the Fourth Amendment question, instead finding that the officer was allowed to rely on the geofencing warrant under the good-faith exception. The defendant pled guilty and appealed.

On appeal, the Fourth Circuit undertook a detailed analysis of geofencing warrants. Cell phones operating with Google software at the time of the search warrant in the case had a setting for "Location Services." This is a setting users can choose to activate, whereby Google tracks the movement of the phone. By default, Location Services are turned off. There are user benefits to the service, such as tracking the phone if it is lost, and personalized recommendations based on location. The service also generates advertisement revenue for Google. Users must perform several steps to activate the service, including enabling location sharing, opting in to Location History on a Google account, enabling Location Reporting, and signing into a Google account. Google provides explanatory text about the nature of the location service before a user can activate it. Once the service has been activated, users still maintain some control of the location data. They may edit or delete all or parts of past data collected, and they may pause the service at any time. When activated, the location of the phone is always monitored by Google via GPS tracking, regardless of whether the phone is in use. Android phones have an additional option to enable "Google Location Accuracy," which uses additional data inputs like cell towers and wireless network contacts to further refine the location data. This data is stored by Google for study and use in other applications. Starting in 2016, law enforcement began sending geofencing warrants to Google, whereby Location History data for all users within a set geographic area (the "geofence") over a particular timeframe would be disclosed. Geofence warrants only operate to obtain data from users who have Location History enabled; when the service is not enabled, the location data of the user is not collected by Google. The numbers of these kinds of law enforcement requests grew 1500% from 2017-

2018, and another 500% in the following year. Since the time of the search warrant in the defendant's case, Google has amended its policies on geofencing warrants, which the court did not consider.

Google has developed an internal procedure for handling these warrants. First, the warrant must request anonymized data showing the phones within the geofence at the relevant time. Second, law enforcement reviews that data and may request additional information about any of the users identified at step one. Here, unlike in the first step, Google can provide additional information about a given user, including their location both inside and outside the geofence area and over a longer period of time. Google typically will only provide this more detailed information about user locations for a shorter list of users than the greater pool of users identified at step one. Last, Google can provide information that identifies a user by account information, but only once law enforcement has again narrowed the pool of users from the list provided at step two.

A divided panel of the Fourth Circuit affirmed the denial of the motion to suppress, but on different grounds than the district court. Under the third-party doctrine, information voluntarily shared with others is unprotected by the Fourth Amendment, because a person lacks a reasonable expectation of privacy in such information. *U.S. v. Miller*, 425 U.S. 435, 443 (1976). While that rule has sometimes been in tension with evolving technology, it remains good law. In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc), the court explored the contours of the tension between privacy rights and information voluntarily exposed to others, interpreting the evolution of precedent to draw a line between “short-term public tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns.” *Chatrie* Slip op. at 17 (cleaned up). Although *Beautiful Struggle* did not discuss the third-party doctrine, the sweeping and constant aerial surveillance at issue there intruded upon reasonable expectations of privacy because of the breadth of the otherwise-public information gathered. According to the majority, geofencing warrants like the one here—where only two hours of data from a set time and location were gathered—were different. The information sought and obtained by law enforcement in the current case was much more limited in scope, more akin to traditional public surveillance, and revealed much less private information about the defendant. The defendant also consented to share this information with Google, with Google making it clear to users what data is being collected, how it is being collected, and what options users have to edit, delete, or limit it. This case was distinguishable from *U.S. v. Carpenter*, 585 U.S. 296 (2018), where the cell site location data was shared with the communications company involuntarily by the very nature of the device. Also unlike the cell phone in *Carpenter*, Location History is not an indispensable feature of modern life. Most users of Google phones—about two thirds—choose not to activate Location History. In the words of the court:

The third-party doctrine therefore squarely governs this case. The government obtained only two hours' worth of Chatrie's location information, which could not reveal the privacies of his life. And Chatrie opted into Location History . . . This means that he knowingly and voluntarily chose to allow Google to collect and store his location information. In doing so, he too the risk, in revealing his affairs to Google, that the information would be conveyed by Google to the Government. *Chatrie* Slip op. at 22.

Because the defendant had no reasonable expectation of privacy in this information, no search was conducted within the meaning of the Fourth Amendment when the government obtained it, and the motion to suppress was properly denied.

