No. _____

In The
Supreme Court of the United States

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D. ASHLEY PENNINGTON,
in his individual and official capacities,
***Petitioner*,**

v.

BEATTIE I. BUTLER,
***Respondent*.**

———— ♦ ————

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Fourth Circuit, consistent with this Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), should have exercised jurisdiction and considered certain, particular evidence in respect to the application of qualified immunity.

2. Whether, as to qualified immunity and prior to October 14, 2014, it was "clearly established," "beyond debate" to a supervising public defender that restraining a subordinate public defender's speech and terminating the subordinate defender's employment, in the particular circumstances presented, violated the First Amendment.

Parties to the Proceedings

Petitioner is D. Ashley Pennington ("Pennington"). Petitioner is the Ninth Circuit Public Defender in South Carolina.

Respondent is Beattie I. Butler ("Butler"), a former Assistant Ninth Circuit Public Defender in South Carolina and former employee of Petitioner.

Pursuant to Rule 29.6 there is no corporation involved in this proceeding, therefore there is no parent or publicly held company owning 10% or more of corporate stock.

Statement of Related Cases

No known cases.

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The opinion of the Fourth Circuit is not reported. It is reproduced in the Appendix at 1a-4a. The opinion of the District Court is unreported and reproduced in the Appendix at 6a-42a.

Jurisdiction

On March 10, 2020, the Fourth Circuit filed its opinion. Pennington filed a timely petition for rehearing *en banc* on March 24, 2020. The Fourth Circuit entered an order denying the petition on April 14, 2020. (Pet. App. 109a-110a). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Statement of the Case

1. Factual Background

Pennington is the Ninth Circuit Public Defender in South Carolina, an appointed state official/state employee, selected to his position by way of the South Carolina Commission on Indigent Defense and a related, statutory selection process. Pennington's office, in general, defends indigent persons charged with crimes, including capital offenses, in Charleston and Berkeley counties in South Carolina. Pennington's office consists of numerous attorneys and many support staff. Pennington's management responsibilities are similar, if not equivalent, to managing a law firm. In addition to his management responsibilities, Pennington actively represents persons charged with

serious crimes, including capital murder. (C.A. J.A. 87).[1]

Butler, a former assistant public defender, worked directly for Pennington. Within the Ninth Circuit Public Defender office, Butler was designated as the Director of Litigation/Chief Litigator. Butler held this designation because of his experience, particularly his trial experience. (C.A. J.A. 88-89).

Butler is an experienced trial lawyer and his trial experience and skills resulted in his designation as Pennington's Director of Litigation/Chief Litigator. In this role, Butler defended persons charged with serious crimes, assisted attorneys in the office with trials, and served as a trainer for other attorneys who work for Pennington. Butler's role also included serving the overall mission of Pennington's office, including supporting the policies and goals of Pennington. Butler's responsibilities also entailed maintaining appropriate professional working relationships with others with whom he interacted, including other attorneys and the judiciary. (C.A. J.A. 88-89).

Butler was hired as an assistant public defender in or about 2003. At the time Butler was hired, Jennifer Shealy ("Shealy") was the Ninth Circuit Public Defender. Pennington was later appointed/selected as the Ninth Circuit Public Defender in 2007. (C.A. J.A. 88-89).

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[1] "C.A. J.A." is an acronym for the Joint Appendix filed in the Fourth Circuit.

While employed by Pennington, Butler's trial skills were never an issue. However, Butler's ability to comply with directives, policies, and goals, and interact appropriately with others, including prosecutors, was an issue for Shealy and continued when Pennington became the Ninth Circuit Public Defender. (C.A. J.A. 223-232; 237-256; 265-269).

For instance, and by way of example, Pennington's predecessor, Shealy, received and wrote letters in April and October 2006 regarding Butler's conduct and his professional interactions with others, including members of the judiciary. One letter to Butler notes his failure to consult with her, follow her policies, and describes the negative impact Butler's actions and conduct were having on the Ninth Circuit Public Defender office. (C.A. J.A. 223-232).

Pennington, like Shealy, made attempts to modify Butler's failure to comply with Pennington's policies and goals. Although neither Shealy nor Pennington ever disciplined Butler, each counseled and placed Butler on notice of his failure to meet acceptable work standards, both verbally and in his performance evaluations. (C.A. J.A. 223-237).

