CASE NO. 18-7392

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

SCOTT TYREE,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

REPLY BRIEF OF APPELLANT SCOTT TYREE

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INTRODUCTION

The government's responsive brief underscores how radical and inconsistent with precedent its vision of the discretionary function exception ("DFE") is. In the government's view—

- a directive requiring prison guards to respond "immediately" to emergency alarms preserves limitless discretion to decide that "immediately" can mean literally anything, or nothing at all;
- the mere possibility that a guard might delay in responding to an emergency for reasons of policy or competing institutional priorities means that *every* response delay is conclusively presumed to be the product of a policy-based choice; and
- a prisoner cannot state a viable claim that a lengthy delay was the product of negligence or inattention unless he can plead specific facts about what the guards were doing instead of responding—even if the guards and the government refuse to disclose that information, and the plaintiff was locked in a cell and under assault at the time.

That cannot be, and is not, the law. The government has essentially taken principles that make sense in certain limited contexts, and generalized them to the point that the DFE all but swallows up the government's waiver of sovereign immunity in the Federal Tort Claims Act. For example, this Court has recognized

that some government decisions are so "inherently bound up in considerations of economic and political policy" that the DFE precludes any scrutiny of the actual basis of that decision. *Baum v. United States*, 986 F.2d 716, 724 (4th Cir. 1993). But it has never generalized that principle to hold that the routine performance of ordinary job duties by low-level employees is immunized by the DFE. Indeed, *Baum* itself recognized that the plaintiff would have stated a claim if he had alleged ordinary negligence in maintaining highway guardrails. *Id*. Similarly, this Court recently recognized in *Sanders v. United States* that even facially clear job rules often preserve implicit discretion to violate the rule when there is a good, policy-based reason to do so. 937 F.3d 316 (4th Cir. 2019). But this Court did not hold that every case challenging a violation of such rules therefore necessarily fails under the DFE. To the contrary, it held that the claim in *Sanders* must proceed—because there was no indication at that stage of the case that the examiner's failure to follow up on Dylan Roof's arrest *actually* reflected an exercise of policy-based discretion. *Id.* at 330-31.

Here, as in *Rich v. United States*, the government advances a vision of the DFE that supplies "no limiting principle," such that the exception "would always apply" even to ordinary negligence by government employees. 811 F.3d 140, 147 n.7 (4th Cir. 2015). When this case was last here three years ago, this Court reversed an improper grant of summary judgment on the pleadings and specifically pointed

the government and the District Court to precedent holding that a delay in responding to a prison emergency *may or may not* reflect an exercise of policy-based discretion, depending on the facts. *See* JA 28-39 (citing *Palay v. United States*, 349 F.3d 418 (7th Cir. 2003)). The government and the District Court responded with another facial dismissal—this time under a legal theory that would apply the DFE to every delay in responding to an emergency, as a matter of law. This Court should reject that suggestion, hold (again) that Tyree has stated a claim, and (again) remand this case for factual proceedings to resolve the truth of his allegations.

ARGUMENT

I. THE GOVERNMENT'S LIMITLESS CONCEPT OF DISCRETION MEANS THAT NO SUIT AGAINST PRISON OFFICIALS COULD SURVIVE A MOTION TO DISMISS

The government concedes that the relevant policies require that guards respond immediately and effectively to emergencies, but devotes the bulk of its opposition brief to arguing that those policies implicitly leave discretion in implementation.

We agree that "immediately" does not prescribe a specific time limit, and that these policies may preserve implicit discretion for guards to make a policy-based decision to delay their response. It would not be unreasonable for the government to argue, for example, that a particular delay was sheltered by the DFE because guards decided to attend to one emergency rather than to another simultaneous emergency,

or because they decided to delay response until the appropriate officials or safety equipment could arrive. Those sorts of decision would, plausibly, fall within the discretion naturally and implicitly reserved even by a facially unambiguous rule. Rules always work that way. When a mother tells a child to come home "immediately," she does not mean the child should endanger his life by excessive haste, or that he cannot stop to assist if he encounters an emergency along the way. Merriam-Webster defines "immediate" as happening without delay.

But because the government is unwilling to identify any actual policy-based reason for the delay here (or even to admit that a delay occurred at all), it advances a far more radical position. According to the government, the fact that "immediately" leaves some implicit discretion to delay renders the entire set of instructions wholly precatory ("a mere guideline" in their words) and *any* response action (or inaction) sheltered from scrutiny by the DFE, as a matter of law. Appellee Br. at 12. In the government's view, what the guards did and why would never matter because responding to an emergency is *always* an entirely discretionary function. This argument violates precedent and common sense, for at least four reasons.