Responding to the dissent, the court stressed that *Carpenter* did not overturn the third-party doctrine, and that the majority was simply applying established Fourth Amendment principles. Both the electronic tracking device line of cases and the third-party doctrine line of cases from the U.S. Supreme Court remain important considerations when deciding cases involving searches of digital data. While the information obtained here could certainly reveal some private information about the defendant (and others), this “brief glimpse” into the defendant’s life was closely circumscribed to a narrow timeframe and did not allow law enforcement to determine his longer-term movements and associations. The court criticized the dissent’s suggested multi-factor balancing test approach to resolving the question of whether the defendant had a reasonable expectation of privacy. In the words of the majority:

Instead of faithfully apply[ing] established principles to the case before us, the dissent would have us depart from binding case law and apply a novel, unwieldy multifactor balancing test to reach the dissent’s preferred policy outcome. We decline the invitation. Our Fourth Amendment doctrine compels a clear result here. If one thinks that this result is undesirable on policy grounds, those concerns should be taken to Congress. *Id.* at 35.

In a nearly 70-page dissent, Judge Wynn disagreed. He would have ruled that the geofencing information here was a search within the meaning of the Fourth Amendment and faulted the majority opinion for permitting geofencing information to be disclosed without a warrant.

Discovery process could lead to material disputed facts on circumstances immediately before shooting; error to grant pre-discovery motion for summary judgment on behalf of trooper

[Boyle v. Azzari](#), 107 F.4th 298 (July 9, 2024). In this case from the District of Maryland, a state trooper heard a dispatch call about a suspicious armed man in a nearby neighborhood. The trooper went to the house next door to the reported location and parked in the driveway. He did not turn on his lights or sirens. He got out of his car and noticed a man at the house next door with what appeared to be a gun (but was in fact a replica). The trooper believed the man pointed the gun at him, pulled his own service weapon, and fired at least eleven shots, one of which hit the man. The trooper moved closer to the man, yelling commands and reloading. He noticed the man also had a knife and that he was bleeding from his right arm. Around sixty seconds after the initial gunshots, the man was on his knees and the trooper was 15-25 feet away from him. The trooper fired four more times, repeatedly hitting the man. The man later died, and his estate filed suit claiming excessive force and other claims. The trooper moved to dismiss and, in the alternative, sought summary judgment before discovery could be conducted. The plaintiff opposed both motions and requested that discovery be conducted before the district court ruled. In support, the plaintiff submitted a statement from a neighbor who had witnessed part of the interaction between the trooper and the decedent. While some of the neighbor’s statement was ambiguous, she described the decedent as having had his hand up while on his knees and as having been in a “dazed” state. The district court granted the trooper’s request for summary judgment, finding that the plaintiff failed to show that the discovery process would lead to contested material facts. According to the district court, it was clear that the decedent was armed with a knife even after the initial gunshots, and, whether he was on his knees or not, the trooper was justified in using deadly force. The plaintiff appealed, and a divided Fourth Circuit reversed.

Summary judgment is typically only appropriate after discovery, and the district court here erred by deciding the summary judgment motion before that process could occur. The plaintiff specifically informed the court that discovery would assist her in responding to the trooper’s motion, pointing to

contradictions in the trooper's account of the incident and noting important documentation that she had not yet obtained (such as the autopsy report). Additionally, the record as it stood indicated at least a potential dispute of material fact. While the trooper claimed that the decedent was moving towards him at the time of the second round of shots, the neighbor's account stated that the decedent was trying to stand up at the time. "These accounts of the moments immediately preceding the use of force, the core issue in every excessive force case, directly conflict." *Boyle* Slip op. at 8. The district court was aware of this factual dispute, but ruled it was immaterial, since the trooper's use of deadly force was authorized under either account. This was incorrect. Whether the force was excessive is determined by examining the totality of circumstances immediately before the use of force. According to the court:

Deadly force is only permitted if a reasonable officer would have had probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others. And we have previously held that an officer may not use force against an incapacitated person unable to get up or defend himself, even if the person is armed. *Id.* at 9 (citations omitted).

The autopsy report and more information about the distance between the trooper and the decedent at the time of the deadly force could show triable issues of fact. The district court's judgment was therefore reversed, and the case remanded for discovery to proceed.

Judge Faber, sitting by designation, dissented. He would have affirmed the judgment of the district court based on his belief that the facts showed that the officer was entitled to qualified immunity.

Border search exception justified warrantless seizure of cell phones; suspicion that defendant conspired to illegally export arms justified forensic search of the phones