A. Pennington's Restraint of Butler's Speech – 2007 to February 2014.

According to Butler, Pennington, between late 2007 and February 23, 2014, took the following, distinct actions regarding Butler's speech: 1) in or about late 2007 told Butler not to file a grievance with the South Carolina Commission on Lawyer Conduct ("SCCLC") regarding Ninth Circuit Solicitor Scarlett

Wilson ("Wilson"); 2) in or about December 2008, told Butler not to file a grievance with the SCCLC regarding Wilson; 3) sometime prior to November 2012, told Butler, in writing, not "to engage with the press through conversations or invitations to court hearings without prior approval"; 4) in or about December 2012, verbally told Bulter "[d]on't talk to the press"; 5) on or about December 17, 2012, wrote in Butler's yearly performance evaluation "[w]e agree Beattie will not make comments to the press that could be seen as critical of others w/o first seeking input from Ashley"; 6) on or about December 19, 2013, wrote to Butler "[y]ou are not to speak or convey in any manner to others comments that are critical of SAW [Scarlett Wilson, the Ninth Circuit Solicitor ("Wilson")], or her office, especially regarding their ethics or honesty without gaining my permission first. This includes posts on the SCACDL [South Carolina Association of Criminal Defense Lawyers] list serve, informal chats with others in and out of the office and in seminars"; and, 7) on February 23, 2014, wrote all office employees, including Butler, that all were prohibited from posting critical comments about prosecutors on the SCACDL list serve or speaking to the press without going through Pennington. (C.A. J.A. 90-97).

B. Complaints Filed Against Pennington and Wilson – February 2014 to August 2014.

In February 2014, Butler was diagnosed with cancer. Weeks before Butler's diagnosis (or at least weeks before he informed Pennington of the diagnosis), Butler retained counsel. Subsequently, on

February 21, 2014, Butler's counsel sent Pennington letters alleging Pennington was interfering with Butler's right to speak in public, among other allegations. (C.A. J.A. 33; 1800-1801).

Thereafter, on or about April 7, 2014, Butler disclosed to Pennington he was diagnosed with cancer and he was going to take leave because of his illness. As a result, Pennington began to reassign Butler's cases to other attorneys in the office and ceased assigning new cases to Butler.

On May 21, 2014, while Butler was on leave for his ongoing health issues, another attorney (who did not work for Pennington), based upon information provided to her by Butler, filed a complaint with the SCCLC alleging Pennington engaged in misconduct. A second complaint was filed simultaneously, by the same attorney, as to Wilson. In general, the complaints alleged Wilson committed ethical violations in prosecuting cases, and Pennington improperly restricted Butler's right to report the violations allegedly committed by Wilson and/or others in Wilson's office. Butler, simultaneously, self-reported his own conduct (i.e. previous failure to report the alleged misconduct of Wilson and Pennington) to the SCCLC. (C.A. J.A. 2855-2859; 2490-2574).

By on or about June 16, 2014, Butler was back at work in Pennington's office, providing training and assisting other attorneys with trials. Butler later underwent surgery in August 2014 and Pennington offered to be flexible as to Butler's schedule when he returned to work.

C. Termination of Butler's Employment – August 2014 to October 2014.

On or about August 21, 2014, the SCCLC dismissed the complaint filed against Pennington. Thereafter, on or about August 26, 2014, Pennington met with Butler and agreed to allow Butler to work from home and excuse him from direct contact with clients. During the meeting, Butler noted his sick leave was exhausted, but he still had annual leave available. Pennington, in response, told Butler he could work from home without using his remaining annual leave. Butler agreed to the arrangement and told Pennington would be working on trial practice training activities for the other attorneys in the office. (C.A. J.A. 107; 1795-1797).

On or about September 2, 2014, Butler told Pennington a recent CT scan showed no remaining cancer. Because of Butler's apparently improving condition and the corresponding dismissal of the complaint by the SCCLC against Pennington on August 21, 2014, Pennington requested a meeting with Butler about the allegations in the complaint filed against Pennington with the SCCLC. In advance of the meeting, Pennington provided Butler with a specific set of questions he wished to discuss at their meeting. (C.A. J.A. 98-99; 257-264).

Pennington, along with Lorri Proctor ("Proctor"), the Charleston County Public Defender, met with Butler on September 29, 2014, to discuss the SCCLC complaint. The meeting lasted approximately one hour and Butler, with Pennington's knowledge and permission, recorded the meeting. Subsequently,

on October 14, 2014, because of the meeting and for the reasons stated in his termination letter to Butler, Pennington terminated Butler's employment. (C. A. J.A. 98-99; 265-269).