First, it is completely inconsistent with how human beings use language. A mother who tells a child to come home "immediately" *does* intend to say, at least, that he may not stop for ice cream. The BOP policy at issue here may implicitly leave discretion to delay response in order to address a competing emergency, but it

clearly does not preserve any "discretion" to ignore an emergency for no reason, or to be negligent or inattentive in monitoring the alarm system. To the contrary, the policy says as clearly as it possibly can that employees are required to "remain fully alert and attentive during duty hours" because "[i]nattention to duty in a correctional environment can result in escapes, assaults, and other incidents." FED. BUREAU OF PRISONS, BOP PS § 3420.09(10), AT 8 (STANDARDS OF EMPLOYEE CONDUCT (AMENDED ON DECEMBER 6, 2013 AND NOW AT § 3420.11(6)). In *Rich* this Court recognized that "[t]here is always some level of discretion regarding the performance of even the most specific of mandates" but firmly rejected the government's suggestion that actions "marked by individual carelessness or laziness" are therefore immunized by the DFE. 811 F.3d at 147 & n.7.

Second, it is settled law that Program Statements and Post Orders do impose mandatory obligations on prison staff. The government quotes *Hibble v. United States* in support of their argument that an agency may have guidelines that are not mandatory directives. Appellee Br. at 24. But that was a case about an Army informational pamphlet, which is not at all the same as prison post orders. In *Hibble*, this Court noted that the pamphlet at issue was not a "mandatory directive" because it was clearly defined by an Army Regulation as an "instructional or informational publication" which was not to be used "to issue departmental policy." *Hibble v. United States*, No. 96-2180, 1998 U.S. App. LEXIS 86, at *5, *5 n.2 (4th Cir. Jan.

7, 1998). In contrast, this Court has already held that Post Orders impose mandatory directives and that if those directives are violated then they may not be covered by the DFE. See *Rich*, 811 F.3d at 147; see also *Sanders*, 937 F.3d at 329 ("[I]nternal guidelines can be an actionable source of a mandatory obligation under the FTCA"). The government did not respond to these precedents or those of other circuits.[1] Tyree's opening brief cited, for example, to *Keller v. United States*, in which the plaintiff prisoner alleged that guards failed to monitor assigned areas due to laziness or inattention. 771 F.3d 1021, 1022 (7th Cir. 2014). The Seventh Circuit rejected the government's argument that Post Orders imposed no actionable obligations at all. *Id.* at 1025. Similarly, in *Ashford v. United States*, 511 F.3d 501 (5th Cir. 2007), the Fifth Circuit rejected the government's invocation of the DFE because the plaintiff

[1] The government represents that the Post Orders here "do not mention distress alarms, nor do they mandate a response time to any emergency situation." Appellee Br. at 24. We have no way to evaluate that, except to note that applicable Program Statements *require* prisons to have Post Orders with "instructions regarding the immediate action staff should take in an emergency particular to the particular post or location of the post they occupy" and "specific action steps" and "[p]articular requirements regarding assaultive inmates." FED. BUREAU OF PRISONS, BOP PS § 5500.14, CORRECTIONAL SERVICES PROCEDURES MANUAL, AT 1, AND AT CH. 1, P. 3. If the correctional center was in compliance with these requirements, some instruction applicable to this situation must exist. It is also curious how the Post Orders language relevant to this case could simultaneously consist of only "mere guidelines" and also be so sensitive that it cannot be released to opposing counsel. Additionally, the Post Orders appear to be produced to counsel for prisoners, pursuant to protective orders, in other cases. *See* Sealed Exhibit by David Danser, *Danser v. Stansberry*, No. 5:08-CT-03116, (E.D.N.C. August 26, 2014), ECF No. 98.

pointed to policies that imposed more specific obligations than just the government's general 18 U.S. C. § 4042 duty to care for inmates. Here too, there is a specific policy in place that imposes a mandatory directive to respond "immediately," and an unexplained ten minute delay does not satisfy any reasonable understanding of the word immediate.

Third, the government's approach to the DFE effectively disposes of the second prong of the test as outlined by the Supreme Court. The DFE does not provide immunity merely because an act falls within the official's discretion. The official also must have exercised the *kind* of discretion "that the discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The exception protects only discretion "based on considerations of public policy" and not, for example, the ordinary discretion that one exercises when driving a car. *United States v. Gaubert*, 499 U.S. 315, 323, 325 n.7 (1991). Under the second prong, a court must determine whether any discretion that was exercised was based in public policy—not simply assume that it was.