[U.S. v. Nkongho](#), 107 F.4th 373 (July 10, 2024). Law enforcement suspected the defendant of participating in a money laundering conspiracy and illegal export of weapons. The conspirators convinced military defense contractors to send them military equipment worth millions of dollars by misrepresenting that they were connected to the U.S. Navy. After law enforcement traced and recovered some of the missing property, they located two members of the conspiracy. One of those men shared with agents that he knew the leader of the conspiracy. The alleged ringleader had been deported from the U.S. to Nigeria, but his wife (the defendant) remained in the U.S. The man further shared that he had recently been in touch with the ringleader, who had proposed a new scheme within the last few months. The ringleader directed the man to turn over profits to the defendant, and the man ultimately gave the defendant more than \$200,000. Federal authorities allowed the operation to continue for a while, surveilling various members of the conspiracy and learning more about its scope and membership. The lead agent on the case discovered that the ringleader would soon be meeting his wife in Cuba. That agent arranged for customs officials to stop and search the defendant before she could leave the country. When customs officials stopped her at the airport and asked if she was travelling with cash, she reported around \$5,000. She actually had \$8,500. The authorities then let her travel on to Cuba. When she came back into the U.S., customs officials seized four cell phones from her and her children. Customs sent the phones to Homeland Security. Those officials were unsure of whether they needed a warrant to forensically examine the phones and received conflicting advice from their in-house counsel and the local U.S. Attorney's office. Nine days later, Homeland Security officials applied for and received a search warrant to examine the phones. There, law enforcement discovered inculpatory communications

between the wife and other members of the conspiracy. The phones were eventually returned to the defendant around five weeks after their seizure.

The defendant was ultimately charged in connection with the conspiracy and moved to suppress the evidence obtained from the cell phones. She complained that agents should have obtained a search warrant to seize the phones and that the delay between the seizure of the phones and their search was unreasonable. The district court denied the motion, holding that the border search exception applied as far as the seizure of the phones. It found that the search of the phones was justified, given that authorities knew the defendant was involved in an international fraud scheme. *Nkongho* Slip op. at 7. The district court also determined that the delay in searching the phones was not unreasonable under the circumstances of the case. The defendant was convicted at trial and sentenced to 24 months.

On appeal, the Fourth Circuit unanimously affirmed. The border search exception permits border officials to conduct “routine” warrantless searches of people and property at the border without any individualized suspicion and to conduct “nonroutine” warrantless searches at the border with reasonable suspicion. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985). The forensic search of a phone is a nonroutine search subject to an even higher standard. There, border agents must demonstrate particularized suspicion of a crime with a nexus to the justifications for the border search exception—such as “protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband.” *Nkongho* Slip op. at 13 (citation omitted). Although this standard in the circuit was previously only applied in the context of digital device *searches*, the court adopted the same rule for *seizures* of digital devices. The government here easily satisfied that standard—they suspected the defendant of involvement in exporting ill-gotten military equipment as a part of an international conspiracy, which is squarely the type of offense the border search exception is designed to protect against.

As to the nine-day delay between the seizure of the phones and their search, the court acknowledged that an unreasonable delay in conducting the search could, in some circumstances, become unreasonable and violate the Fourth Amendment. The time frame of nine days was “relatively short.” Other circuits have approved of similar delays, and here the government used the time to determine whether it needed to obtain search warrants for the devices. The search and seizure of the phones occurred before there was clear precedent in the circuit on the point, and law enforcement “took the commendable step of consulting legal counsel.” *Id.* at 20. In the words of the court: “And though we ultimately hold that a warrant wasn’t required, we decline to fault the officers for affording Nkongho greater protection that she was due.” *Id.*

A challenge to the sentence was also rejected, and the district court was affirmed in full.

Shooting of breaking and entering suspect who was charging at the officer in the dark and yelling aggressively was reasonable; denial of qualified immunity reversed

[Rambert v. City of Greenville](#), 107 F.4th 388 (July 12, 2024). Around 4 a.m., police in Greenville, North Carolina, received a report of a breaking and entering in progress. The callers were residents of the home, and they told police they could hear glass breaking and a man yelling. The first officer to arrive knew that other responding officers were 5-7 minutes away. He parked his car without activating his flashing lights and began walking towards the home. He heard a man yell and immediately turned on his body camera. Within approximately 40 seconds, the officer heard more yelling and drew his firearm. The

deceased was not visible on the body cam footage at this point, but the officer apparently made contact with the suspected intruder, telling the man to “get on the ground.” Seconds later, the officer informed dispatch that the man was running towards him. At this point, the video footage reflects the man running towards the officer while yelling in an unintelligible manner. The officer retreated to the sidewalk to a more brightly lit section of the street. The man continued yelling and running towards the officer, and the officer fired three shots. The man fell down, and the officer tripped and fell as well. While the officer was trying to get up, the man—merely feet away from the officer—got on his hands and knees, stood, and tried to continue moving towards the officer. The officer fired four more shots from the ground. The camera footage was unclear for a few seconds, but within seconds, the man’s face appeared on the video as he stood over the officer, who was still on the ground. The two tussled on the ground for a few seconds and both men tried to stand up. As the man began rising up from the ground, the officer fired twice more. This time, the man was knocked down by the impact of one of the shots and rolled on the ground. The officer reloaded and backed up from where the man laid. He pointed his gun at the man but did not fire again. The man moved around on the ground and tried to stand up. At one point, he rose to his feet and stumbled towards the officer but quickly collapsed on the ground again. The man eventually succumbed to his injuries. His estate sued the officer and the City of Greenville for excessive force and other claims.