D. Butler's Actions While Employed by Pennington.

Pennington believed Butler's actions while employed were divisive and negatively impacted the work of Pennington's office, including relationships with Wilson's office and the judiciary. After terminating Butler's employment, Pennington learned of the following, by way of example, actions by Butler while working for Pennington: 1) on September 24, 2013, in an email exchange between Butler and Fielding Pringle ("Pringle"), a practicing attorney in South Carolina, Butler referred to Pennington using derogatory language and further informed Pringle that Butler had written a book, calling it "my [Butler's] ticket out and my revenge [against Pennington and Wilson]. I [Butler] always win. Or I [Butler] get fired and end up on the streets"; 2) on January 3, 2014, Butler engaged in an email exchange with Cameron Blazer ("Blazer"), an attorney who formerly worked in Pennington's office with Butler. Blazer asked Butler, "Tell me why you're still there?" referencing Butler's employment in Pennington's office, under Pennington's leadership. Butler responded, "I stay for a lot of reasons, not the least of which may be spite. I know, I know, not the healthiest of reasons. But the only person happier than Ashley [Pennington] with me gone is SW [Wilson]. And I can't let her win"; 3) on May 22, 2014, in an email to Charles Grose ("Grose"), a practicing

attorney in South Carolina (and copying two other practicing attorneys), Butler discussed a matter unrelated to Butler that Pennington needed to address with another attorney in Pennington's office. Commenting on his understanding of the matter, Butler stated, "He's [Pennington] an idiot." Elsewhere in this email, Butler refers to Pennington as "paranoid"; 4) on May 27, 2014, in an email to Ronald Tyler ("Tyler"), a law professor at Stanford Law School, Butler referred to Pennington as a "liar"; 5) on September 14, 2014, Butler sent an email to Elizabeth Franklin-Best ("Franklin-Best"), a practicing attorney in South Carolina, stating in reference to Pennington, "[h]e's [Pennington] such a . . . weasel he could lie his way out of a lawsuit"; and, 6) Blazer testified she heard Butler make negative statements about Pennington while Butler was employed by Pennington more than ten times - calling Pennington a "wuss," an "asshole," and making other "snotty" comments about Pennington. Blazer testified all the derogatory comments Butler made were either about Pennington's performance as a lawyer or Pennington's performance as administrator/Ninth Circuit Public Defender. (C.A. J.A. 265-269; 314-365).[2]

Additionally, Ben Lewis ("Lewis"), an attorney who worked in Pennington's office with Butler for a number of years, stated several attorneys working in Pennington's office, including Butler, went to lunch together each Friday. According to Lewis, it was

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[2] Butler's actions also included numerous other instances of using derogatory terms in reference to Pennington, all while employed by Pennington as an assistant public defender and Director of Litigation/Chief Litigator. (C.A. J.A. 2880-2908).

typical at the Friday lunches for Butler to complain about Pennington to Lewis and the other assistant public defenders present who were then employed by Pennington. Lewis testified Charleston attorneys who did not work for Pennington also attended these lunches. (C.A. J.A. 314-365; 1112-1116; 1121-1124; 1137-1140; 1145-1148; 1153-1156; 1173-1176).

According to Lewis, at these Friday lunches, Butler called Pennington incompetent, stupid, a poor administrator and made statements about Pennington's ability (or inability) to perform his job as the Ninth Circuit Public Defender. Lewis further testified Butler criticized Pennington as a trial attorney, saying no one would want Pennington as a second chair. Lewis, finally, testified Butler probably called Pennington derogatory names, and that other people, including other attorneys, were around when Butler made these comments about Pennington. (C.A. J.A. 314-365, 1112-1116; 1121-1124; 1137-1140; 1145-1148; 1153-1156; 1173-1176).

Butler acknowledges it is possible, and does not refute, he referred to Pennington in derogatory terms to other people, including other attorneys. Butler further acknowledges, and does not refute, it is possible he made disparaging remarks about Pennington to Lewis, and others who then worked for Pennington, at the Friday lunches before Pennington terminated Butler's employment on October 14, 2014. (C.A. J.A. 329-332).

