No. 20-6884

United States Court of Appeals
FOR THE FOURTH CIRCUIT

DAVID NIGHTHORSE FIREWALKER-FIELDS,
Plaintiff-Appellant,

v.

BRUCE ALBERTSON, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Virginia

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ARGUMENT

Defendants do not dispute that a probationary condition that bars Mr. Firewalker-Fields from attending church services violates his religious liberty. Instead, they argue that his action challenging the condition must be brought in habeas because, under Virginia law, probationary conditions should categorically be considered part of a sentence. *See* Appellees' Br. 20, 25–27. But in advancing this novel argument, Defendants have not articulated a principled distinction between challenges to conditions of imprisonment, which inarguably may be brought under § 1983, and challenges to conditions of parole or probation that are not imposed by the sentencing judge. That is because none exists. The validity of the underlying state court judgment is left intact in either case, so *Heck* does not bar those actions unless their success would shorten the duration of confinement. *See Wilkinson v. Dotson*, 544 U.S. 74, 83–84 (2005).

That is precisely what the Ninth Circuit held in *Thornton* when it determined that a "parolee may challenge a condition of parole under § 1983 if his or her claim, if successful, would neither result in speedier release from parole nor imply, either directly or indirectly, the invalidity

of the criminal judgments underlying that parole term." *Thornton v. Brown*, 757 F.3d 834, 845–46 (9th Cir. 2013). And Defendants are wrong to suggest that state law should lead this Court to a different result: California and Virginia both endow their respective Departments of Corrections with discretion to impose conditions separate from those imposed by the sentencing judge.

Nor are Defendants' alternative arguments availing. Their assertion of a statute of limitations defense is premature. And their arguments as to the merits of Mr. Firewalker-Fields' claim all would require this Court to draw impermissible inferences against Mr. Firewalker-Fields.

I. DEFENDANTS MISREAD SUPREME COURT PRECEDENT.

Defendants' argument—that *Heck* categorically bars § 1983 challenges to conditions of probation imposed by Virginia probation officers because such conditions should be considered "part of the sentence"—is built on a premise foreclosed by Supreme Court precedent. *See* Appellees' Br. 25–27. In *Wilkinson v. Dotson*, the Supreme Court explained that the *Heck* inquiry is not whether an action challenges part of a sentence, but rather whether the action, if successful, would alter the

length of confinement. *See* 544 U.S. at 83–84; *see also Muhammad v. Close*, 540 U.S. 749, 751 (2004) ("*Heck*'s requirement . . . is not . . . implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.").

In any event, Defendants offer no meaningful response to Mr. Firewalker-Fields' contention that there is no principled distinction between a challenge to a burden on religious exercise when the defendant is a prison guard—which is inarguably cognizable under § 1983—and a challenge when the defendant is a probation officer. *See* Appellant's Br. 13; *see also Thornton*, 757 F.3d at 842. Neither of these challenges implies the invalidity of the underlying state court judgment or would lead to releasing the prisoner or probationer from confinement a moment earlier. Any potential distinction simply cannot be squared with *Dotson*'s instruction that an action that necessarily implies the invalidity of a sentence is an action that challenges "substantive determinations as to the length of confinement." *Dotson*, 544 U.S. at 83–84. This Court should therefore join the Ninth Circuit in holding that where a plaintiff challenges conditions of probation or parole under § 1983 and his successful challenge will neither "affect the 'fact or duration' of his

[probation or] parole nor 'necessarily imply' the invalidity of his state-court conviction or sentence[,]" *Heck* does not bar his claim. *Thornton*, 757 F.3d at 841.

In an attempt to distance themselves from *Thornton*'s conclusion, Defendants argue that *Thornton* relied on "application of California law." *See* Appellees' Br. 21, 24. That is incorrect, except for the unremarkable proposition that California, like Virginia, permits state actors other than the sentencing court to discretionarily impose conditions of supervised release. *See Thornton*, 757 F.3d at 844 n.12. So at the very minimum, *Thornton* stands for the proposition that where specific probation conditions are not imposed by the sentencing court and a plaintiff's claims will have no effect on the duration of his probation, he may bring his challenge under § 1983. *Thornton*, 757 F.3d at 844.

But what of the fact that, in Virginia, the power to impose terms and conditions of probation ultimately rests with the courts? Appellees' Br. 25–28. It does not prove what Defendants hope. Virginia law explicitly contemplates that probationers may be required to abide by "requirements of supervision imposed or established by the local community-based probation services agency." Va. Code Ann. § 19.2-

303.3(B). Here, the state circuit court imposed "the usual conditions of probation," JA27, which include a requirement to follow the instructions of the probation officer, *Virginia Sentencing Guidelines: Sentencing Revocation Report and Probation Violation Guidelines*, Appendix 1 – Conditions of Probation/Post-Release Supervision, 57 (July 2021), https://tinyurl.com/3ey7r9zs. The probation officer then unconstitutionally exercised that delegated authority by prohibiting Mr. Firewalker-Fields from attending congregational religious services. *See* JA7. Mr. Firewalker-Fields' challenge to the probation officer's action cannot be reasonably seen as a collateral attack on his judgment of guilt or on any conditions imposed by the court. So, even if Defendants are right that courts should adjudicate the question whether *Heck* bars a claim on a "case by case basis," Appellees' Br. 25, this case can only come out one way: Mr. Firewalker-Fields challenges a non-court-imposed discretionary condition and does not challenge any part of his court-imposed sentence, so his claim is cognizable under § 1983.

An additional legal error by Defendants bears mention. They incorrectly assert that because habeas *may* be available to Mr. Firewalker-Fields, he *must* bring his claim in habeas. *See* Appellees' Br.