The city and the officer moved for summary judgment, arguing that they were entitled to qualified immunity. The district court denied the motion, finding that the facts, when viewed in the light most favorable to the plaintiff, could support a jury determination that the deadly force was excessive under the circumstances. It pointed to the fact that the man was unarmed, the officer was able to move away from the man, and that the man had already been shot at the time that the final two shots were fired. The district court also held that it was clearly established at the time of the shooting that the officer was not entitled to use deadly force once the man was no longer an immediate threat.

The defendants appealed, and a unanimous panel of the Fourth Circuit reversed the qualified immunity ruling as to both the officer. The plaintiff here failed to show a constitutional violation. The officer was alone, responding to a residential break-in in progress, in the dark. The suspected crime was one that was potentially dangerous by its nature, and the broken glass (which the officer knew of) indicated the potential use of a weapon by the suspect. The yelling heard on the call by dispatch and the yelling heard by the officer on the ground further indicated some level of danger. When the officer saw the man running towards him, he commanded the man eight times to get on the ground. “A reasonable officer could have viewed this noncompliant and charging potential suspect as an imminent threat.” *Rambert Slip op.* at 15. When the officer backed up to the sidewalk, the man continued running towards the officer. After the initial round of shots, the officer fell onto the ground, and the man moved in closer towards the officer. While the officer managed to get some amount of distance between himself and the man immediately before the final round of shots, the man was still nearby and trying to get up. “Even construing the facts in the light most favorable to the Ramberts, Rambert posed an obvious, serious and immediate threat to [the officer].” *Id.* at 17. While the man was unarmed at the time, the officer did not know that at the time, nor was the officer aware of any mental health condition the man may have had. Similarly, while the video did not clearly show the man making physical contact with the officer, “the undisputed evidence shows that Rambert remained a threat whether or not he physically touched [the officer].” *Id.* at 19.

Even if the officer used excessive force, he was still protected by qualified immunity because no case law clearly articulated that the officer's conduct here was unreasonable. While earlier cases have deemed the law regarding the use of deadly force clear when the suspect is unarmed, nondangerous, and not suspected of a serious crime, none of those cases confronted the kind of situation here: a man suspected of a serious crime, refusing to follow officer commands, acting aggressively, running towards the officer in a threatening manner, and continuing to move towards the officer even after being shot. And while an officer cannot continue using deadly force against a suspect after the suspect no longer presents a threat, the decedent here kept trying to approach the officer and the threat was continuing. According to the court:

At the time of the final shots, [the officer] had not regained his footing. He was not standing over Rambert. And Rambert was not lying badly wounded and subdued. To the contrary, Rambert continued to try to rise up and advance towards [the officer]. In sum, the case law as of July 9, 2019, did not put the constitutional question beyond debate. *Id.* at 29.

The district court order denying summary judgment to the officer was therefore reversed, and the case remanded for any additional proceedings. The city's appeal was dismissed for lack of jurisdiction.

Summary judgment to prison administrators and guards for deliberate indifference based on failure to protect inmate from stabbing by fellow inmate affirmed in part; claim against one guard could proceed where a jury could find that the guard was aware of the risk and affirmatively disregarded it

[Ford v. Hooks](#), 108 F.4th 224 (July 16, 2024). The plaintiff was an inmate at Scotland Correctional in the Middle District of North Carolina. He sued various prison officials for an Eighth Amendment violation stemming from an incident in prison where another inmate shanked him and caused serious injuries. The plaintiff allegedly alerted prison officials that he was at risk of such an attack multiple times, and the officials were deliberately indifferent to that risk.

According to the plaintiff, he was threatened with being stabbed by a fellow inmate. He requested and received placement into protective custody temporarily, during which time prison officials investigated his complaint. The prison officials could not determine who made the alleged threats, and eventually placed the defendant back into general population. Soon after, he was again threatened with stabbing and was later stabbed. His assailants told the plaintiff not to report the assault, and he did not report it. Around a month later, the plaintiff again reported to prison officials that inmates were making weapons and that he believed his safety was in jeopardy. The warden ordered an investigation, which was not completed for two years. The same month, the plaintiff was again personally threatened by a fellow inmate, and prison officials again put the plaintiff in protective custody to investigate. This complaint was once more rejected. Once the plaintiff was put back into general population for the second time, a prison guard came into his cell and loudly berated the plaintiff to name the inmates who had been making threats. In response, the plaintiff filed a new complaint, alleging that the guard's actions further put him at risk by loudly implying that the plaintiff was "snitching" on other inmates. This time, the plaintiff offered to identify the names of those involved in the threats, but the complaint was again denied due to a purported lack of specifics regarding the identities of the other inmates involved. In a third complaint later that month, the plaintiff recounted all of this context, including the earlier stabbing that he had not previously disclosed. This time, prison officials rejected the complaint because his second complaint was still pending. The next month, the plaintiff filed a fourth complaint covering much

of the same ground. It too was denied for lack of information. Around three months later, the plaintiff was repeatedly stabbed by a fellow inmate, causing serious injuries. The inmate allegedly accused the plaintiff of being a snitch during the attack. The plaintiff was soon transferred to another prison.