This Court's decision in *Sanders* demonstrates how this works. This Court recognized that a policy requiring examiners to follow up on arrest reports would provide implicit discretion to deviate from the letter of the rule if some policy-based consideration justified a deviation. 937 F.3d at 330-31. But since no policy-based justification for deviating from the facially mandatory policy was offered by the

government, the case could not be dismissed under the DFE. *Id.* The government has no response—except to continue to insist that the guards here used their discretion to decide to respond immediately. Appellee Br. at 31.

This case is also analogous to *Keller*, which allowed a claim to proceed when officers allegedly failed to monitor assigned areas in violation of post orders and prison policy. 771 F.3d at 1025. The government argues that *Keller* is a case "in which the plaintiff[] actually alleged facts suggesting that officers were inattentive or dilatory in their duties." Appellee Br. at 33. In fact, the plaintiff in that case had presented "no evidence" showing that the guards were lazy or inattentive at the time in question. *Keller v. United States*, No. 2:09-cv-00297-JMS-TAB, 2013 U.S. Dist. LEXIS 104805, at *27 (S.D. Ind. July 26, 2013). The 7th Circuit simply refused to assume that the guards had exercised discretion based in public policy when there was no evidence to support such a conclusion.

The government still has not identified any discretionary decision that accounts for this lengthy delay. It also continues to maintain that both of the guards responded immediately. Appellee Br. at 31 ("officers . . . responded as soon as they saw the light."). Tyree affirmatively alleged that officers delayed more than ten minutes in responding, and also that the reason for the delay was negligence or deliberate indifference. JA 17. The government's argument that Tyree's allegations rest only on his "unsupported, self-serving statements" improperly disregards the

procedural posture. Appellee Br. at 20. If witness credibility were in any way at issue, we would point out that the officers' statements are not just unsupported and self-serving but also implausible and inconsistent with the objective facts. But witness credibility is in no way at issue. The government filed an entirely legal motion to dismiss for lack of jurisdiction, and is required to accept the truth of Tyree's allegations.

The government also failed to meaningfully respond to Tyree's point that it is highly unlikely that officials made a policy-based discretionary decision to delay their response to an emergency when they had not even gathered enough information to know what the emergency *was*. Even if there were no specific mandates regarding officer response, the second prong of the DFE always requires proof that officers exercised the kind of discretion that the exception protects.

Fourth, the government's theory causes the DFE to swallow the FTCA's waiver of sovereign immunity in essentially all cases involving negligence by government officials. This Court and others have repeatedly rejected the government's litigating position that ordinary negligence or inattention are somehow sheltered by the DFE. *See, e.g.*, *Rich*, 811 F.3d at 147 n.7 (rejecting the government's argument as supplying "no limiting principle" such that "the discretionary function exception would always apply."). If the government's argument in this case were accepted, every emergency response case would have to be dismissed on the

pleadings. It is not clear there are *any* cases that could survive a motion to dismiss, given the government's position that every mandate implicitly preserves some discretion.

The government cites *Gaubert* and *Baum* to argue that "it is immaterial whether the correctional officers actually balanced or considered the various policy considerations, as the relevant question is whether the nature of the conduct is 'susceptible to policy analysis'" and whether it is a decision "we would expect inherently to be grounded in considerations of policy." Appellee Br. at 17, 29-30. But *Gaubert* itself recognized that some discretionary acts are "within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7. And as our opening brief explains, *Baum* was careful to draw a distinction between the sorts of decisions that are "inherently bound up in economic and political policy considerations" (such as the choice of materials for the guardrails) and actions that may or may not reflect an application of policy discretion (such as maintenance of the guardrails). *Baum*, 986 F.2d at 721-24; Opening Br. at 31-33.

The government essentially invites this Court to treat *every* action by prison officials as "inherently bound up in economic and political policy considerations," such that an exercise of policy-based discretion is always presumed as a matter of

law. If that were correct, then all of the cases permitting allegations of negligence to proceed, including negligent delay, would have come out the other way. *See* Opening Br. at 28-30, *Coulthurst v. United States*, *214 F.3d 106, 110 (2d Cir. 2000); Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006), *Palay*, 349 F.3d at 432. This Court cited *Palay* with approval the last time this case was here, on the exact point that a delay might reflect an exercise of policy-based discretion—or might reflect simple negligence or inattention. JA 38-39. Again, if the government were correct, then *Sanders* should have come out the other way. This Court recognized that the examiner's failure to follow up with the Columbia Police Department was the sort of decision that *might have been* justified by policy-based considerations, and that a genuine policy-based decision not to follow up would have been implicitly permitted by policy. 937 F.3d at 330-31. Nonetheless this Court held that the facial violation of the follow-up policy stated a valid claim despite the DFE, in the absence of any actual policy-based explanation from the government.