27–28. Once again, Defendants' argument runs contrary to instruction from the Supreme Court. In *Wolff v. McDonnell*, the Court explicitly acknowledged that there are "instances where the same constitutional rights might be redressed" under both § 1983 and habeas. 418 U.S. 539, 579 (1974); *see also Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (noting that § 1983 and habeas may both provide remedies for challenges to prison conditions). And this Court has never held that § 1983 and habeas are mutually exclusive remedies.

In fact, it is Defendants who seek an expansive categorical approach. They argue that habeas is the exclusive federal remedy for Virginia probationers—no matter if they challenge the duration of their confinement or a discrete condition of probation imposed by a probation officer. Appellees' Br. 25. Yet they concede that only a narrow subset of claims brought by prisoners must be brought in habeas—those affecting the validity or duration of confinement. Appellees' Br. 20. This inconsistency cannot be justified by precedent or by policy, and Defendants do not even attempt to do so.

II. DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT IS PREMATURE.

This Court should not consider Defendants' alternative argument that the complaint is time-barred. *See* Appellees' Br. 28–31. First, although Defendants are correct that Virginia's personal injury statute of limitations governs, they miss that the entire body of Virginia's limitations rules applies. *See Battle v. Ledford*, 912 F.3d 708, 713 (4th Cir. 2019) ("A state's limitations and tolling rules are to be followed unless doing so 'defeat[s] either § 1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism.'" (quoting *Hardin v Straub*, 490 U.S. 536, 539 (1989))). Those rules include Virginia's statutory requirement that the statute of limitations be raised as an affirmative defense in a responsive pleading. Va. Code Ann. § 8.01-235. Defendants did not enter an appearance below, let alone raise this argument in a responsive pleading.[1] This Court should therefore simply

[1] Defendants argue that a statute of limitations defense, though not raised below, may nonetheless by considered sua sponte. Appellees' Br. 28–29. But they rely on opinions explaining why, under narrow circumstances, a *district court* may consider certain affirmative defenses sua sponte. *See* Appellees' Br. at 29 (citing *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 655–57 (4th Cir. 2006) (explaining that although "a court generally possesses no strong institutional interest in the enforcement of a statute of limitations . . . certain narrow circumstances" justify a

remand for the district court to consider any properly-raised statute of limitations defense in the first instance. *See Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006) ("[W]e are a court of review, not of first view.").

Second, because the district court dismissed the complaint sua sponte on other grounds without serving Defendants, JA9–13, Mr. Firewalker-Fields did not have the opportunity to respond to any statute of limitations defense by submitting additional filings or evidence. Consequently, although it is true that this Court may affirm the district court on "any basis fairly supported by the record," Appellees' Br. 29 n.6, here there is no record upon which this Court can rely.

III. DEFENDANTS MISCONSTRUE MR. FIREWALKER-FIELDS' COMPLAINT AND ASK THIS COURT TO DRAW IMPERMISSIBLE INFERENCES AGAINST HIM.

As for the substance of Mr. Firewalker-Fields' Free Exercise claim, Defendants first make the same error the district court did: they insist

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district court raising the issue sua sponte); *Howard v. Sharrett*, 540 F. Supp. 3d 549, 553–54 (E.D. Va. 2021) (raising the statute of limitations sua sponte where plaintiff alleged that the judge who presided over his criminal trial and his defense attorney violated his constitutional rights seven years prior to the filing of the complaint)). Whether a district court may raise the statute of limitations sua sponte is irrelevant because the district court did not do so here. *See* JA9–12.

that the allegations in the complaint should be "construed together" as a single claim and reason that Mr. Firewalker-Fields does not explain "how a condition that he not have internet or phone access interferes with his ability to practice his religion." Appellees' Br. 33 (quoting JA12). Absolutely nothing in the complaint justifies that reading. On the contrary, the challenges to the internet/smartphone ban and the religious services ban are explicitly presented as separate claims in the complaint. *See* JA7 (labeling the internet and smartphone allegations as "Claim #1" and the religious services allegation as "Claim #2"). Even setting aside this Court's obligation to construe allegations in the complaint liberally and to draw inferences in Mr. Firewalker-Fields' favor, the document cannot fairly be read as presenting a single claim. *See Wilcox v. Brown*, 877 F.3d 161, 166–67 (4th Cir. 2017) (observing that a court "must construe all factual allegations in the light most favorable to the plaintiff" and "must construe pleading requirements liberally" when a pro se plaintiff raises a civil rights issue).

Finally, Defendants argue that Mr. Firewalker-Fields has failed to allege that Defendant Hopkins is personally responsible for that deprivation because the complaint does not suggest that the condition

was "new" or that "such restriction was not merely an explanation of the application of his existing conditions of probation." Appellees' Br. 34. But Defendant Hopkins may still be properly sued even if he is merely enforcing a condition created by a previous probation officer. *Cf. Williamson v. Stirling*, 912 F.3d 154, 171–72 (4th Cir. 2018) (explaining that a § 1983 plaintiff seeking to establish personal liability need only show that an "official charged acted personally in the deprivation of the plaintiff's rights"). Whether he has a defense to suit is irrelevant at this juncture and is for the district court to resolve on remand.

CONCLUSION

This Court should reverse the district court's order dismissing Mr. Firewalker-Fields' Free Exercise claim and remand for further proceedings including service of Defendants.

Respectfully Submitted,

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March 3, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Lauren Bateman, certify that on March 3, 2022, a copy of the Reply Brief was served on counsel for Appellees via the Court's ECF system.

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