He sued various prison administrators and guards. The district court granted the prison officials' motion for summary judgment, finding insufficient evidence of deliberate indifference to support the Eighth Amendment claim. The plaintiff appealed. The Fourth Circuit reversed in part. Prison officials have a duty to protect inmates from violence by other inmates. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). To show an Eighth Amendment violation in this context, the plaintiff must present evidence that prison officials were subjectively aware of the risk and had actual knowledge that their actions taken in response were insufficient to protect against the risk. The plaintiff here could not meet that standard for the prison warden on either prong and the claim against him was properly dismissed. As to most of the other defendants, while the plaintiff could show they had knowledge of the risk, he could not show their responses to the risk were subjectively inappropriate. Those claims too were properly dismissed. As to the prison guard who allegedly yelled at the plaintiff in his cell within earshot of other inmates, though, there was a material issue of disputed fact as to whether the guard's actions amounted to deliberate indifference. That officer was aware of the risk to the plaintiff and a jury could conclude that the guard's acts were done in conscious disregard of that danger.

The award of summary judgment to the warden and 6 of the other prison defendants was therefore affirmed. The award of summary judgment to the remaining officer was reversed and the matter remanded for additional proceedings.

Claims against officers for suspicionless detention and search of the plaintiff and his car could proceed; grant of summary judgment to the officers and finding of qualified immunity unanimously reversed

[Milla v. Brown](#), ___ F.4th ___ (July 19, 2024). Police in Fairfax, Virginia, received an anonymous report of a stabbing. Officers responded to the gas station where the victim was reported to be and encountered a man with a deep cut on his arm yelling obscenities at the gas station employee. The man would not respond to officer questions about what happened. The officers also detected the odor of alcohol about the man. Because the initial report had indicated the man had been stabbed in the chest, a police helicopter was dispatched. Once emergency responders determined that the man did not need an airlift, the police decided to use an infrared heat-detection camera mounted on the helicopter to search the area for potential suspects. The camera can see whether a vehicle was recently driven because of its heat signature. Officers noticed a "hot" vehicle parked in front of a nearby residence behind a closed gate. Officers went to the residence and shined the patrol car headlights into the vehicle. The plaintiff was seated inside the car with the driver-side door open. He shut the door when police arrived. According to the plaintiff, he was looking for his headphones inside the car when the officers arrived. He could not see that the patrol car was a police vehicle and assumed it was another resident of the home. The plaintiff claimed that he shut the door of his car to allow the arriving vehicle to enter the driveway and park. The officers had not identified themselves at this point and did not have their flashers activated. The officers decided to detain the man, pulling their guns and ordering him out of his car. The plaintiff was quickly handcuffed and put in the back of the patrol car. The officers searched the plaintiff's car, found no evidence, and released the man. This all occurred within approximately eight minutes. The plaintiff sued pro se, alleging a Fourth Amendment violation for his detention and the search of his car.

The officers sought summary judgment, arguing that they had reasonable suspicion to detain the plaintiff and to perform a protective sweep of his car. Alternatively, they argued that they were entitled to qualified immunity. The district court granted the motion, agreeing with the officers that reasonable suspicion existed, and that qualified immunity applied, because no constitutional violation occurred. The Fourth Circuit reversed.

There was no basis to believe that the plaintiff had committed a crime when the officers encountered him. The recent stabbing in the area was not enough to permit officers to seize the plaintiff and search his car. The officers did not have a description of any suspect connected to the stabbing, nor any information about the suspect's potential whereabouts. The Fourth Circuit has previously held that mere proximity to the sound of gunshots in a high-crime area was insufficient to justify the seizure of a person and subsequent pat-down. *U.S. v. Curry*, 965 F.3d 313, 325-26 (4th Cir. 2020) (en banc). The same was true here. While the plaintiff was located near the gas station, other cars were also in the vicinity, and the officers did not investigate those, other cars driving by, or other pedestrians in the area. The plaintiff was not engaged in criminal activity when the officers encountered him, and the court rejected the officers' argument that the plaintiff behaved evasively. "At most, [the plaintiff's] actions were a decision to 'ignore the police and go about his business.' And refusal to engage with police is not, by itself, a valid basis for reasonable suspicion." *Milla* Slip op. at 12 (citation omitted). This was especially so given that it was unclear whether the plaintiff even recognized the officers as police without their patrol lights or sirens on. The officers here "succumbed to the impulse to spin 'largely mundane acts into a web of deception.'" *Id.* at 16 (citation omitted). Further, case law in the circuit was clear that mere proximity to a crime, without more, was insufficient to establish reasonable suspicion, and the officers were not entitled to qualified immunity.