Pennington did not have specific knowledge of the noted and listed activities of Butler prior to terminating Butler's employment on October 14,

2014. However, prior to October 14, 2014, Pennington believed Butler engaged in actions that were disruptive to operations of the Ninth Circuit Public Defender's office, including those discussed by Pennington in the termination letter he provided to Butler. (C.A. J.A. 265-269; 314-365; 2880-2908).

E. Post – Termination Events.

After Pennington terminated Butler's employment on October 14, 2014, Butler filed a Charge of Discrimination with the U. S. Equal Employment Opportunity Commission ("EEOC"). In his Charge of Discrimination, Butler alleged Pennington engaged in disability discrimination when Pennington terminated Butler's employment. Moreover, in his Charge of Discrimination, Butler swore under oath, subject to penalty of perjury, Pennington would not have terminated Butler "but for" his disability (i.e. cancer). (C.A. J.A. 291-313).

Butler subsequently filed a Verified Complaint in October 2015 and, thereafter, a Verified Amended Complaint. In both complaints, Butler swears the following under oath, subject to penalty of perjury: "Defendant Pennington had knowledge of Plaintiff's disability and intentionally and willfully discriminated against Plaintiff based on that disability in direct violation of the ADA [Americans with Disabilities Act] by terminating Plaintiff's employment on October 14, 2014, in the midst of his on-going course of chemotherapy treatments." (C.A. J.A. 108).

Additionally, Butler's counsel sent a letter to the EEOC months after Butler filed his Charge of Discrimination but while the Charge of Discrimination remained pending. Butler's counsel's letter to the EEOC does not mention the First Amendment, free speech, or unlawful restrictions on Butler's speech. Butler's counsel's letter does state the following: "Given the timing of the termination it is our position that it [Butler's termination] would not have occurred had Mr. Butler been in good health and not disabled by cancer." (C.A. J.A. 291-313).

2. District Court Proceedings.

The District Court concluded the applicable law was clearly established, beyond debate at the time Pennington allegedly restricted Butler's speech and when Pennington terminated Butler's employment. Therefore, the District Court concluded Pennington was not entitled to qualified immunity. Accordingly, the District Court denied summary judgment to Pennington as to Butler's First Amendment claims. (Pet. App. 6a-108a.)

3. Decision of the Fourth Circuit.

Pennington appealed the District Court's grant of summary judgment. The Fourth Circuit affirmed the District Court. In doing so, Fourth Circuit failed to recognize and apply *Scott v. Harris*. Instead, the Fourth Circuit summarily concluded it lacked jurisdiction to consider the sufficiency of evidence in respect to the application of qualified immunity. Consequently, the Fourth Circuit refused to consider whether Butler's account of his First Amendment

claim is contradicted by the record to the extent that no reasonable jury could believe it. (Pet. App. 1a-5a.)

Pennington timely filed a petition for rehearing *en banc*, based on the panel's failure to harmonize its opinion with other binding Fourth Circuit precedent, failure to define clearly established law at an adequate level of specificity, and misapplication of Supreme Court precedent. Pennington's petition for hearing *en banc* was denied. (Pet. App. 109a-110a).

Reasons for Granting the Petition

1. The Fourth Circuit Decision Disregards This Court's Holding in *Scott v. Harris*.

As recognized by this Court in *Scott v. Harris*, 550 U.S. 372, 380 (2007), a case involving qualified immunity, "[w]here the nonmoving plaintiff's account is 'blatantly contradicted by the record' so that 'no reasonable jury could believe it,' it should not be adopted by a court ruling on a motion for summary judgment." The Fourth Circuit failed to recognize and apply *Scott*. Instead, the Fourth Circuit summarily concluded it lacked jurisdiction to consider the sufficiency of evidence in respect to the application of qualified immunity.

In this matter, Butler's claims are "blatantly contradicted by the record" to an extent that "no reasonable jury could believe" his First Amendment prior restraint and retaliation claims. Butler creates these "blatant contradictions" by his own, sworn statements, including his Verified Complaint,

Verified Amended Complaint, and Charge of Discrimination. Consequently, proper application of *Scott* to Butler's First Amendment claims required the Fourth Circuit exercise jurisdiction as to whether there is sufficient, genuine, material evidence Pennington violated Butler's First Amendment rights in form of prior restraint and retaliation.

