IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 24, 2020

Lyle W. Cayce
Clerk

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

Plaintiffs - Appellees

v.

CARL CARSON,

Defendant - Appellant

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cons. w/15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

Plaintiffs - Appellees

v.

MICHAEL HUNTER; MARTIN CASSIDY,

Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas

Before OWEN, Chief Judge, and HIGGINBOTHAM, JONES, SMITH, STEWART, DENNIS, CLEMENT, ELROD, SOUTHWICK, HAYNES,

GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellants' opposed motion to recall the mandate is DENIED.

IT IS FURTHER ORDERED that Appellants' opposed motion to stay the district court proceedings is DENIED.

Fifteen judges voted against recalling the mandate (Chief Judge Owen, Judge Higginbotham, Judge Smith, Judge Stewart, Judge Dennis, Judge Elrod, Judge Southwick, Judge Haynes, Judge Graves, Judge Higginson, Judge Costa, Judge Willett, Judge Duncan, Judge Engelhardt, and Judge Oldham), and two voted in favor of recalling the mandate (Judge Jones and Judge Ho).

Judge Ho dissented from the Court's denial of the motions. His Dissent is attached.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

JAMES C. HO, Circuit Judge, joined by EDITH H. JONES, Circuit Judge, dissenting:

We should have granted qualified immunity to the police officers in this case—not because there is no "clearly established" violation, *see Horvath v. City of Leander*, 946 F.3d 787, 800–03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (criticizing the "clearly established" prong of qualified immunity doctrine on textual and other grounds)—but because there was no Fourth Amendment violation at all, *see Cole v. Carson*, 935 F.3d 444, 478 (5th Cir. 2019) (en banc) (Ho and Oldham, JJ., dissenting) (concluding that there is no Fourth Amendment violation when officers take reasonable steps to stop a potential mass school shooter).[1]

Barring that, we should at least grant the officers' request for a limited stay while the Supreme Court considers their petition for certiorari.

Perhaps the en banc majority declines the stay request because the officers did not make it earlier, before we issued the mandate in this case. But the officers' timing is understandable. The district court put a stay in place over three years ago and lifted it only recently.

Moreover, this is a modest request. The officers simply ask us to recall the mandate and stay further proceedings in this case pending Supreme Court review of their certiorari petition—a stay that would likely last only until June.

We have granted relief from the burdens of litigation to countless individuals during the current pandemic. We should grant relief here as well.

I.

We grant stays pending appeal or certiorari where further proceedings could irreparably injure the very interests at stake on appeal. That is the case

[1] *See also id.* at 458 (Jones, J., dissenting) ("[The officers] were entitled to receive summary judgment confirming their immunity."); *id.* at 470 (Smith, J., dissenting) (same); *id.* at 473 (Willett, J., dissenting) (same); *id.* at 479–80 (Duncan, J., dissenting) (same).

here. As the Supreme Court has made clear, qualified immunity is more than a right not to be held liable—it is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). So "when a public official takes an interlocutory appeal to assert a colorable claim to absolute or qualified immunity from damages, the district court must stay proceedings." *Goshtasby v. Bd. of Trs. of the Univ. of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997). And if the district court does not, we may do so on appeal. *Cf. United States v. Dunbar*, 611 F.2d 985, 989 (5th Cir. 1980) (en banc) ("This Court is, of course, empowered to protect the defendant's double jeopardy rights by staying proceedings below pending appeal.").

The fact that the mandate must first be recalled before we can issue the stay should pose no obstacle. "[C]ourts of appeals have an inherent power to recall their mandates, the exercise of which is subject to review for abuse of discretion." *Goodwin v. Johnson*, 224 F.3d 450, 459 (5th Cir. 2000).

Recall of the mandate is, of course, an extraordinary remedy. "Usually the issuance of a mandate by this court means that the litigation has come to an end." *Gradsky v. United States*, 376 F.2d 993, 995 (5th Cir. 1967). "[A]bsent good cause or unusual circumstances," we would not recall a mandate "to modify or vacate a prior judgment." *Am. Iron & Steel Inst. v. EPA*, 560 F.2d 589, 595 (3rd Cir. 1977).

But the request here is not to modify or vacate a prior judgment, but to stay further proceedings pending Supreme Court review. We have recalled the mandate "to prevent injustice" to a convicted criminal defendant "after he had petitioned the Supreme Court for certiorari." *Gradsky*, 376 F.2d at 995 & n.2. If recalling the mandate after the filing of a certiorari petition is appropriate for a convicted criminal defendant, surely it is appropriate for the police officers in this case. After all, enforcement of the mandate here risks imposing an

unjust result on them—namely, the loss of the officers' "right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526). And the officers have a strong claim to that right—as the multiple en banc dissenting opinions from our court make clear—while the Supreme Court considers their petition.

II.

The officers did not initially request that the en banc court stay its mandate because the district court had already stayed proceedings in the case years ago. But now the district court has lifted its stay out of deference and respect to the en banc court.[2]

The district court's deference is admirable, but unnecessary. Issuance of our mandate directed the district court to move forward and try this case within its sound discretion. That includes the "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997).

Perhaps the district court will reconsider. After all, the officers' request is modest. These proceedings have already been stayed for over three years. The officers simply ask for a few more months of relief—just until the Supreme Court resolves their certiorari petition, which will likely occur before the end of the Court's term in June.

Such relief is well within the discretion of the judiciary to grant. In response to the current pandemic, federal courts have postponed proceedings

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[2] The district court expressed concern that granting a stay "would practically disregard the mandate and thereby undercut [its] conclusion that it 'lacks authority to stay the execution of the appellate court's mandate.'" Order 2 (Mar. 4, 2020), ECF No. 209 (quoting another source). That echoes its earlier concern that maintaining the stay would be tantamount to staying this court's mandate—a power it concluded only this court or the Supreme Court possessed. Order 3–4 (July 19, 2016), ECF No. 180.

and deadlines for convicted criminals. Our court has categorically extended all filing deadlines for incarcerated pro se filers by thirty days. Order ¶ 2, General Docket No. 2020-4. The Northern District of Texas—where district court proceedings in this case are occurring—has indefinitely continued guilty plea proceedings and guilty pleas. Special Order No. 13-6. The Northern District has also granted a sixty-day extension to those "who have been ordered to voluntarily surrender to a Bureau of Prisons facility before May 1, 2020." Special Order No. 13-10.

We should provide the modest relief from the burdens of litigation requested by the police officers in this case as well.

* * *

The current global crisis has resulted in renewed appreciation for the millions of Americans who keep our country going—the farmers, food processors, and grocery store clerks who keep our pantries stocked and our children fed; the truckers who keep our supply chain moving; and the doctors, nurses, and other health care workers who treat our sick. That appreciation is long overdue, but it is especially warranted today, when those who agree to take on this work do so at heightened risk to their own lives.

There is one group, however, that does not need reminding that there are jobs people wake up to each morning not knowing whether they will return home alive—police officers.

I would recall and stay the issuance of our mandate pending resolution of the certiorari petition.