The district court's judgment was therefore unanimously reversed, and the matter remanded for additional proceedings.

Grant of pre-discovery summary judgment to detention center defendants for failure to provide medical care and unsanitary conditions was error; trial court abused its discretion in denying plaintiff's request for appointment of counsel and extension of time to conduct discovery

[Jenkins v. Woodard](#), ___ F.4th ___ (July 22, 2024). The plaintiff was a pretrial detainee in the Wilson County Detention Center in the Eastern District of North Carolina. He regularly takes medication for several psychiatric conditions. When he requested officers in the facility to administer his medication, they refused. This led to an altercation between the plaintiff and the officers, for which the plaintiff was placed into solitary confinement. The plaintiff attempted suicide in solitary, and was eventually moved to the so-called "Rubber Room," a padded cell designed to reduce the likelihood that an occupant could commit suicide. According to the plaintiff, the room constantly smelled of human waste and had fecal matter on the ceiling and floor. Officers allegedly fed the plaintiff meals on the floor of the cell near fecal matter and would not allow him to wash his hands before meals, which he had to eat without utensils. At least one meal was given to the plaintiff was crawling with roaches; another had "a green mold-like substance." The plaintiff was moved to a prison facility for evaluation. When he returned to the detention center, he was no longer placed in the rubber room. He did not file any complaints about the experience at this point, but a month or two later, he began experiencing rectal bleeding and severe pain. Despite multiple complaints and requests for medical assistance, the Sheriff only responded to the complaints once (without obtaining medical treatment for the plaintiff). Several months later, the

plaintiff received medical care for the first time. The appointment led to a bevy of tests, which showed three colon polyps, one of which was “the worst [the providers] had ever seen.” The plaintiff was also diagnosed with a bacterial infection in his stomach, diverticulitis, and hemorrhoids. According to his allegations, the plaintiff bled heavily for at least eight months, and was denied medical treatment for at least three. He sued, claiming that the Sheriff and other facility officials caused his medical condition by forcing him to live in unsanitary conditions and had failed to provide proper medical treatment when his symptoms were apparent. He repeatedly asked the district court to appoint counsel, but it refused. He also sought additional time for discovery, which the district court also refused. Eventually, the district court granted the Sheriff’s motion for summary judgment, finding that the complaint was not sufficient and that there were no material facts in dispute. The plaintiff appealed, arguing that the district court erred in denying his request for counsel in the case and by refusing his request for additional discovery.

A unanimous panel of the Fourth Circuit agreed. Federal district court judges have the authority to appoint counsel for an indigent person in a civil case in exceptional circumstances. Here, the plaintiff had a plausible claim, and he lacked the skills needed to properly present it, which amounts to exceptional circumstances. The district court erred in concluding otherwise. Relatedly, the district court also abused its discretion in denying the request for additional time to conduct discovery. Had counsel been appointed, discovery could have been conducted. Further, the plaintiff adequately explained his inability to do so from within a detention center, among other limitations. Because of these mistakes, the district court was premature in granting the Sheriff’s motion for summary judgment.

The matter was thus remanded to the district court with instructions for it to appoint counsel, and the order granting summary judgment was vacated.

Claims against individual federal prison guards for excessive force were not barred under *Bivens* where officers allegedly prevented the plaintiff from utilizing administrative complaint process

[Fields v. Federal Bureau of Prisons](#), ___ F.4th ___ (July 25, 2024). The plaintiff was a federal inmate in the Western District of Virginia. He claimed that guards at the facility had physically abused him by beating him while he was restrained, permanently seized his eyeglasses and certain legal documents, and had denied him access to the administrative prison complaint process. He filed suit pro se, alleging excessive force in violation of the Eighth Amendment. The district court dismissed the complaint, partly for failure to state a claim and partly based because no remedy was available under *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*, 403 U.S. 388 (1971). *Bivens* provides for a judicially created “implied cause of action” for constitutional violations by federal officers, but a *Bivens* remedy has only been recognized in three narrow circumstances (none of which squarely fit the excessive force claim at issue here). In the years since *Bivens* was decided, the U.S. Supreme Court has expressed a strong distaste for expanding the doctrine to new situations. If a case presents “new context” from the circumstances where a *Bivens* remedy has been found to exist, the court must determine whether special factors counsel against judicial extension of the doctrine. *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (internal citations omitted). The plaintiff here acknowledged that his case presented new context for a *Bivens* claim but argued that no special factors weighed against the court (rather than Congress) providing a remedy for his situation. The Fourth Circuit has repeatedly declined to extend *Bivens* to claims against Bureau of Prisons (“BOP”) officials. It has pointed to the existence of other administrative remedies, the potential that a new type of *Bivens* claim could have far-reaching impacts on the prison system, and to

the Prison Litigation Reform Act (which expressly omits a damages remedy for individuals) as special factors weighing against an extension of *Bivens*.

