

**ORAL ARGUMENT NOT SCHEDULED**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUITNo. 12-5038  
(C.A. No. 10-1962)

EARLE A. PARTINGTON,

Appellant,

v.

JAMES W. HOUCK, Vice Admiral, JAGC, USN, *et al.*,

Appellees.

**APPELLEES' OPPOSITION TO MOTIONS FOR SUMMARY REVERSAL  
OR, IN THE ALTERNATIVE, FOR AN EXPEDITED SCHEDULE**

Appellees respectfully oppose Partington's motions for summary reversal and for an expedited schedule. Both motions are untimely, and the former is also contrary to the Court's June 15, 2012 Order deciding that summary disposition is inappropriate here, and the latter is unwarranted under the circumstances. Accordingly, the Court should deny both motions and proceed on the schedule already in place pursuant to Court's July 5, 2012 Order.

The Court's February 13, 2012 Order directed the parties in this case to file procedural motions no later than March 14, 2012, and dispositive motions by March 29, 2012. Partington filed no motion in compliance with these deadlines, and he affirmatively indicated the parties' intention to utilize a deferred appendix. On August 1, 2012, he requested summary reversal and expedited briefing. By then, the

Court had denied Appellees' motion for summary affirmance and Partington had submitted his full brief. Pursuant to the Court's July 5, 2012 Order, Appellees' Brief is currently due on September 17, 2012. Final briefs are due to be submitted by October 23, 2012, and no oral argument has been scheduled.

The Court should deny Partington's motions for untimeliness because he has failed to show good cause for why he failed to file them within the prescribed deadlines. *See* Circuit Rule 27(g)(1). Partington's motions neither acknowledge nor address their untimeliness under the Court's Orders, and he failed to seek leave to file them. At this point, the case has been scheduled for disposition in accordance with this Court's standard procedures. Nothing in Partington's motion raises any developments since the deadline for procedural motions has passed, and nothing in his motion reveals any legitimate need for a more immediate decision than will be produced under the existing schedule. Although Partington appears to fault the Clerk for failing to realize that his opening brief had already been filed and scheduling the Appellees' Brief sooner than September 17, 2012, the suggestion of fault is misplaced. Nothing in the record indicated any need for expedition; to the contrary, Partington's request to use a deferred appendix signals just the opposite. Partington filed his brief prematurely, but nothing about his frustration or misapprehension of

the Court's procedures warrants any kind of relief either on the merits or by shortening the time for Appellees to file their brief.<sup>1</sup>

Further, even if considered, Partington's motion for summary reversal should be denied. As noted, the Court has already determined that this case is not one for which summary treatment is appropriate, June 15, 2012 Order, and Partington's motion fails to demonstrate otherwise. Second, by failing to raise any error in the District Court's dismissal of the *Bivens*<sup>2</sup> and due process claims in his motion for summary reversal, Partington's motion demonstrates that summary affirmance of those claims is warranted. Consequently, the Court should affirm on the *Bivens* and due process claims now, and proceed with full briefing only on the remaining claims. This is appropriate because the Supreme Court has admonished that insubstantial *Bivens* claims should be "quickly terminated" because of the hardships and imposition that such suits against federal officers personally have on them and the performance of their duties. *E.g., Harlow v. Fitzgerald*, 457 U.S. 800, 808, 814

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<sup>1</sup> Additionally, Partington's implicit assertion that a different briefing schedule would move the case forward more quickly is speculative. Counsel for Appellees with daily responsibility for this matter would likely have needed to request an extension of the deadline into September in any event because she was already scheduled to be away from the office for two weeks in August.

<sup>2</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

(1982); accord *Butz v. Economou*, 438 U.S. 478, 507-08 (1978). This Court has appropriately managed prior cases to achieve that result, and there is no reason to do otherwise here because Partington failed to contest them in his motion for summary reversal. E.g., *Christopher v. Harbury*, 536 U.S. 403, 410-13 (2002) (reviewing the procedural history of case where *Bivens* claims were separated from tort and other claims and reviewed in the D.C. Circuit and the Supreme Court prior to resolution of remaining claims).

Lastly, Partington argues that summary reversal is warranted on his APA claims because Appellees have acknowledged in their motion for summary affirmance that part of the District Court's reasoning on his APA claim was flawed because the APA applies to the Navy Judge Advocate General ("NJAG"). See Appellant's Motion, at 4-5. As Partington acknowledges, however, this Court exercises *de novo* review of the grant of summary judgment on his APA claims attacking the NJAG's indefinite suspension in 2010 of his ability to appear in proceedings involving the NJAG, and a separate one-year reciprocal suspension imposed by the United States Court of Appeals for the Armed Services. See *id.* at 4. And because this Court may affirm on grounds different from those articulated by the District Court, see *Conecuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581, 588 (D.C. Cir.

1988), Partington's argument for summary reversal of the APA claims should be rejected.

### CONCLUSION

Because Partington's motions for summary reversal and to expedite briefing are untimely and lack merit, the Court should deny both motions. Because Partington's motion fails to note any error in the District Court's dismissal of his *Bivens* and due process claims, the Court should modify its June 15, 2012 Order to grant Appellees' motion for summary affirmance in part, specifically with respect to the *Bivens* and due process claims.

RONALD C. MACHEN JR.,  
United States Attorney

R. CRAIG LAWRENCE,  
Assistant United States Attorney

/s/ Marina Utgoff Braswell  
MARINA UTGOFF BRASWELL  
Assistant United States Attorney  
555 4<sup>th</sup> Street, N.W. - Civil Division  
Washington, D.C. 20530  
(202) 514-7226

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2012, the foregoing Appellees' Opposition to Motion for Summary Reversal Or, In the Alternative, For an Expedited Schedule was served via this Court's Electronic Case Filing System.

/s/ Marina Utgoff Braswell  
MARINA UTGOFF BRASWELL  
Assistant United States Attorney  
U.S. Attorney's Office  
555 Fourth Street, N.W.  
Washington, D.C. 20530  
(202) 514-7226