Although the Federal Rules of Civil Procedure did not require Butler verify his complaints, including his Verified Amended Complaint, Butler chose to do so. Consequently, Butler, an attorney, converted his Verified Complaint and Verified Amended Complaint from containing only allegations and, perhaps, alternative theories of recovery, to containing something more concrete: *sworn statements of material fact*.

The Fourth Circuit, contrary to the tenants established in *Scott* and without applying *Scott*, condones Butler using his Verified Amended Complaint as both a "sword" and a "shield." On the one hand, Butler, in opposition to summary judgment, persistently relied upon, and used his Verified Amended Complaint as a "sword" to create factual disputes because it is equivalent to a sworn affidavit. However, on the other hand and as a "shield," Butler casts selective aspects of his Verified Amended Complaint as mere alternative theories of recovery when his Verified Amended Complaint is shown to contain distinct, contradictory, sworn statements of fact. The Fourth Circuit's ruling in this respect fails to comply with *Scott*.

A. *Scott* Required the Fourth Circuit Consider the Sufficiency of Evidence in Respect to Qualified Immunity as to Butler's First Amendment Retaliation Claim.

In his Verified Amended Complaint, Butler swears the following under oath, subject to penalty of perjury: "Defendant Pennington had knowledge of Plaintiff's disability and intentionally and willfully discriminated against Plaintiff based on that disability in direct violation of the ADA [Americans with Disabilities Act] by terminating Plaintiff's employment on October 14, 2014, in the midst of his on-going course of chemotherapy treatments." Taken together with Butler's Charge of Discrimination, where Butler also swore under oath, subject to penalty of perjury, Pennington would not have terminated him "but for" his disability, Butler's First Amendment retaliation (i.e. termination of employment) claim does not withstand the proper application of *Scott*. In short, Butler's First Amendment retaliation claim is "blatantly contradicted by the record," including, in particular, Butler's sworn statements of material fact.

Butler's sworn Charge of Discrimination, Verified Complaint and Verified Amended Complaint each swear, under penalty of perjury, and by way of necessity, Pennington would not have terminated Butler's employment on October 14, 2014, "but for" Butler's <u>disability</u>. Applying *Scott*, Butler's sworn statements of material fact regarding disability discrimination cannot be read or interpreted otherwise.

The application of *Scott* does not allow Butler to have the "benefit" of his Verified Amended Complaint while avoiding the burden of it. Applying *Scott*, the Fourth Circuit should have held Butler to the "burden" created by his sworn representations in his Charge of Discrimination, Verified Complaint and Verified Amended Complaint. The "burden" being these sworn representations create a record Butler cannot now "blatantly contradict" to avoid summary judgment as to Pennington's assertion of qualified immunity.

Additionally, and important in applying *Scott*, a letter sent by Butler's then legal counsel (i.e. Butler's agent) to the EEOC months after Butler filed his Charge of Discrimination, but while the Charge of Discrimination remained pending, does not mention the First Amendment, free speech, or unlawful restrictions on Butler's speech. Instead, and consistent with Butler's sworn Charge of Discrimination, Butler's counsel's letter states the following: "Given the timing of the termination it is our position that it [Butler's termination] would not have occurred had Mr. Butler been in good health and not disabled by cancer."

Butler's motive and reason for his material representations to the EEOC, whether in his sworn Charge of Discrimination or his counsel's letter, alleging disability discrimination only are clear: "but for" causation is required to support an Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., discrimination claim. Indeed, if Butler or his counsel represented to the EEOC that Pennington had any motive to terminate Butler's employment

other than Butler's disability, Butler's ADA discrimination claim, particularly as it related to termination of his employment, would be barred as a matter of law. *See Gross v. FBI Fin. Servs., Inc.,* 557 U.S. 167, 177 (2009) (to succeed on an ADA discrimination claim a plaintiff must show "but-for" causation.

Butler's sworn statements (Verified Complaint, Verified Amended Complaint and EEOC Charge of Discrimination) bar his First Amendment retaliation claim because, according to Butler's sworn statements, Pennington did not terminate him due to his speech but, to the contrary, solely because of Butler's disability. Butler's claim Pennington terminated his employment because of his speech "blatantly contradicts the record," in particular Butler's sworn statements of material fact, to the extent "no reasonable jury could believe it." The Fourth Circuit's failure to recognize and apply *Scott*, and consequently conclude it lacked jurisdiction to consider evidence, in particular Butler's statements, is contrary to *Scott*.