Here, though, none of those special factors applied to the facts of the plaintiff's case. According to the court, this was the "rare case" where a *Bivens* remedy was appropriate. While the claims against higher-up administrators and the BOP itself could not survive under *Egbert*, the claims against the individual officers could. ". . . [W]here an inmate brings a claim against individual, front-line officers who personally subjected the plaintiff to excessive force in clear violation of prison policy, and where rouge officers subsequently thwarted the inmate's access to alternative remedies, no special factors counsel against providing a judicial remedy." *Fields* Slip op. at 12. The allegations against the guards did not implicate systemic concerns regarding prison administration or policy—indeed, the allegations of the complaint were that they acted contrary to policy—and did not infringe on the prison system's ability to make discretionary policy decisions. Alternative remedies were not available to the plaintiff, allegedly because the guards intentionally prevented the plaintiff from accessing them. That process could have provided a remedy for the plaintiff, but for the actions of the guards. Here, "[f]ar from trampling on Congress's or the Executive's authority, the judiciary secures the objectives of the wrongfully displaced remedial scheme by stepping in." *Id.* at 17. This case also presented somewhat similar context to one of the types of *Bivens* claims previously allowed by the U.S. Supreme Court. See *Carlson v. Green*, 446 U.S. 14 (1980) (allowing a *Bivens* remedy for failure to treat an inmate's medical condition under the Eighth Amendment). Under these circumstances, the plaintiff's claims against the front-line officers could proceed.

The district court's judgment dismissing the claims against the BOP, the warden, and supervising officers was therefore affirmed, its judgment dismissing the claims against the individual line officers was reversed, and the case was remanded for further proceedings.

Judge Richardson dissented and would have affirmed the wholesale dismissal of the plaintiff's claims.

State court rulings on ineffective assistance claims based on alleged attorney conflict of interest in death verdict case were not unreasonable applications of federal law; other claims relating to presentation of mitigation evidence at the penalty phase were procedurally barred; denial of habeas relief affirmed

[Stanko v. Stirling](#), ___ F.4th ___ (July 29, 2024). The petitioner was convicted of murder in state court and was sentenced to death. After his direct appeals and state post-conviction claims were denied, he sought federal habeas relief in the District of South Carolina. The petitioner had been convicted of murder and sentenced to death in another South Carolina county in a different, earlier case. While the current death case was pending at the trial level, the petitioner made claims in state post-conviction proceedings alleging that his trial attorney in the first case was ineffective. Despite this, that same trial attorney continued to represent the defendant in the second death case. Both the state post-conviction court considering the first death verdict claims and the trial court handling the second death case repeatedly warned the defendant about this potential conflict of interest and took pains to ensure that the defendant knowingly and voluntarily waived any such conflict. Over the course of four total hearings in the two different courts, the petitioner insisted on retaining his trial counsel. After he received a second death sentence in the second case, he appealed, complaining of ineffective assistance of counsel based on the alleged conflict of interest. The state appellate court rejected that argument. In state post-conviction, the petitioner again raised the conflict-of-interest claim. He also complained that his trial

counsel “unreasonably told the jury that his family disliked him,” “dehumanized him” to the jury with expert testimony on his mental health, and failed to properly find and present mitigation evidence. The state post-conviction court rejected these arguments as well. It found trial counsel made a reasonable strategic decision to focus on the petitioner’s family relationship as a means of demonstrating the petitioner’s functionality and to garner sympathy for him. As to the mental health evidence, counsel likewise made a reasonable strategic decision to present it as a means of advancing the insanity defense. Trial counsel was also diligent in obtaining and presenting mitigation evidence, which included presenting numerous mitigation witnesses at sentencing. That trial counsel had largely relied on the mitigation investigation from the earlier death case did not alter the equation. The state supreme court denied review of the post-conviction case, and the petitioner filed a habeas petition in federal court.