A prison guard's failure to show up in response to an emergency alarm is not, without more, the sort of decision that is "inherently bound up in considerations of economic and political policy" such that further inquiry into what actually happened is unnecessary or inappropriate. *Baum*, 986 F.2d at 724. To the contrary, it is the sort of failure that courts recognize as plausibly reflecting inattention, negligence, or some sort of technical failure rather than a deliberate policy choice. This reality

should not be subverted through a rule, advocated by the government here, effectively presuming that because prison guards can sometimes make discretionary decisions to delay responding to an emergency for policy-grounded reasons, every delay is "inherently discretionary" and immune from challenge.

II. THE GOVERNMENT'S CONCEPTION OF TYREE'S PLEADING BURDEN IS MISTAKEN AND UNREALISTIC

The government also argues that Tyree failed to sufficiently plead a claim of negligence because he did not plead specific acts of negligence by particular guards. Appellee Br. at 32. This argument disregards both reality and precedent.

Tyree alleged that guards delayed at least ten minutes in responding to his emergency alarm, when policy required an immediate response. During those ten minutes, Tyree was locked in a cell and under assault. He could not possibly have alleged anything more specific about exactly what the guards were doing. He affirmatively alleged that the cause of the delay was negligence or deliberate indifference. JA 17. And against the backdrop that the government conspicuously refuses to advance *any* justification for the delay whatsoever—standing instead on the officers' assertion that they in fact responded immediately—Tyree's allegations certainly make actionable negligence a "plausible" explanation (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) or a "reasonable inference" (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) from the facts pled. No formal application of *res ipsa loquitur* is required to conclude that a reasonable trier of fact would be entitled to

infer from these circumstances that the officers are attempting to cover their negligence or inattention. Placing the burden of proof on a prisoner cannot be taken so far as to require the impossible. And while the failure to present further evidence of negligence could conceivably result in a loss at trial, if the trier of fact finds the officers' testimony credible, it by no means is "fatal to his claim" at this stage, where his allegations must be considered true for purposes of the motion. Appellee Br. at 20.[2]

The government continues to insist that the burden of proof must be strictly construed against Tyree because the FTCA is a waiver of sovereign immunity. As Tyree's opening brief explained, this Court recognized in *Sanders* that the Supreme Court had repudiated that principle in the FTCA context. *See Sanders*, 937 F.3d at 327; *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006). Congress intended to waive the United States' sovereign immunity for ordinary torts committed by government employees, and an artificially strict construction of the exceptions is inconsistent with that intent. Tyree also explained that several other circuits have

[2] The Eastern District of New York case that the government cites concerns a cell reassignment application and denial, a decision that may be inherently policy-based. *See Nabe v. United States*, No. 10-CV-3232, 2014 WL 4678249, at *5 (E.D.N.Y. Sept. 15, 2014) (noting that cellmate transfers are "traditionally left up to corrections officers within the prisons" and fall squarely under the DFE). However, the case also explains that "[s]ince any act not mandated specifically by policy or a statute would be considered 'discretionary,' the second prong of the *Berkovitz–Gaubert* test is necessary to limit the exemption only to those discretionary acts of government agents undertaken in pursuit of their official responsibilities." *Id.*

held that the burden is generally on the government in these cases, and that this Court's contrary precedents rested entirely on the strict construction canon that the Supreme Court has since disavowed in this context. Opening Br. at 34-38. The government offers no substantive reason why this Court should not reconsider its precedent in light of that shift in Supreme Court precedent. But even if this Court is inclined to leave its burden of proof precedent where it is, it should not *extend* that precedent in a manner that effectively immunizes simple negligence under the banner of the abstract possibility of a discretionary decision. Again, that approach would effectively abrogate the FTCA in virtually any context where official negligence takes place outside the victim's range of vision.

CONCLUSION

This Court should reverse the district court's judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Reply Brief of Appellant contains 3,479 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

Dated: January 16, 2020

s/ JAMES SCOTT BALLENGER
Counsel for Appellant