B. *Scott* Required the Fourth Circuit Consider the Sufficiency of Evidence in Respect to Qualified Immunity as to Butler's First Amendment Prior Restraint Claim.

In his Verified Amended Complaint, Butler alleges Pennington unlawfully restrained his First Amendment rights in 2007 (specific date undefined), December 2008, November 2010, and January 2011. Butler further alleges the following unlawful

restraints by Pennington in his Verified Amended Complaint: 1) Pennington told Butler on or about December 9, 2012, "[d]on't talk to the press;" 2) Pennington wrote in Butler's yearly performance evaluation, on or about December 17, 2012, "[w]e agree Beattie will not make comments to the press that could be seen as critical of others w/o first seeking input from Ashley;" 3) Pennington wrote to Butler on December 19, 2013, "[y]ou are not to speak or convey in any manner to others comments that are critical of SAW [Scarlet Wilson], or her office, especially regarding their ethics or honesty without gaining my permission first. This includes posts on the SCACDL list serve, informal chats with others in and out of the office and in seminars; and 4) Pennington wrote all employees on February 23, 2014, that they were prohibited from posting critical comments about prosecutors on the SCACDL list serve or speaking to the press without going through Pennington. The noted events constitute the full extent of Butler's First Amendment prior restraint claims.

Taking Butler's claims in his Verified Amended Complaint as true, any unlawful restraint of Butler's First Amendment rights in 2007 (specific date undefined), December 2008, November 2010 and January 2011 are barred by the statute of limitations and, consequently, by *Scott*. Although 42 U.S.C. § 1983 does not have its own statute of limitations, it is well-recognized the South Carolina three-year statute of limitations for personal injuries governs Butler's First Amendment claims; claims asserted by way of 42 U.S.C. § 1983. *See e.g. Wilson v. Garcia*, 471 U.S. 261, 265-280 (1985) (in § 1983 actions, federal

courts should apply the state's general statute of limitations for personal injury actions); S.C. Code Ann. § 15-3-530 (2010) (three-year statute of limitation applies to personal injury actions). Applying the three-year statute of limitations to Butler, his § 1983 prior restraint claims are barred by *Scott* to the extent he complains of alleged unlawful restraints by Pennington occurring before November 2, 2012 – three years prior to Butler filing his Verified Complaint on November 2, 2015.

The application of *Scott* required summary judgment as to these distinct acts of alleged unlawful restraint, at a minimum, because the denial of summary judgment as to each disregards the "blatant contradiction" to the record. Like the video recordings at issue in *Scott*, the record is uncontradicted as to when these alleged, distinct restraints occurred - Butler admits when each allegedly occurred - and that each fall outside the applicable three-year statute of limitations. Consequently, applying *Scott*, it would be a "visible fiction" to ignore Butler's Verified Complaint and Verified Amended Complaint and their clear, indisputable showing these particular, alleged restraints on speech are barred by the applicable statute of limitations.

Like Butler's First Amendment retaliation claim, the Fourth Circuit's failure to recognize and apply *Scott*, and consequently conclude it lacked jurisdiction to consider evidence, in particular Butler's statements, is contrary to *Scott*.

2. The Fourth Circuit's Decision is Contrary to This Court's Repeated Instruction Not to Define Clearly Established Law at a High Level of Generality.

The doctrine of qualified immunity "'shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Reichle v. Howard*, 566 U.S. 658, 664 (2012)). As noted in *Taylor*, to be clearly established, a right must be sufficiently clear that "'every reasonable official would have understood that what he is doing violates that right.'" *Ibid.*

"When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ibid.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "We do not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *Ibid.* ((internal quotations and citations omitted). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations and citation omitted).

In short, the relevant inquiry on qualified immunity is whether in this case it would have been clear to every reasonable supervising public defender – at the time Pennington acted and in the particular

factual circumstances Pennington confronted with regard to Butler – that restraining Butler's speech and terminating Butler's employment violated the First Amendment. Proper application of the law to the facts of this case dictates Pennington is entitled to qualified immunity.

Specific circumstances are key when reviewing the grant or denial of qualified immunity. "[T]he right [an] official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The relevant inquiry the Fourth Circuit should have made as to qualified immunity is whether, in this case, it would have been clear to every reasonable *supervising public defender* – at the time Pennington acted and in the particular factual circumstances Pennington confronted with regard to Butler – that restraining Butler's speech and terminating Butler's employment violated the First Amendment. However, in its decision, the Fourth Circuit only concludes "Butler maintained a First Amendment right to report alleged prosecutorial misconduct" and the right was "clearly established." The Fourth Circuit's decision is too general and fails to meet the requirements of this Court's well-established precedent.