Among other claims, the petitioner again raised the issue of his trial counsel’s alleged conflict of interest and argued that he received ineffective assistance of counsel based on that conflict. He also argued for the first time that trial counsel’s conflict of interest could not be waived, and renewed his arguments about ineffective assistance due to trial counsel’s presentation of evidence during the penalty phase. The district court denied relief, finding that the state post-conviction court’s findings were reasonable as to the conflict-of-interest claims and that the sentencing phase claims were defaulted for failure to present them to the state appellate court reviewing the state post-conviction court’s ruling. The Fourth Circuit affirmed.

The state court resolutions of the conflict-of-interest claims were not clearly unreasonable applications of federal law. “Any potential conflict here was not so ‘egregious’ that a court would be bound to reject a fully informed waiver to protect its ‘independent interest’ in assuring the appearance of fairness.” *Stanko* Slip op. at 19 (citations omitted). Further, “the trial court undertook a ‘careful inquiry’ into the potential conflict, extensively questioning Stanko to confirm that his request to keep [the trial lawyer] as counsel was ‘conscious and well-informed.’” *Id.* at 24. As to the penalty phase claims, the district court correctly determined those to be defaulted.

The denial of a motion for reconsideration by the district court and other challenges relating to the conduct of the habeas proceeding before the district court were likewise rejected, and the case was affirmed in part and dismissed in part.

Excessive force and related claims stemming from fatal shooting were properly dismissed against City of Greensboro, but can proceed against the officer in his individual capacity; grant of summary judgment to the officer reversed

[Doriety v. Sletten](#), ___ F.4th ___ (July 29, 2024). A police officer with the Greensboro, North Carolina, department received a report of a stolen car. He located the car in transit and followed it into a parking lot with his flashing lights on. The car parked and the officer exited his patrol car and tried to approach the suspect vehicle. The car began slowly driving away, so the officer got back into his patrol car and followed the car in until they reached a dead end of the lot. As the suspect car began making a three-point turn, the officer attempted to block it by parking his patrol car at a right angle in very close proximity to the suspect’s car. The suspect attempted to back up and hit the front end of the patrol car in the process. The officer then exited his patrol car once more, moved to the rear of his car, and ordered the driver to surrender. The suspect car instead managed to turn around and started moving away from the officer. Several back seat passengers in the car exited the stolen car and fled on foot, while the driver and another front-seat passenger remained in the car. The officer then fired his service pistol into the

front windshield of the fleeing car. According to the plaintiff, the officer was not at risk of being hit by the car at the time. The car continued moving past the officer, and the officer fired additional shots at the front-passenger window, at which point the car stopped. The driver, a 17-year-old, was hit by three of the gunshots and died on scene.

His estate filed suit against the officer and the City of Greensboro, alleging a Fourth Amendment excessive force violation, along with other state tort claims. The district court granted the City's motion to dismiss all claims based on governmental immunity. The City of Greensboro did not have an insurance policy to cover these claims and had therefore not waived its governmental immunity. The district court also granted the officer's motion to dismiss for failure to state a claim. He asked the district court to review the bodycam footage of the encounter. After doing so, the district court found that it unequivocally would not support an excessive force claim and that the officer's actions were not unreasonable. The district court also dismissed the remaining state law claims, and the plaintiff appealed.

The Fourth Circuit reversed as to the claims against the officer only. When deciding a motion to dismiss for failure to state a claim, the trial court examines only whether there are adequate facts alleged in the complaint that, if true, would support the claim alleged. This includes reasonable inferences from the facts pled. The trial court should treat the factual allegations as true at this stage of the litigation and not resolve factual disputes. Evidence outside of the factual allegations of the complaint are normally not relevant at this stage, although an exception to that general rule exists for documents that are "integral to the complaint" when their authenticity is undisputed. *Doriety* Slip op. at 14. The Fourth Circuit had not previously decided whether a video could be used in this manner at this stage of the litigation, but decided here that the same standard applied. In the words of the court:

" . . . [A] district court can consider a video submitted at the motion to dismiss stage when (1) the video is integral to the complaint and its authenticity is not challenged, but (2) only to the extent that the video clearly depicts a set of facts contrary to those alleged in the complaint or blatantly contradicts the plaintiff's allegations, rendering the plaintiff's allegations implausible. *Id.* at 15.

Here, the video did not plainly contradict the plaintiff's allegations. The video did not clearly show the officer's location once he was on foot and moving towards the rear of the patrol car; it did not show how far the officer was standing from the moving car; it did not clearly show the direction of the car as it was trying to flee. It also did not clearly show the second round of shots fired through the passenger window, among other details. The district court therefore erred in resolving these factual issues at the motion to dismiss stage. The complaint here stated a claim for excessive force, even taking the video into account. The excessive force claim and related state law claims against the officer in his individual capacity should not have been dismissed for failure to state a claim.

The district court was therefore affirmed in part, reversed in part, and the remaining claims remanded for additional proceedings.