Similar to the Ninth Circuit in *City of Escondido, California v. Emmons*, 139 S. Ct. 500, 503

(2019), a case involving excessive use of force by law enforcement, the Fourth Circuit "defined the clearly established right at a high level of generality" only – the "right to report alleged prosecutorial misconduct." In *City of Escondido*, by only concluding the "'right to be free of excessive force' was clearly established," this Court concluded the Ninth Circuit failed to define the right with sufficient particularity. *Id*.

In reversing the Ninth Circuit in *City of Escondido*, this Court instructed that the Ninth Circuit "should have asked whether clearly established law prohibited the officers from stopping and taking down a man *in these circumstances*." *Id*. (emphasis added). Therefore, instead of limiting its inquiry to only whether Butler "maintained a First Amendment right to report alleged prosecutorial misconduct," the Fourth Circuit was required to determine whether clearly established law, beyond debate, prohibited Pennington from either restraining Butler's speech and/or terminating Butler's employment in the particular circumstances and specific context presented to Pennington, a supervising public defender. The Fourth Circuit's decision is contrary to this Court's precedent because the Fourth Circuit failed to adequately or properly consider whether, beyond debate, the clearly established law prohibited Pennington from either restraining Butler's speech and/or terminating Butler's employment, in the particular circumstances and specific context presented to Pennington, a supervising public defender.

This Court, in *Mullinex v. Luna*, 136 S. Ct. 305 (2015), restated the proper question the Fourth

Circuit should have utilized: "'whether the violative nature of *particular* conduct is clearly established'" and that the inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Mullinex* at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*)) (emphasis in original). Accounting for the relevant law from the Supreme Court and the Fourth Circuit at the time of Pennington's alleged conduct, the law did not clearly establish Pennington's alleged conduct violated Butler's First Amendment rights.

The Fourth Circuit failed to recognize and apply the correct standard. Contrary to *Mullinex*, the Fourth Circuit applied existing law in the abstract, instead of applying existing law to the specific, challenged conduct alleged as to Pennington, a supervising public defender. Regardless whether Butler meets his burden to prove a First Amendment violation by Pennington, the specific, challenged conduct Butler alleges was not established "beyond debate."

In denying Pennington qualified immunity, the Fourth Circuit primarily relied upon cases involving law enforcement officers. However, Pennington is not, and never was, a law enforcement officer. Similarly, Butler was not a law enforcement officer when employed by Pennington. To the contrary, both Butler and Pennington worked as public defenders: attorneys defending the indigent in respect to criminal charges, including serious felonies. The Fourth Circuit's reliance on precedent involving law enforcement officers, not public defenders, and/or a supervising public defender like Pennington, is the

type of "broad general proposition" the *Mullinex* court warned against the courts applying when considering qualified immunity.

As noted in *Mullinex*, but not applied by the Fourth Circuit, *specificity* when examining qualified immunity is critical. *Mullinex* at 308 ("specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'"). Therefore, instead of relying upon and applying cases involving law enforcement officers, or other public officials performing some other government function, the Fourth Circuit should have looked to relevant, existing cases involving a supervising public defender, like Pennington, and a subordinate public defender, like Butler and consider the uniqueness of the position and relationships involved, including the necessary relationships between public defenders and prosecutors. To do otherwise places Pennington in the same situation the *Mullinex* court concludes Pennington should not face: a supervising public defender trying to determine how relevant legal doctrines apply to the situation he confronted with Butler.

Notably, the Fourth Circuit neither cited nor relied upon such relevant, applicable precedent because it does not appear there is any regarding public defenders. Consequently, the Fourth Circuit had no relevant, applicable precedent showing Pennington's actions as to Butler were "clearly established," "beyond debate" as unlawful at the time

Pennington took the actions Butler alleges. The Fourth Circuit's decision is contrary to *Mullinex* and its directive to look at the specific context of this case in determining whether the right Butler alleges Pennington violated was "clearly established," "beyond debate."

Conclusion

For the foregoing reasons, Pennington respectfully requests that his writ of certiorari be granted.

Respectfully submitted,

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